

PROTECTING THE HUMAN RIGHTS OF UNACCOMPANIED IMMIGRANT MINORS

Kate Englund

School of Social Service Administration

University of Chicago

Abstract

Each year, approximately 8,000 immigrant children under the age of 18 enter the United States without a parent, guardian, or legal documents. Without adequate access to legal resources or social services, many of these children will be returned to dangerous situations in their home countries. This paper argues that to protect the human rights of each child, it is critical to understand their circumstances and to determine their eligibility for legal relief. It demonstrates that social workers with an expertise in cross-cultural communication and advocating for the vulnerable can provide a critical voice for these children by uncovering their stories and fighting for their best interests.

The United States' immigration system can be confusing and complex for anyone to navigate, but especially so for immigrant children who arrive here without parents. Each year, thousands of unaccompanied minors arrive in the United States—through the U.S.-Mexico border, by boat, or at an airport—and, upon arrival, they are soon caught up in a dense web of governmental and legal actors. Unaccompanied minors are particularly powerless because of their dual status as immigrants and as children. As immigrants, a majority of whom are racial minorities in the United States, they may automatically be distrusted. Group characteristics can favor or harm a case for asylum, especially when the immigrant is not given ample opportunity to gain recognition as an individual with a unique story. As children, they are almost powerless to represent themselves in the myriad of legal contexts they face.

Within the chaos of interacting with shelter workers, government officials, immigration lawyers, and judges, social workers can serve as a vital component to come alongside the child and ensure that there is an advocate looking out for the child's best interests and basic human rights. With their

expertise in acculturation issues, cross-cultural competence, and knowledge of child development, the role of social workers in this context is to work with the legal and governmental actors who decide a child's fate. The social worker must speak out for the human rights of each child and ensure that his or her needs are being voiced. While accounting for the unique rights of children, social workers can utilize child welfare best practice principles to advocate for more humane detention standards and the provision of legal representation for every unaccompanied minor who is detained by immigration authorities.

THE HUMAN RIGHTS OF CHILDREN

The United Nations' 1959 Declaration of the Rights of the Child argued that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth." In 1989, the international community adopted the Convention on the Rights of the Child (CRC) to provide universal standards concerning the treatment of children. To date, the United States and Somalia are the only two countries that have not ratified this convention.

Human rights language attempts to articulate a set of principles whereby all people would be afforded the same legal protections and assurances of dignity. In the case of children, a human rights approach "rejects the presumption that children are entitled to only those rights that governments grant them, that the dominant culture will tolerate, or that the market will bear" (Ensalaco and Majka 2005, 2). Instead, the CRC outlines the rights inherent to the humanity of children, including the right to a family, a name, a nationality, and an education, as well as protection from abuse, abandonment, or neglect. Article 3 of the CRC states, "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" (OHCHR 1989).

While poverty and inequality hamper the development of children worldwide, protecting children's rights demands that nations adjust their budgetary priorities in such a way as to promote the safety, education, health, and nutrition of the children among them, as well as to establish safeguards to protect children from exploitation and abuse (Ensalaco and Majka 2005). The distinctive vulnerabilities of children make the basic rights outlined by the CRC and other human rights documents essential, as children are less likely than adults to be able to claim these rights for themselves and to speak out when their rights are being violated.

IMMIGRATION LAW AND THE TREATMENT OF MINORS

In 2009, there were at least 922,500 applications for asylum worldwide from people seeking protection outside of their country of origin. Of these, 18,700 of them, or four percent of total asylum claims, were lodged by unaccompanied and separated children under the age of 18 (UNHCR 2010). Although the number of unaccompanied minors trying to gain entry into the United States is small, the numbers are growing. In 2005, there were 7,787 unaccompanied minors detained by U.S. immigration authorities, up 26 percent from the previous year.

Children often flee their country of origin for the same reasons as adults: escaping war, fleeing persecution, or seeking reunification with family members (Kotlowitz 2006). Despite the demand being placed on governments to create frameworks for processing an influx of unaccompanied minors, nations like the United States have only recently made a distinction between the treatment of immigrant minors and the treatment of immigrant adults.

Governmental policies surrounding immigrant children have improved dramatically over the last 15 years, but they are still not sufficient to protect basic human rights. Despite policies that view the needs of the child as more important than the need to bar foreigners from entering the United States, accounting for children's particular experiences has rarely been used to help shape immigration policies (Nugent 2006). Until recently, immigrant families and unaccompanied minors were all housed in the same detention centers, with conditions akin to those of prisons. Maltreatment of unaccompanied minors was first brought to public attention in 1985, when a group of children filed a lawsuit (*Reno v. Flores*) against the U.S. Immigration and Naturalization Service (INS). The suit stemmed from an INS policy which limited the release of immigrant children to a parent or legal guardian, except in "unusual or compelling circumstances" (Nafziger 2006, 366). This policy kept children detained even when a distant relative or other adult was willing to be a guardian. The case helped to expose the inhumane conditions of detention centers and resulted in mobilization and advocacy efforts to change government policies. Settlement of the case included two stipulations: first, children should be treated with dignity and respect in recognition of their unique vulnerability as minors; second, children should be held in the "least restrictive setting appropriate to the minor's age and special needs" (Nafziger 2006, 370-371). Despite the implications of the settlement, it was not until 2002 that the government started to implement elements of those standards. The Homeland Security Act removed jurisdiction over immigrant children from the INS and granted it to the Office of Refugee Resettlement (ORR), an office with expertise working with child refugees.

The INS was unable to protect the rights of children because of a conflict of interest between being a guardian and being the police officer and prosecutor of those same children, making ORR a more suitable option to administer placement decisions (Nugent 2006). Transferring responsibility to ORR created more humane detention possibilities for immigrant children, with the establishment of shelters, group homes, and foster care families to house children undergoing immigration proceedings. Nonetheless, some unaccompanied minors continue to be housed in secure facilities, an exception that is written into immigration policy for “limited circumstances,” including times of influx and emergency, or when children pose a danger to others. In spite of this provision, 80 percent of unaccompanied minors detained in secure facilities are non-delinquent (Nafziger 2006).

The second piece of legislation enacted to improve the situation for immigrant children was the Unaccompanied Alien Child Protection Act (UACPA) of 2005. The UACPA reformed the release of children, loosened the requirements for potential guardians, prohibited the detention of unaccompanied minors in delinquent or adult facilities if they have not displayed violent or criminal behavior, and prohibited the unreasonable use of restraints, solitary confinement, or strip searches (Nafziger 2006). To date, however, the effectiveness of the UACPA in implementing these standards has yet to be measured. Without creating laws that outline the penalties for violating standards of the UACPA, the discretion of government officials will continue to dictate how immigrant minors are treated.

Violations of immigrant minors’ rights include physical abuse and, in particular, invasive medical testing. For example, the Department of Homeland Security (DHS) has the authority to determine who will be categorized as an adult based on unreliable dental and wrist bone forensics—a method that can err by a few years (Nugent 2006). In detention facilities, unaccompanied minors are subject to the discretion of law enforcement officials to interpret what is considered an unreasonable use of restraints and strip searches (Nafziger 2006). Continuing to lobby for policies outlining more humane treatment of unaccompanied minors will be ineffective without legal enforcement of standards promoting the best interests of the child. Although the UACPA offers hope for better treatment of immigrant minors, the manner in which government officials interacting with unaccompanied children have the freedom to use discretion that infringes on the welfare of the child fails to live up to the policy’s ideals.

THE ROLE OF SOCIAL WORKERS IN GIVING VOICE TO UNACCOMPANIED MINORS

While refugees have obtained legal status abroad prior to being resettled in the United States or elsewhere, asylum seekers seeking international protection often have little time to obtain refugee status in their country of origin before crossing international boundaries. Since many asylum seekers may nevertheless be eligible for resettlement based on persecution experienced in their home countries and a well-founded fear of returning, it is vital that their claims are listened to and addressed upon arrival in the United States. Compared to adults, minors are more likely to be involuntary immigrants. Susan Krehbiel, the Director of Children's Services for Lutheran Immigration and Refugee Service, states that unaccompanied minors often get "caught up in a transnational network that is so beyond their understanding" (Kotlowitz 2006). Rather than being provided guidance as to whether their case qualifies them to be granted asylum or another form of legal relief such as the T-visa for victims of trafficking or Special Immigrant Juvenile Status (SIJS), unaccompanied minors have no legal rights and are not provided with legal representation unless it is voluntarily given to them by social service agencies. Unless a pro-bono attorney or volunteer steps in to advocate for them, unaccompanied minors will spend months to years in detention, face a judge alone, or be unjustly deported.

After being arrested by DHS, unaccompanied minors are put under the care of ORR and confront administrative removal proceedings by the Executive Office for Immigration Review (EOIR), a division of the Department of Justice (DOJ). In these proceedings, the child faces a trained DHS attorney before an immigration judge, and as many as 90 percent of these children have no representation in court (Nugent 2006). It is a violation of basic human rights for the U.S. government to continue to claim that unaccompanied minors have no right to government-appointed legal counsel as non-citizens, especially when their age or language ability precludes them from comprehending what is happening to them. Failing to understand children's rights to asylum and the potentially hazardous situations they may have left behind in their country of origin is blatantly placing children into harm's way when they are deported. In one such case, a 16-year-old Guatemalan boy was deported despite his pleas for asylum and having an aunt living in the United States who had offered to take custody of him. Upon repatriation to Guatemala, he was killed by the gang he had tried to flee (Piwowarczyk 2006).

In addition to being provided with legal representation, children in the domestic child welfare system who have been abused, neglected, or abandoned are provided with child advocates, or *guardians ad litem*, in court

proceedings. These individuals act as a voice in court for children who may be unable to advocate for themselves. Although non-profit organizations and projects such as the Immigrant Child Advocacy Project in Chicago have emerged over the last decade to train volunteers to act as child advocates for unaccompanied immigrant minors, the majority of these children will never receive such support due to a lack of capacity. At the very least, *guardians ad litem* must be provided by the federal government for all unaccompanied minors if every child is to receive a fair trial. Advocates are needed because U.S. immigration policies give discretion to public law officials—from border patrol agents and detention workers to the judiciary—that can potentially excuse rigid interpretations of laws and disregard a child’s best interests. In this legal framework, social workers who are trained as *guardians ad litem*, or who work with shelter staff, are well positioned to act as a vital source of support for unaccompanied minors at risk.

The domestic child welfare standards that prioritize the safety, permanency, and well-being of the child can and should be translated into work with immigrant children (Detlaff and Rycraft 2010). Often those making decisions about housing unaccompanied minors do not have enough expertise in child development to make sound judgments about appropriate placements (Piwowarczyk 2006). Family reunification, the ultimate goal of domestic child welfare policies, is neglected when immigrant children are withheld from family members due to differences in legal status. While home studies are necessary in certain circumstances, the lengthy process of conducting home studies to investigate the suitability of a potential sponsor for a child lengthens the time children remain in detention and separated from friends or relatives. By providing an informed perspective on child welfare standards in the domestic system and how these standards may apply cross-culturally, social workers can provide recommendations to judges and shelter staff regarding reunification efforts.

While social workers may advocate on behalf of children at risk of deportation or extended detention, they can also ensure that children are empowered to act as their own advocates. Article 12 of the CRC provides that “States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child” (OHCHR 1989). In the court of law, however, there are many reasons why a child may not be granted an opportunity to express her or his point of view. With their expertise in interviewing children, counseling survivors of trauma, and establishing rapport with cross-cultural clients, social workers may be able to extract the child’s story and empower him or her to bring critical information into the court. Social workers are particularly attuned to people’s stories, with special interest given to relationships, circumstances, histories, tragedies, and losses (Kohli and

Mitchell 2007). By using the language of the CRC, social workers and lawyers can collaborate to write best interest letters to judges.

In addition to advocating for unaccompanied immigrant children and communicating their stories to the authorities, social workers can continue to be vital advocates for the economic rights of immigrants who arrive in the United States without money or resources. Children have little power in dictating what services they can and cannot receive, especially when they have no claim to citizen rights. For adolescents who gain asylum, having access to education, vocational training, and social services to support them in making the transition to adulthood is critical. A study conducted between 2001 and 2002 in the United Kingdom revealed a heightened risk of homelessness and unemployment for asylum-seekers who aged out of care and lost contact with social services (Kohli and Mitchell 2007). Social workers can help plan for the transitional services needed by youth about to age out, as well as help immigrant minors access the economic resources and social services they require.

CONCLUSION

Without the will to recognize that human rights apply to all children regardless of citizenship status, policies such as the UACPA will continue to be an ideal rather than a set of minimal standards. Providing legal representation and a *guardian ad litem* to all unaccompanied minors is one step towards protecting their rights. Social workers who have direct experience working with unaccompanied minors and with other undocumented immigrants must be a part of advocating for U.S. policies that will protect the human rights of these populations. Outside of their role as a direct social support and professional in advocating for the needs of an individual child, social workers can use their direct practice experiences to inform policy and to make recommendations to governing bodies such as ORR. The United States has started to recognize the distinctive needs of unaccompanied minors, but the provisions of relevant laws too often fall short of monitoring the multiple actors who are implementing decisions about what constitutes a child's best interests. Without proper legal representation and the support of a *guardian ad litem*, immigrant children will continue to be subject to unfair legal proceedings in which their voices are stifled.

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ABOUT THE AUTHOR

Kate Englund is a second-year student at the School of Social Service Administration. Originally from Portland, Oregon, she received a B.A. in human development from Boston College. Her travels and work in humanitarian disaster relief have taken her to Mali, Ethiopia, Uganda, and the Democratic Republic of the Congo. She currently interns at the Immigrant Child Advocacy Project, where she works with unaccompanied minors undergoing immigration proceedings. After she graduates, Kate hopes to continue working in the field of child protection, particularly in the support of orphans and vulnerable children in sub-Saharan Africa.