

# Interviewing Refugee Children: Theory, Policy, and Practice with Traumatized Asylum Seekers

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**ABSTRACT:** For detained children seeking asylum, the Credible Fear Interview (CFI) is highly consequential: those who do not pass are deported to countries in which they fear persecution or torture. We consider whether policies and practices during child CFIs ensure that complete information is elicited in the first instance. We uncover infirmities that prevent some child asylum seekers from fully exercising their rights. Accordingly, we propose reforms across all branches of government to protect minors in CFIs, including updated and better-enforced agency guidelines for child interviews, an end to child detention, habeas review, and appointment of counsel.

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<sup>†</sup> Amit Jain and Joanne Lee, co-authors, are members of the Yale Law School J.D. class of 2018. We are grateful for the patient support and supervision provided by Professor Edward Stein, Professor of Law at the Benjamin M. Cardozo School of Law, throughout the writing process. We are also greatly indebted to the Dilley Pro Bono Project (DPBP) and the Karnes Pro Bono Project (KPBP), and we are grateful for each organization’s willingness to share documents and insights. We are especially thankful for the insights and feedback provided by Melissa Crow, Karen Lucas, and Katie Shepherd. Finally, we give many thanks to the Asylum Seeker Advocacy Project (ASAP) and its founders Conchita Cruz, Swapna Reddy, Dorothy Tegeler, and Liz Willis. ASAP reimagines legal aid for asylum seekers by integrating technology, crowdsourcing volunteers, and partnering with community organizations to support asylum-seeking families. The issues addressed in this paper first came to the authors’ attention through volunteer work with ASAP. Were it not for the work of ASAP, DPBP, and KPBP, as well as the courage of the detained mothers and children who agreed to share their records anonymously, this Note could not have been written.

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## INTRODUCTION

In February 2016, ten-year-old David,<sup>1</sup> his mother, and another child named Marco fled their native El Salvador. In the previous year, El Salvador had recorded the highest homicide rate for a country not at war,<sup>2</sup> largely because of violence perpetrated by a transnational criminal organization,<sup>3</sup> the Mara Salvatrucha (“MS”), and its leading rival organization, the Barrio 18. These organizations routinely target children for violence, often along gendered lines: boys are targeted for recruitment as foot soldiers and subjected to harsh physical violence, while girls are targeted for recruitment as sex slaves and subjected to rapes and beatings.<sup>4</sup> As young boys, David and Marco were at risk of recruitment and retribution: MS members had repeatedly beaten both children to coerce them into joining the organization and to punish them when they refused to do so.

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1. The families discussed in this paper have consented to share their stories anonymously. All names have been changed. We owe the deepest debt of gratitude to these families.
  2. Alan Gomez, *El Salvador: World's New Murder Capital*, USA TODAY, Jan. 8, 2016, <http://www.usatoday.com/story/news/world/2016/01/07/el-salvador-homicide-rate-honduras-guatemala-illegal-immigration-to-united-states/78358042/> [<https://perma.cc/3FM6-QFA8>].
  3. Although we use the terms “transnational criminal organization” and “gang” interchangeably, the former is more accurate.
  4. See, e.g., Annie Hylton & Sarah Salvadore, *They Said We Would Pay with Our Lives*, SLATE, Aug. 31, 2016, [http://www.slate.com/articles/news\\_and\\_politics/gender\\_and\\_migration/2016/08/as\\_central\\_american\\_gangs\\_target\\_younger\\_kids\\_more\\_minors\\_are\\_fleeing\\_to.html](http://www.slate.com/articles/news_and_politics/gender_and_migration/2016/08/as_central_american_gangs_target_younger_kids_more_minors_are_fleeing_to.html) [<https://perma.cc/9VX6-W5R9>].

To seek refuge, Marco, David, and David's mother embarked on a treacherous journey to the United States. On their way, Mexican authorities intercepted Marco and deported him back to El Salvador. David and his mother made it to the U.S. border, where they rafted across the Rio Grande River, presented themselves at a border patrol station, and disclosed their fear of return. Federal agents shuffled the two into a frigid holding facility that asylum seekers commonly refer to as an *hielera* ("freezer")<sup>5</sup> before transferring them to another facility known as a *perrera* ("dog kennel"). Finally, David and his mother were moved to a detention facility in remote Dilley, Texas, about one hour southwest of San Antonio. Prohibited from leaving the compound, they awaited a Credible Fear Interview (CFI) with an Asylum Pre-Screening Officer (APSO), who would determine whether their fear of persecution was sufficiently credible for them to proceed to a full asylum hearing. In David's CFI, he and his mother explained the beatings he had suffered, the MS's practice of murdering children who defied recruitment,<sup>6</sup> and the gang's authority and capacity for surveillance throughout El Salvador. But the APSO's rough notes reflect that the ten-year-old gave brief, one-word answers and laughed in apparent confusion in response to serious questions about torture.

Two days later, David and his mother received a negative credible fear determination, meaning that they would be deported back to El Salvador. The determination was reviewed by an Immigration Judge appearing via videoconference, who excused David from the room and upheld the negative finding. Soon after, David and his mother learned that MS had murdered young Marco upon his return to El Salvador. The family's pro bono lawyers submitted a Request for Reconsideration noting Marco's death; the Asylum Office summarily denied it within one hour. Finally, after months more of detention and sustained advocacy, David and his mother's negative findings were reversed. The two were released on surveillance to argue their asylum claims in a full hearing.

For the thousands of women and children whom the U.S. government holds in family detention centers each year,<sup>7</sup> the CFI is the only avenue to seek asylum

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5. In August 2016, a federal court unsealed documents and photographs from eight *hieleras* in Arizona. The images showed "human excrement smeared on the walls" and a woman changing a child's diaper on the floor. Melvin Félix & Rachel Glickhouse, *Arizona Court Releases Photos from Inside 'Freezers' at Immigrant Processing Centers*, UNIVISION, Aug. 18, 2016, <http://www.univision.com/univision-news/immigration/arizona-court-releases-photos-from-inside-freezers-at-immigrant-processing-centers> [<https://perma.cc/5VDK-ANZA>]; see also *Doe v. Johnson*, No. 15-00250 (D. Ariz. filed June 8, 2015).
  6. See, e.g., Mariana Sánchez-Aizcorbe, *Why Are So Many Young Boys Disappearing in El Salvador?*, AL JAZEERA AM., Sept. 25, 2014, <http://america.aljazeera.com/watch/shows/america-tonight/articles/2014/9/25/why-are-so-many-youngboysdisappearinginelsalvador.html> [<https://perma.cc/5VDK-ANZA>] ("Gangs often first harass youngsters to join, then threaten them. If they still resist, the youth risk getting killed.").
  7. A.B.A. COMM'N ON IMMIGR., FAMILY IMMIGRATION DETENTION: WHY THE PAST CANNOT BE PROLOGUE 25 (2015), available at [https://www.americanbar.org/content/dam/aba/publications/commission\\_on\\_immigration/FINAL%20ABA%20Family%20Detention%20Report%208-19-15](https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/FINAL%20ABA%20Family%20Detention%20Report%208-19-15)

and access U.S. legal protections before summary deportation.<sup>8</sup> Congress intended the CFI to be a threshold measure to screen out noncitizens who clearly did not qualify for asylum.<sup>9</sup> In practice, however, particularly during the recent influx of Central American child refugees, the standard has ratcheted up.<sup>10</sup> In many family detention cases, conducting a CFI with a child is unnecessary because the Asylum Officer is prepared to issue a credible fear finding for the family based on the mother's testimony alone. But in others, a child's CFI is highly consequential: if both the mother and child receive negative determinations, they are deported back to their home country,<sup>11</sup> where they may be persecuted or killed.<sup>12</sup>

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.authcheckdam.pdf [https://perma.cc/B8H5-ELPC]. The numbers of overall CFIs (including for men and women without children) have ballooned in recent years. The federal government served 81,864 CFI determinations in fiscal year 2016—nearly double the number in the previous fiscal year, and sixteen times the number in fiscal year 2009. U.S. CITIZENSHIP & IMMIGR. SERVS., CREDIBLE FEAR WORKLOAD REPORT 1 (Apr. 18, 2017), available at [https://www.uscis.gov/sites/default/files/USCIS/Outreach/PED\\_-\\_Credible\\_Fear\\_Workload\\_Report.pdf](https://www.uscis.gov/sites/default/files/USCIS/Outreach/PED_-_Credible_Fear_Workload_Report.pdf) [https://perma.cc/QZD9-3HUB]. Most CFIs continue to result in positive determinations—78.1 percent of the 26,928 CFI decisions issued during the final three months of calendar year 2016 were positive. U.S. CITIZENSHIP & IMMIGR. SERVS., CREDIBLE FEAR AND REASONABLE FEAR STATISTICS AND NATIONALITY REPORT 1 (Feb. 7, 2017), available at [https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED\\_FY17CFandRFstats\\_thru2016\\_12\\_31.pdf](https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_FY17CFandRFstats_thru2016_12_31.pdf) [https://perma.cc/DL47-D7QY].

8. Detained noncitizens who have been previously deported go through a similar but substantially more difficult process called the Reasonable Fear Interview (RFI). See 8 C.F.R. § 208.31 (2017). In contrast to the 78.1 percent grant rate for CFIs in the final three months of 2016, only 33.1 percent of RFI results issued in the same timeframe were positive determinations. CREDIBLE FEAR AND REASONABLE FEAR STATISTICS AND NATIONALITY REPORT, *supra* note 7, at 1, 4.
9. 8 C.F.R. §§ 235.3(b)(4), 208.30(e)(2) (2017).
10. New instruction materials in 2014 began to state that applicants must “demonstrate a substantial and realistic possibility of succeeding” in their cases, a seemingly higher standard than the “significant possibility” required by law. SARA CAMPOS & JOAN FRIEDLAND, AM. IMMIGR. COUNCIL, MEXICAN AND CENTRAL AMERICAN ASYLUM AND CREDIBLE FEAR CLAIMS: BACKGROUND AND CONTEXT I (2014), available at <https://www.americanimmigrationcouncil.org/research/mexican-and-central-american- asylum-and-credible-fear-claims-background-and-context> [https://perma.cc/3BXZ-MBZ2]. Updated lesson plans issued by the Trump Administration in 2017 again shifted the standard by entirely removing the “significant possibility” language from training materials, requiring disclosure of more details during CFIs, and directing Asylum Officers to give greater weight to unreliable interviews with border enforcement personnel. See, e.g., TAHIRIH JUSTICE CENTER, SUMMARY OF FEBRUARY 13, 2017 ASYLUM DIVISION LESSON PLAN IMPLEMENTING EXECUTIVE ORDERS (2017), available at <http://www.tahirih.org/pubs/summary-of-february-13-2017-asylum-division-lesson-plan/> [https://perma.cc/939G-HBEY].
11. See 8 C.F.R. § 235.3 (2017) (describing Expedited Removal and providing for removal of undocumented immigrants who do not have credible fears of persecution or torture).
12. E.g., GUILLERMO CANTOR & TORY JOHNSON, AM. IMMIGR. COUNCIL, DETAINED, DECEIVED, AND DEPORTED: EXPERIENCES OF RECENTLY DEPORTED CENTRAL AMERICAN FAMILIES (2016), available at <https://www.americanimmigrationcouncil.org/special-reports/deported-central-american-families> [https://perma.cc/A7LC-USP3]; Nicholas Kristof, *We're Helping Deport Kids to Die*, N.Y. TIMES, July 16, 2016, <http://www.nytimes.com/2016/07/17/opinion/sunday/were-helping-deport-kids-to-die.html> [https://perma.cc/9Q8G-CHTV] (interviewing Guatemalan children and adults intercepted in Mexico or deported from the United States, now fleeing gang violence and hit squads); Wil S. Hylton, *The Shame of America's Family Detention Camps*, N.Y. TIMES MAG., Feb. 4, 2015, <http://www.nytimes.com/2015/02/08/magazine/the-shame-of-americas-family-detention-camps.html> [https://perma.cc/J2RU-U759] (relating reports that 10 Salvadoran children were killed after being deported from Artesia family detention facility in July 2014).

Thus, a border-crossing asylum seeker must navigate her way through the CFI in order to avoid deportation to the country she has fled. Since David and his mother were released in 2016, the window of the CFI has been narrowed further. In January 2017, President Donald Trump signed an executive order that indicated that the Asylum Office might stop considering Requests for Reconsideration and suggested further tightening of the credible fear standard.<sup>13</sup> To implement the order, the Trump Administration issued new training documents for Asylum Officers that removed language favorable to credible fear applicants, demanded greater specificity of claims, and permitted negative findings based on minor inconsistencies.<sup>14</sup> More recently, Attorney General Jeff Sessions has argued for further “elevat[ion]” of “the threshold standard of proof in credible fear interviews,” asserting that the credible fear process has “become an easy ticket to illegal entry into the United States” and that “any adjudicatory system with a grant rate of nearly 90 percent is inherently flawed.”<sup>15</sup>

In the face of these policies and rhetoric, it is imperative that the CFI process be critically examined to ensure, at the very least, that Asylum Officers elicit complete testimony from the asylum seekers whose fates they control. Special attention must be given to the claims of minors seeking asylum, who are among the world’s most vulnerable people. Accordingly, this Note considers the sufficiency of the CFI process for asylum-seeking children in detention through an analysis of primary sources: records generated directly from child CFIs in Texas between 2015 and 2016. Part I reviews the legal framework of asylum law and expedited removal, while Part II taps into psychological research and standards for child forensic interviewing to consider whether the techniques used by APSOs in CFIs in 2015 and 2016 were conducive to the full development of children’s asylum claims.

Our analysis of best practices and notes from actual CFIs with children uncovers gaps in policy and practice that leave many children’s claims

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13. *Border Security and Immigration Enforcement Improvements*, Exec. Order No. 13,767, 82 Fed. Reg. 8,793 (Jan. 25, 2017) [hereinafter *Executive Order*].
  14. For the revised guidance documents, see John Lafferty, Release of Updated Asylum Division Officer Training Course (ADOTC) Lesson Plans (Feb. 13, 2017), available at [https://drive.google.com/file/d/0B\\_6gbFPjVDoxY0FCczROOFZASVk/edit](https://drive.google.com/file/d/0B_6gbFPjVDoxY0FCczROOFZASVk/edit) [<https://perma.cc/3FTP-AQ8>]. For analyses of the changes, see, e.g., TAHIRIH JUSTICE CENTER, *supra* note 10; *USCIS Amends Credible Fear Lesson Plans*, CLINIC LEGAL, <https://cliniclegal.org/resources/uscis-amends-credible-fear-lesson-plans>; Tal Kopan, *Trump Admin Quietly Made Asylum More Difficult in the U.S.*, CNN, Mar. 8, 2017, <http://www.cnn.com/2017/03/08/politics/trump-immigration-crackdown-asylum/> [<https://perma.cc/PR5S-GQU4>].
  15. Jefferson B. Sessions III, U.S. Att’y Gen., Remarks to the Executive Office of Immigration Review, Oct. 12, 2017, available at <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review> [<https://perma.cc/RE5P-D7T6>]. *But see* Michelle Mendez & Swapna Reddy, *Why Sessions Is Wrong About Asylum Seekers*, CHI. TRIB., Oct. 23, 2017, <http://www.chicagotribune.com/news/opinion/commentary/ct-perspec-asylum-sessions-immigration-1024-20171023-story.html> [<https://perma.cc/HSB2-BTNG>]. (“Each year, more than 90 percent of medical students pass their board exams. They do not pass because . . . the exams are inherently flawed. They pass because they are self-selected, having excelled despite years of challenges and setbacks.”).

underexplored, violate their rights, and frustrate the purposes of the CFI. Thus, rather than representing an “easy ticket” for false claims by children, the CFI process has likely resulted in the deportation of bona fide child asylum seekers, even without the restrictions proposed by the Trump Administration. Accordingly, in Part III, we offer proposals for executive agencies, Congress, and the judiciary to ensure that the federal government meets its legal obligations to asylum-seeking children.

### I. ASYLUM LAW AND EXPEDITED REMOVAL

The United States’ obligations to asylum seekers are rooted in both international and domestic law. The 1951 United Nations Convention Relating to the Status of Refugees, or “Refugee Convention,” laid down the framework for refuge and asylum,<sup>16</sup> outlined states’ obligations in protecting refugees, and established the core principles of non-discrimination, non-penalization, and *non-refoulement*.<sup>17</sup> The U.S. later ratified the 1967 Protocol Relating to the Status of Refugees, which expanded the scope of the Refugee Convention.<sup>18</sup> In 1980, Congress passed legislation to bring U.S. law into comportment with the 1967 Protocol.<sup>19</sup> To fulfill the U.S.’s obligations under the Refugee Convention, Congress prohibited the deportation of noncitizens whose life or freedom would be threatened in their country of origin.<sup>20</sup> Congress also delegated discretion to the Attorney General to grant asylum to any applicant who can demonstrate that they are a refugee, meaning that they are unable or unwilling to return to their home country because of past persecution or a “well-founded fear” of future persecution on account of their race, religion, nationality, membership in a “particular social group,” or political opinion.<sup>21</sup>

Most detained asylum-seeking children are detained with one parent—their mother—in a streamlined process called Expedited Removal (ER), established by Congress in 1996.<sup>22</sup> Before 1996, immigration officers referred undocumented noncitizens at ports of entry to Immigration Judges (IJs) for

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16. Convention Relating to the Status of Refugees, Apr. 22, 1954, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter *Refugee Convention*].

17. OFFICE OF THE U.N. HIGH COMM’R FOR REFUGEES (UNHCR), CONVENTION AND PROTOCOL RELATING TO THE STATUS OF REFUGEES 3 (2010), available at <http://www.unhcr.org/en-us/3b66c2aa10> [https://perma.cc/3PVF-S9Q8].

18. Protocol Relating to the Status of Refugees, Oct. 4, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

19. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980); *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987).

20. 8 U.S.C. § 1253(h) (2012).

21. 8 U.S.C. § 1158(b)(1)(A) (2012).

22. 8 U.S.C. § 1225(b)(1)(A)(i) (2012).

hearings.<sup>23</sup> ER curtails this review,<sup>24</sup> authorizing immigration officers to “order [such] alien[s] removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum . . . or a fear of persecution.”<sup>25</sup> If a noncitizen expresses such an intention or fear, the officer may refer the noncitizen<sup>26</sup> to an Asylum Pre-Screening Officer (APSO)<sup>27</sup> for a Credible Fear Interview (CFI).<sup>28</sup> All noncitizens in ER are subject to mandatory detention.<sup>29</sup>

Because the executive branch has broad discretion over whether to subject arriving noncitizens to ER, the application of ER has fluctuated under different administrations.<sup>30</sup> Until 2004, noncitizens on the U.S. side of the border were not subject to ER at all.<sup>31</sup> In 2004, the Bush Administration expanded ER to certain noncitizens apprehended inside the United States, if they were within 100 miles of the border and could not demonstrate that they had been in the United States for more than fourteen days.<sup>32</sup> Two years later, the Bush Administration opened

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23. 8 U.S.C. § 1226(a) (2012); *see also* U.S. COMM’N ON INT’L RELIGIOUS FREEDOM [hereinafter USCIRF], REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL, VOL. I at 1 (2005) [hereinafter *USCIRF Report*], available at [http://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum\\_seekers/Volume\\_I.pdf](http://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/Volume_I.pdf) [<https://perma.cc/Q28X-L4YB>].
  24. *See* 8 U.S.C. § 1252(e) (2012) (limiting judicial review of expedited removal orders).
  25. 8 U.S.C. § 1225(b)(1)(A)(i) (2009).
  26. In February 2017, Senator Kamala Harris introduced legislation to ensure that those detained while attempting to enter the United States be guaranteed access to counsel, partly to prevent abuses by these low-level officers. *See* Press Release, Kamala D. Harris, Following Muslim Ban Detentions, Senator Harris Introduces First Bill to Guarantee Access to Counsel at Border, Port of Entry (Feb. 9, 2017), <https://www.harris.senate.gov/news/press-releases/following-muslim-ban-detentions-senator-harris-introduces-first-bill-to-guarantee-access-to-counsel-at-border-ports-of-entry> [<https://perma.cc/38SF-KLRE>]. There is no judicial or administrative review of an immigration officer’s decision not to refer a noncitizen. *See* 8 U.S.C. § 1225(b)(1)(A)(i) (2009).
  27. Under current law, APSOs are simply AOs who are assigned to conduct credible fear interviews. 8 U.S.C. § 1225(b)(1)(B)(i) (2009) (“An asylum officer shall conduct interviews of aliens referred” for credible fear determinations.). Accordingly, this Note uses the terms “APSO” and “AO” interchangeably.
  28. 8 U.S.C. § 1225(b)(1)(A)(ii) (2009). *See generally* Alvaro Peralta, *Bordering Persecution: Why Asylum Seekers Should Not Be Subject to Expedited Removal*, 64 AM. U. L. REV. 1303 (2015) (discussing constitutionality of ER as applied to asylum seekers).
  29. 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (2009).
  30. *See* Brief of American Immigration Council et al. as Amici Curiae in Support of Plaintiff’s Motion to Enforce Settlement and Appoint a Special Monitor at 5, *Flores v. Lynch*, CV 85-4544 DMG (Sept. 2016), available at <http://www.aila.org/infonet/amicus-brief-flores-supporting-plaintiffs-motion> [<https://perma.cc/T2H3-XPU2>].
  31. Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877 (Aug. 11, 2004) (authorizing officers to place undocumented noncitizens who satisfied certain criteria into ER).
  32. Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(a)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68924 (Nov. 13, 2002) (authorizing the Immigration and Naturalization Service (INS) to place in Expedited Removal noncitizens who arrive in the United States by sea who have not been physically present in the United States continuously for the two-year period prior to the determination of inadmissibility); Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877 (Aug. 11, 2004) (authorizing DHS to place into ER noncitizens who are encountered by an immigration officer within 100 miles of a U.S. land border and who have not

the T. Don Hutto Family Residential Facility for “families” in ER, the first instance of U.S. child immigration detention in a prison-like facility.<sup>33</sup> At Hutto, as at subsequent family detention facilities, “families” in ER were defined as mothers and children. Adult fathers were, and are, separated from their children and detained elsewhere.<sup>34</sup>

In 2009, the Obama Administration closed the Hutto facility, greatly reducing the number of detained families.<sup>35</sup> But in 2014, it reversed course by announcing the establishment of three new facilities.<sup>36</sup> The Department of Homeland Security justified the shift by describing asylum seekers as a threat to national security,<sup>37</sup> and it pursued family detention as part of “an aggressive deterrence strategy focused on the removal and repatriation of recent border crossers.”<sup>38</sup> A key aspect of this strategy was continued detention of families even after they were found to hold credible fears of persecution. After public pressure and successful litigation by advocates,<sup>39</sup> federal officials ceased to invoke deterrence as a factor in custody determinations, lowered requested bond amounts, and offered electronic monitoring as an alternative to detention for families who had passed their CFIs.<sup>40</sup>

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established to the satisfaction of an immigration officer that they have been physically present in the U.S. continuously for the fourteen-day period immediately prior to the date of encounter).

33. Emily Gogolak, *What’s Next for Immigrant Families in Detention?*, NEW YORKER, July 30, 2015, <http://www.newyorker.com/news/news-desk/whats-next-for-immigrant-families-in-detention> [<https://perma.cc/2RGU-SKYQ>].
34. *Id.*
35. *Id.*
36. For a discussion of the Obama Administration’s change in policy, see LARA DOMINGUEZ ET AL., U.S. DETENTION AND REMOVAL OF ASYLUM SEEKERS: AN INTERNATIONAL HUMAN RIGHTS LAW ANALYSIS 2–3 (June 20, 2016), *available at* [https://www.law.yale.edu/system/files/areal\\_center/schell/document/human\\_rights\\_first\\_-\\_immigration\\_detention\\_-\\_final\\_-\\_20160620\\_for\\_publication.pdf](https://www.law.yale.edu/system/files/areal_center/schell/document/human_rights_first_-_immigration_detention_-_final_-_20160620_for_publication.pdf) [<https://perma.cc/MBV9-GRAB>].
37. STEPHEN W. MANNING, ENDING ARTESIA: THE ARTESIA REPORT (2014), *available at* <https://innovationlawlab.org/the-artesia-report> [<https://perma.cc/LXM2-K2P8>]. Approximately three years later, President Trump’s Executive Order similarly characterized undocumented immigrants crossing the border as “a significant threat to national security and public safety.” *Executive Order*, *supra* note 13, at 8,793.
38. U.S. Dep’t of Homeland Sec., Statement by Secretary of Homeland Security Jeh Johnson Before the Senate Committee on Appropriations (June 10, 2014), *available at* <http://www.dhs.gov/news/2014/07/10/statement-secretary-homeland-security-jeh-johnson-senate-committee-appropriations> [<https://perma.cc/32UP-RLQD>].
39. *See* R.I.L.-R v. Johnson, 80 F. Supp. 3d 164 (D.D.C. 2015) (issuing preliminary injunction barring DHS from attempting to deter future immigration to the United States by detaining families who have a credible fear of persecution); Flores v. Lynch, 212 F. Supp. 3d 907 (C.D. Cal. 2015), *aff’d in part, rev’d in part and remanded* 828 F.3d 898 (9th Cir. 2016) (holding that family detention policies violated the terms of a 1997 settlement agreement).
40. *See* Press Release, U.S. Citizenship & Immigr. Servs., ICE Announces Enhanced Oversight for Family Residential Centers (May 13, 2015), <https://www.ice.gov/news/releases/ice-announces-enhanced-oversight-family-residential-centers> [<https://perma.cc/TP8J-G3N6>]; Joseph Sorrentino, *Asylum Under Assault*, 100REPORTERS, Oct. 21, 2015, <https://100r.org/2015/10/18654/> [<https://perma.cc/PHA6-BFXW>].



The Trump Administration portends further changes. Even after the Obama Administration's reopening of family detention facilities, some proportion of families apprehended at the border were released to fight their cases in immigration courts without placement into ER.<sup>41</sup> The Trump Administration seeks to end this practice and build additional detention facilities around the United States, foreshadowing another substantial increase in the number of asylum-seeking families in ER and attendant detention.<sup>42</sup> The Trump Administration has also stated that it may expand ER from its existing scope, established in 2004, to encompass noncitizens anywhere in the country who cannot "affirmatively show[], to the satisfaction of an immigration officer, that they have been continuously physically present in the United States for the two-year period immediately prior."<sup>43</sup>

Because ER has, to date, been enforced against those who have recently crossed the border, its limited process and accompanying restrictions have been applied disproportionately to immigrants from Mexico and Central America, who typically enter the United States by crossing the southern border.<sup>44</sup> Thus, it is difficult, if not impossible, to isolate dramatic shifts in ER policies from underlying racial ideologies. In line with historically racialized perceptions of

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41. See HUM. RTS. WATCH, "YOU DON'T HAVE RIGHTS HERE": US BORDER SCREENING AND RETURNS OF CENTRAL AMERICANS TO RISK OF SERIOUS HARM 9 (2014), available at <https://www.hrw.org/report/2014/10/16/you-dont-have-rights-here/us-border-screening-and-returns-central-americans-risk> [<https://perma.cc/DC2H-SCFE>] (exact proportion unknown).

42. See *Executive Order*, *supra* note 13, at 8,795 (directing detention of noncitizens "apprehended for violations of immigration law pending the outcome of their removal proceedings . . . to the extent permitted by law" as well as "the termination of the practice commonly known as 'catch and release'"); Sessions, *supra* note 15 (criticizing the Obama Administration for "allow[ing] most aliens who passed an initial credible fear review to be released from custody into the United States pending a full hearing").

43. Memorandum from John Kelly, Sec'y, U.S. Dep't of Homeland Sec., Implementing the President's Border Security and Immigration Enforcement Improvement Policies 6 (Feb. 20, 2017), available at [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf) [<https://perma.cc/5GPW-STJH>].

44. BRYAN BAKER & CHRISTOPHER WILLIAMS, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2015 7 (2017), available at [https://www.dhs.gov/sites/default/files/publications/Enforcement\\_Actions\\_2015.pdf](https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2015.pdf) [<https://perma.cc/BSP9-ZEWY>] ("As in previous years, detentions of nationals of Mexico and Northern Triangle countries comprised 85 to 90 percent of the total [detentions]").

threat and merit,<sup>45</sup> the Trump Administration<sup>46</sup> and affiliated organizations<sup>47</sup> have depicted border crossers as dangerous, sneaky, manipulative, and undeserving in order to support proposed expansions of ER and other immigration restrictions. In some instances, even descriptions of children crossing the border have invoked similar themes.<sup>48</sup> In others, officials have focused blame on Central-American parents, asserting that they are acting irresponsibly or even criminally for subjecting their children to the “dangerous” journey to the United States.<sup>49</sup> Such rhetoric accords with longstanding, well-

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45. Judith A. Warner, *The Social Construction of the Criminal Alien in Immigration Law, Enforcement Practice and Statistical Enumeration: Consequences for Immigrant Stereotyping*, 2005–2006 J. SOC. & ECOL. BOUNDARIES 56, 56 (2005) (“Historically, immigrants have been represented as depriving citizens of jobs, as welfare-seekers, or as criminals,” with particular emphasis on “Hispanic, and particularly Mexican, immigrants . . . as criminals.”); *see also* STEVEN W. BENDER, GREASERS AND GRINGOS: LATINOS, LAW, AND THE AMERICAN IMAGINATION 11 (2003) (“In the aggregate, stereotypes of Latinas/os paint a staggeringly negative view of America’s most populous minority group,” including “criminal tendencies” and “tendencies to be lazy.”); *see also id.* at 12 (“A striking aspect of Latina/o stereotypes is their longevity. Most of the stereotypes addressed here date back to the nineteenth-century Southwest.”); *see also* KEVIN R. JOHNSON, THE “HUDDLED MASSES” MYTH: IMMIGRATION AND CIVIL RIGHTS 27–39 (2004) (describing how longstanding stereotypes against Mexican and Latinx immigrants have manifested in racialized immigration enforcement).
46. *See, e.g., Executive Order*, *supra* note 13, at 8,793 (“Among those who illegally enter are those who seek to harm Americans through acts of terror or criminal conduct. Continued illegal immigration presents a clear and present danger to the interests of the United States.”).
47. *See, e.g., Illegal Aliens Taking U.S. Jobs*, FED’N FOR AM. IMMIGR. REFORM, Mar. 2013, <https://fairus.org/issue/workforce-and-economy/illegal-aliens-taking-us-jobs> [<https://perma.cc/ML73-SJBN>] (“The illegal alien workers are mostly persons who sneaked into the country—nearly all Mexicans or Central Americans who enter from Mexico.”). Julie Kirchner, the Executive Director of FAIR during the publication of this report, is now the Citizenship and Immigration Services Ombudsman at the Department of Homeland Security. *See Julie Kirchner*, DEP’T OF HOMELAND SEC. (May 15, 2017), <https://www.dhs.gov/person/julie-kirchner> [<https://perma.cc/E6SY-AHGT>].
48. *E.g., Caroline May*, *Report: Central American Minors Turning Down Offers of Refuge in Mexico*, BREITBART, Apr. 4, 2016, <http://www.breitbart.com/big-government/2016/04/04/report-central-american-minors-turning-offers-refuge-mexico/> [<https://perma.cc/9YJK-3BDM>] (citing report by Center for Immigration Studies (CIS) to assert that Central American children declined offers of refuge in Mexico in favor of unlawfully entering the U.S.). Although Breitbart and CIS are both privately owned organizations, high-level Trump Administration officials such as former Chief Strategist Stephen K. Bannon and Senior Advisor Stephen Miller have well-documented ties to both groups. *See, e.g.,* Maggie Haberman et al., *Stephen Bannon Out at the White House After Turbulent Run*, N.Y. TIMES, Aug. 18, 2017, <https://www.nytimes.com/2017/08/18/us/politics/steve-bannon-trump-white-house.html> [<https://perma.cc/WK4A-8DW8>]; Stephen Miller, Keynote Address at 2015 Katz Award Ceremony for Center for Immigration Studies (May 31, 2015), *available at* <https://cis.org/2015-Katz-Award-Ceremony-Transcript> [<https://perma.cc/4RJY-9Z8T>] (“I’d like to thank everyone here today, and especially at the Center for Immigration Studies for everything they do to illuminate a debate that far too often operates, like illegal immigrants, in the shadows.”).
49. Daniella Diaz, *Kelly: DHS Is Considering Separating Undocumented Children from Their Parents at the Border*, CNN, Mar. 7, 2017, <http://www.cnn.com/2017/03/06/politics/john-kelly-separating-children-from-parents-immigration-border/> [<https://perma.cc/35UU-7L72>]; *see also, e.g.,* Ron Nixon & Caitlin Dickerson, *Immigration Officials Taking New Steps to Discourage Smuggling of Children*, N.Y. TIMES, Sept. 24, 2017, <https://www.nytimes.com/2017/09/24/us/politics/parents-illegal-immigrants-human-smuggling.html> [<https://perma.cc/2PSZ-375W>] (quoting an ICE official as saying that “[t]he sponsors who have placed children directly into harm’s way by entrusting them to violent criminal organizations will be held accountable for their role in these conspiracies”).

documented, and racist perceptions of Latinx people and other racial minorities as incompetent or malicious parents.<sup>50</sup>

Today, many families fleeing persecution are apprehended at or near the southern border by Customs and Border Protection (CBP).<sup>51</sup> After apprehending noncitizens, CBP officers interview them to determine whether they should be referred for a CFI or deported summarily.<sup>52</sup> Officers then transfer mothers and children to one of two detention centers in Texas,<sup>53</sup> both of which are run by for-profit corporations.<sup>54</sup> Once detained and referred for CFIs, mothers and some children are interviewed by APSOs. Many are prepared for their interviews by volunteer attorneys and law students in collaboration with the Dilley Pro Bono Project (DPBP) and the Karnes Pro Bono Project (KPBP).<sup>55</sup>

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50. See, e.g., Richard R. Valencia & Mary S. Black, “Mexican Americans Don’t Value Education!”—*On the Basis of the Myth, Mythmaking, and Debunking*, 2 J. OF LATINOS AND EDUC. 81 (2002) (“[A] major myth lingers that Mexican Americans, particularly parents of low-socioeconomic status background, do not value education.”); see also Heather Mac Donald, *Hispanic Family Values?: Runaway Illegitimacy Is Creating a New U.S. Underclass*, CITY J. (2006), available at <https://www.city-journal.org/html/hispanic-family-values-12965.html> [<https://perma.cc/U6B6-F2HH>] (perpetuating racist stereotypes regarding “irresponsible” Latinx parents).

51. For example, CBP estimated that it had apprehended 71,445 “family units” at the Southwestern border in Fiscal Year 2017. *U.S. Border Patrol Southwest Border Apprehensions by Sector*, U.S. CUSTOMS & BORDER PROTECTION, Nov. 3, 2017, <https://www.cbp.gov/newsroom/stats/usbp-sw-border-apprehensions> [<https://perma.cc/9S9V-DVU4>].

52. 8 C.F.R. § 208.31(b) (2017); ALISON SISKIN & RUTH ELLEN WASEM, IMMIGRATION POLICY ON EXPEDITED REMOVAL OF ALIENS 4 (2005). There is no judicial or administrative review of an immigration officer’s decision not to refer a noncitizen. See 8 U.S.C. § 1225(b)(1)(A)(i). In 2005, the United States Commission on International Religious Freedom found that CBP officers routinely failed to refer for CFIs those who expressed a fear of return. See *USCIRF Report*, *supra* note 23, at 6. In 2014, Human Rights Watch identified similar failures. See *HUM. RTS. WATCH*, *supra* note 41, at 6. The report by Human Rights Watch indicated that CBP officers fail to refer Central American asylum seekers at a disproportionate rate compared to asylum seekers from other countries:

The data show that the vast majority of Hondurans [who cross the border and are interviewed by CBP], at least 80 percent, are placed in fast-track expedited removal and reinstatement of removal proceedings but only a minuscule minority, 1.9 percent, got flagged for credible fear assessments by CBP. The percentages for Mexico, Honduras, El Salvador, and Guatemala are similar, ranging from 0.1 to 5.5 percent. By comparison, 21 percent of migrants from other countries who underwent the same proceedings in the same years were flagged for credible fear interviews by CBP.

*Id.* Some evidence suggests that these issues have worsened under the Trump Administration. John Burnett, *In Their Search for Asylum, Central Americans Find the U.S. Is Closing Its Doors*, NPR, Mar. 13, 2017, <http://www.npr.org/2017/03/13/519662321/in-their-search-for-asylum-central-americans-find-the-u-s-is-closing-its-doors> [<https://perma.cc/8DJ7-345E>].

53. See 8 U.S.C. § 1225(b)(1)(A)(ii) (2012).

54. The Karnes County Residential Center is run by GEO Group, while the South Texas Family Residential Center is run by CoreCivic (formerly Corrections Corporation of America). See John Burnett, *Texas Judge Refuses to License Child Care Facility in Immigrant Detention Center*, NPR, May 6, 2016, <http://www.npr.org/sections/thetwo-way/2016/05/06/476976133/texas-judge-refuses-to-license-childcare-facility-in-immigrant-detention-center> [<https://perma.cc/Y6UD-WUZR>].

55. DPBP and KPBP are projects within CARA. CARA is a collaboration among the Catholic Legal Immigration Network (CLINIC), the American Immigration Council (“the Council”), the Refugee and Immigrant Center for Education and Legal Services (RAICES), and the American Immigration

CFIs determine whether asylum seekers in ER can keep fighting their cases. A CFI is meant to be a low-standard threshold screening that evaluates whether an asylum seeker holds a credible fear—i.e., whether there is a “significant possibility” that they will be eligible for asylum.<sup>56</sup> A supervisor reviews each APSO’s determination,<sup>57</sup> and each asylum seeker is issued a positive or negative decision.

If a family receives a negative credible fear determination, it can seek review before an IJ.<sup>58</sup> These reviews occur within detention centers with IJs, interpreters, and government attorneys appearing via videoconference.<sup>59</sup> If an IJ finds that a mother or child holds a credible fear of persecution, then the negative findings are vacated and the family may be considered for release.<sup>60</sup> However, if the IJ affirms the officer’s finding, the family may be removed.<sup>61</sup>

Until recently, a family that received a positive decision would typically be issued a Notice to Appear and then released on bond<sup>62</sup> or with an ankle monitor.<sup>63</sup> The mother and children would then be allowed to argue their fact-intensive asylum case in a removal proceeding outside of detention.<sup>64</sup> However, the Trump Administration has indicated an intent to detain families pending the outcome of their removal proceedings,<sup>65</sup> which would require families to gather evidence and prepare for their fact-intensive asylum hearings while detained.

The Asylum Office may reconsider its own negative findings.<sup>66</sup> DPBP and KPBP regularly submit Requests for Reconsideration (RFRs) on behalf of clients, typically highlighting procedural irregularities and new evidence. However, the Asylum Office does not provide reasons for RFR denials.<sup>67</sup> The

Lawyers Association (AILA). See CARA FAMILY DETENTION PRO BONO PROJECT, <http://caraprobono.org/partners/> [<https://perma.cc/K9Z4-KK98>] (last visited Jan. 14, 2018).

56. See 8 U.S.C. § 1225(b)(1)(B)(v) (2012); 8 C.F.R. § 208.30(e)(3) (2017).

57. 8 C.F.R. § 208.30(e)(7) (2017).

58. 8 C.F.R. § 1208.30(g)(2)(i) (2017).

59. Cf. 8 C.F.R. § 1003.42(c) (2017) (permitting IJ review “through telephonic or video connection”).

60. 8 C.F.R. § 1208.30(g)(2)(iv)(B) (2017); see also 8 C.F.R. § 1003.42(f) (2017).

61. 8 C.F.R. § 1208.30(g)(2)(iv)(A) (2017).

62. See Esther Yu-Hsi Lee, *Migrant Woman Attempted Suicide Minutes After Realizing She Can’t Afford Her Own Release*, THINKPROGRESS, Mar. 12, 2015, <http://thinkprogress.org/immigration/2015/03/12/3633003/honduran-woman-attempts-suicide-over-high-bond/> [<https://perma.cc/PE5S-3UAS>].

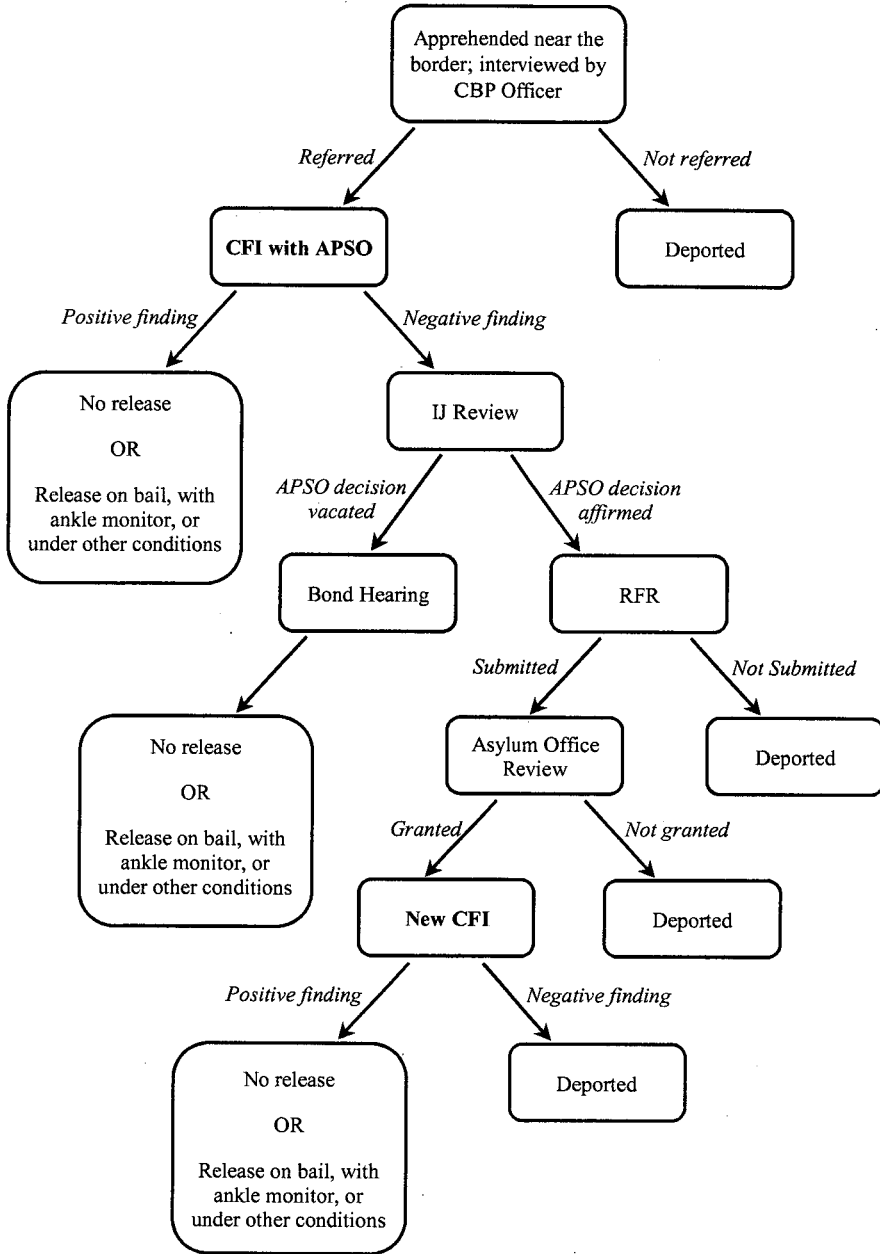
63. See Molly Hennessy-Fiske, *Immigrants Object to Growing Use of Ankle Monitors After Detention*, L.A. TIMES, Aug. 2, 2015, <http://www.latimes.com/nation/immigration/la-na-immigrant-ankle-monitors-20150802-story.html> [<https://perma.cc/KB6T-KDHS>].

64. 8 C.F.R. § 208.30(f) (2017); see also *USCIRF Report*, *supra* note 23, at 24.

65. *Executive Order*, *supra* note 13, at 8,795 (directing Secretary of DHS to “take all appropriate actions to ensure the detention of aliens apprehended for violations of immigration law”).

66. 8 C.F.R. § 208.30(f) (2017).

67. After denying an RFR, the Asylum Office sends the following stock message: “USCIS credible fear screening determinations are not subject to motions to reopen or reconsider. Governing regulations provide that the avenue for an applicant to challenge a USCIS credible fear screening determination is to seek review of that screening determination from an immigration judge. While USCIS can,



*Figure 1.* Diagram of the Expedited Removal Process for Asylum Seekers.

solely in its own discretion, reconsider its screening determination where information comes to its attention that it believes warrants such action, USCIS does not believe such reconsideration is warranted in your case.” Letter from Senior Asylum Officer [name redacted] to Amit Jain (Mar. 22, 2016) (on file with authors).

CFI thus constitutes the pivotal stage of ER and determines many child asylum seekers' fates.

## II. POLICY AND PRACTICE: THE *GUIDELINES FOR CHILDREN'S ASYLUM CLAIMS* AND CFIS IN SOUTH TEXAS, 2015–16

### A. Introduction to the Guidelines

Although one regulation lists unaccompanied minor status as an example of a “legal disability,”<sup>68</sup> U.S. asylum law references children’s special needs only minimally.<sup>69</sup> However, in response to international reforms,<sup>70</sup> NGO advocacy, and a landmark 1997 settlement,<sup>71</sup> the Immigration and Naturalization Service (INS) published nonbinding child-specific asylum guidance in 1998 (*Guidelines*).<sup>72</sup> As policy guidance, these *Guidelines* carry only advisory weight.<sup>73</sup> Nevertheless, the *Guidelines* have been cited approvingly by at least five circuits.<sup>74</sup> In addition, all Asylum Officers (AOs) receive training on the *Guidelines*.<sup>75</sup>

The *Guidelines* are intended to apply to minors who apply for asylum as principal applicants, not as derivative applicants in ER.<sup>76</sup> However, the

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68. 8 C.F.R. § 208.4(a)(5)(ii) (2017).

69. Jacqueline Bhabha & Susan Schmidt, *Kafka's Kids: Children in U.S. Immigration Proceedings Part I: Seeking Asylum Alone*, 07-01 IMMIGR. BRIEFINGS 1 (Jan. 2007).

70. See Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; Immigr. & Refugee Board of Canada, Chairperson Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues (Sept. 30, 1996).

71. Christine M. Gordon, *Are Unaccompanied Alien Children Really Getting a Fair Trial? An Overview of Asylum Law and Children*, 33 DENV. J. INT’L L. & POL’Y 641, 662 (2005).

72. Immigr. & Naturalization Serv., U.S. Dep’t of Justice, *Guidelines for Children’s Asylum Claims 2* (Dec. 10, 1998) [hereinafter *Guidelines*], available at <https://www.uscis.gov/sites/default/files/USCIS/Laws%20and%20Regulations/Memoranda/Ancient%20History/ChildrensGuidelines121098.pdf>.

73. E-mail from Jacqueline Bhabha, Professor of the Practice of Health and Human Rights, Harvard School of Public Health, to authors (May 9, 2016) (on file with authors).

74. *E.g.*, *Mejilla-Romero v. Holder*, 614 F.3d 572, 572 (1st Cir. 2010); *Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042, 1046 (9th Cir. 2007); *Jorge-Tzoc v. Gonzales*, 435 F.3d 146, 150 (2d Cir. 2006); *Liu v. Ashcroft*, 380 F.3d 307, 314 (7th Cir. 2004); *Abay v. Ashcroft*, 368 F.3d 634, 640 (6th Cir. 2004). *But see Razzak v. Att’y Gen. of U.S.*, 287 F. App’x. 208, 213 (3d Cir. 2008) (finding “no reason . . . to hold that the Immigration Court must follow the [*Guidelines*] because the IJ acknowledged the minor petitioners’ status as children”). See generally Deborah Anker et al., *Mejilla-Romero: A New Era for Child Asylum*, 12-09 IMMIGR. BRIEFINGS 1 (Sept. 2012).

75. All AOs and APSOs must complete the Asylum Officer Basic Training Course, which includes a lesson on the *Guidelines*. U.S. CITIZENSHIP AND IMMIGR. SERVS., RAO, ASYLUM DIV., LESSON PLAN OVERVIEW: GUIDELINES FOR CHILDREN’S ASYLUM CLAIMS (Sept. 1, 2009) [hereinafter *Lesson Plan*], available at <http://www.refworld.org/docid/4f3e30152.html> [<https://perma.cc/CV3W-BGPD>].

76. *Guidelines*, *supra* note 72, at 1. Derivative asylum seekers are those who seek asylum status through a family member—here, a parent—who meets the definition of a refugee. If the principal applicant’s

*Guidelines* encourage Asylum Officers to inquire into children's cases even in derivative applications "[w]hen a parent or parents do not appear to have an approvable claim."<sup>77</sup> The *Guidelines* also note that their suggestions "may be useful for children's cases generally," despite their "particular[] relevan[ce] for children who raise independent asylum claims."<sup>78</sup> Given the high stakes of CFIs, it stands to reason that the *Guidelines* should be applied therein.

Perhaps owing to their status as one of the first formal U.S. acknowledgements of child asylum seekers' unique needs, the *Guidelines* have enjoyed a largely positive reception.<sup>79</sup> Advocates have suggested that the Executive Office for Immigration Review adopt the *Guidelines*, which would make them binding on Immigration Judges.<sup>80</sup> Scholarly criticism of the *Guidelines* has generally taken three forms. First, it has highlighted the *Guidelines*' failure to establish procedures for the appointment of guardians ad litem and legal representatives for unaccompanied minors,<sup>81</sup> in contrast to Canadian and British guidance.<sup>82</sup> Second, critics have underscored the importance of adequate training in the *Guidelines*,<sup>83</sup> questioned whether the prescribed monitoring and supervision have actually taken place,<sup>84</sup> and noted the continuing lack of policy of assigning children's cases to trained specialists.<sup>85</sup> Third, advocates have criticized the *Guidelines*' failure to reform substantive asylum law by incorporating the "best interests of the child" principle into the framework of U.S. asylum law.<sup>86</sup> Our research did not uncover any articles that

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asylum status is terminated, the derivative applicant's status is also automatically terminated. 8 C.F.R. § 1208.24(d) (2017).

77. *Id.* at 12.

78. *Id.* at 5.

79. See, e.g., Devon A. Corneal, *On the Way to Grandmother's House: Is U.S. Immigration Policy More Dangerous than the Big Bad Wolf for Unaccompanied Juvenile Aliens?*, 109 PENN ST. L. REV. 604, 632–33 (2004).

80. 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, 254–55 (2010). Although legislation to this effect was introduced in both 2005 and 2007, it fell short of passage both times. Crystal Estrada, Note, *Misperceived Child Testimony: Why Credibility Should Be Presumed for Unaccompanied and Separated Children Seeking Asylum*, 31 T. JEFFERSON L. REV. 121, 136 (2008).

81. Jacqueline Bhabha & Wendy Young, *Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines*, 11 INT'L J. REFUGEE L. 84, 124–25 (1999); Bhabha & Schmidt, *supra* note 69, at 1; Corneal, *supra* note 79, at 633–34.

82. Joyce Koo Dalrymple, Note, *Seeking Asylum Alone: Using the Best Interests of the Child Principle to Protect Unaccompanied Minors*, 26 B.C. THIRD WORLD L.J. 131, 156 (2006).

83. Bhabha & Young, *supra* note 81, at 124–25.

84. Bhabha & Schmidt, *supra* note 69, at 1.

85. *Id.*

86. Dalrymple, *supra* note 82, *passim*; see also Kristine K. Nogosek, *It Takes a World to Raise a Child: A Legal and Public Policy Analysis of American Asylum Legal Standards and Their Impact on Unaccompanied Minor Asylees*, 24 HAMLINE L. REV. 1, 13 (2000); Rachel Bien, Note, *Nothing to Declare But Their Childhood: Reforming U.S. Asylum Law to Protect the Rights of Children*, 12 J.L. & POL'Y 797, 826–32 (2004); Danuta Villarreal, Comment, *To Protect the Defenseless: The Need*

analyzed the *Guidelines*' techniques in the context of best practices or any that considered whether these techniques were being implemented in actual child CFIs. By undertaking such an analysis, we hope to add a new dimension to the discussion.

To understand whether the *Guidelines* comport with best practices, we collected techniques from five child forensic interview protocols, three developed by non-profit organizations<sup>87</sup> and two created by government agencies.<sup>88</sup> Our review uncovered a consensus on an array of practices designed to maximize narrative accuracy through interview structure, questioning, atmospheric considerations, accommodations for trauma, and electronic record-keeping. Most of these practices are included in the *Guidelines*. However, our survey of actual CFIs revealed that current practice utterly fails to conform to the *Guidelines*. Contrary to the *Guidelines* and other best practices, Asylum Pre-Screening Officers (APSOs) in CFIs generally omit child-friendly opening statements; use adversarial questioning; fail to build rapport; regularly fail to investigate children's expressions of fear or harm and are insensitive to trauma; and frequently fail to ascertain whether children are comfortable speaking with their mothers present in the room. These violations have inhibited children's ability to voice their claims in their CFIs, often resulting in prolonged detention and unjust deportation.<sup>89</sup>

### B. Methodology

The individuals in the case studies below were detained in Texas and represented by attorneys and law students in collaboration with DPBP and KPBP. Although DPBP and KPBP facilitate access to legal services that would

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for Child-Specific Substantive Standards for Unaccompanied Minor Asylum-Seekers, 26 HOUS. J. INT'L L. 743, 762 (2004).

87. AM. PROF'L SOC'Y ON THE ABUSE OF CHILDREN, PRACTICE GUIDELINES: FORENSIC INTERVIEWING IN CASES OF SUSPECTED CHILD ABUSE (2012) [hereinafter *APSAC Protocol*]; *The National Institute of Child Health and Human Development (NICHD) Protocol: Interview Guide*, in CHILDREN'S TESTIMONY: A HANDBOOK OF PSYCHOLOGICAL RESEARCH AND FORENSIC PRACTICE 431 (Michael E. Lamb et al. eds., 2d ed. 2011) [hereinafter *NICHD Protocol*]; Jennifer Anderson et al., *The CornerHouse Forensic Interview Protocol: RATAc*, 12 T.M. COOLEY J. PRAC. & CLINICAL L. 193 (2010) [hereinafter *RATAc Protocol*].
88. DEP'T OF HUM. SERVS., STATE OF MICHIGAN, FORENSIC INTERVIEWING PROTOCOL (3d ed. 2011) [hereinafter *Michigan Protocol*]; GRAHAM M. DAVIES & HELEN L. WESTCOTT, UK HOME OFFICE, INTERVIEWING CHILD WITNESSES UNDER THE MEMORANDUM OF GOOD PRACTICE: A RESEARCH REVIEW (1999) [hereinafter *UK Memorandum*].
89. E.g., INT'L DETENTION COAL., CAPTURED CHILDHOOD 46 (June 2012), available at <https://idcoalition.org/wp-content/uploads/2012/03/Captured-Childhood-FINAL-June-2012.pdf> [<https://perma.cc/RDY6-UP92>]; Sarah Mares et al., *Seeking Refuge, Losing Hope: Parents and Children in Immigration Detention*, 10 AUSTRALASIAN PSYCHIATRY 91, 92 (2002); Zachary Steel et al., *Psychiatric Status of Asylum Seeker Families Held for a Protracted Period in a Remote Detention Centre in Australia*, 28 AUSTRALIAN & NEW ZEALAND J. PUB. HEALTH 527, 533-34 (2004); Janet Cleveland, *Psychological Harm and the Case for Alternatives*, 44 FORCED MIGRATION REV. 7 (2013).



otherwise be unavailable to these families, they cannot provide full representation to the hundreds of mothers and children who cycle through detention centers each week. For instance, most mothers and children attend their CFIs without counsel. To prepare families for CFIs, DPBP typically provides a group presentation followed by one-on-one preparations with volunteers, provided there are enough Spanish-speaking volunteers available.

During and after CFIs, APSOs record notes in the form of an informal transcript. The interview is not recorded in any other way. As discussed below, these transcripts are neither verbatim nor objective, but we have relied on them out of necessity. Guidance in effect from 2015–16 directed APSOs to include in these notes any “questions used to inform the applicant of any relevant credibility issues” and “the applicant’s responses to those questions”; “all information relevant to whether or not a bar to asylum or withholding applies”; and a “factual summary” of “material facts as stated by the applicant.”<sup>90</sup> Beyond these requirements, APSOs appear to enjoy broad discretion over what to include in their CFI notes. In addition, because APSOs and asylum seekers may be the only individuals present during an interview, accountability for inaccuracies in CFI notes is virtually nonexistent. Nevertheless, immigration courts and reviewing U.S. courts of appeals regularly treat CFI transcripts as reliable evidence in asylum proceedings.<sup>91</sup>

This subjective nature of CFI notes is a limitation for our analysis, as APSOs may forget or otherwise omit important information from the records. In conjunction with their own professional interests, APSOs are more likely to exercise their discretion to omit evidence of children’s discomfort or confusion than of their own adherence to stated policies. In other words, to the extent that CFI notes present an inaccurate impression of whether APSOs are meeting professional standards in interviews with children, they are likely to understate departures from the professional norm than to overstate them. With these limitations in mind, we have also endeavored to supplement CFI notes when possible with information from Requests for Reconsideration (RFRs) submitted by asylum seekers as well as from attached exhibits, including declarations and psychiatric evaluations.

In reviewing these sources, we elected to use a critical case sampling methodology. We reviewed fifteen children’s stories as critical incidents, five of which are detailed below. In critical case sampling, certain cases are chosen

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90. U.S. CITIZENSHIP & IMMIGR. SERVS., RAO, ASYLUM DIVISION, LESSON PLAN OVERVIEW: CREDIBLE FEAR 19, 42, 44 (Feb. 28, 2014), available at <http://cmsny.org/wp-content/uploads/credible-fear-of-persecution-and-torture.pdf> [<https://perma.cc/VA43-HUCW>].

91. *E.g.*, *Qi Zhang v. Lynch*, 634 F. App’x. 13, 15 (2d Cir. 2015) (holding that the Immigration Judge “reasonably relied on inconsistencies among [the applicant’s] testimony, asylum application, and credible fear interview” in reaching an adverse credibility determination, as the CFI transcript “bore sufficient ‘hallmarks of reliability’ for the agency to rely on it”). In some cases, some circuit courts have disputed this practice and held that CFI transcripts “lack certain important indicia of reliability.” *Zheng Wang Huang v. Holder*, 351 F. App’x. 191, 192 (9th Cir. 2009).

because of their particular importance and value in generalizing to a larger set. Here, these cases came to our attention because DPBP and KPBP had submitted RFRs after these children received negative decisions. Thus, the majority of decisions reviewed came from the pool of negative CFIs, which make up approximately twelve to thirteen percent of all CFIs.<sup>92</sup>

We chose the critical case methodology rather than an exhaustive review of all child CFIs out of both necessity and choice. We were confined to negative CFIs because the available client data is limited; a CFI transcript is usually uploaded to DPBP and KPBP's databases only if the client did not receive a positive decision. Also, the database is primarily used by volunteer attorneys and law students who review the files remotely to assist detained families in arguing for release; it was not designed for the purpose of research, so there are limits on how the data can be filtered. For example, there is no way to filter for CFIs in which children were interviewed. In addition, children often do not need to be interviewed in positive CFIs, as an APSO may find a credible fear for the family based on the mother's claims alone; in contrast, an APSO may not issue a negative finding without considering a child's case, which makes a child interview more likely in a negative CFI. These limitations meant that we were mostly confined to reviewing negative CFIs.

There is also merit in specifically evaluating children's CFIs that receive negative decisions. Specifically, negative CFIs are critical in any evaluation of the CFI process because the process is designed to fulfill the U.S. government's obligations for humanitarian relief. In meeting its *non-refoulement* obligation, the government must place more emphasis on avoiding false negatives (i.e., finding no credible fear when the children hold credible fear) than false positives (i.e., finding credible fear when the children hold no such fear). Further, the harms resulting from false negatives substantially outpace those from false positives: false negatives can lead to at best the prolonged detention of bona fide asylum seekers and at worst their return to persecution, torture, or death in violation of international and domestic law. The costs of prolonged detention are also significant for the government.<sup>93</sup> Conversely, asylum seekers who receive false positives in their CFIs are not likely to prevail in their subsequent removal proceedings, in which they must *prove* their eligibility for asylum—a more rigorous standard than showing a credible fear. These circumstances render the critical case methodology an appropriate choice for examining the CFI process for detained children.

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92. See CREDIBLE FEAR AND REASONABLE FEAR STATISTICS AND NATIONALITY REPORT, *supra* note 7, at 1 (finding that negative CFIs made up approximately 11.8 percent of all CFIs from October 2016 to December 2016, inclusive); Brief of American Immigration Council et al., *supra* note 30, at 10 n.10 (finding that negative CFIs made up approximately 13 percent of all CFIs between July 2014 and June 2016, inclusive).

93. See *infra* § III(A)(2).

Moreover, if the recommendations of the *Guidelines* are being followed in negative CFIs, it is likely that the *Guidelines* are being followed in all decisions, including positive ones.<sup>94</sup> Conversely, the violations of the *Guidelines* that we ultimately identified in negative CFIs likely pervade positive CFIs as well, for three reasons. First, the fifteen children were interviewed by twelve APSOs, who interview multiple asylum seekers each day and issue both negative and positive decisions. Second, our review showed that even CFIs that receive positive results often contain deficiencies as well. Third, violations of the *Guidelines* pervaded every single one of the fifteen cases we examined. In sum, these violations appear to be widespread, casting the integrity of the entire CFI process into doubt.<sup>95</sup>

### C. Findings

#### 1. Interview Structure

##### i. Policy

The *Guidelines* recommend a phased interview structure, acknowledging that an AO “may have to build rapport with the child to elicit claims,” especially given that “from the point of view of most applicants, Asylum Officers are authority figures and foreign government officials.”<sup>96</sup> Accordingly, the *Guidelines* suggest an initial “brief rapport-building phase during which time neutral topics are discussed.”<sup>97</sup> After building rapport, the *Guidelines* recommend “a brief ‘Opening Statement’” in which AOs can “explain in very simple terms . . . what will happen during the asylum interview.”<sup>98</sup> Finally, the *Guidelines* suggest a closing phase after substantive questioning in which the AO returns to a discussion of the neutral topics, answers the child’s questions, and informs the child of the next steps in the process.<sup>99</sup>

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94. Cf. MICHAEL Q. PATTON, *QUALITATIVE RESEARCH & EVALUATION METHODS* 236 (3d ed. 2002) (“A clue to the existence of a critical case is a statement to the effect that ‘if it happens there, it will happen anywhere,’ or, vice versa, ‘if it doesn’t happen there, it won’t happen anywhere.’”).

95. Violations of the *Guidelines* in positive CFIs also adversely affect asylum-seeking children. Although these violations may not result in immediate deportation, they nevertheless damage a child asylum seeker’s chance of success on the merits. For example, IJs can deny asylum applications based on inconsistencies or omissions in credible fear notes, or between credible fear notes and subsequent documents or testimony. *E.g.*, *Matter of J-Y-C-*, 24 I. & N. Dec. 260, 262 (BIA 2007) (affirming adverse credibility determination in asylum proceeding based on inconsistency “without regard to whether an inconsistency . . . goes to the heart of the applicant’s claim”) (quoting REAL ID Act of 2005, Div. B of Pub. L. No. 109-13, 119 Stat. 302, 303, codified at 8 U.S.C. § 1158(b)(1)(B)(iii)); see also *Zheng Wang Huang v. Holder*, 351 F. App’x. 191 (9th Cir. 2009).

96. *Guidelines*, *supra* note 72, at 7.

97. *Id.* at 8.

98. *Id.*

99. *Id.* at 10.

The five other child interview protocols we reviewed all supported these recommendations.<sup>100</sup> Research finds that rapport-building in particular allows children to practice sharing narratives in a nonthreatening context<sup>101</sup> and lets interviewers gauge children's preferred communication styles and competencies.<sup>102</sup> Similarly, the closing phase recommended by the *Guidelines* can assist children in the recovery process and improve their subsequent interactions with the legal system.<sup>103</sup>

## ii. Practice

The APSOs reviewed in our critical case study consistently did not provide age-appropriate opening statements, nor did they participate in meaningful rapport-building, perhaps due to time constraints. While it is possible that the APSOs simply did not record these interactions in their notes, even if they did cursorily engage in such practices the children's silent or monosyllabic responses indicated a lack of trust, pervasive discomfort, and a lack of understanding of the process.<sup>104</sup>

**Case Study 1: 15-year-old Lucia.** In interviewing Lucia, the APSO did not use the opening statement provided in the *Guidelines*. Instead, he began by instructing Lucia not to give lengthy answers:

Now, I am going to ask you some questions about why you do not want to return to your country. If possible, please speak in short sentences so that the interpreter can accurately interpret everything that you say. If what you say is too long for the interpreter to interpret, the interpreter or I will stop you. We have a limited amount of time today, so please listen to my questions carefully and answer them directly.<sup>105</sup>

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100. See generally OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, CHILD FORENSIC INTERVIEWING: BEST PRACTICES, JUVENILE JUSTICE BULLETIN 7-11 (Sept. 2015) (detailing the broad consensus surrounding the phased interview model).

101. *APSAC Protocol*, *supra* note 87, at 18; *Michigan Protocol*, *supra* note 88, at 12-14; *NICHD Protocol*, *supra* note 87, at 433-36; *RATAC Protocol*, *supra* note 87, at 258-60; *UK Memorandum*, *supra* note 88, at 20; OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *supra* note 100, at 8.

102. *Michigan Protocol*, *supra* note 88, at 10; *RATAC Protocol*, *supra* note 87, at 266-73; *UK Memorandum*, *supra* note 88, at 20.

103. See, e.g., *RATAC Protocol*, *supra* note 87, at 320-21.

104. See, e.g., *Michigan Protocol*, *supra* note 88, at 10 (noting that rapport-building helps children overcome the expectation "that interviewers will ask a lot of questions and that [the child's] job is to respond to each one with a short answer"); *NICHD Protocol*, *supra* note 87, at 433 (directing interviewers to continue rapport-building until children are comfortable giving detailed answers, rather than short answers or non-answers); *UK Memorandum*, *supra* note 88, at 18 ("[I]ntimidating or non-supportive interviewers can inhibit children's testimony . . .").

105. Interview by Asylum Pre-Screening Officer with Lucia, at the South Texas Family Residential Center in Dilley, Tex. (Mar. 16, 2016) (on file with authors) [anonymized to protect client confidentiality].

After this opening statement, the APSO did not appear to ascertain whether Lucia had understood the explanation of the interview process.<sup>106</sup> The officer also did not ask Lucia whether she was comfortable being interviewed by a man, even though the *Guidelines* suggest that young women be interviewed by women Asylum Officers, given that victims of sexual violence may feel more comfortable with interviewers and interpreters of the same gender.<sup>107</sup>

In the brief conversation that followed, Lucia told the officer that she believed gang members wanted to rape and kill her as they had other girls. She told him that she believed she was being targeted because she lived alone with her mother and commuted to school by herself. The APSO found that Lucia did not hold a credible fear.

Lucia and her family, including Lucia's four-year-old sister, were detained for over a month. Pro bono attorneys' advocacy prompted the Asylum Office to reverse its negative determination, and the family was released.

**Case Study 2: 8-year-old Diego.** Diego's CFI reflects no rapport-building phase. According to the notes, the officer asked difficult questions almost immediately, starting with whether Diego wanted to go back to Guatemala. The entire interview as recorded in the notes is quoted below:

Q: Do you want to go back to Guatemala?

A: No.

Q: Why not?

A: Because there are thieves and gang members.

Q: Did the thieves or gang members ever say anything to you?

A: No.

Q: Did the thieves or gang members ever do anything to you?

A: No.

Q: Why are you afraid of them?

A: Just because.

Q: Do they look scary to you?

A: Yes.

Q: Did they ever say or do anything to your mother?

A: No.

Q: Did they ever say or do anything to anyone you know?

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106. 8 C.F.R. § 208.30(d)(2) (2017) ("The officer shall also determine that the alien has an understanding of the credible fear determination process.").

107. *Guidelines*, *supra* note 72, at 7 ("Children who have been victims of sexual violence may feel more comfortable recounting their experiences to an interpreter and interviewer of the same gender. . . . Girls and young women, in many cases, may be more comfortable discussing their experiences with women Asylum Officers, particularly in cases involving rape[ or] sexual abuse. . . . To the extent that personnel resources permit, Asylum Offices may have women Asylum Officers interview these cases.").

A: No.

Q: If you went back to Guatemala, what do you think would happen?

A: (Applicant did not say anything. Mother stated:) If he goes back they would take him and teach him bad things. (Asked mom to allow the child to speak, if he is able to.)

Q: Why would they grab you?

A: Just because.

Q: Because what?

A: (Mom states he does not know anything else.)

Q: Are you afraid of anyone else in Guatemala?

A: No just the gangs.<sup>108</sup>

Diego's reluctance to talk to the APSO was clear: most of his responses were "yes," "no," or silence.

Had a rapport-building phase been included, Diego might have felt more comfortable enunciating a claim. According to a declaration subsequently given by his mother Rosa, Diego was with Rosa on multiple occasions in which gang members threatened to rape her or recruit him into the gang. For instance, Rosa and Diego were walking together when gang members threw Rosa down to the ground and began tearing off her clothes, only stopping when Diego started screaming. On another occasion, gang members attempted to break into Diego and Rosa's house at night. Diego did not share these stories with the APSO. Rosa was also unable to fully disclose her past persecution during her interview because of cognitive and psychological difficulties. A psychiatrist later diagnosed her with post-traumatic stress disorder and a lifelong cognitive disability.

The APSO issued negative credible fear findings for both Rosa and Diego. An Immigration Judge upheld the negative findings, and volunteer attorneys filed an RFR on Rosa's behalf. After more than 45 days of detention, the Asylum Office reversed the negative findings, and Rosa and Diego were released.

## 2. Questioning

### i. Policy

The *Guidelines* instruct AOs to employ "child-sensitive" questioning techniques.<sup>109</sup> They advise AOs to "[u]se open-ended questions to encourage narrative responses" and "avoid leading questions whenever possible" but fail to

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108. Interview by Asylum Pre-Screening Officer with Diego, at the South Texas Family Residential Center in Dilley, Tex. (Dec. 30, 2015) (on file with authors) [anonymized to protect client confidentiality].

109. *Guidelines*, *supra* note 72, at 10.

provide examples.<sup>110</sup> The *Guidelines* also encourage the use of “short, clear, age-appropriate questions and sentences, avoiding long or compound questions . . . [and] three or four syllable words.”<sup>111</sup> They charge each AO with “actively considering” a child’s understanding and determining when a “brief recess” may be necessary.<sup>112</sup> The *Guidelines* further note that “[c]oercion has no place in any interview.”<sup>113</sup> Beyond the *Guidelines*, each APSO has “an affirmative duty to elicit all information relevant to the legal determination” in a CFI.<sup>114</sup>

Again, these directives are supported by best practices and empirical research.<sup>115</sup> However, because children can struggle with open-ended questions,<sup>116</sup> similarly structured protocols also tend to recommend following up on such questioning with directed “cued-response” questions.<sup>117</sup>

## ii. Practice

Despite these recommendations, APSOs appear to routinely fail to ask adequate follow-up questions when children express fear of harm or describe past instances of harm.

**Case Study 3: 7-year-old Tomás.** Tomás’s interview was marred by the APSO’s failure to properly follow up on his expression of fear. The APSO began the interview without building rapport and asked Tomás’s mother to leave the room.<sup>118</sup> Tomás subsequently explained that he became nervous after his mother’s departure. Nevertheless, Tomás was able to tell the officer about his father’s shooting. However, the APSO quickly changed the subject:

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110. *Id.* at 11.

111. *Id.* at 10.

112. *Id.* at 9.

113. *Id.* at 11.

114. See U.S. CITIZENSHIP & IMMIGR. SERVS., RAIO, ASYLUM DIVISION, *supra* note 90, at 12.

115. *APSAC Protocol*, *supra* note 87, at 12; *Michigan Protocol*, *supra* note 88, at 16–17; *NICHD Protocol*, *supra* note 87, at 436; OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *supra* note 100, at 6; *RATAC Protocol*, *supra* note 87, at 226; *UK Memorandum*, *supra* note 88, at 21–22; see also Michael E. Lamb et al., *Structured Forensic Interview Protocols Improve the Quality and Informativeness of Investigative Interviews With Children: A Review of Research Using the NICHD Investigative Interview Protocol*, 31 *CHILD ABUSE & NEGLECT* 1201, 1208 (2007).

116. Karen J. Saywitz & Lorinda B. Camparo, *Contemporary Child Forensic Interviewing: Evolving Consensus and Innovation over 25 Years*, in *CHILDREN AS VICTIMS, WITNESSES, AND OFFENDERS* 102, 107 (Bette L. Bottoms et al. eds., 2009); Karen J. Saywitz & Thomas D. Lyon, *Coming to Grips with Children’s Suggestibility*, in *MEMORY AND SUGGESTIBILITY IN THE FORENSIC INTERVIEW* 85, 86 (Mitchell L. Eisen et al. eds., 2002).

117. See *supra* notes 87, 88, 100, 115 and accompanying text.

118. Interview by Asylum Pre-Screening Officer with Tomás, at the South Texas Family Residential Center in Dilley, Tex. (Dec. 28, 2015) (on file with authors) [anonymized to protect client confidentiality]. This is contrary to the *Guidelines*, which encourage AOs to allow a trusted adult to be present. *Guidelines*, *supra* note 72, at 5.

Q: Has anyone done anything mean to you, or something that scared you back in El Salvador?

A: Yes.

Q: What happened? Can you tell me about it?

A: My dad was shot.

Q: Ok, that does sound scary. But I am wondering, did anyone ever do anything to you that was mean, or hurt you?

A: No.<sup>119</sup>

The APSO never returned to the topic of the shooting, even though it lay at the heart of Tomás's asylum claim. Tomás articulated his fear more fully in a subsequent declaration: "When I think about what happened to my dad I feel bad and sad and I think about what would have happened if he had died."<sup>120</sup> The *Guidelines* expressly note that such harm to a caretaker can qualify as persecution for the purposes of a child's asylum claim.<sup>121</sup>

Tomás was also fearful for his mother's and his own safety because after the shooting, gang members had twice threatened that they would "finish the job" and "hit [Tomás's father] where it hurt[] the most."<sup>122</sup> Tomás's father fled soon after these threats, and his absence made Tomás feel unprotected and scared. In failing to provide Tomás with the opportunity to convey these fears during his CFI, the APSO did not fulfill his duty to elicit all relevant information.

The APSO found Tomás and his mother to lack credible fear. An Immigration Judge upheld his decisions. After volunteer attorneys filed three RFRs, the Asylum Office granted Tomás's mother a second interview, and she received a positive credible fear finding. After more than four months in detention, Tomás and his mother were released.

### 3. Atmospheric Considerations and Trauma

#### i. Policy

The *Guidelines* encourage AOs to consider atmospheric influences on children's testimony. Specifically, the *Guidelines* note that interviews should be "non-adversarial" and "allow the child to testify at a comfortable speed."<sup>123</sup>

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119. Interview by Asylum Pre-Screening Officer with Tomás, *supra* note 119.

120. Declaration of Tomás in Support of a Positive Finding of Credible Fear (Jan. 11, 2016) (on file with authors) [anonymized to protect client confidentiality].

121. *Guidelines*, *supra* note 72, at 24.

122. Declaration of Tomás, *supra* note 120.

123. *Id.* at 5.



Forensic child-interview protocols and researchers largely agree.<sup>124</sup> The *Guidelines* also state that the presence of a “trusted adult” is “generally in the child’s best interests.”<sup>125</sup> This assertion is endorsed by some protocols but controverted by others.<sup>126</sup>

The *Guidelines* further emphasize the importance of sensitivity to trauma and developmental differences. They warn AOs not to expect children to be “immediately forthcoming about events which have caused great pain” and concede that “children cannot be expected to present testimony with the same degree of precision as adults.”<sup>127</sup> They also note that cultural differences or trauma can affect a child’s demeanor in a way that may present as “vagueness and inconsistencies” in testimony.<sup>128</sup> Accordingly, the *Guidelines* direct AOs not to construe such inconsistencies as indicators of unreliability.<sup>129</sup>

Research supports these warnings. Individuals who “have recently emigrated from areas of considerable social unrest and civil conflict may have elevated rates of [PTSD]” and “may be especially reluctant to divulge experiences of torture and trauma.”<sup>130</sup> This reluctance is often exacerbated by a lack of emotional support, unfamiliarity with the legal system, and conditions of detention.<sup>131</sup> Individuals with PTSD are more likely to experience short-term memory problems,<sup>132</sup> challenges with learning new information,<sup>133</sup>

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124. *Michigan Protocol*, *supra* note 88, at 4; *RATAC Protocol*, *supra* note 87, at 260; *UK Memorandum*, *supra* note 88, at 18.

125. *Guidelines*, *supra* note 72, at 7.

126. *Compare APSAC Protocol*, *supra* note 87, at 9 (recommending the use of support persons), with *Michigan Protocol*, *supra* note 88, at 2 (cautioning against their use).

127. *Guidelines*, *supra* note 72, at 12–13.

128. *Id.* at 14–15.

129. *Id.* at 15.

130. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 465 (4th ed. 2000). The current version of the DSM does not address emigration’s effect on PTSD directly, but explains, “The risk of onset and severity of PTSD may differ across cultural groups as a result of variation in the type of traumatic exposure (e.g., genocide) . . . and other cultural factors (e.g., acculturative stress in immigrants).” *Posttraumatic Stress Disorder*, in AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013),

131. Jessica Chaudhary, *Memory and Its Implications for Asylum Decisions*, 6 J. HEALTH & BIOMEDICAL L. 37, 50 (2010).

132. Carol M. Suzuki, *Unpacking Pandora’s Box: Innovative Techniques for Effectively Counseling Asylum Applicants Suffering from Post-Traumatic Stress Disorder*, 4 HASTINGS RACE & POVERTY L.J. 235, 261 (2007).

133. SUSAN F. COLE ET AL., HELPING TRAUMATIZED CHILDREN LEARN: SUPPORTIVE SCHOOL ENVIRONMENTS FOR CHILDREN TRAUMATIZED BY FAMILY VIOLENCE 22–23 (2005) (citing Annette Streeck-Fischer & Bessel A. van der Kolk, *Down Will Come Baby, Cradle and All: Diagnostic and Therapeutic Implications of Chronic Trauma on Child Development*, 34 AUSTRALIAN & NEW ZEALAND J. OF PSYCHIATRY 903, 912 (2000)).

dissociation,<sup>134</sup> and difficulty putting words to their experiences,<sup>135</sup> all of which can lead interviewers to erroneously find children with PTSD not to be credible.<sup>136</sup>

These policies set forth in the *Guidelines* fall short of best practices in two ways. First, they neither recommend nor offer mechanisms for connecting children with psychological counseling. Although psychological counseling can cause memory “contamination,”<sup>137</sup> when done properly, it can improve recall of traumatic events.<sup>138</sup> Second, the *Guidelines* overlook a critical atmospheric consideration by offering no guidance regarding the setting of the interview. Other protocols and studies overwhelmingly indicate that conducting interviews in neutral settings enhances children’s disclosures.<sup>139</sup>

## ii. Practice

Again, the practice of APSOs in CFIs proves far removed from the *Guidelines*. Far from being trauma-sensitive, APSOs often use adversarial and disbelieving tones during CFIs, re-traumatizing children and inhibiting their ability to disclose past persecution. APSOs also demonstrate insensitivity to atmospheric considerations by failing to evaluate whether a child is able to speak freely while their parent is present.<sup>140</sup>

**Case Study 4: 10-year-old Alex.** In a declaration given after his CFI, Alex described his APSO as “very strict” and “very serious.” Alex stated that the officer made him feel “intimidated,” “a little scared,” “nervous,” and “very upset.”<sup>141</sup> The APSO’s actions that upset Alex were generally not reflected in the

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134. See, e.g., Bruce D. Perry, *The Neurodevelopmental Impact of Violence in Childhood*, in TEXTBOOK OF CHILD AND ADOLESCENT FORENSIC PSYCHIATRY 221 (D. Schetky & E.P. Benedek eds., 2001); see also Chaudhary, *supra* note 131, at 45–47; Talia Kraemer & Eliza Patten, *Establishing a Trauma-Informed Lawyer–Client Relationship (Part One)*, 33 CHILD L. PRAC. 193, 198–99 (2014); Linda Piwowarczyk, *Seeking Asylum: A Mental Health Perspective*, 16 GEO. IMMIGR. L.J. 155, 171 (2011); Streeck-Fischer & van der Kolk, *supra* note 133, at 912.

135. Kraemer & Patten, *supra* note 134, at 199; COLE ET AL., *supra* note 133, at 24.

136. OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *supra* note 100, at 5; Suzuki, *supra* note 132, at 239.

137. Saywitz & Camparo, *supra* note 116, at 117–18.

138. Christina Rainville, *Best Practices for Interviewing Children with Disabilities*, 31 CHILD L. PRAC. 65 (2012).

139. See, e.g., OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *supra* note 100, at 6; Saywitz & Camparo, *supra* note 116, at 106; *Michigan Protocol*, *supra* note 88, at 3–4.

140. On July 29, 2014, then-USCIS Director Leon Rodriguez stated that he was “aware of the concern” that women and their children were being interviewed in groups. U.S. Citizenship & Immigr. Servs. Hearing Before the H. Comm. on the Judiciary, 113th Cong. 39 (2014). However, all of the CFIs reviewed in this Note took place in 2015 or 2016.

141. Declaration of Alex in Support of a Positive Finding of Credible Fear (Mar. 14, 2016) (on file with authors) [anonymized to protect client confidentiality].

APSO's notes.<sup>142</sup> For instance, according to Alex, the officer told him at the beginning of the interview that he could answer only "yes" or "no" to her questions. The notes also did not capture nonverbal communication, such as Alex's later description of how the officer's body language made him feel as if she did not believe him:

While she was interviewing me, the officer's computer blocked her face. Whenever I answered her question, she would move over, look at me, and make a face. She moved her eyebrows, and it looked like she was doubting everything I said. This made me feel even more nervous.<sup>143</sup>

Because of the officer's demeanor, Alex was unable to share his story of persecution. In El Salvador, gang members had tried to recruit him on about seven occasions. When Alex refused, one of the gang members lifted his shirt to show Alex his gun. The gang members also threatened to hurt Alex's brother. Fearing for his and his brother's safety, Alex fled El Salvador with his mother. Even in the United States, Alex constantly worried about his brother. A woman who shared a room with Alex told him that he screamed his brother's name in his sleep. Given his reason for fleeing, Alex became upset when the APSO asked him if he had been in a gang. The officer was likely trying to verify that Alex did not fall under one of the exclusions to asylum.<sup>144</sup> Nevertheless, as Alex explained in his declaration, the way she phrased the question "made [him] very upset and bothered [him]," as he "was not a gang member" and "[did] not want to be a gang member."<sup>145</sup>

After the interview, a psychiatrist found that Alex "was specifically traumatized by the hostile and scornful demeanor of . . . the officer who made him clam up in fear and confusion during his interview." The psychiatrist explained that Alex could not comprehend "why a woman who had the power to help him . . . would question his truthful account."<sup>146</sup>

The APSO issued negative decisions for Alex and his mother. An Immigration Judge reviewed and upheld the decisions. Volunteer attorneys filed RFRs for both Alex and his mother, but both were denied. After about three months in detention, Alex and his mother were deported.

**Case Study 5: 9-year-old Mateo.** Because of his mother's presence during his CFI, Mateo was unable to share a full account of the dangers he had faced in

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142. Interview by Asylum Pre-Screening Officer with Alex at the South Texas Family Residential Center in Dilley, Tex. (Mar. 8, 2016) (on file with authors) [anonymized to protect client confidentiality].

143. Declaration of Alex, *supra* note 141.

144. See 8 C.F.R. § 208.13(c)(2)(E) (2017).

145. Declaration of Alex, *supra* note 141.

146. Psychiatric Report for Alex, prepared by faculty in Clinical Psychiatry at New York University at the request of the CARA Pro Bono Project (Mar. 21, 2016) (on file with authors) [anonymized to protect client confidentiality].

El Salvador. According to a subsequent declaration,<sup>147</sup> Mateo had been threatened on two different occasions by gang members who said that if he refused to give them money, they would force him to join the gang. The gang members menaced Mateo by brandishing guns and machetes. However, Mateo was unable to share these details during his CFI because he was worried about causing his mother Ximena emotional distress. Mateo had never told Ximena the full extent of the threats; he had told her only that gang members had taken his money once. She did not know about the second confrontation or that the gang members had brandished weapons and threatened to recruit her son. Mateo did not want to upset her by sharing these details.

Mateo's interview started without a rapport-building phase. Soon, the APSO noticed Mateo's distraught state. The officer noted that Mateo looked at his mother twice during the interview. One of these moments was especially revealing:

Q: What else did [the gang members] say other than they wanted your money?

A: (mother taps son, he looks up and is confused about what he said wrong) no nothing just that.<sup>148</sup>

Though the APSO found the dynamic between Mateo and his mother unusual enough to record in her notes, she did not address his apparent confusion and discomfort.

The APSO issued negative credible fear findings for Ximena, Mateo, and Mateo's brother. Volunteer attorneys submitted two RFRs for Ximena and one for Mateo, but all were denied. Although Ximena and her children were released after more than four months of detention due to a medical emergency, they have yet to win reconsideration of their negative credible fear finding.

#### 4. *Objective Record-Keeping*

All five of the other child interview protocols surveyed encouraged electronic recording of all interviews with children, preferably in video format.<sup>149</sup> In addition to providing opportunities for supervisory review and feedback,

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147. Declaration of Mateo in Support of a Positive Finding of Credible Fear (Jan. 7, 2016) (on file with authors) [anonymized to protect client confidentiality].

148. Interview by Asylum Pre-Screening Officer with Mateo at the South Texas Family Residential Center in Dilley, Tex. (Nov. 17, 2015) (on file with authors) [anonymized to protect client confidentiality].

149. OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *supra* note 100, at 6; *APSAC Protocol*, *supra* note 87, at 8; *Michigan Protocol*, *supra* note 88, at 3; Saywitz & Camparo, *supra* note 116, at 105.

recordings can preserve a complete record for the trier of fact, guard against suggestive questioning,<sup>150</sup> and help interviewers accurately recall disclosures.<sup>151</sup>

Despite this broad consensus, however, the *Guidelines* make no mention of electronic recording. Similarly, APSOs do not record CFIs in any objective manner. Instead, APSOs rely on their own, non-verbatim written recollections and checklists that “reduce the overall time required” for each credible fear determination.<sup>152</sup> These records rarely reflect either the APSO’s or the child’s nonverbal affect. Further, at times CFI notes contain errors that could adversely affect an asylum seeker’s claim at multiple stages of their case, as these notes are referenced (1) during IJ review, (2) in preparing RFRs, and (3) as evidence in adversarial removal proceedings. At each step, the lack of reliable records impedes accurate determinations.

#### D. Conclusion

The *Guidelines* propose many child-sensitive interviewing techniques that are backed by empirical research, including a phased interview structure, open-ended and age-appropriate questioning, a non-adversarial atmosphere without coercion, and accommodations for trauma. But the *Guidelines* also contain significant gaps: they ignore the physical setting of interviews, provide no mechanism for the appointment of guardians ad litem or legal counsel, acknowledge no role for AOs in connecting children with psychological counseling, and allow non-electronic recording of interviews.

Still, as significant as these policy shortcomings may be, they pale in comparison to the pervasive violations found in actual child CFIs in South Texas. In practice, the child CFIs we reviewed from 2015 and 2016 fell far below nearly all of the standards outlined above, including those expressly incorporated into the *Guidelines*. APSOs regularly failed to build rapport, give child-friendly opening statements, ascertain whether children were comfortable, remain sensitive to children’s trauma, and fully develop children’s claims. These subpar CFIs in some cases resulted in asylum-seeking children’s prolonged detention.

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150. James M. Wood et al., *Child Sexual Abuse Investigations: Lessons Learned from McMartin and Other Daycare Cases*, in CHILDREN AS VICTIMS, WITNESSES, AND OFFENDERS 81, 94 (Bette L. Bottoms et al. eds., 2009).

151. Terence W. Campbell, *Interviewing Children: Taking Notes or Relying on Memory Is Not Good Enough*, 81 MICH. B.J. 32, 34 (2002); Estrada, *supra* note 80, at 142; Orly Bertel, Note, *Let’s Go to the Videotape: Why the Forensic Interviews of Children in Child Protective Cases Should Be Video Recorded*, 50 FAM. CT. REV. 344 (2012).

152. Memorandum from Ted H. Kim, Acting Chief, Asylum Div., U.S. Dep’t of Homeland Sec., regarding the Implementation of Credible Fear Determination Checklist Pilot 2 (Jan. 14, 2013), available at <https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2013/March%202013/Implementation-CF-DeterminationChecklist.pdf> [<https://perma.cc/L6D2-JGMD>].

In other cases, these procedural defects likely resulted in children's improper deportation to countries where they faced persecution.

### III. IMPLICATIONS AND SOLUTIONS

The procedural infirmities uncovered above are likely to generate false negatives in the CFI process. Although an Asylum Officer has an affirmative duty to elicit all relevant information in a CFI, the burden ultimately lies on the asylum seeker, and if she is unable to provide sufficient information to establish a credible fear in the view of the Asylum Office, she will be deported. Therefore, the existence of the procedural violations described above indicates that at least some children with meritorious claims are being deported, in violation of their substantive rights under domestic and international law and in contravention of the purpose of the CFI.

International law guarantees the right of all people to seek asylum,<sup>153</sup> and both domestic and international law prohibit a state from returning a refugee to a country where they may be persecuted or tortured (an obligation known as *non-refoulement*).<sup>154</sup> Children, in particular, occupy a special place in domestic and international law. For example, the Supreme Court has afforded children greater protections in criminal sentencing based on scientific evidence of their particular vulnerabilities.<sup>155</sup> Asylum law recognizes some of these vulnerabilities, in part by designating the status of being an unaccompanied minor as a "legal disability."<sup>156</sup> Yet by failing to accommodate children's unique competencies and vulnerabilities in the particular context of CFIs, APSOs can effectively deny children a meaningful opportunity to be heard, severely limiting their ability to establish a credible fear. By deporting children who are bona fide refugees but who have been prevented from fully enunciating their claims due to inadequate interview procedures, the U.S. government violates these children's right to *non-refoulement* under international law.<sup>157</sup>

The procedural issues uncovered in this study also frustrate the purpose of the CFI itself. The Immigration and Nationality Act (INA) specifies that a credible fear determination must take into account "the credibility of statements made by the alien in support of the alien's claim and such other facts as are known to the officer."<sup>158</sup> Regulations further specify that the purpose of the CFI

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153. G.A. Res. 217A (III), Universal Declaration of Human Rights (Dec. 10, 1948).

154. *Refugee Convention*, *supra* note 16, art. 31; 8 U.S.C. § 1253(h) (1996).

155. *Roper v. Simmons*, 543 U.S. 551 (2005) (abolishing the death penalty for juveniles); *Graham v. Florida*, 560 U.S. 48 (2010) (abolishing life imprisonment without parole for non-homicide offenses for juveniles).

156. 8 C.F.R. § 208.4(a)(5)(ii) (2017).

157. *Refugee Convention*, *supra* note 16, art. 31.

158. 8 U.S.C. § 1225(b)(1)(B)(v) (2009).

is to “elicit all relevant and useful information bearing on whether the applicant has a credible fear.”<sup>159</sup> For these reasons, if an APSO finds, for example, that a noncitizen cannot “participate effectively in the interview because of illness, fatigue, or other impediments,” the interview may be rescheduled.<sup>160</sup> Similarly, if the APSO and applicant are unable to communicate in a shared language, the APSO is required to arrange for an interpreter.<sup>161</sup> Yet despite the regulatory classification of minor status as a legal disability, as well as the mounting scientific consensus that age-appropriate questioning, like language translation, is necessary to elicit accurate information from children,<sup>162</sup> our critical case studies indicate that many APSOs are accounting for neither. Accordingly, the practices of these APSOs contravene the purpose of the CFI as a mechanism for allowing asylum seekers in ER to raise their claims.

Asylum-seeking children are among the world’s most vulnerable individuals. Procedural protections for these children should not be a partisan issue—particularly when their safety may be at stake. Indeed, the Trump Administration has invoked child-protective rhetoric in support of immigration policy proposals.<sup>163</sup> But without meaningfully child-protective reforms, many of the policy shifts announced by President Trump and foreshadowed by the Attorney General are certain to exacerbate frustrations of children’s rights. For example, a January 2017 executive order calls for mandatory detention of all apprehended immigrants<sup>164</sup> with extremely limited opportunities for parole,<sup>165</sup> rendering it impossible for children to be interviewed in neutral environments and likely restricting their access to legal advocates. Further, the Trump Administration’s efforts to raise the credible fear standard will make APSOs less likely to permit asylum-seeking children to advance to a full hearing.<sup>166</sup> Thus, it is reasonable to expect procedural violations to grow still more frequent and more severe under the proposed new policies.

The results of these procedural infirmities—the needless deportation and prolonged detention of asylum-seeking children with bona fide claims—are untenable. To fulfill its obligations to all asylum-seeking children, the federal government must ensure fair hearings, even amid administration transitions and policy shifts. All three branches of government can take steps to address these violations and ensure that children are meaningfully heard before they are deported to possible persecution.

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159. 8 C.F.R. § 208.30(d) (2017).

160. *Id.*

161. 8 C.F.R. § 208.30(d)(5) (2017).

162. *See supra* notes 109–114 and accompanying text.

163. *See supra* note 49 and accompanying text.

164. *Executive Order, supra* note 13, at 8,795.

165. *Id.* at 8,796.

166. *See supra* notes 10, 13–15 and accompanying text.

First, executive officials should revise and enforce the *Guidelines* and reconsider the government policy of detaining asylum-seeking children and families. Second, federal judges should provide some form of habeas review, in recognition of the facts that the Suspension Clause properly extends to noncitizens detained on U.S. soil and that the CFI process does not offer an adequate alternative to habeas corpus for detained children. Finally, Congress should provide a right to appointed counsel for asylum-seeking children and reopen the avenues for judicial review that it foreclosed in 1996. Taken together, these policy reforms would reduce detention costs and maintain the government's ability to enforce immigration laws while protecting against the unlawful removal of asylum-seeking children and families.

### *A. Executive Branch Reforms*

In its first year, the Trump Administration has ramped up immigration enforcement and heightened the credible fear standard, increasing the likelihood that detained children's procedural rights will be violated and that bona fide asylum seekers will be deported. By updating and enforcing the *Guidelines for Children's Asylum Claims* and limiting or ending the detention of children, the executive branch could counteract these risks and better protect the rights of child asylum seekers.

#### *1. Updating the Guidelines*

The *Guidelines for Children's Asylum Claims* have not been updated since they were issued in 1998. Twenty years later, and particularly given recent substantive changes to the credible fear standard,<sup>167</sup> the *Guidelines* are showing their age. Because the *Guidelines* are not binding, U.S. Citizenship and Immigration Services (USCIS) could update them without passing new legislation or even following the procedures of notice-and-comment rulemaking.<sup>168</sup> It should do so promptly.

An update to the *Guidelines* could accomplish two goals at minimal expense. First, it could fill in the gaps in guidance outlined *supra* Section II(D). For instance, modern *Guidelines* could offer Asylum Officers clearer guidance on the importance of utilizing funneled questioning techniques and neutral interview settings. Asylum Officers could also be directed to minimize their intimidating authority in creative ways, as demonstrated in a 2007 Department

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167. *See id.*

168. *See supra* note 73 and accompanying text.



of Justice memo directing Immigration Judges to preside over children's cases without robes if needed.<sup>169</sup>

A new version of the *Guidelines* could also establish procedures for videotaping, or at least audio-recording, all Credible Fear Interviews. Electronic recording and storage may have been prohibitively costly when the *Guidelines* were released in 1998, but this concern does not apply today, when microphones and cameras are embedded in most modern cell phones. In addition, USCIS maintains individual records in searchable electronic databases, which could include recordings of CFIs.<sup>170</sup> Moreover, internal Justice Department guidance from May 2014 establishes a presumption that all custodial statements by detained individuals should be electronically recorded.<sup>171</sup> Vulnerable asylum seekers deserve similar protections, and technological advances made since the *Guidelines*' 1998 publication should enable the Asylum Office to implement them at limited cost.

Second, an update to the *Guidelines* could achieve express application of its procedures to children in ER, and a meaningful mechanism of accountability for failure to follow those procedures. We have observed that some APSOs consistently flout the best practices in the *Guidelines* while interviewing vulnerable, detained children in ER proceedings. APSOs who wish to improve their interview techniques may, of course, consult these best practices immediately. Additionally, for the sake of accountability, USCIS should consider promulgating some of the *Guidelines*' recommendations for interview techniques, training, and monitoring as binding legislative rules. It could also codify the Request for Reconsideration process into regulation and offer children and families additional, meaningful remedies for procedural violations, such as an automatic re-interview or a presumption of credible fear. And the Asylum Division could establish transparent oversight mechanisms for child interviews, mandate ongoing trainings and professional development sessions tailored specifically to interviewing children, and impose sanctions on non-complaint AOs and APSOs. By giving the *Guidelines* force in this fashion, USCIS and the Asylum Division could remedy many of the egregious violations we uncovered, without controversy and at little expense.

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169. EXECUTIVE OFFICE FOR IMMIGR. REVIEW, U.S. DEP'T OF JUSTICE, OPPM 07-01: GUIDELINES FOR IMMIGRATION COURT CASES INVOLVING UNACCOMPANIED ALIEN *Children* 6 (2007).

170. USCIS operates multiple search engines using its electronic databases, including the Systematic Alien Verification for Entitlements Program (SAVE) and E-Verify, which allow benefit-granting government agencies and employers, respectively, to check individuals' immigration status. See U.S. CITIZENSHIP & IMMIGR. SERVS., SAVE, <https://www.uscis.gov/save>; U.S. CITIZENSHIP & IMMIGR. SERVS., E-VERIFY, <https://www.uscis.gov/e-verify>.

171. See Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice, to the Assoc. Att'y Gen. et al., regarding Policy Concerning Electronic Recording of Statements (May 12, 2014) [<https://perma.cc/59MM-E4DE>].

## 2. Ending Detention

Children's ability to fully develop their claims in CFIs will also remain inhibited until the U.S. ends its policy of detaining asylum-seeking families.<sup>172</sup> In part, this is because children are more likely to disclose traumatic experiences in neutral settings,<sup>173</sup> which are unavailable by definition when a child's liberty is restricted.<sup>174</sup> More fundamentally, detention exacerbates immigrants' trauma and obstructs access to psychological care.<sup>175</sup> Additionally, as the *Guidelines* themselves note,<sup>176</sup> detention is particularly harmful for children.<sup>177</sup> And children's ability to enunciate their claims is materially inhibited by trauma-related conditions, which detention creates and exacerbates.<sup>178</sup>

A complete transition from family detention to community-based programs would result in substantial cost savings that would likely offset any marginal increase in spending. For example, electronic monitoring devices cost less than \$14 per day per family—compared to detention costs of \$600 per day<sup>179</sup>—and have been proven to be 90 percent effective.<sup>180</sup> In contrast, the Trump

172. See DEP'T OF HOMELAND SEC., REPORT OF THE DHS ADVISORY COMMITTEE ON FAMILY RESIDENTIAL CENTERS, (2016), available at <https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf> [<https://perma.cc/A6B3-QRR9>] (recommending an end to family detention).

173. See *supra* note 139 and accompanying text.

174. Although any restricted environment may be intimidating for a child, immigration detention centers are often particularly so, as they are likely to be located in remote areas and surrounded by walls and barbed wire. Cf. Pauline McLoughlin & Megan Warin, *Corrosive Places, Inhuman Spaces: Mental Health in Australian Immigration Detention*, 14 HEALTH & PLACE 254, 262 (2008) (noting the “profound sense of isolation” and “alienating . . . prison[-]like architecture” in Australian immigration detention centers); Amy Lorek et al., *The Mental and Physical Health Difficulties of Children Held Within a British Immigration Detention Center: A Pilot Study*, 33(9) CHILD ABUSE & NEGLECT 573, 574 (2009) (“The physical appearance of detention centers [in the UK] can also be intimidating for children as the buildings are surrounded by barbed wire and have uniformed staff.”).

175. Allen S. Keller et al., *Mental Health of Detained Asylum Seekers*, 362 LANCET 1721, 1722 (2003) (finding that 77 percent of 70-person sample of INS detainees exhibited symptoms of anxiety, 86 percent of depression, 50 percent of PTSD, and 26 percent of suicidal thoughts); Craig Haney, *Conditions of Confinement for Detained Asylum Seekers Subject to Expedited Removal*, in USCIRF, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL, VOL II 178, 196–97 (2005) [hereinafter *USCRIF Report, Vol. II*], available at [http://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum\\_seekers/ERS\\_RptVolII.pdf](http://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/ERS_RptVolII.pdf) [<https://perma.cc/4UCB-7X9K>].

176. *Guidelines*, *supra* note 72, at 14.

177. See *supra* note 89.

178. See *supra* notes 132–135 and accompanying text.

179. Matthew Teague, *Women and Children First: Legality of ICE Raids in Southern States Scrutinized*, GUARDIAN, Jan. 30, 2016, <http://www.theguardian.com/us-news/2016/jan/30/ice-raids-women-children-legality-southern-states> [<https://perma.cc/BD46-6DRA>]. CoreCivic, which operates the family detention center in Dilley, allegedly charges a flat rate of 1 billion dollars for four years. Chico Harlan, *Inside the Administration's \$1 Billion Deal to Detain Central American Asylum Seekers*, WASH. POST, Aug. 14, 2016, [https://www.washingtonpost.com/business/economy/inside-the-administrations-1-billion-deal-to-detain-central-american-asylum-seekers/2016/08/14/e47f1960-5819-11e6-9aee-8075993d73a2\\_story.html](https://www.washingtonpost.com/business/economy/inside-the-administrations-1-billion-deal-to-detain-central-american-asylum-seekers/2016/08/14/e47f1960-5819-11e6-9aee-8075993d73a2_story.html) [<https://perma.cc/JF4M-GVXE>].

180. ACLU, ALTERNATIVES TO IMMIGRATION DETENTION: LESS COSTLY AND MORE HUMANE THAN FEDERAL LOCK-UP; AM. IMM. LAWYERS ASSOC. ET AL., THE REAL ALTERNATIVES TO FAMILY

Administration's planned increase in the frequency and duration of detention will require hiring of thousands of new immigration enforcement officials and the building and staffing of new detention facilities,<sup>181</sup> costing billions of additional dollars and constricting the procedural rights of asylum-seeking children.<sup>182</sup>

A full development of the legal and policy arguments in favor of ending family detention is beyond the scope of this Note. For now, a policy shift in the other direction appears almost certain: a January 2017 executive order calls for construction of more detention facilities on the border<sup>183</sup> and assignment of additional APSOs and Immigration Judges<sup>184</sup> to detention facilities in order to conduct and review CFIs. Based on the policies and practices uncovered in this study, however, continued or expanded detention of asylum-seeking children is both counterproductive and inefficient.<sup>185</sup> Until family detention is abolished, at least some children's asylum claims will continue to be frustrated, in violation of the United States' obligations under both domestic and international law.

### B. Judicial Review

The ER process carries enormous stakes for some of the most vulnerable children in the world. To ensure that asylum seekers can seek protection in ER, they may receive three stages of administrative review on their threshold claims: the CFI itself (including review by a supervisory officer), review before an IJ,

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DETENTION (citing Lutheran Immigration and Refugee Services pilot with 44 out of 46 referrals in full compliance after 18 months).

181. *Executive Order*, *supra* note 13, at 8,794–95.

182. Analysts estimate that mandatory detention pursuant to the January 2017 executive order will increase federal spending by 9 billion dollars over the next ten years. Philip E. Wolgin & Shariya Gruberg, *Trump's Immigration Proposals Will Cost the U.S. Billions*, THINKPROGRESS, Jan. 25, 2017, <https://thinkprogress.org/immigration-detention-mandatory-cost-e3a7c470c740/> [<https://perma.cc/L76F-RY82>].

183. *Executive Order*, *supra* note 13, at 8,794.

184. *Id.* at 8,794–95.

185. In March of 2017, the Trump Administration considered separating mothers from children upon their arrival to the United States, with mothers detained and children put in protective custody with the Department of Health and Human Services. Julia Edwards Ainsley, *Exclusive: Trump Administration Considering Separating Women, Children at Mexico Border*, REUTERS, Mar. 3, 2017, <http://www.reuters.com/article/us-usa-immigration-children/exclusive-trump-administration-considering-separating-women-children-at-mexico-border-idUSKBN16A2ES> [<https://perma.cc/AF4Q-UK4J>].

This, too, would be counterproductive. Because children's struggle to disclose their claims stems in part from psychological trauma, a policy of separating children from their parents would only exacerbate the problem. The *Guidelines* themselves acknowledge this. See *Guidelines*, *supra* note 72, at 14 (“Children who are separated from their families due to war or other refugee-producing circumstances are placed at greater psychological risk.”); accord *Lesson Plan*, *supra* note 75, at 39–40 (noting that violating a child's right to remain with their family could rise to the level of persecution for purposes of asylum). Appropriately, the Administration “walk[ed] back” the proposal one month later. Elise Foley & Roque Planas, *Trump Administration Won't Routinely Separate Families at the Border After All*, HUFF. POST, Apr. 5, 2017, [https://www.huffingtonpost.com/entry/dhs-separating-families-border\\_us\\_58e50d4fe4b0f4a923b448b7](https://www.huffingtonpost.com/entry/dhs-separating-families-border_us_58e50d4fe4b0f4a923b448b7) [<https://perma.cc/D7KB-9EDX>].

and consideration of an RFR. But as we have shown, CFIs are often rife with procedural violations that frustrate children's opportunities to be heard, and these violations appear to go unnoticed by supervisory reviewers. Far from addressing these concerns, IJ review imposes an additional level of arbitrariness. During FYs 2015 and 2016, one IJ reviewing negative credible fear determinations at the Dilley facility affirmed 228 of 333 negative determinations while another affirmed only 17 of 332 negative determinations.<sup>186</sup> Furthermore, the executive branch has interpreted regulatory guidance in a way that gives IJs complete discretion over whether to permit the presence of an attorney representing an asylum seeker during an IJ review and whether to allow the attorney to speak during the proceeding.<sup>187</sup> Neither does the RFR process provide meaningful review: the Asylum Office has consistently maintained that it has discretion over whether to even consider RFRs,<sup>188</sup> and the Trump Administration has indicated that it may end the practice entirely.<sup>189</sup>

Given these insufficiencies in administrative process, the Article III judiciary can and should play an important role in reviewing CFIs. However, direct judicial review of CFIs is largely precluded by a sweeping jurisdiction-stripping provision in the INA.<sup>190</sup> Even habeas review over ER orders must be limited to determinations of alienage, whether a removal order was issued, and whether the petitioner can prove that they are a legal permanent resident, have been admitted as a refugee, or have been granted asylum.<sup>191</sup> But because the deficient process of ER fails to provide an "adequate and effective substitute for

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186. Brief of Refugee and Human Rights Organizations and Scholars as Amici Curiae in Support of Petitioners at 23, *Castro v. U.S. Dep't of Homeland Sec.*, 137 S. Ct. 1581 (2016) (mem.), available at <http://www.scotusblog.com/wp-content/uploads/2017/01/16-812-Refugee-Organization-Cert-Amicus-Brief.pdf> [<https://perma.cc/KW8K-V2VQ>].

187. 8 C.F.R. § 208.30(d)(4) (2017) ("The alien may consult with a person or persons of the alien's choosing prior to the interview or any review thereof."). The Executive Branch has interpreted this provision to mean that the immigration judge has the discretion to allow the presence of a legal representative at the review. See Executive Office for Immigration Review, Interim Operating Policy and Procedure Memorandum 97-3: Procedures for Credible Fear and Claimed Status Reviews 10 (Mar. 25, 1997), available at <https://www.justice.gov/sites/default/files/eoir/legacy/2013/05/07/97-3.pdf> [<https://perma.cc/ZK7F-CY45>] ("In the discretion of the Immigration Judge in an individual case, persons with whom the alien consulted may be present at the review. However, nothing in the statute, regulations or this OPPM entitles an attorney to make an opening statement, call and question witnesses, cross examine, object to written evidence, or make a closing argument.").

188. See *Guidelines*, *supra* note 72.

189. See *Executive Order*, *supra* note 13, and accompanying text.

190. 8 U.S.C. § 1252(a)(2)(A) (2012) ("Notwithstanding any other provision of law . . . no court shall have jurisdiction to review . . . except as provided in subsection (e) of this section, any individual determination" under the expedited removal statute.); see also, e.g., *Pena v. Lynch*, 815 F.3d 452 (9th Cir. 2015) (dismissing petition for review of ER order for lack of jurisdiction).

191. 8 U.S.C. § 1252(e)(2) (2012).

habeas corpus,”<sup>192</sup> courts can and should hold the jurisdiction-stripping provision unconstitutional,<sup>193</sup> at least as it is applied to children.

Unfortunately, habeas review is now precluded in the Third Circuit due to a sweeping and unprecedented 2016 decision. In November 2015, thirty-five asylum-seeking families in prolonged detention at the Berks County Residential Center in Leesport, Pennsylvania, attempted to invoke the protections of the Great Writ.<sup>194</sup> These mothers and their children filed habeas petitions to challenge the substantive and procedural sufficiency of their CFI proceedings. Specifically, the mothers alleged that the APSOs and IJs who reviewed their claims applied the incorrect legal standard and violated certain procedures mandated by due process and the INA.<sup>195</sup>

The district court rejected the mothers’ preferred reading of the INA. Moreover, the court found, the INA’s substantial restrictions on the scope of habeas review did not offend the mothers’ “limited habeas rights.”<sup>196</sup> The mothers then appealed to the Third Circuit, which reached even further than the district court to hold that the mothers were entirely “unable to invoke the Suspension Clause.”<sup>197</sup> To reach this unprecedented conclusion, the court relied primarily on dicta from *Landon v. Plasencia*, in which the Supreme Court had indicated that noncitizens seeking initial admission to the United States had “no constitutional rights regarding [their] application[s].”<sup>198</sup> The Third Circuit also relied heavily on the doctrine of congressional “plenary power” over immigration law, citing precedents such as the Chinese Exclusion Case.<sup>199</sup> Thus, unlike the district court, the Third Circuit did not even consider the mothers’ and

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192. *Boumediene v. Bush*, 553 U.S. 723, 733 (2008); *cf.* *INS v. St. Cyr*, 533 U.S. 289, 305 (2001) (“[A] serious Suspension Clause issue would be presented if . . . statutes have withdrawn [habeas] power from federal judges and provided no adequate substitute for its exercise.”).

193. See U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

194. *Castro v. U.S. Dep’t of Homeland Sec.*, 835 F.3d 422 (3d Cir. 2016), *cert. denied mem.*, 137 S. Ct. 1581 (2017).

195. *Id.*

196. *Castro v. U.S. Dep’t of Homeland Sec.*, 163 F. Supp. 3d 157, 169 (E.D. Pa. 2016).

197. *Castro*, 835 F.3d at 448 (3d Cir. 2016).

198. *Id.* at 445 (citing *Landon v. Plasencia*, 459 U.S. 21, 32 (1982)).

199. *Id.* at 439–44 (citing, *inter alia*, *Chae Chan Ping v. United States*, 130 U.S. 581 (1889)). For further discussions and analyses of the plenary power doctrine, see, e.g., David A. Martin, *Why Immigration’s Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29 (2015) (arguing that Supreme Court is unlikely to overrule plenary power doctrine); Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339 (2002) (suggesting that Court might depart from plenary power doctrine after *Nguyen v. INS*, 533 U.S. 53 (2001), and *Zadvydas v. Davis*, 533 U.S. 678 (2001)); Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257 (2000) (questioning whether doctrine exists at all).

children's claims in light of the factors established by the Supreme Court in *Boumediene v. Bush*.<sup>200</sup> The Supreme Court denied certiorari in April 2017.<sup>201</sup>

Both questions in *Castro* were decided incorrectly. On the threshold legal question of whether women and children in ER have Suspension Clause rights, the Third Circuit allowed decades-old dicta to override recent Supreme Court precedent. The Third Circuit's overbroad application of language from *Landon* to bar Suspension Clause rights from "aliens . . . seeking initial entry to the country" and "recent clandestine entrants"<sup>202</sup> contradicted the Supreme Court's reasoning in *Boumediene*,<sup>203</sup> in which the Court held that noncitizens detained as enemy combatants at the U.S. Naval Station at Guantanamo Bay—many of whom had never entered the United States—could invoke the protections of the Suspension Clause. The Third Circuit's decision specifically ignored the *Boumediene* Court's reasoning that "questions of extraterritoriality turn on objective factors and practical concerns," including "the objective degree of control the United States assert[s] over" a given location.<sup>204</sup> And it understated the Court's decision in *Zadvydas v. Davis*, which held that noncitizens who enter the country enjoy due process protections "whether their presence here is lawful, unlawful, temporary, or permanent."<sup>205</sup>

The lower court, in holding that ER was sufficient to satisfy the *Castro* plaintiffs' "limited habeas rights,"<sup>206</sup> also erred. First, the district court's decision relied on the assumption that the INA "afford[ed] Petitioners extensive Executive Branch process, including an interview by a DHS Asylum Officer, followed by supervisory review and a hearing before an immigration court judge."<sup>207</sup> As shown above, however, at least as applied to children, in practice this process is often riddled with infirmities. Further, the purported safeguards of supervisory

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200. *Castro*, 163 F. Supp. 3d at 168–74 (citing *Boumediene v. Bush*, 553 U.S. 723, 741–52, 766, 779–86, 793–98 (2008)).

201. *Castro v. Dep't of Homeland Sec.*, 137 S. Ct. 1581 (2017) (mem.). Shortly thereafter, the Trump Administration began to deport the *Castro* families. In one case, U.S. Senator Bob Casey unsuccessfully attempted to prevent the deportation of a Honduran five-year-old and his mother, who were facing threats from gangs. Ted Hesson & Seung Min Kim, *Casey Blasts Trump Administration Over Child Deportation*, POLITICO, May 3, 2017, <http://www.politico.com/story/2017/05/03/bob-casey-tweets-halt-deportation-237939> [<https://perma.cc/S4ED-62V5>]. The child and mother were ultimately deported during a proceeding in federal court in which their lawyers were requesting a stay of the removal. *Id.* In response to Senator Casey's criticism, then-Secretary of Homeland Security John Kelly publicly asserted that "[t]he vast majority of people who come up here . . . say exactly the same words because they are schooled by the traffickers to say certain words," and that "she [the mother] did that." Ted Hesson, *Kelly Slams Sen. Casey Over Deportation Tweets*, POLITICO, May 4, 2017, <http://www.politico.com/story/2017/05/04/bob-casey-mother-son-deported-john-kelly-react-237986> [<https://perma.cc/LW2Y-AA4A>].

202. *Castro*, 835 F.3d at 447–48 (3d Cir. 2016).

203. 553 U.S. 723 (2008).

204. *Id.* at 763–64.

205. 533 U.S. 678, 693 (2001).

206. *Castro v. U.S. Dep't of Homeland Sec.*, 163 F. Supp. 3d 157, 169 (E.D. Pa. 2016).

207. *Id.* at 158.

and IJ review offer limited protection. Yet the court assumed the efficacy of the process—and, perhaps for this reason, found that the *Castro* plaintiffs had no “challenged liberty deprivation” at stake under *Boumediene* despite their expressed fear of persecution or torture in their home countries.<sup>208</sup>

Second, the district court, like the Third Circuit, relied heavily on the doctrine of plenary power to limit the scope of habeas relief out of separation-of-powers concerns.<sup>209</sup> Although a full treatment of plenary power is beyond the scope of this Note, it is worth noting that litigation against President Trump’s so-called Muslim and Refugee Bans<sup>210</sup> may presage a shift in lower courts’ willingness to shield federal immigration decisions from habeas review. For example, in reviewing a nationwide preliminary injunction blocking the first Ban, the Ninth Circuit emphasized that “although courts owe considerable deference to the President’s policy determinations with respect to immigration and national security, it is beyond question that the federal judiciary retains the authority to adjudicate constitutional challenges to executive action.”<sup>211</sup> Three months later, in striking down the second Ban, the Fourth Circuit similarly acknowledged limitations in the plenary power doctrine, noting that executive authority over immigration could not “go unchecked when, as here, the President wield[ed] it through an executive edict that st[ood] to cause irreparable harm to individuals across this nation.”<sup>212</sup>

Both circuits were reviewing executive actions allegedly motivated by religious and racial animus rather than by the statutory provision at issue in *Castro*. Nevertheless, these and other recent discussions of the limits of the plenary power doctrine offer an alternative to the broad deference exercised by the Third Circuit in *Castro*. By exercising habeas review of substantive and procedural violations in CFIs, courts beyond the Third Circuit could protect children’s rights by considering whether a child CFI determination is unduly colored by procedural defects, such as an erroneous credibility determination or a failure to elicit relevant information. Habeas review would also incentivize agencies to avoid costly litigation by enforcing procedural protections. In this fashion, courts could protect child asylum seekers from erroneous deportation to possible persecution.

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208. *Id.* at 173.

209. *Id.* at 172–73 (emphasizing broad conception of the plenary power of political branches over immigration).

210. *Protecting the Nation from Foreign Terrorist Entry into the United States*, Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017); *Protecting the Nation from Foreign Terrorist Entry into the United States*, Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017); *Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats*, Pres. Proc. No. 9,645, 82 Fed. Reg. 45,161 (Sept. 24, 2017).

211. *Washington v. Trump*, 847 F.3d 1151, 1154 (9th Cir. 2017) (per curiam), *reh’g en banc denied*, 853 F.3d 933 (9th Cir. 2017).

212. *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 572 (4th Cir. 2017), *vacated as moot*, 138 S. Ct. 353 (Mem) (2017).

### C. Legislative Reforms

Because Expedited Removal is a creature of statute, Congress has substantial power to ensure that children in ER are heard and protected. For example, Congress could repeal ER entirely, requiring full immigration-court hearings for all asylum seekers. Alternatively, it could exempt children from the process by statute. Or Congress could repeal either or both of the statutory provisions that preclude Article III judicial review of expedited removal orders<sup>213</sup> and severely limit the scope of habeas review,<sup>214</sup> at least as applied to children.

More narrowly, Congress could—and should—create a statutory right to appointed counsel for accompanied minors in ER proceedings. Although appointment of counsel would not be a panacea, competent legal advocates could guard against many of the procedural violations outlined above,<sup>215</sup> protect minors' rights not to be returned to countries where they will face persecution or torture, and ensure that CFIs are satisfying their statutory and regulatory purposes.

Given the complexity and importance of removal proceedings, advocates argue for the appointment of representatives to *all* asylum seekers, whether child or adult.<sup>216</sup> Many other signatory nations to the Refugee Convention do guarantee representation for asylum seekers.<sup>217</sup> However, the need for counsel is acute for individuals in ER, whose proceedings are closed to public scrutiny,<sup>218</sup> who are detained in remote facilities, and whose right to appeal is minimal.<sup>219</sup> Representation dramatically affects these individuals' likelihood of success: in 2005, represented individuals in ER won relief in twenty-five percent of cases, whereas those without representation were granted relief only two percent of the time.<sup>220</sup>

Representation is especially important for vulnerable groups. Federal and local governments have taken steps toward providing representation for

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213. 8 U.S.C. § 1252(a)(2)(A) (2005).

214. 8 U.S.C. § 1252(e)(2) (2005).

215. Cf. Brian Rowe, *The Child's Right to Legal Assistance in Removal Proceedings Under International Law*, 10 CHI. J. INT'L L. 747, 747 (2010) (arguing that without provision of counsel, "the rights granted to children under international treaty law, domestic law, and customary international law are in danger of being nullified").

216. See, e.g., Nimrod Pitsker, *Due Process for All: Applying Eldridge to Require Appointed Counsel for Asylum Seekers*, 95 CAL. L. REV. 169 (2007); Bien, *supra* note 86, at 821–22; Elizabeth Glazer, *The Right to Appointed Counsel in Asylum Proceedings*, 85 COLUM. L. REV. 1157 (1985).

217. See Pitsker, *supra* note 216, at 190 (noting that Canada, Austria, Belgium, Denmark, Finland, Germany, the Netherlands, Sweden, and the UK provide counsel for unrepresented asylum seekers).

218. 8 C.F.R. § 1208.30(g)(2)(iii) (2017).

219. The only "appeal" available to those in ER is an Immigration Judge's brief review of an Asylum Officer's negative credible fear finding. See *supra* notes 58–61 and accompanying text.

220. See USCIRF Report, *supra* note 23, at 59, 70.



unaccompanied minors<sup>221</sup> and those with mental disabilities.<sup>222</sup> Moreover, advocates have litigated<sup>223</sup> and introduced legislation, such as the Fair Day in Court for Kids Act of 2016,<sup>224</sup> to expand representation for vulnerable groups. But none of these measures specifically protect accompanied minors, who, unlike unaccompanied minors, face the formidable hurdle of ER.<sup>225</sup> Moreover, because domestic asylum law does not espouse the best interests of the child as its central goal,<sup>226</sup> it is critical that legal representatives act as zealous advocates for children's best interests at each stage of ER and beyond.

Legal representation would greatly reduce the types of procedural irregularities described *supra* Section II(C) and help ensure that children with meritorious asylum claims are not wrongfully deported. *Before a Credible Fear Interview*, legal representatives can build rapport with children<sup>227</sup> and uncover accurate information while avoiding re-traumatization.<sup>228</sup> They can gather corroborating evidence and write declarations explaining the harms children faced in their home countries. These materials can be submitted to APSOs.<sup>229</sup> Representatives can also prepare clients by explaining the CFI process in child-friendly terms. These efforts would alleviate APSOs' burden of building rapport, explaining the process in child-friendly terms and eliciting all relevant information in the short amount of time available for each interview.<sup>230</sup>

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221. *See, e.g.*, 6 U.S.C. § 279(b)(1)(A) (2012) (requiring the Office of Refugee Resettlement to develop a plan to find legal representation for unaccompanied minors but at no expense to the government); Niraj Chokshi, *California Will Give Undocumented Immigrant Children \$3 Million in Free Legal Services*, WASH. POST, Sept. 29, 2014, <https://www.washingtonpost.com/blogs/govbeat/wp/2014/09/29/california-will-give-undocumented-immigrant-children-3-million-in-free-legal-services/> [<https://perma.cc/STUG-WC5D>]; Will Bredderman, *Council Speaker Announces Free Attorneys for All Undocumented Migrant Children*, OBSERVER, July 19, 2015, <http://observer.com/2015/07/council-speaker-announces-free-attorneys-for-all-undocumented-migrant-children/> [<https://perma.cc/9L9X-TJSV>].

222. Press Release, Executive Office for Immigr. Review, U.S. Dep't of Justice, Department of Justice and Department of Homeland Security Announce Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions (Apr. 22, 2013), <https://www.justice.gov/eoir/pr/department-justice-and-department-homeland-security-announce-safeguards-unrepresented> [<https://perma.cc/H43L-V2XA>].

223. *See, e.g.*, J.E.F.M. v. LYNCH, ACLU, Sept. 20, 2016, <https://www.aclu.org/cases/jefm-v-lynch> [<https://perma.cc/T5C4-4WGP>].

224. Fair Day in Court for Kids Act of 2016, S. 2540, 114th Cong. (2016).

225. *See Representation Makes Fourteen-Fold Difference in Outcome: Immigration Court 'Women with Children' Cases*, TRACIMMIGRATION, July 25, 2015, <http://trac.syr.edu/immigration/reports/396/> [<https://perma.cc/J8NX-V3AR>].

226. *See* CTR. FOR GENDER AND REFUGEE STUDIES & KIDS IN NEED OF DEFENSE, A TREACHEROUS JOURNEY: CHILD MIGRANTS NAVIGATING THE U.S. IMMIGRATION SYSTEM iii (2014), available at [http://www.uchastings.edu/centers/cgrs-ocscgrsdocs/treacherous\\_journey\\_cgrs\\_kind\\_report.pdf](http://www.uchastings.edu/centers/cgrs-ocscgrsdocs/treacherous_journey_cgrs_kind_report.pdf) [<https://perma.cc/39QA-QAK9>].

227. *See supra* notes 96–98, 101–102 and accompanying text.

228. *See supra* notes 130–136 and accompanying text.

229. 8 C.F.R. § 208.30(d)(4) (2017).

230. *See supra* note 114 and accompanying text.

*During a CFI*, representatives can guard against procedural irregularities. If an interview contravenes the standard established by the *Guidelines*—e.g., if it involves hostile or inadequate questioning—the representative can submit a complaint. The attorney’s notes can also serve as another record of the interview independent of the APSO’s notes. Additionally, with an APSO’s permission, the representative can make a closing statement<sup>231</sup> developing the child’s claim and alerting the officer to relevant case law and country conditions.

*In the case of a negative credible fear finding*, a child’s need for representation intensifies. The stakes are high: deportation to potential persecution may be imminent. Without counsel, it is nearly impossible for children and their mothers to contest the validity of CFIs. After negative decisions, mothers and children are typically provided with notes and checklists<sup>232</sup> written entirely in English and rife with legal terms of art. A child’s representative can help decipher these documents.

*At the stage of IJ review*, lack of representation may undermine children’s ability to participate fully. Moreover, children may not be able to discern and contest procedural violations without legal counsel due to their lack of legal knowledge. A representative can prevent such violations and may submit a legal memorandum to the IJ setting forth and arguing the child’s case.<sup>233</sup> And, if the IJ affirms the APSO’s negative decision, the representative can pursue a Request for Reconsideration (RFR),<sup>234</sup> an avenue for relief that detained children and mothers are unlikely to be aware of and even less likely to be able to pursue.

As with a transition from family detention to community-based programs discussed *supra* Section III(A)(ii), the expense of providing counsel to minors in ER would likely be offset by increased administrative efficiency and decreased costs of detention. Children with meritorious claims would be released more quickly, while those with weak claims would be less likely to prolong their detention.<sup>235</sup> In support of this contention, a report by the U.S. Commission on International Religious Freedom (USCIRF) describes a pilot program for detained noncitizens called the Legal Orientation Program (LOP), which was created by non-governmental organizations in collaboration with ICE and the Justice Department’s Executive Office for Immigration Review (EOIR).<sup>236</sup> EOIR praised the program as being “beneficial to all parties involved,” citing “greater judicial efficiency for EOIR, less time for aliens in DHS detention, and

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231. See 8 C.F.R. § 208.30(d)(4) (2017).

232. APSOs used to provide written explanations of decisions but now provide only checklists. See *supra* note 152 and accompanying text.

233. 8 C.F.R. § 1003.42(c) (2017).

234. 8 C.F.R. § 1208.30(g)(2)(iv)(A) (2017).

235. See *USCIRF Report*, *supra* note 23, at 71; Pitsker, *supra* note 216, at 195.

236. See *USCIRF REPORT, VOL. II*, *supra* note 175, at 241–43 (pilot legal orientation program for detained noncitizens paid for itself after one year).

greater access for detained aliens to legal information, counseling, and pro bono representation.”<sup>237</sup> With detention costing an average of \$85 per day per person, by reducing processing time for individuals by between one-and-a-half and three days the program essentially paid for itself over the course of a year.<sup>238</sup> In comparison, the daily cost of detaining a “family unit” today is \$600.<sup>239</sup> The costs of government-appointed counsel will thus likely be offset by the resulting efficiency gains.

Immigrant parents may be able to represent their children’s interests to an extent, but most parents are not experts in immigration law.<sup>240</sup> Moreover, because mothers are detained with their children, they also have difficulty conducting legal research<sup>241</sup> or obtaining private counsel.<sup>242</sup> Unfamiliarity with the English language presents an additional hurdle.<sup>243</sup> Accordingly, parents cannot be expected to protect their children’s rights as fully as the law allows. In addition to overcoming these obstacles, legal representatives can address conflicts of interest between children and parents. For instance, Mateo could not share his complete story because he wanted to protect his mother. Children may also be reluctant to reveal details regarding certain types of abuse to their parents.<sup>244</sup>

As the Supreme Court has recognized in other contexts, children require “the guiding hand of counsel” to safeguard their fundamental rights.<sup>245</sup> Given the special place that children hold in our society, as well as their unique vulnerabilities, the appointment of counsel would be a worthwhile and cost-effective measure to ensure that their voices are heard in ER.

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237. *Id.* at 243.

238. *Id.* In April 2018, the Department of Justice announced its intention to suspend the program, but it quickly reversed course after members of Congress pushed back. *DOJ Reverses Course on Legal Orientation Program, For Now*, AM. IMMIGR. LAW. ASS’N., Apr. 25, 2018, <http://www.aila.org/advo-media/press-releases/2018/doj-reverses-course-on-legal-orientation-program>.

239. *See supra* note 179.

240. *See, e.g.*, *Baltazar-Alcazar v. I.N.S.*, 386 F.3d 940, 948 (9th Cir. 2004) (“[I]mmigration laws have been termed second only to the Internal Revenue Code in complexity. A lawyer is often the only person who could thread the labyrinth.”).

241. *USCIRF Report, supra* note 23, at 239.

242. *See USCIRF, SPECIAL REPORT ASSESSING THE U.S. GOVERNMENT’S DETENTION OF ASYLUM SEEKERS: FURTHER ACTION NEEDED TO IMPLEMENT REFORM 7* (Apr. 2013), *available at* <http://www.uscirf.gov/reports-briefs/special-reports/assessing-the-us-governments-detention-asylum-seekers> [<https://perma.cc/4VLB-4ESY>].

243. *USCIRF Report, supra* note 23, at 239; *see also* U.N. HIGH COMM’R FOR REFUGEES, WOMEN ON THE RUN: FIRST-HAND ACCOUNTS OF REFUGEES FLEEING EL SALVADOR, GUATEMALA, HONDURAS, AND MEXICO 47 (2015), *available at* <http://www.unhcr.org/en-us/publications/operations/5630f24c6/women-run.html> [<https://perma.cc/9CK4-MGWL>].

244. *See supra* note 126 and accompanying text.

245. *In re Gault*, 387 U.S. 1, 36 (1967) (internal quotations omitted).

## CONCLUSION

Our review of best practices has uncovered a consensus around a phased interview model involving non-substantive opening, rapport-building, and closing phases; age-appropriate and funneled questioning techniques, minimal authority, and a warm tone; a neutral physical setting; accommodations for trauma-related conditions; and electronic record-keeping. Although the *Guidelines* echo many of these recommendations, a survey of children's CFIs from 2015–16 revealed that actual interviews consistently failed to follow those best practices. Instead, children were interviewed without age-appropriate introductory statements or rapport-building; they were questioned in an adversarial manner while detained; their claims were often left partially or wholly unexplored; and no objective records were kept.

Despite these barriers, most individuals in ER in 2015 and 2016—including, after multiple appeals, ten-year-old David—were able to pass their CFIs. Still, prolonged detention and any preventable failure to protect a child from returning to harm are consequential. These failures constitute violations of children's substantive and procedural rights under international and domestic law. Without robust procedural protections, including improved interview techniques, appointment of legal representatives, and an end to family detention, child asylum seekers cannot meaningfully enjoy their rights. Indeed, there have been reports of child asylum seekers who were killed upon being removed to their countries of origin.<sup>246</sup> And the mandates of the January 2017 executive order are likely to exacerbate existing substantive and procedural violations, resulting in further removals of bona fide child asylum seekers.

Such violations of asylum seekers' rights are not only immoral but illegal. Therefore, even after the end of the *Castro* litigation, advocates are pursuing litigation in other arenas using legal theories that might lead to reform in CFIs. But litigation need not be a prerequisite to reform. Government officials can no longer plead ignorance: maintenance of the status quo has shifted from negligent oversight to active choice. Particularly in the current political environment, with asylum seekers' rights and liberties under threat by recent executive actions, we hope this Note underscores how grossly inhumane that active choice is. We urge the executive branch, Congress, and the public to support and implement meaningful changes to Asylum Office policy and practice regarding child CFIs. Asylum-seeking children deserve no less.

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246. See, e.g., Jacqueline Bhabha, "Not a Sack of Potatoes": Moving and Removing Children Across Borders, 15 B.U. PUB. INT. L.J. 197 (2006); Sibylla Brodzinsky, *US Government Deporting Central American Migrants to Their Deaths*, GUARDIAN, Oct. 12, 2015, <http://www.theguardian.com/us-news/2015/oct/12/obama-immigration-deportations-central-america> [https://perma.cc/SN6Z-FPZU].