



REIMAGINING CHILDREN'S IMMIGRATION PROCEEDINGS

A Roadmap for an Entirely New System Centered around Children

OCTOBER 2020

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Prepared by:



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This report is the product of several years of research and writing, a two-day convening in Chicago (the “Chicago Symposium”), the exchange of ideas and drafts with experts around the globe, and careful review by a host of people dedicated to reform of the immigration system. This work was only possible because of the support of the John D. and Catherine T. MacArthur Foundation.

The report’s lead author, Jennifer Nagda, was aided by a team of colleagues and law student and social work student interns who contributed their time and talent to this project. They include Kelly Albinak Kribs, Xiaorong (Jajah) Wu, Marisa Chumil, Sarah Waxman, Moiz Bharmal, Noorjahan Akbar, Mary Miller Flowers, and Jairo Villalobos and former interns Steve Scheuer, Lola Wang, Annie Boyd, and Linette Mejia. In particular, Young Center colleagues Marcy Phillips, Miriam Abaya, and Sarah Diaz were critical allies in writing, researching, analyzing, evaluating and revising aspects of the Roadmap.

Participants in the Chicago Symposium influenced every aspect of the Roadmap. A few have asked that their names not be listed, as they contributed personal time to this project. To the others, who would be at the top of our list for an Child Advocates’ Hall of Fame, we extend our profound gratitude for their work before, during and long after the Chicago Symposium. They are: Annette Appell, Julie Biehl, Emily Buss, Robert Carey, Herschella Conyers, Rená Cutlip-Mason, Bernadine Dohrn, Alice Farmer, Elvis Garcia Callejas, Mary Giovagnoli, Zoe Given-Wilson, Martin Guggenheim, Kristen Jackson, Jyothi Kanics, Antoinette Kavanaugh, Tara Magner, Stacey Platt, Jennifer Podkul, Andrew Schoenholtz, Aryah Somers Landsberger, Ji Seon Song, David Thronson, and Jennifer Woolard. The law firm Sidley Austin LLP graciously hosted the Chicago Symposium.

Equally important to this report are the contributions of trusted advisors who’ve contributed hundreds of hours of their time and expertise over nearly two decades, consulting on the Young Center’s hardest cases and ensuring our work and our model incorporate the wisdom of other fields and disciplines. They include: Michelle Geller, Marsha Griffin, Lauren Heidbrink, Greg Lewis, Anita Maddali, Randi Mandelbaum, Breedha McGrath, Uzoamaka Nzelibe, Susan Schmidt, Mike Seifert, Julie Sollinger, Anita Weinberg, and Selma Yznaga. The very best ideas in *Reimagining* grew from seeds planted by this group.

We are also grateful to the children—many now young adults—who gave us permission to share their experiences, their observations, and most importantly their recommendations for change. Their comments generally appear without attribution, as they remain subject to the whims of laws, policies and procedures that often fail to provide true permanency—at least for many years. Their experiences are the driving reasons for this report, and we are indebted to our colleagues at the Young Center for Immigrant Children’s Rights who have worked for nearly two decades to develop a program that recognizes children as children—and as agents for change. Because of their work to build a sustainable model, and their work in individual cases, we have these stories to tell. To each and every colleague, we are grateful.

Finally, and without question, the ideas advanced here are rooted in the child’s rights-based approach to advocacy that Elizabeth Frankel, Gladis Molina Alt, and Maria Woltjen have brought to every moment of their work and leadership at the Young Center for Immigrant Children’s Rights.

To all of the individuals and organizations who shared their time, expertise, and critical analysis, we thank you for your contributions. We are certain that you do not agree with every recommendation within these pages. We hope that as we share our Reimagined Roadmap with policymakers, you will join in a continued, vigorous, and evidence-based dialogue about strategies to ensure wholesale and fundamental reform of the system in which immigrant children’s rights are adjudicated.

Sincerely,

A handwritten signature in blue ink, appearing to read 'J. Nagda', with a stylized flourish at the end.

Jennifer Nagda
October 2020

TABLE OF CONTENTS

Executive Summary.....	1
Principles for Reform.....	2
Roadmap for Change: Adjudication Tailored to Children’s Needs, Capacities, and Best Interests.....	4
Part I: Conceptual Shifts.....	10
Best Interests Is a Primary Consideration in Every Decision.....	11
Safety and Family First.....	16
A Fundamentally Fair Process	23
Specialization.....	27
No Repatriation to Unsafe Situations.....	30
Childhood Continues to Age 21.....	33
All Children Share the Same Rights and Protections.....	36
Part II: A New Vision for Roles and Responsibilities in Children’s Immigration Cases.....	39
Government Actors.....	39
Attorney for the Child.....	41
Independent Child Advocate.....	44
Parents and other Adult Caregivers.....	46
Part III: Roadmap for Change.....	48
Guiding Principle.....	48
Custody and Placement of Children.....	48
Adjudication of Children’s Claims for Protection.....	57
Safe Repatriation Determination and Best Interest Protective Status	65
Part IV: Commentaries.....	69
Zoe Given-Wilson, <i>An Imagined Immigration System</i>	69
Elvis Garcia Callejas, <i>My Experience as an Unaccompanied Child in Government Custody</i>	73
Martin Guggenheim, <i>Providing Meaningful Representation to Children in Immigration Proceedings</i>	78
Antoinette Kavanaugh, <i>Emerging Adults: It’s Time to Recognize Their Specific Judicial Needs</i>	82
Alice Farmer, <i>The Chasm Between Standards and Practice: Can Recent Advances in Migrant Children’s Rights Be Realized?</i>	85
Mary Giovagnoli, <i>The Idea of Seeking Justice</i>	91
Sources.....	95

EXECUTIVE SUMMARY:

REIMAGINING CHILDREN'S IMMIGRATION PROCEEDINGS

'Reimagining Children's Immigration Proceedings' inspires us to open our minds. It invites us to think beyond the constraints of tradition, funding and resource limits, human errors and judgements, public attitudes, and to start anew.

Dr. Zoe Given-Wilson, Commentary

Immigrant children who seek protection in the United States are thrown into a system of laws, regulations and policies developed for adults. That system is adversarial in nature, with the government in the position of protagonist, fighting to restrict migration into the United States. Children are on the defensive. They bear the burden of responding to and defending against the government's effort to remove them from the country and they bear the burden of proof to win protection. In short, it's the worst of both worlds. In many cases, their ability to access protection depends on whether or not they are accompanied by a parent or legal guardian, with modest, child-specific protections available to children that are unaccompanied or separated from a parent. Unlike many other systems, decisionmakers are not required—or in some instances even permitted—to consider their best interests when making decisions that directly impact a children's safety, permanency, and connection to family.

For decades, advocates for children have worked to carve out discrete protections for immigrant children in this system. They won the right for children to be held in spaces designated for children—provided not just with food and a bed, but also with education, recreational activities, medical attention, and the right to meet with lawyers. They succeeded in transferring unaccompanied and separated children's care and custody from the government's enforcement agency to a federal agency focused on health and welfare. They secured the right for unaccompanied and separated children to be released from government custody to family, prioritizing release to parents without regard to the parents' immigration status. They fought for a law that authorizes federal officials to appoint independent advocates to child trafficking survivors and other vulnerable, unaccompanied children to ensure that the child's best interests are considered in decision-making. This same law permits unaccompanied and separated children seeking asylum to make their claim before an asylum officer, rather than face a government attorney in a courtroom. The law requires federal officials to ensure children's safe repatriation when they ask to return or are forced to return to their home countries.

Advocates continue to seek greater protections for immigrant children, including legal representation for all children, and a mandate that every agency consider the child's best interests in every decision. But change is incremental at best, and within immigration reform debates, protections for children continue to be inserted piecemeal into a system designed for adults. More recently, advocates have had to direct their energy toward ensuring that the few protections that already exist are not stripped away in a bargaining game over larger

immigration policies. Advances are hard won, but insufficient. The immigration system lags behind developments in child welfare and juvenile justice by decades (e.g., the right to counsel) and in some cases, a century (the creation of separate courts for children).

With the support of the John D. and Catherine T. MacArthur Foundation, we set out to reimagine the way in which the federal government adjudicates an unaccompanied or separated child's request to remain permanently in the United States. Rather than addressing problems within the current system, we set out to develop a framework for a new system, built around the needs and capacities of children. To do so, we convened a symposium bringing together experts in the fields of immigration, international migration, child welfare, juvenile justice, and child development. The goal was to draw upon their expertise and lessons learned from efforts to reform child welfare and juvenile justice proceedings over the last many decades. We focused both on processes and substantive protections, addressing the roles of multiple federal agencies in determining the protections children should receive, including the right to remain in the United States if it is unsafe for them to return to their countries.ⁱ

What follows is a summary of our recommendations for wholesale change.

A. Principles for Reform

Seven guiding principles emerged from the Chicago Symposium and subsequent conversations with experts. These principles represent a radical change in the policies and practices embedded in the existing adjudicatory process for children. Whether advocates and policymakers pursue comprehensive reform of immigration laws or instead seek piecemeal reforms at a time when wholesale reform is impracticable, they should check any proposed laws, regulations, or policies against these principles to ensure a child-rights approach to policymaking.

1: A Child's Best Interests Is a Primary Consideration in Every Decision

In every decision made about a child, from the moment the child is identified or apprehended by immigration officials until a final decision is made, the child's best interests shall be a primary consideration. This does not preclude other considerations, such as the child's stated interests, a parent's stated interests, concerns for the safety of others or national security. But consideration of the individual child's best interests—which includes consideration of the child's stated interests—must inform every decision, with decisionmakers held accountable for meeting this obligation.

2: Safety and Family First

When any child is identified by immigration authorities (at the border or internally) the sole focus shall be finding a safe placement with family, minimizing any time spent in institutional, government care. Children apprehended with parents or other family members—whether at the border or internally—shall not be separated for purposes of immigration enforcement absent a determination that the parent or family member poses an imminent danger to the child's safety, a determination that would be subject to prompt review by a judge with expertise in family law. The initiation of an immigration case to determine whether the child will remain in the United States or return to home

country will begin only after the child's safe reunification with family or placement in a family- or community-based setting such as foster care.

3: A Fundamentally Fair Process

After safe placement in the community, children who wish to remain in the United States will participate in a holistic process of decision making which places the child at the center. Children will not be subject to repeated inquiry about past traumatic events and there will be timely but not rushed decision-making. All children will be represented by counsel and vulnerable children will be appointed a child advocate to help identify the child's best interests.

4: Specialization

Every participant and decisionmaker in a child's case will have specialized training in child development and the impact of trauma on children, as well as training and experience working with children from different cultural backgrounds.

5: No Repatriation to Unsafe Situations

A child may fail to prove eligibility to remain in the United States. However, before repatriation, the government must demonstrate to an independent adjudicator that the child will be safe upon return. If a child will not be safe upon return, the child will be permitted to remain in the United States until adulthood.

6: Childhood Continues to Age 21

There is consensus in the scientific community that children continue to develop and mature well into their 20s. An increasing number of legal systems have recognized this principle, extending the age of childhood or youth to 21. All immigrant youth will be recognized as children and will be able to avail themselves of child-specific protections until they reach the age of 21.

7: All Children Share the Same Rights and Protections

All children placed in immigration proceedings, whether arriving at the border or encountered within the United States after being here for any period of time, hold the same rights. These include the rights to express their own wishes, to safety, to liberty, to be protected from family separation, to develop, to maintain their identity, to have their best interests considered in all decisions, to be treated with dignity and respect, and to have a fair opportunity to seek protection from harm.

With these principles as our guideposts, and with direction from experts in a variety of disciplines, including migrant children who sought protection in the United States, we turned to the task of designing a system that recognizes and treats migrant children as children. What follows is our proposed Roadmap for Change—a reimagination of the process for deciding whether a child who comes to, or is brought to, the United States and expresses a wish to stay, is able to do so.

B. Roadmap for Change: Adjudication Tailored to Children's Needs, Capacities, and Best Interests

This Roadmap does not layer onto the current system. Its starting point is the needs and capacities of children. The Roadmap's first priority is children's immediate need for shelter, safety and family, and thereafter, the need for permanency. Unlike the current system, where government custody—detention—is the one space in which children are guaranteed certain protections, this system connects children to services at the time and place best suited to the child's needs and vulnerabilities—once they are placed with families or living in family-like settings.

When it is time to adjudicate the child's case, the proposed system puts the child at the center of the case, rather than positioning the child as a respondent/defendant. Decisionmakers and advocates involved in the case collaborate to discern the child's interests even though they may ultimately disagree.

Children are not left to navigate complex legal proceedings on their own. The reimagined system guarantees an attorney for every child, to ensure the child's expressed wishes are known and considered. It provides a child advocate for vulnerable children, including those who may be unable to express an opinion or whose best interests may be unknown or uncertain. Children may seek various forms of protection, whether as asylees, survivors of trafficking or other crimes, based on abuse, abandonment or neglect that they experienced in their home countries, or some other existing basis in immigration law. If they are successful, they will secure the right to remain permanently.

We spent considerable time debating the merits of a single decisionmaker as compared to multiple decisionmakers in the child's case. Ultimately, we proposed hybrid, in which a single decisionmaker—a presiding judge—oversees and follows the legal case from start to finish. If a child fails to qualify for traditional forms of protection, that presiding judge will make the ultimate determination of whether the child can safely repatriate. But for the many children who first pursue some other form of protection—whether asylum, protection as a trafficking victim, or protection based on their relationship to another family member—those claims will continue to be adjudicated by specialized decisionmakers, who have expertise in that particular area of law—and who under the Roadmap would have special training to evaluate children's claims.

The reimagined system also creates a new basis for protection from removal. If a child is unable to request protection, or is denied relief, that child cannot be repatriated to home country unless the government proves that the child would be safe upon return. In contrast to the current system, in which a child carries the burden to prove they are eligible to remain in the U.S., under the new system the burden will shift back to the government, which will have an affirmative obligation to prove that the child can be returned safely. The government will be required to provide facts and evidence specific to the child's case in order to demonstrate its capacity to facilitate the child's safe return.

A finding that the child cannot be safely repatriated will result in the grant of “best interests protective status” that will protect the child from repatriation until adulthood.

In 2008, Congress took an affirmative step to ensure safe repatriation when it passed the bipartisan William Wilberforce Trafficking Victims Protection Reauthorization Act, which imposes on multiple federal agencies an obligation to ensure the safe repatriation of children. Aside from a briefly funded pilot project to facilitate children’s safe return to Guatemala, by and large the federal government has taken no steps to fulfill the statute’s mandate to prevent the unsafe repatriation of children. In significant ways, the non-governmental community has stepped in to fill this void. But those programs remain *ad hoc*, focused on specific children or specific countries, and are not integrated into decision-making about how, when, and to what conditions children will be returned.

Thus, our reimagined system functions as follows.

Step One: Singular Focus on Safe Placement

When children are apprehended by immigration authorities, the government’s sole focus will be on finding a safe placement where the children can live outside of government custody as their immigration case proceeds. The Roadmap’s goal is a period of government custody that lasts for days or weeks—not months or years. Children who arrive with a trusted, adult caregivers who are not their parent should not be separated from those adults, absent indicators of trafficking or other imminent danger. This will mean a reworking of the definition of “unaccompanied children,” and/or changes to immigration law that will extend the same protections to all children, whether accompanied or unaccompanied (including the right to seek protection). Children who are truly unaccompanied will be placed in homes in the community (such as temporary foster placements or group homes) rather than institutionalized care, which today commonly includes facilities of 200, 400 or even 1400 “beds”. Government custody lasting more than a few weeks, or any refusal to promptly reunify a child with a parent or legal guardian in the United States, will be subject to review by a court outside of the immigration system (e.g., a family court), with expertise in adjudicating children’s custody. The government will be prohibited from sharing information gathered about the child to ensure safe short- and long-term placement with immigration enforcement authorities or using that information to pursue the child’s removal or removal of the child’s family members.

Perversely the current system creates additional hurdles for children who may have the greatest need to reunify with family or live in a community setting while seeking protection: specifically, children with physical or mental health needs, children with disabilities, and very young children. In the current system, unaccompanied children with special or greater needs often face greater delays in reunifying with family while their needs are evaluated. At the same time, family members are tasked with identifying services while the child is still separated and detained (and often deteriorating, suggesting the need for more services, which leads to longer detention . . . a vicious circle.) In the reimagined system, the government will carry the burden to demonstrate that the child’s placement with family, with community-based supports, will be

unsafe. Absent that demonstration, children will be released to family or placed in foster care, and provided with integrated, holistic support to ensure their safety and healthy development.

Unaccompanied children who do not have family members or other sponsors to take custody, but who do not wish to return to their countries, will have the same opportunity to be placed in a supportive, home-based environment and will be eligible for community-based foster placements or other forms of supportive housing, such as independent living situations for older teens. They will not have to prove their eligibility for protection in order to access these placements. This is a significant change from the existing system, where foster placements or group homes for children without sponsors are available only to children identified as having “viable” claims for protection. The existing system places attorneys in a gatekeeper role, limiting their ability to zealously advocate for each child’s holistic needs. In the reimagined system, the government will be obligated to maintain as many foster placements as necessary for children who lack a family sponsor, without regard to the child’s likelihood of prevailing in a claim for protection once again shifting burdens off of the child, and onto the government.

Children already living in the United States—including but not limited to “DREAMers,” DACA recipients and those who entered unbeknownst to immigration authorities—will remain in the home in which they were living when identified by immigration officials, unless that home is determined to present an immediate danger to the child by a family court.

Finally, children who wish to return promptly to their country of origin—at any point—will be able to do so with the assistance of counsel and an appointed child advocate. This may arise in situations where children were brought to the United States against their will, or when children wish to return to home country because of changed circumstances or emergency circumstances (e.g., illness or death of a loved one), or simply because they change their minds free of government coercion.

Step Two: Proceedings to Determine Whether Child May Remain in the United States

The entire purpose is to get it right. Errors, in either direction, undermine the rule of law.

Marty Guggenheim, Commentary

The processes below were designed with an eye toward eliciting information in a manner tailored to each child’s age and development without endangering the child’s safety, so that adjudicators have the best possible information on which to base decisions.

Presiding Judge. Each child’s case will be assigned to a presiding immigration judge, who, while not the decisionmaker on every protection claim, will be responsible for guiding the child’s case through the adjudicatory process and making the ultimate determination as to whether a child can safely repatriate if no form of permanent protection is granted.

Preliminary Conference. With a nod to the more child-appropriate process of family court, the child’s case, which will commence only after the child’s release from custody to a safe placement, will begin not with a hearing but with a case conference attended by

all parties, including the child's parent(s) if available. If the child does not have counsel, a lawyer will be appointed at government expense. Particularly vulnerable children will be appointed a child advocate.

Consolidated Application for Protection. At a time determined during the preliminary conference, the child's attorney will submit a single, consolidated, application for each form of relief the child has elected to pursue, for which the child can establish prima facie eligibility or make a non-frivolous claim. This concurrent process is intended to help streamline the child's application for legal relief so that stories of trauma and hardship do not need to be told multiple times and to facilitate counsel's ability to explore all possible claims for protection. The case will not be complete—and the child will not face removal—before all claims for protection are fully adjudicated.

Government review of the Application for Protection. The attorney's submission of a child's application(s) for protection will trigger a reasonable but limited window for each agency responsible for reviewing the petition(s) to grant the petition, issue a request for additional evidence or testimony, or deny the petition outright. Claims for protection will be evaluated by agencies with expertise in the form of protection (e.g., trafficking, asylum) and by specially trained adjudicators in these agencies.

Opportunity for Further Inquiry. Decisionmakers from any agency who require additional information from the child will submit questions to the presiding immigration judge. If those questions cannot be addressed by the child's attorney in writing, the immigration judge will schedule an interview with the child where all outstanding issues can be addressed. The single interview format provides the child with a non-threatening, less adversarial setting, more akin to the interviewing models employed by child advocacy centers investigating claims of child abuse.

Determination of Eligibility. Within a limited time after the submission of all applications, including time for review, questions from the government and a possible interview with the child, each decisionmaker will render a decision on the child's application(s) for protection and submit that decision to the presiding immigration judge. If the child is granted a form of protection, the government will end its efforts to secure the child's removal to home country. If the child is denied protection, the child will be guaranteed an appeal of the denial(s).

Step Three: Best Interests Protective Status

If the child seeks protection but is unsuccessful, or if the child is unable to raise any claim for protection but fears return, the government will then carry the burden to prove that the child can safely repatriate. The government, not the child, will be obligated to provide case-specific evidence that the child will be safe upon return to home country. Evidence could include testimony or affidavits that there is a parent or legal guardian in the child's home country both available and willing to take custody of child and able to meet the child's needs. If the child had provided evidence that she will be unsafe in her country as part of her earlier application(s) for protection, the government will have to provide evidence of either changed circumstances or of feasible steps that will protect the child upon return.

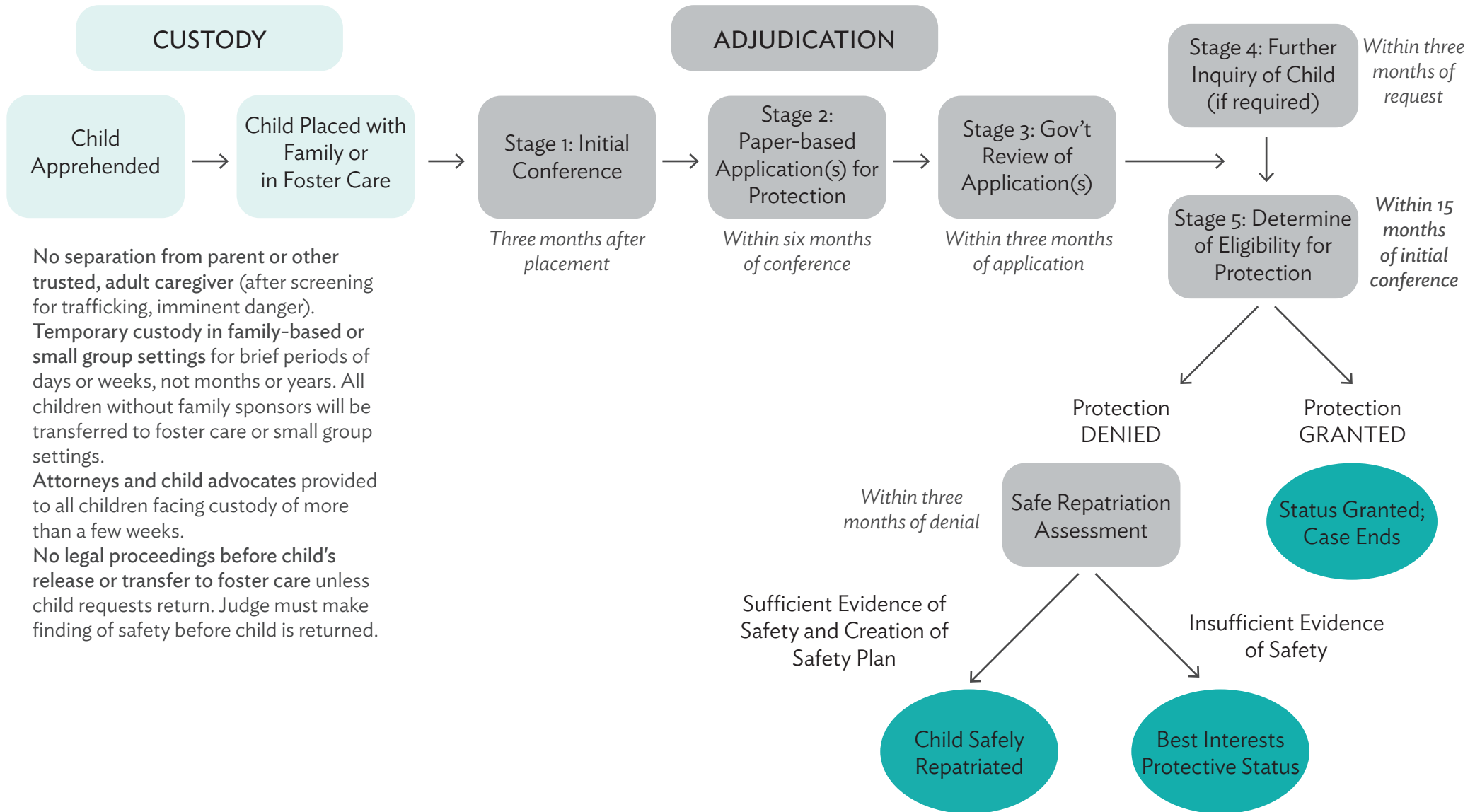
If the government cannot meet this burden, the child will automatically receive best interests protective status, which will be valid until the child is 21 years old. This status serves two purposes. First, it will prevent the government from placing children into unsafe situations. Second, by allowing children who will be unsafe in their home country to remain in the United States until the age of 21, protective status recognizes that childhood and adolescence extends well beyond the age of 18. Second, during this period, children will have the opportunity to complete their education and mature physically, emotionally, and intellectually, consistent with evidence that childhood extends beyond the age of 18.

At the age of 21, some young adults may seek return to their country of origin. To the extent that the government seeks to return (deport or remove) any young adult who was previously granted protective status as a child, the young adult will have an opportunity to present evidence that return would pose a threat to their safety. For some young adults, time spent in the United States may make them a target for persecution or other violence should they return to their home country; they may also face return to country conditions that have changed since the time they applied for protection as a child. For all young adults previously granted protective status, the equities they develop during their time in the United States—including attending school, graduating, obtaining a G.E.D., working or volunteering, and establishing family, community or religious ties, will be considered by the government in exercising its discretion to allow these young adults to remain in the United States.

The following pages describe this reimagined system in detail, Including: a discussion of the conceptual shifts necessary to reimagine a fair system for children (Part I); an analysis of how stakeholders in children’s cases would have to adapt their roles in a system where children’s rights were at the center (Part II); and a detailed Roadmap for Change, beginning with the moment of apprehension and continuing through the final adjudication of a child’s protection claim (Part III). Throughout the report, we include the voice of experts who participated in the Chicago Symposium; the report concludes with commentaries from six of those experts, including an adult with lived experience in the current system and other experts in law, child development, migration, and justice (Part IV).

ⁱ Between that symposium and the publication of this report, a new administration extended and initiated policies intended to unlawfully deter children (and others) from seeking and securing protection in the United States—forcibly separating parents and children, using children as “bait” for immigration enforcement efforts against family members, forcing families to wait outside the United States for hearings within the United States, forcibly sending asylum-seekers to third countries, attempting to narrow the definition of asylum to exclude certain social groups or individuals who traveled through other countries on their way to the United States and then closing the border to children and asylum seekers during the 2020 COVID-19 pandemic. To the extent this report attempts to envision an entirely new system for adjudicating children’s immigration claims, those changes in policy might bear little on our analysis. On the other hand, those policies exemplify how the failure to consider immigrant children’s status as children, or to consider their best interests in any and every policy, can put children in harms’ way. In short, they reinforced our believe in the necessity of a system developed for, and around, children, that would still provide the government with the ability to determine who crosses the border and who may remain permanently.

REIMAGINING CHILDREN'S IMMIGRATION PROCEEDINGS



PART I: CONCEPTUAL SHIFTS

In our process of reimagining a system in which the government determines whether or not children born in other countries may remain in the United States or will return to their countries of origin, we wanted to free ourselves from the constraints of the current system. We did not want to reform the current system or simply correct its problems. Instead, we wanted to propose an entirely new process based on best practices from other disciplines where children's rights are adjudicated while avoiding the mistakes in those systems that have denied children a fair process and just outcomes.

What emerged from the process of researching and consulting with experts in other disciplines—child protection, juvenile justice, child development and systems to adjudicate migrant children's rights in other countries—was confirmation of the need to make **fundamental shifts in how we think about immigration proceedings for children** in the United States. Before setting forth a new process (which we discuss at length in Part III: The Roadmap), we needed to establish some baseline principles to guide that process—principles that in many cases run contrary to existing laws and policies about migrant children but which are well-grounded in decades of building experience and reforming other systems to protect children and foster their growth and development.

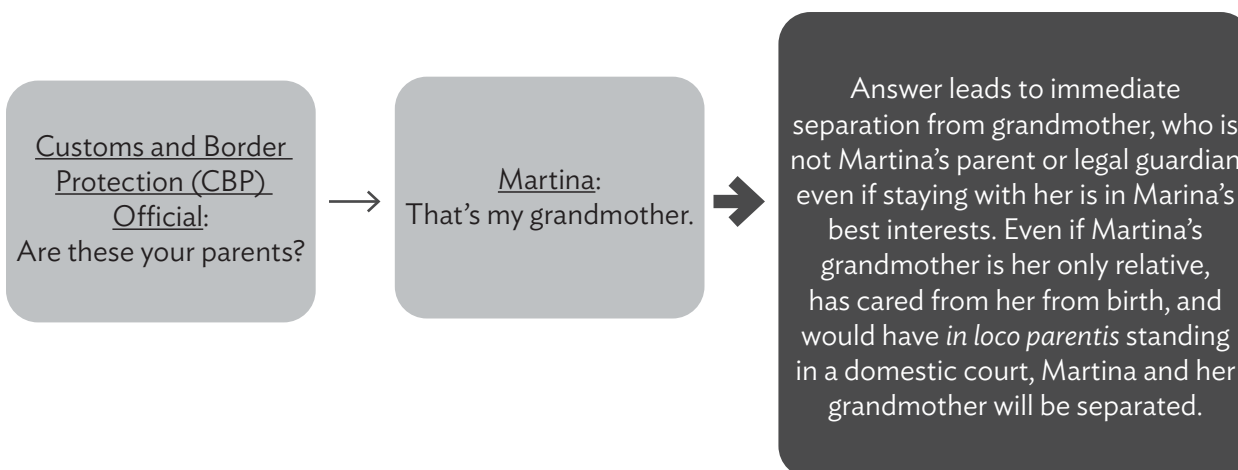
To someone entirely unfamiliar with the current immigration system, the plain language of these seven principles may read as common sense. Nevertheless, each principle is a steep departure from the complex and fragmented process for adjudicating children's immigration cases, one carved out piecemeal from a system designed for adults.

Principle #1: Best Interests Is a Primary Consideration in Every Decision

In every decision made about a child, from the moment the child is identified or apprehended by government officials until a final decision is made about the child's case, the child's best interests shall be a primary consideration. This does not preclude other considerations, such as the child's stated interests, the parents' stated interests, concerns for the safety of others, or national security. Consideration of the individual child's best interests (which includes the child's stated interests) must inform every decision, with decision-makers held accountable for meeting this obligation.

A. Current System for Immigrant Children

In the current system, only a single government agency has a statutory obligation to consider a child's best interests—and even then, that consideration is limited in scope.¹ Other decisionmakers have the discretion to consider a child's best interests, but there is no obligation to do so. There is no mandate within immigration law to even identify the best interests of each child. Consider the hypothetical case of Martina, a child from Central America who arrives at the southern border of the United States where she encounters U.S. immigration authorities.



1. Determination of Child's Status at the Border

Under current law, any child under 18 apprehended by immigration authorities who does not have a parent or legal guardian available to care for her at the time of apprehension and who lacks lawful status in the United States will be designated as an "unaccompanied alien minor."² Once a child is designated as "unaccompanied," immigration authorities must transfer physical custody of the child to a separate federal agency (the Department of Health and Human Services) within 72 hours.³

Because Martina is not with a parent or legal guardian she will be designated as an unaccompanied child and separated from her grandmother, who will most likely be detained in an adult immigration facility and/or quickly deported. The law has been interpreted to have no flexibility to prevent this type of family separation, nor provide an opportunity to evaluate the relationship between the child and the adult she is with, even when an adult family member has acted *in loco parentis* or has otherwise raised or served as the child's traditional caregiver. The policy behind this provision was a concern about child trafficking and the challenges involved in determining whether someone other than a parent, who carries a constitutional right to the care and custody of a child, can provide a safe home for the child. However, the standard has proven insufficiently flexible to allow children to remain with loving caregivers who are not biological parents or legal guardians.

As implemented, the statute frequently separates children from the most protective adult figures in their lives—older siblings who raised them upon a parents' death or disappearance, or grandparents, aunts or uncles who have raised grandchildren, nieces or nephews as their own children without the benefit of a formal, legal declaration of their rights and responsibilities. Another circumstance which results in the separation of children from family is when children fleeing abuse, abandonment, violence or persecution in their countries of origin arrive here with other, trusted family members such as grandparents or older siblings but are separated because the government has no mechanism in place to quickly assess whether that adult can safely care for the child or presents a risk of trafficking or abuse. Equally problematic, under current laws, immigrant children are only eligible for child-specific protections if they are designated as "unaccompanied," which requires separation from a parent or legal guardian. Children arriving with parents and guardians lack many of those same protection—and face harms including expedited removal (deportation without the chance to be heard by a judge).

2. Release of Unaccompanied Children from Government Custody

Once children are transferred out of the custody of immigration officials and to the Department of Health and Human Services (HHS), that agency must place them "in the least restrictive setting that is in the best interest of the child."⁴ Historically, after a child arrives in HHS custody, the agency works to identify a family member with whom the child can be placed. The agency has policies for verifying the relationship between the child and any adults who step forward to "sponsor" the child's release.⁵

However, there are limited procedures to challenge the agency's decision to deny release in a system where many children do not yet have counsel or where legal services providers may be focused primarily or exclusively on addressing the child's immigration status. There is almost no court oversight of agency decisions to hold, release or move children, as would occur in the domestic child welfare system, unless the child seeks review in an independent federal court pursuant to *habeas corpus*, which happens rarely. HHS only recently created procedures for parents to challenge the agency's decision to deny release, with no clear corollary for other family members.

Most problematically, decisions about a child's release from HHS custody, whether made by the agency or a federal court, occur *concurrently* with the adjudication of the child's immigration

status. In many cases, each agency is waiting on the other, which can delay either a child's release or adjudication of the child's claim. This overlap of custody and court proceedings can muddy the otherwise clear waters of whether a child has a family to provide her with a safe home. In recent years (in the absence of a best interests mandate for all immigrant children), immigration officials have co-opted the process for evaluating the safety of adult family members who seek to sponsor the child's release from custody. Before a child is released from custody, DHS receives information from HHS's "safety evaluation." In some cases, DHS has used that information to apprehend and deport members of the child's family.⁶ As a result, the sole statutory mandate to consider a child's best interests—the process for evaluating a child's release to family—has been used to put the child's family in danger and has led children to spend more time in detention, to abandon their claims for protection and return to the very countries they fled.⁷

3. Determination of Eligibility to Remain or Order to Remove (Deport)

Similarly, the ultimate decision of whether a child is eligible to remain in the United States if they fear or do not wish to return to home country is based on their ability to meet the legal criteria of certain prescribed forms of protection (relief from removal), which address specific dangers (persecution, torture, trafficking, abuse) but certainly not all threats to the child's safety. And with one exception, each of those forms of protection were developed for adults.⁸ The sole form of protection developed exclusively for minor children—special immigrant juvenile status—does require consideration of the child's best interests, though in a process so complex, multi-layered, jurisdiction-specific, and dependent upon other factors that many children are still unable to access it or wait years for the protection it was created to provide.

If a child is unable to prove her eligibility for one of those forms of protection, she will be ordered removed. Although a 2008 law requires the federal government to ensure the safe repatriation of children,⁹ in the last decade the government has failed to implement a single policy to ensure that children will be safe upon their repatriation, and there is no obligation for decisionmakers to ask if the child will be safe upon return, much less act on facts that demonstrate the child will be harmed if forced to return to her home country. More recently, the government has instituted a series of policies intended to speed up immigration cases, in which children can be ordered removed by one agency before a separate agency has finished its review of the child's protection claim.

B. Lessons Learned from other Disciplines: Best Interests Must be a Primary Consideration

International law has long required that the best interests of the child be a primary consideration in every decision made by public or private institutions, courts, administrative agencies or legislative bodies.¹⁰ Likewise, consideration of a child's best interests is the hallmark of child welfare proceedings,¹¹ though application of the principle has been subject to criticism and appropriately so—too often the subjective determination of "best interests" has been used in a manner adverse to parents' right to the care and custody of their children and children's rights to be with family.¹²

For more than 50 years, courts have recognized the importance of providing attorneys to children who are in judicial proceedings that may limit their freedom.¹³ In child welfare proceedings, courts will typically appoint a best interests guardian *ad litem* to identify and advocate for the child's best interests.¹⁴ Likewise, other countries that adjudicate children's immigration claims ensure that unaccompanied migrant children are represented by attorneys in asylum proceedings.¹⁵ Other countries also appoint guardians for unaccompanied or separated children in asylum proceedings.¹⁶

The absence of such mandates for children in immigration proceedings has not gone without notice. In the 1990's, Senator Feinstein began introducing the "Unaccompanied Alien Child Protection Act" in Congress. Her bill would have given every unaccompanied child the right to an attorney and the right to a Child Protection Advocate to provide recommendations on whether it was in the child's best interests to voluntarily depart from the United States or seek relief from removal, and to develop recommendations related to the child's custody, detention and release.¹⁷

In 2016, after a multi-year discussion between officials representing each federal agency with authority over immigrant children, and organizations and experts that serve and advocate for those children and their families, the Interagency Working Group on Unaccompanied and Separated Children released its *Framework for Considering the Best Interests of Unaccompanied Children*. Relying on child welfare laws from the 50 states as well as international principles, the *Framework* identifies the following most widely accepted elements of any best interests consideration: the child's safety and well-being; the child's expressed interests in accordance with the child's age and maturity; health; family integrity; liberty; development (including education); and identity.¹⁸

Thus, the following changes to the immigration system are necessary to ensure consideration of each child's best interests in a fair, non-discriminatory, and meaningful manner:

1. Children must be represented by counsel who will zealously advocate for the child's expressed interests (wishes) with respect to every decision made about the child.¹⁹
2. Children who do not have a parent or legal guardian to represent their best interests—or whose parents or legal guardians have been proven to have acted contrary to the child's best interests—and children unable to express their own wishes due to tender age, developmental or health issues, shall be appointed an independent child advocate to identify and represent their best interests.
3. Every decisionmaker shall document their consideration of the best interests of the child and how they believe their decision will impact the child's best interests.

C. Challenges for Implementing this Shift to Best Interests

Consideration of a child's best interests in all decisions will require significant revision of existing laws and regulations. Better stated, the best interests principle demands an entirely separate system, with child-specific procedures and protections for all children, not just those who meet discrete legal criteria such as being "unaccompanied." A system that requires every decisionmaker to consider the child's best interests will be a more fact-driven and potentially

time-intensive system—though these fact-based considerations may lead to decisions that ultimately decrease the time the child is in custody or awaits a final adjudication of her rights. Nevertheless, the “best interests of the child” is a standard with multiple contributing factors, rather than a simple, bright-line rule.

Many children’s attorneys have operated under the principle that because they take direction from their clients’ expressed wishes, they cannot consider the child’s best interests in their advocacy. Attorneys will require training on how to inquire about best interests in a manner consistent with their ethical obligations and training on how to seek recommendations from the child’s best interests guardian (child advocate) to inform their advocacy when the child is unable to express her wishes or when best interests and expressed interests conflict. Ultimately, ensuring that every child has an attorney who is ethically bound to pursue the child’s wishes will ensure the child’s voice is not lost and remains central to the process of considering best interests and all decisionmaking.

D. Conclusion

The “best interests” standard requires advocates and decisionmakers to consider the child’s safety, well-being, and rights to expression, liberty, family, health and development, and expression of identity.²⁰ In a system designed around children, children will be able to remain with and designate trusted adults—parents or other family members who’ve acted in the child’s interests in the past—to help advocate for their best interests. For those children without this support system, an independent child advocate can identify and represent the child’s best interests to decisionmakers, as has been done on a limited scale, but with considerable effect, in the current system.²¹ However, every child must have access to an attorney—appointed by the government if necessary—to ensure that the child’s wishes are heard before every decision. Ultimately, decisionmakers must be required to address their consideration of each child’s best interests and there must be mechanisms to hold decisionmakers accountable to that responsibility.

For those who care about children, just imagine how frightening—not to mention Kafkaesque—it must feel to a young person about to “participate” in a proceeding that will profoundly determine his or her future, lacking all knowledge of the law and forced to endure going through the proceedings alone without the assistance of a trained professional committed to helping them know their rights. Only a cruel person would comfortably impose such an unfair arrangement on children.

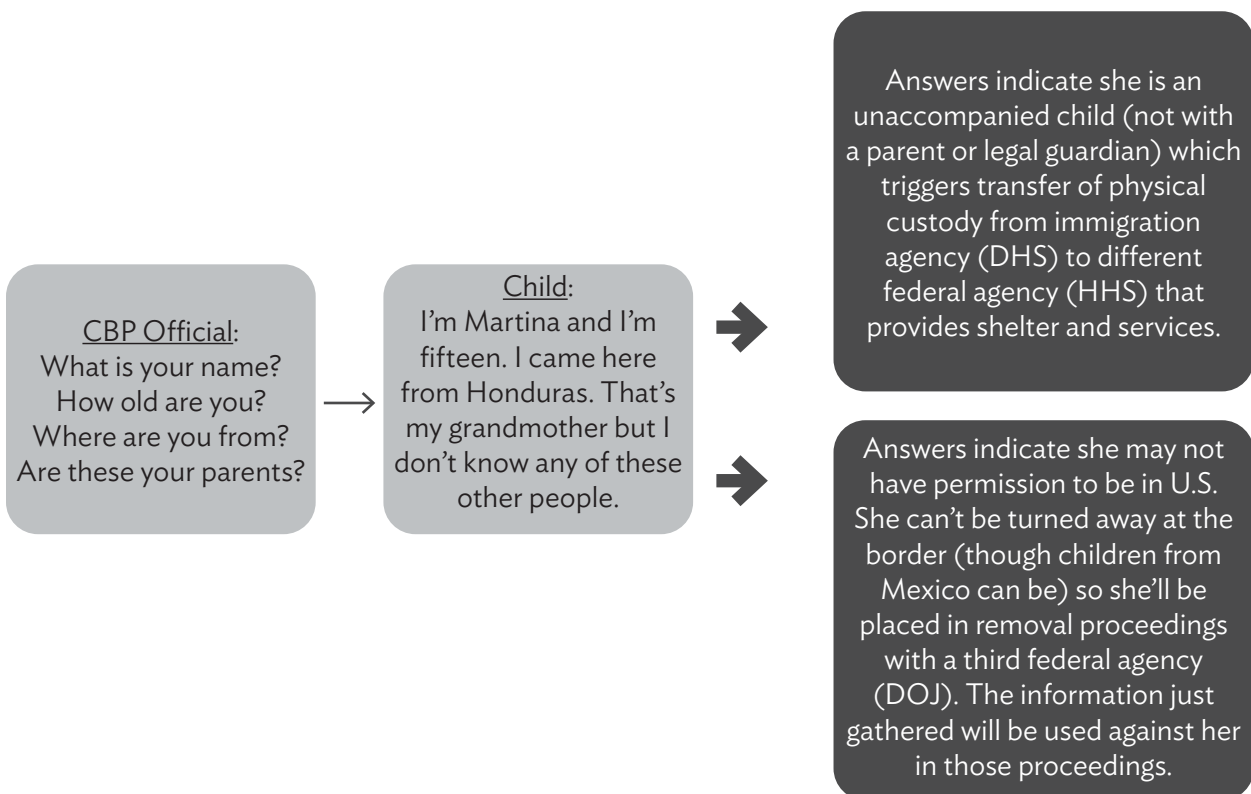
Marty Guggenheim, Commentary

Principle #2: Safety and Family First

When any child is identified by immigration authorities at the border or internally, the sole focus shall be finding a safe placement with family with the least possible time spent in any form of government custody. Immigration proceedings—whether the child will remain in the United States or return to home country—will begin only after the child’s safe placement with family or in a family- or community-based setting.

A. Current System for Immigrant Children

Under current immigration law, policy and practice, the moment a child without immigration status comes to the attention of immigration officials, they face both detention and the possibility of removal from the country. Officials will question the child—nearly always without an attorney present—and use those answers to inform placement or detention decisions, as well as to begin a legal case against the child, in which the child must defend against the government’s charge of removability (deportability). For example:



1. The Simultaneous Focus on Custody and the Child’s Legal Case Is Not in the Child’s Best Interests

From the moment Martina comes into contact with immigration officials, there is a simultaneous focus on the legal issue of whether she may remain in the country *and* where she will stay while that decision is made.

There is no place like a home environment with family members or having freedom.

Elvis Garcia Callejas, Commentary

If she is placed in government custody, she'll be asked a host of questions: for example, questions about her physical and mental health, trauma history, language skills and education, and whether she has any family members in the United States who may be able to care for her. She will be asked about these same issues repeatedly, by different adults with different goals—from officials trying to identify health needs to those trying to identify family to whom the child can be released, to attorneys trying to determine if she has a viable claim to remain in the United States.

At no time will Martina be looked at solely as a child – her status as an immigrant will affect every decision and may trump concerns about her safety or render her status as a child subsidiary to that of an immigrant facing removal (deportation). For example, if Martina has no family to care for her, she will only be able access a long-term, federal foster care placement if she persuades an attorney that she has a good faith defense to her removal, such as a claim for asylum (a very specific and complex legal test) or some type of visa. Additionally, if she does not have a family with whom she can be placed, the case against her may be fast-tracked, requiring her to defend against deportation while she is still in government detention, and in all probability, before she has had an opportunity to recover from her journey or the circumstances that caused her to flee Honduras.

Moreover, every moment that Martina is in government custody—including the weeks, months or even years she spends in “protective” custody—is documented in a file to which the federal government has access. That includes both prosecutorial and adjudicatory agencies. Her records will contain medical, educational, and even therapeutic evaluations. The paper trail attached to these services is not benign. It can be, and is often, used against the child. In short, the child's ability to find a safe home is intertwined with the government's legal case in ways that nearly always work against the child's interests.

This simultaneous focus on both placement and the child's legal case can be incredibly confusing to children and even the adults who care for or work with them. As one child explained to his child advocate long after his release from custody:

I was confused when I was caught and detained. I didn't know if it was true I could be released to a sponsor, or get help to get papers and have a future here in the U.S. I didn't know what was going to happen in the months during my detention, especially about my reunification case. I was confused why I was detained for nearly a year. I felt desperate and sometimes didn't trust what I was told.²²

I was very confused about the process regarding how the government decided who could be reunified with their family members, who had to stay in detention, and who had to be deported.²³

2. Children Access Some of the Most Critical Legal Services in Detention, Rather than in the Community

Research indicates that traumatised people need to be ‘stabilised’ before they can confront details of their experiences or make plans for their future.

Dr. Zoe Given-Wilson, Commentary

In the current system, the government funds nonprofit lawyers to come into detention facilities, provide “know your rights” presentations to children, and meet with each child individually to determine if each child has a claim to remain in the United States. In this system, the lawyer’s role is focused primarily—and sometimes exclusively—on the issue of whether the child remains or returns, and not on the issue of placement or conditions of custody. With very limited exceptions, the government generally does not fund actual representation of the child in court unless the child is asking to return home. Thus, if the child is seeking asylum or some other form of protection, the government-funded nonprofits must generally use private funds to represent the child or seek a pro bono attorney to represent the child free of charge.

Lawyers who meet with children in detention face the challenge of identifying whether children have legitimate claims for protection while those children are still in crisis after leaving their country, surviving their journey, and being placed in detention. Evaluating children’s legal rights in these circumstances is harrowing for both lawyer and child:

[In my first week in custody], a lawyer came and asked why I came to the U.S. [I] didn’t know what they were asking and [I] didn’t share anything. [I] also didn’t speak much Spanish and didn’t understand what the attorney was asking. [I] only said “yes” to the questions. The lawyer asked [me] about [my] entire life experience and [I] didn’t know why [I] should have to tell him my story . . . [I] thought [my] story was my own and that no one else should know about it. It is difficult to trust someone, especially the first time, especially when you don’t know why the person is asking you. You are not ready and don’t have experience to speak with that person. [I] didn’t know those questions were going to help me and were very important. No one told [me] that the lawyer was going to ask [me] about [my] story and what it would mean for [my] future.

[One week later, the child was transferred cross-country to another facility.] Again a lawyer asked [me] about [my] story. [I] didn’t tell him anything. [I] thought he must be crazy to ask [me] these things: did your mom or dad scold you? Did anyone harm you? Did your dad hit you? [I] said no, everything was well in Guatemala. [I] didn’t open [my] mouth or share what was inside [me]. The lawyer asked two times and [I] didn’t respond to his questions. [I] didn’t know what the questions were about. In the following months [I] was informed [I] couldn’t apply for papers because everything was fine in [my] country. It is very difficult when you don’t trust people here or why people ask you questions, especially when they are private questions.²⁴

3. Conditions of Detention can Impact Children's Ability to Proceed with Legal Case

In keeping with basic principles of non-discrimination, unaccompanied children should be treated with the same standards as national children deprived of parental care, as detailed in the UN Guidelines for the Alternative Care of Children.

Alice Farmer, Commentary

Conditions of detention can exacerbate children's well-being and their ability to proceed with their legal cases. Because children in immigration custody are targets for removal (deportation) by the government, there are often disincentives to providing appropriate care while they are in government custody. This conflict of interest led to a 1980's lawsuit, commonly known as *Flores*, challenging the conditions in which children were held. In the 1990s, that case was settled when the government agreed to meet minimum standards of care for children in removal proceedings.²⁵ In 2001, Congress transferred physical custody of unaccompanied children from the apprehending and prosecuting agency (the former INS, now DHS) to a separate federal agency (HHS). Nevertheless, for the two decades since the settlement agreement and the subsequent legislation, attorneys in the *Flores* case have repeatedly returned to court to enforce the agreement's provisions on issues ranging from which children are covered by the agreement²⁶ to the misuse of medication for children in custody.²⁷

Aside from conditions generally, the largest number of children are held in government custody in facilities along the U.S.-Mexico border, often in rural areas with limited legal, medical, and social services for children whose needs exceed what is available in government custody. In general, children are not placed in facilities closest to family they have in the United States. Rather, they are placed in a facility based on characteristics such as their age, gender, whether they are with siblings, or have special needs. As a result, their location often precludes in-person visitation by family members while the child is in custody. Most significantly, children are generally held in large shelters for prolonged lengths of time. From 2008 to 2018, the average length of stay dropped from approximately 120 days to as low as 30-40 before jumping back up to 90 days. Review of a family member's eligibility to sponsor the child's release, which might take days in the state child welfare system, lasts weeks or months for children in immigration custody.

Recent years have shown a marked increase in the number of massive, congregate care facilities, ranging from 200+ beds in a single building to as many as 1,400 children at a permanent location and more than 2,500 children in temporary, "influx" facilities. For reasons discussed below related to the confluence of immigration enforcement and custodial responsibilities, the amount of time children spend in these facilities is rapidly increasing, doubling from approximately one month to more than 70 days (for average cases, not the most difficult cases) in a matter of months in 2018.²⁸ When asked to explain the most difficult aspect of being in government custody, one youth said to his child advocate:

To be enclosed the entire time. To be bored. To receive little amounts of food. To do the same thing every day. To be there so much time when companions only stayed 15-20 days. To not

know when you can leave. You cry, you feel sad and alone. You don't have any salvation. Your case didn't have a sponsor. I don't know how to say it. But asking God for help. You feel despair to be there. Some staff treated [us] well, some treated [us] poorly even though we are all humans.²⁹

In short, while the Flores litigation and subsequent legislation moved children out of punitive conditions, they remain in government custody where they are not free to leave and often have no in-person contact with family members or engagement with the surrounding community. Moreover, while a child is in custody, everything they disclose is documented in government files which are available to the government's immigration enforcement agency for use in pursuing the child's removal (deportation) at any time in the future.

B. Lessons Learned from other Disciplines

Lessons learned from the field of child protection, international law, and immigration systems in other parts of the world reinforce the argument that current immigration practice in the U.S. risks children's short-term safety and well-being and undermines the possibility of a fair process of determining whether children will be permitted to remain in the United States.

In child protection proceedings, government officials may take a child from their home—but only while they investigate whether it's safe for the child to return. In every state, the government has only a brief period of time in which to keep the child in protective custody, sometimes as short as 48 hours, before they must go before a court and persuade a judge that the child's continued separation from her family is necessary to protect her safety.³⁰ Admittedly, these investigations into the safety of a child's home can be completed more quickly when the child lives in the same city, county or state as the agency holding the child and investigating the child's home. Nevertheless, the process is one of temporary custody and reunification with family or placement in another safe home before the case-in-chief proceedings.

Additionally, over the last several decades state child protection systems have moved away from large, institutionalized care to models that emphasize kinship care—care provided for children within their immediate or extended families, while the state and family work together to address concerns within the home.³¹ A host of protections have been put in place within state child protection systems to ensure that the child's immediate needs of shelter, access to medical care, uninterrupted schooling, and contact with family members including parents and siblings are addressed while children live with family members or in a foster home, rather than institutionalized care. In 2018, the U.S. enacted legislation that prioritizes children's ability to remain in the home even when there are concerns of abuse or neglect, and to provide services in the home so that the child can remain with family.³²

State systems created for youth accused of delinquency have also moved away from institutionalized care to community-based programming where youth remain with their families. For example, Illinois undertook a ten-year reform effort in which the agency responsible for delinquent youths was separated from the larger state department of corrections. After a host of statutory, structural and procedural changes focused on the needs

of youth, the agency was able to close three large detention facilities and reduce the number of detained youth by 75 percent.³³ Advocates involved in the reform of the Illinois juvenile justice system commented that, “there’s a growing consensus that court-involved youth, to the extent reasonably possible, do not belong in institutions—they belong in the community.”³⁴ Specific efforts to limit the number of children placed in institutional care in Illinois included funding for alternatives to incarceration, adopting a “least restrictive” requirement for placements, eliminating detention (commitments) on the basis of status offenses, misdemeanors, and low-level felonies, treating drug addiction prior to commitment, and reducing the use of detention (commitment) for probation violations.³⁵

Migrant children seeking protection in other countries also benefit from provisions that prioritize their immediate safety, health and age-appropriate services. In Ireland, “minors over 12 years of age are placed in a residential intake unit for four to six weeks, where their needs are assessed by social workers and psychologists. Following this period, they are placed in foster care. Children under the age of 12 years are placed directly into foster care.”³⁶ In New Zealand, “detention is a last resort and used only in exceptional circumstances.”³⁷

These lessons demonstrate the need for a shift away from a simultaneous assessment of custody and immigration status to an immediate focus on the child’s ability to be placed with family before the immigration proceedings begin.

1. Institutional care undermines the safety, well-being and development of the child and therefore children should spend the least possible time in government custody.³⁸
2. Children should not be separated from parents unless the parent poses an imminent threat to the child’s safety.³⁹
3. Children should not be separated from family members (kinship care providers), including those who have served as the child’s traditional caregiver, when they do not pose a risk to the child’s safety.⁴⁰ The government must establish mechanisms to quickly screen for children’s safety before they are separated from family caregivers.
4. Children taken into government custody should be placed quickly in a home environment with family members—parents, but if parents are unavailable, then other adult family members who can provide a safe home and continuity with respect to the child’s identity and community.⁴¹
5. Placement in a culturally competent foster home is the final option for safe release from government custody and must be available for children who do not have family, so that they spend no more than a brief time in government custody.⁴²
6. Children’s immigration proceedings should begin only after the child is living safely with a trusted adult.⁴³

C. Challenges for Implementing this Shift to Safety and Family First

Moving to a system where the exclusive, preliminary focus is finding a safe placement for the child will not limit the ability of the government to determine whether the child ultimately remains in the United States or returns home. Government custody is not necessary to ensure the child’s subsequent participation in legal proceedings. For years, attorneys have represented children after their release from custody, ensuring children appear in court through the

duration of their proceedings. Children who have attorneys are much more likely to participate in, rather than abscond from, legal proceedings.⁴⁴ The government also has experience funding services for children after their release from custody and reunification with family: shifting services from detention settings to released settings will not be an entirely new challenge.

In recent years, as problems arose when children were placed into proceedings in the jurisdiction where they were detained but had to seek a change of jurisdiction when they were released from custody, government officials implemented a program to delay the filing of charging documents with the court for up to 60 days, so that charging documents would be filed only after the release of most children to family. Thus, there is precedent for delaying the start of a child's case for at least some period of time.

Safe placement with family will still require a short period for investigation by the government in the case of unaccompanied children, to ensure that the individuals to whom the child will be released are who they say they are, and do not present a risk of danger to the child. But just as the child protection system has moved away from long-term institutional care, so too should immigration custody be brief and focused on finding a safe family, or family-based (foster care) placement for unaccompanied children, while ensuring that children apprehended with parents are not placed in detention at all (absent findings that the parent poses an imminent danger to the child).

Attorneys may still need to meet with children while they're in custody, to orient them to the legal system, but they will not face the burden of triaging cases for representation or making assessments about eligibility for legal relief while children are detained. Delaying commencement of the legal process does not mean that children would not have the opportunity to meet with lawyers or learn about their rights during their brief time in government custody. Rather, in delaying legal proceedings and any information-gathering by the government (which in immigration proceedings is the party opposing the child), the child will be protected from disclosing information that may be used against the child later.

D. Conclusion

The ultimate question in a child's immigration proceeding is whether they will remain in the United States or return to their country of origin. Before children can participate in proceedings that require consideration about, and inquiry into their lives in home country and their migration journey, they need to be in a safe space with adults they trust; not in government custody, where everything they say and do is recorded and could be used by the government in its effort to remove them from the country. In short, they need to be with family. For children who do not have any family to take care of them, the government must ensure a family-like or community-based setting, where they can prepare for their legal proceedings and recover from trauma outside of a detention environment. Fair proceedings will only be possible by decoupling the process of ensuring a child's safe placement from the child's immigration case.

Principle #3: A Fundamentally Fair Process

Children who wish to remain in the United States will participate in a coordinated procedure tailored to their ongoing development, in which they are not subject to repeated inquiry about past, traumatic events and in which there is timely but not rushed decision-making.

A. Current System for Immigrant Children

As with adults, the legal process for determining whether a child remains in the United States begins almost immediately upon the child's apprehension. The overarching structure is an adversarial, courtroom-based proceeding. The child faces opposition from a government attorney and appears before an immigration judge in the same courtroom as adults, following the same adversarial procedures applied to adults and with nearly the same evidentiary and substantive standards as adults. A child who wishes to remain in the United States may seek protection in that courtroom. But the child may also apply for protection from other agencies entirely separate from the immigration courts. Those agencies have their own fact-finding processes and own adjudicators. In short, children confront a complex maze of options that can confuse even experienced attorneys. During this process, children have the right to an attorney to represent them, but only if they can find and retain one on their own. Advocates for children have organized to provide free representation to some children, but demand far exceeds capacity. Meanwhile, the government is always represented by an attorney in immigration court proceedings. Once the government satisfies a preliminary burden to demonstrate that the child lacks permission to be in the United States, the burden shifts entirely to the child.

Over the years, children have expressed extraordinary anxiety about the process to their child advocates.

*Every time I go to court, I feel anxious and nervous. Many times, I don't understand what's going on. Usually my attorney gives me an idea of what to expect. Her explanations ease my anxiety for a little bit. It's hard to remain calm. The process is very intimidating because I understand that the government attorney doesn't want me to stay in the U.S.*⁴⁵

*I did not want to tell my story at court. I felt I had given it many times and it was painful to go over and over and over again. I felt sad and anxious because I had to remember very painful memories and then I was asked to tell them in front of strangers at court. Thankfully, I was close to the judge when I shared my story and the rest of the people in the court room were behind me. Being right in front of the judge made things easier [because not everyone else, including people I did not know, could hear my story].*⁴⁶

Advocates for immigrant children have won victories to improve procedures for children in court. They won the right for children to appear in court separately from unrelated adults, a

victory that prevents many, but not all, children from sharing details about their life in an open court. In 2007, the agency overseeing the immigration courts recognized that judges could take steps to make an adversarial courtroom less hostile to children.⁴⁷ But in recent years the government has implemented policies that undermine the possibility of fair hearings for children and diminish the possibility that children will be able to establish their eligibility for asylum or other forms of protection from danger.

First, the Attorney General imposed case goals (quotas) on immigration judges in an effort to reduce the backlog of unadjudicated cases.⁴⁸ This quota was widely criticized by advocates and judges familiar with the immigration system.⁴⁹ Significantly, the Attorney General failed to include variations in the quota for judges overseeing children's cases or any other type of flexibility to account for the types of challenges inherent in evaluating an immigrant child's claim for protection in an adversarial environment. Not long afterwards, the Attorney General issued a decision in which he purported to foreclose the possibility of granting continuances for immigration court while children and adults applied for certain immigration benefits from other federal agencies (as federal law and policy require them to do.)⁵⁰ As a result, children who apply for asylum before asylum offices, which offer a non-adversarial and less formal setting to present a claim of asylum but which are located in a different agency than the immigration courts, may be ordered deported by the immigration court while they are waiting for a decision from the asylum office. The Attorney General also issued a decision in which he attempted to foreclose the possibility of receiving asylum for persecution perpetrated by a family member (who, for example, subjected the child to domestic violence) or by gang members (who, for example, attempted to conscript a child into membership through assaults or torture.)⁵¹ Although those changes in policy remain the subject of litigation and may eventually succumb to federal court decisions or changes in administrations, it is clear that children increasing hurdles to develop a protection claim, especially when they often appear alone, without an attorney.

Additionally, between 2017 and 2019, thousands of children arrived at the U.S. border with their parents but were separated and rendered unaccompanied so that the parents could be charged in both criminal and immigration court—and often quickly deported.⁵² Their children were placed in HHS custody and evaluated for legal claims often without the input or knowledge, much less the assistance, of their parents.⁵³ Children have also been subject to a policy ironically named the “Migration Protection Protocols” or Remain in Mexico, in which they are forced to wait outside the United States in conditions of homelessness that may dissuade families from pursuing protection or decrease their likelihood of success in winning asylum from “tent courts” established along the border.⁵⁴ They are also subject to various, recently-enacted restrictions on eligibility in even filing for asylum, such as the “transit ban,” which bars them from seeking asylum if they've passed through another country before reaching the United States without stopping to seek asylum in transit.⁵⁵

Yet as much as cases that are “rushed” through the system are detrimental to children's safety and undermine their right to fair process, so is the uncertainty of cases that may last for many years, especially when that uncertainty is paired with an inability to work or travel, or the possibility that any mis-steps in their teenage years—from missing school to experimenting with alcohol or marijuana—could undermine their entire immigration case. Because of

the many different agencies involved in immigration cases, the very different processes for applying for protection and a years-long backlog of immigration cases pending before the courts, children may wait years for their “merits” hearing—in which a judge determines whether they are eligible for protection or may adjust their status to that of lawful permanent resident. Children face added complexity in a system that, depending on the nature of the protection the child seeks, requires decisions from different actors in entirely different settings (for example, state court judges rendering decisions in family court that are later submitted to federal immigration authorities.) Children typically have no control over the timing of the decisions made by each of these entities. Until there is a final decision on each claim for protection a child seeks, that child lives with perpetual uncertainty, and may ultimately abandon legitimate protection claims in search of finality.

B. Lessons Learned from other Disciplines

Immigration cases are not criminal matters; they are civil proceedings. However, children (and adults) in immigration proceedings face consequences that are comparable to if not more severe than criminal proceedings. These include the loss of liberty, separation from family, and the possibility of banishment from a country and permanent separation from family and community.

Outside of the immigration system, court proceedings for children in the United States are typically conducted separately from adults—and at least in theory, have been designed to address the vulnerabilities inherent in childhood and the distinct developmental stages of childhood. The first juvenile courts were created for children in 1899, when the public and lawmakers acknowledged that children charged with bad acts, which would constitute crimes if committed as adults, should be adjudicated in separate courtrooms with special judges and where the consequences were different than those imposed upon adults.⁵⁶ Additionally, for more than 40 years, Congress has enacted legislation regarding the role of government in cases where children are the suspected victims of abuse or neglect—situations that involve the investigation of parents or other family members, and which lead to decisions about the short- and long-term placement of children.

Children do not have the same ability as adults to narrate their history; their stage of development and any history of trauma impact their ability to recall past events or understand how current decisions will impact their future.⁵⁷ In recent years, many (most) states have created “Child Advocacy Centers,” where children subjected to harm such as abuse can be questioned about the experience by a trained professional, in a child-appropriate setting. Other decisionmakers with an interest in the case—law enforcement officials who may investigate the crime, prosecutors who may lodge charges against the offender—have an opportunity to observe the interview and submit questions to the professional interviewing the child.⁵⁸ Similarly, federal law permits videotaped depositions of children who were the victim of an offense charged in federal court when the child “would suffer emotional trauma from testifying in open court” or would be “unable to testify because of fear.”⁵⁹

In recent years, advocates for children involved in both child welfare and delinquency proceedings—known as “dual-status youth”—have developed systems to collaborate for the

benefit of children and to limit adverse outcomes for children.⁶⁰ These collaborations, which involve both information-sharing and joint responsibility for children can lead to “decision-making that is fair, equitable, and developmentally appropriate” and which ultimately prevent additional, adverse outcomes for children.⁶¹

Additionally, children’s need for permanency⁶² requires that there be timely decisions in their cases.⁶³ While proceedings should not be rushed, neither should they drag on indefinitely without any likelihood of a final determination regarding the child’s future.

For all of these reasons, children need an advocate at their side in proceedings where decisions are made about them by someone other than their parent; an advocate who speaks for the child and who can hold decisionmakers accountable for just and timely decisions.⁶⁴

In sum, the fair adjudication of children’s rights requires that:

1. Children should not be subjected to repeated interviews or inquiries about traumatic events.
2. Decision-making must be coordinated in a way to promote timely outcomes in the best interests of the child.⁶⁵
3. Children must be represented by counsel when they are subject to an adjudicatory process that determines whether they may stay or must return, and which could result in a limitation of their liberty or other rights.⁶⁶

C. Challenges for Implementing this Shift to a Fundamentally Fair Process

We anticipate significant disagreement among immigration practitioners over how best to “coordinate” a child’s case in a manner that leads to a more fair decision. In the present system, where there is no best interest standard, no specialized courts for children and no specialized corps of adjudicators, having a disjointed system with any number of potential decisions-makers means that an attorney may find one decisionmaker among the many who is particularly sensitive to the facts of that child’s case—and thereby secure protection for her client. That possibility is increasingly threatened, however, as immigration judges rely on Attorney General guidance to order children removed even while they have protection claims pending before other agencies. And while disjointed and often delayed decision-making provides more opportunity for a child to recover from past harm and live in a family environment, delayed decisions leave children in an unacceptable limbo. In the Roadmap (Section III) we attempt to set forth a process that accounts for these challenges, and where concerns about individual decisionmakers are mitigated by the general principles set forth in this section.

D. Conclusion

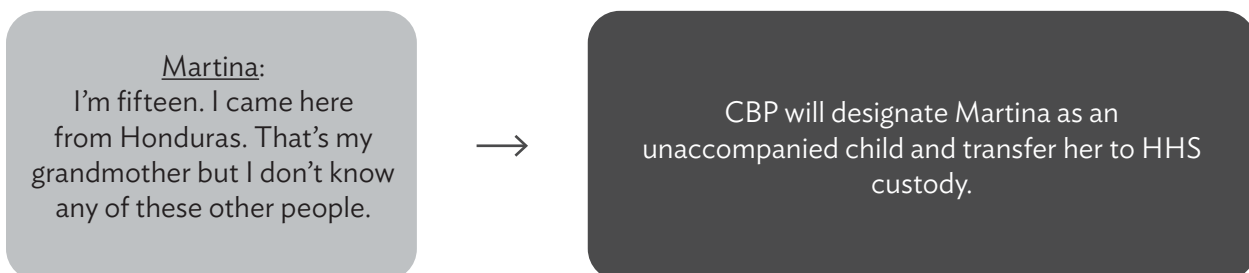
Decisions to permit a child to remain in the United States, permit them to return home at their request, or order them to return when they fail to demonstrate a right to remain, must be fair. For children, this means developing procedures tailored to their evolving development, addressing their capacities and their needs. But fairness requires both fair procedures and substantive protections that meet children where they are, as discussed in greater detail below.

Principle #4: Specialization

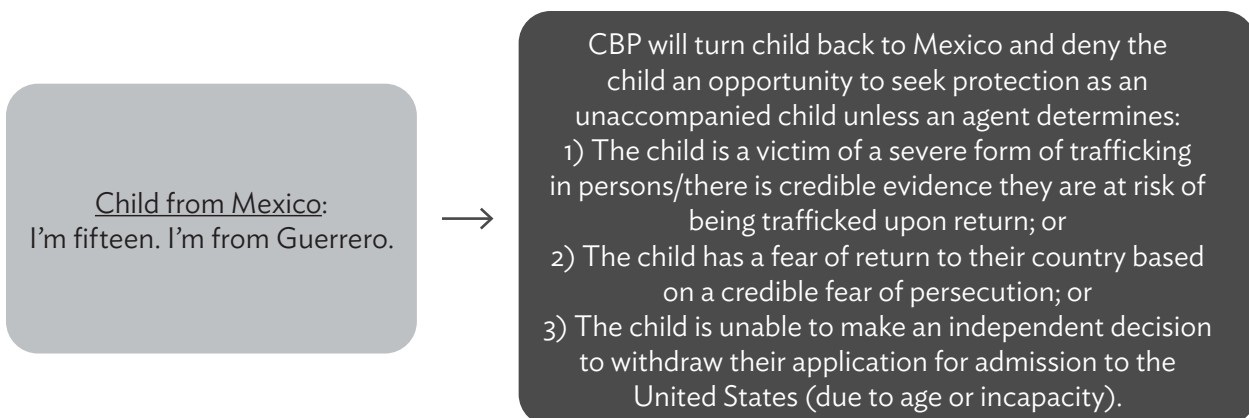
Every decisionmaker and stakeholder in a child's case will have specialized training and experience in children's cases including an understanding of child development, the impact of trauma on children, and strategies for working with children from different cultural backgrounds who have left their countries of origin.

A. Current System for Immigrant Children

In any child's immigration case, officials from at least three different federal agencies will make decisions affecting the child's safety and their ability to remain in the United States. Officers from two of those agencies—including border patrol officers within the Department of Homeland Security and immigration judges within the Department of Justice—often deal with a high number of both children and adults on a daily basis. At best these officials may have some minimal training about migrant children and will be familiar with the legal process. But they lack specialized training in interviewing or questioning children or working with child migrants as compared to adult migrants. Consider Martina's case. When apprehended by border patrol officials, she indicated that she did not know the people found with her, except for her grandmother.



Another child in Martina's group disclosed that he was a 15-year-old from Mexico. Unlike Martina, a child from Mexico will not be designated as an "unaccompanied alien child" and will not be placed in protective custody. Instead a child from Mexico will be immediately returned without further inquiry *unless the border agent who happens to encounter the child determines that the child falls into one of three, specialized categories.*



This distinction is the result of a federal law that treats children from contiguous countries (Canada and Mexico) differently from children from all other countries. Whereas unaccompanied children from all other countries must be transferred from DHS custody to HHS custody within 72 hours, DHS may return children from Mexico directly to Mexico, unless the agency identifies them as vulnerable pursuant to one of the three categories above (the child is a victim of trafficking or at risk of trafficking, has an asylum claim, or is unable to make an independent decision to return to Mexico or Canada). The immigration officials who make these determinations are the same officials who carry weapons as they patrol the border, who seek out traffickers of weapons, drugs or people, and who apprehend people attempting to evade apprehension.

For over a decade, the process has failed most children from Mexico.⁶⁷ Advocates have raised concerns about each aspect of this “screening” of Mexican children, from the questions DHS officials ask children, to the conditions under which the screenings take place, to the training and qualifications of the officials responsible for questioning children.⁶⁸ Efforts to increase the ability of border authorities to appropriately identify these children—for example, by requiring immigration officials to staff border patrol stations with child welfare workers to interview and evaluate children—have been proposed but failed to win sufficient political support.⁶⁹

Alternatively, asylum officers and immigration judges who hear children’s cases have from time to time been provided with additional training on children’s claims for relief and issues including children’s stages of development and the impact of trauma on children. Yet training is subject to budgets and political priorities, and these officials hear claims from both adults and children. Immigration judges, in particular, carry heavily backlogged dockets with both children’s and adults’ cases.⁷⁰ More recently, they were subjected to case quotas that will make it more difficult to delve deeply into the facts and circumstances of each child’s case.⁷¹ These quotas were not adjusted for judges who hear children’s cases nor were children’s cases excluded from the quotas.

To the person that decides if I stay: I would like to tell that person that I am in a very tough and difficult position. I am the one who is suffering. Not everyone goes through the same experiences in life. I would tell that person to make a conscious effort to understand me and my struggles, and my desire to stay in the U.S. to remain safe.⁷²

Officials responsible for making decisions about immigrant children need to have agency training and expertise in understanding how children communicate, how trauma impacts children and affects their memory and communication, and how children perceive and experience danger. Without such training, they risk misunderstanding children or missing critical information, which undermines children’s right to a fair process.

B. Lessons Learned from Other Disciplines

In both child welfare and delinquency proceedings, children’s cases are generally heard and adjudicated by judges with specialized training.

In recent years, those systems have established standards to deepen the skills and expertise

of judges and other decisionmakers. For example, the National Council of Juvenile and Family Court Judges' Guidelines for Improving Court Practice in Juvenile Delinquency Cases has established "Key Principles of a Juvenile Delinquency Court of Excellence." These Principles recommend that delinquency court judges "have multiple year or permanent assignments," with judges who have "a professed interest in and capacity to handle juvenile and family matters . . .".⁷³ Additionally, "the Judiciary, court Staff, and all system Participants" should be "both individually trained and trained across systems and rolls."⁷⁴ The guidelines also require understanding and appreciation of "the ethnic and cultural traditions and mores, the socio-economic circumstances, the gender differences, the disabilities, and the strengths of those who enter the juvenile delinquency system."⁷⁵

The following strategies would help ensure a system in which all actors have the training necessary to understand children's stories and protect their rights:

1. Every decisionmaker in a child's case, including but not limited to the presiding judge and any decisionmakers, the attorney representing the child, the independent child advocate, and the attorney representing the government, will have specialized training in working with children.
2. On a regular basis, decisionmakers will receive training on subjects including: child development, particularly with respect to behavior, communication and development; the impact of trauma on child development; and working with children from different language backgrounds and cultures.
3. To the extent possible, decisionmakers in children's cases will work exclusively on children's cases, to minimize the possibility that children are seen or treated as adults, or that adult standards are applied to children's cases.

C. Challenges for Implementing this Shift to Specialization

We anticipate that the greatest challenge of increased specialization and training will be pushback from agencies that have long prioritized generalization over specialization and that have limited budgets for training and professional development. Nevertheless, there are strong, proven examples of specialization in immigration adjudication, such as asylum officers, whose work is specific to reviewing applications for asylum filed by unaccompanied children (or by adults who are not in removal proceedings). Advocates and decisionmakers in other fields adjudicating rights have produced materials that could be adapted for children in immigration proceedings, and they convening meetings and trainings where the system for adjudicating the rights of migrant children are already discussed and where stakeholders from the immigration system are welcome.

D. Conclusion

The goal of specialization and training is to increase the likelihood that decisionmakers will be able to effectively communicate with and understand children—and thereby increase the likelihood of a fair decision-making process. But specialization only advances children's rights when it is applied in concert with procedures and substantive provisions that accommodate children's particular needs.

Principle #5: No Repatriation to Unsafe Situations

Before a child can be repatriated against the child's wishes to their home country or sent to a third country, the government must demonstrate to an independent adjudicator that the child will be safe upon return.

A. Current System for Immigrant Children

Under existing laws, a child carries the burden of proving his eligibility to remain in the United States, once the government has properly charged the child with lacking permission to enter or to remain in the country. If the child fails to carry this burden, the child is removed—typically without inquiry into whether the child will be safe, and even if the child had previously proven she will be unsafe upon return. This is the case despite a federal law that requires the safe repatriation of children.⁷⁶ Consider Martina's case:

Martina's Testimony:

After my mother died, I went to live with my grandmother. I became best friends with the girl next door. Her father is an aide to the governor. Starting at the age of 10, whenever I visited my friend, her father would take me into a separate room to "speak" with me, but he was touching me. When I was 12 he started raping me. He would pick my friend and I up from school every day. I eventually told a teacher but she told me it would be dangerous to keep talking. I even told a police officer, but he told me if I kept "complaining" I might disappear. That's when my grandmother brought me here. No one in our community will take me in because they are afraid of my neighbor. I will have nowhere to live when I return. [Martina's attorney submits evidence that the children's shelters in her country will only care for children under the age of 14.]



Immigration Officials (Asylum Officer and Immigration Judge)

After hearing additional evidence, both an asylum officer and immigration judge finds Martina's testimony credible and determines that the sexual abuse constituted persecution. But both nevertheless conclude she is not eligible for asylum under current interpretation of asylum law (specifically, they decide that she has not established membership in a qualified "particular social group.")



Deportation Officials

When Martina's asylum claim fails and her appeals are exhausted, the immigration judge orders her removed and DHS takes her into custody and arranges for her to be flown to her home country. DHS's sole concern is that she has documents that allow her to re-enter her country.

When she lands at the airport in her home country she is transferred to officials from her country without further inquiry or action by U.S. officials as to who will take custody or what will happen next.

B. Lessons Learned from other Disciplines

[R]ecent advances deepen the notion that the non-refoulement standard for adults is augmented for children. The New York Declaration and the Joint General Comments emphasize the importance of considering the best interests of the child in decisions concerning return, above and beyond that of immigration status.

Alice Farmer, Commentary

A fundamental principle of human rights is the right to safety.⁷⁷ Children have no lesser right to life and safety than adults and are entitled to “special care and assistance.”⁷⁸ In Europe, countries have taken steps to ensure that children are not repatriated unless they will be safe. For example, if an unaccompanied child in Switzerland cannot establish eligibility for refugee status, the State Secretariat for Migration (SEM) assesses “whether it is reasonably justified for the unaccompanied minor to return to the country of origin.”⁷⁹ Factors that contribute to this analysis include: “the situation in the country of origin, the minor’s age and what solution would be in the child’s best interests . . . [which] includes an assessment of the minor’s level of maturity and independence, the extent of his or her relationships in both the country of origin and in Switzerland, the degree of integration in Switzerland, and the possibilities for a full reintegration in the country of origin.”⁸⁰ In other words, Switzerland evaluates the child’s safety and possibility for stability and permanence in home country, applying specific, measurable factors. Similarly, Denmark will permit an unaccompanied child to remain in Denmark even after the child’s asylum claim is refused, “if it is determined that the minor would be placed in an emergency situation if returned to the country of origin owing to the lack of an adequate support network in the form of family or public assistance.”⁸¹ This protection lasts until the children turn 18.⁸²

Within the United States, legal recognition of the principle that “children are different than adults” has led to fundamental changes in the penalties that can be meted out to children convicted of serious crimes. In three seminal decisions, the United States Supreme Court found it unconstitutional to: impose the death penalty as a punishment for crimes committed by children;⁸³ impose the sentence of life without parole for children convicted of crimes other than homicide;⁸⁴ and to automatically sentence youth convicted of homicide to life without parole.⁸⁵ As the team of litigators and experts who collaborated on these cases explained, the decisions rested on several factors, including the Supreme Court’s recognition of the “reduced culpability” of juveniles, their “greater potential for reform,” and their “reduced trial competence.”⁸⁶ The last factor reflects the Court’s view “that a juvenile may simply be less able than an adult to navigate a high stakes encounter with the police and a criminal proceeding in which his entire future life is on the line.”⁸⁷

Together, the idea that children are different than adults because they are still evolving, they are less culpable, and they have potential for growth and development, in concert with international consensus that children should not be repatriated to situations where they may be persecuted or face similar harm, suggests that:

1. Children cannot be repatriated against their will if there is evidence they will be unsafe upon their return.
2. An analysis of a child’s safety upon return shall focus on case-specific facts including: the availability and willingness of family to receive and care for the child

upon return; the existence of services to address existing physical or mental health needs; and services to support full reintegration.

C. Challenges for Implementing this Shift to Repatriation only When Safe

Despite federal law directing U.S. agencies to safely repatriate children, a reimagined system that shifts the burden to the government to demonstrate the likelihood of safe repatriation will require substantially further decision making than exists in the current system. Thus, children will require representation for the duration of all proceedings—including the safe repatriation assessment and determination. As proposed in the Roadmap (Part III), A child’s attorney will be able to test or challenge the government’s evidence of safety upon return. Similarly, an independent child advocate can identify whether repatriation is in the best interests of the child.

This principle does not mean that every child who prefers to remain in the United States will be able to do so. If the child is unable to win protection and the government can provide evidence that the child will safely repatriate, for example, to live with a family member willing and able to meet the child’s needs, repatriation may be determined to be safe for, and in the best interests of, the child. That is, in fact, the very standard the government requires for a child to be released from government custody (detention). There is no justifiable reason the standard should be any lower for a child facing repatriation—particularly if that decision will be permanent.

Under this standard, children may be eligible to remain in the United States until they reach adulthood, at which time they may be required to return to their country of origin. By that time, the children may have lost connection to family and community members in home country. They may be fully integrated into the community in the United States, they may have married, or have U.S. citizen children—which may be the direct result of a system that can require multiple years to adjudicate claims for protection. They may have lost language skills and have little that binds them to their home country. Alternatively, their family or foster home may have enabled them to maintain ties to their identity, culture and community. Sending them back to home country will undoubtedly result in another uprooting with the risk of new separations from family and community established in the United States. On balance, however, adults will have had notice of, and an opportunity to prepare for, return. They should be better equipped to address and respond to challenges than children who are still developing physically, intellectually, and emotionally. And, as we propose, they will have an opportunity to argue that the equities they have established in the United States merit an exercise of discretion that allows them to remain.

D. Conclusion

A system designed to “do no harm” to children must consider the consequences of decisions, including the decision to repatriate a child who is not yet an adult and not yet able to fend for herself, protect herself, and meet all of her needs without the care of family members or the assistance of others. For these reasons, the principle of “safe repatriation” must have teeth. This principle imposes upon the government the burden to prove that a child will be safe upon return before the child is repatriated. Absent that determination of safety, the child will have the opportunity to seek protected status that lasts until adulthood.

Principle #6: Childhood Continues to Age 21

There is consensus in the medical community that children continue to develop and mature well into their twenties. An increasing number of legal systems have recognized this principle, extending the age of childhood or youth to 21.

A. Current System for Immigrant Children

The protections afforded unaccompanied children end the day a child turns 18. For example, when an unaccompanied child in protective custody turns 18, they will be turned over to immigration officials at DHS. Those officials typically come to the child's place of custody (a shelter or more restrictive detention center) on their 18th birthday; they may handcuff and shackle the 18-year-old; they will transport him to a processing center; and then in almost all cases they will jail the teenager in an adult detention facility. If the 18-year-old has either a child advocate or an attorney prior to turning 18, those adults will have advocated with DHS officials to release the child to either a family member or an institutional sponsor to avoid the child's transfer to adult detention. But even with these resources, most children who turn 18 while in HHS custody are directly transferred to adult detention, despite a statutory requirement for DHS to consider a less restrictive placement for each 18-year-old.⁸⁸

Consider Martina's case. While she is in HHS custody, the agency will attempt to place her with a family member. But in some cases, HHS will deny a child's release to family, in a process that takes place outside of courtrooms and is rarely subject to appeal. For example, HHS might refuse to release Martina to her grandmother because while in custody, Martina allegedly acted out and displayed behavioral concerns (most likely age-appropriate responses to separation, detention and other traumatic events), and the agency believes Martina's grandmother won't be able to keep her "out of trouble" after her release. Alternatively, HHS may be unable to release Martina to her grandmother because DHS subjected the grandmother to expedited removal, deporting her to Guatemala shortly after Martina and her grandmother entered the United States without considering the impact on Martina. Either way, Martina will be transferred to DHS and placed into adult detention on her 18th birthday if she does not have an attorney or child advocate to both identify a "post-18" placement and persuade DHS to exercise its discretion to release her to an alternative ("post-18") placement.

In just one day, a day that should have been one of celebration, Martina will move from a facility where federal law required access to education, counseling services, physical exercise and time outside, to a facility where solitary confinement is permissible, where there are no education or counseling services, and where her release is conditioned not on the availability of a safe sponsor but on the ability to pay a bond. In many cases, after just a short period in the adult detention system, children will seek an order of removal to their home country to escape the conditions of adult detention or because they have been persuaded that there is little or no hope of securing a release through bond or a permanent grant of protection.

B. Lessons Learned from other Disciplines

[S]cholars no longer think adolescence ends when a person becomes eighteen years old. Instead, they recognize there is a transitional period between adolescence and adulthood.

Dr. Antoinette Kavanaugh, Commentary

The field of adolescent development has provided critical insight into the maturity of teenagers and young people in their early twenties to those in their late twenties.

Federal and state law all recognize the importance of treating youth or young adults between the ages of 18 and 21 differently than adults. The Federal Fostering Connections to Success and Increasing Adoptions Act (P.L. 110-351) provides federal funding to states that allow youth to remain in foster care after those youth turn 18 years old.⁸⁹ The District of Columbia and 46 states permit foster youth to continue receiving services under this act.⁹⁰ Several states will also take initial jurisdiction over a case when the subject youth is over the age of 18, for purposes of adjudicating dependency or custody.⁹¹ Similarly, the vast majority of states allow delinquency courts to maintain jurisdiction over children after they turn 18.⁹² This prevents children's abrupt transfer to adult systems, and allows judges and other stakeholders to continue to provide services to children in the delinquency system.

U.S. immigration law itself is inconsistent in how it defines childhood; in some instances it extends the benefits of childhood beyond the age of 18. The Immigration and Nationality Act defines a "child" as someone who is under the age of 21 (and unmarried).⁹³ It also includes provisions to protect children from "aging out" of that status due to backlogs in processing applications for benefits.⁹⁴ Together, the trends in child protection, delinquency law, and in other areas of immigration law, indicate that:

1. Protections afforded to immigrant children should be available to and extend to the age of 21, given that decisions in their cases affect where they live, with whom they live, whether they will return to a country where they experienced persecution, torture, abuse or other harm in the past, or fear that harm if they are returned, as well as the possibility of banishment from a country (the United States) where they have lived for some time.
2. These protections include: eligibility for protective custody (rather than adult detention) and the ability to seek forms of protection available only to children, or that have different requirements for children than adults (for example, the provision exempting child victims of trafficking from assisting law enforcement in the prosecution of their traffickers).
3. Children should have the opportunity both to continue with their schooling but also to work lawfully (in a manner consistent with state child labor laws) in order to foster their development and independence to the age of 21.

C. Challenges for Implementing this Shift to Accepting Emerging Adulthood

Although this principle means that more youth—those between the ages of 18 and 21—would be placed initially in protective custody when they are apprehended at the border, application of the first principle (prompt release of children to family) should help to avoid significant, long-term spikes in the number of children in government custody. For those children who must spend some short period in custody, it would be important to develop age-appropriate placements in which children over 18 are not in contact with significantly younger youth. State licensing laws, which often limit institutional placement to children under the age of 18 are not an insurmountable barrier, as state agencies have already identified ways to respond to foster youth who have elected to remain in care over the age of 18 or who have returned to care before turning 21 under the Fostering Connections Act.

Admittedly, in concert with the prior principle that children cannot be repatriated to unsafe situations, this change is likely to result in children spending more time in the United States before facing the possibility of repatriation to their countries of origin as adults—resulting in separation from even deeper and stronger family and community ties developed while living in the United States. Nevertheless, at age 21, those young people ordered to return to their home countries will at least have the benefit of greater maturity and more experiences to support them upon return.

D. Conclusion

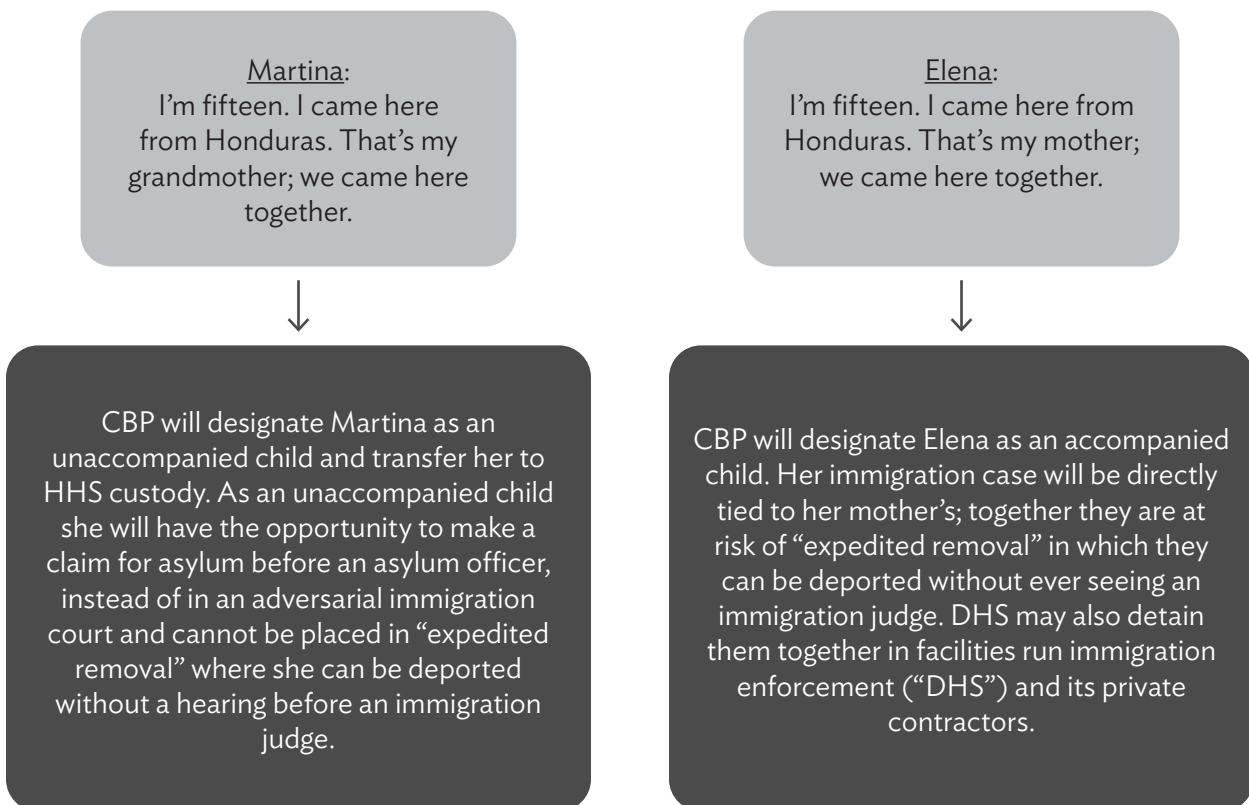
Any number chosen to represent the end of childhood and the beginning of adulthood for children will be arbitrary. But all evidence indicates that at the age of 18, children are still very much developing, and years away from full maturity. This includes the development of executive functioning, which is critical for reasoning and decision-making. Extending childhood to at least the age of 21 will allow youth to benefit from rules and procedures that are different from those imposed upon adults, in a manner consistent with other areas of the law in which children's rights and obligations are limited before the age of 21. Most significantly, for immigrant children, it will prevent the government from placing children in harm's way, whether in the United States or in their home country.

Principle #7: All Children Share the Same Rights and Protections

All children placed in immigration proceedings hold the same rights. These include the rights to express their own wishes, to safety, to liberty, to be protected from family separation, to develop, to maintain their identity, to have their best interests considered in all decisions, to be treated with dignity and respect, and to have a fair opportunity to seek protection from harm. Policies established on behalf of one group of children (for example, those who are unaccompanied) will be applied to all children who seek protection in, or face removal from, the United States.

A. Current System for Immigrant Children

As noted earlier, the few protections that currently exist for children in immigration proceedings were carved out of—or into—a system that otherwise treats children as adults. And in general, these protections apply only to certain children—for example, children who are apprehended or identified without a parent or legal guardian to take custody or care for the child (“unaccompanied children”). Consider the difference between Martina and another child apprehended at the same time, by the same immigration authorities:



Courts have recognized the unequal treatment that can result when the government categorizes children differently based on the location of their entry or apprehension, the manner of their entry, and/or the adults accompanying them. For example, the “Flores

Settlement Agreement” reached in the late 1900s, sets minimum standards of care for children in government custody.⁹⁵ At the time of the agreement, children were held in the custody of the then-Immigration and Naturalization Service (“INS”). With the passage of the 2002 Homeland Security Act, Congress transferred custody of unaccompanied children away from immigration officials (now part of the new Department of Homeland Security or “DHS”) to the Department of Health and Human Services (“HHS”).⁹⁶ Officials within HHS recognized that they were bound by the Flores Agreement with respect to the care and custody of unaccompanied children. Yet DHS officials, who retained custody of “accompanied children”—children who arrive with parents—did not consider themselves similarly bound and refused to facilitate children’s release from ICE custody. In 2015, Flores class counsel challenged this distinction. A federal court rightly held that the protections of the Flores agreement apply equally to unaccompanied and accompanied children.⁹⁷

As recognized in that decision, there is little justification for treating immigrant children in fundamentally different ways simply because of when they arrived at the United States or where they were apprehended in the United States, particularly when those circumstances may be beyond the child’s control. Moreover, providing children with different protections based on the adults with whom they travel or live can force family to make choices that pit the child’s own rights against each other—for example, the right to family integrity against the right to liberty and safety. In recent years, advocates witnessed families make just these choices—for example, parents intentionally separating from children so that children could be transferred into HHS custody, while parents were subjected to a new “Remain in Mexico” policy during the pendency of their immigration case.⁹⁸

B. Lessons Learned from Other Systems

In other systems adjudicating the rights of children, children receive the same process and protections. At least on paper. Access to these rights and protections often varies as a result of the child’s or family’s race, gender, ethnicity, economic status, or other factors.⁹⁹

One example is the increasing practice of charging children accused of certain crimes as adults—and the corresponding effort to limit or end these “transfers” from delinquency court to adult criminal court. In the 1990s, children’s advocates observed an increasing use of the “super-predator” narrative, in which children accused of crimes—typically children of color—were described in ways that suggested their behavior was distinctly dangerous and which therefore merited arrest, detention and trial in criminal court. Many states lowered the age of adulthood for charging children with crimes that could be prosecuted in criminal court, and which resulted in criminal sentences, rather than adjudications of delinquency. At the same time, researchers were identifying the unique markers of childhood, including those that impact comprehension, reasoning, and decision-making.¹⁰⁰

Over time, advocates used these developments bring about the end of the death penalty and juvenile life without parole for children. Today they use these arguments in an ongoing effort to push back against the transfers of youth from delinquency to criminal court.

To prevent the disparate treatment of immigrant children a reimagined system should ensure that:

1. Protections for immigrant children—both procedural and substantive—should apply to all immigrant children, regardless of the location, time, or manner in which they are apprehended or present themselves to immigration authorities.
2. If extending these protections to children will impact the immigration case of a parent or other accompanying family member, any distinctions in treatment should be resolved in the child’s favor, taking all steps necessary to preserve the child’s right to family integrity.

C. Conclusion

The system of laws governing immigration was generally written with adults in mind. Existing protections for children were created as “carve-outs” or exceptions and reflected the needs of particular groups of children—such as children who arrive at the border without a parent, or those who were brought to the country at a very young age by a parent. Early drafts of this document focused primarily on unaccompanied and separated children, who benefit from several important protections but who still face a manifestly unfair system that fails to account for all of the factors that distinguish children from adults. Several reviewers were quick to point out that designing a new system for these children would still result in the disparate treatment of other children and youth. For that reason, we believe that the principle set forth in this document should apply to all children subject to a determination of whether they will remain in the United States or return to their country of origin.

PART II: A NEW VISION FOR ROLES AND RESPONSIBILITIES IN CHILDREN'S IMMIGRATION CASES

A significant part of the Chicago Symposium was dedicated to the role(s) of attorneys, child advocates and government decisionmakers in children's cases. In their discussions, Symposium participants focused on how these actors' roles within the immigration system were confined by the structure of a system designed for adults. They also considered how, even in systems designed for children such as child welfare and juvenile justice, actors could fail to understand their role, fail to embrace their role, or be constrained in their advocacy by system-wide challenges, such as high caseloads, insufficient training, and a failure to view children as rights-holders.

In this section, we highlight existing limitations on the roles of stakeholders, and identify goals for stakeholders in a reimagined system—one in which a child is never on their own.

A. Government Actors

I understood that my job wasn't about removals and deportations, but about finding the right answer in the individual case. I saw myself working in partnership with the judge and counsel, or the immigrant, to try to get to the bottom of an asylum claim or possible eligibility for some other form of relief. I understood that I wasn't really representing INS, but an idea of seeking justice.

Mary Giovagnoli, Commentary (on her role as a government decisionmaker)

Observations from experts within the immigration system: Immigration experts noted that there are a host of government agencies and officials who may be called upon to issue decisions in a child's case, from the immigration judge overseeing the removal proceeding, to officials within U.S. Citizenship & Immigration Services (USCIS), who decide whether or not children are eligible for particular benefits such as asylum, special immigrant juvenile status, or U- or T- non-immigrant status. Throughout the Chicago symposium, participants expressed concerns that government officials responsible for decisionmaking in children's immigration cases were essentially "adapting" their approach in adult's cases in order to adjudicate children's claims.

- With the enactment of a 2008 anti-trafficking law,¹⁰¹ all unaccompanied children gained the right to have their asylum claims heard first in an asylum interview before USCIS officials, even though the children were simultaneously facing removal in immigration court. Symposium participants commented on the "steep learning curve" of asylum officers suddenly adjudicating complex asylum cases brought by children—in many

cases, children who were unrepresented. Those officials needed to learn how to explore facts—facts relating to past persecution, or a fear of future persecution on account of very specific grounds—as related by children, rather than adults.

- Others commented on the limited training provided to immigration judges and other officials on the differences between children and adults in ways that are relevant to understanding children’s communication, gauging their credibility, and evaluating the dangers they face.
- Participants also commented upon the use of boilerplate documents and boilerplate decisionmaking for children. For example, officials from the agency apprehending children at or near the border (CBP), issue each child a standardized “notice to appear” at immigration court at some point in the future. To do this, they use the very same document issued to adults, followed by a boilerplate explanation of the child’s rights.
- Participants also discussed how quickly children experience fear around government actors, from judges who sit on a raised dais wearing black robes, to federal buildings in which children are forced to remove shoes and belts and pass through a metal detector before entering.

Observations from experts from other fields, including child welfare and juvenile justice: These experts noted that the roles of participants in their systems were defined in relationship to the standards adopted by those systems, which change over time: for example, the shift in juvenile justice from a best interests standard of decision-making to a “restorative justice” decision-making impacted the roles of juvenile court judges in those cases. They also observed that questions of the competency or capacity of a child, which can have a significant if not determinative impact on children’s immigration cases—require the judge to view the child’s situation in context—a very challenging task if judges lack training in child development, child trauma, child health, and the impact of adverse childhood experiences (ACEs).¹⁰²

With respect to evaluating a child’s credibility, experts noted that social science research could help manage decisionmakers’ expectations about children’s ability to provide evidence. They also emphasized the importance of identifying and addressing the ways in which race, gender, poverty and historic perceptions of children as property influence decision-making.

Recommendations for Government Actors:

- Role. Symposium participants consistently emphasized the obligation of government actors—particularly officers of the court—to ensure fair proceedings that would lead to just outcomes. In the Roadmap that follows, we reimagine the role of many, if not most, of the government officials who make decisions about unaccompanied children, especially immigration judges. But regardless of specific decisionmaking responsibility, each actor must ensure fair, child-centered policies and practices. The Roadmap expresses a strong preference for government decisionmakers who work exclusively with children, at least for periods of time. But all decisionmakers should have in-depth and specialized training on adjudicating children’s claims and dedicate a substantial part of their time to children’s cases.

- Training. To ensure they are able to communicate with and understand children, are able to put their claims into perspective, and to ensure a fair proceeding for the child, government actors should receive regular training on:
 - the forms of protection available to children and the evidence required to support claims for protection;¹⁰³
 - the identity and role of stakeholders involved in children's immigration cases;¹⁰⁴
 - information about the circumstances under which children and families leave their countries, their journeys to the United States, and the risks they experience in home country, on the journey and upon arrival;¹⁰⁵
 - children's stages of development and impact of trauma on children;¹⁰⁶
 - strategies for communicating and working with children in a developmentally- and culturally competent manner;¹⁰⁷
 - the impact of child welfare, juvenile justice or criminal cases on a child's immigration case;¹⁰⁸
 - the factors relevant to considering the best interests of the child;¹⁰⁹
 - the obligations for protecting client confidentiality;¹¹⁰
 - understanding and seeking evaluations of a child's competency;¹¹¹ and services available to children if in government custody and in the community.¹¹²

B. Attorney for the Child

In their discussions, Chicago Symposium participants identified the following barriers to the effective representation of children facing loss of liberty, separation from family, and possible return to unsafe situations.

- The chasm between demand and supply: Because there are so many more children than attorneys (even when attorneys handle large caseloads), attorneys are often forced to “triage” and choose the cases that are most likely to win, or most likely to benefit from an attorney's involvement, leaving many children without representation.¹¹³
- Repeat players: Lawyers who aggressively challenge the government's burden, or who demand immigration judges rule on novel procedural claims are expending resources on a single case that might be dedicated to several others; and also risk angering judges and government attorneys in an environment rife with “repeat players.”¹¹⁴
- Scope of representation: Another consequence of an insufficient supply of lawyers is the limited focus of lawyers' representation in immigration cases. Lawyers representing detained children often focus on the child's claim for immigration relief but lack the resources or training to challenge the conditions of the child's detention. Perhaps even more problematic is the conflict resulting from the fact that, the agency detaining the child also provides funding to the lawyer's agency. Finally, even if the child is represented by an attorney who is not funded by the government, there are few or no clearly-defined procedures for challenging conditions of detention.
- Insufficient resources to pursue most creative advocacy: In some cases, lawyers may feel compelled to advise clients to seek return when they fail to see a “winnable” claim, where

their perspective on what could be successful is much narrower than a lawyer with more resources might perceive. This is due in part to a system that puts the primary burden on the child to prove eligibility to remain; not all lawyers have the training or resources to challenge those moments where the government carries the burden and has failed to meet it.¹¹⁵

- Burnout and lack of training: Symposium participants also expressed tremendous concerns regarding burnout and secondary trauma for lawyers working with highly traumatized children—not just in the immigration system, but in family, child welfare and juvenile justice courts. They also recognized the significant investment required in supervising generous *pro bono* attorneys who often lack experience working with child clients or with the special procedures or forms of protection available to certain children.
- Public defender model vs. local representation: Finally, participants grappled with the idea of appropriately sourcing attorneys. They debated whether to move away from a system that currently combines NGO-based attorneys (often partially government-funded) with *pro bono* counsel to a system funded almost entirely by the government, akin to a public defender model.

These concerns are not limited to children in immigration proceedings. The Chicago Symposium participants identified myriad similar challenges for representing children in custody, dependency, and juvenile justice proceedings.

- There was a general consensus that once government intervenes in a child's family life through a dependency case, the outcome for the child is almost never better. Yet Symposium participants expressed concern that many lawyers work too much within the system, rather than pushing back against it, or face caseloads that are so high they deny lawyers the time necessary to build relationships with children that will allow them to learn the children's stories and zealously pursue their interests.
- One participant observed that children tend to see all adults as authority figures, not as allies, and therefore think of their own lawyers as either a parent or a teacher—the two other adult decisionmakers most common in their lives. Children may struggle to recognize the lawyer as the advocate for their own wishes based on their experience outside of the legal system, or because of working with lawyers who failed to zealously represent their wishes.
- Another participant emphasized the need to understand the role of lawyers in the culture the child comes from, in order to understand how the child or the child's family perceives the role of the lawyer, which in turn may affect their engagement with the lawyer. Participants commented upon the challenges of interviewing, counseling and advocating for trauma survivors—both children and adults, noting that trauma survivors can take a particularly long time to trust advocates, to tell their stories, and often require counseling before they can advise their lawyers about steps to take in a legal case. As one expert noted from work on domestic violence cases, trauma survivors “need some time to become their best selves again.” Participants expressed grave concerns about the

pressure for immigration advocates to identify eligibility or relief or counsel children who were still in government custody and who had yet to receive any therapeutic services to address trauma.

- Participants also stressed the role of attorneys to raise concerns about a child's competency and seek out experts to determine competence, but also the challenges that culture or cultural competency play in evaluating a child's development.

Recommendations for Attorney for the Child:

In light of these observations, the extensive recommendations provided in the American Bar Association's Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States,¹¹⁶ and existing research, advocacy and thinking about the role of attorneys for children in the immigration and other systems, the following principles emerge:

- Scope of Role. Attorneys must be zealous advocates for the children they represent, representing their "legal interests, as directed by the Child's expressed wishes."¹¹⁷ Zealous advocacy includes the duties of "undivided loyalty, confidentiality, and competent representation."¹¹⁸ Zealous advocacy should address the inter-related aspects of the child's immigration case—including, where applicable, the conditions of custody that affect a child's rights to liberty, health, family integrity, consistent with the child's expressed wishes.¹¹⁹ Attorneys are not expected to be masters of all trades, and should consult with experts in complex, unusual, and challenging cases. Finally, initial interviews should be to "screen in" (e.g., identify protection claims or eligibility for relief from removal) and never to screen out (e.g., rule out eligibility for protection or relief from removal).
- Appointment. The Roadmap requires the government to fund counsel for all children. That funding must be sufficiently independent such that lawyers are not restricted in their ethical obligation of zealous advocacy. Thus, funding should not be provided by any agency with specific, decision-making authority over children (custodial, adjudicatory, or immigration enforcement) absent clear protections against loss of funding based on advocacy. As for a model for ensuring counsel for all children, symposium participants, and others who later weighed in on the Roadmap, were divided between proposing a system in which a variety of non-governmental organizations provide representation (similar to the current system) and a system comparable to the federal defenders appointed to criminal defendants. The Roadmap ultimately takes no position on this to allow for maximum flexibility.
- Training. Attorneys representing children in immigration proceedings should receive ongoing training on topics including immigration laws, regulations, policies and caselaw including the forms of protection available to children and the evidence required to support claims for protection, as well as training in each of the issues identified above with respect to government actors.

C. Independent Child Advocate

Observations from experts within the immigration system: A pilot project to provide child advocates (best interests guardians ad litem) to the most vulnerable children in immigration custody is now an established program authorized by federal immigration law.¹²⁰ A central feature of this role is the child advocate's independence, including independence from the government agencies that make decisions about children, so that the child advocate is free to argue that a government decision is not in a child's best interests. Independence also requires separation from other entities that provide services to children, so that there is no possibility of a conflict of interest in recommending services for a child.

The child advocate's role is twofold. The first is to identify and advocate for the child's best interests in every decision, from the child's placement and services in custody, to release to family, to access to protection, to the ability to safely repatriate. The second is to accompany children through the immigration process, including (currently) detention and legal proceedings. In the absence of a statutory mandate to consider a child's best interests in every decision, child advocates rely on federal law (which contemplates the safe repatriation of children), state child welfare laws, which set forth standards for identifying children's best interests, as well as international law and principles including the Convention on the Rights of the Child. Best interests determinations must be grounded in children's rights, and must address the risks of bias, racism, reliance on stereotypes, and paternalism.

Child advocates play a critical role when a child is on their own, without a parent to advocate for their best interests. They provide a necessary perspective when a child is unable to express her wishes, for example because they are very young (infancy) or have a disability that prevents them from expressing their wishes; when a child's expressed wishes put her in harm's way (for example, a child who prefers to return to known persecution rather than endure additional time in detention); when government decisionmakers or other stakeholders focus on only one aspect of the child's case to the child's detriment; and when decisionmakers have evaluated a child's interests inconsistent with a best interests framework or simply failed to consider the child's best interests. Since 2004, child advocates have played a necessary role in a variety of cases in which children are particularly vulnerable to government decision-making that does not consider their best interests, including: children with complex medical issues, children facing prolonged detention, child trafficking survivors, children who are pregnant or parenting, children at-risk of reaching the age of adulthood in detention, children who express a fear of return but who have been told they are not eligible to remain in the United States, and children whose identity (language, ethnicity, country of origin, gender, sexual orientation) renders them even more vulnerable to harm while in government custody.

Observations from experts from other fields, including child welfare and juvenile justice: Notably, in state court proceedings that evaluate whether a child must be removed from a parent and declared dependent on the state, "best interests" plays a limited and specific role: government actors may not consider the child's best interests until the state has determined that the parent is unfit. As a result, an outsider's opinion of the best interests of the child is not relevant when a parent is a fit caregiver.

Child welfare advocates expressed concern over the use of best interests in state family courts—especially dependency courts—to strip children of rights including the right to be with parents. They noted the ability of “those who purport to know what is in the child’s best interests” to advocate for the child without addressing or being led by the child’s expressed wishes and the risks of bias, stereotypes, race and class to influence best interests analyses. Some advocates for children have long argued that racism, bias, and stereotypes have rendered “best interests” a tool that harms children, Black children and children of color.

Other participants noted that the ratification of the Convention on the Rights of the Child by European countries—and every other country in the world—means that those countries are obligated to consider children’s best interests in all decisions. However, the mechanisms for doing so vary by country, particularly in Europe: in some cases, child migrants are placed directly into the child welfare system, rather than a separate system for children in immigration custody. In these countries, the role of immigration advocates and best interests advocates or guardians varies widely.

Recommendations for Child Advocates:

- Scope of role. The role of a child advocate is to identify and advocate for the best interests of children “with particular emphasis on the child’s safety and child’s express wishes.”¹²¹ To do so, a child advocate must understand the child’s wishes, which requires establishing rapport and trust with the child in order to learn the child’s story. Child advocates should apply relevant laws, including federal law, state child welfare law, and international law in reaching recommendations about the child’s best interests.¹²² Child advocates also accompany children through the process of determining their right to remain—which means a relationship that may last for a long period of time. To achieve both objectives, the child advocate should speak the child’s language or have access to in-person interpretation whenever possible. Finally, child advocate programs must be staffed by lawyers, given that child advocates submit recommendations to decisionmakers about children who are the subjects of a legal proceeding. Those proceedings decide whether children will be granted legal protection to remain in the U.S. and determine children’s rights to self-expression, safety, liberty, family integrity, permanency.
- Appointment. Unlike in the current system, where child advocates are appointed by the agency that has custody of unaccompanied children, appointment authority will vest with an independent agency that has no decision-making authority over children in government custody or in immigration proceedings. This will help ensure the independence of the child advocate’s recommendations, and the ability of the child advocate to engage in their work without fear that their appointment will be withdrawn based on their advocacy. Any decisionmaker in the child’s case will have the ability to refer a child for the appointment of a child advocate in order to solicit and consider a recommendation on the child’s best interests.
- Training. Child advocates require training in best interests law as established in the domestic child welfare system and international law and all of the other training consistent with that recommended for attorneys, above.¹²³

D. Parents and other Adult Caregivers

Observations from experts within the immigration system: In many if not most cases, parents' wishes are aligned with their children's wishes, but there is no mechanism for them to support their children as they move through the immigration process. Parents are not affirmatively provided notice of and may not even know about a child's proceedings—for example, the government does not inform a parent in home country of immigration proceedings in the United States. Even when the child is involved in state court proceedings related to the parent's custodial rights, notice to the parent may be limited or ineffective. Alternatively, parents in the U.S. may be reluctant to be involved in their child's immigration case (unless they have a case linked to their child's case) for fear that their involvement could trigger removal proceedings against them, or someone else in their household.¹²⁴ Despite these challenges, parents and adult caregivers often go to great lengths to find representation for children, to accompany them to immigration court, and to seek orders of custody or guardianship in state court.

Cases involving a potential or actual conflict between a child's wishes and the parents' wishes require further analysis to determine the parents' role in the child's immigration case. In 1999 and 2000, the former Immigration and Naturalization Service, part of the Department of Justice, grappled with this issue in the highly publicized case of Elian Gonzalez. Elian and his mother fled Cuba when he was just six years old; but his mother did not survive the journey to the United States. Elian's U.S.-based maternal relatives retained counsel to file an application for asylum so that Elian could remain in the United States. Elian's father sought his son's immediate return to Cuba. In a detailed analysis, the agency's General Counsel and Commissioner found that Elian's father had legal authority to speak for his son and that his own interests did not prevent him from speaking on behalf of his child's immigration interests.¹²⁵

The agency nevertheless considered whether Elian had an independent right to file an asylum application. "We believe, in keeping with the United States' obligation of nonrefoulement under the 1967 Protocol Relating to the Status of Refugees, certain circumstances require the United States to accept and adjudicate a child's asylum application, and provide necessary protection, despite the express opposition of the child's parents."¹²⁶ Ultimately, in balancing Elian's rights with those of his father, the agency concluded that he was too young to file an independent claim for asylum and that there was a lack of objective evidence to support a claim of persecution.¹²⁷

Federal courts considering this issue both before and after the Elian Gonzalez case have permitted children to seek asylum over their parent's objections in the face of evidence that the parents' interests conflicted with those of children who expressed a fear of return. In 1985, the Seventh Circuit Court of Appeals considered the case of a twelve-year-old child who sought asylum against his parents' wishes.¹²⁸ The court found that they were entitled to notice of the proceedings involving their child, and to assert their interests—but it also concluded that the child had a right to express his own interests by seeking asylum. More recently, in an incredibly complex case, three siblings were granted asylum—protection from return to Mexico where their mother resided—while their mother simultaneously fought for their return under the Hague Convention on the Civil Aspects of International Child Abduction.¹²⁹

In short, there is no bright-line rule as to when a child can seek protection or an immigration benefit over a parent's objection—either with respect to the type of protection or the age of the child. Nevertheless, it is clear that children have a right to have their interests considered and for them to seek protection over the objection of a parent.¹³⁰

Observations from experts from other fields, including child welfare and juvenile justice: These experts generally expressed surprise and concern that there is no role for parents in a child's immigration proceeding, unless the parent's and child's cases were officially joined. However, experts in the field of juvenile justice commented that parental involvement in children's delinquency proceedings can lead to increased conflict over case resolution, either because children are rarely willing to follow the advice of a lawyer over the advice of a parent or because a parent's misinformation or concerns about the juvenile justice system are passed on to and held by their children and impact decision-making.

Those experts emphasized the need to inform parents about the system their children are in, so that parents can be "recruited" to help children make the type of long-term decisions that science has demonstrated children struggle to make independently before they are fully mature. Other experts emphasized the importance not just of identifying who can make decisions on the child's behalf, but what decisions can be made by someone other than the child. Ultimately, they expressed the importance of finding a way to ensure a parent's role in the child's case.

Recommendations for Parents and Adult Caregivers:

- Education. There was general consensus that parents must have an understanding of their child's legal case, but that this information must be provided in a space and a manner that is accessible—not in moments of crisis (separation). It must also be provided in a language and format that lay people can understand, by someone with both linguistic competency and cultural competency or training in cultural humility. Moreover, access to this information cannot create a risk of enforcement against the parent.
- Role in Child's Immigration Case. Parents and legal guardians—whether they reside in the United States, the child's home country, or elsewhere—will be notified that their child is in immigration proceedings. They will be welcome participants in a child's legal case unless their child objects, at which point the parent's participation should be permitted only when it is in the child's best interests. This will require the appointment of an independent child advocate when conflicts arise between parents and children, to provide judges with a recommendation on whether the child's best interests are served by the parent's participation. Judges should not prevent a parent's participation in the child's case when the parents and child share that desire. In many cases, parents may have important information about their child's history and protection claim(s); in other cases, the parents' presence may be supportive or even necessary for the child to proceed with the process of seeking protection. In those cases where a child's wishes to proceed with her immigration case conflict with that of the parent(s), the child should be permitted to proceed in their immigration case. No child should be returned to their country of origin without providing the child with an opportunity to raise a claim that they would be in danger upon return.

PART III: ROADMAP FOR CHANGE

A. Guiding Principle

This Roadmap proposes an entire restructuring of the system for welcoming a child who arrives at our border or is found within the United States and determining whether a child may stay in the United States or must return to their home country. The Roadmap is premised on the idea that the child's best interests must be a primary consideration in every decision from the child's first encounter with a government official, and that the most relevant factors in determining the child's best interests are the child's safety, expressed wishes, liberty, unity, family, ability to develop, and identity. The Roadmap envisions a fair, developmentally appropriate process for all children that provides them with certainty and permanency within a reasonable time, and in which the government carries the burden to prove that children can be safely repatriated if they are ineligible for protection.

Best Interests a Primary Consideration in Every Decision

In every decision made about a child, from the moment the child is identified or apprehended by government officials until a final decision is made about the child's case, the child's best interests shall be a primary consideration. This does not preclude other considerations, such as concerns for the safety of others or national security. But consideration of the individual child's best interests must inform every decision, with decision-makers held accountable for meeting this obligation.

B. Custody and Placement of Children

When a child is identified by immigration authorities (at the border or internally), the sole focus shall be finding a safe placement with family with the least possible time spent in any form of government custody.

At the moment a child is apprehended by an immigration official, the child's immediate need is a safe home. Children at the border may be trying to reach what they hope is a safe home with a parent or relative in the United States. Children with no family in the United States still require a safe home. If immigrant children are already living in the United States when they are apprehended, they may have a home waiting for them; however, that home may no longer be safe if immigration officials arrested the other adults or family in the home. Currently, at the moment of apprehension, the primary focus is on immigration enforcement and starting a case against the child. The child's placement in custody is linked to the manner in which the child is apprehended.

**Principle:
Safety and Family
First**

The Roadmap shifts from focusing on the child's immigration status as a primary concern to finding a safe placement for the child (even if it will not be permanent) before evaluating and making decisions about the child's immigration status. Government custody will be for the briefest possible time, with all efforts focused on ensuring the child's prompt release to a family member or family friend.

1. Safe, Trauma-Informed Evaluation of Needs, Assessment of Family Relationships and Risks of Trafficking, and Obligation of Prompt Release

To ensure that the child is first placed in a safe, family environment and that their immigration case does not proceed until they are released from government custody, the following protections will exist:

- **Child-centered evaluation of needs, risks, and family relationships upon contact with immigration enforcement.** When immigration enforcement officials—at the border or within the interior—come into contact with immigrant children, they must ensure only adults with expertise in child protection engage with the children. These experts should lead, or supervise all questioning and screening of children, whether for health or legal purposes. Meeting this demand may require transferring children—and the adults with them—to centers staffed with child protection and child health experts or ensuring that all border stations have these staff onsite or quickly available. This obligation extends to all children: children who are encountered alone or unaccompanied, as well as children arriving with parents and other family members.

Children may not be separated from parents absent evidence that the parent poses an imminent danger to the child's safety, consistent with the parent's constitutional rights. When children arrive with other family members, they must not be separated absent evidence—documented by one of the aforementioned experts—that the child is at risk of trafficking or other serious harm at the hands of the accompanying family members. Because access to child-specific legal protections will no longer depend the adults accompanying a child, or the child's status as "unaccompanied," there will be no need or incentive to separate children from loving family members who are not parents.

**Principle:
All Children Share
Same Rights and
Protections**

Because children cannot be detained solely for purposes of immigration enforcement, children with families apprehended at or near the border or in the interior of the country, must be released from immigration enforcement after screening, to live with their accompanying family members in the community. In limited cases, immigration enforcement officials may release the family pursuant to "alternatives to detention," such as case management programs, rather than straight release. But family detention will be prohibited, as will be the separation of children from trusted and caring adult family members (which again, will not be necessary when legal protections for children are not limited to a subset of those children.) Services typically provided to children in government detention will instead be provided to them in the community.

- **Brief custody limited to days or weeks for children unaccompanied by any parent or trusted adult.** Many children arriving at the border will be accompanied by a parent, or trusted adult family member. But others will arrive without adult family members, or with individuals who pose a trafficking risk (as evaluated by the trained experts noted above). These children have no adult with whom they can be released and will constitute the population of children who require a brief period of government custody. But not the months of restrictive custody that have become the norm in our existing system. Rather, the agency with preliminary custody of the children will work to release children to family within the United States, or to a foster placement if no family can be identified, within three weeks, with limited exceptions.

In the last decade, the average length of stay for unaccompanied and separated children in government custody has swung from a high of four months to as little as 30 days and back to three months. Over the decades, this window has become a time to provide services to children, but not without a cost. Placement in an institutional setting, apart from family, is by itself harmful to children's health and development. Even the least restrictive congregate care placements—shelters—are highly regimented. The facilities are locked. Children do not have freedom of movement. Time outdoors is limited and carefully monitored. Parents and family members cannot call or drop by when they want to; call communication is scheduled and monitored. Age-appropriate responses to trauma and separation may be recorded as negative events and used to delay release. Children in government care are also subject to the priorities of political officials—for example, those who would withhold access to reproductive health care.

It is simply not necessary, in most cases, to detain children for months in order to evaluate their safety with family member. Within the state child welfare system, children removed from their homes and taken into government custody are often placed with family members within days, though placements across state lines often take longer. Thus, a period of two to three weeks is a reasonable time for securing an immigrant child's safe placement to family or to foster care. Children will not be moved from one placement to another within government custody unless it serves their best interests.

- **Release to parent.** A parent has a constitutional right to the care and custody of their child, absent a judicial determination that the parent poses an imminent threat to the child's safety. Under international law, a child has the right to be with their family. Therefore, immigration enforcement cannot separate children from parents unless these conditions are met. Parents who seek the release of an unaccompanied child from government custody will be required to submit evidence of their relationship with the child. They must also submit to a prompt search of state child welfare records to confirm that other children have not been removed from their care and that the parents' rights have not been terminated with respect to the child. Such situations would require further investigation but would not per se prohibit the child's release. Absent concerns about the parent-child relationship or ongoing child welfare investigations of the parent, the child should be promptly released to the parent.
- **Release to other family or traditional caregivers.** Consistent with the well-established importance of kinship ties and the role of traditional but non-parent caregivers for

children, children should not be separated from traditional caregivers as a matter of immigration enforcement. Children will be promptly released from custody to other family members or traditional caregivers when a parent is not available or when a parent is available but unable to care for the child.¹³¹ These individuals could include friends of family who are able to provide a safe and supportive home for the child. Non-parent family members or traditional caregivers who seek an unaccompanied child's release from government will be subject to greater scrutiny than a child's parent, but only to the extent consistent with existing state child welfare practices for "kinship care" placement.¹³²

- **Eliminating barriers to release.** There is a small but significant group of children who spend prolonged time in government custody because the government imposes barriers to release based on the child's behavior in detention; these barriers are often framed as ensuring the family will be able to address the child's allegedly problematic behavior. However, prolonged separation and the conditions of custody impact children's mental health and often exacerbate symptoms that cause the behavior that is labeled as "acting out. Detention leads to acting out leads to demands for services leads to delayed release leads to more acting out: a vicious cycle.

If children have family members to sponsor their release, but also have special needs that the family must be able to address to ensure the child's safety, the government will facilitate the child's prompt release and direct resources to provide in-home support to the family (e.g., regular visits from a social worker, funds to participate in classes or receive services that can address the child's needs outside of detention.) Children's behavior in detention will not justify denying their release as that punishes children for responding to an inherently unjust situation of being detained unless a court determines that they present a danger to themselves or others. Concerns about child's care upon release will be addressed through community-based, post-release services rather than continued detention. Finally, before the government can deny a child's release to a parent or legal guardian, it will have to seek approval of that decision by an independent court outside of the immigration system and with appropriate expertise in the parent-child relationship (e.g., a family court). For any case in which the government denies a child's release to a non-parent sponsor, that sponsor will have the right to seek review by a family court. In this way, release denials based on a child's behavior in custody, or disability, or other factor should be limited to only those cases where there is strong evidence that release would pose a threat to the child's safety or the safety of others.

- **Post-release supports.** Every child released from government custody will receive post-release support including assistance enrolling in school and connection to at least one community-based organization that can assist the child's family with emergency food and medical needs. Parents and family sponsors may also request visits from a social worker at intervals determined by the child's age, needs and prior relationships; parents and family sponsors must be informed of the social worker's obligations to report child welfare concerns to child welfare authorities. Children will be eligible to work consistent with state child labor laws; their ability to work will not depend on or be related to the type of claim they are making in their immigration case, or whether they were welcomed at the border and directly released or spent time first in government custody.

- **Appointment of counsel and child advocate when there are barriers to release.** Any child facing prolonged custody—exceeding one month—will be appointed counsel and a child advocate when there are barriers to the child’s release. Based on the parameters outlined elsewhere, prolonged custody will most likely result from delays in gathering or reviewing the information necessary for a child’s release to a family member or family friend; or delays in finding an appropriate foster care bed (see below). Prolonged custody might also stem from concerns about the safety of releasing the child to a designated family member. Thus, the role of the attorney and child advocate will be to advocate that the government make a prompt release decision, with the attorney representing the child’s expressed interests and the child advocate representing the child’s best interests.

2. Conditions of Custody

Government has an obligation to provide all necessary services for children in its care. Yet a child’s need for services—because of past trauma, disability, physical or mental health, education, or other unique factors—shall not be a barrier to release. Family members and trusted caregivers can provide those services or seek out those services for children while they live in a family environment. Children’s rights—not government interests—should determine both the environments in which children are held in custody and all processes for their release.

- **Home-based or small, community-based placements.** During a brief window of government custody, the government will place children in home-based placements (short-term foster care) or small, community-based group homes (under 25 residents) as the norm, with limited exceptions. The practice of placing children in 50-, 100-, 200- or 1000-bed facilities will be prohibited. These larger facilities resemble detention. Children are not free to come and go, they attend classes within the facility rather than in community schools, and they receive services, eat meals and sleep in the same building, often with limited outdoor time and few true recreational or leisure activities. The environment itself is institutional, rather than smaller spaces that model a home environment. The need for fewer single-building, institutional settings has become even more evident during the COVID-19 pandemic. Children will instead live in a home- or community-based environment. If they are identified as having “behavioral” concerns (often related to the trauma they experienced in home country, on their journey, or by virtue of being separated from family) they will be placed in a home where the caretakers have received training to care for traumatized children.
- **Services in custody.** While holding children in custody, the government will address all of children’s needs in a developmentally-appropriate way, including but not limited to: physical and mental health, including access to reproductive health services; daily contact with family; education; access to religious and cultural services; physical and recreational activity; and respect for each child’s identity, including but not limited to indigenous identity, sexual orientation, and gender identity. At a minimum, the services will meet the standards set forth in the *Flores* settlement agreement and the 2008 Trafficking Victims Protection Reauthorization Act as well as state law standards for children in government custody. As described below, children would also be entitled to meet with lawyers to learn about their right to be released as well as the legal process

that would follow their release, in presentations provided in an age- and developmentally appropriate manner. Both attorneys and child advocates would have routine access to the custodial programs to ensure compliance with standards of care.

- **Complete separation of custody from enforcement.** In the course of caring for a child, the government gathers information about the child's health, family members, life in home country and journey to the United States. Under the Roadmap, that information will be used solely to care for the child and to facilitate the child's prompt and safe release. The government will be prohibited from using that information for any other purpose and from sharing the information with other government officials (including immigration enforcement authorities within DHS) without the child's informed consent.
- **Attorneys and child advocates.** Children will be provided with free access to attorneys and child advocates while in custody: 1) to ensure that conditions of custody are appropriate and do not violate their rights; 2) to ensure children are promptly released to family members or placed in appropriate long-term foster placements; 3) to expedite the release and the legal cases of children at-risk of "aging out" of protections ; and 4) to represent and advocate for children who wish to return to home country. To the extent that a child would benefit from meeting with attorneys to better understand their rights while in custody, and/or the legal process upon their release, the government would be obligated to provide access to attorneys to consult with children. This will require legal services providers and child advocates to re-orient themselves to a new system in which conditions of custody and release from custody are a primary focus during a child's time in government custody, rather than the child's legal case, which will begin only after their release (or transfer to foster care, as described below). Because children will spend only brief periods in custody and will have counsel upon release, the need to orient children to the legal process or evaluate potential protection claims while they are still in custody will arise only in exceptional circumstances, such as children who wish to return quickly to home country. The government must ensure that there are legal services programs and child advocate programs available wherever children are in custody, in addition to locations where their legal case will be adjudicated.

3. Children without a Parent or Family Sponsor: Placement in Foster Care or Supportive Housing

Some children will not have family members or traditional or trusted caregivers who can take custody of them. But these children should also have the benefit of seeking protection while living in a home- or community-based environment rather than an institutional setting. Today, children may wait months or even years for a federal foster care placement (with a family or in a group home) to become available. Federal foster care programs will have to expand to ensure that all children without family members can quickly transition to a family- or small-group setting while seeking protection.

- **Foster care:** The government will continue to provide foster placements for children who have no parent, family member or family friend to step forward and care for them. These foster placements will be licensed and should be family-based, group homes, or

small shelter settings that are consistent with state child welfare standards. Although federal foster beds currently exist, demand far exceeds capacity and children languish in detention for months or even years waiting for a placement to open. The government will fund foster care placements for qualifying youth and make them available to a child within three weeks of a determination that no parent, family member or family friend is available to accept custody of the child, thus limiting their time in temporary custody to a maximum of six weeks. Moreover, placement in federal foster care will not preclude the child's subsequent release to a family member or family friend should one become available. The government will invest in developing culturally competent and trauma-informed foster care and group home providers, including placements for children with disabilities.

- **Supportive housing:** We have proposed elsewhere that a new model for adjudicating the protection claims of children will consider individuals age 21 or younger to be children, consistent with the developmental concept of "emerging adulthood." Whatever line is drawn between childhood and adulthood, however, there will be children who arrive or are apprehended close to that arbitrary line and who do not have family to whom they can be released. In the current system these children are almost uniformly transferred to adult detention on their 18th birthday.¹³³ The failure to place children with family or in foster/group home placements before they "age out" into adult detention is due to unduly high barriers to release to family; a system that limits foster programs to youth determined to be "eligible" for protection long before their legal case concludes; and a simple lack of capacity in the federal foster care system..

To avoid a comparable situation in this new system, the government will prioritize release to organizational sponsors who can take custody of any children without family or family friends, and provide them with a safe, community-based space where they can live while their legal case proceeds. For some youth, this will take the form of "semi-independent living" placements, in which an older youth or group of older youth live independently of an on-site foster parent or staff member but receive supportive services to facilitate their safety and integration into the local community. Only those young people determined by an independent adjudicator to pose a threat to the safety of others should be eligible for placement in adult immigration detention; and even then, there should be a first priority for placing those youth in a program designed to treat the underlying causes of their allegedly problematic behavior (e.g., residential treatment programs or other mental health programs for young adults.)

4. Exception: Children Who Wish to Return to Home Country

Not all children who are apprehended by immigration authorities wish to pursue permanent status in the United States. Historically, children request return even when they have viable protection claims because they are experiencing detention fatigue. They are frustrated by the conditions of detention and their failure to be released to the parent or family they intended to join. To the extent the above-mentioned recommendations on custody and placement are implemented, children detained over 30 days will have both counsel and child advocates to fight for their safe and prompt release.

Not all children who are apprehended by immigration authorities wish to pursue permanent status in the United States. Some children may enter with the intention to remain, but change their mind based on changed circumstances at home—for example, the illness of a parent or close relative. Some children may have been apprehended at or near the border, unaware that they had entered the United States or uninterested in remaining permanently; others wish only to transit through the United States to reach family elsewhere—for example, in Canada.¹³⁴ Children may wish to return to their home country after becoming separated from a family member during the journey. U.S. officials should ensure that actions of the U.S. government did not result in a child's separation from family—and if they did, remedy the separation so that the child and family members may consider, together, whether to pursue protection from removal or repatriate safely. In some cases, children may wish to return home after escaping a trafficker. Finally, there may be children who seek return so they may again attempt to enter, but without apprehension.

Each of these situations demands attention to the child's expressed desires—but also confirmation that if the child returns, her life will not be in danger. For this reason, children in custody who express a wish to return should be afforded the following protections.¹³⁵

- **Attorney:** Before they are returned to home country, children must meet with immigration attorneys who can help them understand their rights and their options if they seek protection in the United States. Counsel will be provided at no cost to the children. In these situations, counsel must be independent from other stakeholders (e.g., not the agency with temporary physical custody of the children, nor the agency seeking the child's removal or adjudicating the child's case, nor a provider of other services for children, which could create a conflict of interest.) Staff, house parents, and other caregivers within the government's custodial program would be prohibited from giving children legal advice with respect to their immigration case.
- **Child advocate:** The government will appoint an independent child advocate for any child in government custody who wishes to return home, to address any concerns about the child's capacity to understand the consequences of the decision to return, or evidence of safety concerns if the child returns home. The child advocate will provide a recommendation to the child's attorney and to the government that return is in the child's best interests, or that it is not in the best interests because there are safety concerns that are sufficiently grave and not yet addressed, to counter or over-ride the child's expressed interests.
- **Independent adjudication:** The child shall be represented by counsel to zealously represent the child's expressed wishes. That attorney will promptly bring the child's wish to return before an immigration judge. If the child wishes to return home at this stage, the child's attorney should provide evidence about who will take custody of the child in home country, and whether there are any immediate risks to the child's safety upon return. If a child advocate has been appointed, the child advocate shall present her recommendation to the judge. If the judge finds that the child can be repatriated safely, the judge may enter an order approving the child's return. If the judge finds that the child will not be safe upon repatriation, the judge may deny the child's request to return.

- **Return without penalty:** The grant of return will be made without penalty or prejudice to the child—the equivalent of voluntary departure. Today, many children are ordered removed as a condition of return, which imposes lengthy bars on the child’s ability to return in the future. Children should always be afforded the opportunity to leave without penalties that could impact their ability to seek lawful entry in the future.
- **Safe repatriation:** If a parent or traditional caregiver is present in the home country and both parent and child wish for the child’s return, return should be granted expeditiously. If there is no parent or traditional caregiver in home country and the immigration judge is concerned about the child’s ability to return safely, the child’s attorney may return with new evidence (for example, by persuading a home country organization to take custody of the child if the child would otherwise be rendered homeless upon return.) At any time, the child could seek re-hearing of their request to return before the judge; those requests should be granted liberally so that a child wishing to return home has every opportunity to have her voice heard and to persuade the judge of the merits of her request.
- **Timeliness:** When a child says she wants to return to her home country an immigration judge shall promptly hear the child’s case, evaluate evidence that the child will be safe upon return, and issue an order granting or denying the child’s request. The immigration judge shall act with even greater speed for younger children for whom separation from parents or other loving caregivers may inflict exponentially greater harm to their health and development.
- **Parents’ wishes:** A parent’s or parents’ wishes for their child should be considered in these decisions. When a parent and child both seek reunification in home country, reunification should be granted as expeditiously as possible to avoid any further disruption in the parent-child relationship. When a child and parent disagree, the child should have every opportunity to express their wishes and have those considered. Specifically, if the child wishes to return but the parent disagrees, the court should inquire as to the basis of the parent’s concerns and whether those concerns could be remedied prior to the child’s return.

C. Adjudication of Children's Claims for Protection

Children are the Subject of the Proceedings and Decisionmakers Must Consider their Expressed Interests, Best Interests, Abilities, Needs

Once the matter of a child's safe placement with family and community is separated from the child's request for protection or immigration status, the Roadmap shifts focus to a process that allows for a fair and just review of the child's case. Here, decades of experience in the fields of child protection, juvenile justice and child development, as well as processes developed in other countries to consider immigrant children's protection claims, offer concrete and complimentary recommendations to create a system centered on children, rather than modifying a system designed for adults.

Current immigration laws allow individuals (both adults and children) the possibility of remaining in the United States based on family relationships or employment needs/opportunities, or because the person merits protection from past or future harm.¹³⁶ Within each of these areas there are multiple ways in which an individual may apply to remain—and those applications are often determined by different individuals, sometimes in different federal agencies. To simplify: different types of requests to enter or remain are decided by different decisionmakers. But in the Roadmap, all of them must consider the child's best wishes in evaluating children's legal claims.

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Children**

Decisionmaker. In consolidating feedback from the Chicago Symposium, as well as lessons learned from other fields, we considered proposing a system for children in which there is a single, streamlined application for benefits with a sole decisionmaker. Having a sole decisionmaker would require that individual to have expertise in all forms of relief in addition to the expertise and specialization in children's cases.

While such a model would be possible, we ultimately determined it would be more reasonable and more practicable to create a system in which a single individual—a presiding immigration judge—manages a child's case, and is familiar with all aspects of it, while allowing other decisionmakers with particular expertise to consider specialized claims. Placing a single, presiding judge in the position of watching all aspects of a child's case—both to ensure all stakeholders complete their work in a timely fashion and to render a decision on safe repatriation—will better ensure both timely and comprehensive adjudication of the child's claims. However, relying on existing specializations will allow an asylum officer to review a child's case to determine eligibility for asylum, while an official with trafficking expertise will review the same case to determine if a child was eligible for protection as a survivor of trafficking and if the claim is made, an official with expertise in special immigrant juvenile status will determine whether the child is eligible for that benefit.

Nature of Proceedings. In current immigration proceedings, the government charges the child with lacking permission to be in the United States and places the child into adversarial removal proceedings where the government is on one side (the "petitioner") and the child is on the other (the "respondent"). Cases are captioned *Petitioner versus Respondent*. The government

bears the initial burden of proving the child lacks permission to be in the United States; but once established, the burden transfers to the child to prove eligibility to remain in the United States. All of the trappings of an adversarial framework follow—from a courtroom where the child sits opposite the prosecutorial attorney to the government’s ability to cross examine the child and challenge the child’s credibility.

The Roadmap eliminates the adversarial nature of children’s proceedings. To be clear: under the Roadmap, the immigration enforcement arm of the government may still seek the child’s removal. But the Roadmap reframes the proceedings, pivoting away from an adversarial approach that casts the child as the respondent and turning toward an approach that focuses on the child as the subject—the central focus—of the proceedings. Such reframing does not prevent the government from effectuating the child’s return if the child is not eligible to remain in the United States and can be safely repatriated to home country, as discussed below. But this change in framing—a change in perspective in which the child becomes the subject of the proceedings—creates a space in which the adults involved in the case must consistently consider the abilities and the needs of the child facing removal.

To counter the inhibiting effects of a formal courtroom, proceedings for children would happen in a non-adversarial and less hierarchical environment. Ideally this would not even be a courtroom, but rather a child-friendly environment, with consideration for the type of traumas these children may have experienced. For example open rooms with windows and a view of the outside world, so as not to replicate the confinement of a smuggling vehicle, or a captor’s room. For younger children, objects to draw or play with may help them to give the necessary information. Concentration is also affected by development and mental illness (e.g. depression and PTSD reduce concentration), so the proceedings may need to allow for regular breaks.

Dr. Zoe Given-Wilson, Commentary

STAGE 1: PRELIMINARY CONFERENCE

Objective. The purpose of the preliminary conference is to bring together the participants in the child’s immigration case in a non-adversarial setting, to ensure the child understands the proceedings and their rights, and to set a timeframe for the child’s case. During the preliminary conference, the government should provide evidence of its position that the child does not have permission to be in the United States. The attorney for the child should indicate whether the child wishes to seek permission to remain in the United States or wishes to return home. If the child wishes to remain in the United States, the conference participants should identify a date by which the child’s attorney will submit all applications for relief. That timeframe should not exceed six months from the date of the preliminary conference.

Logistics. To ensure that the child’s participation in the proceeding does not jeopardize the child’s safety or well-being by putting the child’s parent, family or caregiver at risk of arrest, the preliminary conference should take place in a building where the child’s family can enter

without fear of immigration enforcement. The conference should take place not in a courtroom but a conference room. Participants will sit around a single table, at the same level. If the child does not have an interpreter, the court will provide an interpreter for the conference. The interpreter will interpret the entirety of the conference in the child's best language, not just the moments when someone is addressing the child directly.

To initiate a child's case, the government will schedule a preliminary conference approximately three months after the child's placement with a family member. For those children with no viable family placement, the preliminary conference will take place approximately three months after their placement in a foster home or group home setting. Consistent with the stakeholder roles articulated in Section II:

- The conference will be led by a **presiding judge** who oversees the case until its conclusion. The presiding judge will be an immigration judge as that position exists under immigration law but will have specialized training in working with children and children's claims. If immigration judges become independent of the Department of Justice in the future, the presiding judge should be drawn from this corps of independent judges and have received training in working with children.¹³⁷
- The child will be represented by an **attorney**, who will meet with child at least once before the first conference. If the child's family is unable to retain counsel prior to the conference, the government will appoint an attorney to represent the child and reset the preliminary conference so that the child, child's family and appointed counsel have an opportunity to meet before the conference.
- The government will be represented by an attorney with specialized training in working with children and will be part of a **children's corps of attorneys** within the agency seeking the child's removal.
- All decisions made as part of the preliminary conference will consider the **child's best interests**. Even the timing of the conference will account for the child's best interests—for example, considering whether the child and their family must travel considerable distance to attend the conference.
- If prior to or during the conference it becomes clear that the child meets one of the following criterion, the presiding judge shall appoint an independent **child advocate** to represent the child's best interests:
 - the child is unable to direct her attorney's representation by virtue of age or disability and lacks a parent or legal guardian to speak to the child's best interests;
 - the child and the parent/legal guardian's interests conflict (e.g., the child has identified the parent or legal guardian as abusive);
 - the child's expressed wishes put her in harm's way (for example, a child who was trafficked expresses a wish to return to her trafficker in home country, which may happen if the child formed a "trauma bond" with her trafficker); or

**Principle:
Specialized
Training for all
Decisionmakers**

- any of the parties to the proceeding express a reasonable concern that the child's attorney is representing the interests of a trafficker or smuggler rather than the child's interests.

Similar to the appointment of counsel, appointment of an independent child advocate may require a continuation of the preliminary conference, until the child advocate has had an opportunity to meet with the child and family.

- **Parents, adult family members or caregivers** with whom the child lives will be welcomed into this process, so that they can ensure the child's communication with their attorney and ensure the child's appearance and participation in the process. They will not face a risk of immigration enforcement for doing so. If the child's parent is located outside of the United States or is elsewhere in the United States (including immigration detention), they will have the opportunity to participate by video or telephone in the preliminary conference. If the child objects to the participation of a parent or family member, their counsel will have an opportunity to object; the child advocate will also provide a recommendation on whether the child's best interest are served by the parent's or family member's participation and will provide a factual basis for that recommendation. The presiding judge will determine whether the parent or adult family member may participate after considering the child's expressed wishes and best interests.

Safety assessment. At the conference, the presiding judge will have an obligation to inquire into the child's safety and well-being, including whether the child has enrolled in school and has identified health care services if needed. To the extent the judge has concerns about the child's safety, the judge can ask the attorney to assist the family in seeking services and/or appoint a child advocate to the case. If the judge has reason to believe the child is in immediate danger—for example, that the child is being abused or trafficked—the judge will make a report both to state child welfare authorities and to the federal agency that released the child to the family.

Return to Country. If the child wishes to return home at this stage, the child's attorney should provide evidence about who will take custody of the child in home country, and whether there are any immediate risks to the child's safety upon return. If the judge finds that the child can be repatriated safely, the judge may enter an order approving the child's return. The attorney for the government should provide specific plans for how they will collaborate with the child's attorney to agree upon how and when the child will return and what steps will be taken to ensure the child's safety in transit and the child's safe transfer to an appropriate caregiver in home country.

STAGE 2: CONSOLIDATED, PAPER-BASED APPLICATION(S) FOR PROTECTION AND SECOND CONFERENCE

At or before the date agreed upon at the preliminary conference, the child's attorney shall submit applications for each form of relief the child wishes to pursue and for which the child can establish *prima facie* eligibility or make a non-frivolous claim. There will be no prejudice for seeking multiple forms of relief at the same time so that the child can pursue all forms of relief for which she is eligible.

Objective. The purpose of submitting all applications for protection (relief from removal) via simultaneous submission is to reduce the likelihood that children will have to appear in different venues at different times to pursue different types of relief, requiring the child to tell their story multiple times. The Roadmap limits unnecessary testimony and appearances at adversarial settings through a consolidated process for seeking protection and submitting required evidence. To the extent that children seek orders in state court that make them eligible to pursue Special Immigrant Juvenile Status (SIJS), they may be required to participate in separate proceedings; but review of their subsequent SIJS application will be subject to this same consolidated review process.

Logistics. This “same time” process is intended to help streamline the case so that children are not asked to recount past, traumatic events multiple times. The attorney will be able to identify all possible forms of relief and avoid prolonged processes if one form of relief is denied and another must be pursued. It will also be beneficial for the presiding judge to have all of the relevant information about the child in a consolidated file, even if different officials will ultimately decide eligibility for relief, as the presiding judge will determine whether the child can safely repatriate if all forms of protection are denied.

- **Streamlined, electronic submission.** The Roadmap requires the child’s application or applications for protection to be submitted through an electronic database similar to the system operated by the federal courts. It anticipates the creation of a new form that consolidates information relevant to all forms of relief and which eliminates requests for irrelevant information. To the extent there is a type of relief for which no form exists, the government should create procedures that allow a child to make a preliminary application on paper. Once filed, the child (through their attorney), the presiding judge, the government attorney, and the child advocate would have simultaneous access to applications or other documents filed in the case. An electronic system will also allow for electronic routing of files and applications, rather than the costly, time-consuming and error-prone system of sending a single paper file to different locations as a case proceeds. Applications for specific types of protection will be routed to the agency designated to adjudicate those types of claims—and within that agency, to decisionmakers who have specialized training in reviewing and adjudicating children’s claims.
- **Second conference.** Shortly after the submission of the child’s application(s) for protection from removal, the parties will reconvene with the presiding judge. This second conference provides another opportunity for the immigration judge to “lay eyes” on the child, to familiarize themselves with the child’s case, and confirm that the child is living in a safe environment while the case proceeds. Additionally, the parties will confirm which applications were submitted and identify any issues that might impact adjudication of those applications. Finally, if the child’s attorney was unable to submit any good-faith applications for protection, the proceeding will be an opportunity to schedule the “safe repatriation” hearing outlined below.

Role of parent when child seeks protection. Consistent with the role for parents contemplated earlier in this report, parents will be welcome participants in the process of seeking protection absent a demonstration that parents’ interests conflict with those of their child. If a child seeks

protection but a parent in home country wishes for the child to be returned, the child will have an opportunity to proceed with the request for protection, both to ensure the child's right to *nonrefoulement* under the Refugee Convention and the child's right to safety. The parent(s) will nevertheless be able to be present for the child's hearing absent an order of protection or an order terminating parental rights from a family court and will be provided with legal representation to ensure consideration of the parents' interests.

STAGE 3: GOVERNMENT REVIEW OF AND RESPONSE TO CHILD'S APPLICATION

The attorney's submission of a child's application(s) for protection will trigger a reasonable but limited window for each agency responsible for adjudicating a petition to: (1) grant the petition; (2) submit a request for additional evidence or testimony; or (3) deny the petition outright.

Objective. Simultaneous review of the child's application by government officials with expertise in that type of claim will result in determinations by each agency, or requests for additional information, within the same timeframe, so that the child's case can be completed within a reasonable period, ending prolonged periods of uncertainty for children whose health and development benefit from stability and permanency.

Logistics. Upon submission of the child's consolidated application for protection, the application will be sent (via the electronic filing system; or in the absence of such a system, by the presiding judge) directly to each agency with authority over the type of claim filed by the child's attorney. The agency reviewing most claims filed by children is U.S. Citizenship and Immigration Services (USCIS). Within USCIS, different offices are designated to review specific types of claims, from the asylum office to the office reviewing claims for T-nonimmigrant status. An electronic filing system would ensure automatic transmission of the application and any supporting documents to each appropriate decision-making agency, though this can also be done with paper-based applications. Each agency will be able to engage in simultaneous review of the child's file and would have three months to review the child's petition and grant or deny protection or determine if more information or an interview of the child is necessary to make a final decision.

Multiple decisionmakers. Participants at the Chicago Symposium considered the merits of having a single adjudicator for all of the claims a child might bring, or multiple adjudicators specific to each claim brought by a child. Some worried that a single adjudicator's bias about one aspect of the case might affect the adjudicator's attitude toward all claims made by the child. But a system in which claims are adjudicated by separate agencies or sub-agencies carries its own challenges—particularly those involving timing and the possibility of unduly repetitive and potentially harmful questioning of the child.

Ultimately, the Roadmap offers a hybrid system: one in which specific claims for protection are evaluated by agencies with expertise in that issue (e.g., trafficking, asylum) and special training in evaluating children's claims, but where a single, presiding judge coordinates the process of gathering additional information. This synchronous adjudication forecloses the possibility that one agency would grant protection after a different agency had ordered the child returned to

home country. Moreover, in this hybrid system, the ultimate decision to repatriate a child if the child's claims for protection fail remains with the presiding judge, who only turns to that issue after the specialized decisionmakers complete their evaluation of the child's claims for protection or upon the child's request to return to home country.

STAGE FOUR: FURTHER INQUIRY

The Roadmap anticipates that some of the specialized decisionmakers will seek an opportunity to ask clarifying questions of the child or the child's attorney, or would wish to evaluate the child's credibility, taking into account the child's age, stage of development, history of trauma, language and communication skills, and cultural background. For this reason, the Roadmap provides an opportunity for each agency to request additional evidence or testimony in a streamlined, trauma-minimizing and developmentally appropriate manner.

Objective. This stage was created to provide decisionmakers with an opportunity to question the child directly—but only when necessary. As a result, fewer children will be subjected to interviews about past traumatic experiences. Currently, they may be asked to testify or provide an affidavit for each form of protection for which they apply; and even if they are granted protection, they may be re-interviewed when they petition to adjust their status to that of lawful permanent resident. In this new system, the questions that may relate to more than one form of relief will be channeled through a single interviewer in a forum intended to provide the child with a non-threatening, less adversarial and developmentally appropriate format.

Logistics.

- **Timing:** At the conclusion of the three months preliminary adjudication window, the presiding judge will gather the parties together to review the decisions of the one or more agencies that evaluated the child's paper-based petition. If any of those agencies request further information, they will set forth specific questions for the child or other witnesses. The presiding judge will set out a schedule for the child's attorney to provide this information. If any of that information is required directly from the child via testimony, the presiding judge will set a date for the child to be interviewed on these issues. At an agreed-upon date but within 90 days of the end of the preliminary adjudication window, the interview will take place before the presiding judge. The government attorney participating in the case from the outset will be responsible for consolidating the questions and interviewing the child in a child-appropriate manner informed by principles of child welfare, child development and the impact of trauma on children. At the conclusion of the interview, the presiding judge will ensure transcripts are forwarded to any decisionmaker that was unable to make a final decision without more information. Each decisionmaker will render a final decision within three months (90 days) of the interview.
- **Consolidated, CAC-like interview.** One risk of the multi-decisionmaker framework established above is the possibility that each decisionmaker would need additional information from the child. In responding to this challenge, participants in the Chicago Symposium drew upon the model created by many state Child Advocacy Centers, in which a single expert interviews a child in order to address issues raised by a variety

of interested stakeholders—from law enforcement officials who view the child as a victim-witness to state prosecutors evaluating whether to pursue a criminal case.¹³⁸ In the Roadmap, the interviewing responsibility falls to the government attorney who was appointed to the case at the start, and who would have participated in the conferences and had access to the petition(s) submitted by the child’s counsel. As noted earlier, these government attorneys will belong to a specialized “children’s corps” within the immigration agency and will have specialized training in interviewing and evaluating children. They will carry the burden of synthesizing questions from the adjudicating agencies to ensure a single interview of the child. The child will have the benefit of an attorney and a presiding judge, and in some cases an independent child advocate, who will be familiar with the full scope of the child’s protection claims (having reviewed all claims upon their submission) and who will therefore be better positioned to protect the child’s rights and ensure that the questioning occurs in a manner that accounts for the child’s best interests. Much like a Child Advocacy Center, where the goal is truth-finding, these interviews should take place in a non-adversarial environment such as the conference setting where the child will have previously met with the presiding judge and the government attorney.

Asylum for children. Pursuant to the Trafficking Victims Protection Reauthorization Act, the asylum office has initial jurisdiction of asylum claims submitted by unaccompanied children. The Roadmap is not limited, however, to unaccompanied children. Its processes apply to all children. Consistent with the TVPRA, the Roadmap contemplates adjudication of all children’s asylum claims by asylum officers in a non-adversarial setting, instead of an adversarial immigration courtroom.

STAGE FIVE: DETERMINATION OF ELIGIBILITY

Objective. Children will receive a timely determination of all of their claims, allowing them to achieve permanency or to move to a determination of whether they can safely repatriate to their country of origin.

Logistics. If the child is granted a form of protection, the government will end its efforts to secure the child’s removal to home country. Some forms of protection are temporary in nature; they can become permanent only through a subsequent application. For example, a grant of T-nonimmigrant status (based on trafficking) provides temporary relief and enables the recipient to eventually apply for lawful permanent resident status. In such cases, the government will end its effort to secure the child’s removal as soon as the child obtains the temporary form of relief. The government will also develop a process for the child to immediately apply for permanent status, which will require amendment of current laws which limit the number of people who can receive certain benefits and forms of protection. If the child fails to apply for the permanent protection and the temporary status expires, the government may re-open the child’s removal case. The Roadmap anticipates, however, that the guarantee of counsel for children will increase the likelihood that children will seek and secure permanent protection (lawful permanent resident status) based on an initial grant of temporary protection.

If the child is denied protection and counsel believes the denial was wrongly decided, the child's counsel may appeal the decision. But rather than a traditional review by the BIA or AAO, the child's appeal will be heard by a panel of independent judges. Those judges may be drawn from the BIA or AAO, but they will have specialized training in children's protection claims. They will be required to issue an opinion discussing the child's claim(s) and the government's decision(s) and determining whether any claim was improperly denied. If any claim was improperly denied, the panel of independent judges can reverse the denial or remand the case back to the respective agency or agencies for further consideration. If the denials are upheld, the child's case will progress to stage six (safe repatriation determination) though the child will not be precluded from other means of appeal that exist for adults, such as an appeal to the federal Circuit Courts of Appeals.

D. Safe Repatriation Determination and Best Interests Protective Status

If the child fails to secure a grant of protection and exhausts all appeals, the focus of the case will immediately shift to whether the child can be repatriated safely.

Currently, when a child fails to win a grant of protection, an immigration court will order the child removed, because that system focuses entirely on whether the child has met the criteria to remain in the United States. It does not consider whether the child will be safe upon return. Even when a child's application for protection generates evidence that the child would be in danger upon return to home country, the child is ordered removed. Consider a child who fled her country where she'd lived with aunt who was grooming her for prostitution, and who ran a brothel from the family home. That child might fail in her petition for asylum, for example by failing to prove that prostitution rises to the level of persecution, or by failing to establish a nexus between prostitution and one of the five grounds for asylum (race, religion, national origin, political opinion or membership in a particular social group).

**Principle:
No Unsafe
Repatriation of
Children**

While federal law currently calls for the safe repatriation of children, there are no processes in place to ensure through fact-finding and a determination made by an independent adjudicator that when the child returns they will be safe. In the case above, the immigration judge might find that the child does not qualify for asylum but might be deeply concerned about sending the child back to home country where the aunt was the only available guardian for the child. Nevertheless, in the current system the most the immigration judge can do is to close the child's immigration case before the court; today, as a result of policies implemented by the Attorney General, immigration judges nearly always order the child removed, even if other forms of relief remain pending before agencies outside of the immigration court. Judges focused solely on determining whether the child applicant proved her case, or who see no distinction between children and adults, would and do order the child removed after denying the child's application for asylum, or when the child fails to demonstrate eligibility to remain—even if the child has an application for protection still pending before another agency.

Objective. At the safe repatriation determination, the burden shifts to the government to provide sufficient, case-specific evidence that the child will be safe upon return to home country. Evidence could include testimony or affidavits that there is a parent or legal guardian in home country both available and willing to take custody of child and to meet the child's needs. If the child provided evidence that she would be unsafe in her country as part of her application(s) for protection, the government will have to provide evidence of either changed circumstances or of feasible steps that would protect the child upon return. Absent a determination that the child can safely repatriate, the child will be granted protective status. This protective status, based on the child's best interests, permits the child to remain in the United States until adulthood (age 21).

Logistics.

- **Government's Case.** The government will have three months after Stage Five of the determination of eligibility to secure information and evidence that the child could be safely repatriated. The government will have the ability to collaborate with child welfare officials in the child's country of origin or consular officials to develop a safety plan for the child.
- **Safe Repatriation Conference.** The government will present its evidence of safe repatriation at a final "Safe Repatriation Conference" before the same presiding judge who oversaw the child's immigration case from the start, and who will be familiar with the claims raised and evidence presented by the child's attorney as part of the child's application(s) for protection. The continuity of the presiding judge is critical to the case. Although the presiding judge will not have adjudicated the child's independent claims for protection, that judge will be familiar with the child's claims as well as the child's present circumstances and will be able to take all relevant information into account in determining whether the child can be safely repatriated. The presiding judge must find clear and convincing evidence that the child can safely repatriate before ordering removal. Just as the government had an opportunity to challenge or rebut evidence provided by the child during the child's petition for protection, the child through her attorney will have an opportunity to challenge or rebut the government's evidence that the child can repatriate safely. The independent child advocate will also provide a recommendation as to whether repatriation is in the child's best interests. At the conclusion of the conference, the judge will issue a determination as to whether the child can repatriate.
- **Safe Repatriation Safety Plan.** If the presiding judge determines that the child can safely repatriate, the judge will establish or approve a safety plan setting forth the conditions under which the child will return. The attorney for the government will be obligated to ensure that each government agency involved in the child's repatriation complies with the conditions of the safety plan.

Unsafe Conditions for Child’s Return: Best Interests Protective Status. If the presiding judge determines that the child cannot safely repatriate, the child will be granted permission to remain in the United States until the age of 21, through a grant of protective status based on the child’s best interests.

“Best interests protective status” reflects the premise that children and young people who are not yet adults should not be returned to, or placed in, unsafe situations.¹³⁹ As noted earlier, research has demonstrated that the human brain continues to mature through an individual’s mid-20’s. During this time, children continue to mature physically, emotionally, and intellectually. Therefore, prior to the age of 21, children and youth will not be returned to situations that would endanger their lives and ability to reach adulthood safely.

**Principle:
Childhood
Continues
to Age 21**

Certain benefits will attach to a grant of protective status to facilitate the child’s safe, healthy, and meaningful development.

- **No removal:** While the child has best interests protective status, immigration officials cannot return the child to home country or remove the child from the United States.
- **Work authorization:** Children granted best interests protective status will be eligible to work, in a manner consistent with state child welfare law.
- **Admission for purposes of adjustment:** Children granted best interests protective status will be deemed “admitted,” so that if they become eligible to adjust their status to that of lawful permanent resident through another mechanism, they will not be barred from doing so because of the manner of their entry.

At the age of 21, some young adults may seek return to their country of origin, particularly if some of the root causes that drove their flight or migration have been addressed. But a prior grant of best interests protective status will provide protection against automatic removal (deportation) upon the child reaching the age of majority. Specifically, if the government seeks to remove (deport) an adult who was previously granted best interests protective status, the adult will have an opportunity to present evidence that return would pose a threat to their safety, to file a petition for a benefit for which they are eligible, or to seek the government’s exercise of discretion so that they may remain in the United States. For some young adults, time spent in the United States may make them a particular target for persecution or other violence should they return to their home country. Whether or not they pursued asylum or another form of protection as a child, they will have an opportunity to do so prior to removal as an adult, under the system that exists for adults, but absent time restriction imposed on other adults, such as the current, one-year-window for applying for asylum. Some may be eligible to adjust their status based on marriage to a citizen or will be eligible to request cancellation of removal based on a qualifying family member. Alternatively, for young adults previously granted protective status, the equities they develop during their time in the United States—including attending school, graduating, obtaining a G.E.D., working or volunteering, and establishing family, community or religious ties—will be considered by the government in exercising its discretion to allow these young adults to remain permanently in the United States.

The Roadmap does not create a new path to permanency for adults. Instead, on reaching adulthood, young people would have an opportunity to request that immigration authorities exercise their discretion to permit them to remain in the United States if their circumstances merit that protection. This presumes, of course, that our system has returned to one in which immigrants seeking protection or with longstanding ties to or contributions to the country may seek the reasonable exercise of discretion by government officials. While the outcome of this process might ultimately result in the removal of an adult from the United States after spending considerable time here, it would happen because removal at an earlier time would have put a child directly in harm's way.

System reform doesn't happen overnight. Our proposed Roadmap for children's immigration proceedings will require significant changes in law, regulation, and policies; and everyone with responsibility for immigrant children will need to change their practice. Today, at the time of publication, children are subject to such horrendous policies—family separation, deportations to known danger, banishment after an entire childhood lived in the United States—that focusing on a new system developed with bipartisan consensus might seem a fool's errand. But the work of undoing these cruel practices is different from that of imagining, and creating, a system in which children are cared for because they are children. To push the pendulum away from policies grounded in racism, classism, and cruelty, we need a commitment to wholesale change. But we do not need to start from scratch. There are such valuable lessons to learn from other movements for reform. That is what we have attempted to capture here. We hope the Roadmap inspires further dialogue, engagement, and a commitment to the hard work of creating the system that children deserve.

An Imagined Immigration System

Dr. Zoe Given-Wilson

‘Reimagining Children’s Immigration Proceedings’ inspires us to open our minds. It invites us to think beyond the constraints of tradition, funding and resource limits, human errors and judgements, public attitudes, and to start anew. Perhaps we can learn from the children who are at the centre of these proceedings by considering, who they are, what they have been through, and how this affects legal proceedings, and emerge with a fairer immigration system.

Imagine Carlos, a fifteen-year-old boy, who arrives alone in the United States of America (USA) from Honduras, seeking a safer life. To gain this safety he must attend a number of different court hearings to determine, first that he is indeed an ‘alien child’, and then provide an account of the atrocities he has experienced in order to convince the officials at the Department of Homeland Security that he should be granted some protection, and not be deported.

Carlos has experienced several traumas, such as witnessing extreme gang violence in his home country, being sexually assaulted during his journey to the USA, and being treated with suspicion, prejudice and hostility since arriving in the USA. These experiences have left him with symptoms of post-traumatic stress disorder and a deep lack of trust in adults including officials. Carlos is told he has the right to legal protection, but he cannot afford a lawyer and he does not know where to ask for help. As a result, Carlos goes alone to a series of interviews with government departments, including Homeland Security and Health and Social Services. He attends a court hearing where he does not understand much of what is happening, but at the end it is decided that he is an ‘alien’. While Carlos is considered an ‘alien’ by the government, in turn he finds the new culture of legal talk and government involvement in his life very alien.

Legal proceedings continue, as now he has to prove that he should not be deported. He isn’t clear what he needs to say to prove this – but he does know one thing for certain he is terrified to return to Honduras. Carlos tells different people different things, depending on what and how he is asked. Carlos tries to give the answers he thinks people want to hear, which results in inconsistencies and omissions. It is decided that this ‘alien’ child’s story has too many gaps, isn’t consistent and therefore does not support his claim that he needs protection. Carlos’ request for protection is refused and he is returned to violence and persecution in his home country.

At the symposium Reimagining children’s immigration proceedings held by the Young Center in September 2016 experts from immigration, child protection and juvenile justice contrasted and compared systems. While there are many differences across these areas, they all have vulnerable children at the centre of them. Children who don’t always have the psychological maturity, the good health, education, skills, or the support to navigate the legal system or be adequately protected. With this in mind we need to re-imagine an immigration system which recognises how exposed these children are, and how making adjustments and providing advocacy, will offer protection.

Let us imagine immigration proceedings which could support someone like Carlos to achieve a fairer decision. Such proceedings would be organised in a holistic way that takes into account children's needs and capacities, including their developmental stage, the limitations of their memory and their mental health. By putting the child's needs and capacity at the centre of immigration proceedings system, it is likely better evidence will come to light and consequently higher quality decisions about each child's need for protection could be made (UNHCR, *The Heart of the Matter*, 2014).

Typically, there is little objective evidence in asylum cases and so the child's story of what they experienced becomes the central evidence. To judge whether someone does indeed have a well-founded fear of persecution, the decision is often based on a judgement of the child's story: Do they seem genuinely traumatised? Does this child's story have enough detail to seem credible? So, the child just needs to tell their story, the judge listens, makes a rational decision. Simple?

It is not so simple. The story the child tells will depend on who and how they are asked. There are a number of layers to this way of proceeding which disadvantage the child. For example if the interrogator does not ask many questions or gives non-verbal messages that they are disinterested it might inhibit the child from disclosing relevant information, which means their case may not seem detailed enough and may prevent a judge from making a well-informed decision. Given the permission to reimagine, the following are suggestions for how we might reinvent the immigration process to free ourselves from these barriers and allow for a fairer immigration system.

The UNHCR recommends that a child is considered a child first, and asylum seeker second, and that their developmental maturity should be taken into account (UNHCR, 2006). An immigration system should take into account a child's developmental stage and recognise that the maturity of a 12-year-old is vastly different that of a 17-year-old, which is different again to that of a 26 year-old. These differences may affect the child's ability to understand legal proceedings or grasp another person's perspective – for example what a judge expects of them in a courtroom, or how their demeanour may be interpreted by others.

To counter the inhibiting effects of a formal courtroom, proceedings for children would happen in a non-adversarial and less hierarchical environment. Ideally this would not even be a courtroom, but rather a child-friendly environment, with consideration for the type of traumas these children may have experienced. For example, open rooms with windows and a view of the outside world, so as not to replicate the confinement of a smuggling vehicle, or a captor's room. For younger children, objects to draw or play with may help them to give the necessary information. Concentration is also affected by development and mental illness (e.g. depression and PTSD reduce concentration), so the proceedings may need to allow for regular breaks.

The burden of proof would be shifted towards the decision-maker with less onus placed on the child. This imagined system would provide optimum opportunity to gather quality information from the child. It would consider the research on interviewing techniques for children, who are nearly always in a less powerful position than those interviewing them. For example, we know

that children need more prompts to access details of their memories – particularly if they are traumatised or depressed. Children are also sensitive to an interviewer’s demeanour and may interpret even a neutral manner as threatening, and so disclose less.

There is also a high level of psychological need among asylum seeking children. The horrifying events these children have experienced may leave them traumatised and/or depressed. Post-traumatic stress disorder and depression are the most common problems affecting between 25% and 75% of asylum-seeking youth (Fazel, Reed, Panter-Brick, & Stein, 2012; Hodes et al., 2008). This is of concern, not only because it indicates the high level of need these children have, but also because it reveals the impact mental illness is likely to have on their capacity to engage adequately with immigration legal proceedings.

Unaccompanied alien children (UAC) who are depressed or traumatised are unlikely to be able to give neat detailed accounts of the horrors they have experienced, or even details of everyday life. Owing to what is called an ‘overgeneral memory style’ many people who are depressed and/or have PTSD cannot access specific details of past experiences. This means their accounts may sound superficial, or incomplete, or unlikely and may lead decision makers to judge their stories as lacking credibility (Brennen et al, 2010; Spinhoven et al, 2006).

Culture can also shape how and what is remembered or forgotten. People from a culture that values collectivist experience and social norms are more likely to report memory in a way that reflects this. In contrast, in an individualistic culture, like the USA, people recall their experiences with more focus on individual actions, experiences and agency. An immigration system which acknowledges cultural differences and provides training for decision-makers on these differences – how people remember and tell their stories – would considerably reduce erroneous assumptions – that because an account seems to lack the individual detail an American would expect, it is false.

Children who are younger, or have poorer memory, or are anxious, are more likely to answer with what they think the interviewer wants to hear. All, or any, of these factors can lead to a child’s story being judged as lacking credibility. So judges and decision-makers would be trained to understand this research, and to allow for how interviews were conducted and take into account these issues, before making a decision.

Many UAC have witnessed atrocities, been exploited, and have been separated from those who cared for them and who they trusted. These experiences can lead to difficulties trusting others and mean that UACs may not disclose information that is key to supporting their immigration proceedings. Therefore, time should be spent building rapport with children and supporting them to provide a full account. Ideally every UAC child would have equal access to a legal representative without any cost to the child. Their representative would have the time to establish trust, aid disclosure and guide them through the immigration process, while offering expert advice.

There would be recognition of and allowance for the impact mental illness has on child asylum-seekers both in interviews as well as general functioning. Research indicates that traumatised people need to be ‘stabilised’ before they can confront details of their experiences or make plans for their future. This need would be prioritised, as opposed to emphasis on rapid processing to reduce burden on the government resources.

An imagined immigration system. A new system would recognise that while assessment of eligibility for state protection is needed, it will take a holistic approach to gathering facts and decision-making which places the child at the centre of the process. This system would take into account the vulnerability of the child and be structured in a developmentally sensitive way. It would also offer equal opportunity for free legal representation. Education and training would be available for decision-makers so they had the skills and knowledge to weigh up the facts in light of what we know about disclosure, memory and interviewing. This would all lead to an immigration system which offered a fairer process in establishing a child’s need for refugee protection.

Brennen, T., Hasanovic, M., Zotovic, M., Blix, I., Solheim Skar, A.-M., Prelic, N. K., . . . Gavrilov-Jerkovic, V. (2010). Trauma exposure in childhood impairs the ability to recall specific autobiographical memories in late adolescence. *Journal of Traumatic Stress*, 23(2), 240-247.

Fazel, M., Reed, R., Panter-Brick, C., & Stein, A. (2012). Mental health of displaced and refugee children resettled in high-income countries: risk and protection factors. *The Lancet*, 379, 266-282.

Hodes, M., Jagdev, D., Chandra, N., & Cunliffe, A. (2008). Risk and resilience for psychological distress amongst unaccompanied asylum seeking adolescents. *The Journal of Child Psychology and Psychiatry*, 49(7), 723-732.

Spinhoven, P., Bean, T., & Eurelings-Bontekoe, L. (2006). Inconsistencies in the self-report of traumatic experience by unaccompanied refugee minors. *Journal of Traumatic Stress*, 19(5), 663-673.

UNHCR (2006). A framework for the protection of children. UNHCR, Geneva: Switzerland.

UNHCR (2014). The heart of the matter. Assessing credibility when children apply for asylum in the European Union. UNHCR, Geneva: Switzerland.

My Experience as an Unaccompanied Child in Government Custody

Elvis Garcia Callejas

The arrival of unaccompanied children from Central America to the United States is not a new phenomenon. Children have been fleeing from Central America for many years. They come to the United States for many different reasons, including seeking protection, a better future, and reunification with family members. Often kids do not know what to expect when entering the United States and some find it difficult to navigate or understand the complex U.S. immigration system. I know this because I first arrived to the United States as an unaccompanied minor from Honduras, in 2005, and experienced this first hand.

In this paper, I will share my personal experience in U.S. immigration custody as a 15-year-old unaccompanied minor from Honduras. First, I will describe the experience of arriving to the United States as an unaccompanied minor and searching for assistance. Second, I will describe my experience in the U.S. immigration system, which, from start to finish, involved three different federal agencies. Finally, I will comment on how we can improve the treatment of unaccompanied minors seeking protection in the United States.

I. Arriving to the United States as an unaccompanied minor

I first crossed the border undocumented and for this reason I did not want to be detained by “the *migra*,” which I now know is called U.S. Custom and Border Protection (CBP). I thought that if I was apprehended by CBP, I was going to be sent back immediately to Honduras and this was a risk I was not willing to take. For this reason, I did everything I could to try to not get caught and I was successful in entering the United States.

After I entered the United States, I was alone. I did not have family or money to support myself. As a result, I began to look for a place where I could find food and shelter. I went to a homeless shelter in El Paso, Texas, and they were able to put me in contact with Annunciation House, a shelter that welcomes immigrants and refugees. I lived in Annunciation House for a year and a half. I was treated very well in Annunciation House, but for a child alone living in a shelter was very difficult.

During my time at Annunciation House, I met the family of one of the volunteers at the shelter at that time, Katie. Her family learned about my situation and they wanted to help and care for me. The family offered to help me obtain Special Immigrant Juvenile Visa (SIJS). They explained that if it was approved, I would be able to stay in the United States and live with them in Chicago, Illinois. I accepted their offer. However, the approval process for SIJS took a really long time. While the application was pending, I continued to live at Annunciation House. After over a year of waiting, I became really homesick. I missed my family in Honduras, and I became discouraged because, being an undocumented minor, I could not work.

Gradually, as I became more and more homesick, I became depressed. I began to feel that I

should give up on my plans for living in the United States legally and just go back to Honduras to be with my family. I thought that although life was very difficult in Honduras, at least I could be close to my mother and my siblings. So, one afternoon I went to a park in El Paso and found a Border Patrol agent. I told the officer that I was undocumented and asked if he could send me back to my country. The officer got out of his vehicle, opened the back doors, and he instructed me to get in. As soon as I got in the Border Patrol vehicle I started asking myself, "What have I done? Why did I turn myself in?" I realized that it was too late to change my decision and I was now going to be sent back to Honduras. What is clear to me now with the benefit of hindsight is how difficult it was to be an unaccompanied minor living in the United States without the care of a family, and that my desperation resulted in my making an impulsive, bad decision to turn myself in to CBP.

II. My experience in U.S. immigration custody

Once I was apprehended by CBP, I was put in a room with cement walls. There was a cement bench attached to the wall at a 90° angle and an aluminum toilet across from the bench. One of the walls had a big glass window where I could see CBP officers walking from one place to another inside the facility. This facility was very cold I was shivering and they did not give me anything to cover myself. There was no privacy, because the toilet did not have doors and the officers could see if you were using it. I was held there for about ten hours and then an officer came and took me for an interview. He was standing in front of a white computer as I stood across from him. He asked me a lot of questions for about twenty minutes. I was very confused because the officer was a little rude, and I felt as if he was interrogating me. Then he took me to a fingerprint scanner, and he took my fingerprints and a photo of me.

After the interview, the officer asked me to sign a document, but I did not sign it because during my time living in El Paso I had been advised not to sign any documents given to me by CBP. After my interview the officer brought me to another cell which look like a box made out iron wire fencing, with an aluminum bench in the middle. As I sat there an officer brought me a small juice and a small cold burrito. After two hours another CBP officer came and put handcuffs on me, which made me feel humiliated. I had never been in handcuffs in my life and I felt like I was a criminal. The officer took me to one of the nearby ORR facilities in El Paso.

I arrived at the facility at about 5:00 AM in the morning. The staff at the facility asked me some questions and then I was brought to a bedroom. This facility was a lot nicer then the "ice boxes" of the earlier facility. It looked a lot like a dormitory, but with a several cameras and people sitting outside the bedrooms. I was very tired because I had not been able to sleep while I was in CBP custody since it was very cold, and moving from one place to another did not help. I was also very scared because I did not know what CBP was going to do with me. Soon I fell asleep in one of the two beds in the bedroom and a staff member came to wake me up in the morning. She took me to a room that had clothes and ask me choose a couple of t-shirts and some shorts. She gave me long white socks, underwear, and a pair of blue shoes similar to the ones prisoners use in jail. The lady showed me the way to the bathroom and told me that I needed to take a shower. She gave me lice shampoo, and she ask me to use it when I took my shower. After showering, the lady took my personal belongings and told me that someone would return them to me when I left the facility. Next, I was taken to another room

where another lady asked me more questions and explained to me the rules of the facility. She brought me to the same bedroom where I had slept earlier and told me to stay there. I was in this bedroom for seven days.

During this time I was considered to be in quarantine, and could not leave the room except to use the bathroom. I had to call one of the staff members to escort me to the bathroom. I could not talk to the other kids in the rooms because the staff would yell at us to stop talking to each other. Those seven days felt like an eternity, I cried a lot, I was very sad, and very bored. I had never been in a same room for such a long time. I remember seeing through a small window the other kids who were not in quarantine playing and I wanted to go out and play with them, or at least get some sun. I would ask the staff if could go out to play with the rest of kids, but they told me that I could not until I completed all of my vaccinations.

After seven days, I was transferred to be with the rest of the kids who were not in quarantine. This was much better because I was sharing my room with two other kids and I could attend school. During breaks I could watch TV or play with the rest of the kids. This shelter had about 100 kids, boys and girls, of all ages. I met a lot kids from Honduras, Guatemala, El Salvador, and Nicaragua, as well as some from Ecuador, Peru, Argentina, and Mexico. We all had different stories, but we were there for the same reason, we were underage and undocumented. Although we were in a safe place, many of us were unhappy being in detention.

We were allowed to make one or two telephone calls per week. I would call my family in Honduras, and my new American family in the United States whom I had met while I living in Annunciation House. I asked them to do everything they could to get me out of the facility as soon as possible. I was treated well by the staff at this facility, however, I found it very difficult to handle having so many restrictions. I did not like that a staff member would tell me when to go to bed, when to wake up, and when to take a shower. I did not like that we had to form a line every time we were going to engage in an activity, and I had to ask a staff to escort me every time I had to use the bathroom. I was never alone, there was someone with me all the time.

I was very confused about the process regarding how the government decided who could be reunified with their family members, who had to stay in detention, and who had to be deported. I learned that if you turn eighteen in the facility, the government could take you to an adult detention. One of the kids who had been in custody for six months was taken to adult detention because he turned eighteen years old. I was very sad and scared for him when they took him. I was also afraid that the same thing could happen to me. There were two girls from Mexico that have been living in that facility for two years. I did not know why they were in the facility for such a long time or what was holding up a change in their situation. I only knew that they did not want to be sent back to Mexico.

After several weeks at the facility, I met with a woman who interviewed me again. She told me that she felt I would be able to stay in the United States. She also told me that while in detention I would need to meet with an Immigration Judge and instructed me to ask the judge for more time to resolve my case. This same person asked me if I knew anyone in the United States who was willing to sponsor me, I told her about my American family and how they had already started the application process for me to live with them. This is how I began my reunification process to live with my American family in Chicago.

I had my first immigration hearing while I was still in ORR with a group of other kids. I did not understand at the time why we had to see the judge; I only knew that I needed to ask the judge for more time so I could go live with my American family. I had my immigration hearing in a very formal setting room, there were three people (a Judge, a clerk, and an interpreter) from the Executive Office of Immigration Review (EOIR), one person from ICE (a government attorney whose job is to deport people), and the rest of kids. None of us had an attorney.

I waited as the judge called us up one by one, until it was my turn to meet with her. The judge spoke to me in English using the interpreter, but it was hard for me to understand. The judge asked me if I needed more time to figure out my case and I responded yes, I did. She approved an extension and scheduled a follow up court hearing date. At the follow up hearing the judge placed me in the temporary custody of my American family while my immigration proceedings continued and agreed to the transfer of my case to the Chicago immigration court. After staying in the facility for forty nine days I was finally unified with my new American family who brought me to their home in Chicago. My experience highlights that the involvement of several different government agencies in the detention and immigration process can be very confusing for children to understand. Although my experience ended with a very positive outcome, I was continually confused as to what was happening and why, and at the time, I thought everyone was working against me.

III. Recommendations for changes to the detention of unaccompanied children

As a former unaccompanied minor, I personally understand some of the challenges children face while they are in the custody of government agencies such as CBP and ORR. It is difficult for children to understand where they are in the process of seeking protection, and whether they will be deported or get some type of protection in the United States. I believe that children should never be put in the custody of CBP and instead they should go directly to the custody of ORR. CBP custody was very difficult for me emotionally. The officers were not friendly and they did not appear to have been trained in how to handle cases of children. I was put in handcuffs when I was transferred from CBP to ORR, which made me feel humiliated. I felt as if I was treated like a criminal. The officer was rude when interviewing me. I felt as if I was being interrogated. It is also clear that the CBP detention facilities are not an appropriate place to deal with children. These facilities are so cold that we called them “ice boxes”. They do not feed people adequately, and the food provided during my experience was frozen. These facilities have the look and feel of a jail rather than a processing center. Moreover, I believe the children should have the right to have an attorney present when they are interacting with a CBP officer or any time that children are asked to sign any legal document. I was given a document written in English to sign which was very difficult for me to understand. Many of those crossing the border are young children who often do not know how to read. Many speak only indigenous languages, which make it more difficult to communicate with the CBP officers or to understand legal documents. Consequently, I reiterate my strong recommendation that unaccompanied minors should not have contact with CBP, but rather, should go straight to the custody of ORR.

In addition, I believe unaccompanied minors should spend the least amount of time as possible in the custody of ORR. It is very difficult for children to be in ORR custody. It is difficult to have people who are monitoring every movement you make. I was followed every time I went to the

bathroom, when I woke up, when I went to bed, when I was in school, and even when I was playing with the other kids. I could not even shake hands with the other children, because I could get in trouble. I knew that if I did something “wrong” or did something that look “bad”, I could get in trouble, so I tried to not do anything out of the ordinary to avoid getting in trouble.

There is no place like a home environment with family members, or having freedom. When kids spend too much time in ORR custody, they sometimes begin to act out and make bad decisions out of the frustration the results for been detained for a long time. I remember while in ORR thinking I might request voluntary departure, because I could no longer handle been in detention. Candidly, I also considered trying to escape from ORR custody because I was so tired and frustrated of being there. At night, I frequently cried along with my friends (other unaccompanied minors) because we were really sad and homesick after being in detention for so long. I recommend that children should be reunified with their family members as soon as possible. If they do not have family members in the United States they should be transferred to long time foster care, or be repatriated to their home country, but only if it is safe to do so.

My interaction with the Immigration Court system was less stressful. This may have been because I did not realize at the time that my staying in the United States depended on the outcome of the immigration court hearings, or because I had an attorney and an amazing family who spoke on my behalf. I remember going to immigration court while I was in ORR custody, but not understanding the roles each person played or the importance of that immigration hearing. After, I was united with my American family I only had to go to immigration court twice. I believe the judge may have waived some of my appearances because she did not want me to miss school. I met with my attorney, Claudia Valenzuela, a couple of times so she could learn more about my case and present it properly to the judge, so I would not be deported. I remember Claudia explaining the entire process, including specific details regarding the immigration court building, how we were going to go through security with metal detectors, and assuring me not to be nervous. She explained the role of the immigration judge and the role of the immigration chief counsel who represents the government. The first court appearance was very easy; the judge only asked me a few questions. About six months later I went to see the judge again. At that time she asked me more questions about myself and my American family. The chief counsel then asked me questions, and asked me to promise that I was going to be a good individual in the community, to which I agreed. I really believe that my experience with the Immigration Court was not representative of the experience for many unaccompanied minors today. I was lucky that I had an American family and an attorney who helped me navigate the immigration systems even when I did not realize their importance. I am sure that my experience would have been more negative if I had not had that support. I hope that with this description of my experience people can understand the challenges and the confusion children face when they enter the immigration system, and how complicated it can seem if you do not have the support of a family and an attorney.

In conclusion, I can see that there have been improvements to the custody and care of unaccompanied children since my experience in the system in 2005. However, there is still great room for improvement. I hope this report will be useful toward improving the treatment of unaccompanied minors in U.S. custody and improving their access to protection from the U.S. government during the process.

Providing Meaningful Representation to Children in Immigration Proceedings

Martin Guggenheim

I assume was invited to the wonderful event hosted by the Young Center for Immigrant Children's Rights with some degree of concern by the hosts. This was, after all, a gathering of advocates throughout the country to focus on a unifying message that would result in children being represented in immigration-related proceedings. I am perhaps best known for my opposition to children having lawyers in a wide variety of proceedings, in contrast with much of the organized bar and children's advocates in the United States. I'm on record expressing my opposition to giving children's lawyers in many different kinds of proceedings in which they currently have the right to be represented by a lawyer or a guardian ad litem.

With this in mind, I am pleased to be able to contribute these few remarks in support of the Young Center's call for providing meaningful representation to children enmeshed in immigration-related proceedings. I am an unabashed supporter. I can think of few things less fair than forcing a child to appear alone and without legal representation before an official gathering of administrative or judicial officers. I will say a word about its unfairness to the child shortly. But, first, I want to focus on the substantive principles that drive our national immigration policy in order to demonstrate that discussing whether someone should be given a lawyer in a certain kind of proceeding is too abstract an inquiry and, in all events, should never be the first matter to be considered.

Although it may seem backwards to some, the best way to determine whether children in immigration proceedings ought to have legal representation is to focus on the substantive rights children in immigration-related proceedings have. If, for example, there was a rule that all foreign-born children without legal papers proving their right to be on American soil must be deported immediately upon being discovered, they would not need lawyers, nor would it make any sense to ensure that they were represented.

But this doesn't remotely describe American law with respect to undocumented children coming to or found living in the United States. Congress, in its wisdom, has enacted laws designed to protect undocumented children from being removed from the United States in certain situations. These laws are the result of a considered decision that we want certain undocumented children to remain in the United States. We want that because of our commitment to justice and our recognition that too many children were born into dangerous or unstable settings who may have ended up in this country for compelling, humanitarian reasons that a just society would want to take into account. We know that many undocumented children who have made the journey to the United States did so under chillingly dangerous conditions. Sometimes, these conditions existed in their country of origin. Sometimes, the dangers were created by their own families – parents, or relatives who have abused them and gravely endangered their lives or mental health. Other times, the dangers were in their communities where they were subject to gang activities that threatened their lives. Still other

times, they were simply the children of parents who were targeted by government as dangerous or subversive. And there are many more categories of harms to which undocumented children may have been exposed in their countries of origin.

We also know the journeys they took to reach the United States were themselves fraught with extraordinary dangers. Children die on these journeys; they sell their bodies to make it to our border; they risk their lives and their futures. This is well known and serves as the vital backdrop for all that follows.

Let me be clear to the reader: I am not making any kind of argument about what our substantive laws involving undocumented children ought to be. I am merely clarifying what our substantive laws already say. All of us should agree on one simple principle: duly enacted laws should be properly enforced. Everything really important about immigration law and policy should be focused on the *substantive* question of what the law and policy should be. That's where the action is.

And what we know about this area of the law is that Congress, and the American people, have been extremely sensitive to the realities of the plight of many undocumented children found in the United States. It matters greatly to these lawmakers (and voters) who, precisely, these children are. Why did they come to the United States? What are their stories? Do they deserve to remain in this country? Or should they be removed and returned to their country of origin? And all of these questions can be more succinctly reframed as: How can we create a system by which the results best comport with our substantive goals?

At the heart of the question whether children should be provided with legal representation in immigration-related proceedings we should all understand that what we are actually asking is: Do we want the substantive laws on immigration to be faithfully carried out. Perhaps some who oppose legal representation for children in immigration-related proceedings are stealth opponents of the substantive laws in the field. These opponents must be called out for what they are. They mean to undermine our laws; they are activists for the subversion of law. Having lost in the political arena by failing to repeal our laws, they now want to make it unlikely that our laws will be faithfully enforced. Nothing is more destructive of the rule of law than setting into motion a deliberate process designed to prevent the law from being properly followed. That is exactly what some opponents of legal representation for children are up to. They are stealth opponents of the norms of our society. They mean, quite deliberately, to make it unlikely that our laws will be enforced. This is an unacceptable way for a just society to operate.

That leads to a simple place: The question whether undocumented children should be represented in immigration-related proceedings is finally about – *only* about – whether there is enough risk that the law will not be properly enforced unless lawyers are included in the proceedings. The purpose of the proceedings, it must be recalled, is to maximize the likelihood that the case will be resolved properly. In other words, the proceedings are conducted to identify those cases in which children who have the substantive right to remain in the United States will be allowed to remain here and those cases in which children who lack such rights will, accordingly, be removed. The entire purpose is to get it right. Errors, in either direction, undermine the rule of law.

This rather quickly brings us to an easy answer. The question now becomes whether the substantive law of immigration as it relates to children is sufficiently straightforward to allow us to confidently conclude that immigration proceedings will reach the correct result without the benefit of counsel for children. If, for example, current substantive law called for undocumented children below the age of seven have the right to remain in the United States, there would rarely be any need for children to be given lawyers. In most cases, a child's age is not so difficult to ascertain that we should insist that all children are given a lawyer. We might agree that some small subset of children might require counsel, but that would be for the few children who are neither obviously above nor below the age of seven *and* who are unable to produce any kind of documentation proving their age. For this very small subset of children, immigration officials might have to conclude they cannot determine the correct outcome without providing the child with a lawyer charged with the responsibility of finding documentation regarding the child's age or, as a next best procedure, finding a witness who can testify to the child's age (perhaps someone who was present when the child was born). Thus, even the simplest of tests for determining which undocumented children should be removed might lead to the conclusion that at least some children should be given lawyers.

But anyone even remotely familiar with the laws of immigration as they relate to undocumented children will immediately agree that the rules are anything but easy or clear. They are extraordinarily complex. American law allows undocumented children to apply to remain in the US when they have demonstrated past persecution or a fear of persecution on account of certain, enumerated grounds; when they have been the victims of certain types of serious crimes or child trafficking; when they can demonstrate that they were abused, abandoned or neglected by a parent such that it is not in their best interests to return to their country of origin; and when they fall within an even larger number of possible categories based on specially-defined family relationships and circumstances.ⁱ

Thus, the only remaining question is whether this extraordinarily complex set of laws is very likely, or even somewhat likely, to be properly resolved without lawyers for children. No reasonable student of the field could conclude the answer is "yes." And once the answer is "no," then we should have settled once and for all the question. Asking whether undocumented children should be given lawyers in immigration-related proceedings is simply another way of asking whether there is a high likelihood that the proceeding will be resolved correctly without providing children with lawyers. Children deserve lawyers in these proceedings because *Americans* deserve a system of law that will result in the rule of law prevailing most of the time. We often stress that undocumented children have rights (as the corollary to the law on undocumented children). And that is, of course, undeniable.

When Congress enacts a law like the Special Immigrant Juvenile Status law, for example, it creates a legally enforceable right for undocumented children who were victims of abuse and who do not have safe guardians to whom to turn for their upbringing. But we too often lose sight of the broader meaning of laws of this kind. They do more than create rights for undocumented children. *They also establish a baseline of values for all Americans.* Through Congress, we create legal norms that have broad meaning even to Americans who are not recent immigrants and may not even know recent immigrants. They are an important value-based statement about Americans, the United States, and what we (and it) stand for. But

they are not platitudes or propaganda. They are vital, substantive principles. And when they are thwarted or undermined, Americans, and our country, are the losers just as much as the individual child involved in the proceedings.

Children need lawyers in these proceedings for reasons unrelated to the children themselves. Lawyers are the oil than runs through the engines of justice to ensure they run smoothly. They are a vital protector of the rule of law whose faithful adherence is, in turn, essential to all Americans, whether they are involved in the particular area of the law or not.

And, finally, there is the justification based on the children themselves. For those to care about children, just imagine how frightening – not to mention Kafkaesque – it must feel to a young person about to “participate” in a proceeding that will profoundly determine his or her future, lacking all knowledge of the law and forced to endure going through the proceedings alone without the assistance of a trained professional committed to helping them know their rights. Only a cruel person would comfortably impose such an unfair arrangement on children.

ⁱ More specifically, children may be able to remain if they can prove that they experienced persecution or have a well-founded fear of persecution on account of their political opinion, race, religion, nationality, or membership in a particular social group. Whether a fear is well-founded, whether harm rises to the level of persecution and whether that persecution was “on account of” one of the five enumerated grounds is defined by case law, which varies by location. The ground of membership in a particular social group is one of the most litigated issues in immigration law. US immigration law may also allow children to remain if they can prove they were a victim of certain “qualifying” crimes and cooperated with law enforcement. The “qualifying crimes” are established by statute but may be proved under federal, state or local law. Children may also apply to remain if they were a victim of a “severe form of trafficking” and can establish “extreme hardship involving unusual or severe harm” if they were returned to their country. Federal statute determines whether trafficking is “severe”; case law governs the definition of “extreme hardship”; and federal regulations establish evidentiary standards including the use of primary or secondary evidence. A child may also apply to remain in the United States if she is declared dependent on a juvenile court or is placed in the custody of an agency, department, individual or entity appointed by a state or juvenile court and can demonstrate that she cannot be safely reunified with one or both of her parents because of abuse, abandonment or neglect (as defined by the law of the state where the child resides) and that it is not in her best interests to return to her country of origin. To secure this benefit, a child must participate (often simultaneous) state court proceedings before a family court or similar judge while appearing in either immigration court or before a different federal agency where certain protection claims are adjudicated. Other children may apply if they were subject to abuse by a parent and, if they are over 14, can demonstrate good moral character (another well-litigated legal standard that may vary by location). Certain children may qualify to remain based specifically on their relationship to other adults such as a parent. It is also worth noting that these benefits are discretionary—a child may meet the criteria but still be denied—and that some of them have numerical caps limiting the number of children who can apply in a given year. And finally, children may be able to remain if they can establish they will be subject to torture upon their return to home country.

Emerging Adults: It's Time to Recognize Their Specific Judicial Needs

Dr. Antoinette Kavanaugh

The law is often slow to change to reflect the advancement of science. That said, in a recent series of United State Supreme Court cases, the Court has changed the law based on longstanding scientific findings that prove the adolescent brain functions differently than the adult brain. These findings have not only contributed to changes in certain areas of law but, for scholars, to new characterizations of the stages of life and development. Now it is time the judicial system changes in a manner that reflects these new characterizations. Specifically, there is a call to establish a national young adult court. What follows is a brief review of the empirical findings regarding the functioning of the adolescent brain and of the Supreme Court cases that recognize these findings, as well as examples of the need to establish a court for those who fall into this newly characterized stage of development. Just as these findings have been recognized by the United States Supreme Court, it is imperative that they be considered when adjudicating children's immigration cases.

The research documenting the normative developmental changes in the adolescent brain, and how these structural changes impact the brain's functioning, has existed for nearly twenty years. As a normative process, these changes do not culminate until a person is in their twenties. The easiest way to think of it is that the brain matures from the inside out and from the back to the front. Consequently, the last part of the brain to mature is the frontal lobe. The frontal lobe is often referred to as the CEO of the brain because of its central role in executive functioning.

As a normal part of adolescent development, the way the brain functions changes as well. The dual system model of functional development, the brain's cognitive control system and the socio-emotional system (sometimes referred to as the risk and reward system), accounts for these changes. The cognitive control system involves portions of the prefrontal cortex and allows a person to do things such as control impulses and consider the consequences (pros and cons) before one acts. Of the two systems, the cognitive control system is the last to mature. The other system – the risk and reward system – contributes to the increase in impulsivity, sensation-seeking and risk-taking. All hallmarks of adolescence.

Psychosocial maturity is a term psychologists use to refer to a person's development in areas such as sensation-seeking, time orientation, impulsivity and the ability to resist the influence of adults and peers. This body of research debunks the idea that on a person's eighteenth birthday they mysteriously became a mature thinking adult. Instead, research has shown that maturity is a process that continues well into a person's twenties. These findings are also particularly relevant to immigration proceedings as they have been replicated internationally. In at least five cases since the start of the twenty-first century, the United States Supreme Court acknowledged that adolescents and adults are developmentally different. As a result of these empirical findings, a person cannot be executed or automatically receive a sentence

of life without parole for crimes committed before their eighteenth birthday. The Supreme Court has also determined that police must consider a person's age when they determine if that person is in custody. This is an important distinction because it triggers a person's Miranda rights. In making this distinction, the Court said "officers and judges need no imaginative powers, knowledge of developmental psychology, training in cognitive science, or expertise in social and cultural anthropology to account for a child's age. They simply need the common sense to know that a 7-year old is not a 13-year old and neither is an adult." (*JDB v. North Carolina*, 2011, p. 17) Although it was beyond the scope of the case before it, based on science, this quote could be extended to say that a 13-year-old is not an 18-year-old and an 18-year-old is not a 28-year-old.

These judicial decisions were based on scientific research that demonstrated empirical differences in how adolescent and adult brains function—and how those differences impact behaviors including judgment, impulsivity and decision-making. The weight of these studies is so strong that scholars no longer think adolescence ends when a person becomes eighteen years old. Instead, they recognize there is a transitional period between adolescence and adulthood. Science has also led scholars to characterize the stages of life differently. For example, German scholars now refer to the period of life between ages 18-21 as *middle adolescence* and the period between ages 22-27 as *late adolescence*. Since the 2000s, scholars in the United States have been referring to the period of time after age eighteen through early twenties as *emerging adulthood*.

There has been a worldwide call to reform the legal system to recognize this transition period and not treat those within it as if they are as mature as adults in their late twenties or beyond. In Europe, this call has been responded to in different ways. In some countries, the juvenile justice system has been expanded to include emerging adults. In other European countries, the national response was to develop a court system dedicated to emerging adults. The United States has not yet developed a national response to this call to reform, however, a few states and jurisdictions have responded and have developed a court system specifically for emerging adults. For example, San Francisco has established a Young Adult Court (YAC) that serves youth ages 18-25. YAC recognizes the distinct needs of those in this particular age group and that oftentimes a YAC defendant is not as autonomous a mature adult. Consequently, unlike what is typically the case in the adult criminal system, a YAC defendant and his or her family might be ordered to participate in family therapy. Similarly, in Douglas County, Nebraska, a YAC has been established and like its San Francisco counterpart, it is for the same age group and includes those with felony cases.ⁱ

If a national response to the call to reform is not possible at this moment, local jurisdictions are urged to implement a YAC. The court should recognize the unique developmental needs of those before it. Those staffing the YAC, including the judge, defense counsel, prosecution, probation staff as well as social service workers, should be trained on the manner that emerging adults are different than their younger and older counterparts. A YAC must also have at its disposal, treatment interventions that are evidence-based and acknowledge these developmental differences. For example, the YAC would recognize that the offenders who come before it are not autonomous beings and therefore acknowledge the fact that the family may be an integral part in addressing treatment needs, reducing the risk for recidivism and

increasing the likelihood the young adult will successfully complete their court sanctions. Unlike their juvenile or adult counterparts, a YAC would also offer life skills training to assist those involved in their transition to independence. A cornerstone of any YAC should be following the precedent the United States Supreme Court has set- as a class, youth are less culpable than adults.

An immigration YAC should be rooted in similar tenets and provide similar services. It could be debated that the YAC described in the previous paragraph should reflect a trauma-informed perspective. In my opinion, it is imperative that an *immigration* YAC be rooted in a trauma-informed perspective. That is not to say the majority of those seen in the immigration court will meet the diagnostic criteria for Posttraumatic Stress Disorder (PTSD) as it is currently conceptualized. Instead, everyone who works in an immigration YAC should be knowledgeable of the potential impact of chronic stress and complex trauma on youth. Clearly, this knowledge could impact how the lawyers involved view their cases. Also, this knowledge could improve the way interpreters and bailiffs interact with those in the court. For example, hypervigilance is often a byproduct of chronic stress. With this in mind, the interpreter and bailiff may respond differently to a youth in an immigration YAC who is constantly looking around and *appearing* to not pay attention. Finally, immigration YACs should have access to experts who can educate those involved in the case about aspects of the country and culture from which a young person originates. In addition to having a roster of interpreters, an immigration YAC also needs a roster of background experts. In an immigration YAC, the judge would order an expert to write an affidavit which is to be distributed to both lawyers as well as the judge. A benefit of using a court-ordered to obtain the affidavit is that each side gets to weigh in on the particular aspects for which it needs education. For example, one party may want education on the impact of drugs or gangs in the particular city, town or county while another party may also want to be educated on the availability of mental health services or jobs in that same area. This “background education” allows both parties to gain impartial knowledge of relevant factors germane to the case at hand.

In summary, in light of scientific findings there has been a call to develop court systems that recognize emerging adults are still developing and are not fully matured adults. Hence, their needs are different, and courts should respond to them differently. Some local jurisdictions in Europe and America have already responded, however for the sake of justice, many more jurisdictions in the United States are urged to also respond to this call. Furthermore, this call should be extended to immigration proceedings involving adolescents and young adults.

ⁱ For more information about Young Adult Courts, visit https://www.sfsuperiorcourt.org/sites/default/files/images/YAC%20Interim%20Report_05252017.pdf and <https://www.sfsuperiorcourt.org/divisions/collaborative/yac>.

The Chasm Between Standards and Practice: Can Recent Advances in Migrant Children's Rights Be Realized?

*Alice Farmer**

With some 35 million young migrants and refugees spread throughout the globe,ⁱ among them more than 100,000 asylum-seeking children who arrive in the United States each year,ⁱⁱ there is a clear need to ensure their protection. Juvenile justice in the United States and beyond has established a set of standards that – however imperfect – acknowledge the imperative to protect children in a manner distinct from that extended to adults. However, the migration sphere lags behind juvenile justice, with abuses flourishing in an incomplete rights framework. Migrant children may lack basic rights, from education to family reunification or birth registration, and may be detained in substandard conditions while waiting to regularize their status.

Three recent international documents push states to advance thinking on migrant and refugee children's rights. 2016's New York Declaration for Refugees and Migrants (a set of commitments adopted by 193 UN member states to enhance the protection of refugees and migrants)ⁱⁱⁱ and 2017's two Joint General Comments from the UN Committee on the Rights of the Child and UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW)^{iv} advance and clarify certain aspects of international law with respect to migrant children. But these standards are far from aligned with child protection policies on the ground.

How can these emerging children's rights standards – as seen in these new documents – be balanced against the state imperative to regulate migration? The New York Declaration, which articulates the will of states, gives some promise but its implementation remains unclear. The document itself contains myriad examples of states retaining power over migration control in a manner at odds with child protection. The Joint General Comments, which are considered authoritative interpretations of multilateral treaties, are delivered by experts, not states, and so are free of such constraints. Perhaps as consequence, they present certain conflicts with the New York Declaration itself (discussed further below) and expose fissures with state practice.

When speaking of migrant children, the legal scholar Jacqueline Bhabha has observed, “no other group of children... except perhaps convicted juvenile offenders, is expected to fend for themselves in the face of such overwhelming legal and personal complexities.”^v The two Joint General Comments, by deepening and clarifying provisions articulated in the Convention on the Rights of the Child, push policy makers to think more profoundly about how to realize children's rights in what remains an adult-framed migration regulatory scheme. The New York Declaration gives some indication of whether states may realize these principles, facing the magnetic pull of migration control. By looking at two particularly contentious areas – detention and non-refoulement – certain challenges become clear.

Deepening and Clarifying Standards on Migrant Children's Rights

Taken together, the New York Declaration and the Joint General Comments deepen the understanding of children's rights principles as they apply to migration. All three documents emphasize the importance of certain foundational areas of children's rights in the migration and asylum arenas. For example, due to their particular need for protection, children should be under the care of social welfare agencies, not immigration authorities. In the New York Declaration, States speak to unaccompanied children in stating "we will refer their care to the relevant national child protection authorities and other relevant authorities."^{vi}

A prohibition on discrimination, particularly with respect to discrimination by national origin or by irregular migratory status, is central to protecting migrant children. Indeed, non-discrimination is one of the first principles raised in the Joint General Comments, with the Committees stating that the principle is "fundamental, and in all its facets, applies with respect to children in the context of international migration."^{vii}

The right of the child to have his or her best interests considered as a primary consideration in matters affecting them is a key factor in developing an appropriate framework for migrant children. The Joint General Comments guide states to ensure that best interests are "taken fully into consideration in immigration law, planning, implementation and assessment of migration policies" and "in particular... ensured explicitly through individual procedures."^{viii} Likewise, the New York Declaration urges states to give "primary consideration... to the best interests of the child."^{ix} Even prior to these documents, states including the United States have taken steps towards implementing best interests assessments in decision-making,^x and these documents further underscore the need for that commitment.

Detention

The Joint General Comments specifically state what advocates have long pushed for: that detention of a child for immigration reasons is never permissible. In part because immigration detention "contravenes the principle of the best interests of the child," the Committees state that "[a]ny kind of child immigration detention should be forbidden by law and such prohibition should be fully implemented in practice."^{xi}

The Committees settle a long-running debate as to whether article 37(b) of the Convention on the Rights of the Child permitted detaining migrant children as a "measure of last resort." Here, the Committees clarify that such an exception, "which may apply in other contexts such as juvenile criminal justice, is not applicable in immigration proceedings as it would conflict with the principle of the best interests of the child and the right to development."^{xii} Consequently, the Committees call for the complete abolition of child immigration detention, stating that it "should be prohibited by law and its abolishment ensured in policy and practice."^{xiii}

The Joint General Comments, issued in 2017, may be a rebuttal to the weaker position taken in the New York Declaration, which demonstrates states' unwillingness to commit to complete abolition. The Declaration draws heavily on the language in article 37(b), stating that "we will use [detention] only as a measure of last resort, in the least restrictive setting, for the shortest

possible period of time, under conditions that respect their human rights and in a manner that takes into account, as a primary consideration, the best interest of the child, and we will work towards the ending of this practice.”^{xiv}

Increases in migration and forced displacement have seen larger numbers of children at risk of detention, and UNHCR estimates that more than 140,000 asylum-seeking children were detained in 12 focus countries in 2015.^{xv} States routinely detain both unaccompanied children and children with their families in degrading conditions, even though detention has a profound negative impact on child health and development.^{xvi} Detention can deter children from pursuing their asylum claims, as they are forced to choose between indefinite detention or return to danger.^{xvii} Yet states facing pressure to regulate migration may assert that short periods of limits on freedom of movement are necessary for identification and public health reasons;^{xviii} others may insist on detention to deter migratory flows and present an image of control.^{xix}

The Committees were clearly aware of these realities when drafting the Joint General Comments and took pains to illustrate alternative policies. The Committees say that states should “allow children to remain... in non-custodial, community-based contexts while their immigration status is being resolved and the children’s best interests are assessed, as well as before return.”^{xx} In keeping with basic principles of non-discrimination, unaccompanied children should be treated with the same standards as national children deprived of parental care, as detailed in the UN Guidelines for the Alternative Care of Children.^{xxi} For children traveling with their families, the Committees resolve confusion demonstrated in state practice by stating that “when the child’s best interests require keeping the family together, the imperative requirement not to deprive the child of liberty extends to the child’s parents and requires the authorities to choose non-custodial solutions for the entire family.”^{xxii}

These standards may seem hard to meet – and certainly they are far from the reality in many countries. Yet there are some instances of progress, with countries as far apart as Lithuania and Zambia introducing improvements to their legal and policy frameworks related to the detention of children.^{xxiii} Alternatives to detention that allow children (and their families) to reside in the community, subject to some conditions or restrictions on freedom of movement, pending the resolution of their immigration cases have been piloted across the globe.^{xxiv} Finally, while advocacy on this issue is some decades behind similar efforts in the juvenile justice context, there are clear lessons demonstrating that standard-setting can lead to substantive behavioral change in practice.

Refoulement

Protecting children from harmful return is a necessary cornerstone of a migrant and refugee children’s rights framework. Indeed, recent advances deepen the notion that the *non-refoulement* standard for adults is augmented for children. The New York Declaration and the Joint General Comments emphasize the importance of considering the best interests of the child in decisions concerning return, above and beyond that of immigration status.

Children are protected by the standards in the Convention on the Status of Refugees and the Convention Against Torture that prevent return to persecution or torture.^{xxv} Yet they are additionally protected by the concept of *non-refoulement* in the Convention on the Rights of the Child, which prohibits return of a child where there are “substantial grounds for believing that there is a real risk of irreparable harm to the child.”^{xxvi} This is one of the most expansive definitions of non-refoulement in international law, given that “irreparable harm” refers to a particularly broad set of rights including “survival and development” of the child.^{xxvii}

The Joint General Comments and the New York Declaration advance thinking on how to operationalize the broad definition of non-refoulement as applied to children, emphasizing that the decision to return should go beyond the inquiry of immigration status. The New York Declaration acknowledges the need to develop principles to protect “unaccompanied and separated children who do not qualify for international protection as refugees and who may need assistance,” suggesting that all relevant stakeholders develop “non-binding guiding principles and voluntary guidelines.”^{xxviii} The Joint General Comments emphasize that “the best interests of the child should be ensured explicitly through individual procedures as an integral part of any... decision concerning the... return of a child[.]” These provisions acknowledge that for a child, return may be improper, even if the child is not found to have a protection need under the Convention on the Status of Refugees or the Convention Against Torture.

The Joint General Comments go into considerable detail on *non-refoulement*. The Committees reinforce earlier language that a child cannot be returned if there is “real risk of irreparable harm.” Evidence of such harm can be based on factors far broader than those articulated in documents prohibiting *refoulement* of adults. The Committees specify that *non-refoulement* obligations apply regardless of whether the violations “originate from non-State actors or whether such violations are directly intended or are the indirect consequence of States parties’ action or inaction.”^{xxix} This leaves open the possibility of protection from refoulement based on serious patterns of domestic violence or other non-state actors.

If return is seen to be in the child’s best interest, the Committees stress that “an individual plan should be prepared... for his or her sustainable reintegration.” Such a plan should encompass “effective access to education, health, psychosocial support, family life, social inclusion, access to justice and protection from all forms of violence.” The Committees emphasize that “return and reintegration measures should be sustainable from the perspective of the child’s right to life, survival and development.”^{xxx}

Clearly, current domestic legal frameworks do not always reflect the idea that return should only be carried out if it is in the best interests of the child.^{xxxi} Many states do not have provisions in domestic law that would operationalize these requirements (for instance, in the United States, if a child fails to meet the standards for asylum or withholding from removal, there are limited other options). Some states, however, do protect children from return with exceptional visas prior to the age of 18.^{xxxii} Operationalizing the new standards articulated in these three documents means embracing a child-specific definition *non-refoulement* assessed with best interests as a primary consideration.

Bridging the Gap

Will the new Joint General Comments and the New York Declaration push policy makers to think more creatively? They present serious advancements in deepening the framework for protecting migrant and refugee children. Substantive implementation now remains the challenge. The New York Declaration is in the process of being operationalized through two major compacts: The Global Compact on Refugees and the Global Compact on Migration. Both are facing serious political challenges in a global policy environment hostile to migration and overwhelmed by forced displacement. Yet juvenile justice advocates faced similarly hostile climates, and pushed for strong universal standards, nonetheless. Their operationalization can give hope that migrant children's rights may see similar advancement.

* The views expressed herein are those of the author and do not necessarily reflect the views of the United Nations.

ⁱ United Nations Department of Economic and Social Affairs, *Population Facts*, No. 2017/5 (Dec. 2017), available at https://www.un.org/en/development/desa/population/publications/pdf/popfacts/PopFacts_2017-5.pdf.

ⁱⁱ For recent data, see Council on Foreign Relations, *U.S. Detention of Child Migrants*, available at <https://www.cfr.org/backgrounders/us-detention-child-migrants>.

ⁱⁱⁱ G.A. Res. 71/1, New York Declaration for Refugees and Migrants, (Sept. 19, 2016).

^{iv} U.N. Comm. on the Protection of the Rights of All Migrant Workers and Members of Their Families, Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return, [hereinafter "Joint General Comment"], U.N. Doc. CMW/C/GC/4-CRC/C/GC/23 (Nov. 16, 2017).

^v Jacqueline Bhabha, CHILD MIGRATION AND HUMAN RIGHTS IN A GLOBAL AGE (2016), 215.

^{vi} New York Declaration for Refugees and Migrants, *supra* note 3, ¶132.

^{vii} Joint General Comment, *supra* note 4, ¶121.

^{viii} Joint General Comment, *supra* note 4, ¶¶129-30.

^{ix} New York Declaration for Refugees and Migrants, *supra* note 3, ¶132.

^x See, e.g., SUBCOMM. ON BEST INTERESTS, INTERAGENCY WORKING GRP. ON UNACCOMPANIED AND SEPARATED CHILDREN, FRAMEWORK FOR CONSIDERING THE BEST INTERESTS OF UNACCOMPANIED CHILDREN 5 (2016).

^{xi} Joint General Comment, *supra* note 4, ¶15.

^{xii} *Id.*, ¶110.

^{xiii} *Id.*, ¶112.

^{xiv} New York Declaration for Refugees and Migrants, *supra* note 3, ¶133.

^{xv} UNHCR, "Beyond Detention: A global strategy to support governments to end the detention of asylum-seekers and refugees: Progress Report Mid-2016," pp. 25-31.

^{xvi} *Id.* See also Michael Garcia Bochenek, *How Immigration Detention and Procedural Shortcomings Undermine Children's Right to Seek Asylum*, BIRKBECK LAW REVIEW 3(2) 271-276 (2015).

^{xvii} UNHCR, Arrancados de Raiz; Bochenek at n. 55.

^{xviii} See, e.g., UNHCR, "Options Paper 1: Options for governments on care arrangements and alternatives to detention for children and families" (2015), available at <https://www.unhcr.org/protection/detention/5538e4e79/unhcr-options-paper-1-options-governments-care-arrangements-alternatives.html> (summarizing screening and initial reception practices of certain states).

^{xix} See ROBYN SAMPSON, INT'L DETENTION COALITION, REFRAMING IMMIGRATION DETENTION IN RESPONSE TO IRREGULAR MIGRATION: DOES DETENTION DETER? 2 (2015), <https://www.refworld.org/docid/5a1e808a4.html>. See also R.I.L.-R v. Johnson, 80 F. Supp. 3d 164, 188-191 (D.D.C. 2015) (rejecting Government's reliance on deterrence of mass migration as interest justifying family detention policy in granting preliminary injunction); R.I.L.-R v. Johnson, No. 15-11 (D.D.C. June 29, 2015) (order

administratively closing case in light of “May 13, 2015, policy announcement by U.S. Immigration and Customs Enforcement that it would no longer invoke general deterrence as a factor in custody decisions involving families”).

^{xx} Joint General Comment, *supra* note 4, ¶11.

^{xxi} *Id.*

^{xxii} *Id.*

^{xxiii} UNHCR, “Beyond Detention: A global strategy to support governments to end the detention of asylum-seekers and refugees: Progress Report Mid-2016,” p. 26.

^{xxiv} See, e.g., UNHCR, “Beyond Detention: A global strategy to support governments to end the detention of asylum-seekers and refugees: Progress Report Mid-2016,” p. 23-24; see also, International Detention Coalition, “There are alternatives: a handbook for preventing unnecessary immigration detention,” <https://idcoalition.org/publication/there-are-alternatives-revised-edition/>.

^{xxv} Convention Relating to the Status of Refugees arts. 1(a), 33, July 28, 1951, 189 U.N.T.S. 150 [hereinafter Refugee Convention]; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 1, 3, Dec. 10, 1984, 1465 U.N.T.S. 85.

^{xxvi} U.N. Comm. on the Rights of the Child, General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, ¶ 27, U.N. Doc. CRC/GC/2005/6 (Sept. 1, 2005).

^{xxvii} Farmer, Alice, “A Commentary on the Committee on the Rights of the Child’s Definition of Non-Refoulement for Children: Broad Protection for Fundamental Rights” (2011), Fordham Law Review Res Gestae Paper 8, pp. 40-42.

^{xxviii} New York Declaration for Refugees and Migrants, *supra* note 3, ¶52.

^{xxix} Joint General Comment, *supra* note 4, ¶46.

^{xxx} *Id.*, ¶32(k).

^{xxxi} Bochenek, *supra* note 16, p. 1, fn 40 onward.

^{xxxi} Farmer, *supra* note 27, p.44-46.

The Idea of Seeking Justice

Mary Giovagnoli

It should go without saying that an individual facing removal proceedings should have a full and fair day in court, but our immigration laws often make that difficult. The current administration's policies make it even harder to ensure justice. One of the best and easiest ways to level the playing field remains providing access to legal information and counsel, and yet many government officials today belittle the role of attorneys and treat special protections for asylum seekers and children as loopholes that people will use to game the system. As a former government official, I can't imagine doing my job well without attorneys and advocates making their case, without sufficient procedural safeguards in place to ensure that the people I work with have guidance to follow the law, or without the input of the public through stakeholder engagement. My job was easier when all of those factors were in place; I worry for my colleagues who are still in government, as these protections are attacked and weakened a bit more each day.

I started my career in immigration law on the day that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 went into effect. In fact, my very first job on my very first day was to photocopy the law for all the other attorneys in my office, not realizing that I was holding a document that would fundamentally reshape the way our immigration system worked. In those early years, many immigration cases were governed by some aspects of the old and the new law, and regulations implementing other parts of the law continued to be issued, and then litigated, for years to come. Caught between these two worlds, I was struck by the attitudes of my fellow attorneys, some of whom seemed grateful when a case was under the old and more generous law, while others were equally happy when a case was a slam-dunk because the new law took away relief or expanded the list of minor crimes that were removable offenses.

I found the practice of immigration law pretty grim. The system seemed geared toward rapid removal of immigrants, many of whom had no attorney and spoke limited or no English. The cases were hurried and had little opportunity for research or investigation, and even when it was clear that a person had no claim, I felt no joy in winning a case. I probably would have quit altogether, but for a speech that the General Counsel of INS at the time, David Martin, a University of Virginia law professor, gave to a group of new attorneys that spring. He reminded us that our job was to follow the Department of Justice motto: "The government wins when justice is done." Suddenly, I understood that my job wasn't about removals and deportations, but about finding the right answer in the individual case. I saw myself working in partnership with the judge and counsel, or the immigrant, to try to get to the bottom of an asylum claim or possible eligibility for some other form of relief. I understood that I wasn't really representing INS, but an idea of seeking justice.

That idea is under attack today, largely because our immigration system remains veiled in mystery and largely misunderstood. While immigration itself has become an almost daily

front-page story, the mechanics of the system are not. Most people have no idea that immigration courts are different from criminal courts. They don't realize that people are not entitled to an attorney. They have no idea that there are a host of laws and international treaties protecting asylum seekers, or that these laws are being violated on a daily basis. Most are surprised to learn that federal prosecutions for illegal entry and re-entry have far exceeded drug prosecutions for the last few years. On a personal level, many people are deeply moved by images of family separation and the deaths of young children in government custody, but very few people understand the complex network of shelters, foster care, and placement decisions that are in place to care for unaccompanied minors. Most American citizens will never experience any of the immigration system firsthand, and therefore, it will always be far more likely that people will be generally more informed about how their local Department of Motor Vehicles works, or more outraged by the abuses of their local police department, than they ever will about the federal immigration system.

The fact that people are generally unaware of how our immigration system works is not a value judgement. We trust our institutions to work fairly and well. We trust our government to follow the law. We assume, sometimes wrongly, that everything is OK unless we hear otherwise. This means, however, that people in the field have to be ready to sound the alarm when things aren't working. It particularly means that government officials, as part of their public duty, have to be good stewards of the systems they implement and enforce. They must go beyond simply carrying out the laws, and instead must ask—why? How? At what cost? And because this can be both time consuming and difficult, the best systems will build those questions into the process. Although we do this primarily to protect the rights of the individual under scrutiny, it also protects the government official. It makes sure we pause and do our jobs right and ask those questions that serve as a fundamental check on the impulse to rush things along or to assume we know best. Unfortunately, many of my colleagues over the years have been unwilling to recognize that good systems protect their interests as well, and have balked at doing anything that would, in their opinion, further complicate the process of arresting, detaining, or removing people.

At one level this is understandable. No one in government is immune from the frustration that can come from having too few resources and too many cases. Frequently, government officials have access to sensitive or classified information that may change the analysis of a particular case or policy. You are rarely making decisions in a vacuum, and, especially in Washington, the National Security Council, the Domestic Policy Council, the State Department, the Department of Defense, the CIA, and the FBI, among others, may all have an opinion about the immigration case or issue you are trying to resolve. Sometimes your warnings and recommendations are ignored or decisions are overruled. In such instances, the last thing you may want to do is take that call from an attorney or advocate hoping for good news or agree to speak to a group of advocates and citizens who are angry about a new policy. If good systems are in place, however, no matter how much you don't want to do something, the process will make it happen anyway.

Unfortunately, sometimes people really don't want to do the right thing. I recall teaching a class on asylum to new attorneys and stressing the need to explore all aspects of the case if an immigrant was *pro se*. Someone challenged me, asking why they needed to do the other

side's job for them. I responded that it was our job to find the truth. He said, "No, my job is to deport illegal aliens." To their credit, most of the class was as shocked as I, and we turned that statement into a productive discussion of the role of the government attorney, but I found it incredibly disturbing. When people walk into the immigration system—whether as an ICE or CBP officer, an attorney, or a USCIS adjudicator—with the idea that our job is deportation, then the immigrant is at a disadvantage no matter the merits of his or her case. And when those same people are responsible for implementing all aspects of the law, including developing policy and regulations that govern behavior, we have a significant problem.

Building in more protections, rather than stripping them away, provides a benefit to everyone, but government officials must acknowledge and support this. Someone who believes that their only job is to deport people won't necessarily have much interest in ensuring that all people in immigration court are represented by counsel. A government attorney who knows their job is to seek the truth is far more likely to acknowledge that it is easier, more efficient, and more productive to ensure representation for the other side. It also takes a level of responsibility from the government's shoulders because there is someone whose sole job is to protect the interests of the individual.

Even before someone appears in court, however, ensuring access to counsel improves the quality of justice. Know your rights presentations and screenings at detention centers provide a valuable service to the government. Attorneys triage cases, identify possible forms of relief, and frequently break the bad news to an individual that they do not have any viable claim. Too often, government officials suspect attorneys of simply trying to help people beat the system, and sometimes make it difficult for them to talk to clients in detention. DHS is often so fragmented that people see only their limited mission—the arrest—the detention—the interview—the hearing, without thinking about the process as a whole. If, instead, the immigrant's counsel is viewed as an equally important part of the process, a process that values truth and the best possible outcome, then the system will produce better results. It may not produce better monthly statistics, but it may lead to more individuals whose cases, whether they win or lose, are given a fair shot.

While access to counsel is important across the board, the government's responsibility towards children, particularly unaccompanied minors, shows the distinct need for active and engaged partners from outside the government. Years of public pressure, pro bono efforts, and limited government funding have meant that more children have been represented in court and have qualified for benefits they could never have sought on their own. Surely this has to be seen as a win for the government. And yet, the mindset remains that laws protecting children somehow give them an unfair advantage. For years, CBP has systematically balked at fully implementing its responsibility to screen children under the Trafficking Victims Protection Reauthorization Act, finding myriad reasons to avoid updating and expanding the basic sets of questions officers are required to ask. Part of the problem is a practical one—to implement the law's ideal, CBP would need to bring in child welfare experts and other individuals who could conduct more sensitive and time consuming interviews, and would likely have to arrange for better facilities as well. A bigger part of the problem, however, is philosophical. Because CBP has repeatedly said that it does not view its mission as providing social services, there is no institutional pressure to complete the job, particularly under the Trump administration. In

fact, current DHS officials point to the protections provided unaccompanied children under the TVPRA as obstacles to facilitating removal. It is hardly surprising, then, that such attitudes, left unchecked and deliberately fostered by the current administration created an atmosphere where family separation could flourish.

Even for those of us who believe that the job of government officials is to seek the right outcome in any given case, it can be easy to get it wrong. When I returned to DHS as a political appointee in 2015, I fielded numerous complaints and concerns raised by advocates about every aspect of our immigration system. Plenty of times there was more than one side to a story, or the facts would come out in dribs and drabs, or people would exaggerate on both sides. Sometimes I would check out a case only to have the facts flatly denied by one immigration officer and then confirmed by a different officer working on the ground. Sometimes the attorney's or advocate's story was inaccurate. Sometimes policy was misinterpreted or ignored. And sometimes, a removal order was the appropriate decision. In my particular position, I often had to rely on the findings and instincts of others in making my own recommendations, and so had to believe that there were appropriate safeguards built into the system. Tireless advocates who didn't accept my initial conclusions sometimes showed me that the system wasn't working as I thought—and those are the moments when you realize how fraught every decision is with the possibility that you might be wrong.

Precisely because of that fear, we need more oversight, not less. People often called my office because they couldn't get an answer from ICE or CBP. There is no ombudsman for either agency, and thus, no mediator to independently investigate individual cases. My job involved policy, not individual cases, but anyone at all sympathetic to improving the immigration system would find themselves troubleshooting cases precisely because there was no real system in place for the agencies to do it themselves. These issues have only escalated under the current administration, which has shut off many forms of public communication. While it may be easier to do whatever you want when you don't talk to the public, you are simply not doing your job.

I am constantly amazed by the number of government officials who resist reforms because they will be too costly or time-consuming. While these are factors to bear in mind, and may affect the speed of implementation, they simply can't be the over-riding concern when you are talking about justice. When I returned to DHS, it became quite clear that the old DOJ motto that "the government wins when justice is done" was not the philosophy of many DHS officials. Of course, part of that has to do with the fact that DHS had a different mission statement, one that focused almost exclusively on protecting against terrorism in its earliest iterations. Over time there has been greater recognition that part of DHS's mission is to confer immigration benefits and to safeguard our values, but the primary emphasis of the institution as a whole continues to focus on the detection and removal of threats. That mindset, coupled with the division of the old INS into separate enforcement and benefits agencies, has led to increasingly myopic thinking within DHS about the nature of immigration work. Enforcement of the law is equated with removal; the idea that conferring a benefit, such as asylum or citizenship, is simply another kind of enforcement of our nation's laws, is not discussed. As long as this mindset prevails, it is critical that Congress and the courts ensure that every immigration process—whether it is an arrest, a detention, an expedited removal determination, or the grant of a benefit—has sufficient procedural protections built in to protect not only the individual immigrant, but to protect us from ourselves.

SOURCES

¹ See 8 U.S.C. § 1232(c)(2) (“an unaccompanied [minor] in the custody of the Secretary of Health and Human Services shall be promptly placed in the least restrictive setting that is in the best interest of the child.”).

² 6 U.S.C. § 279(g) (2002).

³ 8 U.S.C. 1232 § (b)(3).

⁴ 8 U.S.C. § 1232(c)(2) (2008).

⁵ OFFICE OF REFUGEE RESETTLEMENT, ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP’T OF HEALTH & HUMAN SERV., ORR GUIDE: CHILDREN ENTERING THE UNITED STATES UNACCOMPANIED § 2 (2015), <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2#2.1>, [hereinafter ORR GUIDE ON UNACCOMPANIED CHILDREN].

⁶ *The ORR and DHS Information-Sharing Agreement and Its Consequences*, LUTHERAN IMMIGR. AND REFUGEE SERV. et al. (Oct. 2019), <https://justiceforimmigrants.org/wp-content/uploads/2019/10/Updated-formated-MOA-backgroundunder-10.2.19.pdf>.

⁷ *Id.*

⁸ See THRONSON, DAVID B., THE LEGAL TREATMENT OF IMMIGRANT CHILDREN IN THE UNITED STATES, in *Protecting Migrant Children: In Search of Best Practice*, (Mary Crock et. al eds., 2018) (explaining how substantive and procedural protections for children in immigration proceedings are designed around the experiences of adults and how those protections are inadequate for migrant children seeking protection in the United States).

⁹ 8 U.S.C. § 1232(c)(5).

¹⁰ G.A. Res. 44/25, Convention on the Rights of the Child, art. 3 (Nov. 20, 1989) [hereinafter CRC].

¹¹ *Determining the Best Interests of the Child*, CHILD WELFARE INFO. GATEWAY (2016), https://www.childwelfare.gov/pubPDFs/best_interest.pdf.

¹² MARTIN GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS, (2007) (arguing that the “best interests of the child” standard as applied in child welfare proceedings has failed as a test for making decisions and protecting the rights of children and families).

¹³ *Gault*, 387 U.S. 1.

¹⁴ See 42 U.S.C. § 5106a(b) (2017) (requiring states to document the appointment of a guardian ad litem to represent a child’s best interests in cases of abuse or neglect by identifying the needs of the child and submitting recommendations to the court on the child’s best interests).

¹⁵ See, e.g., Intergovernmental Consultations on Migration, Asylum and Refugees, *Asylum Procedures: Report on Policies and Practices in ICG Participating States*, 2015 (countries appointing counsel include Finland at 166, New Zealand at 292, Norway at 317, Sweden at 362–63, Switzerland at 388, United Kingdom at 415; Canada appoints designated representatives,).

¹⁶ See, e.g., Intergovernmental Consultations on Migration, Asylum and Refugees, *Asylum Procedures: Report on Policies and Practices in ICG Participating States*, 2015 (countries that appoint or permit the appointment of guardians or their equivalent include Belgium at 76, Canada (which appoints “designated representatives” who are not the same as counsel at 112), Germany at 194, Greece at 221, New Zealand at 291–92, Norway at 317, Spain at 342).

¹⁷ See Unaccompanied Alien Child Protection Act of 2001, S. 121, 107th Congress (YEAR); Unaccompanied Alien Child

Protection Act of 2005, S. 119, 109th Congress (YEAR).

¹⁸ SUBCOMM. ON BEST INTERESTS, INTERAGENCY WORKING GRP. ON UNACCOMPANIED AND SEPARATED CHILDREN, FRAMEWORK FOR CONSIDERING THE BEST INTERESTS OF UNACCOMPANIED CHILDREN 5 (2016) (citations omitted) [hereinafter BEST INTERESTS FRAMEWORK].

¹⁹ *In re Gault*, 387 U.S. 1 (1967); COMM’N ON IMMIGRATION, AM. BAR ASS’N, STANDARDS FOR THE CUSTODY, PLACEMENT AND CARE; LEGAL REPRESENTATION; AND ADJUDICATION OF UNACCOMPANIED ALIEN CHILDREN IN THE UNITED STATES § VII.G.3 (2018) [hereinafter AUGUST 2018 ABA STANDARDS].

²⁰ *Id.* at 5; General Comment No. 14, *supra* note 3, at 13–17.

²¹ See 8 U.S.C. § 1232(c)(6). The Young Center for Immigrant Children’s Rights developed the first program in the United States to provide independent child advocates (best interests guardians ad litem) for unaccompanied children in removal proceedings. For more than 15 years, the organization has developed procedures to identify and advocate on behalf of the best interests of vulnerable unaccompanied children with federal agencies, attorneys, and other decisionmakers. See THE YOUNG CENTER FOR IMMIGRANT CHILDREN’S RIGHTS, <http://www.theyoungcenter.org>. A 2016 report by the General Accounting Office found that government agencies including DHS, DOJ and ORR consider the Young Center’s child advocate best interests recommendations and follow more than 70% of those recommendations. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-16-367, UNACCOMPANIED CHILDREN: HHS SHOULD IMPROVE MONITORING AND INFORMATION SHARING POLICIES TO ENHANCE CHILD ADVOCATE PROGRAM EFFECTIVENESS (2016).

²² Interview by Young Center child advocate with formerly detained child, in Chicago, IL (June 2, 2017).

²³ Elvis Garcia Callejas, My Experience as an Unaccompanied Child in United States Custody, *Reimagining Children’s Immigration Proceedings* (2020).

²⁴ Interview by Young Center child advocate with formerly detained child, in Chicago, IL (June 2, 2017).

²⁵ *Flores v. Reno*, No. CV 85-4544-RFK (Px) (C.D. Cal. Jan. 17, 1997).

²⁶ *Flores v. Lynch*, 828 F.3d 898, 901 (9th Cir. 2016).

²⁷ Exhibits in Support of Motion to Enforce Settlement, *Flores v. Sessions*, No. CV 85-4544-DMG (AGRx) (C.D. Cal. June 29, 2018). See also Order re Plaintiff’s Motion to Enforce Class Action Settlement [Docket #409], *Flores v. Sessions*, No. CV 85-4544-DMG (AGRx) (C.D. Cal. July 30, 2018).

²⁸ See Dan Diamond, *HHS Reviews Refugee Operations as Trump Calls for Border Crackdown*, POLITICO (Oct. 23, 2018, 1:07 PM), <https://www.politico.com/story/2018/10/23/trump-caravan-border-hhs-873152> (stating that the average migrant child was in HHS custody more than 70 days, more than double the average 35 days in custody under the Obama administration).

²⁹ Interview by Young Center child advocate with formerly detained child, in Chicago, IL (June 2, 2017).

³⁰ See, e.g., CAL. WELF. & INST. CODE § 315 (West 1976) (hearing must be the next day); 705 ILL. COMP. STAT. § 405/2-10 (2018) (must have a court authorize separation for more than 48 hours); AZ. REV. STAT. ANN. §§ 8-821, 823 (1997) (medical examination for abuse must be completed within 12 hours, and dependency order must be filed within 72 hours).

SOURCES

³¹ See CHILDREN'S BUREAU, ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERV., A NATIONAL LOOK AT THE USE OF CONGREGATE CARE IN CHILD WELFARE 1 (May 13, 2015), https://www.acf.hhs.gov/sites/default/files/cb/cbcongregatecare_brief.pdf (stating that "[t]here has been a significant decrease in the percentage of children placed in congregate care settings in the past decade . . ."). This report also acknowledges that improvement is not consistent across states. *Id.*

³² Family First Prevention Services Act, 42 U.S.C. § 622 (2018).

³³ Children & Family Justice Ctr., *Restoring the State Legacy of Rehabilitation and Reform*, 1 COMMUNITY SAFETY & THE FUTURE OF ILLINOIS' YOUTH PRISONS 1, 12 (2018), <https://www.law.northwestern.edu/legalclinic/cfjc/documents/CFJC%20Youth%20Prison%20Brief%20Vol%201%20FINAL.pdf>.

³⁴ *Id.* at 10 (quoting Lindsay Miller, ACLU Illinois).

³⁵ *Id.* at 11.

³⁶ INTERGOVERNMENTAL CONSULTATIONS ON MIGRATION, ASYLUM AND REFUGEES, ASYLUM PROCEDURES: REPORT ON POLICIES AND PRACTICES IN IGC PARTICIPATING STATES 240 (2015), https://www.igc-publications.ch/upload/Asylum_Procedures_Report_2015.pdf.

³⁷ *Id.*

³⁸ See, e.g., AUGUST 2018 ABA STANDARDS AT VI.A.1 ("There is a presumption that release from a Detention Facility and family reunification are in the best interests of the Child and that a Child should be so reunified and/or so released."); *id.* at III.D.2 ("A determination of the best interests of the child shall take into account...the impact on the Child of continued detention versus immediate release to a parent, other Adult Family Member, or legal guardian.") See also 42 U.S.C.A. § 671 (requiring that "reasonable efforts" are "made to preserve and reunify families (i) prior to the placement of the child in foster care, to prevent or eliminate the need for removing the child from the child's home; and (ii) to make it possible for a child to return safely to the child's home.").

³⁹ The United States Supreme Court has consistently recognized the importance of the family unit and the right of parents to care for their children. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 767 (1982) (declaring that a state "registers no gain toward its declared goals when it separates children from the custody of fit parents") (quoting *Stanley v. Illinois*, 405 U.S. 645, 652 (1972)). Specifically, the Supreme Court has declared that the Due Process Clause of the Fourteenth Amendment "protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000). Indeed, the fundamental right to care for one's child is "perhaps the oldest of the fundamental liberty interests recognized by [the] Court." *Id.* at 65. Undocumented immigrant parents also enjoy the fundamental right to care for their children—to the same extent as parents who are citizens or lawful immigrants. As the Supreme Court has made clear: "[T]he Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). This fundamental right was affirmed on June 28, 2018 when the United States District Court, Southern District of California, issued a preliminary injunction ordering the federal government to stop all parent-child separations absent a finding that the parent is unfit or presents a danger to the minor. *Ms. L. v. United States Immigration & Customs Enft*, No. 18 CVO 428, 2018 WL 3129486, at *22-23 (S.D. Cal. June 06, 2018). The Court further ordered the government to reunify all separated children under the age of five within 14 days and all other separated children within 30 days. *Id.* at *23. See also CRC at art. 9 ("State parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial

review determine...that such separation is necessary for the best interests of the child."); U.N. Comm. on the Rights of the Children, Gen. Comment No. 14: On the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration, 62nd Sess., Jan. 14-Feb. 1 (2013) [hereinafter Comm. On the Rights of the Child, Gen. Comment No. 14], at ¶ 58 ("[I]t is indispensable to carry out the assessment and determination of the child's best interests in the context of potential separation of a child from his or her parents."); *id.* at ¶ 61 ("[S]eparation [of a child from his or her parents] should only occur as a last resort measure, as when the child is in danger of experiencing imminent harm or when otherwise necessary."); *id.* at ¶ 66 ("When the child's relations with his or her parents are interrupted by migration...preservation of the family unit should be taken into account when assessing the best interests of the child in decisions on family reunification.").

⁴⁰ Comm. On the Rights of the Child, Gen. Comment No. 14, at ¶ 59 ("The term 'family' must be interpreted in a broad sense to include biological, adoptive or foster parents, or where applicable, the members of extended family or community as provided for by local custom") (citation omitted).

⁴¹ Personal Responsibility and Work Opportunity Reconciliation Act, 42 U.S.C. § 671(a)(19) (2006) (encouraging states to give preference to adult relatives over nonrelatives for a child's placement, as long as the caregiver meets state child protection standards).

⁴² *Burgos v. Ill. Dep't of Children & Family Serv.*, No. 1:75-CV-03974 (N.D. Ill. June 20, 1977).

⁴³ U.N. High Comm'r for Refugees, *Safe and Sound: What States Can Do to Ensure Respect for the Best Interests of Unaccompanied and Separated Children in Europe* 30-31 (Oct. 2014), <https://www.refworld.org/pdfid/5423da264.pdf>.

⁴⁴ *Children in Immigration Court: Over 95 Percent Represented by an Attorney Appear in Court*, Amer. Immigration Council 2 (May 2016), <https://www.justice.gov/eoir/file/852516/download>.

⁴⁵ Interview by Young Center child advocate with formerly detained child, in Harlingen, TX (June 9, 2017).

⁴⁶ Interview by Young Center child advocate with formerly detained child, in Harlingen, TX (June 9, 2017).

⁴⁷ Memorandum from David L. Neal, Chief Immigration Judge, U.S. Dep't of Justice, to All Immigration Judges, Court Admins, Judicial Law Clerks, & Immigration Court Staff, *Operating Policies and Procedures Memorandum 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children* (May 22, 2007), rescinded and replaced by Memorandum from Mary Beth Keller, Chief Immigration Judge, U.S. Dep't of Justice, to All Immigration Judges, Court Admins, All Attorney Advisors and Judicial Law Clerks, & All Immigration Court Staff, *Operating Policies and Procedures Memorandum 17-03: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children* (Dec. 20, 2017).

⁴⁸ Joel Rose, *Justice Department Rolls Out Quotas For Immigration Judges*, NPR (Apr. 3, 2018), <https://www.npr.org/2018/04/03/599158232/justice-department-rolls-out-quotas-for-immigration-judges>.

⁴⁹ *Id.*

⁵⁰ *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018).

⁵¹ *In re A-B-*, 27 I. & N. Dec. 316 (A.G. 2018) [overruled in part by *Grace v. Barr*, 965 F.3d 883 (D.C. Cir. 2020)].

⁵² See YOUNG CENTER FOR IMMIGRANT CHILDREN'S RIGHTS, FAMILY SEPARATION IS NOT OVER: HOW THE TRUMP ADMINISTRATION CONTINUES TO SEPARATE

SOURCES

CHILDREN FROM THEIR PARENTS TO SERVE ITS POLITICAL ENDS (2020), <https://www.theyoungcenter.org/report-family-separation-is-not-over>.

⁵³ OFFICE OF THE INSPECTOR GENERAL, DEP'T OF HOMELAND SEC., OIG-18-84, SPECIAL REVIEW – INITIAL OBSERVATIONS REGARDING FAMILY SEPARATION ISSUES UNDER THE ZERO TOLERANCE POLICY 3 (2018), <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf>; OFFICE OF THE INSPECTOR GENERAL, DEP'T OF HEALTH & HUMAN SERV., OEI-BL-18-00511, SEPARATED CHILDREN PLACED IN OFFICE OF REFUGEE RESETTLEMENT CARE 4 (2019), <https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf>.

⁵⁴ Young Center for Immigrant Children's Rights, *The "Migrant Protection Protocols" Are Harming Children and Must End*, (Nov. 2019), available at <https://www.theyoungcenter.org/stories/2019/12/12/the-migrant-protection-protocols-are-harming-children-and-must-end>.

⁵⁵ Human Rights First, *Trump Administration's Third-Country Transit Bar is an Asylum Ban that will Return Refugees to Danger* (updated Sept. 2019), available at: <https://www.humanrightsfirst.org/sites/default/files/Third-Country-Transit-Ban.pdf>.

⁵⁶ Illinois is credited with developing the first courts for children as a result of Jane Addams's advocacy. All 50 states now have dedicated courts for children. *Youth in the Justice System: An Overview*, JUVENILE LAW CTR., <https://jlc.org/youth-justice-system-overview> (last visited Oct. 4, 2019).

⁵⁷ See Michael D. De Bellis & Abigail Zisk, *The Biological Effects of Childhood Trauma*, 23 CHILD ADOLESCENT PSYCHIATRIC CLINICS OF NORTH AM. 185, 199-200 (2014) (discussing how childhood trauma can inhibit executive function, memory, and problem solving), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3968319/pdf/nihms-555973.pdf>.

⁵⁸ See "How the CAC Model Works," NATIONAL CHILDREN'S ALLIANCE, <https://www.nationalchildrensalliance.org/cac-model/> (explaining that a child advocacy center is a "safe, child focused environment" where the child "tells their story once to a trained interviewer who knows the right questions to ask in a way that does not retraumatize the child" after which "a team that includes medical professionals, law enforcement, mental health, prosecution, child protective services, victim advocacy, and other professionals make decisions together about how to help the child.").

⁵⁹ 18 USC 3509(b)(2).

⁶⁰ ROBERT F. KENNEDY NAT'L RES. CTR. FOR JUVENILE JUSTICE, FROM CONVERSATION TO COLLABORATION: HOW CHILD WELFARE AND JUVENILE JUSTICE AGENCIES CAN WORK TOGETHER TO IMPROVE OUTCOMES FOR DUAL STATUS YOUTH (2014), available at <https://rfknrcj.org/wp-content/uploads/2014/05/RFK-whitepaper-April2014.pdf>.

⁶¹ Id. at 5 (when advocates in both systems work together, a potential outcome is "decision making that is fair, equitable, and developmentally appropriate).

⁶² General Comment No. 14, *supra* note 39, ¶ 84; Adoption and Safe Families Act, 42 U.S.C. § 673(b) (1997).

⁶³ Adoption and Safe Families Act, 42 U.S.C. § 675(5) (1997) (requiring states to identify and pursue permanent placements for children removed from their homes, including pursuit of termination of parents' rights once children have been removed from their homes for 15 of 22 months).

⁶⁴ CHILDREN'S BUREAU, ADMIN. FOR CHILDREN AND FAMILIES, U.S. DEP'T OF HEALTH AND HUMAN SERV., REPRESENTATION OF CHILDREN IN CHILD ABUSE AND

NEGLECT PROCEEDINGS (2017), <https://www.childwelfare.gov/pubpdfs/represent.pdf> (nothing that federal law requires every state to document plans for providing a guardian ad litem to represent the best interests of children subject to child welfare proceedings); Annie Chen, *Unaccompanied Children and Access to Counsel in Immigration Proceedings*, AM. BAR ASS'N (July 14, 2014), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2014/urgent-need-unaccompanied-children-access-to-counsel-immigration-proceedings/>.

⁶⁵ See, e.g., Adoption and Safe Families Act, 42 U.S.C. § 675(5) (1997).

⁶⁶ *In re Gault*, 387 U.S. 1 (establishing that children in delinquency proceedings have the right to an attorney and other protections).

⁶⁷ YOUNG CTR. FOR IMMIGRANT CHILDREN'S RIGHTS, CURRENT BORDER SCREENING OF UNACCOMPANIED CHILDREN FROM MEXICO HAS FAILED AND SHOULD NOT BE A MODEL FOR "REFORM" (2019), <https://static1.squarespace.com/static/597ab5f3bebfba625aaf45/t/5d6e8040e8fd10000177f1fd/1567522881009/Young+Center+Explainer-CBP+Contiguous+Country+Screening+Has+Failed.pdf>.

⁶⁸ U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-521, UNACCOMPANIED ALIEN CHILDREN: ACTIONS NEEDED TO ENSURE CHILDREN RECEIVE REQUIRED CARE IN DHS CUSTODY (2015), <https://www.gao.gov/assets/680/671393.pdf>; U.N. High Comm'r for Refugees, *Findings and Recommendations Relating to the 2012-2013 Missions to Monitor the Protection Screening of Mexican Unaccompanied Children Along the U.S.-Mexico Border* 23-43 (June 2014), https://www.immigrantjustice.org/sites/immigrantjustice.org/files/UNHCR_UAC_Monitoring_Report_Final_June_2014.pdf.

⁶⁹ Child Trafficking Victims Protection and Welfare Act, H.R. 7047, 115th Cong. § 3(c-d) (2018); Child Trafficking Victims Protection and Welfare Act, S. 3558, 115th Cong. § 3(c-d) (2018).

⁷⁰ *Immigration Court Backlog Surpasses One Million Cases*, TRAC IMMIGRATION (Nov. 6, 2018), <https://trac.syr.edu/immigration/reports/536/>; Denise Lu & Derek Watkins, *Court Backlog May Prove Bigger Barrier for Migrants Than Any Wall*, N.Y. TIMES (Jan. 24, 2019), <https://www.nytimes.com/interactive/2019/01/24/us/migrants-border-immigration-court.html>.

⁷¹ See Maria Sacchetti, *Immigration Judges Say Proposed Quotas from Justice Dept. Threaten Independence*, WASH. POST (Oct. 12, 2017, 7:15 PM), https://www.washingtonpost.com/local/immigration/immigration-judges-say-proposed-quotas-from-justice-dept-threaten-independence/2017/10/12/3ed86992-aeet-11e7-be94-fabb0f1e9ffb_story.html (stating that the National Association of Immigration Judges spoke out about the effect of quotas on immigrants, including children).

⁷² Interview by Young Center child advocate with formerly detained child, in Harlingen, TX (June 9, 2017).

⁷³ NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, JUVENILE DELINQUENCY GUIDELINES: IMPROVING COURT PRACTICE IN JUVENILE DELINQUENCY CASES 24-25 (2005), https://isc.idaho.gov/juvenile/pdfs/Improving_Court_Practice_Juvenile_Delinquency_Cases.pdf.

⁷⁴ Id. at 28.

⁷⁵ Id. at 25.

⁷⁶ 8 U.S.C. § 1232(a)(1).

⁷⁷ G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 3 [hereinafter UDHR] ("Everyone has the right to life, liberty and the security of person."); id., art. 5 ("No one

SOURCES

shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”) The United States ratified the UDHR in 1992 and is bound by its provisions.

⁷⁸ *Id.* art. 25.

⁷⁹ INTERGOVERNMENTAL CONSULTATIONS ON MIGRATION, ASYLUM AND REFUGEES, ASYLUM PROCEDURES: REPORT ON POLICIES AND PRACTICES IN IGC PARTICIPATING STATES (2015) 388-89 (2015), https://www.igc-publications.ch/upload/Asylum_Procedures_Report_2015.pdf. See also *id.* at 363 (noting that an unaccompanied child in Sweden is not returned “if he or she cannot be received by a member of his or her family or a nominated guardian, or if there are no adequate reception facilities in the State to which he or she would be returned”)

⁸⁰ *Id.* at 388-89.

⁸¹ *Id.* at 140.

⁸² *Id.*

⁸³ *Roper v. Simmons*, 543 U.S. 551 (2005).

⁸⁴ *Graham v. Florida*, 560 U.S. 48 (2010).

⁸⁵ *Miller v. Alabama*, 567 U.S. 460 (2012).

⁸⁶ ELIZABETH SCOTT, THOMAS GRISSO, MARSHA LEVICK, & LAURENCE STEINBERG, THE SUPREME COURT AND THE TRANSFORMATION OF JUVENILE COURT SENTENCING 3-4 (2015).

⁸⁷ *Id.*

⁸⁸ 8 U.S.C. § 1232(c)(2)(B) (“If a minor described in subparagraph (A) reaches 18 years of age and is transferred to the custody of the Secretary of Homeland Security, the Secretary shall consider placement in the least restrictive setting available after taking into account the alien’s danger to self, danger to the community, and risk of flight. Such aliens shall be eligible to participate in alternative to detention programs, utilizing a continuum of alternatives based on the alien’s need for supervision, which may include placement of the alien with an individual or an organizational sponsor, or in a supervised group home.”) See also *Garcia-Ramirez v. U.S. Customs and Immigration Enft*, 338 F.Supp.3d 1 (D.D.C. 2018) (holding that the government violated the terms of 8 U.S.C. § 1232(c)(2)(B)).

⁸⁹ *Fostering Connections to Success and Increasing Adoptions Act*, 42 U.S.C. §§ 675, 672-73 (2008).

⁹⁰ CHILDREN’S BUREAU, ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP’T OF HEALTH AND HUMAN SERV., CHILD WELFARE INFORMATION GATEWAY, EXTENSION OF FOSTER CARE BEYOND AGE 18 (2017), <https://www.childwelfare.gov/pubPDFs/extensionfc.pdf>.

⁹¹ NAT’L CONFERENCE OF STATE LEGISLATURES, EXTENDING FOSTER CARE BEYOND 18 (2017), <http://www.ncsl.org/research/human-services/extending-foster-care-to-18.aspx>; see also Bruce A. Boyer, Foster Care Re-Entry Laws: Mending the Safety Net For Emerging Adults in the Transition to Independence, 88 TEMP. L. REV. 837, 850 (2016) (noting that “almost every state has extended supports for foster youth through the age of twenty-one”).

⁹² OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PROGRAMS, U.S. DEP’T OF JUSTICE, JUVENILE JUSTICE SYSTEM STRUCTURE & PROCESS (2016) https://www.ojjdp.gov/ojstatbb/structure_process/qa04106.asp.

⁹³ 8 U.S.C. § 1101(b)(1) (2014).

⁹⁴ *Child Status Protection Act*, Pub. L. No. 107-208 (2002).

⁹⁵ *Flores v. Reno*, No. CV 85-4544-RFK (Px) (C.D. Cal. Jan. 17,

1997).

⁹⁶ *Homeland Security Act of 2002*, Pub. L. No. 107, 296, at Sec. 462.

⁹⁷ *Flores v. Lynch*, 828 F.3d 898, 901 (9th Cir. 2016).

⁹⁸ Women’s Refugee Commission, *Complaint to the Office of Civil Rights and Civil Liberties and Inspector General of the Dep’t of Homeland Security: Separation of Families via the Migrant Protection Protocols*, Aug. 16, 2019, available at: <https://www.womensrefugeecommission.org/rights/resources/1824-separation-of-families-via-the-migrant-protection-protocols>.

⁹⁹ See, e.g., Dorothy Roberts, *Shattered Bonds: The Color of Child Welfare* (2000) (identifying how child welfare laws are disproportionately applied to Black children, to their detriment); and Vivek Sankaran, *With Child Welfare, Racism is Hiding in the Discretion*, The Imprint (June 21, 2020), available at <https://imprintnews.org/child-welfare-2/with-child-welfare-racism-is-hiding-in-the-discretion/44616>.

¹⁰⁰ See YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE (Thomas Grisso and Robert G. Schwartz, Eds.) (2000).

¹⁰¹ 8 U.S.C.A. § 1232(d)(7)(C).

¹⁰² Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14 AM. J. PREVENTATIVE MEDICINE 245, 248 (1998) (defining adverse child experience (ACE) as abuse and household dysfunction experienced during childhood, including physical, psychological, and sexual abuse and exposure to substance abuse, mental illness, violent treatment, and criminal behavior in the home).

¹⁰³ AUGUST 2018 ABA STANDARDS, *supra* note 14, at 14; BEST INTERESTS FRAMEWORK, *supra* note 20, at 22.

¹⁰⁴ AUGUST 2018 ABA STANDARDS, *supra* note 14; BEST INTERESTS FRAMEWORK, *supra* note 20.

¹⁰⁵ AUGUST 2018 ABA STANDARDS, *supra* note 14.

¹⁰⁶ *Id.* BEST INTERESTS FRAMEWORK, *supra* note 20.

¹⁰⁷ BEST INTERESTS FRAMEWORK, *supra* note 20.

¹⁰⁸ *Id.*

¹⁰⁹ AUGUST 2018 ABA STANDARDS, *supra* note 20.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Benjamin Good, *A Child’s Right to Counsel in Removal Proceedings*, 10 STAN. J. C.R. & C.L. 109, 115 (2014) (explaining that children have no statutory guarantee of counsel and how pro bono services are far from comprehensive).

¹¹⁴ Donna Erez-Navot, *The Repeat Player Effect in Child Protection Mediation: Dangers of and Protections Against Second-Class Justice for Marginalized Parties*, 16 CARDOZO J. CONFLICT RESOL. 831, 851 (2015) (explaining how, similarly to immigration courts, repeat players in litigating child protection cases have an advantage over those who are unfamiliar with the litigation process and have limited access to representation).

¹¹⁵ Cf. SAFE PASSAGE PROJECT, REPRESENTING NONCITIZEN YOUTH IN REMOVAL PROCEEDINGS: A STEP-BY-STEP GUIDE TO REPRESENTING IMMIGRANT YOUTH IN 2018-2019 44-45 (2019), <https://www.safepassageproject.org/wp-content/uploads/2019/02/>

SOURCES

[Safe-Passage-Project-Manual-Representing-Noncitizen-Youth-2018-2019.pdf](#).

¹¹⁶ COMM’N ON IMMIGRATION, AM. BAR ASS’N, STANDARDS FOR THE CUSTODY, PLACEMENT AND CARE; LEGAL REPRESENTATION; AND ADJUDICATION OF UNACCOMPANIED ALIEN CHILDREN IN THE UNITED STATES § VII.G.3 (2018)

¹¹⁷ *Id.* at 15–16.

¹¹⁸ *Id.*

¹¹⁹ BEST INTERESTS FRAMEWORK, *supra* note 20.

¹²⁰ See 8 U.S.C. §1232(c)(6). Since 2008, independent child advocates have been appointed to the most vulnerable unaccompanied or separated children in federal custody, including babies and toddlers, pregnant and parenting teens, children at-risk of becoming adults while in federal custody, children with disabilities, children whose identity isolates them from others or puts them at risk of discrimination, and others.

¹²¹ BEST INTERESTS FRAMEWORK, *supra* note 20, at 23.

¹²² See, e.g., *id.*

¹²³ AUGUST 2018 ABA STANDARDS, *supra* note 14, at 23.

¹²⁴ These fears have been greatly augmented since the 2016 symposium, as federal agencies have used children’s cases as a means for finding, apprehending, and attempting to deport parents and other family members. MIGRATION & REFUGEE SERV., THE ORR AND DHS INFORMATION-SHARING AGREEMENT AND ITS CONSEQUENCES (2018), https://static1.squarespace.com/static/597ab5f3beba625aaf45/t/5c128cea0ebbe879f2ccee96/1544719595405/2018_DHS+MOA+Backgrounder_YC+USCCB+NIJC+WRC.pdf.

¹²⁵ Memorandum re: Elian Gonzalez from Bo Cooper, Gen. Counsel, U.S. Immigration & Naturalization Serv., to Doris Meissner, Comm’r, U.S. Immigration & Naturalization Serv. (Jan. 3, 2000), https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum_ins_counsel_elian_gonzalez.pdf.

¹²⁶ *Id.* at 8.

¹²⁷ *Id.* at 8–11.

¹²⁸ Polovchak v. Meese, 774 F.2d 731 (7th Cir. 1985).

¹²⁹ Sanchez v R.G.L., 761 F.3d 495 (5th Cir. 2014) (finding that children’s fundamental interests were at stake, requiring the appointment of a guardian *ad litem* on remand, and that the children’s grant of asylum was relevant to proceedings under the Hague Convention).

¹³⁰ For further analysis, see M. ARYAH SOMERS, CHILDREN IN IMMIGRATION PROCEEDINGS: CHILD CAPACITIES AND MENTAL COMPETENCY IN IMMIGRATION LAW AND POLICY, Vera Institute of Justice Unaccompanied Children’s Program, pp. 31–38 (May 2015).

¹³¹ If a parent seeks a child’s release, but the child wishes to be released to a relative other than a parent, the child shall be appointed an attorney who will seek an adjudication of the placement before a family court, which has expertise in the parent’s rights, parental fitness, and kinship care.

¹³² This principle recognizes that federal immigration authorities do not have the authority to limit a parent’s rights to the care and custody of a child as well as the child’s interests in seeking reunification with an adult who may have served as a traditional caregiver or de facto parent in the biological parent’s absence. These questions are best

resolved before courts with expertise in these issues. We recognize that implementation of this principle could require modification of state laws to ensure that state courts could take jurisdiction over such questions, whether as a matter of custody, dependency, or some other similar basis in state law.

¹³³ See *Garcia-Ramirez v. U.S. Immigration & Customs Enf’t*, 338 F.Supp.3d 1 (D.D.C. 2018). (challenging ICE’s failure to consider less restrictive placements for unaccompanied children aging out of the custody of the Office of Refugee Resettlement).

¹³⁴ Compare with Matthew Weaver, *UK Family Arrested in US for ‘Inadvertently Crossing Border’*, THE GUARDIAN (Oct. 15, 2019), <https://www.theguardian.com/uk-news/2019/oct/15/uk-family-arrested-in-us-for-inadvertently-crossing-border>.

¹³⁵ If a child expresses a desire to return after their release from government custody, this same procedure should be followed.

¹³⁶ This is an intentional over-simplification of U.S. immigration laws and is offered solely to help put the discussion that follows into context. For an excellent overview—both visual and narrative—of these laws, we recommend Virgil Wiebe, *The Immigration Hotel*, 68 Rutgers U. L. Rev. 1373 (2016), <http://www.rutgerslawreview.com/wp-content/uploads/2017/05/Virgil-Wiebe-The-Immigration-Hotel-68-Rutgers-U.-L.-Rev.-1673-2016.pdf>.

¹³⁷ See, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, AILA POLICY BRIEF: RESTORING INTEGRITY AND INDEPENDENCE TO AMERICA’S IMMIGRATION COURTS (updated Jan. 24, 2020), <https://www.aila.org/infonet/aila-calls-for-independent-immigration-courts#PDF>.

¹³⁸ See *How the CAC Model Works*, NAT’L CHILDREN’S ALLIANCE, <https://www.nationalchildrensalliance.org/cac-model/> (last visited Dec. 23, 2019).

¹³⁹ The Young Center and other advocacy groups have raised this idea for many years. See, e.g., CTR. FOR GENDER & REFUGEE STUDIES & KIDS IN NEED OF DEFENSE, A TREACHEROUS JOURNEY: CHILD MIGRANTS NAVIGATING THE U.S. IMMIGRATION SYSTEM (2014) (advocating for a form of legal status to protect children who are ineligible for other relief but where return is not in their best interests), <https://cgrrs.uchastings.edu/our-work/treacherous-journey>; LUTHERAN IMMIGR. & REFUGEE SERV., AT THE CROSSROADS FOR UNACCOMPANIED MIGRANT CHILDREN: POLICY, PRACTICE, & PROTECTION 40 (2015) (noting that additional forms of relief, such as a best interests visa, would be an ideal system for unaccompanied children), https://www.lirs.org/assets/2474/lirs_roundtablereport_web.pdf. Others have written about extending protection to children who are otherwise ineligible for relief, including Erin B. Corcoran, *Getting Kids Out of Harm’s Way: The United States’ Obligation to Operationalize the Best Interests of the Child Principle for Unaccompanied Minors*, 47 CONN. L. REV. 1, 11–12 (2014) (recommending that DHS use prosecutorial discretion and humanitarian parole to provide protection for children who are ineligible for relief but would not be able to safely return to home country), https://scholars.unh.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1025&context=law_facpub; and Erin B. Corcoran, *Deconstructing and Reconstructive Rights for Immigrant Children*, 18 HARV. LATINO L. REV. 53, 94–95 (2015) (recommending that the United States create, at the very least, a form of withholding of removal for children who cannot be safely repatriated), http://scholars.unh.edu/cgi/viewcontent.cgi?article=1263&context=law_facpub.

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Reimagining Children's Immigration Proceedings: A Roadmap for an Entirely New System Centered around Children

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