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Deconstructing and Reconstructing Rights for Immigrant Children

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DECONSTRUCTING AND RECONSTRUCTING RIGHTS FOR IMMIGRANT CHILDREN

Erin B. Corcoran*

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* Professor of Law, University of New Hampshire School of Law. This article is dedicated to M.B, my first child client, and Abraham, my first child. I am grateful for all the help and hard work of my research assistant Zachary Wolf and the law students at the *Harvard Latino Law Review* for their professionalism and editing. I would like to thank my colleagues Lauren Aronson, Keith Harrison, Kevin Lapp, Karen Musalo, David Thronson, Wendy Young, and Maria Woltjen, for their insights, comments, and thoughtful suggestions to this Article. To Cory Smith, thank you for all the support that you provide me each and every day.

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To regard people as equals is to take a stand on how they are to be treated, not to make a remark about their capacities. It is to recognize that they have something about them which justifies their being accorded the same status as others irrespective of their ability to achieve that status for themselves.

—John Harris¹

INTRODUCTION

Children's rights advocates and scholars alike continue to call for the development of innovative and alternative rights models, which specifically provide for an expansive conceptualization of children's rights.² Central to their calls for reform is a simultaneous recognition that children's rights must embody agency—a child's voice (a proxy for autonomy)—free from governmental interference, as well as the establishment of certain fundamental “needs” that the State has an affirmative obligation to ensure the child has, and when necessary, affirmatively provide. Informed by medicine, developmental psychology, social work, and neuroscience,³ such needs are com-

¹ John Harris, *The Political Status of Children*, in CONTEMPORARY POLITICAL PHILOSOPHY: RADICAL STUDIES 35, 50 (Keith Graham ed., 1982).

² See generally Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1 (1986); Anne C. Dailey, *Children's Constitutional Rights*, 95 MINN. L. REV. 2099, 2169 (2011) (arguing for a developmental theory of children's constitutional rights); TALI GAL, CHILD VICTIMS AND RESTORATIVE JUSTICE: A NEEDS-RIGHTS MODEL (2011) (advocating a needs-rights model as a restorative justice tool for children victims crime); Ruth Zafran, *Children's Rights as Relational Rights: The Case of Relocation*, 18 AM. U. J. GENDER SOC. POL'Y & L. 163 (2010).

³ See, e.g., Janet Weinstein & Ricardo Weinstein, *Before It's Too Late: Neuropsychological Consequences of Child Neglect and Their Implications for Law and Social Policy*, 33 U. MICH. J.L. REFORM 561, 561–65 (2000) (detailing the failure of child welfare law and practices to incorporate the current knowledge on brain development for children, particularly from

prised of the basic provisions including, but not limited to, education, food, shelter, and responsible caregiver(s).⁴ These children's interest-based rights models⁵ critique the earlier theories concerning the treatment of children, including: the paternalistic notions of *parens patriae*, from which the best interest of the child standard in the United States evolved; traditional rights theory (choice theory, liberal theory), in which children are devoid of rights and agency because they lack autonomy;⁶ and the children liberationists, who simply argue that children should be treated as miniature adults,⁷ while ignoring the significant differences cognitively, physically, and emotionally, which exist between children and adults.

Re-imagining children's rights also requires reforming our laws in such a way that reflects children as inimitable rights holders⁸ who possess unique positive rights.⁹ Indeed, constitutional rights for children require "rejecting the prevailing view of affirmative constitutional rights as they pertain to children. A constitutional regime of negative liberty *for adults* does not preclude the recognition of affirmative rights *for children*."¹⁰ Advocates for the interest-based—also referred to as a needs-based—rights theory have called for its implementation and incorporation into contested custody disputes,¹¹

a neuroscience perspective and arguing that interventions for neglected children focus on providing developmentally appropriate educational, rehabilitative, and protective services for children, and must be a mandatory component of child welfare practice).

⁴ *Id.* at 599–611; GAL, *supra* note 2, at 30 (summarizing Ochafta and Esponsa's argument that children's needs and their satisfiers differ in accordance to the different states of a child's development).

⁵ Jeremy Waldron, *The Role of Rights in Practical Reasoning: "Rights" Versus "Needs,"* 4 J. ETHICS 115 (2000) (rejecting the notion that rights are usually negative claims on others—claims to their forbearance—and arguing that rights can be understood perfectly well as a discourse in which affirmative claims are articulated).

⁶ David Archand, *Free Speech and Children's Interests*, 79 CHI.-KENT L. REV. 83, 91–93 (2004) ("A child incapable of exercising choice is reasonably disqualified from having liberty rights."); *see also* GAL, *supra* note 2, at 23–28.

⁷ *See* Dailey, *supra* note 2, at 2123.

⁸ Martha Minow argues that autonomy is not a precondition for having rights. It is the relationship that creates the power differences between children and adults, and that can be changed. Minow, *supra* note 2, at 4–5.

⁹ Joel Feinberg, *A Postscript to the Nature and Value of Rights*, in RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY: ESSAYS IN SOCIAL PHILOSOPHY 156–57 (1980) (arguing that children-only rights include positive rights such as education).

¹⁰ Dailey, *supra* note 2, at 2169. "The developmental theory's core insight into the importance of caregiving to children's future autonomy supports recognizing children's fundamental constitutional rights in the caregiving relationship." *Id.* at 2104.

¹¹ *See, e.g.,* Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 18–21 (1994) (arguing for the importance of considering a child's voice and the importance of incorporating children into the legal model of personhood in constitutional law, child support, and child custody determinations); *see also* Zafran, *supra* note 2, at 166–68 (arguing for an alternative "relational rights" approach that conceptualizes children as moral agents but also mutually dependent on the family relationship in the context of relocation decisions).

the juvenile justice framework,¹² and adoption and parental termination proceedings.¹³

Yet, children in U.S. immigration law are still most often seen as illegal migrants and “the law enforcement approach toward [these] migrants [is][to] prioritize[] their ‘alien’ status over their status as children.”¹⁴ With a few notable exceptions, immigration law has been stagnant to adopt dynamic models that incorporate rights models that are informed by the developmental needs of children. Indeed, “[d]ebates about the nature of children’s rights have largely bypassed immigration law.”¹⁵

This Article contributes to the much-needed discourse about how children’s rights should be understood and realized in immigration law. Specifically, the incorporation of a needs-based rights model, informed by international human rights law, would provide a scaffold through which to critically assess how the existing procedural framework and avenues for substantive immigration relief fail to protect children—as children. Ultimately, this Article recommends structural changes to the immigration system that acknowledge migrant children as independent rights holders—distinct from other adults—eligible to apply for immigration relief in their own right, while simultaneously recognizing the need to protect children with child-centered procedures and expertise.

Part I of the Article provides a history of the “child saving movement,” which advocated for an active role of the State in protecting children from grave harms such as child abuse, neglect, and child labor. To this end, the State, as *parens patriae*, must be vigilant to determine what are the “best interests” of the child; yet, this determination is devoid of any consideration of the child’s wants or desires.

Part II summarizes and critiques both the traditional rights theory, which fails to recognize rights for children due to a belief that they are not autonomous, as well as the child liberationist theory, which is insensitive to child-centered needs that must be protected. Both of these models are inadequate because they fail to fully appreciate that the rights accorded to a child must integrate a child’s complex developmental needs.

Part III describes how human rights law situates rights as trans-sovereign. Humans do not possess rights simply because they are citizens of a state, nor do they possess them because they are rational agents bound by a

¹² Cynthia Conward, *The Juvenile Justice System: Not Necessarily in the Best Interests of Children*, 33 NEW ENG. L. REV. 39, 70–80 (1998) (advancing alternative measures to the juvenile justice system that encompass prevention, rehabilitation, appropriate punishment as well as provide for the best interest of the child as a priority).

¹³ See generally Matthew B. Johnson, *Examining the Risks to Children in the Context of Parental Rights Termination Proceedings*, 22 N.Y.U. REV. L. & SOC. CHANGE 397, 417–24 (1996) (documenting three parental termination case studies to illustrate how a child’s needs are assessed by the courts).

¹⁴ LAUREN HEIDBRINK, *MIGRANT YOUTH, TRANSNATIONAL FAMILIES AND THE STATE: CARE AND CONTESTED INTERESTS* 42 (2014).

¹⁵ David Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children’s Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 990 (2002).

social contract with a sovereign; the rights humans enjoy flow from their mere existence—rights are inherent to being human. Human rights law recognizes this position and accordingly extends rights to children. The wide acceptance of this needs-based rights model is perhaps best illustrated by the creation and rapid international acceptance of the Convention on the Rights of the Child (CRC), the first comprehensive and international framework for children's rights. This seminal human rights treaty locates the child as the principal agent, who as a rights holder is guaranteed not only protection from governmental interference, but also demands that children are bestowed explicit positive rights.

Part IV explores the existing gaps in immigration law—substantively and procedurally—that serve as roadblocks to providing the necessary child-centered approach, which includes the congressional and executive branch responses to the recent surge of unaccompanied minors who seek safe haven in the United States from violence in their homes across Central America. This crisis illuminates the fundamental structural gaps in our immigration system that prevent treating children as rights bearers in need of distinct safeguards.

Part V concludes that, in order to adequately protect immigrant children, our immigration system must adopt a needs-based rights model that conceptualizes children, separate and apart from adults, as unique rights holders with exceptional needs. Specifically, significant changes must be made to our immigration system, including the formation of a statutory federal “best interest of the child standard” that is informed by the CRC and unconditionally applied to children seeking immigration relief. Furthermore, the guiding principles of the CRC, which serve as a framework for a needs-based rights model, must be operationalized through a congressionally created interagency “Child Protection Corps” in all future U.S. government responses, approaches, guidelines, and forms of international relief and protection to immigrant children.

I. THE BEST INTEREST OF THE CHILD STANDARD IN ANGLO-AMERICAN LAW AND ITS CRITICS

This section of the Article examines the ancient conceptions of children as private property subject to the whims of their father, and also traces the historical evolution of realizing children as individuals that are inherently worthy in their own right and deserving of a basic level of protection. This realization permits the state to intervene and usurp parental prerogatives when necessary to protect a child from harm. This section also summarizes the emergence of the best interest of the child standard in Anglo-American law and concludes with critiques of the standard as it applies in family law.

Until the nineteenth century, children were considered the property of their father, who was afforded near absolute rights over his children.¹⁶ Under Athenian law, children could be sold into slavery or simply abandoned; there was simply no obligation, legal or otherwise, to either protect a child or provide for a child's unmet needs.¹⁷ Likewise, under the Roman law "doctrine" of *pater familias*, children owed their father their labor and any income they earned while living in his household.¹⁸ Moreover, a father was free to discipline children as he saw fit, including the use of corporal punishment.¹⁹

Although during the early part of the medieval period there was a similar "absence of interest in children," parents appeared to develop a "new preoccupation with the experiences of childhood" and in nurturing their children into adulthood beginning in the eleventh and twelfth centuries.²⁰ Throughout the Middle Ages, consistent with the feudalistic structure of authority based on status and hierarchy, children were often relegated to "duty and obedience" under their parents' authority.²¹ Political and social reforms, which began in sixteenth-century England and continued into the American colonies, shifted the notion of authority from status to consent.²² However, despite even these reforms, children were still viewed as immature and believed to lack the necessary capabilities to intelligently consent.²³ Therefore, at that time, "childhood became a distinct legal status because [they] were perceived as lacking the ability to form their own judgments."²⁴

This view of children prevailed into the beginning of the nineteenth century, where the Progressive Era Reformers spurred a "child saving" movement, which ultimately gave the government a "paternal presence in

¹⁶ LeAnn Larson LaFave, *Origins and Evolution of the "Best Interests of the Child" Standard*, 34 S.D. L. REV. 459, 464-70 (1989) (providing an overview of the historical development of children's rights). Professor LaFave describes how under the Roman Empire a "child was simply the property of the father; a Roman father could sell his own child into slavery or even put his child to death." *Id.* at 464-65. The English Common Law gave all powers to the father, and the mother, in contrast, "was entitled to no power [over her children], but to reverence and respect." *Id.* (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *453).

¹⁷ Stephen R. Arnott, *Autonomy, Standing, and Children's Rights*, 33 WM. MITCHELL L. REV. 807, 809 (2007). Athenian children born out of wedlock were not even considered "citizens." *Id.*

¹⁸ Under the Roman law of *pater familias*, a man's wife and children were chattels belonging to him, along with slaves and other personal property. See Francis Bowes Sayre, *Inducing Breach of Contract*, 36 HARV. L. REV. 663, 664 (1923). A Roman father even had the legal right to kill his child. See IRA MARK ELLMAN ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS 491 (2d ed. 1991).

¹⁹ See Hon. Leonard P. Edwards, *Corporal Punishment and the Legal System*, 36 SANTA CLARA L. REV. 983, 986-87 (1996).

²⁰ Arnott, *supra* note 17, at 811-12.

²¹ See *id.* Arnott further posits that this notion of a child's duty of obedience, without "corresponding rights," has persisted throughout history and into the American legal system. *Id.* He also notes that "notions of duty and obedience" did not distinguish between adults and children; the structure was based solely on status, which explains why some children in post-Reformation England held such great power. *Id.*

²² *Id.* at 812.

²³ *Id.*

²⁴ *Id.*

children's lives."²⁵ Children, who were still considered incapable of making decisions for themselves, were seen as dependent upon adults.²⁶

Under this movement, acting in its capacity as *parens patriae*, the State necessarily interfered with the family structure and decisions when the parents' actions threatened the child's well-being.²⁷ "But state authority [did] not lead to children having rights of their own."²⁸ Initiatives to protect children included compulsory education and restrictions on child labor.²⁹ Most notably, "[t]he juvenile court under challenge in *In re Gault* was itself a product of Progressive Era reforms."³⁰ These reformers sought to protect children's innocence by shielding them from their own impressionability.³¹ This movement was responsible for the invention of "adolescence," which resulted in the expansion of childhood.³²

It was during this time in Anglo-American family law that the "best interest of the child" standard emerged as the prevailing substantive legal principle in determining the fate of children."³³ Under this new standard state courts and quasi-judicial tribunals were ordered to employ the best interest standard when making a placement decision for a child in adoption, fostering, guardianship, and even matrimonial proceedings.³⁴ In 1973, Joseph Goldstein, Anna Freud, and Albert Solnit, in *Beyond the Best Interests of the Child*,³⁵ articulated a psychoanalytic theory to encompass "all legislative, judicial, and executive decisions generally or specifically concerned with establishing, administering, or re-arranging child-parent relationships."³⁶ They advocated for:

three component guidelines for decision-makers concerned with determining the placement and the process of placement of a child in a family or alternative setting. These guidelines rest on the belief that children whose placement becomes the subject of contro-

²⁵ Martha Minow, *What Ever Happened to Children's Rights?*, 80 MINN. L. REV. 267, 279 (1995).

²⁶ See *Developments in the Law — The Constitution and the Family: III. State Interests in the Family*, 93 HARV. L. REV. 1198, 1201–02 (1980) (discussing the overarching principles and justification of the State's *parens patriae* powers).

²⁷ *Id.*

²⁸ Dailey, *supra* note 2, at 2112.

²⁹ Minow, *supra* note 25, at 280.

³⁰ *Id.* at 279 (quoting *In re Gault*, 383 U.S. 1 (1967)) (footnote omitted).

³¹ See *id.*

³² Minow, *supra* note 2, at 9; see also VIVIANA ZELIZER, *PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN* 56–137 (1985) (noting that changes in societal attitudes about work and education contributed to the transformation in how a child's worth is conceptualized).

³³ Thronson, *supra* note 15, at 984; see also Sara McGinnis, Comment, *You Are Not the Father: How State Paternity Laws Protect (and Fail to Protect) the Best Interest of Children*, 16 AM. U. J. GENDER SOC. POL'Y & L. 311, 314 (2008) (noting that American courts have utilized the best interest of the child standard since 1815).

³⁴ CLAIRE BREEN, *THE STANDARD OF THE BEST INTERESTS OF THE CHILD: A WESTERN TRADITION IN INTERNATIONAL AND COMPARATIVE LAW* 44–45 (2002).

³⁵ JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973).

³⁶ *Id.* at 5.

versy should be provided with an opportunity to be placed with adults who are or are likely to become their psychological parents.³⁷

In making placement decisions an adjudicator must (1) “safeguard the child’s need for continuity of relationships”;³⁸ (2) “reflect the child’s, not the adult’s, sense of time”;³⁹ and (3) “must take into account the law’s incapacity to supervise interpersonal relationships and the limits of knowledge to make long-range predictions.”⁴⁰ Overall, these authors argued that “the law’s presumption that the child’s parents are best suited to represent and safeguard his interests should not prevail.”⁴¹

Currently, the fifty states⁴² and the District of Columbia⁴³ have statutes that recognize that the best interests of the child must be a consideration in determining what services, actions, and orders will best serve a child, as well as who is best suited to take care of a child. While there is no singular definition of best interests of the child, some commonly accepted principles in assessing the best interests of a child have developed over time, including incorporating the child’s voice, as well as prioritizing safety, permanency, and the well-being of every individual child.⁴⁴ Yet, even today the substantive differences among the states are striking. For example, as of 2012

³⁷ *Id.* at 31.

³⁸ *Id.*

³⁹ *Id.* at 40.

⁴⁰ *Id.* at 49.

⁴¹ BREEN, *supra* note 34, at 50 n.108.

⁴² ALA. CODE § 12-15-101 (2014); ALASKA STAT. ANN. §§ 47.05.065(3)–(4) and 47.10.082 (West 2014); ARIZ. REV. STAT. ANN. §§ 8-845(A)–(C) and 8-847(D) (2012); ARK. CODE ANN. § 9-27-102 (West 2014); CAL. FAM. CODE § 175(a), (b) (West 2014); CAL. WELF. & INST. CODE § 16000 (West 2014); COLO. REV. STAT. ANN. § 19-1-102(1), (1.5) (West 2014); CONN. GEN. STAT. ANN. § 45a-719 (West 2014); DEL. CODE ANN. tit. 13, § 722 (West 2014); FLA. STAT. ANN. § 39.810 (West 2014); GA. CODE ANN. §§ 15-11-310 (West 2014); HAW. REV. STAT. § 587A-2 (West 2014); IDAHO CODE ANN. § 16-1601 (West 2014); IND. CODE ANN. § 31-34-19-6 (West 2014); IOWA CODE ANN. §§ 232B.2 and 232.104 (West 2014); KAN. STAT. ANN. § 38-2201(b) (West 2014); KY. REV. STAT. ANN. § 620.023 (West 2014); LA. CHILD. CODE ANN. art. 601 and 675 (2014); ME. REV. STAT. tit. 22, §§ 4055(2) (2014); MD. CODE ANN., FAM. LAW § 5-525(f) (West 2014); MASS. GEN. LAWS ANN. ch. 119, § 1 (West 2014); MICH. COMP. LAWS ANN. § 722.23 (West 2014); MINN. STAT. ANN. § 260C.193(subdivision 3) (West 2014); MISS. CODE ANN. § 43-21-103 (West 2014); MONT. CODE ANN. § 41-3-101 (West 2014); NEB. REV. STAT. ANN. § 43-533 (West 2014); NEV. REV. STAT. ANN. § 128.005(2)(c) (West 2014); N.H. REV. STAT. ANN. § 169-C:2 (West 2014); N.J. STAT. ANN. §§ 30:4C-1 and 30:4C-11.1(a) (West 2014); N.M. STAT. ANN. §§ 32A-4-28(A) and 32A-1-3 (West 2014); N.Y. Soc. SERV. LAW §§ 358-a(3)(c) and 384-b(1) (McKinney 2014); N.C. GEN. STAT. ANN. §§ 7B-507(d) and 7B-100 (West 2014); OHIO REV. CODE ANN. § 2151.414(D) (West 2014); OR. REV. STAT. ANN. § 107.137(1) (West 2014); S.C. CODE ANN. §§ 63-1-30 and 63-1-20(D) (2013); S.D. CODIFIED LAWS § 26-7A-56 (2014); TENN. CODE ANN. §§ 36-1-101 and 36-1-113(i) (West 2014); TEX. FAM. CODE ANN. § 263.307 (West 2013); UTAH CODE ANN. § 78A-6-503(8), (12) (West 2014); VT. STAT. ANN. tit. 33, §§ 5114 (West 2014); VA. CODE ANN. § 20-124.3 (West 2014); WASH. REV. CODE ANN. § 13.34.020 (West 2014); W. VA. CODE ANN. § 49-1-1(a)(1)–(8) (West 2014); WIS. STAT. ANN. § 48.426(2)–(3) (West 2014); WYO. STAT. ANN. § 14-3-201 (West 2014).

⁴³ D.C. CODE § 16-2353 (2014).

⁴⁴ See generally Bridgette A. Carr, *Incorporating a “Best Interests of the Child” Approach into Immigration Law and Procedure*, 12 YALE HUM. RTS. & DEV. L.J. 120, 127 (2009) (argu-

twenty-one states and the District of Columbia enumerate specific criteria the courts should consider when making a best interest determination; whereas, the other twenty-nine states' statutes only provide general guidance and permit vastly more discretion to a court making the best interests determinations.⁴⁵ Moreover, several states and the District of Columbia expressly require courts to consider the child's wishes, taking into account the child's age and maturity to express a reasonable preference, when making this determination.⁴⁶

The overall lack of consistency, coupled with broad judicial discretion as evidenced by variance among the states, has resulted in resounding criticisms from the courts⁴⁷ and scholars⁴⁸ alike that the best interest of the child standard "is a vague, subjective, and malleable principle."⁴⁹ The strongest critics are troubled by the standard's apparent indeterminacy.⁵⁰ Professor Robert Mnookin asserts that what is "best" or "least detrimental" for any individual child is both speculative and indeterminate; and even if this model could produce predictions, there is no societal consensus on what is "best" or "least detrimental."⁵¹ Instead of using a balancing test borne out of the best interest of the child standard,⁵² Mnookin argues that a more rule-like

ing that the best interests of the child principle used in state child welfare proceedings should be applied to accompanied children in immigration proceedings).

⁴⁵ CHILD WELFARE INFO. GATEWAY, DETERMINING THE BEST INTERESTS OF THE CHILD 3-4 (2012), https://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.cfm, archived at <http://perma.cc/MFW7-DG49?type=pdf>.

⁴⁶ *Id.* at 5.

⁴⁷ See, e.g., *Gruber v. Gruber*, 583 A.2d 434, 436 (Pa. Super. Ct. 1990) ("[O]ur research has failed to reveal a consistent, universally accepted approach to the question of when a custodial parent may relocate out-of-state over the objection of the non-custodial parent. In fact, the opposite is true. Across the country, applicable standards remain distressingly disparate.").

⁴⁸ See, e.g., Mary Becker, *Judicial Discretion on Child Custody: The Wisdom of Solomon?*, 81 ILL. B.J. 650, 651 (1993) (illustrating the range of judicial interpretations of the best interest standard); McGinnis, *supra* note 33, at 313 (arguing that state laws do not act in the best interest of the child).

⁴⁹ See Zafran, *supra* note 2, at 178 (citing Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. L. REV. & WOMEN'S STUD. 133, 172 (1992) (describing the difficulties in determining and implementing what is in the best interest of the child)). There is considerable literature on problems with applying the best interest standard in state custody disputes between parents. See, e.g., LaFave, *supra* note 16, at 514-27 (arguing for substantive and procedural modifications to the best interest of the child standard to better define the standard for adjudicators and parties involved in custody disputes); Andrea Charlow, *Awarding Custody: The Best Interests of the Child and Other Fictions*, 5 YALE L. & POL'Y REV. 267, 269 (1987) (criticizing the best interest standard as a "euphemism for unbridled judicial discretion"); PHYLLIS CHESLER, *MOTHERS ON TRIAL: THE BATTLE FOR CHILDREN AND CUSTODY* 66 (1986) (finding in a study of sixty mothers who had been custodially challenged between 1960-1981, that 70% of her sample, which she described as "good enough" mothers, lost custody; and 83% of the fathers had not been involved in the primary care of their children, 62% of the fathers had physically abused their wives, and 37% of the fathers had kidnapped their children).

⁵⁰ Robert H. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 229 (1975).

⁵¹ *Id.*

⁵² *Id.* at 262-68.

structure in making these types of determinations for children is preferable.⁵³ Expounding on Mnookin's criticism of the best interest of the child standard, Jon Elster argues that, in addition to the standard being indeterminate and ignoring the rights of parents, it is also vulnerable to being subjugated to larger public policy considerations including preserving societal values regarding who is a legitimate parent.⁵⁴

Consistent with these criticisms, in her recent article, *Children's Rights as Relational Rights: A Case for Relocation*, Professor Ruth Zafran advances an ontological critique of the best interest of the child standard for failing to incorporate a child's agency and status as a rights holder, and concludes that:

[T]he principle of the best interests of the child suffers from being a paternalistic (or, more precisely, parentalistic) criterion, formulated by the parent or by the state standing in the parent's shoes. In that sense, there is a substantive conceptual difference between the principle of the best interests of the child—which reflects the understanding of the “responsible adult” who determines for the child where her best interests lie—and a decision grounded in the rights of the child. The latter is supposed to reflect the will of the child herself (when it can be ascertained) and her rights, just like any decision reached with respect to any individual. In that sense, the deep (or “true”) interest of the child is to be treated as a right-bearer; adopting a best interest standard therefore is inconsistent with the child's fundamental interest.⁵⁵

Overall, the child saving movement challenged the earlier notions of families as purely private relationships that are immune from governmental interference. This movement reformed the law to provide additional legal grounds for state intervention into “domestic” affairs when the state determined such interference was in the best interest of the child. Yet, the best interests standard, entrenched in paternalistic notions of a child's need for state protection, in addition to assisting children, served as a cloak to advance the state's prerogatives and values, while at the same time trumping private morals, all in the name of protecting a child's best interests.

⁵³ *Id.*

⁵⁴ Elster cites the example of a lesbian mother losing custody of her child in Great Britain because of her sexual orientation to illustrate circumstances in which a court knowingly and deliberately refuses to apply the best interest of the child standard because other public policy considerations trump. Jon Elster, *Solomonic Judgments: Against the Best Interests of the Child*, 54 U. CHI. L. REV. 1, 26 (1987). In summarizing the decision, Elster concludes that the argument of the court was essentially: “the risk of the children, at critical ages, being exposed or introduced to ways of life which, as this case illustrates, may lead to severance from normal society, to psychological stresses and unhappiness and possibly to physical experience which may scar them for life.” *Id.* at 27.

⁵⁵ Zafran, *supra* note 2, at 179.

II. TRADITIONAL AND LIBERATIONIST RIGHTS MODELS AS APPLIED TO CHILDREN

If the Anglo-American best interest of the child standard truly falls short for children, as Zafran claims, are rights theories the correct solution? This section of the Article explores how certain rights models have treated children throughout history. Specifically, this section provides an overview of both the traditional rights model and the liberationist rights model as applied to children. The aim of this section is to illustrate why traditional rights theories, which often implicate negative rights, are insufficient models for children because they ultimately depend on the mistaken assumption that autonomy is a precondition for rights.⁵⁶ Moreover, this section also highlights the pitfalls of the child liberationist theory as an appropriate model for children due to the fact that it does not take into consideration the difference in the capacity a child has to advocate for his or her rights⁵⁷ and what child-specific needs or child rights exist.⁵⁸ Consequently, both the traditional rights model and the child liberationist theory disappoint because they fail to provide a workable framework to protect children's basic needs without limiting their voice. However, while this section concludes that a rights discourse can be limiting, there is no doubt that it can be instrumental both politically in changing realities,⁵⁹ as well as in promoting a non-paternalistic, child-centered framework that structurally empowers children.⁶⁰

A. Traditional Rights Models Exclude Children as Right-Holders

The traditional rights model is anchored in contemporary liberalism informed by the works of Thomas Hobbes, Benedict Spinoza, and John Locke, whose writings embodied a modern individualist outlook.⁶¹ Reacting to the tyrannical and arbitrary use of state power against the individual that was often manifested by religious and political intolerance and persecution, these political philosophers "sought to articulate a framework for a society in which all citizens could be free from the fear, injustice, suffering and socio-political turmoil produced by capricious judgments and punishments justi-

⁵⁶ MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 301 (1990).

⁵⁷ Cecelia M. Espenosa, *Good Kids, Bad Kids: A Revelation About the Due Process Rights of Children*, 23 HASTINGS CONST. L.Q. 407, 408 (1996) ("Children, as nonvoting actors in society, cannot advocate for their own rights. Instead their rights are determined by others.").

⁵⁸ Waldron, *supra* note 5, at 122–25 (discussing how a needs-based rights model might be conceptualized).

⁵⁹ MINOW, *supra* note 56, at 307.

⁶⁰ "The language of rights helps people to articulate standards for judging conduct without pretending to have found the ultimate and unalterable truth . . . children no less than adults can participate in the legal conversation that uses rights to gain the community's attention." *Id.* at 308.

⁶¹ See SHAUN P. YOUNG, BEYOND RAWLS: AN ANALYSIS OF THE CONCEPT OF POLITICAL LIBERALISM 26 (2002).

fied and enforced via the whimsical use of state power—they sought to provide the foundation for a stable and just society.”⁶² While there are variations of liberalism,⁶³ the values and beliefs most commonly associated with this political philosophy include: the importance of the individual; the belief in individual equality and individual rights; the right to be free from government intrusion through a limited constitutional government; the importance of private property; and lastly, autonomy.⁶⁴ Building upon the work of classical liberalists, which was largely centered on the relationship between protection and self-preservation, John Stuart Mill transformed the focus into modern liberalism’s struggle for “the fundamental connection between protecting individual liberty and property and securing the conditions under which all individuals might be able to realize their full potential”⁶⁵ Following from Locke’s view, the “traditional rights model” premise is that individuals are rational and autonomous by nature and that the ultimate function of law is to accord an individual’s dignity.⁶⁶ Therefore, the government should respect individual choice, because as a rational agent, a person can choose his or her own conception of the good⁶⁷ as it relates to morality, religion, occupation, or life’s purposes.⁶⁸

Critical to both modern liberal theory and the traditional rights model is the notion of consent. Individuals are capable of making rational choices about morality, religion, and occupation. This autonomy in decision making is the predicate to both possessing and protecting the fundamental rights of a free society, including the right to vote, as well as freedom of speech, association and religion, and personal liberty.⁶⁹ Undeniably, the primary purpose of the U.S. Constitution’s Bill of Rights is to shield individuals from governmental interference and provide equal liberty for autonomous choice.⁷⁰ As

⁶² *Id.* at 26.

⁶³ JOHN GRAY, *LIBERALISM* xi (2d ed. 1995) (“[W]hereas liberalism has no single, unchanging nature or essence, it has a set of distinctive features which exhibits its modernity and at the same time marks it off from other modern intellectual traditions and their associated political movements.”).

⁶⁴ YOUNG, *supra* note 61, at 26.

⁶⁵ *Id.* at 28.

⁶⁶ John Rawls’ theory of justice as fairness argues that the following “principles of justice” will emerge: “a. Each person has an equal right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all. b. Social and economic inequalities are to satisfy two conditions. First, they must be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they must be to the greatest benefit of the least advantaged members of society.” JOHN RAWLS, *POLITICAL LIBERALISM* 291 (1993).

⁶⁷ JOHN RAWLS, *A THEORY OF JUSTICE* 407–16 (1971).

⁶⁸ *Id.* at 1987–98.

⁶⁹ Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 *STAN. L. REV.* 875, 876 n.2 (“Autonomy has been identified as a value underlying the constitutional protection of privacy, procedural due process, equal protection, and free exercise rights.”).

⁷⁰ RAWLS, *supra* note 67, at 28.

such, the traditional rights model only recognizes negative rights—specifically, freedom from intrusion.⁷¹

Nonetheless, the liberal model acknowledges exceptions to personal autonomy, most notably, where the State must interfere with one person's choices in order to protect the liberties and autonomy of another individual.⁷² Moreover, liberal scholars also recognize that certain individuals have innate qualities that may justify affirmative state action as an exception to the presumption of freedom of choice with no government interference.⁷³ For example, in the traditional rights/choice theory model, children cannot be rights holders because they are not autonomous; rather, as Mill explains, they need the protection of the State:

It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculty. We are not speaking of children, or of young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury.⁷⁴

Under the principles of both liberal and traditional rights models, the U.S. Supreme Court has been unwilling to permit state intervention against another individual to protect a child—regardless of incongruous results—because children are devoid of rights, therefore rendering them incompetent and unable to make rational decisions.⁷⁵ In *DeShaney v. Winnebago County Department of Social Services*,⁷⁶ the Court held that the state had no affirmative obligation to interfere with a parent's right to choose how to raise a child, even where a father violently beat his four-year-old son into a coma, which resulted in permanent brain damage. It is only when the U.S. Supreme

⁷¹ See Tamar Ezer, *A Positive Right to Protection for Children*, 7 YALE HUM. RTS. & DEV. L.J. 1, 4–5 (2004) (discussing the “classical Western notion” of negative rights, specifically its focus on choice and autonomy).

⁷² RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 191 (1978).

⁷³ *Id.*

⁷⁴ JOHN STUART MILL, *ON LIBERTY WITH THE SUBJECTION OF WOMEN AND CHAPTERS ON SOCIALISM* 13 (Stephan Collini ed., Cambridge Texts in the History of Political Thought 1989) (1859).

⁷⁵ Dailey, *supra* note 2, at 2109–11; see also DAVID ARCHARD, *CHILDREN: RIGHTS AND CHILDHOOD* 54 (2004) (“If, as many will argue, children are incapable of exercising choice, then according to the will theory at least, they do not have rights.”); *Thompson v. Oklahoma*, 487 U.S. 815, 825 n.23 (1988) (noting that parents possess broad constitutional right about the care and custody of their children because children are not yet “fully rational, choosing agent[s]”); *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (“The law’s concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions.”).

⁷⁶ *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189 (1989) (holding that the state child services agency had no duty to rescue the child from his abuser); see also *Bowen v. Gilliard*, 483 U.S. 587 (1987) (holding that state aid to impoverished children, including providing the requisite nutrition for bare survival, is a mere legislative prerogative and not a constitutional right).

Court sees children as miniature adults, which are suddenly capable of rational decision making, that it seemingly locates independent rights of a child.⁷⁷

For example, in *In re Gault* the Court held that when a child is to be sentenced like an adult, then that child should have the same procedural due process protections of an adults facing criminal prosecution.⁷⁸ These rights include the right to government-funded counsel, the right against self-incrimination, the right to confront witnesses, and the right to timely notification of charges.⁷⁹ The Supreme Court found that the Arizona State legislature's establishment of state juvenile delinquency procedures, while it may well have intended to provide special protections for immature offenders,⁸⁰ had in fact functioned oppressively so much so that the Gault child was exposed to punishment significantly harsher than adults faced with similar infractions.⁸¹

Certainly, children are accorded rights only to the extent it helps prepare them "for the autonomous individuality of adulthood."⁸² In *Plyler v. Doe*,⁸³ the Supreme Court posited that the state provision of education, including the education of non-citizen children with or without valid immigration status, was not merely a legislative prerogative, but a necessary state action in a democratic society and a means for children to achieve gainful employment as adults.⁸⁴ While education itself is not a fundamental right guaranteed by the Constitution, either explicitly or implicitly,⁸⁵ the Supreme Court nevertheless concluded that "[i]n sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests."⁸⁶

⁷⁷ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (holding that older children in school have the same constitutional right to free speech that adults do); *In re Gault*, 387 U.S. 1 (1967) (holding that juveniles in delinquency proceedings have the same constitutional rights to due process as adults facing criminal prosecution).

⁷⁸ 387 U.S. at 78.

⁷⁹ *Id.*

⁸⁰ *Id.* at 15.

⁸¹ *Id.* at 29. An alternative reason for the Court's concern over the process accorded to juveniles is not rooted in protecting the autonomy of a child, but rather in protecting the vulnerability of a child and the need to protect the child from state overreaching. See Dailey, *supra* note 2, at 2130.

⁸² Fitzgerald, *supra* note 11, at 30.

⁸³ *Plyler v. Doe*, 457 U.S. 202 (1982).

⁸⁴ *Id.* at 221. "In addition to the pivotal role of education in sustaining our political and cultural heritage, denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit. . . . But more directly, 'education prepares individuals to be self-reliant and self-sufficient participants in society.'" *Id.* (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972)).

⁸⁵ "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

⁸⁶ *Plyler*, 457 U.S. at 221.

In these two cases, the Supreme Court, expounding on the liberal rights theory, required the State to affirmatively provide for children—in *Gault* it was procedural due process, while in *Plyler* it was K-12 education for all state residents regardless of immigration status—not because they were themselves individual rights holders, but only because they were conceptualized as potential adults and potential future rational agents that would be participating in society.⁸⁷

B. The Child Liberationist Movement: Children as a Minority Class in Need of Emancipation

In reaction to both the progressive era reforms—advocating for a paternalistic model for protecting children—and the traditional rights theorists—contending that children are devoid of independent rights as children—the Children's Liberation Movement (led by John Holt, Richard Farson, and others) insisted that children should be seen as a minority group that deserves to have both adult freedom and self-determination rights, similar to other groups who have faced discrimination such as women and African-Americans.⁸⁸ Drawing on the works of Jean Jacques Rousseau and John Dewey,⁸⁹ child liberationists argued that children deserve the right to participate fully in society and also opined “that children’s voices were wrongly absent even from public discussions of children’s rights.”⁹⁰ John Holt argued that children, “of whatever age,” are equal and should be treated like adults under the law.⁹¹ Under this premise, children should have the right to vote, work for pay, sign contracts, manage their own educations, travel, and form their own families.⁹²

⁸⁷ Fitzgerald, *supra* note 11, at 31.

⁸⁸ RICHARD EVANS FARSON, BIRTHRIGHTS 10 (1974) (drawing parallels with the civil rights movement and women’s liberation to children’s liberation efforts); *see generally* JOHN HOLT, ESCAPE FROM CHILDHOOD (1974).

⁸⁹ Farson, in explaining the roots of the child liberation movement, traces its strong ideological commitment to freedom for children to the works of Rousseau and Dewey. *See* FARSON, *supra* note 88, at 9 (citing JEAN-JACQUES ROUSSEAU, EMILE (Barbara Foxley trans., Dutton 1974) (1762); JOHN DEWEY, EXPERIENCE AND EDUCATION (1938)).

⁹⁰ Minow, *supra* note 25, at 271 (citing Helen Baker, *Growing Up Unheard*, in THE CHILDREN’S RIGHTS MOVEMENT: OVERCOMING THE OPPRESSION OF YOUNG PEOPLE 187, 189 (Beatrice Goss & Ronald Goss eds., 1977) (citing two *Harvard Educational Law Review* issues on children’s rights that do not contain any articles by people under the age of eighteen)).

⁹¹ HOLT, *supra* note 88, at 18 (arguing that children should be granted eleven rights including: the right to choose an alternative family framework; the right to information; the right to choose an education framework and self-education (Holt is considered the founder of home schooling in the United States); the right to work and enter into and perform economic transactions; the right to sexual freedom; the right to vote; the right to be educated in accordance with a child’s characteristics; the right to protection against corporal punishment; and the right to justice).

⁹² John Holt, *Why Not a Bill of Rights for Children?*, in THE CHILDREN’S RIGHTS MOVEMENT: OVERCOMING THE OPPRESSION OF YOUNG PEOPLE 319, 324–25 (Beatrice Goss & Ronald Goss eds., 1977).

Holt recognized that children do depend on others to care for them, feed them, keep them warm and clean, and protect them from harm.⁹³ Yet, he extolled the example of twin boys, approximately four years old, whose parents were either killed or taken prisoner during World War II, and managed to survive on their own in the midst of great poverty—"all by themselves."⁹⁴ For Holt and other liberationists, humans "outgrow our physical helplessness and dependency much sooner or faster than most people think."⁹⁵ Liberationists were suspicious of the idea of childhood; they believed it was a state construct instrumental in both suppressing and limiting the conduct of a class of individuals.⁹⁶ For them, children did not always exist; they were invented.⁹⁷ Once society was willing to embrace the concept of childhood, liberationists proffered that the government was only then able to establish a bright-line distinction between childhood and adulthood based on an arbitrary age distinction, and then use that manufactured divide to confer rights to some—adults—and to deny rights to others—children.⁹⁸

Moreover, children liberationists were convinced that governmental and parental decision making, rooted in child protection justifications, were in fact a guise to control, segregate, and program children to be obedient, well behaved, and complicit. The system was designed so that children were seen as lacking independent thinking and emotion.⁹⁹ Therefore, these liberationists argued, children, just as adults, are entitled by right to self-determination and should "have the right to exercise self-determination in decisions about eating, sleeping, playing, listening, reading, washing, and dressing."¹⁰⁰

Likewise, children liberationists maintained that the family was not necessarily the natural and fundamental unit of society, and that children, like adults, had the right to choose alternative home environments¹⁰¹ when their parents failed to protect or affirmatively harmed them. Citing child abuse and torture¹⁰² by biological parents as evidence, Farson posited, "while the natural parents of the child do not necessarily make the best parents it is abundantly clear that they make the worst ones."¹⁰³

Though children under this theory have a right to leave a horrific family environment and seek an alternative living arrangement, a child has no right to state protection from violence or other maltreatment. For liberationists,

⁹³ HOLT, *supra* note 88, at 23.

⁹⁴ *Id.* at 24.

⁹⁵ *Id.* at 24–25.

⁹⁶ FARSON, *supra* note 88, at 17–25.

⁹⁷ *Id.* at 17 (arguing that childhood is a European invention of the sixteenth century).

⁹⁸ HOLT, *supra* note 88, at 26.

⁹⁹ FARSON, *supra* note 88, at 2.

¹⁰⁰ *Id.* at 27.

¹⁰¹ *Id.* at 42.

¹⁰² Farson details examples of horrific abuse: "[c]hildren are tied, gagged, whipped, systematically exposed to electric shock, made to swallow all kinds of noxious materials such as pepper, dirt, feces, urine, vinegar, alcohol; their skulls and bones have been broken—sometimes repeatedly—their faces and bodies lacerated, their eyes pounded, even gouged out." *Id.* at 47.

¹⁰³ *Id.* at 47–48.

"asking what is good for children is beside the point[.]"¹⁰⁴ and it is this callous indifference regarding children's developmental and age appropriate needs that fuels much of the criticism towards the liberationist view of children's rights.¹⁰⁵

C. *Reclaiming the Rights Rhetoric*

While both the traditional liberal rights and child liberationist models are inadequate in fully articulating what obligations a state owes to children or under what circumstances a state should refrain from interfering with a child's decision-making powers, does that necessarily mean these rights theories are not instructive tools for framing the law? After dissecting the critiques of the rights discourse, Professor Cass Sunstein bluntly resolved, "the real question is not whether we should have rights, but what rights should we have."¹⁰⁶ This conclusion can be applied to children as well.¹⁰⁷

"Admittedly children's rights present a particularly difficult case for rights theorists, mainly due to the children's limited capacities, greater vulnerabilities, and dependency on others."¹⁰⁸ In *Making All the Difference: Inclusion, Exclusion and American Law*, Professor Martha Minow argues that if rights are only understood as emanating from an autonomous rational male, then rights function to differentiate and effectively silence difference.¹⁰⁹ Undeniably, Minow argues that law's dilemma is to ameliorate the unfair consequences of the powerless without further reducing their power.¹¹⁰ So for Minow, and others, if rights, particularly children's rights, can speak to more than just autonomy, there is power in reclaiming the rights rhetoric. In particular, children's rights should include a child's needs, "especially the central need for relationships with adults who are themselves enabled to create settings where children can thrive."¹¹¹ Moreover, needs should be placed within the rights talk because "basic needs are not only the justification of having rights; they also identify the nature of many of children's rights."¹¹² Therefore, the task of reimagining and reclaiming rights as tools of power and protection for children requires constructing a rights framework that embodies positive rights such as participation, education,

¹⁰⁴ *Id.* at 31.

¹⁰⁵ GAL, *supra* note 2, at 17.

¹⁰⁶ Cass R. Sunstein, *Rights and Their Critics*, 70 NOTRE DAME L. REV. 727, 757–58 (1995) (summarizing the six thematic critiques on rights: rights are social and collective in nature, not inherently individual; rights are too rigid and do not allow for "competing considerations"; rights are indeterminate and do not provide answers on how to handle particular problems; rights promote excessive individualism and undesirable characteristics such as selfishness and indifference; rights are too readily invoked to protect existing unjust discrimination; and rights obscure and crowd out the issue of responsibilities).

¹⁰⁷ GAL, *supra* note 2, at 17.

¹⁰⁸ *Id.* at 13.

¹⁰⁹ MINOW, *supra* note 56, at 152–56.

¹¹⁰ *Id.* at 310.

¹¹¹ *Id.* at 306.

¹¹² GAL, *supra* note 2, at 31.

protecting critical relationships to others such as family, and shelter,¹¹³ while simultaneously articulating what rights/liberties are immune from government interference.

III. THE CONVENTION ON THE RIGHTS OF THE CHILD'S CONCOMITANT MANDATES: THE STATE'S DUTY TO PROTECT CHILDREN'S NEEDS AND REALIZE THEIR INHERENT HUMAN RIGHTS

The child shall in all circumstances be among the first to receive protection and relief.

– Article III, 1924 Geneva Declaration

After over a decade, a working group established in 1979 by the United Nations Commission on Human Rights negotiated and drafted the United Nations Convention on the Rights of the Child (CRC).¹¹⁴ This effort ultimately resulted in 41 substantive articles, including extensive provisions on implementation and monitoring,¹¹⁵ which were ratified collectively in record time. "[N]o other specialized United Nations human rights treaty has entered into force so quickly and been ratified by so many states in such a short period of time,"¹¹⁶ making it the most universally adopted human rights charter to date.¹¹⁷ So far, 194 States have become parties to the treaty. In 1995, the United States signed the CRC,¹¹⁸ however, despite its pivotal role in drafting the treaty,¹¹⁹ the United States has not ratified it. The only other UN member countries that have not ratified the treaty are Somalia and South Sudan.¹²⁰ Although the U.S. has signed, but not ratified the CRC, it is still "obliged to refrain from acts that would defeat the object and purpose of the agreement."¹²¹ In addition, non-refoulement is considered to be customary

¹¹³ David A.J. Richards, *The Individual, the Family, and the Constitution: A Jurisprudential Perspective*, 55 N.Y.U. L. REV. 1, 21–23 (1980).

¹¹⁴ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter CRC].

¹¹⁵ LAWRENCE J. LeBLANC, *THE CONVENTION ON THE RIGHTS OF THE CHILD: UNITED NATIONS LAWMAKING ON HUMAN RIGHTS* 24 (1995).

¹¹⁶ *Id.* at 45.

¹¹⁷ *Id.*

¹¹⁸ *Multilateral Treaties Deposited with the Secretary-General: Status as at 29 January 2015*, UNITED NATIONS TREATY COLLECTION (Jan. 29, 2015, 5:00 AM), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en, archived at <http://perma.cc/25Z2-XG4R> [hereinafter *Multilateral Treaties Deposited*].

¹¹⁹ See generally Cynthia Price Cohen, *Role of the United States in Drafting The Convention on the Rights of the Child: Creating a New World for Children*, 4 LOY. POVERTY L.J. 9 (1998).

¹²⁰ See *Multilateral Treaties Deposited*, *supra* note 118.

¹²¹ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 312(3) (1987); see also *id.* § 312 cmts. d, i.

international law or *jus cogens*.¹²² As such, the U.S. is bound by the CRC's non-refoulement obligation.¹²³

The CRC's central contribution to the rights discourse is its situation of children not in relation to their parents or the State, but as independent rights holders regardless of their lack of autonomy.¹²⁴ Thus, the treaty recognizes a State's responsibility to not simply refrain from interference in a child's life, but also to affirmatively realize positive rights—independent of social contract theory—including right to survival, which includes the right to basic necessities such as health care, social security, and freedom from poverty.¹²⁵ This human rights approach, which develops a broader understanding of children's rights, is based on a child's entitlement to dignity, respect, and freedom from arbitrary treatment.¹²⁶ The CRC enumerates the interests and needs of children that must be considered by States, including, but not limited to, "the three P's":¹²⁷ "provision" (fulfillment of basic needs such as right to food, health care, and education);¹²⁸ "protection" (the right to "be shielded from harmful acts or practices" such as commercial or sexual exploitation and involvement in warfare);¹²⁹ and "participation" (the right "to be heard on decisions affecting one's own life").¹³⁰ Overall the CRC, "for the first time, acknowledged children as individuals fully entitled to human rights—civil, political, economic, social, and cultural—without neglecting their special needs for protection."¹³¹

The individual articles and responsibilities of the States, pursuant to the CRC, are situated in a framework consisting of four guiding principles: non-discrimination;¹³² best interest of the child as the primary consideration;¹³³ right to life, survival, and development;¹³⁴ and participation.¹³⁵ These princi-

¹²² Alice Farmer, *Non-refoulement and Jus Cogens: Limiting Anti-terror Measures that Threaten Refugee Protection*, 23 GEO. IMMIGR. L.J. 1, 23–28 (reviewing arguments from UNHCR, Lauterpacht, Allian, and others that non-refoulement is customary international law or *jus cogens*).

¹²³ "If a norm qualifies as *jus cogens*, that is a peremptory norm of international law, then a persistent objection, reservation, or a 'controlling executive or legislative act or judicial decision' does not excuse U.S. violation of that norm." DAVID WEISSBRODT ET AL., INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 894 (4th ed. 2009).

¹²⁴ Guy S. Goodwin-Gill, *Unaccompanied Refugee Minors: The Role and Place of International Law in the Pursuit of Durable Solutions*, 3 INT'L. J. CHILDREN'S RTS. 405, 410 (1995).

¹²⁵ LEBLANC, *supra* note 115, 77–80.

¹²⁶ Minow, *supra* note 25, at 296 (noting that rights talk for children includes child liberation, child protection, and social welfare and redistribution).

¹²⁷ Thomas Hammarberg, *The UN Convention on the Rights of the Child—and How to Make It Work*, 12 HUM. RTS. Q. 97, 99–101 (1990).

¹²⁸ CRC, *supra* note 114, at art. 24.

¹²⁹ *Id.* at art. 38.

¹³⁰ *Id.* at art. 12.

¹³¹ GAL, *supra* note 2, at 35 (citing SHARON DETRICK, J.E. DOEK & NIGEL CANTWELL, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: A GUIDE TO THE "TRAVAUX PRÉPARATOIRES" 27 (1992)).

¹³² CRC, *supra* note 114, at art. 2.

¹³³ *Id.* at art. 3.

¹³⁴ *Id.* at art. 6.

¹³⁵ *Id.* at art. 12.

ples are to be applied to, as well as to inform, the other articles of the Convention. In addition, the CRC incorporates two important human rights doctrines: first, that the family is the fundamental unit of society; and second, that States have an affirmative duty to not return or "refoul" a person to certain harm.

A. The CRC's Four Guiding Principles: Non-discrimination; the Best Interest of the Child as the Primary Consideration; the Right to Life, Survival, and Development; and Participation

Non-discrimination, the first principle under the CRC, requires equality; all children should have the same rights—*de jure* and *de facto*—regardless of where a child lives, to what minority group a child belongs, whether the child was born in or out of wedlock, whether or not the child has a disability, and whether or not the child is residing in her homeland.¹³⁶ This principle does not mean that all children must receive exactly the same resources, protections, or freedoms; rather, "[t]o achieve substantive equality, a legal system has to be sensitive to the inequalities of children and provide them with the required means to overcome these inequalities as much as possible in order to provide all children equal opportunities."¹³⁷ Under the non-discrimination principle, non-national migrants, refugees, and asylum seekers shall be treated equally as native children.¹³⁸ This principle requires host countries to adopt policies that enable the full inclusion of those who might be considered different,¹³⁹ including immigrants.

Second, the Convention's best interests principle creates a duty for States to conduct an individual assessment of a child's interest and not rely "on general assumptions regarding children in different situations."¹⁴⁰ In fact, "the best interests standard may be regarded as being a general overall theme of the Convention. It appears eight times in the fifty-four-article Convention, in addition to being one of its governing General Principles. This elevates the standard to being the most important international standard currently regulating decisions regarding the child."¹⁴¹ States are required to weigh this individualized interest against all other competing state interests, such as cost and efficiency, and the child's interest should take precedence over any other considerations. The best interest standard, read in concert with the non-refoulement obligation of the Convention that is discussed at

¹³⁶ GAL, *supra* note 2, at 37.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Martha Minow argues that the way to move beyond the dilemma of difference is not to avoid or notice difference because that undermines equality, but to see difference as relational and work to remake institutions that accommodate difference instead of using difference as a way to exclude individuals. MINOW, *supra* note 56, at 375–80.

¹⁴⁰ GAL, *supra* note 2, at 39.

¹⁴¹ BREEN, *supra* note 34, at 78–79 (summarizing how the best interest of the child standard was negotiated among the Working Group and Member States and its ultimate articulation in Article 3 of the Convention).

greater length later in this Article, means that the prerogative of a State to exclude non-citizens from crossing its borders cannot take precedence over what is in the best interest of an individual child. In some instances, families may decide that it is not in the best interest of their children to remain in the home, and in other instances families may sell their children for sex or labor.¹⁴² Therefore, the United States cannot summarily deport children seeking sanctuary without first conducting a case-by-case assessment of each child's best interests¹⁴³ and determining whether or not the child would face irreparable harm if returned to his or her country of origin.¹⁴⁴

In addition, the right to life, survival, and development principle necessarily compels States to protect children from violence.¹⁴⁵ Children exposed to violence, including sexual abuse and exploitation, can suffer serious negative short-term and long-term effects to their development.¹⁴⁶ Article 6.2 of the CRC, which reads, "States Parties shall ensure to the maximum extent possible the survival and development of the child[.]" is closely related to the CRC's Article 19 requirement that States provide protection against child abuse.¹⁴⁷ In addition, the Committee on the Rights of the Child regarded the principle of right to life, survival, and development as creating an affirmative obligation to protect children from violence both in their home and from the society at large.¹⁴⁸ Children fleeing violence should have the ability to seek protection from their country of nationality, and to the extent that country is unable to provide protection, the CRC contemplates other states providing surrogate state protection.¹⁴⁹

Finally, the right to participation principle requires that, in decisions concerning a child, that child has "more than a right to be heard, but less than a right to independent decision making."¹⁵⁰ The Convention's view is distinct from the aforementioned child liberationists who posit that children, as rational and autonomous agents, should be able to make their own decisions. Rather, Article 12 of the Convention recognized for the first time in a child-focused international instrument that "the views of the child be[]

¹⁴² Jacqueline Bhabha, *Lone Travelers: Rights, Criminalization and the Transnational Migration of Unaccompanied Children*, 7 U. CHI. L. SCH. ROUNDTABLE 269, 271–73 (2000).

¹⁴³ OFFICE OF THE U.N. HIGH COMM'R FOR REFUGEES, A THEMATIC COMPILATION OF EXECUTIVE COMMITTEE CONCLUSIONS 87 (7th ed. June 2014), archived at <http://perma.cc/G3TF-EHF6>.

¹⁴⁴ Alice Farmer, *A Commentary on Committee on the Rights of the Child's Definition on Non-Refoulement for Children: Broad Protection for Fundamental Rights*, 80 FORDHAM L. REV. RES. GESTAE 39, 41–43 (2011).

¹⁴⁵ GAL, *supra* note 2, at 42.

¹⁴⁶ Gayla Margolin & Elana B. Gordis, *The Effects of Family and Community Violence on Children*, 51 ANN. REV. PSYCHOL. 445, 449–52 (2000); see also OLA W. BARNETT ET AL., FAMILY VIOLENCE ACROSS THE LIFESPAN: AN INTRODUCTION 3, 152–55 (3d ed. 2011).

¹⁴⁷ GAL, *supra* note 2, at 41–42.

¹⁴⁸ *Id.* at 42.

¹⁴⁹ See CRC, *supra* note 114, at art. 22.1 (requiring States Parties to provide the appropriate protection and humanitarian assistance "in the enjoyment of applicable rights set forth in the present Convention and other international human rights or humanitarian instruments to which the said States are Parties.").

¹⁵⁰ GAL, *supra* note 2, at 45.

given due weight in accordance with the age and maturity of the child[.]”¹⁵¹ and that a “child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body[.]”¹⁵² This principle differs from the child liberationists’ claim that children, with rights to self-determination and autonomy, are entitled to make their own decisions without adult consultation. The CRC’s principle also distinguishes itself from *parens patriae* models, which assume children are incapable of expressing opinions and preferences. Under the CRC’s principle, immigrant children’s preferences and opinions should be accorded deference in the law and given due weight in relation to their age and maturity.¹⁵³

B. The CRC’s Key Human Rights Law Obligations: Primacy of Family and Non-Refoulement

First, consistent with international law and similar treaties, the CRC recognizes “the right to respect for family life,” specifically, the critical importance of the family unit to children.¹⁵⁴ With respect to the family unit, the two following key doctrines have been incorporated into various international treaties: (1) that family is the natural and fundamental unit of society, and (2) that maintaining the family unit is in the best interests of the child.¹⁵⁵

In recognition of the family as society’s fundamental unit, the CRC provides that, “the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.”¹⁵⁶ This standard, which is repeated throughout international law, not only recognizes family as a “natural and fundamental unit of society,” but also places an affirmative duty on the state to provide for its protection.¹⁵⁷

The CRC also explicitly recognizes that a child’s “best interests” are, as far as possible, in the maintenance of the family unit.¹⁵⁸ As previously mentioned, the CRC provides that the “best interest of the child shall be [the] primary consideration” in all actions concerning children.¹⁵⁹ Moreover, con-

¹⁵¹ CRC, *supra* note 114, at art. 12.1.

¹⁵² *Id.* at art. 12.2.

¹⁵³ *See id.* at art. 12.1.

¹⁵⁴ *See* Ryan T. Mzazki & Andrew I. Schoenholtz, *Protecting and Promoting the Human Right to Respect for Family Life: Treaty Based Reform and Domestic Advocacy*, 24 GEO. IMMIGR. L.J. 651, 652–54 (2010).

¹⁵⁵ *Id.* at 652.

¹⁵⁶ *Id.* (quoting CRC, *supra* note 114, at Preamble).

¹⁵⁷ *Id.* at 652–53.

¹⁵⁸ *See id.* at 653–54 (arguing that it can be inferred from certain provisions, such as art. 9.1, which puts “a ban on the separation of a child from his or her parents, except by competent authorities subject to judicial review[.]” that the CRC links the “best interest of the child” with the “maintenance of the family unit”).

¹⁵⁹ CRC, *supra* note 114, at art. 3.1.

sistent with international law principles, the CRC respects the family unit by giving the child the “right to . . . be cared for by his or her parents.”¹⁶⁰

Accordingly, as the recognized fundamental unit of society, international law reflects that the family unit is both primarily responsible for and best suited to providing for the needs and care of children.¹⁶¹ Therefore, adverse immigration action, “from denial of entry to forced removal to separation from a caretaker to detention,” against any one individual of the family unit is an interference of these principles.¹⁶²

Equally important is the CRC’s non-refoulement duty, which “is one of the most expansive definitions in international law.”¹⁶³ The Committee on the Rights of the Child states that, “in fulfilling obligations under the Convention, States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child.”¹⁶⁴

The Committee cites Articles 6 (rights to life and survival) and 37 (rights to liberty and freedom from torture) as instances that would qualify as irreparable harm to a child.¹⁶⁵ The CRC binds States to not only refrain from interfering with the political rights of children, but also requires that States affirmatively protect children from harm perpetrated by other States or private actors.¹⁶⁶ Arguably, for migrant children fleeing irreparable harm from their home countries, there is an affirmative obligation on States to provide protection by not returning the children to their homes.¹⁶⁷ Under the CRC, the non-refoulement of children applies in more instances than it does for adults.¹⁶⁸ “Ultimately, the underlying risk of ‘irreparable harm’ to individual children is non-negotiable: their interests cannot be traded away.”¹⁶⁹

¹⁶⁰ See *id.* at art. 7.1.

¹⁶¹ See Jeremy Waldron, *Dignity, Rights, and Responsibilities*, 43 ARIZ. ST. L.J. 1107, 1114–15 (2011) (recognizing that the designation of the “care and upbringing of children,” which is implicit in the European National Convention and explicit in German Basic Law, creates “both a right and a duty incumbent on parents”).

¹⁶² See Mzazki & Schoenholtz, *supra* note 154, at 670.

¹⁶³ Farmer, *supra* note 144, at 41.

¹⁶⁴ Comm. on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, ¶ 27, U.N. Doc. CRC/GC/2005/6 (Sept. 6, 2005).

¹⁶⁵ *Id.*

¹⁶⁶ See Farmer, *supra* note 144, at 41.

¹⁶⁷ *Id.* at 47.

¹⁶⁸ See *id.* at 45 (arguing that the United Kingdom had an affirmative obligation not to return Afghan children to Afghanistan if “the conditions for children’s rights in Afghanistan are sufficiently adverse that there may be a ‘real risk of irreparable harm’”).

¹⁶⁹ *Id.* at 48.

IV. CHILDREN IN IMMIGRATION LAW DEVOID OF RIGHTS AND NEEDS

With a few notable exceptions,¹⁷⁰ U.S. immigration law fails in its entirety to recognize immigrants as rights bearers.¹⁷¹ The Supreme Court of the United States has ruled that immigration, and the right to regulate which individuals are allowed to enter the United States, is a power of the sovereign.¹⁷² Further, the Court, applying the plenary power doctrine, has refused to overturn or invalidate immigration statutes (including those that discriminate on race, national origin, and political opinion), when holding that immigration is a matter “vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of . . . government . . . exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.”¹⁷³ Moreover, the Court has also stated that, “over no other area is the legislative power more ‘complete’ than immigration.”¹⁷⁴ It is the U.S. Congress that enacts laws determining who can enter the United States, under what conditions, and for how long.¹⁷⁵ Congress also establishes who can be removed from the United States based on acts committed after entry.¹⁷⁶ Such individual immigrants have no legal basis to challenge these decisions because they have no legal right to remain—entry is a privilege. It is

¹⁷⁰ See, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (detailing the 1980 Refugee Act’s establishment of a statutory asylum process to fulfill the United States’ international obligations pursuant to the 1951 Convention relating to the Status of Refugees and its subsequent 1968 Protocol); see also THOMAS ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 903–06 (7th ed. 2012) (describing congressional action to incorporate the United States’ Article 3 obligations of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment into the Immigration and Nationality Act).

¹⁷¹ See, e.g., *Harisiades v. Shaughnessy*, 342 U.S. 580, 586–87 (1952) (holding that a noncitizen remaining in the United States is a “matter of permission and tolerance”; it is not a right); *Fong Yue Ting v. United States*, 149 U.S. 698, 707 (1893) (concluding that “[t]he right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country”).

¹⁷² See Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 854 (1987) (“The Court also established that the Constitution does not bar Congress from enacting laws inconsistent with international obligations of the United States and that the courts will give effect to an act of Congress inconsistent with provisions of an earlier treaty.”); Adam Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 469 (2009) (citing the “Chinese Exclusion Case,” *Chae Chan Ping v. United States*, 130 U.S. 581 (1889)).

¹⁷³ *Harisiades*, 342 U.S. at 588–89; see also Cox & Rodríguez, *supra* note 172, at 460.

¹⁷⁴ Cox & Rodríguez, *supra* note 172, at 461 (citing *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972)).

¹⁷⁵ See STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 12–24 (5th ed. 2009).

¹⁷⁶ See DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 5–6 (2007) (discussing two basic types of deportation laws: “extended border control” and “post-entry social control”).

no surprise then that “U.S. immigration law fails to fully recognize children as individuals with independent rights and interests.”¹⁷⁷

The next section of the Article first describes how immigration law generally—both in substance and process—fails to treat children as children. Highlighting two examples, this section argues that not only do U.S. immigration laws need to be radically transformed, but so do the embedded cultural attitudes regarding what immigrant children need, how they should be treated, and what rights of theirs must be realized.

A. *Children Are Not Property, Wards, or Adults—They Are Persons: Professor David Thronson’s Critique*

Current treatment of children by immigration law and policy is fundamentally flawed, argues Professor David Thronson,¹⁷⁸ because it treats children both as objects¹⁷⁹ and adults,¹⁸⁰ but not individual rights holders.¹⁸¹ This dilemma pervades both the substantive immigration relief available to children and the procedure by which such relief is granted.¹⁸²

Immigration law processes and treats most non-citizen children as the derivatives of adults.¹⁸³ Under immigration law, status as a child is greatly significant because if the individual is a non-citizen child, he or she can derive the status of a qualifying parent, but only when that parent applies for

¹⁷⁷ David B. Thronson, *Entering the Mainstream: Making Children Matter in Immigration Law*, 38 FORDHAM URB. L.J. 393, 396 (2010).

¹⁷⁸ Thronson, *supra* note 15; David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165 (2006) [hereinafter *Choiceless Choices*] (highlighting how an immigrant child is volleyed as an object between parents and the State when parents facing deportation make claims about the harm their children will suffer if they are deported and the reaction of the state child welfare systems to a parent’s decision to preserve family unity by potentially placing his or her child in harm’s way if deported).

¹⁷⁹ Thronson, *supra* note 15, at 991–97 (arguing that current immigration law recognizes children primarily as dependents of the family, and “children are conceived as objects rather than actors, and their voices are largely ignored”).

¹⁸⁰ *Id.* at 997–1003 (arguing that if immigrant children are unaccompanied while in the United States, that is without a parent or guardian, immigration law treats them as adults by default, which is problematic because there are no remedies or procedures that are tailored for children, and consequently children are left unprotected and without a voice).

¹⁸¹ *Id.* at 989 (advocating that the Convention on the Rights of the Child recognizes child rights as human rights centering on the personhood of children); see also Minow, *supra* note 25, at 296 (advocating that children should be seen as human beings that deserve dignity and respect, even if they cannot act autonomously, like all others in the international law framework).

¹⁸² Thronson, *supra* note 15, at 990–91.

¹⁸³ *Id.* at 991. The majority of these applications are family-sponsored immigration, the bulk of the total legal immigration. U.S. DEP’T OF HOMELAND SEC., YEARBOOK OF IMMIGRATION STATISTICS: 2013, tbl. 7, available at <http://www.dhs.gov/yearbook-immigration-statistics-2013-lawful-permanent-residents>, archived at <http://perma.cc/SH28-P9SX>. Of the 990,553 permanent visas issued, 439,460 were issued to immediate relatives of U.S. Citizens and 210,303 were issued to other family preference categories. There are other instances, such as diversity lottery, asylum, and refugee status, in which children can derive status from the qualifying parent. 8 U.S.C. §§ 1153(d) (diversity lottery), 1157(c)(2) (refugee), 1158(b)(3) (asylum) (2012).

such relief.¹⁸⁴ In fact, Thronson notes, “[e]mphasizing dependence on parents as a prerequisite to being a ‘child’ strongly reflects notions of the child as property.”¹⁸⁵ Under the current framework, a child lacks the ability to affirmatively ask for recognition or status on account of a family relationship; put more simply, they are at the mercy of the qualifying parent.¹⁸⁶ In fact, children are not permitted to petition for others, such as siblings or a parent, even if the child is a U.S. citizen.¹⁸⁷

Equally concerning is the fact that young parents who are under 21 (a child under the INA) have no avenue to pursue immigration relief for their child because “derivative status extends only one generation from the principal beneficiary. A young parent who otherwise qualifies as a child cannot immigrate as a derivative without leaving her child behind.”¹⁸⁸ In addition, a child’s dependence on a parent to apply for status means that the ultimate decision maker will often not consider the child’s own independent claim for immigration relief. For example, in the case of refugees, “[a]ccompanied children have tended to be submitted within their family’s asylum application; indeed, both the United Nations High Commissioner for Refugees and the INS have pointed out that invisibility is a common problem for refugee children.”¹⁸⁹ Even when a child’s immigration status is aligned with that of

¹⁸⁴ In immigration law, if the principal beneficiary has a spouse and child at the time an immigrant benefit is conferred, the beneficiary can petition to have the spouse and child acquire immigration status as derivatives. 8 U.S.C. § 1153(d).

¹⁸⁵ Thronson, *supra* note 15, at 992. Immigration law defines a child as an unmarried person under twenty-one years of age who falls into one of six categories: (1) “a child born in wedlock”; (2) a stepchild, “provided the child had not reached the age of eighteen years at the time of the marriage creating the status of stepchild occurred”; (3) “a child legitimated . . . if such legitimation takes place before the child reaches eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation”; (4) “a child born out of wedlock, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother or to its natural father if the father has or had a bona fide parent-child relationship with the person”; (5) “a child adopted while under the age of sixteen years if the child has been in the legal custody of, and has resided with, the adopting parent or parents for at least two years”; or (6) “a child, under the age of sixteen at the time a petition is filed in his behalf . . . who is an orphan” and whose adoptive parents have “complied with the preadoption requirements.” 8 U.S.C. § 1101(b)(1)(A)–(F). In addition, if children marry or reach the age of twenty-one, they are categorically not considered “children” under the Immigration and Nationality Act, but rather are defined as “sons” or “daughters.” 8 U.S.C. § 1153(a)(1).

¹⁸⁶ Thronson recounts the case of Boguslaw Fornalik to illustrate the dependency the child has on the adult petitioner for immigration status. *Fornalik v. Perryman*, 223 F.3d 523, 527–28 (7th Cir. 2000). In this case, seventeen-year-old Boguslaw discovered that his abusive father failed to include him in an immigration petition. This omission resulted in Boguslaw’s deportation back to Poland and leaving his mother and siblings in the United States. See Thronson, *supra* note 15, at 994.

¹⁸⁷ It is only after the U.S. citizen child turns twenty-one, and is no longer classified as a child but rather an adult under the INA, that he or she could apply for derivative status for parents or siblings. 8 U.S.C. §§ 1151(b)(2)(A)(i) (parents of U.S. citizen adults are classified as immediate relatives and not subject to numerical limitations on allowable visas), 1153(a)(4) (eligibility for brothers and sisters of U.S. citizens for family immigrant based visas).

¹⁸⁸ Thronson, *supra* note 15, at 994.

¹⁸⁹ Jacqueline Bhabha & Wendy Young, *Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines*, 11 INT’L J. REFUGEE L. 84, 87 (1999).

his or her parents, Thronson notes that, “although this version of family integrity does, in most instances, tend to keep children together with parents, it has no concern for where the family ends up or for children whose parents are unable to or choose not to assist them.”¹⁹⁰

In contrast, for children who do not share the same status as their parents, immigration law automatically treats them as adults.¹⁹¹ Unaccompanied minors—children without a parent or legal guardian to provide care and physical custody¹⁹²—that arrive at the border are only eligible to apply for the same types of immigration relief as an adult. Immigration law does not “tailor substantive or procedural protections to their age or development.”¹⁹³ Children, like adults, must navigate the complex immigration system and have no right to government-funded or appointed counsel, which means they may be forced to navigate the immigration courts pro se.¹⁹⁴

While children may in certain instances serve as the principal applicant for immigration relief, including asylum and U and T visas, the only child-centered immigration benefit currently available to children in the immigration system is Special Immigrant Juvenile Status (SIJS).¹⁹⁵ The Obama administration under the Deferred Action for Childhood Arrivals (DACA) program¹⁹⁶ has decided to defer placing certain individuals who came to the United States as children¹⁹⁷ in removal proceedings and permitted work authorization for those meeting the requirements of DACA.¹⁹⁸ DACA, however,

¹⁹⁰ *Choiceless Choices*, *supra* note 178, at 1182.

¹⁹¹ Thronson, *supra* note 15, at 1000–04.

¹⁹² 6 U.S.C. § 279(g)(2)(A)(ii) (2012).

¹⁹³ *Choiceless Choices*, *supra* note 178, at 1186.

¹⁹⁴ Erin B. Corcoran, *Bypassing Civil Gideon: A Legislative Proposal to Address the Rising Costs and Unmet Legal Needs of Unrepresented Immigrants*, 115 W. VA. L. REV. 643, 649–50 (2012) (discussing the barriers to accessing competent representation for immigrants in removal proceedings).

¹⁹⁵ 8 U.S.C. § 1101(a)(27)(J)(iii) (2012).

¹⁹⁶ See Memorandum from Janet Napolitano, Sec’y of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot. (June 15, 2012) [hereinafter Memo from Janet Napolitano].

¹⁹⁷ Congress has introduced multiple bills to provide relief to this unauthorized immigrant student population, which has often been entitled the “Development, Relief, and Education for Alien Minors Act,” or the DREAM Act. Yet, despite various congressional attempts to provide status to this select group of unauthorized immigrants living in the United States, there have been no changes in the law and this group still has no path to permanent status in the United States. See Elisha Barron, *Recent Development: The Development, Relief, and Education for Alien Minors (DREAM Act)*, 48 HARV. J. ON LEGIS. 623, 632–37 (2011) (summarizing the failed attempts to enact various versions of the DREAM Act from 2001–2011).

¹⁹⁸ The criteria detailed in the memorandum include: (1) “has continuously resided in the United States for at least five years preceding the date of this memorandum and is present in the United States on the date of this memorandum”; (2) “is currently in school, has graduated from high school, has obtained a general education development certificate, or is honorably discharged veteran of the Coast Guard or Armed Forces of the United States”; (3) “has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety”; (4) “came to the United States under the age of sixteen”; and (5) “is not above the age of thirty.” Memo from Janet Napolitano, *supra* note 196.

does not confer any immigration benefit or put the individual on a path to permanent status in the United States.¹⁹⁹

Granted, asylum is potentially an option for some unaccompanied children to secure immigration relief in the United States; however, adjudicators are skeptical of granting children asylum under novel legal theories like claims of persecution on account of membership in a particular social group, such as children fleeing gang violence or abuse in the home.²⁰⁰ So while some children are able to gain refugee status through the asylum process, many do not qualify for such relief.²⁰¹

For a child to be eligible for SIJS, he or she must be present in the United States. Second, the child must be “declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State . . . and whose reunification with 1 or both of the immigrant’s parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law.”²⁰² According to DHS regulations, “long term foster care” means “that a determination has been made by the juvenile court that family reunification is no longer a viable option.”²⁰³ The juvenile court also must make a finding “that it would not be in the alien’s best interest to be returned to the alien’s or parent’s previous country of nationality or country of last habitual residence.”²⁰⁴ Immigration status is not conferred by the juvenile court; rather, once the juvenile court issues an order with a finding of fact, the child must still apply to DHS for immigration status.²⁰⁵ DHS adjudicates the application and if there are no grounds of inadmissibility, then the child may be granted SIJS status, which confers on him or her legal permanent status to remain in the United States.²⁰⁶ However, the child is permanently barred from petitioning for his or her non-abusive parent²⁰⁷ to derive status from the child’s SIJS status, severing any possibility of family unity.²⁰⁸

Even with this child-centered immigration visa, which requires the fact-finding of child welfare experts, problems with its implementation are com-

¹⁹⁹ See *id.*

²⁰⁰ See Lauren R. Aronson, *The Tipping Point: The Failure of Form Over Substance in Addressing the Needs of Unaccompanied Immigrant Children*, 18 HARV. LATINO L. REV. 1 (2015) (discussing challenges unaccompanied children face to being granted asylum in the United States).

²⁰¹ See *id.*

²⁰² 8 U.S.C. § 1101(a)(27)(J)(i) (2012).

²⁰³ 8 C.F.R. § 204.11(a) (2013).

²⁰⁴ 8 U.S.C. § 1101(a)(27)(J)(ii).

²⁰⁵ *Id.* § 1101(a)(27)(J)(iii).

²⁰⁶ *Id.* § 1255(h). There are some specific waivers of inadmissibility for SIJS applicants and those waivers are adjudicated by DHS. *Id.*

²⁰⁷ The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(d)(1)(A), 122 Stat. 5044, 5079, amended the INA to only require that the petitioner show that only one parent has abused, abandoned, or neglected the immigrant child, not both.

²⁰⁸ 8 U.S.C. § 1101(a)(27)(J)(iii)(II). This is not the only immigrant status where a child who is principal applicant cannot petition for his or her parents. Only children and spouses can derive asylum status from the principal applicant. *Id.* § 1158(b)(3)(A).

monplace.²⁰⁹ Namely, DHS “has failed to break free of its dominant modes of thinking about children. The result has been a usurpation of the juvenile court role and the creation of substantial barriers for abused, neglected, and abandoned children seeking immigration relief.”²¹⁰ Unless and until structural changes are made in the immigration system, which will not only transform the process and relief available to children, but the culture as well, children will continue to be seen as objects or adults in miniature bereft of any rights that safeguard their child-specific needs.

B. A Contemporary Case Study: The Policy Response to Unaccompanied Children at Our Border

The Department of Homeland Security (DHS) estimates that by the end of this Fiscal Year (September 30, 2014), upwards of 90,000 unaccompanied minors will enter the United States,²¹¹ up from 24,668 in 2013.²¹² Not only is the number of children fleeing the region on the rise, but also their reasons for flight have shifted. Prior to 2011, most children left their home countries to reunite with family living in the United States. Now, most of the children are fleeing because of armed criminal violence, which is often caused by gangs or drug cartels, as well as horrific abuse at home.²¹³ These children are primarily fleeing from El Salvador, Guatemala, and Honduras,²¹⁴ where mur-

²⁰⁹ Thronson, *supra* note 15, at 1009.

²¹⁰ *Id.* Thronson highlights through case examples how DHS (former INS) often attempts to revisit the juvenile court’s best interest finding or, even more detrimental to the child, refuse to consent to the juvenile court’s jurisdiction. *Id.* at 1009–13.

²¹¹ Richard Fausset & Ken Belson, *Faces of an Immigration System Overwhelmed by Women and Children*, N.Y. TIMES, June 5, 2014, http://www.nytimes.com/2014/06/06/us/faces-of-an-immigration-system-overwhelmed-by-women-and-children.html?_r=0, archived at <http://perma.cc/RJR5-7NZB>. The U.S. Senate Appropriations Committee further estimates that this number could rise to as high as 145,000 in FY 2015. Press Release, U.S. Senate Comm. on Appropriations, Chairwoman Mikulski Prepared Remarks: FY15 LHHS Subcommittee Markup (June 10, 2014), available at <http://www.appropriations.senate.gov/news/chairwoman-mikulski-prepared-remarks-fy15-lhhs-subcommittee-markup>, archived at <http://perma.cc/ZTY7-LFL9>.

²¹² See LISA FRYDMAN ET AL., A TREACHEROUS JOURNEY: CHILD MIGRANTS NAVIGATING THE U.S. IMMIGRATION SYSTEM 2 (2014), available at http://www.uchastings.edu/centers/cgrs-docs/treacherous_journey_cgrr_kind_report.pdf, archived at <http://perma.cc/6ZZX-G7VL>.

²¹³ See U.N. HIGH COMM’R FOR REFUGEES REG’L OFFICE FOR THE U.S. AND THE CARIBBEAN, CHILDREN ON THE RUN: UNACCOMPANIED CHILDREN LEAVING CENTRAL AMERICA AND MEXICO AND THE NEED FOR INTERNATIONAL PROTECTION 24–25 (May 2014) [hereinafter CHILDREN ON THE RUN], available at http://www.unhcrwashington.org/sites/default/files/UAC_Children%20on%20the%20Run_Full%20Report_May2014.pdf, archived at <http://perma.cc/73L2-UUHG>; see also WOMEN’S REFUGEE COMM’N, FORCED FROM HOME: THE LOST BOYS AND GIRLS OF CENTRAL AMERICA 1 (2012) (noting that unaccompanied minors are subject not only to violent gang attacks, but also face targeting by police who mistakenly assume that they are gang-affiliated; additionally, girls in particular “face gender-based violence, as rape becomes increasingly a tool of control”).

²¹⁴ See CHILDREN ON THE RUN, *supra* note 213, at 16. The number of children coming from Mexico is also on the rise, but they are less visible because they are usually returned to Mexico after no more than a day or two in U.S. custody. *Id.*

der rates mirror that of conflict zones.²¹⁵ These countries of origin are inundated with various human rights violations, which are met with a complete lack of meaningful State protection.²¹⁶ Indeed, the United Nations High Commissioner for Refugees recently concluded that at least 58% of unaccompanied children arriving from these countries were forcibly displaced and potentially in need of international protection.²¹⁷

As the current crisis escalated, many of these children were being housed at emergency shelters in icebox-cold cells—nicknamed *hieleras*, Spanish for freezers—with no access to food or medical care,²¹⁸ while DHS attempted to establish which children may have an available sponsor in the United States to whom they could be released,²¹⁹ while concurrently initiating removal proceedings against each child without valid immigration status. Under current immigration law, the only protections for these children are discrete and narrow forms of immigration relief. Currently, the most common forms of relief for unaccompanied minors are: asylum,²²⁰ special immigrant juvenile status (SIJS),²²¹ and T and U visas.²²² However, some children may legitimately fear violence or have suffered past harm but do not qualify for these forms of immigration relief. For example, fleeing generalized violence perpetrated by armed criminals or gang members, no matter how horrific, is not grounds for asylum, SIJS status, or T or U Visas.²²³ Such relief depends on if someone, such as an attorney, identifies the appropriate availa-

²¹⁵ Press Release, Sens. Menendez, Durbin, Hirono, and Reps. Gutierrez and Roybal-Allard Discuss Humanitarian and Refugee Children Crisis at the Border (June 19, 2014), *available at* <http://www.menendez.senate.gov/newsroom/press/sens-menendez-durbin-hirono-and-reps-gutierrez-and-roybal-allard-discuss-humanitarian-and-refugee-children-crisis-at-the-border>, *archived at* <http://perma.cc/KLP2-VUJ5>.

²¹⁶ U.S. CONF. OF CATHOLIC BISHOPS, MISSION TO CENTRAL AMERICA: THE FLIGHT OF UNACCOMPANIED CHILDREN TO THE UNITED STATES 2 (Nov. 2013), *available at* <http://www.usccb.org/about/migration-policy/upload/Mission-To-Central-America-FINAL-2.pdf>, *archived at* <http://perma.cc/EP5J-3FU3>.

²¹⁷ CHILDREN ON THE RUN, *supra* note 213, at 25.

²¹⁸ Editorial, *Innocents at the Border*, N.Y. TIMES, June 16, 2014, www.nytimes.com/2014/06/17/opinion/immigrant-children-need-safety-shelter-and-lawyers.html, *archived at* <http://perma.cc/9973-3RPG>.

²¹⁹ A “sponsor” includes, but is not limited to, the following individuals or entities listed in order of preference: a parent; a legal guardian; an adult relative (brother, sister, aunt, uncle, or grandparent); an adult individual or entity designated by the child’s parent or legal guardian as capable and willing to provide care. *See* OLGA BYRNE & ELISE MILLER, VERA INST. OF JUSTICE, THE FLOW OF UNACCOMPANIED CHILDREN THROUGH THE IMMIGRATION SYSTEM 18 (Mar. 2012) [hereinafter VERA INSTITUTE].

²²⁰ 8 U.S.C. § 1101(a)(42) (2012) (requiring the applicant prove a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion).

²²¹ *Id.* § 1101(a)(27)(J)(i)–(iii) (requiring a state court finding that the child has been abused, neglected, and abandoned and a determination by DHS that it is in the best interests of the child not to be returned to his or her home country but remain permanently in the United States).

²²² *Id.* §§ 1101(a)(15)(T), (U) (providing long-term protection for victims of certain severe crimes and human trafficking).

²²³ *See* Linda Kelly Hill, *The Right to Be Heard: Voicing the Due Process Right to Counsel For Unaccompanied Alien Children*, 31 B.C. THIRD WORLD L.J. 41, 59–60 (2011).

ble relief and actively assists the child with the application process.²²⁴ Yet, children are not entitled to government-funded counsel and therefore often must proceed before an immigration judge alone. For other children, there is no available immigration relief; while they have witnessed unspeakable horrors and have been the victims of violence and abuse, there is simply no legal answer to their calls for help. They are not simply migrants crossing international borders; they are emblematic of an international humanitarian crisis rapidly unfolding in Central America.

In responding to this humanitarian crisis, multiple members of the Obama administration have called for statutory changes to the 2008 Trafficking Victims Protection Reauthorization Act (TVPRA).²²⁵ In addition, members of Congress have put forth legislation calling for treating Central American children in the same fashion as Mexican children under the TVPRA.²²⁶

Under the TVPRA, there are special rules for children originating from contiguous states (Mexico and Canada), which include a presumption of immediate return to their home country with no hearing before an immigration judge, unless the child is identified as a victim of severe trafficking, demonstrates a credible fear of persecution, or is unable to make independent decisions about his or her options.²²⁷ A child capable of making decisions and who does not have such fears can be “permitted to withdraw” his or her application for admission and be sent home.²²⁸ The legislation calls for such screening to occur promptly (within 48 hours), but if such screening does not occur within 48 hours then that child is transferred to Health and Human Services.²²⁹ Safe repatriation of children to Mexico is presumably insured by contiguous country agreements and other procedures.²³⁰ Even though the rules for contiguous states found at TVPRA § 235(a) are more permissive of quick return than for non-contiguous states, Congress passed the law in or-

²²⁴ See FRYDMAN, *supra* note 212, at 35–37 (discussing the failures of the current system to identify unaccompanied minors that are eligible for forms of relief such as Special Immigrant Juvenile Status, T Visas, and U visas).

²²⁵ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044.

²²⁶ On July 9, 2014, Senator Jeff Flake, along with several other Republican Senators including John McCain, introduced an amendment to S. 2363, the Sportsman’s Heritage Act (the bill currently under floor consideration in the U.S. Senate) that calls for treating Central American children in the same fashion as Mexican children under the TVPRA. In addition, this amendment provides the DHS Secretary broad and unchecked discretion to expand this treatment to any child from any country the Secretary deems appropriate. S. 2363, 113th Cong. (2014), *available at* http://www.flake.senate.gov/public/_cache/files/e84629ca-603f-4a9b-b3fb-c413f159f7af/flake-tvpra-reform-amendment.pdf, *archived at* <http://perma.cc/K2M2-JSBU>. Senator John Cornyn and Representative Henry Cuellar are planning on introducing a bill to amend the 2008 TVPRA and treat Central American children in the same fashion as Mexican children. Sureng Min Kim, *Bill Aims to Quicken Border Process*, POLITICO (July 14, 2014, 12:06 PM), <http://www.politico.com/story/2014/07/immigrants-border-children-bill-108872.html>, *archived at* <http://perma.cc/R7EV-FNTM>.

²²⁷ 8 U.S.C. § 1232(a)(2)(A).

²²⁸ *Id.* § 1232(a)(2)(B).

²²⁹ *Id.* § 1232(a)(4).

²³⁰ *Id.* §§ 1232(a)(2)(C), (5).

der to provide more protection for Mexican children than had been the case up to that point.

In contrast, under the 2008 trafficking legislation, unaccompanied minors from noncontiguous states are placed in ordinary removal proceedings—a long-standing immigration enforcement mechanism. Simultaneously, these children are transferred to facilities run by the Office of Refugee Resettlement (“ORR”) where they are allowed to meet with social workers and attorneys experienced in working with children. In addition, and pursuant to the TVPRA, HHS appoints independent child advocates for particularly vulnerable unaccompanied children in the Rio Grande Valley and Chicago; their role is to meet with the children, learn their stories, and advocate for their best interests.

These proposed changes by both members of Congress and the Obama administration aptly illustrate the U.S. government’s tendency to see children as illegal migrants first and foremost, with little regard for the child’s rights and needs. These proposed policies violate children’s rights by first, contravening the Supreme Court’s decision in *Sale v. Haitian Centers Council, Inc.*,²³¹ and second, failing to provide for the children’s physical and psychological protection needs, which run afoul of the U.S.’s international obligations to not return children to a country where “there are substantial grounds for believing that there is a real risk of irreparable harm to the child.”²³²

First, in *Sale*, the Supreme Court upheld President Reagan’s interdiction program, which permitted the U.S. Coast Guard to interdict unauthorized migrants attempting to land in the U.S. on the high seas and return them to their country of origin without any advice about their right to seek protection.²³³ The Supreme Court found that the program did not violate the U.S.’s obligations under the Refugee Convention of non-refoulement—the obligation not to return an individual to a country where he or she may face serious harm—because the interdiction occurred on the high seas and not within U.S. territory.²³⁴ So while the interdiction program survived judicial scrutiny, Congress’ and the Administration’s proposals to fast track the deportation of unaccompanied minors with little, if any, process squarely violate the Court’s *Sale* decision because obligations that do not apply on the high seas do in fact apply at our borders.

Second, summarily deporting unaccompanied minors explicitly fails to incorporate the best interests of the child principle required by international law.²³⁵ Upon arrival, these children are hungry, sleep deprived, and scared. Additionally, they are coming from countries where there is a high degree of

²³¹ *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993).

²³² Comm. on the Rights of the Child, *supra* note 164, ¶ 27.

²³³ 509 U.S. 155.

²³⁴ *Id.* at 187–88.

²³⁵ See generally Carr, *supra* note 44; see also International Covenant on Civil and Political Rights art. 24(1), opened for signature Dec. 16, 1966, 999 U.N.T.S. 171 (“Every child shall have, without any discrimination as to . . . national or social origin . . . the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.”).

mistrust of government officials. Indeed, they may even be fleeing government persecution. Immediately subjecting these young children to a cursory and arbitrary interview by a law enforcement officer risks children failing to fully articulate why they are afraid or why they cannot return. Swift deportation risks that such children will be repatriated to unsafe conditions, including continued physical and sexual abuse, gang recruitment, and other forms of criminal violence.²³⁶

C. Parents Without Status: Severing Family Unity in the Name of the Best Interest of the Child

When a parent's lack of immigration status results in an arrest, his or her child often enters the child welfare system. These children are both involuntarily taken from their parents and placed in the custody of strangers—all in the name of the best interest of the child standard.²³⁷ According to a 2011 report by the Applied Research Center, there were at least 5100 children living in foster care whose parents had either been detained or deported.²³⁸ This report also found that the “research clearly indicates that once children of noncitizens are removed from the custody of their parents, their families are subjected to particular and deep systemic failures to reunification.”²³⁹ When immigration officials apprehend an undocumented parent, there is often no opportunity for the parent to make arrangements for child-

²³⁶ Appleseed Foundations of the United States, in a 2011 report evaluating the ability of the current U.S. government screening policy of Mexican children to adequately identify potential refugees and victims of trafficking, concluded that: “[i]n the United States, TVPRA screening is not conducted either in a manner or in environments likely to elicit information that would indicate whether the minor is a potential victim of trafficking or abuse, and whether the child can and does voluntarily agree to return to Mexico. This failure predictably follows DHS’s decision to assign TVPRA screening duties to its law enforcement branch, Customs and Border Protection (CBP), a force intended to repel external threats to the United States and, not surprisingly, without any child welfare expertise. The minimal training and tools provided to CBP officers have done little to equip them to satisfy the Congressional mandates of the TVPRA. As a result, the expected post-TVPRA influx of unaccompanied Mexican minors into the U.S. system designed to evaluate their rights to protection has not materialized, leaving many of these children vulnerable to trafficking and other forms of exploitation, including by criminal gangs and drug cartels.” BETSY CAVENDISH & MARU CORTAZAR, APPLESEED, CHILDREN AT THE BORDER: THE SCREENING, PROTECTION AND REPATRIATION OF UNACCOMPANIED MEXICAN MINORS 2 (2011), available at <http://appleseednetwork.org/wp-content/uploads/2012/05/Children-At-The-Border1.pdf>, archived at <http://perma.cc/KG2Q-ZANF>.

²³⁷ See generally Marcia Yablon-Zug, *Separation, Deportation, Termination*, 32 B.C. J.L. & SOC. JUST. 63 (2012) (arguing that the best interest of the child standard is being used unjustly as a tool to separate, remove, and terminate parental rights in instances where children have a right to remain in the United States and the parent is subject to deportation).

²³⁸ SETH FRED WESSLER, SHATTERED FAMILIES: THE PERILOUS INTERSECTION OF IMMIGRATION ENFORCEMENT AND THE CHILD WELFARE SYSTEMS 6 (2011), available at http://www.atlanticphilanthropies.org/sites/default/files/uploads/ARC_Report_Shattered_Families_FULL_REPORT_Nov2011Release.pdf, archived at <http://perma.cc/E53B-428G>. The report also found that currently there are approximately 5.5 million children living in the United States who have an undocumented parent, and about 4.5 million of these children are U.S. citizens. *Id.* at 10.

²³⁹ *Id.* at 17.

care and immigration officials refuse to release parents during the pendency of their immigration proceedings.²⁴⁰ As a result, parents may be involuntarily separated from their children.

This situation is exacerbated when the immigration status of the parent and the child are not aligned, particularly in circumstances where the parent does not have valid immigration status but the child is a legal permanent resident or U.S. citizen. Cancellation of removal²⁴¹ permits an immigration judge to grant lasting relief to a non-citizen parent if the parent has resided in the United States continuously for ten years, possesses good moral character, and can prove that his or her removal would result in "exceptional or extremely unusual hardship" to the U.S. citizen or legal permanent resident child.²⁴² In this situation, the parent usually argues that, in the event he or she was deported, the child would accompany the parent and this would result in exceptional or extremely unusual hardship to the child. Additionally, immigration law generally presumes that a child and parent will be reunited in the parent's country of origin after deportation.²⁴³ Since a child in such a situation would not be required to leave because he or she has a right to remain in the U.S., a parent making these types of arguments inadvertently triggers the intervention of child welfare agencies, who recommend that the child be removed from the family because it is in the child's best interest to remain in the country, regardless of what the parent feels is best for the child.²⁴⁴

In addition to arguing that U.S. citizen children should not be deported with their parents, but rather should remain in the care and custody of the State, these child welfare agencies also advocated for the termination of the parental rights of non-citizen parents residing in the U.S. simply because the parent does not have valid immigration status and therefore is an unfit parent.²⁴⁵ For example, in *In re M.M.*, a Georgia juvenile court terminated a

²⁴⁰ *Id.*

²⁴¹ Cancellation of removal is a form of discretionary immigration relief that allows an immigration judge:

"[to] cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien—

- (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;
- (B) has been a person of good moral character during such period;
- (C) has not been convicted of an offence under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title [except in a case described in section 1227(a)(7) of this title where the Attorney General exercises discretion to grant a waiver]; and
- (D) establishes that the removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. § 1229b(b)(1) (2012).

²⁴² *Id.*

²⁴³ See, e.g., *Newton v. INS*, 736 F.2d 336, 343 (6th Cir. 1984); *Ayala-Flores v. INS*, 662 F.2d 444, 446 (6th Cir. 1981).

²⁴⁴ See generally *Yablon-Zug*, *supra* note 237.

²⁴⁵ See, e.g., *In re V.S.*, 548 S.E.2d 490, 492–93 (Ga. Ct. App. 2001). The juvenile court deemed a father unfit to care for his infant daughter in part because he "[was] an illegal alien and [was] subject to deportation." *Id.* at 493. In a recent Missouri case, Encarnación Bail Romero, an undocumented from Guatemala and mother of Carlos, a six-month-old U.S. citizen, was detained when immigration agents raided a poultry processing plant in Missouri. See

father's parental rights after finding him unfit because he was an undocumented immigrant and where there was the "possibility that [he] could someday be deported."²⁴⁶ In this case, the father was not facing removal by DHS; rather, the mere possibility that deportation could occur was enough to terminate his parental rights.²⁴⁷ These decisions are both a disturbing trend and run counter to past practices where "[o]nly a handful of courts have published opinions that formally endorse the consideration of immigration status in making custody determinations."²⁴⁸

A parent's immigrant status should not be dispositive of that parent's ability to care for his or her own child. Additionally, it should not be a factor considered by child welfare experts in parental termination decisions. "Children, as well as parents, have a fundamental, constitutionally protected interest in the preservation of the parent-child relationship."²⁴⁹ Conversely, these cases illustrate how the State's best interest of the child standard is being misapplied by courts in parental termination proceedings because the court and child welfare agencies alike fail to understand that a parent's deportation, for immigrant families with mixed immigration status, may in fact cause serious harm to the child, as well as violate the Convention on the Rights of the Child's presumption that family unity is in the best interest of the child.²⁵⁰ Generally speaking, a child should not be removed from a parent even if the parent is not documented unless there evidence that the parent is unable or unwilling to care for the child. For a child who has valid immigration status in the United States and undocumented parents, the U.S. government should consider whether or not the deportation of the parent with or without the child would be in the child's best interest. In such cases immigration adjudicators should consider exercising prosecutorial discretion and allow the parent to remain in the United States. Preservation of the familial unit, when appropriate, is paramount.

C. Elizabeth Hall, Note, *Where Are My Children . . . And My Rights?: Parental Rights Termination as a Consequence of Deportation*, 60 DUKE L.J. 1459, 1460 (2011). The immigration officials refused to release Ms. Bail Romero even though she was the primary caretaker for an infant because they alleged she was guilty of fraud. *Id.* The fraud charge that was the basis for Encarnación Bail Romero's incarceration was later found not to be a criminal offense by the U.S. Supreme Court. *Id.* (citing *Flores-Figueroa v. United States*, 556 U.S. 646 (2009) (holding that identity theft, specifically using another person's social security card, can only be an aggravated identity theft if the prosecution established intent; simply using another person's social security card is not sufficient evidence of intent to knowingly use another person's identity)). Ultimately, the state of Missouri terminated Ms. Bail Romero's parental rights and approved the adoption petition. *S.M. v. E.M.B.R.*, 414 S.W.3d 622 (Mo. Ct. App. 2013).

²⁴⁶ *In re M.M.*, 587 S.E.2d 825, 829, 831–32 (Ga. Ct. App. 2003).

²⁴⁷ *Id.* at 832.

²⁴⁸ David B. Thronson, *Custody and Contradictions: Exploring Immigration Law as Federal Family Law in the Context of Child Custody*, 59 HASTINGS L.J. 453, 454 (2008).

²⁴⁹ *Choiceless Choices*, *supra* note 178, at 1179.

²⁵⁰ See *supra* Part IV.B.

V. IMPLEMENTING A NEEDS-RIGHTS MODEL FOR CHILDREN IN IMMIGRATION LAW

Despite an international mandate, as exemplified by the CRC, for a needs-based rights model to children's rights, U.S. immigration law has failed to incorporate these fundamental principles into its statutory framework or its daily protocols and procedures. The following section recommends a needs-based rights framework for children in immigration law that incorporates both the CRC's framing principles and concomitant human rights obligations. Specifically, this section identifies discrete steps for the U.S. Congress to take in addressing significant structural gaps in the federal government's capacity to protect immigrant children's rights.

A. Non-discrimination Principle Applied to the INA's Definition of Child

Consistent with the CRC's express principle of non-discrimination, the current Immigration and Nationality Act (INA) definition of "child" must be changed in order to accommodate both children who have parents and those who do not. Currently, under the INA a child is only legally considered a "child" if he or she is "an unmarried person under twenty-one years of age" and fits within one of six categories, each of which requires a distinct relationship with a parent, including birth in wedlock, adoption, a statutorily defined stepchild relationship, and what is referred to as "legitimation."²⁵¹ Therefore, any child falling outside of these categories is, by default, an adult for all intents and purposes under the INA.²⁵²

Treating two children, who are similarly situated (e.g., both fleeing violence), differently based on arbitrary categories is undoubtedly discriminatory in nature.²⁵³ The child who fits within the INA definition finds safety, is afforded a path to relief as a derivative of the sponsor parent, and is given the opportunity of family unity; the child who does not fit within the INA definition finds none of these benefits and must "suffer the same harsh con-

²⁵¹ Thronson, *supra* note 15, at 991. See 8 U.S.C. § 1101(b)(1)(A)–(F) (2012).

²⁵² Thronson, *supra* note 15, at 997.

²⁵³ The Supreme Court's decision in *Nguyen v. Immigration and Naturalization Service*, 533 U.S. 53 (2001), underscores further disparate treatment created by current U.S. immigration law. In *Nguyen*, the Supreme Court upheld the deportation of a man, who had lived the majority of his life in the United States being raised by his American father, because his father failed to satisfy the statutory requirements for unwed paternal transmission of citizenship. *Id.* at 70–71; see also Erin Chlopak, *Mandatory Motherhood and Frustrated Fatherhood: The Supreme Court's Preservation of Gender Discrimination in American Citizenship Law*, 51 AM. U. L. REV. 967, 969 (2002). This result would have been completely different if Nguyen's mother, who was not a U.S. citizen and abandoned him in infancy, was a U.S. citizen because the statutory scheme of maternal transmission would have then made Nguyen an American citizen. Chlopak, *supra* note 253, at 969–70. Therefore, the statutory scheme led to a discriminatory result in this situation as well, in that it treated similarly situated parents of American citizenship differently based on their gender. See also *Miller v. Albright*, 523 U.S. 420, 445 (1998) (discussing the same statute at controversy in *Nguyen* and holding that "[t]he biological differences between single men and single women provide a relevant basis for differing rules governing their ability to confer citizenship on children born in foreign lands").

sequences and limited procedural protections faced by adult immigrants.” Unlike other areas of the law, U.S. immigration law still affords no legal distinction between children and adults when adjudicating potential forms of relief. Procedurally, there are no compulsory child-specific accommodations for immigrant children, as there are in family or juvenile court. Moreover, children are held to the same credibility and evidentiary burdens as adults.

Moreover, such outcomes are wholly contradictory to Congress’s apparent priority of promoting family unity under the INA, which is evidenced by numerous amendments added since the Immigration and Nationality Act of 1952 was enacted, such as “quota exempt permanent residence for children and parents of adult U.S. citizens” and “derivative status for the children of new permanent residents and nonimmigrant visa holders.”²⁵⁴ Accordingly, Congress should also extend the definition of “immediate relative”²⁵⁵ out of the recognition that the family unit encompasses other integral members, such as siblings, grandparents, aunts and uncles, and cousins.²⁵⁶ Currently, immigration law provides no avenue for these members to act as the child’s sponsor. If the child is not a “child” for purposes of the INA, he or she is an adult, and therefore simply cannot derive status from these members of their family.

Instead of the INA specifying varying ages for various forms of immigration relief and benefits, the INA’s definition of child should be amended to read: “the term ‘child’ means a person under eighteen years of age.” The age of majority, eighteen, mirrors the CRC’s definition of a child.²⁵⁷ While in some circumstances this change will result in individuals no longer being classified as children pursuant to the INA (i.e., unmarried, born-in-wedlock persons between the ages of 18 and 21), this new standard would be consistent with international definitions of a child. Moreover, aligning the definition of child throughout the INA, regardless of whether the child was born in or out of wedlock, is adopted, is a step-child, or is married, fully realizes the CRC’s guiding principle of non-discrimination.

B. The CRC’s Best Interest Standard Must Be Codified and Operationalized in Federal Immigration Law

Article 3.1 of the Convention on the Rights of the Child (CRC) provides that, “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administration authorities or legislative bodies, the best interest of the child shall be a primary consideration.”²⁵⁸ The current immigration system does not—neither

²⁵⁴ Thronson, *supra* note 15, at 1009.

²⁵⁵ 8 U.S.C. § 1551(b)(2)(A)(i) (defining immediate relatives).

²⁵⁶ Mzazki & Schoenholtz, *supra* note 154, at 654–55.

²⁵⁷ See CRC, *supra* note 114, at art. 1 (“For purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”).

²⁵⁸ See *id.* at art. 3.

through statute nor regulation—incorporate the best interest principle, as required by the CRC, into the initial screening of children on arrival, the care and custody decisions thereafter, or the crucial decision of which avenues of relief to pursue.

The child's need-rights model compels States to elevate the best interests of the child as a primary consideration, even when other policy goals, such as immigration control, are paramount.²⁵⁹ Several changes are required for immigration law to truly assess and protect the best interests of immigrant children. First, Congress should enact a federal best interest standard to be interpreted and applied consistently throughout the INA. Second, it should establish an interagency "Child Protection Corps" to ensure that children have access to trained child welfare specialists and that the process for applying for immigration relief is a child-centered approach.

1. Enacting a Federal Best Interest Standard

In order to ensure consistent decision making by immigration courts and the Board of Immigration Appeals, which incorporates a child-sensitive approach to all adjudication decisions, Congress must first adopt a federal best interest standard.²⁶⁰ A federal best interest standard must embody a child-centered approach, which places the "best interests" considerations and the child's right to express views and opinions, referred to as the right to "voice," at the heart of the decision making concerning children.²⁶¹ A federal best interest standard should also be a primary consideration in the treatment of children in the immigration system.²⁶² The Young Center at the University of Chicago Law School, a nationally recognized organization specializing in protecting immigrant children's rights and needs, has proposed model legislation for a federal best interest standard. This standard incorporates the CRC's core principles. Accordingly, a federal best interest standard in immigration law:

Shall consider, in the context of the child's age and maturity, the following factors:

1. The views of the child.
2. The safety and security considerations of the child.
3. The mental and physical health of the child.
4. The parent-child relationship and family unity, and the potential effect of separating the child from the child's parent or legal guardian, siblings, and other members of the child's extended biological family.
5. The child's sense of security, familiarity and attachments.

²⁵⁹ Bhabha, *supra* note 142, at 281.

²⁶⁰ FRYDMAN, *supra* note 212, at 11.

²⁶¹ Bhabha, *supra* note 142, at 281.

²⁶² Carr, *supra* note 44, at 149–53; Thronson, *supra* note 15, at 1014–16.

6. The child's well-being, including the need of the child for education and support related to child development.
7. The child's ethnic, religious, and cultural and linguistic background.²⁶³

This best interest standard should not only be used to adjudicate immigration relief, but also should govern DHS's decisions pertaining to the screening and classification of minors, as well as the care and custody determinations of minors as detailed in the next subsection.

2. Operationalizing a Federal Best Interest Standard²⁶⁴

To ensure that the Federal Best Interest Standard is fully operationalized within the Department of Homeland Security, the U.S. Congress—through legislation—should establish an interagency known as the “Child Protection Corps,” comprised of specialized experts: “child protection officers” who possess both extensive child welfare training and a deep understanding of immigration law. Child protection officers would be deployed to the federal agencies who are either responsible for the care and custody of unaccompanied minors or are charged with determining whether these children have a legal right to remain in the United States. Child protection officers would ensure that government officials are applying the best interests of the child principle²⁶⁵ in determinations of care and custody, as well as providing long-term protection and permanency.

a. Custody Determinations and Placement

In order to comply with Article 37(b) of the CRC, which dictates that the arrest and detention of children should only be used as a measure of last resort and should be for the shortest appropriate period of time, the U.S. needs child welfare experts to monitor and guide DHS and HHS regarding decisions about custody and placements.²⁶⁶ DHS is required to transfer cus-

²⁶³ *Young Center Proposal for Best Interests of the Child Standard*, YOUNG CTR. FOR IMMIGRANT CHILDREN'S RIGHTS, <http://theyoungcenter.org/wp-content/uploads/2013/11/2013-Young-Center-Proposal-for-Best-Interests-Standard.pdf>, archived at <http://perma.cc/B28X-D8ED> (last visited Oct. 26, 2014).

²⁶⁴ This next section was part of an earlier essay I authored entitled *Getting Kids Out of Harm's Way: The United States' Obligation to Operationalize the Best Interest of the Child Principle for Unaccompanied Minors*, 47 CONN. L. REV. ONLINE 1, 5–9 (2014), <http://connecticutlawreview.org/files/2014/09/Corcoran.PUBLISH1.pdf>, archived at <http://perma.cc/YB5M-Q8TV>.

²⁶⁵ There is no singular definition of best interest, but there are some commonly accepted principles that should persist in assessing the best interest of unaccompanied children including incorporating the child's voice, and prioritizing safety, permanency, and well-being of every individual child. See generally Carr, *supra* note 44.

²⁶⁶ Linda Piwowarczyk, *Our Responsibility to Unaccompanied and Separated Children in the United States: A Helping Hand*, 15 B.U. PUB. INT. L.J. 263, 269–72 (2006) (documenting the severe mental health impacts on detained immigrant children awaiting adjudication decisions, including: mood disorders, major depression, posttraumatic stress disorder, and dysthymia).

tody of an unaccompanied child to the Office of Refugee Resettlement (ORR) within 72 hours of apprehension.²⁶⁷ Presently, ORR is obligated by law to place unaccompanied minors in the least restrictive setting possible.²⁶⁸ ORR typically detains these children in ORR-operated detention centers until the child is either released to the care of a parent or close family member ("sponsor"), or placed in HHS facilities that are licensed to house children when no sponsor is available.²⁶⁹ As to the latter scenario, such placements include long-term foster care, extended-care group homes, and residential treatment centers for children in need of certain psychological or psychiatric services.²⁷⁰

The Child Protection Corps' officers would help ensure that, while the children are in ORR custody, the best interest principle guides all accommodations, including policies regarding visitation, recreation, education, medical treatment, and nutrition. Moreover, the Child Protection Corps would coordinate with ORR and NGOs that have expertise in identifying linguistically and culturally appropriate community resources, including mental health and integration services. These NGOs could provide such services even at the inundated surge shelters and transit centers.

b. Adjudication

As Article I immigration judges adjudicate potential relief for children that are either unaccompanied or applying as the principle applicant, statutory and regulatory safeguards must be in place to ensure that the best interests of the child are paramount. Congress should require that all unaccompanied children, or children who are the principal applicant for relief, that are placed in removal proceedings be afforded a government-funded or pro bono attorney who is trained in representing unaccompanied children. Under current law while any noncitizen facing removal may be represented by counsel in removal proceedings, there is no right to government-funded counsel.²⁷¹ In addition, the child would be assigned to a child

²⁶⁷ 8 U.S.C. § 1232(b)(3) (2012). The Secretary of Health and Human Services has delegated this responsibility to the Office of Refugee Resettlement within the Administration for Children and Families, a bureau of the Department of Health and Human Services. *Id.* § 279.

²⁶⁸ See Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997); 8 U.S.C. § 1232(c)(2)(A) (Supp. I 2013).

²⁶⁹ See VERA INSTITUTE, *supra* note 219, at 17-21.

²⁷⁰ *Id.* at 16.

²⁷¹ 8 U.S.C. § 1229a(b)(4). While the Supreme Court of the United States has not specifically addressed whether or not immigrants in removal proceedings have a right to government-paid counsel, the federal circuit courts have recurrently rejected a constitutionally mandated right to appointed counsel for indigent immigrants facing removal from the United States. See, e.g., *Zeru v. Gonzales*, 503 F.3d 59, 72 (1st Cir. 2007) (citing *Saakian v. INS*, 252 F.3d 21, 24 (1st Cir. 2001)) ("While aliens in deportation proceedings do not enjoy a Sixth Amendment right to counsel, they have due process rights in deportation proceedings."); *United States v. Perez*, 330 F.3d 97, 101 (2d Cir. 2003) ("As deportation proceedings are civil in nature, aliens in such proceedings are not protected by the Sixth Amendment right to counsel."); *Uspango v. Ashcroft*, 289 F.3d 226, 231 (3d Cir. 2002) (citation omitted) ("Second, there is no Sixth Amendment right to counsel in deportation hearings, so any claim of ineffective assistance of

advocate²⁷² (comparable to a state court best interests guardian *ad litem*) whose primary responsibility would be to assess, evaluate, and then advocate for the best interests of the child. Working with both the child and the appointed child advocate, the appointed attorney would apply for immigration relief, including temporary humanitarian options.²⁷³

In addition to Congress providing counsel for children faced with deportation, they should also require that all unaccompanied children, or children as the principal applicant in removal proceedings, be assigned to a dedicated juvenile docket at the immigration court. Every jurisdiction would designate a day or a portion of day, depending on the numbers of cases in that jurisdiction, for all cases involving unaccompanied minors and cases in which the child is the primary applicant for relief. Every immigration court would maintain a dedicated juvenile docket with at least two dedicated immigration judges assigned to such docket.²⁷⁴ These judges would receive sig-

counsel advanced by Uspango must be based on the Fifth Amendment's due process guaranty."); *Ambati v. Reno*, 233 F.3d 1054, 1061 (7th Cir. 2000) ("Deportation hearings are civil proceedings, and asylum-seekers, therefore, have no Sixth Amendment right to counsel."); *Mojislovic v. INS*, 156 F.3d 743, 748 (7th Cir. 1998); *Sene v. INS*, No. 95-3104, 1996 U.S. App. LEXIS 36140 (4th Cir. Nov. 19, 1996) (citing *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984)) ("Deportation proceedings are 'purely civil' in nature; thus, constitutional guarantees that apply only to criminal proceedings, such as the Sixth Amendment right to counsel, do not attach."); *Michelson v. INS*, 897 F.2d 465, 467 (10th Cir. 1990) (citations omitted) ("[N]o Sixth Amendment right to counsel in a deportation proceeding exists."); *Castro-O'Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1987) (citing *Ramirez v. INS*, 550 F.2d 560, 563 (9th Cir. 1977) ("No right to counsel under the Sixth Amendment is recognized in deportation proceedings."); *United States v. Campos-Asencio*, 822 F.2d 506, 509 (5th Cir. 1987); *Aguilera-Enriquez v. INS*, 516 F.2d 565 (6th Cir. 1975); *Matute v. Dist. Dir., INS*, 930 F. Supp. 1336, 1341 (D. Neb. 1996) (citation omitted) ("Because deportation hearings are considered civil proceedings, aliens have no Sixth Amendment right to counsel; instead, the right to counsel at a deportation hearing is governed by the due process clause of the Fifth Amendment.").

²⁷² The role is already established and defined by federal statute. See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(c)(6), 122 Stat. 5044, 5079 (authorizing the appointment of Child Advocates for unaccompanied alien children).

²⁷³ See, e.g., Wendy Shea, *Almost There: Unaccompanied Alien Children, Immigration Reform, and a Meaningful Opportunity to Participate in the Immigration Process*, 18 U.C. DAVIS J. JUV. L. & POL'Y 148, 166-67 (2014) (advocating for unaccompanied children's need for counsel). Recent data from TRAC Immigration at Syracuse University concludes that among unaccompanied children represented by lawyers, in almost half of the cases the child was permitted by an immigration judge to remain in the country, about a quarter of the children were issued a voluntary departure order in lieu of removal, and only 28% of the children represented were removed. Compare this to the 77% of children who appeared before an immigration judge with no attorney and were ordered removed, 13% who were issued a voluntary departure order, and only 10% who were permitted to remain. In addition, those children who are represented are rarely designated *in absentia* (failing to appear for a hearing before an immigration judge). For example, 95.4% of children represented by lawyers have not been designated *in absentia*. Similar rates exist even for children with U.S. family. 95.1% of children represented by lawyers, and in a parent or guardian's custody, have not been designated *in absentia*. In closed cases, 93.5% of children represented by lawyers were not designated *in absentia*. *New Data on Unaccompanied Children in Immigration Court*, TRAC IMMIGRATION (July 15, 2014), <http://trac.syr.edu/immigration/reports/359/>, archived at <http://perma.cc/FH7E-5HGH>.

²⁷⁴ Currently about one-third of the country's immigration courts have established juvenile dockets. See U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, UNACCOMPA-

nificant, uniform training from child protection officers in the Child Protection Corps on adjudicating children's cases, including child-specific relief and how evidentiary rules should be applied to children in these proceedings. Finally, every Immigration and Customs Enforcement (ICE) Trial Attorney unit would have an ICE trial attorney who specializes in immigrant children's cases and has been thoroughly trained on the best interest principle from child protection officers. These ICE attorneys would be educated on when and how to question children in removal proceedings and be instructed to exercise prosecutorial discretion in favor of not seeking deportation in deserving cases. Lastly, these attorneys would be encouraged to work with appointed counsel to find a solution for the child that is in the child's best interest.

C. Right to Life, Survival, and Development Requires Upholding Non-Refoulement

It is unquestionable that the worst fate a child that has escaped a place of danger, depravity, and violence faces is being forced to return to that place by those from whom they sought safety. At the very least, the United States must create a form of withholding of removal for a child who would face irreparable harm upon return to his or her country of origin. For example, Article 3 of the Convention Against Torture²⁷⁵ provides withholding or deferral of removal for an individual who is not eligible for refugee relief, but who nevertheless establishes that "it is more likely than not that he or she would be tortured if removed to the proposed country of removal."²⁷⁶ In fact, "the CRC, unlike the Convention Against Torture, does not require State perpetration for an action to be torture or cruel, inhuman, or degrading treatment, and thus the non-refoulement protection offered by the CRC is broader."²⁷⁷ For immigrant children fleeing irreparable harm from their home country, there is an affirmative obligation on States, including the United States, to provide protection by not returning that child to his or her home.²⁷⁸ This obligation can be met by amending the withholding of removal provision²⁷⁹ in the Immigration and Nationality Act to include a provision for children facing irreparable harm upon return. An amendment to the INA should include at the very least the following language:

NIED ALIEN CHILDREN IN IMMIGRATION PROCEEDINGS (Apr. 22, 2008), *available at* <http://www.justice.gov/eoir/press/08/UnaccompaniedAlienChildrenApr08.pdf>, *archived at* <http://perma.cc/YH2A-NURK> (providing agency overview of unaccompanied minor adjudications).

²⁷⁵ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT].

²⁷⁶ Henry Mascia, *A Reconsideration of Haitian Claims for Withholding of Removal Under the Convention Against Torture*, 19 PACE INT'L L. REV. 287, 296 (2007).

²⁷⁷ Farmer, *supra* note 144, at 41 (comparing CAT, *supra* note 275, at art. 3, with CRC, *supra* note 114, at art. 37).

²⁷⁸ *Id.* at 47-48.

²⁷⁹ 8 U.S.C. § 1231(b)(3) (2012).

Section 241(b) of the Immigration and Nationality Act is amended by inserting the following after 241(b)(3):

(4) Restriction on removal to a country where a child would face irreparable harm

IN GENERAL – Notwithstanding paragraphs (1), (2), and (3), the Attorney General may not remove a child to a country if the Attorney General decides that the child would face irreparable harm upon return to his or her home country by the government, individuals, or groups that the government is unable or unwilling to control.

As a highly respected and central member of the international community, the United States must establish a non-derogable, non-discretionary policy that creates a strict non-refoulement policy for these children. This policy would be consistent with what is quickly becoming a *jus cogens* norm—a norm from which no derogation is permitted—across the international community of non-refoulement in the refugee context.²⁸⁰ Applying the emerging *jus cogens* non-refoulement norm to children fleeing harm would “enforce[] observance of the basic human rights that underlie refugee protection, because it fundamentally prevents [children] from being returned to situations where they would face violations of those rights.”²⁸¹

In addition to establishing a statutory right to remain for a child that faces irreparable harm upon return, the process for assessing this claim must also be child-centered. Children who experience trauma often do not open up immediately. They often need time, in an appropriate setting, to express their true reasons for coming to the United States and should be interviewed by individuals with expertise and training in child welfare and development. Under the Child Protection Corps model, child protection officers would be imbedded at ICE to initially determine if the child is potentially in need of international protection, whether accompanied or unaccompanied. Child protection officers would make these determinations instead of Customs and Border Patrol (CBP) or ICE officers whose primary training and job responsibilities are in law enforcement. These trained specialists would know how to interview the child in a comprehensive, sensitive manner that takes into account the child’s age, maturity, and other pertinent developmental factors. This would provide a more accurate understanding of their eligibility for relief from deportation, including withholding of removal.

²⁸⁰ Farmer, *supra* note 122, at 22.

²⁸¹ See *id.* at 22–24 (arguing that the drafters of the 1951 Convention on the Status of Refugees, who relied heavily on the guiding opinions of the States concerned, intended non-refoulement to be a non-derogable norm and right).

D. Right to Participation: Expanding Immigration Options for Children

Giving children a voice in immigration law requires that adjudicators evaluate both a child's opinions and needs when deciding if an immigration benefit should be conferred. For example, in decisions about whether or not to grant cancellation of removal, the immigration judge should fully develop the record to include the U.S. citizen or legal permanent resident (LPR) child's perspective on his or her hardship if his or her noncitizen parent was deported.²⁸²

In addition to integrating child-sensitive practices into the adjudication process, a child's ability to access relief under the INA must also be reformed. This means altering the family-sponsored immigration model to allow for children to self-petition for relief if they have a qualifying relationship with a U.S. citizen or LPR parent. Under current immigration law, a child must rely on his or her parent to petition, or agree to sponsor the child for a family-based petition.²⁸³ There is precedent for such a change. Pursuant to the Violence Against Women Act of 1994,²⁸⁴ spouses and children of abusive U.S. citizens or LPR's can self-petition for immigration classification without the abuser's knowledge.²⁸⁵ The key is that the qualifying relationship exists; not whether or not the abuser is willing to petition for the non-citizen spouse or child. If this kind of self-petition were available, children could apply for immigration classification in their own right.

There are also examples of children being permitted to earn the right as children to stay in the United States. In July 2012, President Obama issued a directive, Deferred Action for Childhood Arrivals (DACA), which provides temporary protection from removal to a select group of immigrants who came to this country as children and have no current immigration status (the DREAMers²⁸⁶) but want to go to college or join the military.²⁸⁷ While this

²⁸² Thronson, *supra* note 15, at 996–97 (criticizing the Board of Immigration Appeals' decision in *In re Monreal-Aguinaga*, 23 I. & N. Dec. 56 (BIA 2001), because the Board made generalizations about the harm the children would have experienced if they were deported to Mexico, without developing the record or focusing on the children's needs).

²⁸³ *Id.* at 990–95.

²⁸⁴ Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796. VAWA was passed as Title IV, §§ 40001–40703 of the Violent Crime Control and Law Enforcement Act of 1994, H.R. 3355, and signed as P.L. 103-322 by President William Clinton on September 13, 1994.

²⁸⁵ *Id.* §§ 40701–40703 (codified at 8 U.S.C. § 204(a)(1), 8 U.S.C. § 216(c)(4), and 8 U.S.C. § 244(a)).

²⁸⁶ These individuals are referred to as “DREAMers” because they are the beneficiaries of comprehensive immigration relief legislation that has been introduced multiple times in Congress entitled the “Development, Relief, and Education for Alien Minors Act” or the “DREAM Act.” Since 2001, there have been at least 25 bills introduced that provide some path to legal residency for certain unauthorized immigrants who have completed qualified higher education, or military service, and have the requisite years of continuous presence in the United States. See Barron, *supra* note 197, at 632–37 (summarizing the failed attempts to enact various versions of the DREAM Act from 2001–2011). While each DREAM Act bill differs slightly, most versions contemplate enabling certain unauthorized, noncitizen students to obtain legal permanent resident (LPR) status through a two-stage process. First, the individual obtains a conditional status by demonstrating that he or she has at least five years of residence

relief is currently only temporary, it “recognizes children as actors who, based on their own actions and ambitions, may qualify for immigration status.”²⁸⁸

Finally, in cases where a child is the primary applicant for relief, his or her parents and siblings should be able to derive status if it is in the best interests of the child. Under current immigration law, there are two circumstances where parents and siblings may derive immigration status from a child. In 2000, when Congress passed the Victims of Trafficking and Violence Protection Act,²⁸⁹ it created what is commonly known as the “U visa” and “T visa.” Both the U and T visas include parents and siblings of the child among those eligible for derivative visas.²⁹⁰ This option should be available for any child, who is the principal applicant for immigration relief, including asylum.

By expanding pathways for family unity and opportunities for children to petition for immigration relief as principal applicants, immigration law can uphold our nation’s valuation of the family. Furthermore, such changes guarantee fuller participation for children, as rights holders, as envisioned by the CRC.

CONCLUSION

In sum, debates about the nature and the parameters of children’s rights have had little bearing on the existing legal framework for immigrant children. Currently, no children’s needs-based rights model in immigration law exists. Unlike other areas of the law, U.S. immigration law still affords no legal distinction between children and adults when adjudicating potential forms of relief. Procedurally, there are no compulsory child-specific accommodations for immigrant children as there are in family or juvenile court. Moreover, children are held to the same credibility and evidentiary burdens

in the United States and a high school diploma, its equivalent, or admission into an institution of higher learning. Second, the individual, upon acquisition of a degree from an institution of higher education, completion of two years of a bachelor’s degree or higher degree program, or two years of military service, can apply for legal permanent resident status. ANDORRA BRUNO, CONG. RESEARCH SERV., RL33863, UNAUTHORIZED ALIEN STUDENTS: ISSUES AND “DREAM ACT” LEGISLATION 2 (2012).

²⁸⁷ See Memo from Janet Napolitano, *supra* note 196. Relying on the Department of Homeland Security’s existing prosecutorial authority, on June 15, 2012, the Secretary of Homeland Security, Janet Napolitano, implemented the DACA directive by issuing an agency-wide memo instructing all departments within the Department of Homeland Security to stop initiating deportation proceedings against DREAMers living in the United States. *Id.*; see Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens 4 (June 17, 2011) available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

²⁸⁸ Thronson, *supra* note 15, at 1016.

²⁸⁹ Victims of Trafficking and Violence Protection Act, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified as amended in scattered sections of 8 U.S.C., 18 U.S.C., and 22 U.S.C.).

²⁹⁰ 8 U.S.C. § 1101(a)(15)(T)(ii), (U)(ii) (2012).

as adults.²⁹¹ Children have no right to government-funded counsel; instead they must pay for the costs of representation.²⁹² Except in extremely narrow circumstances, they cannot petition to bring their parents and siblings as derivatives. Overall, their child-specific needs and rights are disregarded and left unmet.

This Article concludes that international human rights law—specifically, the Convention on the Rights of the Child—articulates a workable, comprehensive framework of children's positive (or welfare) and liberal rights, and can and should be implemented in U.S. immigration law. Specifically, immigration law must at a minimum prohibit the return of a child to a country where that child would face irreparable harm; permit children when appropriate to petition for immigration relief on their own behalf; provide experts trained in child welfare and immigration law to assess the best interests of the child; and provide free legal counsel to children facing deportation. Not only are these minimal steps critical to fulfill the United States' obligations under international human rights law,²⁹³ but they are also necessary to provide the space, tools, and means for an immigrant children needs-based rights model to be realized.

²⁹¹ Thronson, *supra* note 15, at 1000 (citing Jacqueline Bhabha & Wendy Young, *Through a Child's Eyes: Protecting the Most Vulnerable Asylum Seekers*, 75 INTERPRETER RELEASES 757, 757 (June 1, 1998)).

²⁹² Shea, *supra* note 273, at 151–52.

²⁹³ FRYDMAN, *supra* note 212, at 37–55.