

# UTTERLY ALONE IN COURT: HOW UNACCOMPANIED MINORS' LACK OF ACCESS TO APPOINTED COUNSEL FALLS SHORT OF DOMESTIC, INTERNATIONAL, AND BIBLICAL STANDARDS

## ABSTRACT

This Note examines the lack of a right to government-funded counsel for unaccompanied minors in immigration proceedings by comparing the United States' immigration system with those of Germany, Italy, and Greece. To begin, this Note surveys the current legal protections available to children in different court proceedings in the United States. Then, this Note analyzes all four systems in light of the United Nations' Convention on the Rights of the Child and the United Nations' Convention Relating to the Status of Refugees. For countries which are members of the European Union (EU), compliance with EU Directives regarding unaccompanied minors, including the Dublin III agreement, is also analyzed.

This paper concludes the best method for compliance with international duties towards unaccompanied minors would be the creation of systems that provide unaccompanied minors with appointed counsel throughout the immigration process. This involves expansion of 8 U.S.C. § 1232(c)(5) beyond the reliance upon only pro bono attorneys to represent unaccompanied minors but rather include line items in the budget for federal funding of attorneys for these children.

## I. INTRODUCTION

Over the last decade, there has been no shortage of heartbreaking headlines describing traumatic events that unaccompanied minors face during their flights to freedom and safety. In 2014, the Santa Cruz County Attorney's Office prosecuted a "coyote"<sup>1</sup> for his repeated rapes against L, a 14-year-old girl traveling in his group into the United States.<sup>2</sup> Women

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<sup>1</sup> A coyote is "a person who is paid to secretly and illegally bring people across the border into the U.S. from Latin America." *Coyote*, CAMBRIDGE ENGLISH DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/coyote> (last visited Aug. 16, 2023).

<sup>2</sup> Jude Joffe-Block, *Women Crossing the U.S. Border Face Sexual Assault with Little Protection*, PBS NEWSHOUR (Mar. 31, 2014, 1:49 PM), <https://www.pbs.org/newshour/nation/facing-risk-rape-migrant-women-prepare-birth-control>.

and even some young girls preemptively purchase contraceptives along the route from Central America to the United States because they know that the risk of being raped along the journey is high.<sup>3</sup> In San Antonio, “a sheriff’s deputy . . . was charged with sexually assaulting the 4-year-old daughter of an undocumented Guatemalan woman and threatening to have her deported if she reported the abuse.”<sup>4</sup> Meanwhile, across the Atlantic Ocean, Samir, a 17-year-old, journeyed across the Mediterranean Sea on a raft holding between 200 and 300 people in the hopes of finding more economic success in Europe to send money back to his family.<sup>5</sup> Similarly, 14-year-old Yvan traveled from Cameroon to Sicily on a boat with at least 500 people and spent a year in Italy before he was able to contact his brother Hypolite again.<sup>6</sup>

These heartbreaking headlines have highlighted the growing number of unaccompanied minors entering the United States in recent years.<sup>7</sup> A 2019 report by the United States Customs and Border Patrol counted 76,020 unaccompanied minors arriving at the United States–Mexico border.<sup>8</sup> This is double the number from 2015, where “the Office of Refugee Resettlement received 33,726 referrals of unaccompanied children.”<sup>9</sup> In 2020, the Department of Homeland Security received referrals for forty-one minors per day on average.<sup>10</sup> In fiscal year 2023,

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<sup>3</sup> Alice Farmer, *Finding a New Balance: Bringing Together Children’s Rights Law and Migration Policy for Effective Advocacy for Migrant Children*, in RESEARCH HANDBOOK ON CHILD MIGRATION 173, 176 (Jacqueline Bhabha et al. eds., 2018).

<sup>4</sup> Manny Fernandez, *You Have to Pay with Your Body’: The Hidden Nightmare of Sexual Violence on the Border*, N.Y. TIMES (Mar. 3, 2019), <https://www.nytimes.com/2019/03/03/us/border-rapes-migrant-women.html>.

<sup>5</sup> Francesco Vacchiano, *Desiring Mobility: Child Migration, Parental Distress and Constraints on the Future in North Africa*, in RESEARCH HANDBOOK ON CHILD MIGRATION 82, 83–84 (Jacqueline Bhabha et al. eds., 2018); see also *The Mediterranean Migration Crisis: Why People Flee, What the EU Should Do*, HUM. RTS. WATCH (June 19, 2015), <https://www.hrw.org/report/2015/06/19/mediterranean-migration-crisis/why-people-flee-what-eu-should-do> (stating that unprecedented numbers of migrants travel across the Mediterranean Sea each year to improve their economic status).

<sup>6</sup> Greta Ruffino, *A Story of Fostering an Unaccompanied Refugee Minor in Europe*, LINKEDIN (Oct. 3, 2017), <https://www.linkedin.com/pulse/story-fostering-unaccompanied-refugee-minor-europe-greta-ruffino>.

<sup>7</sup> See, e.g., Camilo Montoya-Galvez, *Nearly 130,000 Unaccompanied Migrant Children Entered the U.S. Shelter System in 2022, A Record*, CBS NEWS (Oct. 14, 2022, 7:00 AM), <https://www.cbsnews.com/news/immigration-unaccompanied-migrant-children-record-numbers-us-shelter-system/>.

<sup>8</sup> *U.S. Border Patrol Southwest Border Apprehensions by Sector Fiscal Year 2019*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/newsroom/stats/sw-border-migration/usbp-sw-border-apprehensions-fy2019> (last modified Aug. 9, 2023).

<sup>9</sup> Susan Bibler Coutin, *Roots of Juvenile Migration from El Salvador*, in RESEARCH HANDBOOK ON CHILD MIGRATION 113, 122 (Jacqueline Bhabha et al. eds., 2018).

<sup>10</sup> Rosa M. Peterson, *The Mother of Exiles is Abandoning Her Children: The Systemic Failure to Protect Unaccompanied Minors Arriving at Our Borders*, 24 SCHOLAR 107, 134 (2022).

there have already been 1,077,916 new cases brought to the immigration courts as of August 30th.<sup>11</sup> This trend in unaccompanied minor migration is not limited to the United States.<sup>12</sup> Globally, unaccompanied minors have increased in recent years.<sup>13</sup> A study from 2017 found that “29.8 percent of Africa’s migrants and 17.5 percent of Asia’s migrants were children.”<sup>14</sup> In the European Union, the number of unaccompanied minors exploded from 12,000 in 2008 to 88,245 in 2015.<sup>15</sup>

The risks faced by these unaccompanied minors include a variety of mental health difficulties including PTSD, depression, and “long-term psychological trauma.”<sup>16</sup> Further, of those that registered upon arrival to Europe, authorities estimate that at least 10,000 children went missing,<sup>17</sup> potentially caused by issues with sexual abuse, labor trafficking, human trafficking, and organ trafficking.<sup>18</sup> Unaccompanied minors who are discovered by authorities and placed in removal proceedings often struggle to understand the legal landscape and meet the evidentiary burdens placed upon them.<sup>19</sup>

While there are several ways public policy could be improved to ensure unaccompanied minors are better protected, one critical step is providing legal counsel to them as they navigate the immigration system.<sup>20</sup> In previous studies, this has been found to be highly effective in

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<sup>11</sup> See *Immigration Court Quick Facts*, TRAC IMMIGR., <https://trac.syr.edu/immigration/quickfacts/eoir.html> (last visited Aug. 30, 2023).

<sup>12</sup> See Press Release, UNICEF, *Eleven Children Die Every Week Attempting to Cross the Central Mediterranean Sea Migration Route* (July 13, 2023), <https://www.unicef.org/press-releases/eleven-children-die-every-week-attempting-cross-central-mediterranean-sea-migration> (noting that, in the first three months of 2023, 71% of the children entering Europe from North Africa were unaccompanied minors or minors separated from parents or guardians).

<sup>13</sup> Susanna Corona Maioli et al., *International Migration of Unaccompanied Minors: Trends, Health Risks, and Legal Protection*, 5 LANCET CHILD & ADOLESCENT HEALTH 882, 882–84 (2021).

<sup>14</sup> Eirini Papoutsis, *The Protection of Unaccompanied Migrant Minors Under International Human Rights Law: Revisiting Old Concepts and Confronting New Challenges in Modern Migration Flows*, 35 AM. U. INT’L L. REV. 219, 220 (2020).

<sup>15</sup> Bernd Parusel, *Unaccompanied Minors in the European Union—Definitions, Trends and Policy Overview*, SOC. WORK & SOC’Y, 2017, at 1, 1.

<sup>16</sup> Peterson, *supra* note 10, at 139.

<sup>17</sup> Elena Rozzi, *Unaccompanied Minors in Italy: Children or Aliens?*, in RESEARCH HANDBOOK ON CHILD MIGRATION 241, 241 (Jacqueline Bhabha et al. eds., 2018).

<sup>18</sup> Marta Rullán, *The Story of Europe’s 210,000 Unaccompanied Minors Seeking Asylum*, EURACTIV (Apr. 18, 2023), <https://www.euractiv.com/section/justice-home-affairs/news/the-story-of-europes-210000-unaccompanied-minors-seeking-asylum/>.

<sup>19</sup> See David B. Thronson, *Children’s Rights and U.S. Immigration Law*, in RESEARCH HANDBOOK ON CHILD MIGRATION 157, 162 (Jacqueline Bhabha et al. eds., 2018).

<sup>20</sup> See Benjamin Good, Note, *A Child’s Right to Counsel in Removal Proceedings*, 10 STAN. J. C.R. & C.L. 109, 137–38 (2014); Amanda Kavita Sewanan, Note, *The Right to Appointed Counsel: The Case for Unaccompanied Immigrant Children*, 41 CARDOZO L. REV. 317, 350 (2019).

protecting children: “over a recent two-year period, 73 percent of unaccompanied children with an attorney were allowed to stay in the United States while only 15 percent of those without an attorney were afforded the same right.”<sup>21</sup> Additionally, in a study of immigration respondents, detained individuals with representation were ten and a half times more likely to be successful on the claims they brought than similarly situated pro se individuals, and non-detained individuals with representation were three and a half times more likely to find success in court than their pro se counterparts.<sup>22</sup> Another study found that represented unaccompanied minors are four times more successful on their asylum claims than unrepresented unaccompanied minors.<sup>23</sup> When the Vera Institute conducted a study on a counsel appointment system in New York City, it found that providing individuals with attorneys created a success rate at 48%, eleven times higher than the 4% success rate prior to the program’s implementation.<sup>24</sup> As one scholar points out, “[j]ust as losing your life for a crime requires counsel due to the tremendous risk, so too does deportation to a country torn apart by war, gangs, drugs, violence, and oppression.”<sup>25</sup> While immigration proceedings are not classified as criminal proceedings, the consequences of these proceedings have significant impacts upon the children’s lives.<sup>26</sup>

Not only does the provision of counsel to unaccompanied minors provide protection to them, it also comports with the duties of state parties to the United Nations’ Convention on the Rights of the Child.<sup>27</sup> Indeed,

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<sup>21</sup> Lisa Frydman & Blaine Bookey, *Applying the Refugee Definition to Child-Specific Forms of Persecution*, in RESEARCH HANDBOOK ON CHILD MIGRATION 187, 194–95 (Jacqueline Bhabha et al. eds., 2018).

<sup>22</sup> Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 UNIV. PA. L. REV. 1, 49 (2015).

<sup>23</sup> Emily A. Benfer, *In the Best Interests of the Child? An International Human Rights Analysis of the Treatment of Unaccompanied Minors in Australia and the United States*, 14 IND. INT’L & COMPAR. L. REV. 729, 748 (2004).

<sup>24</sup> Marco Poggio, *NY Seeks First-in-the-Nation Right to Counsel in Deportations*, LAW360 (Oct. 14, 2022, 8:20 PM), <https://www.law360.com/articles/1540216/ny-seeks-first-in-the-nation-right-to-counsel-in-deportations>.

<sup>25</sup> Peterson, *supra* note 10, at 123–24.

<sup>26</sup> See Amelia Cheatham & Diana Roy, *U.S. Detention of Child Migrants*, COUNCIL ON FOREIGN RELS., <https://www.cfr.org/backgrounders/us-detention-child-migrants> (last updated Mar. 27, 2023, 3:11 PM) (explaining that immigration proceedings result in either child deportation, detainment, or release which for many leads to children working in dangerous jobs that violate child labor laws); see also Melba J.T. Vasquez & Frank Donaghue, *The Victims of Immigration Policy: Children of Broken Homes and a Broken System*, AM. PSYCH. ASS’N., <https://www.apa.org/news/press/op-eds/immigration-policy#:~:text=Children%20and%20adolescents%20whose%20parents,and%20decline%20in%20educational%20achievement> (last visited Sept. 16, 2023) (describing the severe, separation-induced psychological distress and behavioral health impact on children whose parents are taken into immigration custody during such proceedings).

<sup>27</sup> See G.A. Res. 44/25, Convention on the Rights of the Child, art. 40, ¶¶ 1, 2(b)(ii) (Nov. 20, 1989).

the best course of compliance with the United Nations' Convention on the Rights of the Child is for state parties to provide unrepresented unaccompanied minors with appointed counsel throughout the immigration process. Because the United States is not yet a state party to the Convention, it does not have a duty to comply with the Convention on the Rights of the Child,<sup>28</sup> but it should establish a system to provide appointed counsel to children in immigration proceedings to ensure that the best interests of the children are protected.

Part II outlines the current legal precedent surrounding the rights of unaccompanied minors in the United States immigration system. Part III outlines the rights minors have in other contexts of the United States' legal system. Part IV discusses international standards and duties of state parties. Part V analyzes the immigration protections for unaccompanied minors of Germany, Italy, and Greece in light of European Union regulations. Part VI suggests next steps the United States can take to better protect the rights of these unaccompanied minors. Finally, Part VII addresses Biblical principles undergirding efforts to protect all children to the utmost.

## II. OVERVIEW OF CURRENT UNITED STATES LAW REGARDING MINORS IN IMMIGRATION PROCEEDINGS

Immigrants subject to proceedings in immigration court have a statutory right to "have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government."<sup>29</sup> These goals are best accomplished by a lawyer, who has been trained in the rules of evidence admissibility and the best techniques for obtaining supporting information on cross-examination.<sup>30</sup> However, immigrants in proceedings are not guaranteed access to counsel.<sup>31</sup> Their rights regarding access to counsel are laid out in 8 U.S.C. § 1362, which provides:

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

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<sup>28</sup> LUISA BLANCHFIELD, CONG. RSCH. SERV., R40484, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 1 (2015).

<sup>29</sup> 8 U.S.C. § 1229a(b)(4)(B).

<sup>30</sup> See *Immigration Court Quick Facts*, *supra* note 11 (showing that in July 2023, 17.9% of immigrants who were ordered removed were represented by counsel while the remainder were not); see also Sewanan, *supra* note 20, at 346 (contending that unaccompanied immigrant children "cannot adequately present evidence or testimony, cross-examine witnesses, or even answer [the judge's] questions accurately and strategically" and that such Due Process violations are resolvable by granting "a categorical right to appointed counsel").

<sup>31</sup> Poggio, *supra* note 24.

privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.<sup>32</sup>

Because their right to counsel includes only the right to hire counsel, immigrants understandably face difficulties due to the cost of retaining counsel.<sup>33</sup> A NERA report estimates the average cost of hiring immigration counsel for one case at \$128,850,<sup>34</sup> which is a substantial cost, especially when “19.7% of the foreign-born in the United States . . . liv[e] in poverty as of 2016, compared to the native-born poverty rate of 15.8%.”<sup>35</sup> Some circuits have held that individuals in immigration proceedings should be provided counsel if they cannot afford it,<sup>36</sup> but Congress has not seen fit to implement such a provision, nor has the Supreme Court ruled on the issue.

However, Congress has passed legislation that provides minimal protections to unaccompanied minors, albeit they have done so at no cost to the federal government.<sup>37</sup> Under 8 U.S.C. § 1232(c)(5), the Secretary of Health and Human Services has a duty to:

ensure, to the greatest extent practicable and consistent with section 292 of the Immigration and Nationality Act (8 U.S.C. 1362), that all unaccompanied alien children who are or have been in the custody of the Secretary or the Secretary of Homeland Security, and who are not described in subsection (a)(2)(A), have counsel to represent them in legal proceedings or

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<sup>32</sup> 8 U.S.C. § 1362.

<sup>33</sup> See Nadia Almasalkhi, *Immigrants Lack Access to Legal Representation*, HAAS INS. (Sept. 11, 2023), <https://escholarship.org/uc/item/1dt4k4vg> (“[I]mmigrants are less likely than U.S.-born citizens to have disposable income to spend on hiring attorneys.”).

<sup>34</sup> JOHN D. MONTGOMERY, NERA ECON. CONSULTING, COST OF COUNSEL IN IMMIGRATION: ECONOMIC ANALYSIS OF PROPOSAL PROVIDING PUBLIC COUNSEL TO INDIGENT PERSONS SUBJECT TO IMMIGRATION REMOVAL PROCEEDINGS 32 (2014).

<sup>35</sup> Almasalkhi, *supra* note 33.

<sup>36</sup> See *Aguilera-Enriquez v. Immigr. & Naturalization Serv.*, 516 F.2d 565, 568 n.3 (6th Cir. 1975) (“Where an unrepresented indigent alien would require counsel to present his position adequately to an immigration judge, he must be provided with a lawyer at the Government’s expense. Otherwise, ‘fundamental fairness’ would be violated.”); see also *Escobar Ruiz v. Immigr. & Naturalization Serv.*, 787 F.2d 1294, 1297 n.3 (9th Cir. 1986) (“The fifth amendment guarantee of due process applies to immigration proceedings, and in specific proceedings, due process could be held to require that an indigent alien be provided with counsel despite the prohibition of section 292.”).

<sup>37</sup> See HOLLY STRAUT-EPPSTEINER, U.S. IMMIGRATION COURTS: ACCESS TO COUNSEL IN REMOVAL PROCEEDINGS AND LEGAL ACCESS PROGRAMS, CONG. RSCH. SERV., IF12158 (2022) (noting that “the federal government generally may not provide counsel” to immigrants in removal proceedings and that they “may obtain counsel at their own expense or pro bono”); see also 8 U.S.C. § 1232(c)(5) (providing that the Secretary of Health and Human Services shall, “to the greatest extent practicable” under the law, provide unaccompanied immigrant children with legal representation).

matters and protect them from mistreatment, exploitation, and trafficking. To 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>38</sup>

However, this provision has “not been construed as requiring the appointment of counsel at the government’s expense since [Section 292 of the INA] require[s] that any such counsel be ‘at no expense to the Government.’”<sup>39</sup> Thus, this statutory provision may soothe the consciences of those who passed it by providing protections for children in word, but it fails to actually effect significant change because of Congress’ unwillingness to allocate funding for a system that would provide counsel to the children in need of representation.

While, “children were more likely than adults to be represented by counsel”<sup>40</sup> with 55% of children obtaining representation,<sup>41</sup> the current structures still leave a large percentage of children unrepresented in immigration proceedings. For these children, obtaining representation in their immigration proceeding is “the single most important factor influencing the case’s outcome.”<sup>42</sup> In fact, the children’s lack of counsel creates “the risk of erroneously depriving a child the ability to *competently navigate* the immigration court system . . . given that children are incapable of representing themselves in a court of law without a lawyer, regardless of their legal status.”<sup>43</sup>

Additionally, representation of minors affects not only the minors themselves, but also the efficiency of the courts and the ability of immigration Judges to effectively do their jobs.<sup>44</sup> Without an attorney representing unaccompanied minors, immigration judges do not receive the benefit of hearing the case argued by someone “meticulously trained to communicate relevant and applicable facts to the law in question.”<sup>45</sup> This affects their ability to efficiently process cases, as relevant facts may not be brought to light by the pro se parties at the time that an attorney would properly bring them to the court’s attention.<sup>46</sup> One scholar noted

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<sup>38</sup> 8 U.S.C. § 1232(c)(5).

<sup>39</sup> KATE M. MANUEL & MICHAEL JOHN GARCIA, CONG. RSCH. SERV., R43623, UNACCOMPANIED ALIEN CHILDREN – LEGAL ISSUES: ANSWERS TO FREQUENTLY ASKED QUESTIONS 19–20 (2014).

<sup>40</sup> Eagly & Shafer, *supra* note 22, at 24.

<sup>41</sup> *Id.*

<sup>42</sup> *Representation for Unaccompanied Children in Immigration Court*, TRAC IMMIGR., <https://trac.syr.edu/immigration/reports/371/> (last visited Sept. 19, 2023).

<sup>43</sup> Wendy Melissa Hernandez, *The Immigration Crisis in American Courts: Children Representing Themselves*, 47 HASTINGS CONST. L.Q. 145, 156 (2019).

<sup>44</sup> Eagly & Shafer, *supra* note 2222, at 10, 59.

<sup>45</sup> Hernandez, *supra* note 43, at 157.

<sup>46</sup> *Id.*

that “whatever laudable efforts immigration judges may make in individual proceedings to develop the record and enable the respondent to understand the proceedings cannot make up for the incapacity of child litigants to assert their rights and present their cases.”<sup>47</sup>

It is even understood by most immigration judges that providing counsel would be more efficient.<sup>48</sup> Some “[i]mmigration judges agree that legal representation for youth in immigration court would be more ethical and efficient.”<sup>49</sup> Even those who may not be in favor of providing government-funded counsel to unaccompanied minors agree that the current system “takes a lot of time. It takes a lot of patience. . . . It’s not the most efficient . . .”<sup>50</sup> It therefore seems illogical for courts to continue using an admittedly inefficient system.

In addition to the concerns regarding efficiency, the lack of appointed counsel raises due process concerns because these children are not being given “the opportunity to be heard.”<sup>51</sup> Due process rights generally apply to both citizens and noncitizens because “the protection of the Fourteenth Amendment extends to anyone, citizen or stranger, who *is* subject to the laws of a State, and reaches into every corner of a State’s territory.”<sup>52</sup> The standard for review on statutes that distinguish between individuals based on citizenship status is “inherently suspect and subject to close judicial scrutiny.”<sup>53</sup> Indeed, in his concurrence in *Plyler v. Doe*, Justice Blackmun noted that “these children may not be denied rights that are granted to citizens, excepting only those rights bearing on political interests.”<sup>54</sup> However, this holding is rare for children in the immigration context.

More often, the United States immigration system disregards the unique needs of children in this limited area and treats them as adults.<sup>55</sup> Indeed, children face “roughly the same legal regime as adults: they may seek the same immigration benefits, are subject to the same grounds for immigration violations and the same defenses to deportation are available

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<sup>47</sup> Kevin Lapp, *A Child Litigant’s Right to Counsel*, 52 LOY. L.A. L. REV. 463, 499 (2019).

<sup>48</sup> Eagly & Shafer, *supra* note 2222, at 10, 59.

<sup>49</sup> Peterson, *supra* note 10, at 144.

<sup>50</sup> Transcript of Deposition of Honorable Jack H. Weil at 69–70, *J.E.F.M. v. Lynch*, Case No. 2:14-cv-01026-TSZ (W.D. Wash. Oct. 15, 2015), <https://www.aclu.org/cases/jefm-v-lynch?document=jefm-v-lynch-deposition-honorable-jack-h-weil>.

<sup>51</sup> Legal Info. Inst., *Procedural Due Process*, CORNELL L. SCH., [https://www.law.cornell.edu/wex/procedural\\_due\\_process](https://www.law.cornell.edu/wex/procedural_due_process) (last visited Sept. 27, 2023).

<sup>52</sup> *Plyler v. Doe*, 457 U.S. 202, 215 (1982).

<sup>53</sup> *Nyquist v. Mauclet*, 432 U.S. 1, 7 (1977) (citing *Graham v. Richardson*, 403 U.S. 365, 372 (1971)).

<sup>54</sup> *Plyler*, 457 U.S. at 236 (Blackmun, J., concurring).

<sup>55</sup> Laila Hlass, *The Adultification of Immigrant Children*, 34 GEO. IMMIGR. L.J. 199, 202–03 (2020) (noting that “immigration laws and policies chiefly tend to adultify child migrants,” specifically children of color, because they are perceived to be more mature).



to them, if they can prove their cases.”<sup>56</sup> When compared with other domestic and international legal systems,

U.S. immigration law makes no real attempt to consider or vindicate children’s rights. In some cases, the best interests of children are actively undermined. U.S. immigration law does treat children disparately in different contexts, sometimes ignoring the realities of childhood to expose children to all the complexities and harsh policies that immigration law visits upon adults.<sup>57</sup>

While the Supreme Court has not directly ruled on whether due process mandates a right to counsel for unaccompanied minors, the Ninth Circuit has addressed the question.<sup>58</sup> In his concurring opinion in *C.J.L.G. v. Barr*, Judge Paez expressed dissatisfaction with the majority’s silence regarding the minor’s access to counsel,<sup>59</sup> noting that “[a] violation of the right to retained counsel is uniquely important, and thus we do not require a showing of prejudice to grant relief.”<sup>60</sup> Since the court notes that the right to counsel is so important that an ordinary showing of prejudice is not needed, it would seem only logical to provide counsel to them. Indeed, as Justice Paez noted, “the law already recognizes that children require more procedural protections than adults in immigration proceedings. . . . Providing children with counsel in removal proceedings is the next logical step.”<sup>61</sup>

Finally, there are due process concerns paralleling criminal law. While immigration court proceedings do not fall within the scope of criminal law, the process requires extensive interviewing,<sup>62</sup> as well as the possibility that statements a minor makes to immigration officials may be used against them by an immigration judge in finding the unaccompanied minor removable<sup>63</sup> and returning them to their country of origin where

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<sup>56</sup> *Id.* at 212.

<sup>57</sup> Thronson, *supra* note 1919, at 159.

<sup>58</sup> See *C.J.L.G. v. Barr*, 923 F.3d 622, 629–30 (9th Cir. 2019) (Paez, J., concurring) (disagreeing with the majority’s failure to address whether the Fifth Amendment creates a right to counsel for minor immigrant children).

<sup>59</sup> *Id.* Judge Paez’s concurrence was joined by two of the eleven judges *en banc*. *Id.*

<sup>60</sup> *Id.* at 631.

<sup>61</sup> *Id.* at 635.

<sup>62</sup> See U.S. CITIZENSHIP & IMMIGR. SERVS., RAI0 COMBINED TRAINING PROGRAM: INTERVIEWING—ELICITING TESTIMONY TRAINING MODULE 3 (2019) (explaining that officers will be trained in how to obtain “all relevant information” including “how to elicit information pertaining to possible mandatory bars, inadmissibility grounds, or discretionary grounds for denial or referral”).

<sup>63</sup> See 8 C.F.R. § 1240.7(a) (2023); 8 C.F.R. § 1240.46(b) (2023) (authorizing immigration judges through both statutes to use their discretion to “receive in evidence any

they may face danger. Thus, the procedures used are parallel to criminal law in some ways, yet do not trigger the protection of counsel guaranteed in criminal cases by *Gideon v. Wainwright*.<sup>64</sup>

### III. MINORS' RIGHT TO COUNSEL IN OTHER LEGAL PROCEEDINGS

Children have protections that differ from those for adults in a variety of other legal settings.<sup>65</sup> It is generally understood that children lack capacity to make certain decisions, and their youth affects the way they perceive and think about their circumstances.<sup>66</sup> This section analyzes their access to counsel in juvenile proceedings, family court proceedings, and school disciplinary proceedings.

#### A. *Juvenile Proceedings*

The Supreme Court held in 1967 that the minors in juvenile proceedings have a constitutional right to counsel.<sup>67</sup> Further, because minors perceive the world around them in a manner that differs from adults, an individual's age is one of the considerations police officers must consider when giving *Miranda* warnings to youths they are questioning.<sup>68</sup> The Supreme Court explained that this decision came, in part, from the fact "that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave."<sup>69</sup>

Additional protections for minors in juvenile proceedings include a ban on life without parole sentences for them, as laid out by the Supreme Court in *Miller v. Alabama*.<sup>70</sup> The Court found that such sentences violated the Eighth Amendment's "cruel and unusual punishment"<sup>71</sup> provision. The Court additionally stated here that a rule that does not make some exception for the protection of children is the outlier not the general rule.<sup>72</sup> However, a few states have narrow exceptions to the

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oral or written statement that is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing, or trial.").

<sup>64</sup> See *The Right to Counsel in Criminal and Civil Cases*, NAT'L COAL. FOR A CIV. RIGHT TO COUNS., <http://civilrightstocounsel.org/about/criminalandcivilrightstocounsel> (last visited Sept. 4, 2023).

<sup>65</sup> RICHARD LAWRENCE & CRAIG HEMMENS, *JUVENILE JUSTICE* 28–29 (2008).

<sup>66</sup> *J.D.B. v. North Carolina*, 564 U.S. 261, 273 (2011).

<sup>67</sup> See *In re Gault*, 387 U.S. 1, 40–41 (1967); see also *Youth Interrogations & Access to Counsel*, JUV. L. CTR., <https://jlc.org/issues/access-counsel> (last visited Sept. 7, 2023).

<sup>68</sup> *J.D.B.*, 564 U.S. at 264–65.

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

<sup>70</sup> *Miller v. Alabama*, 567 U.S. 460, 479 (2012).

<sup>71</sup> U.S. CONST. amend. VIII; see *Miller*, 567 U.S. at 465.

<sup>72</sup> *Miller*, 567 U.S. at 481.

mandate of appointing counsel for minors in juvenile proceedings who can pay for counsel.<sup>73</sup>

## *B. Family Court*

### 1. Abuse Proceedings

As of 2019, thirty states and D.C. require the appointment of a lawyer for a child involved in a court proceeding for allegations of abuse or neglect levied against a parent or guardian.<sup>74</sup> Those that do not require appointment of an attorney ensure some representative is provided for the child, although some states provide the option for courts to appoint a guardian ad litem, who need not be a barred attorney.<sup>75</sup> Since all states provide some sort of protection for ensuring that children's interests and voices are given attention in the court proceeding, the Supreme Court has issued no opinions dealing with whether a lack of counsel violates due process in this scenario.<sup>76</sup>

Although this has not been found to be required by the Supreme Court but has been widely accepted by states, a similar system at the federal level for immigration could be created. Because the Constitution gives exclusive jurisdiction over naturalization to the federal government,<sup>77</sup> states face difficulty in passing legislation which would implement programs providing children with counsel in immigration court.<sup>78</sup> Despite these difficulties, eight states (namely New York, New Jersey, Nevada, Colorado, Illinois, Washington, California, and Oregon) have begun implementing programs for funding counsel in immigration proceedings,<sup>79</sup> but this progress could be greatly expedited by the creation of a national counsel appointment system.

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<sup>73</sup> Lapp, *supra* note 47, at 480 n.97. ("Some states require proof of indigence before they will provide a court-appointed lawyer to a juvenile in delinquency proceedings, while others presume indigence.")

<sup>74</sup> *Id.* at 484. The thirty states include Alabama, Arkansas, Colorado, Connecticut, Delaware, Georgia, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Utah, Vermont, Virginia, West Virginia, and Wyoming. *Id.* at 484 n.116.

<sup>75</sup> *See id.* at 484 n.114, 485 n.119.

<sup>76</sup> *Id.* at 485.

<sup>77</sup> *See* United States v. Wong Kim Ark, 169 U.S. 649, 703 (1898); *see also* U.S. CONST. art. I, § 8, cl. 4.

<sup>78</sup> *See* Hines v. Davidowitz, 312 U.S. 52, 68 (1941) ("[T]he power to restrict, limit, regulate, and register aliens as a distinct group is not an equal and continuously existing concurrent power of state and nation, but that whatever power a state may have is subordinate to supreme national law.")

<sup>79</sup> Poggio, *supra* note 24.

## 2. Judicial Bypass Hearings

A judicial bypass hearing is:

A procedure permitting a person to obtain a court’s approval for an act that would ordinarily require the approval of someone else, such as a law that requires a minor to notify a parent before obtaining an abortion but allows an appropriately qualified minor to obtain a court order permitting the abortion without parental notice.<sup>80</sup>

Such proceedings “are not adversarial, do not result in any finding of wrongdoing by the minor, and there is no possibility of detention or similar punishment. Nevertheless, of those states that provide judicial bypass procedures for minors seeking an abortion, all enable the appointment of counsel to the minor.”<sup>81</sup>

In comparison, immigration proceedings are adversarial, and under the current system, unaccompanied minors are frequently pitted against experienced government attorneys<sup>82</sup> trained in legal strategy and the complex world of immigration law.<sup>83</sup> This fight is clearly unbalanced, and children who prevail in persuading a judge are certainly the rare exception in these circumstances.<sup>84</sup>

### C. Disciplinary Proceedings

In school disciplinary proceedings, the Supreme Court has said that the Due Process Clause of the 14th Amendment does not always require children to have counsel.<sup>85</sup> Indeed, the Supreme Court “stop[ped] short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses

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<sup>80</sup> *Judicial Bypass*, BLACK’S LAW DICTIONARY (5th Pocket ed. 2016).

<sup>81</sup> Lapp, *supra* note 47, at 488.

<sup>82</sup> Erica Bryant et al., *No Child Should Appear in Immigration Court Alone*, VERA INST. OF JUST. (Jan. 28, 2022), <https://www.vera.org/news/no-child-should-appear-in-immigration-court-alone> (explaining that immigration respondents “must adhere to strict filing rules, interact with multiple government agencies, and present evidence and legal arguments against trained government lawyers in an adversarial setting. This is extremely difficult for adults, especially those who may have trauma histories or are unfamiliar with the English language, and all but impossible for children.”).

<sup>83</sup> See *What Every Lawyer Needs to Know About Immigration Law*, A.B.A. (June 2017), <https://www.americanbar.org/news/abanews/publications/youraba/2017/june-2017/immigration-law-basics-every-lawyer-should-know/>.

<sup>84</sup> Bryant et al., *supra* note 82 (noting that unaccompanied minors who were represented “were more than seven times more likely to receive an outcome that allowed them to remain in the United States than those who did not have attorneys”).

<sup>85</sup> *Goss v. Lopez*, 419 U.S. 565, 582–83 (1975).

supporting the charge, or to call his own witnesses to verify his version of the incident.”<sup>86</sup> However, the Court left room for the representation by counsel of children in certain disciplinary proceedings.<sup>87</sup>

#### IV. INTERNATIONAL IMMIGRATION GUIDELINES FOR MINORS

The United Nations has outlined various guidelines intended to protect vulnerable populations, such as children and refugees.<sup>88</sup> This Note discusses the Convention on the Rights of the Child, the Convention Relating to the Status of Refugees and the subsequent protocol, and the 1997 Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum. The overarching goal of these publications is to protect the human rights of vulnerable individuals, particularly migrant children.<sup>89</sup> The general rules that each publication puts forth in support of that goal will be later used to compare the current structures of each examined country’s compliance with these benchmarks.

##### *A. Convention on the Rights of the Child*

The Convention on the Rights of the Child is intended to ensure that “childhood is entitled to special care and assistance.”<sup>90</sup> The drafters of the Convention noted that each child “by reason of his physical and mental immaturity”<sup>91</sup> is in need of special protections “including appropriate legal protection.”<sup>92</sup> The Convention provides for such legal protections by establishing that children are entitled to “the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”<sup>93</sup> Children detained,

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<sup>86</sup> *Id.* at 583.

<sup>87</sup> See E.A. Gjeltén, *What Are Students’ Rights in School Disciplinary Proceedings?*, LAWYERS.COM, <https://www.lawyers.com/legal-info/research/education-law/what-are-students-rights-in-school-disciplinary-proceedings.html> (last updated Oct. 16, 2018) (“A federal appellate court has held that secondary school students don’t have the right to a lawyer at school disciplinary proceedings if criminal charges are not pending. However, several states provide this right at formal hearings for long-term suspension or expulsion, as long as the students or parents pay for the attorney.”).

<sup>88</sup> See *The Human Rights Protection of Vulnerable Groups*, ICE. HUM. RTS. CTR., <https://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/the-human-rights-protection-of-vulnerable-groups> (last visited Sept. 12, 2023).

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

<sup>90</sup> G.A. Res. 44/25, *supra* note 27,27 at Preamble.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* art. 12(2).

for whatever reason, are further entitled to “prompt access to legal and other appropriate assistance.”<sup>94</sup>

The Convention also establishes that the guiding principle in all matters pertaining to children should be the best interests of the child standard.<sup>95</sup> Certainly, it cannot be argued that making children represent themselves in a country they have not long lived in and in an area of the law which is widely regarded as being complex even amongst lawyers,<sup>96</sup> is in the child’s best interests. Indeed, guidance put out by the United Nations on the meaning of the best interests standards indicates that “[a]ssessment of a child’s best interest must include respect for the child’s right to express his or her views freely and due weight given to said views in all matters affecting the child.”<sup>97</sup> Thus, if a nation’s procedural rules deprive children of the ability to adequately express their views in a proceeding which directly affects the country they reside in, such procedural rules do not further the best interests of the child.

State parties to the Convention must “respect and ensure the rights set forth in the present Convention to each child within their jurisdiction.”<sup>98</sup> Thus, the Convention’s application is not bound merely to those children who are citizens of a state, but all those children who are within the jurisdiction of the country, whether in the country with proper immigration documentation or not.<sup>99</sup> The United States is not yet a state party although it is a signatory.<sup>100</sup> Becoming a signatory “creates an obligation to refrain, in good faith, from acts that would defeat the object and the purpose of the treaty.”<sup>101</sup>

Some scholars have concluded that under the Convention, “[c]hildren are protected only when adults have a duty to provide that protection,

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<sup>94</sup> *Id.* art. 37(d).

<sup>95</sup> *Id.* art. 3(1) (“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”).

<sup>96</sup> See *What Every Lawyer Needs to Know About Immigration Law?*, *supra* note 83.

<sup>97</sup> Comm. on the Rts. of the Child., General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3, para. 1), at para. 43, U.N. Doc. CRC/C/GC/14 (May 29, 2013) [hereinafter Comm. on the Rts. of the Child.].

<sup>98</sup> G.A. Res. 44/25, *supra* note 2727, art. 2(1).

<sup>99</sup> Comm. on the Rts. of the Child., *supra* note 97, para. 21.

<sup>100</sup> BLANCHFIELD, *supra* note 28. While it is currently only a signatory, the United States Senate should open discussions regarding the adoption of the Convention on the Rights of the Child. Constitutionally, this would require a 2/3 majority, U.S. CONST. art. II, § 2, but passage of the Convention would bind the United States to the treaty, providing an elevated level of protection to all children within the United States. While the Convention may not be approved by the Senate, it has not yet been presented to the Senate for a vote. *Id.* at Summary.

<sup>101</sup> *Glossary*, U.N. TREATY COLLECTION, [https://treaties.un.org/pages/overview.aspx?path=overview/glossary/page1\\_en.xml#signaturesubject](https://treaties.un.org/pages/overview.aspx?path=overview/glossary/page1_en.xml#signaturesubject) (last visited Oct. 2, 2023).

rather than cloaking children with the right to do so themselves.”<sup>102</sup> Under this analysis, it would seem necessary for an attorney, who is not only an adult, but one well-versed in the immigration law necessary to complete the immigration proceedings, to be appointed to unaccompanied minors so that their rights in the proceeding could be vindicated and protected.

The United States’ failure to provide government-funded counsel to unaccompanied minors could be construed as an act that defeats the object of the Convention.<sup>103</sup> As the New York City program has shown, providing government-funded counsel for children in immigration proceedings would yield more successful claims.<sup>104</sup> If these children have valid claims of asylum or other similar relief, their best interests would not be served by living in dangerous home countries. Therefore, by refusing to implement a system with proven effectiveness, the United States is committing an act of omission that defeats the object of the Convention.

### *B. Convention Relating to the Status of Refugees*

Under the Convention Relating to the Status of Refugees, refugees are entitled to “free access to the courts of law on the territory of all Contracting States.”<sup>105</sup> Additionally, the Convention states that this free access should be “the same treatment as a national in matters pertaining to access to the courts, including legal assistance.”<sup>106</sup>

Additionally, the Convention seeks to ensure implementation of its standards for judicial process in immigration proceedings by stating that refugees cannot be removed from a country on the basis of a decision that was obtained without due process.<sup>107</sup> Refugees have a right to submit their own evidence, appeal a court’s decision, and obtain appointed counsel for the purposes of such appeal.<sup>108</sup>

On the substantive law governing removal, the Convention provides:

Contracting States shall not impose penalties, on account of their illegal entry, on refugees who, coming directly from a

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<sup>102</sup> Lynne Marie Kohm, *Suffer the Little Children: How the United Nations Convention on the Rights of the Child Has Not Supported Children*, 22 N.Y. INT’L L. REV. 57, 90 (2009).

<sup>103</sup> Cf. *Legal Obligations of Signatories and Parties to Treaties*, INSIDE JUST., [https://www.insidejustice.com/intl/2010/03/17/signatory\\_party\\_treaty/](https://www.insidejustice.com/intl/2010/03/17/signatory_party_treaty/) (last visited Oct. 2, 2023) (explaining that a signatory’s duty not to defeat the object of the treaty would not be violated by failing to meet a 70% emissions reduction in the interim period, but it would be violated by increasing emissions).

<sup>104</sup> Poggio, *supra* note 24.

<sup>105</sup> G.A. Res. 429 (V), Convention Relating to the Status of Refugees, art. 16(1) (Dec. 14, 1950).

<sup>106</sup> *Id.* art. 16(2)–(3) (“A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.”).

<sup>107</sup> *Id.* art. 16(2)–(3), 32(2).

<sup>108</sup> *Id.* art. 32(2).

territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.<sup>109</sup>

This ensures that those who face dangers upon return to their country of origin are eligible for protection even if they originally entered under improper procedures.

The protections present in the Convention Relating to the Status of Refugees were expanded in the Protocol Relating to the Status of Refugees.<sup>110</sup> The Protocol has been ratified by the United States, Germany, Greece, and Italy.<sup>111</sup> By this ratification, the protections in the Refugee Convention are standards which all four countries discussed within this Note must uphold.<sup>112</sup>

### *C. Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*

In February 1997, the United Nations High Commissioner for Refugees in Geneva published Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum which seeks to protect the interests of unaccompanied minors across the multiple facets of their lives.<sup>113</sup> In a legal setting, Guideline 4.2 provides: “[u]pon arrival, a child should be provided with a legal representative. The claims of unaccompanied children should be examined in a manner which is both fair and age-appropriate.”<sup>114</sup> This encourages state parties to appoint

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<sup>109</sup> *Id.* art. 31(1).

<sup>110</sup> See generally G.A. Res. 2198 (XXI), Protocol Relating to the Status of Refugees (Dec. 16, 1966).

<sup>111</sup> Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

<sup>112</sup> G.A. Res. 2198, *supra* note 110, art. 1(1) (incorporating the duties of the 1951 Convention by reference by stating, “States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined.”); see also Notes, *American Courts and the U.N. High Commissioner for Refugees: A Need for Harmony in the Face of a Refugee Crisis*, 131 HARV. L. REV. 1399, 1401 (2018) (“The United States joined the international refugee regime in 1968 when it acceded to the 1967 Protocol, thereby taking on the Convention’s obligation’s as well.”).

<sup>113</sup> Off. of the U.N. High Comm’r for Refugees Geneva, Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum 4 (1997), [unhcr.org/3d4f91cf4.pdf](https://www.unhcr.org/3d4f91cf4.pdf) (explaining the purpose of these guidelines was to “promote awareness of special needs of unaccompanied children and the rights reflected in the Convention on the Rights of the Child; to highlight the importance of a comprehensive approach; and to stimulate in discussions in each country on how to develop principles and practices that will ensure that needs of unaccompanied children are being met”).

<sup>114</sup> *Id.* at 5.



counsel to each unaccompanied minor brought into immigration proceedings in their territories.<sup>115</sup> It also takes age into consideration in conducting questioning of unaccompanied minors.<sup>116</sup>

The guidelines further protect children by advising that unaccompanied minors be assigned a guardian and allowed access to legal counsel.<sup>117</sup> Additionally, this guideline explicitly directs that it applies to minors between sixteen and eighteen, who might otherwise be treated as adults in the context of immigration proceedings.<sup>118</sup> The guidelines thus seek to avoid the adultification that can happen to older children in immigration proceedings by ensuring that protections for minority are not terminated early merely because a minor appears more mature.<sup>119</sup>

Rather, the United Nations High Commissioner for Refugees, recognizing the high stakes nature of such proceedings, “encourages states to provide for properly trained legal assistance of unaccompanied minors, that will uphold support of their best interests throughout the entire procedure.”<sup>120</sup> Providing legal counsel ensures there is an adult in the proceedings that is seeking and advocating for the child’s interests and desires, which connects to the Convention on the Rights of the Child’s protection for children to be heard in proceedings which affect them.<sup>121</sup>

## V. A COMPARISON OF GERMANY, ITALY, AND GREECE AND THEIR PROTECTIONS FOR UNACCOMPANIED MINORS IN IMMIGRATION PROCEEDINGS

Because Germany, Italy, and Greece are all members of the European Union,<sup>122</sup> this section will begin by discussing the overarching regulations and protections to which the European Union holds its members. Subsequently, the immigration system of each individual country will be analyzed in light of such standards.

### A. *European Union*

In addition to the measures implemented by the United Nations, the European Union has introduced measures to further heighten protections

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

<sup>116</sup> *Id.* This comports with the due process analysis under U.S. law in other areas of law affecting children. See *J.D.B. v. North Carolina*, 564 U.S. 261, 264–65 (2011).

<sup>117</sup> Off. of the U.N. High Comm’r for Refugees Geneva, *supra* note 113, at 12.

<sup>118</sup> *Id.*

<sup>119</sup> See Hlass, *supra* note 55 (“Perceiving children of color as more mature than they are creates a presumption that they should be held to a higher standard of responsibility and with less forgiveness.”).

<sup>120</sup> Papoutsis, *supra* note 14, at 244.

<sup>121</sup> See Comm. on the Rts. of the Child., *supra* note 97, ¶¶ 43, 45.

<sup>122</sup> *Country Profiles*, EUR. UNION, [https://european-union.europa.eu/principles-countries-history/country-profiles\\_en](https://european-union.europa.eu/principles-countries-history/country-profiles_en) (last visited Oct. 17, 2023).

for unaccompanied minors within its jurisdiction.<sup>123</sup> Some measures include an “[Anti-Trafficking Directive which] obliges Member States to ensure legal representation to these [unaccompanied minors].”<sup>124</sup> Others, such as Dublin III, provide details on the jurisdiction of member states over an unaccompanied minor’s case.<sup>125</sup>

### 1. Directive 2011/95/EU

The EU in 2011 published certain directives with the purpose of setting up protections for refugees and asylees.<sup>126</sup> This directive advocates a best interest of the child standard, in line with that of the Convention on the Rights of the Child.<sup>127</sup> It classifies children, particularly unaccompanied minors, as vulnerable persons whose particular circumstances should be considered in each member state’s implementation of the goals and policies under the directive.<sup>128</sup> One of the key provisions for unaccompanied minors is that the directive urges member states to “take the necessary measures to ensure the representation of unaccompanied minors by a legal guardian or, where necessary, by an organisation responsible for the care and well-being of minors, or by any other appropriate representation including that based on legislation or court order.”<sup>129</sup> Thus, since 2011, E.U. nations should have been making provisions for the representation of unaccompanied minors. As detailed later in this Note, progress on this issue has been mixed.

### 2. Dublin III

The Dublin III agreements are the primary agreements governing jurisdiction and procedure for inter-country immigration proceedings in the European Union.<sup>130</sup> These agreements provide that member states are responsible for providing unaccompanied minors with representatives who “have the qualifications and expertise to ensure that the best

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<sup>123</sup> Council Directive 2011/36, para. 23, 2011 O.J. (L 101) 4–5.

<sup>124</sup> Parusel, *supra* note 15, at 9.

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

<sup>126</sup> Council Directive 2011/95, paras. 1–4, art. 1, 2011 O.J. (L 337) 9, 13.

<sup>127</sup> *Id.* para. 18 (“The ‘best interests of the child’ should be a primary consideration of Member States when implementing this Directive, in line with the 1989 United Nations Convention on the Rights of the Child. In assessing the best interests of the child, Member States should in particular take due account of the principle of family unity, the minor’s well-being and social development, safety and security considerations and the views of the minor in accordance with his or her age and maturity.”).

<sup>128</sup> *Id.* art. 20(3).

<sup>129</sup> *Id.* art. 31(1).

<sup>130</sup> U.N. High Comm’r for Refugees, The Dublin Regulation, <https://www.unhcr.org/media/dublin-regulation> (last visited Oct. 19, 2023).

interests of the minor are taken into consideration during the procedures carried out under this Regulation.”<sup>131</sup>

In seeking compliance with the United Nations’ best interest of the child standard, some of the factors established by the Dublin III agreement include: “(a) family reunification possibilities; (b) the minor’s well-being and social development; (c) safety and security considerations, in particular where there is a risk of the minor being a victim of human trafficking; (d) the views of the minor, in accordance with his or her age and maturity.”<sup>132</sup> As indicated in preceding sections, the ability of the minor to express his or her viewpoint in these procedures is a critical element of aligning procedural rules to the best interests of the child.

One way in which the Dublin III agreement establishes procedural rules that amplify the voices of minors is its provision that individuals appealing their sentence should be provided appointed counsel for the appellate process as well as be provided with any necessary language support for the appeal.<sup>133</sup> The extent and availability of free legal representation for appeals is somewhat limited by considerations of the case’s merits.<sup>134</sup> The provisions state:

Members States shall ensure that legal assistance is granted on request free of charge where the person concerned cannot afford the costs involved. Member States may provide that, as regards fees and other costs, the treatment of applicants shall not be more favourable than the treatment generally accorded to their nationals in matters pertaining to legal assistance.

Without arbitrarily restricting access to legal assistance, Member States may provide that free legal assistance and representation not be granted where the appeal or review is considered by the competent authority or a court or tribunal to have no tangible prospect of success.

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Legal assistance shall include at least the preparation of the required procedural documents and representation before a court or tribunal and may be restricted to legal advisors or

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<sup>131</sup> Commission Regulation 604/2013, art. 6(2), 2013 O.J. (L. 180) 31, 38.

<sup>132</sup> *Id.* art. 6(3).

<sup>133</sup> *Id.* art. 27(5).

<sup>134</sup> *Id.* art. 27(6).

counsellors specifically designated by national law to provide assistance and representation.<sup>135</sup>

Thus, the Dublin III provisions do not allow for counsel to be appointed for frivolous claims and therefore, the provision of counsel does not inhibit the court's efficiency or create a waste of national resources.<sup>136</sup>

In determining a state's responsibility to provide counsel, Dublin III lays out which country has jurisdiction over a child who has crossed international lines.<sup>137</sup> Dublin III lodges the jurisdiction for unaccompanied minors in the location where the minor files for relief, but such jurisdiction is subject to what is in the child's best interest.<sup>138</sup> Thus, the country in which the proceeding will occur is the country in which the child first files for immigration relief or is apprehended by officials.<sup>139</sup>

However, the responsibilities between member states can occasionally become a point of dispute between member states.<sup>140</sup> In general, European Union directives provide certain rights and privileges to immigrants entering the territory within its jurisdiction.<sup>141</sup> For example, "EU law mandate[s] government-supplied accommodations for all asylum seekers while they wait for their asylum hearing."<sup>142</sup> However, the protections of the EU regarding immigration are non-binding insofar as member states must actually transpose the EU guidelines and requirements into their statutory code, but "local structures and historical contexts mold the actual asylum processes in each individual EU state.

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

<sup>136</sup> *See id.*

<sup>137</sup> Commission Regulation 604/2013, *supra* note 131, art. 8(1)–(3).

<sup>138</sup> *Id.* art. 8(4).

<sup>139</sup> *Id.*

<sup>140</sup> *See, e.g.*, SUSAN FRATZKE, NOT ADDING UP: THE FADING PROMISE OF EUROPE'S DUBLIN SYSTEM 24 (2015) (acknowledging that, despite the Dublin system's "aim" at "preventing disputes over responsibility," disagreement "over the distribution of responsibility for asylum applications" continues to present day); Ashley Binetti Armstrong, *You Shall Not Pass! How the Dublin System Fueled Fortress Europe*, 20 CHI. J. INT'L L. 332, 352–53, 360 (2020) (criticizing Dublin III's responsibility-allocation criteria and describing how its disproportionate burden on Member States like Greece and Italy "incentivized [them] to evade Dublin's reach").

<sup>141</sup> Multiple European Council directives have established the minimum standards of care Member States owe to asylum seekers. *E.g.*, Council Directive 2003/9, arts. 5–7, 10–11, 2003 O.J. (L 31) 20–21 (EC) (establishing asylum seekers' rights, including the right to information, documentation, freedom of movement, education, and employment); Council Directive 2004/83, arts. 4–19, 22–34, 2004 O.J. (L 304) 15–22 (EC) (creating common criteria for identifying asylum seekers and reiterating the asylum seekers' rights described in 2003/9); Council Directive 2005/85, arts. 6–22, 2005 O.J. (L 326) 17–24 (EC) (establishing asylum seekers' procedural rights pending the grant or withdrawal of refugee status).

<sup>142</sup> Maryellen Fullerton, *Asylum Crisis Italian Style: The Dublin Regulation Collides with European Human Rights Law*, 29 HARV. HUM. RTS. J. 57, 72 (2016).

Moreover, member states do not always enforce the laws they have passed.”<sup>143</sup> This is often where the difficulties begin.

Because regulations must be implemented into an individual nation’s code, the European Court of Human Rights (ECtHR) held that “ratification of refugee and human rights conventions does not necessarily entail compliance with the treaty provisions.”<sup>144</sup> Thus, EU member states cannot blindly assume that fellow member states are in compliance with EU guidelines.<sup>145</sup> If a country is aware that a systemic problem with compliance exists, they cannot transfer an asylum seeker back to the non-complying country under the Dublin III agreement.<sup>146</sup> The European Court of Human Rights ruled in 2011 that:

the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the convention . . . .<sup>147</sup>

This is particularly relevant to the treatment of unaccompanied minors because they often must cross through several countries en route to their final destination.<sup>148</sup> Under the combination of Dublin III and the European Court of Human Right’s ruling in *In the case of MSS v. Belgium and Greece*, unaccompanied minors seeking to settle in Germany can file in Germany and subject themselves to that jurisdiction (and the associated procedural rules) rather than filing upon entry in countries such as Italy or Greece.<sup>149</sup> Because of this narrow ability to control the

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<sup>143</sup> *Id.* at 66.

<sup>144</sup> *Id.* at 105.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *M.S.S. v. Belgium and Greece*, 2011-I Eur. Ct. H.R. 255, ¶ 353.

<sup>148</sup> *Unaccompanied Minors in the Migration Process*, FRONTEX 17–18 (Dec. 2010), [https://www.frontex.europa.eu/assets/Publications/Risk\\_Analysis/Unaccompanied\\_Minors\\_in\\_Migration\\_Process.pdf](https://www.frontex.europa.eu/assets/Publications/Risk_Analysis/Unaccompanied_Minors_in_Migration_Process.pdf) (describing the typical migration patterns of unaccompanied Afghan minors, which may involve crossing the borders of Italy, France, or Germany to reach Denmark or crossing the borders of Greece, Italy, Germany, the Netherlands, and Sweden to reach Norway); Janna Ataiants et al., *Unaccompanied Children at the United States Border, a Human Rights Crisis that Can Be Addressed with Policy Change*, 20 J. IMMIGR. MINORITY HEALTH 1000, 1001 (2018) (explaining that unaccompanied minors seeking entry into the U.S. may “travel over 1000 miles and cross several borders” prior to arriving at their final destination).

<sup>149</sup> *See M.S.S. v. Belgium and Greece*, 2011-I Eur. Ct. H.R. 255, ¶ 339 (explaining that the Dublin Regulation allows a State to “examine an application for asylum lodged with it by a third-country national,” and therefore become the “State responsible for the purposes of

jurisdiction of their proceeding, this Note will now examine the immigration processes in Germany, Italy, and Greece.

### *B. Germany*

Germany was one of the primary destination countries entering unaccompanied minors sought to reach.<sup>150</sup> Upon arrival of migrants, German reception centers have a duty to:

inform the foreigner, if possible, in writing and in a language which he can reasonably be assumed to understand, of his rights and obligations under the Act on Benefits for Asylum Applicants. With the information referred to in the first sentence, the reception centre shall also inform the foreigner about who is able to provide legal counsel and which organizations can advise him on accommodations and medical care.<sup>151</sup>

Additionally, Germany is one of the countries that provides counsel to asylum seekers.<sup>152</sup>

Minors, more specifically individuals under the age of eighteen, cannot file an asylum application with the Federal Office for Migration and Refugees on their own, because they do not have legal capacity.<sup>153</sup> To seek asylum, these minors must have an application filed by either a guardian or a youth welfare office.<sup>154</sup> Guardians must be provided to unaccompanied minors by the youth office, as well as providing a supervisor.<sup>155</sup> Materials that describe the immigration process to the

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the Regulation”); FED. ASS’N FOR UNACCOMPANIED MINOR REFUGEES, WELCOME TO GERMANY: A GUIDE FOR UNACCOMPANIED MINORS 30 (Tobias Klaus & Ulrike Schwarz, eds., R. Mhandu trans., 2016), [https://b-umf.de/src/wp-content/uploads/2017/12/welcometogermany\\_english.pdf](https://b-umf.de/src/wp-content/uploads/2017/12/welcometogermany_english.pdf) [hereinafter WELCOME TO GERMANY: A GUIDE FOR UNACCOMPANIED MINORS] (noting that, although the Dublin regulation requires adults to return to their country of entry during the pendency of their asylum application, the requirement “does not apply to unaccompanied underage refugees . . . if [they] posted [their] asylum application in Germany.”).

<sup>150</sup> Parusel, *supra* note 15, at 3 (relying on data from 2008 to 2016).

<sup>151</sup> Asylgesetz [AsylG] [Asylum Act], Sept. 2, 2008, BGBl I at 1824, § 47(4) (Ger.).

<sup>152</sup> KAREN MUSALO ET AL., REFUGEE LAW AND POLICY: A COMPARATIVE AND INTERNATIONAL APPROACH 1019 (5th ed. 2018) (“In recognition of the importance of counsel, a number of State signatories to the Refugee Convention provide counsel to asylum seekers who would otherwise proceed unrepresented. Among the States that generally do so are Canada, Austria, Belgium, Denmark, Finland, Germany, the Netherlands, Sweden, and the United Kingdom.”).

<sup>153</sup> *Unaccompanied Minors*, FED. OFF. FOR MIGRATION & REFUGEES (June 7, 2023), <https://www.bamf.de/EN/Themen/AsylFluechtlingsschutz/UnbegleiteteMinderjaehrige/unbegleiteteminderjaehrige-node.html>.

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

<sup>155</sup> WELCOME TO GERMANY: A GUIDE FOR UNACCOMPANIED MINORS, *supra* note 149, at

unaccompanied minors explain that “[t]he guardian will take care of you from a legal standpoint, the supervisor will take care of you in your everyday life.”<sup>156</sup> Additionally, a minor seeking asylum cannot be interviewed until the minor has had a guardian appointed, and the guardian must be in attendance with the option for a curator or advisor.<sup>157</sup>

Thus, Germany’s provision of appointed guardians for unaccompanied minors comports with the international standards and allow the child’s voice to be heard in court on an equal footing with the adults who are also present in the immigration proceeding. This may be one of the reasons that it is such an attractive destination country for many unaccompanied children.

### C. Italy

In the last decade, Italy has been a popular arrival site for migrants, primarily from North Africa.<sup>158</sup> In 2015, over 3,700 people sought to reach Italy but fell victim to the perils of the Mediterranean Sea in the process.<sup>159</sup> Between January 1 and February 23, 2023 there were 13,067 migrants that arrived on Italy’s shores in boats.<sup>160</sup> Of those, at least 861 were unaccompanied minors.<sup>161</sup> In 2022, 13,386 unaccompanied minors were registered in Italy.<sup>162</sup> Most of the migrant children that enter Italy are unaccompanied, which differs from the Greek statistics for migrant children.<sup>163</sup> However, because of “increasing immigration hostility in these and other EU countries and its interaction with cumbersome bureaucracy, and now the COVID-19 pandemic, Italy and Greece have, de facto, become host countries where there is an uncertain future for these minors.”<sup>164</sup>

In the Italian immigration system, there are Constitutional provisions that would offer asylum “to all those who have been prevented from participating in democratic self-government.”<sup>165</sup> However, the

<sup>156</sup> *Id.*

<sup>157</sup> *Unaccompanied Minors*, *supra* note 153.

<sup>158</sup> See Crispian Balmer, *Factbox: Migrant Arrivals in Italy on the Rise, Despite High Danger*, REUTERS (Feb. 26, 2023, 11:21 AM), <https://www.reuters.com/world/europe/migrant-arrivals-italy-rise-despite-high-danger-2023-02-26/#:~:text=The%20record%20number%20of%20arrivals,Tunisia%20and%2015%25%20from%20Turkey>.

<sup>159</sup> Fullerton, *supra* note 142, at 60.

<sup>160</sup> Balmer, *supra* note 158.

<sup>161</sup> *Id.*

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

<sup>163</sup> Ravinder Barn et al., *Unaccompanied Minors in Greece and Italy: An Exploration of the Challenges for Social Work Within Tighter Immigration and Resource Constraints in Pandemic Times*, 10 SOC. SCI. (SPECIAL ISSUE) 1, 2 (2021).

<sup>164</sup> *Id.* at 13.

<sup>165</sup> Fullerton, *supra* note 142, at 74.

Parliament has not made efforts to incorporate this clause into the statutory law of Italy.<sup>166</sup> Individuals in immigration proceedings “may bring a lawyer, but most do not.”<sup>167</sup> Despite this, more than half of asylum cases obtain the sought relief.<sup>168</sup> While it may seem that this proportion of positive results indicates an assigned counsel system would be unnecessary in Italy, the assistance of a lawyer in cases could improve the efficiency of the system as well as potentially obtain an even higher percentage of asylum grants.

In comparison to other E.U. countries, Italy is advanced in its protections for unaccompanied minors.<sup>169</sup> Italian law prevents unaccompanied minors from being deported or placed in detention centers during the pendency of their proceedings.<sup>170</sup> Rather, “children are issued residence permits simply on the grounds of their minor age. Once they turn 18, they are given legal permission to remain in Italy under certain conditions.”<sup>171</sup> Additionally, in 2017, Italy became the first European country to codify protections for unaccompanied minors that included the assignment of a guardian and eligibility to attend public school, receive healthcare, and stay with foster families.<sup>172</sup> Italy’s law 47/2017 provides voluntary guardians to serve as the “legal representative and spokesperson” for unaccompanied minors.<sup>173</sup> However, these voluntary guardian positions are filled by “private citizens willing to exercise the legal representation of a foreign minor who arrived in Italy without reference adults.”<sup>174</sup> Thus, Italy does not guarantee a licensed attorney as representative for these children.<sup>175</sup>

Additionally, as a result of the COVID pandemic which arrived in Italy in early 2020, certain changes were made to the immigration system due to shutdowns and border closures.<sup>176</sup> Within this vein, “[s]ome

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<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 77.

<sup>168</sup> *Id.* at 79.

<sup>169</sup> Rozzi, *supra* note 1717.

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

<sup>171</sup> *Id.*

<sup>172</sup> Ruffino, *supra* note 6.

<sup>173</sup> Barn et al., *supra* note 163, at 6.

<sup>174</sup> *Id.*

<sup>175</sup> See *id.*; see also EUR. UNION AGENCY FOR FUNDAMENTAL RTS., GUARDIANSHIP FOR UNACCOMPANIED CHILDREN IN ITALY 1–4 (Mar. 2018), [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2018-it-guardianship-legal-update\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-it-guardianship-legal-update_en.pdf) (describing voluntary guardians as “private citizens”).

<sup>176</sup> See Gabriela Fernandez et al., *Social Network Analysis of COVID-19 Sentiments: 10 Metropolitan Cities in Italy*, 19 INT. J. ENVIRON. RES. PUB. HEALTH 7720, 7721 (2022) (“Italy’s first confirmed case of Covid-19 was reported on 20 February 2020”); e.g., Sophie Carlei & Fatia Bouteiller, *Italy-Covid-19-Immigration Update*, DELOITTE SOCIÉTÉ D’AVOCATS, <https://blog.avocats.deloitte.fr/italy-covid-19-immigration-update/> (last updated Jan. 5, 2021) (detailing changes in residency permit validity as lockdowns began to ease in Italy).



essential services for the protection of UAMs—such as cognitive interviews with qualified personnel, the appointment of a guardian and legal information—have been suspended in the absence of shared standards and in compliance with social distancing measures.”<sup>177</sup> It remains to be seen how Italy will reimplement these procedures after working through the COVID backlog.

In Italy, there are some protections for the arriving unaccompanied minors, but the sheer volume of unaccompanied minors entering the country as well as the COVID pandemic created difficulties in implementation that indicate more could be done to ensure the voices of children are being heard in Italian immigration courts.

#### *D. Greece*

In Lesvos, a major arrival town for migrants in Greece, a group of migrant children interviewed “expressed their current situation as worse than living under the factors that forced or motivated them to migrate.”<sup>178</sup> Given the difficulties that unaccompanied minors can face on their journeys, including homelessness, gang violence, sexual assault, war, and disease,<sup>179</sup> this statement by the children in Lesvos should draw concern over the conditions unaccompanied minors are facing in Greece.

In the Greek immigration system, asylum seekers can obtain appointed counsel in order to appeal their initial decisions to the Supreme Administrative Court, but like the Dublin III standards,<sup>180</sup> only where “the appeals are not manifestly inadmissible or ill-founded.”<sup>181</sup> However, immigrants seeking relief on appeal statistically only obtained a positive ruling in 4.13% of cases.<sup>182</sup> The vast majority of appeals offer no relief to the migrants seeking it. By comparison, the success rates in five other European countries,<sup>183</sup> based on data from 2008, was 36.2%.<sup>184</sup>

In addition to the grim prospects of obtaining appellate relief, Greece poses a unique situation in that it has existing legislation, but repeated criticisms show that enforcement of statutory rights and protections is not

<sup>177</sup> Barn et al., *supra* note 163, at 5.

<sup>178</sup> Vasileia Digidiki, *The Experience of Distress: Child Migration on Lesvos, Greece*, in RESEARCH HANDBOOK ON CHILD MIGRATION 447, 447, 452 (Jacqueline Bhabha et al. eds., 2018).

<sup>179</sup> NAT'L CHILD TRAUMATIC STRESS NETWORK, UNACCOMPANIED MIGRANT CHILDREN 1 (2015) [hereinafter UNACCOMPANIED MIGRANT CHILDREN], [https://www.nctsn.org/sites/default/files/resources/unaccompanied\\_migrant\\_children.pdf](https://www.nctsn.org/sites/default/files/resources/unaccompanied_migrant_children.pdf).

<sup>180</sup> Council Regulation 604/2013, art. 27(6), 2013 O.J. (L 180) 46 (EU).

<sup>181</sup> M.S.S. v. Belgium and Greece, 2011-I Eur. Ct. H.R. 255, ¶ 118.

<sup>182</sup> *Id.* ¶ 126.

<sup>183</sup> The five countries included in this data were France, Germany, Italy, Sweden, and the United Kingdom. *Id.*

<sup>184</sup> *Id.*

being achieved.<sup>185</sup> First, there is inadequate implementation of legal aid ensuring that immigrants in proceedings are adequately represented.<sup>186</sup>

Additionally, while Greece has legislated expedited review of the relief applications of unaccompanied minors,<sup>187</sup> like other unenforced legislation, this provision has not been adequately implemented.<sup>188</sup> Meanwhile guardianship is largely handled directly by police officers “due to inadequacies of the currently operating guardianship system. This leads to the paradox in which authorities primarily responsible for law enforcement bear responsibilities for child migrants’ protection at the same time.”<sup>189</sup> These failures to enforce protective provisions prevent the child’s voice from being adequately heard in immigration proceedings and therefore falls short of the best interests of the child standard.

While Greece struggles to ensure that it protects child migrants in more than word only, progress has been made in their detention law because recent legislation ended the practice of “detaining newly arrived UAMs in police stations across the country, sometimes for months with unrelated adults.”<sup>190</sup> Moving forward, it remains to be seen whether this new legislation will be better enforced in conformance with the Convention on the Rights of the Child than the provisions regarding appointment of counsel previously have been enforced.

## VI. NEXT STEPS LEGALLY: THE UNITED STATES

A 2020 survey indicated that 67% of the U.S. population is in favor of providing government-funded lawyers to immigrants in removal proceedings.<sup>191</sup> In fact, more than half of those involved in the survey were supportive of funding counsel for immigrants with criminal convictions.<sup>192</sup>

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<sup>185</sup> *Id.* ¶ 300 (“[F]or a number of years the UNHCR and the Council of Europe Commissioner for Human Rights, as well as many international non-governmental organisations, have revealed repeatedly and consistently that Greece’s legislation is not being applied in practice and that the asylum procedure is marked by such major structural deficiencies that asylum-seekers have very little chance of having their applications and their complaints under the Convention seriously examined by the Greek authorities . . . at the end of the day they are not protected against arbitrary removal back to their countries of origin . . .”).

<sup>186</sup> *Id.* ¶¶ 299–301.

<sup>187</sup> Barn et al., *supra* note 163, at 8 (“As in Italy and other countries such as Finland, Hungary, Malta, and Spain, UAM applications for asylum are prioritized and examined in a shorter time than those of adults.”).

<sup>188</sup> Digidiki, *supra* note 178, at 451.

<sup>189</sup> Papoutsis, *supra* note 14, at 240–41.

<sup>190</sup> Barn et al., *supra* note 163, at 9. The abolishing law was L. 4760/11.12.2020. *Id.*

<sup>191</sup> VERA INST. OF JUST., PUBLIC SUPPORT IN THE UNITED STATES FOR GOVERNMENT-FUNDED ATTORNEYS IN IMMIGRATION COURT 1 (2021), <https://www.vera.org/downloads/publications/taking-the-pulse-national-polling-v2.pdf>.

<sup>192</sup> *Id.* (showing that 56% of those surveyed supported access to government-funded counsel for immigrants with criminal convictions).

This sort of public support indicates that a program of government-funded counsel for unaccompanied minors would be well-received in the United States. Additionally, support for this sort of program is not correlated only to one political party or preferred candidate.<sup>193</sup>

Many people recognize that leaving children without representation in immigration proceedings could have grave consequences, particularly for children who may lack full knowledge about how dangerous their home country is or who may lack the ability to express that danger to the immigration judge deciding their case.<sup>194</sup> Additionally, without representation, children face risk of deportation at nearly every point in the course of the proceeding.<sup>195</sup> Thus, this Note proposes the modification of 8 U.S.C. § 1232(c)(5) to provide for government-funded attorneys who can represent unaccompanied minors. This section first addresses the funding concerns this raises and then discusses legislative next steps.

### A. Funding

Funding is of course an important concern raised in opposition to providing appointed counsel for minors in immigration proceedings.<sup>196</sup> NERA Economic Consulting conducted a fiscal analysis of the costs for providing immigrants in removal cases with appointed counsel and found that such a program might be covered by the savings in other areas of the immigration process, including decreased costs of detention and decreased costs associated with greater court efficiency.<sup>197</sup> In fact, even using conservative estimates, 98% of the program costs could be offset by

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<sup>193</sup> See *id.* at 9 (“There is sizable support for government-funded attorneys for immigrants facing deportation across political party identifications and regardless of 2020 presidential vote choice.”).

<sup>194</sup> See Magnus Treiber, *From Revolutionary Education to Futures Elsewhere: Children and Young Refugees Fleeing from Eritrea*, in RESEARCH HANDBOOK ON CHILD MIGRATION 49, 61 (Jacqueline Bhabha et al. eds., 2018) (“Social workers and law clinics have repeatedly expressed their surprise at the lack of country knowledge of their Eritrean clients, a risk factor in asylum applications which depend on proof of a well-founded fear of persecution by the asylum applicant.”); Hernandez, *supra* note 43.

<sup>195</sup> See Cheatham & Roy, *supra* note 26 (describing how some unaccompanied minors face immediate deportations under U.S. law during multiple stages of the immigration process and that “[t]oday, unaccompanied minors apprehended in Mexico en route to the United States face almost-certain deportation”); see also Ataiants et al., *supra* note 148, at 1003 (“Unaccompanied children experience substantial hurdles as they navigate complex and adversarial immigration proceedings. . . . Without legal origination, some children are subjected to deportation *in absentia* for failure to appear in immigration court.”); KIDS IN NEED OF DEFENSE (KIND), KIND BLUEPRINT: CONCRETE STEPS TO PROTECT UNACCOMPANIED CHILDREN ON THE MOVE 6 (2020) (stating it is “virtually impossible for children to navigate protection systems without lawyers” and that “attorneys make the difference between relief and deportation”).

<sup>196</sup> See Hernandez, *supra* note 43, at 157.

<sup>197</sup> MONTGOMERY, *supra* note 34, at 2–3, 26.

savings, leading to a maximum total cost of \$4 million per year.<sup>198</sup> The length of a case for a detained individual could be shortened by 12.7 days simply by providing such individuals with appointed counsel.<sup>199</sup>

Likewise, appointing counsel would decrease the cost of detention by making detention less necessary. In one six-year study, 93% of individuals represented by counsel appeared for their court cases compared with only 32% of individuals who were proceeding on their cases pro se.<sup>200</sup> This could indicate a decreased cost for detention in the future if unaccompanied minors were provided with appointed counsel, as they would have a higher likelihood of showing up to court proceedings without being detained.<sup>201</sup> Thus, the rationale behind detention as an assurance that respondents will show up to court would be minimized substantially by the fact that providing appointed counsel correlates to a nearly two-fold increase in likelihood of respondents to reappear in court.<sup>202</sup> The costs of detention are substantial.<sup>203</sup> In a comparison of different detention methods, the costs of detention for each child over a five-year period after initial detention were “conservatively estimated at \$33,008, \$33,790, and \$34,544 after 5 years for No Detention, Family Detention, and Zero Tolerance, respectively.”<sup>204</sup> On a larger scale, annual totals for “spending increases ranged from \$1.5 million to \$14.9 million for Family Detention and \$2.8 million to \$29.3 million for Zero Tolerance compared to baseline spending under the No Detention scenario.”<sup>205</sup> These estimated costs did not include the increase in number of persons being detained, which is approximated as costing the government \$126 per detained individual per day.<sup>206</sup>

Finally, funds could be saved by the increase in court efficiency. In Marin County, California, the appointment of immigration counsel has been put into practice on a small scale.<sup>207</sup> In that setting, appointments

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<sup>198</sup> *Id.* at 3.

<sup>199</sup> *Id.* at 11.

<sup>200</sup> Eagly & Shafer, *supra* note 22, at 73.

<sup>201</sup> *See id.* at 74–75.

<sup>202</sup> *Id.* at 73.

<sup>203</sup> *See, e.g.,* T. Joseph Mattingly II et al., *Unseen Costs: The Direct and Indirect Impact of U.S. Immigration Policies on Child and Adolescent Health and Well-Being*, 33 J. TRAUMATIC STRESS 873, 877, 879 (2020) (explaining that detention costs are more substantial due to additional direct health care costs and indirect societal costs in addition to housing costs).

<sup>204</sup> *Id.* at 873.

<sup>205</sup> *Id.* at 877.

<sup>206</sup> *Id.* at 879; Ingrid Eagly et al., *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 CAL. L. REV. 786, 802 (2018) (using the 2017 fiscal year federal budget report to reach the \$126 per day figure and noting that the daily cost of detention per family unit is “even higher” at “approximately \$161 per person, or \$644 for a family unit of four”).

<sup>207</sup> MONTGOMERY, *supra* note 34, at 26.

were found to “eliminate[] one hearing per case and save[] 5 to 15 minutes of hearing time per hearing, as well as 1 to 1.5 hours of court staff time per case.”<sup>208</sup> The NERA report concluded from this data that on a national scale, appointment of counsel would “save about 87,000 hearings per year from the reduction in continuances, and about 115,000 hours of court staff time per year more generally.”<sup>209</sup> Thus, the funding for a program that provides government-funded counsel to unaccompanied minors is financially feasible.

### *B. Proposed Legislation*

The first legislative step that should be taken by Congress would be to revise 8 U.S.C. § 1232(c)(5) by striking the last sentence of that section which gives preference to pro bono counsel.<sup>210</sup> Instead, the statute could be revised to create a budget for government-funded immigration attorneys, much like a public defender’s office but for attorneys who specialize in removal defense to represent unaccompanied minors. As demonstrated above, the reduced costs to the immigration court system and detention system would offset the costs of such a program.

Immigration courts already provide for representation by BIA (Board of Immigration Appeals) Accredited Representatives.<sup>211</sup> By expanding this program and licensing more individuals as Accredited Representatives, the immigration courts could ensure that all children received representation by qualified legal professionals.

Other legislative possibilities include proposals similar to a Senate bill from 2019, the Fair Day in Court for Kids Act of 2019.<sup>212</sup> The bill sought to amend INA § 240(b) and would have provided counsel to individuals classified as unaccompanied minors even after they reached the age of majority.<sup>213</sup> Codifying a right to protection in the immigration code would further solidify the protections for child migrants and ensure that the immigration courts complied with added requirements to provide counsel.

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<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 26–27.

<sup>210</sup> *See* 8 U.S.C. § 1232(c)(5) (“To 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>211</sup> *See* 8 C.F.R. § 1292.1(a)(4) (2023) (“An individual whom EOIR has authorized to represent immigration clients on behalf of a recognized organization, and whose period of accreditation is current and has not expired. A partially accredited representative is authorized to practice solely before DHS. A fully accredited representative is authorized to practice before DHS, and upon registration, to practice before the Immigration Court and the Board.”).

<sup>212</sup> S. 662, 116th Cong. (2019).

<sup>213</sup> *Id.* § 2(a).

## VII. BIBLICAL PRINCIPLES

While immigration is prevalent in political discussions and media updates, it is not as often discussed in churches. Nonetheless, there are Biblical principles at play surrounding this issue, particularly regarding treatment of immigrants, children, and justice.

### *A. Treatment of Immigrants*

Regarding immigrants, the Bible has a few passages that speak to Israel's commanded duty towards sojourners. In Exodus 22:21-24, God commands the Israelites,

You shall not wrong a sojourner or oppress him, for you were sojourners in the land of Egypt. You shall not mistreat any widow or fatherless child. If you do mistreat them, and they cry out to me, I will surely hear their cry, and my wrath will burn, and I will kill you with the sword, and your wives shall become widows and your children fatherless.<sup>214</sup>

This sentiment is further reiterated in Deuteronomy 10:17-19, which says:

For the LORD your God is God of gods and Lord of lords, the great, the mighty, and the awesome God, who is not partial and takes no bribe. He executes justice for the fatherless and the widow, and loves the sojourner, giving him food and clothing. Love the sojourner, therefore, for you were sojourners in the land of Egypt.<sup>215</sup>

Thus, Christians have a duty to care about the immigrants and refugees around us because God has expressed that immigrants and their needs are important to Him.

### *B. Children*

The Bible also clearly demonstrates the heart of God for children. In Matthew 19:13-15, Jesus rebukes the disciples for keeping the children away from him.<sup>216</sup> The passage says:

Then children were brought to him that he might lay his hands on them and pray. The disciples rebuked the people, but Jesus said, "Let the little children come to me and do not hinder them,

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<sup>214</sup> *Exodus 22:21–24 (ESV).*

<sup>215</sup> *Deuteronomy 10:17–19 (ESV).*

<sup>216</sup> *Matthew 19:13–15.*

for to such belongs the kingdom of heaven.” And he laid his hands on them and went away.<sup>217</sup>

Jesus also healed Jarius’s daughter,<sup>218</sup> which further demonstrates the value he placed on children.

### *C. Justice*

The Bible also points to justice throughout its pages. God commands the Israelites: “You shall not be partial in judgment. You shall hear the small and the great alike. You shall not be intimidated by anyone, for the judgment is God’s. And the case that is too hard for you, you shall bring to me, and I will hear it.”<sup>219</sup> It is clear a toddler in U.S. immigration court is not truly being given the opportunity to be heard, when they may not speak English and cannot understand the proceedings around them. By failing to provide these immigrant children with counsel, we are failing to give them an opportunity to be fairly heard in these cases, and justice is not being accomplished. As this instruction to the Israelites shows, God cares about procedural justice in addition to obtaining a just result.

The prophet Micah also remarks that the Lord calls His people to seek justice, writing: “He has told you, O man, what is good; and what does the LORD require of you but to do justice, and to love kindness, and to walk humbly with your God?”<sup>220</sup>

Additionally, James addresses the issue of justice in discussing partiality within the church. He asks the church to consider: “Listen, my beloved brothers, has not God chosen those who are poor in the world to be rich in faith and heirs of the kingdom, which he has promised to those who love him?”<sup>221</sup> Here, this caution is for the church to avoid engaging in unjust behaviors. Then James further commands them: “If you really fulfill the royal law according to the Scripture, ‘You shall love your neighbor as yourself,’ you are doing well. But if you show partiality, you are committing sin and are convicted by the law as transgressors.”<sup>222</sup> Thus, those who are guided by Biblical principles should seek to ensure that justice is done for all people because God cares about both procedural justice and obtaining a just result.

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<sup>217</sup> *Id.*

<sup>218</sup> See *Mark* 5:40–42; *Luke* 8:49–56.

<sup>219</sup> *Deuteronomy* 1:17 (ESV).

<sup>220</sup> *Micah* 6:8 (ESV).

<sup>221</sup> *James* 2:5 (ESV).

<sup>222</sup> *James* 2:8–9 (ESV).

## VIII. CONCLUSION

This Note sought to analyze the level of representation provided for unaccompanied minors in the United States, Germany, Italy, and Greece. It compares these findings to the international standards governing those nations. It concludes by analyzing the effective parts of these systems and suggests the creation of a counsel appointment system in the United States.

As highlighted from the stories of minors traveling to another country in the Introduction of this Note, unaccompanied minors often experience trauma. This trauma can manifest in a variety of symptoms including stomachaches, nightmares, changes in mood, insomnia, behavioral changes, hypervigilance, anxiety, and a lack of joy in play or other previously enjoyed activities.<sup>223</sup> After all that these children have endured to reach a place of safety, it seems the least we can do to ensure their stories are heard and the protections they need from the dangers of home can be properly requested.

--*Elizabeth M. Gilbert\**

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<sup>223</sup> UNACCOMPANIED MIGRANT CHILDREN, *supra* note 179, at 4.

\* Elizabeth M. Gilbert is a May 2024 J.D. graduate of Regent University School of Law. She would like to thank Associate Dean Jeffrey Brauch for his guidance in writing and shaping this Note. Additionally, she thanks her fiancé, David Evans, for his time meticulously proofreading this Note and finding many formatting errors, and for his loving support in the writing of this Note.