

# WHY DOES THE FEDERAL GOVERNMENT GET A PASS? APPLYING BEST PRACTICES IN CHILD PROTECTION TO THE CIRCUMSTANCES OF MIGRANT CHILDREN AND FAMILIES

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*For too long, the United States has had a separate child-caring system for migrant children and families that operates alongside our domestic child welfare systems. The latter is a robust system focused on the principles of safety, well-being, and permanency; while the former flouts constitutional protections, separates children from parents, and perpetuates a system that is detaining children, warehousing them in large jail-like settings at worst, and sheltering them in large congregate care facilities at best. Children are being harmed, some irreparably.*

*Yet, if our child welfare laws reflect what we know to be proper standards for caring for vulnerable and traumatized children, why is it that these same protections are not afforded to migrant children and families? Why does the federal government get a pass? Does the fact that we are addressing the needs of migrant children and families alter the responsibilities of the agencies charged with caring for the children? What laws exist to hold the federal government accountable? And what would change if child protection principles were relied*

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*upon to guide the circumstances and care of migrant children in the United States? This Article seeks to answer these questions and to fully explore the application of child welfare principles in the immigration context, both in terms of family separation policies as well as the care and custody of migrant children.*

*It must be acknowledged that there are serious concerns with how our domestic foster care systems function, particularly their racist underpinnings, the disproportionate number of children and families of color involved within these systems, and the disparate outcome for children and families of color, especially Black and Native American children and families. Yet, we also must recognize that best practices in child protection, along with constitutional protections and international laws and norms, provide a necessary roadmap for ensuring that the basic rights and needs of migrant children and families are met. For when the government steps into the role of “parent” or caregiver, it must be held accountable for ensuring the well-being and protection of those in its custody whether they are a citizen or non-citizen. Accordingly, it is hoped that this Article is the beginning of a dialogue on why the federal government must cease flouting its own rules and policies and how it can begin to transform its policies to ensure that children are with family whenever possible, and if not, that they are well cared for and their needs met.*

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## INTRODUCTION

[T]he Government's practice of separating class members from their children, and failing to reunite those parents who have been separated, without a determination that the parent is unfit or presents a danger to the child violates the parents' substantive due process rights to family integrity under the Fifth Amendment to the United States Constitution . . .<sup>1</sup>

Beginning in July 2017, and likely earlier, our government began separating children from their parents solely because the parents were without immigration status and were arriving at our Southern border seeking asylum.<sup>2</sup> Images of crying and traumatized children were plastered throughout social and news media both home and abroad.<sup>3</sup> The public outcry was both sobering and somewhat surprising, as the

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1. *Ms. L. v. U.S. Immigr. & Customs Enf't*, 310 F. Supp. 3d 1133, 1142 (S.D. Cal. 2018).

2. *Id.* at 1136; *M.M.M. v. Sessions*, 318 F. Supp. 3d 310, 311 (D.D.C. 2018); Complaint for Declaratory and Injunctive Relief at 11, *Dora v. Sessions*, No. 18-cv-01938 (D.D.C. Aug. 17, 2018); *see also* U.S. DEP'T OF HEALTH & HUM. SERVS., OFF. OF INSPECTOR GEN., OEI-BL-18-00511, SEPARATED CHILDREN PLACED IN OFFICE OF REFUGEE RESETTLEMENT CARE (2019) (conducting a review to determine the number and status of separated children who have entered ORR care, including but not limited to the subset of children covered by *Ms. L.*).

3. *See, e.g.*, Doha Madani, *Children Separated from Parents at the Border Heard in Heartbreaking New Audio*, HUFFPOST (June 18, 2018), [https://www.huffpost.com/entry/publica-recording-children-crying-family-separation\\_n\\_5b2811a6e4b0fb9e9a3d035](https://www.huffpost.com/entry/publica-recording-children-crying-family-separation_n_5b2811a6e4b0fb9e9a3d035) [<https://perma.cc/39SF-NY5X>]; *see also* Sophie Evans, *Children Torn from Parents Under Trump's New Immigration Policy Are 'Kept in Cages and Staff Can't Touch Them'*, MIRROR (Jun. 18, 2018), <https://www.mirror.co.uk/news/us-news/children-torn-parents-under-trumps-12732982> [<https://perma.cc/2ED6-DDY7>]; Oliver Laughland, *'Going Through Hell' at the Border: Parents Split from Children Tell of Anguish*, GUARDIAN (Jun. 22, 2018), <https://www.theguardian.com/us-news/2018/jun/22/going-through-hell-at-the-border-parents-split-from-children-tell-of-anguish> [<https://perma.cc/79BU-QTPQ>].

sentiments against these outrageous actions crossed political lines<sup>4</sup> and traversed various professional disciplines.<sup>5</sup>

In most cases, there was absolutely no concern about whether the parent was unfit or presented a safety risk to the child.<sup>6</sup> In many instances, the parent and child were separated so that the parent could be prosecuted for the alleged offense of illegally entering the country; in other cases, the parents had presented themselves at a Port of Entry and requested asylum, but the children and parents nonetheless were separated.<sup>7</sup>

In declaring these separation policies and practices illegal, the U.S. District Court for the Southern District of California looked to well-established child welfare principles, as well as the constitutional precepts of family integrity, namely the due process rights of parents to rear and raise their children.<sup>8</sup> Additionally, the court stressed the irreparable and severe harm and trauma that can and will befall children when they are forcibly separated from their parent or parents.<sup>9</sup> Because of the severity of this harm, the court also emphasized the necessity of expeditiously reunifying children with parents.<sup>10</sup>

But this application of longstanding constitutional principles and child welfare tenets must not end with these declarations, as children and families continue to be harmed by various policies and practices of our federal government. The U.S. Department of Homeland Security (DHS) continues to separate children from parents if there is any concern that the parent has had any criminal history, a practice

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4. See Laura Bush, *Separating Children from Their Parents at the Border 'Breaks My Heart'*, WASH. POST (June 17, 2018), [https://www.washingtonpost.com/opinions/laura-bush-separating-children-from-their-parents-at-the-border-breaks-my-heart/2018/06/17/f2df517a-7287-11e8-9780-b1dd6a09b549\\_story.html](https://www.washingtonpost.com/opinions/laura-bush-separating-children-from-their-parents-at-the-border-breaks-my-heart/2018/06/17/f2df517a-7287-11e8-9780-b1dd6a09b549_story.html) [https://perma.cc/74WY-JFUH]; see also Michelle Goldberg, *Opinion: The Terrible Things Trump Is Doing in Our Name*, N.Y. TIMES (June 21, 2019), <https://www.nytimes.com/2019/06/21/opinion/family-separation-trump-migrants.html> [https://perma.cc/FLZ8-Z6SZ].

5. See Colleen Kraft, *Op-Ed: Separating Parents from Their Kids at the Border Contradicts Everything We Know About Children's Welfare*, L.A. TIMES (May 3, 2018, 4:15 AM), <https://www.latimes.com/opinion/op-ed/la-oe-kraft-border-separation-suit-20180503-story.html> [https://perma.cc/5DXP-93EK].

6. See *Ms. L.*, 310 F. Supp. 3d at 1137.

7. *Id.*

8. *Id.*

9. *Id.* at 1147.

10. *Id.* at 1149.

that was permitted by the U.S. District Court for the Southern District of California, the same court that found most separations to be unlawful.<sup>11</sup> Children also are regularly separated from family caretakers, such as adult siblings and grandparents.<sup>12</sup> And the government continues to ignore foreseeable parent-child separations in implementing harsh border closure policies such as Title 42, which began at the direction of the Trump administration and remains under the Biden administration, with plans to end the policy on May 23, 2022.<sup>13</sup> Under this policy, no one has been permitted to enter the

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11. See Memorandum in Support of Motion to Enforce Preliminary Injunction at 6, *Ms. L.*, No. 18-cv-00428, (S.D. Cal. July 30, 2019), 2019 WL 3493903; see also Riane Roldan & Alana Rocha, *Family Separations Aren't Over. As Many as Five Kids per Day Are Separated from Their Parents at the Border*, TEX. TRIB. (July 12, 2019, 12:00 AM), <https://www.texastribune.org/2019/07/12/migrant-children-are-still-being-separated-parents-data-show> [<https://perma.cc/TC5C-RSW3>]; YOUNG CTR. FOR IMMIGRANT CHILD.'S RTS., FAMILY SEPARATION IS NOT OVER 10–11 (2020), <https://static1.squarespace.com/static/597ab5f3beba625aaf45/t/5f032e87ff32c80f99c7fee5/1594044048699/Young+Center-Family+Separation+Report-Final+PDF.pdf> [<https://perma.cc/D583-MQWR>].

12. See Rick Jervis, *Migrant Children at Border Are Still Being Separated from Relatives for Weeks Under Biden Administration*, USA TODAY (Mar. 6, 2021), <https://www.usatoday.com/story/news/nation/2021/03/06/migrant-children-facility-used-house-minors-separated-family/4587455001> [<https://perma.cc/3L3T-2REM>]; see also Kristina Cooke & Mica Rosenberg, *Where Is My Aunt? Kids Separated from Relatives at the Border Strain U.S. Shelters*, REUTERS (Mar. 30, 2021), <https://www.reuters.com/article/us-usa-immigration-separations/where-is-my-aunt-kids-separated-from-relatives-at-the-border-strain-u-s-shelters-idUSKBN2BM149> [<https://perma.cc/788W-L5BE>].

13. Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists, 85 Fed. Reg. 65,806 (U.S. Dep't of Health & Hum. Servs. Oct. 16, 2020); Public Health Determination Regarding an Exception for Unaccompanied Noncitizen Children, 86 Fed. Reg. 38,717 (U.S. Dep't of Health & Hum. Servs. July 22, 2021); see also Angelina Chapin, *Parents Stuck in Mexico Are Sending Kids as Young as 4 Across the U.S. Border Alone*, HUFF POST (Dec. 10, 2019, 05:00 AM), [https://www.huffpost.com/entry/remain-in-mexico-policy-immigrant-kids\\_n\\_5deeb143e4b00563b8560c69](https://www.huffpost.com/entry/remain-in-mexico-policy-immigrant-kids_n_5deeb143e4b00563b8560c69) [<https://perma.cc/TVT3-HCN4>]. But see Press Release, U.S. Dep't Homeland Sec., Statement by Secretary Mayorkas on CDC's Title 42 Order Termination (Apr. 1, 2022), <https://www.dhs.gov/news/2022/04/01/statement-secretary-mayorkas-cdcs-title-42-order-termination> [<https://perma.cc/Z3U3-LN4V>] (ending the Title 42 Expulsion Order as of May 23, 2022). However, a new lawsuit brought by Arizona, Louisiana, and Missouri requesting that Title 42 be kept in place beyond May 23, 2022 might alter the plans of the Biden administration. Minutes from Status Conference, *Louisiana v. CDC*, No. 22-cv-885, (W.D. La. Apr. 25, 2022), <https://storage.courtlistener.com/recap/gov.uscourts.lawd.188754/gov>.

country due to the COVID-19 pandemic regardless of whether the person was infectious.<sup>14</sup> The Biden administration rescinded the policy but only for unaccompanied children,<sup>15</sup> creating another *de facto* family separation policy as desperate parents arriving at the border with their children and who were not permitted to enter were thus forced to then send their children back to the border alone.<sup>16</sup> The children, unless from Mexico or Canada, were then designated as unaccompanied minors, permitted entry, placed into “removal proceedings” (where the federal government is seeking to remove them through a court process), and placed into the custody of the U.S. Department of Health and Human Services (DHHS).<sup>17</sup>

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uscourts.lawd.188754.34.0\_1.pdf [https://perma.cc/75QX-TP6C]; Miriam Jordan & Eileen Sullivan, *Judge Says Migrants Must Still Be Denied Entry for Health Reasons*, N.Y. TIMES (Apr. 25, 2022), <https://www.nytimes.com/2022/04/25/us/title-42-migrants-biden-border.html> [https://perma.cc/9HC9-6E6N]. The Remain in Mexico program (MPP) is another governmental program that has separated families, as some parents became so desperate, due to unsafe living quarters, that they have sent their children to the border alone. Chapin, *supra*.

14. Public Health Determination Regarding an Exception for Unaccompanied Noncitizen Children, 86 Fed. Reg. at 38,717.

15. *See id.* But *see* Texas v. Biden, No. 21-cv-0579-P (N.D. Tex. Mar. 4, 2022), [https://storage.courtlistener.com/recap/gov.uscourts.txnd.347182/gov.uscourts.txnd.347182.100.0\\_1.pdf](https://storage.courtlistener.com/recap/gov.uscourts.txnd.347182/gov.uscourts.txnd.347182.100.0_1.pdf) [https://perma.cc/AT36-TKWX] (ordering that the Biden administration can no longer exempt unaccompanied children from the Title 42 Expulsion policy).

16. *See* Michele Statz & Lauren Heidbrink, *Unintended Trauma: The Role of Public Health Policy in the Detention of Migrant Children*, LANCET REG'L HEALTH AMS. 1 (July 14, 2021), [https://www.thelancet.com/journals/lanam/article/PIIS2667-193X\(21\)00004-1/fulltext](https://www.thelancet.com/journals/lanam/article/PIIS2667-193X(21)00004-1/fulltext) [https://perma.cc/S8SL-CQXH]. The “Remain in Mexico” policy (MPP) also led to forced separations. *See Children's Rights Groups File Supreme Court Amicus Brief Telling the Stories of Children Harmed by “Remain in Mexico”*, YOUNG CTR. FOR IMMIGRANT CHILD.'s RTS. (Jan. 27, 2021), <https://www.theyoungcenter.org/stories/2021/1/27/rights-organizations-file-amicus-supreme-court-brief-telling-the-stories-of-children-harmed-by-the-remain-in-mexico-policy> [https://perma.cc/Y2EJ-8D8K]; *see also End MPP for All*, YOUNG CTR. FOR IMMGR. CHILDREN'S RTS., <https://www.theyoungcenter.org/mpp-harms-children> [https://perma.cc/BZY5-WD7P].

17. For a summary of what happens to unaccompanied minors when they arrive at a U.S. border, why so many unaccompanied children are fleeing to the U.S., and a trajectory of the immigration removal system that most unaccompanied children must participate in, please see AM. IMMIGR. COUNCIL, A GUIDE TO CHILDREN ARRIVING AT THE BORDER: LAWS, POLICIES AND RESPONSES 1 (2015), [https://www.americanimmigrationcouncil.org/sites/default/files/research/a\\_guide\\_to\\_children\\_arriving\\_at\\_the\\_border\\_and\\_the\\_laws\\_and\\_policies\\_governing\\_our\\_response.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/a_guide_to_children_arriving_at_the_border_and_the_laws_and_policies_governing_our_response.pdf) [https://perma.cc/7E33-WS3B].

The situation is equally concerning for the children once they have been deemed unaccompanied minors, either because they actually arrived alone or because they have been separated from a parent or caregiver.<sup>18</sup> As is evident from frequent news reports, showing children in cages, tent camps, and huge jail-like facilities,<sup>19</sup> migrant children continue to be placed in environments that are not suitable for animals, much less children. Even children as young as the age of five are not permitted to initially reside in traditional foster homes.<sup>20</sup> Many children ultimately will be placed with family or close friends, dubbed

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18. 6 U.S.C. § 279(g)(2). Pursuant to this statute, the term is “unaccompanied alien child.” *Id.* However, this Article will refer to these children as “unaccompanied minors” or “unaccompanied children.” An unaccompanied child is defined by statute as a child

who (A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom (i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody.

*Id.*

19. See Geoff Bennett, Julia Ainsley & Jacob Soboroff, *Record Number of Unaccompanied Migrant Children Held in Facilities Meant for Adults*, NBC NEWS (Mar. 8, 2021), <https://www.nbcnews.com/news/investigations/record-number-unaccompanied-migrant-children-held-facilities-meant-adults-n1260097> [https://perma.cc/2S4D-PXYN] (showing children and workers at a tent encampment); see also Nomaan Merchant, *Children Packed into Border Patrol Tent for Days on End*, AP NEWS (Mar. 12, 2021), <https://apnews.com/article/immigration-coronavirus-pandemic-border-patrols-texas-9b959d739d59f03dd5873927171f2e29> (emphasizing that children at the border are living in packed conditions); *Migrant Children in US Living in Mass Shelters, Little Oversight*, ALJAZEERA (May 11, 2021), <https://www.aljazeera.com/news/2021/5/11/migrant-children-in-us-living-in-mass-shelters-little-oversight> [https://perma.cc/F4CQ-HZSY] (explaining that tens of thousands of children are packed in facilities); Angelina Chapin, *‘It Feels Like We Are Prisoners’: Migrant Children Describe Trauma at Florida Detention Center*, HUFFPOST (May 31, 2019), [https://www.huffpost.com/entry/migrant-children-describe-life-at-florida-detention-center\\_n\\_5cf19b49e4b0a1997b6a85ab](https://www.huffpost.com/entry/migrant-children-describe-life-at-florida-detention-center_n_5cf19b49e4b0a1997b6a85ab) [https://perma.cc/J582-6GKK] (illustrating that migrant children stuck in facilities are experiencing immense trauma); Angelina Chapin, *Migrant Children Describe Tent City as ‘Punishment,’ Experts Say*, HUFFPOST (Oct. 2, 2018), [https://www.huffpost.com/entry/migrant-children-say-being-in-texas-tent-city-is-punishment\\_n\\_5bb2a902e4b00fe9f4f9ab0f](https://www.huffpost.com/entry/migrant-children-say-being-in-texas-tent-city-is-punishment_n_5bb2a902e4b00fe9f4f9ab0f) [https://perma.cc/S4FK-JRG3] (noting that the facilities that migrant children are staying in constitute a humanitarian crisis).

20. See Kevin McCoy, *New York Nonprofit Cayuga Centers Takes Care of Migrant Kids—and Triples Revenue*, USA TODAY (July 23, 2018), <https://www.usatoday.com/story/money/2018/07/23/cayuga-migrant-children-trump-parents-separated-zero-tolerance/734501002> [https://perma.cc/4XYU-VTGF] (noting that Cayuga Centers places the children it serves in the homes of bilingual foster families by night and provides services in the Center by day).

“sponsors.”<sup>21</sup> However, for those children who are unable to be placed with family sponsors, they are forced to live indefinitely in subpar and inadequate conditions.<sup>22</sup> The situation has become even more dire, given the COVID-19 pandemic and the serious risks to children and adults forced to reside in congregate care settings, where safety and health precautions are compromised.<sup>23</sup>

What is abundantly clear is that the current state of affairs cannot continue. While the government continues to flout constitutional protections and perpetuate a system that is operating contrary to federal mandates, children are being harmed, some irreparably.<sup>24</sup> In order to improve the situation, the federal government need look no further than our state and federal child welfare laws and principles.

At the state level, statutory provisions and rules restrict state intervention into the family unless there is imminent risk of harm;<sup>25</sup> protect children in out-of-home care through mandates and regulations;<sup>26</sup> and define through laws and court rulings what it means to act in the “best interest[]” of a child.<sup>27</sup> Federal laws and regulations ensure that the needs of children in state care are met and that their well-being is protected.<sup>28</sup> Congress has generally used amendments to

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21. See Graham Kates, Angel Canales & Manuel Bojorquez, *Thousands of Unaccompanied Migrant Children Could Be Detained Indefinitely*, CBS NEWS (July 23, 2019), <https://www.cbsnews.com/news/thousands-of-unaccompanied-migrant-children-could-be-detained-indefinitely> [<https://perma.cc/BT47-MU25>].

22. *Id.*

23. See Jaimie P. Meyer et al., *COVID-19 and the Coming Epidemic in US Immigration Detention Centres*, 20 LANCET: INFECTIOUS DISEASES 646, 646–47 (2020); see also Talha Burki, *Prisons Are “in No Way Equipped” to Deal with COVID-19*, 395 LANCET 1411, 1412 (2020); Adolfo Flores & Hamed Aleaziz, *Detained Immigrant Children Didn't Have Adequate Masks During A COVID Outbreak, Whistleblowers Allege*, BUZZFEED NEWS (July 29, 2021, 3:27 PM), <https://www.buzzfeednews.com/article/adolfoflores/whistleblowers-fort-bliss-immigrant-children>.

24. Meyer et al., *supra* note 23, at 647.

25. See e.g., CHILD.'S JUST. TASK FORCE, ILL. DEP'T OF CHILD. & FAM. SERVS., MANUAL FOR MANDATED REPORTERS 7 (rev. ed. 2020) (elucidating the limitations of Illinois state law to intervene in child welfare situations).

26. *Id.*

27. *Id.*

28. See e.g., Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended at 42 U.S.C. § 671); Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 11 Stat. 2115 (codified as amended at 42 U.S.C.A. § 679); Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949. Most recently, the Family First Prevention Services Act was

the Social Security Act<sup>29</sup> to legislate in this area through a funding schema for state and local child welfare programs.<sup>30</sup> In other words, states and localities must comply with these federal laws and regulations to receive federal funds. Accordingly, DHHS regularly monitors state and local child welfare agencies to ensure compliance.<sup>31</sup>

Ironically, this is the same federal agency, DHHS, along with the Department of Homeland Security, that is charged with caring for migrant youth.<sup>32</sup> Yet, DHHS—specifically its unit known as the Office of Refugee Resettlement (ORR)—regularly ignores these very same child welfare laws and policies.<sup>33</sup> How is this possible? If our child welfare laws reflect what we know to be proper standards for caring for vulnerable and traumatized children, why is it that these same protections are not afforded to migrant children and families? Why does the federal government get a pass? Does the fact that we are addressing the needs of migrant children alter the responsibilities of the agencies charged with caring for the children? What laws exist to hold the federal government accountable? And what would change if child welfare principles were relied upon to guide the circumstances and care of migrant children in the United States? This Article seeks to answer these questions and to fully explore the application of child welfare principles in the immigration context.

The utilization of child protection principles to address the treatment of migrant children and families is a relatively new phenomenon, one which needs to be more fully explored, both within the family separation context as well as in other settings concerning

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signed into law as part of the Bipartisan Budget Act on February 9, 2018. Family First Prevention Services Act, Pub. L. No. 115-123, 132 Stat. 232 (2018). This Act amended Title IV-E and Title IV-B of the Social Security Act and aims to change child welfare systems across the country by providing services to families who are at risk of entering foster care and by limiting the use of congregate care facilities as foster care placements. *Id.*

29. 42 U.S.C. §§ 301-1305 (Supp. 4 1934).

30. U.S. DEP'T OF HEALTH & HUM. SERVS., CHILD WELFARE POLICY MANUAL § 5.1 (2022).

31. *Id.*

32. *About the Program*, OFF. OF REFUGEE RESETTLEMENT, <https://www.acf.hhs.gov/orr/programs/ucs/about> [<https://perma.cc/3EZR-93JE>].

33. Kristen Torres, *Number Unknown: The Egregious Family Separation Policy Had No Plan*, IMPRINT (Feb. 5, 2019), <https://imprintnews.org/child-welfare-2/egregious-family-separation-policy-had-no-plan/33687> [<https://perma.cc/V8DZ-JA3X>].

immigrant children and families.<sup>34</sup> For too long, we have had a “stand-alone child welfare system” for migrant children and families that “operates parallel to [our] domestic systems.”<sup>35</sup>

In this Article, Part I first surveys the various child welfare laws that have been promulgated since the 1970s<sup>36</sup> as well as the Convention on the Rights of the Child,<sup>37</sup> in order to explicate what are the relevant and best practices from child protection doctrines. Part II then explains current immigration laws and policies, illustrating how differently migrant children and families are treated as compared to children and families enmeshed in our state and local child welfare systems. This Part not only addresses what is happening to children and families at our Southern border but describes what happens to children when they are taken into the custody of DHHS, either because they have been separated from their parent or because they have arrived in this country without a guardian or parent and have been designated as an unaccompanied minor.<sup>38</sup>

In Part III, the analysis turns to a discussion of how and why our child welfare laws should apply to migrant children and their circumstances. To date, the government has taken the position that because unaccompanied minors are served by DHHS, namely ORR, it is not bound by the laws that govern state and local child welfare agencies.<sup>39</sup> However, the written policies of ORR state that they adhere to “child welfare best practices,”<sup>40</sup> and the Trafficking Victims Protection Reauthorization Act<sup>41</sup> mandates that children in the custody of ORR

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34. *But see* Adam Avrushin & Maria Vidal de Haymes, *Well-Being and Permanency: The Relevance of Child Welfare Principles for Children Who Are Unaccompanied Immigrants*, 96 CHILD WELFARE 107, 122–26 (2019).

35. Thomas M. Crea et al., *Unaccompanied Migrant Children in the United States: Predictors of Placement Stability in Long Term Foster Care*, 73 CHILD. & YOUTH SERVS. REV. 93, 95 (2017).

36. *See* KASIA O’NEILL MURRAY & SARAH GESIRIECH, PEW CHARITABLE TRS., A BRIEF LEGISLATIVE HISTORY OF THE CHILD WELFARE SYSTEM 1–6 (2004).

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

38. Children who are separated from parents and placed into the custody of DHHS are also designated and treated as unaccompanied minors, even though they arrived with at least one parent.

39. *Children Entering the United States Unaccompanied*, OFF. REFUGEE RESETTLEMENT § 1.1 (July 14, 2021).

40. *Id.*

41. 22 U.S.C. §§ 7101-7114.

must be placed “in the least restrictive setting” in their best interest.<sup>42</sup> Thus, while child welfare laws are aimed at ensuring that state and local agencies who receive federal funds are complying with best practices, it is incumbent to look to these laws to understand what appropriate child welfare practices are. There also are delineations of “best interest” principles and child protections in international law, namely the Convention on the Rights of the Child.<sup>43</sup>

Finally, this Article concludes with a description of what the nation’s immigration system would look like for children if child protection principles were applied and the federal government complied with the same laws and policies that govern states and local municipalities when these institutional entities take custody of children. If this were to occur, all migrant children would be represented by at least a *guardian ad litem*, if not an attorney, or both. The focus of any decisions about the child and of any immigration court proceedings would use a best interest of the child standard. Children would not be separated from parents unless there was imminent risk of harm and reasonable efforts had been made to prevent the separation. And if they did need to be separated, or if they arrived in this country alone, all efforts would be made to connect children with kin, and if they could not be released to family, to be placed in the most family-like setting available. Additionally, for those who remain in the custody of ORR long term, there would be a system in place to ensure that the children’s well-being is paramount and that all children are safe and on a path toward permanency or self-sufficiency, as these are core child protection principles.

No doubt there are serious concerns with how our domestic child welfare (foster care) system functions, particularly its racist underpinnings, the disproportionate number of children and families of color involved within these systems, and the disparate outcome for children and families of color, especially Black and Native American children and families.<sup>44</sup> It also is extremely troubling that these

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42. 8 U.S.C. § 1232(c)(2)(A).

43. See CRC, *supra* note 37, art. 3. While the Convention on the Rights of the Child has never been submitted to and ratified by the U.S. Senate, the U.S. is a signatory to the Convention, and thus cannot act against the principles of the convention, even if it is not bound by its terms.

44. See *Disproportionality and Race Equity in Child Welfare*, NAT’L CONF. STATE LEGISLATURES (Jan. 26, 2021), <https://www.ncsl.org/research/human-services/disproportionality-and-race-equity-in-child-welfare.aspx> [https://perma.cc/LU62-

agencies are seldom in compliance with federal and state laws and regulations.<sup>45</sup> Calls to abolish and/or reimagine child welfare systems,<sup>46</sup> which some have aptly named “family regulation system[s],”<sup>47</sup> must be heeded and must include the needs of migrant children and families. But we also must not forget that basic child welfare principles, along with constitutional protections and international human rights, provide a necessary roadmap for ensuring that the basic needs of migrant children are met. Additionally, these principles guarantee that the federal government is meeting its *parens patriae* (parent of the Nation) obligations, referring to the authority of the state to act as the “parent” of any vulnerable child or individual who is in need of protection.<sup>48</sup> For when the government steps into the role of “parent” or caregiver, it must be held accountable for ensuring the well-being and protection of those in its custody, whether they are a citizen or non-citizen. Accordingly, it is hoped that this Article is the

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M8PS]; Dorothy Roberts, *Race and Class in the Child Welfare System*, PBS FRONTLINE, <https://www.pbs.org/wgbh/pages/frontline/shows/fostercare/caseworker/roberts.html> [<https://perma.cc/95VR-FFYN>]. See generally Jessica Dixon, *The African-American Child Welfare Act: A Legal Redress for African-American Disproportionality in Child Protection Cases*, 10 BERKELEY J. AFR.–AM. L. & POL’Y 109, 110 (2008).

45. See Josh Gupta-Kagan, *America’s Hidden Foster Care System*, 72 STAN. L. REV. 841, 898 (2020); see also Reese Oxner, “Serious, Harmful Consequences”: Texas Continues Placing Foster Children in Harm’s Way, *Court Monitors Find*, TEX. TRIB. (May 6, 2021), <https://www.texastribune.org/2021/05/06/texas-foster-care-system-lawsuit> [<https://perma.cc/V83C-2FG7>]; Daniel Heimpel *Analysis: 11 States Struggle to Meet Federal Education Requirements for Foster Youth*, IMPRINT (Jan. 17, 2018), <https://imprintnews.org/analysis/analysis-11-states-struggle-meet-federal-education-requirements-foster-youth/29482> [<https://perma.cc/8UJA-9PVE>].

46. See DOROTHY ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD* (2022); Alan J. Dettlaff et al., *It Is Not a Broken System, It Is a System that Needs to Be Broken: The upEND Movement to Abolish the Child Welfare System*, 14 J. PUB. CHILD WELFARE 500, 508–09 (2020); see also Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 525–26, 563–65, 567–69 (2019).

47. Emma Williams, ‘Family Regulation,’ Not ‘Child Welfare’: *Abolition Starts with Changing Our Language*, IMPRINT (July 28, 2021, 11:45 PM), <https://imprintnews.org/opinion/family-regulation-not-child-welfare-abolition-starts-changing-language/45586> [<https://perma.cc/5H4E-G9MH>]; see Ava Cilia, *The Family Regulation System: Why Those Committed to Racial Justice Must Interrogate It*, HARV. CIV. RTS.-CIV. LIBERTIES L. REV. (Feb. 17, 2021), <https://harvardcrcl.org/the-family-regulation-system-why-those-committed-to-racial-justice-must-interrogate-it> [<https://perma.cc/Q844-T7XZ>].

48. *Parens Patriae*, BLACK’S LAW DICTIONARY (8th ed. 2004) (“Latin [for] ‘parent of his or her country’” and referring to “[a] doctrine by which a government [may] prosecute a lawsuit . . . on behalf of someone who is under a legal disability.”).

beginning of a dialogue on why the federal government must cease flouting its own rules and policies and how it can begin to transform its policies to ensure that children are with family whenever possible, and if not, that they are well cared for and their needs met.

## I. SURVEY OF CHILD WELFARE LAWS AND PRINCIPLES

### A. *Constitutional Law Protects the Sanctity of the Family*

When the jurisprudence of the family is surveyed in depth, it becomes clear that the United States Constitution protects the family as a sacrosanct part of our society. It has long been recognized that interference in the family sphere is inappropriate, as freedom of family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.<sup>49</sup> A host of U.S. Supreme Court cases highlight the importance of the family and the level of respect and protections that have remained through passing generations: *Meyer v. Nebraska*,<sup>50</sup> *Pierce v. Society of Sisters*,<sup>51</sup> *Prince v. Massachusetts*,<sup>52</sup> *Moore v. City of East Cleveland*,<sup>53</sup> *Wisconsin v. Yoder*.<sup>54</sup> Although the facts of these cases range from compulsory education laws,<sup>55</sup> to a city housing ordinance defining who is allowed to live in a home,<sup>56</sup> the holdings have “consistently acknowledged a ‘private realm of family life which the state cannot enter.’”<sup>57</sup> Moreover, the Supreme Court has long recognized family integrity to be a core interest protected by the

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49. See *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (quoting *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974)) (illustrating that the Supreme Court has upheld an individual’s personal choice in matters relating to marriage and family life).

50. 262 U.S. 390, 401 (1923).

51. 268 U.S. 510, 535 (1925).

52. 321 U.S. 158, 165 (1944).

53. 431 U.S. 494, 500 (1977).

54. 406 U.S. 205, 213–15 (1972).

55. See *Meyer*, 262 U.S. at 400.

56. See *Moore*, 431 U.S. at 500.

57. *Id.* at 499 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)); see *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (finding that state involvement with respect to the decision to enter into a marriage was erroneous because those are matters of family life privacy); see also *Obergefell v. Hodges*, 576 U.S. 644, 666 (2015) (“Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make.”).

Constitution.<sup>58</sup> In fact, the “interest of parents in the care, custody, and control of their children [] is perhaps the oldest of the fundamental liberty interests recognized by this Court.”<sup>59</sup> In other words, “[t]he fundamental theory of liberty upon which all governments in this Union repose” excludes the power of the State to abridge the sanctity of family.<sup>60</sup>

### *B. State Law Prioritizes and Supports Keeping Children with Family*

#### *1. The importance of the family*

State laws also have prioritized the importance of the family and of keeping children with family whenever possible. In Washington State, its Code “declares that the family unit is a fundamental resource of American life which should be nurtured” and mandates “that the family unit should remain intact unless a child’s right to conditions of basic nurture, health, or safety is jeopardized.”<sup>61</sup> Iowa has declared that to separate a child from their parents “inflicts a unique deprivation of a constitutionally protected liberty interest.”<sup>62</sup> While in Oregon, there is support for “preserv[ing] family life” by “stabilizing the family.”<sup>63</sup> In addition, Oregon has declared there is a “strong preference” that children should live “with their own families.”<sup>64</sup> Finally, the State of California has held that protecting the physical, emotional, and psychological health of minors and preserving and fostering the parent-child relationship “are extremely important interests that rise to the level of ‘compelling interests’ for purposes of constitutional analysis.”<sup>65</sup>

#### *2. Imminent risk*

In keeping with the principle of preserving the sanctity of the family, the government generally cannot remove a child from the care and

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58. See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (concluding that there is a “fundamental liberty interest of natural parents in the care, custody, and management of their child”).

59. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion).

60. See *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925).

61. WASH. REV. CODE ANN. § 13.34.020 (West 2022).

62. *In re M.S.*, 889 N.W.2d 675, 677–78 (Iowa Ct. App. 2016) (en banc).

63. OR. REV. STAT. ANN. § 419B.007 (West 2021).

64. *Id.* § 419B.090(5) (West 2021).

65. *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 823 (Cal. 1997).

custody of the parent absent “immediate danger” to the child’s safety.<sup>66</sup> While this standard is defined differently by each state, and also has been found to be applied in a racially biased manner,<sup>67</sup> it typically refers to a serious safety danger to a child that is likely to occur immediately. Moreover, any finding of imminent risk of harm made by a child protection agency that results in a child being removed from his or her parent or parents must be quickly reviewed by a court to determine if such a determination was merited and if the child should remain separated from their parents.<sup>68</sup>

The imminent risk of harm standard is reiterated in various constructions in state codes throughout the nation. For example, in New Jersey, a child may only be removed from his or her parent if the child is deemed to be in “imminent danger,” and following such a removal, there must be a court hearing within “two court days” to determine if such removal was warranted and whether the child should remain in state custody.<sup>69</sup> Likewise, in Michigan,

[a]n officer may . . . take [a] child into protective custody if . . . the officer has reasonable grounds to believe that a child is at substantial risk of harm or is in surroundings that present an imminent risk of harm and the child’s immediate removal from those surroundings is necessary to protect the child’s health and safety.<sup>70</sup>

Similarly, in Arizona, the government is prohibited from separating a parent and child absent exigent circumstances, which are limited to situations where “there is probable cause to believe that the child is likely to suffer serious harm,” and there is no alternative that would protect the child’s health or safety.<sup>71</sup>

### *C. State Law Instructs that the Focus Must Be on the Best Interest of the Child*

While the “best interest” standard has been the subject of much concern with regard to whether it is applied in a non-racist and

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66. U.S. DEP’T OF HEALTH & HUM. SERVS., CHILD.’S BUREAU, HOW THE CHILD WELFARE SYSTEM WORKS (2020) (a child must be at risk of “immediate danger” before a state can remove that child from the custody of his caregiver).

67. See Vivek Sankaren, *With Child Welfare, Racism Is Hiding in the Discretion*, IMPRINT (June 21, 2020), <https://imprintnews.org/child-welfare-2/with-child-welfare-racism-is-hiding-in-the-discretion/44616> [<https://perma.cc/ZGU9-R5YS>].

68. See, e.g., N.J. STAT. ANN. §§ 9:6-8.29, 8.30 (West 2021).

69. *Id.*

70. MICH. CT. R. 3.963.

71. ARIZ. REV. STAT. ANN. § 8-821 (2018).

culturally sensitive manner,<sup>72</sup> every state, the District of Columbia, and Puerto Rico require courts to consider the “‘best interests’ of the child” when making “placement and custody determinations, safety and permanency planning, and proceedings for termination of parental rights.”<sup>73</sup> While the term ‘best interests of the child’ is not uniformly defined, it generally refers to the courts’ analysis in determining what actions, services, and orders will best help a child, including who is best situated to take care of that child.<sup>74</sup> Such decisions are generally made “by considering a number of factors related to the child’s circumstances and the parent or caregiver’s circumstances and capacity to parent, with the child’s ultimate safety and well-being the paramount concern.”<sup>75</sup>

A survey of state statutes conducted by the Children’s Bureau of the U.S. Department of Health and Human Services identified the following as “Guiding Principles” most frequently articulated in various states’ statutes concerning best interest determinations: “[t]he importance of family integrity and preference for avoiding removal of the child from [their] home”; “[t]he health, safety, and/or protection of the child”; “[t]he importance of timely permanency decisions”; and “[t]he assurance that a child removed from [their] home will be given care, treatment, and guidance that will assist the child in developing into a self-sufficient adult.”<sup>76</sup> In addition, there is consistency among the states in terms of factors that are commonly considered by courts making best interest determinations. The factors include the following: (1) the child’s relationship with his or her family members, household members, or other caregivers; (2) the parents’ ability to maintain a safe home with sufficient access to food, medical care, and clothing; (3) the child’s physical and mental health needs; (4) the

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72. See Cynthia R. Mabry, *The Browning of America—Multicultural and Bicultural Families in Conflict: Making Culture a Customary Factor for Consideration in Child Custody Disputes*, 16 WASH. & LEE J. C.R. & SOC. JUST. 413, 414–15 (2010) (noting that most states do not require courts to consider culture when determining the best interests of the child); see also Timothy P. Fadgen & Dana E. Prescott, *Do the Best Interests of the Child End at the Nation’s Shores? Immigration, State Courts, and Children in the United States*, 28 J. AM. ACAD. MATRIM. LS. 359, 377–81 (2016) (comparing the best interests standards of the United Kingdom, Norway, Canada, and Australia to highlight the necessity of a cultural consideration in the best interest analysis).

73. U.S. DEP’T OF HEALTH & HUM. SERVS., CHILD.’S BUREAU, DETERMINING THE BEST INTERESTS OF THE CHILD 1 (2020).

74. *Id.* at 2.

75. *Id.*

76. *Id.*

parents' physical and mental health needs; and (5) the child's exposure to domestic violence in the household.<sup>77</sup> In addition, many states also consider the child's wishes and close ties to siblings or other family members.<sup>78</sup>

*D. Federal and State Child Welfare Statutes Prioritize Safety, Permanency, and Well-Being*

The first major piece of federal legislation in the area of child welfare occurred on January 31, 1974, with the enactment of the Child Abuse Prevention and Treatment Act<sup>79</sup> (CAPTA).<sup>80</sup> Its stated purpose was to "provide financial assistance for a demonstration program for the prevention, identification, and treatment of child abuse and neglect."<sup>81</sup> The Act provided assistance to states to develop child abuse and neglect identification and prevention programs, authorized federally funded research into child abuse prevention and treatment, established an information clearinghouse, and created the National Center on Child Abuse and Neglect.<sup>82</sup>

Federal legislation in the area of child welfare is critical as it provides uniformity, as well as mandates and guidelines, for how child welfare systems should work to prevent and respond to child abuse and

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77. *Id.* at 2, 3.

78. *Id.* at 4.

79. Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (codified as amended at 42 U.S.C. §§ 5101–5119 (2020)).

80. CAPTA was originally enacted on January 31, 1974 as Pub. L. No. 93-247. Sections 101 and 114 of the Keeping Children and Families Safe Act of 2003 amended and reauthorized CAPTA. Keeping Children and Families Safe Act, Pub. L. No. 108-36, 117 Stat. 800, 801, 808 (codified as amended at 42 U.S.C. §§ 5102–5119 (2000 & Supp. 2004)). The act amended title I and replaced title II, Community-Based Family Resource and Support program, with Community-Based Grants for the Prevention of Child Abuse and Neglect. *Id.* CAPTA also was amended and reauthorized by the CAPTA Reauthorization Act of 2010, which amended both titles I and II of CAPTA. CAPTA Reauthorization Act, Pub. L. No. 111-320, 124 Stat. 3459, 3478 (2010). CAPTA was amended in 2015, 2016, and 2018, and most recently, certain provisions of the act were amended on January 7, 2019, by the Victims of Child Abuse Reauthorization Act of 2018. Victims of Child Abuse Reauthorization Act, Pub. L. No. 115-424, 132 Stat. 5465, 5470 (codified as amended at 34 U.S.C.S. § 20303); U.S. DEP'T OF HEALTH & HUM. SERVS., CHILD.'S BUREAU, ABOUT CAPTA: A LEGISLATIVE HISTORY, CHILD WELFARE GATEWAY (2019), <https://www.childwelfare.gov/pubPDFs/about.pdf> [https://perma.cc/9DK8-GH47].

81. Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (codified as amended at 42 U.S.C. §§ 5101–5119 (2018)).

82. *Id.*

neglect. In fact, one of the reasons that CAPTA was enacted was to create “consistent policy” and to remedy “the inadequacies of [s]tate law[.]”<sup>83</sup> The leading piece of legislation that followed CAPTA was the Adoption Assistance and Child Welfare Act of 1980<sup>84</sup> (AACWA), which specifically added to and amended Parts IV-B and XX of the Social Security Act, initially enacted in 1935.<sup>85</sup> Significantly and like CAPTA, AACWA was passed, in part, to address a lack of a national commitment to children, the many unmet needs of foster children, and the lack of a comprehensive national policy for children and their families.<sup>86</sup>

Additional amendments to AACWA and the Social Security Act have occurred over the years.<sup>87</sup> Each of these pieces of legislation establishes important principles and mandates as to how child welfare systems are to operate to fulfill their mission of protecting children and assisting families in remediating the concerns that brought the family to the attention of the child welfare agency in the first place. Noteworthy and relevant legislative enactments are as follows:

- Adoption and Safe Families Act of 1997<sup>88</sup>
- Foster Care Independence Act of 1999<sup>89</sup>
- Child and Family Services Improvement Act of 2006<sup>90</sup>
- Fostering Connections to Success and Increasing Adoptions Act of 2008<sup>91</sup>
- Preventing Sex Trafficking and Strengthening Families Act of 2014<sup>92</sup>
- Family First Prevention Services Act<sup>93</sup>

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83. 119 CONG. REC. 4293 (1973) (statement of Sen. Randolph).

84. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500, 516 (1980).

85. *Id.*

86. 125 CONG. REC. 13,307–08 (1979) (statement of Rep. Miller).

87. PA. OFF. OF CHILD. & FAMS. IN THE CTS., OVERVIEW OF FEDERAL AND STATE CHILD WELFARE LEGISLATION 1–5 (2019), <https://ocfcpacourts.us/wp-content/uploads/2020/05/ZC-Chapter-21-Overview-Of-Federal-And-State-Child-Welfare-Legislation-LM-Nfinal-6-4-19-002438.pdf> [<https://perma.cc/UG73-ZD73>].

88. Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).

89. Pub. L. No. 106-169, 113 Stat. 1822.

90. Pub. L. No. 109-288, 120 Stat. 1233 (codified in scattered sections of 42 U.S.C.).

91. Pub. L. No. 110-351, 122 Stat. 3949.

92. Pub. L. No. 113-183, 128 Stat. 1919 (2014).

93. Family First Prevention Services Act, Pub. L. No. 115-123, sec. 50701, 132 Stat. 64,232 (2018) (codified as amended in scattered sections of 42 U.S.C.).

Because most of the federal laws are part of a federal statutory schema that conditions a state or locality's receipt of federal funds on its compliance with federal mandates, a rich body of state law, regulations, and caselaw also exist that embodies the dictates of federal law. Moreover, approximately fifteen states have taken their commitment to children in out-of-home care even further and have established a code of "rights" for children placed into the custody of the "State."<sup>94</sup> Interestingly, while some of these "Bills of Rights" are limited to children in domestic foster care programs, some are not and, as will be explained below, could be construed to provide rights to children within the custody of ORR.<sup>95</sup>

1. *The importance of maintaining family bonds*

a. *Reasonable efforts*

Beginning with AACWA, child protective services agencies have been required to make "reasonable efforts" to avoid unnecessary removal of children from their homes and to reunify children with their families whenever possible.<sup>96</sup> "Reasonable efforts" means providing a parent with useful resources that enable them . . . to provide a stable home environment, and to promote the child's well-being."<sup>97</sup> Additionally, AACWA instructs the court or child welfare agency to review the child's status at least once every six months to assess the child's need for out-of-home placement and the parents' progress, with the goal of returning the child home or placing the child for adoption or legal guardianship as soon as possible.<sup>98</sup>

b. *Placement with kin*

The importance of looking to kin if a child cannot be returned to his or her parents began with the Adoption and Safe Families Act of

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94. *Foster Care Bill of Rights*, NAT'L CONF. ST. LEGISLATURES (Oct. 29, 2019), <https://www.ncsl.org/research/human-services/foster-care-bill-of-rights.aspx> [<https://perma.cc/64GY-8TD3>].

95. *See infra* Section III.G.

96. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500, 503; 42 U.S.C. § 671(a)(15).

97. WILLIAM G. JONES, U.S. DEP'T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMS., *WORKING WITH THE COURTS IN CHILD PROTECTION* 19 (2006).

98. Adoption Assistance and Child Welfare Act of 1980, 94 Stat. at 511.

1997.<sup>99</sup> The Act mandates states to document efforts to find permanent placements for children, including placements with fit and willing relatives.<sup>100</sup> It gives preference when making placement decisions to adult relatives over non-relative caregivers when relative caregivers meet all relevant state child protection standards.<sup>101</sup>

The Fostering Connections to Success and Increasing Adoptions Act of 2008 further emphasizes a child's right to remain with his or her family by connecting and supporting relative caregivers.<sup>102</sup> The law authorizes grants to state, local, or tribal child welfare agencies and private nonprofit organizations for the purpose of helping children, who are in or at-risk of foster care, reconnect with family members through kinship navigator programs, find biological family and reestablish relationships, and participate in family group decision-making meetings.<sup>103</sup> The law added a requirement to notify all adult relatives of a child within thirty days of the child's removal from the parents' care, so that the relatives could become a placement resource for the child.<sup>104</sup> It also requires agencies to make reasonable efforts to place siblings removed from their home in the same foster home and facilitate visitation or ongoing contacts with those children that cannot be placed together.<sup>105</sup>

*c. Prevention services*

Most recently, the Family First Prevention Services Act, signed into law in February 2018, implemented reforms to help keep children safely with their families and prevent the traumatic experience of entering foster care, emphasizing the importance of children growing up with their families.<sup>106</sup> "Family First" acknowledges that parents are not perfect and that there is great harm that comes from removing

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99. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).

100. 42 U.S.C. § 675(1)(E).

101. *Id.* § 675(1)(F)(iii), (5)(E).

102. Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949, 3950.

103. 42 U.S.C. § 627.

104. *Id.* § 671(a)(29).

105. *Id.* § 671(a)(31).

106. Family First Prevention Services Act, Pub. L. No. 115-123, sec. 50701, 132 Stat. 232 (2018) (codified as amended in scattered sections of 42 U.S.C.).

children from their parents and placing them into foster care.<sup>107</sup> The Act provides services to families who are at risk of entering into the child welfare system by allowing federal reimbursement for mental health and substance use prevention and treatment, in-home parenting skills training, and kinship navigator services.<sup>108</sup>

2. *Children must be placed in the least restrictive, most family-like setting*

AACWA also mandates that states must implement procedures for ensuring that “each child has a case plan designated to achieve placement in . . . the least restrictive (most family like) setting available” and, if the child will benefit, one that is “in close proximity to the parents’ home.”<sup>109</sup> Over the years, this mandate has been repeated and strengthened with each amendment to AACWA. For example, the Fostering Connections to Success and Increasing Adoptions Act of 2008 provides financial incentives for states “to enter into kinship guardianship assistance agreements” which provide monetary assistance to those “who have assumed legal guardianship of the children for whom they have cared,” whether through fostering or “on a permanent basis.”<sup>110</sup>

Additionally, the Preventing Sex Trafficking and Strengthening Families Act of 2014 supports “normalcy” for children in foster care by requiring states to implement a “reasonable and prudent parent standard” for the child’s participation in age or developmentally appropriate extracurricular, enrichment, cultural, and social activities and applies this standard to any foster home or child care institution receiving Title IV-E funds.<sup>111</sup> It also developed strategies to assist foster parents in applying a reasonable and prudent parent standard in a manner that promotes child safety while also allowing children to experience normal and beneficial activities.<sup>112</sup> Further, the Act made it

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107. Trivedi, *supra* note 46, at 527 (explaining that “the bond between children and their parents is extremely strong and disrupting it can be even more damaging to [children]—even when [their] parents are imperfect”); *see also* Rebecca Bonagura, *Redefining the Baseline: Reasonable Efforts, Family Preservation, and Parenting Foster Children in New York*, 18 COLUM. J. GENDER & L. 175, 196 (2008) (noting that “[r]emoval and placement in foster care may have a worse impact on the child than neglect”).

108. 42 U.S.C. §§ 671(e)(1)(A)–(B), 627(a)(1).

109. *Id.* § 675(5)(A).

110. Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, sec. 101(a)(3), 122 Stat. 3949, 3950.

111. Preventing Sex Trafficking and Strengthening Families Act of 2014, Pub. L. No. 113-183, sec. 111(a), 128 Stat. 1919, 1923; 42 U.S.C. § 671(a)(10).

112. 42 U.S.C. § 671(a)(24).

a purpose of the John H. Chafee Foster Care Independence Program “to ensure children who are likely to remain in foster care until [age 18] have regular, ongoing opportunities to engage in age or developmentally-appropriate activities.”<sup>113</sup>

Relying on research that youth in congregate care placements<sup>114</sup> have worse outcomes in terms of educational success, higher rates of delinquency, and increased emotional and behavioral concerns,<sup>115</sup> the Family First Prevention Services Act includes strong statutory provisions prohibiting most children from being placed in congregate care settings.<sup>116</sup> In passing this Act, DHHS recognized the need to reduce the number of children in the child welfare system that are in group homes and congregate care settings, placing limits on the use of federal funding for congregate care facilities.<sup>117</sup> Specifically, the Act provides that after two weeks in state or local custody, federal reimbursement will only be made for group homes if the child is in: a qualified residential treatment program; a setting specializing in providing prenatal, postpartum, or parenting supports for youth; or supervised independent living for youth over eighteen.<sup>118</sup> It also limits the number of youth permitted in a child care institution to twenty-five.<sup>119</sup>

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113. *Id.* § 677(a)(7).

114. “Congregate care” is often defined as a “licensed or approved setting that provides 24 hour care for children in a group home (7–12 children) or an institution (12 or more children).” *Congregate Care, Residential Treatment and Group Home State Legislative Enactments 2014–2019*, NAT’L CONF. ST. LEGISLATURES (Oct. 30, 2020), <https://www.ncsl.org/research/human-services/congregate-care-and-group-home-state-legislative-enactments.aspx> [<https://perma.cc/SH4W-R9NK>].

115. See Joseph P. Ryan et al., *Juvenile Delinquency in Child Welfare: Investigating Group Home Effects*, 30 CHILD. & YOUTH SERVS. REV. 1088, 1089–90, 1094, 1096 (2008). In addition, youth who have experienced trauma are at higher risk of further abuse when placed in group homes compared to family homes. See CASEY FAMILY PROGRAMS, STRONG FAMILIES: WHAT ARE THE OUTCOMES FOR YOUTH PLACED IN CONGREGATE CARE SETTINGS? 1, 2 (2017), [https://caseyfamilypro-wpengine.netdna-ssl.com/media/SF\\_CC-Outcomes-Resource.pdf](https://caseyfamilypro-wpengine.netdna-ssl.com/media/SF_CC-Outcomes-Resource.pdf) [<https://perma.cc/KF3G-LVEL>].

116. Family First Prevention Services Act, Pub. L. No. 115-123, sec. 50741, 132 Stat. 253–54 (2018) (codified as amended in scattered sections of 42 U.S.C.).

117. See EMILIE STOLTZFUS, CONG. RSCH. SERV. IN10858, FAMILY FIRST PREVENTION SERVICE ACT (FFPSA) (2018) (summarizing the FFPSA’s funding provisions).

118. 42 U.S.C. § 672(k)(2)(A)–(D).

119. Family First Prevention Services Act, 132 Stat. at 253–54.

3. *Children are afforded permanency and assistance in transitioning to adulthood*

Beginning with the Adoption and Safe Families Act (ASFA) in 1997, federal law transitioned to focus on children's safety, health, well-being, and permanency.<sup>120</sup> While the mandates to reunify children with their families whenever possible remained, and continue to be in place today, ASFA added federal prescriptions for how long children should be in foster care, when alternatives to reunification should be considered, and even set forth mandates as to when child welfare agencies must file petitions to terminate parental rights.<sup>121</sup> Specific statutory provisions require child welfare agencies to initiate court proceedings to free a child for adoption once that child has been waiting in foster care for at least fifteen of the most recent twenty-two months, with some exceptions.<sup>122</sup> They also mandated that at least once

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120. See U.S. DEP'T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMS., PI-98-02, PROGRAM INSTRUCTION ABOUT NEW LEGISLATION 2 (1998), <https://www.acf.hhs.gov/sites/default/files/documents/cb/pi9802.pdf> [<https://perma.cc/E59L-XB9A>] ("It establishes unequivocally that our national goals for children in the child welfare system are safety, permanency, and well-being.").

121. Adoption and Safe Families Act sec. 103(a)(3) (requiring that states file or join petitions to terminate the parental rights of a child's parents when: "(1) the 'child . . . has been in foster care . . . for 15 of the most recent 22 months;' (2) 'a court of competent jurisdiction has determined the child to be an abandoned infant (as defined by state law);' or (3) a court of competent jurisdiction has determined that the parent committed or participated in the murder or voluntary manslaughter of another child of the parent or 'committed a felony assault that has resulted in serious bodily injury to the child or another child of the parent'). The state is not required to file or join a petition for termination of parental rights when:

(i) at the option of the state, the child is being cared for by a relative; (ii) a State agency has documented in the case plan . . . a compelling reason for determining that filing such a petition would not be in the 'best interests of the child; or (iii) the State has not provided to the family of the child, consistent with the time period in the State case plan, such services as the State deems necessary for the safe return of the child to the child's home, if reasonable efforts are required . . . to be made with respect to the child.

42 U.S.C. § 675(5)(E)(i)-(iii).

122. Adoption and Safe Families Act sec. 103(a)(1)-(3). *But see* Richard Wexler, *We Don't Need the Adoption and Safe Families Act to Shorten Foster Care Stays*, IMPRINT, (Apr. 30, 2021, 9:04AM), <https://imprintnews.org/opinion/we-dont-need-adoption-and-safe-families-act-shorten-foster-care/53970> [<https://perma.cc/GA6M-G9KP>] (suggesting the AFSA is not as effective at reducing the time a child spends in foster care); Emily K. Nicholson, *Racing Against the ASFA Clock: How Incarcerated Parents Lose More Than Freedom*, 45 DUQ. L. REV. 83 (2006) (discussing the punishing nature of ASFA 15/22 provision and the disproportionate effects on female and minority prisoners).

per year, a permanency hearing must be held,<sup>123</sup> and provided financial incentives to increase the number of children adopted out of foster care.<sup>124</sup> Congress increased these financial incentives in 2008 by passing the Fostering Connections to Success and Increasing Adoptions Act.<sup>125</sup>

In addition to being responsible for ensuring that youth in our child welfare systems achieve permanency, local and state child welfare agencies are also obligated to provide youth who have turned eighteen with support and assistance while transitioning into adulthood. Child welfare agencies are encouraged and given fiscal incentives to permit youth to keep their cases open beyond their eighteenth birthday to the age of twenty-three.<sup>126</sup> In fact, as of December 2020, DHHS reported twenty-two states had extended services to age twenty-three.<sup>127</sup> In addition, there are federal funds<sup>128</sup> and statutory provisions<sup>129</sup> to ensure that youth over the age of eighteen are provided with housing, medical and mental health care, and even financial assistance for

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123. Adoption and Safe Families Act sec. 101(a).

124. *Id.* sec. 201(a).

125. Pub. L. No. 110-351, sec. 401(d), 122 Stat. 3949, 3974.

126. “The John H. Chafee Foster Care Program . . . provides funds to states, territories, and Indian tribal entities [] with material and other supports for *current and former foster* youth.” ADRIENNE L. FERNANDES-ALCANTARA, CONG. RES. SERV., IF11070, JOHN H. CHAFEE FOSTER CARE PROGRAM FOR SUCCESSFUL TRANSITION TO ADULTHOOD (2019) (emphasis added). Also, the Family First Prevention Services Act permits states to extend services to the age of twenty-three. See Jenny Pokempner, *Leveraging the FFPSA for Older Youth: Improving Transitions*, A.B.A. (Jan. 15, 2019), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2019/winter2019-leveraging-the-ffpsa-for-older-youth-improving-transitions> [https://perma.cc/B7YU-SLZC].

127. KATRINA BREWSAUGH, AUDREY RICHARDSON & ANNELESE LOVELESS, STATE APPROACHES TO EXTENDING SERVICES TO AGE 23, at 3 (2021) <https://www.urban.org/sites/default/files/publication/104773/state-approaches-to-extending-chafee-services-to-age-23.pdf> [https://perma.cc/8RAZ-CDAJ].

128. “The statute provides \$140 million annually in mandatory funding for the Chafee program,” which increased to \$143 million in FY2020. ADRIENNE L. FERNANDES-ALCANTARA, CONG. RES. SERV., IF11070, JOHN H. CHAFEE FOSTER CARE PROGRAM FOR SUCCESSFUL TRANSITION TO ADULTHOOD (2019). ETV funding is discretionary, however, “the statute authorizes up to \$60 million annually.” *Id.* How much each state receives is dependent upon the number of children in its foster care program in a given year. *Id.*

129. Family First Prevention Services Act, Pub. L. No. 115-123 sec. 50741, 132 Stat. 253–54 (2018).

college or vocational schools.<sup>130</sup> These mandates are a recognition that there is nothing magical with turning eighteen or twenty-one and that more must be done to improve outcomes for individuals who age out of foster care.<sup>131</sup> Data shows that “of the youth who transition out of foster care into adulthood nearly 20 percent will be homeless after 18, only half will be employed at age 24, and less than 3 percent will earn a college degree.”<sup>132</sup>

4. *When children are transferred into state custody there is oversight and some level of accountability*

When children are temporarily transferred into the custody of a state or locality within our domestic child welfare system, immediate “checks and balances” are triggered, all of which help to ensure that a child is safe, that the child welfare agency is acting in accordance with the child’s best interest and well-being, and that the parents or guardian’s constitutional rights are safeguarded. These accountability measures can be seen at all levels: (1) by the fact that the child and parents are provided representation and are immediately placed into a court process, (2) through the processes in place that the local or state agency must follow, as well as (3) through regular assessment protocols mandated by federal agencies.

CAPTA, first enacted in 1974 and revised and reauthorized numerous times since then, calls for all children who are victims of child abuse or neglect that results in a judicial proceeding to be provided with a representative, either a specially trained attorney or lay advocate (called a Court Appointed Special Advocate), or both.<sup>133</sup> In

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130. ADRIENNE L. FERNANDES-ALCANTARA, CONG. RES. SERV., IF11070, JOHN H. CHAFEE FOSTER CARE PROGRAM FOR SUCCESSFUL TRANSITION TO ADULTHOOD (2019).

131. 163 CONG. REC. H4952–3 (daily ed. June 20, 2017).

132. *Id.* at H4953.

133. CAPTA currently calls for all states to have a State Plan that includes provisions and procedures requiring that in every case involving a victim of child abuse or neglect which results in a judicial proceeding, a guardian ad litem, who has received training appropriate to the role, including training in early childhood, child, and adolescent development, and who may be an attorney or a court appointed special advocate who has received training appropriate to that role (or both), shall be appointed to represent the child in such proceedings (I) to obtain first-hand, a clear understanding of the situation and needs of the child; and (II) to make recommendations to the court concerning the best interests of the child.

the majority of states and U.S. jurisdictions, the representative is an attorney.<sup>134</sup> In most jurisdictions, the parents, guardians, or legal custodians of the child also are provided with legal representation if they are unable to afford such representation on their own.<sup>135</sup>

There also are immediate and mandatory court actions that must be initiated by the State or locality to consider whether the removal of the child from the biological family was warranted and also whether it should continue.<sup>136</sup> This court filing sets in motion a child protection proceeding with jurisdictional requirements, regular reviews, and procedural checks on the child welfare agency.<sup>137</sup> While this process may differ slightly from one jurisdiction to another, all court processes must ensure that parents' due process rights to raise and care for their children are protected.<sup>138</sup> Oversight by courts also provides the opportunity for state court judges to ensure that the children's needs

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42 U.S.C. 5106a(b)(2)(B)(xiii). For a comprehensive history of CAPTA, see NAT'L CHILD ABUSE & NEGLECT TRAINING & PUBL'NS PROJECT, U.S. DEP'T OF HEALTH & HUM. SERVS. *THE CHILD ABUSE PREVENTION AND TREATMENT ACT: 40 YEARS OF SAFEGUARDING AMERICA'S CHILDREN* 5 (2014).

134. CHILD WELFARE INFO. GATEWAY, REPRESENTATION OF CHILDREN IN CHILD ABUSE AND NEGLECT PROCEEDINGS 1 (2021), <https://www.childwelfare.gov/pubPDFs/represent.pdf> [<https://perma.cc/65XL-PX46>] (reporting that in at least 30 states or U.S. jurisdictions, the children are provided with an attorney); *see also* Jean Koh Peters, *How Children Are Heard In Child Protective Proceedings, in the United States and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study*, 6 NEV. L.J. 966, 968-69 (2006) (assessing the number of jurisdictions with legislation aimed at protecting children in proceedings); BRITANY ORLEBEKE ET AL., CHAPIN HALL UNIV. OF CHI., EVALUATION OF THE *QIC-CHILDREP* BEST PRACTICES MODEL TRAINING FOR ATTORNEYS REPRESENTING CHILDREN IN THE CHILD WELFARE SYSTEM 18 (2016), [https://www.chapinhall.org/wp-content/uploads/QIC-ChildRep\\_Chapin\\_Hall\\_Evaluation.pdf](https://www.chapinhall.org/wp-content/uploads/QIC-ChildRep_Chapin_Hall_Evaluation.pdf) [<https://perma.cc/ETK3-TVTE>] (noting that “[s]tates and regions within states vary in who the representative must be, how the representative is trained, when the representative is appointed, and whether the representative is an attorney. If the representative is an attorney, there are further differences whether that attorney’s role is as a substitute judgment/best interests GAL or a client-directed attorney”).

135. *See Peters, supra* note 134, at 1002.

136. *See supra* Section II.D.1.b.

137. *See* DONALD N. DUQUETTE, ANN M. HARALAMBIE, & VIVEK S. SANKARAN, *CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES* 422 (3d ed. 2016).

138. *See, e.g.,* *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000); *see also* *Stanley v. Illinois*, 405 U.S. 645, 649, 651 (1972); *Santosky v. Kramer*, 455 U.S. 745, 747–48, 753, 758–59 (1982) (all affirming that parents' have fundamental due process rights to make decisions as to the care, custody, and control of their children).

are being met and that the families are receiving necessary rehabilitative services to encourage reunification.<sup>139</sup>

Federal laws also instruct that children in state custody are regularly monitored. The Child and Family Services Improvement Act of 2006 directs that all children must be visited at least once per month by a case manager from the child welfare agency, and these visits must be well-planned and focused on issues pertinent to case planning and service delivery to ensure children's safety, permanency, and well-being.<sup>140</sup> This law was re-emphasized and strengthened in 2011 with the enactment of the Child and Family Services Improvement and Innovation Act.<sup>141</sup> Thus, state laws and regulations must be in compliance with this mandate.<sup>142</sup>

With regard to the oversight of state and local child welfare systems, the Administration for Children and Families of the HHS has established the Children's Bureau, whose purpose is to monitor state child welfare services.<sup>143</sup> The Children's Bureau accomplishes its supervisory function through various review and evaluation processes, including, but not limited to, the Child and Family Services Reviews (CFSRs),<sup>144</sup> title IV-E foster care eligibility reviews,<sup>145</sup> the Adoption and

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139. See LEONARD EDWARDS, *REASONABLE EFFORTS: A JUDICIAL PERSPECTIVE* (2014), <http://judgeleonardedwards.com/docs/reasonableefforts.pdf> [<https://perma.cc/8FEV-AKZJ>]; see also Bob Friend & Kelly Beck, *How "Reasonable Efforts" Leads to Emotional and Legal Permanence*, 45 CAP. U. L. REV. 249, 251-52 (2017).

140. Child and Family Services Improvement Act of 2006, Pub. L. No. 109-288, sec. § 7(a)(3), 120 Stat. 1233, 1248.

141. Child and Family Services Improvement and Innovation Act, Pub. L. No. 112-34, sec. § 101, 125 Stat. 369, 370 (2011).

142. See, e.g., N.J. STAT. ANN. § 30:4C-25 (West 2012); N.Y. COMP. CODES R. & REGS. tit. 18, § 441.21(d) (2020).

143. U.S. DEP'T OF HEALTH & HUM. SERVS., *CHILD'S BUREAU, HOW THE CHILD WELFARE SYSTEM WORKS 2* (2020) [hereinafter *HOW THE CHILD WELFARE SYSTEM WORKS*], <https://www.childwelfare.gov/pubpdfs/cpswork.pdf> [<https://perma.cc/BPK4-F3NW>].

144. CFSRs are periodic reviews of state child welfare systems. The Children's Bureau conducts the CFSRs to achieve three goals, namely, "[e]nsure conformity with federal child welfare requirements; [d]etermine what is actually happening to children and families as they are engaged in child welfare services;" and "[a]ssist states in helping children and families achieve positive outcomes." *Child & Family Services Reviews (CFSRs)*, CHILD'S BUREAU, <https://www.acf.hhs.gov/cb/monitoring/child-family-services-reviews> [<https://perma.cc/TJ2Z-MS2T>].

145.

Foster Care Analysis and Reporting System (AFCARS) assessment reviews,<sup>146</sup> and the Comprehensive Child Welfare Information System (CCWIS) assessment reviews.<sup>147</sup> Child welfare systems are monitored as to how well they are meeting the nationally mandated and interconnected goals of providing safety, permanency, and well-being for all children.<sup>148</sup> These overarching and interrelated principles are defined as follows by the Children's Bureau:

- SAFETY: All children have the right to live in an environment free from abuse and neglect.
- PERMANENCY: Children need a family and a permanent place to call home.

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The regulatory reviews of the title IV-E Foster Care program determine whether children in foster care meet the federal eligibility requirements for foster care maintenance payments claimed on their behalf . . . Each Title IV-E Foster Care Eligibility Review (IV-E Review) details the strengths and weaknesses of a Title IV-E agency's program and identifies technical assistance that may be needed for program improvement.

*Title IV-E Reviews*, CHILD'S BUREAU, <https://www.acf.hhs.gov/cb/monitoring/title-ive-reviews> [<https://perma.cc/E3A5-7JP4>].

146. AFCARS

collects case-level information from state and tribal title IV-E agencies on all children in foster care and those who have been adopted with title IV-E agency involvement . . . The purpose of the AFCARS assessment reviews is to more fully assess and evaluate how an agency gathers, records, extracts, and submits its AFCARS data. The AFCARS review process is a rigorous evaluation of the agency's information system and allows the review team to identify problems, investigate the causes, and suggest solutions during the review.

*AFCARS 1993 Assessment Reviews*, CHILD'S BUREAU, <https://www.acf.hhs.gov/cb/monitoring/afcars-assessment-reviews> [<https://perma.cc/8XAV-QRJF>].

147.

The Division of State Systems (DSS) conducts CCWIS reviews to assess title IV-E agency compliance with the . . . CCWIS regulations. The new CCWIS reviews process is in development. DSS is currently creating tools for title IV-E agencies to use to assess their child welfare information systems. As tools become available, they will be posted to the CCWIS Reviews web page. Data from child welfare information systems is used to support the Adoption and Foster Care Analysis and Reporting System (AFCARS), the National Youth in Transition Database (NYTD), the National Child Abuse and Neglect Data System (NCANDS), and the Child and Family Services Review (CFSR) process.

*CCWIS Reviews*, CHILD'S BUREAU, <https://www.acf.hhs.gov/cb/monitoring/ccwis-reviews> [<https://perma.cc/3PXR-5AAF>]; *Child and Family Services Review: Fact Sheet*, CHILD'S BUREAU [hereinafter *CFSR Fact Sheet*], [https://www.acf.hhs.gov/sites/default/files/documents/cb/cfsr\\_general\\_factsheet.pdf](https://www.acf.hhs.gov/sites/default/files/documents/cb/cfsr_general_factsheet.pdf) [<https://perma.cc/HG7V-B4B3>].

148. *CFSR Fact Sheet*, *supra* note 147.

- CHILD AND FAMILY WELL-BEING: Children deserve nurturing environments in which their physical, emotional, educational, and social needs are met.<sup>149</sup>

Each of these goals is critical to ensuring that children are protected and their needs are met throughout their involvement with the child welfare system.<sup>150</sup> The specific intent behind the safety goal is to ensure that children are safe, are not abused or neglected while in foster care, and, if at all possible, are kept safely in their family homes with their parent or parents, and if not, with kin.<sup>151</sup> The purpose of the permanency objective is to ensure a long-term nurturing family for every child in out-of-home care through family reunification, adoption, guardianship, or another planned permanent living arrangement (APPLA).<sup>152</sup> Part of achieving permanency means working with the child and family to develop a case plan that provides stability.<sup>153</sup> Throughout the permanency process, the agency must strive to keep the child's family connections intact, by helping the child maintain family relationships and ensuring that, if the child is removed from the home, the child is in close proximity to siblings and other family members.<sup>154</sup> It also may encompass the need to help the youth transition into adulthood if the child will be aging out of foster care.<sup>155</sup> And finally, the well-being goal addresses the physical health and behavioral, emotional, and social functioning of children and youth who have experienced maltreatment, trauma, and/or exposure to violence.<sup>156</sup> Good casework practice in achieving positive well-being outcomes includes thorough and ongoing assessment of children and their caregivers to determine their needs and then meet those needs through written case plans and service provisions.<sup>157</sup> Regular and careful caseworker visits are also important

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149. *Id.*

150. "Taken together, safety, belonging and success are three dimensions that act as the foundations of a stable life for all vulnerable children." Ravi Kohli, *Working to Ensure Safety, Belonging and Success for Unaccompanied Asylum-seeking Children*, 20 CHILD ABUSE REV. 311, 315 (2011).

151. *CFSR Fact Sheet*, *supra* note 147.

152. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, sec. 107(2) 111 Stat. 2115, 2121 (codified as amended at 42 U.S.C. § 675(1)(E)).

153. *CFSR Fact Sheet*, *supra* note 147.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

to monitor a child's functioning. The goal is for the child to thrive as best he or she can while involved with the child welfare system.<sup>158</sup>

## II. THE TRAJECTORY FOR UNACCOMPANIED CHILDREN

When children arrive at the U.S. Southern border without documentation and without a parent or legal guardian, their initial interactions are often with law enforcement, specifically Customs and Border Protection (CBP),<sup>159</sup> a law enforcement unit of the U.S. Department of Homeland Security.<sup>160</sup> CBP likely will apprehend the children, unless they are from Mexico or Canada,<sup>161</sup> designate them as “unaccompanied minors,”<sup>162</sup> and charge them with entering the country without permission. Doing so places the children into removal proceedings before the Executive Office for Immigration Review (EOIR, more colloquially known, as “immigration court”), the agency

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158. *Id.*

159. See *Southwest Land Border Encounters*, U.S. CUSTOMS & BORDER PROT. (Jan. 24, 2022), <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters> [<https://perma.cc/VJY5-HUNU>] (reporting 146,925 encounters with unaccompanied children in FY 2021); *Latest UC Data – FY 2021*, U.S. DEP'T HEALTH & HUM. SERVS. (Nov. 15, 2021), <https://www.hhs.gov/programs/social-services/unaccompanied-children/latest-uc-data-fy2021/index.html> [<https://perma.cc/L7SY-MQRL>] (reporting a total of 135,482 unaccompanied children in the Office of Refugee Resettlement's custody for FY 2021).

160. *About CBP*, U.S. CUSTOMS & BORDER PROT. (Jan. 4, 2022), <https://www.cbp.gov/about> [<https://perma.cc/65CW-P68D>].

161. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Pub. L. No. 110-457, § 235(a)(2)(A), 122 Stat. 5044 (2008). The TVPRA excludes Mexican and Canadian children (children from contiguous countries) from being designated as unaccompanied children and receiving the statutory protections afforded to unaccompanied children, requiring that they be immediately repatriated to their country of origin unless: (1) there are indications of human trafficking; (2) the child indicates a fear of persecution in the home country or express an intent to apply for asylum; or (3) the child lacks the capacity to choose to return to the child's country of origin. *But see Border Screening for Children Has Failed*, YOUNG CTR. FOR IMMIGRANT CHILD.'S RTS. (Aug. 5, 2019), <https://www.theyoungcenter.org/stories/2019/8/5/current-border-screening-of-unaccompanied-children-from-mexico-has-failed-and-should-not-be-a-model-for-reform> [<https://perma.cc/4VHB-TW87>] (reporting that children from Mexico are routinely returned to Mexico despite having protection claims under this provision).

162. 6 U.S.C. § 279(g)(2).

within the U.S. Department of Justice that houses the immigration courts.<sup>163</sup>

Along with being charged with unlawful admission, the children also will be detained by CBP, most commonly in small, overcrowded, and often freezing cells or cages.<sup>164</sup> However, pursuant to the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008<sup>165</sup> (TVPRA), children are only permitted to be held in the custody of CBP for up to seventy-two hours, although this statutory provision is regularly flouted.<sup>166</sup> Children are then transferred to DHHS, specifically ORR.

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163. Memorandum from Robert Silvers, Under Sec'y, Off. of Strategy, Pol'y, & Plans, Dep't of Homeland Sec., on *Guidance Regarding the Court-Ordered Reimplementation of the Migrant Protection Protocols to Customs and Border Prot.*, Immigr. and Customs Enf't, Citizenship and Immigr. Servs., and Off. of Operations Coordination 4 n.4 (Dec. 2, 2021), [https://www.dhs.gov/sites/default/files/2022-01/21\\_1202\\_plcy\\_mpp-policy-guidance\\_508.pdf](https://www.dhs.gov/sites/default/files/2022-01/21_1202_plcy_mpp-policy-guidance_508.pdf) [<https://perma.cc/42FV-TGNK>]; see *Fact Sheet: Immigration Court Considerations for Unaccompanied Children Who File for Asylum with USCIS While in Removal Proceedings, in Light of J.O.P. v. DHS, No. 19-01944 (D. Md. filed July 1, 2019)*, CATH. LEGAL IMMIGR. NETWORK, INC. (Sept. 30, 2021), <https://cliniclegal.org/resources/asylum-and-refugee-law/fact-sheet-immigration-court-considerations-unaccompanied-children> [<https://perma.cc/4J28-2T24>].

164. See Teo Armus, *Unaccompanied Migrant Children Suffer 'Inhumane and Cruel Experience' in CBP Custody, Report Alleges*, WASH. POST (Oct. 30, 2020), <https://www.washingtonpost.com/nation/2020/10/30/migrant-children-border-unaccompanied> [<https://perma.cc/9E79-KSYB>]; see also Geoff Bennett et al., *Record Number of Unaccompanied Migrant Children Held In Facilities Meant For Adults*, NBC NEWS (Mar. 8, 2021, 9:19 PM), <https://www.nbcnews.com/news/investigations/record-number-unaccompanied-migrant-children-held-facilities-meant-adults-n1260097> [<https://perma.cc/TT5Y-U4BV>]; Camilo Montoya-Galvez, "They Never Saw The Sun": *Lawyers Describe Overcrowded Conditions For Children in Border Patrol Custody*, CBS NEWS (Mar. 12, 2021, 7:45 PM) <https://www.cbsnews.com/news/migrant-children-detained-in-overcrowded-conditions> [<https://perma.cc/PX3S-QCN4>].

165. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Pub. L. No. 110-457, 122 Stat. 5044 (codified in scattered sections of 42 U.S.C.).

166. *Id.* § 235(b)(3); see Swathi Kella, *From the Border, into Foster Care*, HARV. POL. REV., (Mar. 19, 2021), <https://harvardpolitics.com/from-the-border-into-foster-care> [<https://perma.cc/PNU6-LPJB>]; Jasmine Aguilera, *What to Know About What's Happening to Unaccompanied Minors at the Border*, TIME, (Apr. 2, 2021, 2:23 PM) <https://time.com/5950832/unaccompanied-minors-border> [<https://perma.cc/Q2ZG-RGPW>]; see also FLORES EXHIBITS, <https://flores-exhibits.org> [<https://perma.cc/M5K4-9GRB>] (voicing the sworn testimony of children detained along the U.S.-Mexico border).

While in ORR custody, the child will be placed in an ORR facility.<sup>167</sup> ORR contracts with organizations to run the facilities pursuant to both state licensing requirements and ORR policy. Typical ORR placements are shelters, transitional foster care placements, residential treatment centers, or secure facilities.<sup>168</sup> Even young children (defined as under the age of thirteen) are not permitted to be placed into traditional foster homes.<sup>169</sup> Instead, they are placed into what is called “transitional foster care,” where they sleep in a family home but must report back to the facility for “schooling” (which takes place in the contracted facility rather than public school), no matter the age of the child and even if the family is willing to care for and keep the child in the home.<sup>170</sup>

Moreover, when ORR is faced with an unexpected increase in children, as occurs frequently, and most recently happened in the first half of 2021,<sup>171</sup> it is permitted to place children in large unlicensed

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167. *Children Entering the United States Unaccompanied: Section 1*, OFF. REFUGEE RESETTLEMENT § 1.1 (July 14, 2021), <https://www.acf.hhs.gov/orr/policy-guidance/children-entering-united-states-unaccompanied-section-1> [<https://perma.cc/KN9E-YX79>].

168. *Id.* § 1.2; *see also id.* § 1.2.2 (“Children with Special Needs”).

169. *Id.* § 1.2.2.

170.

ORR transitional foster care is synonymous with ORR short term foster care. Transitional foster care is an initial placement option for unaccompanied alien children under 13 years of age, sibling groups with one sibling under 13 years of age, pregnant/parenting teens, or unaccompanied alien children with special needs. Unaccompanied alien children are placed with foster families in the ORR network of care but may attend school and receive most service components at the care provider site.

*Children Entering the United States Unaccompanied: Guide to Terms*, OFF. Refugee Resettlement (Mar. 21, 2016), <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-guide-to-terms> [<https://perma.cc/2WQ3-99UT>].

171.

In response to the increasing number of referrals, ORR had added (as of April 7, 2021) 15 emergency intake sites and 2 influx care facilities. Emergency intake sites and influx care facilities open temporarily to provide emergency shelter and services for unaccompanied children. Unlike permanent facilities, emergency intake sites and influx care facilities are temporary and are therefore not required to be State-licensed. Emergency intake sites provide only basic services (e.g., food and clothing) to children before they are transferred to a permanent shelter facility or released to sponsors. Influx care facilities generally provide the same services as permanent ORR-funded

facilities called emergency intake sites or influx centers.<sup>172</sup> These facilities are not licensed for children and tend to be quite large, housing hundreds, if not thousands, of children at any one time.<sup>173</sup> ORR has criteria detailing which children can be transferred to an influx facility or emergency intake site, including requirements that ORR can only place unaccompanied children in an influx facility who

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shelter facilities. On April 8, 2021, 46 percent of the children in HHS custody resided in emergency intake sites and 6.5 percent in influx care facilities. OFF. OF INSPECTOR GEN., U.S. DEP'T OF HEALTH & HUM. SERVS., OEI-09-21-00220, TOOLKIT: INSIGHTS FROM OIG'S WORK ON THE OFFICE OF REFUGEE RESETTLEMENT'S EFFORTS TO CARE FOR UNACCOMPANIED CHILDREN 3 (2021), <https://oig.hhs.gov/oei/reports/OEI-09-21-00220.pdf> [<https://perma.cc/82LX-AVNA>]; see also Julia Ainsley, *Record Number of Unaccompanied Children Crossed the Border in March*, NBC NEWS (Apr. 2, 2021, 11:30 AM), <https://www.nbcnews.com/politics/immigration/record-number-unaccompanied-children-crossed-border-march-n1262901> [<https://perma.cc/W967-3J2F>]; Danilo Zak, *Explainer: Emergency Shelters and Facilities Housing Unaccompanied Children*, NAT'L IMMIGR. F. (May 4, 2021), <https://immigrationforum.org/article/explainer-emergency-shelters-and-facilities-housing-unaccompanied-children> [<https://perma.cc/3LV2-SZJL>]; Mark Greenberg, *U.S. Government Makes Significant Strides in Receiving Unaccompanied Children but Major Challenges Remain*, MIGRATION POL'Y INST. (May 2021), <https://www.migrationpolicy.org/news/unaccompanied-children-emergency-intake-site-challenges> [<https://perma.cc/F7EU-UMXR>]; *Record Numbers of Unaccompanied Minors Are Seeking Asylum in U.S.*, CLOSE UP (Apr. 13, 2021), <https://closeup.org/record-numbers-of-unaccompanied-minors-are-seeking-asylum-in-u-s> [<https://perma.cc/URN3-2SR5>].

172. See *Children Entering the United States Unaccompanied: Section 7*, OFF. REFUGEE RESETTLEMENT §§ 7.1, 7.6–7.7 (Sept. 18, 2019), <https://www.acf.hhs.gov/orr/policy-guidance/children-entering-united-states-unaccompanied-section-7> [<https://perma.cc/U9G6-GR2N>] (establishing policies when influx exceeds standard capabilities); Stipulated Settlement Agreement at 9, exhibit 3, *Flores v. Reno*, No. CV 85-4544 (C.D. Cal. Jan. 17, 1997), [https://www.aclu.org/sites/default/files/assets/flores\\_settlement\\_final\\_plus\\_extension\\_of\\_settlement011797.pdf](https://www.aclu.org/sites/default/files/assets/flores_settlement_final_plus_extension_of_settlement011797.pdf) [<https://perma.cc/B4AL-ETDA>] (requiring a written plan “to place all minors as expeditiously as possible”).

173. Priscilla Alvarez, *Texas Emergency Shelter Is Mostly ‘Warehousing’ Thousands of Migrant Children, According to Eyewitnesses*, CNN (May 24, 2021), <https://www.cnn.com/2021/05/24/politics/fort-bliss-migrant-children-shelter/index.html> [<https://perma.cc/F3XW-E4JB>]; Graham Kates, *Migrant Children in U.S Are Being Held in Unlicensed Shelters, Lawyers Say*, CBS NEWS, (Jan. 23, 2019, 10:04 PM), <https://www.cbsnews.com/news/migrant-children-in-u-s-are-being-held-in-unlicensed-shelters-lawyers-say> [<https://perma.cc/UKP9-K7NM>]; Dara Lind, “No Good Choices”: *HHS Is Cutting Safety Corners to Move Migrant Kids out of Overcrowded Facilities*, PROPUBLICA, (Apr. 1, 2021, 8:00 AM), <https://www.propublica.org/article/no-good-choices-hhs-is-cutting-safety-corners-to-move-migrant-kids-out-of-overcrowded-facilities> [<https://perma.cc/RR8V-S522>].

are ages thirteen to seventeen, have no known medical or behavioral issues, speak English or Spanish, and are expected to be released to a sponsor within 30 days.<sup>174</sup> Nonetheless, there are great concerns about the conditions in these emergency intake sites and influx centers.<sup>175</sup>

Worse yet, the reality is that even when there is not a crisis situation most children are residing in shelter facilities that are huge, some housing thousands of children at any one time.<sup>176</sup> In a study conducted by several advocacy groups between January 2018 and September 2019, “more than half of the unaccompanied children in ORR facilities were detained in facilities that held over two hundred children” and “[t]hirty-three ORR facilities regularly [held] more than 100 children at a time.”<sup>177</sup> In another recent study, conducted between 2017 and 2019, seventy-two percent of the unaccompanied children were in large or mega facilities—facilities holding one hundred or more children and those holding five hundred or more children,

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174. See *Children Entering the United States Unaccompanied: Section 7*, *supra* note 172, § 7.2.1.

175. SHANTEL MEEK, KELLY EDYBURN & CAMILLE SMITH, CHILD.’S EQUITY PROJECT , FEDERAL POLICY AND STATE LICENSING STANDARDS FOR THE OPERATION OF RESIDENTIAL FACILITIES HOUSING UNACCOMPANIED MIGRANT CHILDREN (2021), <https://childandfamilysuccess.asu.edu/sites/default/files/2021-04/CEP-ORR-report-041721.pdf> [<https://perma.cc/5236-5EA7>] (expressing concerns about the emergency shelters and suggesting policies to limit children’s time in these facilities and to improve standards); NEHA DESAI, MELISSA ADAMSON & LEWIS COHEN, NAT’L CTR. FOR YOUTH L. , A NEW WAY FORWARD: WHAT CONGRESS MUST DO TO PROTECT THE DIGNITY, HEALTH AND SAFETY OF CHILDREN IN IMMIGRATION CUSTODY 13–14 (2021), [https://youthlaw.org/sites/default/files/attachments/2022-02/2021\\_NCYL-Congressional-Briefing\\_A-New-Way-Forward.pdf](https://youthlaw.org/sites/default/files/attachments/2022-02/2021_NCYL-Congressional-Briefing_A-New-Way-Forward.pdf) [<https://perma.cc/8SRH-3RLP>] (explaining that the “lack of any external oversight or regulation left the health, safety and welfare of the children to an administration which at the time was hostile to immigrant children”).

176. Miriam Jordan, *Migrant Children Are Spending Months ‘Crammed’ in a Temporary Florida Shelter*, N.Y. TIMES (June 26, 2019), <https://www.nytimes.com/2019/06/26/us/homestead-migrant-children-shelter.html> [<https://perma.cc/B6SP-GXLT>]; see also NEHA DESAI ET AL., CHILD WELFARE & UNACCOMPANIED CHILDREN IN FEDERAL IMMIGRATION CUSTODY: A DATA AND RESEARCH BASED GUIDE FOR FEDERAL POLICYMAKERS 10 (2019), <https://youthlaw.org/publication/guide-federal-lawmakers-unaccompanied-children-immigration-custody> [<https://perma.cc/KYW9-ZZG9>] (finding that from January 2018 to September 2019, “ORR has increasingly relied on large, unlicensed influx facilities to detain unaccompanied children for prolonged periods of time”).

177. DESAI ET AL., *supra* note 176, at 9.

respectively.<sup>178</sup> This should be compared to our domestic foster care systems where eighty-two percent were placed in family-based care.<sup>179</sup> Children also move around a lot when in ORR custody, which adds to their emotional and psychological instability and trauma. From January 2018 to September 2019, “1,463 children were held at three or more facilities, and 228 children were held at four or more facilities.”<sup>180</sup>

Children residing in ORR shelter placements receive educational services but are not permitted to go to community schools or leave the facility.<sup>181</sup> They also are limited in the amount of recreation, exercise, and even fresh air that they can get on a daily basis.<sup>182</sup> Even worse, children in “influx” or “emergency intake sites,” are not guaranteed any education services or recreational activities, as these services are “merely ‘encouraged . . . to the extent practicable.’”<sup>183</sup>

If there are family sponsors in the United States, meaning parents, other family members (such as grandparents, aunts, uncles, older siblings, or cousins), or close family friends, ORR will look to release the children to the care of these “sponsors,” while the children await their immigration hearings.<sup>184</sup> When making these placement decisions, ORR divides children into four different “categories.”<sup>185</sup> The first category includes children who have immediate family members such as parents or legal guardians; the second involves children with

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178. Emily Ryo & Reed Humphrey, *Children in Custody: A Study of Detained Migrant Children in the United States*, 68 UCLA L. REV. 136, 173 (2021).

179. CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., THE AFCARS REPORT (2020), <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport27.pdf> [https://perma.cc/X2JF-P7ZC].

180. DESAI ET AL., *supra* note 176, at 7.

181. *See Services Provided* OFF. REFUGEE RESETTLEMENT, <https://www.acf.hhs.gov/orr/about/ucs/services-provided> [https://perma.cc/WBG9-AV9X]; *see* DESAI ET AL., *supra* note 176, at 22 (“Under the *Flores* Settlement, the government must provide every detained child with education services and recreation activities . . . . At ORR’s unlicensed influx facilities . . . reports from detained class members and attorneys indicated the quality of education and recreation . . . is woefully inadequate.”).

182. DESAI ET AL., *supra* note 176, at 9, 24.

183. *Id.* at 22.

184. *Unaccompanied Alien Children Released to Sponsors by State*, OFF. REFUGEE RESETTLEMENT (Sept. 27, 2019), <https://www.acf.hhs.gov/orr/resource/unaccompanied-alien-children-released-to-sponsors-by-state> [https://perma.cc/AFV2-B7WF].

185. *Children Entering the United States Unaccompanied: Section 2*, OFF. REFUGEE RESETTLEMENT § 2.2.1 (June 18, 2019), <https://www.acf.hhs.gov/orr/policy-guidance/children-entering-united-states-unaccompanied-section-2> [https://perma.cc/T2UF-CMFF].

close relatives such as siblings, grandparents, or other close relatives; and the third is for those children who have distant relatives or unrelated adults.<sup>186</sup> The fourth cohort includes children who have no sponsor or for whom ORR has not approved a sponsor. In FY 2020, of those children placed with sponsors, “about 39 percent were released to a parent, 46 percent to another close relative, and 16 percent to a more distant relative, family friend, or other approved sponsor.”<sup>187</sup>

During the Trump administration, this process spanned many months and became more difficult due to new and restrictive policies.<sup>188</sup> The Biden administration has attempted to speed up the process of approving family sponsors and also has ended the Trump-era policy of sharing information between ORR and DHS’s interior enforcement arm, known as ICE, which created disincentives for family members, who themselves may be undocumented, to come forward and sponsor a relative child.<sup>189</sup> Yet, many children are still forced to spend several months in ORR facilities, as well as influx centers or emergency intake sites.<sup>190</sup> Additionally, when children are released, most are sent to family sponsors without any subsequent support from the federal government.<sup>191</sup> In other words, in most instances, there are no child welfare case managers checking to make sure that the child is

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186. *Id.*

187. MARK GREENBERG ET AL., MIGRATION POL’Y INST., STRENGTHENING SERVICES FOR UNACCOMPANIED CHILDREN IN U.S. COMMUNITIES 9 (2021).

188. Press Release, *Trump Administration Using Fingerprint Checks to Delay Release of Immigrant Children*, NAT’L CTR. FOR YOUTH L. (Nov. 6, 2018), <https://youthlaw.org/trump-administration-using-fingerprint-checks-to-delay-release-of-immigrant-children> [<https://perma.cc/W8DA-JZCM>].

189. *The ORR and DHS Information-Sharing Agreement and Its Consequences*, JUST. FOR IMMIGRANTS, <https://justiceforimmigrants.org/what-we-are-working-on/unaccompanied-children/orr-and-dhs-information-sharing-agreement-its-consequences> [<https://perma.cc/5KCW-USHR>].

190. *See Facts and Data*, OFF. REFUGEE RESETTLEMENT (Dec. 20, 2021), <https://www.acf.hhs.gov/orr/about/ucs/facts-and-data> [<https://perma.cc/EC3S-ZTYU>] (reporting the average length of time an unaccompanied minor remained in ORR care in FY 2020 was 102 days).

191. “ORR has been criticized for not adequately screening sponsors or other adults in the home prior to placement, and for not making post-placement visits, after a number of unaccompanied children were placed with human traffickers in 2015.” Crea et al., *supra* note 35, at 95 (comparing domestic foster care with the ORR system and concluding that in domestic foster care systems, home study assessments are required of all foster parents, including kin, prior to receiving a child, but in the ORR system, home studies are only conducted in limited instances).

safe and well cared for by the family sponsor,<sup>192</sup> and the families are not assisted in terms of being connected to social services or legal assistance.<sup>193</sup> Prior to August 2015, ORR closed the child's file within twenty-four hours of releasing the child from its custody. Since August 2015, all children receive a safety and well-being call within the first thirty days of being placed with a sponsor.<sup>194</sup> During this call, a contracted care provider, typically from a social services agency funded by ORR, attempts to verify that the child is safe, that the child is attending school, and that the sponsor and child are aware of any upcoming immigration court proceedings.<sup>195</sup> The caller also is supposed to try to speak with the child separately from the sponsor. If no concerns are noted on the call, this will be the last time that anyone connected with ORR will be in touch with the child or sponsor.<sup>196</sup> Roughly ten percent of the children released to sponsors receive post-release services beyond the thirty-day phone call.<sup>197</sup>

In ten to twenty percent of all cases involving unaccompanied children, ORR is unable to identify and/or approve sponsors.<sup>198</sup> These

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Post-release services are case management services funded by ORR after a child has been released to a parent or other sponsor . . . TVPRA home studies and post-release services are mandated when there is evidence that the minor may be a victim of human trafficking, have a disability, or have been a victim of physical or sexual abuse, or that the sponsor may present a risk of abuse or trafficking . . . From FY 2015 through FY 2019, the number of children receiving post-release services represented approximately 20 percent to 40 percent of minors released to a parent or other sponsor.

GREENBERG ET AL., *supra* note 187, at 11–12 & n.24.

193. *Id.* at 12.

194. *Children Entering the United States Unaccompanied: Section 2*, *supra* note 185, § 2.8.

195. GREENBERG ET AL., *supra* note 187, at 10.

196. *Id.*

197. U.S. SENATE, PERMANENT SUBCOMM. ON INVESTIGATION, COMM. ON HOMELAND SEC. AND GOV'TL AFFS., PROTECTING UNACCOMPANIED ALIEN CHILDREN FROM TRAFFICKING AND OTHER ABUSES: THE ROLE OF THE OFFICE OF REFUGEE RESETTLEMENT 42 (July 1, 2015); *see also* GILLIAN HUEBNER & RHONDA FLEISCHER, UNICEF, BUILDING BRIDGES FOR EVERY CHILD: RECEPTION, CARE AND SERVICES TO SUPPORT UNACCOMPANIED CHILDREN IN THE UNITED STATES 24 (2021) [hereinafter UNICEF: BUILDING BRIDGES]; GREENBERG ET AL., *supra* note 187, at 1, 10.

198. For example, comparing the number of referrals to ORR in FY 2021, *see Facts and Data*, *supra* note 190, with the releases in FY 2021, *Unaccompanied Children Released to Sponsors by State—November 2021*, U.S. DEP'T HEALTH & HUM. SERVS., <https://www.hhs.gov/programs/social-services/unaccompanied-children-released-to-sponsors-by-state-november-2021.html> [<https://perma.cc/VT94-J4KM>], one finds that 88% (107,646/122,731) of the children were released in FY21.

children are referred to as “Category 4” children.<sup>199</sup> They will remain in ORR custody until they are deported or reach the age of eighteen, at which point they are either released or transferred to an adult ICE facility within DHS.<sup>200</sup> At some point, these Category 4 children may be moved to more traditional foster care, which ORR calls long term foster care (LTFC).<sup>201</sup> Until June 2021, ORR policy stated that an unaccompanied minor may be placed into LTFC if the child is under seventeen and a half, is expected to have a stay of four months or more in ORR custody because he or she does not have a viable sponsor, and a legal services provider has identified that the child is potentially eligible for immigration relief.<sup>202</sup> Currently, based upon revised policy, the requirement of a child to be eligible for immigration relief affords a priority for LTFC, but is no longer a requirement.<sup>203</sup> Yet, given the paucity of LTFC placements,<sup>204</sup> this prioritization essentially continues the requirement. Thus, the child’s placement into foster care is dependent upon their age, and whether the child has persuaded a legal services organization, which may or may not represent the child in the child’s immigration case, that the child has a potential claim for protection.

In reality, a very small percentage of children are placed into long term foster care, and most children who cannot be placed with a sponsor remain in large scale institutionalized settings, at times even

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199. *Children Entering the United States Unaccompanied: Section 2*, *supra* note 185, § 2.2.1.

200. *See Ramirez v. U.S. Immigr. & Customs Enf’t*, 471 F. Supp. 3d 88, 92 (D.D.C. 2020) (challenging ICE’s policy of detaining immigrants after they turn 18 who entered the United States as unaccompanied minors).

201. *Children Entering the United States Unaccompanied: Section 1*, *supra* note 167, § 1.2.6.

202. OFF. REFUGEE RESETTLEMENT, FIELD GUIDANCE #18—EXPANSION OF LONG-TERM FOSTER CARE ELIGIBILITY (2021), <https://www.acf.hhs.gov/sites/default/files/documents/oir/FG18%20-%20LTFC%20Eligibility%20%2806-21-2021%29.pdf> [<https://perma.cc/EY7S-WRVD>].

203. *Id.*

204. *See DESAI ET AL.*, *supra* note 176, at 12 (noting that there are generally far more eligible children than LTFC placements available); 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. 2, 44 (2015) (explaining that availability is not the only issue preventing placement in LTFC, foster care agencies that offer placements also have their own requirements for accepting youth into their programs).

secure settings, sometimes for months on end.<sup>205</sup> For example, in FY 2018, 50,036 unaccompanied children arrived to the United States,<sup>206</sup> but only 4,786 were in ORR's long term foster care program, and many of these children likely arrived in prior years.<sup>207</sup> Similar ratios can be seen for prior fiscal years.<sup>208</sup> There are an insufficient number of LTFC spots for the many children who are eligible for and require these placements, causing many children to "languish in detention for months or even years waiting for a placement to open."<sup>209</sup>

Another option that serves an even smaller percentage of children is the Unaccompanied Refugee Minor (URM) program, which is highly selective and limited in terms of eligibility.<sup>210</sup> The TVPRA of

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205. Graham Kates, *Some Migrants Kids Detained for Months in Jail-Like "Secure" Facilities, New Study for Congress Finds*, CBS NEWS (Dec. 10, 2019, 12:06 PM), <https://www.cbsnews.com/news/some-migrant-kids-detained-for-months-in-jail-like-secure-facilities-new-study-for-congress-finds> [<https://perma.cc/6CGJ-C5WP>]; Franco Ordoñez, *Hundreds of Migrant Children Held in Border Detention for More than 10 Days*, NPR (Mar. 18, 2021, 10:19 PM), <https://www.npr.org/2021/03/18/979014713/hundreds-of-migrant-children-held-in-border-detention-for-more-than-10-days> [<https://perma.cc/FMU4-HBG6>].

206. See *U.S. Border Patrol Southwest Border Apprehensions by Sector FY2018*, U.S. CUSTOMS & BORDER PROT. (Oct. 23, 2018), <https://www.cbp.gov/newsroom/stats/usbp-sw-border-apprehensions> [<https://perma.cc/GFV4-KZFQ>].

207. OFF. OF REFUGEE RESETTLEMENT, U.S. DEP'T OF HEALTH & HUM. SERVS., ANNUAL REPORT TO CONGRESS, FISCAL YEAR 2018, at 53 (2018) [hereinafter ORR FY2018 REPORT].

208. *U.S. Border Patrol Southwest Border Apprehensions by Sector FY2017*, U.S. CUSTOMS & BORDER PROT. (Feb. 11, 2019) [hereinafter *CBP FY2017 Report*], <https://www.cbp.gov/newsroom/stats/usbp-sw-border-apprehensions-fy2017> [<https://perma.cc/VV58-KNQW>]; OFF. OF REFUGEE RESETTLEMENT, U.S. DEP'T OF HEALTH & HUM. SERVS., ANNUAL REPORT TO CONGRESS, FISCAL YEAR 2017, at 55 (2017) [hereinafter ORR FY2017 REPORT]; OFF. OF REFUGEE RESETTLEMENT, U.S. DEP'T OF HEALTH & HUM. SERVS., ANNUAL REPORT TO CONGRESS, FISCAL YEAR 2016, at 51 (2016).

209. YOUNG CTR. FOR IMMIGR. CHILDREN'S RTS., REIMAGINING CHILDREN'S IMMIGRATION PROCEEDINGS: A ROADMAP FOR AN ENTIRELY NEW SYSTEM CENTERED AROUND CHILDREN 54 (2020) [hereinafter YOUNG CTR., REIMAGINING], [https://static1.squarespace.com/static/597ab5f3bebafb0a625aaf45/t/5f9acdcb38fc5b520e882eb1/1603980749320/Reimagining+Children%E2%80%99s+Immigration+Proceedings\\_Young+Center+for+Immigrant+Children%27s+Rights.pdf](https://static1.squarespace.com/static/597ab5f3bebafb0a625aaf45/t/5f9acdcb38fc5b520e882eb1/1603980749320/Reimagining+Children%E2%80%99s+Immigration+Proceedings_Young+Center+for+Immigrant+Children%27s+Rights.pdf) [<https://perma.cc/56D4-AX38>].

210. 8 U.S.C. 1522(d)(2).

Youth are eligible for the URM Program through six legal categories: refugees, asylees, youth with Special Immigrant Juvenile (SIJ) classification, victims of trafficking, Cuban/Haitian entrants, and U-status recipients . . . . For all

2008 expanded eligibility for youth in the URM program to those youth who had been designated as unaccompanied and who were found eligible for Special Immigrant Juvenile Status (SIJS).<sup>211</sup> As a result, many youth are now eligible for both ORR's long-term foster care and the URM program. Yet, the majority of eligible youth are not placed into either program. In FY 2018, the URM program only served 1,966 children and accepted 333 new enrollees.<sup>212</sup> Similarly, in FY 2017, 41,435 unaccompanied children arrived to the United States.<sup>213</sup> Yet, the URM program served 1,975 children and only accepted 431 new children into the program.<sup>214</sup> A recent study concluded that an average of 390 children enter the program each year<sup>215</sup> and "[t]he number of youth entering the URM program declined from FY 2014 to FY 2018[.]"<sup>216</sup> In addition, the relative proportions of different eligibility statuses changed from 2014 to 2018.<sup>217</sup> During this period, refugees made up the largest group of youth, followed by children who were

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categories, youth must be under age 18 when they enter the URM Program and not have a parent or relative who is eligible and available to care for them.

See KIMBERLY FOLEY ET AL., U.S. DEP'T OF HEALTH & HUM. SERVS., OPRE REP. NO. 2021-81, FINAL REPORT OF THE DESCRIPTIVE STUDY OF THE UNACCOMPANIED REFUGEE MINORS PROGRAM: SERVICE PROVISION, TRENDS, AND EVALUATION RECOMMENDATIONS iv (2021). "Lutheran Immigration and Refugee Service and United States Conference of Catholic Bishops, help with the placement services for all eligible populations. These two agencies coordinate placements with local URM providers. Unaccompanied refugee minors are served by the local providers in 15 states." OFF. OF REFUGEE RESETTLEMENT, U.S. DEP'T OF HEALTH & HUM. SERVS., UNACCOMPANIED REFUGEE MINORS PROGRAM (Nov. 23, 2021), <https://www.acf.hhs.gov/orr/programs/refugees/urm> [<https://perma.cc/7GQW-72RY>]. For a comprehensive history of the URM program, see M. Aryah Somers et al., *Constructions of Childhood and Unaccompanied Children in the Immigration System in the United States*, 14 U.C. DAVIS J. JUV. L. & POL'Y 311, 335-37 (2010).

211. 8 U.S.C. 1232 (d) (4) (A).

212. ORR FY2018 REPORT, *supra* note 207, at 45.

213. CBP FY2017 Report, *supra* note 208.

214. ORR FY2017 REPORT, *supra* note 208, at 46.

215. FOLEY ET AL., *supra* note 210, at 2.

216. *Id.* at v. The number of youth entering the URM Program peaked in 2015 but then decreased in subsequent years. *Id.* This downward trend occurred even though the number of unaccompanied children arriving to the U.S. has remained very high. See WILLIAM A. KANDEL, CONG. RSCH. SERV., IN11638, INCREASING NUMBER OF UNACCOMPANIED ALIEN CHILDREN AT THE SOUTHWEST BORDER 2-3 (2021) (noting that apprehensions of unaccompanied children have increased and fluctuated substantially over the past decade).

217. FOLEY ET AL., *supra* note 210, at v.

found eligible for SIJS. This period also saw an increase in both the number and percentage of youth who were victims of trafficking.<sup>218</sup>

Unlike any of ORR's other foster care or shelter programs, the URM program follows the same federal, state, and county laws and regulations that govern domestic foster care, and the children in the URM program are eligible for all the same services as a U.S.-born youth in state or county-run foster care.<sup>219</sup> In fact, "[e]ach URM program parallels the child welfare system in the state in which it operates."<sup>220</sup> Services that may be provided include foster care, independent living arrangements for youth transitioning into adulthood, reunification services, as well as other child welfare services that promote a youth's development.<sup>221</sup>

Most children designated as unaccompanied, whether those that remain in ORR custody or those that are released to sponsors, are not afforded attorneys.<sup>222</sup> A child is permitted to retain an attorney, but none is provided at government expense, although recently ORR has provided representation in a small number of cases.<sup>223</sup> Thus, in most

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218. *Id.*

219. *Id.* at 2.

220. *Id.* at 2, 3. This means that URM programs are required to provide the same range of services to URM youth as are provided to youth in the domestic foster care system in the state, and the child becomes a ward of the state or private agency, depending on the state. *Id.* at 2.

221. *Id.* See generally *Foster Care for Unaccompanied Refugee & Immigrant Children: Frequently Asked Questions*, USCCB MIGRATION & REFUGEE SERVS. AND LUTHERAN IMMIGR. & REFUGEE SERV., <https://www.usccb.org/about/children-and-migration/upload/URM-FAQ-s.pdf> [<https://perma.cc/U9U6-6RKJ>].

222. A small percentage are provided attorneys funded by ORR through the Vera Institute. *Legal Services for Unaccompanied Children*, VERA, <https://www.vera.org/projects/legal-services-for-unaccompanied-children> [<https://perma.cc/V8CA-2JM8>]. But, in the majority of cases, children are unrepresented. Carlee Goldberg, *Legal Aid for Unaccompanied Children in the U.S. Illegally*, NAT'L CONF. ST. LEGISLATURES (Sept. 2020), <https://www.ncsl.org/research/immigration/legal-aid-for-unaccompanied-children-in-the-u-s-illegally.aspx> [<https://perma.cc/W6CN-CZWC>] (estimating that 75-90 percent of children in removal proceedings are without an attorney). See generally Mary O' Neill, Parisa Bagheri & Alexis Sarnicola, *Forgotten Children of Immigration and Family Law: How the Absence of Legal Aid Affects Children in the United States*, 53 FAM. CT. REV. 676, 677 (2015) (arguing that unaccompanied children should be provided with government-funded legal representation in immigration proceedings).

223. See Sarah Burr, *Why Are Children Representing Themselves in Immigration Court?*, HILL (Oct. 24, 2021), <https://thehill.com/opinion/judiciary/578076-why-are-children-representing-themselves-in-immigration-court> [<https://perma.cc/AE5V-HUYX>] (decrying, based on the author's experience as a retired immigration judge,

jurisdictions around the country only a tiny percentage of children are able to obtain a *pro bono* or publicly subsidized attorney.<sup>224</sup> This fact is magnified when one considers that most unaccompanied minors are immediately placed into removal proceedings upon arrival into the U.S.,<sup>225</sup> meaning the federal government is actively seeking to deport the child.<sup>226</sup> It also is significant to those children who remain in ORR custody indefinitely because the child's placement into a long-term foster care program is largely dependent upon an attorney advocating for a viable form of immigration relief.

For many unaccompanied children, one viable and prominent form of immigration relief will be SIJS, a path to lawful permanent resident status available to youth under the age of 21.<sup>227</sup> To be eligible, a state juvenile court judge must find that reunification is not possible with at least one of the youth's parents, due to abuse, neglect, abandonment, or something similar under state law, and that it is not in the child's best interest to return to his or her country of origin.<sup>228</sup> However, to apply for SIJS, a child must first be under the jurisdiction of or dependent upon a state juvenile court and request that a state court

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the lack of constitutional or statutory right to appointed counsel in immigration proceedings).

224. See Hannan Adely, *Immigrant Children Often Face Deportation Hearings Without a Lawyer. NJ Wants to Change That*, NORTH JERSEY (June 29, 2021), <https://www.northjersey.com/story/news/new-jersey/2021/06/29/nj-budget-includes-legal-aid-unaccompanied-minors-immigration/5345936001> [<https://perma.cc/7J6V-2P67>] (noting that while nonprofit organizations offer free legal services, these services have not kept pace with the surge in cases); Monsy Alvarado, *NJ Moves to Give Children Legal Aid in Immigration Cases*, NJ SPOTLIGHT NEWS, (June 25, 2021), <https://www.njspotlight.com/2021/06/legal-aid-unaccompanied-minors-immigration-hearings-lawyers-legal-representation> [<https://perma.cc/A6J9-6RWC>] (reporting on New Jersey's efforts to expand access to legal services for unaccompanied minors).

225. See KIDS IN NEED OF DEF., MAPPING MIGRANT CHILDREN IN DETENTION 1 (2021), <https://supportkind.org/wp-content/uploads/2021/02/Mapping-Migrant-Children-2.1.pdf> [<https://perma.cc/MQ3B-FCPG>] (explaining that the TVPRA requires CBP to transfer unaccompanied minors to ORR within 72 hours, and that prior to transfer, DHS will initiate removal proceedings against the child).

226. CATH. LEGAL IMMIGR. NETWORK, INC., *supra* note 163.

227. See 8 U.S.C. § 1101(a)(27)(J)(i)–(ii) (defining the requirements for such status). *But see* David B. Thronson, *The Legal Treatment of Immigrant Children in the United States*, PROTECTING MIGRANT CHILDREN: IN SEARCH OF BEST PRACTICE 259, 265–67 (Mary Crock & Lenni B. Benson eds., 2018) (discussing the limitations of SIJS both in terms of its framing of the child as dependent but also because “it leaves out many youth in need of humanitarian relief whose situations simply cannot be molded to fit the exacting requirements of special immigrant juvenile status”).

228. 8 U.S.C. § 1101(a)(27)(J)(i)–(ii).

judge make these findings.<sup>229</sup> Thus, for many children, they are not only required to appear in immigration court, but also a state juvenile or family court, making the availability of an attorney even more important.

### III. THE CASE FOR APPLYING CHILD WELFARE LAWS AND PRINCIPLES

As is clear from the above description of our immigration system, ORR is responsible for sheltering and caring for migrant children, as well as ensuring their safe placement with parents or other kin. Accordingly, it is in a similar position to our domestic child welfare agencies. Nonetheless, the laws that pertain to children and families who are involved with our domestic child welfare systems have never been applied to ORR and its custody of migrant children.<sup>230</sup> This is largely due to the fact that many of the federal child welfare statutes are part of, and amendments to, the Social Security Act, a funding statute that places certain requirements on states and localities before funds are transferred from the federal government to the local agencies.

Yet, the supposition that these standards and laws do not, or at the very least should not, apply to the federal government and ORR, in particular, must be challenged.<sup>231</sup> The policies and practices outlined in these laws, and mandated by DHHS, establish what is expected of a governmental entity that is caring for children in its custody.<sup>232</sup> One professor of social work, who studies these disparities, aptly asked:

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229. *See id.* (requiring such determinations be made in administrative or judicial proceedings).

230. Keila E. Molina & Lynne Marie Kohm, *Are We There Yet? Immigration Reform for Children Left Behind*, 23 BERKELEY LA RAZA L.J. 77, 86 (2013) (noting how “[i]mmigration law as it is currently enforced does not take family law and family circumstances into account, even though similar circumstances, in a non-immigration context, would be considered in state family court proceedings”).

231. 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, 220 (2006) (arguing that there is a paramount need to change the discourse and approach to a “child welfare and child-centered paradigm that gives primacy to the child’s perspective, needs and involvement”).

232. *See id.* at 219. (calling for a paramount need to change the discourse and approach to a “child welfare and child-centered paradigm that gives primacy to the child’s perspective, needs and involvement”); *see also* Avrushin & Haymes, *supra* note 34, at 122 (noting that “while state child welfare systems have their challenges, they still present a formal system of intentional care to address the needs” of vulnerable

If there is some precedence for doing this [for American born children], why isn't the same precedence applied in the federal system? . . . You ask the feds and they'll say it comes down to funding most of the time, but I don't know that it's that simple. I would argue that there's some other underlining drivers of why we have a system that seems to work for kids that are born in this country, but we don't apply those best practices in the federal system [for undocumented children].<sup>233</sup>

Two other social scientists emphasize the similarities between children in our domestic foster care systems and children involved with ORR.<sup>234</sup>

Many young people from both groups experienced trauma, depend on community-based services that often struggle to address their vast needs, navigate confusing and complex legal and social services systems – often without a parent or legal guardian – and rely on the professional staff within those systems to make critical legal and social service decisions in their best interest.<sup>235</sup>

Moreover, both ORR and the Administration for Children and Families, which oversees our domestic child welfare programs, are part of DHHS.<sup>236</sup> This leads to the obvious question of why these necessary and mandatory practices and policies only apply to state and local child welfare agencies and not to the oversight entity itself? And isn't this question especially pertinent when that agency is charged with the care of children who have suffered similar trauma and present with comparable needs and vulnerabilities as foster children? The fact remains that ORR is required to come into compliance with basic child welfare standards, because, as will be explained below, the federal government does not get a pass when it concerns the care of non-citizen children and their families. The U.S. Constitution, federal immigration statutes, child welfare laws and policies, state statutes, as well as international conventions and norms all call for the application of these well-established principles to the care and custody of non-citizen children.

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children); YOUNG CTR., REIMAGINING, *supra* note 209, at 14 (leveling a similar challenge regarding the fair, non-discriminatory treatment of children).

233. Kella, *supra* note 166 (internal quotations omitted).

234. Avrushin & Haymes, *supra* note 34, at 108.

235. *Id.*

236. See *Offices*, ADMIN. FOR CHILD. & FAMS., <https://www.acf.hhs.gov/about/offices> [<https://perma.cc/G823-9ZE5>] (detailing the ACF's organizational structure and subunits).

*A. Constitutional Protections*

First, the U.S. Constitution, with its protections against state intervention into the family and the right of parents to rear and raise their children, applies to all persons regardless of immigration status.<sup>237</sup> As the opening quote of this Article reflects, the holdings in the *Ms. L* litigation, the lawsuit challenging the legality of forcibly separating children from one or both parents at the border, emphasize a parent's constitutional right to rear and raise their children, and the government's limited authority to intervene into the sanctity of the parent-child relationship only when there is harm or significant risk of harm to the child.<sup>238</sup> As stated by the Honorable Dana Sabraw in his initial injunction ending the government's policy of separating children who arrived to this country with a parent, the practice of "separating [parents] from their children, and failing to reunite those parents who have been separated, without a determination that the parent is unfit or presents a danger to the child violates the parents' substantive due process rights to family integrity under the Fifth Amendment . . . ."<sup>239</sup>

Judge Sabraw also expressed great concern with the fact that the Government had (1) no process in place to track the children and parents once separated, (2) no process to permit them to communicate with one another, and (3) and no process to reunite the parents with their children.<sup>240</sup> Once again, the court went back to the Constitution and found that the lack of such systems violates a parent's due process right to family integrity. Specifically, the court held that the "unfortunate reality is that under the present system migrant children are not accounted for with the same efficiency and accuracy

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237. See *Zadydas v. Davis*, 533 U.S. 678, 693 (2001) ("[T]he Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."); *Jacinto-Castanon de Nolasco v. U.S. Immigr. & Customs Enf't*, 319 F. Supp. 3d 491, 500 (D.D.C. 2018) (emphasizing that lawful detention in immigration custody does not eliminate an individual's due process right to family integrity); *M.G.U. v. Nielsen*, 325 F. Supp. 3d 111, 119 (D.D.C. 2018) (same).

238. See *Ms. L. v. U.S. Immigr. & Customs Enf't*, 310 F. Supp. 3d 1133, 1143 (S.D. Cal. 2018); see also *Molina & Kohm*, *supra* note 230, at 87 (concluding that family law and immigration law both acknowledge the significance of family reunification); Marcia Yablong-Zug, *Separation, Deportation, Termination*, 32 B.C. J.L. & SOC. JUST. 63, 71–72 (arguing how immigrant parents also have the right to the care and custody of their children).

239. *Ms. L.*, 310 F. Supp. 3d at 1142.

240. *Id.* at 1144.

as *property*.”<sup>241</sup> Accordingly, the court found that the government had “no system in place to keep track of, provide effective communication with, and promptly produce children.”<sup>242</sup> And on the issue of harm to the children due to being separated from their parents, the court determined that “separating children from parents is a highly destabilizing, traumatic experience that has long term consequences on child well-being, safety, and development.”<sup>243</sup> The court also discussed “toxic stress,” highlighting studies showing that children who experience such traumatic events “can suffer from anxiety and post-traumatic stress disorder, have poorer behavioral and educational outcomes, and experience higher rates of poverty . . . .”<sup>244</sup>

*B. Safeguards Memorialized in the Trafficking Victims Protection Reauthorization Act (TVPRA)*

Not only does the Constitution protect the sanctity of the parent-child relationship by imposing restrictions on family separations, but there also are federal laws that protect unaccompanied minors.<sup>245</sup> These laws also would be applicable to those children who are separated from a parent or guardian, as those children are designated and treated as unaccompanied minors.

The Trafficking Victims Protection Reauthorization Act (TVPRA) is a key component of this federal framework.<sup>246</sup> Enacted in 2008, the statute aims, in part, to protect migrant children who are escaping to this country or who have been trafficked into this country.<sup>247</sup> It sets forth mandatory procedures on how unaccompanied children should

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241. *Id.* (citing *Santosky v. Kramer*, 455 U.S. 745, 758–59 (1982) (quoting *Lassiter v. Dep’t of Soc. Servs. of Durham Cnty.*, 452 U.S. 18, 27 (1981)) (stating it is “‘plain beyond the need for multiple citation’ that a natural parent’s ‘desire for and right to the companionship, care, custody, and management of his or her children’ is an interest far more precious than any property right”); *see also* David B. Thronson, *supra* note 227, at 992 (concluding that “[c]hildren . . . are by definition passive objects subject to parental control”); David B. Thronson & Judge Frank P. Sullivan, *Family Courts and Immigration Status*, 63 *JUV. & FAM. CT. J.* 1, 5–8 (2012) (discussing the devaluing of children in immigration law).

242. *Ms. L.*, 310 F. Supp. 3d at 1144.

243. *Id.* at 1147.

244. *Id.*

245. *See* 6 U.S.C. § 279(g)(2).

246. The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (codified at 8 U.S.C. § 1232).

247. *See* 8 U.S.C. § 1232(c)(1).

be treated by the federal government once in its custody.<sup>248</sup> For example, the TVPRA mandates that, except under exceptional circumstances, any department or agency in custody of an unaccompanied minor from a “non-contiguous country” must transfer that child to DHHS within seventy-two hours after determining that the child is an unaccompanied minor.<sup>249</sup>

Once a child is transferred to DHHS, and more specifically ORR, the child “shall be promptly placed in the *least restrictive setting that is in the best interest of the child.*”<sup>250</sup> And as a signal as to what is intended in terms of such settings, the TVPRA expands eligibility into the URM program to children who are unaccompanied and eligible for SIJS.<sup>251</sup>

Relying largely on the obligation to place children in the “least restrictive setting available,” a recent case challenged the policy of transferring unaccompanied children to the custody of the U.S. Immigration and Customs Enforcement (ICE) unit on their 18th birthday.<sup>252</sup> After an eighteen-day bench trial, the Honorable Rudolph Contreras held that ICE did not comply with its statutory obligations under the TVPRA because ICE had “‘unlawfully withheld or unreasonably delayed’ required consideration of placement in the least restrictive setting available to many members of the certified

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248. *Id.* § 1232. The TVPRA establishes two sets of standards for UAC: (1) UAC from “contiguous” countries that share a border with the United States (Mexico and Canada); and (2) UAC from “non-contiguous” countries. *See id.* § 1232(a)(2)–(3), (b) (delineating each standard).

249. *Id.* § 1232(b)(3).

250. *Id.* § 1232(c)(2)(A) (emphasis added).

251.

A child who has been granted special immigrant status under section 101(a)(27)(J) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(27)(J)) and who was in the custody of the Secretary of Health and Human Services at the time a dependency order was granted for such child, was receiving services pursuant to section 501(a) of the Refugee Education Assistance Act of 1980 (8 U.S.C. 1522 note) at the time such dependency order was granted, or has been granted status under section 101(a)(15)(U) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(U))[,] shall be eligible for placement and services under section 412(d) of the Immigration and Nationality Act (8 U.S.C. 1522(d)).

*Id.* § 1232(d)(4)(A) (footnote omitted). Moreover, “[a] child shall not be placed in a secure facility absent a determination that the child poses a danger to self or others or has been charged with having committed a criminal offense.” *Id.* § 1232(c)(2)(A).

252. *Ramirez v. U.S. Immigr. & Customs Enf’t*, 471 F. Supp. 3d 88, 94 (D.D.C. 2020).

class,”<sup>253</sup> which constituted youth aging out across the country.<sup>254</sup> The court also concluded that the actions of ICE violated the Administrative Procedure Act in that ICE acted in a manner that was “arbitrary, capricious,” an “abuse of discretion,” and “most clearly otherwise not in accordance with the law.”<sup>255</sup> In making these legal conclusions, the court found that “if the least restrictive setting was being considered in every case,” there would be “large changes and differences” in detention rates.<sup>256</sup>

Due to poor training and non-existent guidance, many ICE field offices detained youth on a nearly automatic basis (above 95% in certain field offices),<sup>257</sup> and in some cases refused to release immigrants to their parents, other family members, or organizations who volunteered to sponsor them.<sup>258</sup> In September 2021, the court issued a permanent injunction in the case, which was amended in November 2021.<sup>259</sup> In its opinion granting the permanent injunction, the court pointed to ICE’s “pervasive violations” of the TVPRA and its failure to comply with the statute, constituting “a pattern of agency recalcitrance and resistance to the fulfillment of its legal duties.”<sup>260</sup> The five-year permanent injunction requires ICE to: (1) comply substantively with the mandate of the TVPRA, requiring ICE to consider placing unaccompanied immigrant children in settings less restrictive than ICE detention; (2) re-train its officers and revise its policies and handbook on how to make custody determinations when youth in ORR custody turn 18; and (3) document its custody decisions with reports to class counsel.<sup>261</sup>

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253. *Id.* at 191 (quoting 5 U.S.C. § 706(1)).

254. *Id.* at 101.

255. *Id.* at 191 (quoting 5 U.S.C. § 706(2)).

256. *Id.* at 189.

257. *Id.* at 139, 143.

258. *See generally id.* at 126–71 (detailing gaps in training and outcomes at various field offices throughout the country).

259. *Ramirez v. U.S. Immigr. & Customs Enf’t*, No. 18-cv-508, 2021 WL 4284530 (D.D.C. Sept. 21, 2021); Final Judgment and Permanent Injunction, *Ramirez*, No. 18-cv-508, [https://immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2021-09/Garcia-Ramirez-v.-ICE\\_Final-Judgment.pdf](https://immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2021-09/Garcia-Ramirez-v.-ICE_Final-Judgment.pdf) [https://perma.cc/2CKJ-X7HH]; Addendum to Final Order and Permanent Injunction, *Ramirez*, No. 18-cv-508, (D.D.C. Nov. 10, 2021), [https://immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2022-01/Garcia-Ramirez-v-ICE\\_Final-Judgment-Decision-addendum\\_Nov-10-2021.pdf](https://immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2022-01/Garcia-Ramirez-v-ICE_Final-Judgment-Decision-addendum_Nov-10-2021.pdf) [https://perma.cc/JDH3-D54H].

260. *Ramirez*, 2021 WL 4284530, at \*44.

261. *Id.* at \*77–83.

The TVPRA also calls for the “safe repatriation” of children who are returning to their countries of origin and specifically requires the development of safe repatriation “policies and procedures for unaccompanied children.”<sup>262</sup> With the passage of the TVPRA, this was the first time the obligation to ensure that children were safely returned was placed on government officials. Yet, this mandate has not been fulfilled, as no administration since the law’s enactment in 2008 has put into place the required policies and procedures.<sup>263</sup> And finally, the TVPRA directs DHHS to ensure “to the greatest extent practicable and consistent with [the INA],” that all unaccompanied minors in DHHS or DHS custody “have counsel to represent them in legal proceedings or matters and to protect them from mistreatment, exploitation, and trafficking.”<sup>264</sup>

For child trafficking victims and other vulnerable unaccompanied children, the statute permits DHHS to appoint an independent child advocate to advocate for the best interest of the child, similar to the role of a *guardian ad litem* in state family court proceedings.<sup>265</sup> The Young Center for Immigrant Children’s Rights is the organization that is designated as the independent child advocate. The Young Center views its role as an “advocate for [the child’s] best interests—from custody and release to the ultimate decision about whether the child will be allowed to remain in the [United States].”<sup>266</sup> Individual child advocates are supervised by attorneys and social workers and apply best interest law and principles in their best interest determinations; but they do not serve as the immigration attorney representing the child

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262. 8 U.S.C. § 1232(a)(1) (stating “[i]n order to enhance the efforts of the United States to prevent trafficking in persons, the Secretary of Homeland Security, in conjunction with the Secretary of State, the Attorney General, and the Secretary of Health and Human Services, shall develop policies and procedures to ensure that unaccompanied children in the United States are safely repatriated to their country of nationality or of last habitual residence”). See generally Linda Kelly Hill, *The Right of Safe Repatriation for Unaccompanied Alien Children: Advancing the Intent of the Trafficking Victims Protection Reauthorization Act*, 12 LOY. J. PUB. INT. L. 85, 86–87 (2010) (providing an overview of the TVPRA’s key provisions).

263. Karen Baker, *Is the United States Safely Repatriating Unaccompanied Children? Law, Policy, and Return to Guatemala*, 73 U. MIAMI L. REV. 781, 806–12 (2019) (arguing that the U.S. Government has failed to effectively implement the law).

264. 8 U.S.C. § 1232(c)(5).

265. *Id.* § 1232(c)(6).

266. *About the Young Center*, YOUNG CTR. FOR IMMIGRANT CHILD.’S RTS., <https://www.theyoungcenter.org/about-the-young-center> [<https://perma.cc/DNE6-V2ZK>].

in his or her removal proceeding.<sup>267</sup> Additionally, not all children are afforded a child advocate—only those who have been found to be victims of trafficking or who are in a small category of unaccompanied minors who are viewed as especially vulnerable.

*C. The Flores Settlement Agreement (FSA) Ensures that Children Are Not Detained and Are Placed with Family Wherever Possible*

The TVPRA memorialized into law some of the provisions of the 1997 *Flores* Settlement Agreement (FSA), which addresses how migrant children are to be treated and how their needs are to be addressed.<sup>268</sup> The FSA was the result of over two decades of litigation responding to the U.S. government's detention policy concerning children.<sup>269</sup> The agreement, between the federal government and immigrant rights organizations on behalf of a class of child migrants, aimed to minimize the unnecessary and harmful practice of detaining children.<sup>270</sup> The FSA has been litigated extensively over the last two decades.<sup>271</sup> Most recently, the agreement withstood an attempt by the federal government to establish regulations that would have gutted some of the key elements of the settlement decree.<sup>272</sup>

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267. See *Briefing Paper on Young Center's Child Advocate Program*, YOUNG CTR. FOR IMMIGRANT CHILD.'S RTS., <https://static1.squarespace.com/static/597ab5f3bbebafb0a625aaf45/t/5cf02b0b9cf22b0001613c8d/1559243531930/Yong+Center+Child+Advocate+Program.pdf> [<https://perma.cc/QY7X-4DRH>] (noting that the Center's volunteer child advocates accompany children to hearings or appointments and submit written best interest recommendations (BIRs)).

268. Stipulated Settlement Agreement, *supra* note 172; see also Rebeca M. Lopez, Comment, *Codifying the Flores Settlement Agreement: Seeking to Protect Immigrant Children in U.S. Custody*, 95 MARQ. L. REV. 1635, 1642 (2012) (noting that the TVPRA came after more than a decade of criticism of the INS for violating the terms of the *Flores* agreement).

269. Lopez, *supra* note 268, at 1642.

270. See Matthew Sussis, *The History of the Flores Settlement*, CTR. FOR IMMIGR. STUD. 3 (Feb. 11, 2019), <https://cis.org/sites/default/files/2019-02/sussis-flores-history.pdf> [<https://perma.cc/BS4Z-28K9>] (noting that comments by former government officials involved in signing the *Flores* Settlement indicate that the decision was “guided by humanitarian considerations for the children, rather than simply a concern about the risks of further litigation”).

271. See *Strategies: Flores v. Reno*, NAT'L CTR. FOR YOUTH L., <https://youthlaw.org/case/flores-v-reno> [<https://perma.cc/9R7R-DPED>] (collecting cases and news coverage of *Flores*-derived litigation).

272. See *Flores v. Rosen*, 984 F.3d 720, 726–27 (9th Cir. 2020) (affirming in part and reversing in part the judgment of the district court to enjoin the regulations from

The FSA established national standards regarding the detention, release, and treatment of all children in immigration detention and underscores the principle of family unity.<sup>273</sup> It provides that, when release is not possible, a minor shall be placed in the least restrictive setting “appropriate to the minor’s age and special needs, provided that such setting is consistent with [the agency’s] interests [in ensuring] the minor’s timely appearance before the [legacy] INS and the immigration courts and to protect the minor’s well-being and that of others.”<sup>274</sup>

Where release is possible, the FSA creates a strong presumption in favor of release and favors family reunification, in the following order of preference, to:

- A. a parent;
- B. a legal guardian;
- C. an adult relative (brother, sister, aunt, uncle, or grandparent);
- D. an adult individual or entity designated by the parent or legal guardian . . .
- E. a licensed program willing to accept legal custody; or
- F. an adult individual or entity seeking custody . . .<sup>275</sup>

Further, the FSA requires “prompt and continuous efforts . . . toward family reunification and the release of the minor,” and instructs that these “efforts at family reunification . . . continue so long as the minor is in [legacy] INS custody.”<sup>276</sup> These requirements are grounded in child protection principles and recognize that children need a close

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taking effect and deny the government’s motion to terminate the agreement). The Ninth Circuit panel rejected the Government’s argument that the *Flores* Agreement terminated by its own terms simply because the Regulations were published. *Id.* at 741. The panel also affirmed the district court’s ruling that changed circumstances, including the passage of recent legislation, did not warrant termination of the *Flores* Agreement. *Id.* Accordingly, the court upheld the injunction prohibiting certain aspects of the Trump Administration’s Regulations from taking effect, and it rejected DOJ’s attempt to terminate the *Flores* Agreement. *Id.* at 744. Nonetheless, even the Biden administration attempted to implement the regulations that were not enjoined by the 9th (most of them concerning DHHS), but finally backed off after strong advocacy. Camilo Montoya-Galvez, *Biden Administration Discards Trump-era Plan to End Legal Agreement Protecting Migrant Children*, CBS NEWS (Dec. 11, 2021, 12:37 PM), <https://www.cbsnews.com/news/biden-administration-discards-trump-era-plan-to-end-legal-agreement-protecting-migrant-children> [<https://perma.cc/32YP-EH8W>].

273. Somers et al., *supra* note 210, at 338.

274. Stipulated Settlement Agreement Exhibit 2, *supra* note 172, at 7.

275. *Id.* at 9–10.

276. *Id.* at 12.

and supportive relationship with a caregiver in order to thrive. They also are informed by research, which shows that congregate care facilities are harmful to children's health and well-being.<sup>277</sup>

If the government does not release a child to a parent or family member, it must place the child in a "licensed program" within three to five days.<sup>278</sup> A "licensed program" is one "licensed by an appropriate State agency to provide residential, group, or foster care services for dependent children," which must be "non-secure as required under state law" and meet the standards set forth in the FSA.<sup>279</sup> Those standards, which also can be found in ORR policy, include food, clothing, grooming items, medical and dental care, individualized needs assessments, educational services, recreation and leisure time, counseling, access to religious services, contact with family members,

277. Stipulated Settlement Agreement Exhibit 2, *supra* note 172, at 7.

278. *Id.* Exhibit 2, at 3. But, as of the writing of this Article, ORR shelters in Texas and Florida were not permitted to be licensed, as per the states' respective governors. Uriel J. García, *Dozens of Texas Facilities Housing Child Migrants to Operate Without Licenses amid Fight Between Gov. Greg Abbott and Biden Administration*, TEX. TRIB. (Aug. 11, 2021), <https://www.texastribune.org/2021/08/10/texas-child-migrant-facilities-licenses> [<https://perma.cc/QP9E-WRKW>]; *Feds Say State Licenses Not Needed for Migrant Children Shelters to Stay Open*, TAMPA BAY TIMES (Feb. 24, 2022), <https://www.tampabay.com/news/florida-politics/2022/02/24/feds-say-state-licenses-not-needed-for-migrant-children-shelters-to-stay-open/> [<https://perma.cc/MUB3-26BP>]. In Texas, there are emergency regulations allowing the shelters to operate without licenses but those expire soon. New Emergency Rules Adopted Related to Governor's Proclamation Declaring Disaster, 46 Tex. Reg. 4418 (July 23, 2021), <https://www.hhs.texas.gov/sites/default/files/documents/doing-business-with-hhs/provider-portal/protective-services/ccl/emergency-rules-gov-disaster-july-2021.pdf> [<https://perma.cc/4S5Y-DN82>].

279. Stipulated Settlement Agreement Exhibit 2, *supra* note 172, at 4, 5. In September 2021, DHHS issued a "Request for Information" asking whether a federal licensing scheme should be adopted for ORR facilities that house unaccompanied children. Attorney Generals from seventeen states and the District of Columbia wrote a joint letter opposing such a change in law and policy. They argued that such a move "intrudes on a traditional area of state sovereignty and expertise, risks lowering the standards of care for these children, and would create a risk of conflict between state and federal licensing regimes, including by sanctioning the operation of secure facilities and family detention facilities that the States have refused to license due to the harms they inflict on children." The seventeen states are as follows: California, Connecticut, Delaware, Illinois, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Virginia, and Washington. Rob Bonta, Cal. Att'y Gen. et al., Federal Licensing of Office of Refugee Resettlement Facilities Request for Information, (Oct. 4, 2021), [https://www.michigan.gov/documents/ag/2021.10.04\\_Multistate\\_Comment\\_Letter\\_Docket\\_No.\\_ACF-2021-0001\\_737620\\_7.pdf](https://www.michigan.gov/documents/ag/2021.10.04_Multistate_Comment_Letter_Docket_No._ACF-2021-0001_737620_7.pdf) [<https://perma.cc/66KP-YXHX>].

legal services information, and a reasonable right to privacy.<sup>280</sup> In most states, there is no difference between the licensing requirements for state or locally-run foster care programs and those administered and paid for by ORR. Moreover, ORR must provide “visitation and contact with family members (regardless of their immigration status).”<sup>281</sup> Thus, it seems clear that, at a minimum, ORR must provide a safe and adequate residential program for the children in its custody and must begin to comply with some basic norms of child welfare practice.

*D. Federal Law Transfers the Care of Unaccompanied Children to the Office of Refugee Resettlement*

Further authority for the proposition that ORR is equivalent to a foster care agency can be found in the statute which created the Department of Homeland Security and moved the care of unaccompanied children to DHHS. In 2002, when the Department of Homeland Security was created and replaced the Immigration and Naturalization and Service (INS), the responsibility for caring for unaccompanied minors was transferred from the INS to DHHS, and more specifically ORR.<sup>282</sup> This marked a deliberate choice to shift away

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280. *Children Entering the United States Unaccompanied: Section 3*, OFF. REFUGEE RESETTLEMENT § 3.3 (Apr. 20, 2015), <https://www.acf.hhs.gov/orr/policy-guidance/children-entering-united-states-unaccompanied-section-3> [<https://perma.cc/NBK4-Y9CA>]. Some examples of the expectations ORR states in its policy it will meet, in order to comply with the *Flores* Settlement Agreement, are as follows: children shall have “[a]t least one individual counseling session per week conducted by trained social work staff with the specific objective of reviewing the child’s progress, establishing new short-term objectives, and addressing both the developmental and crisis-related needs of each child.” *Id.* Recreational activities must “include daily outdoor activity, weather permitting, with at least one hour per day of large muscle activity and one hour per day of structured leisure time activities (that should not include time spent watching television). Activities should be increased to a total of three hours on days when school is not in session.” *Id.* In addition, a reasonable right to privacy includes: a child’s right “to wear his or her own clothes when available, retain a private space in the residential facility, group or foster home for the storage of personal belongings, talk privately on the phone and visit privately with guests, as permitted by the house rules and regulations, receive and send uncensored mail unless there is a reasonable belief that the mail contains contraband.” *Id.*

281. *Id.*

282. 6 U.S.C. § 279(a).

from the adult detention model and create a distinction between immigration and child welfare services.<sup>283</sup>

A review of the legislative history illustrates that this was done because DHHS was viewed as the appropriate agency to ensure that the children's needs would be met. In fact, all members of the House Committee on the Judiciary, Subcommittee on Immigration, Border Security and Claims agreed with the following testimony of Mr. Appleby from the Catholic Conference:<sup>284</sup>

It is our position that if all of INS were to go into Homeland Security the unaccompanied alien minor program should be separated out and placed into Health and Human Services. Our first blush was that it might go into the Office of Refugee Resettlement, because they have certain unaccompanied refugee minors and trafficking victims who are children and have some expertise. But the fact that it should go into HHS, which has the child welfare expertise and is able to take care of children, their psychological, emotional and other material needs, is very vital to how these children are treated and their well-being. So we would strongly support that.<sup>285</sup>

In enacting this transfer of functions, the responsibilities of ORR were set forth in the statute.<sup>286</sup> Among these functions were the obligations to “ensur[e] that the interests of the child[ren] are considered in decisions and actions relating to the[ir] care and custody;”<sup>287</sup> make and implement placement determinations;<sup>288</sup> “coordinat[e] and implement[] the care and placement of unaccompanied” minors;<sup>289</sup> and “develop[] a plan . . . to ensure that

283. UNICEF: BUILDING BRIDGES, *supra* note 197, at 20; *see also* Somers et al., *supra* note 210, at 341 (describing the transfer of government authority over the custody of unaccompanied children as a “structural paradigm shift from the enforcement-oriented trend to a child protection-oriented framework with respect to unaccompanied children”).

284. *Role of Immigration in the Department of Homeland Security Pursuant to H.R. 5005, the Homeland Security Act of 2002: Hearing on H.R. 5005 Before Subcomm. on Immigr., Border Sec., & Claims of the H. Comm. on the Judiciary*, 107th Cong. 31, 33, 53 (2002) (statement of Kevin Appleby, United States Conference of Catholic Bishops).

285. *Id.* at 53.

286. Somers et al., *supra* note 210, at 349 (noting that although “the HSA of 2002 achieved a monumental task of shifting custodial responsibility from the INS to ORR[,] . . . it left intact the existing custodial system that the INS had constructed,” namely juvenile justice programs, secure facilities and other large congregate care institutions).

287. 6 U.S.C. § 279(b)(1)(B).

288. *Id.* § 279(b)(1)(C)–(D).

289. *Id.* § 279(b)(1)(A).

qualified and independent legal counsel is timely appointed to represent the interests of each such child, consistent with the law regarding appointment of counsel that [wa]s in effect on November 25, 2002.”<sup>290</sup> Interestingly, the statute outlining the functions of ORR also encouraged the Director of ORR to use the refugee children foster care system, specifically the URM program established pursuant to section 412(d) of the Immigration and Nationality Act.<sup>291</sup> This program authorizes the Director of ORR to financially assist States and to contract with nonprofit agencies “for the provision of child welfare services,” such as “foster care and health care.”<sup>292</sup> And in fact, as is stated above, the TVPRA of 2008 expanded the eligibility for youth in this program to those youth who had been designated as unaccompanied and who were found eligible for SIJS.<sup>293</sup> Thus, the intent of the legislation was as much as possible to treat unaccompanied minors as foster children and to place migrant children into our state and locally-run child welfare systems, just like the URM program.

*E. ORR Policy Guidelines Mandate “Child Welfare Best Practices”*

While ORR has never promulgated regulations governing how it should care for and address the needs of unaccompanied minors, it has issued policy guidance.<sup>294</sup> This guidance document changes quite frequently without notice.<sup>295</sup> Nonetheless, it is instructive on what ORR views as its role and obligations. Significantly, ORR states that its

policies for placing children and youth in its custody into care provider facilities are based on *child welfare best practices* in order to

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290. *Id.* But see Somers et al., *supra* note 210, at 345–46 (emphasizing the difference between the word “interest” as compared to “best interest” and stating that “while the statute did not go so far as to incorporate the ‘best’ interests of the child,” it did introduce the concept of the interests of the child . . . . Nevertheless, this stripping down of the clause to the ‘interests’ of the child left the provision ambiguous in practice because ‘interests’ can be interpreted so broadly and diversely, and the term lacked the definitional moorings and domestic and international history of the term ‘best interests of the child’”).

291. 6 U.S.C. § 279(b)(3).

292. 8 U.S.C. § 1522(d)(2)(A).

293. *Id.* § 1232(d)(4)(A).

294. *Children Entering the United States Unaccompanied: Section 3*, *supra* note 280, §§ 3.1–3.

295. The legality, pursuant to the Administrative Procedures Act, of ORR operating without regulations and instead issuing policy without any notice to the public and without the opportunity for the public to comment is beyond the scope of this Article.

provide a safe environment and place the child in the least restrictive setting appropriate for the child's needs.<sup>296</sup>

ORR requires its contracted care providers to be "State licensed"<sup>297</sup> and "to ensure a high level of quality care."<sup>298</sup> According to its policies, "ORR may place a child in a shelter facility, foster care or group home (which may be therapeutic), staff-secure or secure care facility, residential treatment center, or other special needs care facility."<sup>299</sup> Specifically, ORR may make two types of placement decisions: (1) it may make "the initial placement [of a child] into an ORR care provider facility or setting and (2) transfer placement [of a child] between ORR care providers."<sup>300</sup>

#### F. Child Welfare Best Practice

Thus, what we can discern from the TVPRA, FSA, and ORR policy, as well as the statutory authority creating ORR, is that ORR is under the obligation to protect the well-being of children and to place children designated as unaccompanied minors in the "least restrictive" environment, in "their best interest," and "appropriate for the child's

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296. *Children Entering the United States Unaccompanied: Section 1*, *supra* note 167, § 1.2 (emphasis added). Specifically, "[t]he facilities, which operate under cooperative agreements and contracts, provide children with classroom education, health care, socialization/recreation, vocational training, mental health services, access to legal services, access to Child Advocates where applicable, and case management." *Children Entering the United States Unaccompanied: Section 3*, *supra* note 280, § 3.1.

297. *Children Entering the United States Unaccompanied: Section 3*, *supra* note 280, § 3.1. However, a recent GAO Report found serious flaws in the oversight of the state licensure process of ORR facilities and made 8 recommendations to improve accountability and the process overall. U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-609, UNACCOMPANIED CHILDREN: ACTIONS NEEDED TO IMPROVE GRANT APPLICATION REVIEWS AND OVERSIGHT OF CARE FACILITIES (2020). For example, "ORR does not systematically confirm the information submitted by applicants or document a review of their past performance on ORR grants, when applicable, according to GAO's analysis of ORR documents and interviews with ORR officials." *Id.* According to the GAO Report,

[i]n fiscal years 2018 and 2019, ORR awarded grants to approximately 14 facilities that were unable to serve children for 12 or more months because they remained unlicensed. In addition, ORR did not provide any documentation that staff conducted a review of past performance for the nearly 70 percent of applicants that previously held ORR grants. Without addressing these issues, ORR risks awarding grants to organizations that cannot obtain a state license or that have a history of poor performance.

*Id.*

298. *Children Entering the United States Unaccompanied: Section 3*, *supra* note 280, § 3.1.

299. *Children Entering the United States Unaccompanied: Section 1*, *supra* note 167, § 1.1.

300. *Id.*

[age and special] needs.”<sup>301</sup> It also is ORR policy to follow the principles of “child welfare best practices.”<sup>302</sup> Moreover, ORR solicits and considers the recommendations of independent Child Advocates, when they are appointed, regarding the “best interests of the child,”<sup>303</sup>

Accordingly, the question then becomes how these terms are defined. The TVPRA does not provide any additional guidance as to its mandate. Similarly, ORR does not provide any further instructions as to what is meant by “child welfare best practices,”<sup>304</sup> beyond its policies, which change frequently and are not binding.<sup>305</sup> Yet, the obvious, and in fact *the only*, place to find how “least restrictive setting” and “best interests” are defined and what are considered “child welfare best practices” is in our child welfare laws.<sup>306</sup> It also is instructive to study the assessment tools that DHHS and the Administration for Children and Families use to evaluate our domestic child welfare programs.<sup>307</sup> These documents clearly set forth our national child welfare standards and articulate with clarity and detail the practices and policies that are necessary to protect children, as well as the fundamental rights of children and families.

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301. *Id.*

302. *Id.*

303. U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-367, UNACCOMPANIED CHILDREN: HHS SHOULD IMPROVE MONITORING AND INFORMATION SHARING POLICIES TO ENHANCE CHILD ADVOCATE PROGRAM EFFECTIVENESS (2016), <https://www.gao.gov/assets/gao-16-367.pdf> [<https://perma.cc/6RTL-4BBW>] (finding that ORR followed more than 70% of the recommendations of the independent Child Advocate).

304. *Children Entering the United States Unaccompanied: Section 1*, *supra* note 167, § 1.1.

305. See Sarah John, *Website Changes Foreshadowed New Trump Limits on Unaccompanied Minors Program*, IMPRINT (June 13, 2019, 9:05 AM), <https://imprintnews.org/analysis/website-changes-foreshadowed-trump-changes-to-unaccompanied-minors-program/35555> [<https://perma.cc/RZF8-WHJE>]; see also ADMIN. CONF. OF THE U.S., AGENCY GUIDANCE THROUGH POLICY STATEMENTS 1 (2017), <https://www.acus.gov/recommendation/agency-guidance-through-policy-statements> [<https://perma.cc/NCU4-QGAD>].

306. *Children Entering the United States Unaccompanied: Section 1*, *supra* note 167, § 1.2.

307. See *Monitoring*, CHILD'S BUREAU, (Dec. 15, 2021), <https://www.acf.hhs.gov/cb/training-technical-assistance/monitoring> [<https://perma.cc/JK8J-S45N>] (explaining forms of monitoring, such as AFCARS, CFSRs, NYTDs, CCWIS reviews, and title IV-E reviews); see also *Sources for Screening and Assessment Tools, Instruments, and Measures*, CHILD WELFARE INFO. GATEWAY, <https://www.childwelfare.gov/topics/systemwide/assessment/family-assess/sources> [<https://perma.cc/JD98-RKSV>] (describing additional forms of assessment).

*G. State Foster Care Bills of Rights*

It also is worth highlighting that in some states, state statutes provide additional authority and protections for non-citizen children. These statutes, often entitled “Foster Children’s Bill of Rights,” have been enacted in fifteen states and Puerto Rico.<sup>308</sup> These laws call on individual states to ensure that the basic needs of children in out-of-home care are met and also often require “participation in extracurricular or community activities, efforts to maintain educational stability, access to guardians ad litem, access to mental, behavioral and physical health care, [and] access to or communication with siblings and family members.”<sup>309</sup> California’s is the longest, with forty-one enumerated rights.<sup>310</sup> As an example, New Jersey lists the following rights for children placed outside their home:

- a. To placement outside [the child’s] home only after the applicable department has made every reasonable effort, including the provision or arrangement of financial or other assistance and services as necessary, to enable the child to remain in his home;
- b. To the best efforts of the applicable department, including the provision or arrangement of financial or other assistance and services as necessary, to place the child with a relative;

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308. *Foster Care Bill of Rights*, *supra* note 94 (listing states with Foster Children Bill of Rights including Arizona, California, Colorado, Delaware, Florida, Hawaii, Massachusetts, Nevada, New Hampshire, New Jersey, North Carolina, Oregon, Pennsylvania, Rhode Island, and Texas); *e.g.*, ARIZ. REV. STAT. ANN. § 8-529 (2022); CAL. WELF. & INST. CODE § 361.2 (West 2022); COLO. REV. STAT. ANN. §§ 19-7-101, 19-7-102, 19-7-103 (West 2022); 2011 Colo. Sess. Laws, SB 120, Chap. 102; DEL. CODE ANN. tit. 13 § 2522 (West 2022); FLA. STAT. ANN. § 39.4085 (West 2022); HAW. REV. STAT. ANN. § 587A (West 2022); Mass. Dep’t of Child. & Fams., *Foster Child Bill of Rights*, MASS.GOV, <https://www.mass.gov/doc/foster-child-rights-0/download> [https://perma.cc/LUV9-WRW9]; NEV. REV. STAT. ANN. § 432.500 (West 2022); 2018 N.H. Laws ch. 220; N.J. STAT. ANN. § 9:6B-4 (West 2022); N.C. GEN. STAT. ANN. § 131D-10.1 (West 2022); OR. REV. STAT. ANN. §§ 418.200, 418.201, 418.202 (West 2022); 11 PA. STAT. AND CONS. STAT. ANN. § 2633 (West 2022); 42 R.I. GEN. LAWS § 42-72-15 (West 2022); TEX. FAM. CODE ANN. § 263.008 (West 2022). In addition, several other states have child welfare policies where children are afforded these rights while they are in state custody. *See, e.g.*, ‘*Know Your Rights*, NYC CHILD., <https://www1.nyc.gov/site/acs/youth/know-your-rights.page> [https://perma.cc/HAJ2-DMQV].

309. *Foster Care Bill of Rights*, *supra* note 94. “Included in statute in 14 states is the requirement that foster parents use a reasonable and prudent parenting standard, particularly when making decisions regarding foster children’s participation in extracurricular or other activities.” *Id.*

310. CAL. WELF. & INST. CODE § 16001.9 (West 2022).

- c. To the best efforts of the applicable department, including the provision or arrangement of financial or other assistance and services as necessary, to place the child in an appropriate setting in his own community;
- d. To the best efforts of the applicable department to place the child in the same setting with the child's sibling if the sibling is also being placed outside his home;
- e. To visit with the child's parents or legal guardian immediately after the child has been placed outside his home and on a regular basis thereafter, and to otherwise maintain contact with the child's parents or legal guardian, and to receive assistance from the applicable department to facilitate that contact, including the provision or arrangement of transportation as necessary;
- f. To visit with the child's sibling on a regular basis and to otherwise maintain contact with the child's sibling if the child was separated from his sibling upon placement outside his home, including the provision or arrangement of transportation as necessary;
- g. To placement in the least restrictive setting appropriate to the child's needs and conducive to the health and safety of the child;
- h. To be free from physical or psychological abuse and from repeated changes in placement before the permanent placement or return home of the child;
- i. To have regular contact with any caseworker assigned to the child's case who is employed by the applicable department or any agency or organization with which the applicable department contracts to provide services and the opportunity, as appropriate to the age of the child, to participate in the planning and regular review of the child's case, and to be informed on a timely basis of changes in any placement plan which is prepared pursuant to law or regulation and the reasons therefor in terms and language appropriate to the child's ability to understand;
- j. To have a placement plan, as required by law or regulation, that reflects the child's best interests and is designed to facilitate the permanent placement or return home of the child in a timely manner that is appropriate to the needs of the child;
- k. To services of a high quality that are designed to maintain and advance the child's mental and physical well-being;
- l. To be represented in the planning and regular review of the child's case, including the placement and development of, or revisions to, any placement plan which is required by law or regulation and the provision of services to the child, the child's parents or legal guardian and the temporary caretaker, by a person other than the child's parent or legal guardian or temporary caretaker who will

advocate for the best interests of the child and the enforcement of the rights established pursuant to this act, which person may be the caseworker, as appropriate, or a person appointed by the court for this purpose;

m. To receive an educational program which will maximize the child's potential;

n. To receive adequate, safe and appropriate food, clothing and housing;

o. To receive adequate and appropriate medical care; and

p. To be free from unwarranted physical restraint and isolation.<sup>311</sup>

Significantly, after minor children challenged New Jersey's Bill of Rights, the U.S. District Court for the District of New Jersey found that a private right of action existed. In making this finding, the district court held that construing the Child Placement Bill of Rights Act<sup>312</sup> in a way that failed to provide a private right of action would be contrary not only to principals of statutory construction, but also to the underlying policy goals of the legislation. The court held that there was no other logical interpretation of the Act. Such an interpretation would violate children's various rights to food, shelter, and reasonable safety.<sup>313</sup> Analogous analyses could be made about several of the other States' Bills of Rights.

Moreover, while some of these statutes are specific to the state or locally-run foster care programs and a few are written in an aspirational manner, as "goals" or "legislative intent," in five states—Nevada, New Jersey, North Carolina, Pennsylvania, and Texas—they are clearly structured as "rights" and are not limited to the domestic foster care program.<sup>314</sup> For example, New Jersey's Bill of Rights merely references children "placed outside [their] home."<sup>315</sup> Similarly, North Carolina's statute is applicable "[w]hen a child requires care outside the family unit."<sup>316</sup> In Nevada, the statute encompasses children "placed in . . . foster home[s] by an agency which provides child welfare

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311. N.J. REV. STAT. ANN. § 9:6B-44 (West 2022).

312. N.J. REV. STAT. ANN. § 9:6B-1 (West 2022).

313. *K.J. ex rel. Lowry v. Div. of Youth & Fam. Servs.*, 363 F. Supp. 2d 728, 744–45 (D.N.J. 2005).

314. N.J. REV. STAT. ANN. § 9:6B-4 (West 2022); NEV. REV. STAT. ANN. § 432.525 (West 2022); TEX. FAM. CODE ANN. § 263.008 (West 2022); 11 PA. STAT. AND CONS. STAT. ANN. § 2633 (West 2022); N.C. GEN. STAT. ANN. § 131D-10.1 (West 2022).

315. N.J. REV. STAT. ANN. § 9:6B-4.

316. N.C. GEN. STAT. ANN. § 131D-10.1.

services . . . .”<sup>317</sup> Likewise, the statutes in Pennsylvania and Texas simply speak to “children in foster care” or “each child in foster care,” respectively.<sup>318</sup> Furthermore, the statute in Texas, specifically its definitions for what constitute residential facilities for children, is phrased in a broad manner to include all children in some form of state custody.<sup>319</sup> For example, a “child-care facility” in Texas is defined as

a facility licensed, certified, or registered by the department to provide assessment, care, training, education, custody, treatment, or supervision for a child who is not related by blood, marriage, or adoption to the owner or operator of the facility, for all or part of the 24-hour day, whether or not the facility is operated for profit or charges for the services it offers.<sup>320</sup>

And an “agency foster home” in Texas means a “facility that provides care for not more than six children for 24 hours a day, is used only by a licensed child-placing agency or continuum-of-care residential operation, and meets department standards.”<sup>321</sup>

Arguably, these state statutes provide additional child welfare protections and standards for non-citizen children, especially those that are framed as “rights,” are not limited to state sponsored foster care placements and are in states where there are ORR facilities. As of September 2020, this includes Nevada with one ORR shelter, New Jersey with four, Pennsylvania with six, and Texas with the highest number of ORR facilities at fifty-two.<sup>322</sup> In these states, in particular, children in ORR facilities conceivably possess increased rights to child welfare best practices and could insist on these mandates being enforced. These Bills of Rights also provide legislative models for advocates in other states who attempt to get them enacted.

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317. NEV. REV. STAT. ANN. § 432.525.

318. 11 PA. STAT. AND CONS. STAT. ANN. § 2633; TEX. FAM. CODE ANN. § 263.008.

319. TEX. FAM. CODE ANN. § 263.008.

320. TEX. HUM. RES. CODE ANN. § 42.002 (West 2021).

321. *Id.* § 42.002(11).

322. U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-609, UNACCOMPANIED CHILDREN: ACTIONS NEEDED TO IMPROVE GRANT APPLICATION REVIEWS AND OVERSIGHT OF CARE FACILITIES 7 (2020); *see also* Zak, *supra* note 171 (noting that the Biden administration opened many new DHHS facilities in an effort to rectify overcrowding issues in CBP holding centers).

### *H. International Law*

Finally, an assessment of how and why child welfare principles must be applied to non-citizen children would not be complete without an acknowledgment of the numerous standards and tenets in international law. International human rights law provides another source of authority and guidance as to what is expected when a child is in the custody of a governmental entity.<sup>323</sup> Most notably, the Convention on the Rights of the Child, was adopted by the United Nations on November 20, 1989, and went into effect in September of 1990.<sup>324</sup> And while the United States is the only country that has not ratified the CRC,<sup>325</sup> its principles afford a comprehensive framing of children's rights.<sup>326</sup>

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323. A discussion of how and why international treaties create rights and are enforceable in U.S. courts is beyond the scope of this paper. The above discussion on the Convention on the Rights of the Child is limited to an analysis of the substantive principles of the Convention as examples of what constitutes human rights for a child. For examples of treatises and articles analyzing the relationship between international human rights law and U.S. law please see the following: BETH STEPHENS ET AL., *INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS* (2d ed. 2008); CURTIS A. BRADLEY, *INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM* (2013); Oona A. Hathaway et al., *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 *YALE J. INT'L L.* 51 (2012); Vincent J. Samar, *Justifying the Use of International Human Rights Principles in American Constitutional Law*, 37 *COLUM. HUM. RTS. L. REV.* 1 (2005).

324. CRC, *supra* note 37.

325. The U.S. government contributed to the drafting of the Convention. It commented on nearly all of the articles and proposed the original text of seven of them. On February 16, 1995, Madeleine Albright, at the time the U.S. Ambassador to the United Nations, signed the Convention. However, President Clinton did not submit it to the Senate and neither has any administration since then. See Richa Mathur, *The UN Convention on the Rights of the Child: Why Federal Rights for Children are Important*, *FIRST FOCUS* (Nov. 2016), <https://firstfocus.org/wp-content/uploads/2016/11/UN-Convention-Child-Rights-Fact-Sheet-1.pdf> [https://perma.cc/3R47-2MF6].

326. "Treaties to which the United States is not a party, while not legally binding, can be evidence of customary international law." INS, *THE BASIC LAW MANUAL: U.S. LAW AND INS REFUGEE/ASYLUM ADJUDICATIONS* 12 (1994). At least one circuit, in dicta, held that the CRC had attained the status of "customary international law." *Cabrera-Alvarez v. Gonzales*, 423 F.3d 1006, 1007, 1010 (9th Cir. 2005); see Shani M. King, *U.S. Immigration Law and the Traditional Nuclear Conception of Family: Toward a Functional Definition of Family that Protects Children's Fundamental Human Rights*, 41 *COLUM. HUM. RTS. L. REV.* 509, 548–49 (2010) (discussing whether the CRC could be considered "customary international law"); see also Olga Byrne, *Promoting a Child Rights-Based Approach to Immigration in the United States*, 32 *GEO. IMMIGR. L.J.* 59, 61 (2018) (calling for policymakers and activists to implement a child rights-based approach to immigration law and based upon international norms and conventions).

The CRC was the first international treaty focused on the human rights of children.<sup>327</sup> It is based on four key principles—non-discrimination, best interests of the child, the right to participation, and the right to life, survival, and development.<sup>328</sup> The CRC also respects the rights of children as members of families; emphasizes the right to protection against abuse, neglect, and exploitation and the right not to be separated from one’s parents unless necessary;<sup>329</sup> and addresses issues concerning education, access to health care, justice and legal systems.<sup>330</sup> Of particular relevance to the plight of migrant children in the United States, Article 3 decrees that “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”<sup>331</sup> This same article also instructs that the institutions tasked with the care and protection of children comply with the standards for safety, health, supervision, etc. established by the proper authorities.<sup>332</sup> Moreover, Comment 14 notes that when legal provisions or policies are open to more than one interpretation, decision-makers should choose the option that most effectively serves the child’s best interest.<sup>333</sup>

Additionally, Article 2 protects children from discrimination of any kind, irrespective of the child’s race, color, sex, national, ethnic, or social origin, or other status.<sup>334</sup> Thus, some argue that children no matter their status—citizen or non-citizen—should have access to the same types and quality of services.<sup>335</sup> These human rights advocates

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327. Byrne, *supra* note 326, at 76 n.94.

328. *Id.* at 77–96.

329. CRC, *supra* note 37, arts. 3, 5, 6, 9, 14, 18, 27, 34.

330. *Id.* arts. 19, 24, 25, 29, 40.

331. *Id.* art. 3; see Bridgette A. Carr, *Incorporating a ‘Best Interests of the Child’ Approach into Immigration Law and Procedure*, 12 YALE HUM. RTS. & DEV. L.J. 120, 127–28 (2009) (noting that the best interests of the child principle was first seen in the 1959 Declaration of the Rights of the Child, which served as a precursor to the CRC); see also Andrew I. Schoenholtz, *Developing the Substantive Best Interests of Child Migrants: A Call for Action*, 46 VAL. U. L. REV. 991, 1002–03 (2012) (summarizing the development of the best interest principle in the United States).

332. CRC, *supra* note 37, art. 3.

333. See U.N. Comm. on the Rights of Children, General Comment No. 14 (May 29, 2013) (maintaining that the child has the right to have his/her best interests taken as a primary consideration).

334. CRC, *supra* note 37, art. 2.

335. UNICEF: BUILDING BRIDGES, *supra* note 197, at 26.

point to some promising examples of governments that are putting this “equity in care” principle into practice.<sup>336</sup> For instance, since 2010, Ireland requires that all unaccompanied minors receive similar care as other children in Ireland’s child welfare system until they turn eighteen.<sup>337</sup> Similarly, “[i]n the Netherlands, fifty-one percent of unaccompanied [minors] and refugee children are in family-based care, compared with 58 percent for Dutch children” in their child welfare system.<sup>338</sup>

#### IV. APPLYING CHILD PROTECTION PRINCIPLES TO THE CIRCUMSTANCES OF MIGRANT CHILDREN AND FAMILIES—A TRANSFORMED WORLD

As is stated at the outset, in discussing child welfare reform, it must be acknowledged that our current child welfare systems are overdue for a massive overhaul. Some are even calling for their abolition, due to the fact that state intervention in the form of child welfare systems is rooted in and perpetuates systemic racism and, in many instances, actually causes further harm and trauma to children and families.<sup>339</sup> The following recommendations are not intended to enable this institutional racism, nor are they meant to further oppress Black and Brown children and families. It also must be recognized that most non-citizen children are entering the ORR system because they arrived at a U.S. border without a parent or legal guardian or were separated from a parent or guardian. Thus, they are not necessarily enmeshed in a custodial system due to child abuse or neglect or because they were at a risk of harm in their parents’ care, although they may have been.

Nonetheless, the goal of the recommendations below is to take those child protection principles that are focused on supporting families and children, as well as due process tenets and international human rights standards, and apply them to migrant children along with all other children. Any newly envisioned world where most children do not need to be removed from families, and children and families are provided with the supports and services they need, should include all

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336. *Id.*

337. *Id.*

338. *Id.*

339. See Alan J. Dettlaff et al., *It Is Not a Broken System, It Is a System that Needs to Be Broken: The upEND Movement to Abolish the Child Welfare System*, 14 J. PUB. CHILD WELFARE 500-01 (2020); Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523 (2019).

children and must not distinguish between citizen and non-citizen. Importantly, what is being recommended here is nothing more than what is required for and afforded children and families who are involved with our domestic foster care systems if these statutes were implemented in a non-racist and equitable manner. These recommendations also are very much in line with the ABA Standards for the “Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States,” first published in 2004 and revised and republished in 2018,<sup>340</sup> as well as recent reports by several child advocacy organizations calling for reforms and a child-centered immigration system.<sup>341</sup>

In addition to emphasizing accountability and the need for children’s positions and voices to be heard, the recommended reforms prioritize the three pillars of our domestic child welfare system, that of safety, well-being, and permanency, as well as the important precepts from international law, which focus on human rights and a child’s best interest as central considerations.<sup>342</sup> More specifically, they call for all children to be represented; for the child’s best interest to be central to any immigration proceeding seeking the removal of the child from the

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340. AM. BAR ASS’N COMM. ON IMMIGR., STANDARDS FOR THE CUSTODY, PLACEMENT AND CARE; LEGAL REPRESENTATION; AND ADJUDICATION OF UNACCOMPANIED ALIEN CHILDREN IN THE UNITED STATES 8–14 (2018) [hereinafter ABA STANDARDS] (listing the “rights” unaccompanied children are entitled to as, namely, treatment with dignity and respect; “full rights” of all children; best interest standard should govern; right to non-discrimination; right to full participation in decision-making; right to interpreter and translation; right to an attorney; right to a child advocate; right to friend-of-the-court assistance; presumption against detention and in favor of family reunification; right to privacy and freedom of expression; right to personal safety and protection; right to preservation of culture and identity; right of all agencies to cooperate and coordinate with each other to ensure the child’s welfare; right to consistent treatment regardless of where the child is placed).

341. See YOUNG CTR., REIMAGINING, *supra* note 209, at 2–3 (listing the seven guiding principles for child welfare reform; the child’s best interests should be the primary consideration in every decision; immigration authorities sole focus should be on safety and family first; a fundamentally fair process that places the child at the center; training on child development, cultural awareness, and impact of trauma for every participant and decision-maker in child’s case; no repatriation to unsafe situations; childhood continues to age 21; all children share the same rights and protections); see also UNICEF: BUILDING BRIDGES, *supra* note 197, at 20, 42; GREENBERG ET AL., *supra* note 187, at 7; KIDS IN NEED OF DEF., KIND BLUEPRINT: CONCRETE STEPS TO PROTECT UNACCOMPANIED CHILDREN ON THE MOVE 17 (2020) [hereinafter KIND BLUEPRINT]; DESAI ET AL., *supra* note 176, at 10.

342. DESAI ET AL., *supra* note 176, at 7.

United States; for children not to be separated from a parent or parents, or other trusted caregivers, unless absolutely necessary for their safety; and for children to remain with, or be placed with kin, if they cannot be placed with one or both parents. Additionally, they call for those children who cannot be placed with family to be placed in the community, either in existing domestic child welfare systems or in settings that mirror our domestic foster care programs. This includes the types of foster care placements that are made available, as well as the supportive and therapeutic community-based services provided.

#### A. *Representation*

When our domestic child welfare systems were first being developed, one of the central precepts and mandates was the provision of a representative for every vulnerable child brought before the court as a victim of child abuse and neglect.<sup>343</sup> This was mandated because no child should appear in court alone and because a child's counsel helps to facilitate better outcomes and ensure that legislative and judicial processes are being implemented. Research demonstrates that counsel for a child reduces delays in case processing, increases parties' participation in the case plan, informs better judicial decision-making, produces cost savings for child welfare agencies and courts, and, most importantly, helps children reach permanency sooner with more stable long-term outcomes.<sup>344</sup>

If this important principle was applied to migrant youth, every unaccompanied child who is being charged with unlawful admission and for whom the federal government is trying to remove (in other words every child who arrives to the U.S. alone or who is separated from a parent or parents and who now must appear in immigration court before a judge in an adversarial proceeding where the government is represented by an attorney), would be provided counsel

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343. Child Abuse Prevention and Treatment Act of 1974, Pub. L. No. 93-247, 88 Stat. 4, 7 (codified at 42 U.S.C. §§ 5101–19). *But see* NOY DAVIS ET AL., A CHILD'S RIGHT TO COUNSEL 23 (4th ed. 2019) (grading states on the quality and type of representative assigned and finding that 11 states are now "D or F States" (6 D and 5 F States), as compared with 15 in 2008, 3 and 11 states are now "C" states, as compared with 14 in the 2008 study).

344. In a 2015 study of child representation, funded by the U.S. Department of Health and Human Services, children represented by trained attorneys were 40% more likely to reach permanency (reunification, adoption, guardianship) within six months of placement in foster care as compared to a control group. Orlebeke et al., *supra* note 134, at 15.

at the government's expense.<sup>345</sup> And following the trend in the majority of the states,<sup>346</sup> this representative would be an attorney who was charged with representing the child in court and ensuring that their objectives and interests were met. The role and approach of attorneys for children has been the subject of much debate among scholars and advocates, with a majority calling for the attorney to as much as is reasonably possible represent the child as they would an adult client in what is often deemed client-directed representation.<sup>347</sup> This same approach would make sense for children who are appearing in immigration court facing charges of unlawful entry, especially given the fact that a child also may be appointed an independent child advocate to represent the child's best interest.<sup>348</sup> In addition to

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345. Shaina Aber et al., *End the Cycle of Crises for Unaccompanied Immigrant Children*, IMPRINT (May 4, 2021), <https://imprintnews.org/child-welfare-2/end-cycle-crises-unaccompanied-immigrant-children/54095> [<https://perma.cc/H4A9-8J7W>] (discussing the recommendation of the Vera Institute for Justice to provide representation to unaccompanied minors, remarking that “children cannot be expected to navigate complex and confusing immigration proceedings alone, so it is imperative that every child facing deportation have access to legal representation. The government should work to increase the number of attorneys who can work with unaccompanied children by adding federal funding for programs that provide direct representation”). See generally KIND BLUEPRINT, *supra* note 341, at 2 (recommending that “the U.S. Government should ensure that all unaccompanied children in immigration proceedings have attorneys”); Shani M. King, *Alone and Unrepresented: A Call to Congress to Provide Counsel for Unaccompanied Minors*, 50 HARV. J. LEGIS. 331, 333 (2013) (applying human rights standards to the plight of unaccompanied children and arguing for the need for attorneys for all unaccompanied minors).

346. “Of the 51 jurisdictions (50 states and DC), by far most – two-thirds (66%) require counsel for all children in abuse and neglect proceedings.” DAVIS ET AL., *supra* note 343, at 28.

347. Based upon a recent study of the representation of children in dependency proceedings, it seems as if this is what occurs in a majority of states. About one third of states have statutes requiring client-centered representation under all possible circumstances. These statutes also require that minority-status is taken into account. Another one fifth of states provide for client-centered representation under specific circumstances and another one third require that the child's perspective be heard in court. Only 6% of states require only best interest representation, and another 6% have unclear laws when it comes to client-centered representation. DAVIS ET AL., *supra* note 343, at 30.

348. AM. BAR ASS'N, *ACHIEVING AMERICA'S IMMIGRATION PROMISE: ABA RECOMMENDATIONS TO ADVANCE JUSTICE, FAIRNESS AND EFFICIENCY* 31 (2021) [hereinafter ABA RECOMMENDATIONS] (recommending that “[c]ounsel should be provided to unaccompanied children in all stages of their immigration processes and proceedings, including initial interviews before U.S. Citizenship and Immigration

representation in immigration court, an attorney also is necessary to advise the child of all feasible legal options and their potential consequences and assist the child in applying for viable forms of immigration relief. Furthermore, for children who remain in ORR custody, an attorney is essential in ensuring that the child's basic needs are being met and advocating for the child to be moved into long term foster care or the URM program if the child has been found eligible for SIJS.<sup>349</sup>

In many instances an independent child advocate also would be critical, as this person is responsible for seeing that the child's best interests are a primary consideration in decisions affecting the child.<sup>350</sup> "Particularly for [c]hildren without families in the United States, a [c]hild [a]dvocate is the only individual exclusively interested in that [c]hild's' physical and mental well-being."<sup>351</sup> Accordingly, for many children, both a child advocate and an attorney will be necessary. This will be especially important for young children, children with special needs, and children who do not have a parent or legal guardian in this country or whose parents or legal guardians have proven to have acted contrary to the child's best interest.<sup>352</sup>

#### B. *Best Interest Standard Must Be the Focus*

International law, along with the administrative and statutory principles that govern child welfare matters, instruct that the best

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Services asylum offices, and at all proceedings necessary to obtain Special Immigrant Juvenile status, asylum, and other remedies"); *see also* ABA STANDARDS, *supra* note 340, at 15 (establishing a rule that "[t]he Attorney for the Child is a lawyer who provides legal services for the Child and who owes the Child the same duties, including undivided loyalty, confidentiality, and competent representation as would be owed to an adult client").

349. ABA RECOMMENDATIONS, *supra* note 348, at 31 (recommending that "[t]he government should ensure that an unaccompanied child has had a meaningful opportunity to consult with counsel about the child's specific legal options before immigration courts conduct any hearings, including final hearings, that involve the taking of pleadings or admission of evidence"); *see also* ABA STANDARDS, *supra* note 340, at 16 (identifying the role of the attorney as the person who "advise[s] the [c]hild of all his legal options and their potential consequences in a [d]evelopmentally [a]ppropriate manner, even where some options may not be in the [c]hild's best or legal interests. Ultimately, the Attorney must advocate for the [c]hild's expressed wishes, or for his legal interests where the [c]hild expresses no wish or has been found to lack competence").

350. ABA STANDARDS, *supra* note 340, at 22–24.

351. *Id.* at 24.

352. YOUNG CTR., REIMAGINING, *supra* note 209, at 14.

interest of the child standard shall be the overriding consideration in every decision made by courts or administrative agencies concerning a child.<sup>353</sup> While the subjectivity and cultural biases of the best interest standard has been subject to much criticism in the child welfare context,<sup>354</sup> if these principles were applied in the immigration context, it would necessitate a transformation of every aspect of the immigration removal system for children. Accordingly, scholars and practitioners alike have called for the best interest of the child standard to be the central focus when children are enmeshed in our immigration removal system.<sup>355</sup> To date, these pleas have gone unanswered. Yet, if child welfare principles were applied, it becomes impossible to ignore these calls for reform, as the best interest standard, defined in terms of a child's well-being and need for safety and permanency, is central to any system that is in line with child welfare precepts.

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353. Molina & Kohm, *supra* note 230, at 79–80.

354. See Byrne, *supra* note 326, at 59, 88 (noting the fact that the best interest of the child has had a “troubled past that should be recognized and understood when invoking it today”); see also Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & FAM. STUD. 337, 370–76 (2008) (highlighting critiques of the best interest standard); Janet L. Dolgin, *Why Has the Best Interest Standard Survived?: The Historic and Social Context*, 16 CHILD. LEGAL RTS. J. 2, 2 (1996) (discussing how the best-interest standard has been “often criticized for requiring courts to make subjective decisions regarding children’s welfare”).

355. See ABA RECOMMENDATIONS, *supra* note 348, at 31 (recommending that “[t]he Department of Justice should establish an independent office with child welfare expertise to ensure that children’s interests are recognized and respected at all stages of the immigration process”); see also UNICEF: BUILDING BRIDGES, *supra* note 197, at 12; YOUNG CTR., REIMAGINING, *supra* note 209, at 11–15; Erin B. Corcoran, *Deconstructing and Reconstructing Rights for Immigrant Children*, 18 HARV. LATINO L. REV. 53, 57, 88–92 (2015) (calling for 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”); 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) (discussing how the best interest standard is defined domestically and internationally and illustrating what changes would be required in immigration law if a best interest of the child approach was applied); Thronson, *supra* note 227, at 1014–16 (recommending that independent experts in child welfare make decisions on a child’s best interests); JENNIFER NAGDA & MARIA WOLTJEN, FIRST FOCUS ON CHILD., BEST INTERESTS OF THE CHILD STANDARD: BRINGING COMMON SENSE TO IMMIGRATION DECISIONS 107–09 (2015), <https://firstfocus.org/wp-content/uploads/2015/04/Best-Interests-of-the-Child-Standard.pdf> [<https://perma.cc/3SEV-QLVD>]; Andrew I. Schoenholtz, *Developing the Substantive Best Interests of Child Migrants: A Call for Action*, 46 VAL. U. L. REV. 991 (2012).

Integrating a best interest framework into the immigration system must begin the moment a child steps foot onto U.S. soil. First, the question of whether a child should be separated from a parent or a family member with whom they arrived must be subject to a best interest analysis. Clearly, and as will be discussed below, a child should not be separated from a parent absent a finding of imminent risk of harm. But a child also should not be separated from other family members with whom he or she may have traveled without a best interest analysis.<sup>356</sup>

Under existing law, if a child fled to the U.S. with her grandmother or another close relative, the child would be separated from that grandmother or caregiver at the border. The child would then be designated as an unaccompanied child and placed under the custody of ORR.<sup>357</sup> Depending on the circumstances at the time, the grandmother would be charged with unlawful entry and would immediately be expelled, detained, or permitted to enter with restrictions.<sup>358</sup> Yet, a best interest analysis, with trained child welfare experts or DHHS staff who are similarly trained, might ascertain that the grandmother is a parental or important figure in the child's life and separating the child from their grandmother would cause further harm to the child.<sup>359</sup> In fact, in most instances when a child arrives with an adult relative, there really is no need to take that child into the custody of ORR as they already are with an appropriate caregiver. As part of the Fiscal Year 2021 Appropriations Report language, Congress directed DHS to hire child welfare professionals at southern land border CBP facilities where they would conduct mandatory protection screening of children and oversee their care.<sup>360</sup> Such personnel could begin to conduct best interest screenings and advise DHS staff not to

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356. JENNIFER PODKUL ET AL., WOMEN'S REFUGEE COMM'N, KIDS IN NEED OF DEF. & YOUNG CTR. FOR IMMIGRANT CHILD.'S RTS., RECOMMENDATIONS FOR CBP STANDARDS WHEN DETAINING CHILDREN 2 (2019), <https://static1.squarespace.com/static/597ab5f3beba0a625aaf45/t/5ce419146070c6000188aac/1558452500801/Recommendations+For+CBP+Standards+While+Detaining+Children.pdf> [https://perma.cc/5F53-8X22].

357. AM. IMMIGR. COUNCIL, *supra* note 17, at 9.

358. *Id.* at 9–10.

359. See KIND BLUEPRINT, *supra* note 341.

360. H.R. REP. NO. 116-458, at 23 (2020).

separate children from important family members. To date, DHS has failed to meet this directive.<sup>361</sup>

A second determination that occurs at the border also would need to be overhauled if child welfare principles applied. Under existing immigration law, children from contiguous countries (Canada and Mexico) are treated differently than children from any other country.<sup>362</sup> As explained earlier in this Article, these children are not transferred to the custody of ORR, by law within seventy-two hours, but rather may be repatriated to their country of origin if: (1) there are no indications of human trafficking; (2) the child does not indicate a fear of persecution in the home country or express an intent to apply for asylum; and (3) the child has the capacity to choose to return to the child's country of origin.<sup>363</sup> Child protection principles, which are solely concerned with the welfare and best interest of the child, would render these distinctions impermissible and would require that government officials immediately act to protect all children at our borders who are fleeing to the United States for safety and protection.

Determinations in immigration court also would need to be changed to align with a best interest of the child standard. In order to be successful in countering a charge by the government that the child should be removed, a child (or an adult for that matter) must prove to the immigration judge and the government that they have one or more viable forms of immigration relief. In other words, this means that the child meets the requirement for some form of a visa or protected status, such that the child can remain in the United States. For children, these forms of relief are humanitarian-based—protection from persecution, torture, trafficking, abuse—or may be based upon familial relationships and the fact that certain close relatives may be U.S. citizens or have Lawful Permanent Resident (LPR) status.<sup>364</sup>

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361. KIDS IN NEED OF DEF., EMERGENCY INTAKE SITES FOR UNACCOMPANIED CHILDREN: RECOMMENDED STANDARDS AND BROADER SOLUTIONS 5 (2021), <https://supportkind.org/wp-content/uploads/2021/04/EIS-Policy-Brief-Final-4.28.pdf> [<https://perma.cc/TT6N-J6UA>].

362. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, sec. 235(a)(2), 122 Stat. 5044.

363. *Id.*; see *supra* notes 249, 251, 252 and accompanying text.

364. See Joyce Koo Dalrymple, *Seeking Asylum Alone: Using the Best Interests of the Child Principle to Protect Unaccompanied Minors*, 26 B.C. THIRD WORLD L.J. 131, 136 (2006) (contending that the “only way to ensure that unaccompanied children are not deported into harmful situations is to consider the best interests of the child in their asylum applications”).

However, if a child is unable to prove their eligibility for one of these forms of relief, they will be ordered removed, even though it may be unsafe for the child to return to her country of origin and even though there may not be a caregiver in the home country who can care for and protect this child.<sup>365</sup> Many advocates for migrant youth have expressed great concern about this occurring.<sup>366</sup>

Such actions are contrary to child protection principles and international norms, which call for a child's safety and well-being to be paramount. For example, in the domestic child welfare system, never would a child be sent to a home without a preliminary check as to whether the child would be safe and well cared for in the home.<sup>367</sup> Not ensuring a safe repatriation also explicitly violates the TVPRA, which mandates the safe return of children.<sup>368</sup> However, the government has failed to execute policies to protect children upon their return home. Additionally, there are no requirements that officials inquire into the child's safety or other risk factors they may face if deported.<sup>369</sup> In a newly redesigned system where the child's best interest was central to the decisions being made, no child could be ordered removed and sent to a foreign country without some process in place to ensure that (1) the child will be safe, (2) there will be a caretaker who can protect and provide for the child, and (3) there is some entity that will be available if circumstances change and the child is once again in danger or at risk of harm.

Finally, as will be discussed below,<sup>370</sup> ORR's decisions about where children should be placed must be re-examined and re-structured in accordance with the best interest of the child standard.

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365. See UNICEF: BUILDING BRIDGES, *supra* note 197, at 11–13; YOUNG CTR., REIMAGINING, *supra* note 209, at 8. See generally ABA RECOMMENDATIONS, *supra* note 348, at 31–39.

366. See, e.g., *Migrant and Displaced Children*, UNICEF, <https://www.unicef.org/migrant-refugee-internally-displaced-children> [<https://perma.cc/VG6J-R52M>].

367. 42 U.S.C. 675(c).

368. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 § 235(a)(1); see also Linda Kelly Hill, *The Right of Safe Repatriation for Unaccompanied Alien Children: Advancing the Intent of the Trafficking Victims Protection Reauthorization Act*, 12 LOY. J. PUB. INT. L. 85, 99 (2010). Numerous advocacy groups also have called for efforts to cease the deportation of children unless the safety of the child can be ensured. For examples of these recommendations, see UNICEF: BUILDING BRIDGES, *supra* note 197, at 42; KIND BLUEPRINT, *supra* note 341, at 24–27; YOUNG CTR., REIMAGINING, *supra* note 209, at 65–68.

369. YOUNG CTR., REIMAGINING, *supra* note 209, at 13.

370. *Infra* Section IV.E.

*C. Children Must Remain with Their Parent Unless There is Imminent Risk of Harm*

Recognizing the directives of most major child welfare legislation, as well as the U.S. Constitution and international law, the preservation of the family unit must come first. No child should be separated from a parent or parents unless there is imminent risk of harm if they remain in the care and custody of the parent or parents. Therefore, the only justifiable reason to separate a child from a parent is a serious safety concern that potentially places a child at imminent risk of harm. Even if this is the case, the government must only remove a child from a parent if due process has been afforded, meaning the parent is given notice and an immediate hearing, where evidence can be reviewed, and the parents have an opportunity to respond and submit evidence which rebuts the State's concerns. In other words, before a child can be separated, there must be an immediate and emergent hearing by a neutral arbiter, where the government has the burden of presenting evidence to support the separation and the parent or parents have the opportunity to rebut the government's claims. The final decision must then rest with the adjudicator after a proper assessment of the evidence. Due process principles demand such protections, which are in place in state family courts around the country, although they are not always consistently applied in a non-racist manner.

To comply with these mandates, two fundamental shifts in practice must take place. One involves the practices of DHS at the border when children are separated from their parents. The other concerns the practices of ORR once children are placed into the custody of DHHS from DHS.

At the border, the government must cease engaging in any practices, directly or indirectly, that result in the separation of a child from a parent or parents. The direct separation was blatant with the Trump administration's Zero Tolerance policy in the spring of 2018, as well as its actions prior to and even after this policy.<sup>371</sup> However, separations are still occurring with the Biden administration due to an alleged criminal history of a parent.<sup>372</sup>

If children are placed into the custody of ORR, it is incumbent upon government officials to transfer children, as expeditiously as possible,

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371. Memorandum for Federal Prosecutors Along the Southwest Border from the Attorney General on the Zero-Tolerance for Offenses Under 8 U.S.C. § 1325(a) (Apr. 6, 2018).

372. See *supra* note 11.

to the care of parents, and if not parents, then other family members or close friends.<sup>373</sup> While the Biden administration has repealed several policies from the prior administration that caused family members to be unwilling to come forward to sponsor a child in the custody of ORR,<sup>374</sup> there are still far too many children who are not reunited with parents or family, and even more families who need some support to be able to appropriately care for a child that are not provided with this necessary assistance.<sup>375</sup>

In addition, too often there is an “institutional presumption that parents of unaccompanied minors are unfit by virtue of their child’s unaccompanied status.”<sup>376</sup> In the child welfare context, agencies are mandated to provide “reasonable efforts” to prevent the need to remove a child from a parent or parents, and if removal is deemed necessary, to reunify the child with the parent as soon as it is safe to do so.<sup>377</sup> State and local child welfare agencies are obligated to provide such services because the relationships between parents and their children are constitutionally protected.<sup>378</sup> Thus, for the State to intervene, it must be only for safety reasons, and only after efforts to prevent the separation are made. Unacceptably, such mandates do not exist for non-citizen children and parents who are forced to be separated from one another or to remain apart. However, given the constitutional rights at stake, along with the fact that the federal government is supposed to be following “best practices in child

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373. *Children Entering the United States Unaccompanied: Section 2*, *supra* note 185, § 2.2.1.

374. Betsy Klein, Kate Sullivan & Geneva Sands, *Biden Administration Rescinds Trump-era Immigration Policy to Alleviate Surge of Unaccompanied Minors*, CNN (Mar. 12, 2021), <https://www.cnn.com/2021/03/12/politics/biden-rescinds-trump-immigration-migrants-minors/index.html> [<https://perma.cc/5E5W-ZNYV>].

375. *Id.*

376. Lauren Heidbrink, *Assessing Parental Fitness and Care for Unaccompanied Children*, 3 RUSSELL SAGE FOUND. J. SOC. SCIS. 37, 44 (2017).

377. 42 U.S.C. 671(a)(15)(A); CHILD WELFARE INFO. GATEWAY, REASONABLE EFFORTS TO PRESERVE OR REUNIFY FAMILIES AND ACHIEVE PERMANENCY FOR CHILDREN 1–4, <https://www.childwelfare.gov/pubpdfs/reunify.pdf> [<https://perma.cc/8ZL4-GVA9>].

378. *See, e.g.*, *Meyer v. Nebraska*, 262 U.S. 390 (1923) (explaining that the Due Process Clause of the Fourteenth Amendment protects “the right . . . to marry, establish a home and bring up children”); *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977) (“[T]he right of the family to remain together without the coercive interference of the awesome power of the state . . . encompasses the reciprocal rights of both parent and children”). *But see* *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18 (1981) (holding that parents have no strict due process right to counsel in civil court, though fundamentally fair procedures may require the appointment of counsel).

welfare,” we must reimagine how we think about non-citizen children and begin to apply these principles to all instances where a child is separated from a parent, either intentionally or unintentionally.

*D. All Efforts Must Be Made to Place Children with Family*

Child welfare laws and policies also are replete with mandates that children should be placed with kin, and supported in these placements, if they cannot be with or remain with a parent or parents.<sup>379</sup> Any system that is focused on a child’s best interest and which aims to implement best practices in child welfare must honor these mandates. At the outset, and as is discussed above, no child should be separated from a close relative by CBP at the border simply because the relative caregiver is not a parent or legal guardian.<sup>380</sup> There must be an assessment made as to what is in the child’s best interest.

Once a child is placed in ORR custody, all efforts must be made to reunify the children with the parent or parents or to place the children wherever possible with kin. ORR’s current policies, as well as the mandates of the *Flores* Settlement Agreement, instruct that children should be released as soon as possible to family. Pursuant to *Flores*, placements with parents are prioritized, followed by legal guardians and adult relatives, including but not limited to, siblings, grandparents, aunts, and uncles.<sup>381</sup>

However, ORR’s processes are not encouraging, supportive, or transparent. To the contrary, rather than assist family members in coming forward to care for a relative child, as is the case for children who must enter our domestic foster care systems, ORR poses obstacles and disincentives.<sup>382</sup> And while some of the more egregious barriers

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379. See *supra* Section I.D.1.b.

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A better model would use ORR officials at the border to immediately evaluate family relationships in child-friendly, non-detention spaces. Where a familial relationship is confirmed and no red flags are raised, the child could be immediately released to family and settle in the community to continue her legal case, while retaining child-specific due process protections.

Aber et al., *supra* note 345 (expounding on the eight recommendations of the Vera Institute for Justice and stressing how no child should be automatically separated from a family member at the border); see also King, *supra* note 326, at 512–13 (calling for a more expansive definition of family in immigration law).

381. Stipulated Settlement Agreement, *supra* note 172, at 9–10 (listing placement priorities).

382. See Klein, Sullivan, & Sands, *supra* note 374.

have been lifted by the Biden administration,<sup>383</sup> many remain, and those that were rescinded are at risk of being re-enacted with a new administration because they have not been promulgated in statute or even regulation.

First, instead of encouraging potential family members to come forward, as is mandated by our domestic child welfare laws, relative caregivers of migrant children must apply to “sponsor” a child.<sup>384</sup> The application process is daunting and purposefully intended to scare away many potential caregivers who are themselves undocumented and therefore view themselves at risk of being placed into deportation proceedings if they come forward.<sup>385</sup> Moreover, little, if any, support is provided to those family members who are willing to sponsor a relative child. Relatives are left on their own to financially support the children, navigate community resources, and obtain legal authority so that they can enroll the children into school and ensure that the children receive proper medical care.<sup>386</sup> Thus, it is not surprising that some of these placements do not last, and the children end up in our domestic foster care programs or worse yet on the streets, left to fend for themselves.<sup>387</sup>

Because child welfare laws mandate that relatives be identified and that placement with kin occurs, if at all possible,<sup>388</sup> the emphasis must

383. Andrew R. Arthur, *Is the Biden Administration Endangering Migrant Kids?*, CTR. FOR IMMIGR. STUD. (Mar. 15, 2022), <https://cis.org/Arthur/Biden-Administration-Endangering-Migrant-Kids> [<https://perma.cc/F772-G76F>].

384. *Children Entering the United States Unaccompanied: Section 2*, *supra* note 185, § 2.2.

385. While the Biden Administration has eased the restrictions and barriers for relatives to come forward, it is still an arduous process. Michael D. Shear, Zolan Kanno-Youngs & Eileen Sullivan, *Young Migrants Crowd Shelters, Posing Test for Biden*, N.Y. TIMES (Apr. 10, 2021), <https://www.nytimes.com/2021/04/10/us/politics/biden-immigration.html> [<https://perma.cc/3SL5-TJQU>].

386. The Vera Institute for Justice recommends that

to minimize the risk that children will be released to inappropriate or potentially exploitative circumstances, ORR should coordinate legal representation and child advocate programs for children released from custody as well as post-release services, such as home studies, family integration and support services, and community programming to support the family or sponsor and ensure safe, stable placements.

Aber et al., *supra* note 345.

387. EMILY RUEHS-NAVARRO, UNACCOMPANIED: THE PLIGHT OF IMMIGRANT YOUTH AT THE BORDER 51 (2022) (interviewing immigrant youth and caseworkers who work with immigrant youth and finding that numerous youth do not remain in the placements made by ORR).

388. Stipulated Settlement Agreement, *supra* note 172, at 9–10.

be on supporting the placement of children with family. In other words, the policies of ORR need to radically shift from being focused on dissuading relatives from coming forward to *encouraging* them. At the inception, there must be a promise during the assessment process to keep information confidential so that there would be no risk to the proposed caregivers. Relatives, other than parents, would still be assessed to ensure that they are safe and appropriate caregivers, but there would be no sharing of information with DHS.

Second, relatives also need to be assisted in their care of the children through the provision of stipends: necessities, such as beds, linens, clothing, and referrals to necessary community services, none of which is currently taking place. In addition, in a revamped world, ORR would not simply transfer a child to a relative caregiver but would remain involved for at least a period of time to make certain that the child transitions from state custody to the home of a relative as smoothly as possible and that the family has all available community-based supports. This recommendation should be approached sensitively and carefully to address the understandable anxiety that some caregivers, who themselves may be undocumented, may have about ongoing involvement with ORR or any arm of DHS. Accordingly, the provision of any post-release services must be voluntary, disconnected from ORR and DHS, and protected by prohibitions against the reporting or sharing of any confidential information. Nonetheless, there is a great need for community-based case management services to assist the relative with enrolling the child into school, arranging for medical, dental, and mental health services, and just generally ensuring that the child's needs are being met. A recent study by the Migration Policy Institute revealed the extreme need for increased post-release services and recommended, among other significant reforms, that "ORR should extend case management to all children for the first 90 days after they are released from federal custody and identify circumstances in which it should be provided beyond that period."<sup>389</sup> Providing these services to relatives caring for recently-arrived migrant children would greatly increase the number of children released from ORR custody to relatives, ensure that the family placements are successful, and improve the overall well-being of migrant children.

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389. GREENBERG ET AL., *supra* note 187, at 42.

*E. Category 4 Children Must Either Be Afforded a True Foster Care System or Be Transferred to State Foster Care Systems Through the URM Program or a Newly Created System*

As explained above, while the majority of non-citizen children are transferred to family or friends, ten to twenty percent<sup>390</sup> must remain in the custody of ORR because they do not have a sponsor or do not have family or friends willing to come forward to take on the responsibility of a sponsor. These children are often referred to as “Level 4” or “Category 4” kids.<sup>391</sup> The strongest case for applying child welfare mandates to non-citizen children is present when considering the plight of these children, as they are not quickly transferred to family members, rather they are left languishing in federal custody. It is at this point that the circumstances and needs of non-citizen children are nearly identical to children who are in our domestic foster care systems. It is not safe for them to return to a parent or to alternate family members, yet their needs for safety, well-being, and permanency are paramount and must be met. If the provision that ORR must afford all unaccompanied children child welfare best practices signifies anything, it must mean that for these children they are entitled to no less than children who find themselves in our domestic foster care systems.<sup>392</sup> Yet, the ORR system for unaccompanied children does not begin to exemplify child welfare best practices.

First, there is no oversight by state family or juvenile courts.<sup>393</sup> Thus, there is little, if any, accountability especially for children who are transferred to, or trapped in, more restrictive placements, or denied release to family members based on discretionary criteria not subject to review by any court or independent body.<sup>394</sup> Children who would be

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390. DESAI ET AL., *supra* note 176, at 13.

391. *Children Entering the United States Unaccompanied: Section 2*, *supra* note 185, § 2.2.1.

392. KOHLI, *supra* note 150, at 315 (citing to a study in the U.K. where it was found that asylum-seeking children “settle[d]” if they had “a safe and supportive place to live, continuities with past relationships, customs and cultures, and opportunities to create new ones, access to purposeful education and training, [and] opportunities to move forward from troubling experiences, recenter their lives and find new purpose in everyday routines and activities”).

393. *Immigration Courts and Immigration Judges Fact Sheet*, NAT’L IMMIGR. F., <https://immigrationforum.org/wp-content/uploads/2019/04/Immigration-Courts-fact-sheet.pdf> [<https://perma.cc/43KM-BGS7>].

394. Lopez, *supra* note 268, at 1674 (calling for the creation of an oversight and enforcement entity).

eligible for long-term foster care or the URM program are left to languish in ORR shelters, or worse, are placed in secure settings without adequate justification.

Second, because these programs do not follow the statutory and regulatory mandates of our child protection laws, there is no focus on the three pillars of child welfare, that of safety, well-being, or permanency. So, while a few children may be placed in the URM program or ORR's long-term foster care programs, most remain in ORR shelters or secure facilities, without the benefit of a family home in the community and without any efforts being made to help the children find permanency and/or transition into adulthood.<sup>395</sup> In fact, as explained above, most state and local child welfare agencies now extend services to the age of twenty-one or twenty-three and assist youth with housing, medical and mental health care, and even financial assistance for college. Yet, for many non-citizen youth in ORR custody, at the age of eighteen, they are, at worst, transferred to ICE, or at best, forced to be on their own.<sup>396</sup>

The most expeditious way to bring ORR into compliance with domestic foster care standards would be to place most children who are in the custody of ORR into our state and county-based child welfare systems and to simply have one system that services all children. This could be an expansion of the URM program, along with the need to amend criteria for admission, or alternatively, through the creation of a new system that transfers unaccompanied minors to state and local child welfare systems, while remaining financially supported by DHHS. Careful thought must be afforded as to how such a system should be administered. It might be best to start with child welfare agencies in states that either have seen a reduction in the number of children requiring foster care<sup>397</sup> or states and localities that have been known to

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395. Aber et al., *supra* note 345 (discussing the eight recommendations of the Vera Institute for Justice and highlighting the recommendation that “[w]hen no viable adult ‘sponsor’ (family or family friend) is available, ORR should place children in a licensed childcare setting. But the agency has relied instead on large-scale congregate settings that are often harmful to children who have already suffered trauma”).

396. *See supra* Section I.D.3.

397. *See Fewer Than 8,000 NYC Kids in Foster Care, an All-Time Low*, N.Y. FOUNDLING (Feb. 13, 2020), <https://www.nyfoundling.org/fewer-than-8000-nyc-kids-in-foster-care-an-all-time-low> [<https://perma.cc/G9JQ-ZG94>]; *see also New Jersey Leads Country in Key Child Welfare Performance Areas*, N.J. DEP'T CHILD. & FAMS. (Oct. 22, 2020), [https://www.nj.gov/dcf/news/press/2020/approved/201022\\_childwelfareperforma](https://www.nj.gov/dcf/news/press/2020/approved/201022_childwelfareperforma)

be sensitive and cognizant to special issues affecting immigrant children, youth, and families.<sup>398</sup> It also would make sense to place the child in a state where there is a potential sponsor.

Beginning with states that currently serve children in the URM program would ensure that ORR was working with states that are accustomed to caring for migrant children. This transfer of custody could occur at the beginning of a child's time with ORR, or when it becomes clear that the child is not likely to be placed with a family sponsor (but not later than three or four months). Stated differently, all children who are designated Category 4 children would be transferred to state foster care.

Alternatively, if a unitary system is not created, then ORR must ensure that there are uniform standards between ORR policy and that of domestic foster care. And ORR must greatly expand its existing URM and long-term foster care programs, so that they are readily available to all children who cannot be placed with parents or other family after a short period of time, and so that they comply with all of the mandates that DHHS requires child welfare agencies around the country to follow.

A unitary or uniform system would ensure that all of the procedural and substantive protections, described above, that are in place for children enmeshed in our domestic foster care systems are afforded to non-citizen children. Regardless of how this necessary reform is implemented, it remains abundantly clear that DHHS cannot continue to oversee separate systems for children based upon how the child entered this country and whether the child was able to be placed with a family member. This is especially true when one of those systems

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nce.html [https://perma.cc/LE2P-PB3K]; *New Jersey to Foster Parents: Thanks But No Thanks!*, CHILD WELFARE MONITOR (Feb. 3, 2021), <https://childwelfaremonitor.org/2021/02/03/new-jersey-to-foster-parents-thanks-but-no-thanks> [https://perma.cc/D5SE-59GR]; Nancy Parello, *How Kinship Care Can Help Foster Children Find Alternative Path to a Stable Family*, JERSEY'SBEST (Dec. 6, 2021), <https://www.jerseysbest.com/family/how-kinship-care-can-help-foster-children-find-alternative-path-to-a-stable-family> [https://perma.cc/CJV3-RKLD].

398. For example, New Jersey permits the licensing of undocumented family members if placement with these caregivers as foster parents would be in the child's best interests. See *New Jersey Department of Children and Families Policy Manual: Placement of Children with Kinship Caregivers Who Are Undocumented Immigrants*, N.J., DEP'T CHILD. & FAMS., (Feb. 19, 2019), [https://www.nj.gov/dcf/policy\\_manuals/\\_CPP-IV-A-11-200\\_issuance.shtml](https://www.nj.gov/dcf/policy_manuals/_CPP-IV-A-11-200_issuance.shtml) [https://perma.cc/CQ8P-7CRG]. Moreover, New Jersey, New York City, and parts of California provide legal representation to children in foster care who require the services of an immigration attorney.

regularly violates the Constitution, federal law in the form of the TVRA, and our policies and norms about what constitutes “best practices in child welfare.”

#### CONCLUSION

In December 2019, the United Nations General Assembly unanimously passed the Resolution on the Rights of the Child.<sup>399</sup> This Resolution focuses “on children without parental care, including unaccompanied children and asylum-seeking children.”<sup>400</sup> The resolution “expresses deep concern regarding the large and growing number of migrant children, particularly those who are unaccompanied or separated from their parents or primary caregivers”<sup>401</sup> and urges governments to “prioritiz[e] investments in child protection services and social services to support quality alternative care, including families and communities in order to prevent the separation of children from their families, with the best interests of the child as the primary consideration.”<sup>402</sup>

It is perhaps not surprising that the United States did not sponsor this Resolution, nor even vote for its passage.<sup>403</sup> Yet, while the United States can continue to shy away from international treaties and resolutions, despite the embarrassment from abroad, it cannot continue to disregard its legal obligations to migrant children and families under the Constitution, federal laws, regulations, child welfare policies and best practices, and state law. For when all these authorities are considered individually and cumulatively, there is no question that children must not be separated from parents and other family members unless the child’s safety is at risk. If removed, all efforts must be made to transfer them to the care of kin as expeditiously as possible. Further, the U.S. government is under an obligation to protect the safety and well-being of children in its custody, to act in their best interest, and to provide care for them that is in the “least restrictive

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399. G.A. Res. 74/133 (Jan. 20, 2020).

400. *Id.* at 11.

401. *Id.* at 9.

402. *Id.*; see 2019 UNGA Resolution on the Rights of the Child, BETTER CARE NETWORK (Dec. 18, 2019), <https://bettercarenetwork.org/library/social-welfare-systems/child-care-and-protection-policies/2019-unga-resolution-on-the-rights-of-the-child> [https://perma.cc/VUH5-YJFE].

403. LUISA BLANCHFIELD, CONG. RSCH. SERV., R40484, THE UNITED NATIONS CONVENTIONS ON THE RIGHTS OF THE CHILD 1 (2015).

setting” and “appropriate to their age and special needs.”<sup>404</sup> It is about time that the federal government begins to accept these mandates and responsibilities and that a serious dialogue commences about how the system needs to change.

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404. 45 C.F.R. § 410.201(a) (2019).