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CHILD MIGRANTS AND CHILD WELFARE: TOWARD A BEST INTERESTS APPROACH

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I. INTRODUCTION

In the past five years, astounding numbers of unaccompanied children have migrated across Europe and North America, fleeing from social and economic instability, gang violence, armed conflict, and other intolerable circumstances.¹ Governments including ours have struggled to respond to this wave, or surge, or flood, or “influx” of children, both in highly practical terms and as a policy matter.² It has not been easy to strike a balance between prevention and protection, and between the goals of controlling immigration on one side and preserving families or protecting children on the other.³

Recognizing that nations have sovereign rights to define their citizenship, to control their borders, and to determine when and on what terms non-citizens may enter, we can nevertheless affirm that children are

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1 On the surge of child migration to the United States, see WILLIAM A. KANDEL, CONG. RESEARCH SERV., R43599, UNACCOMPANIED CHILDREN: AN OVERVIEW (2017), <https://fas.org/sgp/crs/homesecc/R43599.pdf>. See also UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, CHILDREN ON THE RUN: UNACCOMPANIED CHILDREN LEAVING CENTRAL AMERICA AND THE NEED FOR INTERNATIONAL PROTECTION (2014), <http://www.unhcr.org/en-us/about-us/background/56fc266f4/children-on-the-run-full-report.html>.

2 See U.S. OFFICE OF REFUGEE RESETTLEMENT, GUIDANCE: CHILDREN ENTERING THE UNITED STATES UNACCOMPANIED 1.7 (2015) (defining “influx”), <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied> [hereinafter ORR Guide].

3 See MARC R. ROSENBLUM, UNACCOMPANIED CHILD MIGRATION TO THE UNITED STATES: THE TENSION BETWEEN PROTECTION AND PREVENTION, MIGRATION POLICY INSTITUTE (2015), <https://www.migrationpolicy.org/research/unaccompanied-child-migration-united-states-tension-between-protection-and-prevention>.

entitled to special consideration, particularly when they have no parent or legal guardian present or available to assist them. The United States has taken significant steps toward extending this protection, following both our own constitutional principles and international human rights law. My thesis this afternoon is that we can and should do better.

Ten years ago, Congress signaled its intention to improve our treatment of unaccompanied minors entering the United States when it enacted the Trafficking Victims Protection Reauthorization Act.⁴ Since 2008, the federal agencies charged with implementing the Trafficking Act have made some important progress, but the tasks remain unfinished. At the same time, the numbers of children in the system have increased, and the problems have grown worse.

In evaluating the current situation, I want to distinguish between several sets of concerns, which correspond roughly with the division of responsibility within the federal government. First, one important objective is to provide children with more effective access to the different forms of humanitarian immigration relief that are available to them under U.S. statutes, as well as a safe pathway home if they are ultimately not permitted to remain in the United States. This falls within the jurisdiction of the Department of Homeland Security (and the immigration courts in the Department of Justice) and is primarily the business of immigration lawyers.

A separate objective is to assure that the federal agencies who take custody of unaccompanied minors are adequately addressing children's needs for care and protection as the process unfolds, including their need for legal representation. These responsibilities have been assigned to the Department of Health and Human Services.

Finally, there are policy questions as to how difficult or dangerous conditions in children's home countries might be improved, to help them remain safely at home. These are foreign relations issues, addressed primarily by the State Department.

As a family lawyer, my main interest is with the second set of questions, where the traditional child welfare concerns are most pronounced. These are also issues that often fall to the side when we read about and discuss immigration policy, and my goal is to help bring these concerns back into the conversation.

⁴ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008) (TVPRA). *See also* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, §§ 1261-1264, 127 Stat. 54 (2013).

II. FRAMEWORKS

Beyond the Trafficking Act, our obligation to protect unaccompanied minors can be grounded in three sources:

- Constitutional values of due process and equality;
- the *parens patriae* tradition and best interests principle, familiar from family law, and
- international human rights law, including the U.N. Convention on the Rights of the Child.

A. Due Process and Equality

In constitutional terms, undocumented adults and children who are present within the United States have Due Process and Equal Protection rights under the Fourteenth Amendment. This is clear from the text, which says that a state may not “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” For well over a century, the Supreme Court has read this language to include noncitizens who are present within the United States.⁵

At a minimum, the right to due process includes the right to fair procedures, including notice and an opportunity to be heard. These rights extend to children as well as adults,⁶ and are particularly important for children whose parents are not available to assist in their protection.⁷ Similarly, the right to equal protection has particular importance for children, who may have little control over the circumstances in which they find themselves.⁸

In 1982, the Court’s landmark ruling in *Plyler v. Doe*⁹ reaffirmed this reading and held that undocumented minors in Texas had a right to attend local public schools. In constitutional terms, however, *Plyler* is a bit unusual. Writing for the majority, Justice Brennan worried about the risk that our policies would create “a permanent caste of undocumented resident aliens,” noting: “The existence of such an underclass presents

⁵ See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (equal protection rights of non-citizens); *Wong Wing v. United States*, 163 U.S. 228 (1896) (due process rights in criminal prosecution).

⁶ See, e.g., *In re Gault*, 387 U.S. 1 (1967); *Parham v. J.R.*, 442 U.S. 584, 600 (1979).

⁷ See *Parham*, 442 U.S. at 617-20.

⁸ See, e.g., *Levy v. Louisiana*, 391 U.S. 68 (1968); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972); *Trimble v. Gordon*, 430 U.S. 762, 770 (1977).

⁹ *Plyler v. Doe*, 457 U.S. 202 (1982).

most difficult problems for a Nation that prides itself on adherence to principles of equality under the law.”¹⁰ But he rejected the claim that “illegal aliens” were a suspect class,¹¹ or that access to public education was a fundamental right.¹² The opinion drew analogies to the Court’s Equal Protection cases regarding nonmarital children, where it had applied intermediate scrutiny, and the majority ultimately concluded that the Texas policy of excluding undocumented children from its schools was “irrational” because it did not further any “substantial state interest.”¹³ This amounts to a type of intermediate scrutiny, an example of what Kerry Abrams and Brandon Garrett call a “cumulative” constitutional right.¹⁴ Four justices dissented in *Plyler*, applying traditional rational basis review and finding that the policy was rational as a means of conserving financial resources.

Plyler stands as the high-water mark of constitutional protection for undocumented immigrants. The majority emphasized the special circumstances of children who had been brought by their parents to the United States, arguing that their immigration status was a characteristic over which they had little control and for which they should not be penalized.¹⁵ The case reflects strong support for the values of fairness and equality, but the Court has not extended its holding in *Plyler* beyond what the Justices viewed as a unique situation.¹⁶ In light of their analysis, and the changes in the Supreme Court over the past generation, unaccompanied and undocumented minors appear to have very little hope of strong constitutional protection from the courts. This makes the statutory framework of the Trafficking Act especially important.

B. Best Interests and Measures of Protection

In the U.S. tradition, children have many of the constitutional rights that adults enjoy, but they do not have any rights as children. In international law, however, the International Covenant on Civil and

¹⁰ *Id.* at 219.

¹¹ *Id.* at 219 fn.19 & 223. The Court applies strict scrutiny to state laws discriminating against aliens who are lawfully present in the U.S., see *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971), but it has held that Congress’s powers over immigration and naturalization give it authority to enact laws that treat aliens and citizens differently, see *Mathews v. Diaz*, 426 U.S. 67 (1976).

¹² *Plyler*, 457 U.S. at 220-21 & 223.

¹³ *Id.* at 230.

¹⁴ Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. REV. 1309, 1337-38 (2017).

¹⁵ *Plyler* 457 U.S. at 219-21.

¹⁶ *E.g.* *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 459 (1988) (declining to extend *Plyler*).

Political Rights (ICCPR),¹⁷ and the U.N. Convention on the Rights of the Child (CRC)¹⁸ recognize children as having special rights.¹⁹

In the ICCPR, which the United States ratified in 1992, Article 24 mandates that “[e]very child shall have, without any discrimination as to race, colour, sex, language, religion, *national or social origin*, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society, and the state.” The CRC goes even further, providing in Article 3(1) that: “In all actions taken concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”²⁰ This is a powerful directive, with broad implications.

In the United States, family laws emphasize the child’s best interests when courts act to assign parental responsibilities after a divorce, approve adoptions, and protect child welfare. A wide range of state and federal statutes and policies reflect the government’s role in protecting children as *parens patriae*. In constitutional cases, the government interest in child protection is often characterized as compelling, serving as a counterweight to balance other interests, such as parental rights, which are protected by the Constitution.²¹ But our constitutional tradition has not required the state or federal government to act to protect children’s interests. In *DeShaney v. Winnebago County*, local child welfare authorities were aware that a child was at serious risk of injury from his father and failed to intervene, but the Supreme Court rejected a claim on the child’s behalf, concluding that the Due Process Clause does not confer any affirmative right to protection by the government.²²

What does it mean to say that the best interests of the child must be “a primary consideration”? According to the U.N. Committee on the Rights of the Child, the best interests principle operates on multiple levels: as a substantive right, as a procedural rule, and as a principle for interpreting

17 International Covenant on Civil and Political Rights, Dec. 6, 1966, 993 U.N.T.S. 171 (ICCPR).

18 Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 43 [hereinafter CRC]. Information about signature and ratification is available from the U.N. Treaty Collection website, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en.

19 Note that both the ICCPR and the CRC include broad prohibitions on discrimination, the ICCPR in article 24 and the CRC in article 2.

20 *Id.* art 3(1).

21 *E.g.*, *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944). *Compare Santosky v. Kramer*, 455 U.S. 745, 766 (1982) (majority opinion) *with id.* at 788-791 (Rehnquist, J., dissenting); *see also Troxel v. Granville*, 530 U.S. 57, 88-91 (2000) (Stevens, J., dissenting).

22 *DeShaney v. Winnebago County*, 489 U.S. 189 (1989).

provisions of the law.²³ Children’s interests may be balanced against other interests or rights, but the use of the word “primary” means “that the child’s interests have high priority and [are] not just one of several considerations.”²⁴ The language of Article 3 sweeps well beyond the scope of family law proceedings, to include all actions taken by “administrative authorities and legislative bodies.” The Committee has made clear in several of its “General Comments” that this includes immigration and asylum laws and proceedings.²⁵

Beyond the general obligation to consider a child’s best interests, the CRC articulates a more specific duty to provide protection and humanitarian assistance to children seeking refugee status. Thus, in cases “where no parents or other members of the family can be found,” Article 22 states that “the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason.”²⁶

We can see the force of these principles in the United Kingdom and the European Union more generally, where governments have made serious efforts to apply the CRC and prioritize children’s best interests in immigration cases.²⁷ In *ZH (Tanzania) v. Secretary of State*²⁸ the U.K. Supreme Court concluded that when U.K.-citizen children have a non-citizen parent (or parents), the decision to remove or deport the parent had to treat the best interests of the children as a primary consideration.²⁹ By comparison, courts in the United States do not weigh children’s best interests in the context of immigration proceedings. In situations like the one in *ZH*, U.S.-citizen children are routinely separated from their non-citizen parents, or effectively deported along with their parents, without a serious consideration of their best interests.³⁰

23 U.N. Comm. on the Rights of the Child, General Comment No. 14 (2013) on the Right of the Child to have his or her interests taken as a primary consideration, par. 6, U.N. Doc. CRC/C/GC/14 (2013).

24 *Id.* par. 39. Note that in the case of adoption, CRC article 21 provides that the child’s best interests must be the “paramount” consideration.

25 *Id.* par. 30; see also U.N. Comm. on the Rights of the Child, General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, U.N. Doc. CRC/GC/2005/6 (2005) [hereinafter CRC General Comment 6] and U.N. Comm. on the Rights of the Child, Joint Comment on Human Rights of Children in International Migration (2017) [hereinafter Joint Comment].

26 See also CRC, *supra* note 18, art. 20, (providing that a child who is temporarily or permanently deprived of his or her family environment “shall be entitled to special assistance and protection by the State.”)

27 See, e.g., Case C-648/11, *MA & Others v. United Kingdom*, EURO-LEX (June 6, 2013), <http://curia.europa.eu/juris/celex.jsf?celex=62011CJ0648&lang1=nl&type=NOT&ancre=>.

28 *ZH (Tanzania) v. Secretary of State* [2011] UKSC 4.

29 *Id.* at par. 26.

30 Nonpermanent residents seeking “cancellation of removal” must show among other factors that

In the context of unaccompanied minors, the leading case in the U.S. is *Reno v. Flores*, a class action lawsuit that challenged immigration detention of minors who did not have a parent, guardian, or other close relative available to take custody of them.³¹ The plaintiffs argued that keeping them in government custody violated their due process rights, and that immigration authorities should be required to make an individualized determination as to whether a child's "best interests lie in remaining in INS custody or in release to some other 'responsible adult.'"³² When the case reached the Supreme Court, Justice Antonin Scalia's majority opinion squarely rejected the plaintiffs' best interests argument. He wrote: "'The best interests of the child' is . . . not an absolute and exclusive constitutional criterion for the government's exercise of the custodial responsibilities that it undertakes, which must be reconciled with many other responsibilities."³³

Flores made it clear in 1993 that U.S. law does not follow the best interests principle as a constitutional matter, but Congress moved beyond *Flores* in 2008, with legislation that requires greater consideration for the best interests of unaccompanied minors. In the fifteen years between *Flores* and the Trafficking Act, the United States took a number of steps toward greater participation in the emerging system of international children's law, and the Trafficking Act should be understood as a central part of that project.

C. International Children's Rights

Discussing the CRC in the United States is its own difficult problem. It is well known that the United States has not ratified the CRC – alone among all the countries of the world – and is therefore not bound by its provisions.³⁴ But the U.S. signed the CRC in 1995. In international law terms, this signaled our intention to proceed toward ratification, and gave

removal "would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. § 1229b (1)(D). For a comparison of the U.K. and U.S. approaches, see Patrick J. Glen, *The Removability of Non-Citizen Parents and the Best Interests of Citizen Children: How to Balance Competing Imperatives in the Context of Removal Proceedings?*, 30 BERKELEY J. INT'L L. 1-34 (2012).

³¹ 507 U.S. 292 (1993).

³² *Id.* at 300.

³³ *Id.* at 304. The *Flores* case was later settled with an agreement that remains in effect. See *infra* notes 45, 70, and 71 and accompanying text.

³⁴ See generally LUISA BLANCHFIELD, CONG. RESEARCH SERV., R40484, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD (2013), <https://fas.org/sgp/crs/misc/R40484.pdf>.

rise to an obligation to do nothing that would undermine the treaty.³⁵ The United States has also participated in drafting two Optional Protocols to the CRC, one on the Sale of Children, Child Prostitution, and Child Pornography,³⁶ and another on the Involvement of Children in Armed Conflict,³⁷ and we ratified both of these in 2002. This is relevant to our topic today because child trafficking is a central concern of these protocols, and unaccompanied minors face serious trafficking risks.

So, the United States maintains an awkward stance with respect to international children's rights, with one foot inside the framework established by the CRC and the other resting somewhere outside it. While it seems unlikely that the political obstacles to ratification of the CRC will disappear any time soon, there has been bipartisan support in the United States, over the past thirty years, for other aspects of international children's law. For example:

- During the Reagan Administration (1980-1988), the United States signed and ratified the 1980 Hague Child Abduction Convention and enacted implementing legislation.³⁸
- During the George H. W. Bush Administration (1988-1992), the United States ratified the ICCPR.
- During the Clinton Administration (1992-2000), the United States signed the CRC, enacted legislation to implement the 1993 Hague Intercountry Adoption Convention,³⁹ ratified the 1999 Convention on the Worst Forms of Child Labour,⁴⁰ and signed the CRC Protocols.
- During the George W. Bush Administration (2000-2008), the United States ratified the CRC Optional Protocols, ratified the Adoption Convention,⁴¹ signed the 2007 Hague Child Support Convention,⁴² and enacted the Trafficking Act.

³⁵ Note that even if the United States ratified the CRC, it would likely do so with a set of reservations, understandings and declarations (RUDs). Based on prior human rights treaties, for example, it seems likely that the RUDs would provide that the Convention was non-self-executing.

³⁶ Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, May 25, 2000, 2171 U.N.T.S. 227.

³⁷ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, May 25, 2000, 2173 U.N.T.S. 222.

³⁸ See generally Ann Laquer Estin, *Families Across Borders: The Hague Children's Conventions and the Case for International Family Law in the United States*, 62 FLA. L. REV. 47, 70-71 (2010).

³⁹ *Id.* at 80-83.

⁴⁰ International Labour Organization [ILO], *Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*, C182 (June 17, 1999), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C182.

⁴¹ Estin, *supra* note 38, at 83-84.

⁴² *Id.* at 92-93

- During the Obama Administration (2008-2016), the United States signed the 1996 Hague Child Protection Convention,⁴³ and ratified the Child Support Convention.⁴⁴

Laws in the United States governing treatment of unaccompanied minors present a similarly mixed story. Important statutes and regulations designed to protect children fit awkwardly within a broader immigration system that does not embrace the best interests approach. Two legal developments are particularly significant: the 1997 Settlement Agreement in the *Flores* litigation (*Flores* Agreement), which came after the Supreme Court's opinion in the case,⁴⁵ and the Trafficking Act of 2008.⁴⁶

Based on its ratification of the CRC Protocols, the United States makes periodic appearances before the U.N. Committee on the Rights of the Child in Geneva, to report on our progress in implementation.⁴⁷ In 2012, the report from the United States highlighted the Trafficking Act and also the new DACA Program, or "Deferred Action for Childhood Arrivals."⁴⁸ In its conclusions, the Committee welcomed these developments, but also recommended that the U.S. take further steps, including "the incorporation of a 'best interests determination' for unaccompanied children in all decisions throughout immigration-related procedures"⁴⁹ and efforts to ensure that every unaccompanied child is "appointed an independent Child Advocate to protect the child's best interests in all immigration-related procedures and . . . represented in all immigration court proceedings by a qualified attorney."⁵⁰ In 2017, the Committee made more extensive recommendations, noting the significant increase in the number of

43 See generally *id.* at 94-98.

44 Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, § 301, 128 Stat. 1919, 1943-45 (2014). On the policies of the Trump Administration, see *infra* note 70.

45 See Stipulated Settlement Agreement in *Flores v. Reno*, *Documents Relating to Flores v. Reno Settlement Agreement on Minors in Immigration Custody*, AMERICAN IMMIGRATION LAWYERS ASS'N (July 5, 2017), <http://www.aila.org/infonet/flores-v-reno-settlement-agreement> [*Flores* Agreement].

46 TVPRA, *supra* note 4.

47 The initial U.S. report was considered by the CRC Committee in 2008, with subsequent reports considered in 2012 and 2017. The next periodic report by the United States is due in January 2022. U.S. Treaty Reports are available at *U.S. Treaty Reports*, U.S. DEPT. STATE, <https://www.state.gov/j/drl/reports/treaties/index.htm#ftn5> (last visited May 3, 2018).

48 Guidelines for DACA, or "Deferred Action for Childhood Arrivals," were issued in a memorandum from the DHS in June 2012, but at the time of this writing the status of the program was not clear.

49 Comm. on the Rights of the Child, Concluding Observations on the Second Periodic Report of the United States of America Submitted Under Article 12 of the Optional Protocol to the Convention on the Sale of Children, Child Prostitution and Child Pornography, Adopted by the Committee at Its Sixty-Second Session (14 January – 1 February 2013), CRC/C/OPSC/USA/CO/2, par. 47 (2013), <https://www.state.gov/documents/organization/246457.pdf>.

50 *Id.*

unaccompanied children arriving in the United States, the fact that many children have no legal representation in deportation proceedings, and reports that children were being returned or released to traffickers or to a risk of trafficking.⁵¹

To summarize, the CRC mandate to give “primary consideration” to children’s best interests includes children who are migrants, refugees and asylum-seekers.⁵² It applies to initial screening and assessment of unaccompanied minors, to their care and accommodation, to appointment of a guardian and legal representative, and to the evaluation of their immigration and asylum claims.⁵³ Moreover, in common with all other children, unaccompanied minors have basic rights to education, health care, protection from exploitation, and due process.⁵⁴ These principles should be a touchstone of our policies toward child migrants.

III. PROTECTING CHILD MIGRANTS

With that background, let me turn to the laws in the United States that govern our treatment of unaccompanied minors. These cases present a series of difficult child welfare questions, some addressed by the Trafficking Act and others that fall into the gap between immigration and child welfare law. The statutes address a number of different child protection challenges, including initial screening of children who are detained or apprehended, locating family members and making placements for children, and finding legal representation for children in immigration proceedings. Another area of difficulty, which is not addressed in the statute, has been coordination between the federal agencies and the state child welfare system.

In the United States, of course, child protection cases are primarily the business of state courts and agencies, in a system that is supported by federal funding and shaped by federal guidelines that mandate certain protections for children and families.⁵⁵ State child welfare authorities have

51 Comm. on the Rights of the Child, Concluding Observations on the Combined Third and Fourth Reports Submitted by the United States of America Under Article 12(1) of the Optional Protocol to the Convention on the Sale of Children, Child Prostitution and Child Pornography, CRC/C/OPSC/USA/CO/3-4, par. 38-39 (2017).

52 CRC General Comment 6, *supra* note 25.

53 See generally INTERAGENCY WORKING GROUP ON UNACCOMPANIED AND SEPARATED CHILDREN, SUBCOMMITTEE ON BEST INTERESTS, FRAMEWORK FOR CONSIDERING THE BEST INTERESTS OF UNACCOMPANIED CHILDREN (2016), <https://www.gcir.org/sites/default/files/resources/2016%20Young%20Center%20Framework%20for%20Considering%20Best%20Interests%20of%20Unaccompanied%20Children.pdf>.

54 See *supra* part II for a discussion of *Plyler*.

55 Title IV-B and IV-E of the Social Security Act, 42 U.S.C. §§ 602, 670 (2018).

some experience with international cases, when children who are present within their jurisdiction have a habitual residence in another country or family members living abroad.⁵⁶ When a guardian is appointed for a child who is a citizen of another country, child welfare authorities may be required to inform foreign consular officials.⁵⁷ Local authorities may need to locate a child's parents or family members in another country, in order to provide notice of proceedings, or identify a potential placement for the child with another family member.⁵⁸ In cases involving unaccompanied minors, however, state courts and agencies have a highly limited role.⁵⁹

Since 2002, responsibility for unaccompanied minors is divided between the federal Department of Homeland Security (DHS), which carries out immigration enforcement, and the Office of Refugee Resettlement (ORR) in the Department of Health and Human Services.⁶⁰ ORR has responsibility for “coordinating and implementing the care and placement of unaccompanied alien children,”⁶¹ and also for “ensuring that the interests of the child are considered in decisions and actions” relating to their care and custody.⁶²

In contrast to state courts and child welfare agencies, ORR does not have much history or expertise in child welfare, and yet it has had to establish policies and practices, train social workers, recruit partners, and monitor compliance with the law for a very large number of children. When the Trafficking Act was enacted, these responsibilities extended to between 6,000 and 8,000 unaccompanied children each year. Since 2008, those numbers have increased dramatically, peaking at more than 68,000 children in fiscal year 2014.⁶³ As it has struggled to scale up to meet this challenge, the agency published a *Guide to Children Entering the United States Unaccompanied* (ORR Guide)⁶⁴ in 2015, collecting its policies on

⁵⁶ See generally Ann Laquer Estin, *Global Child Welfare: The Challenges for Family Law*, 63 OKLA. L. REV. 691, 694-97 (2011).

⁵⁷ Vienna Convention on Consular Relations art. 36(1)(b), April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (entered into force March 19, 1967). See generally Estin, *supra* note 51, at 701-03.

⁵⁸ Estin, *supra* note 56, at 708-10.

⁵⁹ See *infra* notes 109 to 119.

⁶⁰ Homeland Security Act of 2002, Pub. L. No. 107-296, § 462, 116 Stat. 2135 (2002) (transferring responsibility for children's affairs to the Office of Refugee Resettlement in the Department of Health and Human Services). See also TVPRA, *supra* note 4. For data, see OFFICE OF REFUGEE RESETTLEMENT, ANNUAL REPORT TO CONGRESS FISCAL YEAR 2015 (2017), <https://www.acf.hhs.gov/orr/resource/office-of-refugee-resettlement-annual-report-to-congress-2015> [hereinafter ORR Annual Report].

⁶¹ 6 U.S.C. § 279(b)(1)(A).

⁶² 6 U.S.C. § 279(b)(1)(B).

⁶³ Kandel, *supra* note 1, at 2.

⁶⁴ ORR Guide, *supra* note 2.

the placement, release, and care of unaccompanied children. In effect, ORR is a child welfare agency with a caseload larger than many states handle.

A. Initial Screening

When an unaccompanied (and “inadmissible”) child is stopped at or near the U.S. border, the Trafficking Act defines two different procedures, depending on the child’s home country. For children from Canada or Mexico, the U.S. Customs and Border Patrol must conduct a screening within forty-eight hours to determine whether the child is a trafficking victim, has a potential claim for asylum, or is unable for some reason to make an independent decision regarding whether to return home voluntarily.⁶⁵ If one of these determinations is made, or if screening is not possible within forty-eight hours, the child must be transferred to the care and custody of ORR. Otherwise, the child is permitted to return home voluntarily, that is, without serious immigration consequences.⁶⁶

Unaccompanied minors from other countries, and children from Canada or Mexico who are apprehended within the United States (rather than at the border), must be transferred within seventy-two hours to ORR custody.⁶⁷ This group includes the large number of children coming into the United States from the Northern Triangle countries of El Salvador, Guatemala, and Honduras. Because they arrive from “non-contiguous countries,” the Trafficking Act provides that they may not be returned immediately.⁶⁸ At the same time that immigration authorities transfer custody of unaccompanied children to ORR, they begin immigration removal proceedings.⁶⁹ From the outset, then, children who remain in the United States are subject to the jurisdiction of both agencies.

Beyond those children who are unaccompanied when they arrive in the United States or are found here, there are important questions about the treatment of children who are accompanied at the time they are

⁶⁵ 8 U.S.C. § 1232(a)(2)(A) & (a)(4). See U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-15-521, UNACCOMPANIED ALIEN CHILDREN: ACTIONS NEEDED TO ENSURE CHILDREN RECEIVE REQUIRED CARE IN DHS CUSTODY (2015) [hereinafter UNACCOMPANIED ALIEN CHILDREN].

⁶⁶ See 8 U.S.C. § 1232(a)(2)(B) and § 1229c. The statute includes further provisions designed to ensure safe repatriation; see § 1232(a)(5); see also *infra* notes 155 to 158 and accompanying text.

⁶⁷ 8 U.S.C. §§ 1232(a)(3) and (b). See generally ORR Guide, *supra* note 2. Another useful resource is: OLGA BYRNE & ELISE MILLER, THE FLOW OF UNACCOMPANIED CHILDREN THROUGH THE IMMIGRATION SYSTEM: A RESOURCE FOR PRACTITIONERS, POLICY MAKERS, AND RESEARCHERS (March 2012), http://uf.imumi.org/recursos/flow_unaccompanied_children.pdf. Byrne and Miller found that up to 15% of unaccompanied minors entered the system as a result of being apprehended within the United States rather than at a port of entry. *Id.* at 4.

⁶⁸ *Id.*

⁶⁹ See 8 U.S.C. § 1229a and § 1232(a)(5)(D).

apprehended and then separated from their parents or caretakers by immigration authorities.⁷⁰ In addition to the other issues addressed here, these cases involve rights of family integrity protected under both U.S.⁷¹ and international law.⁷² After separating children from their parents at the border, often without careful procedures, federal agencies have treated them as unaccompanied children, and it appears that some of these separations will be longstanding.⁷³

There are many concerns about how initial screenings of unaccompanied children are carried out by the Border Patrol, which has not been consistent or transparent about this stage of the process.⁷⁴ One particular question has been how the age of unaccompanied children is determined. U.S. law defines an “unaccompanied alien child” as an individual who has no lawful immigration status in the United States, who has not attained eighteen years of age, and who has no parent or legal guardian present in the United States or available to provide care and physical custody.⁷⁵ Many children crossing the border do not have documents to prove their age, and their birth may never have been registered. The difficulty is compounded by the fact that many individuals seeking to be treated as unaccompanied minors are older teenagers, who may appear to be adults.⁷⁶

70 See *Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016) (holding that the *Flores* Agreement applies to accompanied minors, but does not require that accompanying parents be released from detention). On the evolving U.S. policy in this area, see Caitlin Dickerson, *Trump Administration Targets Parents in New Immigration Crackdown*, N.Y. TIMES, July 1, 2017; Caitlin Dickerson & Ron Nixon, *Trump Administration Considers Separating Families to Combat Illegal Immigration*, N.Y. TIMES, Dec. 21, 2017; Caitlin Dickerson, *Hundreds of Immigrant Children Have Been Taken From Parents at U.S. Border*, N.Y. TIMES, Apr. 20, 2018; Michael D. Shear, Abby Goodnough and Maggie Haberman, *Trump Retreats on Separating Families, but Thousands May Remain Apart*, N.Y. TIMES, June 20, 2018.

71 See *Ms. L. v. U.S. Immigration and Customs Enforcement*, 302 F. Supp. 3d 1149 (S.D. Cal. 2018) (holding that lawsuit stated a claim for violation of class members’ due process right to family integrity); *Ms. L. v. U.S. Immigration and Customs Enforcement*, ___ F. Supp. 3d ___, 2018 WL 3129486 (S.D. Cal. 2018) (granting preliminary injunction prohibiting separation and requiring reunification of families unless parent is unfit or presents a danger to the child).

After the ruling in *Ms. L.*, DHS began to detain families together, but the agency may not hold children in family detention for longer than the 20-day maximum set by the *Flores* Agreement. See Miriam Jordan & Manny Fernandez, *Judge Rejects Long Detentions of Migrant Families, Dealing Trump Another Setback*, N.Y. TIMES, July 9, 2018.

72 See ICCPR, *supra* note 17, at art. 23; CRC, *supra* note 18, at arts. 5, 7, 8, and 9.

73 The absence of careful procedures made it difficult for the agencies to achieve reunification after this was ordered by the court, particularly for very young children. See also Miriam Jordan, *‘I Can’t Go Without My Son,’ a Mother Pleaded as She Was Deported to Guatemala*, N.Y. TIMES, June 17, 2018.

74 See UNACCOMPANIED ALIEN CHILDREN, *supra* note 65.

75 6 U.S.C. § 279(g)(2).

76 See Elisabeth Braw, *When ‘Underage’ Refugees Look Anything But*, FOREIGN POLICY (Jan. 13,

Countries including the United States utilize medical tests such as dental or wrist-bone x-rays in making this age determination, but the use of x-rays has been controversial.⁷⁷ The Trafficking Act requires that procedures for age determination “take into account multiple forms of evidence, including the non-exclusive use of radiographs.”⁷⁸ The ORR Guide expands on this requirement, noting that “each case must be evaluated carefully based on the totality of all available evidence, including the statement of the individual in question.”⁷⁹

In a General Comment, the CRC Committee has underlined the importance of making this determination quickly, but also in “a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child.”⁸⁰ Identification measures should take into account the physical appearance of the individual, and his or her “psychological maturity.” An individual should be afforded the benefit of the doubt if there is any uncertainty after the assessment.⁸¹

B. Finding Families

According to the ORR Guide, the initial interview with a child should be conducted “in an age-appropriate and gender-sensitive manner” in a language the child understands. One key question is to determine who the child’s family members are, including parents, siblings, and other relatives, with the goal of keeping family members together, when possible, or reunifying the child with his or her family.⁸² The ORR Guide states that the agency “begins the process of finding family members and others who may be qualified to care for an unaccompanied alien child as soon as the child enters ORR’s care.”⁸³ Consular notification may be required, and foreign consulates may be helpful in authenticating documents and tracing family members.⁸⁴

There is a clear analogy here to U.S. child welfare laws, which require

2016), <http://foreignpolicy.com/2016/01/13/when-underage-refugees-look-anything-but-age-tests-sweden/>.

⁷⁷ See Marie-Bénédicte Dembour, *Surely Not! Procedurally Lawful age Assessments in the UK*, in UNACCOMPANIED CHILDREN IN EUROPEAN MIGRATION AND ASYLUM PRACTICES: IN WHOSE BEST INTERESTS? 155 (Mateja Sedmak et al., eds. 2018).

⁷⁸ 8 U.S.C. § 1232(b)(4).

⁷⁹ ORR Guide, *supra* note 2, at 1.6.

⁸⁰ CRC General Comment 6, *supra* note 25, at par. 31.

⁸¹ *Id.*

⁸² CRC General Comment 6, *supra* note 25, at par. 31, 40. See also ORR Guide, *supra* note 2, at 1.2.7.

⁸³ ORR Guide, *supra* note 2, at 2.2.

⁸⁴ ORR Guide, *supra* note 2, at 5.4. Compare the rule on consular notification when children come into the state child welfare system, noted *supra* note 57.

state agencies to make “reasonable efforts” to preserve and reunify families.⁸⁵ Agencies must also make efforts to find relatives for a child who has been removed from the care of his or her parents,⁸⁶ and the laws prioritize placements with family members when a child is in need of alternative care.⁸⁷

In some situations, even when family members are located for an unaccompanied minor, family reunification is not appropriate, either because the child’s parents or other family members are not suitable custodians for the child,⁸⁸ or because circumstances in the child’s country of origin present a risk of harm to the child.⁸⁹ In one interesting and complicated case, after three brothers from Mexico requested asylum at the U.S. border in El Paso, their mother filed a return petition under the Hague Child Abduction Convention, alleging that the children were being wrongfully retained by the United States. After the mother obtained a return order in federal district court, the children were granted asylum in immigration court.⁹⁰ On appeal, the Fifth Circuit vacated the return order and remanded the Hague case for a hearing at which the children’s interests could be represented by a guardian ad litem.

C. Making Placements

Children who are transferred to ORR are placed initially in shelters, where they remain for an average of two months.⁹¹ Under the Trafficking Act, ORR must place children “in the least restrictive setting that is in the best interests of the child.”⁹² Most children are ultimately placed with a

85 Under Title IV-B and IV-E of the Social Security Act, state child welfare systems must make reasonable efforts to preserve and reunify families. *See* 42 U.S.C. § 671(a)(15)(B) (2018).

86 *See* 42 U.S.C. § 671(a)(29) (procedures required to search for and notify adult relatives); *see also* 42 U.S.C. § 627(a)(2) (support for “family-finding”). In the international context, *see* Felicity Sackville Northcott, *Pathways to Permanency: Supporting Cross-Border Family Finding and Engagement for Children in Foster Care*, 22 *TRANSNAT’L L. & CONTEMP. PROBS* 623 (2013).

87 *See* 42 U.S.C. § 671(a)(19) (prioritizing placement with child’s adult relatives). *See also* United Nations Guidelines for the Alternative Care of Children, G.A. Res. 64/142, U.N. Doc. A/RES/64/142 (Feb. 24, 2010).

88 *Cf. D.B. v. Cardall*, 826 F.3d 721 (4th Cir. 2016), *remanded by* 222 F.Supp.3d 476 (E.D. Va. 2016).

89 CRC General Comment 6, *supra* note 25, at par. 81-84.

90 *Sanchez v. R.G.L.*, 761 F.3d 495 (5th Cir. 2014). *See generally* Ann Laquer Estin, *Protecting Child Welfare in Abduction and Asylum Proceedings*, 41 *N.C. J. INT’L L.* 793 (2016).

91 Byrne & Miller, *supra* note 67, at 4, 14-17. This statistic was reported in 2012, and probably understates the length of stay in shelters for more recently-arrived children. The ORR shelters are described in Manny Fernandez, *Inside the Former Walmart That Is Now a Shelter for Almost 1,500 Migrant Children*, N.Y. *TIMES*, June 14, 2018; and Manny Fernandez and Katie Benner, *The Billion-Dollar Business of Operating shelters for Migrant Children*, N.Y. *TIMES*, June 21, 2018.

92 8 U.S.C. §§ 1232(e)(2).

sponsor living in the United States, typically a family member, while they await immigration proceedings.⁹³ In fiscal year 2015, more than 33,726 unaccompanied children came into the care of ORR, and more than eighty percent were placed with a sponsor.⁹⁴ Of the children released to sponsors during the last fiscal year, approximately seventy percent were released to their parents, siblings, or grandparents, with twenty-three percent released to other relatives and 7 percent to nonrelatives.⁹⁵

ORR must assess the safety and suitability of the proposed custodian, including a home study in some – but not all – situations.⁹⁶ When no sponsor is available, an unaccompanied minor may be placed in foster care⁹⁷ or a secure (detention) facility. Children may not be placed in detention without “a determination that the child poses a danger to self or others or has been charged with having committed a criminal offense.”⁹⁸ Under the *Flores* Agreement, children in detention have the right to a bond hearing before an immigration judge, a point reaffirmed by the Ninth Circuit in 2017.⁹⁹

Under the Trafficking Act, ORR must determine that a proposed custodian “is capable of providing for the child’s physical and mental well-being.”¹⁰⁰ At a minimum, this includes verification of the proposed custodian’s identity and relationship to the child. In some circumstances, a home study must be completed prior to placement: if the child has special needs, has been a victim of trafficking or physical or sexual abuse, or if a proposed sponsor “clearly presents a risk of abuse, maltreatment, exploitation, or trafficking to the child based on all available objective

93 Byrne & Miller, *supra* note 67, at 4, 17-21. See U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-16-180, UNACCOMPANIED CHILDREN: HHS CAN TAKE FURTHER ACTIONS TO MONITOR THEIR CARE (2016) (“Between January 2014 and April 2015, ORR released about 50,000 children from Central America to sponsors to await their immigration hearings. In nearly 90 percent of these cases, the sponsors were a parent or close relative already residing in the United States.”).

94 See ORR Annual Report, *supra* note 60, at 41-4. Note that recent policy shifts by the Trump Administration are likely to discourage unaccompanied minors from reuniting with their parents after arriving in the United States. See Caitlin Dickerson, *Trump Administration Targets Parents in New Immigration Crackdown*, N.Y. TIMES, July 1, 2017; Sonia Nazario, *Opinion, These Are Children, Not Bad Hombres*, N.Y. TIMES, Feb. 25, 2017.

95 See ORR Annual Report, *supra* note 60, at 42-3. The placement process has been difficult for children separated from their parents at the border under the new policies discussed *supra* at notes 70 - 73 and accompanying text. See Miriam Jordan, *Sponsors of Migrant Children Face Steep Transport Fees and Red Tape*, N.Y. TIMES, July 1, 2018.

96 8 U.S.C. §§ 1232(c)(3). See also Wendy Young & Megan McKenna, *The Measure of a Society: The Treatment of Unaccompanied Refugee and Immigrant Children in the United States*, 45 HARV. CIV. RTS.-CIV. LIB. L. REV. 247 (2010).

97 8 U.S.C. §§ 1232(c)(2)(A) and 8 U.S.C. § 1522(d).

98 *Id.*

99 See *Flores v. Sessions*, 862 F.3d 863 (9th Cir. 2017); see also Miriam Jordan, *Detained Immigrant Children are Entitled to Hearings, Court Rules*, N.Y. TIMES, July 5, 2017.

100 8 U.S.C. § 1232(c)(5). See also Kandel, *supra* note 1, at 8-9.

evidence.”

These procedures are further elaborated in the ORR Guide,¹⁰¹ but they are not adequately followed. In 2015, law enforcement officials uncovered a human trafficking ring that brought children from Guatemala to the U.S. border, and obtained custody of the children again from ORR after they were apprehended, and then put the children to work on egg farms in Ohio, leading to a federal criminal indictment.¹⁰² A follow-up investigation by a Senate committee concluded that the agency’s policies and procedures were inadequate to protect the children in the agency’s care, particularly with respect to sponsors who have no close relation to the child.¹⁰³ The agencies agreed to establish new procedures, but more than a year after the guidelines were due they had not been completed.¹⁰⁴

After ORR places a child with a sponsor, “the care and well-being of the child becomes the responsibility of that sponsor.”¹⁰⁵ Although most children do not receive post-release services from ORR, the agency does follow up with some children, such as those for whom there has been a home study, children who are placed with a non-relative, or children determined to have special needs.¹⁰⁶ According to its policy guidelines, all children released to a sponsor receive a “Safety and Well-Being Follow – Up Call” thirty days after the child’s release from ORR custody, to determine whether the child is still residing with the sponsor, is enrolled in or attending school, is aware of upcoming court dates, and is safe.¹⁰⁷ When ORR made these calls to check on 7,635 children at the end of 2017, however, it was unable to locate 1,475 of them.¹⁰⁸

D. Coordinating with Family Courts and Agencies

101 ORR Guide, *supra* note 2, at 2.1-2.8

102 See Emmarie Huetteman, *U.S. Placed Immigrant Children with Traffickers, Report Says*, N.Y. TIMES, Jan. 28, 2016.

103 U.S. SENATE, PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, PROTECTING UNACCOMPANIED ALIEN CHILDREN FROM TRAFFICKING AND OTHER ABUSES: THE ROLE OF THE OFFICE OF REFUGEE RESETTLEMENT (2016), https://www.hsgac.senate.gov/download/majority-and-minority-staff-report_-_protecting-unaccompanied-alien-children-from-trafficking-and-other-abuses-the-role-of-the-office-of-refugee-resettlement.

104 See Ron Nixon, *Federal Agencies Lost Track of Nearly 1,500 Migrant Children Placed With Sponsors*, N.Y. TIMES, Apr. 26, 2018.

105 See ORR Annual Report, *supra* note 60, at 46.

106 *Id.* See also ORR Guide, *supra* note 2, at 6.1-6.4.

107 ORR Guide, *supra* note 2, at 6.1.

108 See Nixon, *supra* note 104.

Neither the Trafficking Act nor the ORR Guide address the complex interface that may be necessary between unaccompanied minor cases and the state courts and child welfare agencies. Many different circumstances could call for the involvement of state authorities in unaccompanied minor cases. For example:

- When a child is placed by ORR with a sponsor who is not the child's parent, that individual will need to obtain appropriate orders from the local family or juvenile court to act as the child's guardian.
- Children and parents who are reunited by ORR, often after many years of separation, may not have an easy time adjusting to their new life together.
- A child in ORR custody who secures the right to remain in the United States, whether by asylum or on other grounds, may be transferred to long-term foster care.¹⁰⁹
- Children seeking Special Immigrant Juvenile status from immigration authorities must obtain a best interest determination from a state court in order to be eligible. This presents serious difficulties in some cases because state court judges are often unfamiliar with the requirements of federal immigration law.¹¹⁰

These coordination problems may arise in the other direction, when state agencies and courts encounter children without legal immigration status among their child welfare caseload, or when child trafficking victims come to the attention of local law enforcement. The complexity is illustrated by *In re Y.M.*¹¹¹ a California case which considered the concurrent jurisdiction of state and federal authorities regarding a teenage victim of sexual and physical abuse who had been trafficked from Guatemala to California.¹¹² In its opinion, the court pointed out that children in California dependency proceedings are entitled to appointment

¹⁰⁹ ORR Guide, *supra* note 2, at 1.2.6. Note that ORR foster-care programs are not state funded and not part of the state child welfare system, but ORR foster care families must be licensed by the state to serve as foster care families. *See id.* at 3.6.

¹¹⁰ *See infra* notes 131 to 134 and accompanying text; *see generally* ANN LAQUER ESTIN, INTERNATIONAL FAMILY LAW DESK BOOK 309-311 (2d ed. 2016). *See also* Laila L. Hlass, *Minor Protections: Best Practices for Representing Child Migrants*, 47 N.M. L. Rev. 247, 278-80 (2017); Elizabeth Keyes, *Evolving Contours of Immigration Federalism: The Case of Migrant Children*, 19 HARV. LATINO L REV. 33 (2016); and Liz Robbins, *Immigration Crisis Shifts from Border to Courts*, N.Y. TIMES, Aug. 23, 2015.

¹¹¹ *In re Y.M.*, 144 Cal. Rptr.3d 54 (Cal. Ct. App. 2012).

¹¹² After dependency proceedings began in California, the girl was transferred to federal custody and placed in a specialized residential treatment program in another state. The court concluded that the transfer had not deprived the state courts of jurisdiction to provide services or to make SIJ findings.

of a guardian ad litem and receive other protections that are not available through the federal system.

The disconnect between state child welfare systems and the federal agencies responsible for unaccompanied minors became more obvious when large numbers of children were separated from their parents at the southern border and sent to live in shelters or with foster families all over the country. These shelters and families must be state licensed,¹¹³ but state officials were not informed about the influx of children into their states.¹¹⁴ Moreover, in contrast to the mandate to use best efforts to preserve and reunify families that applies to children in the care of the state,¹¹⁵ federal immigration authorities removed children without having a system to determine their identity or to keep track of separated parents and children.¹¹⁶

The Committee on the Rights of the Child takes the view that children in the context of international migration should be “treated first and foremost as children.”¹¹⁷ It recommends that migrant children should be mainstreamed into existing child protection programs at the national and local levels,¹¹⁸ and that there should be “comprehensive, inter-institutional policies between child protection and welfare authorities and other key bodies,” including migration authorities.¹¹⁹ With the current state of the law, the United States is far from meeting this standard.

E. Finding Legal Representation

In addition to its responsibilities to care for unaccompanied children, the Trafficking Act directs ORR to organize “legal orientation presentations” and also to assure, “to the greatest extent practicable,” that children in its custody “have counsel to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking.”¹²⁰ Unfortunately, this mandate does not include an

¹¹³ See *supra* note 109.

¹¹⁴ See Liz Robbins, *Hundreds of Separated Children Have Quietly Been Sent to New York*, N.Y. TIMES June 20, 2018; Jesse McKinley, *Cuomo Jumps to the Front Line in Battle Over Separated Children*, N.Y. TIMES, June 22, 2018.

¹¹⁵ See *supra* note 85 and accompanying text

¹¹⁶ See Annie Correal and Liz Robbins, *First Step to Helping Children Sent to New York: Find Them*, N.Y. TIMES, June 21, 2018; Maria Sacchetti, *Trump administration seeks more time to reunite some migrant families split at border*, WASH. POST, July 6, 2018.

¹¹⁷ Joint Comment, *supra* note 25, at par. 11.

¹¹⁸ *Id.* par. 14.

¹¹⁹ *Id.* par. 18.

¹²⁰ See 8 U.S.C. § 1232(c)(5); see also Byrne & Miller, *supra* note 67, at 22-24.

obligation – or funding – to pay for legal representation. Important efforts have been made to provide “know your rights” presentations to children in ORR custody, and to develop pro bono referral networks, but it has proved to be extremely difficult to find volunteer lawyers for many thousands of unaccompanied minors.¹²¹

Without legal assistance, children face a very difficult time in immigration removal proceedings, even when they may have strong claims for humanitarian relief. Because the system is enormously complicated, access to legal representation is essential. According to data from immigration proceedings conducted between 2014 and 2016, only thirteen percent of children who had legal representation were ordered removed from the United States, while eighty-eight percent of children who did not have legal representation were ordered removed.¹²²

The Trafficking Act also authorizes ORR to appoint independent child advocates for child trafficking victims and some other especially vulnerable children.¹²³ This program has also not been effectively implemented.¹²⁴ By contrast, in the state child welfare system, federal law directs the states to provide a guardian ad litem to represent children in all abuse and neglect cases that result in judicial proceedings.¹²⁵ The role of the GAL in domestic cases is to “obtain first-hand, a clear understanding of the situation and needs of the child,” and to “make recommendations to the court concerning the best interests of the child.”

Legal representation or a child advocate can help to assure that the child’s views are heard in immigration or other proceedings. This is required by the CRC, which provides in Article 12 that children must be provided the opportunity to be heard “in any judicial or administrative proceedings directly affecting the child, either directly or through a representative.”¹²⁶ Given the complexity of immigration and asylum law,

121 *Id.* (“To the greatest extent practicable, the Secretary of Health and Human Services shall make every effort to utilize the services of pro bono counsel who agree to provide representation to such children without charge.”); *see also* 8 U.S.C. § 1362. These issues were litigated in *J.E.F.M. v. Lynch*, 837 F.3d 1026 (9th Cir. 2016), but the court did not reach the merits in its opinion. *See also infra* note 154.

122 Kandel, *supra* note 1, at 12-13. *See also* Hlass, *supra* note 110, at 270-71.

123 8 U.S.C. § 1232(c)(6); *see also* ORR Guide, *supra* note 2, at 2.3.4

124 *See* U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-16-367, UNACCOMPANIED CHILDREN: HHS SHOULD IMPROVE MONITORING AND INFORMATION SHARING POLICIES TO ENHANCE CHILD ADVOCATE PROGRAM EFFECTIVENESS (2016). *See also* CENTER FOR REFUGEE STUDIES AND KIDS IN NEED OF DEFENSE, A TREACHEROUS JOURNEY: CHILD MIGRANTS NAVIGATING THE U.S. IMMIGRATION SYSTEM 75-76 (2014), http://www.uchastings.edu/centers/cgrs-docs/treacherous_journey_cgrs_kind_report.pdf [hereinafter *Treacherous Journey*].

125 42 U.S.C. § 5106a(b)(2)(B)(xiii); *but see generally* Gerard F. Glynn, *The Child’s Representation Under CAPTA: It Is Time for Enforcement*, 6 NEV. L.J. 1250 (2006).

126 CRC, *supra* note 18, art. 12(2). *See also* U.N. Comm. on the Rights of the Child, General

legal representation is often essential to full consideration of children's claims for relief. This is an important area in which Congress could improve the protections of the Trafficking Act.¹²⁷

IV. CHILDREN'S BEST INTERESTS IN IMMIGRATION PROCEEDINGS

In the United States, unaccompanied minors may be eligible for one of several types of immigration relief, but each of these alternatives presents a narrow path that is difficult to navigate. Full compliance with the CRC standard would require Congress to establish a new form of humanitarian immigration relief based directly on children's best interests.¹²⁸ Even without further legislative action, however, Congress has clearly indicated, with the Trafficking Act, its intent that children's best interests should be a primary consideration in the procedures that apply in these cases, and in the interpretation of existing immigration laws.

A. Pursuing Immigration Relief

As noted, at the same time that immigration authorities transfer children to the custody of ORR, they begin removal proceedings. Removal cases are prosecuted by attorneys from the U.S. Citizenship and Immigration Services (USCIS), and adjudicated by immigration courts under the supervision of the Executive Office for Immigration Review (EOIR) in the U.S. Department of Justice. Children typically seek one of three types of relief: Special Immigrant Juvenile status, asylum, or a T or U visa. Each type of relief presents its own substantive and procedural challenges, and children may need to file multiple petitions in different tribunals.¹²⁹ Recognizing these challenges, both EOIR and USCIS have developed special guidelines for working with unaccompanied minors.¹³⁰

1. Special Immigrant Juvenile Status

Comment No. 12 (2009): The Right of the Child to be Heard, U.N. Doc. CRC/C/GC/12 (2009).

¹²⁷ See Treacherous Journey, *supra* note 124, at 77-78; Hlass, *supra* note 110 at 251. As noted *supra* at text accompanying notes 50 - 51, this was one of the Committee on the Rights of the Child's concluding recommendations to the United States in 2012 and 2017.

¹²⁸ See Treacherous Journey, *supra* note 124, at 56-60. As noted *supra* at text accompanying note 49, this was one recommendation to the United States made by the Committee on the Rights of the Child in 2012.

¹²⁹ See Kandel, *supra* note 1, at 10-11. Children's asylum applications are generally adjudicated by the Asylum Office in USCIS, with the case referred back to immigration court if the child's asylum petition is denied. Minors may have their asylum claim heard in the Asylum Office even after being placed in removal. See *infra* note 140 and accompanying text.

¹³⁰ See *infra* notes 138 and 143 and accompanying text.

Children may become lawful permanent residents of the United States if they qualify for “Special Immigrant Juvenile” status. The child must obtain a determination from a state court that reunification with “one or both” of the child’s parents “is not viable due to abuse, neglect, abandonment or a similar basis found under State law,”¹³¹ and also that it would not be in the child’s best interest to be returned to the child’s or parent’s previous country of nationality or the country of last habitual residence.¹³² After a state court makes this order, the juvenile can apply for a special immigrant juvenile visa, and then for adjustment of status to become a lawful permanent resident. This tool can be extremely helpful for children who come into the state child welfare system, because with LPR status those children become eligible for federal foster care subsidies.¹³³ For children who begin in the immigration system, however, getting the necessary orders from a state court is not a simple matter.¹³⁴ Moreover, this category of relief is subject to quotas, which began to present serious problems for children from the Northern Triangle Countries in April 2016.¹³⁵

2. Asylum

An individual may obtain asylum under the U.S. statute – based on the U.N. Refugee Convention¹³⁶ – if he or she can establish a “well-founded fear of persecution” in his or her home country, based on one of five factors: race, religion, nationality, membership in a particular social group, or political opinion.¹³⁷ An individual who meets the definition of refugee may not be expelled or returned “in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened” on account of any of these five factors.¹³⁸

131 8 U.S.C. § 1101(a)(27)(J) (2015) and 8 CFR § 204.11 (2015). See Randi Mandelbaum and Elissa Steglich, *Disparate Outcomes: The Quest for Uniform Treatment of Immigrant Children*, 50 FAM. CT. REV. 606 (2012).

132 8 U.S.C. § 1101(a)(27)(J)(ii).

133 8 U.S.C. § 1101(a)(27)(J)(iii)(II).

134 See Treacherous Journey, *supra* note 124, at 37-45, and LENNI B. BENSON, U.S. PROTECTION OF IMMIGRANT CHILDREN: A SYSTEM IN NEED OF IMPROVEMENT, SAFE PASSAGE PROJECT 8-10 (2016). In recent months, the Trump Administration has adopted a new interpretation of the SIJ statute that excludes many older applicants who were previously granted relief. See Liz Robbins, *A Rule is Changed for Young Immigrants, and Green Card Hopes Fade*, N.Y. TIMES, Apr. 18, 2018.

135 See BENSON, *supra* note 134.

136 See Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter Refugee Convention]; and Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T.S. 6223, 606 U.N.T.S. 267.

137 8 U.S.C. § 1101(a)(42); see also 8 U.S.C. § 1158(b).

138 Refugee Convention, *supra* note 136, art. 33.1. One particular difficulty in children’s cases has been to define the meaning of “particular social group,” which under U.S. law cannot be defined

Children have the same rights as adults to seek asylum, and there are special rules and procedures in U.S. law for children, including a more generous time period for filing a petition.¹³⁹ Under the Trafficking Act, children's claims are heard initially by the Asylum Office even when the child has been placed in immigration removal proceedings.¹⁴⁰ Given the range of different "push" and "pull" factors that bring unaccompanied children into a new country, however, it is often difficult to determine which children have substantive grounds for asylum.¹⁴¹

Recognizing that children face special difficulties in seeking asylum, the U.N. High Commission on Refugees (UNHCR) developed guidelines in 1997 for handling children's claims.¹⁴² The United States developed a set of policy guidelines for children's asylum claims in 1998,¹⁴³ and at least one federal court has insisted that these must be followed.¹⁴⁴ In 2008, the Trafficking Act mandated development of regulations "which take into account the specialized needs of unaccompanied alien children and which address both the procedural and substantive aspects of handling unaccompanied alien children's cases."¹⁴⁵ These regulations have not yet been developed, however, and the lack of binding guidance has led to inconsistent approaches and outcomes.¹⁴⁶ Moreover, in 2017 the Trump Administration rescinded and replaced the Asylum Guidelines with a new set that removed guidelines on child-sensitive questioning.¹⁴⁷

based solely on broad demographic criteria, such as age or gender, but may sometimes be determined by family membership. See U.S. IMMIGRATION & NATURALIZATION SERV., MEMORANDUM: GUIDELINES FOR CHILDREN'S ASYLUM CLAIMS, at III(e) (1998) [hereinafter *Children's Asylum Guidelines*].

¹³⁹ Adults must generally apply for asylum within a year after entry into the United States, but the one-year rule does not apply to unaccompanied minors. 8 U.S.C. § 1158(a)(2)(E) (2018).

¹⁴⁰ TVPRA, *supra* note 4, § 235(d)(7)(B).

¹⁴¹ *Children on the Run*, *supra* note 1.

¹⁴² UNHCR, GUIDELINES ON POLICIES AND PROCEDURES IN DEALING WITH UNACCOMPANIED CHILDREN SEEKING ASYLUM (1997), <http://www.unhcr.org/3d4f91cf4.html> [hereinafter *UNHCR Guidelines*]. See also UNHCR, Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, HCR/GIP/09/08 (2009). CRC General Comment No. 6, *supra* note 25, highlights the particular human rights concerns for children seeking asylum. See also Jacqueline Bhaba & Wendy Young, *Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines*, 11 INT'L J. REFUGEE L. 84 (1999).

¹⁴³ See *Children's Asylum Guidelines*, *supra* note 138; and U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, OPERATING POLICIES AND PROCEDURES MEMORANDUM 07-01: GUIDELINES FOR IMMIGRATION COURT CASES INVOLVING UNACCOMPANIED ALIEN CHILDREN (2007), <http://www.justice.gov/sites/default/files/eoir/legacy/2007/05/22/07-01.pdf>.

¹⁴⁴ See *Mejilla-Romero v. Holder*, 614 F.3d 572 (1st Cir. 2010) (vacating asylum decision that did not take guidelines into account).

¹⁴⁵ 8 U.S.C. § 1232(d)(8).

¹⁴⁶ See *Treacherous Journey*, *supra* note 124, at 9-20, and *BENSON*, *supra* note 134, at 11-12.

¹⁴⁷ See U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, OPERATING

Children's right to consideration of their asylum claims has particularly powerful backing in international law and U.S. statutes, reinforced by CRC Article 22¹⁴⁸ and the General Comments of the Committee on the Rights of the Child.¹⁴⁹ The government's failure to carry out the responsibilities assigned by Congress in the Trafficking Act should not be tolerated.

3. *Nonimmigrant T and U Visa Protection*

Children who have been victims of human trafficking may be eligible for a T-visa if they comply with reasonable requests to assist in investigation or prosecution of trafficking, and if they show that they would suffer extreme hardship if they were removed from the United States.¹⁵⁰ A child who has been a victim of serious criminal activity such as domestic violence or trafficking may be eligible for a U visa if he or she suffered substantial physical or mental abuse as a crime victim, and has information concerning that criminal activity and can be helpful in its investigation or prosecution.¹⁵¹ A U-visa applicant must obtain certification from a law enforcement agency that they have provided helpful information.¹⁵²

It is not clear how many of the thousands of unaccompanied minors who have arrived in the United States in recent years are eligible for one of these types of immigration relief. One estimate reported in 2012 suggested that forty percent of children admitted to ORR custody were potentially eligible for one or more types of legal relief. The results suggested about twenty-three percent had a basis for seeking special immigrant juvenile status, about seventeen percent had a potential asylum claim, and five percent a possible T or U visa claim.¹⁵³ Because the system is enormously complicated, however, even minors with good claims face serious obstacles in applying for relief.

The Trafficking Act reflects a commitment to protecting children from

POLICIES AND PROCEDURES MEMORANDUM 17-03: GUIDELINES FOR IMMIGRATION COURT CASES INVOLVING JUVENILES, INCLUDING UNACCOMPANIED ALIEN CHILDREN (2017), <https://www.justice.gov/eoir/file/oppm17-03/download>.

148 *See supra* note 26 and accompanying text.

149 *See supra* note 25.

150 *See* 8 U.S.C. §§ 1101(a)(15)(T) and 1184(o).

151 *See* 8 U.S.C. §§ 1101(a)(15)(U) and 1184(p).

152 To identify children who may be at risk, the Trafficking Act mandates screening of all children detained at the border, *see* 8 U.S.C. § 1232(a)(2)(A)(i), but this screening has not been criticized adequate. *See* Kandel, *supra* note 1, at 4; UNACCOMPANIED ALIEN CHILDREN, *supra* note 65; and Treacherous Journey, *supra* note 124, at 48-50.

153 Byrne & Miller, *supra* note 67, at 4, 24-26.

harm and providing them with fair access to the forms of relief provided by federal immigration and asylum law. It has not been fully implemented, however, and the problems have grown worse as the capacity of all agencies has been strained by the large numbers of children involved. Moreover, without adequate legal representation for these children, the promise of fair treatment in the Trafficking Act remains elusive.¹⁵⁴

B. Assuring Safe Repatriation

Children who are not successful in contesting removal may agree to a voluntary departure, which protects their eligibility for legal migration in the future. In the Trafficking Act, Congress directed the Department of Homeland Security, the Attorney General, and the Department of Health and Human Services to “develop policies and procedures to ensure that unaccompanied alien children in the United States are safely repatriated to their country of nationality or of last habitual residence.”¹⁵⁵ At this stage, trafficking concerns clearly belong at the forefront. It is important to remember that dangerous conditions in their home countries are often the reason that children risk a difficult trip north in the first place.

The statute requires the agencies to create a pilot program and “develop and implement best practices to assure the safe and sustainable repatriation and reintegration of unaccompanied alien children into their country of nationality or last habitual residence, including placement with their families, legal guardians or other sponsoring agencies.”¹⁵⁶ Here, as with other aspects of the Trafficking Act, the agencies have made some efforts but have not carried out all of their obligations.

ICE is responsible for the physical removal of foreign nationals, including unaccompanied minors. Its policies provide some protections: children must be provided with an opportunity to communicate with a consular official prior to departure for their home country, and can be returned only during daylight hours and through a port designated for repatriation.¹⁵⁷ A report from Kids in Need of Defense (KIND), published

¹⁵⁴ See *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1039 (9th Cir. 2016) (McKeown, concurring specially). Plaintiffs in this case argued that unaccompanied minors had statutory and due process rights to government-appointed counsel in immigration removal proceedings. Although the court held that the federal courts did not have jurisdiction to hear this claim before the plaintiffs exhausted the administrative process in immigration courts, the decision came with an unusual concurring opinion underscoring the point that “the Executive and Congress have the power to address this crisis without judicial intervention.”

¹⁵⁵ 8 U.S.C. § 1232(a)(1).

¹⁵⁶ 8 U.S.C. § 1232(a)(5).

¹⁵⁷ Kandel, *supra* note 1, at 7-8.

in February 2015, lays out the enormous problems with the system as it is presently operated and presents recommendations based on their experience working with return and reintegration of children in Guatemala.¹⁵⁸ At a minimum, federal agencies should assure that children aren't simply returned to the capital city of their country and left to find their way home.

V. CONCLUSION

How can we do better to assure that the best interests of child migrants are protected? As a first step, we need to hold our government accountable, including all of the federal agencies and tribunals with responsibilities for unaccompanied children. To the extent that they have not fully implemented the requirements of the Trafficking Act, it is long past the time to do so.¹⁵⁹ Second, we can work to create better communication and connections between federal agencies, state courts and child welfare agencies and the thousands of children and families who are subject to federal immigration jurisdiction.¹⁶⁰ And third, we can advocate statutory reforms to incorporate best interests considerations more fully into our immigration law, across the board.¹⁶¹

Beyond the dictates of statutes and treaties, we have a moral obligation to use all of the legal tools that are available to us to protect children from the harms of globalization. Those tools include family law, immigration law, and international human rights. We need to harness these to oppose obvious violations of the best interest principle, and be particularly attentive to problems that arise in the gaps between these areas, looking for immigration questions in the context of family law, or child welfare issues embedded in immigration law. In the language of the Convention on the Rights of the Child, we need to treat children's best interests as a primary consideration in policy and in law, especially when children are separated from their parents.

¹⁵⁸ See generally Wendy Ramirez, Megan McKenna, & Aryah Somers, *Repatriation and Reintegration of Migrant Children*, in CHILDHOOD AND MIGRATION IN CENTRAL AND NORTH AMERICA: CAUSES, POLICIES, PRACTICES AND CHALLENGES ch. 12 (2015). See also Treacherous Journey, *supra* note 124, at 79-83.

¹⁵⁹ See *supra* text accompanying notes 74, 102-103, 124, 145-147, and 156-158.

¹⁶⁰ See *supra* notes 109-119 and accompanying text.

¹⁶¹ See, e.g., *supra* notes 128 and 138 and accompanying text.