

ARTICLES

THE ADULTIFICATION OF IMMIGRANT CHILDREN

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There is evidence . . . that the child receives the worst of both worlds [in juvenile court]: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.

—Justice Fortas¹

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INTRODUCTION

Migrant children²—alongside adult immigrants—have been subjected to a “cimmigration crisis” whereby the immigration deportation machinery has mimicked the carceral state in its severity revolution.³ In the past twenty years, the immigration regime has been marked by the rise of mass and longer-term detention,⁴ widespread surveillance,⁵ bloated enforcement agencies,⁶

2. For the purposes of this article, “child” and “children” without further qualification refer to those under the age of 21, “minor” refers to someone under the age of 18, and “youth” or “young person” may refer to children or minors.

3. Juliet Stumpf, *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 368 (2006). While the “cimmigration crisis” genesis is often marked by the passages of the Anti-Terrorism and Effective Death Penalty Act and the Illegal Immigration Reform and Immigrant Responsibility Act in 1996, the immigration system has been punitive throughout its history. See generally K-Sue Park, *Self-Deportation Nation*, 132 HARV. L. REV. 1878 (describing how “self-deportation,” the indirect method of coercing the removal of a group of people from the polity, has been used against Native Americans, Blacks, and Chinese in the early history of the United States).

4. César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1371 (2014); César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CALIF. L. REV. 1449, 1507–11 (2015); Mariela Olivares, *Intersectionality at the Intersection of Profiteering & Immigration Detention*, 94 NEB. L. REV. 963, 976–91 (2016).

5. Anil Kalhan, *Immigration Surveillance*, 74 MD. L. REV. 1, 36 (2014).

6. With 60,000 employees, Customs and Border Protection is one of the world’s largest law enforcement agencies, and its rapid growth has been plagued by corruption. See Garrett M. Graff, *The Green Monster*, POLITICO MAG. (Nov./Dec. 2014), <https://www.politico.com/magazine/story/2014/10/border-patrol-the-green-monster-112220>. The Trump administration has ordered the hiring of 15,000 more border and ICE agents but has not been able to meet this goal. See Molly O’Toole, *Must Reads: Trump Ordered 15,000 New Border and Immigration Officers – but Got Thousands of Vacancies Instead*, L.A. TIMES (Jan. 27, 2019), <https://www.latimes.com/politics/la-na-pol-border-patrol-hiring-20190126-story.html>.

a proliferation of criminal prosecutions of immigration violations,⁷ expanded basis for deportation of long-term residents,⁸ increased collusion between local law enforcement and immigration officials,⁹ and pervasive rhetoric attacking the dignity of noncitizen people.¹⁰ Meanwhile, the norm of proportionality¹¹ has been noticeably absent from the immigration law regime.¹² Overall, the system has one sanction—deportation—regardless of the severity of immigration violation or mitigating factors of the noncitizen.¹³ Other aspects of the immigration apparatus, including the enforcement and detention scheme as well as the substantive and procedural protections, are often harsh and not tailored to account for particular circumstances.¹⁴

Children have not been spared from this progressively punitive immigration enforcement regime.¹⁵ Public officials regularly exploit tropes¹⁶ of immigrants, including children, as criminals,¹⁷ gang members,¹⁸ vectors of

7. Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1284 (2010).

8. See 28 U.S.C. § 2254 (2012); see generally Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

9. Christopher N. Lasch et al., *Understanding “Sanctuary Cities,”* 59 B.C. L. REV. 1703, 1713 (2018).

10. For a recent qualitative and quantitative study of the Trump administration’s narrative regarding immigrants, see UCLA César E. Chávez Dep’t of Chicana & Chicano Studies, *Our Findings*, UCLA, <https://www.thepresidentsintent.com/our-findings> (last visited Jan. 9, 2019).

11. In discussing proportionality, this Article is not engaging in an Eighth Amendment substantive proportionality review but considers more broadly whether there is a match between the treatment meted out by the immigration legal system in light of the purported transgression and characteristics of immigrant youth.

12. This article is the first to specifically suggest how proportionality might apply to migrant children. For discussions of proportionality in immigration proceedings, see generally Angela M. Banks, *Proportional Deportation*, 55 WAYNE L. REV. 1651 (2009) [hereinafter Banks, *Proportional Deportation*] (discussing the need for proportionality in deportation); Angela M. Banks, *The Normative and Historical Cases for Proportional Deportation*, 62 EMORY L.J. 1243 (2013) [hereinafter Banks, *The Normative and Historical Cases for Proportional Deportation*]; Jason A. Cade, *Judging Immigration Equity: Deportation and Proportionality in the Supreme Court*, 50 U.C. DAVIS L. REV. 1029 (2017); Jason A. Cade, *Judicial Review of Disproportionate (or Retaliatory) Deportation*, 75 WASH. & LEE L. REV. 1427 (2018); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 477–78 (2007); Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1684 (2009) (“Immigration law eschews proportionality.”); Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 U.C. IRVINE L. REV. 415 (2012) (discussing proportionality in review of removal orders).

13. Stumpf, *supra* note 12, at 1688.

14. See generally Jennifer M. Chacón, *The 1996 Immigration Laws Come of Age*, 9 DREXEL L. REV. 297 (2017); Bill Ong Hing, *Redressing the Shame of the U.S. Immigration Laws and Enforcement Policies* (University of San Francisco Law Research Paper No. 2014-11), <https://ssrn.com/abstract=2428963>.

15. See generally Laila Hlass, *The School to Deportation Pipeline*, 34 GA. ST. U. L. REV. 697 (2018).

16. Natalia Molina has written about how this form of rhetoric functions as a “racial script,” demonstrating how the lives of racialized groups are historically contingent. She explains further how attitudes, practices, policies and laws that are directed at one social group are redirected at others. These “scripts” signal and reinforce a distinction among which immigrants are and are not worthy of inclusion into the nation. See NATALIA MOLINA, *HOW RACE IS MADE IN AMERICA: IMMIGRATION, CITIZENSHIP AND THE HISTORICAL POWER OF RACIAL SCRIPTS* 148 (2014).

17. Bart Jansen & Alan Gomez, *President Trump Calls Caravan Immigrants ‘Stone Cold Criminals.’ Here’s What We Know*, USA TODAY (Nov. 26, 2018), <https://www.usatoday.com/story/news/2018/11/26/president-trump-migrant-caravan-criminals/2112846002/>.

18. Veronica Stracqualursi, *Trump Re-Ups ‘Infestation’ Rhetoric in Immigration Debate*, CNN (July 3, 2018), <https://www.cnn.com/2018/07/03/politics/trump-ms13-illegal-immigration-rhetoric/index.html>.

disease,¹⁹ and animals.²⁰ This discourse works in tandem with the emerging phenomenon referred to as the school-to-deportation pipeline,²¹ in which immigrant children are increasingly subject to over-policing within educational,²² juvenile, and criminal justice systems and overzealous enforcement from the immigration regime. In the immigration legal system, children are arrested and often subjected to detention as they navigate adjudication and removal proceedings nearly devoid of safeguards for children.

Children within the immigration legal system are particularly susceptible to being perceived under extreme categories of “good” or “bad” immigrants.²³ As such, the prominent role of discretion in immigration proceedings,²⁴ working in tandem with anemic procedural safeguards, may undermine the immigration legal system’s ability to effectuate justice.²⁵ In some cases, children are infantilized through a patronizing lens and perceived as so innocent that they are robbed of agency.²⁶

However, immigration laws and policies chiefly tend to adultify²⁷ child migrants, who are largely teens of color. Adultification is the phenomenon

19. Hunter Walker, *Donald Trump Just Released an Epic Statement Raging Against Mexican Immigrants and ‘Disease’*, BUSINESS INSIDER (July 6, 2015), <https://www.businessinsider.com/donald-trumps-epic-statement-on-mexico-2015-7>.

20. *Trump: Immigrant Gangs ‘Animals, not People’*, BBC NEWS (May 17, 2018), <https://www.bbc.com/news/av/world-us-canada-44148697/trump-immigrant-gangs-animals-not-people>.

21. See generally Hlass, *The School to Deportation Pipeline*, *supra* note 15.

22. The school-to-deportation pipeline converges with the school-to-prison pipeline where zero-tolerance policies and other institutional practices make it more likely that children of color will not remain in schools to graduate, but instead become implicated within the juvenile and criminal justice systems and ultimately incarcerated. See generally DEREK W. BLACK, *ENDING ZERO TOLERANCE: THE CRISIS OF ABSOLUTE SCHOOL DISCIPLINE* (2016); CATHERINE Y. KIM ET AL., *THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM* (2010).

23. For a discussion on narratives regarding “good” and “bad” immigrants, see Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207 (2012).

24. See Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 518–19 (2009) (“Prosecutorial discretion has thus overtaken the exercise of discretion by immigration judges when it comes to questions of relief.”); see generally SHOBA SIVAPRASAD WADHIA, *BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES* (2015); Jason A. Cade, *Policing the Immigration Police: ICE Prosecutorial Discretion and the Fourth Amendment*, 113 COLUM. L. REV. SIDEBAR 180 (2013); David A. Martin, *A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach’s Latest Crusade*, 122 YALE L.J. ONLINE 167 (2012); Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819 (2011); Nina Rabin, *Victims or Criminals? Discretion, Sorting, and Bureaucratic Culture in the U.S. Immigration System*, 23 S. CAL. REV. L. & SOC. JUST. 195 (2014).

25. The deleterious impact of discretion particularly on young people of color in the juvenile justice system has been closely studied. See generally Tina L. Freiburger & Alison S. Burke, *Status Offenders in the Juvenile Court: The Effects of Gender, Race, and Ethnicity on the Adjudication Decision*, 9(4) YOUTH VIOLENCE AND JUV. JUST. 352, 352–65 (2011); Alexes Harris, *The Social Construction of “Sophisticated Adolescents”: How Judges Integrate Juvenile and Criminal Justice Decision-Making Models*, 37 J CONTEMP. ETHNOGRAPHY 469 (2008); Jyoti Nanda, *Blind Discretion: Girls of Color & Delinquency in the Juvenile Justice System*, 59 UCLA L. REV. 1502 (2012).

26. For example, ORR disregarded the requests of unaccompanied girls who wished to seek an abortion, and prohibited shelters from following the girls’ requests, but instead referred decisions to the Director of ORR. See Garza v. Hargan, 304 F. Supp. 3d 145, 149–50 (D.D.C. 2018), *aff’d in part, vacated in part, remanded sub nom.* J.D. v. Azar, 925 F.3d 1291 (D.C. Cir. 2019).

27. Adultification may refer to: (1) children that are forced to take on adult-like responsibilities, as well as (2) the cultural perceptions of children of color as more adult-like than white peers and the casual

whereby children of color are perceived as more adult-like and therefore less innocent than white peers. Perceiving children of color as more mature than they are creates a presumption that they should be held to a higher standard of responsibility and with less forgiveness. This presumption has created systemic harm for children of color within public systems like education,²⁸ juvenile justice,²⁹ and child welfare.³⁰ In particular, the disproportionate rates of arrests, adjudications, and sentencing for children of color within the juvenile justice system have been studied closely.³¹ Meanwhile, the adultification of children in the immigration regime has been virtually ignored. Described another way, migrant children occupy a “liminal childhood” where they are “viewed as dependent, limited rights-bearing subjects while at the same time imbued with adult characteristics.”³²

In this Article, I consider how an increasingly punishing immigration administrative state has conceptualized migrant children. I catalog how children’s rights are abrogated throughout the immigration legal system, and I argue that the lens of adultification may help explain why existing law and policies have not adequately addressed children’s unique vulnerabilities. I argue that equating children to adults and ignoring children’s unique vulnerabilities results in immigration law effectively discriminating against children. I engage juvenile justice jurisprudence to theorize how the evolving understanding of juveniles under the law and the need for proportionality may inform the conceptualization of migrant children.³³

Despite a growing discourse regarding the rights of migrant children,³⁴ no one has fully studied the impact of the crimmigration convergence on

outcomes where they are treated more harshly in several systems. This paper will only focus on the second trend: how cultural perceptions of immigrant children as adult-like impact their treatment under immigration laws, policies, and practices.

28. See generally KIMBERLÉ WILLIAMS CRENSHAW ET AL., *BLACK GIRLS MATTER: PUSHED OUT, OVERPOLICED AND UNDERPROTECTED* (2015), available at http://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/54d2d22ae4b00c506cffe978/1423102506084/BlackGirlsMatter_Report.pdf.

29. See generally Jyoti Nanda, *Blind Discretion: Girls of Color & Delinquency in the Juvenile Justice System*, 59 UCLA L. REV. 1502 (2012).

30. Patricia Turner Hogan & Sau-Fong Siu, *Minority Children and the Child Welfare System: An Historical Perspective*, 33 SOC. WORK 493–98 (1988).

31. See generally Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY AND SOC. PSYCH. 526, 527 (2014); Michael J. Leiber & Jennifer H. Peck, *Race in Juvenile Justice and Sentencing Policy: An Overview of Research and Policy Recommendations*, 31 LAW & INEQ. 331 (2013), available at <https://scholarship.law.umn.edu/lawineq/vol31/iss2/2>.

32. Priscilla A. Ocen, *(E)racing Childhood: Examining The Racialized Construction of Childhood and Innocence*, 62 UCLA L. REV. 1586, 1594 (2015) (defining “liminal childhood,” by situating it within the context of sexually exploited black girls who are “underprotected and overpoliced”).

33. Only modest exceptions are made for unaccompanied minors—those children who are under the age of 18 and not accompanied by a parent or legal guardian. While many unaccompanied children may be traveling with adults, the agency will make a formal determination if any adults are a parent or legal guardian; if not, then the child is deemed unaccompanied. See 6 U.S.C. § 279(g)(2) (2012).

34. See generally Lauren R. Aronson, *The Tipping Point: The Failure of Form Over Substance in Addressing the Needs of Unaccompanied Immigrant Children*, 18 HARV. LATINO L. REV. 1 (2015); Erin B. Corcoran, *Deconstructing and Reconstructing Rights for Immigrant Children*, 18 HARV. LATINO L. REV. 53 (2015); Laila L. Hlass, *Minor Protections: Best Practices for Representing Child Migrants*, 47 N.M. L. REV. 247 (2017) [hereinafter Hlass, *Minor Protections*]; Laila L. Hlass, *States and Status: A*

children.³⁵ Crimmigration scholarship details and critiques the way immigration and criminal law intersect.³⁶ A core critique within the literature stems from the blurring of immigration and criminal law spheres and consequent amplification of coercive force against migrants without corollary safeguards.³⁷ This article seeks to examine how a punitive immigration system has impacted children specifically, affording them few protections throughout the spectrum of immigration legal proceedings, including arrest, detention, adjudication, and removal. The meager protections designed into immigration law, policies, and practices can be understood through the lens of adultification, whereby children of color are not afforded the protections ordinarily understood to attach to children. Furthermore, I argue that proportionality concerns about other areas within the immigration law regime³⁸ apply with special force in the case of migrant children.

This paper proceeds in four parts. In Part I, I expose how immigration laws treat migrant youth as though they are liminal children—not affording them meaningful protections, despite being perceived as dependent. Next, I examine the rise of unaccompanied minor exceptionalism, whereby the few accommodations that exist have been allocated almost exclusively to minor children who are not accompanied by a parent. Furthermore, I detail how the Trump administration has aggressively adultified unaccompanied minors, as well as other children, through invidious discourse and harsh policies. In Part III, I consider how juvenile justice jurisprudence has responded to failures

Study of Geographical Disparities for Immigrant Youth, 46 COLUM. HUM. RTS. L. REV. 266 (2014) [hereinafter Hlass, *States and Status*]; Hlass, *The School to Deportation Pipeline*, *supra* note 15; David B. Thronson, *Entering the Mainstream: Making Children Matter in Immigration Law*, 38 FORDHAM URB. L. J. 393 (2010); David B. Thronson, *Thinking Small: The Need for Big Changes in Immigration Law's Treatment of Children*, 14 U.C. DAVIS J. JUV. L. & POL'Y 239 (2010); David B. Thronson, *You Can't Get Here From Here: Toward A More Child-Centered Immigration Law*, 14 VA. J. SOC. POL'Y & L. 58 (2006).

35. *But see* Karla M. McKanders, *America's Disposable Youth: Undocumented Delinquent Juveniles*, 59 HOW. L.J. 197 (2015) (examining the conceptualization of immigrant youth who are subject to delinquency adjudications); Hlass, *The School to Deportation Pipeline*, *supra* note 15 (examining how gang allegations against immigrant youth work to push young people into a school-to-deportation pipeline).

36. *See, e.g.*, Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135 (2009); Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 613 (2012); César Cuatémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457 (2013); Daniel Kanstroom, *Deportation, Social Control, and Punishment*, 113 HARV. L. REV. 1890 (2000); Legomsky, *supra* note 12; Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105 (2012); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81 (2005); Juliet P. Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006); Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a 'Post-Racial' World*, 76 OHIO STATE L.J. 599 (2015).

37. Legomsky, *supra* note 12, at 477–78.

38. *See* Legomsky, *supra* note 12, at 477–78; Stumpf, *supra* note 12, at 1683; *see generally* Banks, *Proportional Deportation*, *supra* note 12 (discussing the need for proportionality in deportation); Banks, *The Normative and Historical Cases for Proportional Deportation*, *supra* note 12; Cade, *supra* note 12; Wishnie, *supra* note 12 (discussing the proportionality in review of removal orders).

within the juvenile justice system,³⁹ and I derive principles based upon the progression of children's rights. In Part IV, I explore how the immigration system could remedy the adultification of migrant children through a more proportional immigration legal system, one that recognizes bias against children of color, expands childhood protections, and ultimately reorients the immigration legal system towards justice.

I. CONSTRUCTIONS OF CHILDHOOD UNDER IMMIGRATION LAW

Childhood is often understood as a biological and development stage where a person needs safeguards to address their lack of maturity and development.⁴⁰ Yet, how children are perceived and treated varies by socially constructed categories such as race, gender, and immigration status.⁴¹ Immigrant children, who are predominantly children of color, exist at the outskirts of childhood and adulthood.⁴² Immigration law defines children by their relationship and dependence on adults. However, immigration laws, policies, and practices also adultify children, by ignoring youth-related vulnerabilities throughout the spectrum of enforcement and adjudication proceedings.

The detention of migrant children is a particularly stark example of the liminal childhood of migrant youth within the immigration legal regime. Instead of addressing young people's unique vulnerabilities, the system has permitted, and even supported, their physical abuse, racial subordination, and dehumanization.⁴³ Two children detained in the secure Shenandoah facility describe in their own words how they have been beaten, restrained in a chair for hours, denied clothes, and discriminated against along racial and immigration status lines.⁴⁴

“They said the reason for the moves from place to place was because I was a member of MS-13. I told them I was not part of anything. . . . At Shenandoah, I was put in restriction for any little thing. . . . [After a staff

39. Although juvenile jurisprudence has recognized certain special vulnerabilities attributed to children, the reality for youth in the juvenile justice system remains grim, particularly for youth of color who face structural racism, resulting in a variety of harms. See generally Tamar R. Birckhead, *The Racialization of Juvenile Justice and the Role of the Defense Attorney*, 58 B.C. L. REV. 379 (2017); Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383 (2013).

40. Convention on the Rights of the Child art. 1, Nov. 20, 1989, 1577 U.N.T.S. I-27531. Notably, the United States is the only United Nations member state who has not ratified the U.N. Convention on the Rights of the Child.

41. See Ocen, *supra* note 32; see also Annette Ruth Appell, *Representing Children Representing What?: Critical Reflections On Lawyering for Children*, 39 COLUM. HUM. RTS. L. REV. 573, 575 (2008) (“The notion of ‘child’ has much less coherence in social and material (as opposed to legal) contexts given that children, like adults, range in age, class, race, gender, sexual identity, sexual orientation, nationality, language, culture, ethnicity, and geography.”).

42. Priscilla Ocen has analyzed the liminal childhood of sexually exploited Black Girls who exist on the border of childhood and adulthood. See generally Ocen, *supra* note 32.

43. See discussion *infra* Section II.B (describing the detention conditions for children).

44. Pls.’ Mot. for Prelim. Inj. at Exs. 1–6, *Lopez v. Shenandoah Valley Juv. Center Commission*, No. 15:17-cv-00097-EKD (W.D. Va. Feb. 28, 2018), available at <https://int.nyt.com/data/documenthelper/89-shenandoah-valley-mask-chair-migrants/8e56a566f394c7087140/optimized/full.pdf#page=1>.

member yelled at me for holding a door open for others, the staff member] restrained me, putting my hands behind my back and slamming my face in the wall. . .two staff members slammed my body to the ground, and when they picked me back up, shoved me against the wall again. . .After this, they put me in restriction in my room. They took away my mattress and blanket and left me only in my boxers. I was left in my room all day without clothes and it was very cold. . .I want us to be treated as human beings.”(boy, Age 15)⁴⁵

“I was detained at Shenandoah for over a year and a half. . .[M]y room had a mattress, a sink, and a toilet. There is no wall or divider in the room. . .One time a staff member stood at my doorway and watched me use the bathroom. . .[S]taff members would make fun of me on a daily basis. . . On one occasion, I got into a fight with one of the American kids after he had taunted me and told me that he ‘hates Latinos’. When staff broke up the fight, I was grabbed and thrown forcefully to the ground, but the other kid was just held by the arms and pulled away. I was then restrained, tied to a chair, and hit several times by staff members. . .I was left tied to the chair in my room for four hours.”

(boy, Age 17) *While at the Shenandoah detention facility, this youth began to cut his wrists with shards of glass and plastic and banging his head against the wall and floor. After a year of detention, he attempted suicide by hanging himself from a curtain.*⁴⁶

Although conditions at Shenandoah are particularly harsh, the mistreatment of children is not an anomaly within the immigration legal system. The Immigration and Nationality Act (INA) was not designed to protect children.⁴⁷ In fact, the INA’s construction of childhood is marked by carelessness. Terms used within the INA are contradictory, and safeguards related to their status are often illusory. The INA uses a variety of terms to connote youth that does not consistently use the same benchmarks for age. For example, a “child” must always be under the age of twenty-one,⁴⁸ although an “unaccompanied alien child” must be under age eighteen.⁴⁹ Even more confounding, the statute mentions the term “minor child” throughout the statute

45. Plaintiff’s Mot. For Preliminary Injunction, Ex. 1, *Lopez v. Shenandoah Valley Juv. Center Commission*, No. 5: 17-cv-00097-EKD, (W.D. Va. February 28, 2018) available at <https://int.nyt.com/data/documenthelper/89-shenandoah-valley-mask-chairmigrants/8e56a566f394c7087140/optimized/full.pdf#page=1>.

46. Plaintiff’s Mot. For Preliminary Injunction, at Ex. 1 and complaint, *Lopez v. Shenandoah Valley Juv. Center Commission*, No. 5: 17-cv-00097-EKD, (W.D. Va. February 28, 2018) available at <https://int.nyt.com/data/documenthelper/89-shenandoah-valley-mask-chairmigrants/8e56a566f394c7087140/optimized/full.pdf#page=1>.

47. Fear of communism animated drafting of the Immigration and Nationality Act of 1952, as well as excluding people based on health, criminal, moral, economic and political criteria. See KEVIN R. JOHNSON ET AL., UNDERSTANDING IMMIGRATION LAW 64–67, 73–90 (2015).

48. 8 U.S.C. § 1101(b) (2012). Children must also be unmarried. See 8 U.S.C. § 1101(c) (2012).

49. 6 U.S.C. § 279(g)(2) (2012).

referring to a child under eighteen,⁵⁰ as well as a mention in one place of children under sixteen.⁵¹ A “minor” could indicate a youth under the age of twenty-one,⁵² eighteen,⁵³ or fourteen,⁵⁴ depending on the context in the statute. Unaccompanied refugee minors are usually not yet eighteen years old, although they may be older depending on the state they reside in.⁵⁵ The term “juvenile” also conveys different ages in separate contexts, alternatively including those under age twenty-one,⁵⁶ and limiting to those under the age of eighteen.⁵⁷ Even more confusing, the INA interchangeably uses “minor” and “juvenile,” even within the same provision.⁵⁸

While the terms child, unaccompanied alien child, juvenile, and minor have varied uses and meanings, three concepts dominate: (1) children are generally defined by their dependence on adults under immigration law, such that children’s independent claims and voices are often ignored,⁵⁹ yet; (2) their dependency and capacity limitations generally do not result in more rights; in fact, in some instances, children may have fewer rights than adults because of their status;⁶⁰ (3) lastly, a subset of youth, termed “unaccompanied alien children,” has gained the most accommodations and protections, largely unavailable to other youth, while accompanied minors access fewer accommodations and children aged eighteen to twenty-one have almost no child-protections.

A. *Infantilization of Migrant Children*

Immigration law does not conceive of children as entities unto themselves.⁶¹ Generally, under immigration law, a “child” is defined by their

50. 8 U.S.C. §§ 1101(15)(F), (H), (J)–(M), (T)(ii) (2012); 8 C.F.R. § 245a.1(m) (2013).

51. 8 U.S.C. § 1101(U)(i) (2012).

52. 8 U.S.C. § 1101(15)(H) (2012). Minor children of nonimmigrant cultural exchange visitors may be up to age 21. *See* 8 U.S.C. § 1101(15)(J) (2012). Minor children of those on fiancée visas may be up to age 21. *See* 8 U.S.C. § 1101(15)(K) (2012). Minor children of nonimmigrant workers may be up to age 21. *See* 8 U.S.C. § 1101(15)(O) (2012). Minor children of L visa holders may be under 21. *See* 8 U.S.C. § 1101(15)(L) (2012).

53. 8 U.S.C. § 1232(c)(2) (2012); 8 C.F.R. § 245a.1(m) (2013); 8 C.F.R. § 274a.2(B)(3) (2018).

54. 8 C.F.R. § 103.8(c) (2011).

55. *Unaccompanied minor* means a person who has not yet attained 18 years of age, or a higher age established by the State of resettlement in its child welfare plan under title IV-B of the Social Security Act for the availability of child welfare services to any other child in the State. *See* 45 C.F.R. § 400.111 (1987).

56. 8 U.S.C. § 1101(a)(27)(J) (2012); *see also* 8 U.S.C. § 1357(h) (2006) (describing how “abused juveniles” shall not be required to contact abusers in the context of SIJS application, with juveniles being aged up to 21).

57. 8 C.F.R. § 274a.12(c)(5) (2018); 8 C.F.R. § 1236.3 (2015).

58. 8 C.F.R. § 212.5(a)(3)(i) (2011); *see generally* Hlass, *States and Status*, *supra* note 34 (describing how in the case of the Special Immigrant Juvenile, he or she must be subject to jurisdiction of a state court, implicating a range of disparate age cut-offs, depending on the form of proceeding).

59. *See* David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children’s Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 979–80 (2002) (concluding that “critical frameworks of immigration law simultaneously reflect and reinforce discredited approaches to children’s rights,” leading to a disregard for children’s independent personhood and the suppression of their unique voices).

60. *See generally id.*; Medha D. Makhlof, *Theorizing the Immigrant Child: The Case of Married Minors*, 82 BROOK. L. REV. 1603 (2017).

61. Thronson, *supra* note 59, at 991 (“Immigration law never employs the term ‘child’ except in relation to a parent and, therefore, does not conceive of a ‘child’ existing outside this relationship.”).

relationship to adults, and often their status is dependent on their parents. The formal INA definition characterizes a “child” by her relationship to parents or other adults, relating to varying scenarios of dependency on adults and parental status.⁶² Similarly, “unaccompanied alien children” are also defined in part by their lack of relationship to a parent or legal guardian.⁶³ Another example of defining children by their dependence is the case of the “Special Immigrant Juvenile,” defined in part by the child’s inability to reunify with one or both parents due to abandonment, abuse or neglect.⁶⁴ In the context of family-sponsored immigration, children’s dependency is paramount. Children are the passive beneficiaries of family-based petitions but cannot act as petitioners themselves for their own parents or siblings until they become adults at age twenty-one.⁶⁵

Defining children by their dependent status and barring them from acting as petitioners for family members are forms of the infantilization of children or treating them as persons without agency. However, infantilization exists beyond formal legal definitions and plays out in policies and practices. As a recent example, the agency tasked with caring for unaccompanied children, the Office of Refugee and Resettlement (ORR) did not allow teenage girls in government custody to access an abortion unless they obtained personal approval from the agency Director of ORR.⁶⁶ Practices and actions of decision-makers, advocates and parents often erase children’s voices in immigration legal proceedings.⁶⁷ For example, although accompanied children who fear persecution may make independent claims for asylum, often their claims are subsumed by their parents’ claims, leading to the silencing of their voices.⁶⁸ In other cases, a child may be ordered deported without even being present, because notice of a hearing was sent to the “principal” immigrant, a parent, with the child never knowing about the hearing.⁶⁹

62. 8 U.S.C. §§ 1101(b)(1)(A)–(G) (2012) (referring to children born in and out of wedlock, stepchildren, legitimated children, orphans and adopted children); 8 U.S.C. § 1101(e)(1) (2012) (referring to child for the purposes of citizenship and naturalization).

63. 6 U.S.C. § 279(g)(2)(C) (2012).

64. 8 U.S.C. § 1101(a)(27)(J) (2012).

65. There are limited exceptions where children are allowed to petition for parents, when the child is a victim of a serious crime or severe form of trafficking. *See* 8 C.F.R. § 214.11(k)(1)(ii) (2017); 8 C.F.R. § 214.14(f)(1) (2013). Yet child asylees, VAWA recipients and SIJS grantees are precluded from petitioning for parent derivatives. *See* 8 U.S.C. §§ 1158(3)(A)–(B) (2012) (noting child asylees, with the exceptions of unaccompanied minors, are only able to accompany, follow, or join an adult immediate family member who has applied for asylum); 8 C.F.R. § 204.2 (f)(1) (2007) (noting that there is nothing to allow a parent derivative on a child’s self-petition, and that only a United States Citizen over the age of 21 may file a petition on behalf of a parent); 8 U.S.C. § 1101(a)(27)(J)(iii)(II) (2012) (noting no natural parent of a child who is granted SIJS status can gain lawful immigration status through this child in the future).

66. *See* J.D. v. Azar, 925 F.3d 1291 (D.C. Cir 2019); *see also* J.D. v. Azar (*Formerly* Garza v. Azar and Garza v. Hargan) - *Challenging Trump Administration’s Refusal to Permit Teenage Immigration Detainees to Access Abortion Services*, ACLU OF THE DISTRICT OF COLUMBIA, <https://www.acludc.org/en/cases/jd-v-azar-formerly-garza-v-azar-and-garza-v-hargan> (last visited Dec. 26, 2019).

67. *See generally* Thronson, *supra* note 59.

68. *See id.* at 994.

69. *See id.*

Children's voices are even absent when the child's perspective may be central to a legal claim, such as in the context of non-lawful permanent resident cancellation of removal cases. In these cases, an immigrant must show that if she is deported, it will result in exceptional and extremely unusual hardship to a qualifying relative, including a child.⁷⁰ In a leading case, *Monreal-Aguinaga*, the Board of Immigration Appeals found that the applicant failed to meet the standard, noting the children lacked health problems.⁷¹ The record is most notable for what it did not contain. As a dissenting Board Member explained, the record was "minimal," lacking evaluation of children's language skills, medical or psychological reports of the impact of their relocation, and no background information regarding children's ability to maintain relationships with family remaining within the United States.⁷² The majority upheld the lower court's denial without ensuring the children's perspectives were included, despite them being central to the legal claim.

B. *Adultification of Migrant Children*

Most often, children⁷³ are treated as adults under immigration law.⁷⁴ There are some exceptions for unaccompanied minors, and to a lesser extent accompanied minors, who have limited protections in the arrest, detention, and courtroom context, and a paucity of substantive legal protections.⁷⁵ In the immigration law regime, there are broadly two systems—which are deeply intertwined—within which children must operate: the apprehension and detention system, and the adjudication⁷⁶ and removal system.⁷⁷ In the apprehension system, generally Immigration and Customs Enforcement (ICE) or Customs and Border Protection (CBP) agents make arrests and apprehensions, at which time they classify children. Depending on children's classification as an unaccompanied minor,⁷⁸ accompanied minor, or non-minor, for those children aged eighteen or older, they are afforded different protections, and subjected to different standards in detention, with oversight by different agencies.⁷⁹ Children under age eighteen can be released to individuals, and

70. 8 U.S.C. § 1229b(b)(1) (2000).

71. Thronson, *supra* note 59, at 991 (citing *In Re Monreal-Aguinaga*, 23 I. & N. Dec. 56, 65 (B.I.A. 2001)).

72. *Id.* at 979 (citing *In Re Monreal-Aguinaga*, 23 I. & N. Dec. 56, 70–73 (B.I.A. 2001)).

73. *In re Monreal-Aguinaga*, 23 I. & N. Dec. 56, 73 (B.I.A. 2001).

74. See Hlass, *Minor Protections*, *supra* note 34.

75. See Hlass, *The School to Deportation Pipeline*, *supra* note 15, at 743–52.

76. Some children, who have either entered without permission, or with a temporary visa, or as lawful permanent residents, may not be subjected to removal proceedings, but have pending adjudications before USCIS, the benefits agency.

77. M. Aryah Somers et al., *Constructions of Childhood and Unaccompanied Children in the Immigration System in the United States*, 14 U.C. DAVIS J. JUV. L. & POL'Y 311, 333 (2010) (describing only the two systems in relation to unaccompanied minors, but these two concepts are relevant to accompanied minors and 18 to 20-year-old children who are no longer minors).

78. Formally termed "Unaccompanied Alien Child" under the Immigration and Nationality Act.

79. 8 U.S.C. § 1357(h) (2006) (stating that unaccompanied alien children "shall be promptly placed in the least restrictive setting that is in the best interest of the child").

those 18 years or older may be released on their own recognizance.⁸⁰ The second structure—the adjudication and removal system—involves immigration proceedings either before an immigration officer or immigration judge who will determine the child’s legal status, whether they will be allowed to remain in the United States, and for those children in removal proceedings in immigration court, whether they will be ordered deported.⁸¹ First, I will describe children’s treatment in the apprehension and detention system; next, I will discuss their experience in the adjudication and removal system.

The apprehension system treats children essentially as adults. Children, like adults, are usually subjected to ICE or CBP interrogation upon arrest, where enforcement agents ask immigrants about their nationality and citizenship status in order to complete immigration police reports, Form I-213’s, which are used against immigrants in immigration court. Regulations and guidance affording special protections for children in the apprehension regime are scant, often superficial, and generally exclude eighteen to twenty-one-year-olds.⁸²

ICE has issued Juvenile Protocols, which apply mostly to unaccompanied minors and merely instruct ICE officers to follow statutory and regulatory obligations.⁸³ The guidance mostly mirrors the process of arresting and interrogating adults, with chiefly superficial exceptions. First, the protocols state that all “juveniles should be treated with dignity, respect, and special concern for their vulnerability.” This is largely meaningless as there is no specificity about how to do so or what “concern” for “vulnerability” entails. A second *pro forma* procedural difference for the arrest of minors stems from the *Flores* Settlement Agreement (“*Flores*”), a court-supervised agreement setting the minimum standards for minors in immigration custody.⁸⁴ This

80. See discussion *infra* Section II.B (discussing the varying rights of children in the detention context).

81. There is arguably a post-adjudication stage for children, who may be granted status, have their cases administratively closed or terminated, or be ordered deported, potentially resulting in repatriation. This stage extends beyond the scope of this article.

82. Hlass, *The School to Deportation Pipeline*, *supra* note 15, at 749–50.

83. U.S. IMMIGRATION AND NATURALIZATION SERV., JUVENILE PROTOCOL MANUAL (2006), available at https://www.ice.gov/doclib/foia/dro_policy_memos/juvenileprotocolmanual2006.pdf [<https://perma.cc/CFA9-YEPG>].

84. See Homeland Security Act of 2002, Pub. L. No. 107-296, § 462, 116 Stat. 2135 (2002) (reorganizing responsibilities for juvenile aliens; ICE’s ERO is responsible for housing juvenile aliens apprehended with family members, and transporting juveniles to longer term detention facilities). ICE has promulgated detention standards that reflect the different treatment of children under 18, particularly those who are unaccompanied. U.S. IMMIGRATION & CUSTOMS ENF’T, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 2011 (PBNDS 2011) 99 (2016) (discussing, *inter alia*, hold rooms in detention facilities), available at <https://www.ice.gov/doclib/detention-standards/2011/pbnds2011r2016.pdf>. However, complaints regarding detention of juveniles abound and include children being physically and sexually abused, being forced to sleep on floors without a mattress, being held in painfully freezing rooms, not being properly served legal papers, not being read their rights, being questioned by the same officers who arrested them, and being questioned in a language they do not understand. See, e.g., Letter from Ashley Huebner, Nat’l Immigrant Justice Ctr., et al. to Megan H. Mack, Officer for Civil Rights and Civil Liberties, Dep’t of Homeland Sec. & John Roth, Inspector Gen., Dep’t of Homeland Sec. (June 11, 2014), available at <http://www.acluaz.org/sites/default/files/documents/DHS%20Complaint%20re%20CBP%20Abuse%20of%20UICs.pdf> [<https://perma.cc/X8D7-YF33>]. In the juvenile justice system,

second difference in enforcement practice states that immigration officers must provide children under eighteen a “Form I-770,”⁸⁵ which explains the right to a phone call, the right to find an attorney, and the right to appear before an immigration judge.⁸⁶ However, a piece of paper about rights provides meager benefits to young people who cannot generally effectuate rights on their own.⁸⁷ Third, by regulation, immigration agents are required to read this form to the child in a language the child can understand, if the child is a minor under fourteen years old.⁸⁸ Fourth, for children under fourteen who are arrested, immigration officials must serve the immigration violations charging document, the “Notice to Appear,” upon the person with whom the child resides, and whenever possible, DHS shall also serve on the “near relative, guardian, committee, or friend.”⁸⁹ Note that this service is not in addition to serving the child. Ironically, a child could be charged to go to court and never be informed of it by the adult who received notice. Lastly, children under fourteen do not have to be fingerprinted upon arrest.⁹⁰

The detention context is where minors—those children under age eighteen—have the most accommodations, as a result of *Flores*, which I extensively detail in the subsequent section of this Article within the context of unaccompanied minor exceptionalism.⁹¹ While detention standards apply to both accompanied and unaccompanied minors, accompanied minors have only benefited from the *Flores* protections since 2016, when a federal court found the agreement applies to all minors, regardless of whether they are accompanied.⁹² Juvenile protocols, tracking the *Flores* language, state that juveniles’ vulnerability should be

states are unlawfully sharing confidential information with U.S. Immigration and Customs Enforcement (ICE) and ICE is coercively interrogating children. See HELEN LAWRENCE ET AL., STRATEGIES FOR SUPPRESSING EVIDENCE AND TERMINATING REMOVAL PROCEEDINGS FOR CHILD CLIENTS 3 (2015), available at <https://perma.cc/CH2JGHJ5>. Apart from these changes, ICE can parole juveniles subject to expedited removal although this can “generally be justified only on a case-by-case basis for “urgent humanitarian reasons” or “significant public benefit,” provided the aliens present neither a security risk nor a risk of absconding.” See 8 C.F.R. § 212.5(b)(3) (2011) (describing the release and parole of juveniles).

85. U.S. DEP’T OF HOMELAND SEC., A REVIEW OF DHS’ RESPONSIBILITIES FOR JUVENILE ALIENS 11 (2005), available at https://www.oig.dhs.gov/assets/Mgmt/OIG_05-45_Sep05.pdf; see also 8 C.F.R. § 236.3(h) (2002).

86. 8 C.F.R. § 236.3(h) (2003); 8 C.F.R. § 1236.3(h) (2003). See also LAWRENCE ET AL., *supra* note 84, at app. 2.A–2.B (containing a sample of Form I-770).

87. However, if Form I-770 is not provided, one potential benefit is a lawyer representing the child in removal proceedings may move to terminate removal proceedings and suppress evidence against the young person based on this violation. LAWRENCE ET AL., *supra* note 84, at app. 2.A–2.B.

88. 8 C.F.R. § 236.3(h) (2003); 8 C.F.R. § 1236.3(h) (2003).

89. 8 C.F.R. § 103.8(c)(2)(ii) (2011). When a child is in federal custody, DHS must serve the head of the ORR-funded facility where the child resides. See *In re Amaya*, 21 I. & N. Dec. 583, 584–85 (B.I.A. 1996). Additionally, the B.I.A. has held that if the child’s parent is in the United States, the parent must also be served, in addition to any prior service upon ORR or the sponsor the child was released to. See *In re Mejia-Andino*, 23 I. & N. Dec. 533, 536 (B.I.A. 2002).

90. U.S. IMMIGRATION AND NATURALIZATION SERV., JUVENILE PROTOCOL MANUAL (2006), available at https://www.ice.gov/doclib/foia/dro_policy_memos/juvenileprotocolmanual2006.pdf [<https://perma.cc/CFA9-YEPG>].

91. See discussion *infra* Section I.C.

92. In 2016, the Ninth Circuit affirmed that the *Flores* Settlement unambiguously applies to minors who are accompanied and unaccompanied. See *Flores v. Lynch*, 828 F.3d 898, 901 (9th Cir. 2016).

accommodated by placing them in safe and sanitary detention facilities and the least restrictive environment.⁹³

After arrest, enforcement agents must make a custody determination regarding the child—if the child can be released or will remain in custody. Due to the *Flores* litigation, there are minimum standards for the treatment of accompanied and unaccompanied minors who are detained. Those who remain in detention after an initial seventy-two-hour period must be held in a facility licensed for caring for children in the state where the facility is located. Furthermore, unaccompanied minors must be transferred to the care of ORR. Minors should be in the least restrictive setting possible, although children aged 18 and older, if detained, are held in regular ICE detention facilities, often in leased beds at regular jails and prisons throughout the country without any special protections.

Just like the apprehension system, the adjudication and removal system, offers few child-specific accommodations. Children are subjected to roughly the same legal regime as adults: they may seek the same immigration benefits, are subject to the same grounds for immigration violations and the same defenses to deportation are available to them, if they can prove their cases. Under immigration law, it is the immigrant's burden to prove eligibility for protections like asylum or lawful permanent residence;⁹⁴ often, immigrants must prove they deserve a positive exercise of discretion, as most forms of immigration protection are discretionary.

As a general rule, there is no age limit on who is subject to immigration court jurisdiction. Even babies may be ordered deported.⁹⁵ Although studies show that representation can make immigrants up to fifteen times more likely to win their cases,⁹⁶ there is no statutory right to an appointed attorney under

93. U.S. IMMIGRATION AND NATURALIZATION SERV., JUVENILE PROTOCOL MANUAL (2006), *available at* https://www.ice.gov/doclib/foia/dro_policy_memos/juvenileprotocolmanual2006.pdf [<https://perma.cc/CFA9-YEPG>].

94. 8 U.S.C. § 1229a(c)(4)(A) (2012).

95. *See, e.g.,* Mary Papenfuss, *1-Year-Old Baby Appears in Immigration Court, Cries Hysterically*, HUFFINGTON POST (Sept. 7, 2018), https://www.huffingtonpost.co.uk/entry/year-old-baby-appears-in-immigration-court_us_5b4290e3e4b07b827cc1e76c?guccounter=1&guce_referrer_us=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_cs=3n0ezaTfmNrHxO3FGeNKiA; *see also* Tal Kopan, *Kids in Immigration Court: A Maze With Life and Death Consequences*, CNN (July 1, 2018), <https://edition.cnn.com/2018/06/30/politics/children-in-court/index.html>.

96. For example, one study showed that odds were fifteen times greater that immigrants with representation, as compared to those without, sought relief from deportation, and those represented immigrants were five-and-a-half times more likely to obtain relief. *See* Ingrid V. Eagley & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 76 (2015) (“Tellingly, over a six-year period only 2% of immigrants without counsel prevailed in their cases.”). A study of those seeking asylum found that access to counsel was perhaps the most critical, statistically, for success. *See* Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340 (2007) (“[W]hether an asylum seeker is represented in court is the single most important factor affecting the outcome of her case.”).

immigration law.⁹⁷ Children in removal proceedings, like adults, must represent themselves against a government prosecutor if they cannot otherwise obtain counsel.⁹⁸ Unrepresented children must not only defend themselves in court, but they must also complete complicated immigration forms, assemble necessary evidence, and make their cases before the court, all on their own.⁹⁹ The reality for children is grim, although the government maintains that children are capable of representing themselves in court hearings; a senior official even stated that toddlers can learn immigration law.¹⁰⁰ Most children are unrepresented in court, and most unrepresented youth are deported.¹⁰¹

Formal and informal¹⁰² procedural and substantive protections within the adjudication legal system are few and often ineffectual. Formally, the INA creates few protections for immigrant children. In fact, children are sometimes treated worse than adults because of their status under the law. For example, once a minor is married, he or she is no longer treated as a child for immigration benefits purposes, but he or she will not have the same rights as an adult petitioner, either. Married minors are no longer eligible to be recognized as Special Immigrant Juveniles, a protection reserved only for children.¹⁰³ Married minors are also prohibited from petitioning for parents or siblings even though the married minors are considered adults in relation to their spouses. Simultaneously married minors cannot benefit as immediate relative “children” of their parents.¹⁰⁴ As scholar Medha Makhoul writes in the context of married minor children, the law treats married minors “indistinguishably from married adults, and when they are treated as children, it is often to their detriment.”¹⁰⁵

97. The Ninth Circuit, however, recently reheard a class action case regarding this issue. See *Ninth Circuit to Decide Whether Children Have a Right to Appointed Counsel in Deportation Hearings*, PUBLIC COUNSEL (Sept. 21, 2018) <http://www.publiccounsel.org/stories?id=0261>.

98. 8 U.S.C. § 1229a(b)(4)(A) (2012); 8 C.F.R. § 238.1(b) (2011). Yet if a child is incompetent, like an adult, there may be a competency hearing to determine if other safeguards should be put in place. See generally *In re M.A.M.*, 25 I. & N. Dec. 474 (B.I.A. 2011).

99. See Hlass, *The School to Deportation Pipeline*, *supra* note 15, at 746–47 (noting that while children may be released to, or living with an adult, it is unlikely these adults can provide meaningful assistance in representation; in fact, many are undocumented themselves and may decide not to accompany children to court proceedings).

100. Assistant Chief Immigration Judge Jack H. Weil, who was in charge of training immigration judges and has particular oversight over vulnerable populations in immigration, stated: “I’ve taught immigration law literally to 3-year-olds and 4-year-olds.” Deposition of Honorable Jack H. Weil at 69, *J.E.F. M. v. Lynch*, No. 2:14-cv-01026-TSZ, (W.D. Wash. Oct. 15, 2018), available at <https://www.aclu.org/legal-document/jefm-v-lynch-deposition-honorable-jack-h-weil> [<https://perma.cc/N2DE-F4S7>].

101. *Representation for Unaccompanied Children in Immigration Court*, TRAC IMMIGRATION (Nov. 25, 2014), <http://trac.syr.edu/immigration/reports/371/> (noting that 207,519 children were not represented and 207,205 were represented).

102. Within immigration law, some protections are mandated by law and regulations, yet other protections may be created through more informal mechanisms such as sub-regulatory agency guidance or policy memoranda.

103. 8 C.F.R. § 204.11(c)(2) (2009).

104. Medha D. Makhoul, *Theorizing the Immigrant Child: The Case of Married Minors*, 82 BROOK. L. REV. 1603, 1628 (2017).

105. See *id.* at 1607.

Another example of children's sub-treatment is seen in the context of immigrant visas and derivative status. Children derivatives who are parents themselves may not provide immigration status obtained through a parent to their own children, since derivative status only extends to one generation.¹⁰⁶ A third example involves specific waivers for what are known as the three and ten-year unlawful presence bars, which prohibit applicants from obtaining certain immigration benefits.¹⁰⁷ In order to seek a waiver for these bars, noncitizens can show hardship to adult "immediate relatives," meaning their spouse or parent, but not to their child.¹⁰⁸

Arguably, the only substantive immigration benefit designed for children is Special Immigrant Juvenile Status,¹⁰⁹ which enables a pathway to lawful permanent residence for those children deemed to be abandoned, abused or neglected.¹¹⁰ Although special immigrant juveniles are still defined by their relationship to a parent and their dependent status,¹¹¹ these children do have agency to act as self-petitioners. Additionally, the best interests of the child are paramount to the determination of whether a child is a special immigrant juvenile.¹¹²

The only other substantive, youth-specific protections are several exceptions to punitive rules,¹¹³ largely limited to minors, that exclude 18 to 21-year-old children. The exceptions to punitive rules relate to "unlawful presence"¹¹⁴

106. 8 U.S.C. § 1153(d) (2006).

107. 8 U.S.C. § 1182(a)(9)(B) (2012).

108. 8 U.S.C. § 1182(a)(9)(B)(v) (2012).

109. Although it has hardly ever been utilized, a foundling provision allows children of unknown parentage who were found in the United States when they were under 5 years old or younger to be considered citizens. INA 301(f), see <https://www.ilw.com/articles/2007,0123-nugent.shtm>. Another protection relating to children is the Child Status Protection Act. However, this benefits *adults* who were beneficiaries of family-based petitions based on being classified as children, but who eventually aged out of childhood status while their cases were pending before the immigration agency. One quasi-protection related to childhood is Deferred Action for Childhood Arrivals (DACA). However, this program's future is tenuous, dependent on a pending Supreme Court decision, and initial DACA registration was available to young adults up to age 30, as well as children, providing some of these high-achieving young people an opportunity to apply for discretionary deferment of removal. See Memorandum from Janet Napolitano, Sec'y of U.S. Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, Customs & Border Prot., et al. (June 15, 2012), available at <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

110. 8 U.S.C. § 1101(a)(27)(J) (2012). There is a provision for SIJS-seekers that prohibits forcing them to contact the abusive family member during the SIJS process. See 8 U.S.C. § 1357(h) (2006).

111. Specifically, the child must be declared dependent by a court or placed under the custody of an entity or person, and there must be a finding that reunification with at least one parent is not viable due to abandonment, abuse or neglect, or a similar basis. See 8 U.S.C. § 1101(a)(27)(J)(i) (2012).

112. 8 U.S.C. § 1101(a)(27)(J)(ii) (2012) ("[F]or whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence.").

113. Convictions are defined as a formal judgment of guilt such that civil juvenile delinquency adjudications do not trigger a conviction for the purposes of immigration law, which is often required to trigger immigration consequences in the criminal context. See *generally In re* Devison, 22 I. & N. Dec. 1362 (B.I.A. 2000).

114. Minors under 18 are excluded from accruing "unlawful presence" while living within the United States with permission; this is beneficial because accrual of unlawful presence can result in three-

and “crimes involving moral turpitude,”¹¹⁵ both of which may bar individuals from receiving certain immigration benefits.¹¹⁶ Child-protection regulations regarding the procedural process for children in court are few in number, and generally are limited to “minor children,” excluding 18 to 21-year-olds. For example, under one regulation, judges are precluded from accepting an admission of removability, which establishes the legal basis for deportation, unless the minor is accompanied by a relative, guardian or friend.¹¹⁷ This regulation is largely meaningless for two reasons. First, the waiver of being accompanied by almost any adult is broad and does not ensure that such a person will have the ability or inclination to enforce the child’s rights. Secondly, under court interpretation, although immigration judges may not accept a formal legal plea of removability, they may accept factual admissions from the child that would establish removability, and this may be the sole basis for making a finding of deportability.¹¹⁸ Another regulation—that specifically allows judges to waive minors’ presence if a legal guardian can attend in their place—does not further procedural rights.¹¹⁹ In fact, it may act to lessen the voice of the young person, who, if he or she utilizes the regulation, will not participate in the proceeding.¹²⁰

Informal protections do not meaningfully improve children’s rights in adjudications either. In the adjudication and removal system, there are two types of adjudicators: judges within the immigration courts and certain officers within U.S. Citizenship and Immigration Services (USCIS) with authority to grant or deny certain immigration applications. First, I turn to guidance for courts and then guidance for USCIS adjudicators. Although immigration courts have had policy guidance regarding the treatment of minors in courtrooms since 2004, this guidance has been largely superficial in nature,¹²¹ and mostly focused on unaccompanied minors.¹²² Over the years, the guidance has always made clear that the concept of the “Best Interest of the Child”

year and ten-year bars from obtaining immigration benefits and from entering the U.S. See 8 U.S.C. § 1182(B)(iii) (2012).

115. Many immigration consequences relating to crimes involve a conviction, and some juveniles may benefit from the fact that juvenile adjudications are not considered convictions under immigration law.

116. With “crimes involving moral turpitude,” children under age 18 who commit or admit committing one may avoid negative immigration consequences, as long as they committed the act while under 18 and five years before trying to enter the US or apply for lawful permanent residence. 8 U.S.C. § 1182(a)(2)(A)(ii) (2012).

117. 8 C.F.R. § 1240.10(c) (2009).

118. *In re Amaya*, 21 I. & N. Dec. 583 at 586–87 (B.I.A. 1996).

119. 8 C.F.R. § 1003.2(a) (2005).

120. However, the child may be able to attend school without interruption, which will likely contribute to the child’s socio-emotional well-being, more than attending court proceedings.

121. See Hlass, *The School to Deportation Pipeline*, *supra* note 15, at 697.

122. Compare U.S. DEP’T OF JUSTICE, INTERIM OPERATING POLICIES AND PROCEDURES MEMORANDUM 04-07 (Sept. 16, 2004), available at <https://www.immigrantjustice.org/sites/default/files/EOIR%2520guideline%2520on%2520Children%2520in%2520immigration%2520court.pdf> [<https://perma.cc/XQ95-SRAN>]; and U.S. DEP’T OF JUSTICE, INTERIM OPERATING POLICIES AND PROCEDURES MEMORANDUM 17-03 (Dec. 20, 2017), available at <https://www.justice.gov/eoir/file/oppm17-03/download> [<https://perma.cc/MBE2-6KLH>].

does not apply to provide substantive protections. Instead, the guidance offers only slight modifications¹²³ to procedures like offering a child a toy to hold or a booster seat to use while testifying.¹²⁴ Guidance over the years has always explicitly reiterated that Immigration Judges do not have the right to appoint legal representatives or a guardian ad litem.¹²⁵ Even the slightly more substantive procedural protection of utilizing juvenile dockets, a separate docket or regular time and place for hearings for unaccompanied minors, is merely a suggestion, not a requirement.¹²⁶

USCIS' silence on the treatment of children is noteworthy. The agency does not publish guidance regarding how adjudicators should treat children's cases, with the narrow exception of the Asylum Division, a sub-division of USCIS.¹²⁷ Therefore, there is no guidance regarding claims for children seeking any immigration benefit other than asylum—such as lawful permanent residence, Special Immigrant Juvenile Status, temporary protective status, or Deferred Action for Childhood Arrivals (DACA).¹²⁸

In contrast, the Asylum sub-division of USCIS has issued some helpful language based on the “unique vulnerability” of child asylum-seekers.¹²⁹ Two key accommodations in the guidance encourage asylum officers to: 1) create a “child-friendly” environment¹³⁰ and 2) use a child-sensitive approach to determine various legal standards, implying that youthfulness should be considered when determining whether a legal standard is met.¹³¹ Unfortunately, more than twenty years since the inception of the asylum guidance in 1998, it has not been updated to include recent advancements in the understanding of child brain development.

123. Guidance specifically uses the term “modification,” and the term “accommodations” is noticeably absent in reference to the changes that should or could be made for children. *See* note 122 *supra* and accompanying text.

124. *See id.*

125. *See id.* The guidance memoranda have also made clear that substantive protections should not be afforded on behalf of children due to their status, because their status as children does not mean they are not still subject to the same statutory and regulatory regimes.

126. *See id.* Along these same tentative lines, guidance also suggests IJs “consider” making an opening statement in juvenile cases to explain the purpose of the proceeding, introduce parties and operational matters such as recording, interpretation, and note-taking.

127. Memorandum from Jeff Weiss, Acting Dir., Office of Int'l Affairs, U.S. Dep't of Justice, to Asylum Officers, Immigration Officers, & Headquarters Coordinators (Asylum and Refugees), Guidelines for Children's Asylum Claims 1 (Dec. 10, 1998), available at <https://www.uscis.gov/sites/default/files/USCIS/Laws%20and%20Regulations/Memoranda/Ancient%20History/ChildrensGuidelines121098.pdf> [<https://perma.cc/5MSE-Q83J>] [hereinafter Memorandum from Jeff Weiss]. Note that these guidelines predominantly apply to children under the age of 18, although children between the ages of 18 and 21 should benefit from protections relating to scheduling and derivative determinations. *Id.* at 1. Asylum officers are also cautioned that 18 to 21 year olds may exhibit a “minor's recollection” of past traumatic events if they occurred while under age 18. *Id.* at 5.

128. *See generally* U.S. CITIZENSHIP & IMMIGRATION SERVS., USCIS POLICY MANUAL (2020), available at <https://www.uscis.gov/policy-manual/export>.

129. *See generally* Memorandum from Jeff Weiss, *supra* note 127.

130. *See id.* at 5–16.

131. For example, although children must prove persecution, qualifying harm a child suffers “may be relatively less than that of an adult.” *See* Memorandum from Jeff Weiss, *supra* note 127, at 19.

C. *Exceptionalism: Unaccompanied Minors*

The rights of unaccompanied minors, termed “Unaccompanied Alien Children” under the INA, are quite limited. However, the immigration regime treats them more protectively in four major ways. Existing legal protections have largely emerged through the (1) designation of unaccompanied minor care and custody to ORR, (2) terms of the *Flores*¹³² class action settlement, which was applied to only unaccompanied minors until a 2016 court ruling, (3) amendments to the INA stemming from the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA),¹³³ as well as (4) informal and occasional court accommodations in the form of “juvenile dockets.” I will discuss these four categories of child protections in turn.

Detained unaccompanied minors are treated differently than other children, as they are placed in the custody of the ORR¹³⁴ under the supervision of the Department of Health and Human Services (HHS).¹³⁵ Accompanied minors who are detained are generally held in ICE family detention facilities,¹³⁶ while detained children aged eighteen to twenty-one are sent to the same facilities where ICE detains adults. Yet despite the distinction of ORR custody, ongoing, serious complaints have arisen regarding child abuse and mistreatment in ORR facilities.

In 2002, by statute, the Director of ORR took over responsibility for the care and custody of unaccompanied immigrant children¹³⁷ from the Commissioner of the Immigration and Naturalization agency,¹³⁸ due to ORR’s mission to assist vulnerable populations, including refugees and unac

132. Although the *Flores* settlement is a central case that has helped to create more distinct benefits for Unaccompanied Minor Children, it does not stand alone. *See* *Perez-Funez v. INS*, 611 F. Supp. 990, 993 (C.D. Cal. 1984); *see generally* *Perez-Olano v. Holder*, No. CV 05-3604, 2010 WL 9594539 (C.D. Cal. 2010). Both *Perez-Funez* and *Perez-Olano* successfully prompted the recognition of particular rights for Unaccompanied Minor Children and Special Immigrant Juvenile Children.

133. *See* 6 U.S.C. § 279(g) (2006); 8 C.F.R. § 236.3 (2002); 8 C.F.R. § 1236.3 (2002); *see also* Hlass, *The School to Deportation Pipeline*, *supra* note 15, at 745.

134. However, ORR has jurisdiction over a few discrete populations in addition to unaccompanied minors: refugees, asylees, Cuban/Haitian entrants, Special Immigrant Visa holders, and Amerasians. *See What We Do*, U.S. DEP’T OF HEALTH & HUMAN SERVS., OFFICE OF REFUGEE RESETTLEMENT (Dec. 5, 2019), <https://www.acf.hhs.gov/orr/about/what-we-do>.

135. Homeland Security Act of 2002, Pub. L. No. 107-296, § 462, 116 Stat. 2135, 2202 (2002) (designating ORR as a custodian for unaccompanied minors). Before 1996, unaccompanied children were placed within the custody of the Department of Justice within an agency called Community Relations Service, and in 1996, this agency was absorbed directly into the Immigration and Naturalization Service (INS), a separate agency under the Department of Justice. *See* M. Aryah Somers et al., *Constructions of Childhood and Unaccompanied Children in the Immigration System in the United States*, 14 U.C. DAVIS J. JUV. L. & POL’Y 311, 334 (2010).

136. *See generally* Lindsay M. Harris, *Contemporary Family Detention and Legal Advocacy*, 21 HARV. LATINX L. REV. 135 (2018); Lindsay M. Harris, *Learning in “Baby Jail”: Lessons from Law Student Engagement in Family Detention Centers*, 25 CLINICAL L. REV. 155 (2018).

137. The statute refers to an “unaccompanied alien child.” Homeland Security Act of 2002, Pub. L. No. 107-296, § 462, 116 Stat. 2135, 2202 (codified as amended at 6 U.S.C. § 279) (2006).

138. 6 U.S.C. § 279(a) (2006).

accompanied refugee minors.¹³⁹ According to legislative history, ORR's "child welfare expertise" and ability to address "the psychological, emotional and other material needs" of children were key to this designation.¹⁴⁰ Senator Dianne Feinstein noted that the Department of Homeland Security's national security mission was in conflict with the humanitarian mission of caring for unaccompanied children in government custody who had "no resort to counsel, with no resort to an ad litem guardian, unable to speak the language."¹⁴¹ In testimony regarding the division of duties within the immigration agency, Senator Kennedy underscored that the "services and the protection of people, [including] . . . unaccompanied children" must not get "short shrift."¹⁴²

As a result, the Director of ORR was tasked with broad obligations to unaccompanied minors, including oversight over their care and placement,¹⁴³ ensuring children's interests are addressed,¹⁴⁴ and even furthering access to justice by developing a plan to ensure qualified and independent legal counsel is appointed to represent children¹⁴⁵ and publishing a list of legal services for children.¹⁴⁶ ORR may even continue to hold a child after immigration proceedings are terminated if it cannot find a suitable custodian.¹⁴⁷

Some of ORR's statutory responsibilities towards unaccompanied minors map onto the second class of protections, won as part of the *Flores* court-supervised agreement.¹⁴⁸ *Flores* importantly set out minimum protections for

139. See Refugee Act of 1980, Pub. L. No. 96-212, § 411(a), 94 Stat. 102 (1980). Refugees, asylees, Cuban and Haitian entrants, certain Amerasians from Vietnam, and individuals admitted for lawful permanent residence (provided that they previously held one of the aforementioned statuses) are assisted. 45 C.F.R. § 400.43(a) (2000). Also assisted are survivors of human trafficking, see 22 U.S.C. § 7101 (2006); survivors of torture, see 22 U.S.C. § 2152 (2000); and Iraqi and Afghani Special Immigrants, see 8 U.S.C. § 1101(a)(27) (2012).

140. *Role of Immigration in the Department of Homeland Security Pursuant to H.R. 5005, the Homeland Security Act of 2002: Hearing Before Subcomm. on Immigration and Border Security, & Claims of H. Comm. on the Judiciary*, 107th Cong. 115 (2002) (Statement of Kevin Appleby, Policy Director of the U.S. Conference of Catholic Bishops (USCCB) Migration and Refugee Services).

141. *Immigration Reform and the Reorganization of Homeland Defense: Hearing Before the Subcomm. on Immigration of the Comm. on the Judiciary*, 107th Cong. 4 (2002) (Statement of Senator Dianne Feinstein).

142. *Id.* at 1, 99–101 (Statement of Senator Edward Kennedy, Chairman of the Subcommittee).

143. 6 U.S.C. §§ 279(b)(1)(A), (C)–(I), (L) (2012).

144. 6 U.S.C. § 279(b)(1)(B) (2012).

145. 6 U.S.C. § 279(b)(1)(A) (2012).

146. 6 U.S.C. § 279(b)(1)(I) (2012).

147. *D.B. v. Cardall*, 826 F.3d 721, 736 (4th Cir. 2016).

148. *Flores v. Sessions*, CENTER FOR HUMAN RIGHTS AND CONSTITUTIONAL LAW, <https://www.centerforhumanrights.org/Unaccompanied%20Immigrant%20Minors/Flores%20Case.html> (last visited Dec. 26, 2019) [hereinafter *Flores* Case Overview]; see Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544-RJK (Px) (C.D. Cal. Jan. 17, 1997), available at <https://www.aila.org/File/Related/14111359b.pdf> [hereinafter *Flores* Settlement Agreement]. The *Flores* Settlement Agreement initially provided it would remain in effect until the earlier of 5 years after the final court approval or 3 years after the court determined the government is in "substantial compliance," and then a 2001 Stipulation Agreement amended it to provide it would terminate 45 days after government published final regulations implementing the agreement. See Stipulation and Order, *Flores v. Reno*, No. CV 85-4544-RJK (Px) (C.D. Cal. entered Dec. 13, 2001); see also Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 84 Fed. Reg. 44,392 (Aug. 23, 2019) ("The [*Flores* Settlement Agreement], as modified in 2001, provides that it will terminate forty-five days after publication of final regulations implementing the agreement."). No final regulations have been published to date.

minors in immigrant detention.¹⁴⁹ For decades, the immigration agency interpreted the agreement to only apply to unaccompanied minors, although in 2016, a federal court found that it applies to all minors, regardless of whether they are accompanied.¹⁵⁰ Notably, the language makes clear that anyone outside of the class of detained minors—such as minors who are not detained—will be treated as “adults for all purposes.”¹⁵¹

Due to the wide-ranging harms that minor plaintiffs face, the *Flores* settlement covers several issues relating to the care of minors, including release procedures, conditions of custody, and attorney-client visits.¹⁵² The named plaintiff, fifteen-year-old Jenny Lisette Flores, fled violence in El Salvador in 1985 and hoped to reunite with her aunt in the United States.¹⁵³ Immigration officials, after arresting Jenny at the border, proceeded to handcuff, strip search, and place her in a detention center, where she remained for two months.¹⁵⁴ The detention center did not offer educational services or real recreational opportunities to children, and forced Jenny and other minors to share “bathrooms and sleeping quarters with unrelated adults of both sexes.”¹⁵⁵

A key principle of *Flores* is ensuring children are detained for as short a period as possible before being placed in a safe setting with family or an appropriate detention facility. Under *Flores*, the immigration agency must “expeditiously process” minors following their arrest, hold them in facilities that are “safe and sanitary,” and consider the “particular vulnerability” of children.¹⁵⁶ Generally, minor children should be held in the “least restrictive setting” possible¹⁵⁷ and released “without unnecessary delay” to an adult relative or licensed program.¹⁵⁸ The government must “make all reasonable efforts” to place minors in licensed programs “as expeditiously as possible,”¹⁵⁹ which

149. Much of the *Flores* Settlement Agreement has also been formalized in statute and regulations. See 8 U.S.C. 1232(c)(2) (2012).

150. In 2016, the Ninth Circuit affirmed that the *Flores* Settlement unambiguously applies to minors who are accompanied and unaccompanied. See *Flores v. Lynch*, 828 F.3d 898, 901 (9th Cir. 2016).

151. See generally *Flores* Settlement Agreement, *supra* note 148; see also *id.* at ¶ 13 (stating that when age is in dispute, the immigration agency shall treat individuals whom a reasonable person would conclude are adults even though they claim to be minors as adults, and may require them to submit to mental or dental examination to determine their age).

152. See generally *Flores* Case Overview, *supra* note 148; *Flores* Settlement Agreement, *supra* note 148.

153. See generally *Flores* Case Overview, *supra* note 148.

154. See generally *id.*

155. See generally *id.*

156. See generally *Flores* Settlement Agreement, *supra* note 148, at Ex. 2 ¶ (c).

157. However, there are some instances under the agreement where minors may be held in a secure facility or juvenile detention facility, including: if the child is criminally-involved, has committed or threatened to commit a violent act while in custody, has engaged in unacceptably disruptive behavior such as using drugs, fighting or intimidating others, is an escape-risk, or for the child’s own safety. *Flores* Settlement Agreement, *supra* note 148, at Ex. 2 ¶ (i).

158. The agreement prescribes placement preferences beginning with parents. See *Flores* Settlement Agreement, *supra* note 148, at ¶ 14.

159. This is true when there is an “influx”, defined as more than 130 children in custody—which is always the case in recent history. Furthermore, a Juvenile coordinator should keep list of additional

has been interpreted to be no more than twenty days.¹⁶⁰

A related *Flores* principle is ensuring that detention facilities address young people's special needs. Licensed programs must comply with all state and local child welfare laws. They must also provide suitable accommodations, food, medical and dental care, an individualized needs assessment to determine special needs, educational assessments, access to religious practice, support goals, information about family and friends for reunification, and a social history.¹⁶¹ Additionally, they must provide educational services in a structured classroom, structured leisure activities and recreation, individual and group counseling, social skills development classes, access to visitation, family reunification services and information about free legal assistance.¹⁶² All services should respect the right to privacy¹⁶³ and be sensitive to the age, culture, native language and individual complex needs of a child.¹⁶⁴ Program rules and discipline should consider the range of ages and cultural sensitivity and should not adversely affect minors' health, or physical or psychological well-being. Children shall not be subject to mental abuse, humiliation or punitive interference with daily functions of living.¹⁶⁵ Programs should have a system of accountability to preserve the "confidentiality" of client information and protect records from unauthorized use or disclosure.¹⁶⁶

The third set of protections available to minors are provided through the TVPRA.¹⁶⁷ The law amended some existing protections to expand unaccompanied minors' access to asylum, voluntary departure,¹⁶⁸ and counsel.¹⁶⁹ While most child protections within the TVPRA were designed solely for unaccompanied minors, the statute also expanded access to special immigrant juvenile status in several ways—regardless of whether the child is an accompanied minor or not.¹⁷⁰ The TVPRA expanded unaccompanied

placements and may consult with child welfare specialists and others to develop the list. If more placements are needed than are on the "Emergency List" that has been developed, the agency must locate additional placements "through licensed programs, county social services departments, and foster family agencies." See *Flores* Settlement Agreement, *supra* note 148, at Ex. 3.

160. *Flores v. Lynch*, 212 F. Supp. 3d 907, 914 (C.D. Cal. 2015), *aff'd in part, rev'd in part, and remanded*, *Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016).

161. *Flores* Settlement Agreement, *supra* note 148, at Ex. 1 (minimum standards for licensed programs).

162. *Flores* Settlement Agreement, *supra* note 148, at Ex. 1 ¶ (a).

163. *Id.*

164. *Id.*

165. *Id.*

166. *Flores* Settlement Agreement, *supra* note 148, at Ex. 1 ¶ (e).

167. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008).

168. The TVPRA provides that these children shall be eligible for Voluntary Departure under INA § 240B at no cost to the child. 8 U.S.C. § 1232 (a)(5)(D)(ii) (2006).

169. "To the greatest extent practicable," the Secretary of Health and Human Services should provide pro bono legal services to these minors. 8 U.S.C. § 1232(c)(5) (2006).

170. Expanded eligibility for relief and expanded waivers and exceptions. See DEBORAH LEE ET AL., UPDATE ON LEGAL RELIEF OPTIONS FOR UNACCOMPANIED ALIEN CHILDREN FOLLOWING THE ENACTMENT OF THE WILLIAM WILBERFORCE TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT OF 2008

minors' ability to seek immigration relief in several ways. First, it prohibited forcing unaccompanied minors arrested at the border—except those from Mexico and Canada—into “expedited removal” proceedings, which afford immigrants limited due process. Instead, the TVPRA directs these unaccompanied minors to be placed in removal proceedings before an immigration judge.¹⁷¹ Secondly, under the TVPRA, unaccompanied minors in deportation proceedings must be given the opportunity to initially seek asylum before an asylum officer, whereas normally they could only seek asylum before the judge presiding over their case.¹⁷² Asylum officers are purportedly non-adversarial.¹⁷³ In contrast, when one makes an initial claim before an immigration judge,¹⁷⁴ a government prosecutor is present who may oppose the immigrant's claim for relief. Also, if the asylum officer does not grant asylum, an immigration judge may then hear the case, offering the child a second chance to obtain relief. Third, the TVPRA removed two bars for unaccompanied minors that normally apply to asylum-seekers.¹⁷⁵ Lastly, it includes a catch-all provision stating that when an unaccompanied minor applies for asylum and other forms of relief, governing regulations must “take into account the specialized needs of unaccompanied alien children” and “address both procedural and substantive aspects” of handling these cases.¹⁷⁶

The fourth, and last, protection established for unaccompanied minors is the practice of juvenile dockets. At the gentle encouragement of administrators within the Executive Office of Immigration Review, some immigration courts established “juvenile dockets,” through which unaccompanied alien

(2009), available at http://www.ilrc.org/files/235_tvpra_practice_advisory.infonet.pdf; 8 U.S.C. 1255 § 245(h)(2)(A) (2012).

171. 8 U.S.C. § 1232(a)(5)(D) (2006).

172. Under the Trump administration, the USCIS has attempted to abrogate this right. See Memorandum from John Lafferty, Chief, U.S. Citizenship & Immigration Servs. Asylum Division, to All Asylum Office Staff (May 31, 2019) (on file with USCIS), available at https://www.uscis.gov/sites/default/files/USCIS/Refugee%2C%20Asylum%2C%20and%20Int%27%20Ops/Asylum/Memo_-_Updated_Procedures_for_I-589s_Filed_by_UACs_5-31-2019.pdf.

173. 8 C.F.R. § 208.9(b) (2011) (“The asylum officer shall conduct the interview in a nonadversarial The purpose of the interview shall be to elicit all relevant and useful information bearing on the applicant's eligibility for asylum”).

174. See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235, 122 Stat. 5044 (2008); Memorandum from Donald Neufeld, U.S. Citizenship & Immigration Servs. Acting Assoc. Dir. Domestic Operations, to Field Leadership (Mar. 24, 2009), http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/TVPRA_SIJ.pdf; See also Memorandum from Joseph E. Langlois, Chief, USCIS Asylum Division, to All Asylum Office Staff (Mar. 25, 2009), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/uac_filings_5f25mar09.pdf.

175. Notably the one-year deadline to file is not a bar for unaccompanied minors. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(d)(7)(A), 122 Stat. 5044 (2008). Also, the third-party country bar does not apply. Currently, only Canada is a safe third-country, and the validity of our bilateral agreement with Canada is being challenged in the Canadian courts. See Sylvia Thomson, *El Salvador Woman at The Heart of the Safe Third Country Agreement*, CBC (July 8, 2017), <http://www.cbc.ca/news/canada/safe-third-country-agreement-legal-test-case-1.4195228>.

176. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 235(d)(8), 122 Stat. 5044 (2008).

children's cases are separated from regular immigration dockets.¹⁷⁷ The stated purpose is to promote *pro bono* representation (by making it easier for *pro bono* attorneys to identify these cases), encourage child-friendly courtroom practices, and promote consistency.¹⁷⁸ Child advocates have praised the model of juvenile dockets, as judges often work closely with *pro bono* providers to facilitate access to counsel, are well versed in the timeline for Special Immigrant Juvenile cases, and provide more generous adjournments.¹⁷⁹

II. EVISCERATION OF UNACCOMPANIED MINOR EXCEPTIONALISM

Through hostile rhetoric targeting unaccompanied minors alongside aggressive policies that criminalize and strip minors of their rights, the Trump administration has sought to eviscerate any preferential treatment unaccompanied minors and other children receive in the immigration system, further contributing to the adultification of immigrant children. First, I will examine the anti-child public discourse; next, I will consider how the immigration legal regime has been further weaponized against children through specific policies and practices.

A. *Anti-Immigrant Child Public Discourse*

In tandem with anti-immigrant policies, Trump's administration has used explicitly and implicitly biased discourse attacking immigrants as a whole, and migrant children, specifically as "criminals,"¹⁸⁰ "animals,"¹⁸¹ and "gang members."¹⁸² President Trump has directed animus particularly towards

177. Memorandum from MaryBeth Keller, Chief Immigration Judge, U.S. Dep't of Justice, to All Immigration Judges et. al., Exec. Office for Immigration Review 5 (Dec. 20, 2017), <https://www.justice.gov/eoir/file/oppm17-03/download> (discussing Operating Policies and Procedures Memorandum 07-03: Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children); see also Memorandum from David L. Neal, Chief Immigration Judge, U.S. Dep't of Justice, to All Immigration Judges et. al. 5 (May 22, 2007), <https://www.immigrantjustice.org/sites/default/files/Appendix%20O%20-%20Working%20with%20Kids%20and%20EOIR%20Guidelines%20for%20Cases%20Involving%20Kids.pdf> (discussing Operating Policies and Procedures Memorandum 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children; and stating that "[w]herever possible, courts should conduct cases involving unaccompanied alien children on a separate docket or at a fixed time in the week or month").

178. Hlass, *Minor Protections*, *supra* note 34, at 282–283; see generally U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, FACT SHEET: UNACCOMPANIED ALIEN CHILDREN IN IMMIGRATION PROCEEDINGS (2008), available at <https://www.justice.gov/sites/default/files/eoir/legacy/2008/04/24/UnaccompaniedAlienChildrenApr08.pdf>.

179. Hlass, *supra* note 34, at 283.

180. Bart Jansen & Alan Gomez, *President Trump Calls Caravan Immigrants 'Stone Cold Criminals.'* *Here's What We Know*, USA TODAY (Nov. 26, 2018), <https://www.usatoday.com/story/news/2018/11/26/president-trump-migrant-caravan-criminals/2112846002/>.

181. *Trump: Immigrant gangs 'animals, not people'*, BBC NEWS (May 17, 2018), <https://www.bbc.com/news/av/world-us-canada-44148697/trump-immigrant-gangs-animals-not-people>.

182. Veronica Stracqualursi, *Trump Re-Ups 'Infestation' Rhetoric in Immigration Debate*, CNN (July 3, 2018), <https://www.cnn.com/2018/07/03/politics/trump-ms13-illegal-immigration-rhetoric/index.html>.

Latinx communities.¹⁸³ Additionally, he has stated that the DREAM Act, intended for high-achieving immigrant youth, is “not for our children,”¹⁸⁴ and suggested care for DREAMers is misplaced.¹⁸⁵ Lastly, he has targeted Mexican-American children, calling them “anchor babies.”¹⁸⁶

According to a scientific study of more than 300 speeches and 5,000 tweets, a team of UCLA researchers found several metaphors within Trump’s rhetoric, namely that “Fortress America is under attack; many of its cities and towns have been overrun by ruthless aggressors,” with “Mexico as the enemy that sent unauthorized immigrants as invaders,” and Trump as the hero.¹⁸⁷ Researchers found that code words have been used to make the narrative more persuasive and deceptive, such as associating *MS-13* with all Latino gangs and more broadly with all young Latinos who wear specific urban clothes.¹⁸⁸ Additionally, Trump often states that US-born children of Latino immigrants are not “our children” and do not deserve US citizenship.¹⁸⁹

According to researchers, Trump regularly uses a few “metonyms,” or stand-ins, for another word to convey other concepts.¹⁹⁰ Trump portrays immigrants—particularly Latinos—as drug dealers¹⁹¹ and gang members¹⁹²

183. President Donald Trump, *Remarks at a Roundtable Discussion on Immigration in Bethpage, New York* (Feb. 2, 2018) (transcript available at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-customs-border-protection-roundtable/>) [hereinafter President Trump’s Immigration Roundtable] (“We want strong borders You catch somebody, and you release them. And you know they’re bad They’re coming in—they’re pouring in from other—El Salvador, Guatemala, Honduras, Mexico, all over. They’re just pouring into our country.”); see also Ramos v. Nielsen, 336 F. Supp. 3d 1075, 1100 (N.D. Cal. 2018) (referencing President Trump’s remarks characterizing immigrants from Mexico as “drug dealers or users, criminals, and rapists”); see also Jia Tolentino, *Trump and the Truth: The “Mexican” Judge*, THE NEW YORKER (Sept. 20, 2016), <https://www.newyorker.com/news/news-desk/trump-and-the-truth-the-mexican-judge> (describing how President Trump referred to U.S. born federal judge Gonzalo P. Curiel as “Mexican,” and therefore unable to be impartial).

184. See President Trump’s Immigration Roundtable, *supra* note 183.

185. CELESTE GÓMEZ ET AL., THE PRESIDENT’S INTENT: PRELIMINARY FINDINGS OF A CRITICAL DISCOURSE ANALYSIS OF TRUMP’S SPEECHES AND TWEETS FROM THE DATE OF HIS CANDIDACY TO MID-SEPTEMBER 2017, at 23 (2017), available at <https://www.thepresidentsintent.com/full-report/> [<https://perma.cc/KZL7-7FGS>] (“The dreamers we never talk about are the young Americans I want my dreamers to be young Americans.”).

186. GÓMEZ ET AL., *supra* note 185, at 22 (“A person has a baby, lives in Mexico . . . has a baby, walks across the border, has the baby here. Now we’re responsible for that person for the next 85 years. I don’t think so We have a situation a mother is pregnant She walks across the border in front of our border patrol She lies down they have a baby they call anchor baby Now we’re responsible for the baby for 85 years.”).

187. *Id.* at 1.

188. *Id.*

189. *Id.*

190. *Id.* at 2.

191. Maya Oppenheim, *Donald Trump Brands Illegal Immigrant Gang Members ‘Animals’ Who ‘Slice and Dice’ Young Beautiful Girls*, INDEPENDENT (July 26, 2017), <https://www.independent.co.uk/news/world/americas/donald-trump-illegal-immigrants-animals-slice-dice-young-beautiful-girls-us-president-a7861596.html> (“[T]he illegal gang members, drug dealers, thieves, robbers, criminals and killers we are sending them the hell back where they came from The predators and criminal aliens who poison our communities with drugs and prey on innocent young people – these beautiful, beautiful innocent young people – will find no safe haven anywhere in our country.”).

192. *Fact Sheets: President Donald J. Trump is Dedicated to Combating MS-13*, THE WHITE HOUSE (May 23, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-dedicated->

who wreak violence¹⁹³ within communities: “we are protecting our families, schools, and cities by removing the gang member – MS-13.”¹⁹⁴ In particular, he references MS-13 as a stand in for young Latinos.¹⁹⁵ Studies have illustrated how the immigration agency has wrongfully conflated gang and immigration enforcement, calling Latino boys gang members in immigration proceedings without evidentiary support.¹⁹⁶

Additionally, Trump refers to “criminal aliens” as a stand in for all unauthorized immigrants.¹⁹⁷ For example, he states “one by one we are finding the illegal gang members, drug dealers, thieves, robbers, criminals and killers. And we sending them the hell back home . . . [they are] predators and criminal aliens who poison our communities with drugs and prey on innocent young people.”¹⁹⁸ These metonyms function to create a narrative where the nation is under attack from an enemy, namely immigrants, that wreak “havoc, rape, and all kinds of human violence.”¹⁹⁹ Trump regularly equates immigrants with criminal behavior. For example, he stated, “we are getting criminals, gang members, the worst of the worst, and we’re just letting them flow right in.”²⁰⁰

By painting Latinx youth as violent gang members, the Trump administration has placed children directly in its crosshairs. Consider, again, the President’s own statement: “alien minors from the border surge have been recently implicated in MS-13-related violence. Failure to enforce our immigration laws had predictable results: drugs, gangs and violence.”²⁰¹ Trump has implicated the nation’s entire immigration system in his narrative of violent attack when he claims that MS-13 gang members “exploited the loopholes in our laws to enter the country as unaccompanied alien minors. They look so innocent; they’re not innocent.”²⁰² When he targets children this way, the President casts child migration as an invasion: “in the three years before I took office, more than 150,000 unaccompanied alien minors arrived at the border and were released all throughout our country into United States

combating-ms-13/. (“Transnational gangs, such as MS-13 take advantage of our porous borders and seek to use our current immigration system to their advantage.”).

193. GÓMEZ ET AL., *supra* note 185, at 16 (“[MS-13 gang members] have transformed peaceful parks and beautiful, quiet neighborhoods into bloodstained killing fields. They’re animals.”).

194. *Id.* at 14.

195. *Id.* at 2.

196. See generally NEW YORK IMMIGRATION COALITION & CUNY SCHOOL OF LAW IMMIGRANT AND NON-CITIZEN RIGHTS CLINIC, SWEPT UP IN THE SWEEP: THE IMPACT OF GANG ALLEGATIONS OF IMMIGRANT NEW YORKERS (2018), available at https://www.law.cuny.edu/wp-content/uploads/page-assets/academics/clinics/immigration/SweptUp_Report_Final-1.pdf; LAILA L. HLASS & RACHEL PRANDINI, IMMIGRATION LEGAL RES. CTR., DEPORTATION BY ANY MEANS NECESSARY: HOW IMMIGRATION OFFICIALS ARE LABELING IMMIGRANT YOUTH AS GANG MEMBERS (2018), available at https://www.ilrc.org/sites/default/files/resources/deport_by_any_means_nec-20180521.pdf.

197. GÓMEZ ET AL., *supra* note 185, at 2.

198. *Id.* at 7–8.

199. *Id.* at 5.

200. *Id.* at 12–13.

201. *Id.* at 14.

202. President Trump’s Immigration Roundtable, *supra* note 183.

communities—at a tremendous monetary cost to local taxpayers and also a great cost to life and safety.”²⁰³ This discourse trickles down through the administration, repeated by the Attorney General, the Director of ICE, and across all levels of immigration agencies and law enforcement, conflating unaccompanied minors, Central American youth, and gang members.²⁰⁴

In the context of a roundtable about immigration, Acting Assistant Attorney General John Cronan stated, “MS-13 is infiltrating our high schools, our middle schools, even our elementary schools.”²⁰⁵ Thomas Homan has repeatedly painted gang violence as endemic to unaccompanied child migration, claiming “[t]here is a connection.”²⁰⁶ Rod Rosenstein explained that “resurgence of MS-13” in the DC area “was fueled by illegal immigration and particularly by the challenge of unaccompanied minor children.”²⁰⁷ According to a White House “fact”²⁰⁸ sheet: “MS-13 has sought to use the

203. See President Donald Trump, *Remarks by President Trump to Law Enforcement Officials on MS-13* (July 28, 2017) (transcript available at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-law-enforcement-officials-ms-13/>) [hereinafter President Trump’s 2017 MS-13 Remarks] (“[W]e’re liberating our American towns . . . we are indeed freeing up these great American towns and cities that are under siege from gang violence. . . previous administration enacted an open-door policy to illegal migrants from Central America . . . As a result, MS-13 surged into the country, and scoured, and just absolutely destroyed, so much in front of [us].”).

204. President Donald Trump Remarks, *Remarks by President Trump at Law Enforcement Roundtable on MS-13*, THE WHITE HOUSE (Feb 6, 2018), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-law-enforcement-roundtable-ms-13/> [hereinafter President Trump’s 2018 MS-13 Remarks] (“[In] 2017 alone, 40,801 unaccompanied alien children were placed for resettlement . . . it turns out 21,881 of them are from Northern Triangle countries; they are in the right age for gang recruitment, between the ages of 13 and 17; and they are males . . . [MS-13 is] looking at these 21,000 unaccompanied alien children that came into those states as potential recruits to continue to fill in their ranks . . . 30 percent is a consistent number that we’ve seen of MS-13 members that have been arrested that came into this country as unaccompanied alien children . . . I’ve been down to the detention spaces, I’ve seen these teenage males that their home becomes MS-13 . . . the unaccompanied alien children, and that is really an issue, because we’ve found . . . 30 percent of those who are arrested in MS-13 are unaccompanied minors.”).

205. President Trump’s Immigration Roundtable, *supra* note 183.

206. *Id.*

207. *Id.*

208. For example, one “fact” is “[c]ertain loopholes in our immigration system are holding back efforts to fully confront MS-13” The White House has regularly and inaccurately called legal protections for children “loopholes,” and indicated it is hard to deport children, which is also not true. See Miriam Valverde, *Donald Trump Omits Facts In Claim About Loopholes, Unaccompanied Minors*, POLITIFACT (Oct. 11, 2017), <https://www.politifact.com/truth-o-meter/statements/2017/oct/11/donald-trump/donald-trump-omits-facts-claim-loopholes-minors-un/>. Another purported fact is that “[t]ransnational gangs, such as MS-13, take advantage of our porous borders and seek to use our current immigration system to their advantage.” See Hannah Drier, *I’ve Been Reporting About MS-13 for a Year. Here Are 5 Things Trump Gets Most Wrong*, PROPUBLICA (June 25, 2018), <https://www.propublica.org/article/ms-13-immigration-facts-what-trump-administration-gets-wrong> (“MS-13 is not a border issue.”). Also claimed is that “[f]ederal immigration officials are not able to quickly remove alien gang members based on their membership in a gang.” *Fact Sheets: President Donald J. Trump is Dedicated to Combating MS-13*, *supra* note 192. This is misleading; while there is no removability ground explicitly based on gang membership, there are a host of removability grounds for the most minor of crimes, and most forms of immigration relief are discretionary such that gang membership would preclude obtaining immigration status. See generally Hlass, *The School to Deportation Pipeline*, *supra* note 15. Furthermore, if gang members were in fact just coming through “porous borders,” they would be removable based on being present without inspection. See 8 U.S.C. § 1182(a)(6)(A) (2018); *Fact Sheets: President Donald J. Trump is Dedicated to Combating MS-13*, *supra* note 192 (discussing gangs entering through “porous borders”).

influx of Unaccompanied Alien Children (UAC) entering the United States for recruitment.”²⁰⁹ During a Presidential Roundtable discussion, Suffolk Police Commissioner Hart said “MS-13 members recruit children placed in communities in Suffolk County through the UAC [Unaccompanied Alien Child] program”²¹⁰ The Trump administration has literally stripped children’s youth from them—by also claiming that adults are masquerading as children. Indeed, former Secretary Nielsen once explained that the Administration would be “cracking down on adults who pretend to be children to come in, because they know that’s a loophole.”²¹¹

In tandem with stripping children of their identity as children and recasting them as violent animals, the Trump administration has also attacked the modest protections established to protect the rights of unaccompanied minors. Through numerous speeches, commentary by staff,²¹² and even a White House “fact” sheet, the Trump administration has created a narrative around “loopholes” that act as barriers to their efforts fighting MS-13.²¹³ DHS released a news story on February 15, 2018 that outlined its attack on legal protections for minors and conflated gang violence, particularly that associated with MS-13, with child migration.²¹⁴ In a section that begins, “[I]legal loopholes are exploited by minors,” DHS lists a few aspects of existing law that the agency maintains impairs its ability to detain and deport unaccompanied minors, specifically the *Flores* Settlement Agreement and the TVPRA of 2008.²¹⁵ In the press release, DHS noted that the *Flores* Settlement Agreement “handicaps” the agency because of the requirement to place children expeditiously in the custody of ORR.²¹⁶ DHS suggests — without reliance on any studies — that *Flores* and the TVPRA incentivize child migration. Lastly, the press release suggests that minors will become gang members: “UACs provide fertile recruiting ground for violent gangs, such as MS-13.”²¹⁷ Although DHS acknowledges there are no official statistics

209. *Fact Sheets: President Donald J. Trump is Dedicated to Combating MS-13*, *supra* note 192.

210. President Trump’s Immigration Roundtable, *supra* note 183.

211. President Donald Trump, Sec’y of Homeland Sec. Kirstjen Nielsen, *Remarks at a Roundtable Discussion on Immigration in Bethpage, New York* (May 23, 2018) (transcript available at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-roundtable-discussion-immigration-bethpage-ny/>).

212. For example, Deputy Att’y Gen. Rod Rosenstein noted that there are “several loopholes in federal laws that facilitate” migration of children and resurgence of MS-13, referring to TVPRA and *Flores*. President Donald Trump, Deputy Att’y Gen. Rod Rosenstein, *Remarks at a Roundtable Discussion on Immigration in Bethpage, New York* (May 23, 2018) (transcript available at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-roundtable-discussion-immigration-bethpage-ny/>).

213. *Fact Sheets: President Donald J. Trump is Dedicated to Combating MS-13*, *supra* note 192.

214. Press Release, U.S. Dep’t of Homeland Sec., *Unaccompanied Alien Children and Family Units Are Flooding the Border Because of Catch and Release Loopholes* (Feb. 15, 2018), <https://www.dhs.gov/news/2018/02/15/unaccompanied-alien-children-and-family-units-are-flooding-border-because-catch-and>.

215. *Id.*

216. *Id.*

217. *Id.*

regarding the number of gang-involved unaccompanied minors, they argue that “this gang recruiting strategy is working.”²¹⁸

The term “loophole” has been used by Trump²¹⁹ and his allies²²⁰ to refer to rights established under the TVPRA, *Flores*, and Special Immigrant Juvenile Status.²²¹ In a January 2019 letter to Congress regarding the budget and impending shutdown, Trump stated that the “most pressing” legal challenge was *Flores*, and he called on Congress to terminate it.²²² In the same letter, he also called for amendments to the TVPRA, “to allow for the safe and humane return of illegally-smuggled minors back to their families in their home countries,” presumably instead of allowing these minors to access immigration courts to determine if they have a legal basis to remain in the United States.²²³ Members of the President’s cabinet echoed these calls. For example, the HHS Deputy Secretary stated:

President Trump’s administration has been calling on Congress to put an end to dangerous loopholes in U.S. immigration laws like the practice of ‘catch and release’ in which federal authorities release illegal immigrants to await hearing for which few show up. In the worst cases, these loopholes are being exploited by human traffickers and violent gangs like MS-13.²²⁴

Trump and his allies have attacked the provision of the TVPRA that prevents most unaccompanied minors from being subjected to expedited removal,²²⁵

218. *Id.*

219. “Loopholes in current law prevent children from being removed” placed with HHS and released to sponsor. President Donald Trump, *President Donald J. Trump’s Letter to House and Senate Leaders & Immigration Principles and Policies*, THE WHITE HOUSE (Oct. 8, 2017), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-letter-house-senate-leaders-immigration-principles-policies/>.

220. *See, e.g.*, President Trump’s 2018 MS-13 Remarks, *supra* note 204 (“[W]hen we fail to enforce our immigration and human smuggling laws, when we have loopholes in our immigration laws, and when we have porous borders and insufficient enforcement of our immigration laws, MS-13 can simply replenish its jail population by sending more and more gang members across our borders If they’re an unaccompanied minor, other than from Mexico or Canada, they are then released quickly into the interior of the United States And they are continuing – the criminal organizations are profiting off taking advantage of these loopholes in our system.”).

221. *See* President Trump’s 2018 MS-13 Remarks, *supra* note 204 (Angel Melendez, special agent in charge of ICE’s New York City office, remarking that New York is looking into Special Immigrant Juvenile Statutes—“Sixty-three percent of the unaccompanied alien children have filed for this immigration status. . . .”).

222. *President Trump Sends a Letter on Border Security to Congress*, THE WHITE HOUSE (Jan. 4, 2019), <https://www.whitehouse.gov/articles/president-trump-sends-letter-border-security/>.

223. *Id.*

224. *Statement by HHS Deputy Secretary on Unaccompanied Alien Children Program*, U.S. DEP’T OF HEALTH & HUMAN SERVS. (May 28, 2018), <https://www.hhs.gov/about/news/2018/05/28/statement-hhs-deputy-secretary-unaccompanied-alien-children-program.html>.

225. “Current law also makes it virtually impossible to return most apprehended Unaccompanied Alien Children (UAC) to their home countries. Judicial rulings by activist courts have even made it virtually impossible to remove many dangerous criminal aliens. The result of these loopholes is that aliens can illegally enter the United States, and make then fraudulent asylum claims, with the expectation that they will be released into U.S. society and never appear in court.” *What You Need to Know About the Surge in Illegal Border Crossings and the Failures of Our Current Immigration System*, THE WHITE HOUSE (May 9,

asserting the law is tantamount to “open borders”²²⁶ that results in gang violence.²²⁷ Former ICE Director Homan stated:

[W]hat we want is changes to these loopholes so we can treat all the children the same. Because once you release a child from Central America that’s going to claim asylum, most of them, once they get to court . . . most of them don’t get asylum, so they’re released in the community and very few of them are ever removed because they’re in the wind.²²⁸

Further, Trump asked House and Senate leaders to pass statutory changes to strip children of their existing rights. Specifically, he requested that Congress 1) amend the TVPRA to remove protections; 2) remove protections to accompanied minors; 3) terminate the *Flores* Settlement; 4) nullify Special Immigrant Juvenile Status by an additional requirement the child be a human trafficking victim; and 5) specifically remove the TVPRA protection that vests initial jurisdiction with the asylum office for UAC asylum-seekers.²²⁹ Lastly, he called for new measures to deny “known gang members and those associated with criminal gangs” from receiving immigration benefits,²³⁰ even though adjudicators can already deny asylum based purely on discretion, finding an asylum-seeker is undeserving.²³¹

B. *Weaponization of Immigration Agencies*

In concert with this discourse, the Trump administration’s policies and practices have exacerbated the adultification of immigrant children. Under the Obama administration, the DHS started to detain Central American asylum-seeking families²³² and prioritized detaining those with alleged gang

2018), <https://www.whitehouse.gov/articles/need-know-surge-illegal-border-crossings-failures-current-immigration-system>.

226. *Statement by HHS Deputy Secretary on Unaccompanied Alien Children Program*, *supra* note 224 (“Closing these loopholes is also essential to protect American communities from the criminal gangs, like MS-13, who exploit these catch-and-release policies to expand their criminal enterprise.”).

227. President Donald Trump, *President Donald J. Trump’s Weekly Address* (Feb. 11, 2018) (transcript and video available at <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-weekly-address-27/>) (“Glaring loopholes in our laws have allowed criminals and gang members to break into our country. For example, under current law, unaccompanied alien minors at the border are released into American communities no matter where, no matter how This loophole is easily exploited by MS-13 . . .”).

228. President Trump’s Immigration Roundtable, *supra* note 183.

229. President Donald Trump, *President Donald J Trump’s Letter to House and Senate Leaders & Immigration Principles and Policies*, THE WHITE HOUSE (Oct. 8, 2017), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-letter-house-senate-leaders-immigration-principles-policies/>.

230. *Id.*

231. See generally Kate Aschenbrenner, *Discretionary (In)Justice: The Exercise of Discretion in Claims for Asylum*, 45 U. MICH. J.L. REFORM 595 (2012) (discussing discretion in asylum claims). Advocates also reported negative discretionary findings in asylum proceedings relating to gang allegations. See generally Hlass & Prandini, *supra* note 196.

232. Sarah Sherman-Stokes, *Reparations for Central American Refugees*, 96 DENV. L. REV. 585, 601 (2019).

associations.²³³ The current administration has embraced and expanded these policies and advanced new means to corrode children's rights through the spectrum of apprehension, detention, and adjudication and removal proceedings.²³⁴ First, I will analyze recent government efforts to abrogate children's rights within the apprehension and detention system; next, I will consider the adjudication and removal system.

1. *Apprehension and Detention System*

The Trump administration's efforts to target children within the apprehension and detention system can be summarized in four major trends: children have been 1) separated from their parents; 2) detained in record-breaking numbers and for longer periods of times; 3) subjected to enforcement activity from ORR, the custodian agency for unaccompanied children who entered into a memorandum of agreement with ICE;²³⁵ and 4) held in deplorable detention conditions.²³⁶

During the summer of 2018, images of migrant children held in cages along the border²³⁷ and the sound of their desperate cries created shockwaves throughout the country.²³⁸ In April 2018, former Attorney General Jeff Sessions announced a "zero tolerance" policy to criminally prosecute all migrants — including parents with children — who cross the border without authorization.²³⁹ In the following months, reports surfaced that detailed how the government had taken more than 700 children from parents — including one hundred who are three years old and younger — and transferred them to detention centers, while their parents were incarcerated, prosecuted, and deported.²⁴⁰

233. See Ali Winston, *Obama's Use of Unreliable Gang Databases for Deportations Could be a Model for Trump*, INTERCEPT (Nov. 28, 2016), <https://theintercept.com/2016/11/28/obamas-use-of-unreliable-gang-databases-for-deportations-could-be-a-model-for-trump/>.

234. See Letter from Peter Schey, President of the Center for Human Rights and Constitutional Law, to the Chairman/Ranking Member of the Senate Comm. on Homeland Sec. and Gov. Affairs et al. (Jan. 8, 2019), <https://files.constantcontact.com/baccf499301/64140f77-c521-4625-a610-5c687c441bc5.pdf>.

235. See *id.* However, it is important to note that the Obama administration also detained children in violation of *Flores* and as long as children have been in care, there have been reports of their abuse while in care.

236. See discussion *infra* Section II.B.1.

237. Nomaan Merchant, *Immigrant Kids Seen Held in Fenced Cages at Border Facility*, AP NEWS (June 18, 2018), <https://www.apnews.com/6e04c6ee01dd46669eddba9d3333f6d5>.

238. Ginger Thompson, *Listen to Children Who've Just Been Separated From Their Parents at the Border*, PROPUBLICA (June 18, 2018), <https://www.propublica.org/article/children-separated-from-parents-border-patrol-cbp-trump-immigration-policy>.

239. Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018), <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry> [https://perma.cc/FJR9-AQLD].

240. Caitlin Dickerson, *Hundreds of Immigrant Children Have Been Taken From Parents at U.S. Border*, N.Y. TIMES (Apr. 20, 2018), <https://www.nytimes.com/2018/04/20/us/immigrant-children-separation-ice.html>; see also Rafael Carranza & Daniel González, *AG Jeff Sessions Vows to Separate Kids from Parents, Prosecute All Illegal Border-Crossers*, USA TODAY (May 9, 2018, 1:40 PM), <https://www.usatoday.com/story/news/politics/immigration/2018/05/08/ag-jeff-sessions-vows-separate-kids-parents-border/591924002/>.

Official government discourse during the family separation crisis underscores the Trump administration's adultification of migrant children. Government rhetoric ignored children's unique vulnerability by centering around concepts of "law and order" and criminality.²⁴¹ Then-Attorney General Sessions defended the policy when he stated that "[o]rderly and lawful processes are good in themselves and protect the weak and lawful."²⁴² Moreover, the Administration minimized children's trauma. One official even testified before Congress that "summer camp" is the "best way" to characterize immigrant children's detention.²⁴³

As public disapproval of family separation grew with reports surfacing that thousands of children were being separated from parents,²⁴⁴ President Trump claimed that the Administration would step back the family separation policy through an executive order.²⁴⁵ The Executive Order purported to "maintain family unity" and made clear that could be achieved "by detaining alien families together."²⁴⁶ While the Executive Order appeared to be a policy reversal, much of its language aligned with ongoing rhetoric criminalizing migrants and eviscerating child protections. The text reiterated that the government "will initiate proceedings to enforce [illegal entry] and other criminal provisions of the INA until and unless Congress directs otherwise."²⁴⁷

The President used the so-called family reunification executive order to further efforts in a second category of anti-child initiatives, namely the pervasive and long-term detention of children. The Executive Order mandates that the Attorney General seek release from terms of *Flores*, which limits the length of children's detention.²⁴⁸ A day after the Executive Order was issued,

241. See John Bacon, *Amid Outrage, Homeland Security Chief Kirstjen Nielsen 'Will Not Apologize' for Separating Families*, USA TODAY (June 18, 2018), <https://www.usatoday.com/story/news/nation/2018/06/18/homeland-security-chief-denies-policy-separates-families-border/709378002/> (DHS Secretary Nielsen said "we will not apologize for doing our job If you cross the border illegally, we will prosecute you.").

242. In criticism of Sessions' remarks, many noted that this same passage was used to defend slavery in the American South during the 1840s and 1850s. See Julie Zauzmer & Keith McMillan, *Sessions Cites Bible Passage Used to Defend Slavery in Defense of Separating Immigrant Families*, WASH. POST (June 15, 2018), https://www.washingtonpost.com/news/acts-of-faith/wp/2018/06/14/jeff-sessions-points-to-the-bible-in-defense-of-separating-immigrant-families/?utm_term=.788dd4fce815.

243. *Oversight of Immigration Enforcement and Family Reunification Efforts, Hearing Before the Subcomm. on Border Sec. and Immigration of the S. Comm. on the Judiciary*, 118th Cong. (2018) (statement of Matthew Albence, Executive Associate Director of the Enforcement and Removal Operations (ERO) division of ICE) <https://www.judiciary.senate.gov/download/07-31-18-albence-testimony>.

244. Miriam Jordan, *Family Separation May Have Hit Thousands More Migrant Children Than Reported*, N.Y. TIMES (Jan. 17, 2019), <https://www.nytimes.com/2019/01/17/us/family-separation-trump-administration-migrants.html>.

245. Exec. Order No. 13841, 83 Fed. Reg. 29435 (June 20, 2018), available at <https://www.federalregister.gov/documents/2018/06/25/2018-13696/affording-congress-an-opportunity-to-address-family-separation>.

246. *Id.*

247. *Id.*

248. *Id.* (stating in section (e) that "[t]he Attorney General shall promptly file a request with the U.S. District Court for the Central District of California to modify the Settlement Agreement in *Flores v. Sessions*, CV 85-4544 ('*Flores* settlement'), in a manner that would permit the Secretary, under present resource constraints, to detain alien families together throughout the pendency of criminal proceedings for improper entry or any removal or other immigration proceedings").

Attorney General Sessions filed a motion seeking to gut *Flores* protections, essentially allowing ICE to detain children indefinitely.²⁴⁹ Once that effort failed,²⁵⁰ officials proposed new regulations with the “primary purpose” of ending the *Flores* agreement, which would, among other things, remove the child care state-licensing requirement for detention centers.²⁵¹ This rule, if implemented, would allow for the indefinite detention of minors with fewer protections regarding detention standards.²⁵² Nineteen states and the District of Columbia have challenged the regulation, positing that the regulations violate children’s rights by subjecting them to indefinite detention in unlicensed centers, where children’s health will deteriorate.²⁵³

Even before the new child detention regulation was finalized, the number of children in detention and their length of stay had compounded under the Trump administration. According to a *New York Times* report, the number of detained immigrant children multiplied five-fold in 2018 from summer through the end of the year, reaching nearly 15,000, the highest levels ever documented.²⁵⁴ The government has begun to hold children in military-like camps, most prominently in a Texas “tent city,” where up to 3,800 children were held surrounded by a barbed wire fence.²⁵⁵

The expansion of child detention is intertwined with the third trend within Trump’s anti-child policies: the coordinated collaboration between ORR and ICE as part of an overall scheme to punish migrants.²⁵⁶ As a central feature of this partnership, ORR shared with immigration enforcement agencies,

249. Def.’s Memorandum of Points and Authorities in Support of *Ex Parte* Application for Relief From the *Flores* Settlement Agreement, *Flores v. Sessions*, No. 2:85-cv-04544-DMG-AGR (C.D. Cal. June 21, 2018).

250. Judge Gee denied the government’s motion to amend the *Flores* settlement, calling it “a cynical attempt . . . to shift responsibility to the Judiciary for over 20 years of Congressional inaction and ill-considered Executive action that have led to the current stalemate.” *Id.*

251. Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 Fed. Reg. 45,486 (Sept. 7, 2018) (to be codified at 8 C.F.R. pt. 212 & 236, 45 C.F.R. pt. 410).

252. The rule has been promulgated with an effective date of October 22, 2019. Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 84 Fed. Reg. 44,392 (Aug. 23, 2019) (codified at 8 C.F.R. pts. 212 & 236, 45 C.F.R. pt. 410).

253. Complaint, *State of California et al. v. McAleenan*, No. 2:19-cv-07390, 2019 WL 4017654 (C.D. Cal. Aug. 26, 2019).

254. Caitlin Dickerson, *Detention of Migrant Children Has Skyrocketed to Highest Levels Ever*, N.Y. TIMES (Sept. 12, 2018), <https://www.nytimes.com/2018/09/12/us/migrant-children-detention.html>.

255. Tanvi Misra, *The Life and Death of an American Tent City*, CITY LAB (Jan. 15, 2019), <https://www.citylab.com/equity/2019/01/border-crisis-migrant-children-detention-tornillo-tent-city/578557/> (stating that near the beginning of 2019, the facility was shut down).

256. However, ORR has had a spotty record in caring for unaccompanied minors. ORR has “failed to adopt and maintain a regularized, transparent body of policies and procedures concerning the placement of UACs” and has been “[s]etting governmental policy on the fly” in a manner “inconsistent with the accountability and transparency that should be expected of every administrative agency.” *Adequacy of the Dep’t of Health and Human Servs.’s Efforts to Protect Unaccompanied Alien Children From Human Trafficking: Hearing Before the S. Comm. on Homeland Sec. and Gov’t Affairs*, 114th Cong. (2016), available at https://archive.org/stream/gov.gpo.fdsys.CHRG-114shrg20085/CHRG-114shrg20085_djvu.txt.

including ICE,²⁵⁷ fingerprints of parents and other potential sponsors who hoped to have cared for children upon their release from detention despite widespread criticism that this would have a chilling effect.²⁵⁸ In testimony, ICE revealed they arrested dozens of children's sponsors in the six months following the April agreement with ORR.²⁵⁹

Months later, fewer children had been released, and children had been detained longer — languishing for an average of sixty days,²⁶⁰ up from thirty-four days in 2015.²⁶¹ This substantial increase in the length of children's incarceration might be the goal.²⁶² As revealed in ongoing litigation,²⁶³ children are transferred from ORR care to adult jails on their eighteenth birthday in large numbers — between April 2016 to February 2018, more than 1,000 teenagers were transferred from ORR to adult ICE jails.²⁶⁴ As then-Attorney General Sessions stated;

We have to end this policy of taking unaccompanied minors . . . and turning them over to the Department of Health and Human Services, and then they take them to their “destination city”. . . this is a very bad and dangerous policy and it can be ended and it must be ended.²⁶⁵

257. Memorandum of Agreement Among the Office of Refugee Resettlement of the U.S. Dep't of Health and Human Servs. and U.S. Immigration and Cust. Enf't and U.S. Customs and Border Prot. of the U.S. Dep't of Homeland Sec. Regarding Consultation and Information Sharing in Unaccompanied Alien Children Matters 5 (Apr. 13, 2018), <https://www.texasmonthly.com/wp-content/uploads/2018/06/Read-the-Memo-of-Agreement.pdf>.

258. See generally NAT'L IMMIGRANT JUSTICE CTR. & WOMEN'S REFUGEE COMM'N, CHILDREN AS BAIT: IMPACTS OF THE ORR-DHS INFORMATION SHARING AGREEMENT (2019), available at <https://www.womensrefugeecommission.org/images/zdocs/Children-as-Bait.pdf>; see also Media Buzz, DHS Secretary Kirstjen Nielsen Senate Testimony 5/15/18 (Full Hearing), YOUTUBE (May 16, 2018), <https://www.youtube.com/watch?v=f2dO-TnbPAU&feature=youtu.be&t=50m51s>.

259. Tal Kopan, *ICE Arrested Undocumented Immigrants Who Came Forward to Take in Undocumented Children*, CNN (Update Sept. 20, 2018), <https://www.cnn.com/2018/09/20/politics/ice-arrested-immigrants-sponsor-children/index.html>.

260. *Facts and Data*, U.S. DEP'T OF HEALTH & HUMAN SERVS., OFFICE OF REFUGEE RESETTLEMENT (last reviewed May 18, 2019), <https://www.acf.hhs.gov/orr/about/ucs/facts-and-data>.

261. *Fact Sheet: U.S. Dep't of Health and Human Servs., Administration for Children and Families, Office of Refugee Resettlement, Unaccompanied Children's Program*, ADMIN. FOR CHILDREN AND FAMILIES (last updated Jan. 2016), http://yoloagenda.yolocounty.org:8085/docs/2017/BOS/20170509_1756/6255_ORR%20UC%20Fact%20Sheet%2001.2017.pdf. In 2014, a record-breaking year for the number of unaccompanied minors apprehended, the average length of stay was still only about 35 days. See generally WILLIAM A. KANDEL & LISA SEGHELLI, CONG. RESEARCH SERV., R43599, UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW (2015).

262. See generally Complaint, *In re L.V.M.*, No. 1:18-cv-01453 (S.D.N.Y. Feb. 16, 2018).

263. See, e.g., Complaint, *Garcia v. U.S. Immigration and Customs Enforcement*, No. 1:18-cv-00508 (D.D.C. May 5, 2018).

264. See John Burnett, *Migrant Youth Go from a Children's Shelter to Adult Detention on their 18th Birthday*, NPR (Feb. 22, 2019), <https://www.npr.org/2019/02/22/696834560/migrant-youth-go-from-a-childrens-shelter-to-adult-detention-on-their-18th-birth> (“Government data, obtained in connection with the class action, showed that in two-thirds of 1,531 cases, from April 2016 to February 2018, ICE put migrant youths into detention when they turned 18.”); see also *Coming of Age In American Detention*, N.Y. TIMES (Sept. 22, 2018), <https://www.nytimes.com/2018/09/22/opinion/sunday/immigration-children-detention.html>.

265. *Sessions: 'We Need to Eliminate Illegality in Our Immigration System'*, FOX NEWS INSIDER (Aug. 3, 2017), <https://insider.foxnews.com/2017/08/03/jeff-sessions-tucker-carlson-tonight-ms-13-illegal-immigration>.

ORR has also taken other steps that extend children's length of detention under the guise of alleged gang affiliation, despite reports discrediting immigration agency's use of flimsy and false gang allegations against children.²⁶⁶ ORR has described in policy memoranda their intention to keep children suspected of gang affiliation in detention until they are eighteen so they can be transferred to ICE's adult detention centers, and the agency also made clear that it will only allow the release of a child suspected of gang involvement if the Deputy Director for Children's Programs and the ORR Director personally approve the release.²⁶⁷

In addition to ORR's practices that delay the release of children to sponsors²⁶⁸ and send eighteen-year-olds to ICE's adult detention centers,²⁶⁹ the ORR-ICE collaboration memoranda details other formal avenues of transforming ORR from a child-centered orientation towards an enforcement focus. According to the agreement, ORR will develop a Memorandum of Agreement with the Department of Homeland Security regarding release decisions.²⁷⁰ Furthermore, ORR intends to expand "secure" detention for children and to directly collaborate with local law enforcement when children are released from secure detention, specifically naming the Suffolk County Police Commissioner as an existing partner.²⁷¹ Under the semblance of public safety, ORR has undertaken efforts to detain children, transport them far from families and attorneys, and increase the likelihood that children will be denied immigration benefits based on unreliable and unsubstantiated gang allegations.²⁷² As part of the ICE-ORR memoranda, DHS will train ORR staff on how to identify MS-13 and other gang colors and signs and how to report suspected gang affiliation. ORR staff will also become integrated into local anti-gang task forces.

Apart from formal collaboration with ICE and CBP, ORR has taken other punitive actions against children. For more than a decade, ICE has engaged

266. See generally NEW YORK IMMIGRATION COALITION ET AL., *supra* note 196; Hlass & Prandini, *supra* note 196; N.Y. CIVIL LIBERTIES UNION & N.Y. IMMIGRATION COAL., STUCK WITH SUSPICION: HOW VAGUE GANG ALLEGATIONS IMPACT RELIEF AND BOND FOR IMMIGRANT NEW YORKERS (2019), www.nyclu.org/sites/default/files/field_documents/020819-nyclu-nyic-report.pdf.

267. Memorandum from the Dep't of Health and Human Servs., Admin. For Children and Families, Office of Refugee Resettlement to the Domestic Policy Council 2-3 (Aug. 16, 2017), <https://assets.documentcloud.org/documents/4380794/Community-Safety-Initiative-for-the.pdf> (discussing the Community Safety Initiative being undertaken by the ORR to address concerns regarding gang involvement by former unaccompanied alien children).

268. See Third Amended Class Action Complaint and Petition for Writ of Habeas Corpus, J.E.C.M. v. Hayes, No. 1:18-CV-903-LMB (E.D. Va. Jan. 18, 2019), available at <https://www.documentcloud.org/documents/5692346-3rd-Amended-SPLC-Complaint.html>.

269. Complaint, Garcia v. U.S. Immigration and Customs Enforcement, No. 1:18-cv-00508 (D.D.C. May 5, 2018).

270. Memorandum from the Dep't of Health and Human Servs., Admin. For Children and Families, Office of Refugee Resettlement to the Domestic Policy Council, *supra* note 267, at 4.

271. *Id.* at 4.

272. See First Amended Petition For Writ of Habeas Corpus and Class Action Complaint for Injunctive and Declaratory Relief, Gomez v. Sessions, No. 3:17-cv-03615-VC (N.D. Cal. Aug. 11, 2017), available at https://www.aclunc.org/docs/20170811-first_amended_petition.pdf.

in the discredited practice of using dental exams to challenge the age of children who report being minors,²⁷³ and recent reports suggest that ORR is replicating this practice. According to a 2019 interim report regarding ORR age assessments, researchers found that ORR officials are perpetrating fraud, using Facebook posts and other unreliable means to make age determinations, and the agency is using their healthcare budget for children to perform dental age assessments.²⁷⁴ In 2019, reports emerged that ORR aggressively targeted about 145 young Bangladeshi migrants²⁷⁵ using dental exam assessments because an ORR official stated that these youth might be “posing” as minors.²⁷⁶ There is no scientific support for the use of dental exam evidence and generally it produces a wide range of purported ages.²⁷⁷

Deplorable detention conditions constitute the fourth category of anti-child policy within the apprehension and detention system. Although poor detention conditions are not new, reports of abuse are expansive and acute. There is a dizzying array of security levels for youth detention facilities, as well as different immigration agencies involved in their care. ORR maintains more than a hundred facilities, which are categorized as shelters, staff-secure facilities, secure detention centers which are literally juvenile jails,²⁷⁸ and residential treatment centers.²⁷⁹ There are also temporary holding cells maintained by Customs and Border Protection (CPB) and family detention centers maintained by ICE. ICE also detains eighteen- to twenty-one-year-old children in adult ICE jails. Regardless of detention facility type and custodian, detention conditions reflect a fundamental disregard for children’s vulnerability and immaturity.

CBP temporary facilities, where children may be detained immediately after arrest at the border, have come under sharp criticism for their conditions. Reports identify frigid temperatures, overflowing toilets, “dog cage” holding cells that lack beds or mattresses, inedible food, and inadequate healthcare as

273. See Mimi Dwyer et al., *The U.S. is Checking Immigrant Kids’ Teeth to See if They Actually Belong in Adult Detention*, VICE NEWS (Oct. 11, 2018), https://www.vice.com/en_us/article/qv9mbx/the-us-is-checking-immigrant-kids-teeth-to-see-if-they-actually-belong-in-adult-detention.

274. Jackie Stevens, *Interim Report on Age Assessment Policy Violations by the U.S. Department of Health and Human Services, Office of Refugee and Resettlement*, STATES WITHOUT NATIONS (July 12, 2019, 5:01 PM), <http://stateswithoutnations.blogspot.com/2019/07/age-assessments-for-unaccompanied.html>.

275. See Letter from Julissa P. Banzon, Federal Field Specialist, U.S. Dep’t of Health and Human Servs., Admin. For Children and Families, Office of Refugee Resettlement to Officers (Nov. 2, 2018), available at https://deportationresearchclinic.org/DeLaCruz_7.pdf (noting an example of an age assessment memorandum).

276. Dwyer et al., *supra* note 273.

277. See generally Vincenzo De Sanctis et al., *Pros and Cons for the Medical Age Assessments in Unaccompanied Minors: A Mini-Review*, 87 ACTA BIOMED 121 (2016), available at <https://mattioli1885journals.com/index.php/actabiomedica/article/download/4657/3601>.

278. *Immigration Courts Near Staff Secure and Secure Facilities*, U.S. DEP’T OF HEALTH & HUMAN SERVS., OFFICE OF REFUGEE RESETTLEMENT (last visited Dec. 25, 2019), https://www.acf.hhs.gov/sites/default/files/orr/immigration_court_list_and_filing_address.pdf.

279. *About Unaccompanied Alien Children’s Program*, U.S. DEP’T OF HEALTH & HUMAN SERVS., OFFICE OF REFUGEE RESETTLEMENT (last reviewed May 18, 2019), <https://www.acf.hhs.gov/orr/programs/ucs/about>.

among some of the many conditions meriting concern.²⁸⁰ In one instance, a child lost a third of his body weight while in CBP custody.²⁸¹

Children have experienced forced hunger, dehydration, and sleeplessness.²⁸² Holly Cooper, an attorney representing children in the *Flores* Settlement Agreement commented on the facilities' severe conditions: "In my 22 years of doing visits with children in detention I have never heard of this level of inhumanity."²⁸³ In their own words, children described the following:

- I'm hungry here at Clint all the time. I'm so hungry that I have woken up in the middle of the night with hunger. Sometimes I wake up from hunger at 4 a.m. (Age 12, boy).²⁸⁴
- At Ursula, we have not been able to shower. The toilet is out in the open in the cage, there is no door for any privacy. There is water but no soap to wash our hands. There are no paper towels to dry our hands. We have not been given a toothbrush or toothpaste to brush our teeth. (Age 17, boy).²⁸⁵
- The day after we arrived here, my baby began vomiting and having diarrhea. I asked to see a doctor and they did not take us. I asked again the next day and the guard said, "she doesn't have the face of a sick baby. She doesn't need to see a doctor." My baby daughter has not had any medicine since we first arrived. She has a very bad cough, fever and continues to vomit and have diarrhea. (Age 16, girl).²⁸⁶
- The guards at the second facility were mean and scary. They yelled at us. One day the guards demanded to know who had food. "Whoever has food will go to prison," they yelled. They wanted to know if anyone had snuck in food in the cell. They found one kid who was 15 or 16 years old who had a burrito, pudding, and juice.

280. See Exhibits in Support of Plaintiffs' Response to Defendants' First Juvenile Coordinator Reports, *Flores v. Sessions*, No. 2:85-cv-04544-DMG-AGR (C.D. Cal. July 16, 2018), available at <https://www.documentcloud.org/documents/4609538-Flores-0716-459-4.html>; see also *Doe v. Kelly*, 878 F.3d 710, 725 (9th Cir. 2017).

281. Miriam Jordan, *Whistle-Blowers Say Detaining Migrant Families 'Poses High Risk of Harm.'* N. Y. TIMES (July 18, 2018), <https://www.nytimes.com/2018/07/18/us/migrant-children-family-detention-doctors.html>.

282. Amy Taxin, *Immigrant Children Describe Treatment in Detention Centers*, AP NEWS (July 17, 2018), <https://apnews.com/1a8db84a88a940049558b4c450dccc8a>.

283. Associated Press, *I Have Never Heard of this Level of Inhumanity*, MARKETWATCH (June 20, 2019, 9:27 PM), <https://www.marketwatch.com/story/in-my-22-years-of-doing-visits-with-children-in-detention-i-have-never-heard-of-this-level-of-inhumanity-2019-06-20>.

284. *The Trump Administration's Child Separation Policy: Substantiated Allegations of Mistreatment, Hearing Before the H. Comm. on Oversight and Reform*, 115th Cong. 10 (2018) (testimony of Elora Mukherjee, Director, Immigrants' Rights Clinic), available at <https://docs.house.gov/meetings/GO/G000/20190712/109772/HHRG-116-GO00-Wstate-MukherjeeE-20190712.pdf>.

285. *Id.* at 10.

286. *Id.* at 12.

The officials handcuffed his wrists. My cousin and I were very shocked and scared. (Age 12, boy).²⁸⁷

ICE's so-called family detention centers, referred to as "baby jails" by advocates, fare no better.²⁸⁸ Health professionals noted that "overcrowded, institutional environments heighten children's risk of physical, mental, or sexual abuse."²⁸⁹ Family detention facilities have been plagued with complaints of health and safety violations, as evidenced by the death of an eighteen-month-old toddler just weeks after being detained.²⁹⁰ Complaints include continuous flashlight checks during the night, poor medical care, and abuse and sexual harassment by staff.²⁹¹ Medical problems included an eight-year-old boy with "boils all over him and a fever" who was told he could not be seen immediately by the clinic.²⁹² Advocates complained of dirty water, limited baby food, and a lack of medical care before twelve infants were finally released from detention.²⁹³

Unaccompanied²⁹⁴ minors are detained by ORR in a range of facilities, including temporary, secure, and staff-secure, residential treatment and least restrictive facilities. "Secure facilities" are juvenile jails, with only a couple operational nationwide,²⁹⁵ while staff-secure facilities restrict children's movement inside the unit, prohibiting them from leaving the facility except to attend court; outdoor recreation is limited to one hour a day in a fenced in area, although cells and pods are not locked, like in secure facilities.²⁹⁶

287. *Id.* at 14.

288. See generally Lindsay M. Harris, *Contemporary Family Detention and Legal Advocacy*, 21 HARV. LATINX L. REV. 135 (2018) (elaborating upon the detailed history); Lindsay M. Harris, *Learning in "Baby Jail": Lessons from Law Student Engagement in Family Detention Centers*, 25 CLINICAL L. REV. 155 (2018) (elaborating upon advocacy within baby jails).

289. NAPNAP Statement Opposing the Border Separation of Children and Parents, NAT'L ASS'N OF PEDIATRIC NURSE PRACTITIONERS (June 11, 2018), <https://www.napnap.org/napnap-statement-opposing-border-separation-children-and-parents>.

290. Joel Rose, *A Toddler's Death Adds to Concerns About Migrant Detention*, NPR (Aug. 28, 2018), <https://www.npr.org/2018/08/28/642738732/a-toddlers-death-adds-to-concerns-about-migrant-detention> [<https://perma.cc/FQK6-9SCH>]. For Obama-era family detention conditions, see Wil S. Hylton, *The Shame of America's Family Detention Camps*, N.Y. TIMES (Feb. 4, 2015), <https://www.nytimes.com/2015/02/08/magazine/the-shame-of-americas-family-detention-camps.html?module=inline>.

291. Emily Kassie & Eli Hager, *Inside Family Detention, Trump's Big Solution*, THE MARSHALL PROJECT (June 22, 2018), <https://www.themarshallproject.org/2018/06/22/inside-family-detention-trump-s-big-solution>.

292. Kate Smith, *12 Detained Babies Have Been Released from ICE Custody in Dilley, Texas*, CBS NEWS (Mar. 4, 2019), <https://www.cbsnews.com/news/immigrant-children-detained-12-babies-released-from-ice-custody-detention-center-dilley-texas-2019-03-04/>.

293. *Id.*

294. Children may be deemed "unaccompanied" if they were forcibly separated from parents.

295. Class Action Complaint and Petition for a Writ of Habeas Corpus at ¶ 23, *In re. L.V.M.*, No. 1:18-cv-01453 (S.D.N.Y. Feb. 16, 2018), available at https://www.nyclu.org/sites/default/files/field_documents/ecf_1_class_action_complaint_and_petition_for_a_writ_of_habeas_corpus_2018-02-16_00062143xb2d9a.pdf; see also Sara Tiano, *Feds Almost Lose One of Its Two Secure Detention Centers for Unaccompanied Immigrant Minors*, THE CHRONICLE OF SOC. CHANGE (Apr. 4, 2018), <https://chronicleofsocialchange.org/justice/juvenile-justice-2/feds-almost-lose-juvenile-detention-contract-unaccompanied-kids-arriving-border>.

296. Class Action Complaint and Petition for a Writ of Habeas Corpus, *supra* note 295; see also *Children Entering the United States Unaccompanied: Guide to Terms*, OFFICE OF REFUGEE

Shelter placements, while not as repressive as secure or staff-secure facilities, still severely limit children's movement—not allowing them to move between rooms or up and down the stairs without staff permission, while external doors remain locked and outdoor time is limited.²⁹⁷ There are only a few residential treatment centers nationwide as well. ORR calls these facilities, which involved 24-hour-a-day structured programming for mental health needs, “sub-acute.”²⁹⁸

At times, ORR manages temporary shelters, such as a for-profit child detention center, Homestead.²⁹⁹ Located within a fenced camp next to Florida's Homestead Air Reserve Base, the facility had contracted to receive up to 2,350 kids at triple the cost of non-temporary facilities, grossing Homestead about \$1.2 million per day.³⁰⁰ Although deigned a temporary facility, children in Homestead were held an average of sixty-seven days.³⁰¹ In addition to criticism about the profit-driven operation, advocates have criticized potential contamination,³⁰² as well as railed against restrictive rules, such as children being threatened with behavioral write-ups and having their immigration case harmed if they hugged friends goodbye.³⁰³

Child advocates have denounced child immigrant incarceration conditions across levels of security and placement-type within ORR. Ongoing litigation challenges violations of children's rights in the two secure facilities.³⁰⁴ According to a complaint against a secure facility known as the Shenandoah Valley Juvenile Center, teenagers as young as fourteen were strapped to a restraint chair — some while only in their underwear — with their feet, arms and waist restrained by straps.³⁰⁵ One former worker recalled that children

Resettlement, U.S. Dep't of Health & Human Servs. (Mar. 21, 2016), <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-guide-to-terms#Staff%20Secure%20Care>.

297. Class Action Complaint and Petition for a Writ of Habeas Corpus, *supra* note 295; see also *Children Entering the United States Unaccompanied: Guide to Terms*, OFFICE OF REFUGEE RESETTLEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS. (Mar. 21, 2016), <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-guide-to-terms#Staff%20Secure%20Care>.

298. Class Action Complaint and Petition for a Writ of Habeas Corpus, *supra* note 295; see also *Children Entering the United States Unaccompanied: Guide to Terms*, OFFICE OF REFUGEE RESETTLEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS. (Mar. 21, 2016), <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-guide-to-terms#Staff%20Secure%20Care>.

299. John Burnett, *Inside the Largest and Most Controversial Shelter for Migrant Children in The U.S.*, NPR (Feb. 13, 2019), <https://www.npr.org/2019/02/13/694138106/inside-the-largest-and-most-controversial-shelter-for-migrant-children-in-the-u->.

300. Last fall, as part of its initial SEC public filings, Homestead's parent company announced that the Trump administration's "border enforcement and immigration policy . . . is driving significant growth." *Id.*

301. *Id.*

302. Jonathan Fried & Lisa Evans, *Potential Contamination at Homestead Detention Center Means It Can't Be Safe to House Children*, MIAMI HERALD (Oct. 3, 2019), <https://www.miamiherald.com/opinion/op-ed/article235772247.html>.

303. Burnett, *supra* note 299.

304. Victoria Rocha, *California Lawyer Refuses to Allow Trump Immigration Policies to Keep Youth 'Locked in Cages'*, CHRONICLE OF SOC. CHANGE (July 13, 2017), <https://chronicleofsocialchange.org/news-2/california-lawyer-refuses-allow-trump-immigration-policies-keep-youth-locked-cages/27533>; see also Class Action Complaint and Petition for a Writ of Habeas Corpus, *supra* note 295.

305. Jess Bidgood et al., *Harsh discipline methods reported at centers for troubled migrant youths*, N.Y. TIMES (Aug. 4, 2018), <https://nyti.ms/2OIXnBi>.

whom the guards thought might spit had a meshed hood put over their entire faces and heads, even while strapped in the chair.³⁰⁶ According to children's complaints, staff, who were predominantly white and non-Spanish speaking, discriminated against youth based on their race and national origin by calling children "wetbacks" and mocking them. Children were not provided adequate medical treatment as they manifested mental illnesses and, in some instances, engaged in self-harm.³⁰⁷ In the Yolo detention center in California, children complain of pepper spray being used against them, including in their eyes. As one youth said, Yolo "makes me feel like an animal. The conditions at the detention center are terrible."³⁰⁸

Even ORR's "least restrictive" shelter facilities have been criticized for violating children's rights.³⁰⁹ ORR has come under steep criticism for restrictive rules,³¹⁰ inedible food,³¹¹ keeping children indoors for twenty-three out of twenty-four hours a day,³¹² inadequate medical care,³¹³ drugging children without authorization,³¹⁴ and disregarding children's reports of sexual abuse at the shelter, including at the hands of childcare staff.³¹⁵

306. *Id.*

307. Plaintiffs' Motion for Preliminary Injunction, Exs. 5, 7, *Doe v. Shenandoah Valley Juvenile Ctr. Comm'n*, No. 5:17-cv-00097-EKD, http://www.washlaw.org/pdf/shanandoah_motion_for_preliminary_injunction.PDF.

308. Blake Ellis et al., *Handcuffs, Assaults, and Drugs Called 'Vitamins': Children Allege Grave Abuse at Migrant Detention Facilities*, CNN INVESTIGATES (June 21, 2018, 9:59 PM), <https://www.cnn.com/2018/06/21/us/undocumented-migrant-children-detention-facilities-abuse-invs/index.html>.

309. Exhibits in Support of Plaintiffs' Response to Defendants' First Juvenile Coordinator Reports, *Flores v. Sessions*, No. 2:85-cv-04544-DMG-AGR (C.D. Cal. July 16, 2018), available at <https://www.documentcloud.org/documents/4609538-Flores-0716-459-4.html>.

310. Dan Barry et al., *Cleaning Toilets, Following Rules: A Migrant Child's Days in Detention*, N.Y. TIMES (July 14, 2018), <https://www.nytimes.com/2018/07/14/us/migrant-children-shelters.html> ("Do not misbehave. Do not sit on the floor. Do not share your food. Do not use nicknames. Also, it is best not to cry. Doing so might hurt your case . . . There were rules. You couldn't touch others. You couldn't run. You had to wake up at 6:30 on weekdays, with the staff making banging noises until you got out of bed.").

311. Gus Bova, *'Treated Worse than Dogs': Immigrant Kids in Detention Give Firsthand Accounts of Squalid Conditions*, TEXAS OBSERVER (July 18, 2018), <https://www.texasobserver.org/treated-worse-than-dogs-immigrant-kids-in-detention-give-firsthand-accounts-of-squalid-conditions/>.

312. See, e.g., Dan Barry et al., *supra* note 310 ("For an hour every day, the girls went outside to exercise in the hot Texas air. It was not uncommon to see someone suddenly try to escape. No whispers, no planning — just an out-of-nowhere dash for the fence. No one made it.").

313. Bova, *supra* note 311; Michael Grabell, *Pediatrician Who Treated Immigrant Children Describes Pattern of Lapses in Medical Care in Shelters*, PROPUBLICA (May 3, 2019), <https://www.propublica.org/article/pediatrician-who-treated-immigrant-children-describes-pattern-of-lapses-in-medical-care-in-shelters>.

314. Memorandum in Support of Motion to Enforce Class Action Settlement, *Flores v. Sessions*, No. 2:85-cv-04544-DMG-AGR (C.D. Cal. Apr. 16, 2018), available at <https://youthlaw.org/wp-content/uploads/1997/05/409-1.pdf>; see also Samantha Schmidt, *Trump Administration Must Stop Giving Psychotropic Drugs to Migrant Children Without Consent, Judge Rules*, WASH. POST (July 31, 2018), https://www.washingtonpost.com/news/morning-mix/wp/2018/07/31/trump-administration-must-seek-consent-before-giving-drugs-to-migrant-children-judge-rules/?utm_term=.61359c85e0e8.

315. *Arizona shelter shut in latest case of alleged migrant child abuse*, CBS NEWS (Oct. 10, 2018), <https://www.cbsnews.com/news/arizona-shelter-shut-in-latest-case-of-alleged-migrant-child-abuse/>; see also Michael Grabell et al., *In Immigrant Children's Shelters, Sexual Assault Cases Are Open and Shut*, PROPUBLICA (Dec. 21, 2018), <https://www.propublica.org/article/boystown-immigrant-childrens-shelter-sexual-assault>.

The long-lasting nature of the harm from detention indicates its inherently (and excessive) punitive nature. Research shows adverse childhood experiences and intense stress, which detained children face, can “change children’s brains and bodies, including disrupting learning, behavior, immunity, growth, hormonal systems, immune systems, and even the DNA.”³¹⁶ Even worse, many children in detention have already suffered “multidimensional, recurrent and sustained” trauma.³¹⁷ Childhood trauma may lead to a range of health complications into adulthood, such as heart problems, cancer, stroke, diabetes, liver disease, and skeletal fractures.³¹⁸

2. Removal and Adjudication System

In the removal and adjudication system, children face an additional set of obstacles before immigration courts and asylum offices due to harsher guidance and changes in the interpretation of law. These practices and policies track with the belligerent discourse painting immigrant children as a threat and undercut the few existing protections—the *Flores* settlement, TVPRA and Special Immigrant Juvenile Status—as illegitimate “loopholes.”³¹⁹ In sum, the Trump administration has attacked child-protections in the removal and adjudication system by 1) weakening guidance on courtroom policy regarding minors; 2) increasing the use of false and flimsy gang allegations to detain, deny benefits, and deport children; and 3) undercutting children’s ability to seek the two of the most common forms of immigration protection that youth seek, asylum and Special Immigrant Juvenile Status.

In 2017, the Trump administration made significant changes to remove the modest accommodations provided by guidance regarding the handling of minors’ cases, which had been in place since 2004, with some modest amendments in 2007.³²⁰ When referring to “immigration courts,” I refer exclusively

316. *The Landmark Adverse Childhood Experiences Study*, CTR. FOR YOUTH WELLNESS (last visited Dec. 26, 2019), <https://centerforyouthwellness.org/the-science/>.

317. Kevin Ackerman et al., *There Is No One Here to Protect You*, PHYSICIANS FOR HUM. RIGHTS 8 (June 10, 2019), <https://phr.org/our-work/resources/there-is-no-one-here-to-protect-you/>.

318. See generally Bessel A. van der Kolk, MD, *Developmental Trauma Disorder: Toward a Rational Diagnosis for Children With Complex Trauma Histories*, 35:5 *HEALIO PSYCHIATRIC ANNALS* 401 (2005), available at <https://www.healio.com/psychiatry/journals/psycann/2005-5-35-5/%7B3119e8d0-bf35-4e6d-b8f6-aa9f3c6720b0%7D/developmental-trauma-disorder-toward-a-rational-diagnosis-for-children-with-complex-trauma-histories>.

319. Press Release, U.S. Dep’t of Homeland Sec., *Unaccompanied Alien Children and Family Units Are Flooding the Border Because of Catch and Release Loopholes* (Feb. 15, 2018), <https://www.dhs.gov/news/2018/02/15/unaccompanied-alien-children-and-family-units-are-flooding-border-because-catch-and> (“These loopholes [stemming from *Flores*, TVPRA, and SIJS/UAC asylum protections] create a pull factor that invites more illegal immigration.”); *Loopholes in Child Trafficking Laws Put Victims—and American Citizens—At Risk*, THE WHITE HOUSE (Apr. 5, 2018), <https://www.whitehouse.gov/articles/loopholes-child-trafficking-laws-put-victims-american-citizens-risk/> (asking Congress to amend the TVPRA due to “loopholes”).

320. See U.S. DEP’T OF JUSTICE, INTERIM OPERATING POLICIES AND PROCEDURES MEMORANDUM 04-07 (Sept. 16, 2004) [hereinafter INTERIM OPERATING POLICIES AND PROCEDURES MEMORANDUM 04-07], available at <https://www.immigrationjustice.org/sites/default/files/EOIR%2520guideline%2520on%2520Children%2520in%2520immigration%2520court.pdf> [<https://perma.cc/XQ95-SRAN>]; see also Memorandum from David L. Neal, Chief Immigration Judge, U.S. Dep’t of Justice, to All Immigration Judges et. al. 5 (May

to trial level immigration courts; the immigration appellate court, the Board of Immigration Appeals, has no special guidance regarding children.³²¹

The Trump Administration's newly released court guidance generally removed existing, modestly protective language.³²² New guidance has been sanitized of numerous references to child-sensitivity; in contrast, it dictates that Immigration Judges exercise "impartiality" even though "juvenile cases may present sympathetic allegations."³²³ While new court guidance includes accompanied minors as well as those unaccompanied,³²⁴ this appears to be a cosmetic change, since most protections have been removed. For example, the introduction has been cut in half in the new version, and the old language regarding "issues of age development, experience, and self-determination" and how those issues might implicate changes in procedure, have been deleted.³²⁵ Instead, the new guidance states that cases involving children are "complicated and implicate sensitive issues beyond those encountered in adult cases;" it furthers the adultification of immigrant children by highlighting examples of children "illegally" brought or "smuggled" by family, as well as "an adolescent gang member, and a teenager convicted as an adult for serious criminal activity."³²⁶

22, 2007), <https://www.immigrantjustice.org/sites/default/files/Appendix%200%20-%20Working%20with%20Kids%20and%20EOIR%20Guidelines%20for%20Cases%20Involving%20Kids.pdf>.

321. In fact, in the Board of Immigration Practice Manual, there is only one reference to a child-specific accommodation, namely that children can be represented before the Board by a parent or guardian without having to seek permission from the Board first. *See* U.S. DEP'T OF JUSTICE, BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL 28 (2019), available at <https://www.justice.gov/eoir/page/file/1189771/download>. There are some passing references to rights of battered children, alongside battered spouses, provided under the Violence Against Women Act. Under the motion to expedite section, one example of a matter meriting expedite is someone who might be in danger of losing eligibility for immigration relief such as a minor aging out. *Id.* at 93.

322. *See generally* EOIR Documents 2007 to 2017, REUTERS GRAPHICS, <https://web.archive.org/web/20180311021157/http://fingfx.thomsonreuters.com/gfx/reuterscom/1/53/53/EOIR%20documents%202007%20to%202017.pdf> [<https://perma.cc/299U-872Z>] (last visited Mar. 11, 2018) (providing a redline that shows the changes between the 2007 memorandum and the 2017 memorandum). Some sections remain the same; for example, both guidance memoranda state that courts should conduct these cases on a separate docket or at a fixed time in the week or month, both mention identical practices to put children more at ease, by allowing the use of pillows or booster seats, quiet toys or books, and allowing the child to testify while seated next to an adult or friend. *See id.* Both guidance memoranda state children may need more breaks than adults, should have their time in court minimized, and judges' robes may be removed if helpful. *See id.*

323. In fact, this guidance is found under a new section, with no corresponding section in old guidance, under "Basic Principles" titled as "Judicial impartiality," emphasizing judges must be "mindful" that they are "unbiased arbitrators of the laws," bound by neutrality when adjudication juvenile cases even if they present sympathetic allegations. U.S. DEP'T OF JUSTICE, INTERIM OPERATING POLICIES AND PROCEDURES MEMORANDUM 17-03 (Dec. 20, 2017) [hereinafter OPERATING POLICIES AND PROCEDURES MEMORANDUM 17-03], available at <https://www.justice.gov/eoir/file/oppm17-03/download> [<https://perma.cc/MBE2-6KLH>].

324. In one instance, where the guidance discusses the possibility of allowing a child to establish rapport with the translator by talking about unrelated matters before testimony is taken, it is noteworthy that the guidance has become more restrictive; the older guidance said this modification should be available to an "unaccompanied alien child" and newer guidance says "younger child." *Compare* OPERATING POLICIES AND PROCEDURES MEMORANDUM 17-03, *supra* note 323, at 6 (allowing modification for a younger child) and INTERIM OPERATING POLICIES AND PROCEDURES MEMORANDUM 04-07, *supra* note 320, at 7 (allowing modification for an unaccompanied alien child).

325. *See EOIR Documents 2007 to 2017, supra* note 322.

326. OPERATING POLICIES AND PROCEDURES MEMORANDUM 17-03, *supra* note 323, at 2.

In other areas, the new guidance adultifies children by ignoring their vulnerabilities and omitting previously suggested modifications, such as leniency in granting motions for continuances and to changes in venue without requiring pleadings, the possibility that children may be excepted from the usual practice of using videoconference hearings, and suggestions that Immigration Judges play an active role in training *pro bono* attorneys to increase the possibility of representation for minors.³²⁷ Furthermore, the new guidance reaffirms that unless the Immigration Judge waives the juvenile's appearance, the child must attend the immigration proceedings. The new guidance not only omits DHS guidelines regarding child-sensitive questioning and active listening,³²⁸ but it adds further language emphasizing that due process requires juvenile witnesses, like any other witness, be subject to cross-examination, particularly if the testimony is speculative, vague, or contains indicia of inappropriate coaching.³²⁹ New guidance suggests several ways to undermine the credibility of children's testimony, moving to silence their voices. The new guidance emphasizes that credibility standards and burdens of proof are not relaxed for juveniles, making clear that even though child witnesses may be more likely to provide truthful yet "vague, speculative, or generalized testimony," this testimony still may be insufficient to be found credible.³³⁰ The guidance also has a lengthy discussion implying children's testimony may be compromised, as they are highly suggestible.³³¹ Although there is no concrete evidence of phenomena of adults masquerading as children,³³² the new guidance advises judges to be "vigilant" when adjudicating cases of a purported unaccompanied alien child, as there are incentives for adults to pose as minors.³³³ It further reminds Immigration Judges that they and their employees have an ethical duty to the United States government and its citizens to disclose "waste, fraud, abuse, and corruption to appropriate authorities."³³⁴

In tandem with curbing modest courtroom accommodations, the Trump administration has increased the use of false and flimsy gang allegations in immigration proceedings, with devastating consequences for young people in immigration proceedings.³³⁵ This emerging phenomenon has been

327. *Id.*

328. *See EOIR Documents 2007 to 2017, supra* note 322, at 16-17.

329. OPERATING POLICIES AND PROCEDURES MEMORANDUM 17-03, *supra* note 323, at 7.

330. *Id.*

331. *See id.*

332. *See generally* Brittny Mejia & Kate Morrissey, *U.S. is Using Unreliable Dental Exams to Hold Teen Migrants in Adult Detention*, L.A. TIMES (June 2, 2019), <https://www.latimes.com/local/lanow/la-me-ln-immigrant-age-migrants-ice-dental-teeth-bangladesh-20190602-story.html> (explaining how there is unclear reporting on the frequency of children posing as adults).

333. OPERATING POLICIES AND PROCEDURES MEMORANDUM 17-03, *supra* note 323, at 7-8.

334. *Id.* at 8.

335. *See* Hlass & Prandini, *supra* note 196, at 4-5.

documented through several recent reports,³³⁶ news stories³³⁷ and practice advisories.³³⁸ Using non-uniform and broad criteria, a single individual—immigration agent, school official, or law enforcement—may allege gang affiliation, based on where a young person lives, who they know, or how they dress.³³⁹ These allegations have far-reaching consequences at every level of immigration proceedings; based on such an allegation, a young person may be more likely to be detained, denied bond, denied immigration benefits, and deported.³⁴⁰ While gang allegations may ultimately foreclose the possibility of protection for youth seeking a wide variety of immigration protections—such as lawful permanent residence status, U nonimmigrant status for crime victims, and DACA—the Trump administration has taken additional steps to specifically target the two most common forms of immigration protection for young people: asylum and Special Immigrant Juvenile Status.³⁴¹

The Trump administration has tried to cut off asylum protection for asylum-seekers of all ages.³⁴² Many of the Administration's asylum practices are being challenged in the courts for depriving asylum-seekers access to the system, including turning them away at the border, threatening them with

336. *E.g., id.*; NEW YORK IMMIGRATION COALITION ET AL., *supra* note 196; N.Y. CIVIL LIBERTIES UNION ET AL., *supra* note 266.

337. *E.g.,* Nicole Acevedo, *Gang Crackdowns Have Increased Arrests, Deportations of Latino, Immigrant Youth, Says Report*, NBC NEWS (May 16, 2018), <https://www.nbcnews.com/news/latino/gang-crackdowns-has-increased-arrests-deportations-latino-immigrant-youth-says-n874766>; Caitlin Dickson, *He Grew Up in West Africa. He Never Heard of MS-13. Then He Fled to the U.S. — and ICE Accused Him of Being a Gang Member*, YAHOO! NEWS (Jan. 21, 2019), <https://news.yahoo.com/grew-west-africa-never-heard-ms-13-fled-u-s-ice-accused-gang-member-100051192.html>; Alice Speri, *Federal Judge Frees Salvadoran Teen Accused of Gang Ties, Pens Lengthy Rebuke of His Detention by ICE*, INTERCEPT (June 27, 2018), <https://theintercept.com/2018/06/27/federal-judge-frees-salvadoran-teen-ice-detention/>.

338. *E.g.,* Hlass & Prandini, *supra* note 196; LAILA L. HLASS ET AL., RECOGNIZING AND RESPONDING TO GANG AFFILIATION ALLEGATIONS (2019), available at <https://www.aila.org/File/Related/16112144b.pdf>; IMMIGRANT LEGAL RES. CTR., PRACTICE ADVISORY: UNDERSTANDING ALLEGATIONS OF GANG MEMBERSHIP/AFFILIATION IN IMMIGRATION CASES (2017), available at https://www.ilrc.org/sites/default/files/resources/ilrc_gang_advisory-20170426.pdf; IMMIGRANT DEF. PROJECT, PRACTICE NOTE: CHALLENGING EVIDENCE OF GANG-RELATED ACTIVITY AT IMMIGRATION COURT BOND HEARINGS (2017), available at <https://www.immigrantdefenseproject.org/wp-content/uploads/Practice-Note-8-3-17-gang-bond-hearings-1.pdf>; SEAN GARCIA-LEYS ET AL., U.C. IRVINE SCH. OF L. IMMIGRANT RTS. CLINIC, MISLABELED: ALLEGATIONS OF GANG MEMBERSHIP AND THEIR IMMIGRATION CONSEQUENCES (2016), available at <https://www.law.uci.edu/academics/real-life-learning/clinics/ucilaw-irc-MislabeledReport.pdf>.

339. Hlass, *The School to Deportation Pipeline*, *supra* note 15.

340. *See id.*

341. *Cf.* Hlass, *Minor Protections*, *supra* note 34, at 256–57; *see* Camilo Montoya-Galvez, 2019: The Year Trump “Effectively” Shut Off Asylum at the Border and Restricted Immigration, CBS NEWS (Jan. 5, 2020), <https://www.cbsnews.com/news/immigration-2019-the-year-trump-restricted-legal-immigration-and-effectively-shut-off-asylum-at-the-border/>; Jonathan Blitzer, *Does Asylum Have a Future at the Southern Border?*, THE NEW YORKER (Oct. 3, 2019), <https://www.newyorker.com/news/daily-comment/does-asylum-have-a-future-at-the-southern-border>; Eli Hager, *Trump’s Quiet War on Migrant Kids*, THE MARSHALL PROJECT (May 1, 2018), <https://www.themarshallproject.org/2018/05/01/trump-s-quiet-war-on-migrant-kids>; Mica Rosenberg, *New Trump immigration efforts aim to stop child border crossers*, REUTERS (Nov. 3, 2017), <https://www.reuters.com/article/us-trump-effect-immigration-children/new-trump-immigration-efforts-aim-to-stop-child-border-crossers-idUSKBN1D309S>.

342. *See* Joshua Keating, *Trump’s Radical New Attack on the Asylum System Would Block Nearly All Central American Refugees*, SLATE (July 15, 2019), <https://slate.com/news-and-politics/2019/07/trump-plan-deny-asylum-central-american-migrants-disaster.html>.

family separation if they pursued asylum, and detaining them in Mexico.³⁴³ Asylum officers in Mexico have described being pawns in a system, where they may be punished for reaching a positive determination, even when they have determined asylum-seekers are in real danger of imminent death.³⁴⁴ In April 2019, President Trump issued a memo outlining asylum policies including ordering DHS and the Department of Justice (DOJ) to act within the next ninety days to: expedite asylum proceedings and decisions; force asylum-seekers who pass an initial “credible fear” test into “asylum-only” court proceedings; charge asylum-seekers fees to apply for asylum, as well as to ask for work permits; and prohibit asylum-seekers who entered without permission from getting work authorization at all.³⁴⁵ The memo also suggests redeploying DHS employees to “improve” credible fear interviews at the border. As a result, border patrol agents are now conducting some interviews.³⁴⁶

Child asylum-seekers face specific challenges, additional to policies directed to restrict asylum-seekers of all ages.³⁴⁷ First, as of August 2017, USCIS changed the review of asylum applications for children at secure facilities or who had alleged past or current gang affiliation, such that their applications could only be reviewed by Asylum Headquarters and not the regional office. Second, a major priority is to limit the ability of unaccompanied minors in removal proceedings to seek asylum before the asylum office initially, instead of having their claim only heard before an Immigration Judge. The government is using the full spectrum of legal tools to narrow the class of children receiving this benefit through executive order, agency policy memoranda, informal guidance, proposed rulemaking, and administrative case law. Under the January 2017 “Border Security” Executive Order, President Trump instructed DHS to “take appropriate action” to ensure unaccompanied minor cases are “properly” processed.³⁴⁸ DHS then stated that

343. See *Al Otro Lado v. Nielsen*, CTR. FOR CONSTITUTIONAL RIGHTS (last updated July 30, 2019), <https://ccrjustice.org/home/what-we-do/our-cases/al-otro-lado>.

344. See Dara Lind, *Exclusive: Civil servants say they're being used as pawns in a dangerous asylum program*, VOX (May 2, 2019), <https://www.vox.com/2019/5/2/18522386/asylum-trump-mpp-remain-mexico-lawsuit>.

345. See President Donald Trump, *Presidential Memorandum on Additional Measures to Enhance Border Security and Restore Integrity to Our Immigration System*, THE WHITE HOUSE (Apr. 29, 2019), <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-additional-measures-enhance-border-security-restore-integrity-immigration-system/>.

346. Molly O'Toole, *Border Patrol agents, rather than asylum officers, interviewing families for 'credible fear'*, L.A. TIMES (Sept. 19, 2019), <https://www.latimes.com/politics/story/2019-09-19/border-patrol-interview-migrant-families-credible-fear>. See Lindsay M. Harris, *Withholding Protection*, 50 COLUM. HUM. RTS. L. REV. 1, 22 (2019).

347. For an account of new challenges targeting Central American asylum-seekers, including children, see Sarah Sherman-Stokes, *Reparations for Central American Refugees*, 96 DENV. L. REV. 585, 608–18 (2019).

348. Exec. Order No. 13767, 82 Fed. Reg. 8793, 8795–96 (Jan. 25, 2017), available at <https://www.whitehouse.gov/presidential-actions/executive-order-border-security-immigration-enforcement-improvements/>.

once children are released to a parent, they will no longer be considered a UAC and therefore unable to continue their asylum claims before USCIS.³⁴⁹ An internal DHS Memo stated a need to “seek legislative fix” to the TVPRA, as it provides initial jurisdiction of the asylum claims of minors in removal proceedings to asylum to USCIS, instead of an Immigration Judge; the TVPRA also permits youth to renew asylum claims before an Immigration Judge if not granted by USCIS.³⁵⁰ On September 7, 2018, DHS and HHS issued proposed rules to allow the agencies to re-determine “unaccompanied alien child” status.³⁵¹ In October 2018, the Board of Immigration Appeals further narrowed unaccompanied children’s rights, finding that an Immigration Judge, not USCIS, has initial jurisdiction over an asylum application filed by youth previously designated as an unaccompanied minor, but who turned eighteen *before* filing the asylum application.³⁵² The new court guidance memorandum suggests Immigration Judges should double check that UACs are still considered UACs at the time their case is decided; furthermore, the guidance suggests “there is an incentive to misrepresent accompaniment status or age” to qualify for benefits.³⁵³

Additionally, former Attorney General Sessions’s 2018 decision in *Matter of A-B* eroded children’s ability to seek asylum related to domestic and gang violence, which have been frequently used claims for child migrants.³⁵⁴ *Matter of A-B* overruled the precedential decision *Matter of A-R-C-G*-, which had recognized the rights of those fleeing domestic violence to seek asylum, finding namely that “married women in Guatemala who are unable to leave their relationship” could constitute a protected class as a “particular social group” under asylum law.³⁵⁵ The *A-R-C-G* court stated that the profoundly pervasive patriarchal norms in Guatemala preserved and bolstered pandemic gender-based violence that exists with impunity.³⁵⁶ By contrast, a

349. Memorandum from John Kelly, Sec’y, U.S. Dep’t of Homeland Sec., to Kevin McAleenan, Acting Comm’r, U.S. Customs & Border Prot., et al. 10–11 (Feb. 20, 2017), available at https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf.

350. Draft Memorandum on Policy Options to Respond to Border Surge of Illegal Immigration 4 (Dec. 16, 2017), available at <https://www.documentcloud.org/documents/5688664-Merkleydocs2.html>; see also John Burnett, *Lawsuits Allege ‘Grave Harm’ To Immigrant Children In Detention*, NPR (Jan. 24, 2019), <https://www.npr.org/2019/01/24/688068932/lawsuits-allege-grave-harm-to-immigrant-children-in-detention> (referencing the aforementioned draft memorandum).

351. 8 C.F.R. § 236.3(d) (2003); 45 C.F.R. § 410.101 (2003).

352. See *In re M-A-C-O-*, 27 I. & N. Dec. 477, 479 (B.I.A. 2018). This case was then followed by policy guidance to implement in a Memorandum from USCIS on Updated Procedures for Asylum Applications Filed by Unaccompanied Alien Children. See Memorandum from John Lafferty, Chief, U.S. Citizenship & Immigration Servs., Asylum Division, to All Asylum Office Staff (May 31, 2019) (on file with USCIS), available at https://www.uscis.gov/sites/default/files/USCIS/Refugee%2C%20Asylum%2C%20and%20Int%27%20Ops/Asylum/Memo_-_Updated_Procedures_for_I-589s_Filed_by_UACs_5-31-2019.pdf.

353. OPERATING POLICIES AND PROCEDURES MEMORANDUM 17-03, *supra* note 323, at 7–8.

354. See *In re A-B-*, 27 I. & N. Dec. 316, 320 (2018); see also *Grace v. Whitaker*, 344 F. Supp 3d 96 (D.D.C. 2018) (partially enjoining enforcement of *In re A-B-*), *stay pending appeal denied*, No. 18-1853, 2019 WL 329572 (D.D.C. 2019).

355. *In re A-R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. 2014).

356. *Id.* at 393–94.

large theme in *Matter of A-B-* is the Attorney General's deep skepticism of recognizing harm at the hands of a private actor as a valid basis for asylum. The case states, "private criminals are motivated more often by greed or vendettas than by an intent to 'overcome [the protected] characteristic of the victim.'"³⁵⁷ In accompanying policy guidance, USCIS writes "[i]n general, . . . claims based on membership in a putative particular social group defined by the members' vulnerability to harm of domestic violence or gang violence committed by non-government actors will not establish the basis for asylum, refugee status, or a credible or reasonable fear of persecution."³⁵⁸ As many of today's child migrants arriving from Central America face harm from family members as well as gangs, this case directly undermines their ability to seek protection.³⁵⁹

The Trump administration has also waged a multi-front assault on Special Immigrant Juvenile Status (SIJS), the only immigration protection designed specifically for youth. While government officials have attempted to delegitimize Special Immigrant Juvenile Status, calling the protection a "loophole," they have mapped out a plan to restrict access to the protection. According to an internal DHS memorandum, the administration hopes for a "legislative fix" of the SIJS statute purportedly because "state juvenile court dockets are overwhelmed,"³⁶⁰ without citing any studies or reports that back this claim. The DHS memo further suggests that USCIS reconsider its interpretation of SIJS through formal rule-making to make SIJS only available to children who "do not have a single parent available,"³⁶¹ in contrast to statutory language which states children who have been abused, abandoned or neglected by "one or both" parents could be eligible.³⁶² Furthermore, USCIS issued 2015 guidance making it more likely that SIJS-seekers who are denied the benefit will be referred to ICE to commence deportation proceedings.³⁶³

357. *In re A-B-*, 27 I. & N. Dec. at 337 (quoting *In re Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996)).

358. U.S. CITIZENSHIP & IMMIGRATION SERVS., PM-602-0162, POLICY MEMORANDUM, GUIDANCE FOR PROCESSING REASONABLE FEAR, CREDIBLE FEAR, ASYLUM, AND REFUGEE CLAIMS IN ACCORDANCE WITH *MATTER OF A-B-* (July 11, 2018), available at <https://www.aila.org/infonet/uscis-guidance-processing-fear-matter-of-a-b->; see also *In re A-B-*, 27 I. & N. Dec. at 320.

359. See THE UNITED NATIONS HUMAN RIGHTS COUNCIL (UNHCR), CHILDREN ON THE RUN: UNACCOMPANIED CHILDREN LEAVING CENTRAL AMERICA AND MEXICO AND THE NEED FOR INTERNATIONAL PROTECTION (2014), available at <https://www.unhcr.org/56fc266f4.html>.

360. Draft Memorandum on Policy Options to Respond to Border Surge of Illegal Immigration, *supra* note 350, at 4–5.

361. *Id.* at 5.

362. 8 U.S.C. § 1101(a)(27)(J) (2012).

363. For an overview of the risks to SIJS-seekers, see generally IMMIGRANT LEGAL RESOURCE CENTER (ILRC), RISKS OF APPLYING FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) IN AFFIRMATIVE CASES (2018), available at https://www.ilrc.org/sites/default/files/resources/risks_apply_sijs_affirm_cases-20180831.pdf; U.S. CITIZENSHIP & IMMIGRATION SERVS., PM-602-0050.1, POLICY MEMORANDUM: UPDATED GUIDANCE FOR THE REFERRAL OF CASES AND ISSUANCE OF NOTICES TO APPEAR (NTAs) IN CASES INVOLVING INADMISSIBLE AND DEPORTABLE ALIENS (June 28, 2018), available at <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf>.

The Trump administration appears to have increased denials of eighteen to twenty-one-year-old SIJS applicants, as part of a formal shift in adjudication.³⁶⁴ Prior to November 2016, SIJS classification petitions were decided at one of approximately eighty-seven USCIS field offices relating to where the child lived.³⁶⁵ On Nov. 1, 2016, the agency began centralizing SIJS classification petitions, as well as applications for permanent residency for those who were already approved for SIJS, before the National Benefits Center (NBC) in Missouri.³⁶⁶ After centralization, NBC and USCIS field offices asked Office of Chief Counsel (OCC) for guidance in decisions where petitions were between ages of eighteen and twenty-one, and NBC stopped adjudications in anticipation of guidance.³⁶⁷ OCC issued guidance in February 2018 instructing offices that evidence must establish the court had authority to make findings regarding the care and custody of the petitioner . . . as a juvenile.”³⁶⁸ According to Acting Branch Director Peter L. Rosenstock, denials of eighteen to twenty-one year old applications were a result of OCC’s guidance on the statute and NBC’s “correct application” of the law.³⁶⁹

DHS describes their plan to restrict SIJS as a way to “prevent potential abuses in the SIJS program” through careful scrutiny of possible gang membership/affiliation of applicants and other vetting.³⁷⁰ DHS also suggests potentially referring SIJS cases to ICE Homeland Security Investigations, as well as looking at whether USCIS can use so-called “consent” power to deny cases which they believe pose a threat to public safety. The internal memo encourages collaboration with other DHS agencies, including ICE trial attorneys or other officers, to look for and report suspicions regarding abuse in SIJS.³⁷¹

III. EVOLUTION AND DERIVED PRINCIPLES FROM JUVENILE JUSTICE

The incongruous treatment of migrant youth is paralleled more broadly by how children are treated outside of the immigration law arena. While the laws³⁷² governing children in delinquency, abuse, and neglect proceedings are complex and children’s rights are murky, some discernible trends exist.³⁷³

364. See THE LEGAL AID SOCIETY & LATHAM & WATKINS LLP, *R.F.M. v. NIELSEN PRACTICE ADVISORY* (2019), available at <https://static1.squarespace.com/static/59578aade110eba6434f4b72/t/5cffe84de883f9000123dc18/1560275025071/RFM+Practice+Advisory+%28June+10%2C+2019%29.pdf>; see generally Galvez v. Cuccinelli, 387 F. Supp. 3d 1208 (W.D. Wash. 2019); J.L. v. Cissna, 341 F. Supp. 3d 1048 (N.D. Cal. 2018).

365. Declaration of Peter L. Rosenstock at ¶ 5, *R.F.M. et al. v. Nielsen et al.*, No. 1:18-cv-05068-JGK (S.D.N.Y. July 24, 2018), ECF No. 46-5.

366. *Id.* at ¶ 7.

367. *Id.* at ¶ 10.

368. *Id.* at ¶ 11.

369. *Id.* at ¶ 13.

370. Burnett, *supra* note 299.

371. *Id.*

372. These laws also vary state by state.

373. See Michael S. Wald, *Children’s Rights: A Framework for Analysis*, 12 U.C. DAVIS L. REV. 255, 258 (1979) (stating that “neither legislatures nor courts have developed a coherent philosophy or

At times, children have been understood to be “miniature adults,” with no acknowledgment of their development;³⁷⁴ alternatively, children have been infantilized—treated as objects, not subjects of the law.³⁷⁵ Whether children are treated as “vulnerable, incapable, and needing protection,” or “persons with rights, decision-making capacity, and personal responsibility,”³⁷⁶ scholar Annette R. Appell argues that “equality is all but impossible for most children,” because childhood is constructed under law as “unequal and limited.”³⁷⁷

Considering children’s rights in the juvenile justice system is particularly instructive for the process of rethinking immigrant children’s rights, as both the juvenile justice and immigration legal systems are quasi-criminal, yet civil systems, where young people are being held accountable for their so-called transgressions. Although the arc of juvenile justice has bent toward differentiating children from adults, the history of the juvenile system highlights the dangers of liminal childhood within the law. Within the juvenile justice system, lawmakers have oscillated between benevolently stripping children of legal rights under the guise of protection and treating children as irredeemable adults deserving of the harshest treatment. This trend is reflected in four periods of the history of juvenile justice jurisprudence: the Progressive period, the *Gault* period, the “get-tough” era, and the modern era.³⁷⁸ Through this progression, I derive four key principles relevant to migrant children: 1) children’s differences should be accommodated by more rights, not less; 2) racism has infected laws and legal institutions causing significant harm to children of color; 3) the range of childhood should be considered more expansively; and 4) fundamentally, legal systems should not be punitive towards children.

A. *More Rights, Not Fewer*

At the dawn of the juvenile justice system, near the close of the nineteenth century, Progressive advocates pushed for the establishment of juvenile courts based on the understanding that children are unique from adults.³⁷⁹ “Children are different” was a central premise of the Progressive period, and

approach when addressing questions relating to children’s rights. Different courts and legislatures have been willing to give some new rights to children, while denying them others, without explaining the difference in outcome”).

374. *Id.*

375. DOUGLAS E. ABRAMS ET AL., CHILDREN AND THE LAW: DOCTRINE, POLICY AND PRACTICE 17–18 (6th ed. 2017). In fact, some scholars have suggested that current legal approaches treat children’s lives as if they are “lesser versions of adult lives,” discounting children’s unique strengths and abilities, as well as their special vulnerabilities. Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448, 1451 (2018).

376. Abrams, *supra* note 375.

377. Annette R. Appell, *The Child Question*, 2013 MICH. ST. L. REV. 1137, 1140 (2013).

378. See generally David S. Tanenhaus, *First Things First: Juvenile Justice Reform in Historical Context*, 46 TEX. TECH L. REV. 281 (2013).

379. See generally Mae C. Quinn, *Introduction: Evolving Standards in Juvenile Justice: From Gault to Graham and Beyond*, 38 WASH. U. J.L. & POL’Y 1 (2012).

it was framed through a protectionist lens.³⁸⁰ Some Progressive policies clearly benefited children. For example, to protect children, children were segregated from adults in prisons, placed in a “civil” court system where the purported purpose was rehabilitation,³⁸¹ and their confidentiality in proceedings was maintained. Yet, Progressive courts were marked by an absence of procedural safeguards for children.³⁸² To Progressives, procedural rights “restrained” the court and created a hostile environment.³⁸³ This protectionist framework suggested informal court procedures and increased adjudicatory discretion would benefit children, because adjudicators would act in children’s best interests, but ultimately this supposition proved false.³⁸⁴ Disturbingly, the system overall was infected with racism, with Child Savers’ care commonly reserved for poor white and European immigrant youth, while black children faced “whippings, convict leasing, lynchings, executions, and Jim Crow juvenile justice.”³⁸⁵

The Progressive period of juvenile justice reform ended with the Supreme Court’s 1967 decision in *Gault*, which held that “neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.”³⁸⁶ The *Gault* era is marked by the rise of prosecutors within juvenile courts, as these courts began reckoning with the rights of juveniles to due process.³⁸⁷ Policymakers and courts began to perceive children as more adult-like, reversing the Progressive course in many ways. While courts rejected the Progressive premise that due process did not belong in juvenile justice proceedings, conditions did not necessarily improve for children.³⁸⁸ In this period, the Supreme Court decided six non-death penalty cases regarding procedural claims in the adjudicative or pre-adjective phase, including *Gault*.³⁸⁹ Viewed together, these cases show juvenile’s nature was only used to justify providing fewer rights. Notably, in five of the six cases, juveniles asked to be treated like

380. See Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637, 647–48 (2006) (describing how the “child-saving” movement initiated in the 1850s influenced the modern child welfare system as well as the orientation of some scholars’ view of children’s rights).

381. Some scholars have documented how rehabilitation was only the purpose for white youth, and remained very punitive for children of color. *E.g.*, Tamar R. Birckhead, *Towards a Theory of Procedural Justice for Juveniles*, 57 BUFF. L. REV. 1447 (2009); Robin Walker Sterling, “Children Are Different”: Implicit Bias, Rehabilitation, and the “New” Juvenile Jurisprudence, 46 LOY. L.A. L. REV. 1019 (2013).

382. See generally Tamar R. Birckhead, *Towards a Theory of Procedural Justice for Juveniles*, 57 BUFF. L. REV. 1447 (2009); Walker Sterling, *supra* note 381.

383. Martin Guggenheim, *Graham v. Florida and A Juvenile’s Right to Age-Appropriate Sentencing*, 47 HARV. C.R.-C.L. L. REV. 457, 465 (2012).

384. The absence of standards “has not necessarily meant that children receive careful, compassionate, individualized treatment.” *In re Gault*, 387 U.S. 1, 18 (1967). “The constitutional and theoretical basis for this peculiar system is—to say the least—debatable. And in practice . . . the results have not been entirely satisfactory.” *In re Gault*, 387 U.S. 1, 17–18 (1967).

385. Sterling, *supra* note 381, at 1025.

386. *In re Gault*, 387 U.S. 1 (1967).

387. Tanenhaus, *supra* note 378, at 285–86.

388. *Id.* at 1052–54.

389. Guggenheim, *supra* note 383, at 467; see generally Schall v. Martin, 467 U.S. 253 (1984); Fare v. Michael C., 442 U.S. 707 (1979); Breed v. Jones, 421 U.S. 519 (1975); McKeiver v. Pennsylvania, 403 U.S. 528 (1971); *In re Winship*, 397 U.S. 358 (1970); *In re Gault*, 387 U.S. 1 (1967).

adults and posited that they are entitled to the same constitutional rights, while state prosecutors argued the Constitution requires fewer rights than for adults.³⁹⁰ In the sixth case, the juvenile proposed the Constitution suggested better treatment for children than adults, which the court declined to do.³⁹¹ *Gault* established critical rights for youth in the juvenile justice system, such as notice of charges, the right to remain silent, the right to counsel, and the ability to cross-examine adverse witnesses.³⁹² Additional victories for juveniles came with finding the standard for a delinquency finding at trial is guilt beyond a reasonable doubt,³⁹³ and that children cannot face double jeopardy.³⁹⁴ However, when children argued their rights were violated because they did not have a right to a jury trial, the Court used a protectionist lens to justify fewer rights, stating the juvenile system did not need to become fully adversarial and thus identical to the adult system.³⁹⁵ Similarly, youth's limitations were used against them,³⁹⁶ where the Court upheld a New York law allowing judges to preventively detain juveniles until trial if there was a risk the youth might commit a crime if released—even including for petty offenses.³⁹⁷ The Court justified its ruling by citing to children's vulnerability and the state's role in protecting them from their own mistakes.

After *Gault*-era moves to restrain judicial discretion with due process, the “get-tough” period was marked by paternalism succumbing to punishment, and the erosion of the reportedly rehabilitative response to adolescent behavior due to “increased media attention to public safety, victims' rights, and a demand for increasingly harsh punishments in juvenile court.”³⁹⁸ Policy-makers and courts began to perceive children, particularly children of color, as more adult-like, reversing course in many ways.³⁹⁹ Legislatures simultaneously rejected the *Progressive* vision that children should generally be prosecuted in a special court and punishment should be administered with mercy.⁴⁰⁰ During this time, legislatures—acting on the proposition that increasing numbers of children of color were “super-predators”—made moves to facilitate transfers of children to the adult criminal justice system and subject children to longer and harsher sentences.⁴⁰¹ States made moves to transfer children at younger ages to the adult system, subject children to longer and harsher sentences, and exposing them to the stigmatizing impacts of convictions including “sex-offender registration, fingerprint and DNA

390. Guggenheim, *supra* note 383, at 467.

391. *Id.*

392. *In re Gault*, 387 U.S. 1 (1967).

393. *See generally In re Winship*, 397 U.S. 358 (1970).

394. *See generally Breed v. Jones*, 421 U.S. 519 (1975).

395. *See generally McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

396. Guggenheim, *supra* note 383, at 471.

397. *See generally Schall v. Martin*, 467 U.S. 253 (1984).

398. Kristin Henning, *Juvenile Justice After Graham v. Florida: Keeping Due Process, Autonomy, and Paternalism in Balance*, 38 WASH. U. J.L. & POL'Y 17, 20 (2012).

399. *See generally Walker Sterling*, *supra* note 381.

400. Guggenheim, *supra* note 383, at 466–67.

401. Sterling, *supra* note 381, at 1054–60.

data banking, eviction from public housing, disqualification from military service, and exclusion from public schools.”⁴⁰²

Despite some real setbacks for children, juvenile justice jurisprudence from the Progressive Period to ultimately to the modern era has expanded the rights of children in proceedings. The *Roper*⁴⁰³ and *Graham*⁴⁰⁴ decisions heralded the beginning of the modern era. In the contexts of the death penalty and life without parole, the Court struck down these practices, dictating that a lens of proportionality should be used in how courts treat juveniles. While still subject to fierce criticism for its treatment of children, the modern era formally moved away from both the Progressive Era’s absence of rights for children and away from the *Gault* and “get tough” periods’ adultification of children. Essentially, the modern system recognized children’s uniqueness should result in more rights, not fewer. Prior to *Roper* and *Graham*, the Court had not expressed the idea that children are less culpable and deserve to be treated better than adults since 1962.⁴⁰⁵ The *Roper* and *Graham* Court ruled that a lens of proportionality should be used. Considering children’s vulnerabilities and lessened capacity, children must not be treated the same as adults, nor may the system strip them of rights because they are children; instead laws must address their youthfulness.⁴⁰⁶

Roper involved a young person sentenced to death for committing a premeditated murder at age seventeen.⁴⁰⁷ In *Roper*, the Court noted that the “diminished culpability” of juveniles stems from three differences: 1) lack of maturity; 2) increased vulnerability to negative influences and pressure; and 3) a more transitory and less fixed character than adults.⁴⁰⁸ Decided five years later, *Graham* centered around a young person who was sentenced to life without parole for violating his probation at age seventeen by engaging in criminal activity with a firearm, after previously pleading guilty to armed burglary with assault or battery and attempted armed robbery at age sixteen.⁴⁰⁹ The Court in *Graham* held that states are precluded from sentencing juveniles to life in prison without parole for a non-homicide crime. Furthermore, states must give these juveniles sentenced to life for non-homicide offenses a meaningful opportunity to obtain release.⁴¹⁰ While there are several theories about the implications of *Graham*, some scholars have

402. *Id.*

403. *Roper v. Simmons*, 543 U.S. 551 (2005).

404. *Graham v. Florida*, 560 U.S. 48, 74–75 (2010), *as modified* (July 6, 2010).

405. Guggenheim, *supra* note 383, at 487.

406. In *Graham* the Court states that “criminal procedure laws that fail to take defendants’ youthfulness into account at all would be flawed,” but then goes on to reject the lower court’s decision to use youth against the defendant holding him incorrigible and therefore deserving of life without parole. *Graham v. Florida*, 560 U.S. 48, 76 (2010), *as modified* (July 6, 2010).

407. *Roper v. Simmons*, 543 U.S. 551 (2005).

408. *Id.*

409. *Graham*, 560 U.S. at 53.

410. *Id.* at 74–75.

suggested the decision is best understood as a new constitutional principle that “juveniles are different.”⁴¹¹

The Court specifically opted to enforce youth rights categorically, instead of allowing sentencing case by case for juveniles in death penalty and life without parole cases. It reasoned that laws allowing discretion and a case-by-case consideration could result in a judge or jury’s subjective judgment resulting in an impermissibly harsh outcome. Only a categorical approach could ensure children’s youthfulness would be appropriately addressed. For example, the Court in *Roper* noted the fallacy of the prosecutor arguing that the juvenile’s youth was an aggravating, rather than a mitigating, factor.⁴¹² Ultimately, modern jurisprudence dictates that substantive laws and procedures must be designed to take youthfulness into account; specifically children’s lessened capacity and immaturity demand appropriate accommodations, instead of an absence of rights in favor of discretion or simply treating children as adults.

B. *The Super-Predator Myth*

Modern juvenile justice jurisprudence is still reckoning with the legacy of adultification of children, epitomized by the “super-predator” myth, a discounted theory about growing numbers of irredeemable and dangerous youth.⁴¹³ During the “get tough” period, state legislatures moved towards zero-tolerance policies for juveniles, trending towards more expansive transfers of children into the adult criminal system, with longer and harsher sentences.⁴¹⁴ State legislatures became swept up in a “get tough on crime” race,⁴¹⁵ which has since been termed a “severity revolution.”⁴¹⁶ By 1994, nearly every state broadened the number of juveniles in adult court by lowering age or offense limits, and shifting authority from judges to prosecutors.⁴¹⁷ As a result, the number of youth prosecuted as adults rose by more than eighty percent, and youth held in adult jails pending trials increased 366 percent between 1983 and 1998.⁴¹⁸ Much evidence points to how racism played

411. Neelum Arya, *Using Graham v. Florida to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99, 100 (2010); Guggenheim, *supra* note 383.

412. *See Simmons*, 543 U.S. at 573.

413. Political scientist John DiLulio warned of an impending influx of young “super-predators,” during the height of “tough on crime” campaigns, fueling zero-tolerance policies, harsh sentences, and ultimately the rise of mass incarceration of juveniles in the 1990s. John DiLulio, *The Coming of the Super - - Predators*, WASH. EXAM’R (Nov. 27, 1995), <https://www.washingtonexaminer.com/weekly-standard/the-coming-of-the-super-predators>.

414. *See generally* Walker Sterling, *supra* note 381.

415. Guggenheim, *supra* note 383, at 473–87 (“The claim in every case but one was always the same. Minors’ advocates complained that minors were treated as children; state officials defended their choice to treat minors differently from adults.”).

416. 3 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 224, 226 (Michael Grossberg & Christopher Tomlins eds., 2008).

417. Guggenheim, *supra* note 383, at 473.

418. *Id.*

a role in these trends.⁴¹⁹ Children of color—who are disproportionately represented in the juvenile justice system—are treated more harshly at every stage of the juvenile justice system.⁴²⁰

Although the Court neither acknowledged nor addressed the role of race in the adultification trends impacting the juvenile justice system, it debunked the idea that children should be treated as irredeemable or more culpable than adults. In *Roper*, the Court undercut the foundation of the super-predator myth, pointing to how psychiatrists are prohibited from diagnosing any patient under eighteen as having sociopathy, marked by callousness, cynicism, and contempt for the feelings, rights, and suffering of others.⁴²¹ The Court reasoned that if trained psychiatrists with their expertise must forgo making these assessments, then States should not ask jurors to make a far graver judgment regarding juveniles and the death penalty.⁴²² In fact, the Court made clear young people have particular vulnerabilities that must be addressed and their character is still very much a work in progress.⁴²³

C. *Towards a More Inclusive Childhood*

Currently, juvenile laws generally categorize youth as either children or adults, with, at times, confounding results. In some instances, adolescents are treated under the law “as though they were indistinguishable from young children, and are subject to paternalistic policies based on assumptions of dependence, vulnerability, and incompetence;” yet in other areas, “teenagers are treated as fully mature adults, who are competent to make decisions, accountable for their choices and entitled to no special accommodations.”⁴²⁴ Children of color are particularly vulnerable to being treated as older than they are, and as a result being treated more harshly.⁴²⁵ Historically, the age of majority was twenty-one in most states, and those under that age were considered children.⁴²⁶ However, in the early 1970s, shortly after the Twenty-

419. NAT'L RESEARCH COUNCIL, REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 221–22 (Richard J. Bonnie et al. eds., 2013) (“In sum, with few exceptions, data consistently show that youth of color have been overrepresented at every stage of the juvenile justice system, that race/ethnicity are associated with court outcomes, and that racial/ethnic differences increase and become more pronounced with further penetration into the system through the various decision points.”).

420. *Id.*

421. *Roper v. Simmons*, 543 U.S. 551, 573 (2005) (citing AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-IV) 701–06 (4th ed. text rev. 2000)); see also Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOL. 1009, 1015 (2003).

422. *Simmons*, 543 U.S. at 573.

423. See *id.* at 570 (“The personality traits of juveniles are more transitory, less fixed.”).

424. Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 548 (2000).

425. See generally Tamar R. Birckhead, *The Racialization of Juvenile Justice and the Role of the Defense Attorney*, 58 B.C. L. REV. 379 (2017).

426. DOUGLAS E. ABRAMS ET AL., CHILDREN AND THE LAW: DOCTRINE, POLICY, AND PRACTICE 17 (6th ed. 2017).

sixth Amendment established eighteen as the minimum age to vote, nearly all states lowered the age of majority to eighteen.⁴²⁷

In the modern era, there has been a move to shift the dial in juvenile justice, as state legislatures across the country have moved to “raise the age” of when youth should be subject to the juvenile justice system instead of the adult criminal justice system.⁴²⁸ After the Court relied on the science of adolescent brain development in *Roper* and *Graham*, states began to grapple with how to address juvenile rights. They began to pivot from policies constructed in the wake of the prior severity revolution towards “raising the age” of who is included as a juvenile, moving towards a more inclusive view of childhood.⁴²⁹ More broadly, in the children’s rights movement, advocates and scholars are paying increasing attention to children’s development needs.⁴³⁰ In 2007, fourteen states had an “age of jurisdiction” below age eighteen, automatically considering a group of minor children as adults for purposes of the criminal justice system, but that number has winnowed to only four,⁴³¹ and States are considering increasing the age⁴³² to older teenagers as Vermont raised the age to twenty-one.⁴³³

The Supreme Court in *Roper* acknowledged the fluidity of childhood development and age, stating that “[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18.”⁴³⁴ Studies conducted post-*Roper* have further found that young people are often less equipped than adults with severe mental illness to respond to court

427. *Id.*

428. See John Kelly, *In Another Big Year for “Raise the Age” Laws, One State Now Considers All Teens as Juveniles*, THE CHRONICLE OF SOC. CHANGE (June 25, 2018), <https://chronicleofsocialchange.org/youth-services-insider/juvenile-justice-raise-the-age-vermont-missouri-state-legislation>.

429. See Elizabeth S. Scott, Miller v. Alabama and the (Past and) Future of Juvenile Crime Regulation, 31 LAW & INEQ. 535, 548 (2013) (describing how “changing attitudes toward young offenders have affected policymakers at all levels of government; across the country, there has been a rethinking of harsh incarceration-based policies and a readiness to try different approaches”); see also Carly Loomis-Gustafson, *Adjusting the Bright-Line Age of Accountability within the Criminal Justice System: Raising the Age of Majority to Age 21 based on the Conclusions of Scientific Studies Regarding Neurological Development and Culpability of Young-Adult Offenders*, 55 DUQ. L. REV. 221, 246 (2017) (arguing that the age should be raised to 21); CHRISTINA CLARK-KAZAK, AGE & GENERATION IN CANADA’S MIGRATION LAW, POLICY AND PROGRAMMING 7 (2016), available at https://refugeersearch.net/wp-content/uploads/2017/02/clark_feb’17.pdf (noting that “chronological age can be considered to be an imperfect proxy for biological development”).

430. See David D. Meyer, *The Modest Promise of Children’s Relationship Rights*, 11 WM. & MARY BILL RTS. J. 1117, 1120 (2003) (“What is ultimately likely to be of most benefit to children . . . [is] innovation in the collection and dissemination of empirical knowledge about their developmental needs.” (emphasis added)).

431. See John Kelly, *In Another Big Year for “Raise the Age” Laws, One State Now Considers All Teens as Juveniles*, THE CHRONICLE OF SOC. CHANGE (June 25, 2018), <https://chronicleofsocialchange.org/youth-services-insider/juvenile-justice-raise-the-age-vermont-missouri-state-legislation>.

432. Katie Lannan, *Mass. Watching as Vermont Pulls Teenagers Into Family Court*, DAILY NEWS (July 4, 2018), https://www.newburyportnews.com/news/regional_news/mass-watching-as-vermont-pulls-teenagers-into-family-court/article_750e7535-0a00-5081-aab6-12e29d5a166d.html.

433. *Governor Signs Law Creating More Rational Juvenile Justice Policies In Vermont*, DEP’T FOR CHILDREN AND FAMILIES (June 1, 2016), <https://dcf.vermont.gov/dcf-blog/governor-signs-law-creating-more-rational-juvenile-justice-policies-vermont>.

434. The Court further states “[b]y the same token, some under 18 have already attained a level of maturity some adults will never reach.” *Roper v. Simmons*, 543 U.S. 551, 574 (2005).

proceedings.⁴³⁵ For developmental reasons, young people will exercise poor judgment, make choices, and be vulnerable to influence.⁴³⁶ Alongside this changing understanding of childhood and development, legislatures have moved away from punitive laws and instead begun to: 1) repeal mandatory transfer statutes that send children charged with certain crimes to adult criminal proceedings; 2) restrict the transfer of younger juveniles to adult proceedings; 3) raise the general jurisdictional age; and 4) pass laws requiring assessment of juveniles' competence before allowing them to be adjudicated as adults.⁴³⁷

D. *The Character and Purpose of the System*

Progressive period policymakers established the juvenile justice system as a civil system, apart from the adult criminal system to underscore the more rehabilitative, less penal-focused purpose. Despite this goal, in many cases, this vacuum of procedural protections and over-reliance on discretion functionally deprived young people of rights, and did so, purportedly for their own good.⁴³⁸ Furthermore, rehabilitation was the aim only for white children, leaving children of color in the system subjected to extreme violence.⁴³⁹ Then, during the “get tough” era, as procedural protections mimicked the adult criminal system, some state legislatures changed the stated purpose of their juvenile justice systems moving away from purportedly considering the best interest of the child with an emphasis on treatment.⁴⁴⁰ By 1997,

435. “Studies have shown that a significant portion of adolescents, especially those under age 15, are neither psychologically nor cognitively equipped to participate and assist in their own trials” in juvenile or criminal court – many under fifteen “are as poorly prepared to do these things as adults with severe mental illness.” MACARTHUR FOUND., *JUVENILE JUSTICE IN A DEVELOPMENTAL FRAMEWORK A 2015 STATUS REPORT* 11, 27 (2015), available at https://www.macfound.org/media/files/MacArthur_Foundation_2015_Status_Report.pdf.

436. SAMUEL M. DAVIS ET AL., *CHILDREN IN THE LEGAL SYSTEM: CASES AND MATERIALS* 110 (5th ed. 2013).

437. Elizabeth S. Scott, *Miller v. Alabama and the (Past and) Future of Juvenile Crime Regulation*, 31 *LAW & INEQ.* 535, 548 (2013) (noting that “changing attitudes toward young offenders have affected policymakers at all levels of government” and that “there has been a rethinking of harsh incarceration-based policies and a readiness to try different approaches”); see also GOVERNOR’S COMM’N ON YOUTH, PUB. SAFETY & JUSTICE, *FINAL REPORT OF THE GOVERNOR’S COMMISSION ON YOUTH, PUBLIC SAFETY AND JUSTICE: RECOMMENDATIONS FOR JUVENILE JUSTICE REFORM IN NEW YORK* 28–38 (2015), available at [http://www.njjn.org/uploads/digital-library/ReportofCommissiononYouthPublicSafetyandJustice_0%20\(1\).pdf](http://www.njjn.org/uploads/digital-library/ReportofCommissiononYouthPublicSafetyandJustice_0%20(1).pdf); see generally JUSTICE POLICY INST., *RAISE THE AGE: SHIFTING TO A SAFER AND MORE EFFECTIVE JUVENILE JUSTICE SYSTEM* (2017), available at http://www.justicepolicy.org/uploads/justicepolicy/documents/raisetheage_final_3_6_17.pdf.

438. For example, the U.S. Supreme Court and the California Supreme Court have held that because juvenile processes are not penal, there is no right to a jury trial. See *McKeiver v. Pennsylvania*, 403 U.S. 528, 545–46 (1971); *In re Daedler*, 228 P. 467, 472 (1924).

439. See generally Walker Sterling, *supra* note 381.

440. Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 *B.U. L. REV.* 821, 821–22 (1988) (stating that “the trend of juvenile courts to employ a ‘justice model,’ which prescribes the appropriate sentence on the basis of ‘just deserts’ rather than ‘real needs,’ reflects a movement away from a rehabilitation-treatment based model”); David C. Owen, *Striking Out Juveniles: A Reexamination of the Right to a Jury Trial in Light of California’s “Three Strikes” Legislation*, 29 *U.C. DAVIS L. REV.* 437, 456 (1996) (describing how state legislatures moved towards a more punitive and adult purpose, moving away from serving “the spiritual, emotional,

seventeen states amended their juvenile codes' purpose clause to incorporate language relating to "punishment, accountability, and public safety, with only three states having language prioritizing best interest of the child as a core goal."⁴⁴¹

With the ushering in of the modern era of juvenile justice, however, the pendulum swung again, back to a more rehabilitative goal. With a new understanding that children are different, particularly due to their brain development, the Supreme Court struck down the most punitive treatment of children. In the aftermath of *Roper* and *Graham*, state legislatures began to acknowledge that children's brain development merited more protections and began processes to raise the age of childhood to prevent children from being transferred into adult systems.

IV. REIMAGINING AN IMMIGRATION LEGAL SYSTEM FOR CHILDREN

The immigration legal system suffers from a fundamental misorientation, particularly for migrant children. The prevailing model is to view children either through a lens of adultification and enforcement, ignoring their vulnerabilities and impaired capacity, or through a lens of infantilization and protection, ignoring their voices. Instead, the system must seek proportionality and a child-informed approach that eschews the existing punitive aspects of the system.

In the past few decades, some modest protections have been specially carved out, especially for unaccompanied minors, stemming from transfer of the care and custody of unaccompanied minor children to ORR, the terms of the *Flores* settlement, the establishment of SIJS, and the TVPRA. Insidious discourse in the Trump era is challenging these protections, resulting in an onslaught of new policies and practices.

The project of reimagining an immigration system is mammoth. These suggestions provide a starting point to do so, by applying lessons learned from failures within the juvenile justice system. First, these principles derived from the juvenile justice system suggest a move towards more proportional treatment, resulting in more rights in the spectrum of immigration law proceedings for migrant children. Second, just as juvenile justice advocates moved towards deconstructing the racist super-predator myth which informed harsh policies, the immigration legal system must apply a race-conscious lens to disrupt bias against migrant children. Third, just as the juvenile justice system has moved towards a more inclusive childhood with recent raise the age movements, protections within the immigration system should be expanded to older children and those accompanied by a parent. Ultimately, the purpose of the immigration legal system must be reconsidered, and laws,

mental, and physical welfare of the minor . . . to protect[ing] the public and impos[ing] a sense of responsibility on minors for their acts").

441. Walker Sterling, *supra* note 381, at 1060.

policies, and practices should be designed to implement justice, rather than speed deportation.⁴⁴²

A. *Implementing Proportionality for Immigrant Children*

As the trajectory of juvenile justice jurisprudence demonstrates, substantive laws and procedures must be designed to take youthfulness into account, resulting in a less punitive system with established rights to address children's vulnerabilities. In the immigration legal system, children confront a system where, unless they can obtain counsel on their own, they must represent themselves against deportation, defending allegations of "inadmissibility" against an experienced government prosecutor, and raising legal defenses for which they may be eligible. Immigrants bear the burden of proof in establishing eligibility for immigration protections, so a child must complete complicated immigration forms, assemble evidence, and prepare to testify, without the guarantee of having a representative.⁴⁴³ For SIJS, the child would not only have to navigate the immigration legal system but also a state court system in order to obtain the necessary predicate findings in order to seek SIJS.

What would proportionality dictate for understanding the fundamental difference of children from adults in the immigration system? Overall, the system lacks proportionality with one sanction—deportation—regardless of the severity of immigration violation.⁴⁴⁴ Deportation as a sanction can be quite grave; thus Jill Family argues that immigration law "needs a graduated system of consequences," including fines or delays in benefits.⁴⁴⁵ Under such a system, it may be more fitting for children—who categorically have lessened culpability and immaturity than adults—to face other consequences, aside from deportation, such as the exercise of forms of prosecutorial discretion.

In the special case of children, an initial inquiry regarding a proportional immigration legal system is whether separate proceedings—a more robust juvenile docket, or juvenile courts—would best serve this purpose.⁴⁴⁶ A separate system may make implementing procedural rights easier and could ensure adjudicators and prosecutors who may be repeat players have some training around child litigants.⁴⁴⁷

442. While I offer several reform-oriented solutions here, to truly transform the system change must occur at a foundational level.

443. Laila L. Hlass, *Defenseless Children*, SLATE (July 5, 2018), <https://slate.com/news-and-politics/2018/07/children-detained-at-border-dont-have-lawyers-must-represent-themselves.html>.

444. Stumpf, *supra* note 12, at 1688.

445. AMERICAN CONSTITUTION SOCIETY, *RETHINKING ADMIN LAW: FROM APA TO Z*, at 49 (2019) available at <https://www.acslaw.org/wp-content/uploads/2019/06/Rethinking-Admin-Law-From-APA-to-Z.pdf> (containing a portion authored by Jill Family, entitled "Injecting Independence and Proportionality into Immigration Adjudication").

446. See Hlass, *Minor Protections*, *supra* note 34, at 282–84; see generally Erin B. Corcoran, *Getting Kids Out of Harm's Way: The United States' Obligation to Operationalize the Best Interest of the Child Principle for Unaccompanied Minors*, 47 CONN. L. REV. ONLINE 1 (2014).

447. *Id.*

Related to the question of separate proceedings is whether proportionality suggests a different legal standard for children, perhaps relating to the “best interests of the child.”⁴⁴⁸ This proposition would be in direct contrast to existing Immigration Court guidance that states the “best interests of the child” should not be considered for substantive relief.⁴⁴⁹ Indeed, what if best interests⁴⁵⁰ considerations animated the full spectrum of immigration proceedings—from arrest to final adjudication? While factors related to best interests may differ depending on the case, some concepts are always present: safety, well-being, permanency, and the child’s own views.⁴⁵¹ Rethinking the immigration legal system in terms of best interests of the child could provide more meaningful accommodations to immigrant youth that make both process and outcomes better suited to their status as children. For example, Erin Corcoran writes an “operationalized” best interests principle could result in a Child Protection Corps, who would be embedded within ICE to screen children arriving at the border for immigration relief.⁴⁵² These child protection officers would also coordinate with nonprofits to improve conditions within detention.⁴⁵³ However, abolishing immigration incarceration for children would substantially advance children’s best interests.⁴⁵⁴ Another model to operationalize a best interests standard is the development and implementation of Best Interest Determination panels, devised by the Young Center and modeled by the U.N. High Commission for Refugee proceedings. The panels are comprised of diverse experts not associated with the child in question, and whose expertise supports their ability to apply the best interest framework to the particular facts within the child’s case.⁴⁵⁵ The Best Interest Determination panel’s recommendation is incorporated into the child advocate’s position regarding the child’s legal case, and can also be used by adjudicators to exercise discretion in favor of the child.⁴⁵⁶

Considering the complexity of proceedings, access to quality representation is another fundamental question to ensure a better fit for children’s

448. For a rich discussion of how to implement a best interest principle substantively to immigration proceedings for children, see generally Andrew I. Schoenholtz, *Developing the Substantive Best Interests of Child Migrants*, 46 VAL. U. L. REV. 991 (2012).

449. U.S. Dep’t of Justice, *Operating Policies and Procedures Memorandum 17-03: Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children*, Dec. 20, 2017, <https://www.justice.gov/eoir/file/oppm17-03/download>.

450. JENNIFER NAGDA & MARIA WOLTJEN, FIRST FOCUS, BEST INTERESTS OF THE CHILD STANDARD: BRINGING COMMON SENSE TO IMMIGRATION DECISIONS 107 (2015), available at <https://firstfocus.org/wp-content/uploads/2015/04/Best-Interests-of-the-Child-Standard.pdf> (noting that all fifty states require the consideration of a child’s best interest in decisions about child custody and “other critical life issues.”).

451. *Id.*

452. Erin B. Corcoran, *Getting Kids Out of Harm’s Way: The United States’ Obligation to Operationalize the Best Interest of the Child Principle for Unaccompanied Minors*, 47 CONN. L. REV. ONLINE 1, 2 (2014).

453. *Id.*

454. For a discussion of prison abolition in the immigration context, see César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245 (2017).

455. NAGDA & WOLTJEN, *supra* note 450, at 107, 112.

456. *Id.* at 112–13.

treatment considering their special status.⁴⁵⁷ The constitutional right of certain children to appointed counsel remains an open question.⁴⁵⁸ While immigration law suggests a small sub-set of children—unaccompanied minors in custody of the government—should be provided *pro bono* legal services “to the greatest extent practicable,” this aspirational part of the law has yet to be realized in a meaningful way.⁴⁵⁹ Ensuring access to quality *pro bono* counsel for those children who cannot afford an attorney, or otherwise obtain one, would certainly help in securing children’s rights in immigration proceedings.⁴⁶⁰ Others have suggested child advocates or guardians ad litem may be necessary, as well as reconsidering the adversarial nature of immigration proceedings.⁴⁶¹

The framework of proportionality and understanding children’s unique development should inform what other substantive protections should be afforded to children. For example, as most forms of immigration benefits are discretionary, one protection could be explicitly making youth a positive discretionary factor.⁴⁶² This protection could be used to counteract any negative discretionary factors that may be presented.⁴⁶³

B. *Confronting Bias Against Children of Color*

Race dictates outcomes in the juvenile justice system⁴⁶⁴—from the explicitly racist rhetoric of the super-predator, which informed harsh policies, to implicit bias from adjudicators and other actors corresponding to negative

457. Several scholars have written about need and rights for representation in the immigration context. *E.g.*, Ingrid V. Eagley, *Gideon’s Migration*, 122 YALE L.J. 2282 (2013); Careen Shannon, *Immigration is Different: Why Congress Should Guarantee Access to Counsel in All Immigration Matters*, 17 U. D.C. L. REV. 165 (2014); Dan Kanstroom, *The Right to Deportation Counsel in Padilla v. Kentucky: The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461 (2011).

458. *See* C.J.L.G. v. Barr, 923 F.3d 622, 629 n.7 (9th Cir. 2019) (majority opinion) (“Because CJ will be represented by counsel in future administrative proceedings, we need not address his contention that appointment of counsel is constitutionally required.”); *see also id.* at 629 (Paez, Fletcher and Berzon, JJ.s, concurring) (“I would hold that [a Fifth-Amendment Right to appointed counsel] does [attach], for indigent children under age 18 who are seeking asylum, withholding of removal, CAT, or another form of relief for which they may be eligible, such as SIJ status.”).

459. 8 U.S.C. § 1232(c)(5) (2006).

460. *See generally* Erin B. Corcoran, *Getting Kids Out of Harm’s Way: The United States’ Obligation to Operationalize the Best Interest of the Child Principle for Unaccompanied Minors*, 47 CONN. L. REV. ONLINE 1 (2014); Benjamin Good, *A Child’s Right to Counsel in Removal Proceedings*, 10 STAN. J. C.R. & C.L. 109 (2014); Ashley Ham Pong, *Humanitarian Protections and the Need for Appointed Counsel for Unaccompanied Immigrant Children Facing Deportation*, 21 WASH. & LEE J. C. R. & SOC. JUST. 69 (2014).

461. NAGDA & WOLTJEN, *supra* note 450, at 107, 112.

462. Prior prosecutorial discretion guidance allowed for special care for cases of minors, as well as the elderly. *See* Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, to All Field Office Directors et al., at 4 (June 17, 2011), available at <https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

463. *See* Hlass, *The School to Deportation Pipeline*, *supra* note 15, at 759–61 (describing how false and flimsy gang allegations can be considered a negative discretionary factor).

464. *See generally* KIMBERLÉ WILLIAMS CRENSHAW ET AL., BLACK GIRLS MATTER: PUSHED OUT, OVERPOLICED AND UNDERPROTECTED (2015), available at http://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/54d2d22ae4b00c506cffe978/1423102506084/BlackGirlsMatter_Report.pdf.

outcomes for children of color. Immigrant children, who are primarily children of color, are similarly vulnerable to bias, both explicit⁴⁶⁵ and implicit.⁴⁶⁶ Specifically, in recent years, Latino boys have been subjected to explicitly racist discourse from the Trump administration.⁴⁶⁷ This racist and anti-child rhetoric, just like that of “super-predator” characterizations from earlier times, may inform and encourage overly punitive policies. An important first step in disrupting bias is identifying it.⁴⁶⁸ It is critical to consider and be conscious of how bias may infiltrate the immigration system, particularly for children.⁴⁶⁹ Once that is understood, the government can institute policies and systems to interrupt it. A leading study of implicit bias in courts suggest: 1) exposing individuals to counter-typical individual to undercut stereotypes; 2) increasing decision-makers’ motivation to decrease bias and question their own objectivity through trainings; and 3) improving conditions of decision-making so that adjudicators have sufficient time and resources to make decisions; and 4) collecting data regarding decision-making to understand how bias may be implicated in decisions.⁴⁷⁰

C. *Expanding the Conceptualization of Childhood*

Just as state legislatures acknowledged the role of brain development in the aftermath of *Roper and Graham*, the immigration system should strive for a more inclusive conceptualization of children afforded accommodations. Adolescent brain development research, which informed the Court’s juvenile decisions,⁴⁷¹ does not support eighteen as a marker for adulthood.⁴⁷² Policymakers should consider expanding protections reserved to unaccompanied

465. Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a ‘Post-Racial’ World*, 76 OHIO STATE L.J. 599, 608 (2015) (“[W]hile overt racism has played a role in its [crimmigration’s] development, structural inequality works to mask and entrench racism within the system as it allows for the continued racial disparities in a post-racial world—court decisions refuse to recognize it, society refuses to acknowledge it, and individuals can forcefully insist that they support the system as it stands because it is not based on race or racism.”).

466. Cognitive and social psychologists’ research demonstrates that people are often directed by unconscious attitudes and stereotypes of a variety of social categories including race. See Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1128 (2012).

467. See discussion *supra* Section II.A.

468. For example, in the juvenile justice context, Robin Walker Sterling argues for educating decision-makers to debunk the super-predator myth and explicitly making clear that black youth are not more prone to commit violent crime. See generally Walker Sterling, *supra* note 381.

469. See generally Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417 (2011).

470. Kang et al., *supra* note 466, at 1130–31 (providing counter-typical examples); *id.* at 1172–79 (describing how to disrupt bias in the courtroom).

471. The American Psychological Association (APA) and the American Medical Association (AMA) both submitted *amicus* briefs summarizing neuroscience evidence, proposing adolescents are fundamentally different from adults due to their ongoing brain development. See, e.g., Brief for the American Psychological Association and the Missouri Psychological Association as Amici Curiae Supporting Respondent, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633); Brief for the American Medical Association and the American Academy of Child and Adolescent Psychiatry as Amici Curiae in Support of Neither Party, *Graham v. Florida*, 560 U.S. 48 (2010) (Nos. 08-7412, 08-7621).

472. Sara B. Johnson et al., Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy, 45 J. ADOLESCENT HEALTH 216, 216–21 (2009).

minors to all children—up to age twenty-one, the marker of childhood under the INA, regardless of their status as accompanied or unaccompanied. Children’s family and custody status does not transform them into adults and should not determine whether child protections attach.

D. *Reconsidering the Character of the Immigration Legal System*

Although courts have long held that the immigration adjudication and removal system is a formally civil system and, therefore, should not be punitive,⁴⁷³ many scholars have made the case the system as implemented, is punitive.⁴⁷⁴ In contrast, the architects of the juvenile justice system have long used rhetoric that the underlying purpose of the system is rehabilitative, not punitive, because it is a civil, not a criminal system, although the system has long fallen short of these goals. Moreover, in the immigration legal system, no distinction has been drawn regarding the purpose of proceedings involving immigrant youth, differentiated from adults.

Facially, immigration proceedings are civil, just as in the juvenile justice system.⁴⁷⁵ However, while the Supreme Court has stated that immigration proceedings should be “nonpunitive in purpose and effect,”⁴⁷⁶ it has acknowledged these proceedings are “intimately related to the criminal process.”⁴⁷⁷ Meanwhile, scholars have extensively documented the ways in which the immigration and criminal justice systems have converged, with the immigration adjudication and enforcement apparatus mimicking the ideologies, approaches, and priorities within criminal law without incorporating the corresponding procedural rights.⁴⁷⁸ The system has become harsher in consequences, with a ballooning jailing system. Immigrant detention, in particular, is an area where the civil and criminal line is particularly blurred.⁴⁷⁹ Scholar César Cuauhtémoc García Hernández has made the case that because Congress intertwined immigrant detention with penal incarceration, they have created a “detention legal architecture that, in contrast with the prevailing legal characterization, is formally punitive.”⁴⁸⁰

473. Angela Banks writes how civil sanctions can sometimes be punitive and contends civil sanctions can be a useful approach to reconsidering deportation. Banks, *Proportional Deportation*, *supra* note 12, at 1654.

474. See generally K-Sue Park, *Self-Deportation Nation*, 132 HARV. L. REV. 1878 (2019).

475. See *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (stating that “deportation is not a punishment for [a] crime”); *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892); *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 603 (1889); *Carlson v. Landon*, 342 U.S. 524, 537–38 (1952) (stating that “[d]eportation is not a criminal proceeding and has never been held to be punishment” and that “[d]etention is necessarily a part of this deportation procedure”).

476. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

477. *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010).

478. Legomsky, *supra* note 12, at 472.

479. Beth Caldwell, *Banished for Life: Deportation of Juvenile Offenders as Cruel and Unusual Punishment*, 34 CARDOZO L. REV. 2261, 2277 (2013); Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 U. KAN. L. REV. 541, 561 (2011).

480. César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1349 (2014).

Scholars writing about the goals and purposes within the immigration legal system often focus solely on deportation,⁴⁸¹ and not on the purpose of the removal and adjudication system as a whole.⁴⁸² Ensuring control of the border and regulating the conduct of those who have been legally admitted are two categories of deportation.⁴⁸³ These forms of deportation often focus on the exclusion of certain people, relating to crime control, national security, ideological controls, public health, foreign policy, labor market, and economic policies.⁴⁸⁴ Scholar Daniel Kanstroom writes that deportation appears to be about border control, which in turn may serve “to safeguard culture, identity, social peace, security and relative wealth.”⁴⁸⁵ The Trump administration and at times those leading immigration policies during the Obama era made clear that rapid deportation of migrants and deterrence of future migrants are primary goals. As Trump tweeted, “[w]hen somebody comes in, we must immediately, with no Judges [sic] or Court Cases [sic], bring them back from where they came.”⁴⁸⁶ This sentiment echoes Obama’s DHS Secretary Jeh Johnson’s refrain to Central American asylum-seekers at the border: “[O]ur message to this group [of immigrants at the border] is simple: we will send you back.”⁴⁸⁷

The central question of the immigration legal system on whom to remove as a social control could be re-conceptualized as an adjudication system asking who has the ability to stay. Refocusing the inquiry makes clear that the system should not be one of deterrence or punishment, but one structured to ensure immigrants, particularly children, can access the protection to which they are eligible.

CONCLUSION

The immigration legal system has been widely criticized for its disproportionately harsh treatment of immigrants. Children, often seen as a special case under the law, fare no better. Migrant children are generally not acknowledged as entities unto themselves through a protectionist lens of

481. See Banks, *Proportional Deportation*, *supra* note 12, at 1658; see generally DANIEL KANSTROOM, *AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA* (2012).

482. Removability itself is a complex concept. See generally Jennifer Lee Koh, *Rethinking Removability*, 65 FLA. L. REV. 1803 (2013). There are many actors and agencies involved in the removal and adjudications system, who may have divergent goals. See Jason A. Cade, *The Challenge of Seeing Justice Done in Removal Proceedings*, 89 TUL. L. REV. 1, 18–28 (2014) (stating that trial attorneys “administer laws that bear on the nation’s public safety and security” but must do so “in ways that make the removal adjudication system as just and accurate as possible”).

483. KANSTROOM, *supra* note 481, at 31.

484. *Id.* at 32; see generally STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* (7th ed. 2018).

485. KANSTROOM, *supra* note 481, at ix.

486. President Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 10:02 AM), <https://twitter.com/realDonaldTrump/status/1010900865602019329>.

487. Wil S. Hylton, *The Shame of America’s Family Detention Camps*, N.Y. TIMES (Feb. 4, 2015), <https://www.nytimes.com/2015/02/08/magazine/the-shame-of-americas-family-detention-camps.html?module=inline> (stating that, according to a local city council officer in Artesia New Mexico, Secretary Johnson said: “[a]s soon as we get them, we’ll ship them back”).

infantilization. Additionally, the immigration legal system adultifies children by ignoring their special vulnerabilities throughout apprehension, enforcement, adjudication and deportation processes. By imposing procedures, practices and laws designed for adults onto children, the immigration legal system is effectively discriminating against children.

Similar to the immigration system, the juvenile justice system has fluctuated between infantilizing and adultifying children, with dire results for young people in the system. In reckoning with failures within the juvenile justice system, recent jurisprudence illuminates new possibilities in addressing children in the immigration system. This new approach must be proportionate, acknowledging and responding to special vulnerabilities of children. A reimagined immigration legal system for children must begin by naming and un-doing racist stereotyping of youth of color, expanding protections for more children, including those accompanied by an adult and older teenagers, and ultimately re-conceptualizing the purpose of immigration proceedings to effectuate justice.