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## Representing Child Migrants (in the Midst of Our Border Crisis)

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# Representing Child Migrants (in the Midst of Our Border Crisis)

<http://family.jotwell.com/representing-child-migrants-in-the-midst-of-our-border-crisis/>

Shani M. King, *Alone and Unrepresented: A Call to Congress to Provide Counsel for Unaccompanied Minors*, 50 *Harv. J. Legis.* 331 (2013).



Caroline Bettinger-Lopez

Some of the summer's biggest news headlines focused on the surge of children from Guatemala, El Salvador, and Honduras who, fleeing widespread violence and extreme poverty, have crossed the U.S.-Mexico border to seek refuge in the United States.<sup>1</sup> The border crisis has sparked a highly politicized debate, with compromise solutions shifting steadily to the right. The most recent bipartisan proposal would, in many cases, require detention of minors (in violation of the 1997 Flores v. Reno settlement requiring the release of migrant children, when possible, to relatives or foster care) and result in rapid deportations without due process.

Within this contemporary context, Shani King's *Alone and Unrepresented: A Call to Congress to Provide Counsel for Unaccompanied Minors*, provides a fresh perspective on the issue. King argues that three constellations of international and regional human rights standards—children's rights, immigrants' rights, and the right to civil counsel—should be interpreted together to provide the right to free legal counsel for unaccompanied minors in immigration proceedings. King offers an extremely helpful collection of international and regional standards on these rights, as well as comparative examples from countries that provide representation to unaccompanied minors facing immigration proceedings. Congress, he concludes, should likewise enact legislation guaranteeing legal representation to unaccompanied minors. King's article is thought-provoking and practically useful, and it can serve as a source of persuasive international authority to support recent proposals and lawsuits calling for constitutional due process rights of unaccompanied minors.

King begins with a helpful review of the standard law and policy arguments in favor of appointing free legal counsel to unaccompanied minors: the vulnerability of unaccompanied minors as they navigate an unfamiliar and arduous legal process; the complexity of immigration law; and the significantly increased likelihood for immigrants, especially minors, with lawyers to win their cases over those who represent themselves. Few academics, however, have argued that unaccompanied minors have the *right* to free legal counsel, and constitutional challenges along these lines have failed. (N.B.: the ACLU recently filed a new lawsuit challenging the federal government's failure to provide minors with legal representation in deportation hearings).<sup>2</sup> The closest the federal government has come to fulfilling this right, King offers, is a contract with the Vera Institute of Justice to manage the Unaccompanied Children Program, which provides legal assistance to unaccompanied minors and has increased the percentage of children who receive free legal assistance in immigration proceedings from ten percent in 2003 to fifty percent in 2011.<sup>3</sup>

Although King does not advert to the principal human rights instruments that are binding upon the United States (the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture (CAT), and the American Declaration on the Rights and Duties of Man), he does undertake a thoughtful exploration of various international and regional standards that support free legal representation to children in other international law contexts. King thoughtfully combs through human rights treaties, case law, and “soft law” from the United Nations treaty monitoring bodies, and the European, Inter-American, and African human rights systems. He describes how international bodies have explicitly applied both the international “best interests of the child” standard (which, interestingly, was modeled after the U.S. “best interests” standard) and the right to family unity in the context of unaccompanied minors, and makes a compelling argument for why proceedings for unaccompanied minors “may well present the most compelling scenario for free civil counsel.” (366).

The Article makes an especially valuable contribution when it surveys the laws of various countries that provide free representation to unaccompanied minors. Some countries, such as Finland, Norway, Sweden, Switzerland, and the Netherlands, appoint attorneys and personal representatives/guardians for unaccompanied minors. Other countries, including Austria, the Netherlands, Finland, Canada, the United Kingdom, France, Denmark, Australia, and New Zealand, provide children the right to free representation—legal, personal, or both—only *after* preliminary processing takes place, and some of these countries provide this right only to children seeking asylum. In contrast, the United States and Uganda provide children the right to counsel only at the minor’s expense. King maps these foreign laws and practices onto international human rights standards and analyzes their shortcomings, such as exceptions to the right to free representation, the appointment of non-lawyer legal representatives, and delays resulting in crucial interviews occurring without representation.

King concludes by recommending a model for Congress that guarantees “the appointment of an attorney, who gives the child a voice, before any interviews by border patrol agents or immigration officials, [and] who is specially trained in immigration law and in representing children. For those children who cannot express their own interests, the government should also appoint a personal representative, or guardian, who can guide the attorneys.” (376). The guardian must be the exception rather than the rule, he wisely insists, because the lawyer’s role is to represent the client’s best interests, and too many cooks could unnecessarily complicate matters.

*Alone and Unrepresented* is brimming with international standards and comparative examples that make a compelling case for the right to free counsel for unaccompanied minors in the U.S. Indeed, advocates are now making that case in the international arena. Last month, a coalition of human rights and immigrants’ rights advocates appeared at a hearing before the Inter-American Commission on Human Rights on the “Human Rights Situation of Migrant and Refugee Children and Families in the United States” and argued that the United States is committing human rights violations by, *inter alia*, failing to provide migrant children with legal representation. The hearing came on the heels of a site visit by the Commission to the southern U.S. border to evaluate U.S. compliance with international human rights obligations. The Commission’s preliminary findings identified several troubling human rights violations. King’s thoughtful analysis is reflected in these developments in the international arena, and marks an important example of human rights praxis.

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1. Haeyoun Park, Q. and A.: Children at the Border, Aug. 7, 2014 (updated), *available at* <http://www.nytimes.com/interactive/2014/07/15/us/questions-about-the-border-kids.html?action=click&contentCollection=U.S.&module=RelatedCoverage&region=Marginalia&pgtype=article>. [?]
2. *See* ACLU Press Release, *J.E.F.M. v. Holder*, Aug. 1, 2014, *available at* <https://www.aclu.org/immigrants-rights/jefm-v-holder>. [?]
3. For detailed data on unaccompanied children in immigration court, *see* Transactional Records Access Clearinghouse (TRAC) at Syracuse University, *New Data on Unaccompanied Children in Immigration Court*, July 15, 2014, *available at* <http://trac.syr.edu/immigration/reports/359/>. [?]

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