

# Lost Children

by PETER AFRASIABI

We can begin assessing the kind of process people in our immigration system deserve by revisiting immigration cases from the turn of the last century. In 1901, a Japanese national, Ms. Yamataya, arrived at the Port of Seattle. Deemed a burden on the public charge and ordered deported (the substantive immigration law of that day posited that those who entered illegally and would be a public burden were *per se* excludable), Ms. Yamataya argued to stay.<sup>1</sup> The Supreme Court took her case and issued an important immigration ruling—before her liberty interests could be impinged upon—her right to avoid an unwarranted deportation—Ms. Yamataya was entitled to “all opportunity to be heard” on whether she was in fact a public burden; this “opportunity” was held to be included in the Fifth Amendment’s guarantee of due process.<sup>2</sup>

Two decades later, this fair process concept became further rooted in the Fifth Amendment’s guarantee of due process when the Supreme Court held that a wrongful deportation has the potential to inflict perhaps the most serious of losses upon one’s constitutional liberty rights—a “loss of both property and life; or of all that makes life worth living.”<sup>3</sup>

By 1945, the Supreme Court confronted a case where an Australian man, Harry Bridges, had lived in the United States unlawfully for twenty years but was subject to a deportation order. Because “deportation is a penalty—at times a most serious one,” the Supreme Court held that “[m]eticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.”<sup>4</sup>

## Where Children in the 21st Century Fit into this Framework

It is my contention that the immigration system in its current state does not dispense justice, nor does it afford real due process consistent with the principles articulated by the Supreme Court in the last century. Considering everything

from immigration judges to the laws (and the body politic by extension) to the government lawyers overzealously deporting immigrants and the underperforming private immigration bar, radical systemic change is needed so that the liberty interests (and sometimes lives) of people in the system may be managed and guarded properly. Much of that needed change can be found in precedents from property disputes, since our federal and state courts protect our rights so well in those cases. Life and liberty questions should be harmonized with our federal (and state) courts’ treatment of property rights.

Children are particular victims of this break in due process between our immigration and non-immigration court systems. There are thousands of children in political asylum immigration proceedings every year. None of those children are appointed guardians *ad litem* by any legal structure. This is because, in immigration proceedings, there is no legal requirement for a child to be appointed a guardian to assess the child’s unique issues; there’s just a vacuum.

In contrast, our federal and state courts have complicated laws and procedures that exist to protect the interests of children. In those forums, when the money or claims of a child are at stake, courts require control

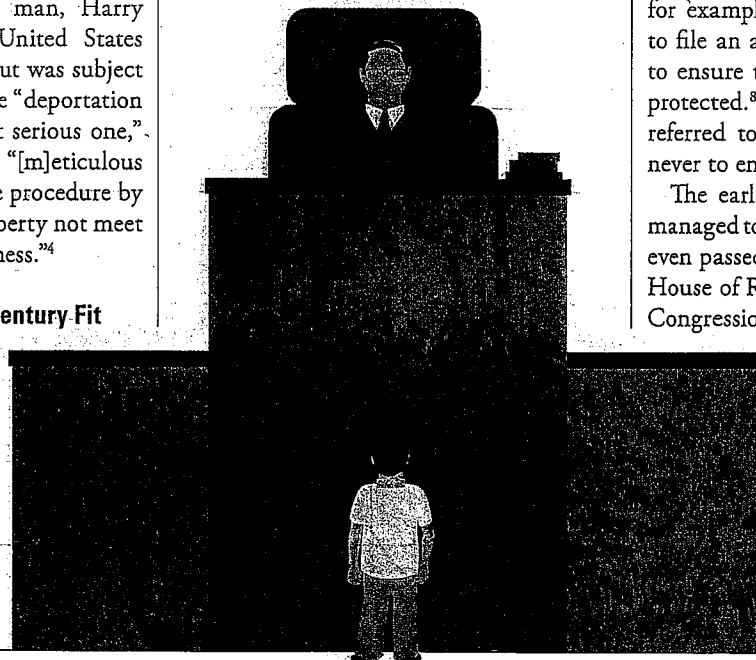
over the proceeds and the existence of a formal guardian.<sup>5</sup> Indeed, the rules are so well-developed that the Central District even has local rules designed to guarantee that the process is employed before money is paid to a child on a claim: there must be formal appointment of a guardian, the court has to approve the settlement as appropriate, the money must be paid to the court’s trust account, and the court requires proof that the guardian has posted a surety bond covering the settlement or judgment.<sup>6</sup>

But in immigration court, there are no such rules, even where children arrive in the United States alone, without a parent, and seek asylum. For this group of children, even the argument that they have *de facto* parental guardians falls away. Instead, these children traverse the immigration system without a parent or a guardian.

Over the years, bills have been introduced to provide some basic guardian *ad litem* protections for unaccompanied children in immigration proceedings. In 2007, Senator Dianne Feinstein introduced a proposed bill, the Unaccompanied Alien Child Protection Act of 2007, which sought to create what are in effect government-appointed guardians, known as “Child Advocates.”<sup>7</sup> A Child Advocate would investigate all the facts of the case, consult with lawyers on possible arguments, ensure that able counsel (one, for example, who did not miss a deadline to file an appeal) is secured, and take steps to ensure that the child’s best interests are protected.<sup>8</sup> This bill was introduced and referred to a committee for consideration, never to emerge.

The earlier 2005 version of this bill had managed to make it out of committee and was even passed by the Senate, but it died in the House of Representatives.<sup>9</sup> Interestingly, the Congressional Budget Office analyzed the 2005 Bill and concluded that it would cost approximately \$7 to 8 million dollars to implement. This amounts to a couple of cents per American to implement these child protection reforms.<sup>10</sup>

This, then, casts the cauldron in which we can assess the impact of the



absence of positive laws from Congress (and the lack of any equivalent federal court due process demands) by considering the story of one such unaccompanied child seeking political asylum.

### One Child's Plight

Johnny<sup>11</sup> was born in Honduras in 1994. He lived with his mother and a man he assumed was his father. His mother abandoned him a few years after his birth and moved to the United States, where she refused to help or support him. Johnny was left in Honduras with his "father." This man in fact had married Johnny's mother when she was already pregnant, and when she left, the man remarried and kicked Johnny to the street as a young boy. Johnny then moved into a home shared by his paternal grandmother and paternal uncle.

executed street children and youths in what appears to be a "social cleansing" program.<sup>14</sup> A lot of these extrajudicial, state-sanctioned executions of children have a nexus to gang warfare and the drug operations of Honduran gangs. In 2002, it was reported that 556 children were murdered under these circumstances.<sup>15</sup>

Johnny had one hope, though. His maternal uncle, a man named Aldo, was fortunate to live in the United States and was worried about Johnny. Aldo arranged for Johnny to be brought through Central America to a border crossing at Texas, where Johnny was able to enter the United States in 2004. Johnny was nine years old at this point.

The immigration authorities learned of his entry and began deportation proceedings. At his first hearing, Johnny appeared without a lawyer and without an appointed guardian *ad litem*. Aldo attended, but Aldo did not speak English well so he communicated with the judge through an interpreter. The immigration judge set another hearing. At the second hearing, there was an attorney present for Johnny. Still, Aldo was not appointed as guardian *ad litem*, nor was he ever questioned to see if he was capable or competent to be one for Johnny. Another hearing was set, but this time a different attorney appeared for

Johnny. Again, Aldo was not questioned to see if he was capable or competent to be a guardian *ad litem* for Johnny or to ensure that he had communicated all issues to the lawyer to advocate on Johnny's behalf, and he again was not appointed as a guardian with identified, corresponding duties.

The immigration judge then ordered the parties to proceed with testimony about Johnny's experiences to see if he qualified for political asylum. At Johnny's one-morning trial, Johnny and Aldo testified about the horrible conditions in Honduras. Aldo explained that the gangs there try to recruit children like Johnny to use them in the drug trade. Johnny testified about his abusive uncle. Johnny explained that he feared a return to Honduras "because somebody might kill me" and because he feared his gangster "uncle" in Honduras. Johnny explained that, since arriving in the U.S., he had adjusted well to school here and wanted to be an attorney when he grew up.

Johnny had a *prima facie* case for asylum according to the Convention Against Torture, given his membership in an arguable social group and fear of serious physical harm if returned to Honduras. Johnny also had a claim that he was entitled to relief under the Special Immigrant Juvenile Status laws, which allow children who have been the victims of

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Johnny's uncle was an alcoholic who beat Johnny regularly. Johnny's uncle was also a member of a Honduran gang, which meant that the house was infested with gang members. Johnny's grandmother was powerless to help him, so Johnny lived under the thumb of an abusive gang member.

Johnny could not look to the Honduran government for help because Honduras is not a particularly child-friendly nation. In 2006, our State Department issued a report finding that Honduran police regularly engaged in acts of violence against children and poor youth, often using lethal force.<sup>12</sup> The 2010 State Department Report similarly concluded that the extra-judicial murders of children in Honduras had increased in recent years.<sup>13</sup> Amnesty International has likewise noted that the Honduran state

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abuse, neglect, or abandonment to the street a unique pathway to relief from removal. But after hearing Johnny's story, the immigration judge refused to grant Johnny political asylum. When Johnny appealed to the Board of Immigration Appeals (BIA), it simply agreed with the immigration judge.<sup>16</sup> Johnny was thus ordered deported by the BIA. His immigration lawyers did not go back again to the Ninth Circuit for a full and final evaluation of the merits of his asylum case.

Maybe Aldo could not afford to pay the lawyers to continue, or did not understand the odds of success and failure in Johnny's case before the Ninth Circuit. Maybe Aldo did not know of the myriad of *pro bono* resources for final appeals, or maybe Aldo even died, leaving Johnny with other distant "family" members who lost track of Johnny's case. Maybe the lawyers messed up, harried and underpaid, as is all too common in immigration cases. However, if a formal guardian or advocate had existed—an independent child welfare professional who was trained in immigration law and appointed to advocate for Johnny—we would know the answers to these questions and be assured that at least someone embraced full responsibility for the child's well-being *vis-à-vis* the American immigration system. We

would know that someone made an educated decision not to pursue an appeal to the only neutral court available (the federal Circuit Courts of Appeal) for an immigrant child who faced a risk of return to gangs on the streets of Honduras by way of an order issued by an Executive-controlled immigration court (which are reversed by appellate courts at staggeringly higher rates than other courts). Instead, Johnny's case became a lone digit in the statistics of children who enter the United States unaccompanied and whose cases end in a process that is not designed to provide the same accountability, accuracy, and safety that our federal and state courts afford property.

### Lost Fidelity to Our Basic Constitutional Precepts

It is of course right and just that children in courts addressing property disputes have extra protections so that their property is not stolen by parents, friends, or managers, and so that their interests may be more carefully guarded and assessed before the issuance of legal decisions that affect their rights. Due process has been assiduously developed in these court systems precisely because the constituents of our democracy—the voters, the parents, the judges, the legislators—recognize that children in property court are, or on any given day may be, our children. But children like Johnny are not *our* children and not likely to be *our* children. They are here without documentation and without parental support; they do not have parents who vote or sit on school boards, legislative bodies, or courts. They are invisible in the shadows of society and in the shadows of the law. Thus, there has been no corresponding demand from the constituents of our social, political, and legal systems for the application of the same accepted, basic tenets of due process for these children.

Johnny needed a similar due process—whether enacted by Congress or by federal court decisions that demand due process in child immigration hearings to include the same guardianship concepts embedded in our federal and state codes—so that if he was to be deported back to Honduras, we would be able to say with confidence that it was after a full and fair "meticulous process" of the kind afforded in *Bridges*, one that fully assessed Johnny's asylum claim as pressed by a qualified guardian and, therefore, a process that undeniably internalized *Ng Fung Ho's* admonition that a wrongful deportation can inflict a "loss of all that makes life worth living." Because Johnny lacked a guardian akin to one given his property counterparts, we are unable to pin that conclusion on the deportation order.

### ENDNOTES

(1) *Japanese Immigrant Case*, 189 U.S. 86 (1903).

(2) *Id.* at 101.

(3) *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

(4) *Bridges v. Wixon*, 326 U.S. 135, 154 (1945).

(5) Fed. R. Civ. P. 17.

(6) Local Rules of the Central District of California 83-5.1-6.

(7) Unaccompanied Alien Child Protection Act of 2007, Section 201, Senate Bill No. 844, introduced March 12, 2007. Similar proposed laws were introduced in 2002 and 2005 also.

(8) *Id.* § 201(a)(3).

(9) Unaccompanied Alien Child Protection Act of 2005, Senate Bill No. 119, introduced January 24, 2005.

(10) Congressional Budget Office Cost Estimate, Senate Bill No. 119, April 29, 2004, located at <http://www.cbo.gov/ftpdocs/63xx/doc6325/s119.pdf>.

(11) His name is a pseudonym. The facts come from a case that Kyhm Penfil and I litigated several years ago with our students in an appellate clinic we taught at the Chapman University School of Law.

(12) U.S. State Department Report, *Honduras: Country Reports on Human Rights Practices* (2006), at Sections 1 & 5, located at <http://www.state.gov/j/drl/rls/hrrpt/2006/78896.htm>.

(13) U.S. State Department Report, *Honduras: Country Reports on Human Rights Practices* (2010), at 4, 33.

(14) Amnesty International USA, *Honduras: Zero Tolerance . . . Extrajudicial Executions of Children and Youth Since 1998* (2003), pp.2-10, located at <http://www.amnesty.org/en/library/asset/AMR37/001/2003/en/06d64a73-d752-11dd-b024-21932cd2170d/amr370012003en.pdf>.


(15) *Id.*

(16) My book, *Show Trials*, addresses in great detail the relative qualifications of immigration judges compared to federal judges and the nature of the BIA and its tendency to affirm nearly everything an immigration judge does.



*Peter Afrasiabi is a partner at One LLP in Newport Beach, California, and the author of the book, Show Trials: How Property Gets More Legal Protection than People in Our Failed Immigration System (Envelope Books, released May 1, 2012). More information can be found at [www.ShowTrialsBook.com](http://www.ShowTrialsBook.com).*

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