

GENDER, LAW, AND DETENTION POLICY:
UNEXPECTED EFFECTS ON THE MOST VULNERABLE
IMMIGRANTS

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INTRODUCTION

The United States Department of Homeland Security's enforcement arm, the Bureau of Immigration and Customs Enforcement, detains around 8,000 unaccompanied alien children each year.¹ The majority of unaccompanied alien children detained in the United States originate from Central and South American countries.² Nearly 2,000 of these children await the outcome of their immigration court proceedings in federal custody, while the rest are released to relatives.³ The children in custody are disproportionately male—nearly 80% in 2008.⁴

The United States immigration system is especially difficult for children to navigate. Advocates commonly argue that this difficulty stems largely from the poor fit of a system designed for adults in light of the reality of the child immigrant experience. As a result, advocates have traditionally focused their efforts on modifying the law to include recognition of children as subjects, rather than objects of immigration law.⁵ Such efforts resulted in changes to both detention policy and substantive immigration law as they relate to a subset of child immigrants known as Unaccompanied Alien Children (UAC).

Using the legal changes created for UAC as a case study, this article argues that the model of advocacy used by child advocates in U.S. immigration law and detention policy mirrors the approaches taken by feminist theorists in international legal theory and gender asylum law. Essentially, current child advocate efforts focus on liberal inclusion of children's issues in an existing system and on creating procedures to combat adult-centered bias. This article investigates evidence that these models are failing, and argues that implementation of immigration detention policy and access to legal relief vary

1. Dep't Health & Human Servs., Office of Refugee Resettlement, *Report to Congress FY 2007*, at 63, available at http://www.acf.hhs.gov/programs/orr/data/ORR_2007_report.pdf (last visited Nov. 21, 2010) [hereinafter *ORR Report to Congress*]. The term "Unaccompanied Alien Children" is defined as those under the age of eighteen, present in the United States without a parent or guardian who can care for them, 6 U.S.C. § 279(g)(2) (2006).

2. Dep't Health & Human Servs., Office of Refugee Resettlement, *Unaccompanied Children's Services*, http://www.acf.hhs.gov/programs/orr/programs/unaccompanied_alien_children.htm (last visited Nov. 21, 2010) [hereinafter *ORR Fact Sheet*]; see also WOMEN'S REFUGEE COMM'N, *HALFWAY HOME: UNACCOMPANIED CHILDREN IN IMMIGRATION CUSTODY* 3 (Feb. 2009), http://womensrefugeecommission.org/docs/halfway_home.pdf.

3. See *ORR Fact Sheet*, *supra* note 1; WOMEN'S REFUGEE COMM'N, *supra* note 2, at 22.

4. CHAD C. HADDAL, CONG. RESEARCH SERV., *UNACCOMPANIED ALIEN CHILDREN: POLICIES AND ISSUES* 19 (2009), available at http://assets.opencrs.com/rpts/RL33896_20080131.pdf.

5. See, e.g., Jacqueline Bhabha, "More than their Share of Sorrows": *International Migration law and the Rights of Children*, 22 ST. LOUIS U. PUB. L. REV. 253, 254-55 (2003); David B. Thronson, *You Can't Get Here from Here: Toward a More Child-Centered Immigration Law*, 14 VA. J. SOC. POL'Y & L. 58, 67-69 (2006) [hereinafter Thronson, *Child-Centered Immigration Law*]; David B. Thronson, *Kids Will Be Kids?: Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 991-97 (2002) [hereinafter Thronson, *Kids Will Be Kids?*].

depending on the construct of childhood assigned to each unaccompanied child in accordance with his or her gender and related backgrounds.

This article proceeds in four parts. Part I describes the phenomena of child migration to the United States, discussing theories on the impetus of migration and detailing the demographics of child immigrants. Particular attention is paid to the subset of child immigrants, UAC, for whom special detention and legal standards have been developed. Part II argues that attempts to modify UAC detention and legal standards in order to acknowledge a child's agency parallel similar efforts in international legal feminism and asylum law. Part III reveals that although efforts to include children as subjects, rather than objects, of immigration law and to improve detention policy have focused on UACs, the effectiveness of the reforms is undermined by the social constructs imposed on UACs during implementation. In order to equalize implementation of detention policy and immigration law and tailor a UAC's immigration experience to the individual UAC, rather than to his or her gender and the construct attached to that gender, Part IV proposes that the Office of Refugee Resettlement update the principles of the *Flores* Settlement Agreement⁶ by interjecting best interests considerations at crucial points. Part IV further recommends that immigration law be amended to further insulate UACs from the Department of Homeland Security's mandate to combat national security threats and to uphold UAC's economic rights. The article concludes with a call to child immigrant advocates to move beyond models of liberal inclusion and systemic bias critique to an approach that will individualize a child's detention experience and opportunity for legal relief by combating the artificial social constructs assigned to UACs.

I. CHILDREN IN THE U.S. IMMIGRATION SYSTEM: DEMOGRAPHICS AND IMPETUS FOR MIGRATION

Children comprise approximately half of the world's refugees.⁷ An estimated 500,000 of these children are unaccompanied alien children (UAC).⁸ Regarding child migration to the United States, "[a]pproximately 1.8 million children, some in families and some unaccompanied, live in the United States without legal immigration authorization."⁹ Specifically, scholars estimate that

6. Stipulated Settlement Agreement, *Flores v. Reno*, Case No. CV 85-4544-RJK (C.D. Cal. 1996), available at http://www.aclu.org/files/pdfs/immigrants/flores_v_meese_agreement.pdf [hereinafter *Flores* Settlement Agreement]. For a discussion of the *Flores* Settlement Agreement, see *infra* notes 56-59 and accompanying text.

7. Laura P. Wexler, Note, *Street Children and U.S. Immigration Law: What Should Be Done?*, 41 CORNELL INT'L L.J. 545, 545 (2008).

8. Carolyn J. Seugling, Note, *Toward a Comprehensive Response to the Transnational Migration of Unaccompanied Minors in the United States*, 37 VAND. J. TRANSNAT'L L. 861, 863 (2004).

9. Thronson, *Child-Centered Immigration Law*, *supra* note 5, at 63 (citing JEFFREY S. PASSEL, PEW HISPANIC CENTER, THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.: ESTIMATES BASED ON THE MARCH 2005 CURRENT POPULATION SURVEY 8 (2006), <http://pewhispanic.org/files/reports/61.pdf>).

between 43,000 and 48,000 undocumented UACs enter the United States each year.¹⁰ Of these, over 35,000 children come from contiguous countries and undergo immediate return to their country of origin.¹¹ The Department of Homeland Security (DHS) detains approximately 8,000 additional UACs each year.¹² Of those detained, around 2,000 are required to remain in the custody of the Office of Refugee Resettlement (ORR) for the duration of their immigration proceedings, while the other 60% are released to relatives.¹³

Eighty-five percent of children in ORR custody are between the ages of fourteen and eighteen and hail from the Central American countries of El Salvador, Guatemala, and Honduras.¹⁴ Interestingly, nearly 76% of the children in custody are male.¹⁵ Conceivably, male and female UACs may be driven to transnational migration for different reasons, which, in turn, may affect the statistical disparity seen in UAC detention facilities. As such, an examination of the impetus for UACs' migration to the United States is necessary.

At the outset, it is undeniable that the "children's motivations are complex, their stories unique."¹⁶ Initial studies on UACs singled out wars, refugee situations, famines, and natural disasters as the main reasons children attempt transnational migration separately from their parents.¹⁷ As the phenomena grew, studies recognized that many UACs also migrate to flee "abuse, abandonment, neglect, or violations of their human rights such as forced prostitution, child marriage, female genital mutilation, and conscription."¹⁸ Still other UACs undertake transnational migration out of

10. AMY THOMPSON, CTR. FOR PUB. POLICY PRIORITIES, *A CHILD ALONE AND WITHOUT PAPERS: A REPORT ON THE RETURN AND REPATRIATION OF UNACCOMPANIED UNDOCUMENTED CHILDREN BY THE UNITED STATES* 7 (2008), <http://www.cppp.org/repatriation/A%20Child%20Alone%20and%20Without%20Papers.pdf> (estimating 43,000); SONIA NAZARIO, ENRIQUE'S JOURNEY: THE STORY OF A BOY'S DANGEROUS ODYSSEY TO REUNITE WITH HIS MOTHER 5 (2006) (estimating 48,000).

11. THOMPSON, *supra* note 10, at 7.

12. *ORR Report to Congress*, *supra* note 1, at 63 (showing over 8,000 UACs entered in FY 2006 and FY 2007); WOMEN'S REFUGEE COMM'N, *supra* note 2, at 4 (estimating 8,300).

13. WOMEN'S REFUGEE COMM'N, *supra* note 2, at 22.

14. HADDAL, *supra* note 4, at 20.

15. *Id.* at 19.

16. THOMPSON, *supra* note 10, at 7.

17. EVERETT M. RESSLER, NEIL BOOTHBY & DANIEL J. STEINBOCK, *UNACCOMPANIED CHILDREN: CARE AND PROTECTION IN WARS, NATURAL DISASTERS, AND REFUGEE MOVEMENTS* 9-12 (1988).

18. Wendy Young & Megan McKenna, *The Measure of a Society: The Treatment of Unaccompanied Refugee and Immigrant Children in the United States*, 45 HARV. C.R.-C.L. L. REV. 247, 248 (2010) (citing U.N. Secretary-General, *Report of the United Nations High Commissioner for Refugees, Questions Relating to Refugees, Returnees and Displaced Persons and Humanitarian Questions: Assistance to Unaccompanied Refugee Minors*, ¶¶ 4, 10, 13, U.N. Doc A/52/273 (Aug. 7, 1997) available at <http://www.un.org/documents/ga/docs/52/plenary/a52-273.htm>); see also Greta Lynn Uehling, *The International Smuggling of Children: Coyotes, Snakeheads, and the Politics of Compassion*, 81 ANTHROPOLOGICAL Q. 833, 840 (2008) (listing flight from human rights abuses, armed

economic necessity, a motivation more frequently expected to compel adults.¹⁹ Other children travel to the United States alone in order to reunite with parents who had travelled before them.²⁰

While some of the motivations prompting unaccompanied child migration are gender specific, such as female genital mutilation or forced marriage, migration theorists increasingly posit that no matter their gender, “[w]hat usually precipitates a child’s departure is that fragile (or untenable) care arrangements break down in a process that often involves abuse, abandonment, or neglect.”²¹ This remains true whether a child flees abusive parents in his or her country of origin, seeks to reunite with non-abusive parents in the destination country, or has lived alone for many years and is fleeing war, human rights abuses, or other mistreatment.²² Admittedly, the social science literature focuses on the extent to which globalization has increasingly forced an active decision-making role upon children in questions of migration, whether alone or in a family setting.²³ The issue of variance in the decision-making process by gender has not yet been examined systematically. However, the fact that every specific impetus for child migration can be said to reflect a break-down in the child’s care arrangements suggests that the underlying impetus for migration fails to explain the large disparity in treatment received in U.S. immigration detention policy and substantive law along gender lines. Instead, disparate treatment stems from a system that, at its core, views children

conflict, gang or forced military recruitment, female genital mutilation, forced marriages, prostitution, and life as street children as impetus for child migration).

19. Wexler, *supra* note 7; see also Jacqueline Bhabha, *Lone Travelers: Rights, Criminalization, and the Transnational Migration of Unaccompanied Children*, 7 U. CHI. L. SCH. ROUNDTABLE 269, 278-79 (2000) (describing the calculations families undertake when deciding to send a child abroad unaccompanied by a parent or guardian, noting that it includes situations “where children are sent away to improve their life chances, whether through education at boarding schools in metropolitan countries or work in urban sweatshops”); Julia Meredith Hess & Dianna Shandy, *Kids at the Crossroads: Global Childhood and the State*, 81 ANTHROPOLOGICAL Q. 765, 772 (2008) (“[I]t is often a desire to provide economic support for family members at home that compels these youth to migrate.”); Uehling, *supra* note 18, at 840 (“Still other children leave in search of work to support their families.”).

20. Paula S. Fass, *Children in Global Migrations*, J. SOC. HIST. 937, 942 (2005) (“Family migration has never been a process in which all members of the family necessarily move together.”). See generally, Sarah Horton, *Consuming Childhood: “Lost” and “Ideal” Childhoods as a Motivation for Migration*, 81 ANTHROPOLOGICAL Q. 925 (2008) (providing several narratives of families migrating to the United States in stages).

21. Uehling, *supra* note 18, at 840.

22. See Marjorie Faulstich Orellana, Barrie Thorne, Anna Chee & Wan Shun Eva Lam, *Transnational Childhoods: The Participation of Children in Processes of Family Migration*, 48 SOC. PROBS. 572, 578-83 (2001).

23. See, e.g., Anna Kirova, Book Review, 8 J. INT’L MIGRATION & INTEGRATION 127 (2007) (reviewing CHILDHOOD AND MIGRATION: FROM EXPERIENCE TO AGENCY (Jacqueline Knörr ed., 2005)); Fass, *supra* note 20, at 948-49; Hess & Shandy, *supra* note 19, at 767.

as objects of migration by adults rather than as subjects with their own agency.²⁴

II. PUTTING FEMINIST THEORY TO WORK FOR UACS: LIBERAL INCLUSION, STRUCTURAL BIAS, AND UAC DETENTION AND LEGAL STANDARDS

Generally speaking, United States immigration law views children as dependant upon and derivative of their parents. In fact, “[b]y definition in immigration and nationality law, no ‘child’ exists except in relation to a parent.”²⁵ Mirroring the historical development of anthropological literature and migration theory, which “treat[ed] children, in effect, as luggage. . . . [and] burdens weighing down otherwise mobile adults,”²⁶ U.S. immigration law contains “enduring images of children as passive objects or as property.”²⁷ As such, neither immigration law nor detention policy specifically addressed the needs of UACs until child welfare advocates actively engaged the issue beginning in the 1980s.²⁸ Notably, the approach taken by child welfare advocates since 1980 mirrors the trajectory of feminists lobbying to recognize women’s rights in international law and asylum law.²⁹ However, while feminist activists and scholars introspectively self-corrected their course when necessary, child welfare advocates for UACs fail to do so.³⁰ As a result, child advocates created a detention policy for UACs made of a complex network of facilities and family reunification that only occasionally serves the UAC’s best interests.³¹ Simultaneously, child advocates carved out two significant UAC-specific forms of legal relief.³² These changes to UAC legal standards parallel the feminist liberal inclusion and structural bias approaches to effecting change in international law and asylum law, and similarly require that child advocates engage in a third stage of critique regarding their implementation.

A. *Child Advocates Mirror the Feminist Approaches of Liberal Inclusion and Structural Bias Critique*

The noted scholar Karen Engle categorizes the efforts of feminist theory and literature with regard to international law into three phases: liberal

24. Thronson, *Kids Will Be Kids?*, *supra* note 5, at 995.

25. Thronson, *Child-Centered Immigration Law*, *supra* note 5, at 68; Thronson, *Kids Will Be Kids?*, *supra* note 5, at 991 (“Immigration law never employs the term ‘child’ except in relationship to a parent and, therefore, does not conceive of a ‘child’ existing outside this relationship.”).

26. Orellana et al., *supra* note 22, at 578.

27. Thronson, *Kids Will Be Kids?*, *supra* note 5, at 995.

28. HADAAL, *supra* note 4, at 2.

29. *See infra* Part. II.A.

30. *See infra* Part. II.A.

31. *See infra* Part. II.B.

32. *See infra* Part. II.C.

inclusion, structural bias critique, and third world feminist approaches.³³ Engle describes the liberal inclusion phase as one in which “[t]he task of feminist scholarship in international law . . . was to add women to human rights protections guaranteed under international law.”³⁴ The structural bias phase, on the other hand, argued that “inclusion of women into human rights law was impossible” because international law and institutions were “structured to permit, even require, women’s subordination.”³⁵ Finally, Engle attributes critiques of the previous two approaches—for failure to include or accurately represent third world women—to a phase of scholarship she terms “third world approaches.”³⁶ According to Engle, liberal inclusion succeeded in so far as there “are increasing numbers of women involved in both the academic and practical pursuits of international human rights law, and women’s rights have become a part of the mainstream human rights and humanitarian law agenda.”³⁷ Structural bias critiques brought issues such as trafficking, female genital mutilation, and wartime rape to the forefront of international human rights discourse.³⁸ Finally, third world critiques succeeded in introducing issues of cultural bias and the idea of gender as a larger social construct to the discussion.³⁹ Essentially, each phase identified by Engle contributed to the forward progress of women’s rights in international law. Notably, Engle herself argues that the stages she identifies are not unique to any particular subset of literature.⁴⁰

Indeed, authors similarly describe the success of feminist scholars in migration studies and asylum law in “help[ing] women move to active conceptual presence.”⁴¹ Feminist scholars have produced a wealth of literature documenting “the discrimination against women in asylum and refugee law, and specif[ying] needed reforms.”⁴² This literature argues that the root of the discrimination lies in the devaluation of women’s political activities and “the neglect of the kinds of private-sphere persecutions most often afflicting women.”⁴³ Advocacy efforts have focused on incorporating gender issues into asylum law and other forms of immigration relief. With the addition of claims

33. Karen Engle, *International Human Rights and Feminisms: When Discourses Keep Meeting*, in *INTERNATIONAL LAW: MODERN FEMINIST APPROACHES* 47, 48 (Doris Buss & Ambreena Manji eds., 2005).

34. *Id.* at 49.

35. *Id.*

36. *Id.*

37. *Id.* (citing SARI KOUVO, *MAKING JUST RIGHTS? MAINSTREAMING WOMEN’S HUMAN RIGHTS AND A GENDER PERSPECTIVE* 200-98 (2004)).

38. *Id.*

39. *See id.* at 50.

40. *Id.* at 48.

41. Orellana et al., *supra* note 22, at 578.

42. Kitty Calavita, *Gender, Migration, and Law: Crossing Borders and Bridging Disciplines*, 40 *INT’L MIGRATION REV.* 104, 111 (2006).

43. *Id.* (citing HEAVEN CRAWLEY, *REFUGEES AND GENDER: LAW AND PROCESS* 18-21 (2001)).

under the Violence Against Women Act⁴⁴ and the recognition of gender as a potential basis for membership in a particular social group,⁴⁵ this model of liberal inclusion achieved significant successes. Increasingly, however, scholars have embraced the idea that an analysis of gender, migration, and law involves more than a simple recognition of how the “male versus female divide” affects migration or immigration law and its processes. Instead, the literature frequently emphasizes gender’s “dynamic nature,” recognizing that “gendered ideologies and practices change as human beings . . . cooperate or struggle with each other, with their pasts, and with the structures of changing economic, political, and social worlds linked through their migrations.”⁴⁶ Gender is thus increasingly conceived as a social construct imposed on individuals, together with other preconceived notions pertaining to race, culture, and social class,⁴⁷ and the literature continues to struggle to propose modifications to the current legal paradigm that addresses these constructs.⁴⁸

Furthermore, scholars and advocates increasingly recognize that *both* “[w]omen and children’s immigration stories are rarely told outside of the

44. The Violence Against Women act provides, among others, the following forms of relief: (1) the right of undocumented battered spouses of lawful permanent residents or U.S. citizens to self-petition for permanent residency; (2) cancellation of removal for battered spouses who have lived continuously in the United States for three years and show that removal will result in extreme hardship to themselves or their children; and (3) U-Visas for victims of violent crime who are helpful in making a case against the offender. See Immigration and Nationality Act § 204(a)(1), 8 U.S.C. § 1154(a)(1) (2006); 8 C.F.R. §204.2(c), (e) (2010) (self-petition provisions); Immigration and Nationality Act § 240A(b)(2), 8 U.S.C. § 1229b(b)(2); 8 C.F.R. §1240.58 (VAWA cancellation provisions); Immigration and Nationality Act §101(a)(15)(U), 8 U.S.C. § 11 01(a)(15)(U); Immigration and Nationality Act §214(p), 8 U.S.C. § 1184(p); 8 C.F.R. §214.14 (U-Visa provisions).

45. Kasinga, 21 I. & N. Dec. 357, 366 (B.I.A. 1996). For further guidance on women-specific asylum claims, see Memorandum from Phyllis Coven, U.S. Dep’t of Justice, on Considerations for Asylum Officers Adjudicating Asylum Claims from Women to all INS Asylum Officers and HQASM Coordinators (May 26, 1995) (on file with author), *reprinted in* 7 INT’L J. REFUGEE L. 700 (1995).

46. Katharine M. Donato, Donna Gabaccia, Jennifer Holdaway, Martin Manalansan, IV & Patricia R. Pessar, *A Glass Half Full? Gender in Migration Studies*, 40 INT’L MIGRATION REV. 3, 6 (2006).

47. JUDITH LORBER, PARADOXES OF GENDER 13 (1994) (arguing that “gender is constantly created and re-created out of human interaction, out of social life, and is the texture and order of that social life gender, like culture, is a human production that depends on everyone constantly ‘doing gender’”).

48. See generally, e.g., Carrie Menkel-Meadow, *Asylum in a Different Voice? Judging Immigration Claims and Gender*, in REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM 202-26 (Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag eds. 2009); Deborah Anker, Lauren Gilbert & Nancy Kelly, *Women Whose Governments Are Unable or Unwilling to Provide Reasonable Protection from Domestic Violence May Qualify as Refugees Under United States Asylum Law*, 11 GEO. IMMIGR. L.J. 709 (1997); Monica Boyd & Elizabeth Grieco, *Women and Migration: Incorporating Gender into International Migration Theory*, MIGRATION INFO. SOURCE (Mar. 1, 2003), <http://www.migrationinformation.org/Feature/display.cfm?id=106>.

masculine-oriented narrative of family unification.”⁴⁹ The work of child welfare advocates in making children subjects rather than objects of immigration law mirrors that of feminist scholars in international law and in gender and asylum law. Namely, advocates began with a liberal inclusion model and then investigated a structural bias paradigm. With its emphasis on bringing child welfare principles into immigration law, the liberal inclusion model succeeded in several areas but only for a subset of children—UACs.⁵⁰ In detention policy, an elaborate system of child-specific detention facilities provides UACs with a specific set of rights created via litigation by child welfare advocates.⁵¹ In immigration law, Special Immigrant Juvenile Status interjects a child-specific form of legal relief into an otherwise adult-centered system, while new procedural requirements for UAC asylum claims seem to respond to the structural bias critique that the current process is incapable of fairly adjudicating children’s claims.⁵² There exists, however, a notable failure to engage in discourse regarding constructs of childhood and gender, which undermines these successes by allowing significant problems of implementation to go unchecked.⁵³

B. Current Detention Policy for UACs: A Complex Network of Facilities and Family Reunification

A series of lawsuits against the former Immigration and Naturalization Service (INS) alleged mistreatment of UACs during their immigration-related detention.⁵⁴ Ultimately, the United States Supreme Court ruled in favor of the INS policies.⁵⁵ However, the child welfare advocates handling the suit later reached a settlement agreement with the INS, known as the *Flores* Settlement Agreement, which provided UACs certain rights relating to their detention, release, and repatriation.⁵⁶ The *Flores* Settlement Agreement serves as the primary foundation for UAC detention policy,⁵⁷ and the Trafficking Victims

49. Isabel Guzman Molina, *Rescuing Elián: Gender and Race in Stories of Children’s Migration*, in IMMIGRANT RIGHTS IN THE SHADOWS OF CITIZENSHIP 179, 180 (Rachel Ida Buff ed., 2008) (emphasis added).

50. See *infra* Part II.B-C.

51. See *infra* Part II.B.

52. See *infra* Part II.C.

53. See *infra* Part III.

54. HADDAL, *supra* note 4, at 2.

55. *Reno v. Flores*, 507 U.S. 292 (1993).

56. HADDAL, *supra* note 4, at 2.

57. OFFICE OF REFUGEE RESETTLEMENT, DIVISION OF UNACCOMPANIED CHILDREN’S SERVICES, DRAFT POLICIES AND PROCEDURES MANUAL 9 (on file with author) (“The *Flores* Settlement Agreement is the principal guiding document for the standards of care for UAC until the ORR publishes its regulations.”); see also HADDAL, *supra* note 4, at 2; HUMAN RIGHTS WATCH CHILDREN’S RIGHTS PROJECT, SLIPPING THROUGH THE CRACKS: UNACCOMPANIED CHILDREN DETAINED BY THE U.S. IMMIGRATION AND NATURALIZATION SERVICE 30 (1997).

Protection Reauthorization Act of 2008 (TVPRA) recently codified many of its provisions.⁵⁸

Essentially, the *Flores* Settlement Agreement provides UACs with the right to legal assistance, adequate medical, dental, reproductive, and mental health services, education and recreation, rights of privacy, right to adequate interpretation services, freedom of expression and religion, the right to be detained in the least restrictive setting, and the right to prompt family reunification where possible.⁵⁹ In 2003, the Homeland Security Act (HSA)⁶⁰ transferred the care and custody of UACs from the INS to the Department of Health and Human Services' Office of Refugee Resettlement (ORR).⁶¹ The transfer aimed, like many of the other changes to the immigration system enacted by the HSA, to separate conflicting mandates. In the case of UACs, the transfer aimed "to decouple prosecution from care."⁶² Prior to the transfer, about one-third of children in INS custody were held "in juvenile detention facilities intended for the incarceration of youth offenders."⁶³ The transfer of the caretaker role to ORR also resulted in increased emphasis on the *Flores* mandate to house UACs in the least restrictive setting commensurate with the safety, emotional, and physical needs of the child.⁶⁴

In order to meaningfully fulfill this mandate, ORR houses UACs in a complex network of shelter facilities. Each of the ORR facilities falls along a continuum of security from foster care, the least restrictive placement option, to secure facilities, the most restrictive placement.⁶⁵ Two types of foster care placements exist: short-term and long-term. ORR generally reserves short-term foster care placements for children under the age of twelve, pregnant teens, and groups of siblings.⁶⁶ Long-term foster care usually serves as a child's second placement, after determining that family reunification is not an option for the child and that the child's immigration case is likely to be of considerable duration.⁶⁷ Shelter care facilities follow a group-home model and house those UACs who cannot be placed in foster-care, but who are not considered flight risks or in need of intensive services.⁶⁸ Staff-secure facilities "provide a heightened level of staff supervision, communication, and services to control

58. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (codified as amended in scattered sections of 8, 18, 22 U.S.C.). Specifically, see § 235(c)(2), § 235(c)(6).

59. *Flores* Settlement Agreement, *supra* note 6.

60. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in scattered sections of 6 U.S.C.).

61. *See id.* § 462.

62. WOMEN'S REFUGEE COMM'N, *supra* note 2, at 1.

63. *Id.* at 3.

64. *See* OFFICE OF REFUGEE RESETTLEMENT, *supra* note 57, at 38.

65. *Id.* at 42-49; *see also* WOMEN'S REFUGEE COMM'N, *supra* note 2, at 56.

66. WOMEN'S REFUGEE COMM'N, *supra* note 2, at 56.

67. *Id.*

68. *Id.*

problem behavior and prevent runaways.”⁶⁹ Staff-secure facilities generally sport a secure perimeter that appears similar to correctional facilities, but do not typically include significant restraining devices inside the facility.⁷⁰ Finally, secure facilities, the most restrictive setting in the ORR continuum of care,⁷¹ “maintains a physically secure structure. . . . in addition to a heightened level of staff supervision, communication and services to control problem behavior and prevent escapes.”⁷²

Currently, the ORR Manual requires providers to “regularly assess” whether a transfer to a less restrictive facility is appropriate for any given UAC.⁷³ The TVPRA heightens this requirement for UACs initially placed in secure facilities, requiring that the appropriateness of such placements be re-evaluated on a monthly basis.⁷⁴ ORR undertakes such “step-down” transfers under the auspices of a “best-interest of the child” rationale.⁷⁵ Notably, however, few jurisdictions contain the full continuum of facilities offered by ORR.⁷⁶ As a result, a step-down transfer (or, conceivably, a step-up transfer) may result in a transfer across jurisdictions, resulting in a disruption in the

69. OFFICE OF REFUGEE RESETTLEMENT, *supra* note 57, at 45.

70. *Id.*

The DUCS Manual provides a list of criteria to consider in assessing the appropriateness of a staff-secure placement. These criteria include inappropriate sexual behavior, disruptive acts, such as destruction of property and non-specific threats to commit a violent act that do not involve a significant risk to harm another person. In practice, children with an offender history that is not serious, children who are flight risks and children who have displayed disruptive behavior in a shelter program are also considered for staff-secure placement.

WOMEN’S REFUGEE COMM’N, *supra* note 2, at 57. For the specific list of criteria, see OFFICE OF REFUGEE RESETTLEMENT, *supra* note 57, at 45-46

71. WOMEN’S REFUGEE COMM’N, *supra* note 2, at 57.

72. OFFICE OF REFUGEE RESETTLEMENT, *supra* note 57, at 47.

The DUCS Manual considers secure placement to be appropriate for children (i) charged with or convicted of a crime or adjudicated as delinquent; (ii) who have committed or threatened acts of crime or violence while in DUCS custody; (iii) who have engaged in unacceptably disruptive acts; (iv) who are a flight risk; or (v) who need extra security for their own protection. *This placement criteria may be narrowed in the coming months as the TVPRA mandates that children should not be placed in secure facilities absent a determination that the child poses a danger to self or others or has been charged with a criminal offense.*

WOMEN’S REFUGEE COMM’N, *supra* note 2, at 57 (emphasis in the original). For the specific language of the criteria, see OFFICE OF REFUGEE RESETTLEMENT, *supra* note 57, at 47-48.

73. WOMEN’S REFUGEE COMM’N, *supra* note 2, at 57.

74. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(c)(2), 122 Stat. 5044 (codified as amended in scattered sections of 8, 18, 22 U.S.C.).

75. OFFICE OF REFUGEE RESETTLEMENT, *supra* note 57, at 136 (“An UAC will be transferred for child welfare reasons when it is determined that another care provider is better suited to care for the particular needs of a child.”).

76. See WOMEN’S REFUGEE COMM’N, *supra* note 2, at 54-55.

provision of legal and other services.⁷⁷ Notably absent from the agency's analysis of the child's "best-interests" is a consideration of the effect of a transfer on the UAC's legal case: "The ORR will consider the UAC's age, gender, immigration status, criminal background, potential for family reunification, mental or physical conditions requiring special services, past behavior in an ORR program as well as review supporting documentation when making transfer decisions."⁷⁸

The additional mandate to prioritize family reunification overlays the entirety of this complex system of ORR facilities and transfers. In accordance with the *Flores* Settlement Agreement, when it is determined:

that the detention of the minor is not required either to secure his or her timely appearance before . . . the immigration court, or to ensure the minor's safety or that of others the INS shall release a minor from its custody without unnecessary delay, in the following order of preference, to: a parent; a legal guardian; an adult relative . . .; an adult individual or entity designated by the parent or legal guardian as capable and willing to care for the minor's well-being . . .; a licensed program willing to accept legal custody; or an adult individual or entity seeking custody . . . when it appears that there is no other likely alternative to long term detention and family reunification does not appear to be a reasonable possibility.⁷⁹

Around 60% of all children in ORR custody are released via the family reunification process.⁸⁰ Understandably, legal services providers generally do not assign children expected to be released or reunified an attorney while in custody.⁸¹ Thus, as a direct result of the priority placed on family reunification by child welfare advocates, an estimated 70% of children "released from custody to a sponsor do not have an attorney and must appear before an immigration judge by themselves."⁸²

The perception of a particular UAC as eligible for initial placement in a lesser restrictive setting, any subsequent step-up or step-down transfers, and the prioritization of family reunification undoubtedly affect a child's detention experience, and eventually, his or her legal case. Notably, discussion of the possible effects of each of these decisions on the child's legal case remains

77. Linda A. Piwowarczyk, *Our Responsibility to Unaccompanied and Separated Children in the United States: A Helping Hand*, 15 B.U. PUB. INT. L.J. 263, 274 (2006) (citing DEP'T OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., A REVIEW OF DHS' RESPONSIBILITIES FOR JUVENILE ALIENS 27 (2005), http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_05-45_Sep05.pdf).

78. OFFICE OF REFUGEE RESETTLEMENT, *supra* note 57, at 136.

79. *Flores* Settlement Agreement, *supra* note 6, at 9-10 (internal quotations omitted).

80. WOMEN'S REFUGEE COMM'N, *supra* note 2, at 22.

81. *Id.* at 22-23.

82. *Id.* at 23.

absent from the criteria invariably used by ORR to make such determinations.⁸³ In addition, when ORR bases determinations on criteria such as “flight risk” or “disruptive behavior,” the cultural constructs imposed upon each UAC by their ORR care providers⁸⁴ will influence the outcomes, and in turn, influence the UAC’s overall detention experience and access to legal services.

C. Legal Carve-Outs for UACs: SIJS and UAC Asylum Claims

In addition to pursuing a liberal inclusion model with regard to UAC detention policy, child welfare advocates sought to incorporate child welfare principles in immigration law. The first of two successes in this regard, Special Immigrant Juvenile Status (SIJS), provides undocumented children a path to legal permanent residency⁸⁵ if a state juvenile court has declared the child a dependent, or placed the child in the custody of a state agency or person, and has done so because: (1) “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,” and (2) it is not in the child’s best interests to return to his or her country of nationality.⁸⁶ SIJS is often considered a “significant first step toward a more child-centered approach to thinking about children in immigration law,”⁸⁷ especially because it is “the only provision in immigration law that expressly incorporates a best interests of the child standard into its eligibility criteria.”⁸⁸ By creating SIJS, child advocates sought to recognize UACs’ agency by adding them to the existing system, rather than fundamentally altering the existing system. Such an approach reflects a liberal inclusion model.

When child welfare advocates approached the issue of creating child-centered asylum law, however, their tactics spoke to a structural bias critique model rather than one of liberal inclusion. Namely, believing immigration courts and immigration judges simply unable to adapt a system originally designed for the adjudication of adult claims, advocates pursued the creation of a wholly separate process in which to adjudicate UAC claims.⁸⁹ The TVPRA provides the United States Citizenship and Immigration Service (USCIS) with initial jurisdiction over UAC asylum claims, affording UACs a less adversarial setting for the adjudication of their cases.⁹⁰ If a UAC’s claim is denied by

83. See OFFICE OF REFUGEE RESETTLEMENT, *supra* note 57, at 136

84. See *infra* Part III.

85. See 8 C.F.R. § 204.11(b) (2010).

86. 8 U.S.C.S § 1101(a)(27)(J)(i) (LexisNexis 2008 & Supp. 2010).

87. Thronson, *Kids Will Be Kids?*, *supra* note 5, at 1008.

88. *Id.* at 1004.

89. Young & McKenna, *supra* note 18, at 252-53 (describing the “improperly tailored forms of immigration relief available to unaccompanied children”).

90. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(d)(7)(C) 122 Stat. 5044 (codified as amended in scattered sections of 8, 18, 22 U.S.C.).

USCIS, the TVPRA grants the UAC an additional opportunity to press his or her case before the immigration judge.⁹¹

The SIJS and UAC asylum provisions have been described as “progress . . . toward acknowledging the unique challenges that arise when a child arrives in the United States without his or her traditional caregiver.”⁹² However, the well-known principle that the “law on the books” and the “law in action” rarely coincide⁹³ equally applies to the substantive immigration law applicable to UACs. While formally, both SIJS and the procedural changes for UAC asylum claims made strides in recognizing UACs’ agency and child-specific needs, social constructs of good and bad childhoods assigned to UACs by ORR caretakers, immigration judges, and policy-makers has undermined their implementation.⁹⁴

III. INSUFFICIENCY OF THE NEW UAC DETENTION AND LEGAL STANDARDS REVEALED: FORMAL EQUALITY UNDERMINED BY CULTURAL CONSTRUCTS DURING IMPLEMENTATION

Although child advocates succeeded in formally recognizing UACs as subjects of immigration law by providing UACs certain protections while in immigration custody,⁹⁵ better protecting the child welfare interests of UACs⁹⁶ by shifting primary care for UACs away from DHS and toward the Office of Refugee Resettlement,⁹⁷ and carving out UAC-specific forms of legal relief, their use of the liberal inclusion and structural bias models caused significant problems. Specifically, child advocates interjected child welfare principles into a detention system used foremost as a tool to combat the national security threat of undocumented immigration. As a result, implementation of detention policy and access to UAC-specific legal relief vary depending on the construct of childhood assigned to each UAC in accordance with their gender and related backgrounds.⁹⁸ Ultimately, the current models of liberal inclusion and structural bias critique used by child welfare advocates with regards to UACs are insufficient, and advocates should follow the lead of their feminist counterparts by accounting for and combating the cultural constructs undermining the implementation of child welfare reforms.

91. *Id.* § 235(d)(7).

92. Young & McKenna, *supra* note 18, at 260.

93. *See, e.g.*, Peter H. Schuck, *Law and the Study of Migration, in* MIGRATION THEORY: TALKING ACROSS DISCIPLINES 187, 191 (Caroline B. Brettell & James F. Hollifield eds., 2000). This distinction between law-in-action and law-on-the-books is also prominently discussed in literature on Comparative Law.

94. *See infra* Part III.

95. *See supra*, Part II.B.

96. WOMEN’S REFUGEE COMM’N, *supra* note 2, at 1-3; *see also* OFFICE OF REFUGEE RESETTLEMENT, *supra* note 57, at 38.

97. *See* 6 U.S.C. § 279 (2006).

98. *See infra* Part III.A.

A. *The Creation of a Preferred Childhood Through Detention Policy: Child Welfare Principles Confront National Security Concerns*

The system created as a direct result of the liberal inclusion and structural bias models suffers from conflicting internal agendas. Namely, the conviction “that children must be treated with the utmost care and attention,”⁹⁹ as embodied in the *Flores* Settlement Agreement and the TVPRA, conflicts with the general view of undocumented adolescents “as potential juvenile offenders”¹⁰⁰ or as general “security risks to the United States.”¹⁰¹ As a result of this incongruence,¹⁰² some of the most important factors in the care, long-term permanency planning, and protection of UACs remain undervalued. Specifically, access to legal services is undervalued in comparison to family reunification; the detention facilities’ step-up/step-down procedures sacrifices continuity of care; and ORR remains the only constant entity providing best interests determinations,¹⁰³ resulting in a conflict of interest to the detriment of UACs.

First, while the *Flores* Settlement Agreement made family reunification a mandated priority for immigration detention facilities, current implementation of that priority often comes at the sacrifice of a UAC’s access to legal services. This tension is a direct result of the liberal inclusion model used by child advocates in lobbying for reform. Child advocates “have not appreciated the importance of securing long-term legal protections for residency status, preferring to concentrate on the pressing welfare issues at hand.”¹⁰⁴

Furthermore, the directive from the *Flores* Settlement Agreement to house UACs in the least restrictive setting while awaiting the conclusion of their immigration proceedings often interrupts the continuity of care UACs receive regarding psychological, medical, and legal services.¹⁰⁵ Because few, if any, jurisdictions contain the complete continuum of shelter facilities in close geographic proximity, a step-up or step-down decision may cause UACs to be transferred across the country.¹⁰⁶ ORR makes such decisions without consulting legal providers, which often causes significant disruption in the child’s ability to work through past traumatic experiences in therapy due to interruption of

99. Uehling, *supra* note 18, at 844.

100. *Id.* at 843.

101. *Id.* at 837.

102. Also described by one author as follows: “a janus-faced attitude to children in the international migration context: concern over particular vulnerability and need for protection combines with suspicion and hostility towards their unregulated, uncontrolled status – compassion for deprivation merges into suspicion of delinquency.” Bhabha, *supra* note 5, at 274.

103. *See infra* notes 105-12 and accompanying text.

104. Bhabha, *supra* note 5, at 267.

105. Piwowarczyk, *supra* note 77, at 274-76.

106. *Id.* at 274 (citing DEP’T OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., A REVIEW OF DHS’ RESPONSIBILITIES FOR JUVENILE ALIENS 27 (2005), http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_05-45_Sep05.pdf).

care.¹⁰⁷ This poses a significant problem for male UACs, who are more likely to act out after trauma, and who are already viewed as a greater security threat than their female UAC counterparts because of potential increased gang affiliations.¹⁰⁸

Finally, many child advocates call for the use of the “best interests of the child” standard in immigration law,¹⁰⁹ however, for UACs, the only consistent source of such determinations have been the Division of Unaccompanied Minors Field Coordinators.¹¹⁰ Field Coordinators are ostensibly charged with making “independent” best interests recommendations to ORR when issues of custody and placement are being decided.¹¹¹ While Field Coordinators are directly hired by outside agencies, such as Lutheran Immigrant and Refugee Services or the United States Conference of Catholic Bishops, Field Coordinators are ORR-funded contract positions.¹¹² The relative level of independence of such offices should be viewed with deep suspicion.

Ultimately, these three major problems, routine parts of the UAC detention experience, reveal the systemic failure of the liberal inclusion model. ORR’s implementation of the *Flores* principles is “built upon a construction of American childhood which profoundly shapes the experiences of these young migrants.”¹¹³ In particular, ORR “protects some childhoods more than others.”¹¹⁴ While some argue that ORR prefers childhoods based on an ethnic

107. See *id.* at 276 (“The U.S. must create a continuum of care for juvenile aliens in order to ensure their well-being.”).

108. See Monisha Bansal, *Chertoff: Street Gangs a Threat to National Security*, CNSNEWS.COM, July 7, 2008, <http://www.cnsnews.com/news/article/22826> (identifying MS-13 and other Central American gangs as a national security threat); see also James C. Howell, *Youth Gangs: An Overview*, JUV. JUST. BULL. (U.S. Dep’t of Justice, Office of Juvenile Justice and Delinquency Prevention), Aug. 1998, at 1 (“Male gang members outnumber females by a wide margin, and this span is greater in late adolescence than in early adolescence.”).

109. See, e.g., Bridgette A. Carr, *Incorporating a ‘Best Interests of the Child’ Approach into Immigration Law and Procedure*, 12 YALE HUM. RTS. DEV. L.J. 120 (2009) (arguing that the best interests approach be used to safeguard all children “directly affected” by immigration proceedings – even those affected only by their parents’ removal proceedings); Christopher Nugent, *Whose Children Are These? Towards Ensuring the Best Interests and Empowerment of Unaccompanied Alien Children*, 15 B.U. PUB. INT. L.J. 219, 235 (2006) (arguing that a best interests approach for UACs requires “direct representation, advocacy efforts and a central role in shaping their future”).

110. Notably, the Immigrant Children’s Advocacy Project, based in Chicago, does strive to provide best interests recommendations for some children in certain circumstances. See Piwowarczyk, *supra* note 77, at 293-94 for a brief description of the project. See also the organization’s website at <http://www.immigrantchildadvocacy.org/index.shtml>.

111. See LUTHERAN IMMIGRATION AND REFUGEE SERVICE, FREQUENTLY ASKED QUESTIONS ABOUT THE DIVISION OF UNACCOMPANIED CHILDREN’S SERVICES (DUCS) 3-4 (2006), <http://www.aila.org/content/fileviewer.aspx?docid=19612&linkid=146817>.

112. *Id.*

113. Hess & Shandy, *supra* note 19, at 768.

114. Uehling, *supra* note 18, at 837.

hierarchy,¹¹⁵ this article submits that the preference for certain socially constructed childhoods is more subtle and general than simple ethnic bias. Rather, the childhood that is perceived as most vulnerable to loss is the childhood more protected by implementation of detention policy¹¹⁶—namely, that perceived more as a victim and less as a security threat.

Female UACs are thought to be the most vulnerable to trafficking and other forms of abuse,¹¹⁷ and, like female refugees in general, are depicted as more passive and less resourceful.¹¹⁸ As a result, female UACs more readily fit the criteria required for placement in foster care settings rather than staff-secure or secure facilities.¹¹⁹ Male UACs, on the other hand, are more often suspected of deviancy,¹²⁰ more likely to be perceived as delinquent or suspected of gang connections, and thus more likely to fulfill the criteria for bed spaces in staff-secure and secure facilities.¹²¹ Furthermore, one study of Honduran children removed from the United States found that “though girls represent one-third to one-fourth of the unaccompanied Honduran minors in U.S. Custody, proportionately fewer girls than boys appear to be subject to removal.”¹²² Essentially, UAC detention policy uses gender as shorthand for distinguishing “the delinquent child whose agency and choice make him more accountable for his actions and more liable for control from the victimized child whose vulnerability and manipulation by others make him less responsible and more eligible for assistance,”¹²³ with male UACs assigned a construct endowed with more agency, and female UACs one with less.

115. See, e.g., *id.* at 839.

116. As one author notes, “Today, our western commitment to child protection often incubates a similar sense of superiority which lays a claim to virtue in the vision of a proper childhood.” Fass, *supra* note 20, at 939.

117. *Gender Equality: Trafficking in Human Misery*, UNITED NATIONS POPULATION FUND, <http://www.unfpa.org/gender/violence1.htm> (last visited Nov. 21, 2010) (“Because of their subordinate position, women and girls are most vulnerable.”).

118. See Loveness H. Schafer, *True Survivors: East African Refugee Women*, 49 AFRICA TODAY 29, 30 (2002).

119. OFFICE OF REFUGEE RESETTLEMENT, *supra* note 57, at 42-49 (listing foster care criteria as including low flight risk, long anticipated duration of immigration case, and lack of reunification options, and secure facility criteria as prior criminal history, disruptive or violent behavior, and flight risk).

120. Areti Georgopoulos, *Beyond the Reach of Juvenile Justice: The Crisis of Unaccompanied Immigrant Children Detained by the United States*, 23 LAW & INEQ. 117, 117-19 (2005) (describing detention conditions in which “many officials don’t understand the difference between a juvenile offender and an unaccompanied child,” which is “insensitive to their needs and in violation of their rights”).

121. See Bansal, *supra* note 108; see also Howell, *supra* note 108.

122. CTR. FOR PUB. POLICY PRIORITIES, A CHILD ALONE AND WITHOUT PAPERS BACKGROUNDERS: REPORT METHODOLOGY 6, <http://www.cppp.org/repatriation/Backgrounder5.pdf> (last visited Nov. 21, 2010).

123. Susan J. Terrio, *New Barbarians at the Gates of Paris? Prosecuting Undocumented Minors in the Juvenile Court—The Problem of the ‘Petits Roumains’*, 81 ANTHROPOLOGICAL Q. 873, 876 (2008) (describing the attribution of particular constructs to undocumented minors by the government of France).

B. *The Protected Childhood and UAC Legal Standards: No Room for Gangs or Poverty*

The creation of different cultural constructs for male and female UACs, combined with the increased value given to the construct of childhood assigned to female UACs also affects the application of substantive law to UAC asylum claims. For example, the view of the UACs, and particularly male UACs, as pertaining to a childhood construct of deviance and menace, has rendered gang-based asylum claims effectively useless.¹²⁴ Furthermore, the constructs of childhood assigned to UACs through immigration law systematically undervalue the economic rights of children. There exists no basis in asylum law for a claim on the basis of deprivation of economic rights.¹²⁵ Furthermore, because most state dependency law precludes findings of dependency on the sole basis of economic neglect,¹²⁶ most UACs cannot pursue SIJS as a method for vindicating economic rights. Many families send children abroad in “search for childhoods free from material want and adult responsibilities”¹²⁷ in response to the “global flows of media, goods and people [that] have spread bourgeois images of a commercialized childhood.”¹²⁸ Upon their arrival, however, United States immigration law refuses to recognize the “lost childhood”¹²⁹ from which they seek refuge as a legitimate form of suffering. The social constructs of

124. See Susan M. Akram, *Are They Human Children or Just Border Rats?*, 15 B.U. PUB. INT. L.J. 187, 191 (2006) (“Government counsel take aggressive positions in children’s cases, opposing the interpretation of the grounds of asylum to include special types of persecution affecting children, such as fleeing gang violence, domestic violence, or street violence.”).

125. See M. Beth Morales Singh, Note, *To Rescue, Not Return: An International Human Rights Approach to Protecting Child Economic Migrants Seeking Refuge in the United States*, 41 COLUM. J.L. & SOC. PROBS. 511, 519-25 (2008).

126. See *id.* at 527 (explaining that under New York state law, a finding of neglect cannot be entered by a dependency court solely because the parents were not financially able to care for the child). For another example of state dependency law excluding economic grounds as a basis of neglect, see WASH. REV. CODE § 26.44.020 (2008 & Supp. 2009):

‘Negligent treatment or maltreatment’ means an act or a failure to act, or the cumulative effects of a pattern of conduct, behavior, or inaction, that evidences a serious disregard of consequences of such magnitude as to constitute a clear and present danger to a child’s health, welfare, or safety, including but not limited to conduct prohibited under RCW 9A.42.100. When considering whether a clear and present danger exists, evidence of a parent’s substance abuse as a contributing factor to negligent treatment or maltreatment shall be given great weight. The fact that siblings share a bedroom is not, in and of itself, negligent treatment or maltreatment. Poverty, homelessness, or exposure to domestic violence as defined in RCW 26.50.010 that is perpetrated against someone other than the child does not constitute negligent treatment or maltreatment in and of itself.

127. Horton, *supra* note 20, at 940-41.

128. *Id.* at 926.

129. For further discussion on the notion of a “lost childhood,” see generally *Id.*

foreign childhoods as belonging to victims or national security threats¹³⁰ contain no space for the vindication of a UAC's economic rights or the reality of their childhood experience in the country of origin. Essentially, in the realm of immigration law, the liberal inclusion model, which interjected principles of child welfare as perceived through an American cultural lens, only continues to strip children of agency in immigration proceedings by assigning to male and female UACs foreign cultural constructs and failing to recognize the cultural and social reality of the UAC's life in their country of origin.

The creation of special detention procedures for UACs and the enactment of the SIJ statute and procedural changes to UAC asylum claims are strong strides in advancing the rights of this subset of children in immigration proceedings. Most child advocates, however, continue to call for two things: (1) that such considerations be expanded to all children, not just UACs, and (2) that further steps toward liberal inclusion be made via provision of legal representation and appointed child advocates.¹³¹ While laudable, these calls to action do not go far enough because the evidence suggests that the system, created under the models of liberal inclusion and structural bias critique,¹³² imposes a construct of gender and childhood that affects a child's immigration detention experience and opportunity for legal relief.¹³³ Essentially, child immigrant advocates should learn from the experience of their feminist counterparts in the international law and gender asylum law arenas and engage in a "third world" critique of the system and then attempt to move beyond it toward a system that individualizes a UAC's experience and recognizes the full measure of a child's agency.

130. Uehling, *supra* note 18, at 837 (arguing that in the United States, "undocumented children are simultaneously perceived as the most vulnerable of the vulnerable, and as security risks to the United States" and that "this security has at least two dimensions: there is the risk adolescent children pose as potential offenders or 'terrorist' elements and there is the threat children are perceived to pose to communities' social service networks").

131. *See, e.g.*, Thronson, *Kids Will Be Kids?*, *supra* note 5, at 1014-15 ("Decisions about children's best interests should be located with independent decision makers who have expertise in child welfare. . . . Certainly children in particularly vulnerable situations need, indeed demand, our urgent attention. But changes affecting only relatively small populations of children are not sufficient."); *see also* Bhabha, *supra* note 5, at 274 ("Children need to become a central focus of migration policy, not an afterthought, and active participants in contestation over rights not invisible dependent variables, if the promise of the ambitious normative regime is to be concretized in practice."); Carr, *supra* note 109, at 159 (arguing that the best interests of the child determination is only currently available to UACs, and calling for this approach to be used with regard to "all children directly affected by immigration proceedings"); Young & McKenna, *supra* note 18, at 256-59 (recommending government appointed counsel, the appointment of child welfare experts, elimination of all appearances by children before the Immigration Court, and regulations which implement juvenile dockets in every immigration court).

132. *See supra* Part I.A for a discussion of these models.

133. *See supra* notes 113-23 and accompanying text.

IV. USING THE UAC EXPERIENCE TO REEVALUATE ATTEMPTS TO
RECOGNIZE CHILDREN AS INDIVIDUAL RIGHTS BEARERS IN
IMMIGRATION LAW

The models of liberal inclusion and structural bias critique produced significant UAC-specific reforms in immigration law and detention policy. Unfortunately, child advocates' failure to engage in the "third world" critique undertaken by their counterparts in international legal feminism and gender and asylum law allows discriminatory implementation of these reforms to go unchecked.¹³⁴ In this setting, a "third world" critique¹³⁵ calls for methodological dialogue and critique of the social constructs of childhood assigned to UACs on the basis of gender, country of origin, and other factors. Such efforts will undoubtedly yield a myriad of proposed methods for individualizing UACs' immigration law and detention experience, however, this article aims to begin the discussion by suggesting two specific starting points and calling on advocates to investigate a third. With regard to detention policy, advocates should update the *Flores* Settlement Agreement principles to limit ORR discretion by interjecting best interests determinations, based on a specifically defined standard, at crucial points. With regard to immigration law, policymakers should combat the social construct of children as national security threats or deviants through a reexamination of certain gang-based asylum claims. Finally, advocates and policymakers should begin investigating new ways to address the violations of UACs' economic rights, which shape the reality of their childhoods but are not considered under the current constructs assigned to them.

A. *Equal Treatment in Detention Policy: Towards a Best Interests Standard that Individualizes a UAC's Experience*

In crafting the *Flores* Settlement Agreement, child welfare advocates improved the standard of care for UACs in immigration custody.¹³⁶ However, the social constructs assigned to UACs during their detention, on the basis of gender, country of origin, and other factors, cause the *Flores* principles to be better implemented for some UACs than for others. In order to combat this disparity, the *Flores* principles should be updated by interjecting best interests considerations at crucial points;¹³⁷ namely, to temper the duty to reunify, to

134. For the argument that implementation of these reforms reflects a gender bias, see *supra* Part III.A.

135. For a discussion of the third world critique undertaken by international legal feminism and gender and asylum law, see Engle, *supra* note 33, at 49.

136. See WOMEN'S REFUGEE COMM'N, *supra* note 2, at 1-3.

137. At this juncture, I note that child welfare advocates frequently call for the best interests of the child to be taken into consideration in UAC immigration cases. However, the call is usually for the best interests standard to be further incorporated into substantive immigration law. See, e.g., Jacqueline Bhabha, "Not a Sack of Potatoes": *Moving and Removing Children Across Borders*, 15 B.U. PUB. INT. L.J. 197, 208 (2006) ("Additionally, the absence of a 'best interest' standard as a primary consideration governing the

temper staff reactions to incidents that may cause a step-up or step-down transfer, and to help provide UACs with meaningful access to medical, mental health, and legal services during the entirety of their case. In order for such best interests considerations to be useful, a defined standard for “best interests” must be adopted, and permanency planning should take a more important role in UAC care.

Best interests determinations should be interjected into the detention process when ORR discretion is at its peak, allowing for the social constructs to affect decision-making. For instance, family reunification is based on a variety of subjective factors.¹³⁸ However, the best interests of the UAC are notably absent from that list. The Field Coordinators¹³⁹ exist to provide some measure of best interests analysis, however, ORR funds their positions and their reports are only considered “recommendations,” and are not binding.¹⁴⁰ Notably, placement decisions affect “the child’s emotional and social adjustment, identity, and career plans.”¹⁴¹ As such, ORR decisions regarding family reunification and transfers affect more than the UAC’s temporary detention experience.

The key to making this strategy a meaningful tool for combating the social constructs causing disparities in UAC treatment is to give content to the best interests standard. Historically, the “broad nature of the term ‘best interests of the child,’ has allowed it to be used in a standardless, highly discretionary manner.”¹⁴² A widely recognized work aiming to give shape to the standard

unaccompanied or separated alien child’s immigration proceedings contradicts recognized international standards for child asylum seekers.”). For a variety of reasons, I contest the idea that immigration judges and USCIS officers are appropriate adjudicators of a child’s best interests. It was, in part, a desire to keep such substantive determinations with the courts with the most experience in that realm that led the creators of the SIJ statute to require state juvenile courts to make best interests findings. See Theo S. Liebmann, *Keeping Promises to Immigrant Youth*, 29 PACE L. REV. 511, 513 (2009) (describing special immigrant juvenile findings required of juvenile family courts as “matters within the traditional purview of family courts”). As a result, I argue here that best interests determinations should be kept in the realm of detention decisions, where social workers, often with advanced degrees in social work, serve as the UAC’s caseworkers.

138. See OFFICE OF REFUGEE RESETTLEMENT, *supra* note 57, at 143 (“The ORR releases an unaccompanied alien child (UAC) to a sponsor without unnecessary delay when the ORR determines that the detention of an UAC is not required either to secure the UAC’s timely appearance before the DHS or the immigration courts, or to ensure the UAC’s safety or the safety of others.”).

139. See *supra* note 111 and accompanying text.

140. *Id.*

141. RESSLER ET AL., *supra* note 17, at 187.

142. *Id.* at 229. One commentator argues that the “ambiguity and ambivalence that have come to surround” the best interests standard has been codified in § 402 of the Uniform Marriage and Divorce Act. JOSEPH GOLDSTEIN, ALBERT J. SOLNIT, SONJA GOLDSTEIN & ANNA FREUD, *THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE* 256 n.6 (1996). Section 402 reads:

The court shall determine custody in accordance with the best interests of the child. The court shall consider all relevant factors including: (1)

argues that any best interests analysis should: “safeguard the child’s need for continuity of relationships,”¹⁴³ “reflect the child’s sense of time,”¹⁴⁴ and “provide the least detrimental available alternative for safeguarding the child’s growth and development.”¹⁴⁵ A complete investigation of the meaning of “best interests of the child” is beyond the scope of this article, and is likely better reserved for experts in a different field of academia. However, following the model of Joseph Goldstien et al., when making reunification and transfer decisions, ORR should prioritize stability of relationships by stressing continuity because “children need stability of relationships for their healthy growth and development.”¹⁴⁶ When continuity is not possible, ORR should, at the very least, “act ‘quickly’ (in child time) to maximize each child’s opportunity either to restore stability to an existing relationship or to facilitate the establishment of new relationships.”¹⁴⁷ Finally, if all else fails, ORR should simply provide “that *specific placement* and *procedure for placement* which maximizes [the UAC’s] opportunity for being wanted and for maintaining, on a continuous, unconditional, and permanent basis, a relationship with at least one adult.”¹⁴⁸ If required to undertake such considerations, and further, to document the analysis in a transparent, accountable way, ORR discretion at these crucial points could be minimized, and the social constructs currently undermining implementation of UAC detention policy could be neutralized.

Additionally, once placement decisions have been made, the competing roles of DHS and ORR—namely, combating national security threats and caring for vulnerable and traumatized youth—must be further separated so as to provide UACs the utmost protection. This is especially true in a post-9/11 world,¹⁴⁹ because as “enforcement and immigration control concerns increasingly dominate the policy agenda, [] there is growing cause for concern.”¹⁵⁰ Essentially, ORR-contracted care providers should operate under a

the wishes of the child’s parent or parents as to his custody; (2) the wishes of the child as to his custodian; (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child’s best interests; (4) the child’s adjustment to his home, school, and community; and (5) mental and physical health of all individuals involved.

Unif. Marriage & Divorce Act § 402, 9A U.L.A. 282 (1998), *as reprinted in id.* at 256 n.6.

143. GOLDSTEIN ET AL., *supra* note 142, at 19-40.

144. *Id.* at 41-45.

145. *Id.* at 50-61.

146. *Id.* at 20.

147. *Id.* at 42.

148. *Id.* at 50.

149. *See* Uehling, *supra* note 18, at 846 (noting the effect of 9/11 on “our humanitarianism” in the realm of immigration).

150. Bhabha, *supra* note 19, at 282 (warning that the national security agenda subjects unaccompanied minors “to harsh immigration control measures, such as threats of removal, indefinite detention, or legal proceedings without access to professional representation, [which leaves] their ability to articulate their views or bring best interest considerations to the attention of decision makers . . . compromised”). Bhabha describes a situation in which,

“generous and inclusive policy that prioritizes protection over penalty and inclusion over exclusion.”¹⁵¹ Specifically, staff at each ORR-contracted care facility should receive child welfare training, cultural sensitivity training, and should be required to attend seminars akin to continuing education classes that discuss the types of situations that cause UACs to migrate and the effect it can have on their behavior, speech, and outlook. Study of the reality that UACs experience as “childhood” provides a significant, simple mechanism for combating the social constructs of childhood that ORR staff and contracted care staff assign to UACs based on gender, country of origin, and related factors.

B. Realizing the Full Potential of UAC-Specific Legal Relief: Towards Application of Substantive Law That Protects All Forms of Childhood

The constructs of childhood assigned to UACs on the basis of gender, country of origin, and related factors undermine the even application of immigration law, even UAC-specific legal relief, to UACs. Namely, two problematic features of UAC-specific legal relief have been identified: the disregard of asylum claims based on gang persecution, and the perpetual undervaluing of economic rights.¹⁵² The construction of children, especially male UACs, as threatening and deviant renders gang-based asylum claims essentially useless. This result ignores the reality of childhood for most of the UACs in custody, who hail from Central America where the gang problem is endemic.¹⁵³ To combat this social construct of childhood, the social visibility test for determining a particular social group should be reevaluated with regard to certain gang-based asylum claims.¹⁵⁴ As to the undervaluing of a UACs’ economic rights, recognizing that asylum law cannot address every calamity, but is rather designed as a remedy for particular types of persecution,¹⁵⁵ this article does not argue that asylum law should vindicate economic rights through the definition of a social group.¹⁵⁶ Instead, this article calls for child

as a direct result of the view of unaccompanied minors as a national security threat, “[a]t worst children are removed without any legal redress; or they abandon their claims and seek to be returned home irrespective of the consequences because they cannot see an alternative; alternatively they remain in the host country in a state of legal and emotional limbo.” *Id.*

151. Bhabha, *supra* note 137, at 217.

152. *See supra* notes 124-26 and accompanying text.

153. *See generally* USAID, CENTRAL AMERICA AND MEXICO GANG ASSESSMENT (2006), http://www.usaid.gov/locations/latin_america_caribbean/democracy/gangs_assessment.pdf.

154. *See infra* notes 157-64 and accompanying text.

155. For an extended discussion of this viewpoint, see Matthew E. Price, *Persecution Complex: Justifying Asylum Law’s Preference for Persecuted People*, 47 HARV. INT’L L.J. 413 (2006).

156. *See infra* notes 165-66 and accompanying text. For the opposite view see generally Singh, *supra* note 125, at 517 (calling for an amendment to “the United States’ statutory definition of refugee to specifically conceptualize violations of children’s economic rights as persecution on the basis of membership in a particular social group”).

advocates and policy makers in Congress to investigate the reality of economic hardship that consumes many UACs' childhood experiences and design a program to address it.

To qualify for asylum, an applicant must have suffered persecution on the basis of race, religion, nationality, membership in a particular social group, or political opinion.¹⁵⁷ Circuit courts repeatedly find against gang-related asylum claims because the proposed particular social group lacks social visibility.¹⁵⁸ Such decisions generally argue that society cannot discern outward characteristics of a person reflecting membership in, for example, the particular social group "former gang members" or "young boys who resist gang recruitment."¹⁵⁹ Unfortunately, this analysis addresses social visibility from the viewpoint of a member of U.S. society, who, indeed, may or may not know which youth are former members and which are current members. In the rural communities of many Central American countries, however, such information is widely known and the same "social visibility" rationale just simply does not apply.¹⁶⁰ The underlying incongruence directly results from the misconstrued constructs of childhood imposed on foreign UAC asylum applicants, which assumes that a UAC's childhood either mirrors that of the average childhood in the United States, or involves a childhood of either victimization or of deviance. Gang-based asylum claims are held up against the average U.S. childhood construct and when they do not align, the analysis tips in favor of assigning a construct of deviance rather than a construct of victimization.

One recent Seventh Circuit case seems to eschew this framework and instead recognizes "former gang membership" as a social group despite arguments regarding lack of social visibility.¹⁶¹ Specifically, Judge Richard Posner held that a "gang is a group, and being a former member of a group is a characteristic impossible to change, except perhaps by rejoining the group."¹⁶² Thus, Posner's opinion held that membership in the group "former gang members" met the definition of social group set out in case law.¹⁶³ Importantly, this decision recognizes the reality of the Central American situation.¹⁶⁴ Indeed,

157. 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1), 1231(b)(3) (2006).

158. *See, e.g.*, Ramos-Lopez v. Holder, 563 F.3d 855, 862 (9th Cir. 2009); Scatambuli v. Holder, 558 F.3d 53, 59-60 (1st Cir. 2009).

159. S-E-G-, 24 I. & N. Dec. 579, 583 (B.I.A. 2008).

160. Affidavit of Ernesto Bardales ¶ 18 (on file with author).

161. Benitez Ramos v. Holder, 589 F.3d 426 (7th Cir. 2009).

162. *Id.* at 429.

163. *Id.* at 436. Case law defines a social group as one whose members share "common characteristics that members of the group either cannot change, or should not be required to change because such characteristics are fundamental to their identities." *Cf.* Kasinga, 21 I. & N. Dec. 357, 366 (B.I.A. 1996); Acosta, 19 I. & N. Dec. 211, 233-34 (B.I.A. 1985).

164. For a discussion of the situation of gang violence in Central America, see generally, e.g., CLARE RIBANDO, CONG. RESEARCH SERV., GANGS IN CENTRAL AMERICA (2005), <http://fpc.state.gov/documents/organization/47140.pdf>; CLARE RIBANDO SEELKE, CONG. RESEARCH SERV., GANGS IN CENTRAL AMERICA (2008),

recognizing former gang membership as a social group could even promote national security interests in so far as it incentivizes youth to disassociate with gangs. In opening space for some gang-based asylum claims, immigration law could both combat the current set of social constructs imposed on UACs fleeing gang persecution (one of deviance), and simultaneously combat gangs, a perceived national security threat.

With regard to the undervaluing of UAC's economic rights, the current substantive immigration legal framework simply does not provide space for the vindication of these rights.¹⁶⁵ Asylum law's "membership in a particular social group" cannot serve as a catch all provision through which all reasons for transnational migration are boot-strapped to claims of persecution.¹⁶⁶ Furthermore, traditional definitions of "neglect" in the family court setting rightly defer to a parent's struggle to provide for their children such that poverty alone does not constitute neglect under most state dependency statutes.¹⁶⁷ As such, Special Immigrant Juvenile Status does not provide a proper forum for vindication of economic rights. Instead, a wholly new form of UAC-specific legal relief seems necessary to address the reality of economic hardship that consumes much of UACs' childhoods. Whether that relief takes the form of a new temporary work program for youth, a path to permanent residency, or intensive out-of-country development programs is beyond the scope of this article. However, this article does raise a call to advocates and policy makers to systematically investigate the economic rights violations of UACs in their countries of origin and craft a plan of action to address their "lost childhoods."

CONCLUSION

Child welfare advocates have made excellent strides in improving detention policy and immigration law for UACs. However, in order to progressively advance the rights of children in immigration law generally, and to provide even UACs meaningful enjoyment of the rights that child welfare advocates obtained for them, those same advocates must move beyond the liberal inclusion and structural bias critique models of advocacy and begin to combat the social constructs imposed on UACs during the pendency of their immigration proceedings. Essentially, advocates must proceed with the third phase embraced by their international legal feminists and gender and asylum

<http://openrcs.com/document/RL34112/2008-10-17/download/1013/>; INT'L HUMAN RIGHTS CLINIC, HARVARD LAW SCH., NO PLACE TO HIDE: GANG, STATE, AND CLANDESTINE VIOLENCE IN EL SALVADOR (2007), [http://www.law.harvard.edu/programs/hrp/documents/FinalElSalvadorReport\(3-6-07\).pdf](http://www.law.harvard.edu/programs/hrp/documents/FinalElSalvadorReport(3-6-07).pdf); USAID, *supra* note 153; WASHINGTON OFFICE ON LATIN AMERICA, CENTRAL AMERICAN GANG-RELATED ASYLUM: A RESOURCE GUIDE, 3 (2008), http://www.wola.org/popup_englishtext.php?page=http%3A/www.wola.org/media/Gangs/WOLA_Gang_Asyllum_Guide.pdf.

165. See Singh, *supra* note 125, at 519-25.

166. See generally Price, *supra* note 155.

167. See *supra* note 126 and accompanying text.

law counterparts—a “third world” critique that identifies and reveals the reality of childhoods all over the world and uses that reality to combat the myths of childhood that United States immigration law and detention policy prefer to protect. Only a shift in the advocacy paradigm will allow the reforms obtained thus far to affect the change that advocates desire: recognition and empowerment of UACs’ agency in the migration process and in the laws and procedures that shape that process.