The Tipping Point: The Failure of Form Over Substance in Addressing the Needs of Unaccompanied Immigrant Children

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THE TIPPING POINT: THE FAILURE OF FORM OVER SUBSTANCE IN ADDRESSING THE NEEDS OF UNACCOMPANIED IMMIGRANT CHILDREN

Lauren R. Aronson*

TABLE OF CONTENTS

INTRODUCTION – PUTTING THE “SURGE” IN CONTEXT .......................... 2
I. LEGAL AND LEGISLATIVE AUTHORITY PROVIDE LITTLE GUIDANCE ON TREATMENT OF UACs ........................................... 6
   A. Flores Settlement Agreement/Reno v. Flores ................................ 6
   B. The Homeland Security Act of 2002 ........................................... 8
   C. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 .................................................. 9

II. CURRENT PROCEDURE: WHERE HAS THE FOCUS ON PROCEDURE GOTTEN US? ......................................................... 10
   A. Apprehension ............................................................................. 11
      1. Children from Contiguous Nations ........................................... 12
   B. Detention .................................................................................. 14
      1. Levels of Care ......................................................................... 16
      2. Immigration Court Proceedings .............................................. 19
   C. Release from Custody ................................................................. 20

III. INADEQUATE AND ILL-FITTING IMMIGRATION PROTECTIONS AVAILABLE TO CHILDREN .............................................. 23
   A. Asylum ..................................................................................... 24
   B. Special Immigrant Juvenile Status ............................................. 27
   C. T Nonimmigrant Status/T Visas ................................................. 29

IV. LITTLE TO LOSE ........................................................................ 30
   A. Detention Statistics ................................................................. 30
   B. Motivating Factors ................................................................. 31

V. CUSTODY DECISIONS ................................................................. 36
   A. Initial Custody Decision – Apprehension: Do you stay or do you go? ................................................................. 36

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INTRODUCTION – PUTTING THE “SURGE” IN CONTEXT

Although to the general public it appears that the spring and summer of 2014 marked a sudden explosion of unaccompanied immigrant children crossing the southern border of the United States, statistics tell a radically different tale. Despite what the sensationalized nomenclature (“the surge” and “the influx”) have led the public to believe, the current “crisis” began decades ago. Although lawmakers and advocates alike were aware of the growing concerns, they took few steps to address them. The government spent money on the unaccompanied children, but the expenditures were focused on procedural developments, while failing to address the legal framework governing this population’s immigration relief options. The need for reform has been present, though veiled, for decades. Now, having faced just under 70,000 arriving unaccompanied children in 2014, the government can no longer simply sweep them under the rug; clearly, it must take action.¹

While the government must respond swiftly to the increase in UAC arrivals in order to address their immediate safety needs, its focus on the logistics of the processing and placement of the children only perpetuates the shortsighted approach that has dominated the unaccompanied immigrant child conversation since it began. With the number of children high and increasing, it is easy to lose sight of the more important issues of what actually happens to these children once they leave the border and enter the custody of the Office of Refugee Resettlement (ORR) under the Department of Health and Human Services (HHS), as well as what principles govern their release from custody. Although the government’s intention is that every immigrant child in its custody be treated uniformly, in practice, random twists of chance, good or bad timing, and government-dictated decisions cause dramatically divergent outcomes in otherwise factually indistinguishable cases.

In 1987, the challenges surrounding federal custody of unaccompanied immigrant children became significant enough to prompt a class action law-

suit, *Reno v. Flores.* As early as 1997, when the suit settled, the involved parties had begun to contemplate an “influx” of unaccompanied children to this country. While the number of children being apprehended at that time was far lower than what the country is experiencing now, and the anticipated “influx” referred to any number greater than 130 children, it was already obvious that the phenomenon was not a fluke and the numbers would only continue to grow.

A 2007 Congressional Research Service Report explained that beginning in 2002, and continuing in each of the next five years, immigration officials apprehended over 80,000 immigrant children annually (though this figure accounts for both accompanied and unaccompanied children). Significantly, between FY2008 and FY2009 there was a one hundred and forty-five percent increase in the number of unaccompanied immigrant children encountered by Customs and Border Protection (CBP). While it is true that the numbers have increased in recent years, the increase has not been as abrupt or shocking as the 2014 media frenzy makes it seem. In the past, even as the numbers grew, legacy Immigration and Naturalization Services (INS) and later ORR were able to process the additional children without attracting significant media or political attention.

As of 2010, an estimated one million immigrant children were living in the United States without authorization. This “urgent humanitarian situation” did not develop overnight; rather, the condition has been mounting for many years and has finally reached its tipping point. The children had to get here somehow, and research shows that for over ten years children have been traveling to this country in the same manner and for many of the same reasons.
reasons as those more recent arrivals. A primary explanation for the difference in the number of apprehensions is that before 2014, children tried harder and more successfully to enter the United States undetected, whereas now many come with the intention of being caught. Rumors spread by smugglers that UACs were given amnesty once they crossed the border have induced the arriving children, often at their parents’ instruction, to turn themselves over to immigration authorities.

In 2011 and 2012, ORR struggled to accommodate the growing numbers of arriving children. Midway through 2014, however, the government’s resources for housing and caring for the unaccompanied immigrant children became entirely overwhelmed. On June 2, 2014, with three times as many immigrant youth in need of housing and services as in prior years, President Obama enlisted the Federal Emergency Management Agency (FEMA) to coordinate relief efforts for this vulnerable population. Still, the 2014 “crisis” was not the first time ORR’s capacity was reached and hundreds of children were diverted from licensed shelters to air force bases, arenas, or other unsuitable holding locations.

Even with the aid of FEMA and faith-based and social services organizations across the nation, on any given day in the month of June 2014 there were as many as 3,500 unaccompanied immigrant children held in border patrol stations, awaiting safe placement elsewhere. During their wait, these children were (and continue to be) subjected to inhumane conditions, sleeping on floors or, if they are lucky, on cots, with limited access to drinking water and toilets. Once a child is transferred to an approved ORR facility, the government provides her with food, shelter, minimal educational, therapeutic and legal services, and also coordinates that child’s release from custody.

The official government term for the immigrant minor ever-present in the news throughout the summer of 2014 is an “unaccompanied alien child” or “UAC.” An unaccompanied alien child is statutorily defined as a person who has not yet reached eighteen years of age, has no lawful immigration status in the United States, and for whom there is no parent or legal guardian.

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9 HADDAL, supra note 5, at 1; see also Jacqueline Bhabha & Susan Schmidt, Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in the U.S., 1 J. HIST. CHILDHOOD & YOUTH 126, 133 (2008).


12 See Memorandum from the President for the Heads of Exec. Dep’ts and Agencies, supra note 8.


14 This is based on the author’s personal experience and observation.
available in the United States to provide care.\textsuperscript{15} The UAC title is assigned not only to arriving immigrant juveniles, but also to certain foreign-born youths who are internally apprehended after living in this country for days, months and, in some cases, years.\textsuperscript{16}

Part I of this article provides the general background and legislative history of the UAC phenomenon. It discusses the three primary domestic legal and legislative authorities to address the treatment of UACs, highlighting that the focus of such authorities has consistently been on processing the children through the federal system, while virtually ignoring substantive immigration law as it relates to children in general, and to UACs specifically.

Part II describes UAC procedures as they exist today. When U.S. officials apprehend UACs attempting to enter the country, the children embark upon complex journeys through our immigration system, often involving numerous government agencies, courts, and programs. This section delineates the three primary custody decisions the U.S. government makes on behalf of each UAC upon apprehension, initial detention, and release from detention. It explains in more detail the inequitable and arbitrary treatment of Mexican children upon initial apprehension, the various detention facility options available to UACs, and some of the complications that arise as multiple government agencies with disparate goals interact with the UACs.

Part III presents the current substantive immigration law most relevant to unaccompanied children, demonstrating the inadequacy of the available remedies. It makes clear that all but one (Special Immigrant Juvenile Status or “SIJS”) of the potential relief options for children were not designed with children in mind, and even in the case of SIJS, UACs were not the originally intended beneficiaries.

Part IV presents the UAC detention statistics from recent years and describes several of the factors motivating the children’s flight. In addition, it dispels many of the incorrect rationales championed by the anti-immigrant contingent as the reasons for the “crisis.”

Part V returns to the three custodial decisions and specifically addresses the inefficient and arbitrary manner in which these decisions are made. Despite the critical effects these decisions have on the futures of the UACs, a majority of the decision-making individuals lack formal training in child welfare, family and immigration law, or social services. These decisions are made outside of courtrooms, without transparency, and often in the absence of any formal standards, policies, or checks. Yet, these are truly the dispositive actions on which the children’s ultimate fates depend.


\textsuperscript{16} During the first decade and a half of the twenty-first century, the number of internal arrests was negligible compared to that of arriving UACs; as such, these apprehensions are not responsible for the increase and are not the focus of this article. 95\% of all UACs are apprehended by CBP, which operates only within a one hundred mile stretch of the border, indicating that the UACs are primarily arriving immigrants, rather than unauthorized immigrants who have been living in the United States for any significant period of time. UTEP UAC PROJECT, \textit{supra} note 10, at 6.
Finally, Part VI discusses proposed legislative measures and general responses to the UAC situation in the wake of the “influx.” Outside of a few remedial suggestions by advocates and scholars, the proposed legislation appears to be following suit with its predecessors by maintaining a procedural focus as opposed to addressing the legal framework that most directly affects outcomes for the children. The suggested changes are inadequate to effectively address the problems involved with the processing and care of children, and in practice they would strip a huge majority of children of any chance they had at gaining, or even applying for, substantive relief.

I. Legal and Legislative Authority Provide Little Guidance on Treatment of UACs

Despite the persistence of the UAC problem, over the past twenty-seven years, the treatment of UACs has been addressed by only one major class action lawsuit and two legislative reforms. Discussed below, each of these legal authorities has inappropriately focused on administrative considerations, removing more important substantive interests—especially the short- and long-term welfare of UACs themselves—from the conversation.

A. Flores Settlement Agreement/Reno v. Flores

Concerns about the treatment of UACs did not reach the political consciousness until the filing of a class action lawsuit, Reno v. Flores, in 1987. Parties to Reno v. Flores claimed a constitutional right to due process for unaccompanied immigrant children. This lawsuit culminated in 1997 when parties stipulated to a settlement known as the Flores Settlement Agreement (Flores Agreement), which established a “nationwide policy for the detention, release, and treatment of minors in the custody of the federal government.” The parties' collective intention was that the government agencies tasked with the care of UACs uniformly follow the guidelines delineated in the Flores Agreement. Reno v. Flores and the Flores Agreement are significant primarily because they prompted the first genuine conversation regarding the treatment of UACs in custody; however, in practice, the Flores Agreement did little to advance the broader UAC cause.

The Flores Agreement established minimum standards that detention facilities must meet in order to avoid violations of basic human rights. For example, it required that all detainees be allowed access to toilets and drinking water. The Flores Agreement set forth a few other mandates designed specifically for this population. It instructed that children be transferred from
the holding facilities to a government-contracted juvenile facility within three or five days, depending upon place of apprehension.\textsuperscript{21}

The Flores Agreement also stated that each child should be placed “in the least restrictive setting appropriate to the minor’s age and special needs.”\textsuperscript{22} This mandate prompted creation of facility options of varying levels of security and care; however, the Flores Agreement did not specify how many levels were appropriate or what factors were to be considered in determining where to place individual children. The extent to which ORR has abided by these directives and the various facility options available today are discussed below in Parts IV and II, respectively.

The Flores Agreement exempted the government from adhering to the transfer and placement requirements “in the event of an emergency or influx of minors into the United States.”\textsuperscript{23} It went on to define “influx” as a time at which more than one hundred and thirty minors are awaiting placement or have been placed in federal custody.\textsuperscript{24} When considered now, this number is laughable given that so many facilities exist today which alone house well over one hundred and thirty minors at any given time.\textsuperscript{25} While the number itself may be outdated, the fact that such an event was even contemplated is relevant to the current UAC discussion. However, this detail is almost universally ignored as it contravenes the narrative of sudden shock put forth by the government and the media alike.

Although Congress codified parts of the Flores Agreement as procedural directives in the Homeland Security Act of 2002 (HSA) and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), in reality, the agreement’s influence was limited.\textsuperscript{26}

While due process for and humane treatment of minors are imperative to their immediate wellbeing, the Flores Agreement was preoccupied with the mechanics of detaining minors at the expense of consideration for the children’s long-term outcomes, which are determined by substantive U.S. immigration law. Unfortunately, the Flores Agreement unofficially set the boundaries for the UAC conversation, and future legislative action on the issue has emulated this shortsighted approach.

\textsuperscript{21} Id. at 8.
\textsuperscript{22} Id. at 7.
\textsuperscript{23} Id. at 8.
\textsuperscript{24} Id. at 9.
\textsuperscript{25} This is based on the author’s personal experience and observation. The author worked for an ORR/Vera contracted legal service provider in the Chicago, Illinois region from 2012 to 2013, regularly visiting detention facilities to perform Know Your Rights presentations and legal screenings. She observed the growth during that time and the various release processes applied to the unaccompanied children. From 2013 to 2015, the author has worked for a different contracting service provider, and in addition to the services for detained children, has been providing direct services to those children released into long-term foster care programs. Her observations are drawn from these experiences.
Of the relevant legal and legislative authorities to tackle the unaccompanied immigrant child issue, the Homeland Security Act did the most to effectuate positive reform in the government's treatment of UACs by transferring the responsibility for their care and custody from the Department of Homeland Security (DHS) (which had assumed this responsibility from legacy INS) to ORR.27 Contrary to its responsibility to do so, DHS has never made the policy developed in adherence to the legislative directive accessible to the public. This lack of transparency and the minimal relevant legislation make it impossible to ascertain what the government's goal is with respect to the children in its care. It is unclear whether there even exists an objective beyond avoiding the flagrant violation of the UACs' basic human rights and preserving government resources as much as possible. The government is not meeting either goal particularly well.

Prior to the enactment of the HSA, legacy INS was charged with the apprehension and arrest of UACs, as well as with their care and custody. Not only did this arrangement create a clear conflict of interest by placing INS in the dual role of enforcer and caregiver, it entrusted the wellbeing of the UACs to a law enforcement agency ill-equipped to create and maintain environments adherent to child welfare standards.28

Since the passage of the HSA, ORR has been responsible for herding UACs through the initial stages of their bureaucratic journey. The HSA charged ORR with making various custody decisions with respect to all unaccompanied children—including preliminary placements within ORR care, as well as identifying and approving release-from-care options.29 The HSA instructed ORR to consider the "interests of the child" (notably, not the "best interests" of the child) in all actions relating to a UAC's care and custody.30 In addition to running and maintaining the detention facilities for UACs, the HSA made ORR responsible for compiling and publishing statistical information on UACs in federal custody, as well as on other government agencies' interactions with UACs, such as the Department of Justice (DOJ) and DHS.31 Finally, with respect to the UACs' legal needs, the HSA

31 6 U.S.C. §§ 279(b)(1)(F), (G), (J)-(L).
required only that ORR create and publish a list of legal service providers every year.\footnote{32}

\section*{C. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008}

Even the most recent legislation to address treatment of UACs failed to address the substantive shortcomings of immigration law in providing appropriate relief options to UACs in any meaningful way. The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 included several provisions relating generally to UACs, and specifically to their apprehension, care, and custody.\footnote{33} Some provisions aimed to codify mandates from the Flores Agreement, eleven years after its creation, while others presented new standards for the treatment of UACs. Whenever such new standards or other provisions of the TVPRA conflict with the terms of the Flores Agreement, ORR follows the TVPRA.\footnote{34}

Most of the TVPRA provisions relating to UACs were codified in Title 8 of the U.S. Code, Section 1232, including the special rules for treatment of children from contiguous countries.\footnote{35} The TVPRA established a new procedure for evaluating the individual needs of all Mexican and Canadian UACs in lieu of automatic repatriation.\footnote{36}

One TVPRA stipulation modifying a mandate from the Flores Agreement stated that within seventy-two hours of apprehension CBP or Immigration and Customs Enforcement (ICE) must transfer any child identified as a UAC to ORR custody.\footnote{37} Further echoing and actually improving upon the Flores Agreement, the TVPRA required that when such a transfer was made the child be “placed in the least restrictive setting that is in the best interest of the child.”\footnote{38} The TVPRA expanded on prior authorities’ directives by outlining reunification circumstances that trigger mandatory home studies, requiring UAC sponsors to attend legal orientation presentations, and establishing a system of appointing child advocates for certain at-risk UACs.\footnote{39}

Notably, the Flores Agreement does not mandate ORR to ensure that UACs are represented by legal counsel in removal proceedings.\footnote{40} Despite the fact that children are inherently less capable of advocating for themselves
than are adults, the children’s cases are adjudicated in an identical manner. Instead of rectifying this oversight, the TVPRA only requires that HHS ensure “to the greatest extent practicable . . . that all [UACs] that are or have been in [federal custody] have counsel to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking.” In effect, the TVPRA did little more than acknowledge the importance of securing legal counsel for UACs and point out the danger of their remaining unrepresented.

Finally, bearing in mind the unique vulnerabilities and disadvantages of UACs, the TVPRA clarified certain substantive elements of Special Immigrant Juvenile Status and modified the application and adjudication procedures of both SIJS and asylum, two immigration protections available to children. The modifications relating to asylum were codified by amending 8 U.S.C. § 1158, and those relating to SIJS were codified in part by amending 8 U.S.C. § 1101 and otherwise via 8 U.S.C. § 1232. These modifications, which will be described in Part III, were not intended to make these benefits easier for UACs to acquire; rather, they were enacted in order to acknowledge that children are distinct from adults and, in terms of procedure, should be treated as such. Prior to these reforms, immigration law ignored the unique circumstances inherent to being a child, by treating children as indistinguishable from adults. TVPRA forced immigration law to begin, albeit slowly and in only a limited, procedural sense, to catch up to all other areas of law that recognize this difference and handle juvenile cases accordingly.

II. CURRENT PROCEDURE: WHERE HAS THE FOCUS ON PROCEDURE GOTTEN US?

Considering the focus on form over substance that has consumed the UAC conversation to this point, one would expect the system to operate efficiently and effectively, with logical and predictable outcomes. Unfortunately, it has not played out this way. The government takes most apprehended UACs into custody, and places them with ORR. Though certainly preferable to prolonged detention in the border patrol stations where the children are held in cold, cramped cells and lack access to any specialized services, ORR care does not adequately address all of the children’s

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42 8 U.S.C. § 1232(c)(5).
43 Id. §§ 1158(a)(2)(E), 1158(b)(3)(C), 1101(a)(27)(J), 1232(d).
44 David B. Thronson, Entering the Mainstream: Making Children Matter in Immigration Law, 38 Fordham Urb. L.J. 393, 401 (2010); see also Bhabha & Schmidt, supra note 9, at 7 (quoting former immigration judge Joseph Vail: “children are the biggest void in immigration law.”).
45 Mexican and Canadian UACs are not automatically detained. The difference in their treatment is discussed below in Section II.A.1.
needs. Of course, ORR’s provision for the day-to-day requirements of the children (what they eat, where they sleep, and what education they receive) is important; still, these basic needs represent only one small piece of the puzzle.

Each UAC’s unique journey through the federal system is determined by a series of custody decisions made by U.S. government employees throughout the apprehension and detention process. These children are placed in the tremendously vulnerable position of being forced to navigate the system without the benefit of speaking English or the resources needed to meaningfully alter their situations. With the government as custodian, unaccompanied children effectively lack any adult representative to advocate for their wishes or best interests. Startlingly, post-detention outcomes in immigration courts or before the U.S. Citizenship and Immigration Services (USCIS) are frequently determined by these initial decisions.

A. Apprehension

When unauthorized immigrants are apprehended, the first priority of the apprehending agency is to establish the immigrants’ identities. The officials record the immigrants’ self-reported names and ages, and fingerprint them to determine whether they have any known criminal or immigration histories, and if not, to add them into the federal database. Few arriving immigrants carry any documentary proof of identity; CBP and ICE officers must make their own judgments as to the veracity of the purported ages.

Any individual who the agency believes to be under eighteen, and who is traveling without a parent, is classified as a UAC and is supposed to be immediately separated from the adult detainees. As stipulated in the Flores Agreement and later codified by the TVPRA, all UACs apprehended by a DHS agency (with the exception of children from bordering nations) are to be immediately referred to ORR, and subsequently transferred to its custody. Although the TVPRA now mandates that the transfer happen within seventy-two hours of the UAC determination, it is unclear to what extent the agencies adhere to this requirement. During the recent years of the “influx,”

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47 This is based on the author’s personal experience and observation.
48 This is based on the author’s personal experience and observation.
49 8 U.S.C. § 1232(b)(3) (2012). The TVPRA mandates this immediate transfer. “[e]xcept in the case of extraordinary circumstances.” The extent to which CBP and ICE adhered to this mandate in the past is unclear. What is clear is that in recent months, even years, CBP and ICE have not been able to transfer children within the mandated time period due to steadily increasing demand and static capacity. See Administrative Complaint Re: Systemic Abuse of Unaccompanied Immigrant Children by U.S. Customs and Border Protection from Ashley Huebner, Nat’l Immigrant Justice Ctr., to Megan H. Mack, Officer of Civil Rights & Civil Liberties, Dep’t of Homeland Sec., and John Roth, Inspector Gen., Dep’t of Homeland Sec. (June 11, 2014) (hereinafter Administrative Complaint) (on file with author) (reporting that 70 percent of the children interviewed were held beyond the mandated maximum 72 hours in CBP custody).
some UACs were detained for over two weeks in DHS holding cells. During the spring and summer of 2014, these periods of time almost certainly lengthened. This situation is of grave concern, considering the conditions the children must endure while awaiting placement. In the holding cells and ICE stations, the children are isolated and lack access to any services, let alone services specialized for children.

Of course, when making age estimations based solely on human judgment, mistakes are inevitable. Once in federal custody, it is ORR’s responsibility to verify the children’s ages. ORR-facility caseworkers are tasked with acquiring birth certificates for all UACs in order to confirm their ages. When birth certificates are unavailable, ORR is responsible for developing and administering procedures for determining its detainees’ ages. Subsequent transfers from ORR to adult facilities and vice versa are common after birth certificates or the results of bone density or dental exams prove that an individual is, in fact, an adult.

1. Children from Contiguous Nations

As has been true for the last decade, and probably decades before, the vast majority (around ninety percent) of unauthorized immigrants arriving to the United States are citizens of Mexico. For this reason, upon apprehension, CBP separates all immigrants into two categories: "Mexican" and "Other than Mexican" ("OTM"). The protocol for treatment of children from the two contiguous nations differs from that for non-Canadian OTMs. Although most years there are a handful of Canadian children apprehended entering the United States, the number (not exceeding twelve annually be-

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61 This is based on the author’s personal experience and observation.


tween 2008 and 2012) is inconsequential; the discussion of this issue accordingly focuses on Mexican UACs.\textsuperscript{56} DHS agencies not only classify arriving unaccompanied children from Mexico separately from OTMs, they process Mexican (and Canadian) UACs differently as well.\textsuperscript{57} This practice is particularly relevant considering the legislative reforms proposed during the summer of 2014 intended to address the UAC "crisis."

Until 2008, every unaccompanied child arriving from Mexico or Canada who was apprehended by DHS was automatically repatriated, regardless of the individual’s circumstances.\textsuperscript{58} Generally speaking, contiguous repatriation required no purchase of plane tickets, and due to the proximity, the U.S. government officials could easily work with the neighboring governments’ officials to ensure that the children were returned to safe situations.\textsuperscript{59} Additionally, the volume of arriving Mexican UACs would have single-handedly overwhelmed the system in place for housing and processing unaccompanied minors.

This expedited repatriation of children was always an issue of contention with immigration advocates who were concerned that the children may be returned home to dangerous conditions, only to be trafficked or otherwise harmed once again.\textsuperscript{60} However, after 2008, the TVPRA mandated that DHS present all children from contiguous countries with the choice of a hearing before an immigration judge or voluntary withdrawal of their applications for admission to the country and swift repatriation.\textsuperscript{61} Post-TVPRA, if children opt for voluntary return, DHS officials must first interview them to ensure that they are not victims of trafficking, that they will not face persecution should they be returned to Canada or Mexico, and that they are mentally capable of making the decision to return.\textsuperscript{62} If not, the children may not be returned and are treated identically to non-Canadian OTM children.\textsuperscript{63}

\[\textsuperscript{56} \text{Unaccompanied Children (Age 0-17). supra note 6.}\]
\[\textsuperscript{57} \text{The number of Canadian citizens apprehended each year is insignificant. Canadians constitute about 0.1 percent of total apprehensions. Sapp, supra note 54.}\]
\[\textsuperscript{59} \text{See U.S. DEP’T OF HOMELAND SEC., supra note 58.}\]
\[\textsuperscript{60} \text{See, e.g., CAVENDISH & CORTAZAR, supra note 53, at 10.}\]
\[\textsuperscript{62} \text{Id. § 1232(a)(2)(A); see CAVENDISH & CORTAZAR, supra note 53, at 1.}\]
\[\textsuperscript{63} 8 U.S.C. § 1232(a)(2)(A).}\]
the interviews reveal mental capacity and uncover no trafficking, fear, or threat, DHS works with the foreign consulates to safely return the children.64

B. Detention

From the border stations and holding cells, all minors are sent to detention facilities located broadly across the United States that house only juveniles and are maintained and operated by ORR. The ORR UAC Program Operations Manual, revised in March 2013, states that ORR funds only forty-five care providers in thirteen states; however, this statistic is stale and does not account for the many state-run foster care facilities that transitionally house UACs.65 Many new centers opened in response to the increased number of UACs in the past few years, and while the exact number and location of facilities is confidential, a more recent estimation is that in 2013 there were a total of five thousand beds available for UACs in licensed ORR sites.66 At this capacity, ORR was equipped to process 25,000 UACs through custody annually, though ORR correctly predicted a need for twice that amount in 2014.67

During the second half of FY2014, however, this number likely jumped again in order to accommodate the increase. With new facilities popping up across the country, it is impossible to accurately estimate how many facilities will exist at the time of this article’s publication or even how many exist currently. Although many of these facilities are located near large ports of entry in Texas, Arizona, and California, juvenile immigration detention facilities are spread widely throughout the nation.68 For example, Chicago, Illinois hosts nine such centers, five of which opened after May 2012,69 including one facility with capacity to hold up to two hundred and fifty children, more than the four preexisting Chicago centers combined.70

As mentioned above, the 2014 “surge” was far from the beginning of this challenge; the 2011–2012 increase in arriving UACs entirely overwhelmed ORR’s capacity, which forced ORR to create emergency shelters in which to hold immigrant youth. Many children were detained in gymnasiums and other warehouse-like structures while they awaited vacancies in ORR facilities.71 At these “surge” shelters, the children were systematically denied access to legal screenings and Know Your Rights (KYR) presenta-

64 Id. § 1232(a)(2)(C).
65 Office of Refugee Resettlement, supra note 34, at 5.
66 UTEP UAC Project, supra note 10, at 16. Information regarding the actual number and locations of ORR facilities is confidential.
67 Id.
69 This is based on the author's personal experience and observation.
70 This is based on the author's personal experience and observation.
The government placed hundreds of children at Lackland Air Force Base in San Antonio, Texas.\(^7\) At one point in the spring of 2012, ORR held over three hundred and fifty children at the base, where “uniformed local law enforcement officers guarded the facility.”\(^7\) The conditions in these and other ad hoc shelters were in clear violation of the terms of the Flores Agreement and relevant legislation. Although the Flores Agreement contemplated the possibility of an “influx,” it exempted the government only from adhering to the seventy-two hour transfer mandate, not the requirements ensuring respect for the children’s basic human rights.\(^7\) Yet, during the “surge,” the government was doing all it could within its financial restraints and still failing to meet its burden with respect to the basic living conditions, access to legal and social services, and of course, the constantly reiterated mandate regarding placing children in the least restrictive setting appropriate.\(^7\)

The 2014 “surge” (with over 67,000 children from Central America and Mexico alone apprehended between October 2013 and September 30, 2014\(^7\)) may seem shocking compared to the 24,481 children from all over the world who were apprehended in 2012, but this increase was not that surprising to those who have stayed abreast of the UAC flow.\(^7\) This time around, two other Department of Defense facilities, Fort Sill in Oklahoma and Naval Base Ventura County in California, joined Lackland Air Force Base as emergency detention centers for 7,700 UACs.\(^7\) Combined, these three facilities can hold 2,675 children at one time.\(^8\) And even with these massive centers at full capacity, on any given day in June 2014 there were as many as 3,500 children stuck on the border, awaiting placement in an ORR facility.\(^8\) While awaiting transfers, the children are provided with only food,

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\(^{73}\) Jones & Podkul, supra note 50, at 16; Fernandez, supra note 13.

\(^{74}\) Jones & Podkul, supra note 50, at 16.

\(^{75}\) Flores Agreement, supra note 3, at 8.

\(^{76}\) See, e.g., Martinez & Hurtado, supra note 72.

\(^{77}\) Southwest Border Unaccompanied Alien Children, supra note 1.

\(^{78}\) Unaccompanied Children (Age 0-17), supra note 6.


\(^{80}\) Preston, supra note 79; Number of Immigrant Minors at Fort Sill Tops 1,100, supra note 79.

\(^{81}\) This is based on the author’s personal experience and observation.
clothing, and a roof over their heads, leading many to observe that these facilities have essentially become prison camps for children.82

1. Levels of Care

The ORR shelter facilities range in levels of security and, to some degree, services offered. For example, some centers are intended exclusively for "tender-aged" children (children under thirteen) and pregnant and parenting teens, while others are designed specifically for children with behavioral problems and/or criminal records.

A common misapprehension regarding the children detained by ORR is that they are all criminals. Though all of these children are technically incarcerated in the juvenile detention centers, for a vast majority of the detained UACs, entering the country without permission is their only infraction. Those children with criminal records are generally apprehended internally after committing some criminal act, having lived in the United States clandestinely for several years.83 These apprehensions account for only five percent of total UAC apprehensions.84 The actual juvenile offenders are held separately for the safety of the other children.

The Flores Agreement established the need for facilities with varying levels of care, but did not delineate those care levels.85 As it currently stands, ORR’s categories of facilities include shelter care, staff-secure, secure, short- and long-term foster care, group home, therapeutic care, and residential treatment care,86 explained further below.

The Flores Agreement and the TVPRA require that ORR base detention center assignments not solely upon availability, but also upon the unique characteristics of each child. These authorities explicitly direct ORR to place each UAC in the least restrictive setting that is appropriate for the child.87 In reaching the “least restrictive setting” determination, ORR must consider whether a child poses a danger to self or others, and the presence or absence of a child’s criminal record;88 however, considering the many varieties of care available, these issues alone are not sufficiently instructive. Further-

83 UTEP UAC PROJECT, supra note 10, at 6.
84 Id.
85 Flores Agreement, supra note 3, at 13–14.
86 OFFICE OF REFUGEE RESettlement, supra note 34, at 5.
more, during the last several years, as expeditious transfer from the border facilities became the primary objective, such individualized placement determinations were regularly disregarded due to ORR’s limited capacity.89

The vast majority of arriving UACs are placed in shelter care. Offering no specialized services, it is the least restrictive care-level option, and is in essence the default placement.90 Notably, some shelter care facilities, representing the “least restrictive” care level, have perimeters secured by “no climb” fencing requiring either a key or internal permission for entry, as well as restricted entry and exit on all internal doors. It is due to such characteristics that even children in the “least restrictive” environment feel that they are prisoners, and that their detention is punitive rather than protective.

Staff-secure care provides one level of security greater than shelter care and is intended for children who are flight risks or who otherwise need more intense supervision.91 It is unclear what other characteristics a child must possess to merit an assignment to a staff-secure facility because such details are not defined by any legislation, the Flores Agreement, or even the ORR Policy Manual. However, the addendum to the ORR Initial Placement Referral Form indicates that gang affiliation (self-admitted or extrapolated from tattoos) could land a child in a staff-secure placement.92

The most restrictive placement option for a UAC is secure care. A secure care facility must have a “physically secure structure and staff able to control violent behavior.”93 Thus, secure centers more closely resemble and may actually be part of other state or federal juvenile detention facilities.94 Though still somewhat vague, the ORR Policy Manual does more to define which UACs are to be housed in secure care than any other level of care: those UACs who pose a danger to themselves and/or others, or who have been charged with (though not necessarily convicted of) committing a criminal offense.95 This description, used by ORR, was lifted directly from the TVPRA.96

After initial placement in an ORR facility, certain behaviors such as infighting, escape attempts, or suicidal ideations or expressions can cause children to be stepped up to higher levels of care.97 Similarly, good behavior while in custody can lead to a child being stepped down to a less restrictive care level.98

UAC placements in short-term foster care, long-term foster care, group homes, therapeutic care, and residential treatment centers are based on characteristics of the children, not necessarily relating to security needs. For ex-

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89 This is based on the author’s personal experience and observation.
90 Office of Refugee Resettlement, supra note 34, at 14.
91 Id.
92 UTEP UAC Project, supra note 10, at 7–8.
93 Office of Refugee Resettlement, supra note 34, at 13.
94 Id.
95 Id.
97 This is based on the author’s personal experience and observation.
98 This is based on the author’s personal experience and observation.
ample, a group home may be designated for males between the ages of fifteen and seventeen or for teen mothers.99 Therapeutic care is designed for children with exceptional medical, developmental, and/or psychiatric needs.100 Short-term foster care, also referred to as transitional foster care, is designated for tender-aged children (under thirteen years old), sibling groups that include at least one tender-aged child, pregnant and parenting teens, and children with special needs.101

Long-term foster care (LTFC) exists for UACs identified by legal services providers as eligible for immigration relief, and who are likely to remain in ORR custody for longer than average.102 Beyond relief eligibility, there is little guidance on what renders a child eligible for LTFC. This lack of clarity is most likely due to the fact that each foster care provider has its own criteria for accepting youth for admission.

While detained, the children are required to attend school, and begin the task of learning English. They are evaluated by social workers and examined by medical health professionals. Each child is assigned a case manager, who works toward achieving “family reunification.” This process involves contacting a child’s potential sponsors, relatives, or family friends both inside and outside of the United States, gathering information from said sponsors, facilitating home studies where necessary to determine the viability of the sponsorship, and finally, assisting in the travel and actual reunification arrangements.

A report prepared by the Vera Institute of Justice (Vera) in 2012 stated that between 2008 and 2010 UACs, on average, spent sixty-one days in immigration detention.103 In 2011, this number had risen to seventy-two days.104 However, this statistic changed drastically over the next few years as the need for expeditious processing emerged while the system was flooded by arriving minors. As of May 2014, the average length of stay had decreased to thirty-five days.105 Advocates speculate that one reason why the lengths of stay have decreased is that ORR loosened the eligibility requirements for sponsorship in order to move UACs in and out of custody rapidly, opening up beds for the next wave of kids.

99 Office of Refugee Resettlement, supra note 34, at 12.
100 Id. at 14.
101 Id. at 12–13.
102 Id. at 12–13.
104 UTEP UAC Project, supra note 10, at 16.
2. Immigration Court Proceedings

As children’s reunification cases progress, so do their removal cases in immigration court. There is no government-mandated respite from legal proceedings while the children’s care and placement are addressed. When children are initially apprehended and identified as UACs, ICE simultaneously initiates removal proceedings against them by serving each of them with a Notice to Appear (NTA) in immigration court. These removal proceedings move forward even while the children remain in detention. Thus, attorneys and paralegals not employed by, though often indirectly funded by, the government come to the detention centers to provide the children with limited legal services and later accompany the children to immigration court.

The filing of NTAs with immigration courts when the children initially enter detention leads to a host of logistical problems including wasting the resources of the already over-burdened courts and undermining UACs’ rights to due process. Even before the “surge,” the constant movement of children between shelters, to long-term foster care, and/or to sponsors created significant confusion in immigration courts. Children were expected to attend hearings in their initial shelter jurisdictions, even after they had been released to sponsors or transferred to new shelters or programs in different jurisdictions. The ICE attorneys\(^{106}\) were required to file motions to change venue for the children as they were moved, but the lack of communication between the multiple government players and the speed and frequency at which transfers occurred made it extremely difficult for the government to keep abreast of the children’s whereabouts. Even if motions were timely filed, they would often sit dormant for weeks awaiting review and approval by immigration judges. This confusion resulted in many children, through no fault of their own, missing their hearings, which would normally result in the issuance of removal orders against them after an in absentia hearing (a hearing conducted when a respondent fails to appear and where the judge feels satisfied the respondent was appropriately notified).\(^{107}\) In order to prevent this result, counsel or other advocates for the child respondents would be required to explain the situation in court, serving as the middle-man between ORR and the courts (both U.S. government agencies), wasting their own time and that of the already over-burdened immigration judges and government attorneys.

In 2014, with the tremendous number of children moving through the system and the loosened requirements for release from detention, the task of changing venue for each child proved to be altogether impossible. In light of this fact, in Spring 2014, DHS agreed to delay the filing of NTAs with the immigration courts (although they continue to serve the children with NTAs immediately upon placement in ORR custody) until sixty days after UACs’

\(^{106}\) In immigration court, the government is always represented by counsel, referred to as ICE or trial attorneys.

\(^{107}\) 8 CFR § 1003.26 (2014).
initial ORR placements or until they are reunified, whichever occurs first.\textsuperscript{108} Because the average length of stay in detention has decreased to thirty-five days,\textsuperscript{109} this simple and logical policy adjustment hopes to prevent bureaucratic confusion for a large majority of the children—not to mention the unnecessary trauma avoided by allowing the children to wait to appear in court until they are safely reunited with sponsors. The delay in filing saves time and resources, not just of the DHS officials charged with filing the NTAs, but also the immigration judges and court staff, the ICE attorneys responsible for submitting the change of venue motions, the detention center staff, and, finally, the legal service providers, who will only infrequently be required to appear in court with the detained children.

Currently, these legal service agencies are contracted by the Vera Institute of Justice as part of its Unaccompanied Children Program (primarily funded by the federal government) to go into the centers to apprise the UACs of their rights and responsibilities in this country, as well as the reason for their detention. These “Know Your Rights” presentations are generally given to large groups of children with the stated goal that each child receives a presentation within two weeks of detention.\textsuperscript{110} After the presentations, members of the legal teams must meet individually with each child to conduct a legal relief assessment. With exceptions in certain jurisdictions, no attorney-client relationships result from these arrangements. Rather, the purpose of these screenings is to enable the legal service-providing agencies to complete referrals for the children to attorneys in their destination jurisdictions. Although the Vera contractors attempt to refer all relief-eligible children to attorneys once they are released from detention, many factors intervene leaving a majority of immigrant juveniles unrepresented in immigration court.\textsuperscript{111}

\subsection*{C. Release from Custody}

Except for children who turn eighteen while in custody, each child’s release from detention depends upon the combined status of that child’s family reunification and legal cases. Those children who reach age eighteen while in custody “age-out” of the juvenile shelters, at which point, they are either transferred to adult detention or are released on their own recognizance.\textsuperscript{112} These children’s fates depend upon their individual criminal histories and ICE’s practice in each jurisdiction. Former UACs with criminal

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\item \textsuperscript{108} This is based on the author’s personal experience and observation.
\item \textsuperscript{109} \textit{Children in Danger}, supra note 105; \textit{Vera Flow Report}, supra note 103, at 17.
\item \textsuperscript{110} \textit{Office of Refugee Resettlement}, supra note 34.
\item \textsuperscript{111} Fifty-seven percent of the juveniles appearing in immigration court proceedings appeared without an attorney or representative. \textit{See Juveniles – Immigration Court Deportation Proceedings, Court Data Through June 2014}, TRAC IMMIGRATION [hereinafter TRAC IMMIGRATION], http://trac.syr.edu/phptools/immigration/juvenile/, archived at http://perma.cc/M42S-KS99.
\item \textsuperscript{112} This is based on the author’s personal experience and observation.
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records are almost assuredly maintained in custody, regardless of jurisdiction. Those children who remain minors throughout their detention have three release options. Children who have willing, viable sponsors within the United States will most likely be released to them. For children without sponsors, eligibility for immigration relief dictates their release outcomes.

Children may be sponsored by parents, aunts, uncles, adult siblings, or any relative; however, no blood relation is required for sponsorship and children may be released to non-relatives—sometimes family friends, friends of friends, or individuals with even more tenuous or no connections whatsoever to the children. Notably, these individuals need not be in valid immigration status in order to be approved as sponsors. Although not memorialized officially in any policy or memorandum, it is not ORR’s practice to share information about potential sponsors with ICE, so that ICE may seek out and apprehend those sponsors who are themselves unauthorized immigrants. Still, the fact that individuals must submit to fingerprinting, and reveal their locations and much other personal information to the government in order to be approved as sponsors, can be a significant deterrent to sponsorship for unauthorized immigrants.

An additional deterrent to sponsorship is the expectation that sponsors attend an information session (Legal Orientation Program, hereinafter “LOP”) about immigration court before a child can be released into their custody. Although the LOP is intended to be a prerequisite for sponsorship, ORR does not require that a sponsor actually attend such a program prior to a child’s release, only that the sponsor agree to do so in the future, if such a program exists in the sponsor’s location. Although the sponsors commit to ensuring that the UACs appear in court, once out of custody, no entity is responsible for tracking down the sponsors or children if they fail to do so. If a child misses a hearing, the judge simply issues an in absentia removal order, and if that child is ever apprehended in the future, the removal order will be executed and the individual will be removed.

Despite the understandable trepidation unauthorized sponsors feel about getting near an immigration court, recent data shows that seventy-seven percent of UACs actually do attend their removal hearings after being released from ORR shelter care. This data disproves the claim made by advocates of more harsh immigration policies for UACs that ninety percent of the children skip their hearings. Still, this is a figure that must be improved upon.

115 Sponsor Care Agreement, supra note 114.
116 TRAC Immigration, supra note 111.
Live LOPs are available only in ten states and the District of Columbia. 118 During these orientations, legal service providers explain that sponsorship will not generally expose unauthorized immigrants to more danger of detection by ICE, and that no ICE enforcement officers will be present in immigration court. 119 The LOP as it exists now is an excellent start; however, the limited availability of the orientations, combined with the fact that there is no check in place to ensure that custodians attend such sessions, and the understandable skepticism of potential sponsors, seriously hinders the efficacy of the program. Thus, reform of the program is needed.

Release to family members, friends, or others may occur whether or not the children qualify for immigration relief. Children’s eligibility for immigration benefits becomes relevant to their release options only when they have no viable sponsors. If children qualify for immigration benefits, for example, asylum, yet have no viable sponsors to whom they may be released, those children are placed on a waiting list for one of few federally funded foster care beds. 120 In reality, those children may wait many months, sometimes as long as a year, in detention for beds to open in foster care. 121 This delay can result in children “aging-out” of relief eligibility while they wait to be transferred. 122

For UACs with no viable sponsors and no available immigration relief, there is only one option, and it is not a desirable one: repatriation. Instead of being removed, most UACs in this situation qualify for “voluntary departure.” Voluntary departure is an alternative to removal available to certain immigrants who lack other relief options, who have no or only a minimal criminal history, and who can demonstrate that they have the means to travel back to their home countries. 123 However, in the case of detained unaccompanied children, the government pays for the children to be safely returned to their countries of origin. If a child has an extensive criminal record or gang affiliation, judges will likely opt to remove that child rather than grant him or her voluntary departure, a discretionary form of relief. Voluntary departure is viewed as a benefit because, unlike removal, it does not, on its own, trigger the various bars to reentry. 124

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120 This is based on the author’s personal experience and observation.
121 This is based on the author’s personal experience and observation.
122 This is based on the author’s personal experience and observation.
The challenges presented by the presence, maintenance, and detention of UACs are not novel; the U.S. government has been struggling to create a satisfactory procedure for their care and custody and a legal framework under which they can be evaluated for decades, well before the number of children became so overwhelming. Considering this fact, the dearth of legislation, regulations, and guidance issued on the subject thus far is shocking.

III. INADEQUATE AND ILL-FITTING IMMIGRATION PROTECTIONS AVAILABLE TO CHILDREN

U.S. immigration law and procedure has been alarmingly slow to acknowledge the differences between adult and child immigrants, or to apply and reform the law with those differences in mind. Substantively speaking, children are held to the same standards as adults in building and presenting their cases for those forms of relief available to them.\textsuperscript{125}

In keeping with the theme of the government exclusively adjusting child-related procedure, while ignoring substance, the DOJ issued discretionary guidelines on the treatment of UACs in immigration court in 2007.\textsuperscript{126} The Operating Policies and Procedures Memorandum addressed the negative effects the adversarial nature and formality of court proceedings have on children, and encouraged judges presiding over juvenile cases to alter the courtroom setting in order to increase the children’s potential comfort levels.\textsuperscript{127} While this aspiration is admirable, children would most likely not particularly care whether they are ordered removed by judges in robes versus suits, or while they are sitting propped up on a pillow or playing with a toy.

These superficial modifications, while well-meaning, pale in comparison to the genuine problems of children being unrepresented in court and lacking any adequate and fitting relief options to begin with. Judges in civilian clothing may seem friendlier, but they cannot step in and advocate for the children against the government, which is always represented by counsel, nor can they create well-designed immigration remedies out of thin air.

Some relatively recent legislative reform and other changes have started the ball rolling for child immigrants, but as the body of law exists now, there are only two immigration remedies designed to benefit children specifically, and only one of these remedies, Special Immigrant Juvenile Status, potentially applies to a significant faction of children entering as part of the “influx.” The original Deferred Action for Childhood Arrivals Program (DACA), discussed below, and the expanded DACA Program alike, though designed to benefit immigrants who came into the country as children, have residency requirements that automatically preclude recent entrants from eli-
gibility.\textsuperscript{128} Considering all factors, there are only a handful of remedies for which arriving UACs are realistically eligible, though none of them was developed with this population in mind.

A. Asylum

Asylum is a form of relief available to certain noncitizens present in the United States who cannot return to their country of origin because they have suffered past persecution or they have a well-founded fear of persecution should they be forced to return.\textsuperscript{129} This persecution must at least in part be motivated by or "on account of" one of the five following protected grounds: race, religion, nationality, membership in a particular social group, and political opinion.\textsuperscript{130} Additionally, the foreign government must be either complicit in the persecution or unable or unwilling to protect the applicant from the persecution.\textsuperscript{131} Should applicants prove all of these facts, they may be granted asylee status (asylum is a discretionary rather than mandatory form of relief), which can lead to legal permanent resident status and ultimately citizenship.

Asylum is available to immigrants regardless of age and, substantively the law of asylum applies identically to children as it does to adults. Procedurally, the government does differentiate, albeit minimally, between adults and children, and further between accompanied and unaccompanied minors. According to the Asylum Officer Basic Training Course materials, officers

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\textsuperscript{128} Memorandum from Janet Napolitano, Sec'y of Homeland Sec., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), \textit{available at} http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf, \textit{archived at} http://perma.cc/GN9N-A9FD; see also Memorandum from Jeh Charles Johnson, Sec'y of Homeland Sec., Exercising Prosecutorial Discretion with Respect to Certain Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014), \textit{available at} http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf, \textit{archived at} http://perma.cc/4SSS-559F. Neither the DACA nor Deferred Action for Parents of Americans and Legal Permanent Residents (DAPA) Programs address the needs of the children who are the subject of this article. The most recent memorandum regarding the exercise of prosecutorial discretion is not helpful either. In fact, it continues to include those immigrants caught at the border attempting to enter the United States as part of the highest enforcement priority. See Memorandum from Jeh Charles Johnson, Sec'y of Homeland Sec., Policy for the Apprehension, Detention and Removal of Undocumented Immigrants (Nov. 20, 2014), \textit{available at} http://www.dhs.gov/sites/default/files/publications/14_1120_memoProsecutorialDiscretion.pdf, \textit{archived at} http://perma.cc/YRE7-KNX2.

\textsuperscript{129} 8 U.S.C. § 1101(a)(42)(A) (2012) ("The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.").

\textsuperscript{130} \textit{Id.}

\textsuperscript{131} \textit{Id.}
\end{footnotesize}
are instructed to conduct specialized interviews for all child applicants.\textsuperscript{132} Several of the specific instructions echo the superficial suggestions made to immigration court judges presiding over juvenile cases. For example, officers are encouraged to avoid the use of legal jargon, to use a lighter tone during interviews, and to build rapport with the applicants by discussing topics like pets and hobbies.\textsuperscript{133} Although intended to make a child applicant more comfortable, such tactics can actually backfire, either by lulling the child into a false sense of security, or by disorienting the child, who may be aware of the true purpose of the interview and wonder why he or she is being asked about playing soccer.

More usefully, the Guidelines acknowledge that juveniles process information differently than do adults, and that their memories may be less effective, particularly when corrupted by trauma or persecution.\textsuperscript{134} Building off of that idea, and getting as close to a substantive differentiation as asylum law gets, the Guidelines and case law instruct evaluators to recognize that less harm, actual or feared, can rise to the level of persecution when dealing with child, rather than adult, victims.\textsuperscript{135}

Since the passage of TVPRA in 2008, UAC asylum seekers are processed somewhat distinctly than are adults or accompanied children. For example, the one-year filing deadline no longer applies to UACs; unlike adults who must submit their claims within one year of entry into the United States, UACs may apply for asylum at any point during which they are still classified as UACs.\textsuperscript{136} Additionally, whereas adults in removal proceedings may only apply for asylum defensively, UACs may present their cases affirmatively at the asylum office level, despite the fact that proceedings have been initiated against them.\textsuperscript{137} In effect, UACs have two chances to prove the merits of their claims when adult applicants would only have one.

Because these policy changes apply only to children who are classified as UACs and expand the opportunities for UACs to present their claims, the question of when and how a child loses that status has become contentious. As explained above, to be UACs, children must be under eighteen years of age and must not have a parent or legal guardian present in the United States who is able to care for them.\textsuperscript{138} ORR only detains children if they qualify as UACs upon apprehension; however, this determination is made prior to actually knowing whether the children at issue have parents present in the United States.


\textsuperscript{133} Id. at 21–23.
\textsuperscript{134} Id. at 31–35.

\textsuperscript{135} Id. at 37; see also Ordonez-Quino v. Holder, 760 F.3d 80 (1st Cir. 2014); Hernandez-Ortiz v. Gonzales, 496 F.3d 1042 (9th Cir. 2007); Jorge-Tzoc v. Gonzales, 435 F.3d 146, 150 (2d Cir. 2006).


\textsuperscript{137} Id. § 1158(b)(3)(C).

States who are viable caregivers. These children remain UACs during their stay in federal custody, despite the fact that one or both of the children’s parents may reside in the United States and be willing and able to care for them.\(^{139}\)

Children may be able to apply for asylum during their detention, usually with the help of counsel sent to the detention centers to inform them of their rights and perform legal screenings. Although efforts have been made to expedite the adjudication of UAC asylum applications, many children who apply from detention are reunited with parents or other sponsors while their applications are pending. In recent years, many asylum offices argued that once children are reunited with parents or guardians, they no longer qualify as UACs and that, because they are generally subject to removal proceedings, their cases should automatically be bumped back into immigration court. Immigrant advocates, alternatively, argued that the UAC determination at the time of filing was enough to keep a child’s case before the asylum office, regardless of the success or failure of reunification efforts.

Finally, after five years of arguing back and forth, and different jurisdictions subscribing to different rules, USCIS released guidance on the issue.\(^{140}\) According to the May 28, 2013 memorandum from the acting chief of the asylum division, USCIS is instructed to follow the interpretation championed by the advocate community.\(^{141}\) If CBP or ICE classifies a child as a UAC and that classification remains in place when the asylum application is filed, USCIS may not question the applicant’s right to an affirmative hearing before an asylum officer.\(^{142}\) Children maintain their UAC status for the duration of the asylum process unless there is “an affirmative act by HHS, CBP or ICE to terminate the UAC finding before the applicant filed the initial application for asylum.”\(^{143}\) Characteristic of government-issued guidance, the memorandum neither defines “affirmative act,” nor does it provide much instruction as to what qualifies as such an act; however, language in the memo makes clear that neither reunification with one or both parents, nor the attainment of eighteen years of age will invalidate the initial determination.\(^{144}\)

Such procedural adjustments are helpful in allowing more children to access the asylum system and to present their cases more comfortably, but in all but a few cases wherein comfort level actually contributes to presenting a credible claim, these adjustments do not meaningfully increase the utility of

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\(^{140}\) Id.

\(^{141}\) Id. at 2.

\(^{142}\) Id.

\(^{143}\) Id. (emphasis added).

\(^{144}\) Id.
asylum for this population. Children, like adults, must present coherent claims that fit them into the refugee framework. Considering the complexity of this framework and the difficulties even trained attorneys have in formulating such cases, it is unreasonable to expect a child to be capable of doing so.

Advocates argue that many of the circumstances uniquely faced by children should provide bases for valid asylum claims based on membership in a particular social group, for example, status as street children, vulnerability to domestic violence, targeting by gangs, etc.\textsuperscript{145} However, such arguments are not well accepted by adjudicators who cite "floodgates" concerns or lack of particularity and social visibility as reasons for denials.\textsuperscript{146} Unless and until the UACs fleeing persecution by the gangs, cartels, and smugglers are deemed to satisfy the refugee definition and to be deserving of international protection, asylum relief will continue to evade most UAC applicants. In the meantime, the form of relief most commonly applicable to this population is Special Immigrant Juvenile Status.

\textbf{B. Special Immigrant Juvenile Status}

Special Immigrant Juvenile Status is a unique form of immigration relief in that it creates the only pathway to citizenship that is designed exclusively for children. For all other forms of immigration relief, although there may be special procedures for children, immigrants of all ages may qualify. Though not designed for arriving children like the majority of UACs taken into federal custody in the last several years, UAC advocates have been more and more successful in helping their clients acquire SIJS.

Congress passed the SIJS provisions of the Immigration Act of 1990 specifically to address the needs of unauthorized immigrant youth who were already residing in the United States, and who, for one reason or another, had become involved with state foster care systems.\textsuperscript{147} In 2008, TVPRA clarified certain SIJS eligibility requirements, in effect making UAC advocates’ jobs slightly easier in seeking this benefit for their clients.\textsuperscript{148}

In order to qualify as a Special Immigrant Juvenile, a child must be unmarried and under twenty-one years of age.\textsuperscript{149} Before submitting an application to USCIS, the child must first obtain an order from a state juvenile court in which the court finds: 1) that the child is dependent upon the court or a court-appointed entity; 2) that it is not in the child’s best interest to be returned to the child’s home country; and 3) that reunification with one or

\textsuperscript{146} Id. at 487.
\textsuperscript{149} 8 C.F.R. § 204.11(c) (2014).
both of the child’s parents is not viable due to abuse, neglect, abandonment, or a similar basis under State law.\textsuperscript{150} By requiring state courts to make certain findings with respect to the child’s best interest and dependency, the federal government recognized that USCIS lacks the specialized knowledge to make such determinations on its own.\textsuperscript{151}

Although the statute specifies that children need only be under the age of twenty-one to qualify for SIJS, in most states children age out of juvenile court jurisdiction at eighteen. While New York is one of a few states in which courts are willing to appoint guardians for consenting individuals up to twenty-one years of age,\textsuperscript{152} most states draw the line at eighteen, effectively rendering the age of eligibility for SIJS eighteen as well. Once children are awarded Special Immigrant Juvenile Status, they become immediately eligible to apply for legal permanent residence, which can ultimately lead to citizenship.

The amendments included in TVPRA clarified Special Immigrant Juvenile Status in several major ways. Before TVPRA, in order for children to be eligible for SIJS, the statute required not only that the court declare that the children were its dependents, by placing the children in the custody of a state agency or department, but also that the children qualified for long term foster care due to abuse, neglect, or abandonment.\textsuperscript{153} TVPRA added that the court could alternatively place the children in the custody of any “individual or entity,” rather than solely state agencies or departments. Although even prior to 2008, some children placed in the custody of family members or other individuals were considered eligible for SIJS, this TVPRA amendment, and the USCIS guidance memorandum issued to aid in its interpretation, greatly increased awareness of this option and encouraged attorneys to seek the necessary findings in guardianship, custody, paternity, as well as delinquency proceedings.\textsuperscript{154}

In addition, TVPRA eliminated the prior long-term foster care eligibility requirement and added the language clarifying that children who could not reunify with “I or both parents” due to “abuse, neglect, abandonment, or a similar basis found under State law” could qualify for SIJS.\textsuperscript{155} First, this

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\textsuperscript{152} N.Y. FAM. CT. ACT § 661 (McKinney 2011).
\end{flushright}
change explicitly allowed children who still have one non-negligent parent, either in the United States or in the home country, to potentially qualify for SIJS. Second, the inclusion of “a similar basis under State law” clarified the expansive reasons for dependency that could render a child eligible for SIJS. For example, children whose parent or parents are deceased, or whose families are loving and attentive, but simply incapable of sufficiently providing for or protecting the children, may qualify for SIJS.

C. T Nonimmigrant Status/T Visas

The final form of relief most relevant to UACs is T Nonimmigrant Status, available to victims of human trafficking. The T Visa was created in 2000 as a means to improve the ability of law enforcement agencies to investigate and prosecute human traffickers, by encouraging unauthorized immigrant victims (particularly vulnerable due to their lack of status in the United States) to come forward and report abuse in exchange for potential government protection.

In order to qualify for a T Visa, applicants must show that they were induced by means of force, fraud, or coercion to engage in commercialized sex, slave labor, or another similar activity. Additionally, applicants must be present in the United States on account of the trafficking and willing to reasonably comply with law enforcement requests for assistance. Finally, T Visa recipients must prove that they would suffer extreme hardship should they be removed from the United States.

Similar to asylum, the evidentiary burden for the T Visa is challenging to meet, even for adults with representation. Yet, again like asylum, the only accommodation made for children applying for T Visas is procedural in nature. Unlike adult applicants, children under eighteen years of age who have suffered psychological or physical trauma are not compelled to cooperate with law enforcement requests for assistance.

This form of relief has always been germane to UACs who are vulnerable not only due to their lack of immigration status, but have the added vulnerabilities inherent to children (lack of agency, capacity, etc.). In recent years the T Visa has become more pertinent still, as gangs, drug cartels, and

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159 Victims of Human Trafficking: T Nonimmigrant Status, supra note 157.

160 Id.

161 Id.
human smugglers are increasingly targeting children for various forms of exploitation. UACs’ smaller stature, speed, naivety, and desperation make them prime candidates to serve as drug mules, sex slaves, and smugglers.

IV. Little to Lose

A. Detention Statistics

Statistics from the years immediately preceding the recent increase show that around greater than ninety-five percent of the children who entered via our southwestern border and were later detained by the U.S. government were of Central American and Mexican descent. Around seventy percent of the apprehended UACs were between the ages of fifteen and seventeen, and seventy-five percent of the apprehended children were male. However, data from 2012 and beyond shows that while the nationalities of the children remain somewhat constant, the latter two statistics are rapidly changing as tender-aged and female children increasingly embark upon the treacherous journey to the United States.

According to Vera, in 2009, the U.S. government placed 6,092 UACs into federal custody. In 2010 the number rose to 8,207, a thirty-five percent increase in one year. This figure steadily increased as more and more children were detained each year, and in FY2012, 13,625 children cycled through ORR custody. FY2012 marked a pivotal point in this migration

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163 VERA FLOW REPORT, supra note 103, at 15; OFFICE OF REFUGEE RESETTLEMENT, supra note 34, at 4 (stating that the “vast majority of UAC[s] are 15-17 years of age”).


165 About Unaccompanied Children’s Services, supra note 113. In 2012, the percentage of children under the age of fourteen was seventeen percent, while by 2014 it grew to twenty-seven percent. Similarly, in 2012 seventy-seven percent of the detained children were male, while by 2014 only sixty-six percent of the children were male. As Migration of Unaccompanied Minors Endures, supra note 164; Sonia Nazario, The Children of the Drug Wars: A Refugee Crisis, Not an Immigration Crisis, N.Y. TIMES, July 11, 2014, http://www.nytimes.com/2014/07/13/opinion/sunday/a-refugee-crisis-not-an-immigration-crisis.html?_r=1, archived at http://perma.cc/FV3V-RSZS.

166 VERA FLOW REPORT, supra note 103, at 10.

167 Id.

phenomenon and triggered the first use of the terms “surge” and “influx.”\textsuperscript{169} Notably, in FY2012, U.S. Customs and Border Protection recorded only a seven percent increase in overall apprehensions, while that same period showed a shocking fifty-two percent increase in apprehensions of UACs alone.\textsuperscript{170}

In FY2013, ORR assumed custody over an unprecedented 24,668 children, eighty-one percent more than the year prior.\textsuperscript{171} Detention statistics for 2014 show a one hundred and thirty-three percent increase, with 57,496 children referred to ORR custody. By June 2014, the terms “surge” and “influx” were popularly replaced with “crisis” and “exodus.” President Obama went so far as to name the state of affairs an “urgent humanitarian situation,” and to call in for reinforcement from FEMA and faith-based groups.\textsuperscript{172}

This summer’s migration trend continued and ORR took custody of almost 70,000 UACs in fiscal year 2014.\textsuperscript{173} This quantity represents more children than have been taken into custody in the United States in the prior three years combined.\textsuperscript{174} These apprehension statistics may seem shocking, but the increase can be partially explained by the fact that many children now enter hoping to be apprehended by CBP, whereas in prior years they lacked any incentive to be caught.\textsuperscript{175} It is clear that something is driving these children from their homes—the question is what.

**B. Motivating Factors**

The increased number of children entering the United States without adult supervision has prompted scholars to investigate the motivations inducing the children to embark on such perilous journeys. To begin the inquiry, we must first examine from which nations these children originate. Though the sheer numbers of UAC apprehensions have changed significantly over the past few years, the demographics have not necessarily followed suit.

\textsuperscript{169}Id. According to ORR’s figures, the surge began in October 2011. The trend has continued, picking up speed with each passing year.

\textsuperscript{170}Sector Profile - Fiscal Year 2011, supra note 162; Juvenile and Adult Apprehensions - Fiscal Year 2012 (Oct. 1st–Sept. 30th), in U.S. BORDER PATROL FISCAL YEAR 2012 STATISTICS, supra note 6. This disconnect remained true in June 2014. See Letter from the President, Efforts to Address the Humanitarian Situation in the Rio Grande Valley Areas of Our Nation’s Southwest Border (June 30, 2014), available at http://www.whitehouse.gov/the-press-office/2014/06/30/letter-president-efforts-address-humanitarian-situation-rio-grande-valle, archived at http://perma.cc/2AFG-HYZA (asserting that “overall apprehensions across our entire border have only slightly increased . . . and remain at near historic lows, we have seen a significant rise in apprehensions and processing of children and individuals from Central America”).

\textsuperscript{171}Id.; See Memorandum from the President for the Heads of Exec. Dep’ts and Agencies, supra note 8.

\textsuperscript{172}Id.; See Memorandum from the President for the Heads of Exec. Dep’ts and Agencies, supra note 8.

\textsuperscript{173}Southwest Border Unaccompanied Alien Children, supra note 1.

\textsuperscript{174}FACT SHEET (November 2014), supra note 168.

As noted above, the ages and genders of UACs are diversifying, as younger children and girls are increasingly tackling the dangers of the trip to the United States. However, the national makeup of the UAC population entering this country has stayed somewhat constant over the last six years\textsuperscript{176} The overwhelming majority (over ninety-seven percent) of detained UACs was and continues to be from Central America's "Northern Triangle" (El Salvador, Guatemala, and Honduras) and Mexico\textsuperscript{177} Some of the reasons for the escalation in numbers of arriving youth and the changes in demography are known, or can be logically extrapolated from research and conversations with the children themselves\textsuperscript{178}

A primary stimulus for the journey reported by these children is the widespread violence in their home countries\textsuperscript{179} The genuine and reasonable fear engendered by the Central American and Mexican gangs and drug cartels is causing children to flee north en masse\textsuperscript{180} It is common gang practice to begin harassing children at young ages, demanding money and threatening violence to the children and their families should they fail to pay. More disturbingly, the gangs and cartels begin recruiting children, particularly boys, for membership when they are still adolescents\textsuperscript{181} Given the staunch "you're either with us or against us" gang mentality, children are threatened, beaten, tortured, and sometimes even killed as a result of resisting recruitment\textsuperscript{182}

Law enforcement agencies in these countries cannot or will not protect the general population from the organized criminal groups. The police are often corrupt, accepting monetary or other bribes in exchange for lack of enforcement, and alternatively may even be the perpetrators of violence themselves, accusing innocent youth of gang involvement and beating them, or worse, as punishment\textsuperscript{183} The gangs and cartels may also pursue young girls for membership, but more frequently they target them for sexual exploitation or simply as victims of random violence\textsuperscript{184} Not unlike the resistant

\textsuperscript{176} Unaccompanied Children (Age 0-17), supra note 6; Vera Flow Report, supra note 103; see also Southwest Border Unaccompanied Alien Children, supra note 1.
\textsuperscript{177} U.N. High Comm'r for Refugees, Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection 6 (2014) [hereinafter Children on the Run].
\textsuperscript{178} Id.
\textsuperscript{179} Id.
\textsuperscript{180} Id.
\textsuperscript{181} Michael Daly, The Deported L.A. Gangs Behind this Border Kid Crisis, The Daily Beast (July 11, 2014), http://www.thedailybeast.com/articles/2014/07/11/the-deported-l-a-gangs-behind-this-border-kid-crisis.html, archived at http://perma.cc/W4SE-2KBM (remarking on the nickname "The Children's Army" given to the 18th Street Gang or MS-18 "because of its predilection for recruiting . . . kids still in elementary school").
\textsuperscript{182} Id.
\textsuperscript{184} Id.
boys, girls' refusals to acquiesce to gang demands also trigger violence, usually of a sexual nature.185

Organized criminal violence and other external dangers are not the only physical threats children of this region face. Twenty-one percent of the children interviewed by UNHCR reported running away from abuse and mistreatment committed in their own homes, by their parents or primary caregivers.186 Surrounded by violence, these children truly have no place left to turn.

Although flight from violence is probably the most publicized motivating factor, it is by no means the only impetus. The recent UNHCR report echoes the message from prior studies on the subject, stating that children's motivations for leaving home are multi-faceted and complex. The reports indicate that family reunification, poverty, and the hope of improved economic opportunity join rampant violence as some of the primary incentives prompting the youth to leave the Northern Triangle.187 Over twenty-five percent of the children included in the UNHCR report cited deprivation as a major motivation for leaving home.188

The Council on Hemispheric Affairs and others suggest that U.S. policies, unrelated to immigration, are the true root causes of the widespread poverty in Central America that has in part prompted children to flee the region.189 They argue that the U.S.-Central American Free Trade Agreement devastated the Central American economies when it gave near free reign to American agriculture corporations.190 They also cite the United States' lack of support of struggling Central American governments as a cause of the breakdown in those countries' economies.191 Still, comparing Nicaragua, a similarly poverty-stricken country, but one lacking in the gang culture or violent crime rate, to Guatemala, Honduras, and El Salvador, it is clear that poverty alone is not driving these children.192 Statistics show that between 2008 and 2012 immigration authorities never apprehended more than forty-five children of Nicaraguan citizenship each year, while in that same span authorities apprehended well over one thousand children from similarly-sized El Salvador each year, including over three thousand in 2012.193

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185 Id.
187 Id., supra note 178, at 7.
189 Id.
190 Id.
191 Id.
192 Id.
193 Id.; Jones & Podkul, supra note 183, at 2.
Irrespective of the heightened violence in Central America, some rise in the number of unaccompanied adolescents from that region is not surprising. During the first eleven years of the twenty-first century, the population of Central Americans in the United States grew by more than fifty percent. This represented the largest increase, by percentage, of foreign-born residents from any region of the world. In 2011, the median age of U.S. residents of Central American and Mexican descent was lower (thirty-eight years old for each) than those of foreign-born individuals from any other region. Many of the Central American migrants in the early 2000’s were likely young parents coming to this country hoping to better provide for their children. Around ten years later, these parents are naturally eager to reunite with their children.

Because immigration courts are backlogged to a new extreme (a phenomenon not solely caused by the increase in arriving UACs), many UACs who entered years ago are still waiting for their removal proceedings to be resolved. This dilatory effect created the illusion that UACs were released from detention with permits to live in the United States. Smugglers capitalized on this misperception by spreading rumors of an American amnesty for UACs. This misinformation may have caused those parents to send for their children and to encourage the children to seek out and surrender to law enforcement once they reached U.S. soil.

A common public misapprehension is that recent changes in immigration enforcement policies have caused or at least significantly contributed to the current influx. Some critics of the Obama administration point to the presidential executive action taken on June 15, 2012 (creating the DACA program), as incentivizing unauthorized immigrant parents living in the United States to send for their children. These same critics cite the June 2013 Senate passage of S. 744, a “comprehensive immigration reform” bill, as a stimulus for the “surge.” The bill included a version of the DREAM Act, which sets forth a process by which DACA recipients and other eligible youth could gain legal immigration status.
Statistics demonstrate that the “influx” cannot be due solely to these government actions, particularly administrative actions that do not convey legal status, are easily reversed by subsequent Presidential administrations, and are unlikely to result in actual reform. A pattern of steadily increasing numbers of UACs entering the country was already firmly established by a one hundred and forty-five percent upsurge in arrivals of UACs between 2008 and 2009 (from 8,041 to 19,668).\footnote{Unaccompanied Children (Age 0-17), supra note 6.} It was in 2011 or 2012 that the word “influx” was first used to describe the UAC situation. And the next significant rise in numbers was reported in fiscal year 2012 when CBP apprehended 24,481 UACs.\footnote{Id.} DACA could not have been the primary cause of the 2012 “surge” because CBP’s fiscal year spans October of the previous calendar year until September of the reported year, while the DACA Program was announced on June 15, 2012 and was not operational until August 15, 2012, nearly the end of the fiscal year.\footnote{Tom K. Wong, Statistical Analysis Shows that Violence, Not Deferred Action, is Behind the Surge of Unaccompanied Children Crossing the Border, CTR. FOR AM. PROGRESS (July 8, 2014), 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/, archived at http://perma.cc/J6F9-SR9P.} Furthermore, children who entered and continue to enter during this time are not now, nor will they ever be, eligible for the benefits bestowed by the DACA Program or those contemplated by S. 744 because these programs require applicants to show that they entered the United States before June 15, 2007 and December 31, 2011, respectively.\footnote{Memorandum from Janet Napolitano, supra note 128; S. 744, § 245B(b)(2). Under the newly expanded DACA Program, individuals who entered the United States after June 15, 2007 but before January 1, 2010 are also eligible for the benefit. However, this program was announced by President Obama on November 20, 2014, and thus could not have played any role in the increased arrivals of unaccompanied minors during the summer of 2014.}

Further evidence that contravenes the claim that U.S. immigration reform is driving the surge can be found in the numbers of asylum seekers in other, less violent Central American countries. Between 2008 and 2013, the same years during which the U.S. had received increased quantities of immigrants fleeing their Northern Triangle homes, the number of asylum applications in more stable Central American countries from citizens of Northern Triangle states increased by an astonishing 712 percent.\footnote{Robles, supra note 183, at 5.} This figure demonstrates that rather than running toward the United States, these individuals are running away from their home countries.

Interviews with individual children did show that some of their parents became aware that the requirements for sponsorship had been loosened in order to accommodate the great number of children overwhelming the system.\footnote{Children in Danger, supra note 105, at 6.} Given that this loosening of demands shortens the children’s stay in detention, parents are perhaps more willing to send or send for their chil-
children, and at increasingly younger ages. Still, this belief alone could not have caused an “influx” of this magnitude.

Although the limited research conducted thus far has significantly informed advocates, researchers, and scholars about the complex and varied motivations of the arriving UACs, more knowledge is necessary to effectively address the problem. The U.S. government should employ diverse tactics, including integrating various efforts to stem the flow of children from the source nations. In a letter to Speaker of the House John Boehner, President Obama delineated some of these efforts, including launching media campaigns in the sending countries designed to deter children from embarking on the journey north, as well as assisting those governments in controlling both their citizens and their borders.\textsuperscript{209}

Other organizations have called for aid to the Northern Triangle and Mexico to improve their child welfare programs and to provide children with the option to find at home the same kind of opportunity they seek in the United States.\textsuperscript{210} Still, none of these proposals provides a quick fix to the crisis at hand, and the children continue to arrive. For the children who are here now or are already on the way, there must be a system in place both for processing and caring for the children while in custody, and also for providing them with the immigration relief they need here in the United States in order to prevent their return to perilous situations.

\section{Custody Decisions}

\subsection{Initial Custody Decision – Apprehension: Do you stay or do you go?}

The first custody decision made for unaccompanied children apprehended in the United States occurs almost immediately when they encounter CBP or ICE, and is primarily based on the child’s nationality. As discussed above, a vast majority of the tens of thousands of children from Mexico, and the few children arriving from Canada, are swiftly repatriated to their respective countries. Only children who affirmatively request a hearing before a judge and those who indicate fear of return based on serious threats or trafficking victimization are allowed (or compelled) to stay in the country in federal custody. Non-Canadian OTMs, on the other hand, are automatically transferred to ICE holding facilities to await their next placements, regardless of their wishes and individual circumstances.

There is little publicly available guidance regarding the procedure for interviewing the children from contiguous nations and subsequently making determinations regarding the severity of their fears, their levels of credibil-


\textsuperscript{210} \textit{Children in Danger}, supra note 105, at 8.
ity, and their mental capacities. The DHS officers who perform the interviews and make these decisions are not child welfare specialists, trained to deal with children and to identify what actions may be in their best interests. Rather, they are CBP and ICE officers, trained first and foremost to be enforcers and to protect this country’s borders and interior against unlawful entries and the presence of unauthorized immigrants. It is wholly improper for such individuals to be evaluating these children and deciding whether certain UACs may enter federal custody and potentially be granted permanent protection by the U.S. government or whether they will be forced to return to their home countries to face serious threats, violence, or even death.

Interviewing children is not a simple endeavor. At these ages, children’s minds have not yet fully developed, and therefore their perspectives, priorities, and goals are often quite different from those of adults. The government cannot ignore these differences. Repatriation interviews should be conducted by individuals educated in adolescent development and trained to solicit the information needed to make this initial custodial decision. Moving beyond simple communication, it is imperative to understand children’s motivations and goals, as well as how those goals may affect the manner in which they respond to questions.

The addition of the fear interview mandated by the TVPRA is an important step toward increasing protections for this vulnerable population; however, it does not constitute complete protection and is far from failsafe. This procedure is particularly troubling in light of the fact that Mexican youth are susceptible to a danger unique from those faced by the OTMs. According to the UNHCR study “Children on the Run,” a new trend has emerged with respect to Mexican adolescents, who are increasingly becoming involved in the human smuggling trade. Out of a group of one hundred and two Mexican children apprehended by immigration officials, thirty-nine (about thirty-eight percent) reported that they were recruited into the human smuggling trade.

Children are highly attractive to the smugglers, not only because they are smaller and often less risk averse than adults, but also because of the distinct treatment Mexican children receive from the U.S. government. They are likely to be immediately returned to Mexico, rather than being detained, allowing them to expeditiously reconvene with the smugglers and begin the process all over again. Some children join the trade willingly, knowing they can make more money smuggling than doing virtually any other work available to them, while others are coerced or forced into partici-

211 See, e.g., CAVENDISH & CORTAZAR, supra note 53, at 7.
212 Ellmann et al., Interviewing and Counseling Atypical Clients, in LAWYERS AND CLIENTS: CRITICAL ISSUES IN INTERVIEWING AND COUNSELING (2010).
213 CHILDREN ON THE RUN, supra note 178, at 38.
214 Id.
215 Id.
This group of children, therefore, may not want or feel able to leave their smuggling jobs. They may become financially dependent on the work or face threats of extreme consequences should they attempt to quit or escape. Like child victims of human trafficking, children recruited as smugglers may be coached or otherwise motivated to respond to CBP’s questioning in a way intended to evade detention and allow them to return to work as quickly as possible.

Again, there is no publicly available policy to consult, but apparently the decision to repatriate or detain a child is one made by a CBP officer who conducts one interview with the child, often in the open area of a holding facility for all other officers and detainees to hear. Troublingly, no formal or informal review process exists for these hasty decisions. Continuing in accordance with current standards, untrained CBP and ICE officers are superficially questioning these children in order to arrive at potentially life or death decisions. DHS must take measures to develop the most effective method of interviewing this population (for example, determining which questions are asked, and how) and to find the appropriate people to complete the task. Just as USCIS recognized that making determinations of abuse, neglect, and abandonment was a task best left to the experts in the state juvenile courts, the government should assign such important and nuanced determinations to specialists with experience interviewing children and interacting with trauma victims.

B. Second Custody Decision – Internal ORR Placement

Once enforcement officials identify children as UACs, CBP and/or ICE begin the transfer of their care to ORR. The DHS officers must contact ORR to initiate the transfer by submitting an Initial Placement Referral Form, which is intended to occur within one hour of apprehension. The arresting agency must then maintain the children in their custody until beds become available in the ORR shelter facilities. As stated above, according to the Flores Agreement and TVPRA, this transfer must occur within seventy-two hours of apprehension. However, even before the recent increase, children complained of spending several days, sometimes over a week, in holding cells awaiting transfer. There the children sit, like criminals. They lack access to any services, let alone specialized legal and social services. Most notably for the children, these facilities are extremely cold and the guards often do not give them blankets to stay warm. The minors have nicknamed...
these sites “las hieleras,” Spanish for “the freezers,” and they have become emblematic of the challenging journey into the United States.222

In addition to the cold the children must endure, they report being fed less than three times a day and denied reasonable access to drinking water and necessary medical attention.223 The government officials working the stations may not speak Spanish, and some shout orders at the children in English, frightening and confusing them. A significant proportion of children reported being threatened with death, beaten, and sexually assaulted by CBP agents.224 The lengths of confinement, inhumane treatment, and unsanitary conditions are of grave concern, but are beyond the scope of this article.

Although the language from the Flores Agreement, later repeated in the TVPRA, specifies that children should be held in the least restrictive setting appropriate for their particular needs, ORR has been unable to comply due to recent capacity issues. Even before the system was at its threshold, compliance was difficult because ORR lacked intelligence about the children necessary to make placement assignments. ORR relies on information from the Initial Placement Referral Form provided by CBP/ICE to make its shelter placement decisions.225 The only information included on the Form that is at all instructive is whether the child has a health concern or a criminal history. Therefore, children with juvenile records, obvious gang-affiliations, and demonstrated violent tendencies are isolated from the larger group, as are children with special needs, pregnant and parenting girls, “tender-aged” children, and sometimes sibling groups. However, such specialized placement has been unavailable during the last several years due to the rapid turnover of children in ORR care.226

CBP and ICE are responsible for facilitating these shelter placements in conjunction with ORR, but unlike certain ORR staff, neither CBP nor ICE staff have specialized training in child welfare or juvenile justice. Yet, they are tasked with evaluating children for these “specialized needs,” as well as the unspecified characteristics that are intended to dictate placement decisions. Furthermore, the DHS officials are charged with communicating these observations to ORR. If internal guidance exists to assist these agencies with the placement process, it is not publicly available. According to the UTEP UAC Project, CBP and ICE make referrals to ORR via email, but ORR does

222 Id. at 7.
224 Administrative Complaint, supra note 49, at 2 (“[A]pproximately one in four children . . . reported some form of physical abuse . . . . More than half . . . . reported various forms of verbal abuse, including racially- and sexually-charged comments and death threats.”).
225 UTEP UAC PROJECT, supra note 10, at 9-10.
226 This is based on the author’s personal experience and observation.
not always return the communication even after the placements are completed, which wastes valuable resources and can result in children remaining in holding cells unnecessarily.227

Notably, during the “influx,” even the little guidance that existed to inform placement was necessarily ignored in favor of simply finding any bed, anywhere in the country.228 Existing shelters have begun adding beds and hiring additional staff, while new shelters are being established throughout the country.229 However, these developments alone cannot maintain pace with the number of children who are coming to America in need of protection.

Although the practice is not memorialized by any law or policy, children from certain countries also tend to be sent to selected shelter locations, ostensibly depending on the language skills available among staff or a higher density of detained nationals from the same countries. For example, in the past when many arriving children were from India, they were sent to San Diego, where they could benefit from Urdu, Punjabi, and Hindi speaking staff, and where they could communicate and relate to their Indian peers.230

While it is certainly preferable that the UACs are made as comfortable as possible while in federal detention by being placed in centers with children and staff who speak their languages or with whom they share other characteristics, there are at least two other important considerations that are largely ignored during these placement decisions. In current practice, ORR sends kids out to shelters with complete disregard for the children’s potential legal cases, as well as their intended final destinations.

The latter practice wastes government and taxpayer resources and imposes burdensome expenses on the children’s future sponsors. However, the impact can reach well beyond the cost of plane tickets. Children are transported at the government’s expense from whichever ICE stations are nearest their places of apprehension to the first shelters with spaces available for them.231 In certain circumstances, ORR may simply place a child in a van from McAllen to Houston, but in others, it may send a child on a chartered flight from southern Arizona all the way to a shelter in New York. Once children are settled in a shelter, the shelter staff works with the children to locate and connect with potential sponsors.

In addition to undergoing background checks and submitting other personal information to the shelter (effectively ORR), discussed in more detail below, certain potential sponsors must prove that they can financially support the children upon release from detention.232 Part of that demonstration of financial stability includes the ability to purchase plane tickets, one for the

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227 This is based on the author’s personal experience and observation.
228 UTEP UAC PROJECT, supra note 10, at 13.
229 This is based on the author’s personal experience and observation.
230 This is based on the author’s personal experience and observation.
231 UTEP UAC PROJECT, supra note 10, at 20, 23.
sponsored child and one for the accompanying government official or shelter staff member, from the shelter site to the sponsor’s home.

The ability to support a child over time and the ability to, at a moment’s notice, purchase two expensive plane tickets do not necessarily coincide. Many sponsors must work to save money in order to afford the plane tickets necessary to trigger children’s release from the shelters. The time required to save this money is time during which a shelter bed remains occupied and another child sits in una hielera, eagerly awaiting a transfer.

Of course, even under the best of circumstances, it would belogistically impossible to place all children in shelters located near their sponsors. However, if ORR were to take the children’s ultimate destinations into consideration to the extent practicable, it could not only redirect some of the limited funds earmarked for the care of UACs (perhaps toward the purchase of blankets for the children in the holding cells or training of enforcement staff in child-conscious tactics), but also many of the delays caused by the inability to immediately afford plane tickets would be obviated, and the children would naturally move more quickly through the shelters.

The time required for sponsors to save money certainly affects the children waiting to get into the shelter system, but it can also affect the children waiting to get out. Because some legal relief is only available to children under the age of eighteen, for some individuals time is of the essence. Depending upon the jurisdiction in which the shelter is located, the ability to pursue legal relief may be limited while the children remain in detention. As discussed above, eligibility for SIJS requires a state court to take jurisdiction over the child applicant. In certain locations, such as the Chicago shelters, which collectively can house well over four hundred UACs at a time, the local courts have refused to take jurisdiction over any child who remains in federal custody. The state courts argue that only federal courts have jurisdiction over the children, who are federal detainees. Thus, as the days drag on while these children’s sponsors save money, the possibility of gaining protection from the U.S. government via immigration relief disappears.

This discussion begins to bring out the other important factor ORR fails to consider in determining the shelter placements: children’s potential legal relief. The shelter assignments can mean the difference between being able to gain legal status in this country and ultimately being removable. For some the assignment also means the difference between life and death. These extreme consequences are arguably much more important than speaking the same language as a handful of staff members or other kids. As the system currently exists, children are not evaluated for potential legal relief until they reach the shelters (with the exception of the alarmingly shallow fear of return interviews conducted with Mexican and Canadian children). It is true that there are insufficient resources in place now to allow the performance of complete legal evaluations before the shelter assignments are made; however, the most crucial factor in determining relief for many is immediately determined as a matter of course by CBP or ICE for all children: age.
Without requiring that every child undergo a full legal screening before shelter placement, DHS could improve many children’s outcomes by simply identifying the older children (seventeen years and above) and separating them out for more in-depth questioning. The responses to a few simple questions would allow ORR to direct certain children to the shelters that offer them the greatest chances of gaining the protection they deserve.

In addition to adding more spots for UACs, ORR loosened the requirements for releasing children to sponsors in order to allow them to cycle through the shelters more quickly. Already struggling to keep up with the provision of services for children at the old rate of circulation, legal service providers have had to kick their efforts into overdrive to try to satisfy their contracts with Vera and ORR, which require that each child receive a KYR Presentation and a legal screening within fourteen days and thirty days of entry into the shelter, respectively. Without additional funding from ORR, these contractors cannot possibly serve every child. Further, with a majority of the children passing through the shelter sites so quickly, even weekly visits cannot guarantee that service providers will meet each child. Given that the number of UACs entering the country is not decreasing or even stabilizing, ORR and its contractors will continue to operate in triage mode.

**C. Final Custody Decision – Release from Custody**

The third and final placement decision left to ORR is the ultimate release decision made for each child. Children leave shelters in one of four ways: age-out, release to sponsors, release to federal foster care, or repatriation.

When children turn eighteen while in custody they “age-out” of the juvenile shelters. Depending upon ICE’s practice in each jurisdiction, these eighteen-year-old individuals are either transferred to adult detention or are released on their own recognizance. In neither instance does ORR or any government agency mandate continued care or provision of legal services. Certain legal service providers may continue to represent the newly aged-out youth, but they do so voluntarily and without any additional support or funding from the government.

The release of a child who remains a minor for the duration of detention depends upon that child’s reunification and immigration relief options. When ORR assumes custody of a child, one of the first inquiries is whether that child has any willing sponsor available in the United States. Reunification is addressed before immigration relief is investigated because release to sponsors can occur regardless of eligibility for relief.

Although the Flores Agreement delineates a hierarchy of acceptable sponsors, virtually anyone can sponsor a UAC. Prior to the current

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233 Children in Danger, supra note 105, at 6.
234 Office of Refugee Resettlement, supra note 34.
235 Flores Agreement, supra note 3, at 10.
“surge,” release occurred only after the prospective sponsors had proven their relationships to the children (using birth certificates or affidavits from parents/guardians), undergone fingerprinting for criminal background checks, submitted pay stubs to prove they could sustain the children, and paid for plane tickets, both for the children and escorts, from the detention site to the sponsors’ locations.

In an effort to expedite the movement of children through detention during the “crisis,” ORR substantially lowered the bar with respect to screening potential sponsors.236 Confronting the increased number of UACs moving through federal custody in 2013, ORR discontinued the practice of fingerprinting certain potential sponsors.237 ORR also withdrew the requirement that parent-sponsors submit proof of earnings to demonstrate they could afford to feed their children.238 Because such information is not available, it is unclear whether any of the other safeguards in place to protect children from potentially predatory or otherwise unfit sponsors were or continue to be disregarded in the interests of faster processing. If ORR’s goal was to promote faster turnover in the shelters, it was successful. As mentioned above, between 2011 and 2014, the average number of days UACs spent in detention decreased from seventy-two to fewer than thirty-five.239

This relaxing of protections is worrisome for several reasons. First, and most obviously, it is dangerous to release children to adults whose criminal backgrounds have not been appropriately vetted. Considering the large number of children who report fleeing violence perpetrated by their caregivers (twenty-one percent of the children interviewed by the United Nations High Commissioner on Refugees (UNHCR)),240 the potential risk of sending them back into dangerous living situations and re-traumatizing them is high. Another real concern with performing so little investigation of sponsors is that children who were trafficked to the United States may end up back in the custody of their traffickers. Recently, recognizing these and other concerns, ORR reinstituted at least the fingerprinting requirement.241

In arranging the release of a child who has no connections in the United States or for whom family reunification fails, ORR caseworkers must next consider whether the child is eligible for legal relief. If the child has no relief eligibility and no viable sponsor available in the United States, that child’s only option is repatriation. Most children in this situation request the immigration judge grant them voluntary departure.

Unlike for adults or children outside of ORR care, if children are granted voluntary departure while still in federal custody, the U.S. government pays for them (and a safeguard) to return to their home countries, where they must be reunited with guardians or placed into some pre-identi-
ied entity’s care. ORR works with the consulates from the home countries to secure travel documents for the children and to coordinate repatriation efforts. Should the children express fear of persecution upon return, despite their requests for voluntary departure, immigration judges generally delve further into that fear to ensure that the children have no viable asylum claims and that they will be safe upon repatriation. Unlike being removed, when one accepts voluntary departure, there is no subsequent ban on reentry. Should the children find a way to procure valid visas to return to the United States, they would be permitted to do so at any point. However, after accepting voluntary departure, if a child returns unlawfully and is again apprehended, that child is statutorily ineligible for a second grant of voluntary departure and will most likely be formally removed.

Children screened as eligible for some immigration benefit also have two possible release outcomes: family reunification (discussed above) or placement in long-term foster care. Transfers from shelters to LTFC occur only if the children have no viable sponsors present in the United States. There are limited foster care beds available for immigrant youth. Although the number of beds is increasing as the children continue to come to the country, children may still wait many months for a LTFC bed to open up.

Availability is not the only issue preventing placement in LTFC; the foster care agencies that offer the beds have their own requirements for accepting youth into their programs. The foster care providers may only accept youth up to a certain age, resulting in some children aging-out of eligibility for foster care as they await placement. Because these beds are subject to federal funding limitations, foster care providers are forced to limit their acceptance to children who will viably gain legal status before reaching the age of eighteen. If the children age-out prior to obtaining relief, the government will no longer provide monetary support for them, leaving the foster care agencies with the choice of absorbing the cost of maintaining the children or turning them out on the street. Therefore, many foster care providers will not accept children over seventeen years old into their programs for fear that they will age-out before gaining relief and therefore lose their funding. Those UACs lucky enough to secure a spot in long-term foster care are practically guaranteed to have representation upon release as most foster care providers will not accept children into their programs without first securing counsel.

Relief-eligible children released to sponsors are more or less on their own in acquiring legal representation. Ideally, before children leave the de-

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242 OFFICE OF REFUGEE RESETTLEMENT, supra note 34.
243 Id.
244 This is based on the author’s personal experience and observation.
246 Id.
247 Id.
248 This is based on the author’s personal experience and observation.
249 This is based on the author’s personal experience and observation.
250 This is based on the author’s personal experience and observation.
tention center, legal service providers apprise them of the form or forms of relief for which they are eligible. Additionally, legal service providers from the sending jurisdiction are charged with making referrals to other organizations in the receiving jurisdictions.\textsuperscript{251} However, referrals are not always successful and fifty-seven percent of released UACs appear in immigration proceedings without representation.\textsuperscript{252}

Via the Vera Institute, ORR indirectly funds only one provider of direct representation for UACs who are released to sponsors—Kids In Need of Defense ("KIND"). In response to the growing number of UACs entering the country, KIND became operational in 2008 with offices in seven major U.S. cities.\textsuperscript{253} Almost immediately upon its foundation, in December 2008, KIND contracted with Vera to provide legal services to released UACs.\textsuperscript{254} Despite the enormous demand for representation given the increased numbers of arriving kids, KIND has only been able to expand to eight offices (the newest office opened in Seattle in 2013), as its ORR funding has remained static since KIND’s first contract.\textsuperscript{255} ORR has received increased resources from the federal government, but opted to use it for in-detention services, rather than post-release services. By focusing on providing solely KYRs and legal screenings so that bureaucratic boxes can be checked, while neglecting to actually help children gain protection via immigration status, ORR is continuing the trend of ignoring the substance in favor of procedure.

VI. LOOKING FORWARD: SHORTCOMINGS IN PROPOSED LEGISLATION AND POLICY RESPONSES

A. Proposed Legislative Measures

Both prior and in response to the 2014 frenzy over arriving UACs, lawmakers from both major political parties proposed legislation to tackle the unaccompanied immigrant child problem. Unfortunately, none of the proposed measures appropriately or adequately address the needs of the UACs or the concerns of this nation.

On July 8, 2013, Representative Roybal-Allard (D-Cal.) introduced H.R. 2624 with the stated purpose "[t]o provide for enhanced protections for vulnerable unaccompanied alien children . . . ."\textsuperscript{256} This bill would require, among other things, that HHS provide trained child welfare profes-
sionals to assist CBP agents in the interviewing and decision-making process at seven of the stations most highly trafficked by UACs. The bill would also mandate the development of much needed guidelines for the treatment of UACs by government officials.

While these changes would begin to address a primary concern of UAC advocates (lack of training in child-sensitivity of immigration officials), children moving through the remaining ninety-five percent of CBP stations and all ICE locations would still encounter and be evaluated by untrained and unqualified individuals. Furthermore, the bill only requires the development of guidelines for the general treatment of UACs; it does not set forth actual standards for interacting with and interviewing the children from contiguous nations. The bill does not specify which questions should be asked and how, nor does it provide guidance on interpreting the UACs' answers.

Even in the event that DHS, ORR, or Congress develops and implements a policy for appropriately educated and trained professionals to perform standardized interviews of these children, the model may not be effective because the interviews take place under highly stressful circumstances for the children. In some instances, no level of training or thoughtful questioning could reliably uncover sufficient information upon which to base such grave decisions.

In the wake of the government-dubbed “urgent humanitarian situation,” several more legislative initiatives were quickly proposed to stem the flow of UACs across the southern border. The three main legislative proposals are largely the same. Senators Jeff Flake (R-Ariz.) and John McCain (R-Ariz.), Senator John Cornyn (R-Tex.) and Representative Henry Cuellar (D-Tex.), and Representative Jason Chaffetz (R-Utah) all suggest amending the TVPRA to eliminate the distinction in treatment between UACs from contiguous nations and all other arriving UACs. The legislative amendments would allow for expedited removal of UACs from all non-contiguous nations, though clearly they are intended, first and foremost, to affect those UACs from El Salvador, Guatemala, and Honduras. Instead of addressing the due process and human rights concerns previously discussed with respect to the current treatment of Mexican UACs, these reforms would

257 Id. § 2(e).
258 As of March 29, 2014, there were 139 CBP stations located around the U.S. border. The improvements proposed by this bill would immediately address the needs of children passing through only about five percent (seven total) of all CBP stations and would completely ignore those children internally apprehended. Border Patrol Sectors, U.S. Customs & Border Protection, http://www.cbp.gov/border-security/along-us-borders/border-patrol-sectors, archived at http://perma.cc/X9GP-JCPH (last visited Feb. 23, 2015).
260 See, e.g., Cavendish & Cortazar, supra note 53, at 6.
262 HUMANE Act, S. 2611, 113th Cong. (2014).
264 S. 2611; H.R. 5137.
only exacerbate the same problems by applying them to tens of thousands more children.

In addition to the above amendment to the TVPRA, the Helping Unaccompanied Minors and Alleviating National Emergency (HUMANE) Act proposed by Senator Cornyn and Representative Cuellar would create a pathway to permanent residency for UACs that immigration judges could grant children when it would not be “manifestly unjust.” While this may seem like a positive measure, it is nonsensical and fraught with problems. History has demonstrated that such discretionary measures, in practice, do not have a dramatic effect. The very individuals who proposed such measures are also critics of DACA and proposed DREAM Acts. They argue that deferred action, with no genuine hope of permanent immigration protection, caused the “surge.” How do they think that the possibility of permanent status will affect the flow of UACs? Furthermore, why are these children, who will have only just arrived to the United States, more deserving of protection than those who have lived in this country their entire lives?

H.R. 5137, proposed by Representative Chaffetz, suggests an amendment to the SIJS provisions of the TVPRA that would significantly reduce the number of deserving UACs eligible for the protection. This proposal would dramatically alter the definition of a Special Immigrant Juvenile, stating that reunification must not be viable with “either of the immigrant’s parents” rather than “1 or both of the immigrant’s parents[.]” H.R. 5137 would also remove the procedural safeguards enacted by TVPRA with respect to UAC asylum applicants. UACs would again be subject to the one-year filing deadline and would lose the ability to present their claims first in the non-adversarial setting of the Asylum Office. Both of these alterations clearly contravene the legislative intent behind the passage of the TVPRA in 2008.

Most disturbingly, however, H.R. 5137 would redefine “unaccompanied alien child” by including over eighteen-year-old siblings, aunts, uncles, grandparents, and cousins as guardians whose presence in the United States would render a child “accompanied.” The Bill would also have the effect of stripping UACs of that status if at any point a parent or one of the above-

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265 S. 2611.
267 H.R. 5137.
268 Id.
269 Id. § 11.
270 Id.
272 H.R. 5137.
mentioned "guardians" were discovered inside the country. Such a change would only disincentivize potential safe and loving guardians from coming forward to take custody of their family members, causing the UACs to languish for even longer in federal detention.

These suggestions are reactionary and shortsighted. None of the proposals would significantly improve UACs' capacities to apply for or acquire existing remedies, nor do the suggested measures substantively expand upon existing remedies. Furthermore, some of these legislative changes would actually intensify the already overwhelming UAC "crisis."

B. Potential Administrative Responses: The Refugee Option

For years, UNHCR has indicated that children fleeing violence and poverty deserve refugee protection. Immigration scholars and advocates echoed this stance, going further to spell out that President Obama need only "lift a finger" to declare that most or all of the UACs from the Northern Triangle region of Central America are in fact refugees. In July 2014, UNHCR announced its position that the United States and Mexico should officially recognize these UACs as refugees.

Finally, the White House responded to these calls to action by announcing its consideration of in-country refugee processing for UACs in Honduras. Immediately, critics from both sides of the aisle emerged to point out the problems inherent to this proposal.

Some say that acknowledging this group as refugees will actually increase the flow of UACs and others from Central America rather than slow it down. Another concern is that this designation would unlawfully expand on the current definition of refugee. The debate over whether children fleeing or resisting gang recruitment and violence constitute a "particular social group" within the refugee definition has been ongoing for several years.

273 Id.
278 Id.
279 Id.
From the opposite standpoint, Karen Musalo, a preeminent refugee and asylum law scholar and advocate, is concerned that in-country processing could be viewed by government officers at the borders as well as in the asylum offices and immigration courts as the only process available for Honduran UACs (as well as Guatemalan and Salvadoran UACs should the pilot be expanded to those countries) to seek refugee status.281 This perspective could "justify less than full and fair procedures for those Honduran youth who reach the United States."282 Another major procedural concern with this proposal is that it would require children to remain in their dangerous home countries while waiting out the lengthy application process.283 It is unrealistic and unreasonable to expect children to travel multiple times to processing centers, when the same children cannot even safely walk home from school.284 The practices of the Central American gangs and cartels suggest that UACs who attempt to apply for this protection would be targeted even more severely by the violent groups they are fleeing in the first place.

Finally, the possible initiative delineated by the Obama Administration states that only 1,750 people annually would be able to benefit from refugee protection on this basis.285 Every child protected is a positive step toward improving global human rights protections, but this would help only a small fraction of the potentially eligible population; in FY2014, 18,244 UACs arrived to the United States from Honduras.

C. Action on the Ground: Increasing Representation of Unaccompanied Minors in Immigration Court

For more than twenty years, immigrant rights advocates and scholars have beseeched the U.S. government to provide counsel to the many unaccompanied immigrant children appearing in immigration court.286 Immigration court statistics show that there were over 101,000 juveniles in immigration proceedings across the country in the last decade, less than half of whom had legal counsel.287 Most importantly, of those children with representation, forty-seven percent were allowed to remain in the United States

281 Interview with Karen Musalo, Dir., Ctr. for Gend. & Refugee Studies (July 30, 2014).
282 Id.
283 Id.; see also Bill Frelick, In-Country Refugee Processing of Haitians: The Case Against, REFUGEE, 2003, at 66 (discussing the failure of in-country processing for Haitian refugees in the 1990s).
284 Id. at 68 (reporting that Haitian refugee applicants were required to visit processing centers more than four times each).
285 Robles & Shear, supra note 277.
287 TRAC IMMIGRATION, supra note 111.
at the culmination of their proceedings (whether by acquiring some form of legal immigration status or through grants of prosecutorial discretion), while only ten percent of pro se (self-represented) children were allowed to stay.288

As described above, the 2008 passage of TVPRA included a weak call to HHS to provide counsel for UACs, but only “to the greatest extent practicable,” effectively letting the government off the hook on the issue.289 Although initially the percentage of children with attorneys increased after the passage of TVPRA, clearing sixty percent in 2011, in 2012 that figure began to drop and in 2014 a mere nine percent of juveniles in immigration court have representation.290 Dissatisfaction from the advocate community continued post-TVPRA, and finally, in light of the current crisis, the government has taken action. Unfortunately, this action has a narrow scope and limited budget, and will only scratch the surface in providing services to those in need.

On June 6, 2014, the Corporation for National and Community Services (CNCS) and the Department of Justice’s Executive Office for Immigration Review (EOIR) announced a jointly sponsored program entitled 2014 Justice AmeriCorps Legal Services for Unaccompanied Children. This program is designed “to improve the efficient and effective adjudication of immigration court proceedings involving unaccompanied children.”291 Together the groups will recruit a total of one hundred attorneys and support staff who will be trained in relevant immigration law, immigration court practice and procedure, specialized skills for working with children, and identifying victims of human trafficking, abuse and other trauma.292 The program will only provide representation to children in removal proceedings who are under the age of sixteen and who are not detained in ORR custody.293 By limiting the service provision to those ages fifteen and below, the program systematically disqualifies an enormous contingent of the arriving children who are sixteen or seventeen years old.294 Furthermore, the program similarly overlooks children in ORR custody who, with the aid of counsel, could have their immigration cases expeditiously resolved while still in detention.

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288 New Data on Unaccompanied Children in Immigration Court, TRAC IMMIGRATION (July 15, 2014), http://trac.syr.edu/immigration/reports/359/, archived at http://perma.cc/M7LC-HXTK. This statistic does not necessarily mean that counsel alone can improve a given child’s chances of gaining relief nearly five-fold, because the children most likely to retain attorneys are those with the strongest cases. Those children might not have won their cases without representation, but many of the unrepresented children likely would not have won the right to stay in the United States even with representation.


290 TRAC IMMIGRATION, supra note 111.


292 Id. at 5–8.

293 Id. at 3. The announcement also precludes children whose cases have been consolidated with the removal proceedings of a parent or legal guardian.

294 JONES & PODKUL, supra note 50, at 3; OFFICE OF REFUGEE RESSETTLEMENT, supra note 34, at 4 (stating that the “vast majority of UACs are 15–17 years of age”).
In his July 8, 2014 letter to Congress, President Obama requested fifteen million dollars for “direct legal representation services to children in immigration proceedings.” The fifteen million dollar request was part of a 3.7 billion dollar emergency funding appeal to address “this urgent humanitarian situation.” His letter was accompanied by a letter from Brian Deese, the Acting Director of the Office of Management and Budget, which explicitly delineated how those funds would be distributed. The fifteen million dollars earmarked for the DOJ to help provide children with direct legal representation in immigration court is a paltry sum when compared to the 1.8 billion dollars allocated to HHS for the care of children in custody. The Justice AmeriCorps budget is a modest two million dollars. This fact begs the question: if the DOJ is using only two million dollars for the representation of released UACs, where is the other thirteen million dollars going?

The Justice AmeriCorps program expects that grantee organizations will add to the funding by providing supplemental salaries, office space, computers, and benefits packages for the newly hired advocates. The attorneys will likely be recent law school graduates, strapped with student debt, and yet will be expected to live in metropolitan areas on a living allowance of no more than $24,200, placing them just over one hundred and fifty percent of the federal poverty level for a household of two. Additionally, CNCS and EOIR require grant applicants to commit to serving complete dockets rather than allowing multiple agencies in a region to contribute resources to the representation.

The Justice AmeriCorps Program is a step in the right direction and shows that the government is taking seriously the UACs’ need for representation in proceedings; however, it is an inadequate remedy. With greater funding and fewer restrictions, a program like this could make a significant impact on the lives of this vulnerable population.

CONCLUSION

The attention surrounding the great number of children arriving to the United States has only made more urgent the longstanding necessity of reforming the framework for addressing the needs of UACs in federal care. It is surprising that so little has been done to substantively change the law affecting this population. It seems that in the face of the rapidly increasing

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295 Letter from President Barack Obama to John Boehner, supra note 209.
296 Id. at 1.
297 CORP. FOR NAT’L. & CMTY. SERV., supra note 291, at 3.
298 Id. The announcement also precludes children whose cases have been consolidated with the removal proceedings of a parent or legal guardian.
299 Id. at 10.
301 Interview with Elizabeth Dallam, supra note 254.
number of arriving UACs over the past several years, all the U.S. government focused on was maintaining the flow of children through its own detention system, with little to no regard to their final case outcomes.

Ultimately, the government must redesign its approach to the UAC situation. The resources devoted to creating a clear, efficient procedure for handling UACs have been imprudently used, and should be redirected toward developing standards that address the decision-makers' training and that require serious consideration of the consequences their decisions have on each child’s future. This method must include giving weight to both the children’s family reunification and immigration outcomes. Furthermore, the “crisis” of 2014 highlighted the need for reform in U.S. immigration law itself. It is difficult to say what, exactly, the solution will be, but considering a benefit designed precisely for this faction would be an excellent place to start. As it stands, U.S. immigration law almost completely ignores child immigrants generally, and fails entirely to consider the unique needs of this exceptionally vulnerable population.