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Zero Sympathy: Unaccompanied Minors' Rights in the US Immigration System

MAHRUKH ALI*

ABSTRACT

This note analyzes the US Government's approach to unaccompanied minors and the webs they must navigate when they are apprehended by the US immigration system. More importantly, this note calls for reformative approaches to children's rights through acknowledging the differences between adults and children while simultaneously taking their vulnerability and autonomy into account. After explaining the migrant crisis along with its implications and examining the underlying reasons fostering this movement, this note discusses the legal options available for unaccompanied minors. It draws on the shortcomings of the immigration system as the system labels unaccompanied minors as dependent children, but also treats them as adults. Further, this note establishes and calls attention to the long-term impact of this system on detained children. The note concludes by examining international law—more specifically, the Canadian approach—outlining how the US system can adopt certain policies to better its treatment of unaccompanied minors and refrain from further human rights violations.

INTRODUCTION: WHAT'S THE PROBLEM?

In 2014, approximately 70,000 children fled to the United States for three key reasons: (1) extreme violence in their countries, including drug and cartel violence; (2) increased levels of poverty; and (3) reunification with family members living in the United States.¹ The

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1. *Fleeing for Our Lives: Central American Migrant Crisis*, AMNESTY INT'L (April 1, 2016), <https://www.amnestyusa.org/fleeing-for-our-lives-central-american-migrant-crisis/>.

overwhelming majority of these children came from Central America's "Northern Triangle" (i.e., El Salvador, Guatemala, and Honduras), as well as from Mexico.² These children arrived alone, already facing language barriers and possessing no concept of their legal rights. Despite this hardship, they left difficult lives behind—lives that made their immigration struggles pale in comparison. What awaits them is a stringent and extremely restrictive border policy that separates families and holds children in abhorrent conditions.³ These children are the casualties of an immigration system that rejects family reunification and asylum claims in the name of "national security."

Of the 170,000 people who attempted to illegally cross into the United States in March of 2021, 18,500 of these were unaccompanied alien children (UACs), accounting for approximately 11% of incoming migrants.⁴ The Center on Immigration and Justice defines such a child as one "who [a] has no immigration status in the United States, [b] has not attained 18 years of age, and [c] has no parent or legal guardian in the country present or available to provide care and physical custody."⁵ Once these children enter the US immigration system, they face a myriad of procedures and policies, usually with no legal representation or guidance—and they must navigate this system on their own. Furthermore, children are "likely to move between several cities and states, and thus interact with even more stakeholders for the duration of their proceedings."⁶

Under the Trump administration, these incoming minors were no longer able to enter the country as discreetly as they could in the past. Not only did the Trump administration turned away many immigrants, it subjected those who do make it into the system to inhumane conditions, coupled with abuse by federal authorities. In fact, the Department of Homeland Security itself has warned of "dangerous overcrowding" among migrants, with reports of some cells holding 155 people as opposed to the maximum capacity of thirty-five.⁷ While this

2. *Id.* See also Lauren R. Aronson, *The Tipping Point: The Failure of Form Over Substance in Addressing the Needs of Unaccompanied Immigrant Children*, 18 HARV. LATINO L. REV. 1, 33 (2015).

3. See Caitlin Dickerson, *"There Is a Stench": Soiled Clothes and No Baths for Migrant Children at a Texas Center*, N.Y. TIMES (June 21, 2019), <https://www.nytimes.com/2019/06/21/us/migrant-children-border-soap.html?action=click&module=RelatedLinks&pgtype=Article>.

4. Julia Ainsley, *Record number of unaccompanied children crossed the border in March*, NBC NEWS (April 2, 2021), <https://www.nbcnews.com/politics/immigration/record-number-unaccompanied-children-crossed-border-march-n1262901>.

5. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2205 (2002).

6. OLGA BYRNE & ELISE MILLER, *THE FLOW OF UNACCOMPANIED CHILDREN THROUGH THE IMMIGRATION SYSTEM* 5 (2012).

7. Dickerson, *supra* note 3.

note does not delve into the Trump administration's family separation policy, the policy of separating parents from their children violates multiple human rights and was instantly condemned by actors from Congress to legal scholars, for this very reason.⁸ The lasting impact this policy has had on these children cannot be estimated in any empirical manner, as reported in *Flores v. Sessions*, government-contracted facilities have apparently subdued immigrant children with psychiatric drugs⁹ and private companies face similar allegations of severe mistreatment.¹⁰ Similarly, the effects of navigating the US immigration system without any guidance further traumatize unaccompanied children, who have already undergone significant hardships. As one scholar aptly put it: "We are creating a mental health crisis that's going to affect these [individuals] for a lifetime . . . and it's going to take an awful lot to turn those problems around so that these children don't go through life worried about when the same thing will happen to them."¹¹

There are very few safeguards in place to protect these children, despite the fact that immigration law views children "chiefly as dependents, not as individuals bearing rights."¹² This notion of dependency has led to the assumption that children are not self-sufficient, and thus the laws that are passed, either by legislatures or other actors, are intended to promote children's well-being, not "empower[] them through the preservation of their individual rights."¹³ As a result, when unaccompanied minors arrive at the border, the state

8. See generally Lela Miller, *A Father and Daughter Reunite, but Trauma Follows Them Home*, PBS: FRONTLINE (July 31, 2018), <https://www.pbs.org/wgbh/frontline/article/a-father-and-daughter-reunite-but-trauma-follows-them-home/> (following Arnovis Guidos Portillo and his daughter Meybelin through their harrowing journey through the US family separation policies); Condemning the Trump administration's zero tolerance policy, H. Res. 927, 115th Cong. (2017-18); Kevin Breuninger, *Even Trump's allies are criticizing his 'zero tolerance' policy of separating illegal immigrants from their children*, CNBC (June 18, 2018), <https://www.cnbc.com/2018/06/18/trumps-allies-criticize-his-zero-tolerance-immigration-policy.html>; Eli Watkins, *These Republicans have criticized Trump's 'zero tolerance' immigration policy*, CNN POLITICS (June 18, 2018), <https://edition.cnn.com/2018/06/18/politics/republican-party-family-separation/index.html>.

9. See *Flores v. Sessions*, 862 F.3d 863 (9th Cir. 2017).

10. Aura Bogado et al., *Migrant Children Sent to Shelters with Histories of Abuse Allegations*, REVEAL (June 20, 2018), <https://www.revealnews.org/article/migrant-children-sent-to-shelters-with-histories-of-abuse-allegations/>.

11. Miller, *supra* note 8. See also Octavio N. Martinez & Luis H. Zayas, *To Help Separated Families, Tap the Experts*, UT NEWS (Aug. 10, 2018), <https://news.utexas.edu/2018/08/10/to-help-separated-families-tap-the-experts/> (following immigrant families through their experience in the US detention system).

12. Sarah Rogerson, *The Politics of Fear: Unaccompanied Immigrant Children and the Case of the Southern Border*, 61 VILL. L. REV. 843, 845 (2017).

13. *Id.* at 846. See Hillary Rodham, *Children Under the Law*, 43 HARV. EDUC. REV. 487, 493 (1973).

must determine what rights they are entitled to and when these rights are triggered.¹⁴ Historically, and still today, the government has not paid considerable heed to any rights these minors may have, and does not consider, let alone prioritize, the child's "best interests"—a "central family law tenet in decisions respecting the health, safety, and welfare of children."¹⁵

Part I of this note will examine how unaccompanied minors enter the system, the processes they must navigate, and the legal options available to them. This section will also elaborate on the radical shortcomings of the remedies and how they have become relatively difficult for children to pursue as permanent options to enter or remain in the United States. Part II highlights the lack of distinctions between adults and children under the legal system. This part concludes that in order to adequately protect unaccompanied minors, the law must view children as separate from adults, i.e., persons with their own autonomy. Additionally, this section calls attention to the significant long-term consequences detention centers can have on detainees—particularly children. Part III compares American law to international standards as well as the Canadian approach to immigration. The United States may have violated international law under President Trump's administrative policies, and this section of the note discusses how the Canadian approach is relatively different. Part III also looks at existing and proposed reformative approaches. I suggest a few reform practices which, although seemingly unrealistic right now, are only a step in the right direction. I advocate for the notion that liberal democracies around the world have at least a limited moral duty to implement measures which allow refugees to enter the country and to not take the zero-tolerance measures the United States does today. It is time for the United States to consider humanitarian interests as the foundational basis of its law enforcement efforts, and this is an appropriate place to begin.

I. APPREHENSION AND DETENTION: A COMPLEX WEB

A. *Entry into the System*

Unaccompanied minors usually enter the immigration system through one of three ways: (1) the Office of Border Control catches most children attempting to illegally cross the border; (2) Immigration and Customs Enforcement (ICE) agencies around the nation conduct home

14. Rogerson, *supra* note 12, at 846.

15. *Id.* at 847.

and work raids to discover undocumented and unaccompanied minors; or (3) state and local authorities arrest minors, exposing the minor to detainment proceedings.¹⁶ The federal government controls immigration law and policy, with state courts deferring to Congress and the executive branch when dealing with immigration cases.¹⁷ This means that immigration law is “insulated from judicial review.”¹⁸ This deprives migrants access to judicial review, which might be the migrants’ best chance at being heard.

Once detained, children are held in the custody of the Department of Homeland Security (DHS) in Customs and Border Protection (CBP) processing centers.¹⁹ In the event that an accompanying adult cannot verify a legal or biological relationship to the child, border agents separate the adult and child, and label the child “unaccompanied.”²⁰ Once processed, DHS places some of these children in facilities run by the US Department of Health and Human Services (HHS) Office of Refugee Resettlement (ORR), and most are released to community sponsors pending their immigration decisions.²¹ ORR is a product of protests by human rights organizations, religious groups, and political leaders who argued against ORR’s predecessor, the Immigration and Naturalization Service (INS).²² Critics argued that INS had a conflict of interest because it simultaneously held unaccompanied minors in custody while it also prosecuted them for illegally entering the United States.²³

B. Legal Options & Remedies

The push towards better treatment of unaccompanied minors by activist groups began well before ORR took over INS.²⁴ In 1997, the

16. BYRNE & MILLER, *supra* note 6, at 8, 10.

17. See *Hines v. Davidowitz*, 312 U.S. 52 (1941) (emphasizing the Supremacy Clause of the U.S. Constitution). See also Susan Price, OLR Research Report: State versus Federal Power to Regulate Immigration, 2007-R-0621 (Nov. 14, 2007), <https://www.cga.ct.gov/2007/rpt/2007-R-0621.htm>.

18. Jessica R. Pulitzer, *Fear and Failing in Family Court: Special Immigration Juvenile Status and the State Court Problem*, 21 CARDOZO J.L. & GENDER 201, 202 (2014).

19. Julie M. Linton et al., *Detention of Immigration Children*, 139 PEDIATRICS 1, 2 (2017).

20. *Id.*

21. *A Guide to Children Arriving at the Border: Law, Policies and Responses*, AMERICAN IMMIGRATION COUNCIL, June 2015, at 1, 9, <http://immigrationpolicy.org/special-reports/guide-children-arriving-border-laws-policies-and-responses>.

22. BYRNE & MILLER, *supra* note 6, at 6.

23. *Id.*

24. Matthew Sussis, *The History of the Flores Settlement*, CTR. IMMIGRATION STUDIES (Feb. 11, 2019), <https://cis.org/Report/History-Flores-Settlement>.

Clinton administration agreed to the Flores settlement agreement (FSA), which set minimum, legally binding standards for unaccompanied minors in government custody.²⁵ The agreement stemmed from a 1993 class-action suit, *Flores v. Reno*, in which one of the plaintiffs was a fifteen-year-old girl from El Salvador, Jenny Flores, who entered the United States in an attempt to reunite with her aunt.²⁶ INS subjected Flores to questionable conditions while she was detained at the border, which brought the treatment of unaccompanied minors to light. Though at the time the FSA was only applicable to INS, today it binds all relevant authorities, such as ORR and DHS. The FSA requires that INS: (a) release children from detention to approved sponsors without unnecessary delay; (b) place children in the “least restrictive setting,” which was read to individually consider their ages and needs; and (c) implement general standards for the care and treatment of children in detention.²⁷

The 1997 FSA protected “all minors who are detained in the legal custody of INS,”²⁸ but until recently, this was interpreted to only include unaccompanied minors by both the Obama and Trump administrations, as well as Congress.²⁹ According to Peter Margulies, the period between 1997 and 2011 saw a significant rise in unaccompanied minors arriving at the border, as opposed to immigrant families.³⁰ Margulies asserts that, under the circumstances, an agreement specifically applicable to accompanied minors was not required until now,³¹ a development which may explain why it became

25. Dara Lind & Dylan Scott, *Flores Agreement: Trump's Executive Order to End Family Separation Might Run Afoul of a 1997 Court Ruling*, VOX (Jun 21, 2018, 10:42 am EDT), <https://www.vox.com/2018/6/20/17484546/executive-order-family-separation-flores-settlement-agreement-immigration>.

26. *Id.* See also Jill Cowan, *What to Know About the Flores Agreement and Why It Matters Now*, N.Y. TIMES (Aug. 22, 2019), <https://www.nytimes.com/2019/08/22/us/flores-agreement-california-migrant-children.html> (explaining that a member of the class action, Alma Yanira Cruz, was a twelve-year old girl when she was placed in a detention center).

27. BYRNE & MILLER, *supra* note 6, at 6.

28. Stipulated Settlement Agreement, ¶ 10, *Flores v. Reno*, No. CV 85-4544-RJK (C.D. Cal. 1996), https://www.aclu.org/sites/default/files/assets/flores_settlement_final_plus_extension_of_settlement011797.pdf.

29. Peter Margulies, *What Ending the Flores Agreement on Detention of Immigrant Children Really Means*, LAWFARE (Thursday, August 29, 2019, 5:39 PM), <https://www.lawfareblog.com/what-ending-flores-agreement-detention-immigrant-children-really-means>. (“For both the Obama and Trump administrations, this distinction between UACs and accompanied minors reflected the longtime reading of the FSA itself—as well as Congress’s view that UACs warrant special protections because of the absence of parental supervision, while the treatment of accompanied minors must balance their welfare with the orderly enforcement of U.S. immigration law.”)

30. *Id.*

31. *Id.*

essential to distinguish between accompanied and unaccompanied minors. The FSA imposed a twenty-day limit on DHS's holding of unaccompanied minors, but the government consistently read this as only applying to unaccompanied children and excluding accompanied children.³² Thus, the government could hold accompanied minors for longer periods, even indefinitely.³³ However, in 2016, a federal judge held that the FSA also covered *accompanied* minors, and affirmed the longstanding rule requiring “children to be released to licensed care programs within 20 days.”³⁴ This time limit is perhaps one of the most important provisions of the FSA and it has been codified in two statutes—the Homeland Security Act (HSA)³⁵ and the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA).³⁶ The provision currently permits DHS to retain minors for only seventy-two hours, after which the minors must be sent to ORR.³⁷

The TVPRA has more practical impact because it is codified in the US Code, while the FSA is only a settlement agreement.³⁸ Although the TVPRA was passed after lawmakers likely had a full understanding of the lack of options available to unaccompanied minors, it still fails to address this issue.³⁹ It is imperative to note that the FSA does not “mandate ORR to ensure that unaccompanied children are represented by legal counsel in removal proceedings,” despite the fact that children are unable to adequately represent themselves.⁴⁰

The TVPRA does not mandate counsel; it requires only that such minors “have counsel to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking”⁴¹ to the “greatest extent practicable.”⁴² The Act also clarified Special Immigrant Juvenile Status (SIJS) and “modified the application and adjudication procedures of both SIJS and asylum.”⁴³ The TVPRA

32. *Id.*

33. *Id.*

34. *Flores v. Lynch*, 828 F.3d 898, 905 (9th Cir. 2016); Miriam Jordan & Manny Fernandez, *Judge Rejects Long Detentions of Migrant Families, Dealing Trump Another Setback*, N.Y. TIMES (July 9, 2018), <https://www.nytimes.com/2018/07/09/us/migrants-family-separation-reunification.html>. See also *Flores v. Sessions*, 862 F.3d 863, 866 (9th Cir. 2017).

35. BYRNE & MILLER, *supra* note 6.

36. Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006).

37. *Id.*

38. 8 USC. § 1232 (2018).

39. Aronson, *supra* note 2, at 9.

40. *Id.*

41. 8 USC. § 1232(c)(5) (2018).

42. *Id.*

43. Aronson, *supra* note 2, at 10.

further “granted authority to HHS to appoint child advocates (guardians *ad litem*) to trafficking victims and other vulnerable unaccompanied children.”⁴⁴

Unaccompanied minors have several options when they arrive in the United States.⁴⁵ Asylum is available to noncitizens who are “unable or unwilling” to return to their home countries because of a well-founded fear of persecution or past persecution, founded on at least one of the following: race, religion, nationality, membership in a particular social group, or political opinion.⁴⁶ Further, their country’s government must be unwilling or unable to help or be complicit in the persecution.⁴⁷ Children seeking asylee status are treated different from adults by immigration authorities, because officers are encouraged to avoid the use of legal jargon, to use a lighter tone during interviews, and to build rapport with the applicants by discussing topics like pets and hobbies.⁴⁸ This often ends up backfiring and offering the child a false sense of security.⁴⁹ Special Immigrant Juvenile Status (SIJS) is the only pathway to citizenship that is exclusively available to children.⁵⁰ Unaccompanied minors arriving at the border have increasingly used SIJS, although Congress did not draft this legislation with this group in mind.⁵¹ Children who wish to claim SIJS must be under twenty-one years of age and unmarried;⁵² must establish that they are dependent on the court;⁵³ must prove that they have been abused, neglected, or abandoned;⁵⁴ and must demonstrate that it is not in their best interest to return to their home country.⁵⁵ U- & T-Visas⁵⁶ are available to

44. BYRNE & MILLER, *supra* note 6, at 8.

45. This note is unable to go into in-depth discussions about the legal options available to unaccompanied minors. For more information, see Aronson, *supra* note 2, at 24–31.

46. 8 USC. § 1101(a)(42)(A) (2012) (“[R]efugee’ means (A) any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . .”).

47. *Id.*

48. US CITIZENSHIP & IMMIGRATION SERVS., *Asylum Officer Basic Training Course: Guidelines for Children’s Asylum* 21-22, 27 (March 21, 2009), <https://www.refworld.org/pdfid/4f3e30152.pdf>.

49. Aronson, *supra* note 2, at 25.

50. *What is Special Immigrant Juvenile Status (SIJS)?*, SAFE PASSAGE PRJ., <https://www.safepassageproject.org/what-is-sijs-status/>.

51. Aronson, *supra* note 2, at 27.

52. 8 C.F.R. § 204.11(c) (2014).

53. 8 USC. § 1101(a)(27)(J).

54. BYRNE & MILLER, *supra* note 6, at 25-26.

55. *Id.*

victims of crimes, such as human trafficking, or those victims experiencing “substantial physical or mental abuse as a result of having been a victim of . . . criminal activity.”⁵⁷ These visas permit immigrants to stay in the United States for a specified time period.⁵⁸ Voluntary departure allows individuals to return to their country of origin, but without the consequences that accompany a removal order, which include physical removal by ICE within 90 days of the date of the removal order, as well as ineligibility for a number of years.⁵⁹ Under TVPRA, most unaccompanied children qualify for this remedy.⁶⁰

Though this may suggest that unaccompanied children have multiple options available to them to obtain legal status in the United States, children are not aware of what relief and remedies may be available to them.⁶¹ Indeed, they are often incapable of obtaining any of these remedies.⁶² Both procedural and substantive rules require the “ability to master the facts surrounding their arrest, interactions between state and federal law and agencies, and complex constitutional

56. The Victims of Trafficking and Violence Prevention Act of 2000 introduced T- and U-Visas to combat human trafficking and protect victims. The difference between the visas is primarily in the eligibility requirements: “In order to qualify for a T-Visa, you must meet the legal definition of a past or current victim of human trafficking. As result of trafficking, you must be present at a port of entry to the United States or in the United States (or the Commonwealth of the Northern Mariana Islands or American Samoa) . . . Finally, you must be legally admissible (or eligible for a waiver) to the U.S.” Alternatively, for a U-Visa, “you may have entered the U.S. for another, unrelated reason, and then become a victim of human trafficking,” but a U-Visa is not limited to trafficking, going “beyond human trafficking to include any immigrant who has become the victim of a specific serious crime while in the U.S., or a crime that violates U.S. law.” Landerholm Immigration Law, *What is the Difference Between a T-Visa and a U-Visa?*, LANDERHOLM IMMIGRATION (Sept. 7, 2016), <https://www.landerholmimmigration.com/blog/2016/september/what-is-the-difference-between-a-t-visa-and-a-u-/>.

57. 8 USC. § 1101(a)(15)(U)(i)(I) (2018).

58. *Id.*

59. BYRNE & MILLER, *supra* note 6, at 26. Ilona Bray, *Voluntary Departure vs. Deportation*, ALLLAW (<https://www.alllaw.com/articles/nolo/us-immigration/voluntary-departure-vs-deportation.html>).

60. *Id.*

61. Press Release, Hakeem Jeffries, U.S. Congressman for the Eighth Dist. of N.Y., Rep. Hakeem Jeffries and House Members Introduce Legislation to Provide Legal Representation of Unaccompanied Minors, (2014), <http://jeffries.house.gov/media-center/press-releases/rep-hakeem-jeffries-and-house-members-introduce-legislation-to-provide> (“Most undocumented children are not aware of the claims they can make in immigration court. The claims are technically available without counsel, but it is highly unlikely these children can vindicate their rights absent legal representation.”).

62. *Id.*

tests.”⁶³ Children, who receive minimal help from translators, cannot decipher legal rights that they may or may not be entitled to.

C. No Right to Appointed Counsel & the Immigration and Nationality Act

Although the Immigration and Nationality Act has long held that there is a right to counsel in immigration proceedings,⁶⁴ the law does not go so far as to require that the right be available at the government’s expense. Instead, the Act provides that “the person concerned shall have the privilege of being represented (*at no expense to the Government*) by such counsel, authorized to practice in such proceedings, as he shall choose.”⁶⁵

The Constitution similarly grants protections to criminal defendants, who “have the Assistance of Counsel for [their] defense.”⁶⁶ The Constitution does not extend this right to unaccompanied minors, however, because removal is a civil matter.⁶⁷ The HSA compels ORR to ensure that “qualified and independent legal counsel is timely appointed to represent the interests of each such child,”⁶⁸ but does not require the government to pay for such counsel. As a result, these minors must either represent themselves pro se or bear the expenses of appointing counsel.

Notably, in *In re Gault*, the Supreme Court held that children who were at risk of losing their liberty should be given the right to appointed counsel, regardless of whether the proceeding is civil or criminal in nature.⁶⁹ The *Gault* Court held that it is a due process requirement to notify children of their right to retain counsel or the right to receive appointed counsel if they are unable to afford one, particularly if the proceeding would infringe on the child’s freedom.⁷⁰ Thus far, the argument made against using this constitutional requirement for

63. McKayla M. Smith, Note, *Scared, but No Longer Alone: Using Louisiana to Build a Nationwide System of Representation for Unaccompanied Children*, 63 LOY. L. REV. 111, 123 (2017).

64. 8 USC. § 1362 (2012); *Biwot v. Gonzales*, 403 F.3d 1094, 1098 (9th Cir. 2005) (“right to counsel in immigration proceedings is rooted in the Due Process Clause and codified” in the Immigration and Nationality Act).

65. 8 USC. § 1362 (1996) (emphasis added).

66. US CONST. amend. VI.

67. *Chavez–Raya v. Immigration & Naturalization Serv.*, 519 F.2d 397, 400 (7th Cir. 1975) (“[D]eportation proceedings have, nevertheless, been consistently classified as civil rather than criminal.”).

68. 6 USC. § 279(b)(1)(A) (2008).

69. *In re Gault*, 387 US 1, 36-37 (1967).

70. *Id.*

unaccompanied minors, by immigration authorities, has only been the distinction between civil and criminal proceedings.

II. CHILDREN VERSUS ADULTS: THE DIFFERENCE AND ITS IMPLICATIONS

A. *Impact & Consequences*

Detaining children, especially in squalid conditions, is a practice that is condemned worldwide. The United Nations Convention on the Rights of the Child (UNCRC), an international agreement setting guidelines for children's rights, has been ratified by every nation except the United States.⁷¹ UNCRC calls for freedom from detention and appropriate treatment of children in detention,⁷² special protections for children seeking asylum,⁷³ and family reunification.⁷⁴ The relatively few empirical studies examining the long-term consequences for detained children show that detained children suffer negative emotional, mental, and physical consequences, which do not instantly disappear at the time of release.⁷⁵ Children held in detention centers may "experience developmental delay and poor psychological adjustment," and face "high rates of posttraumatic stress disorder, anxiety, depression, suicidal ideation, and other behavioral problems."⁷⁶

For example, Meybelin and her father attempted to migrate to the United States, but the two were separated at the border as part of the Trump administration's family-separation policy, rendering Maybelin an unaccompanied minor.⁷⁷ The father-daughter duo had traveled through Mexico in a tractor trailer, "with frigid temperatures that left both of them shaking and coated his hair with frost" as they survived on a cracker and an apple for fifty-two hours.⁷⁸ For weeks after they were

71. Sarah Mehta, *There's Only One Country That Hasn't Ratified the Convention on Children's Rights: US*, ACLU (Nov. 20, 2015), <https://www.aclu.org/blog/human-rights/treaty-ratification/theres-only-one-country-hasnt-ratified-convention-childrens>; see also Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, <https://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf> [hereinafter UNCRC].

72. UNCRC, *supra* note 71, at art. 37.

73. *Id.* at art. 22.

74. *Id.* at art. 9(4).

75. See Sarah Mares & Jon Jureidini, *Psychiatric Assessment of Children and Families in Immigration Detention – Clinical, Administrative and Ethical Issues*, 28 AUSTL N.Z. J. PUB. HEALTH 520 (2004); Rachel Kronick, Cécile Rousseau, & Janet Cleveland, *Asylum-seeking Children's Experiences of Detention in Canada: A Qualitative Study*, 85 AM. J. ORTHOPSYCHIATRY 287 (2015); see also Miller, *supra* note 8.

76. Linton et al., *supra* note 19, at 6.

77. Miller, *supra* note 8; see also *Frontline: Children at the Border* (PBS television broadcast July 31, 2018).

78. *Id.*

apprehended and separated at the border, Meybelin's father received no information regarding her whereabouts.⁷⁹ He was eventually deported back to El Salvador, and his daughter joined him a week later.⁸⁰ However, the child has evidently suffered psychological trauma from being separated from her father and having to navigate the immigration system on her own.⁸¹

Unaccompanied minors endure a significant amount of hardship before they even arrive at the US border. Their home countries have compelled them to flee as a result of trauma and dysfunctional, corrupt governments, which is then followed by an extremely dangerous journey. The process of migrating to a new country consists of a loss of familiarity: family, language, society, and home. Further, common threats on the journey include physical and sexual abuse; abduction and exploitation by human traffickers, drug smugglers, and prostitution rings; theft and robbery; rape; and death.⁸²

These struggles are further exacerbated as individuals encounter post-migration stressors, including "stays in detention centers, immigration proceedings[,] and social context."⁸³ Additionally, the remote location of these detention centers makes them difficult to reach, "impeding access by family, friends and legal counsel."⁸⁴ Moreover, the Trump administration tried to eliminate the requirement that these facilities be state licensed, which will result in the DHS becoming its own controlling authority on facility conditions.⁸⁵ The Trump administration further attempted to eradicate the twenty-day holding limit imposed by *Flores*, which would only further the children's trauma.⁸⁶ Thus, it does not seem as if the government formulated any of these processes with the children's best interests in mind.

B. Acknowledging the Difference Between Children and Adults

The US immigration system has not entirely acknowledged the clear distinction between adults and children, nor has it applied or reformed

79. *Id.*

80. *Id.*

81. *Id.*

82. Kenneth E. Miller, *A Perilous Journey: The Plight of Unaccompanied Minors*, PSYCHOL. TODAY (Oct. 31, 2017), <https://www.psychologytoday.com/us/blog/the-refugee-experience/201710/perilous-journey-the-plight-unaccompanied-minors>.

83. Kiara Alvarez & Margarita Alegria, *Understanding and Addressing the Needs of Unaccompanied Immigrant Minors*, AM. PSYCHOL. ASS'N (June 2016), <https://www.apa.org/pi/families/resources/newsletter/2016/06/immigrant-minors>.

84. Margulies, *supra* note 29.

85. *Id.*

86. *Id.*

the law according to these distinctions.⁸⁷ In order to effectively advocate for children while also recognizing these differences, it is necessary that children's rights embody agency (i.e., a voice of autonomy free from state intervention). It is also imperative that the immigration system identify certain developmental needs of children that the state should provide for, or at least establish, as a requirement.

The lack of an explicitly defined distinction between children and adults is partially due to the assumption that children are dependent on adult parents and guardians, and are thus incapable of making decisions. Though this is true, we must look to the issue of the lack of specifically tailored rights which take into account children's vulnerability and developing personalities, their inability to make informed decisions, and the significance of the parental role in child-rearing.⁸⁸ Justifications against such an approach emphasize that parental rights to raise children along with the state's right to protect children effectively lead to an acceptable delineation of children's rights.⁸⁹ Further, courts have also stated that children need protection, not rights.⁹⁰

These children carry another label that classifies them as a group with no rights: aliens. They are still, more often than not, seen as illegal immigrants by law enforcement, and "the law enforcement approach toward [these] migrants [is to] [prioritize] their 'alien' status over their status as children."⁹¹ Immigration law limits "the role of children and the value placed on their interests."⁹² By defining children as dependent on their parents, parental possession and control supersede, and are seen as, one of the few rights granted to immigrants.⁹³ Through these narrow definitions, immigration law treats children "as passive objects and not actors in the immigration system."⁹⁴ As David Thronson says, "[i]f children are viewed as passive, it seems only natural to deny agency to children in immigration law and, more broadly, to limit the use of children and their interests as organizing forces in family immigration."⁹⁵

87. See Aronson, *supra* note 2, at 23.

88. See *Bellotti v. Baird*, 443 US 622, 634 (1979).

89. See *Santosky v. Kramer*, 455 US 745, 758 (1982); *Pierce v. Soc'y of the Sisters*, 268 US 510, 535 (1925); *Meyer v. Nebraska*, 262 US 390, 399 (1923).

90. *Santosky v. Kramer*, 455 US 745, 758 (1982).

91. LAUREN HEIDBRINK, *MIGRANT YOUTH, TRANSNATIONAL FAMILIES, AND THE STATE: CARE AND CONTESTED INTERESTS* 42 (2014).

92. David B. Thronson, *You Can't Get Here from Here: Toward a More Child-Centered Immigration Law*, 14 VA. J. SOC. POL'Y & L. 58, 68 (2006).

93. *Id.* at 69.

94. *Id.*

95. *Id.*

By contrast, unaccompanied minors that arrive at the border are only eligible to apply for the same types of visas as adults, with the exception of SIJS.⁹⁶ Immigration law does not “tailor substantive or procedural protections to their age or development.”⁹⁷ This entails that children, like adults, must navigate the immigration system without any right to government-funded or appointed counsel.

III. WHAT’S NEXT?: REFORM APPROACHES

The concept of protecting a child’s best interests requires that immigration reform joins together what it has been trying to achieve separately: grant children dignity and autonomy, while also taking into consideration the fact that they are *relatively* more vulnerable subjects than adults. It is important, in discussing reform, to take account of everything “from immigration judges to the laws (and the body politic by extension) to the government lawyers overzealously deporting immigrants and the underperforming private immigration bar,”⁹⁸ to ensure the liberty interests of these individuals.

Various proposals have been suggested to grant more rights to unaccompanied minors and to better their experience within the immigration system. These include an exception to the Immigration and Nationality Act for unaccompanied minors to be appointed counsel,⁹⁹ the elimination of the distinction between unaccompanied minors from contiguous nations and unaccompanied minors from noncontiguous nations in the TVPRA, and the application of strict scrutiny to review equal protection claims of undocumented immigrants.¹⁰⁰

For the purpose of this note, I will first examine the Canadian immigration model, along with certain international doctrines. I will also propose reformative approaches that could be taken by relevant US government agencies or the legislature.

Developed, liberal communities worldwide have taken in immigrant and refugee children who have fled their countries out of fear for their lives. Canada has been said to be a “pioneer” in this respect, taking in

96. David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165, 1187 (2006). See also Aronson, *supra* note 2, at 23.

97. *Id.* at 1186.

98. Peter Afrasiabi, *Immigration Law: Lost Children*, 54 ORANGE CNTY L. 22, 22 (2012).

99. Amanda K. Sewanan, *The Right to Appointed Counsel: The Case for Unaccompanied Immigrant Children*, 41 CARDOZO L. REV. 317, 323 (2019).

100. Scott Stottlemire, *Strict Scrutiny for Undocumented Childhood Arrivals*, 18 J. GENDER RACE & JUST. 289, 291 (2015).

refugees as recently as 2015 when the Syrian refugee crisis hit.¹⁰¹ The Canadian Government's website, in its introduction to its private refugee sponsorship program, states, "Each year, millions of people around the world are forced to flee their homeland to escape persecution, war or severe human rights abuses. Often, these people are permanently displaced and are never able to return home."¹⁰²

Canada's refugee program was established in 1979 and allows citizens and permanent residents to provide additional opportunities for incoming refugees to ease their transition.¹⁰³ In 2015, the refugee sponsorship program accepted approximately 40,000 Syrian refugees.¹⁰⁴ The model attracted global attention, with the new government pledging to export the approach to other countries.¹⁰⁵ The refugee program's success has been attributed to the "network of advocates . . . provid[ing] material support and also advice, contacts, and instant social relationships."¹⁰⁶ Meanwhile, Canada experienced the Syrian refugee crisis at the same time that the United States was experiencing its migrant crisis of refugees from Central America,¹⁰⁷ but both countries' reactions differed significantly.

The United States has signed the UN Convention on the Rights of the Child (UNCRC), but it remains the only country that has not yet ratified UNCRC.¹⁰⁸ Though the denial of refugee or asylum status remains up to authorities' discretion, if the US were to implement UNCRC, children would at least be given an opportunity for fair consideration.¹⁰⁹ Additionally, the 1967 Protocol to the Convention Relating to the Status of Refugees (Refugee Protocol)¹¹⁰ aims to protect

101. Sadiya Ansari, *What Do Borders Really Do?*, UNI. OF TORONTO MAG. (Oct. 2, 2019), <https://magazine.utoronto.ca/research-ideas/culture-society/what-do-borders-really-do-immigration-ethics/>.

102. *Introduction: Guide to the Private Sponsorship of Refugees Program*, GOV'T CAN., <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/guide-private-sponsorship-refugees-program/section-1.html> (last updated Nov. 2, 2018).

103. *Id.*

104. JENNIFER HYNDMAN, WILLIAM PAYNE & SHAUNA JIMENEZ, *THE STATE OF PRIVATE REFUGEE SPONSORSHIP IN CANADA* 4 (2016).

105. Ansari, *supra* note 101.

106. *Id.*

107. Eliana Corona, *The Reception and Processing of Minors in the United States in Comparison to that of Australia and Canada: Would Being a Party to the UN Convention on the Right of the Child Make a Difference in US Courts?*, 40 HASTINGS INT'L & COMP. L. REV. 205, 205 (2017).

108. *See id.* at 207.

109. *See id.*

110. United Nations High Commissioner for Refugees, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (Sept. 2011), <http://www.unhcr.org/4ec262df9.html>.

refugees (i.e., the most vulnerable people in the world).¹¹¹ Both Canada and the United States have signed this document.¹¹² Although UNCRC explicitly included the definition of an asylum seeker, it has “created the international standard for evaluating an asylum seeker’s claim of persecution.”¹¹³ As a signatory to both documents, Canada has incorporated a definition of a “Convention Refugee,” based on UNCRC, but codified in the Immigration and Refugee Protection Act.¹¹⁴ This has further resulted in Canada requiring that the relevant immigration authorities grant refugees access to courts in order to make their claims and also grant them a full hearing or review of their claims.¹¹⁵

In the case of unaccompanied minors, Canada takes specific measures. Because Article 22 of UNCRC states that children must “receive appropriate protection and humanitarian assistance,”¹¹⁶ the Canadian system designates a representative for minor applicants to help them understand the process.¹¹⁷ Furthermore, Canada takes its own steps to align with the best-interest standard attributed to children’s well-being. For instance, in 1996, the Immigration and Refugee Board of Canada issued the “Child Refugee Claimants: Procedural and Evidentiary Issues” guidance document that distinctly identified the vulnerability of children, as they cannot articulate their claims effectively, and thus established a different procedure that the court must follow when dealing with an unaccompanied minor’s claim.¹¹⁸ These guidelines conform to UNCRC obligations,¹¹⁹ indicating that the Canadian immigration system considers UNCRC an important foundational basis for its immigration laws for minors. The implementation of these guidelines “filled an important gap and established how committed [Canada is] to protecting interests of unaccompanied minors in their immigration system.”¹²⁰

The United States can similarly adopt its own private refugee sponsorship program, which poses numerous benefits. First and foremost, the possibility of entering the country through legal methods is greater, resulting in less illegal immigrants attempting to cross the border, especially since a large number of these have recently been

111. Corona, *supra* note 107, at 207.

112. *See id.*

113. *Id.* at 209.

114. *Id.*

115. Immigration and Refugee Protection Act (IRPA), S.C. 2001, c 27 (Can.).

116. UNCRC, *supra* note 71, at art. 9(4).

117. Corona, *supra* note 107, at 210-11. *See also* IMMIGR. & REFUGEE BOARD CAN., <https://www.irb-cisr.gc.ca/en/pages/index.aspx#note2>.

118. Corona, *supra* note 107, at 211.

119. *Id.*

120. *Id.* For case discussion regarding Canadian court results, see *id.* 212-14.

unaccompanied minors.¹²¹ Second, by default, adopting a private refugee sponsorship program will decrease the burden on the immigration system and on the federal agencies responsible for managing the migrant crisis. Third, the anti-immigration sentiments that became increasingly evident during President Trump's time in office may diminish. Fourth, private sponsors who are US citizens or residents can give these unaccompanied minors a better life and a better transition to a new country, primarily because for sponsors this is familiar territory.

The United States is a signatory of UNCRC, but it has not yet ratified UNCRC.¹²² Although UNCRC led the United States to change the standard to avoid deportation from showing "a clear probability of persecution" to "a well-founded fear of persecution,"¹²³ it has become evident that this standard itself is still difficult to meet for defendants in immigration proceedings, especially under recent administrations. Though UNCRC triggered certain changes in US domestic law, it is also important that the United States ratify UNCRC and implement its laws according to the Convention's principles. Currently, although the United States cannot enact legislation that conflicts with UNCRC provisions, it is also not obligated to enforce them.¹²⁴

One of UNCRC's fundamental principles is the child's best interest, which includes a child's right to "family, a name, a nationality, and an education, as well as protection from abuse, abandonment, or neglect."¹²⁵ The United States must follow this guideline and adopt a best-standard policy that applies on a uniform federal level. A best-interest analysis will be necessarily individualized to each child, taking their experiences into account. This analysis would also be in conjunction with the *Flores* settlement agreement, which sought the least restrictive setting for children, requiring individual child assessment.¹²⁶ It could easily be argued that US law, in not taking these principles into account, is infringing on international norms that recognize the specific needs and rights of children in legal proceedings. Furthermore, US family law cases repeatedly emphasize the best-interest standard; thus, there is no reason why the same practices

121. Ainsley, *supra* note 4.

122. United Nations High Commissioner for Refugees, States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, (July 28, 1951), <https://www.unhcr.org/en-us/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html>.

123. *INS v. Stevic*, 467 US 407, 413 (1984).

124. Pulitzer, *supra* note 18, at 209.

125. *Id.*

126. BYRNE & MILLER, *supra* note 6, at 6.

should not be true in the immigration context, since children are children irrespective of their national identities.

Requiring children to represent themselves *pro se*, as is expected under US immigration policy, amounts to the government taking advantage of these children. Children's rights differ from adults in that their individual needs must be considered each step of the way, by immigration authorities, law enforcement, and judges. The US government cannot rationally expect already traumatized children, who do not speak the language and do not understand their rights, to state their claims effectively. Instead, the system treats them as adults and sentences them to removal proceedings whenever it finds that the minor does not have a case. Like Canada, the United States must implement a system that gives these unaccompanied minors the right to *government-provided* counsel. As mentioned above, *Gault* emphasized this principle, noting that it is a due process requirement that children be granted counsel rights when their liberty is at stake.¹²⁷ There are several similarities between juvenile delinquency (i.e., criminal) and immigration (i.e., civil) proceedings. Each proceeding consists of a minor child—who has been apprehended by law enforcement and is naturally in a coercive situation—attempting to navigate a web of policies and procedures. These situations induce fear, result in a potential loss of freedom or long periods in detention, and include judicial proceedings that determine the final outcome. Thus, unaccompanied minors deserve the right to counsel in order to satisfy constitutional due process in immigration proceedings. As one scholar stated, the child requires “the assistance of counsel to cope with the problems of law, to make skilled inquiry into the facts, to insist upon the regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it.”¹²⁸

The government must at least implement this right to counsel, if not entirely fund it. The government, through one of its subsidiary federal agencies, must assume responsibility for contracting counsel through *pro bono* immigration resources and have a financial allocation to this area of immigration proceedings. Executing this proposal benefits the system as well: unaccompanied minors without representation can remain stuck in the system for extensive periods of time, burdening judicial and financial resources. Contrary to this, however, the Ninth Circuit recently held in *C.J.L.G. v. Sessions* that the Due Process Clause does not “create a categorical right to court-appointed counsel for

127. In re *Gault*, 387 US 1, 106, 116 (1967).

128. Devon A. Corneal, *On the Way to Grandmother's House: Is US Immigration Policy More Dangerous Than the Big Bad Wolf for Unaccompanied Juvenile Aliens?*, 109 PENN ST. L. REV. 609, 648 (2004).

undocumented children,”¹²⁹ echoing the *Gault* distinction between civil and criminal proceedings. However, as aforementioned, immigration proceedings that “intersect with criminal law, are complex to litigate, and have been deemed ‘crimmigration’ by some scholars.”¹³⁰

Also, from the unaccompanied minor’s point of view, retaining a guaranteed right to counsel is beneficial. Having a lawyer significantly impacts a legal proceeding’s outcome. A recent study found that representation by an attorney was the single most important factor in determining whether a child remains in the United States or is ordered to leave.¹³¹ With an attorney present, seventy-three percent of the cases resulted in a minor being allowed to stay.¹³² Contrarily, when a child did not have legal representation, only fifteen percent were permitted to stay, with the remainder of cases resulting in deportation orders.¹³³ Beyond the numbers, legal representation allows these children to navigate the system better and more confidently, can play a role in reducing the amount of trauma they endure, and ultimately makes their journey worthwhile. When even trained legal professionals need special expertise to navigate the US immigration system, it is not far-fetched to believe that unaccompanied minors who have barely set foot in the United States will need at least minimal aid through the process.

The United States should focus short-term solutions, particularly in light of recent events, on bettering the conditions of US immigration detention centers. Further, the nation should tackle problems of hygiene and overcrowding through either diverting more financial resources to these institutions or through holding fundraisers to aid in the management of such issues. DHS and ICE should immediately release children who have family or next-of-kin to these individuals as sponsors, rather than separating children from their parents and then deeming them “unaccompanied.” The legislature must implement better training policies for all authorities who come into contact with these children. These policies should also take into account a distinct way of treating apprehended children while simultaneously granting them their autonomy. To minimize the impact these proceedings have on minors who have already suffered arduous journeys, the United States should eliminate exposure to conditions that can potentially retraumatize or

129. *C.J.L.G. v. Sessions*, 880 F.3d 1122 (9th Cir. 2018); Wendy Melissa Hernandez, *The Immigration Crisis in American Courts: Children Representing Themselves*, 47 HASTINGS CONST. L.Q. 145, 147 (2019).

130. Hernandez, *supra* note 129.

131. Representation for Unaccompanied Children in Immigration Court, TRAC IMMIGR. (Nov. 25, 2014), <http://trac.syr.edu/immigration/reports/371/>.

132. *Id.*

133. *Id.*

trigger them. Instead of subjecting children to these uniform proceedings, officials should conduct routine screening to determine if children have undergone experiences such as trafficking, abuse, or rape. Officials should work around language barriers and offer children a safe space within which they are able to communicate. Likewise, immigration authorities such as DHS and ICE should inform children of their rights and their options in a way that they can understand, as opposed to providing them with legal jargon. Most importantly, US immigration authorities should never compel children to attend immigration proceedings without an informed representative or counsel.

CONCLUSION

Joseph Carens, a University of Toronto professor, believes that Western democracies hold an inherent responsibility to implement open border policies and be inclusive of those who have already arrived.¹³⁴ Though he acknowledges that state sovereignty indicates that nations do have a right to erect walls at their borders, he claims that this does not absolve them of their moral duty to help migrants.¹³⁵ He has equated this to a feudal system, one in which birthright determines the chances one has in life and the borders within which one resides.¹³⁶ The United States has to at least begin approaching the migrant “crisis” from such a viewpoint.

Questions concerning the rights these individuals are entitled to, particularly within the context of the US immigration system, can no longer remain unanswered. This is due, at least in part, to the recent administrations’ treatment of minors. More importantly, however, it is imperative to seek solutions, or at least some enforcement of rights for minors, because unaccompanied children are the manifestation of a “paradoxical situation where those considered vulnerable and most in need of protection, care, and compassion may end up being particularly disadvantaged and discriminated against—objects of suspicion and fear rather than subjects with rights to dignity and due process.”¹³⁷

Simply said, unaccompanied minors, irrespective of origin, have faced extreme difficulties, and they should not be met with insurmountable obstacles when they arrive. From a security point of view, it is evident that the United States will take the necessary measures to regulate these arrivals. However, this note merely

134. Ansari, *supra* note 101.

135. *Id.*

136. *Id.*

137. Jacqueline Bhabha, “Not a Sack of Potatoes”: Moving and Removing Children Across Borders, 15 B.U. PUB. INT. L.J. 197, 212 (2006).

advocates for this process to be an easy one to navigate—one that takes minors' unique position into account and pushes for reform accordingly. Currently, the system ignores children's rights, and any further continuance of this will only result in gross violations of international law. The best-interest framework has to come into play, and objective standards to assess this interest must be established. Instead of building walls and separating families in detention centers, America must, at the very least, adopt standards which have been implemented in other nations that acknowledge the strife of these unaccompanied minors.