FROM HUMANITARIAN CRISIS TO MARAUDING HORDES: A MANUFACTURED OUTCOME

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INTRODUCTION

A discussion of the modern procedures for processing and adjudicating the immigration status of unaccompanied alien children (UACs)—non-citizen children who are unaccompanied by their parents and come into contact with immigration authorities—must begin in 1985 with the filing of the *Flores* lawsuit, federal litigation that remains ongoing.[1] Much of the current law regarding these minor migrants has its genesis in that litigation.[2] Yet, we are currently in the midst of an era that began much more recently, an ongoing reality that the Obama administration called a humanitarian crisis and the Trump administration has deemed a threat to national security and our very identity as the United States.[3] Through myriad administrative actions, various officials within the current administration have methodically narrowed UACs' ability to lawfully remain in the United States. In

1. *See, e.g.*, Order Denying Defendants' "*Ex Parte* Application for Limited Relief from Settlement Agreement," Flores v. Sessions, CV 85-4544-DMG (AGRx) (C.D. Cal. July 9, 2018).

2. *See* Stipulated Settlement Agreement, Flores v. Reno, CV 85-4544-RJK (Px) (C.D. Cal. filed Jan. 17, 1997).

3. *Compare* Tim Hull, *Humanitarian Crisis on the U.S. Border*, COURTHOUSE NEWS SERV. (June 11, 2014), https://www.courthousenews.com/humanitarian-crisis-on-the-u-s-border/ ("President Barack Obama called the influx 'an urgent humanitarian situation requiring a unified and coordinated federal response.'"), *with* Seung Min Kim, *Trump Warns Against Admitting Unaccompanied Migrant Children: 'They're Not Innocent,'* WASH. POST (May 23, 2018), https://www.washingtonpost.com/politics/trump-warns-against-admitting-unaccompanied-migrant-children-theyre-not-innocent/2018/05/23/e4b24a68-5ec2-11e8-8c93-8cf33c21da8d_story.html ("Trump added: 'They look so innocent. They're not innocent.'").

doing so, the current administration has intentionally manufactured a massive and ever-growing population of non-citizen children who will be without lawful status. As such, a self-fulfilling prophecy has emerged: many UACs will remain in the United States without lawful immigration status and employment authorization, leaving them permanent outsiders to the community.

The arrival of UACs to the United States is not new, but between 2011 and 2013, the number of UACs arriving doubled, and the numbers doubled again in 2014.[4] At the time, the sudden arrival of tens of thousands of children was seen as a "surge"—a temporary increase to be addressed (humanely) and overcome.[5] The children were processed according to existing law and policy simply in increased numbers. The government added new facilities to ensure the children were cared for in accordance with the *Flores* settlement and the federal laws enacted to comply with that settlement.[6] The children were generally unhindered in seeking the lawful immigration status for which they may have been eligible. Indeed, while the Obama administration (consistent with federal law) vehemently opposed legal challenges demanding that these children be appointed government-funded counsel, the

4. U.S. CUSTOMS & BORDER PROTECTION, U.S. BORDER PATROL TOTAL MONTHLY UAC APPREHENSIONS BY SECTOR (FY 2010 – FY 2017) (July 2, 2018), https://www.cbp.gov/document/stats/us-border-patrol-total-monthly-uac-apprehensions-sector-fy-2010-fy-2017 [hereinafter TOTAL MONTHLY UAC APPREHENSIONS]; OFFICE OF REFUGEE RESETTLEMENT, U.S. DEP'T OF HEALTH & HUM. SERV., FACTS AND DATA (May 18, 2019), https://www.acf.hhs.gov/orr/about/ucs/facts-and-data [hereinafter FACTS AND DATA]; *see also* U.N. High Commissioner for Refugees, *Children on the Run* 4 (2014) [hereinafter *Children on the Run*].

5. *See* Press Release, President Barack Obama, Office of the Press Secretary, Response to the Influx of Unaccompanied Alien Children Across the Southwest Border (June 2, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/06/02/presidential-memorandum-response-influx-unaccompanied-alien-children-acr (instructing federal agencies to coordinate in responding to the "humanitarian aspects" of the "influx" of UACs consistent with existing law).

6. *See, e.g.*, Michael D. Shear & Jeremy W. Peters, *Obama Asks for $3.7 Billion to Aid Border*, N.Y. TIMES (July 8, 2014), https://www.nytimes.com/2014/07/09/us/obama-seeks-billions-for-children-immigration-crisis.html.

administration nonetheless supported efforts to ensure that these children had access to free legal counsel.[7]

The change from the Obama administration to the Trump administration saw a fundamental shift as to how the federal government views UACs. Federal executives have altered legal interpretation, administrative processing, and policy implementation of immigration laws regarding UACs. Each change has decreased the likelihood that individual UACs will be granted immigration status and permitted to permanently and lawfully reside in the United States. Some of these changes have made immediate repatriation more likely, but others likely disincentivize compliance with the law. This article will address how this has occurred in three areas: (1) greater hindrances to UACs being released from federal detention; (2) narrowed opportunities for UACs to apply for and be granted asylum; and (3) decreased eligibility for abandoned, abused, and neglected UACs to seek permanent residency.

Certain facts are beyond dispute, but perception can be influential. It is an indisputable fact that hundreds of thousands of UACs arrived to the United States in the last several years.[8] If UACs are denied access to the legal protections the law provides for them, they will either be deported or remain an underclass permanently excluded from full participation in society. UACs do not need to be confined to such a future. The narrative matters.

I. A VERY BRIEF INTRODUCTION TO UNITED STATES IMMIGRATION LAW

The United States Constitution establishes that certain individuals—the vast majority of those persons born within the territory

7. *Compare* J.E.F.M. v. Lynch, 837 F.3d 1026, 1038 (9th Cir. 2016) (dismissing on jurisdictional grounds a suit brought by unaccompanied minors claiming constitutional and statutory right to appointed counsel), *with* Press Release, U.S. Dep't of Justice, Justice Department and CNCS Announce $1.8 Million in Grants to Enhance Immigration Court Proceedings and Provide Legal Assistance to Unaccompanied Children (Sept. 12, 2014), https://www.justice.gov/opa/pr/justice-department-and-cncs-announce-18-million-grants-enhance-immigration-court-proceedings (announcing Justice Department collaboration to ensure UACs are represented).

8. *See* sources cited *supra* note 4.

of the United States—are citizens of this country.[9] Congress has legislated additional classes of people who are citizens or non-citizen nationals of the United States.[10] And, pursuant to its constitutional authority, Congress has established laws for the naturalization of certain immigrants—the process by which noncitizens become citizens.[11]

Everyone else must have permission from the U.S. government to enter or be present in the country.[12] Explicit (and distinct) permission is also required for a noncitizen to work in the United States.[13] Noncitizens who have been granted permission to enter or be present in the United States may lose such permission for a variety of reasons.[14] Conduct that may subject a noncitizen to deportation ranges from staying longer than permitted to committing a crime.[15] Others will be found ineligible for admission to the United States for reasons including, but not limited to, being poor or sick, having committed certain crimes, supporting terrorist organizations, or having any prior negative immigration history.[16]

When immigration officers identify a noncitizen without lawful permission to enter or be present in the United States, the officers may begin the formal process to "remove" that individual from the

9. U.S. CONST. amend XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").

10. Immigration and Nationality Act (INA) of 1952 §§ 301-309, ch. 477, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C. (Westlaw 2019)).

11. U.S. CONST. art I, § 8, cl. 4 ("The Congress shall have Power . . . To establish an uniform Rule of Naturalization."); INA § 310.

12. *See* INA § 291.

13. *Id*. § 274A.

14. *See generally id*. § 237 (listing classes of deportable alien).

15. *See, e.g.*, *id*. § 237(a)(1)(C) ("Any alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status . . . is deportable."), (2)(A)(i) ("Any alien who (I) is convicted of a crime involving moral turpitude committed within five years . . . after the date of admission . . . is deportable.").

16. *Id*. § 212(a)(1)(A) (aliens with certain communicable diseases are inadmissible), (2) (aliens with certain criminal histories are inadmissible), (3) (aliens with terrorist connections are inadmissible), (4)(A) (aliens likely to become public charges are inadmissible), (6)(A) (aliens who entered the United States unlawfully are inadmissible), (9) (aliens with prior deportations or prior incidents of unlawful presence are inadmissible).

country.[17] The arresting officer may come into contact with the noncitizen at a port of entry, while patrolling the border, or anywhere within the United States.[18] The officer may charge the noncitizen as subject to deportation for violating the terms of a lawful entry or simply for lacking lawful immigration status.[19]

The legal process to which the noncitizen is entitled varies greatly based on the facts of the case.[20] In some cases, the noncitizen receives nothing more than an interview with the arresting officer.[21] In other situations, the noncitizen will have the benefit of a quasi-judicial administrative proceeding before an immigration judge.[22] Depending on the circumstances, the noncitizen may be held in civil detention for the duration of the proceeding, which may last months to years.[23]

17. *See id*. §§ 235(b)(1)(B)(iii)(I) (expeditious removal of certain aliens "without further hearing or review"), 236(a) (arrest of aliens pending removal proceedings), 238(a) (removal of criminal aliens), 239(a) (initiation of removal proceedings).

18. *Compare* INA § 235(a)(1), *with id*. § 236(a).

19. *See* INA §§ 237(a) (grounds of deportability for alien previously admitted but subject to removal), 212(a) (grounds of inadmissibility for alien seeking admission).

20. *Compare* INA § 235(b)(1)(B)(iii) (allowing for expeditious "remov[al] from the United States without further hearing or review" if a recently arrived alien without entry documents does not express a fear of harm in country of origin), *with id.* § 240 (giving certain aliens the right to quasi-judicial administrative proceedings before an immigration judge). Prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), there was a clear division between noncitizens on United States soil to whom the whole panoply of due process rights was owed in formal deportation proceedings and those noncitizens who presented at a port of entry and were entitled to much diminished process in exclusion proceedings. IIRIRA merged the two and created a grey middle for those noncitizens who are present in the United States but have not been admitted or paroled after inspection by an immigration officer. Such unadmitted but present noncitizens, if recently, arrived are entitled to limited rights when appearing before an immigration judge. INA § 235(a)(1), (b)(1)(A)(iii)(II).

21. INA § 235(b); *see also* 8 C.F.R. § 235.3 (2019).

22. INA § 240; *see also* 8 C.F.R. § 1240.1.

23. INA §§ 235(b)(2)(A) ("an alien seeking admission . . . shall be detained for a proceeding under section [240 Removal Proceedings]"); 236(a) (allowing for detention of the alien pending removal proceedings or release upon the posting of bond or conditional parole). The Supreme Court has held there is a liberty interest at stake for noncitizens detained by the immigration authorities. *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 690 (2001) ("A statute permitting indefinite detention of an alien

Many noncitizens will be deported from the United States without delay because they do not have lawful immigration status to enter or remain in the country.[24] However, the law allows some noncitizens to apply for specific remedies to avoid deportation.[25] Included among those remedies are a number of humanitarian protections—opportunities that Congress has legislated—to avoid deporting certain noncitizens. Asylum is one such remedy, but it is not the only available path to protection from deportation.[26] The law also protects certain vulnerable noncitizens including, but not limited to, those who: (1) are likely to suffer torture upon return to their country;[27] (2) have long resided in the United States without immigration status but whose deportation will cause exceptional harm to a qualifying U.S. citizen relative;[28] (3) have suffered domestic violence perpetrated by a citizen or permanent resident family member;[29] (4) have been victims of crime or human trafficking;[30] (5) come from certain countries currently

would raise a serious constitutional problem."). As at least some of the immigration laws seem to allow indefinite detention, *see* INA § 235(b)(2)(A), it is perhaps not surprising that some federal courts have read into the immigration law an implicit right to consideration for release from detention after detention becomes prolonged. *See* Rodriguez v. Robbins, 804 F.3d 1060, 1089-90 (9th Cir. 2015) (holding that most or all noncitizens in immigration detention have the right to a bond hearing after detention becomes prolonged). The Supreme Court subsequently held, however, that there is no implicit right to a bond hearing after immigration detention becomes prolonged, but the constitutionality of the immigration law's apparent authorization of indefinite detention remains to be decided. Jennings v. Rodríguez, 138 S. Ct. 830, 876 (2018).

24. INA § 235(b)(1)(A)(i) (applying expedited removal to aliens inadmissible simply for not having lawful entry documents).

25. *Id*. § 240(c)(4) (establishing requirements for applications for relief from removal before an immigration judge).

26. *Id*. § 208(a) (allowing broad latitude in applying for asylum).

27. 8 C.F.R. §§ 1208.16 (2019) (withholding of removal under the United Nations Convention Against Torture), .17 (deferral of removal under the United Nations Convention Against Torture).

28. INA § 240A(b)(1) (cancellation of removal for certain nonpermanent residents).

29. *Id*. § 240A(b)(2) (special rule cancellation of removal for battered spouse or child).

30. *Id*. § 101(a)(15)(T) (victims of severe forms of human trafficking), (U) (victims of other crimes who cooperate with law enforcement).

experiencing the effects of natural disasters or civil unrest;[31] or (6) are children who have been abandoned, abused, or neglected by their parents.[32]

The outcome of seeking any of these remedies, however, is never guaranteed; and for many noncitizens placed in removal proceedings there is no relief from removal available.[33] With limited exceptions, immigration proceedings end in one of two ways: the noncitizen gets to stay in the United States with lawful immigration status or the noncitizen must leave. The latter is the more common outcome.[34]

II. AN INTRODUCTION TO THE LEGAL PROCESSING OF UACS

Unaccompanied Alien Children existed long before the term was created.[35] Presumably, such children have interacted with the relevant authorities for as long as modern immigration enforcement has existed. But the definition of a UAC is much newer, having only been codified in its current form in 2002.[36]

Before discussing what it means to be a UAC, it is crucial to understand what such a designation does not mean. UACs, like all noncitizens, are subject to removal from the United States and deportation to their country of nationality.[37] The mere fact of being a noncitizen present but without lawful immigration status in the United States is enough to earn UACs, even infants, one-way tickets back to

31. *Id*. § 244 (temporary protected status).

32. *Id*. § 101(a)(27)(J) (special immigrant juvenile classification).

33. *See*, *e.g.*, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, STATISTICS YEARBOOK FISCAL YEAR 2017 14 figs.7 & 8 (2017), https://www.justice.gov/eoir/page/file/1107056/download [hereinafter STATISTICS YEARBOOK] (showing that orders of removal far outpace grants of immigration relief).

34. *Id*.

35. Ample popular sources, and a bronze statue, suggest that the first immigrant processed through New York's Ellis Island when it opened in 1892 was a teenager who was likely unaccompanied. *See* Sam Roberts, *Story of the First Through Ellis Island Is Rewritten*, N.Y. TIMES (Sept. 14, 2006), https://www.nytimes.com/2006/09/14/nyregion/14annie.html.

36. *See* 6 U.S.C. § 279(g)(2), Pub. L. 107-296, tit. IV, § 462, 116 Stat. 2202 (2002).

37. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA 2008) § 235(a)(5)(D)(i), Pub. L. 110-457, tit. II, 122 Stat. 5077 (2008) (directing that UACs be placed in removal proceedings before an immigration judge).

their countries of origin.[38] In other words, UAC classification alone does not grant the child any substantive lawful immigration status in the United States; instead, the classification affects how the child will be processed through the immigration system and, possibly, the remedies available to the child and how those remedies may be accessed.[39]

A. The Flores Litigation and Settlement

This discussion begins before being a "UAC" was even a legal status, when a proto-UAC, Jenny Flores, a noncitizen child, sued the United States government in 1985.[40] At the time, noncitizen children arrested without their parents by immigration officers were treated not dissimilarly than adults.[41] These children were detained by the same officials who detained adults, and there were no special provisions for them notwithstanding their inherent status as especially vulnerable minors.[42] The *Flores* litigation sought to change that.

The litigation continued for years. Over a decade after the litigation began, the government and plaintiffs agreed to a consent decree, which became known as the *Flores Settlement.*[43] The agreement contains many provisions, but its overall sentiment is especially noteworthy.

38. *See, e.g.*, STATISTICS YEARBOOK, *supra* note 33, at 33 (listing rates of *in absentia* orders of removal for UACs as well as all other aliens in removal proceedings).

39. *See, e.g.*, TVPRA 2008, § 235(b), (c), (d).

40. Complaint at 5, Flores v. Meese, 681 F. Supp. 665 (C.D. Cal. 1988) (No. 85-4544 RJK(Px)) (suit brought by a noncitizen immigrant minor and similarly situated individuals who were held in U.S. government custody pending deportation proceedings, alleging inappropriate and unlawful treatment in the relevant processes).

41. *Id.* at 2-3 ("[Immigration officers] regularly place persons under the age of eighteen (18) years under administrative arrest . . . . Like adults, juveniles arrested pursuant to 8 U.S.C. 1252 are entitled to release on bail while deportation proceedings are conducted . . . . While in [immigration] detention, plaintiffs and those similarly situated are required to share sleeping quarters with unrelated adults. Juveniles so detained are provided no educational instruction, no educational or other reading materials, and no supervised recreational activity. Plaintiffs and those similarly situated are also denied reasonable visitation with family or friends.").

42. *Id.*

43. *See* Stipulated Settlement Agreement, *supra* note 2.

The settlement disfavored the detention of children.[44] It set clear limitations on how long noncitizen children, including UACs, could be held in immigration custody for the simple sake of detention.[45] When it was determined that a child could not be released to a family member, the child would not remain in immigration custody but instead would be shifted to the physical custody of a licensed program.[46] It required the government to inform children of their rights and to allow children to challenge their ongoing detention.[47] This shifted the focus of the process of detaining UACs—they were no longer ordinary subjects of detention but vulnerable children needing specialized care and protection.[48]

B. The Homeland Security Act of 2002

The Homeland Security Act of 2002 fundamentally reorganized the federal government's staffing of immigration enforcement (as well as a host of other functions).[49] It shifted all responsibility for immigration enforcement as well as the majority of responsibility for administrative processing of immigration applications from the Department of Justice's Immigration and Naturalization Service to several sub-agencies of the newly-created Department of Homeland Security.[50]

The Homeland Security Act of 2002 also codified many of the crucial elements of the *Flores Settlement*.[51] It also introduced an additional federal agency into the world of immigration processing: UACs would be held in the physical custody not of the immigration

44. *Id*. at 7 ("The [immigration authority] shall place each detained minor in the least restrictive setting appropriate to the minor's age and special needs, . . . and to protect the minor's well-being and that of others."), 9-10 ("Where the [immigration authority] determines that the detention of the minor is not required either to secure his or her timely appearance before the [immigration authority] or the immigration court, or to ensure the minor's safety or that of others, the [immigration authority] shall release a minor from its custody without unnecessary delay . . . .").

45. *Id*. at 8.

46. *Id*. at 12.

47. *Id*. at 7.

48. *See, e.g.*, *id*. at 11-12.

49. Homeland Security Act of 2002 (HSA 2002) §§ 411, 442, 451, 471, Pub. L. 107-296, 116 Stat. 2135 (2002).

50. *Id*. § 456.

51. *Id*. § 462(b).

enforcement authorities but instead in the federal Department of Health and Human Services.[52] While the act primarily focuses on transferring functions to the newly-created department (from the Departments of Treasury, Transportation, and Justice, among others), this is not the case for the care and custody of UACs.[53] These provisions altered not only who would be responsible for the task of detaining UACs, but also the priorities of the federal government. The newly created priorities of the federal government involve the child's welfare during detention, expeditious release from detention considering the child's safety, and the child's access to independent counsel.[54]

C. The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008

In 2008, Congress advanced protecting UACs a step further when it promulgated the William Wilberforce Trafficking Victims Protection Reauthorization Act. This law primarily focused on protecting victims and survivors of human trafficking, but it also implicitly recognized that all UACs are vulnerable to human trafficking and thus require special protection upon apprehension by federal immigration agents.[55] Crucially, apprehended UACs would be screened for indicators of having been trafficked.[56]

This law also refined how UACs would be processed. UACs must be transferred to Health and Human Services' custody within seventy-two hours of apprehension, and that agency then seeks to release each UAC from custody to the care of a safe sponsor as soon as possible.[57] Additionally, such children must be placed in formal administrative removal proceedings before an immigration judge; they are not expeditiously removed from the United States upon the unreviewable decision of an immigration officer as occurs with noncitizen adults and accompanied children.[58] But the law created an important exception: a

52. *Id.* § 462(a).
53. *Compare id.* § 462(a), *with e.g.*, *id.* §§ 411, 421, 423, 441, 451(b).
54. *Id.* § 462(b)(1).
55. TVPRA 2008 § 235(a), Pub. L. 110-457, tit. II, 122 Stat. 5077 (2008).
56. *See id.* § 235(a)(4).
57. *Id.* § 235(b)(1), (3).
58. *Compare* INA § 235, ch. 477, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C. (Westlaw 2019)), *with* TVPRA 2008 § 235(a)(5)(D).

UAC from a contiguous country (i.e., Mexico or Canada) can be quickly repatriated to their country of origin but only 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.[59] If not all three of these requirements are met—or if it cannot be determined within forty-eight hours that the three requirements are met—the child will not be repatriated without receiving all the benefits available to other UACs, including transfer to Health and Human Services custody, consideration for release to a safe sponsor, and formal removal proceedings before an immigration judge.[60] The law also established important amendments to the laws regarding UACs' access to asylum and special immigrant juvenile status, which will be discussed below.

D. The Current Definition of a UAC

Perhaps most importantly for this discussion, the Homeland Security Act of 2002 codified the definition of a UAC, and the Trafficking Victims Protection Reauthorization Act of 2008 reaffirmed it.[61] Interestingly, the definition is not codified in Title 8 of the United States Code, which relates generally to immigration and nationality, but instead it is codified in Title 6, which relates to domestic security. The protections available to UACs refer to the definition now found at Section 279(g)(2) of Title 6 of the United States Code:

> The term ''unaccompanied alien child'' means 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.[62]

59. TVPRA 2008 § 235(a)(2).

60. *Id*. § 235(a)(4).

61. HSA 2002 § 462(g)(2), Pub. L. 107-296, 116 Stat. 2135 (2002); *see also* TVPRA 2008 § 235(g).

62. 6 U.S.C. § 279(g)(2), Pub. L. 107-296, tit. IV, § 462, 116 Stat. 2202 (2002).

At first glance, this definition seems simple and straightforward. Yet, its simplicity is misleading. Neither the definition itself nor the sections that cross-reference it contain a temporal explanation; it is not clear when the definition is considered and applied, when the relevant protections attach, and when, if ever, such protections are lost. These questions, as will be discussed below, have become crucial and have allowed great leeway in decisions by the administration of how to protect (or refuse to protect) UACs.

E. Proposed Regulations

As previously noted, many of the protections afforded to UACs—especially those regarding their detention, care, and custody—have their roots in the *Flores Settlement*. As modified in 2001, the settlement and consent decree will terminate upon full adoption of its provisions into law and regulation.[63] Yet, despite the passage of the laws discussed above, litigants, including the United States government, continued to recognize that the settlement provisions were binding; for years, implementing regulations were not promulgated.[64] The Trump administration has sought to change that.

In 2018, the Departments of Homeland Security and Health and Human Services jointly published a notice of proposed rulemaking in the Federal Register.[65] The proposal indicated an intention to enact regulations implementing the settlement provisions, thereby terminating the settlement agreement.[66] Advocates, not surprisingly, expressed concern over the proposed regulations.[67] Given the track

63. Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 Fed. Reg. 45,486, 45,486 (Sept. 7, 2018) (joint proposed regulations by the Departments of Homeland Security and Health and Human Services).

64. *Id*. at 45,487-88.

65. *See generally id*.

66. *Id*.

67. *See, e.g.*, Letter from Immigration & Nationality Law Comm., Children & the Law Comm., Council on Children, Family Court & Family Law Comm., & Int'l Human Rights Comm., N.Y.C. Bar Ass'n to Debbie Seguin, Assistant Dir., Office of Policy, U.S. Immigration & Customs Enforcement, Dep't of Homeland Sec. 2 (Nov. 6, 2018) ("However, the Proposed Rules contravene the substance and purpose of the [Flores Settlement Agreement], and their publication is therefore insufficient to trigger the termination of the [Flores Settlement Agreement].").

record of the current administration of narrowing protections for UACs, such concern appeared warranted.

On August 23, 2019, these two departments published the final rule in the Federal Register.[68] The departments noted the concerns expressed by various commenters and explained how the rules had been amended after the notice and comment period.[69] As expected, the administration stated that the publication of the final rule effectively terminated the *Flores* agreement.[70] Advocates for UACs were quick to disagree and plaintiffs' counsel in the *Flores* litigation sought to have the administration enjoined from implementing the final rule.[71] The federal district judge presiding over the *Flores* litigation agreed that the new regulations were inconsistent with the *Flores* agreement and enjoined the government from implementation.[72] It is fair to assume that this dispute is not settled.

III. WHO ARE THE UACS AND WHY ARE THEY ARRIVING?

UACs are, by no means, a homogenous group of children. UACs hail from all corners of the world and speak hundreds of languages. UACs include cisgender and transgender boys and girls and gender-nonconforming children.[73] They range in age from days old to days short of turning eighteen. Some have known significant economic privilege while others left behind abject poverty; some have completed secondary or even tertiary education while others have never seen a classroom and cannot write their own names. In short, being a UAC has nothing to do with a child's identity but rather their transitory place

68. Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 84 Fed. Reg. 44,392, 44,392 (Aug. 23, 2019) (joint final regulations promulgated by the Departments of Homeland Security and Health and Human Services).

69. *Id*. at 44,395-96.

70. *See id*. at 44,393.

71. *See* Order Re. Plaintiffs' Motion to Enforce Settlement and Defendants' Notice of Termination of Settlement and Motion in the Alternative to Terminate Flores Settlement Agreement at 1, Flores v. Barr, CV 85-4544-DMG (AGRx) (C.D. Cal. Sept. 27, 2019).

72. *Id*. at 5, 24.

73. This article strives to use gender neutral pronouns.

in the United States immigration system as tempered by their age, custodial status, location in this country, and lack of immigration status.

That being said, there are some noteworthy demographic trends. Statistically, the prototypical UAC is—and has been for years—a Guatemalan male in his late teens.[74] But the last few years have seen important and concerning demographic shifts. The percentage of younger, arriving UACs has increased.[75] According to the Department of Health and Human Services, in fiscal year 2012, only 11% of UACs were age twelve and under; in fiscal year 2017, this number rose to 17%.[76] During that same period, the gender percentages of UACs shifted: the percentage of girls rose from 23% to 32%.[77] These percentages must be considered in light of the increased number of UAC apprehensions during the last five years. Customs and Border Protection reported that apprehensions of UACs increased from sixteen thousand in fiscal year 2011 to a peak of over sixty-eight thousand in fiscal year 2014.[78] The inherent increased vulnerability of younger children is obvious. While travel to the United States is horrendously dangerous for all immigrants, especially UACs, the prevalence of gender-based violence, sexual assault, and rape adds an additional layer of danger for girls. Tens of thousands of additional UACs traveling to the United States per year thus means thousands of additional especially vulnerable children.

There are some important caveats to this data. Statistics regarding UACs—at least those published by Health and Human Services—generally only include those children transferred to that agency. Since Mexican (and Canadian) children are from contiguous countries and thus can be quickly returned to countries of origin if there are no indicators of human trafficking and they do not express a fear of return, those children may well be arriving in large numbers but only the fraction that are transferred to Health and Human Services are counted

74. FACTS AND DATA, *supra* note 4. *See generally* WILLIAM A. KANDEL, CONG. RESEARCH SERV., UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW (2017).

75. FACTS AND DATA, *supra* note 4 (comparing data on UACs ranging in age between 0 to 12 years old).

76. *Id*.

77. *Id*.

78. KANDEL, *supra* note 74, at 2.

in government-published statistics on UACs.[79] It is also important to note that UACs are not only children who have *just* arrived to the United States. On the contrary, any noncitizen child found within the United States, without immigration status, and not in the care of a parent is classified as a UAC according to the plain language of the definition. When a federal immigration agent performs enforcement activities within the United States and encounters such a child, the officer must follow the protocol to transfer the child to Health and Human Services custody. As a practical matter, however, the vast majority of UACs processed in recent years have been children who very recently arrived to the United States and were encountered by immigration agents at the ports of entry or near unauthorized border crossing points.[80]

Each UAC has a personal story, and for those old enough to decide to travel to the United States, they have their own reasons for coming. Those who study UACs describe both push factors and pull factors.[81] Push factors are reasons in the country of origin that encourage an individual to leave.[82] These factors may include a history of victimization and violence as well as poverty.[83] Conversely, pull factors are reasons in the United States that may encourage the journey to this country, including the desire to reunify with family members already resident in the United States or the promise of educational and work opportunities.[84] While it is impossible and dangerously irresponsible to look for *the* reason UACs are arriving to the United States, it is important to see what may be driving changing trends.[85]

79. Although noncitizen children may be arriving to the United States in large numbers, those who are not transferred to the agency are not counted because in the absence of indicators of human trafficking and expressed fear of return, they are quickly repatriated. *See* TVPRA 2008 § 235(a)(2).

80. *See* TOTAL MONTHLY UAC APPREHENSIONS, *supra* note 4 (noting thousands of UACs apprehended at the southwest border but dozens at the coastal and northern borders).

81. KANDEL, *supra* note 74, at 1.

82. *Id*.

83. *Id*.

84. *Id*.

85. *See* FRANK DE WAEGH, JESUIT CONFERENCE OF CANADA AND THE UNITED STATES, UNWILLING PARTICIPANTS: THE COERCION OF YOUTH INTO VIOLENT CRIMINAL GROUPS IN CENTRAL AMERICA'S NORTHERN TRIANGLE 9 (2015) ("The type of migration patterns currently occurring from the Northern Triangle resemble displacement and migration typical of open conflicts, and as such illustrate the gravity

Given that consistently over 80% of UACs have been nationals of three countries in particular—El Salvador, Guatemala, and Honduras—and that there was a monumental increase in the number of UACs arriving from all of these countries at the same time, the shared stories of these UACs in particular provides valuable insight.[86]

The United Nations High Commissioner for Refugees did a qualitative study of children fleeing these three countries (as well as from Mexico).[87] Children were interviewed about life in their countries of origin and their reasons for fleeing.[88] The resulting publication is instructive and compelling, beginning with its very name: *Children on the Run*. While children reported varied (and often multiple) reasons for fleeing, "[t]wo overarching patterns of harm related to potential international protection needs emerged: violence by organized armed criminal actors and violence in the home."[89] In other words, while many of the children also wished to reunify with family members in the United States or benefit from increased educational and work opportunities, the majority were in fact fleeing their home countries.[90] Other reports published by on-the-ground, non-governmental organizations and think tanks confirm this reality.[91] These reports confirm a near or complete breakdown of the state and the lawful authority in these countries as well as a regularity of and impunity for violence in the home and in the streets.[92] Central American children

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of the phenomenon."); SARNATA REYNOLDS, REFUGEES INT'L, "IT'S A SUICIDE ACT TO LEAVE OR STAY": INTERNAL DISPLACEMENT IN EL SALVADOR 4-5 (2015) ("massive numbers of Salvadoran youth and adults do not make the choice to leave their homes but are instead forced out").

86. *See* DE WAEGH, *supra* note 85, at 9 ("Beginning in 2011, the U.S. Customs and Border Protection (CBP) recorded a dramatic increase in the number of children migrating without their parents or guardians and crossing into the United States from El Salvador, Guatemala, and Honduras."); *see also* REYNOLDS, *supra* note 85 and accompanying text.

87. *See Children on the Run*, *supra* note 4.

88. *Id*. at 18-20.

89. *Id*. at 6.

90. *Id*. at 6-7, 23-29.

91. *See* DE WAEGH, *supra* note 85, at 9 ("In the Northern Triangle context, forced migration must be understood as a last recourse to the threats and violence exerted by *maras*."); REYNOLDS, *supra* note 85, at 4-5.

92. *See* DE WAEGH, *supra* note 85, at 2 ("Weak state institutions struggle to limit the power criminal groups exercise . . . and are often compromised by internal

who have fled their home countries and arrived to the United States and been classified as UACs have consistently reported being the victims of domestic violence and/or gang violence.[93] As they sought refuge in the United States, this has most often been the basis upon which UACs have applied for permission to remain in the United States.

While UACs continue to arrive from all over the world, these Central American children were and are the primary group of children that the government, the media, and academics are referring to amid current analysis of the UAC issue.[94] These are the children that comprised the "surge" that the Obama administration called a humanitarian crisis and scrambled to house in sufficient and appropriate facilities.[95] And these are the children who have been called gang members, drug mules, and terrorists during the Trump administration.[96]

IV. SPECIFIC PROTECTIONS AND LEGAL REMEDIES FOR UACS AND THEIR RECENT LIMITATIONS

The mere fact of being classified as—or meeting the definition of—a UAC does not grant the child any legal immigration status in the United States. On the contrary, each year thousands of UACs are ordered deported from the United States by immigration judges.[97] However, being a UAC does give the child special protections and special access to immigration remedies that are not available to other noncitizens, whether adults or accompanied children.[98] The most

corruption or outright complicity with illicit actors."); REYNOLDS, *supra* note 85, at 5 ("[T]he constant insecurity experienced by so many in El Salvador is a direct demonstration of the state's unwillingness and/or inability to protect some of its citizens from torture and persecution.").

93. *Children on the Run*, *supra* note 4, at 31-39.

94. *See, e.g.*, KANDEL, *supra* note 74, at 2.

95. *Id*. at 1 ("Some Members of Congress as well as the Obama Administration have characterized the issue as a humanitarian crisis."); *see also* Hull, *supra* note 3.

96. *See* Kim, *supra* note 3.

97. *See, e.g.*, STATISTICS YEARBOOK, *supra* note 33, at 14 figs.7 & 8 (showing that orders of removal far outpace grants of immigration relief); *see also* KANDEL, *supra* note 74, at 12.

98. *See, e.g.*, TVPRA 2008 § 235(d), Pub. L. 110-457, tit. II, 122 Stat. 5077 (2008) (establishing "permanent" protections for certain children, including primarily UACs).

important of these protections, and their recent modifications, will be addressed below.

A. Release from Federal Detention

The legal process to deport noncitizens from the United States occurs through civil proceedings. Regardless of the reason the government seeks to deport a noncitizen—even if the reason is the noncitizen's criminal history—the decision to deport the individual is a civil determination, not a criminal penalty.[99] The law generally allows—and in some instances requires—that the noncitizen will be detained in civil detention during the course of those proceedings.[100]

The Department of Homeland Security—acting as arresting officer, jailer, and prosecutor—has broad discretion over whether a noncitizen is detained during removal proceedings before an immigration judge.[101] It is almost always within the department's discretion to decide whether a noncitizen should be detained.[102] If a noncitizen is detained, the individual may have a right to challenge that determination and seek to be released upon posting bond.[103] But in certain situations, including in the case of a noncitizen asylum seeker who lawfully seeks admission to the United States at a port of entry to seek protection, the noncitizen currently has no right to challenge the department's custody determination.[104] That asylum seeker may be required to spend months or years in civil detention while fighting for asylum.[105]

The *Flores Settlement* solidified the concept that this process should not apply to immigrant children.[106] It implemented a presumption that children should be held in the least restrictive setting

99. INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984).

100. INA §§ 235(b)(1)(B)(iii)(IV), 236(a), (c), ch. 477, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C. (Westlaw 2019)).

101. 8 C.F.R. § 212.5 (2019).

102. *Id*.

103. INA § 236(a).

104. *Id*. § 235(b)(1)(A)(i); *cf*. Rodriguez v. Robbins, 804 F.3d 1060, 1089-90 (9th Cir. 2015), *vacated and remanded to* Jennings v. Rodríguez, 138 S. Ct. 830 (2018).

105. *See* Rodriguez, 804 F.3d at 1089-90; *see also* sources cited *supra* note 23.

106. Stipulated Settlement Agreement, *supra* note 2, at 7.

that ensures the safety of both the child and the community.[107] This process and presumption was codified by both the Homeland Security Act of 2002 and the Trafficking Victims Protection Reauthorization Act of 2008.[108] Further, the child shall be released to the care of a sponsor—a family member residing in the United States, a non-relative responsible adult, or even a community organization—when it is determined that the sponsor will provide proper care for the child.[109]

There are some very important details about this process. If the government decides to detain the child in a secure facility, that decision must be justified and reviewed every thirty days.[110] Release from government custody does not grant the child status to remain in the United States.[111] On the contrary, the child will remain in active removal proceedings that may eventually result in an order of deportation.[112] The child need not post bond in order to be released from custody, but the child's sponsor is required to provide adequate assurances that the child will appear for court hearings.[113] The consequence for failing to appear—an immediate order of deportation *in absentia*—applies to UACs just as it does to adults and accompanied children.[114] UACs may not be released on their own recognizance.[115] If a UAC turns eighteen while in government custody, the law mandates the child be considered for release from government custody, rather than immediately be detained with other adult immigrant detainees.[116]

To fulfill this judicial and statutory framework, the Department of Health and Human Services has contracted with a network of private

107. *Id*.

108. HSA 2002 § 462(b)(1)(C), (b)(2), Pub. L. 107-296, 116 Stat. 2135 (2002); TVPRA 2008 § 235(c)(1)-(3), Pub. L. 110-457, tit. II, 122 Stat. 5077 (2008).

109. *See* TVPRA 2008 § 235(c)(2)-(3); *see also* Stipulated Settlement Agreement, *supra* note 2, at 10.

110. TVPRA 2008 § 235(c)(2).

111. Stipulated Settlement Agreement, *supra* note 2, at 7 (release of UAC contingent upon assurances of appearing for removal proceedings); TVPRA 2008 § 235(c)(2) ("risk of flight" is a factor in determining suitability of sponsor for release).

112. TVPRA 2008 § 235(a)(5)(D).

113. HSA 2002 § 462(b)(2)(A)(i); TVPRA 2008 § 235(f)(2)(B).

114. INA § 240(b)(5)(A), ch. 477, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C. (Westlaw 2019)).

115. HSA 2002 § 462(b)(2)(B).

116. 8 U.S.C. § 1232(c)(2)(B) (2018).

agencies to provide care for these children.[117] While private, for-profit corporations often perform contracted services for adult immigrant detention, not-for-profit agencies that focus on child welfare are the primary (though not exclusive) providers of care and custody for detained UACs.[118] The vast majority of UACs are housed in facilities labeled "shelters"; while these children are not quite free to leave, they are not in jail cells or shackled.[119] Being cared for in a shelter means a determination has been made that the child does not present a risk to themselves or others and will be detained only until a suitable sponsor has been identified and vetted.[120]

The government and its contractors are required to begin searching for an appropriate sponsor the moment a UAC is placed in custody.[121] There is a hierarchy of potential sponsors: parents; other close adult relatives, including siblings, aunts and uncles, grandparents, cousins; unrelated adults, including family friends; and community organizations.[122] Sponsors must demonstrate they will provide a safe home for the child, however, sponsors are not required to demonstrate they have lawful immigration status in the United States.[123] Over the last several years, a large portion of the UACs in government custody had parents living in the United States who willingly accepted their children into their homes.[124]

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117. *See, e.g.*, Kim Barker, Nicholas Kulish, & Rebecca R. Ruiz, *He's Built an Empire, with Detained Migrant Children as the Bricks*, N.Y. TIMES (Dec. 2, 2018), https://www.nytimes.com/2018/12/02/us/southwest-key-migrant-children.html.

118. *See id*.; *see generally* Livia Luan, *Profiting from Enforcement: The Role of Private Prisons in U.S. Immigration Detention*, MIGRATION POL'Y INST. (May 2, 2018), https://www.migrationpolicy.org/article/profiting-enforcement-role-private-prisons-us-immigration-detention.

119. *See* KANDEL, *supra* note 74, at 8 n.45.

120. *See id*.

121. *See id*. at 8 ("The same care providers also facilitate the release of UAC to family members or other sponsors who are able to care for them."); *see also* Stipulated Settlement Agreement, *supra* note 2, at 9-10 (general policy favoring release).

122. Stipulated Settlement Agreement, *supra* note 2, at 10.

123. OFFICE OF REFUGEE RESETTLEMENT, U.S. DEP'T OF HEALTH & HUM. SERV., CHILDREN ENTERING THE UNITED STATES UNACCOMPANIED § 2.6 (Jan. 30, 2015) [hereinafter CHILDREN ENTERING THE UNITED STATES UNACCOMPANIED] ("ORR does not disqualify potential sponsors on the basis of their immigration status.").

124. *See* KANDEL, *supra* note 74, at 10 n.51.

Although lawful immigration status is not a requirement for sponsoring a UAC, in choosing to sponsor a child out of federal custody the sponsor must still provide crucial personal information to the government, including name, address, and telephone number.[125] In some cases, the sponsor must agree to a home study, background check, and ongoing supervision after the child is released.[126]

In 2011, the Department of Homeland Security released several memoranda specifying the government's priorities for immigration enforcement.[127] The government focused its enforcement operations on noncitizens who, in addition to lacking lawful immigration status, had a criminal history or otherwise presented a threat to the community.[128] Immigration officers and prosecutors were granted discretion to not seek removal of noncitizens who lacked lawful immigration status but were otherwise law-abiding members of the community with positive equities.[129] The government shifted its stance in 2017, declaring that while it would continue to prioritize the deportation of noncitizens with criminal histories, now any noncitizen without lawful immigration status would not be immune from adverse immigration enforcement activities.[130] As such, it suddenly became much more risky for a noncitizen without lawful immigration status to provide their personal information to the government and serve as a sponsor for a UAC.

At least two additional policy changes directly disincentivized sponsoring a UAC. Health and Human Services announced it entered into an information sharing agreement with Homeland Security; the information collected during the vetting process of a potential sponsor

125. *Id*. at 9; *see* CHILDREN ENTERING THE UNITED STATES UNACCOMPANIED, *supra* note 123, § 2.5.1 (noting that immigration status checks are run on sponsors through the Department of Homeland Security).

126. TVPRA 2008 § 235(c)(3)(B), Pub. L. 110-457, tit. II, 122 Stat. 5077 (2008).

127. Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, to All ICE Employees (Mar. 2, 2011), https://www.ice.gov/doclib/foia/prosecutorial-discretion/civil-imm-enforcement-priorities_app-detn-reml-aliens.pdf (regarding Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens).

128. *See id*.

129. *Id*.

130. *See* Exec. Order, No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017) ("Enhancing Public Safety in the Interior of the United States").

would now be available to the immigration enforcement authority.[131] Contemporaneously, Health and Human Services "imposed expanded fingerprinting requirements to cover all sponsors and their household members."[132] Again, this meant the government collected even more personal information from the sponsors. Reports of immigration agents targeting UAC sponsors soon began to appear.

The Trump administration retracted the expanded fingerprinting policy after it prompted advocacy and at least one lawsuit.[133] Following these policy changes, there was a significant increase in the length of time the average UAC remained in government custody.[134] It is reasonable to assume that the longer average time in care meant either fewer sponsors were willing to come forward or a reticence to provide the required information to the government. As noted below, detention fatigue might also mean more children abandoning their claims for protection and requesting repatriation.

B. Limiting UACs' Eligibility for Asylum

While asylum is an ancient concept, its current legal structure was designed by the international community in 1951 with the adoption of the United Nations Convention on the Status of Refugees.[135] In 1980, the United States incorporated the new international definition of a

131. OFFICE OF REFUGEE RESETTLEMENT, U.S. DEP'T OF HEALTH & HUMAN SERV., U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SEC'Y., & U.S. CUSTOMS & BORDER PATROL, U.S. DEP'T OF HOMELAND SEC., MEMORANDUM OF AGREEMENT (Apr. 13, 2018) (regarding Consultation and Information Sharing in Unaccompanied Alien Child Matters).

132. *See* Class Complaint and Petition for Habeas Corpus at 8, Duchitanga v. Lloyd, No. 1:18-cv-10332 (S.D.N.Y. filed Nov. 6, 2018).

133. *See* Jason Grant, *Trump Administration Changes Fingerprint Check Policy for Immigration Sponsors*, N.Y. L.J., (Dec. 19, 2018).

134. *Compare* FACTS AND DATA, *supra* note 4 (showing current average time a UAC is in care is sixty days), *with* KANDEL, *supra* note 74, at 10 (noting that by January 2016, average time in care had dropped to thirty-four days). *See* Class Complaint and Petition for Habeas Corpus, *supra* note 132, at 9 ("The recent changes in fingerprint policies have dramatically increased how long children must wait for release.").

135. United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137.

refugee into domestic immigration law.[136] That definition is the basis upon which a noncitizen may be accepted for resettlement in the United States as a refugee or may seek asylum in the United States upon arrival.[137] Children, just like adults, may seek asylum, but UACs have special access to this status.

Federal law provides preferential treatment for UACs when they choose to apply for asylum. Unlike other noncitizens subject to deportation, including accompanied children—who may only apply for asylum in adversarial quasi-judicial proceedings before an immigration judge—UACs are given an initial opportunity to make their case for asylum in a non-adversarial, non-judicial setting, a process intuitively preferable for traumatized, fleeing children.[138] Federal law also exempts UACs from the strict requirement that an asylum application be filed within one year of arrival to the United States and from the requirement that an asylum applicant first seek asylum in certain other countries.[139] Since 2013, the Obama administration allowed these benefits to flow to UACs relatively generously.[140] By contrast, several Trump administration officials have declared these opportunities should be strictly limited.[141] Moreover, the Attorney General's recent unilateral decision to restrict immigration judges' authority to grant asylum on substantive grounds severely limited UACs' ability to access asylum protection in the United States.[142]

136. Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102 (Mar. 17, 1980).

137. *See* INA § 208(b)(1)(A), ch. 477, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C. (Westlaw 2019)) (defining asylum eligibility by cross-referencing INA § 101(a)(42)(A) (definition of refugee)).

138. INA § 208(b)(3)(C); 8 C.F.R. §§ 208.9(b), 208.14(c) (2019).

139. INA § 208(a)(2)(E).

140. *See* Memorandum from Ted Kim, Acting Chief, Asylum Division, U.S. Citizen and Immigration Services, to All Asylum Office Staff 2 (May 28, 2013) [hereinafter Kim Memo 2013] (directing that the asylum office will accept a prior determination by CBP or ICE that an applicant is an unaccompanied alien child and will assume jurisdiction).

141. *See* Memorandum from Jean King, General Counsel, Exec. Office for Immigration Review, to James R. McHenry III, Acting Director, Exec. Office for Immigration Review 9 (Sept. 19, 2017) [hereinafter King Memo 2017] (Legal Opinion re: EOIR's Authority to Interpret the Term Unaccompanied Alien Child for Purposes of Applying Certain Provisions of the TVPRA); *see also, e.g.*, Matter of Castro-Tum, 27 I&N Dec. 271, 278-79 n.4 (A.G. 2018).

142. *See* Matter of L-A-B-R-, 27 I&N Dec. 405 (A.G. 2018).

1. Statutory Asylum Protections for UACs

Congress recognized that UACs require special protections when applying for asylum. Accordingly, it legislated:

> Applications for asylum and other forms of relief from removal in which an unaccompanied alien child is the principal applicant shall be governed by regulations which take into account the specialized needs of unaccompanied alien children and which address both procedural and substantive aspects of handling unaccompanied alien children's cases.[143]

While Congress gave federal agencies discretion in the rulemaking process to develop such regulations, some considerations were so important that Congress incorporated them into the law.[144]

a. Initial Jurisdiction over UACs' Asylum Applications

In the United States, there are generally two ways to apply for asylum, which are commonly referred to as affirmative and defensive applications. A noncitizen present in the United States—with or without lawful immigration status and not currently defending against deportation—may affirmatively apply for asylum.[145] An affirmative asylum application is adjudicated by an asylum officer through a private, informal, and non-adversarial interview.[146] If the officer grants asylum, there is no appeal, and the new asylee is on a path to lawful permanent residence and eventual citizenship.[147] If the officer declines to grant asylum, in most situations the officer will institute removal proceedings against the noncitizen applicant, thereby requiring the applicant to appear before an immigration judge to defend against deportation.[148] The noncitizen will then have the opportunity to renew the application for asylum before the immigration judge for de novo

143. TVPRA 2008 § 235(d)(8), Pub. L. 110-457, tit. II, 122 Stat. 5077 (2008).

144. *See generally id*. § 235(d)(7).

145. INA § 208, ch. 477, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C. (Westlaw 2019)).

146. 8 C.F.R. § 208.9(b) (2019).

147. *Id*. §§ 208.14(b), 209.2(a).

148. *Id*. § 208.14(c)(1).

consideration, albeit in a formal, adversarial, administrative trial.[149] From the judge's decision, an appeal may be taken to the administrative appellate body—the Board of Immigration Appeals—and possibly to the corresponding federal circuit court for further review.[150] The risk of affirmatively applying for asylum is great because if unsuccessful, the applicant will have to defend against deportation. But, in doing so, the applicant gets two opportunities—first affirmatively, then defensively—to seek asylum with the first instance being conducted in a less intimidating environment more suitable for a survivor of persecution or torture.

A noncitizen who is already defending against deportation does not have this first opportunity to seek asylum affirmatively with an asylum officer. Rather, once the noncitizen is apprehended and removal proceedings are commenced, the only opportunity to seek asylum will be in a defensive posture before the immigration judge.[151] Therefore, these asylum applicants are limited to one opportunity to request asylum, which is only done in the adversarial, trial-court setting. If a noncitizen who is already in removal proceedings tries to apply for asylum with the asylum officer, the officer will generally lack jurisdiction over the application.[152]

There is an inherent great benefit to being able to seek asylum through the affirmative (and then, if necessary, defensive) process. Most UACs, however, are apprehended upon or soon after entry to the United States and would never have such an opportunity. Recognizing the value of the affirmative process, especially for exceptionally vulnerable applicants such as UACs, Congress mandated that UACs get the benefit of this initial opportunity to seek asylum notwithstanding prior initiation of removal proceedings.[153] The Trafficking Victims Protection Reauthorization Act of 2008 provided, "An asylum officer . . . shall have *initial* jurisdiction over any asylum application

149. *See id*.; *Id*. § 1240.10.

150. *Id*. §§ 1240.15, 1003.1(b)(3); INA § 242(a)(2)(B) (generally denying judicial jurisdiction to review immigration decisions but maintain judicial jurisdiction over asylum denials).

151. 8 C.F.R. §§ 208.2(b), 1208.2(b).

152. *See* sources cited *supra* note 151.

153. INA § 208(b)(3)(C).

filed by [a UAC]."[154] In other words, all UAC asylum applicants get two bites at the apple. While the immigration judge may continue to schedule hearings, the plain language of the act suggests that the judge must take no action on an asylum application unless and until the asylum officer has exercised initial adjudicatory responsibility.

While the statutory provision makes clear that jurisdiction vests when the asylum application is filed, it does not answer the question of when UAC status is determined. It is plausible to presume that UAC status is determined at the time of the filing of the application, but this is perhaps the narrowest reading of the statute. It is also plausible to presume that UAC status is determined upon apprehension or even upon entry to the United States. From 2008 until 2013, the approach to this interpretation was unclear. Then, in 2013, an administrative directive was issued: in general, the UAC status determination made at the time of first contact with the immigration authorities controls.[155] The directive ordered asylum officers to continue to treat the asylum applicant as a UAC if the asylum applicant had previously been found by an immigration officer to be a UAC and that determination had not been rescinded.[156] On the other hand, if the applicant had not previously come into contact with an immigration officer, the asylum officer must consider the details of the child's life at the time the asylum application was filed.[157] This allowed UACs to continue to benefit from the initial jurisdiction provision of the statute. The directive was to be followed even if a UAC had turned eighteen or had been released from government custody to a parent or legal guardian before an asylum application was filed. Accordingly, the asylum officer would continue to have jurisdiction to adjudicate the application on the merits based on the individual having been classified as a UAC at the time of apprehension.[158]

In 2018, while this directive was still in effect, the general counsel of the Executive Office for Immigration Review (the administrative agency within the Department of Justice that houses both the

154. TVPRA 2008 § 235(d)(7)(B), Pub. L. 110-457, tit. II, 122 Stat. 5077 (2008) (emphasis added).

155. Kim Memo 2013, *supra* note 140, at 2.

156. *Id*.

157. *Id*. at 2-3.

158. *See id*. at 2.

immigration courts and the Board of Immigration Appeals) sent a memorandum to that agency's director regarding UAC status determinations.[159] The memorandum argued that immigration judges should determine whether a noncitizen appearing before them meets the definition of a UAC at that moment and determine, accordingly, whether the court should adjudicate any application for asylum in the first instance rather than allowing the asylum officer an initial opportunity to adjudicate the case.[160]

Several months later, Attorney General Sessions exercised a power vested in him as the ultimate administrative interpreter of immigration law.[161] Since all administrative authority exercised by immigration judges and the Board of Immigration Appeals is technically authority delegated to them by the Attorney General, the Attorney General may certify any pending immigration case to himself to review and issue a precedential decision binding on the immigration courts and the Board of Immigration Appeals (as well as on asylum officers and other immigration adjudicators within the Department of Homeland Security).[162] This first decision issued by Attorney General Sessions in the exercise of this authority will be discussed further below. Importantly, though, he included a footnote that referenced his clear opinion that UAC status is not static. He suggested, without deciding, that a (former) UAC loses such status (and the attendant protections) upon reaching age eighteen (and perhaps upon release from government custody to a sponsor).[163]

159. *See* King Memo 2017, *supra* note 140.

160. *Id*. at 3-6.

161. 8 C.F.R. § 1003.1(h)(1) (2019).

162. *Id*. § 1003.1(g)(1); *see also* INA § 103(a)(1), ch. 477, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C. (Westlaw 2019)) ("determination and ruling by the Attorney General with respect to all questions of law shall be controlling"). These decisions are binding on asylum officers and other immigration adjudicators within the Department of Homeland Security as well. *Id*.

163. Matter of Castro-Tum, 27 I&N Dec. 271, 279 n.4 (A.G. 2018). The Attorney General makes a vague reference to whether the UAC in that case ceased to be a UAC upon release from government custody to his brother-in-law. *Id*. While this speculative comment lacks sufficient evidentiary detail for evaluation, it appears the Attorney General has failed to consider the plain language of contrary federal law. *See* TVPRA 2008 § 235(d)(5), Pub. L. 110-457, tit. II, 122 Stat. 5077 (2008) ("A department or agency of a State, or an individual or entity appointed by a State court or juvenile court located in the United States, acting in loco parentis, shall not be

Not long thereafter, the Board of Immigration Appeals—by definition, subordinate and beholden to the Attorney General—issued a precedential opinion directly on point.[164] In *Matter of M-A-C-O-*, it considered the case of a young noncitizen who clearly had been a UAC but turned eighteen prior to filing his asylum application with the asylum officer.[165] The Board of Immigration Appeals held the immigration judge properly found that jurisdiction over any asylum application rested only with the immigration court.[166] While no precedential decision has yet held that a UAC released to a parent is also limited to seeking asylum before an immigration judge, such a holding is presumably within the realm of possibility.

Then, in May 2019, a new administrative directive was issued to asylum officers. This memorandum, rescinding the 2013 directive, instructed asylum officers to consider whether the asylum applicant was a UAC at the time of filing the application.[167] If the child did not meet all criteria for being a UAC at the time the application was filed—regardless of prior UAC status—the asylum officer would lack jurisdiction.[168] Litigation followed quickly, and the government is currently enjoined from applying the new directive.[169]

Although the last directive is currently stayed, those administration officials nonetheless wiped away five years of otherwise settled processing of UAC asylum applications. The effects of these decisions are devastating. Many young noncitizens will not only be limited to one opportunity to seek asylum but more crucially will have to tell their stories of fear, persecution, and torture in open court subject to cross-examination by both an immigration prosecutor and an immigration

considered a legal guardian for purposes of this section or section 462 of the Homeland Security Act of 2002 (6 U.S.C. 279).").

164. 8 C.F.R 1003.1(a)(1) ("There shall be . . . a Board of Immigration Appeals . . . appointed by the Attorney General to act as the Attorney General's delegates in the cases that come before them.").

165. Matter of M-A-C-O-, 27 I&N Dec. 477, 477 (BIA 2018).

166. *Id*. at 479.

167. Memorandum from John Lafferty, Chief, Asylum Division, to All Asylum Office Staff 1 (May 31, 2019) (regarding Updated Procedures for Asylum Applications filed by Unaccompanied Alien Children).

168. *Id*.

169. Order at 1, J.O.P. v. U.S. Dep't of Homeland Security, No. 8:19-cv-01944-GJH (D. Md. Aug. 2, 2019).

judge rather than within a non-adversarial interview.[170] Presumably, Congress had reasons to allow such children to seek asylum in the first instance before asylum officers. Many of these young people, without the benefit of the protections Congress intended them to have, will be unable to adequately express themselves and receive the protections the law has afforded them.

b. Exemption from the Statutory Deadline

Congress tempered the international definition of asylum by adding a strict filing deadline: an asylum applicant must file the application within one year of their last arrival to the United States.[171] While there are some very limited exceptions, failure to timely file the application generally renders the noncitizen statutorily ineligible for asylum.[172] Simply not being aware of the filing deadline is not an excuse.[173] Noncitizens who miss the statutory deadline may still seek protection from deportation if they are more likely than not to be persecuted or tortured upon deportation, but those protections are greatly limited.[174] While a noncitizen granted asylum is on a path to permanent residence and eventual citizenship and may immigrate their spouse and children, a noncitizen who misses the filing deadline but proves they will be persecuted or tortured is likely to only have their deportation withheld or deferred.[175] These individuals will never receive permanent

170. *Compare* INA § 240(b)(1), ch. 477, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C. (Westlaw 2019)) (allowing the immigration judge to "interrogate, examine, and cross-examine" the noncitizen), and 8 C.F.R. § 1240.2(a) (2019) (empowering government counsel to conduct "interrogation, examination, and cross-examination" of the noncitizen), *with* 8 C.F.R. § 208.9(b) ("The asylum officer shall conduct the interview in a non-adversarial manner.").

171. INA § 208(a)(2)(B).

172. *See id*.; 8 C.F.R. §§ 208.4(a), 1208.4(a).

173. *Cf*. 8 C.F.R. §§ 208.4(a) (defining "extraordinary circumstances" and "changed circumstances"), 1208.4(a) (similarly defining "extraordinary circumstances" and "changed circumstances").

174. *See* INA § 241(b)(3); 8 C.F.R. § 1208.16.

175. *Compare* INA § 241(b)(3) and 8 C.F.R. § 1208.16, *with* 8 C.F.R. § 209.2(a) (allowing noncitizen granted asylum to seek lawful permanent residence).

residence or citizenship and will never be able to immigrate their spouse and children.[176] In other words, meeting the filing deadline is crucial.

Congress realized failure to comply with the statutory filing deadline carried extremely harsh consequences for vulnerable UACs. Accordingly, in 2008, Congress exempted UACs from the statutory filing deadline.[177] UACs do not, as the regulations falsely suggest, need to prove that their unaccompanied minor status should constitute an exception to the filing deadline because they need not prove a fact-specific exception.[178] Rather, the deadline simply does not apply.[179] This makes intuitive sense. To expect children, including children of very tender age, who are without the protection of a parent or legal guardian to not only know that they must apply for asylum but to successfully do so within one year of arrival to the United States would be absurd.

To that end, ever since asylum officers received guidance in 2013 as to UACs, the officers did not need to consider the date of filing as long as the child had previously been classified as a UAC by another immigration official.[180] The decisions and memoranda discussed above suggest that UAC classification is not static. This means when a former UAC is no longer a UAC, the one-year filing deadline will automatically apply.[181] If this is the case, noncitizen young people might find themselves having lost the opportunity to apply for asylum altogether. Congress did not legislate that being a UAC tolls the one-year filing deadline but simply said that the one-year filing deadline does not apply to UACs.[182] As such, there is no clarity as to how the one-year filing deadline should be applied to a former UAC. It is not clear that Congress even conceptualized the idea of a former UAC.

176. *Cf.* INA § 208(b)(3)(A) (allowing asylum status for spouse and children of noncitizen granted asylum); 8 C.F.R. § 208.21(a) (similarly allowing asylum status for spouse and children of noncitizen granted asylum).

177. TVPRA 2008 § 235(d)(7)(A), Pub. L. 110-457, tit. II, 122 Stat. 5077 (2008).

178. 8 C.F.R. §§ 208.4(a)(5)(ii), 1208.4(a)(5)(ii); INA § 208(a)(2)(E).

179. INA § 208(a)(2)(E).

180. Kim Memo 2013, *supra* note 140, at 2-3.

181. King Memo 2017, *supra* note 141, at 8.

182. *Cf. id*. (proffering tolling to prevent mooting asylum eligibility for former UACs).

Here, hypothetical situations are illustrative. Imagine a seventeen-and-a-half-year-old UAC and a sixteen-and-a-half-year-old UAC who both arrive to the United States. Each marvelously becomes a fully competent adult on their eighteenth birthday and, the next day, files their asylum application. If they are still considered UACs, neither has a problem with the one-year filing deadline because the deadline does not apply to UACs. However, if on their eighteenth birthday, they were no longer considered UACs, the older of the two children would not be hindered by the one-year filing deadline (they applied six months and a day after arrival) while the younger child would be statutorily barred (having applied eighteen months and a day after arrival). The same would be true of a child who arrived when only three years old and applied days after their eighteenth birthday. It makes intuitive sense that the child who arrived younger (and thus was more vulnerable as an even younger child without parental care) should have greater access to protection, not less. It is true that both the sixteen-year-old and three-year-old could seek an exception to the one-year filing deadline, but it is legally problematic to restrict such children to a possible regulatory exception when Congress clearly created a statutory exemption.

Application of this provision becomes even more unreasonable if a UAC released to a parent is no longer a UAC. By statute, the government must determine whether a receiving sponsor could provide a safe placement for the child and must conduct a home study when necessary.[183] It is possible that a UAC remains in government custody for a year before placement is approved. Should this happen, and should such a UAC be released to a parent, their statutory opportunity to seek asylum could expire retroactively to the period while the UAC was in government custody. Although there is no prohibition on the child filing the asylum application while in government custody, it would presumably become incumbent upon the custodian—the United States government—to ensure the application is filed. This seems like a responsibility the government would be unwilling to assume.

These concerns could be quelled if the one-year filing deadline is tolled during the time a child remains a UAC, but that is not what Congress legislated.[184] Tolling is not the same as an exemption, and

183. TVPRA 2008 § 235(c)(3)(B), Pub. L. 110-457, tit. II, 122 Stat. 5077 (2008).

184. *See* King Memo 2017, *supra* note 141, at 8.

there is no basis to assume Congress intended tolling. But, if the one-year filing deadline begins to apply to (former) UACs, many of them will still encounter severe consequences. Unlike eliminating initial jurisdiction and adjudication by the asylum officer, this change will not simply shift adjudication to a different (adversarial and more intimidating) adjudicator. Rather, it will completely undermine statutory asylum eligibility before any adjudicator. As a result, minors—who in nearly any other legal context would be found legally incompetent—will find themselves suffering the consequences of missing statutory deadlines to apply for asylum.

c. Exemption from Safe Third Country Bar

The third specific protection Congress created for UACs applying for asylum also relates to a statutory bar to asylum: potential return to a safe third country. By law, an asylum applicant is ineligible for asylum if they can be removed to a "safe" country with which the United States has entered into a bilateral or multilateral agreement by which that country will adjudicate the asylum claim.[185] Just as the one-year filing deadline does not apply to UACs, this prohibition does not apply to UACs as a matter of law.[186] Thus, a UAC will not be barred from seeking asylum in the United States simply because the United States has entered into agreements with other countries regarding those countries' willingness to process asylum seekers transferred to them from the United States. UACs losing this exemption is yet another factor that will statutorily limit their access to asylum.

Until very recently, this limitation was primarily theoretical. For many years, the United States had only one such bilateral agreement; the agreement is with Canada and it only applies to those asylum seekers who entered the United States from Canada (or entered Canada from the United States).[187] However, there have been proposals

185. INA § 208(a)(2)(A), ch. 477, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C. (Westlaw 2019)).

186. *Id*. § 208(a)(2)(E).

187. Agreement Between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, Canada-U.S., Dec. 5, 2002, GLOBAL AFFAIRS CANADA (Mar. 3, 2014), https://www.treaty-accord.gc.ca/details.aspx?id=104943 (agreement covering third-country asylum

regarding adoption of such a bilateral agreement with Mexico.[188] In January 2019, the government announced that while the United States had not yet signed a safe third country agreement with Mexico, adult asylum seekers arriving by land via Mexico would now be required to await their removal proceedings in Mexico.[189] Although this new policy does not apply to UACs, it is reasonable to expect that the government intends to enter into a bilateral, safe third country agreement. More recently, the United States has entered into bilateral agreements with El Salvador, Guatemala, and Honduras that would allow the United States to send asylum seekers to any of those countries.[190] None of those agreements require the asylum seeker to have passed through the receiving country (as does the agreement with Canada) and none explicitly excludes UACs from applicability.[191] If these agreements can be applied to (former) UACs, virtually all UACs would find themselves ineligible to apply for asylum in the United States. Given the recent increase in the number of children fleeing

claims at the border). It is noteworthy, however, that the agreement as written and in effect exempts unaccompanied minors. *Id*. art. 4.

188. Joshua Partlow & Nick Miroff, *U.S. and Mexico Discussing a Deal That Could Slash Migration at the Border*, WASH. POST (July 10, 2018), https://www.washingtonpost.com/world/the_americas/us-and-mexico-discussing-a-deal-that-could-slash-migration-at-the-border/2018/07/10/34e68f72-7ef2-11e8-a63f-7b5d2aba7ac5_story.html.

189. *See* Memorandum from Kirstjen M. Nielsen, Sec'y, Dep't of Homeland Security, to L. Francis Cissna, Dir., U.S. Citizenship & Immigration Serv.; Kevin K. McAleenan, Comm'r., U.S. Customs & Border Protection; Ronald D. Vitiello, Deputy Dir. & Senior Official Performing the Duties of Dir., U.S. Immigration & Customs Enforcement 2 (Jan. 25, 2019), https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf (regarding Policy Guidance for Implementation of Migrant Protection Protocols).

190. *See* Agreement on Cooperation Regarding Examination of Protection Claims, U.S.-Guat., art. 3, July 26, 2019, FEDERAL REGISTER (Nov. 20, 2019), https://www.federalregister.gov/documents/2019/11/20/2019-25288/agreement-between-the-government-of-the-united-states-of-america-and-the-government-of-the-republic; Agreement for Cooperation Regarding Examination of Protection Claims, U.S.-El Sal., art. 3, Sept. 20, 2019, FEDERAL REGISTER (Nov. 19, 2019), https://www.federalregister.gov/documents/2019/11/19/2019-25137/implementing-bilateral-and-multilateral-asylum-cooperative-agreements-under-the-immigration-and; *see also* U.S. DEP'T OF HOMELAND SECURITY, FACT SHEET: DHS AGREEMENTS WITH GUATEMALA, HONDURAS, AND EL SALVADOR (Oct. 3, 2019).

191. *See* sources cited *supra* note 186.

El Salvador, Guatemala, Honduras, and Mexico, this proposition understandably raises serious concerns about its reasonableness and safety.[192]

2. Substantive Eligibility in Common UAC Asylum Claims

Recent legal developments regarding the substantive eligibility for asylum are even more harmful to UACs seeking protection. Asylum law is both strict and harsh; there is perhaps no issue within immigration law that is more litigated—and with more disparate judicial conclusions across the various federal circuits—than who qualifies for asylum and why.

Noncitizens may meet the definition of a refugee and thereby qualify for asylum if they fear grave harm on account of their identity—specifically their race, religion, nationality, political opinion, or membership in a particular social group.[193] Developing as it did at the conclusion of the Second World War, it is not surprising that the international community was not focused on protecting individuals who feared randomized harm but rather peoples who were in specific, targeted danger. Tomes of judicial decisions have been written to explain precisely who fits within this very narrow definition. Notably, gender is not included among the grounds that give rise to asylum eligibility.

Notwithstanding a straight forward comment by the Board of Immigration Appeals in its first instructive asylum decision back in 1985 that gender would provide a basis for asylum, the Board of Immigration Appeals and immigration judges spent the following three decades denying asylum to noncitizens who had suffered gender-based harm.[194] Applicant after applicant credibly testified to the horrendous suffering endured on account of their gender, often within the context

192. *See, e.g.*, *Children on the Run*, *supra* note 4, at 37-39 (describing unique dangers suffered by children fleeing Mexico).

193. INA § 101(a)(42)(A), ch. 477, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C. (Westlaw 2019)).

194. Matter of Acosta, 19 I&N Dec. 211, 233 (BIA 1985) ("The shared characteristic might be an innate one such as sex. . . . "); Matter of A-B-, 27 I&N Dec. 316, 318-19 (A.G. 2018) (previously decided by the Board of Immigration Appeals and reviewed by the Attorney General).

of an abusive domestic relationship, but their cases were denied.[195] The facts of one such denied case were so egregious that the Attorney General at the time vacated the denial and directed that regulations be promulgated to allow such cases to be granted;[196] two decades later, those regulations remain pending.[197] The United Nations High Commissioner for Refugees—the international interpreter of the international law upon which U.S. asylum law is formed—has found gender indeed fits within the protection framework.[198] In line with this interpretation, federal circuit courts directed the Board of Immigration Appeals to fix its analysis and try again, but on remand such cases were quietly resolved without creating precedential decisions.[199]

Then, in 2014, the Board of Immigration Appeals finally published a case, *Matter of A-R-C-G-*, addressing the issue directly.[200] It held that a gender-based asylum claim arising from certain countries and cultures could be successful under U.S. asylum law.[201] Specifically, it found "married Guatemalan women unable to leave the relationship" might be a cognizable particular social group giving rise to asylum protection.[202] As a result, many women who had survived gender-based harm were able to find protection. Although the Board of Immigration Appeals did not publish a case relating to child abuse, its analysis similarly allowed children who had escaped domestic abuse to find safety in the United States by seeking asylum. Considering large percentages of arriving UACs reported fleeing violence in their homes,

195. *See, e.g.*, Matter of R-A-, 22 I&N Dec. 906, 908-09 (BIA 1999) (en banc).

196. *Id*. at 906.

197. *See* A-B-, 27 I&N Dec. at 318-19 ("Attorney General Reno vacated that decision for reconsideration in light of a proposed regulation, but no final rule ever issued, and the case was eventually resolved in 2009 without further consideration by the Board.") (citations omitted).

198. U.N. High Comm'r for Refugees, *Guidelines on International Protection: Gender-Related Persecution Within the Context or Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees*, at 7, HCR/GIP/02/01 (May 7, 2002) ("It follows that sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently than men.").

199. *See, e.g.*, Perdomo v. Holder, 611 F.3d 662, 669 (9th Cir. 2010).

200. Matter of A-R-C-G-, 26 I&N Dec. 388, 388 (BIA 2014).

201. *Id*.

202. *Id*. at 392-95.

it is reasonable to assume that at least some of these children, relying on this precedential case law, were granted asylum.[203]

Four years later, the Attorney General ended such grants of asylum. In 2018, using his broad authority to interpret immigration law, the Attorney General certified a domestic violence-based asylum case to himself for review.[204] In a wide-ranging decision, *Matter of A-B-*, he vacated the 2014 precedential *A-R-C-G-* decision, which held domestic violence survivors might be eligible for asylum.[205] He chastised the Board of Immigration Appeals for failing to conduct a rigorous review of the law and facts in that decision.[206] He reiterated prior requirements for defining a particular social group and suggested that "unable to leave the relationship" was impermissibly circular.[207] He challenged the idea that men harmed women because of their gender and relationship status rather than simply because they were criminals.[208] Finally, he sought to heighten the long-standing requirement for determining whether a non-governmental actor is a qualifying persecutor for the purposes of asylum claims.[209] In what is arguably dicta, he concluded, "Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum."[210]

Not surprisingly, advocates were quick to challenge this decision. In fact, one federal district court has already enjoined certain applications of that decision.[211] Nonetheless, the decision's limiting effect on asylum eligibility remains. Many UACs who fled sexual abuse, gender-based violence, or violence in the home—children who may have quickly been granted asylum between 2014 and 2018—will now have to fight an uphill battle. They will likely have their cases denied by asylum officers and immigration judges who must follow the

203. *Children on the Run*, *supra* note 4, at 23-29.

204. Matter of A-B-, 27 I&N Dec. 316, 317 (A.G. 2018).

205. *Id*.

206. *Id*. at 319.

207. *Id*. at 335.

208. *Id*. at 338-39.

209. *Id*. at 343-44.

210. *Id*. at 320.

211. Order at 3, Grace v. Whitaker, 344 F. Supp. 3d 96 (D.D.C. Dec. 19, 2018); *Grace*, 344 F. Supp. 3d at 105.

precedential decision of the Attorney General, at least until a federal circuit court holds otherwise.

Not all UAC asylum applicants were able to benefit from *A-R-C-G-*. On the contrary, those UACs who fled other harm—most prominently gang violence—continued to face difficulty in winning asylum.[212] Precedential decisions still consistently denied asylum to applicants (including children) who escaped some of the most notorious criminal gangs in the world and who presented uncontroverted evidence that their home countries were basically failed states.[213] Yet, there were some exceptions. Some applicants prevailed because the gangs had come after their whole families, meaning their nuclear or extended families had become a cognizable particular social group eligible for asylum protection.[214] Others could be granted asylum because they and other proposed group members shared immutable histories, such as serving as witnesses against the gangs.[215] Others might have been targeted because their own religious convictions compelled them to speak out against the gangs at their own peril or because their identity as sexual or gender minorities made them targets for the gangs.

For many of these asylum applicants (including children), *A-B-* also likely closed the door to asylum. Even if some may eventually prevail in appeals to the federal circuit courts, many more will be denied in the interim. In 2019, the Attorney General exercised his precedential authority again, this time to restrict access to asylum for those groups defined by family relationships.[216] In *Matter of L-E-A-*, the Attorney General rescinded a prior decision in the same matter that found family-defined particular social groups generally sufficient to sustain asylum eligibility; only the rarest of such families would qualify.[217]

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212. *See, e.g.*, Matter of W-G-R-, 26 I&N Dec. 208, 221-22 (BIA 2014) (rejecting proposed social group of "former members of the Mara 18 gang in El Salvador who have renounced their gang membership").

213. *Id*.; *see also* Matter of M-E-V-G-, 26 I&N Dec. 227, 249-51 (BIA 2014).

214. *See, e.g.*, Matter of L-E-A-, 27 I&N Dec. 40, 45 (BIA 2017) (finding that a family constitutes a particular social group, though finding in this case that the nexus element was not met); Rios v. Lynch, 807 F.3d 1123, 1128 (9th Cir. 2015).

215. *See, e.g.*, Henriquez-Rivas v. Holder, 707 F.3d 1081, 1083 (9th Cir. 2013) (en banc).

216. Matter of L-E-A-, 27 I&N Dec. 581, 586 (A.G. 2019), *overruling* Matter of L-E-A-, 27 I&N Dec. 40 (BIA 2017).

217. *Id*.

While *A-B-* and *L-E-A-* did not involve an asylum application brought by a UAC, it cannot be doubted that the Attorney General was thinking about UACs when he painted with such a broad brush in curtailing eligibility for asylum.[218]

C. Limiting UACs' Access to Special Immigrant Juvenile Status

In 1990, Congress added a provision to the immigration law allowing young people under twenty-one years old who have been abandoned, abused, or neglected by their parents to seek special immigrant status in the United States and, eventually, receive lawful permanent residence.[219] The corresponding visas were underused for over two decades until, suddenly, the surge of UACs created a years-long backlog.[220] The Attorney General began attacking the idea that immigration judges should postpone potential deportation to allow time for delayed visas to be adjudicated.[221] Subsequently, without any official announcement as to the change in policy, the immigration authorities reversed course and began denying this status to young people between the ages of eighteen and twenty-one.[222] While federal litigation challenging these actions remains pending and at least one injunction is in place, this special protection for juveniles is no longer so easily acquired.[223] Once again, if the administration is successful, many UACs will find themselves without lawful immigration status.

218. *See* Matter of A-B-, 27 I&N Dec. 316, 320 (grouping gang violence asylum claims with domestic violence asylum claims).

219. Immigration Act of 1990 § 153(a), Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990).

220. *Compare* BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, VISA BULLETIN 4 (Apr. 2016) [hereinafter APRIL 2016 VISA BULLETIN] (showing visas for special immigrants (employment-based category 4) as "current" (available)), *with* BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, VISA BULLETIN 4 (May 2016) [hereinafter MAY 2016 VISA BULLETIN] (showing visas for special immigrants (employment-based category 4) from El Salvador, Guatemala, and Honduras backlogged to January 1, 2010).

221. *See, e.g.*, Matter of L-A-B-R-, 27 I&N Dec. 405, 419.

222. *See infra* note 289 and accompanying text.

223. *See* J.L. v. Cissna, 341 F. Supp. 3d 1048, 1054 (N.D. Cal. 2018).

1. "Special" Protection for Abandoned, Abused, and Neglected Children

Immigration law allows for various categories of noncitizens who present specific factors to be classified as "special immigrants" and to be granted lawful immigration status on account of such classification.[224] One such category is for special immigrant juveniles, which Congress defined as unmarried noncitizens under twenty-one years old; present in the United States; and, who had suffered abandonment, abuse, or neglect by one or both of their parents and whose best interests are not served by return to country of origin as determined by a relevant *state* court.[225] In other words, where appropriate, children who would be protected by the child welfare system may also be shielded from deportation (after the state court determines both that the children could not be reunified with their parent(s) and should not be returned to their country of origin).[226]

This category of children, in its nearly three decades of existence, has been redefined and broadened to protect more children.[227] At first, the law required the child to be eligible for long-term foster care due to abuse, abandonment, or neglect.[228] However, in 2008, this provision was modified presumably after Congress realized it was a narrow definition that left many children without needed protection.[229] Accordingly, Congress legislated that it was only necessary that the child had been made dependent upon the state and placed under the care of an institution or individual and that reunification with one or both parents was not viable because of abuse, abandonment, neglect, or a similar basis under state law.[230] The same legislative revision replaced the requirement that the Attorney General "expressly consent" to the

224. *See generally* INA § 101(a)(27), ch. 477, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C. (Westlaw 2019)).

225. *See id*. § 101(a)(27)(J)(i).

226. *See id*. § 101(a)(27)(J)(ii).

227. *See generally* Dalia Castillo-Ramos & Yasmin Ravar, *A New Legal Framework for Children Seeking Special Immigrant Juvenile Status*, 20 RICH. PUB. INT. L. REV. 49, 52-56 (2017).

228. *Id*. at 53; *see also* Immigration Act of 1990 § 153(a), Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990).

229. TVPRA 2008 § 235(d)(1), Pub. L. 110-457, tit. II, 122 Stat. 5077 (2008).

230. *Id*. § 235(d)(1)(A).

grant of special immigrant juvenile status with simply the "consent" of the Secretary of Homeland Security.[231]

From the very creation of this status, Congress recognized that the federal immigration authorities were not competent to determine a child's welfare and best interest. Rather, such evaluations have always been squarely the province of the state juvenile courts.[232] So, Congress created a multi-step process. First, the appropriate state court would need to exercise its jurisdiction over the child and find the child dependent on the court or make a custody order over the child.[233] Then, (under the law's current form) the same court would have to find that the child's reunification with one or both of the child's parents is not viable due to abandonment, abuse, neglect, or a similar basis under state law and it is not in the child's best interest to return to their country of origin.[234] The child could then take this order—known in the immigration world as the "predicate order"—and petition to be classified by the immigration authority as a special immigrant juvenile.[235] Concurrently or subsequently, the new special immigrant juvenile could apply for lawful permanent residence in the United States.[236]

The path to lawful permanent residence for a special immigrant juvenile is neither direct nor easy. The law requires that the child interact with multiple adjudicators from both the state and federal governments; it also requires that the actions of one government be sufficient for the needs of the other government. Ultimately, however, it is a crucial protection for these vulnerable young people and often the only pathway they may have to lawful immigration status in the United States.

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231. *Id*. § 235(d)(1)(B).

232. *See* Castillo-Ramos & Ravar, *supra* note 227, at 56.

233. U.S. CITIZENSHIP & IMMIGRATION SERV., U.S. DEP'T OF HOMELAND SECURITY, POLICY MANUAL, vol. 6, pt. J, ch. 2, D1 (Feb. 6, 2019), https://www.uscis.gov/policy-manual/toc. The name of the appropriate court varies by state including juvenile court, dependency court, family court, probate court, and orphans' court, to name a few. *Id*. ch. 3, A1.

234. *Id*. at ch. 2, D2-D3.

235. *Id*. at ch. 4, A.

236. *See* U.S. CITIZENSHIP & IMMIGRATION SERV., U.S. DEP'T OF HOMELAND SECURITY, INSTRUCTIONS FOR APPLICATION TO REGISTER PERMANENT RESIDENCE OR ADJUST STATUS 23 (July 15, 2019), https://www.uscis.gov/i-485.

2. Reaching the Visa Cap

A child does not have to be a UAC in order to be classified as a special immigrant juvenile, but based on the underlying reasons for the surge of UAC arrivals to the United States since 2014, many UACs nonetheless qualify for this protection. In fact, the massive number of eligible children arriving to the United States caused the first of the recent factors narrowing access to this status.[237]

Since the creation of modern United States immigration law in the early twentieth century, numerical limitations on classes of immigrants have been a hallmark.[238] Some noncitizens, primarily the immediate relatives of United States citizens and asylum seekers, are granted lawful status in the United States without numeric limitations.[239] Nearly every other category of noncitizen seeking permanent immigration status in the United States—more distant relatives of citizens as well as all relatives of lawful permanent residents, workers and professionals seeking employment-based visas, and refugees—is limited by numerical caps.[240] In general, these caps work in two ways: they limit the total number of noncitizens who may enter the United States with a certain type of visa, and they prevent immigrants from any one country from receiving too high a percentage of each visa type.[241]

Each year, only a limited number of visas may be given out, which may be further limited based on the immigrant's country of origin. Again, an example is helpful. An adult citizen can petition to immigrate a sibling to the United States, but only so many of these visas (known as family-based category four) may be given out each year.[242] Once the

237. *See supra* note 220 and accompanying text. The timing of the significant retrogression of visa availability intuitively corresponds to the time it would take for the surge of children that began arriving in 2014 and 2013 to wind through the state court system and be ready to petition for classification as special immigrant juveniles.

238. Emergency Quota Act of 1921, Pub. L. 67-5, 42 Stat. 5 (May 19, 1921).

239. INA § 201(b)(2)(A)(i), ch. 477, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C. (Westlaw 2019)); *id*. § 209(b) (not listing any limitation on asylees granted lawful permanent residence).

240. *Id*. § 201(c)-(d). Although there is no limit to how many refugees can be granted permanent residence per year, *Id.* §201(b)(1)(B), the President establishes the average number of refugees to be resettled in the first instance in the United States each year. *Id*. § 207(a)(2).

241. *Id*. § 202(a)(2).

242. *Id*. § 203(a)(4).

cap is reached, the next person to apply is put in line for the next year. As of February 2019, the next person in line for a sibling visa filed their petition back on June 22, 2005.[243] But more visas have been requested for some countries than others, so immigrants from those countries have to wait even longer. As of February 2019, the next sibling in line from Mexico filed their petition on February 8, 1998, and the next sibling in line from the Philippines filed their petition on October 1, 1995.[244] For many who want to immigrate to the United States, patience is a requirement.

The immigration authority has the power to classify young noncitizens as special immigrant juveniles upon presenting valid predicate orders. There is no limit to how many non-citizen young people can be classified. But the fact of being classified as such does not grant the noncitizen lawful immigration status in the United States, even though this classification is commonly referred to as "special immigrant juvenile *status*." Rather, being so classified makes the young noncitizen eligible to apply for lawful permanent residence, that is, an immigrant visa. These visas, too, are subject to numerical caps and the per-country limitations.

Fortunately for these vulnerable juveniles (and for humanity), this category has so far been undersubscribed. In other words, there has always been a visa generally available under this category for non-citizen youth classified as special immigrant juveniles because there have not been enough applicants to reach the cap.[245] But, while the total number of visas has not reached the cap, certain countries have reached their own percentage caps because of a high number of non-citizen applicants from those countries.[246] Since only a certain percentage of the visas available can be given to immigrants from any particular country, some special immigrant juveniles had to begin waiting in line.[247] The cap "hit" for the first time under this category in

243. BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, VISA BULLETIN 2 (Feb. 2019) [hereinafter FEBRUARY 2019 VISA BULLETIN].

244. *Id*.

245. *See id*. at 3-4 (for "all chargeability areas except those listed," special immigrant (employment-based category 4) is "current").

246. *See id*. at 4 (listing final action date of September 1, 2017, for special immigrants from Mexico and March 1, 2016, for special immigrants from El Salvador, Guatemala, and Honduras).

247. *See, e.g.*, MAY 2016 VISA BULLETIN, *supra* note 220.

2016.[248] Suddenly, visas could no longer be issued to special immigrant juveniles hailing from El Salvador, Guatemala, Honduras, and Mexico.[249] Not long thereafter, special immigrant juveniles from India also had to begin waiting for visas to become available.[250]

This new backlog clearly has its roots in the significant increase in arrivals of UACs that began in 2014. It is well documented that many of those UACs were Central Americans fleeing domestic violence and gang violence, and thus there is good reason to believe they would be able to demonstrate both that they had suffered abandonment, abuse, or neglect by one or both parents (domestic violence) and that it was not in their best interest to return to their countries of origin (because of the rampant gang violence). Currently, visas for special immigrant juveniles from India are immediately available, which suggests the increase in demand was only temporary.[251] The availability of visas for special immigrant juveniles from Mexico has fluctuated greatly.[252] However, the visas for young people from El Salvador, Guatemala, and Honduras are currently backlogged approximately three years.[253] As a matter of law, the immigration authority is currently simply unauthorized to issue visas to these children allowing them to begin their lawful permanent residence in the United States until their "turn" in the line.[254]

248. *See supra* note 220 and accompanying text.

249. *See supra* note 220 and accompanying text.

250. BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, VISA BULLETIN 8 (August 2016) [hereinafter AUGUST 2016 VISA BULLETIN].

251. FEBRUARY 2019 VISA BULLETIN, *supra* note 243, at 4 (final action date is "current" for special immigrants (employment-based category 4) from India).

252. *Compare* AUGUST 2016 VISA BULLETIN, *supra* note 250, at 4 (listing final action date of January 1, 2010), *with* FEBRUARY 2019 VISA BULLETIN, *supra* note 243, at 4 (listing final action date of September 1, 2017, for special immigrants from Mexico).

253. FEBRUARY 2019 VISA BULLETIN, *supra* note 243, at 4 (listing final action date of March 1, 2016, for special immigrants from El Salvador, Guatemala, and Honduras).

254. INA § 245(a), ch. 477, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C. (Westlaw 2019)) (requiring that a visa be available in order for an application for adjustment of status to be granted).

3. Marching Forward with Removal Proceedings

The availability of visas for special immigrant juveniles has nothing to do with the Trump administration. The cap for young people was "hit" for the impacted countries during the last administration, and the immigration authority was obligated to follow the law and delay issuing visas to these immigrants unless and until the visas became available.[255] The administration does control, however, whether immigration judges and immigration enforcement agents are willing to give special immigrant juveniles the opportunity to wait their turn.

While any non-citizen youth present in the United States who meets the eligibility requirements may apply for classification as a special immigrant juvenile, many of the applicants in recent years have been children who were previously apprehended by immigration officers and classified as UACs. Virtually all of these children upon apprehension were issued a Notice to Appear, a charging document that begins formal administrative removal proceedings before an immigration judge.[256]

During these proceedings, the immigration judge is charged with determining whether the UAC is subject to removal from the United States (most are by virtue simply of being noncitizens present without lawful immigration status) and, if so, whether the child is eligible for some relief from removal.[257] If a UAC seeks asylum, initial jurisdiction will be vested in an asylum officer; if asylum is not granted by the officer, the decision is subject to a renewed de novo application with the immigration judge.[258] But applications for special immigrant juvenile status are different. The predicate findings are made by a state court judge, and the special immigrant classification is determined by the Department of Homeland Security.[259] The immigration judge has no jurisdiction over either of these steps in the process (although the

255. *See id*.; *see also supra* note 220 and accompanying text.

256. *See* TVPRA 2008 § 235(a)(5)(D), Pub. L. 110-457, tit. II, 122 Stat. 5077 (2008); *see also* KANDEL, *supra* note 74, at 12 n.64.

257. *See* INA § 240(a)(1), (c)(1), (c)(4).

258. INA § 208(b)(3)(C) (vesting initial jurisdiction in the asylum office). There are no implementing regulations for this provision, so it is generally assumed that the regulations related to referred affirmative asylum applications apply. *See* 8 C.F.R. § 208.9(b) (2019) (defining generally how an asylum officer must conduct an asylum interview).

259. *See* Castillo-Ramos & Ravar, *supra* note 227, at 51.

immigration judge, in some circumstances, can adjudicate the visa application once special immigrant juvenile classification has been approved).[260] Nonetheless, the immigration judge is expected to preside over active removal proceedings and determine whether the special immigrant juvenile applicant is eligible to remain in the United States. Immigration judges across the country, therefore, find themselves charged with adjudicating the removal proceedings of UACs who are clearly subject to removal; who have been adjudicated as dependents by state court judges who concluded it is not in the children's best interests to return to their countries of origin; and, who have been classified by the Department of Homeland Security as special immigrant juveniles; and yet, the child is currently without lawful immigration status and thus currently has no legal claim to remain in the United States. What is the judge to do?

Administrative closure has been a docketing tool available to immigration judges and the Board of Immigration Appeals for decades.[261] This tool is a way to temporarily remove a case from the immigration judge's active docket.[262] In these situations, there is no final conclusion of the case; it remains under the judge's jurisdiction, but it is filed away until further action is ready to be taken.[263] For decades, administrative closure was used when the parties were not ready for final adjudication, such as when the parties were awaiting the results of a collateral matter that would fundamentally affect the outcome of the removal proceedings (e.g., issuance of a long-backlogged visa).[264] Administrative closure was also used when the immigration prosecutor exercised discretion to not seek removal of a removable noncitizen at a particular time.[265] This tool is not unique to

260. *See* 8 C.F.R. § 204.11(b) (requiring that the petition for special immigrant juvenile classification be filed with the immigration authority). *But see* 8 C.F.R. § 1245.2(a)(1) (vesting the immigration judge with jurisdiction over certain applications for adjustment of status).

261. *See* Matter of Avetisyan, 25 I&N Dec. 688, 690 (BIA 2012) (citing Matter of Gutierrez, 21 I&N Dec. 479, 480 (BIA 1996)).

262. *Id*. at 692; *see* Matter of W-Y-U-, 27 I&N Dec. 17, 17-18 (BIA 2017).

263. Avetisyan, 25 I&N Dec. at 694; *see* W-Y-U-, 27 I&N Dec. at 18.

264. *See* sources cited *supra* note 263.

265. W-Y-U-, 27 I&N Dec. at 17.

immigration judges but is an established tool in other courts as well.[266] While no law or regulation generally authorized immigration judges to administratively close cases, it is referenced by some regulations and is the subject of precedential case law.[267] For many special immigrant juveniles for whom visas were not yet available, administrative closure was a very important way to delay an order of deportation until the visa could be issued.

In 2018, the Attorney General, using his authority to interpret the immigration law and to issue precedential decisions, acted to eliminate administrative closure.[268] The Attorney General axed administrative closure when he issued *Matter of Castro-Tum*, which involved a UAC.[269] In *Castro-Tum*, the UAC failed to appear before the immigration judge and, rather than ordering the child removed *in absentia*, the immigration judge administratively closed proceedings, expressing concerns over the validity of service of notice made upon the UAC.[270] The Department of Homeland Security appealed, and the Board of Immigration Appeals held that the immigration judge erred; he should have ordered removal.[271] The Attorney General was apparently unsatisfied with this result. He ordered the case to be certified to him and then concluded that, notwithstanding decades of use, there was no lawful authority for immigration judges and the Board of Immigration Appeals to administratively close cases.[272] Thus, a tool that allowed immigration judges to manage crushing caseloads and to focus on cases that were ripe for adjudication was lost.[273]

The Attorney General, however, was still not satisfied that all cases would expeditiously march forward. Soon thereafter, he issued another

266. *See, e.g.*, Freeman v. Pittsburgh Glass Works, LLC, 709 F.3d 240, 247 (3d Cir. 2013); Lehman v. Revolution Portfolio LLC, 166 F.3d 389, 392 (1st Cir. 1999).

267. *See* 8 C.F.R. §§ 1240.62(b)(1)(i), (2)(iii), 1240.70(f)–(h) (2019); *see also* Avetisyan, 25 I&N Dec. at 688; W-Y-U-, 27 I&N Dec. at 17.

268. Matter of Castro-Tum, 27 I&N Dec. 271, 272 (A.G. 2018) (overruling prior precedent and stripping immigration judges and the Board of Immigration Appeals of the authority to administratively close cases).

269. *Id*.

270. *Id*. at 273-74.

271. *See id*. at 274, 290-91.

272. *Id*. at 281-94.

273. *See id*.

precedential decision, *Matter of L-A-B-R-*.[274] In that case, the Attorney General considered the authority of immigration judges to continue removal proceedings, specifically in the context of collateral matters outside the immigration judge's control.[275] While he adopted the long-standing "good cause" standard, he cautioned, "'Good cause,' in other words, does not mean 'no cause' or 'any cause.'"[276] The Attorney General did not hide his inspiration for this conclusion nor his reasoning for issuing a rare precedential decision on this matter: "The overuse of continuances in the immigration courts is a significant and recurring problem. Unjustified continuances provide an illegitimate form of de facto relief from removal."[277] By this holding, the Attorney General restricted immigration judges in granting continuances to allow the adjudication of immigration applications such as petitions for special immigrant juvenile classification with other adjudicators, even though those adjudications, if successful, would obviate the need for removal proceedings by granting the noncitizen lawful immigration status.[278] Admittedly, the cases under review in *L-A-B-R-* were extreme examples of continuances issued by immigration judges over the objections by the prosecuting attorneys, but the case's conclusion is clear: noncitizens cannot assume they will be given time to pursue collateral remedies.[279]

Neither *Castro-Tum* nor *L-A-B-R-* addressed the issue of UACs seeking classification as special immigrant juveniles or, thereafter, seeking lawful permanent residence. Indeed, given current processing of these cases, limiting access would be problematic: federal law requires adjudication of special immigrant juvenile petitions within six months, yet the Department of Homeland Security is currently in flagrant violation of this Congressional mandate.[280] However, it is not

274. *See generally* Matter of L-A-B-R-, 27 I&N Dec. 405 (A.G. 2018).

275. *Id*. at 405-06.

276. *Id*. at 407.

277. *Id*. at 411.

278. *Id*. at 419 ("I therefore conclude that an immigration judge must assess whether good cause supports a continuance to accommodate a collateral proceeding by considering primarily the likelihood that the collateral relief will be granted and will materially affect the outcome of the removal proceedings, and any other relevant secondary factors.").

279. *Id*. at 409-19.

280. *See* TVPRA § 235(d)(2), Pub. L. 110-457, tit. II, 122 Stat. 5077 (2008) ("All applications for special immigrant status under section 101(a)(27)(J) of the

hard to imagine that UACs—perhaps especially older teens who are far back in the line for visas—will soon find themselves told by immigration judges that they have not established good cause to delay their deportation any longer. As absurd as it may sound, a state court judge's ruling that a child *should not* be returned to their country of origin and Department of Homeland Security's classification that the child *is* a special immigrant juvenile, may not shield from deportation the youth whose visa remains out of reach.

4. Interpreting the Law to Exclude Older Teens

The definition of "child" is important because many paths to lawful immigration status are based on family relationships and may allow family members to accompany the principal immigrant. For most immigration purposes, "child" is defined broadly to include young unmarried people under the age of twenty-one.[281] This same age cut-off was promulgated by regulation for special immigrant juveniles.[282] Yet, now efforts are underway to restrict access to this protection for older youths.[283]

At first, the idea of a special immigrant juvenile who is eighteen, nineteen, or twenty years old may be confusing. In this country, eighteen is generally the age of majority. Since special immigrant juvenile classification requires a predicate finding by the state juvenile court that the child is dependent on the state or placed under the custody of another, classifying such a youth as a special immigrant juvenile might seem impossible. This is not the case. Just as Congress recognized that young people should continue to be considered children until twenty-one for many purposes, some state legislatures and state

Immigration and Nationality Act (8 U.S.C. 1101(a)(27)(J)) shall be adjudicated by the Secretary of Homeland Security not later than 180 days after the date on which the application is filed.").

281. INA § 101(b)(1), ch. 477, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C. (Westlaw 2019)) (defining child as under twenty-one years old for most immigration purposes). *But see id.* § 101(c)(1) (defining child differently for citizenship and naturalization purposes).

282. 8 C.F.R. § 204.11(c)(1) (2019).

283. *See, e.g.*, J.L. v. Cissna, 341 F. Supp. 3d 1048, 1054 (N.D. Cal. 2018).

courts have done the same.[284] At least several states allow for a youth over eighteen to have the state court exercise proper jurisdiction and thereafter make the required predicate findings for special immigrant juvenile classification.[285]

Many of these youths, some of whom were UACs, were able to benefit from the state court processes available to them and to thereafter be classified as special immigrant juveniles and acquire lawful permanent residence. Then the immigration adjudicators began pushing back. Notwithstanding the clear federal law allowing for classification of youth of this age, adjudicators began denying these applications, generally finding the underlying state court predicate orders were not valid for these purposes.[286] Federal litigation quickly followed.[287]

There was no change in the regulations as to who qualifies for special immigrant juvenile classification and how cases of older youths should be adjudicated.[288] There was no official policy statement or memorandum issued publicly. But, through federal litigation, internal guidance to adjudicators became public.[289] While the guidance is carefully couched so as not to require across-the-board denial of these applications, the subtext is clear: these applications should generally be denied.[290] A unitary result, however, is not possible because whether

284. *See, e.g.*, Cal. Prob. Code § 1510.1 (West 2019); Md. Code Ann., Fam. Law § 1-201(b)(10) (West 2017); N.Y. Fam. Ct. Act § 661(b) (McKinney 2019); *see also* Recinos v. Escobar, 473 Mass. 734, 739 (2016).

285. *See* sources cited *supra* note 284.

286. *See* J.L., 341 F. Supp. 3d at 1061; *see also* R.F.M. v. Nielsen, 365 F. Supp. 3d 350, 360 (S.D.N.Y. 2019).

287. *See generally* J.L., 341 F.Supp.3d at 1061; *see also* R.F.M., 365 F.Supp.3d at 360; Budhathoki v. Nielsen, 898 F.3d 504, 507 (5th Cir. 2018).

288. *See* 8 C.F.R. § 204.11(c)(4) (2019). In fact, it is important to note that the regulations have not been updated to incorporate the changes made to the law a decade ago by TVPRA 2008 (still referring to long-term foster care requirement). Budhathoki, 898 F.3d at 508 & n.4.

289. *See* Certification of Administrative Record at AR0728-37, R.F.M., 365 F. Supp. 3d 350 (No. 18-cv-05068-JGK) (internal adjudication manual specifying basis for rejecting post-18 bases for special immigrant juvenile classification).

290. *See id*. at AR0728 ("When a court loses the capacity to order a child's reunification with a parent at age 18, they necessarily cannot make a juridical determination that reunification is not viable . . . . The burden is on the petitioner to establish eligibility. Generally, a petition should not be denied based on USCIS'

classification is valid will depend entirely on the technical substantive and procedural law of the state that issued the predicate order in question.[291] A federal court in Texas ruled against youths seeking this classification.[292] Litigation is ongoing in New York as it is in California, where the government is currently enjoined from denying applications for special immigrant juvenile classification for these older youths.[293] Attorneys and observers can only speculate how these cases will end.

D. Increased Desirability of Voluntary Departure

As discussed above, under the Trump administration, UACs are less likely to be released from government custody or are at least likely to be detained longer; will have fewer opportunities to seek asylum and will have greater difficulty providing substantive eligibility; and, may not be given the opportunity to seek special immigrant juvenile classification and/or await subsequent lawful permanent residence. This brings an alternative solution to the surface, albeit not the one arriving immigrants generally desire: voluntary departure.

At the conclusion of removal proceedings, if the immigration judge finds the noncitizen appearing before the court is subject to removal and is not eligible for a remedy from removal, the judge must order deportation.[294] With deportation comes a ten-year bar from reentry to the United States, even if otherwise eligible.[295] Reentry after an order of deportation may have even harsher consequences, including criminal penalties.[296] But there is one important exception to deportation,

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interpretation of state law, but rather officers should defer to the juvenile court's interpretation of the relevant state laws.").

291. *See id*. at AR0732-37 (distinguishing different states' laws).

292. *Compare, e.g.*, Cal. Prob. Code § 1510.1 (West 2019) (statutorily allowing a guardian to be appointed to a noncitizen youth between eighteen and twenty-one years old in conjunction with a petition for findings regarding eligibility for special immigrant juvenile status), *with* Recinos v. Escobar, 473 Mass. 734, 734 (2016).

293. *See, e.g.*, J.L. v. Cissna, 341 F. Supp. 3d 1048, 1054 (N.D. Cal. 2018). *See generally* R.F.M. v. Nielsen, 365 F. Supp. 3d 350 (S.D.N.Y. 2019).

294. *See* Matter of S-O-G- & F-D-B-, 27 I&N Dec. 462, 465-66 (A.G. 2018).

295. INA § 212(a)(9)(A), ch. 477, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C. (Westlaw 2019)).

296. *Id*. § 276(b).

known as voluntary departure, which may serve as the smallest of consolations.

A grant of voluntary departure allows the noncitizen to "voluntarily" depart the United States in lieu of deportation.[297] Substantively, the result is the same because the noncitizen must depart, but legally and practically there are some crucial differences. The noncitizen who complies with a grant of voluntary departure will not have the legal bar to subsequent reentry on account of having been deported, which can be especially important if they hope to someday immigrate through a family member.[298] The individual will generally be given a date by which to leave, thus having at least some time to settle their affairs.[299] Most will be able to leave by ordinary commercial transport, not in shackles.[300] For someone who wants to avoid the stigma of being deported, voluntary departure can be a great option.

Certain requirements must be met, however, if individuals wish to be granted voluntary departure. Unlike deportation, voluntary departure is achieved at the expense of the noncitizen.[301] The noncitizen must demonstrate that they have the means and intent to depart and may be required to post a bond to prove that intention.[302] Voluntary departure is also unavailable to certain noncitizens, including some recently arrived noncitizens, noncitizens who sought entry at a port of entry, and noncitizens with serious criminal or terrorist backgrounds.[303] Finally, if detained, a noncitizen granted voluntary departure will remain detained until voluntary departure is achieved.[304]

297. *Id*. § 240B(a)(1), (b)(1).

298. Individuals granted voluntary departure who do in fact voluntarily depart may, however, still be barred from reentry on account of unlawful presence. *Id*. § 212(a)(9)(B).

299. *Id*. § 240B(a)(2)(A) (allowing up to one hundred twenty days to depart under certain conditions), (b)(2) (allowing up to sixty days to depart at the conclusion of proceedings).

300. *Id*. § 240B(a)(1), (b)(1) (requiring noncitizen to purchase their own transportation at their own expense).

301. *See id*.

302. *Id*. § 240B(b)(1)(D) (requiring a showing of "clear and convincing evidence" that the person has the means to depart and intends to do so); (3) (requiring bond at the conclusion of proceedings to ensure departure).

303. *See id*. § 240B(a)(1), (a)(4), (b)(1)(B)-(C), (c).

304. 8 C.F.R. § 240.25(b) (2019).

Presumably recognizing some UACs may repent from their decision to travel to the United States or might not qualify for lawful immigration status and that such vulnerable children should not have the stigma and consequences of an order of deportation, Congress granted to UACs special access to voluntary departure.[305] The Trafficking Victims Protection Reauthorization Act of 2008 authorized voluntary departure for UACs at no expense to the children.[306] No other strings are attached. Given the specificity of this rule, it is reasonable to presume almost all UACs are eligible for voluntary departure, notwithstanding their time and manner of entry, their history, or their means to depart.

Given the issues discussed above, in the current political climate, many UACs will find voluntary departure to be their best option. Lacking a sponsor who is willing to speak for them and thus suffering detention fatigue and being told their prospects for substantive lawful immigration status have greatly diminished, many children may choose simply to ask permission to depart the United States. Given the same or worsening conditions in countries of origin, however, UACs are unlikely to find the reasons for their initial departure mitigated. Unfortunately, many may try to repeat the harrowing journey to the United States and to seek more remote and dangerous entry points in hopes of avoiding detection.

V. DISINCENTIVIZING COMPLIANCE WITH THE LAW AND THUS INCREASING VULNERABILITY

UACs are not given a free pass to gaining immigration status in the United States. Each one will have to navigate the labyrinthine system in hopes of finding a permanent home in the United States.[307] To that end, Congress has specifically directed the government to ensure that UACs in government custody are made aware of their rights and responsibilities throughout the legal process.[308] A network of not-for-profit organizations and law firms endeavor to ensure these children are

305. TVPRA 2008 § 235(a)(5)(D)(ii), Pub. L. 110-457, tit. II, 122 Stat. 5077 (2008).

306. *Id*.

307. *See id*. § 235(a)(5)(D)(i) (all UACs placed in removal proceedings).

308. *Id*. § 235(c)(4)-(5).

well-informed and, to the extent possible, represented by legal counsel.[309]

Once released from federal custody, it is up to the UACs and their sponsors to ensure compliance with the law and to find legal counsel to represent them throughout the process. Competent legal counsel, committed to honestly explaining to their clients the possibilities for lawful immigration status in the United States, will find themselves increasingly disappointing UACs with the news that protection may no longer be within reach. As the prospect for winning their cases dims, the incentive for complying is removed. Their attorneys will continue to tell them to show up to court, to diligently prepare their applications, and to not work without authorization but that they should also prepare for the reality of having their cases denied and needing to return home; internal and external pressures, however, will understandably encourage the opposite reaction. The American immigration story is a story of optimism, but as the hope for lawful immigration status decreases, the likelihood that UACs will rely on the legal process will also diminish—especially when it comes to older teens who have already become accustomed to making their own way in the world.

Even for those UACs who remain faithful to the legal process, the narrowing of protections will make compliance more difficult. As asylum and special immigrant juvenile status are less generously granted, these children will have to endure through the appeals process until, hopefully, they eventually find protection. Status that should be acquired within six months may take years.[310] In the meantime, many of these children may finish high school and find they have worn out their welcome at the sponsors' homes but do not yet have work authorization.[311] Especially for older teens who need to support

309. *See* Shain Aber & Anne Marie Mulcahy, *Legal Services for Unaccompanied Children*, VERA INST. OF JUST., https://www.vera.org/projects/legal-services-for-unaccompanied-children (last visited Nov. 10, 2019).

310. *Cf.* TVPRA 2008 § 235(d)(2) (requiring that application for special immigrant juvenile classification be adjudicated within 180 days). Practitioners know this is not occurring.

311. Only certain classes of noncitizens are granted work authorization. *See* 8 C.F.R. § 274a.12(c) (2019). Some grants of work authorization are intentionally punitive. *See id.* § 208.7 (delaying, perhaps indefinitely, access to employment authorization for any asylum seeker who creates any delay in adjudication of their application).

themselves or contribute to the household, the inability to work lawfully for years is likely to be hugely problematic.

Lacking hope or just the ability to survive, these UACs are likely to fade into the population of noncitizens without lawful immigration status, working and living in conditions that make them incredibly vulnerable to exploitation. It does not take much supposition to assume these children may soon find themselves in dangerous situations at best and the most horrid situations of human trafficking—slave labor and sex work—at worst.[312]

With that, perhaps Congress's design in the Trafficking Victims Protection Reauthorization Act becomes clear. With this law, Congress created "permanent protection for certain at-risk children," including the expanded access to both asylum and special immigrant juvenile status discussed above.[313] Congress provided these protections to all UACs, not just survivors of human trafficking, because all UACs can find themselves on the path to this horrendous form of human exploitation. Ignoring such far-sighted protections—or working against them—subjects children to the harm the law meant to address.

VI. A SELF-FULFILLING PROPHECY

Since 2014, over two hundred thousand UACs have been apprehended by immigration officials upon arrival to the United States.[314] The legal outcome of these children's cases is unclear. While the Executive Office for Immigration Review reports on the percentage of UACs who have been ordered removed for failing to appear at their immigration court hearings, the substantive outcomes of the cases of

312. *See, e.g.*, Abbie VanSickle, *Overwhelmed Federal Officials Released Immigrant Teens to Traffickers in 2014*, WASH. POST (Jan. 26, 2016), https://www.washingtonpost.com/national/failures-in-handling-unaccompanied-migrant-minors-have-led-to-trafficking/2016/01/26/c47de164-c138-11e5-9443-7074c3645405_story.html; Press Release, U.S. Attorney's Office, Northern District of Ohio, Dep't of Justice, Another Defendant Pleads Guilty in Connection with Labor Trafficking of Minors at Ohio Egg Farm (Sept. 18, 2018), https://www.justice.gov/usao-ndoh/pr/another-defendant-pleads-guilty-connection-labor-trafficking-minors-ohio-egg-farm.

313. TVPRA 2008 § 235(d).

314. *See* TOTAL MONTHLY UAC APPREHENSIONS, *supra* note 4; FACTS AND DATA, *supra* note 4.

those children who did appear are not so readily provided.[315] Nonetheless, given the overwhelming number of cases pending before the immigration courts, it is fair to assume the cases of many of the UACs who arrived in the last years remain pending.[316]

As discussed, the last three years have seen significant efforts by the federal government to limit the UACs' ability to access and to succeed in requesting permanent permission to remain in the United States—primarily in the forms of asylum and special immigrant juvenile classification. Further, while immigrant children are legally entitled to benefit from public education, many of the UACs who have arrived in the last several years will by now have aged out of public education.[317] For those whose applications for protection have not (yet) been denied, many will nonetheless not be eligible to work legally in the United States even if they have reached the age of majority.[318]

At the same time, the rhetoric regarding these children has changed dramatically. There has undoubtedly been a rash of extreme violence in certain parts of the country that appears to be tied to gang violence with certain roots in Central America.[319] Government officials have been quick to suggest UACs are, across the board, affiliated with such violent gangs and responsible for the harms that have befallen some

315. *See* STATISTICS YEARBOOK, *supra* note 33, at 33 (providing *in absentia* removal rates for UACs), 14 (providing substantive outcomes but not specifying rates for UACs).

316. *Id*. at 8-9 (reporting that as of the conclusion of fiscal year 2017, there are over 650,000 cases pending before the immigration courts nationwide).

317. *See* Plyer v. Doe, 457 U.S. 202, 230 (1982); FACTS AND DATA, *supra* note 4 (reporting that for the last several years at least two-third of UACs have been fifteen years old or older).

318. Those with pending applications for adjustment of status may be granted work authorization. 8 C.F.R. § 274a.12(c)(9) (2019). But, given the backlog in visas for special immigrant juveniles from Central America, UACs may have to wait years before they can file their applications for adjustment of status (and the corresponding application for employment authorization). *See* FEBRUARY 2019 VISA BULLETIN, *supra* note 243, at 4. Similarly, those with pending applications for asylum can eventually apply for employment authorization. 8 C.F.R. § 274a.12(c)(8). But, any misstep by the applicant that delays the application, even inadvertently, may indefinitely delay eligibility for employment authorization. *Id*. § 208.7.

319. *See, e.g.*, Liz Robbins & Nadia T. Rodriguez, *The Gang Murders in the Long Island Suburbs*, N.Y. TIMES (July 12, 2017), https://www.nytimes.com/2017/07/12/nyregion/ms-13-murders-long-island.html.

living in those communities.[320] Yet, this rhetoric fails to recognize recently-arrived UACs are often the community members most vulnerable to the harms being perpetrated.[321] To their horrid surprise, UACs who fled the violence of their home countries may have found the violence preceded them and awaits them here in the United States.[322]

It would be naïve and dishonest to suggest that of the hundreds of thousands of UACs who arrived to the United States in recent years, none have violent pasts or bad intentions.[323] However, it is equally insidious to suggest all or most or many of these children do have such aspects.[324] Such a false narrative, combined with the tactics discussed above, has been and will continue to be a powerful tool. When fleeing children are no longer seen as vulnerable but rather as criminals, malefactors, and—most disturbingly—"animals,"[325] it becomes easier for society to accept the idea these children should not be protected from almost certain harm and death upon deportation.

With that, the myth that UACs arrive to the United States to harm us justifies the decision to do everything possible to expel them. Notwithstanding conclusions by the international agency designated by the United Nations to protect those fleeing and the clear instruction by Congress to protect all UACs, protection will elude their grasp. This, in turn, will push them further from mainstream society. Told that they have few prospects to remain permanently in the United States, that they may not express their human dignity by sustaining themselves, and having their very status as human beings denigrated, many will likely slip from one legal limbo—being the subject of long-pending immigration court proceedings—to another—being another noncitizen present in the United States with no prospects of ever becoming a full member of our community. Should that happen, we will indeed have scores of newly arrived, young immigrants who are permanent

320. *See, e.g.*, Kim, *supra* note 3.

321. *See, e.g.*, Jonathan Blitzer, *How Gang Victims Are Labeled as Gang Suspects*, THE NEW YORKER (Jan. 23, 2018), https://www.newyorker.com/news/news-desk/how-gang-victims-are-labelled-as-gang-suspects.

322. *See id*.

323. *Id*.

324. *Cf., e.g.*, *Children on the Run*, *supra* note 4.

325. *See, e.g.*, Kim, *supra* note 3.

outsiders to our community—permanently excluded, permanently marginalized, and permanently vulnerable.