



ST. MARY'S  
UNIVERSITY

The Scholar: St. Mary's Law Review on Race  
and Social Justice

---

Volume 24 | Number 1

Article 3

---

4-19-2022

## The Mother of Exiles is Abandoning Her Children: The Systemic Failure to Protect Unaccompanied Minors Arriving at Our Borders

Rosa M. Peterson  
*St. Mary's University School of Law*

Follow this and additional works at: <https://commons.stmarytx.edu/thescholar>



Part of the [Child Psychology Commons](#), [Civil Law Commons](#), [Civil Procedure Commons](#), [Civil Rights and Discrimination Commons](#), [Immigration Law Commons](#), [Juvenile Law Commons](#), [Law and Politics Commons](#), [Law and Race Commons](#), [Law and Society Commons](#), [Legal Remedies Commons](#), [Migration Studies Commons](#), [Multicultural Psychology Commons](#), [Other Psychology Commons](#), [Psychiatry and Psychology Commons](#), and the [Social Justice Commons](#)

---

### Recommended Citation

Rosa M. Peterson, *The Mother of Exiles is Abandoning Her Children: The Systemic Failure to Protect Unaccompanied Minors Arriving at Our Borders*, 24 THE SCHOLAR 107 (2022).

Available at: <https://commons.stmarytx.edu/thescholar/vol24/iss1/3>

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in The Scholar: St. Mary's Law Review on Race and Social Justice by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact [egoode@stmarytx.edu](mailto:egoode@stmarytx.edu), [sfowler@stmarytx.edu](mailto:sfowler@stmarytx.edu).

**THE MOTHER OF EXILES IS ABANDONING HER  
CHILDREN: THE SYSTEMIC FAILURE TO PROTECT  
UNACCOMPANIED MINORS ARRIVING  
AT OUR BORDERS<sup>1</sup>**

**ROSA M. PETERSON\***

---

1. See EMMA LAZARUS, *The New Colossus*, in EMMA LAZARUS: SELECTED POEMS AND OTHER WRITINGS 233 (2002) (recognizing the Statue of Liberty as the Mother of Exiles, welcoming all who arrive searching for a better life).

\* St. Mary's University School of Law, J.D., May 2022. Liberty University, B.S., 2019. I write this piece with the greatest respect for immigrants, children, attorneys, advocates, and all those individuals involved in the ongoing attempts to reform our current immigration system. I wrote this comment to shed light on the flaws found within the immigration system, particularly in cases involving unaccompanied minors. I am not asking for a free pass for anyone to just walk into our country, but I am asking that we see these children as we see our own children and ask ourselves why we are not doing better. Beyond the politics and fighting, is a resolution that will still allow us to be a nation of laws, and a nation of immigrants; it is time that reform occur so that we may all move forward in harmony instead of demonizing and dehumanizing one another.

I dedicate this piece to my family. To my mother and father, Gloria and Pedro Peterson, thank you for showing me what unconditional love and support looks like. It may have taken me a little bit longer to get here, but without you, I would be lost. Words cannot express the enormity of my gratitude for all you have done and sacrificed to help me become the person I am today. To my daughters, Marie and Gabriella Peterson, I pray that my journey will show you that there are no limits to what you can do, and that my ceilings will be your floors. To my brothers, sisters, nieces, and nephews, thank you for your wisdom, insight and for having faith in my work. Lastly, to my grandmother, Bertha Vasquez, who, like my parents, saw the potential within me long before I saw it in myself; you are loved, and you are missed.

I want to thank Director Gregory Zlotnick for your unwavering support. Through you, I began working with immigration cases and pro bono in general, and that passion has fueled not only this piece, but my entire time in law school. Thank you, Professor Erica Schommer, for taking me under your wing during my first semester as a 2L law student in Immigration Clinic and helping me learn to navigate and understand this complicated system. Thank you to the staff at American Gateways in San Antonio, Texas. Your mentorship has been invaluable, as are the services you provide to this community. To every single one of my friends and fellow law students that have listened, asked questions, and helped as I have moved through this entire piece, thank you. I see you and I appreciate you.

Finally, I wish to thank the Staff Writers and Editorial Board from Volume 23 and Volume 24 of *The Scholar*. The relationships grown and fostered during these two years will forever be

108	<i>THE SCHOLAR</i>	[Vol. 24:107]
INTRODUCTION .....		108
I. OFFICE OF REFUGEE RESETTLEMENT DEFINES UNACCOMPANIED ALIEN CHILD AND CARE TO BE PROVIDED.....		112
II. SHARING CONFIDENTIAL MENTAL HEALTH INFORMATION AND HIPAA .....		116
III. UNACCOMPANIED MINORS RIGHTS AGAINST SELF INCRIMINATION .....		118
IV. CHILDREN’S RIGHTS ON AN INTERNATIONAL SCALE.....		125
V. IMMIGRATION POLICIES AND THE INFLUX OF UNACCOMPANIED MINORS.....		127
VI. PROTECTING UNACCOMPANIED, UNDOCUMENTED CHILDREN ....		128
VII. CHILDREN IN COURT—REVIEWING THE BURDEN .....		135
VIII. THE FIGHT TO RESTORE HUMANITY TO THE IMMIGRATION SYSTEM.....		138
IX. WHAT LIES AHEAD .....		141

INTRODUCTION

Kevin Euceda is a young man seeking that which most American citizens take for granted: safety, peace, and a life free from the fear and horror he experienced from the gangs in Honduras.<sup>2</sup> Desperate and fleeing for his life, Kevin, an unaccompanied minor, made the treacherous trip to the United States.<sup>3</sup> During a required counseling

---

ingrained in my soul. To Bianca Ybarra, thank you for being a guiding light as I worked on my comment and editing skills. Thank you to my fellow Associate Editors Sophia Sanchez and Zachary Gilbert; this journey has been intense, and I could not think of better partners to help see it through to its conclusion. To Dominique Bernal, thank you for helping me find my voice before and after the comma. May we all continue to be a voice for those who would otherwise go unheard and unrecognized.

2. See Hannah Dreier, *Trust and Consequences*, WASH. POST (Feb. 15, 2020), <https://www.washingtonpost.com/graphics/2020/national/immigration-therapy-reports-ice/> [<https://perma.cc/KL92-3S7K>] (illustrating the multitude of reasons individuals flee their home country in search of a better life in the United States. This article also describes the situation of Kevin Euceda, who found himself detained after disclosing the atrocities he witnessed before fleeing to petition for asylum in the United States due to safety concerns).

3. See *id.* (describing the route taken by most immigrants on their way to the southern United States borders); see also 45 C.F.R. § 410.101 (2019) (defining an unaccompanied child as an individual who does not have a lawful immigration status within the United States and who is under

session, Kevin described the atrocities he witnessed, believing the information he was sharing was confidential, and not realizing he would end up being detained for over 900 days because of his disclosure.<sup>4</sup> Regrettably, Kevin's story is not unique, as unaccompanied minors are finding that information shared during supposedly confidential counseling sessions is being wielded against them at trial by Immigration and Customs Enforcement (ICE) and the Department of Homeland Security (DHS).<sup>5</sup>

In 2019, Customs and Border Patrol (CBP) reported that 76,020 unaccompanied children were apprehended at the southwest border of the United States.<sup>6</sup> Arriving without families or parents by their side, unaccompanied children are detained by CBP when they cross the border into the United States.<sup>7</sup> These children are then remanded to the Office of Refugee Resettlement (ORR) for care.<sup>8</sup>

While an unaccompanied minor is detained, there are certain procedures for processing the minors that must be recognized and completed.<sup>9</sup> Minors must be given notice of their legal rights, which

---

the age of eighteen. An unaccompanied child does not have a parent or legal guardian in the United States, or has a parent or legal guardian in the United States that is unable to care for the child).

4. See Dreier, *supra* note 2 (reporting on the use of confidential therapy notes to allege that unaccompanied children are a threat to society in the United States and the use of this information to keep the children detained far longer than necessary).

5. See *id.* (emphasizing the use of confidential notes as a tool to punish rather than help children who arrive at our borders seeking asylum and protection).

6. See U.S. CUSTOMS & BORDER PROT., SOUTHWEST BORDER MIGRATION FY 2019 (2019) (reporting the number of unaccompanied children arriving at the borders of the United States yearly).

7. See *A Guide to Children Arriving at the Border: Laws, Policies and Responses*, AM. IMMIGR. COUNCIL (June 26, 2015), <https://www.americanimmigrationcouncil.org/research/guide-children-arriving-border-laws-policies-and-responses> [<https://perma.cc/5CSV-K2LB>] [hereinafter *A Guide to Children Arriving at the Border*] (outlining the process of apprehending unaccompanied children at the border of the United States and then transferring them into ORR custody).

8. See 45 C.F.R. § 410.102 (2019) (authorizing the care and placement of unaccompanied children into ORR custody while requiring that they be treated with dignity and respect due to their vulnerability).

9. See ACLU, FLORES SETTLEMENT FINAL PLUS EXTENSION OF SETTLEMENT (2001) (clarifying the need for children to be treated with special consideration and outlining the procedures that must take place to protect children in ORR custody. The Flores Settlement was placed into effect following the deplorable treatment of children in United States custody); see also 8 C.F.R. § 236.3(i)(4) (2019) (discussing the procedures codified into law following the Flores Settlement, which include informing a minor of their rights and request for disposition of their case upon apprehension and transfer to ORR).

include making telephone calls to a parent, relative, or friend, in both a language and manner that they may understand.<sup>10</sup> Unaccompanied children are then given a list of free legal services providers to help the child find legal assistance regardless of their age.<sup>11</sup>

Amid a minor arriving in a new country and being detained by a governmental agency, ORR is also placing the burden of understanding the right to be represented by counsel and applying for relief from removal on the shoulders of unaccompanied children.<sup>12</sup>

Children are then forced into mandatory counseling sessions, where they are encouraged to speak the truth.<sup>13</sup> Children, admitting fear of returning to their home country because of gang-related activity, including threats to their own lives, risk information being turned over to ICE, as per the Memorandum of Agreement (MOA) between the two agencies.<sup>14</sup>

This system is set up and designed to collect as much information as possible on these children.<sup>15</sup> What this system does not do is carry out the stipulation that ORR and DHS must work to remove the child from

---

10. See 8 C.F.R. § 263.3(g)(1)(iii) (2021) (providing an example of legal rights granted to minors in detention custody and emphasizing that these rights must be provided to minors in a manner that is comprehensible for them).

11. See *id.* (indicating how unaccompanied migrant children gain access to legal assistance while in detention custody).

12. See *generally id.* at § 236.3(i)(4)(xiv) (reiterating that minors must be made aware of their right to free legal counsel at no expense to the government as well as their right to apply for asylum and/or seek voluntary departure).

13. See Dreier, *supra* note 2 (stressing that these mandatory counseling sessions can be helpful for the child to work through past trauma experienced before arriving in the United States. However, the mental help these children so desperately need often comes at a high cost—their freedom).

14. See Memorandum of Agreement Among the Off. of Refugee Resettlement of the U.S. Dep't of Health & Hum. Servs. & U.S. Immigr. & Customs Enf't & U.S. Customs & Border Prot. of the U.S. Dep't of Homeland Sec. Regarding Consultation & Info. Sharing in Unaccompanied Alien Child. Matters (Apr. 13, 2018), [https://www.splcenter.org/sites/default/files/72.3\\_-\\_3d\\_am.compl\\_.exh.2\\_moa\\_01-18-2019.pdf](https://www.splcenter.org/sites/default/files/72.3_-_3d_am.compl_.exh.2_moa_01-18-2019.pdf) [<https://perma.cc/V63B-KJXM>] [hereinafter Memorandum of Agreement] (describing the timeframe allowed for reporting suspected gang-related activity).

15. See *id.* (encouraging individuals working with unaccompanied children to obtain as much information as possible from the child under the guise of assisting with reunification. The information obtained during counseling sessions is recorded and sent in within one day of each session without the child's express consent).

detention as quickly as possible.<sup>16</sup> Instead, these two organizations accumulate the information, report findings obtained during confidential therapy sessions, and use this information against the best interest of the child as ORR is obliged to keep them detained—or worse, return the children to the countries they fled from out of fear of persecution or harm.<sup>17</sup>

This comment will review the required mental health treatment unaccompanied children are given, the loopholes in the Health Insurance Portability and Accountability Act (HIPAA) and Texas state laws that allow notes from these confidential mental health sessions to be shared with ICE, and the violation of Fifth Amendment rights meant to protect these children from self-incrimination when they disclose the violence and cruelty suffered before fleeing to the United States.<sup>18</sup> Lastly, this comment will review solutions that need to be enacted to protect the basic, fundamental, and constitutional rights of all unaccompanied children involved.<sup>19</sup> Solutions include the passage of two legislative pieces currently in the Judiciary Committees which would advance much needed immigration reform and allow for the protection of unaccompanied minors' sensitive information, and also guarantee children's access to appointed counsel during the removal process.<sup>20</sup>

---

16. See generally STAFF OF S. COMM. ON HOMELAND SEC. & GOV'T AFFS., 115 CONG., PERM. SUBCOMM. ON INVESTIGATIONS (Comm. Print 2018) (highlighting the failures in compliance and adherence to the Flores Settlement Agreement by the ORR and other licensed facilities).

17. See generally Dreier, *supra* note 2 (using the notes taken during counseling sessions with an unaccompanied minor, ICE and DHS were able to keep a child detained for an extended period of time. This action is contradictory with evidence that shows long term detention of children is catastrophic to their development).

18. See *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (recognizing that most constitutional provisions are applicable to noncitizens, including those who have entered the United States in violation of the immigration laws); see also *Plyer v. Doe*, 457 U.S. 202, 210 (1981) (reaffirming the commitment to protect the rights of immigrants including due process of law guaranteed by the Fifth and Fourteenth Amendments).

19. See *In re Gault* 387 U.S. 1, 13 (1967) (“[T]he Fourteenth Amendment nor the bill of rights is for adults alone”); see also *Bellotti v. Baird*, 443 U.S. 622, 633 (1979) (“[A] child, merely on account of his minority, is not beyond the protection of the Constitution.”).

20. See Fair Day in Court for Kids Act of 2019, S. 662, 116th Cong. (2019) (seeking to enact laws to require court appointed attorneys be provided to unaccompanied minors at the expense of the Government, whereas that unaccompanied minor must be notified that they will be provided legal representation within seventy-two hours of being taken into Federal custody); see also Immigrants' Mental Health Act of 2020, H.R. 6075, 116th Cong. (2d Sess. 2020) (urging the review of the use of psychotherapy notes against immigrants and refugees arriving at the United States

The engraving on the Statue of Liberty, the iconic symbol of freedom and hope, does not read “[B]ring me only individuals free of fear and in good positions”; instead it reads, “Give me your tired, your poor, Your huddled masses yearning to breathe free.”<sup>21</sup> These children are yearning to breathe free, to experience life without terror and are full of hope.<sup>22</sup> It is incumbent upon the United States to do what is necessary to ensure that at the very least, these children are provided humane living conditions and essentials—like food and water—to ensure their ability to fight for that life.<sup>23</sup>

#### I. OFFICE OF REFUGEE RESETTLEMENT DEFINES UNACCOMPANIED ALIEN CHILD AND CARE TO BE PROVIDED

The Homeland Security Act of 2002 transferred the responsibility of the care and placement of children who arrive in the United States without a parent or legal guardian from Immigration and Naturalization Service (INS) to the Director of the ORR, a subsection of the Department of

---

border, including unaccompanied minors. This bill would offer protection to minors for notes taken during those conversations, as well as provide for better mental health care during detention); *see generally* Hannah Dreier, *Bill Would End Practice of Using Confidential Therapy Notes Against Detained Immigrant Children*, WASH. POST (Mar. 4, 2020, 5:02 PM), [https://www.washingtonpost.com/national/bill-would-end-practice-of-using-confidential-therapy-notes-against-detained-migrant-children/2020/03/04/0ab73d52-5e46-11ea-9055-5fa12981bbbf\\_story.html](https://www.washingtonpost.com/national/bill-would-end-practice-of-using-confidential-therapy-notes-against-detained-migrant-children/2020/03/04/0ab73d52-5e46-11ea-9055-5fa12981bbbf_story.html) [<https://perma.cc/DM87-ME5T>] (detailing conditions unaccompanied minors face in federal custody to provide reasoning as to why the Immigrants Health Act of 2020 was introduced).

21. *See* LAZARUS, *supra* note 1, at 233 (establishing that the United States is truly a nation of immigrants and offering hope to those arriving at the borders of the United States as they flee from war, death, and violence).

22. *See Oversight of HHS and DHS Efforts to Protect Unaccompanied Alien Child. from Hum. Trafficking & Abuse: Hearing Before the Permanent Subcomm. on Investigations of the Comm. on Homeland Sec. & Governmental Affs.*, 115th Cong. 1 (2018) (statement of Chairman Rob Portman), <https://www.govinfo.gov/content/pkg/CHRG-115shrg36157/html/CHRG-115shrg36157.htm> [<https://perma.cc/39BJ-DCGD>] (reviewing and tracking information from credible fear interviews with unaccompanied minors and the Subcommittee’s investigation into the Department of Homeland Security, finding that children are sent from countries into the “United States with promises of education” and hope for a better life but are instead greeted by a broken immigration system that repeatedly fails to treat unaccompanied children with human decency).

23. *See* Teo Armus, *Unaccompanied Migrant Children Suffer “Inhumane and Cruel Experience” in CBP Custody, Report Alleges*, WASH. POST (Oct. 20, 2020, 5:31 AM), <https://www.washingtonpost.com/nation/2020/10/30/migrant-children-border-unaccompanied/> [<https://perma.cc/5FPF-KT5F>] (describing the deplorable living conditions unaccompanied minor children are subjected to while in U.S. Customs and Border Protection Custody, including a “lack of adequate food and water”).

Health and Human Services (DHHS).<sup>24</sup> ORR defines “unaccompanied alien child” as an individual who is not yet eighteen, has no lawful immigration status in the United States, and who does not have a legal guardian or parent in the United States.<sup>25</sup> Additionally, if the child does have a parent or guardian in the United States but the parent cannot provide care and physical custody, then the child is also considered an “unaccompanied alien child.”<sup>26</sup> Under the guidelines provided, ORR is responsible for the placement of minors labeled as “unaccompanied alien children” into either a detention facility or an alternative to a detention facility.<sup>27</sup>

When a child comes across the border of the United States and is apprehended, they are transferred to the custody of ORR while they await their immigration proceedings.<sup>28</sup> The care of the child then becomes the responsibility of ORR, requiring that the child is placed in the least restrictive setting that is in their best interest.<sup>29</sup> Most of the facilities for the detention of unaccompanied minors by ORR are state licensed facilities, and as such they must not only meet state regulations, but also regulations set forth by ORR for treatment and care of children.<sup>30</sup>

Once the facility or care provider has taken custody of the child from the DHHS, they are required to ensure the physical health, mental health, and well-being of the child.<sup>31</sup> This includes ensuring the child receives food, clothing, personal grooming items, and a complete medical examination within forty-eight hours of that child’s admission to the

---

24. 6 U.S.C. § 279(a) (2018).

25. *Id.* at § 279(g)(2)(A-C).

26. *See id.* at § 279(g)(2)(C)(ii) (detailing the procedural requirements for the treatment and care of unaccompanied children while in ORR custody).

27. *See id.* at § 279(g)(1) (defining placement of an unaccompanied child in a detention facility or an alternative facility).

28. *See Unaccompanied Alien Children: An Overview*, FED’N AM. SCIENTISTS 8–9, <https://fas.org/sgp/crs/homsec/R43599.pdf> [<https://perma.cc/3STY-YB3V>] (last updated Oct. 9, 2019) (outlining the authoritative power of ORR to assume custody of unaccompanied children arriving at the United States border).

29. *See id.* (setting forth the requirement for the safe and secure placement of minors in ORR custody).

30. 45 C.F.R. § 410.402 (2020).

31. *See id.* at § 410.402(c) (detailing proper care for unaccompanied children in the care of government approved “licensed programs” by a state agency, including care for the mental health and physical health of the children).



facility.<sup>32</sup> A trained staff member must also complete an initial assessment interview to gauge the immediate mental and physical needs of the child.<sup>33</sup> The initial assessment must take place within twenty-four hours of the child's admission to the care facility.<sup>34</sup>

In addition to the requirements from the policy manuals of ORR, the care facilities are required to adhere to stipulations set forth by the Flores Settlement Agreement, which requires a standard of care for each unaccompanied minor under the care of ORR.<sup>35</sup> Under the terms of this agreement, care facilities must provide proper physical care and suitable living conditions, including food, clothing, and personal hygiene items.<sup>36</sup> Each facility must also provide routine medical and dental care, initiated by a complete medical examination within forty-eight hours of the child's arrival to assess the immediate physical and psychological needs of the child.<sup>37</sup>

Another requirement of the Flores Settlement Agreement is that unaccompanied children must be given at least one individual counseling session per week, along with group counseling sessions at least twice a week.<sup>38</sup> These counseling sessions are to be conducted by trained social workers and staff, and they should address the developmental and crisis-

32. *See generally id.* at § 410.402 (describing basic minimum standards to be met and completed expeditiously upon receipt of an unaccompanied minor into the care and custody of licensed facility).

33. *See id.* at § 410.402(3) (outlining the various assessments that must be performed upon the apprehension of an unaccompanied minor to identify that child's needs and gauge both their physical and mental wellbeing).

34. *See Children Entering the United States Unaccompanied: Section 3*, THE ADMIN. FOR CHILD. & FAMILIES OFF. OF REFUGEE RESETTLEMENT (Apr. 20, 2015), <https://www.acf.hhs.gov/orr/policy-guidance/children-entering-united-states-unaccompanied-section-3#3.1> [<https://perma.cc/M45B-3PWM>] (requiring care providers for unaccompanied children in custody to be committed to the overall health and wellbeing of the child while in custody).

35. *See id.* (mandating that individuals responsible for the care of the children adhere to all stipulations set forth by the Flores Settlement, as well as by ORR policy).

36. *See id.* (noting that safe and sanitary conditions, along with the utmost concern for the particular vulnerability of children are mandated and specifying treatment that does not meet these requirements, such as denying children "regular meals, sufficient sleep . . . or legal assistance.").

37. *See id.* (expanding on the requirements for the proper treatment of children in detention, including an assessment of the physical and psychological needs of the children arriving. Children may have suffered immense trauma prior to arriving at the borders of the United States and need trauma-informed care).

38. *See ACLU, supra* note 9 (justifying the need for mental health personnel to assist the children arriving at the border, but also expressing concern that due process be followed and privacy for the children be allowed).

related needs of each child.<sup>39</sup> During these counseling sessions, the children are informed that whatever they reveal is confidential to allow for candor and to ensure they receive the mental healthcare that they need.<sup>40</sup> However, the confidential notes from the counseling sessions are turned over to ICE and used against the children in their detaining hearings in immigration court.<sup>41</sup>

Sharing these confidential notes from traumatized children destroys whatever trust has been built between the children and the counselors and goes against the entire purpose of the treatment stemming from the Flores Settlement Agreement.<sup>42</sup> Rather than receiving the help that these children so desperately need, the actions of ICE and ORR create betrayal and trauma for the children.<sup>43</sup> The purpose of mandating these children to receive counseling and therapy is not to build a case against them by using their own words, hardships, and trauma; nor is it to force them to stay detained longer than necessary.<sup>44</sup> Rather, the purpose of the therapy is to help heal the psychological trauma that these children have

---

39. *See id.* (adopting the terms of the Flores Settlement includes mandating medical and psychological evaluations for children arriving at the border of the United States both with and without their parents. The guidelines set forth in the Flores Settlement are a means of striking cruel and inhumane treatment of minors in detention facilities and replacing that treatment with care that will help the child deal with the trauma they have experienced so early in life).

40. *See Dreier, supra* note 2 (advancing the agenda of ICE and DHS through the use of psychotherapy notes. These children have become the innocent victims of yet another country. As a vulnerable population, extreme care should be exercised when speaking with them and privacy maintained so that they may begin to deal with their trauma. Without mental health services that are strictly confidential, these children will face unprecedented amounts of mental health stress with consequences that could be devastating later in life).

41. *See* Letter from Arthur Evans, Jr., Chief Executive Officer of the Am. Psych. Ass'n, to Secretary Alex Azar and Acting Secretary Chad F. Wolf (Feb. 21, 2020), <https://www.apa.org/news/press/releases/azar-wolf-letter.pdf>. [<https://perma.cc/6NNQ-6DLM>] (denouncing the use of psychotherapy notes taken during counseling sessions as violating what little trust is established between the child and the counselor when notes are shared).

42. *See* Kim Mills, *American Psychological Association Calls for Immediate Halt to Sharing Immigrant Youths' Confidential Psychotherapy Notes with ICE*, AM. PSYCH. ASS'N. (Feb. 17, 2020), <https://www.apa.org/news/press/releases/2020/02/sharing-therapy-notes> [<https://perma.cc/JL2R-7G8R>] (warning that the consequences of sharing psychotherapy notes are far reaching and unethical; demanding an end to the sharing of confidential notes).

43. *See id.* (urging the government to reconsider the use of confidential notes as the damage done to the psyche of the children is more than just the immediate harm seen. The betrayal of trust during such an important part of the healing process sets these children up for further mental health complications later in life).

44. *See id.* (describing how the use of psychotherapy notes is weaponizing the confidential therapy sessions).

experienced so that they may experience a better overall quality of life.<sup>45</sup> It is unfortunate however, that both ICE and ORR have decided to use these tragic events as fuel to keep unaccompanied minors in detention centers, often moving them from group environments to more secure, jail-like facilities.<sup>46</sup>

## II. SHARING CONFIDENTIAL MENTAL HEALTH INFORMATION AND HIPAA

In 1996, HIPAA was passed and required the creation of a national standard which allowed for the protection of sensitive health information.<sup>47</sup> The DHS, the same organization which oversees ORR, issued the HIPAA Privacy Rule, which stated that protected health information could not and should not be released without the patient's consent and approval.<sup>48</sup> By definition, protected health information includes demographic data that allows for an individual to be identified and is related to past, present, or future mental, physical, or overall health of the individual.<sup>49</sup> Items which are considered reasonable for detecting the identity of an individual include the patient's name, date of birth, and address, among other unique identifiers.<sup>50</sup>

There are limited circumstances in which HIPAA may not be as strict with the disclosure of confidential information, such as for treatment,

---

45. *Id.*

46. *See Dreier, supra* note 2 (continuing to use the notes as evidence in cases across the country causes unaccompanied minors to suffer unintended consequences for simply telling the truth).

47. *See Summary of the HIPAA Privacy Rule*, HHS, <https://www.hhs.gov/hipaa/for-professionals/privacy/laws-regulations/index.htm> [<https://perma.cc/TJR3-XCZJ>] (last updated July 26, 2013) (outlining the creation of HIPAA and the required national standard for the protection of sensitive health information. Note that the language never points solely to citizens, rather it states "individuals" are granted this protection).

48. *See id.* (mandating the requirement of patient consent for the release of sensitive and private patient information, and demonstrating how astonishing it is that a division of HHS would violate the rule it created).

49. *See id.* (analyzing the information that is considered private or confidential included information that can be used to readily identify the patient, and certain notes such as psychotherapy notes. If the information falls into these categories, special care must be taken to ensure that the information is not released with patient consent).

50. *See id.* (including information such as Social Security Numbers, and other clearly identifying markers that allow the patient's identity to be recognized).

payment, or healthcare operations.<sup>51</sup> Additionally, if there is a public interest, the Privacy Rule allows for disclosure of protected health information without the patient's consent or permission regarding twelve national priority purposes including judicial proceedings, administrative proceedings, and law enforcement.<sup>52</sup> It is through these exceptions, and with a MOA, that ICE and ORR share the confidential mental health notes of minors in care or detention facilities.<sup>53</sup> As children self-disclose the trauma and horrors they have experienced to counselors during therapy sessions, counselors are helping both ORR and ICE to “develop information about children,” which is entered into evidence during removal proceedings.<sup>54</sup>

Sharing psychotherapy notes between ORR and ICE is a violation of an individual's right to protected health information and HIPAA.<sup>55</sup>

---

51. See *id.* (describing the instances in which certain information may be released without consent).

52. See *id.* (listing all public interest and benefit activities including: when required by law, public health activities, victims of abuse or neglect or domestic violence, health oversight activities, judicial and administrative proceedings, law enforcement, functions such as identification of deceased persons, cadaveric organ, eye and tissue donation, research under very limited conditions, to prevent or lessen a serious threat to health or safety, essential government functions, and workers compensation).

53. See Dreier, *supra* note 2 (describing the process by which confidential notes are shared between ICE and ORR) *but cf.* *Does a Parent Have a Right to Receive a Copy of Psychotherapy Notes About a Child's Mental Health Treatment?*, HHS (2017), <https://www.hhs.gov/hipaa/for-professionals/faq/2094/does-parent-have-right-receive-copy-psychotherapy-notes-about-children-mental-health-treatment.html> [<https://perma.cc/V8Q6-K3PT>] (explaining that psychotherapy notes should not be disclosed as the notes are protected by the Privacy Rule).

54. See Dreier, *supra* note 2 (expressing the frustration of having the children's words used against them in trial); see generally *Oversight of HHS and DHS Efforts to Protect Unaccompanied Alien Child from Hum. Trafficking & Abuse: Hearing Before the Permanent Subcomm. on Investigations of the Comm. on Homeland Sec. & Governmental Affs.*, 115th Cong. 1 (2018) (statement of Chairman Rob Portman), <https://www.govinfo.gov/content/pkg/CHRG-115shrg36157/html/CHRG-115shrg36157.htm> [<https://perma.cc/39BJ-DCGD>] (describing how HHS and DHS fail to follow established protocols).

55. *Does a Parent Have a Right to Receive a Copy of Psychotherapy Notes About a Child's Mental Health Treatment?*, *supra* note 53 (stating that the Privacy Rule distinguishes between mental health information, such as start time and stop time of sessions. A mental health professional's private notes taken during counseling with a patient, regardless of the age of the patient, are private, even if those notes are in the patient's file. For United States citizens, psychotherapy notes are used by the mental health professional and not generally released or disclosed for any other purposes beyond the treatment of the patient); see also 45 C.F.R. § 164.524(a)(1)(i) (2014) (detailing the right of access to individual protected health information but noting the exception of psychotherapy notes. Psychotherapy notes are not to be as accessible as other parts of the medical record due to their sensitive nature).

Psychotherapy notes, which are recorded on any medium by a mental health professional during a private counseling session or group, are usually kept apart from the main record of the individual and customarily remain confidential.<sup>56</sup> Nevertheless in 2018, ORR added two policies to its handbook which cemented the sharing of information between the two agencies.<sup>57</sup> First, the agency requires their agents to inform children of their legal rights, but emphasized that children should be honest with counselors and any self-disclosure could impact their release from the facilities.<sup>58</sup> The second requirement states if any child “mentioned anything having to do with gangs or drug dealing, therapists would file a report within four hours.”<sup>59</sup> The supervisor is then required to pass the information along to ICE within a day.<sup>60</sup> This process effectively hands over self-incriminating evidence to an adversarial agency that handles the removal proceedings of the child.<sup>61</sup>

### III. UNACCOMPANIED MINORS RIGHTS AGAINST SELF INCRIMINATION

The Fifth Amendment lays out certain rights for individuals regarding due process and the right against self-incrimination.<sup>62</sup> The Constitution clearly states that no “person” shall be compelled to bear witness against himself, specifically using the word person instead of citizen.<sup>63</sup> Many of the provisions held within the Constitution use the term person; such provisions apply according to the individual’s personhood, and not their

---

56. See 45 C.F.R. § 164.501 (defining how psychotherapy notes are abused in immigration proceedings. For citizens of the United States, the practice of confidentiality is commonplace. Yet, for children who are in an extremely vulnerable position in immigration detention facilities, this rule is ignored).

57. See STAFF OF S. COMM. ON HOMELAND SEC. & GOV’T AFFS., 115 CONG., PERM. SUBCOMM. ON INVESTIGATIONS, 11, 17, 31 (Comm. Print 2018) (testifying to the widespread knowledge that sensitive information was being extracted from children during counseling sessions and then turned over to ICE by ORR).

58. See Dreier, *supra* note 2 (informing children that while it is necessary to be truthful and open with counselors, any self-disclosures could influence their release).

59. See *id.* (making members of both organizations aware that the information obtained from unaccompanied children would be shared and the timeframes for such disclosures).

60. See *id.* (discussing the procedural requirements relating to gang or drug disclosures).

61. See *id.* (chastising the government for taking advantage of the trauma of unaccompanied minors).

62. See U.S. CONST. amend. V (outlining protected rights of individuals to not self-disclose incriminating information harmful to them at trial).

63. See *id.* (using the term person rather than citizen means the Constitution’s protections go beyond the citizenship status of individuals and apply to all persons in the United States).

citizenship status.<sup>64</sup> This also means these provisions rely on the jurisdiction of the United States.<sup>65</sup> By using the term person, the application of the rights found within the Fifth Amendment must apply to individuals physically on United States soil, even if they are unaccompanied and undocumented children.<sup>66</sup>

In 1993, the Supreme Court heard the case of *Reno v. Flores*, and Justice Antonin Scalia wrote: “it is well established that the ‘Fifth Amendment entitles aliens to due process of law in deportation proceedings.’”<sup>67</sup> Since the rights granted by the Fifth Amendment are fundamental rights, the government may not infringe upon those rights unless the infringement is narrowly tailored to serve a compelling state interest.<sup>68</sup> The Federal Government is responsible for the custody and control of unaccompanied children.<sup>69</sup> At the absolute least, the

---

64. See Gretchen Frazee, *What Constitutional Rights Do Undocumented Immigrants Have?*, PBS (June 25, 2018, 5:08 PM), <https://www.pbs.org/newshour/politics/what-constitutional-rights-do-undocumented-immigrants-have> [<https://perma.cc/5LFD-SNBW>] (noting constitutional scholars have long debated that the protections extend to every individual. Indeed, the Supreme Court has stated that all persons are subject to Fifth Amendment protections, regardless of citizenship).

65. See *id.* (clarifying the reach of the Constitution extends within the borders of the United States. Thus, once unaccompanied minors set foot on United States soil, they are protected in specific areas just as citizens are).

66. See *id.* (appealing to the government to appropriately recognize these rights and acknowledge that the Constitution protects all persons).

67. See *Reno v. Flores*, 507 U.S. 292, 306 (1993) (emphasizing that it has long been established individuals within removal proceedings are entitled to due process of law, which is a constitutional right. This right does not dissipate simply because an individual lacks citizenship from the United States); see also Frazee, *supra* note 64 (reporting on the seeming lack of due process rights shown to immigrants currently in the immigration system, regardless of their age or reasons for fleeing to the United States).

68. See *Flores*, 507 U.S. at 302 (forbidding government infringement on an individual’s fundamental interests unless the infringement is narrowly tailored to serve a compelling state interest, but failing to find the fundamental rights argued applicable); see e.g., *Collins v. Harker Heights* 503 U.S. 115, 127–28, (1992) (asserting governmental treatment of children during immigration proceedings should be deemed violative of the tenets of the Constitution because the government does not provide even minimal due process protections which are required while the child is in custody).

69. See *Flores*, 507 U.S. at 304 (stating the best interest standard applies where “a child . . . has come within the Federal Government’s control.”); see also *Children Entering the United States Unaccompanied: Section 3*, *supra* note 34 (identifying the procedures for custody and care of unaccompanied children once they are detained).

government must meet a set of minimum standards to ensure the child's fundamental rights are not impaired.<sup>70</sup>

The fact that most unaccompanied children arriving at the Texas border have not met the age of majority as defined by statute is significant.<sup>71</sup> Texas defines the age of majority as eighteen-years-old, finding this age is the phase when a child can make legal decisions regarding their own person.<sup>72</sup> Texas also uses the term "individuals" when defining the age of majority, refraining from using the word citizen.<sup>73</sup> Following the example set by the United States Supreme Court regarding the term person, the argument can be made that the law for the legal age of majority in Texas also extends to unaccompanied minors within its borders.<sup>74</sup>

The United States Government waives this consideration when unaccompanied children are apprehended and given a piece of paper with written notice of their rights.<sup>75</sup> If the unaccompanied child is under fourteen, the detaining officer must read and explain the written notice of their rights to the child in a language and manner commensurate with the child's understanding.<sup>76</sup> Unaccompanied minors who are apprehended within 100 miles of the Canada or Mexico border and who also reside permanently in Mexico or Canada, must be informed of their right to call

---

70. See *Flores*, 507 U.S. at 304 (describing the conditions that detained children face in immigration facilities, which includes deplorable treatment. The Court found that the minimum standards of care needed to be implemented to maintain dignified treatment of children while in the custody and care of the government. Further, the *Flores* Settlement Agreement requires the assurance that children's fundamental rights are not violated while under the supervision of the United States Government).

71. See *Tex. Civ. Prac. & Rem. Code Ann.* §§129.001, 129.002 (codifying the age of majority in Texas is eighteen).

72. See *id.* (declaring the age of majority to be the age at which children may enter legally binding contracts and may begin to make legal decisions without the aid or knowledge of their parents).

73. See *id.* (reviewing the language used in the Texas code, there is no mention of the word citizen, only individuals).

74. See *In re Gault* 387 U.S. 1, 13 (1967) (holding the Constitution protects minors, regardless of age).

75. See 8 C.F.R. § 236.3(g)(1) (2021) (detailing how unaccompanied children are informed of their rights, including the right to counsel at no expense to the government); see also *ACLU*, *supra* note 9 (distinguishing the levels of care that are required and the information that must be told to children).

76. See 8 C.F.R. § 236.3(g)(1) (2021) (expounding on the proper notification for children of their rights once apprehended).

a parent, close family member, or a pro bono attorney from a list given to the child.<sup>77</sup> Once this has taken place, the detaining officer may present the unaccompanied child with a form to request voluntary departure.<sup>78</sup> Even if the child has not reached the age of majority in the state that they are apprehended in, they are asked to make a legal decision regarding their life and their possible future within the borders of the United States.<sup>79</sup>

Upon refusal of voluntary departure, the children are then placed in the least restrictive environment possible and are required to undergo several types of evaluations, including a physical examination and counseling to help with any mental health issues.<sup>80</sup> Counselors reassure the child that the conversation they have is confidential and ask them questions about their lives prior to arriving at the United States border.<sup>81</sup> Counselors ask for details and often write them down in their notes, which are turned over to ICE within a matter of hours after they are filed if the child admits to having any experiences with drugs, drug trafficking, or even gangs.<sup>82</sup> This sharing goes against the very nature of the Fifth Amendment and the rights of individuals to not disclose information that will later be harmful to themselves in a trial.<sup>83</sup>

Alex Azar, Secretary for the Department of Health and Human Services, has acknowledged the practice of sharing psychotherapy notes between ORR and ICE, with ICE using this information against the unaccompanied minors held within detention facilities under the

---

77. *See id.* at § 236.3(g)(1)(iii) (providing a list for pro bono attorneys is required upon the apprehension of unaccompanied children. However, for most children the language and age barriers remain large obstacles to securing asylum alone).

78. *See generally id.* at § 236.3(g)(1)(i) (describing the alternatives that children have to being detained, including voluntary departure back to the country they are fleeing).

79. *See id.* at § 236.3(c)(3) (setting forth the standards that allow for children at a very young age to be required to decide how they wish to pursue asylum, or if they want to just be returned home).

80. *See* ACLU, *supra* note 9 (placing a nationwide policy for the detention, release, and treatment of children in the custody of ORR).

81. *See* Dreier, *supra* note 2 (stressing that the information extracted from unaccompanied minors is often gathered during counseling sessions).

82. *See id.* (emphasizing that ICE is deliberately looking for specific information that is then used to state the child is a threat to others and must therefore remain in detention).

83. *See* *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“[O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United States . . .”).



supervision of ORR.<sup>84</sup> Azar stated that the sharing of the information stems from the 2018 MOA between ORR and DHS, but admitted that it did not address the sharing of information collected by licensed health care providers, nor information pertaining to any of the psychotherapy notes.<sup>85</sup> This sharing of confidential information, including the confidential psychotherapy notes, violates the rights of unaccompanied minors who are under the custody and care of the government.<sup>86</sup> For children who are United States citizens, an attempt to share this type of confidential information between two parties without proper consent or court subpoena, is a clear violation of HIPAA and would not be tolerated.<sup>87</sup> Additionally, the sharing of these confidential psychotherapy notes in a manner beyond a direct threat of harm to the child or others violates the duty of ORR to ensure that it is acting in the best interest of the child.<sup>88</sup>

The impact of these actions is prevalent and indisputable, as children hear confidential conversations they had with a counselor read aloud.<sup>89</sup> Their own words are used against them and they have unknowingly

---

84. See Letter from Edward Markey, et al., U.S. Senators, United States Senate, to Johnathan H. Hayes, Director of Office of Refugee Resettlement (Mar. 3, 2020), [https://www.markey.senate.gov/imo/media/doc/ORR\\_Sharing\\_Notes\\_with\\_ICE.pdf](https://www.markey.senate.gov/imo/media/doc/ORR_Sharing_Notes_with_ICE.pdf) [<https://perma.cc/T4C5-7SUY>] [hereinafter Letter from Edward Markey, et al.] (acknowledging the use and sharing of confidential psychotherapy notes as a technique that should be removed from practice. However, despite repeated promises for the practice to stop, the damage to children has already been done).

85. See Memorandum of Agreement, *supra* note 14 (detailing how to share the information properly between parties); see also *Protecting Unaccompanied Children: The Ongoing Impact of the Trump Administration's Cruel Policies Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 116th Cong. 6 (2019) (statement of Jonathan H. Hayes, Dir., Off. of Refugee Resettlement), <https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Testimony%20-%20Hayes%2001%202020190919.pdf> [<https://perma.cc/2AQQ-VQUB>] (stating that health care providers regularly collected information from patients).

86. See Letter from Edward Markey, et al., *supra* note 84 (demanding the practice of sharing notes be terminated immediately, as it is an unethical practice and a violation of the privacy of children which cannot be deemed to be in their best interest).

87. See *Does a Parent Have a Right to Receive a Copy of Psychotherapy Notes About a Child's Mental Health Treatment?*, *supra* note 53 (proclaiming that even if the child is a minor, the psychotherapy notes of the child are not generally released to individuals for the sake of the privacy of the child).

88. See 6 U.S.C. § 279(b)(A)(b) (2019) (mandating actions taken should be considered when determining a course of action for a child).

89. See Dreier, *supra* note 2 (criticizing the use of confidential notes to keep children incarcerated in immigration detention centers long past their eighteenth birthdays).

committed self-incrimination.<sup>90</sup> The issue with this is that the release of these notes from ORR to ICE, is a violation of the fundamental right to not self-incriminate.<sup>91</sup> As far back as 1898, the United States Supreme Court has ruled that the term “person” applies to undocumented individuals living within the United States.<sup>92</sup> Courts have even recognized that the consequences of removal, which often follows when ICE uses a child’s words against them, are often as grave, if not worse than the results of criminal proceedings, equating deportation to exiling a child back to a country where they experienced these traumas.<sup>93</sup> Yet, this sharing continues to happen, as children are led to believe their conversations with counselors are confidential, but then find their psychotherapy notes are used in removal proceedings.<sup>94</sup>

The Supreme Court established that, in the interest of due process and fundamental fairness, individuals facing allegations of a crime should be appointed an attorney if they cannot afford one because the cost of pro se representation bears too heavily on the consequences for the individual.<sup>95</sup> Just as losing your life for a crime requires counsel due to the tremendous

---

90. See *What is Self-Incrimination?*, THE L. DICTIONARY (2013), <https://thelawdictionary.org/self-incrimination/> [<https://perma.cc/BV67-77Y3>] (defining self-incrimination as the declaration or act of an individual which incriminates them either directly or implicitly).

91. See *Chavez v. Martinez*, 538 U.S. 760, 791 (2003) (holding that the self-incrimination clause can be asserted in any proceeding and provides that a person will not be required to testify against themselves).

92. See *U.S. v. Wong Kim Ark*, 169 U.S. 649, 695 (1898) (holding that regardless of the citizenship status of an individual, the term “person” in the United States Constitution is meant to encompass all individuals within the jurisdiction of the United States).

93. *United States ex rel. Brancato v. Lehmann*, 239 F.2d 663, 666 (6th Cir. 1956) (echoing the Supreme Court in *Mahler v. Eby*, stating “deportation is a drastic measure, at times the equivalent of banishment or exiles, for which reason deportation statutes should be given the narrowest of the several possible meanings.”); see also *Johns v. Dep’t of Just. of the United States*, 624 F.2d 522, 524 (5th Cir. 1980) (finding that due process is a protection for all individuals regardless of their citizenship status).

94. See *Chavez*, 538 U.S. at 791–92 (citing to *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892)) (indicating the principle of the self-incrimination clause also forbids policies which would exert official compulsion, especially if these compulsions would induce an individual into forfeiting their rights under the Clause. Here, officials tell the children that they must be truthful, but fail to accurately describe the possible penalties of revealing the full information of their life and travel to the United States); see also Letter from Edward Markey, et al., *supra* note 84 (admitting to the systemic failure of ORR to act in the best interest of the children under its care).

95. See generally *Matthews v. Eldridge*, 424 U.S. 319 (1976) (determining that the cost of not having an attorney bears too heavily on the possible consequences for the individual).

risk, so too does deportation to a country torn apart by war, gangs, drugs, violence, and oppression.<sup>96</sup>

Using the test set forth in *Matthews v. Eldridge*, the argument can clearly be made that immigrants, and especially those who are unaccompanied children, should be appointed attorneys in the interest of due process.<sup>97</sup> In *Matthews*, the Court held that there are three distinct factors that should be applied when considering whether an action violates due process.<sup>98</sup> The first is the private action that would be impacted by the government, which here, is protecting the possible citizenship status of a child through asylum or some other relief from removal and ensuring the overall safety and well-being of a child.<sup>99</sup> Next, *Matthews* would have us evaluate the risk associated with erroneous deprivation of interest through the procedure being used, such as the removal of the child back to their country of origin or remaining in a detention facility longer than reasonably necessary.<sup>100</sup> During this phase, the value or probable value of adding substitute or additional safeguards must also be weighed.<sup>101</sup> Finally, the interest of the Government must be weighed to include any additional fiscal or administrative burdens which would come into play with additional or substitute safeguards enacted.<sup>102</sup>

Weighing all three of these factors together, it is in the interest of justice, due process, and fundamental fairness that the United States begin

---

96. *See id.* at 335 (noting that the disparity and unfairness of self-representation can have dire effects); *see also* Caitlin Dickerson, *Detention of Migrant Children Has Skyrocketed to Highest Levels Ever*, N.Y. TIMES (Sept. 12, 2018), <https://www.nytimes.com/2018/09/12/us/migrant-children-detention.html> [<https://perma.cc/59DZ-YHZ3>] (questioning the lack of resources for children detained by immigration, pointing out that pro bono attorneys are overwhelmed, and those who consequently suffer are the children forced to represent themselves in court).

97. *See* *Matthews*, 424 U.S. 319, 335 (1976) (outlining the three factors necessary to determine when appointed attorneys paid for by the government are in the interest of due process).

98. *See id.* at 335 (detailing the three-step test that allows for the determination of what is best in the interest of fundamental fairness and justice).

99. *See id.* (proposing that each step be taken individually and carefully evaluated. Beginning with the first portion of the test, the private action would be weighed against the refusal of use of appointed attorneys).

100. *See id.* (evaluating the possible risks associated without the appointment of attorneys).

101. *See id.* (reviewing the steps of the test which requires one to weigh the value of adding safeguards to the system in question).

102. *See id.* at 348 (listing the interest of the government, as well as the amount of fiscal and administrative burden that would be placed on them if individuals were required to have an appointed attorney, as a factor to be weighed).

to consider appointing attorneys to unaccompanied minors within the immigration system.<sup>103</sup> Further, at the moment that ICE decides to use alleged crimes committed by the children as a reason for holding them in custody, ICE begins to weave criminal law into an immigration case.<sup>104</sup>

#### IV. CHILDREN'S RIGHTS ON AN INTERNATIONAL SCALE

Taken a step further, these actions violate international treaties that have been ratified by the United States regarding treatment of citizens and noncitizens alike.<sup>105</sup> In 1992, the United States ratified the International Covenant on Civil and Political Rights (ICCPR).<sup>106</sup> The ICCPR established that all individuals detained by what is now known as ICE, regardless of their age, have the right to be free from arbitrary detention and to be protected from cruel, inhumane, or degrading treatment.<sup>107</sup> The United Nations Conventions on the Rights of the Child is seen as the most authoritative international document regarding the treatment of children in detention, and recognizes that children are entitled to special care and assistance.<sup>108</sup> In 1955, the United States became a signature member of this convention, recognizing that at all

103. *See id.* (summarizing that in the interest of fairness and justice, if the test is concluded with a large imbalance of power against the individual facing court, appointed attorneys should be seriously considered).

104. *See* Dickerson, *supra* note 96 (condemning the rise in the detention of migrant children that are unaccompanied because ICE has begun to hold them on alleged crimes. The immigration system is an administrative court, and if criminal procedures are allowed in, then so too must the protections from criminal courts).

105. *See, e.g.*, G.A. RES. 217 (III) A, Universal Declaration of Human Rights, 1 (Dec. 10, 1948) (extending the right to due process, among others, to nationals and non-nationals alike).

106. *See* International Covenant on Civil and Political Rights, *opened for signature Dec. 19, 1966*, 999 U.N.T.S. 171, (entered into force Mar. 23, 1976) (recognizing that all members of the human family have certain unalienable rights); *see also* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature Dec. 10, 1984*, 1465 U.N.T.S. 85 (entered into force June 26, 1987) (modeling the rules for the treatment of all individuals seeking refuge and solace in another country).

107. *See* International Covenant on Civil and Political Rights, *supra* note 106 (“Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication . . . Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.”); *see also* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 106 (detailing what the normal standards are for humane treatment of detainees).

108. *See* Vienna Convention on the Law of Treaties, Article XVIII(a), 1155 U.N.T.S. 331 (concluded May 23, 1969; entered into force January 27, 1980) (recognized as one of the most authoritative documents on the treatment of children).

times the best interests of the child must be a primary consideration in actions involving children.<sup>109</sup> All of these documents and treaties, from the Constitution of the United States to international treaties entered into by the United States, evidence that children have fundamental rights and protections similar to adults and that they should be afforded the same protections as adults, regardless of their citizenship status.<sup>110</sup>

Ultimately, these children, having already been through so much during their short lives, are being asked to defend themselves against their own traumas with complex and confusing processes that confound lawyers and law students that navigate them daily.<sup>111</sup> In seeking to solidify the rights of these children to Fifth Amendment protection, society would be helping a vulnerable population at the mercy of a complex legal system that they simply cannot fathom nor comprehend.<sup>112</sup> Assuring that unaccompanied children arriving at our borders are afforded all of the protections to which they are rightly entitled will allow for the United States to handle an influx of unaccompanied children in a way that reflects the mission statement of ORR, that is, requiring decisions be made in the best interest of the child.<sup>113</sup>

---

109. *See id.* (outlining that at all times, the highest priority for countries is to act in the best interest of the children that are seeking solace at their borders).

110. *Reno v. Flores*, 507 U.S. 292, 306 (1993) (emphasizing that it has long been established individuals within removal proceedings are entitled to due process of law, which is a constitutional right. This right does not dissipate simply because an individual lacks citizenship from the United States. The United States has entered into many treaties and the Supreme Court agrees that due process is a right given to those children arriving at our borders; however, the execution of this seldom happens).

111. Dreier, *supra* note 2 (recognizing that even when an unaccompanied minor receives assistance, the immigration system is complex and fraught with obstacles which make attaining asylum extremely difficult).

112. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (“[I]ndefinite detention of an alien would raise a serious constitutional problem.”).

113. *See Protecting Unaccompanied Child: The Ongoing Impact of the Trump Administration’s Cruel Policies Before the Subcomm. on Oversight & Investigations of the H. Comm. on Energy & Com.*, 116th Cong., 1 (2019) (statement of Jonathan H. Hayes, Dir., Off. of Refugee Resettlement), <https://docs.house.gov/meetings/IF/IF02/20190919/109953/HHRG-116-IF02-Wstate-HayesJ-20190919.pdf> [<https://perma.cc/2AQQ-VQUB>] (providing that the ORR Director desires to ensure the safety and well-being of all children in the agency’s care).

## V. IMMIGRATION POLICIES AND THE INFLUX OF UNACCOMPANIED MINORS

During the 2019 fiscal year, there was a staggering 76,020 unaccompanied minors detained at or near the United States-Mexico border.<sup>114</sup> Rising fifty-two percent in just one fiscal year, the number of unaccompanied minors is both troublesome and telling.<sup>115</sup> While apprehensions are still lower than they were in 2000, this is the first time in United States history where unaccompanied minor and family apprehensions are accounting for more than half of the border crossings in a fiscal year, reaching a total of 473,682 people in one year alone.<sup>116</sup> A troubling trend is emerging based on reactions from migrants to the ever changing canvas of immigration policy in the United States.<sup>117</sup>

The Trump Administration decried the influx of individuals seeking asylum as a threat to national security, creating restrictive immigration policies under the guise of deterring migrants and combating human trafficking.<sup>118</sup> Instead, these policies are exacerbating a humanitarian crisis, and causing parents to give up their children and send them across our border alone.<sup>119</sup> Hoping for a better life for their child, parents have unknowingly placed their children into a system that will require them to

---

114. See Amelia Cheatham & Diana Roy, *U.S. Detention of Child Migrants*, COUNCIL ON FOREIGN RELATIONS, <https://www.cfr.org/backgrounder/us-detention-child-migrants> [<https://perma.cc/K5ME-V9ZD>] (last updated Dec. 2, 2021) (noting the rise in unaccompanied minor apprehensions at the US-Mexico Border compared to the 2018 fiscal year).

115. See *id.* (reporting that the increase in apprehended unaccompanied minors at the border from the 2018 fiscal year to the 2019 fiscal year threatens to overrun the system set in place to handle these children arriving alone).

116. See *id.* (recognizing the humanitarian crisis that is unfolding as unaccompanied minors continue to seek help and refuge in the United States).

117. See John Burnett, *'I Want to be Sure my Son is Safe': Asylum-Seekers Send Children Across Border Alone*, NPR (Nov. 27, 2019, 3:41 PM), <https://www.npr.org/2019/11/27/783360378/i-want-to-be-sure-my-son-is-safe-asylum-seekers-send-children-across-border-alone> [<https://perma.cc/5JCL-A6CZ>] (emphasizing that it is only out of sheer necessity and desperation that parents are sending more children across the border unaccompanied. As parents are refused entrance into the United States, they send their children over in hopes of allowing them an opportunity at a life filled with peace).

118. See Cheatham & Roy, *supra* note 114 (criticizing the actions taken by the Trump administration under the guise of national security, which has exacerbated a humanitarian crisis on our southern border).

119. See Burnett, *supra* note 117 (describing how, with desperation and a need to protect their children, parents are left with little to no options on the border of the United States. They have been sending their children into the United States to keep them safe from kidnappers and gangs that see the large amounts of migrants at the border as easy prey).

bear a burden of proof that they should be allowed to remain in this country without assistance from their parents, and often without assistance of counsel.<sup>120</sup> Statistics show that nearly three-quarters of unaccompanied children currently within federal care are fifteen years of age or older, however, authorities have detained children much younger, including toddlers and even infants.<sup>121</sup> Without proper representation, and with information sharing between ORR and ICE, fewer and fewer children are being granted asylum, and information they share is being used against them.<sup>122</sup>

#### VI. PROTECTING UNACCOMPANIED, UNDOCUMENTED CHILDREN

In 1985, a class action lawsuit was filed by two organizations, on behalf of immigrant children that were being detained by what was then the INS.<sup>123</sup> In 1997, after years of legal arguments and a trip to the Supreme Court, both parties settled and the Flores Settlement Agreement laid guidelines for limitations on the length of time under which children can be detained in immigration detention centers and the conditions of their detention.<sup>124</sup> In 2008, Congress established the Trafficking Victims Protection Act (TVPA), as a channel for unaccompanied migrant

---

120. See USCIS, VOLUME 1, CHAPTER 4—BURDEN AND STANDARDS OF PROOF (Aug. 12, 2021) (stating the burden and standards of proof for individuals seeking a benefit from the immigration system of the United States); see also Burnett, *supra* note 117 (providing the burden of proof for individuals seeking a benefit from the immigration system of the United States. The burden of proof is on the individual, regardless of their age, to prove that they deserve the benefit of asylum and legal entry into the United States. With such a high risk for detrimental consequences should an applicant fail, USCIS still maintains that an unaccompanied child may represent themselves during these proceedings).

121. See Cheatham & Roy, *supra* note 114 (reporting the number of unaccompanied children under federal care from teens to infants).

122. See Nicholas Wu, *The Trump Administration Is Closing the Door on Migrant Children*, THE ATL. (Dec. 25, 2018), <https://www.theatlantic.com/politics/archive/2018/12/asylum-approvals-children-have-plummeted-under-trump/578614/> [<https://perma.cc/Z8FP-3X34>] (summarizing that with the rising number of children in detention and cases taking longer, the approval of asylum has begun to wane as more and more children defend themselves in court).

123. ACLU, *supra* note 9 (asserting the rights of children in detention to humane treatment regardless of their citizenship status).

124. See *The Flores Settlement and Family Incarceration: A Brief History and Next Steps*, Hum. Rts. First 1, 5 (Oct. 2018), [https://www.humanrightsfirst.org/sites/default/files/FLORES\\_SETTLEMENT\\_AGREEMENT.pdf](https://www.humanrightsfirst.org/sites/default/files/FLORES_SETTLEMENT_AGREEMENT.pdf) [<https://perma.cc/DE7H-8S6R>] (creating strict guidelines for the length of time children should be incarcerated).

children to seek asylum and entry into the United States.<sup>125</sup> In 2015, the Department of Justice (DOJ) partnered with the Corporation for National and Community Service (CNCS) in an effort to provide children in the immigration system legal representation during removal proceedings.<sup>126</sup> While CNCS, a federal program which runs the more widely known AmeriCorps program, partnered with the DOJ to develop Justice AmeriCorps, a grant program that partnered with nearly 100 attorneys and paralegals, there are still children who need help.<sup>127</sup>

In 2017, the Trump Administration refused to renew the \$4.5 million budget allocated annually for legal representation of children through the Justice AmeriCorps program.<sup>128</sup> Since immigration law is not considered a criminal law, but instead civil law, these children are not by right entitled to appointed legal counsel when they are interviewed or attend court proceedings.<sup>129</sup> Even if a child is unrepresented, the burden still remains on the child to argue their case for asylum in a way that will fit into the law's protections or face being removed back to their country of origin.<sup>130</sup> As fewer and fewer children get the legal representation they need, a truth is becoming more clear: it is almost impossible for a child to win asylum cases without proper legal representation.<sup>131</sup>

These issues are exacerbated by the MOA between ORR, ICE, and CBP.<sup>132</sup> In the MOA, ORR agrees to provide and share information

---

125. See Wu, *supra* note 122 (developing more protections for unaccompanied children to seek asylum in the United States).

126. See *Unaccompanied Alien Children: An Overview*, *supra* note 28 (explaining the creation of a government program to provide legal representation for children).

127. See *id.* (describing the creation of a federal program of nearly 100 attorneys to represent undocumented children); see also Annie Chen, *An Urgent Need: Unaccompanied Children and Access to Counsel in Immigration Proceedings* AM. BAR ASS'N (July 14, 2014), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2014/urgent-need-unaccompanied-children-access-to-counsel-immigration-proceedings/> [<https://perma.cc/E2Z2-RRNX>] (discussing how organizations and law firms are above capacity and unable to provide legal representation to even more undocumented children).

128. See Wu, *supra* note 122 (criticizing the Trump administration for refusing to renew contracts with immigration nonprofits providing legal representation to unaccompanied minors).

129. See *id.* (reviewing the removal of funding for programs to help unaccompanied minors receive adequate representation in court).

130. See *id.* (recognizing that regardless of whether a child has representation, the burden to prove their eligibility for asylum remains with them throughout the removal process).

131. See *id.*

132. See generally *Protecting Unaccompanied Child.: The Ongoing Impact of the Trump Administration's Cruel Policies Before the Subcomm. on Oversight & Investigations of the H.*



from unaccompanied minors in their care, and their sponsors, should a sponsor come forward.<sup>133</sup> This information includes information about arrests, abuse experienced, violent behavior, unauthorized absences, age determination findings, and any possibility of gang affiliation.<sup>134</sup> Children are asked questions throughout their time in detention, including during psychotherapy sessions, and all information gleaned from them is reported to ICE.<sup>135</sup> ORR also began sharing biometric and biographic information such as fingerprints of the children and of their sponsors, and individuals living with the sponsors, and in return, ICE would provide a summary criminal and immigration history so that ORR could determine if the placement was suitable for the child or not.<sup>136</sup> This was touted by the Trump Administration and immigration enforcement advocates as necessary to ensure the safety and well-being of the children in ORR custody.<sup>137</sup>

As sponsors, typically family members, stepped forward to claim an unaccompanied minor, ICE arrested any individual that was in the United States without authorization.<sup>138</sup> In 2018 alone, ICE arrested 170

---

*Comm. on Energy & Com.*, 116th Cong. 10–11 (2019) (statement of Jonathan H. Hayes, Dir., Off. of Refugee Resettlement) (acknowledging the increased complications in issues with unaccompanied minors after the memorandum of agreement was placed into effect).

133. See *Unaccompanied Alien Children: An Overview*, *supra* note 28 (citing Memorandum of Agreement Among the Off. of Refugee Resettlement of the U.S. Dep't of Health & Hum. Servs. & U.S. Immigr. & Customs Enf't & U.S. Customs & Border Prot. of the U.S. Dep't of Homeland Sec. Regarding Consultation & Info. Sharing in Unaccompanied Alien Child. Matters (Apr. 13, 2018)).

134. See *id.* (“Under the MOA, ORR agreed to collect and share with ICE and CBP information about unaccompanied children in their custody, such as, their arrests, unauthorized absences, death, abuse experienced, and violent behavior, as well as age determination findings and gang affiliation information.”).

135. See generally *Protecting Unaccompanied Child: The Ongoing Impact of the Trump Administration's Cruel Policies Before the Subcomm. on Oversight & Investigations of the H. Comm. on Energy & Com.*, 116th Cong. 5–6 (2019) (statement of Jonathan H. Hayes, Dir., Off. of Refugee Resettlement) (outlining the various types of mental health services provided to minor unaccompanied children while in custody, which may operate as information collecting tools).

136. See *Unaccompanied Alien Children: An Overview*, *supra* note 28 (reviewing the information sharing policies cited in the MOA between ORR and ICE for information obtained from unaccompanied minors).

137. See *id.* (disagreeing with the views of the Trump administration that sharing of private and confidential psychotherapy notes was in the best interest of unaccompanied minors).

138. See *id.* (illustrating ICE's actions after policy was implemented.) (“From July through November 2018, ICE arrested 170 potential sponsors—109 of whom had no previous criminal histories—and placed them in deportation proceedings.”)

potential sponsors for these children, and 109 had no previous criminal background or record.<sup>139</sup> As immigrant advocates feared, this policy raised the number of children detained and the length of their detention.<sup>140</sup> Meanwhile, children sit in ORR detention facilities, waiting for their turn to go in front of an immigration judge, with no true understanding of what is going on, or why they have even been sent to the United States by themselves.<sup>141</sup>

Interviewing procedures are vastly different for undocumented children and for United States citizen children, even though both, in the eyes of the United States Supreme Court, have protections under the Constitution of the United States.<sup>142</sup> In *J.D.B. v. North Carolina*, a thirteen year-old was questioned in connection with a burglary in his school, without consent from his parents.<sup>143</sup> Following the interview, police allowed him to go home, but then subsequently charged him with the information obtained in the interview.<sup>144</sup> The Court held that children could not be viewed as miniature adults and instead needed to

---

139. *See id.* (criticizing the actions taken by ICE under the Trump Administration which only exacerbated the issue of children remaining in detention centers for extended periods of time, rather than being with their loved ones).

140. *See id.* (detailing the amount of strain placed on the immigration system and more importantly the children left in detention centers for periods of 90 days or more).

141. *See* Cheatham & Roy, *supra* note 114 (reporting that even if children do not speak English, they are given a translator for court proceedings. However, this does not stop or negate the fact that the children remain unrepresented, facing a complex legal system in a language that is not their own).

142. *Compare* *J.D.B. v. North Carolina* 564 U.S. 261, 280 (2011) (maintaining that children need to be treated with special care when being questioned to ensure the preservation of their due process rights. Further, consideration of a child's age is required in making sure that any confession voluntarily made was made in accordance with their due process rights); *with Rights of Children in the Immigration Process*, Amer. Civ. Liberty Union, 3–4 (July 2014), [https://www.aclu.org/sites/default/files/field\\_document/aclu\\_irp\\_legal\\_backgrounder\\_on\\_children\\_july\\_2014\\_final.pdf](https://www.aclu.org/sites/default/files/field_document/aclu_irp_legal_backgrounder_on_children_july_2014_final.pdf) [<https://perma.cc/FSR2-V3V9>] (outlining the questioning procedures for unaccompanied minors, stating that a parent or guardian need not be present or even contacted prior to or during questioning. In fact, only unaccompanied children from noncontiguous countries must make contact with a parent, adult relative, friend, or attorney prior to questioning).

143. *See* *J.D.B.*, 564 U.S. at 266 (“Prior to the commencement of questioning, J.D.B. was given neither *Miranda* warnings nor the opportunity to speak to his grandmother. Nor was he informed that he was free to leave the room.”).

144. *See id.* at 272 (emphasizing that children are not capable of making the same type of decisions adults are and must therefore be afforded protection in the form of consent from the parent, or the presence of adequate counsel).

be afforded extra protection.<sup>145</sup> The Court further pointed out that “the law has historically reflected the . . . assumption that children lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them.”<sup>146</sup> Children are incapable of determining what choices are detrimental to them, and how to avoid these choices.<sup>147</sup> Yet recognizing this, United States Citizenship and Immigration Services (USCIS) does not require that a parent or even a trusted adult be present during an interview with an unaccompanied minor.<sup>148</sup> This contradicts guidelines for children set forth by USCIS in the Guidelines for Children’s Asylum Claims memorandum.<sup>149</sup> The memorandum clearly points out that it is in the best interest of the child to allow a parent or trusted adult to be present during the interviews.<sup>150</sup> Within the memorandum, USCIS clearly states that the guidance for how to treat detained children stems from the Universal Declaration of Human Rights, set forth by the United Nations General Assembly as an understanding of fundamental rights that speak to the dignity, and development of every person.<sup>151</sup> Fundamentally, the international standard of care or recognized guiding principle is to do that which is in the best interest of the child.<sup>152</sup>

---

145. *See id.* at 274 (discussing the care needed when speaking with children from a position of authority and reiterating that children cannot be expected to rise to the level of adults).

146. *Id.* at 273.

147. *See Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (holding that children are unable to recognize inherently bad decisions regarding life choices and therefore require extra care and consideration).

148. *See Minor Children Applying for Asylum by Themselves*, USCIS, <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/minor-children-applying-for-asylum-by-themselves> [<https://perma.cc/B5PJ-GX4N>] (last updated Aug. 6, 2020) (stating that USCIS does not require that children be accompanied or represented at all and allows for children to represent themselves in court during removal proceedings).

149. *See* Jeff Weiss, *INS Guidelines for Children’s Asylum Claims*, AM. IMMIGR. LAW. ASS’N (Dec. 10, 1998), <https://www.aila.org/infonet/ins-guidelines-for-childrens-asylum-claims> [<https://perma.cc/KJD9-BQZE>] (recognizing the fragility of children, these guidelines set the standard of care required for children in custody of ORR throughout removal proceedings).

150. *See id.* (affirming that it is in the best interest of a child to have a parent or trusted guardian present, and in the case of unaccompanied minors, that it is in the best interest of the child for there to be an attorney present to speak on behalf of the child).

151. *See id.* (citing the standards of care that are internationally recognized as the acceptable treatment of both adults and children during detention).

152. *Id.*

Perhaps the worst part about this entire dilemma is that for the United States to determine if children qualify for asylum or any form of relief, they must speak about the conflicts and trauma they have endured.<sup>153</sup> In order to qualify for asylum, special immigration juvenile status, U visas or T visas, the child would have to prove that they qualify for that particular type of humanitarian relief.<sup>154</sup> At the same time, children who speak about their experiences, about crimes they have seen committed, or about drugs and gang violence, continue to find their own words used, not to help them secure asylum, but instead as a weapon against them, to keep them detained until they can be deported.<sup>155</sup>

Instead of upholding the Flores Settlement Agreement, aiding the children through any mental health issues they may be experiencing, and keeping them in the least restrictive form of detention possible, the United States uses the past experiences of these children in its favor.<sup>156</sup> Rather than releasing children to a relative or close family friend, the Government keeps them detained, even though it has been proven that detention leads to chronic illnesses, serious mental health problems, and even other psychological issues.<sup>157</sup> ORR and ICE continue to stand by their decisions, stating that their actions are in the best interest of the child involved.<sup>158</sup>

The truth, however, is that in fiscal year 2019, DHS referred 69,550 unaccompanied minors to the care of ORR.<sup>159</sup> Prior to this however, the

---

153. *See A Guide to Children Arriving at the Border*, *supra* note 7 (declaring that in order to receive asylum, unaccompanied children must pass a credible fear interview).

154. *See id.* (outlining the different types of relief available to unaccompanied minors seeking refuge in the United States).

155. *See Dreier*, *supra* note 2 (reporting on the atrocious practice of ICE using information from shared confidential psychotherapy notes to detain children far longer than acceptable by law).

156. *See id.* (recognizing that past experiences of children may be used against them in removal hearings); *see also* Cheatham & Roy, *supra* note 114 (encouraging the use of mental health providers to adequately care for the children in detention centers rather than as a punishment for a past they had no control over).

157. *See A Guide to Children Arriving at the Border*, *supra* note 7 (detailing the types of mental health issues that are noticed after prolonged detention of children).

158. STAFF OF S. COMM. ON HOMELAND SEC. & GOV'T AFFS., 115 CONG., PERM. SUBCOMM. ON INVESTIGATIONS, 5 (Comm. Print 2018) (testifying that the actions taken by DHS, ICE and ORR were in the best interest of the children and not a vindictive or punitive process).

159. *See Latest UAC Data – FY2020*, HHS, <https://www.hhs.gov/programs/social-services/unaccompanied-alien-children/latest-uac-data-fy2020/index.html#overall-data> [<https://perma.cc/3WXH-P3DC>] (last updated Feb. 1, 2021) (demonstrating the large volume of children being

children are often in CBP custody, and even though they should only be held for a maximum of seventy-two hours by CBP before being moved to a care facility, this is not always the case.<sup>160</sup> It has recently been shown that the average stay for children in CBP custody has grown to ten days or more.<sup>161</sup> This is more than three times the limit allowed for the detention of a child, regardless of if they arrived with their parents and were separated, or if they arrived unaccompanied.<sup>162</sup> Once placed in ORR custody, the length of the average stay of children increases dramatically, and during fiscal year 2020, it reached a peak average of 348 days in detention.<sup>163</sup> As of September 2020, the average stay for a child in detention is 149 days.<sup>164</sup> The number of referrals that DHS is currently seeing for unaccompanied minors is a recent average of forty-one unaccompanied minor referrals each day in the United States for the year 2020.<sup>165</sup> Most of these children will face the immigration system alone.<sup>166</sup>

The result is that unaccompanied minors are now becoming more prevalent on immigration court dockets, and children as young as two are

---

funneled into ORR through DHS at our borders and then held in detention for an indefinite amount of time).

160. See Anna Flagg & Andrew R. Calderón, *500,000 Kids, 30 Million Hours: Trump's Vast Expansion of Child Detention*, MARSHALL PROJECT (Oct. 30, 2020, 6:00AM), <https://www.themarshallproject.org/2020/10/30/500-000-kids-30-million-hours-trump-s-vast-expansion-of-child-detention> [<https://perma.cc/WF2A-DFV9>] (acknowledging that in some cases children are held by CBP far longer than seventy two hours before being transferred into the custody of ORR).

161. See generally *Latest UAC Data – FY2020*, *supra* note 159 (indicating that the actions that are claimed to be in the best interest of the children are in fact hurting them more than helping them).

162. See generally *id.* (determining that children are being held far longer than allowed by law and policies).

163. See generally *id.* (last updated Feb. 1, 2021) (depicting the amount of time children are being held in ORR custody).

164. See *id.* (distinguishing that 149 days is much longer than seventy-two hours, and that the delays in releasing the children often lead to further issues).

165. See *id.* (last updated Feb. 1, 2021) (pointing to the higher trending numbers as proof the system is working. HHS is failing to acknowledge the systemic failure for the overall care of the children in detention centers).

166. See Vivian Yee & Miriam Jordan, *Migrant Children in Search of Justice: A 2-Year-Old's Day in Immigration Court*, N.Y. TIMES (Oct. 8, 2018), <https://www.nytimes.com/2018/10/08/us/migrant-children-family-separation-court.html> [<https://perma.cc/9N79-MXDA>] (providing the story of a two-year-old unaccompanied minor that went to immigration court and had to represent herself).

facing an immigration judge in court without any legal representation.<sup>167</sup> Before 2018, it was not common to see children under the age of six in immigration court, but by October of 2018, this became a regular scene in immigration courthouses across the United States.<sup>168</sup> Disturbingly, this pattern has continued due to the fact that the Trump Administration made it more difficult for relatives of unaccompanied minors to claim the children and have children removed from detention.<sup>169</sup> Nearly half of all unaccompanied minors go to court without representation.<sup>170</sup>

## VII. CHILDREN IN COURT—REVIEWING THE BURDEN

The Immigration and Naturalization Act (INA) mandates that children who arrive at our borders are eligible for the right to counsel, with the caveat that the attorney must not be at the expense of the United States Government.<sup>171</sup> The American Bar Association (ABA) points out that with as little as \$1 million dollars annually, the current federally funded legal orientation program currently serves twenty percent of individuals in removal proceedings each year.<sup>172</sup> Should the government decide to allocate more funds to this program, it would allow for greater access to attorneys for immigrants in deportation proceedings and would help to quell the rising tide of unaccompanied minors in court proceedings.<sup>173</sup>

---

167. *Cf. id.* (showing that no matter how young the unaccompanied minor is, they are still required to meet the burden set forth by USCIS in order to remain in the country or be granted asylum).

168. *See id.* (restating that the systemic failure to properly care for unaccompanied minors, and the lack of representation available, are causing even toddlers to defend themselves in immigration court).

169. *Cf. id.* (referring to the policy set forth by the Trump Administration to fingerprint individuals as they came to pick up the unaccompanied minors who are family members. The information obtained during the request for custody of the minor has been transferred to ICE and ICE has begun using the information to detain individuals not legally within the United States, regardless of their lack of criminal history).

170. *Cf. id.* (addressing the fact that children are continuously asked to defend themselves in court against trained attorneys working for the government).

171. *See* 8 C.F.R. §236.3(i)(4)(xiv) (2001) (providing that immigrants are allowed counsel so long as it is at no cost to the government).

172. *See* Richard Pena, *Right to Counsel Resolution*, AM. BAR ASS'N 1, 9 (Feb. 13, 2006), [http://civilrighttocounsel.org/uploaded\\_files/72/ABA\\_Resolution\\_107A\\_RTC\\_in\\_immigration\\_.pdf](http://civilrighttocounsel.org/uploaded_files/72/ABA_Resolution_107A_RTC_in_immigration_.pdf) [perma.cc/W5UF-NZ9T] (illustrating the overwhelming burden on pro bono programs to assist in representation of all the unaccompanied minors in the immigration system).

173. *Cf. id.* (evaluating the benefits of government aid to nonprofit organizations that represent unaccompanied minors).

It is of crucial importance that individuals in removal proceedings have access to these types of resources, especially vulnerable populations such as unaccompanied minors.<sup>174</sup> By providing legal assistance to unaccompanied minors without having them seek it out on their own, children would be safeguarded from the various pitfalls found within the immigration courts and allow for informed decisions to be made as attorneys fully understand the consequences of their decisions during the removal proceedings.<sup>175</sup> It would also provide a level of comfort to children who often are too young and too fearful to adequately articulate what happened to them before their arrival at the United States border.<sup>176</sup>

While children await their day in court, they wait in detention centers where they are often cold and crowded, noisy facilities.<sup>177</sup> They are also not allowed to touch their own siblings, or anyone else for that matter, while they are detained.<sup>178</sup> These children are held without even being able to write a letter to a loved one to let them know that they are okay, or even alive.<sup>179</sup> In some cases, older children traveling with their siblings have been accused of trafficking their own family.<sup>180</sup> In 2019, the Americans for Immigrant Justice interviewed nearly 9,500 minors detained in immigration facilities in the United States and found that nearly 895 of them reported some form of verbal abuse at the hands of

---

174. *See id.* (reflecting on the fact that unaccompanied minors are a very vulnerable population and require legal assistance to navigate the immigration system).

175. *See id.* (establishing that children do not clearly understand the immigration system and would be best served by attorneys representing their best interests).

176. *See Yee & Jordan, supra* note 166 (remarking on the overcrowded conditions in detention facilities for immigrant children, that are often loud and offer little rest or solace for the children).

177. *See Armus, supra* note 23 (describing a normal juvenile detention facility housing unaccompanied minors awaiting removal proceedings).

178. *See Dan Barry et al., Cleaning Toilets, Following Rules: A Migrant Child's Days in Detention*, N.Y. TIMES (July 14, 2018), <https://www.nytimes.com/2018/07/14/us/migrant-children-shelters.html?action=click&module=RelatedCoverage&pgtype=Article&ion=Footer%3E> [<https://perma.cc/7YG2-42W3>] (discussing the substandard conditions faced by unaccompanied minors in detention centers).

179. *See id.* (referring to conversations with unaccompanied minors that were not allowed to even write to their parents or loved ones either in the United States or in their home countries).

180. *See Armus, supra* note 23 (commenting on the large array of charges and accusations leveled against unaccompanied minors that travel with siblings).

CBP officers, and 147 stated they had been subjected to physical abuse.<sup>181</sup>

The combined actions of falsely accusing the children of trafficking and tactics of intimidation are extremely alarming because any response that sounds like an admission to trafficking would make the child inadmissible under the INA.<sup>182</sup> Fleeing from a life of trauma and cruelty, these children come to the United States seeking refuge and safety, and are instead suffering a cruel and dehumanizing experience that only leads to further trauma.<sup>183</sup> To top it all off, children appear in court and find that their own words are being used against them to keep them detained.<sup>184</sup>

The Government must make a reasonable effort during the proceedings involving an unaccompanied minor to afford the child a reasonable opportunity to confront the witness that is being used against them.<sup>185</sup> There is no reasonable opportunity for a child to rebut their own experiences and words, when the information provided in what was believed to be a confidential conversation is used against them.<sup>186</sup> While the Federal Rules of Evidence may not apply in immigration hearings, evidence that is entered must not only be probative, but also the admission of that evidence must be fundamentally fair to the individual facing deportation.<sup>187</sup> Information found within the psychotherapy notes

---

181. *See id.* (reporting on the abhorrent treatment of unaccompanied minors at the hands of CBP officers).

182. *See* 8 C.F.R. § 1208.13(C)(6)(ii) (2021) (outlining things that would make an unaccompanied minor inadmissible and disqualified for asylum).

183. *See* Armus, *supra* note 23 (referencing the despicable conditions and treatment witnessed by children in detention facilities).

184. *See* Dreier, *supra* note 2 (challenging the system to change for the better and assist the children left to fend for themselves in immigration court).

185. *See* Saidane v. I.N.S., 129 F.3d 1063, 1065 (9th Cir. 1997) (discussing the reliability of government documents, interviews, and reports presented during deportation proceedings).

186. *See* Dreier, *supra* note 2 (describing a particular unaccompanied child's experience where his words, which he thought were confidential, were used against him to keep him detained for hundreds of days); *see also* Saidane, 129 F.3d at 1066 (finding that I.N.S. must make a good faith effort to afford an immigrant a reasonable opportunity to confront witnesses against him); *see also* U.S. CONST. amend. V (sanctioning the rights which are meant to protect individuals from self-incrimination and allow for individuals to mount a proper defense).

187. *See EOIR Releases Materials from the 2018 Legal Training Program for Immigration Judges*, AM. IMMIGR. LAWS. ASSOC. (Oct. 25, 2018), <https://www.aila.org/infonet/eoir-2018-training-program-judges> [<https://perma.cc/2E97-YV78>] (noting that the Federal Rules of Evidence



of the unaccompanied children, and presented as evidence by ICE and DHS could be seen as coerced information, since the children were under the impression that the conversations were confidential, and should be weighed by the court accordingly.<sup>188</sup> Courts have found that when this is the case, the reliability of the information must be taken into serious consideration.<sup>189</sup>

It is for these reasons that legislative reform needs to be put into motion to correct the error in policy which does not allow court appointed attorneys for children in the immigration system but allows for the sharing of confidential information.<sup>190</sup>

#### VIII. THE FIGHT TO RESTORE HUMANITY TO THE IMMIGRATION SYSTEM

The Trump Administration consistently attempted to dehumanize immigrants, even child immigrants, with a zero-tolerance policy; the United States has turned children away and sent them back to their origin countries in staggering amounts by insisting that gang violence is not grounds for asylum.<sup>191</sup> Meanwhile ICE used those same activities to keep children locked in detention centers across the United States, leaving them to handle a complicated system with multiple moving parts,

---

are not referenced or required in administrative court hearings. There are, however, still guidelines that speak to the type of evidence that may be submitted in removal hearings).

188. See *Ramsameachire v. Ashcroft*, 357 F.3d 169, 180 (2d Cir. 2004) (outlining that evidence presented by the Government during deportation proceedings may be less reliable if the person appears to have been reluctant to reveal information or where circumstances were coercive. Here, the children are often shy and unwilling to share information until they are assured that the information will not be shared with others and is confidential. By creating this false environment, the Government knowingly and willingly sets up a system to elicit the information from the children without their consent); see also Dreier, *supra* note 2 (discussing how children do not often wish to speak with counselors and share their stories of the horrors and atrocities they have had to endure in their lives prior to fleeing to the United States).

189. See *Ramsameachire*, 357 F.3d at 180 (holding that coerced testimony must be weighed with the seriousness of the coercion).

190. See *Pena*, *supra* note 172 (recommending that the passage of legislative change be encouraged to provide for the safety and well-being of unaccompanied minors in detention centers).

191. See Katie Benner & Caitlin Dickerson, *Sessions Says Domestic and Gang Violence Are Not Grounds for Asylum*, N.Y. TIMES (June 11, 2018), <https://www.nytimes.com/2018/06/11/us/politics/sessions-domestic-violence-asylum.html> [<https://perma.cc/NM2V-TMPC>] (reporting on the decision by the Trump administration to reduce the number of acceptable claims for asylum by disregarding gang violence as being a credible fear).

all too often without an attorney to assist them.<sup>192</sup> Until the policy set in place by the Trump Administration is removed and we begin to truly assist these children by providing them with adequate legal representation from the moment they arrive at our borders and protection from sharing psychotherapy notes, we continue to condemn thousands of children to return home and face the very real possibility of death, simply because we took no action to protect them when we could.<sup>193</sup>

It is already recognized that unaccompanied minors are more likely to suffer from depression and PTSD in higher rates than other individuals who attempt to migrate to the United States.<sup>194</sup> It is also understood that unaccompanied minors are fleeing from severe poverty, traumatic abuse, or an extremely dangerous environment, and because of this, and the ever increasing young age of children arriving, the children are not able to care for themselves properly, are not able to make their needs known as easily as an adult, and are more likely to have long-term psychological trauma to deal with.<sup>195</sup> Yet, our immigration policies deny them the opportunity to have an advocate to speak for them in their darkest hour.<sup>196</sup>

Without the appropriate help from an attorney, unaccompanied children are less likely to successfully apply for asylum or SIJ status.<sup>197</sup>

---

192. Cf. Dreier, *supra* note 2 (proclaiming that even though gang violence is not a serious enough issue to request asylum, it is a serious enough issue for the government to use against unaccompanied minors).

193. See Evan Halper, *Trump Administration Moves to Block Victims of Gang Violence and Domestic Abuse from Claiming Asylum*, L.A. TIMES (June 11, 2018, 4:50PM), <https://www.latimes.com/politics/la-na-pol-sessions-asylum-20180611-story.html> [https://perma.cc/3PE3-MZYN] (sentencing children to more trauma simply by rejecting the plea for asylum based on gang violence).

194. Cf. *A Guide to Children Arriving at the Border*, *supra* note 7 (emphasizing that while unaccompanied children can be detained, it should be for the shortest amount of time possible and in the least restrictive manner possible. This piece also indicates that there have been well-documented negative effects on children as a result of prolonged periods of detention on both their mental and physical development, such as long-term cognitive damage, depression, and anxiety).

195. See G.A. Res. 36/5, ¶ 12–15 (Sept. 28, 2017) (noting that both unaccompanied minors and adolescents have rights that should always be protected).

196. See *id.* (emphasizing how the immigration system fails to provide unaccompanied minors with the resources for their traumas).

197. See generally Austin Rose, *For Vulnerable Immigrant Children, a Longstanding Path to Protection Narrows*, MIGRATION POL'Y INST. (July 25, 2018), <https://www.migrationpolicy.org/article/vulnerable-immigrant-children-longstanding-path-protection-narrows> [https://perma.cc/FH3Z-PCFJ] (investigating the decline of approved asylum cases for unaccompanied minors while also describing the decline of children applying for the appropriate immigration relief and receiving it).

Since 2010, a little over 70,000 unaccompanied children have applied for SIJS out of the more than 210,000 that have entered the United States.<sup>198</sup> It has also been seen that out of 1,800 children that applied for asylum from fiscal year 2011 to fiscal year 2013, only about 300 were granted.<sup>199</sup> In these cases, the majority of the successful applicants were children who had obtained counsel.<sup>200</sup> In cases where the children had no access to an attorney or could not find a pro bono attorney for their case, approximately ninety percent of those children failed to achieve asylum status.<sup>201</sup> These children need our help to ensure that their rights are not violated, that they are afforded due process, and most importantly, that there is someone who will give them a voice in the courtroom.<sup>202</sup>

The Supreme Court has held that while deportation may not be a criminal proceeding as defined by statute, it is still a great hardship on the individual and it ultimately deprives them of the right to live, work, and stay in the United States, a land of freedom and possibility.<sup>203</sup> The Court has also held that while deportation is not necessarily punitive, it still remains a serious penalty which cannot be ignored, especially when dealing with children.<sup>204</sup> Lastly, it is important to recognize that the burden of proof during these deportation proceedings falls solely on the individual who is requesting the benefits from the United States, even if

---

198. *See id.* (analyzing the decline in accepted and approved applications and finding that fewer children are being represented in court leading to a dramatic decrease in approvals).

199. *See* MARC R. ROSENBLUM, UNACCOMPANIED CHILD MIGRATION TO THE UNITED STATES: THE TENSION BETWEEN PROTECTION AND PREVENTION, 7 (Transatlantic Council on Migration, Apr. 2015), <https://www.migrationpolicy.org/research/unaccompanied-child-migration-united-states-tension-between-protection-and-prevention> [https://perma.cc/597B-LTA4] (establishing that there is a tension between admitting unaccompanied minors and assisting them effectively).

200. *See Representation for Unaccompanied Children in Immigration Court*, TRAC IMMIGR. (Nov. 25, 2014), <https://trac.syr.edu/immigration/reports/371/> [https://perma.cc/DS68-9AQG] (remarking on the increased approval chances for children seeking refuge in the United States if they are represented).

201. *See generally Juveniles—Immigration Court Deportation Proceedings*, TRAC IMMIGR. (Dec. 2020), <https://trac.syr.edu/phptools/immigration/juvenile/> [https://perma.cc/VB2B-2YHR] (outlining the devastating outcomes of children who face the immigration system alone).

202. *See* Pena, *supra* note 172 (contending that now more than ever, unaccompanied minors at the border need the help of the legal profession and of the United States Government to ensure due process).

203. *See* Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (comparing the hardships faced in immigration proceedings and outcomes of those proceedings to a criminal trial).

204. *See id.* (reasoning that while deportation is not punitive, the repercussions of losing an immigration case may be devastating, especially for children left fend for themselves).

the individual is the unaccompanied child.<sup>205</sup> This burden of proof will never shift on USCIS or on ICE, but rather, it will rest solely on the shoulders of a minor, oftentimes not even old enough to be considered an adult in the state they have entered the country in.<sup>206</sup>

## IX. WHAT LIES AHEAD

The very bedrock of America is the fundamental belief that it is both a nation of immigrants and a nation of laws.<sup>207</sup> The argument surrounding immigration reform long ago ceased to be a discussion on how best to reform the system, and became an argument about which side was correct.<sup>208</sup> The truth is, we are both a nation of immigrants, and a nation of laws; and in order to truly solve the immigration crisis and protect our borders, we must seek to return to the true nature of our country and balance both sides of this discussion out.<sup>209</sup> The immigration system is broken, and legislation is needed to advance fair laws which work in humane and just ways to protect our nation and innocent children seeking refuge in our great nation.<sup>210</sup>

Multiple solutions have been proposed to address the fundamental issues that lead to the large numbers of unaccompanied children arriving at our borders and the care and treatment of children who arrive here alone.<sup>211</sup> Immigration reform should begin with incorporating the standard of best interest of the child to all decisions made for the child

---

205. See USCIS, VOLUME 1, CHAPTER 4 – BURDEN AND STANDARDS OF PROOF (Aug. 12, 2021) (explaining that the burden of proof to establish eligibility for an immigration benefit will always fall to the individual that is requesting the benefit. In this case, the unaccompanied minor always has the burden of proof, and that burden of proof will never shift to USCIS).

206. Cf. *id.* (demonstrating that the burden does not shift under this framework. Rather, the prima facie case is made and there is no burden upon the other governmental entities).

207. See Tom Jawetz, *Restoring the Rule of Law Through a Fair, Humane, and Workable Immigration System*, CTR FOR AM. PROGRESS (July 22, 2019, 4:45 AM), <https://www.americanprogress.org/issues/immigration/reports/2019/07/22/472378/restoring-rule-law-fair-humane-workable-immigration-system/> [<https://perma.cc/85ZL-RXBA>] (arguing that the United States can and must be both a nation of immigrants and a nation of laws).

208. See *generally id.* (proclaiming that a balance must be struck between both sides in order for there to be true lasting change).

209. See *id.* (upholding the belief that it is possible to balance both sides of the immigration reform argument).

210. See *id.* (clarifying that while the current system for immigration is broken, it is still repairable with the correct legislative actions).

211. See *A Guide to Children Arriving at the Border*, *supra* note 7 (evaluating several core issues which must be acknowledged to move toward true humane immigration reform).

and not just for custody decisions by ORR.<sup>212</sup> Before returning a child to a country they have fled from, based on their own testimony that was given in confidence to a counselor, we should first give due consideration to the overall best interest of the child, as well as the humanitarian concerns that surround the circumstances of that child arriving to the United States alone.<sup>213</sup>

Another solution that should be set into motion is to pair CBP officers with child welfare experts, or alternatively, implement CBP officers' training to allow quicker identification of children in danger.<sup>214</sup> Recognizing children who are fleeing from persecution or trafficking at the border would then allow for their cases to be heard without violating the rights of the children.<sup>215</sup>

Notably, the most helpful type of reform would be implementing due process protections and resources.<sup>216</sup> Numerous times, non-governmental organizations have proposed that procedures should be in place to protect children and families entering the United States when fleeing from violence.<sup>217</sup> Reinstating funding for the Justice AmeriCorps would be the first step in developing this reform.<sup>218</sup> Taking a step further towards reform, unaccompanied children arriving at our borders should be appointed counsel rather than being left to find counsel on their own.<sup>219</sup> Working in tandem with post-release caseworkers, the

---

212. *See id.* (recommending that the United States follow the understood international standard of care for unaccompanied children and act first and foremost in the best interest of the child).

213. *See id.* (exploring the ways to best help the children arriving at our borders and to also stem the humanitarian crisis which is forcing children to run from their homes).

214. *See id.* (recognizing that some unaccompanied minors are in much more grave situations than others and may be more prone to issues like human trafficking. Spotting these children quickly and assisting them is essential for protecting the children at our borders).

215. *See id.* (applying the assistance of trained individuals to help spot issues without coercing the information out of the child).

216. *See id.* (addressing the fact that fundamental rights must be protected for the children in order to truly effect change).

217. *See id.* (remarking on the continued suggestions by nongovernmental agencies in an attempt to find a humane solution for unaccompanied minors).

218. *See id.* (advocating that reinstatement of funding is a vital first step to helping children along the border).

219. *See id.* (urging for legislative reform to provide appointed counsel to act in the best interest of the child).

aim would be to protect children both during the intake process and throughout the child's removal proceedings.<sup>220</sup>

The Biden Administration has promised to reverse border policies put into place by the Trump Administration and replace them with more effective and humane policies.<sup>221</sup> However, reversing the policies of the Trump Administration is not something that can be done overnight and may take up to six months.<sup>222</sup> Additionally, the Biden Administration has admitted the need for legislative changes to begin repairing the immigration system of the United States.<sup>223</sup> Regardless of their age, every person in immigration court is entitled to due process under the Fifth Amendment, and current law allows even a toddler to appear without representation, unless the child can secure representation by themselves at no expense to the court.<sup>224</sup> In populations of detained immigrants, only fourteen percent obtain legal representation, even though immigrants appearing in court with attorneys are much more likely to gain release from a detention center following their custody hearing than those without an attorney.<sup>225</sup> They are also twice as likely

---

220. *See id.* (favoring a holistic approach to a systemic problem would encourage complete change and reform).

221. *See* Miriam Jordan & Zolan Kanno-Youngs, *Biden Says He Cannot Quickly Undo Trump Border Policies*, N.Y. TIMES (Dec. 22, 2020), <https://www.nytimes.com/2020/12/22/us/biden-border-asylum.html> [<https://perma.cc/RR2S-76TF>] (rejecting the policies set forth by the Trump Administration and allowing for policy change in a safe way).

222. *See id.* (establishing a timeline for the reversal of immigration policies due to the ever-increasing humanitarian crisis on the southern border).

223. *See* Nick Miroff & Maria Sacchetti, *Biden Says He'll Reverse Trump Immigration Policies but wants 'Guardrails' First*, WASH. POST (Dec. 22, 2020, 4:12 PM), [https://www.washingtonpost.com/national/biden-immigration-policy-changes/2020/12/22/2eb9ef92-4400-11eb-8deb-b948d0931c16\\_story.html](https://www.washingtonpost.com/national/biden-immigration-policy-changes/2020/12/22/2eb9ef92-4400-11eb-8deb-b948d0931c16_story.html) [<https://perma.cc/P7V2-M34N>] (admitting that legislative change will be necessary for the overall reform of the immigration system).

224. *See* Jawetz, *supra* note 207 (recommending changes that will require appointed attorneys for children rather than self-representation); *see also* 8 C.F.R. § 236.3(g)(1) (allowing for self-representation of individuals in immigration court hearings if free legal services are not available); *cf.* Molly Hennessy-Fiske, *This Judge Says Toddlers Can Defend Themselves in Immigration Court*, L.A. TIMES (Mar. 6, 2016, 3:00 AM), <https://www.latimes.com/nation/immigration/la-na-immigration-judge-20160306-story.html> [<https://perma.cc/P8E8-C689>] (portraying the case of a toddler in immigration court, and the judge who felt that toddlers were adept enough to self-represent during removal proceedings).

225. *See* Jawetz, *supra* note 207 (supporting the premise that immigrants represented by an attorney receive substantially more favorable outcomes).

to secure relief from deportation.<sup>226</sup> When it comes to immigration hearings for unaccompanied minors, the DOJ “recognizes that immigration court proceedings are more effective and efficient when individuals are represented” and “has urged Congress to support legal representation for unaccompanied children.”<sup>227</sup> Immigration judges agree that legal representation for youth in immigration court would be more ethical and efficient.<sup>228</sup> Therefore, during his presidency, Biden should seek to work with Congress to ensure that the Immigrants’ Mental Health Act of 2020 and the Fair Day in Court for Kids Act of 2019 are passed into law.<sup>229</sup>

Introduced on March 4, 2020, the Immigrants’ Mental Health Act sponsored by Representative Grace Napolitano seeks to direct CBP to take steps to address the numerous mental health issues among immigrants, CBP officers, and agents.<sup>230</sup> If approved, it would permanently restrict the sharing of mental health information, specifically prohibiting psychotherapy notes from being used in immigration proceedings against immigrants, including unaccompanied minors.<sup>231</sup> This legislation would require CBP to train all officers to be able to identify mental health issues, provide a trauma-informed approach to mental health care, and prohibit DHHS from providing information about the mental health of an immigrant that was obtained by a mental health professional while they were in federal custody.<sup>232</sup> This bill would also provide for the mental health care of CBP officials as well, to ensure the

---

226. *See id.* (upholding that children with legal representation are much more likely to achieve successful immigration outcomes).

227. *See* Hennessy-Fiske, *supra* note 224 (contradicting a sitting judge, the Department of Justice recognizes the need for counsel for unaccompanied minors).

228. *See id.* (agreeing overall that the best course of action for children in immigration proceedings is to have an attorney).

229. *See* Immigrants’ Mental Health Act of 2020, H.R. 6075, 116th Cong. (2d Sess. 2020) (advocating that if this law is passed, it would eliminate the possibility of children being blindsided in court with their own words from psychotherapy sessions); *see also* Fair Day in Court for Kids Act of 2019, S. 662, 116th Cong. (2019) (proposing the provision of appointed counsel to unaccompanied minors within twenty-four hours of apprehension).

230. *See* H.R. 6075 (prohibiting the use of mental health notes in removal proceedings, if the notes were acquired through mental health sessions held while the unaccompanied minors were in the custody of ORR).

231. *See id.* (encouraging a change to the mental health support system for both children and the individuals charged in ORR’s care).

232. *See id.* (limiting the use of mental health notes against children during removal proceedings or asylum determinations).

safety and well-being of all involved in the ongoing humanitarian crisis at our southern borders.<sup>233</sup> Passing this legislation along with the legislation for access to counsel for unaccompanied minors, would result in large strides towards a more humane and ethical immigration system for unaccompanied minors.<sup>234</sup>

On March 5, 2019, Senator Mazie Hirono introduced the Fair Day in Court for Kids Act of 2019, the purpose being to provide access to counsel for unaccompanied undocumented children through legislative action at the expense of the United States Government.<sup>235</sup> Without the passage of this Act, unaccompanied minors in our immigration system are forced to defend themselves against a myriad of legal challenges.<sup>236</sup> Regardless of their age, unaccompanied minors must face a trained government attorney that will present evidence against them in court, file applications for relief along with the supporting documents in a timely manner in English with the immigration court regardless of whether the minor can speak, read, or write in English, testify under oath, speak to a judge about what form of relief they wish to pursue, and even call witnesses without knowing the customs or normal standards of the immigration system.<sup>237</sup> This is because nonprofit organizations that normally assist unaccompanied minors with legal matters are stretched far too thin after changes in immigration policies during the Trump Administration.<sup>238</sup>

Legislation such as the Fair Day in Court for Kids Act would move us in the right direction of protecting these children from the moment they

233. *See id.* (recognizing that individuals are placed under severe stress during this crisis, and as such, it is not only the children who may need mental health support, but officials from CBP as well).

234. *See id.* (supporting individuals who care for unaccompanied minors in ORR custody, as well as individuals guarding our borders to ensure the best possible mental health for all involved).

235. Fair Day in Court for Kids Act of 2019, S. 662, 116th Cong. (2019) (requesting that unaccompanied minors be appointed counsel within twenty-four hours of apprehension to allow for their best interests to be guarded throughout the asylum process).

236. *See generally* Chen, *supra* note 127.

237. *See id.* (noting that expecting children to be able to advocate for themselves against experienced attorneys is cruel and unethical).

238. *Cf.* Beth Fertig, *Why It's Harder for Unaccompanied Minors to Find a Lawyer Now*, WNYC: N.Y. PUB. RADIO (Aug. 20, 2018), <https://www.wnyc.org/story/why-its-harder-unaccompanied-minors-find-lawyer-now> [<https://perma.cc/C3UG-LZCV>] (describing the difficulties that pro bono attorneys face as the immigration system is slowed down by Trump administration changes. This ultimately makes it more difficult to take on more pro bono cases).



are apprehended at our borders by providing them with appointed counsel.<sup>239</sup> The Flores Settlement Agreement which has long been held as an agreement until such time as it would be codified into law, must now be codified into law for the sake of all children in our immigration system.<sup>240</sup> We have reached a point in our nation where the impact of the Trump Administration's policy changes have had drastic consequences on unaccompanied minors, as well as far reaching implications throughout the entire United States, and it is time for the Biden Administration and Congress to put an end to the madness.<sup>241</sup> We must stand firm and look at the mistakes that are costing innocent children to spend time in detention centers because they wanted a chance at a better life.<sup>242</sup>

While there is a strong argument that the government may be required to provide counsel to immigrants in removal proceedings, there is a much stronger argument to be made for the government to provide counsel to unaccompanied minors in our system.<sup>243</sup> Unaccompanied children are faced with the stress of having to make critical decisions, and are interrogated by individuals who are foreign to them and who are authoritative.<sup>244</sup> As a federal district court has noted: the law is complex

---

239. See Immigrants' Mental Health Act of 2020, H.R. 6075, 116th Cong. (2d Sess. 2020) (providing for a new system in which unaccompanied minors would receive counsel at an expense to the government); see also Fertig, *supra* note 238 (establishing funding for appointed counsel for unaccompanied minors would help alleviate some of the backlog experienced at many nonprofit immigration organizations).

240. See *The Flores Settlement and Family Incarceration: A Brief History and Next Steps*, *supra* note 124 (demonstrating the procedural steps of implementing the Flores Settlement into codified law); see generally Fertig, *supra* note 238 (indicating that codifying the Flores Settlement Agreement and other legislative endeavors would assist unaccompanied minors facing a complex legal system alone).

241. See *21 for '21: Fixing America's Immigration System*, NEW AM. ECON., <https://www.newamericaneconomy.org/21-for-21-fixing-americas-immigration-system/> [<https://perma.cc/2MQ7-4BCM>] (listing steps that can be taken to improve and reform the immigration system while maintaining the safety of the nation).

242. See, e.g., Dreier, *supra* note 2 (reporting on the detention of an unaccompanied minor after truthfully expressing the experiences they faced before fleeing to America).

243. See *II. Legal Standards*, HUM. RTS. WATCH, [https://www.hrw.org/legacy/reports98/ins2/berks98d-01.htm#P227\\_40198](https://www.hrw.org/legacy/reports98/ins2/berks98d-01.htm#P227_40198) [<https://perma.cc/U8UU-5CY4>] (arguing for the necessity of appointed counsel for unaccompanied minors).

244. See *Perez-Funez v. Dist. Dir., I.N.S.*, 619 F. Supp. 656, 668 (C.D. Cal. 1985) (suggesting that certain steps must be taken before removing unaccompanied minors through voluntary departure, and must do so in the least, as it presents a minimal burden upon the government).

and “it is obvious to the Court that the situation faced by unaccompanied minors is inherently coercive.”<sup>245</sup> In cases where unaccompanied minors are able to secure legal counsel, nearly seventy-three percent of the cases ended with the children being allowed to remain in the United States.<sup>246</sup> For those children who stand in front a judge without representation, only fifteen percent of those children won their case and were allowed to stay in the United States.<sup>247</sup>

It is time to recognize that in a country founded by immigrants, the word “immigrant” has long been a word filled with negative connotations, of instant associations of criminality, filled with shame and disgust; and it should not be this way.<sup>248</sup> Public attitude towards words often impact policy in the United States.<sup>249</sup> In 1994, sixty-three percent of Americans felt that immigrants were a burden to the United States.<sup>250</sup> Now, fifty-nine percent of Americans feel that immigrants make our

245. See, e.g., *id.* at 662 (affirming that adults in authoritative positions may knowingly or unknowingly coerce unaccompanied minors and steps must be taken to ensure this does not happen).

246. See *Representation for Unaccompanied Children in Immigration Court*, *supra* note 200 (depicting the disparity in case results between children who are represented and those forced to self-represent).

247. See *id.* (providing statistical data on unaccompanied and unrepresented minors and their success rates in immigration court).

248. See *Dear School Districts: “Immigrant” is Not a Bad Word*, IMMIGRANT CONNECTIONS, <https://www.immigrantsrefugeesandschools.org/post/dear-school-districts-immigrant-is-not-a-bad-word> [<https://perma.cc/9VMS-JYMB>] (last updated Dec. 17, 2020) (pleading with schools to examine the use of the word immigrant to allow for a positive connotation and association); see generally K’naan, *The Hamilton Mixtape: Immigrants (We Get The Job Done)*, YOUTUBE (2017), [https://www.youtube.com/watch?v=6\\_35a7sn6ds](https://www.youtube.com/watch?v=6_35a7sn6ds) [<https://perma.cc/5NNV-VDKH>] (echoing the sentiment of many that in a nation of immigrants, the word immigrant has become a bad word); cf. *The Dehumanizing History of The Words We’ve Used to Describe Immigrants*, FOSTER U.S. & GLOB. IMMIGR. SERVS., <https://www.fosterglobal.com/blog/the-dehumanizing-history-of-the-words-weve-used-to-describe-immigrants/> [<https://perma.cc/6SA5-JJBT>] (evaluating the importance of word choice and the dehumanization of immigrants over several years).

249. See *The Dehumanizing History of The Words We’ve Used to Describe Immigrants*, *supra* note 248 (providing that words have power, and it is incumbent upon individuals to provide positive connotations for individuals migrating to the United States).

250. See Bradley Jones, *Majority of Americans Continue to Say Immigrants Strengthen the U.S.*, PEW RSCH. CTR. (Jan. 31, 2019), <https://www.pewresearch.org/fact-tank/2019/01/31/majority-of-americans-continue-to-say-immigrants-strengthen-the-u-s/> [<https://perma.cc/ZVK9-R5TC>] (providing statistical data for the connotations associated with the word immigrant and the impression of immigrants over the years); see also K’naan, *supra* note 248 (expressing the view of how much is done by immigrants even if it is not always publicly acknowledged and providing that this lends towards the diversity of the nation).

country stronger.<sup>251</sup> While we have made improvements in this area, we must still do more.<sup>252</sup> President Biden and his Administration began the process of removing degrading nomenclature in all legislation and policies involving individuals migrating to the United States.<sup>253</sup> This is a pivotal and crucial step to not only recognize the United States as nation of immigrants, but also to remove the dehumanizing slur from legislative materials and begin the healing process desperately needed.<sup>254</sup>

On March 20, 2020, the Center for Disease Control (CDC) issued an order that authorized the expulsion of noncitizens arriving at our borders without proper documentation due to the COVID-19 pandemic.<sup>255</sup> This order overrides the normal immigration process and does not allow for hearings or for an individual to even request asylum.<sup>256</sup> The Trump Administration seized the opportunity presented and invoked public health authority as a means to violate the safeguards for unaccompanied minors arriving at our borders, the fundamental due process rights of immigrants of all ages, and the Refugee Act.<sup>257</sup> Even though federal anti-trafficking laws and the Flores Settlement Agreement govern the

251. See Ana Gonzalez-Barrera & Phillip Connor, *Around the World, More Say Immigrants Are a Strength Than a Burden*, PEW RSCH. CTR. (Mar. 14, 2019), <https://www.pewresearch.org/global/2019/03/14/around-the-world-more-say-immigrants-are-a-strength-than-a-burden/> [<https://perma.cc/NY58-XJCU>] (indicating an uptick in approval of immigrants).

252. See *id.* (“In the U.S., the nation with the world’s largest number of immigrants, six-in-ten adults (59%) say immigrants make the country stronger because of their work and talents, while one-third (34%) say immigrants are a burden because they take jobs and social benefits”).

253. See Catherine E. Shoichet, *Biden Wants to Remove this Controversial Word from US Laws*, CNN, <https://www.cnn.com/2021/01/21/politics/alien-biden-immigration-law/index.html> [<https://perma.cc/73EB-8A5D>] (last updated Jan. 21, 2021, 2:13 PM) (referencing the sweeping immigration overhaul President Biden begun on his second day in office which included terminology in the bill to remove the word “alien” from United States immigration laws and have the word “noncitizen” replace it).

254. See *id.* (pushing for a more accurate portrayal of immigrants, as well as a step away from the dehumanizing verbiage used by individuals when discussing the lives of noncitizens attempting to migrate to the United States. By removing a term that shows others as less than human or not human and replacing it with a more correct term that reflects their immigration status in this country, Biden hopes to improve the treatment of immigrants reaching our borders).

255. See Lucas Guttentag, *Coronavirus Border Expulsions: CDC’s Assault on Asylum Seekers and Unaccompanied Minors*, JUST SEC. (Apr. 13, 2020), <https://www.justsecurity.org/69640/coronavirus-border-expulsions-cdcs-assault-on-asylum-seekers-and-unaccompanied-minors/> [<https://perma.cc/B84L-F36M>] (explaining how the public health order due to the COVID-19 pandemic directly affected the immigration at the border).

256. See *id.* (describing the far reach of the order issued by the CDC).

257. See *id.* (lamenting on the use of the CDC order to expel more immigrants out of the country by the Trump Administration).

treatment of migrant children and require that most children are sent to shelters once they arrive at our borders, the Trump Administration instead began to detain immigrant children in hotels for varying amounts of time before deporting them back to their home countries.<sup>258</sup> By August of 2020, more than 2,000 unaccompanied minors had been expelled from the United States without ever having filed for asylum, and some without ever speaking to their parents in the United States.<sup>259</sup>

In November of 2020, a federal judge in Washington D.C. ruled that unaccompanied minors could not be immediately expelled under the public-health emergency order of the CDC when they crossed into the country without documentation at our southern borders.<sup>260</sup> The United States already faced issues regarding where to place unaccompanied children, as Mexico refused to accept these children, and other countries required them to test negative for COVID-19 before allowing them to return.<sup>261</sup>

As we look towards the Biden Administration and healing our fractured nation, we note that this Administration has worked with the CDC to enact a humanitarian exception to the CDC order, exempting unaccompanied children and possibly families from the order until it can be repealed.<sup>262</sup> This humanitarian exception, along with the passage of

258. See Nomaan Merchant, *AP Exclusive: Migrant Kids Held in US Hotels, Then Expelled*, ASSOCIATED PRESS (July 22, 2020), <https://apnews.com/article/u-s-news-arizona-only-on-ap-politics-immigration-c9b671b206060f2e9654f0a4eae6388> [<https://perma.cc/SW9H-64K6>] (reporting the act of holding unaccompanied minors in hotels in McAllen, Texas before expelling them back to their country without due process).

259. See Nomaan Merchant, *Seeking Refuge in US, Children Fleeing Danger Are Expelled*, ASSOCIATED PRESS (Aug. 5, 2020), <https://apnews.com/article/ap-top-news-honduras-mexico-health-immigration-1144b498194cd6b6818acd04d7880e05> [<https://perma.cc/T9YV-YL9W>] (noting the number of immigrant children expelled under the CDC rule, citing the coronavirus as the primary reason).

260. See Michelle Hackman, *Judge Rules Trump Administration Can't Immediately Expel Migrant Children Under Pandemic Order*, WALL ST. J., [https://www.wsj.com/articles/judge-rules-trump-administration-cant-immediately-expel-migrant-children-under-pandemic-order-11605721508?mod=article\\_inline](https://www.wsj.com/articles/judge-rules-trump-administration-cant-immediately-expel-migrant-children-under-pandemic-order-11605721508?mod=article_inline) [<https://perma.cc/8BQZ-259D>] (last updated Nov. 18, 2020, 1:42 PM) (holding that unaccompanied minors were still entitled to due process and that due to their vulnerable classification, outright expulsion was not permitted).

261. See *id.* (facing backlash from the quick expulsion of unaccompanied minors, children were often held in hotels until they were sent back home. This was stopped with the current injunction).

262. Cf. Stephen Yale-Loehr, *CDC Immigration Order Lifted for Children, Should Expand for Adults*, CORNELL CHRON. (July 21, 2021), <https://news.cornell.edu/media-relations/tip-sheets/cdc-immigration-order-lifted-children-should-expand-adults> [<https://perma.cc/RA9K-22>]

true, humane legislative immigration reform, are key components to creating a path towards protecting the children at our borders and those children detained in our immigration system.<sup>263</sup> It is time for us to grant these children the rights that Supreme Court of the United States has already stated they possess: their Fifth Amendment rights, because 500,000 children detained and held for over 30 million hours during the Trump Administration must not become the standard of care the United States becomes known for.<sup>264</sup> President Biden and his Administration must now work with Congress to pass legislative reform to protect the rights and mental health notes of unaccompanied minors detained within the immigration system, and work towards passing legislation which would allow for children to be appointed counsel at the Government's expense, ensuring that our immigration system is fair, humane, efficient, and just.<sup>265</sup>

Lastly, we must all recognize one glaring fact that is often overlooked in immigration discussions, and that is the issue of why these children are leaving their homes willingly and crossing our borders seeking refuge.<sup>266</sup> We are a nation of immigrants, and we are a nation of laws where children flee to find safety when they are afraid.<sup>267</sup> Before we begin to demonize and criminalize these children simply because they are "immigrants," we should pause to consider why they are fleeing their home, and to remember the eloquent words of Warsan Shire: "you only leave home, when home is the mouth of a shark."<sup>268</sup>

---

ZE] (signaling that children are exempt from the CDC order, and urging the exemption should apply to all immigrants).

263. See *Fact Sheet: A Guide to Title 42 Expulsions at the Border*, AM. IMMIGR. COUNS. (Mar. 29, 2021), <https://www.americanimmigrationcouncil.org/research/guide-title-42-expulsions-border> [<https://perma.cc/9ZQF-QVJA>] (highlighting that the exemption includes anyone that DHS believes is a humanitarian or public health interest).

264. See *Plyer v. Doe*, 457 U.S. 202, 210 (1981) (reasoning that immigrants have protection under the Fifth and Fourteenth Amendments); see also Flagg & Calderón, *supra* note 160 (pointing to the lengthy and inhumane treatment of children in immigration detention facilities).

265. See generally Flagg & Calderón, *supra* note 160 (explaining the steps needed to correct the atrocities of the Trump administration).

266. See generally Merchant, *supra* note 259 (reminding that often in immigration cases, the why behind the child leaving their home is rarely examined closely).

267. Cf. *id.* (relaying that, in the eyes of children fleeing their country and their home, the United States is a symbol of safety and hope).

268. See Tania Sheko, *Warsan Shire: "Home,"* MEDIUM (Sept. 11, 2017), <https://medium.com/poem-of-the-day/warsan-shire-home-46630fcc90ab> [<https://perma.cc/GYE7-8UX2>] (describing through the eyes of a refugee, just how horrific the conditions of an individual's

---

country must be for them to flee. When in prison, the thought of sending your child—the flesh and blood that you have nurtured and loved—into a country alone for the slim chance that they may experience something better than violence, rape, drugs, and death present in their homeland, the best option you have is to flee and seek refuge. Immigrants and refugees do not flee their homes out of want, but out of necessity).