

Immigrant Youth Exceptionalism

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ABSTRACT

U.S. policies that address youth migration are deeply ambivalent. In some cases, children are seen as vulnerable, dependent, and in need of humanitarian relief; in other cases, they are seen as an immigration enforcement threat or a source of exploitable labor. This Article examines two high-profile programs for immigrant youth—Special Immigrant Juvenile Status (SIJS), and Deferred Action for Childhood Arrivals (DACA)—that illustrate how piecemeal approaches to immigration reform leave children and their families in limbo. Although SIJS and DACA represent the only hope many young people have for status in the United States, these narrow forms of relief come at the cost of family reunification and permanency. In addition to perpetuating harmful narratives about children’s worthiness and autonomy, these policies also rationalize the exclusion of parents and other family members. Policies that favor the migration of lone children, rather than intact families, also increases the likelihood of youth labor exploitation.

This Article posits that family separation and youth labor exploitation are systemic harms that result from the exceptional and liminal immigration relief available to young people. It concludes that immigration policy would benefit from widening the lens beyond immigrant youth exceptionalism, providing paths for family migration and legalization, and focusing on employer liability for youth labor exploitation rather than scrutinizing and punishing families.

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INTRODUCTION

From one perspective, children occupy a privileged position in U.S. humanitarian immigration policy. The specificity of immigration relief for youth—including Special Immigrant Juvenile Status (SIJS) and Deferred Action for Childhood Arrivals (DACA)—theoretically reflects the vulnerability, innocence, and aspirations of migrating and undocumented young people. However, while SIJS and DACA provide permission to work and some protection from deportation, these programs do not automatically result in permanent status. These programs also systematically exclude noncitizen family members from accompanying immigration relief. In this sense, SIJS and DACA are exemplars of what this Article refers to as “immigrant youth exceptionalism”—a policy rationale that justifies protecting the vulnerable immigrant child to the exclusion of others, even the child’s own family.

U.S. immigration programs for youth¹ take on greater significance as more young people make the journey to the United States. Many unaccompanied

¹There is no universally recognized definition of “child” or “youth.” Some global definitions of the latter encompass people up to age 35. Martina Belmonte & Simon McMahon, *Searching for Clarity: Defining and Mapping Youth Migration*, IOM (2019) https://publications.iom.int/system/files/pdf/mrs_59.pdf [<https://perma.cc/PR3T-YGVP>] at 2 (“In the European Union young people may range from 13 to 30 years of age. The UN and Global Migration Group define youth as any individual aged from 15 to 24. Other international organizations refer to young people between the ages of 10 and 24 years. The African Union’s Youth Charter defines youth or young people as every person between 15 and 35 years of age.”). In the United States, the term “child” is often used interchangeably with “minor,” in some states the age of majority is 19 (*see*,

young people are from El Salvador, Honduras, and Guatemala,² but young people migrate from all over the world.³ Border Patrol apprehensions increased from 38,833 unaccompanied minors in 2013 to 140,230 in 2021.⁴ Children are also an increasing proportion of Border Patrol apprehensions, though the number of children attempting to enter with family members has consistently been larger than the number of children travelling alone.⁵ In 2022, nearly one-third of all noncitizens in removal proceedings were age 17 or under.⁶ These immigration policies also affect the situation of undocumented youth and families who have resided in the United States long-term. Whereas seasonal-cross border movement was once common, restrictive immigration policies and enforcement practices that make border-crossing more dangerous have led to more family settlement. Accordingly, a growing number of young people live in mixed-status households.⁷

This Article contends that immigration policies that exclude family members by design pose significant harm to migrant youth—harms that have been largely overlooked in debates over immigration policy. Historically, immigration law has reflected conflicting views of children, vacillating between treating them as humanitarian subjects and as economic actors. This ambivalent view of migrant youth has eclipsed the vulnerability they face under ostensibly humanitarian, age-based immigration relief. While SIJS and DACA provide temporary relief for recipients, many young migrants struggle long-term with the uncertainty of their status and fear of separation from undocumented family members. Policies that prevent families from migrating together also increase the likelihood that youth will become familial providers, often working at a very young age and under difficult or even dangerous conditions. This article introduces immigration youth exceptionalism as a critique

e.g., Neb. Rev. Code § 43-2101) in others, it is age 21 (*see, e.g.*, Miss. Code § 1-3-27 (2020)). In U.S. immigration law, “child” generally refers to unmarried people under the age of 21. 8 U.S.C. § 1101(b)(1). The term “unaccompanied children” refers to youth who are age 17 or under. 6 USC § 279(g)(2). The term “youth,” as defined in the Violence Against Women Act, refers to young people between the ages of 11 and 24. 34 U.S.C. § 12291(a)(45). Due to variance in these definitions and the culture-bound significance of age, this Article will use the terms “youth” and “young people” to refer generally to individuals under age 21, and will also discuss age ranges associated with specific forms of immigration relief.

² *Fact Sheets and Data: Country of Origin*, U.S. DEPT OF HEALTH AND HUM. SERVS., OFFICE OF REFUGEE RESETTLEMENT (ORR), <https://www.acf.hhs.gov/orr/about/ucs/facts-and-data#countryoforigin> [https://perma.cc/38TH-3HQX] (May 14, 2024) (showing that, since 2012, the highest number of unaccompanied youth have come from Guatemala, Honduras, and El Salvador).

³ In FY 2023, youth from countries other than Guatemala, Honduras, El Salvador and Mexico represented 13% of arriving unaccompanied children. *Id.* *See also* Michele L. Statz, *Between Children and Transnational Economic Actors: The Discounted ‘Belongings’ of Young Chinese Migrants*, 39 PoLAR 4 (2017) (highlighting the experiences of unaccompanied youth from China).

⁴ *See* GROWING NUMBERS OF CHILDREN TRY TO ENTER THE U.S., TRANSACTIONAL REC. ACCESS CLEARINGHOUSE: IMMIGR. (June 28, 2022), <https://trac.syr.edu/immigration/reports/687/> [https://perma.cc/C32X-RNB9].

⁵ *Id.*

⁶ “One-Third of New Immigration Court Cases Are Children; One in Eight Are 0–4 Years of Age,” TRANSACTIONAL REC. ACCESS CLEARINGHOUSE: IMMIGR. (Mar. 17, 2022), <https://trac.syr.edu/immigration/reports/681/> [https://perma.cc/FS88-Q2RG].

⁷ WALTER J. NICHOLLS, *THE DREAMERS: HOW THE UNDOCUMENTED YOUTH MOVEMENT TRANSFORMED THE IMMIGRANT RIGHTS DEBATE* 27 (2013).

of these programs that systemically produce vulnerability for youth and their families alike.

* * *

This Article lays out a critique of immigrant youth exceptionalism in four parts. Part I defines the immigrant youth exceptionalism and examines the concept in three historic policy contexts: family-based immigration, humanitarian protection, and labor. This part also includes a discussion of two contemporary forms of immigration relief available to youth: Special Immigrant Juvenile Status (SIJS) and Deferred Action for Childhood Arrivals (DACA). Part II explores the phenomenon of legal liminality within current immigration policies, particularly the SIJS and DACA programs, and traces their ambivalent treatment of youth to political divides over humanitarian immigration responses and comprehensive immigration reform. This part highlights immigrant youth exceptionalism as a policy justification that simultaneously rationalizes the exclusion of noncitizen family units from immigration relief. Part III examines the state's outsized protection role in cases involving youth, as well as the consequences of familial harm, family separation, and labor exploitation that arise in these programs ostensibly designed to protect youth. This part examines the barriers that immigrant youth exceptionalism poses to the already fraught process of family reunification. It also examines how youth-specific immigration relief and the separation of children from their families compounds the power dynamics in exploitative workplaces. Part IV proposes a perspective to widen the lens on systemic harms affecting immigrant youth, framing the threats of deportation and the exploitation of underage workers as consequences of policies that remove immigrant youth from their family context.

I. IMMIGRANT YOUTH EXCEPTIONALISM IN U.S. IMMIGRATION POLICY

A. *Immigrant Youth Exceptionalism as a Policy Rationale*

Immigration law is generally constructed around policies of exclusion, with narrow exceptions carved out for relief. Immigration legal scholar Hiroshi Motomura points out that public understanding of the exceptionality of humanitarian relief is critical because it ensures that “few will associate it with legalization or amnesty.”⁸ The rationales for such policies and exclusions are underscored by narratives, which offer both explanations and solutions for social problems.⁹ These rationales and their accompanying storytelling are

⁸ Hiroshi Motomura, *The New Migration Law: Migrants, Refugees, and Citizens in an Anxious Age*, 105 CORNELL L. REV. 457, 484 (2020).

⁹ See CHARLES TILLY, *STORIES, IDENTITIES AND POLITICAL CHANGE* xi–xii (2002).

thus instrumental to state goals of immigration control, explaining and justifying who is worthy of protection and who must be subject to expulsion.¹⁰

In the present era, narratives around children are particularly compelling. There is more public support for people who are seen in need of protection,¹¹ and unaccompanied children in particular are more likely to be perceived as worthy given their “self-evident” vulnerability.¹² The United Nations High Commissioner for Refugees (UNHCR) considers age as one of the criteria in its Vulnerability Assessment Framework.¹³ Accordingly, age is one of many binary distinctions—“between accompanied and unaccompanied, healthy and infirmed, adults and children, able-bodied and disabled, and citizen or stateless”¹⁴—that separate the protected from the excluded in immigration law.

Exceptions in immigration law are thus about more than ameliorating suffering.¹⁵ Rebecca Hamlin has criticized states’ narrow reading of their protection obligations towards noncitizens, noting that this parsing of worthiness “benefits those states that want to keep people out by emphasizing the ways in which refugees are the exception to the rule” as entitled to admission and protection.¹⁶ As cultural anthropologist Lauren Heidbrink argues, programs that focus exclusively on children come at a larger social cost: categorical failure to recognize how states produce vulnerability, and a narrower scope of protection overall.¹⁷ This is evident in youth-specific immigration programs, which extend relief to young migrants without accompanying relief for parents and families.

B. Precedent for Youth Exceptionalism in U.S. Immigration Law and Enforcement

Immigrant youth exceptionalism is borne from the general idea that children should be treated differently from adults. It also reflects ambivalence as to how policies should reflect that difference. A recurring consideration in immigration law is the extent to which children are perceived as connected to a family unit. The law of family immigration—a longstanding policy model

¹⁰ See, e.g., Adrian Edwards, *UNHCR viewpoint: ‘Refugee’ or ‘migrant’ – Which is right?*, UNHCR (2016), <https://www.unhcr.org/us/news/stories/unhcr-viewpoint-refugee-or-migrant-which-right> [https://perma.cc/Q9UE-NAPU]; Emine Bilgen et al., *Are They Refugees or Economic Migrants? The Effect of Asylum Seekers’ Motivation to Migrate on Intentions to help Them*, 53 J. OF APPLIED SOC. PSYCH. 907 (2023).

¹¹ *Id.*

¹² CIARA GALLI, PRECARIOUS PROTECTIONS: UNACCOMPANIED MINORS SEEKING ASYLUM IN THE UNITED STATES 10 (2023); Lauren Heidbrink, *Anatomy of a Crisis: Governing Youth Mobility Through Vulnerability*, 47 J. ETHNIC & MIGRATION STUDIES 988, 995–96 (2021).

¹³ VULNERABILITY SCREENING TOOL - IDENTIFYING AND ADDRESSING VULNERABILITY: A TOOL FOR ASYLUM AND MIGRATION SYSTEMS, UNHCR (2016), <https://www.unhcr.org/us/media/unhcr-idc-vulnerability-screening-tool-identifying-and-addressing-vulnerability-tool- asylum> [https://perma.cc/X4X2-E62M].

¹⁴ LAUREN HEIDBRINK, MIGRANT YOUTH, TRANSNATIONAL FAMILIES, AND THE STATE 993 (2014).

¹⁵ See, e.g., Edwards, *supra* note 10; Bilgen et al., *supra* note 10, at 996.

¹⁶ REBECCA HAMLIN, CROSSING: HOW WE LABEL AND REACT TO PEOPLE ON THE MOVE 3 (2021), at 3.

¹⁷ Heidbrink, *supra* note 12, at 990.

within the U.S. immigration system—contemplates children as inseparable from and covered by the head of the family. However, such kinship ties are comparatively invisible in humanitarian immigration policies for youth. Youth participation in the labor force has been largely guided by labor commodification rather than familial connection. Children are thus recognized as part of family units where it benefits their admission to the United States, but there has been limited concern about children’s kinship arrangements if there is an interest in placing youth in adoptive or foster settings, or where there is an economic interest in their work.

1. Family-Based Immigration

The first formal immigration system in the United States, established in the 1920s, prioritized the nuclear family and its traditional roles for household members. In this arrangement, the presumption was that the male head of household was the primary immigrant and that his wife and children migrated with him as dependents.¹⁸ Children’s dependency was so entrenched in law that minors historically did not count toward visa quotas.¹⁹ Today, this categorical view of children as dependent family members is still a powerful paradigm in immigration policy, particularly given that 65% of all noncitizens are admitted each year through family-based immigration.²⁰ The fact that so many youth receive visas through family-based petitions each year contributes to the general impression that immigration law treats children favorably.²¹ However, family reunification categories still reflect the conceptions of family from the nineteenth and early twentieth centuries, slotting immigrants into rigid familial roles of husbands, wives, and children.²² Present-day family-based immigration law also centers adults as petitioners, “advanc[ing] family integrity . . . only in the narrow sense of creating opportunities for parents to align their children’s status with their own.”²³

Moreover, family-based immigration also has a deeply racialized history in the United States. Early immigration laws sought not only to reunify families but also to restrict immigration from certain countries. The Johnson-Reed Act of 1924 imposed a nationality quota that limited the number of immigrants each year to three percent of the U.S. population from each country, based on the 1890 census.²⁴ Because most immigrants from Southern and Eastern Europe arrived in the early 1900s, relatively few petitioners from

¹⁸ Anita O. Maddali, *Left Behind: The Dying Principle of Family Reunification Under Immigration Law*, 50 U. MICH. J. L. REFORM 107, 110 (2016).

¹⁹ *Id.* at 124.

²⁰ Zoya Gubernskaya and Joanna Dreby, *U.S. Immigration Policy and the Case for Family Unity*, 5 J. MIGRATION & HUM. SEC. 417, 419 (2017).

²¹ David B. Thronson, *Entering the Mainstream: Making Children Matter in Immigration Law*, 38 FORDHAM URB. L.J. 393, 396 (2010).

²² Kerry Abrams, *What Makes the Family Special?*, 80 U. CHI. L. REV. 7, 9 (2013).

²³ David B. Thronson, *You Can't Get There From Here: Toward a More Child-Centered Immigration Law*, 14 VA. J. SOC. POL'Y & L. 58, 69 (2006).

²⁴ Immigration Act of 1924 (Johnson-Reed Act, including the Asian Exclusion Act and National Origins Act), Pub. L. 68-139, 43 Stat. 153 at Sec. 11(a).

these countries could be admitted each year. Despite the sizable populations of immigrants from Asian countries present in the United States, no family-based visas were available to immigrants from Asia.²⁵ As the House Committee on Immigration and Naturalization Report on Restriction of Immigration made plain, the quota system was “used in an effort to preserve, as nearly as possible, the racial status quo in the United States.”²⁶

The nationality-based quota system was not eliminated until the Immigration and Nationality Act of 1965, which adopted a “unified quota” that capped admissions from each country at 20,000, with separate total caps for the Eastern and Western Hemispheres.²⁷ While the abandonment of nationality quotas was considered progressive, it had a particularly devastating effect on Mexican nationals. Labor migration from Mexico was already curtailed with the termination of the Bracero program in 1964, and family immigration options were limited by the quotas for the Western hemisphere.²⁸ As these previous legal developments limited the population that was eligible to petition, the unified quota increased the wait time for family unification. These cascading developments produced unequal access to family reunification, even with the elimination of nationality-based quotas.²⁹

The current rule imposes a global limit on available visas, with no more than 7% of the total allocated for nationals of a given country.³⁰ But, as observed in the case of Mexican nationals, the history of unequal access to family petitions shapes the populations with access to family-based immigration and the duration of their wait for permanent status. In particular, the per-country caps make for extremely long waits for immediate relatives and family-sponsored preference categories, particularly for countries where restrictions on immigration were more recently lifted, such as China, India, Mexico, and the Philippines.³¹ Although the 1990 Immigration Act authorized a higher number of family-sponsored immigrants, the additional visas went only to spouses and children of lawful permanent residents, and Mexican nationals still face a longer wait for visas than people from any other country.³² These long wait times mean that children regularly age out of dependent categories during the

²⁵ Exceptions for nationals of Japan (which had a “Gentleman’s Agreement” with the United States limiting total migration from Japan to the U.S) and the Philippines (which, at the time, was a colony of the United States).

²⁶ H.R. Rep. No. 68-350, pt. 1, at 16 (1924).

²⁷ U.S.C. §1151(a).

²⁸ The 20% of admissions reserved for employment-based immigration under the 1965 Immigration & Nationality Act was for workers performing “specified skilled or unskilled labor, not of a temporary or seasonal nature,” thereby excluding most agricultural workers. Immigration and Nationality Act of 1965, § 1, 79 Stat. 911, 911 (codified as amended at 8 U.S.C. §1151(a)).

²⁹ See, e.g., Stephen Lee, *Family Separation as Slow Death*, 119 COLUM. L. REV. 2319, 2337–38 (2019).

³⁰ Immigration and Nationality Act § 202.

³¹ See Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (1990); 8 U.S.C. 1152.

³² See Samuel W. Bettwy, *A Proposed Legislative Scheme to Solve the Mexican Immigration Problem*, 2 SAN DIEGO INT’L L.J. 93, 113 (2001); U.S. Dep’t of State, Visa Bulletin for May 2024, No. 89, Vol. X, <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2024/visa-bulletin-for-may-2024.html> [<https://perma.cc/5ZWJ-X6R7>] (Apr. 3, 2024) (showing that, for example, married sons and daughters of U.S. citizens who are nationals of Mexico who are currently eligible for permanent residence filed their petitions prior to October 2001).

wait,³³ affecting children's access to family reunification through the family-based immigration system.

2. Humanitarian Protection

As an understanding of childhood and child vulnerability has evolved, so too has the state's protection role. There is a long line of one-off U.S. immigration programs developed to assist youth in escaping conflict zones. U.S. civil society organizations organized, for example, the migration of children from the Basque region during the Spanish Civil War,³⁴ and later for Jewish children fleeing Germany and Austria during World War II.³⁵ In 1940, the U.S. Committee for the Care of European Children was formed to lobby for the admission of children from the region, arrange for their passage, and provide for their welfare.³⁶ Other notable "rescues" of children include Operation Peter (Pedro) Pan (evacuating 14,000 Cuban children in 1959 following Fidel Castro's coup)³⁷ and Operation Babylift (placing more than 2,500 Vietnamese children in U.S. orphanages).³⁸ While these children may have had living parents, the programs were designed only to bring children to safety, leaving their family members behind.³⁹ A more recent example is the Special Humanitarian Parole for Haitian Orphans program, developed in 2010 following a massive earthquake in Haiti. The USCIS International Operations Division Branch Chief for Programs at the time, Whitney A. Reitz, gave a speech about designing the program, entitled "Adoption: The Best Form of Protection."⁴⁰

³³ CHILD STATUS PROTECTION ACT (CPSA), U.S. CITIZENSHIP & IMMIGR. SERV., (Feb. 14, 2023), <https://www.uscis.gov/green-card/green-card-processes-and-procedures/child-status-protection-act-cspa> [<https://perma.cc/25SE-YU3W>] ("The Immigration and Nationality Act (INA) defines a child as a person who is both unmarried and under 21 years old. If someone applies for lawful permanent resident (LPR) status as a child but turns 21 before being approved for LPR status (also known as getting a Green Card), that person can no longer be considered a child for immigration purposes. This situation is commonly referred to as 'aging out' and often means that these applicants would have to file a new petition or application, wait even longer to get a Green Card, or may no longer be eligible for a Green Card."). In response to the widespread aging-out that resulted from long processing backlogs, Congress enacted the Child Status Protection Act (CSPA), which went into effect on August 6, 2002. Child Status Protection Act, Pub. L. No. 107-208 (2002). This preserves the age of children at the time of application for certain categories, such as immediate relatives. However, its application has been tested. See Lee, *supra* note 29, at 2343.

³⁴ See Anita Casavantes Bradford, *Better Off With 'Their Own People': Basque Refugee Children, Catholic Anti-Communism, and the Geopolitics of Compassion in FDR's America*, 14 J. HIST. CHILDHOOD & YOUTH 211 (2021) (highlighting the political failure of the program).

³⁵ See *In re German Jewish Children's Aid, Inc.*, 151 Misc. 834 (N.Y. Sup. Ct. 1934).

³⁶ See Michal Ostrovsky, "We Are Standing By": *Rescue Operations of the United States Committee for the Care of European Children*, 29 HOLOCAUST & GENOCIDE STUD. 230 (2015).

³⁷ See Operation Pedro Pan Group, *This Is Our Story*, <https://www.pedropan.org/history> [<https://perma.cc/CTY5-3GYG>].

³⁸ See Kathleen Ja Sook Bergquist, *Operation Babylift or Babyabduction? Implications of the Hague Convention on the Humanitarian Evacuation and "Rescue" of Children*, 52 INT'L. SOC. W. 621 (2009); DANA SACHS, *THE LIFE WE WERE GIVEN: OPERATION BABYLIFT, INTERNATIONAL ADOPTION, AND THE CHILDREN OF WAR IN VIETNAM* (2010).

³⁹ Daniel J. Steinbock, *The Admission of Unaccompanied Children into the United States*, 7 YALE L. & POL'Y REV. 137, 140-42, 152 (1989).

⁴⁰ Whitney A. Reitz, *Adoption: The Best Form of Protection*, delivered at the Pepperdine Law School International Adoption Conference (Feb. 8, 2013), 79 VITAL SPEECHES OF THE DAY (2013) at 148.

The restricted scope of this program was glaring, given the long history of U.S. rejection of asylum-seekers from Haiti and the lack of humanitarian response to political violence and economic desperation in the country.⁴¹ The nation was already in turmoil when the earthquake occurred, with the assassination of President Jovenel Moïse only two weeks prior.⁴² “[P]arents are—by far—the best form of protection we can give children who need it,” stated Reitz in her speech.⁴³ Yet this invocation of protection and the special role of parents rings hollow, given that immigration policy provided no path for Haitian families to obtain humanitarian protection in the United States.

As another recent example, many young migrants have entered the United States and found a pathway to permanent status through the admission procedures of the Refugee Act of 1980. The Refugee Act is best known as the law that allowed a national from any country to apply for asylum in the United States. However, it also authorized funding for care of unaccompanied children and established legal responsibility over placement and support with the Office of Refugee Resettlement.⁴⁴ The Homeland Security Act of 2002 created the Unaccompanied Alien Minor (UAM) (now Unaccompanied Child (UC)) program and charged the Office of Refugee Resettlement (ORR) with children’s care.⁴⁵ As will be discussed later in this Article, many of these unaccompanied children may be eligible to apply for Special Immigrant Juvenile Status, and may also have asylum claims based on youth-specific harm.

3. Labor

Since colonial times, there has been a relationship between young people’s migration—running the spectrum between voluntary and involuntary—and the demand for labor in the United States. By the time of the Industrial Revolution, many children and youth were engaged in waged labor, particularly in mills and factories.⁴⁶ Labor migration was extremely common prior to the immigration regulations of the early twentieth century. Cultural anthropologist Lauren Heidbrink observes that “[h]istorically, government programs have facilitated and even actively encouraged the movement of children.”⁴⁷

⁴¹ See, e.g., USCRI, *A History of Haitian Discrimination by United States Immigration Policy* (Sept. 2021), <https://refugees.org/wp-content/uploads/2021/09/Haiti-Snapshot.pdf> [<https://perma.cc/7RYX-E32X>]; Ibrahim Hirsi, *America’s Long History of Mistreating Haitian Migrants*, THE NATION (Oct. 12, 2021), <https://www.thenation.com/article/world/haiti-immigration-mistreatment/> [<https://perma.cc/3YRH-MLTU>].

⁴² See, e.g., INTERNATIONAL CRISIS GROUP, *HANDLING THE AFTERMATH OF HAITI’S PRESIDENTIAL ASSASSINATION* (Jul. 31, 2021), <https://www.crisisgroup.org/latin-america-caribbean/haiti/handling-aftermath-haitis-presidential-assassination> [<https://perma.cc/6JF9-ZBJA>].

⁴³ Reitz, *supra* note 40, at 151.

⁴⁴ 8 U.S.C. § 1522(d)(2)(A).

⁴⁵ Homeland Security Act of 2002, Pub. L. 107-296 (Nov. 25, 2002), § 462.

⁴⁶ Barbara Bennett Woodhouse, “*Who Owns the Child?*”: Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995, 1059 (1992) (“In 1900, one out of every six children between the ages of ten and fifteen worked for wages. One-third of the workforce in southern textile mills was children aged ten to thirteen.”).

⁴⁷ HEIDBRINK, *supra* note 14, at 3–4.

She observes that slavery, migration, and indentured servitude did not distinguish between children and adults, treating them only as “a vital unit of labor necessary for economic growth in predominantly agricultural regions.”⁴⁸ Unsurprisingly, demand for noncitizen labor caused these migrations—including child and youth migration—to persist even after regulations were put in place.⁴⁹

Limits on child labor emerged in the twentieth century, alongside the concept of the “sacred” child.⁵⁰ Nonetheless, the Supreme Court struck down proposed legislation to regulate child labor.⁵¹ The politics of child labor were contested, with some states passing child labor laws and others—motivated by price competition—continuing to rely on children’s work.⁵² Proposed federal child labor laws met strong opposition from southern states, where the ability to keep wages low was seen as essential to revitalizing the textile industry, as well as in northern states where conservative businesses were generally opposed to federal economic regulation.⁵³ Corporations opposed efforts to impose labor bans and compulsory education for children.⁵⁴ These employers were highly motivated to enlist children as workers because their labor was relatively inexpensive. Additionally, because child labor was seen as a supplement to a family’s income, it allowed adults to accept lower wages for their own work.⁵⁵ For the children who started working at a very young age, employers also saw potential to create a docile and compliant worker for the future.⁵⁶

In the 1930s, over one million Mexican nationals were repatriated with the end of the Bracero program and the development of federal, state, and local laws intended to protect native-born workers.⁵⁷ However, the lack of parameters on terms and conditions of work effectively increased demand for noncitizen workers. Due to this demand, and because the Mexican employment market could not absorb the surplus labor pool, many workers chose to escape unemployment and poverty by continuing to work in the United States. Faced with the restrictions on school attendance and lack of affordable daycare options, families often brought their children to the fields to work.⁵⁸ This is not to say that there were not attempts to limit child migrant labor. The Sugar Act of 1937 required sugar beet farmers to prohibit labor by children

⁴⁸ *Id.*

⁴⁹ See, e.g., CATHERINE DAUVERGNE, *MAKING PEOPLE ILLEGAL: WHAT GLOBALIZATION MEANS FOR MIGRATION AND THE LAW* (2007).

⁵⁰ Woodhouse, *supra* note 46, at 1060.

⁵¹ See *Hammer v. Dagenhart*, 247 U.S. 251 (1918), *overruled by United States v. Darby*, 312 U.S. 100 (1941) (finding that the Keating-Owens child labor bill exceeded Congress’s Commerce Clause powers); *Child Labor Tax Case*, 259 U.S. 20 (1923) (finding that the Child Labor Tax Law intruded on the jurisdiction of states to adopt and enforce child labor codes).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Woodhouse, *supra* note 46, at 1061–63.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See FRANCISCO E. BALDERRAMA & RAYMOND RODRIGUEZ, *DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S*, at 1 (1996).

⁵⁸ Ivón Padilla-Rodríguez, ‘*Los Hijos Son La Riqueza Del Pobre:*’ *Mexican Child Migration and the Making of Domestic (Im)migrant Exclusion, 1937–1960*, 42 J. AM. ETHNIC HIST. 43, 55 (2022).

under 14 in order to receive federal subsidies.⁵⁹ However, this ban was scarcely enforced by many local officials, who preferred to let children work rather than be “burdens to schools and welfare systems.”⁶⁰ Congress eventually banned child labor with the Fair Labor Standards Act of 1938 (FLSA).⁶¹ Migrant workers, however, were excepted from the law’s provision due to their “non-residence.”⁶² Child labor migration became so common by 1948 that these young migrants “[were] either ignored by the police or [proved] too numerous for the law enforcement authorities to handle.”⁶³

Many noncitizen children were also excluded from state education policies, despite school attendance being mandatory in many states since the nineteenth century. Even after FLSA passed, there was an exception to the age requirement and work hours maximum for children who were “not legally required to attend school” under state and local education laws—a proviso specific to young migrant workers.⁶⁴ FLSA was amended in 1949 to address the lack of uniformity between states’ school attendance requirements and the resulting “inadequate protection of the educational opportunities of children employed in agriculture in many States.”⁶⁵ The bill limited the exemption for employment for child workers to work “outside of school hours for the school district where the child is living while so employed.”⁶⁶ However, some migrant children were still excluded from school because they were not considered “legal residents” or “citizens” of the state.⁶⁷ Conversely, where states or localities did require school attendance—in the letter of the law if not in practice—children could be punished for school absenteeism.⁶⁸

Thus, migrant children were excluded from “modern childhood”—a concept that contemplated the vulnerability of youth and prioritized their welfare and education.⁶⁹ Despite the fact that many youth were dependents attached to families, the fact of their labor made them legally culpable and subject to the same threat of immigration enforcement as an adult.⁷⁰ In addition, these youth faced surveillance by law enforcement, who perceived them as suspicious in their impoverished state,⁷¹ and associated them with delinquency.⁷² Unaccompanied children were cast by nationalists as “elusive and untrackable,” and targeted as a perceived “threat to the social order.”⁷³ This narrative also pathologized parents, who were seen as “neglectful, ignorant, and abusive.”⁷⁴

⁵⁹ 50 Stat. 903, 7 U. S. C. § 1100 et seq. (Supp. 1937).

⁶⁰ Padilla-Rodríguez, *supra* note 58, at 55.

⁶¹ The Fair Labor Standards Act of 1938, as amended 29 U.S.C. 201, *et seq.* (1938).

⁶² Padilla-Rodríguez, *supra* note 58, at 44.

⁶³ *Id.*

⁶⁴ *Id.* at 44.

⁶⁵ H.R. REP. NO. 81-267, at 22 (1949).

⁶⁶ *Id.*

⁶⁷ Padilla-Rodríguez, *supra* note 58, at 47–48.

⁶⁸ *Id.*

⁶⁹ *Id.* at 55; Laila Hlass, *The Adultification of Immigrant Children*, 34 GEO. IMMIGRATION L.J. 199, 202 (2020).

⁷⁰ Hlass, *supra* note 69, at 203.

⁷¹ Padilla-Rodríguez, *supra* note 58, at 46.

⁷² *Id.* at 58.

⁷³ *Id.* at 56.

⁷⁴ *Id.* at 49.

This confluence of social narratives, legalized exclusion, and intense policing of migrant youth emerged from racialized politics of migration from Mexico and hostility towards migrants generally.⁷⁵ This social profiling also contributed to the marginalization of child migrant workers, imposing a threat of deportation. Immigration policies ensured that migrant youth “ke[pt] [] ‘well hidden’ in the fields” and “all but guarantee[d] the endurance of a seemingly self-generated source of child laborers who would turn into future adult farm-workers, with few tools with which to escape the migratory streams.”⁷⁶

C. Contemporary Immigration Relief for Immigrant Youth

Despite the meaningful differences between immigrant youth—nationality, culture, and length of time in the United States—many face common challenges, including separation from family members and irregular status. This subsection explores two forms of deferred action categorically associated with contemporary youth migration: Special Immigrant Juvenile Status (SIJS) and Deferred Action for Childhood Arrivals (DACA).

1. Special Immigrant Juvenile Status

Youth who enter the United States without a parent may be eligible for Special Immigrant Juvenile Status (SIJS), a classification intended to provide protection from deportation and a pathway to citizenship for young people who are dependents of the state. Advocacy for SIJS followed the passage of the Immigration Reform and Control Act of 1986 (IRCA), which provided a pathway to permanent status for individuals residing in the United States since at least 1982, with payment of a fee and extensive documentation.⁷⁷ Child welfare advocates in Santa Clara County, California, advocated for relief for noncitizen children who were dependents of the county’s Department of Children and Family Services and who could not access IRCA relief through a parent.⁷⁸ Congress introduced SIJS as part of the Immigration Act of 1990 to allow dependent youth to obtain lawful permanent residence through a special immigrant visa category.⁷⁹ The Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) clarified and expanded the special immigrant category, allowing noncitizen youth without lawful status who have been

⁷⁵ *Id.* at 58.

⁷⁶ *Id.* at 67.

⁷⁷ Immigration Reform and Control Act of 1986, Pub. L. No. 99-603 (codified as amended in scattered sections of 8 U.S.C.); *cf.* Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court; Revocation of Approval of Petitions; Bona Fide Marriage Exemption to Marriage Fraud Amendments; Adjustment of Status, 58 Fed. Reg. 42843-01, 42844 (Aug. 12, 1993) (providing “qualified aliens with the opportunity to apply” for SIJS, permanent residency and the possibility of becoming a United States citizen).

⁷⁸ HEIDBRINK, *supra* note 14, at 79.

⁷⁹ Immigration Act of 1990, Pub. L. No. 101-649 (codified as amended in scattered sections of 8 U.S.C.).

abused, neglected, or abandoned by one or both parents to apply for status as special immigrants.⁸⁰

Because SIJS originated as a form of relief for youth in foster care, dependency proceedings play a central role in the process.⁸¹ For a UC to apply for SIJS, a juvenile court must issue a predicate order with special findings, including that reunification with one or both parents is not viable for the child due to abuse, neglect, or abandonment. The court must also declare that is not in the child's best interest to return to their home country.⁸² Though youth are able to apply for SIJS if they are under age 21, local jurisdiction determines whether youth qualify for these findings up to age 21, or whether they have to be minors under the age of 18.⁸³ Once the court issues the order with special findings, the child may apply for SIJS through a petition to U.S. Citizenship and Immigration Services (USCIS). Once the petition is approved, the child technically has status in the form of SIJS. This status carries some protection against removal, but it is not a permanent form of status. It also allows for family reunification in some jurisdictions.⁸⁴

Under the terms of the settlement in *Flores v. Reno*, noncitizen children must be held in the least restrictive form of appropriate immigration custody.⁸⁵ Under policies that comply with the settlement, UCs are transferred to Office of Refugee Resettlement (ORR) custody within 72 hours of apprehension by immigration officials. ORR contracts with local voluntary agencies to provide housing to these youth through the foster care system. These agencies will make efforts to contact parents or guardians to facilitate reunification. The expansion of SIJS theoretically permits youth to both obtain status and reunify with parents or other family members. It is not uncommon for a parent, older sibling, or other family member to be in the United States to work, and for a young person to seek out this family member to escape abuse or other violence in their home country. This can happen when a caretaker in their home country passes away or becomes incapacitated, where there is abuse by a household member, or where a young person faces a threat based on their age. In such situations, the family member in the United States becomes the person apparently situated to care for the child. These family members are vetted for suitability as sponsors when youth are released from ORR custody, and juvenile courts do their own evaluations in the course of making special findings for SIJS. Yet these familial relationships receive few legal safeguards, even though the sponsorship determination hinges on the family member's

⁸⁰ Pub. L. No. 110-457 § 235(d) (2008).

⁸¹ See Elizabeth Keyes, *Evolving Contours of Immigration Federalism: The Case of Migrant Children*, 19 HARVARD LATINO L.R. 33, 44–45 (2015) (outlining the state-favored and federal-favored iterations of SIJS policy since 1990).

⁸² *Id.* § 1101(a)(27)(J)(i)-(ii).

⁸³ See PROJECT LIFELINE, STATE-BY-STATE AGE-OUT DATABASE, <https://projectlifeline.us/resources/state-by-state-age-out-database/> [<https://perma.cc/B9VN-NN5E>] (compiling the state statutes on age for juvenile court jurisdiction).

⁸⁴ See notes 158–160, 164, and 166, and accompanying text.

⁸⁵ Stipulated Settlement Agreement, *Flores v. Reno*, No. 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997) at 8.

ability to provide a safe and stable home. If a child cannot be released to a family member or guardian, they will remain in foster care.

Not all youth who are admitted into the U.S. as unaccompanied children will apply for—much less successfully receive—SIJS. The UC program received 118,938 referrals from ORR in fiscal year 2023;⁸⁶ the same year, USCIS received less than half that number of SIJS applications.⁸⁷ The scope of SIJS also excludes many young people, particularly minors who are between the ages of 18 and 21, who will not qualify as dependents in many state courts.⁸⁸ Many young people in the UC program are already teenagers; in fiscal year 2023, approximately 76% of all children referred were over 14 years of age.⁸⁹

2. Deferred Action for Childhood Arrivals

The concept of DACA originated with the Immigrant Children’s Educational Advancement and Dropout Prevention Act of 2001, a proposal to grant cancellation of removal and permission to apply for permanent residence for undocumented high school or college students who were long-term residents of the United States.⁹⁰ The proposal is better known as the Development, Relief, and Education for Alien Minors (DREAM) Act, after the titular bill introduced in the Senate the same year.⁹¹ Congress repeatedly failed to pass DREAM Act legislation over the next two decades, rejecting the proposal in both independent bills and as text within larger immigration reform bills.⁹² Among the most moving advocates for the proposal were the noncitizen youth poised to benefit from the program, often referred to as “DREAMers.” It was not uncommon for DREAMers to protest in graduation caps and gowns, “us[ing] their liminal legal status and their valorized social status to access and launch their challenges from these invisible spaces of migration control.”⁹³ The campaign for the DREAM Act emphasized that these youth

⁸⁶ U.S. DEP’T OF HEALTH AND HUMAN SERVS, FACT SHEET: UNACCOMPANIED CHILDREN (UC) PROGRAM, Jan. 19, 2024, <https://www.acf.hhs.gov/orr/fact-sheet/programs/uc/fact-sheet> [<https://perma.cc/ZZ3M-Y875>]. The number of applications has dramatically increased in the past eight years; in 2023, USCIS received nearly as many applications in a single quarter than in the entirety of 2015. *Id.*

⁸⁷ U.S. CITIZENSHIP & IMMIGR. SERVS, I-360 PETITIONS FOR SPECIAL IMMIGRANT WITH A CLASSIFICATION OF SPECIAL IMMIGRANT JUVENILE (SIJ) BY FISCAL YEAR, QUARTER AND CASE STATUS (FISCAL YEAR 2021, QUARTER 1, OCT. 1 - DEC. 31, 2023), Mar. 21, 2024, https://www.uscis.gov/sites/default/files/document/data/i360_sij_performancedata_fy2024_q1.xlsx [<https://perma.cc/PT2A-KY7B>] (showing 53,146 applications filed in FY2023).

⁸⁸ Laila Hlass, *The Adultification of Immigrant Children* 34 GEO. IMMIGRATION L.J. 199, 214 (2020).

⁸⁹ U.S. DEP’T OF HEALTH AND HUMAN SERVS, FACT SHEET: UNACCOMPANIED CHILDREN (UC) PROGRAM (2024), <https://www.acf.hhs.gov/orr/fact-sheet/programs/uc/fact-sheet> [<https://perma.cc/BXY7-33N>].

⁹⁰ H.R. 1582, 107th Cong. (2001).

⁹¹ S. 1291, 107th Cong. (2001); *see also* companion bill Student Adjustment Act of 2001, H.R. 1918, 107th Cong. (2001).

⁹² AMERICAN IMMIGRATION COUNCIL, THE DREAM ACT: AN OVERVIEW (March 16, 2021), <https://www.americanimmigrationcouncil.org/research/dream-act-overview> [<https://perma.cc/X9FY-TUQE>].

⁹³ Luisa Laura Heredia, *Of Radicals and DREAMers: Harnessing Exceptionality to Challenge Immigration Control*, 9 ASSOC. OF MEXICAN-AMERICAN EDUCATORS 74, 74 (2015).

were “good immigrants” who were blameless for the legal stumbling blocks in their paths, having come to the United States “by no fault of their own.”⁹⁴

After multiple attempts by advocates in Congress to pass the DREAM Act, the Obama administration issued an executive action in June 2012 that established the DACA program. Like SIJS, DACA is a form of deferred action, but it does not offer a path to permanent residence and citizenship. Rather, DACA grants only a renewable two-year stay of deportation, which includes authorization to work. Applicants must have been under age 31 by June 15, 2012, must have arrived in the U.S. before age 16, must be in school, graduated from high school, or be in the military, and must not have a felony or multiple misdemeanors.⁹⁵

As with SIJS, there are many young people in the United States who qualified for DACA but have never applied. There were 530,000 youth with active DACA as of December 2023.⁹⁶ Yet, the Migration Policy Institute estimates that as many as 1.2 million youth meet the age and entry requirements and are potentially eligible for relief.⁹⁷ As the result of an injunction issued by the U.S. District Court for the Southern District of Texas, USCIS can only process renewal applications for DACA recipients who received relief on or before July 16, 2021.⁹⁸ Many other youth—including children of employment-based visa holders—are unable to apply for DACA because the law requires them to have been without status since June 15, 2012. The provision that allows people to apply after their lawful status was terminated cannot be enforced due to pending litigation that prohibits USCIS from granting new DACA applications.⁹⁹

⁹⁴ See, e.g., WHITE HOUSE BLOG, GET THE FACTS ON THE DREAM ACT, December 1, 2010, <https://obamawhitehouse.archives.gov/blog/2010/12/01/get-facts-dream-act> [<https://perma.cc/5LF8-5FJB>]; see also Duhita Mahatmya and Lisa M. Gring-Pemble, *DREAMers and Their Families: A Family Impact Analysis of the DREAM Act and Implications For Family Well-being*, 20 J. FAMILY STUDIES 79, 83 (2014) (“[T]he discourse surrounding the DREAM Act makes explicit that children are not responsible for their parents’ decisions to immigrate without proper documentation. . . . In this way, the DREAM Act discourse makes assumptions about which family members are good and bad; thereby creating and sustaining social practices and power relationships that may ultimately reinforce dominant ideologies, perpetuate inequality in, and be detrimental to positive family relationships. Indeed, the congressional hearings commend immigrant children for exhibiting traditional American values” (internal citations omitted)).

⁹⁵ U.S. CITIZENSHIP & IMMIGR. SERVS., CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA), Sept. 18, 2023, <https://www.uscis.gov/DACA> [<https://perma.cc/3S6W-BHAS>].

⁹⁶ U.S. CITIZENSHIP & IMMIGR. SERVS., ACTIVE DACA RECIPIENTS, FISCAL YEAR 2024, QUARTER 1 (Mar. 21, 2024), https://www.uscis.gov/sites/default/files/document/data/active_daca_recipients_fy2024_q1.xlsx [<https://perma.cc/48FG-36NN>].

⁹⁷ MIGRATION POLICY INSTITUTE, DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA) DATA TOOLS (Sept. 20, 2023), <https://www.migrationpolicy.org/programs/data-hub/deferred-action-childhood-arrivals-daca-profiles> [<https://perma.cc/AXP3-5E5Y>].

⁹⁸ *Texas v. United States*, 549 F.Supp.3d 572, 624 (S.D. Tex. 2021).

⁹⁹ *Texas v. United States*, 50 F.4th 498 (5th Cir. 2022).

II. LEGAL LIMINALITY AND POLICIES OF EXCLUSION

A. *Legal Liminality*

The sociological theory of liminality, introduced by sociologist Cecelia Menjívar, refers to “a temporally and socially uncertain transitional state of partial belonging that arises out of marginal legal status.”¹⁰⁰ Immigration law scholar Jennifer Chacón elaborated on the theory of legal liminality, noting that a liminal state is defined by “uncertainty about the scope of reprieve from banishment, a reliance on administrative grace to effectuate freedom from banishment, an obligation to pay one’s way to prevent that banishment, experiences of heightened monitoring by governmental actors, and a related vulnerability to control, exclusion, and abuse by private actors.”¹⁰¹ Labor law scholar Leticia Saucedo uses the term “liminality” to describe both in-between legal states, and the situation of workers who are work-authorized noting that it encapsulates work-authorized noncitizens who lack recognizable, permanent legal status.¹⁰²

Temporary relief from deportation may come with certain benefits associated with lawful immigration status, such as work authorization, the ability to obtain a driver’s license, and the ability to live without fear of imminent deportation. Yet this relief is also precarious, and “comes at the price of registration and government surveillance.”¹⁰³ Indeed, immigration law scholar Geoffrey Heeren observes that these forms of immigration relief “do[] not resemble an act of lawmaking so much as it does a massive government registration program,” which requires applicants to provide sensitive details regarding their whereabouts, familial relationships, and work history.¹⁰⁴ A key aspect of the precarity inherent in liminal status is the possibility that providing this information may have deportation consequences, hinging on the whims of executive action that may be “inconsistent, unpredictable, and sometimes, discriminatory.”¹⁰⁵

It is for this reason that many scholars have associated liminality with legal violence. As Chacón points out that:

Legalization without citizenship is a punitive compromise: it achieves the goal of moving a large class of residents—most of whom are constructed as racial outsiders—into a legal status. But it does so in a way that penalizes the recipients of that legalization with permanent political exclusion . . . Forfeiting citizenship is the price that immigrants would have to pay for their immigration violations.¹⁰⁶

¹⁰⁰ Jennifer Chacón, *Producing Liminal Legality*, 92 DENVER L. REV. 709, 710 (2015).

¹⁰¹ *Id.* at 709.

¹⁰² Leticia M. Saucedo, *Employment Authorization, Alienage Discrimination and Executive Authority*, 38 BERKELEY J. EMP. & LAB. L. 183, 198 (2017).

¹⁰³ Geoffrey Heeren, *The Status of Nonstatus*, 64 AM. UNIV. L.R. 1115, 1132 (2015).

¹⁰⁴ *Id.* at 1175.

¹⁰⁵ HIROSHI MOTOMURA, *IMMIGRATION OUTSIDE THE LAW* 22 (2014); *see also* Heeren, *supra* note 103, at 1175.

¹⁰⁶ Jennifer M. Chacón, *Citizenship Matters: Conceptualizing Belonging in an Era of Fragile Inclusions*, 52 U.C. DAVIS L. REV. 1, 17–18 (2018).

Chacón observes that liminality is associated with not just being undocumented, but also forms of temporary status that require renewal (always for a fee) and resubmission of personal information. Such practices force noncitizens to make disclosures and, each time, face the uncertainty as to whether the discretionary state will use this information to grant relief or pursue deportation.¹⁰⁷ Particularly when combined with the surveillance “e-carceral” technologies of detention alternatives,¹⁰⁸ liminality is inseparable from the threat of immigration enforcement and removal. Thus, legal liminality can be understood as a form of administrative violence—legal scholar Dean Spade’s term for how law structures and reproduces vulnerability in the management of large groups.¹⁰⁹

B. Liminality through Political Compromise, Policy Ambivalence, and Executive Action

A number of legal scholars have emphasized liminality as a growing feature of immigration law, noting the shift in executive action to favor programs that offer liminal status rather than permanent forms of immigration relief.¹¹⁰ This phenomenon is directly attributable to the limits of executive action in establishing immigration policy. The Supreme Court has long held that Congress has sole provenance to regulate immigration under the “plenary power” doctrine,¹¹¹ making legislation the only path to comprehensive immigration

¹⁰⁷ See, e.g., Susan B. Coutin, et al., *Deferred Action and the Discretionary State: Migration, Precarity and Resistance*, 21 CITIZENSHIP STUD. 951, 958 (2017) (Noting that, in the case of DACA for example, “[i]nformation submitted by requestors is protected as a matter of discretion as well. Trump could rescind existing operation mandates and require USCIS to share this information with the enforcement arms of DHS. DACA requestors therefore took some risk in soliciting DACA. In doing so, they had to appeal to an invisible administrator who would evaluate, on a case-by-case basis but in accordance with the criteria set out in the guidance documents, whether they were a low priority for removal and therefore warranted humanitarian consideration.”).

¹⁰⁸ See, e.g., Sarah Sherman-Stokes, *Immigration Detention Abolition and the Violence of Digital Cages*, 95 U. COLO. L. REV. 219, 219 (2024) (describing the surveillance via ankle monitors, smartphone apps, and reporting to Immigration and Customs Enforcement for noncitizens who subject to immigration detention); Kate Weisburd, *Punitive Surveillance*, 108 VA. L. REV. 147, 155–157 (2022) (describing e-carceral technologies and observing that such surveillance is punitive and “must be understood within this larger ecosystem of state surveillance as a form of social and racial subordination.”).

¹⁰⁹ DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF THE LAW* 73 (2015) (specifically noting how administration of gender norms turn law into sites of “production and implementation” of marginalization).

¹¹⁰ Chacón, *supra* note 100, at 710.

¹¹¹ See e.g., *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) (“The Court without exception has sustained Congress’ plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.”) (quoting *Boutilier v. Immigration & Naturalization Serv.*, 387 U.S. 118, 123 (1967)); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 343 (1909) (noting the “plenary power of Congress as to the admission of aliens” and “the complete and absolute power of Congress over the subject” of immigration); *Galvan v. Press*, 347 U.S. 522, 531 (1954) (“Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government . . . But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.”).

reform. Proposed reforms regularly engage with two key questions: how to address migration at the border, and how to address the substantial undocumented population already in the United States.

Age-specific immigration relief is animated by the policy rationale that children should be treated differently. But such policies are also effectively a form of compromise—narrow carveouts from the general rule of exclusion. In the absence of immigration reform, presidential administrations have addressed emerging immigration issues through executive action. While the situation of immigrant youth has captured popular sympathy, these sentiments have yet to manifest in congressional action to create permanent legal status options for these youth and their families. According to human rights scholar Jaqueline Bhabha, the liminal legal status accorded to noncitizen youth reflects “an unresolved ambivalence about the legitimacy of according protection to migrant children,” with programs like SIJS and DACA embodying the “strategic compromise that represents our unresolved ambivalence” in the absence of political consensus.¹¹²

1. SIJS as a Response to Youth Migration from Central America

Asylum law, which derives from the United Nations Refugee Convention, offers a path to permanent status to individuals who have a fear of returning to their home country because they will be persecuted based on their race, religion, nationality, political opinion, or membership in a particular social group.¹¹³ Many of the youth migrating from Central America are fleeing age-specific harm, such as child abuse and forcible gang recruitment.¹¹⁴ However, the way asylum law has developed in the United States, including for age-related claims and persecution by non-government actors like gangs, makes these claims by young asylum-seekers highly contested. Asylum claims are very difficult to win without legal representation. The cases are also resource-intensive and have long timelines, making private representation costly and limiting the number of cases that pro bono legal services providers can accept.

¹¹² JACQUELINE BHABHA, CHILD MIGRATION AND HUMAN RIGHTS IN A GLOBAL AGE 11 (2014).

¹¹³ 8 U.S.C. §1101(a)(42).

¹¹⁴ Maryanne Buechner & Sarah Ferguson, *Why Migrants Flee Central America*, UNICEF USA (2018), <https://www.unicefusa.org/stories/why-migrants-flee-central-america> [<https://perma.cc/5XF6-JG8K>]; Matthew Lorenzen, *The Mixed Motives of Unaccompanied Child Migrants from Central America's Northern Triangle*, 5 J. MIGRATION & HUM. SEC. 744 (2017); UNHCR, *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection* (2014), <http://www.unhcr.org/en-us/children-on-the-run.html> [<https://perma.cc/HJ8H-5MV3>]; Elizabeth Kennedy, *No Childhood Here: Why Central American Children Are Fleeing Their Homes*, AMERICAN IMMIGRATION COUNCIL (2014), <https://www.americanimmigrationcouncil.org/research/no-childhood-here-why-central-american-children-are-fleeing-their-homes> [<https://perma.cc/7XBN-5L6R>]; Nestor Rodriguez, Ximena Urrutia-Rojas & Luis Raul Gonzalez, *Unaccompanied minors from the Northern Central American countries in the migrant stream: social differentials and institutional contexts*, 45 J. ETHNIC & MIGRATION STUDIES 218 (2019); Sita G. Patel, Vicky Bouche, William Martinez, Karla Barajas, Alex Garcia, Maya Sztainer & Kathleen Hawkins, “*Se extraña todo: Family separation and reunification experiences among unaccompanied adolescent migrants from Central America*,” 176 NEW DIRECTIONS FOR CHILD AND ADOLESCENT DEVELOPMENT 227, 228 (2021).

By contrast, SIJS delegates the most intensive factfinding to local dependency courts, and nonprofits can handle SIJS cases at a much higher volume. This is particularly true for UCs who remain in foster care, where a dependency finding is relatively straightforward, and where there is national funding to provide legal assistance.¹¹⁵ SIJS has thus evolved into a more certain path to status than the resource-intensive asylum system, which currently has a backlog of over one million cases in immigration courts alone.¹¹⁶ In a climate where asylum was seen as a “loophole” in the border enforcement system—and asylum claims by Central American families faced overwhelming denial—SIJS was also seen as a more sure path for youth in need of protection.

At the same time, immigration enforcement strategies have made it more challenging for families seeking asylum. The Obama administration reintroduced family detention in 2014—a policy that compromised the abilities of families to seek asylum, and hastened their deportation as a means of deterring other migrants.¹¹⁷ Even so, while the number of unaccompanied children seeking entry to the United States decreased slightly, the number of asylum-seeking families from Central America continued to rise.¹¹⁸ In response, the Obama administration attempted to dissuade migration via public relations campaigns in Central America. One such effort was the U.S. Customs and Border Patrol (CBP) “Know the Facts” campaign, which emphasized that undocumented Central American migrants would be targeted for deportation. The informational posters for the campaign made no reference to any available form of humanitarian protection.¹¹⁹

While SIJS is a path that eventually leads to permanent status, SIJS beneficiaries experience liminality in the form of significant wait times imposed by visa caps. Special Immigrant Juveniles (SIJs) are not eligible to adjust status to permanent resident until a visa is available in the fourth-priority employment visa category.¹²⁰ The current three-track immigration system (containing

¹¹⁵ See *supra* note 44 and accompanying text.

¹¹⁶ Transactional Record Access Clearinghouse, *Immigration Court Asylum Backlog*, (June 2024), <https://trac.syr.edu/phptools/immigration/asylumbl/> [<https://perma.cc/MC4S-G7N7>]. There are also over one million additional affirmative asylum claims pending with the USCIS Asylum Office. U.S. CITIZENSHIP AND IMMIGR. SERVS., ASYLUM DIVISION MONTHLY STATISTICS REPORT, FISCAL YEAR 2024, APRIL 2024 (May 9, 2024), https://www.uscis.gov/sites/default/files/document/reports/asylumfiscalyear2024todatestats_240430.xlsx [<https://perma.cc/X7BL-VQPE>].

¹¹⁷ Wil S. Hylton, *The Shame of America's Family Detention Camps*, N.Y. TIMES MAGAZINE (Feb. 4, 2015), <https://www.nytimes.com/2015/02/08/magazine/the-shame-of-americas-family-detention-camps.html> [<https://perma.cc/6NND-YETQ>]; *Ending Artesia: The Artesia Report*, Innovation Law Lab, January 20, 2014, <https://innovationlawlab.org/the-artesia-report/> [<https://perma.cc/Z83F-EC38>].

¹¹⁸ U.S. BORDER PATROL, SOUTHWEST FAMILY UNIT SUBJECT AND UNACCOMPANIED ALIEN CHILDREN APPREHENSIONS FISCAL YEAR 2016 (2016), <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016#:~:text=In%20Fiscal%20Year%202016%2C%20total,from%20the%201980s%20through%202008> [<https://perma.cc/T747-WQ8U>].

¹¹⁹ U.S. DEPARTMENT OF HOMELAND SECURITY, DEPARTMENTS OF STATE, HOMELAND SECURITY LAUNCH EXECUTIVE ACTION ON IMMIGRATION: KNOW THE FACTS AWARENESS CAMPAIGN (2015), <https://www.dhs.gov/news/2015/01/05/departments-state-homeland-security-launch-executive-action-immigration-know-facts> [<https://perma.cc/3LDV-ZL6F>].

¹²⁰ 8 U.S.C. §§ 1151(d); 1153(b)(4).

family-sponsored, employment-based, and diversity-based categories) is also a creation of the 1990 Act, and it limits employment-based immigration to 140,000 people each year.¹²¹ At the inception of the SIJS program, the number of applicants were relatively low and it was possible to obtain permanent status immediately; in 2016, SIJs from Guatemala, El Salvador, Honduras, India, and Mexico began to exceed the number of available visas for their nationality in a given year.¹²² In response to the particularly long waits for Central American SIJs—which grew to upwards of six years—nationality categories were combined in 2023.¹²³ As of May 2024, SIJs with petitions approved in November 2020 are eligible to apply for adjustment,¹²⁴ but there is no way to estimate the wait time for youth who petitioned after that date.¹²⁵ As Laila L. Hlass, Rachel Leya Davidson, and Austin Kocher describe, SIJS creates “double exclusion,” inhibiting migrant youth from enjoying the protections of childhood and the independence of adulthood, and also from transitioning fully from life in one country to another.¹²⁶ Legally, it also creates a period of uncertainty between application and adjudication for the purposes of obtaining permanent status in the United States.¹²⁷

2. DACA as an Alternative to Legalization

Walter J. Nicholls sees DREAMers having successfully found a “political opening in a hostile country,” fighting an anti-immigrant rights movement that was growing in its sophistication and mainstream appeal.¹²⁸ Part of such conservative arguments is that if there were concessions made for sympathetic

¹²¹ 8 U.S.C. § 1151(d)(1)(A). Section 203(b) of the Immigration and Nationality Act sets out various calculations in the event of undersubscribed and oversubscribed visa categories. 8 U.S.C. § 1153(b).

¹²² Rachel Prandini, *Special Immigrant Juvenile Status and Visa Availability*, IMMIGRANT LEGAL RESOURCE CENTER (2021), https://www.ilrc.org/sites/default/files/resources/special_immigrant_juvenile_status_visa_availability.pdf [<https://perma.cc/AXZ7-UHK6>].

¹²³ U.S. DEPT OF STATE, PUBLIC NOTICE 11985, EMPLOYMENT-BASED PREFERENCE IMMIGRANT VISA FINAL ACTION DATES AND DATES FOR FILING FOR EL SALVADOR, GUATEMALA, AND HONDURAS (2023), <https://www.federalregister.gov/documents/2023/03/28/2023-06252/employment-based-preference-immigrant-visa-final-action-dates-and-dates-for-filing-for-el-salvador> [<https://perma.cc/Y34B-6HUE>]; subsequently published in the Federal Register at 88 F.R. 18252 EMPLOYMENT-BASED PREFERENCE IMMIGRANT VISA FINAL ACTION DATES AND DATES FOR FILING FOR EL SALVADOR, GUATEMALA, AND HONDURAS (Mar. 28, 2023), <https://www.federalregister.gov/documents/2023/03/28/2023-06252/employment-based-preference-immigrant-visa-final-action-dates-and-dates-for-filing-for-el-salvador> [<https://perma.cc/64SK-NU5P>].

¹²⁴ U.S. Dept of State, Visa Bulletin for May 2024, No. 89, Vol. X, <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2024/visa-bulletin-for-may-2024.html> [<https://perma.cc/RVM7-68F4>] (Apr. 3, 2024) (showing November 1, 2020, the fourth-priority employment category).

¹²⁵ National Immigration Project, Immigrant Lega Resource Center, American Bar Association Children’s Immigration Law Academy, “Breaking Down the Visa Bulletin: What SIJS Advocates Need to Know,” April 2024 at 4, <https://www.ilrc.org/resources/breaking-down-visa-bulletin-what-sijs-advocates-need-know> [<https://perma.cc/MJR6-RHLU>].

¹²⁶ Laila L. Hlass, Rachel Leya Davidson & Austin Kocher, *The Double Exclusion of Immigrant Youth*, 111 GEO. L.J. 1407, 1413–14 (2023).

¹²⁷ *Id.* at 1414.

¹²⁸ NICHOLLS, *supra* note 7, at 21.

cases, it would “open the floodgates” to a barrage of migrants.¹²⁹ DREAMer activist Lorella Praeli explained the strategic embracing DACA as part of the campaign’s vision of incremental change—“although comprehensive immigration reform is a primary goal, if it did not seem likely at a given moment, then go for the narrower DREAM Act, and if that isn’t possible, push for administrative relief, such as DACA.”¹³⁰

DACA was considered a political victory for DREAMer youth. Many young people described a sense of relief and possibility once they had deferred action and no longer faced the threat of deportation. Many experienced a feeling of “liberation” after—as one DACA recipient put it—years of being “trapped in [a] golden cage,”¹³¹ with the “‘illusion of freedom’ that provided limited opportunities.”¹³² DACA was a path that offered a proof of status, work authorization, and a social security number, allowing DACA recipients to pursue major milestones of young adulthood, including obtaining a driver’s license, attending college, and pursuing a career.¹³³ These youth made large social and economic strides, increasing their earnings and achieving milestones like homeownership.¹³⁴

But after obtaining DACA, as these young people moved towards adulthood, many also became conflicted about their status, uneasy about the future, and frustrated with their new reality as “DACAlimited.”¹³⁵ Some DACA recipients found, for example, that their immigration status still limited access to job opportunities and financial aid, and did little to resolve the uncertainty of legal status.¹³⁶ As one survey of DACA participants concluded, youth considered DACA “a short-term privilege”—one that “isolated and rejected them from other American citizens all over again.”¹³⁷

The liminality associated with DACA is inseparable from its existence as a contested site in immigration politics. The Obama administration announced an expansion of the DACA program (DACA+) in late 2014, which would have eliminated the DACA age gap and allow youth who entered the country

¹²⁹ *Id.* at 23.

¹³⁰ MARJORIE S. ZATZ AND NANCY RODRIGUEZ, *DREAMS AND NIGHTMARES: IMMIGRATION POLICY, YOUTH, AND FAMILIES* 62 (2015).

¹³¹ Lindsay Pérez Huber, “*Como una Jaula de Oro*” (*It’s Like a Golden Cage*): *The Impact of DACA and the California DREAM Act on Undocumented Chicanas/Latinas*, 33 *CHICANA/O-LATINA/O L. REV.* 91, 94 (2015).

¹³² *Id.*

¹³³ Lorraine T. Benuto, et al., *Undocumented, to DACAmended, to DACAlimited: Narratives of Latino Students with DACA Status*, 40 *HISP. J. BEHAV. SCI.* 259, 268 (2018); Roberto G. Gonzales, Veronica Terriquez & Stephen P. Ruszczyk, *Becoming DACAmended: Assessing the Short-Term Benefits of Deferred Action for Childhood Arrivals (DACA)*, 58 *AM. BEHAV. SCIENTIST* 1852 (2014).

¹³⁴ See Tom Wong et al., *DACA Recipients’ Economic and Educational Gains Continue to Grow*, CENTER FOR AMERICAN PROGRESS (2017), <https://www.americanprogress.org/article/daca-recipients-economic-educational-gains-continue-grow/> [<https://perma.cc/DRB9-YUYB>].

¹³⁵ Benuto et al., *supra* note 133, at 268–70; see also Sameer M. Ashar et al., *Navigating Liminal Legalities Along Pathways to Citizenship: Immigrant Vulnerability and the Role of Mediating Institutions*, U.C. IRVINE SCH. L. RES. PAPER SERIES, 8–9 (2016) (noting the role of anti-immigrant political rhetoric in limiting a sense of security for DACA recipients).

¹³⁶ *Id.* at 266.

¹³⁷ *Id.* at 270.

between June 15, 2007, and January 1, 2010, to apply.¹³⁸ The announcement also stated an intention to create the Deferred Action for Parental Accountability (or “Deferred Action for Parents of Americans and Lawful Permanent Residents” (DAPA)), which would have granted deferred action to parents of U.S. citizens.¹³⁹ Texas and several other states sued to prevent DAPA from taking effect, arguing that the Department of Homeland Security violated various sections of the Administrative Procedures Act and that DAPA violated the Take Care Clause of the U.S. Constitution.¹⁴⁰ Judge Andrew Hanen in the Southern District of Texas ruled that DACA was unlawful because it created a substantive rule without following the procedural requirements of the Administration Procedure Act; the Fifth Circuit affirmed the decision and upheld the injunction.¹⁴¹ The Supreme Court, comprised of only eight justices at the time, also affirmed the injunction.¹⁴²

Going into the 2016 presidential election, DACA recipients reported being fearful of becoming undocumented again and facing consequences of having provided information about themselves and their families in the pages of their immigration applications.¹⁴³ The Trump administration announced the phase-out of the DACA program in September 2017,¹⁴⁴ causing widespread fear and anxiety in DACAmented communities.¹⁴⁵ When the Biden administration reinstated DACA program in 2021,¹⁴⁶ Texas and nine other states once again sued in the Southern District of Texas to challenge its legality. Judge Hanen ultimately issued an injunction that prohibited the filing of new applications after July 16, 2021 and a finding that the DACA program was illegal.¹⁴⁷ In September 2023, Judge Hanen in the Southern District of Texas again ruled that the most recent iteration of the DACA rule issued by the Biden Administration was unlawful.¹⁴⁸ The order stayed the effective date of the vacatur such that DACA recipients can continue to renew their status, but USCIS cannot review new DACA applications. Meanwhile,

¹³⁸ White House, Fact Sheet: Immigration Accountability Executive Action, November 20, 2014, available through the The Southern California Deferred Action (DACA, DACA+, DAPA) Project at UCI Law Scholarly Commons, <https://scholarship.law.uci.edu/cgi/viewcontent.cgi?article=1004&context=daca-dapa-federal-regulations> [<https://perma.cc/5MAF-KK37>].

¹³⁹ DAPA would have granted deferred action to the undocumented parents of U.S. citizen or permanent resident children. U.S. CITIZENSHIP AND IMMIGRATION SERVICES, 2014 EXECUTIVE ACTIONS ON IMMIGRATION (Apr. 15, 2015), <https://www.uscis.gov/archive/2014-executive-actions-on-immigration> [<https://perma.cc/B725-LX5Q>].

¹⁴⁰ *Texas v. United States*, 86 F. Supp. 3d 591, 607 (S.D. Tex. 2015).

¹⁴¹ *Id.* at 677–78, *aff'd*, *Texas v. United States*, 809 F.3d 134, 146 (5th Cir. 2015).

¹⁴² *United States v. Texas*, 579 U.S. 547 (2016).

¹⁴³ See, e.g., Edelina M. Burciaga & Aaron Malone, *Intensified Liminal Legality: The Impact of DACA Recission for Undocumented Young Adults in Colorado*, 46 LAW & SOC. INQUIRY 1092, 1102 (2021).

¹⁴⁴ U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL SESSION DELIVERS REMARKS ON DACA (Sept. 5, 2017), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-daca> [<https://perma.cc/A2W3-Q8JR>].

¹⁴⁵ See, e.g., Burciaga, *supra* note 143, at 1102; Luz M. Garcini et al., *Anti-Immigration Policy and Mental Health: Risk of Distress and Trauma Among Deferred Action for Childhood Arrivals Recipients in the United States*, 15 PSYCH. TRAUMA 1067 (2023).

¹⁴⁶ Deferred Action for Childhood Arrivals, 8 C.F.R. § 236.21–236.25 (Aug. 30, 2022).

¹⁴⁷ Tex. Memorandum and Order, *Texas v. U.S.*, 1:18-CV-00068 (July 16, 2021).

¹⁴⁸ Memorandum and Order, *Texas v. U.S.*, 1:18-CV-00068 (S.D. Texas, Sept. 13, 2023).

DACA recipients have grown wary of the protections offered by the program and apprehensive about what changes might come with the next presidential administration.¹⁴⁹

3. Protecting Youth at the Expense of Family Unity

Policies affecting immigrant youth attempt to reconcile border control objectives with “best interest” considerations of minors, but not always successfully.¹⁵⁰ As sociologist Lauren Heidbrink explains, immigrant youth “encounter the state as both a paternal protector and punishing regulator.”¹⁵¹ In assuming responsibility for youth, the state takes on both paternal and protective functions. But paradoxically, this protective role—ostensibly necessary to protect the interest of children and youth—presents other potential harms.

In the case of youth seeking to reunite with family in the United States, enhanced border enforcement has made it difficult for parents to return to visit their children in their home countries. Galli observes that most youth she interviewed had migrated to reunite with family.¹⁵² SIJS allows for children to be formally reunited with parents in the course of obtaining status, but children will need to travel alone to do so.¹⁵³ Families—or even the children themselves—may need to enter into agreements with others to secure passage, “which place the children in coercive, exploitative, highly insecure situations.”¹⁵⁴ Immigration policies that provide relief to exclusively to children increase the likelihood that youth will migrate alone while their parents stay behind, making unaccompanied children especially vulnerable during already dangerous journeys.¹⁵⁵

Once UCs arrive in the United States, any seeking SIJS protection must contend with the hurdles of juvenile proceedings, where state laws restrict who is eligible for SIJS based on special findings.¹⁵⁶ This has the effect of states playing a substantive gatekeeping role in access to immigration benefits, rather

¹⁴⁹ See, e.g., *With DACA Again Under Threat, Recipients and Families Express Confusion and Fear*, WTTW NEWS (Sept. 23, 2023), <https://news.wttw.com/2023/09/23/daca-again-under-threat-recipients-and-families-express-confusion-and-fear> [https://perma.cc/RWD5-8J5L].

¹⁵⁰ See Allison S. Hartry, *Birthright Justice: The Attack on Birthright Citizenship and Immigrant Women of Color*, 36 N.Y.U. REV. L. & SOC. CHANGE 57, 60 (2012); Jacqueline Bhabha, *Lone Travelers: Rights, Criminalization, and the Transnational Migration of Unaccompanied Children*, 7 UNIV. CHICAGO LAW SCHOOL ROUNDTABLE 269, 280 (2000).

¹⁵¹ HEIDBRINK, *supra* note 14, at 3.

¹⁵² Ciara Galli, *Wolves in Sheep's Clothing? What Central American Unaccompanied Minors Know About Crossing the US-Mexico Border*, 38 J. BORDERLANDS STUD., 975, 979 (2023).

¹⁵³ See JACQUELINE BHABHA, CHILD MIGRATION AND HUMAN RIGHTS IN A GLOBAL AGE 24 (2016).

¹⁵⁴ Jacqueline Bhabha, *Lone Travelers: Rights, Criminalization, and the Transnational Migration of Unaccompanied Children*, 7 U. OF CHICAGO LAW SCHOOL ROUNDTABLE 269, 275 (2000).

¹⁵⁵ Daniel J. Steinbock, *The Admission of Unaccompanied Children into the United States*, 7 YALE L. POL'Y REV. 137, 138 (1989); Laura Naranjo et al., *The Endless Vulnerability of Migrant Children In-Transit across the Darién Gap*, 109 AM. J. TROP. MED. HYG. 515 (2023).

¹⁵⁶ See, e.g., Laila Hlass, *States and Status: A Study of Geographical Disparities for Immigrant Youth*, 46 COLUM. HUM. RTS. L. REV. 266 (2014); Jessica R. Pulitzer, *Fear and Failing in State court: Special Immigrant Juvenile Status and the State Court Problem*, 21 CARDOZO J.L. & GENDER 201, 217 (2014); Randi Mandelbaum & Elissa Steglich, *Disparate Outcomes: The Quest for Uniform Treatment of Immigrant Children*, 50 FAM. CT. REV. 606 (2012).

than the primary onus being placed on immigration agencies to perform that role.¹⁵⁷ In some jurisdictions, a UC can be reunited with the parent who has not engaged in abuse or neglect—a path known as “one-parent SIJS.”¹⁵⁸ In signing ORR “sponsor agreements” to obtain custody of their children, parents or guardians commit to financially supporting the minor, enrolling the minor in school, providing for physical and mental health, and making sure the child attends scheduled hearings in immigration court.¹⁵⁹ The specter of deportation produces obstacles for family members; Galli reported that some undocumented family members she interviewed were afraid to pick up their children from ORR because they feared they would be arrested.¹⁶⁰ The result is that the state’s immigration enforcement role can undermine the potential for children and youth to reunite with family members while also obtaining legal protection in the form of SIJS.

The TVPRA presents additional hurdles—including home studies—for youth who are survivors of trafficking, have special needs, or have been victims of abuse.¹⁶¹ Studies may also be required where the sponsor “clearly presents” a risk that the child will be abused or exploited.¹⁶² While the safety of youth is important, advocates have repeatedly raised concerns that such screenings may reflect institutional bias and profiling practices.¹⁶³ Maria Woltjen of the Young Center pointed out that this framework, which produces additional hurdles for parents, inherently presumes that foster care is an appropriate placement.¹⁶⁴ As an example, she shared the story of a young deaf client whose mother was required to undergo a home study, saying “I don’t understand why a deaf child stays in custody with no appropriate education and no one who speaks his language when his mother is here and she speaks sign language and he can’t get reunified with her.”¹⁶⁵ Other parents have sued in state courts to prevent their children from being adopted by families who were intended to be temporary foster care providers.¹⁶⁶

Inherent in the dependency framework of SIJS is that foster care is the presumptive best place for these children. In states where one-parent SIJS is

¹⁵⁷ See Keyes, *supra* note 81, at 37, 43–46, 56–57.

¹⁵⁸ See U.S. CITIZENSHIP & IMMIGR. SERVS. “SPECIAL IMMIGRANT JUVENILES: ELIGIBILITY REQUIREMENTS—CUSTODY” POLICY MANUAL, VOL. 6, PART J, CH. 2, <https://www.uscis.gov/policy-manual/volume-6-part-j-chapter-2> [<https://perma.cc/R8P4-ZQF8>] (“A qualifying court-appointed custodial placement could be with one parent, if reunification with the other parent is found to be not viable due to that parent’s abuse, neglect, abandonment, or similar maltreatment of the petitioner.”).

¹⁵⁹ *Id.*

¹⁶⁰ Ciara Galli, *No Country for Immigrant Children: From Obama’s “Humanitarian Crisis” to Trump’s Criminalization of Central American Unaccompanied Minors*, California Immigration Research Initiative (CIRI) Research Brief Series #6, 6 (2018).

¹⁶¹ TVPRA 2008, codified at 8 U.S.C. §1232(c)(3)(b).

¹⁶² TVPRA 2008, Sec. 235c3(b).

¹⁶³ HEIDBRINK, *supra* note 14, at 96.

¹⁶⁴ Interview with Maria Woltjen, cited in ZATZ & RODRIGUEZ, *supra* note 130, at 165.

¹⁶⁵ *Id.*

¹⁶⁶ DOROTHY ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A BETTER WORLD* 207 (2022) (citing Garance Burke & Martha Mendoza, *AP Investigation: Deported Parents May Lose Kids to Adoption*, AP NEWS, October 9, 2018, <https://apnews.com/article/97b06ced0c149c492bf25a48cb6c26f> [<https://perma.cc/ZQ7A-NBYF>]).

not permitted, state law leaves foster care as the only available option. The central role of the foster care system in UC policy is reflected in not only ORR funding for foster care,¹⁶⁷ but also in the grant funding that provides legal representation to youth residing in foster care.¹⁶⁸ The effect of this funding was astronomical, given the likelihood that unaccompanied youth will be deported without legal assistance—only 2.3% of youth without attorneys received legal relief in 2015, compared to the nearly 33% who obtained immigration relief with the assistance of an attorney. Youth who reunite with their families are thus more likely to find themselves without representation and at higher risk of deportation themselves.

While the state takes an overtly protective role in the case of UCs, those critical of the impact of the DREAM Act posit that an immigration policy that benefits youth alone reflects a “belief that children are foremost a national resource, rather than a family resource; the depictions imply that children may be better off separated from their families.”¹⁶⁹ This practice of severing the bonds between children and parents is reflected in the earlier “humanitarian” programs that placed noncitizen children in orphanages or with foster families; it also reflects the anxieties that parents would use their children as “anchor[s]” or “parachutes” to obtain legal status themselves.¹⁷⁰

Immigration is often a multi-generational process wherein people rely on the power of petition to reunite families in the United States. However, individuals in liminal status have no ability to pass on permanent status to immediate family members and may never be able to obtain permanent status for themselves or their families. For SIJs, the state assumes a parental role through the issuance of a dependency order, extinguishing the power to petition even once youth have permanent residence and even when they reach the age of adulthood. For DACA recipients, the state does not offer any accompanying status for the family members of youth who have deferred action. Thus, youth with SIJS and DACA must also cope with their family’s ongoing legal liminality, living under the threat of a loved one’s deportation. The psychological and emotional toll of family separation is thus at odds with exceptionalist policies ostensibly designed to protect noncitizen children and youth.¹⁷¹

¹⁶⁷ See, e.g., ORR, ANNOUNCEMENT OF THE INTENT TO AWARD SINGLE-SOURCE AWARDS FOR LONG TERM FOSTER CARE, NOV. 3, 2022, <https://www.federalregister.gov/documents/2022/11/03/2022-23960/announcement-of-the-intent-to-award-single-source-awards-for-long-term-foster-care> [<https://perma.cc/2KQM-64AJ>] (announcing award five single-source awards in the amount of \$9,118,248, for Long Term Foster Care (LTFC) services for Unaccompanied Children).

¹⁶⁸ See LEGAL SERVICES FOR UNACCOMPANIED CHILDREN, *Vera Institute of Justice*, <https://www.vera.org/projects/legal-services-for-unaccompanied-children> [<https://perma.cc/VMW9-4Z48>] (describing grants funded by ORR for legal services for UCs).

¹⁶⁹ Mahatmya & Gring-Pemble, *supra* note 94, at 82.

¹⁷⁰ HEIDBRINK, *supra* note 14, at 6.

¹⁷¹ See, e.g., KARLA CORNEJO VILLAVICENCIO, *THE UNDOCUMENTED AMERICANS* 127 (2020) (“Stories in the news often end at the deportation, at the airport scene. But each deportation means a shattered family, a marriage ending, a custody battle, children who overnight go from being raised by two parents to one parent with a single income, children who become orphans in foster care.”); BHABHA, *CHILD MIGRATION AND HUMAN RIGHTS* at 21 (“While migrant parents who send remittances can often improve the material well-being of their families, prolonged parental absence leaves many children without the resources and support to maintain

C. *Exceptionalist Master Narratives*

Master narratives—stories that are pervasive within a society—shape public understanding; they also rationalize policies and how policies should be enforced. These narratives can include oppressive narrative formations, which reinforce power differentials by “pretending to justify them.”¹⁷² Legal scholars who examine the concept of “victim” in trafficking, domestic violence, and immigration policy have all noted the ways in which protection concepts are weaponized to punish and exclude immigrants.¹⁷³ Legal scholar Dean Spade points out that programs designed as “care taking” implicitly reflect assumptions about perceived harms as well as who is “inside” and “outside” the scope of protection.¹⁷⁴ This section examines the master narratives inherent in immigrant youth exceptionalism, and the role that worthiness, childlike presentation, and blamelessness play in distinguishing who benefits from immigrant youth exceptionalism and who is targeted by immigration enforcement.

1. *Worthiness*

Pathways to lawful status in immigration policy are deeply tied to narratives of worthiness and deservingness of political and social inclusion. These narratives have been used to bridge the political divide between those who favor immigration reforms that would offer more pathways to citizenship, and those who are concerned that these policies will “open the floodgates” for migration. Writing in 2017, in the midst of comprehensive immigration reform debates, immigration legal scholar Muneer Ahmad observed a shift in the rhetoric around citizenship from amnesty to “earned citizenship,” characterized by “performance of economic, cultural, and civic metrics.”¹⁷⁵ Immigration legal scholar Elizabeth Keyes similarly observes that immigration reforms represent the “opportunity to pick and choose those most worthy of

schooling and educational performance, to attain adequate nutrition status and health, to achieve a standard of living that takes them above the poverty line. Available research also shows that long-term separation negatively impacts the psychosocial development and functioning of children left behind, contributing to a sense of family disintegration. A complicating factor in many cases is the difficulty of reunifying the family legally, once the parent is legally qualified and economically prepared to do so.”)

¹⁷² Hilde Lindemann, *Counter the Counterstory: Narrative Approaches to Narratives*, 17 J. ETHICS & SOC. PHIL. 286, 288 (2020); see also RAINER FORST, *NORMATIVITY AND POWER* 56 (2015) (“‘Normative orders’ are based on fundamental justifications and correspondingly serve to justify social rules, norms, and institutions; they ground claims to power and justify a certain distribution of goods and life chances. As such, a normative order must be regarded as an order of justification; it presupposes justifications and at the same time generates them.”).

¹⁷³ See, e.g., Sabrina Balamwalla, *Trafficking in Narratives: Conceptualizing and Recasting Victims, Offenders, and Rescuers in the War on Human Trafficking*, 94 DENV. L. REV. 1, 38–39 (2016); Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75, 79–88 (2008); Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207, 209–12 (2012); Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 BOS. UNIV. L. REV. 157, 205–07 (2007).

¹⁷⁴ SPADE, *supra* note 109, at 75.

¹⁷⁵ Muneer Ahmad, *Beyond Earned Citizenship*, 52 HARV. C.R.-C.I.L. REV. 257, 257 (2017).

inclusion.¹⁷⁶ Immigration policies informed by immigrant youth exceptionalism similarly emphasize the worthiness and deservingness of particular youth.

The Obama administration deemed the rise in youth migration a sudden “humanitarian crisis,” though the rise in youth migration could be traced to documented factors that were years in the making.¹⁷⁷ The administration’s response was to heighten border enforcement, including policies to externalize border control by warehousing asylum-seekers in Mexico, and detaining families to hasten their deportation.¹⁷⁸ But children’s welfare advocates responded to the crisis as well, particularly in light of the federal government’s increased funding for unaccompanied children, with a focus on assisting youth in foster care. SIJS was a form of relief for these deserving children who were fleeing abuse and other harm. The dependency proceedings also accommodated possibilities such as foster care and even adoption, reminiscent of the humanitarian protection strategies for noncitizens who were treated as orphans.¹⁷⁹ The shift accommodated sympathy for youth from the perspective of children’s rights advocates, without engaging with the asylum claims of Central American families that were failing in immigration courts.

Interestingly, the worthiness of SIJs was being assessed in the public eye at the same time as DREAMer youth were seeking immigration relief based on their own migration at a young age. Keyes observes that the DREAMer movement “has shifted the history of citizenship away from its troubled racial past, but in doing so inadvertently raises the bar for how America perceives citizenship itself.”¹⁸⁰ Sociologist Walter J. Nicholls identifies this DREAMer archetype as a consciously cultivated image to garner political support for the DREAM Act and, later, for the executive policy of Deferred Action for Childhood Arrivals (DACA).¹⁸¹ DREAMer—and later DACA—youth were characterized as “working hard in school and making great sacrifices to complete a college education,” and as not complaining but rather “put[ting] their heads down, work[ing] hard, and earn[ing] stellar grades.”¹⁸²

¹⁷⁶ Elizabeth Keyes, *Race and Immigration, Then and Now: How the Shift to “Worthiness” Undermines the 1965 Immigration Law’s Civil Rights Goals*, 57 HOWARD L. J. 899, 915 (2014).

¹⁷⁷ See, e.g., *Dramatic Surge in the Arrival of Unaccompanied Children Has Deep Roots and No Simple Solutions*, *Migration Pol. Inst.*, June 13, 2014, <https://www.migrationpolicy.org/article/dramatic-surge-arrival-unaccompanied-children-has-deep-roots-and-no-simple-solutions> [<https://perma.cc/ZQ7A-NBYP>]. As of the *Flores* settlement in 1997, the federal government was already contemplating an increase in youth migration, including the stipulation that the settlement’s restriction on the use of detention for minors could be suspended “in the event of an emergency or influx of minors into the United States.” Stipulated Settlement Agreement, *Flores v. Reno*, No. 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997), at 8.

¹⁷⁸ Nina Lakhani, *Central America’s Rampant Violence Fuels an Invisible Refugee Crisis*, THE GUARDIAN (October 13, 2016), <https://www.theguardian.com/world/2016/oct/13/central-america-violence-refugee-crisis-gangs-murder> [<https://perma.cc/TW23-239N>]; *Easy Prey: Criminal Migration and Central American Migration*, INTERNATIONAL CRISIS GROUP (July 28, 2016), <https://www.crisisgroup.org/latin-america-caribbean/central-america/easy-prey-criminal-violence-and-central-american-migration> [<https://perma.cc/7PQA-88KX>].

¹⁷⁹ See notes 34–39 and accompanying text.

¹⁸⁰ See Elizabeth Keyes, *Defining American: The DREAM Act, Immigration Reform and Citizenship*, NEV. L.J. 101, 104 (2013).

¹⁸¹ NICHOLLS, *supra* note 7, at 31–32, 153.

¹⁸² Leisy J. Abrego & Genevieve Negrón, *Introduction, WE ARE NOT DREAMERS: UNDOCUMENTED SCHOLARS THEORIZE UNDOCUMENTED LIFE IN THE UNITED STATES* 9 (2020).

The campaign for DACA has been analyzed and criticized for reifying constructions of citizenship based on normative conceptions of worthiness,¹⁸³ and for the expectations placed on youth that they found difficult to bear.¹⁸⁴ As Ahmad observes, the “earned citizenship” framework commodifies DACA recipients as well, by emphasizing their ability to contribute to the labor force. A 2024 letter to the White House from the Presidents’ Alliance on Higher Education and Immigration alludes to this worthiness framing, describing DREAMer/DACA youth as “pursuing and graduating from undergraduate and graduate education in STEM, healthcare, and teaching, fields that face severe labor shortages,” and noting that “[t]hree-quarters of DACA recipients were employed in essential occupations during the COVID-19 pandemic.”¹⁸⁵

2. Childlike Presentation

For youth who arrive at the border between Mexico and the United States, it is possible to qualify for an exception to the general rule of immigration restriction, but only insofar as these young people travel alone. The (often dangerous) journey to the United States requires young migrants to make critical decisions on a daily basis; yet the role of dependency proceedings and foster care for UCs suggests that these youth lack autonomy.¹⁸⁶ Furthermore, SIJs bear the hallmark of vulnerability, given their experiences of abuse, abandonment, or neglect that serve as the basis for the judicial findings necessary to obtain status. Scholars critical of SIJS policy argue that youth may feel compelled to embrace more dependent and child-like roles to ensure that they will be seen as objects of humanitarian immigration protection, rather than as sites of immigration enforcement.¹⁸⁷ In Galli’s interviews, for instance, teenage youth described being accused by border officials that they were lying about being minors and apparently believed them to be older than they actually were.¹⁸⁸ To the extent that noncitizen youth are seen as adults rather than children, it casts suspicion on their designation for youth-specific relief.¹⁸⁹

¹⁸³ Heredia, *supra* note 93, at 75 (internal citations omitted).

¹⁸⁴ Walter J. Nicholls & Tara Fiorito, *Dreamers Unbound: Immigrant Youth Mobilizing*, 24 NEW LABOR FORUM 86, 88 (2015); Grecia Mondragón, “I Felt Like an Embarrassment to the Undocumented Community”: Undocumented Students Navigating Academic Probation and Unrealistic Expectations, WE ARE NOT DREAMERS 45–65 (describing the alienating nature of DREAMer narratives for undocumented youth who struggled to graduate or were on academic probation, attempting to cope with burdens of poverty, family-related stressors, trauma and shame).

¹⁸⁵ *Congress Must Include Protections for Dreamers in Immigration Compromises*, PRESIDENTS’ ALLIANCE ON HIGHER EDUCATION AND IMMIGRATION (February 12, 2024), https://www.presidentsalliance.org/wp-content/uploads/2024/02/Final_Letter_2024.SC_.Letter_re_Dreamers-w_-Signatories.pdf [<https://perma.cc/M27H-D77F>].

¹⁸⁶ ZATZ & RODRIGUEZ, *supra* note 130, at 170–71.

¹⁸⁷ GALLI, *supra* note 12, at 7, 211.

¹⁸⁸ *Id.* at 769 (One interviewee, Manuel, states, “One of the agents didn’t believe I was 17. He said I was 18, that I was lying. They put me in this small room, by myself, which was like a punishment so that I would tell the truth. It was cold, they didn’t give me water or anything to eat. I felt hungry when they took me out to ask me again. I always told them I was 17. It was the whole truth.”).

¹⁸⁹ *Id.* at 199; see also Priscilla A. Ocen, (*E*)racing Childhood: Examining the Racialized Construction of “Childhood” and “Innocence” in the Treatment of Sexually Exploited Minors, 62 UCLA

Unsurprisingly, it is older youth—particularly young adults between the ages of 18 to 21—who are likely to go without representation.¹⁹⁰

Galli notes that unaccompanied youth develop a “dichotomous legal consciousness” regarding their status, navigating the dichotomies of fear/trust and stigma/deservingness as they receive mixed messages about being noncitizens but also the beneficiaries of youth-specific immigration relief.¹⁹¹ There is tension between innocent, dependent narratives of childhood and the autonomous migration of children who work.¹⁹² On the one hand, as of May 2022, SIJs are also eligible for employment authorization,¹⁹³ and many youth are interested in working to provide for themselves and their families.¹⁹⁴ On the other hand, culturally-specific conventions of childhood—living with immediate family, attending school, and spending free time at home—animate social expectations for immigrant youth.¹⁹⁵ An idealization of childhood inherent in SIJS means that youth receive mixed messages about how open they should be about their desire to work.¹⁹⁶

DACA policy is also connected to the age of recipients—in this case, based on their age when arriving in the United States. The first sentence of the June 2012 DACA memo, which announced the program’s creation, calls its beneficiaries “certain young people who were brought to this country as children and know only this country as home.”¹⁹⁷ In addition to the emphasis on their immigration at a tender age, DACA beneficiaries are generally thought of as young adults, even though they could be as old as 31 when they first applied.¹⁹⁸ DACA is also inseparable from DREAMer activism, which

L. REV. 1586 (2015); Laila Hlass, *The Adulthood of Immigrant Children*, 34 GEO. IMM. L.J. 199, 210 (2020).

¹⁹⁰ Laila Hlass, *The Adulthood of Immigrant Children*, 34 GEO. IMM. L.J. 199, 210 (2020).

¹⁹¹ GALLI, *supra* note 12, at 19.

¹⁹² See, e.g., Sita G. Patel et al., “*Se extraña todo*”: Family separation and reunification experiences among unaccompanied adolescent migrants from Central America, 176 NEW DIRECTIONS FOR CHILD AND ADOLESCENT DEVELOPMENT 227, 228 (2021).

¹⁹³ U.S. CITIZENSHIP & IMMIGR. SERVS., “Special Immigrant Juvenile Classification and Deferred Action,” March 7, 2022, <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20220307-SIJAndDeferredAction.pdf> [<https://perma.cc/7SX4-MXCA>].

¹⁹⁴ It is not uncommon for many young people to discontinue school at an early age to work outside the home or engage in domestic care work. See CIARA GALLI, PRECARIOUS PROTECTIONS: UNACCOMPANIED MINORS SEEKING ASYLUM IN THE UNITED STATES 19–20 (2023) (citing LAUREN HEIDBRINK, MIGRANTHOOD: YOUTH IN A NEW ERA OF DEPORTATION (2020)).

¹⁹⁵ Jonathan Todres, *Independent Children and the Legal Construction of Childhood*, 23 S. CAL. INTERDISC. L.J. 261, 262–63, 269 (2014); see also Chiara Galli, *Dichotomous Legal Consciousness of Unaccompanied Minors*, 67 SOC. PROBLEMS 763, 772 (2019) (noting that ORR and immigration attorneys emphasize school attendance “as an indicator of good future citizenship and an appropriate coming-of-age objective, according to its care mandate that enshrines middle-class norms that see childhood as a time for school rather than work.”).

¹⁹⁶ See *id.* (“Knowledge about laws and notions about desirable behavior learned by interacting with different state agencies often become so entwined that youths cannot tell laws, rules, and advice apart.”).

¹⁹⁷ *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*, U.S. DEPT OF HOMELAND SECURITY (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/WA6S-PPVB>].

¹⁹⁸ Yet these narratives of vulnerable youth persist. See, e.g., KARLA CORNEJO VILLAVICENCIO, *THE UNDOCUMENTED AMERICANS* xiv (2020) (pointedly observing that when she was an undergraduate student at Harvard and there was interest in her writing a memoir about being

depicted the typical recipient as a high school graduate or hopeful young college student.¹⁹⁹ Indeed, when U.S. Senator Dick Durbin urged Congress to pass the DREAM Act in 2007, he referred to the potential beneficiaries as “student council presidents . . . valedictorians . . . junior ROTC leaders . . . star athletes,”²⁰⁰ clearly reflecting assumptions about their young ages and their involvement in activities associated with (albeit overachieving) American childhood. At the same time, as the age of the average DACA holder has risen with time, there is a disconnect between these images of DREAMer youth and the realities of DACA recipients.

3. Blamelessness

While youth with SIJS and DACA are portrayed as blameless for their presence in the United States, their parents are often portrayed as culpable for those migration decisions. These narratives, Heidbrink argues, require “advocates [to] embrace an agency-less, individualistic depiction of the migrant child in order to divorce children from responsibility or blame seeking that may subject them to punitive laws.”²⁰¹ The assignment of blame for immigration purposes also eclipses the roles of political and economic systems and actors, suggesting that the causes of unauthorized migration are not systemic but rather “the aggregation of several million individual, agentic decisions to break the law.”²⁰²

The state process for UCs adds another layer of scrutiny. ORR regularly feeds UCs into the foster care system. The state’s role presumes a dependency construct as essential to a legal understanding of the child, “a site for having the needs of the child met while also limiting the agency of the child.”²⁰³ As M. Aryah Somers, Pedro Herrera, and Lucia Rodriguez observe, the dependency construct of childhood “focuses substantially on the adults surrounding the child, whether it be the child’s adult caregivers or parents or adults staffing institutions and systems that work with children.”²⁰⁴ This view can bring adult guardians under heightened scrutiny. It is important to take seriously the potential for exploitation and abuse within families. However, critics of the foster care system point to the recurring narrative “of irreparably broken families and parents, and the need to ‘save’ their children,” with child removal

undocumented, she didn’t want to write a “rueful tale about being a sickly Victorian orphan with tuberculosis and no Social Security number, which is what the agents all wanted.”)

¹⁹⁹ See, e.g., Alejandro Portes, *Bifurcated Immigration and the End of Compassion*, 43 *ETHNIC & RACIAL STUDIES* 2, 11–12 (2020).

²⁰⁰ Press Release, Office of Sen. Dick Durbin, “DREAM Act as an Amendment to the Defense Authorization Bill,” (Jul. 13, 2006), <https://www.durbin.senate.gov/newsroom/press-releases/dream-act-as-an-amendment-to-the-defense-authorization-bill> [<https://perma.cc/MM3X-JNT8>].

²⁰¹ LAUREN HEIDBRINK, *MIGRANT YOUTH, TRANSNATIONAL FAMILIES, AND THE STATE* (2014) at 158–59; see also Keyes, *supra* note 180, at 114–15.

²⁰² Ahmad, *supra* note 175., 261.

²⁰³ M. Aryah Somers, Pedro Herrera, & Lucia Rodriguez, *Constructions of Childhood and Unaccompanied Children in the Immigration System in the United States*, 14 *U.C. DAVIS J. JUV. L. & POL’Y* 311, 326–27 (2010).

²⁰⁴ *Id.*

representing “a political choice to deal with inequality,” regularly targeting poor, Black, Brown, and Native families.²⁰⁵ Immigration enforcement, child welfare agencies, and the criminal justice system coordinate and share information, bringing immigrant families under surveillance.²⁰⁶ Fear of family separation through state intervention can be particularly acute for families of SIJs, where a parent has already been accused of abuse, abandonment, or neglect, and where a family member faces state scrutiny in obtaining both physical custody and guardianship.

The DACA program is similarly justified with narratives of immigrant youth blamelessness,²⁰⁷ with repeated reference to the fact that these young people came “by no fault of their own.”²⁰⁸ The narratives of DREAMers contrast sharply with the narratives attributed to their parents, who are often portrayed as “uneducated and unskilled, unable to support themselves, and people who cause a myriad of problems.”²⁰⁹ The exceptionalist view of DACA casts DREAMers as blameless but their parents as culpable for the wrongdoing of unauthorized migration, undermining alternative narratives (like that of parental sacrifice, or the need for family unity) that could serve as a rationale for DAPA or other paths to lawful status for families.²¹⁰

III. CONSEQUENCES OF IMMIGRANT YOUTH EXCEPTIONALISM

A. Familial Harm and Family Separation

As discussed previously, the narratives associated with immigrant youth exceptionalism can be weaponized against the family members, who face both limited options for admission and the constant threat of immigration enforcement.²¹¹ For UCs, there may be a need to emphasize a disconnect between themselves and their families to be seen as dependents who require state

²⁰⁵ ROBERTS, *supra* note 166, at 85–114; *id.* at 47–48 (noting that those who decried family separation at the U.S. southern border in 2020 made no such objection to families separated by the child welfare system); Tina Lee, *Response to the Symposium: Strengthened Bonds: Abolishing the Child Welfare System and Re-Envisioning Child Well-Being*, 12 COLUM. J. RACE & L. 1, 4 (2022).

²⁰⁶ ROBERTS, *supra* note 166, at 206.

²⁰⁷ Keyes, *supra* note 180, at 114–15.

²⁰⁸ See, e.g., *Get the Facts On the DREAM Act*, THE WHITE HOUSE (December 1, 2010), <https://obamawhitehouse.archives.gov/blog/2010/12/01/get-facts-dream-act> [<https://perma.cc/YP8F-UQPR>]; see also Mahatmya & Gring-Pemble, *supra* note 94, at 83 (“[T]he discourse surrounding the DREAM Act makes explicit that children are not responsible for their parents’ decisions to immigrate without proper documentation In this way, the DREAM Act discourse makes assumptions about which family members are good and bad; thereby creating and sustaining social practices and power relationships that may ultimately reinforce dominant ideologies, perpetuate inequality in, and be detrimental to positive family relationships. Indeed, the congressional hearings commend immigrant children for exhibiting traditional American values”).

²⁰⁹ Mahatmya & Gring-Pemble, *supra* note 94, at 83; see also WALTER J. NICHOLLS, THE DREAMERS: HOW THE UNDOCUMENTED YOUTH MOVEMENT TRANSFORMED THE IMMIGRANT RIGHTS DEBATE 52 (2013) (“[I]n addition to stressing the attributes that make undocumented students ‘normal’ Americans, DREAM advocates have also drawn attention to their most exceptional qualities. They are indeed ‘normal’ American kids, but they are also the ‘best and the brightest’ of their generation.”).

²¹⁰ *Id.*

²¹¹ Stephen Lee, *Family Separation as Slow Death*, 119 COLUM. L. REV. 2319, 2345 (2019).

protection through SIJS.²¹² Both leaving the family and conforming to the narrative of an unaccompanied child take a toll on familial relationships. Legal anthropologist Michele Statz observes that for one Fujianese unaccompanied minor, “her relationship with her mother represented a most valued experience of belonging—yet one that was simultaneously still ‘wrong’ and had to remain secret” so as not to jeopardize her SIJS case.²¹³ Statz further observes that cultural practices related to families can be flattened and distorted in the service of proving abuse or neglect. She offers the example of Fujianese youth, many of whom begin working at a young age; she observes that their where SIJ applications often portray “a child who is indefinitely and irrefutably obligated to the Chinese family unit,” and thus a victim of parental neglect.²¹⁴ Youth are often aware of these narratives and are ambivalent about these negative portrayals of family members.²¹⁵ Familial relationships suffer as the result of separation and in the face of these narratives.²¹⁶ The portrayal of the parents of these children as neglectful and abusive calls to mind the same narratives that contributed to the criminalization of Mexican migrant families in the post-Bracero era.²¹⁷

DACA similarly places the status of recipients at odds with adult family members. In underscoring the deservingness of youth, the DREAMer campaign used “discursive framings and the managing of protest to reinforce normative framings of citizenship that divide migrants into criminals and non-criminals, terrorists and non-terrorists, and DREAMers and non-DREAMers; in short, migrant criminality versus migrant exceptionality.”²¹⁸ As legal scholar Stephen Lee observes, both SIJS and DACA “reflect legally-sanctioned violence through obfuscation,” with “the effort to protect (in the case of SIJS) and praise (in the case of DACA) migrants detract[ing] from the fissures that such programs can create within transnational families.”²¹⁹

These narratives about family members also take a toll on noncitizen youth. For youth who were part of the DREAMer movement and eventually obtained DACA, many were critical of the narratives that maligned their parents’ intent to migrate in the interest of their families. As one said:

A key talking point created in the past [for the DREAM Act] was that we were brought here “by no fault of our own.” This was created by policymakers and advocates, but most DREAMers disagreed with that statement . . . We now say that we were brought here by our parents who are courageous and responsible and who would not let their children die and starve in another country.²²⁰

²¹² Katharine M. Donato & Blake Sisk, *Children’s Migration to the United States from Mexico and Central America: Evidence from the Mexican and Latin American Migration Projects*, 3 J. OF MIGRATION AND HUM. SEC. 58, 59 (2015); see also Statz, *supra* note 3, at 6, 10 (2017); HEIDBRINK, *supra* note 14, at 131.

²¹³ Statz, *supra* note 3, at 11.

²¹⁴ *Id.* at 10.

²¹⁵ *Id.* at 11 (citing one interviewee who said that she told her mother that “[y]ou have to be a bad guy in my case.”).

²¹⁶ HEIDBRINK, *supra* note 14, at 139.

²¹⁷ See note 74 and accompanying text.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ NICHOLLS, *supra* note 7, at 127.

DREAMers were acutely aware that this attribution of unlawful migration to their parents contributed to a larger narrative that could be used to justify their deportation.

The term “family separation” has become synonymous with Trump-era policies that shocked the conscience of the American public. But the reality is that family separation is a feature of the current immigration system, even one that carves out exceptional immigration relief for youth. Many DREAMer and SIJS youth suffered long separations from family members that irreparably harmed their sense of safety. Exceptionalist youth immigration policies do not address the deep insecurity and fear that such a separation will occur again. Journalist Karla Cornejo Villavicencio, who grew up undocumented and later obtained DACA, writes in her memoir *The Undocumented Americans* that stress hormones produced by traumatic separation from family members at a young age create physical and psychological changes. One psychologist said to her that “[her] brain looked like a tree without branches.”²²¹ She writes:

I just think about all the children who have been separated from their parents, and there’s a lot of us, past and present, and some under more traumatic circumstances than others. . . . We’ve all been touched by this monster, and our brains are forever changed, and we all have trees without branches in there, and what will happen to us? Who will we become? Who will take care of us?²²²

B. Labor Exploitation

As described in the previous section, unaccompanied youth receive mixed messages about performing work. Immigration restrictions have produced family separation for decades, often with a parent coming to the United States to work and financially support their family.²²³ Restrictions on migration and the exceptions for admission of noncitizen youth mean that immigration policy has forced many young people to step into the role of breadwinner for their families. The longstanding marginalization of noncitizen workers, the preference for workers in legal liminality, and the invisibility of children and youth in the workplace all contribute to their commodification and potential for exploitation by employers.

The experience of noncitizen youth in the workplace is shaped by the history of employers’ commodification and coercive use of migrant labor. Employers have relied on foreign labor in the United States to increase profits by lowering the costs of labor and reproduction of the labor force, while allowing for “the export of unemployment” and the costs of firing through

²²¹ KARLA CORNEJO VILLAVICENCIO, *THE UNDOCUMENTED AMERICANS* 61 (2020).

²²² *Id.*

²²³ See, e.g., Joanna Dreby, *Honor and Virtue: Mexican Parenting in the Transnational Context*, 20 *GENDER & SOC’Y* 32, 32–33, 35 (2006); Ester Hernandez & Susan Bibler Coutin, *Remitting Subjects: Migrants, Money and States*, 35 *ECON. & SOC’Y* 185, 202–03 (2006).

deportation.²²⁴ As Audre Lorde observes, “[i]n a society where the good is defined in terms of profit rather than in terms of human need, there must always be some group of people who, through systematized oppression, can be made to feel surplus, to occupy the place of the dehumanized inferior.”²²⁵ Border enforcement mechanisms criminalize presence in the country and can be used selectively when economically necessary, protecting the sectors that rely on these labor pools but under the guise of protecting native-born workers.²²⁶

Historic use of immigrant labor has not only shaped migration; it has shaped the nature of work. In response to employer demands for labor that can be used under specific conditions, certain jobs are now associated with noncitizen labor. Migrant labor—including youth labor²²⁷—is ubiquitous in the agricultural industry, which is exempt from FLSA overtime provisions and allows youth of any age to work on small farms with parental permission.²²⁸ Noncitizen workers are also disproportionately represented in low-wage work and in “firms or sectors of firms which have shift work, obsolete and hazardous equipment, and job insecurity.”²²⁹ Other sectors benefit from the labor supply and organizational flexibility associated with reliance on noncitizen workers.²³⁰ These hiring practices also produce a highly flexible labor pool, where the overall number of employment-based visas can be raised and lowered, and where the number of undocumented workers can be controlled through raids and other forms of immigration enforcement.²³¹ This flexibility is particularly critical for sectors characterized by narrow profit margins and high levels of responsiveness to fluctuations in demand.²³² Legal scholar Leticia Saucedo observes that recently-arrived immigrants (defined as having arrived in the last five years) are more vulnerable in the workplace due to their “perceived immigration status, lack of knowledge about workplace rights, political disenfranchisement, ‘push’ factors, fear of job loss and/or deportation, and language deficiencies, [which] combine to create an especially vulnerable workforce.”²³³ She quotes one employer as saying, “[t]he Latinos in our locations, most are recent arrivals. Most are tenuously here, and here on fragile documents. I see

²²⁴ SASKIA SASSEN, *THE MOBILITY OF LABOR AND CAPITAL: A STUDY IN INTERNATIONAL INVESTMENT AND LABOR FLOW* 31 (1988).

²²⁵ Audre Lorde, *Age, Race, Class, and Sex: Women Redefining Difference*, *SISTER OUTSIDER: ESSAYS AND SPEECHES* 114–15 (1984).

²²⁶ SASSEN, *supra* note 224, at 36–37.

²²⁷ See, e.g., *Fields of Peril: Child Labor in U.S. Agriculture*, HUM. RIGHTS WATCH (May 5, 2010), <https://www.hrw.org/report/2010/05/05/fields-peril/child-labor-us-agriculture> [<https://perma.cc/P5TJ-PH3Z>].

²²⁸ FLSA, § 213(b)(12); U.S. DEP’T OF LABOR, *Child Labor Requirements in Agricultural Occupations under the Fair Labor Standards Act* (2016), <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/childlabor102.pdf> [<https://perma.cc/K79P-98PS>] (summarizing the exemptions for youth, including the minimum work age at 29 C.F.R. §570.2(b); minimum wage under FLSA §13(a)(6)(A); and age limits for hazardous work at 29 C.F.R. §570.2(b)).

²²⁹ *Id.* at 39–40.

²³⁰ *Id.* at 40.

²³¹ *Id.* at 21.

²³² *Id.*; see also ROGER WALDINGER AND MICHAEL LICHTER, *HOW THE OTHER HALF WORKS: IMMIGRATION AND THE SOCIAL ORGANIZATION OF LABOR* 144 (2003).

²³³ Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO STATE L. J. 961, 966 (2006).

them as subservient.”²³⁴ However, undocumented worker organizing,²³⁵ as well as enforcement crackdowns,²³⁶ have led employers to look to other individuals with liminal status in the United States who have work authorization. Sociologist David Feldman opines that there is a preference for employees in liminal status, noting that “many businesses are increasingly likely to view unauthorized workers as more of a liability than an asset, and that this makes an ostensibly legal but intensely surveilled and ultimately deportable workforce look more attractive.”²³⁷

Noncitizen youth are precisely such a source of this labor. The Department of Labor reported a 69% increase in complaints of youth labor exploitation in 2023.²³⁸ Deferred action through SIJS and DACA comes with work authorization, but children’s status is liminal in that it relies on administrative grace and constant surveillance. Even where in the possession of a grant of work authorization, immigration courts and immigration officials have not always treated SIJS as a form of permanent relief, subjecting unaccompanied youth to removal proceedings, detention, and even orders of deportation.²³⁹ Unaccompanied youth face the realities of liminal status, under the regular scrutiny of ICE, the courts, and the foster care system until they are granted lawful permanent residence.²⁴⁰ DACA requires renewal of status every two years.²⁴¹ The scrutiny that these youth face as the result of their liminality makes them less likely to seek redress for workplace complaints; for those who are aware that they are working in violation of the law, there is additional incentive to keep their work secret. Youth who cannot access legal help to file for SIJS or asylum may not be able to expediently file the necessary paperwork to obtain work authorization at all, and thus be more susceptible to recruitment into exploitative labor.

Liminal status can also limit higher-paid employment opportunities because it is temporary and is not recognizable as a form of status like being a permanent resident or a citizen.²⁴² Feldman points out that beneficiaries

²³⁴ *Id.* at 970 (citing ROGER WALDINGER AND MICHAEL LICHTER, HOW THE OTHER HALF WORKS: IMMIGRATION AND THE SOCIAL ORGANIZATION OF LABOR 163 (2003)).

²³⁵ David Feldman, *Beyond the Border Spectacle: Global Capital, Migrant Labor, and the Specter of Liminal Legality*, 46 CRITICAL SOCIOLOGY 726, 736 (2020).

²³⁶ *Id.* at 733, 736; see also Shae Frydenlund and Elizabeth Cullen Dunn, *Refugees and Racial Capitalism: Meatpacking and the Primitive Accumulation of Labor*, 95 POLITICAL GEOGRAPHY 102575 (2022) (noting that when immigration raids in the late 2000s resulted in the arrest of a third of the undocumented Latinx workers in the meatpacking industry, there was a shift to recruiting “vulnerable but ‘legal’ refugee workers.”).

²³⁷ Feldman, *supra* note 235, at 733.

²³⁸ U.S. DEP’T OF LABOR, DEPARTMENTS OF LABOR, HEALTH AND HUMAN SERVICES ANNOUNCE NEW EFFORTS TO COMBAT EXPLOITATIVE CHILD LABOR (Feb. 27, 2023), <https://www.dol.gov/newsroom/releases/osec/osec20230227> [<https://perma.cc/W76E-LUVS>].

²³⁹ RACHEL L. DAVIDSON & LAILA L. HLASS, ANY DAY NOW THEY CAN DEPORT ME: OVER 44,000 IMMIGRANT CHILDREN TRAPPED IN SIJS BACKLOG 21 (2021).

²⁴⁰ *Id.*

²⁴¹ USCIS, CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA) (APR. 8, 2024), <https://www.uscis.gov/DACA> [<https://perma.cc/V2DU-YL44>].

²⁴² See, e.g., *Juarez v. Northwestern Mutual Life Ins. Co., Inc.*, 69 F. Supp. 3d 364, 365–66 (S.D.N.Y. 2014) (in which a DACA recipient sued Northwestern Mutual Life Insurance Company for revoking an offer of an internship because he was not a citizen or lawful permanent resident, even though he was in possession of work authorization); see also Burciaga & Malone, *supra* note 144,

of ostensibly humanitarian programs such as DACA and TPS have “been quite advantageous to capital, producing an extremely precarious, flexible, and tightly controlled workforce.”²⁴³ The labor contributions by DACA recipients exemplify the messaging and realities of labor needs. During the COVID-19 pandemic, DACA recipients were hailed as vital frontline workers in the healthcare industry. A 2015 survey found that an overwhelming majority of DACA recipients were employed in nonmanual blue-collar jobs paying an average of \$11.47 an hour, with 25% of survey participants making \$9.00 or less per hour and nearly half of participants struggling to pay rent, utilities, and other monthly expenses.²⁴⁴ The subordination in this labor arrangement is also evident: the 2015 study of DACA recipients showed that less than 5% worked unionized jobs.²⁴⁵

The “pathologization of mobility”²⁴⁶ for children who migrate alone—particularly those children who are older and those who might not be easily slotted into narratives of dependency—allows for them to be more easily assimilated into a marginalized labor force. Immigrant youth are particularly vulnerable to exploitation by employers because most immigrant youth begin their migration journeys without sufficient resources to reach their final destinations without working, necessitating stops en route for short-term employment.²⁴⁷ Under the current system, employers must comply with certification requirements to ensure that youth meet age requirements.²⁴⁸ However, employers regularly rely on staffing agencies, which streamline the hiring process but also create plausible deniability in the hiring of underage workers.²⁴⁹ These agencies work closely with employers—in some cases, are even

at 1101 (citing statements from DACA survey participants stated “employers were reluctant to promote them or invest in them because their work permits have a two-year expiration cycle.”).

²⁴³ Feldman, *supra* note 235, at 737.

²⁴⁴ CAITLIN PÄTLER, JORGE A. CABRERA, AND DREAM TEAM LOS ANGELES, FROM UNDOCUMENTED TO DACAMENTED: IMPACTS OF THE DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA) PROGRAM 5 (2015).

²⁴⁵ *Id.*

²⁴⁶ HEIDBRINK, *supra* note 14, at 131.

²⁴⁷ Vasileia Digidiki & Jacqueline Bhabha, *The Hidden Costs of Unaccompanied Child Migration*, 31 INT’L J. CHILDREN’S RIGHTS 114, 121 (2023) (“Key informants described cases where children had embarked on these hazardous journeys alone and without the financial resources required to reach their destination. In such instances, they were forced to stop en route to earn money for food, transport, and other necessities, a strategy that brought them into contact with employers offering a broad range of income-generating opportunities from agriculture to domestic, to other forms of manual work. Children spent weeks or months working and saving before moving on to the next stage of their journey. Some relationships with employers were short-term and limited to a particular work site, others led them into the hands of exploiters and gangs operating across popular, irregular routes.”).

²⁴⁸ 29 C.F.R. § 570.5(a). Children under 14 are not allowed to work. 29 C.F.R. § 570.2(a)(1)(i). This age restriction does not apply to agricultural jobs; minors of the age of 12 or 13 may be employed on farms where a parent is also employed, and a minor under the age of 12 may be employed on a farm owned by a parent. 29 C.F.R. § 570.2(b)(1)-(2). There is no minimum age where the child is employed by a parent. 29 C.F.R. § 570.2(a)(2). Young people who are 14 to 16 years of age may be employed outside school hours under limited periods and conditions. 29 C.F.R. § 570.2(a)(1)(i).

²⁴⁹ Marcela Valdes, *Why Can't We Stop Unauthorized Immigration? Because It Works*, NY TIMES MAGAZINE, October 1, 2023; Tonya Mosley, *Amid a child labor crisis, U.S. state governments are loosening regulations*, NPR, May 4, 2023, <https://www.npr.org/2023/05/04/1173697113/immigrant-child-labor-crisis> [<https://perma.cc/A54P-Y6LB>] (As one reporter told NPR, “I talk

physically located in the same building as employers²⁵⁰— but because they are legally separate entities, agencies give employers plausible deniability around the hiring of underage workers. One Reuters investigation illustrates the ubiquity of funneling underage workers into particular industries. For \$1,500, a young woman who migrated to the United States at 11 and entered as an unaccompanied minor obtained a fake social security number and an identification with a different birthdate. “How old do you want to be?” asked the broker.²⁵¹ Through a staffing firm, she was hired by a local chicken processing plant for \$10 an hour. “Everybody around here knows how this works,” her sister said.²⁵²

Even for youth who apply for deferred action in the form of DACA or SIJS, the delay in obtaining permission to work produces its vulnerability to exploitation.²⁵³ According to Kristie-Anne Padron, Managing Attorney at Catholic Legal Services Miami:

I think one of the biggest risks [to UCs] is exploitation by employers. Clients will work for weeks and weeks on the promise that they will get paid later, and then sometimes they find they have worked for months without getting paid. Sometimes they feel they have no recourse for wage theft because they still don't have a work permit while stuck in the SIJS backlog. . . I think that the SIJS kids are more susceptible to these arrangements and exploitation because they are in no-man's-land and can't survive so many years without any way of working . . .²⁵⁴

Youth labor is not an isolated phenomenon. As New York Times reporter Hanna Dreier says, “I found these children working in all 50 states. They were not hard to find.”²⁵⁵

to children who are making Flamin' Hot Cheetos every night, and they told me their lungs were burning from that spicy dust. They were doing this grueling work night after night, but they weren't working directly for this big brand. So when we then went to Cheetos, they said, 'Oh, well, we have no idea this was happening. This is in violation of our policies.' And it creates this strange situation where you can easily go to the place where this product is being made and talk to children who are getting off shift at 4 in the morning, and yet the brand itself can still claim ignorance.”)

²⁵⁰ Joshua Schneyer, Mica Rosenberg, & Kristina Cook, *Teen Risked All to Flee Guatemala. Her Payoff: Grueling Job in U.S. Chicken Plant*, REUTERS, Feb. 7, 2022, <https://www.reuters.com/investigates/special-report/usa-immigration-alabama/> [<https://perma.cc/F7ZX-AJGC>].

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ DAVIDSON & HLAAS, *supra* note 239, at 17.

²⁵⁴ *Id.*; see also Daniel Costa, *Employers increase their profits and put downward pressure on wages and labor standards by exploiting migrant workers*, ECONOMIC POLICY INSTITUTE (August 27, 2019), <https://www.epi.org/publication/labor-day-2019-immigration-policy/> [<https://perma.cc/L7KR-NHTX>].

²⁵⁵ Mosley, *supra* note 249.

IV. WIDENING THE LENS ON MIGRANT YOUTH VULNERABILITY

A. *Resisting Liminality in Immigration Policy for Youth and Families*

In countless other contexts, policies emphasize that children's welfare and best interests are protected when they live with and are cared for by their families. Conversely, children are often more vulnerable outside a familial support system. Yet, immigration policies regularly produce family separation, making youth more vulnerable.²⁵⁶ When parents face deportation, "children of immigrants are treated as the children of others," facing either a loss of citizenship if they are Americans but accompany a deported parent, or a loss of the right to family if they remain in the United States alone.²⁵⁷ Critics of family immigration policy argue that the state of the law devalues children's interests and their roles in families,²⁵⁸ and that the trauma of separation has profound psychological and emotional effects on youth and their families alike.²⁵⁹ Immigration law scholar Anita Sinha observes that historically, policies that remove children from their families of origin are also deeply racialized.²⁶⁰ From this perspective, SIJS and DACA are the most recent in a long line of programs where children cut ties with their families and are placed for adoption or taken into foster care. Yet, given the extensive documentation of the harms associated with separation from a parent, it becomes hard to argue that programs are designed to assist and protect youth when they do not address the harms of family separation and its wider consequences.

Critics of the DREAM Act recognize that even while the legislation (which has never successfully materialized) would offer a path to status for a vulnerable sector of the undocumented population, it would do so in perpetuation of a new tendency within the law to move away from family unity and determine worthiness for a path for permanent status based on individual

²⁵⁶ *Exec. Order No. 13769*, 82 *Fed. Reg.* 8977 (Jan. 27, 2017) and 82 *Fed. Reg.* 8977 (Mar. 6, 2017) (revised version); see also Anita Sinha, *A Lineage of Family Separation*, 87 *BROOK. L. REV.* 445, 445 (2022).

²⁵⁷ Shani M. King, *Contextualizing (Children's) Immigration in Law, History, Theory and Politics*, 2022 *MICHIGAN STATE L. REV.* 187, 201-02 (citing *Acosta v. Gaffney*, 558 F.2d 1153, 1157 (3d Cir. 1977)) (parents arguing, on behalf of their citizen daughter, that her constitutional right to reside in the United States would be violated by their deportation); *Ayala-Flores v. INS*, 662 F.2d 444, 445 (6th Cir. 1981) (same); *Delgado v. INS*, 637 F.2d 762, 763 (10th Cir. 1980) (father arguing, on behalf of his four citizen children, that his deportation would violate his children's Fifth and Fourteenth Amendment rights by forcing them to live without their father or to leave the United States, respectively); *Newton v. INS*, 736 F.2d 336, 342 (6th Cir. 1984) (parents arguing, on behalf of their two citizen children, that their deportation would violate their children's rights); *Ms. L. v. U.S. Immigration and Customs Enforcement*, 302 F.Supp.3d 1149 (S.D. Cal.) (2018) (finding that forcible separation of families at the U.S.-Mexico border violated families' due process right to family integrity).

²⁵⁸ See, e.g., King, *supra* note 257, at 190; Maddali, *supra* note 18, at 110-11.

²⁵⁹ See, e.g., Society for Community Research and Action: Division 27 of the American Psychological Association, *Statement on the Effects of Deportation and Forced Separation on Immigrants, their Families, and Communities*, 62 *AM. J. COMMUNITY PSYCHOL.* 1 (2018).

²⁶⁰ See generally Sinha, *supra* note 256 (placing the Trump administration's family separation policies in the context of other practices of forced separation, including the sale and enslavement of African children, forced residential school for Indigenous children, and "orphan train" children who were sent to live with rural families).

characteristics—particularly those associated with educational achievement and prospects for employment. M. Isabel Medina observes that, in the context of the DREAM Act and DACA, it would make more sense to put DAPA or a similar form of relief in place for parents first:

If the United States prizes citizenship and values a unified parent-child relationship, one would expect that the deportation decision-making process would take material note of whether the deportation of an individual is going to deprive a U.S.-citizen child of a parent. Yet, American society has grown used to the continued and persistent image of young U.S.-citizen children left behind when a parent is deported or forced to leave their native country when the noncitizen parent opts to take the U.S.-citizen child with them.²⁶¹

Similarly, advocates for SIJs reform note that the inability of SIJ youth to petition for family members undermines the safe environment that parents and family members are best situated to offer, meaning that this limitation undermines the “best interest of the child” at the heart of juvenile court processes.²⁶²

Accordingly, one way to address this disconnect is to improve family access to paths to permanent immigration rather than focusing on policies that are available to youth alone. Present-day family-based immigration law centers adults as petitioners, “advanc[ing] family integrity . . . only in the narrow sense of creating opportunities for parents to align their children’s status with their own.”²⁶³ Immigrant youth exceptionalism and its associated narratives further entrench this stereotype of young migrants as “passive victims of harsh situations forced upon them by the decisions and actions of others, even when the migrants in question are adolescents at the cusp of adulthood.”²⁶⁴ Both youth and their families would benefit from broader legalization policies that preserve the integrity of kinship. Such reforms also have the potential to address the racialized preferences inherent in the foundation of a family-based immigration system. Two such reforms would be to allow SIJs to petition for family members, and to adjust the caps on visas for SIJs. As previously discussed, the history of quotas has shaped access to family immigration. Pathways to permanent status for families become more significant in light of the “weaponization of crisis” that has been used to characterize migration patterns as “border emergencies” warranting increased enforcement.²⁶⁵

²⁶¹ M. Isabel Medina, *Reflections on the DACA Cases in the Supreme Court—The “Illusion of Freedom”* N.C. L. REV. FORUM 101, 111 (2020).

²⁶² See Laila Hlass, *The Adulthood of Immigrant Children* 34 GEO. IMMIGRATION L.J. 199, 202 (2020).

²⁶³ David Thronson, *You Can’t Get There From Here: Toward a More Child-Centered Immigration Law*, 14 VA. J. SOC. POL. 58, 69 (2006); Laila Hlass, *The Adulthood of Immigrant Children*, 34 GEO. IMMIGRATION L.J. 199, 207–08 (2020).

²⁶⁴ Vasileia Digidiki & Jacqueline Bhabha, *The Hidden Costs of Unaccompanied Child Migration*, 31 INT’L J. CHILDREN’S RIGHTS 114, 118 (2023).

²⁶⁵ Lee, *supra* note 29, at 2363–64 (“The example of forcible separation at the border illustrates the importance of crisis narratives to generating political momentum . . . [E]ven with the formal end to the policy of forcibly separating families at the border, both advocates and government officials continue to shape discussions around border enforcement in terms of crises.

A policy shift towards legalization for families, and the ability for SIJS to sponsor family members, would address youth vulnerability in the manner preserved by over 100 years of U.S. immigration policy—through permanent family reunification.²⁶⁶

Critically, this family-based policy approach also avoids pitting the protection interests of youth against the fears of immigration enforcement and deportation of family members. As Keyes points out in her analysis of the 1965 Civil Rights Act and its application to immigration policy, “[i]f the undocumented are the subject of controversy and even hatred pre-reform, those left out of reform are likely to be even more reviled, as their lack of status will signify their status as those least desired among the undocumented population.”²⁶⁷ This reality has been particularly fraught in the lives of youth who have been brought under the protection of state policy and have remained fearful for their families.

B. Immigrant Youth Exceptionalism and Systemic Causes of Labor Exploitation

Immigrant youth exceptionalism obscures the fact that youth will engage in work intended for adults, but the risks associated with the work are not acceptable regardless of age. Agriculture remains a highly dangerous industry for youth, with high rates of injury and death each year.²⁶⁸ Noncitizen youth may face particular risks—as the result of smaller physical stature, workplace inexperience, and/or lesser ability to bargain around workplace conditions—but the industry hardships and hazards they encounter have affected marginalized workers for decades. The New York Times reported that many youths are employed in the roofing industry, despite federal laws that make this work off-limits to anyone under the age of 18.²⁶⁹ Young workers have been maimed

In this way, crises are malleable and can operate as weapons within highly contested political exchanges.”).

²⁶⁶ *Id.* at 2357 (citing Marc R. Rosenbaum & Ariel G. Ruiz Soto, *An Analysis of Unauthorized Immigrants in the United States by Country and Region of Birth*, MIGRATION POLICY INST. 4 fig.1 (2015), <https://www.migrationpolicy.org/sites/default/files/publications/Uauth-COB-Report-FINALWEB.pdf> [<https://perma.cc/BE5G-YHDG>]).

²⁶⁷ Keyes, *supra* note 180, at 916.

²⁶⁸ Human Rights Watch, *More U.S. Child Workers Die in Agriculture Than in Any Other Industry*, Dec. 4, 2018, <https://www.hrw.org/news/2018/12/04/more-us-child-workers-die-agriculture-any-other-industry> [<https://perma.cc/9L8S-RYSZ>]; National Children’s Center for Rural and Agricultural Health and Safety, *2022 Fact Sheet: Child Agricultural Injuries* (2022), <https://doi.org/10.21636/nfmc.nccrahs.injuryfactsheet.r.2022> [<https://perma.cc/Z9AG-JZBN>] (reporting that, from 2011 to 2020, the agricultural industry had the largest number of occupational fatalities for children 17).

²⁶⁹ Hannah Dreier et al., *Children Risk Their Lives Building America’s Roofs*, N.Y. TIMES (Dec. 14, 2023), <https://www.nytimes.com/interactive/2023/12/14/us/roofing-children-immigrants.html?smid=nytcore-android-share> [<https://perma.cc/FT77-UX6X>]. Youth under 18 years of age are prohibited from engaging in “hazardous” work. 29 C.F.R. § 570.2(a)(1)(ii). This includes work that requires the operation of certain equipment (e.g. forklifts, power-driven meat processing and baking equipment), as well as most jobs in certain industries (e.g. mining, roofing, and slaughterhouses). *Id.*

or killed by factory equipment,²⁷⁰ suffered disfiguring burns²⁷¹ and falls that resulted in severe brain injury or even death.²⁷² Underage workers are more likely to be injured on the job and more likely to be abandoned by employers following an injury with limited options for both medical treatment and legal recourse.²⁷³ The realities of youth work also remain largely invisible because there are no applicable transparency requirements on the federal rules; employers are not required to provide information or numbers of underage workers or their workplace injuries because, under law, these underage workers do not exist.²⁷⁴ Like the young people who labored in the fields in the 1940s, they work clandestinely out of fear of immigration enforcement.

The recent investigative reporting on underage labor has prompted overtures by corporations looking to address youth labor exploitation in their supply chains, including the prioritizing of social audits.²⁷⁵ The Department of Labor has also created an Interagency Taskforce to Combat Child Labor Exploitation, and the Wage and Hour Division is developing a National Strategic Enforcement Initiative.²⁷⁶ As admirable as these efforts are, enforcement agencies must contend with inflation, the tightening of the labor market, growing demands for production in the face of worker scarcity, and the increasing prevalence of a “fissured workplace” that relies on contractors and subcontractors.²⁷⁷ The largely outdated FLSA rules are intended to be supplemented by state and local regulation of underage hiring, yet many state regulations have become even more relaxed. State laws intended to “streamline” hiring eliminate work certificates that provide a paper trail in child labor investigations.²⁷⁸ State interests in expanding the use of youth labor, particularly

²⁷⁰ See, e.g., David Leonhardt, *Child Labor and the Broken Border*, N.Y. TIMES (Sept. 19, 2023), <https://www.nytimes.com/2023/09/19/briefing/child-labor-migrants.html> [<https://perma.cc/U75Z-UTJS>]; Michael Sainato, *U.S. Labor Department Condemns Surge in Child Labor After Teen Dies on the Job*, THE GUARDIAN, Jul. 27, 2023, <https://www.theguardian.com/us-news/2023/jul/27/child-deaths-labor-department> [<https://perma.cc/Y4G6-BCLS>].

²⁷¹ See, e.g., Mike Stunson, *Kids as Young as 13 Got Chemical Burns Working at Sanitation Business, Officials Say*, KANSAS CITY STAR (Nov. 10, 2022), <https://www.kansascity.com/news/nation-world/national/article268583482.html#storylink=cpy> [<https://perma.cc/J5BY-234J>].

²⁷² See, e.g., Dreier et al., *supra* note 269.

²⁷³ *Id.* (“The government does not publish data about injuries or fatalities among child roofers—a category of workers that is not supposed to exist.”).

²⁷⁴ *Id.*

²⁷⁵ Hannah Dreier, *Confronted With Child Labor in the U.S., Companies Move to Crack Down*, N.Y. TIMES, February 7, 2024, <https://www.nytimes.com/2024/02/07/us/child-labor-us-companies.html> [<https://perma.cc/787C-4VJQ>].

²⁷⁶ U.S. DEPARTMENT OF LABOR, DEPARTMENTS OF LABOR, HEALTH AND HUMAN SERVICES ANNOUNCE NEW EFFORTS TO COMBAT EXPLOITATIVE CHILD LABOR (Feb. 27, 2023), <https://www.dol.gov/newsroom/releases/osec/osec20230227> [<https://perma.cc/NZ3E-M5WY>].

²⁷⁷ See David Weil, *Understanding the Present and Future of Work in the Fissured Workplace Context*, 5 RSF: RUSSELL SAGE FOUND. J. OF THE SOC. SCIENCES 147, 148 (2019) (defining the “fissured workplace”).

²⁷⁸ Kaitlyn Radde, *Arkansas Gov. Sanders Signs a Law That Makes It Easier to Employ Children*, NPR (Mar. 10, 2023), <https://www.npr.org/2023/03/10/1162531885/arkansas-child-labor-law-under-16-years-old-sarah-huckabee-sanders> [<https://perma.cc/2MPT-W2FB>]; Arkansas Advocates for Children and Families, *New Law Will Make Arkansas Youth More Vulnerable to Exploitation*, March 3, 2023, <https://www.aradvocates.org/new-law-will-make-arkansas-youth-more-vulnerable-to-exploitation/> [<https://perma.cc/8UWA-9HSY>]; see also Mosley, *supra* note 250 (quoting a *Washington Post* reporter who says, “It’s important to understand how a child labor violation is investigated. The paperwork here, believe it or not, is actually

in right-to-work jurisdictions, have the potential to undermine federal oversight.²⁷⁹ Under the existing federal regulations, youth workers also have limited recourse, meaning little liability or financial loss for employers who violate underage hiring laws. The FLSA provisions related to child labor are dated and do not carry a private right of action, and agency remedies offered by the Department of Labor are inadequate.²⁸⁰ Even where a federal investigation is conducted and finds wrongdoing, fines are incredibly low—just over \$15,000 per violation—compared to the profits made by companies.²⁸¹ Many employers are desperate to fill jobs as unemployment rates drop.²⁸² Some of these employers also continue to benefit from financial incentives despite their practices; Hyundai, for example, has received billions of dollars in tax breaks and other incentives.²⁸³ Policies to address labor exploitation must thus contend with the economic pressures that lead to reliance on marginalized workers, such as eliminating the separate standards for agricultural and nonagricultural work, enforcing wage and hour laws, and supporting workers' rights to organize and the efforts of unions to integrate young people.²⁸⁴

The recent stories of youth labor exploitation highlight the systemic effects of immigrant youth exceptionalism. A grim observation is that these young people are now working in the jobs their parents would have done as undocumented workers, had they been able to enter the United States. Migrating alone, or being the sole family with work authorized status, systematically compounds the risk of youth employment and precarity in the workplace. Youth who do not have parents in the United States may be living with more distant relatives and may be expected to contribute financially to the maintenance of the household. Youth may be working pursuant to work authorization that undocumented family members cannot access. Families

very important. If I'm a federal child labor investigator and I go down to Arkansas because I want to investigate reports of minors working at chicken processing plants, which, by the way, multiple chicken processing plants in Arkansas have been cited for illegally employing minors. The first thing I do is I show up at the state unemployment office and I say, give me all of the working papers, all of the permits for the minors that are employed in your state, because I want to look at those to see if they're accurate. I want to know where I should be devoting my resources, where I should start my investigation. The Arkansas legislation and the legislation in Missouri and Georgia and Iowa would eliminate that paper trail.⁵)

²⁷⁹ Mica Rosenberg, Kristina Cooke & Joshua Schneyer, *Child Workers Found Throughout Hyundai-Kia Supply Chain in Alabama*, REUTERS (Dec. 16, 2022), <https://www.reuters.com/investigates/special-report/usa-immigration-hyundai/> [<https://perma.cc/WQ28-KTR7>].

²⁸⁰ Seymour Moskowitz, *Save the Children: The Legal Abandonment of American Youth in the Workplace*, 43 AKRON L. REV. 107, 110 (2010).

²⁸¹ See U.S. DEPT OF LABOR, WAGE AND HOUR DIVISION, MORE THAN 100 CHILDREN ILLEGALLY EMPLOYED IN HAZARDOUS JOBS, FEDERAL INVESTIGATION FINDS; FOOD SANITATION CONTRACTOR PAYS \$1.5M IN PENALTIES, Feb. 17, 2023, <https://www.dol.gov/newsroom/releases/whd/whd20230217-1> [<https://perma.cc/U6YF-3WR5>] (“In an investigation against food safety sanitation provider Packer Sanitation Services Inc. in 2023, the Department of Labor issued a fine of \$15,138 for each minor-aged employee who was unlawfully employed—the maximum permitted.”).

²⁸² Nicole Goodkind, *Illegal child labor Is on the Rise in a Tight Job Market*, CNN BUSINESS (July 30, 2023), <https://www.cnn.com/2023/07/30/economy/child-labor-louisiana-texas/index.html> [<https://perma.cc/88W3-9QAP>].

²⁸³ Rosenberg, *supra* note 279.

²⁸⁴ Jennifer Sherer & Nina Mast, *Child Labor Laws Are Under Attack in States Across the Country*, ECONOMIC POLICY INSTITUTE (Dec. 21, 2023).

may owe staggering amounts of money for their children's journeys to the United States. All of this points to the shortcomings in immigration policies that selectively admit unaccompanied children while failing to address an economic reality—that the demand for labor remains, as does families' need to survive.²⁸⁵ SIJS and DACA increase the number of children in liminal status.²⁸⁶ Immigrant youth exceptionalism provides a policy justification that further places youth and their families at risk while refusing to address the root causes of noncitizen labor exploitation. As one headline proclaims, "The U.S. Is Choosing Child Labor Over More Immigration"—specifically, the immigration of families.²⁸⁷

It is critical to maintain a systemic focus on the causes of youth labor exploitation, especially its connection to an immigration system that withholds permanent relief and commodifies noncitizen labor. Not all agency strategies align with the principle of preserving family unity. For example, Department of Labor announced in February 2023 that its Interagency Taskforce would share investigation information with HHS to vet sponsors.²⁸⁸ This adds to the scrutiny that many sponsors already face. A Reuters investigation about child labor at a chicken processing plant in Enterprise, Alabama indicates that HHS had "temporarily halted the release of minors to Enterprise and the surrounding area" due to concerns of exploitation and trafficking.²⁸⁹ Given the ubiquity of migrant labor in communities like Enterprise, HHS's action likely prevented legitimate family reunification.²⁹⁰ HHS also indicated that it was conducting more home visits to potential sponsors, placing undocumented or

²⁸⁵ Katharine M. Donato & Blake Sisk, *Children's Migration to the United States from Mexico and Central America: Evidence from the Mexican and Latin American Migration Projects*, 3 J. OF MIGRATION AND HUMAN SECURITY 58, 58 (2015) ("[T]he increase in child migration from Central America, and the continued high levels of child migration from Mexico result from widespread migration networks and the United States' long-standing reliance on the children's parents as immigrant workers.").

²⁸⁶ See, e.g., Jacob Bogage, *In a Tight Labor Market, Some States Look to Another Type of Worker: Children*, WASH. POST (Feb. 11, 2023), <https://www.washingtonpost.com/business/2023/02/11/child-labor-iowa/> [<https://perma.cc/TV5F-AKDQ>]; Chris Marr & Rebecca Rainey, *States Look to Ease Child Labor Laws as Federal Scrutiny Grows*, BLOOMBERG LAW (Mar. 20, 2023), <https://news.bloomberglaw.com/daily-labor-report/states-look-to-ease-child-labor-laws-as-federal-scrutiny-grows> [<https://perma.cc/2PTV-NWUX>]; Kaitlyn Radde, *Child Labor Violations Are on the Rise as Some States Look to Loosen Their Rules*, NPR (Feb. 26, 2023), <https://www.npr.org/2023/02/26/1157368469/child-labor-violations-increase-states-loosen-rules> [<https://perma.cc/BVK6-U5HM>]; Tonya Mosley, *Amid a Child Labor Crisis*, NPR (May 2023) ("[T]he Iowa Senate passed a bill allowing minors as young as 14 to work night shifts, and states like Missouri and Ohio are considering bills that would allow teenagers to work longer hours in jobs that were previously deemed too dangerous."); see also O. Kay Henderson, *Bill to Adjust Iowa Child Labor Rules Advances*, RADIO IOWA (Feb. 9, 2023), <https://www.radioiowa.com/2023/02/09/bill-to-adjust-iowa-child-labor-rules-advances/> [<https://perma.cc/3CXW-ENTN>].

²⁸⁷ Eric Levitz, *The U.S. Is Choosing Child Labor Over More Immigration*, INTELLIGENCER, (Feb. 28, 2023), <https://nymag.com/intelligencer/2023/02/labor-shortages-child-labor-migrants.html> [<https://perma.cc/M27U-4P9A>].

²⁸⁸ U.S. DEPT OF LABOR, DEPARTMENTS OF LABOR, HEALTH AND HUMAN SERVICES ANNOUNCE NEW EFFORTS TO COMBAT EXPLOITATIVE CHILD LABOR (Feb. 27, 2023), <https://www.dol.gov/newsroom/releases/osec/osec20230227> [<https://perma.cc/9XNL-TPUU>].

²⁸⁹ Schneyer, *supra* note 250 (describing how profiling youth as survivors of trafficking or smuggling gives rise to family separation at the border).

²⁹⁰ *Id.*

liminally documented family members under additional scrutiny.²⁹¹ Adopting the trafficking framework reinforces the suspicions cast on parents and guardians and reinforces the mindset that children are better off in foster care than with their families.²⁹²

The invocation of trafficking by scholars and policymakers in situations involving migrant children²⁹³ shows the value of widening the lens to accommodate a broader, systemic view. Recent research on child labor trafficking for exploitation²⁹⁴ should be taken seriously, but with a holistic perspective that accounts for family context and the needs and wishes of individual youth. The risk of using a trafficking framework to address youth labor exploitation is that its focus is on punishing individual “perpetrators,” with no recognition for connection with the “victim” and other extenuating circumstances.²⁹⁵ Investigating and prosecuting child labor violations as trafficking cases would not recognize, for example, the very real possibility that parents and children may be working alongside each other to survive and that the voluntariness of youth labor exists on a spectrum. Even more troubling, the existing legal mechanisms of criminalization and punishment inherent in trafficking may punish parents and guardians for their poverty, reinforce the dependency paradigm that inhibits family reunification, and instill greater fear in families that are already marginalized by the threat of deportation. Family separation may ultimately be more harmful for youth and families and reinforces the fears that employers use to subordinate migrant workers. A broader lens and systemic view allow for another policy rationale: that enforcement policies designed to protect the interests of youth should place scrutiny on employers, who bear ultimate liability for hiring and exploiting young workers.

CONCLUSION

Immigration policy suggests sharp distinctions between family-based, humanitarian, and labor-based migration, as well as significant legal distinctions between those who migrate for protection and those who migrate for

²⁹¹ Schneyer, *supra* note 250. The interview subject of this story, referred to as “Amelia,” was reunited with her older sister.

²⁹² Sinha, *supra* note 256, at 457, 460–462, 469–470.

²⁹³ The reference to youth as being “trafficked” has also been conflated with smuggling. *See, e.g.,* Janna Ataints et al., *Children at the United States Border: A Human Rights Crisis That Can Be Addressed with Policy Change*, 4 J. IMMIGR. MINOR HEALTH 1000, 1001 (2018). (stating that 75–80% of UCs are “victims of trafficking” sold into forced labor or sex work; the citation references (unsourced) remarks made by then-Vice President Joe Biden that 75–80% of UCs had been smuggled into the United States). Not only is there a failure to distinguish between trafficking and smuggling, but this policy approach ignores the fact that for children who are forced to travel without their parents, paying someone to transport—indeed, smuggle—children is the surest way to ensure they reach their destination. Humanitarian immigration policies that benefit only children are actually forcing parents and youth alike to rely on these “dangerous, not-nice” actors referenced by Vice President Biden. *See* White House, Office of the Vice President, “Remarks to the Press with Q&A by Vice President Joe Biden in Guatemala,” press release, June 20, 2014.

²⁹⁴ *See, e.g.,* Amy Farrell et al., *Understanding the Trafficking of Children for the Purposes of Labor in the United States*, U.S. DEPT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS’ NATIONAL CRIMINAL JUSTICE REFERENCE SERVICE (April 2024).

²⁹⁵ *See* Balgamwalla, *supra* note 174, at 14–15.

economic reasons. However, many young people who migrate have characteristics of all these categories. Many migrant youth are seeking to reunite with family, and work to help provide for that family. At the same time, many are in special need of protection because they enter the country alone or must navigate the legal system independently.

A question raised by the situation of exploited youth workers is whether it is possible for humanitarian programs to exist within larger policies of migrant exclusion, particularly where there are economic benefits to the marginalizing effects of immigration law. The combination of economic draw and a preference for admitting lone children instead of families increases prospects for child economic migration and, ultimately, the risk of employers exploiting noncitizen youth. Immigrant youth exceptionalism offers a critique of policies that produce vulnerability by removing youth from the family context. By widening the lens and broadening paths to family legalization, immigration policy can address longstanding issues of access for noncitizen families and noncitizen workers and in solidarity with larger movements for immigrant rights.