

The Measure of a Society: The Treatment of Unaccompanied Refugee and Immigrant Children in the United States

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“Placed on a boat bound for the United States by her very own parents, a 15-year-old girl fled China’s rigid family planning laws. Under these laws she was denied citizenship, education, and medical care. She came to this country alone and desperate. And what did our immigration authorities do when they found her? They held her in a juvenile jail in Portland, Oregon. She was held for eight months and was detained for an additional four months after being granted political asylum. At her asylum hearing, the young girl could not wipe away the tears from her face because her hands were chained to her waist. According to her lawyer, ‘her only crime was that her parents had put her on a boat so she could get a better life over here.’”¹

The above scenario, which took place about a decade ago, and many others like it, prompted advocates for unaccompanied children to begin a campaign to change the way the United States treats immigrant and refugee children who come to this country alone. Although progress has been made since this young girl’s case, the United States has a long way to go before its handling of these children truly takes into account their unique obstacles as children processed in a system that was designed for adults. Part I of this Article will provide an overview of the demographics of unaccompanied children in the United States and the problems these children face; Part II will discuss U.S. government care and treatment of these children; Part III will provide an overview of the forms of relief from deportation for which unaccompanied children may be eligible; Part IV will highlight the lack of legal representation available to these children; and Part V will discuss procedural aspects of U.S. immigration law that affect unaccompanied children.

I. OFTEN OVERLOOKED: UNACCOMPANIED CHILDREN IN THE UNITED STATES

The immigration reform debate is once again engrossing the nation. Congress and the Obama administration largely overlook one population when assessing the possibilities of overhauling the nation’s immigration sys-

¹ 147 CONG. REC. S398 (daily ed. Jan 22, 2001) (statement of Sen. Feinstein).

tem: children under age eighteen who arrive without their parents, legal guardians, or traditional caregivers.

The number of unaccompanied children who arrive in the U.S. each year has increased substantially in the past decade. In 1999, the Immigration and Naturalization Service (“INS”) held approximately 2000 unaccompanied children in juvenile jails.² In 2004, after responsibility for the care, custody, and placement of these children was transferred from INS to the Department of Health and Human Services (“HHS”), 6471 unaccompanied children were admitted into U.S. custody; from 2005–2007, more than 8000 were placed in federal care each year; in 2008, the number was 7211 children.³ Customs and Border Protection (“CBP”) apprehended more than 86,000 unauthorized alien juveniles at the border annually from 2001–2006.⁴ The vast majority of these children were from Mexico and were returned almost immediately;⁵ it is unknown how many of them were unaccompanied. In addition, countless others—as is typical of the undocumented—manage to cross the border, arrive undetected and fade into the shadows of American society.

Unaccompanied children are vulnerable before, during, and after their flight from their homelands because they lack adult protection and are unable to care for themselves properly.⁶ Many are escaping abuse, abandonment, neglect, or violations of their human rights such as forced prostitution, child marriage, female genital mutilation, and conscription.⁷ Others are fleeing gang recruitment in societies that are plagued by lawlessness and social disenfranchisement.⁸ Many come from countries experiencing or suffering the after-effects of armed conflict.⁹ In 2008, about 80% of children in U.S. custody were from Central America.¹⁰ The children are as young as infants, while the average age is approximately fifteen years old.¹¹

The trip to the United States is fraught with peril for unaccompanied children. They are easy prey for traffickers, who may offer them false promises of education, employment, or reuniting with family in the United States, only to put them into exploitative and abusive situations as child

² *Id.*

³ DIV. OF UNACCOMPANIED CHILD. SERVS., DEP’T OF HUM. HEALTH & SERVS., FISCAL YEAR SUMMARY: UAC STATISTICS (2008).

⁴ CHAD C. HADDAL, CONG. RESEARCH SERV., UNACCOMPANIED ALIEN CHILDREN: POLICIES AND ISSUES 21 (2007), available at <http://trac.syr.edu/immigration/library/P1642.pdf>.

⁵ JACQUELINE BHABHA & SUSAN SCHMIDT, SEEKING ASYLUM ALONE: UNACCOMPANIED AND SEPARATED CHILDREN AND REFUGEE PROTECTION IN THE U.S. 16 (2006).

⁶ The Secretary-General, *Report of the High Commissioner for Refugees, Questions Relating to Refugees, Returnees and Displaced Persons and Humanitarian Questions: Assistance to Unaccompanied Refugee Minors*, ¶ 2, delivered to the General Assembly, U.N. Doc A/52/273 (Aug. 7, 1997), available at <http://www.un.org/documents/ga/docs/52/plenary/a52-273.htm>.

⁷ *Id.* ¶¶ 4, 10, 13.

⁸ See, e.g., Miriam Jordan, *Family Seeks Asylum After Fleeing Gang*, WALL ST. J., August 21, 2009, at A3.

⁹ See generally BHABHA & SCHMIDT, *supra* note 5.

¹⁰ DIV. OF UNACCOMPANIED CHILD. SERVS., *supra* note 3.

¹¹ *Id.*

laborers or prostitutes. Predators often take advantage of the particular vulnerability of unaccompanied girls, who are “often the principal targets of sexual exploitation, abuse, and violence.”¹² Children smuggled by coyotes (human smugglers), who are paid by the family or the children themselves, also often face mistreatment by their smugglers when they arrive in the United States. Although these financial arrangements theoretically are completed once an immigrant crosses the border, the smugglers often become coercive or abusive and demand additional money from the children or their families.¹³

II. A WORK IN PROGRESS: CARE, CUSTODY, AND PLACEMENT OF CHILDREN

Once these children reach the United States, they are also vulnerable to mistreatment in the immigration system. The thousands of children apprehended each year by U.S. government officials find themselves in a system that expressly states that their best interests should not be considered by immigration judges when deciding eligibility for relief.¹⁴ The system also does not guarantee these children a lawyer to represent their claims or an advocate to ensure that their basic needs are met.¹⁵

When U.S. government officials first discover children who have entered the country illegally, these children are placed in the custody of the Department of Homeland Security (“DHS”).¹⁶ Under the Homeland Security Act of 2002, if children are found to be unaccompanied, they are transferred into the care and custody of an office within the HHS called the Office of Refugee Resettlement (“ORR”).¹⁷

Although the bifurcation of responsibility for unaccompanied children between DHS and ORR still lacks many basic and vital protections neces-

¹² The Secretary-General, *Report of the United Nations High Commissioner for Refugees, Questions Related to Refugees, Returnees and Displaced Persons and Humanitarian Questions: Assistance of Unaccompanied Refugee Minors*, ¶ 3, delivered to the General Assembly, U.N. Doc A/58/299 (Aug. 20, 2003), available at http://www.iom.ch/jahia/webdav/shared/mainsite/policy_and_research/un/58/A_58_299_en.pdf.

¹³ See Joel Millman, *Immigrants Become Hostages as Gangs Prey on Mexicans*, WALL ST. J., June 19, 2009, at A1; Kris Axtman, *Changing Landscape of an Underground Trade*, CHRISTIAN SCI. MONITOR, July 17, 2003, available at <http://www.csmonitor.com/2003/0717/p03s01-usgn.html>.

¹⁴ Memorandum from David L. Neal, Chief Immigration Judge, U.S. Dep’t of Justice, to All Immigration Judges, Court Admins., Judicial Law Clerks, & Immigration Court Staff, Operating Policies and Procedures Memorandum 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children (May 22, 2007), available at <http://www.usdoj.gov/eoir/efoia/ocij/oppm07/07-01.pdf> (“The concept of ‘best interest of the child’ does not negate the statute or the regulatory delegation of the Attorney General’s authority and cannot provide a basis for providing relief not sanctioned by law.”).

¹⁵ See 8 U.S.C. § 1362 (2006).

¹⁶ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(a)(4), 122 Stat. 5044, 8 U.S.C.A. § 1232.

¹⁷ Homeland Security Act of 2002, Pub. L. No. 107-296, § 462, 116 Stat. 2135, 2202 (codified as amended at 6 U.S.C. § 279).

sary for this vulnerable population, this system represents a significant improvement from the previous governmental approach. Prior to the creation of DHS in 2002, children, like adults, were held in the custody of Legacy Immigration and Naturalization Service (“INS” or “Legacy INS”),¹⁸ which applied the same model of punitive detention to children as it did to adults. Children were often detained in criminal facilities, commingled with the juvenile delinquent population.¹⁹ Even if held in one of INS’s special children’s centers, children faced detention-like conditions and had to contend with facility administrators more attuned to the priorities of INS than the needs of the children.²⁰

The detention of unaccompanied children has long been a point of contention between advocates and the government. The Immigration and Nationality Act gave Legacy INS broad authority to detain newcomers who lacked appropriate documentation to enter the United States.²¹ In 1985, advocates filed *Flores v. Meese*, a class action that challenged INS’s treatment and detention of children in its custody.²² The resulting settlement agreement, reached in 1996, requires that all children in INS custody be treated with “dignity, respect and special concern for their particular vulnerability as minors.”²³ The *Flores* settlement agreement also states that “INS shall place each detained minor in the least restrictive setting appropriate to the minor’s age and special needs”²⁴ and, when appropriate, release the child from detention to a family member, legal guardian, or entity willing to ensure the child’s well-being and timely appearance in immigration court.²⁵

Unfortunately, these standards were not routinely followed after *Flores*. Unaccompanied children were still detained for long periods of time, from

¹⁸ “Legacy INS” is the official term used to refer to the Immigration and Naturalization Service, which was abolished on March 1, 2003, when DHS was created.

¹⁹ *Unaccompanied Alien Child Protection Act of 2001: Hearing on S. 121 Before the Subcomm. on Immigration of the S. Comm. on the Judiciary*, 107th Cong. 21-27 (2002) (testimony of Edwin Larios Munoz (“I was locked in the cell around 18 hours a day The officers did not know why I or other children picked up by INS were being held there. They treated us the same as the others, as criminals. They were mean and aggressive and used a lot of bad words. They sometimes hit me with their sticks and shoved me and other boys when they thought that we were not following their orders.”)), available at http://judiciary.senate.gov/hearings/testimony.cfm?id=172&wit_id=237.

²⁰ See generally WOMEN’S COMM’N FOR REFUGEE WOMEN & CHILDREN, PRISON GUARD OR PARENT?: INS TREATMENT OF UNACCOMPANIED REFUGEE CHILDREN (2002), available at <http://www.unhcr.org/refworld/category,COI,,THEMGUIDE,,49ae53f32,0.html>; AMNESTY INT’L, UNITED STATES OF AMERICA: UNACCOMPANIED CHILDREN IN IMMIGRATION DETENTION (2003), available at http://www.amnestyusa.org/refugee/pdfs/children_detention.pdf.

²¹ Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163, 181 (codified as amended at 8 U.S.C. § 1181(a) (2006)).

²² 681 F. Supp. 665 (C.D. Cal. 1988) (class action challenging routine INS strip searches of apprehended juveniles).

²³ *Flores v. Reno*, No. CV 85-4544-RJK(Px), at 7 (C.D. Cal. filed Jan. 17, 1997) (stipulated settlement agreement), available at http://www.aclu.org/pdfs/immigrants/flores_v_meese_agreement.pdf.

²⁴ *Id.*

²⁵ *Id.* at 9-10.

more than six months to nearly two years.²⁶ Children were inappropriately detained in secure facilities, often because no beds were available in a less restrictive setting.²⁷ Children with behavioral or mental health issues were also often placed in secure facilities because of a lack of services tailored specifically to children with such issues.²⁸ Accusations of abuse at such facilities were prevalent.²⁹

Advocates repeatedly tried to alter the bureaucratic framework in order to more effectively address the special needs of unaccompanied children and better protect the children's interests. The Unaccompanied Alien Child Protection Act of 2000 ("UACPA"), introduced by Senator Dianne Feinstein, would have created an Office of Children's Services within INS to holistically address unaccompanied children's needs.³⁰ Although the bill was not enacted, some of its aims were realized in subsequent legislation. In particular, the Homeland Security Act of 2002, enacted primarily to improve the agency infrastructure for national security, created a unique legislative opportunity to transfer custody of unaccompanied children from INS to ORR.³¹ Sponsors of the bill, and of a companion bill in the House of Representatives, used the Act as a vehicle to attach the provisions of the UACPA related to care, custody, and placement.³² However, the sponsors did not incorporate UACPA's more extensive changes related to the legal and social services needs of children.

The positive impact of the Homeland Security Act of 2002 provisions has been unquestionable. ORR, which has decades of experience caring for resettled refugees including unaccompanied refugee children, has worked to develop a spectrum of placement options for the children in its care.³³ These options range from long-term foster care for particularly young children and children with special needs to secure care for children who have been charged or convicted of crimes.³⁴ This change is a testament to the impact of an approach that views these children as children first, and immigrants sec-

²⁶ See AMNESTY INT'L, *supra* note 20, at 52; Susan Benesch, *Haitians Trapped by "War on Terrorism,"* AMNESTY MAG., Fall 2003, available at <http://www.amnestyusa.org/amnestynow/haiti.html>.

²⁷ Ruth Teichroeb, *Jail Alternative Safeguards Teen Aliens: 3,000-mile trip from El Salvador ends in Fife facility,* SEATTLE POST-INTELLIGENCER, Dec. 2, 2004, at B1.

²⁸ WOMEN'S REFUGEE COMM'N & ORRICK, HERRINGTON & SUTCLIFFE LLP, *HALFWAY HOME: UNACCOMPANIED CHILDREN IN IMMIGRATION CUSTODY 15 (2009)* [hereinafter *HALFWAY HOME*], available at http://www.womenscommission.org/pdf/halfway_home.pdf.

²⁹ *Id.* at 28. All the children interviewed at the Abraxas Hector Garza Center in February 2007 expressed "concern and fear regarding what they described as excessive physical restraining techniques and the use of physical force."

³⁰ Unaccompanied Alien Child Protection Act of 2000, S. 3117, 106th Cong. (2000).

³¹ Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in scattered sections of 6 U.S.C.).

³² See *id.* § 462, 6 U.S.C. § 279.

³³ See *HALFWAY HOME*, *supra* note 28, at app. E.

³⁴ *Id.*

ond. However, much remains to be done to improve the care provided by ORR.

Outstanding problems with the ORR program for unaccompanied children include excessively long detention, even of those children ultimately released to caregivers, and the overuse of secure placements due to the unavailability of detention beds in less restrictive facilities.³⁵ Particularly lacking are bed spaces for children in need of therapeutic care;³⁶ ORR maintains an insufficient number of facilities dedicated to children requiring therapeutic care for a population which is characterized by trauma, depression, and other mental health challenges. In addition, ORR continues to utilize facilities in remote regions either to reduce costs or to keep children close to the border and therefore ready for deportation if ordered.³⁷ Placement in remote locations makes it even more difficult for the children to find representation, as most attorneys' offices, especially those with the resources to take on pro bono cases, are located in major metropolitan areas.

To address such problems, an independent organization with child welfare expertise should be hired to conduct an analysis of the ORR program to determine whether operations are consistent with child welfare best practices. In addition, HHS should codify the *Flores* settlement agreement standards into formal regulations, establish shelters for children in need of therapeutic services, and greatly expand the use of group homes and foster care. To accomplish this, Congress must appropriate a sufficient amount of resources to fund ORR's reform efforts.

III. JUVENILE INCONGRUENCE: IMPROPERLY TAILORED FORMS OF IMMIGRATION RELIEF AVAILABLE TO UNACCOMPANIED CHILDREN

The overarching obstacle to proper treatment for unaccompanied children is an immigration system that was never designed take children into account. For the most part, these immigration programs continue to treat immigrant children and adults identically under U.S. law.³⁸ Often, in this one-size-fits-all approach, children are, at best, squeezed into programs that are not designed for them. At worst, children in dire need of protection slip through the cracks and are deported.

The 2008 passage of the William Wilberforce Trafficking Victims Protection Reauthorization Act ("TVPRA") took the first major steps toward

³⁵ *Id.* at 18.

³⁶ LUTHERAN IMMIGRATION & REFUGEE SERVS., WORKING WITH REFUGEE AND IMMIGRANT CHILDREN: ISSUES OF CULTURE, LAW AND DEVELOPMENT 12 (1998).

³⁷ HALFWAY HOME, *supra* note 28, at 14.

³⁸ However, Special Immigrant Juvenile Status ("SIJS") is available to immigrant children under twenty-one years old. Immigration and Nationality Act § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J), amended by William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457 § 235(d)(1), 122 Stat. 5044; 8 U.S.C.A. § 1232; cf. 8 C.F.R. § 204.11 (2009); see *infra* notes 55-56 and accompanying text.

developing a more effective system to address the needs of unaccompanied children.³⁹ TVPRA states that an unaccompanied child in HHS custody “shall be promptly placed in the least restrictive setting that is in the best interests of the child.”⁴⁰ TVPRA also authorizes HHS to appoint independent child advocates to “effectively advocate for the best interests of the child.”⁴¹ However, the potential impact of these provisions is blunted by conflicting procedural elements and general failures of implementation.

For example, the Legacy INS guidelines that preceded TVPRA, and are still in effect, require that the “best interests” standard not play any role in the determination of a child’s status. The 1998 *Guidelines for Children’s Asylum Claims* state that:

Certain international instruments can provide helpful guidance and context on human rights norms. For example, the internationally recognized “best interests of the child” principle is a useful measure for determining appropriate interview procedures for child asylum seekers, although it does not play a role in determining substantive eligibility under the U.S. refugee definition.⁴²

Furthermore, the 2007 *Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children* issued by the Department of Justice’s Executive Office for Immigration Review (“EOIR”) dictate that immigration judges may consider “best interests” as a factor in establishing a “child appropriate” hearing environment with respect to their courtroom procedures, but not as a basis for providing immigration relief.⁴³

The imposed prohibition on considering “best interests” when determining a child’s status is especially problematic for those children who may be endangered by returning to their countries of origin. This is because establishing an asylum claim for a child can be extraordinarily difficult. Asylum is available only to individuals who have a well-founded fear of persecution on account of race, religion, nationality, political opinion, or membership in a particular social group.⁴⁴ Because children are not a protected class under this structure, most asylum claims are argued on the “so-

³⁹ Pub. L. No. 110-457, 122 Stat. 5044 (codified as amended in scattered sections of 8, 18 & 22 U.S.C.)

⁴⁰ *Id.* § 235(c)(2), 122 Stat. at 5078, 8 U.S.C.A. § 1232(c)(2).

⁴¹ *Id.* § 235(c)(6), 102 Stat. at 5079, 8 U.S.C.A. § 1232(c)(6).

⁴² Memorandum from Jeff Weiss, Acting Dir., Office of Int’l Affairs, to Asylum Officers, Immigration Officers, & Headquarters Coordinators (Asylum and Refugees), *Guidelines for Children’s Asylum Claims* (Dec. 10, 1998), available at http://www.uscis.gov/files/press_release/ChildrensGuidelines121098.pdf.

⁴³ Memorandum from David L. Neal, *supra* note 14. “The concept of ‘best interests of the child’ does not negate the statute or the regulatory delegation of the Attorney General’s authority and cannot provide a basis for providing relief not sanctioned by law. Rather, this concept is a factor that relates to the immigration judge’s discretion in taking steps to ensure that a ‘child appropriate’ hearing environment is established, allowing a child to discuss freely the elements and details of his or her claim.” *Id.*

⁴⁴ 8 U.S.C. § 1158(b) (2006).

cial group” grounds. While this is the most litigated area in the asylum definition, adjudicators struggle to define the scope of “social group.”⁴⁵

Moreover, the forms of persecution experienced by children are often inflicted by non-state actors and take place in non-public settings. These include such abuses as domestic violence, child prostitution, persecution of street children, recruitment by criminal gangs, and female genital mutilation.⁴⁶ Adjudicators have been generally conservative in their approach to extending asylum protection to such categories. Use of domestic violence claims as the basis for asylum has been particularly hotly contested over the last eight years.⁴⁷

Gang-related asylum claims have also been largely regarded with skepticism, and recent case law has tended to disfavor the applicant. For example, a July 2008 decision by the Board of Immigration Appeals (“BIA”) found that a Honduran boy “failed to establish that he was a member of a particular social group of ‘persons resistant to gang membership,’ because the evidence failed to establish that members of Honduran society, or even gang members themselves, would perceive those opposed to gang membership as members of a social group.”⁴⁸ Despite the BIA’s categorical justification, the threat that gangs can pose to children who resist their recruitment is very real. In 2004, Edgar Chocoy told an immigration judge that gangs in Guatemala would kill him if he were forced to go home. He was denied asylum, sent back to Guatemala, and murdered seventeen days later.⁴⁹

Advocates have suggested that EOIR make binding on all immigration judges the Legacy INS *Guidelines for Children’s Asylum Claims* for cases

⁴⁵ See, e.g., *In re R-A-*, 22 I. & N. Dec. 906 (B.I.A. 1999).

⁴⁶ BHABHA & SCHMIDT, *supra* note 5, at 20.

⁴⁷ See Center for Gender & Refugee Studies, Documents and Information on Rody Alvarado’s Claim for Asylum in the U.S., available at <http://cgrrs.uchastings.edu/campaigns/alvarado.php> (last visited Oct. 28, 2009). Alvarado fled years of severe domestic abuse in Guatemala to come to the United States in 1995. An immigration judge granted her asylum, but the Board of Immigration Appeals (“BIA”) reversed the immigration judge’s decision in 1999. Attorney General Janet Reno vacated the BIA’s decision, and Legacy INS issued proposed regulations clarifying that victims of domestic violence and other gender-based persecution are eligible for asylum. However, these proposed regulations never became final. In March 2003, the BIA told Alvarado’s attorneys that Attorney General John Ashcroft had recertified the case to himself. Many thought that he would issue a decision to limit asylum in cases such as Alvarado’s. In February 2004, the Department of Homeland Security (“DHS”) filed a brief supporting asylum for Alvarado. The prior INS had initially opposed asylum in Ms. Alvarado’s case. DHS urged the Attorney General to grant asylum to Ms. Alvarado, but not to issue a broad decision that could impact other cases. DHS stated that it planned to issue regulations that would provide guidance in cases involving similar issues. Human Rights First, *AG Ashcroft Sends Domestic Violence Case Back to Appeals Board*, ASYLUM PROTECTION NEWS 35 (Jan. 2005), http://www.humanrightsfirst.org/asylum/torchlight/newsletter/newslet_35.htm. In 2008, Attorney General Michael Mukasey ordered the BIA to decide the case without waiting for the regulations to be finalized. Alvarado’s case is now before an immigration judge in San Francisco. Center for Gender & Refugee Studies, *supra*.

⁴⁸ *Matter of E-A-G*, 24 I. & N. Dec. 591 (B.I.A. 2008).

⁴⁹ Greg Campbell, *Remembering Edgar Chocoy*, FORT COLLINS NOW, Mar. 27, 2008, available at <http://www.fortcollinsnow.com/article/20080327/NEWS/230019754>.

involving unaccompanied children,⁵⁰ under which Edgar would likely have been deemed eligible for asylum since he experienced real fear and persecution. In denying Edgar's case, the immigration judge "felt that that Edgar, a child of fifteen, could hide from the gang somewhere in a country of 13 million people."⁵¹ According to the American Immigration Lawyers Association, the immigration judge denied his claim because he felt that a "person who had committed errors in the past 'even though a juvenile' is not entitled to asylum."⁵² Binding guidelines would have required the immigration judge to recognize that children cannot be expected to relocate inside their country to escape persecution and that a child's age should ameliorate her criminal activity from being a defining factor in eligibility for asylum.

Advocates have also suggested a new temporary visa category for children facing extreme hardship if removed from the United States and more extensive training for immigration judges and trial attorneys focusing on how to address children's unique needs in court.⁵³ TVPRA makes further progress in addressing cases like Edgar's by establishing that applications from children seeking asylum and other forms of relief "shall be governed by regulations which take into account the specialized needs of unaccompanied alien children and which address both procedural and substantive aspects of handling unaccompanied alien children's cases."⁵⁴

Several alternatives to formal asylum for children also remain underutilized. Special Immigrant Juvenile Status ("SIJS") is available to children found to be abused, abandoned, or neglected by a domestic juvenile court.⁵⁵ If a court finds one of these circumstances present, a child becomes eligible to petition for SIJS, which later allows for adjustment to permanent residence.⁵⁶ Again, SIJS has historically been underutilized for unaccompanied children in federal custody. Legacy INS, and subsequently DHS's Immigration and Customs Enforcement, insisted that such children obtain permission to pursue a juvenile court finding of dependence. TVPRA has shifted this responsibility to ORR,⁵⁷ and it is as yet unknown whether this change will lead to greater provision of advance consent to proceed to juvenile court.

Unaccompanied children can also pursue the T visa, which allows both child and adult victims of especially brutal forms of trafficking to remain in

⁵⁰ Letter from American Immigration Lawyers Ass'n to Tom Ridge, Sec., U.S. Dep't of Homeland Sec. et al., (July 1, 2004) (advocating reforms for children seeking asylum), *available at* <http://www.aila.org/content/default.aspx?docid=10988>.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(d)(8), 122 Stat. 5044, 5081.

⁵⁵ 8 U.S.C. § 1101(a)(27)(J)(i) (2006).

⁵⁶ 8 C.F.R. § 204.11(b) (2009).

⁵⁷ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(d)(1)(B)(ii), 122 Stat. 5044, 5079-80, 8 U.S.C.A. § 1232(b)(1).

the United States; the U visa, available to non-citizens who have suffered substantial physical or mental abuse resulting from a wide range of criminal activity and who are involved in the investigation or prosecution of the crime; or voluntary departure, for children who agree to return home.⁵⁸ Under changes enacted as part of TVPRA, the U.S. government must assume the costs of voluntary departure for unaccompanied children.⁵⁹ However, it is not made clear in the TVPRA exactly which agency should fund these departures.⁶⁰

TVPRA is a step toward the consideration of best interests in the treatment of unaccompanied children, but full implementation that will translate into real changes in the lives of these children will take some time. Ultimately, the U.S. government must recognize that current immigration programs do not adequately safeguard immigrant and refugee children who are best protected by remaining in the United States.

IV. THE BIGGEST GAP: LACK OF LEGAL REPRESENTATION

The effort to ensure that U.S. immigration laws provide appropriate legal representation to unaccompanied children has been significantly more challenging than efforts to ensure adequate care, custody, and placement of children. Some positive steps have been taken, but the system still lacks a holistic approach to ensuring the representation, protection, and well-being of unaccompanied children.

Unlike in many domestic court proceedings,⁶¹ the U.S. government provides no appointed counsel for unaccompanied children in immigration proceedings. As a result, more than half of unaccompanied children do not have lawyers.⁶² Children with limited education and English skills are therefore pitted against trained government attorneys and before administrative judges. These proceedings rely on a highly complex system of arcane rules, and children must adhere to the same standards and burdens of proof as adult immigrants. Without counsel, the children are unlikely to understand the procedures they face and the options and remedies that may be available to them under the law.

The positive results that can be achieved when children are represented by counsel are striking. Studies have shown that “represented clients win

⁵⁸ Victims of Trafficking and Violence Prevention Act of 2000, §§ 107(e)(4), 1513(c), Pub. L. No. 106-386, 114 Stat. 1464, 1479, 1535-36 (as amended, 8 U.S.C. §§ 1101, 1184).

⁵⁹ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(a)(5)(D)(ii), 122 Stat. 5044, 5077, 8 U.S.C.A. § 1232(a)(5)(D)(ii).

⁶⁰ *See id.*

⁶¹ *See, e.g., In re Gault*, 387 U.S. 1, 35-37, 41 (1967).

⁶² OLGA BYRNE, VERA INST. OF JUSTICE, UNACCOMPANIED CHILDREN IN THE UNITED STATES: A LITERATURE REVIEW (2008) (citing Claire L. Workman, *Kids are People Too: Empower Unaccompanied Minor Aliens Through Legislative Reform*, 3 WASH. U. GLOBAL STUD. L. REV. 223, 233 (2004); OFFICE OF THE INSPECTOR GEN., UNACCOMPANIED JUVENILES IN INS CUSTODY, REPORT I-2001-009 (2001), available at <http://www.justice.gov/oig/reports/INS/e0109/index.htm>).

their cases at a rate that is about three times higher than the rate for unrepresented clients.”⁶³ Even for children ultimately not found eligible for relief, legal counsel can be critical. A lawyer can explain to a child that return is her only option and can seek to assure that she is returned under the most humane circumstances possible. This can limit the child’s time in custody and save the U.S. government costs associated with adjudication and detention.⁶⁴

The Unaccompanied Alien Child Protection Act of 2000, as originally introduced by Senator Dianne Feinstein, took the dramatic step of mandating that the Department of Justice ensure that all unaccompanied children have counsel, including, if necessary, counsel appointed at the expense of the government.⁶⁵ The legislation also encouraged the Department of Justice to contract with legal service providers who specialize in meeting the legal needs of unaccompanied children in immigration proceedings.⁶⁶

Unfortunately, the provision providing for government funded appointed counsel was removed from the legislation. Under the final language of Section 292 of the Immigration and Nationality Act, persons in removal proceedings have “the privilege of being represented,” but “at no expense to the Government.”⁶⁷ Despite the fact that immigration proceedings can have life or death consequences and are extremely complicated—and that children have difficulty grasping the complexity or profundity of such proceedings—Congress seemingly feared that it might open the door to similar efforts on behalf of other immigrant groups.⁶⁸

Nonetheless, some progress was made. The Homeland Security Act included language that charged ORR with:

developing a plan to be submitted to Congress on how to ensure that qualified and independent legal counsel is timely appointed to represent the interests of each such child, consistent with the law regarding appointment of counsel that is in effect on the date of the enactment of this Act.⁶⁹

This language provided an opportunity for ORR to create a pilot infrastructure to undergird the provision of pro bono legal services to unaccompanied children.

⁶³ Jaya Ramji-Nogales, Andrew I. Schoenholtz & Phillip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 376 (2007).

⁶⁴ NINA SIULC ET AL., VERA INST. OF JUSTICE, IMPROVING EFFICIENCY AND PROMOTING JUSTICE IN THE IMMIGRATION SYSTEM (2008).

⁶⁵ Unaccompanied Alien Child Protection Act of 2000, S. 3117, 106th Cong. (2000).

⁶⁶ *Id.*

⁶⁷ 8 U.S.C. § 1362 (2006) (“In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, 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.”).

⁶⁸ BHABHA & SCHMIDT, *supra* note 5, at 104.

⁶⁹ Homeland Security Act of 2002, Pub. L. No. 107-296, § 462, 116 Stat. 2135, 2203 (codified as amended at 6 U.S.C. § 279(b)(1)(A)).

In 2005, ORR contracted with the Vera Institute of Justice to manage the Unaccompanied Children Pro Bono Program, designed to develop and test ways to meet the legal needs of unaccompanied children.⁷⁰ Administered in partnership with fourteen nongovernmental organizations, this project made notable strides in ensuring that unaccompanied children have increased access to pro bono counsel.⁷¹ TVPRA also advanced this cause by directing HHS to ensure “to the greatest extent practicable” that all unaccompanied alien children who have been in DHS custody have counsel to represent them in immigration proceedings.⁷²

While these steps are positive and will result in greater numbers of represented children, the system remains inherently unfair and inconsistent with American principles of justice and due process, because it propels children through a complex immigration system without the guaranteed guidance of legal counsel. The availability of nongovernment organizations that provide legal services is no substitute. Although other legal service providers can assist, their resources are often insufficient. Immigration detainees are often located in rural areas where pro bono services are not readily available, such as along the Texas border where legal resources are scarce.⁷³ In addition, some children’s cases are not accepted by pro bono counsel either because their cases require swift and immediate action or because their cases involve considerable complexities. Thus, the government will have to directly fund provision of counsel if these gaps are to be addressed.

In addition to receiving counsel, the government should assign unaccompanied children child welfare experts. A child welfare expert can approach each case holistically by identifying the best interests of the child and eliciting as many details as possible about a child’s situation in order to determine her eligibility for relief. While the TVPRA does authorize HHS to appoint independent child advocates, such as social workers with child welfare expertise, Congress has not sufficiently funded these appointments.

Though Congress has made strides, funding is needed for these important directives to have the desired impact. Congress must allocate sufficient funding to support the appointment of child advocates and the TVPRA directive. Importantly, Congress must act to build on the progress demonstrated by the Vera Institute of Justice project and fund legal representation for unaccompanied children, if they are to receive meaningful protection.

⁷⁰ VERA INST. OF JUSTICE, UNACCOMPANIED CHILDREN PROGRAM (2009), <http://www.vera.org/project/unaccompanied-children-program>.

⁷¹ *Id.*

⁷² William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(c)(5), 122 Stat. 5044, 5079, 8 U.S.C.A. § 1232(c)(5).

⁷³ *Cf. Crossing the Border: Immigrants in Detention and Victims of Trafficking: Testimony before the Subcomm. on Border, Maritime and Global Counterterrorism of the H. Comm. of Homeland Security*, 110th Cong. 4 (2007) (statement of Christina Fiflis on behalf of the American Bar Association).

V. PROCEDURAL RECOMMENDATIONS FOR US IMMIGRATION LAW

Congress has recognized that adversarial hearings for unaccompanied children are not appropriate.⁷⁴ TVPRA tries to ensure that more children have access to nonadversarial hearings by giving initial jurisdiction of children's asylum claims to DHS asylum officers, instead of immigration courts.⁷⁵ Unfortunately, the underlying intent of this provision has been disregarded; children are still required to appear in immigration court and express their intent to apply for asylum before they are allowed to appear before an asylum officer.⁷⁶ DHS and the Department of Justice should reinterpret this provision using their regulatory powers and allow children to appear directly before the asylum office, thus obviating the need to appear in court.

TVPRA also mandates the screening of children from contiguous countries.⁷⁷ If implemented, this would result in better protection for children from Mexico, who are often immediately returned to their home country.⁷⁸ It is unclear how many of these children are currently properly screened to determine if they are victims of trafficking, are unaccompanied, or are otherwise particularly vulnerable. Adequate procedures must be put in place to ensure adherence to these new requirements.

TVPRA further states that applications for asylum and other forms of relief made by unaccompanied children "shall be governed by regulations which take into account the specialized needs of unaccompanied alien children and which address both procedural and substantive aspects of handling unaccompanied alien children's cases."⁷⁹ EOIR should systematically implement, through regulations, juvenile dockets in every immigration court that include the use of child-friendly procedures, as is recommended in its *Operating Policies and Procedures Memorandum*⁸⁰ and Legacy INS's *Guidelines for Children's Asylum Claims*.⁸¹

⁷⁴ See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235, 122 Stat. 5044, 5081, 8 U.S.C.A. § 1232.

⁷⁵ *Id.* § 235(d)(7)(C), 8 U.S.C.A. §§ 1232(a)(2), (3).

⁷⁶ Memorandum from Joseph E. Langlois, Chief, USCIS Asylum Div., to All Asylum Office Staff, Implementation of Statutory Change Providing USCIS with Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Children (Mar. 25, 2009), available at www.uscis.gov/files/nativedocuments/UAC_filings_25mar09.pdf.

⁷⁷ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(a)(2)(C), 122 Stat. 5044, 5075.

⁷⁸ BHABHA & SCHMIDT, *supra* note 5, at 16 (citing a DHS Office of Inspector General report that states that Customs and Border Protection apprehended 122,122 juveniles in fiscal year 2004 at the U.S. southern border, "of which 101,731 were from Mexico and 20,391 were 'Other-Than-Mexican.' Of this total figure, 103,274 were immediately returned (usually to Mexico, very rarely to Canada).").

⁷⁹ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(d)(8), 122 Stat. 5044, 5081.

⁸⁰ Memorandum from David L. Neal, *supra* note 14.

⁸¹ Memorandum from Jeff Weiss, Acting Dir., Office of Int'l Affairs, to Asylum Officers, Immigration Officers, & Headquarters Coordinators (Asylum & Refugees), Guidelines for

VI. GOING FORWARD

Progress has been made in recent years toward acknowledging the unique challenges that arise when a child arrives in the United States without his or her traditional caregiver. However, the question remains whether the immigration system as a whole will ever truly move away from enforcing U.S. immigration laws as if its only subjects were adults with the capacity to make migration decisions of their own volition. The passage of TVPRA marks an opportune moment to ensure that changes to the current system are grounded in the best interests of the child, and treat immigrant children first and foremost as children.

Comprehensive immigration reform is needed to address the gaps that remain in the United States' ad hoc treatment of unaccompanied children. It will be an uphill battle to ensure that these children's basic rights are protected, but the last ten years have shown that significant progress can be made by dedicated advocates. Only when the thousands of unaccompanied children in immigration court each year have adequate counsel will the United States uphold its obligation to protect unaccompanied children.