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# LONE TRAVELERS: RIGHTS, CRIMINALIZATION, AND THE TRANSNATIONAL MIGRATION OF UNACCOMPANIED CHILDREN

JACQUELINE BHABHA<sup>†</sup>

## INTRODUCTION ONE OF MANY: A CASE HISTORY

L. is a fourteen year old Christian girl from the area surrounding Fuzhou City, a city of about 5 million on China's southeastern coast line.<sup>1</sup> She has been in an Immigration and Naturalization Service (INS) children's detention center in Chicago for several months. She is one of 68 children between the ages of 7 and 17 detained in the center. All but 4 are Chinese. Several of the children have been in the detention center for over a year, though the majority has been there for less than 3 months. Before being brought to Chicago, L. was in an adult detention facility outside New York for 5 weeks, having been stopped at the airport attempting to enter the U.S. on a false passport. Eventually a prison guard in the adult facility spotted her as being under age, so she was transferred to one of the principal detention facilities for unaccompanied Chinese children.<sup>2</sup> Every year thousands of unaccompanied migrant children are detained by the INS because of their immigration status.<sup>3</sup> A New York lawyer

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<sup>†</sup> Jacqueline Bhabha is the director of the Human Rights Program at the University of Chicago. The author would like to thank Lyonette Louis-Jacques for invaluable research assistance.

1. Peter Kwong, *Forbidden Workers: Illegal Chinese Immigrants and American Labor* 22 (The New Press 1997).

2. Apart from Chicago, the principal facility for detained Chinese children is outside Phoenix, Arizona.

3. According to INS data 4,295 "custody occurrences" of children occurred between October 1997 and July 1998; at the end of July 1998 the INS had 479 children in detention. Data quoted in *Detained and Deprived of Rights: Children in the Custody of the U.S. Immigration and Naturalization Service*, Human Rights Watch 3 (Dec 1998). A 1997 survey by Human Rights Watch Children's Rights Project revealed that, at any given time, over 200 unaccompanied migrant children were in INS custody for more than 72 hours. Human Rights Watch Children's Rights Project, *Slipping Through the Cracks: Unaccompanied Children Detained by the U.S. Immigration and Naturalization Service* 2 (Human Rts Watch 1997). According to INS spokesman Ross Bergeron, the INS at present handles 4,000 unaccompanied minors a year. CISNEWS [Center for Immigration Studies News; www.cis.org; 1522 K St. N.W., Suite 820, Washington DC 20005; center@cis.org], January 13, 2000. Human Rights Watch estimates that, as of

known to the detention center for his links with smuggling networks transporting Chinese children to the U.S. has telephoned the center and said that he represents this child and will file the necessary asylum papers to secure her release from detention and her transfer to her relatives in New York. L. knows nothing about the lawyer, but confirms that she has a telephone number for relatives in Chinatown, New York. Her family in China, victims of anti-Christian persecution, agreed to a fee of \$40,000 for L.'s transport to safety in the U.S. Only \$1,000 of that fee has so far been paid in China. The balance will be met from her wages once she starts work in Chinatown. Despite grim stories about the conditions of child laborers in the clothing sweatshops, restaurants and takeaway outlets in Chinatown, L. is anxious to get out to work to start repaying her debt. Stories about the treatment meted out on defaulting asylum seekers and their families back home in China by the snakeheads, the operators who control the smuggling networks, are far worse.

The staff at the detention center has given the relatives' phone number to a non-profit organization in New York to assess their suitability as a home for L., should she be released from detention. The organization's brief, by agreement with the INS, is simply to ascertain the acceptability of the living conditions for the child. Ensuring school attendance, pursuit of a legal immigration status, or release from bondage is no-one's responsibility. There is no statutory obligation to appoint a guardian<sup>4</sup> to explore in depth what the child's views are, to help her through the court proceedings and the adjustment to life in the U.S. after she is released from detention. Government interest in L. is confined to documenting and penalizing her mode of entry; her post-entry conditions are not a government concern. Like everyone else involved in the process, the non-profit workers know that if L. is released into the U.S. she will be rapidly put to work in slavery-like conditions, in violation of prohibitions on child labor and of labor safety regulations. The non-profit workers are trapped in a moral dilemma. Providing reliable information to secure the child's safe release from detention is their primary goal. They also support the right of L.'s family in China to make the choice they did to send her away from an environment in which they feared she would face persecution. They do not question the parents' judgement or seek to interpose their own assessment of the child's best interest. In any event, they are not in a position to assess whether the child

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January 2000 the INS had 500 children in custody on any one day. Alisa Solomon, *Immigrant Minors*, Village Voice, (Jan 26, 2000) available at <<http://www.villagevoice.com/>>.

4. The author is presently engaged in a pilot project, which will afford trained legal and personal representatives to all detained unaccompanied minors appearing in the immigration court in one INS district. The pilot project will monitor the effects of ensuring this quality representation, with a view to broader adoption of these procedures in future.

would be better off at home with her family or working in Chinatown. On the other hand, they are aware that L.'s is one among many cases fueling a multi-billion dollar trade in human migration, with increasingly exploitative and abusive features. Securing L.'s release and her insertion into the Chinatown labor market is critical to the profitability of the business interaction.

This Article examines and evaluates the different approaches that have been taken in developing laws designed to deal with cases such as the one outlined above. Section I of this Article outlines the growing migration of unaccompanied minors and the accompanying growth in criminal sanctions adopted to deter such migration. Section II discusses the development of national responses to unaccompanied child migration. This section demonstrates that nations have become increasingly involved in a decision-making process that was previously left to the families of the migrant children. Section III examines the current paradigm for evaluating the migration of these children and demonstrates that the current coercion/consent distinction is too simplistic to account for all of the factors presented by this migration trend. Section IV further investigates how the coercion/consent distinction has lead policy-makers to focus, too narrowly, on eradicating the threats posed in the trafficking context, while ignoring the threats posed to children in the smuggling context. The conclusion calls for an approach that looks beyond the simplistic coercion/consent and trafficking/smuggling distinctions and focuses instead on the human rights of the migrating children.

## I. THE STATE OF TRANSNATIONAL MIGRATION OF CHILDREN

### A. UNACCOMPANIED MINORS AS TRANSNATIONAL MIGRANTS TODAY

There is a prevailing consensus that the family is the "natural" and optimal environment for children to grow up in.<sup>5</sup> Yet every year thousands of children are separated from their families, not just by small distances from one village or town to another, but separated to embark on transnational migration alone. Children become transnational migrants in a variety of ways, some analogous to those of adults (smuggled across borders to safety), others unique to children

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5. For example, the preamble to the United Nations Convention on the Rights of the Child, the most widely and rapidly ratified international human rights convention to date, states "the family [is] the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children." The Convention on the Rights of the Child, adopted by the United Nations General Assembly, November 20, 1989, entered into force on September 2, 1990. [hereafter CRC]. According to a recent report of a seminar on unaccompanied child migrants in Europe, "the family is a precondition for the well being of the child". Radda Barnen, *Separated Children and Voluntary Return: Ways of Surviving* 3 (Save the Children 1998).

(subjects of evacuation programs or transnational adoption), yet others in ways similar to adults but complicated by the fact that children are involved (trafficked for labor or sex exploitation). As other categories of migrants, children too are drawn into what has come to be known as “the migration business,”<sup>6</sup> a global and heterogeneous industry which comprises a vast range of different concerns, legal and illegal, small scale and global, humanitarian, corporate, legitimately profitable and criminally exploitative.

For unaccompanied minors, as for adults, migration is no longer a predominantly ad hoc process involving simply an individual alien and a host state. Up to the early 1990s, families seeking to send their children unaccompanied to a place of safety or to be an “anchor” for family resettlement<sup>7</sup> typically pooled resources to purchase an air ticket or a passage, from Addis Ababa to London, from Mogadishu to Frankfurt, from Colombo to Rome, from Budapest to New York, and trusted that relatives, fellow villagers or welfare agencies would take on the responsibility of caring for the child at the other end; couples seeking to adopt abroad would deal directly with orphanages in developing countries; migrant parents hoping to facilitate family reunion with children left behind would make the arrangements themselves directly, sending airline tickets and proof of ability to support the child.

Today, the difficulties of access to places of safety in the developed world, including visa requirements imposed on most source countries, carrier sanctions discouraging airlines from transporting undocumented travelers, and rigorous, often adversarial immigration controls, fuel a diverse profit-driven global business, which delivers transportation and expertise about immigration controls in return for payment. Thus it is that children fleeing to safety or seeking family reunion get caught up in the use of fraudulent documents or sophisticated smugglers networks, even where the motivation behind their travel and the status they seek on arrival are lawful. In fact the policy driven classificatory distinctions between legal and illegal migration are hard to sustain—humanitarian activities may be exploited for criminal purposes. Thus, for example, transnational adoption motivated by parents with benign concerns is frequently facilitated by agents engaged in baby selling;<sup>8</sup> participants in child

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6. John Salt and Jeremy Stein, *Migration as a Business: The Case of Trafficking*, 35 *Intl Migration* 467 (1997).

7. David Pearl and Carole Lyons, *The Treatment by the European Union of Unaccompanied Minors*, in Nigel Lowe and Gillian Douglas, eds, *Families Across Frontiers* 437 (Martinus Nijhoff 1996).

8. Among the numerous press reports see, for example, David M. Halbfinder, *Three Charged with Running Mexican Baby-Smuggling Ring*, *NY Times* A1 (May 28, 1999) (describing baby-smuggling ring in which at least 17 Mexican infants were illegally sold to unwitting adoptive parents in the New York area for \$20,000 or more).

prostitution or drug rings are tutored to claim asylum as a means of gaining legal immigration status;<sup>9</sup> child refugees fleeing to safety avail themselves of the services of smugglers to obtain false documents or secure clandestine entry.<sup>10</sup> Frequently, the adverse effects of securing immigration unlawfully are felt for years, as children are relegated to illegality and exploitation: the case described at the outset is an example of an all too typical scenario.

## B. CRIMINALIZATION

While the exact scale of the migration business is uncertain,<sup>11</sup> there is no doubt that it is vast and rapidly growing. Official reports presented by the International Organization for Migration in 1998 estimate that 4 million people are trafficked around the world each year and that this global business is worth \$5 billion to \$7 billion annually, making it as profitable as drug-smuggling.<sup>12</sup> Drugs can only be used once whereas humans can be exploited again and again. It is also clear that an increasing segment of non-coerced migration activity is undocumented and thus illegal. Growing sectors of the transnational transport and migration system have been criminalized and an increasing proportion of the migrant population in host states has become illegal,<sup>13</sup> their presence acknowledged—even required as labor in the face of declining indigenous population growth<sup>14</sup>—but unaccommodated by public

9. Frank Viviano, *Global Mob Cashes in on Human Cargo*, San Fran Chronicle A1 (Feb 16, 1999) (describing traffic in asylum seekers forced into prostitution and sold to sex rings); Adrienne Tanner, *Drug ring lures kids as dealers: Hondurans as young as 11 deal crack in Vancouver*, Ottawa Citizen, <http://www.ottawacitizen.com/> (July 20, 1998).

10. Wendy Ayotte, *Supporting Unaccompanied Children in the Asylum Process* 10 (Save the Children 1998).

11. Precise quantification poses methodological and evidentiary problems, see Salt and Stein, 35 Intl Migration at 472-73 (cited in note 6).

12. Anthony M. DeStefano, *Smuggling Boom Prompts Nations to Take Action*, Newsday A5 (June 1, 1998).

13. "Czech officials have noted a correlation between tighter visa restrictions and increases in human smuggling, while smugglers in Mexico merely increased their fees in response to recent anti-smuggling amendments to U.S. immigration law." Ian Peck, *Removing the Venom from the Snakehead: Japan's Newest Attempt to Control Chinese Human Smuggling*, 31 Vand J Transnat'l L 1041, 1077 (1998).

14. According to a March 2000 United Nations Population Division report, Europe's population "is about to start shrinking, and aging, dramatically. Unless the trend toward small families is reversed or immigration increases sharply, its citizens face the prospect of not only waiting longer to retire, but receiving smaller pensions when they do". The report predicts that by the middle of the century, on current trends, Italy's population will have dropped from 57 to 41 million. Thus the report argues that "the only way to maintain the current ratio would be to let 159 million immigrants into Europe — 40 percent of the current population over the next 25 years." *Pensions Threaten European Economies: Governments Ill-Prepared for Crisis of Retiring Baby Boomers* Washington Post A1 (April 26, 2000).

policy makers.<sup>15</sup> Evidence of this can be found in the “Fortress Europe” policies of the late 1980s and early 1990s strengthening border controls, the growing detention of asylum seekers in Europe and North America, the institution of visa and carriers’ liability policies to deter undocumented travel, and the growing preoccupation with alien smuggling and trafficking.<sup>16</sup> This recent phenomenon is part of a restrictionist process that links firm immigration control with drug detection and anti-terrorist measures as an aspect of state security.<sup>17</sup> As the hurdles have generated a flourishing industry, official attention has become increasingly obsessed with the task of clamping down on the smugglers and agents.<sup>18</sup> This vicious circle affects even those migrants who have a “legal” basis to their migration, such as asylum seekers. As a report by the British Refugee Council pointed out, “the journeys that refugees make to reach [their destinations] owe their complexity and their ‘illegality’ to the dominance of the European enforcement agenda over that of individual rights and refugee protection.”<sup>19</sup> According to one study, approximately 15-30 per cent of migrants successfully reaching West European destinations in 1993 used the services of smugglers or traffickers for part of their journey; for asylum seekers the proportion was even higher, at 20-40 per cent.<sup>20</sup>

Children are caught up in this business for a range of reasons. They include children sent, often smuggled out, for whom migration is considered to be in their best interests, as well as children whose migration has nothing to do with a “best interest” calculation on the part of their families or themselves. Some

15. This is true of many developed countries, including the U.S., E.U. states and Japan. A clear example of this process of work is the situation of illegal Chinese workers in Japan. The 1997 amendment to the Immigration Control and Refugee Recognition Act of 1951 specifically targeted organized smuggling syndicates between Japan and China; at the same time it retained the long-standing exclusion of unskilled workers as a category qualifying for legal entry, despite the shortage of such workers in Japan (the Japanese Ministry of Labour projects labour shortages of 2.5 million workers in the year 2000). As a result, the demand for unskilled labour is filled by illegal Chinese workers, at present estimated at 25,000. “Illegal workers are contributing to the incredible growth of Japan’s economy but receiving little or nothing in return. The government has no short-term incentive to create an unskilled worker category ... because doing so would require Japan to recognize foreign workers officially, while illegal employees work in silence and receive no such benefits.” Peck, 31 *Vand J Transnat’l L* at 1070 (cited in note 13).

16. This has encouraged a burgeoning business in forged and false documents, and in travel agents that steer would-be migrants to frontiers with clandestine routes and bribed border patrols.

17. European developments in the context of the Schengen process which resulted in the *1990 Convention on the Application of the Schengen Agreement of 14 June 1985*, and U.S. policies culminating in the *Illegal Immigration Reform and Immigrant Responsibility Act 1996*, exemplify the process of government association between immigration and crime.

18. John Morrison, *The Cost of Survival* 56.

19. *Id* at 57.

20. Jonas Widgren, *Multinational co-operation to combat trafficking in migrants and the role of international organizations*, 11<sup>th</sup> IOM Seminar on Migration, quoted in Salt and Stein, 35 *Intl Migration* at 473 (cited in note 6).

circumstances are clearly coercive, as where children are kidnapped, sold or tricked and trafficked into sexual or labor servitude. According to one expert, trafficking in women and children for sex is “the fastest growing criminal enterprise in the world.”<sup>21</sup> ECPAT, the NGO trying to End Child Prostitution in Asian Tourism, estimates that over 10,000 foreign children are trafficked into Thailand alone every year for prostitution.<sup>22</sup> Sex is not the only reason for a growing international presence for unaccompanied children. Cross-border labor exploitation is another. There is evidence of a resurgence of traffic in child slaves in West Africa<sup>23</sup> with police intercepting 150 children at the Benin/Togo border alone in the first half of 1999;<sup>24</sup> of “begging teams” of North Korean underfed children operated in South Korea by child brokers;<sup>25</sup> of Estonian children smuggled into the U.S. to work 15 hour days as cleaners for \$10-\$50 per week.<sup>26</sup> These exploitative practices are contemporary versions of the slave trade and are increasingly targeted by domestic and international law enforcement efforts. A concern to prevent exploitation and human rights abuses underlies this criminalization effort.

However, much criminalization of unaccompanied child migration operates in the opposite way by pushing children into coercive situations, and producing rather than preventing human rights abuses. This is the case where families have to resort to commercial migration professionals to secure safety for their children. The case described above is a telling, yet typical, example of this process. Since immigration enforcement procedures increasingly bar access, families who need to send their children away are compelled to enter into agreements, which place the children in coercive, exploitative, highly insecure situations. In some ways this situation is reminiscent of earlier “exports” of unaccompanied minors, where benign motivations by philanthropists seeking to “rescue” orphaned or destitute children from urban squalor in the eighteenth and nineteenth centuries led to them being sent far away from home.<sup>27</sup> As in

21. Theresa Lore, senior coordinator for international women’s issues at the State Department, quoted in De Stefano, *Smuggling Boom* (cited in note 12).

22. ECPAT, *Preventing the Commercial Sexual Exploitation of Pacific Children*, Report of Conference Proceedings held in Fiji, 2-3 June 1998 25 (ECPAT 1998).

23. Ticky Monekosso, *West Africa’s child slave trade*, August 5, 1999, [http://news.bbc.co.uk/1/hi/english/world/africa/newsid\\_412000/412628.stm](http://news.bbc.co.uk/1/hi/english/world/africa/newsid_412000/412628.stm).

24. IPS, LEXIS: Human\_Traffic\_(child labor) RIGHTS-BENIN, June 8, 1999.

25. “People traders” cash in on plight of fleeing North Koreans, CISNEWS July 8, 1999.

26. Mary Pemberton, *Alien Smuggling*, CISNEWS, July 28, 1999.

27. About 150,000 destitute or orphaned children were sent from Britain under the “child migration scheme” to various outposts of the British empire, including the United States, Canada and Australia, over a 350 year period, from 1618 until 1967. Philip Bean and Joy Melville, *Lost Children of the Empire* (Unwin Hyman Ltd 1989). In the United States, a similar ideological blend of messianic salvation, pastoral romanticism and economic calculation motivated Charles Loring Brace, founder of the Children’s Aid Society, to send destitute children on so-called “orphan trains” out of New York city to the rural west.



former times, so today children are removed from their home surroundings for their future betterment and sent to unfamiliar and distant locations. This separation exposes children to hardship, exploitation and new risks and dangers, including in some instances, work in slavery like conditions with no state supervision of welfare or educational needs. Some of the unaccompanied minors of today even end up worse off than their historical counterparts. In the U.S., for example, unaccompanied minor asylum seekers are subject to indefinite detention by the immigration authorities while their cases are considered,<sup>28</sup> the majority lack access to legal advice or representation, and some, detained alongside juvenile offenders in correctional facilities, are even shackled and handcuffed when transported<sup>29</sup> or produced in court.<sup>30</sup> Whether these children, like the migrant children of an earlier era, would have been better off had they not emigrated, is not clear. What is incontrovertible is that their status as unaccompanied children places them at risk of neglect and even punitive responses indicating a disregard for the children's welfare chillingly reminiscent of attitudes to indigent children pervasive a century ago.<sup>31</sup>

Comprehensive figures for this phenomenon are not available but it is clear that sizeable numbers of children travel alone in search of safety every year and that the numbers are rising. One expert estimates that there are at least

Between 1864 and 1910 over 110,000 children had been sent off en masse. Linda Gordon, *The Great Arizona Orphan Abduction* 9-10 (Harvard 1999).

28. Human Rights Watch, *Detained and Deprived of Rights* (cited in note 3). According to Human Rights Watch, only 11 percent of detained minors have such access. Alisa Solomon, *Immigrant Minors*, Village Voice (cited in note 3).

29. "Regardless of whether they were in secure detention or in shelter care, most of the children we interviewed reported that they were handcuffed when they were taken to court to appear before an immigration judge... Several children told us that they were handcuffed [when taken to court] for more than eight hours, including transportation and timespent consulting with their attorney. One attorney complained about the practice and described meeting with an eleven-year-old client who was 'so small, the handcuffs were practically falling off his hands.'" Id at 21.

30. A lawyer fighting for the release of a 15 year old Chinese girl held in a juvenile jail for seven months, who eventually was awarded political asylum, described how at one hearing she could not wipe away her tears because her hands were chained to her waist: "The girl was crying and she couldn't wipe the tears coming down her face. It was one of the most wrenching and disturbing experiences I've had as a lawyer." David Crary, *Eliau's VIP Treatment Unusual*, CISNEWS, January 13, 2000.

31. This is how one informant recalled her experience of being sent off from a small village in North England to Canada in 1913 at the age of twelve and a half: "We went down to the docks in carriages drawn by four horses, where the big ship was waiting. We were three weeks crossing and most of us [200 children from Dr. Barnado's Homes] were dreadfully seasick all the way ... We landed at Quebec and then we had to go on a small boat down the St. Lawrence river ... the first place I went to was Hagersville. It was called a foster home ... I went to school while there for just one year. I never played with the other kids, we were just Home kids and you just weren't supposed to have any feelings. You weren't considered as good as the rest of the kids, because you had no home of your own and no parents. You don't know what this does to you. I have never got over it ... I got terribly withdrawn as it seemed nobody wanted me, only for the work I did." Bean and Melville, *Lost Children* at 11 (cited in note 27).

100,000 unaccompanied minors across Europe today.<sup>32</sup> In Italy, for example, in March 1997 alone, 600 unaccompanied Albanian minors arrived after fleeing political and economic crisis; the following year saw even larger numbers.<sup>33</sup> A children's charity in Denmark runs three homes for unaccompanied Somali children, who managed to survive the war and flee, but are separated from family.<sup>34</sup> The numbers of unaccompanied minors fleeing to Britain is increasing steadily. In 1992, when official records were first kept, "at least 190" asylum applications by unaccompanied children were received; in the first half of 1998 alone nine times that number (1,199) had applied, which amounted to 5 percent of the total number of asylum applications received during that period.<sup>35</sup> Identification of children has been problematic, since immigration officers are untrained in child welfare concerns and disinclined to adopt a pro-active approach. Accordingly, there are disturbing reports of misclassification of children as adults, resulting in detention and abuse in adult jails.<sup>36</sup> Moreover, in some countries there is a surprising lack of information and monitoring. In the U.S., for example, no official records exist of the numbers of unaccompanied minors entering the country. Anecdotal evidence, however, suggests that the numbers are even higher than those in Europe. The Immigration and Naturalization Service estimates that on average 5,300 are apprehended by the service every year. A significant number of these children are detained in the U.S., some for lengthy periods and in harsh conditions, akin to those for children charged with criminal offences.<sup>37</sup> According to

32. David Wright, *Overview of the Current Situation*, in Barnen, *Separated Children* 6 (cited in note 5).

33. Melanie Taubert, *Identifying Best Practice: Italy*, in Barnen, *Separated Children* 33-35 (cited in note 5).

34. John Reinstein, *Mukhtar Mohamed: Identifying Best Practice: Denmark*, in Barnen, *Separated Children* 32 (cited in note 5).

35. Ayotte, *Supporting Unaccompanied Children* at 8 (cited in note 10). In Kent, one of the coastal local authorities in Britain, the number of unaccompanied children seeking asylum rose from 115 to 850 in less than a year; special centers have had to be established to care for unaccompanied children as foster home opportunities have been exhausted. Richard Ford, *Splitting the cost of child refugees*, *The Times* (March 17, 2000).

36. "A Nigerian girl was detained at Campsfield House [adult detention center] because of an age dispute. She was eventually released after several months in detention following a paediatric examination that confirmed she was 13"; "A Tanzanian boy aged 14 arrived in the U.K. on a false passport and was not properly identified on arrival, despite his very small size and youthful appearance. As a result, he was admitted in the U.K. with nowhere to go and no money. After a while he lodged with four other Tanzanian men and was subsequently raped by all of them. His extreme fear of reprisals prevented him reporting this incident to the police." Amnesty International, *Most Vulnerable of All: The Treatment of Unaccompanied Refugee Children in the UK* 45 (Amnesty Intl 1999).

37. "For six months, Xiao Ling lived in a small concrete cell, completely bare except for bedding and a Bible in a language she could not read. Locked up in prison-like conditions with juveniles accused of murder, rape, and drug trafficking, Xiao Ling told Human Rights Watch in June 1998 that she was kept under constant supervision, not allowed to speak her own language, told not to laugh, and even forced to

Human Rights Watch on any given day 500 children are in detention, of which 350 are in immigration shelters and 150 (a third of those detained) are in correctional facilities.<sup>38</sup>

## II. GLOBALIZATION AND UNACCOMPANIED MINORS: FROM LAISSEZ FAIRE TO INTERFERENCE

No challenge to the consensus about the family as a child's "natural environment" is posed where the separation is unintended by the family, a product of war,<sup>39</sup> civil turmoil<sup>40</sup> or child kidnapping.<sup>41</sup> Communities torn apart by forces beyond their control cannot ensure optimal conditions for their children. But much transnational migration of unaccompanied children is intentional, the result of a "best interest" calculation by families.<sup>42</sup> It may be motivated by desperation, the lack of tolerable local alternatives, as where children are sent to places of safety as refugees, given up for adoption, sold as child laborers or sex workers. Or it may be prompted by ambition and aspiration, where children are sent away to improve their life chances, whether through education at boarding schools in metropolitan countries or work in

ask permission to scratch her nose. Bewildered, miserable, and unable to communicate with anyone around her, she cried every day". Human Rights Watch, *Detained and Deprived of Rights* at 3 (cited in note 3).

38. Solomon, *Immigrant Minors* (cited in note 3).

39. See Daniel J. Steinbock, *The Admission of Unaccompanied Children into the United States*, 7 Yale L & Policy Rev 137 (1989) (description of U.S. refugee admission policy for unaccompanied children evacuated from war zones or otherwise separated from their parents). See also, Amnesty International, *In the Firing Line: War and Children's Rights* (Amnesty Intl 1999); Center for Social Policy Initiatives and Radda Barnen, *Unaccompanied Children In Exile; Refugee Children Affected by the War on the Territory of Former Yugoslavia* (Swedish Save the Children Fund 1998); P. Stromberg, *Going home ... but to an Uncertain Future, Refugees 19-21* (UNHCR 1997) (describing situation concerning 51,000 unaccompanied Rwandan children).

40. Radda Barnen, *Separated Children and Voluntary Return* 11-12 (1998).

41. Human Rights Watch, *Forgotten Children of War: Sierra Leonean Refugee Children in Guinea* (Human Rights Watch July 1999); ECPAT, *Preventing Commercial Sexual Exploitation* (cited in note 22); Associated Press, *Landmark Conviction against Cambodian Human Trafficker* (Sept 10, 1999) (smuggler sentenced to 15 years for smuggling Cambodian children into Thailand to work in a Bangkok begging gang).

42. It is not only families that have made these calculations, and that have weighed considerations of immediate protection needs against prospects of long term advantage. In some cases transnational migration of unaccompanied children has also been initiated by state or private philanthropic organizations, as in the case of the more than 100,000 indigent U.K. children "exported" to (white) colonies and former colonies. See John Eekelaar, *'The Chief Glory': The Export of Children from the United Kingdom*, in Lowe and Douglas, eds, *Families Across Frontiers* 539-58 (cited in note 7). The history of this migration illustrates the complexity of disentangling "best interest" from other instrumental concerns about economic prospects, spiritual redemption, and adult wish fulfillment. As the authors of a critical history of this export of destitute children from the U.K. to the white colonies comment: "Child migration was meant to be in the best interests of the children. But throughout its history the children never came first. 'Coming out to Australia' said a child migrant, 'was like coming from the warmth to the cold. I'll never forget. *Why did they do it?*'" Beane and Melville, *Lost Children* at 170 (cited in note 27).

urban sweatshops. In either case the assumption that home is the best place for a child is rejected by those making the decisions. Across classes and continents families have considered the dangers and hardships of separation, travel, and relocation to be justified by the desired goals of safety, education, family survival, and prosperity.

In itself this is not a new phenomenon. Economic migration and flight following war have been the norm throughout history. Deferring to the primary role of parents as providers and protectors of children, states<sup>43</sup> have generally tended to support parents' choices regarding their children's future and only to step in where parental involvement was absent.<sup>44</sup> Public policy has tended to legitimate transnational migration by unaccompanied children, assuming that where the motivation for travel was to benefit the child<sup>45</sup> and the immigration credentials were in order, the travel arrangements themselves and the post-entry situation could be left to families.<sup>46</sup> Refugee protection schemes

43. Private organizations have played a large role in the migration of indigent and orphaned children, but often with the active support of national or state governments. See *Lost Children* (cited in note 42); Gordon, *Arizona* (cited in note 27).

44. In fact separation from family has long been considered a reason for intervention. The first international children's rights document, the *Declaration on the Rights of the Child*, submitted to the League of Nations in 1924, specifically focused on the need to assist children separated from their families by war. Geraldine Van Bueren, *The International Law on the Rights of the Child* 8 (Martinus Nijhoff 1995). There are however some exceptions to this: transnational adoptions, considered to be primarily devices for evading immigration control, have been subjected to intense scrutiny; so have family decisions to send adolescents separated from their parents during childhood from developing to developed states. Thus the U.K. government prevented many South Asian families from sending their teenage boys to join all male migrant households in the U.K., ostensibly out of concern for the welfare of the boys but more likely for fear the boys were taking unauthorized work instead of attending school; and it prevented many lone Caribbean parents, who had left young children behind in the West Indies when migrating to the U.K. for work, from bringing those children to join them, on the grounds that the migrating parent had not had "sole responsibility" for the child. See J. Bhabha and S. Shutter, *Women's Movement: Women Under Immigration, Nationality and Refugee Law* 129-61 (Trentham Books 1994).

45. Benefit to the child is the critical consideration. Where child migration is driven by ulterior motives, public intervention has tended to prevent it. Thus the exchange of a child, whether by his or her parents or others, with a view to exploitation of the child, has been specifically prohibited by international law. See 1956 *U.N. Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery*, art 1 (d) which renders unlawful "Any institution or practice whereby a child or young person under the age of 18 years is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour."

46. By contrast abusive separations have long been the subject of international attention. Throughout this century international treaties have been concerned with the abduction or recruitment of young girls away from their families for purposes of sexual exploitation. But from the start, anti-trafficking treaties focused on criminalizing the recruitment and transportation of young girls for prostitution, and did not deal with their circumstances after arrival. See 1910 *International Convention for the Suppression of White Slave Traffic* (requiring state parties to punish anyone who hired, abducted, or enticed for immoral purposes any woman under the age of twenty-one, but excluding from its purview the forced detention of a girl in a brothel); the 1921 *International Convention for the Suppression of the Traffic in Women and Children* (expanding the protective measures to children of either sex). For an excellent discussion of the issues

for unaccompanied minors have been instituted in many cases,<sup>47</sup> transnational adoptions have been approved,<sup>48</sup> parental educational choices, insofar as they have not depended on state financial subsidy, have been supported; and family reunion has been accepted as a legitimate basis for immigration enabling unaccompanied children to join permanently resident parents.

Over the last decade, this relatively *laissez faire* approach has been superseded.

Deference to familial decision making on behalf of child migrants is being replaced by interventionist measures, prompted by two divergent sets of policy considerations. One set derives from the increasingly xenophobic contemporary responses to the transnational migration described above. The other set of policies derive from recently expanded notions of children's rights, which place "best interest" considerations and the child's right to express views and opinions, the right to "voice," at the heart of public decision making about children. These policies have gradually gained broad acceptance, partly as a result of the codification in international law of this approach through the 1989 U.N. Convention on the Rights of the Child.<sup>49</sup>

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involved, see Janie Chuang, *Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts*, 11 Harv Hum Rts J 65 (1998). For the most recent international effort to address this problem see UNGA, Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Revised Draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime A/AC.254* (requiring states parties to take steps to prevent, investigate, and punish international trafficking in persons, with particular attention to women and children, but failing to give victims of trafficking enduring protections or permanent legal status in the destination country). For an interesting contrast which does attend to the protection needs and immigration vulnerabilities of trafficked women and children, including a new visa status with access to permanent residence after three years see *Trafficking Victims Protection Act of 1999* H.R.3244. (see also note 65).

47. Everett M. Ressler, Neil Boothby and Daniel J. Steinbock, *Unaccompanied Children: Care and Protection in Wars, Natural Disasters, and Refugee Movements* (Oxford 1988).

48. David S. Rosettenstein, *Trans-Racial Adoption in the United States and the Impact of Considerations Relating to Minority Population Groups on International Adoptions into the United States*, in Lowe and Douglas, *Families Across Frontiers* at 605 (cited in note 5). Twila L. Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race and Feminist Legal Theory*, 10 Yale J L & Feminism 101, 131 n 110 (1998). However, the dramatic growth in intercountry adoption in the last twenty years, bringing with it a flourishing black market business in baby selling, has given rise to international measures, see 1988 *Hague Conference on Private International Law and Final Act of the Convention in Respect of Intercountry Adoptions*, completed at the seventeenth Session of the Hague Conference in May 1993.

49. The CRC has been very widely signed and ratified (the United States is one of only two signatory states not to have ratified, the other being Somalia which has no recognized government at present) and encapsulates the new child-centered approach to policy regarding children. Even in states where the Convention is not binding because of non-ratification (U.S.) or reservations (U.K.) policies towards children have clearly been influenced by its provisions. See IGC Secretariat (Secretariat of the Intergovernmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia), *Report on Unaccompanied Minors: Overview of Policies and Practices of IGC Participating States*, 21 (July 1997).

This new child-centered framework encourages states to intervene not only where children need protection from exploitation or neglect, as formerly, but in a much broader array of matters concerning children. It requires states to assess, as a primary consideration, which of a set of alternative decisions is "in the best interests of the child." It also obliges states to elicit and take into consideration the child's "voice" by creating the opportunity for a child to express his or her views in the decision making process.<sup>50</sup> Minimally this should entitle a child to legal representation, to secure presentation of the child's perspective in legal proceedings. But the obligation goes beyond this. In cross-cultural situations, such as those concerning transnational child migrants, a child's ability to express his or her views depends on effective translation and on the establishment of mediating mechanisms to ensure that a clear sense of the available options is presented to the child, and that the child's reaction is understood, in a culturally relevant way, by adult decision makers.<sup>51</sup> This may require balancing host country and country of origin values, and resolving differences between the best interest judgment of adult decision makers and the child's expressed views. This child's rights perspective obliges states to make the best interests of the child a primary consideration, even when other policy goals, such as immigration control, are paramount.<sup>52</sup>

These two frameworks produce opposing normative assumptions for policies dealing with unaccompanied child migrants.<sup>53</sup> Immigration enforcement concerns privilege considerations of the child's alienage and legal status in determining outcomes, thus tending to encourage expulsion or penalization. By contrast, child rights concerns privilege consideration of best interest and voice in the development of policy, emphasizing child welfare concerns and due process. In some situations these different frameworks may

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50. "1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or appropriate body, in a manner consistent with the procedural rules of national law." *CRC* Article 12.

51. "States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive *appropriate protection and humanitarian assistance* in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties." *Id* at Art. 22 (1).

52. Eliahu Frank Abram, *The Child's Right to Family Unity in International Immigration Law*, 17 *Law & Pol'y* 397 (1995).

53. For an analysis of the relationship between refugee status and children's rights under the *Convention on the Rights of the Child* see J. Bhabha and W. Young, *Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines*, 11 *Intl J Refugee L* 84 (1999).

produce the same outcome. For example, immigration enforcement agents and child welfare advocates agree that childhood itself can be exploited as an advantageous status mitigating the effects of strict immigration enforcement. If an unaccompanied child is more likely to gain asylum or permanent residence than a similarly placed adult is, then this could act as a distorting factor in family migration decisions.<sup>54</sup> Both immigration officers and advocates have therefore advocated closing off preferential immigration access for unaccompanied minors' families.<sup>55</sup>

However, usually these two sets of policies are in direct conflict. Where unaccompanied minors are subject to harsh immigration control measures, such as threats of removal, indefinite detention, or legal proceedings without access to professional representation, their ability to articulate their views or bring best interest considerations to the attention of decision makers is compromised. At worst children are removed without any legal redress;<sup>56</sup> or they abandon their claims and seek to be returned home irrespective of the consequences because they cannot see an alternative;<sup>57</sup> alternatively they remain in the host country in a state of legal and emotional limbo.<sup>58</sup> As enforcement and immigration control concerns increasingly dominate the policy agenda, so there is growing cause for concern.<sup>59</sup> As the figures cited above suggest, this is not an academic or marginal issue: growing numbers of unaccompanied minors

54. Unaccompanied minors are usually not deported or returned by receiving states, making them a better investment for a family paying an exorbitant fee to get at least one member to safety: "...in the view of states the 'pull' factor is increased because unaccompanied minors are generally not returned." David Wright, *An Overview of the Current Situation: The European Context*, in *Separated Children* at 7 (cited in note 32). There is also evidence that children are being used as props or "tools" by smugglers. According to a report, "smugglers are now pairing up unrelated men and women and providing them with an infant so they appear to be a family." Since the U.S. has no family detention facilities these "family units" are treated advantageously compared to single adult migrants. The report documents the case of a 6 month-old Honduran rented out at \$200 per trip by her undocumented Houston-based parents. James Pinkerton, *Children are latest tools in immigrant smuggling scams: Rented infants help 'families' cross the border via INS loophole*, *The Houston Chronicle* 1 (May 1999) [CISNEWS June 1, 1999].

55. Steinbock, 7 *Yale L & Pol'y R* at 200 (cited in note 39).

56. Cindy Loose, *Most Unaccompanied Minors Quickly Sent Back*, *Washington Post* (Feb 3, 2000).

57. See *Perez-Funez v INS*, 611 F Supp 990 (DC Cal 1984). The following excerpts from interviews conducted by Human Rights Watch with detained minors exemplify this: "I don't know why we are staying here, I don't know anything about my case, I don't care if it's over ... I just want to get out of here and go home" (Ana, fifteen); "I think I will be deported...I don't know what's up, I don't want to fight anymore...I just don't know what's up, you know?" (Jorge, seventeen). *Slipping Through the Cracks* at 36 (cited in note 3).

58. See, for example, the case described in Amnesty International, *Most Vulnerable of All* at 45 (cited in note 36).

59. This is particularly so given the general reluctance by states to prioritize the needs of children, see IGC, *Report on Unaccompanied Minors*. See also, for examples of cases where immigration enforcement concerns have overridden "best interest" considerations, Pearl and Lyons, *Treatment* at 442-43 (cited in note 7).

are arriving in developed states putting pressure on policy makers to address their contradictory goals and assumptions.<sup>60</sup>

### III. THE COERCION/CONSENT DISTINCTION

In formulating policy about the treatment of unaccompanied alien minors arriving in host states, it is clearly important to distinguish between children coercively trafficked out of their homes for exploitative purposes, and children who consent to be sent away for reasons of safety or self-advancement. While the former may benefit from prompt intervention to ensure safe return home,

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60. The complex dilemmas and inconsistencies have been starkly brought to U.S. public attention by the dramatic case of Elian Gonzalez, the 6 year old Cuban boy, found clinging to an inner tube after his mother and 10 others had drowned following the shipwreck of their boat bound from Cuba to Miami, on November 25, 1999. This is the most highly publicised case ever concerning an unaccompanied alien minor, smuggled out of his country of origin. The powerful Cuban exile community in Miami managed to make a national issue out of their case, calling for the boy to be allowed to stay with his U.S. based great uncle, rather than be returned to his father and grandparents in Cuba. The drama surrounding the case culminated in a pre-dawn gunpoint raid by federal law-enforcement officers on April 22, 2000 when Elian was snatched from the Little Havana, Miami home of his great uncle and flown to a reunion with his father in Washington. Many observers have been critical of the manipulation of this traumatised child for anti-Castro political purposes, and a majority of American public opinion, albeit sceptical about the militarised tactics deployed during the raid, has supported the Attorney General's decision to reunite the boy with his father. However, the important and novel legal issues raised by the case are less clear cut: are there any circumstances in which, despite a complete asylum application, the INS is entitled to deny the right to an asylum hearing? what rights do young children, as opposed to their parents, have in the asylum process, and is there any lower age limit for such rights? who speaks for the child in contested situations? what is the appropriate procedure for eliciting the voice of the child or assessing the best interests of the child when there is a potential or actual conflict between parent and child? what if any is the role of guardians and child welfare experts in this process? Lawyers acting for the Miami great-uncle filed an asylum claim on behalf of Elian, alleging that he had a well-founded fear of persecution if returned to Cuba; the father opposed the application and made representations to the INS to withdraw it, on the basis that he alone could speak for the child. Having interviewed the father, but not the child, the INS decided to accede to the father's request. Withdrawal of the asylum claim was then challenged by the great-uncle's lawyers, on the basis that there was no lower age limit for making an asylum request. A federal district judge dismissed the great uncle's challenge on March 21, 2000, upholding the INS's contention that the father could adequately represent the child's immigration interests. 86 F Supp 2d 1167. For a useful and concise summary see 77 *Interpreter Releases* March 24, 2000, 377-80. At the time of this writing, this decision is under appeal. On April 25 the 11<sup>th</sup> Circuit Court of Appeals barred Elian from being taken out of the U.S. pending determination of the case. The huge public attention and expenditure (estimated at \$578,000 as of April 28) on this case have given rise to critical comparisons with the fate of other equally unfortunate children who arrive in the US unaccompanied. See for example J. Bhabha, "What about all the other Elians?", Op Ed, *Chicago Tribune* February 2, 2000. For example, 2 Haitian children aged 8 and 9, also shipwrecked, were returned to Haiti within days of the Gonzalez affair, despite their pregnant mother having been taken ashore for medical treatment and consideration of an asylum claim. Responding to national protests about discriminatory and inconsistent treatment, U.S. officials later said the children would be allowed to return to Florida to reunite with their mother, pending consideration of her asylum claim. CISNEWS January 17, 2000. In another case, a 6 year-old Haitian girl, whose mother brought her to the US, dropped her off at the home of a friend in March 1999, then returned to Haiti and died, faces deportation back to Haiti, despite the fact that there is no family in Haiti to look after her. CISNEWS April 27, 2000.



the latter may require prolonged supervision, protection and guidance to ensure that their best interests in the host country are attended to, in much the same way as native children in state custody. However, the two categories of children are not in practice so easy to separate.

Despite the claims of immigration control advocates, increasingly preoccupied with curbing “trafficking,” the distinction between coercion and consensus in the migration field is not straightforward. Freely chosen travel may include coercive elements, and, conversely, coerced travel may end with a situation where the migrant chooses to remain in the host state. In the case of children, the difficulty is further complicated by the fact that consent may come from the parents or other concerned adults based on a “best interest” judgement about the child, rather than directly from the child. Only in exceptional cases do decisions about transnational migration directly involve the child him or herself.<sup>61</sup> Of course the absence of the child’s direct consent to the migration does not mean he or she opposed the decision, even less that refusal of entry or deportation is appropriate, particularly if, on or after arrival, the child expresses a wish to stay on in the host state.<sup>62</sup>

Part of the difficulty arises from the complex nature of “consent” as a form of transaction, irrespective of the age of the consenting party. Does the fact that someone consents mean that they should be allowed the privilege of their choice, and that to act otherwise is to patronize them? Arguably, the fact that a consensual transaction is exploitative is not reason enough to interfere, because the consenting child may have taken an informed decision that the transaction is advantageous despite the exploitation.<sup>63</sup> A Kosovar 16-year-old, orphaned and living in a refugee camp, may agree to be a prostitute in the Netherlands

61. A tragic and remarkable case was that of two stowaways aged 15 and 16 from Guinea in West Africa, who were found dead in the landing gear of a plane in Brussels, having embarked on the journey to Europe to seek help for African youth. A letter found wrapped in their clothing, and addressed to the “Excellencies, gentlemen-members and those responsible in Europe” said: “It is to your solidarity and generosity that we appeal for your help in Africa. If you see that we have sacrificed ourselves and lost our lives, it is because we suffer too much in Africa and need your help to struggle against poverty and war... Please excuse us very much for daring to write this letter.” *Guardian* 13 col 7 (Aug 5, 1999).

62. Assessing the child’s capability to propose a viewpoint, and weighing that against parental or expert opinion concerning the child’s best interest may pose a difficult challenge, as the Elian Gonzalez case demonstrates. The child’s age, the risks attendant upon return, and the presence of supportive adults in the host country will be important factors bearing on the decision. In practice states appear to be reluctant, in the absence of identified parents or guardians in the home country, to remove or deport unaccompanied children, even if they do not qualify for asylum or other lawful status (an exception in the U.S. treatment of Haitian and central American unaccompanied minors). No figures are available to document the numbers of unaccompanied minors allowed to remain on such a discretionary basis, but anecdotal evidence suggests that many such children remain in the host country. Personal communication, Susan Schmidt, director of child services, Lutheran Immigrant and Refugee Services, December 8, 1999.

63. Alan Wertheimer, *Exploitation and Commercial Surrogacy*, 74 *Denver U L Rev* 1215 (1997).

and not regret the decision post-migration. An exploitative or dangerous circumstance may be freely chosen as the most advantageous given the available options.

Where the decision is based on misinformation, interference may be more justifiable. People often consent to migration with considerable ignorance about the post-migration circumstances they will encounter; a consensual migration may therefore end in a coercive, even abusive post-entry situation. The migrant may welcome being rescued and returned home. This is even more likely to be the case where the original consent to migration was obtained not simply by ignorance but by fraudulent accounts of the post-entry situation. In such circumstances one might argue consent is negated by subsequent events. For example, a teenager in Fujian province, such as the one whose case is described above, may consent to be smuggled into New York to escape religious persecution, indeed may be excited by the prospects of safety and opportunity, and may have been told that education and wealth rather than harsh, slavery-like labor conditions await her post-entry. Or she may have known that she would end up working 15 hours a day in a garment sweatshop to repay her smuggling fee, but find post-entry that the circumstances and the coercive debt repayment terms are much worse than described, and are, in fact, intolerable. Do subsequent conditions negate consent in both situations? Are the two circumstances morally distinguishable? After entry, the teenager may prefer to escape from her situation and return home, or she may prefer to carry on working and remain in the new country. Her parents may have similar or different views to hers. The outcome cannot be predicted by whether the original journey was "chosen" or not. An opportunity for the child to express his or her views is therefore critical to formulating an appropriate decision about the child's future.

This is particularly the case given the absence of reliable information about the counterfactual situation—would the child have been, or be, better off if the migration had not taken place? What are the appropriate criteria for this decision—political safety, economic security, emotional and cultural rootedness? And what is the appropriate time frame for the calculation—the child's minority, the child's life, the life of the child's offspring? Given that historically so much voluntary migration has been propelled by long term considerations of advantage and advancement, spanning one generation or more, should such calculations be brought to bear on the unaccompanied migration of children? Clearly this is an arena of opinion rather than fact: information about the relative benefits, short and long-term, of migration over return home has to be weighed taking account of objective and subjective considerations. Most of the factors being weighed up are incommensurable.

Research on the effects of transnational migration on unaccompanied children suggests that they experience a relatively high rate of psychological illness, particularly depression, after the migration but that this improves over time and with non-institutional, culturally suitable placements.<sup>64</sup> Political security and economic success are likely to further enhance adjustment and a self-evaluation that concludes that migration was worth the hardships endured. In such circumstances it is arguable that protection of children from exploitative post-migration situations should prioritize legalization of immigration status and traditional child welfare remedies to eradicate the coercion and improve living conditions in the host state.

A careful balancing of child welfare experts' "best interest" judgements and the child's own expressed views is required. The stark contrast between family unity "back home" in a familiar (even if oppressive) social and cultural setting, and isolation, exploitation and dislocation in the host country may militate against attending to a child's view that staying on in the host country is preferable. The danger of allowing an "expert's" best interest judgement to trump the child's own voice is that it restores decision making about children to the paternalistic context. Given the artificial homogenization produced by the category "child," a construct that spans a remarkably diverse population, this has disparate consequences. In some situations the privileging of "interest" over "voice" certainly seems more acceptable—for very young children, for children with mental disabilities, for children from the same cultural and class environment as the policy maker. But in other contexts, particularly for older children from cultural backgrounds different from the welfare expert's—the typical situation with unaccompanied transnational migrants—this approach seems much less justifiable. Moreover, in cases where the child's view replicates that of his or her parents, and clashes with that of the host society policy maker concerned about the risks of short term slavery-like exploitation, the trumping will simply result in the substitution of a culturally alien adult's view of best interest over that of a culturally akin adult. This is the common situation facing children such as the one described at the outset—smuggled out of adverse home situations but facing extreme uncertainty in the host state.

#### IV. COMMERCIAL MIGRATION: TRAFFICKING AND SMUGGLING

The difference of emphasis between protectionist measures to eradicate coercive and exploitative transport of persons on the one hand, and

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64. Ressler, Boothby, and Steinbock, *Unaccompanied Children* at 135-207 (cited in note 47); Steinbock, 7 *Yale L & Pol'y Rev* at 174-76 (cited in note 55).

restrictionist measures to combat voluntary irregular migration on the other, has historically been captured in the distinction between two terms: “trafficking” and “smuggling.” Both terms concern commercially assisted migration, but the term “trafficking” is used to highlight the exploitation of the migrant, whereas the term “smuggling” emphasizes consensual unauthorized entry. The two concepts reflect different historical agendas of policy makers, the abolition of slavery and trade in persons, on the one hand, and the exclusion of unwanted migrants on the other.

Trafficking is the older, victim-centered term, dating back to the first international treaty on trafficking, the 1904 *International Agreement for the Suppression of White Slave Traffic*. Generally it refers to situations where the migrant is coerced or deceived into travelling by a trafficker,<sup>65</sup> though this is not uniformly the case.<sup>66</sup> Much international law on trafficking has tended to concentrate specifically on its use for sexual exploitation,<sup>67</sup> though transport for

65. The Europol Convention, agreed upon by European states addressing the problem of illegal immigration, defined the “traffic in human beings” as the “subjection of a person to the real and illegal sway of other persons by using violence or menace or by abuse of authority or intrigue with a view to the exploitation of prostitution, forms of sexual exploitation and assault of minors or trade in abandoned children.” *Expert Group of the Budapest Group 1996*, cited in Salt and Stein, 35 Intl Migration at 471 (cited in note 6). There are several bills currently before the U.S. Congress addressing the issue of trafficking. Bill S 600 defines trafficking as “the use of deception, coercion, debt bondage, the threat of force, or the abuse of authority to recruit, transport within or across borders, purchase, sell, transfer, receive, or harbor a person for the purpose of placing or holding such person, whether for pay or not, in involuntary servitude or slavery or slavery-like conditions, or in forced, bonded or coerced labor,” Sec.4 (2). On this definition, trafficking excludes situations where the migrant has “freely” consented to travel and to engage in exploitative work; the definition relies on the post entry work situation, not simply on the conditions of migration. Another bill, HR 1356, focuses on international sexual trafficking. It differentiates between adults and children with respect to the possibility of consent; adults are not considered victims of sexual trafficking if they have consented to being taken across an international border to perform commercial sexual acts; but migrants under 18 are, whether or not they have consented. A third bill, HR 3244, the Trafficking Victims Protection Act of 2000, focuses both on combatting trafficking for sex and slavery-like work, and on the protection of and assistance to victims. Most interesting and potentially effective is the proposal to create a new non-immigrant “T” visa for victims of severe trafficking with a well-founded fear of retribution if removed to enable them to remain in the U.S. and to apply for permanent residence after three years. This provision would for the first time enable trafficked persons to benefit from a secure immigration status even where they reasonably refuse to testify against threatening traffickers without the obligation to put themselves at risk of retaliation to resist deportation.

66. Salt and Stein, for example, use the term “trafficking” in a much broader sense, requiring neither coercion of migrants at the point of travel, nor exploitative or slavery-like conditions at the point of arrival: “an international business, involving the trading and systematic movement of people as “commodities” by various means and potentially involving a variety of agents, institutions and intermediaries.” 35 Intl Migration at 471.

67. The 1949 *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, which consolidates the earlier 1904, 1910, 1921 and 1933 international treaties, defines its scope as follows (Art. 1):

The Parties to the present Convention agree to punish any person who, to gratify the passions of another:

labor exploitation, particularly in times of acute social and political devastation has also given rise to concern. After World War I, the League of Nations considered the problem of trafficking in women and children to be so serious that it appointed a special body of experts on the topic and eventually oversaw the conclusion of two treaties on the topic, the first of which was the 1921 *Convention for the Suppression of the Traffic in Women and Children*. This convention obligated participating states to prosecute child traffickers (Art. 2), to establish licensing and supervision of employment agencies “for the protection of women and children seeking employment in another country” (Art. 6), and to protect and assist migrating women and children (Art. 7). Thus, the first international legislative interventions addressing trafficking recognized the importance of attending to questions of post-entry labor conditions and welfare assistance, something greatly neglected in contemporary work on the problem. The majority of subsequent international treaties concerning trafficked children have focused on criminalizing slavery,<sup>68</sup> and more recently sexual trafficking<sup>69</sup> and abusive adoption practices.<sup>70</sup> The strategy has been to criminalize the migration process itself in an attempt to eradicate abuse and exploitation,<sup>71</sup> but the means employed have ignored the socio-economic causes of trafficking, and have had weak enforcement measures. As a result, they have done little to stem the tide of human trafficking.<sup>72</sup> Their main result to date has been a steady escalation of penalties for convicted traffickers rather than any significant long-term protection for victims. The 1989 U.N. *Convention on the Rights of the Child* has consolidated and expanded on this earlier work, providing the first international treaty article specifically

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Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person;

Exploits the prostitution of another person, even with the consent of that person.

68. See 1926 *Slavery Convention*, art. 2; 1956 *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery*.

69. See 1949 *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*.

70. 1986 U.N. *Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally*; see also 1993 *Hague Conference on Private International Law: Intercountry Adoption Convention Project*. For a discussion see Holly C. Kennard, *Curtauling the Sale and Trafficking of Children: A Discussion of the Hague Conference Convention in Respect of Intercountry Adoptions*, 14 U Pa J Int'l Bus L 623 (1994).

71. Van Bueren, *International Law on the Rights of the Child* at 280-83 (cited in note 44). See also Stephanie Farrior, *The International Law on Trafficking in Women and Children for Prostitution: Making it live up to its Potential*, 10 Harv Hum Rts J 213 (1997); Chuang, 11 Harv Hum Rts J 65 (cited in note 46); Ali Miller and Alison N. Stewart, *Report from the Roundtable on the Meaning of “Trafficking in Persons”: A Human Rights Perspective*, 20 Women's Rts L Rep 11 (1998).

72. Farrior, 10 Harv Hum Rts J at 214-15 (cited in note 71).

addressing child trafficking.<sup>73</sup> However, numbers of children trafficked have continued to escalate, and in some countries, notably the U.S., concerns over the unchecked activities of traffickers have been cited to justify detention of unaccompanied minors.<sup>74</sup>

In an effort to impinge on the problem of trafficking more effectively, the U.N. is currently at work on a new international instrument that for the first time addresses all forms of trafficking in persons, as part of the elaboration of a *Convention against Transnational Organized Crime*. Like the 1921 and 1949 Conventions, the *Revised Draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children* has as its purpose the prevention of trafficking, the punishment of traffickers, and the protection of victims. By contrast with earlier treaties, however, it includes broader enforcement measures, aimed at the migration business, and it encompasses (in one proposed article) a more comprehensive range of “illicit purposes or aims” for traffickers.<sup>75</sup> As of this writing, the Protocol’s definition of the crime of trafficking is not finalized,<sup>76</sup> but as it stands at present there is no coercion

73. Art. 35 calls on states to “take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form”.

74. “We have documented cases of Chinese juveniles who have been beaten, raped and murdered in the attempt by the organized crime groups to secure their smuggling fees by extorting them from relatives both in the United States and in China. And while we do not like the idea of keeping juveniles in a detention environment, the reality of the situation is that we have a responsibility to ensure the safety of these juveniles.” Russ Bergeron, INS Spokesman. NPR Segment on INS Detained Children, January 26, 2000 transcript produced by Burrell’s Information Services, Box 7, Livingstone NJ 07039.

75. Art. 2 option 2 (c).

76. The current U.N. *Draft Protocol* addressing trafficking in persons, includes two suggested definitions; option 1 defines “trafficking in persons” as “the recruitment, transportation, transfer, harbouring or receipt of persons, either by the threat or use of abduction, force, fraud, deception or coercion, or by the giving or receiving of unlawful payments or benefits to achieve the consent of a person having control over another person. . . . 3. For the purposes of this Protocol, trafficking in persons for the purpose of [sexual exploitation] includes subjecting to such trafficking a child under eighteen years of age, regardless of whether that child has consented.” Article 2, Option 1. This definition requires coercion or deception of the person being trafficked, unless it is for sexual exploitation of an ‘under age’ child; by contrast Option 2 includes within the definition of trafficking situations where the trafficked party has consented and where the trafficker does not make a profit, provided the trafficking is conducted for an “illicit purpose or aim”, which is defined, in part, as :

Reduction to slavery, servitude or other similar condition;

Maintenance of a person in such a condition in order to demand, under the threat of some penalty, the performance of forced and compulsory labour to which the person has not voluntarily consented or in order to force the person, in accordance with custom or by agreement, for payment or free of charge, to provide certain services without the freedom to change his or her condition;

The prostitution or other form of sexual exploitation of a woman or child, even with the consent of that person...

*Revised Draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, GA/IA/AC.254/15, AD Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, Vienna, 28 June – 9 July 1999.*

requirement for child sexual trafficking. Deeming consent irrelevant has the advantage of abolishing it as a possible defense to a charge of trafficking.<sup>77</sup> It also avoids the difficulty of having to distinguish coercive from consensual migration raised earlier. The legality or illegality of the migration per se is not deemed a relevant consideration either. Recognition that the evil being addressed is the rights violation of the trafficked person, not the irregular migration status of the migrant, is positive. The danger however is that this broad scope of inquiry has the potential to make immigration enforcement a harsher form of police action with increased criminal sanctions,<sup>78</sup> an approach likely to raise the cost of exit from the trafficked relationship.

Measures for victim protection include assistance in court proceedings against traffickers, and “social support.” However, these do not include financial compensation for the victims. Nor do they initiate sustained attention to the powerful social and economic forces generating the context for trafficking, including income generation initiatives in recruitment sites, extensive public education and personal protection services for vulnerable populations—measures which in the medium to long term seem more likely to impact on the problem than the punitive and immigration centered focus. One version of the draft protocol states that penalties should not be imposed on trafficking victims<sup>79</sup> and that return to their country should only be effected if voluntary.<sup>80</sup> For unaccompanied children this should entail appropriate support and expert intervention to establish a lawful status and determine the optimal strategy for the child. This is critical since the draft does not give victims access to legal residence in the host country, an essential measure to liberate victims from the threats of trafficking networks. The draft merely requires states parties to “consider enacting immigration laws that permit victims of trafficking in persons to remain in [their] territory, temporarily or permanently, in appropriate cases.”<sup>81</sup> Without further strengthening, this clause is unlikely to

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77. It has been suggested that treating consent as irrelevant for trafficked persons represents a paternalistic approach, denying agency and choice to those who may find themselves forced to choose trafficking over other even less tolerable living alternatives. See Chuang, 11 *Harv Hum Rts J* 65 (cited in note 46). For children who are trafficked, however, with the possible exception of older adolescents, this approach seems consistent with prevailing public policy as expressed in Art. 19, Convention on the Rights of the Child (cited in note 50). For recommendations and commentary on the Draft Protocol, addressing many of the concerns presented in this text, see Human Rights Caucus, *Recommendations and Commentary on the Draft Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime (A/AC.254/4/Add.3/Rev.2)* July 1999.

78. This is confirmed by the Protocol’s repeated references to strengthening border controls, screening passengers, and imposing carriers’ liability penalties. see Art. 9; art. 14.

79. Art. 1 (option 2).

80. Art. 1 (option 1).

81. Art. 5(1).

produce noticeable improvement in victims' immigration status in the new country.

By contrast with trafficking, the term "smuggling" is generally used to refer to transactions which circumvent lawful immigration control in consensual situations: the migrant, whether legal or not, avails him or herself of the services of agents, to facilitate a desired migration. Though the transaction may be exploitative and the terms harsh, they are a reflection of market conditions, one might say, mutually advantageous "consensual exploitation," rather than fraud or coercion. Thus, in the case of Fuzhounese migrants from China, the cost of smuggling one person is currently up to \$40,000 for the United States<sup>82</sup> and between \$19,300 and \$23,000 for Japan;<sup>83</sup> for a trip across an East European or Middle-Eastern border the rate is a mere \$500. One expert calculates the average payment by migrant to smuggler to be between \$2000 and \$5000.<sup>84</sup> Consistent with this notion of smuggling as being a consensual undertaking, agents are often viewed by the migrant as protectors, even friends.<sup>85</sup> Characterizing "smuggled" migrants as victims therefore misses the point.

Within the international context alien smuggling is being addressed primarily as a matter of criminal law enforcement of immigration control. The U.N. is currently working on a draft protocol on alien smuggling within the same framework as trafficking. The focus is on preventing misuse and abuse of established immigration and asylum procedures, by criminalizing all aspects of this process that occur "within the context of transnational organized crime." So far this latter process is not defined but clearly much unaccompanied child migration, of Asian children into the U.S. for example, might fall within this category.

The U.N. *Draft Protocol against Smuggling* establishes as a criminal offense the smuggling of migrants, defined as "the intentional procurement for profit of the illegal entry of a person into and /or illegal residence of a person in a

82. DeStefano, *Smuggling Boom* at A5 (cited in note 12).

83. Peck, 31 Vand J Transnat'l L at 1050 (cited in note 13).

84. Jonas Widgren, *Global Arrangements to Combat Trafficking in Migrants*, 23 Migration World 19, 24 (1995).

85. "...many of our case studies suffered no abuse at the hands of the agent, and .. in some cases the agent was a close personal friend of the refugee or their family." John Morrison, *The Cost of Survival* at 47 (cited in note 18). "In China, family members of Fuzhounese immigrants have a very different understanding of the smugglers and the conditions in America than might be expected of an exploited population. Those who are waiting to emigrate look to the smugglers as the providers of an essential service. When informed of the safe arrival of a family member in New York, the family in China invites the snakehead for a big community banquet, sets off firecrackers, and puts up big red wall posters in front of the family home to celebrate." Kwong, *Forbidden Workers* at 96 (cited in note 1).



State of which the person is not a national or a permanent resident.”<sup>86</sup> Endangering the lives or safety of migrants is to be considered an aggravating circumstance (art 4.5). This emphasis on criminalization and immigration enforcement is not complemented by attention to the needs of smuggled migrants, in the country of origin or destination. Unlike the draft protocol on trafficking, this draft protocol does not specifically address the situation of smuggled children or their special needs. Nor does it make provision for the possibility of legalizing the immigration status of migrants that have been smuggled, thus freeing them from potentially abusive demands from smugglers or their agents. On the contrary it calls on states parties to facilitate the speedy return to their country of origin of persons smuggled, with no explicit mention of the rights of refugees or other victims of human rights violations.<sup>87</sup> Though the draft calls on states parties to train specialized immigration officials to “recogniz[e] the need to provide humane treatment to and protect the human rights of migrants,”<sup>88</sup> it is not clear how this is compatible with the overall goals of the protocol.<sup>89</sup>

## CONCLUSION

### LONE CHILDREN: THE NEED FOR A COMPLEX APPROACH

Given the large numbers of unaccompanied children whose migration is facilitated by smugglers and the acute dangers they confront, the silence of the Draft Protocol on this topic is significant. The specific needs of children are

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86. UNGA, Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Draft Protocol against the Smuggling of Migrants by Land, Air and Sea, Supplementing the United Nations Convention against Transnational Organized Crime*, A/AC.254/15, Art 2.1 (a). A more realistic definition, which avoids the difficulty of classifying all smuggler-assisted entry as illegal, is that proposed by the Europol Convention: ‘illegal migrant smuggling’ comprises ‘activities intended deliberately to facilitate, for financial gain, the entry into, residence or employment of an alien in the territory of the State, contrary to the rules and conditions applicable in such a State.’ Quoted in Salt and Stein, *Migration as a Business*, 471 (cited in note 5). According to one writer the central ingredients of the smuggling transaction are: “(1) the exchange of money; (2) a voluntary journey; (3) a facilitator that arranges an illegal passage across an international border.” Paul J. Smith, *Chinese Migrant Trafficking: A Global Challenge*, in Paul J. Smith, ed, *Human Smuggling: Chinese Migrant Trafficking and the Challenge to America’s Immigration Tradition*, cited in Peck, 31 Vand J Transnat’l L at note 1 (cited in note 13). Criminalizing these sought after services tends to increase the costs and therefor the price, rather than reducing demand—“Czech officials have noted a correlation between tighter visa restrictions and increases in human smuggling, while smugglers in Mexico merely increased their fees in response to recent anti-smuggling amendments to U.S. immigration law. Peck, 31 Vand J Transnat’l L at 1077 (cited in note 13).

87. Art. 15, Draft Protocol.

88. Art. 14.2 (e).

89. See Draft Protocol Art 15 (and related footnote 116 discussing the conflict between the majority of states for whom the return of migrants is necessary as a deterrent and a minority concerned with migrants’ rights).

considered in one draft protocol and not the other because the dominance of the immigration enforcement perspective has distorted policy making to the detriment of rights-based approaches. Unaccompanied children need as much attention in the trafficking as in the smuggling context. Whether they are victims of the exploitative plans of traffickers, or consensual participants in an unauthorized migration process that transports them to safety, their needs converge at the point of arrival in the host state. In both contexts, children may need to make asylum claims or other applications for compassionate or humanitarian immigration status; in both contexts children will need welfare assistance and protection; in both contexts questions of access to guardianship and legal representation are pressing. Finally in line with the stipulation in the Children's Rights Convention,<sup>90</sup> in both contexts these children have rights to voice, to express their wishes and preferences.

Whether smuggled or trafficked these children have much in common with unaccompanied children already recognized as legal refugees, whose needs for protection and welfare assistance, including fostering, have long been attended to within the context of refugee resettlement programs.<sup>91</sup> But the use of a deceptively simplistic coercion/ consensus dichotomy, reflected in the trafficking/smuggling dichotomy, has militated against this approach. It has promoted a perspective on current migration, which has rendered many children invisible as children, by admitting of only two categories of migrant—"victims of trafficking" and "illegals." These categories need to be complicated once more, so that state interventionism in this area takes note of the many factors in migration that the laissez faire approach of an earlier era acknowledged. Among these the age, views, and "best interest" of unaccompanied child migrants have a strong claim.

Part of complicating the approach is to acknowledge in the immigration field what psychologists and child welfare experts have long acknowledged within their disciplines: that the category "child", (unknown in the Middle Ages)<sup>92</sup> is unsatisfactory as a unitary indicator of need or skill. More attention needs to be paid to the widely varying capabilities of very young children, such that some are able to cogently articulate their fears and desires, while others lack the intellectual and/or emotional maturity to do so; a fixed age-defined threshold for access to a guardian, or dismissal of views articulated is thus inappropriate. Advocates concerned with questions of asylum and immigration,

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90. Art. 12.

91. See, for example, Office of Refugee Resettlement, *Refugee Resettlement Program; Statement of Goals, Priorities, Standards and Guidelines for the Unaccompanied Minor Refugee and Cuban/Haitian Entrant Programs*, Federal Register Vol 52, No 198, Oct 14, 1987, 38147-38152.

92. Neil Postman, *The Disappearance of Childhood* 13 (Delacourt 1982).

whether or not mediated by traffickers or smugglers, need to import more complex understandings of decision making by and on behalf of children, and expertise in relation to questions of custody and guardianship. As the *Elian Gonzalez* case, still before the courts at the time of this writing, has so powerfully demonstrated, the complexities of who speaks for the child are not confined to contested custody or family law situations.

Finally, if the promise of the Convention on the Rights of the Child is to be realized, host states need to acknowledge an obligation to make adequate resources available to assist unaccompanied minors, despite the absence of electoral pressure from the affected constituency. Quality legal representation, consistent guardianship, custodial arrangements that are nurturing not alienating, diverse educational programs that cater to multiple needs are essential requirements for humanizing this neglected area of law and public policy and dispelling criticism that alien children are a manifestly low priority of affluent host states. These measures are also indispensable if the dramatic escalation of child sexual and labor exploitation hidden below the surface in most metropolitan cities today is to be curtailed. Ultimately the exhortations against child labor and sexual slavery by the U.S. and other powerful developed states directed at trafficked persons' countries of origin ring increasingly hollow if those same practices are allowed to flourish in developed states because migrant child victims have no safe and viable exit routes from those forms of bondage.