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## One Size Fits All: Unaccompanied Alien Children and the Right to Appointed Counsel

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**ONE SIZE FITS ALL: UNACCOMPANIED  
ALIEN CHILDREN AND THE RIGHT TO  
APPOINTED COUNSEL**

*Ginny Nunez, Esq.\**

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## I. INTRODUCTION

Thousands of immigrant children come to the United States undocumented and unaccompanied. The UN High Commissioner for Refugees (UNHCR) states that from 2008-2013 there was a 712 percent increase in asylum applicants from El Salvador, Guatemala, and Honduras.<sup>1</sup> This huge increase of child migrants has been called a humanitarian crisis resulting from the crime, violence, and extreme poverty in Mexico and Central American countries.<sup>2</sup>

In many of these countries, gangs and criminal groups are constantly in violent confrontations for drug trafficking routes, territory, public transportation systems, highways, and human trafficking.<sup>3</sup>

The dangers that these fleeing children face, such as rape, mutilations, and physical assault, may fulfill the criteria for refugee status under the Convention Against Torture (CAT), United Nations Refugee Convention, or U.S. protection.<sup>4</sup> They are also potentially eligible for other forms of relief such as Special Immigrant Juvenile Status or relief due to being a victim of human trafficking.<sup>5</sup>

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<sup>1</sup> AMERICAN IMMIGRATION LAWYERS ASSOCIATION, AILA RECOMMENDATIONS ON LEGAL STANDARDS AND PROTECTIONS FOR UNACCOMPANIED ALIEN CHILDREN 1 (2014), <http://www.aila.org/infonet/recommendations-legal-standards-protections-uacs>.

<sup>2</sup> *Id.* at 1.

<sup>3</sup> Susan Gzesh, Claudia Flores, Caroline Bettinger-Lopez, Mark Fleming, National Immigrant Justice Center, *Request For Precautionary Measures Minors From Guatemala, El Salvador, Honduras and Mexico*, 5 (2014), <http://www.immigrantjustice.org/sites/immigrantjustice.org/files/IACHR%20PetitionresponseSept5final2.pdf>. (Local law enforcement has been ineffective and at times cooperative with the criminal groups)

<sup>4</sup> *Id.*

<sup>5</sup> Jennifer Chan, *Rocket Dockets Leave Due Process in the Dust* (Aug. 11, 2014, 2:22 p.m.), <http://www.immigrantjustice.org/staff/blog/rocket-dockets-leave-due-process-dust#.VG4fVsmalSF>.

Even though there are many avenues to pursue to avoid being deported, unaccompanied alien children, do not possess the necessary knowledge to navigate the labyrinth that is the United States immigration system. Without the assistance of counsel, the child is confronted with proceedings in an unfamiliar environment with unknown adults in an unknown language.

This comment will argue that unaccompanied alien children have a due process right to appointed counsel at the government's expense. These children make up a vulnerable class, confront a complex adversarial system, and are at severe risk for the deprivation of liberty. For these reasons, this right is necessary to maintain the fundamental fairness of trial. Part II of this comment will discuss the history behind the migration of immigrant children and the rights they currently have. Part II will begin by discussing the history of immigration reform, will then discuss the challenges and issues arising from the influx of unaccompanied alien children, and the solutions already in place which have been ignored. Part II will continue with a discussion of the journey faced by unaccompanied alien children, a brief history of the lack of right to counsel in the immigration system, and finally the most recent obstacle confronting these children, "rocket dockets." Part III will argue that unaccompanied alien children should have a due process right to counsel in order to maintain the fundamental fairness of trial because: (1) unaccompanied alien children are a vulnerable class, (2) they confront a complex adversarial system difficult to navigate independently, and (3) have a severe risk of the deprivation of liberty. Part IV will conclude that unaccompanied alien children have a due process right to appointed counsel at the government's expense.

## II. BACKGROUND

### A. Transformation of U.S. Immigration from 1980-present

An "unaccompanied alien child" is a child under the age of 18, who has no parent or legal guardian in the country to provide care and physical custody, and has no lawful immigration status in the

United States.<sup>6</sup> In 2010, fifty-two percent of unaccompanied alien children were apprehended within twenty-four hours, eighty percent within two to seven days, eighty-five percent within a month, and eighty-seven percent within a year.<sup>7</sup> In 2013, 24,668 unaccompanied alien children were apprehended and the number was predicted to double for 2014.<sup>8</sup> In 2014 the number of unaccompanied children that were apprehended was approximately 68,451.<sup>9</sup>

The number of unaccompanied alien children entering the United States started to increase in the 1980's.<sup>10</sup> At that time the children were held in custody of the U.S. Immigration and Naturalization Service (INS).<sup>11</sup> The INS served as the children's prosecutor, as well as their guardian, creating a conflict of interest.<sup>12</sup> In 2002, after the World Trade Center attacks, immigration policy reform took aim at tackling the conflict of interest.<sup>13</sup> Congress passed the Homeland Security Act of 2002 (HSA) to alleviate the tension.<sup>14</sup>

The HSA completely eliminated INS and created three subdivisions within the new Department of Homeland Security (DHS): United States Citizenship and Immigration Services (USCIS), Immigration and Customs Enforcement (ICE), and Customs and Border Protection (CBP).<sup>15</sup> Advocates for unaccompanied alien

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<sup>6</sup> OLGA BYRNE AND ELISE MILLER, THE FLOW OF UNACCOMPANIED ALIEN CHILDREN THROUGH THE IMMIGRATION SYSTEM: A RESOURCE FOR PRACTITIONERS, POLICYMAKERS, AND RESEARCHERS, 4 (2012).

<sup>7</sup> *Id.* at 12.

<sup>8</sup> National Immigrant Justice Center, *A Policy Brief from Heartland Alliance's National Immigrant Justice Center: Unaccompanied Immigrant Children*, 1 (Jan. 2014), <https://www.immigrantjustice.org/sites/default/files/content-type/research-item/documents/2016-11/NIJC%20Policy%20Brief%20-%20Unaccompanied%20Immigrant%20Children%20FINAL%20Winter%202014.pdf>.

<sup>9</sup> U.S. Customs and Border Patrol, Southwest Border Unaccompanied Alien Children Statistics FY 2014, <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2015>

<sup>10</sup> BYRNE AND MILLER, *supra* note 6, at 6.

<sup>11</sup> *Id.* at 4.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Homeland Security Act, 6 U.S.C. §462 (2002); *see also* OLGA BYRNE AND ELISE MILLER, *supra* note 6, at 6 (2012).

<sup>15</sup> *Id.*

children lobbied successfully to add an amendment that transferred the custody and responsibility of unaccompanied alien children to the Department of Health and Human Services' (HHS) in the Office of Refugee Resettlement (ORR), instead of DHS.<sup>16</sup> The unaccompanied alien children remain in ORR custody, until a sponsor is found.<sup>17</sup> ORR is responsible for the safety and coordination of their stay.<sup>18</sup> Under the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008, ORR has to place an unaccompanied child in the least restrictive setting, which can include a sponsor.<sup>19</sup> DHS still plays a role in the proceedings, as a prosecutor on behalf of the government without the conflict that previously existed.<sup>20</sup> If the child is ordered removed Enforcement and Removal Operations (ERO) is responsible for returning the child to their home country.<sup>21</sup> The surge of migration has made this effort insufficient to meet their legal needs.<sup>22</sup>

#### B. Current Issues Faced by Unaccompanied Alien Children

Heartland Alliance's National Immigrant Justice Center (NIJC) conducted interviews with unaccompanied alien children to learn about the motivation behind the risk they took to migrate, their treatment in the detention facilities, and their confrontation with the immigration system.<sup>23</sup> The study was conducted by NIJC's Immigrant Children's Protection Project by interviewing 224 children, for whom they provided legal consultation, in the Chicago area from December 23, 2013 through January 10, 2014.<sup>24</sup> According to the interviews,

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<sup>16</sup> *Id.*

<sup>17</sup> Office of Refugee Resettlement, *About Unaccompanied Children Services*, <http://www.acf.hhs.gov/programs/orr/programs/ucs/about>. A sponsor can be the child's parent, legal guardian or various adult family members, preference given in that order.

<sup>18</sup> Children's Affairs, 6 U.S.C. § 279(b)(1)(A) (2006).

<sup>19</sup> *Id.*

<sup>20</sup> BYRNE AND MILLER, *supra* note 6, at 12.

<sup>21</sup> *Id.* at 4.

<sup>22</sup> *Id.*

<sup>23</sup> National Immigrant Justice Center, *supra* note 8, at 1-2 (a nongovernmental organization that provides legal services to unaccompanied alien children).

<sup>24</sup> *Id.* at 2.

fifty-two percent said their migration was driven by gang or other violent experiences; forty-eight percent said they were economically driven by extreme poverty, and/or to reunite with parents; sixty-one percent had one or both their parents within the United States to reunite with.<sup>25</sup>

One child, Beatrice, left El Salvador because her sister was murdered in 2010 by gang violence. Beatrice's mother lived in New York and sent for Beatrice due to the threats against Beatrice's life if protection fees were not paid to the gangs.<sup>26</sup> Another child, Francisco, a thirteen year old from Honduras, lived alone after his brothers moved away for work. He migrated to meet with his mother in the United States.<sup>27</sup> Beatrice and Francisco's stories are not unique. Many other children are leaving because they are alone or abandoned and have no choice but to reunite with family members that are currently in the U.S.<sup>28</sup>

After deciding to migrate to the United States, the unaccompanied alien children risk their lives on the journey.<sup>29</sup> An example of the dangers faced is the case of a fifteen year old girl who was raped twice by a man while waiting to cross over the Mexico-United States border.<sup>30</sup>

Once apprehended, the experience does not necessarily get any better. In 1997, in *Reno v. Flores*, a class action was brought on behalf of all minors apprehended by INS in the Western region.<sup>31</sup> The class was challenging the INS policies, practices, and regulations regarding the detention and release of unaccompanied alien child in INS custody.<sup>32</sup> The case was settled with a stipulated agreement.<sup>33</sup>

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<sup>25</sup> *Id.* at 1-2.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Shani M. King, *Alone and Unrepresented: A Call to Congress to Provide Counsel for Unaccompanied alien child*, 50 HARV. J. ON LEGIS. 331, at 361 (2013).

<sup>29</sup> National Immigrant Justice Center, *supra* note 8, at 1-2.

<sup>30</sup> *Id.*

<sup>31</sup> *Reno v. Flores*, 507 U.S. 292 (1993).

<sup>32</sup> American Civil Liberties Union, *Flores Stipulated Settlement Agreement*, 3 (Jan. 17, 1997).

<sup>33</sup> *Id.*

The settlement, which applied nationwide, required INS to treat all minors in their custody with “dignity, respect and special concern for their particular vulnerability as minors . . . detain [] them in the least restrictive setting . . . ensure timely appearance before the INS . . . [a]nd protect their wellbeing,” and to release the minors in a timely manner.<sup>34</sup> Examples of standards included were physical care and maintenance, food, clothing, grooming items, medical and dental care, emergency health services, education and communication skills in a classroom setting, muscle activities for an allotted amount of time per day, and a comprehensive orientation about aids to and availability of legal services.<sup>35</sup>

Unfortunately, once in the custody of DHS, many children were exposed to unacceptable conditions, such as facilities with extreme temperatures and three-point shackles.<sup>36</sup> The *Reno v. Flores* agreement applies to DHS and ORR even though it was decided under INS.<sup>37</sup> Once in the custody of ORR, the children have to seek out services that will help them understand their rights and responsibilities in order to figure out the next step.<sup>38</sup>

### C. Challenges in the Immigration System

Unaccompanied alien children do not have the right to appointed counsel. If they cannot afford counsel or obtain pro bono counsel, they have no choice but to appear before an immigration judge *pro se*.<sup>39</sup> DHS initiates removal proceedings when the unaccompanied alien child is in ORR custody.<sup>40</sup> The location of the hearings depend on where the child is detained before being released to a sponsor.<sup>41</sup> The hearings may not be in the same city or near the

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<sup>34</sup> *Id.* at 7.

<sup>35</sup> *Id.* at 3 (exhibit 1, 1-3).

<sup>36</sup> National Immigrant Justice Center, *supra* note 8, at 1-2. Three-point shackles restrain the unaccompanied alien children at the wrists, waist, and ankles.

<sup>37</sup> Women’s Commission, *Halfway Home: Unaccompanied Children in Immigration Custody*, 5 (Feb. 2009).

<sup>38</sup> National Immigrant Justice Center, *supra* note 8, at 1-2.

<sup>39</sup> National Immigrant Justice Center, *supra* note 8, at 3.

<sup>40</sup> BYRNE AND MILLER, *supra* note 6, at 9.

<sup>41</sup> CTR. FOR GENDER & REFUGEE STUDIES & KIDS IN NEED OF DEFENSE, *A TREACHEROUS JOURNEY: CHILD MIGRANTS NAVIGATING THE U.S.*



unaccompanied alien child's home, therefore determining when removal proceedings begin and filing a change of venue is crucial to avoid deportation.<sup>42</sup> It is up to the child or their sponsor to file the child's address with the court or risk not receiving their notice to appear for the removal proceedings.<sup>43</sup> If a child misses their removal proceeding, the child faces the possibility of being deported *in absentia*.<sup>44</sup> It is also up to the child or sponsor to figure out when deportation proceedings start in order to change the venue closer to their sponsor's home.<sup>45</sup> These are just some of the many delicate matters with which unaccompanied alien children are confronted.

Members of congress have introduced bills to provide services to unaccompanied alien children including appointment of counsel and guardians ad litem.<sup>46</sup> California Senator Dianne Feinstein introduced the Unaccompanied Alien Child Protection Act (UACPA) every year from 2000 to 2007, but it was never passed.<sup>47</sup> In 2000, the UACPA had language to provide for counsel at the expense of the government but it did not pass.<sup>48</sup> In 2004, the UACPA removed "at the expense of the government" language from the provision.<sup>49</sup> Instead it provided that ORR will ensure that all unaccompanied alien children had competent counsel, unless it made a factual determination that the unaccompanied alien child did not need counsel.<sup>50</sup> It also stressed the use of pro bono attorneys.<sup>51</sup>

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IMMIGRATION SYSTEM, 78 (2014), [http://www.uchastings.edu/centers/cgrs-docs/treachurous\\_journey\\_cgrs\\_kind\\_report.pdf](http://www.uchastings.edu/centers/cgrs-docs/treachurous_journey_cgrs_kind_report.pdf).

<sup>42</sup> National Immigrant Justice Center, *supra* note 8, at 4.

<sup>43</sup> *Id.*

<sup>44</sup> Gzesh, Flores, Bettinger-Lopez, Fleming, National Immigrant Justice Center, *supra* note 3, at 3.

<sup>45</sup> National Immigrant Justice Center, *supra* note 8, at 3.

<sup>46</sup> CTR. FOR GENDER & REFUGEE STUDIES & KIDS IN NEED OF DEFENSE, *supra* note 41, at iii, iv.

<sup>47</sup> BYRNE AND MILLER, *supra* note 6, at 7.

<sup>48</sup> King, *supra* note 28, at 340 (2013); *see also*, Unaccompanied Alien Child Protection Act, S. 3117, 106th Cong (2000).

<sup>49</sup> *Id.* at 361 (2013); *see also*, Unaccompanied Alien Child Protection Act, S. 1129, 108th Cong. (2004).

<sup>50</sup> King, *supra* note 28, at 340 (2013); *see also*, Unaccompanied Alien Child Protection Act, S. 1129, 108th Cong. (2004).

<sup>51</sup> King, *supra* note 28, at 340 (2013); *see also*, Unaccompanied Alien Child Protection Act, S. 1129, 108th Cong. (2004).

Fortunately, many of the core provisions of the failed UACPA made it into the TVPRA. These provisions included the non-adversarial adjudication of unaccompanied alien children's asylum claims and, if practicable, access to legal services through pro-bono legal representatives.<sup>52</sup>

Senate comprehensive immigration reform bill S.744 and the House of Representatives companion bill H.R. 15 have sought to guarantee the right to appointed counsel for the unaccompanied alien children.<sup>53</sup> Unfortunately, like the UACPA this bill has not been passed.<sup>54</sup>

The only responsibility assigned to ORR in regards to legal representation is to develop a plan to ensure legal representation for each unaccompanied alien child.<sup>55</sup> ORR contracted with the Vera Institute for Justice to develop ways to provide unaccompanied alien children counsel.<sup>56</sup> While the Vera Institute for Justice has increased the amount of legal representation, it still has not been able to guarantee legal representation for every unaccompanied alien child.<sup>57</sup>

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<sup>52</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 22 U.S.C. § 7107 (2008); *see also*, Olga Byrne and Elise Miller, *supra* note 6, at 8.

<sup>53</sup> CTR. FOR GENDER & REFUGEE STUDIES & KIDS IN NEED OF DEFENSE, *supra* note 41, iii-iv (2014); *see also*, Immigration Policy Center, *A Guide to S.744: Understanding the 2013 Senate Immigration Bill* (July 10, 2013), <http://www.immigrationpolicy.org/special-reports/guide-s744-understanding-2013-senate-immigration-bill>.

<sup>54</sup> CTR. FOR GENDER & REFUGEE STUDIES & KIDS IN NEED OF DEFENSE, *supra* note 41, iii-iv (2014).

<sup>55</sup> King, *supra* note 28, at 340 (2013); *see also*, 6 U.S.C. §279 (b)(1)(A) (2006) (“coordinating and implementing the care and placement of unaccompanied alien children who are in Federal custody by reason of their immigration status, including developing a plan to be submitted to Congress on how to ensure that qualified and independent legal counsel is timely appointed to represent the interests of each such child, consistent with the law regarding appointment of counsel that is in effect on November 25, 2002”).

<sup>56</sup> King, *supra* note 28, at 340 (2013) (Vera Institute for Justice is a non-profit center oversees the Unaccompanied Children Program).

<sup>57</sup> *Id.* at 341 (The Vera Institute for Justice, in efforts to develop a plan to ensure representation has hosted know your rights presentation before an

The ORR has also used the help of the Lutheran Immigration and Refugee Service to ensure compliance with the HSA directive.<sup>58</sup> The Lutheran Immigration and Refugee service helps facilitate the transfer of unaccompanied alien children to foster care if no family member is available, a home assessment to ensure that the needs of the children are being provided, and group counseling.<sup>59</sup> This group also assists ORR in finding volunteer attorneys.<sup>60</sup> Unfortunately, this leaves the hope for legal representation in the hands of pro bono attorneys and any willing non-profit organization, and less so as a directive of the government.<sup>61</sup>

In addition to lack of appointed counsel, unaccompanied alien children are not provided independent child advocates in immigration proceedings.<sup>62</sup> The TVPRA provides for child advocates in vulnerable situations and in child trafficking situations.<sup>63</sup> But even on this basis the designation of child advocates are rare and discretionary.<sup>64</sup> The TVPRA also provides that, “[t]o the greatest extent practicable, the Secretary of Health and Human Services shall make every effort to utilize the services of pro bono counsel who agree to provide representation to such children without charge.”<sup>65</sup> This provision has helped increase the representation of unaccompanied alien children, however, the recent

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unaccompanied alien child’s first appearance, held screenings to determine individual legal needs, and helped facilitate pro bono referrals among other services).

<sup>58</sup> Lutheran Immigration and Refugee Service, *Protecting Unaccompanied Migrant Children*, 1 (March 8, 2014), <http://lirs.org/wp-content/uploads/2014/07/LIRS-Backgrounder-on-Unaccompanied-Migrant-Children-UPDATE-7-7-14-FINAL.pdf>; *see also*, 6 U.S.C. §279(b)(1)(A) (2006).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> King, *supra* note 28, at 341 (2013).

<sup>62</sup> CTR. FOR GENDER & REFUGEE STUDIES & KIDS IN NEED OF DEFENSE, *supra* note 41, at 5. Independent child advocates are in domestic child welfare proceedings and represent the best interests of the child.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> CTR. FOR GENDER & REFUGEE STUDIES & KIDS IN NEED OF DEFENSE, *supra* note 41, at 86 (citing) TVPRA 22 U.S.C. § 235(c).

#### D. Procedural Framework

The TVPRA, in addition to procedural amendments, lays out the care for unaccompanied alien children from contiguous and non-contiguous countries. In non-contiguous countries, once the unaccompanied alien children are identified they must be transferred within seventy-two hours to HHS/ORR.<sup>66</sup> Once in custody of ORR, ORR must screen the child to identify medical and other immediate needs, identify any relatives to care for the child, or place the child in the least restrictive setting if they remain in government custody before being placed in removal proceedings.<sup>67</sup> ORR is required to try to provide legal counsel and coordinate with the courts to set up a legal orientation program for the child's sponsor.<sup>68</sup>

In contiguous countries, unaccompanied alien children have a more streamlined process. A determination of whether the child is a trafficking victim, has a fear of returning to their country, or cannot make an independent decision to withdraw their application of admission to the U.S. is made within forty-eight hours.<sup>69</sup> If none of those issues are flagged officials give the child the option to withdraw their application to enter the U.S. and be repatriated without ever coming before an immigration judge.<sup>70</sup> This expedited removal procedure has failed to protect adult applicants and can have the same effect on unaccompanied alien children.<sup>71</sup> In 2009 the Women's Refugee Commission issued a report stating that of the 90,000 children apprehended at the southwest border, most were repatriated immediately without the chance to ever appear before a judge.<sup>72</sup>

Once in DHS custody, fifty-six percent of the unaccompanied alien children claim they were placed in three-point

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<sup>66</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 8 U.S.C. §1232 (2008).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> AMERICAN IMMIGRATION LAWYERS ASSOCIATION, *supra* note 1, at 5.

<sup>72</sup> King, *supra* note 28, at 336; see also Women's Commission, *supra* note 28 at 5.

shackles; seventy-one percent were held in extremely cold detention rooms, which they nicknamed *hieleras*, or ice boxes; twenty-nine children said they were held beyond the seventy-two hour limit required by *Flores*, or that it was difficult to know how long they were held because the lights where they were held were never turned off.<sup>73</sup> There have also been reports of children barely being fed.<sup>74</sup> For example, one child was only given bread to eat.<sup>75</sup>

#### E. Unaccompanied Alien Child's Journey

These unaccompanied alien children's first contact with the U.S. immigration system is when they are apprehended by federal authorities at the border or once it is discovered that there may have been a violation of immigration law.<sup>76</sup> The Office of Border Patrol apprehends the children at the border while enforcement authorities, acting on behalf of ERO, apprehend other children within the United States at worksites.<sup>77</sup> Other children are arrested by local law enforcement and are directly reported to ICE or sent to juvenile delinquency facilities to serve time before being transported to ICE.<sup>78</sup>

Once in DHS custody, the child is placed in a temporary facility to avoid interaction with adults until DHS determines that they are an unaccompanied minor.<sup>79</sup> Then CBP or ICE refers the child to an ICE juvenile coordinator for that district who refers the child to a national juvenile coordinator in Washington D.C., contacts ORR, and arranges for the child's transfer to an ORR facility.<sup>80</sup> The ORR intake team gathers information from ICE, such as the child's gender, age, country of origin, date and location of apprehension, and

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<sup>73</sup> National Immigrant Justice Center, *supra* note 8, at 3.

<sup>74</sup> *Id.*

<sup>75</sup> National Immigrant Justice Center, *supra* note 8, at 3; *see also*, American Civil Liberties Union, *Flores Stipulated Settlement Agreement*, Exhibit 1, at 1 (January 17, 1997)

<sup>76</sup> BYRNE AND MILLER, *supra* note 6, at 8.

<sup>77</sup> *Id.* at 10.

<sup>78</sup> *Id.* at 4

<sup>79</sup> BYRNE AND MILLER, *supra* note 6, at 10.

<sup>80</sup> *Id.* If there is doubt about the age of an alien, DHS performs dental or skeletal radiographs, which have been criticized for their inaccuracy.

medical and psychological condition.<sup>81</sup> Based on this information the ORR intake team can classify the level of security needed and which facility is best suited for the child.<sup>82</sup>

According to The Flow of Unaccompanied Alien Children Through the Immigration System, ORR's principal responsibility should be releasing unaccompanied alien children to an approved sponsor in a timely manner.<sup>83</sup> This process is called reunification.<sup>84</sup> Approximately sixty-five percent of unaccompanied alien children are released to a sponsor.<sup>85</sup> Even if a child has family in the United States, due to fears of deportation, undocumented family members may not come forward when the child is apprehended.<sup>86</sup> According to the *Flores* settlement, there is an order of preference when releasing a child to a sponsor:

first a parent; second, a legal guardian; third, an adult relative (brother, sister, aunt, uncle or grandparent); fourth, an adult individual or entity designated by the child's parent or legal guardian as capable and willing to provide care; fifth a licensed program willing to accept legal custody (such as a shelter for homeless youth); or sixth an adult or entity approved by ORR.<sup>87</sup>

Documentation is required to establish a relationship within one of the six preference categories, for example documentation required to establish a relationship between the child and a sponsor is a notarized letter.<sup>88</sup> Once a sponsor is found, ORR sends the adult or program a family reunification packet, requests a fingerprint background check, and sends a facility case manager to interview the unaccompanied alien child, the potential sponsor, and parent or legal

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<sup>81</sup> *Id.* at 14.

<sup>82</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 8 U.S.C. §1232 (2008); *see also* BYRNE & MILLER, *supra* note 6, at 14.

<sup>83</sup> BYRNE AND MILLER, *supra* note 6, at 17.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 28.

<sup>86</sup> *Id.* at 10.

<sup>87</sup> American Civil Liberties Union, *Flores Stipulated Settlement Agreement*, 3 (Jan.17, 1997).

<sup>88</sup> BYRNE AND MILLER, *supra* note 6, at 18.

guardian, if possible.<sup>89</sup> Once the reunification process has been approved, the sponsor is not only responsible for childcare, but also responsible for attendance of all scheduled immigration court appearances and compliance with court orders.<sup>90</sup>

After the unaccompanied alien child has been processed by ORR and has not voluntarily withdrawn their application, DHS initiates removal proceedings as stipulated by the Immigration and Nationality Act (INA) §240:

[A] proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States . . . The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses.<sup>91</sup>

A memorandum by John Morton written on June 17, 2011 encourages prioritization of resources to focus on national security, border security, public safety, and the integrity of the immigration system.<sup>92</sup> It urges the exercise of prosecutorial discretion to avoid deportation.<sup>93</sup> Some of the factors identified for consideration when exercising prosecutorial discretion include the person's ties to their home country and conditions in that country, and the person's age, with particular consideration given to minors.<sup>94</sup>

After President Barack Obama's announcement of immigration reform on November 20, 2014, a new memo for

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 20.

<sup>91</sup> Immigration and Nationality act 8 C.F.R. 240 (1997); Illegal Immigration Reform and Immigrant Responsibility Act § 304 (1996).

<sup>92</sup> John Morton, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*, 2 (July 17, 2011) [hereinafter *Morton Memo*]

<sup>93</sup> *Id.* at 4-5. Prosecutorial discretion is defined within the memorandum as the "authority of an agency charged with enforcing a law to decide to what degree to enforce the law against a particular individual."

<sup>94</sup> *Id.* at 4.

apprehension, detention, and removal of undocumented immigrants was distributed by Secretary Jeh Charles Johnson.<sup>95</sup> The Johnson Memo supersedes prior memos, including the Morton Memo, and applies only to aliens apprehended on or after January 5, 2015.<sup>96</sup> The Johnson Memo sets up a framework of priority levels for different categories.<sup>97</sup> The highest priority refers to undocumented immigrants who are a threat to national security, border security, and public safety; the second highest priority refers to undocumented immigrants who are misdemeanants and new immigration violators; the lowest priority level refers to other immigration violations.<sup>98</sup> According to the Johnson Memo, the groups should be identified unless in the judgment of the immigration officer, “there are compelling and exceptional factors that clearly indicate the alien is not a threat to national security, border security, or public safety and should not therefore be an enforcement priority.”<sup>99</sup> The Johnson Memo lists factors to take into consideration which includes if the undocumented immigrant is a young child.<sup>100</sup> The Johnson Memo is the first time all DHS agencies will be under the guidance of the same enforcement priorities.<sup>101</sup>

If the prosecutor decides not to use prosecutorial discretion, a Notice to Appear is filed with the U.S. Department of Justice’s Executive Office for Immigration Review (EOIR) which starts proceedings against the child called a master calendar hearing.<sup>102</sup> At that point, the unaccompanied alien child has the option of a continuance in order to attempt to procure legal services.<sup>103</sup> Unfortunately, despite the words of encouragement this

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<sup>95</sup> Jeh Charles Johnson, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*, (Nov. 20, 2014) [hereinafter *Johnson Memo*].

<sup>96</sup> Johnson Memo, *supra* note 95, at 2, 6.

<sup>97</sup> *Id.* at 3-4.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 5.

<sup>100</sup> *Id.* at 6.

<sup>101</sup> *A Guide to the Immigration Accountability Executive Action*, AM. IMMIGRATION COUNCIL, 8 (Nov. 2014), [https://www.americanimmigrationcouncil.org/sites/default/files/research/a\\_guide\\_to\\_the\\_immigration\\_accountability\\_executive\\_action\\_final.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/a_guide_to_the_immigration_accountability_executive_action_final.pdf).

<sup>102</sup> BYRNE AND MILLER, *supra* note 6, at 22.

<sup>103</sup> *Id.*



memorandum is, “not intended to, do[es] not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil or criminal matter.”<sup>104</sup>

#### F. Forms of Relief available

In fleeing their home country unaccompanied alien children enter the United States in hopes of escaping the dangers of home.<sup>105</sup> In order to be granted asylum an unaccompanied alien child must fit into the same definition as refugee:

[A]ny person who is outside any country of such person’s nationality, or in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of past persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>106</sup>

This definition does not distinguish between adults and children, but the UNHCR has set forth guidelines to adapt the refugee definition to a child-sensitive definition.<sup>107</sup> The UNHCR delineates this framework as:

... taking into account a child’s age and maturity; recognizing that children are particularly vulnerable to certain types of harm; relaxes the requirements in regards to the elements of the definition; and gives the child a benefit of the doubt when making a

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<sup>104</sup> Johnson Memo, *supra* note 95, at 6.

<sup>105</sup> Gzesh, Flores, Bettinger-Lopez & Fleming, *supra* note 3, at 11.

<sup>106</sup> 8 U.S.C.A. §1101(a)(27)(M)(42).

<sup>107</sup> CTR. FOR GENDER & REFUGEE STUDIES & KIDS IN NEED OF DEFENSE, *supra* note 41, at 8-9.

determination of the evidence in regards to the elements of the refugee definition.<sup>108</sup>

While these guidelines are promulgated by the UNHCR, they are not binding to any adjudicators and are applied at the discretion of the BIA or federal judges.<sup>109</sup> Out of eighty-six unpublished IJ, BIA and federal decisions, only seven cite to the above guidelines.<sup>110</sup>

Special Immigrant Juvenile Status (SIJS) is another form of relief that grants residency to children without legal status who have been abused, neglected or abandoned.<sup>111</sup> To be eligible for SIJS a child must be declared dependent on the state family court, and found by the state judge that a “child cannot be reunited with either parent for reason of abuse, neglect, or abandonment, and being returned to their home country is against their best interest.”<sup>112</sup> There are still challenges in identifying eligibility, issues with states being open to utilizing this form of relief, and in USCIS adjudication proceedings.<sup>113</sup>

TVPPRA established T and U non-immigrant visas which provide temporary legal status for the duration of 4 years to immigrants who were victims of trafficking or specific types of severe crimes, and assist law enforcement in the investigation or prosecution

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<sup>108</sup> *Id.* at 9 (citing, U.N. Committee On The Rights Of The Child, General Comment Number 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (ART. 3, PARA. 1), 53 (2013)).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Immigration and Nationality Act, 8 U.S.C. §1101(a)(27)(J) (1990) (amended by) 22 U.S.C. §7107. Prior to 2008 this status only applied to children dependent on juvenile court and eligible for long term foster care. It was created as a protection from harmful caregivers without obtaining permanent residency.

<sup>112</sup> CTR. FOR GENDER & REFUGEE STUDIES & KIDS IN NEED OF DEFENSE, *supra* note 41, at 37.

<sup>113</sup> *Id.* at 38. Although TVPPRA has left the determination for SIJS to juvenile courts and amended the provision to removing the express consent requirement from DHS, USCIS follows guidance from before the enactment of the TVPPRA when express consent was still used. USCIS re-examines the findings of the juvenile court and has the power to ask for additional factual evidence. USCIS justifies this request to ensure that SIJS has not been pursued for primarily immigration purposes.

thereof.<sup>114</sup> These humanitarian visas have a pathway for legal permanent resident status and ultimately citizenship.<sup>115</sup> Despite these available forms of relief, difficulties surface such as identifying unaccompanied alien children that were victims of trafficking at the border and the administrative process of applying and obtaining these visas.<sup>116</sup>

#### G. The Right to Counsel in Immigration

The unaccompanied alien child has a right to counsel but not in the same sense as criminal proceedings. In criminal proceedings, an indigent defendant has a right to appointed counsel and cannot be placed in adversarial proceedings without competent counsel.<sup>117</sup> Currently, unaccompanied alien children in removal proceedings may have counsel if they can afford a lawyer or have obtained pro bono counsel.<sup>118</sup> In INA §292, the right to counsel is granted:

In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (*at no expense to the Government*) by such counsel, authorized to practice in such proceedings, as he shall choose.<sup>119</sup>

While federal regulation explicitly states the government will not provide appointed counsel four federal courts have found a right

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<sup>114</sup> *Id.* at 46. T visas protect against human trafficking such as harboring, transporting, provision or obtaining a person for sex, labor or services trafficking. U visas protect against physical and mental abuse as a result of being a victim of certain crimes. To be eligible for these visas, petitioners must be willing to help law enforcement in their prosecution. T visas exempt children under 18 at the time of the trauma to from the requirement of helping law enforcement, but U visas do not. U visas will allow those under the age of 16 to have help presenting the information on their behalf.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 48.

<sup>117</sup> U.S. Const. amend. XI.

<sup>118</sup> 8 U.S.C.A. §1362 (1996).

<sup>119</sup> *Id.* (emphasis added).

to appointed counsel for indigent aliens, if it is found, that the alien is incapable of representing themselves due to age, ignorance, or mental capacity.<sup>120</sup> Despite four federal courts making this finding counsel has yet to be appointed under this idea.<sup>121</sup>

Efforts to provide counsel for these children depend mainly on private funding and volunteers.<sup>122</sup> A study found that forty-seven percent of children that had an attorney in removal proceedings were permitted to stay in the United States; only ten percent of children without an attorney were allowed to stay.<sup>123</sup>

The main case law in immigration, relating to appointed counsel, is a case about a thirty-nine year old citizen of Mexico who was admitted for permanent residence, *Aguilera-Enriquez v. INS*.<sup>124</sup> He returned from vacation and was subjected to a search which uncovered two grams of cocaine.<sup>125</sup> Aguilera pled guilty for possession of a controlled substance which, unknowing to him, led to his deportation.<sup>126</sup>

Aguilera raised the issue of right to appointed counsel because he could not afford one to appear before the immigration judge.<sup>127</sup> The court determined that due process would require the right to counsel, for an indigent alien, if an attorney would be necessary to maintain the fundamental fairness of a trial.<sup>128</sup> It is

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<sup>120</sup> Kate M. Manuel, *Aliens' Right to Counsel in Removal Proceedings: In Brief*, CONG. RESEARCH SERV., 8 (Mar. 17, 2016), <http://fas.org/sgp/crs/homsec/R43613.pdf>.

<sup>121</sup> *Id.*

<sup>122</sup> Gzesh, Flores, Bettinger-Lopez & Fleming, *supra* note 3, at 6-7.

<sup>123</sup> *Id.* at 7.

<sup>124</sup> *Aguilera-Enriquez v. INS*, 516 F.2d 565 (6th Cir. 1975).

<sup>125</sup> *Id.* at 567.

<sup>126</sup> *Id.* at 567.

<sup>127</sup> *Id.* at 568.

<sup>128</sup> *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973); *see also* LENNI B. BENSON & RUSSELL R. WHEELER, *Enhancing Quality and Timeliness in Immigration Removal Adjudication* (June 7, 2012), <https://www.acus.gov/sites/default/files/documents/Enhancing-Quality-and-Timeliness-in-Immigration-Removal-Adjudication-Final-June-7-2012.pdf>. This is a draft report prepared for the Administrative Conference of the United States.

determined on a case-by-case basis.<sup>129</sup> The court found that the statute denied appointed counsel at the government's expense and that a constitutional argument for lack of due process fails because the fundamental fairness of the trial was not curtailed.<sup>130</sup> The lack of counsel did not deprive the full administrative consideration of Aguilera-Enriquez's argument.<sup>131</sup> District Judge DeMascio, dissenting, stated that a resident alien's fundamental right to personal liberty is in jeopardy in every case.<sup>132</sup> Therefore, the due process right to counsel is a necessary protection against infringement of their personal liberty.<sup>133</sup>

In Gonzalez-Machado v. Ashcroft, a fourteen year old appealed his deportation on the basis that, as an indigent alien, he was denied the Fifth Amendment due process right to appointed counsel at the government's expense.<sup>134</sup> Importantly, the court held that there is no right to appointed counsel for juveniles.<sup>135</sup> The court reasoned that in order to survive a motion to dismiss, the petitioner had to demonstrate that the current law was no longer valid or that the uniqueness of the petitioner's class warranted a different outcome.<sup>136</sup> The court found recent case law had not diminished precedent and the petitioner did not show he, and those similarly situated, were in a unique situation to warrant the right.<sup>137</sup> The Supreme Court, and some circuits, have distinguished the right to appointed counsel between civil and criminal contexts, holding that deportations proceedings are civil proceedings which do not warrant the right to appointed counsel at the government's expense.<sup>138</sup>

One exception where the government must bear the expense of appointed counsel is if the indigent alien is removed by the Alien

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<sup>129</sup> *Gagnon*, 411 U.S. at 790.

<sup>130</sup> *Aguilera-Enriquez*, 516 F.2d at 569.

<sup>131</sup> *Id.* at 569.

<sup>132</sup> *Id.* at 571-72.

<sup>133</sup> *Id.* at 572.

<sup>134</sup> *Gonzalez Machado v. Ashcroft*, No.C5-02-0066-FVS, 2 (2002), <http://www.clearinghouse.net/chDocs/public/IM-WA-0017-0002.pdf>.

<sup>135</sup> *Id.* at 12.

<sup>136</sup> *Id.* at 13.

<sup>137</sup> *Id.* at 13, 18.

<sup>138</sup> *Id.*

Terrorist Removal Court.<sup>139</sup> Another exception for appointed counsel is section 504 of the Rehabilitation Act which allows for qualified representation for those who suffer “serious mental disorders or conditions that may render them mentally incompetent to represent themselves in immigration proceedings.”<sup>140</sup> Qualified representatives are not limited to licensed attorneys and can include law students, and law graduates, as long as they are directly supervised by retained attorneys or accredited representatives, which include persons working for certain non-profit organizations who are accredited by the Board of Immigration Appeals (BIA).<sup>141</sup>

#### H. Most Recent Obstacle

Recently, the Department of Justice (DOJ) has created what are called “Rocket Dockets.”<sup>142</sup> This DOJ directive to fast track these cases applies to two categories of migrants: (1) to families that consist of at least one adult member and one child, and (2) unaccompanied minors.<sup>143</sup> The Rocket Dockets apply to those children who were released to a sponsor starting May 2014.<sup>144</sup> These Rocket Dockets prioritize the recent cases involving the unaccompanied alien children from Central America and present them in front of an immigration judge expeditiously.<sup>145</sup> Rocket Dockets were created due to the belief that many of the unaccompanied alien children do not have valid claims of relief.<sup>146</sup> This belief is mistaken because many would qualify

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<sup>139</sup> Manuel, *supra* note 120, at 7.

<sup>140</sup> *Id.* at 11; *see also* 8 U.S.C. §1534 (2001).

<sup>141</sup> Manuel, *supra* note 120, at 11.

<sup>142</sup> Chan, *supra* note 5.

<sup>143</sup> Jayashri Srikantiah, *The Immigration “Rocket Docket”: Understanding the Due Process Implications*, THE LEGAL AGGREGATE, (Aug. 15, 2014), <https://stanfordlawyer.law.stanford.edu/2014/08/the-immigration-rocket-docket-understanding-the-due-process-implications/>.

<sup>144</sup> American Bar Association, Commission on Immigration, *A Humanitarian Call to Action: Unaccompanied Alien Children at the Southwest Border* (Oct. 17, 2014) <http://www.americanbar.org/content/dam/aba/administrative/immigration/UACSstatement.authcheckdam.pdf>.

<sup>145</sup> Kirk Semple, *Advocates in New York Scramble as Child Deportation Cases are Accelerated*, N.Y. TIMES (Aug. 4, 2014) [http://www.nytimes.com/2014/08/05/nyregion/advocates-scramble-as-new-york-accelerates-child-deportation-cases.html?\\_r=0](http://www.nytimes.com/2014/08/05/nyregion/advocates-scramble-as-new-york-accelerates-child-deportation-cases.html?_r=0).

<sup>146</sup> Srikantiah, *supra* note 143.

under refugee claims or other claims specific for juveniles.<sup>147</sup> In other words, the master calendar hearings that were scheduled for months down the line now have to be scheduled within 21 days.<sup>148</sup> This also moves up the timeline for potential deportation from a couple of years to a couple of months.<sup>149</sup>

New notices were sent to the addresses on file for the unaccompanied alien children, many of which have not been updated to reflect their change of address.<sup>150</sup> This leads to many of these children failing to appear.<sup>151</sup> As previously noted, a failure to appear can lead to deportation *in absentia*.<sup>152</sup> This change in strategy is attributed to President Obama's attempt to deter the exorbitant number of unaccompanied alien child migrants.<sup>153</sup> A spokesperson from DOJ referred to the change in docket as a reprioritizing and refocusing of the EOIR to address the issue.<sup>154</sup>

### III. ANALYSIS

#### A. A Vulnerable Class

Due process right to counsel is indispensable because unaccompanied alien children are a vulnerable class. An unaccompanied alien child is first and foremost a child who has crossed into the United States without a parent or guardian present to provide care or custody.<sup>155</sup> They have fled their home countries, many of which run rampant with conflicts between gangs and criminal groups, human trafficking, and violent confrontations.<sup>156</sup>

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<sup>147</sup> *Id.*; see also 8 C.F.R. §245 (2011).

<sup>148</sup> American Bar Association, *supra* note 143.

<sup>149</sup> Semple, *supra* note 145.

<sup>150</sup> Chan, *supra* note 5

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> Semple, *supra* note 145.

<sup>154</sup> *Id.*

<sup>155</sup> BYRNE AND MILLER, *supra* note 6, at 4.

<sup>156</sup> Gzesh, Flores, Bettinger-Lopez, Fleming, National Immigrant Justice Center, *supra* note 4, at 5.

Numerous unaccompanied alien children come to the United States to reunite with family.<sup>157</sup> In their journey to come to the United States they face dangers such as rape, mutilations, and physical assault.<sup>158</sup> Once they arrive, conditions do not get better. As previously mentioned, many are put in three-point shackles, kept in rooms of extreme temperatures, and/or barely fed.<sup>159</sup> After facing these many dangers, unaccompanied alien children are ushered into an immigration system and placed in removal proceedings without the assistance of counsel.<sup>160</sup>

Unaccompanied alien children from contiguous countries, after suffering through any number of dangers are next placed in non-reviewable summary proceedings.<sup>161</sup> In these proceedings, where assistance of counsel is prohibited, immigration officials are interviewing the unaccompanied alien children to determine whether or not there is a credible fear.<sup>162</sup> Credible fear would allow them to continue to court proceedings, but a lack of credible fear will have them summarily removed.<sup>163</sup> Almost all unaccompanied alien children from Mexico are subjected to summary expulsion procedures and deprived of many forms of relief available.<sup>164</sup> Many officials are not properly trained to appropriately determine whether an unaccompanied alien child has a credible fear.<sup>165</sup> A mistake on an official's behalf can result in expedited removal for the unaccompanied alien child.<sup>166</sup> Following their flight from the dangers of their home country, and persevering through the peril of crossing

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<sup>157</sup> National Immigrant Justice Center, *supra* note 9, at 1-2.

<sup>158</sup> Gzesh, Flores, Bettinger-Lopez, Fleming, National Immigrant Justice Center, *supra* note 4, at 5.

<sup>159</sup> American Civil Liberties Union, *Flores Stipulated Settlement Agreement*, exhibit 1, at 1; *see also*, National Immigrant Justice Center, *supra* note 8, at 3.

<sup>160</sup> Srikantiah, *supra* note 143.

<sup>161</sup> Gzesh, Flores, Bettinger-Lopez, Fleming, National Immigrant Justice Center, *supra* note 3, at 11.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> Women's Commission, *supra* note 37, at 5; *see also*, King, *supra* note 28, at 7.

<sup>166</sup> Gzesh, Flores, Bettinger-Lopez, Fleming, National Immigrant Justice Center, *supra* note 3, at 11.



the border, counsel is prohibited from assisting in an interview which determines their chance to remain in the United States.<sup>167</sup> This blatant lack of due process, with such a vulnerable class of immigrants, is one of the reasons unaccompanied alien children need the right to appointed counsel.

When a child is appearing in front of an immigration judge, some judges can be hostile and hold proceedings in a formal matter similar to those held with adults, ultimately confusing and intimidating the unaccompanied alien child.<sup>168</sup> An unrepresented unaccompanied alien child cannot fully appreciate the proceedings and the severe consequences for failure of appearing at future proceedings, strengthening their need for counsel.<sup>169</sup>

The First, Second, Sixth, Seventh, and Ninth Circuit Courts of Appeals have acknowledged in case law a child sensitive approach.<sup>170</sup> The Seventh Circuit has reduced the threshold for persecution in children's cases; the Sixth Circuit recognizes that objective evidence can establish a child's well-founded fear; the Second and Ninth Circuit has recognized that persecution of a child's family members is a consideration in determining whether the child suffered persecution; and the First Circuit has reversed the BIA for failing to take these into consideration.<sup>171</sup> Even though these Circuits

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<sup>167</sup> National Immigrant Justice Center, *supra* note 8, at 3; *see also*, Gzesh, Flores, Bettinger-Lopez, Fleming, National Immigrant Justice Center, *supra* note 3, at 11.

<sup>168</sup> CTR. FOR GENDER & REFUGEE STUDIES & KIDS IN NEED OF DEFENSE, *supra* note 41, at 62.

<sup>169</sup> *Id.* at 63.

<sup>170</sup> *Id.* at 10.

<sup>171</sup> CTR. FOR GENDER & REFUGEE STUDIES & KIDS IN NEED OF DEFENSE, *supra* note 41, at 21; *see also*, Liu v. Ashcroft, 380 F.3d 307, 314 (7th Cir. 2004); Kholyavskiy v. Mukasey, 540 F.3d 555 (7th Cir. 2008); Zhang v. Gonzales, 408 F.3d 1239, 1247 (9th Cir. 2005); Mansour v. Ashcroft, 390 F.3d 667, 678 (9th Cir. 2004); Abay v. Ashcroft, 368 F.3d 634, 640 (6th Cir. 2004); Mendoza-Pablo v. Holder, 667 F.3d 1308, 1314-15 (9th Cir. 2012); Jorge-Tzoc v. Gonzales, 435 F.3d 146, 150 (2d Cir. 2006); Hernandez-Ortiz v. Gonzales, 496 F.3d 1042, 1045-46 (9th Cir. 2007); Mejilla-Romero v. Holder, 614 F.3d 572 (1st Cir. 2010).

have recognized a form of a child sensitive approach limitations such as lack of binding precedent among circuits.<sup>172</sup>

#### B. Navigating the U.S. Immigration Labyrinth

Due Process right to counsel is needed to maneuver through the complex adversarial immigration system. Without appointed counsel, unaccompanied alien children will be forced to face removal proceedings before an immigration judge and attempt to present valid claims as to why he or she should be permitted to stay in the United States.<sup>173</sup> In addition to presenting evidence weighed against the evidence presented by the government's attorney, an unaccompanied alien child has to cross-examine any witnesses presented.<sup>174</sup> Unaccompanied children would have to wade through various agencies, statutes, memorandums, directives, and even executive orders in order to stand a chance in a removal proceeding.<sup>175</sup>

In addition to the federal regulations, the child must present case law which differs amongst jurisdictions.<sup>176</sup> Before confronting a master calendar hearing, an unaccompanied alien child must make sure that the immigration court has all up to date documents, and file any needed motions, such as a change of venue.<sup>177</sup> If a child misses their removal proceeding a removal order will be given and the child can be ordered to be deported.<sup>178</sup> A removal order is comparable to a criminal arrest warrant.<sup>179</sup> Even in the face of the complexities and

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<sup>172</sup> CTR. FOR GENDER & REFUGEE STUDIES & KIDS IN NEED OF DEFENSE, *supra* note 41, at 10.

<sup>173</sup> Julia Preston, *Young and Alone, Facing Court and Deportation*, N.Y. TIMES (Aug. 25, 2012), <http://www.nytimes.com/2012/08/26/us/more-young-illegal-immigrants-face-deportation.html?pagewanted=all>.

<sup>174</sup> King, *supra* note 28, at 9.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> National Immigrant Justice Center, *supra* note 8, at 3.

<sup>178</sup> Gzesh, Flores, Bettinger-Lopez, Fleming, National Immigrant Justice Center, *supra* note 3, at 3.

<sup>179</sup> Preston, *supra* note 173.

severity of the matter, an unaccompanied alien child is missing a key element: an attorney.<sup>180</sup>

When in ORR custody, ORR is required to try to provide legal counsel and coordinate a legal orientation program.<sup>181</sup> The TVPRA does not delineate the extent the ORR must try or any system in place to ensure the ORR is providing current quality information. Efforts to provide counsel for unaccompanied alien children depend mainly on private funding and volunteers.<sup>182</sup> A specific example of the benefits of having an attorney is the case of Edmun, who with the help of a pro bono attorney achieved legal immigration status for himself and his sister, Cintia.<sup>183</sup>

With the implementation of “rocket dockets,” unaccompanied alien children are forced into this complex adversarial system, endure accelerated hearings, and have little chance of success without counsel.<sup>184</sup> Age is no factor. A toddler or an infant can be forced to present themselves in front of an immigration judge without appointed counsel.<sup>185</sup> For example the case of Juan, who was called forward by the judge, but the judge could not be seen because he was shorter than the podium.<sup>186</sup>

With no prior knowledge of the immigration system, or the forms or procedures, unaccompanied alien children who cannot afford counsel are forced to navigate through the U.S. immigration system from the moment a notice to appear is served until the final order of removal is issued. Failure in stating a valid claim can result in the unaccompanied alien child being deported to their home country regardless of the lack of family, fears of returning, or violent

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<sup>180</sup> Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 10 (2007)

<sup>181</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 8 U.S.C. §1232 (2008).

<sup>182</sup> Gzesh, Flores, Bettinger-Lopez, Fleming, National Immigrant Justice Center, *supra* note 3, at 7.

<sup>183</sup> Preston, *supra* note 173.

<sup>184</sup> Gzesh, Flores, Bettinger-Lopez, Fleming, National Immigrant Justice Center, *supra* note 3, at 8.

<sup>185</sup> *Id.*

<sup>186</sup> Preston, *supra* note 173.

conditions awaiting.<sup>187</sup> A report, by the Vera Institute of Justice, claims that as much as forty percent of the unaccompanied alien children were eligible for various forms of legal immigration status.<sup>188</sup>

### C. Deprivation of Liberty

A due process right to counsel is essential because of the severe risk of the deprivation of the liberty for the unaccompanied alien children. In 2010, eighty-five percent of unaccompanied alien children were apprehended within a month.<sup>189</sup> Once in the custody of DHS, the unaccompanied alien children are faced with abhorrent conditions.<sup>190</sup> As previously mentioned over half of the children were placed in prison-like conditions and almost a third were kept over the prescribed seventy-two hour limit, but could not be sure because the lights in their facility were never turned off.<sup>191</sup> These conditions violate the *Flores* agreement, but the unaccompanied alien children are not provided counsel who can make them aware that these are violations or raise their rights.

Unaccompanied alien children who emigrate from contiguous countries, have their removal process streamlined. An unaccompanied alien child could unknowingly make the egregious error of withdrawing their application for immigration relief, and returned to their home country without ever presenting their case in front of a judge if immigration officials, based on their discretion, finds that the child is not a trafficking victim, or does not have a fear of returning to their home country.<sup>192</sup> Whether or not the child is capable of making an independent decision is left to the discretion of the immigration official.<sup>193</sup>

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<sup>187</sup> Gzesh, Flores, Bettinger-Lopez, Fleming, National Immigrant Justice Center, *supra* note 4, at 3.

<sup>188</sup> Preston, *supra* note 173.

<sup>189</sup> National Immigrant Justice Center, *supra* note 8, at 4.

<sup>190</sup> *Id.* at 1-2.

<sup>191</sup> American Civil Liberties Union, *Flores Stipulated Settlement Agreement*, exhibit 1, at 1; *see also*, National Immigrant Justice Center, *supra* note 9, at 3.

<sup>192</sup> AMERICAN IMMIGRATION LAWYERS ASSOCIATION, *supra* note 1, at 5.

<sup>193</sup> *Id.*

In attempts to deter the influx of the unaccompanied alien children, Obama has implemented “Rocket Dockets” which has moved up deportation hearings.<sup>194</sup> This limits the amount of time that an alien child has to acclimate into their sponsor’s home, obtain an attorney if possible, or prepare their case *pro se* in front of an immigration judge to twenty-one days. Almost half of unaccompanied alien children with an attorney during removal proceedings were permitted to stay in the United States, but only ten percent of unaccompanied alien children without an attorney were permitted to stay.<sup>195</sup> The liberty of these unaccompanied aliens is in grave danger. As seen, having appointed counsel can make a difference on whether or not an unaccompanied alien child can stay in the United States.

#### IV. CONCLUSION

Due process right to counsel is needed to maintain the fundamental fairness of trial. A combination of unaccompanied alien children being a vulnerable class, facing a complex adversarial system, and facing the grave risk of deprivation of their liberty raises the threat of the fairness of trial to a due process violation.

Unaccompanied alien children are under the age of eighteen and have no parent or legal guardian present in the United States. Some family members that are present cannot come forward to claim their children due to fear of deportation. These children have left behind a home flourishing with widespread violence. Their safety is at risk on a day to day basis. Many of these dangers and assaults they have to face make them eligible for various forms of relief, if successfully presented before an immigration judge.

The immigration system is a department with many different working gears and unpredictable fluctuations. An unaccompanied alien child is expected to navigate through this machine without assistance of counsel. From the notice to appear, to changing venues,

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<sup>194</sup> Chan, *supra* note 5.

<sup>195</sup> Gzesh, Flores, Bettinger-Lopez, Fleming, National Immigrant Justice Center, *supra* note 3, at 7.

to presenting valid claims to be permitted to stay in the United States, these children and their unqualified sponsors must take careful steps to try and succeed. Statistics show that an unaccompanied alien child has a much higher chance of being permitted to stay when they have counsel, than the ten percent counterpart.

The right to life and liberty is one many take for granted, but for these unaccompanied alien children liberty is always just out of reach. Initial apprehension by the United States has led to their detention in unsuitable facilities. Some are being fed only bread, and others shackled in restraints. Once released to a sponsor, which may or may not be a blood relative, unaccompanied alien children have to scrounge up any legal knowledge they can find and try to obtain liberty in an unfamiliar country. These daily obstacles are faced by children of all ages, including infants and toddlers. One wrong form can lead to a final order of removal.

A system without the assistance of counsel is unjust and an infringement of due process. The unaccompanied alien children's vulnerability, the complexities of immigration proceedings, and the severe risk of deportation are inequities that can only be remedied by an appointment of counsel. Assigning unaccompanied alien children a due process right to counsel can facilitate rectifying the imbalance within the system. Counsel can zealously and competently represent unaccompanied alien children advocating for their safety and future.