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Denormalizing Harm to Migrant Children in the U.S. Immigration System: A Comparative Perspective

*Sarah Diaz** & *Oneida Vargas*[∞]

I. INTRODUCTION

The United States (“U.S.”) has a rich history of being one of the first nations to recognize the rights and humanity of children. While U.S. judicial systems for children remain imperfect,¹ we can all recognize that children and youth hold a special place in American legal systems. Children are not treated merely as adults in miniature but are instead recognized as developing bodies and minds—vulnerable and in need of protection, yet entitled to and deserving of the right to be heard and have their best interests considered. Recognition that children are not merely miniature adults permeates every U.S. legal setting except for one: the immigration system. The U.S. immigration system remains an outlier—a complex, dysfunctional system with extraordinary stakes and few protections specially tailored to the rights and needs of children. The normalization of the failure to treat migrant children as children first has led to a legal experience for migrant children that can be adequately described as encountering sustained systemic violence. Through the juxtaposition of other domestic child-serving systems’ practices with the experience of the migrant child, we hope to illuminate the extent to which migrant children experience harm and to denormalize that violence within the U.S. immigration system.

The U.S. Supreme Court has acknowledged that “history is replete with laws and judicial recognition that children cannot be viewed simply as miniature adults.”² Dating

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¹ See generally Ben Wiseman, *US States Fail to Protect Children’s Rights*, HUMAN RIGHTS WATCH (Sep. 13, 2022), <https://www.hrw.org/news/2022/09/13/us-states-fail-protect-children-rights>

² *JDB v. North Carolina*, 564 U.S. 261, 262 (2011).

back to 1875, before any laws of that nature were on the books, non-government institutions began committing themselves to child protection.³ In an attempt to identify and support children in need of protection, several measures unfolded between the era of the New Deal and contemporary times to bring about a court system committed exclusively to ensuring that vulnerable children are kept safe. Simultaneously, the world's first juvenile court appeared in Chicago in 1899 with jurisdiction over criminal offenses committed by juveniles—ushering in a new era of judicial philosophy around the treatment of children under the law.⁴ Juvenile courts sought to avoid hearing children's criminal cases—and watching children's sentences being carried out—alongside hardened adult offenders.⁵ These approaches to working with children under U.S. jurisprudence continued to evolve over time. Yet, they were established with the same fundamental principles as bedrock: 1) children are inherently different from adults; and 2) children should receive protection and understanding—even when adjudicating acts by the child that might conflict with the law.

In the immigration process, however, the U.S. government fails to recognize that “children cannot be viewed simply as miniature adults.”⁶ From apprehension to adjudication, at nearly every step of the process, the immigration infrastructure proceeds by treating immigrant children as immigrants first, failing to recognize their youth or vulnerability. The immigration system remains untouched by the advances of social science that have brought about changes in other child-serving systems. The result is predictable. Migrant children experience systemic violence and absurd, inappropriate results that have been sought to be eliminated in other child-serving systems. The following story is derived from a compilation of all migrant children's cases and meant to highlight key distinctions in the immigration system that diverge from practices in other child-serving legal systems.

Maya is a 9-year-old girl from Honduras. She never knew her father, and her mother came to the United States when she was just 2 years old. Since that time, Maya has lived with her grandmother. Recently, she and her grandmother began receiving threats to their lives because her grandmother is associated with a neighborhood watch program in their hometown. The threats grew worse and her grandmother was beaten in front of her. Eventually, Maya was kidnapped on her way home from school and returned to her grandmother the following day with the message to stop her neighborhood watch program. After this, Maya and her grandmother fled to the United States. At the border, Maya was forcibly separated from her grandmother and placed in a congregate care detention facility. Her mom has stepped forward to sponsor her, but she lives in an arrangement that the government states is not acceptable for the child. Specifically, the government says

³ John E.B. Myers, *A Short History of Child Protection in America*, 42 *Fam. L.Q.* 449, 449 (2008).

⁴ *Id.* at 452.

⁵ Quinn Myers, *How Chicago Women Created The World's First Juvenile Justice System*, NPR (May 13, 2019), <https://www.npr.org/local/309/2019/05/13/722351881/how-chicago-women-created-the-world-s-first-juvenile-justice-system>.

⁶ JDB, *supra* note 2, at 262.

there are too many people living in the apartment, and—until that is resolved—Maya has been in congregate care for several weeks but must continue to remain in detention. While her mother tries to work towards securing Maya's release, Maya appears in court without a lawyer. There is always an attorney for the government who asks the court to proceed on the merits of her case. This means she will eventually have to testify about her kidnapping, about watching her grandmother being beaten, about her fear of return to Honduras—all in an adversarial setting and possibly in an open court. The judges and other courtroom personnel have no training in child development, child trauma, or even comparative law approaches to children in legal settings.

While a composite of many cases, the story above highlights how children experience the immigration legal system including family separation, mandatory detention, and proceedings with a request for safety in an adversarial legal setting.

The following sections are designed to compare and contrast the experiences of migrant children who are treated simply as miniature adults with the children who proceed in legal systems that consider their age, development, and vulnerability. The purpose is twofold: to highlight for immigration practitioners how divergent immigration law is from other practices, and to highlight for practitioners in other child-serving systems how dangerously flawed the immigration legal system is as it exists. The following sections explore how migrant children experience persistent family separation, are subject to mandatory detention, and subject to court practices recognized as harmful to children. By drawing attention to these damaging practices, it is our hope to denormalize harm to migrant children in the U.S. immigration system.

II. THE IMMIGRATION SYSTEM AS IT IS APPLIED TO CHILDREN

When a migrant child enters the U.S., they might do so with a trusted adult such as a parent or legal guardian, a grandparent, an aunt or uncle, or even an adult sibling. If a migrant child is not with a parent or legal guardian, however, they are considered unaccompanied. The U.S. Code employs the dehumanizing term “alien” to refer to an immigrant, including a child under the legal age of 18, for whom “there is no parent or legal guardian in the United States; or no parent or legal guardian in the United States is available to provide care and physical custody.”⁷ This article will refer to these children as unaccompanied children or migrant children, rather than aliens. While not outright evident from the statutory definition, an unaccompanied child (UC) includes a child reunifying with a parent who is already present in the United States.⁸ To be discussed below, a child who enters with a trusted adult that is not a parent or legal guardian will undergo forced separation from that trusted adult, regardless of the familial relationship.

⁷ Homeland Security Act, 6 U.S.C. § 279(g)(2).

⁸ William A. Kandel, *Unaccompanied Alien Children: An Overview (2021)*, Cong. Rsch. Serv., R43599 (explaining that a child is “classified as unaccompanied if the parent or legal guardian cannot provide immediate care”).

There are three federal administrative agencies responsible for different parts of the child's placement and the outcome of their case: the Department of Homeland Security (DHS), the Department of Health and Human Services (HHS), and the Department of Justice (DOJ).⁹ DHS oversees Customs and Border Patrol (CBP) along with Immigration and Customs Enforcement.¹⁰ Typically, CBP is the first U.S. government agency that a child comes into contact with because CBP is responsible for apprehending and preliminarily detaining the child.¹¹ Afterwards, CBP refers children to HHS's Office of Refugee Resettlement (ORR) which is responsible for the care and placement of the migrant child.¹² The overwhelming majority of children detained by ORR are kept in a congregate care setting. If ORR has "bed space" available for the child, then the child is remanded by DHS to ORR detention placement.¹³ In essence, ORR is the physical custodian of the child throughout their time in detention while DHS prosecutes the child's immigration case.¹⁴ This bears mentioning because ORR's prerogative is not exclusively the child's welfare. ORR is responsible for the welfare of the child whilst the child is in government custody, but the purpose of detention is to satisfy the DHS prerogative of detention and deportation.

In accordance with the Immigration Nationality Act (INA), once detained, DHS initiates removal proceedings pursuant to INA § 240.¹⁵ The DHS must create a charging document, and file it with the DOJ's Executive Office for Immigration Review ("immigration court"), thereby commencing removal proceedings.¹⁶ Upon filing, the court schedules the child for an initial hearing.¹⁷ Typically, the charging document is created within the first 72 hours that CBP detains the child and before they are transferred to the legal custody of the ORR. When the child is in the care of ORR, a local non-profit legal service provider (LSP) will deliver a "know your rights" orientation and a legal screening.¹⁸ The orientation—conducted by either attorneys or paralegals from the LSP—¹⁹ is

⁹ *Id.* at 2.

¹⁰ Amelia Cheatham & Diana Roy, *U.S. Detention of Child Migrants*, COUNCIL ON FOREIGN RELATIONS (Dec. 2, 2021), <https://www.cfr.org/backgrounder/us-detention-child-migrants>.

¹¹ *Id.* See also Kandel, *supra* note 8, at 2.

¹² Kandel, *supra* note 8, at 11.

¹³ *Id.* at 2.

¹⁴ Alison Bowen, *Immigrant Children Crossing the Border Present Perplexing Problems* THE LATIN AM. NEWS DISPATCH (Sep. 2, 2010), <https://latindispatch.com/2010/09/02/immigrant-children-crossing-the-border-present-perplexing-problems/>.

¹⁵ Olga Byrne & Elise Miller, *The Flow of Unaccompanied Children Through the Immigration System A Resource for Practitioners, Policy Makers, and Researchers*, VERA CTR. ON IMMIGR. AND JUST. 1, 22 (March 2012), <https://www.vera.org/downloads/publications/the-flow-of-unaccompanied-children-through-the-immigration-system.pdf>. See generally Immigration and Nationality Act, 8 U.S.C. § 1229(a).

¹⁶ Helen Lawrence et. al., *Strategies for Suppressing Evidence and Terminating Removal Proceedings for Child Clients*, VERA INST. OF JUST. UNACCOMPANIED CHILD. PROGRAM 1, 5 (2015).

¹⁷ Byrne & Miller, *supra* note 15, at 22.

¹⁸ Office of Refugee Resettlement, *Unaccompanied Children Policy Guide Section 3.7* (Jul. 19, 2022), <https://www.acf.hhs.gov/orr/policy-guidance/unaccompanied-children-program-policy-guide-section-3#3.7>.

¹⁹ Byrne & Miller, *supra* note 15, at 23.

presented in the first ten days of admission to ORR, covering topics regarding the immigration process.²⁰ The LSP also conducts the mandatory legal screening to “answer questions about a child’s situation and determine whether legal relief from removal may be available”²¹ and screen for “indicators of mistreatment, exploitation, or trafficking.”²² Thus, with a terse legal screening and a *pro se* orientation, an unaccompanied child proceeds alone on bifurcated law enforcement tracks: one in which the child is detained and seeking release from ORR custody, and one in which the child’s removal from the United States is being sought by DHS.

The number of children encountering the U.S. immigration system has exploded over the last decade and shows no signs of abating.²³ Without addressing the reasons for why child migrants come to the United States (reasons which are usually associated with the child’s safety), it is imperative to note the number of children subjected to this system is extraordinary: in FY2021, CBP reported 146,925 encounters with unaccompanied children.²⁴ Of these encounters, during FY2021, the DHS referred 122,731 youth to the ORR.²⁵ At the end of FY2022, the total number of encounters reached 152,057.²⁶ These six-digit quantities are dramatically higher from a decade ago in 2012 when the DHS referred 13,625 youth to the ORR.²⁷ With hundreds of thousands of children continuously being shuffled through the immigration system, we can no longer ignore the harmful reality of the system’s failure to recognize migrant children as children.

III. EXPLORING THE HARM: FAMILY SEPARATION, MANDATORY CONGREGATE CARE CHILD DETENTION, AND ADJUDICATORY PRACTICES THAT PERSISTENTLY HARM CHILDREN

The domestic U.S. child protection system exists to protect children from harm. State laws serving this function were on the books before the federal government intervened.

²⁰ Office of Refugee Resettlement, Unaccompanied Children Policy Guide Section 3.7 (Jul. 19, 2022), <https://www.acf.hhs.gov/orr/policy-guidance/unaccompanied-children-program-policy-guide-section-3#3.7>.

²¹ Byrne & Miller, *supra* note 15, at 23.

²² OFFICE OF REFUGEE RESETTLEMENT, Unaccompanied Children Policy Guide Section 3.7 (Jul. 19, 2022).

²³ OFFICE OF REFUGEE RESETTLEMENT, *Referrals* <https://www.acf.hhs.gov/orr/about/ucs/facts-and-data> (referring to the referrals from the Department of Homeland Security to the Office of Refugee Resettlement which is the only way children fall into the custody of the Office of Refugee Resettlement); *See generally* Camilo Montoya-Galvez, *Nearly 130,000 Unaccompanied Migrant Children Entered the U.S. Shelter System in 2022, a Record*, CBS NEWS (OCT. 14, 2022), <https://www.cbsnews.com/news/immigration-unaccompanied-migrant-children-record-numbers-us-shelter-system/> (describing the influx of migrants generally which includes children).

²⁴ U.S. CUSTOMS AND BORDER PROTECTION, SOUTHWEST LAND BORDER ENCOUNTERS, <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>.

²⁵ OFFICE OF REFUGEE RESETTLEMENT, *Referrals* <https://www.acf.hhs.gov/orr/about/ucs/facts-and-data>.

²⁶ U.S. CUSTOMS AND BORDER PROTECTION, SOUTHWEST LAND BORDER ENCOUNTERS, <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>.

²⁷ Kandel, *supra* note 8, at 4.

Particularly, states promulgated laws to protect children from child abuse and neglect.²⁸ Inevitably, families were being separated, and in many cases, the separations were completely unnecessary.²⁹ In response, the federal government passed the Adoption Assistance and Child Welfare Act of 1980 to create momentum towards the collective goal to keep families together.³⁰ The most recent domestic efforts to protect children and families can be found in the Family First Prevention Services Act (FFPSA).³¹ FFPSA aims to keep children with their families, and if necessary, use foster homes (family-care settings), instead of defaulting to congregate or group care.³² The focus on keeping children in family care is accomplished by defunding congregate care after two weeks and ensuring family-based placements—either with family or foster care setting. The U.S. government thus recognizes the harm of separation and has actively opted to defund congregate care detention to protect children and families in a domestic setting. Compare this to the experience of migrant children in an immigration system that prioritizes apprehension and detention, in which the average length of stay is currently 30 days and which went as high as 102 days in FY2020.³³ Instead of reducing the use of family separation and congregate care, the immigration system standardizes these practices for children.

A. Migrant Children Experience Persistent Family Separation

Long before it made headlines under the Trump administration, and continuing to this day, migrant children persistently experience family separation. Under federal regulation, a family unit “means a group of two or more “aliens” consisting of a minor or minors accompanied by his/her/their adult parent(s) or legal guardian(s).”³⁴ Thus, DHS is legally allowed to separate children from that family unit if the adult is not the parent or legal guardian, or if that parent or legal guardian cannot prove the relationship to the child.³⁵ Thousands of families are separated at the border each year: children from grandparents, children from adult siblings, children from aunts and uncles or other trusted caregivers who have acted in *loco parentis* for most of the child’s life. The separations are made by

²⁸ Martin Guggenheim, *General Overview of Child Protection Laws in the United States*, 1–3 (ABA) <https://www.americanbar.org/content/dam/aba-cms-dotorg/products/inv/book/224751148/Excerpt%20from%20Chapter%201.pdf/>

²⁹ *Id.* at 3.

³⁰ *Id.*

³¹ See generally *Family First Prevention Services Act*, CHILD WEL. INFO. GATEWAY (last visited Apr. 4, 2023), <https://www.childwelfare.gov/topics/systemwide/laws-policies/federal/family-first/>.

³² *Family First Prevention Services Act*, NAT’L CONF. OF STATE LEGIS. (April 26, 2022), <https://www.ncsl.org/research/human-services/family-first-prevention-services-act-ffpsa.aspx>.

³³ OFFICE OF REFUGEE RESETTLEMENT, *supra* note 27.

³⁴ 8 CFR § 236.3 (Processing, detention, and release of alien minors)

³⁵ *Id.* The federal regulation provides, “In determining the existence of a parental relationship or a legal guardianship for purposes of this definition, DHS will consider all available reliable evidence. If DHS determines that there is insufficient reliable evidence available that confirms the relationship, the minor will be treated as a UAC.” *Id.*

operation of law because there are no child-appropriate considerations under the law (such as best interest of the child standard) or built into the immigration system at any juncture.

1. U.S. Government Policies that Force Migrant Families to Separate

Much has been written on the policy of Zero Tolerance and forcible parent-child separations. This article seeks to point out that the normalization of treating children as merely an extension of their migrant guardian contributed to the permissibility of the Zero Tolerance policy formally announced in 2018. Under the Zero Tolerance policy, ignoring the existence of the child or any rights associated with that child, DHS opted to “refer for prosecution” and remove children from any adult who purportedly entered the U.S. without inspection.³⁶ The “100% prosecution” policy was later revealed as a guide to deliberately harm migrants by taking their children away.³⁷ If DHS was required to consider the best interests of the child, however, the separations would have been exponentially harder to execute. There is, of course, no obligation for DHS to *ever* consider the best interests of a child. The weaponization of immigration law to harm migrant children and families was only possible because there are *zero* child protections built into the immigration legal scheme.

a. Zero Tolerance in Brief

The Zero-Tolerance policy began as a strategy to deter migration by separating children from their parents.³⁸ In the end, thousands of children were forcibly torn from their parents' care, causing irreparable harm to the children.³⁹ Neither tender age nor degree of vulnerability prevented the devastating separations as DHS took adolescents, children, toddlers, and nursing infants alike.⁴⁰ The separations were executed arbitrarily and found to violate the constitutional right to family integrity.

³⁶ Sarah Diaz & Jenny Lee, *Zero Tolerance Atrocity Crimes Against Migrant Children and Families in the United States: An Accountability Framework for Family Separation, Regional Expert Paper Series, Center for Mexico and Central America*, COLUM. U., December 2022, at 1, 28.

³⁷ *Id.*, See William A. Kandel, *The Trump Administration's "Zero Tolerance" Immigration Enforcement Policy* (2021) (DHS's Immigration and Customs Enforcement referred to the “zero tolerance” policy as the 100% prosecution policy”).

³⁸ Julia Edwards Ainsley, *Exclusive: Trump Administration Considering Separating Women, Children at Mexico Border*, REUTERS (Mar. 3, 2017), <https://www.reuters.com/article/us-usa-immigration-children/exclusive-trump-administration-considering-separating-women-children-at-mexico-border-idUSKBN16A2ES>; see also Daniella Diaz, “Kelly: DHS is considering separating undocumented children from their parents at the border.” CNN (March 7, 2017), <http://www.cnn.com/2017/03/06/politics/john-kelly-separating-children-from-parents-immigration-border/index.html>.

³⁹ See generally Sarah A. MacLean et al., *Mental Health of Children Held at a United States Immigration Detention Center*, 230 SOC. SCI. & MED. 303, 303-308, (2019). Trauma resulting from family separation can severely harm a child's development and create harmful consequences that last into adulthood. Research shows that children who experience more adverse experiences during childhood, such as separation from family and detention, are statistically more likely to experience negative behavioral and physical health outcomes as adults. *Id.*

⁴⁰ Kevin Sieff, *The Trump Administration Used an Early, Unreported Program to Separate Migrant Families along a Remote Stretch of the Border*, THE WASH. POST (July 9, 2021),

The number of children separated from their family skyrocketed under the Trump Administration due to specific harmful policies implemented, such as Zero-Tolerance, MPP, and Title 42. Following through with his presidential campaign promises, the Trump administration began strategizing how to deter people from immigrating to the United States. Every single immigration strategy to dissuade people from migrating to the U.S. caused lasting and profound harm⁴¹ to children by separating them from family.

a. *Migrant Protection Protocols and Title 42*

While Zero Tolerance was the only policy that clearly required family separation, Migrant Protection Protocols (MPP) and Title 42 caused family separation in less direct, but equally devastating ways. Six months after the official rescission of Zero Tolerance, under the newly instated MPP policy, immigration officials began returning “non-Mexican asylum seekers to Mexico for the duration of their immigration proceedings.”⁴² Contrary to the name of the policy, there was nothing about this new program that protected migrants seeking asylum.⁴³ Under this policy, tens of thousands of asylum seekers were forced to

<https://www.washingtonpost.com/world/2021/07/09/trump-separated-families-yuma-2017/>; See also Al Otro Lado et al., *The Separation of Family Members Apprehended by or Found Inadmissible While in U.S. Customs and Border Protection (CBP) Custody at the U.S.-Mexico Border* (Dec. 11, 2017), <https://www.womensrefugeecommission.org/research-resources/joint-complaint-on-forcible-separation-of-families-in-customs-and-border-protection-custody/> (Complaint filed by 6 immigrant organizations with DHS).

⁴¹ MacLean, *supra* note 39 (Trauma resulting from family separation can severely harm a child’s development and create harmful consequences that last into adulthood. Research shows that children who experience more adverse experiences during childhood, such as separation from family and detention, are statistically more likely to experience negative behavioral and physical health outcomes as adults); see also *U.S. Government Confirms Migrant Children Experienced Severe Mental Health Issues Following “Family Separation,”* PHYS. FOR HUM. RTS. (Sept. 4, 2019), <https://phr.org/news/u-s-government-confirms-migrant-children-experienced-severe-mental-health-issues-following-family-separation/>; See also *Statement of APA President Regarding Executive Order Rescinding Immigrant Family Separation Policy*, AM. PSYCH. ASSOC. (June 20, 2018), <https://www.apa.org/news/press/releases/2018/06/family-separation-policy>; See generally *Children with Traumatic Separation: Information for Professionals*, THE NAT’L CHILD TRAUMATIC STRESS NETWORK (2016), http://www.nctsn.org/sites/default/files/assets/pdfs/children_with_traumatic_separation_professionals.pdf.

⁴² CENTER FOR THE HUMAN RIGHTS OF CHILDREN, SUBMITTED INPUT AN NGO INPUT TO THE SPECIAL RAPPORTEUR FOR THE HUMAN RIGHTS OF MIGRANTS TO THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS REPORT ON PUSHBACK PRACTICES AND THEIR IMPACT ON THE HUMAN RIGHTS OF MIGRANTS, at 7 (2021), <https://www.luc.edu/media/lucedu/law/centers/chrc/pdfs/UN%20Input%20to%20SR%20on%20Human%20Rights%20of%20Migrants%20-%20Final%20.pdf>; POLICY GUIDANCE IMPLEMENTATION OF THE MIGRANT PROTECTION PROTOCOLS, U.S. DEP’T OF HOMELAND SEC. (Jan. 25, 2019), https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf.

⁴³ Kathryn Hampton, et al., *Forced into Danger: Human Rights Violations Resulting from the U.S. Migrant Protection Protocols*, PHYSICIANS FOR HUMAN RIGHTS (Jan. 19, 2021), <https://phr.org/our-work/resources/forced-into-danger/>. Describing the danger and physical harm people experienced after being returned to Mexico under MPP, such as “physical violence sexual violence, kidnapping, theft,

wait in “MPP camps,” constructed of crude, makeshift tents and plagued by crime, abuse, and poverty. While unaccompanied children were exempt from MPP,⁴⁴ they were not spared from the harms. Hundreds of children who arrived at the southern border with their relatives were rendered “unaccompanied” by U.S. immigration officials in one of two ways: 1) families were forced to send children to seek help alone in the relative safety of the United States; or 2) children arrived at the border with a relative other than their parent or legal guardian.⁴⁵

Title 42 has similar repercussions. Under the guise of public health, the politicization of the COVID-19 pandemic was used to advance the goal of returning immigrant families to Mexico without providing due process⁴⁶ Title 42 of the Public Health Services Act is a public health authority that authorizes the Director of the Centers for Disease Control and Prevention (CDC) to suspend entry of individuals into the U.S. to protect public health.”⁴⁷ Unaccompanied children were initially included in the summary expulsions carried out under Title 42. Thousands of children were sent back to the most dangerous corridor of the world, the U.S.-Mexico border, without a plan for the child’s safety or physical care.⁴⁸ Federal courts eventually determined that unaccompanied children must be exempted from

extortion, threats, and harm to family members.” In addition to “unsanitary and unsafe living conditions, poor access to services, family separations, and poor treatment in U.S. immigration detention.” Leah Chavla & Ursela Ojeda, *Chaos, Confusion and Danger: The Remain in Mexico Program in El Paso*, WOMEN'S REFUGEE COMM'N (May 6, 2019), <https://www.womensrefugeecommission.org/research-resources/chaos-confusion-and-danger/> (Describing the due process issues including impediments to legal representation, unclear and insufficient processes and procedures, non-refoulment interviews, ad hoc procedures for requesting non-refoulment interviews, along with issues with notice and service of legal documents).

⁴⁴ AMERICAN IMMIGRATION COUNCIL, THE ‘MIGRANT PROTECTION PROTOCOLS’ (2022), <https://www.americanimmigrationcouncil.org/research/migrant-protection-protocols>.

⁴⁵ KIND, *Forced Apart: How the “Remain in Mexico” Policy Places Children in Danger and Separates Families*, KIDS IN NEED OF DEFENSE (Feb. 24, 2020), <https://supportkind.org/wp-content/uploads/2020/02/MPP-KIND-2.24updated-003.pdf> [hereinafter *Forced Apart*]; see also *Featured Issue: Migrant Protection Protocols (MPP)*, AM. IMMIGR. LAWS. ASS'N (Oct. 7, 2022), <https://www.aila.org/advo-media/issues/port-courts>. Between the changing presidential administrations and ongoing federal litigation, there have been inconsistencies between the branches of government surrounding the initial termination, reinstatement, and now the official end of MPP. As of August 2022, “DHS confirmed that ‘individuals are no longer being newly enrolled into MPP, and individuals currently in MPP in Mexico will be disenrolled when they return for their scheduled court date. Individuals disenrolled from MPP will continue their removal proceedings in the United States.’” *Id.*

⁴⁶ Zolan Kanno-Youngs & Annie Karni, *Under the Virus's Cloak, Trump Pursues Long-Sought Policies*, N.Y. TIMES (Mar. 20, 2020), <https://www.nytimes.com/2020/03/20/us/politics/trump-virus-conservative-policies.html?action=click&module=RelatedLinks&pgtype=Article>; see also Foreign Quarantine, 42 C.F.R. § 71 (2020).

⁴⁷ Public Health Services Act, 42 U.S.C. 265; Drishti Pillai & Samantha Artiga, *Title 42 and its Impact on Migrant Families*, KAISER FAM. FOUNDATION 1 (May 26, 2022), <https://www.kff.org/racial-equity-and-health-policy/issue-brief/title-42-and-its-impact-on-migrant-families/#:~:text=Title%2042%20may%20also%20be,exempt%20from%20Title%2042%20expulsions.>

⁴⁸ Camilo Montoya-Galvez, *12,212 Migrant Children Entered U.S. Border Custody Alone in 2021 After Being Expelled*, CBS NEWS (May 20, 2022), <https://www.cbsnews.com/news/immigration-migrant-children-us-border-custody-unaccompanied-minors-2021/>.

Title 42. This meant that families who arrived together at the southern border were subjected to expulsion and parents had to make the impossible decision to separate from their children so that their child could seek protection in the relative safety of the U.S.⁴⁹ The staggering number of children who were expelled with their families under Title 42, and then presented themselves unaccompanied at the border, reached an astonishing 12,212 children in FY2021.⁵⁰

1. U.S. Law and Policy Protecting Domestic Families from Separation

The Supreme Court has consistently recognized the importance of the family unit and the right to family integrity as a right subject to disruption only by due process of law.⁵¹ “The liberty interest—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.”⁵² As a result, each state in the U.S. prevents arbitrary, forced separation by requiring a legal proceeding that demonstrates the separation is due to abuse, abandonment, or neglect of the child.⁵³ Many states require an assessment of whether the separation is in the best interest of the child.⁵⁴ Under both international and domestic law, the key to interfering with family integrity lies in the requirement of due process—it simply cannot be done arbitrarily.

To protect family integrity in the domestic child welfare setting, parents are entitled to robust procedural safeguards including notice, in which they are “informed about the reason [they] are being investigated, the outcome of the investigation, and details regarding upcoming court hearings” along with a right to a hearing.⁵⁵ The right to notice stands in stark contrast with a parent’s right in the immigration setting where parents are separated from their children without any prior notice, and at times have been physically separated under false pretenses only to be moved to separate detention centers in different parts of the country.⁵⁶ More importantly, there is no investigation leading up to the separation or any assessment of whether the separation is in the best interests of the

⁴⁹ Erica Bryant, *Children Are Still Being Separated from Their Families at the Border*, VERA INST. OF JUST. (Jun. 23, 2022), <https://www.vera.org/news/children-are-still-being-separated-from-their-families-at-the-border>.

⁵⁰ Montoya-Galvez, *supra* note 48.

⁵¹ See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 767 (1982) (finding that a state “registers no gain toward its declared goals when it separates children from the custody of fit parents”) (quoting *Stanley v. Illinois*, 405 U.S. 645, 652 (1972)).

⁵² *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

⁵³ *Grounds for Involuntary Termination of Parental Rights*, PUBL’N (Child.’s Welfare Info. Gateway), last visited Mar. 18, 2023 at 1, 2.

⁵⁴ *Determining the Best Interests of the Child*, PUBL’N (Child.’s Welfare Info. Gateway), last visited Mar. 18, 2023 at 1.

⁵⁵ *Understanding Child Welfare and the Courts*, PUBL’N (Child.’s Welfare Info. Gateway), last visited Mar. 18, 2023 at 1 [hereinafter *Understanding Welfare*].

⁵⁶ KIND, *Family Separation: Two Years Later, the Crisis Continues*, KIDS IN NEED OF DEFENSE (July 16, 2020), <https://supportkind.org/resources/family-separation-two-years-later-the-crisis-continues/> [hereinafter *Family Separation*].

child, is done to protect the child from abuse or neglect, or will result in harm to the child. Rather, the separation is based on a CBP agent's discretion, by operation of law, or as the result of an immigration enforcement policy. In other words, the separations are completely arbitrary.

There is also no hearing made available to a parent or guardian who has been forcibly separated from their child, no access to counsel, no opportunity to provide evidence that the separation would be harmful, and no other mechanisms available to otherwise prevent protracted separation. In most U.S. states, parents have the right to an attorney (appointed by the court or hired by [them]) to prevent permanent separation.⁵⁷ Parents are not afforded an opportunity to seek counsel in the immigration context because the separation takes place in an unregulated administrative setting. This means that the separation happens unexpectedly at the border, often at the discretion of a border patrol agent, while the parent is subject to administrative, civil custody. If a separated parent is deported without their child, the separation can become permanent, as we learned in the context of Zero Tolerance.

There are no efforts made to properly track separated family members and ensure that they can continue communication after separation. In the domestic child welfare setting, the agencies involved keep records that identify the parent, the child, and any other necessary information.⁵⁸ Unlike the domestic child welfare setting, where child protection agencies have procedures to ensure documentation of the parents' whereabouts and location of the child, DHS officials do not keep these types of records or always share the information with the ORR.⁵⁹ For example, when a federal judge ordered the immediate reunification of families separated by Zero Tolerance, the task was not easily accomplished as the whereabouts and relationships to children were not tracked or were otherwise unknown. Those children whose whereabouts were known to the government were nonetheless unable to communicate with their parents due to a lack of protocols and poor interagency communication.⁶⁰ Over four years later, 200 of those children still remain separated from their parents today.⁶¹ Non-governmental organizations assisting in the reunification of families realized "the federal government had failed to systematically track children and their parents and lacked effective mechanisms to quickly reunify them."⁶² The failure to record basic information regarding the separation resulted in "separations [that] persisted for months beyond the court order, even for very young children."⁶³ This is a direct result of a system that ignores the abject vulnerability of childhood and youth

⁵⁷ *Understanding Welfare*, *supra* note 55.

⁵⁸ Chavla & Ojeda, *supra* note 43.

⁵⁹ *Family Separation*, *supra* note 56 at 5.

⁶⁰ U.S. DEP'T OF HEALTH AND HUM. SERVS., OFF. OF INSPECTOR GEN., COMMUNICATION AND MANAGEMENT CHALLENGES IMPEDED HHS'S RESPONSE TO ZERO-TOLERANCE POLICY (Mar. 5, 2020), <https://oig.hhs.gov/newsroom/news-releases/2020/uac-reunification.asp>.

⁶¹ Young Center for Immigrant Children's Rights, *Family Separation is Not Over*, YOUNG CTR 1, 5 (June 2020).

⁶² *Family Separation*, *supra* note 56.

⁶³ Young Center for Immigrant Children's Rights, *supra* note 61, at 4.

allowing policies and practices that cause children long-term, sometimes irreparable harm.⁶⁴

2. Migrant Children Experience Mandatory, Prolonged Congregate Care Detention

Whether accompanied or alone, “a migrant child’s first contact with government authorities is usually with border guards or immigration enforcement officials who are unlikely to have professional training in child welfare and protection.”⁶⁵ This means that the first agency a vulnerable, unaccompanied child (undoubtedly traumatized by the reasons for their flight and the dangerous journey to the U.S.) encounters is one whose “primary mission is preventing terrorists and terrorist weapons from entering the United States.”⁶⁶ Unsurprisingly, because DHS is meant to stop terrorists and detain people who attempt to enter the U.S. without legal authorization, it is a problematic space in which a child’s detention experience begins.⁶⁷ CBP agents are the first officials to encounter the children, and their mandate is to interrogate the child during an initial interview to gather information on the child and their reason for migrating.⁶⁸ Permitting an untrained law enforcement officer to detain and interrogate a child (using the information they collect against them later in court proceedings) is a byproduct of the system that does not recognize children as children.

Pursuant to the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), CBP is supposed to transfer the children from the congregate care adult detention facility to the custody of the ORR within 72 hours.⁶⁹ Despite the statutory requirement, the U.S. government fails at limiting mixed-adult detention to three days for every single child after identifying them as unaccompanied.⁷⁰ The failure to successfully limit time in detention can be traced to the policies that permitted the DHS to incarcerate every immigrant, the short supply of beds in the ORR facilities for children, and an ill-

⁶⁴ Sarah J. Diaz, Parent-Child Border Separations Violate International Law: Why it Matters and What Can Be Done to Protect Children and Families, 6 GEO. L. HUM. RTS. INST., PERSPS. ON HUM. RTS., 1, 10, 12 (Aug. 2018).

⁶⁵ Gillian Huebner & Rhonda Fleischer, Building Bridges for Every Child: Reception, Care and Services to Support Unaccompanied Children in the United States, UNICEF 4, 19 (Feb. 2021).

⁶⁶ Karen Musalo et al., Childhood and Migration in Central and North America: Causes, Policies, Practices, and Challenges, UNIV. OF CAL. HASTINGS CTR. FOR GENDER & REFUGEE STUDS., 1, 242 (2015).

⁶⁷ Huebner & Fleischer, *supra* note 65, at 20.

⁶⁸ Immigration Brief: Eight Ways to Ease the Child Detention Crisis, VERA INST. OF JUST. 1, 1 (Apr. 2021) [hereinafter VERA INST. OF JUST.].

⁶⁹ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(b)(3) (2008). This section provides that “Except in the case of exceptional circumstances, any department or agency of the Federal Government that has an unaccompanied alien child in custody shall transfer the custody of such child to the Secretary of Health and Human Services not later than 72 hours after determining that such child is an unaccompanied alien child.”

⁷⁰ Caitlin Dickerson, “There Is a Stench”: Soiled Clothes and No Baths for Migrant Children at a Texas Center, N.Y. TIMES (June 21, 2019), <https://www.nytimes.com/2019/06/21/us/migrant-children-border-soap.html>.

equipped immigration system infrastructure to process migrants quicker.⁷¹ Consequently, CBP's guidance for officers on transferring the unaccompanied children out of detention at the southern border reads more like a suggestion.⁷² This suggestion has forced children to be subjected to the horrors of protracted stays in overcrowded adult detention facilities.⁷³ The issues with incarceration at the border are not limited to the lack of appropriate training of CBP officials on child welfare and trauma-informed questioning; there are public health concerns encompassing hygiene and sanitary issues, insufficient medical attention, and the horrid conditions of the facilities.⁷⁴ The severity of the conditions in detention centers cannot be overstated as evidenced by the alarming death of six migrant children, between September 2018 and May 2019, pursuant to the conditions of their stay in CPB detention.⁷⁵

1. All Migrant Children are Subject to Mandatory Detention in Congregate Care Facilities

Following detention by DHS, unaccompanied children are subject to mandatory detention under the custody of ORR and placed, almost exclusively, in congregate care detention facilities.⁷⁶ Currently, there are nearly two hundred licensed facilities across the country that differ in security level, ranging from juvenile county detention center bed space to shelter care bed space.⁷⁷ Every licensed facility is subject to the requirements laid out in the *Flores* Settlement Agreement of 1997. The *Flores* Settlement Agreement came about because of a lawsuit against the U.S. government challenging the propriety of

⁷¹ Abigail Hauslohner & Maria Sacchetti, Hundreds of Minors Held at U.S. Border Facilities are There Beyond Legal Time Limits, WASH. POST (May 30, 2019),

https://www.washingtonpost.com/immigration/hundreds-of-minors-held-at-us-border-facilities-are-there-beyond-legal-time-limits/2019/05/30/381cf6da-8235-11e9-bce7-40b4105f7ca0_story.html.

⁷² U.S. DEP'T OF HOMELAND SEC., U.S. CUSTOMS AND BORDER PROT. NAT'L STANDARDS ON TRANSP., ESCORT, DET., AND SEARCH 1, 22 (Oct. 2015). "Every effort must be made to transfer UACs from CBP to ORR custody as soon as possible, but no later than 72 hours after determining that a child is a UAC. . . The reasons for any detention longer than 72 hours must be logged in the appropriate electronic system(s) of record."

⁷³ See generally The Trump Administration's Child Separation Policy: Substantiated Allegations of Mistreatment: Hearing Before the U.S. House of Representatives Committee on Oversight and Reform, 116th Cong. 1, 2, 8-9 (testimony of Elora Mukherjee, Jerome L. Greene Clinical Professor of Law and Dir. of the Immigrants' Rights Clinic and Columbia Law School).

⁷⁴ Hauslohner & Sacchetti, *supra* note 71; Conditions in Migrant Detention Centers, AMERICAN OVERSIGHT (Jan. 20, 2021), <https://www.americanoversight.org/investigation/conditions-in-migrant-detention-centers#:~:text=Squalid%20conditions%2C%20overcrowding%2C%20cold%20temperatures,administratio n's%20hardline%20anti%20immigration%20stance>.

⁷⁵ See generally Molly Hennessy-Fiske, Six Migrant Children Have Died in U.S. Custody. Here's What We Know About Them, L.A. TIMES (May 24, 2019), <https://www.latimes.com/nation/la-na-migrant-child-border-deaths-20190524-story.html>.

⁷⁶ Swathi Kella, *From the Border, into Foster Care* HARV. POL. REV. 1, 2 (2021),

<https://harvardpolitics.com/from-the-border-into-foster-care/> ("The majority of children who go in ORR custody, who are considered 'unaccompanied,' go into a shelter-type facility, a large shelter or group home.").

⁷⁷ Kella, *supra* note 76, at 5, 6.

detaining migrant children alongside adults.⁷⁸ Since 1997, the settlement agreement has been applied and reinterpreted to cover various detention conditions and release from federal custody—both in the DHS detention center and the ORR facility.⁷⁹ These conditions of care are generally designed to ensure that children, while in congregate detention, are not detained with adults and are provided age-appropriate services. Importantly, the *Flores* settlement requires that immigrant children are placed in the *least restrictive setting*.⁸⁰ The TVPRA codified this requirement for children placed in the custody of ORR and added that the placement be in the child's best interests.⁸¹ This is the only space in which best interests of the child are considered under immigration law.

The *Flores* Settlement shaped the conditions of the ORR facilities today by requiring children to be provided with “notice of rights, safe and sanitary facilities, toilets and sinks, drinking water and food, medical assistance, temperature control, supervision, and contact with family members.”⁸² Yet, even with precedent mandating bare minimum conditions for children in both DHS and ORR detention, both still fail to meet the requirements to provide migrant children with a basic standard of care.⁸³ For example, although the least restrictive setting for a child is not a shelter, children are uniformly placed in congregate care instead of the few foster care beds available.⁸⁴ Between 2015 and 2021, “more than 25,000 [unaccompanied children were] detained in ORR custody for longer than 100 days” in congregate care facilities likely causing mental anguish to children because they did not know when they would be released from the facility.⁸⁵

2. U.S. Law and Policy Prevents Domestic Child Detention

For over a century, all fifty states have had a juvenile justice system that “established a separate system of criminal justice designed to acknowledge the differences” between adults and children in the criminal system.⁸⁶ This is a recognition of the inherent difference

⁷⁸ *Flores v. Reno*, No. CV 85-4544-RJK(Px), slip op. 1, 3-20 (C.D. Cal. filed Jan. 17, 1997), http://www.aclu.org/files/pdfs/immigrants/flores_v_meese_agreement.pdf (stipulated settlement agreement).

⁷⁹ Elizabeth Frankel, *Detention and Deportation with Inadequate Due Process: the Devastating Consequences of Juvenile Involvement with Law Enforcement for Immigrant Youth*, 3 DUKE F. FOR L. AND SOCI. CHANGE 63, 75 (2011), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2427&context=journal_articles.

⁸⁰ *The History of the Flores Settlement*, CTR. FOR IMMIGR. STUD. 1, 6. (Feb. 11, 2019), <https://cis.org/Report/History-Flores-Settlement>.

⁸¹ William Wilberforce Trafficking Victims Protection Act of 2008, 8 U.S.C.A. § 1232(c)(2).

⁸² Abbie Gruwell, *Unaccompanied Minors and the Flores Settlement Agreement: What to Know*, NAT'L CONF. OF STATE LEGIS. (Oct. 30, 2018),

⁸³ Kella, *supra* note 76, at 3, 7.

⁸⁴ *Id.* at 3, 8.

⁸⁵ Stacy Brustin, *A Vision Forward: Policies Needed to Protect the Best Interests of “Category 4” Unaccompanied Immigrant Children*, THE IMMIGRANT & REFUGEE ADVOC. CLINIC AND MIGRATION AND REFUGEE SERV. (2021), <https://law.edu/news-and-events/2021/faculty/2021-0629-faculty-news-brustin-report.html>. R18

⁸⁶ *Youth in the Justice System: An Overview*, JUV. L. CTR., <https://jlc.org/youth-justice-system-overview>.

between children and adults in a system in which the child is “in conflict with the law” including, especially, the harms that befall children pursuant to detention. The following analogy is not meant to imply that migrant children are “in conflict with the law.” They are not. Rather, the analogy is drawn to demonstrate the extent to which protection from detention are offered in the domestic setting, even when children have committed serious offenses. Migrant children seeking safety and protection in the United States have not run afoul of any laws, yet are subject to the harms of detention.

Time and again, research demonstrates detention is harmful to children. Detention can have lasting effects on a child’s cognitive development and can impact their overall wellbeing, physical and mental development, as well as future educational and employment opportunities:⁸⁷ “[detention] has a profound and negative impact on child health and development, and that this damage can occur even if the detention is of relatively short duration.”⁸⁸ For those children that suffer from poor physical or mental health, the effects of detention further exacerbate these conditions and damage the long-term cognitive and physical development of the child.⁸⁹

Recognizing the vulnerability of children, domestic juvenile justice systems generally disfavor detaining children, even when they have committed harmful offenses. While there are specific harsh penalties typically reserved for more severe crimes, young people are normally released to “the custody of a parent or public guardian” after commission of an offense.⁹⁰ For the instances where youth “pose a high risk of re-offending before their trial, or who are seemed likely to not appear for their trial,” they may be placed in a secure detention center.⁹¹

Appreciating the numerous harms on youth who are detained in secure detention centers, jurisdictions across the country are experimenting with the Juvenile Detention Alternatives Initiative.⁹² The purpose of the Initiative “is to make sure that locked detention is used only when necessary” and seeks to accomplish this goal by “[restructuring] the surrounding systems to create improvements that reach far beyond detention alone.”⁹³ Some of the strategies involve inter-governmental collaboration, expedited case processing, and improving conditions of confinement.⁹⁴

⁸⁷ *UNICEF Working Paper: Alternatives to Immigration Detention of Children*, UNICEF (Feb. 2019), [https://www.unicef.org/media/58351/file/Alternatives%20to%20Immigration%20Detention%20of%20Children%20\(ENG\).pdf](https://www.unicef.org/media/58351/file/Alternatives%20to%20Immigration%20Detention%20of%20Children%20(ENG).pdf).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Constitutional Rights for Defendants in the Juvenile Justice System*, JUSTIA, <https://www.justia.com/criminal/offenses/other-crimes/juvenile-crimes/constitutional-rights-for-juvenile-defendants/> (last visited, Apr. 5, 2022).

⁹¹ Barry Holman & Jason Ziedenberg, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities*, 1, 2, JUST. POL’Y INST. https://justicepolicy.org/wp-content/uploads/2022/02/06-11_rep_dangersofdetention_jj.pdf.

⁹² *Id.* at 14.

⁹³ *Id.*

⁹⁴ *Id.*

In the immigration system, migrant children are detained merely because they fall squarely into the statutory definition of an unaccompanied child. Their release from detention is guided by an administrative process which lacks any real judicial review.⁹⁵ As a result, children are exposed to the harms of detention and increased length of separation from their family. Once children enter the immigration system, there is no official end date to their detention.⁹⁶ Instead, ORR's decision to reunify a child with their family may be prolonged for reasons such as failure to place the child in a congregate care facility with sufficient staff to work their case in a timely manner, transferred to another facility for any number of circumstances, or complications in the reunification process.⁹⁷ A child can even be denied release to a parent if the parent fails to comply with ORR administrative hoops, none of which would be permissible in a domestic family reunification under state law.

The current immigration infrastructure into which unaccompanied children enter "largely functions as a law enforcement agency, not a child welfare agency."⁹⁸ The harm inflicted on immigrant children in the DHS detention centers and, despite ORR's best efforts, as a result of mandatory congregate care detention derives from the normalization of treating migrant children as miniature migrant adults.

C. Migrant Children are Subjected to Harmful Court Practices

As noted above, when DHS detains an unaccompanied child, they simultaneously initiate an adversarial court proceeding against the child by serving the child with the charging document and filing it with the court. Under the INA § 240, the government is always represented by DHS counsel, reaffirming the adversarial nature of the proceeding. Migrants have the right to counsel but at no expense to the government. The result is only 37% of all immigrants are able to secure legal counsel in their removal cases.⁹⁹ Migrant children often appear *pro se*¹⁰⁰ and only 15% of unaccompanied children without representation are allowed to remain in the safety of the United States.¹⁰¹

⁹⁵ expert notes last flores settlement agreement litigation allowed for bond but only in theory as ORR has shut this down.

⁹⁶ Frankel, *supra* note 82, at 80.

⁹⁷ Melissa Sanchez, "A failure on all our parts." *Thousands of Immigrant Children Wait in Government Shelters*, PROPUBLICA 1, 2 (Oct. 7, 2022) <https://www.propublica.org/article/immigration-children-shelters-office-refugee-resettlement>. (providing an example of facility transferring Afghan children to another facility after failing to meet their language and mental health needs; *Reimagining Children's Immigration Proceedings A Roadmap for Entirely New System Centered Around Children*, THE YOUNG CTR. FOR IMMIGR. CHILD.'S RTS, 24, (Oct. 2020).

⁹⁸ Kella, *supra* note 79, at 2.

⁹⁹ Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court*, AMERICAN IMMIGR. COUNCIL, 4, (September 2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf.

¹⁰⁰ YOUNG CTR. FOR IMMIGR. CHILD.'S RTS. *supra* note 61; *Reimagining Children's Immigration Proceedings*, *supra* note 100.

¹⁰¹ *American Immigration Council*, *supra* note 103 at 17.

The DOJ does not allow the use of federal funds to pay for attorneys for children:¹⁰² the “government is prohibited [by the INA] from paying for direct legal representation for non-citizens in removal proceedings.”¹⁰³ docket, [OBJ] unaccompanied children still appear before an immigration judge in the same courtroom as adults, following the same adversarial procedures applied to adults and with nearly the same evidentiary and substantive standards as adults.¹⁰⁴ From beginning to end, the U.S. immigration infrastructure standardizes processes that treat children as adults despite the differences in their cases and their overall age and stage of development.

1. *Harmful Immigration Court Practices for Children*

When children do have attorneys, they are often forced to recount the trauma they have reported on multiple occasions beginning with CBP after apprehension, during intake processes with DHS, their ORR case manager, and the legal services provider who first screens them for legal relief.¹⁰⁵ Forcing a child to repeatedly recount their trauma is widely understood to have adverse effects and result in the retraumatization of the child: “[r]etraumatization refers to additional traumatization during a survivor’s interactions with professionals and processes in the justice system and other fields (medical, behavioral health, and services meant to help the [person]).”¹⁰⁶ This is particularly true in cases where children are applying for protection-based claims because the applicant must testify about their experiences to prove to the adjudicator that they meet the statutory burden.¹⁰⁷

¹⁰² Frankel, *supra* note 79, at 81; *Who Is An Unaccompanied Child?* NAT'L IMMIGR. JUST. CTR. <https://immigrantjustice.org/issues/unaccompanied-immigrant-children> (last visited Apr. 5, 2023).

¹⁰³ Olga Byrne & Elise Miller, *The Flow of Unaccompanied Children Through the Immigration System A Resource for Practitioners, Policy Makers, and Researchers* VERA CTR. ON IMMIGR. AND JUST. 22 (March 2012) <https://www.vera.org/downloads/publications/the-flow-of-unaccompanied-children-through-the-immigration-system.pdf>.

¹⁰⁴ *Reimagining Children's Immigration Proceedings*, *supra* note 100.

¹⁰⁵ Author's experience as a former case manager in completing forms such as the Initial Intakes Assessment required by ORR MAP 3.2.1. The assessment contains questions regarding suicide and sexual abuse that we needed to ask within 24 hours to comply with ORR's policy but were normally asked within the first hour of a child's arrival to the facility prior to building any rapport. The ORR cites the purpose of the assessment to obtain information about “any immediate medical or mental health concerns, current medications, and any concerns about personal safety that the child may have at the time.” While gathering this information as soon as possible is important, there was little training or encouragement to ask the questions in a child-friendly manner based on the child's age and ORR's policies do not provide guidance on this issue either. The longer assessment is the UAC Assessment required by ORR MAP 3.3.1 that contains lengthy sections on trafficking, reasons for migration, sexual abuse, and drug abuse. The UAC Assessment took about one hour to complete and needed to be done within the child's first five days in the facility. Office of Refugee resettlement, *ORR Unaccompanied Children Program Policy Guide: Section 3* (Current as of Dec. 23, 2022), <https://www.acf.hhs.gov/orr/policy-guidance/unaccompanied-children-program-policy-guide-section-3#3.2.1>.

¹⁰⁶ Negar Katirai, *Retraumatized in Court*, ARIZ. L. R. 82, 88, (2020); see also Quas, Jodi A., and Gail S. Goodman. “CONSEQUENCES OF CRIMINAL COURT INVOLVEMENT FOR CHILD VICTIMS.” *Psychology, Public Policy, and Law* 18.3 (2012): 392-414. 398

¹⁰⁷ Stephen Paskey, *Telling Refugee Stories: Trauma, Credibility and the Adversarial Adjudication of Claims for Asylum*, 56 SANTA CLARA L. REV. 457, 460 (2016).

Experts estimates that post-traumatic stress disorder and depression impact 25-75% of asylum-seeking youth, making it difficult for unaccompanied youth to tell their story to immigration judges in a consistent, credible manner.¹⁰⁸ Consistency is often perceived as the key to a positive credibility finding in asylum (a negative credibility determination can be fatal to the case). As a result, if the child does have a lawyer, the lawyer will likely prepare their child client by having them relive their trauma over and over to “get the story straight” thereby increasing the chances of getting immigration relief.¹⁰⁹

Moreover, children who were rendered unaccompanied by U.S. government policies, may not know the full story about why they left their home country, making immigration relief more difficult to attain.¹¹⁰ If a child’s parent disappeared or stayed behind in Mexico as a result of a policy such as MPP or Title 42, the child may be experiencing extreme trauma and lack the information necessary to meaningfully participate in their immigration proceedings.¹¹¹ The compounded trauma creates unnecessary risks that children may lose their right to safety in the United States.

2. Domestic Court Analogs Related to Testimony and Child Trauma

Children testify in court for various issues, including family disputes, criminal matters, and civil suits. In immigration court (a civil proceeding), a judge is likely to hear all types of immigration cases for both adults and youth, whereas in “both child welfare and delinquency proceedings, children’s cases are generally heard and adjudicated by judges with specialized training.”¹¹² Child victims of certain types of traumatic harm (child victims of sexual abuse, for example) are often not required to testify in a public hearing.¹¹³ These children may be interviewed by a trauma-informed child specialist on closed circuit television.¹¹⁴ Moreover, the amount of discretion the judges may exercise in their respective proceedings can make a fundamental difference in protection afforded to youth in each court.¹¹⁵ In the juvenile delinquency system, judges may use their discretion to issue an order to avoid detaining youth by requiring community service instead.¹¹⁶

Immigration judges, on the contrary, have little to no training on child or adolescent development, trauma-informed court practices, or training on taking testimony from child victims of crime (such as persecution in the form of rape, witnessing murder of family or

¹⁰⁸ *Reimagining Children’s Immigration Proceedings*, *supra* note 100 at 71.

¹⁰⁹ Stephanie L. Canizales, *Advocating for Asylum-Seeking Children is Traumatic, New Research Finds*, WASH. POST (Mar. 18, 2021), <https://www.washingtonpost.com/politics/2021/03/18/advocating-detained-migrant-children-is-traumatic-new-research-finds/>.

¹¹⁰ *Forced Apart*, *supra* note 45.

¹¹¹ *Id.*

¹¹² *Reimagining Children’s Immigration Proceedings*, *supra* note 100 at 28.

¹¹³ *The Child Witness in the Courtroom*, POL’Y STATEMENT (Robert H. Pantell and Am. Acad. of Pediatrics Comm. on Psych. Aspects of Child and Fam. Health), Mar. 2017, at 1, 2.

¹¹⁴ *Id.*

¹¹⁵ Frankel, *supra* note 79, at 86, 87.

¹¹⁶ *Id.* at 86.

loved ones, having been engaged as a child soldier, etc.). Without training, children are subjected to open trial in which they are first examined by their counsel, if they are represented, and then cross-examined by a DHS trial attorney who will have had extensive training in fraud detection and national security but none related to child development or trauma. Moreover, immigration judges have significant limitations on the discretion they may exercise to avoid deportation if a child does not carry their burden in removal proceedings.¹¹⁷

Despite having no training related to the purpose of juvenile delinquency law, process, and policy, immigration courts consider juvenile records in adjudicating a youth's immigration case.¹¹⁸ Immigration courts view these encounters and records as criminal matters and use this information adversely. This stands in contrast with the juvenile delinquency systems which recognize "that 1) juvenile encounters with law enforcement, whether or not they result in delinquency adjudication, must not be treated as criminal matters; and 2) a young person's character is not fixed and misconduct is not indicative of 'bad character.'"¹¹⁹ The immigration system taking into consideration juvenile records, while applying its limited discretion in the cases of immigrant youth, is dangerous for the youth's case in seeking immigration relief because it could be the deciding factor to deny them relief.¹²⁰

Children of all ages are subject to adversarial court proceedings and potential deportation, regardless of their age or competence. The federal immigration system insists that toddlers and infants can have a fair hearing even if they appear without counsel. Former Chief Immigration for Vulnerable Populations, Judge Jack. H. Weil stated in sworn testimony that "I've taught immigration law literally to 3-year-olds and 4-year-olds... It takes a lot of time. It takes a lot of patience. They get it. It's not the most efficient, but it can be done."¹²¹ Here we see how normalized the treatment of children as adults in miniature has become in the immigration system. It is a glimpse into how ubiquitous the notion that a child, or per Chief Judge Weil a toddler, can navigate the adult immigration system.

IV. CONCLUSION

When comparing domestic child-serving legal systems to the U.S. immigration system, the extent of the lack of protections under immigration law and policy becomes painfully

¹¹⁷ *Id.*

¹¹⁸ Sarah Diaz & Lisa Jacobs, *The Inappropriate Use of Juvenile Records in Immigration Discretion*, 34 CTR. FOR THE HUM. RTS. OF CHILD. 1 (2022) (Immigration officials consider adverse conduct even if it is not a conviction along with arrest reports; Frankel, *supra* note 79, at 5.

¹¹⁹ Diaz & Jacobs, *supra* note 125, at 3.

¹²⁰ *Id.* at 4; Frankel, *supra* note 82, at 86-7.

¹²¹ Jerry Markon, *Can a 3-year-old Represent Herself in Immigration Court? This Judge Thinks So*. THE WASH. POST (Mar. 5, 2016), https://www.washingtonpost.com/world/national-security/can-a-3-year-old-represent-herself-in-immigration-court-this-judge-thinks-so/2016/03/03/5be59a32-db25-11e5-925f-1d10062cc82d_story.html?postshare=9471457105551038&tid=ss_tw-bottom.

apparent. The harm that befalls migrant children who are system-involved is unnecessary and preventable. As the number of children entering the system continues to grow, the resulting violence triggered by a system that fails to recognize children as children will continue to become exacerbated. For example, ORR has announced plans to put a heavy emphasis on the well-being of children through post-release services.¹²² While the intentions are good, the immigration system will now begin to dabble in the release of children to family and, inevitably, the re-apprehension of children when those placements break down. In a system that lacks the goals of the child protection system, the effort will inevitably lead to more family separations post-detention and release. The only way to prevent systemic violence to children is to change the system—to ameliorate the harm by recognizing migrant children for what they are above all else, children.

¹²² The authors have a combined 20+ years in immigration law and policy with a focus on unaccompanied immigrant children. Many of the details of the child immigration process are generally known through practice. Where sources are unavailable, the authors refer to personal knowledge of these processes and events.