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The Politics of Fear: Unaccompanied Immigrant Children and the Case of the Southern Border

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THE POLITICS OF FEAR: UNACCOMPANIED IMMIGRANT CHILDREN AND THE CASE OF THE SOUTHERN BORDER

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“No society, no state can successfully assume the tremendous responsibility of fostering thousands of motherless, embittered, persecuted children of undesirable foreigners and expect to convert these embattled souls into loyal, loving American citizens These children are seasoned veterans of a revolution of hate, are fertile fields for anarchy, and as such are potential leaders of a revolt against our American form of government.”¹

INTRODUCTION

THE abuse and neglect of unaccompanied children² claiming refugee status at the U.S.–Mexico border³ by the U.S. Customs and Border Patrol and related immigration authorities have reignited legal scrutiny of border practices. Questions concerning the Constitutional and humanitarian floor of rights owed to unaccompanied children in immigration law

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1. *Admission of German Refugee Children: Joint Hearings Before a Subcomm. of the Comm. on Immigration U.S. S. & a Subcomm. of the Comm. on Immigration & Naturalization H.R. on S.J. Res. 64 & H.J. Res. 168, Joint Resolutions to Authorize the Admission into the U.S. of a Limited Number of German Refugee Children*, 76th Cong. 197–98 (1939) (statement from Agnes Waters of far right-wing group of anti-Semite women who opposed U.S. government’s decision to enter World War II, known as “the Mothers’ Movement”). For an in-depth portrait of Mrs. Waters and other leaders of the Mothers’ Movement, see GLEN JEANSONNE, *WOMEN OF THE FAR RIGHT: THE MOTHERS’ MOVEMENT AND WORLD WAR II* (1996).

2. The Immigration and Nationality Act defines an “unaccompanied alien child” as:

[A] child who (A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom – (i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody.

6 U.S.C. § 279(g)(2) (2012).

3. See *The US-Mexico Border*, MIGRATION POL’Y INST. (June 1, 2006), <http://www.migrationpolicy.org/article/us-mexico-border/> [https://perma.cc/2Q8P-F7NJ] (“The border area in the United States consists of 48 counties in four states.”).

that have long gone unanswered are now unavoidable as record numbers of these children flee gang violence, civil unrest, exploitation, and extreme poverty to seek a better life in the United States. In just the first quarter of the 2016 fiscal year, the rates of unaccompanied children migrating to the United States have nearly doubled compared to the same quarter last year, with some sectors along the border seeing more than five times the number of children than they identified in 2015.⁴

The presence of these children has disrupted a border zone that has developed from an unregulated wilderness to a militarized immigration enforcement regime over the last century.⁵ Today there exists a zone where “the law is operating . . . to protect the body politic from violations of the nation’s borders and to repel individuals who are characterized, oddly, as simultaneously so dependent as to be undesirable and so superhumanly criminal as to require violent containment.”⁶ Unaccompanied children bear the brunt of this uber-militant enforcement, exacerbating a “paradoxical situation where those considered vulnerable and most in need of protection, care, and compassion may end up being particularly disadvantaged and discriminated against — objects of suspicion and fear rather than subjects with rights to dignity and due process.”⁷

Human rights reports have detailed the abuses of unaccompanied children by immigration officials at the U.S.–Mexico border and have decried the absence of border patrol accountability.⁸ These abuses persist in

4. According to statistics published by U.S. Customs and Border Protection, the regions seeing the largest increase include Yuma, Arizona (>500%), Big Bend, Texas (296%), and El Paso, Texas (222%). See *United States Border Patrol Southwest Family Unit Subject & Unaccompanied Alien Children Apprehensions Fiscal Year 2016*, U.S. CUSTOMS & BORDER PROT., <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016> [https://perma.cc/A5HR-7XWY] (last updated Oct. 18, 2016).

5. For further discussion on this point, see *infra* notes 158–87 and accompanying text.

6. See Jennifer Chacón, *Feminists at the Border*, 91 DENV. U. L. REV. 85, 96 (2014).

7. See Jacqueline Bhabha, “Not a Sack of Potatoes”: *Moving and Removing Children Across Borders*, 15 B.U. PUB. INT. L. J. 197, 212 (2006); see also Liz Robbins, *A Paradoxical Position on Youths Fleeing Violence*, N.Y. TIMES (July 28, 2016), <http://www.nytimes.com/2016/07/29/nyregion/a-paradoxical-position-on-youths-fleeing-violence.html> [https://perma.cc/M6LW-C2LQ].

8. See, e.g., *A Culture of Cruelty: Abuse and Impunity in Short-Term U.S. Border Patrol Custody*, NO MORE DEATHS 5, 25 (2011), <http://forms.nomoredeaths.org/wp-content/uploads/2014/10/CultureOfCruelty-full.compressed.pdf> [https://perma.cc/DS4K-MSQU] (stating “[c]hildren were more likely than adults to be denied water or given insufficient water,” that “physical abuse was reported by [ten] percent of interviewees, including teens and children,” and “[r]ates of physical abuse did not differ by gender or age . . . meaning that children were as likely to be physically abused as adults”); Daniel E. Martínez et al., *No Action Taken: Lack of CBP Accountability in Responding to Complaints of Abuse*, AM. IMMIGR. COUNCIL 1, 4–5 (May 2014), https://www.americanimmigrationcouncil.org/sites/default/files/research/No%20Action%20Taken_Final.pdf [https://perma.cc/2F4P-D3K7] (compiling statistics regarding CBP abuses against undocumented women, men, and children “in all nine southwestern Border Patrol sectors between January 22, 2009

spite of recent legal reforms designed specifically to afford certain constitutional protections to children in immigration custody.⁹ In fact, throughout history, nearly every advance that has been made to shelter children from disproportionate enforcement policies that punish them as criminal aliens upon arrival has been met with fear-based objections by groups opposing rights for these children, including local, state, and federal governments.

The persistence of exclusionist policies and practices that circumvent laws developed to protect the rights of children at the border is symptomatic of a long history in the United States of devaluing children's rights and fearing the unaccompanied immigrant child. The subordination and diminution of children's rights in America, particularly those of immigrant children, is well-documented.¹⁰ And immigration law, like many other bodies of American law, views children chiefly as dependents, not as individuals bearing rights.¹¹ The lack of child-centered laws and policies is rooted in the western cultural underpinning of childhood as an experience of dependency¹²:

and January 5, 2012"); *see also* Letter from Ashley Huebner, Nat'l Immigrant Justice Ctr., et al., to Megan H. Mack, Officer for Civil Rights & 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/KZA2-B6W5>] [hereinafter Letter from Nat'l Immigration Justice Ctr.]; *Halfway Home: Unaccompanied Children in Immigration Custody*, WOMEN'S REFUGEE COMMISSION 1, 9–11, <https://www.womensrefugeecommission.org/resources/download/196> [<https://perma.cc/A5JP-7G2S>] (last updated Nov. 12, 2015). For further discussion of the treatment unaccompanied immigrant children receive, *see infra* notes 215–45 and accompanying text.

9. *See infra* notes 145–246 and accompanying text for a discussion of the treatment unaccompanied immigrant children receive in immigration custody.

10. *See generally* Martha Minow, *Whatever Happened to Children's Rights?*, 80 MINN. L. REV. 267, 298 (1996) (documenting historical evolution of debate over child rights and concluding that no child rights advocacy strategy has or could succeed in United States without "summon[ing] attention and resources"); Hillary Rodham, *Children Under the Law*, 43 HARV. EDUC. REV. 487 (1973); *see also* 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, 68 (2006) ("Immigration law is systemically and specifically designed to limit the role of children and the value placed on their interests.").

11. *See* David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 987 (2002) (stating decision regarding how to treat children "need not be between an extreme position of abandoning children to their rights and earlier paradigms in which children's vulnerabilities blocked recognition of them as rights holders"); *see also*, Christopher Nugent, *Whose Children Are These? Towards Ensuring the Best Interests and Empowerment of Unaccompanied Alien Children*, 15 B.U. PUB. INT. L.J. 219, 219–21 (2006) (discussing absence of agency and voice of children in creation of same policies enforced against them).

12. *See generally* Susan Terrio et al., *Voice, Agency and Vulnerability: The Immigration of Children Through Systems of Protection and Enforcement*, 49 INT'L MIGRATION, Oct. 2011, at 1, 1–2 (compiling articles that address impact of "Western ideologies" on conceptions of children's autonomy).

As a result, children's independence, autonomy, and actions are often overlooked or, when recognized, discussed in negative terms and as the result of adults' failure to exercise responsibility for children. There are constant disruptions between boundaries of meaning around what constitutes childhood, because children exercising autonomy are often characterized by adults as unchildlike.¹³

Rather than existing as persons with individual substantive and procedural rights, children are subjected to the presumption that they lack self-sufficiency and are therefore innately dependent; the conclusion is then made that the establishment of laws and social institutions for their well-being, rather than laws aimed at empowering them through the preservation of their individual rights, is inherently appropriate.¹⁴ As such, the very notion that children hold rights independent from any adult or state custodial connection challenges the foundational legal framework through which the unaccompanied child's experience is evaluated. By design and default, state action targets unaccompanied children more often than children who migrate with their parents because the state has no legal obligation to care for accompanied children absent parental default or delinquency.¹⁵ In contrast, children who present themselves at the border without a parent force the state to decide what individual rights and freedoms to afford them, and to determine at what point those rights and freedoms are triggered.

13. Stuart C. Aitken et al., *Unaccompanied Migrant Children and Youth: Navigating Relational Borderlands*, in *CHILDREN & BORDERS* 214, 232 (Spyros Spyrou & Miranda Christou eds., 2014).

14. See Rodham, *supra* note 10, at 493 (locating value of dependency in laws respecting children in United States, identifying appropriate boundaries of state intervention in private life of children, and urging separation, where appropriate, between rights of children and those of their parents); see also, 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, 322–30 (2010) (describing five different “constructions” of childhood, including “dependency construction,” and how constructions operate within context of immigration removal hearings for two undocumented immigrant children).

15. As will be discussed, this dependency preference is evident in immigration laws and policies that privilege children who arrive with their families over unaccompanied children, as well as fear-based restrictions on the admission of unaccompanied children rooted in their dependency. However, the dependency preference is not strong enough to stay the removal of immigrant parents of U.S.-citizen children. See *Hamdi ex rel. Hamdi v. Napolitano*, 620 F.3d 615, 620–29 (6th Cir. 2010); *Payne-Barahona v. Gonzáles*, 474 F.3d 1, 2–4 (1st Cir. 2007); *Acosta v. Gaffney*, 558 F.2d 1153, 1158 (3d Cir. 1977); *In re Anaya*, 14 I. & N. Dec. 488 (B.I.A. 1973). Oddly, the converse is true for undocumented children. Courts have recognized the hardship resulting from their parents' deportation on a very limited theory of “constructive deportation” when the child is at risk of harm upon return. See *Benyamin v. Holder*, 579 F.3d 970, 974–75 (9th Cir. 2009) (citing *Abebe v. Gonzales*, 432 F.3d 1037, 1043 (9th Cir. 2005)). These are two anomalies that fall outside the majority of examples that constitute the dependency preference.

In the absence of parents, the law strips children of the rights that would default to them by parental cover and, assuming the role in loco parentis, views their dependency fearfully. Even nascent immigration laws assume that children are absolutely and inherently dependent, while also protecting the general public from myriad perceived dangers triggered by their mere presence in the country. History has shown that the government is a stubbornly unsympathetic caretaker on this point. The current state of the law is that most existing immigration laws and policies, including those applied at the borders while children are in the custody of the federal government, do not contain or reflect fundamental legal standards respecting the care and custody of children. As many scholars have documented, largely absent from immigration law is the “best interests of the child” standard, a central family law tenet in decisions respecting the health, safety, and welfare of children.¹⁶

What has developed in place of best interests is a complex web of legal hurdles that children must clear without any guarantee of legal representation or even a legal chaperone to make the case for their protection under the law. Historically documented in the exclusion and poor detention conditions for the “undesirable minority” of children with developmental disabilities,¹⁷ this phenomenon has also been observed in a recent mapping of academic empirical studies of migrant Mexican and Central American children. The studies noted two common observations in the literature: (1) the lack of a best interest standard in the political and legal institutions and processes that address unaccompanied children; and (2) “irregularities reported in the treatment of [] migrant children [by

16. One important mention of this standard occurs in the Special Immigrant Juvenile eligibility requirements, discussed below. But the standard has been largely overlooked or actively excluded from the vast majority of immigration law applicable to children. In fact, the Department of Justice (DOJ) has expressly instructed Immigration Judges not to concern themselves with the “best interests” standard. See Memorandum from David L. Neal, Chief Immigration Judge, U.S. Dep’t of Justice, to All Immigration Judges, Court Adm’rs, Judicial Law Clerks, & Immigration Court Staff 4 (May 22, 2007), available at <https://www.justice.gov/sites/default/files/eoir/legacy/2007/05/22/07-01.pdf> [<https://perma.cc/NF82-ZHRR>] (“The concept of ‘best interest of the child’ does not negate the statute or the regulatory delegation of the Attorney General’s authority, and cannot provide a basis for providing relief not sanctioned by law.”); see also Bridgette A. Carr, *Incorporating a “Best Interests of the Child” Approach into Immigration Law and Procedure*, 12 YALE HUM. RTS. & DEV. L.J. 120 (2009); David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 TEX. HISP. J.L. & POL’Y 45 (2005); Thronson, *supra* note 10, at 68 n.41 (“So foreign to immigration law is the concept of ‘best interests of the child’ that in these cases special factual findings with regard to the child’s interest are made not in immigration proceedings but in a state juvenile court.” (citing 8 U.S.C.A. § 1101(a)(27)(J) (2006))); 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).

17. See *Undesirable Immigrants*, N.Y. TIMES, Nov. 14, 1911, at 12.

officials] both in Mexico and the U.S.”¹⁸ The exclusion of child-centered norms from immigration law and the resulting abuses in enforcement are a result of the incursion of fear-based interference to the development and successful implementation of child-centered laws and policies.

Fear, more than any other factor, has shaped immigration law, policy, and enforcement against children, but current trends in litigation show that fear-based oppositions are losing ground to humanitarian-focused, individual rights arguments in favor of protecting existing due process rights. This paper examines that shift. Part I of this Article examines U.S. immigration policies impacting unaccompanied children from Ellis Island to the passage of the Refugee Act of 1980.¹⁹ This section examines the relationship between dependency-based views of children and fear-based objections to immigration laws impacting unaccompanied minors, connecting the experience of unaccompanied children at today’s U.S.–Mexico border with its historical precedent. Part II identifies the rights that have been afforded to unaccompanied children at the border through legislation and litigation in the last several decades, observing a recent jurisprudential trend of identifying non-fear-based frameworks in extending certain individual rights to unaccompanied minors. Part III continues with observations about pending litigation and advocacy efforts, noting the resurrection of fear-based objections to due process rights for unaccompanied minors and, for the first time, the explicit judicial rejection of those arguments. Part IV suggests a legal framework rooted in the recent jurisprudential shift away from the fear-based paradigm. When applied to future laws, policies, and judicial decisions, this more constitutionally sound framework has the potential to interrupt history’s cycle of abuse and neglect of unaccompanied minors, extending additional due process protections for children and penalizing the government’s failure to guarantee established safeguards.

I. A HISTORY OF FEAR: AMERICA’S DISCOMFORT WITH THE DEPENDENCY OF UNACCOMPANIED REFUGEE CHILDREN

Fear has always played a central role in the development of laws and policies to address unaccompanied immigrant children seeking admission to the United States. Examining the experience of unaccompanied children within the broader context of America’s migration history reveals a dramatic shift that is most easily observable at the U.S.–Mexico border: over time, immigration enforcement against children moved from willful blindness and deferral to parental authority to militaristic, quasi-criminal punishment using laws designed to curb unauthorized migration of

18. See Lilian Chavez & Cecilia Menjívar, *Children Without Borders: A Mapping of the Literature on Unaccompanied Migrant Children to the United States*, 5 MIGRACIONES INTERNACIONALES 71, 96–101 (2010) (identifying mistreatments such as violations of privacy, prolonged detention, and placement of children in prison-like settings without access to legal representation).

19. See Pub. L. No. 96-212, 94 Stat. 102.

adults.²⁰ A close examination of the history of immigration enforcement against unaccompanied immigrant children, and the fears throughout history that served as the normative impetus to enact them, informs the relatively rapid militarization and move toward strict enforcement at the border. Observing this shift illustrates the political and practical implications of the relationship between dependency and fear in immigration law and policy affecting unaccompanied immigrant children.

A. *The Four Fears*

In debates involving any new immigration proposal or policy regarding unaccompanied minors, opponents reliably voice certain arguments in opposition to the proposed reform, which can be categorized into four different fear-based myths: (1) the Fear of Economic Dependency, (2) the Fear of Floodgates, (3) the Fear of Ideological Invasion, and (4) the Fear of “the Immigrant Other.”²¹ The first two are rooted in the dependency norm, and the second two are extensions of nationalist arguments challenging progressive and inclusive immigration movements.

1. *The Fear of Economic Dependency*

Voiced as early as the very first immigration reforms targeted specifically at unaccompanied children, the fear of economic disadvantage has taken many different forms, all rooted in an idea of children depending on the economic system, rather than contributing to it. For some, the fear is that the children will become dependents on the state foster care system, which is expensive and requires the diversion of financial resources to their care.²² Others express a fear that unaccompanied children will flood the job market and compete with their children for jobs and educational opportunities. However, recent reports have shown that, rather than becoming dependent on the job market, immigrants contribute a substantial amount of capital and growth to our economy.²³ Related to

20. See Wendy Young & Megan McKenna, *The Measure of a Society: The Treatment of Unaccompanied Refugee and Immigrant Children in the United States*, 45 HARV. C.R.-C.L. L. REV. 247, 252 (2010) (“The overarching obstacle to proper treatment for unaccompanied children is an immigration system that was never designed [to] take children into account. For the most part, these immigration programs continue to treat immigrant children and adults identically under U.S. law.”).

21. See Anita Ortiz Maddali, *The Immigrant “Other”: Racialized Identity and the Devaluation of Immigrant Family Relations*, 89 IND. L.J. 643 (2014) (coining term “Immigrant ‘Other,’” specifically in context of immigrant children).

22. Note, however, that this fear has also been used to advocate for reforms that favor unaccompanied children in the child welfare and family justice systems. Some justify both family unity- and child-centered reforms that would prevent unaccompanied minors from being placed in the child welfare system.

23. See, e.g., Press Release, Office of the N.Y. State Comptroller, DiNapoli: New York City’s Immigrant Population Playing Increased Role in Economy (Nov. 5, 2015), available at <http://osc.state.ny.us/press/releases/nov15/110515.htm> [<https://perma.cc/W795-TXMD>] (“Immigrants accounted for \$257 billion in economic activity in New York City in 2013, nearly one-third of the city’s total eco-

this fear is the false assumption that the children who enter from abroad will have the same training, education, and job-preparedness skills as a child born in the United States.

Finally, a fear rooted in an assumed dependency of unaccompanied children on the state is that they will divert resources that should be committed to assisting underprivileged children in the United States.²⁴ However, the systems and processes involved in assisting, for example, homeless children in the United States are completely different than the systems and processes involved in resettling unaccompanied minors—they come from completely different budgets. This fear assumes that there is a trade-off, dollar for dollar, between these two budgets as if they are competing, which stems from a misunderstanding of the federal budgetary process. It also assumes that these children will all either become dependent on the state, require state resources, or both. This assumption is problematic vis-à-vis the most recently arrived children: (1) many unaccompanied children from Central America are joining family members in the United States, who then support them²⁵; and (2) some children are of working age and support themselves either partly or completely by working.

2. *The Fear of Floodgates*

Rooted in the idea that children are dependent on either their family members or the state, or both, is the fear that establishing systems and processes to resettle unaccompanied child refugees will open the floodgates to additional migrants, including the parents of children who seek refuge. This particular fear has given rise to a false metaphor of migrant children as an anchor securing a virtual ship of myriad foreign adult relatives within the territory of the United States. As manifested in the term “anchor baby,” which has gained popular appeal in anti-immigrant, anti-birthright citizenship parlance, children are objectified as physical representations of a corresponding legal fallacy—that they “exert their infant political heft to pull others into the country.”²⁶

In other iterations, this fear is expressed as one that will result in a massive influx of children who are incentivized to come to the United States for reasons that are not necessarily related to the humanitarian crisis. A last floodgate fear is that other countries will notice the United

economic output and nearly twice the level in 2000” (citing November 2015 report by N.Y. State Comptroller)).

24. For a further discussion on this point, see *infra* notes 21–33 and accompanying text.

25. See *A Guide to Children Arriving at the Border: Laws, Policies and Responses*, AM. IMMIGR. COUNCIL 2 (June 26, 2015), <http://immigrationpolicy.org/special-reports/guide-children-arriving-border-laws-policies-and-responses> [https://perma.cc/3LJ2-GD4U] [hereinafter *A Guide to Children Arriving at the Border*] (listing “family reunification” as one factor contributing to migration).

26. See Rachel Ida Buff, *Toward a Redefinition of Citizenship Rights*, in IMMIGRANT RIGHTS IN THE SHADOWS OF CITIZENSHIP 10 (Rachel Ida Buff ed., 2008).

States' admission of these children at its borders and send their children to live here, too. These fears are objectively refutable. Given the reasons children are articulating for why they are fleeing, their migration is specifically connected to the humanitarian crises in the countries that they are fleeing, and, for many of them, they already have a parent here with status but not the ability to petition for their children to join them. This is a function of a uniquely humanitarian floodgate control that is already embedded in U.S. immigration law and policy.

Out of the four main countries from which we are seeing these children, two of them—El Salvador and Honduras—have been provided special immigration relief by the U.S. government called “Temporary Protected Status” (TPS). TPS permits individuals who have already arrived and cannot “return[] safely” due to civil war, “environmental disaster,” or “[o]ther extraordinary and temporary conditions” to stay in the United States.²⁷ This form of relief is available only to individuals present in the United States when the TPS designation occurred. The relief mimics the international refugee principle of “non-refoulement,” which prohibits countries from returning individuals to their countries of origin or “any country in which [the individuals] might be subject to persecution” on account of “race, religion, nationality, membership of a particular social group or political opinion.”²⁸ TPS extends similar protections and includes a right to work in the United States, which is uncommon among humanitarian forms of relief (including asylum status), for individuals fleeing certain wars and disasters.

For some of the children who flee, their parents or a parent has been provided TPS status, while the rest of the family remains. Because the protection is intended to be temporary, it does not afford individuals the right to bring their families to join them unless they can otherwise adjust their status to lawful permanent residency or become naturalized citizens. In November 2014, the State Department enacted a program that would allow for in-country processing of children from El Salvador, Honduras, and Guatemala to join their lawfully-present parents in the United

27. Individuals from both El Salvador and Honduras are currently in a state of prolonged TPS eligibility, which has been extended from March 9, 2001, until September 9, 2016, and from January 5, 1999, until July 5, 2016, respectively. See *Temporary Protected Status*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/humanitarian/temporary-protected-status> [<https://perma.cc/7J2B-Z8LZ>] (last updated Oct. 26, 2016). Mexico and Guatemala are the other two countries of origin for the vast majority of unaccompanied minors seeking entry at the southern border.

28. See *Refoulement*, UNITED NATIONS EDUC., SCI. & CULTURAL ORG., <http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/refoulement/> [<https://perma.cc/NVW7-QMGG>] (last visited Oct. 7, 2016) (citing *Convention and Protocol Relating to the Status of Refugees*, OFFICE OF THE UNITED NATIONS HIGH COMM’R FOR REFUGEES 30, <http://www.unhcr.org/en-us/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html> [<https://perma.cc/TM96-3ZLF>] (last visited Oct. 7, 2016) [hereinafter *Convention and Protocol*]).

States,²⁹ but the program is onerous and has well-documented limitations that have inhibited its success.³⁰

The U.S. government must verify that conditions in any country to which TPS has been extended are so intolerable that people should not have to return. All of the reasons that children from these countries articulate for fleeing are a function of the permanent, systemic threats that have persisted from a temporary socioeconomic or political disturbance.³¹ In fact, there is a movement underway by over 270 organizations and an equally impressive number of law professors to re-designate El Salvador and Honduras for continued TPS protections and extend TPS protections to nationals from Guatemala. Children in all three countries, which comprise the “Northern Triangle,” flee due to continued unrest.³² The argument is that if the conditions are bad enough for individuals here to remain, the same humanitarian justifications should allow those individuals’ children to join them or to allow children who have no one to protect them to seek refuge in the United States. The floodgate control mecha-

29. See *In-Country Refugee/Parole Program for Minors in El Salvador, Guatemala, and Honduras with Parents Lawfully Present in the United States*, U.S. DEP’T OF STATE (Nov. 14, 2014), <http://www.state.gov/j/prm/releases/factsheets/2014/234067.htm> [<https://perma.cc/MXW9-D7NV>].

30. Through in-country processing, parents lawfully present in the United States may file to bring their unmarried children who are under the age of twenty-one living in El Salvador, Guatemala, and Honduras to join them in this country. “As of August 2015, parents have submitted nearly 3,000 applications and children are being interviewed to determine their eligibility.” U.S. DEP’T OF STATE, U.S. DEP’T OF HOMELAND SEC., & U.S. DEP’T OF HEALTH & HUMAN SERVS., REPORT TO THE CONGRESS ON PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 2016 i, iv (Oct. 1, 2015), available at <http://www.state.gov/documents/organization/247982.pdf> [<https://perma.cc/JH6A-CCTH>]. Through this proposal, the Obama administration established the Central American Minors (CAM) Refugee Parole Program. See Faye Hipsman & Doris Meissner, *In-Country Refugee Processing in Central America: A Piece of the Puzzle*, MIGRATION POL’Y INST. 1 (Aug. 2015), <http://www.migrationpolicy.org/research/country-processing-central-america-piece-puzzle> [<https://perma.cc/3CQY-XQTD>]. The outlook on this program is still unclear:

CAM may provide an alternative to dangerous journeys for some unaccompanied children, but it is not likely to do so at a scale that can significantly reduce child migrant flows to the United States at this time Overall, in-country programs have helped and can help many people. But they have inherent limitations that make them inadequate—as stand-alone programs—to counteract dire humanitarian circumstances.

Id. at 2.

31. See *A Guide to Children Arriving at the Border*, *supra* note 25, at 1–3 (detailing reasons children are fleeing to United States from Northern Triangle).

32. See Letter from Access Living et al., to President Barack Obama 1 (Jan. 25, 2016), available at <http://immigrantjustice.org/sites/immigrantjustice.org/files/images/Northern-Triangle-TPS-National-Letter-January-25-2016.pdf> [<https://perma.cc/WJ83-W6PA>] (requesting TPS designation of Northern Triangle); Letter from Erin B. Corcoran, et al., to President Barack Obama 1 (Feb. 26, 2016), available at http://immigrantjustice.org/sites/immigrantjustice.org/files/2016_02_26_ProfessorTPSLetter.pdf [<https://perma.cc/3D3H-CLSD>] (“We urge that the . . . countries of[] El Salvador, Guatemala, and Honduras . . . [are designated] for Temporary Protected Status . . .”).

nism is built into the fact that the executive branch of the U.S. Government has absolute control over the TPS designation and period of duration.

3. *The Fear of Ideological Invasion*

A fear that has been articulated from the earliest recorded American conversations about immigration of unaccompanied children is the fear that these children will bring an unwanted ideology and proselytize what they see as an otherwise homogenous “American” public to the country’s detriment. In other articulations, it is the fear that unaccompanied children are radicalized and will commit acts of terror or gang violence in the United States once admitted. Major assumptions inherent in this fear include perceptions of America as culturally and ideologically homogenous, unaccompanied children as homogenous and dogmatic in their ideologies, and these children even possessing such ideologies to begin with.

With the country’s earliest immigration policies now over a century old, data reveal that the opposite is actually more likely: immigrant children integrate much more quickly than adults, and, even more powerful than spouses, children encourage the integration of American culture and values in their families. As Kerry Abrams notes:

In all of these scenarios, children may be a much more important factor in integration than spouses. It is commonly argued that parents help to integrate their children But often, it happens the other way around. Children attend school and participate in extracurricular activities at a time in their lives when they are rapidly developing, emotionally and intellectually. Their loyalties, preferences, and understanding of their place in the world will be largely shaped by their experiences with peers. Although their parents may be able to resist acculturation, doing so will be difficult for their children. Children bring American culture home to their parents.³³

As will be evident in the rest of this section, this fear has been refuted far more often than it has been reinforced, even anecdotally.³⁴ The idea

33. Kerry Abrams, *What Makes the Family Special?*, 80 U. CHI. L. REV. 7, 19 (2013) (footnotes omitted). *But see* William Booth, *One Nation, Indivisible: Is It History?*, WASH. POST, Feb. 22, 1998, at A1, *available at* <http://www.washingtonpost.com/wp-srv/national/longterm/meltingpot/melt0222.htm> [<https://perma.cc/WB2N-6VKU>] (challenging assumptions regarding assimilation and identifying groups of immigrants, including children, who prefer not to self-identify as American and wish to retain culture and identity in “twilight of common dreams”).

34. For example, at least one study concluded that the legalization of millions of immigrants under the Reagan amnesty of the mid-1980s resulted in a decrease in crime rates, contrary to the persistent fear that immigrants import crime. *See* Scott R. Baker, *Effects of Immigrant Legalization on Crime*, 105 AM. ECON. REV. 210, 210–13 (2015) (providing empirical data on crime reduction and linking reduction with amnesty).

of integration is difficult to define and even more difficult to measure, but history is rife with the false alarms raised by those who hold this fear. Its persistence, despite overwhelming evidence to the contrary, speaks to how deeply it is felt by a significant portion of the American population.

4. *The Fear of “the Immigrant Other”*

The earliest immigration policies in our country were specifically aimed at keeping certain groups of individuals out of the United States. The first two pieces of legislation restricting immigration to the United States were race based, “targeting Chinese women” as well as Chinese laborers.³⁵ The second of the two, the Chinese Exclusion Act of 1882,³⁶ “was the first [immigration law] that explicitly made race an exclusionary factor and one that escaped equal protection review”³⁷ when it was upheld by the U.S. Supreme Court in *Chae Chan Ping v. United States*.³⁸ Today, the fear of the immigrant other continues to manifest itself systemically and overtly—for example, the disproportionate rate at which immigrant parents’ rights are infringed upon or terminated in the family justice system³⁹ and the exclusionist rhetoric and proposed policies of President-Elect Donald Trump.⁴⁰ This fear capitalizes on constructions of race and the

35. See Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 692–95 (2005) (noting Congressional approval of 1875 Page Act and law’s focus on Chinese women). At the time, Chinese women who immigrated to the United States were widely viewed as “prostitutes . . . second wives or concubines establishing a system of polygamy contrary to the American model of monogamous marriage.” See *id.* at 693.

36. Pub. L. No. 47-126, 22 Stat. 58.

37. See Rose Cuison Villazor, *Chae Chan Ping v. United States: Immigration as Property*, 68 OKLA. L. REV. 137, 151 (2015).

38. 130 U.S. 581 (1889).

39. See Maddali, *supra* note 21, at 646 (connecting termination of parental rights in immigrant families to historical precedent of removing Native American children from their families “in an attempt to cultivate an Anglo-American national identity”); Sarah Rogerson, *Lack of Detained Parents’ Access to the Family Justice System and the Unjust Severance of the Parent-Child Relationship*, 47 FAM. L.Q. 141, 157 (2013) (“[T]he parental rights of fit but unauthorized parents could be terminated in the name of the best interests of the state”); Sarah Rogerson, *Unintended and Unavoidable: The Failure to Protect Rule and Its Consequences for Undocumented Parents and Their Children*, 50 FAM. CT. REV. 580, 582–83 (2012) (citing *In re Victoria L.*, 950 A.2d 1168 (R.I. 2008)) (noting relative ease with which courts infringe on parental rights of unauthorized mothers).

40. See Michelle Ye Hee Lee, *Donald Trump’s False Comments Connecting Mexican Immigrants and Crime*, WASH. POST (July 8, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime/?tid=a_inl [<https://perma.cc/D766-CM8F>] (scrutinizing Donald Trump’s comments regarding Mexican immigrants with facts refuting assertion that immigrants and crime rates are directly proportional); see also *Immigration*, DONALD J. TRUMP FOR PRESIDENT, <https://www.donaldj-trump.com/policies/immigration/> [<https://perma.cc/8UUP-PPBN>] (last visited Nov. 20, 2016).

corresponding imagined threat to whiteness in America.⁴¹ As each wave of new Americans arrives, this fear is invoked for both political and self-interested reasons, but has never been empirically supported.

B. *The Earliest Immigration Laws Regarding Unaccompanied Minors Arriving by Sea*

Prior to the establishment of the U.S. Government, orphan children and those who were otherwise separated from their parents were sent to the colonies in large numbers to serve “in homes as apprentices or indentured servants.”⁴² “In England as well as the American colonies, children had no legal say in whether they were placed out.”⁴³ This earliest reception of what would today be considered unaccompanied immigrant children anchors the American history of children in dependency and state control.

The earliest U.S. immigration laws on record date back to the late-eighteenth century and focus almost entirely on three things: (1) regulating vessels transporting immigrants to the water ports of entry in the United States, (2) the naturalization process, and (3) establishing the right of the federal government to exclude certain individuals from the country on the basis of national security.⁴⁴ With some exceptions, these three main issues would dominate immigration law and policy in the United States. Restrictions on the immigration of unaccompanied children were minimal, focusing mainly on health and safety, and not explicitly relating to race-based classifications. The first immigration law addressing immigrant children without parents was an 1824 amendment to the naturalization process, which allowed unaccompanied children under the age of twenty-one to naturalize “as long as he or she had resided within the United States for five years or more,” counting the years since

41. See Kevin R. Johnson & Bill Ong Hing, *National Identity in a Multicultural Nation: The Challenge of Immigration Law and Immigrants*, 103 MICH. L. REV. 1347, 1378 (2005) (providing critical review of SAMUEL P. HUNTINGTON, WHO ARE WE? THE CHALLENGES TO AMERICA’S NATIONAL IDENTITY (2004)). Johnson and Hing note that *Who Are We?* offers thinly-veiled racially-based fears regarding migration of Latinos and state that Huntington “fears the challenge to his Anglo-Protestant, English-language vision of American identity.” See *id.*

42. See Rebecca S. Trammell, *Orphan Train Myths and Legal Reality*, 5 MOD. AM., Fall 2009, at 3 (citing HOMER FOLKS, THE CARE OF DESTITUTE, NEGLECTED, AND DELINQUENT CHILDREN 3–4 (1902)) (“Records indicate that as early as 1627, Virginia-bound English ships carried between 1400 and 1500 children across the Atlantic and into child labor apprenticeship in the colonies.” (citing I ARTHUR W. CALHOUN, A SOCIAL HISTORY OF THE AMERICAN FAMILY: FROM COLONIAL TIMES TO PRESENT 306–07 (1917))).

43. *Id.*

44. See Henry B. Hazard, *The Immigration and Nationality Systems of the United States of America*, 14 F.R.D. 105, 107–14 (1954) (detailing early immigration history of United States and noting Alien and Sedition statute of 1798 “gave the President power to expel aliens dangerous to the United States”).

the child's arrival.⁴⁵ Although this law was aimed at children who had already arrived, it was the first to establish an alienage right for a child independent of his or her parents.

The next law specific to unaccompanied children, passed over eighty years later, was the 1907 Exclusionary Act, which expanded the categories of excluded persons to include unaccompanied children under the age of sixteen.⁴⁶ As documented by librarian and historian Barry Moreno, this restriction had a gendered impact because girls and women were required to have a male escort into the country, unlike "boys [sixteen] and older and all men [who] were generally admissible on their own account."⁴⁷ "The unfairness of this policy was upheld on grounds that females needed special safeguards to protect them from the dangers of immorality and white slavery. These threats were real, and . . . alarmed the public."⁴⁸ Aside from this gendered fear and assumption of dependency, Ellis Island also ran a state-sponsored program—a collaboration of faith-based organizations and social service organizations—to care for orphans, stowaways, adventure-seekers, and other unaccompanied minors until they could be found a home inside the United States or deported.⁴⁹

Despite the increasingly restrictive exclusion of unaccompanied minors, approximately 3.4 million children immigrated to the United States between 1892 and 1954.⁵⁰ Child immigration peaked at 158,621 children in 1914, seven years after Ellis Island began to implement its rule prohibiting unaccompanied children from entering without one or both parents.⁵¹ A 1915 *New York Times* article provides anecdotal evidence of the strict enforcement of this law, telling the story of one English child, Thorold Avery, who was chaperoned, first class, to join his parents in America, but was nonetheless taken into custody by immigration officials because he did not arrive with either of them.⁵² Another article that ran around the same time told the story of Josefina Chinchilla and her brother

45. U.S. IMMIGRATION AND NATURALIZATION LAWS AND ISSUES: A DOCUMENTARY HISTORY 22 (Michael C. LeMay & Elliott Robert Barkan eds., 1999) (citing 934 Stat. 603). Notably, the law itself did not refer to "unaccompanied children," but was specifically aimed at children who were naturalizing without their parents.

46. *See id.* at 109 ("The 1907 act increased the head tax to \$4 and added to the excludable classes imbeciles, feeble-minded persons, persons with physical or mental defects which might affect their ability to earn a living, children unaccompanied by their parents, persons who admitted the commission of a crime involving moral turpitude, and women coming to the United States for immoral purposes." (citing 34 Stat. 898)).

47. *See* BARRY MORENO, CHILDREN OF ELLIS ISLAND 7 (2005).

48. *Id.*

49. *See id.* at 8 ("The arrangement to bring over orphans was usually made by charity workers, missionaries, and immigrant aid societies.")

50. *See id.* at 125.

51. *See id.*

52. *See id.* (publication page) (citing *Ellis Island Holds Boy of First Cabin*, N.Y. TIMES, Oct. 23, 1915, at 20).

Enrico, from Bogota, Colombia.⁵³ Josefina and Enrico were detained at Ellis Island having arrived with their aunt after the death of their father to seek an education in America with their cousins.⁵⁴ Despite their aunt having arranged for a male escort (her brother) as required by law for the party, and despite her producing “\$4,000 [] in gold,” they were at risk of deportation because both Josefina and Enrico “were under 16.”⁵⁵

Unaccompanied minors were explicitly excluded again in 1910 and 1917. The 1917 Act extended a literacy test to children over sixteen and added a provision that gave the Secretary of Labor the sole discretion to admit children who were eligible and who he determined were “not likely to become a public charge.”⁵⁶ One historian marked the literacy tests in the 1917 Act as “a definite move from regulation to attempted restriction.”⁵⁷ Additional provisions served as a “declaration of a white immigration policy” and “the strongly restrictionist and antialien temper of Congress at the time.”⁵⁸ The additional discretion afforded to the Secretary of Labor also speaks to the growing fear of the potential dependencies of these children. The exclusion against unaccompanied immigrant children, including the literacy exclusion, “remained unchanged until it was dropped by the 1952 Act.”⁵⁹

These policies toward unaccompanied minors also reflected the tensions of competing, progressive-era child welfare movements for dependent children and fear-based nationalist sentiments. Defenders of child labor rights and social reformers were very vocal in their support of unaccompanied immigrant children, regularly rebutting nationalist sentiments that the southern and eastern Europeans arriving were racially inferior to the prior wave of northern European migrants.⁶⁰ The formation of these laws was likely also informed by well-intentioned “child saver” policies, which originally focused on non-institutional early interventions and education for children identified as poor or at-risk, including the establish-

53. See *id.* at 32 (citing *Children on Ellis Island: Boy and Girl Held for Lack of Legal Guardianship*, N.Y. TIMES, Oct. 29, 1915, at 21).

54. See *id.*

55. See *id.*

56. See E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798–1965 438 (1981); LeMay & Barkan, *supra* note 45, at 110 (citing 39 Stat. 874).

57. See HUTCHINSON, *supra* note 56, at 167.

58. See *id.*

59. See *id.* at 438.

60. For example, pragmatic feminist and social reformer Jane Addams’s establishment of the Immigrants’ Protective League of Chicago urged open-border policies and the education and assimilation of all immigrant children. The organization sponsored many individual private bills in an attempt to prevent the wrongful deportation of many immigrants, including children. See generally Henry B. Leonard, *The Immigrants’ Protective League of Chicago 1908–1921*, 66 J. ILL. STATE HIST. SOC’Y 271 (1973).

ment of specialized juvenile courts.⁶¹ Unfortunately, many of these programs had an adverse impact on immigrant children and families. One such program was the “Orphan Train” program, which resettled 200,000 children, some of whom were not actually orphans but were nonetheless removed from their Catholic parents to be resettled with preferred Protestant families in the West.⁶² Some historians have also viewed the establishment of juvenile courts as a way for the white middle class to assert its values and ideas of “proper [] methods of child rearing” on immigrant children and parents out of a “fear that if something were not done about the unruly behavior of slum children, social order might be undermined.”⁶³ This early history illustrates that lawmakers and even some child welfare advocates of the time viewed unaccompanied immigrant children as racially inferior, dependent, needy, and poor future criminals.

C. 1920s to 1950s: *The Beginning of a Border Policy*

In contrast to the development of early immigration laws, which largely contemplated the arrival of immigrants at water-based ports, immigration law and policy at the U.S.–Mexico land border developed later in time. According to researchers at the National Archives, there are no statistics of land border crossings at the Mexican border prior to 1906.⁶⁴ Until Congress enacted the Labor Appropriations Act in 1924 and formally established the Customs and Border Patrol, the U.S.–Mexico border was informally policed by immigration officers on horseback.⁶⁵ Notably, it was an exclusionary agenda, the need to enforce newly-legislated numerical limitations on the migration of large numbers of unauthorized European migrants entering via Mexico, which led to the establishment of the Cus-

61. See DEAN J. CHAMPION, *THE JUVENILE JUSTICE SYSTEM: DELINQUENCY, PROCESSING, AND THE LAW* 45–77 (6th ed. 2010) (explaining child savers and child-saving movement organized efforts during early 1800s to provide assistance to wayward youths, including food and shelter).

62. See Trammell, *supra* note 42, at 3; see also Maddali, *supra* note 21, at 666–67 (situating history of orphan trains within broader discussion of relationship between early immigration and national identity).

63. See ELIZABETH J. CLAPP, *MOTHERS OF ALL CHILDREN: WOMEN REFORMERS AND THE RISE OF JUVENILE COURTS IN PROGRESSIVE ERA AMERICA* 205 (1998).

64. See NAT’L ARCHIVES & RECORDS ADMIN., *A3396: Index to Manifests of Permanent and Statistical Alien Arrivals at El Paso, Texas, July 1924–July 1952* 1 (comp. by Claire Prechtel-Klusgens 2004), <https://www.archives.gov/files/research/microfilm/a3396.pdf> [<https://perma.cc/MD3L-V35U>] (noting records of arrivals from Mexico were not kept until 1906).

65. See MAI M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA*, at 64–68 (2004) (discussing creation of Border Patrol and noting that, previously, “[t]he Chinese patrol inspector, assigned to horseback detail . . . occupied the loneliest and bottommost position in the hierarchy of the service”); see also KELLY LYTLE HERNÁNDEZ, *MIGRA! A HISTORY OF THE U.S. BORDER PATROL*, 32–36 (2010) (documenting history of Border Patrol and noting that its “beginnings were inauspicious”). “The [original] appropriation comprised less than 25 percent of the Immigration Bureau’s total budget of \$4,084,865 for that year.” *Id.* at 32.

toms and Border Patrol.⁶⁶ At the same time, the 1924 Act specifically exempted “unmarried children under eighteen years of age” from the limits of immigration quotas.⁶⁷ On its face, this appears to be favorable for unaccompanied minors; however, the exclusion of unaccompanied children from the 1917 Act remained in place, so the quota exemption benefited families over unaccompanied children.

During this time period, the fear of the immigrant other was gaining momentum, and therefore, immigration policies at the border developed much more rapidly from an unregulated zone of free movement to a heavily restricted area in which immigration enforcement mechanisms were exceptionally restrictive, racially discriminatory, and harsh.⁶⁸ From its very beginning, immigration policy at the U.S.–Mexico border mirrored the rising anti-immigrant sentiment of the time and was driven by fears regarding the relative (un)desirability of newcomers. Inspection procedures at nascent border checkpoints “involved a degrading procedure of bathing, delousing, medical-line inspection, and interrogation.”⁶⁹ Inspections did not involve, however, the collection of relevant identification and biographical data. It is therefore impossible to know how many unaccompanied children were migrating through the land borders without detection. However, it is easy to imagine that they may have, and, for reasons that will be detailed, mid-century accounts of Border Patrol agents support a hypothesis that unaccompanied minors were largely left alone, even when detected by Border Patrol, despite their statutorily-mandated exclusion.⁷⁰

1. *The Wagner-Rogers Bill of 1939 and the Truman Directive*

Evidence of attitudes of undesirability, exclusion, and xenophobia against unaccompanied children can be found in the congressional debates regarding the very first piece of immigration legislation solely relating to unaccompanied minors: the Wagner-Rogers Bill of 1939. If passed, the bill would have made 10,000 immigrant visas available for children under the age of fourteen who resided in German territory. Historian Glen Jeansonne recounts the history of the bill as follows:

66. See NGAI, *supra* note 65, at 66 (“The most heavily traveled route for illegal European immigration was through Mexico.”).

67. See HUTCHINSON, *supra* note 56, at 194 (citing Act of May 29, 1928, 45 Stat. 1009); see also NAT’L ARCHIVES & RECORDS ADMIN., *supra* note 64, at 3.

68. For an extensive and detailed historical comparison and analysis of the migration policy at the southern border and elsewhere in the United States, see NGAI, *supra* note 65, at 64–90 (“Before the 1920s the Immigration Service paid little attention to the nation’s land borders because the overwhelming majority of immigrants entering the United States landed at Ellis Island and other seaports.”).

69. See *id.* at 68.

70. For a further discussion on this point, see *infra* notes 77–100 and accompanying text.

On January 9 a delegation of clergymen presented a petition to Roosevelt, asking him to open the doors of the United States to the children. Sen. Robert F. Wagner of New York and Congressman Edith Nourse Rogers of Massachusetts introduced the Wagner-Rogers Bill, or Child Refugee Bill, providing that a maximum of ten thousand children under the age of fourteen be admitted in 1939, and an additional ten thousand be admitted in 1940, apart from the German quota for those years. They would be adopted temporarily by American families, with costs assumed by individuals and private organizations. The children would not be permitted to work—a provision designed to mollify labor unions—and would return to their parents when conditions in Europe were safe The day after the plan was announced, four thousand families offered to adopt children.⁷¹

A number of influential groups rose in opposition, including a collection of far-right wing women's groups, called "The Mothers' Movement," who opposed the United States's participation in World War II on anti-Semitic and nationalist grounds. The bill failed and "some twenty thousand children were left to their fates in Nazi-occupied countries."⁷² The exclusion of unaccompanied children continued until President Truman issued a directive in 1946 providing war orphans "immediate consideration for admittance to the United States."⁷³ The so-called "Truman Directive" remained in effect until the Displaced Persons Act was passed in 1948,⁷⁴ allowing for the "admission of three thousand nonquota orphans" under the age of sixteen.⁷⁵

Absent any comprehensive legislation addressing unaccompanied children or refugees, this humanitarian gesture from the President was the first of what would be many ad hoc executive directives aimed at unaccompanied children fleeing their home countries. In the statement that accompanied the Truman Directive, President Truman acknowledged the need to ensure that these children would not become dependent on the state, but vouched for existing child welfare systems in place to secure that guarantee.⁷⁶ Valuing human rights over fear and exclusion, the President

71. JEANSONNE, *supra* note 1, 143–44.

72. *See id.* at 144 (citing ARTHUR D. MORSE, WHILE SIX MILLION DIED: A CHRONICLE OF AMERICAN APATHY 268 (1983)). Wagner "withdrew the bill" after an amendment was added that would have "count[ed] the twenty thousand children against the quota." *See id.*

73. *See* BETH B. COHEN, CASE CLOSED: HOLOCAUST SURVIVORS IN POSTWAR AMERICA 96 (2007) (noting Truman Directive aided Jewish minors entering United States "from 1946 until July 1948").

74. *See* Pub. L. No. 80-774, 62 Stat. 1009.

75. *See* COHEN, *supra* note 73, at 96 ("Those between the ages of sixteen and twenty-one received affidavits from the U.S. Committee to enter on the regular quota.").

76. *See* Pres. Harry S. Truman, Statement and Directive by the President on Immigration to the United States of Certain Displaced Persons and Refugees in

urged “[t]his period of unspeakable human distress is not the time for us to close or to narrow our gates.”⁷⁷ President Truman’s statement marked the first explicit executive rejection of fear-based objections to the admission of unaccompanied children. However, as history unfolded post-WWII, fears continued to hold back meaningful progress for future groups of children seeking protection.

A. *1952 to 1980: The “Dependency Preference” and Ad Hoc Unaccompanied Minor Admission Programs*

As larger-scale border policies developed through the mid-century, the focus on “territoriality and border control” of the post-War era continued to have a racializing effect at the border, where the discretion of Border Patrol agents trumped the statutory reform efforts that would follow.⁷⁸ Terms used by Border Patrol agents to refer to unauthorized migrants shifted from “deportable alien” to “criminal alien” and “border violator,” which indicated a shift from “migration control” to “crime control.”⁷⁹ Over time, Border Patrol’s mission crept from civil regulation to criminal enforcement fairly easily, unchecked by any form of judicial review or discretionary guidance.⁸⁰ Despite the passage of the first major piece of immigration legislation in the country’s history, the McCarran-Walter Act of 1952, which removed race-based quotas and eliminated the outright exclusion of unaccompanied children, Congress continued to privilege children arriving with parents or children who were immigrating to join their adoptive families.⁸¹

Europe (Dec. 22, 1945), *available at* <http://www.presidency.ucsb.edu/ws/?pid=12253> [<https://perma.cc/5DPT-55YT>] (“I am informed that no persons admitted under their sponsorship have ever become charges on their communities.”). As reported from the field of the welfare groups who received these children:

We find the struggle between dependence and independence going on at full force. As one would expect, they seek love and acceptance but are ambivalent about taking it. They carry into their relationships the pattern of competition and drive for survival which has characterized so important a part of their formative years.

COHEN, *supra* note 73, at 97 (quoting Deborah Portnoy, *The Adolescent Immigrant*, JEWISH SOC. SERVICE Q., Sept. 1948, at 268, 269). This historical account is no less accurate a description of the struggles of unaccompanied immigrant children today. It would be many more years before this duality of dependence or resiliency was even hinted at in immigration law and policy.

77. See Truman, *supra* note 76.

78. See NGAI, *supra* note 65, at 90.

79. See HERNÁNDEZ, *supra* note 65, at 206 (noting Border Patrol “disseminated the new terminology to the general public”).

80. See AVIVA CHOMSKY, UNDOCUMENTED: HOW IMMIGRATION BECAME ILLEGAL (2014); HERNÁNDEZ, *supra* note 65, at 206.

81. See *generally* HUTCHINSON, *supra* note 56, at 273–379.

1. *Laissez-Faire Border Policies and the End of Administrative Oversight*

As noted earlier, there is a dearth of historical statistical information regarding unauthorized immigrant children at the border generally, which border historian Kelly Lytle Hernández attributes to early gendered Border Patrol quota policies that favored the deportation of single men over women, children, and families.⁸² In fact, women and children were often simply released from Border Patrol custody early in its history because they were ineligible for a government-sponsored program targeted at regulating the migration of male Mexican laborers.⁸³ During this so-called “Bracero Era” of the 1940s and 1950s, “millions of husbands, sons, brothers, and fathers were lifted into legal streams of migration, while women, children, and families were left to cross the border without sanction.”⁸⁴ Immigrant children were, from time to time, “loaned” to single, male workers in their efforts to present an appearance of family to avoid deportation.⁸⁵ Rather than being an independent subject of the policies, children were either passively transported with their families or actively used by other unauthorized adults to avoid border restrictions. Unaccompanied minors were largely unaccounted for, and there is little statistical information regarding their migration at the time.⁸⁶ However, the anecdotal accounts captured by history reveal the beginnings of a laissez-faire attitude towards unaccompanied children—inspired not by policy, but through the combination of civil disobedience and impotent enforcement.

Border Patrol officers of the time reported that children were simply too difficult to capture at the border. “In the public places where apprehension quite often occurred, the ‘shrieking’ and ‘struggling’ of children who had been grabbed by Border Patrol officers often forced the ‘embar-

82. See HERNÁNDEZ, *supra* note 65, at 33 n.78, 135–36 (describing historical data regarding unauthorized, unaccompanied immigrant children).

83. See *id.* at 135–36.

84. See *id.* at 135.

85. See *id.* at 136 (citing reports from Patrol Inspectors).

86. This author has not reviewed the microfilm of the land border manifests available in the National Archives. However, based on the description of what statistical data was recorded at the time, it appears that most migrants arriving from the Western Hemisphere were largely omitted from the statistical data collected. See generally *Mexican Border Crossing Records*, NAT’L ARCHIVES, <http://www.archives.gov/research/immigration/border-mexico.html#howwhy> [https://perma.cc/322T-ZBM7] (last updated Apr. 4, 2011). According to the records:

Statistical arrivals were immigrants or nonimmigrants who were subject to the head tax and generally not from the Western Hemisphere. By contrast, nonstatistical arrivals were immigrant or nonimmigrants who usually were natives of the Western Hemisphere and not subject to the head tax. Although arrival of the latter was not included in immigration statistics, a record of that arrival may still have been made. It cannot be said with certainty that the definitions of statistical and nonstatistical arrivals were applied uniformly at any particular port on the Canadian or Mexican borders.

Id.

arrassed officers' to set the children free."⁸⁷ Such "rebellious" children employed these "'professional method[s]' of shrieking and struggling to evade apprehension, detention, and deportation."⁸⁸ The Border Patrol's failure to effectively manage or influence either the behavior of migrant children or navigate their own emotional difficulties when observed in their failure essentially led to a public shaming of child deportation. One might imagine that any unaccompanied minors of the time were able to traverse the borderlands without much trouble—either coming to the attention of an enterprising adult or entering of their own free will undetected, unobstructed, or relinquished.

Unfortunately, the effect of this rather humorous dynamic between Border Patrol and children ultimately served to accelerate the focus on border enforcement. As Kelly Lytle Hernández summarized:

[W]hile U.S. and Mexican officers had not initially erected border fences to address gendered problems of state violence, the increasingly common and troublesome confrontations between unsanctioned women, undocumented children, and embarrassed officers affirmed the Border Patrol's turn toward displacing the violence of immigration law enforcement onto the landscape of the borderlands.⁸⁹

While the Border Patrol began ramping up its enforcement efforts, parallel legislative measures enacted in Congress insulated border policies from due process constraints with the passage of the first Immigration and Nationality Act in 1952.⁹⁰ In that very first piece of comprehensive immigration legislation, Congress upended a 1950 Supreme Court ruling requiring the former Immigration and Naturalization Service (INS) to comply with the newly-enacted Administrative Procedure Act⁹¹—insulating deportation proceedings from fair hearing requirements of due process and judicial review.⁹² In tandem, Border Patrol was empowered, encouraged and incentivized to turn their attention to securing the border, rather than negotiating it. This combination of stepped up enforcement and deregulation of oversight created fertile soil in the borderlands for abuse of discretion and impunity.

Children were not singled out in the creation of increasingly restrictive policies at the border in the 1960s due to a "hands-off" directive from

87. HERNÁNDEZ, *supra* note 65, at 136 (citing Memorandum from David Snow, Patrol Inspector in Charge, Brownsville, Tex., to Fletcher Rawls, Chief Patrol Inspector, McAllen, Tex., Need for Construction of Boundary Fence and Observation Towers in Vicinity of Brownsville, Texas-Matamoros, Mexico to Control Illegal Traffic 14 (Mar. 20, 1953)).

88. *See id.*

89. *Id.* at 137.

90. Pub. L. No. 82-414, 66 Stat. 163 (codified under 8 U.S.C. ch. 12).

91. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551–559 (2012)).

92. *See* NGAI, *supra* note 65, at 88–89 n.123.

Border Patrol leadership and “continued to cross illegally.”⁹³ At the same time, ad hoc refugee programs created by the government during this time reinforced the admission preferences for migrant children with family ties to the United States in immigration law generally. The authority for these programs stemmed from the passage of the Refugee Relief Act of 1953, which “broadly defined” a refugee as:

[A]ny person in a country or area which is neither Communist nor Communist-dominated, who because of persecution, fear of persecution, natural calamity or military operations is out of his usual place of abode and unable to return thereto, who has not been firmly resettled, and who is in urgent need of assistance for the essentials of life or for transportation.⁹⁴

Note the fear of ideological invasion present in the explicit exclusion of individuals fleeing “Communist” or “Communist-dominated” countries from the definition of refugee. The remainder of the statute, which otherwise reflects more humanitarian concerns, was actually more expansive than the international human rights norms at the time.⁹⁵

The failures of the first refugee programs for unaccompanied minors at non-land borders portend the mistreatment of children at the U.S.–Mexico border today. Refugee minor programs struggled to secure appropriate foster care placements, and major lapses in the government’s ability to keep track of non-detained children resulted in unfavorable placements.⁹⁶ As these systems failures were uncovered, admissions under these programs were dramatically reduced.

For example, in the early months of the U.S. refugee program for Hungarians fleeing the 1956 Soviet invasion, 1,000 unaccompanied minors were admitted, but due to the lack of guidance and confusion among social welfare agencies, the government lost track of many of the children.⁹⁷ “In response to concern[s]” raised by “relatives of unaccompanied Hungarian children” to the U.S. Secretary of State, INS established a “special program” for the admission of unaccompanied minors, separate

93. See HERNÁNDEZ, *supra* note 65, at 203.

94. HUTCHINSON, *supra* note 56, at 529 (citing Refugee Relief Act of 1953, Pub. L. No. 83-203, § 2(a), 67 Stat. 400, 400).

95. In the newly-enacted 1951 United Nations Convention Relating to the Status of Refugees, the term “refugee” is defined as:

Any person who . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.

Convention and Protocol, *supra* note 28, at 14.

96. See EVERETT M. RESSLER ET AL., UNACCOMPANIED CHILDREN: CARE AND PROTECTION IN WARS, NATURAL DISASTERS, AND REFUGEE MOVEMENTS 49–50 (1988) (discussing lack of uniform policies regarding placement of unaccompanied minors).

97. See *id.*

from the general Hungarian refugee population.⁹⁸ However, the new program overcompensated for the failures of the initial reception of children by severely restricting the possible placements for children upon arrival.⁹⁹ As a result, many applications were denied, and “only 136 children” were admitted through this program.¹⁰⁰

Four years later, despite the exclusion of refugees from Communist-occupied territories, federal funds were appropriated in a series of ad hoc Cuban refugee programs to support child welfare agencies in the placement and care of children; this marked the first time that federal funding was allocated to the child welfare agencies who had been charged with administering unaccompanied minor resettlement programs since the Truman era.¹⁰¹ Despite the support of funding, neither the agencies nor immigration services had coordinated their efforts in any cohesive way, which led to the failure of a number of systems. For example, because unaccompanied children were not identified upon admission, child welfare agencies spent tremendous energy identifying and placing unaccompanied children with caretakers “almost one year” into the migration.¹⁰² Data collected by the child-welfare agencies for record-keeping purposes captured some numbers and documented that “at least 14,000 unaccompanied children” were assisted.¹⁰³ Public reaction to the newly-arrived, mostly resettled in Florida, was mixed.¹⁰⁴ However, at least one leading government official at the time rebuffed the fears of ideological invasion, stating:

Many of the refugees who have entered the United States since November, 1960, are children, and a surprisingly large number have been unaccompanied by parents or guardians. In the safe environment of a normal American home, it is difficult to conceive of sending one's children alone to an alien land where language, manners, and customs are entirely strange to them. But this is the choice that thousands of Cuban parents have made and are making in the belief that the alternative—indoctrination with the malignant seeds of communist dogma—would be infinitely more detrimental to the welfare of their children.¹⁰⁵

98. *See id.* at 50.

99. *See id.* (“[O]nly those unaccompanied minors would be admitted whose sponsors were both relatives and U.S. citizens.”).

100. *See id.*

101. *See id.* at 53.

102. *See id.* at 51 (noting no agencies even recorded presence of unaccompanied, Cuban children “who entered the [United States] during the first six months of 1959”).

103. *See id.* (stating social service agencies documented “at least 14,000 unaccompanied children [were present in] the United States” in October 1962).

104. *See, e.g., Cuban Children Helped in Florida: Charities, U.S. and State Join to Aid 10,000 Refugees*, N.Y. TIMES, May 27, 1962, at 41.

105. Katherine Brownell Oettinger, *Services to Unaccompanied Cuban Refugee Children in the United States*, 36 SOC. SERV. REV. 377, 378 (1962). At time that she

Issues of dependency were eclipsed by ideological concerns in this example. There may be several reasons for this: (1) the Cuban programs that were enacted before the missile crisis contemplated a return of the children to Cuba; (2) child welfare agencies self-organized and secured funding from the federal government for the caretaking of these children, funding which was largely unopposed due to the national and international sympathies for post-War refugees; and, perhaps most importantly, (3) "most of the unaccompanied children came from middle-class families and had attended private Catholic schools."¹⁰⁶ Standing in stark contrast to darker-skinned children that would arrive later from Haiti, the Cuban children represent an anomaly in the treatment of unaccompanied children more generally, a privilege which remains today.¹⁰⁷

2. *The 1965 Hart-Celler Act Restricts Immigration from the Western Hemisphere*

The dependency preference was no more visible than in the second round of comprehensive immigration legislation in modern history: the Hart-Celler Act of 1965. The Act featured migrant children as the primary beneficiaries of a larger policy of family reunification, which was seen as "the major cornerstone of the immigration admission system."¹⁰⁸ The 1965 amendments created a category of unlimited immigrant visas for "minor, unmarried children of citizens," who received preference over all other categories of immediate relatives.¹⁰⁹ Certainly, children who otherwise may have arrived unaccompanied benefited from these unlimited visas that allowed them to reunify with a parent within the contemplation of existing immigration laws. However, lacking any provisions directly relating to the care of unaccompanied children, the law reinforced the preference for the immigration of accompanied children.

Additionally, although the Hart-Celler Act provided for progressive reforms like the elimination of the race-based national origin system, the Act also "imposed restrictions on immigration from anywhere in the Western Hemisphere," which was a major factor leading to the crisis at the

wrote this article, Oettinger was chief of the Children's Bureau of the Social Security Administration, U.S. Department of Health, Education, and Welfare, which was "the first national governmental agency in the world devoted entirely to promoting the health and welfare of children." *See id.* at 377.

106. *See* RESSLER ET AL., *supra* note 96, at 52.

107. For a detailed comparison of the treatment of Cuban and Haitian refugees and the role of the fear of the immigrant other, see Lori A. Nessel, *Externalized Borders and the Invisible Refugee*, 40 COLUM. HUM. RTS. L. REV. 625, 627 (2009) ("[T]he image of poor black immigrants in rickety boats appears to evoke an unwarranted degree of fear and resistance . . .").

108. *See* BILL ONG HING, *DEPORTING OUR SOULS: VALUES, MORALITY, AND IMMIGRATION POLICY* 118 (2006).

109. *See id.*

U.S.–Mexico border today.¹¹⁰ Mae Ngai most recently reflected on the “unintended consequences” of the Act, which she posits “guaranteed that a significant portion of Mexican immigration would be unauthorized, because ongoing labor-market demands far exceeded legal avenues for entry.”¹¹¹ Similarly, there were no carve-outs, exceptions, or provisions relating to unaccompanied minors arriving at the border from the Western Hemisphere, which would prove to be shortsighted when humanitarian crises exploded in Central America.

3. *Ad Hoc Refugee Programs for Unaccompanied Minors Continue*

Absent any legal path for admission, lawful entry of unaccompanied children continued to be relegated to ad hoc and poorly-managed refugee programs. These programs impacted groups of children that the United States pre-identified as worthy of assistance—not the unanticipated waves of migrant children today. As such, the systems and processes developed in these cases were not transferrable to future populations, but their failures were instructive and served as a harbinger for future reforms. As more unanticipated unaccompanied children arrived from Cuba, Haiti, and East Asia, the ad hoc programs led to systemic child abuse and human rights violations.¹¹²

One such high-profile failure that resulted in a class-action against the United States was “Operation Babylift,” in which the United States removed thousands of children in military planes from war-torn Vietnam, en masse, without first verifying whether removal was in the best interests of the child or whether reunification with the children’s parents was possible.¹¹³ As one scholar remarked:

110. See THE IMMIGRATION AND NATIONALITY ACT OF 1965: LEGISLATING A NEW AMERICA xiv (Gabriel J. Chin & Rose Cuison Villazor eds., 2015).

111. See Mae Ngai, *This Is How Immigration Reform Happened 50 Years Ago. It Can Happen Again*, NATION (Oct. 2, 2015), <http://www.thenation.com/article/this-is-how-immigration-reform-happened-50-years-ago-it-can-happen-again/> [https://perma.cc/TUB8-E2ZC].

112. It was during these waves of migration that unaccompanied children were detained as a matter of course in adult detention facilities or group youth facilities upon arrival, rather than placed in a more child-appropriate care environment. Additionally, some children were trafficked by their foster parents, sexually abused, and financially exploited. See SUSAN S. FORBES & PATRICIA WEISS FAGEN, UNACCOMPANIED REFUGEE CHILDREN: THE EVOLUTION OF U.S. POLICIES—1939–1984, 60–78 (1984); see also RESSLER ET AL., *supra* note 96, at 51–112 (documenting failures of systems and resulting abuses for each wave of unaccompanied refugee children).

113. On April 1975 a federal class action suit, *Nguyen Da Yen v. Kissinger*, was filed by the Center for Constitutional Rights (New York City) and the International Children’s Fund (Berkeley) on behalf of three children brought to the United States who allegedly had parents living in Vietnam, and any other children in similar circumstances. The case claimed that the basic human rights of the children had been violated by their removal from the country without proper custody having been obtained, and by their continued detention in the United States in custody of parties other than their natural parents After various appeals, the court ordered

[t]he suit sought to force the government to make a determination of each child's adoptive status; institute procedures for tracing parents or relatives; prohibit adoption of the children until a search for parents or relatives failed; and immediately return any child found to have a living parent seeking its return.¹¹⁴

When entries by unaccompanied minors from Cuba surged again in 1980, the government finally “issued guidelines specifying responsibilities and criteria for state child welfare agencies Now responsible for the care and placement of the minors, state agencies were directed to consider special needs and cultural factors in determining placement.”¹¹⁵ However, this era also resulted in a policy of “detain and verify,” in which children who arrived—primarily from Cuba and Haiti—were held in detention facilities, rather than other more child-appropriate settings, until such time as their claim for relief could be determined and their placement secured.¹¹⁶ This resulted in a dangerous precedent for future waves of unaccompanied minors at the under-equipped southern border, and history would repeat itself again and again to the present day due, in part, to the lack of clear, consistent, and detailed guidelines for programs assisting unaccompanied immigrant children upon their arrival.¹¹⁷ Notably, the economic downturn and high rates of unemployment of the 1970s and 1980s resulted in strong public and congressional opposition to more comprehensive and progressive refugee policy reforms.¹¹⁸ Congressional leaders were not only concerned about whether refugees would compete with Americans for jobs, but also that the lack of controls had resulted in

the Immigration and Naturalization Service to review files and make plans for tracing overseas.

RESSLER ET AL., *supra* note 96, at 74.

114. *Id.*

115. *See id.* at 56; Refugee Resettlement Program; Statement of Goals, Priorities, Standards, and Guidelines for the Unaccompanied Minor Refugee and Cuban/Haitian Entrant Programs, 52 Fed. Reg. 38147-01, 38152 (Oct. 14, 1987) (discussing “placement options”).

116. *See* FORBES & FAGEN, *supra* note 112, at 65–66 (“In the military reception centers, which were detention centers in all essential physical aspects, the minor children were mixed with the general adult population. They were frequently subject to violence and abuse, were without protection or supervision, and were under control of the military police and the INS.”).

117. A well-documented account of the failures of these ad hoc programs included the resettlement of a group of children who became known in popular American culture as the “Lost Boys of the Sudan.” Public fascination with the Lost Boys’ struggles to assimilate and the efforts of largely faith-based organizations to assist them became a public interest story that spanned nearly a decade. *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, 222 n.60 (2012) (“Because of the compelling heartbreak of their individual and collective experiences, articles, novels and films about the Lost Boys abound.”).

118. *See* Harvey Gee, *The Refugee Burden: A Closer Look at the Refugee Act of 1980*, 26 N.C. J. INT’L L. & COM. REG. 559, 646 (2001) (citing PETER H. SCHUCK, *CITIZENS, STRANGERS, AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP* 98 (1998)).

“uncontrolled refugee flows.”¹¹⁹ The fear of economic disadvantage and the fear of floodgates played a large role in the ad hoc nature of these programs and their systemic failures.

B. *The Refugee Act of 1980*

Given that the modern history of immigration policy directed at unaccompanied children is rooted in “ad hoc and situation-specific” programs largely focused on children isolated by acts of war and dictatorships, it follows that the first piece of successful immigration legislation to address the circumstances of unaccompanied immigrant children explicitly was humanitarian in nature.¹²⁰ The Refugee Act of 1980 was a comprehensive bill aimed at the identification, assistance, and processing of all refugees resettled to the United States, including very specific provisions regarding unaccompanied minors.¹²¹ As with prior, unsuccessful legislative efforts, voices raised in opposition reflected the Four Fears. Some opponents cited the potential for refugees to experience difficulties in assimilation.¹²² Opponents were further concerned that the refugees would flood the labor market, leaving American citizens with the second pick for jobs, and used the politically-charged example of the unemployment rate of black Americans to try to drive a wedge between racial minorities and refugee minorities.¹²³ Ultimately, this served only to galvanize influential black leaders to support the bill.¹²⁴

The success of the bill also had much to do with the fact that it federalized the web of child welfare agencies across the country to hedge against the likelihood of unaccompanied refugee minors becoming dependent on the state and to ensure their resettlement with individuals who

119. See *id.* at 607 (citing GILL LOESCHER & JOHN A. SCANLAN, *CALCULATED KINDNESS: REFUGEES AND AMERICA’S HALF-OPEN DOOR, 1945 TO THE PRESENT* 115–17 (1986)).

120. For a detailed legislative history of the 1980 Refugee Act, see Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 6 *IMMIGR. & NAT’LITY L. REV.* 693 (1983).

121. See Daniel J. Steinbock, *The Admission of Unaccompanied Children into the United States*, 7 *YALE L. & POL’Y REV.* 137, 142–43 (1989); see also FORBES & FAGEN, *supra* note 112, at 55.

122. See generally *Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and Int’l Law of the Comm. on the Judiciary H.R.*, 96th Cong. 204 (1979).

123. See *id.* at 96–97. In his testimony before the House of Representatives supporting the bill, African American Civil Rights leader Bayard Rustin noted that the black press at the time was very concerned about the unemployment rate among young black Americans in light of the consideration to admit refugees from what was then known as Indochina. In response, Rustin secured the signatures of 97 out of 100 black leaders in support of a statement which read, “[i]f America can be so insensitive and so cruel as not to accept in the American tradition, as we always had, refugees who are in trouble, the likelihood is that that same [n]ation will never have the sensitivity to deal with the problem of unemployment here.” See *id.* at 97.

124. See *id.* at 96–97.

could care for them. The Refugee Act established and funded the Office for Refugee Resettlement (ORR) and the Unaccompanied Refugee Minor Program (the Program) and made explicit that the federal government was legally responsible for any unaccompanied child who was “in transit to the United States but before the child is [] placed.”¹²⁵ It also provided that children would be placed “under the laws of the States” in which they were to be placed, and that the federal government would reimburse those states for any placement costs incurred.¹²⁶ It further required the ORR to keep statistics on all unaccompanied children and that the Secretary of Health and Human Services submit an annual report to Congress regarding their location and status.¹²⁷ Finally, it gave ORR the right to contract “with appropriate private and public nonprofit agencies.”¹²⁸ Through this legislative foundation, the government established a network of institutions, systems, and policies to reunify unaccompanied children with their parents or other family members, if appropriate, identify alternate caregivers through the child welfare system, and to support unaccompanied children in transition to their new life in the United States.¹²⁹

The early shortcomings of these systems are well-documented.¹³⁰ As an improvement over the last several years, some best practices of the Program have focused on the “best interest of the child” in determining long-term care options and appropriate interim care and support.¹³¹ However,

125. See Refugee Act of 1980, 8 U.S.C. § 1522 (establishing Office of Refugee Resettlement); *id.* § 1522 (a)(6)(A)(iv); see also U.S. CONFERENCE OF CATHOLIC BISHOPS, THE UNITED STATES UNACCOMPANIED REFUGEE MINOR PROGRAM: GUIDING PRINCIPLES AND PROMISING PRACTICES (2013) (giving historical description of program and its goals including, “to provide placement and resettlement services to unaccompanied refugee minors in the United States” as well as report of best practices developed to date), available at <http://www.usccb.org/about/children-and-migration/unaccompanied-refugee-minor-program/upload/united-states-unaccompanied-refugee-minor-program-guiding-principles-and-promising-practices.pdf> [<https://perma.cc/9XKU-FLAW>]; Steinbock, *supra* note 121, 154–57; see also FORBES & FAGEN, *supra* note 112, at 55.

126. See 8 U.S.C. § 1522(d)(2)(B)(ii); see also FORBES & FAGEN, *supra* note 112, at 55.

127. See 8 U.S.C. § 1523(b)(1); see also FORBES & FAGEN, *supra* note 112, at 55.

128. See 8 U.S.C. § 1522(d)(2)(B)(iii); see also FORBES & FAGEN, *supra* note 112, at 55.

129. See 8 U.S.C. §§ 1522(c)(1)(A)(ii), (d)(2)(A) (authorizing head of Office of Refugee Resettlement to contract with and reimburse “public or private nonprofit agencies for projects specifically designed [] to assist refugees in obtaining the skills which are necessary for economic self-sufficiency, including projects for job training, employment services, day care, professional refresher training, and other recertification services[,]” as well as “training in English where necessary”).

130. See generally FORBES & FAGEN, *supra* note 112 and accompanying text; Christopher Nugent, *Whose Children Are These? Towards Ensuring the Best Interests and Empowerment of Unaccompanied Alien Children*, 15 B.U. PUB. INT. L.J. 219 (2006) (identifying procedural gaps in detention, housing, and resettlement efforts of DHS, ORR and their contracting agencies); Steinbock, *supra* note 121.

131. See generally FORBES & FAGEN, *supra* note 112 and accompanying text; Steinbock, *supra* note 121; Carrie A. Hartwell, *Former Unaccompanied Refugee Minors: Stories of Life in Resettlement* 16, 239 (2011) (unpublished doctoral dis-

for unaccompanied children at the border, the Program provides no relief: children who are detained must be released by Border Patrol into the Program in order to benefit from it. Because Border Patrol is detaining these children beyond the statutory maximum timeframes and/or summarily deporting them absent any due process, the resources historically developed for these children are not reaching those who are in immigration custody.

Aside from building the infrastructure for housing and processing unaccompanied minors, the Act embodied the potential for a normative shift toward a more inclusive immigration policy grounded in customary international human rights principles. By adopting the United Nations Protocol Relating to the Status of Refugees, the Act performed the “significant ideological function” of providing “a facially neutral criterion for admission”—that is to say that it was a definition void of any inclusion or exclusion on the basis of country of origin—and the “broad parole authority traditionally exercised by the Attorney General” was significantly narrowed through the adoption of an internationally developed and recognized standard.¹³² But as Daniel Steinbock observed almost a decade after its passing, the Act “largely resolved the *how* of accepting unaccompanied children, but not the *why* or the *when*.”¹³³

Although rooted in international human rights norms, the Refugee Act ultimately served to reinforce the notion that only certain types of suffering earned children the ability to seek refuge and receive child-appropriate attention from immigration authorities in the United States. The United Nations Protocol effectively privileges certain types of immigrant children over others, protecting only those whose persecution claims fit within a limited definition of “refugee”—those who are unwilling or unable to go back to their countries due to “a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”¹³⁴ Some of the chief critiques of the

sertation, University of Michigan) (suggesting that while Unaccompanied Refugee Minor Programs (URMPs) have provided range of services to URMs in their care, URMs would be better served if URMPs incorporated services and programs designed specifically for URM population, as opposed to traditional URMPs modeled on or combined with American foster care); Refugee Resettlement Program; Statement of Goals, Priorities, Standards, and Guidelines for the Unaccompanied Minor Refugee and Cuban/Haitian Entrant Programs, 52 Fed. Reg. 38147-01, 38151 (Oct. 14, 1987).

132. See Ira J. Kurzban, *A Critical Analysis of Refugee Law*, 36 U. MIAMI L. REV. 865, 878, 881 (1982) (citing Refugee Act of 1980).

133. See Steinbock, *supra* note 121, at 139.

134. See 8 U.S.C. § 1101 (a)(42). The Refugee Act codified the international definition of “refugee” in the U.S. Immigration and Naturalization Act:

The term “refugee” means (A) any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion,

United Nations Protocol are that it contemplates only state-sponsored persecution and is under-inclusive in that it does not capture all of the reasons why refugees flee.¹³⁵ For example, gender discrimination is not included in the definition, and neither is forced conscription nor gang recruitment.¹³⁶ These limitations effectively exclude many Central and South American unaccompanied children who have fled specifically for these reasons.¹³⁷

Other definitional problems presented themselves in the interpretation of the Act: for example, as Steinbock identified in an early critique, the term “unaccompanied” was interpreted by the federal government so narrowly that, in practice, children entering the United States with an extended family member or entering to be placed with any relative were largely excluded from the definition.¹³⁸ As a result, children without any adult guidance were left to articulate their eligibility under the Act without legal representation or advice, and children accompanied by some family-member adult were precluded from articulating their claim altogether.

Interpretation problems ultimately gave rise to a larger critique that, although the Act set forth *criterion* for the admission of unaccompanied minors, it did not “contain any special provisions that govern the *processing* of unaccompanied minors for admission to the United States.”¹³⁹ Any specific processes and procedures for unaccompanied child refugees presenting themselves at land-based ports of entry at the border were not articulated in the scheme of admission.¹⁴⁰ That function was left to the discretion of existing immigration authorities and systems: Customs and Border Patrol and Immigration Judges with nearly limitless, unchecked

nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation . . . may specify

Id.

135. See generally PETER NYERS, *RETHINKING REFUGEES: BEYOND STATES OF EMERGENCY* (2006) (critiquing state-centric views of refugees, traditional responses to refugee movements and United Nations definition of refugee).

136. See *Convention and Protocol*, *supra* note 28, at 14 (including “any person who . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion” in definition of refugee and failing to include gender in list of accepted bases of persecution).

137. See *infra* notes 113–44 and accompanying text.

138. See Steinbock, *supra* note 121, at 157–58.

139. See FORBES & FAGEN, *supra* note 112, at 58 (emphasis added); see also Refugee Act of 1980, 8 U.S.C. § 1522(b)(3) (authorizing Secretary to “make arrangements . . . for the temporary care of refugees in the United States in emergency circumstances, including the establishment of processing centers” but failing to provide method of processing).

140. See generally *Marincas v. Lewis*, 97 F.3d 733 (3d Cir. 1996) (stating that “the Refugee Act of 1980 mandated that the Attorney General establish a procedure for an alien physically present in the United States or at a land border, or port of entry” (internal quotation marks omitted)). However, the Act failed to provide for procedure within statute. See *id.*

discretion being chief among them. Processing norms developed in a vacuum of statutory guidance. While the Act built an infrastructure to receive unaccompanied children once they made it past the border, it gave very little guidance to immigration officials to efficiently identify, process, and admit qualifying children at the border.

This implementation gap proved problematic almost immediately after the Act was signed into law as waves of unaccompanied Haitian and Cuban children arrived in the United States without the pre-designation of “refugee” status. Within one month of its enactment, government officials failed to properly identify unaccompanied children among the migrants in the Mariel boatlift from Cuba.¹⁴¹ There were no screening processes in place to sort out the relationships between the migrant children and the migrant adults.¹⁴² Children who may have otherwise been eligible for the newly established ORR programs were not directed to it.¹⁴³ Simultaneously, the government summarily turned away or admitted, but failed to properly care for Haitian refugees, including minors, attempting to enter via boat from Haiti and the Bahamas.¹⁴⁴

In response to complaints of disparate treatment between the two groups, namely, that arriving Cubans were released while arriving Haitians were detained—including the detention of children in adult facilities contrary to laws specifying that no children under the age of fifteen be detained—and despite the similarity of the claims of persecution from children and families fleeing both countries, President Carter’s administration “announced that Cubans and Haitians would be treated ‘equally’ The equal treatment consisted of granting refugee status to neither group, and creating the Entrant category¹⁴⁵ for both.”¹⁴⁶ The following year, the Reagan administration took a much tougher stance when responding to the Haitian influx by summarily rejecting the admission of the vast majority of migrants seeking refuge in the United States—a decision that may have had more to do with the fact that Haitians were fleeing an American-ally dictator, rather than a communist oppressor. For Hai-

141. See FORBES & FAGEN, *supra* note 112, at 63–67.

142. See *id.*

143. See *id.*

144. See *id.*

145. The “Cuban Haitian Entrant” category was defined as (1) any individual granted parole status as a Cuban/Haitian entrant . . . or granted any other special status subsequently established under the immigration laws for nationals of Cuba or Haiti, regardless of the status of the individual at the time assistance or services are provided; and (2) any other national of Cuba or Haiti . . . (B) [who is not subject to] a final, non-appealable and legally enforceable order of deportation or exclusion.

Refugee Education Assistance Act of 1980, Pub. L. No. 96-422, § 501(e), 94 Stat. 1799, 1810. The person must also be in removal proceedings under the INA, or “ha[ve] an application for asylum pending with the Immigration and Naturalization Service.” See *id.* §§ 501(e)(2)(A)(ii)–(iii), 94 Stat. at 1810.

146. See FORBES & FAGEN, *supra* note 112, at 69–70.

tian children who were admitted, difficulties in the process of family reunification and placement resulted in failed placements, additional expense to the government, and the mistreatment and exploitation of some children within the United States.¹⁴⁷ As Ira Kurzban observed in his early, critical examination of the Act:

Although much heralded as the end of the political use of the refugee process, the Act actually embodies executive choice. Try as it might, Congress has failed to remedy the most pressing problem plaguing our admissions program: the absence of legal standards to define refugee status, thereby allowing the wholesale infusion of political biases into a purportedly neutral policy.¹⁴⁸

Notably, unaccompanied children were eventually carved out, again by a Presidential Directive, issued in May, 1983, that specifically indicated that unaccompanied minors should be considered by the Attorney General as those for whom group refugee status should be considered under the Refugee Act.¹⁴⁹

An influential policy analysis of these early programs conducted by the Refugee Policy Group in 1984 recommended that the government direct its attention toward articulating clearer policies and procedures for the agencies involved to ensure that “unaccompanied minors are protected, in accordance with child welfare principles” at two critical points: (1) apprehension and detention and (2) foster care placements.¹⁵⁰ The recommendations noted the particular challenge of determining whether a child is unaccompanied and recommended that processes for quickly identifying them, particularly during emergencies, should be made clear to all affected agencies and subject to public review and discussion, “to ensure that they are in accordance with the best interests of the children.”¹⁵¹ Although there have been major developments in terms of foster care placements for unaccompanied children since the report, most of the reforms have focused on the placement of the children once they clear the border. Very few developments have focused on procedures to protect them at the time of apprehension and detention.

In sum, although the ORR and the URM programs have been further developed in the last thirty-five years and expanded to include other classes of undocumented migrant children, as will be discussed *infra*, the gap between those who enforce immigration laws and those who assist unaccompanied minors has widened. This fate was predicted by the historical patterns of which the Refugee Act itself was a product: first, the privileging

147. *See id.* at 71–77.

148. Kurzban, *supra* note 132, at 867 (footnotes omitted).

149. *See* National Security Decision Directive on Refugee Policy and Processing Refugees from Indochina (May 13, 1983), *reprinted in* 133 CONG. REC. S26840 (1987).

150. *See* FORBES & FAGEN, *supra* note 112, at 80–83.

151. *See id.* at 80–81.

of certain categories of worthiness, blamelessness, and need over others, and second, the ability of the executive to work around the facially neutral definition of “refugee” to admit or exclude the unaccompanied children from particular countries at its discretion. Rather than safeguard against this historical bias, the Act served to reinforce it. Because the definition of refugee was so limiting, it empowered the executive to exclude certain groups by using immigration classifications subject to the political prioritization of the executive. Finally, because the Refugee Act addressed only the criterion for admission and not processing, it cultivated a fertile ground for abuse and neglect at the hands of immigration authorities with unlimited discretion to exclude any child that they deem unworthy from the systems and processes put in place to protect that child.

II. PUBLIC LAW LITIGATION DEFINES THE CONSTITUTIONAL FLOOR FOR UNACCOMPANIED CHILDREN AT THE BORDER

Public law litigation, famously defined by Abram Chayes, has been the most effective tool in setting forth guidelines for the treatment of unaccompanied minors at the U.S.–Mexico border.¹⁵² A boom in class actions concerning the rights of unaccompanied children over the last four decades has begun to address the historical truth articulated by a former immigration judge: “children are the biggest void in all of immigration law.”¹⁵³ However, just two years after the passage of the Refugee Act of 1980, the very first Supreme Court case to hold that the Constitution applies to undocumented immigrants present in the United States was a case concerning immigrant children.¹⁵⁴ The *Plyler* Court outlawed education discrimination against migrant children and required any state seeking to limit its access to public education to establish a “compelling state inter-

152. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976) (describing concept of public law litigation). Chayes stated:

[T]he dominating characteristic of modern federal litigation is that lawsuits do not arise out of disputes between private parties about private rights. Instead, the object of litigation is the vindication of constitutional or statutory policies Most important, the trial judge has increasingly become the creator and manager of complex forms of ongoing relief, which have widespread effects on persons not before the court and require the judge’s continuing involvement in administration and implementation.

Id.

153. See Jacqueline Bhabha & Susan Schmidt, *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in the U.S.*, 1 J. HIST. CHILDHOOD & YOUTH 127, 129 (2008) (internal quotation marks omitted) (quoting Interview by Susan Schmidt with Joseph Vail, former Immigration Judge, Exec. Office for Immigration Review, in Hous, Tex. (Mar. 29, 2004)).

154. See *Plyler v. Doe*, 457 U.S. 202 (1982); HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 7 (2014) (“All nine justices in *Plyler* agreed that the Constitution in some way applies to unauthorized migrants. In other words, constitutional protections come, at least initially, with physical presence in the United States, whether or not that presence is lawful.”).

est” for doing so.¹⁵⁵ Scholars have discussed at length the limited impact of the 5-4 decision, designating it as a constitutional “high-water mark” in immigration jurisprudence.¹⁵⁶ But the Justices’ unanimous conclusion that immigrant children lawfully or unlawfully present in the country are still “persons” under the U.S. Constitution still serves as the starting point for determining what rights attach to that personhood.¹⁵⁷ In fact, over the next three decades, federal courts would continue to shape and define the rights of unaccompanied minors, setting forth a new legal framework that rejected the fears that informed immigration legislation, relying instead on an equitable balancing of interests. And as legislation built the infrastructure of rights, legislation codifying the new structure followed. Beginning with *Plyler*, federal litigation has pushed back on the cycle of fear and restriction that defined the regulation of unaccompanied minors for centuries.

A. *Points of Adjudication and the Effect of the “Entry Fiction” Doctrine*

Unaccompanied minors who cross the U.S.–Mexico border come to the attention of immigration adjudicative bodies in three very different scenarios. First, they may present themselves or be detected by immigration officials at the border and processed according to the procedures detailed in this article, with the hope of ultimately raising their eligibility for relief before an immigration judge as a defense to removal. Second, they may enter the United States undetected and come to the attention of federal or state law enforcement through state child welfare or criminal justice systems, which then may refer or transfer them to federal immigration authorities.¹⁵⁸ Third, they may enter the United States undetected and

155. Notably, the Court relied heavily on the fact that the subject children arrived with their parents and did not enter the country unlawfully of their own volition. See *Plyler*, 457 U.S. at 220 (“[L]egislation directing the onus of a parent’s misconduct against his children does not comport with fundamental conceptions of justice.”). This is distinguishable from many cases involving unaccompanied minors who do arrive in the United States of their own free will. See *id.* at 238 (“The appellee children are innocent in this respect. They can ‘affect neither their parents’ conduct nor their own status.’” (quoting *Trimble v. Gordon*, 430 U.S. 762, 770 (1977))).

156. See Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2043 n.20 (2008) (citing multiple scholars’ works discussing limited impact of *Plyler*); see also MOTOMURA, *supra* note 151, at 7 (discussing impact of *Plyler* decision).

157. See *Plyler*, 457 U.S. at 210 (“[E]ven aliens whose presence in this country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments.” (citing *Shaughnessy v. Mezei*, 345 U.S. 206, 212 (1953); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886))). For an analysis of the rights of non-citizens articulated by the courts before and after *Plyler* and the effect on legal personhood, see Geoffrey Heeren, *Persons Who Are Not the People: The Changing Rights of Immigrants in the United States*, 44 COLUM. HUM. RTS. L. REV. 367 (2013).

158. See DEP’T OF HOMELAND SEC., GUIDANCE ON STATE AND LOCAL GOVERNMENTS’ ASSISTANCE IN IMMIGRATION ENFORCEMENT AND RELATED MATTERS 13–14

affirmatively bring themselves to the attention of immigration by filing an application for any form of relief for which they are eligible. In almost all cases where undocumented children apply for immigration status from the interior of the United States, their unlawful entry, which may otherwise interfere with an adult's application, is waived or waivable by operation of law.¹⁵⁹ The same is true for children who are brought to the attention of immigration authorities through their interaction with state government agencies. In fact, a criminal plea or conviction that would otherwise bar admission may be waived if the crime involved is not one of moral turpitude and the child was charged as a juvenile. In those cases, the criminal offense is treated as if it never occurred.¹⁶⁰

Adjudications at the border are complicated by the persistence of what is called the "entry fiction." The "entry fiction" is a doctrine by which individuals who are physically detained within the United States but who were apprehended at the border are deemed not to have entered the United States for the purposes of determining what individual rights are triggered. The Ninth Circuit has described the "entry fiction . . . as a fairly narrow doctrine that primarily determines the *procedures* that the executive branch must follow before turning an immigrant away."¹⁶¹ In other

(2015), available at <https://www.dhs.gov/xlibrary/assets/guidance-state-local-assistance-immigration-enforcement.pdf> [<https://perma.cc/QK3J-P9WR>]; Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557 (2008) (analyzing evolution of influence on immigration law from exclusive hands of federal government to state and local governments); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084 (2004) (demonstrating federal initiatives to involve state and local enforcement agencies in immigration enforcement).

159. For example, for special immigrant juvenile applicants, the waiver is found at INA § 245(h)(2), 8 U.S.C. § 1255(h)(2) (2012).

160. See INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182 (a)(2)(A)(ii)(I). The BIA has consistently held that acts of juvenile delinquency are not "crimes" for the purposes of immigration law, and that a determination of juvenile delinquency cannot qualify as a "conviction" of a crime—regardless of the elements of the underlying offense. See, e.g., *In re Devison-Charles*, 22 I & N Dec. 1362, 1372–73 (BIA 2000) ("[A]s to persons who have been found to be juveniles and have been treated as juvenile offenders in the disposition of their cases, we find that this provision has no application." (quoting *In re C-M*, 5 I & N Dec. 327, 329 (BIA 1953))); *In re Ramirez-Rivero*, 18 I & N Dec. 135, 135 (BIA 1981) (holding "[a]n act of juvenile delinquency is not a crime in the United States and an adjudication of delinquency is not a conviction for a crime within the meaning of the [INA]"); *In re A*, 3 I & N Dec. 368, 371 (BIA 1948) ("Conviction as a juvenile offender is not a conviction rising to such a degree of guilt or involving such moral turpitude as to require a finding that appellant is not of good moral character."); *In re M-U*, 2 I & N Dec. 92, 93 (BIA 1944) ("[T]he respondent was only about 15 years of age at the time of the theft It therefore follows that the admission of the offense contained in the record was not admission of a crime"). Similarly, the BIA has ruled that an admission to an act of juvenile delinquency, even when the underlying offense may otherwise qualify as a crime involving moral turpitude, does not trigger a finding of inadmissibility. See *id.* at 93. Note, however, that an immigration judge retains absolute discretion in these cases, and even sealed juvenile offenses can result in an unfavorable exercise of discretion.

161. See *Wong v. United States*, 373 F.3d 952, 973 (9th Cir. 2004).

words, although someone is physically within the custody of border patrol, legally he or she is not within the territory of the United States and the Constitution may not apply. The Fifth Circuit has interpreted this to mean that only due process challenges relevant to the exclusion proceedings are allowed until the individual has been deemed to have entered.¹⁶² Due process scrutiny does not apply to claims of official use of excessive force that are not directly connected to making a determination on whether to exclude.¹⁶³ As such, unaccompanied children who are subject to pre-entry exclusion proceedings are the most vulnerable due to a legal fiction.¹⁶⁴ Aside from those to whom this legal fiction is applied, federal litigation has expanded the due process rights of children at the southern border.

B. *Courts Define Due Process for Unaccompanied Minors
at the Southern Border*

Litigation specifically regarding the detention conditions at the southern border was triggered in 1983 when the Salvadoran Civil War led to a mass diaspora of unaccompanied children.¹⁶⁵ The government's response to this migration led to what one border anthropologist has termed a "state of exception" for unaccompanied children in which "automatic detention [became] the new norm and release [became] the exception."¹⁶⁶ She observes that "[o]nce the state of exception was firmly established, the rationale for detaining a vulnerable population became both a self-authorizing status and a moral imperative."¹⁶⁷ Even children who articulated a credible fear of persecution and may have been eligible for asylum or some other form of humanitarian-based immigration relief were immediately detained pending further investigation into their claims.¹⁶⁸

This "detain and verify" policy embodied a number of assumptions rooted in the Four Fears: (1) that the children may have been fabricating their refugee stories; (2) that the children may constitute a flight risk;

162. See *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 623 (5th Cir. 2006).

163. See *id.* ("[W]hatever due process rights excludable aliens may be denied by virtue of their status, they are entitled under the due process clauses of the fifth and fourteenth amendments to be free of gross physical abuse at the hands of state or federal officials." (quoting *Lynch v. Cannatella*, 810 F.2d 1363, 1374 (5th Cir. 1987))).

164. See Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 951–52 (1995).

165. See generally Sarah Gammage, *El Salvador: Despite End to Civil War, Emigration Continues*, MIGRATION POL'Y INST. (July 26, 2007), available at <http://www.migrationpolicy.org/article/el-salvador-despite-end-civil-war-emigration-continues> [<https://perma.cc/R7YA-VM6J>].

166. See SUSAN J. TERRIO, WHOSE CHILD AM I? UNACCOMPANIED, UNDOCUMENTED CHILDREN IN U.S. IMMIGRATION CUSTODY 10 (2015).

167. *Id.*

168. See FORBES & FAGEN, *supra* note 112, at 74–77.

(3) that the children may have ulterior and nefarious motives for seeking entry; (4) that the state was required to detain them in order to ensure that they did not become a public charge; or (5) that their entry was a criminal act and therefore their liberty was justifiably infringed upon. It also cloaked these children with a veneer of undesirability, rather than suitability because it assumed that the country would be best served by severely restricting their ability to participate in its society. This state of exception originated with the Haitian arrivals of the late 1970s, discussed in Part I, but the Salvadoran diaspora brought its institutionalized racism to the southern border.¹⁶⁹

The difference between the government's initial treatments of the two groups is essential: the former groups were considered refugees absent the need for court intervention; government funding and resources had already been committed to receiving and processing the children who arrived, even if it meant spreading them out in detention facilities across the country.¹⁷⁰ The Salvadoran diaspora was not formally recognized as a refugee event by the United States government and, therefore, Border Patrol could not release these individuals from custody absent an admissibility determination.¹⁷¹ Many of those in custody applied for asylum, but the majority of the claims were deemed frivolous—only “[two] percent of applications were approved.”¹⁷² As such, the volume of detainees reached

169. See *supra* notes 105–12 and accompanying text.

170. See Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087, 1125 (1995) (explaining that, in violation of its own policy to parole Cuban and Haitian unaccompanied children into community, INS instead detained over one hundred Haitian and Cuban children “at the overcrowded Krome SPC . . . while many more were held in detention camps at Guantanamo Bay” (footnote omitted) (citing news reports of confinement conditions)); see also *A Slow-Motion Mariel: Cubans (and Haitians) Take to Sea*, 71 INTERPRETER RELEASES 1091, 1091–92 (1994) (explaining detention of Haitian and Cuban refugees at Guantanamo Bay).

171. See Suzan Gzesh, *Central Americans and Asylum Policy in the Reagan Era*, MIGRATION POL'Y INST. (Apr. 1, 2006), <http://www.migrationpolicy.org/article/central-americans-and-asylum-policy-reagan-era> [<https://perma.cc/PW2K-EBV5>] (“Characterizing the Salvadorans and Guatemalans as ‘economic migrants,’ the Reagan administration denied that the Salvadoran and Guatemalan governments had violated human rights. As a result, approval rates for Salvadoran and Guatemalan asylum cases were under three percent in 1984.”); see also *A Humanitarian Call to Action: Unaccompanied Children in Removal Proceedings Present a Critical Need for Legal Representation*, ABA COMM'N ON IMMIGR. (June 3, 2015), <http://www.americanbar.org/content/dam/aba/administrative/immigration/UACSstatement.pdf> [<https://perma.cc/V9JV-8CZK>] (“DHS initially insisted on continued mandatory detention even after the families were found to have established a ‘credible fear’ of return to their home countries . . . indicating a significant possibility of qualifying for asylum or withholding of removal and permitting them to proceed with seeking relief before the immigration court.” (citing 8 U.S.C. § 1225(b)(1)) (2012))).

172. This is not to suggest that the applications were frivolous—many individuals were not represented by counsel and faced many obstacles to articulating a successful claim. See Gammage, *supra* note 162 (noting INS was forced to reconsider applications for asylum previously considered “frivolous” after class action).

crisis levels for which the Border Patrol was ill-prepared.¹⁷³ Judicial intervention became necessary, both to curb the rights violations being committed by immigration authorities, but also to establish this movement of individuals a humanitarian crisis deserving of the protections of The Refugee Act.

1. *The Orantes Litigation (1982–1988): The Right of Access to Counsel*

The Border Patrol's abuse of Salvadorans during this time period was so widespread that it resulted in the first federal class action to challenge border policies.¹⁷⁴ The outcome of this litigation continues to serve as a basis for the due process rights of unaccompanied children at the border today. The certified class was comprised of "all citizens and nationals of El Salvador eligible to apply for political asylum . . . who [] have been or will be taken into custody . . . by agents of the [INS]."¹⁷⁵ In response to the initial lawsuit, the government resurrected nearly every single one of the Four Fears in opposition to the petitioner's request for relief:

Faced with an ever-increasing backlog of asylum applications from aliens of several nationalities, the agency fears that the proposed notice would *encourage even more applications and would exhaust its already strained resources*. Further, because of the predicted need to divert INS resources to handling the additional claims, the Chief Counsel argued that the agency *will be unable to fulfill its function of protecting the borders*. Counsel urged the Court to consider the public interest in *limiting the inflow of aliens who will take jobs from American citizens and lay claim to limited social services*.¹⁷⁶

Rejecting these fears, the Court granted a preliminary injunction, finding evidence of a number of abuses, including: "immigration officials provid[ing] misleading information to Salvadoran detainees regarding their right to apply for political asylum," the denial of "adequate access to

173. See Taylor, *supra* note 167, at 1113–16 (explaining that detention centers were overcrowded and under-staffed in 1980s, particularly in 1989 and 1990 "when the INS announced a sudden crackdown to detain asylum applicants at facilities in South Texas").

174. See generally *Orantes-Hernandez v. Smith (Orantes I)*, 541 F. Supp. 351 (C.D. Cal. 1982); *Orantes-Hernandez v. Meese (Orantes II)*, 685 F. Supp. 1488 (C.D. Cal. 1988), *aff'd sub nom. Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990).

175. See *Orantes I*, 541 F. Supp. at 355.

176. *Id.* at 378–79 (emphasis added) (footnote omitted). The argument that the border would fail if immigration officials were required to comply with basic human rights obligations is a repackaging of the fear of invasion and terrorism. The government used the idea of the destruction of law and order at the border as a threat of retaliation for being forced to comply with the relief sought. Because the government could commit additional resources to ensure that such a deterioration of the border did not occur, the threat is merely a thinly-veiled attempt to drum up fears of lawlessness and invasion.

counsel and [] information about their rights,” and the “[placement of] Salvadoran detainees into solitary confinement without an administrative hearing.”¹⁷⁷ The case was then litigated for six more years until a permanent order guaranteeing certain due process rights was issued in 1988.

The *Orantes* litigation was the first to expose the abuses at the border, and it resulted in a permanent, nationwide injunction mandating that Salvadorans in immigration custody receive written notice about their rights, access to telephones, counsel, and legal materials in detention.¹⁷⁸ The permanent order also enjoined immigration officials from coercing class members into agreeing “to voluntarily depart” the country.¹⁷⁹ Despite several appeals, the injunction stands today.¹⁸⁰ Human rights groups recently invoked the *Orantes* injunction when they were denied access to unaccompanied minors from El Salvador being held in detention.¹⁸¹ The government was ordered to produce a representative sample of the class to meet with their attorneys, upholding the right of access to counsel.¹⁸² Although it remains applicable only to Salvadoran detainees, *Orantes* established certain minimum due process rights for detained individuals, which remain helpful in connecting unaccompanied Salvadoran children to counsel.

2. *Perez-Funez (1984–1986): Right of Access to Counsel and Legal Information*

The next suit filed to enjoin the government from violating the rights of unaccompanied children in detention was the *Perez-Funez v. District Director, I.N.S.*¹⁸³ line of cases. The primary allegations against immigration officials involved coercive tactics used by border patrol officials to convince children to accept voluntary departure, a form of consent to removal from the United States.¹⁸⁴ Although the class action was brought on behalf of detained children from El Salvador, the approved class was much wider:

177. See *The Orantes Injunction*, NAT'L IMMIGR. LAW CTR., (Mar. 2011), <https://www.nilc.org/issues/immigration-enforcement/orantesinjunction/> [https://perma.cc/6ZZP-KE6E].

178. See *Orantes II*, 685 F. Supp. at 1511–13 (listing resources court forced INS to provide detainees after *Orantes II*).

179. See *id.* at 1513.

180. See *Orantes-Hernandez v. Gonzales*, 504 F. Supp. 2d 825, 876 (C.D. Cal. 2007) (“[T]he injunction remains necessary to ensure that Salvadorans are able to exercise their right to apply for asylum freely and intelligently.”), *aff'd sub nom.* *Orantes-Hernandez v. Holder*, 321 F. App'x 625, 629–30 (9th Cir. 2009).

181. See *Federal Court Orders Department of Homeland Security to Allow Class Action Lawyers to Meet with Children Fleeing Violence*, ACLU (July 17, 2014), <https://www.aclu.org/news/federal-court-orders-department-homeland-security-allow-class-action-lawyers-meet-children> [https://perma.cc/U87K-UVMU].

182. See *id.*

183. *Perez-Funez v. Dist. Dir., I.N.S.*, 619 F. Supp. 656 (C.D. Cal. 1985).

184. See *id.* at 657 (noting plaintiff claimed INS presented him with voluntary departure form “without advising him of his rights in a meaningful manner”).

All persons who appear, are known, or claim to be under the age of eighteen years who are now or in the future taken into or held in custody in the United States by agents of the Immigration and Naturalization Service for possible deportation from the United States, and who are not accompanied by at least one of their natural or lawful parents at the time of being taken or received in custody within the United States.¹⁸⁵

Plaintiffs' original prayer for relief was for the appointment of counsel to children in the custody of immigration, arguing that it would ensure consideration of a child's best interest when determining whether deportation was appropriate and would make the cases move along "more quickly."¹⁸⁶ The government raised concerns that, because there were so few immigration judges to handle the cases, "class members . . . [and] all aliens undergoing any type of administrative proceeding" would have longer detentions.¹⁸⁷ This argument harkened back to the arguments that the government raised in *Orantes* with respect to fear of floodgates.

The judge ordered the officials to "adopt certain supplementary procedures when processing class members to ensure that they are meaningfully and adequately advised of their rights, much in the same way that police officers are required to deliver *Miranda* warnings."¹⁸⁸ In likening the protections that were to be afforded to *Miranda*, the court invoked the Sixth Amendment right to counsel in addition to the Fifth Amendment right against self-incrimination.¹⁸⁹ However, the court cited statutes and case law for denying relief in the form of appointed counsel.¹⁹⁰

In addition to providing a written explanation of their rights read aloud to them, a list of free legal services in the area and access to telephones to call a parent, relative, friend or attorney, the final injunction provided that "for all children except those who are Mexicans or Canadians who were apprehended in the immediate vicinity of the border, DHS also must *ensure that the child actually communicates*, by telephone or otherwise, with a parent, close adult relative or friend, or an attorney or legal services organization."¹⁹¹ "The injunction was originally entered in 1984,

185. *Id.*

186. *See Perez-Funez v. Dist. Dir., I.N.S.*, 611 F. Supp. 990, 1004 (C.D. Cal.1984).

187. *See id.* (citing INS's motion in opposition to preliminary injunction).

188. *See id.* (internal quotation marks omitted).

189. *See generally* *Miranda v. Arizona*, 384 U.S. 436 (1966).

190. *See Perez-Funez*, 611 F. Supp. at 1004 (citing 8 U.S.C. § 1252(b)(2) (2012); *Martin-Mendoza v. INS*, 499 F.2d 918, 922 (9th Cir. 1974)).

191. *See The U.S. Government's Response to the Current Influx of Unaccompanied Children at the Border and Its Obligations Under Existing Court Orders*, NAT'L IMMIGR. LAW CTR. (June 20, 2014), <https://www.nilc.org/issues/immigration-enforcement/fedsresponsekids/> [<https://perma.cc/753Y-3YG5>].

was modified and made permanent in 1985, and further modified in 1986.”¹⁹²

Apart from the settlement, it is the court’s articulation of a new balancing test that may one day be viewed as the turning point for the rights of unaccompanied minors. Noting the unique vulnerabilities of children in detention, the judge found that “it is obvious to the [c]ourt that the situation faced by unaccompanied minors is inherently coercive.”¹⁹³ He then engaged in a balancing test of three factors established by the Supreme Court in *Mathews v. Eldridge*¹⁹⁴: (1) “the private interest . . . affected”; (2) “the risk of erroneous deprivation of [rights] . . . and the probable value, if any, of additional safeguards”; and (3) “the [g]overnment’s interest,” determining “that past and current INS procedures violate the due process rights of plaintiff class.”¹⁹⁵ Discussed in further detail in Part IV of this Article, nothing in the three *Mathews* factors echoes any of the Four Fears. In fact, the first two factors are child-centered, focusing directly on the individual liberties at stake. As future courts would separate legitimate government interests from fear-mongering, this balancing test would provide a more legitimate frame through which to map out and shape the appropriate landscape of due process for unaccompanied minors at the border.

C. *The Flores Settlement (1993)*

The Supreme Court took up the issue of the due process rights of unaccompanied minors from El Salvador detained at the border in the landmark case of *Reno v. Flores*.¹⁹⁶ The case was filed to seek a remedy for the protracted detention of children under a new policy that allowed for indefinite detention until such time as a child could be released to parents, close relatives, or legal guardians absent “unusual and compelling circumstances.”¹⁹⁷ As was the case in the *Perez-Funez* line of cases, the class was expanded to consist of “all persons under the age of eighteen years

192. *The Nationwide Perez-Funez Permanent Injunction Provisions for Unaccompanied Children in DHS Custody*, NAT’L IMMIGR. LAW CTR. 1 (June 2014), <https://www.nilc.org/wp-content/uploads/2015/11/Perez-Funez-perm-inj-requirements-2014-06-19.pdf> [<https://perma.cc/UE5P-H6VS>].

193. *See Perez-Funez v. Dist. Dir., INS*, 619 F. Supp. 656, 662 (C.D. Cal. 1985) (citing *Orantes I*, 541 F. Supp. 351, 377 (C.D. Cal. 1982)).

194. 424 U.S. 319 (1976).

195. *See id.* at 321; *Perez-Funez*, 619 F. Supp. at 659, 669 (applying “three-part balancing test for the resolution of procedural due process issues”).

196. 507 U.S. 292 (1993).

197. *See Flores*, 507 U.S. at 292 (citing 8 C.F.R. § 242.24 (2015)) (“Respondents contend that they have a right under the Constitution and immigration laws to be routinely released into the custody of other ‘responsible adults.’”); *see also Flores v. Meese*, 681 F. Supp. 665, 667 (C.D. Cal. 1988) (“Plaintiffs contend that defendants’ policy of routinely strip searching detained juvenile aliens violates the Fourth Amendment of the United States Constitution”), *aff’d sub nom. Flores v. Meese*, 942 F.2d 1352, 1354 (9th Cir. 1991) (“We now affirm the district court’s order.”), *rev’d sub nom. Flores*, 507 U.S. at 315.

who have been, are, or will be apprehended and detained pursuant to 8 U.S.C. § 1252 by the INS within the INS's Western Region."¹⁹⁸ The litigation that followed culminated in the first "nationwide policy for the detention, release, and treatment of minors in the custody of the INS."¹⁹⁹

In *Flores*, the Scalia-led majority explained at length its decision not to incorporate a "best interests" standard, benchmarking its expectations of the government's obligations to children in its custody to "minimum requirements of child care."²⁰⁰ Rejecting the applicability of the asserted liberty interest at stake, freedom from physical restraint, the majority reduced the due process claim to one of administrative procedure: "the alleged right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than of a government-operated or government-selected child-care institution."²⁰¹ The rhetorical impact of referring to immigration detention as "child care" provided a logical loophole to shift the focus of the case away from the individual due process rights of children and toward political deference to the executive on matters of immigration.

In an impassioned dissent, Justice Stevens compared the treatment of unaccompanied minors to that of juvenile delinquents and took issue with the majority setting aside the best interests of the child.²⁰² He reasoned from an individual rights perspective that children are denied basic liberties when the minimum standard of care articulated is akin to that afforded to juvenile delinquents rather than similarly-situated law-abiding children:

These juveniles do not want to be committed to institutions that the INS and the Court believe are "good enough" for aliens simply because they conform to standards that are adequate for the incarceration of juvenile delinquents. They want the same kind of liberty that the Constitution guarantees similarly situated citizens. And as I read our precedents, the omission of any provision for individualized consideration of the best interests of the

198. See *Meese*, 681 F. Supp. at 666 (footnote omitted) (noting plaintiffs are individuals "who have been, are, or will be subjected to, *inter alia*, a strip or body cavity search upon admission to an INS detention facility, after meeting with persons other than their attorneys, or at any other time or occasion absent demonstrable adequate cause.").

199. See Stipulated Settlement Agreement at 6, *Flores v. Meese*, 681 F. Supp. 665 (C.D. Cal. 1988), available at https://www.aclu.org/files/pdfs/immigrants/flores_v_meese_agreement.pdf [<https://perma.cc/9MN8-KM56>] [hereinafter Stipulated Settlement Agreement].

200. See *Flores*, 507 U.S. at 304.

201. See *id.* at 302.

202. See *id.* at 320, 348 (Stevens, J., dissenting) (criticizing majority's opinion that "devote[d] considerable attention to debunking the notion that 'the best interests of the child' is an 'absolute and exclusive' criterion for the Government's exercise of the custodial responsibilities that it undertakes").

juvenile in a rule authorizing an indefinite period of detention of presumptively innocent and harmless children denies them precisely that liberty.²⁰³

He further likened immigration detention to serving a criminal sentence in terms of the similarities in the deprivation of liberty comparable in each:

It makes little difference that juveniles, unlike adults, are always in some form of custody, for detention in an institution pursuant to the regulation is vastly different from release to a responsible person In many ways the difference is comparable to the difference between imprisonment and probation or parole. Both conditions can be described as “legal custody,” but the constitutional dimensions of individual “liberty” identify the great divide that separates the two.²⁰⁴

The *Flores* settlement agreement also requires that juveniles be released from custody “without unnecessary delay . . . to a parent; [] legal guardian, [] an adult relative . . . individual or entity specifically designated by the parent, licensed program . . . or an adult seeking custody” deemed appropriate by the responsible government agency.²⁰⁵ A number of international and national human rights organizations have documented the human rights violations resulting from the failure to implement the *Flores* settlement in any meaningful way.²⁰⁶

D. *Legislation for the 21st-Century Unaccompanied Child*

Between 1990 and 2008, a series of legislative efforts, some successful and some not, significantly impacted the situation of unaccompanied minors in immigration law and policy. In 1990, the Immigration and Nationality Act was amended to include protections for children who were in

203. *Id.* at 348 (Stevens, J., dissenting).

204. *Id.* at 322–23 (footnotes omitted) (citing *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972)).

205. See Stipulated Settlement Agreement, *supra* note 196, at 9–10.

206. See *Prison Guard or Parent?: INS Treatment of Unaccompanied Refugee Children*, WOMEN’S COMM’N FOR REFUGEE WOMEN AND CHILDREN 29 (May 2002), <http://www.refworld.org/pdfid/49ae53f32.pdf> [<https://perma.cc/7CJB-GM2T>] (noting administrator of one holding facility “indicated that he had never heard of the *Flores* agreement”); *Refugees and Migrants in the United States: Families and Unaccompanied Children*, INTER-AM. COMM’N ON HUMAN RIGHTS 93 (July 24, 2015), <https://www.oas.org/en/iachr/reports/pdfs/Refugees-Migrants-US.pdf> [<https://perma.cc/2RQ9-BJQS>] (discussing failure of *Flores* settlement to force holding facilities to provide “most basic necessities”); *Slipping Through the Cracks: Unaccompanied Children Detained by the U.S. Immigration and Naturalization Service*, HUMAN RIGHTS WATCH CHILDREN’S RIGHTS PROJECT (1997), <https://www.hrw.org/sites/default/files/reports/us974.pdf> [<https://perma.cc/CXP5-PV3M>] (noting evidence that *Flores* requirements are not being met at detention facility in Arizona).

juvenile court but could not be returned to their parents.²⁰⁷ After several amendments to the law in 1997 and 2008, this very limited form of relief, Special Immigrant Juvenile Status, is available to children if they can show that they have been abused, abandoned, or neglected in their home country by one or both parents, or that their parents and other caretakers have died.²⁰⁸ These children are in a uniquely precarious position because their government does not have a child welfare infrastructure to support them. If deported, they are left homeless and vulnerable to exploitation by gangs, cartels, child soldier recruiters, and human traffickers.²⁰⁹ But the process involved in obtaining a special form of immigration relief available to them has been criticized for its clumsy reliance on state family courts to determine the child's best interests and its narrow focus.²¹⁰ It requires children to file lawsuits essentially alleging that their parents are unfit.

This last critique is worth highlighting because in many of these cases, the claim for parental neglect is crafted by using privileged, American

207. See Immigration Act of 1990, Pub. L. No. 101-649, § 153, 104 Stat. 4978, 5005–06.

208. Relief for Special Immigrant Juveniles was limited to those who suffer “abuse, neglect, or abandonment” in 1997. See Act of Nov. 26, 1997, Pub. L. No. 105-119, sec. 113, § 1101(a)(27)(J), 111 Stat. 2440, 2460. This limitation was eased somewhat by the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, which expanded the definition, provided protections for children at risk of aging out of the status (freezing their age at the date of filing), removed additional grounds of inadmissibility (stowaways, unlawful presence, misrepresentation and presence without inspection), and required immigration services to process the applications within a 180 day window in a more timely manner. See Pub. L. No. 110-457, 122 Stat. 5044 (2008). We have represented several of these children in the clinics at Albany Law School. Children in this situation are often eligible for a Special Immigrant Juvenile visa, which provides a path to a green card and eventually naturalization if they are successful in their application. See 8 U.S.C. § 1101(a)(27)(J) (2012).

209. See Emily Rose Gonzalez, *Battered Immigrant Youth Take the Beat: Special Immigrant Juveniles Permitted to Age-Out of Status*, 8 SEATTLE J. FOR SOC. JUST. 409, 409–10 (2009) (describing stories of three potentially Special Immigrant Juvenile Status-eligible children without family in their respective home countries); Maria LoPiccolo, Comment, *You Don't Have to Go Home, but You Can't Stay Here: Problems Arising When SIJS Meets International Adoption*, 33 WIS. INT'L L.J. 194, 197 (2015) (describing story of eighteen-year-old soccer player from The Gambia abandoned by both parents at age of thirteen).

210. See Elizabeth Keyes, *Evolving Contours of Immigration Federalism: The Case of Migrant Children*, 19 HARV. LATINO L. REV. 33, 34–57 (2016) (describing “tension between states and the federal government” in recent developments of law and critiquing deference to role and competence of state court); Jessica R. Pulitzer, Note, *Fear and Failing in Family Court: Special Immigrant Juvenile Status and the State Court Problem*, 21 CARDOZO J.L. & GENDER 201, 214–23 (2014) (outlining procedural and substantive inconsistencies in applying Special Immigration Juvenile Status statute and explaining that because “[e]ach state has its own domestic law codes for its family and juvenile courts . . . [P]olicies and procedures vary from state to state, and even between jurisdictions within the same state” (footnote omitted) (citing Maria Virginia De Los Santos, *SIJS: Problems with Substantive Immigration Law and Guidelines for Improvement*, 3 J. RACE, GENDER, & POVERTY 81, 94 (2012))).

parenting standards to judge parents who are functioning in very different socio-economic circumstances. It also delegitimizes poverty alone as a basis for children seeking a better life in the United States. Most Central and South American countries face inordinate wait times due to restricted availability of immigrant visas. Children who wait in that line are adults by the time their applications for lawful admission are even considered. It is for this reason that the more appropriate framework for the assessment of their claims must center on a humanitarian ethic. This ethic must include a deeper understanding of the effect of extreme poverty on children; the dearth of child welfare infrastructure in developing countries; and the modern reality of families with mixed immigration status, with family members residing inside and outside of the United States due to a broken immigration system, attempting to reunify with their children.

The 2002 Homeland Security Act established the legal definition of “unaccompanied alien child.”²¹¹ It also transferred responsibility for the care of unaccompanied children from the former INS to the ORR established by the 1980 Refugee Act, a move praised by child advocates because ORR was viewed as a federal agency with “a social service mandate and a background in serving foreign-born children outside the care of their parents.”²¹² Also in 2002, the Child Status Protection Act amended immigration laws to prevent children from “aging out” of certain forms of relief due to administrative delays.²¹³ This meant that even if the relief sought was not ultimately granted until the applicant children had exceeded the statutory age limit, their age on the date of filing controlled regarding their eligibility for the benefit, not the date relief was ultimately granted.

Despite regular resuscitations in Congress, the proposed Unaccompanied Alien Child Protection Act, introduced by Senator Diane Feinstein, failed several times between 2002 and 2007.²¹⁴ The Act would have been the most comprehensive piece of legislation to date regarding unaccompanied minors. It called for the appointment of child advocates to every unaccompanied child in the care and custody of immigration officials and contained provisions expanding access to counsel—calling for the placement of children in locations where pro bono counsel were more likely to

211. See Pub. L. No. 107-296, § 462(g)(2), 116 Stat. 2135, 2205 (2002) (codified at 6 U.S.C. § 279(g)(2) (2012)).

212. See JACQUELINE BHABHA & MARY CROCK, *SEEKING ASYLUM ALONE: A COMPARATIVE STUDY* 65 (2006).

213. See Pub. L. No. 107-208, 116 Stat. 927 (2002) (codified as amended at 8 U.S.C. §§ 1151(f), 1153(h), 1154(k), 1158(b)(3), 1157(c)(2)(B) (2012)) (“An Act to amend the Immigration and Nationality Act to determine whether an alien is a child, for purposes of classification as an immediate relative, based on the age of the alien on the date the classification petition with respect to the alien is filed, and for other purposes.”).

214. See, e.g., S. 844, 110th Cong. (2007); S. 1129, 109th Cong. (2004); H.R. 3361, 108th Cong. (2003); S. 121, 107th Cong. (2001).

be available.²¹⁵ Passed by unanimous consent in the Senate in 2005, the bill never passed through both houses despite overwhelming support from government officials, including immigration officials and judges, who testified in a Senate hearing on the bill.²¹⁶ In a post-9/11 Congress, the political will to expand the rights of unaccompanied minors was lacking.

The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), the most recent successful attempt to codify the *Flores* settlement agreement, requires that, “within [forty-eight] hours of [their] apprehension,” all unaccompanied children be screened as potential victims of human trafficking.²¹⁷ The TVPRA also requires the Department of Health and Human Services (HHS) to ensure “to the greatest extent practicable” that unaccompanied children in HHS custody have counsel, not only to “represent them in legal proceedings,” but to “protect them from mistreatment, exploitation, and trafficking.”²¹⁸ However, this is no guarantee of representation, and the reality is that the vast majority of these children remain unrepresented.

Additional protections under the TVPRA required that unaccompanied children must be transferred by DHS to HHS custody within seventy-two hours of apprehension.²¹⁹ HHS is further required to “promptly place []” each child in its custody “in the least restrictive setting that is in the best interests of the child.”²²⁰ Although this system has worked fairly well for several years, under the stress of the recent waves of unaccompanied minors at the southern border, the weaknesses turned into failures.²²¹ As more and more failures are uncovered, Congress has been compelled to investigate allegations that children were placed in homes in the United States through this program “where they were sexually assaulted, starved or forced to work for little or no pay.”²²² Once again, legislative protections fell short without due process guarantees in place,

215. See S. 121 § 203(a)(4)(E) (“The Director shall develop standards for conditions of detention in such placements that provide for . . . access to legal services”); see also S. 844 § 103(a)(4)(A)(v); H.R. 3361 § 103(a)(4)(A)(v).

216. See *Unaccompanied Alien Child Protection Act: Hearing on S. 121 Before the Subcomm. on Immigration of the Comm. on the Judiciary*, 107th Cong. 7–11, 12–26, 31–49, 56–74 (2002).

217. See Pub. L. No. 110-457, § 235(a)(4), 122 Stat. 5044, 5076 (2008) (codified as amended at 8 U.S.C. § 1232(a)(4) (2012)).

218. See *id.* § 235(c)(5), 122 Stat. at 5079 (codified as amended at 8 U.S.C. § 1232(e)(5)).

219. See *id.* § 235(b)(3), 122 Stat. at 5077 (codified as amended 8 U.S.C. § 1232(b)(3)).

220. See *id.* § 235(c)(2), 122 Stat. at 5078 (codified as amended 8 U.S.C. § 1232(c)(2)).

221. For a critique of this program, see 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).

222. See Mary Clare Jalonick & Garance Burke, *Senate Subcommittee Examines Migrant Children Abuse*, BUS. INSIDER (Jan. 28, 2016, 7:23 PM), <http://www.businessinsider.com/ap-senate-subcommittee-examines-migrant-children-abuse-2016-1> [<https://perma.cc/7R3T-5N2S>].

resulting in violations of the very same *Flores* agreement that the TVPRA itself codified.

III. TODAY'S UNACCOMPANIED CHILD AND JUDICIAL REJECTION OF THE FOUR FEARS

The children who arrived at the U.S.–Mexico border in the 2014 surge, and who continue to arrive in record numbers today, do not differ from previous waves in terms of their motivations for fleeing. A study of the nearly 70,000 children who fled to the United States in fiscal year 2014 revealed that the majority of them came for three humanitarian-based reasons: increased violence (primarily gang or cartel) in their home country, “poverty, and [] reunification” with family members living in the United States.²²³ What is different is their age and country of origin. Today’s unaccompanied immigrant child at the border is statistically much more likely to be of Central or South American origin, male, and in his late teens.²²⁴

The unique experiences of children at the southern border today are symptomatic of what scholar Elizabeth Keyes calls the “sorting device” of “worthiness” that functions as a proxy for race discrimination in modern immigration law.²²⁵ We have not deemed them worthy of the most basic

223. See *A Guide to Children Arriving at the Border*, *supra* note 23, at 1–2 (“While a child may have multiple reasons for leaving his or her country, children from the Northern Triangle consistently cite gang or cartel violence as a primary motivation for fleeing.”); see also Frances Robles, *Fleeing Gangs, Children Head to U.S. Border*, N.Y. TIMES (July 9, 2014), http://www.nytimes.com/2014/07/10/world/americas/fleeing-gangs-children-head-to-us-border.html?_r=0 [<https://perma.cc/86DH-YKXH>].

224. See Marc R. Rosenblum, *Unaccompanied Child Migration to the United States: The Tension Between Protection and Prevention*, MIGRATION POL’Y INST. 3 (Apr. 2015), <http://www.migrationpolicy.org/research/unaccompanied-child-migration-united-states-tension-between-protection-and-prevention> [<https://perma.cc/WWA3-K9VY>] (explaining that minors from Northern Triangle account for overwhelming majority of exponential growth in number of unaccompanied children arriving at U.S.–Mexico border between FY 2011 and 2014).

225. Many scholars have named and documented numerous racist immigration laws and policies. Immigration historians have identified race as an “explicit[]” factor in “admission and citizenship” as early as 1790. See DEIRDRE M. MOLONEY, NATIONAL INSECURITIES 4 (2012) (“Race was used explicitly to define eligibility for admission and citizenship in 1790, when eligibility for naturalization or obtaining U.S. citizenship was denied to nonwhite immigrants.”); see also NGAI, *supra* note 65, at 67 (“During the 1920s, immigration policy rearticulated the U.S.–Mexico border as a cultural and racial boundary”); EDIBERTO ROMÁN, THOSE DAMNED IMMIGRANTS: AMERICA’S HYSTERIA OVER UNDOCUMENTED IMMIGRATION 114, 120, 122–23 (2013); César Cuauhtémoc García Hernández, *La Migra in the Mirror: Immigration Enforcement and Racial Profiling on the Texas Border*, 23 NOTRE DAME J.L. ETHICS & PUB. POL’Y 167, 196 (2009) (“[N]aming the Border Patrol’s emphasis on recruiting Mexican-descendant agents as a manifestation of internalized oppression allows us to position this agency’s law enforcement strategy alongside similar moments in human history”). In an age where fewer immigration policies are explicitly race-based, Professor Keyes has explored the particular idea of “worthiness” as a modern proxy for racism in a number of contexts, most recently with regard to the 2014 immigration reform efforts and specifically with

protections of the Constitution, much less a path to safety through our immigration laws. And the popularity of anti-immigrant sentiment, specifically anti-refugee sentiment, is again on the rise due to the fear-mongering of President-Elect Donald J. Trump.²²⁶ Although history details regular patterns of vitriolic sentiment towards unaccompanied children, the intolerance suffered by children at the southern border today is marked by extreme abuse and neglect by border officials.

These children survive what is typically a perilous journey²²⁷ to and through the U.S.–Mexico border only to be subjected to inhumane treatment by Customs and Border Patrol officers upon arrival.²²⁸ Reports tell of children housed for extended periods of time at the border in tempo-

regard to certain child migrants. See Keyes, *supra* note 117 (discussing how narratives addressing worthiness limit remedies available to immigrants in court); Elizabeth Keyes, *Defining American: The DREAM Act, Immigration Reform and Citizenship*, 14 NEV. L.J. 101, 102–05 (2013) (examining tiers of worthiness among children applying for relief under “Development, Relief, and Education for Minors Act” (DREAM), which “put forward a strategy of citizenship based on worthiness—elevating the best, the brightest, and the blameless—with costs both within the world of immigration and outside it”); Elizabeth Keyes, *Race and Immigration, Then and Now: How the Shift to “Worthiness” Undermines the 1965 Immigration Law’s Civil Rights Goals*, 57 HOWARD L.J. 899 (2014).

226. See, e.g., Ben Schreckinger, *GOP Candidates Link Paris Attacks to Immigration*, POLITICO (Nov. 15, 2015, 6:44 AM), <http://www.politico.com/story/2015/11/paris-attacks-republicans-immigration-trump-cruz-215895> [<https://perma.cc/F766-WWXY>]; Mollie Reilly, *Republican Candidates Want to Block Syrian Refugees After Paris Attacks*, HUFFINGTON POST (Nov. 16, 2015, 3:42 PM), http://www.huffingtonpost.com/entry/republicans-refugees-paris-attacks_us_564a1747e4b08cda3489da73 [<https://perma.cc/Z9EL-PBEZ>]; Anthony Zurcher, *Trump Leads Republican “Bandwagon” Against Syrian Refugees*, BBC (Nov. 20, 2015), <http://www.bbc.com/news/world-us-canada-34884544> [<https://perma.cc/EL5X-C3GQ>]; see also *Immigration*, *supra* note 40.

227. Many children do not survive the border crossing, which often involves dangerous modes of transportation, exploitation by “coyotes” (smugglers), and grueling travel by foot through unforgiving desert terrain and heat. See MARGARET REGAN, *THE DEATH OF JOSSELINE: IMMIGRATION STORIES FROM THE ARIZONA BORDERLANDS* (2010) (detailing horrific deaths of children attempting to migrate through southern border); see also Wilson Sayre, *Riding “the Beast” Across Mexico to the U.S. Border*, NPR (June 5, 2014, 10:44 AM), <http://www.npr.org/sections/parallels/2014/06/05/318905712/riding-the-beast-across-mexico-to-the-u-s-border> [<https://perma.cc/2G9B-8ZQ6>].

228. Children who arrived with their parents in this surge were subjected to similar abuses. Many of them remain in newly-created family detention facilities, which have historically failed to meaningfully address the needs of migrant children and families. See *Halfway Home*, *supra* note 8, at 11. Recent CBP abuses against children detained in the Tucson sector are detailed in a lawsuit filed by advocacy groups led by the American Immigration Counsel. See *Complaint, Doe v. Johnson*, No. No. 4:15-cv-00250-DCB, 2015 WL 3619102 [hereinafter *Doe v. Johnson Complaint*]. I use the terms “Customs and Border Patrol” and “Border Patrol” throughout this essay to refer to both the border enforcement agents that historically were charged with the duties now assigned to the CBP as well as the specific bureaucratic sub-agency of DHS, written into existence through the Homeland Security Act of 2002. See Pub. L. No. 107-296, § 101, 116 Stat. 2135, 2142 (2002) (codified as amended at 6 U.S.C. § 111 (2012)).

rary detention facilities that resemble dog kennels.²²⁹ Others are detained in extremely harsh conditions, such as the well-documented “*hielera*” or “ice box:” a freezing cold cell without a bed or blanket in which the “lights are kept on [twenty-four] hours a day,” depriving children (some of them infants) of developmentally-critical sleep.²³⁰ In some cases, children are physically and sexually abused by CBP officers, asked to make admissions about legally significant facts surrounding their entry to the United States without a right to an attorney, and otherwise disempowered and subordinated by government officials.²³¹ As one young girl recounted, “[w]e were so cold all the time I thought of the [United States] as a country where human rights are respected, especially of children. I thought of it as a place of freedom, full of sunlight, where you’d feel the wind like you were outside.”²³² Children are held in these conditions under color of law with exceptionally limited due process rights²³³ and very little information about when they can expect to be released. “[One male detainee] apprehended near the McAllen, Texas, border was threatened with rape by a CBP official He was subsequently

229. See Michael Kiefer, *Immigrant Kids Detained in Warehouse of Humanity*, USA TODAY (June 18, 2014, 8:48 PM), <http://www.usatoday.com/story/news/nation/2014/06/18/immigrant-children-detention-centers/10798643/> [https://perma.cc/LQ27-BR38] (noting detainees “sit in fenced off areas or lie on mattresses placed [] up against the other with a look of intense boredom on their faces”).

230. See Ed Pilkington, “*It Was Cold, Very Cold*”: *Migrant Children Endure Border Patrol “Ice Boxes*”, GUARDIAN (Jan. 26, 2015, 7:00 AM), <http://www.theguardian.com/us-news/2015/jan/26/migrant-children-border-patrol-ice-boxes> [https://perma.cc/R53-WU8W].

231. See generally Letter from Nat’l Immigrant Justice Ctr., *supra* note 8 (filing complaint on behalf of 116 unaccompanied immigrant children and urging DHS to “conduct a prompt and thorough investigation into each of these allegations”); see also James Lyall, “*Welcome to Hell*”: *The Border Patrol’s Repeated Abuse of Children*, HUFFINGTON POST (June 24, 2014, 10:45 PM), http://www.huffingtonpost.com/james-lyall/welcome-to-hell-the-borde_b_5527967.html [https://perma.cc/XG5E-XBNV].

232. Pilkington, *supra* note 227 (internal quotation marks omitted). Tatiana (a pseudonym) was detained in a temporary immigration detention facility at the U.S.–Mexico border, along with her nine-month-old baby, for ten days, and a recent report details the conditions of her civil confinement:

There was no bedding, not even a blanket, and she slept fitfully with Rafael in her arms. After a few days the baby caught a cold and stopped eating solids, and for a couple of days he wouldn’t even take his mother’s milk. His weight fell from 23lbs when he arrived at the border station to 15lbs. She said she didn’t ask for medical treatment for her son because of an incident she had witnessed involving another mother in the holding cell. The other woman had asked a guard for help with her infant child who was suffering from the cold, and the guard replied: “Why do you come here if you don’t like it? You should go back home.”

Id.

233. See HUMAN RIGHTS WATCH CHILDREN’S RIGHTS PROJECT, *supra* note 203, at 5–6 (documenting inadequate detention conditions of unaccompanied alien children and other immigrant minors, including restriction of “access to legal representation”). Conditions have not improved significantly since this report was issued.

strip-searched and made to stand naked for 15 minutes while a different CBP official patted him down His crime? The officials didn't believe he was 16 years old."²³⁴ These children endure state-sponsored punishment typically reserved for the most detested, most reviled criminals and terrorists prosecuted under the laws of the United States.²³⁵ They endure what they fled to avoid. At the peak of the crisis in 2014, the government's response was officially, "we will send you back."²³⁶

As a result, very little has changed in official policy at the border, which has led to mounting lawsuits filed by the same groups who blazed the trail against these types of conditions and in defense of due process for unaccompanied minors in *Orantes* and *Perez-Funez*. In at least one of these cases, the government is dusting off the Four Fears and bringing them back to match the political rhetoric of the election year. However, the judiciary is pushing back. The first of these complaints was at the height of the crisis in June 2014. Filed against the Department of Homeland Security by the American Civil Liberties Union along with a number of other legal advocacy organizations, the complaint details the abuses of unaccompanied minors at the border, and includes first-hand accounts of abuse from the children themselves.²³⁷ The complaint calls upon DHS to implement a number of policies consistent with the *Flores* settlement agreement and makes a number of recommendations regarding how to curb the abuses.²³⁸ Shortly after the filing of the complaint, the same group of organizations filed a lawsuit challenging the Obama administration's family-detention policies.²³⁹

234. Lyall, *supra* note 228.

235. See generally Stella Burch Elias, *Rethinking "Preventive Detention" from a Comparative Perspective: Three Frameworks for Detaining Terrorist Suspects*, 41 COLUM. HUM. RTS. L. REV. 99 (2009) (comparing and contrasting different forms of preventive detention for terror suspects with immigration detention and noting use of immigration detention in some cases of migrant terror suspects as "proxy . . . for preventive detention").

236. See *Hearing Reviewing the President's Emergency Supplemental Request for Unaccompanied Children and Related Matters Before the S. Comm. on Appropriations*, 113th Cong. (2014) (statement of Jeh Johnson, Sec'y of Homeland Sec. of the United States), available at <http://www.appropriations.senate.gov/download/2014/07/10/secretary-johnson-testimony> [<https://perma.cc/57QP-2K58>].

237. See Letter from Nat'l Immigrant Justice Ctr., *supra* note 8, at 7–18. Note that just after this complaint was filed, the ACLU was barred from visiting its clients and the lawyers had to file an injunction under *Orantes* in order to see their clients. See *Federal Court Orders Department of Homeland Security to Allow Class Action Lawyers to Meet with Children Fleeing Violence*, *supra* note 178.

238. See Letter from Nat'l Immigrant Justice Ctr., *supra* note 8, at 22–24.

239. See *R.I.L.-R v. Johnson*, 80 F. Supp. 3d 164 (D.D.C. 2015); see also *ACLU Sues Obama Administration for Detaining Asylum Seekers as Intimidation Tactic*, ACLU (Dec. 16, 2014), available at <https://www.aclu.org/news/aclu-sues-obama-administration-detaining-asylum-seekers-intimidation-tactic> [<https://perma.cc/6BN4-JEJS>] (announcing ACLU filed nationwide class action challenging Obama administration "on behalf of mothers and children who have fled extreme violence, death threats, rape, and persecution in Central America"). The outcomes of the family detention are not squarely on point for the purpose of this paper, but may

A. Doe v. Johnson

The American Immigration Council and others recently filed suit against officials in the Tucson, Arizona, Sector of the U.S. Border Patrol, where some of the worst abuses of unaccompanied minors have occurred.²⁴⁰ The claims asserted in the complaint involve numerous Fifth Amendment Due Process violations as well as a violation of the Administrative Procedure Act.²⁴¹ As to this latter claim, Plaintiffs allege that border patrol officers failed to uphold their own official policies regarding the detention of unaccompanied minors and *Flores* compliance and, in spite of their awareness of the “unhealthy” and punitive conditions, “failed to take remedial action.”²⁴² Over the course of the litigation thus far, the court has issued sanctions against the government for the destruction of some of the potentially most damaging evidence, including thousands of hours of video from inside the facilities.²⁴³

The case raises important questions about the standards owed to unaccompanied minors in civil immigration detention. Importantly, in ruling against the government’s Motion to Dismiss, the court cited the leading case on civil detention standards, which provides that civilly-detained individuals are entitled to due process protections “at least as great as those afforded to an individual accused but not convicted of a crime . . . cannot be subjected to conditions that amount to punishment.”²⁴⁴ As will be discussed in Part IV, this standard has played a central role in pending litigation regarding a host of issues for undocumented immigrant children.

have implications for other pending suits concerning the rights of similarly detained unaccompanied children.

240. See AM. IMMIGR. COUNCIL, *Challenging Unconstitutional Conditions in CBP Detention Facilities* (2015), <https://www.americanimmigrationcouncil.org/litigation/challenging-unconstitutional-conditions-cbp-detention-facilities> [<https://perma.cc/R9RC-H9R9>] (last visited Oct. 31, 2016) (describing mistreatment of detainees at Tucson Border Patrol Stations).

241. See generally *Doe v. Johnson* Complaint, *supra* note 228. The court has dismissed the claim under the Administrative Procedure Act, but the claims under the Fifth Amendment remain. See Order on Defendants’ Motion to Dismiss, *Doe v. Johnson*, No. CV 15-00250-TUC-DCB (D. Ariz. Jan. 11, 2016), available at https://www.americanimmigrationcouncil.org/sites/default/files/litigation_documents/118_order_on_mtd.pdf [<https://perma.cc/7F9E-MY6W>].

242. See *Doe v. Johnson* Complaint, *supra* note 228, at 34–42.

243. See Order Granting Plaintiffs’ Motion for Sanctions Against Defendants at 10–13, *Doe v. Johnson*, No. CV 15 15-00250-TUC-DCB (D. Ariz. Sept. 28, 2015), available at https://www.americanimmigrationcouncil.org/sites/default/files/litigation_documents/64_order_grnt_part_mtn_sanctions.pdf [<https://perma.cc/4EKK-UQWP>].

244. See Order on Defendants’ Motion to Dismiss, *supra* note 238, at 5–6 (quoting *Jones v. Blanas*, 393 F.3d 918, 932 (9th Cir. 2004)) (internal quotation marks omitted).

B. Flores v. Johnson

Predictably, it is the most recent resurrection of the *Flores* case that is stirring up the usual fear-based narratives. Filed in February 2015, this suit challenges the blanket no-release policy enacted by DHS, in which the government detained “all female-headed families, including children, in secure, unlicensed facilities for howsoever long as it takes to determine whether they are entitled to remain in the U.S.”²⁴⁵ The complaint alleges that this policy violates provisions of the *Flores* agreement that require immigration authorities to “release a minor from its custody without unnecessary delay” and to make “prompt and continuous efforts on its part toward family reunification and release of the minor.”²⁴⁶ In her initial ruling on the case, ordering the prompt release of children from family detention centers, the judge articulated what has been on the minds of advocates for years:

It is astonishing that Defendants have enacted a policy requiring such expensive infrastructure without more evidence to show that it would be compliant with an Agreement that has been in effect for nearly [twenty] years It is even more shocking that after nearly *two decades* Defendants have not implemented appropriate regulations to deal with this complicated area of immigration law.²⁴⁷

The judge then specifically refuted the fear-based claims that the government asserted in defense of its policy:

Defendants state that “the proposed remedies could heighten the risk of another surge in illegal migration across our Southwest border by Central American families, including by incentivizing adults to bring children with them on their dangerous journey as a means to avoid detention and gain access to the interior of the United States.” *This statement is speculative at best, and, at worse, fear-mongering.*²⁴⁸

This is a rare example of the judiciary explicitly rejecting the use of the floodgates fear in opposition to the migration of unaccompanied minors. Although the Judge’s ruling was subsequently limited on appeal to children only and not their parents, the decision on appeal clari-

245. See Plaintiffs’ Memorandum in Support of Motion to Enforce Settlement of Class Action at 2, *Flores v. Johnson*, No. CV 85-4544-RJK(Px) (C.D. Cal. Feb. 2, 2015).

246. See *id.* at 6, 9.

247. Order Re Plaintiffs’ Motion to Enforce Settlement of Class Action and Defendants’ Motion to Amend Settlement Agreement at 23–24, *Flores v. Johnson*, CV 85-4544 DMG (AGRx) (C.D. Cal. July 24, 2015).

248. Order Re Response to Order to Show Cause at 11, *Flores v. Lynch*, No. CV 85-04544 DMG (Ex) (C.D. Cal. Aug. 21, 2015), 2015 WL 9915880, at *6 (emphasis added) (citation omitted).

fied that the *Flores* agreement applies to both accompanied and unaccompanied minors.²⁴⁹ With a number of similar cases pending, the judiciary has a number of opportunities to publicly denounce the fear-based narratives and re-examine its role in checking the unbalanced power of the executive in the administration of immigration law and policy.

C. *Private Harms, Public Concern: Government Culpability*

Apart from lawsuits against the government, litigation against private individuals responsible for the abuse and exploitation of unaccompanied minors resettling in the United States has given rise to increased scrutiny of HHS by concerned legislators. A ring of human traffickers with whom HHS had placed a number of unaccompanied children were federally indicted for forcing the children to work six or seven days per week, twelve hours per day on egg farms in and around Marion, Ohio.²⁵⁰

This indictment prompted the Permanent Subcommittee on Investigations in the U.S. Senate to conduct an investigation and a series of hearings on the matter.²⁵¹ The staff report, compiled as a part of the investigation, constitutes official governmental recognition of these repeated failures to identify, receive, process, place, and monitor unaccompanied minors admitted to the United States.²⁵² The report concludes by stating that ORR has undertaken the long-awaited process of codifying relevant TVPRA provisions, as well as some of the placement protections of the *Flores* settlement, which advocates would say has been a long time coming.²⁵³ It remains to be seen whether ORR will finish this project, and even if it does, without parallel scrutiny of the practices of Customs and Border Patrol, the project's impact on the treatment of unaccompanied minors at the U.S.-Mexico border will be limited. However, attempts to codify the protections developed for these children over the years, and the willingness of the government to formally re-examine its policies and practices to curb abuses by private actors, represent a normative shift toward accepting some responsibility for harms unaccompanied children have suffered and acknowledging the constitutional rights owed to them.

249. See *Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016).

250. See *Superseding Indictment, United States v. Castillo-Serrano*, No. 3:15-cr-00024 (N.D. Ohio July 1, 2015), ECF No. 28.

251. See S. SUBCOMM. ON INVESTIGATIONS, 114TH CONG., REP. ON PROTECTING UNACCOMPANIED ALIEN CHILDREN FROM TRAFFICKING AND OTHER ABUSES: THE ROLE OF THE OFFICE OF REFUGEE RESETTLEMENT (Jan. 28, 2016).

252. The Subcommittee did not take up the issue of unaccompanied minors abused by Border Patrol officers, but did assign responsibility for the placements of children with abusive sponsors to HHS and the Office for Refugee Resettlement. See *id.*

253. See *id.* at 51 (quoting *Implementation of the Unaccompanied Alien Children (UAC) Provisions of the Trafficking Victims Reauthorization Act of 2008*, OFFICE OF INFO. & REG. AFF., <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201510&RIN=0970-AC42> [<https://perma.cc/JD2Q-RVJT>] (last visited Oct. 31, 2016)).

IV. TRANSFORMATIVE PUBLIC LAW LITIGATION AND THE ANTIDOTE
TO THE FOUR FEARS

Applying a dispute-transformation framework to the treatment of unaccompanied minors in immigration law and, specifically at the U.S.–Mexico border, suggests that the last forty years of litigation have only begun to scratch the surface of rectifying the suffering of these children in the last century since the creation of the Border Patrol.²⁵⁴ It also suggests that further study of the fear-based oppositions to their arrival, anchored in centuries of systemic subordination of their rights, is central to identifying the depth of the problem and crafting the appropriate due process remedy.²⁵⁵ The antidote to the Four Fears is strategic, targeted, and coordinated public law litigation that balances the interests protected by securing due process remedies for children with more salient government interests stripped of the illegitimacy of the Four Fears. The courts are uniquely positioned to take a stand in opposition to the Four Fears and further, to identify a ceiling, rather than a floor, for due process owed to unaccompanied minors.

The three-factor balancing test for procedural due process protections articulated by the Supreme Court in *Mathews* and applied to the case of unaccompanied immigrant children in *Perez-Funez* has emerged as a central unifying theme in pending cases. Applying *Mathews*, courts are balancing (1) “the private interest affected”; (2) “the risk of erroneous deprivation of rights . . . and the probable value, if any, of additional . . . safeguards”; and (3) “the government’s interest.”²⁵⁶ In the decades that have followed the *Perez-Funez* decision, the increasingly criminal nature of the proceedings against these children, the gravity of the potential outcome (systemic and pervasive abuse and neglect, resulting in death in some cases) paired with the complete inability of the Border Patrol to self-police unlimited and unchecked discretion afforded to its agents, and policy considerations set forth the strongest arguments for expanding procedural due process protections.²⁵⁷

254. For a discussion of the legal framework guideline disputes more generally, see William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC’Y REV. 631 (1981). “Formal litigation and even disputing within unofficial fora account for a tiny fraction of the antecedent events that could mature into disputes.” *Id.*

255. *See id.* (“Moreover, what happens at earlier stages determines both the quantity and the contents of the caseload of formal and informal legal institutions. Transformation studies spotlight the issue of conflict levels in American society and permit exploration of the question of whether these levels are too low.”).

256. *See Perez-Funez v. Dist. Dir.*, I.N.S., 619 F. Supp. 656, 659 (C.D. Cal. 1985) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)) (articulating “three-part balancing test for the resolution of procedural due process issues”).

257. In fact, the *Mathews* factors were cited extensively and centrally in a very recent brief submitted in support of a class action regarding children’s right to appointed counsel in immigration proceedings. *See* Brief of the Amicus States of Washington and California, *J.E.F.M. v. Lynch*, No. 2:14-cv-01026-TSZ (9th Cir. Mar. 11, 2016).

A. *The Militarization of the U.S.–Mexico Border Supports the Case for Expanded Due Process Rights for Unaccompanied Children*

In the years since the *Orantes* and *Perez-Funez* injunctions were initially entered, the relationship between Border Patrol and unaccompanied children at the U.S.–Mexico border has increasingly resembled that of law enforcement and criminals. Throughout the second half of the twentieth century, and accelerating until the end of its last decade, layers of exponentially more restrictive immigration policy and practice at the Border would both create “illegal immigration” and criminalize acts that are “civil in nature.”²⁵⁸ The 1990s witnessed a “stunning militarization of the U.S.–Mexico border” with Congress authorizing “a doubling of the Border Patrol’s force, the erection of fences and walls, and the deployment of all manner of high-tech surveillance on land and by air.”²⁵⁹ After the September 11th terrorist attacks in 2001, Congress further limited the ability of courts to review the quasi-legal discretionary decisions of CBP officers, so long as the decisions were related to deportation and removal.²⁶⁰

In other words, if the officers err on the side of exclusion, their decisions are not subject to review, despite evidence of abuse of discretion or even physical abuse of the excluded individual.²⁶¹ The national dialogue also shifted to a greater focus on border security and immigration enforcement at the expense of humanitarian concerns at the southern border.²⁶²

The United States today spends more money each year on border and immigration enforcement than the combined budgets of the FBI, ATF, DEA, Secret Service and U.S. Marshals—plus the

258. See Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 472, 527 (2007) (“[I]mmigration law has been absorbing the theories, methods, perceptions, and priorities of the criminal enforcement model while rejecting the criminal adjudication model in favor of a civil regulatory regime.”); see also CHOMSKY, *supra* note 80; NGAI, *supra* note 65, at 248.

259. See NGAI, *supra* note 65, at 266.

260. See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, §§ 201–225, 412, 115 Stat. 272, 278–96, 350–52; Quinn H. Vandenberg, Note, *How Can the United States Rectify Its Post-9/11 Stance on Noncitizens’ Rights?*, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 605, 615 n.50 (2004) (“[W]ith the USA PATRIOT Act, immigrants’ rights to judicial review are practically zero.”).

261. See David B. Pakula & Lawrence P. Lataif, *Judicial Review of Administrative Immigration Decisions: Can the Doctrine of “Ejusdem Generis” Save It from Extinction?*, 78 FLA. B.J., Jan. 2004, at 32, 34 (stating that INA Section 242(a)(2)(B) is Act’s “most controversial jurisdiction-limiting provision” in that it provides “no court shall have jurisdiction to review . . . statutory forms of relief that can be raised both before commencement of removal proceedings and during removal proceedings[.]” namely “waivers of inadmissibility, voluntary departure, adjustment of status and asylum,” as well as “cancellation of removal” (footnotes omitted)).

262. See Chacón, *supra* note 6, at 93 (“The term *border security* as it is currently used in the national discourse is a post-9/11 phenomenon. In fact, the term that we have come to view as synonymous with immigration issues has only been a part of this discourse for the last seven years or so.”).

entire NYPD annual budget. Altogether, the country has invested more than \$100 billion in border and immigration control since 9/11.²⁶³

The “construction of illegality” that now shrouds unaccompanied children at the border has been identified by social scientists as “a form of state violence[] [because] it individualizes the actions of the children and disavows a series of dependencies as well as the independencies of the travel, transnational familial contexts, isolation, and communities.”²⁶⁴ Labeling otherwise law-abiding unaccompanied children with this construction of illegality also changes the baseline of a Border Patrol officer’s intuitive perception. When Border Patrol officers are trained to view all unauthorized immigrants as potential criminals, their discretion is impaired. Recent psychological scholarship provides an explanation of how this happens. Essentially, the cognitive mental anchor for the population with which immigration authorities regularly interact is firmly planted in anti-immigrant bias, which then competes with any other information that they process from their interactions with the children themselves (such as innocence, humanitarian concerns, and dependency) that would counter such an implicit bias.²⁶⁵ In addition, such anchoring acts to establish a baseline for confirmation bias—the process by which the brain seeks out information to confirm what one already knows to be true, which competes with the more critically analytic cognitive processing, particularly when wrestling with ethical dilemmas.²⁶⁶ The criminalization of unaccompanied children thus has a more insidious, systemic, and psychological impact on children and border patrol alike, felt on an even deeper emotional level than the inhumane punitive processes and conditions.²⁶⁷

263. Garrett M. Graff, *The Green Monster: How the Border Patrol Became America’s Most Out-of-Control Law Enforcement Agency*, POLITICO MAG. (Nov./Dec. 2014), <http://www.politico.com/magazine/story/2014/10/border-patrol-the-green-monster-112220#.Vda23U2FNdh> [<https://perma.cc/3MUH-J694>].

264. See Aitken et al., *supra* note 13, at 234.

265. See Keyes, *supra* note 117, at 238–39 (discussing specific ways in which anti-immigrant narratives act as psychological anchors in legal decision-making process).

266. For an accessible and rigorous overview of the psychological models explaining this phenomenon, which has been proven through brain science, see Mark D. Rogerson et al., *Nonrational Processes in Ethical Decision Making*, 66 AM. PSYCHOLOGIST 614, 622 (2011) (“Emotions and values exert their powerful influence through automatic and intuitive processes. Acknowledging and understanding the resulting tendencies and biases represent a promising path to a more realistic, accurate, and helpful conceptualization of decision making, particularly in emotionally charged situations.”); see also generally DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011) (explaining concepts of anchoring, cognitive bias, and confirmation bias in every day decision-making, both personal and professional).

267. See Jorge M. Chavez et al., *Sufren Los Niños: Exploring the Impact of Unauthorized Immigration Status on Children’s Well-Being*, 50 FAM. CT. REV. 638, 642–47 (2012); Irene Scharf & Christine Hess, *What Process Is Due? Unaccompanied Minors’ Rights to Deportation Hearings*, 1988 DUKE L.J. 114, 114 n.2 (noting restrictions on telephone use “exacerbated” impact on young unaccompanied children).

1. *The Effects of Border Patrol Militarization on Unaccompanied Children*

The circumstances of unaccompanied minors at the border are archetypical illustrations of the moral dilemmas presented by the existence of borders generally. “[B]orders are today considered to be active zones of negotiation, exchange and creation, impacting not only people’s physical worlds and mobility but also their symbolic worlds and notions of belonging.”²⁶⁸ Borders are functions of political dynamics in which the individuals who are affected by them have no agency or influence. Children, specifically, face immeasurable challenges in negotiating borders, which are not typically the type of legal distinctions that they have the sophisticated knowledge base to recognize or understand. And yet, children are also deeply impacted by border policies in terms of their internal orientation to the world around them and the limitations that borders place on their access to safe places in the world.

Border zones are places that force governments to answer questions regarding security, freedom, gatekeeping, and belonging. They are also places where there are few protections from the government’s abuses. The unchecked discretion afforded to government agents in apprehending undocumented immigrants, including unaccompanied children, allows for rampant heuristic stereotyping and biases to play a central role in race-based exclusions. And as the law attempts to navigate these issues, the ever-watchful eye of due process interrogates the expediency, efficiency, deliberativeness, and fairness of the result. The lens of due process of law serves a different purpose than that of sociological, historical, or ethnographic examinations. It reveals the level of mistreatment of a person that a society and its government are willing to tolerate in order to pursue interests that are, by definition, located in a higher order of priority than individual rights and freedoms. The apprehension of unaccompanied children at the border place CBP squarely, albeit reluctantly, in the role of temporary custodian. The questions forced by this situation present difficult issues. How much do we value the lives and well-being of children? On what basis are we differentiating between the rights afforded those children whose only infraction is the violation of a civil–legal construct of “border” versus children who are alleged to have committed a crime? To what level of custodial integrity do we hold the government as temporary caregivers to these children?

Certainly, these questions are implicated in many other contexts in U.S. law, and this paper is not intended to address them. What is interesting in this examination, however, is that the lack of official oversight at the border has allowed Border Patrol practices to unfold, resulting in these questions being answered to the detriment of children. In part by design and in part by customary practice, the Border Patrol does not have the authority to police its own force. As documented by investigative journalist Garrett Graff:

268. CHILDREN AND BORDERS 9 (Spyros Syrou & Miranda Christou eds., 2014).

When DHS was set up, ICE was given exclusive “1811 authority” to conduct investigations in the border region; CBP was only given so-called “1801 authority,” a lesser classification that allowed Border Patrol agents and Customs officers to make arrests and enforce federal law—but not investigate. They could be cops but not detectives.

That didn’t particularly matter in the daily performance of CBP’s duties—the borders were patrolled, the ports of entry watched—except that CBP was legally prohibited from policing its own workforce.²⁶⁹

Graff goes on to detail how these disparate authorities, which are actually just human resources codes created and used by the Office for Personnel Management (OPM) to classify different types of federal jobs,²⁷⁰ result in escalating tensions between Border Patrol leadership, the DHS, and the Federal Bureau of Investigations (FBI).²⁷¹ In the face of rising death tolls of children both inside and outside the border zone at the hands of Border Patrol agents,²⁷² attempts by CBP leadership to establish an internal affairs unit were quashed by their own host agency—DHS.²⁷³ And when they “turned to the FBI for investigative help” internally, DHS “cut of all [] cooperation” with the FBI’s Border Corruption Task

269. Graff, *supra* note 260.

270. The Classification Act of 1949 established this classification standards program. *See* 5 U.S.C. § 5101 (2012). The Act provides, among other things, that the Office for Personnel Management is responsible for establishing standards and working with various government agencies to determine the appropriate standard for each position of employment. *See* 5 U.S.C. § 5103. Individuals can challenge their classification and those of their subordinates through an appellate process. *See* 5 U.S.C. § 5112(b). A cursory study of the appellate opinions, which are handled internally by OPM, contains fascinating contortions of logic to deny this very shift in classification. *See, e.g.*, OPM Decision GS-1801-12, No. C-1801-12-05 (1999). The decision found that, although the “first duty” of the appellant’s job description involved “identifying those in criminal institutions who have violated immigration laws and are subject to deportation” and “managing the process of identifying, interviewing, and processing criminal aliens,” and even though the basis for the appeal was that the position description “has not properly taken into account the recent changes in law relating to removal of criminal aliens,” such changes requiring “a higher level of knowledge of the Immigration Agents to perform their duties,” the work of the appellant and his staff nevertheless did not require “knowledge of investigative techniques and a knowledge of the laws of evidence, the rules of criminal procedure, and precedent court decisions concerning admissibility of evidence, constitutional rights, search and seizure, and related issues” to justify the higher classification. *See id.*

271. *See* Graff, *supra* note 260.

272. Several recent cases highlight the shooting deaths of unaccompanied migrant children at the U.S.–Mexico border by Border Patrol agents, including one in which the Supreme Court of the United States has granted certiorari. *See, e.g.*, *Hernandez v. United States*, 785 F.3d 117 (5th Cir. 2015), *cert. granted sub nom. Hernandez v. Mesa*, 84 U.S.L.W. 3060 (U.S. Oct. 11, 2016); *Perez v. United States*, 103 F. Supp. 3d 1180 (S.D. Cal. 2015).

273. *See* Graff, *supra* note 260.

Forces.²⁷⁴ The discrepancy persists today. A bureaucratic, administrative labeling system that dates back to the 1940s, the most turbulent and restrictionist time in the history of American immigration law and policy, is preventing CBP from establishing any meaningful self-regulation mechanism.

The normative impact of this hamstringing of Border Patrol leadership at the top is revealed in the persistence of abusive and coercive tactics of Border Patrol boots on the ground. The failure of the U.S. government, Congress, and courts to adequately address and curb known, documented abuses by Border Patrol agents reveals that some of the most vulnerable humans in their care are so far subordinated in the legal order such that their abuse and death are inconsequential to the countervailing import of insulating the government from liability.

B. *Promising Litigation: The Right to Appointed Counsel in Immigration Proceedings and the Irony of the Delinquent Immigrant Child*

Unaccompanied immigrant children are not provided with appointed counsel for deportation hearings at the government's expense.²⁷⁵ A separate but related issue is that children are likewise not afforded counsel while in government custody at the border. However, the availability of a lawyer can dramatically improve outcomes for children facing deportation. A recent study revealed that unaccompanied children represented by counsel in immigration court were permitted to stay in the United States 73% of the time, compared with only 15% when the child appeared without representation.²⁷⁶ The "probable value" of the presence of counsel is clear. Because many of the government abuses of children at the southern border involve securing waivers of rights—including access to counsel and the right to a hearing, obtaining consents to voluntary departure under duress, and longer delays between apprehension and a hearing

274. *See id.*

275. Many scholars, litigators and activists are working on this issue, and their work will be the subject of future scholarly articles on this subject. I raise it here to acknowledge the critical mass that is gelling around this issue in particular, not to offer an extensive descriptive treatment of the exceptional litigation that is currently being handled by "the American Civil Liberties Union, the American Immigration Council, the Northwest Immigrant Rights Project, Public Counsel, and K&L Gates LLP." *See* Kristin Macleod-Ball, *Judge Who Believes Toddlers Can Represent Themselves, Only Part of the Problem in the Battle over Representation for Kids*, AM. IMMIGR. COUNCIL: IMMIGR. IMPACT (Mar. 9, 2016), <http://immigrationimpact.com/2016/03/09/judge-believes-toddlers-can-represent-part-problem-battle-representation-kids/> [<https://perma.cc/J3N5-YVEZ>] (noting counsel involved in immigration proceedings).

276. *See Representation for Unaccompanied Children in Immigration Court*, TRAC IMMIGR. (Nov. 25, 2014), <http://trac.syr.edu/immigration/reports/371/> [<https://perma.cc/T2JD-RWKU>].

on deportability—the “risk of erroneous deprivation of rights” is high.²⁷⁷ With the “private interests” affected being life and liberty, the only remaining factor is the government’s interest. Although the burden on the government is unknown, guaranteeing access to counsel to unaccompanied children at the border is the minimum standard owed; providing them with appointed counsel when removal proceedings are initiated against them, even at the border, is constitutionally sound.

In the earliest cases addressing this issue, the Ninth Circuit held that, because immigration proceedings were civil in nature, the criminal right to counsel was inapplicable.²⁷⁸ This distinction has since been turned on its head by the Ninth Circuit.²⁷⁹ And although the Court in *Perez-Funez* declined to extend the right to government-appointed counsel to detained children, there is a substantial amount of dicta that supports such a finding.²⁸⁰ In fact, after engaging in the balancing test, the *Perez-Funez* Court found that, “[u]nder the circumstances presented in th[e] case, legal counsel certainly would be the best insurance against a deprivation of rights.”²⁸¹ However, where the court fell short was in its decision that a phone call to “a parent, close adult relative, or adult friend . . . put[s] the child on more equal footing with the INS.”²⁸² The last several decades have proven the *Perez-Funez* court wrong on this point, and increasingly, courts are not only entertaining the notion of the right to counsel for immigration proceedings, but paving the way.

In recent years, some courts have upheld the right of immigrant children to representation and other rights when they are alleged to have

277. See *Perez-Funez v. Dist. Dir., I.N.S.*, 619 F. Supp. 656, 659 (C.D. Cal. 1985) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)) (discussing three-part balancing test).

278. See *Murgia-Melendrez v. U.S. Immigration & Naturalization Serv.*, 407 F.2d 207, 209 (9th Cir. 1969) (“The Supreme Court has repeatedly held that a deportation proceeding is not a criminal prosecution.” (citing *Woodby v. Immigration Serv.*, 385 U.S. 276, 285 (1966); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 44 S.Ct. 54, 68 L.Ed. 221 (1923); *Diric v. Immigration & Nat. Serv.*, 400 F.2d 658 (9th Cir. 1968)).

279. See *Jones v. Blanas*, 393 F.3d 918 (9th Cir. 2004) (“[W]e instruct the district court on remand to appoint counsel to assist Jones in pursuing his case.”). For a further discussion of *Blanas*, see *supra* notes 234–37 and accompanying text.

280. See *In re Gault*, 387 U.S. 1 (1967) (“With respect to the waiver by the Juvenile Court to the adult court . . . we said that ‘there is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons.’” (quoting *Kent v. United States*, 383 U.S. 541, 554 (1966))); *Aguilera-Enriquez v. Immigration & Naturalization Serv.*, 516 F.2d 565, 568 & n.3 (6th Cir. 1975) (“The test for whether due process requires the appointment of counsel for an indigent alien is whether, in a given case, the assistance of counsel would be necessary to provide ‘fundamental fairness the touchstone of due process.’” (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973))).

281. See *Perez-Funez v. Dist. Dir., I.N.S.*, 619 F. Supp. 656, 665 (C.D. Cal. 1985).

282. See *id.* (footnote omitted) (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)).

committed a crime at the border under the Juvenile Justice and Delinquency Prevention Act (JDA) of 1974, which identifies core protections afforded to minors in federal custody.²⁸³ These core protections include that the arresting officer “must immediately advise the juvenile of his or her rights; immediately advise the juvenile’s parents, guardian, or custodian of the juvenile’s rights; comply with any request by the juvenile to speak with his or her parents or a parental surrogate; and bring the juvenile before a magistrate judge ‘forthwith.’”²⁸⁴

Note that the triggering event is the taking of the child into federal custody, not that the hearings are criminal in nature. The Ninth Circuit has gone so far as to state that in the civil commitment context, the due process protections should be “at least as great as those afforded to an individual accused but not convicted of a crime.”²⁸⁵ This leading civil detention standard is increasingly entrenched in the litigation concerning the due process floor for detention conditions for unaccompanied minors at the border, but has not yet been extended to the right to counsel.²⁸⁶ A class action in the 9th Circuit, where the *Mathews* factors are taking center stage, is making great strides towards articulating both a jurisprudential and a statutory basis for appointing counsel to unaccompanied minors facing removal in immigration courts.²⁸⁷ *J.E. F.M. v. Lynch* (formerly *J.E. F.M. v. Holder*) recently received a boon of publicity when it was revealed that an immigration judge who was deposed in the case asserted that he “had [] taught immigration law to toddlers” who “represent themselves in immigration court.”²⁸⁸

Like immigration proceedings, juvenile delinquency proceedings are often not considered criminal in nature, and the punishment does not count as a “criminal conviction” under immigration law.²⁸⁹ But the admissions made in a juvenile delinquency hearing can have lingering “immigration consequences,” including the establishment of the factual predicate for exclusion.²⁹⁰ Looking at a few recent cases, the irony is that it may be advantageous for unaccompanied children to commit a crime

283. See 18 U.S.C. § 5032 (2012) (“A juvenile alleged to have committed an act of juvenile delinquency . . . shall not be preceded against . . .”).

284. See *United States v. C.M.*, 485 F.3d 492, 496 (9th Cir. 2007) (discussing 18 U.S.C. § 5033).

285. See *Jones v. Blanas*, 393 F.3d 918, 932 (9th Cir. 2004).

286. For further discussion on this point, see *supra* notes 234–37 and accompanying text.

287. See *J.E. F.M. v. Lynch*, Nos. 15-35738, 15-35739, 2016 WL 5030344 (9th Cir. Sept. 17, 2015), *sub nom.*, *J.E.F.M. v. Holder*, 107 F. Supp. 3d 1119 (W.D. Wash. 2014).

288. See *Macleod-Ball*, *supra* note 272.

289. See *In re Devison-Charles*, 22 I. & N. Dec. 1362, 1373 (B.I.A. 2000) (reaffirming that “juvenile delinquencies are not considered to be crimes within the meaning of the immigration laws and charges relating to the conviction of or the admission of the commission of crimes are inapplicable in such cases”).

290. See Theo Liebmann, *Adverse Consequences and Constructive Opportunities for Immigrant Youth in Delinquency Proceedings*, 88 TEMP. L. REV. 869, 870–74 (2016).

insignificant enough to avoid admissibility issues, but significant enough to trigger the right to counsel.

In one case, a juvenile plaintiff who was “a Mexican national[] approached [a] border patrol checkpoint” in California.²⁹¹ Instead of waiting to be flagged on after questioning, the plaintiff kept driving and his tires were flattened.²⁹² After being held for approximately six hours, the plaintiff was read his *Miranda* rights in Spanish.²⁹³ The agents “did not attempt to contact [the plaintiff’s] uncles” or the consulate, and the plaintiff “ultimately gave a sworn statement incriminating himself.”²⁹⁴ Furthermore, plaintiff was held for eleven hours prior to his first appearance in front of a magistrate judge.²⁹⁵ The court held that the plaintiff “was deprived of his rights . . . to immediate notification and prompt arraignment, and to the advice and counsel of a responsible adult prior to interrogation” in violation of the JDA, and the charges against him were dismissed.²⁹⁶

Another successful case did not result in a finding of a due process violation, but it did result in the suppression of a statement against interest secured from a fifteen-year-old plaintiff “detained at the border” for transporting cocaine from Mexico to the United States.²⁹⁷ These few cases do not address squarely the issue of government-provided counsel for immigration proceedings, but they serve as potential precedent for future arguments that unaccompanied children in the custody of the federal border patrol are entitled to representation, especially when detention conditions equate to punishment. The right should attach irrespective of whether they are being held for a civil violation of the immigration laws or allegations of criminal activity, because in either case, the potential penalty is severe enough to warrant it.²⁹⁸

291. *See* United States v. C.M., 485 F.3d 492, 496 (9th Cir. 2007).

292. *See id.* (“[The plaintiff] proceeded forward without having been visibly flagged on. The officer yelled for deployment of a ‘spike mat,’ which flattened the tires on the vehicle and brought it to a rest about a half-mile from the checkpoint.”).

293. *See id.* at 497 (noting agents “ignored” plaintiff’s request to speak to Mexican consulate after receiving *Miranda* warning).

294. *See id.* (noting agents used plaintiff’s “statements to support a juvenile information”).

295. *See id.* at 502–03 (“The record indicates that C.M. was processed between 5 and 6:30 a.m., interrogated between 11 a.m. and about 1 p.m. . . . The four to five hours that it took to conduct these tasks do not explain why eleven hours elapsed before C.M. was arraigned.”).

296. *See id.* at 505.

297. *See* United States v. D.L., 453 F.3d 1115, 1115, 1120–25, 1127 (9th Cir. 2006). The court indicated that the plaintiff was not a U.S. citizen, the vehicle that the plaintiff was driving alone had Mexican license plates, and when officials inquired about his family members, he stated that they lived in Mexico. *See id.* at 1117–18 (describing plaintiff and noting “he was not a United States citizen”). It is conceivable that the subject child was, in fact, an unaccompanied minor.

298. In both cases discussed previously, the child was represented by Federal Defenders Services of San Diego, Inc., a legal aid organization for the criminal

V. CONCLUSION

Historical tensions between Border Patrol and unaccompanied children at the U.S.–Mexico border foreshadowed the underpinnings of the very same border policies at the center of legal scrutiny today. Unaccompanied children continue to flee, border patrol agents continue to abuse and neglect, due process rights are barely respected, government resettlement programs privilege few and harm many, and the criminalization of childhood arrivals marches ever onward. Unaccompanied children detained at the border are, whether they realize it or not, in a liminality of sorts.²⁹⁹ As experienced by the waves of children before them, navigating the border becomes a rite of passage as children begin to leave behind their former legal identities and traverse a legally ambiguous zone seeking legal status in the United States. Their guardians on this journey are a Border Patrol with nearly absolute discretion and little oversight, lacking the resources, capacity, or training to take them along a safe and secure path.

What happens to these children during this passage is a process of association and dissociation that reflects the cognitive dissonance of exclusion and humanitarianism shown in modern immigration policy and discourse.³⁰⁰ The experience of these children is a forced litmus test, checking the temperature of the nation struggling again with the fears provoked by the uncertainty and ambiguity of race and belonging. The interventions and choices that will be made at this critical juncture will be judged by history as normatively progressive or regressive, as the fundamental issues remain the same—time after time. There is an opportunity here. With political gridlock stalling both legislative reforms and President Obama’s Truman-esque executive directives, the judiciary has unprecedented power to serve as the guide for the vision quest of a

portion of their case. In such cases, litigants are often referred to another pro bono legal service provider specializing in immigration if their criminal defense counsel does not have the capacity to handle any related immigration proceedings.

299. See VICTOR TURNER, *THE RITUAL PROCESS: STRUCTURE AND ANTI-STRUCTURE* 95 (1969) (stating liminality is primarily social-psychological concept of existing “betwixt and between the positions assigned and arrayed by law, custom, convention, and ceremonial”). For an application of liminality to immigration law concepts, see Jennifer M. Chacón, *Producing Liminal Legality*, 92 *DENV. U. L. REV.* 709 (2015).

300. This phenomenon may be evidence of what pragmatist philosopher William James described as the “Law of Dissociation by Varying Concomitants”:

What is associated now with one thing and now with another tends to become dissociated from either, and to grow into an object of abstract contemplation by the mind The practical result of it will be to allow the mind which has thus dissociated and abstracted a character to analyze it out of a total, whenever it meets with it again.

1 WILLIAM JAMES, *THE PRINCIPLES OF PSYCHOLOGY* 506 (rev. ed. 1950); see also Kit Johnson, *Theories of Immigration Law*, 46 *ARIZ. ST. L.J.* 1211, 1213 (2014) (identifying “four theories of immigration law” that reflect dissonance in text of Immigration Code: “(1) individual rights, (2) domestic interest, (3) national values, and (4) global warfare”).

nation.³⁰¹ By identifying and staking out the minimum legal standards for the treatment of unaccompanied children and opening avenues for court intervention when those standards are breached, the judiciary has begun the process of restoring human rights and dignity at the Border. But cases are pending in which the courts could bend the arc of transformative public law litigation even closer to justice; the question remains whether they will seize this historic opportunity.

301. See *Texas v. United States*, 787 F.3d 733 (5th Cir. 2015) (denying government's motion to stay preliminary injunction entered by U.S. District Court for Southern District of Texas); Memorandum from Jeh Charles Johnson, Sec'y, Dep't of Homeland Sec., to Leon Rodriguez, Dir., U.S. Citizenship & Immigration Servs., et al. (Nov. 20, 2014), available at https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action_0.pdf [<https://perma.cc/MQC4-JFW2>]; Memorandum from Janet Napolitano, Sec'y, Dep't of Homeland Sec., to David Aguilar, Acting Comm'r, U.S. Customs and Border Protection, et al. (June 15, 2012), available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/LWM5-TB3L>]; Robert Barnes & Juliet Eilperin, *Supreme Court to Review Obama's Power on Deportation Policy*, WASH. POST (Jan. 19, 2016), https://www.washingtonpost.com/politics/courts_law/supreme-court-to-review-obamas-power-on-deportation-policy/2016/01/19/5db355da-bb8a-11e5-b682-4bb4dd403c7d_story.html [<https://perma.cc/9HPV-5647>].