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FOR THE KIDS

ARGUMENTS IN FAVOR OF
RIGHT TO COUNSEL

Kathleen Guthrie Woods

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hildren in the Bay Area are being detained every day in removal hearings at immigration court. Compounding the trauma of what these children have already endured, many are then left to fend for themselves in court, facing proceedings too complex for even many adults to understand.

“To me, it’s incredibly scary to have a child in court without representation,” says Avantika Shastri, former legal director of the San Francisco Immigrant Legal Defense Collaborative and the Immigrant Legal Defense Program for the Justice and Diversity Center (JDC) of the Bar Association of San Francisco (BASF). “It’s shocking,” says Abigail Trillin, executive director of Legal Services for Children, “and we should be shocked.”

In May 2019, the United States Court of Appeals for the Ninth Circuit declined to address the question of whether “appointment of counsel for minors in removal proceedings is constitutionally required.” The eleven-judge en banc panel in *C.J.L.G. v. Barr* ruled in favor of the Honduran boy on the merits of his immigration claim, but the panel did not reach the constitutional issue of whether children have the right to counsel. Judge Richard Paez, in a concurring opinion signed by two other judges, said the constitution guarantees the right to appointed counsel “for indigent children under age 18 who are seeking asylum, withholding of removal, CAT [Convention Against Torture], or another form of relief for which they may be eligible, such as SIJ [Special Immigrant Juvenile] status.”

While the case was still pending, we examined some of the expressed reasons for denying children the right to

appointed counsel and asked child advocates in the Bay Area why they respectfully disagree.

“THEY’RE NOT U.S. CITIZENS, THEREFORE THEY SHOULD NOT BE AFFORDED THE SAME RIGHTS.”

Although it’s been the practice to extend due process protections to noncitizens, political pressures in recent years have chipped away at those rights in immigration proceedings. For example, the original decision handed down in *C.J.L.G.* in January 2018 stated the court would not “upend Congress’s statutory scheme” by requiring legal counsel for children. Children who have been in federal custody may receive representation through the Vera Institute of Justice, which has a contract with the Office of Refugees and Resettlement (ORR), but once those children

THERE'S SOME SORT OF TRAUMA THAT BROUGHT THEM TO COURT IN THE FIRST PLACE. [THE LACK OF ADEQUATE FUNDING FOR LEGAL REPRESENTATION] IS COMPOUNDING THE TRAUMA.

Kristin Mateer
East Bay Children's Law Offices

are released, they lose that representation. "Immigration court always makes it clear that people have the right to counsel, but it's at their own expense," says Claire Fawcett, who is the attorney coordinator for JDC's Attorney of the Day Program (AOD).

But children—as well as adults—in removal proceedings face huge obstacles. "How many people are going through it alone, are engaging in a legal fight for their lives without someone to help them?" asks Stephen Kang, a detention attorney for the ACLU Immigrants' Rights Project. "They've fled here for safety," says Trillin, "yet the court system makes them feel unsafe."

In *C.J.L.G.*, his attorneys spoke to the unfairness of a child having to "stand alone in front of an immigration judge, opposed by a federal prosecuting attorney." On behalf of C.J.L.G., they argued, "it was impossible for him to get a fair hearing, including a meaningful opportunity to apply for asylum and present an application for an immigrant juvenile visa." Statistics show that a child's lack of legal representation can have serious ramifications. Between 2004

and 2014, according to a study of federal data by Syracuse University, "more than half the children who did not have lawyers were deported. Only one in ten children who had legal representation were sent back" to their countries of origin.

For many advocates, it isn't an "us versus them" issue. "What are we saying as a society when we deny the right to counsel in detention hearings and removal proceedings?" asks Zabrina Aleguire, co-executive director of East Bay Family Defenders. "The immigration issues we're having in this country today should not be a matter of opinion," says Fawcett, "it should be about human rights."

Children in juvenile delinquency and dependency proceedings are entitled to lawyers. Immigration courts have never recognized this right.

"You have the right to counsel at every level of criminal proceedings, even if you are detained only one night," says Trillin. But, according to the government, children in immigration proceedings are not "locked up," they're "in shelters." "I know the excuse," says Trillin. "If they wanted out, they could just go back [to their home country]."

"The government also argued that the immigration statute itself forbids the provision of [court-appointed] representation to people facing removal," says Kang, who is part of the team representing C.J.L.G., "but for various reasons, we don't agree with their interpretation of the statute." Aleguire refers to *In re Gault*, a case heard by the United States Supreme Court in 1967 that determined juveniles accused of crimes in delinquency proceedings must be afforded many of the same due process rights as adults, including the right to counsel. "It was the first time establishing a right to court-appointed counsel in the context of children being incarcerated," she says. Advocates also cite *Kenny A. v. Deal*, a 2005 dependency case heard in the United States Court of Appeals for the Eleventh District. In the decision, justices wrote "...because a child's fundamental liberty interests were at stake... it was

in the state's and child's interest to appoint an attorney for the child."

Some of the hurdles are procedural, and pushback is strong by the Trump Administration. "There's a deep resistance to establishing precedent," says Kang. For the case that became *C.J.L.G.*, disagreements arose over the proper way to raise the issue in federal court. "We were told each individual pro se kid has to go to court, ask for an attorney, and have the individual removal case rejected," Kang says. Initially, C.J.'s mother tried hard to get him an attorney for an asylum hearing, but was unsuccessful, and they lost in immigration court. The ACLU got involved and appealed it to the Ninth Circuit.

Whether their cases are criminal or civil, the children are participating in very serious legal proceedings with very high stakes, and advocates believe attorneys should be by their sides. "It's an issue of great importance to us," says Kang. "We feel we're right on the law."

"JUDGES WILL MAKE SURE IT'S FAIR."

While it's assumed judges in immigration court will provide fair treatment and assistance to unrepresented children in removal proceedings, they cannot be seen as intervening, advising, or advocating on behalf of the child. Expecting children to adequately understand the processes and procedures defies common sense. "Immigration is a complicated area of law," says Fawcett, "requiring an incredible amount of training and oversight." While it's up to the judge to ask appropriate questions to obtain the facts of the case, the child may not understand the language or know how to answer the court's questions, what questions to ask the judge, or what evidence to provide.

"The legal requirement is you must establish a well-founded fear of persecution," says Bill Ong Hing, a professor at USF Law School who works with its Immigration and Deportation Defense Clinic. This may include providing evidence of being threatened by a gang or being a victim of domestic violence, and it's unlikely a child would have

the wherewithal to obtain corroborating evidence through sources such as media reports or Amnesty International. "It's an abusive process," says Aleguire, "and with no one to support them, the trajectory of their lives can be changed."

The environment is inherently intimidating. "In court, the person must tell their story in person," says Hing. "The judge needs to hear it, the government must be able to cross-examine." But according to Assistant Chief Immigration Judge Jack H. Weil, placing this burden on a child isn't a problem. In a 2015 deposition, he infamously claimed, "I've taught immigration law literally to three-year-olds and four-year-olds. It takes a lot of time. It takes a lot of patience. They get it. It's not the most efficient, but it can be done." This claim inspired Amy Maldonado, an immigration attorney based in Michigan, to videotape a series of mock immigration interviews in 2016 with three- and four-year-olds. The kids' answers to her questions are hilarious and sobering. In one, featured in a segment on "Immigration Courts" on HBO's *Last Week Tonight with John Oliver* in 2018, the interviewer asked, "If you were removed, would you like to designate a country of removal?" to which the child answered "Yeah." "Okay, what country would that be?" "Um...pizza." (You'll find the *Last Week Tonight* episode and some of Maldonado's interviews on YouTube.)

Another factor is the inconsistency in rulings across the country. "Variances in asylum approval rates among judges are staggering," says Hing, and according to a report by Transactional Records Access Clearinghouse (TRAC), a data-gathering organization at Syracuse University, denial rates among judges in San Francisco's Immigration Court ranged from 97 to 10 percent.

"IT'S EXPENSIVE. WHO'S GOING TO PAY FOR THIS?"

Cost is a leading argument for why the Trump Administration should not have to provide free counsel to undocumented, indigent immigrants.

The ACLU did its own studies and presented them to the Ninth Circuit with its *C.J.L.G.* brief. Regarding complaints



An immigrant mother and her young child captured coming across the United States-Mexico border are released at a bus station. The family will travel to stay with family members in the US while awaiting a deportation or asylum hearing. Photo credit: Bob Daemmrich / Alamy

about the cost of providing representation, Kang responds, “One, the government pays a lawyer to represent itself in every deportation proceeding, so why not level the playing field? And two, the cost is not nearly as large as people make it out to be, when you keep in mind that some will pay for their own lawyers while others will receive pro bono assistance from other sources.”

It’s interesting to note that research indicates equal representation can actually reduce costs. In 2008, in one Florida county, the state saved money on administrative costs and services when children were represented by attorneys, in part because those children spent less time being cared for in custody. The American Bar Association

reports improved efficiency and fairness in proceedings in which all parties have legal representation.

In 2014, the New York Immigrant Family Unity Project (NYIFUP) became the first program in the country to provide government-funded legal counsel to qualified indigent, detained noncitizens who met specific financial criteria. In 2017, the program was deemed a success when a study revealed a “direct and causal relationship” between representation through NYIFUP and efficient court operations, improved access to due process for clients, and a projected success rate of 48 percent for clients.

Still, it’s unclear where money for mandatory representation would initially come from. California has recognized a

child's right to counsel in dependency proceedings for decades. California's Brown-Presley Trial Court Funding Act (1988) provided some funds for trial court operations, and since 1989 the state has assumed responsibility for funding court-appointed counsel for indigent parents and children. "But funding has never been fully realized," says McNerney. "Only thirty years later are we now in reach of closing the gap," thanks to years of advocacy, spurring the state legislature and Governor Newsom's administration to invest in the program. In late 2018, there was a policy change at the United States Children's Bureau, an agency under the United States Department of Health and Human Services. That change will release funds from Title IV-E of the Social Security Act to reimburse states for a portion of the cost of providing children and indigent parents with legal representation. Funding is crucial," says McNerney, for "establishing a right to counsel doesn't mean anything without a budget."

"The court cases are complicated, confusing, traumatic," says Kristin Mateer, executive director of East Bay Children's Law Offices, an organization that works with children and parents in dependency cases. "There's some sort of trauma that brought them to court in the first place. [The lack of adequate resources for legal representation] is compounding the trauma."

"ATTORNEYS WORKING PRO BONO AND NONPROFIT ORGANIZATIONS CAN HANDLE IT."

Indeed, hundreds of organizations are working to fill the need. "Legal services do the best they can, but they do not have enough funding or staffing to bear the burden to represent all of these people," says Fawcett. Individual attorneys' caseloads are overwhelming, and long waiting lists are common. A National Study of Access to Counsel in 2015 determined less than two percent of immigrants in removal proceedings were able to obtain pro bono legal representation.

Fawcett, who coordinates JDC's AOD program, which provides pro bono counseling and same-day representation to individuals in removal proceedings in San Francisco's

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Justice & Diversity Center

Immigration Court, says in February, she routinely saw twenty-plus unrepresented children on each docket. In March 2019, USF Law School's Immigration and Deportation Defense Clinic had 300 open cases, of which 70 percent were with children. The clinic, which first opened in 2015, currently operates with seven full-time staff members, two of whom are attorneys, and five to ten students each semester.

Beyond being overwhelmed by the number of people who need help, agencies take on responsibilities that go beyond the scope and stress levels of typical legal representation. Every semester, staff from USF travel to a detention center to hold a pro se clinic, to Tijuana to meet people stuck at the border, or to meet with clients in the Central Valley.

"We often take the emergency cases," says Jacqueline Brown Scott, the supervising attorney of the USF School of Law's Immigration and Deportation Defense Clinic, and there is additional pressure because those clients are working against tight timelines. Trillin includes the consequences of what's called "detention fatigue." "They're frustrated,"

she says. “We see children who have very strong cases, but who choose to be deported because they can’t take it [being detained] any more.”

Mateer also points out that, done right, these cases aren’t one-day events. Especially when working with traumatized children, it can take time for them to trust the strangers trying to help. “These children are truly unaccompanied in every sense of the word,” says Trillin, and the scope of the work encompasses personal and professional support. Their attorneys provide services that would be impossible for these extremely vulnerable children to handle on their own. “It could be someone to get around the bureaucracy for the kid, for example, help getting his birth certificate,” says Mateer. “A child can’t articulate everything necessary,” says Hing, so it falls to the lawyer to try to obtain the information indirectly, such as asking friends and neighbors to fill in gaps, and researching the conditions that forced the child to flee their home country.

One of the organizations working to address the needs is the San Francisco Immigrant Legal Defense Collaborative, in which JDC holds a leadership role. Funded in 2014, the collaborative is comprised of fifteen partner agencies that provide technical assistance, training, mentoring, and resources for attorneys, as well as direct assistance and legal counsel for families and children.

Advocates remain guardedly hopeful that the right to appointed counsel will one day be the norm. For them, the answer to “Why do kids need and deserve an attorney?” is simple. “These are kids,” says Kang. “It’s just the right thing to do.”

Kathleen Guthrie Woods is a San Francisco-based freelance writer and a regular contributor to San Francisco Attorney. Previous articles include “Understanding the Crisis in Our Immigration Courts” (Spring 2015) and “Meet Nemo” (Winter 2018).

HOW YOU CAN HELP



Learn more about the San Francisco Immigration Legal Defense Collaborative at sfildc.org.



Volunteer for JDC’s Attorney of the Day Program. Learn more at www.sfbar.org/aod.



Offer financial support, contact JDC Director of Donor and Community Engagement Shuwaski Young at 415-782-8917 or syoung@sfbar.org.