

UNACCOMPANIED CHILDREN IN THE
UNITED STATES
A Literature Review

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Executive Summary

Every year in the United States, thousands of noncitizen children who have been separated from their parents or other legal guardians undergo removal (deportation) proceedings before the Executive Office for Immigration Review (EOIR), the office within the Department of Justice that oversees the U.S. immigration courts. Unfortunately, *pro bono* (volunteer) legal services for these “unaccompanied children” are in short supply, and very few of these children have the resources to hire their own legal counsel. As a result, many have no choice but to go through the difficult and intimidating experience of appearing in immigration court without legal representation.

In 2002, when Congress passed the Homeland Security Act, it transferred the care and custody of unaccompanied children from the former Immigration and Naturalization Service (INS) to the Office of Refugee Resettlement (ORR) and in doing so, instructed the ORR to develop a plan to ensure the timely appointment of legal counsel for each unaccompanied child in its custody. In response to this legislative mandate, the ORR asked the Vera Institute of Justice to administer a pilot project, called the Unaccompanied Children Pro Bono Project (UACBPB), which provides *pro bono* legal services to unaccompanied children in removal proceedings through local subcontractors, and to draft a series of recommendations as to how the ORR can provide qualified legal counsel to all such children in a timely manner.

This literature review, which examines articles by an assortment of scholars, advocates, and practicing attorneys, seeks to inform Vera’s work by sketching an overview of the published research on unaccompanied children in the United States. It also seeks to place that overview in its proper legal, institutional, and historical context. The report should be of interest to practitioners, researchers, and scholars whose work touches on immigration issues.

The literature on unaccompanied children in the United States has identified a handful of broad concerns. These include the lack of systematic research on the migration of unaccompanied children; the failure of U.S. immigration law to adopt sufficient child-specific standards; the lack of consensus on the need for child advocates; the absence of the child’s perspective from immigration policy proposals or decisions; the methods used by the Department of Homeland Security (DHS) to classify unaccompanied children; the need for clear policies regulating confidentiality, repatriation, and reunification with family members; the challenges that unaccompanied children in federal custody face in applying for Special Immigrant Juvenile Status; and finally, the lack of legal counsel for unaccompanied children.

The literature also points to substantial improvements in the treatment of unaccompanied children in recent years. These include the introduction of procedural safeguards for children in removal proceedings; a reduction in the use and length of detention and a general improvement in conditions that accompanied the transfer of responsibility for the care and custody of unaccompanied children from the now-defunct INS to the ORR; and an increased awareness of trafficking in children.

Although the existing literature contains a wealth of useful information, there is nonetheless a need for more nuanced research. Our hope is that as more is learned, decision makers will be able to shape policies and practices that more effectively promote the welfare of unaccompanied children in the United States.

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Introduction

Every year in the United States, thousands of noncitizen children who have been separated from their parents or other legal guardians undergo removal (deportation) proceedings before the Executive Office for Immigration Review (EOIR), the office within the Department of Justice that oversees the U.S. immigration courts.¹ These “unaccompanied children” have very different stories: some come to the United States to escape war, famine, poverty, or abuse; some come in search of family members; and some are brought by adults who intend to exploit them.² Unaccompanied children enter the immigration system by other pathways as well: while some are apprehended crossing an international border, others live in the United States for months or years before coming to the attention of federal authorities, often through their involvement with the juvenile justice system.³

Unfortunately, *pro bono* (volunteer) legal services for unaccompanied children are in short supply, and very few of these children have the resources to hire their own legal counsel. As a result, many have no choice but to undergo the difficult and intimidating experience of appearing in immigration court without legal representation.

In 2002, when Congress passed the Homeland Security Act (HSA), it transferred the care and custody of unaccompanied children from the former Immigration and

¹ Over the past decade, the term “removal proceedings” has largely replaced “deportation proceedings.” See Donald Kerwin, “Revisiting the Need for Appointed Counsel,” *Migration Policy Institute* 4 (April 2005): 1-20; Judge J. Daniel Dowell, “Protection and Custody of Children in the United States Immigration Court Proceedings,” *Nova Law Review* 16 (1992): 1285-1297.

² Throughout this report, “unaccompanied children” refers to the same population that the Homeland Security Act of 2002 (HSA) describes as “unaccompanied alien children”: persons under the age of 18 without a parent or legal guardian in the United States or without a parent or legal guardian in the United States who is able to provide care and physical custody. See 6 U.S.C. §279(g)(2). However, it should be noted that some authors prefer the term “separated children,” which includes all children who are separated from their parents or caregivers, regardless of whether they were accompanied by an adult when crossing an international border. See Susan Schmidt, *Separated Refugee Children in the United States: Challenges and Opportunities*, (Bridging Refugee Youth and Children’s Services, 2004). Furthermore, in the Immigration and Nationality Act, the terms “minor,” “juvenile,” and “child” are used on an inconsistent basis. For example, “minor” is variously used to describe people under age 14, people under age 18, and people under age 21. See David B. Thronson, “Kids Will Be Kids? Reconsidering Conceptions of Children’s Rights Underlying Immigration Law,” *Ohio State Law Journal* 63 (2002): 979-1016; Joyce Koo Dalrymple, “Seeking Asylum Alone: Using the Best Interests of the Child Principle to Protect Unaccompanied Minors,” *Boston College Third World Law Journal* 26 (2006): 131-168. In this report, the terms “minor” and “juvenile” will be used only in direct quotations from the law or the literature. The term “child” (or “children”) will be used more generally throughout.

³ Jacqueline Bhabha and Susan Schmidt, *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in the U.S.* (Cambridge, MA: Harvard University Committee on Human Rights Studies, 2006); Sarah Maloney, “TransAtlantic Workshop on ‘Unaccompanied/Separated Children’: Comparative Policies and Practices in North America and Europe,” *Journal of Refugee Studies* 15 (2002): 102-119; Christopher Nugent, “Whose Children Are These? Towards Ensuring the Best Interests and Empowerment of Unaccompanied Alien Children,” *Boston University Public Interest Law Journal* 15 (Spring 2006): 219-235.

Naturalization Service (INS) to the Office of Refugee Resettlement (ORR) and in doing so, instructed the ORR to develop a plan to ensure the timely appointment of legal counsel for each unaccompanied child in its custody.⁴ In response to this legislative mandate, the ORR has contracted with the Vera Institute of Justice to administer the Unaccompanied Children Pro Bono Project (UACPBP), which provides *pro bono* legal services to unaccompanied children through local subcontractors.⁵ Through its administration of the UACPBP and related research on unaccompanied children, the Vera Institute has also been asked to draft a series of recommendations as to how the ORR can provide qualified legal counsel to all unaccompanied children in a timely manner, consistent with the requirements of the HSA.

This report seeks to inform Vera's work by sketching an overview of the published literature on unaccompanied children in the United States. It also seeks to place that overview in its proper legal, institutional, and historical context. The report will be of interest to practitioners, researchers, and scholars whose work touches on immigration issues, particularly if that work involves the study or representation of unaccompanied children.

The articles we have reviewed here were written by an assortment of scholars, advocates, and practicing attorneys and published in a variety of legal and social science journals. Most of them take the issue of unaccompanied children in the United States as their primary focus.⁶ (There is a wealth of literature on unaccompanied children from an international perspective, but only those articles that discussed these children in the context of the U.S. immigration system were included in this review.)

A number of common themes arise in these articles. In this report, we have organized these themes into the following five categories: the migration of unaccompanied children to the United States; U.S. immigration law and its relation to international and domestic legal standards (especially the "best interests" principle); the detention, release, and repatriation of unaccompanied children; forms of relief for unaccompanied children; and legal representation for unaccompanied children.

⁴ The Homeland Security Act of 2002 charges the ORR with creating and submitting to Congress a plan for ensuring that each unaccompanied child in ORR custody is appointed qualified and independent legal counsel in a timely manner. See 6 U.S.C. §279(b)(1)(A).

⁵ As of March 2008, the Vera Institute subcontracted with 10 different legal services agencies across the country. These subcontractors sponsor Know Your Rights presentations, screen unaccompanied children for eligibility for various forms of legal relief, and make referrals to *pro bono* attorneys. (Subcontractors are currently prohibited from using ORR funds to provide direct legal representation. However, some do use funding from other sources for this purpose.)

⁶ We also discuss a handful of articles which, while not primarily concerned with unaccompanied children, nonetheless help clarify certain issues that affect them (such as the effects of legal representation on immigration court outcomes).

Migration of Unaccompanied Children

In the United States and other developed countries, the majority of unaccompanied children have historically arrived through planned resettlement programs. Since the beginning of World War II, the United States has administered several such programs for children. Examples include the evacuation of British children in 1940 during the Battle of Britain, the evacuation of more than 14,000 Cuban children in the wake of the 1961 Bay of Pigs invasion, and the evacuation of more than 2,500 Vietnamese children in 1975 at the end of the Vietnam War (“Operation Babylift”).⁷ However, the phenomenon of unaccompanied children arriving outside of planned resettlement programs went largely unnoticed—and consequently, unmeasured—until quite recently.⁸

In the 1980s, unaccompanied children began to arrive in the United States in increasing numbers, many of them fleeing civil wars in Central America and the resulting hardships. In response, several government agencies began to develop rough data systems to track these children.⁹

Today, the most commonly cited source of information about unaccompanied children in the United States is the statistical database maintained by the Office of Refugee Resettlement (ORR), which assumed custodial authority of unaccompanied children in 2003, pursuant to the Homeland Security Act of 2002 (HSA).¹⁰ ORR statistics show that 7,000 to 9,000 unaccompanied children have been referred to the ORR from the Department of Homeland Security (DHS) each year since 2005. (This figure does not include the large number of Mexican children who choose to be “voluntarily returned” to Mexico at the U.S. border, and thus never enter ORR custody.)¹¹ In 2006, approximately

⁷ Daniel J. Steinbock, “The Admission of Unaccompanied Children into the United States,” *Yale Law & Policy Review* 7 (1989): 137-200; Bhabha and Schmidt, 2006.

⁸ Bhabha and Schmidt, 2006.

⁹ *Ibid.*

¹⁰ Section 462(b)(1)(J) of the Homeland Security Act provides that the ORR shall maintain statistical information and other data on unaccompanied children, including “biographical information, such as a child's name, gender, date of birth, country of birth, and country of habitual residence; the date on which the child came into Federal custody by reason of his or her immigration status; information relating to the child's placement, removal, or release from each facility in which the child has resided; in any case in which the child is placed in detention or released, an explanation relating to the detention or release; and the disposition of any actions in which the child is the subject.” 6 U.S.C. §279(b)(1)(J).

¹¹ According to a 2007 report by the Congressional Research Service, U.S. Customs and Border Protection (CBP) has apprehended more than 86,000 juveniles—a category that includes both unaccompanied and accompanied children—each year since 2001. Approximately four out of five of these juveniles were Mexican nationals. See Chad C. Haddal, *Unaccompanied Alien Children: Policies and Issues*, Washington, DC: Congressional Research Service, 2007, RL33896 <http://assets.opencrs.com/rpts/RL33896_20070301.pdf> (18 January 2008). For more information on the identification, apprehension, and detention of unaccompanied children, see the “Detention, Release, and Repatriation” section of this report.

85 percent of children in ORR custody came from El Salvador, Guatemala, or Honduras.¹² According to Bhabha and Schmidt, most entered the United States by way of the Mexican border, traveling by foot, train, or motor vehicle.¹³

As some observers have pointed out, though, ORR statistics do not paint a complete portrait of the migration of unaccompanied children. For one, they are not comprehensive; each government agency that comes into contact with unaccompanied children keeps its own records.¹⁴ For example, ORR statistics do not include those children who are apprehended by the DHS but never referred to the ORR.¹⁵ Researchers' efforts to obtain data about children apprehended by the DHS have thus far been unsuccessful.¹⁶

Another problem concerns the fact that most government statistics—whether from the ORR or other agencies—have had little to say about unaccompanied children who do not come into contact with the authorities. This problem is not unique to the United States: in the late 1980s and early 1990s, many countries noted an increase in the migration of unaccompanied children and subsequently began to study the phenomenon. However,

¹² Studies have found that unaccompanied children generally move from developing nations to North America and Europe and that each North American or European country tends to attract children from specific parts of the developing world. The United Kingdom, for instance, has received large numbers of children who were forced to serve as child soldiers in Somalia and the Sudan, while the Netherlands has attracted children mostly from Angola and China. See Maloney, 2002.

¹³ Unaccompanied children from Africa, Asia, or Europe often enter the United States by this pathway as well, traveling first to Central America before crossing the Mexican border. See Bhabha and Schmidt, 2006.

¹⁴ According to Bhabha and Schmidt, there are at least four major government departments and 15 government agencies within those departments that interact with unaccompanied children in some way. Bhabha and Schmidt further point to a lack of coordination in data gathering, management, and tracking, noting that each federal agency maintains its own information management system and that there is no apparent effort to develop compatible systems. See Bhabha and Schmidt, 2006.

¹⁵ After the DHS apprehends a child it suspects of violating immigration laws (whether at a border or within the United States), it must determine whether the child is unaccompanied. Children who are determined to be unaccompanied are referred to ORR custody, while children who are determined to be accompanied remain in DHS custody. Some advocates believe that children who do satisfy the definition of unaccompanied set forth in the Homeland Security Act are sometimes misclassified by the DHS, with the result that they are not referred to ORR custody. For more information on the apprehension and legal custody of unaccompanied children and the role of the DHS, including possible reasons why some children are not referred to the custody of the ORR, see the “Detention, Release, and Repatriation” section of this report.

¹⁶ Bhabha and Schmidt sought access to DHS data, but their request was denied. See Bhabha and Schmidt, 2006. However, because children who are apprehended by the DHS but not referred to the ORR are required to undergo removal proceedings before an immigration judge, it is likely that data from the Executive Office for Immigration Review (EOIR), the office of the Department of Justice that oversees the immigration courts, can supply some of the gaps in ORR statistics. Unfortunately, EOIR records do not consistently distinguish between children and adults, nor do they record the age or birth date of petitioners in the immigration courts. As part of its research for the Unaccompanied Children Pro Bono Project, Vera is collecting and merging data from EOIR and the ORR. We expect that this process will help identify unaccompanied children in immigration court.

most of these studies focused on child asylum seekers who had come into contact with the authorities.¹⁷ Many observers have since cited the need for research that would take into account unaccompanied children who do not come into contact with the authorities, thus providing more reliable information about how many unaccompanied children arrive in a given country each year, who these children are, where they are living, where they come from, and why they traveled.¹⁸

¹⁷ Maloney, 2002. In 2001, for example, the United Nations High Commissioner for Refugees (UNHCR) began collecting some statistics on unaccompanied child asylum seekers and now has figures from 28 European countries. (Due to problems with the comparability and availability of data from different government sources, UNHCR does not collect information on unaccompanied children for the United States.) See Bhabha and Schmidt, 2006.

¹⁸ Maloney, for example, notes that many of the diverse group of experts—among them academics, practitioners, politicians, government officials, and representatives from international and non-governmental organizations—who attended a seminal 2001 workshop on unaccompanied children cited the need for further research. See Maloney, 2002.

Children's Rights and the Best Interests Principle

Before the early twentieth century, children had very few legal rights. In fact, most legal codes regarded children as the property of their parents, with no legal identity of their own.¹⁹ That began to change in the early and middle part of the twentieth century, as children came to be valued as persons in their own right.²⁰ This cultural shift was particularly dramatic in the aftermath of World War II, when the suffering of young people attracted international attention and a movement to establish an international human rights treaty for children gained momentum.²¹

International law

The international movement to provide a legal basis for children's rights came to fruition in 1959 with the passage of the Declaration of the Rights of the Child (DROC) by the United Nations (UN) General Assembly. The DROC later served as the precursor for the 1989 UN Convention on the Rights of the Child (CRC), which is widely considered to be the most important international treaty concerning the human rights of children.²²

The CRC is founded on the "best interests of the child" principle (or simply the best interests principle), a legal standard that seeks to ensure the protection and welfare of children even when that means restricting parental control. In particular, the CRC provides that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interests of the child shall be the primary consideration."²³ The CRC also provides that a child's articulation of his or her own views ought to be considered in legal proceedings—a point of procedure that has long been associated with the best interests principle.²⁴

¹⁹ Thronson, 2002; Crystal J. Gates, "Working Toward a Global Discourse on Children's Rights: The Problem of Unaccompanied Children and the International Response to Their Plight," *Indiana Journal of Global Legal Studies* 7 (1999): 299-334.

²⁰ Gates, 1999.

²¹ Ibid.

²² Amnesty International, *Why Am I Here? Children in Immigration Detention*, (New York: Amnesty International USA, June 2003).

²³ United Nations Office of the High Commissioner for Human Rights, *Convention on the Rights of the Child* (A/RES/44/25). 20 November 1989 <<http://www.unhcr.ch/html/menu3/b/k2crc.htm>> (7 September 2007). According to Dalrymple, this provision indicates that the best interests principle is relevant not only when determining procedural questions, but also when considering substantive issues of law. See Dalrymple, 2006.

²⁴ Claire L. Workman, "Kids are People Too: Empowering Unaccompanied Minor Aliens Through Legislative Reform," *Washington University Global Studies Law Review* 3 (2004): 223-250; Danuta

The CRC has been signed and ratified by every country in the world except the United States and Somalia, both of which have signed but not ratified it.²⁵ According to Bhabha and Schmidt, the United States, because it is a signatory to the CRC, may not enact legislation that contradicts any of the convention's provisions; it is not, however, required to enforce those provisions in domestic law, as it did not ratify the convention.²⁶ Dalrymple and Carolyn J. Seugling (among others) have argued that the U.S. ought to ratify the CRC, as this would place U.S. law in conformity with international standards regarding the rights of unaccompanied children. Others, however, maintain that the convention abridges parental rights by granting governments too much authority.²⁷

The best interests principle has been incorporated into other aspects of international law as well. In 1997, for example, the United Nations High Commissioner for Refugees explicitly invoked the best interests principle in its *Guidelines on Dealing with Unaccompanied Children Seeking Asylum*. These guidelines recommend that the best interests of the child should be the guiding principle in all custodial or protective actions involving unaccompanied children.²⁸

Best interests principle in the U.S.

In many respects, the recognition of children's rights under U.S. law has paralleled international developments: by the mid to late twentieth century, child protective laws were widespread, and most U.S. states viewed children as legal persons with individual rights, in accordance with the best interests principle. Today, the best interests principle is the overarching doctrine in U.S. family law.²⁹

U.S. immigration law, however, represents an important exception to these developments: while international law and U.S. family law have both adopted the best interests principle, authors we surveyed have pointed out that the U.S. Congress, which regulates immigration policy by enacting immigration laws, has failed to incorporate the best interests principle into substantive U.S. immigration law (with a handful of

Villareal, "Comment, To Protect the Defenseless: The Need for Child-Specific Substantive Standards for Unaccompanied Minor Asylum-Seekers," *Houston Journal of International Law* 26 (2004): 743-746.

²⁵ Thronson, 2002.

²⁶ Bhabha and Schmidt, 2006.

²⁷ Dalrymple, 2006; Carolyn J. Seugling, "Toward a Comprehensive Response to the Transnational Migration of Unaccompanied Minors in the United States," *Vanderbilt Journal on Transnational Law* 37 (2004): 861- 895.

²⁸ See Dalrymple, 2006.

²⁹ A state court judge applying the best interests principle is generally required to balance the following factors: 1) the parent's interest in family integrity; 2) the state's interest in protecting the child; and 3) the child's interest in safety and a stable family environment. The best interests principle is usually applied when there is a finding of abuse or neglect; otherwise, the usual assumption is that the parents are acting in the child's best interests. See Dalrymple, 2006.

exceptions).³⁰ In fact, substantive asylum law makes no distinction whatsoever between adults and children.³¹

As many observers point out, though, some government agencies have issued procedural guidelines (as opposed to laws) that *do* invoke the best interests principle. For example, the Immigration and Naturalization Service's (INS) 1998 *Guidelines for Children's Asylum Claims* (the INS Guidelines) state that the best interests principle "is a useful measure for determining appropriate interview procedures for child asylum seekers." They also establish a number of child-sensitive interviewing procedures.³² According to Dalrymple, the promulgation of these guidelines was an important step in broadening the application of the best interests principle. Additionally, the *Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children*, issued by the Executive Office for Immigration Review (EOIR), state that immigration judges may use the best interests principle at their own discretion "in taking steps to ensure that a 'child-appropriate' hearing environment is established."³³ As several authors have noted, though, neither of these documents has any bearing on the substantive asylum law delineated in the Immigration and Nationality Act.³⁴

Many of the authors we surveyed for this literature review believe that the best interests principle ought to be applied more broadly throughout the U.S. immigration system. There are numerous suggestions for how this might be done. Bhabha, for example, has argued that the best interests principle ought to be the primary consideration in deciding whether to place an unaccompanied child in government custody in a secure

³⁰ Thronson, 2002; Dalrymple, 2006. One exception is the eligibility requirements for Special Immigrant Juvenile Status (SIJS), a form of legal relief for children who have been abused, abandoned, or neglected. For more on SIJS, see the "Forms of Relief for Unaccompanied Children" section of this report. Note also that unaccompanied children are distinguished from adults with respect to immigration custody. Unaccompanied children are referred to the Office of Refugee Resettlement (ORR) for placement in a shelter operated by the ORR's Division of Unaccompanied Children's Services (DUCS), whereas adults are placed in the custody of the Department of Homeland Security. See also Kristine K. Nogosek, "It Takes a World to Raise a Child: A Legal and Public Policy Analysis of American Asylum Legal Standards and Their Impact on Unaccompanied Minor Asylees," *Hamline Law Review* 24 (2000): 1-23.

³¹ Thronson, 2002; Dalrymple, 2006; Bhabha & Schmidt, 2006. For more on unaccompanied children seeking asylum, see the "Forms of Relief for Unaccompanied Children" section of this report.

³² U.S. Immigration and Naturalization Services (INS), *Guidelines for Children's Asylum Claims* (Washington, DC: INS, 1998). The INS Guidelines note that although the "best interests of the child principle" is useful to the interview process, "it does not replace or change the refugee definition in determining substantive eligibility." For more on substantive eligibility for asylum, see the "Forms of Relief for Unaccompanied Children" section of this report.

³³ U.S. Department of Justice (DOJ), *Interim Operating Policies and Procedures Memorandum 04-07: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children* (Washington, DC: DOJ, 2007). These guidelines were initially published in 2004 and were updated in 2007.

³⁴ Nogosek, 2000; Bhabha & Schmidt, 2006; Dalrymple, 2006.

detention facility.³⁵ And Dalrymple has argued that the best interests principle ought to be incorporated into substantive asylum law.³⁶ Others have proposed assigning child advocates or guardians *ad litem* (child welfare professionals charged with advocating the best interests of a child involved in a court proceeding) to cases involving unaccompanied children. In fact, with funding from the ORR, the Chicago-based Immigrant Children’s Advocacy Center is currently running a pilot program to test this approach.³⁷ Finally, Nugent, in advocating for the application of the best interests principle to decisions involving unaccompanied children, draws attention to the fact that the child’s perspective has been absent from policy proposals or decisions and strongly urges legislators and policymakers to take the child’s view into account.³⁸

Although some observers have argued that the best interests principle impinges on parental rights, none of the authors we surveyed advocated this point of view—perhaps because issues of parental rights are largely irrelevant for unaccompanied children.³⁹ At any rate, some authors *did* note that the lack of well-defined criteria for identifying a child’s best interests is a significant concern.⁴⁰

³⁵ Jacqueline Bhabha, *Crossing Borders Alone: The Treatment of Unaccompanied Children in the United States*, Immigration Policy Brief (Washington, DC: American Immigration Law Foundation, 2004).

³⁶ Dalrymple, 2006. Dalrymple argues that the SIJS eligibility requirements could serve as a model for the reform of asylum law. See also Villareal, 2004; Workman, 2004.

³⁷ If enacted by Congress, the Unaccompanied Alien Child Protection Act would establish a similar child advocate program on the national level. According to the text of the bill, child advocates would seek to “take reasonable steps to ensure that the best interests of the child are promoted while the child participates in, or is subject to, proceedings or matters under the Immigration and Nationality Act.” The text of the bill is available at <<http://www.govtrack.us/congress/billtext.xpd?bill=s110-844>>.

³⁸ While unaccompanied children have been interviewed for academic research, their views have not been taken into consideration to evaluate policies and practices concerning their welfare. Nugent, 2006.

³⁹ For more on opposition to the best interests principle (in the context of opposition to the CRC), see Dalrymple, 2006.

⁴⁰ See for example Villareal, 2004. Note also that, while the CRC does not specify criteria for identifying a child’s best interests, UNHCR did recently publish a set of guidelines to help clarify this matter. See UNHCR, *Guidelines on Formal Determination of the Best Interests of the Child*, (Provisional release, 2006).

Detention, Release, and Repatriation

Custodial authority

When unaccompanied children began to arrive in the United States in increasing numbers in the 1980s, they were under the legal custody of the now-defunct Immigration and Naturalization Service (INS). A separate agency, the Community Relations Service (CRS), a division within the Department of Justice, was responsible for their day-to-day care.⁴¹ The INS began to play a more significant role in the day-to-day care of unaccompanied children in 1987, when the two agencies reached an agreement to share the responsibility for providing care and other child welfare related services.⁴² Nine years later, this function was fully integrated into the INS as a result of budget cuts, leaving the former INS with sole responsibility for the care and custody of unaccompanied children.⁴³

In 2002, with immigration policy and border security under increased scrutiny in the aftermath of September 11, 2001, Congress passed the Homeland Security Act (HSA). Among other measures, the HSA created the Department of Homeland Security (DHS), eliminated the INS (a step which had been discussed even before the terrorist attacks), and transferred the immigration and enforcement functions of the former INS to three separate divisions of the DHS: U.S. Citizenship and Immigration Services (CIS), U.S. Immigration and Customs Enforcement (ICE), and U.S. Customs and Border Protection (CBP). With the closing of the INS, responsibility for the care, custody and placement of unaccompanied children was transferred to the Office of Refugee Resettlement (ORR), a division of the Department of Health and Human Services (HHS).⁴⁴ The ORR officially assumed this role on March 1, 2003.

Apprehension and referral to the ORR

The process by which an unaccompanied child is placed in ORR custody begins when the child is apprehended by federal immigration authorities—in other words, one of the subsidiary agencies of the DHS, such as CBP, the U.S. Coast Guard, or ICE—for allegedly violating a U.S. immigration law. Many of these children are apprehended

⁴¹ Bhabha and Schmidt, 2006.

⁴² Human Rights Watch, *Slipping Through the Cracks: Unaccompanied Children Detained by the U.S. Immigration and Naturalization Service*, (New York: Human Rights Watch, April 1997).

⁴³ Bhabha and Schmidt, 2006.

⁴⁴ See 6 U.S.C. §279(a). The Division of Unaccompanied Children's Services (DUCS), a subdivision of the ORR, provides housing and other services to the children. Throughout this report, "ORR" will be used to when referring to broad agency policies and custodial authority generally, while "DUCS" will be used when referring to the shelter facility system.

when trying to enter the United States.⁴⁵ In recent years, though, increasing numbers have been apprehended within U.S. borders.⁴⁶

After a person who appears to be an unaccompanied child is taken into custody, the DHS places that person in a detention facility.⁴⁷ The DHS then initiates a process to determine whether the person is under the age of 18 and unaccompanied.⁴⁸ Once the DHS has determined to its satisfaction that the person in question is indeed an unaccompanied child, it has three to five days to refer that child to ORR custody.⁴⁹ If the DHS finds, on the other hand, that a person is either *not* under the age of 18 or *not* unaccompanied, that person remains in the custody of the DHS.⁵⁰ As Nugent has noted, the DHS thus serves as the “gatekeeper” for admission to ORR custody.⁵¹

⁴⁵ Most of the unaccompanied children who are apprehended when trying to enter the United States are apprehended by CBP while attempting to cross the Mexican border. According to a 2007 report by the Congressional Research Service, CBP has apprehended more than 86,000 juveniles—a category that includes both unaccompanied and accompanied children—each year since 2001. Approximately four out of five of these juveniles were Mexican nationals. A smaller number of unaccompanied children are intercepted while attempting to enter the United States by sea by the U.S. Coast Guard’s Alien Migrant Interdiction program. See Haddal, 2007; Bhabha and Schmidt, 2006.

⁴⁶ Children who are apprehended by ICE within U.S. borders include those who eluded detection when entering the United States without proper documentation as well as those who entered the country lawfully. In many cases, these children come to the attention of federal immigration authorities after becoming involved in the juvenile justice system. According to Bhabha and Schmidt, little is known on a national level about children who come to the attention of the immigration authorities through the juvenile justice system. See Bhabha and Schmidt, 2006; Haddal, 2007; National Collaboration for Youth and National Juvenile Justice Network, *Undocumented Immigrant Youth: Guide for Advocates and Service Providers*, Washington, DC: National Collaboration for Youth, 2006.
<<http://www.nassembly.org/ncy/documents/ImmigrationBrief.pdf>> (18 January 2008).

⁴⁷ The DHS has the authority to release an unaccompanied child within the first 72 hours of custody if it is able to locate a sponsor for the child. Also, if the child wishes to withdraw his or her application for admission to the United States at this time, the DHS will contact the consulate of the child’s home country to make arrangements for the child’s return. Mexican and Canadian nationals who are apprehended in the vicinity of the border have the option to be “voluntarily returned” to their home country with no further legal consequences. See Haddal, 2007; Nugent, 2006.

⁴⁸ Nugent, 2006.

⁴⁹ The Flores Settlement Agreement (see the “Conditions for Detained Children” subsection of this report) allows the DHS three to five days to transfer an unaccompanied child to the ORR. According to Haddal, standard DHS practice has been to transfer the child within 72 hours. However, according to a policy brief by the National Collaboration for Youth and the National Juvenile Justice Network, the DHS does not always adhere to this timeline. See Haddal, 2007; The National Collaboration for Youth and National Juvenile Justice Network, 2006; Bhabha and Schmidt, 2006; Nugent, 2006.

⁵⁰ Note also that the DHS also has the right to detain indefinitely unaccompanied children (and others) it considers to pose a “security threat.” However, very little has been written about children held in ICE or DHS detention facilities (whether during the three to five-day holding period or for a more extended period of time), so not much is known about this population. See Haddal, 2007.

⁵¹ Nugent, 2006.

To determine a child’s age, the DHS (acting through ICE) relies on forensic evidence such as dental exams and/or wrist and bone x-rays—even when other forms of evidence, such as birth certificates and reliable testimony, are available. According to one report, these methods are based on standards derived from an outdated study.⁵² In fact, the use of dental examinations and x-rays to determine a person’s age has been widely criticized by medical experts and several of the authors we surveyed.⁵³ Jennifer Smythe maintains that this approach has led to instances in which children have been wrongly identified as adults.⁵⁴ And Nugent believes that such erroneous classifications have led to subsequent placement of those children in adult detention facilities.⁵⁵ As a result, many medical experts and advocates have argued that the DHS should do away with its current method of assessing the age of unaccompanied children and replace it with a more comprehensive approach that includes, for example, the testimony of the children themselves.⁵⁶ Smythe has further argued that age determinations represent a waste of resources, as millions of tax dollars and thousands of hours of *pro bono* legal work have been spent fighting wrongful determinations.⁵⁷

To determine whether a child is unaccompanied, the DHS relies on the definition of “unaccompanied alien child” set forth in the Homeland Security Act: “a child who has no lawful immigration status in the United States; has not attained 18 years of age; and with respect to 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.”⁵⁸ More specifically, if the DHS finds that a parent or legal guardian was neither present with the child nor “within a geographical proximity” when the child was apprehended, the child is classified as “unaccompanied.”⁵⁹ However, several of the authors we

⁵² Physicians for Human Rights and the Bellevue/New York University Program for Survivors of Torture (PHR), *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers*, (Boston: PHR, June 2003).

⁵³ Physicians for Human Rights and the Bellevue/NYU Program for Survivors of Torture (PHR), June 2003; Bhabha and Schmidt, 2006; Nugent, 2006; Jennifer Smythe, “Age Determination Authority of Unaccompanied Alien Children and the Demand for Legislative Reform,” *Interpreter Releases* 81, no. 23 (2004): 753-762.

⁵⁴ Smythe, 2004.

⁵⁵ Nugent, 2006.

⁵⁶ Smythe, 2004; Bhabha and Schmidt, 2006.

⁵⁷ Smythe, 2004.

⁵⁸ Haddal, 2007; 6 U.S.C. §279(g)(2).

⁵⁹ Haddal, 2007.

surveyed claim that the procedures the DHS uses to determine whether a child is unaccompanied have been inconsistent.⁶⁰

Once a child is transferred to ORR custody, the DHS no longer plays a custodial role. But if the child subsequently undergoes removal proceedings before an immigration judge (as nearly all unaccompanied children do), the DHS, acting through ICE, will prosecute the case on behalf of the government. And if the immigration judge orders the child's removal, the DHS will be responsible for returning the child to his or her home country.⁶¹

Conditions for detained children

According to Bhabha and Schmidt, when the Community Relations Service (CRS) was responsible for the care of unaccompanied children in the 1980s, it housed them in facilities that combined the features of a shelter care facility with those of a detention center.⁶² Later, as the INS assumed increasing responsibility for the care of unaccompanied children, law enforcement priorities began to supersede child welfare considerations.⁶³ According to Bhabha, the United States, when compared with other countries that received significant numbers of unaccompanied children during this period, regularly and systematically detained children for long periods of time under harsh conditions. In fact, some observers have argued that detention under the INS was inhumane and inappropriate for children.⁶⁴ According to Human Rights Watch, the INS placed one third of unaccompanied children (including those with very minor behavior

⁶⁰ Nugent, 2006; Bhabha and Schmidt, 2006. The proposed Unaccompanied Alien Child Protection Act of 2007 (see the "Improving Conditions for Detained Children" section of this report) contains a provision that would require the DHS to train its personnel on how to properly identify unaccompanied children.

⁶¹ Christopher Nugent and Steven Schulman, "A New Era in the Legal Treatment of Alien Children: The Homeland Security and Child Status Protection Acts," *Interpreter Releases* 80, no. 39 (Oct. 8, 2001): 1569-1589; Nugent, 2006; Seugling, 2004.

⁶² Bhabha and Schmidt, 2006. An Amnesty International report, *Why Am I Here: Children in Immigration Detention*, which was written before the ORR assumed custody of unaccompanied children, explains that "shelter care facilities" are typically characterized by the lack of "security fences or security hardware or other major construction typically associated with correctional facilities." Detention centers, on the other hand, tend to resemble full-fledged correctional facilities. See Amnesty International, June 2003.

⁶³ Bhabha and Schmidt, 2006; Nugent, 2006; Women's Commission for Refugee Women & Children (Women's Commission), *Prison Guard or Parent? INS Treatment of Unaccompanied Refugee Children* (New York: Women's Commission, May 2002).

⁶⁴ Nugent, 2006; Women's Commission for Refugee Women & Children, 2002.

problems) in secure juvenile detention centers.⁶⁵ Some of these children were subjected to shackling or handcuffing when transported or appearing in court.⁶⁶

In the view of some, these conditions resulted from a fundamental conflict of interest. Wendy Young and Nugent, for instance, argue that, as the government entity charged with enforcing federal immigration law, the INS was not in a position to promote the welfare of unaccompanied children in its custody.⁶⁷

The Flores Settlement. In 1985, two human rights organizations filed a class action lawsuit challenging INS procedures regarding the detention, treatment, and release of unaccompanied children in its custody.⁶⁸ After several years of litigation, including an appeal to the United States Supreme Court, the parties reached a settlement.⁶⁹

The Flores Settlement imposed several obligations, which fall into three broad categories, on the former INS.⁷⁰ First, the INS was required to release children from immigration detention without unnecessary delay.⁷¹ Second, it was obligated to place children in the “least restrictive” setting appropriate to their age and any special needs. Third, it was required to implement standards relating to the care and treatment of children in immigration detention.⁷²

Many observers concluded that the INS failed to fulfill these obligations. According to Taverna, the Flores Settlement was never formally incorporated into INS policy, even

⁶⁵ Human Rights Watch, “Detained and Deprived of Rights: Children in the Custody of the U.S. Immigration and Naturalization Service,” *Human Rights Watch* 10, no. 4 (G) (New York: Human Rights Watch, December 1998).

⁶⁶ Human Rights First, *In Liberty’s Shadow: U.S. Detention of Asylum Seekers in the Era of Homeland Security* (New York: Human Rights First, 2004); Nugent, 2006.

⁶⁷ For more on the conflict of interest in the old system, see Nugent, 2006; Wendy A. Young, “A Refugee Child at Risk,” *Human Rights Magazine* 28, no. 10 (2001).
<<http://www.abanet.org/irr/hr/winter01/young.html>>.

⁶⁸ Jessica G. Taverna, “Did the Government Finally Get it Right? An Analysis of the Former INS, the Office of Refugee Resettlement and Unaccompanied Minor Aliens’ Due Process Rights.” *William & Mary Bill of Rights Journal* 12 (2004): 939-978.

⁶⁹ In *Reno v. Flores*, 507 U.S. 292 (1993), the Supreme Court upheld the constitutionality of the challenged INS regulations on their face and remanded the case to the district court for further proceedings consistent with its opinion. The parties reached a settlement before the lower court issued a decision.

⁷⁰ The text of the Flores settlement agreement is available at www.centerforhumanrights.org.

⁷¹ The agreement specifies that a child may be released to one of the following parties, in order of preference: a parent; a legal guardian; an adult relative; an adult individual or entity designated by the parent or legal guardian to care for the child; a licensed program willing to accept legal custody; or an adult individual or entity seeking custody, at the discretion of the INS, when there appears to be no other alternative.

⁷² Areti Georgopoulos, “Beyond the Reach of Juvenile Justice: The Crisis Facing Unaccompanied Immigrant Children Detained by the United States,” *Law and Inequality Journal* 23 (2004): 117-155; Taverna, 2004.

though that was specified under the terms of the agreement.⁷³ In 2001, after conducting a nationwide assessment of INS procedures regarding the detention, treatment, and release of unaccompanied children in its custody, the Department of Justice Office of the Inspector General (OIG) found that the INS had fallen short of the requirements set forth in the Flores Settlement. “Although the INS has made significant progress since signing the Flores agreement,” the OIG report stated, “our review found that deficiencies in the handling of juveniles continue to exist in some INS districts, Border Patrol sectors, and [INS] headquarters that could have potentially serious consequences for the well-being of juveniles.”⁷⁴ In particular, the OIG found that the INS had often breached the “least restrictive setting” requirement by ignoring available alternatives in favor of secure facilities and by failing to separate unaccompanied children who had not been involved with the juvenile justice system from those who had been.⁷⁵

Transfer of custody to the ORR. For many years, a broad coalition of human rights organizations, religious groups, and political leaders lobbied for the transfer of the responsibility for the care and custody of unaccompanied children away from the INS and to an agency that was not also charged with enforcing immigration law.⁷⁶ This was accomplished in 2003, when the ORR assumed custodial authority.

Today, under ORR custody, unaccompanied children are placed in licensed facilities that comprise varying levels of security and openness. Most facilities are non-secure shelters. There are also “staff secure” facilities, group facilities, or homes where each child is under continuous staff supervision and where all services—including education and treatment—are provided on site. (Staff secure facilities may or may not be locked.)⁷⁷ Secure detention facilities, which generally house unaccompanied children who have been involved in the juvenile justice system, represent a third type of facility. The ORR has reduced the number of secure detention facilities it uses, from 32 in FY2003 to two in FY2006.⁷⁸ The ORR also provides foster care.⁷⁹

⁷³ Taverna, 2004. Under the terms of the settlement agreement, the INS was to incorporate the Flores standards in its internal regulations within 120 days of final approval by the district court.

⁷⁴ The full report can be found at the Department of Justice web site. See U.S. Department of Justice, “Unaccompanied Juveniles in INS Custody,” Washington, DC: September 28, 2001, <<http://www.usdoj.gov/oig/reports/INS/e0109/index.htm>> (30 August 2007).

⁷⁵ Workman, 2004.

⁷⁶ Amnesty International, 2003. Organizations and political leaders who lobbied for a change in the custodial authority of unaccompanied children included Amnesty International, Human Rights Watch, the Women’s Commission for Refugee Women and Children, the American Bar Association, Lutheran Immigration and Refugee Services (LIRS), the United States Conference of Catholic Bishops (USCCB), Senator Dianne Feinstein, and Senator Edward M. Kennedy.

⁷⁷ Haddal, 2007.

⁷⁸ *Ibid.* However, in the next year, this increased to four secure detention facilities.

Almost all observers cite improved detention conditions since the ORR assumed custody of unaccompanied children in 2003.⁸⁰ According to Bhabha and Schmidt, the overall use of detention, the average amount of time spent in detention, and the proportion of children placed in detention facilities alongside children who are involved with the juvenile justice system have all been reduced.⁸¹ Also, the ORR has discontinued the use of county lock-down juvenile detention centers. According to Nugent, children in DUCS shelters receive education, health care, and opportunities for social activity and recreation, as well as services that address such issues as mental health, family reunification, and trafficking in persons.⁸² Nugent has further maintained that the ORR, which was created by the Refugee Act of 1980 to oversee the placement, financial support, and care of children admitted to the United States through refugee resettlement programs (among other functions), is well suited for its current custodial function.⁸³

As Taverna has pointed out, though, some observers have argued that the transfer of custody to the ORR was an excessive measure. In the view of such critics, the due process rights of unaccompanied children should not outweigh possible threats to national security.⁸⁴

Still others have faulted the ORR for its failure to incorporate the Flores standards into official policies and procedures.⁸⁵ The Flores agreement applies to the INS and its “successors in office,” which include the ORR. As a result, several authors have continued to recommend incorporating the Flores standards into federal policy. According to Workman, this would encourage the speedy release of unaccompanied children from detention and foster care.⁸⁶

Also, as Bhabha and Schmidt make clear, there are continuing concerns about the treatment of unaccompanied children in government custody. One such concern involves

⁷⁹ Ibid. Foster care placements are performed through the Lutheran Immigrant and Refugee Services and the U.S. Conference of Catholic Bishops.

⁸⁰ Christopher Nugent, “Protecting Unaccompanied Immigrant and Refugee Children in the United States,” *Human Rights Magazine* 32 (2005) <<http://www.abanet.org/irr/hr/winter05/immigrant.html>>; Lara Yoder Nafziger, “Protection or Persecution?: The Detention of Unaccompanied Immigrant Children in the United States,” *Hamline Journal of Public Law and Policy* 28 (2006): 357-403; Bhabha and Schmidt, 2006; Taverna, 2004.

⁸¹ Bhabha and Schmidt, 2006.

⁸² Nugent, 2006.

⁸³ Nugent, 2005.

⁸⁴ Taverna, 2004.

⁸⁵ Workman, 2004; Georgopoulos, 2005. According to an ORR fact sheet dated March 2006, ORR policies and procedures are in fact guided by the terms of the Flores settlement agreement. However, as of December 2007 these terms had not been codified in official ORR policy. See Office of Refugee Resettlement Division of Unaccompanied Children's Service Fact Sheet (March 31, 2006).

⁸⁶ Workman, 2004; see also Georgopoulos, 2005.

the length of time that children spend in the custody of either the Border Patrol or ICE before being transferred to the ORR. A September 2005 report by the Office of the Inspector General found that 12 percent of unaccompanied children were held for longer than five days at Border Patrol stations; the report noted that, under the terms of the Flores agreement, children are not to be held longer than 72 hours. Another concern involves the number of unaccompanied children being placed in secure detention when alternatives may be available.⁸⁷

Many observers believe that the Unaccompanied Alien Child Protection Act, first introduced by Senator Dianne Feinstein (D-CA) in 2001, would address some of these concerns.⁸⁸ This proposed legislation would make it illegal to detain unaccompanied children without criminal convictions alongside people—whether adults or children—with criminal convictions. It would also require all custodial facilities to provide education, medical care, and access to phones and interpreters.⁸⁹ As of September 2007, the most recent version of the bill was the Unaccompanied Alien Child Protection Act of 2007, which was under consideration by the Senate Judiciary Committee.⁹⁰

Confidentiality

Several observers have suggested that the DHS does not always respect the confidential nature of unaccompanied children’s personal information.⁹¹ Clinicians, psychologists, and other staff employed at DUCS shelters often obtain sensitive personal information (information pertaining to a history of abuse, for example) from the children in their care. In the course of removal proceedings, the DHS sometimes requests DUCS files for review and has been known to use personal information from those files as evidence against a child’s claim to remain in the United States or to assert a lack of credibility by alleging inconsistencies in a child’s account. While there are many state laws that regulate the confidentiality of relationships between clinicians and their patients, there are no federal standards that do so. Moreover, the ORR does not have clear guidelines on how individual DUCS shelters should respond to file requests from the DHS.⁹² As a result, shelters will sometimes deliver a child’s file to the DHS, which may then use the personal information it has obtained against the child during the child’s removal

⁸⁷ Bhabha and Schmidt, 2006.

⁸⁸ Seugling, 2004; Taverna, 2004.

⁸⁹ Ibid.

⁹⁰ The text of the bill can be found at <http://www.govtrack.us/congress/bill.xpd?bill=s110-844> (7 September 2007).

⁹¹ Haddal, 2007; Nugent, 2006.

⁹² Ibid.

proceedings.⁹³ As Nugent points out, children will be reluctant to share personal information with clinicians or psychologists if they fear it will be used against them.

Soon after the ORR assumed its custodial role, it began working with the DHS on a memorandum of understanding that would address some of these confidentiality issues. However, the conflict between the ORR's privacy concerns and the DHS's security concerns led to a stalemate.⁹⁴ Congress also addressed the issue of confidentiality in a 2005 House report that urged the ORR to maintain the privacy and confidentiality of all information regarding the care, custody, and placement of unaccompanied children.⁹⁵ However, the report's recommendations were not binding. According to Nugent, as of 2006 the ORR was working to draft regulations that would codify its confidentiality policy.⁹⁶

Release from government custody: Reunification with family and repatriation

In general, release from custody takes place in one of two ways: an unaccompanied child is either reunified with family ("released to a sponsor") or repatriated to his or her home country.⁹⁷ Repatriation, in turn, takes place in three different ways: Mexican or Canadian children apprehended near the border may choose to be "voluntarily returned" to their home country; a child may qualify for "voluntary departure" in immigration court; or an immigration court judge may issue a removal order. According to Bhabha and Schmidt, 65 percent of children who were released from DUCS custody in 2004 were reunified with sponsors, while 19 percent were repatriated.⁹⁸

Repatriation is carried out by the DHS. According to Haddal, the standard procedure is for the DHS and the ORR jointly to initiate the repatriation process by contacting the consulate of the child's home country, after which the DHS arranges for transportation. (In the case of Mexican and Canadian children apprehended near the border, the DHS,

⁹³ For example, the DHS may use this information as a basis upon which to deny a child's request for consent to request a state juvenile court to exercise jurisdiction over him. See Nugent, 2006. Obtaining consent to request state court jurisdiction is an essential step in making a claim for Special Immigrant Juvenile Status. See the section "Forms of Relief for Unaccompanied Children" for more information on consent requests related to Special Immigrant Juvenile Status.

⁹⁴ Haddal, 2007.

⁹⁵ HR Report 109-143 (2005).

⁹⁶ Nugent, 2006.

⁹⁷ The literature contains very little information about ORR and DHS procedures for deciding when to release unaccompanied children from custody. Nonetheless, many authors have reiterated that, in deciding when to release unaccompanied children from custody, government agencies are bound to follow the standards set forth in the Flores settlement. See Taverna, 2004.

⁹⁸ Of the remaining 16 percent, six percent attained the age of 18 and thus no longer qualified as "unaccompanied children" and 10 percent were listed as "other." (Bhabha and Schmidt do not specify what this might mean.) See Bhabha and Schmidt, 2006.

acting through Customs and Border Protection, may transfer the child to Mexican or Canadian border protection officials.)⁹⁹

Several advocacy groups have expressed concern that the DHS does not do enough to ensure that unaccompanied children are repatriated safely.¹⁰⁰ And indeed, little is known about what happens to children after they are returned to their home countries.¹⁰¹ Nugent has referred to repatriation as a “black hole where unaccompanied children easily fall through the cracks,” noting that government protocols or standards for ensuring that children are safely returned to their home countries are not publicly available.¹⁰² He further speculates that in some cases, children are removed to dangerous or life-threatening situations without any intervention on the part of U.S. authorities. As Nugent points out, although the DHS has the authority to remove from the United States noncitizens who are found to be in violation of immigration laws, no agency is responsible for deciding whether repatriation would be in an unaccompanied child’s best interests.¹⁰³ In cases where an unaccompanied child’s home country refuses to accept him or her, or where there is no repatriation treaty between the child’s home country and the United States, repatriation cannot take place.¹⁰⁴

⁹⁹ Haddal, 2007.

¹⁰⁰ Haddal, 2007.

¹⁰¹ Elżbieta M. Goździak and Margaret MacDonnell, “Closing the Gaps: The Need to Improve Identification and Services to Child Victims of Trafficking,” *Human Organization* 66, no. 2 (2007): 171-184.

¹⁰² Nugent, 2006.

¹⁰³ Nugent, 2006. According to Bhabha, determining whether repatriation is in a child’s best interest would likely require time and an extensive investigation—unless one takes the view (as several analysts do) that family reunification is always in the child’s best interest, regardless of where the family lives. See Bhabha, 2006.

¹⁰⁴ Taverna, 2004. The author maintains that in such cases where the government is unable to repatriate a person ordered removed, there is a risk of indefinite detention. This issue was addressed by the U.S. Supreme Court in *Zadvydas v. Davis*, 533 U.S. 678 (2001). For a discussion of this case and its implications for unaccompanied children, see Taverna, 2004.

Forms of Relief for Unaccompanied Children

Several forms of legal relief from removal are available for unaccompanied children. Much of the literature focuses on two: asylum and Special Immigrant Juvenile Status (SIJS). In addition, there is a small but emergent body of literature discussing relief for unaccompanied children who are victims of trafficking in persons.¹⁰⁵

Asylum

One form of legal relief that is repeatedly invoked by unaccompanied children is asylum.¹⁰⁶ There are two different types of asylum applications: affirmative applications and defensive applications. To qualify for an affirmative application (a nonadversarial interview at a U.S. Citizenship and Immigration Service (USCIS) asylum office), a child must have entered the United States legally (or have eluded detection by immigration authorities when entering without legal documentation).¹⁰⁷ In all other cases—in other words, whenever the individual entered the United States without documentation and was apprehended at a border or port of entry or within U.S. territory—the asylum seeker must file a defensive application with the immigration judge who is adjudicating his or her removal proceedings. According to Bhabha and Schmidt, the majority of unaccompanied children who seek asylum begin the process in immigration court—in other words, they file defensive applications.¹⁰⁸

Substantive asylum law. Many of the authors we surveyed argue that children who seek asylum in the United States are forced to grapple with a complex system that does little to accommodate their unique needs. In fact, Bhabha and Schmidt have described the system

¹⁰⁵ Other forms of relief from removal for unaccompanied children include the U-Visa for crime victims, as well as various forms of family-sponsored immigration.

¹⁰⁶ While children have the right to apply for asylum, there is some ambiguity as to how old one must be to apply for asylum without parental consent. According to Bo Cooper, the law is clear that an unaccompanied child has a right to seek asylum. However, the question of when (or at what age) an unaccompanied child has the *capacity* to seek asylum remains unresolved. In the *Polovchak* case, the Seventh Circuit found that a 12-year-old boy did have the capacity to seek asylum. In contrast, a federal court determined that Elian Gonzalez, a six-year-old Cuban boy, who became the focus of a high-profile custody battle after he arrived in the U.S. alone in November 1999, did not have the capacity to seek asylum. Bo Cooper, “Office of the General Counsel, Immigration and Naturalization Service, Elian Gonzalez, Memorandum for Doris Meissner, Commissioner,” *International Journal of Refugee Law* 12 (2000): 447-459.

¹⁰⁷ If an asylum officer rejects an affirmative asylum claim, the person will be placed in removal proceedings before an immigration judge where he or she may apply for asylum defensively.

¹⁰⁸ Bhabha and Schmidt, 2006. Bhabha and Schmidt recommend that all children’s asylum claims originate in the USCIS asylum office, which has a nonadversarial setting. The defensive process should be reserved for children’s claims that are denied by the asylum office.

as “Kafkaesque.”¹⁰⁹ The primary difficulty comes from substantive U.S. asylum law, which treats unaccompanied children as adults by default. (When a parent is involved, the law considers the child to be the property of the adult).¹¹⁰ As a result, to qualify for asylum an unaccompanied child must satisfy the usual adult requirements.¹¹¹ That means he or she must meet the definition of refugee outlined in the Immigration and Nationality Act (INA): “any person who is outside any country of such person’s nationality and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”¹¹²

According to many observers, satisfying the adult definition of a refugee presents special challenges for unaccompanied children. For one, unaccompanied children are often unable to articulate their experiences as “persecution.”¹¹³ As Michael A. Olivas notes, unaccompanied children who are asked why they fled their home countries often respond in general terms, referring to their “situation” or “the war.”¹¹⁴ And according to Villareal, even additional questioning or guidance may be of little help if the child has limited knowledge of the conditions in his or her home country.¹¹⁵ In addition, it may be difficult for children to establish that they have a “well-founded fear of persecution,” as this requires them to show not only that they face an objective risk based on their civil or political status, but also that they subjectively experience fear as a result.¹¹⁶

Also, it can be difficult for many unaccompanied children to prove that any persecution they experienced took place “on account of” one of the five grounds

¹⁰⁹ Ibid.

¹¹⁰ Thronson, 2002.

¹¹¹ Michael A. Voss, “Young and Marked for Death: Expanding the Definition of ‘Particular Social Groups’ in Asylum Law to Include Youth Victims of Gang Persecution,” *Rutgers Law Journal* 37 (2005): 235-275.

¹¹² 8 U.S.C. §1101(a)(42)(A); Voss, 2005. According to Seugling, this definition is based on standards that were created with adults in mind and set forth in the 1951 Geneva Convention; see Seugling, 2004. Chad C. Haddal points out, however, that while the statutory requirements are the same for children and adults, children, in contrast to adults, are not required to show malicious intent on the part of the persecutor, nor do they have to show that they sought government protection; see Haddal, 2007.

¹¹³ The INS Guidelines state that the harm a child suffers “may be less than that of an adult and still qualify as persecution. In addition to many forms of persecution an adult may suffer, children may be particularly vulnerable to sexual assault, forced labor, forced prostitution, infanticide, and other forms of human rights violations such as the deprivation of food and medical treatment.” INS Guidelines, 1998.

¹¹⁴ Michael A. Olivas, “Unaccompanied Refugee Children: Detention, Due Process, and Disgrace,” *Stanford Law & Policy Review* 2 (1990): 159-166.

¹¹⁵ Villareal, 2004.

¹¹⁶ Bridgette A. Carr, “We Don’t Need to See Them Cry: Eliminating the Subjective Apprehension Element of the Well-Founded Fear Analysis for Child Refugee Applicants,” *Pepperdine Law Review* 33 (2005/2006): 535-573; Olivas, 1990.

specified in the definition (race, religion, nationality, political opinion, or membership in a particular social group). Age is not specified as a ground for persecution; in fact, the Board of Immigration Appeals and the federal courts have rejected social group claims based primarily or exclusively on age.¹¹⁷ Yet according to Rachel Bien, many children leave their home countries to escape dangers that are either specific to children or exploitative to children though not necessarily to adults.¹¹⁸ Examples of the former include infanticide, child marriage, and being forced to live as a “street child”; examples of the latter include arduous manual labor and service in the armed forces.¹¹⁹ In addition, children may be more vulnerable than adults to gang violence, domestic violence, and sexual exploitation.¹²⁰

Bhabha and Schmidt believe that “membership in a particular social group” is probably the most common basis for children’s asylum claims because it is broader and more malleable than the other four grounds.¹²¹ The Immigration and Nationality Act does not define “particular social group” and the federal circuit courts of appeal are divided in their interpretation of the term.¹²² The Board of Immigration Appeals, in *In re Acosta*, defined “particular social group” to be “a group of persons all of whom share a common, immutable characteristic...that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”¹²³ Later, the First, Third, Sixth, and Seventh Circuits adopted this definition.¹²⁴ The Ninth Circuit adopted a more liberal definition, stating that a particular social group must be formed by voluntary association.¹²⁵ And the Second Circuit also took its own approach to the definition, following the Ninth Circuit and adding that it

¹¹⁷ For example, the Board of Immigration Appeals rejected claims that young Salvadoran men who were urban, working class of military age constituted a particular social group. INS Guidelines, 1998.

¹¹⁸ Rachel Bien, “Nothing to Declare but their Childhood: Reforming U.S. Asylum Law to Protect the Rights of Children,” *Journal of Law and Policy* 12 (2004): 797-841.

¹¹⁹ Bien, 2004. According to Bhabha and Schmidt, extreme poverty and physical, emotional, or sexual abuse are the circumstances that most often cause children to flee their homes and become “street children.”

¹²⁰ Bhabha and Schmidt, 2006; Maloney, 2002.

¹²¹ Bhabha and Schmidt, 2006. Bhabha and Schmidt state that the family is the social group identified most frequently by children seeking asylum. Their qualitative research showed that domestic abuse was a very common claim made under the “social group” ground.

¹²² Voss, 2005.

¹²³ Voss, 2005 (quoting “*In re Acosta*,” 19 I. & N. Dec. 211, 233 (BIA 1985) (Interim Decision No. 2986)); See also INS Guidelines, 1998.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

must be a group with “recognizable and discrete” attributes.¹²⁶ According to Voss, this lack of consensus leaves immigration judges broad discretion in adjudicating claims of membership in a particular social group and many such claims are denied.¹²⁷

In light of these considerations, some observers have advocated specialized legal standards that would distinguish between children and adults seeking asylum. Seugling, for example, has suggested that the list of grounds for persecution in the legal definition of a refugee be expanded to include status as a “street child” or an “unaccompanied minor,” in addition to race, religion, nationality, political opinion, and membership in a particular social group.¹²⁸ Voss has proposed developing a uniform definition of “particular social group” throughout the circuit courts in order to give immigration judges more guidance and to reduce judicial discretion.¹²⁹

Procedural asylum law and procedural policies. In contrast to substantive asylum law, procedural immigration law has tended to be more accommodating to the special needs of children in general and unaccompanied children in particular. Terry Coonan has noted, for example, that the INA establishes an exception for children with respect to certain evidentiary rulings.¹³⁰ Specifically, the INA prohibits immigration judges from accepting an “admission of removability from an unrepresented respondent who is incompetent or under the age of 18.”¹³¹ To determine a child’s immigration status and establish whether he or she is lawfully present in the United States, judges are instead required to hold a hearing.¹³² Also, the ordinary one-year filing deadline for asylum applications does not always apply to unaccompanied children, who may argue that their status as an unaccompanied child entitles them to waive this rule.¹³³

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ Seugling, 2004. The author uses the term “unaccompanied minor” throughout her article and defines it in the same way as the UNHCR: as a child who has been separated from both parents and is not being cared for by an adult.

¹²⁹ Voss, 2005.

¹³⁰ Coonan notes, however, that the rules of evidence do not apply in removal proceedings. See Terry Coonan, “Tolerating No Margin for Error: The Admissibility of Statements by Alien Minors in Deportation Proceedings,” *Texas Tech Law Review* 29 (1998): 75-96.

¹³¹ 8 C.F.R. §240.10(c).

¹³² Thronson, 2002.

¹³³ Lee Berger and Davina Figeroux, “Protecting Unaccompanied Child Refugees from the One-Year Deadline: Minority as a Legal Disability,” *Georgetown Immigration Law Journal* 16 (2002): 855. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 amended the INA to require asylum petitioners to apply within one year of their arrival in the U.S. except in “extraordinary circumstances.” At the end of 2000, the INS issued regulations that defined extraordinary circumstances to include “legal

Also, there are a number of procedural policies that are sensitive to the needs of children seeking asylum. The 1998 INS Guidelines for Children’s Asylum Claims, for example, which apply to the asylum officers who conduct interviews as part of the affirmative asylum application process (not, however, to immigration judges), incorporate a number of child-friendly interview procedures: the guidelines permit children to have a trusted adult present during the interview; they require the asylum hearing officer to tailor his or her questions to the child’s age, language skills, and background; and they acknowledge that “the balance between subjective fear and objective circumstances may be more difficult...to assess” in children than in adults.¹³⁴ And while the INS Guidelines clearly state that they do not impact substantive asylum law, they do emphasize the unique needs of unaccompanied children: “[A]lthough the same definition of a refugee applies to all individuals regardless of their age, in the examination of such factual elements of the claim of an unaccompanied child, particular regard should be given to circumstances such as the child’s stage of development, his or her possibly limited knowledge of conditions in the country of origin, and their significance to the legal concept of refugee status, as well as his/her special vulnerability.”¹³⁵ According to Voss, some advocates have urged the Department of Justice to adopt the 1998 guidelines, which would make them binding for immigration judges adjudicating the asylum claims of children in removal proceedings.¹³⁶

In 2004, the Executive Office for Immigration Review (EOIR) published a similar set of guidelines for court cases involving unaccompanied children. These guidelines aim to help immigration judges ensure that unaccompanied children understand the nature of the court proceedings, can effectively present evidence, and have appropriate assistance.¹³⁷ The EOIR guidelines were updated in 2007.

Special Immigrant Juvenile Status

Special Immigrant Juvenile Status (SIJS), which was created by the Immigration Act of 1990, allows certain undocumented children to obtain lawful permanent residency.¹³⁸

disability (e.g., the applicant was an unaccompanied minor or suffered from a mental impairment) during the one-year period after arrival.” Ibid., quoting 8 C.F.R. §208.4(a)(5) (2001).

¹³⁴ INS Guidelines, 1998; Nogosek, 2000.

¹³⁵ INS Guidelines, 1998; see also Nogosek, 2000; Carr, 2005/2006.

¹³⁶ Voss, 2005.

¹³⁷ U.S. Department of Justice (DOJ), 2007.

¹³⁸ Devon A. Corneal, “On the Way to Grandmother’s House: Is U.S. Immigration Policy More Dangerous than the Big Bad Wolf for Unaccompanied Juvenile Aliens?” *Pennsylvania State Law Review* 109 (2004): 609-656.

SIJS is the only provision in substantive immigration law that incorporates the best interests principle.¹³⁹

To be eligible for classification as a special immigrant juvenile, a petitioner must be unmarried and under the age of 21.¹⁴⁰ In accordance with the Immigration and Nationality Act, the child must also show that:

- 1) He or she has been declared dependent on a U.S. juvenile court, or has been placed under the custody of a state department or agency by a U.S. juvenile court. (If the unaccompanied child is in federal custody, he or she must obtain the consent of the Secretary of the DHS through the local ICE office before a juvenile court can take jurisdiction.)
- 2) The juvenile court has deemed the child eligible for long-term foster care due to abuse, neglect, or abandonment.¹⁴¹
- 3) It has been determined through judicial or administrative proceedings that it would not be in the child's best interest to be returned to his or her home country or his or her parents' home country.¹⁴²

Once the child has obtained an order from a juvenile court judge that affirms these findings, he or she may petition the U.S. Citizenship and Immigration Service (USCIS) for SIJS, as well as for adjustment of status to lawful permanent residency.¹⁴³ According to Thronson, this seemingly convoluted process represents a careful balance of state and federal decision making that delegates critical decisions about eligibility for SIJS to the juvenile courts—as opposed to immigration judges, who often lack expertise in child welfare.¹⁴⁴ However, as of this writing, children in federal custody must first make a written request to the local ICE office seeking the consent of the secretary of the DHS (as noted above) for the juvenile court to take jurisdiction over the child. Thus, it is the DHS that ultimately decides whether to accept SIJS applications for children in custody.¹⁴⁵ The

¹³⁹ Bhabha and Schmidt, 2006; Thronson, 2002.

¹⁴⁰ 8 C.F.R. §204.11(c) (1993).

¹⁴¹ Federal regulations created by the INS define “deemed eligible for long-term foster care” to mean that the court has found that family reunification is not a viable option and that the child is likely to go into foster care, adoption, or guardianship. 8 C.F.R. §204.11(a) (1993).

¹⁴² INA §101(a)(27)(J).

¹⁴³ The juvenile court must retain jurisdiction over the child until the child's SIJS petition and the application for permanent residency have been decided by the USCIS. 8 C.F.R. §204.11(c)(5) (1993).

¹⁴⁴ Thronson, 2002.

¹⁴⁵ As amended in 1997, the SIJS statute provides that no state juvenile court “has jurisdiction to determine the custody status or placement of an alien in the actual or constructive custody of the Attorney General unless the Attorney General specifically consents to such jurisdiction.” U.S. Code 8 §1101(a)(27)(J)(i).

Immigrant Legal Resource Center has characterized this as an “unusual federal law,” as it deprives state courts of jurisdiction within the state.¹⁴⁶ Indeed, Thronson has cited this requirement as evidence that the punitive policies of the now-defunct INS were never really abandoned. In his view, the requirement allows the federal government to usurp the best interests principle and prejudice issues that are best left to the discretion of the juvenile courts.¹⁴⁷ Several advocates have complained that it can be extremely difficult to obtain consent from the secretary of the DHS for SIJS-eligible children in federal custody.¹⁴⁸ They have also pointed out that because the primary mission of the DHS (and previously, the INS) is immigration enforcement, it is not qualified to decide whether a child should be under the jurisdiction of a juvenile court and has no experience in determining the best interests of children.¹⁴⁹

Trafficking victims

Some unaccompanied children also seek legal relief through the T-Visa program, which was established by the Victims of Trafficking and Violence Protection Act (TVPA) of 2000.¹⁵⁰ The T-Visa program allows victims of severe forms of trafficking (both adults and children) to remain in the United States.¹⁵¹ However, many researchers believe that

“Actual custody” means that the ICE has the child in a facility run by either the ICE or the ORR. “Constructive custody” has not been defined in official USCIS memoranda, but according to the Immigrant Legal Resource Center, federal authorities seem to agree that it refers to children housed in a special ICE- or ORR-funded foster care setting. Sally Kinoshita and Katherine Brady, *Special Immigrant Juvenile Status for Children Under Juvenile Court Jurisdiction*. (San Francisco: Immigrant Legal Resource Center, January 2005).

¹⁴⁶ Kinoshita and Brady, 2005.

¹⁴⁷ Thronson, 2002.

¹⁴⁸ Nugent, 2006; Thronson, 2002.

¹⁴⁹ Katherine Porter, “In the Best Interests of the INS: An Analysis of the 1997 Amendments to the Special Immigrant Juvenile Law,” *Journal of Legislation* 27 (2001): 441-462.

¹⁵⁰ Public Law 106-386. The TVPA, which also made trafficking in persons a federal crime, was subsequently reauthorized in 2003 (Public Law 108-193) and 2005 (Public Law 109-164). The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2007 (TVPRA, HR 3887) was passed by the House in December 2007 and moved to the Senate for consideration; as of this writing, the Senate had yet to vote on it, though a vote was expected before the end of the session.

¹⁵¹ Most observers draw a distinction between smuggling and trafficking. Child smuggling takes place when an informed adult moves a child across an international border illegally; once across the border, the relationship typically ceases. Trafficking in persons, on the other hand, involves the transport of an individual for the purpose of subsequent exploitation, usually forced labor or commercial sexual activity. It has been described as a contemporary version of slavery. Studies suggest that the majority of victims are women and children and that the illegal movement of children across international borders has increased in recent years. Nonetheless, because reliable data on the nature and extent of human trafficking is hard to come by, these generalizations have not been verified. See Maloney, 2002; Godziak and MacDonnell, 2007.

only a fraction of all child victims of trafficking are ever identified, with the result that many children who fit the profile of positively identified trafficking victims never seek relief. In fact, after conducting case studies of unaccompanied children who were potential victims of trafficking, Elżbieta Goździak and Margaret MacDonnell identified several junctures where federal and local officials routinely missed opportunities to screen them for signs of having been trafficked.¹⁵² Goździak and MacDonnell also noted that, while the ORR has introduced screening protocols designed to identify victims of trafficking, ORR-funded facilities have applied these protocols inconsistently.¹⁵³

¹⁵² According to Goździak and MacDonnell, immigration officials who monitor ports of entry, staff at custodial facilities, and medical and social service providers (including educators) are the officials most likely to come into contact with children who are unidentified trafficking victims.

¹⁵³ Bhabha, 2000; Goździak and MacDonnell, 2007.

Legal Representation

Right to counsel

People in removal proceedings—including unaccompanied children—have a statutory right to legal counsel pursuant to section 292 of the Immigration and Nationality Act (INA). However, they do not have a right to government-funded legal counsel.¹⁵⁴ This means that people in removal proceedings have two options if they are to exercise their right to counsel: either hire a legal representative through their own means or obtain *pro bono* legal assistance.

There is no consensus on whether section 292 of the INA precludes the government from funding legal counsel for people in removal proceedings; as of this writing, no court has ruled on the issue. The prevailing view in the executive branch is that the statute prohibits the government from funding legal counsel. However, some observers, such as Kerwin, maintain that the statute does not preclude government-appointed representation for people in removal proceedings, nor does it prevent the government from establishing programs to increase legal representation. In this view, the statute merely affirms that the government is not legally required to provide counsel.¹⁵⁵

Studies show benefits associated with legal representation

Several studies have shown that people in removal proceedings (adults as well as children) benefit from legal representation.¹⁵⁶ For example, Jaya Ramji-Nogales, Andrew Schoenholtz, and Philip Schrag have found that for people seeking asylum in the United States, being represented by an attorney is the single most important factor affecting the outcome of asylum cases.¹⁵⁷ And the Transactional Records Access Clearinghouse has determined that 93 percent of asylum claims are denied when the asylum seeker does not

¹⁵⁴ Section 292 of the INA provides that, “In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.” 8 U.S.C. §1362.

¹⁵⁵ See, for example, Kerwin, 2005.

¹⁵⁶ Because all of the studies surveyed here were based on data from the Executive Office for Immigration Review (EOIR)—which, as noted above, does not consistently distinguish between adults and children—they do not shed any light on benefits that are specific to unaccompanied children. However, anecdotal evidence suggests that such benefits do in fact exist. Maloney, for example, notes that unaccompanied children with access to competent legal counsel tend to better understand (and are more likely to meaningfully participate in) the immigration court process. Maloney further believes that attorneys trained in representing children—particularly traumatized children—are likely to draw out compelling claims for relief that might otherwise go unidentified. See Maloney, 2002. See also Kerwin, 2005; Susan F. Martin and Andrew I. Schoenholtz, “Asylum in Practice: Successes, Failures, and the Challenges Ahead,” *Georgetown Immigration Law Journal* 14 (Spring 2000): 589-617.

¹⁵⁷ Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Philip G. Schrag, “Refugee Roulette: Disparities in Asylum Adjudication,” *Stanford Law Review* 60 (2007): 295-412.

have legal representation; by contrast, only 64 percent of claims are denied when the asylum seeker does have representation.¹⁵⁸ Statistics compiled by the Catholic Legal Immigration Network, Inc., indicate that positive outcomes are correlated with access to legal representation not just in the case of asylum seekers, but for all those involved in removal proceedings.¹⁵⁹

The literature also suggests that when people have access to legal representation in immigration court, the system functions more efficiently.¹⁶⁰ According to Kerwin, that is because qualified attorneys are more likely to submit well-prepared, well-grounded applications for relief.¹⁶¹ Similarly, Finkel and Workman, who advocate for government-appointed counsel for children in immigration court proceedings, argue that increased legal representation could save the government time and money by streamlining the administrative process and decreasing detention times.¹⁶²

Lack of legal counsel for unaccompanied children

Coupled with the fact that *pro bono* legal assistance can be hard to come by, the government's reluctance to pay for direct legal representation for unaccompanied children has meant that many such children appear in immigration court *pro se* (that is, without the help of a lawyer). While estimates vary as to the exact proportion of unaccompanied children without legal representation, the general consensus is that it is more than half.¹⁶³ The American Bar Association has acknowledged that this is a serious concern given the inability of most unaccompanied children to represent themselves effectively in immigration court.¹⁶⁴ Legislators and policymakers have also recognized

¹⁵⁸ Transactional Records Access Clearinghouse, "Judges Show Disparities in Denying Asylum," (July 31, 2006), available at <http://trac.syr.edu/immigration/reports/>. The data for this study were originally collected from the EOIR from 1994 to 2005.

¹⁵⁹ These statistics show that 34 percent of non-detained persons with legal representation were granted relief from removal, while only 23 percent of those without representation were granted relief. Similarly, 24 percent of detained persons secured relief from removal when they had representation, as compared with 15 percent of those without representation. Data were collected from the EOIR in fiscal year 2005. See Kerwin, 2005.

¹⁶⁰ Sharon Finkel, "Voice of Justice: Promoting Fairness Through Appointed Counsel For Immigrant Children" *New York Law School Journal of Human Rights* 17 (2001): 1105-1138.

¹⁶¹ Kerwin, 2005.

¹⁶² Finkel, 2001; Workman, 2004.

¹⁶³ Estimates concerning the proportion of children represented by counsel include children who obtain counsel through their own means as well as those who do so with the assistance of a legal service organization or *pro bono* legal service provider. See Workman, 2004, citing Office of the Inspector General, *Unaccompanied Juveniles in INS Custody*, Report I-2001-009 (September 28, 2001).

¹⁶⁴ American Bar Association, *American Justice Through Immigrants' Eyes*, 2004, available at <http://www.abanet.org/publicserv/immigration/americanjusticethroughimmigeeyes.pdf>.

the need for better access to legal representation. As noted in the introduction to this report, the Homeland Security Act charges the director of the ORR with “developing a plan...to ensure that qualified and independent legal counsel is timely appointed to represent the interests of each [unaccompanied] child, consistent with the law regarding appointment of counsel.” Again, though, it remains unclear whether this means that legal counsel is to be provided at the government’s expense.¹⁶⁵

Some observers, building upon Kerwin’s interpretation of section 292, have argued that the government has an obligation to provide legal counsel for unaccompanied children, even if that means paying for it. (Among those who believe that the government has an obligation to pay for legal counsel for unaccompanied children are Finkel, Workman, and Bhabha.)¹⁶⁶ Workman and Bhabha go further by maintaining that the government should assign (and pay for) a guardian *ad litem* (a child welfare professional charged with advocating the best interests of a child involved in court proceedings) to unaccompanied children. Bhabha has also argued that any government-appointed counsel ought to be specially trained in representing traumatized children.¹⁶⁷

Lawyers for unaccompanied children

Representing unaccompanied children in government custody can require special considerations on the part of attorneys. Nugent and Schulman recommend that attorneys who represent such children consider the effects of detention and adopt child-sensitive interviewing techniques to help build trust.¹⁶⁸ As an example, they suggest that the attorney establish a rapport with the child by asking friendly questions about his or her country, culture, or favorite pastimes before approaching the difficult topics that, from a legal perspective, are likely at the heart of the matter. The American Bar Association has also published a comprehensive set of guidelines for lawyers representing unaccompanied children.¹⁶⁹

¹⁶⁵ Workman, 2004. The uncertainty on this point stems from the differing interpretations of section 292 of the Immigration and Nationality Act.

¹⁶⁶ Finkel, 2001; Bhabha, 2004; Workman, 2004. In domestic juvenile delinquency proceedings, children are usually provided with legal counsel. The legal basis for this policy was enunciated by the Supreme Court in *In re Gault* (1967), in which the Court found that due process demands that children in juvenile delinquency proceedings be provided with counsel, even though a juvenile delinquency proceeding is not a criminal matter. (The Sixth Amendment right to counsel applies to all criminal cases.) See Corneal, 2004.

¹⁶⁷ Workman, 2004; Bhabha, 2004. In domestic juvenile delinquency proceedings, a guardian *ad litem* is often provided in addition to legal counsel. See Bhabha and Schmidt, 2006.

¹⁶⁸ Christopher Nugent and Steven Schulman, “Giving Voice to the Vulnerable: On Representing Detained Immigrant and Refugee Children,” *Interpreter Releases* 78, no. 39 (2001).

¹⁶⁹ American Bar Association, *Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States*, (Chicago: American Bar Association, August 2004) <http://www.abanet.org/publicserv/immigration/Immigrant_Standards.pdf>.

Attorneys who represent unaccompanied children may also face complex ethical questions about the nature of their role as advocates. According to Nugent and Schulman, there is an ongoing debate on the relative merits of two approaches: advocating the child’s expressed wishes (the “traditional attorney” model) and advocating the child’s best interests (the “guardian *ad litem*” model).¹⁷⁰ At the crux of the debate is the question of whether unaccompanied children are able to judge their own best interests; it sometimes happens that an unaccompanied child wishes to be removed to his or her home country, but the attorney feels strongly that this is not in the child’s best interests.¹⁷¹

At present, the ethical rules that govern the professional conduct of attorneys are predicated on the traditional attorney model, which means that the attorney is obligated to advocate the unaccompanied child’s wishes—regardless of age, capacity, or the interests of the child’s family.¹⁷² In cases where the attorney believes that the child is not in a position to judge his or her best interests, the attorney may seek appointment of a guardian *ad litem* or other representative charged with doing so.¹⁷³

¹⁷⁰ Nugent and Schulman, 2001.

¹⁷¹ Ibid.

¹⁷² See the Model Rules of Professional Conduct, promulgated by the American Bar Association in 1983, <http://www.abanet.org/cpr/mrpc/mrpc_toc.html>. Nugent and Schulman maintain that the traditional model empowers the child to make decisions and participate in legal proceedings and is thus consistent with a child-centered approach to representation. Nugent and Schulman, 2001.

¹⁷³ Ibid. As noted in the “Children’s Rights and the Best Interests Principle” section, the Immigrant Children’s Advocacy Center in Chicago is currently testing a program that assigns guardians *ad litem* to unaccompanied children involved in removal proceedings.

Conclusion

As this review has demonstrated, the literature on unaccompanied children in the United States identifies a handful of common concerns. These include the lack of systematic research on the migration of unaccompanied children; the failure of U.S. immigration law to adopt child-specific standards; the lack of consensus on the need for a child advocate or guardian *ad litem*; the absence of the child's perspective from immigration policy proposals or decisions; the appropriateness of the methods used by the Department of Homeland Security to classify unaccompanied children in order to make a referral to the ORR; the need for clear policies regulating confidentiality, repatriation, and reunification with family members; the challenges that unaccompanied children in federal custody face in applying for Special Immigrant Juvenile Status; and finally, the lack of legal counsel for unaccompanied children.

In spite of these concerns, the literature also points to substantial improvements in the treatment of unaccompanied children in recent years. These include the introduction of procedural safeguards for children in removal proceedings; the reduction in the use and length of detention and the general improvement in conditions that accompanied the transfer of responsibility for the care and custody of unaccompanied children from the now-defunct INS to the ORR; and an increased awareness of trafficking in children. Many observers believe that the proposed Unaccompanied Alien Child Protection Act would likely result in further improvements by separating unaccompanied children in federal custody from those with a juvenile justice conviction, requiring that custodial facilities provide proper services and requiring that unaccompanied children be provided with legal representation and a guardian *ad litem*.

In sum, compiling this review has convinced us that while the existing literature on unaccompanied children in the United States contains a wealth of useful information, there remains a need for more nuanced research on these children's experiences and the issues they face in immigration court. As Vera staff, subcontractors, and other stakeholders continue to work with unaccompanied children through the Unaccompanied Children Pro Bono Pilot Project, the knowledge and experience they gain will be used to help fill this need. Our hope is that, as more is learned, decision makers will be able to shape policies and practices that more effectively promote the welfare of unaccompanied children in the United States.

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