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Not Your Average Summer Camp: Children in Immigration Detention

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* St. Mary’s University School of Law, J.D., expected May 2020; University of Maryland, B.S., Political Science, December 2011; Montgomery College, A.A., International Studies, May 2009. The author wishes to express her love and appreciation for her son, Matthew, whose witty sense of humor inspired the title of this piece. Thank you to my husband, Mario, for his support and patience throughout this entire journey. To my mother who sacrificed it all to bring me to America, and for that I am grateful. To the advocates at Catholic Charities of Central Texas, especially Nai Leite Da Silva, who provided the initial guidance from which this piece germinated. To The Scholar: St Mary’s Law Review on Race and Social Justice Volume 21 and Volume 22 Editorial Boards for their valuable insight and contributions to this piece. To all of the individuals in the legal and law school community whose feedback shaped this Comment. Finally, to all of the children who have endured brutal acts of abuse, may you rise against all odds: “when the world says, give up, hope whispers, try it one more time.” —King Tutankhamun

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INTRODUCTION

Give fair judgement to the poor and the orphan; uphold the rights of the oppressed and the destitute. Rescue the poor and helpless; deliver them from the grasp of evil people.¹

Plagued by a decade long civil war, funded by the United States government, the United States was a main contributor to the violence that engendered the deaths and displacement of many Salvadorans.² Post-war, a massive and catastrophic wave of prolonged gang violence erupted in the streets of El Salvador.³ The United States was amid the plight of displaced Central American immigrants all along; from contributing billions to corrupt Central American governments, to firearm trafficking, and arming the criminal syndicates that commit violent crimes against children.⁴ The wave of violence correlated with the mass deportations in

3. See Farber, supra note 2 (describing the aftermath of El Salvador’s twelve-year battle).
4. See id. (alleging the United States gave roughly $6 billion to the Salvadoran military authoritarian regime, who is responsible for the slaying and disappearance of Salvadoran civilians); see also MARAS: GANG VIOLENCE AND SECURITY IN CENTRAL AMERICA 25–26
the late 1990s that resulted from the Illegal Immigration Reform and Immigration Responsibility Act of 1996. The gang violence in the impoverished streets of the northern triangle countries mirrored what began on American soil in the streets of Los Angeles. The gang MS-13 resulted from a type of culture shock, as Salvadoran immigrant youth struggled to assimilate to city life in Los Angeles. Most were undocumented and the prey of many local gangs. MS-13 formed as a social group that furnished some level of protection, assistance, association and connections for the arriving and unassimilated Salvadoran immigrant youth. It gave the local youth an alternative affiliation from the 18th Street Gang and encouraged those who had been recruited by local gangs, to leave the gangs. MS-13 is among the most infamous of the international Latino street gangs. They will continue to maintain their reputation as an infamous gang, as deportations from the United States to Central America continue. Deportations further gang behavior because one contributing factor is America’s demand for illegal drugs—a lucrative business that entices gang members.

(Thomas Bruneau et al. eds., Univ. of Tex. Press 2011) (discussing how the gang MS-13 is often portrayed as a byproduct of the effects of El Salvador’s bloody civil war, when, in fact, it is a repercussion of urban gang dynamics); Steven Dudley et al., Firearms Trafficking in Honduras, INSIGHT CRIME (Aug. 23, 2017), https://www.insightcrime.org/images/PDFs/2017/Firearms-Trafficking-Honduras.pdf [https://perma.cc/PW8G-UYSZ] (recognizing the United States is the source of almost half of the unregistered weapons seized in Honduras); CLARE RIBANDO SEELKE, CONG. RESEARCH SERV., GANGS IN CENTRAL AMERICA 7 (Aug. 29, 2016) (highlighting 39,000 students in El Salvador dropped out of school in 2015 due to threats and harassment by gangs).

5. See SEELKE, supra note 4, at 3 (describing the expansion of gang presence in Central America).


7. See Bruneau et al eds., supra note 4 (describing the difficult transition that immigrants faced after arriving in Los Angeles).

8. Id.

9. Id.

10. Id.

11. See Farber, supra note 2 (noting the Obama administration referred to MS-13 as an “international criminal organization,” and urged travelers to avoid El Salvador given its increasing homicide rate).

12. See id (describing the muddled position that the United States has maintained by continuing to deport individuals to El Salvador, despite deeming the country “too dangerous”).

13. Cf. Bruneau et al. eds., supra note 4 (asserting drug trafficking maintains the power and control that gangs hold).
To spread terror, gangs commit senseless acts of violence such as extortions, drug trafficking, and kidnapping. The United States’ failure to take responsibility for the actions that contributed to the displacement of thousands of people from Central America will continue to destroy the lives of the vulnerable, particularly the lives of displaced immigrant children. As many of the children attempt to escape violence and gang recruitment, they make their way to the nearest safe haven—the United States. However, the current political climate makes it increasingly more difficult for children to escape the violence that torments them. There is a universal standard in human rights law, known as “the best interest of the child” standard, where society must do everything to protect children without discrimination.

To turn our backs on immigrant children plagued by violence from countries from the neighboring northern triangle is a flagrant violation of human rights. The most affected are children who are migrating unaccompanied without any protection. These children fall in the crossfire of American political rhetoric. The unaccompanied children are migrating from the northern triangle countries, and the

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14. See Farber, supra note 2 (listing the most common crimes conducted by gangs in El Salvador).
15. Cf. id. (maintaining the United States has contributed to the increase in gang violence and displacement of individuals in El Salvador).
16. See Bruneau et al. eds., supra note 4 at 24–25 (describing the increase in gang violence that ultimately drove a mass migration of undocumented immigrants to the United States).
17. See JACQUELINE BHABHA, CHILD MIGRATION & HUMAN RIGHTS IN A GLOBAL AGE 234 (Princeton Univ. Press 2014) (noting children are at a particular risk for being recruited by gangs, gangs engage in extreme brutality and persecution against those who leave or reject their membership, and minimal success that individuals have in their asylum application).
20. See id. at 2 (urging the best interest of the child standard to be given deference at all times).
epicenter for MS-13 is El Salvador. \textsuperscript{22} Honduras, \textsuperscript{23} Guatemala, \textsuperscript{24} and Mexico \textsuperscript{25} also experience similar levels of gang violence. \textsuperscript{26} Children affected by gang violence experience psychological trauma regardless of their country of origin. \textsuperscript{27} Immigrant children flee violence to seek refuge in a country that is both able and capable of helping vulnerable children. \textsuperscript{28} Further, these children are not a threat to American society; to the contrary, when they receive assistance, they begin to thrive. \textsuperscript{29} Providing aid to child victims of crime is vital to their development. \textsuperscript{30} Children flourish when they are able to assimilate in their new environment and become contributing members of society. \textsuperscript{31}

\begin{itemize}
\item \textsuperscript{24} See id. at 28 (reporting there are around 14,000 to 17,000 gang members and the areas of influence include Guatemala City, San Marcos, Xela, and Antigua).
\item \textsuperscript{25} See id. at 24 (describing the gang violence that enters and exits out of Mexico).
\item \textsuperscript{26} See id. at 28–29 (indicating gang membership is concentrated in the northern triangle; however, El Salvador has the highest concentration of gang membership at 323 per 100,000 people—double the number of those of in Guatemala and Honduras).
\item \textsuperscript{27} See cf. Usama El-Awad et. al., \textit{Promoting Mental Health in Unaccompanied Refugee Minors: Recommendations for Primary Support Programs}, 7 \textit{Brain Sci.} 146 (2017) (proposing mental health solutions for refugees of all origins).
\item \textsuperscript{28} See U.N. \textit{Office on Drugs and Crime [UNODC], supra} note 23 at 44 (proposing the international community should provide Central American countries with support in dealing with gangs given that the flow originates and terminates outside the region).
\item \textsuperscript{29} See Walter Ewing, \textit{Investing in the Children of Immigrants is Critical for American Economy}, AM. IMMIGR. COUNCIL (Sept. 26, 2016), http://immigrationimpact.com/2016/09/26/children-of-immigrants-economic-benefits/ [https://perma.cc/A48S-MZLU] (declaring second-generation immigrants earn higher incomes than the native-born population because they tend to be bilingual, bicultural, and are high achievers in school).
\item \textsuperscript{30} See cf. Susan P. Robbins, \textit{Forensic Social Work: Psychosocial and Legal Issues Across Diverse Populations and Settings} 333 (Tina Maschi & George S. Leibowitz eds., Springer Publishing Company 2nd ed. 2018) (reporting interviews are guided by research from the past thirty years on proper interviewing techniques and a child’s development capabilities).
\item \textsuperscript{31} See Ewing, \textit{supra} note 29 (arguing immigrants contribute to the U.S. economy through their labor power, purchasing power, tax payments, business formation, and scientific innovation).
\end{itemize}
I. HISTORICAL BACKGROUND

A. The Influx of Unaccompanied Minors is Due to Violent Crime in the Northern Triangle

Central America is known as one of the most dangerous regions in the world. People live in fear of the criminal syndicates. Thousands of immigrants entering the United States are from Honduras, Guatemala, and El Salvador. These three countries rank among the most violent countries in the world. In 2016, 540 Salvadoran minors were murdered as a direct result of gang violence. Families in impoverished cities in Latin American countries have no choice but to flee in an attempt to protect their children from becoming victims of violent gang activities such as recruitment, sexual harassment, and rape. Gang victims experience extreme brutality and prosecution when they reject membership. As a result, children from the northern triangle leave their country of origin unaccompanied and motivated...
entirely by fear. These children escape violence or other conflict and turn to surrounding countries for safety. The parents of these children are usually faced with two alternatives: hand their child off to a smuggler where their child may die or do nothing and watch their child die. 

Gangs are entities of organized crime and a substantial amount of their income comes from extortion. These gangs demand every business and individual to pay a fee, collected by young children, in order to have the privilege of not dying. Furthermore, young women are highly attractive to gangs for sexual exploitation. Gangs commit all types of criminal activities, including profiting on the backs of slaves through human trafficking. They prey on the vulnerable, unprotected members of society. Thus, gangs see children as cheap, expendable, “low-cost, low-risk” for sex, or labor. The threat of sexual violence against young women has become a serious component for why this group flees to the Southwest border of the United States. In the 2017 fiscal year, thirty-two percent of unaccompanied minors under the custody of the Office of Refugee Resettlement were seventeen year-old females. In a similar

39. See Labrado & Renwick, supra note 34 (describing the violence in the Northern Triangle).
42. See Nolen, supra note 41 (describing the influence gangs have over El Salvador).
43. Id.
44. See Lakhani, supra note 37 (describing the modern slavery gang members force women and girls into).
46. See id. at 18 (outlining the role gangs play in modern day slavery).
48. Nina Lakhani, supra note 37.
vein, young boys under the age of thirteen are highly coveted by gangs because they are too young to face legal charges and are presumed incapable of infringing the law in these countries.\textsuperscript{50} Gangs use boys as errand runners.\textsuperscript{51}

The valiant child who has managed to escape the violence in his or her country of origin has been face-to-face with death and other dangers.\textsuperscript{52} Death is highly likely in such a perilous journey.\textsuperscript{53} Death by drowning in a river crossing or by dehydration are the most common.\textsuperscript{54} Those that do not die face other dangers such as kidnapping for ransom.\textsuperscript{55} The drug cartels enslave children traveling alone and use them to pack cocaine for drug traffickers.\textsuperscript{56} Additionally, children who are caught by Mexican officials risk being sexually or physically abused by corrupt authorities.\textsuperscript{57}

Therefore, it is clear that the children that set foot on American soil have crossed through one of the most violent areas outside of a warzone.\textsuperscript{58} These children are presented with mental health issues.\textsuperscript{59} They have experienced a substantial amount of abuse in their country of origin, as well as abuse along their journey to the American border.\textsuperscript{60} Once these children reach the border, they are apprehended by border patrol agents and detained until a determination of whether they are able

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\item \textsuperscript{50} See Juan J. Fogelbach, Comment, Gangs, Violence, and Victims in El Salvador, Guatemala, and Honduras, 12 SAN DIEGO INT&L L.J. 417, 431–33 (2011) (stating political parties in El Salvador have proposed an amendment to Article 30 of the Penal Code making the use of minors an aggravating circumstance to a crime, and punishing the recruitment of children by ten to fifteen years in prison).
\item \textsuperscript{51} See Nolen, supra note 41.
\item \textsuperscript{52} See id. (discussing the public-relations campaigns which detail the dangers on this trip).
\item \textsuperscript{53} See id. (discussing an example of the deathly dangers in traveling).
\item \textsuperscript{54} Id.
\item \textsuperscript{55} Id.
\item \textsuperscript{56} Id.
\item \textsuperscript{57} Id.
\item \textsuperscript{58} See Farber, supra note 2 (describing the number of homicides and the correlation to the deaths in a war zone).
\item \textsuperscript{59} See LAURA PACIONE ET AL., THE MENTAL HEALTH OF CHILDREN FACING COLLECTIVE ADVERSITY POVERTY, HOMELESSNESS, WAR AND DISPLACEMENT, IACAPAP TEXTBOOK OF CHILD & ADOLESCENT MENTAL HEALTH J.4, 10 (Joseph M. Rey et al. eds. 2015) (reporting children have high rates of mental health problems such as depression and post-traumatic stress, which persists after resettlement in the new country).
\item \textsuperscript{60} See, e.g., Nolen, supra note 41 (describing the deaths that occur due to gangs and abuse by Mexican officials as well as the dangerous journey to get to America).
\end{itemize}
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to seek refuge in America through asylum or some other form of relief.\footnote{61} Most of these children fall within the meaning of 6 U.S.C. §279(g)(2), which defines an “unaccompanied alien child” as one who has no lawful status in the United States and is under the age of 18 with no parent or legal guardian available in the United States, or their parent or legal guardian is not available to provide care and physical custody.\footnote{62}

Some children develop a mental disorder at the hands of the U.S. government.\footnote{63} The U.S. policy of detaining unaccompanied minors contributes to the exploitation, abuse, and irreparable psychological damage.\footnote{64} When confined, children experience psychological changes as a result of anxiety and depression, directly related to detention.\footnote{65} The longer the confinement, the longer the impact on the child.\footnote{66} The importance of promptly placing children in a least restrictive setting is vital to minimizing the pernicious impact on a child’s mental health.\footnote{67} Children are being held in prison-like conditions with less than desirable living quarters.\footnote{68}

\footnote{65. See Complaint for Injunctive Relief, Declaratory Relief and Nominal Damages at ¶ 15, Lucas R., v. Azar, No. CV 18-5741-DMG (PLAx) (C.D. Cal. Dec. 12, 2018) (No. 2:18-cv-05741) 2018 WL 7200716 [hereinafter Complaint] (pointing ORR’s restrictive settings such as juvenile halls or involuntary medication causes children and youth great trauma, requiring the Children Center to devote greater resources to mental health).
\footnote{67. Id.
\footnote{68. See Carey, supra note 63 (discussing the psychological harm including developing depression and anxiety as a result of being held in detention); see also Ella Nilsen, How the Trump Administration is Using Undocumented Kids’ Confidential Health Information to Lock them Up, VOX MEDIA (June 19, 2018), https://www.vox.com/policy-and-politics/2018/6/18/17449150/
The governmental agencies with authority over unaccompanied minors are committing an extensive list of human rights violations. Perhaps this is attributed to the lack of governmental oversight in these facilities. The surge of unaccompanied children at the border brings many human rights concerns to the forefront of immigration discussions. Children under the custody of the Customs Border Patrol (CBP) have reported physical and psychological abuse, unsanitary and inhumane living conditions, isolation, extended periods of detention, as well as denial of access to legal and medical services. Once an unaccompanied immigrant child is apprehended by CBP, they are held for seventy-two hours, or up to five days before being sent to a long-term facility as they await an immigration hearing or become unified with their families.

Unaccompanied minors are seen as a high-risk subset of orphaned children: they report higher rates of exposure to traumatic experiences, including physical and sexual violence. Therefore, it is particularly important for those who have experienced organized violence in their home country of origin to receive adequate mental health services. There is a high rate of mental health problems, including depression and post-traumatic stress disorder. These issues continue after resettlement in a new country. Migrant children need to receive adequate care.

70. See Grabell & Sanders, supra note 64 (describing a plan that was not implemented and has continued the lack of governmental oversight).
71. See UNHCR, supra note 40 (detailing the way in which the increase in immigration has led to increased discussion about protecting unaccompanied children).
74. Laura Pacione et al., supra note 59.
75. See Pacione et al., supra note 59 at 24 (proposing clinicians keep in mind families seeking asylum are going through a period of adaptation. The family’s strength needs to be taken into account, their readiness and abilities to cope with difficulties, and their understandings of the causes of their difficulties and their feelings about solutions proposed to address them).
76. Id.
77. Id.
to battle these various mental health issues.\textsuperscript{78} Such care will influence the child’s psychological well-being as they learn coping mechanisms.\textsuperscript{79} Children who build rapport with their care-provider have a smooth transition, facilitating more cooperation with the immigration process.\textsuperscript{80} Further, comparing children in orphanages to unaccompanied minors, children in orphanages lag behind and are not at the same cognitive level as their non-orphaned peers, but once adopted, they begin to flourish and develop at accelerated rates—ultimately catching up to their peers.\textsuperscript{81}

\textbf{B. The Flores Settlement Established the “Bare Minimum” in the Confinement and Treatment of Unaccompanied Minors}

The seminal case, \textit{Reno v. Flores},\textsuperscript{82} also known as the “Flores Settlement Agreement,” (FSA) has governed the treatment of migrant children since 1997.\textsuperscript{83} The FSA requires that children under immigration custody be treated with dignity, respect, and special concern for their vulnerability as children.\textsuperscript{84} The FSA declared that facilities housing migrant children provide a list of services—including physical care and maintenance; individual and group counseling; education; recreation and leisure-time activities; family reunification services and access to religious services, visitors, and legal assistance.\textsuperscript{85} The FSA established that minors are not to be placed in a secured facility if there are less

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\item \textsuperscript{78} See \textit{id.} at 28–29 (proposing the treatment of refugee children with a combination of cultural knowledge and trauma therapy methods that encompass individually focused psychotherapies, traditional therapeutic approaches and systematic interventions addressing the consequences of organized crime on the family’s social relationships).
\item \textsuperscript{79} \textit{Id.} at 24.
\item \textsuperscript{80} See generally \textsc{Robbins}, supra note 30 (discussing how developing a rapport with children helps provide narrative answers which assists with determining developmental level and teaching children how to respond appropriately).
\item \textsuperscript{81} See generally \textsc{Pacione et al.}, supra note 59 at 9 (understanding that the lack of education and psychological distress experienced by immigrants affects cognitive abilities such as seen in orphaned children).
\item \textsuperscript{82} 507 U.S. 292 (1993).
\item \textsuperscript{84} See \textit{id.} at 299 (regulating the treatment of migrant children); see also \textsc{The U. of Chicago L. Sch. Int’l Hum. Rts. Clinic et al.}, supra note 69 (describing the abuse that children face when detained).
\item \textsuperscript{85} See \textit{Reno}, 507 U.S. at 298 (specifying services that migrant children should receive).
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restrictive alternatives available. Under the FSA, minors are entitled to receive one counseling session per week by a trained social worker. The sole purpose of the session is to review the minor’s progress, establish new short term objectives, and address both the developmental and crisis-related needs of each minor. In addition, the FSA states that group counseling sessions must be held at least twice a week. The group counseling sessions provide the children with an opportunity to become acquainted with the staff and other children. During the session, children have the freedom to discuss any problems they are facing and have the opportunity to resolve those problems. The FSA further establishes a reasonable right to privacy.

The Unaccompanied Alien Children Program was transferred to the Office of Refugee Resettlement (ORR) following the 1997 FSA under the Homeland Security Act of 2002. Since then, migrant children are under the responsibility and care of ORR. As indicated in the FSA, mental health services must be provided to migrant children in custody. When possible, ORR determines the initial placement designation of the unaccompanied minor within twenty four hours of the initial referral. ORR’s assessment is contingent upon the minor’s history and condition, including: criminal history, to include involvement in human trafficking or smuggling; prior acts of violence or threats in government custody; and.

88. See id. at Ex.1 p.1 (stating the standard for licensed programs).
89. See id. at Ex.1 p.2 (detailing the requirements for counseling sessions for licensed programs).
90. See id. (examining the advantages of group counseling).
91. See id. at Ex.1 p.2–3 (highlighting the open environment in counseling sessions).
92. See id. at Ex.1 p.3 (signifying the existence of privacy rights within other requirements).
94. Id.
gang/cartel involvement; prior escape(s) or attempted escapes from government custody; mental health concerns; and sexual predatory behavior.\footnote{97} Upon the minor’s responses and ORR’s evaluation, the minor’s level of care is determined.\footnote{98} According to ORR policy, at least every thirty days the record of the child is reassessed in order to determine whether a new level of care is needed.\footnote{99} ORR may refer a child to a transfer known as either a “step-up” or a “step-down.”\footnote{100} A step-up is determined for the more restrictive level of care while step-downs are determined upon ORR’s discretion.\footnote{101} For step-downs, ORR considers the minor’s behavior and the immigration judge’s decision in a bond hearing pertaining to the minor’s level of danger.\footnote{102} Lastly, the Trump Administration’s Zero Tolerance Policy fundamentally disrupted the Department of Homeland Security’s (DHS) approach to immigration enforcement.\footnote{103} As of May 2018, DHS determined that Trump’s policy would include immigrant adults with minor children arriving without authorization to the United States.\footnote{104} Because minor children cannot be held in criminal custody with an adult, the adults who entered the United States without authorization were separated from their minor children upon the adult’s placement for criminal prosecution.\footnote{105} Those children were then labeled as “unaccompanied alien children” and were held under DHS custody until transferred to ORR custody.\footnote{106} ORR knew the unaccompanied minor’s parents’ location, thus complying with HIPAA regulations and obtaining consent from the parent.\footnote{107} However, the
initial DHS data set is misleading. Upon the Office of Inspector General’s request to obtain the information, the data DHS provided did not match how the minors initially entered the country—with their parents. DHS’s data showed that the minors entered the United States unaccompanied, when in fact they had entered with their parents, while CBP’s and ICE’s systems continued to identify the minors as “having been separated from an adult.”

C. Unaccompanied Children’s Mental Health Information is Disseminated without Their Consent

A growing number of allegations from numerous immigration attorneys who represented undocumented children have stated that the child’s psychological records during their time in detention are used against the children in immigration court. DHS heavily relies on private information provided by psychologists and social workers in order to make their decisions. While the services provided to immigrant children in detention centers include counseling, it is not kept confidential and every private dialogue between child and counselor can be exposed in immigration court. The child’s case files are used by the Trump administration as an argument to place migrant children in higher levels of detention, similar to “jail-like” settings. The child’s case files usually contain their mental health record, including the diagnosis and treatment of psychiatric conditions. Occasionally children are deported back to their home country of origin based on the information of the confidential health records. While the practice of agencies sharing confidential information is nothing new, the Trump

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108. See id. (highlighting inconsistencies in DHS’ records of children).
109. See id. (reporting incomplete and inconsistent reports by DHS of the children in their custody).
110. See id. (signifying the inconsistencies between different data banks).
111. See Nilsen, supra note 68 (providing samples of when confidential medical and psychological records have appeared in immigration court as evidence).
112. See id. (emphasizing the role of psychologists and social workers within the immigration court system).
113. See id. (explaining the lack of confidentiality within the detention centers).
114. See id. (mapping out the manner in which the children’s case files are used).
115. See id. (listing the contents of a child’s case file).
116. See id. (describing how the child’s confidential records can sometime be used against their benefit).
administration has been more aggressive in effectively using the children’s own medical records against them.\textsuperscript{117} Ultimately, this practice is a violation of a child’s right to privacy.\textsuperscript{118} According to ORR’s policy on maintaining confidentiality of mental health records, it is the care providers’ responsibility to procure and maintain the records of the health services provided.\textsuperscript{119} ORR’s policy further states that health and case files must be maintained separately.\textsuperscript{120} It is also ORR’s policy that care providers use discretion and protect the confidentiality of medical information.\textsuperscript{121} These children may have histories of abuse or may be seeking safety from threats of violence.\textsuperscript{122} Health and Human Services (HHS) states it does not release information which would compromise the minor—however, the contrary has transpired.\textsuperscript{123}

A child’s right to privacy is a basic human right.\textsuperscript{124} The Health Insurance Portability and Accountability Act (HIPAA) protects the confidentiality of an individual’s medical information.\textsuperscript{125} Confidential information must be protected at all times and kept in a manner that does
not violate the privacy of the individual. HIPAA becomes complex with detained children, but that fact does not justify stripping away the rights and protections provided by the United States. For example, in the correctional environment, the agency with authority over the child may release the child’s confidential records. Migrant children cannot legally exercise their HIPAA rights without the proper authorization, such as a signature from a parent or legal guardian when that parent or guardian is available. Sometimes, the parent is also detained, which makes it difficult to obtain authorization. Every effort must be made to obtain consent from a child’s parent or guardian. While HIPAA is a federal law, it can be superseded by a more stringent state law. States have enacted privacy laws that are more stringent than HIPAA because they further protect mental health records. Disclosure of psychotherapy notes is permissible only where certain federal exceptions apply.

For example, under HIPAA, a covered entity may disclose protected health information (PHI) without the written consent of the

126. See id. ("[includ[ing] procedures to assure that such information is provided and utilized in a manner that appropriately protects the confidentiality of the information and the privacy of individuals receiving health care services and items.").

127. See Nilsen, supra note 68 (discussing the difficulties in maintaining the HIPAA requirements with undocumented children).

128. See 45 C.F.R. § 164.512 (2019) (containing exceptions where disclosure may occur without an individual’s consent).

129. See 45 C.F.R. § 164.512 (2019) (providing instances where an individual’s medical information can be release without authorization); see also Nilsen, supra note 68 (explaining the Trump Administration’s use of children’s medical records).

130. Nilsen, supra note 68.; cf. Julie Linton et al., Detention of Immigrant Children, 139 AM. ACAD. PEDIATRICS COUNCIL ON COMMUNITY PEDIATRICS, no. 4, at 1, 6 (2017) (detailing the effect of detention on the rights of the parents).


132. See 45 C.F.R. § 160.203(b) (2019) (explaining that a state law is “more stringent” and more protective of the patient, then that state law takes precedence over HIPAA).

133. Maas & LeBlanc, supra note 131.

134. Id.

135. See 45 C.F.R. § 160.103 (2019) ("a covered entity means (1) a health plan; (2) healthcare clearinghouse; (3) a healthcare provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter.").
individual if that individual is a victim of abuse, neglect, or domestic violence. The statute explicitly states that these types of disclosures are not intended to be used against the individual and that they require materiality. However, HIPAA extends special protections to psychotherapy notes. HIPAA defines psychotherapy notes as those “recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or group, joint or family counseling session and are separated from the individual’s medical record.” Records containing psychotherapy notes, however, do not have a “right of access.”

In *Flores v. Sessions*, Plaintiffs alleged psychotropic drugs were administered to a minor child at a detention center without first obtaining authorization such as a court order to obtain the plaintiffs’ informed consent. The plaintiffs point out the migrant child’s mother received no call to obtain her consent to give her child mental health medication. Additionally, the Memorandum In Support Of Motion to Enforce Class Action Settlement states:

ORR also regularly places youth on multiple psychotropic medications. It often tells children little or nothing about the drugs, nor does the agency obtain parental consent, or the legal equivalent thereof, to medicate children. There can be no question that psychotropic drugs can seriously and permanently injure children, yet ORR routinely administers such drugs

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140. See 45 C.F.R. § 164.524(a)(1)(i) (2019) (stating the instances where an individual has a “right of access” to inspect and obtain a copy of protected health information about an individual).
141. No. CV 85-4544-DMG (AGRx) at 22 (July 30, 2018).
142. Id.
143. Id.
to youth in utter disregard of state laws designed to support children’s mental health.\textsuperscript{144}

According to the Texas Regulations, a General Residential Operations must acquire “written, signed, and dated consent, specific to the psychotropic medication to be administered, from the person legally authorized to give medical consent before administering a new psychotropic medication to a child.”\textsuperscript{145} In \textit{Flores}, the court held that the defendant shelter must: 1) disclose to a “person legally authorized to give medical consent,” and 2) obtain the informed written consent of that person—in compliance with the Texas Administrative Code.\textsuperscript{146} Defendants who do not obtain informed written consent do not have the authority to administer psychotropic drugs to the plaintiff unless they obtain a court order authorizing them under state law or in an emergency as defined in Section 266.009 of the Texas Family Code.\textsuperscript{147} This section specifically states that “[c]onsent or court authorization for the medical care of a foster care child…is not required in an emergency during which it is immediately necessary to provide medical care to the foster child to prevent the imminent probability of death or substantial bodily harm to the child or others.”\textsuperscript{148}

A growing number of mental health organizations and professionals have issued letters of protest against the detention of immigrant children.\textsuperscript{149} These letters refer to the increased risk of anxiety and depression in the detained children.\textsuperscript{150} Post-traumatic stress (PTSD) and attention-deficit hyperactivity disorder (ADHD) have also been named.\textsuperscript{151} These mental illnesses depend on many factors, including the age of the child at the time of separation from the parent and the length

\begin{footnotes}
\footnote{144. Memorandum in Support of Motion to Enforce Class Action Settlement, Flores v. Sessions, No. CV 85-4544-DMG (AGRx) at 12 (May 18, 2018).}
\footnote{145. \textsc{26 Tex. Admin. Code} § 748.2001(b) (2019).}
\footnote{146. \textsc{Tex. Fam. Code} § 266.004(a) (2015); No. CV 85-4544-DMG (AGRx) at 32 (July 30, 2018).}
\footnote{147. \textsc{Tex. Fam. Code} § 266.004(g) (2015).}
\footnote{148. \textsc{Tex. Fam. Code} § 266.009(a) (2005).}
\footnote{149. See Carey, supra note 63 (listing several reasons for these letters of protest).}
\footnote{150. \textit{Id.}}
\footnote{151. \textit{Id.}}
\end{footnotes}
This new norm of detaining children is alarming psychologists.\textsuperscript{152} Doctors have concluded the trauma experienced by immigrant children will be problematic in the future as they integrate into our society.\textsuperscript{153} The separation of children from parents causes severe stress on young, developing minds, which significantly alters the brain and increases the risk of developing serious psychiatric and physical problems later in life.\textsuperscript{154} In addition, migrant children’s mental health will impact the world at large because these children are likely to struggle as they cope with their mental health and attempt to become productive members of society.\textsuperscript{155} Various physicians and psychologists wrote in a letter to Attorney General Jeff Sessions:

The best interests of the child is the recognized legal standard for the treatment of children across a range of domains, including parental custody and immigration proceedings. It should not be U.S. policy to traumatize children . . . intentional infliction of pain on children and their families is not just inhumane, it also fails to meet the stated goals of deterrence . . . it will not change the realities that drove the parents to seek safe haven in the United States.\textsuperscript{156}

II. THE MENTAL HEALTH OF IMMIGRANT CHILDREN

A. The Psychological Effect of Trauma and the Effects of Detention

In order to understand how trauma affects children, it is important to understand some of the mental health conditions affecting immigrant children.\textsuperscript{157} The most common include anxiety, depression, PTSD, and

\begin{itemize}
\item 152. \textit{Id.}
\item 153. \textit{Id.}
\item 155. See \textit{id.} (describing the impact that children will face in their future due to trauma endured in detention centers throughout their childhood).
\item 156. \textit{Id.}
\item 158. See Linton et al., supra note 130 (providing examples of the mental health conditions that arise due to the confinement of children).
\end{itemize}
other behavioral problems.\textsuperscript{159} PTSD transpires when a child is exposed to a catastrophic event, such as natural disasters, violence, or severe accidents.\textsuperscript{160} For a child to meet the elements of a mental disorder, the occurrence of the event must have caused the child to experience extreme fearfulness and helplessness.\textsuperscript{161} In addition to extreme fearfulness, there are other specific types of responses, including symptoms of re-experiencing, avoidance, and arousal, which manifest through sleep disturbance, increased irritability, expressions of anger or aggression.\textsuperscript{162} These are all common symptoms of PTSD.\textsuperscript{163} Children are vulnerable and feel less secure, as they have little power and status in society.\textsuperscript{164} They experience feelings of defenselessness following a traumatizing experience, causing a more arduous challenge for mental health counselors and therapists to overcome.\textsuperscript{165}

Unaccompanied minors are treated and classified as foster children, and both groups suffer similar traumatic experiences.\textsuperscript{166} Foster children are often exposed to neglect and abuse before placement, which correlates to an increased rate of mental disorders compared to their non-abused counterparts.\textsuperscript{167} However, over time, foster children can adapt to their new adoptive environment, and their cognitive development increases.\textsuperscript{168} That indicates that it is likely that unaccompanied minors could have the same results as American foster children.

\begin{footnotesize}
\textsuperscript{159} Id.
\textsuperscript{161} Id.
\textsuperscript{162} Id.
\textsuperscript{163} Id.
\textsuperscript{164} Id.
\textsuperscript{165} Id.
\textsuperscript{167} See Jill M. Waterman et al., Pre-Placement Risk and Longitudinal Cognitive Development for Children Adopted from Foster Care, 92 CHILD WELFARE, no. 4 at 1, 7–8 (2013) (detailing statistics as to the effects of abuse in foster care on the children’s cognitive development).
\textsuperscript{168} Id. at 7, 10.
\end{footnotesize}
B. Health Information Privacy in the Confinement Setting

Regardless of their status, children should be protected in every environment because of their vulnerability.\(^{169}\) Mental health counselors and therapists must build rapport with their child clients.\(^{170}\) It is of utmost importance that therapists do not violate their client’s trust, as lack of confidentiality would interfere with the child’s recovery.\(^{171}\) In a setting such as a detention center, therapists do not relinquish their code of ethics; thus, a child’s records must be kept according to the ethical standards of the profession as well as comply with state law.\(^{172}\) Therefore, a therapist is obligated to keep confidential all conversations, diagnoses, treatment, and any material revealed during treatment.\(^{173}\) Failure to keep this private information confidential is a violation of the therapist’s code of ethics and the child’s right to privacy.\(^{174}\)

In comparing unaccompanied minors to foster children, foster children in America are not treated any better just by being “American” or “American born.”\(^{175}\) For example, around 2000, poor treatment of black foster youth caused bipolar disorder diagnoses to skyrocket in that demographic.\(^{176}\) Similarly, unaccompanied minors also have a high number of diagnoses of mental health disorders.\(^{177}\) To cover up the

\(^{169}\) See G.A. Res. 44/25, Convention on the Rights of the Child (Nov. 20, 1989) (emphasizing children are “entitled to special care and assistance.”).

\(^{170}\) ROBBINS, supra note 30.


\(^{172}\) Id. at 74.

\(^{173}\) See id. at 75 (discussing that the “material” includes “written or oral, and in the case of children, can include actions and occurrences such as observations of the child’s play and drawings.”).

\(^{174}\) Id.

\(^{175}\) See ROBERT WHITAKER, ANATOMY OF AN EPIDEMIC: MAGIC BULLETS, PSYCHIATRIC DRUGS, AND THE ASTONISHING RISE OF MENTAL ILLNESS IN AMERICA 253–55 (Crown Publisher, 2010) (discussing how our very own American society treats children in the foster care system by keeping them sedated on psychotropic medication).

\(^{176}\) See WHITAKER, supra note 175 (“based on hospital discharges, they are now said to suffer from bipolar disorder at a greater rate than whites.”).

problem, agencies would rather medicate children, rather than solve it by providing coping mechanisms. Further, failing to address this issue head-on leads the American economy to suffer because so many of these children will rely on welfare or other aid for the rest of their lives.

For example, a teenage minor under ORR custody reported that he was assigned a therapist who told him that she would help him. However, every time he would share his exposure to deadly violence, he was labeled a “gang member” by the therapist. Further, the confidential information he shared with the therapist, including the dangers he faced in Guatemala and the fear he experienced, was used against him. In a class-action suit filed on behalf of unaccompanied minors, the complainant alleged children under ORR custody were placed in residential shelters with the knowledge they would be medicated with powerful psychotropic medications.

The minor reported that he was forced to take psychotropic medications against his will. He also witnessed fellow residents forced to take medication, injected with drugs, and “tied up in restraint chairs for hours with cowls over their heads.”

https://commons.stmarytx.edu/thescholar/vol22/iss1/3
reported they were given “up to eighteen pills a day…without being informed what the pills were for.”\textsuperscript{186} These drugs included “antidepressants, anti-anxiety, antipsychotic medications such as Clonazepam, Divalproex, Duloxetine, Lithium and Geodon.”\textsuperscript{187}

### III. CURRENT PROTECTIONS

#### A. Asylum

The aid, once available to these children, is slowly diminishing.\textsuperscript{188} It has become more difficult for the persecuted to seek refuge in the United States.\textsuperscript{189} The classic refugee flees their country of origin because the government has persecuted them, either directly through its own actions or indirectly by being unwilling or unable to prevent the misconduct of non-government actors.\textsuperscript{190} However, it is important to note the difference between an asylum seeker and a refugee, as they are often used interchangeably.\textsuperscript{191} An individual may suffer threats and violence in their country of origin for reasons relating to their social, economic, family, or other personal circumstances.\textsuperscript{192} However, asylum is only available for certain classes of people.\textsuperscript{193} If the persecution arises due to membership in a protected group, the victim may not have a choice but

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\textsuperscript{186} Cummings, supra note 185; see Smith & Bogado, supra note 185 (recounting an experience where a child was actually injected without permission).

\textsuperscript{187} Cummings, supra note 185.


\textsuperscript{189} OFF. OF INSPECTOR GEN., supra note 103.


\textsuperscript{192} See Matter of A-B-, 27 I&N Dec. at 318.

to flee to another country for refuge.\footnote{See id. at 344 (A.G. 2018) (detailing a specific account where an immigrant was forced to flee their country).} The Immigration Nationality Act (INA) defines “refugee” as:

any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which a person last habitually resided, and who is unable or unwilling to return 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 …\footnote{Immigration Nationality Act § 101(a)(3), 8 U.S.C. § 1101(a)(42)(A) (2014).}

The Immigration and Nationality Act (INA) does not define persecution on account of membership in a particular social group.\footnote{See Matter of Acosta, 19 I&N Dec. 2011, 233 (BIA 1985).} This issue was addressed by the Board of Immigration Appeals (BIA) based on four grounds of persecution: race, religion, nationality or political opinion.\footnote{See id. at 318.} Generally, gang-related claims do not qualify for asylum due to lack of credibility.\footnote{See id. at 320 (citing 8 U.S.C. § 1225(b)(1)(B)(v)).}

An individual seeking asylum must have a credible fear of persecution.\footnote{See id. (citing Matter of A-B-, 27 I&N Dec. at 318).} However, the individual seeking asylum carries the burden of establishing a nexus between the alleged persecution and one of the statutory grounds.\footnote{See Matter of A-B-, 27 I&N Dec. at 338.} Further, granting asylum is discretionary.\footnote{See 8 U.S.C. § 1158(b)(1)(A) (2009) (providing the Attorney General broad discretion in granting asylum determinations).} As discussed, the person seeking asylum must bear the burden and meet certain statutory grounds, but they also must prove that their case merits asylum as a matter of discretion.\footnote{See 8 U.S.C. § 1158(b)(1)(B)(i) (2009) (understanding the burden requirements in establishing asylum).} There are certain limitations or “disqualifications” as well, such as previous criminal convictions.\footnote{8 U.S.C. §§ 1158(b)(2)(A)–(B) (2009).}
“Victims of gang violence often come from all segments of society, and they possess no distinguishing characteristic or trait that would readily identify them as members of such a group.”\textsuperscript{204} The BIA has established that a “particular social group must not be ‘amorphous, overbroad, diffuse, or subjective,’ and ‘not every ‘immutable characteristic’ is sufficiently precise to define a particular social group.’”\textsuperscript{205} There is no clear, bright-line rule which determines the specific characteristics in deciding whether one particular group falls within the meaning of 8 U.S.C. § 1101(a)(42)(A).\textsuperscript{206} The BIA determined that groups who are resistant or susceptible to gang violence are “too diffuse to be recognized as a particular social group.”\textsuperscript{207}

This is not the case for children who are part of a vulnerable social class.\textsuperscript{208} In \textit{Matter of A-B-},\textsuperscript{209} the BIA stated that individuals seeking asylum based on gang violence “are often not exposed to more violence or human rights violence than other segments of society.”\textsuperscript{210} However, this is not the case when the individual exposed is a child.\textsuperscript{211} A child exposed to ruthless violence experiences significant damage to their psyche.\textsuperscript{212}

For asylum purposes, the individual seeking asylum must establish that he or she “is a refugee within the meaning of section 1101(a)(42)(A)” of the INA.\textsuperscript{213} The individual must be “unable or unwilling to return to, and is unable or unwilling to avail him[her]self of the protection, of that country due to a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political
opinion.” The BIA and federal courts have repeatedly stated that the phrase “membership in a particular social group” is ambiguous. A “particular social group” is not defined by the INA or federal regulations. Furthermore, there is no clear evidence as to what the legislature intended “particular social group” to mean. In the broadest literal meaning, the phrase is completely open-ended, as any group of people could be described as a “particular social group.” On its own, the statutory language is not very instructive. Moreover, the attorney general has the authority to construe terms liberally. The Supreme Court also noted that “administrative agencies are not bound by the prior judicial interpretations of ambiguous statutory interpretations.” The rationale is that Congress, when it left a statute open to interpretation, meant for all ambiguous statutory language to be resolved by the desired agency instead of the courts. Therefore, the authority to evaluate the ambiguous term remains within the discretion of the agency enforcing the statute.

Furthermore, “[i]n a number of opinions spanning several decades, the Board has articulated and refined the standard for persecution on account of membership in a ‘particular social group’ so that this category is not boundless.” The BIA stated that persecution on account of membership in a particular social group is construed to mean “persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable, characteristic.” It is applicable to individuals who are either unable by their own actions or, as a matter of conscience, are forced to avoid persecution. There must be some understanding of how the

216. Id.
217. Id.
218. Id.
219. Id.
220. Id. 27 I&N Dec. 316, 326 (A.G. 2018).
221. See id. at 327 (citing Matter of R-A., 24 I&N Dec. 629, 631 (A.G. 2008)).
222. Id.
223. Id.
224. Id.
225. See id. (citing Matter of Acosta, 19 I&N Dec. 211, 233 (BIA 1985)).
226. Id.
immutable characteristics shared by the group are understood in the individual’s country of origin, so the BIA can understand that the potential persecutors, in fact, see that these characteristics warrant suppression. Over the years, the BIA has refined its interpretation of “particular social group” on a case-by-case basis.

B. Special Immigrant Juvenile Status

Another option currently in place for unaccompanied minors is the Special Immigrant Juvenile Status (SIJ). “SIJ Status is a humanitarian form of relief available to noncitizen minors,” including unaccompanied minors. A juvenile seeking an SIJ cannot do so to obtain immigration benefits, but rather, to seek relief from abuse, neglect or abandonment, or a similar basis under state law. To apply for an SIJ, the applicant must be under 21 years of age and currently living in the United States. In addition, an application for an SIJ requires that the:

1. [minor] [must be] dependent on the court, or in the custody of a state agency or department or an individual or entity appointed by the court; 2. [minor] cannot be reunified with one or both of [the] parents because of abuse, abandonment, neglect, or a similar basis under state law; AND 3. it is not in [the] best interest to return to the country or nationality or last habitual residence of [the] parents.

For the first element, a juvenile court in the United States must have issued a court order stating that the minor is dependent on the court. For the second element, the termination of parental rights is not a

227. See id. at 332 (citing Matter of R-A-, 22 I&N Dec. 629, 918 (A.G. 2008)).
228. See id. at 331 (citing W-G-R-, 26 I&N Dec. 208 (BIA 2014)).
231. Id., supra note 229.
232. Id.
233. Id.
234. Id.
prerequisite, but only a finding that the child is unable to be with one or both of their parents due to that parent’s treatment of the child under the state’s welfare laws.\textsuperscript{235} For example, it must be the juvenile’s parent and not merely a guardian who terminates parental rights.\textsuperscript{236} Additionally, if there is a claimed parent—usually a father—who is not listed on the juvenile’s birth certificate, it requires further evidentiary documentation from the court.\textsuperscript{237} Under state law, the presumed father is generally named on the birth certificate.\textsuperscript{238} Lastly, the child’s best interest standards are followed.\textsuperscript{239} The state court must determine whether it is in the child’s best interest to be placed in the United States.\textsuperscript{240} However, finding that it is in the child’s best interest to stay in the United States does not eliminate the possibility that the child’s country of origin is also in the best interest of the child.\textsuperscript{241} The state court determines the standard, and federal law does not require the state to make any further analysis other than what is required under state law.\textsuperscript{242} The SIJ allows for the juvenile to adjust status and obtain lawful permanent residency.\textsuperscript{243}

C. **Unaccompanied Refugee Minors Program**

Again, unaccompanied minors are treated like foster children.\textsuperscript{244} In an effort to find permanent placements, some unaccompanied minors are placed in long-term foster care.\textsuperscript{245} To receive an unaccompanied minor, a foster parent must meet the same requirements as if they were going to foster an American child in the foster care system.\textsuperscript{246} The two organizations that assist in fostering placement coordination are the

\begin{itemize}
\item \textsuperscript{235} Id.
\item \textsuperscript{236} Id.
\item \textsuperscript{237} Id.; see 8 C.F.R. § 204.11(d) (stating that the initial documents include a “birth certificate, passport, official foreign identity document issued by a foreign government, such as a Cartilla or a Cedula, or other document which in the discretion of the director establishes the beneficiary’s age.”).
\item \textsuperscript{238} US. CITIZENSHIP & IMMIGR. SERV., supra note 234.
\item \textsuperscript{239} Id.
\item \textsuperscript{240} Id.
\item \textsuperscript{241} Id.
\item \textsuperscript{242} Id.
\item \textsuperscript{243} Id.
\item \textsuperscript{244} OFF. OF REFUGEE RESETTLEMENT, supra note 166.
\item \textsuperscript{245} Id.
\item \textsuperscript{246} See id. (“ORR requires that all foster care parents be fully licensed by their state.”).
\end{itemize}
United State Conference of Catholic Bishops and the Lutheran Immigration and Refugee Services. These organizations train foster families with cross-cultural experiences, interest, and sensitivity. They also provide intensive, culturally sensitive, trauma-informed case management. The children placed in foster care are able to attend public school and integrate into American society.

IV. SOLUTIONS FOR PROTECTING VULNERABLE UNACCOMPANIED CHILDREN

A. Improving Mental Health Treatment for Vulnerable Immigrant Children

One of the most important needs for migrant children is mental health treatment for those suffering from PTSD or other mental health conditions. To provide these children with adequate treatment, mental health practitioners must keep their minor patient’s culture in mind. Mental health practitioners must consider specific cultural sensitivities while maintaining ethical standards. Cultural competency has three main characteristics. First, cultural sensitivity—which requires recognizing and appreciating diversity. Second, cultural knowledge—this entails “the factual understanding of basic anthropological knowledge about cultural variation” through reading, research, expert consultation, as well as meaningful interactions with a community made up of people with diverse backgrounds. Lastly, cultural empathy, which is the ability to engage emotionally with

247. Id.
249. Id.
250. OFF. OF REFUGEE RESETTLEMENT, supra note 166.
251. LAURA WEISS ROBERTS, A CLINICAL GUIDE TO PSYCHIATRIC ETHICS 144 (2016).
252. See ROBERTS, supra note 251 (noting psychiatrists and other mental health professionals must consider the patient’s cultural sensitives, and their own professional ethical standard).
253. See id. (affirming psychiatrists practice cultural competency given their increasing multicultural patient population).
254. Id.
255. Id.
256. Id.
an individual’s cultural perspective. Additionally, this model sets aside cultural stereotypes and acknowledges cultural differences. Unquestionably, unaccompanied minors experience physical and emotional abuse during their perilous journey. Once these children reach their families, or enter a new environment in a new country, they have a difficulty adjusting to their new surroundings. There is no designated organization in charge of the mental health of migrant children and there is a global need for mental health services for these minors to be able to integrate into their new society, to thrive, and contribute to its economy. Presently, there is no collaboration between countries to address mental health issues in migrant children. In fact, “the lack of a unified approach has resulted in such youth tending to fall through the cracks of safety nets developed to protect them.” Furthermore, there is no legal framework in place for unaccompanied minors.

1. Mental Health Treatment Under Sponsor Custody

The utilization of detention centers to deter and manage unaccompanied minors is a contradictory approach to helping children. It goes against the best interest of the child. Detaining children must be the last resort, not the first and only measure. If detention is to be used, it must be used as infrequently and as humanely
Research conducted by psychologists prove that unaccompanied minors face a higher risk of mental illness compared to the general public. Due to the high levels of victimization and the unaccompanied minor’s exposure to trauma coupled with the lack of adequate mental health treatment services, they are at higher risk for long-term consequences. These consequences include the inability to regulate emotions and behaviors, which may be masked as rage, fear, shame, substance abuse or self-injury. Psychological research indicates that unaccompanied minors need emotion regulation, goal setting, and goal striving—not forced psychotropic drugs. Placing an unaccompanied minor with their sponsor will eliminate forced medication. The continuous practice of drugging children in detention centers while they await their immigration hearings is not helping children or society. The experiences and environments that an individual is exposed to have a significant impact on their mental health. Children who are exposed to poverty, abuse, and discrimination are more likely to develop mental health conditions. Although not frequently exposed, there is evidence of a correlation between childhood trauma and a mental health disorder in the future.

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269. Id.; see Greeley, et al., supra note 32 at 13 (“Immigration advocates across the U.S. and globally continue to shed light on the treatment of child migrants and the need to ensure they are treated humanely and ethically.”).

270. Collier, supra note 122 at 58, 60.

271. Id. at 61.

272. Id.

273. See generally El-Awad, et al., supra note 27 (arguing the necessity to support unaccompanied refugee minors in their goal setting and goal striving because they carry many unrealistic wishes and unattainable goals, which can be threatening to their mental health).

274. See Complaint, supra note 65 at ¶4 (stating ORR knowingly places children in residential treatment and detention facilities where they will be administered powerful psychotropic medication for an undetermined time without safeguards such as parent consent).

275. See id. at ¶112–113 (arguing that few psychotropic medications have been approved by the U.S. Food and Drug Administration given the common, serious, long-lasting effects such as psychosis, seizures, movement disorders, suicidal ideation, aggression, extreme weight gain, and organ damage).

276. See Ailbhe Finn, Our Approach to Mental Health Isn’t Working, OPEN SOCIETY FOUND. (Oct. 10, 2017), https://www.opensocietyfoundations.org/voices/our-approach-mental-health-isnt-working [https://perma.cc/LL5V-FK2E] (citing clinical psychologist Richard Bentel, who reported that the link between childhood misfortune and future psychiatric disorder is as strong as the link between smoking and lung cancer).

277. Finn, supra note 276.

278. Id.
To truly help and protect vulnerable unaccompanied minors, adequate mental health services must be made accessible to them.\textsuperscript{279} Every child must be placed with a sponsor when available.\textsuperscript{280} The minor can then integrate in American society, attend public school, and receive counseling through the school.\textsuperscript{281} Unaccompanied minors do not qualify for Medicaid or government benefits, such as public welfare, that are available to American citizens.\textsuperscript{282} Psychologists continually find that building trust between a child and a therapist is the first step to treatment.\textsuperscript{283} One of the challenges faced by therapists, regardless of where the therapy takes place, is bonding with the child.\textsuperscript{284} Many of these children do not let their guard down because of the trauma they have experienced.\textsuperscript{285} Once successful, the therapist cannot break the trust by disseminating the child’s private mental health records.\textsuperscript{286} The therapist must be knowledgeable with the child’s culture and language.\textsuperscript{287} Adopting a trust-driven, culturally cognizant framework will be a step of healing for these children.

In the alternative, a child without a sponsor or a foster care placement who must await for a hearing under custody of ORR must be provided access to an education.\textsuperscript{288} For example, allowing children to attend public school would establish a sense of normality—a routine.\textsuperscript{289} Children will feel more secure rather than unpredictability due to their

\textsuperscript{279} See id. (signifying the importance of mental health for vulnerable classes such as minors).

\textsuperscript{280} Collier, supra note 122 at 58, 61.

\textsuperscript{281} Id.

\textsuperscript{282} See id. (noting the hardships and challenges unaccompanied minors face).

\textsuperscript{283} Id. at 58, 61–62.

\textsuperscript{284} See id. at 62 (indicating the tools therapist use when talking with unaccompanied minors, such as not using the words “therapy” and “counseling” with the children.).

\textsuperscript{285} Id. at 58, 61–62.

\textsuperscript{286} See generally 45 CFR § 160.103 (2019) (governing the confidentiality of medical records and under the circumstances when the records may be disclosed).

\textsuperscript{287} Collier, supra note 122 at 58, 62.

\textsuperscript{288} See id. at 58, 61–62 (asserting undocumented children can receive social services by attending public school, including mental health counseling, given they are ineligible for Medicaid and otherwise unable to afford treatment).

Children who attend public school, despite living in an immigration detention shelter, will have access to a school counselor. Instead of spending billions on private immigration detention centers that cause more harm to vulnerable children and their emotional psyche long-term, money must go to mental health counseling for school counselors. Many of these children will attend under-funded public schools. These children will not be able to receive adequate mental health treatment to allow them to integrate into American society until the best interest of the child framework is followed.

It is imperative that social workers working in detention shelters be aware of what drove these children to enter the United States. This calls for understanding the high rates of trauma, attachment disruptions, and the immigration system. As previously discussed, when an unaccompanied minor flees gang-violence and discloses to the shelter-provided counselor that he or she is fleeing gang-violence, it is imprudent for the social worker to label the child as a gang member or as having

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290. Reynolds, supra note 289.

291. See Kiara Alvarez and Margarita Alegria, Understanding and Addressing the Needs of Unaccompanied Minors, AM. PSYCHOL. ASS’N (June 2016), https://www.apa.org/pi/families/resources/newsletter/2016/06/immigrant-minors.aspx [https://perma.cc/32T3-2HQB] (suggesting school counselors can set up a welcoming environment for newly enrolled youth, advocate for strategies to help families navigate unfamiliar systems, support for direct service staff in addressing trauma, and be in a position to facilitate immigration cases by conducting evaluation reports to be used in asylum cases).


293. See Greeley, et. al., supra note 32 (arguing child and adolescent trauma can lead to difficulties in school, and increase the risk of dropping out of school, resulting in increasing the likelihood of obtaining the skills for rewarding and prosperous employment).

294. See id. (reporting that not all public schools have the funds to provide all school-based health services recommended by the state of Texas).

295. See id. (arguing detention is never in the best interest of the child and children should be provided with mental health services such as screening and treatment for PTSD).

296. See Alvarez & Alegria, supra note 291 (suggesting social workers can work with populations that have related challenges such as unaccompanied minor children, and asylum seekers).

297. See id. (arguing that a lot can be accomplished through evidence-based-trauma-focused therapy, family therapy or multilevel approaches).
gang affiliation.\textsuperscript{298} There is limited literature on favorable approaches for mental health services to unaccompanied minors, however, there are established approaches in psychology that can be adopted to help child victims of gang violence.\textsuperscript{299} Receiving therapy at school is an approach that can be implemented.\textsuperscript{300} Through school-based therapy, children are exposed to society and have access to a school counselor, rather than feel confined to the parameters of a detention center.\textsuperscript{301}

\textbf{2. Exclusion of Mental Health Records in Immigration Hearings}

The collaboration between social worker and attorney is necessary in order to protect unaccompanied minors.\textsuperscript{302} This cooperation will prevent private mental health information from being disseminated without consent in immigration court and protect the child.\textsuperscript{303} All parties involved can ensure the protection of the child’s best interest by following the best interest standard.\textsuperscript{304} Immigration Judges carefully control how the proceedings are conducted.\textsuperscript{305} The judge’s role is to ensure a fundamentally fair hearing.\textsuperscript{306} An Immigration Judge should

\begin{itemize}
  \item \textsuperscript{298} See Bob Ortega et al., \textit{supra} note 180\] (alleging that a child’s fears and dangers were used against him and he was placed in a high-security detention center despite his record of good behavior).
  \item \textsuperscript{299} See Alvarez & Alegria, \textit{supra} note 291\] (advocating that unaccompanied minors can participate in evidence-based-trauma-focused therapy, family therapy or multilevel approaches to address the interface between the child, family, school, and other institutions).
  \item \textsuperscript{300} See id.\] (suggesting children needing mental health services can receive Trauma Systems Therapy through school-based psychotherapy groups).
  \item \textsuperscript{301} See id.\] (detailing what can be done to alleviate the effects of the detention center).
  \item \textsuperscript{302} See id.\] (recognizing Child Advocacy Centers provide a safe place for children to be interviewed for child development and legal proceedings).
  \item \textsuperscript{303} See OFF. OF REFUGEE RESETTLEMENT, \textit{supra} note 119\] (enforcing accountability systems for caregivers to keep child’s mental health records confidential).
  \item \textsuperscript{304} See id.\] (enforcing accountability systems for caregivers to keep child’s mental health records confidential).
  \item \textsuperscript{306} See Shaughnessey v. United States, 345 U.S. 206, 212 (1953)\] (stating immigration proceedings must conform to traditional standards of fairness encompassed in due process); Reno, 507 U.S. at 306\] (holding that the Fifth Amendment entitles aliens to due process of law); Matter of
refer a child to an advocate if there are concerns regarding the child’s capacity.\textsuperscript{307} Children are vulnerable and must be recognized as children.\textsuperscript{308} Most importantly, judges must be culturally sensitive when dealing with a child’s case.\textsuperscript{309} Knowledge of the child’s development and the impact of the trauma the child has suffered are paramount.\textsuperscript{310} An Immigration Judge cannot base his or her decision solely on a statement the child made to a counselor.\textsuperscript{311} Keeping with the best interest standard, Immigration Judges must issue a qualified protective order if psychiatric records are to be included in the child’s immigration case.\textsuperscript{312} Private psychiatric notes are outside the scope of the therapist’s report and require a qualified protective order if an Immigration Judge believes those notes are necessary.\textsuperscript{313} Once obtained, psychiatric notes cannot be used against the child.\textsuperscript{314
B. Allowing Asylum Claims for Unaccompanied Minor Victims of Gang Violence

To request asylum in the United States, an individual seeking asylum must have a well-founded fear of prosecution—a generalized fear of gang violence is insufficient. In gang-related asylum cases, displaying a well-founded fear is not difficult—establishing that the fear is “on account of” one of the protected classes is the challenge. The asylum seeker must show that they will suffer persecution on account of their race, political opinion, religion, nationality or membership in a particular social group. Additionally, the asylum seeker must establish that the persecution is at the hands of the government or third party, which the government is unable or unwilling to control. Applicants making these claims bear the burden of proving the allegations. However, when asylum officers review applications, they do not spend more than one hour reviewing the application. This limited review is not sufficient to make such a determination which, often times, results in disparate findings among officers.

315. See Immigration Nationality Act, supra note 195 (listing the five protected grounds for asylum); see, e.g., Eduard v. Ashcroft, 379 F.3d 182, 190 (5th Cir. 2004) (an applicant’s fear of persecution cannot be based solely on general violence and civil disorder); see Shaikh v. Holder, 588 F.3d 861, 864 (5th Cir. 2009) (criminal violence based on financial motives is not connected to a protected ground); Matter of Mogharrabi, 19 I&N Dec. 439, 447 (BIA 1987) (aliens fleeing general conditions of violence and upheaval do not qualify for asylum); Matter of A-B-, 27 I&N Dec. 316, 320 (A.G. 2018) (reasoning claims pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum).


317. Immigration Nationality Act, supra note 195; see Ruffer, supra note 316.

318. Immigration Nationality Act, supra note 195; Ruffer, supra note 316; see Matter of A-B-, 27 I&N Dec. 316 (A.G. 2018) (providing that persecution is harm with the acquiescence of the government).


322. See Matter of M-S-, 27 I&N Dec. at 512 (reasoning if the alien does not establish a credible fear, the asylum officer shall order the alien removed from the United States without further hearing or review pursuant to INA § 235(b)(1)(B)(iii)(I)); Zonana, supra note 320.
When it comes to cases regarding children, the United States must do more to protect them. A PTSD diagnosis is based purely on self-reports, as are most psychiatric diagnosis.\textsuperscript{323} For child claims, children are the story-tellers; their analysis and “self-report” are based solely on their ability to talk about issues that—for some are uncomfortable to talk about.\textsuperscript{324} In a survey of 104 Salvadoran children, approximately sixty-six percent reported leaving El Salvador due to violence at the hands of criminal syndicates and lack of protection from such violence.\textsuperscript{325} Day-to-day confrontations included “evading extortion; witnessing murders; and navigating threats to themselves, and their families, friends and neighbors.”\textsuperscript{326} The child’s first instinct is to leave without a plan.\textsuperscript{327} All they want to do is live.\textsuperscript{328} Shame accompanies abuse.\textsuperscript{329} Children may have difficulty articulating or narrating their experiences of abuse, especially in intimidating environments such as a detention center.\textsuperscript{330} Furthermore, some children may not completely recognize their experiences as abuse because an abusive environment is all they have ever known.\textsuperscript{331} When children, or even adults, discuss sexual violence they have a greater difficulty articulating details due to the highly sensitive nature and social stigma associated with sexual violence.\textsuperscript{332} For these reasons, it is particularly important that those seeking asylum—children included—are provided with adequate mental health services and undergo a forensic psychological evaluation.\textsuperscript{333} A forensic interview of a minor is a developmentally sensitive and legally sound technique of obtaining factual information pertaining to allegations of abuse or exposure to

\textsuperscript{323}{ Zonana, supra note 320.}
\textsuperscript{324}{ See UNHCR, supra note 40 (detailing how children speak of their fears and the experiences they have had).}
\textsuperscript{325}{ Id.}
\textsuperscript{326}{ Id.}
\textsuperscript{327}{ See id. (understanding that these families have been forcibly displaced and not able to comprise a plan).}
\textsuperscript{328}{ See id. (highlighting the reason these children leave their countries of origin is their ultimate desire to live).}
\textsuperscript{329}{ Id.}
\textsuperscript{330}{ See id. (understanding the difficulties of discussing traumatic experiences with children).}
\textsuperscript{331}{ Id.}
\textsuperscript{332}{ Id.}
\textsuperscript{333}{ ROBBINS, supra note 30.}
Forensic interviews are conducted by a competently-trained, neutral psychologist who utilizes research and practice-informed methods to determine whether abuse or exposure to violence has occurred. The forensic psychologist must record the video interview with the child for two reasons: 1) to preserve a record of the interview and 2) for easy accessibility of the video if the forensic psychologist needs to make their findings. The psychologists’ most important practices are avoiding bias and building rapport early in the interview. Additionally, other best practices in accordance with the National Institute of Child Health and Human Development (NICHD) include: having a practice interview, providing the child with ground rules, asking the child open-ended questions, and encouraging the child to provide a free narrative, while at the same time avoiding pressure, coercion, and suggestions through disseminating information to the child by asking leading questions, or by repeating questions. During the interview, a forensic psychologist must use a child-friendly room and remove any distracting objects. Furthermore, “prior to the interview, the interviewer should also consider questions that can be used to test alternative hypotheses.” The interviewer must determine if the alleged abuse or traumatic event occurred. It is possible that a portion of the child’s allegations are comprised of “confabulated details that are not accurate or has been influenced to make up additional details that are not true.” Part of building rapport with the child is to inform them that it is okay to answer with “I don’t know” or “I don’t understand.”


335. ROBBINS, supra note 30 at 334.

336. Id. at 336.

337. Id. at 336–338.

338. Id. at 336–337.

339. Id. at 337.

340. Id.

341. See id. at 338 (using the questioning to test hypotheses and determine whether there was abuse).

342. Id. at 337.

343. Id.
The interviewer can use basic questions to establish a baseline; for example, asking the child about something they can relate to or connect with in order to determine if the child can differentiate between true or false statements.\textsuperscript{344} However, if the child asks the forensic psychologist spontaneous questions during the interview, the forensic psychologist must proceed to answer them to continue building rapport.\textsuperscript{345} Once rapport is established, it will manifest a relaxed environment because the child will feel supported.\textsuperscript{346}

Pursuing forensic psychology to interview unaccompanied minors that have a well-founded fear of returning to their home country of origin will require that the interviewers are properly trained.\textsuperscript{347} This requires ongoing supervision to ensure the interviewer is using the best practices protocol.\textsuperscript{348} The skills which forensic psychologists must possess include the ability to ask the child open-ended questions to elicit narrative responses, the ability to rule out alternative explanations via hypotheses testing, and being able to assess the child’s developmental and cultural factors.\textsuperscript{349}

\textbf{C. Re-establishing Pilot Programs that Have Previously Worked}

It is more economical to allow asylum seekers to live in America under close supervision.\textsuperscript{350} Placing them in immigration detention centers costs the United States approximately $150 per day.\textsuperscript{351} In 2017, there were 323,591 immigration detainees.\textsuperscript{352} Given the cost associated with detention, the United States must reinstate the Intensive Supervision

\footnotesize{344. \textit{See id.} (outlining techniques for interviewing with diverse populations).}
\footnotesize{345. \textit{See id.} (signifying the importance of rapport and comfort between the child and psychologist).}
\footnotesize{346. \textit{See id.} (describing the role of rapport in interviewing diverse individuals such as unaccompanied minors).}
\footnotesize{347. \textit{See id.} at 339 (highlighting the importance of the interviewer’s qualifications when interviewing children who have been through trauma).}
\footnotesize{348. \textit{See id.} at 338 (highlighting the importance of interviewing protocols in order to ensure the psychological well-being of unaccompanied minors).}
\footnotesize{349. \textit{Id.}}
\footnotesize{350. \textit{See GLOBAL DETENTION PROJECT, UNITED STATES IMMIGRATION DETENTION} (May 2016), https://www.globaldetentionproject.org/countries/americas/united-states [https://perma.cc/XQN8-ET4Z] (describing officials and advocates agreement that alternative programs are both more humane and less costly).}
\footnotesize{351. \textit{Id.}}
\footnotesize{352. \textit{Id.}}
Appearance Program (ISAP)—the least restrictive alternative to detention. ISAP ended in 2017 after the Trump Administration shut it down to keep immigrants in detention centers. Under ISAP, United States Immigration and Customs Enforcement (ICE) was permitted to release asylum seekers into American society. ICE kept track of these asylum seekers via electronic monitors. Further, the asylum seekers’ release was conditioned upon their appearance in immigration court. ISAP had 99.6% compliance with appearance at their immigration hearings. Approximately 91.1% complied with their immigration court order. Of the 4.9% who absconded, 4% were arrested by other law enforcement agencies. The cost of this program is approximately $8.37 per day.


355. OFF. OF INSPECTOR GEN., supra note 353.

356. Id.

357. Id.; see What is the Intensive Supervision Appearance Program?, LANDERHOLM IMMIGR. L. (July 24, 2017), https://www.landerholmimmigration.com/blog/2017/july/what-is-the-intensive-supervision-appearance-pro/ [https://perma.cc/9PWR-ZAKH] (“[t]he Intensive Supervision of Appearance Program (ISAP) is a monitoring program for immigrants in deportation proceedings who have been released from detention. The goal of the program is to avoid detention and allow immigrants to live with their families and continue working while their deportation proceedings are pending.”).

358. Alex Nowrasteh, Alternatives to Detention are Cheaper than Universal Detention, CATO INST. (June 20, 2018, 7:00 PM), https://www.cato.org/blog/alternatives-detention-are-cheaper-indefinite-detention [https://perma.cc/Z3R5-WQ9C].

359. See Nowrasteh, supra note 358 (individuals either complied with their court order or gained legal status).

360. Id.

361. OFF. OF INSPECTOR GEN., supra note 353 at 4; see e.g., Mirren Gidda, Private Prison Company Geo Group Gave Generously to Trump and Now Has Lucrative Contract, NEWSWEEK (May 11, 2017), https://www.newsweek.com GEO Group Gave Generously to Trump and Now Has Lucrative Contract [https://perma.cc/3LS4-E8H9] (“. . . GEO Corrections Holdings Inc., a subsidiary of the GEO Group, donated $100,000 to the pro-Trump PAC Rebuilding America Now. Then, on November 1—seven days before the presidential election—it gave another $125,000 to the organization.”); Letter from Lawrence M. Noble, Counsel, The Campaign Legal Cent., to Mary
While ISAP was created for adult immigrants, its principle can be applied to unaccompanied minors by allowing minors to live with sponsors.\textsuperscript{362} In February 2014, over 22,000 immigrants were enrolled in ISAP—all of which were living in American society with a family sponsor, costing the government approximately $90 million dollars.\textsuperscript{363} Detention facilities cost nearly three times as much as ISAP—housing approximately 25,000 immigrants in detention facilities will cost tax payers an estimated $233 million.\textsuperscript{364} The most economical and logical outcome is to allow unaccompanied minors to live with their sponsor pending the outcome of their immigration case.

\textbf{CONCLUSION}

The United States needs to help children who are victims of gang violence, brutality, and persecution.\textsuperscript{365} The universal standard, the best interest of the child, must govern all policy.\textsuperscript{366} Allowing children to integrate into society will bring a sense of security and eventually allow them to flourish.\textsuperscript{367} Children are more receptive when mental health practitioners are culturally sensitive; understand the rates of trauma and attachment disruptions; and are aware of the immigration system.\textsuperscript{368} The detention of children must be the last resort.\textsuperscript{369} In cases where a child must be in a detention shelter, the child must be in a least restrictive setting and have an established routine.\textsuperscript{370} It is imperative that the child

\begin{footnotes}
\item[362] Landerholm Immigration Law supra note 357.
\item[363] Id.
\item[365] See supra, Part II of author’s piece.
\item[366] Young Ctr. for Immigrant Child. Rts. at the U. of Chicago, supra note 305.
\item[367] See Ewing, supra note 29 (detailing the benefits of integrating immigrant children into society).
\item[368] See Roberts, supra note 251 at 143 (emphasizing the importance of learning cultural differences and past experiences to make a mental health diagnosis).
\item[369] Young Ctr. for Immigrant Child. Rts. at the U. of Chicago, supra note 305.
\item[370] Id.
\end{footnotes}
build rapport with their counselor.\textsuperscript{371} Lastly, cooperation between attorneys and mental health professionals will avoid future violations of a child’s right to privacy.\textsuperscript{372} By following the best interest standard, children will be protected.\textsuperscript{373} Children are a vulnerable class.\textsuperscript{374} If the child’s guardian, policy makers, government, and society will not protect them, who will?

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\textsuperscript{371} See Alvarez & Alegria, supra note 291 (understanding the importance of learning what the children have gone through in order to properly connect).
\textsuperscript{372} See id. (describing what must be done to protect the privacy and best interests of immigrant children).
\textsuperscript{373} See Young Ctr. for Immigrant Child. Rts. at the U. of Chicago, supra note 305 (detailing the best interest framework to ensure children are protected).
\textsuperscript{374} UNHCR, supra note 40.
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