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Feature Article
**Immigrant Children and Broadening the Constitutional
 Right to a Lawyer**

Victoria Dempsey

Every year, thousands of unaccompanied youth undertake the long and dangerous journey to the United States border.¹ Just between October and September of 2014 alone, Border Patrol apprehended more than 68,500 children without parents or guardians at the U.S.-Mexico border—a 176 percent increase from 2013.² Many of these children make the arduous journey in an effort to flee persecution, escape rampant gang violence, exploitation and economic devastation, or to unite with family members after years of separation.³ The reasons are endless, but the goal is the same: to obtain a stable and secure life in the United States.

The challenges and uncertainties facing these children do not simply end at the border. Every year, the United States initiates thousands of removal hearings against immigrant children.⁴ Yet, unlike juvenile defendants in domestic court proceedings, children facing deportation are not legally entitled to representation.⁵ As a result, nearly half of all unaccompanied youth—many of whom have limited education and English skills—are forced to advocate on their own behalf against government attorneys in extraordinarily complex immigration proceedings.⁶

Recent statistics indicate that legal representation among unaccompanied youth in deportation hearings significantly impacts the outcome of a case: children with attorneys are more than four times likely to win their case than children who go before a judge alone.⁷ Nearly half of all children with attorneys are able to win their case, while only a mere 1 in 10 children without

¹ Department of Homeland Security, *Southwest Border Unaccompanied Children*, U.S. CUSTOMS AND BORDER PROTECTION, available at <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children>. (last visited Dec.29, 2014).

² *Id.*

³ Center for Gender and Refugee Studies & Kids in Need of Defense, *A Treacherous Journey: Child Migrants Navigating the U.S. Immigration System* at ii, Feb. 2014, available at http://www.uchastings.edu/centers/cgrsdocs/treacherous_journey_cgrs_kind_report.pdf.

⁴ TRAC Immigration, *New Data on Unaccompanied Children in Immigration Court*, (July 15, 2014), <http://trac.syr.edu/immigration/reports/359/>.

⁵ Center for Gender and Refugee Studies & Kids in Need of Defense, *supra* note 3, at 3.

⁶ TRAC Immigration, *supra* note 4.

⁷ *Id.*

counsel achieve success in court.⁸ Currently, nearly 64,000 juvenile deportation cases are pending and will presumably be heard despite the child's inability to secure counsel.⁹ In light of the particular vulnerability of these children, immigration advocates have urged the federal government to step in and ensure unaccompanied youth are afforded proper due process.¹⁰

CHALLENGES AND RESPONSES TO PROVIDING LEGAL COUNSEL TO IMMIGRANT CHILDREN AT THE GOVERNMENT'S EXPENSE

Proponents of mandatory counsel for immigrant children have confronted numerous obstacles in their fight for legal representation of youth in removal hearings. The success of these efforts depends not only on overcoming fiscal and ideological barriers, but also on pushing the very boundaries of the United States Constitution. While the due process clause of the Fifth Amendment traditionally affords undocumented immigrants a full and fair opportunity to be heard in removal hearings, this constitutional protection notably stops short of providing effective counsel to undocumented defendants.¹¹ The limited rights of undocumented immigrants in deportation hearings were further reiterated and codified in the Immigration and Nationality Act ("INA").¹² The INA explicitly dictates that though undocumented immigrants shall have a reasonable opportunity to present evidence, cross-examine witnesses and seek legal representation, such legal representation shall be "at no expense to the Government."¹³

Opponents to a federally funded public defender system for immigrants argue that such a system would not only be expensive, but it would also result in only adding to the already high number of immigrants in the United

⁸ *Id.*

⁹ Stephan Dinan, *Most immigration kids lack lawyers, but those who have them get to stay: Study*, THE WASHINGTON TIMES, (Nov. 25, 2014), <http://www.washingtontimes.com/news/2014/nov/25/immigrant-kids-with-lawyers-usually-stay-study>.

¹⁰ Kirk Semple, *Youths Facing Deportation to Be Given Legal Counsel*, N.Y. TIMES, June 6, 2014, available at <http://www.nytimes.com/2014/06/07/us/us-to-provide-lawyers-for-children-facing-deportation.html>.

¹¹ Kate Manuel, *Aliens' Right to Counsel in Removal Proceedings: In Brief*, CONGRESSIONAL RESEARCH SERVICE, (June 2014), <http://fas.org/sgp/crs/homesec/R43613.pdf>.

¹² 8 U.S.C. § 1229a(b)(4) (2006).

¹³ *Id.*

States.¹⁴ Moreover, though *Gideon v. Wainwright* held that defendants in criminal cases have a constitutional right to legal counsel, the Supreme Court has yet to extend a similar right to defendants in civil cases.¹⁵ Jon Feere, legal policy analyst for the Center for Immigration Studies, argues that given removal hearings are categorized as fundamentally civil rather than criminal in nature, undocumented immigrants who are assured counsel in civil removal hearings would effectively be guaranteed greater legal protections than citizens.¹⁶

However, advocates and academics are quick to point out that while removal may be classified as a civil matter, the implications of removal proceedings can be severe and inherently criminal in nature.¹⁷ Deportation “can be a harsh penalty because in many cases removal from the United States has a more dramatic and detrimental effect on a foreign national than going to jail,” says Mr. Landau, an associate professor at Fordham University who specializes in immigration cases.¹⁸ Immigrants subject to removal orders are often deported back to countries where they face persecution or even death.¹⁹ Immigrants who violate a civil removal order and attempt to reenter the United States are also subject to criminal prosecution.²⁰ Jonathan Ryan, executive director of the Refugee and Immigrant Center for Education and Legal Services, states his position on the matter more directly: “If we have to give lawyers to murderers, then perhaps we should give them to refugee orphans.”²¹

Regardless of the civil or criminal nature of removal proceedings, advocates contend that when forced to go before a judge without counsel, unaccompa-

¹⁴ Ian Urbina, *Immigrant Detainees and the Right to Counsel*, N.Y. TIMES, Mar. 30, 2013, available at <http://www.nytimes.com/2013/03/31/sunday-review/immigrant-detainees-and-the-right-to-counsel.html>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Peter Markowitz, *Deportation is Different*, JOURNAL OF CONSTITUTIONAL LAW 1299, 1301 June 2011, available at [https://www.law.upenn.edu/journals/conlaw/articles/volume13/issue5/Markowitz13U.Pa.J.Const.L.1299\(2011\).pdf](https://www.law.upenn.edu/journals/conlaw/articles/volume13/issue5/Markowitz13U.Pa.J.Const.L.1299(2011).pdf).

¹⁸ Mara Gay, *As Child Immigrants Await Fate, a Race for Counsel*, THE WALL ST. J., Oct. 1, 2014, available at <http://online.wsj.com/articles/immigrant-children-in-new-york-city-face-a-shortage-of-attorneys-1412100510>.

¹⁹ Markowitz, *supra* note 17.

²⁰ Complaint of Petitioner-Plaintiff at 11, *J.E.F.M. v. Holder*, No. 2:14-cv-01026 (filed Jul. 9, 2014).

²¹ Semple, *supra* note 10.

nied youth are unable to fairly represent their interests as pro se defendants.²² Not only do these children confront troubling cultural and linguistic barriers that impede their ability to properly advocate on their on behalf, but also the complexity of court proceedings and immigration law itself make it nearly impossible for children to adequately represent their interests.²³ Substantive and procedural immigration law is notoriously complicated and has been regarded as only “second to the Internal Revenue Code in complexity.”²⁴ “How does a child begin to understand what kinds of evidence they have to put together or begin to understand what the definition of a refugee means?” asks Lisa Frydman, managing director of the Center for Gender and Refugee Studies at the University of California Hasting College of Law.²⁵ In the absence of counsel, children are forced to navigate a motely of intricate procedures and policies, respond to claims against them, assemble evidence and present legal arguments.²⁶ Furthermore, many of these children have valid defenses against removal.²⁷ Nevertheless, without a knowledgeable attorney, they are unable to meet their burden in demonstrating eligibility for asylum and other forms of relief including Special Immigrant Juvenile Status, U-Visas (for victims of violent crimes) and T-Visas (for victims of severe human trafficking).²⁸

GOVERNMENT’S RESPONSE TO INFLUX OF UNREPRESENTED YOUTH IN DEPORTATION HEARINGS

While the government has publicly recognized and responded to the need for legal representation among unaccompanied youth in deportation hearings, advocates insist it is not enough.²⁹ In July 2014, President Obama mandated expedited deportation hearings for immigrant minors in a substantive effort to gain control of this humanitarian crisis.³⁰ However, these so-called “rocket

²² Laila Hlass, *Obama is not helping children who face deportation alone*, THE BOSTON GLOBE, (Oct. 26, 2014), <http://www.bostonglobe.com/opinion/2014/10/25/obama-not-helping-children-who-face-deportation-alone>.

²³ Complaint of Petitioner-Plaintiff, *supra* note 20, at 8-9.

²⁴ *Baltazar-Alcazar v. I.N.S.*, 386 F.3d 940, 948 (9th Cir. 2004).

²⁵ Susan Ferris, *A Life-and-Death Struggle for Asylum in America*, THE CENTER FOR PUBLIC INTEGRITY (Oct. 8, 2014), <http://www.publicintegrity.org/2014/10/08/15861/life-and-death-struggle-asylum-america>.

²⁶ Complaint of Petitioner-Plaintiff *supra* note 18, at 3-4.

²⁷ Hlass, *supra* note 22.

²⁸ Complaint of Petitioner-Plaintiff, *supra* note 20, at 9-10.

²⁹ Semple, *supra* note 10.

³⁰ Gay, *supra* note 18.

dockets” have only escalated the issue.³¹ “Children are placed with a sponsor and less than a week later they are asked to appear in court,” says Lynne Davis, an immigration attorney at Pisgah Legal Services in North Carolina.³² In some instances, these children in North Carolina are required to travel as far as Texas to attend their hearing and do not have the money, nor the transportation to get there.³³ “If they don’t show up to court the judge will issue an *in absentia* order, instructing them to be removed in their absence,” states Lynne Davis.³⁴

In response to the number of unrepresented immigrant minors overwhelming court dockets, the Department of Justice announced on September 12, 2014 that it was administering \$1.8 million in grants to provide effective counsel for undocumented children facing deportation.³⁵ The grants were distributed through the justice AmeriCorps and given to eight separate agencies that would work to represent children under the age of 16 in immigration proceedings in 16 cities across the country.³⁶ The Department estimated that these grants would fund positions for some 100 legal fellows.³⁷ In addition to funding, the Department announced it would also provide a workshop where new justice AmeriCorps members would be trained on issues relating to cultural sensitivity and ethics, as well as applicable immigration law, proceedings and practice.³⁸

Though immigrant advocates commend this new initiative, they also insist that these efforts would only create a mere dent in the total number of unrepresented children.³⁹ Furthermore, advocates stress that unaccompanied youth between the ages of 17 and 18 are wholly excluded from legal representation under the federal grants and that these funds fail to reach many areas in critical need, including Los Angeles.⁴⁰ Advocates also note that effective representation for immigrant children requires highly-specialized skills and a steady handling

³¹ Telephone Interview with Lynn Davis, Immigration Attorney, Pisgah Legal Services (Oct. 17, 2014).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Justice Department and CNCS Announce \$1.8 Million in Grants to Enhance Immigration Court Proceedings and Provide Legal Assistance to Unaccompanied Children*, The United States Department of Justice (Sept. 12, 2014), <http://www.justice.gov/opa/pr/justice-department-and-cnacs-announce-18-million-grants-enhance-immigration-court-proceedings>.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Semple, *supra* note 10.

⁴⁰ Complaint of Petitioner-Plaintiff, *supra* note 20, at 13.

of complex immigration law that can only be gained through years of experience.⁴¹ Unless participating attorneys are already experienced in this area of law, it is unlikely that the program's workshops will provide fellows with the necessary skills.⁴² "They may be well meaning, but they can't do it with an hour's training," stated Lenni Benson, a professor at New York Law School and director of the Safe Passage Project.⁴³

On September 30, 2014 the Obama administration announced that the Department of Health and Human Services would be allocating two additional grants as part of a larger nine million dollar award to agencies to provide legal assistance to immigrant children.⁴⁴ In 2014, four million dollars of this fund was distributed to the United States Conference of Catholic Bishops and to the U.S. Committee for Refugees and Immigrants, with the remaining amount set for distribution at a later date.⁴⁵ Once again, immigrant advocates urged that the additional funds would only allow attorneys to represent an estimated 1,222 unaccompanied children—a figure that falls far below the number of unrepresented youth.⁴⁶ Kathleen Maloney, an attorney with the Immigration Law Unit of the Legal Aid Society in New York City, states that despite this extra funding, there are simply not enough trained attorneys to meet the increasing and complex needs of immigrant children.⁴⁷

Later in November 2014, the Obama administration announced a major executive action on immigration that would grant as many as four million illegal immigrants deportation relief.⁴⁸ The new executive plan, however, does not spare the thousands of immigrant children who have crossed the border

⁴¹ Semple, *supra* note 10.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Susan Carroll, *Unaccompanied Immigrant Children to Get Some Help*, SAN ANTONIO EXPRESS NEWS (Sept. 30, 2014), <http://www.expressnews.com/news/local/article/Unaccompanied-immigrant-children-to-get-some-5792360.php>.

⁴⁵ *Id.*

⁴⁶ David Rogers, *Counsel for Child Migrants Rages On*, POLITICO (Sept. 30, 2014), <http://www.politico.com/story/2014/09/child-migrants-legal-counsel-111473.html>.

⁴⁷ Rick Cohen, *Feds Grant \$9M for Legal Needs of Unaccompanied Immigrant Children*, NONPROFIT QUARTERLY (Oct. 3, 2014), <https://nonprofitquarterly.org/policysocial-context/24927-feds-grant-9m-for-legal-needs-of-unaccompanied-immigrant-children.html>.

⁴⁸ Jen Manuel Krogstad & Jeffrey Passel, *Who are the unauthorized immigrants ineligible for Obama's executive action?*, PEW RESEARCH CENTER (Jan. 25, 2015), <http://www.pewresearch.org/fact-tank/2014/12/01/who-are-the-unauthorized-immigrants-ineligible-for-obamas-executive-action>.

within the last five years from removal.⁴⁹ As a result, an estimated 350,000 unauthorized minors remain ineligible for relief.⁵⁰

TAKING THE ISSUE TO COURT

On July 9, 2014, the Northwest Immigrant Rights Project (“NIRP”) filed suit against the federal government on behalf of eight immigrant children between the ages of ten and 17 in a Seattle federal court.⁵¹ Several of these children, like so many other minors traveling across the border, were fleeing from violence in their home countries.⁵² These children-plaintiffs have deportation cases currently pending against them and no legal representation.⁵³ The NIRP seeks class action certification and argues that the Government’s failure to provide legal representation to these children violates both the INA and the Due Process Clause of the Fifth Amendment.⁵⁴ In their brief, the NIRP emphasizes that due to the adversarial nature of immigration proceedings, as well as the age and unique vulnerability of this class of persons, immigrant children are unable to effectively advocate for their own interests.⁵⁵ In response to the suit, Deputy Attorney General Leon Fresco argued that mandating counsel for children “would create a magnet effect,” and that Congress would not be able to fund legal representation for these children.⁵⁶

On September 30, 2014, U.S. District Court Judge Zilly denied the NIRP’s request for a preliminary injunction seeking one-year continuances for child immigrants in deportation hearings.⁵⁷ But “the core issue of whether plaintiffs are entitled, under the Fifth Amendment, to counsel at government expense” Judge Zilly writes, “must wait another day.”⁵⁸ In response, Matt Adams, an attorney with the NIRP says, “We are heartened by the fact that he recognized there are serious constitutional issues at play.”⁵⁹ Ahilan Arulanathan, an attorney with the American Civil Liberties Union who also ap-

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Complaint of Petitioner-Plaintiff, *supra* note 20, at 2.

⁵² *Id.* at 15-21.

⁵³ *Id.* at 2.

⁵⁴ *Id.* at 23, 25.

⁵⁵ *Id.* at 8, 10

⁵⁶ Rogers, *supra* note 46.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

peared before the Judge later stated, “You can read tea leaves one way or the other but the opinion just leaves for another day all of the central questions.”⁶⁰

CONCLUSION

While the debate over whether unaccompanied youth are entitled to legal representation at the government’s expense rages on, immigrant children continue to be pushed through the court system without counsel. “These are refugees, they are fleeing violence. But they are also children,” said Jojo Annobil, attorney-in-charge with the Immigration Law Unit at the Legal Aid Society. “They cannot represent themselves.”⁶¹

⁶⁰ *Id.*

⁶¹ Gay, *supra* note 18.