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UNACCOMPANIED CHILDREN AND THE NEED FOR LEGAL REPRESENTATION IN IMMIGRATION PROCEEDINGS

SEJAL SINGH[†]

INTRODUCTION

An unaccompanied child is defined as someone who enters the United States under the age of eighteen, without lawful status, and without an accompanying parent or legal guardian.¹ Despite the term's implication, many children do not enter the country alone but are either separated from their family members at the border or left by smugglers or other migrants near the border.² The number of unaccompanied minors plunged in early 2020 due to border closures and restrictions amid the COVID-19 pandemic; however, a recent surge has led to a strain on government resources and a backlog of cases in immigration courts.³

Each year, thousands of children travel to the southern border from the Northern Triangle region of Central America. In fiscal year 2021, 47% of children were from Guatemala, 32% were

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¹ 6 U.S.C. § 279(g)(2).

² See Amelia Cheatham & Diana Roy, *U.S. Detention of Child Migrants*, COUNCIL ON FOREIGN RELS. (Dec. 2, 2021, 10:30 AM), https://www.cfr.org/backgrounder/us-detention-child-migrants?gclid=CjwKCAjw6MKXBhA5EiwANWLODCcNvUt3rOT33OIx-WUOCvum9WdtBm3kVA1UTGX5QhBVO3Vzf-7PjBoCpusQAvD_BwE [<https://perma.cc/W34A-XLL2>].

³ See, e.g., Max Rust & Maureen Linke, *A Surge of Children Crossing the Border: What Happens to Them?*, WALL ST. J. (Mar. 18, 2021, 7:00 AM), <https://www.wsj.com/articles/a-surge-of-children-crossing-the-border-what-happens-to-them-11616065221> [<https://perma.cc/3DCM-C7A6>]; see also Alexandra Villarreal, *US Immigration Courts Struggle Amid Understaffing and Backlog of Cases*, GUARDIAN (Feb. 21, 2022, 1:00 PM), <https://www.theguardian.com/us-news/2022/feb/21/us-immigration-courts-cases-backlog-understaffing> [<https://perma.cc/AQ3T-WLF3>].

from Honduras, and 13% were from El Salvador.⁴ Many children are escaping deadly gang violence, poverty, devastating hurricanes, and the pandemic.⁵ Most others are coming from Mexico, where violence continues to escalate amid the government's war against drug cartels.⁶ Despite the dangerous journey, children are fleeing to the U.S. border to either be reunited with family members already here or escape dangerous conditions in their home countries.⁷ Unfortunately, once children arrive at the U.S. border, they continue to face difficult challenges including navigating a complex immigration system to stay in the United States, often by themselves.⁸

While unaccompanied minors are afforded certain protections and have a statutory right to counsel at their own expense, they are not entitled to any form of government-funded, appointed counsel to assist them.⁹ Thus, many children are forced to represent themselves in complex immigration proceedings with little or no knowledge of the legal system and limited English skills.¹⁰ As Syracuse's TRAC Immigration analysis indicates, "the single most important factor" in determining the outcome of a case is whether the child had an attorney.¹¹ In about 73% of cases where the child had representation, the judge "allowed the child to remain in the

⁴ OFF. REFUGEE RESETTLEMENT, OFF. ADMIN. CHILD. FAM., UNACCOMPANIED CHILDREN, FACTSHEETS AND DATA (2022), <https://www.acf.hhs.gov/orr/about/ucs/facts-and-data> [<https://perma.cc/VJ8M-DJGW>].

⁵ See Amelia Cheatham & Diana Roy, *Central America's Turbulent Northern Triangle*, COUNCIL ON FOREIGN RELS., <https://www.cfr.org/backgrounder/central-americas-turbulent-northern-triangle> [<https://perma.cc/7VAR-2R7V>] (June 22, 2022, 3:20 PM).

⁶ See *Mexico's Long War: Drugs, Crimes, and the Cartels*, COUNCIL ON FOREIGN RELS., <https://www.cfr.org/backgrounder/mexicos-long-war-drugs-crime-and-cartels> [<https://perma.cc/X8M9-MUCS>] (Sept. 7, 2022, 2:45 PM).

⁷ See Cheatham & Roy, *supra* note 2.

⁸ See *infra* Part II.

⁹ 8 U.S.C. § 1362 ("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.")

¹⁰ See Annie Chen, *An Urgent Need: Unaccompanied Children and Access to Counsel in Immigration Proceedings*, AM. BAR ASS'N (July 14, 2014), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2014/urgent-need-unaccompanied-children-access-to-counsel-immigration-proceedings/> [<https://perma.cc/7FTQ-D43J>].

¹¹ See *Representation for Unaccompanied Children in Immigration Court*, TRAC: IMMIGR. (Nov. 25, 2014), <https://trac.syr.edu/immigration/reports/371/> [<https://perma.cc/2B4Z-FT9M>].

United States.”¹² In contrast, when a child did not have representation, the judge allowed only 15% of children to remain the country.¹³

This Article argues that unaccompanied minors facing deportation should have a categorical right to counsel under due process principles. Part I will address the protections available to unaccompanied children both after apprehension and during removal proceedings. It will then describe the various agencies involved and the agencies’ roles once unaccompanied minors are apprehended.

Part II will discuss how there is neither a statutory nor constitutional right to government-appointed counsel under the Fifth, Sixth, or Fourteenth Amendments. This section will discuss cases such as *C.J.L.G. v. Sessions*, where the Ninth Circuit found that an unaccompanied child was not entitled to any appointed counsel, and that his removal proceeding did not constitute a violation of due process.¹⁴ Although the Ninth Circuit later granted a petition to rehear the case en banc, the court declined to address the appointment of counsel issue.¹⁵

Part III will discuss the inconsistent treatment of children in judicial proceedings and how courts have used the due process analysis to appoint counsel for minors in other civil cases, such as child welfare cases. This Part will highlight *Kenny A. ex rel. Winn v. Perdue* and argue that a similar due process analysis should be made in the immigration context of requiring government-funded counsel for unaccompanied minors.¹⁶ In doing so, this Article will examine the immigration court system, its severe backlogs, and the disparity in success rates between represented and unrepresented minors in immigration proceedings.

I. LEGAL PROTECTIONS FOR UNACCOMPANIED CHILDREN

After entering the United States, unaccompanied children are provided certain substantive and procedural protections. These protections stem from the Flores Settlement Agreement of 1987, the Homeland Security Act of 2002 (“HSA”), and the

¹² *Id.*

¹³ *Id.*

¹⁴ *C.J.L.G. v. Sessions*, 880 F.3d 1122, 1129 (9th Cir. 2018), *vacated*, *C.J.L.G. v. Barr*, 923 F.3d 622 (9th Cir. 2019).

¹⁵ *Barr*, 923 F.3d at 629 n.7.

¹⁶ *Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353, 1360 (N.D. Ga. 2005).

Trafficking Victims Protection Reauthorization Act of 2008 (“TVPPRA”).¹⁷

In 1985, immigration advocates filed a class action lawsuit, *Flores v. Meese*, challenging the conditions of detention and the restrictive release of unaccompanied children to a parent or legal guardian.¹⁸ After years of litigation, the parties reached a settlement in 1997.¹⁹ The settlement required that all children in Immigration and Naturalization Service (“INS”) custody be treated “with dignity, respect and special concern for their particular vulnerability as minors.”²⁰ It also guaranteed several rights to detained children, including the right to be held in “the least restrictive setting appropriate,” the right to be released from government custody without delay to parents, family members, or appropriate guardians, and the right to a certain standard of care in immigration detention such as food, water, and medical assistance.²¹

After *Flores*, however, INS faced criticism for failing to meet their obligations and for their conflicting role in enforcing immigration laws on the one hand, while caring for unaccompanied minors on the other.²² Eventually, the HSA transferred immigration and enforcement responsibilities to U.S. Citizenship and Immigration Services (“CIS”), U.S. Immigration and Customs Enforcement (“ICE”), and U.S. Customs and Border Protection (“CBP”).²³ It also transferred the care of unaccompanied children to the Office of Refugee Resettlement (“ORR”) within the Department of Health and Human Services.²⁴

Despite these developments, there were “ongoing concerns that CBP was not adequately screening apprehended [unaccompanied children] for evidence of human trafficking or

¹⁷ See, e.g., Lory Pounder, *Legal Issues Surrounding Unaccompanied Alien Children*, 9 ARIZ. SUMMIT L. REV. 109, 117 (2016) (describing an unaccompanied child’s post-arrival experience to the United States).

¹⁸ *Flores v. Meese*, 942 F.2d 1352 (9th Cir. 1991), *rev’d sub nom.* *Reno v. Flores*, 507 U.S. 292, 294 (1993).

¹⁹ Stipulated Settlement Agreement at 3, *Flores v. Reno*, No. CV-85-4544-RJK (C.D. Cal. 1997), https://www.aclu.org/sites/default/files/assets/flores_settlement_final_plus_extension_of_settlement011797.pdf [<https://perma.cc/UX7G-D89Y>].

²⁰ *Id.* at 7.

²¹ *Id.* at 7, 9–10.

²² See, e.g., Maura M. Ooi, *Unaccompanied Should Not Mean Unprotected: The Inadequacies of Relief for Unaccompanied Immigrant Minors*, 25 GEO. IMMIGR. L.J. 883, 887–88 (2011) (providing an overview of how various government agencies treat unaccompanied minors).

²³ *Id.* at 890.

²⁴ *Id.* at 887.

persecution.”²⁵ In response, Congress passed the TVPRA.²⁶ The TVPRA created procedures to screen children for human trafficking and ensure that if unaccompanied children are deported, they are safely repatriated.²⁷ As described below, procedural protections are different for children who are either from a contiguous country, namely Mexico and Canada, or from a non-contiguous country, like all others.²⁸ The TVPRA also exempted unaccompanied children from certain procedural limitations on asylum and ensured that unaccompanied children have counsel “to the greatest extent practicable” not only “to represent them in legal proceedings” but to “protect them from mistreatment, exploitation, and trafficking.”²⁹

Unfortunately, both DHS’s failure to codify the Flores settlement agreement into formal regulations and the TVPRA’s procedural and substantive shortcomings led to continued problems in the protection of unaccompanied children.³⁰ These problems become immediately apparent upon a child’s arrival to the United States, at which point they must overcome several hurdles to remain in the country.

II. NAVIGATING THE IMMIGRATION SYSTEM

Thousands of unaccompanied children detained at or near the U.S. southern border must navigate multiple federal agencies to remain in the United States.³¹ Most unaccompanied children are apprehended, processed, and

²⁵ See WILLIAM A. KANDEL, CONG. RSCH. SERV., R43599, UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW 6 (2021).

²⁶ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235, 122 Stat. 5044 (codified as amended at U.S.C §§ 8, 18, 22).

²⁷ *Id.*; see also *What Are the TVPRA Procedural Protections for Unaccompanied Children? Are They “Loopholes” to Compliance with Our Immigration Enforcement System?*, KIDS IN NEED OF DEF. (Apr. 1, 2019), <https://supportkind.org/wp-content/uploads/2019/04/KIND-TVPRA-talking-points-4.1.19-FINAL.pdf> [<https://perma.cc/2CCX-Y72H>].

²⁸ See KIDS IN NEED OF DEF., MAPPING MIGRANT CHILDREN IN DETENTION 1 (2021), https://supportkind.org/resources/mapping-migrant-children-in-detention/?gclid=Cj0KCQjwmouZBhDSARIsALYcoupc55UHNBvnm0kAbsQbrnRejiakVSDguIrNzXhxYTwLG_g9-DHhbwoaAiTQEALw_wcB [<https://perma.cc/46JG-8469>].

²⁹ Pub. L. No. 110-457, § 235(c)(5).

³⁰ See Ooi, *supra* note 22, at 888.

³¹ See, e.g., Amanda Kavita Sewanan, Note, *The Right to Appointed Counsel: The Case for Unaccompanied Immigrant Children*, 41 CARDOZO L. REV. 317, 325–26 (2019) (discussing the various agencies that unaccompanied children encounter when they enter the United States).

initially detained by CBP.³² During this initial processing, children are typically held in CBP's "short-term detention facilities."³³ Although these facilities must comply with safety, hygiene, and other standards provided for by the Flores settlement agreement, advocates have documented "inadequate medical care, overcrowding, and prolonged detention."³⁴ Children have also described these detention facilities as either "iceboxes" (*hieleras*) or the 'dog kennel' (*la perrera*).³⁵ Under such conditions, "[b]etween 2018 and 2019, six children died in CBP custody."³⁶

Under these conditions, CBP agents determine whether a child meets the legal definition of an "unaccompanied alien child," as defined by the HSA.³⁷ If a child is from a contiguous country like Mexico or Canada, CPB screens these children to determine (1) their age; (2) if they have a fear of persecution or trafficking or are at risk of trafficking if returned home; and (3) if they can make an independent decision to return home voluntarily.³⁸ If no signs of trafficking or persecution are reported, and the child can make an independent decision to withdraw their application for admission, CBP will summarily return the child back home pursuant to negotiated repatriation agreements.³⁹

However, reports describe CPB's failure to effectively screen children, including unaccompanied Mexican children, prior to returning them.⁴⁰ According to Amnesty International, CBP "returned approximately 10,270 unaccompanied Mexican children from November 2020 to April 2021 under the TVPRA 'voluntary returns' provision."⁴¹ In contrast, CBP referred only a few hundred unaccompanied Mexican children to ORR during

³² See KIDS IN NEED OF DEF., *supra* note 28 (describing an unaccompanied child's path in the immigration system).

³³ *Id.*

³⁴ *Id.* at 2–3.

³⁵ *Id.* at 2.

³⁶ *Id.* at 3.

³⁷ See KANDEL, *supra* note 25, at 6–7.

³⁸ *Id.* at 7–8.

³⁹ *Id.* at 8.

⁴⁰ See *Facts and Figures: Deportations of Unaccompanied Migrant Children by the USA and Mexico*, AMNESTY INT'L (June 11, 2021), <https://www.amnesty.org/en/latest/news/2021/06/facts-figures-deportations-children-usa-mexico/> [<https://perma.cc/JBQ6-U77X>].

⁴¹ *Id.*

the same period.⁴² Reports also note that CPB officers receive limited training, make inconsistent screening decisions, and do not have the child welfare expertise or specialized training to interview children.⁴³ Additionally, “[u]niformed officers interview children in” cells or open areas as opposed to private areas where children feel safe to divulge information regarding possible abuse or trafficking.⁴⁴

Custody of children who do make it past CPB are transferred to ORR within seventy-two hours.⁴⁵ “Unlike CBP, ORR does not run its own shelters.”⁴⁶ They place unaccompanied children in state licensed facilities such as foster care, shelters, group home, or residential homes.⁴⁷ “ORR shelters must provide medical care, food, clothing, hygiene items, recreation, education, and access to legal services.”⁴⁸ They also coordinate and approve the reunification of the child with relatives or other qualified sponsors, pending resolution of the child’s immigration proceedings.⁴⁹ However, outstanding problems with the ORR program include insufficient facilities for children requiring mental health services and prolonged periods of detention.⁵⁰ For example, in fiscal year 2020, children were in ORR custody for approximately 102 days.⁵¹ In addition, the influx of children during the Biden administration has further inundated the ORR, resulting in many children living in CPB facilities for longer than the three-day limit outlined in the TVPRA.⁵²

Prior to transferring children to ORR, CBP will initiate removal proceedings against the unaccompanied child before the

⁴² *Id.*

⁴³ See *Unaccompanied Alien Children: Actions Needed to Ensure Children Receive Required Care in DHS Custody*, U.S. GOV’T ACCOUNTABILITY OFF. (July 14, 2015), <https://www.gao.gov/products/gao-15-521> [<https://perma.cc/GZL9-M7EW>]; BETSY CAVENDISH & MARU CORTAZAR, CHILDREN AT THE BORDER: THE SCREENING, PROTECTION AND REPATRIATION OF UNACCOMPANIED MEXICAN MINORS 6–7 (2011), <https://www.issueab.org/resources/14642/14642.pdf> [<https://perma.cc/R47R-LV2M>].

⁴⁴ See CAVENDISH & CORTAZAR, *supra* note 43, at 6.

⁴⁵ See KIDS IN NEED OF DEF., *supra* note 28, at 1.

⁴⁶ *Id.* at 3.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 4.

⁵⁰ See, e.g., Wendy Young et al., *The Measure of a Society: The Treatment of Unaccompanied Refugee and Immigrant Children in the United States*, 45 HARV. C.R.-C.L. L. REV. 247, 252 (2010).

⁵¹ See CONG. RSCH. SERV., *supra* note 25, at 11.

⁵² See Cheatham & Roy, *supra* note 2.

Executive Office of Immigration Review (“EOIR”).⁵³ Removal proceedings are adversarial administrative hearings in which children must defend themselves against experienced DHS attorneys, who are responsible for proving that the child should be removed to his or her home country.⁵⁴ If “an unaccompanied child’s claims are denied, then an immigration judge . . . may issue a removal order and inform DHS that the child should be removed.”⁵⁵ Then, DHS contacts “the consulate of the child’s [home] country and their ORR facility to inform them of the removal.”⁵⁶ Afterwards, transportation is arranged and “the child is removed to their country of origin.”⁵⁷ However, if the judge grants relief, “removal proceedings are terminated and the child may remain where they are.”⁵⁸

III. THE LACK OF LEGAL REPRESENTATION

A. Legislation

Despite the complexity and high stakes involved in removal proceedings, the U.S. government provides no appointed counsel for unaccompanied children in immigration proceedings.⁵⁹

Section 292 of the Immigration and Nationality Act (“INA”) establishes that immigrants facing removal proceedings have a right to counsel; however, the language makes it clear that there is no right to government funded representation:

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.⁶⁰

Nevertheless, Congress has made some progress in increasing representation for unaccompanied children. For example, under the HSA, Congress instructed ORR to develop a

⁵³ See KIDS IN NEED OF DEF., *supra* note 28, at 6.

⁵⁴ See Chen, *supra* note 10.

⁵⁵ See KIDS IN NEED OF DEF., *supra* note 28, at 6.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 4 (highlighting how most unaccompanied children in such proceedings instead “acquire legal counsel through public-private partnerships or pro bono volunteers”).

⁶⁰ 8 U.S.C. § 1362.

plan “to ensure that qualified and independent legal counsel is timely appointed to represent the interests of each such child.”⁶¹ In response, ORR contracted with the Vera organization to provide pro bono representation to children.⁶² While these efforts increased representation, a sizeable percentage of children still do not have representation.⁶³ About 75% to 90% of children in deportation proceedings do not have an attorney.⁶⁴ In 2014, only about 32% of children were represented in immigration court.⁶⁵ Additionally, pro bono legal services are often unavailable to children living in rural areas where many ORR facilities are located.⁶⁶ Thus, without any statutory or due process rights to government appointed attorneys, thousands of children continue to represent themselves in immigration court.

B. *Judicial Interpretation*

Courts have held that there is no *constitutional* right to appointed counsel for unaccompanied children, either under the Fifth, Sixth, or Fourteenth Amendments.⁶⁷ The Sixth Amendment guarantees the right to appointed counsel for indigent criminal defendants, including children.⁶⁸ However, because immigration law is considered civil and not criminal law, and the adverse result of a removal proceedings is not considered punishment, unaccompanied children do not have a right to counsel.⁶⁹

⁶¹ Homeland Security Act of 2002, Pub. L. No. 107-296, § 462, 116 Stat. 2135, 2203 (codified as amended at 6 U.S.C. § 279(b)(1)(A)).

⁶² See *Legal Services for Unaccompanied Children*, VERA, <https://www.vera.org/projects/legal-services-for-unaccompanied-children> [<https://perma.cc/J6B9-C9HL>] (last visited Feb. 20, 2023).

⁶³ See Carlee Goldberg, *Legal Aid for Unaccompanied Children in the U.S. Illegally*, NAT'L CONF. OF STATE LEGISLATURES (Sept. 1, 2020), <https://www.ncsl.org/research/immigration/legal-aid-for-unaccompanied-children-in-the-u-s-illegally.aspx> [<https://perma.cc/HRV8-E6JU>].

⁶⁴ *Id.*

⁶⁵ *Representation for Unaccompanied Children in Immigration Court*, *supra* note 11.

⁶⁶ Ooi, *supra* note 22, at 900.

⁶⁷ Sewanan, *supra* note 31, at 331.

⁶⁸ U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to have the Assistance of Counsel for his defence.”); see also *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (holding that the criminal defendant “require[d] the guiding hand of counsel at every step in the proceedings against him”).

⁶⁹ See, e.g., *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (finding that “deportation is not a punishment for crime. It is not a banishment It is but a method of enforcing the return to his own country of an alien who has not complied

In civil cases, parties seeking appointed counsel implicate the Due Process Clause of the Fifth and Fourteenth Amendments.⁷⁰ However, courts have made clear that since other procedural safeguards—such as the right to counsel at a personal expense, the right to present evidence and cross-examine witnesses, and the right to have a decision before a neutral decisionmaker—already ensure a fair hearing, the right to appointed counsel is not required to comport with due process.⁷¹ In 1976, the Supreme Court, in *Mathews v. Eldridge*, outlined the governing test for determining whether a proceeding satisfies due process.⁷² The test weighs three factors: (1) any private interests that may be affected by the official action; (2) the risk of erroneous deprivation of such interests through the procedures used and any probable value of additional procedural safeguards, if they exist; and (3) the government's interest, such as the administrative and fiscal burdens that additional or substitute procedures would entail.⁷³ Courts must be flexible in balancing these three factors and consider the specific circumstances of each case.⁷⁴ Subsequent cases considered additional factors.⁷⁵

In *Lassiter v. Department of Social Services*, the Supreme Court of the United States created a presumption that defendants have a right to appointed counsel only when they may

with the conditions” that the government has set forth for him to be able to stay in the country); see also *Sewanan*, *supra* note 31, at 336 (“[Unaccompanied children] do not have the right to counsel under the Sixth Amendment because deportation has never been recognized as a criminal punishment.”).

⁷⁰ U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law.”); U.S. CONST. amend. XIV, § 1 (states cannot deprive an individual of “life, liberty, or property, without due process of law”); see also *Sewanan*, *supra* note 31, at 331.

⁷¹ See, e.g., *Vargas-Hernandez v. Gonzales*, 497 F.3d 919, 926–27 (9th Cir. 2007) (“[When] an alien is given a full and fair opportunity to be represented by counsel, to prepare an application for . . . relief, and to present testimony and other evidence in support of the application, he or she has been provided with due process.”).

⁷² *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

⁷³ *Id.*

⁷⁴ *Id.* at 334.

⁷⁵ See, e.g., *Kaley v. United States*, 571 U.S. 320, 334, 337–39 (2014) (noting that “a pre-trial seizure [of property] is wrongful only when there is no probable cause to believe” a defendant committed the alleged crime); *Wilkinson v. Austin*, 545 U.S. 209, 228–29 (2005) (deferring to the “experience of prison administrators” in situations in which “the State’s interest implicates the safety of other inmates and prison personnel”).

be deprived of their physical liberty.⁷⁶ In *Lassiter*, the Court held that a mother's due process rights were not violated when she was not appointed counsel in a termination of parental rights ("TPR") case.⁷⁷ The Court noted that although a parent's right to her child is fundamental, the right to counsel is dependent upon a threat to liberty, which is absent in a TPR case.⁷⁸ However, in *Turner v. Rogers*, the Supreme Court limited the holding in *Lassiter*.⁷⁹ In *Turner*, the Court held that the Fourteenth Amendment *did not* automatically require states to provide counsel at a civil contempt proceeding even if there may be a threat of incarceration.⁸⁰ The Court, however, limited its holding to cases where the opposing parent was also unrepresented by counsel, and where the State provided adequate procedural safeguards, such as notice and a fair opportunity to present and dispute relevant information.⁸¹

In the immigration context, courts have only found a right to representation in cases involving immigrants with mental disabilities.⁸² In *Franco-Gonzales v. Holder*, the United States District Court for the Central District of California held that immigrants who were "not mentally competent" were entitled to appointment of a "Qualified Representative" under the Rehabilitation Act.⁸³ The court, however, avoided addressing whether there was a right to appointment of counsel under the Due Process Clause.⁸⁴

In 2016, the Ninth Circuit had the opportunity to address the issue of appointed counsel for unaccompanied children in

⁷⁶ *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 24–25 (1981); *see also* Sewanan, *supra* note 31, at 332.

⁷⁷ *Lassiter*, 452 U.S. at 31–33.

⁷⁸ *Id.* at 26–27.

⁷⁹ *See generally* *Turner v. Rogers*, 564 U.S. 431 (2011).

⁸⁰ *Id.* at 448.

⁸¹ *Id.*

⁸² *See generally* *Franco-Gonzales v. Holder*, 767 F. Supp. 2d 1034 (C.D. Cal. 2010).

⁸³ *Id.* at 1055, 1058 (defining "Qualified Representative" as meeting five criteria: "(1) be obligated to provide zealous representation; (2) be subject to sanction by the EOIR for ineffective assistance; (3) be free of any conflicts of interest; (4) have adequate knowledge and information to provide representation . . . ; and (5) maintain confidentiality of information").

⁸⁴ *See, e.g.,* Johan Fatemi, *A Constitutional Case for Appointed Counsel in Immigration Proceedings: Revisiting Franco-Gonzalez*, 90 ST. JOHN'S L. REV. 915, 917 (2016).

C.J.L.G. v. Sessions, but it declined to do so.⁸⁵ There, a thirteen-year-old boy, C.J., was forced to defend himself in removal proceedings without legal representation.⁸⁶ C.J. escaped from Honduras with his mother after the Mara Salvatrucha gang, more commonly known as “MS-13,” made repeated death threats demanding that C.J. join the gang.⁸⁷ The immigration judge found that C.J. did not satisfy the legal standards for asylum.⁸⁸ C.J. then appealed his case to the Ninth Circuit, alleging that the lack of court-appointed counsel violated his due process rights.⁸⁹ A Ninth Circuit panel found no due process or statutory right to a government-funded lawyer.⁹⁰ While the Ninth Circuit later granted a petition to rehear the case en banc, the en banc court declined to address the appointment of counsel issue, noting that C.J. would be represented by counsel in future administrative proceedings.⁹¹

Outside the context of immigration cases, courts recognize a right to government counsel in non-criminal cases.⁹² For example, in *In re Gault*, the Supreme Court held that juveniles accused of crimes in a delinquency proceeding must be afforded the right to counsel since a delinquency proceeding can result in loss of liberty.⁹³ Courts have also found a right to counsel for children in child welfare cases and TPR cases where a child's health, safety, well-being, and family unit are at stake.⁹⁴ Part IV of this Article discusses the treatment of children in child welfare cases and argues that children in immigration proceedings should be treated similarly.⁹⁵

⁸⁵ *C.J.L.G. v. Sessions*, 880 F.3d 1122, 1129–31 (9th Cir. 2018), *vacated*, *C.J.L.G. v. Barr*, 923 F.3d 622 (9th Cir. 2019).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 1131.

⁸⁹ *Id.*

⁹⁰ *Id.* at 1129.

⁹¹ *Barr*, 923 F.3d at 629 n.7

⁹² See Wendy Melissa Hernandez, Note, *The Immigration Crisis in American Courts: Children Representing Themselves*, 47 HASTINGS CONST. L.Q. 145, 159 (2019).

⁹³ *In re Gault*, 387 U.S. 1, 36 (1967).

⁹⁴ See, e.g., Sewanan, *supra* note 31, at 337.

⁹⁵ See *infra* Part IV.

IV. THE RIGHT TO APPOINTED COUNSEL IN CHILD WELFARE PROCEEDINGS

Child welfare proceedings refer to a “network of state and federal laws, civil courts, and social programs intended to protect children from abuse and neglect by their caretakers.”⁹⁶ Every year, states remove thousands of children from their homes due to parental or guardian abuse or neglect.⁹⁷ Family courts, in conjunction with child welfare agencies, may temporarily or permanently place the child into foster homes or residential facilities if the child cannot be placed with a close relative.⁹⁸ The agency sets a permanency goal for the child such as reunification with the birth parents, adoption, or placement with a relative.⁹⁹ Family court judges will review the permanency plans and placements to ensure that the child has the appropriate services in place.¹⁰⁰ Judges may also terminate parental rights if the state’s legal requirements are satisfied.¹⁰¹

A. Legislation

Contrary to immigration law, federal law mandates representation for children in child welfare cases.¹⁰² The Child Abuse Prevention and Treatment Act (“CAPTA”) established a statutory right to representation, although not necessarily by counsel, for all children who are the subjects of child protection proceedings.¹⁰³ Specifically, Congress made the receipt of federal funds contingent on the provision of a guardian ad litem (“GAL”) for every child subject to abuse or neglect proceedings.¹⁰⁴ The

⁹⁶ See Barbara Bennett Woodhouse, *Child Abuse, The Constitution, and the Legacy of Pierce v. Society of Sisters*, 78 U. DET. MERCY L. REV. 479, 479 (2001).

⁹⁷ See, e.g., *The State of America’s Children 2021*, CHILD’S DEF. FUND, <https://www.childrensdefense.org/state-of-americas-children/soac-2021-child-welfare/> [https://perma.cc/9CUN-5KT2] (last visited Mar. 17, 2023).

⁹⁸ See, e.g., CHILD WELFARE INFO. GATEWAY, ADMIN. FOR CHILD. & FAMS., DEP’T OF HEALTH & HUM. SERVS., CHILD’S BUREAU, UNDERSTANDING CHILD WELFARE AND THE COURTS, FACTSHEET FOR FAMILIES 3 (2016), <https://www.childwelfare.gov/pubPDFs/cwandcourts.pdf> [https://perma.cc/JRE9-SV9U] (providing an overview of child protective services and the court system).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² See, e.g., Taylor Needham, *Catch Up CAPTA: Amending CAPTA to Guarantee Children Legal Counsel in Dependency Proceedings*, 58 SAN DIEGO L. REV. 715, 716–17 (2021) (arguing that CAPTA should require legal counsel for all children in dependency proceedings not just a GAL under due process principles).

¹⁰³ 42 U.S.C. § 5106a(b)(2)(B)(xiii).

¹⁰⁴ *Id.*

GAL could be an attorney, a Court Appointed Special Advocate (“CASA”), or both.¹⁰⁵ The statute further specified that the purpose of the appointment is to obtain a clear understanding of the situation and needs of the child, and to make recommendations regarding the “best interests of the child.”¹⁰⁶ Thus, every state statute specifies that a child in an abuse or neglect proceeding be provided representation.¹⁰⁷

B. *Judicial Analysis*

A number of state and federal courts have also recognized a child’s due process right to counsel in child welfare and TPR cases.¹⁰⁸ For example, in the 2005 case, *Kenny A. ex rel. Winn v. Perdue*, the Northern District of Georgia found that children in foster care have a right to counsel under state statute and that state’s Due Process Clause.¹⁰⁹ In *Perdue*, a class action suit was brought on behalf of foster children against two counties in Georgia for its “failure to provide . . . adequate and effective legal representation in deprivation” and TPR hearings.¹¹⁰ The plaintiffs alleged that the county defendants’ failure to provide sufficient funding for the hiring of child attorneys left existing attorneys with “extremely high caseloads,” which “[made] effective representation of . . . foster children structurally impossible.”¹¹¹

In holding that children are entitled to appointed counsel, the court conducted a due process analysis.¹¹² First, it found that children have “fundamental liberty interests at stake in deprivation and TPR proceedings.”¹¹³ These interests include “a child’s interest in his or her own safety, health, and well-being, as well as an interest in maintaining the integrity of the family unit and in having a relationship with his or her biological

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ See CHILD WELFARE INFO. GATEWAY, ADMIN. FOR CHILD. & FAMS., DEP’T OF HEALTH & HUM. SERVS, CHILD’S BUREAU, REPRESENTATION OF CHILDREN IN CHILD ABUSE AND NEGLECT PROCEEDINGS (2021), <https://www.childwelfare.gov/pubpdfs/represent.pdf> [<https://perma.cc/U6EB-ZP9A>].

¹⁰⁸ See Kevin Lapp, *A Child Litigant’s Right to Counsel*, 52 LOY. L.A. L. REV. 463, 485–86 (2019).

¹⁰⁹ *Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353, 1357 (N.D. Ga. 2005).

¹¹⁰ *Id.* at 1355.

¹¹¹ *Id.* at 1355–56.

¹¹² *Id.* at 1359–61.

¹¹³ *Id.* at 1360.

parents.”¹¹⁴ Further, the court warned that an erroneous decision in this type of case could lead to “chronic abuse or even death.”¹¹⁵ Alternatively, a wrong decision could destroy a child’s family unit.¹¹⁶ “Furthermore,” according to the court, “a child’s liberty interests [are] at stake” not only at the initial hearing but throughout the course of litigation “even after [a] child is placed in state custody.”¹¹⁷ This creates a “special relationship” in which a child has the right to “reasonably safe living conditions and services necessary to ensure protection from physical, psychological, and emotional harm.”¹¹⁸

Since the court found “liberty interests at stake,” it applied the *Matthews* test.¹¹⁹ With respect to the first prong, the court reiterated that a “child’s fundamental liberty interests” included their “health, safety, and family integrity.”¹²⁰ The court also noted that TPR and deprivation proceedings pose a literal threat to a child’s “physical liberty” when “foster homes are not available” and that child is “forced to live in [an] institutional setting[]” like a state hospital.¹²¹ The court therefore concluded that the first prong leaned in plaintiff’s favor.¹²²

Second, the court found a strong likelihood of an erroneous deprivation of a child’s private liberty interests in a TPR and deprivation case.¹²³ The court pointed out that because these types of cases allow judges wider latitude, their decisions are more subjective and thus prone to greater error.¹²⁴ The court also relied on evidence demonstrating erroneous decisions regularly made by the Georgia Division of Family and Children’s Services with respect to children in foster care.¹²⁵

The court next dismissed defendant’s argument that juvenile court judges, CASAs, and citizen review panels provide sufficient protection.¹²⁶ The court relied on the role that each of these

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 1360–61.

¹²² *Id.* at 1361.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

groups play in a TPR or deprivation case.¹²⁷ Since judge and citizen review panels rely on information provided to them by government officials, their assessment of a case is as good as the information they receive.¹²⁸ Unlike a lawyer, they cannot conduct their own investigations and are thus dependent on the information provided to them.¹²⁹ Furthermore, CASAs do not provide legal representation and are only assigned in a limited number of cases.¹³⁰ Therefore, the court concluded that only a lawyer can effectively mitigate the risk of significant errors.¹³¹

Lastly, the court weighed the government's interest, such as the function involved and the administrative and fiscal burdens entailed.¹³² Since the function of the state is to serve as *parens patriae*, their role is to protect "those unable to care for themselves."¹³³ In this context, it is to ensure a child's safety which, according to the court, could only be achieved through an attorney and that "[t]his fundamental interest far outweighs any fiscal or administrative burden that a right to appointed counsel may entail."¹³⁴

The *Kenny A.* court convincingly argued that children in foster care proceedings have a liberty interest that mandates constitutional protection under the state statute and Georgia Constitution.¹³⁵ Although *Kenny A.* relied on the state's constitutional due process clause, a similar due process analysis should also be made in the context of immigration proceedings involving unaccompanied minors under the Fifth Amendment. Like the children in *Perdue*, unaccompanied minors have a liberty interest at stake and the three-prong *Matthews* test clearly weighs in favor of government-appointed counsel.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* (quoting *Parens Patriae*, BLACK'S LAW DICTIONARY (8th ed. 2004))

¹³⁴ *Id.*

¹³⁵ *Id.* at 1360.

V. DUE PROCESS ANALYSIS FOR UNACCOMPANIED CHILDREN

A. *Private Interest*

Children in deportation proceedings, like those in TPR and child welfare cases, have significant liberty interests at stake.¹³⁶ For many children, a removal proceeding is a matter of life and death.¹³⁷ They are often fleeing from countries where they are terrorized by gangs and surrounded by drugs and violence.¹³⁸ As the *C.J.L.G.* court stated, “If the court errs [in a removal proceeding], the consequences for the applicant could be severe persecution, torture, or even death.”¹³⁹ Courts have recognized the serious impact of deportation on the lives of asylum seekers and have generally found that this first factor leans in favor of unaccompanied children.¹⁴⁰

B. *Strong Likelihood of an Erroneous Deprivation of a Child’s Private Liberty Interests*

In dependency cases, although CAPTA does not require legal counsel for children, there is still a smaller risk of erroneous deprivation because there is an appointed GAL, who may be an attorney or an adult non-attorney, who understands the laws and can advocate for child.¹⁴¹ In contrast, the risk of an erroneous deprivation for an unaccompanied child is comparatively higher given that an unaccompanied child has to navigate a complex legal process alone.¹⁴² Furthermore, immigration law treats children as adults.¹⁴³ Children must satisfy the same legal standards as adults even though relief like asylum was not designed with children in mind.¹⁴⁴ Additionally, most unaccompanied children face language barriers, suffer from extreme trauma, and lack the cognitive ability to understand the

¹³⁶ Lapp, *supra* note 108, at 496.

¹³⁷ Sewanan, *supra* note 31, at 338.

¹³⁸ See sources cited *supra* notes 5–6.

¹³⁹ *C.J.L.G. v. Sessions*, 880 F.3d 1122, 1137 (9th Cir. 2018) (quoting *Oshodi v. Holder*, 729 F.3d 883, 894 (9th Cir. 2013)).

¹⁴⁰ Sewanan, *supra* note 31, at 339.

¹⁴¹ See CHILD WELFARE INFO. GATEWAY, *supra* note 98.

¹⁴² Sewanan, *supra* note 31, at 340.

¹⁴³ See generally Young, *supra* note 50.

¹⁴⁴ *Id.* at 252–54 (explaining how asylum is difficult for children to obtain since children are not a protected class under this form of relief and the types of persecution they suffer are “inflicted by non-state actors and take place in non-public settings”).

procedures they face.¹⁴⁵ These factors make it difficult for children to present their cases in a meaningful manner and succeed in deportation proceedings without an attorney.¹⁴⁶

Judges also fail to provide the safeguards needed to ensure that unaccompanied minors have a fair hearing despite their enhanced role in removal proceedings.¹⁴⁷ Judges do not meet with the child outside of court and cannot investigate all forms of relief.¹⁴⁸ They also cannot be expected to decide cases, on the one hand, while advocating for unaccompanied children on the other. This creates a potentially conflicting role.¹⁴⁹ Also, given the backlog of cases, judges are hindered from fully developing each child's case, increasing the likelihood that an erroneous decision will be made.¹⁵⁰ According to data collected by Syracuse University's Transactional Records Access Clearinghouse, the case backlog increased from just over 516,000 cases in fiscal year 2016 to more than 1.6 million in 2022.¹⁵¹ Furthermore, as courts struggle with understaffing, judges are spread even thinner, making it more difficult for immigrants to receive even the most basic due process rights.¹⁵²

C. *The Government's Interest, Including the Fiscal and Administrative Burdens that the Additional or Substitute Procedures Would Entail*

The last prong of the *Mathews* test requires courts to weigh the government's interest and the fiscal and administrative burdens entailed.¹⁵³ Although the direct cost of providing attorneys to all unaccompanied children may be high, the long-

¹⁴⁵ See Andrew Leon Hanna, *A Constitutional Right to Appointed Counsel for the Children of America's Refugee Crisis*, 54 HARV. C.R.-C.L. L. REV. 257, 276–77 (2019).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 285–86; see also Sewanan, *supra* note 31, at 344–45.

¹⁴⁸ Sewanan, *supra* note 31, at 344–45; see also Hanna, *supra* note 145, at 285–86.

¹⁴⁹ Sewanan, *supra* note 31, at 344–45.

¹⁵⁰ See *id.*

¹⁵¹ See *Immigration Court Backlog Now Growing Faster than Ever, Burying Judges in an Avalanche of Cases*, TRAC: IMMIGRI. (Jan. 18, 2022), <https://trac.syr.edu/immigration/reports/675/> [<https://perma.cc/9QGC-MJTV>].

¹⁵² See Alexandra Villarreal, *US Immigration Courts Struggle Amid Understaffing and Backlog of Cases*, GUARDIAN (Feb. 21, 2022, 1:00 AM), <https://www.theguardian.com/us-news/2022/feb/21/us-immigration-courts-cases-backlog-understaffing> [<https://perma.cc/BDK6-KQVH>] (discussing the severe backlog in immigration courts and whether immigrants are receiving their basic procedural due process rights such as notice before their hearings).

¹⁵³ *Mathews v. Eldridge*, 424 U.S. 319, 347–48 (1976).

term benefits may outweigh any administrative or fiscal burdens.¹⁵⁴ Studies show that lawyers would make immigration courts more efficient by relieving judges of some of their responsibilities, like counseling clients and investigating and developing their cases.¹⁵⁵ In turn, it would reduce the cost of housing immigrants in detention by expediting their cases and helping to decrease the immigration backlog.¹⁵⁶ Furthermore, as in child welfare cases, the government has a strong interest in ensuring the welfare of a child, which outweighs any administrative burden that a right to appointed counsel may entail.¹⁵⁷

CONCLUSION

Thousands of children are currently arriving from Central America and Mexico at the U.S. southern border.¹⁵⁸ Since most children lack the financial resources to secure counsel for themselves and many pro bono attorneys cannot reach children due to the lack of resources and rural locations where the children reside, such children must navigate the immigration court system, and its various federal agencies, by themselves.¹⁵⁹ Although there are certain procedural protections in place, there is no statutory or due process right to government-funded counsel.¹⁶⁰ This is inconsistent with the treatment of children in other civil cases such as child welfare cases, where children are appointed representation under both statutory law and case law.¹⁶¹ However, given the unique circumstances of an unaccompanied child and the complexity and high stakes involved in immigration proceedings, there is a compelling case that unaccompanied children should have a categorical right to counsel under the *Matthews* test and due process principles.¹⁶² Furthermore, the influx of unaccompanied children and the backlog of cases in immigration courts highlight the urgent need for government appointed legal counsel.¹⁶³ Thus, now is the time

¹⁵⁴ Sewanan, *supra* note 31, at 346–47.

¹⁵⁵ Hanna, *supra* note 145, at 289.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ See Cheatham & Roy, *supra* note 5.

¹⁵⁹ See Lapp, *supra* note 108, at 473–74, 499; Ooi, *supra* note 22, at 899–900.

¹⁶⁰ See *supra* Part III.

¹⁶¹ See *supra* Part IV.

¹⁶² See *supra* Part V.

¹⁶³ See sources cited *supra* notes 151–52.

for Congress to enact legislation providing all unaccompanied children with government appointed counsel and for the courts to recognize that children in immigration proceedings are entitled to legal counsel as a matter of Due Process under the Fifth Amendment of the U.S. Constitution.