

PROMOTING A CHILD RIGHTS-BASED APPROACH TO IMMIGRATION IN THE UNITED STATES

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INTRODUCTION

Immigration policies impact millions of children—of diverse backgrounds, socioeconomic classes, nationalities, and migration statuses. Globally, the number of children and youth¹ on the move is increasing, with estimates showing that approximately 50 million children have fled wars, conflicts, violence, and poverty, and searched for a better life.² Other children feel the impact of migration when they are left behind in their home countries after the departure of a parent or primary caregiver.³ Even citizen children are vulnerable to negative impacts of migration policies, such as when family members are subject to detention or deportation.⁴

Mobility can yield positive outcomes. It can help mitigate the effects of rising inequality and lead to improved prospects for children and their families.⁵ However, restrictive immigration policies, which are on the rise, can have devastating effects—such as family separation, decreased access to basic services, or deportation to countries where individuals face persecution or other forms of harm.⁶

1. “Children” are defined in the U.N. Convention on the Rights of the Child as individuals under the age of 18. Convention on the Rights of the Child art. 1, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter Convention on the Rights of the Child]. The United Nations defines “youth” as those persons between the ages of 15 and 24. In the United States, U.S. immigration law defines “children” as under the age of 21. For purposes of this article, “youth” is used when referring to young people who are over the age of 18.

2. U.N. CHILDREN’S FUND (UNICEF), UPROOTED: THE GROWING CRISIS FOR REFUGEE AND MIGRANT CHILDREN (Sept. 2016), available at <https://www.unicef.org/videoaudio/PDFs/Uprooted.pdf>. Moreover, a disproportionate and increasing share of the world’s refugees are children. While children make up about one third of the global population, nearly one half of refugees are children. UNICEF, Uprooted. Children defined as under the age of 18.

3. When adults leave to find work or refuge abroad, the “children left behind” often suffer increased vulnerability. While there is no available estimate on the number of children “left behind” as a result of their parents’ migration, some countries have provided estimate, such as China, which estimates that 58 million children have been left behind, and the Philippines, which estimates 9 million children left behind. Int’l Ctr. for Migration, Health and Dev. (ICMHD), *Migration, Displacement and Children Left Behind*, ICMHD’S BLOG (Aug. 12, 2013), <https://icmhd.wordpress.com/2013/08/12/migration-displacement-and-children-left-behind-clbs/>. In a background paper, the International Organization for Migration noted a “dearth of information” about children who are left behind despite a general acknowledgement that “policies are at their most effective when targeting the family unit and its dynamic as a whole.” INT’L ORG. FOR MIGRATION (IOM), INTERNATIONAL DIALOGUE ON MIGRATION: HUMAN MOBILITY AND DEVELOPMENT: EMERGING TRENDS AND NEW OPPORTUNITIES FOR PARTNERSHIPS, MIGRATION AND FAMILIES 7, 8 (Oct. 2014). For example, “Family disintegration, challenges in parenting, adoption of risky behaviour by children and adolescents left without parental guidance, and increased vulnerability to violence; abuse and exploitation are some of the manifestations observed as a result of migration.” UNICEF, THE IMPACT OF INTERNATIONAL MIGRATION: CHILDREN LEFT BEHIND IN SELECTED COUNTRIES OF LATIN AMERICA AND THE CARIBBEAN 9 (May 2007).

4. See Seth Freed Wessler, *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System*, APPLIED RESEARCH CTR. (Nov. 2011) (finding that at least 5,100 children were in foster care in the United States due to a parent being held in immigration detention or deported).

5. U.N. Dev. Programme (UNDP), *Human Development Report 2009: Overcoming Barriers: Human mobility and development* (2009).

6. UNICEF, THE RIGHTS OF ALL CHILDREN IN THE CONTEXT OF INTERNATIONAL MIGRATION: ACCESS TO CIVIL, ECONOMIC, AND SOCIAL RIGHTS FOR CHILDREN IN THE CONTEXT OF IRREGULAR MIGRATION (WRITTEN SUBMISSION) (2012), http://www.unicef.org/socialpolicy/files/Access_to_Civil_Economic_and_Social_Rights_for_Children.pdf (“Restrictive migration policies increase the likelihood of children experiencing prolonged periods of family separation, losing their regular migration status, or migrating irregularly due to

This article argues that immigration policymakers, activists, and programs should implement a child rights-based approach.⁷ The U.N. Convention on the Rights of the Child (CRC) is a useful starting point, as it provides clear minimum standards and a conceptual framework for enforcing children's human rights in the context of migration.⁸ On November 16, 2017, the Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families and the Committee on the Rights of the Child released a joint general comment on the general principles regarding the human rights of children in the context of international migration—calling for a rights-based approach centered around the four key principles of the CRC as well as the principle of non-refoulement.⁹ This joint general comment drew from a 2012 report by the Committee on the Rights of the Child, which called upon states to adopt a comprehensive rights-based approach to laws and policies to ensure that children impacted by international migration enjoy the full protection of the CRC regardless of their status or the status of their parents.¹⁰ A key aspect of a rights-based approach, as noted by UNICEF and which will be discussed further in this article, is that it must avoid categorizing children into subgroups that result in discriminatory treatment, including

lack of regular opportunities. These conditions often leave all children affected by migration vulnerable to limited access to basic rights and services.”).

7. See Victor Abramovich, Pablo Ceriani Cernadas, & Alejandro Morlachetti, *The Rights of Children, Youth and Women in the Context of Migration: Conceptual Basis and Principles for Effective Policies with a Human Rights and Gender Based Approach*, UNICEF (Apr. 2011).

8. JACQUELINE BHABHA, UNICEF INNOCENTI RESEARCH CTR., INDEPENDENT CHILDREN, INCONSISTENT ADULTS: INTERNATIONAL CHILD MIGRATION AND THE LEGAL FRAMEWORK (2008). As the former U.N. Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, noted in a 2009 report, “[although] the convention neither focuses on child migration nor defines the migrant child, its provisions are of the highest relevance to ensure the adequate protection of all children in all circumstances, including therefore all stages of the migration process.” Jorge Bustamante (Special Rapporteur on the Human Rights of Migrants), *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶ 31, U.N. Doc. A/HRC/11/7 (May 14, 2009). The United States is the only country in the world not to have ratified the U.N. Convention on the Rights of the Child, which is said to be the “uncontested primary normative standard in relation to children’s rights.” UNICEF & THE OFFICE OF THE U.N. NATIONS HIGH COMM’R FOR HUMAN RIGHTS (OHCHR) REG’L OFFICE FOR EUROPE, JUDICIAL IMPLEMENTATION OF ARTICLE 3 OF THE CONVENTION ON THE RIGHTS OF THE CHILD IN EUROPE (June 2012) [hereinafter CRC JUDICIAL IMPLICATIONS].

9. Joint Gen. Comm. No. 3, General principles regarding the human rights of children in the context of international migration, U.N. Doc. CMW/C/GC/3-CRC/C/GC/22 (Nov. 16, 2017). On the same day, the Committees also released Joint General Comment No. 4 on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return. Joint Gen. Comm. No. 4, State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, U.N. Doc. CMW/C/GC/4-CRC/C/GC/23 (Nov. 16, 2017).

10. Office of the U.N. High Comm’r for Human Rights (OHCHR) & Comm. on the Rights of the Child, *Rep. of the 2012 Day of General Discussion: The Rights of All Children in the Context of International Migration* (2012); Joint Gen. Comm. No. 3, Para. 5(b); see also Advisory Opinion OC-21/14, Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection (Inter-Am. Ct. H.R. Aug. 19, 2014) (“Based on all the foregoing, the Court finds that, when designing, adopting and implementing their immigration policies for persons under the age of 18 years, the State must accord priority to a human rights-based approach, from a crosscut perspective that takes into consideration the rights of the child and, in particular, the protection and comprehensive development of the child.”).

unequal access to services.¹¹

Promoting a legal and policy framework that is centered on children's rights is a logical goal for both immigration and child rights proponents. In recent years, some progress to this end has been made as increased awareness of child migration brought children and families to the forefront of domestic and international debates on migration.¹² In 2010, the European Commission issued an Action Plan, calling for the development of common policies and practices with respect to unaccompanied children in Europe.¹³ In the United States, legislation has been repeatedly introduced in Congress that would improve the situation of unaccompanied and other immigrant children, with some of these measures passing into law.¹⁴ The so-called "surge" of asylum-seeking Central American children and families, which began in 2012, forced even greater attention on the circumstances of migrant children.¹⁵

However, despite decades of increasing awareness and reform efforts, gaps in legal frameworks combined with deeply rooted structural inequities have meant that children's rights are still little more than an afterthought in immigration policy.¹⁶ Legal and policy frameworks governing the treatment of children in the context of migration can be divided into two areas:

11. UNICEF Written Submission, *supra* note 6.

12. Daniela Reale, *Children on the Move*, International Organization for Migration, IOM (2013).

13. EUROPEAN COMM'N, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL, ACTION PLAN ON UNACCOMPANIED MINORS (2010-2014) (2010).

14. Unaccompanied Alien Child Protection Act, H.R. 5141, 113th Cong. (2014). The bill was first introduced by Senator Diane Feinstein (D-CA) in 2001, with subsequent versions of the bill introduced in 2005 and 2007, contained provisions related to conditions of detention and access to healthcare, education, phones, legal and social services, and interpreters. While the Unaccompanied Alien Child Protection Act did not pass into law, many of its provisions were incorporated into section 235 of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), which codified federal processes concerning unaccompanied children in the United States. See Bipartisan Policy Ctr., *Unaccompanied Alien Children: A Primer* (July 21 2014); The Child Citizen Protection Act (CCPA), H. R. 182, 111th Cong. (2009) (introduced by Congressman Joe Serrano (D-NY) in 2009, and as recently as 2017 (H.R. 2508), would allow immigration judges to consider whether deportation of a parent would be "clearly against the best interests of [a U.S. citizen] child").

15. In 2012, the United States experienced an unprecedented increase in new arrivals of migrant children, with the overwhelming majority coming from Guatemala, Honduras, and El Salvador. Women's Refugee Commission, *Forced from Home: The Lost Boys and Girls of Central America*, 2012. In 2014, U.S. Customs and Border Protection (CBP) apprehended 68,541 unaccompanied children at the southwest border—nearly double the amount apprehended during the same time period in 2013—and 68,445 individuals traveling as a "family unit" with children—more than four times the number of "family units" apprehended during the previous year. U.S. CUSTOMS & BORDER PROTECTION, UNITED STATES BORDER PATROL SOUTHWEST FAMILY UNIT SUBJECT AND UNACCOMPANIED ALIEN CHILDREN APPREHENSIONS FISCAL YEAR 2016, <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016> (last accessed Mar. 30, 2017).

16. Many scholars have written about the history of racial and class-based discrimination in U.S. immigration law. Kevin R. Johnson writes, "There is no better body of law to illustrate the close nexus between race and class than U.S. immigration law and its enforcement. At bottom, U.S. immigration law historically has operated—and continues to operate—to prevent many poor and working noncitizens of color from migrating to, and harshly treating those living in, the United States. The laws are nothing less than a "magic mirror" into the nation's collective consciousness about its perceived national identity—an identity that marginalizes poor and working immigrants of color and denies them full membership in American social life." Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 L. & CONTEMP. PROBS. 1 (2009); see also Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENGLAND L. REV. 417 (2011); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998).

domestic child protection laws, which concern children living within a country without adequate support, and migration law, which sets standards for authorized immigration.¹⁷ Domestic child protection policies have often failed to consider the situation of immigrant children (though some states have begun enacting measures focused on immigrant children and families), while immigration policies have failed to incorporate even basic principles and protections from broader debates and advances in children's rights.¹⁸ Moreover, while immigration control is a federal matter, child protection laws are generally governed by the states, making the legal discord even more prominent. As a result, noncitizen children are often seen first as "migrants" and only secondarily as children entitled to special protections and considerations.¹⁹

The resulting approach has been contradictory, according to Professor Jacqueline Bhabha, and rooted in an unresolved ambivalence toward protecting immigrant children. "We view the state as having a protective obligation toward vulnerable children in its role as *parens patriae*, parent of the nation; but we also expect the state to protect us from threatening, unruly, and uncontrolled outsiders, even if they are children."²⁰ Thus, even when official policies aim to treat immigrant and citizen children equally, discriminatory notions of "otherness" may influence practices in ways that fail to uphold immigrant children's rights.²¹

The following sections lay out a framework and examples of how a rights-based approach might be applied. The first section provides an overview of immigrant children in the United States, including how terminology and categorizations have evolved, as well as key provisions of U.S. law and policy that children and their families encounter. The second section outlines the conceptual framework for a child rights-based approach and is followed by a four-part analysis of U.S. laws, policies, and practices according to the main principles of the CRC. The article concludes with examples of how various initiatives—including innovative program models as well as state-level

17. BHABHA, *supra* note 8.

18. See generally, David Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979 (2002).

19. See *id.*; M. Aryah Somers, Pedro Herrera & Lucia Rodriguez, *Constructions of Childhood and Unaccompanied Children in the Immigration System in the United States*, 14 U.C. DAVIS J. JUV. L. & POL'Y 311, 325–26 (2010).

20. JACQUELINE BHABHA, *CHILD MIGRATION AND HUMAN RIGHTS IN A GLOBAL AGE* (2014).

21. Ruth Farrugia and Kristina Touzenis note that even "the terms 'immigrant', 'refugee' and 'migrant' give rise to conceptions of 'others' as fundamentally different, and serve the interests designed to promote and protect the interests and privilege of 'not other'." Farrugia and Touzenis further explain that "[w]hile official policy may declare, for example, that 'the child is a child first and an asylum seeker second', the notion of 'child' is mediated through the notion of 'alien' and this may have a bearing on the treatment the child receives." See also U.N., *Durban Declaration and Programme of Action, Adopted at the World Conference against Racism, Racial Discrimination, Xenophobia, and Related Intolerance* (Sept. 2001) (calling on states to "recognize that xenophobia against non-nationals, particularly migrants, refugees and asylum-seekers, constitutes one of the main sources of contemporary racism and that human rights violations against members of such groups occur widely in the context of discriminatory, xenophobic and racist practices").

policies protecting immigrant children—have incorporated elements of a rights-based approach to improve policies and practices impacting immigrant children and their families in the United States.

I. IMMIGRANT CHILDREN IN THE UNITED STATES: A DEFICIT OF RIGHTS

A. *Who are Immigrant Child in the United States: Terminology and Identity*

According to Child Trends, children living in immigrant families are the fastest growing group of children in the United States. In 2014, there were 18.4 million children living in immigrant families, representing 25 percent of U.S. children (compared to 18 percent of the population in 1994).²² The majority—15.9 million—were second-generation immigrants while the remaining 2.8 million children were first-generation immigrants.²³ Furthermore, about 4.5 million U.S. citizen children live with at least one undocumented parent.²⁴

Various terms and categories have been created to describe the situation of immigrant children and youth in the United States.²⁵ Over the last decade, the “DREAMers”—young people who would have been eligible for immigration adjustments under the proposed DREAM Acts²⁶—caught the attention of politicians and the media with their activism and compelling stories of resilience and perseverance. Often seen as having been brought to the United States illegally by their parents and therefore innocent in the eyes of the law, DREAMers gained sympathies even among politicians that took a more restrictive stance on immigration.²⁷ With Congress failing to pass the DREAM Act several times despite gaining some bipartisan support, in 2012, President Obama announced an executive action to defer the deportation of up to 1.7 million eligible youth under the Deferred Action for Childhood Arrivals Program.²⁸

22. CHILD TRENDS DATA BANK, IMMIGRANT CHILDREN: INDICATORS ON CHILDREN AND YOUTH (2014), https://www.childtrends.org/wp-content/uploads/2013/07/110_Immigrant_Children.pdf.

23. *Id.*

24. PAUL TAYLOR ET AL., PEW HISPANIC CTR., UNAUTHORIZED IMMIGRANTS: LENGTH OF RESIDENCY, PATTERNS OF PARENTHOOD (2011), <http://assets.pewresearch.org/wp-content/uploads/sites/7/2011/12/Unauthorized-Characteristics.pdf>.

25. UNICEF, KEY MESSAGES AND RECOMMENDATIONS: THE RIGHTS OF ALL CHILDREN IN THE CONTEXT OF INTERNATIONAL MIGRATION (2012).

26. The DREAM Act was proposed in 2001 as the Development, Relief, and Education for Alien Minors Act, and would have provided conditional permanent residence to high school graduates of good moral character, who had arrived in the United States as minors, and lived here at least 5 years prior to enactment.

27. See AUDREY SINGER, NICOLE PRCHAL SVAJLENKA, & JILL H. WILSON, BROOKINGS METROPOLITAN POLICY PROGRAM, LOCAL INSIGHTS FROM DACA FOR IMPLEMENTING FUTURE PROGRAMS FOR UNAUTHORIZED IMMIGRANTS (June 2015), https://www.brookings.edu/wp-content/uploads/2016/06/BMPP_Srvy_DACAImmigration_June3b.pdf.

28. JEFFREY S. PASSEL & MARK HUGO LOPEZ, PEW RESEARCH CTR., UP TO 1.7 MILLION UNAUTHORIZED IMMIGRANT YOUTH MAY BENEFIT FROM NEW DEPORTATION RULES (2012), http://assets.pewresearch.org/wp-content/uploads/sites/7/2012/12/unauthroized_immigrant_youth_update.pdf. The DACA program continues today and as of March 31, 2016, U.S. Citizenship and Immigration Services

Unaccompanied children gained increased attention beginning in 2012, when increased arrivals of children and families at the U.S. southern border with Mexico was met with a mixed response.²⁹ The new arrivals included both “unaccompanied children” and children traveling as a “family unit” i.e. accompanied by at least one parent. Advocates, politicians, and the media have reacted to this with mixed conclusions. While immigration advocates, faith leaders, community groups, and some politicians have called for a humanitarian or refugee response, many politicians and pundits see the children and their families as a potential threat.³⁰

Other terms in addition to unaccompanied, accompanied, and DREAMER have been used in the United States and beyond to describe the situations or perceived characteristics of immigrant children. Common terms, some of which may have vastly different legal implications or provide different levels of access to services, include immigrant, refugee, asylum-seeker, trafficked, undocumented, unauthorized, and separated.³¹ With the development of these categories, experts began to note that the child protection sector formulated a multiplicity of uncoordinated approaches to support children when, in fact, the measures that need to be adopted to keep children safe and protect their rights are often similar or the same.³²

The result was a step toward developing a broader framework for child migration that moves away from categorizations and recognizes children’s agency in the context of migration. An umbrella term, “children on the move,” emerged—though it has not gained much traction in the United States—that brings together categories of children to highlight their commonalities, particularly with respect to risk factors and vulnerabilities, and aims to refocus interventions through coherent and comprehensive policies

had approved 728,285 DACA applications. FAYE HIPSMAN, BÁRBARA GÓMEZ AGUIÑAGA & RANDY CAPPS, MIGRATION POLICY INST., *DACA AT FOUR: PARTICIPATION IN THE DEFERRED ACTION PROGRAM AND IMPACTS ON RECIPIENTS* (2016), <https://www.migrationpolicy.org/sites/default/files/publications/DACAatFour-FINAL.pdf>.

29. In prior years, U.S. immigration agencies had typically reported apprehensions of between 6,000 and 8,000 unaccompanied immigrant children at the border. See Olga Byrne & Elise Miller, *The Flow of Unaccompanied Children Through the Immigration System*, VERA INST. OF JUSTICE (2012). In fiscal year 2014, the number rose to a staggering 68,541. Similarly, the number of children traveling with their parents (or “accompanied children”) increased significantly. While in fiscal year 2013, only 14,855 individuals traveling as “family units” were apprehended at the southern border, federal agencies reported 68,445 such apprehensions in fiscal year 2014. U.S. CUSTOMS & BORDER PROTECTION, UNITED STATES BORDER PATROL SOUTHWEST FAMILY UNIT SUBJECT AND UNACCOMPANIED ALIEN CHILDREN APPREHENSIONS FISCAL YEAR 2016, STATEMENT BY SECRETARY JOHNSON ON SOUTHWEST BORDER SECURITY (Oct. 18, 2016).

30. See, e.g., ELZBIETA GOZDZIAK, INST. FOR THE STUDY OF INT’L MIGRATION AT GEORGETOWN UNIV., *WHAT KIND OF WELCOME? INTEGRATION OF CENTRAL AMERICAN UNACCOMPANIED CHILDREN INTO LOCAL COMMUNITIES* (2015), <https://isim.georgetown.edu/sites/isim/files/files/upload/Kaplan%20UAC%20Report.compressed%20%282%29.pdf>; see also Greg Sargent, *Hillary: Minors crossing border must be sent home*, WASHINGTON POST (June 18, 2014), https://www.washingtonpost.com/blogs/plum-line/wp/2014/06/18/hillary-minors-crossing-border-must-be-sent-home/?utm_term=.c039dc6563ea.

31. Daniela Reale, *Away from Home: Protecting and Supporting Children on the Move*, SAVE THE CHILDREN (2008).

32. Reale, *supra* note 31; Mike Dottridge, *What Can You Do To Protect Children on the Move?*, TERRE DES HOMMES (2012).

that place child rights at the center of the debate.³³ At a conference in Spain in 2010,³⁴ Save the Children adopted the following definition of children on the move:

Children moving for a variety of reasons, voluntarily or involuntarily, within or between countries, with or without their parents or other primary caregivers, and whose movement might place them at risk (or at an increased risk) of inadequate care, economic or sexual exploitation, abuse, neglect and other forms of violence.

But how do immigrant children describe themselves? A study conducted by the Fordham Law School Feerick Center for Social Justice and the Vera Institute of Justice adopted a participatory action methodology to learn more about the experiences of unaccompanied immigrant children in New York and their interactions with state and local systems. The study relied heavily on the input and participation of youth, hiring two young people who had immigrated to the United States as unaccompanied minors as peer researchers.³⁵ While the intended focus of the study was to learn about youths' interactions with state and local systems and develop policy recommendations to improve those interactions, study participants were eager to speak about issues they faced related to discrimination and identity. The study found that while the term "unaccompanied immigrant child" has a specific legal definition, it may also elicit certain attitudes and assumptions from authorities, children's service providers, as well as the general public.³⁶ The youths agreed that they were forced to adapt to identities prescribed to them, rather than being able to identify themselves, which led to stereotyping and discrimination. Some stated that when others learned they were "unaccompanied children," they responded with suspicion or confusion, perhaps as a result of media portrayals during the 2014 border crisis. One study participant stated, "They might feel we don't deserve things, so we have to fight to get them." Another described being pushed out of schools once the administrators

33. See e.g., Reale, *supra* note 31. Children on the move . . . mirrors broader efforts toward an agency-based conception of migration, such as the broad definition of "migrant" in the International Migrants Bill of Rights. See Avinoam Cohen, *From Status to Agency: Defining Migrants*, 24 GEO. IMMIGR. L.J. 617 (2010) (critically analyzing status-based conceptions of migration and describing the main contribution of an agency-based conception of migrants as the replacement of legally- and politically-based categories with "a more grounded and holistic view of migration").

34. Following the conference, an Inter-Agency Working Group on Children on the Move was formed. The Working Group includes members from United Nations organizations, international NGOs, and individual members.

35. FORDHAM UNIV. SCHOOL OF LAW & THE VERA INST. OF JUSTICE, UNACCOMPANIED IMMIGRANT YOUTH IN NEW YORK: STRUGGLE FOR IDENTITY AND INCLUSION—A PARTICIPATORY ACTION RESEARCH STUDY (Aug. 2015), https://www.fordham.edu/download/downloads/id/2416/unaccompanied_immigrant_youth_in_new_york_august_2015.pdf [hereinafter UNACCOMPANIED IMMIGRANT YOUTH STUDY]. The peer researchers contributed to the development of research questions, recruited study participants, and conducted focus groups and individual interviews with unaccompanied immigrant youth.

36. *Id.*

learned he was an unaccompanied child and did not understand his situation. Another young person described the stigma he faced:

You [feel] like an outsider, you don't belong. Then, it creates a wall, you know, people don't feel sympathy towards your suffering anymore because they're seeing you as an outsider, an intruder. Yet, you're just like one of them. You think, you all want the same thing. You want to have a better life for yourself.

Young people identified as DREAMers also questioned the identity this label imposed upon them, though in this case, the concern related to the privileges it conveyed at the expense of other categories of migrants, which may have included their own parents (often thought of as the wrongdoers in this situation who brought their children to the United States when they were too young to make their own decision).³⁷ In recent years, some young people have decided to shed the “DREAMer” label and with that, the special category it created, opting to focus on more inclusive immigration reform. As one activist described, “It creates a special elitist divide, where we create one category of deserving people, who deserve a better, a faster, an easier pathway to citizenship; and everyone else is somehow made undeserving.”³⁸

B. *What Rights do Children Impacted by Immigration Have in the United States?*

The U.N. Convention on the Rights of the Child applies to all children equally, irrespective of migration status or citizenship.³⁹ It is a broad legal instrument, spanning civil, political, economic, social, and cultural rights of children. However, as the U.N. Office of the High Commissioner for Human

37. See, Drew Schmenner, *Countering the DREAMer Narrative: Storytelling, Immigration Reform, and the Work of 67 Sueños* (Dec. 2014) (unpublished thesis, San Francisco University) (on file with University of San Francisco Gleeson Library); see also, *Plyler v. Doe*, 457 U.S. 202, 220 (1982) (noting that, “while those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited to, deportation [...] the children of those illegal entrants are not comparably situated. Their ‘parents have the ability to conform their conduct to societal norms,’ and presumably the ability to remove themselves from the State’s jurisdiction; but the children who are plaintiffs in this case ‘can affect neither their parents’ conduct nor their own status.’” *Trimble v. Gordon*, 430 U.S. 762, 770 (1977)).

38. Von Diaz, *DREAMers No Longer of One Mind on Immigration Reform*, WNYC NEWS (June 27, 2014), <http://www.wnyc.org/story/dreamers-no-longer-one-mind-immigration-reform/> (quoting Razeen Zaman, a law student at Fordham University); see also Helge Schwiertz, *Beyond the Dreamer Narrative: Undocumented Youth Organizing Against Criminalization and Deportations in California* (UCLA Instit. for Research on Labor and Employment, Working Paper, 2015) (noting the transformation of the undocumented youth movement toward a more inclusive structure, a more radical critique of borders, criminalization, and deportation, and a rejection of the “good immigrant” versus “bad immigrant” narrative).

39. While the United States has not ratified the Convention on the Rights of the Child, as a signatory, it is bound to not take actions that would “defeat the object and purpose” of the Convention. Vienna Convention on the Law of Treaties, May 23, 1969, 1151 U.N.T.S. 331; see also *Roper v. Simmons*, 543 U.S. 551 (2005) (acknowledging “the overwhelming weight of international opinion against the juvenile death penalty,” including the direct prohibition in Article 37 of the United Nations Convention on the Rights of the Child).

Rights (OHCHR) observed, states struggle to implement children's rights in the context of migration, as national immigration laws often do not adopt a child rights perspective, and national child protection laws often miss the specific concerns and nuances related to immigrant children.⁴⁰ Systems and laws tend to view immigrant children first as foreigners who do not benefit from the full set of rights accorded to citizens, and only secondly as children, who carry their own set of basic human rights and require special protections due to their dependency and developmental capacity.⁴¹ The resulting policy gaps mean that immigrant children are often not fully recognized as rights-holders.⁴²

The United States has not ratified the CRC.⁴³ With no comprehensive federal framework to protect children's rights, the Convention was an obvious and needed instrument to protect children's rights.⁴⁴ However, during debates in the 1990s and beyond over ratification, opponents stated that the United Nations was promoting—through the CRC and the Convention on the Elimination of all Forms of Discrimination Against Women—a “counterculture” that would lead to undesirable outcomes, such as more out of wedlock marriages and adolescent sexual promiscuity.⁴⁵ Moreover, in discussions during the drafting of the CRC, the United States had urged a limitation on the scope of the Convention to apply only to children who were legally within a state's territory; however, this proposal was rejected.⁴⁶ Following Somalia and South Sudan's ratification in 2015, which made the United States the only nation in the world to not have adopted the CRC, children's rights advocates renewed calls for ratification, as well as alternative measures that would ensure federal protection of children's rights.⁴⁷

40. See CRC Judicial Implications, *supra* note 8.

41. INTERNATIONAL ORGANIZATION FOR MIGRATION, CHILDREN ON THE MOVE (2013), http://publications.iom.int/bookstore/free/Children_on_the_Move_15May.pdf.

42. *Id.*; Thronson, *supra* note 18 (arguing that in the United States, broad debates about children's rights bypass U.S. immigration law, leaving in place laws and procedures that often limit the recognition of children as persons with individual rights). As domestic debates evolved, conceptions of childhood and children's rights moved from notions of children as the property of their parents, to a period of rapidly growing state intervention where children were seen as inherently vulnerable and incapable of executing their rights, to a more recently emerging conception of children's rights as human rights, grounded in the personhood of the child. *Id.*

43. Convention on the Rights of the Child, *supra* note 1.

44. See, e.g., FIRST FOCUS CAMPAIGN FOR CHILDREN, FACT SHEET: CHILDREN'S BILL OF RIGHTS (2015).

45. See PATRICK F. FAGAN, HERITAGE FOUNDATION, HOW U.N. CONVENTIONS ON WOMEN'S AND CHILDREN'S RIGHTS UNDERMINE FAMILY, RELIGION, AND SOVEREIGNTY (2001), http://thf_media.s3.amazonaws.com/2001/pdf/bg1407.pdf.

46. See Avinoam Cohen, *From Status to Agency: Defining Migrants*, 24 GEO. IMMIGR. L.J. 617, 622 (2010) (citing THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: A GUIDE TO THE “TRAVAUX PREPARATOIRES” 141 (Sharon Detrick ed., 1992)).

47. Martha Middleton, *ABA adds its voice to calls for the US to ratify the Convention on the Rights of the Child*, A.B.A. J., Mar. 2016, at 64. For example, in October 2015, recognizing the need for a national legislative framework governing children's rights, Representatives Karen Bass (D-CA), Judy Chu (D-CA), and Luis V. Gutiérrez (D-IL) introduced a House resolution calling for passage of a Children's Bill of Rights, which incorporated many of the fundamental concepts of the CRC, such as the best interests of the child, the right to family unity, and non-discrimination. Importantly, the proposed Children's Bill of Rights would have applied equally to citizen and noncitizen children in the United

Without an overarching legal framework, children may find themselves in a legal lacuna when migration matters arise. For example, while family unity is a fundamental principle of international law and a right under the CRC, children impacted by international migration are often at risk of being separated from their parents.⁴⁸ Under U.S. immigration law, children—even U.S. citizen children—do not have the ability to sponsor a parent or sibling through a family-based immigration petition.⁴⁹ Only after a child becomes an adult (defined as 21 years old under U.S. immigration law) can that adult child sponsor his or her immediate family members to immigrate to the United States. Similarly, a child, regardless of her immigration or citizenship status, has very limited possibilities to prevent the deportation or detention of her parents.⁵⁰ A 2011 study found that 5,100 children in foster care had been separated from their families due to immigration-related detention or deportation of their mothers and fathers, and estimated that over five years, an additional 15,000 children would face threats to reunification with their detained and deported parents.⁵¹ Legislative efforts to protect children from losing a parent to deportation, such as the Child Citizen Protection Act, have failed to pass.

Immigrant children have even struggled to achieve basic due process rights. Despite decades of advocacy, children in immigration removal proceedings do not have an enforceable right to counsel.⁵² Although it is well accepted that legal representation results in better immigration outcomes as well as increased efficiency, indigent respondents are not provided with

States, regardless of immigration status. Supporting the establishment of a national Children's Bill of Rights, H.R. 476, 114th Cong. (2015).

48. Convention on the Rights of the Child, *supra* note 1, at art. 10(1); Kate Jastram & Kathleen Newland, *Family Unity and Refugee Protection*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS IN INTERNATIONAL PROTECTION 556, 577 (2003); SUMMARY CONCLUSIONS: FAMILY UNITY, EXPERT ROUNDTABLE ORGANIZED BY THE U.N. HIGH COMMISSIONER FOR REFUGEES AND THE GRADUATE INSTITUTE OF INTERNATIONAL STUDIES (2001), <http://www.unhcr.org/419dbfaf4.pdf>; see Zoya Gubernskaya & Joanna Dreby, *US Immigration Policy and the Case for Family Unity*, 5 J. MIGRATION & HUMAN SEC. 2, 417-30 (2017) (making a case for reducing wait times for family reunification with spouses and children of lawful permanent residents ("green card" holders), allowing prospective family-based immigrants to visit relatives in the United States while petitions are pending, and providing relief from deportation and a path to legalization for parents and spouses of U.S. citizens).

49. See Thronson, *supra* note 18.

50. Under 8 U.S.C. § 1229(b)(1) (2000), a person of "good moral character" who has been physically present in the United States for at least ten years may seek cancellation of removal by establishing that the removal would cause "exceptional and extremely unusual hardship" to a U.S. citizen spouse, child, or parent. As discussed in the section below on the right to life, survival and development, this standard is very difficult to meet.

51. APPLIED RESEARCH CTR., SHATTERED FAMILIES: THE PERILOUS INTERSECTION OF IMMIGRATION ENFORCEMENT AND THE CHILD WELFARE SYSTEM (Nov. 2011). Other children are separated from their parents or primary caregivers by Customs and Border Protection officials at the border without regard to the children's best interests. See WOMEN'S REFUGEE COMM'N, BETRAYING FAMILY VALUES: HOW IMMIGRATION POLICY AT THE UNITED STATES BORDER IS SEPARATING FAMILIES (2017).

52. The government has maintained that section 292 of the Immigration and Naturalization Service prohibits it from providing government appointed legal counsel. See KATE M. MANUEL, CONG. RESEARCH SERV., ALIENS' RIGHT TO COUNSEL IN REMOVAL PROCEEDINGS: IN BRIEF (2016).

government-appointed legal representation.⁵³ For example, a recent analysis showed that 92.5 percent of represented children appeared at their immigration court hearings, while only 27.5 percent of unrepresented children did so.⁵⁴ In the case of children, legal representation not only leads to better outcomes in immigration proceedings, but also serves as a conduit to other needed services, such as mental health or safety net services for the family.⁵⁵ Moreover, achieving legal immigration status can lead to improved circumstances for the child with respect to employment, health and mental health, education, and housing.⁵⁶

Despite the major gap in legal frameworks, some protections have evolved through litigation and advocacy, at both the federal and state or local levels. For example, when the detention of children for immigration purposes was first litigated in the 1993 Supreme Court case, *Reno v. Flores*, the court ruled in favor of the former Immigration and Naturalization Service (INS), finding that its policy of detaining immigrant children did not violate substantive or procedural due process, nor did it exceed the Attorney General's authority under immigration law.⁵⁷ In the majority opinion, children were seen first and foremost as an immigration enforcement priority rather than as individuals with rights. However, after the case was remanded to the lower court for further proceedings, the parties engaged in settlement negotiations that resulted

53. The "New York Immigrant Representation Study" (NYIRS) analyzed data from over 70,000 immigration court cases and found that individuals facing deportation in New York immigration courts were 500 percent more likely to win their cases when they had legal representation (2011). A study that reviewed 383,000 asylum cases decided by the U.S. Department of Homeland Security found that asylum seekers were more likely to win their cases when they had legal representation and that representation had a higher impact on cases involving younger applicants, suggesting that younger applicants need more support in articulating their fear of persecution. See ANDREW I. SCHOENHOLTZ ET AL., LIVES IN THE BALANCE: ASYLUM ADJUDICATION BY THE DEPARTMENT OF HOMELAND SECURITY (2014). Studies have also shown that legal representation improves the efficiency of proceedings. The Vera Institute of Justice found that participants in the EOIR-funded Legal Orientation Program spent 13 fewer days in detention and were less likely to receive removal orders in absentia. See NINA SCIULC ET AL., VERA INST. OF JUSTICE, IMPROVING EFFICIENCY AND PROMOTING JUSTICE IN THE IMMIGRATION SYSTEM, REPORT SUMMARY (2008).

54. AM. IMMIGRATION COUNCIL, TAKING ATTENDANCE: NEW DATA FINDS MAJORITY OF CHILDREN APPEAR IN IMMIGRATION COURT (2014), https://www.americanimmigrationcouncil.org/sites/default/files/research/taking_attendance_new_data_finds_majority_of_children_appear_in_immigration_court_final_1_0.pdf.

55. Charles Baily et al., *The Psychosocial Context and Mental Health Needs of Unaccompanied Children in United States Immigration Proceedings*, 13 GRADUATE STUDENT J. 4 (2011).

56. Carola Suarez-Orozco et al., *Growing Up in the Shadows: The Developmental Implications of Unauthorized Status*, 81 HARV. EDUC. REV. 438 (2011).

57. *Reno v. Flores*, 507 U.S. 292 (1993). A class of children who were held in detention by the INS challenged its blanket policy that required detention pending deportation proceedings, allowing release only to adult relatives or guardians living in the United States, but not to other responsible adults willing and able to care for the child and ensure the child's appearance at court hearings. In addressing the constitutionality of placing immigrant children in institutional custody, the court placed heavy emphasis on the fact that the children involved in the case were "aliens"—the legal term bestowed to noncitizens of the United States, quoting language from an 1891 Supreme Court decision, which noted that "Congress regularly makes rules that would be unacceptable if applied to citizens." Counsel for the children argued that the disparate treatment of children detained in INS custody as compared to juveniles in federal delinquency proceedings, who may be released pending the duration of the proceeding, violated the equal protection guarantee of the Fifth Amendment. The court quickly rejected this argument, noting that "the difference between citizens and aliens is adequate to support" the detention of immigrant children.

in the Flores Settlement Agreement, which established a nationwide policy for the detention, release, and treatment of children in federal immigration custody.⁵⁸ It requires the government to make efforts at family reunification according to a priority list to ensure prompt release.⁵⁹ While the child is in custody, he or she must be placed in the least restrictive setting and must be guaranteed education, health, social, and other benefits and rights.⁶⁰ The Flores Settlement is a prime example of a major step forward in protecting the rights of immigrant children.⁶¹

In recent years, states have led efforts to ensure immigrant children's social and economic rights. New York, California, and Illinois ensure that immigrant children, regardless of immigration status, have full access to public healthcare.⁶² Twenty states offer in-state tuition to all immigrant youth (though several other states enacted legislation that *bar* unauthorized immigrant youth from accessing in-state tuition benefits).⁶³ Other states have passed administrative directives and resolutions ensuring that local public schools enroll immigrant children without discrimination, fully upholding the equal protection principles set forth in *Plyler v. Doe*.⁶⁴

With this web of rights, protections and deficits, children encounter barriers, contradictions, and ongoing challenges throughout the migratory process as well as during their residence—whether temporary or permanent—in the United States. International standards provide a much more comprehensive framework for protecting migrant children's rights. International bodies, such as the Committee on the Rights of the Child, the Office of the High

58. Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. 1997).

59. *Id.* at ¶ 14.

60. *Id.* at Ex. 1.

61. However, children and advocates, as well as the U.S. Department of Justice Office of Inspector General, reported ongoing violations of the Flores Settlement Agreement by the INS. Ctr. for Human Rights & Constitutional Law, *Unaccompanied Immigrant and Refugee Children: A Working Paper Prepared for the Office of Refugee Resettlement* (Jan. 14, 2013); U.S. DEPT. OF JUSTICE OFFICE OF INSPECTOR GEN., UNACCOMPANIED JUVENILES IN INS CUSTODY, REPORT NUMBER I-2001-009 (2001). Later in 2003, upon the transfer of custody of unaccompanied children from the former INS to the Office of Refugee Resettlement (ORR), ORR made many improvements to the process of family reunification and release, allowing for a much large percentage of children to be freed from institutional custody. See WOMEN'S REFUGEE COMMISSION, *HALFWAY HOME: UNACCOMPANIED CHILDREN IN IMMIGRATION CUSTODY* (2009).

62. See UNACCOMPANIED IMMIGRANT YOUTH STUDY, *supra* note 35.

63. NAT'L CONF. OF STATE LEGISLATURES, TUITION BENEFITS FOR IMMIGRANTS (July 15, 2015), <http://www.ncsl.org/research/immigration/tuition-benefits-for-immigrants.aspx> (last accessed Oct 31, 2016); see also Michael A. Olivas, *Dreams Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of DREAM Act Students*, 21 WM. & MARY BILL OF RTS. J. 463 (2012).

64. In that seminal Supreme Court case, plaintiffs were a class of undocumented immigrant children in Smith County, Texas who had been required by the local school district to pay tuition to attend public elementary school. The school district reasoned that since the children had not been legally admitted into the United States, they should not be considered *persons within the State's jurisdiction* and therefore could not claim the benefits of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. While the majority emphasized its view that the children's parents were the ultimate wrongdoers—stating that “innocent children,” who have been “assigned a legal status due to a violation of law by their parents” should not be subjected to the discrimination imposed by the Texas school district—it ruled that children could indeed make an equal protection claim and enjoined the school district from charging tuition. *Plyler v. Doe*, 457 U.S. 202, 237 (1982).

Commissioner for Human Rights, and UNICEF, have incorporated human rights standards into model migration policies and practices. In 2012, the Committee on the Rights of the Child addressed the rights of children in the context of international migration and concluded that child rights-based approaches must be mainstreamed into national migration laws and practices.⁶⁵ The following section defines a rights-based approach and sets groundwork for how such an approach could be applied to children in the United States by analyzing U.S. policies and practices through the four key principles of the CRC—non-discrimination; the best interests of the child; life, survival, and development; and participation.

II. THE HUMAN RIGHTS BASED APPROACH: A CONCEPTUAL FRAMEWORK

A human rights-based approach is a conceptual framework based on international human rights standards and directed at promoting and protecting human rights.⁶⁶ Central aspects to a rights-based approach include 1) identifying and building the capacities of individuals to claim their rights and of duty bearers to meet their obligations, 2) moving away from needs-based or philanthropic approaches, and 3) evaluating societal outcomes.⁶⁷ Born in the development field in the 1990s, the rights-based approach was adopted by the United Nations in 2003 in the Common Understanding of a Human Rights Based-Approach to Development Cooperation.⁶⁸ Since then, the “HRBA” has grown and moved into other fields, including child rights, health, and migration, among others.⁶⁹

65. Comm. on the Rights of the Child, Rep. of the 2012 Day of General Discussion: The Rights All Children in the Context of International Migration (2012), http://www2.ohchr.org/english/bodies/crc/docs/discussion2012/2012CRC_DGD-Childrens_Rights_InternationalMigration.pdf [hereinafter UNCRC 2012 General Discussion].

66. OFFICE OF THE U.N. HIGH COMM’R FOR HUMAN RIGHTS, FREQUENTLY ASKED QUESTIONS ON A HUMAN RIGHTS-BASED APPROACH TO DEVELOPMENT COOPERATION (New York & Geneva, 2006) [hereinafter FAQ ON HRBA]; see also Francois Crepeau (Special Rapporteur on Human Rights of Migrants), *Report on the Human Rights of Migrants*, 62, U.N. Doc. A/HRC/29/36 (May 8, 2015) (“A human rights-based framework for migration would ensure the application of these obligations and duties to people in vulnerable situations of migration. It is a framework based on equality and non-discrimination, the duty to protect and access to justice. By upholding the principles of equality and non-discrimination, States acknowledge that human rights are for all and that migrants should be treated as equal rights holders, regardless of their migratory status in relation to the sovereign territory they find themselves in. When migrants are viewed as equal rights holders, a duty to protect them at all stages of the migration process naturally follows. If violations of these rights occur at any point, as equal rights holders, migrants must have access to justice to remedy any injustice.”).

67. FAQ ON HRBA, *supra* note 66.

68. DAVID D’HOLLANDER, IGNACE POLLET & LAURA BEKE, LEUVEN CTR. FOR GLOBAL GOVERNANCE STUDIES, PROMOTING A HUMAN RIGHTS-BASED APPROACH (HRBA) WITHIN THE DEVELOPMENT EFFECTIVENESS AGENDA (2013). The integration of human rights into development practice marked an official movement away from a charity-based approach to one that prioritized promoting and protecting human rights.

69. See URBAN JONSSON, HUMAN RIGHTS APPROACH TO DEVELOPMENT PROGRAMMING (UNICEF 2003); see also WORLD HEALTH ORGANIZATION, HUMAN RIGHTS-BASED APPROACH TO HEALTH, <http://www.who.int/trade/glossary/story054/en/>; OFFICE OF THE U.N. HIGH COMMISS’R FOR HUMAN RIGHTS, IMPROVING HUMAN RIGHTS-BASED GOVERNANCE OF INTERNATIONAL MIGRATION (2013).

Simply recognizing children as rights-holders is often the first hurdle to overcome in applying a rights-based approach.⁷⁰ Children are naturally sympathetic and may be thought of as among the “deserving poor,”⁷¹ viewed as objects in need of charity and protection, rather than as individuals with rights.⁷² While at first, this sympathy can draw attention and resources, the image of the child as vulnerable and in need of protection may impede a rights-based approach. By not seeing children as rights-holders possessing a broad range of rights—and recognizing the interdependence of those rights—narrowly focused efforts can fail to ensure their wellbeing.⁷³ For example, in the aftermath of the 2011 earthquake in Haiti, humanitarian agencies focused on rescuing children, particularly from the threat of human trafficking.⁷⁴ However, much less was done to address the broader range of rights violations children faced, many of which contributed to the underlying risk factors inherent in human trafficking.⁷⁵ A rights-based approach also recognizes children’s agency and resilience and, to that end, may capitalize on positive outcomes resulting from mobility, such as improved access to education or a decent standard of living.⁷⁶ Unfortunately, immigrant children are even less likely to be treated as rights-holders, not only due to being viewed through a paternalistic lens, but as a result of their status as migrants and the prioritization of immigration enforcement measures.⁷⁷

Duty bearers, in the context of children’s rights, include parents or other primary caregivers, as well as other entities, like the state. Urban Jonsson uses the term “pattern of rights” to illustrate the various relationships among individuals and states with respect to children’s rights, noting that when parents lack resources to provide for their children, it is often because *their* rights have been violated, and they cannot be held accountable for not providing adequate support.⁷⁸ “In order to meet their duties to children and realise their children’s rights, parents must be able to claim their own rights vis-à-vis other specific duty-bearers. In this way, parents become ‘secondary’ claims/

70. Wouter Vandenhoele, *Child Poverty and Children’s Rights: An Uneasy Fit?* 22 MICH. ST. J. INT’L L. 609 (2013).

71. *Id.*

72. See Jonathan Todres, *A Child Rights-Based Approach to Reconstruction in Haiti*, 6 INTERCULTURAL HUM. RTS. L. REV. 43, 48 (2011).

73. *Id.* at 52-53.

74. *Id.* at 53.

75. *Id.* Without recognizing the interrelationship and inter-dependence of rights, so-called “rescue” efforts did little to improve children’s wellbeing in Haiti, and may have failed in preventing trafficking as well.

76. See Susu Thatun & Karin Heissler, *Children’s Migration: Towards a multidimensional child protection perspective*, in CHILDREN ON THE MOVE 95 (International Organization for Migration 2013).

77. Jacqueline Bhabha, *Lone Travelers: Rights, Criminalization, and the Transnational Migration of Unaccompanied Children*, 7 UNIV. CHI. L. SCH. ROUNDTABLE 269 (2000). The International Organization for Migration has emphasized that in order to effectively apply a human-rights based approach, migration must be “decontroversialized,” rather than treated firstly as a border security issue. John Rautenbach, *Mainstreaming a human rights-based approach to migration within the High Level Dialogue*, INT’L ORG. FOR MIGRATION (Sept. 4, 2013, 8:12 AM), <https://www.iom.int/speeches-and-talks/mainstreaming-human-rights-based-approach-migration-within-high-level-dialogue>.

78. JONSSON, *supra* note 69.

rights-holders and others become the second-level duty-bearers.”⁷⁹ Protections for the family are thus central to a child rights-based approach, as failing to address the circumstances of the child’s primary caregivers could render other actions aimed at helping children obsolete.

The shift toward a human rights-based approach in the development field also involved a distinct move away from earlier responses to social problems. Under a charity model, donors supplied food, money, clothing, or medical care to alleviate suffering and extreme hardship. But once these immediate needs were met, the poor and marginalized continued to be poor and marginalized, and became increasingly dependent on such charitable donations.⁸⁰ The model assumed that donors knew and understood the needs of the poor and would satisfy those needs through generosity.⁸¹

Toward the middle of the 20th century, the development sector moved from a charity model toward a needs-based approach.⁸² The needs-based approach began an important dialogue with impacted communities, which identified their own needs and the humanitarian sector attempted to fulfill those needs in response. However, this approach fell short of addressing the root causes as well as the policies and systems that could lead to systemic change. People who are poor or in need were seen as beneficiaries of services, not necessarily as actors in their own development.⁸³ Needs were met only when resources were available, thus communities were vulnerable to ongoing violations of their rights.⁸⁴ While the needs approach may involve seeking additional resources on behalf of a community, the rights-based approach seeks more equitable distribution of existing resources, bringing systemic and structural discrimination and marginalization to the focus of efforts. According to Urban Jonsson, “[w]hile a basic needs approach does not

79. *Id.* (noting that “Most scholars in the area of international human rights law only recognise obligations on the part of the state. The CRC is an exception, because parents (or other caretakers) are also recognised as duty-bearers. In an HRAP there is a need to extend the claim-duty relationships to include all relevant subjects and objects at sub-national, community, and household levels. It is interesting to note that the Preambles of both the ICCPR and the ICSECR support such an interpretation, stating: Realising that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognised in the present Covenant (UN, 1976)”) (citing International Covenant on Civil and Political Rights, Preamble (ICCPR) and the International Covenant on Economic, Social Rights, Preamble (ICESR)).

80. According to the Office of the High Commissioner for Human Rights, “Mere charity is not enough from a human rights perspective. Under a human rights-based approach, the plans, policies and processes of development are anchored in a system of rights and corresponding obligations established by international law. This helps to promote the sustainability of development work, empowering people themselves— especially the most marginalized—to participate in policy formulation and hold accountable those who have a duty to act.” FAQ ON HRBA, *supra* note 66.

81. REPLACE CAMPAIGN, INTRODUCTION TO THE RIGHTS BASED APPROACH, <http://www.replace-campaign.org/resources/introduction-to-the-rights-based-approach.pdf> (last accessed Oct. 29, 2015).

82. See U.N. Committee on the Rights of the Child (UNCRC), *General Comment no. 5: General measures of implementation of the Convention on the Rights of the Child* ¶ 11 (2003) (“The Committee emphasizes that, in the context of the Convention, States must see their role as fulfilling clear legal obligations to each and every child. Implementation of the human rights of children must not be seen as a charitable process, bestowing favours on children.”); see also JONSSON, *supra* note 69.

83. JONSSON, *supra* note 69.

84. *Id.*

necessarily recognize willful or historic marginalization, a human rights approach aims directly at overcoming such marginalization.”⁸⁵

Root causes of rights violations and social injustices often stem from many of the same social ills such as inequality, marginalization, or social exclusion. A rights-based approach seeks to address these root causes through measures and initiatives that address structural inadequacies and inequalities.⁸⁶ For example, in the context of child exploitation and abuse, it is well-documented that children who are not in school, who have previously suffered abuse, or who lack parental care are more likely to become victimized. While a needs-based approach may focus exclusively on children’s protection from abuse, a rights-based approach aims to ensure that children’s rights are *comprehensively* addressed and protected, even before any harm has occurred.⁸⁷ There is an inherent preventive approach—in other words, ensuring that children can exercise their rights to education, health, and family unity will lessen the chances that children fall victim to trafficking, exploitation, or other forms of abuse.⁸⁸

Finally, addressing structural inequities and root causes of rights violations requires looking beyond the legal frameworks and more broadly at societal outcomes.⁸⁹ In other words, one must look at *results*, not just the laws or even whether they have been followed. Human rights measurement tools, such as human rights indicators, have been increasingly recognized as critical toward developing evidence-based policies or programs that promote the realization of human rights.⁹⁰ Indicators can be quantitative or qualitative and are typically divided into three subsets: structural indicators (are the laws on the books in line with international treaty obligations and do institutional mechanisms exist to protect rights?), process indicators (are there sufficient implementation mechanisms in place to ensure realization of rights?), and outcome indicators (what is the reality on the ground?).⁹¹

85. *Id.* at 20.

86. *See, e.g.,* Dottridge, *supra* note 32.

87. *See* JONSSON, *supra* note 69.

88. *See id.*

89. As stated by the OHCHR, the HRBA “seeks to analyse inequalities and seek redress of discriminatory practices and uneven distributions of power that impede the realization of human rights and development progress.” FAQ ON HRBA, *supra* note 66.

90. Ann Janette Rosga & Margaret L. Satterthwaite, *The Trust in Indicators: Measuring Human Rights*, 27 BERKELEY J. OF INT’L L. 2 (2009); *see also* JEAN CANDLER, ET AL., EQUAL. & HUMAN RIGHTS COMM’N, HUMAN RIGHTS MEASUREMENT FRAMEWORK: PROTOTYPE PANELS, INDICATOR SET AND EVIDENCE BASE, RESEARCH REPORT 81 (2011). In 2011, the Equality and Human Rights Commission, Great Britain’s national human rights institution, developed a measurement framework to measure and monitor progress on human rights implementation, based on the framework developed by the U.N. Office for the High Commissioner for Human Rights.

91. *See* E.U. AGENCY FOR FUNDAMENTAL RIGHTS, DEVELOPING INDICATORS FOR THE PROTECTION, RESPECT AND PROMOTION OF THE RIGHTS OF THE CHILD IN THE EUROPEAN UNION (Nov. 2010) [hereinafter FRA CHILD RIGHTS INDICATORS]; OHCHR, *Human Rights Indicators: A Guide to Measurement and Implementation*, U.N. HUMAN RIGHTS HR/Pub/12/5 (2012); Pablo Ceriani Cernadas, Michele LeVoy, Lilana Keith, *Human Rights Indicators for Migrants and their Families* (KNOMAD, Working Paper, Apr. 2015); Sital Kalantry, Jocelyn E. Getgen, & Steven A. Koh, *Enhancing Enforcement of Economic, Social, and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR* (Cornell

The U.N. Committee on the Rights of the Child has urged states to develop indicators, as well as other methods of systematically measuring and assessing the realization of children's rights, such as child impact assessments. General Comment No. 5 provides that not only must states ensure collection of data, disaggregated to ensure non-discrimination, they should work with research institutions "to build a complete picture of progress towards implementation [of the Convention], with qualitative as well as quantitative studies," and that such evaluation "requires the development of indicators related to all rights guaranteed by the Convention."⁹² Child rights indicators should consider the interaction between children, the state, and society on matters concerning children, taking into account the need to strengthen capacities of both rights holders to claim their rights and duty bearers to fulfill their obligations.⁹³ In its 2012 report, the Committee on the Rights of the Child urged states to ensure concrete measures to collect data disaggregated by migration status and other factors, while also ensuring such data not be used by migration control authorities to disadvantage undocumented migrants.⁹⁴

Rights-based approaches have been slow to develop among human rights and social justice institutions in the United States.⁹⁵ However, rights-based approaches can be applied not only by governments, but also by activists and advocates, program managers, researchers, and practitioners by following its core principles. Measurement tools developed by civil society make up the

Law Faculty Publications, Paper 1076, 2010). Much less attention has generally been given to measuring and monitoring the rights of child migrants or migrants generally through systematic human rights measurement mechanisms, though the KNOMAD Thematic Working Group on Migrant Rights and Social Aspects of Migration recently released a set of human rights indicators with the aim of fostering more evidence-based policymaking with respect to migrants and their families. Cernadas et al., *supra* note 91; see also OHCHR Human Rights Indicators, *supra* note 91.

92. Comm. on the Rights of the Child, *Gen. Comment No. 5: General measures of implementation of the Convention on the Rights of the Child*, U.N. Doc. CRC/GC/2003/5 (Nov. 27, 2003).

93. FRA CHILD RIGHTS INDICATORS, *supra* note 91. The Fundamental Rights Agency explained that child rights indicators are distinct from the concept of child well being to the extent that *child well being* indicators reveal only the 'state' of children's lives. *Id.*

94. UNCRC 2012 General Discussion, *supra* note 65, at ¶¶ 63-67. In recognition of the need to measure progress on protecting and promoting children's rights in order to identify appropriate policy priorities, the European Commission asked the EU Fundamental Rights Agency to develop child rights indicators to assess and monitor the advancement of children's rights in the European Union according to the child rights framework laid out in the CRC. The effort was seen as a turning point in child rights promotion, since it was the first time an EU institution set out to develop a "coherent, considered approach to the development, monitoring and review of EU law and policy affecting children." FRA CHILD RIGHTS INDICATORS, *supra* note 91.

95. In 2003, following a convening at Howard University Law School among human rights and social justice activists, the U.S. Human Rights Network was formed, which aims to build and expand a domestic, people-centered human rights movement based on human rights principles. While there is growing movement around economic and social rights that has incorporated a rights-based perspective, this has been largely absent from the immigration and refugee debates. See Mariana Chilton & Donald Rose, *A Rights-Based Approach to Food Insecurity in the United States*, 99 AM. J. PUB. HEALTH 1203-11 (2009) (proposing a human-rights based approach as a "fresh approach to solving the problem of food insecurity"); see also KATHRYN LIBAL & SCOTT HARDING, *HUMAN-RIGHTS-BASED COMMUNITY PRACTICE IN THE UNITED STATES* (Springer, 2015); ANJA RUDIGER & BENJAMIN MASON MEIER, *A RIGHTS-BASED APPROACH TO HEALTH CARE REFORM*, (2010); *RIGHTS-BASED APPROACHES TO PUBLIC HEALTH* (Elvira Beracochea, Corey Weinstein & Dabney Evans, eds., Springer, 2010).

bulk of domestic human rights evaluations,⁹⁶ and can be effective in providing a framework through which community groups and NGOs can articulate needs to reform policy.⁹⁷ As a starting point to consider how a rights-based approach might be applied to efforts aimed at immigrant children in the United States, the following section provides a brief analysis of existing U.S. laws, policies, and practices through the lens of the four key principles of the CRC.

III. U.S. TREATMENT OF CHILDREN IN IMMIGRATION SITUATIONS AND THE FOUR PRINCIPLES OF THE CRC

The U.N. Convention on the Rights of the Child, with its broad and comprehensive scope, provides a clear framework for analyzing the protection and realization of children's rights.⁹⁸ In the sections that follow, the situation and treatment of children in the United States—both in the legislative framework and in practice—is explored through the lens of the CRC's four key principles: non-discrimination; the best interests of the child; the right to participation; and the right to life, survival, and development.⁹⁹

A. *Non-discrimination*

Equity and non-discrimination are fundamental principles for respecting and fulfilling all of the rights children are entitled to under the CRC, which vests all children with equal rights, regardless of their immigration or

96. A report by the Opportunity Agenda notes that

The [U.S.] government's engagement with the UPR process, and particularly its inclusion of community groups and advocates, is a commendable beginning. However, in part because the report concentrates on broad legal frameworks, it falls short of providing a comprehensive, evidence-based portrait of human rights throughout the nation. As the United States begins to undergo continuing evaluation, the UPR process highlights the need to develop a meaningful, ongoing human rights assessment model for the United States.

THE OPPORTUNITY AGENDA, *ASSESSING HUMAN RIGHTS IN THE UNITED STATES: DOMESTIC HUMAN RIGHTS INDICATORS* (2011). Human Impact Partners is an example of a nonprofit organization that seeks to "help organizations and public agencies who work with low-income communities and communities of color understand the effects of current or proposed projects and policies on community health" Human Impact Partners, *About Us*, HUMANIMPACT.ORG, <http://www.humanimpact.org/about-us/> (last accessed Dec. 20, 2017).

97. Risa Kaufman, *How to Measure US Progress on Human Rights*, HUMAN RIGHTS AT HOME BLOG (Nov. 11, 2015), http://lawprofessors.typepad.com/human_rights/2015/11/the-data-revolution-is-upon-us-spurred-by-the-uns-adoption-of-the-2030-sustainable-development-goals-sdgs-how-can-us.html; see also LIBAL & HARDING, *supra* note 95.

98. Protections for immigrant children exist in several other international legal instruments, such as the CERD, the Convention Against Torture, and the Trafficking Protocol. See Bhabha, *supra* note 8.

99. UNCRC 2012 General Discussion, *supra* note 65.

citizenship status.¹⁰⁰ Despite decades of measures that have been taken at international, national, local, and community levels to ensure equity among children, discrimination persists. According to Save the Children, discrimination, which is closely linked to poverty, “results from unequal power dynamics and institutional structures in society” and must be addressed through holistic and strategic initiatives at multiple levels.¹⁰¹

Article 2 of the CRC prohibits all forms of discrimination with respect to the enjoyment of the rights under the Convention.

“States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members.”

“A child is a child” and “migrant children are children first and foremost,” are mantras repeated by child rights proponents and governments alike, capturing the notion articulated by Article 2 that all children must be treated equally.¹⁰² The reality is, however, that immigrant children are often subjected to severe rights violations and discrimination. According to Farrugia, “While official policy may declare, for example, that ‘the child is a child first and an asylum seeker second,’ the notion of ‘child’ is mediated through the notion of ‘alien’ and this may have a bearing on the treatment the child receives.”¹⁰³ Such differentiations, seen also through the terms “migrant” and “refugee,” can “give rise to conceptions of ‘others’ as fundamentally different, and serve the interests designed to promote and protect the interests and privilege of ‘not other.’”¹⁰⁴

In its Day of General Discussion, the UN Committee on the Rights of the Child made clear that children in the context of migration are entitled to *all*

100. An earlier draft of the UNCRC included a provision that affirmatively granted noncitizen children equal rights. This was later rejected in favor of avoiding potential limits to the grounds of prohibited discrimination. The United States had urged a limitation on the scope of the Convention to apply only to children who were legally within a state’s territory, but this was flat out rejected. See Avinoam Cohen, *From Status to Agency: Defining Migrants*, 24 GEO. IMMIGR. L.J. 617, 622 (2010) (citing THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: A GUIDE TO THE “TRAVAUX PREPARATOIRES” 141 (Sharon Detrick ed., 1992)).

101. FRANCES SHEAHAN, *SAVE THE CHILDREN, TRANSLATING THE RIGHT TO NON-DISCRIMINATION INTO REALITY* (Sweden, 2008).

102. See Ruth Farrugia & Kristina Touzenis, *The international protection of unaccompanied and separate migrant and asylum-seeking children in Europe* in *MIGRATING ALONE: UNACCOMPANIED AND SEPARATED CHILDREN’S MIGRATION TO EUROPE 21* (UNESCO, 2010).

103. *Id.*

104. *Id.*

of the same protections as children who are nationals of a particular state.¹⁰⁵ Yet in many countries, legislative frameworks directly discriminate against immigrant children, excluding them from certain rights protected under the Convention.¹⁰⁶ Under Article 2, immigrant children should have the right to access the same quality healthcare, education, and other services as citizen children. New York is one of a few U.S. states that provides low-income non-citizen children with public health insurance through the Child Health Plus Program (or Children’s Medicaid).¹⁰⁷ In other states, undocumented children are excluded from healthcare coverage, unless they can pay the high cost of private insurance.¹⁰⁸

Discrimination may be overt—where the actions of governments or individuals directly target a child or group of children based on their particular status, such as directly excluding certain immigrant children from public healthcare—or structural—where the laws, policies, or practices that, when read literally, treat people equally, but have a discriminatory effect on groups of people from marginalized communities.¹⁰⁹ Thus, even when laws do not explicitly deny noncitizens the ability to exercise their rights under the Convention, states may violate the non-discrimination principle if the *effect* of its policies impairs the enjoyment or exercise of rights by certain

105. UNCRC 2012 General Discussion, *supra* note 65.

106. Governments that have signed and ratified the UNCRC nevertheless have excluded migrant children from rights and entitlements otherwise granted to citizen children through the use of reservations and declarations to the UNCRC, instead giving deference to immigration legislation. “For years the United Kingdom was criticized for excluding migrant children from the full entitlements under the CRC due to their migration status until it lifted [its] reservation in 2008, announcing its move days before the United Nations was set to evaluate its children’s rights record.” See Simon Troller, *In the Migration Trap: Unaccompanied Migrant Children in Europe*, HUMAN RIGHTS WATCH, http://www.hrw.org/world-report-2010/migration-trap#_edn3 (last accessed Dec. 2017). (citing U.N. Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations, United Kingdom of Great Britain and Northern Ireland, U.N. Doc. CRC/C/GBR/CO/4 (Oct. 20, 2008), <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC.C.GBR.CO.4.pdf>). Germany had a similar declaration, filed in 1990 by the federal government. The declaration read: “nothing in the Convention may be interpreted as implying that unlawful entry by an alien into the territory of the Federal Republic of Germany or his unlawful stay there is permitted; nor may any provision be interpreted to mean that it restricts the right of the Federal Republic of Germany to pass laws and regulations concerning the entry of aliens and the conditions of their stay or to make a distinction between nationals and aliens.” See Convention on the Rights of the Child, *supra* note 1, at Declarations and Reservations. Germany lifted the reservation in 2010, after some resistance by government actors, who felt it would act as a “pull factor,” attracting more migrant children. See Troller, *supra*.

107. California, Illinois, Massachusetts, New York, and Washington State provide public health insurance coverage to undocumented children. Ruben Castaneda, *Where Can Undocumented Immigrants Go For Health Care*, U.S. NEWS & WORLD REP. (Nov. 2, 2016, 1:01 PM), <https://health.usnews.com/wellness/articles/2016-11-02/where-can-undocumented-immigrants-go-for-health-care>; see also NEW YORK CITY HUMAN RESOURCES ADMINISTRATION, CHILD HEALTH PLUS, <https://www1.nyc.gov/site/ochia/coverage-care/child-health-plus.page> (last accessed Dec. 21, 2017) (noting that all children under age 19 are potentially eligible for Child Health Plus regardless of immigration status).

108. See NAT’L IMMIGRANT LAW CENTER, HEALTH CARE COVERAGE MAPS, <https://www.nilc.org/issues/health-care/healthcoveragemaps/> (last accessed Nov. 11, 2017).

109. See, e.g., Camilla Ida Ravnbol, *Intersectional Discrimination Against Children: Discrimination Against Romani Children and Anti-Discrimination Measures to Address Child Trafficking*, UNICEF INNOCENTI RESEARCH CTR. (2009).

persons.¹¹⁰ For example, despite strong laws calling for inclusive education in New York State, undocumented immigrant children have reported ongoing obstacles to enrollment and registration in the public school system.¹¹¹ Advocacy groups have complained that immigrant children have been denied services by child protective agencies, which may take the position that limited resources force them to prioritize the needs of citizen children, sometimes ignoring allegations of abuse or neglect.¹¹² In response, California changed its laws to proactively declare that immigrant children shall be treated no differently from U.S. citizen children in the delivery of child protective services.¹¹³

The federal immigration system is enmeshed with laws, policies, and practices that purposefully or inadvertently discriminate against certain groups of immigrant children.¹¹⁴ For example, U.S. law creates different standards of protection for Mexican and Canadian children who are apprehended at the border by immigration enforcement officials, as compared to children from all other countries.¹¹⁵ Mexican and Canadian children can be sent back to their home countries almost immediately, with some exceptions, while children from non-contiguous countries must be afforded a hearing before an immigration judge.¹¹⁶ Family unity in the context of immigration is a right bestowed upon certain children and denied to others.¹¹⁷ For instance, children granted asylum may petition for a parent or legal guardian to join them (after the child turns 21), while children who are granted special immigrant juvenile

110. For this reason, UNICEF encourages states to collect disaggregated data in order to measure the effects of their laws and policies. UNICEF, IMPLEMENTATION HANDBOOK FOR THE CONVENTION ON THE RIGHTS OF THE CHILD, UNITED NATIONS CHILDREN'S FUND 17 (Geneva, 2007). When interpreting references to non-discrimination in the ICCPR, the Office of the High Commissioner for Human Rights in General Comment No. 18 (1989) quotes article 1 of the Covenant on the Elimination of all forms of Racial Discrimination (one of the few human rights treaties ratified by the United States) and article 1 of the Covenant on the Elimination of All Forms of Discrimination Against Women. UNHCHR, *General Comment No. 18: Non-discrimination*, (Nov. 10, 1989).

111. UNACCOMPANIED IMMIGRANT YOUTH STUDY, *supra*, note 35; *see also*, Benjamin Mueller, *New York Compels 20 School Districts to Lower Barriers to Immigrants*, N.Y. TIMES (Feb. 18, 2015).

112. *See* CTR. FOR PUBLIC POLICY PRIORITIES, UNDOCUMENTED AND ABUSED: A TEXAS CASE STUDY OF CHILDREN IN THE CHILD PROTECTIVE SERVICES SYSTEM (2010), http://library.cppp.org/files/4/SIJS_UndocAbusedChildren_final.pdf.

113. The Reuniting Immigrant Families Act, S. Bill 1064, 2012 Leg., Reg. Sess. (Ca. 2012).

114. *See, e.g.*, Jaya Ramji-Nogales, 'The Right to Have Rights': *Undocumented Migrants and State Protection*, U. KAN. L. REV. 63, 1045 (summarizing critiques by Hannah Arendt that international human rights law, which reflect sovereign interests of the state representatives who drafted international human rights treaties, "creates hierarchies of suffering in which those outside its scope are dismissed from the discourse.").

115. William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA), 8 U.S.C. § 1232 (2012), Pub. L. No. 110-457, § 235, 122 Stat. 5044, 5074 (2008).

116. *Id.*

117. In general, U.S. children cannot petition for their parents to adjust status to lawful permanent residence until those children are 21 years of age and considered adults under U.S. immigration law. *Bringing Parents to Live in the United States as Permanent Residents*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/family/family-us-citizens/parents/bringing-parents-live-united-states-permanent-residents> (last visited Feb. 18, 2018).

status are denied this right to family unity.¹¹⁸ These policies and practices violate the principle of non-discrimination under the UNCRC, which requires that children have equal rights to protection and family unity.¹¹⁹

The distinction between unaccompanied and accompanied children provides an example of how even the most well-intentioned advocacy efforts to protect vulnerable children can result in uneven protections if the non-discrimination principle is not considered from the outset. After years of tireless efforts by advocates to improve the treatment of unaccompanied children, U.S. immigration law now affords a set of legal benefits and protections to unaccompanied children.¹²⁰ However, these benefits and protections have not always been applied to *accompanied* children. For example, the William Wilberforce Trafficking Victims Reauthorization Act of 2008 (TVPRA) ensured that unaccompanied children seeking asylum are not subject to the one-year filing deadline and will have their claims heard affirmatively rather than defensively, as was previously the case for all children placed in removal proceedings.¹²¹ It also provided for expanded access to legal counsel for unaccompanied children and the option of voluntary departure to the country of origin at no cost to the child.¹²² Finally, TVPRA provided that “[a]pplications for asylum and other forms of relief from removal in which an unaccompanied alien child is the principal applicant shall be governed by regulations which take into account the specialized needs of unaccompanied alien children and which address both procedural and substantive aspects of handling unaccompanied alien children’s cases.”¹²³ As such, none of these protections apply to children who are accompanied by a parent or legal guardian.¹²⁴

The discriminatory impact of legal protections that apply only to unaccompanied children is most evident in the custodial systems that apply to each group. Unaccompanied children, once identified as such by an agency of the U.S. Department of Homeland Security, must be transferred to the custody of the U.S. Department of Health and Human Services’ Office of Refugee Resettlement (ORR) within 72 hours of apprehension.¹²⁵ In accordance with

118. Jacqueline Bhabha, *Internationalist Gatekeepers?: The Tension Between Asylum Advocacy and Human Rights*, 15 HARV. HUM. RTS. J. 155 (Jacqueline Bhabha notes the clear tension between the principle of universalism and asylum law’s somewhat antiquated approach that privileges certain groups over others).

119. RACHEL HODGKIN & PETER NEWELL, UNICEF, IMPLEMENTATION HANDBOOK FOR THE CONVENTION ON THE RIGHTS OF THE CHILD 17-33 (3d ed. 2007), https://www.unicef.org/publications/files/Implementation_Handbook_for_the_Convention_on_the_Rights_of_the_Child_Part_1_of_3.pdf.

120. *See Unaccompanied Alien Children: A Primer*, BIPARTISAN POL’Y CTR. (July 21, 2014), <https://bipartisanpolicy.org/blog/unaccompanied-alien-children-primer/>.

121. TVPRA § 235(d)(7)(A).

122. TVPRA § 235(a)(5)(D)(ii) to (a)(5)(D)(iii); *see also* TVPRA § 235(c)(5).

123. TVPRA § 235(d)(8).

124. TED KIM, U.S. CITIZENSHIP & IMMIGRATION SERVS., UPDATED PROCEDURE FOR DETERMINATION OF INITIAL JUDICATION OVER ASYLUM APPLICATIONS FILED BY UNACCOMPANIED ALIEN CHILDREN (2013), <https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2013/July%202013/Memo-Updated-UAC-Procedures.pdf>.

125. TVPRA § 235(b)(3).

the terms set out in the Flores Settlement, ORR must contact the child's relatives living in the United States and arrange for the child's prompt reunification with a family member, in order of preference beginning with parents, legal guardians, and then on to extended family or family friends.¹²⁶ By sharp contrast, when children are apprehended with a family member and designated as *accompanied*, they are placed in detention centers, contracted by U. S. Immigration and Customs Enforcement, where they may wait months or even over a year for their case to be heard.¹²⁷ In 2016, the Ninth Circuit ruled that the Flores Settlement Agreement applies equally to accompanied and unaccompanied children alike—a move very much in line with the CRC's non-discrimination principle.¹²⁸

These categorizations of children, which are deeply embedded not only in immigration law and policy, but also in research and practice, can deepen divides and lead to discriminatory treatment at the programmatic or service delivery level as well.¹²⁹ Even the very nature of children's vulnerability has been categorized by law and led to unequal protections. For example, the TVPRA included a ground-breaking provision for the appointment of Child Advocates (guardians ad litem for children in immigration removal proceedings) to advocate for the child's best interests. However, the provision applied only to "child trafficking victims and other vulnerable unaccompanied alien children."¹³⁰ The term "vulnerable" was not defined and many would say is a redundancy, as all unaccompanied children by nature of being

126. Flores Settlement Agreement, para. 14.

127. HUMAN RIGHTS FIRST, FAMILY DETENTION: STILL HAPPENING, STILL DAMAGING (2015), <http://www.humanrightsfirst.org/sites/default/files/HRF-family-detention-still-happening.pdf>.

128. Flores v. Lynch, 828 F.3d 898 (9th Cir. 2016), <https://cdn.ca9.uscourts.gov/datastore/opinions/2016/07/06/15-56434.pdf>.

129. At the administrative level, some agencies have taken practical approaches to ensure the non-discrimination of immigrant children. For example, in 2004, Save the Children found that separated immigrant children were housed in centers that were run by the Swedish Migration Board, rather than in programs run by municipal governments that cared for Swedish children who were in need of care. Noting that the main reason for children's migration to Sweden was often related, directly or indirectly to loss of family members or severe family problems (for example, in connection with civil conflict or war), Save the Children concluded that the best suited organization to receive and care for separated children was the municipal authority, which was already mandated to look after orphaned or traumatized Swedish children. In effect, Save the Children recommended that separated (noncitizen) children should be guaranteed the same treatment as other children in Sweden. Rather than segregating immigrant children, they should be integrated, as much as possible, under the auspices of the same agencies and programs that provide services to citizen children. In sum, immigrant or migrant children should not be provided parallel interventions but should be integrated into existing child protection infrastructures and frameworks. Save the Children emphasizes this as a means to reduce stigmatization and xenophobia and contribute to long-term positive outcomes. See MONICA BRENDLER-LINDQVIST, SAVE THE CHILDREN SWEDEN, MEETING THE NEEDS OF SEPARATED CHILDREN (2005), <https://resourcecentre.savethechildren.net/sites/default/files/documents/2490.pdf>; see also LUCY HILLER, SAVE THE CHILDREN UK, CHILDREN ON THE MOVE: PROTECTING UNACCOMPANIED MIGRANT CHILDREN IN SOUTH AFRICA AND THE REGION (2007), <https://resourcecentre.savethechildren.se/sites/default/files/documents/2665.pdf>.

130. TVPRA 235(c)(6) (2000). However, General Comment No. 6 of the UNCRC explicitly provides that guardians (similar to Child Advocates) shall be appointed to all unaccompanied children. Comm. on the Rights of the Child, General Comment No. 6: Treatment of unaccompanied and separated children outside their country of origin, ¶ 33, U.N. Doc. CRC/GC/2005/6 (2005), <http://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf>.

unaccompanied and without immigration status are clearly vulnerable.¹³¹ Government-contracted programs were left to determine, through triage and with limited resources, which children would be eligible for services.¹³² A study by UNICEF’s Innocenti Research Centre identified a similar situation in Finland, where professional guardians were appointed to promote the best interests of children who had been identified as trafficking victims. Other immigrant children, who had not been designated as trafficking victims, did not receive the same service.¹³³ The study, which applied a rights-based approach based on the CRC framework, concluded that such “[c]ustomized services for specific ‘categories’ of children should not create discrimination, but rather should be tailored to the needs of individual children and complement basic child protection services” that are available to all children.¹³⁴

Even when legislation doesn’t preclude the provision of services to certain categories of children—as in the case of Child Advocates being limited to unaccompanied children who meet the threshold of “vulnerable”—limited resources often force programs to triage. Despite years of advocacy efforts to develop a right to counsel for children, there is no right to government appointed counsel in immigration proceedings. Many children (and adults) continue to appear before adjudicators without representation, even while detained and deprived of their liberty.¹³⁵ Many efforts have developed programs to provide legal representation to children, but these under-resourced initiatives have largely applied a needs-based approach plagued by categorizations and triage, selecting children for representation based on an assessment of the merits of the child’s claim, often after only one meeting with the

131. See JOANNA APAP, EURO. PARLIAMENTARY RESEARCH SERV., BRIEFING: VULNERABILITY OF UNACCOMPANIED AND SEPARATED CHILD MIGRANTS (2016), [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/595853/EPRS_BRI\(2016\)595853_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/595853/EPRS_BRI(2016)595853_EN.pdf).

132. See OLGA BYRNE, VERA INST. OF JUSTICE, UNACCOMPANIED CHILDREN IN THE UNITED STATES: A LITERATURE REVIEW (2008).

133. PHIL MARSHALL & SUSANNA NORDH, UNICEF INNOCENTI RESEARCH CTR., CHILD TRAFFICKING IN THE NORDIC COUNTRIES: RETHINKING STRATEGIES AND NATIONAL RESPONSES 21 (2011), http://www.unicef-irc.org/publications/pdf/nordic_countries.pdf.

134. *Id.* at 13, 31 (“[T]he privileging of children who are identified as having been trafficked appears to represent a form of discrimination against other vulnerable groups of migrant children whose rights are not fully met, as well as trafficked victims who, for various reasons, have not been identified as such.”).

135. U.S. immigration laws, which are often compared to the tax code for their complexity and obscurity, are nearly impossible for an untrained adult to navigate on their own, let alone a child. *J.E.F.M. v. Holder*, second amended complaint. Add some history, including interpretations of INA section 292. Moreover, human rights law supports the appointment of counsel to all indigent immigrants in removal proceedings—including all children and all adults—without discrimination or triage based on relative needs or the perceived merit of an individual’s case. Article 14 of the International Covenant on Civil and Political Rights (ICCPR) provides that “all persons shall be equal before the courts and tribunals.” The Inter-American Court of Human Rights issued an advisory opinion on the “Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection,” finding that “[t]he Court considers that States have the obligation to ensure to any child involved in immigration proceedings the right of legal counsel by the offer of free State legal representation services.” Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-21/14, Inter-Am. Ct. H.R. (ser. A) No. 21, ¶ 130 (Aug. 19, 2014), http://www.corteidh.or.cr/docs/opiniones/seriea_21_eng.pdf; see generally, Risa E. Kaufman, Martha F. Davis, & Heidi M. Wegleitner, *The Interdependence of Rights: Protecting the Human Right to Housing By Promoting the Right to Counsel*, 45 COLUM. HUM. RTS. L. REV. 772 (2014).

child.¹³⁶ Acting as gatekeepers, attorneys and legal assistants decide which children will be represented in immigration court and which will stand alone.¹³⁷ A recent move toward “universal representation” models—programs that represent individuals in immigration proceedings to the extent their resources allow but without conducting screening or triage, such as the SAFE Cities Network, which expanded the New York Immigrant Family Unity Project’s proven model—are promising steps toward a rights-based approach to legal services.¹³⁸

B. *Best Interests of the Child*

For over a century, the principle of the best interests of the child has guided the development of law and policy protecting the welfare of children in the United States.¹³⁹ Similarly, under international law, there is universal agreement that the best interests of the child should be a primary consideration in any decision related to the child, as enshrined in Article 3 of the CRC.¹⁴⁰ The best interests of the child is one of the four fundamental principles of the CRC for implementing all rights of the child, and appears in several articles in addition to Article 3.¹⁴¹ Ultimately, the aim of applying the best interests—which benefits individual children and children collectively—is to ensure effective enjoyment of all rights enshrined in the Convention, including the holistic development of the child.¹⁴²

136. Unaccompanied children were represented by an attorney in only 32% of 63,721 cases pending in Immigration Court as of October 31, 2014, according to data obtained and analyzed by Syracuse University’s Transactional Records Access Clearinghouse (TRAC). *Representation for Unaccompanied Children in Immigration Court*, TRAC IMMIGR. (Nov. 25, 2014), <http://trac.syr.edu/immigration/reports/371/>.

137. See Christopher Nugent, *Protecting Unaccompanied Immigrant and Refugee Children in the United States*, 32 HUM. RTS., Winter 2005, at 9.

138. JENNIFER STAVE ET AL., VERA INST. OF JUSTICE, *EVALUATION OF THE NEW YORK IMMIGRANT FAMILY UNITY PROJECT* (2017), https://storage.googleapis.com/vera-web-assets/downloads/Publications/new-york-immigrant-family-unity-project-evaluation/legacy_downloads/new-york-immigrant-family-unity-project-evaluation.pdf. On November 9, 2017, the Vera Institute of Justice announced the launch of the Safety and Fairness for Everyone (SAFE) Cities Network, a multi-jurisdiction network dedicated to providing publicly-funded representation for individuals facing deportation, which would follow the universal representation model developed by NYIFUP. Press Release, Vera Inst. of Justice, *SAFE Cities Network: 11 Communities United to Provide Public Defense to Immigrants Facing Deportation*, (Nov. 9, 2017), <https://www.vera.org/newsroom/press-releases/safe-cities-network-launches-11-communities-united-to-provide-public-defense-to-immigrants-facing-deportation>.

139. See Andrew Schoenholtz, *Developing the Substantive Best Interests of Child Migrants: A Call for Action*, 46 VAL. U.L. REV. 991 (2012) The best interests of the child was enshrined in the 1959 Declaration of the Rights of the Child, the international legal document that served as a precursor to the CRC.

140. NIGEL CANTWELL, UNICEF OFFICE OF RESEARCH, *THE BEST INTERESTS OF THE CHILD IN INTERCOUNTRY ADOPTION 2014*, https://www.unicef-irc.org/publications/pdf/unicef%20best%20interest%20document_web_re-supply.pdf.

141. See, for example, article 9 on separation from parents, article 10 on family reunification, article 18 on parental responsibilities, article 20 on deprivation of family life and alternative care, article 21 on adoption, article 37(c) on separation from adults in detention, and article 40 with respect to certain procedural guarantees in the context of penal matters.

142. Comm. on the Rights of the Child, General Comment 14, I.A.4., U.N. Doc. CRC/C/GC/14 (29 May 2013), at http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf [hereinafter, General Comment No. 14].

In certain instances, it will be clear whether a particular action is in the best interests of children in the context of international migration. For example, the Committee on the Rights of the Child has firmly stated that detention for immigration purposes is never in children's best interests.¹⁴³ Issues that very directly impact other rights may also be relatively easy to determine, such as the right to education or healthcare regardless of immigration status.¹⁴⁴ But in many other circumstances, the answer will be far less clear. Acknowledging the inherent vagueness in the best interests principle, General Comment No. 14 of the CRC lays out guidelines for implementation grounded in a rights-based approach—a critical component of which is respect for the child's own views. The best interests principle is laid out in General Comment No. 14 as a threefold concept consisting of a substantive right, an interpretive legal principle, and a rule of procedure, providing a helpful framework to evaluate whether a set of policies and laws has adequately incorporated the best interests of the child.¹⁴⁵

Despite decades of criticism from experts, there is no substantive right in U.S. immigration law (or federal law otherwise) requiring that children's best interests be considered in immigration decisions that affect them.¹⁴⁶ The only provision of immigration law that calls for an assessment of the child's best interests with respect to potential repatriation is special immigrant juvenile status (SIJS)—an immigration benefit available to certain children who have been abused, neglected, abandoned, or otherwise mistreated by a parent. SIJS—and therefore the best interests assessment it entails—is available to a subset of immigrant children who meet the various eligibility criteria but the way children are identified as potentially eligible for the benefit is highly dependent on access to legal counsel, as well as variations in state court interpretations of federal law.¹⁴⁷ The proposed Children's Bill of Rights, a resolution introduced in the U.S. House of Representatives in October 2015, would instill a substantive right for children to have their best interests

143. Office of the U.N. High Comm'r for Human Rights (OHCHR) & Comm. on the Rights of the Child, *Rep. of the 2012 Day of General Discussion: The Rights of All Children in the Context of International Migration* ¶ 32 (2012), <http://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2012/DGD2012ReportAndRecommendations.pdf>.

144. See Schoenholtz (2012).

145. See General Comment No. 14, *supra* note 142, at ¶ 6.

146. See Jacqueline Bhabha & Wendy A. Young, *Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines*, 11 INT'L J. REFUGEE L. 84 (1999); Joyce Koo Dalrymple, *Seeking Asylum Alone: Using the Best Interests of the Child Principle to Protect Unaccompanied Minors*, 26 B.C. THIRD WORLD L.J. 131 (2006); David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979 (2002). While U.S. law does not require a child's best interests be considered in decisions impacting the right to remain in the United States, section 235(c)(2) of the William Wilberforce Trafficking Victims Protection Reauthorization Act requires the Department of Health and Human Services, which oversees the Office of Refugee Resettlement, to promptly place unaccompanied children in its custody "in the least restrictive setting that is in the best interest of the child." 8 U.S.C. § 1232(c)(2).

147. See Randi Mandelbaum & Elissa Steglich, *Disparate Outcomes: The Quest for Uniform Treatment of Immigrant Children*, 50 FAM. CT. REV. 606, 606 (2012).

considered in decisions that affect them.¹⁴⁸

In a step toward implementing a substantive best interests right, the William Wilberforce Trafficking Victims Reauthorization Act of 2008 (TVPRA of 2008) authorized the U.S. Department of Health and Human Services “to appoint independent child advocates for trafficking victims and other vulnerable unaccompanied alien children” to “advocate for the best interest of the child.”¹⁴⁹ The model for the program grew from the work of the Young Center for Immigrant Children’s Rights in Chicago, which looked to domestic child welfare principles, the CRC, and guidelines developed by UNHCR in developing its methodology. While far too few children receive the benefit of an appointed Child Advocate, those who do have been given a voice in immigration proceedings. From 2012-2015, more than 70 percent of the best interests recommendations set forth by appointed Child Advocates were followed by the ORR, immigration courts, U.S. Citizenship and Immigration Services, and other agencies.¹⁵⁰

The second prong of implementing the best interests standard in General Comment 14 states that when legal provisions or policies are open to more than one interpretation, decision makers should choose the option that most effectively serves the child’s best interests. Using the best interests standard as an interpretive legal principle would be particularly important in children’s asylum claims—given the complex legal standards that children must meet to obtain asylum, many children who nonetheless face persecution in their home countries are denied protection.¹⁵¹ The Young Center has made strides in convincing immigration adjudicators that the best interests of the child is a legitimate and relevant legal standard to consider in cases involving immigrant children. In a few instances, judges have referenced the best interests standard in a written decision –after having received and considered a best interests recommendation from the Young Center – where a child had requested voluntary departure from the United States.¹⁵² In Europe, where governments have not only ratified the CRC but embedded the best interests standard in regional and some national laws, efforts to operationalize the principle have only recently seen practical progress. In 2011, the Office of the High Commissioner for Human Rights (OHCHR) and UNICEF convened a Judicial Colloquium and commissioned a study to better understand how national and regional courts in Europe were applying the best interests principle to concrete situations involving migrant children. While there continues

148. H. Res. 476, 114th Cong. (2015), https://gutierrez.house.gov/sites/gutierrez.house.gov/files/images/GUTIER_017_xml.pdf.

149. Trafficking Victims Protection Reauthorization Act (TVPRA) § 235, 8 U.S.C. § 1232 (2012).

150. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-16-367, UNACCOMPANIED CHILDREN: HHS SHOULD IMPROVE MONITORING AND INFORMATION SHARING POLICIES TO ENHANCE CHILD ADVOCATE PROGRAM EFFECTIVENESS (2016), <https://www.gao.gov/assets/680/676687.pdf>.

151. See Jacqueline Bhabha & Susan Schmidt, *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in the U.S.*, 1 J. HIST. CHILDHOOD & YOUTH 126 (2008).

152. E-mail from Jennifer Nagda, Policy Dir., Young Center for Immigrant Children’s Rights, to author (Nov. 29, 2017) (correspondence on file with author).

to be a lack of clarity as to how decision-makers should apply the standard in cases of individual children, the study found that some national courts made frequent reference to Article 3 of the CRC as the basis for their decisions and often invoked it in conjunction with other rights, such as the right to respect for family life.¹⁵³

Finally, General Comment 14 provides a set of safeguards and guarantees that should be present in any process developed by state institutions to assess an individual child's best interests, or in the case of general policy, administrative or budgetary decisions, to ensure that the best interests of children are taken as a primary consideration.¹⁵⁴ Efforts to develop and incorporate procedural guidelines for implementing the best interests principle have been underway since the late 1980s, but have only recently made strides in operationalizing the standard with clear, replicable standards.¹⁵⁵ In 1997, UNHCR issued Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum, highlighting that "The basic guiding principle in any child care and protection action is the principle of the "best interests of the child."¹⁵⁶ However, the guidelines did not provide a mechanism for actually determining the best interests of the child, and a set of guidelines issued by the legacy INS explicitly stated that

153. See CRC JUDICIAL IMPLICATIONS, *supra* note 8; see also *Maslov v. Austria*, 2008-III Eur. Ct. H. R. 301 (*holding* where offences committed by a minor underlie an exclusion order regard must be had to the best interests of the child by relying on the article 3 of the CRC); *Rodrigues da Silva, Hoogkamer v. Netherlands*, 2006 Eur. Ct. H.R. 223 ("In view of the far-reaching consequences which an expulsion would have on the responsibilities which the first applicant has as a mother, as well as on her family life with her young daughter, and taking into account that it is clearly in Rachael's best interests for the [mother] to stay in the Netherlands, the Court considers that in the particular circumstances of the case the economic well-being of the country does not outweigh the applicant's rights under article 8, despite the fact that the first applicant was residing illegally in the Netherlands at the time of Rachael's birth.").

154. See Comm. on the Rights of the Children, 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), U.N. Doc. CRC/C/GC/14, ¶¶ 85-99, (May 29, 2013), http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf (the procedural safeguards and guarantees including the right of the child to express his or her own views, a fact-gathering process, timeliness (as the passage of time impacts children more severely than adults), trained and qualified professionals, legal representation, legal reasoning (i.e., the grounds for the decision must be clearly explained and justified by the decision maker and it is not sufficient to state, in general terms, that the child's best interests were considered), review processes, and, in the case of policy or broad administrative decisions affecting a group of children, a child rights impact assessment should be incorporated to estimate the impact the proposed action would have on children.).

155. See U.N. High Commissioner for Refugees, *Refugee Children*, No. 47 (XXXVIII) (Oct. 12, 1987), <http://www.unhcr.org/refworld/docid/3ae68c432c.html> (emphasizing that actions taken on behalf of refugee children should be guided by the best interests of the child principle and the principle of family unity); U.N. High Commissioner for Refugees, *Refugee Children: Guidelines on Protection and Care* (1994), <http://www.refworld.org/docid/3ae6b3470.html> (stating that unaccompanied children should be represented by an adult whose task is to conduct an assessment and promote a decision that would be in the child's best interests).

156. U.N. High Commissioner for Refugees, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum* (Feb. 1997); see Memorandum from Jeff Weiss, Acting Dir., Office of Int'l Affairs, Dept. of Justice on Guidelines for Children's Asylum Claims to Asylum Officers Corps 10 (Dec. 10, 1998), <https://www.immigrantjustice.org/sites/default/files/INS%2520Guideline%2520on%2520Children%2520Asylum%2520Claims.pdf> (instructing officers to "evaluate the child's words from a child's point of view").

it did not alter the definition of a refugee under U.S. asylum law.¹⁵⁷ In 2008, UNHCR laid out a framework for conducting a best interests determination (or “BID”) and subsequent publications have incorporated greater detail to the process of making best interests assessments and determinations.¹⁵⁸ But the question of whether assessing best interests can impact the analysis of refugee law remains a topic of debate. While European systems handling child migration matters are generally a few steps ahead in implementing the best interests principle into national laws and policies,¹⁵⁹ critics have drawn attention to states’ failures to properly implement a best interests analysis into asylum decisions.¹⁶⁰

It is worth noting that despite its universal acceptance, the best interests of the child standard has a troubled past that should be recognized and understood when invoking it today. The principle pre-dates human rights law and, according to Nigel Cantwell, “has invariably been used as the basis for decisions about people deemed incapable of making rational decisions for themselves . . .”¹⁶¹ Authorities have misused the best interests of the child principle to justify removal from parental care, for example under the tragic U.S. and Australian policies of removing indigenous children from their parents, or in the removal of children from unwed mothers in Australia, which was sanctioned by churches and charities.¹⁶² In the United Kingdom, the forced migration of British children to Canada, New Zealand, and Australia was justified as being in the best interests of the child. In that case, while the motivations for the policy may have included some genuine benevolent desire to rescue children from destitution, child migration was also seen as an economic benefit to England, by ridding the state of the expense of

157. Memorandum 120/11.26 from Jeff Weiss, Acting Dir., U.S. Dep’t of Justice Immigr. and Naturalization Serv. on Guidelines for Children’s Asylum Claims to Asylum Officer Corps (Dec. 10, 1998), <https://www.uscis.gov/sites/default/files/USCIS/Laws%20and%20Regulations/Memoranda/Ancient%20History/ChildrensGuidelines121098.pdf>; see also U.N. High Commissioner for Refugees, Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, para. 1, U.N. Doc. HCR/GIP/09/08 (2009), <http://www.unhcr.org/50ae46309.pdf> (explaining that “[a]lthough the definition of a refugee contained in Article 1(A)2 of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol . . . applies to all individuals regardless of their age, it has traditionally been interpreted in light of adult experiences. This has meant that many refugee claims made by children have been assessed incorrectly or overlooked altogether.”).

158. See U.N. High Comm’r for Refugees, Guidelines on Determining the Best Interests of the Child, (2008), <http://www.unhcr.org/4566b16b2.pdf>; U.N. High Comm’r for Refugees, Field Handbook for the Implementation of UNHCR BID Guidelines (2011), <http://www.unhcr.org/en-us/50f6d27f9.pdf>.

159. See Council Directive 2005/85/ec, art. 17.6 O.J. (L 326) 13–34 (EC).

160. See Anna Lundbert, *The Best Interests of the Child Principle in Swedish Asylum Cases: The Marginalization of Children’s Rights*, 3 J. HUM. RTS. PRAC. 49 (2011); see e.g., CRC JUDICIAL IMPLICATIONS, *supra* note 8, at 23 (noting for example, that “in Hungary this principle is explicitly referred to in its Asylum Act, where it states that ‘when implementing the provisions of the present Act, the best interests of the child shall be a primary consideration’. However, at the same time the Committee on the Rights of the Child has noted that although the law has consistently required this, it is not always respected in practice, especially in the case of children belonging to vulnerable groups such as refugee and asylum-seeking children.”).

161. Nigel Cantwell, *supra* note 140.

162. *Id.*

caring for them, and the children served as cheap labor in their destination countries.¹⁶³

In light of its problematic history, Cantwell argues that determining best interests must be a “thorough and well-prescribed process directed, in particular, towards identifying which of two or more rights-based solutions is most likely to enable children to realize their rights, bearing in mind that the other people affected by those solutions also have their own human rights.”¹⁶⁴ Strict procedures, such as those enumerated in General Comment 14 or developed by reputable agencies such as Save the Children or the Young Center, can help to ensure that best interests determinations ultimately facilitate a child’s realization of her rights.¹⁶⁵ “The way the best interests principle is to be approached and used today—essentially to ensure the best possible protection of rights—stands in stark contrast to its origins.”¹⁶⁶

C. *Right to Life, Survival, and Development*

The third key principle of the CRC, enshrined in Article 6, obliges governments to “ensure to the maximum extent possible the survival and development of the child.” The Committee on the Rights of the Child—the body of experts established by the CRC to monitor state compliance—expects States Parties to interpret “‘development’ in its broadest sense as a holistic concept, embracing the child’s physical, mental, spiritual, moral, psychological and social development,” and urges that implementation measures aim to achieve optimal development for all children.¹⁶⁷ Thus, under the CRC, ensuring the right to physical survival is not sufficient. States must also ensure equal opportunity, access to services, and the chance for all children to thrive and reach their potential. This involves ensuring that basic services are accessible to all members of society, which may require the adoption of positive measures based on concepts of distributive justice.¹⁶⁸

Many U.S. refugee resettlement programs aim to support children in achieving their full potential through community integration and supportive services.¹⁶⁹ But such services are generally limited to children who meet the definition of a refugee, or other specifically defined groups such as children

163. *Id.*

164. *Id.* at 12. Cantwell also notes that like children, persons with disabilities have often been subjected to a charitable approach rather than one based in human rights. As a result of ongoing criticisms of the treatment of persons with disabilities, “international human rights standards prohibit forced and coerced treatment of people suffering from intellectual disabilities, regardless of arguments of their ‘best interests.’”

165. See Save the Children, BEST INTERESTS DETERMINATION FOR CHILDREN ON THE MOVE: A TOOLKIT FOR DECISION-MAKING (2010), <https://resourcecentre.savethechildren.net/node/3829/pdf/3829.pdf>.

166. Nigel Cantwell, *supra* note 140.

167. Comm. on the Rights of the Child, General Comment No. 5 of its Thirty-Fourth Session, U.N. Doc. CRC/GC/2003/5, at 4 (2003).

168. Jonsson, *supra* note 78.

169. See U.S. CONFERENCE OF CATHOLIC BISHOPS, THE UNITED STATES UNACCOMPANIED REFUGEE MINOR PROGRAM: GUIDING PRINCIPLES AND PROMISING PRACTICES 9-10 (2013); DAVID DYSSGAARD

who have been certified as trafficking victims.¹⁷⁰ The majority of newly arrived immigrant children do not benefit from these programs.¹⁷¹

In some limited circumstances, U.S. immigration authorities will consider the child's right to development, in its broader sense, in immigration status determinations involving a parent of a U.S. citizen or lawful permanent resident child. In 2001, the Board of Immigration Appeals upheld the immigration judge's decision and granted suspension of deportation of two noncitizen parents, who were Taiwanese, finding that deportation would result in "extreme hardship" to at least one of their U.S. citizen children.¹⁷² The parents, who had lived in the United States for nearly 20 years, had five U.S. citizen children who had lived their entire lives in the United States. The children were fully integrated into American culture, were not fluent in Chinese, and their "needs for housing, food, clothing, education, and community support ha[d] been adequately met" in the United States.¹⁷³ To "uproot the oldest daughter, Claire, at this stage in her education and her social development and to require her to survive in a Chinese-only environment would be a significant disruption that would constitute extreme hardship."¹⁷⁴ The Board distinguished the facts from an earlier case involving two Polish citizen parents, whose three U.S. citizen children were under the age of six and spoke Polish, and where the oldest child was living in Poland with his grandmother.¹⁷⁵

But the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 heightened the eligibility requirements for suspension of deportation in a revised statute called cancellation of removal. Under the new standard, the parent of a U.S. citizen or lawful permanent resident child may be eligible for cancellation of removal only if he or she can prove that removal would result in "exceptional and extremely unusual hardship" to the child (or other qualifying relative), going beyond the previous "extreme hardship" standard.¹⁷⁶ In

Kallick & Silva Mathema, Ctr. for Am. Progress, *Refugee Integration in the United States* (2016), <https://cdn.americanprogress.org/wp-content/uploads/2016/06/15112912/refugeeintegration.pdf>.

170. U.S. CONFERENCE OF CATHOLIC BISHOPS, *supra* note 169.

171. The Unaccompanied Refugee Minors Program has approximately 1,300 children in its care, according to its website. Office of Refugee Resettlement, *About Unaccompanied Refugee Minors*, U.S. DEP'T OF HEALTH AND HUMAN SERVS., <https://www.acf.hhs.gov/orr/programs/urm/about> (last visited Oct. 27, 2017). By contrast, U.S. Customs and Border Protection reports that it apprehended 59,692 unaccompanied children in fiscal year 2016. U.S. Customs and Border Protection, *U.S. Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016*, U.S. DEP'T OF HOMELAND SEC., <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016> (last visited Oct. 27, 2017).

172. *In re Kao*, 23 I. & N. Dec. 45, 45 (B.I.A. 2001).

173. *Id.* at 50.

174. *Id.* This case involved an application for suspension of deportation, the legal predecessor to cancellation of removal, under former section 244(a) of the Immigration and Nationality Act. Although similar to cancellation relief, suspension of deportation did not distinguish between noncitizen without immigration status and lawful permanent residents, and had a lower eligibility standard.

175. *Id.* at 51 (citing *In re Pilch*, 21 I. & N. Dec. 627 (B.I.A. 1996)).

176.

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien (A) has been physically present in the United States for a continuous period of not less than

a 2002 case, the Board found that the removal of a single mother of two school-aged U.S. citizen children would not result in exceptional and extremely unusual hardship, despite the fact that the children's entire family lived in the United States and the mother's removal would result in family separation.¹⁷⁷ In that case, the former Immigration and Naturalization Service had argued that the hardship suffered by the family could not meet the current standard, as their hardship would be similar to that suffered by hundreds, if not thousands, of other Mexican nationals who have spent considerable time living in the United States.¹⁷⁸ The Board noted that had this case fallen under the standard of the previous statute, it may well have granted relief, but could not find that the mother had met "the very high standard of the current law."¹⁷⁹ Board member Juan P. Osuna dissented, noting factors such as economic conditions and lack of family ties—central aspects to a child's ability to exercise her right to development.¹⁸⁰ Board members Cecelia M. Espenosa and Lory Diana Rosenberg joined the dissent, but wrote separately emphasizing the loss of opportunities to the U.S. citizen children.¹⁸¹ Citing the majority opinion in *Plyler v. Doe*, which acknowledged "the critical importance of 'education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child,'" the dissent urged a more holistic approach that considers deprivation of future opportunities and the children's ability to be self-reliant and self-sufficient.¹⁸²

Children's right to development has more recently emerged in advocacy related to the detention of children and their parents in family detention centers. In a July 2015 letter, the American Academy of Pediatrics told DHS Secretary of Homeland Security Jeh Johnson that toxic stress, which has been associated with adverse experiences such as detention or incarceration, "can have measurable effects [on children's] developmental trajectory, with life-long consequences for educational achievement, economic productivity, health status, and longevity." Research has shown that detention, even for relatively short periods of time, can lead to poorer health and development outcomes.¹⁸³ However, without a legal or policy framework requiring the U.S.

10 years immediately preceding the date of such application; (B) has been a person of good moral character during such period; (C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and (D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

8 U.S.C. § 1229(b) (current through Pub. L. No. 115-90).

177. *In re Andazola*, 23 I. & N. Dec. 319, 319 (B.I.A. 2002).

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. See, e.g., Rachel Kronick and Cecile Rousseau, *Asylum-Seeking Children's Experiences of Detention in Canada: A Qualitative Study*, 85 AM. J. ORTHOPSYCHIATRY 287 (2015).

government to consider the development of children in decisions to detain, such as through a best interests assessment, these arguments have not succeeded in ending family detention.¹⁸⁴ Instead, the administration has argued that family detention is “an effective and humane alternative to maintain family unity as families await the outcome of immigration hearings or return to their home countries,” noting that detention centers provide medical care, play areas, education, social workers, and access to legal counsel.¹⁸⁵

The right to life, survival, and development—and its modern interpretation by the Committee on the Rights of the Child—can be helpful in deconstructing broad legal and policy regimes that have distinguished between asylum seekers and “economic migrants,” with the former seen as an object of charity in need of protection and with greater rights, and the latter as an object of distrust.¹⁸⁶ While survival is a primary reason—among many—that motivates children to migrate, it is often intertwined with other motivating factors such as family reunification, or a search for better opportunities, blurring lines between legally defined categories.¹⁸⁷ Many scholars have therefore begun to call this divide between refugees and economic migrants a false dichotomy, particularly in the case of children, where survival and development are often closely intertwined.¹⁸⁸ Similar to the notion of Article 3 facilitating the realization of children’s rights through a carefully implemented and rights-based best interests assessment, Article 6 may be thought of as an integrated rights framework enveloping both physical survival and a broad definition of human or child development.¹⁸⁹

D. *Participation*

The right to participate, the fourth main principle of the CRC, has been emphasized by some as the most important contribution of the Convention, confirming that children are full members of society and debunking the old

184. OLGA BYRNE & ELEANOR ACER, HUMAN RIGHTS FIRST, FAMILY DETENTION: STILL HAPPENING, STILL DAMAGING 4 (2015), <http://www.humanrightsfirst.org/sites/default/files/HRF-family-detention-still-happening.pdf>.

185. Press Release, U.S. Immigration and Customs Enforcement, ICE’s new family detention center in Dilley, Texas to open in December (Nov. 17, 2014), <https://www.ice.gov/news/releases/ices-new-family-detention-center-dilley-texas-open-december>.

186. Jonsson, *supra* note 78.

187. Bhabha, *supra* note 8.

188. See Katy Long, *When refugees stopped being migrants: Movement, labour and humanitarian protection*, 1 MIGRATION STUD. 4 (2013); Stephen Castles, *Towards a Sociology of Forced Migration and Social Transformation*, 37 SOC. 13 (2003); Anne Althaus, *The false dichotomy between “economic migrants” and refugees*, U.N. MIGRATION AGENCY (May 19, 2016), <https://weblog.iom.int/false-dichotomy-between-economic-migrants-and-refugees>.

189. This begs the question whether and how advocates and policy makers might reconsider categorizations of migrant children as those fleeing persecution or other abuses, and those seeking opportunities (and essentially pursuing their own “development” and potential) in the United States—the “push” versus “pull” factors often referenced when analyzing migration trends. See Avinoam Cohen, *From Status to Agency: Defining Migrants*, 24 GEO. IMMIGR. L.J. 617 (2010).

saying that children “must be seen and not heard.”¹⁹⁰ Enshrined in Article 12, the right to participate establishes children as individuals who must be treated as the subjects of rights, rather than as objects of parental, adult, or state interventions.¹⁹¹ It relies on children’s “evolving capacities” to form their own views and make informed choices and decisions affecting their lives.¹⁹²

Notably, there is no minimum age at which a child is presumed capable of expressing views—children can and do form views at a very early age. This is where parents, caregivers, educators, service providers, the police, and other members of society take on a critical role in fulfilling children’s right to participate. As UNICEF notes, the child’s right to participate is only one side of the equation; the other is “adults’ evolving capacity and willingness” to hear children, consider their perspective, examine their own attitudes, and work toward solutions that address children’s concerns.¹⁹³

The CRC thus incorporates concepts of both dependence and agency. As children gain experience and the ability to express themselves, they become less dependent on adults to carry out their right to participate and make informed decisions on their behalf.¹⁹⁴ Adults and decision-makers must be equally mindful to carry out their duties on both sides of this spectrum: to adequately fulfill younger, or more dependent, children’s right to participate, while also respecting more mature children’s ability to carry and express their own views. This dynamic comes into play in the context of children’s asylum

190. UNICEF, *An entire generation grows up protected by the CRC*, YouTube (Nov. 21, 2007), <https://www.youtube.com/watch?v=tR5OSd97Z9c>.

191. UNCRC, Day of General Discussion on the Right to be Heard, Report on the 43rd Session, pmb. (Sept. 29, 2006).

To speak, to participate, to have their views taken into account. These three phases describe the sequence of the enjoyment of the right to participate from a functional point of view. The new and deeper meaning of this right is that it should establish *a new social contract*. One by which children are fully recognized as rights-holders who are not only entitled to receive protection but also have the right to participate in all matters affecting them, a right which can be considered as the symbol for their recognition as rights holders.

Id.

192. G.A. Res. 44/25, art. 12 (Nov. 20, 1989).

193. *Fact Sheet: The right to participation*, UNICEF, <http://www.unicef.org/crc/files/Right-to-Participation.pdf>.

194. Andrew Schoenholtz, *Developing the Substantive Best Interests of Child Migrants: A Call for Action*, 46 VAL. U.L. REV. 991, 1000-01 (2012).

The CRC is built on this understanding of the child’s development. Article 5 conceives of this as the “evolving capacities of the child,” focusing on children’s developing competencies as well as their attendant abilities to make informed choices and take responsibility for decisions affecting their lives. In keeping with their capacity, children’s participation in decisions that affect them is both a right and a building block in developing a sense of efficacy and self-worth. This concept is couched in the caregiver’s obligation to respect the child’s evolving capacities. In other words, the more the child knows, experiences and understands, the more parents, legal guardians or other persons legally responsible for the child must limit their directions and guidance. “[A]s the child develops, her or his level of dependence recedes in direct proportion with the inverse growth of their level of autonomy.”

Id.

claims. According to Jacqueline Bhabha and Susan Schmidt, young people seeking protection based on their political opinions have faced skepticism or even incredulity of decision-makers who may hold assumptions that children are unable to hold political views.¹⁹⁵

U.S. immigration law has not kept pace in acknowledging children and young people as social actors.¹⁹⁶ Perhaps the only mechanism in substantive U.S. immigration law that facilitates the child's right to participate is the best interests standard of the special immigrant juvenile law. If applied according to the principles articulated in General Comment 14 and other evidence-based practices, this standard might truly give children a voice in their immigration proceedings, recognizing their agency in the decision to migrate and seek status in the United States. But other aspects of the law may actually interfere with children's autonomy and agency. In addition to determining that it would not be in a child's best interests to return to the home country, a state court judge must also find that the child cannot reunify with one of her parents due to abuse, neglect, abandonment, or a similar basis under state law. Thus, while it may not be in a child's best interests to return for any number of reasons, this assessment serves little benefit to a child if she cannot also prove that she has been mistreated by one of her parents. The result is that zealous advocates, with few legal options available for children to obtain lawful status, are "placed in positions of power over children and their narrative" and may be squeezing children into this category.¹⁹⁷ Lauren Heidbrink, a researcher who interviewed eighty-two children, many of whom were eligible for SIJ status, found that some were uncomfortable with the ways in which they had to characterize their relationship with their parents.¹⁹⁸ One girl interviewed for the study described her eventual rationale: "My mom has to be the bad one. She wants the best for me. She will understand."¹⁹⁹

195. See Jacqueline Bhabha & Susan Schmidt, *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in the U.S.*, 1 J. HIST. CHILDHOOD & YOUTH 126, 130 (2006).

196. Jacqueline Bhabha, *Internationalist gatekeepers? The Tension Between Asylum Advocacy and Human Rights*, 15 HARV. HUM. RTS. J. 155 (2002). International refugee law has also failed to incorporate children's views, or the views of refugees in general. Samira Trad and Michael Kagan note that a key difference between rights-based and needs-based approaches to refugee policy is the extent beneficiaries of those policies are involved in the decision-making process. Citing Mehta and Gupte (2003), Trad and Kagan note:

In theory, a rights-based policy should be less top-down, and should involve refugees in more influential roles. But the way in which rights increase refugee agency in policy-making is complex. We argue that human rights as a set of norms rooted in law can be a very top-down means of decision-making, and does not always reflect the desires of refugees.

Samira Trad & Michael Kagan, *Rights, Needs and Responsibility: Challenges to Rights-Based Advocacy for Non-Palestinian Refugees' Health and Education in Lebanon*, Development Research Centre on Migration, GLOBALISATION & POVERTY 1, 4 (2006).

197. Lauren Heidbrink, *Unintended Consequences: Reverberations of Special Immigrant Juvenile Status*, 5 J. APPLIED RESEARCH ON CHILDREN 1, 22 (2014).

198. *Id.* at 23.

199. *Id.*

Policy guidelines have made efforts to give children a voice in proceedings. For example, the 2007 EOIR Guidelines for Immigration Court Cases Involving Unaccompanied Children suggest numerous ways for judges to create a more child-friendly environment, including by providing children opportunities to visit the courtroom before the hearing, allowing a caregiver or friend to sit next to the child while testifying, avoiding wearing a judge's robe, and ensuring age-appropriate questions, tone, and translation.²⁰⁰ Similarly, the INS Guidelines for Children's Asylum Claims incorporated several child-friendly procedures, including encouraging asylum officers to begin interviews with a "rapport-building phase" to help make the child comfortable, and allowing children to be accompanied by a "trusted adult."²⁰¹

Many researchers and advocates have highlighted the need to incorporate children's and refugees' views into programming and policy making, but efforts have largely fallen short of fulfilling the right envisioned by the CRC.²⁰² One example of an initiative to boost child participation in migration policymaking is the Mario Project, which was launched in 2009 to improve protection for Southern and Eastern European children on the move in Europe.²⁰³ Among other accomplishments, the Project developed Child Consultation Boards—formal groups of children who have been impacted by migration and have come together to advocate for the rights and protection needs of children on the move.²⁰⁴ What made the Mario Project unique is that children were consulted in all activities of the project on a systematic and consistent basis. Importantly, all Child Consultation Boards developed through the Mario Project were set up either through existing statutory institutions or integrated into larger child protection NGO networks at the

200. Memorandum 07-01 from U.S. Dep't of Justice Executive Office for Immigration Review on Operating Policies and Procedures: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children (May 22, 2007).

201. Memorandum 120/11.26 from Jeff Weiss, Acting Dir., U.S. Dep't of Justice Immigr. and Naturalization Serv. on Guidelines for Children's Asylum Claims to Asylum Officer Corps (Dec. 10, 1998), <https://www.uscis.gov/sites/default/files/USCIS/Laws%20and%20Regulations/Memoranda/Ancient%20History/ChildrensGuidelines121098.pdf>.

202. Andrew Schoenholtz, *Developing the Substantive Best Interests of Child Migrants: A Call for Action*, 46 VAL. U.L. REV. 991, 995 (2012).

Researchers who study why children migrate have identified agency as a major issue. They argue strongly that to understand this complex phenomenon all of those involved with child migrants should approach these children as beings who are to different degrees knowing, understanding, judging, and deciding. Some children, for example those classified as trafficking victims, see themselves as adults who value work over education, balk over curfews and chores in their foster homes, and identify as labor migrants.

Id.

See also Avinoam Cohen, *From Status to Agency: Defining Migrants*, 24 GEO. IMMIGR. L.J. 617, 633 (2010) (noting that migration itself is often an indicator of an individual's resourcefulness, and therefore failing to consult refugees is a missed opportunity).

203. Telephone Interview with Pierre Cazenave, Regional Child Rights Officer, Terre des Hommes Project Mario, (Jan. 27, 2015) [notes on file with the author]. The Mario Project was funded by the European Union Daphne III Programme and the Oak Foundation.

204. *Id.*

national level. Therefore, should the Mario Project end, it is expected that other structures would sustain this work.²⁰⁵

Participation of children and young people not only lifts up the voices of directly impacted people—it can lead to real policy reform. The undocumented youth movement (or the “DREAMers”), which has been called “one of the most important social movements in the United States,” began in the early 2000s and initially focused on passing the federal DREAM Act.²⁰⁶ While the DREAM Act never passed at the federal level, the DREAMers were widely successful at the local and state level, ensuring state tuition for undocumented students, and also helping push President Obama to move forward with Deferred Action for Childhood Arrivals (DACA) in 2012.²⁰⁷

IV. CONCLUSION: TOWARDS A RIGHTS-BASED APPROACH TO CHILD MIGRATION IN THE UNITED STATES

Whether newly arrived and seeking protection or family reunification or having lived most of their young lives in the United States, immigrant children and youth face a web of complex systems and laws, often embedded with contradictory notions of protection and exclusion. Categorizations of children leave some with access to services, while others remain at risk of ongoing rights violations, such as exploitation, abuse, and lack of access to education and health. A rights-based approach seeks to unravel the multiplicity of responses that have evolved and reimagine policy and programmatic responses by looking more universally at children’s rights through the lens of the CRC.

Some programmatic responses in the U.S. have already taken on rights-based approaches. As described above, the Young Center for Immigrant Children’s Rights developed a model to advocate for the best interests of individual children in immigration proceedings, based on both domestic child welfare and international human rights principles. Legal service programs are moving away from traditional triage-based models to “universal representation” or public defender models, which avoid prioritizing certain cases over others based on a merits screening of the legal claim.²⁰⁸ Finally, some trafficking programs have adopted a rights-based approach by centering their anti-trafficking work on the rights, priorities, and narrative of the trafficked person, and encouraging survivors’ leadership in social justice advocacy that addresses the root causes of trafficking.²⁰⁹

205. *Id.*

206. Walter J. Nicholls and Tara Fiorito, *Dreamers Unbound: Immigrant Youth Mobilizing*, 24 NEW LAB. F. 86 (2015).

207. *Id.*

208. *See, e.g.*, CAL. COAL. FOR UNIVERSAL REPRESENTATION, CALIFORNIA’S DUE PROCESS CRISIS: ACCESS TO LEGAL COUNSEL FOR DETAINED IMMIGRANTS (2016), <https://www.nilc.org/wp-content/uploads/2016/06/access-to-counsel-Calif-coalition-report-2016-06.pdf>.

209. FREEDOM NETWORK, A RIGHTS-BASED APPROACH TO COMBATTING HUMAN TRAFFICKING (2015), <https://freedomnetworkusa.org/app/uploads/2016/12/A-Rights-Based-Approach.pdf>.

States and local governments have been leaders in advancing children's and migrants' rights. In New York City, for example, officials launched an initiative to post representatives from the City's health and education departments at immigration court to assist children and families with enrolling in healthcare and registering for school.²¹⁰ In late September 2014, the New York City Council approved a public-private funding partnership with the Robin Hood Foundation and the New York Community Trust to provide \$1.9 million to legal services organizations representing unaccompanied youth in their immigration removal proceedings.²¹¹ At the state level, the Department of Education issued guidance to all school districts emphasizing that all children between the ages of five and twenty-one, regardless of immigration status, are entitled to a free public education in New York State.²¹² The New York State Attorney General's office and the State Education Department later announced a joint compliance review of "school district enrollment policies and procedures for unaccompanied minors and other undocumented students" focusing initially "on districts experiencing the largest influx of unaccompanied minors from Central and South America," such as Nassau, Suffolk, Rockland and Westchester counties.²¹³ Other states, including California, have similarly enacted laws to protect immigrant children and their families.²¹⁴

Ensuring the rights of immigrant children are fulfilled is an ever-greater challenge in a time of growing popular support for restrictive policies. Rights-based approaches should not be abandoned to assuage anti-immigrant policies, and can be incorporated by governments and private actors alike in both large and small-scale initiatives. By looking to the four key principles of the CRC, immigrant children and those who support them can begin to develop a rights-based approach. The non-discrimination principle in Article 2 tells us that advocates should look to include all children (and where applicable, their families), as much as possible, in any initiative or action. Universal

210. Mayor Bill de Blasio and Commissioner of Immigrant Affairs Nisha Agarwal Announce Unprecedented City Educational and Health Support for Unaccompanied Migrant Children at the NYC Federal Immigration Court, CITY OF NEW YORK (Sept. 16, 2014), <http://www1.nyc.gov/office-of-the-mayor/news/441-14/mayor-bill-de-blasio-commissioner-immigrant-affairs-nisha-agarwal-unprecedented>.

211. Press Release, NYC Council Speaker Melissa Mark-Viverito, Council of the City of New York, Robin Hood Foundation and New York Community Trust Announce New \$1.9 Million Unaccompanied Minor Initiative, (Sept. 23, 2014), <https://www.robinhood.org/nyc-council-speaker-melissa-mark-viverito-the-robin-hood-foundation-and-new-york-community-trust-announce-new-1-9-million-unaccompanied-minor-initiative-funding-will-go-toward-increasing-access-to-c/>.

212. Letter from Cosimo Tangorra, Jr., Deputy Commissioner for P-12 Education, to District Superintendents, et al., Educational Services for Recently Arrived Unaccompanied Children, (Sept. 10, 2014), <http://p1232.nysed.gov/sss/documents/EducationalServicesforRecentlyArrivedUnaccompaniedChildren.pdf>.

213. Press Release, New York State Attorney General's Office, New York State Attorney General's Office and New York State Education Department launch review of enrollment procedures for unaccompanied minors and undocumented students (Oct. 23, 2014), <http://www.ag.ny.gov/press-release/new-york-state-attorney-generals-office-and-new-york-state-education-department-launch>.

214. S. Karthick Ramakrishnan & Allan Colbern, *The California Package: Immigrant Integration and the Evolving Nature of State Citizenship*, 6 U.C. RIVERSIDE POL'Y MATTERS, Spring 2015, <http://policymatters.ucr.edu/vol6-3-immigration/>.

representation programs are a good model of how such an approach can take form. As provided in Article 3 of the CRC, the best interests of the child should be a primary consideration in all actions relating to immigrant children. While not all programs or initiatives will include formal best interests determinations as a component, they can nevertheless look to established guidelines for determining whether a particular action promotes the best interests of immigrant children, either collectively or individually. In fulfilling Article 6 on the right to life, survival, and development, immigrant children's advocates might look to partner with medical and mental health professionals, who can provide insights into how certain policies or programs may support or hinder children's development. Finally, any initiative aimed at supporting immigrant children should seek to fulfill the rights enshrined in Article 12, guaranteeing children's right to participate, and could learn from exploring the vast work undertaken by the undocumented youth movement.