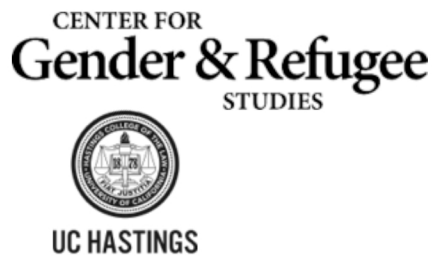


Childhood and Migration in Central and North America: Causes, Policies, Practices and Challenges

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Chapter 8 Introduction to Chapters on Children in the Context of Migration in the United States

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I. Introduction

A founding human rights treaty, the International Covenant of Civil and Political Rights (ICCPR), proclaims: “Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society, and the State.”¹ Elaborating on the rights provided in the ICCPR, the Convention on the Rights of the Child (CRC) declares: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”² Unfortunately, these principles are far from reality for immigrant children in the United States. The United States has signed but not ratified the CRC, and has not incorporated the best interests of the child³ standard into immigration law or policies regarding children. Policies regarding children affected by migration are not created through a child welfare or human rights lens. Instead, security concerns and enforcement principles, such as preventing terrorism and stopping irregular migration, drive the U.S. immigration system.

U.S. immigration policies and decisions made in individual immigration cases rest on domestic immigration law, not international norms or obligations.⁴ Even the application of the U.S. refugee

¹ International Covenant on Civil and Political Rights (ICCPR) art. 24.1, 1966, December 16, 999 U.N.T.S. 171. Ratified by the U.S. in 1992.

² Convention on the Rights of the Child (CRC) art. 3(1), 1989, November 20, 1577 U.N.T.S. 3. The United States signed the CRC in 1995, but has not ratified it. Nevertheless the U.S. must not take actions to defeat its object or purpose. *See* Vienna Convention on the Law of Treaties, art. 18(a), 1969, May 23, 1155 U.N.T.S. 331. Retrieved from <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>.

³ The “best interests” of the child is a fundamental principle in child welfare law and has become enshrined in international law. The actual best interests of a child must be determined case by case, but the United Nations Committee on the Rights of the Child has identified certain factors to consider in making the determination. They include: the views of the child, cultural factors, preserving the family relationship, the child’s care, protection, and safety, the right to health, and the child’s situation of vulnerability. UN Committee on the Rights of the Child (CRC), *General Comment No. 14 (2013) on the Rights of the Child to have His or Her Best Interests Taken as a Primary Consideration (art. 3, para 1)*, CRC/C/GC/14, ¶¶ 46-79. Retrieved from <http://www.refworld.org/docid/51a84b5e4.html>.

⁴ For example, when international law and norms arguments have been made to support the interpretation or application of the federal immigration statute, courts have responded that domestic statutes and caselaw controls the reading and outcome of a case, and that international law or norms are persuasive at best. *See, e.g.* *Guaylupo-Moya v. Gonzalez*, 423 F.3d 121, 135-136 (2d Cir. 2005) (“If a statute makes plain Congress’s intent...then Article III courts...must enforce the intent of Congress irrespective of whether the statute conforms to customary international law” (citing *United States v. Yousef*, 327 F.3d 56 (2d Cir.) (per curiam), *cert. denied*, 540 U.S. 933, 124 S.Ct. 353, 157 L.Ed.2d 241 (2003))). Treaties that are not self-executing do not provide independent, privately enforceable rights; *INS v. Aguirre-Aguirre*, 526 U.S. 415, 428 (1999)(Finding that while United Nations High Commissioner for Refugees Handbook on Criteria for Determining Refugee Status is a useful interpretive aid it is “not binding on the Attorney General, the BIA, or United States courts.”).

definition to individual asylum claims—deriving from the United States’ efforts to conform to its obligations under the 1967 Protocol relating to the Status of Refugees—often strays from the international interpretation of the same. If the United States is serious about developing a regional approach to unaccompanied and other children in the context of migration, it must consider migration an international human rights issue that requires a solution based in international principles.

This introductory chapter provides an overview of the challenges that children affected by migration meet in the U.S. immigration system and the child welfare system. It begins with a brief discussion of the historic treatment of unaccompanied children in the immigration system, as well as the historic treatment of Central American asylum seekers in the United States. The chapter next addresses the progress made for children in the immigration system in the past ten year, then briefly addresses the factors that influence U.S. immigration policy. The chapter proceeds with an overview of the key federal agencies involved in children’s immigration issues. It concludes by examining, in brief, how the child welfare system treats children affected by migration.

II. Children in the U.S. immigration system, a brief history

A. Historic rise in children coming to the United States

Until recent years when the number of unaccompanied children entering the United States increased significantly, unaccompanied children were on the margins of the U.S. immigration debate. The number of unaccompanied children apprehended by U.S. Border Patrol jumped from 16,056 in 2011 to 24,481 in 2012, then to 38,833 in 2013.⁵ In 2014, the figure skyrocketed to 68,631 unaccompanied children.⁶ In other words, the number of children coming to the United States, as reflected by U.S. Border Patrol statistics, quadrupled between 2011 and 2014.

B. U.S. foreign policy in Central America

Inextricably linked to U.S. policies toward Central American migrant children is the history of the United States’ foreign policy in Central America and its historic treatment of Central American asylum seekers. Throughout the 1970s and 1980s, and in the case of Guatemala well into the 1990s, civil wars raged throughout Central America and led millions of Central Americans to seek safe haven abroad.⁷ The United States “systematically denied [Guatemalans and Salvadorans] asylum as Cold War paranoia over revolutionary movements in Central America motivated successive U.S. administrations to ally with repressive military governments.”⁸ The Reagan Administration characterized Salvadoran and Guatemalan refugees as “economic migrants” and denied the rapes, forced disappearances, and murders happening in those countries, rejecting nearly 100% of their

⁵ See Section III of Chapter 1 by UNHCR (listing detailed statistics).

⁶ See USBP. (2015). USBP Sector Profile – Fiscal Year 2014 (Oct. 1st through Sept. 30th). Retrieved from <http://www.cbp.gov/sites/default/files/documents/USBP%20Stats%20FY2014%20sector%20profile.pdf>.

⁷ See Stinchcomb, D. & Hershberg, E. (2014, November). Unaccompanied Migrant Children from Central America: Context, Causes, and Responses, p. 10. Retrieved from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2524001.

⁸ Unaccompanied Migrant Children from Central America: Context, Causes, and Responses, p. 10.

asylum claims.⁹ Many asylum seekers were coerced into accepting “voluntary return” to their countries without even being informed of their right to seek asylum.¹⁰

In the 1980s some members of Congress attempted to pass bills to suspend the deportation of Salvadorans who had fled the civil war, but were ultimately unsuccessful. Congress enacted Temporary Protected Status (TPS) in 1990 to provide safe haven to nationals from countries designated by the president as needing temporary protection.¹¹ TPS has benefitted about 280,000 Hondurans, Salvadorans, and Nicaraguans in the United States,¹² but—as explored in chapter 10—falls far short of providing the range of benefits of refugee protection, most critically a path to permanency and the right to family reunification. Remnants of this history appear to linger at least with respect to the low asylum grant rates for Central Americans proceeding before immigration judges.¹³

C. Enforcement-focused INS regime

Since Congress enacted the first bill directed at solving the problem of irregular migration to the United States, the Immigration Reform and Control Act of 1986 (IRCA), “illegal immigration and enforcement have been the dominant focus and concern driving immigration policymaking for more than 25 years.”¹⁴ The bill proposed to address the immigration problem by granting legal status to qualifying immigrants with irregular status, while prohibiting the hiring of unauthorized immigrants and strengthening border enforcement. This dominant enforcement focus has increased over time, with the terrorist attacks of September 11, 2001 leading the United States to conflate “antiterrorism measures with immigration control,”¹⁵ as explained in greater detail in chapter 10. This immigration control mentality affects policies on children as well as adults.

Prior to 2003, the former Immigration and Naturalization Service (INS) maintained legal and physical custody over unaccompanied children apprehended at the U.S. border or in the interior of the United States. The INS was a massive agency responsible both for immigration enforcement (the detention and removal of irregular immigrants) and conferring immigration benefits to eligible immigrants; its enforcement branch was responsible for unaccompanied children. INS served both as the legal custodian of unaccompanied children in federal custody and as their deportation agent. Unaccompanied children held in INS detention centers were placed in removal proceedings where they had to defend themselves against an INS attorney arguing for their deportation. INS

⁹ In 1984 only 3% of Salvadoran and Guatemalan asylum seekers were granted protection. *See* Gzesh, S. (2006, April 1). Central Americans and Asylum Policy in the Reagan Era. Retrieved from <http://www.migrationpolicy.org/article/central-americans-and-asylum-policy-reagan-era>.

¹⁰ Central Americans and Asylum Policy in the Reagan Era.

¹¹ Central Americans and Asylum Policy in the Reagan Era.

¹² *See* Unaccompanied Migrant Children from Central America: Context, Causes, and Responses, p. 11.

¹³ Unaccompanied Migrant Children from Central America: Context, Causes, and Responses, p. 32, finding that the average asylum grant rate for asylum applicants in immigration court was 53% in fiscal year 2013, whereas judges granted asylum to only 14% of Central American asylum seekers that same year.

¹⁴ *See* Meissner, D., Kerwin, D. M., Chishti, M., & Bergeron, C. (2013, January). Immigration Enforcement in the United States: The Rise of A Formidable Machinery, p. 1. Retrieved from <http://www.migrationpolicy.org/sites/default/files/publications/enforcementpillars.pdf>.

¹⁵ *See* Rosenblum, M. R. (2011, August). US Immigration Policy Institute Since 9/11: Understanding the Stalemate Over Comprehensive Immigration Reform, p. 4. Retrieved from <http://www.migrationpolicy.org/sites/default/files/publications/RMSG-post-9-11policy.pdf>.

contracted with agencies like Catholic Charities to run the detention centers, but INS Juvenile Deportation Officers maintained a regular presence at the centers—blurring the lines between custodian and deportation agent. Information provided by detained children to caseworkers was handed directly over to INS and used against children in their removal (deportation) hearings.¹⁶ Advocates criticized INS’s conflicting roles, arguing that an agency charged with controlling immigration law was not the appropriate body to care for unaccompanied children.¹⁷

INS policies around release were restrictive and punitive. A federal settlement required that unaccompanied children be placed in the “least restrictive environment” while fighting their deportation cases, and included a list of preferences for placement that prioritized release to a family member, friend, or agency over detention.¹⁸ Irrespective of the settlement agreement, INS’s model was one of detention. INS released children to parents, siblings, aunts and uncles, and grandparents; but rarely to cousins, family friends, or agencies willing to care for them. Release from custody took months, and in some cases children were held in immigration detention for over one year.¹⁹ INS took advantage of children’s vulnerability and their separation from family as a means to obtain information from children about family members in the United States lacking regular immigration status. The agency also used unaccompanied children as bait to enforce immigration laws on their family members. Family members were required to meet the INS Juvenile Deportation Officer (JDO) in person in order for a child to be released. When they did, some JDOs would place parents in deportation proceedings.²⁰

As a result of the lengthy detention of many children in INS custody, immigration judges presiding over detained children’s cases required them to proceed with their claims while in custody.

¹⁶ Prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), U.S. immigration law distinguished between immigrants who were “deportable”—those immigrants who were physically inside the territory of the United States and were subject to potential deportation—and immigrants who were “excludable”—those immigrants who sought entry to the United States at a port of entry or entry/departure route and were found inadmissible. IIRIRA took away the distinction between “deportable” and “excludable” aliens and “deportation” and “exclusion” proceedings, instead using the term “removable” to describe all immigrants subject to deportation, and the term “removal proceedings” to describe the legal proceedings all immigrants subject to potential removal must navigate. While “removal” and “removal proceedings” are the technical terms used in U.S. law, they are synonymous with deportation and deportation proceedings.

¹⁷ See Human Rights Watch. (1997, April). *Slipping Through the Cracks, Unaccompanied Children Detained by the U.S. Immigration and Naturalization Service*, p. 82. Retrieved from <http://www.hrw.org/sites/default/files/reports/us974.pdf>; *An Overview of Asylum Policy: Hearing Before the Subcomm. on Immigration of the S. Comm. on the Judiciary*, 107th Cong. (2001) (testimony of Wendy Young, Women’s Commission for Refugee Women and Children). Retrieved from <http://www.gpo.gov/fdsys/pkg/CHRG-107shrg77386/html/CHRG-107shrg77386.htm>.

¹⁸ *Stipulated Settlement Agreement, Flores v. Reno*, January 17, 1997, retrieved from: https://www.aclu.org/files/pdfs/immigrants/flores_v_meese_agreement.pdf. The preference list for release favors a parent, followed by a legal guardian, an adult relative (brother, sister, aunt, uncle, or grandparent), and then programs, entities, or individuals designated by parents or approved by the federal government.

¹⁹ See Schmitt, E. (2001, June 25). INS Both Jailer and Parent to Children Without a Nation. *New York Times – The Learning Network*. Retrieved from http://www.nytimes.com/learning/teachers/featured_articles/20010625monday.html. (Describing the case of an eight-year-old Nigerian girl detained in INS custody for 13 months).

²⁰ See Florida Immigrant Advocacy Center. (2002, October). “I Running out of Hopely...” Profiles of Children in INS Detention in Florida, p. 5. Retrieved from [http://d3n8a8pro7vhmx.cloudfront.net/aijustice/pages/269/attachments/original/1390426185/ChildrensReport\(pg1-25\).pdf?1390426185](http://d3n8a8pro7vhmx.cloudfront.net/aijustice/pages/269/attachments/original/1390426185/ChildrensReport(pg1-25).pdf?1390426185).

Children most impacted were those without family in the United States—who essentially had no hope of release from custody unless they won their case—and children whose family members lacked regular status and hesitated to put themselves and their families at risk of deportation by meeting with INS officers. Children released from detention could ask the court to move their case to their new city of residence.

Immigration judges assigned to cases of detained children had no specialized training. Some heard adult detention cases all day every day, and treated detained children no differently than the adults typically before them.²¹ Some of the judges hearing detained children’s cases granted only a very small percent of all cases they heard, meaning that detained children in some courts were assigned to the most restrictive judges. Not only were inappropriate judges assigned to children’s cases, but in some parts of the country the cases were heard in courtrooms at adult detention centers, wholly inappropriate for children.²² Making matters worse, children had no right to counsel in their cases. Some children were forced to represent themselves against a seasoned INS attorney, in court. Their experiences paint a picture of a system designed to deport children rather than protect them.²³ Children who lost their cases were generally ordered deported and returned to their countries with deportation orders, which have long-term immigration consequences.²⁴

Advocates argued that this enforcement-driven model harmed children and failed completely to recognize their vulnerability and unique protection needs. Some members of Congress were persuaded and introduced legislation to change the system for unaccompanied children. One bill introduced in 2000, again in 2001, and then again in the following years called for the appointment of attorneys to represent unaccompanied children in removal proceedings and guardians ad litem to advocate for their best interests.²⁵ Although the bill did not pass on its own, it was enacted into law as part of the Trafficking Victims Protection Reauthorization Act of 2008, a landmark bill discussed below.

D. Advancements for children in the U.S. immigration system

Between 2002 and 2014, legislation and administrative advocacy yielded positive changes for children in the immigration system. Many of those advancements came under attack as a result of the 2014 influx of unaccompanied children.

²¹ See “I Running out of Hopely...” Profiles of Children in INS Detention in Florida, p. 18.

²² See “I Running out of Hopely...” Profiles of Children in INS Detention in Florida, p. 18.

²³ See Bhabha, J. & Schmidt, S. (2006, June). Seeking Asylum Alone, Unaccompanied and Separated Children and Refugee Protection in the U.S., pp. 146-156, Retrieved from http://www.law.yale.edu/documents/pdf/Clinics/Seeking_Asylum_Alone_US_Report.pdf (giving examples and quotations from children regarding their difficult and stressful experiences before immigration judges).

²⁴ INS refused to agree to voluntary departure, a form of repatriation that does not have long-term immigration consequences. Amended in 2008, the prior statute did not explicitly say that the government would pay for voluntary departures of children and the INS refused to do so.

²⁵ See Unaccompanied Alien Child Protection Act of 2000, S. 3117, 106th Cong. (1999-2000); Unaccompanied Alien Child Protection Act of 2001, S. 121, 107th Cong. (2001-2002); Unaccompanied Alien Child Protection Act of 2003, H.R. 3361, 108th Cong. (2003-2004); Unaccompanied Alien Child Protection Act of 2005, S. 119, 109th Cong. (2005-2006); Unaccompanied Alien Child Protection Act of 2007, S. 844, 110th Cong. (2007-2008).

1. *Transfer to the Department of Health and Human Services*

In 2002 Congress passed the Homeland Security Act to dedicate more resources to preventing terrorism and defending the United States against natural disasters. Congress enacted the bill in response to claims that the U.S. government could have, but failed to prevent the terrorist attacks of September 11, 2001. The Act dissolved the INS, replacing it with the Department of Homeland Security (DHS), a massive organization comprised of many sub-organizations to prevent terrorism, stop irregular migration, administer immigration benefits, and other functions. The Act also made a significant change in the regime for unaccompanied children, transferring their care and custody out of the hands of an immigration enforcement agency and into the hands of a child welfare agency, the federal Department of Health and Human Services (HHS). This shift, which took effect in 2003, was one of the first major recognitions within the U.S. immigration system that children should be treated differently than adults. Enforcement, however, remains a focus even in the treatment of children. Chapter 9 explores the treatment and detention of migrant children in federal custody.

2. *Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA)*

In 2008, Congress passed the TVPRA,²⁶ a landmark bill that built on improvements made for unaccompanied children under the Homeland Security Act. It expanded the concept of unique treatment for children across many aspects of the immigration system, starting from moment of apprehension and ending with safe repatriation practices for children being returned.

The TVPRA includes both substantive and procedural provisions addressing issues affecting children. It significantly advanced unaccompanied children's rights and treatment in the U.S. immigration system, for example by requiring consideration of their best interests in government decisions about their placement, increasing access to counsel, authorizing the federal government to appoint child advocates to especially vulnerable children, and requiring that repatriation be safe. At the same time the legislation is lacking in certain areas. Most importantly, the TVPRA does not adopt the best interests of the child as a substantive standard for all policies and decisions affecting immigrant children. It distinguishes Mexican (and Canadian) children from children from other countries for purposes of initial screening and creates a default position that Mexican (and Canadian) children can and should be repatriated directly from the border, rather than being given the opportunity to seek immigration relief. These distinctions are discussed in greater detail in chapter 9. The TVPRA is also limited to unaccompanied children; none of its provisions address immigrant children who enter the United States with their families, even though these children also require unique treatment in light of their vulnerability. Despite TVPRA's progress, the U.S. has failed to fully implement some of its provisions. For example, inadequate screening of Mexican children has been a chronic problem, and the United States has not yet developed best practices to ensure the safe and sustainable repatriation and reintegration of unaccompanied migrant children. These problem areas are explored in chapter 9 on detention and chapter 12 on repatriation and reintegration.

²⁶ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457. 122 Stat. 5076 (2008) (hereinafter "TVPRA of 2008").

3. Administrative Improvements

Advocacy with the administrative agencies involved in unaccompanied children's cases also resulted in improvements for unaccompanied children in the U.S. immigration system. The government formed an interagency working group on unaccompanied and separated children that allowed for regular dialogue between advocates and the key agencies working with unaccompanied children.²⁷ The Executive Office for Immigration Review (EOIR), the agency responsible for deciding cases of individuals in removal proceedings issued guidelines on children's cases, calling on judges to employ child-sensitive procedures,²⁸ and EOIR recently instituted specialized children's dockets in all immigration courts throughout the country. However, the policies and procedures set forth in the EOIR guidance do not have the force of binding law. Meanwhile, United States Citizenship and Immigration Services (USCIS), the branch of DHS that decides a range of children's immigration claims, improved its training on children and its adjudication of children's cases.

III. Politics and public opinion influence child migration policy

A. Politics

U.S. politics, or the ongoing battle between Democrats and Republicans as the two parties vie for the presidency and control of Congress, is a major factor underlying immigration policy. Since 2007, for example, Republicans in Congress have blocked about 500 legislative proposals supported by President Obama.²⁹ Immigrants, including children, have paid the price. Although the Senate introduced and passed a bipartisan immigration reform bill in 2013, House Republicans refused to take action on comprehensive reform. The failure of federal immigration reform has led some states to introduce and in some cases to enact anti-immigrant measures like Arizona's infamous SB 1070 bill,³⁰ restricting the rights of immigrants to services and allowing state law enforcement agents to demand proof of immigration status from individuals they believe to be in the country without authorization—a policy that has engendered and often encouraged the rampant racial profiling of Latinos, Asian Americans, and others.³¹

²⁷ See Center for Gender & Refugee Studies, and Kids In Need of Defense. (2014, February). *A Treacherous Journey: Child Migrants Navigating the U.S. Immigration System*, p. 81. Retrieved from <http://cgrs.uchastings.edu/our-work/treacherous-journey> (hereinafter "A Treacherous Journey").

²⁸ See Neal, D. L. (2007, May 22). *Operating Policies and Procedures Memorandum 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children*. Retrieved from <http://www.justice.gov/eoir/efoia/ocij/oppm07/07-01.pdf>.

²⁹ See Topaz, J. (2014, May 8). *President Obama: Republicans Blocked 500 Bills*. *Politico*. Retrieved from <http://www.politico.com/story/2014/05/republicans-legislation-obama-dccc-event-106481.html>.

³⁰ The U.S. Supreme Court overturned some provisions of the Arizona law, but upheld the provision requiring law enforcement officials to determine the immigration status of an individual who has been stopped or arrested, and in whose case the official has a "reasonable suspicion" that the individual is in the U.S. without authorization. See Liptak, A. (2012, June 25). *Blocking Parts of Arizona Law, Justices Allow Its Centerpiece*. *New York Times*. Retrieved from http://www.nytimes.com/2012/06/26/us/supreme-court-rejects-part-of-arizona-immigration-law.html?pagewanted=all&_r=0.

³¹ See Gordon, I. & Raja, T. (2012, March/April). *164 Anti-Immigration Laws Passed Since 2010? A MoJo Analysis*. *Mother Jones*. Retrieved from <http://www.motherjones.com/politics/2012/03/anti-immigration-law-database>; *Anti-Illegal Immigration Laws in States*. (2012, April 22). *New York Times*. Retrieved from <http://www.nytimes.com/interactive/2012/04/22/us/anti-illegal-immigration-laws-in-states.html>. Some states have

Unaccompanied migrant children and migrant families were the unfortunate victims of the partisan political showdown over their influx across the border in the spring and summer of 2014. President Obama requested emergency supplemental funding to care for unaccompanied children. The Democratic-led Senate responded by passing a bill that provided supplemental funding. Meanwhile, the Republican-led House of Representatives passed legislation providing some supplemental funding, in exchange for the heavy price of eviscerating critical provisions of the TVPRA and blocking President Obama from providing administrative relief to the 11 million migrants in the United States with irregular immigration status.³² The Obama Administration, under pressure from Congress, instituted measures focused on deporting unaccompanied children and families in order to deter future flows. These measures, as well as the recent action of Congress, are explored in greater detail in chapter 10.

B. Public opinion

Public opinion also plays an important role in shaping U.S. immigration policy, including with regards to migrant children. Immigration is a hotly contested issue in the United States, with anti-immigrant voices charging that “illegal aliens” are taking U.S. jobs, using up resources in schools and hospitals on the taxpayer dime, refusing to learn or speak English, and committing crimes that endanger their communities.³³ These allegations extend to public opinion about unaccompanied children. For instance, in July 2014 anti-immigrants engaged in highly-publicized and widely-reported protests against the arrival of unaccompanied migrant children in local communities. These children, part of the influx of migrant children and families across the border, were sent to various cities and towns across the United States after being processed by immigration authorities.³⁴ Immigrants’ rights, children’s rights, and human rights supporters in the United States have also been vocal in their demands for a humane system for migrant children and families, as well as migrant adults. They have called for family reunification policies and comprehensive immigration reform, urging the U.S. government to protect, not deport, unaccompanied children and families who arrived as part of the 2014 “surge.”³⁵

enacted positive bills, permitting immigrants to obtain a driver’s license or identification card, regardless of immigration status.

³² See Sakuma, A. (2014, August 2). House Passes \$694 Million Border Bill. *MSNBC*. Retrieved from <http://www.msnbc.com/msnbc/house-republicans-attempt-second-shot-border-bill>.

³³ See, e.g., Federation for American Immigration Reform. (2013, March). Illegal Aliens Taking U.S. Jobs (2013). Retrieved from <http://www.fairus.org/issue/illegal-aliens-taking-u-s-jobs>; Mass, W. (2014, April 1). Obama Administration Releases 68,000 Illegal Immigrant Criminals. *The New American*. Retrieved from <http://www.thenewamerican.com/usnews/immigration/item/17963-obama-administration-releases-68-000-illegal-immigrant-criminals>; Hayes, B. (2014, March 13). ‘Anchor Baby’ Outrage: Americans Pay BILLIONS for Illegal Alien Births (Video). *Top Right News*. Retrieved from <http://toprightnews.com/?p=1333>.

³⁴ See, e.g., Johnson, M. A. (2014, July 15). Arizona Residents Protest Arrival of Undocumented Immigrant Children. *NBC News*. Retrieved from <http://www.nbcnews.com/storyline/immigration-border-crisis/arizona-residents-protest-arrival-undocumented-immigrant-children-n155941>; Martinez, M. & Yan, H. (2014, July 3). Showdown: California Town Turns Away Buses of Detained Immigrants. *CNN*. Retrieved from <http://www.cnn.com/2014/07/02/us/california-immigrant-transfers/>.

³⁵ See, e.g., Hebrew Immigrant Aid Society. (2014, July 8). Jewish Organizations Call on U.S. Government to Protect Unaccompanied Immigrant Children and Refugees. Retrieved from <http://www.hias.org/jewish-organizations-call-us-government-protect-unaccompanied-children-and-refugees>; Price, C. (2014, July 31). L.A. City Council Members Call for the Humane Treatment of Unaccompanied Minors and Consideration of their Status as Refugees. Retrieved from <http://www.the-new->

IV. Remaining gaps for children in the immigration system

Despite the advancements made for children in the U.S. immigration system, major shortfalls persist. These deficits start with the flawed screening of immigrant children by Custom and Border Protection (CBP) and continue through the repatriation of children who have potential claims for relief and/or have no safe caretaker to receive them in their country of origin. Chief among the shortfalls is the fact that the United States does not apply a rights-based approach to migrants—whether children or adults. The United States lacks a requirement that all procedures in place for children in the immigration system and all decisions made regarding placement, immigration relief, and repatriation should be made based on the best interests of the child. In the absence of a “best interests” standard, children face repatriation to danger and endure the consequences of other decisions that are harmful to their welfare.

One especially alarming flaw in the U.S. immigration system that has deleterious effects on migrant children is the use of expedited removal for migrant families. Expedited removal permits the summary removal of applicants for admission to the United States who are apprehended at or near the border who do not express a fear of persecution or who are deemed not to have a “credible fear” of persecution. Many migrants removed under these expedited procedures never have an opportunity to speak with a judge before their removal. Unlike unaccompanied migrant children whose screening process is governed by the TVPRA, children arriving with their families are subject to expedited removal, as explained in chapter 9. As a policy, expedited removal threatens to return refugees to persecution, contrary to the international and domestic principle of *non-refoulement*.³⁶ In practice, CBP has returned Central American migrants—including families with children—to persecution under the expedited removal scheme, often without screening children separately for fear or risk of persecution.³⁷ The United States’ flagrant violation of the *non-*

ninth.com/la-city-councilmembers-call-for-the-humane-treatment-of-unaccompanied-minors-and-the-consideration-of-their-status-as-refugees.

³⁶ Expedited removal is a process that involves CBP screening applicants for admission for a fear of persecution. If the applicant does not express a fear of persecution, under expedited removal she is immediately ordered removed. If the applicant expresses a fear of persecution she is technically supposed to be referred for a more in depth screening process in which an asylum officer interviews the applicant to determine if she has a credible fear of persecution. Applicants found to have a credible fear are given an asylum hearing before an immigration judge; applicants found not to have a credible fear of persecution can request review by an immigration judge. If the judge upholds the determination that the individual does not have a credible fear of persecution then she is removed with no further access to appeals. See INA §235(a), (b), 8 U.S.C.A. § 1225(a), (b) (West). Laplante, L. J. (1999). Expedited Removal at U.S. Borders: A World Without a Constitution. *New York University Review of Law and Social Change*. 25 N.Y.U Rev. L. & Soc. Change 213 (1999).

³⁷ See Civil Rights Complaint filed with the DHS Office of Civil Rights and Civil Liberties and the Office of the Inspector General titled, “Inadequate U.S. Customs and Border Protection (CBP) screening practices block individuals fleeing persecution from access to the asylum process,” 2014, November 13. Retrieved from <http://immigrantjustice.org/sites/immigrantjustice.org/files/images/Right%20to%20Asylum%20-%20CRCL%20Complaint%20Cover%20Letter%20-%202011.13.14%20FINAL%20PUBLIC.pdf>. USCIS conducts “credible fear interviews” in which the agency determines whether an arriving asylum applicant has established a credible fear of persecution. In 2014 USCIS elevated the standard for proving a credible fear of persecution; USCIS’s application of the new standard has also resulted in the summary removal of migrant families back to their countries. See Letter to President Obama from faith based, human rights, immigrant rights, domestic violence, and refugee assistance organizations, 2014, November 20. Retrieved from <http://www.humanrightsfirst.org/sites/default/files/Letter-Pres-Asylum.pdf>.

refoulement principle shows that it values immigration enforcement over child welfare and refugee protection.

Also glaringly absent from the U.S. immigration system are the rights to an attorney to represent all children in immigration proceedings and to a child advocate (or guardian) to advocate for the best interests of unaccompanied children. Although the Office of Refugee Resettlement (ORR) and EOIR have recently taken an important step to dedicate money to providing counsel for some unaccompanied migrant children and adolescents, as explained in chapter 10, these efforts do not substitute for a legal right to counsel for *all* migrant children. ORR has also announced an initiative to appoint child advocates in a greater number of cases; while positive, this development will not benefit the majority of unaccompanied children.

When it comes to immigration relief, migrant children and adolescents seem to have been an afterthought. Most forms of relief were written for adults, have stringent eligibility requirements that are difficult to prove, and do not require a child-sensitive analysis. Chapter 10 explores these gaps in relief in detail. The U.S. government is required to issue regulations regarding the substantive application of unaccompanied children's applications for relief (and procedures for the same), but those regulations have not issued; when they do they will be limited to unaccompanied children rather than all child applicants.³⁸

Children left behind in their countries by parents who have migrated as well as children in the United States suffer as a result of deficient family reunification policies. Family reunification policies do not create sufficient avenues to keep children, parents, and siblings together, or to allow children left behind in their countries to reunite with family in the United States. The lack of family reunification policies leads to irregular migration of some children and adults, resulting in mixed status family situations in which some members have regular status, while others do not. Mixed status families suffer devastating consequences when their families are torn apart as a result of immigration enforcement policies that lead to detention and/or deportation. As explained in chapter 11, family separation and living in mixed status families both have significant detrimental effects on migrant children and families.

V. Children affected by migration and the child welfare system

Children affected by migration—whether migrants themselves or whether in regular status but living in mixed-status families—also face significant challenges outside the immigration system. In particular, they are more likely to live in conditions of poverty and “substandard housing,” suffer worse health, lack access to health care, and achieve “low educational attainment” than children born in native families.³⁹ Some of these difficulties are driven by federal laws that restrict certain federal benefits to U.S. citizens and lawful permanent residents who have maintained their status for five years or longer. Migrants with irregular status and individuals who have been lawful permanent residents for less than five years are ineligible for federal financial support—such as food stamps, Temporary Assistance to Needy Families (TANF), and Social Security Income

³⁸ See TVPRA of 2008 § 235(d)(8).

³⁹ See American Academy of Pediatrics, Council on Community Pediatrics. (2013, May 6). Policy Statement, Providing Care for Immigrant, Migrant, and Border Children. *Pediatrics*, 131(6), e2028-e2034. Retrieved from <http://pediatrics.aappublications.org/content/131/6/e2028.full>

(SSI)—as well as for federal health care, such as non-emergency Medicaid for low income families and President Obama’s federal health care plan, known as “Obamacare.”⁴⁰ States and counties can, and in many cases do, provide some of the above types of benefits to migrants and permanent residents barred under federal law. Not all states have acted to fill the void, however, and those that have only partially meet the need due to state budget shortages.⁴¹ Although federal law entitles migrant children to public education regardless of their immigration status, both migrant children and the U.S. citizen children of migrants face barriers to enrolling in school.⁴²

Children affected by migration also experience unique challenges related to the child welfare system. The federal government has historically played an important role in developing national child welfare policy and influencing the development and administration of state child welfare laws. The Department of Health and Human Services (HHS), the agency responsible for the care and custody of unaccompanied children apprehended by immigration agents, is the federal child welfare agency. The federal government grants funding to states to support the costs of the child welfare system; these grants are conditional on state compliance with federal standards. While the federal government plays an important role in the U.S. child welfare system, the system is state-based, meaning that child welfare laws are enacted at the state level and differ state by state.⁴³ Local county governments implement state child welfare laws. Some counties have resisted placing immigrant children in the child welfare system; others lack culturally or linguistically appropriate services for immigrant children or parents caught up in the child welfare the system.

The main federal law that influences state child welfare laws is the Child Abuse Prevention and Treatment Act (CAPTA).⁴⁴ First enacted in 1974, and reauthorized and expanded over time, CAPTA funds research on child abuse and neglect. CAPTA created reporting requirements for cases of child abuse and neglect and required states to appoint guardians ad litem to represent the best interests of children in state dependency (child welfare) legal proceedings.⁴⁵ One of CAPTA’s accomplishments was to set certain minimum child welfare standards. States can choose to enact higher standards, but cannot lower standards without losing eligibility for federal funds.⁴⁶ For example, CAPTA defines the term child abuse to include “death, serious physical or emotional

⁴⁰ See National Immigration Law Center, Broder, T., & Blazer, J. (2011, October). Overview of Immigrant Eligibility for Federal Programs. Retrieved from <http://www.nilc.org/overview-immeligfedprograms.html>.

⁴¹ Overview of Immigrant Eligibility for Federal Programs.

⁴² See Barkoukis, L. (2014, May 8). Obama Admin to Public Schools: You Must Enroll Children of Illegal Immigrants. *Townhall.com*. Retrieved from <http://townhall.com/tipsheet/leahbarkoukis/2014/05/08/obama-admin-says-schools-cant-favor-citizens-over-illegal-immigrants-n1835362> (reporting that in response to reports that some school districts were refusing to register children for school, U.S. Attorney General Holder and the Secretary of Education issued guidance clarifying that under federal law schools districts must register migrant children and children with migrant parents).

⁴³ For example, states may have different definitions of “neglect” or states may include different bases for removing a child from a parent’s custody and placing the child in state custody.

⁴⁴ The Child Abuse Prevention and Treatment Act (CAPTA) of 1974, P.L. 93-247(1974); 42 U.S.C.A. §5106 (West).

⁴⁵ See National Child Abuse and Neglect Training and Publications Project, U.S. Department of Health and Human Services, Children’s Bureau. (2014). The Child Abuse Prevention and Treatment Act: 40 Years of Safeguarding America’s Children. Retrieved from <http://www.pal-tech.com/web/NCCAN/files/CAPTA40yrs508.pdf>.

⁴⁶ Child Welfare Information Gateway, U.S. Department of Health & Human Services. (2012). Major Federal Legislation Concerned with Child Protection, Child Welfare, and Adoption. Retrieved from <https://www.childwelfare.gov/pubs/otherpubs/majorfedlegis/>.

injury, sexual abuse or exploitation, or an act or failure to act which presents an imminent risk of serious harm.”⁴⁷ States may have a more stringent definition, but they cannot, for example, refuse to include serious emotional injury in the definition of child abuse.

CAPTA also requires expedited termination of parental rights in certain situations, for example abandonment of an infant or serious bodily injury of a child.⁴⁸ In addition to CAPTA, the Adoption and Safe Families Act of 1997 (AFSA) developed a mechanism for federal accountability of states’ implementation of federal child welfare system goals.⁴⁹ Certain designated federal funds are earmarked for state child welfare systems, with the goal of promoting federal child welfare priorities. These funds support state- and county-level programs to keep families together so that children do not need to be removed from their homes, and to ensure safe out-of-home care for children who are removed from their homes.⁵⁰

Because county governments implement the child welfare system, county culture and county finances or wealth impact child welfare practices. As a result, immigrant children in some counties face significant challenges entering the child welfare system, and they and their families confront difficulties once in the child welfare system. The federal government gives states matching funds to reimburse costs for child welfare services provided, but these funds do not apply to child welfare services for children with irregular immigration status.⁵¹ This means that states and counties bear the financial burden of caring for immigrant children. Some counties resist placing immigrant children in the child welfare system as a result, even though immigration status says nothing about whether a child is abused, abandoned, or neglected under state law and in need of state intervention.

Once in the child welfare system, counties sometimes fail to provide migrant children the services they need because of the restrictions on federal benefits discussed above. If the state does not cover these benefits for migrant children, the cost falls to county child welfare systems to pay for these services for migrant children in custody. This deprivation of necessary services for migrant children in foster care can be especially acute in poor counties.⁵² Lack of attention to the needs of

⁴⁷ Major Federal Legislation Concerned with Child Protection, Child Welfare, and Adoption.

⁴⁸ 42 U.S.C. § 5106a (b)(2)(B)(xv)(I) (West); Major Federal Legislation Concerned with Child Protection, Child Welfare, and Adoption at 18, Retrieved from

<https://www.childwelfare.gov/pubPDFs/majorfedlegis.pdf#page=18&view=P.L.%20104-235%20Child%20Abuse%20Prevention%20and%20Treatment%20Amendments%20of%201996>.

⁴⁹ Adoption and Safe Families Act of 1997 (AFSA), Pub. L. 105-89 (1997); for comprehensive discussion of AFSA’s goals and results of AFSA, see Urban Institute, Center for the Study of Social Policy, Golden, O., Ehrle Macomber, J., et. al. (2009, December 10). Intentions and Results: A Look Back at the Adoption and Safe Families Act. Retrieved from http://www.urban.org/uploadedPDF/1001351_safe_families_act.pdf.

⁵⁰ See Title IV-B, Title IV-E of the Social Security Act. 45 C.F.R. §§ 1355, 1356, 1357 (West).

⁵¹ Dettlaff, A. & Finno-Velasquez, M. (2013). Child Maltreatment and Immigration Enforcement: Considerations for Child Welfare and Legal Systems Working with Immigrant Families. *Children’s Legal Right’s Journal*, 33(Spring 2013), 55-56. Retrieved from http://cssr.berkeley.edu/cwscmsreports/LatinoPracticeAdvisory/LEGAL_Legal_Issues/Child%20maltreatment%20and%20immigration%20enforcement.pdf.

⁵² These problems extend to the juvenile delinquency system as well, and may be exacerbated in that system because of the stigma that attaches to children in that system. Some law enforcement officials involved in the delinquency system believe that immigrant children who commit acts of delinquency are a burden on the U.S. and should be sent back to their countries. See, e.g., Marta’s story, describing how a juvenile delinquency judge refused to sign predicate order necessary for Special Immigrant Juvenile Status Application on the basis that Marta did not deserve

migrant children in the child welfare system sometimes extends to their immigration status. Although immigrant children in the child welfare system should be eligible for immigration relief, child welfare workers responsible for their care may not identify their need for regularization and may fail to connect them to an immigration attorney or legal services organization.⁵³

Existing services for migrant children and families caught up in the child welfare system are often wanting.⁵⁴ Counties frequently lack appropriate housing for migrant children with limited English capabilities, or lack appropriate language services for children and families.⁵⁵ Lack of cultural competency on the part of child welfare workers or juvenile court judges can lead counties to discriminate against migrant parents and deny them the right to reunify with children.⁵⁶ This may happen, for example, because of different beliefs about the number of family members that can appropriately live in a home, or concerns about undocumented family members. Child welfare workers and juvenile court judges also generally do not understand how the immigration enforcement system works, and sometimes fault parents for their inability to comply with reunification requirements that are rendered impossible by detention or deportation—resulting in highly problematic decisions. In extreme cases the above differences or misunderstandings can result in discriminatory termination of parental rights.⁵⁷ Chapter 11 on family separation explores these issues in greater detail.

VI. U.S. chapters

The subsequent four chapters on children in the context of migration in the United States address many of the concerns raised in this introduction. Chapter 9, *Children at the Border*, assesses the apprehension, screening, and detention of migrant children and adolescents by U.S. immigration officials. Next, chapter 10, *Immigration Remedies and Procedural Rights of Migrant Children and Adolescents*, examines the substantive and procedural inadequacies of existing avenues for immigration relief for children. Chapter 11, *Family Separation as a Result of Immigration Policies in the United States*, highlights the insufficiency of family reunification opportunities and the devastating impacts of immigration enforcement on families. Finally, chapter 12, *Repatriation and Reintegration of Migrant Children*, analyzes the policies and practices of the U.S. government in returning Central American and Mexican migrant children to their home countries, and identifies best practices gleaned from an NGO partnership for children returned to Guatemala.

to become a lawful permanent resident in the United States because of her act of delinquency. *A Treacherous Journey*, p. 40.

⁵³ See *A Treacherous Journey*, pp. 38-39.

⁵⁴ See, e.g., *Child Maltreatment and Immigration Enforcement: Considerations for Child Welfare and Legal Systems Working with Immigrant Families*.

⁵⁵ The Annie E. Casey Foundation. (2006). *Undercounted. Underserved: Immigrant and Refugee Families in the Child Welfare System*. Retrieved from <http://www.aecf.org/m/blogdoc/aecf-undercountedunderserved-2006.pdf>.

⁵⁶ Applied Research Center. (2011, November). *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System*. Retrieved from http://www.atlanticphilanthropies.org/sites/default/files/uploads/ARC_Report_Shattered_Families_FULL_REPORT_Nov2011Release.pdf.

⁵⁷ See generally Hall, C. E. (2011). Where Are My Children...And My Rights? Parental Rights Termination As A Consequence of Deportation. *Duke Law Journal*, 60:1459, 1459-1503.

Appendix: key agencies involved

The Department of Homeland Security, Department of Justice, Department of Health and Human Services, and Department of State are the major U.S. agencies involved in handling migrant children and adolescents. The following is a brief description of the relevant sub-agencies within each of the broader agencies, and their respective work regarding migrant children and adolescents.

A. Department of Homeland Security (DHS)

DHS is the federal agency responsible for preventing terrorism, controlling immigration, and responding to natural disasters and accidents. DHS is similar to Interior Ministries in other countries. The agency oversees a range of sub-agencies, three of which are relevant to migrant children and adolescents.

1. Customs and Border Protection (CBP)

CBP is charged with securing U.S. borders and the space between borders, in addition to overseeing customs. CBP is stationed at the border and in between ports of entry. CBP agents apprehend individuals attempting to enter the United States in places other than designated ports of entry and inspect individuals seeking admission at ports of entry. CBP agents conduct initial screening of unaccompanied migrant children and adolescents and place them in temporary CBP custody. CBP transfers unaccompanied children from non-contiguous countries to HHS custody. The agency transfers unaccompanied Mexican children it finds to be at risk of trafficking or persecution or too young to make a decision to voluntarily return to Mexico. In the case of immigrant families apprehended at or near the border or at ports of entry, CBP conducts preliminary interviews that are part of the summary removal procedure that often leads to near-immediate deportation of children with their families.

2. Immigration and Customs Enforcement (ICE)

ICE is the enforcement arm of DHS within the interior of the United States (i.e., excluding borders and ports of entry) for border control, immigration, and customs. ICE conducts investigations, detains certain immigrants in the interior of the United States, and deports immigrants ordered removed. ICE detains those migrant children and adolescents who sought entry to the United States along with their families in several family detention facilities. ICE also detains many parents of U.S. citizen and lawful permanent resident children.

3. United States Citizenship and Immigration Services (USCIS)

USCIS administers a broad range of immigration benefits, including applications for family-based immigration, naturalization, and many others. Most relevant for unaccompanied children, USCIS decides cases of Special Immigrant Juvenile Status—a form of relief for children only—and decides unaccompanied children's asylum claims in the first instance.

B. Department of Health and Human Services (HHS), Office of Refugee Resettlement (ORR)

ORR, within HHS, is responsible for the care and custody of migrant children and adolescents who have been apprehended by CBP or ICE and referred to HHS as unaccompanied children. ORR houses children in a range of facilities that provide a variety of services, and oversees the family reunification process of releasing children to family in the United States.

C. Department of Justice (DOJ), Executive Office for Immigration Review (EOIR)

DOJ is responsible for the administration of justice and the enforcement of federal law. One of the many branches of the DOJ is the Executive Office for Immigration Review (EOIR), the agency that houses the United State's 50+ immigration courts whose immigration judges hear the claims of individuals in removal proceedings. EOIR includes the Board of Immigration Appeals (BIA), the administrative appeals body that adjudicates the appeals of decisions made at the immigration court level. Appeals from the BIA are heard in the federal courts, which are not part of EOIR; rather, they are part of the judiciary branch, which is entirely separate from the executive branch.

D. Department of State (DOS)

The Bureau of Population, Refugees, and Migration (PRM) and the Bureau of Western Hemisphere Affairs (BWHA) are the branches of DOS whose work most overlaps with Central American migrant children and families. PRM will be responsible for overseeing the in-country refugee processing recently announced for Honduran, Salvadoran, and Guatemalan children. BWHA's work focuses on development, citizen security, and other issues in the region. The programs of the United States Agency for International Development (USAID) have a significant impact on conditions on the ground in the children's sending countries.

Recommendations are included in full at the end of this book. For the full set of recommendations, please visit <http://cgrs.uchastings.edu/Childhood-Migration-HumanRights>.