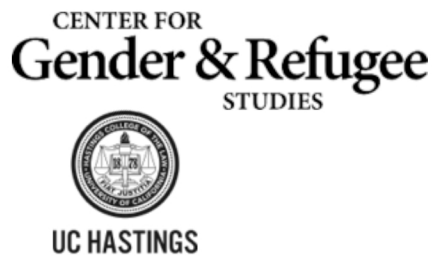


Childhood and Migration in Central and North America: Causes, Policies, Practices and Challenges

February 2015



Chapter 10 Immigration Remedies and Procedural Rights of Migrant Children and Adolescents

Karen Musalo, Lisa Frydman, and Misha Seay
Center for Gender and Refugee Studies
University of California Hastings College of the Law

I. Introduction

The central tenet of the United Nations Convention on the Rights of the Child (CRC) is that the “best interests” of the child must be a primary consideration in all action and decisions affecting children. The best interests of the child is also a key principle in the U.S. child welfare system and in state child welfare laws. However, the United States has not formally extended this standard to children in the immigration system. The lack of a binding best interests of the child principle in U.S. immigration law is harmful to children across all areas of the law. This chapter focuses on two of those areas: (1) the forms of immigration relief available to children and (2) the procedures in place for children in the U.S. immigration system. Both fall short of international standards and moral obligations to treat every child as our own.

The chapter reviews the range of avenues to regular immigration status available to children who migrate to the United States. It outlines the numerous substantive and procedural challenges that Central American and Mexican children in particular face to obtaining such status. To begin with, children can access most of the available immigration remedies only upon arrival to a U.S. border or entry into the United States, which poses a significant obstacle given the barriers children face in obtaining a valid visa and the dangers of the migration route for those who attempt to enter without a visa. Even when children reach the U.S. border and are able to apply for relief, and adjudicators apply legal standards correctly, many children remain unprotected. Nearly all forms of immigration relief—with the exception of Special Immigrant Juvenile Status (SIJS)—do not incorporate, or even consider, the best interests of the child when deciding whether to grant immigration relief, contravening international norms. Moreover, a major pitfall in the immigration system is the lack of appointed legal counsel and guardians for children. Advocates and academics alike have called for new immigration remedies for children and improved procedures that are based on the CRC’s best interests of the child principle.¹ This chapter contributes to that discussion and concludes by recommending how the United States can and should better protect migrant children from Central America and Mexico who seek safety and stability within its borders.

¹ 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. Retrieved from <http://cgrs.uchastings.edu/our-work/treacherous-journey> (hereinafter “A Treacherous Journey”); UNHCR. (2014, March). Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection. Retrieved from <http://unhcrwashington.org/children> (hereinafter “Children on the Run”); Appleseed, Cavendish, B., & Cortazar, M. (2011). Children at the Border: The Screening, Protection and Repatriation of Unaccompanied Mexican Minors. Retrieved from <http://appleseednetwork.org/wp-content/uploads/2012/05/Children-At-The-Border1.pdf>; Women's Refugee Commission. (2012, October). Forced From Home: The Lost Boys and Girls of Central America. Retrieved from <http://www.womensrefugeecommission.org/component/content/article/2-uncategorised/2057-forced-from-home-the-lost-boys-and-girls-of-central-america-background-and-report>.

II. Limited immigration options for Central American and Mexican children who are outside the United States

Central American and Mexican children flee their home countries for a number of reasons, including violence in the home—such as child abuse or incest—or violence at the hands of organized criminal syndicates. Children also seek to reunify with parents in the United States, and escape deep structural poverty that plagues their home countries and is accompanied by social exclusion, and a lack of basic opportunities, including education.² A growing number of child migrants (and adults) from Central America migrate south to other countries in the region and South America; however, a large number also migrate north to Mexico and the United States.³

Children who leave an intolerable situation and seek protection in the United States have few options for gaining entry through regular channels. Most forms of immigration relief require the child to arrive to the U.S. border or enter the United States before seeking protection. Obtaining a visa for travel is highly unlikely, so children are forced to travel through irregular means. Due to the challenges and dangers children experience on the migration route, as well as recent efforts by the Northern Triangle countries and Mexico to stop children and other migrants from leaving Central America or traveling through Mexico, only a fraction of migrant children in need of protection reach the United States and are able to seek relief there.⁴

A. Challenges to obtaining temporary or permanent residence visas to the United States

There are very few options for Central American and Mexican children to travel lawfully to the United States, whether for a temporary period or permanently. Temporary visas such as tourist, student, and employment-based visas are available, but children—particularly those who have been left behind by their parents and are living in unstable situations—are unlikely to qualify for them. To qualify for a tourist visa, for example, an individual must show that he or she is visiting the United States for a limited period of time, for pleasure, and has the financial means to return to his or her home country.⁵ Very few, if any, children are able to meet this standard, especially if they do not have the help of their parents or family, or if they come from a poor family even if they have parental support.⁶

² See chapters 2-7 for an in-depth analysis of root causes of migration in Honduras, El Salvador, Guatemala, and Mexico; chapter 11 for a discussion of the importance of family reunification in meeting children's needs; and chapter 1 for a description of the underlying reasons for Central American and Mexican children's decisions to migrate to the United States, as reported to UNHCR, and the numbers of children arriving.

³ Children on the Run, p. 15 (the report talks about the 435% increase in Guatemalans, Salvadorans, and Hondurans seeking asylum in other countries in the region).

⁴ No statistics are available on the number of children prevented from leaving their countries by domestic law enforcement. Restricting freedom of movement and the right to migrate from within the sending countries is a relatively new practice. Mexico's rate of deportation of child migrants is available and alarming. In 2011, Mexico deported 70% of the 4160 Central American migrant children it apprehended (2915 children). In 2012 Mexico deported 98% of the 6107 Central American migrant children apprehended (5966 children). In 2013 Mexico deported 84% of the 9893 Central American children apprehended (8350 children), and in 2014 thus far 78% of the 19,000 Central American children apprehended were deported (15,000 children). See Graphic Number 4, chapter 6 on Southern Mexico; and chapter 6 generally for more information about these practices.

⁵ See INA §101(a)(15)(B), 8 U.S.C.A. §1101(a)(15)(B) (West).

⁶ Likewise, many children are unlikely to qualify for a student visa. To obtain a student visa, a child must apply to and be accepted by a school approved by the U.S. government. The school must be a university or college, high

The most common way for Central American and Mexican children to enter and permanently remain in the United States through regular channels is through the family immigration system, wherein certain family members can petition for them to receive lawful permanent residency. There are various family visa categories that a child may fall into, depending on whether the petitioning family member is a U.S. citizen parent, a lawful permanent resident parent (LPR or “green card” holder), or a U.S. citizen sibling.⁷ No matter the category, the family member requesting that the child join him or her in the United States must first file a “visa petition” with the appropriate immigration authorities. Once the visa petition is approved, the child can then apply for permanent residency from a U.S. consulate. Both of these steps occur *before* traveling to the United States.

Children under the age of 21⁸ of U.S. citizens can file a visa petition and apply for permanent residency at the same time. They are considered “immediate relatives” and are not subject to any waiting period beyond the normal processing time (usually ranging from three months to a year).⁹ The children of LPR parents, however, must first wait for their visa to become “current” or available after the initial visa petition is filed before they can apply for permanent residency because there is a limit on the number of visas that can be given to family members of LPRs each year. After the visa is available, the second step of applying for permanent residency can take several months. The wait times for the visa to become available can vary significantly depending on the type of family relationship and the country of origin of the applicant. By way of example, under current wait times children from Mexico with LPR parents petitioning for them have to wait a minimum of three years for a visa to become available, whereas children from Mexico with U.S. citizen brothers or sisters petitioning for them will have to wait upwards of 17 years. For more examples, see Table 1 on family visa category wait times in chapter 11, exploring family separation caused by U.S. immigration policies. The long wait times impose a significant burden on families and are often unrealistic in light of children’s need for immediate care and support during their youth.

In addition to the long wait times for certain family visa categories, many—if not the majority—of child migrants arriving in the United States do not qualify for a family visa because (1) they do not have parents living in the United States who can petition for them, or (2) their parents in the United States lack the required immigration status to do so. Undocumented parents (i.e., parents

school, private elementary school, seminary, conservatory, or another academic program. Children under the age of 18 are unlikely to receive offers to study at a private elementary school or high school in the United States in order to qualify for a student visa, and even if they do receive such an offer, the cost of tuition and application fee for the visa can be prohibitive and unattainable for many Central American and Mexican families. The cost for private school education in the United States varies significantly, but usually ranges in the thousands of dollars each year. The current fees associated with an F-1 student visa total at least \$360. See U.S. Department of State. Student Visa. Retrieved from <http://travel.state.gov/content/visas/english/study-exchange/student.html#overview>.

⁷ U.S. citizens over the age of 21 can petition for their siblings, although the wait times can be very long. INA § 203(a)(4), 8 U.S.C.A. § 1153(a)(4) (West).

⁸ U.S. immigration law defines a child as an unmarried person under the age of 21 who is either a natural child, adopted child, or a stepchild of the individual(s) claiming the parent-child relationship. See INA § 101(b)(1), 8 U.S.C.A. § 1101(b) (West). The purpose of the definition of a child under immigration law is to determine which children can benefit from a parent or stepparent’s immigration status. Interestingly, the definition of an “unaccompanied alien child” requires that the individual be under the age of 18, not 21.

⁹ 8 U.S.C.A. § 1151(b)(2)(A)(i) (West).

without any regular status in the United States) have no legal right to bring their children to the United States. Lack of opportunities for family reunification through regular migration channels is a problem that dates back to the Immigration Reform and Control Act of 1986.¹⁰ Such policies keep families apart and encourage migration through irregular means, as explained in greater detail in chapter 11.

Some adults from El Salvador, Honduras, and Nicaragua may have received an immigration benefit called Temporary Protected Status (TPS), a temporary form of relief designated for nationals of certain countries facing extreme instability, explained in greater detail in section III.E.4, *infra*.¹¹ However, these adults with TPS have no right to petition for visas or status for family members.¹²

Apart from family, employment, and tourism, one of the few remaining avenues of immigrating to the United States is through the refugee protection program. Although individuals from Central America and Mexico can apply for asylum once they are at the border or inside the United States, they cannot currently seek such protection while they still in their home countries. The United States has an overseas refugee determination process through which it designates fixed numbers of slots for individuals in certain regions and countries to seek refugee status before they have left their home country or from a neighboring country, but it has not historically not designated refugee slots to individuals from Central America.¹³ In response to the recent, significant increase in the numbers of unaccompanied children arriving in the United States, the U.S. government has decided to put into place an in-country refugee processing system in Honduras, and possibly other Central American countries.¹⁴ In-country processing would benefit children who qualify for the

¹⁰ The legalization program put into place under the 1986 Immigration Reform and Control Act did not provide an avenue for legalization of immediate family members of individuals who qualified for the program, if the family members did not themselves meet the requirements. This led to mixed status amongst family members, which has become a significant problem in the U.S. When the U.S. finally put a program into place for those immediate family members who did not qualify under the 1986 Act to regularize their status huge backlogs ensued. Both of these problems - lack of avenues for family reunification and major backlogs within those family reunification options that do exist—persist today. See Cooper, B., & O-Neil, K. (2005, August). Lessons from the Immigration Reform and Control Act of 1986, Policy Brief. Retrieved from <http://migrationpolicy.org/research/lessons-immigration-reform-and-control-act-1986>. For more information, see chapter 11, examining in detail how U.S immigration policies lead to family separation.

¹¹ The Secretary of Homeland Security may designate a foreign country for TPS because of conditions in the country that make return unsafe, such as armed conflict, an epidemic, an earthquake or flood or environmental disaster. INA § 244(b), 8 U.S.C.A. § 1254a(b) (West). A country must be designated for TPS by the Secretary of Homeland Security. An applicant for TPS must demonstrate that she was in the United States on the date her country was designated for TPS and has been residing in the United States since that date, and she must have registered before the deadline. INA § 244(c)(1)(A), 8 U.S.C.A. § 1254a(c)(1)(A) (West). Honduras was designated for TPS in 2001 and El Salvador and Nicaragua were designated in 1999.

¹² See section III.E.4, *supra*, and Chapter 13 on regional and bilateral agreements for more information on TPS and its limitations.

¹³ In 2012, the majority of refugees admitted to the United States through the overseas refugee program were from the Near East, South Asia, East Asia, Africa, and to a lesser extent Europe. The only refugees admitted from Latin America and the Caribbean came from Colombia, Cuba, and Venezuela; the overwhelming majority of those admitted were from Cuba. See U.S. Department of State. (2013, February 28). FY12 Refugee Admission Statistics. Retrieved from <http://www.state.gov/j/prm/releases/statistics/206319.htm>.

¹⁴ See Robles, F., & Shear, M. (2014, July 24). U.S. Considering Refugee Status for Hondurans. *New York Times*. Retrieved from http://www.nytimes.com/2014/07/25/world/americas/administration-weighs-plan-to-move-processing-of-youths-seeking-entry-to-honduras.html?_r=0.

program by granting them protection and a right to immigrate to the United States. This would provide a regular channel for migration and eliminate their need to take the perilous unauthorized journey north. However, in-country processing also raises concerns. For example, children denied refugee status could be barred from seeking asylum from the United States should they later make it to the U.S. border and apply, and children could be forced to remain in dangerous situations while they wait for their refugee status claims to be heard.¹⁵

B. Dangers children and adolescents encounter in transit

With few options for legal entry to the United States, and due to the structural factors that currently drive migration in the region,¹⁶ Central American and Mexican children seeking to reach the United States are forced to migrate through irregular channels on their own or with a smuggler. Domestic officials, charged with reducing the flow of migration, restrict children from leaving their home countries in the first place.¹⁷ For those who get through, and as also documented in chapter 7 regarding Mexico's Northern Border, the migration journey is fraught with danger and exploitation. Tragically, some children die en route due to injury or violence, and some children are kidnapped and never arrive at their destination. Others suffer physical and sexual abuse, and still others are injured and forced to return to their home countries with a permanent disability. Migration officials also apprehend and deport many children in the countries through which they transit.¹⁸ Regardless of the specific dangers a child encounters on the migration route, one thing is clear: children migrating through irregular means face significant obstacles to reaching the United States. These dangers include:

La Bestia (The Beast). Because of the lack of legal avenues to travel through Mexico and enter the United States, and because Mexican authorities have increased the number of migration checkpoints throughout the country to stop migrants from passing through, many Central American and Mexican migrant children and adults seek to traverse Mexico on top of freight trains. The freight train—called *La Bestia*—harms, maims, and kills migrant riders with regularity. Accidents are frequent, and “significant numbers of migrants [including children] have lost one or both legs to what is sometimes referred to as ‘the death train,’ while many others have been killed.”¹⁹ In August 2014, Mexico announced its intention to increase the speed of *La Bestia* in order to discourage migrants from riding it; however, given the lack of alternatives for many

¹⁵ See Frelick, B. (2014, August 14). Are Central American Kids the New Boat People? *Politico*. Retrieved from <http://www.hrw.org/news/2014/08/14/are-central-american-kids-new-boat-people> (warning that in-country refugee processing in Haiti and the Orderly Departure Program in Vietnam were highly flawed, for example, because they had long delays and were used to justify U.S. interdiction and summary return of asylum seekers.).

¹⁶ See chapters 2-7 on Honduras, El Salvador, Guatemala, and Mexico for more information on these structural causes; and chapter 1 for a description of the underlying reasons for Central American and Mexican children's decisions to migrate to the United States, as reported to UNHCR.

¹⁷ Little public information is available about who is involved in such efforts and how broad the efforts are. However, they appear to involve inclusion of military police in “halting Central American migrants at their origin.” See Stargardter, G. (2014, August 12). Brutality and ‘The Beast’: why child migration to U.S. is slowing down. Reuters. Retrieved from <http://www.reuters.com/article/2014/08/12/us-usa-immigration-decline-insight-idUSKBN0GC09G20140812>.

¹⁸ See chapter 6 for more information on the practices of Mexico, in particular, as a transit country.

¹⁹ Catholic Relief Services. (2010, January). Child Migration: The Detention and Repatriation of Unaccompanied Central American Children from Mexico, p. 32. Retrieved from <http://www.crsprogramquality.org/storage/pubs/peacebuilding/LACRO%20Migration-final.pdf>.

migrants desperate to leave their home countries, it seems likely that this will only increase the number of injuries and deaths rather than reduce the numbers who ride it.²⁰

Violence by coyotes (human smugglers), gangs, organized crime syndicates. According to a 2010 study conducted by Catholic Relief Services, about 29% of unaccompanied children interviewed reported experiencing some form of abuse while in transit to the United States.²¹ Gangs and other organized crime syndicates, as well as some coyotes, exploit the extreme vulnerability of children traveling without adults. These groups have been reported to kidnap, abuse, rape, and mutilate children, and hold them for ransom or subject them to forced labor. Mexican gangs, in particular, “have a history of kidnapping migrants and holding them for ransom, or forcing them to work for drug cartels or on marijuana farms.”²² A 2009 report by the Mexican Human Rights Commission documented a staggering 9,758 victims of kidnapping between September 2008 and February 2009, “including numerous cases involving minors.”²³

Special dangers for girls. Migrant girls face unique dangers during their migration journey. Girls interviewed by the United Nations High Commissioner for Refugees and the Women’s Refugee Commission reported being under constant threat of sexual assault while on the move. Girls suffer rape by coyotes, gang members or members of other criminal groups, other migrants, and even corrupt migration authorities or police officers. Rape is so common that “[i]t is a widely held view—shared by local and international NGOs and health professionals working with migrant women—that as many as six in 10 migrant women and girls are raped.”²⁴ Some girls take birth control pills during the migration journey to avoid getting pregnant in case of rape.²⁵

²⁰ Pérez Silva, C. (2014, August 25). Aumentarán velocidad a ‘La Bestia’ para evitar que migrantes se suban. *La Jornada*. Retrieved from <http://www.jornada.unam.mx/ultimas/2014/08/25/aumentan-velocidad-a-la-bestia-para-evitar-que-migrantes-se-suban-8773.html>.

²¹ Catholic Relief Services. (2010, January). The Detention and Repatriation of Unaccompanied Central American Children from Mexico, p. 33. Retrieved from: <http://www.crsprogramquality.org/storage/pubs/peacebuilding/LACRO%20Migration-final.pdf>.

²² Kids In Need of Defense. (2013, February). The Time is Now: Understanding and Addressing the Protection of Immigrant Children Who Come Alone to the United States, p. 25. Retrieved from http://www.supportkind.org/joomlatools-files/docman-files/TimeIsNow_KIND_Feb_2013.pdf.

²³ Child Migration, The Detention and Repatriation of Unaccompanied Central American Children from Mexico, p. 34.

²⁴ Amnesty International. (2010, April). Invisible Victims: Migrants on the Move in Mexico, p. 15. Retrieved from <http://www.amnestyusa.org/sites/default/files/amr410142010eng.pdf>.

²⁵ See Joffe-Block, J., & Fronteras. (2014, March 31). Women crossing the U.S. border face sexual assault with little protection. *PBS News Hour*. Retrieved from <http://www.pbs.org/newshour/updates/facing-risk-rape-migrant-women-prepare-birth-control/>.

Central American migrant girls also fall prey to human traffickers²⁶ who force them to work in brothels and bars, especially in Chiapas, Mexico and in Guatemala.²⁷ ECPAT International,²⁸ a global network dedicated to combating child trafficking and pornography, reports that girls mainly from El Salvador, Honduras, and Nicaragua, and as young as eight years old, are sold in Guatemala for sexual exploitation.²⁹

Other life-threatening conditions. Children migrating to the United States through irregular channels also face extreme environmental dangers: scorching heat and sun, lack of water and food, and the treacherous currents of the Rio Grande River. Many migrants die each year attempting to navigate these life-threatening conditions. According to a recent report issued by the Women's Refugee Commission, some children who survived the journey through Mexico and reached the United States border reported being abandoned by guides without food or water. "Some wandered for days until [U.S.] Border Patrol found them. Others describe making it to the Rio Grande River and watching others drown as they struggled against the current."³⁰

Corruption among Mexican authorities. Child migrants traveling through Mexico also contend with corruption among Mexican authorities, including migration authorities and security forces that have ties to organized crime syndicates. For example, federal police forces have been known to extort migrants with threats of placing them in detention, and sometimes even rob migrants outright.³¹ Officials from the National Migration Institute (*Instituto Nacional de Migración* or INM), the main immigration enforcement agency in Mexico, have also turned over detained migrants to criminal networks or gangs who then hold them hostage for a ransom.³²

²⁶ Human smugglers or coyotes and human traffickers are not the same. According to the Department of State, the "vast majority of people who are assisted in illegally entering the United States are smuggled, rather than trafficked." Unlike human smuggling, "which is often a criminal commercial transaction between two willing parties who go their separate ways once their business is complete, trafficking specifically targets the trafficked person as an object of criminal exploitation. The purpose from the beginning of the trafficking enterprise is to profit from the exploitation of the victim. It follows that fraud, force, or coercion all plays a major role in trafficking" and the victim is not free to leave after crossing the border. Some situations that start out as human smuggling turn into human trafficking. See U.S. Department of State. (2006, January 1). Fact Sheet: Distinctions Between Human Smuggling and Human Trafficking 2006. Retrieved from <http://www.state.gov/m/ds/hstcenter/90434.htm>.

²⁷ United Nations Office on Drugs and Crime. Trafficking of Women and Girls within Central America. Retrieved from http://www.unodc.org/documents/toc/Reports/TOCTASouthAmerica/English/TOCTA_CACaribb_trafficking_women_girls_within_CAmerica.pdf.

²⁸ ECPAT stands for End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes, but the organization prefers to be referred to as ECPAT.

²⁹ United Nations Office on Drugs and Crime, Trafficking of Women and Girls within Central America.

³⁰ Forced From Home: The Lost Boys and Girls of Central America, p. 8.

³¹ See Isacson, A., Meyer, M., & Morales, G. (2014, June). Mexico's Other Border: Security, Migration, and the Humanitarian Crisis at the Line with Central America. Retrieved from <http://www.wola.org/files/mxgt/report/>.

³² See Fox, E. (2013, January 9). Figures Show Corruption Rife in Mexico's Migration Agency. Retrieved from <http://www.insightcrime.org/news-briefs/figures-corruption-rife-under-calderon-mexico-migration-agency/>; see also chapter 6 on Southern Mexico for more details.

C. Challenges upon arrival at the U.S. border, including deportation

Children who succeed in arriving to the U.S. border face harsh treatment upon arrival, and additional obstacles to seeking regular status. In the name of national security, the border is militarized, which creates a law enforcement setting utterly inappropriate for children. Children at the border encounter armed border patrol officials and military equipment such as watchtowers, tanks, and helicopters, and are detained in border patrol stations that lack beds and blankets and are otherwise not equipped to hold children. The growing militarization of the border and the abuses children face from U.S. border patrol officials are discussed in detail in chapter 9, exploring treatment of unaccompanied migrant children at the U.S.-Mexico border.

As explained in chapter 9 on U.S. border and detention policies and practices, the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) codified the existing practice of treating Mexican and Central American children apprehended by border patrol differently. Children from non-contiguous countries (e.g., Guatemala, El Salvador, and Honduras), have an opportunity to seek immigration relief in the United States. As a result, thousands of Mexican children, making up the vast majority of those seeking entry to the United States, are returned directly to Mexico from the border each year without the opportunity to pursue relief opportunities.³³ In contrast, by law, only certain narrow categories of children from contiguous countries (e.g., Mexico and Canada), are given an opportunity to seek legal relief. However, opportunities for non-contiguous country children are now at risk due to pressure from anti-immigrant sentiments. For more information on differential screening procedures and new developments, see chapter 9.

III. Inadequate forms of immigration relief available to children from Central America and Mexico

The United States offers a range of immigration benefits to adults and children alike as well as certain forms of relief that are only intended for children. While some of these forms of relief provide important protection and benefits to immigrant children, there are numerous challenges accessing these forms of relief for Central American and Mexican children who have come to the United States to seek safe haven, reunite with their families, access better opportunities, or for a combination of reasons. Additionally, a consistent feature of these forms of relief—with the exception of SIJS—is the complete lack of consideration of the best interests of the child. This lack of consideration is inconsistent with international norms, and directly affects whether a child is able to establish that she qualifies for immigration relief. Her best interests should inform her eligibility for legal relief, e.g., by proving hardship or torture would result from return; under current U.S. law, however, they largely do not.

³³ The U.S. Department of Health and Human Services (HHS), Office of Refugee Resettlement (ORR) reports that out of 24,668 UAC in custody in FY 2013 only 3% (740) were Mexican. Meanwhile, CBP reports that in FY 2013 17,240 Mexican UAC were apprehended by U.S. Border Patrol in 2013. This means that only 4.29% of Mexican children were not repatriated from the border, and that 95.71% were. *See* A Treacherous Journey, p. 49; *see also* chapter 1 by UNHCR, *supra* (citing additional statistics for FY 2014).

A. Family immigration system for children who are already in the United States

As noted in section II.A above, one potential means of obtaining regular status in the United States is through the family immigration system. In developing the current system of quotas and preferences for family visas several decades ago, the U.S. Congress had family reunification as its foremost consideration, particularly in keeping the families of U.S. citizens and LPRs united.³⁴ Although some children with family members who hold specific forms of lawful immigration status may eventually be able to reunite, current wait times can be inordinately long, frustrating the purpose of family unity. For detailed figures on wait times, see section II.A, *supra* and chapter 11 on family separation.

The wait time for children of LPRs from Mexico and Central America to immigrate to the United States is approximately two to three years.³⁵ The wait time for siblings of U.S. citizens can be as long as 13 to 18 years before a visa becomes available, and it is only then the children (by then almost certainly an adult) can complete the paperwork to obtain permanent residency.³⁶ If a child is in the United States at the time the petition is filed on his or her behalf, the child may remain in the country while his or her visa is pending; however, having a pending visa does not give the child a legal right to reside in the country and thus he or she remains subject to deportation at any time.

Some forms of immigration relief, such as asylum and certain types of employment-based visas allow a parent to confer status and bring his or her child to the United States.³⁷ Of course, in order for children to benefit from this, they must have parents who are in the United States and hold one of these forms of lawful immigration status. However, the family members of many Central American and Mexican children in the United States do not have the requisite legal status, making reunification through these means unattainable. Moreover, not all forms of relief allow parents to bring their children to the United States to join them. As noted, nationals of El Salvador, Honduras, and Nicaragua who have received TPS are not eligible to confer status to their children.

Given the difficulties of obtaining lawful immigration status, it is common to have mixed status families in which some family members have lawful status and others do not. This leaves many families at risk of separation if a family member is put in removal proceedings, which may violate human rights norms on a child's best interests and right to family, as discussed in more detail in chapter 11.³⁸

³⁴ See Harvard Law Review Association. (1983). Developments in the Law – Immigration Policy and the Rights of Aliens. *Harvard Law Review*. 96, 1286, p. 1351 (citing legislative history); see also *Fiallo v. Bell*, 430 U.S. 787, 795, 811 (1977) (stating that U.S. Congress' main concern in enacting the immigration laws has been "keeping families of United States citizens and immigrants united").

³⁵ See U.S. Department of State. (2014, July). Visa Bulletin for July 2014. Retrieved from <http://travel.state.gov/content/visas/english/law-and-policy/bulletin/2014/visa-bulletin-for-july-2014.html>.

³⁶ U.S. Department of State. Visa Bulletin for July 2014.

³⁷ See, e.g., 8 U.S.C. § 1158(b)(3) (asylees); 8 C.F.R. § 214.2(3) (treaty investors); 8 C.F.R. § 214.2(f) (students); 8 C.F.R. § 214.2(h) (temporary employees); 8 C.F.R. § 214.2(j) (exchange visitors).

³⁸ See Convention on the Rights of the Child (CRC) arts. 9, 10, 1989, November 20, 1577 U.N.T.S. 3.

B. Asylum, withholding of removal, and Convention Against Torture protection—the forms of relief for children fleeing persecution or torture

The United States has three related but distinct forms of relief for individuals fleeing persecution or torture— asylum, withholding of removal, and protection under the Convention Against Torture (CAT). These forms of relief were established in an effort to conform U.S. law to international treaties and norms, particularly the 1951 United Nations Convention Relating to the Status of Refugees (Refugee Convention), the 1967 United Nations Protocol Relating to the Status of Refugees (Refugee Protocol), and the 1984 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention).³⁹

Asylum, withholding of removal, and CAT differ in their levels of protection. Asylum offers the greatest benefits because those granted asylum status (referred to as “asylees”⁴⁰ under U.S. law) are eligible to apply for permanent residency after one year and can apply to become a U.S. citizen five years thereafter.⁴¹ Adults who are granted asylum are also entitled to bring their spouses or children to the United States to join them.⁴² This is an important benefit of asylum protection that contributes to the goal of family reunification. However, the reverse is not true: children granted asylum are not eligible to bring their parents to the United States. The inability under U.S. law for child asylees to petition to bring their parents to the United States runs counter to international norms. A central tenet of the Convention on the Rights of the Child is the right to family reunification.⁴³ When legal barriers exist to reunifying children with their parents in the child’s country of origin—as is the case when a child is granted asylum—family reunification obligations under the Convention should control the host country’s determinations regarding reuniting families.⁴⁴

³⁹ Although the United States has not ratified the Refugee Convention, it has acceded to the Refugee Protocol, which incorporates most of the key provisions of the Refugee Convention, including the principle of *non-refoulement*. The principle of *non-refoulement* reflects the duty to not return refugees to a country where they face persecution, as provided for in Article 33.1 of the Convention and its 1967 Protocol: “No Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” Convention Relating to the Status of Refugees art. 33.1, 1951, July 28, 189 U.N.T.S. 137; Protocol Relating to the Status of Refugees. January 31, 1967. 606 U.N.T.S. 267. The United States ratified the Torture Convention in 1994. That treaty prohibits the returning any person to a country where there are substantial grounds for believing that he or she would be subjected to torture with the consent or acquiescence of a public official. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 1, 3, G.A. Res 39/46, U.N. Doc A/RES/39/46 (1984, December 10).

⁴⁰ Although the United States refers to these individuals as “asylees,” anyone who is granted asylum in the United States has been found to meet the international definition of a “refugee.”

⁴¹ 8 U.S.C.A. § 1159(b) (West); 8 U.S.C.A. § 1422, 1423, 1427. Individuals who receive citizenship through the immigration laws and not through having been born in the United States are referred to as “naturalized citizens.”

⁴² 8 U.S.C. § 1158(b)(3) (West).

⁴³ States parties to the Convention must ensure that children are not separated from their parents against their will, unless separation is in the best interests of the child, and applications by children or their parents to enter or leave a State in order to reunify must be dealt with by states parties “in a positive, humane, and expeditious manner” and “shall entail no adverse consequences for the applicants and for the members of their family.” Convention on the Rights of the Child (CRC) arts. 9(1), 10(1), 1989, November 20, 1577 U.N.T.S. 3. For a more detailed discussion on the right to family reunification, see chapter 11.

⁴⁴ See UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, ¶ 83, CRC/GC/2005/6 (2005, September 1). Retrieved from <http://www.refworld.org/docid/42dd174b4.html>

Unlike asylum, withholding of removal and CAT protection do not provide a path to permanent residency and can be terminated if conditions in the home country improve and the applicant no longer faces persecution or torture there.⁴⁵ Also different from asylum, U.S. law does not permit individuals granted withholding of removal or CAT protection to bring their spouse or children to the United States to join them contrary to international norms. The distinctions between these forms of relief are critical because, as discussed below, there are number of hurdles applicants face when seeking asylum that results in some bona fide refugees only being granted withholding or CAT protection, and thus being denied the benefits that come with asylum and the opportunity of a durable and stable life in the United States.

1. Asylum

There are myriad reasons why children from Central America and Mexico migrate to the United States. Because many of these children leave their home countries in order to avoid violence and other forms of persecution, as explained in detail in other chapters of this book,⁴⁶ they have potentially valid claims for asylum and related protections. The most common asylum claims presented by Central American and Mexican children involve escaping physical or sexual abuse by parents and other family members or caregivers, violence at the hands of gangs or organized crime including drug cartels, sexual or labor exploitation or trafficking, particular harms suffered by street children, and intimate partner violence.⁴⁷ Girls and indigenous children also face unique forms of harm based on their gender and ethnicity due to discriminatory cultural norms and practices. Although many of these claims would be recognized as a basis for protection under international standards, U.S. asylum law adopts a narrower approach that rejects some of these claims. Moreover, despite the existence of domestic and international guidelines on the adjudication of children’s asylum claims, a child-sensitive legal analysis—which accepts a lower evidentiary threshold for children than adults and recognizes that children are developmentally unique from adults—is not employed.

Eligibility Requirements. In order to be granted asylum, children and adults must meet the U.S. refugee definition, which tracks the language of the Refugee Convention and Protocol. Under U.S. law, a “refugee” is:

any person who is outside any country of such person’s nationality, or in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of past persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.⁴⁸

Broken down, the key elements required for asylum eligibility under the U.S. statute are proof of the existence of: (1) past persecution or a well-founded fear of future persecution; (2) “on account

⁴⁵ 8 C.F.R. § 1208.24 (West).

⁴⁶ See chapters 2-7 on Honduras, El Salvador, Guatemala, and Mexico for more information.

⁴⁷ *A Treacherous Journey*.

⁴⁸ 8 U.S.C. § 1101(a)(42) (West).

of” one of the five enumerated grounds: race, religion, nationality, membership in a particular social group, and political opinion (also known as the “nexus” requirement); and (3) that the government is unable or unwilling to control. An applicant for asylum must also establish that he or she is not subject to one of the statutory bars to asylum—including bars for criminal activity, resettlement in third countries, and late filing of the application—and that he or she merits asylum in the exercise of discretion.⁴⁹ As discussed below, additional requirements have been added under the statute’s implementing regulations and through the development of case law.⁵⁰ This has resulted in a highly complex set of legal requirements that is challenging for even a prepared and well-equipped asylum seeker, even with an attorney, to overcome.

The United States’ narrow interpretation of the asylum requirements. Although U.S. asylum law is derived directly from the Refugee Convention and Protocol and purportedly applies the same definition of a “refugee,” U.S. interpretation of that term is much narrower than the international approach—especially with regards to the “particular social group” and “on account of” (or “nexus”) elements. This divergence is exacerbated by the fact that the United States does not require adjudicators to employ a child-sensitive analysis of the elements of the refugee definition that acknowledges the differences between children and adults. While the U.S. government and the United Nations High Commissioner for Refugees (UNHCR) have produced guidelines encouraging adjudicators to adopt a child-sensitive approach when deciding children’s asylum claims,⁵¹ the United States takes the position that these are not binding on adjudicators. Combined with the tendency of adjudicators to interpret the refugee definition in a restrictive manner, many Central American and Mexican children fleeing persecution experience great difficulty in establishing their eligibility for asylum.

⁴⁹ See 8 U.S.C. § 1158(a)(2)(A) (West) (safe third country), § 1158 (a)(2)(B) (one-year filing deadline), § 1158 (a)(2)(C) (previous asylum applications), § 1158 (b)(2)(A)(i) (ordered, incited, assisted, or participated in the persecution of others), § 1158 (b)(2)(A)(ii) (particularly serious crime), § 1158 (b)(2)(A)(iii) (serious nonpolitical crime), § 1158 (b)(2)(A)(iv) (danger to the security of the United States), § 1158 (b)(2)(A)(v) (terrorist activities), § 1158 (b)(2)(A)(vi) (firm resettlement), § 1158 (b)(2)(B)(i) (aggravated felony); see also 8 C.F.R. § 1208.13(b)(1)(i) (West) (discretionary nature of asylum).

⁵⁰ For instance, under the regulations, an applicant cannot establish a well-founded fear of persecution if he or she “could avoid persecution by relocating to another part of the applicant’s country of nationality or, if stateless, another part of the applicant’s country of last habitual residence.” 8 C.F.R. § 1208.13(b)(2)(ii) (West).

⁵¹ U.S. Department of Justice, Immigration and Naturalization Service, & Weiss, J. (1998, December 10). Memorandum: Guidelines for Children’s Asylum Claims. Retrieved from <http://www.uscis.gov/USCIS/Laws%20and%20Regulations/Memoranda/Ancient%20History/ChildrensGuidelines121098.pdf> (hereinafter “U.S. Department of Justice Guidelines for Children’s Asylum Claims”); U.S. Citizenship and Immigration Services. (2009, September 1). Asylum Officer Basic Training Course: Guidelines for Children’s Asylum Claims. Retrieved from <http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Guidelines-for-Childrens-Asylum-Claims-31aug10.pdf>; U.N. High Commissioner for Refugees (UNHCR), *Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, ¶ 5, U.N. Doc. HCR/GIP/09/08 (2009, December 22). Retrieved from <http://www.unhcr.org/50ae46309.html>. U.S. courts have held that the UNHCR guidance is persuasive, but not binding on the United States. See, e.g., Matter of W-G-R-, 26 I&N Dec. 208, 220 (BIA 2014); Matter of M-E-V-G-, 26 I&N Dec. 227, 248 (BIA 2014).

Persecution. The term “persecution” has been interpreted to include physical harms—such as beatings, rape, and prolonged detention—as well as psychological or emotional harm.⁵² It may also include economic harm such as the denial of livelihood and food. However, not all forms of harm or deprivation of fundamental rights constitute “persecution” under the U.S. immigration laws. Because there is no set formula for deciding when a harm or series of harms rises to the level of persecution, the inquiry can seem highly subjective to the individual adjudicator. U.S. and UHNCR guidelines as well as U.S. federal case law recognize that harm that may not constitute persecution in the case of an adult, could rise to the level of persecution when inflicted upon a child.⁵³ However, studies of asylum decisions have shown that adjudicators frequently fail to recognize that children experience harm differently from adults and that an act that might not be persecution when inflicted on an adult could certainly be so when inflicted on a child, especially if it has long-lasting emotional and psychological effects.⁵⁴ This lack of sensitivity to the impact that a child’s age and maturity level can have on their experience of harm creates a significant barrier to recognizing the harm they face as rising to the level of persecution.

On account of a protected ground. One of the most complex and challenging areas of asylum law relates to the “on account of” requirement of the refugee definition; also commonly referred to as the “nexus” requirement. Proof of nexus requires establishing a causal link between the persecution and one or more of the five statutorily protected grounds—race, religion, nationality, political opinion, or membership in a particular social group. An applicant must show that his or her persecutor was motivated to harm him or her *because of* one of these five characteristics. Children can seek asylum based on any of the five protected grounds, but the claims of children from Central America and Mexico c, are often viewed as falling within the social group ground, the most contentious basis.

In general, courts recognize two different standards for claiming asylum based on membership in a particular social group. Under the immutable or fundamental characteristics standard—also known as the *Acosta* standard—a social group must be comprised of individuals who share a common characteristic that they are unable to change (such as sex) or should not be required to change because it is fundamental to their conscience or identity (such as religious or other deeply held beliefs).⁵⁵ The majority of courts, however, follow a second approach, which is the *Acosta* standard plus the requirements of “social distinction” (formerly called “social visibility,” which requires the group be perceived as a group by society) and “particularity” (which requires that the

⁵² See, e.g., *Mashiri v. Ashcroft*, 383 F.3d 1112, 1120 (9th Cir. 2004); *Tamas-Mercea v. Reno*, 222 F.3d 417, 424 (7th Cir. 2000); *Matter of T-Z-*, 24 I&N Dec. 163, 169-71 (BIA 2007); *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985).

⁵³ U.S. Department of Justice Guidelines for Children’s Asylum Claims, p. 19; Asylum Officer Basic Training Course: Guidelines for Children’s Asylum Claims, pp. 36-40; UNHCR, Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, ¶¶ 8-9.

⁵⁴ *A Treacherous Journey*, pp. 20-23.

⁵⁵ *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985). Every circuit to rule on the issue adopted *Matter of Acosta* (see discussion below regarding the Ninth Circuit’s adoption of the standard), and it remained the standard in the federal courts for over twenty years, until the BIA, erroneously citing UNHCR refugee guidelines, stated that the *Acosta* standard was only a threshold and that social visibility and particularity also needed to be established. *Matter of C-A-*, 23 I&N Dec. 951, 959-960 (BIA 2006).

group by clearly defined and determinable in the applicant's society).⁵⁶ The social distinction and particularity requirements have been criticized by advocates, scholars, and the courts alike for causing confusion and restricting the refugee definition. It should be noted that these requirements conflict with UHNCR's approach.⁵⁷

The imposition of these two requirements has made it especially difficult for Central American and Mexican children fleeing a range of harms and violence.⁵⁸ Although children or subgroups of children are targeted precisely because of their status in society and vulnerability *as children*, there is a great resistance on the part of adjudicators to find that children in a range of circumstances can constitute a cognizable social group (in other words, can constitute a social group defined by the immutable characteristic of age). To date, no federal court has approved a social group defined solely by childhood, and one federal court has rejected "street children."⁵⁹ Courts that follow just the *Acosta* standard have, however, been more likely to approve social groups where the applicant's status as a childhood or age is at least one defining characteristic of the group. One decision accepted a social group formulation involving former child soldiers.⁶⁰ On the other hand, courts that apply the *Acosta*-plus approach have consistently rejected social groups defined in part or in whole by childhood for lack of social distinction and/or particularity.⁶¹ For instance, children fleeing gang-related violence, in particular children who have resisted or opposed forced recruitment to the gangs,⁶² are routinely denied asylum on the ground that their claimed social group lacks social visibility, or social recognition, as well as adequate particularity. Adjudicators justify this approach by stating that gangs indiscriminately target young people, and there is insufficient evidence that society perceives certain populations of children as being more vulnerable to gang violence.⁶³ Girls who have been targeted by gangs to become "girlfriends" or

⁵⁶ Social distinction was formally known as "social visibility." See *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014); *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014).

⁵⁷ *A Treacherous Journey* (citing critiques by scholars, academics, and courts).

⁵⁸ These harms, and in particular intrafamilial and gang violence driving migration, are explored in greater detail in chapters 2-7 on Honduras, El Salvador, Guatemala, and Mexico.

⁵⁹ *Escobar v. Gonzales*, 417 F.3d 363 (3d Cir. 2005) (rejecting social group of "Honduran street children" based on finding that age is not immutable and that group is too broad and diverse).

⁶⁰ See, e.g., *Cece v. Holder*, 733 F.3d 662, 673 (7th Cir. 2013) (approving a particular social group of young, Albanian women who live alone); *Lukwago v. Ashcroft*, 329 F.3d 157 (3d Cir. 2003) (approving a particular social group of former child soldiers); *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005) (approving a particular social group of young girls in the Benadiri clan); Anker, D. (2013). *Law of Asylum in the United States*. Eagan, MN: Thomson West (citing *Matter of B-F-O-*, No. 78-677-043, 24 IMMIG. RPT. B1-41, 43-44 (BIA Nov. 6, 2001) as recognizing "abandoned street children in Nicaragua" as a social group); but see *Escobar v. Gonzales*, 417 F.3d 363 (3d Cir. 2005) (rejecting social group of "Honduran street children" based on finding that age is not immutable and that group is too broad and diverse).

⁶¹ See, e.g., *Larios v. Holder*, 608 F.3d 105 (1st Cir. 2010) (rejecting social group of "Guatemalan youth resisting gang recruitment" for lack of social visibility and particularity); *Orellana-Monson v. Holder*, 685 F.3d 511, 521-522 (5th Cir. 2012) (rejecting social group of "Salvadoran males between the ages of 8-15 who have been recruited by Mara 18 but refused to join the gang because of their principal opposition to the gang and what they want" [sic] under social visibility and particularity criteria); *Barrios v. Holder*, 581 F.3d 849, 854 (9th Cir. 2009) (rejecting social group of "young males in Guatemala who are targeted for gang recruitment but refuse because they disagree with the gang's criminal activities"); *Gomez-Guzman v. Holder*, 485 F. App'x 64 (6th Cir. 2012) (rejecting the group of "Guatemalan children under the age of 14" for want of particularity).

⁶² For more information on gang violence and forced recruitment, see chapters 2-7 on Honduras, El Salvador, Guatemala, and Mexico, as well as chapter 1 on UNHCR interviews of migrant children.

⁶³ See *Larios*, 608 F.3d at 109; *Orellana-Monson*, 685 F.3d at 521-522; *Barrios*, 581 F.3d at 854-855; *Gomez-Guzman*, 485 F. App'x. at 65, 68. Some courts have approved social groups comprised of government witnesses and

sex slaves of gang members, or to become members of the gang themselves, have been similarly denied asylum—as adjudicators have likewise rejected social groups defined by gender, age, and/or resistance to gangs.⁶⁴ Many children’s cases should qualify for asylum under a proper application of the refugee definition,⁶⁵ yet restrictive interpretations of the social group ground have impeded protection. It is important to note, however that adjudicators—including in the federal courts that set precedent—have been more open to granting asylum to children targeted because of family membership, as nuclear family is recognized as a fundamental unit in most societies. A child might also be targeted by State or non-State actors because of the activity of other members of the family.

Even if an adjudicator were to find that a boy fleeing forced recruitment or extortion by gangs or a girl being forced into a relationship with a gang member is a member of a valid social group, the nexus requirement still poses significant challenges. An adjudicator could hold that the gang’s reason for targeting a boy is to increase its ranks, power, and capital—not because of the child’s social group membership. Likewise, she could determine a gang member forcing a girl into a relationship is committing a random act of violence, rather than harming her because of her gender. Unfortunately, numerous published decisions in the federal courts have taken such approaches to claims involving resistance to gang violence.⁶⁶

Claims based on other harms which cause children to migrate—such as extreme poverty and lack of access to education (resulting in a violation of the internationally recognized right to develop), or a child’s lack of an adequate caretaker⁶⁷—are unlikely to succeed under the particular social

former gang members. *See* *Martinez v. Holder*, 740 F.3d 902 (4th Cir. 2014) (former gang members); *Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013) (witnesses who testified against gang members); *Garcia v. Att’y Gen. of U.S.*, 665 F.3d 496 (3d Cir. 2011) (witnesses who testified against gang members); *Urbana-Mejia v. Holder*, 597 F.3d 360 (6th Cir. 2010) (former gang members); *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009) (former gang members). Although there are no published decisions, asylum claims based on gang persecution of religious leaders or followers and LGBT persons have also succeeded at the lower levels of adjudication. *See* Frydman, L., & Neha, D. (2012, October). *Beacon of Hope or Failure of Protection? U.S. Treatment of Asylum Claims Based on Persecution by Organized Gangs. Immigration Briefings*, No. 12-10, pp. 20-26 (hereinafter “Beacon of Hope or Failure of Protection?”) (discussing the success of religion cases involving gang persecution at the immigration court level); *see also* *Matter of M-E-V-G-*, 26 I&N Dec. 227, 251 (BIA 2014) (acknowledging that “a factual scenario in which gangs are targeting homosexuals may support a particular social group claim.”).

⁶⁴ *See, e.g.,* *Rivera-Barrientos v. Holder*, 666 F.3d 641 (10th Cir. 2012).

⁶⁵ For example, the Third Circuit’s decision in *Escobar*, 417 F.3d at 363 (rejecting social group of “Honduran street children” based on finding that age is not immutable and that group is too broad and diverse) is flawed. First, federal courts and the BIA have recognized age as an immutable characteristic; while age is not static, neither age nor status as a child can be altered at a given moment in time. *See, e.g., Cece*, 733 F.3d at 673 (recognizing as a cognizable group “young Albanian women who live alone,” concluding that “[n]either their age, gender, nationality, or living situation are alterable”); *Matter of S-E-G-*, et al., 24 I&N Dec. 579, 583-84 (BIA 2008) (acknowledging that “the mutability of age is not within one’s control, and that if an individual has been persecuted in the past on account of an age-described particular social group, or faces such persecution at a time when that individual’s age places him within the group, a claim for asylum may still be cognizable”). Second, concern about the size or breadth of a social group is not a legally sound basis for denial. *See Cece*, 733 F.3d at 673 (rejecting fear of floodgates argument and explaining that even if a protected group of persons is large, the number who can demonstrate nexus is likely small).

⁶⁶ *See, e.g.,* *Mayorga-Vidal v. Holder*, 675 F.3d 9, 19 (1st Cir. 2012); *Rivera-Barrientos*, 666 F.3d at 653; *Mendez-Barrera v. Holder*, 602 F.3d 21, 27 (1st Cir. 2010); *Santos-Lemus v. Mukasey*, 542 F.3d 738, 747 (9th Cir. 2008); *Dominguez v. Ashcroft*, 336 F.3d 678, 680 (8th Cir. 2003); *Matter of S-E-G-*, 24 I&N Dec. 579 at 587; *Matter of E-A-G-*, 24 I&N Dec. 591, 597 (BIA 2008).

⁶⁷ These harms are discussed in detail in chapters 2-7 on Honduras, El Salvador, Guatemala, and Mexico.

group ground for asylum.⁶⁸ Even though children in these scenarios may suffer serious consequences due to these early deprivations, or in the case of a child whose relatives can no longer care for the child are particularly vulnerable to persecution, the interpretation of nexus in the United States makes it difficult to show the required causal connection between the persecution and one of the five statutory grounds for asylum and withholding of removal. Children in the above scenarios have likely suffered or are at risk because of their status as children, and their economic marginalization and lack of parental protection. Under the current interpretation of social group, and the requirements for proving nexus, it would be exceedingly difficult for children in these circumstances to prevail in claims for protection.

Government inability/unwillingness to protect. When the persecutor is a non-State actor, rather than the State, which is the case in many children’s cases, an applicant must prove that the government is “unable or unwilling” to control the persecution against the applicant.⁶⁹ As discussed in the chapters on Honduras, El Salvador, Guatemala, and Mexico,⁷⁰ governments in Central America and Mexico fail to protect children from violence due to a variety of factors, including a weak institutional framework, lack of resources, high levels of corruption, and an acceptance of impunity. Nonetheless, adjudicators often hold children to the standard of adults, and will refuse to find the government was unable or unwilling to protect if the child did not report persecution to the authorities. This approach completely disregards the child’s reality, and how his age, development, and dependency on adults impede ability to report harm.⁷¹

Improper influence of policy concerns. Yet another barrier to children’s asylum claims is the undue influence of migration control policies in asylum decisions. Some adjudicators’ decisions reflect a fear of the proverbial floodgates if they define a particular social group so that it is comprised of children (or women),⁷² because these groups make up a potentially large proportion of a country’s population. These fears are not only inappropriate in interpreting the refugee definition, but are also unfounded because approving a particular social group says little about the number of people who might ultimately qualify for asylum based on membership in that group. Numerous stringent requirements of the refugee definition—such as proving a well-founded fear of persecution, establishing the required nexus between the persecution and the social group,

⁶⁸ However, a child could potentially qualify for asylum if he or she was denied access to education on account of his or her race, religion, nationality or political opinion; *see* *Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010) (noting that “we have rejected the notion that a persecuted group may simply represent too large of a population to allow its members to qualify for asylum”); *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005) (approving the social group of “all alien homosexuals”); U.N. High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 2: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, ¶18, U.N. Doc. HCR/GIP/02/02 (2002, May 7) (stating that “[t]he size of the purported social group is not a relevant criterion in determining whether a particular social group exists”).

⁶⁹ 8 C.F.R. §§ 1208.13(b)(1)-(b)(2) (West).

⁷⁰ *See* chapters 2-7 on Honduras, El Salvador, Guatemala, and Mexico.

⁷¹ A Treacherous Journey, p. 13.

⁷² The Board of Immigration Appeals recently ruled in a precedential decision that “married Guatemalan women who are unable to leave the marital relationship” is a cognizable social group. The Board left open the question whether a social group defined by gender alone could satisfy the social group test. The decision marks a significant advancement in the law of social group, but without a published decision squarely holding that “women” is a social group, adjudicators at all levels are resistant to recognizing such a broadly defined group. *See* *Matter of A-R-C-G- et al.*, 26 I&N Dec. 388 (BIA 2014).

proving that the government be unable or unwilling to protect the child—limit the number of successful claims.⁷³ Additionally, the remaining enumerated grounds—race, religion, nationality, political opinion—also include potentially large numbers of individuals; yet this has not interfered with their acceptance as bases for asylum. Moreover, the breadth of these grounds has not led to mass influxes of group members, nor has recognition of broad social groups that are widely accepted, such as homosexuals fleeing sexual orientation-based persecution or women/girls of a particular clan fleeing female genital cutting.⁷⁴

Policy concerns by adjudicators have been notably apparent in the denial of claims of children fleeing gang violence. For example, some decisions by federal courts and by the highest immigration tribunal, the Board of Immigration Appeals (BIA), have expressly stated that former gang members should not be recognized as a particular social group because the U.S. Congress did not intend to provide protection to such persons regardless of any risk to their lives if returned.⁷⁵ The BIA has even gone so far as to reject a social group of children *wrongly* presumed to be gang members; it incorrectly reasoned that because U.S. policy does not recognize current or former gang members as a social group, asylum adjudicators should not recognize presumed gang membership as a social group.⁷⁶ Many of these decisions are legally unsound because, if fairly interpreted, these groups would meet the particular social group criteria. The group members share immutable characteristics, and country conditions evidence demonstrates that they are widely recognized in society as being vulnerable to distinct forms of gang violence.

The courts should apply the law to the facts, not make policy—yet courts have explicitly done just that. Moreover, many of the concerns about granting asylum to persons—such as former gang members—who do not deserve it are misplaced. Other statutory provisions, such as those that bar individuals with serious criminal histories or who constitute a danger to the country, are more than sufficient to preclude protection to the dangerous or undeserving applicant. Adjudicators also retain discretion to deny asylum to an individual who otherwise qualifies but who is not a desired resident of the United States. This frequently occurs in cases of applicants with a criminal history or a history of committing immigration fraud.⁷⁷

The United States should protect young people of conscience who face death because of their courageous refusal to join the gangs. However, due to several misguided decisions that are binding

⁷³ The burden of proof is on the asylum seeker to establish that he or she meets the definition of a refugee. In order to meet this burden, an asylum applicant must also be found credible, 8 U.S.C. § 1158 (b)(1)(B)(ii)-(iii), must not be able to relocate internally to avoid persecution, 8 C.F.R. §§ 208.13(b)(1)(i)(B), (b)(2)(ii)), must not be barred from asylum, 8 U.S.C. §§ 1158(a)(2), (b)(2)(A)), and must be found to merit asylum in the exercise of discretion, 8 U.S.C. § 1158 (b)(1).

⁷⁴ Musalo, K. (2007). Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action? *Virginia Journal of Social Policy & the Law*, 14, 119. Retrieved from <http://librarysource.uchastings.edu/repository/Musalo/14VaJSocPolyL119.pdf>.

⁷⁵ See, e.g., *Cantarero v. Holder*, 734 F.3d 82, 86 (1st Cir. 2013); *Arteaga v. Mukasey*, 511 F.3d 940, 945-56 (9th Cir. 2007); *Matter of W-G-R-*, 26 I&N Dec. 208, 215 n.5 (BIA 2014); *Matter of E-A-G-*, 24 I&N Dec. 591, 596 (BIA 2008).

⁷⁶ See *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008).

⁷⁷ Asylum is a discretionary form of relief. See INA § 208 (b)(1)(A), 8 U.S.C.A. § 1158 (b)(1)(A) (West): “The Secretary of Homeland Security or the Attorney General may grant asylum” to a migrant who has applied for asylum and meets the statutory definition of a refugee; *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (holding that asylum is discretionary).

on lower courts, there has been a tendency for kneejerk denials of many asylum claims by youth fleeing gang-related persecution, without proper consideration of the evidence presented in each individual case.⁷⁸

2. *Withholding of removal*

Withholding of removal, like asylum, requires a showing of harm on account of one of the five statutory grounds;⁷⁹ thus, an individual seeking withholding of removal faces all the same barriers applicable to asylum. Unlike asylum, however, withholding of removal requires a higher likelihood of harm; an individual must establish that it is “more likely than not,” or a 51 percent chance or greater, that he or she will suffer persecution—as opposed to only a 1 in 10 percent chance for asylum.⁸⁰ The higher likelihood required for withholding of removal can make it much more difficult to obtain than asylum. Withholding of removal can benefit some individuals who are otherwise barred for asylum—for example, because they failed to apply for asylum within the one-year filing deadline.⁸¹ Unlike asylum, once the statutory requirements for withholding are met, relief is mandatory, and not subject to the adjudicator’s discretion. Therefore withholding can be critical for applicants who do not qualify for asylum because of the one-year filing deadline or because of negative factors that result in a denial in the exercise of discretion. In reality, though, most children who are ineligible for asylum are denied because of failure to show persecution on account of one of the five grounds, which would preclude them equally from withholding.

3. *Convention Against Torture*

The requirements for protection under the CAT differ in key ways from asylum and withholding of removal. First, the level of harm must amount to “torture,” which has a technical definition and is generally considered graver than “persecution.”⁸² There is no requirement to show a link between the torture and race, religion, nationality, political opinion, or membership in a particular social group (as needed to establish asylum and withholding of removal eligibility). However, if a non-State actor is the feared perpetrator of the torture, the applicant must establish a higher level of government involvement than is necessary for asylum and withholding of removal. Specifically, the individual must show that the government “consented or acquiesced” to the torture or will do so in the future, which is more difficult to establish than the “unable or unwilling to protect” standard required for asylum and withholding of removal. Evidence that governments offer ineffective protection is not enough to establish acquiescence, rather it must be shown that they were aware torture would take place and failed to intervene. Additionally, there are no guidelines

⁷⁸ See *Beacon of Hope or Failure of Protection?*, pp. 7-8.

⁷⁹ 8 C.F.R. § 1208.16(b) (West).

⁸⁰ See *Cardoza-Fonseca*, 480 U.S. at 421 (1987) (setting out burden of proof for likelihood of persecution for asylum and withholding of removal).

⁸¹ Under U.S. law, individuals must apply for asylum within one year of arriving in the United States—this is known as the one-year filing deadline. The one-year filing deadline does not apply to unaccompanied children, which are defined as children under the age of 18 who lack legal status to remain in the United States and who are not accompanied by a parent or guardian upon their apprehension. Although the deadline does apply to children who were accompanied when apprehended in the United States, there are some exceptions to the deadline that may apply to children in certain circumstances. These exceptions are reviewed by the adjudicator on a case-by-case basis. See INA §§ 208 (a)(2)(B), (a)(2)(E), 8 U.S.C.A. § 1158 (a)(2)(B), (a)(2)(E) (West); 8 C.F.R. § 208.4 (a)(5)(ii) (West).

⁸² 8 C.F.R. §§ 1208.16-1208.18 (West).

on the unique issues that arise in claims made by children under the Torture Convention. The combination of these issues makes winning CAT protection especially difficult for children.

C. Special Immigrant Juvenile Status

In 1990, the United States created SIJS to protect immigrant children without legal status who have been abused, neglected, or abandoned by their parents and for whom it is not in their best interests to return to their home country.⁸³ The U.S. originally created this form of relief to address a gap in protection for children without legal status being placed into state foster care programs. Although these children were taken out of harmful living situations, they lacked a pathway to obtaining permanent residency in the United States and thus a plan for their permanent well-being. This ran counter to the requirement in many states' dependency laws that each child have a permanency plan.

SIJS is unique compared to other forms of immigration relief because it requires the involvement of specialized state courts that deal with child custody issues before federal immigration authorities can approve an application for the visa. It is also the only form of immigration relief that takes into consideration the best interests of the child; in fact, the state courts are directed to make a determination regarding the best interests of the child in every case. The U.S. Congress created this bifurcated approach—requiring determinations by both state juvenile judges and federal immigration authorities—because juvenile courts have greater child welfare expertise than immigration authorities in making best interests determinations.⁸⁴

In 2008, the U.S. amended the law that created SIJS to permit children for whom reunification with *one or both* parents was not possible—the former are known as “one-parent” SIJS claims—rather than both parents, as the law required before. To qualify for SIJS under current law, a child—defined as an unmarried person under 21 years of age—must clear several hurdles.⁸⁵ First, a state juvenile court must make a series of findings, including: (1) declaring the child a dependent of the court—for example, by placing the child in foster care—*or* placing the child under the legal custody of a state agency or other individual appointed by the state, such as a delinquency placement program; (2) declaring the child to be unable to reunify with one or both of her parents due to abuse, neglect, or abandonment; and (3) declaring that it is not in the best interests of the child to be returned to his or her country of citizenship.⁸⁶

To make the second finding, a court will apply the terms “abuse,” “neglect,” and “abandonment” as they are defined under state law; however, it does not require that formal charges of abuse, neglect, or abandonment have been made against the parents. Children who qualify may include those who have been physically and/or emotionally mistreated by their parents, had their basic

⁸³ 8 C.F.R. § 204.11 (West).

⁸⁴ See Chen, G. Z. T. (2002). *Elian or Alien? The Contradictions of Protecting Undocumented Children Under the Special Immigrant Juvenile Statute*. *Hastings Constitutional Law Quarterly*, 27, 597, p. 602. Retrieved from <http://www.hastingsconlawquarterly.org/archives/V27/I4/Chen.pdf>.

⁸⁵ 8 C.F.R. § 204.11 (West). In reality, however, many states end dependency at age 18, meaning that children between 18 and 20 years old will frequently fail to obtain the necessary determination by a state juvenile court in order to qualify for SIJS.

⁸⁶ 8 U.S.C. § 1101(a)(27)(J) (West); 8 C.F.R. § 204.11 (West).

needs neglected (including housing, food, education), or have been abandoned altogether—either willfully or as a result of the death of a parent.

These three “special findings” can be made by a range of state courts that hear matters related to child custody, including family courts, dependency courts, and delinquency courts, and courts that rule on petitions for guardianship of a child. After the state proceedings are completed, the child must submit evidence of the state court’s findings along with an application for SIJS with the federal immigration authorities. United States Citizenship and Immigration Services (USCIS)—the agency that decides SIJS applications—looks at the state court order to determine whether it has sufficient information regarding the bases of the court’s findings and reviews the application and evidence submitted to determine whether the child meets the age and other requirements for SIJS. Once the immigration authorities grant SIJS, a child is given a visa that leads to immediate permanent residency.

SIJS can be an important form of relief for Central American and Mexican children who meet the eligibility requirements because it provides a path to immediate permanent residency and does not require extensive interviews with the child (which can be re-traumatizing for some), as do asylum and related forms of protection. However, many immigrant children who are placed in the U.S. foster care system due to abuse, neglect, or abandonment are never identified as being eligible for SIJS for a variety of reasons including lack of information about their immigration status and options for pursuing relief. Social workers assigned to their cases may have no more information about the child’s immigration status and often lack information about a child’s legal options for relief. Meanwhile, those who are identified in the child welfare system as potentially SIJS eligible, or those who affirmatively seek a juvenile court special order in state court face several barriers to obtaining relief. For instance, some state court judges are unfamiliar with federal laws on SIJS, and thus do not understand that making the special findings mentioned above does not mean that the judge is granting an immigration benefit, something the judge feels is outside of his or her jurisdiction (as immigration matters are wholly within the purview of the federal government). For this reason, some state court judges are reluctant to issue an order with the required findings despite the fact that they make similar determinations in other custody and dependency related matters (and the statute clearly delegates them the authority).⁸⁷

Evidentiary demands by the federal government agency tasked with adjudicating SIJS petitions—the USCIS—regarding the child’s age and identity has also created barriers to obtaining SIJS. Federal regulations allow USCIS officers to consider a range of official foreign documents to establish an applicant’s age to prove he or she is under 21 and thus eligible, but there is little guidance on what documents will suffice. Many children traveling alone may lack the original or a copy of their birth certificate for various reasons, or the documentation they do have from home may be incorrect.⁸⁸ Although evidence of parentage (evidence regarding the identity of one’s parents that would be listed on a birth certificate) is not listed as a requirement in the regulations,

⁸⁷ A Treacherous Journey, p. 40-41; *see also* Jungk, A. (2013, February). Practice Advisory: An Update on One-Parent Special Immigrant Juvenile Status Claims (surveying SIJS practitioners on a nation-wide basis and finding that some local courts have strongly resisted attempts to bring SIJS orders before them in one-parent cases).

⁸⁸ For instance, some children’s birth certificates list incorrect parentage information. It is not uncommon in some Central American countries to list the grandparents’ names on the birth certificate of a child when the mother was under age 18 at the time she gave birth, and it is often difficult to rectify this error. This leads to significant confusion when applying for SIJS with USCIS.

it is often considered by USCIS and has at times held up applications for SIJS or been the basis of denials.⁸⁹ Additionally, in some cases USCIS asks for the evidence submitted to state juvenile court in order to determine the basis for the court's findings regarding abuse/abandonment/neglect, inability to reunify with one or both parents as a result, and that it is not in the best interests of the child to return to the child's country, even though USCIS is not qualified to or responsible for making these types of findings, which are reserved for experts on child welfare and custody issues. The U.S. Congress intentionally created a bifurcated process in which USCIS is not tasked with reexamining the evidence of abuse, neglect, abandonment, and best interests—as the state juvenile court with the expertise has already evaluated—but instead with focusing on the child's eligibility for SIJS itself and any relevant discretionary factors. Second-guessing special findings made by state juvenile courts on the part of USCIS can cause delay in the adjudication of cases and create additional stress for children. What is more, in some cases the agency may be violating state confidentiality laws that protect children by requesting to see documentation from the child's dependency or delinquency proceedings.

Although positive in many respects, there is one significant disadvantage to SIJS. A child granted SIJS can *never* petition for a parent to immigrate to the United States and obtain lawful immigration status. This was not as much of a concern when Congress initially enacted SIJS, requiring that reunification with *both* parents was not viable due to abuse, neglect, or abandonment. However, when Congress amended the statute in 2008 to provide for situations of abuse, abandonment, or neglect by *one* parent it should have, but did not, amend the section of the statute barring a child conferring immigration status to the non-abusive natural parent in recognition of this change. Therefore, in one-parent cases, the non-abusive parent may be the child's primary caretaker and the person best suited to care for the child, but the parent is unable to obtain permission to travel to the United States to reunite with his or her child, or to remain in the United States without fear of deportation if the parent does not already have lawful immigration status. The inability of children granted SIJS to reunify with or sponsor the remaining responsible parent (whether as derivative beneficiary of the SIJS application or through the family-based visa process) frustrates the U.S. government's goal of family unity. More importantly, it often directly conflicts with the best interests of the child and right to family, resulting in tension with international law, as discussed in section III.A above and explored in more detail in chapter 11 on family separation.

D. Visas for victims of trafficking and other serious crimes

The U.S. government has created two visa categories to protect victims of trafficking and other serious crimes in order to encourage them to report the crimes to U.S. authorities and not suffer in silence for fear of being deported: "T" nonimmigrant status and "U" nonimmigrant status (known as the "T visa" and "U visa"). For both visas, the recipient is permitted to legally remain in the United States for up to four years and becomes eligible to apply for permanent residency after three years. Both T and U visas also allow the child to confer status on their parents, even if her parents are overseas.⁹⁰ Visa holders are eligible for special benefits and services, including food

⁸⁹ See *A Treacherous Journey*, pp. 44-45.

⁹⁰ A spouse, children, parents and unmarried siblings under age 18 of a T or U visa holder under the age of 21 are considered derivative beneficiaries. 8 C.F.R. §§ 245.23(b)(2), 245.24(a)(2) (West).

stamps and social security.⁹¹ These benefits and the promotion of family reunification make T and U visas a positive remedy for trafficking victims and victims of other crimes.

To qualify for a T visa, the applicant must meet three primary requirements. First, he must be a victim of a “severe” form of human trafficking as defined in federal law. “Severe forms of trafficking in persons” includes sex trafficking, which is any person “induced by force, fraud, or coercion” to engage in commercial sex, or any child under the age of 18 engaged in commercial sex, is considered a victim of trafficking and may qualify for a T visa.⁹² It also includes labor trafficking, which is defined as “the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through use of forced, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”⁹³ Second, the child must be in the United States on account of being a victim of trafficking, and must show that he or she would suffer extreme hardship involving “unusual and severe harm” if deported from the United States.⁹⁴ This benefit only applies to those who are trafficked into the United States, and not to those who may have been victims of trafficking prior to their arrival to the United States; however, some advocates have been able to win cases in which they could show that a child was brought into the United States for the purpose of human trafficking, even if the child was apprehended prior to being placed in the trafficking situation. In addition, adult applicants must cooperate with reasonable requests from a law enforcement agency for assistance in the investigation or prosecution of human trafficking unless they suffer from trauma that prevents them from cooperating. Children under the age of 18 at the time of the victimization are exempt from this requirement.⁹⁵

The U visa, like the T visa, protects victims of crime but it only protects individuals who have suffered substantial physical or mental abuse as a result of having been a victim of certain serious crimes *in the United States*.⁹⁶ To qualify for a U visa, the individual must obtain a certification from a United States federal, state, or local law enforcement agency (which includes those who detect, investigate or prosecute criminal activity such as police, judges, and prosecutors) that the individual “has been helpful, is being helpful, or is likely to be helpful” in the investigation or

⁹¹ Victims of trafficking that have been certified by ORR are eligible for the same services as a person designated a refugee by USCIS. If the victim is under the age of 18, he or she is eligible for certain benefits without the requirement of certification. Such benefits can include food stamps, Temporary Assistance for Needy Families (TANF); Supplemental Security Income (SSI); Refugee Cash and Medical Assistance (RCA & RMA); health care such as Medicaid or the State Children’s Health Insurance Program (SCHIP); and other social services including placement in ORR’s Unaccompanied Refugee Minors program, which is a long-term foster care program administered by states. *See* Department of Health & Human Services. (2012, May). Services Available to Victims of Human Trafficking: A Resource Guide for Social Service Providers. Retrieved from http://www.acf.hhs.gov/sites/default/files/orr/traffickingservices_0.pdf.

⁹² Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 103 (8)(A), 114 Stat. 1464 (2000).

⁹³ 22 U.S.C.A. § 7102(9) (West).

⁹⁴ 8 U.S.C.A. § 1101(a)(15)(T)(i) (West).

⁹⁵ 8 U.S.C.A. § 1101(a)(15)(T)(i)(III)(aa)-(cc) (West).

⁹⁶ The list of crimes include: “rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; stalking; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; fraud in foreign labor contracting (as defined in [18 U.S.C. § 1351]); or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes.” 8 U.S.C.A. § 1101(a)(U)(iii) (West).

prosecution of the criminal activity.⁹⁷ Unlike the T visa, however, children are not exempt from this cooperation requirement, although a parent, guardian, or “next friend” may cooperate and present that information on behalf of children who are 16 or younger.⁹⁸

Although seemingly simple, there are several obstacles that prevent migrant children from obtaining T and U visas:

First, many child migrants are not aware of these somewhat obscure visas and therefore do not realize that they may be eligible. Their lack of awareness is exacerbated by the fact that they do not have attorneys to explain their options for immigration relief. Especially with regard to T visas, there is a need for better screening at the border, as well as inside the United States, as many immigrant children who may be victims are not being identified.

Second, as noted above, the T visa is only available to those individuals who are in the United States on account of trafficking. This requires a showing that they either are in trafficking situations in the United States, or can prove they were brought to the United States in order to be trafficked. Central American and Mexican children who were victimized during the migration journey prior to reaching the United States may face significant challenges in obtaining a T visa, if apprehended prior to ending up in the trafficking situation. At the same time, children like these who were victims of crimes outside the United States are typically not found eligible for a U visa. In both cases, U.S. law enforcement officials should have an interest in investigating and stopping criminal syndicates that victimize children traveling to the United States, and the children certainly have a need for protection. Thus the purpose of the U and T visas would seem to be furthered by granting protection in these scenarios.

Third, with regard to U visa cases, it can be extremely difficult to obtain the necessary law enforcement certification. Many law enforcement agencies mistakenly believe that they are granting an immigration benefit, rather than simply certifying that the individual is a victim and has cooperated with them.⁹⁹

Fourth, some children who are eligible for T or U visas may apply for SIJS instead, because the SIJS process is often easier and faster.¹⁰⁰ By not pursuing T and U visas, however, children who choose to pursue SIJS are not availing themselves of the special benefits and services available to victims of trafficking and crimes mentioned above. Moreover, in some cases involving one-parent SIJS, they are foregoing the opportunity to have the non-abusive parent join them in the United States.

⁹⁷ 8 U.S.C.A. § 1101(a)(U)(III) (West).

⁹⁸ 8 U.S.C.A. §§ 1101(a)(U)(i)(II), (III) (West).

⁹⁹ A Treacherous Journey, p. 51.

¹⁰⁰ A Treacherous Journey, p. 52.

E. Other forms of immigration relief

There are several other forms of relief for which children from Central America and Mexico occasionally qualify, including prosecutorial discretion, Deferred Action for Childhood Arrivals (DACA), Violence Against Women Act (VAWA) protection, TPS, and cancellation of removal. However, none of these forms of relief require adjudicators to consider what would be in the best interests of the child. Nor do they ensure regular migration status to all migrant children in need of protection.

1. Prosecutorial discretion

While not an immigration “benefit,” some children may avoid deportation if the U.S. Immigration and Customs Enforcement (ICE) voluntarily chooses not to seek removal in what is known as prosecutorial discretion. The term prosecutorial discretion refers both to the exercise of discretion by the U.S. government in a range of immigration enforcement related decisions, and to temporary reprieve from deportation through programs such as DACA and Deferred Action for Parental Accountability (DAPA), discussed below. Prosecutorial discretion is distinct from other forms of relief because it does not confer any lawful status on the recipient. Nor does it guarantee the right to work in the United States (with the exception of those granted DACA, DAPA, or other form of deferred action), or have any path to permanency. ICE may choose to exercise prosecutorial discretion at any stage in the deportation process—before filing the charging document that initiates the deportation process, once removal proceedings have already begun, and after a final order of removal is entered.¹⁰¹ If a child is already in removal proceedings, ICE can request that the immigration judge “administratively close” or, in the alternative, “terminate” the proceedings. Administrative closure means that the immigrant no longer needs to attend immigration court hearings, but his or her case is still considered pending and ICE can choose to re-start their removal hearings at any time. Termination, on the other hand, means that the removal proceedings are closed permanently, and ICE officials must file a new document initiating removal proceedings if they decide to remove that person at some point in the future.

For children who do not qualify for any other forms of immigration relief, prosecutorial discretion can be an important means of preventing return to their home country where they may face violence, and/or keeping them in the United States with parents or other family members. However, the lack of any path to permanent residency as well as the ability of ICE to reinitiate the deportation process at any time, prevents such children from achieving true stability in the United States. Additionally, because prosecutorial discretion is—as the name indicates—a discretionary act by ICE officials, immigration judges and higher courts have no ability to review their decisions or prevent inconsistent applications of prosecutorial discretion in different jurisdictions. A study by the Transactional Records Access Clearinghouse (TRAC) at Syracuse University shows significant variation in the rates of prosecutorial discretion offered and accepted in different

¹⁰¹ Prosecutorial discretion is usually an option of last resort. Some people choose to reject an offer of prosecutorial discretion made by ICE if they are eligible for another form of relief that provides a path to permanent residency, such as cancellation of removal or asylum. For more information on the limited use of prosecutorial discretion, see chapter 11 on family separation.

jurisdictions around the country as well as for different nationalities.¹⁰² This indicates that children in some jurisdictions are more likely to benefit from prosecutorial discretion than others simply due to their place of residence or country of nationality.

On November 20, 2014 President Obama announced a series of executive actions based on the principle of prosecutorial discretion, as well as a new policy regarding U.S. immigration “enforcement and removal priorities.”¹⁰³ Children and families (along with all other migrants) who are apprehended while attempting to enter the U.S. without proper documentation, or who entered the U.S. on or after January 1, 2014—or who cannot prove that they entered prior to that date—are included on the list of immigration enforcement and removal priorities. The priority list additionally includes terrorists and immigrants convicted of certain crimes. The Administration allows for exceptions to the general rule that recent border crossers should be prosecuted and removed unless eligible for an immigration remedy. Although the listed exceptions include age, being or having a young child, pregnancy, mental disability, and other factors,¹⁰⁴ in reality children who arrived in the United States alone or with family on or after January 1, 2014 will likely not benefit.

2. Deferred Action for childhood arrivals and for parents of U.S. citizen and LPR children

On June 15, 2012, the Obama Administration issued an executive order announcing that it would not deport certain individuals who entered the United States as children. Instead, such individuals would receive reprieve from risk of deportation through a program known as Deferred Action for Childhood Arrivals (DACA). This executive announcement followed the U.S. Congress’ failure to pass a DREAM Act,¹⁰⁵ which provoked advocacy by thousands of young undocumented immigrants struggling to build a life in the United States—where many have lived the vast majority of their lives—due to lack of immigration status. On November 20, 2014 President Obama expanded the DACA program as part of a series of administrative actions on immigration described above.

DACA is a specific form of prosecutorial discretion that, once granted, prevents an individual from being removed from the United States for two years, during which time the recipient is eligible for work authorization. Under the recently expanded DACA provisions, DACA is available for children and adults who: (1) were under the age of 16 upon arriving in the United States; (2) entered

¹⁰² The TRAC Immigration Project at Syracuse University has published statistics on the numbers of cases administratively closed or terminated in the immigration courts due to prosecutorial discretion. See TRAC Immigration. (2012, June 28). ICE Prosecutorial Discretion Program, Latest Details as of June 28, 2012. Retrieved from <http://trac.syr.edu/immigration/reports/287/>.

¹⁰³ See U.S. Department of Homeland Security, & Johnson, J. C. (2014, November 20). Memorandum: Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants. Retrieved from http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

¹⁰⁴ See Memorandum: Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants.

¹⁰⁵ Several different DREAM bills have been introduced in Congress since 2001, but none have been enacted into law. The DREAM Act or DREAM bills would provide a path to lawful permanent residence for many undocumented youth. While requirements vary by bill, generally the DREAM bills are for individuals who arrived in the U.S. as children, live in the U.S. for a set number of years, graduate from high school, and have good moral character.

the United States prior to or on January 1, 2010; (3) continuously resided in the United States since that date; (4) have been present in the United States on November 20, 2014 and every day since that date; and (5) are in school, have received a high school completion certificate, or have received a General Education Development (GED) certificate; and (6) have not been convicted of certain criminal offenses.¹⁰⁶ Individuals must be at least 15 years old to apply, unless they are in removal proceedings or have a final removal order or voluntary departure order.¹⁰⁷ Although DACA has benefitted thousands of child immigrants, many children do not qualify because of its strict age and entry date restrictions, particularly children who arrived in the United States after January 1, 2010.

The benefits of DACA are limited. Children who receive DACA may remain in the United States for three years, subject to renewal. DACA does not provide a path to permanent residency or the ability for children to sponsor other family members to join them in the United States. Finally, because DACA was created by an executive order of the President of the United States—and not through legislation passed by the U.S. Congress—it can be revoked or restricted depending on the policy preferences of the sitting president. Republicans in the House of Representatives have charged that issuing DACA through an executive order was an illegal use of President Obama's executive authority. Not only have House Republicans threatened to sue the President over DACA, the House passed a series of bills (which have not been enacted into law) in August 2014 and then again in December 2014 to block President Obama from expanding the DACA program. As of that date, DACA had benefitted about 500,000 individuals.¹⁰⁸

Another form of administrative relief President Obama announced on November 20, 2014 is the Deferred Action for Parental Accountability program for parents of U.S. citizen or lawful permanent resident children. DAPA is available to an individual who: (1) is the parent of a U.S. citizen or lawful permanent resident child; (2) has continuously resided in the United States since January 1, 2010; (3) was present in the U.S. on November 20, 2014; (4) does not have lawful immigration status; and (5) has not been convicted of certain criminal offenses. DAPA will benefit children in the context of migration—both those whose parents received deferred action through the program, and those who are themselves eligible for the program based on length of residency in the U.S. and being a parent of a U.S. citizen or LPR child. It will temporarily remove the risk of the deportation of eligible parents in many mixed status families. However, the program will not help parents of children who have been granted DACA or other temporary status. Similar to DACA, DAPA also does not provide a path to permanency and lasts for only three years, although it can be renewed.

¹⁰⁶ See U.S. Department of Homeland Security, & Napolitano, J. (2012, June 15). Memorandum: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children. Retrieved from <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

¹⁰⁷ See Memorandum: Exercising Prosecutorial Discretion with Respect to Individuals who Came to the United States as Children.

¹⁰⁸ 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>; Mass, W. (2014, December 5). House Passes “Executive Amnesty Prevention Act of 2014.” *New American*. Retrieved from <http://www.thenewamerican.com/usnews/immigration/item/19667-house-passes-executive-amnesty-prevention-act-of-2014>.

3. *Violence Against Women Act*

VAWA, first passed in 1994, is a federal law aimed at ending violence against women in the United States. It created a new immigration remedy for battered undocumented spouses and children of abusive U.S. citizens and LPRs, among others, so they could safely remove themselves from the relationship without the fear of deportation. The remedy sought to address cases in which the abuser would attempt to use the victim's immigration status as another way to control and manipulate her.¹⁰⁹ The law has been renewed several times, in 2000, 2005, and most recently 2013.

In addition to showing the requisite level of abuse by a U.S. citizen or LPR spouse, parent, or stepparent, an applicant for protection under VAWA must prove that he or she is a person of "good moral character." Applicants must also prove that deportation would result in "extreme hardship" to themselves, or in the case of a parent petitioner, "extreme hardship" to themselves *or* their children—a very high bar.¹¹⁰ VAWA can be requested from USCIS at any time by persons not in removal proceedings. For those in proceedings, a related form of VAWA protection can be requested as a defense to deportation in immigration court, referred to as special rule cancellation of removal (or VAWA cancellation of removal). To be eligible for VAWA cancellation of removal, applicants must also have maintained continuous physical presence in the United States for three years prior to the adjudication of the application.¹¹¹

Children can obtain VAWA protection in their own right as children of abusive U.S. citizens or LPRs. In addition, unmarried children under the age of 21 can obtain the benefit through parents who have received VAWA protection.¹¹² Once granted, VAWA protection offers a path to permanent residency and a more stable future in the United States. In reality, however, few children seek and obtain VAWA protection for a variety of reasons. First, the abusive family member may not be a U.S. citizen or LPR. Second, children who are abused by family members other than parents, stepparents, or spouses—such as by their aunts, uncles, or grandparents—are not eligible for this form of relief. Finally, many children who might be eligible for VAWA otherwise qualify for SIJS or a U visa (discussed in subsections C and D of this section), which do not require that the abuser hold any form of lawful immigration status in the United States. Moreover, the U visa does not restrict *who* the abuser is in relationship to the child, i.e., the abuser need not be related. Therefore, VAWA protection has little practical benefit from many children from Central America and Mexico.

4. *Temporary protected status*

As discussed in section III.A above, TPS is a temporary form of relief provided to nationals of certain countries that are unable to handle the return of its nationals due to conditions such as armed conflict or environmental disasters.¹¹³ A country must be "designated" for TPS by the U.S. Secretary of State in order for citizens of that country to apply, and the individual must have been present in the United States on the date of the designation. Currently, the only countries in Central

¹⁰⁹ 8 C.F.R. § 204.2(c), (e).

¹¹⁰ 8 C.F.R. § 204.2(c)(1)(i).

¹¹¹ 8 U.S.C.A. § 1229b(b)(2) (West).

¹¹² 8 C.F.R. § 204.2(c)(4).

¹¹³ 8 U.S.C.A. § 1254a (West); 8 C.F.R. § 244.2.

and North America that have been designated for TPS are El Salvador, Honduras, and Nicaragua, due to the effects of natural disasters there in the late 1990s and early 2000s.¹¹⁴ An individual granted TPS is typically allowed to remain in the United States for 6 to 18 months, but he can renew the status for another temporary period if the country is re-designated for TPS. El Salvador, Honduras, and Nicaragua have continued to be designated for TPS year after year.

An important limitation preventing family unity is that TPS does not allow those who have received TPS to bring their family members to the United States or to confer benefits to them if in the country. Therefore, although some children from these Central American countries have parents in the United States with valid TPS status, it is of no benefit to them. Additionally, the vast majority of children do not satisfy the eligibility requirements for TPS in their own right (even if in the United States) due to the requirement that the applicant have been physically present in the United States at the time the country was first designated for TPS.¹¹⁵ Because the three countries mentioned above were designated over a decade ago, the large numbers of Central American and Mexican children who have been arriving to the United States in recent years—see chapter 12 for more information about the surge in migration of unaccompanied children in particular—and who continue to arrive do not qualify for TPS.¹¹⁶ As with other forms of relief discussed in this chapter, depriving children of the opportunity to reunify with their parents runs counter to the best interests of the child principle and other international norms. Finally, TPS is by definition only a temporary form of relief and does not provide a path to permanent residency. Therefore, it is not a durable solution for many migrant children seeking safety and stability in the United States.

Some advocates have urged the government to grant TPS to unaccompanied children from the Northern Triangle countries as a result of the current violence and instability in those countries.

5. Cancellation of removal

Both LPRs and non-LPRs who have lived in the United States for a substantial period of time may be eligible for cancellation of removal if they meet residency, physical presence, and other requirements. This form of relief was created in recognition of the fact that, under certain circumstances, a person who has been in the United States for a long period of time should be permitted to stay even if he or she is not otherwise eligible to remain. To qualify for cancellation of removal, a non-LPR must show that: (1) he or she has been physically present in the United States for a continuous period of at least 10 years; (2) he or she has been a person of good moral character during that period; (3) his or her removal would result in “exceptional and extremely unusual hardship” to his or her spouse, parent, or child who is an LPR or U.S. citizen; and (4) he

¹¹⁴ Honduras and Nicaragua were designated on January 5, 1999, and El Salvador was designated on March 9, 2001. For the complete list of countries currently designated for TPS: U.S. Citizenship and Immigration Services. (2015, January 7). Temporary Protected Status. Retrieved from http://www.uscis.gov/humanitarian/temporary-protected-status-deferred-enforced-departure/temporary-protected-status#Countries_Currently_Designated_for_TPS.

¹¹⁵ 8 C.F.R. § 244.2(c), (d), (f).

¹¹⁶ El Salvador was designated for TPS in 2001 and Honduras and Nicaragua were designated in 1999. Attorneys have argued that children of TPS holders who are in the U.S. when TPS is extended or re-designated should qualify for initial late registration TPS, even if they were not in the U.S. on the date of initial designation. USCIS and the BIA have a different view and have denied initial late registration applications when the child was not in the U.S. on the initial designation date. *See, e.g.,* Cervantes v. Holder, 597 F.3d 229, 235-36 (4th Cir. 2010) (holding that TPS is only available to children in the U.S. on the date of the initial designation).

or she has not been convicted of any disqualifying crimes.¹¹⁷ Very few Central American and Mexican children qualify for cancellation of removal because of the lengthy physical presence requirement and the hardship requirement to a U.S. citizen or LPR parent or spouse. If granted, however, cancellation of removal leads to immediate permanent residency and the ability to work legally in the United States.

F. Failed comprehensive immigration reform

Organizations and individuals on all sides of the political spectrum have been calling on the U.S. Congress to reform what has been dubbed a “broken” immigration system. One of the main motivators for the legislation is the fact that there are approximately 11 million undocumented persons in the United States who are contributing to the country and its economy but living in the shadows. Some proponents of comprehensive immigration reform believe that immigration reform is necessary to provide the country’s undocumented population with a path to becoming fully-recognized members of society, while others place emphasis on including immigration enforcement provisions as part of any comprehensive reform bill to stem the tide of further unauthorized immigration.

The last major overhaul of U.S. immigration laws took place in 1996, and since then efforts to pass a comprehensive immigration reform bill have waxed and waned. In June 2013, a bipartisan group of U.S. senators drafted a comprehensive bill that passed the Senate by a two-thirds majority, which renewed hope for reform.¹¹⁸ The Senate bill included several positive provisions that increased protections for migrant children, such as: providing government-funded legal counsel for unaccompanied children facing deportation; training border patrol and immigration enforcement officials on identifying and interviewing children who have fled persecution or been victims of trafficking or other crimes; and expediting pathway to citizenship for certain children who came to the United States before the age of 16 and who are attending or have completed high school or higher education (commonly referred to as “DREAMers”).¹¹⁹

On the other hand, the Senate bill had several shortcomings that, if passed, would have negatively affected children and adults alike. The bill failed to provide much needed guidance on the standards for asylum including the definition of a particular social group and the manner in which nexus should be determined. As explained in section III.B.1 above, the current interpretation and application of these legal requirements impose significant barriers to children’s claims for asylum and related protection. The bill also denied affordable healthcare, food stamps, and other critical benefits to immigrants on the path to legal status. Finally, the bill further militarized the border and diverted millions of dollars needed in other areas of immigration to extreme enforcement measures.¹²⁰

¹¹⁷ 8 U.S.C.A. § 1229b(b) (West). Cancellation of removal for LPRs has fewer requirements, *see* 8 U.S.C. § 1229b(a), but it is only available to individuals who already have permanent residency and committed some offense or behavior that renders them removable.

¹¹⁸ Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013-2014).

¹¹⁹ Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013-2014).

¹²⁰ Specifically, the bill would provide an additional \$46.3 billion for additional (and often draconian) security measures, such as adding nearly 20,000 more agents along the border, building 700 miles of fencing, and using “watch towers, camera systems, mobile surveillance systems, ground sensors, fiber-optic tank inspection scopes, portable contraband detectors, radiation isotope identification devices, mobile automated targeting systems.” *See*

The bill did not become law because it failed to gain the approval of the U.S. House of Representatives, which preferred a “piecemeal” rather than comprehensive approach to reforming the immigration system. The House wanted first and foremost to implement stricter immigration enforcement laws, including further militarization of the border and increasing the grounds upon which to refuse immigrants’ admission to the United States and to deport immigrants already here.¹²¹ Many commentators believe the House’s intransigence to passing a comprehensive bill was an intentional effort to prevent any legalization process from moving forward for the country’s estimated 11 million undocumented individuals.¹²²

In May 2014, the issue of irregular immigration came to a head when the Obama Administration announced that the “surge” of unaccompanied children and families coming from the Northern Triangle countries, which has been steadily increasing over the last several years, has now become an “urgent humanitarian situation” for the country.¹²³ Republicans blamed President Obama’s DACA program and what they called his “lax” immigration enforcement policies, in addition to attacking numerous provisions of the TVPRA related to unaccompanied children. They claimed that the TVPRA’s provisions regarding releasing unaccompanied children to family and placing them in regular removal proceedings were too easy on children,¹²⁴ and that human smugglers spread the word throughout the Northern Triangle countries that child migrants would be quickly released from custody and would be eligible for DACA, described in section III.E.2 above. These factors, according to conservatives, caused the surge. Although reliable evidence shows that violence in Honduras, El Salvador, and Guatemala caused the influx,¹²⁵ conservatives continued to use the surge as a rallying cry for emergency enforcement action.

The House of Representatives acted quickly after the surge came to light to introduce two restrictive immigration bills. First, the House introduced a supplemental funding bill in response to the Obama Administration’s request for emergency funds to care for unaccompanied children. The House Bill, which provided wholly insufficient funding to care for the increased number of unaccompanied children, also penalized children and increased enforcement. The bill included

Immigration Policy Center, American Immigration Council. (2013, July 10). A Guide to S.744: Understanding the 2013 Senate Immigration Bill. Retrieved from <http://immigrationpolicy.org/special-reports/guide-s744-understanding-2013-senate-immigration-bill>.

¹²¹ For a brief description of how a bill becomes a law in the United States, see U.S. House of Representatives. The Legislative Process. Retrieved from http://www.house.gov/content/learn/legislative_process/.

¹²² See, e.g., Parker, C. (2014, August 4). The (Real) Reason Why the House Won’t Pass Comprehensive Immigration Reform. Retrieved from <http://www.brookings.edu/blogs/fixgov/posts/2014/08/04-immigration-tea-party-constituencies-parker>; Riccardi, N. (2014, August 13). Republicans May Need ‘Another White House Beat Down’ Before Acting on Immigration. *Huffington Post*. Retrieved from http://www.huffingtonpost.com/2014/06/13/republicans-immigration-reform_n_5490798.html.

¹²³ The White House. (2014, June 30). Letter from the President – Efforts to Address the Humanitarian Situation in the Rio Grande Valley Areas of Our Nation’s Southwest Border. Retrieved from <http://www.whitehouse.gov/the-press-office/2014/06/30/letter-president-efforts-address-humanitarian-situation-rio-grande-valle>.

¹²⁴ See, e.g., *Hearing: Dangerous Passage: The Growing Problem of Unaccompanied Children Crossing the Border Before the H. Comm. on Homeland Security*, 113th Cong. (2014). Retrieved from <http://homeland.house.gov/hearing/dangerous-passage-growing-problem-unaccompanied-children-crossing-border>.

¹²⁵ See, e.g., Wong, T. K. (2014, July 8). Statistical Analysis Shows Violence, Not Deferred Action, Is Behind the Surge of Unaccompanied Children Crossing the Border. Retrieved from <http://www.americanprogress.org/issues/immigration/news/2014/07/08/93370/statistical-analysis-shows-that-violence-not-deferred-action-is-behind-the-surge-of-unaccompanied-children-crossing-the-border/>.

provisions to send the National Guard (armed military troops) to the border, increase additional surveillance along the border, eliminate the existing screening system in place for unaccompanied children by amending the TVPRA,¹²⁶ and expand grounds upon which to refuse admission to or deport immigrants from the United States.¹²⁷ The House also passed a bill to end DACA and prohibit the President from extending DACA to other immigrants—which would make the 500,000 plus young immigrants who have been granted DACA thus far vulnerable to deportation.¹²⁸ The Senate (with a Democratic majority) refused to take up the House provisions that would have eliminated critical protections and, as a result, the House’s bills did not become law.

The battle over immigration between Republican and Democratic leaders is not a new phenomenon, but has occurred over time. This battle highlights how political and polarized the issue of migration is in the United States. It also shows how elected officials are all too willing to scapegoat irregular migrants and make them pawns in their political game. In response to the U.S. Congress’ failure to pass immigration reform, President Obama exercised his executive powers to address the situation of some of the 11 million undocumented persons living in the United States.¹²⁹ At the same time that the White House announced its plans to provide temporary reprieve to about five million immigrants in irregular status in the United States,¹³⁰ the Obama Administration has taken a harsh and restrictive approach to migrants who arrived in the United States after January 1, 2014, including unaccompanied children and migrant families, addressed in the section below.

IV. Procedural challenges for unaccompanied children seeking relief in the immigration system

International bodies call on States to ensure that procedures for migrant children respond to their needs and vulnerabilities as children who are separated from parents and lack regular status. These bodies exhort States to develop policies and practices that are based on the best interests of the child principle, provide minimum safeguards—such as appointment of legal counsel and a guardian to all child migrants identified as unaccompanied—and guarantee full due process.¹³¹ Despite these internationally-recognized fundamental protections and their application to children

¹²⁶ In particular, the bill would gut the existing screening system for children from non-contiguous countries and provide all unaccompanied children with only minimal screening—with the result of immediate deportation for those children not identified on the spot as eligible for immigration relief.

¹²⁷ See H.R. 5230, 113th Cong. (2013-14). Retrieved from <https://beta.congress.gov/bill/113th-congress/house-bill/5230?q=%7B%22search%22%3A%5B%22supplemental%22%5D%7D>.

¹²⁸ See H.R. 5272, 113th Cong. (2013-14). Retrieved from <https://www.congress.gov/bill/113th-congress/house-bill/5272>.

¹²⁹ See Shear, M. D. (2014, November 20). Obama, Daring Congress, Acts to Overhaul Immigration. *New York Times*. Retrieved from http://www.nytimes.com/2014/11/21/us/obama-immigration-speech.html?_r=0.

¹³⁰ See section III.E.2 for more information on the 2014 executive action.

¹³¹ See, e.g., UN Committee on the Rights of the Child (CRC), *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, 2005, September 1, CRC/GC/2005/6. Retrieved from <http://www.refworld.org/docid/42dd174b4.html>; U.N. Human Rights Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Report of the Special Rapporteur on the human rights of Migrants, Jorge Bustamante*, ¶¶ 34, 52-65, 81-82, 100-102, U.N. Doc. A/HRC/11/7 (2009, May 14). Retrieved from <http://www.refworld.org/pdfid/4a3b51702.pdf>.

in the United States involved in the dependency and delinquency systems, procedures in place for children in the U.S. immigration system do not provide adequate safeguards and do not ensure children's due process rights.

As detailed below, children are not provided with government-funded counsel in immigration matters and do not have the right to a child advocate. Furthermore, the procedures are not always consistent with the best interests of the child. Recent procedures put into place by the Obama Administration to respond to the increase in unaccompanied children were initiated based solely on immigration enforcement priorities, with no consideration of the best interests of the child. These procedures force children to proceed at an expedited pace in immigration removal proceedings and compromise due process. Whether driven by a belief that a harsh response to the increase in children and families is necessary in order to gain support for granting broad administrative relief on immigration or other strategic considerations, the Obama Administration's policies implemented in response to the surge in unaccompanied children threaten to return children to dangerous circumstances, contrary to both U.S. and international law.¹³²

A. No right to legal counsel deprives children of due process and leaves children vulnerable to deportation

Children facing legal proceedings in the juvenile justice systems in the United States have a right to an attorney to represent them and defend their legal interests.¹³³ Children in U.S. abuse and neglect proceedings also have a right to an attorney, a guardian, or both. In contrast, in the U.S. immigration system, children—like adults—have no right to government-funded counsel, despite their distinct needs, lack of maturity, and vulnerability.¹³⁴ A study by TRAC in July 2014 showed that, on average, only 48% of children were represented by counsel in their immigration proceedings between January 2013 and June 2014.¹³⁵ Representation makes a critical difference in the outcomes of children's cases; the study concluded that when children were represented by counsel, they had an almost one in two probability of being allowed to remain in the United States; when lacking representation, they had only a one in ten probability of being allowed to remain in the country.¹³⁶

Children—like adults—can have an attorney represent them in immigration proceedings, but only if they can afford to pay for one or find one willing to do so for free. Given the significant difference that legal representation makes in children's cases, and the current numbers of

¹³² Under the withholding of removal statute and the Convention Against Torture regulations the U.S. cannot return individuals to a risk to life or freedom on account of their race, religion, nationality, political opinion, or membership in a particular social group, or to a risk of torture. The withholding of removal obligation stems from the international *non-refoulement* commitment.

¹³³ The requirement of counsel in delinquency proceedings was first recognized in 1967. *See* *Application of Gault*, 387 U.S. 1 (1967).

¹³⁴ Under U.S. law, immigrants may be represented by counsel "at no expense to the government." INA § 240(b)(4)(A), 8 U.S.C.A. § 1229a(b)(4)(A) (West).

¹³⁵ TRAC Immigration. (2014, July 15). New Data on Unaccompanied Children in Immigration Court. Retrieved from <http://trac.syr.edu/immigration/reports/359/>. Previous studies conducted with respect to adults' cases found a 4 fold increase in success where an immigrant had legal representation. TRAC's study shows that when it comes to children there is a fivefold increase (verify math) in grant rates where an attorney is involved.

¹³⁶ TRAC Immigration. (2014, July 15). New Data on Unaccompanied Children in Immigration Court. Retrieved from <http://trac.syr.edu/immigration/reports/359/>.

unaccompanied children arriving in the United States, ensuring lawyers for these children is more important and more challenging than ever.

1. Efforts to provide counsel fall short

Over the past decade the United States has taken steps to encourage representation of unaccompanied children, but the steps that have been taken are insufficient to address the current need for representation. The BIA set out a policy that allows for appointment of legal counsel in cases of detained mentally incompetent children or adults in removal proceedings, recognizing the need for special safeguards in such cases.¹³⁷ However, no similar policy provides for appointment of legal counsel to *all* child migrants as a category of individuals deserving of this safeguard, regardless of proof of incompetence. In addition, two federal laws require the U.S. Department of Health and Human Services (HHS) to promote pro bono legal representation for unaccompanied children, who fall under the jurisdiction of the Office of Refugee Resettlement (ORR) within HHS.¹³⁸ These laws have led to a public-private partnerships model in which pro bono attorneys from law firms, corporations, and law schools represent unaccompanied children in immigration proceedings.¹³⁹ The public-private partnership model increased capacity to provide pro-bono representation for immigrant children, but about half of the unaccompanied children released from custody were still unable to find counsel to represent them. In October 2014 HHS announced a grant of several million dollars to two U.S. non-governmental organizations to provide legal representation to unaccompanied children following release from custody.¹⁴⁰ The program aims to serve 2,600 unaccompanied children in removal proceedings in Los Angeles, California; Houston, Texas; Miami, Florida; Baltimore, Maryland; Arlington, Virginia; Memphis, Tennessee; New Orleans, Louisiana; Dallas, Texas; and Phoenix, Arizona.¹⁴¹ Under it, HHS will fund legal representation directly for the first time, a noteworthy step in the right direction of providing government funded counsel. Given the limited reach of the program, however, it will not come close to solving the problem of the growing need for attorneys to represent migrant children.

¹³⁷ See *Franco-Gonzales v. Holder*, 828 F.Supp. 2d 1133 (C.D. Cal. 2011) (holding that U.S. government must appoint counsel for detained persons in removal proceedings who lack mental competence to represent themselves); Executive Office for Immigration Review, Phase I of Plan to Provide Enhanced Procedural Protections to Unrepresented Respondents with Mental Disorders. Retrieved from <https://dl.dropboxusercontent.com/u/27924754/EOIR%20Protections.pdf>.

¹³⁸ Homeland Security Act of 2002, HSA § 462(b)(1)(A) (codified as amended at 6 U.S.C. § 279(b)(1)(A)) directed HHS to create and submit to Congress a plan to ensure that “qualified and independent legal counsel is timely appointed to represent the interests” of unaccompanied children, “consistent with the law regarding appointment of counsel that is in effect on the date of enactment this Act”; TVPRA encourages HHS to ensure “to the greatest extent practicable” that UAC have attorneys to represent them. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Pub. L. 110-457, 122 Stat 5044 § 235(c)(5) (2008).

¹³⁹ A Treacherous Journey, pp. iii, 75.

¹⁴⁰ See Wayland, M. (2014, October 16). Announcement of the Award of Two Single-Source Program Expansion Supplement Grants to Support Legal Services to Refugees Under the Unaccompanied Alien Children’s Program, A Notice by the Children and Families Administration. *Federal Register*. Retrieved from <https://www.federalregister.gov/articles/2014/10/16/2014-24555/announcement-of-the-award-of-two-single-source-program-expansion-supplement-grants-to-support-legal>.

¹⁴¹ Announcement of the Award of Two Single-Source Program Expansion Supplement Grants to Support Legal Services to Refugees Under the Unaccompanied Alien Children’s Program, A Notice by the Children and Families Administration.

Another branch of the federal government recently announced an initiative to promote counsel for unaccompanied children; however its scope is too limited to solve the problem. The Executive Office for Immigration Review (EOIR), in partnership with another federal agency, will sponsor 100 fellows, including lawyers and paralegals to represent and support cases of unaccompanied migrant children in removal proceedings. The program will provide critical legal services to a small number of unaccompanied children, but cannot meet the needs of all, or even half of the number of children who arrived in the United States in 2014. First, the program excludes many unaccompanied children who need attorneys; it is limited to unaccompanied children not in federal custody under the age of 16. Second, although fellows will be placed in a number of U.S. cities, some cities with very high volumes of unaccompanied children, such as Los Angeles, will not receive a fellow. Third, the relatively small number of 100 fellows will be unable to respond to the legal needs of the nearly 60,000 unaccompanied migrant children who entered the United States between October 1, 2013 and October 1, 2014.

Attorneys at law firms, private practices, non-profit organizations, law schools, and bar associations have responded to the incredible rise in unaccompanied children with offers to help, particularly since the Obama Administration's decision to fast-track these cases (discussed below). Local governments at the city and state-levels are making efforts to respond to the need for representation of children and families in removal proceedings. For example, in California, legislation introduced by Governor Jerry Brown and state Attorney General Kamala Harris and enacted by the state legislature will provide \$3 million to legal services agencies across the state to represent unaccompanied immigrant children in federal custody or released to sponsors. New York City approved a plan to provide immigration counsel to every detained individual in removal proceedings in New York, and San Francisco approved funding to ensure legal representation for recent arrivals of unaccompanied children and families placed in removal proceedings. New York and San Francisco provide models of how receptive attorneys would be to a coordinated federal effort to appoint counsel for children. But the continued lack of a right to counsel and lack of a coordinated federal program appointing counsel means that many children will continue to go unrepresented in immigration proceedings, resulting in a higher likelihood of their deportation.

2. Without an attorney migrant children risk deportation

Children without an attorney are forced to represent themselves in a highly complex legal system, facing off against a trained government attorney arguing for their deportation. Without counsel, children are often unaware of their legal options and thus face formidable challenges to seeking immigration relief. The balance of power is further tipped when the children are monolingual Spanish or other native language speakers and unable to understand the proceedings without interpretation. In short, unrepresented children are deprived of a fundamentally fair process, in tension with their rights under international and domestic law.¹⁴² As was mentioned above, nearly one out of two children with counsel win their immigration cases, whereas only one in ten children

¹⁴² CRC General Comment 6, p. 12; International Covenant on Civil and Political Rights (ICCPR) art. 24.1, 1966, December 16, 999 U.N.T.S. 171 (special protections required for all children according to their situation as children); Child Welfare Information Gateway, U.S. Department of Health & Human Services. (2012). Representation of Children in Abuse and Neglect Proceedings, p. 2. Retrieved from https://www.childwelfare.gov/systemwide/laws_policies/statutes/represent.pdf (noting that all states in the U.S. provide for representation of children involved in abuse or neglect proceedings, and explaining the types of representatives that may be appointed).

without counsel succeed with the same. Moreover, not providing children in the immigration system with legal counsel is inconsistent with the wide recognition that unaccompanied migrant children need special protections due to their unique vulnerability.¹⁴³ A number of other countries provide counsel to unaccompanied children as a matter of right, including Canada, Denmark, New Zealand, and the United Kingdom.¹⁴⁴

In July 2014, a group of leading non-profit immigration organizations filed a lawsuit against the U.S. government for failing to provide attorneys for children in removal proceedings.¹⁴⁵ The lawsuit, brought on behalf of four children without attorneys and seeking to proceed as a nationwide class action, argues that placing unrepresented children in removal proceedings violates due process of law. The lawsuit is currently pending in federal court. The lawsuit argues that representation of all unaccompanied children—the only way in which children can have a fair chance at defending themselves in immigration proceedings against trained government counsel—can only be ensured through government appointment of counsel.

3. *Expedited removal proceedings are fundamentally unfair and heighten the risk of returning children to persecution, torture, or death*

In mid-2014, in response to pressure from anti-immigrant voices, including those in Congress, to deport unaccompanied children arriving as part of the surge, President Obama called for expedited removal proceedings for unaccompanied children and adults with children arriving at the U.S. border. EOIR, which houses the nation's immigration courts, responded by making removal proceedings of unaccompanied children a "priority," and scheduling them before the cases of individuals who arrived earlier, even if those individuals' cases have already been pending for months or years and would be further delayed. In practice, this means that unaccompanied children must appear in immigration court within weeks of arriving in the United States. EOIR not only schedules the child's initial appearance in court quickly, but also requires cases to move forward to trial quickly, instructing immigration judges to grant only short continuances of no more than six weeks to two months for children to seek counsel, explore legal options, and recover from

¹⁴³ See, e.g., U.N. High Commissioner for Refugees (UNHCR). (1997, February). Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum, ¶ 4.2. Retrieved from <http://www.refworld.org/docid/3ae6b3360.html> ("Upon arrival, a child should be provided with a legal representative."); CRC General Comment 6, ¶ 36 ("In cases where children are involved in asylum procedures or administrative or judicial proceedings, they should, in addition to the appointment of a guardian, be provided with legal representation."); CRC General Comment 6, ¶ 1 ("The objective of the General Comment is to draw attention to the particularly vulnerable situation of unaccompanied and separated children[.]"). See Complaint, J-E-F-M- v. Holder, No. 14-cv-01026-TSZ (W.D. Wash. 2014), complaint available at https://www.aclu.org/sites/default/files/assets/filed_complaint_0.pdf.

¹⁴⁴ See Aliens (Consolidation) Act of 2009, 785 of 2009 (D.K.). Retrieved from http://www.nyidanmark.dk/NR/rdonlyres/C2A9678D-73B3-41B0-A076-67C6660E482B/0/alens_consolidation_act_english.pdf; Legal Services Act of 2000 (N.Z.). Retrieved from <http://www.legislation.govt.nz/act/public/2000/0042/latest/DLM71928.html>; Processing an asylum application from a child. Retrieved from https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257469/processingasylumapplication_1.pdf; Immigration and Refugee Board of Canada. (1996, September 30). Chairperson Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues. Retrieved from <http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/GuidDir/Pages/GuideDir03.aspx>.

¹⁴⁵ See Complaint, J-E-F-M- v. Holder, No. 14-cv-01026-TSZ (W.D. Wash. 2014), complaint available at https://www.aclu.org/sites/default/files/assets/filed_complaint_0.pdf.

trauma before proceeding with their case. In some cases, judges have granted only two-week continuances and told children that they will be expected to proceed at their next hearing, even if they have been unable to obtain an attorney.¹⁴⁶ To put this process in context, although times varied across judges and courts, generally, individuals in non-expedited cases prior to the surge would often receive two or more continuances of six months to a year or more, in order to find an attorney and develop an application for relief. Under President Obama's accelerated procedures, up to 45 children at a time appear in court for these proceedings, depending on the location, and some immigration courts schedule children's dockets twice per day, sometimes five days per week. Advocates are calling the hearings "rocket dockets" given the unprecedented pace at which they are moving.

Forcing children to proceed on "rocket dockets" has had multiple harmful results. To begin, an approach that requires children's cases to move forward expeditiously and without a lot of scheduling flexibility makes it exceedingly difficult for children to succeed on their applications for relief, even if they have a strong claim. Existing avenues of relief from removal are meaningless when a child is deprived of the time needed to heal from trauma, to feel comfortable to disclose the information necessary to evaluate a claim for relief (such as whether the child suffered harm in her country or parental abandonment), and to adequately prepare for an interview or court hearing with an immigration officer or judge. Legal proceedings focused on speed, rather than a child's best interests, completely undercut previous advances in the United States' treatment of unaccompanied children. For example, EOIR's guidelines call on judges to accommodate children's needs in court and grant them the time they need to find an attorney. Current policy is in tension with these guidelines, prioritizing speed over child welfare and placing children at risk of deportation to serious danger or death. Current policy also violates U.S. domestic and international obligations not to return individuals to persecution, and the United States' moral obligations to protect children from harm.

Additionally, expedited proceedings of children have elevated the need for legal representation to emergency levels. The number and rate of cases being heard weekly in these expedited cases far outstrips the number of trained attorneys available to take cases of unaccompanied children. Legal services organizations around the country are overwhelmed by children searching for lawyers to help them, and frequently have to turn children away due to lack of capacity.¹⁴⁷ This problem, in turn, has made it all the more challenging for children to secure legal counsel. Pro bono attorneys around the country who have little or no experience in immigration law have stepped forward to help, but their efforts are limited by the availability of experts to train and mentor them on the cases.

¹⁴⁶ See Declaration of Cheryl Pollman in Support of Plaintiff's Reply in Support of Their Motions for Preliminary Injunction and for Class Certification, National Council of Jewish Women, *J-E-F-M- v. Holder*, No. 14-cv-01026-TSZ (W.D. Wash. 2014), Retrieved from

<http://www.americanimmigrationcouncil.org/sites/default/files/docs/lac/Pollman%20Signed%20Declaration.pdf>; Hobbs, M. (2014, August 29). Lawyers Say 'Rocket Dockets' Risk Due Process. *Daily Report*. Retrieved from <http://www.dailyreportonline.com/id=1202668537443/Lawyers-Say-Rocket-Dockets-Risk-Due-Process>.

¹⁴⁷ See Semple, K. (2014, August 4). Advocates in New York Scramble as Child Deportation Cases are Accelerated. Retrieved from http://www.nytimes.com/2014/08/05/nyregion/advocates-scramble-as-new-york-accelerates-child-deportation-cases.html?_r=0.

In some counties, non-profit organizations, attorneys at private law firms, and county bar associations have volunteered to attend some of the “rockets docket” and speak on behalf of children. The role of these attorneys is limited. While their efforts to orient children at their initial hearing and ask judges for more time to find an attorney before moving forward with their cases have helped many children who would have otherwise appeared in court alone, these attorneys are not necessarily able to accept a child’s case for full-scope representation. Nor are they in a position given the time constraints to adequately screen a child for possible eligibility for immigration relief. Such screening is necessary even to provide adequate referrals, as many attorneys and organizations only specialize in certain areas of immigration law.

B. No right to a child advocate

United States courts frequently appoint a child advocate, also called a guardian, for children in cases involving adoption, child custody, child support, divorce, and abuse and neglect proceedings.¹⁴⁸ In fact, U.S. federal law requires states to appoint a guardian or other individual designated with representing the child’s best interests in all child abuse and neglect cases.¹⁴⁹ International bodies also recognize the importance of appointing an individual to advocate for the child’s best interests when a child is caught up in legal proceedings on his or her own. UN bodies, including UNHCR and the United Nations Children’s Fund (UNICEF), have long advocated that an independent child advocate be assigned to cases of unaccompanied children in order to advocate for their best interests and advise them in the immigration system.¹⁵⁰ Countries such as Canada, Finland, and Sweden, and the United Kingdom provide guardians in all cases of unaccompanied children.¹⁵¹ The United States, however, does not provide a child advocate to all unaccompanied children, and prior to 2003 did not provide child advocates to any unaccompanied child.

Starting in 2003, HHS began funding the appointment of guardians in some unaccompanied children’s cases. The non-profit Young Center for Immigrant Children’s Rights, funded by the HHS, developed a model project for the provision of an independent child advocate in cases of

¹⁴⁸ Technically federal law refers to guardians “ad-litem.” A guardian ad-litem is charged with representing the child’s best interests to the court or other bodies, which may differ from the child’s stated or express interests, as discussed below.

¹⁴⁹ See Child Abuse Prevention and Treatment Act (CAPTA), 42 U.S.C. § 5106a(b)(2)(B)(xiii) (2010). The individual appointed may be an attorney ad-litem—responsible for representing the child’s best interests, a Court Appointed Special Advocate (CASA)—charged with advocating for the child and his/her best interests, or an attorney focused on representing the child’s legal and stated interests. See Child Welfare Information Gateway, U.S. Department of Health & Human Services. (2012). Representation of Children in Abuse and Neglect Proceedings. Retrieved from https://www.childwelfare.gov/systemwide/laws_policies/statutes/represent.pdf.

¹⁵⁰ UNHCR 1997 Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum. The Committee on the Rights of the Child and UNICEF also recognize the critical need for appointment of a guardian to represent the best interests of an unaccompanied child. See CRC General Comment 6, ¶¶ 33-38 (calling for appointment of guardian or advisor as soon as UAC is identified); see also UNICEF. (2013, December). Observación Escrita de UNICEF sobre Niñez Migrante en América Latina y el Caribe: Solicitud de Opinión consultiva sobre niñez migrante presentada por Argentina, Brasil, Paraguay y Uruguay, ante la Corte Interamericana de Derechos Humanos. Retrieved from http://www.unicef.org/argentina/spanish/Amicus_Curiae_COMPLETO.pdf (calling for a guardian or legal representative for UACs as a matter of due process).

¹⁵¹ See King, S. M. (2013). Alone and Unrepresented: A Call to Congress to Provide Counsel for Unaccompanied Minors. *Harvard Journal on Legislation*, 50, 331, p. 367; Immigration and Refugee Board of Canada. (2014, June 16). Commentaries to the Immigration Division Rules: Rule 19 (Designated Representatives). Retrieved from <http://www.irb-cisr.gc.ca/Eng/BoaCom/references/ActRegLoi/Pages/CommentIdSi.aspx>.

unaccompanied children.¹⁵² The advocate's role differs from that of the child's attorney. A child's immigration attorney is obligated to represent the child's *stated* or *express* wishes or interest, which sometimes are in tension with a child's best interests. Tension between a child's stated interests and best interests may arise, for example, when a child who fled a dangerous situation asks to return to his or her country. This scenario sometimes arises when a child is in federal immigration custody for an extended time and is desperate to be free, no matter the long-term consequences. It also arises when a child feels compelled by pressure from parents or other adults to do something that would result in harm to the child, such as to work long hours in a restaurant rather than go to school. Child advocates, however, advance the child's best interests (or safety and well-being). Child advocates supervised by the Young Center promote the best interests of the child, but do so "with due regard to the child's expressed wishes," consistent with the CRC.¹⁵³

A major legislative advancement for migrant children enacted in 2008 grants HHS the discretionary authority to appoint an independent child advocate to children identified as trafficking victims or as particularly "vulnerable." As positive as this change may be, only a small percentage of unaccompanied children benefit from it because of its discretionary nature, and because the U.S. Congress has not funded the program at sufficient levels to reach all vulnerable unaccompanied children. HHS decides on a case-by-case basis when to appoint a child advocate using a range of criteria, including pregnancy, disability, and other factors to identify vulnerability. This approach deprives the majority of unaccompanied children of the special protections called for by their situation as children with no adult to advise them, while confronting a legal system in which they risk deportation, potentially back to danger. As part of its initiative to fund legal representation for unaccompanied children released from custody, some of the HHS funds designated for the initiative will be used to provide child advocates for children who receive a lawyer through the program. HHS's initiative should be commended; it increases the number of unaccompanied children who will receive a child advocate and includes children released from custody, who have not previously benefitted from child advocates. Given that the funding aims to provide 2,600 unaccompanied children with attorneys, however, at most 2,600 released children will be assigned child advocates, far short of the need. When no advocate is assigned to an unaccompanied child's case, no one is charged with promoting that child's best interests. Without an attorney or advocate, the child has no one to advise him as he struggles through the immigration system, compounding the due process concerns raised earlier.

C. Procedures for applying for immigration benefits are complex and difficult to navigate

Children without status apprehended by federal immigration officials or children referred to federal immigration officials by state authorities, for example in the context of a juvenile delinquency case, are generally placed in removal proceedings. Like adults, these children must respond to the charges brought against them by the government that they are "removable" (meaning they can be deported from the United States) because they are not citizens of the United

¹⁵² The Young Center for Immigrant Children's Rights, based at the University of Chicago Law School, was formerly the Immigrant Child Advocacy Project (ICAP). Since 2003, even before the TVPRA granted HHS the authority to appoint child advocates, the Young Center has been a pioneer in this area, providing child advocates for unaccompanied immigrant children.

¹⁵³ See The Young Center for Immigrant Children's Rights. Our Mission. Retrieved from <http://theyoungcenter.org/about/mission/>.

States and because they entered the United States without permission or overstayed the permission they had. If they admit removability, children have the right to seek relief from removal by showing their eligibility for an immigration benefit. However, applying for these various forms of immigration relief is very complex and difficult for anyone to understand, let alone an unaccompanied child who recently arrived in the United States and who is not afforded counsel or a guardian.

A child is unlikely to know the proper procedure, or how to follow it, without legal counsel. For example, some applications for relief—such as U and T visas—can only be adjudicated by USCIS (not by the immigration courts). When applying for one of those forms of relief the child would ask the immigration judge for time to pursue the application with USCIS. If USCIS approved the application, the child would then ask the judge to terminate or close the deportation proceedings. If USCIS denied the application, the child’s case would proceed in court where she could then try to seek other benefits. Some applications for relief from removal can only be pursued in immigration court, for example, cancellation of removal. The substantive requirements of these forms of relief are described in section III above.

Asylum, one of the most common forms of relief sought by children, involves a special procedure for unaccompanied children. Prior to 2008, all children placed in removal proceedings seeking asylum were required to submit their asylum application in immigration court, with the immigration judge deciding whether they were eligible for asylum protection. In response to years of advocacy regarding the inappropriateness of the adversarial setting of removal proceedings in cases of child asylum seekers, U.S. Congress changed the law in 2008 to give USCIS initial jurisdiction over all unaccompanied children’s asylum claims—whether in removal proceedings or not. Asylum offices of USCIS now hear and decide all unaccompanied children’s asylum cases in a non-adversarial context. If USCIS grants the case, then as with the other forms of relief discussed above, removal proceedings should be terminated. When USCIS does not grant the case, it refers the case back to court for the immigration judge to consider and rule on the asylum application anew. While this procedure has been a major advance from the previous approach, it falls short by failing to recognize the fact that *all* child asylum seekers, unaccompanied or not, are vulnerable by nature of their age, development, status as children, the fact that they are in removal proceedings, and the fact that they fear persecution.

There are other types of immigration relief that can be decided by more than one government agency or that require decisions from a combination of agencies. For example, as explained in section III.C, children applying for SIJS must go through a two-step process that involves appearances before a state court, followed by filing an application with USCIS. Once granted, SIJS recipients are then eligible for immediate permanent residency. Depending on whether the child is in removal proceedings, the procedures for this process can vary greatly and can be complicated, because USCIS cannot decide the application for permanent residence if the child has a pending case in removal proceedings. Often times, the decision on where to file a particular application depends on case strategy, which is a decision one should make with their lawyer, and which includes considerations about the particular jurisdiction where the case is proceeding. Yet children arriving in the United States—unaccompanied or not—are expected to quickly navigate this complex system without the benefit of counsel or a guardian to guide them through it.

D. Best interests of the child are not a primary consideration

Prior to the recent increase in unaccompanied children arriving in the United States, the United States had made progress in incorporating child-sensitive procedures into its immigration system—although limited by the lack of a binding best-interests standard. The government’s response to the influx, however, has undermined some of the important advances made regarding proceedings for children, and threatens to roll back progress made entirely.

1. Procedures for children in removal proceedings

Due to the adversarial and intimidating nature of removal proceedings, and the grave consequences of a wrong decision, the absence of a best interests standard for children proves especially harmful. The lack of a best interests standard in children’s removal cases manifests in the following ways: (1) an inappropriate (overly formal) courtroom setting for children; (2) insensitive and sometimes aggressive questioning of children by judges or by government attorneys during cross examination; (3) absence of protections for child applicants, such as allowing their testimony to be taken in the judge’s chambers or accepting their declarations as testimony instead of requiring them to testify in court; and (4) overly litigious positions of government attorneys who may be unwilling to limit the contested issues in a case.¹⁵⁴

Immigrant children in removal proceedings must appear in a formal courtroom setting before an immigration judge and against a trained government attorney who works for DHS. The courtroom may be filled with strangers, most of whom are adults, when a judge calls on a child to proceed with his or her case. Because most child migrants speak limited or no English, communication between the child, the judge, and the attorneys in the courtroom is carried out through an interpreter. A courtroom exchange between an immigration judge and a 16-year old girl is representative of what happens during a child’s first appearance in court:

Judge: Calls out the child’s name to come up.

Judge (*through interpreter*): “Is Spanish your best language?”

Child: “Yes.”

Judge: “Please stand and raise your right hand. Do you affirm what you say will be true?”

Child: “Yes.”

Judge: “How old are you please?”

Child: “16.”

Judge: “Ma’am what is your correct name?”

Child: Provides name.

Judge: “What is your address?”

Child: Provides address.

Judge: “Who is here with you today?”

Child: “I am here with my aunt.”

Judge: “Where are you parents? Why aren’t they here?”

Child: “I don’t know.”

Judge: “But you are living with your parents, aren’t you?”

¹⁵⁴ A Treacherous Journey, p. 62-63.

Child: "Yes."

Judge: "You do not have a lawyer?"

Child: "No."

Judge: "Ma'am the reason you're here today is because the Government is seeking to remove you from the United States because they say you came here illegally, with a passport that didn't belong to you. So you were sent to a court and before me as a Judge for me to decide if they're right, if you should be removed. And even if that's true, whether there's any way you can stay here legally. Do you understand?"

Child: "Yes."

Judge: Grants the child some time to try to obtain an attorney.

Judge: "You must come back to court on [date] and [time] with your attorney. If you do not appear at that time, you could be ordered removed in your absence. And then you'll be ineligible for forms of relief under the Immigration Act for 10 years. Do you understand?"

Child: "Yes."

This type of questioning confuses and intimidates children, especially if they are unrepresented; the younger the child, the more frightening or confusing. Scholars and advocates alike have criticized the highly adversarial nature of removal proceedings and argued that they are inappropriate for children.¹⁵⁵ EOIR has issued guidelines on children's cases for immigration judges in order to make removal proceedings more child-friendly. The guidelines give immigration judges "discretion in taking steps to ensure that a "child-appropriate" hearing environment is established" and set forth certain accommodations that can be made in children's cases, such as judges removing their robes and appearing in normal attire. However, the guidelines are not binding on immigration judges and do not go far enough. For example, the guidelines do not explicitly restrict judges from engaging in insensitive questioning or from allowing such questioning. Meanwhile, no binding standards require a child-sensitive approach on the part of attorneys for the government.¹⁵⁶ These can lead to highly problematic exchanges between the child and government attorney. For example, in one case, the government attorney questioned a thirteen-year-old child recollecting incidents that took place years earlier, as follows:

Q: Okay. And do you know why [your family's attacker] didn't like your grandmother?

A: No.

Q: Do you know why he said Communists?

A: I don't know what that word means.

Q: Okay. And did you hear it yourself or did someone tell you that's what he said?

A: He stated Communists.

Q: And you don't know what he meant by that?

¹⁵⁵ Young, W., & McKenna, M. (2010). *The Measure of a Society: The Treatment of Unaccompanied Refugee and Immigrant Children in the United States*. 45, 247, p. 256; Bhabha, J., & Schmidt, S. (2006, June). *Seeking Asylum Alone, Unaccompanied and Separated Children and Refugee Protection in the U.S.* Retrieved from http://www.law.yale.edu/documents/pdf/Clinics/Seeking_Asylum_Alone_US_Report.pdf.

¹⁵⁶ *A Treacherous Journey*, pp. 9-10.

A: No.¹⁵⁷

Incredibly, the DHS attorney in the case argued that the child failed to establish nexus to an imputed political opinion in large part due to supposed gaps in testimony such as the above— notwithstanding the fact that the relevant incidents took place when the child was between five and ten years of age. The immigration judge agreed with the government attorney and denied asylum.¹⁵⁸

Moreover, as discussed in section IV.A.3 above, the current practice of expedited hearings is against the child’s best interests and contrary to the policies announced in the EOIR guidelines. The existence of “rocket dockets” calls into question the continuing applicability and use of those guidelines.

Not only are there insufficient procedures in place for children in removal proceedings, there is also inadequate training of immigration judges, members of the BIA and government attorneys who appear in children’s removal proceedings. Consistent with international and domestic standards, adjudicators must have special training and expertise in order to understand and tailor proceedings to children’s unique circumstances and needs. However, immigration judges and BIA members receive little to no training on children’s issues, such as child development, effects of trauma on children, child-sensitive interviewing, and children’s rights.¹⁵⁹ Attorneys for DHS—who litigate cases in removal proceedings—receive no such training.¹⁶⁰ This critical gap can easily be filled by instituting ongoing training on these issues.

The TVPRA of 2008 requires the United States to issue regulations “which take into account the specialized needs of unaccompanied alien children and which address both procedural and substantive handling” of their cases.¹⁶¹ These regulations would be binding on judges and government attorneys and could resolve the problems highlighted here. However, six years have gone by, and no such regulations have been issued.

¹⁵⁷ *Mejilla-Romero v. Holder*, 600 F.3d 63, fn19 (1st Cir. 2010).

¹⁵⁸ *Mejilla-Romero v. Holder*, 600 F.3d 63 (1st Cir. 2010). The immigration judge denied the child’s asylum claim, and both the BIA and initially the First Circuit upheld the denial. However, at the urging of the child petitioner, supported by U.S. advocacy groups and UNHCR as amici, First Circuit later vacated its decision and remanded to the agency for new proceedings that adhered to U.S. and international guidance on the proper handling of child asylum claims. *Mejilla-Romero v. Holder*, 614 F.3d 572 (1st Cir. 2010).

¹⁵⁹ *A Treacherous Journey*, p 68; *see also* American Bar Association Commission on Immigration. (2004, August) *Standards for the Custody, Placement, and Care; Legal Representation; And Adjudication of Unaccompanied Alien Children in the United States*. Retrieved from http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/Immigrant_Standards.authch_eckdam.pdf (calling for special training for immigration judges deciding children’s cases); CRC General Comment 6 (calling for special training of officials working with UACs including legal issues, interview techniques, “child development and psychology, [and] cultural sensitivity and inter-cultural communication”).

¹⁶⁰ *A Treacherous Journey* p. 68.

¹⁶¹ TVPRA § 235(d)(8).

2. Procedures before United States Citizenship and Immigration Services

Children seeking asylum before USCIS are interviewed by a USCIS officer with special expertise in asylum law, known as an asylum officer. Children applying for SIJS, U visas, and T visas are interviewed by a general USCIS officer who does not have expertise in a particular area.

In contrast to immigration court proceedings, USCIS interviews take place in an office setting, without a judge, and with no cross-examination. As with cases in the immigration courts, children can be represented by an attorney, but have no right to an attorney appointed at the government's expense. USCIS asylum officers receive training on interviewing children and analyzing children's asylum claims. Guidelines issued by the federal government on children's asylum claims also set out child-sensitive interview techniques. Despite their training and the thoughtful interview approaches in the U.S. guidelines, some asylum officers have been reported by advocates to "demonstrate a lack of sensitivity and engage in invasive questioning."¹⁶² General USCIS officers who interview children on other types of claims, such as SIJS, do not receive any special training on interviewing children or analyzing children's claims for relief, and there are no guidelines for USCIS officers on children's SIJS, U visa, or T visa cases.¹⁶³ Consequently, some USCIS officers "employ antagonistic questioning methods in interviewing children on their applications for SIJS or adjustment of status."¹⁶⁴

USCIS could significantly improve its treatment of children by applying the best interests of the child standard to all of its procedures in children's cases, and by requiring specialized training for all officers hearing children's cases.

V. Lack of best interests standard leaves children without durable solutions and results in repatriation to danger

Throughout this chapter the term "best interests of the child" has been used to critique a range of U.S. procedures and policies that affect immigrant children and adolescents but do not prioritize their interests. Previous sections also analyzed how the best interests of the child principle impacts the legal analysis of applications for immigration remedies. This section refers to the best interests of the child in a different context, focusing on the absence of a legal framework for immigrant children built on the best interests of the child principle, and the need for a new form of immigration relief rooted in this principle. The absence of a binding legal standard requiring that the best interests of the child be a primary consideration in all actions and decisions affecting immigrant children carries grave consequences for children. It also undermines their substantive rights under international law, and, as discussed above, deprives them of procedural rights and protections. Finally, the absence of this standard affects children's eligibility for lawful immigration status and places children at risk of repatriation to dangerous and precarious circumstances.

¹⁶² A Treacherous Journey, p. 70.

¹⁶³ A Treacherous Journey, pp. 69-72.

¹⁶⁴ A Treacherous Journey, p. 71-72.

A. The best interests of the child must be a primary consideration in repatriation decisions

As discussed in chapter 9 on the treatment of migrant children at the U.S.-Mexico border and chapter 12 on repatriation and reintegration, U.S. law and existing practices permit repatriation of unaccompanied children without any determination or consideration of their best interests. The consequence is that children may be returned to unsafe circumstances or situations detrimental to their well-being—for instance, return despite family separation or lack of a caregiver. However, ineligibility for immigration relief does not necessarily mean that a child can safely return to his country. In the case of a child asylum seeker, for example, a judge may find that the child has a well-founded fear of persecution upon return to his country, but may deny asylum based on finding that the feared persecution is not linked to a protected ground.¹⁶⁵ A child in this situation would risk return to his persecutors, contrary to his best interests and in violation of his rights under international law.

In cases in which HHS assigns a child advocate (also called a guardian), the advocate provides the immigration judge or USCIS adjudicator with a best interests recommendation. Best interests recommendations made by child advocates include critical information about the child's history and circumstances that may not have come out during the immigration proceedings. The importance and role of child advocates is explored in greater detail in chapter 12, on repatriation and reintegration of migrant children returned by the United States.¹⁶⁶

B. Relief based on best interests of the child is needed

Inadequate forms of immigration relief exist to address children's reasons for migrating from Honduras, El Salvador, Guatemala, and Mexico. As discussed above in this chapter and in chapters 2-7, children from these countries migrate alone to flee many forms of violence or human rights violations pervasive in their communities. However, restrictive interpretation of the refugee definition, coupled with a lack of a child-sensitive approach to immigration relief and procedures, results in their return to dangerous situations in their home countries. Return may even be fatal, as evidenced by stories of children like Edgar Chocóy Guzman, Josue Rafael Orellana Garcia, and the 5-10 deported children recently murdered in Honduras. Edgar fled Guatemala after members of his former gang threatened to kill him for deserting the gang. He had grown up in an abusive home and took to the streets to escape. There he joined a street gang. Edgar testified before an immigration judge that he would be killed if he were sent back to Guatemala. Although the judge believed him, the judge found that he did not deserve asylum because of his former affiliation with a street gang and ordered him deported. Seventeen days after his arrival in Guatemala, the gang members Edgar feared murdered him.¹⁶⁷ Tragically, Josue's story is not much different. Gang members in Honduras targeted Josue due to physical disabilities he suffered as a result of

¹⁶⁵ See section III.B.1 for more information on gaps in asylum protection.

¹⁶⁶ U.N. High Commissioner for Refugees. (2008, May). UNHCR Guidelines on Determining the Best Interests of the Child, pp. 53-54. Retrieved from <http://www.unhcr.org/4566b16b2.pdf>. UNHCR recommends that a multi-disciplinary, gender-balanced BID panel comprised of independent experts in "child development and child protection" conduct the formal BID. The panel should have strong knowledge and experience in domestic children's rights and welfare, refugee law, child and adolescent development, "specific protection risks, such as trafficking, recruitment, sexual and gender-based violence," and the child's community.

¹⁶⁷ See De Leon, S., Associated Press. (2004, May 9). Guatemalan Youth Slain 17 Days After Being Deported From U.S. *Los Angeles Times*. Retrieved from <http://articles.latimes.com/2004/may/09/news/adfg-deport9>.

Hurricane Mitch. Josue fled Honduras and filed for asylum in the United States, but an immigration judge found he did not qualify and ordered him deported. Shortly thereafter Josue disappeared; his dead body was eventually found.¹⁶⁸

Some children make a decision not to apply for relief because they have been informed that they do not qualify. Even applying a child-sensitive analysis, some number of children would not qualify for immigration relief. For example, children migrating because their caregivers become too old to care for them, or solely to reunify with a parent in the United States even though their current situation meets their needs, would likely be ineligible for existing forms of immigration relief.

A new form of immigration relief would protect children from return to their countries when a determination has been made that return is not in their best interests. Requiring primary consideration of a child's best interests is a critical step for protecting migrant children's rights and safety. Providing a form of relief based on best interests would go one step further toward ensuring durable solutions for these children. Specifically, migrant children who do not qualify for existing forms of immigration relief and for whom return would be against their best interests should be granted lawful permanent residency. Such grant would be consistent with state child welfare laws in the United States—which require permanency planning for children in the foster care system—and with UNHCR's recommendation that durable solutions be identified to ensure children's stability.¹⁶⁹

VI. Conclusion

Children from Mexico and Central America navigating the U.S. immigration system face numerous hurdles in regularizing their immigration status. Overly restrictive applications of certain forms of immigration relief—particularly asylum and related forms of protection—and complex procedural barriers deprive many children of legal relief for which they should be eligible. The Obama Administration's new expedited procedures in response to the influx of migrants from the Northern Triangle countries have exacerbated existing problems and deprive children of due process, especially in light of the government's failure to provide appointed counsel to children. Moreover, the lack of a best interests standard driving procedural and substantive decisions applied to child migrants falls short of the United States' international and moral obligations. Absent such standard, the United States will likely continue to return children to countries where they may face danger and life-threatening conditions.

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>.

¹⁶⁸ See Dzubow, J. (2012, January 23). Dead Honduran Seeks Asylum in the U.S. *The Asylumist*. Retrieved from <http://www.asylumist.com/2012/01/23/dead-honduran-seeks-asylum-in-the-u-s/>.

¹⁶⁹ UNHCR focuses on the need for durable solutions for unaccompanied children, but its logic also applies to migrant children facing removal or voluntary departure on their own. See UNHCR Guidelines on Determining the Best Interests of the Child.