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## **Criminal Alien or Humanitarian Refugee?: The Social Agency of Migrant Youth<sup>1</sup>**

Lauren Heidbrink<sup>\*</sup>

### ***“Sueños Rotos” (Broken Dreams)***

Sometimes, we young people get  
together to talk about our unrealized

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<sup>1</sup> Research was generously funded by The Wenner Gren Foundation and the National Science Foundation Law and Social Science Program. This Article is part of a three-year (2006-2009) ethnography that questions the idealized notion of stability and the pathologization of mobility among Central American and Mexican migrant children as they navigate a convoluted network of institutions and actors involved in their care and custody as unaccompanied immigrant children. The author interviewed over 250 stakeholders and 80 unauthorized migrant children and youth and their families. Research spanned from Maryland to the sister cities of El Paso, Texas and Ciudad Juarez, Mexico to El Salvador and to Illinois with intermittent trips to Pennsylvania, Michigan, and Washington, D.C. Since the completion of the study, the author visited five additional facilities in Arizona, Texas, and Illinois and maintained communication with individual children and staff of fourteen facilities and seven foster care programs in Arizona, California, Florida, Michigan, New York, Texas, Virginia, Utah, and Washington.

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dreams. It is easy at times for others to assume why we are here.

The answer is easy: for a better tomorrow. Nobody understands that even though we are young, we have the necessary maturity to confront reality. Here is a country with so many opportunities for everyone but I find myself along a road with no exit—I have only thoughts of my loved ones and of the possibility of moving forward. Yet, my worst enemy is always by my side. I am Latino and an immigrant.

Today I find myself locked up by the laws of the USA as a criminal wearing a prison uniform. I live like a criminal with sadness in my heart. I look at American kids going to school and think, I too am an American child. I should go to school. Is being Latino so different? Is coming here for our family such a bad thing? Is this so difficult to understand?

You will never understand that for my family, I am capable of so much more.

Mario, 15 year old Salvadoran youth<sup>2</sup>

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<sup>2</sup> Under the confidentiality provisions of the Johns Hopkins Institutional Review Board and consistent with disciplinary custom, the author enlists pseudonyms for participants in the study. All translations from Spanish are the author's. *Sueños Rotos* is a poem written by Mario, a detained unaccompanied child who participated in research conducted by this author from 2006-2009. As part of the author's research, she conducted a writing and journaling group with youth in

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**I. Introduction**

A review of migration literature reveals that researchers have shifted their gaze from an exclusively quantitative analysis of change in population-level demographics to a more sustained inquiry on the mobility of humans against a backdrop of dynamic social, economic, political, and environmental change. As an inter-disciplinary field, migration studies is not a discipline with a set of well-defined methodological procedures, but is a topic of great interest to scholars of sociology, geography, anthropology, political science, history, and law.<sup>3</sup> As such, a myriad of approaches to children and migration have merged under the rubric of migration studies. Most quantitative methods that have historically defined the field avoid the complexities of child migration as a dynamic process in which children and their families circulate through time and space with great flexibility and uncertainty. Rather than examine the complexities and variations in child migration, quantitative and qualitative methods instead have located the child within the social and legal categories of the family by which they infer the conditions of the child from those of the household.<sup>4</sup> Feminist scholars have worked diligently to expand the unit of analysis from the male head-of-household to include the feminization of migration and a growing recognition of young migrants.<sup>5</sup> The emergent attention from scholars of childhood studies has only bolstered this effort.<sup>6</sup>

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which they were asked to write about a range of topics. Mario crafted this poem in response to the prompt: "What does it mean to hope?"

<sup>3</sup> See CAROLINE BRETTELL, *ANTHROPOLOGY AND MIGRATION: ESSAYS ON TRANSNATIONALISM, ETHNICITY AND IDENTITY* 1 (2003).

<sup>4</sup> AIHWA ONG, *FLEXIBLE CITIZENSHIP: THE CULTURAL LOGICS OF TRANSNATIONALITY* 10 (1999).

<sup>5</sup> See Katharine M. Donato et al., *A Glass Half Full? Gender in Migration Studies*, 40 *INT'L MIGRATION REV.* 3, 10 (2006) (tracing the ways feminist research in the 1970s and 1980s on female migration was summarily "dismissed as marginal" in contrast to the study of male migration). See generally Pierrette Hondagneu-Sotelo, *Gender and Migration Scholarship: An Overview from a 21<sup>st</sup> Century Perspective*, 6 *MIGRACIONES INTERNACIONALES* 219, 219, 227 (2011) (arguing that while historically migration scholarship "shows continuing

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Although the family as a unit of analysis in migration studies is defined by the presence of dependent children,<sup>7</sup> few studies consider children to be serious contributors to household decision-making processes.<sup>8</sup> The presumption that adults are the decision-makers and providers for children is woven throughout migration literature and immigration law.<sup>9</sup> Children are consistently framed as variables or liminal figures, and not as contributors to migration decisions.<sup>10</sup> The courts do not view children as autonomous

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androcentric blindness to feminist issues and gender,” there is a growing attention to how migration is gendered).

<sup>6</sup> See Sharon Stephens, *Introduction* to CHILDREN AND THE POLITICS OF CULTURE 3, 3 (Sharon Stephens ed., 1995). See generally Myra Bluebond-Langner & Jill E. Korbin, *Challenges and Opportunities in the Anthropology of Childhoods: An Introduction to “Children, Childhoods, and Childhood Studies”*, 109 AM. ANTHROPOLOGIST 241 (2007); see generally EVERYDAY RUPTURES: CHILDREN, YOUTH, AND MIGRATION IN GLOBAL PERSPECTIVE 65 (Cati Coe et al. eds., 2011).

<sup>7</sup> Victoria Degtyareva, *Defining Family in Immigration Law: Accounting for Nontraditional Families in Citizenship by Descent*, 120 YALE L.J. 862, 864-65 (2011).

<sup>8</sup> See JACQUELINE KNÖRR, CHILDHOOD AND MIGRATION: HOW CHILDREN EXPERIENCE AND MANAGE MIGRATION 14-16 (Jacqueline Knörr ed., 2005) (arguing that in order to examine the influence migration has on children and the impact children have on migration, scholars must first recognize childhood as a social space. Often analogized to the advent of women’s studies, childhood studies has emerged as a critical opening through which to consider children as social actors in their own right. Increasingly, scholars are recognizing youth’s role, contribution, influence, and power in familial decision-making processes).

<sup>9</sup> See generally David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children’s Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 981-82 (2002) [hereinafter Thronson, *Kids Will Be Kids?*] (examining the shifts of children from property and chattel in early American law to wards during the Progressive era to rights holders in recent discussions of children). See also Barbara Bennett Woodhouse, “*Who Owns the Child?*”: Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995, 1051-52 (1992) (noting “[h]istorically, children’s rights have been severely limited in practice because they depend upon adults for articulation, assertion, and enforcement”); see, e.g., MiaLisa McFarland & Evon M. Spangler, *A Parent’s Undocumented Immigration Status Should Not Be Considered Under the Best Interest of the Child Standard*, 35 WM. MITCHELL L. REV. 247, 250-51 (2008).

<sup>10</sup> VICTOR TURNER, THE FOREST OF SYMBOLS: ASPECTS OF NDEMBU RITUAL 93 (1967); see ARNOLD VAN GENNEP, THE RITES OF PASSAGE 11 (Monika B. Vizedom & Gabrielle L. Caffee trans., 1960). From the author’s research with child migrants

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individuals from birth, but rather as beings that families must socialize into mature adults.<sup>11</sup> The social position of the child as inferior or somehow exclusively dependent stands in marked contrast to the integral roles children often assume in familial decision-making processes as well as the decisions they make as individual social actors.<sup>12</sup>

This Article argues that the figure of the “unaccompanied alien child” complicates the legal personhood of a child as necessarily bound to the nuclear family within U.S. immigration law. The U.S. legal code defines “unaccompanied alien children” as those under the age of eighteen who have no lawful immigration status in the United States and who are without a parent or legal guardian in the United States who is available to provide care and physical

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and their families, the decision to migrate is often a collective one. Children contribute to the discussion on whether to migrate, the destination and the timing of migration. Children may spark adult migration through a change in the number of household members due to birth, death, adoption, fostering, the departure of older children, or a change in the needs of household members, such as education or illness. See John H. McKendrick, *Coming of Age: Rethinking the Role of Children in Population Studies*, 7 INT'L J. POPULATION GEOGRAPHY 461, 464 (2001) (explaining that children may be the reason for postponing migration, waiting until they are older, or perhaps they catalyze migration given a desire for improved living conditions or education); see Lorraine Young, *Journeys to the Street: The Complex Migration Geographies of Ugandan Street Children*, 35 GEOFORUM 471, 474 (2004) (tracing the ways children's migration to the street is informed by broader historical, local and national processes); see PAUL BOYLE ET AL., EXPLORING CONTEMPORARY MIGRATION 119 (1998); see also Naomi Tyrrell, *Children's Agency in Family Migration Decision Making in Britain*, in EVERYDAY RUPTURES: CHILDREN, YOUTH, AND MIGRATION IN GLOBAL PERSPECTIVE 23, 23-28 (Cati Coe et al. eds., 2011) (discussing the ways children participate in familial migration decisions to Britain and advocating for a more child-centric approach to migration research). At times, adults pursue additional resources for their children, correlating a perceived increase in opportunity with a child's educational attainment or future economic opportunity. Children may shape migration decisions in terms of the completion of their school year and program of study or in the violence or instability they experience in their everyday lives (e.g., pressure to join a gang).

<sup>11</sup> See, e.g., Pia Christensen & Alan Prout, *Anthropological and Sociological Perspectives on the Study of Children*, in RESEARCHING CHILDREN'S EXPERIENCE: APPROACHES AND METHODS 42, 49 (Sheila Greene & Diane Hogan eds., 2005).

<sup>12</sup> See *supra* note 10.

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custody.<sup>13</sup> Without a legally recognized caregiver, the law views unaccompanied children as existing alone, though paradoxically still dependent.<sup>14</sup> Without a recognizable parent, the child cannot meaningfully access the state to petition for legal relief.<sup>15</sup> At the same time, the legal identity of unaccompanied children is contingent

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<sup>13</sup> 6 U.S.C.A. § 279(g)(2) (West 2012). Although many children outside of their country of origin are without their parents or legal guardians, they may be accompanied by customary care providers, extended family, family friends, community members, or entrusted to smugglers throughout the duration of their journey. See LAUREN HEIDBRINK, IN WHOSE BEST INTERESTS: MIGRANT CHILDREN, FAMILIES AND THE STATE (forthcoming 2013) [hereinafter HEIDBRINK, IN WHOSE BEST INTERESTS]. Several youth informants in this research study state that they have parents or immediate family members who have resided in the United States for many years. Some informants who are parents reported that due to their own unlawful status in the United States, they are apprehensive to come forward to claim their child from federal authorities. Parents must provide information regarding their status, employment, housing, and finances when seeking custody of their child. DIVISION OF UNACCOMPANIED CHILDREN'S SERVICES FAMILY REUNIFICATION PACKET, OFFICE REFUGEE RESETTLEMENT, [http://www.acf.hhs.gov/sites/default/files/orr/family\\_reunification\\_packet\\_english.pdf](http://www.acf.hhs.gov/sites/default/files/orr/family_reunification_packet_english.pdf). Internationally, the more prevalent term is "separated children" which, in many ways, more accurately reflects the temporary or contingent nature of travel or living arrangements of many children. EVERETT M. RESSLER ET AL., UNACCOMPANIED CHILDREN: CARE AND PROTECTION IN WARS, NATURAL DISASTERS, AND REFUGEE MOVEMENTS 3 (1988). See JACQUELINE BHABHA & SUSAN SCHMIDT, SEEKING ASYLUM ALONE (2006). In this Article, the author recognizes this problematic and shifting definition, but chooses to enlist the juridical term "unaccompanied child" because it is a critical intersection between migrant youth, their families, and U.S. law. The legal category, constructed though it may be, becomes a useful site of inquiry into the ways the law attempts to identify and to shape the capabilities and rights of children and their relationships to extended kinship networks both in the U.S. and abroad.

<sup>14</sup> See Thronson, *Kids Will Be Kids?*, *supra* note 9; see Woodhouse, *supra* note 9; see HEIDBRINK, IN WHOSE BEST INTERESTS, *supra* note 13.

<sup>15</sup> The author conducted one-on-one structured and semi-structured interviews with over 250 "stakeholders"—individuals engaged in the apprehension and detention of migrant children, including government bureaucrats, non-profit facility staff, attorneys, guardians *ad litem*, judges, members of Congress, community leaders, border patrol agents, ICE agents, consular officials, foster families, teachers, researchers, and policymakers across multiple sites, including in El Salvador and Mexico. The author bases her analysis regarding a child's access to legal relief both in practice and in policy on this three year study.



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because of their unlawful presence in the United States.<sup>16</sup> To enlist American historian Mae Ngai's term, unaccompanied children are "impossible subjects" because their presence is "simultaneously a social reality and a legal impossibility—a subject barred from citizenship and without rights."<sup>17</sup> Yet, as social actors, migrant children challenge conceptualizations of child dependence and passivity, explicitly through their unauthorized and independent presence in the United States, and implicitly in the ways they move through multiple geographic and institutional sites in search of care, education, or employment.<sup>18</sup> By failing to recognize the legal personhood and social agency of unaccompanied children, the state undermines the rights of children and compromises their pursuit of justice.<sup>19</sup>

To these ends, this Article details the development of two competing regimes integrally involved in the lives of migrant children—the humanitarian regime and the law enforcement regime. This Article describes the ways their approaches shape the interventions of law enforcement, legal advocates, government bureaucrats, and non-profit staff involved in the lives of both detained and non-detained migrant children. From divergent imaginaries of the migrant child and his social agency emerges the enduring question: Are unaccompanied children humanitarian refugees or criminal aliens? Part II traces the advocacy and policy efforts of the historic transfer of care and custody of unaccompanied alien children from Immigration and Naturalization Services ("INS") to the Office of Refugee Resettlement ("ORR"). While laudable, the transfer has not ameliorated concerns for the United States' ongoing detention of children.<sup>20</sup> Part III identifies three overlapping

<sup>16</sup> For a useful discussion of the ways a child's legal identity is contingent and respect for his or her rights unenforceable, see Jacqueline Bhabha, *Arendt's Children: Do Today's Migrant Children Have a Right to Have Rights?*, 31 HUM. RTS. Q. 410, 411 (2009).

<sup>17</sup> MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 4 (2004) [hereinafter NGAI, IMPOSSIBLE SUBJECTS].

<sup>18</sup> HEIDBRINK, IN WHOSE BEST INTERESTS, *supra* note 13.

<sup>19</sup> *Id.*

<sup>20</sup> See also WOMEN'S REFUGEE COMM'N & ORRICK HERRINGTON & SUTCLIFFE LLP, *HALFWAY HOME: UNACCOMPANIED CHILDREN IN IMMIGRATION CUSTODY* 3-



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sensibilities within the law enforcement approach that contribute to an overwhelmingly punitive framing of child migrants: the illegal alien, the criminal, and the enemy within.

Part IV turns to the humanitarian approach, chronicling the ways advocates have cast migrant children as deserving victims, which simultaneously ignores and conceals their social agency. To illustrate this approach, Part V traces the circulation of a youth, Mario, from his home in El Salvador to an immigration detention in the United States to his uncle's home in Maryland. Classified as an "unaccompanied alien minor," Mario faces critical legal decisions that shape not only his fate but also his family's future.<sup>21</sup> The law acts as a blunt tool compelling Mario along prefigured trajectories intended either to protect him as a vulnerable child or to expel him as a criminal alien.

Part VI examines the activism of unauthorized youth known as DREAMers, young migrants who might have benefitted from the now stalled Development, Relief, and Education of Alien Minors ("DREAM") Act, to highlight the imperative to recognize the social agency of children and youth within the law and institutional practices.<sup>22</sup> Part VII concludes by arguing that the law is not a disembodied, independent force, but is culturally constructed. While children are not traditionally considered contributors to the law and legal discourses that determine their fate, the narrative of Mario and the political organizing of DREAMers prove otherwise.

## II. Seeking Recognition

The Refugee Act of 1980 recognized the needs of refugee children who are unaccompanied, creating special legal provisions for their acceptance into the United States via formal refugee

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4 (2009) [hereinafter *HALFWAY HOME*] (noting both the significant improvements in the care of unaccompanied children under ORR and the need for ongoing reform).

<sup>21</sup> See *supra* note 1.

<sup>22</sup> The Development, Relief, and Education for Alien Minors Act of 2010, S. 3827, 111th Cong. (2d Sess. 2010); The Development, Relief, and Education for Alien Minors Act of 2011, S. 952, 112th Cong. (1st Sess. 2011).

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resettlement processes.<sup>23</sup> The Act established and funded specialized programs through the Department of Health and Human Services' Office of Refugee Resettlement for minors who are identified as refugees prior to entry in the United States.<sup>24</sup> The State Department identifies refugee children as those living in United Nations refugee camps who do not have a parent or legal guardian.<sup>25</sup> Upon arrival in the United States, refugee children are placed in ORR's Unaccompanied Refugee Minor ("URM") Program and relocated by refugee resettlement agencies.<sup>26</sup>

**A. Reclassification**

The Refugee Act of 1980, however, did not include "unaccompanied alien children," because they are neither recognized prior to entry nor do they maintain legal status in the United States as their refugee counterparts do.<sup>27</sup> The specialized provisions and procedures for refugee children excluded unauthorized migrant children despite their shared experiences of war, violence, and deprivation in many of the same countries of origin because of the absence of approval prior to entry.<sup>28</sup>

"Unaccompanied alien children" can be reclassified as "unaccompanied refugee minors" and enter into the URM programs once they are granted a qualifying legal status, such as political asylum or specialized visas.<sup>29</sup> In the early 1980s the rates of reclassification were quite low because to be reclassified, a child must first be granted political asylum or prove that she was trafficked

<sup>23</sup> Refugee Act of 1980, Pub. L. No. 96-212, §§ 412(a)(4)(A)(6)(A)(iv), (d)(2)(B), 94 Stat. 102 (codified as amended and dispersed throughout 8 U.S.C.A.).

<sup>24</sup> *Id.*

<sup>25</sup> *Refugee Admissions*, U.S. DEP'T ST., <http://www.state.gov/j/prm/ra/index.htm> (last visited Jan. 16, 2013).

<sup>26</sup> 45 C.F.R. §§ 400.110–400.120 (2013).

<sup>27</sup> See Refugee Act of 1980.

<sup>28</sup> See Micaela Guthrie & Angelica Rubio, *Immigration Law and Unaccompanied Minors: An Imperfect Fit*, TEX. LAW., Mar. 22, 2004, at 3, available at LexisNexis, doc-id(#900005403798#).

<sup>29</sup> *State Letters-Policy Issuance: Re-classification to Unaccompanied Minor Program*, ADMIN. FOR CHILD. & FAMILIES, OFF. REFUGEE RESETTLEMENT (Aug. 16, 2012), <http://www.acf.hhs.gov/programs/orr/resource/state-letters-policy-issuance-re-classification-to-unaccompanied-minor>.

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into the United States.<sup>30</sup> Given the absence of court-appointed legal counsel in immigration proceedings, the lack of recognition of persecution on account of being a child, and no specialized procedures distinguishing children from adults, such feats were rare.<sup>31</sup> With key revisions to legislation for abused, abandoned, and neglected children in the 1990s<sup>32</sup> and legislation on trafficking in the early 2000s, these reclassification rates have increased, though they still remain low.<sup>33</sup> Instead, the state continues to incorporate unaccompanied alien children into the same social imaginary as the unauthorized adult population who remain under the custody of the Immigration and Customs Enforcement ("ICE", formerly the INS),

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<sup>30</sup> CHAD C. HADDAL, CONG. RESEARCH SERV., RL 34414, UNACCOMPANIED REFUGEE MINORS 5, 7 (2008), <http://www.hsdl.org/?view&did=484672>. To petition for immigration relief, unaccompanied children have a few forms of legal relief available to them, including petitioning for political asylum, trafficking visa, victim of crime U-visa, Violence Against Women Act ("VAWA"), and the Special Immigrant Juvenile Status ("SIJS"). With the exception of SIJS, there are no binding distinctions or procedures that take children's differing capacities and competencies into account in the administrative process, immigration office, or in front of the immigration judge. Further, with neither a court-appointed attorney nor a guardian *ad litem*, children must navigate complex immigration proceedings and procedures on their own. A number of under-funded legal assistance organizations are available to assist migrant youth, but the organizational capacities are overwhelmed by the demand and geographic distribution of children in need of assistance.

<sup>31</sup> For a useful discussion on the absence of tailored provisions in the political asylum process, see generally Jacqueline Bhabha & Wendy Young, *Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines*, 11 INT'L J. REFUGEE L. 84 (1999). For a discussion of more recent guidelines, see generally BHABHA & SCHMIDT, *supra* note 13.

<sup>32</sup> From 1965 to 1968, the U.S. Senate Judiciary Subcommittee on Immigration, Refugees and Border Security initiated hearings on the creation of a uniform refugee policy to replace the case-by-case approach that emerged following World War II. It was not until 1979 that Senator Edward Kennedy introduced the Refugee Act to Congress in response to an influx of refugees from the Eastern Europe and the Middle East. For the legislative history of the Refugee Act of 1980, see also Edward M. Kennedy, *Refugee Act of 1980*, 15 INT'L MIGRATION REV. 141, 141-44 (1981).

<sup>33</sup> *Id.*

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subject to expedited deportation or prolonged detention.<sup>34</sup>

For nearly twenty years since the Refugee Act of 1980, advocates vied for an analogous transfer of care and custody of unaccompanied, unauthorized children from INS detention to the ORR, similar to the practice for unaccompanied refugee children.<sup>35</sup> Advocates highlighted the INS' irreconcilable conflict of interest in which the INS simultaneously served as guardian, jailer, and prosecutor of unaccompanied children.<sup>36</sup> While the INS was responsible for housing, feeding, and providing medical care for detained children, it was also charged with "the departure from the United States of all removable aliens" including the children entrusted in its care.<sup>37</sup> Prior to 2003, the INS held one-third of unaccompanied children in subcontracted bed space within existing state and county juvenile detention facilities.<sup>38</sup> Although the INS claimed that unaccompanied children were housed in separate cells, in practice, unauthorized children were commingled with juvenile

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<sup>34</sup> Irene Scharf & Christine Hess, *What Process is Due? Unaccompanied Minors' Rights to Deportation Hearings*, 1988 DUKE L.J. 114, 114-15 (1988).

<sup>35</sup> The author assembled a comprehensive history of early advocacy efforts on behalf of unaccompanied alien children through her interviews with advocates and policymakers involved in early reform efforts and with stakeholders involved in the care and custody of unaccompanied children in INS custody prior to 2003 and in ORR care since that time, *supra* note 1. For a discussion of the conditions of care under the INS, see WOMEN'S COMM'N FOR REFUGEE WOMEN & CHILDREN, PRISON GUARD OR PARENT?: INS TREATMENT OF UNACCOMPANIED REFUGEE CHILDREN 4 (2002) [hereinafter PRISON GUARD OR PARENT?]. See HALFWAY HOME, *supra* note 20.

<sup>36</sup> See, e.g., Christopher Nugent, *Whose Children Are These? Towards Ensuring the Best Interests and Empowerment of Unaccompanied Alien Children*, 15 B.U. PUB. INT. L.J. 219, 222 (2006).

<sup>37</sup> BUREAU OF IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SEC., ENDGAME: OFFICE OF DETENTION AND REMOVAL STRATEGIC PLAN, 2003-2012, at 3 (2003).

<sup>38</sup> Michael A. Olivas, *Unaccompanied Refugee Children: Detention, Due Process, and Disgrace*, 2 STAN. L. & POL'Y REV. 159, 160 (1990); see Julianne Duncan, *Joint Testimony of Migration and Refugee Services/U.S. Conference of Catholic Bishops and Lutheran Immigration and Refugee Service Before the Senate Subcommittee on Immigration*, U.S. CONF. CATH. BISHOPS (Feb. 28, 2002), <http://nccbuscc.org/mrs/duncantestimony.shtml>; see HALFWAY HOME, *supra* note 20, at 17.

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offenders, some of whom had committed violent crimes.<sup>39</sup> In these facilities, there were limited opportunities for education, access to interpreters, and recreation.<sup>40</sup> While in the INS custody, children lacking the requisite documents to remain in the United States were detained for extended periods of time, sometimes up to two years while awaiting a ruling on their petitions for legal relief.<sup>41</sup>

#### **B. From the INS to ORR**

It was not until the reorganization of the Department of Homeland Security ("DHS") in 2003 that the federal government conceded to decades of advocacy from attorneys and civil society, and the care and placement of unaccompanied children was transferred to the Office of Refugee Resettlement.<sup>42</sup> If apprehended by the Immigration and Customs Enforcement, unaccompanied children now enter into a network of ORR sub-contracted facilities, euphemistically called "shelters," in which non-profit organizations provide for the everyday needs of unauthorized children.<sup>43</sup> While

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<sup>39</sup> HALFWAY HOME, *supra* note 20, at 3.

<sup>40</sup> Duncan, *supra* note 38.

<sup>41</sup> *Id.*; Olivas, *supra* note 38.

<sup>42</sup> See DHS, *HHS Reach Agreement on Improved Care for Unaccompanied Children*, 81 No. 15 INTERPRETER RELEASES 494 (2004). Following the September 11, 2001 attacks on the World Trade Center, the United States Congress passed the Homeland Security Act of 2002. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135. The Act would prove to be the largest reorganization of federal government agencies since the 1947 National Security Act, which created the Central Intelligence Agency and the National Security Council and shifted the military under the Secretary of Defense. National Security Act of 1947, Pub. L. No. 80-235, ch. 343, 61 Stat. 496. As part of the newly declared "war on terror," the Homeland Security Act also consolidated anti-terrorism initiatives, border security, and immigration enforcement under a single Homeland Security Czar. The renamed Immigration and Customs Enforcement came under the auspices of Department of Homeland Security. In March 2003, the care and custody of unaccompanied children transferred from ICE to the Office of Refugee Resettlement, a division of the Department of Health and Human Services. While ORR's expertise in the intersection of child welfare and refugee populations has shaped the policies and procedures for the care of unaccompanied children, this program was the first in which ORR needed to collaborate with ICE on a regular basis due to the unauthorized presence of unaccompanied alien children.

<sup>43</sup> ELAINE M. KELLEY, DEP'T OF HEALTH & HUMAN SERVS., ORR PROGRAMS FOR VULNERABLE AND UNACCOMPANIED CHILDREN (2009),

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detained, children await sponsorship from detention, placement in federal foster care, voluntary departure, or aging-out of ORR custody on their eighteenth birthday.<sup>44</sup> Of the approximately 8,000 migrant children categorized as “unaccompanied alien minors” and transferred to ORR each year, approximately eighty-five percent come from Central America, primarily Honduras, Guatemala, and El Salvador.<sup>45</sup> Of these youths, twenty-three percent are consistently between the ages of birth and fourteen years old and eighty percent are between fifteen to eighteen years old.<sup>46</sup> Of the total number of unaccompanied children in ORR custody, approximately seventy-four to seventy-seven percent are male and twenty-two to twenty-six percent are female.<sup>47</sup> Experts suggest that this is only a fraction of the total number of unaccompanied children entering the U.S. each year.<sup>48</sup>

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icpc.aphsa.org/home/Doc/KelleyICPCReviewingPractices.pdf; *About Unaccompanied Children's Services*, ADMIN. FOR CHILD. & FAMILIES, OFF. REFUGEE RESETTLEMENT,

<http://www.acf.hhs.gov/programs/orr/programs/ucs/about> (last visited Apr. 15, 2013).

<sup>44</sup> As of the Spring of 2012, ORR funded 70 programs: 37 shelter facilities; 9 staff secure facilities; 6 secure facilities; 3 residential treatment centers; 2 therapeutic staff secure; and 13 foster care programs with a capacity of 2,850 beds (Office of Refugee Resettlement, email communication, July 19, 2012).

<sup>45</sup> *Unaccompanied Children's Services*, ADMIN. FOR CHILD. & FAMILIES, OFF. REFUGEE RESETTLEMENT,

<http://www.acf.hhs.gov/programs/orr/programs/unaccompanied-childrens-services> (last visited Dec. 12, 2012); see also *The Rise in Unaccompanied Minors: A Global, Humanitarian Crisis*, CENTER FOR MIGRATION STUD. (Oct. 15, 2012), <http://cmsny.org/2012/10/15/the-rise-in-unaccompanied-minors-a-global-humanitarian-crisis/>.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> While statistics on the flow of children across U.S. borders remain largely untraced, legal experts estimate that over 500,000 immigrant children enter the United States each year. Carolyn J. Seugling, Note, *Toward a Comprehensive Response to the Transnational Migration of Unaccompanied Minors in the United States*, 37 VAND. J. TRANSNAT'L L. 861, 863 (2004). Central American experts have estimated over 45,000 Central American children immigrate to the U.S. each year. (Estimates from Manuel Capellin, Director of *Casa Alianza Honduras*. Cited in LA PRENSA, Apr. 3, 2008, at Migrantes.) Most recent estimates from the

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Advocacy and policy efforts over the last several decades have pushed to distinguish the migrant children from the migrant adult and to align unaccompanied “alien” children with their refugee counterparts. While these shifts have meant significant institutional reforms in the care and custody of children, evidenced most prominently by the transfer of care from the INS to ORR in 2003, the law enforcement approach to unaccompanied children pervades. Part III identifies three emergent sensibilities that continue to influence the care and custody of migrant children under ORR.

### III. The Law Enforcement Approach

Existing research on the U.S.-Mexico border illustrates the ways law enforcement prioritizes a child's unauthorized status over his status as a legal minor. From research involving local law enforcement, border patrol, immigration officers, and ICE attorneys, this Article argues that law enforcement's approach to unauthorized children coalesces around three overlapping sensibilities. Part III, Sections B through D, detail each sensibility in turn—the illegal alien, the criminal, and the enemy within—by drawing upon legal and social science research as well as original field work.<sup>49</sup>

#### A. “But these are not *our* children.”<sup>50</sup>

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Department of Justice indicate 101,952 unaccompanied children were apprehended in 2007, with four of every fifth child from Mexico. *See, e.g.*, CHAD C. HADDAL, CONG. RESEARCH SERV., RL 33896, UNACCOMPANIED ALIEN CHILDREN: POLICIES AND ISSUES Summary (2007), <http://www.hsdl.org/?view&did=479378>. However, many children evade apprehension and pass clandestinely into the United States joining the 11.9 million unauthorized immigrants currently residing in the United States. JEFFREY S. PASSEL & D' VERA COHN, PEW HISPANIC CTR., A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES 21 (2009), <http://www.pewhispanic.org/files/reports/107.pdf>.

<sup>49</sup> *See supra* note 1.

<sup>50</sup> Interview with Station Commander, U.S. Customs & Border Patrol, in El Paso, Tex. (July 2006) (transcript on file with the author). Under the confidentiality provisions of the Johns Hopkins Institutional Review Board and consistent with disciplinary custom, the author does not provide the Station Commander's name or identifying information.



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Prior to a meeting at a Border Patrol station along the Texas-Mexico border, a Station Commander played a video, which delved “inside the work of the Border Patrol.” Reminiscent of the reality television show *COPS*, the fifteen-minute video opened with blasting music with a deep bass as quick images of uniformed Border Patrol and ICE officers flashed across the small television in the three room station.<sup>51</sup> In the video, a white Border Patrol vehicle pursued a van at high speed along a deserted highway, resulting in a violent crash as the driver lost control of the van. Officers contended with a raging grass fire and youth firebombed officers as they arrested an unauthorized migrant. At the video’s end, the Station Commander explained, “This is what we must contend with. We are not dealing with nice little kids.”<sup>52</sup>

**B. The Illegal Alien**

In the law enforcement approach to unaccompanied children, the migrant child is fused with the pervasive rhetoric of the “illegal alien” who must be apprehended, controlled, and removed from the state.<sup>53</sup> This social sensibility taps into anxieties about an *invasion* or

<sup>51</sup> In conducting research, the author met a Station Commander at a Border Patrol station along the Texas-Mexico border. The author met the Station Commander with the intention of discussing the agents’ experiences apprehending migrant children.

<sup>52</sup> Interview with Station Commander, *supra* note 50.

<sup>53</sup> The term “illegal alien” appears throughout the U.S. Code, though it is not explicitly defined. However, the term “alien” is defined as “any person not a citizen or national of the United States.” 8 U.S.C.A. § 1101(a)(3) (West 2012). For a discussion of the legal history of the term, see Kevin R. Johnson, “*Aliens*” and the U.S. Immigration Laws: *The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 263-92 (1997). While consistent with legal terminology, the term “illegal alien” has become increasingly politicized as someone who willfully trespasses on national sovereignty. For a useful discussion on the socio-legal history of the term “illegal alien,” see Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921-1965*, 21 LAW & HIST. REV. 69, 69-108 (2003). Amongst the migration and human rights networks, “no human is illegal” has become a rallying cry against the derogatory connotations of the term, often associated with criminality or along specific racial lines. See Mae M. Ngai, *No Human Being Is Illegal*, IMMIGRANT CITY CHI., [http://www.uic.edu/jaddams/hull/immigrantcitychicago/essays/ngai\\_nohumanillegal.html](http://www.uic.edu/jaddams/hull/immigrantcitychicago/essays/ngai_nohumanillegal.html) (last visited Jan. 17, 2013). In the United States, rhetoric defines the debate

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flood of “illegal aliens,”<sup>54</sup> requiring repression and containment of unaccompanied children in the same ways as adult migrants. Relying on the state’s authority to regulate inclusion or exclusion of subjects, individuals working in law enforcement view the migrant youth as an ungovernable subject—an outlaw.<sup>55</sup> As sociologist Esther Madriz observes, the figure of the outlaw “brings together members of society in a common conviction, to direct their disapproval against those who are outside the social boundaries. Fear is a very important component in the creation of outlaws: we should fear them because they are dangerous, or evil, or just threatening to ‘us.’”<sup>56</sup> Despite limited evidence supporting its efficacy, the detention of unauthorized migrants is an increasingly pervasive state strategy

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on immigration—dehumanizing the “illegal” or the “alien” as one without due process and without rights. NGAI, IMPOSSIBLE SUBJECTS, *supra* note 17. However, the boundary between citizen and *illegal* is porous. Under some conditions, such as Temporary Protected Status or certain types of visas, an individual can transform his illegal status to legal, just as an individual with legal status in the United States can lose his status through committing certain crimes. See Lauren Heidbrink, *At a Crossroads: Youth at the Intersection of the Family and the State*, in 10 ADVANCES IN ECOPOLITICS: TRANSNATIONAL MIGRATION, GENDER AND RIGHTS 149, 173 (Ragnhild Aslaug Sollund vol. ed., Liam Leonard series ed., 2012) [hereinafter Heidbrink, *At a Crossroads*]. See generally Kitty Calavita, *Immigration, Law, and Marginalization in a Global Economy: Notes from Spain*, 32 LAW & SOC’Y REV. 529, 529-566 (1998). In the case of the Special Immigrant Juvenile, unaccompanied children can lose their legal status simply by turning eighteen years old. Angie Junck, *Special Immigrant Juvenile Status: Relief for Neglected, Abused, and Abandoned Undocumented Children*, 63 JUV. & FAM. CT. J. 48, 58 (2012) [hereinafter Junck, *Special Immigrant Juvenile Status*] (noting “[s]tate laws, however, generally require that a child be under 18 at the time he or she first is declared a juvenile court dependent. Because courts often do not accept jurisdiction of children 18 or older, some children may not be eligible to apply for SIJS even though they are under 21.”). For these reasons, this author enlists the term “unauthorized migrant” which is a more neutral term that recognizes both the integrity of individual migrants and the fluctuation of their legal status in the United States.

<sup>54</sup> See, e.g., LEO R. CHAVEZ, COVERING IMMIGRATION: POPULAR IMAGES AND THE POLITICS OF THE NATION 73-74 (2001); see, e.g., LATIN LOOKS: IMAGES OF LATINAS AND LATINOS IN THE U.S. MEDIA 5-8 (Clara E. Rodríguez ed., 1997).

<sup>55</sup> See ESTHER MADRIZ, NOTHING BAD HAPPENS TO GOOD GIRLS: FEAR OF CRIME IN WOMEN’S LIVES 97 (1997).

<sup>56</sup> *Id.* at 96.

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enlisted to control and remove the “contagion” or “criminal” as well as to deter and to de-incentivize future unauthorized migratory flows.<sup>57</sup>

As there is minimal distinction between children and adults in immigration law,<sup>58</sup> there is little difficulty in identifying unauthorized immigrants exclusively in terms of illegality rather than distinguishing any markers of difference along lines of age, gender, race, ethnicity, or any specific need for rights.<sup>59</sup> While children are often held in an immutable category of innocence, the law enforcement approach toward unauthorized migrants prioritizes the “alien” status over their status as legal minors.<sup>60</sup> The fear that drives the creation and proliferation of the migrant as an “outlaw” fails to recognize that illegal alienage is not a preconditioned set of rules and

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<sup>57</sup> Jane Schneider & Peter Schneider, *The Anthropology of Crime and Criminalization*, 37 ANN. REV. ANTHROPOLOGY 351, 351-73 (2008).

<sup>58</sup> In addition to the three year study in which the author observed immigration proceedings for children, the author also draws on five years of experience working with adult political asylum seekers in the United States in both affirmative immigration interviews and hearings before the Executive Office of Immigration Review. In total, the author has observed over 150 immigration proceedings for both adults and children since 1999. *See also* Amanda Levinson, *Unaccompanied Immigrant Children: A Growing Phenomenon with Few Easy Solutions*, MIGRATION INFO. SOURCE (Jan. 2011), <http://www.migrationinformation.org/Feature/display.cfm?ID=823> (noting “[i]mmigration and asylum law in the United States has not historically afforded protections to children based on their status as minors, and largely makes no distinction between adults and children”).

<sup>59</sup> *See, e.g.*, ELANA ZILBERG, SPACE OF DETENTION: THE MAKING OF A TRANSNATIONAL GANG CRISIS BETWEEN LOS ANGELES AND SAN SALVADOR 14 (2011).

<sup>60</sup> In this study, the author consistently and repeatedly observed how children’s lawful status took precedence over their identity as legal minors. *See* HEIDBRINK, IN WHOSE BEST INTERESTS, *supra* note 13; *see* Heidbrink, *At a Crossroads*, *supra* note 53. As previously mentioned, children are not afforded specialized accommodations under immigration law as in other areas of legal and social life. *See* BHABHA & SCHMIDT, *supra* note 13, at 33. For further discussion on the disparities between the treatment of children under family law and immigration law, *see also* David B. Thronson, *You Can’t Get Here from Here: Toward a More Child-Centered Immigration Law*, 14 VA. J. SOC. POL’Y & L. 58, 58-86 (2006).

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regulations or inherent traits as law enforcement suggests, but it is culturally constructed.<sup>61</sup>

In fact, the bright line distinguishing alien from citizen is “soft.”<sup>62</sup> As historian Mae Ngai argues, “[i]llegal alienage is not a natural or fixed condition but the product of positive law; it is contingent and at times unstable. The line between legal and illegal status can be crossed in both directions.”<sup>63</sup> Migrants can move in and out of lawful immigration status over time.<sup>64</sup> At the same time, the state can also repeal one’s legality or grant graduated benefits and rights contingent upon the individual’s type of lawful status.<sup>65</sup> While various forms of legal relief are available to children, including political asylum, victims of crime visas, Special Immigrant Juvenile (“SIJ”) visas,<sup>66</sup> trafficking visas,<sup>67</sup> family sponsorship, Violence Against Women (“VAWA”),<sup>68</sup> as well as temporary statuses such as Deferred Action for Childhood Arrivals (“DACA”)<sup>69</sup> or Temporary

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<sup>61</sup> See MADRIZ, *supra* note 55, at 97-98.

<sup>62</sup> NGAI, IMPOSSIBLE SUBJECTS, *supra* note 17, at 6.

<sup>63</sup> *Id.*

<sup>64</sup> See generally SUSAN BIBLER COUTIN, LEGALIZING MOVES: SALVADORAN IMMIGRANTS’ STRUGGLE FOR U.S. RESIDENCY (2000) (analyzing the struggles of Salvadoran immigrants to gain and maintain legal status in the United States).

<sup>65</sup> *Id.*

<sup>66</sup> Special Immigrant Status for Certain Aliens Declared Dependent on a Juvenile Court (Special Immigrant Juvenile), 8 C.F.R. § 204.11(a) (2013). SIJ is a form of legal relief that allows abused, abandoned, or neglected children to receive permanent residency.

<sup>67</sup> Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464. The Act established special services, including visas, for victims of human trafficking. See Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006); see William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044.

<sup>68</sup> Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796. For a helpful discussion on the prevalence of domestic abuse of immigrants and the contrasting underrepresentation of VAWA applicants, see Anita Raj & Jay Silverman, *Violence Against Immigrant Women: The Roles of Culture, Context, and Legal Immigrant Status on Intimate Partner Violence*, 8 VIOLENCE AGAINST WOMEN J. 367, 367-98 (2002).

<sup>69</sup> Deferred Action for Childhood Arrivals is a 2012 Program of the Obama Administration which enlists prosecutorial discretion, a decision “not to assert the

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Protective Status ("TPS"),<sup>70</sup> these statuses are both difficult to obtain and easy to lose. Despite the popular perception that the United States serves as a refuge for immigrants, particularly children, there are significant obstacles impeding children's pursuit of these few forms of legal relief, including the absence of court-appointed attorneys, guardians *ad litem*, specialized courts, and binding procedural accommodations for children.

Despite the malleability of both children's and adults' legal status, law enforcement practices historically have treated detained migrant children as inherently illegal, blocking children's access to forms of legal relief from which they could otherwise benefit outside of the "care and custody" of the federal government.<sup>71</sup> In

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full scope of the enforcement authority available to the agency in a given case." Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, Dep't of Homeland Sec., to All Field Office Dirs., All Special Agents in Charge, & All Chief Counsel, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens 2 (June 17, 2011), <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>. See *Consideration of Deferred Action for Childhood Arrivals Process*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=f2ef2f19470f7310VgnVCM100000082ca60aRCRD&vgnnextchannel=f2ef2f19470f7310VgnVCM100000082ca60aRCRD> (last updated Jan. 18, 2013) [hereinafter *Consideration of Deferred Action*].

<sup>70</sup> The Department of Homeland Security designates nationals from a foreign country for Temporary Protected Status when a country's conditions make it temporarily unsafe for nationals to return or where a country "is unable to handle the return of its nationals adequately." *Temporary Protected Status*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=848f7f2ef0745210VgnVCM100000082ca60aRCRD&vgnnextchannel=848f7f2ef0745210VgnVCM100000082ca60aRCRD> (last updated Jan. 9, 2013). For a discussion of the simultaneous protection and precariousness under Temporary Protected Status, see also Alison Mountz et al., *Lives in Limbo: Temporary Protected Status and Immigrant Identities*, 2 GLOBAL NETWORKS 335, 349-51 (2002).

<sup>71</sup> See Interoffice Memorandum from William R. Yates, Assoc. Dir. for Operations, U.S. Citizenship & Immigration Servs., to Reg'l Dirs. & Dist. Dirs., Memorandum #3—Field Guidance on Special Immigrant Juvenile Status Petitions (May 27, 2004) [hereinafter Field Guidance Memorandum], available at

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immigration law, which lacks a legal recognition of a child's individual relationship to the state, unaccompanied children must rely on an adult or guardian as a proxy to petition state courts for a dependency finding, which could lead to legal status.<sup>72</sup> In family reunification petitions, for example, a parent can petition for his or her child as derivatives of an asylum application; however, a child as a principal applicant cannot petition for his or her parents until the child becomes a U.S. citizen *and* reaches the age of twenty one.<sup>73</sup> Absent a legally recognized parent or guardian, the state serves *in loco parentis*,<sup>74</sup> and, as such, until 2008, ICE served as gatekeeper for those seeking access to the law.<sup>75</sup> Children were required to seek "special consent" from the Department of Homeland Security in order to enter into state court and ultimately to pursue the Special Immigrant Juvenile Visa, a principle legal remedy for unaccompanied children who have been abandoned, abused, or neglected.<sup>76</sup>

**1. Special Consent**

DHS policies and practices have been inconsistent and convoluted in regards to specific consent in which a single individual maintained the authority to grant or to deny children's petitions to enter into state court.<sup>77</sup> Through outright denials, delaying applications for sometimes up to six months, or by waiting until a child turns eighteen, ICE's National Juvenile Coordinator served as lawyer, judge, and jury with no mechanism for appeal.<sup>78</sup> From

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[http://www.uscis.gov/USCIS/Laws/Memoranda/Static\\_Files\\_Memoranda/Archives/%201998-2008/2004/sij\\_memo\\_052704.pdf](http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives/%201998-2008/2004/sij_memo_052704.pdf); see DHS, HHS Reach Agreement on Improved Care for Unaccompanied Children, *supra* note 42, at 494.

<sup>72</sup> See Thronson, *Kids Will Be Kids?*, *supra* note 9; see Woodhouse, *supra* note 9.

<sup>73</sup> 8 U.S.C.A. § 1151 (b)(2)(A)(i) (West 2012); 8 U.S.C.A. § 1153(a) (West 2012).

<sup>74</sup> Latin for "in place of the parent."

<sup>75</sup> See Nugent, *supra* note 36, at 233.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*; see Tori Marlan, *Racing the Calendar: America's Rule That's Supposed to Save Abused Immigrant Children*, THE ALICIA PATTERSON FOUND. (2006), <http://aliciapatterson.org/stories/racing-calendar-america%E2%80%99s-rule-that%E2%80%99s-supposed-save-abused-immigrant-children> (last updated May 5, 2011).

<sup>78</sup> Nugent, *supra* note 36, at 233-34; Field Guidance Memorandum, *supra* note 71.



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January 2001 until August 2006, the National Juvenile Coordinator approved only seventy percent of special consent petitions, many of which, advocates contend, came too late to affect a child's legal claim.<sup>79</sup> Once a child reached eighteen years old, he or she could not obtain the required orders in most state courts.<sup>80</sup> In effect, ICE's National Juvenile Coordinator would prejudge cases, often freezing the child's illegal status by limiting his or her ability to file a petition in state court. Consequently, children were held in a double bind—unable to access the law because of their minor status and because the state-as-parent did not grant permission to such access. By restricting children's access to the courts, ICE prevented the opportunity to regularize legal status.<sup>81</sup> The law-enforcement approach to unaccompanied children fixed the criminality of unauthorized migrant children, hedging out potential humanitarian forms of legal relief to child migrants in the name of safety and the security of the nation.<sup>82</sup> In many ways, law enforcement practices invented permanent illegality and inherent criminality, not unlike the way turn-of-the-century reformers invented delinquency as ascribed to behaviors of poor and immigrant children.<sup>83</sup>

In 2008, federal litigation pressured reforms in ICE's gatekeeping of state courts, seeking to stop practices that made illegality and criminality an innate quality of unaccompanied migrant children.<sup>84</sup> Following federal litigation in *Perez-Olano v. Gonzales*,

<sup>79</sup> BHABHA & SCHMIDT, *supra* note 13, at 52-53; Nugent, *supra* note 36.

<sup>80</sup> Nugent, *supra* note 36, at 229; Junck, *Special Immigrant Juvenile Status*, *supra* note 53, at 548.

<sup>81</sup> Nugent, *supra* note 36, at 229.

<sup>82</sup> HEIDBRINK, IN WHOSE BEST INTERESTS, *supra* note 13.

<sup>83</sup> See ANTHONY M. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* (1969) (discussing the ways delinquency was invented from the behaviors of immigrants and immigrant children seen as outside the social and behavioral norms of the middle and upper class at the turn of the century).

<sup>84</sup> The Department of Homeland Security entered into a Settlement Agreement in 2008. Settlement Agreement, *Perez-Olano v. Holder*, No. CV 05-3604 (C.D. Cal. 2010) [hereinafter Settlement Agreement, *Perez-Olano v. Holder*], [http://www.uscis.gov/USCIS/Laws/Legal%20Settlement%20Notices%20and%20Agreements/Perez-Olano%20v%20Holder/Signed\\_Settlement\\_Agreement.pdf](http://www.uscis.gov/USCIS/Laws/Legal%20Settlement%20Notices%20and%20Agreements/Perez-Olano%20v%20Holder/Signed_Settlement_Agreement.pdf). Prior to *Perez-Olano v. Holder*, children in actual or constructive federal custody required *specific consent* from DHS/ICE before proceeding into state court for a



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unaccompanied children must now seek permission to enter into state courts from ORR rather than ICE.<sup>85</sup> For the moment, ORR, *in loco parentis*, has maintained an open access policy permitting all children the “privilege”—although not a “right”—of filing a petition in state court.<sup>86</sup> In practice, however, ORR’s subcontracted non-profit organizations often restrict access, as they will not serve as guardian for the purposes of SIJ while youth are held in their facilities, leaving detained children unable to pursue this principle legal remedy and its ensuing benefits.<sup>87</sup>

### 2. Parent-Child Nexus

Critical to the functionality of this sensibility are the ways law enforcement approaches the relationship between migrant children and their parents. Those children whose parents are identifiable are seen as reproductions of their parents’ illegal or criminal behavior, destined to reproduce the same pathological behaviors embodied in their illicit presence in the United States.<sup>88</sup> In this view, deceptive

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dependency finding. 8 U.S.C.A. § 1101 (a)(27)(J)(iii)(I) (West 2012). In January 2008, a federal district court in California decided that unaccompanied children were not required to seek “specific consent” from ICE prior to entering state court in petitions for SIJ. *Perez-Olano v. Gonzalez*, 248 F.R.D. 248, 264 (C.D. Cal. 2008).

<sup>85</sup> Settlement Agreement, *Perez-Olano v. Holder*, *supra* note 84.

<sup>86</sup> ORR does not require specific consent if the unaccompanied child “only seeks a dependency order and does not seek to have the state court determine or alter his or her custody status or placement . . . . If the UAC [unaccompanied alien child] wishes to go to state court only to be declared dependent in order to make an application for SIJ status (i.e., receive an ‘SIJ-predicate order’), the child does not need HHS’ consent.” ADMIN. FOR CHILDREN & FAMILIES, DIV. OF UNACCOMPANIED CHILDREN’S SERVS., PROGRAM INSTRUCTION: SPECIFIC CONSENT REQUESTS, LOG. NO. 10-01 (Dec. 24, 2009), [http://www.acf.hhs.gov/sites/default/files/orr/special\\_immigrant\\_juvenile\\_status\\_specific\\_consent\\_program.pdf](http://www.acf.hhs.gov/sites/default/files/orr/special_immigrant_juvenile_status_specific_consent_program.pdf). Ironically, immigration authorities will not accept a dependency finding “in cases where the court’s jurisdiction was sought primarily to obtain lawful immigration status” leaving children in a double-bind. Junck, *Special Immigrant Juvenile Status*, *supra* note 53, at 57.

<sup>87</sup> See HEIDBRINK, IN WHOSE BEST INTERESTS, *supra* note 13 (discussing the impasses between ORR policy on consent to enter into state court for the purposes of petitioning SIJ and the practices of many detention facilities that will not serve as guardian of record).

<sup>88</sup> The author draws these conclusions based on her research. See *supra* note 1.

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parents pay smugglers to transport their children illegally to the United States, knowingly violating the law.<sup>89</sup> Children unaccompanied by an adult caregiver are treated as if lacking the parental relationship necessary for effective socialization and governance. For many unaccompanied children, law enforcement and advocates alike assume that their parents have abandoned them, forcing them to live on the streets and to turn to a life of crime. Policymakers and advocates view migration as an indicator of family rupture.<sup>90</sup> In this view, without parents to effectively socialize youth into productive citizens, the unaccompanied child remains pathologically independent and in need of state intervention and discipline. However, there is a critical contradiction in this perspective: ICE considers some children as products of their parents' poor decisions, and in this way divorces children from any social agency to make their own decisions or to contribute to familial migration decisions.<sup>91</sup> At the same time, unaccompanied children are held no less responsible for the outcomes of their parents' decisions even if these choices are viewed as not of their own making. This contradiction is laid bare in the detention of unauthorized infants in federal facilities and in the absence of permanent legal relief for youth who were brought unlawfully to the U.S. as children.<sup>92</sup>

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<sup>89</sup> See *supra* note 1.

<sup>90</sup> See EVERYDAY RUPTURES, *supra* note 6.

<sup>91</sup> See generally The Development, Relief, and Education for Alien Minors Act of 2010, S. 3827, 111th Cong. (2d Sess. 2010) (proposing immigration relief for children who came to the United States through "no fault of their own"). This "no fault of their own" language reoccurs in the *Plyler* decision, and is referenced repeatedly in the media and political forums with the recent Deferred Action for Childhood Arrivals. *Plyler v. Doe*, 457 U.S. 202, 226 (1982); see *Consideration of Deferred Action*, *supra* note 69.

<sup>92</sup> Infants and small children are routinely detained in ORR facilities. While prioritized for federal foster care, as of 2012, ORR established new tender-age facilities in which children under the age of twelve are detained in group homes. It is also common practice to hold U.S. citizen infants with their unauthorized teen parents. In this three year study, the author regularly witnessed small children, pregnant and parenting teens, and infants born in the U.S. to detained youth. By virtue of birthright citizenship, U.S.-citizen infants were detained with their unauthorized teen mothers in ORR facilities. The American citizenship of infants in

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**C. The Criminal**

In a second overlapping sensibility, law enforcement concretizes the link between the criminalization of immigrants with the criminalization of youth of color by analogizing “illegal” immigration with issues of urban crime and gang violence. In each case, predominantly male youth are framed as exhibiting anti-social behavior and existing outside of the law.<sup>93</sup> While different bodies of law govern immigration and state court decisions, both systems draw from the analogous public and institutional narratives that criminalize youths of color.<sup>94</sup> Contemporary American courts contend with multiple layers of norms and values, which inform notions of pathology in relation to multiple and often overlapping terms of race, ethnicity, and poverty.<sup>95</sup> Public perceptions of the criminality and delinquency of youth create tremendous fear, as evidenced in cases of highly publicized school shootings or gang violence.<sup>96</sup> High rates of teen pregnancy and school drop-outs among youth, particularly in African-American and Latino communities, have led some to call for simultaneous policy reform and institutional interventions to “save”

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ORR care was further substantiated in interviews of ORR supervisors, advocates, attorneys, social workers, and facility staff across multiple sites. *See supra* note 1.

<sup>93</sup> *See* BEYOND RESISTANCE! YOUTH ACTIVISM AND COMMUNITY CHANGE: NEW DEMOCRATIC POSSIBILITIES FOR PRACTICE AND POLICY FOR AMERICA'S YOUTH (Shawn Ginwright et al. eds., 2006); *see* Henry A. Giroux, *Racial Injustice and Disposable Youth in the Age of Zero Tolerance*, 16 INT'L J. QUALITATIVE STUD. EDUC. 553, 554 (2003).

<sup>94</sup> *See, e.g.*, Bernardine Dohrn, *Children, Justice and Punishment*, 58 GUILD. PRAC. 65, 67 (2001).

<sup>95</sup> *See, e.g.*, M.A. Bortner et al., *Race and Transfer: Empirical Research and Social Context*, in THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 277, 279 (Jeffrey Fagan & Franklin E. Zimring eds., 2000); *see* Jeffrey J. Shook, *Contesting Childhood in the U.S. Justice System: The Transfer of Juveniles to Adult Criminal Court*, 12 CHILDHOOD 461, 465 (2005).

<sup>96</sup> Madelaine Adelman & Christine Yalda, *Seen But Not Heard: The Legal Lives of Young People*, POL. & LEGAL ANTHROPOLOGY REV., Nov. 2000, at 37, 37; *see* HENRY A. GIROUX, STEALING INNOCENCE: YOUTH, CORPORATE POWER, AND THE POLITICS OF CULTURE 15 (2000).

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troubled youth, while the state bolsters enforcement efforts to allay public anxieties.<sup>97</sup>

Some scholars have attempted to contextualize youth delinquency through studies focusing on how youth experience the law through lenses of race, ethnicity, gender, education level, or socio-economic status. Sociologist Mike Males, for example, argues that by controlling for race in instances of juvenile crime, income inequality becomes the prominent determinant, rather than ethnic or racial differences.<sup>98</sup> Given that more people of color in the United States live in poverty, it remains unsurprising that youth of color are more frequently arrested for criminal activity.<sup>99</sup> Legal scholar Peter Edelman terms these inequalities the “duality of youth,” suggesting that there is a division along racial, ethnic, and class lines that signals the disparate social and economic support accessible to and ultimately received by youth.<sup>100</sup> Philosopher and feminist theorist Ann Ferguson traces how race and gender identities shape whether the school system labels African-American youth as either “troublemakers” or “school boys.”<sup>101</sup> She argues that, albeit a fiction, race continues “as a system for organizing social difference and as a device for reproducing inequality in contemporary United States.”<sup>102</sup>

This criminalization of youth of color folds comfortably into the national public discourses, which associate Latinos and African-Americans with social ills such as poor schools, poverty, unemployment, crime, overpopulation, and public health crises.<sup>103</sup> As

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<sup>97</sup> See HENRY A. GIROUX, *CHANNEL SURFING: RACISM, THE MEDIA, AND THE DESTRUCTION OF TODAY'S YOUTH* (1998); see Dohrn, *supra* note 94, at 68.

<sup>98</sup> MIKE A. MALES, *FRAMING YOUTH: TEN MYTHS ABOUT THE NEXT GENERATION* (1999).

<sup>99</sup> *Id.*

<sup>100</sup> See Peter Edelman, *American Government and the Politics of Youth*, in *A CENTURY OF JUVENILE JUSTICE* 310, 318 (Margaret K. Rosenheim et al. eds., 2002); see Shook, *supra* note 95, at 469.

<sup>101</sup> ANN ARNETT FERGUSON, *BAD BOYS: PUBLIC SCHOOLS IN THE MAKING OF BLACK MASCULINITY* 212 (2000).

<sup>102</sup> *Id.* at 17.

<sup>103</sup> See, e.g., Nicholas De Genova, *Alien Powers: Deportable Labour and the Spectacle of Security*, in *THE CONTESTED POLITICS OF MOBILITY: BORDERZONES AND IRREGULARITY* 91, 107 (Vicki Squire ed., 2011).

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evidenced by Mario's poem that opened this article, unequal access to employment, education, and health care, combined with disproportionate attention from law enforcement officers, demonstrates the structural ways that the state contributes to and exacerbates marginality of youth of color. In U.S. conceptualizations of delinquency, differences in economic status are integrally intertwined with race and ethnicity. Variation in skin color becomes a visible means by which to identify delinquent youth, marking those who require punishment and those who warrant leniency.<sup>104</sup>

### 1. *From Rehabilitation to Punishment*

The juvenile court has shifted from a model based on the tutelary complex as a means of distributing social services, to a more punitive mechanism of social control that ignores mediating conditions of structural poverty and racism.<sup>105</sup> Yet, the conditions under which the court must operate also have changed.<sup>106</sup> Social worker and sociologist Jeffrey Shook traces how legislative changes in the United States blur the boundaries between juvenile and criminal courts, not only shifting the court's focus to "more punitive and control-oriented goals," but also revealing changes in social attitudes toward delinquency of children and youth.<sup>107</sup> The increased ease with which children are transferred from juvenile courts to the adult criminal justice system signals a contestation in the meanings of childhood and adolescence by policymakers and judicial authorities.<sup>108</sup> Individual states in the U.S. may ignore the legal

<sup>104</sup> See Edelman, *supra* note 100, at 324-26; FERGUSON, *supra* note 101, at 10.

<sup>105</sup> JACQUES DONZELOT, *THE POLICING OF FAMILIES* 96 (Robert Hurley trans., 1979).

<sup>106</sup> See Daniel P. Mears et al., *Public Opinion and the Foundation of the Juvenile Court*, 45 *CRIMINOLOGY* 223, 225-27 (2007) (discussing the history of juvenile court); see generally VIVIANA A. ZELIZER, *PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN* (1985) (tracing the changing ways Americans characterize the space of childhood with decreasing economic utility and increasing sentimental value. This shift in the social orientation to children and labor has shaped the ways the courts view the proper social place of the child.).

<sup>107</sup> Shook, *supra* note 95, at 461.

<sup>108</sup> *Id.* at 462; see Jeffrey M. Jenson & Matthew O. Howard, *Youth Crime, Public Policy, and Practice in the Juvenile Justice System: Recent Trends and Needed Reforms*, 43 *SOC. WORK* 324, 324-25 (1998).

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distinction youth maintain as minors, and instead try them as adult offenders and incarcerate them in adult state prisons. In effect, states are claiming that a child is no longer a child.<sup>109</sup> “Supported by images of youth as ‘superpredators’ or otherwise violent and ‘dangerous,’ transfer [to adult courts] denotes the point where youth have crossed over the line into adulthood.”<sup>110</sup>

Acts of violence destabilize the notion of the child’s innate innocence because the child has acquired “adult knowledge” with which he appears willingly, and with awareness commits social transgressions. Courts may view juveniles as competent and capable actors responsible for their actions, though youth are not granted such an independent standing in other areas of contemporary social life. In spite of a dramatic expansion of child protective services, such transfer practices are emblematic of how the state “redraw[s] the boundaries between childhood and adulthood in contradictory ways.”<sup>111</sup> Although youth as problematic or as pathological is not a new phenomenon,<sup>112</sup> the treatment of unaccompanied children as if they possess attributes of certain criminal behaviors associated with adults speaks to the disproportionate consequences for unauthorized children. Through the lens of race, unaccompanied migrants enter into the carceral complex in the U.S. that disproportionately detains young men of color with little hope of rehabilitation.<sup>113</sup> For unaccompanied migrant youth, the state’s presumption is that the youth are an inherent risk to public safety, and as a result, forfeit any opportunity for rehabilitation.<sup>114</sup> Instead, by governing through crime, the state can easily remove them from the “homeland” while

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<sup>109</sup> See Dohrn, *supra* note 94.

<sup>110</sup> Shook, *supra* note 95, at 462-63.

<sup>111</sup> JENNIFER TILTON, DANGEROUS OR ENDANGERED?: RACE AND THE POLITICS OF YOUTH IN URBAN AMERICA 11 (2010).

<sup>112</sup> See Janet L. Finn, *Text and Turbulence: Representing Adolescence as Pathology in the Human Services*, 8 CHILDHOOD 167, 170 (2001).

<sup>113</sup> See ANGELA DAVIS, THE PRISON INDUSTRIAL COMPLEX (AK Press Audio 2001); see Eric Schlosser, *The Prison-Industrial Complex*, THE ATLANTIC, Dec. 1998, at 51, available at <http://www.theatlantic.com/magazine/archive/1998/12/the-prison-industrial-complex/304669/>.

<sup>114</sup> HEIDBRINK, IN WHOSE BEST INTERESTS, *supra* note 13.

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those who are citizens remain incarcerated with little potential for rehabilitation.<sup>115</sup> In many ways, migrant youth share in the experiences of discrimination and incarceration as citizen youth of color, yet their unauthorized status becomes the principle marker of difference justifying specialized detention and containment.

Under both the presidencies of George W. Bush and Barack Obama, the repertoire of enforcement measures that criminalize migrants has diversified and expanded.<sup>116</sup> Surveillance of the U.S.-Mexico border has become increasingly militarized.<sup>117</sup> There has been an expansion of workplace raids, both large and small.<sup>118</sup> ICE campaigns such as 287g<sup>119</sup> and Secure Communities<sup>120</sup> have

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<sup>115</sup> See Jonathan Simon, *Governing Through Crime*, in THE CRIME CONUNDRUM: ESSAYS ON CRIMINAL JUSTICE 171, 176 (Lawrence M. Friedman & George Fisher eds., 1997).

<sup>116</sup> See THE DEPORTATION REGIME: SOVEREIGNTY, SPACE, AND THE FREEDOM OF MOVEMENT (Nicholas De Genova & Nathalie Peutz eds., 2010) [hereinafter THE DEPORTATION REGIME].

<sup>117</sup> See Jason Ackleson, *Constructing Security on the U.S.-Mexico Border*, 24 POL. GEOGRAPHY 165 (2005).

<sup>118</sup> Jonathan Xavier Inda, *Borderzones of Enforcement: Criminalization, Workplace Raids, and Migrant Counterconducts*, in THE CONTESTED POLITICS OF MOBILITY: BORDERZONES AND IRREGULARITY 74, 74 (Vicki Squire ed., 2011).

<sup>119</sup> 8 U.S.C.A. § 1357(g) (West 2012). This statute commonly referred to as Section 287(g) authorized federal immigration enforcement to enter into written contracts with state local law enforcement to perform aspects of federal immigration law, including the investigation, apprehension, or detention of aliens, under the direction and supervision of the Department of Homeland Security. *Id.*

<sup>120</sup> *Id.* Administratively created by DHS in 2008, the Secure Communities is a program designed to prioritize the deportation of criminal aliens by entering into partnerships with local and state law enforcement. Through accessing existing federal and immigration databases, local and state law enforcement can identify “individuals who present the most significant threats to public safety as determined by the severity of their crime, their criminal history, and other factors . . .” *Secure Communities*, IMMIGR. & CUSTOMS ENFORCEMENT, [http://www.ice.gov/secure\\_communities](http://www.ice.gov/secure_communities) (last visited Jan. 17, 2013). However, the program has come under public criticism for misrepresentation of how DHS prioritizes removal of unauthorized migrants. See, e.g., Julia Preston, *Immigrants Are Matched to Crimes*, N.Y. TIMES, Nov. 13, 2009, at A13 (discussing “Secure Communities” program). DHS issued a response to local resistance and negative national media attention to expansion of Secure Communities. U.S. IMMIGR. & CUSTOMS ENFORCEMENT, OFFICE OF THE DIR., PROTECTING THE HOMELAND: ICE



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formalized partnerships between state and local law enforcement and federal immigration authorities. Since 2000, criminal prosecutions have increased, and misdemeanors that are neither “aggravated” nor “felonies” have transformed into aggravated felonies with mandatory deportation orders.<sup>121</sup> Despite claims to a progressive agenda, the Obama administration has deported over 1.06 million migrants in two and one half years—in comparison to 1.57 million deportations during George W. Bush’s two presidential terms—a peculiar and under-publicized milestone for a democratic president with significant support from Latino constituents.<sup>122</sup> The Department of Homeland Security has exceeded President Bush-era rates of deportation with nearly 400,000 individuals deported annually.<sup>123</sup> Mass incarceration of unauthorized migrants has become a multi-billion dollar industry in the United States.<sup>124</sup> At the same time, there is a decreased availability of visas and waivers, and new laws increasingly obstruct the ability of migrants to secure and maintain legal status.<sup>125</sup> Regardless of their legal status, children are impacted disproportionately by the enforcement and deportation regime that may target them individually or may divide their families based on differing legal status.<sup>126</sup> As a result, the enforcement regime has produced a class of irregular migrants, many of whom are

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RESPONSE TO THE TASK FORCE ON SECURE COMMUNITIES FINDINGS AND RECOMMENDATIONS (2012), <http://www.ice.gov/doclib/secure-communities/pdf/hsac-sc-taskforce-report.pdf>.

<sup>121</sup> See, e.g., 8 U.S.C.A. § 1101(a)(43) (West 2012).

<sup>122</sup> Molly O’Toole, *Analysis: Obama Deportations Raise Immigration Policy Questions*, REUTERS, Sept. 20, 2011, available at <http://www.reuters.com/article/2011/09/20/us-obama-immigration-idUSTRE78J05720110920>.

<sup>123</sup> Spencer S. Hsu & Andrew Becker, *ICE Officials Set Quotas to Deport More Illegal Immigrants*, WASH. POST, Mar. 27, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/26/AR2010032604891.html>.

<sup>124</sup> See *The Money Trail*, DETENTION WATCH NETWORK, <http://detentionwatchnetwork.org/node/2393> (last visited Dec. 29, 2012).

<sup>125</sup> See THE DEPORTATION REGIME, *supra* note 116.

<sup>126</sup> See David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165, 1174 (2006).

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children.<sup>127</sup> The “War on Terror” has simply exaggerated enforcement-only measures.<sup>128</sup>

**D. The Enemy Within**

Following the September 11, 2001 terrorist attacks in New York and Washington, D.C., a third sensibility emerged conflating the immigrant with the criminal alien or terrorist. Both the 2001 USA Patriot Act and the 2002 Homeland Security Act<sup>129</sup> exemplify the codification of this cultural shift in which the terrorist and the immigrant are conflated. In the weeks and months following the attacks, escalating terror-alert warnings—from yellow to orange to red—broadcast at airports, in convention centers, and on the radio and television marked the imminence of an attack on native soil.<sup>130</sup> Announcements on highway traffic boards, on public transportation, and in airport terminals encouraged citizens to be aware of suspicious packages, activities, or individuals.<sup>131</sup> ICE issued a Special Registration Program<sup>132</sup> for male youths over sixteen years old from predominantly Muslim countries, further institutionalizing the criminalization of young men of color, of foreign origin, and of

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<sup>127</sup> See THE DEPORTATION REGIME, *supra* note 116. “Irregular migrants” is a term often interchanged with unauthorized or undocumented migrants. In contrast to “illegal alien,” the term emphasizes that migrants may commit administrative, rather than criminal offenses.

<sup>128</sup> *Id.*

<sup>129</sup> Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135; Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

<sup>130</sup> Following September 11, 2001, the Homeland Security Advisory System (“HSAS”) enlisted a color-coded advisory alert scale, which was broadcast widely. Alerts corresponded to heightened or decreased levels of security at airports and public venues. The National Terrorism Advisory System has since replaced the HSAS. *NTAS Public Guide*, U.S. DEP’T HOMELAND SECURITY, <http://www.dhs.gov/ntas-public-guide> (last visited Feb. 12, 2013).

<sup>131</sup> *Id.*

<sup>132</sup> Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 52,584 (Aug. 12, 2002) (to be codified at 8 C.F.R. pt. 264.1(f)(2)(i)). See, e.g., Ty S. Wahab Twibell, *The Road To Internment: Special Registration and Other Human Rights Violations of Arabs and Muslims in the United States*, 29 VT. L. REV. 407 (2005).

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particular faiths. Capillary surveillance *a la* Foucault was, and is, in many ways still in full force.<sup>133</sup>

The lack of knowledge about terrorists, their motivations, and their potential for violent action has led some behavioral and social scientists to draw insights and model intervention strategies from criminal street gangs, leading to a stronger racialization of criminal behavior associated with youth.<sup>134</sup> Racial profiling, particularly of young men, as demonstrated in the Special Registration program, became acceptable in an indefinite war on a still-amorphous enemy.<sup>135</sup> In the ensuing anti-immigrant context, smugglers are seen as agents of terrorism and immigrants as potential terrorists. In 2005, then-Speaker of the House Newt Gingrich warned,

[F]ueled by the global nature of the drug trade, gangs are increasingly international operations, with many of the largest and most vicious gangs operating in America hailing from South America. With the infrastructure in place to move and distribute drugs from across the border, the danger exists that they will

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<sup>133</sup> See generally MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., Vintage Books ed. 1979) (1977). Foucault argues that surveillance is both a powerful and efficient way in which states might enlist citizens to serve as policing agents in everyday life, rather than relying on hierarchical structures to enforce law. Taken together, the Homeland Security Alert System, public announcements calling individuals to report suspicious behavior, and the Special Registration program are technologies of social surveillance. Since the events of September 11, 2001, these technologies have expanded. Most notable, Texas Governor Rick Perry's Virtual Border Watch—a real-time Internet site where individuals can monitor the U.S.-Mexico border and notify Border Patrol via email of any alleged unlawful crossings. *Virtual Border Watch*, BLUESERVO, <http://www.blueservo.net/index.php?error=nlg> (last visited Jan. 17, 2013).

<sup>134</sup> See JESSICA GLICKEN TURNLEY & JULIENNE SMRCKA, ADVANCED CONCEPTS GRP., SANDIA NAT'L LABS., TERRORIST ORGANIZATIONS AND CRIMINAL STREET GANGS: AN ARGUMENT FOR AN ANALOGY 1-5 (2002), [http://www.au.af.mil/au/awc/awcgate/sandia/terrorism\\_gang\\_analogy.pdf](http://www.au.af.mil/au/awc/awcgate/sandia/terrorism_gang_analogy.pdf).

<sup>135</sup> See Mary Romero, *Racial Profiling and Immigration Law Enforcement: Rounding Up of Usual Suspects in the Latino Community*, 32 CRITICAL SOC. 447 (2006); SUNAINA MARR MAIRA, MISSING: YOUTH, CITIZENSHIP, AND EMPIRE AFTER 9/11, at 252 (2009).

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use their network to, for the right price, traffic terrorists and weapons into the country.<sup>136</sup>

Central American gangs, in particular, are cast as a growing threat to national security and as requiring increased levels of surveillance and intervention along the border and within the interior of the country.<sup>137</sup> A 2007 guilty verdict against former Chicago Latin Disciples gang member, Jose Padilla, for his support of terrorism overseas,<sup>138</sup> linked Latino youth, gang activity, and terrorism specifically to the Midwestern landscape.

In addition to being subjected to the vicissitudes of the war on terror and the war on immigrants, unaccompanied children also exist as a particular kind of palpable threat to the body politic.<sup>139</sup> The view that children are in the process of becoming social agents and of being not-yet-socialized into mature, responsible adults translates into the contested potentiality of migrant youth.<sup>140</sup> On the one hand, the potential for socialization and rehabilitation offers some assurances to the state that the child will not become deviant; on the other, the malleability of impressionable youth leaves them open to forming suspicious or even dangerous allegiances with other states, criminals, or terrorists.<sup>141</sup> The dispersed character of contemporary

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<sup>136</sup> *American Gangs: Ties to Terror?* (Fox News television broadcast July 3, 2005) (transcript available at <http://www.foxnews.com/story/0,2933,160595,00.html>).

<sup>137</sup> See *Operation Community Shield/Transnational Gangs*, IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/community-shield/> (last visited Jan. 17, 2013); see CELINDA FRANCO, CONG. RESEARCH SERV., RL 34233, THE MS-13 AND 18TH STREET GANGS: EMERGING TRANSNATIONAL GANG THREATS? 15 n.74 (2008), <http://www.fas.org/sgp/crs/row/RL34233.pdf> (citing the U.S. Immigration and Customs Enforcement website that stated "Operation Community Shield has since been expanded to include 'all criminal street gangs that pose a threat to national security and public safety'").

<sup>138</sup> Abby Goodnough, *Jose Padilla Convicted on All Counts in Terror Trial*, N.Y. TIMES, Aug. 16, 2007, [http://www.nytimes.com/2007/08/16/us/16cnd-padilla.html?\\_r=0](http://www.nytimes.com/2007/08/16/us/16cnd-padilla.html?_r=0).

<sup>139</sup> HEIDBRINK, IN WHOSE BEST INTERESTS, *supra* note 13.

<sup>140</sup> *Id.*

<sup>141</sup> Following the massive immigration rallies in Chicago in 2007, conservative news outlets openly criticized immigrants for waving Mexican flags rather than American ones. Instead of recognizing the flag as a symbol of one's ethnic

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terrorism leaves those allegiances simultaneously undetermined yet, in many respects, inconsequential.<sup>142</sup> It is the fear of the realization of children's potential, influenced by violent terrorist organizations, that warrants additional attention and containment.<sup>143</sup> Images of child soldiers from conflicts around the world and headlines of children as young as fourteen years old training to be suicide bombers in Gaza, Pakistan, Iraq, and Afghanistan offer the public further proof of the capacity of children to commit terrorism.<sup>144</sup> Unaccompanied migrant youth become yet another group of unencumbered, untrustworthy, brown men requiring law enforcement intervention to control the threat to the nation.<sup>145</sup> While seemingly irreconcilable with the image of the hardened criminal incapable of rehabilitation, the still-malleable youth as a potential homegrown terrorist stems from social anxieties of violence and xenophobia. Whether it is due to the INS' Special Registration Program, Latino youth being profiled as gang members, or public fears that children may be terrorists, the out-of-place migrant youth ultimately transforms from *at risk* to *the risk*.

Part III has identified three overlapping and emergent sensibilities and sentiments—the illegal alien, the criminal, and the enemy within—woven throughout the law enforcement approach to migrant children and youth. In practice, these sensibilities override both state and international best interest standards,<sup>146</sup> which dictate child welfare practices in other areas of social and legal life. The very

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heritage, it became a revelation of one's indisputable allegiance. See Alex Kotlowitz, *Our Town*, N.Y. TIMES (Magazine), Aug. 5, 2007, <http://www.nytimes.com/2007/08/05/magazine/05Immigration-t.html?pagewanted=all> (offering a poignant reflection on the sentiments woven in the image of the Mexican flag preceding and following the rally).

<sup>142</sup> HEIDBRINK, IN WHOSE BEST INTERESTS, *supra* note 13.

<sup>143</sup> See Twibell, *supra* note 132.

<sup>144</sup> See Peter W. Singer, Opinion, *Terrorists Must Be Denied Child Recruits*, BROOKINGS INSTITUTION (Jan. 20, 2005), <http://www.brookings.edu/research/opinions/2005/01/20humanrights-singer>.

<sup>145</sup> See, e.g., Nina Bernstein, *Two Girls Held as U.S. Fears Suicide Bomb*, N.Y. TIMES, Apr. 7, 2005, <http://www.nytimes.com/2005/04/07/nyregion/07suicide.html>.

<sup>146</sup> Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990). (Somalia and the United States have not ratified the Convention).

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“shelters” designed as a less restrictive environment than the INS’ immigration jails that detained children just a decade prior have become “total institutions” which not only control and document everyday behaviors, conversations, interactions, and activities, but also restrict knowledge from the very children whose fates hang in the balance.<sup>147</sup> As a Border Patrol officer surveilling the Texas-Mexico border remarked, “[b]ut these are not *our* children.”<sup>148</sup> Taken together, these sensibilities frame the migrant child as not possessing the vulnerability or rights of children at all. The detention, containment, and removal of the “Other” are palpable. The illegality and perceived innate criminality of migrant youth have become the preeminent factors in the ways they are apprehended, detained, and cared for by both law enforcement and civil society to which Part IV now turns.<sup>149</sup>

### IV. A Humanitarian Response?

In most nations, the history of immigration law is at a minimum a catalogue of strategic and intricate interventions to shape or to control flows of people and goods across national borders. Yet, one cannot assume that these interventions derive from a unified or coherent state strategy or that the law itself is necessarily complete or definitive.<sup>150</sup> Instead, as anthropologist Nicolas de Genova argues in

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<sup>147</sup> See ERVING GOFFMAN, *ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES* (1961). Sociologist Erving Goffman developed the term *total institution* to signify a closed social system with barriers to “social intercourse with the outside” and with the purpose of controlling most aspects of an individual’s life. The total institution is characterized by individuals “cleanly stripped of any of [their] accustomed affirmations, satisfactions, and defenses, and is subjected to a rather full set of mortifying experiences: restriction of free movement, communal living, diffuse authority of a whole echelon of people, and so on. Here one begins to learn about the limited extent to which a conception of oneself can be sustained when the usual setting of supports for it are suddenly removed.” *Id.* at 4, 148.

<sup>148</sup> Interview with Station Commander, *supra* note 50.

<sup>149</sup> *Supra* note 1.

<sup>150</sup> Nicholas P. De Genova, *Migrant “Illegality” and Deportability in Everyday Life*, 31 ANN. REV. ANTHROPOLOGY 419, 424 (2002).

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his review of migrant illegality, “the intricate history of law-making is distinguished above all by the constitutive restlessness and relative incoherence of various strategies, tactics, and compromises that nation-states implement at particular historical moments, precisely to mediate the contradictions imminent in social crises and political struggles . . . .”<sup>151</sup> In this vein, the policies and practices that govern the social and legal lives of unaccompanied children do not stem from a coherent and singular legal code, but involve a constellation of anxieties and interests that have emerged over time and space. The 1997 *Flores* Settlement Agreement is a revealing historical moment in the legal lives of unaccompanied children that incorporates multiple, and at times diverging, interests within the care and custody of unauthorized children in the United States.<sup>152</sup>

**A. *Flores* Settlement Agreement**

In 1985, the California-based Center for Human Rights and Constitutional Law filed a class action lawsuit against the INS, *Flores v. Reno*, because of the INS’ policies of detaining, processing, and releasing unaccompanied children.<sup>153</sup> The case challenged a new INS policy that would release youth only to “a parent or legal guardian”<sup>154</sup> rather than to another trusted adult or caregiver who might be available to care for the child. The U.S. Supreme Court ruled against the plaintiff and declared that the INS’ detention and release policies were constitutional and further, that institutional custody, through not the preferred method, was not unconstitutional.<sup>155</sup> In the absence of authorized parents, the state as *parens patriae* was entitled to intervene and institutionalize unaccompanied youth.<sup>156</sup> According to the Court, such an

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<sup>151</sup> *Id.* at 425.

<sup>152</sup> Stipulated Settlement Agreement, *Flores v. Reno*, No. CV-85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997) [hereinafter *Flores* Stipulated Settlement Agreement], [http://www.aclu.org/pdfs/immigrants/flores\\_v\\_meese\\_agreement.pdf](http://www.aclu.org/pdfs/immigrants/flores_v_meese_agreement.pdf).

<sup>153</sup> *Reno v. Flores*, 507 U.S. 292, 292 (1993).

<sup>154</sup> *Id.* at 296.

<sup>155</sup> *Id.* at 292.

<sup>156</sup> *Parens patriae*, “literally ‘parent of the country,’ refers traditionally to the role of state as sovereign and guardian of persons under legal disability, such as juveniles or the insane, and in child custody determinations, when acting on behalf



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intervention was not a limitation on migrant children's rights, as advocates had maintained.<sup>157</sup>

Despite the verdict, the INS was willing to negotiate a settlement decree, otherwise known as the 1997 *Flores* Settlement Agreement, which continues to set the minimum standards of care and release of detained unaccompanied children under the Office of Refugee Resettlement.<sup>158</sup> The decree is based on the premise that the U.S. government must treat children in immigration custody with "dignity, respect and special concern for their vulnerability as minors."<sup>159</sup> In particular, the agreement stipulated that the INS must: 1) ensure the prompt release of children from immigration detention; 2) for those with a pending release from detention, place children in the "least restrictive setting appropriate to the minor's age and special needs"; and 3) implement basic standards of care and treatment of children in immigration detention, including a range of requirements for mental health services, health care, education, recreation, religious services, access to legal representation, telephones, and transportation arrangements.<sup>160</sup>

In the *Flores* Settlement Agreement, the practices of care and protection are exclusively predicated on the child as a victim devoid of social agency and do not apply to those children who have been charged or *potentially* face a chargeable offense, have committed or threaten to commit a violent act against himself or others, have proven disruptive, are an escape-risk, or must be held for their own safety.<sup>161</sup> While subject to interpretation, underlying each exception is an ongoing restriction of the child's social agency to exclusively potential destructiveness and thus necessitating heightened restrictions. For example, ICE consistently refuses to transfer children who face a chargeable offense to ORR.<sup>162</sup> For many youth, it

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of the state to protect the interests of the child." BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

<sup>157</sup> *Flores* Stipulated Settlement Agreement, *supra* note 152.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 7.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 12-13.

<sup>162</sup> Lauren Heidbrink, Field Notes (on file with author).

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is sufficient that they are accused of a crime, whether a minor drug possession, curfew violations, or driving without a license, even if the charges are dismissed or never filed by the arresting agent.<sup>163</sup> From research within ORR facilities, youth exhibiting or even potentially exhibiting delinquent behaviors translates into higher security placements reserved for youth with a “criminal background.”<sup>164</sup>

While advocates continue to hail the *Flores* Settlement Agreement as a victory that improved the standards and conditions of housing and release for unaccompanied children, it has not been a panacea for the identification and treatment of unaccompanied migrant children.<sup>165</sup> In fiscal year 2000, there were 1,933 children held in juvenile detention facilities, of which 1,569 were non-delinquent.<sup>166</sup> In 2001, for example, thirty-four of the fifty-seven detention facilities housing unaccompanied minors could not guarantee that delinquent and non-delinquent minors would not be co-mingled.<sup>167</sup> In spite of the *Flores* Settlement Agreement and with limited oversight, the INS still treated children minimally different from juvenile offenders.<sup>168</sup> While binding, the recommendations are still subject to considerable interpretation and elective implementation by both ICE (formerly the INS) prior to 2003 and ORR since that time.

Since the transition of care and custody of unaccompanied children from ICE to ORR in 2003, unaccompanied children have fared better in their access to education, recreation, and health services, but law enforcement practices pervade in both structural ways and everyday practices. For example, across multiple sites,

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<sup>163</sup> *Id.*

<sup>164</sup> Lauren Heidbrink, Field Notes (on file with author). From research and interviews with facility staff, legal advocates, and ORR Federal Field Specialists across twelve ORR-funded programs, “criminal background” is the term pervasively used in reference to children with any gang involvement or allegations of involvement.

<sup>165</sup> See *supra* notes 1, 15; see *HALFWAY HOME*, *supra* note 20, at 3-4.

<sup>166</sup> U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., UNACCOMPANIED JUVENILES IN INS CUSTODY, I-2001-009 (2001).

<sup>167</sup> *Id.*

<sup>168</sup> Duncan, *supra* note 38.

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facility staff consistently consider any child with an impending deportation order as a flight risk, often refusing children phone calls to family members, confiscating a child's shoes to deter flight, and subjecting children either individually or collectively to "lock down" in facilities.<sup>169</sup> In some respects, the staff considers all unaccompanied children as flight risks and as a result, regularly restricts knowledge of their family reunification options, withholds updates on one's "case" or impending release, and denies access to the phone or email, which compounds children's anxieties within their already liminal existence in immigration detention.<sup>170</sup> By tightly controlling the dissemination of information, claiming the child's own best interests and safety, ORR and the facility staff aim to regulate a child's delinquent tendencies embodied in the very agency that brought him to the United States as an unaccompanied minor. In the case of unauthorized children, agency becomes quickly diverted from discussions of empowerment of individual youth to questions of accountability and the need for containment.<sup>171</sup>

**B. Victimhood**

Notably, advocates enlisted the *Flores* Settlement Agreement to untangle the child from the migrant adult and from illegality.<sup>172</sup> By instantiating the dependency of children who require care within a language of vulnerability, the Agreement forced the image of the vulnerable, migrant child in need of a humanitarian intervention into direct opposition with the criminalized alien who is subject to

<sup>169</sup> Lauren Heidbrink, Field Notes (on file with author). On eight occasions across six ORR-facilities, the author experienced a "lock down" in which staff confiscated children's shoes, restricted children to their rooms, cancelled outings for recreation, and prohibited weekly phone calls with family members.

<sup>170</sup> See *supra* note 1.

<sup>171</sup> Susan J. Terrio, *New Barbarians at the Gates of Paris? Prosecuting Undocumented Minors in the Juvenile Court—The Problem of 'Petits Roumains'*, 81 ANTHROPOLOGICAL Q. 873, 876 (2008); Bluebond-Langner & Korbin, *supra* note 6, at 242-44; see TOBIAS HECHT, AT HOME IN THE STREET: STREET CHILDREN OF NORTHEAST BRAZIL (1998).

<sup>172</sup> Lauren Heidbrink, Field notes (on file with the author). Multiple advocates involved in both advocacy and litigation resulting in the *Flores* Settlement Agreement articulated that the Agreement was a tool with which to reclassify the child in a category distinct from the unauthorized adult.

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removal. Vulnerability became an explicitly defined quality of apprehended migrant children forced to flee war, violence, abuse, depravity, and the street.<sup>173</sup> Mobility was a symptom of their vulnerability as children and a condemnation of the conditions spurring their migration.<sup>174</sup> Claims of a troubling increase in the migration of children were not based on historical fact but on a constructivist approach to child migration as a social problem.<sup>175</sup> Drawing from a perception of increased movement of children across international borders, advocates have come to frame this movement as representative of a rupture in the family unit.<sup>176</sup> The discourses of “lost childhoods” and social anxieties around the “lost generation” gained traction as advocates publicized the victimization of child migrants, abandoned children, and trafficking victims.<sup>177</sup>

However, as sociologist Joel Best cautions, one must look at why and how these anxieties emerged in the first place rather than exclusively on the social concern that advocates seek to remedy.<sup>178</sup> What are the factors that resulted in a surge of interest in child migration as a social phenomenon? How has the image of the child “menaced by deviants” shaped expressions of care?<sup>179</sup> How do American social values shape cultural and economic values of

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<sup>173</sup> Stephens, *supra* note 6, at 9.

<sup>174</sup> See EVERYDAY RUPTURES, *supra* note 6.

<sup>175</sup> JOEL BEST, THREATENED CHILDREN: RHETORIC AND CONCERN ABOUT CHILD-VICTIMS 11 (1990).

<sup>176</sup> EVERYDAY RUPTURES, *supra* note 6, at 1.

<sup>177</sup> See also Stephens, *supra* note 6, at 9, 30 (tracing the ways social and political anxieties have emerged around how childhood as a space characterized as safe, innocent, and care-free has become threatened. Stephens calls for both a historically-informed analysis of childhood and research on children as social agents as essential components in understanding the power of cultural politics in late capitalism.).

<sup>178</sup> See also BEST, *supra* note 175, at 4-6 (detailing the ways the figure of the child has shifted in the eyes of Child Savers from the 19th century through modernization. Best identifies how Child Savers across the centuries have developed social images of the child and childhood that emerge from adult social anxieties. Images include the rebellious child, the deprived child, the sick child, the child victim, and the threatened child.).

<sup>179</sup> *Id.* at 6.

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migrant families in their countries of origin?<sup>180</sup> How has capitalism's impact on the economic functionality of the nuclear family shaped child circulation? By exploring the possible answers to these questions, the framing of a social issue reveals more about the anxieties and values of the framer (advocate) than the framed (child).<sup>181</sup> In response to the imaginaries depicting youth as threatening and in need of containment, advocates framed migrant children as the 'ideal victim'—"a person or a category of individuals who—when hit by crime—most readily are given the complete and legitimate status of being a victim."<sup>182</sup> The humanitarian response to child migration continues to be predicated on an understanding of children as dependent upon adults and the welfare state, and on a culturally-situated understanding of childhood as necessarily shielded from adult responsibilities of care-giving and labor.<sup>183</sup>

The language of the law conceives of the child in a particular way. In many ways, the law requires victimhood as constitutive of the migrant child, discounting the migrant child as an independent social actor. As the United Nations Trafficking Protocol of 2000 argues, a child "can never consent to an exploitative migration facilitated by intermediaries."<sup>184</sup> Yet, an increasing number of

<sup>180</sup> Deborah A. Boehm, "For My Children:" *Constructing Family and Navigating the State in the U.S.-Mexico Transnation*, 81 ANTHROPOLOGICAL Q. 777, 793-97 (2008) [hereinafter Boehm, "For My Children"]; see DEBORAH A. BOEHM, INTIMATE MIGRATIONS: GENDER, FAMILY, AND ILLEGALITY AMONG TRANSNATIONAL MEXICANS (2012) [hereinafter BOEHM, INTIMATE MIGRATIONS].

<sup>181</sup> BEST, *supra* note 175.

<sup>182</sup> Nils Christie, *The Ideal Victim*, in FROM CRIME POLICY TO VICTIM POLICY: REORIENTING THE JUSTICE SYSTEM 18, 18 (Ezzat A. Fattah ed., 1986).

<sup>183</sup> Sarah Horton, *Consuming Childhood: "Lost" and "Ideal" Childhoods as a Motivation for Migration*, 81 ANTHROPOLOGICAL Q. 925, 929-30 (2008); see Jenalia Moreno, *Indigent Families Rely on Teen Immigrant Workers*, HOUS. CHRON., Mar. 20, 2005, <http://www.chron.com/news/nation-world/article/Indigent-families-rely-on-teen-immigrant-workers-2014912.php>.

<sup>184</sup> JACQUELINE BHABHA, INDEPENDENT CHILDREN, INCONSISTENT ADULTS: INTERNATIONAL CHILD MIGRATION AND THE LEGAL FRAMEWORK 1 (2008), [http://www.globalmigrationgroup.org/uploads/gmg-topics/children/2.H\\_Independent\\_children\\_inconsistent\\_adults\\_UNICEF.pdf](http://www.globalmigrationgroup.org/uploads/gmg-topics/children/2.H_Independent_children_inconsistent_adults_UNICEF.pdf) (citing United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, at 31-39, U.N. Doc. A/RES/55/25 (Jan. 8, 2001)).

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unaccompanied youth enter court dockets each year.<sup>185</sup> The explicit consequence is that the unlawful and independent presence of the unaccompanied child forces a production of self that cannot reconcile with the ways institutions and the state have produced them. Thus, the unresolved paradox remains that the child is neither an agent nor an existing category of person, yet must stake a claim as such.

**1. In the Interests of the Child**

The early 2000s heightened the stakes of the debate between law enforcement and advocates in which the state's failure to recognize the innate vulnerability of child migrants and to provide safeguards became a judgment on the values of the nation.<sup>186</sup> The state's failure to protect the most vulnerable population of youth because of their legal status called into question national values of inclusiveness and multiculturalism as well as the United States' heritage as a nation of immigrants.<sup>187</sup> The United States, a nation founded on the premise of protecting the most vulnerable from harm in the spirit of Emma Lazarus' *New Colossus* brazened on the feet of the Statue of Liberty, failed to protect the "littlest immigrants."<sup>188</sup> In

<sup>185</sup> OLGA BYRNE & ELISE MILLER, VERA INST. OF JUSTICE, CTR. ON IMMIGR. & JUSTICE, THE FLOW OF UNACCOMPANIED CHILDREN THROUGH THE IMMIGRATION SYSTEM: A RESOURCE FOR PRACTITIONERS, POLICY MAKERS, AND RESEARCHERS 2 (2012), <http://www.vera.org/sites/default/files/resources/downloads/the-flow-of-unaccompanied-children-through-the-immigration-system.pdf>.

<sup>186</sup> PRISON GUARD OR PARENT?, *supra* note 35, at 3.

<sup>187</sup> While believed to be as old as the United States itself, the popular term "nation of immigrants" originated in a 1958 with a book entitled *Nation of Immigrants* by Robert Kennedy. Intimately linked to Cold War politics and the civil rights movement in the United States, Kennedy's project professed a political, social, and historical commitment to cultural pluralism in America. JOHN F. KENNEDY, A NATION OF IMMIGRANTS (Harper Perennial, 2008) (1964). As Mae Ngai adeptly identifies, however, Kennedy's work failed to include immigrants from Asia and Latin America, instead focusing exclusively on a European immigrant history in the United States. Mae M. Ngai, "A Nation of Immigrants": The Cold War and Civil Rights Origins of Illegal Immigration (Apr. 2010) (unpublished paper), [www.sss.ias.edu/files/papers/paper38.pdf](http://www.sss.ias.edu/files/papers/paper38.pdf).

<sup>188</sup> See Ginger Thompson, *Crossing with Strangers: Children at the Border; Littlest Immigrants, Left in Hands of Smugglers*, N.Y. TIMES, Nov. 3, 2003, <http://www.nytimes.com/2003/11/03/world/crossing-with-strangers-children-border-littlest-immigrants-left-hands-smugglers.html?pagewanted=all&src=pm>.

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a 2002 report entitled *Prison Guard or Parent?*, the Women's Refugee Commission claimed, "One true measure of a society is its treatment of children. The United States must acknowledge and uphold the rights and needs of newcomer children in order to live up to its reputation as a leader in human rights and a nation that protects children."<sup>189</sup> This accusation has particular resonance within the U.S. context, as the country is one of only two nations not a signatory to the United Nations Convention on the Rights of the Child.<sup>190</sup> Instead of protecting children against the dangers of smugglers and traffickers, as well as from abusive parents, the state has developed an extensive apparatus of law enforcement, courts, and legal provisions, and has funded the expansive private prison industry<sup>191</sup> to detain children on the sole basis of their alienage without consideration of their status as legal minors. The accusation unfolded as a condemnation of the state's willful and discriminatory negligence of the child and of the "Other."

#### **2. In the Interests of the State**

In the months prior to the 2003 transfer from the INS to ORR, advocates vocalized the explicit divergence between the interests of the state and the best interests of the child.<sup>192</sup> Advocates argued that the state had a moral imperative to care for unaccompanied children as victims, whether documented or not, but the state's interests to secure its borders and control migratory flows were, and continue to be, paramount. The public persona of the unaccompanied child can be seen throughout the legislative language and appears to inform judicial practice. If unaccompanied children are delinquent, illegal, and potentially terrorists, they are presented as undeserving of specialized care and of limited government resources. The state views some migrants—those who come from countries where the

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<sup>189</sup> PRISON GUARD OR PARENT?, *supra* note 35.

<sup>190</sup> See Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990).

<sup>191</sup> Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 83 (2005); see Michael Welch, *The Role of the Immigration and Naturalization Service in the Prison-Industrial Complex*, 27 SOC. JUST. 73, 74-76 (2000).

<sup>192</sup> See PRISON GUARD OR PARENT?, *supra* note 35.



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U.S. maintains critical political interest—as uniquely deserving of special protection.<sup>193</sup> Historically, nationals from Cuba and the Soviet Union receive special treatment and status under the law, while children and adults alike from Latin America, namely Central America and Mexico, were and are treated as criminalized adults who transgressed the laws of the state.<sup>194</sup> Where the political interests of the state in combating communism and the individual child align, the migrant child calls for specialized accommodations, care, and legal status.<sup>195</sup>

Amidst best intentions to care for migrant children, civil society has unwittingly adopted an agent-less approach to advocacy on behalf of migrant children and youth. Advocates embrace the migrant child devoid of agency in order to divorce children from responsibility or blame that might subject them to punitive laws reserved for perpetrators. In the humanitarian approach, advocates deemphasize a child's agency for the very reasons law enforcement accentuates it—to constitute the deserving victim or the culpable delinquent. Conceiving of agency as necessarily existing within a moral dimension compounds the disempowerment of children with a negation of their essential contributions to society. To illustrate, Part

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<sup>193</sup> For example, under the power of the U.S. Attorney General, Cuban entrants are admitted to the U.S. under a special parole that not only affords them specialized access to humanitarian services but also places them on a pathway to U.S. citizenship. *See* Refugee Education Assistance Act of 1980, Pub. L. No. 96-422, § 501(e), 94 Stat. 1799. In contrast, Guatemalans and Salvadorans systematically were denied asylum until a 1991 Settlement Agreement recognized the discriminatory practices of the USCIS, the Executive Office of Immigration Review, and the Department of State. *See* *Am. Baptist Churches v. Thornburgh*, 760 F. Supp. 796, 799-800 (N.D. Cal. 1991). The 1997 Nicaraguan Adjustment and Central American Relief Act (“NACARA”) also recognized some unauthorized migrants from Nicaragua, El Salvador, Guatemala, Cuba, and some former Soviet bloc countries as *de facto* refugees who had been categorically denied legal status in the 1980s and 1990s. *See* District of Columbia Appropriations Act, 1998, Pub. L. No. 105-100, §§ 202(b)(1), 203(a)(1), 111 Stat. 2160, 2194, 2196 (1997). For some families the legalization process has gone on for decades, resulting in a differing prevalence of legality among some Central Americans and among their child beneficiaries who may age-out of their parents' petitions for legal status.

<sup>194</sup> *See supra* note 193.

<sup>195</sup> *See, e.g.,* *Polovchak v. Meese*, 774 F.2d 731, 736 (7th Cir. 1985).

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V provides an ethnographic vignette of Mario, a Salvadoran youth who found himself ensnared between the competing interests of law enforcement, civil society, and his own social agency.

#### **V. "I walked their geography."**<sup>196</sup>

To evidence the ways these competing regimes trap migrant youth in untenable situations, this Article turns to the narrative of Mario, a lanky youth of fifteen from El Salvador, whose poem "*Sueños Rotos*" opened this Article. Upon meeting Mario, he was dressed in a neon blue sweatshirt with matching pants and black plastic flip-flops provided to him by the facility where he resided. In June's El Paso heat, Mario incessantly wiped the sweat from his brow onto his right sleeve. The facility's director explained that the florescent colored clothing—red, blue, yellow, and green—allowed staff to easily identify children who attempted to escape the federal facility where they were detained. The sandals were also standard-issued flip-flops to deter fast footed children from getting very far along the gravel road connecting the facility to the interstate over a dozen miles away.

At the time, the convoluted network of four government departments, fifteen federal government agencies,<sup>197</sup> and a myriad of voluntary agencies involved in the care and custody of apprehended unaccompanied children were indecipherable to Mario. In his mounting frustration with his "captivity" at the facility, Mario

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<sup>196</sup> Lauren Heidbrink, Case study of Mario (2006-2009). The author first met Mario (pseudonym provided pursuant to confidentiality provisions of the Johns Hopkins Institutional Review Board), an unaccompanied child, in 2006 while he was in federal immigration detention in Texas. Upon his release from ORR custody, the author continued to meet with him bi-weekly in Maryland, in his uncle's home, at area restaurants, legal appointments, and at school. In 2006, the author also conducted research with his family and community members in El Salvador. The author maintained regular communication with Mario until 2011. Quotes in this section that are not otherwise cited are a part of that communication (field notes and interview transcripts are on file with the author).

<sup>197</sup> BHABHA & SCHMIDT, *supra* note 13, at 40 (noting in their 2006 report that there is limited coordination across the departments and agencies involved in the lives of unaccompanied children).

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remarked, "I am ashamed that I got caught. I made my decision, had everything organized, had my plan, and now what? I am trapped here in this place. My debt is increasing as I sit here wasting my time learning geography. They must think I'm stupid. I walked their geography." Mario found himself forced to learn something he already knew in a deeply embodied way. Facility staff ignored his phenomenological familiarity with the very national territories they desired him to respect.

Although Mario's reputation as a talented student and responsible worker brought him school awards for excellence, stable employment as a dishwasher, and an occasional carpenter in his hometown of Santa Ines, it also brought him to the attention of the "Joker," the local *Mara Savatrucha* (also known as MS-13) gang leader. The Joker's first contact with Mario was to demand the new tennis shoes that Mario purchased with his earnings. Later, demands came for sex with Mario's girlfriend and his participation in gang activities. Each threat was met with Mario's scared though firm and sometimes belligerent refusal. "I am not interested in your *babosadas* [stupidity or rubbish]," he told them. On three occasions, several gang members beat Mario, with the Joker directing each blow. They would wait for Mario outside of school, his place of work, and even church on Sundays. At times Mario left through an alternate door, climbed a fence behind the school, or ran to escape these confrontations, but often without success. "It was hard to hide from them," Mario remarked on his efforts to avoid gang members in his community. "I'm taller than most people in my town. It's kind of hard for me to blend in."

Mario contributed to his family's food supplies and to the schooling expenses for his six younger siblings. His two elder sisters, now married with children, had limited capacity to contribute to the household's needs. Mario's stepfather was intermittently employed as a truck driver, which varied with the demand for timber from neighboring Honduras, Guatemala, and Nicaragua, and with his bouts of heavy drinking; he was verbally and physically abusive. After a particularly brutal beating by the Joker and three of his fellow gang members that resulted in Mario suffering a broken arm, Mario stopped attending school and work, only leaving the house once in

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six weeks to remove his cast. "I tried to become invisible," he explained. He slept most of the day or watched Hollywood films on a small television set in the living room, attempting to avoid the gaze of his stepfather, who fortunately was working in Honduras for several weeks at a time during that period. Gang members would regularly pass Mario's home and yell threats through the windows. On one occasion the Joker knocked on the door. When Mario's mother answered, she said Mario had left for the United States, which was a decision Mario had been contemplating for several months. Mario recalled this period of hiding: "There was nothing for me there. I couldn't work; I couldn't study; I couldn't protect my mom from my stepfather or even myself. I had to hide to survive; that is no way to live."

After six weeks of retreat, Mario and his mother began discussing his journey to the United States. She located Mario's distant uncle, who moved to Maryland eight years earlier, and called on Mario's behalf requesting help. Mario's uncle agreed to secure him employment and provide him a place to live, if Mario could get to Maryland on his own. Mario borrowed \$6,000 from a local police officer for whom he had done some carpentry work, but who could not provide him protection from the MS-13's recruitment apparatus. The police officer introduced Mario to his brother, a broker for *coyotes*,<sup>198</sup> who smuggled migrants through Guatemala and Mexico into the United States. Mario's \$3,000 down payment assured him passage to the U.S.-Mexico border, or so he thought.

His departure from Santa Ines marked Mario's entrance into a liminal period of transit, both literally, in moving through borders and nations, and metaphorically, in which he was simultaneously *outside*—devoid of state protection and not-yet arrived—and *inside*—physically present and moving through—the nation.<sup>199</sup> He journeyed for three weeks, by bus through Guatemala, by car and train through Mexico, and eventually by foot into the United States. The success of Mario's journey was predicated upon his hiding in

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<sup>198</sup> *Coyote* is a colloquialism in Spanish which commonly refers to "smuggler" of unauthorized migrants.

<sup>199</sup> Susan Bibler Coutin, *Being En Route*, 107 AM. ANTHROPOLOGIST 195, 196 (2005).

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ditches along the road, on the top of trains, and in the back of vans. He rarely spoke for fear of passers-by detecting his Salvadoran accent and vocabulary. Recalling, the experience, Mario said:

I imagined I was a super-hero in a comic book, you know, who had the power to make himself invisible. No one could see me. I never spoke. It is like I wasn't even there. Besides, it all seems like a bad nightmare now. I try not to think about it. It never really happened.

Mario entered another dimension in an effort to absent himself while in transit. Anthropologist Susan Coutin analyzes how *clandestinity* is a public secret, a known social reality in which unauthorized migrants must be "absent from the spaces they occupy."<sup>200</sup> For unauthorized migrants arriving in the U.S., the law becomes a mechanism by which the state may *absent* those who are present through the prohibition of unauthorized entrance or the denial of certain rights and services. The state is vested in the power to physically absent, through mechanisms of detention and deportation, those that are unlawfully living within national borders.<sup>201</sup>

Upon crossing the territorial boundary between the United States and Mexico, Mario entered into a new juridical space. His principal legal identity shifted from that of a citizen of El Salvador to that of an *illegal alien* with limited access to rights and services in the United States. Within three days of Mario's crossing the border by foot near McAllen, Texas, U.S. Border Patrol agents apprehended him en route to Houston. They interrogated him for two hours and held him for eight days in a small cell with six other migrants. Eventually, because of his age and his presence without a legal guardian, Mario was transferred to an ORR facility for unaccompanied children.

In order to remain in the United States, the most viable legal option for Mario was to petition for a Special Immigrant Juvenile Visa, in which Mario had to detail how his father abandoned him at a

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<sup>200</sup> *Id.* at 195.

<sup>201</sup> *Id.* at 196.

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young age and the abuse that he and his siblings received at the hands of his stepfather from which his mother could not, or chose not, to protect him.<sup>202</sup> In effect, Mario had to publicly claim that he was “abused, neglected, or abandoned” by his family—a claim that, according to Mario, was not only emotionally inaccurate but also undermined his personal and financial commitment to his mother and siblings. “I just can’t say those bad things about my family to a room of people, to a judge. You just don’t do that. They are my family.” According to Mario’s former employer in Santa Ines, the physical abuse was public knowledge, but something not discussed or addressed.<sup>203</sup> He said, “[Domestic violence] happens. I know it happens but it is a family affair. [Mario] never said anything to me, but I knew what was going on. We all knew.”<sup>204</sup>

Mario’s mother explained, “It was tough for him here. He is smart and he didn’t have options.”<sup>205</sup> In addition to the lack of opportunity, she framed his migration north as a rite of passage. “His uncles went to *el Norte* [the north; United States]; many of his cousins did; his father—even if he doesn’t remember him.”<sup>206</sup> Migration was one alternative within a catalog of choices that Mario’s father, extended family members, and now Mario enlisted.

In Santa Ines, even casual conversations are marked by a migration narrative—either of the individual himself or of a close friend or family member. As sociologist and migration scholar Douglas Massey details, a culture of migration develops over time and becomes a social value. “For young men, and in many settings young women as well, migration becomes a rite of passage, and those who do not attempt to elevate their status through international

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<sup>202</sup> See Special Immigrant Status for Certain Aliens Declared Dependent on a Juvenile Court (Special Immigrant Juvenile), 8 C.F.R. § 204.11(a) (2013).

<sup>203</sup> After two months of meeting with Mario in an ORR facility, the author traveled to El Salvador to speak with family and community members of detained youth in the U.S. and to continue her work with two youths who had since been deported to El Salvador (field notes and interview transcripts are on file with the author).

<sup>204</sup> Interview with Police Officer, in El Salvador (July 2006) (field notes and interview transcripts are on file with the author).

<sup>205</sup> Interview with Mario’s Mother, in El Salvador (July 2006) (field notes and interview transcripts on file with the author).

<sup>206</sup> *Id.*

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movements are considered lazy, unenterprising, and undesirable.”<sup>207</sup> What remains striking, though, is that the social agency and entrepreneurialism as well as the fundamental concern for his own physical safety and his family's well-being that spurred Mario's migration is turned on its head upon arrival in the United States. Mario is viewed as delinquent and undesirable in the U.S.-context, denied access to the American mythological virtues of hard-work, innovation, self-reliance, and family values, which are attributes that describe Mario's character.<sup>208</sup> Savvy to this contradiction, Mario articulated the greatest weakness ascribed to him: “my worst enemy is always by my side. I am Latino and an immigrant.”<sup>209</sup>

The quickly growing network of Office of Refugee Resettlement facilities for unaccompanied children might suggest that the law has begun to recognize the social agency of an entrepreneurial youth who orchestrates his transnational journey. However, the bureaucratic processes and institutional practices are predicated exclusively on children as undeveloped and dependent upon adults.<sup>210</sup> Gang-based asylum claims have limited success<sup>211</sup>,

<sup>207</sup> Douglas S. Massey et al., *Theories of International Migration: A Review and Appraisal*, 19 POPULATION & DEV. REV. 431, 453 (1993).

<sup>208</sup> Here the author invokes Horatio Alger and other self-made American heroes, and the ‘American dream’ that brought so many immigrants to the U.S. at the turn of the 20<sup>th</sup> century.

<sup>209</sup> *Sueños Rotos*, *supra* note 2.

<sup>210</sup> The cultural construction of childhood within the United States routinely clashes with the lived experiences of unaccompanied children in youth. For example, several informants were married, owned property, or were parents, yet could not be released unless an adult was willing or able to assume legal custody of the minor. Authenticated marriages in the youth's country of origin were insufficient to permit phone calls with a youth's spouse. The proliferation of non-governmental organizations, transnational social movements, and international meetings around children's rights has only bolstered the impression that the space of childhood is at once singular and universal. *See generally* HUGH CUNNINGHAM, CHILDREN AND CHILDHOOD IN WESTERN SOCIETY SINCE 1500 (1995) (tracing the development of a romantic ideal of childhood since the 1500s, in which a dominant middle-class Western ideology of childhood has led to increasing restrictions placed upon child labor and state regulation of parent-child relationships). *See also* ZELIZER, *supra* note 106 (discussing how increasing involvement of the state and civil society in children's lives through compulsory schooling, public health campaigns, and the



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which may reflect how law and law-like processes associate social agency with the risks of delinquency. Mario's *pro bono* attorney attempted to convince him that proving abuse, abandonment, or neglect in the form of Special Immigrant Juvenile status was a more viable option than political asylum, though he could have pursued both simultaneously.<sup>212</sup> She remarked, "In court, child abuse is more palatable than gangs."<sup>213</sup>

From the moment at which Mario became visible to the state, immigration authorities treated him as a criminal without rights and privileges. Shackled at the point of apprehension, he and others like him were detained in prison cells and interrogated by uniformed U.S. and Border Patrol officers. "No matter what I say, [Border Patrol doesn't] believe me. I am fifteen. I am hungry. I cannot go back [to El Salvador]. I am telling the truth. I cannot go back." Mario's desperation clashes with the institutional perception of Mario, that he is somehow dangerous, as evidenced by the facility staff, and ORR's repeated reference to alleged drug use and "gang involvement" which Mario consistently denied. The overlapping categories of race, age, gender, and delinquency create a youth who is not to be trusted, and in many instances a person to fear.<sup>214</sup>

On the other hand, by positioning migrant youth as victims, legal advocates consistently seek to claim certain rights on Mario's behalf. In contrast to his state-issued sweat suits and sandals, which marked Mario as a prisoner, Mario's attorney also sought to physically and symbolically dress him as a deserving child victim, worthy of the court's sympathies. His attorney explained:

If you have a client who comes into the courtroom  
with muscles, visible tattoos or even just a bad

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development of social work has resulted in the child as laborer decreasing in economic value while increasing in sentimentality).

<sup>211</sup> IINE Development Staff, *Gang Violence, Asylum Claims*, INT'L INST. NEW ENG. (Apr. 15, 2011), <http://iine.us/2011/04/gang-violence-asylum-claims/>.

<sup>212</sup> Interview with Mario's *pro bono* attorney, in Balt., Md. (Oct. 2006) (interview transcripts on file with the author).

<sup>213</sup> *Id.*

<sup>214</sup> See MALES, *supra* note 98; Edelman, *supra* note 100; FERGUSON, *supra* note 101.

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attitude, you will have an extremely difficult time convincing the judge that your client is sufficiently sympathetic and deserving of asylum. However irrelevant to your legal claim, your client must play into a more sympathetic image of the victim—docile, quiet, and sufficiently fearful.<sup>215</sup>

By doing so, attorneys de-emphasize the sophisticated decision-making processes and social agency required not only to cross vast distances but also to survive with some level of mental and physical integrity. A debilitated victim, particularly the child victim, is framed as unable to exercise such significant displays of social agency. In part, the singular depiction of the youth as a victim undermines the credibility of the unaccompanied child, whose narrative becomes an irreconcilable account of passivity and agency.

Sociologist Saskia Sassen argues that migrations are highly selective, structured processes in which migrants travel along specific routes for specific reasons.<sup>216</sup> Mario came to the United States with clearly articulated motivations, not blindly or haphazardly propelled northward. Anthropologist and migration scholar Laura Agustín highlights the fact that:

Individual personalities play their part, differences such as self-confidence, willingness to take risks and adaptability in the face of change. Being in a structurally less powerful position than people in the First World does not mean that one is not making decisions, and that those decisions are influenced by a vast multiplicity of circumstance, including individual desire. Being poor does not make people poor in spirit.<sup>217</sup>

Mario does not see himself as a passive victim without options. Instead, he considers himself a survivor of persecution, a provider for

<sup>215</sup> Interview with Mario's *pro bono* attorney, *supra* note 212.

<sup>216</sup> SASKIA SASSEN, GUESTS AND ALIENS, at XIV (The New Press 1999) (1996).

<sup>217</sup> Laura María Agustín, *Forget Victimization: Granting Agency to Migrants*, 46 DEVELOPMENT, no. 3, 2003 at 30, 32.

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his family, a protector of his mother, and a future car mechanic. “I am here [in the U.S.] for me, my future and my family,” he explained later, while at his uncle’s home in suburban Maryland. He has exercised his social agency in his decision to leave home and to journey north. He solicited knowledge from other migrants as to which *coyotes* (smugglers) were reliable, borrowed large sums of money to fund his journey, and clandestinely crossed three national borders. In spite of his attorney’s encouragement, Mario declined to petition for SIJ, but rather decided to pursue political asylum. He awaits a decision on his petition. While the Author does not wish to suggest that agency equates with autonomous decision-making amidst an abundance of choices or that his situation is necessarily of his own making, Mario understands his reasons for migration in ways consistent with other decision-making processes in his life—to pursue an education, to support his family, and “for a better tomorrow.” He is making the most of his limited options.

Through the narrative of Mario, Part V illustrates how children and youth find themselves caught between two competing regimes that depict them either as victims devoid of social agency or as delinquent with threatening pasts and potentials. By examining Mario’s understanding of his own agency and subjectivity, Part V blurs the bright lines of law enforcement and humanitarian approaches by contextualizing both Mario’s social agency and the landscape of his migration. Part VI builds on the call to recognize youth social agency by examining the activism of the contemporary beneficiaries of *Plyler v. Doe*, unauthorized youth activists known as DREAMers.<sup>218</sup> The vocal, civic engagement of DREAMers demands not only further reconsideration of their socio-legal position in American society but also questions the wisdom of framing youth either as agentive-less or as a risk to the nation.

### VI. No Fault of Their Own

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<sup>218</sup> The Development, Relief, and Education for Alien Minors Act of 2010, S. 3827, 111th Cong. (2d Sess. 2010). DREAMers are young migrants that might have benefitted from the now stalled Development, Relief, and Education of Alien Minors Act.

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To contextualize the denial of agency specific to child and youth migrants, this Article now turns to another crucial legal ruling, *Plyler v. Doe*, which laid the foundation for the current impasses between enforcement and humanitarianism beyond the detention context.<sup>219</sup> In 1982, the U.S. Supreme Court struck down a 1975 Texas state statute that denied state K-12 educational funding based on a child's (il)legal status and attempted to charge tuition to unauthorized students attending public schools.<sup>220</sup> In a 5-4 majority ruling, the U.S. Supreme Court found that the law was in violation of the Fourteenth Amendment because it targeted children and "impose[d] its discriminatory burden on the basis of a legal characteristic over which children can have little control."<sup>221</sup> At the most basic level, the ruling was the first to acknowledge that an undocumented child is a person—in some ways distinct from his or her parents.<sup>222</sup> The Court found that children "can affect neither their parents' conduct nor their own status" and should not be punished for the decisions of their parents.<sup>223</sup> The Court further stated that holding children responsible for the actions of their parents "does not comport with fundamental conceptions of justice."<sup>224</sup> Unauthorized children were seen as blameless for actions of migration across national borders, in effect failing to recognize the children's influence on familial migration decisions and actively denying children the capacity of exercising any agency.

The Court explained that denying education to unauthorized children would result in "the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime."<sup>225</sup> The state has an integral role in protecting children from the tenuous border between becoming an educated member of society and a criminal in a

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<sup>219</sup> *Plyler v. Doe*, 457 U.S. 202 (1982).

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 220.

<sup>222</sup> *Id.* at 202.

<sup>223</sup> *Id.* at 220.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 230.

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permanent underclass, or “shadow population.”<sup>226</sup> In this view, the welfare state must protect children from the consequences of their parents’ poor decisions and criminal acts, socializing potential citizens through education while protecting that state’s interests in public safety and fiscal responsibility.

This language absenting a child’s social agency has continued in over a decade of iterations of the Development, Relief, and Education for Alien Minors Act (“DREAM Act”) or surrounding the more recent Deferred Action for Childhood Arrivals (“DACA”).<sup>227</sup> Within DACA, children, “through no fault of their own,” are undocumented in the United States.<sup>228</sup> In the absence of personal responsibility, youth are seen as deserving of benefits, such as in-state tuition for higher education and a pathway to citizenship.<sup>229</sup> The Supreme Court’s decision in *Plyler v. Doe*, the DREAM Act, and DACA cast the child as lacking any agency or decision-making power and as a victim of “the sins of their fathers.”<sup>230</sup> Thus, the responsibility lies in the hands of the parents, or the state in lieu of the parent, which frees the state to provide some form of relief or specialized services to children. DREAMers themselves question the wisdom of agent-less depictions of the deserving victim, whereby youth who do not fulfill the pristine image of the migrant

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<sup>226</sup> *Id.* at 218.

<sup>227</sup> The Development, Relief, and Education for Alien Minors Act of 2010, S. 3827, 111th Cong. (2d Sess. 2010); *Consideration of Deferred Action*, *supra* note 69.

<sup>228</sup> President Obama has enlisted this phrase repeatedly in discussions of the DREAM Act and DACA. For example, he stated: “One thing that I’m very clear about is that young people who are brought here through *no fault of their own*, who have gone to school here, pledged allegiance to our flag, want to serve in our military, want to go to school and contribute to our society, that they shouldn’t be under the cloud of deportation, that we should give them every opportunity to earn their citizenship.” President Barack Obama, Remarks by the President in a News Conference (Nov. 14, 2012) (emphasis added), *available at* <http://www.whitehouse.gov/the-press-office/2012/11/14/remarks-president-news-conference>.

<sup>229</sup> *Consideration of Deferred Action*, *supra* note 69.

<sup>230</sup> *Exodus* 20:5 (King James). “Sins of the father” or “sins of their fathers” is a popular phrase broadly used to absolve responsibility from children for situations resulting from their parents’ actions or choices.

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valedictorian, are excluded from benefiting from legislation.<sup>231</sup> As one youth leader, Jorge, said, "I am a normal teen, but getting in trouble is a luxury for me."<sup>232</sup> Being an innocent victim has become the legislative gold standard. Further, the demonization of unauthorized parents has profound consequences on the inter-generational relationships between DREAMers and their parents in which youth may benefit from some legal remedies while their parents remain excluded.<sup>233</sup>

The vocal and highly visible activism of DREAMers undermines the image of the docile dependent child as depicted in *Flores v. Reno* and *Plyler v. Doe*. Modeled after the Lesbian, Gay, Bisexual, and Transgender community, undocumented youth began to come "out" publicly regarding their (un)documented status.<sup>234</sup> In public rallies, congressional sit-ins, teach-ins, and online, youth have emerged from the proverbial shadows of their parents, out of both desperation and hope, that they may live lawfully and permanently in the country where they were raised.<sup>235</sup> Educated and socialized in America, DREAMers embrace civic participation as the vehicle for social change and publicly demand resolution to their tentative legal status in the United States.<sup>236</sup> At a rally of DREAMers, another youth, Sofia, declared in defiance, "You gave me this label without asking my permission."<sup>237</sup> In Sofia's statement, "you" refers to the law that has deemed her ineligible for self-actualization. By noting the lack of permission, Sofia asks the listener to recognize the denial of her agency by virtue of her minor and unauthorized status. She

<sup>231</sup> In a separate study, the author conducted one-on-one interviews with 26 youth who self-identify as DREAMers. The author attended conferences, rallies, presentations, and organizational meetings of youth organizers between 2008-2012.

<sup>232</sup> Interview with Jorge (pseudonym provided pursuant to confidentiality provisions of the Johns Hopkins Institutional Review Board) in Chi., Ill. (Sept. 2010) (interview transcripts are on file with the author).

<sup>233</sup> See *supra* note 231.

<sup>234</sup> See *supra* note 231. It is from this fieldwork that the author recounts youth sentiments of coming out as undocumented in the public sphere.

<sup>235</sup> See *supra* note 231.

<sup>236</sup> See *supra* note 231.

<sup>237</sup> Interview with Sofia (a pseudonym provided by the speaker), Public Rally Participant, in Chi., Ill. (Aug. 2009) (field notes on file with the author).

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went on to describe how her illegality was an emotional paralysis passed from one generation to the next in which she moved through the shadows with her head held down, never making contact with the police despite a pressing need to do so in her gang-affected neighborhood.<sup>238</sup> “In coming out about my status, I stand before you, not powerless but powerful, not vulnerable but fierce, not a criminal but an activist, not afraid but committed to a better tomorrow.”<sup>239</sup> Sofia resists the law labeling her simultaneously as a powerless victim of her parents’ decisions and as an outlaw hiding from the long arm of the law.<sup>240</sup>

### VII. Conclusion

Ascribing agency only in terms of delinquency or moral rectitude not only fails to reflect the realities of youth like Mario, Jorge, and Sofia, but also carries considerable risks. Without an acknowledgement of how knowledge, responsibility, and choice are culturally informed notions, advocates and law enforcement alike misrepresent a child or youth’s agency and ultimately misunderstand the reasons for child migration. On the one hand, advocates explicitly summon a restoration of the blameless approach toward delinquency,<sup>241</sup> in which structural inequality and implicitly racist policies characterize delinquency and in which a child’s agency appears only marginally relevant, if at all. The child victim in need of saving usurps power from the child and places it in the hands of the advocate “to give voice” to victimized children. As anthropologist Laura Agustín argues, victimization as a strategy has become a way of characterizing people with structurally less access to power,<sup>242</sup> but does not mean that children do not make decisions and that those decisions are influenced by a variety of factors and relationships.

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<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 139 (1997).

<sup>242</sup> Agustín, *supra* note 217, at 30.



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On the other hand, the practices of law enforcement convey that a child's agency is equivalent to responsibility for one's criminal actions, whether real or potential. The ways that both advocates and law enforcement enlist agency highlights the complexity and, at times, non-translatability of the concept of pure agency into law. Legal argumentation makes use of claims to agency or a lack of agency to secure or to deny particular rights for subjects. In effect, there is a moral weight or value assigned to agency by both advocates and law enforcement alike that shifts contingent on the context of the law and the particular legal struggles of youth. In such a landscape, the two approaches are at such loggerheads that it emboldens the perception that the legal and child welfare systems must necessarily remain irreconcilable.

In order to draw migrant children and youth from the margins of the state, it is important to examine the ways in which both agency and rights are critical, yet unstable, categories of analysis. This Article has argued that children are social actors not easily contained by exclusive analyses of family units, yet are informed by their relationality to social networks and the state. The Author's research with migrant children and youth reveal that children are shaped by their cultural, social, and political contexts, and like adults, are embedded in intricate webs of meaning. Children and youth are active and creative subjects that engage in constant negotiation with other "stakeholders," including the state. In this study, migrant children and youth routinely evade, resist, and transform the law and institutional practices that attempt to discipline them.

Without such a fluid, multiple, and contextualized conceptualization of agency and actor, there is a significant risk of continuing to locate the problem within the migrant child or the migrant family, rather than the ways in which the state and civil society may condition and undermine "national values" of family integrity, equal rights, and a pursuit of justice. As explicitly seen in the *Flores* Settlement Agreement, *Plyler v. Doe*, Mario's narrative, and the activism of DREAMers, the notion of social agency shifts ground and valence as it rubs against different claims and interests that also run through the law. Without a historically situated and culturally informed discussion of child migration, the highly

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politicized and moralized debates over social agency and responsibility force children “along a road with no exit.”<sup>243</sup>

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<sup>243</sup> *Suenos Rotos*, *supra* note 2.