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Child Migrants and America's Evolving Immigration Mission

Shani M. King*

ABSTRACT

This Article explores the many challenges—legal and otherwise—that child migrants face as they attempt to navigate the complex web of courts, laws, and shifting political landscapes to become naturalized United States citizens, while putting these challenges in the context of an immigration system that has long been shaped by politics of exclusion and xenophobia that have shaped immigration law and policy in the United States for over one-hundred years. Such an investigation comes at a time when the issue of immigration in the United States is increasingly complex and contested. As the Trump administration mulls over new prototypes for a wall along the U.S./Mexico border, issues travel bans targeting Muslim-majority countries, and threatens to end the Obama-era DACA program in a bid to realize the president's campaign slogan of "America First," advocates for a more liberal, humanitarian immigration system cite America's legacy as the quintessential nation of immigrants to challenge the xenophobia and politics of exclusion that have recently informed the debate about immigration reform. Notwithstanding this cited legacy, the United States has a long history of the politics of exclusion shaping its immigration system. Thus, this Article attempts to provide additional context for this current—and historical—immigration debate, and argues that political expedience, Cold War ideology, racial prejudice, and politics of exclusion and xenophobia—as contrasted with principles of justice and equality—have long shaped how the United States fashions official immigration law and policy.

INTRODUCTION

This Article explores the many challenges—legal and otherwise—that child migrants face as they attempt to navigate the complex web of courts, laws, and shifting political landscapes to become naturalized United States citizens. Such an investigation comes at a time when the issue of immigra-

* Professor of Law and Director of the Center on Children and Families at the University of Florida Fredric G. Levin College of Law. For generous engagement with this project at various stages, I am grateful to Bill Ong Hing and Daniel Kanstroom. For excellent research and editorial assistance, I thank Sean Lafferty and Betty Donaldson. Thank you to Dean Laura Rosenbury and the University of Florida Fredric G. Levin College of Law for generous research support for this project. Finally, thank you to Professor Martha Minow for her continued and unwavering support.

tion in the United States is increasingly complex and contested. As the Trump administration mulls new prototypes for a wall along the U.S./Mexico Border, issues travel bans targeting Muslim-majority countries, and threatens to end the Obama-era DACA program in a bid to realize the president's campaign slogan of "America First," advocates for a more liberal, humanitarian immigration system cite America's legacy as *the* quintessential nation of immigrants¹ to challenge the xenophobia and politics of exclusion that have recently informed the debate about immigration reform. But politics of exclusion and xenophobia have long shaped how the United States fashions official immigration law and policy.

Indeed, immigration law and its mechanisms of enforcement are notoriously complex.² Adversarial by nature and balanced in favour of experienced government attorneys trained on the intricacies of immigration law, the removal proceeding is a confusing and threatening process, particularly for a child migrant with limited knowledge of the law and the legal burdens of proof involved. The language barriers for children who may not speak English are also significant, given the insufficient number of interpreters available to children throughout the immigration process. This may create problems for detained children when communicating with their attorneys,

1. The idea that the United States is the quintessential nation of immigrants is one of the dominant narratives used to describe the history of immigration in the United States and, in fact, was the title of a book originally written by John F. Kennedy, in 1958, when he was a U.S. Senator, which was published after his death. This book contains a short history of immigration from the colonial period onwards. It analyzes the importance of immigration in this country's history, and includes proposals to liberalize U.S. immigration law. See JOHN F. KENNEDY, *A NATION OF IMMIGRANTS* (Cohen et al. eds., Anti-Defamation League of B'nai B'rith 1959); see also Leti Volpp, *The Indigenous As Alien*, 5 U.C. IRVINE L. REV. 289, 290 (2015) (noting "the distinctively prevalent narrative of the United States of America as a nation of immigrants"); Leti Volpp, *Impossible Subjects: Illegal Aliens and Alien Citizens*, 103 MICH. L. REV. 1595, 1595 (2005) ("America is a nation of immigrants, according to our national narrative. This is the America with its gates open to the world, as well as the America of the melting pot."); Hiroshi Motomura, *Whose Alien Nation?: Two Models of Constitutional Immigration Law*, 94 MICH. L. REV. 1927, 1927 (1996) ("We share a deeply rooted tradition of being 'a nation of immigrants' – the America of Emma Lazarus's Golden Door, of the poor and huddled masses welcomed by the Statue of Liberty."); *Obama: America is a Nation of Immigrants*, CNN (June 29, 2016), <https://www.youtube.com/watch?v=YQ48XAEwOI> [<https://perma.cc/7PU4-52UV>]. In response to President Trump's decision to update the mission statement of USCIS (more on this below), Leon Rodriguez, former director of USCIS (2014–2017), proclaimed: "I ran USCIS. This is a nation of immigrants, no matter what mission statements say." León Rodríguez, *I ran USCIS. This is a nation of immigrants, no matter what mission statements say*, WASH. POST (Feb. 26, 2018), https://www.washingtonpost.com/news/posteverything/wp/2018/02/26/i-ran-uscis-this-is-a-nation-of-immigrants-no-matter-what-mission-statements-say/?utm_term=.e567a40bce0b [<https://perma.cc/QHJ8-WZ62>].

2. Federal courts have repeatedly acknowledged the complexity of the immigration system. See, e.g., *Escobar-Grijalva v. INS*, 206 F.3d 1331, 1335 (9th Cir. 2000) ("Deprivation of the statutory right to counsel deprives an alien asylum-seeker of the one hope she has to thread a labyrinth almost as impenetrable as the Internal Revenue Code."); *Castro-O'Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1988) ("With only a small degree of hyperbole, the immigration laws have been termed second only to the Internal Revenue Code in complexity . . . A lawyer is often the only person who could thread the labyrinth.") (internal citations omitted); *Lok v. INS*, 548 F.2d 37, 38 (2d Cir. 1977) ("[Immigration laws bear a] striking resemblance . . . [to] King Minos's labyrinth in ancient Crete. The Tax Laws and the Immigration and Nationality Acts are examples we have cited of Congress's ingenuity in passing statutes certain to accelerate the aging process of judges.").

detention staff, immigration officers and the immigration judge.³ These language barriers can also cause extreme “loneliness, disorientation, [and] a deterioration of decision-making skills,” especially when children are not able to find someone within their detention facility that speaks their language.⁴ Nevertheless, despite the harsh consequences of deportation, the complexity of the immigration code, the language barriers, and the limited resources of many migrants (particularly children), there exists no recognized categorical right to appointed counsel in removal proceedings.⁵ Section 192 of the INA grants aliens the privilege to retain counsel for removal hearings, but it expressly denies the right to government-funded representation.⁶ The Supreme Court has long held that deportation is not a form of punishment, and the protections and procedures that defendants receive in criminal trials do not apply to removal proceedings—most notably the Sixth Amendment right to appointed counsel.⁷

In light of the significant life and liberty interests at stake, the complexity of the process, and the evolving nature of the law, legal scholars, jurists, and children’s rights advocates have repeatedly advanced arguments in favor of a categorical right to appointed counsel for minors in removal proceedings, but to no avail.⁸ Generally, these arguments point out that such a

3. The ABA Commission on Immigration notes language barriers as one of the reasons that all individuals with potential relief from removal, including children, should have lawyers. See ABA COMM’N ON IMMIGRATION, *THE QUEST TO FULFILL OUR NATION’S PROMISE OF LIBERTY AND JUSTICE FOR ALL: ABA POLICIES ON ISSUES AFFECTING IMMIGRANTS AND REFUGEES* 3 (2006) (noting the complexity of immigration law, including the potential language and cultural barriers to understanding the process); Rhonda McMillion, *ABA Opposes Legislation That Could Endanger Unaccompanied Immigrant Children*, 103 A.B.A. J. 70 (2017) (“The association is also concerned about language that would weaken measures in place to help children obtain counsel. These measures are crucial in light of obstacles the children face because of their age, lack of education, language and cultural barriers, and the complexity of U.S. immigration law.”); Anna O. Law, *The Ninth Circuit’s Internal Adjudicative Procedures and Their Effect on Pro Se and Asylum Appeals*, 25 GEO. IMMIGR. L.J. 647, 658–60 (2011) (discussing “[h]ow [l]anguage, [c]ultural, and [e]ducational [b]arriers [c]an [i]mpede the [d]elivery of [j]ustice and [t]ransparency”); Kevin R. Johnson, *Responding to the “Litigation Explosion”: The Plain Meaning of Executive Branch Primacy Over Immigration*, 71 N.C. L. REV. 413, 453 (1993) (“For many reasons, including language and cultural barriers exacerbated by the sheer complexity of the immigration laws and administrative procedures, immigrants are particularly vulnerable to the strong-arm tactics of the INS.”); *Balasubramaniam v. INS*, 143 F.3d 157, 162 (3d Cir. 1998) (recognizing challenges presented by language barriers).

4. Peter Jan Honigsberg, *Linguistic Isolation: A New Human Rights Violation Constituting Torture, and Cruel, Inhuman and Degrading Treatment*, 12 NW. J. INT’L HUM. RTS. 22, 40 (2014).

5. Shani M. King, *Alone and Unrepresented, A Call to Congress to Provide Counsel for Unaccompanied Minors*, 50 HARV. J. ON LEGIS. 331, 339 (2013) (unaccompanied minors do not have a recognized legal right to free representation in removal proceedings); Aliza B. Kaplan, *A New Approach to Ineffective Assistance of Counsel in Removal Proceedings*, 62 RUTGERS L. REV. 345, 355 (2010).

6. 8 U.S.C. § 1229a(b)(4)(A) (2006).

7. Kaplan, *supra* note 5, at 355 (“[T]he Sixth Amendment right to counsel extends only to criminal cases and as removal proceedings are civil in nature, an alien is not entitled to this Sixth Amendment right.”).

8. See, e.g., King, *Alone and Unrepresented*, *supra* note 5, at 332; Jacqueline Bhabha & Wendy Young, *Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines*, 11 INT’L J. REFUGEE L. 84, 118 (1999); Sharon Finkel, *Voice of Justice: Promoting Fairness Through Appointed Counsel for Immigrant Children*, 17 N.Y.L. SCH. J. HUM. RTS. 1105, 1106 (2001); Michael A. Olivas, *Unaccompa-*

right is consistent with contemporary notions of procedural due process and fundamental fairness as laid out in the Supreme Court's 1976 decision *Mathews v. Eldridge*.⁹ They sometimes also point out that immigration law has become increasingly intertwined with criminal law, a phenomenon often referred to as "crimmigration."¹⁰ This article seeks to bring even greater relevance to these arguments by highlighting the politics of exclusion and xenophobia that have shaped immigration law and policy in this country for over one-hundred years.¹¹ Indeed, if Americans truly are concerned about giving meaning to *Equal Justice Under the Law*, the tag line engraved on the U.S. Supreme Court Building, and serving the best interests of children who must navigate a complex immigration system that has been shaped by political expediency,¹² Cold War ideology,¹³ and racial prejudice,¹⁴ as op-

nied Refugee Children: Detention, Due Process, and Disgrace, 2 STAN. L. & POL'Y REV. 159, 162 (1990); Linda Kelly Hill, *The Right to Be Heard: Voicing the Due Process Right to Counsel for Unaccompanied Alien Children*, 31 B.C. THIRD WORLD L.J. 41, 62 (2011); Complaint, F.L.B. v. Lynch (J.E.F.M. v. Holder), No. 2:14-cv-01026 (W.D. Wash. filed July 9, 2014) (lawsuit filed by American Immigration Counsel, ACLU, Northwest Immigrant Rights Project, Public Counsel, and K&L Gates arguing for the recognition of the right to appointed counsel for unrepresented children in immigration proceedings); Brief for Former Federal Immigration Judges as Amicus Curiae, in Support of Plaintiffs-Appellees' Petition for Rehearing and Rehearing En Banc, at 4, 12, J.E.F.M. v. Lynch, (9th Cir. 2016) (No. 2:14-cv-1026) (arguing for a rehearing on the question of whether minors require appointed counsel to safeguard their due process rights, stating "it is the experience of amici curiae that no child reasonably can be expected to successfully navigate removal proceedings and the immigration appeals process pro se while preserving an appointed-counsel claim" and that the panel's decision would "prevent any court from considering the underlying question whether these minor plaintiffs are entitled to court-appointed counsel, the practical effect of which is to leave 'thousands of children . . . to thread their way alone through the labyrinthine maze of immigration laws'" (quoting J.E.F.M., 837 F.3d 1026, 1040) and would result in a "likely los[s] [of] the most important legal battle of their lives").

9. 424 U.S. 319, 335 (1976). In *Mathews v. Eldridge*, the Court ruled that: "the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." For a summary of the scholarship, see, e.g., Robert N. Black, *Due Process and Deportation – Is There a Right to Assigned Counsel?*, 8 U.C. DAVIS L. REV. 289 (1975); David A. Robertson, *An Opportunity to Be Heard: The Right to Counsel in a Deportation Hearing*, 63 WASH L. REV. 1019, 1027 (1988); William L. Dick, Jr., Note, *The Right to Appointed Counsel for Indigent Civil Litigants: The Demands of Due Process*, 30 WM. & MARY L. REV. 627, 628 (1989); Elizabeth Glazer, Note, *The Right to Appointed Counsel in Asylum Proceedings*, 85 COLUM. L. REV. 1157, 1157–58 (1985); Beth J. Werlin, Note, *Renewing the Call: Immigrants' Right to Appointed Counsel in Deportation Proceedings*, 20 B.C. THIRD WORLD L.J. 393, 394 (2000); Kevin R. Johnson, *An Immigration Gideon for Lawful Permanent Residents*, 122 YALE L.J. 2394, 2399 (2013); Soulmaz Taghavi, *Montes-Lopez v. Holder: Applying Eldridge To Ensure a Per Se Right to Counsel for Indigent Immigrants in Removal Proceedings*, 39 T. MARSHALL L. REV. 245, 259 (2014); Nimrod Pitsker, Comment, *Due Process for All: Applying Eldridge To Require Appointed Counsel for Asylum Seekers*, 95 CALIF. L. REV. 169, 171 (2007); Johan Fatemi, *A Constitutional Case for Appointed Counsel in Immigration Proceedings: Revisiting Franco-Gonzalez*, ST. JOHN'S L. REV. 915, 917 (2017).

10. See, e.g., Juliet P. Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and the Sovereign Power*, 56 AM. U.L. REV. 367 (2006); Mark Fennell, *Preserving Process in the Wake of Policy: The Need for Appointed Counsel in Immigration Removal Proceedings*, 25 NOTRE DAME J.L. ETHICS & PUB. POL'Y 261, 270 (2009).

11. See *infra* Section II.

12. The role of politics in shaping immigration reform is discussed throughout this article. See generally MARY GIOVAGNOLI, *OVERHAULING IMMIGRATION LAW, A BRIEF HISTORY AND BASIC PRINCIPLES OF REFORM* (2013); Benjamin Marquez & John F. Witte, *Immigration Reform Strategies for Legislative*

posed to principles of justice and equality, then a necessary first step is to recognize a statutory right to appointed counsel as a precondition for ensuring fundamental fairness.

I. WHAT'S OLD IS NEW AGAIN

*Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore.
Send these, the homeless, tempest-tossed, to me,
I lift my lamp beside the golden door!*

These final lines of Emma Lazarus' sonnet are etched in the plaque at the base of the Statue of Liberty.¹⁵ Both the poem, and the statue itself, have come to symbolize one of the most cherished and enduring American values—freedom. Indeed, for the poor, oppressed, and dispossessed, for immigrants the world over who come in search of a better life, America has long been heralded as a haven of freedom. In fact, there is a long tradition of a philosophical openness to liberal immigration in the Western world.¹⁶ The debates at the Constitutional Convention demonstrated just how liberal the founders were on these issues. Their views reflected the fact that some of them were immigrants, were a response to anti-immigrant conspiracy theories of the day, and were based on a fundamental belief that the United States was to be founded by all who were philosophically opposed to oppression (with obvious caveats) and was established as a haven for the oppressed.¹⁷ James Madison, for example, underscored the connection between freedom and pluralism when he said, “This freedom arises from that multi-

Action, THE FORUM 1 (2009); Michael Olivas, *The Political Economy of the Dream Act and the Legislative Process: A Case Study of Comprehensive Immigration Reform*, 55 WAYNE L. REV. 1757 (2009); AK Simpson, *The Politics of Immigration Reform*, 18 INT. MIGR. REV. 486 (1984); JAMES GIMPEL & JAMES EDWARDS, *THE CONGRESSIONAL POLITICS OF IMMIGRATION REFORM* (1998).

13. For further discussion of the Cold War's role in shaping immigration policy, see *infra* Section I. See also Xiaojian Zhao, *Immigration to the United States after 1945*, in OXFORD RESEARCH ENCYCLOPEDIA OF AMERICAN HISTORY (2016); Eva Eszter Szabo, *Migration As A Tool of U.S. Foreign Policy In The Cold War*, HUNGARIAN REV. (2017).

14. The role of racial prejudice in shaping immigration reform is discussed throughout this Article. For additional discussion of the role race does and can play in immigration reform see Liav Orgad & Theodore Ruthizer, *Race, Religion, Nationality in Immigration Selection: 120 Years After the Chinese Exclusion Case*, 26 CONST. COMMENT. 237 (2010); see generally CHRISTIAN JOYPKE, *SELECTING BY ORIGIN: ETHNIC MIGRATION IN THE LIBERAL STATE* (2005).

15. See EMMA LAZARUS, *THE NEW COLOSSUS* (1883). The entirety of Lazarus's sonnet is engraved and mounted on the Statue of Liberty.

16. Alex Nowrasteh, *Immigration and Naturalization in the Western Tradition*, CATO INSTITUTE (Mar. 26, 2018), <https://www.cato.org/blog/immigration-naturalization-western-tradition> [<https://perma.cc/P522-TDX3>].

17. AKHIL AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 70 (2006); THE RECORDS OF THE FEDERAL CONVENTION OF 1787 237 (Max Farrand ed., 1911); David Bier, *The Founding Fathers Favored a Liberal Immigration System*, CATO INSTITUTE (Mar. 28, 2018), <https://www.cato.org/blog/founding-fathers-favored-liberal-immigration-system> [<https://perma.cc/A2KZ-DGVD>].

plicity of sects, which pervades America . . . [f]or where there is such a variety of sects, there cannot be a majority of any one sect to oppress and persecute the rest.”¹⁸ And, in *Common Sense* (1776), Thomas Paine praised his adopted homeland as “the asylum for the persecuted lovers of civil and religious liberty.”¹⁹ Thomas Jefferson argued for “a right which nature has given to all men, of departing from the country in which chance, not choice, has placed them.”²⁰ And James Madison defended immigration in the general interests of humanity, correctly observing that “[t]he course of emigrations being always, from places where living is more difficult, to places where it is less difficult,” and in the process, “the happiness of the emigrant is promoted by the change: and . . . human life is at once made a greater blessing.”²¹

And as its history proves, America truly is *the* quintessential nation of immigrants. Since its foundation, the country has welcomed millions of migrants and refugees to its shores. With the onset of the Industrial Revolution and the technological achievements it bore, approximately 75 million immigrants arrived in the country between 1820 and 2010.²² And the trend continues. Today, more than 40 million people living in the United States were born in another country, accounting for about one-fifth of the world’s migrants in 2016.²³ The population of immigrants is also very diverse, with just about every country in the world represented among U.S. immigrants.²⁴

Today, however, America is no longer a nation of immigrants, at least according to the U.S. Citizenship and Immigration Services (“USCIS”)—the lead federal agency tasked with granting citizenship to would-be Americans.²⁵ In an email announcement to staff members dated February 22, 2018, USCIS Director L. Francis Cissna outlined the agency’s new mission statement that read, in part:

U.S. Citizenship and Immigration Services administers the nation’s lawful immigration system, safeguarding its integrity and promise by efficiently and fairly adjudicating requests for immi-

18. JAMES MADISON, *Virginia Ratifying Convention, General Defense of the Constitution, June 12 1788*, in THE PAPERS OF JAMES MADISON 130 (William T. Hutchinson & William M.E. Rachal eds., 1973).

19. THE WRITINGS OF THOMAS PAINE 87 (Moncure Daniel Conway ed., 1894) (emphasis omitted).

20. Thomas Jefferson, *A Summary View of the Rights of British America, 1774*, in WRITINGS 105 (Merrill D. Peterson ed., 1984).

21. JAMES MADISON, *Population and Emigration, from the National Gazette, November 19, 1791*, in SELECTED WRITINGS OF JAMES MADISON 207 (Ralph Ketcham ed., 2006).

22. Charles Hirschman, *Immigration to The United States, Recent Trends and Future Prospects*, 51 MALAYS. J. ECON. STUD. 69, 77 (2014).

23. Elizabeth M. Grieco et al., U.S. Bureau of the Census, THE FOREIGN BORN POPULATION OF THE UNITED STATES (2012).

24. Gustavo Lopez, Kristin Bialik, & Jynnah Radford, *Key Findings About U.S. Immigrants*, PEW RESEARCH CENTER (Sept. 14, 2018), <http://pewrsr.ch/2qz2zvz> [<https://perma.cc/N54Q-JWSW>].

25. See *About US*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <https://www.uscis.gov/aboutus> [<https://perma.cc/JC5R-24HE>].

gration benefits while protecting Americans, securing the homeland, and honoring our values.²⁶

The new mission statement marks a significant departure from the previous one, which hailed America as a nation of immigrants:

USCIS secures America's promise as a nation of immigrants by providing accurate and useful information to our customers, granting immigration and citizenship benefits, promoting an awareness and understanding of citizenship, and ensuring the integrity of our immigration system.²⁷

The removal of the phrase "nation of immigrants" is emblematic of the politics of exclusion and xenophobia that have characterized the Trump Administration's stance on immigration. Indeed, inflammatory rhetoric about immigrants has been a hallmark of Trump's political life since he launched his 2016 campaign for president by branding all immigrants from Mexico as criminals:

When Mexico sends its people, they're not sending their best. They're not sending you. They're not sending you. They're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people.²⁸

Frequently invoking the transnational gang MS-13 as a symbol of the dangers of immigration as a whole, Trump's favourite theme is that immigrants pose a direct threat to all the things that make America great (i.e. white). For instance, during a speech delivered at the annual Conservative Political Action Conference ("CPAC") held in Washington D.C., he offered this "rhetorical red meat" to his supporters: "These [i.e. MS-13] are animals. They cut people. They cut them. They cut them up in little pieces, and they want them to suffer. And we take them into our country."²⁹ Regarding the visa lottery system, he concluded that "countries are sending bad people" who similarly want to kill Americans:

26. See USCIS Director L. Francis Cissna on *New Agency Mission Statement*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (Feb. 22, 2018), <https://www.uscis.gov/news/news-releases/uscis-director-l-francis-cissna-new-agency-mission-statement> [<https://perma.cc/DVZ2-ZFKM>].

27. See Miriam Jordan, *Is America a "Nation of Immigrants"?* *Immigration Agency Says No*, N.Y. TIMES (Feb. 22, 2018), <https://www.nytimes.com/2018/02/22/us/uscis-nation-of-immigrants.html> [<https://perma.cc/WDP3-FZAK>]; Richard Gonzalez, *America No Longer A "Nation of Immigrants," USCIS Says*, NPR (Feb. 22, 2018), <https://www.npr.org/sections/theroway/2018/02/22/588097749/america-no-longer-a-nation-of-immigrants-uscis-says> [<https://perma.cc/VRZ9-UZMX>].

28. Donald J. Trump *Announces A Presidential Bid*, WASH. POST (June 16, 2005), https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/?utm_term=.effb218265dc [<https://perma.cc/UP5R-HKRL>].

29. Dara Lind, *"The Snake": Donald Trump brings back his favorite anti-immigrant fable at CPAC*, VOX (Feb. 23, 2018), <https://www.vox.com/policy-and-politics/2018/2/23/17044744/trump-snake-speech-cpac> [<https://perma.cc/DR42-5W5Q>].

We pick out people. Then they turn out to be horrendous. And we don't understand why. They're not giving us their best people, folks . . . I don't want people who drive a car at 100 miles an hour down the West Side Highway, and kill eight innocent victims and destroy the lives of 14 more.³⁰

Trump also portrays Border Patrol and ICE agents as ruthless in their pursuit of these criminals (i.e. immigrants): “‘All they understand is toughness,’ Trump said of MS-13, and ‘we have the toughest guys you’ve ever seen. We got tough. They don’t respect anything else.’”³¹ And amid raucous applause, “as if it was an encore at a rock concert,” Trump even performed “The Snake”—a poem from the 1960s soul singer and social rights activist Oscar Brown Jr.—which the president re-appropriated during his campaign as an anti-immigration parable.³² In the poem, a snake, freezing outside in the cold, convinces a woman to take him into her home. After the woman lets the snake in and revives it with some honey and milk, the snake repays her kindness by killing her.³³ In Trump’s favorite anti-immigration fable, the United States is the woman who naively gives others refuge, and immigrants are the snake that delivers the fatal strike.

Beyond the nativist populism, however, Trump has taken steps towards putting his anti-immigration rhetoric into practice. On September 5, 2017, Attorney General Jeff Sessions announced that the Deferred Action for Childhood Arrivals program (“DACA”) would come to an end on March 5, 2018.³⁴ That same day, then Acting Secretary of Homeland Security Elaine Duke issued a memorandum to her staff to “execute a wind-down of the program.”³⁵ Instituted by President Obama through executive branch memorandum in 2012, DACA provided legal status to nearly 800,000 young undocumented immigrants brought to the US as children, protecting them from deportation and allowing them to lead a semblance of a normal life in this country.³⁶ In his announcement, Sessions stressed the need to restore

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. Letter from former Att’y Gen. Jeff Sessions to Acting Secretary of the Dep’t of Homeland Security, Admin. R. (Dkt. 77-1) 251) (on file with author).

35. Memorandum, Dep’t of Homeland Security, titled, “Memorandum on Rescission of Deferred Action for Childhood Arrivals (DACA)” (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca> [<https://perma.cc/5LC3-QDDQ>].

In the immediate aftermath of this announcement, multiple lawsuits challenging the Trump administration’s actions to terminate DACA were filed across the country. To date, despite the uncertainty surrounding the fate of the program, DACA remains the law of the land, see *infra* note 41.

36. See *Attorney General Sessions Delivers Remarks on DACA*, U.S. DEP’T OF JUSTICE (Sept. 5, 2017), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-daca> [<https://perma.cc/CRH8-S7L6>] [hereinafter *Sessions Remarks*].

President Obama’s 2012 executive branch memorandum made 1.2 million immigrants eligible for the DACA program. There were subsequent memoranda in 2014 that expanded on DACA benefits and

the “impartial rule of law,” which previous administrations had failed to enforce:

The effect of this unilateral executive amnesty [i.e. DACA], among other things, contributed to a surge of unaccompanied minors on the southern border that yielded terrible humanitarian consequences. It also denied jobs to hundreds of thousands of Americans by allowing those same jobs to go to illegal aliens. We inherited from our Founders—and have advanced—an unsurpassed legal heritage, which is the foundation of our freedom, safety, and prosperity. As the Attorney General, it is my duty to ensure that the laws of the United States are enforced and that the Constitutional order is upheld. No greater good can be done for the overall health and well-being of our Republic, than preserving and strengthening the impartial rule of law.³⁷

The impartial rule of law, according to Sessions, is one that serves to maintain and enhance national interests and societal wellbeing through the strict implementation and enforcement of quotas:

To have a lawful system of immigration that serves the national interest, we cannot admit everyone who would like to come here. That is an open border policy and the American people have rightly rejected it. Therefore, the nation must set and enforce a limit on how many immigrants we admit each year and that means all can not be accepted.³⁸

Other political hardliners have also focused on immigration and spoken out against DACA. Following Sessions' announcement, Iowa Republican Rep. Steve King said that Congress had no legal or moral responsibility to protect young immigrants who came to the country illegally as children. Instead, he told reporters, they [i.e. DACA recipients] can “continue to live the objective that they sought to achieve when they illegally entered

the list of beneficiaries. See Mahdis Azimi & David Schaffer, *It's All in the Details: A Review of the 2014 Immigration Executive Orders*, 27 J. DU PAGE CTY. BAR. ASS'N 28 (2015).

It should be noted that the 2012 memorandum is often referred to as an Executive Order, but it was actually a presidential memorandum. Both forms of action have the force of law on the executive branch, and sometimes they are used interchangeably. See generally PHILLIP COOPER, BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION (2002); see also Gregory Korte, *Presidential Memoranda vs. Executive Orders. What's the Difference?*, USA TODAY (Jan. 24, 2017), <https://www.usatoday.com/story/news/politics/onpolitics/2017/01/24/executive-order-vs-presidential-memorandum-whats-difference/96979014/> [<https://perma.cc/D75U-DZ83>].

For a list of archived presidential memoranda from the Obama Administration, see *Presidential Memoranda*, THE WHITE HOUSE, <https://obamawhitehouse.archives.gov/briefing-room/presidential-actions/presidential-memoranda> [<https://perma.cc/D75U-DZ83>].

37. See *Sessions Remarks*, *supra* note 36.

38. *Id.*

America[:] . . . [to] live in the shadows.”³⁹ And in early April 2018, amid reports of a caravan of a thousand or so immigrants from Central America travelling through Mexico toward the southern U.S. border, Trump announced in a series of aggressive and nativist tweets that any possibility of saving DACA was no more and that Congress must pass tougher immigration laws to protect the country from “illegals” (i.e. desperate men, women, and children).⁴⁰ To date, DACA remains the law of the land, as challenges to the legality of Trump’s decision to halt the program continue to make their way through the federal court system.⁴¹ The fate of tens of thousands of Dreamers who came to the United States through no fault of their own, who pose no threat, and who enrich the fabric of our cultural tapestry on a daily basis now rests on whether or not Americans have the moral conviction to uphold the principles of liberty and freedom upon which the United States was founded.⁴²

The decision to end DACA is just part of a much larger executive branch crackdown on immigration (both illegal and legal) that has come in many forms, from introducing a travel ban on several Muslim-majority countries,⁴³ to promises of expanding the number of ICE officers and Border

39. Lauren Fox, *Rep. Steve King: DACA Recipients Should “Live in the Shadows,”* CNN (Sept. 6, 2017), <https://www.cnn.com/2017/09/06/politics/steve-king-daca-shadow-comments/index.html> [https://perma.cc/9EBX-ND7E]. King, of course, received fierce, bipartisan criticism after he tweeted praise for the anti-immigration views of far-right Dutch politician Geert Wilders: “Wilders understands that culture and demographics are our destiny. We can’t restore our civilization with someone else’s babies.” See *Steve King Tweet Backing Geert Wilders Sparks Social Media Backlash*, BBC (Mar. 13, 2017), <https://www.bbc.com/news/world-us-canada-39250251> [https://perma.cc/97QT-M6GY].

40. See Joel Rose, Carrie Kahn, & Kelsey Snell, *Trump’s Tweets On “Caravans” Crossing the Border, Annotated*, NPR (Apr. 2, 2018), <https://www.npr.org/2018/04/02/598781060/trumps-tweets-on-caravans-crossing-the-border-annotated> [https://perma.cc/LQ8N-DLUP].

41. Two U.S. district courts have since enjoined the government’s termination of DACA and required USCIS to continue accepting DACA renewal applications. A third U.S. district court has ordered the government to follow its original 2012 policy of not sharing DACA recipients’ private information for enforcement purposes, and the U.S. District Court from the District of Columbia reinstated DACA two times. However, the court in Washington, D.C. partially “stayed” its order that vacated the Trump administration’s termination of the DACA program. This stay postpones the effective date of portions of the court’s order that would require USCIS to accept DACA applications regardless of whether the applicants previously had DACA. On May 1, 2018, Texas and six other states filed a lawsuit in the U.S. District Court for the Southern District of Texas challenging the 2012 DACA program itself. On May 2, the plaintiffs asked the court to issue a preliminary injunction that would stop USCIS from adjudicating applications for deferred action under DACA while the lawsuit is pending. On August 8, 2018, the court denied the plaintiff states’ request, concluding that such an injunction would not be in the public’s interest. As a result, it continues to be the case that individuals who have or have previously had DACA can apply to renew it. For current updates on the DACA litigation from the National Immigration Law Center, see *Status of Current DACA Litigation*, NATIONAL IMMIGRATION LAW CENTER, <https://www.nilc.org/issues/daca/status-current-daca-litigation/> [https://perma.cc/R3WD-2P7V].

42. The distinguished legal scholar Bill Ong Hing has gone so far as to call on companies and employers to disregard employer sanctions laws in the event that DACA is rescinded. Such acts of civil disobedience and defiance, Hing contends, are a matter of moral conviction. See Bill Ong Hing, *Beyond DACA – Defying Employer Sanctions Through Civil Disobedience*, 52 U.C. DAVIS L. REV. 299, 305 (2018).

43. For a complete timeline and explanation of the so-called “Muslim Ban,” whereby Trump signed an executive order banning foreign nationals from seven predominantly Muslim countries, including court challenges to the ban and subsequent modified executive orders, see *Timeline of the Muslim Ban*, ACLU WASHINGTON, <https://www.aclu-wa.org/pages/timeline-muslim-ban> [https://perma.cc/6VSY-

Patrol agents,⁴⁴ withholding federal funding to so-called “sanctuary cities,”⁴⁵ the promise to build a wall across an additional 1,200 miles of the southern border,⁴⁶ and backing a new immigration law (RAISE Act) that would cut legal immigration by half while giving priority to immigrants who can speak English.⁴⁷ Most recently, the Trump administration announced that the 2020 census would ask respondents whether they were citizens—a question that has not been included in the decennial census since 1950.⁴⁸ In a statement released January 26, 2018,

the Commerce Department, which oversees the Census Bureau, said Commerce Secretary Wilbur Ross had “determined that rein-statement of a citizenship question on the 2020 decennial census

YT5BJ]. The executive orders themselves, Executive Orders 13769, 13780, are printed in the Federal Register and located on the Federal Register’s website. See *2017 Donald Trump Executive Orders*, FEDERAL REGISTER, <https://www.federalregister.gov/presidential-documents/executive-orders/donald-trump/2017> [https://perma.cc/QZL6-56X6].

44. Julia Horowitz, *Trump’s Tall Order: Hiring 15,000 ICE and Border Patrol Agents*, CNN BUSINESS (Mar. 3, 2017), <https://money.cnn.com/2017/03/03/news/economy/hiring-immigration-agents-ice/index.html> [https://perma.cc/8JWS-N75G]; Brian Naylor, *Trump’s Plan to Hire 15,000 Border Patrol and ICE Agents Won’t Be Easy*, NPR (Feb. 23, 2017), <https://www.npr.org/2017/02/23/516712980/trumps-plan-to-hire-15-000-border-patrol-and-ice-agents-wont-be-easy-to-fulfill> [https://perma.cc/G3B9-J3J4].

45. In 2017, President Donald Trump signed an executive order that allowed the Department of Justice to withhold safety grant funding from “sanctuary cities” where the local governments do not cooperate with federal government authorities on immigration enforcement. See Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017). There have been multiple successful lawsuits against this executive order, emanating from California, Illinois, Massachusetts, New York, Pennsylvania, Washington, and Texas. These lawsuits have largely been based on the Tenth Amendment to the Constitution. The Tenth Amendment was the basis for *Printz v. United States*, 521 U.S. 898 (1997), in which the Court held that the United States Government cannot engage in “federal commandeering of state governments.” For an overview of current litigation, see *Case Status of Sanctuary Jurisdiction Litigation*, NATIONAL IMMIGRATION FORUM (May 4, 2018), <https://immigrationforum.org/article/case-status-sanctuary-jurisdiction-litigation/> [https://perma.cc/3TLA-5L9H].

46. Building a wall across the southern border of the United States was one of President Trump’s key campaign promises. For his evolving stance on “the wall,” see Ron Nixon & Linda Qiu, *Trump’s Evolving Words on the Wall*, N.Y. TIMES (Jan. 18, 2018), <https://www.nytimes.com/2018/01/18/us/politics/trump-border-wall-immigration.html> [https://perma.cc/7R94-QQXE].

47. See *President Donald J. Trump Backs Raise Act*, THE WHITE HOUSE (Aug. 2, 2017), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-backs-raise-act/> [https://perma.cc/6NX Y-8224]. To reference the Act and related Bills, see *RAISE Act*, CONGRESS.GOV <https://www.congress.gov/bill/115th-congress/senate-bill/354/text> [https://perma.cc/A4G7-A3FR]; see also Julia Gelatt, *The RAISE Act: Dramatic Change to Family Immigration, Less So for the Employment Based System*, MIGRATION POL’Y INST. (Aug. 2017), <https://www.migrationpolicy.org/news/raise-act-dramatic-change-family-immigration-less-so-employment-based-system> [https://perma.cc/8ZFA-6TFA].

48. D’Vera Cohn, *What To Know About The Citizenship Question the Census Bureau Is Planning To Ask in 2020*, PEW RESEARCH CENTER (Mar. 30, 2018), <http://www.pewresearch.org/fact-tank/2018/03/30/what-to-know-about-the-citizenship-question-the-census-bureau-is-planning-to-ask-in-2020/> [https://perma.cc/Y9FD-LDVD]. There are currently six lawsuits challenging this action—two each in New York, California and Maryland. See *Litigation About the 2020 Census*, BRENNAN CENTER FOR JUSTICE (Feb. 22, 2019), <https://www.brennancenter.org/analysis/2020-census-litigation> [https://perma.cc/3U9P-9VQG]. The lawsuits contend that the question is unconstitutional because it would violate the government’s duty under the Constitution to count the complete population in the United States by deterring participation and also contain allegations about the failure to comply with the Administrative Procedures Act as well as allegations of illegal discrimination against certain groups. *Id.*

questionnaire is necessary to provide complete and accurate census block level data,” allowing the department to accurately measure the portion of the population eligible to vote.⁴⁹

Critics are quick to point out that such a move is tantamount to gerrymandering: specifically, that the inclusion of such a question would undoubtedly prompt immigrants who are in the country illegally not to respond for fear of possible repercussions.⁵⁰ The result would be a significant underreporting of the population, particularly in areas with a high immigrant population, and in turn, a redistricting skewed in favour of Republicans.⁵¹

In May 2018, the Trump administration announced a new “zero tolerance” policy for illegal border crossings, saying that it would significantly increase criminal prosecutions of migrants.⁵² The practice, which has been universally condemned⁵³ by human rights advocates,⁵⁴ Democratic lawmakers,⁵⁵ and the United Nations,⁵⁶ has resulted in the separation of thousands of children from their families.⁵⁷ A U.S. Customs and Border

49. Emily Baumgaertner, *Despite Concerns, Census Will Ask Respondents if They Are U.S. Citizens*, N.Y. TIMES (Mar. 26, 2018), <https://www.nytimes.com/2018/03/26/us/politics/census-citizenship-question-trump.html> [https://perma.cc/Y4JN-RAK6].

50. See e.g., *id.*; Cohn, *supra* note 48.

51. See e.g., Baumgaertner, *supra* note 49; Cohn, *supra* note 48.

52. *Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration*, U.S. DEP'T OF JUSTICE (May 7, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions> [https://perma.cc/XJ98-DLNQ].

53. See Letter from Hilarie Bass, ABA President to Att'y Gen. Jeff Sessions and DHS Sec'y Kirstjen Nielsen (June 12, 2018), https://www.americanbar.org/content/dam/aba/administrative/child_law/abafamily-separation-letter.pdf [https://perma.cc/57YK-77SL] (condemning the zero-tolerance policy and family separation).

54. Nick Cumming-Bruce, *U.N. Rights Chief Tells U.S. To Stop Taking Migrant Children From Parents*, N.Y. TIMES (June 18, 2018), <https://www.nytimes.com/2018/06/18/world/europe/trump-migrant-children-un.html> [https://perma.cc/43TY-H4AA]; *Zero-Tolerance Criminal Prosecutions: Punishing Asylum Seekers and Separating Families*, HUMAN RIGHTS FIRST (July 18, 2018), <https://www.humanrightsfirst.org/resource/zero-tolerance-criminal-prosecutions-punishing-asylum-seekers-and-separating-families> [https://perma.cc/YKP2-LAGS]; *Q&A Trump Administration's "Zero Tolerance" Immigration Policy*, HUMAN RIGHTS WATCH (Aug. 16, 2018), <https://www.hrw.org/news/2018/08/16/qa-trump-administrations-zero-tolerance-immigration-policy#q6> [https://perma.cc/AEV2-8CYV].

55. Sean Sullivan, “Zero Tolerance Policy Means Zero Humanity:” *Democrats Decry Trump Immigration Policy After Tour of Detention Center*, WASH. POST (June 17, 2018), https://www.washingtonpost.com/politics/zero-tolerance-policy-means-zero-humanity-democrats-decry-trump-immigration-policy-after-tour-of-detention-center/2018/06/17/bb6f68b2c-7248-11e8-9780-b1dd6a09b549_story.html?utm_term=.e62cbad1e26f [https://perma.cc/6Y36-QKUU]; Adam Edelman, “We Have Zero Tolerance For Your Term:” *Democrats Call On DHS's Nielsen to Resign*, NBC NEWS (June 19, 2018), <https://www.nbcnews.com/storyline/immigration-border-crisis/democrats-call-dhs-nielsen-resign-over-family-separation-policy-border-n884596> [https://perma.cc/QX7H-MCZU]; *Democrats, Republicans Slam Trump's "Zero Tolerance Policy,"* THE WEEK (June 18, 2018), <https://theweek.com/speedreads/779618/democrats-republicans-slam-trumps-zero-tolerance-policy> [https://perma.cc/8H2C-K9SB].

56. *UN Experts to US: "Release Migrant Children from Detention and Stop Using them to Deter Irregular Migration,"* U.N. OFF. OF HIGH COMM'R (June 22, 2018), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23245&LangID=E> [https://perma.cc/H254-X9ZE].

57. Ramsey Touchberry, “Zero Tolerance”: *Hundreds of Immigrant Children Remain Separated, Some Under Age of 5, Thanks To Trump Policy*, NEWSWEEK (Oct. 16, 2018), <https://www.newsweek.com/immigrant-children-separated-parents-trump-1171943> [https://perma.cc/CB5C-GYZJ]; Dara Lind, *The*

Protection (“CBP”) official testified in May 2018 to Congress that between May 6, 2018 and May 19, 2018, the Department of Homeland Security separated 658 children from 638 parents because of the increase in prosecutions.⁵⁸ That brings the total of officially acknowledged separations to more than 2,400.⁵⁹ Among the many victims of this draconian policy are Esteban Pastor and his 18-month-old son, separated after they were arrested for crossing the southern border illegally in the summer of 2017. Esteban had mortgaged his land in Guatemala to pay for his son’s medical bills. To pay off the loan, he entered the United States in an effort to secure employment. Instead, he was detained by border patrol officers. His son was placed in a federal detention center, and three months later Esteban was deported—alone. Federal law enforcement agents informed Esteban that his young son was “somewhere in Texas.” Fortunately, two months later, father and son were reunited in Guatemala.⁶⁰ Under this new policy, children are also being taken from those seeking asylum in the country.⁶¹ Indeed, a Congolese woman with a 7-year-old daughter surrendered herself to border patrol agents outside San Diego last November and expressed fear of facing persecution if she returned home. Though her claims were judged legitimate, her daughter was still taken from her and sent to a facility 2,000 miles away in Chicago.⁶²

Trump Administration's Separation of Families at the Border, Explained, VOX (June 15, 2018), <https://www.vox.com/2018/6/11/17443198/children-immigrant-families-separated-parents> [https://perma.cc/L2QW-HLMQ]; Debbie Nathan, *Children Separated Under Trump's "Zero Tolerance" Policy Say Their Trauma Continues*, THE INTERCEPT (Aug. 26, 2018), <https://theintercept.com/2018/08/26/children-separated-under-trumps-zero-tolerance-policy-say-their-trauma-continues/> [https://perma.cc/ER7Y-PH83].

58. Mica Rosenberg, *Exclusive: Nearly 1,800 Families Separated at the U.S.-Mexico Border in 17 Months through February*, REUTERS (June 8, 2018), <https://www.reuters.com/article/us-usa-immigration-children-exclusive/exclusive-nearly-1800-families-separated-at-us-mexico-border-in-17-months-through-february-idUSKCN1J42UE> [https://perma.cc/8N8A-RXJZ]; Joshua Breisblatt, *DHS Prosecutes Over 600 Parents in Two-Week Span and Seizes their Children*, IMMIGRATION IMPACT (May 25, 2018), <http://immigrationimpact.com/2018/05/25/dhs-prosecutes-over-600-parents-in-two-week-span-and-seizes-their-children/> [https://perma.cc/YKC3-Z676]; Caitlin Dickerson, *Hundreds of Immigrant Children Have Been Taken From Parents at the U.S. Border*, N.Y. TIMES (Apr. 20, 2018), <https://www.nytimes.com/2018/04/20/us/immigrant-children-separation-ice.html> [https://perma.cc/T2TH-E5XJ]. However, according to a report released on January 17, 2019 by the Inspector General for the Department of Health and Human Services, it is possible that thousands more migrant children were separated from their families than previously reported by the Trump administration. It remains unclear whether or not these children have been reunified. See OF. INSPECTOR GEN., OEI-BL-18-00511 (Jan. 2019), <https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf> [https://perma.cc/5V7H-J3PH] (“Between July and December 2018, ORR staff received new information indicating that some children who had been in ORR’s care as of June 26, 2018, and whom ORR had not included on the certified list had, in fact, been separated from a parent.”).

59. Rosenberg, *supra* note 58.

60. Lomi Kriel, *Immigrant Families Separated at the Border Struggle to Find Each Other*, HOUS. CHRON. (May 24, 2018), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Immigrant-families-separated-at-border-struggle-12938759.php#photo-14738340> [https://perma.cc/6EVF-4PJV].

61. See HUMAN RIGHTS FIRST, *supra* note 54.

62. *Congolese Woman Released From Federal Custody, But 7-Year Old Daughter Remains Detained in Chicago*, CHI. TRIB. (Mar. 7, 2018), <https://www.chicagotribune.com/news/local/breaking/ct-met-congolese-woman-daughter-chicago-20180307-story.html> [https://perma.cc/D6EB-ZH89].

Taking to Twitter, Trump claimed that these family separations are the result of a “horrible law” that Democrats could end *if they only wanted to!*⁶³ Of course, this is not the case. There is no such law—it is a policy of the Trump administration. Indeed, in May 2018, the Attorney General himself traveled to San Diego to boast about it: “If you are smuggling a child then we will prosecute you, and that child will be separated from you as required by law,” Sessions said. “If you don’t like that, then don’t smuggle children over our border.”⁶⁴ Chief of Staff John Kelly called the policy a “tough deterrent.”⁶⁵ And that is precisely the point: America’s doors to the world are closed (with exceptions for places like Norway).⁶⁶

The Trump administrations “zero-tolerance” policy is entirely consistent with Trump’s overall anti-immigration policy, which has allowed for the systematic dehumanization of immigrants and refugees. Perhaps the nadir of this descent was reached on June 11, 2018, when Jeff Sessions ruled that domestic and gang violence cases no longer generally qualify for asylum.⁶⁷ As part of his “zero-tolerance” approach to illegal immigration, Sessions’ determination overturned a 2016 immigration appeals court ruling granting asylum to a woman from El Salvador who had been raped and abused by her husband.⁶⁸ “Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum,” Sessions wrote in his thirty-one-page ruling.⁶⁹ He added: “The mere fact that a country may have problems effectively policing certain crimes – such as domestic violence or gang violence – or that certain populations are more likely to be victims of crime, cannot itself establish an asylum claim.”⁷⁰ Since 2014, when the Board of Immigration Appeals ruled in favor of a Guatemalan woman fleeing domestic violence, tens of thousands of asylum seekers, especially women from Central America, have

63. @realDonaldTrump, TWITTER (May 26, 2018). See also Domenico Montanaro, *Family Separation is Trump’s Immigration Policy. Here’s Why He Won’t Own It*, NPR (June 20, 2018), <https://www.npr.org/2018/06/20/621489166/family-separation-is-trumps-immigration-policy-here-s-why-he-won-t-own-it> [<https://perma.cc/NZ4A-Z285>].

64. Aric Jenkins, *Jeff Sessions: Parents and Children Illegally Crossing the Border Will Be Separated*, TIME (May 7, 2018), <http://time.com/5268572/jeff-sessions-illegal-border-separated/> [<https://perma.cc/5656-6Q4N>].

65. Philip Bump, *Here Are the Administration Officials Who Have Said That Family Separation is Meant As a Deterrent*, WASH. POST (June 19, 2018), https://www.washingtonpost.com/news/politics/wp/2018/06/19/here-are-the-administration-officials-who-have-said-that-family-separation-is-meant-as-a-deterrent/?utm_term=.f0966c48244b [<https://perma.cc/LRB4-XBF2>].

66. This is an oblique reference to President Trump’s remarks in an Oval Office meeting in which he said that he wanted fewer immigrants from “shithole” countries like Haiti, and more immigrants from countries like Norway. See Jen Kirby, *Trump Wants Fewer Immigrants From “Shithole Countries” And More From Places Like Norway*, VOX (Jan. 11, 2018), <https://www.vox.com/2018/1/11/16880750/trump-immigrants-shithole-countries-norway> [<https://perma.cc/P5R5-UV3C>].

67. Katie Benner & Caitlin Dickerson, *Sessions Says Domestic and Gang Violence Are No Longer Grounds for Asylum*, N.Y. TIMES (June 11, 2018), <https://www.nytimes.com/2018/06/11/us/politics/sessions-do-mestic-violence-asylum.html> [<https://perma.cc/37SK-U3CD>]; see also 27 I.&N. Dec. 316 (A.G. 2018).

68. Benner & Dickerson, *supra* note 67; 27 I.&N. Dec. 316, *supra* note 67.

69. See 27 I.&N. Dec. 316, *supra* note 67, at 320.

70. *Id.*

been granted asylum to stay in the United States.⁷¹ A landmark case for immigration law, that ruling was the result of the Obama administration's decision to treat victims of domestic violence as members of a social group that required protection.⁷² In closing off this avenue, President Trump has effectively condemned untold thousands of individuals to death all in a bid to score political points with his base.⁷³

II. FROM THE LAND OF IMMIGRANTS TO A GATEKEEPING NATION

Though squarely at odds with the principles of justice and equality upon which the United States—the quintessential nation of immigrants—was founded, Trump's virulent anti-immigration playbook is based on a long history. In fact, Trump's specific policies fit well within the broader development of American immigration policy, which has been exclusionary and xenophobic at times and always determined by an overriding political will that placed national interests over those of immigrants. This narrow definition of our national interests has now extended to how the federal government treats child migrants.

For most of the nineteenth century, on the federal level the United States had an open-door immigration policy. In contrast, various restrictions on immigration existed at the state level, which is where much of immigration policy took place early on.⁷⁴ While Congress introduced a few selective statutes in the last quarter of the nineteenth century—for instance, one act excluded prostitutes, persons “likely to become a public charge,” felons, paupers, and persons with mental and physical defects or infectious diseases⁷⁵—these policies had little impact on the flow of immigrants (primarily from Europe) into the country.⁷⁶ Deviating significantly and quite strikingly from this open-door policy was the Chinese Exclusion Act of 1882.⁷⁷ Passed by Congress in response to growing anti-Chinese sentiment and populist calls for immigration restriction, the act was the first immigration exclu-

71. Benner & Dickerson, *supra* note 67; 27 I.&N. Dec. 316, *supra* note 67.

72. Julia Preston, *In First for Court, Woman Is Ruled Eligible for Asylum in U.S. on Basis of Domestic Abuse*, N.Y. TIMES (Aug. 29, 2014), <https://www.nytimes.com/2014/08/30/us/victim-of-domestic-violence-in-guatemala-is-ruled-eligible-for-asylum-in-us.html> [https://perma.cc/QR6L-HW7M].

73. According to the U.S. Citizenship and Immigration Services, a backlog of 311,000 asylum claims existed as of late January 2018. Immigration attorneys said they believe a substantial percentage of them include women and victims of gang violence. See Evan Halper, *U.S. to Bar Victims of Domestic Abuse. No Help Despite 'Vile Abuse.' Sessions Also Rejects Gang Violence As a Basis for Asylum*, L.A. TIMES, http://enewspaper.latimes.com/infinity/article_share.aspx?guid=ea0c3fb-f939-4102-be54-d85c28a02ab3 [https://perma.cc/MMN4-L7EX].

74. See generally Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833 (1993) (examining the major categories of state immigration law during the first century of American history).

75. See Act of Aug. 3, 1882, ch. 376, 22 Stat. 214 (1883).

76. ARISTIDE R. ZOLBERG, *A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA* 1 (2006).

77. Act of May 6, 1882, ch. 126, § 1, 22 Stat. 58, 59 (1882).

sion policy based on race and nationality.⁷⁸ It banned Chinese laborers from entering the country and declared all Chinese immigrants ineligible for US citizenship by naturalization.⁷⁹ Significantly, the Chinese Exclusion Act set in motion new standards of immigration regulation, such as federal immigration officials who inspected and processed newly-arrived foreigners, government-issued identity and residence documents (e.g., passports and green cards), and additional regulations including deportation centers, a definition of illegal immigration, and the possibility of deportation.⁸⁰

The Chinese Exclusion Act was a legislative watershed in U.S. immigration history, ushering in a new era in which one could argue that the United States, at least conceptually, stopped being a nation of immigrants and instead became a gatekeeping nation.⁸¹ It was a nation that used immigration laws to exclude, restrict, and control the flow of immigrants into the country, usually on the basis of race, ethnicity, socio-economic status, and sex.⁸² As immigration came to be viewed as a threat, rather than as a

78. ANDREW GYORY, *CLOSING THE GATE: RACE, POLITICS, AND THE CHINESE EXCLUSION ACT 1* (1998); ERIKA LEE, *AT AMERICA'S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882-1943* 24 (2003).

79. Act of May 6, 1882, ch. 126, 22 Stat. 58. In 1943, Congress passed the Magnuson Act, which finally repealed the discriminatory exclusion laws against the Chinese. The Magnuson Act was wholly grounded in the exigencies of World War II, when the U.S. needed an alliance with China in its war against Japan. See Chinese Exclusion Repeal Act of 1943, ch. 344, § 1, 57 Stat. 600.

80. See generally GEORGE A. PEPPER, *IF THEY DON'T BRING THEIR WOMEN HERE: CHINESE FEMALE IMMIGRATION BEFORE EXCLUSION* (1999); JOHN TORPEY, *THE INVENTION OF THE PASSPORT: SURVEILLANCE, CITIZENSHIP, AND THE STATE* 97-100 (2000); LEE, *supra* note 78, at 24-25.

81. The Chinese Exclusion Act suspended all immigration of Chinese laborers for 10 years and prohibited all Chinese, even those born in the United States, from being naturalized. See Chinese Exclusion Act, ch. 26 at 59. The Chinese Exclusion Act was the first American immigration law to place substantive restrictions on all immigrants, rather than just convicts, prostitutes, lunatics, idiots, and those likely to become public charges. It also imposed a head tax on all immigrants. See *id.* The Act of 1891 established the Bureau of Immigration and, along with additional grounds for exclusion, also added a medical examination as a prerequisite for entry. See Immigration Act of 1891, ch. 551 §§ 7-8, 26 Stat. 1084, 1085 (codified at 8 U.S.C. § 1182 (1976)). Finally, the 1924 Immigration Act provided for national origin quotas, setting arbitrary numerical limits for immigrants regardless of satisfaction of other criteria. Immigration Act of 1924, ch. 190, § 11, 43 Stat. 153 (repealed 1952, 66 Stat. 279). See also, John Hayakawa Torok, *Reconstruction and Racial Nativism: Chinese Immigrants and the Debates on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Laws*, 3 *ASIAN L.J.* 55, 97 (1996) (stating that "[t]he 1882 Chinese Exclusion Act was the first national race-based immigration exclusion in American history and thus was a watershed event in U.S. immigration policy.") (citations omitted); LUCY E. SALYER, *LAW HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* (1996); see generally Patricia I. Folan, *U.S. Immigration Law, Irish Immigration and Diversity: CEAD Failte (A Thousand Times Welcome)*, 6 *GEO. IMMIG. L. J.* 745 (1992).

82. U.S. Immigration law is both implicit and explicit in its discrimination towards women. Since its inception as formalized federal law, immigration law has contained explicitly discriminatory provisions that restrict the manner in which women could enter the country, and the type of immigration status benefits for which they might be eligible.

From the beginning, immigration law embraced the legal doctrine of coverture—whereby women were considered little more than property of their husbands, unable to act independently in the eyes of the law. See Janet Calvo, *A Decade of Spouse-Based Immigration Laws: Coverture's Diminishment, but Not Its Demise*, 24 *N. ILL. U. L. REV.* 153, 161 (2004). The resulting oppression took various forms, including immigrant women's entrance and formal admission to the United States, their ability to sponsor family members for admission, and the laws surrounding naturalization of women. The effect of marital status—that is, being married—was of critical importance. Thus, being married (or unmarried) impacted

benefit, to the country, the Supreme Court, in concert with Congress, forged the so-called plenary power doctrine. This doctrine recognized immigration law as an instrument of national sovereignty, to be used exclusively by the federal government without judicially enforceable constitutional constraints.⁸³ Although scholars and jurists widely and persistently condemn it, the plenary power endures to this day.⁸⁴

a woman's ability to lawfully immigrate and remain in the country, to eventually naturalize, or even to retain her American citizenship. For example, both the Immigration Act of 1917 and the Immigration Act of 1924 (and their later amendments) barred certain American citizen women married to foreign national men from petitioning for lawful immigration status for their husbands, while no such restrictions existed for men. *See* S. REP. NO. 81-1515 OF 1950, at 414–15 (1951). Similarly, the Immigration Act of 1917 provided what was essentially a waiver of the literacy requirement for otherwise admissible aliens if the petitioner was a man seeking to bring his father, grandfather, wife, mother, grandmother, or unmarried or widowed daughter. *Id.* at 415. *See also* James Calvo, *Spouse-Based Immigration Laws: The Legacies of Coverture*, 28 SAN DIEGO L. REV. 593, 600–06 (1991) (discussing the history of gender discrimination in early immigration law). No such waiver existed for a woman petitioning for those same family members. Other explicitly discriminatory provisions abounded in these early immigration laws. *See* S. REP. NO. 81-1515 OF 1950, at 415–17 (describing discrimination against women treaty traders, women seeking to bring in family members affected with certain contagious diseases, and women ministers and professors, among other categories experiencing blatant discrimination). Immigration law also historically discriminated against women in the naturalization context. Due to the law's formalized racial discrimination, only white women could naturalize through their U.S. citizen husbands. Moreover, U.S. citizen women lost their citizenship if they married immigrants who were themselves ineligible for citizenship. *See, e.g.*, Act of Mar. 2, 1907, ch. 2534, § 3, 34 Stat. 1228, 1228 (“[A]ny American woman who marries a foreigner shall take the nationality of her husband.”).

With the passage of the Immigration and Nationality Act of 1952, the law that still forms the basis for the current version of the INA, much of the oppressive effects of immigration law against women were done away with. But discrimination and oppression against women were still operational in the law's implementation. For instance, the family-based immigration visa petitioning process—whereby a lawful permanent resident or U.S. citizen spouse is required to petition for their foreign national spouse's immigration status—became an easy vehicle for abusive spouses with lawful or citizen status to manipulate and keep their spouses in the abusive marriages. *See* Julie E. Dinnerstein, *Options for Immigrant Victims of Domestic Violence*, in IMMIGRATION AND NATIONALITY LAW HANDBOOK 430 (2007).

And as studies consistently show, women make up the vast majority of domestic violence victims. *See Intimate Partner Violence: Consequences*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www/cdc.gov/violenceprevention/intimatepartnerviolence/consequences.html> [<https://perma.cc/9EGN-P47T>] (citing studies that women suffer domestic violence at nearly four times the rate of men). Similarly, in an effort to curb the influx of illegal aliens arriving into the United States from Central and South America, who were fleeing violence and political turmoil and oppression and seeking employment, Congress passed the 1986 IRCA law. Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified at 8 U.S.C. § 1324a). The IRCA created strict prohibitions against employers hiring undocumented people and increased enforcement measures at the southern border. But in light of the large number of undocumented workers already in the country, the law also provided a path towards legalization, including one for undocumented agricultural workers. As critics point out, however, the legislation disproportionately benefited men, who were more often employed in the agriculture industry. *See, e.g.*, Margot Mendelson, *The Legal Production of Identities: A Narrative Analysis of Conversations with Battered Undocumented Women*, 19 BERKELEY WOMEN'S L.J. 138, 205–06 (2004). No such legalization program was available for the thousands of undocumented women who toiled away as nannies and housecleaners, hotel workers, and hospital aides. More recently, the Trump Administration has made it even more difficult for women to escape domestic and state-sponsored violence and abuse within their countries of origin. *See* the discussion of domestic and gang violence cases, and the Trump administration's “zero tolerance” policy, *supra* pp. 11–13.

83. *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889).

84. *See* David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 29 (2015) (“The Court adheres to a strong [plenary power] deference doctrine because it is concerned

Once the principle of immigration restriction had been codified in law, efforts in Congress to construct a “nation by design” that reinforced an Anglo-Saxon homogeneity through exclusionary immigration laws and policies accelerated.⁸⁵ These efforts culminated in the Immigration Act of 1924—a law which Sessions once praised as having had a positive effect on American society.⁸⁶ The end result of a long legislative process informed by the politics of eugenics and post-World War I nativism, the Reed-Johnson Act introduced into law the national origins quota system—a formulaic calculation that differentiated Europeans according to nationality and ranked them in a hierarchy of desirability.⁸⁷ According to historian Mae Ngai, the system favored the “‘Nordics’ of northern and western Europe over the ‘undesirable races’ of eastern and southern Europe”—in particular Jews, Italians, Slavs, and Greeks—all in an effort to ensure stability in the ethnic composition of the country.⁸⁸ As one contemporary commentator remarked approvingly in 1924, the national origins quota system was “a scientific plan for keeping America American.”⁸⁹ Moreover, the Act closed the door on further Asian immigration by denying admission to people from the nations of the Far East, thereby incorporating the principle of racial exclusion into general immigration law and policy.⁹⁰

In the aftermath of World War II, the refugee crisis in Europe and growing concern over the threat posed by the Soviet Union prompted calls for immigration reform.⁹¹ The result was the short-lived McCarran-Walter Im-

that lower courts, if given wider authority to review, will overvalue individual interests and undervalue governmental interests.”).

85. See Zolberg, *supra* note 76, at 1.

86. See Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153; Adam Serwer, *Jeff Sessions’s Unqualified Praise for a 1924 Immigration Law*, THE ATLANTIC (Jan. 10, 2017), <https://www.theatlantic.com/politics/archive/2017/01/jeff-sessions-1924-immigration/512591/> [https://perma.cc/UAV4-26Q5]. Sessions stated, “When the [immigration] numbers reached about this high in 1924, the president and congress changed the policy, and it slowed down immigration significantly, we then assimilated through the 1965 and created really the solid middle class of America, with assimilated immigrants, and it was good for America.” *Id.*

87. Immigration Act of 1924, ch. 190, § 11, 43 Stat. 153 (repealed 1952).

88. Immigration Act of 1924, ch. 190, § 11, 43 Stat. 153 (repealed 1952). Although it was framed in terms of national quotas rather than explicit outright “racial” exclusion, the Immigration Act of 1924 is properly understood as race legislation. See Mae M. Ngai, *The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924*, 86 J. AM. HIST. 67, 69 (1999); Mary Fan, *The Case for Crimmigration Reform*, 92 N.C. L. REV. 75, 106 (2013) (“The Immigration Act of 1924, also known as the National Origins Act, elaborated on the use of racial quotas to preserve the Northern European ideal for the nation, particularly impeding Asian (including Japanese) and Eastern European immigration.”).

89. A. Warner Parker, *The Quota Provisions of the Immigration Act of 1924*, 18 A. J. INT’L L. 737, 740 (1924).

90. Immigration Act of 1924, ch. 190, § 11, 43 Stat. 153 (repealed 1952); see also, Ngai, *supra* note 88, at 80.

91. See generally DAVID SCOTT FITZGERALD & DAVID COOK-MARTIN, *CULLING THE MASSES, THE DEMOCRATIC ORIGINS OF RACIST IMMIGRATION POLICY IN THE AMERICAS* (2014) (examining the foreign policy and domestic concerns that led to the design and implementation of the Immigration and Nationality Act of 1965); Pricilla Alvarez, *A Brief History of American’s ‘Love-Hate Relationship’ with Immigration*, THE ATLANTIC (Feb. 19, 2017), <https://www.theatlantic.com/politics/archive/2017/02/>

migration Act of 1952, which revised, clarified, and codified all of the immigration laws, including the national quota system.⁹² Supporters of the quota system viewed it as a *sine non qua* for maintaining national security. Absent the racist rhetoric that had informed the National Origins Act of 1924, the new language of national security necessitated such quotas and helped to justify intense suspicion of suspected communists.⁹³ Opponents of the bill labeled it racist, xenophobic, contrary to the country's foreign policy efforts, and destructive of civil liberties, arguing that the quotas undermined American claims to being a just and democratic society and thus badly damaged the nation's image abroad, a question of urgent concern in the Cold War struggle for international influence.⁹⁴ Ultimately, the McCarran-Walter Act passed both the House and Senate by overwhelming majori-

donald-trump-immigration/517119/ [https://perma.cc/MP23-3JH5]; Richard A. Boswell, *Crafting True Immigration Reform*, 35 WM. MITCHELL L. REV. 7, 9 (2008) ("The McCarran-Walter Act was enacted at the height of the nation's concern about the threat of communism and therefore contained numerous ideologically restrictive provisions."); see also Zhao, *supra* note 13.

92. See Act of May 19, 1921 Pub. L. No. 42-5, ch. 8, 42 Stat. 5 (1921).

93. See, e.g., CHERYL SHANKS, *IMMIGRATION AND THE POLITICS OF AMERICAN SOVEREIGNTY, 1890-1990* 71-72 (2001); Maxine S. Seller, *Historical Perspectives on American Immigration Policy: Case Studies and Current Implications*, 45 LAW & CONTEMP. PROBS. 137, 156 (1982); DAVID CAUTE, *THE GREAT FEAR: THE ANTI-COMMUNIST PURGE UNDER TRUMAN AND EISENHOWER* 26 (1978); MILTON R. KONVITZ, *CIVIL RIGHTS IN IMMIGRATION* (1953); Mitchell C. Tilner, *Ideological Exclusions of Aliens: The Evolution of a Policy*, 2 GEO. IMMIGR. L.J. 1, 63 (1987); HANK GREENSPUN & ALEX PELL, *WHERE I STAND: THE RECORD OF A RECKLESS MAN* 197 (1966). See generally MICHAEL YBARRA, *WASHINGTON GONE CRAZY: SENATOR PAT MCCARRAN AND THE GREAT AMERICAN COMMUNIST HUNT* (2004).

Democratic Representatives Francis Walter of Pennsylvania and Senator Pat McCarran of Nevada were avowed anti-Communists and vocal supporters of the national origins quotas system. In 1947, as Chairman of the Senate Judiciary Committee, McCarran authorized a study of immigration that in 1950 resulted in a 900-page report and recommendations—the most extensive since the forty-two volume Dillingham Report of 1911. Not surprisingly, the McCarran report, which became the basis for the INA, concluded that quotas were essential for ensuring the stability of the nation. While explicitly repudiating “any theory of Nordic superiority”—especially since that was what Hitler had preached and focusing instead on issues of national security and anti-Communism, the report did echo the concerns voiced by earlier nativists about the changing ethnic character of immigration. It noted, for example, that America's Jewish population had increased “twenty-one fold” since 1877 while the total population had increased only “threefold” in the same period. In 1952, the two legislators co-sponsored and were instrumental in passing the McCarran-Walter Act, an omnibus bill that overhauled certain aspects of immigration law but nevertheless maintained the national origins quotas system as its central structuring principle. In concert with the 1950 National Security Act, the McCarran-Walter Act represented a direct challenge to the post-war liberalization of U.S. immigration law that saw the creation of displaced persons legislation of 1948 and 1950. See ROGER DANIELS, *GUARDING THE GOLDEN DOOR: AMERICAN IMMIGRATION POLICY AND IMMIGRANTS SINCE 1882* 116 (2005); ZOLBERG, *supra* note 76, at 311.

94. The most prominent opponent of the McCarran-Walter Act was Herbert Lehman (D-NY). In affirming the quotas, Lehman asserted that the bill was premised “on the assumption that America is under the constant threat of losing her Anglo-Saxon character because of immigration, and that the so-called blood-stock of America, described as Anglo-Saxon and Nordic, is the basis of America and must be preserved from contamination by foreign immigrants.” As Lehman pointed out, however, “this racist philosophy based on belief in blood-stocks and the superiority of the Nordic strain” was “strikingly similar to the basic racial philosophy officially espoused so unfortunately and with such tragic consequences in Nazi Germany.” See 98 CONG. REC. 5,102 (1952); *Aliens Bill Stirs Filibuster Charge: Foes of McCarran Measure to Revise Immigration Laws Offer 136 Amendments*, N.Y. TIMES (May 14, 1952), https://www.nytimes.com/1952/05/14/archives/aliens-bill-stirs-filibuster-charge-foes-of-mccarran-measure-to.html [https://perma.cc/QM2W-UEL8].

ties and with widespread support from both parties, becoming law on May 22, 1952.⁹⁵ On June 25, 1952, President Truman vetoed the legislation, denouncing it as “an arrogant, brazen instrument of discrimination,” adding that:

The basis of this quota system was false and unworthy in 1924. It is even worse now. At the present time, this quota system keeps out the very people we want to bring in. It is incredible to me that, in this year of 1952, we should again be enacting into law such a slur on the patriotism, the capacity, and the decency of a large part of our citizenry.⁹⁶

Truman’s veto, which was consistent with the president’s overall position on civil rights, challenged the bill as inherently un-American, and contrary to the values, ideals, and traditions that had defined the country as a land of freedom and liberty for all, regardless of race, class, or ethnicity. For members of Congress, however, who passed the bill over Truman’s veto on June 27, 1952, America’s success, indeed its very survival, rested on preserving the sociological and cultural balance (i.e., Anglo-Saxon hegemony) of the country through a restrictive immigration policy that excluded immigrants from southern and eastern Europe and Asia.⁹⁷

In spite of—or rather because of—its blatant discrimination and racism, the national origins quota system remained in effect until October 3, 1965, when Congress passed the Immigration and Nationality Act (“INA”), the basis of today’s immigration law.⁹⁸ As he signed the bill into law in a ceremony at the base of the Statue of Liberty in the New York harbour, President Lyndon B. Johnson proclaimed that with the new law, “the lamp of this grand old lady is brighter today—and the golden door that she guards gleams more brilliantly.”⁹⁹ He also criticized the discriminatory policy of national quotas:

This system violates the basic principle of American democracy—the principle that values and rewards each man on the basis of his merit as a man. It has been un-American in the highest sense, because it has been untrue to the faith that brought thousands to these shores even before we were a country.¹⁰⁰

95. The Senate voted fifty-seven to twenty-six to override the veto, two votes more than the two-thirds majority needed to override the President. The House met its two-thirds threshold as well. See 98 CONG. REC. 8,253, 8,267–68 (1952).

96. President Harry S. Truman’s Veto of Bill to Revise the Laws Relating to Immigration, Naturalization, and Nationality 1 PUB. PAPERS 443 (June 25, 1952).

97. BILL ONG HING, *DEFINING AMERICA: THROUGH IMMIGRATION POLICY* 75–77 (2004).

98. Technically speaking, the statute itself was actually an extensive series of amendments to the Immigration and Nationality Act of 1952, which remains the basic immigration law of the country to this day.

99. President Lyndon B. Johnson’s Remarks at the Signing of the Immigration Bill, Liberty Island, New York, 2 PUB. PAPERS 1040 (Oct. 3, 1965).

100. *Id.* at 1038.

Driven in part by the civil rights movement, which sought to end racial discrimination in the country, and in part by foreign policy concerns stemming from the rapid decolonization of Africa and Asia and the ongoing competition with the Soviet Union for the hearts and minds of the developing world, the INA ushered in a new era of mass immigration.¹⁰¹ In place of quotas, the INA created a new set of preference categories based on family reunification and professional skills, effectively placing people from all national, cultural, political, and ethnic backgrounds on equal footing for immigration into the country.¹⁰² It established an annual cap of 170,000 visas for immigrants from the Eastern Hemisphere, with no country in the hemisphere allowed more than 20,000.¹⁰³ And it also imposed, for the first time, a cap on the number of immigrants (120,000) from the Western Hemisphere.¹⁰⁴ In so doing, the INA unleashed one of the greatest waves of immigration in the nation's history and in the process radically transformed the racial demographics of the country. Indeed, in just over fifty years since the passage of the Immigration and Nationality Act, roughly 59 million immigrants have entered the United States, pushing the country's foreign-born share to a near record 14 percent (just below the record 15 percent seen shortly after the turn of the twentieth century).¹⁰⁵ Of these, the overwhelming majority are from Asia (25 percent) and Latin America (51 percent), as opposed to Europe.¹⁰⁶ Indeed, the demographic diversity of the U.S. population today in many ways is the direct result of the 1965 legislation.

While the INA has resulted in some of the most important changes in post-war American law and society, it did not completely remove all the vestiges of the early gatekeeping system. In place of a system that had been premised largely on racial and ethnic discrimination, the 1965 law created a new system in which class and status—to say nothing of nepotism—have

101. *Modern Immigration Wave Brings 59 Million to U.S., Driving Population Growth and Change Through 2065*, PEW RESEARCH CENTER, 23–34 (Sept. 28, 2015), http://www.pewresearch.org/wp-content/uploads/sites/5/2015/09/2015-09-28_modern-immigration-wave_REPORT.pdf [<https://perma.cc/R9ZP-CEEL>]; Muzaffar Chishti et al., *Fifty Years On, the 1965 Immigration and Nationality Act Continues to Reshape the United States*, MIGRATION POLICY INSTITUTE (Oct. 15, 2015), <https://www.migrationpolicy.org/article/fifty-years-1965-immigration-and-nationality-act-continues-reshape-united-states> [<https://perma.cc/6XNV-7HJX>] (“[The INA] . . . had a profound effect on the flow of immigrants to the United States, and in only a matter of years began to transform the U.S. demographic profile. The number of new lawful permanent residents (or green-card holders) rose from 297,000 in 1965 to an average of about 1 million each year since the mid-2000’s. Accordingly, the foreign-born population has risen from 9.6 million in 1965 to a record high of 45 million in 2015.”).

102. Immigration and Nationality Act of 1965, Pub. L. 89–236, 79 Stat. 911 (1968); see also DESMOND KING, *MAKING AMERICANS: IMMIGRATION, RACE, AND THE ORIGINS OF THE DIVERSE DEMOCRACY* 243 (2000).

103. Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89–236, 79 Stat. 911 (1965) §§ 201(a), 202(a), 203(a).

104. See Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89–236, 79 Stat. 911, § 21(e) (codified as amended in scattered sections of 8 U.S.C.).

105. PEW RESEARCH CENTER, *supra* note 101.

106. *Id.*

become the primary factors for admission.¹⁰⁷ Nor did the law remove many of the barriers established in the nineteenth century, including the “likely to become a public charge” clause (which has a disproportionate effect on noncitizens of color from developing nations),¹⁰⁸ as well as physical and mental health requirements.¹⁰⁹

Although the restrictions based on race were formally rejected, racial discrimination continues to shape immigration law and policy. The imposition of new across-the-board national quotas has resulted in lengthy lines for immigrants from developing nations, such as Mexico, the Philippines, and India (that is, places where depressed socio-economic conditions drive more people to seek opportunities elsewhere), and relatively short, or no lines for people from most other nations.¹¹⁰ Moreover, the architects of the law

107. The express—and oftentimes aggressive—exclusion of the poor is a fundamental function of modern U.S. immigration law, embodied in the provision of the Immigration and Nationality Act of 1952, the basis of today’s immigration law. Unlike domestic laws, which generally do not discriminate against the poor, immigration law is decidedly different. This discrimination is most noticeable in three areas: (i) the public-charge exclusion; (ii) the per-country caps on immigration; and (iii) the number of employment visas for low- and moderately-skilled workers. Under longstanding immigration law, an immigrant seeking permanent status or entry to the United States must prove she is not a “public charge,” or dependent on the government (*see, e.g.*, Act of August 3, 1882, ch. 367 (22 Stat. 214)). In 1996, Congress toughened the public-charge exclusion by significantly tightening the affidavit-of-support provisions to expressly make the affidavits legally enforceable in courts of law. INA § 212(a)(4), 8 U.S.C. § 1182(a)(4)(ii). The intent was clearly “to make it more difficult for noncitizens of modest means to migrate to the United States.” That same year, Congress stripped lawful immigrants, even those who had paid taxes, of eligibility for several major public-benefit programs. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, 110 Stat. 2105 (1996). Now, the Trump administration has proposed a new rule that would expand this test to include programs such as the Supplemental Nutrition Assistance Program and housing subsidies, making it more difficult for those seeking a green card to get food or financial help. *See* Dept. of Homeland Security, *DHS Announces New Proposed Immigration Rule to Enforce Long-Standing Law that Promotes Self-Sufficiency and Protects American Taxpayers* (Sept. 22, 2018), <https://www.dhs.gov/news/2018/09/22/dhs-announces-new-proposed-immigration-rule-enforce-long-standing-law-promotes-self> [<https://perma.cc/GJC2-N4X2>].

The INA’s imposition of across-the-board national quotas has unfairly impacted immigrants from developing nations like Mexico, the Philippines, and India. Currently, the number of immigrants from any one country in a year is limited to approximately 26,000. *See* INA § 203(a)(3), 8 U.S.C. § 1153(a)(3). The limits apply uniformly however great the demand of the citizens of a particular country to come to the United States. *Id.* In effect, people from the developing world face a much longer wait time than do similarly situated people seeking certain visas from almost all other nations. At the same time, the INA created a new set of preference categories based on family reunification and professional skills (Immigration Nationality Act (79 Stat. 911)), in effect putting the world’s poorest populations even further back in the line. Chishti, *supra* note 101.

108. Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1519–528 (1995) (describing the history and modern application of the public charge doctrine).

109. ROGER DANIELS, *COMING TO AMERICA: A HISTORY OF IMMIGRATION AND ETHNICITY IN AMERICAN LIFE* 340–42 (1990).

110. While Mexico, the Philippines, and India are consistently at or near the top, more recently other countries with depressed economic conditions, such as El Salvador, Guatemala, and Honduras have risen to the top group of countries with the longest family-based immigration visa wait times. *See* U.S. DEPT. OF STATE, *ANNUAL REPORT OF IMMIGRANT VISA APPLICANTS IN THE FAMILY-SPONSORED AND EMPLOYMENT-BASED PREFERENCES REGISTERED AT THE NATIONAL VISA CENTER AS OF NOVEMBER 1, 2017* (2017), https://travel.state.gov/content/dam/visas/Statistics/Immigrant-Statistics/WaitingList/WaitingListItem_2017.pdf [<https://perma.cc/U8SN-BDW5>] (citing family-based immigrant visa ap-

themselves expressed a desire to facilitate immigration from Europe and maintain the racial and ethnic homogeneity achieved under the 1924 quota system through the new family reunification preference category—an arrangement that gave priority to European immigrants (precisely because previous discriminatory measures allowed for a greater presence of Europeans in the country).¹¹¹ As President Johnson remarked during the signing ceremony, “This bill we sign today is not a revolutionary bill. It does not affect the lives of millions. It will not restructure the shape of our daily lives.”¹¹² Similarly, Senate Immigration Subcommittee Chairman Edward Kennedy (D-MA) reassured his colleagues and the nation that: “The bill will not flood our cities with immigrants. It will not upset the ethnic mix of our society. It will not relax the standards of admission. It will not cause American workers to lose their jobs.”¹¹³ Representative Emanuel Celler, one of the sponsors of the bill, disputed charges that the bill would allow entry to “hordes” of Africans and Asians or that the bill would allow the United States to become the “dumping ground” for Latin America.¹¹⁴ Asian American Senator Hiram L. Fong from Hawaii declared in Congress that “racial barriers [were] bad for America,” but he also predicted that only a small number of people from Asia would enter the country under the 1965 act.¹¹⁵ So it was by circumstance rather than by design that the main immigrant groups to take advantage of the new law came from Asia and Latin America and not Europe.

The framework of the INA remains largely intact today, as do ideologies and politics and policies of exclusion, which espouse a racialized narrative in which immigrants continue to pose a threat to the country.¹¹⁶ Groups that

plicants from Mexico, the Philippines, and India with the longest wait times); Moni Basu, *Waits for Immigration Status – The Legal Way – Can Be Long and Frustrating*, CNN (Sept. 9, 2014), <https://www.cnn.com/2014/09/08/us/immigration-visa-long-waits/index.html> [<https://perma.cc/9CUL-3PXA>]; Ishani Duttagupta, *Trump Card? ECON. TIMES* (Feb. 19, 2017) (noting that the historical higher demand for visas from China, India, Mexico, and the Philippines, given the country based quotas, result in much longer wait times); Ajay Malshe, *From Obsolete to Essential: How Reforming Our Immigration Laws Can Stimulate and Strengthen The United States Economy*, 3 ALB. GOV'T L. REV. 358, 389 (2010) (“Immigrants from Mexico, China, India and the Philippines suffer the most from the quota system because demand for immigrant visas is higher in these countries than anywhere else in the world.”).

111. Deane Heller & David Heller, *Our New Immigration Law*, AM. LEGION MAGAZINE, at 8 (Feb. 1966), <https://archive.legion.org/bitstream/handle/20.500.12203/3939/americanlegionma802amer.pdf?sequence=1&isAllowed=y> [<https://perma.cc/M9DW-6HPR>] (providing an extremely favorable review of the new immigration law and explaining how the law was designed to favor immigration from northern and western European countries that dominated the U.S. population at the time).

112. *Id.*

113. To Amend the Immigration and Naturalization Act: Hearing on S. 500 Before the Subcomm. on Immigration and Naturalization of the Senate Comm. on the Judiciary, 89th Cong. 1–3 (1965) (statement of Hon. Edward M. Kennedy).

114. 111 CONG. REC. 21,757 (1965) (statement of Rep. Celler), <https://www.govinfo.gov/content/pkg/GPO-CRECB-1965-pt16/pdf/GPO-CRECB-1965-pt16-5-2.pdf> [<https://perma.cc/2TUX-3PBJ>].

115. See KING, *supra* note 102, at 244.

116. Roger Daniels, *Two Cheers for Immigration*, in *DEBATING AMERICAN IMMIGRATION, 1882–PRESENT* 46, 50, 58 (Roger Daniels & Otis Graham, eds., 2001); Neil Gotanda, *Race, Citizenship, and the Search for Political Community Among “We the People.” – A Review Essay on Citizenship without Consent*, 76

had previously been targeted—for example Jews, Italians, and Slavs—face less scrutiny since the abolition of the national quotas system, but others, in particular those from Latin America and the Middle East and Muslim worlds, have taken their place.¹¹⁷ In place of overtly racist and discriminatory policies are systematic efforts to regulate the entry of potentially dangerous foreigners applying for admission and to control those already residing in the country. At present, immigration enforcement costs an estimated \$18 billion per year; at more than 20,000, the number of Border Patrol Officers is at an all-time high; and deportations occur at the unprecedented rate of 400,000 per year.¹¹⁸

The emphasis on administrative, as opposed to legislative, initiatives to regulate immigration control has had a profound effect not just on immigrants, but also on Americans. Beginning in the 1980s, as the United States stepped up its war against illegal immigration from Mexico (an unintended consequence of the 1965 law's new cap on immigration from the Western Hemisphere, and the concomitant elimination of the Bracero Program, which granted short-term entry to foreign workers), the Immigration and Naturalization Service ("INS") employed broad discretionary powers with considerable congressional support and little judicial oversight to enforce immigration laws.¹¹⁹ These efforts culminated in the militarization of the US-Mexico border.¹²⁰ Likewise, in the aftermath of terrorist attacks on the United States on September 11, 2001, drastic new changes in immigration policy took effect in an effort to manage the new terrorist threat. Passed by Congress with an overwhelming majority in 2001, and renewed

OR. L. REV. 233, 253 (1997); George Sanchez, *Face the Nation: Race, Immigration, and the Rise of Nativism in Late Twentieth Century America*, 31 INT'L MIGRATION REV. 1009, 1011 (1999).

117. See MADISON, *supra* note 18; see also Jared A. Goldstein, *Unfit for the Constitution: Nativism and the Constitution, from the Founding Fathers to Donald Trump*, 20 U. PA. J. CONST. L. 489, 490–92, 501–529 (2018) (discussing an enduring view that various groups of foreigners who do not share the predominant demographic of the United States are more likely to be hostile to or unable to espouse constitutional values. The author traces the origin of the nativist argument and notes trends in immigration patterns, resulting in different ethnic groups being excluded over time and culminating most recently in the Tea Party movement and Trump's executive order banning entry of citizens from seven predominantly Muslim countries.).

118. Doris Meissner et al., *Immigration Enforcement in the United States: The Rise of a Formidable Machinery*, MIGRATION POLICY INSTITUTE 3 (2013).

119. TIMOTHY J. DUNN, THE MILITARIZATION OF THE U.S.–MEXICO BORDER, 1978–1992: LOW-INTENSITY CONFLICT DOCTRINE COMES HOME 17, 42–43 (1996). See generally PETER ANDREAS, BORDER GAMES: POLICING THE U.S.–MEXICO DIVIDE (2000). See also Douglass S. Massey and Karen A. Pren, *Unintended Consequences of US Immigration Policy: Explaining the Post-1965 Surge from Latin America*, 38 POPUL. DEV. REV. 1, 5 (2012) (explaining “[t]he rise in illegal migration from Mexico after 1965 not as a result of a sudden surge in Mexican migration, but rather because the temporary Bracero labor program had been terminated and the number of permanent resident visas had been capped, leaving no legal way to accommodate long-established flows”). With a measured increase in the “Latino threat narrative” in American media in the 1960s and 1970s coinciding with increasing income inequality, Massey and Pren provide a quantitatively-backed argument that after the late 1970s, anti-immigrant sentiment increasingly fed off itself to advance the bureaucratic machinery of enforcement, including a series of restrictive immigration policies and budgetary support, despite a lack of any real increase in illegal migration. *Id.* at 22.

120. ANDREAS, *supra* note 119. See generally DUNN, *supra* note 119.

in 2006 and again extended by President Obama in 2011, the Patriot Act granted law enforcement officials unprecedented authority to track, control, and detain immigrants suspected of terrorist activity or those deemed a potential threat to national security.¹²¹ The United States government justified the institutionalized racial profiling and suspension of civil liberties that these sweeping changes entailed by referencing the new War on Terror.¹²² In 2002, Congress passed the Homeland Security Act,¹²³ which abolished the INS and reorganized all immigration functions—from processing naturalization cases, granting visa and work permits, to border and immigration law enforcement—under the control of the newly-formed Department of Homeland Security (“DHS”).¹²⁴ In effect, *all* immigrants, not just those suspected of terrorism, are now considered potential risks to national security. Under the Trump Administration, America’s long war on immigration has intensified to include the planned construction of a massive wall along the U.S.-Mexico border,¹²⁵ the proposed use of military personnel to

121. See generally USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001); USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (2006) (codified as amended in scattered sections of the U.S.C.); PATRIOT Sunsets Extension Act of 2011, Pub. L. No. 112-14, 125 Stat. 216. In 2015 Congress failed to reauthorize Section 215 of the Patriot Act (which authorized data collection of U.S. persons and U.S. citizens), but rather enacted a compromise law, the USA Freedom Act, in response to concerns about the government’s ability to engage in bulk collection of metadata. Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act.” Pub. L. No. 114-23, § 1, 129 Stat. at 268 (USA Freedom Act).

122. As former Attorney General John Ashcroft’s testimony in front of the Senate Arms Services Committee illustrates, many argue that the “demands of waging war . . . require that civil liberties not stand in the way of victory.” David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 955 (2002) (paraphrasing the testimony of Attorney General John Ashcroft, Senate Judiciary Committee Hearing on Anti-Terrorism Policy, 106th Cong. Dec. 5, 2001). Similarly, Vice President Dick Cheney, who defended President Bush’s military order of November 13, 2001, which established military commissions for the trial of certain individuals connected with the 2001 terrorist attacks, argued, “somebody who comes into the United States of America illegally, who conducts a terrorist operation killing thousands of innocent Americans – men, women, and children – is not a lawful combatant . . . They don’t deserve the same guarantees and safeguards that would be used for an American citizen going through the normal judicial process.” Elisabeth Bumiller & Steven Lee Myers, *A Nation Challenged: The Presidential Order; Senior Administration Officials Defend Military Tribunals for Terrorist Suspects*, N.Y. TIMES (Nov. 15, 2001), <https://www.nytimes.com/2001/11/15/us/nation-challenged-presidential-order-senior-administration-officials-defend.html> [<https://perma.cc/98ND-S34E>]; Erwin Chemerinsky, *Civil Liberties and the War on Terrorism*, 45 WASHBURN L.J. 1, 2 (2005) (discussing current and historical governmental justification of the suspension of civil liberties in response to threats to security). See also MICHELLE MALKIN, IN DEFENSE OF INTERNMENT: THE CASE FOR ‘RACIAL PROFILING’ IN WORLD WAR II AND THE WAR ON TERROR (2004).

123. See Homeland Security Act of 2002, Pub. L. No. 107-296, § 462, 116 Stat. 2135, 2202 (codified as amended at 6 U.S.C. § 279)(2006); 8 U.S.C. § 1103(a), (g) (2000 & Supp. V 2005).

124. Homeland Security Act of 2002, Pub. L. No. 107-296, § 462, 116 Stat. 2135, 2202 (codified as amended at 6 U.S.C. § 279) (2006).

125. President Trump’s signature campaign promise was that he would build a wall along the southern border of the United States. When announcing his candidacy for the presidency, he stated, “I will build a great wall—and nobody builds walls better than me, believe me—and I’ll build them very inexpensively. I will build a great, great wall on our southern border, and I will make Mexico pay for that wall. Mark my words.” Dan Gundersman, *President-elect Donald Trump’s ‘Big, Beautiful Wall’ May End up just Being a Modest, Double-layered Fence*, N.Y. DAILY NEWS (Nov. 10, 2016), <http://www>

guard the southern border until a wall can be built,¹²⁶ ending DACA¹²⁷ and other programs that provide temporary protected status for hundreds of thousands of refugees from various underdeveloped countries including Haiti, El Salvador, and African countries (places the President once characterized as “shitholes”),¹²⁸ and cutting legal immigration to levels not seen since 1924.¹²⁹

To be sure, the doors to the United States have been opened wider than at any other time since the late nineteenth century. But the journey through those doors is not an easy one. Access is controlled by laws and policies that reflect and reinforce the social, political, and economic status quo of the country rather than facilitate any kind of egalitarianism in determining who can gain entry and who cannot; these policies favor the wealthy and well-connected both at home and abroad and seek to further national interests and foreign policy objectives instead of humanitarian ones. Indeed, driven by politics and ideologies of restriction and exclusion, and with little, if any, room for judicial review, America’s immigration laws and their execution pose significant challenges to immigrants seeking entry into the country. For child migrants, however, the challenges are even greater.

III. CHILD MIGRANTS AND THE LAW

Of the hundreds of thousands of immigrants who journey to this country every year in hopes of a better life, the most vulnerable are unaccompanied minors, who must often leave conditions of extreme poverty and violence and risk dangerous migratory routes alone. Several research studies have shown that migrating without a parent or caregiver leads to higher rates of depression and PTSD compared to other refugee and migrant groups.¹³⁰

.nydailynews.com/news/politics/donald-trump-big-beautiful-wall-fence-article-1.2867648 [https://perma.cc/5WRE-DYHX].

126. Betsy Klein, Barbara Starr & Catherine E. Shoichet, *Trump: “We’re Going to be Guarding Our Border with the Military” Until Wall Complete*, CNN (April 3, 2018), <https://www.cnn.com/2018/04/03/politics/trump-border-wall-military/index.html> [https://perma.cc/XPM9-YSBY].

127. See *supra* Part I.

128. Megan Flynn, *Federal Judge, Citing Trump Racial Bias, Says Administration Can’t Strip Legal Status from 300,000 Haitians, Salvadorans and Others – For Now*, WASH. POST (Oct. 4, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2018/10/03/federal-judge-citing-trump-animus-against-nonwhites-blocks-removal-of-haitians-salvadorans-and-others/?utm_term=.860132716f86 [https://perma.cc/U32Y-YJAV].

129. Peter Baker, *Trump Supports Plan to Cut Legal Immigration by Half*, N.Y. TIMES (Aug. 2, 2017), <https://www.nytimes.com/2017/08/02/us/politics/trump-immigration.html> [https://perma.cc/9KKJ-W5P5]; Julia Gelatt & Sarah Pierce, *The Trump Administration Plan: A Lopsided Proposal*, MIGRATION POLICY INSTITUTE (Jan. 2018), <https://www.migrationpolicy.org/news/trump-immigration-plan-lopsided-proposal> [https://perma.cc/8FLA-B7TS] (“The Trump Administration has proposed drastic cuts in legal immigration, unlike any seen since the Immigration Act of 1924[.]”).

130. See J. Spallek et al., *Gesundheitliche Situation und Versorgung unbegleiteter minderjähriger Flüchtlinge – eine Näherung anhand qualitativer und quantitativer Forschung in der Stadt Bielefeld*, 59 BUNDESGESUNDHEITSBLATT – GESUNDHEITSFORSCHUNG – GESUNDHEITSSCHUTZ 636, 636–41 (2016); E. Sanchez-Cao et al., *Psychological Distress and Mental Health Service Contact of Unaccompanied Asylum-*

Unaccompanied minors are often unable to care for themselves, are more likely to suffer negative long-term effects if their physical and psychological needs are not met, and are often unable to make their needs known.¹³¹ According to the United Nations Human Rights Council, unaccompanied minors are also at heightened risk of neglect, violence, sexual assault, kidnapping, extortion, child trafficking, and forced labor due to the lack of a parent or other adult caregiver.¹³² The legal pathway to citizenship is similarly fraught with pitfalls. Title 6 of the U.S. Code (“Domestic Security”) defines an “unaccompanied alien child” (“UAC”) as a person who has no immigration status in the United States, is under the age of eighteen, and has no parent or legal guardian in the United States who is available to provide physical care and physical custody.¹³³ Furthermore, unaccompanied minors do not have a right to free legal representation in removal proceedings.¹³⁴

Increases in the migration of UACs have attracted media and policy attention in recent years.¹³⁵ But this migration flow is not without precedent.

Seeking Children: Mental Health Service Contact of Asylum-Seeking Children, 39 CHILD: CARE, HEALTH AND DEV. 651, 655–57 (2013) (noting that unaccompanied asylum-seeking children who were predominantly from the Horn of Africa, sub-Saharan Africa, or the Balkans, and had lived in the United Kingdom for a year and a half “had high levels of psychological distress on self-report, with 66% at high risk for PTSD and 12% at high risk for depressive disorder”); Marianne Vervliet et al., *The Mental Health of Unaccompanied Refugee Minors on Arrival in the Host Country*, 55 SCANDINAVIAN J. OF PSYCHOL. 33, 35–6 (2014) (finding a “high prevalence of anxiety, depression and PTSD symptoms” among unaccompanied refugee minors in Norway and Belgium); Brit Oppedal & Thormod Idsoe, *The Role of Social Support in the Acculturation and Mental Health of Unaccompanied Minor Asylum Seekers*, 56 SCANDINAVIAN J. OF PSYCHOL. 203, 207–08 (2015) (finding that unaccompanied minors “experience[d] high levels of mental health problems”).

131. See Human Rights Council Res. 36/5, A/HRC/RES/36/5 at 3 (Oct. 4, 2017) (“Recognizing that, for the full and harmonious development of a child’s personality, he or she should grow up in a family environment and in an atmosphere of happiness, love and understanding, and, therefore, that States of origin, destination and, where appropriate, transit should . . . facilitate family reunification as an important objective in order to promote the welfare and the best interests of migrant children[.]”).

132. See *id.* (“Expressing serious concern about the vulnerability of and risks faced by migrants . . . in particular children, including adolescents, who are unaccompanied or separated from their families, who . . . may be exposed to serious human rights violations and abuses that can threaten their physical, emotional and psychological well-being, and may also be exposed to crimes and human rights abuses committed by transnational criminal organizations or gangs, including crimes such as theft, kidnapping, extortion, physical abuse, the sale of and trafficking in persons, forced labour, and sexual abuse and exploitation[.]”).

133. See 6 U.S.C. § 279(g)(2).

134. Shani M. King, *Alone and Unrepresented: A Call to Congress to Provide Counsel for Unaccompanied Minors*, 50 HARV. J. ON LEG. 331, 339 (2013).

135. Between 2004 and 2011, the number of UACs arriving into the U.S. averaged 7,000 to 8,000. But these numbers have risen dramatically since 2011. See *Rising Child Migration to the United States*, MIGRATION POLICY INSTITUTE, <https://www.migrationpolicy.org/programs/us-immigration-policy-program/rising-child-migration-united-states> [<https://perma.cc/4B45-ZLB7>] (“The number of unaccompanied minors (also known as UACs) crossing the U.S. Mexico border increased 90 percent between 2013 and 2014, drawing the attention and concern of the U.S. government, media, and public.”); Sural Shah, *The Crisis in Our Own Backyard: United States Response to Unaccompanied Minor Children from Central America*, HARV. PUB. HEALTH REV., <http://harvardpublichealthreview.org/the-crisis-in-our-own-backyard-united-states-response-to-unaccompanied-minor-children-from-central-america/> [<https://perma.cc/V8C5-NSZ3>] (“In the summer of 2014, the news was filled with stories of children from Central America pouring across the from the United States (U.S.) border with Mexico.”); Ian Gordon, *70,000 Kids Will Show Up Alone at Our Border This Year. What Happens to Them?*, MOTHER JONES (July 2014),

In fact, child migrants from all over the world have been coming to America since Ellis Island opened in 1892,¹³⁶ and guidelines for their admission were formally established with the passage of the Refugee Act of 1980.¹³⁷ Today, however, the vast majority of UACs come from Central America. In the spring and summer of 2014, daily media reports chronicled the mass exodus of UACs from Central America across the U.S.-Mexico border.¹³⁸ Roughly 69,000 children, mostly from Guatemala (25 percent), El Salvador (24 percent), and Honduras (27 percent), crossed into the U.S. through the Rio Grande Valley in Texas, in 2014 alone.¹³⁹ These children represent the highest number of UACs arriving in the country annually since 2011. In that year, the US Customs and Border Patrol (“CBP”) recorded 4,059 apprehensions of children from these countries, with numbers of apprehended unaccompanied minors climbing to 24,000 in 2012 and 39,000 in 2013.¹⁴⁰ And the numbers show no sign of abating. While in FY 2015, 39,750 UACs were apprehended (a 42 percent drop from the previous year), the number of apprehensions skyrocketed to 59,692—roughly 20,000 more than in FY 2015, and 9,000 less than the peak of FY 2014. And in the first two months of FY 2017 (October and November, 2016), US border patrol apprehended 14,128 UACs. By comparison, apprehensions in the first two months of FY 2015 and FY 2016 numbered 5,143

<https://www.motherjones.com/politics/2014/06/child-migrants-surge-unaccompanied-central-america/> [https://perma.cc/Y3BH-BMF7] (“The number of undocumented children—mostly teens, but some as young as five—apprehended crossing the border without parents or guardians has more than doubled in the past two years[.]”).

136. Ellis Island, the first and largest immigrant processing station in the United States, opened in 1892 and received over 12 million future American citizens, when it closed in 1954. See *Frequently Asked Questions*, NAT'L PARK SERV., https://www.nps.gov/ellis/faqs.htm#CP_JUMP_853542 [https://perma.cc/95SW-BLXA].

137. See Refugee Act of 1980, Pub.L. No. 96-212, 94 Stat. 102, § 201 (1980); see also Daniel Steinbock, *The Admission of Unaccompanied Children into the United States*, 7 YALE L. & POL'Y REV. 137, 142 (1989) (“As with refugee resettlement in general, until the passage of the Refugee Act of 1980 there existed no ongoing legislative authority for resettlement of refugee children that was free of temporal, geographical, numerical, or ideological restrictions.”).

138. See, e.g., Gordon, *supra* note 135; Siana Villiers Negroponce, *The Surge in Unaccompanied Children from Central America: A Humanitarian Crisis at Our Border*, BROOKINGS (July 2, 2014), <https://www.brookings.edu/blog/up-front/2014/07/02/the-surge-in-unaccompanied-children-from-central-america-a-humanitarian-crisis-at-our-border/> [perma.cc/F79R-GRUG]; Dara Lind, *The 2014 Central American Migrant Crisis*, Vox (Oct. 10, 2014), <https://www.vox.com/2014/10/10/18088638/child-migrant-crisis-unaccompanied-alien-children-rio-grande-valley-obama-immigration> [https://perma.cc/E3GL-V85H]; Rebecca Kaplan, *Surge in Unaccompanied Child Migrants Spurs White House Reaction*, CBS NEWS (June 2, 2014), <https://www.cbsnews.com/news/surge-in-unaccompanied-child-immigrants-spurs-white-house-reaction/> [https://perma.cc/BH82-VSNB].

139. See Shah, *supra* note 135.

140. Since 2014, the number of unaccompanied children arriving at the U.S.-Mexico border has decreased. According to the CBP, 3,514 unaccompanied minors from El Salvador, 6,607 from Guatemala, 1,977 from Honduras, and 6,519 from Mexico were apprehended between October 1, 2014 and April 30, 2015. This represents a 45 percent decrease from the same time period the previous year. See Shah, *supra* note 135.

and 10,588 respectively.¹⁴¹ By contrast, in FY 2009, the total number of UAC apprehensions was 19,688.¹⁴²

According to the United Nations High Commissioner for Refugees (“UNHCR”), the primary driver for this exponential growth in UACs is violence.¹⁴³ During the 1970s and 1980s, these three countries, which together comprise the so-called “Northern Triangle”¹⁴⁴ region of Central America, were plagued by vicious civil wars—wars that were largely funded by the United States and that resulted in a heavily armed population.¹⁴⁵ The proliferation of transnational criminal organizations (including a pair of U.S. gangs, MS-13 and M-18, both formed in Los Angeles), and more recently the presence of regional drug cartels forced into the region as a result of the success of drug enforcement initiatives in Mexico and the Caribbean, exacerbated the violence.¹⁴⁶ National political developments have also contributed to rising violence in the region, including a 2009 coup in Honduras that devastated the country’s political infrastructure, resulting in a high level of corruption and weak mechanisms for law enforcement. Today, these three small Central American countries consistently rank among the world’s most violent and dangerous places, with homicide rates in El Salvador, Honduras, and Guatemala ranking first, third, and fifth highest in the world respectively.¹⁴⁷ The Northern Triangle region as a whole had a homi-

141. WILLIAM KANDEL, CONG. RESEARCH SERV., R43599, UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW 2 (2017), <https://fas.org/sgp/crs/homesec/R43599.pdf> [<https://perma.cc/2CE3-X2XF>].

142. *Id.* at 3.

143. UNHCR, CHILDREN ON THE RUN: UNACCOMPANIED CHILDREN LEAVING CENTRAL AMERICA AND MEXICO AND THE NEED FOR INTERNATIONAL PROTECTION 6 (2014), <http://www.unhcr.org/56fc266f4.html> [<https://perma.cc/WH24-AZHW>]. While the reasons that children flee are complex and multifaceted, the report documented two overarching patterns of harm: violence by organized criminal actors and violence in the home. According to the report, “[f]orty-eight percent of the displaced children interviewed . . . had been personally affected by the augmented violence in the region by organized armed criminal actors, including drug cartels and gangs or by State actors. Twenty-one percent of the children confided that they had survived abuse and violence in their homes by their caretakers.” *Id.* at 6.

144. El Salvador, Honduras, and Guatemala make up the so-called Northern Triangle region of Central America. See Rocio Cara Labrador & Danielle Renwick, *Central America's Violent Northern Triangle*, COUNCIL ON FOREIGN RELATIONS (June 26, 2018), <https://www.cfr.org/backgrounder/central-america-violent-northern-triangle> [<https://perma.cc/2R7B-CTHY>].

145. *Id.* (“Honduras did not have a civil war of its own, but nonetheless felt the effects of nearby conflicts; it served as a staging ground for the U.S.-backed Contras, a right-wing rebel group fighting Nicaragua’s Sandinista government during the 1980s.”)

146. *Id.* (“MS-13 and M-18, the region’s largest gangs, are estimated to have as many as eighty-five thousand members in total . . . Drug trafficking adds to the violence. U.S.-led interdiction efforts in Colombia, Mexico, and the Caribbean have pushed trafficking routes into Central America, and U.S. officials report that 90 percent of documented cocaine flows into the United States now pass through the region.”)

147. *The World's Most Dangerous Cities*, THE ECONOMIST (May 31, 2017), <https://www.economist.com/graphic-detail/2017/03/31/the-worlds-most-dangerous-cities> [<https://perma.cc/FBN3-PA92>]. For a different measure, in which El Salvador, Honduras, and Guatemala are still determined to be quite dangerous (first, second, and seventh, respectively), see *Intentional Homicide Data*, THE WORLD BANK, https://data.worldbank.org/indicator/VC.IHR.PSRC.P5?year_high_desc=true [<https://perma.cc/EA9W-GC3E>]. For a measure in line with this, El Salvador, Honduras, and Guatemala are listed with the first, fourth and fourteenth highest homicide rates in 2017. See ROBERT MUGGAH & AGUIRRE

cide rate of 66.7 murders per 100,000 people in 2015.¹⁴⁸ To put these numbers in perspective, the homicide rate of the United States was only 4.5 murders per 100,000, making this region almost fifteen times as dangerous.¹⁴⁹

While violence is a significant “push factor” behind recent migrant surges, so too is poverty and fleeing migrants’ desire to reconnect with family members in the United States.¹⁵⁰ In addition to ranking among the world’s most dangerous places, Honduras, Guatemala, and El Salvador are also among the poorest—with more than one-third of employed people surviving on incomes of less than \$4 a day.¹⁵¹ Thus, while many UACs have valid claims for political asylum or other forms of humanitarian relief and are thus entitled to remain in the country, others do not.¹⁵² Such a mixed

TOBON, CITIZEN SECURITY IN LATIN AMERICA: FACTS AND FIGURES 4 (2018), <https://igarape.org.br/wp-content/uploads/2018/04/Citizen-Security-in-Latin-America-Facts-and-Figures.pdf> [<https://perma.cc/7ZG9-9UULS>]; Labrador, *supra* note 144.

148. *Northern Triangle Refugee Crisis*, THE INVISIBLE REFUGEES PROJECT BLOG, <https://blogs.brown.edu/invisiblerefugees/regions/refugee-crises-central-america/northern-triangle/> [<https://perma.cc/EQP5-2DM3>].

149. *Global Study on Homicide*, UNITED NATIONS OFFICE ON DRUGS AND CRIME (2013), www.unodc.org/gsh/en/data.html [<https://perma.cc/RA52-8BV5>]. See also Silva Mathema, *They Are Refugees: An Increasing Number of People Fleeing Violence in the Northern Triangle*, CENTER FOR AMERICAN PROGRESS (2016) (noting “El Salvador’s homicide rate has deteriorated significantly—making the country more than 24 times as dangerous than the United States”).

150. A 2014 report from the Government Accountability Office (“GAO”) found that experts in the region attribute the mass migration of UACs to a combination of crime and violence, endemic poverty, poor educational systems, and the desire to reunite with family members. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-15-362, CENTRAL AMERICA: INFORMATION ON MIGRATION OF UNACCOMPANIED CHILDREN FROM EL SALVADOR, GUATEMALA, AND HONDURAS 4 (2015), www.gao/assets/670/668749.pdf [<https://perma.cc/6RZ8-C84G>]. The violence that is a significant push factor behind these surges is violence by organized criminal actors, including drug cartels and gangs, as well as state-sponsored violence. UNHCR, *supra* note 147, at 9–10 (2014), <http://www.unhcr.org/56fc266f4.html> [<https://perma.cc/JT2W-FPUL>]. Of the 104 children from El Salvador UNHCR interviewed, “[s]ixty-six percent of the children cited violence by organized armed criminal actors as a primary motivator for leaving.” *Id.* at 9.

151. Steve Kapsos & Evangelia Bourmpoula, *Employment and Economic Class in the Developing World*, INTERNATIONAL LABOUR OFFICE, 30 (2013), www.ilo.org/wcmsp5/groups/public/-dgreports/-inst/documents/publication/wcms_216451.pdf [<https://perma.cc/3ZKB-R3ZZ>].

152. Under U.S. immigration law, there are some common forms of relief that unaccompanied minors may be eligible for, such as asylum, special immigrant juvenile status, U visas (applicable to victims of certain crimes) or T visas (available to individuals who have been victims of a severe form of trafficking). Each of these forms of relief has certain requirements. For example, to be eligible for asylum, children must demonstrate a, so-called, “well-founded fear of persecution” based on one of five grounds: race, religion, nationality, political opinion, or membership in a particular social group. To be eligible for SIJS, children must have been abused, neglected, or abandoned by one or both parents, be under 21, unmarried, and the subject of certain dependency orders issued by a juvenile court. While some unaccompanied minors may qualify for these forms of relief, many who are so-called economic migrants—those who are fleeing only because of poverty—and those who are fleeing based on a general fear of gangs, drug cartels, or other violence, may not be eligible. See A GUIDE TO CHILDREN ARRIVING AT THE BORDER: LAWS, POLICIES, AND RESPONSES, AMERICAN IMMIGRATION COUNSEL, A GUIDE TO CHILDREN ARRIVING AT THE SOUTHWEST BORDER: LAWS, POLICIES, AND RESPONSES 4 (2015) https://www.americanimmigrationcouncil.org/sites/default/files/research/a_guide_to_children_arriving_at_the_border_and_the_laws_and_policies_governing_our_response.pdf [<https://perma.cc/DAJ9-YJPQ>]; see also Miriam Jordan & Simon Romero, *What It Takes To Get Asylum in the U.S.*, N.Y. TIMES (May 2, 2018), <https://www.nytimes.com/2018/05/02/us/what-it-takes-to-get-asylum-us.html> [<https://perma>

flow of migrants poses significant challenges to the American immigration system, which must balance the need to maintain border controls with the responsibility to protect genuinely vulnerable children.

Characterizing the unprecedented increase in migration flows across the U.S.-Mexico border as an “urgent humanitarian situation,”¹⁵³ President Obama responded by directing greater law enforcement resources to the border, expanding detention facilities for family units, establishing dedicated child and family immigration court dockets, and working with officials in Mexico and Central America to discourage or prevent illegal migration through the introduction of in-country processing centres and a public messaging campaign emphasizing the costs and dangers associated with an unlawful journey to the United States.¹⁵⁴ In the short-term, these measures were a success. The Obama administration thus used policy tools to address a situation described as a humanitarian crisis—an unchecked wave of women and children migrants flowing through the U.S.-Mexico border—and reversed it in a matter of months. After peaking at 10,622 arrivals in June 2014, the number of unaccompanied child arrivals at the U.S.-Mexico border had fallen to 2,424 by September of that year – the lowest monthly total in two years.¹⁵⁵ And by August 2015, the number of unaccompanied minors apprehended by CBP officers dropped more than 50 percent in comparison to the previous year.¹⁵⁶ Focused primarily on deterrence and border enforcement rather than on longer-term solutions, however, these measures have done little to adequately protect vulnerable immigrants both within the country and beyond, or to prevent additional migrant surges in the future. A significant hurdle to achieving any meaningful progress regarding UACs is America’s immigration policy, which prioritizes immigration enforcement over protecting vulnerable children.

.cc/B5X9-LMZ9] (“The biggest hurdle for the migrants is convincing an immigration judge that they belong to a particular social group—gay, transgender or a child soldier, for example—that could entitle them to asylum, since they cannot argue that they face persecution based on race, religion, nationality or political opinion.”).

153. Presidential Memorandum, Response to the Influx of Unaccompanied Alien Children Across the Southwest Border, The White House (June 2, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/06/02/presidential-memorandum-response-influx-unaccompanied-alien-children-acr> [https://perma.cc/5FDA-5DCU].

154. Press Release, The Obama Administration’s Government-Wide Response to Influx of Central American Migrants at the Southwest Border, The White House (Aug. 1, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/08/01/obama-administration-s-government-wide-response-influx-central-american-> [https://perma.cc/8F6V-E3TJ]. See also Adam Isacson & Maureen Meyer, MEXICO’S OTHER BORDER: SECURITY, MIGRATION, AND THE HUMANITARIAN CRISIS AT THE LINE WITH CENTRAL AMERICA, 16–17 (2014), <https://www.wola.org/analysis/new-wola-report-on-mexicos-southern-border/> [https://perma.cc/QZN2-XP4Q].

155. MARC R. ROSENBLUM, TRANSATLANTIC COUNCIL ON MIGRATION, UNACCOMPANIED CHILD MIGRATION TO THE UNITED STATES: THE TENSION BETWEEN PROTECTION AND PREVENTION 4 (Apr. 2015), <https://www.migrationpolicy.org/research/unaccompanied-child-migration-united-states-tension-between-protection-and-prevention> [https://perma.cc/4JB5-2X9L].

156. AMERICAN IMMIGRATION COUNSEL, *supra* note 152, at 1.

While U.S. immigration law guarantees certain protections to UACs in light of their vulnerable status, such guarantees often offer little relief in practice. In accordance with the 1951 United Nations Convention Relating to the Status of Refugees¹⁵⁷ and its 1967 Protocol,¹⁵⁸ U.S. immigration law provides asylum to individuals who can prove that they suffered past persecution or have a well-founded fear of future persecution on account of race, religion, nationality, political opinion, or membership in a particular social group.¹⁵⁹ A separate treaty, known as the Convention Against Torture, prohibits the return of individuals to a country where there are substantial grounds to believe they may be tortured.¹⁶⁰ Victims of trafficking or crime also receive special protection under the Trafficking Victims Protection Reauthorization Act of 2008 (“TVRPA”).¹⁶¹ Moreover, children under the age of 21 who have been abused, abandoned, or neglected by a parent may

157. Convention and Protocol Relating to the Status of Refugees, art. 1, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137, [hereinafter Refugee Convention] (defining refugee as one who, “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”).

158. *See generally id.*

159. *See* 8 U.S.C. 1158 et seq; *see also* 8 U.S.C. § 1101(a)(42)(A) (defining “refugee” in part as “any person who is outside any country of such person’s nationality . . . who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion”).

160. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1984. G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 art. 3(1) (1984) [hereinafter Torture Convention] (“No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”). In 1990, the U.S. Senate ratified the Torture Convention with a substantial number of reservations, declarations, and understandings. *See* 136 CONG. REC. S17, 486-92 (daily ed. Oct. 27, 1990).

The United States did not become a full party to the Torture Convention until November 20, 1994, one month after President Clinton deposited the ratification instrument with the U.N. Secretary-General. *See* Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8478 (Feb. 19, 1999) (proscribing regulations for implementing the United States’ obligations under the Torture Convention). The United States adopted the position that the Torture Convention was not self-executing. *See* MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL32276, THE U.N. CONVENTION AGAINST TORTURE: OVERVIEW OF U.S. IMPLEMENTATION POLICY CONCERNING THE REMOVAL OF ALIENS 4 (2006), <http://trac.syr.edu/immigration/library/P1339.pdf> [<https://perma.cc/RK7P-9JZD>] (noting a declaration by the United States that “CAT Articles 1 through 16 were not self-executing, and therefore required domestic implementing legislation”). Therefore, it was not until Congress enacted implementing legislation in 1998, *see* Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681, 2822 (1998), followed by INS and Department of Justice regulations in 1999, *see* 8 C.F.R. §§ 208.16-.18 (2004); 8 C.F.R. §§ 1208.16-.18 (2004) respectively, that the non-refoulement provision of Article 3 of the Torture Convention became a viable defense against removal in U.S. immigration proceedings. The 1999 INS regulations specified that the Attorney General, in consultation with the Secretary of State, would have exclusive jurisdiction over Torture Convention claims arising under Article 3. *See* 8 C.F.R. §§ 208.18(c), 1208.18(c).

161. *See generally* Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, Div. A (codified at 22 U.S.C. § 7101 et seq).

be eligible for Special Immigrant Juvenile (“SIJ”) visas.¹⁶² Asylum and SIJ status allow successful applicants to remain in the country, apply for work authorization and permanent residence, and eventually apply for citizenship.¹⁶³

The majority of UACs encountered at the border are apprehended, processed, and initially detained by CBP.¹⁶⁴ However, under the TVRPA, unaccompanied minors from countries without a common border with the United States cannot be deported directly by the Department of Homeland Security (“DHS”), which has broad authority to detain most immigrants suspected of being deportable, pending the resolution of removal proceedings.¹⁶⁵ Instead, such minors are always permitted to appear before an immigration judge to petition for humanitarian relief from removal.¹⁶⁶ The TVRPA also mandates that DHS transfer custody of these children to the Office of Refugee Resettlement (“ORR”) within the Department of Health and Human Services (“HHS”) while the children await an immigration hearing.¹⁶⁷ Children in HHS custody must be held in “the least restrictive setting that is in the best interests of the child.”¹⁶⁸ In practice, this standard means that pending their court hearing, most children are initially placed in a network of state licensed ORR-funded care providers, which offer education and health care, and are then placed with a family member or other sponsor who is able to care for them.¹⁶⁹ By contrast, UACs from Mexico are returned after a day or two as allowed by the TVRPA, and thus remain largely out of sight and out of mind of the American people.¹⁷⁰

162. See William Wilberforce, Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(d)(1), 122 Stat. 5044, 5074 (2008) (codified as amended in scattered sections of 8 U.S.C.); see also INA § 101(a)(27)(J); 8 CFR § 204.11 (providing regulations to implement SIJ status).

163. See ROSENBLUM, *supra* note 155, at 7.

164. See AMERICAN IMMIGRATION COUNSEL, *supra* note 152, at 7.

165. TVRPA § 235 (2008); see also 8 U.S.C. § 1232(a)(3) (2018) (establishing procedures for children from countries non-contiguous with the United States).

166. The TVRPA establishes a separate set of protocols for UACs from Mexico and Canada. For these children, CBP agents are required to ascertain whether a child has been a victim of severe trafficking, whether he or she may have a legitimate claim for asylum, and whether he or she is willing to return voluntarily to their home country. If none of these conditions apply, CBP will immediately send the child back to Mexico or Canada through a process called “voluntary return.” See 8 U.S.C. § 1232(a)(2) (2018) (establishing procedures for children from countries contiguous with the United States).

167. See 8 U.S.C. § 1232(b)(3) (2018) (“Except in the case of exceptional circumstances, any department or agency of the Federal Government that has an unaccompanied alien child in custody shall transfer the custody of such child to the Secretary of Health and Human Services not later than 72 hours after determining that such child is an unaccompanied alien child.”).

168. TVRPA § 235(c)(2); 8 U.S.C. 1232 § (c)(2)(A) (2018); see also CHAD HADDAL, CONG. RESEARCH SERV., RL33896, UNACCOMPANIED ALIEN CHILDREN: POLICIES AND ISSUES, 14, n.51 (2007), <https://trac.syr.edu/immigration/library/P1642.pdf> [<https://perma.cc/84PT-HAUH>].

169. KANDEL, *supra* note 141, at 8.

170. ELZBIETA M. GOZDZIAK, WHAT KIND OF WELCOME? IMMIGRATION OF CENTRAL AMERICAN AND UNACCOMPANIED CHILDREN INTO LOCAL COMMUNITIES 7 (2015), <https://isim.georgetown.edu/sites/isim/files/files/upload/Kaplan%20UAC%20Report.compressed%20%282%29.pdf> [<https://perma.cc/9NXX-9FUL>] (“Of the 11,577 Mexican youngsters apprehended at the border in the first seven months of FY 2014, only 494 were placed in ORR custody, the rest were sent back to Mexico.”).

While UACs are entitled to an immigration hearing, very few successfully apply for asylum or SIJ status. For example, since FY 2010, approximately 70,000 children have applied for SIJS out of 307,972 children under age seventeen detained at the border.¹⁷¹ While the approval rate of SIJ applications was around 95 percent every year until 2016, in October 2016, the U.S. Citizenship and Immigration Services (“USCIS”) fundamentally changed the process, slowing down the adjudication rate (USCIS issued a final decision for 42 percent of pending applications in FY 2017, down from 66 percent the year before), and began systematically denying SIJ applications for youth eighteen and older.¹⁷² Similarly, USCIS data from FY 2011–2013 indicates that out of 1,800 children who filed asylum applications, about three-hundred were granted.¹⁷³ This is largely due to the fact that, as discussed below, courts have not recognized a categorical right to appointed counsel in removal proceedings.¹⁷⁴ Under Section 292 of the Immigration and Nationality Act (“INA”), codified at 8 U.S.C. § 1362, non-citizen aliens placed in removal proceedings have a right to counsel:

In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.¹⁷⁵

While the statute establishes the statutory basis for a non-citizen alien’s right to counsel, the parenthetical caveat *at no expense to the Government* clearly limits this right. In other words, the government is under no obligation to pay for legal representation in removal proceedings. Also, in contrast with criminal proceedings, the burden of proof rests with the immigrant to

171. Austin Rose, *For Vulnerable Immigrant Children, A Longstanding Path to Protection Narrows*, MIGRATION POLICY INSTITUTE (July 25, 2018), <https://www.migrationpolicy.org/article/vulnerable-immigrant-children-longstanding-path-protection-narrows> [https://perma.cc/ZLE9-NVNV]. The 307,972 number was calculated from the United States Border Control, Total Unaccompanied Alien Children (0-17 Years Old) Apprehensions By Month – FY 2010 Statistics (by adding the yearly totals for FY 2010–FY2017), <https://www.cbp.gov/sites/default/files/assets/documents/2018-Jul/BP%20Total%20Monthly%20UACs%20by%20Sector%2C%20FY10-FY17.pdf> [https://perma.cc/8MH5-EF8P]; see also ROSENBLUM, *supra* note 155, at 7; BLAINE BOOKEY, *A TREACHEROUS JOURNEY: CHILD MIGRANTS NAVIGATING THE U.S. IMMIGRATION SYSTEM* 38 (2014), <https://cgrs.uhastings.edu/our-work/treacherous-journey> [https://perma.cc/AQ76-88LZ].

172. See Rose, *supra* note 171 (“[I]n October 2016, USCIS began applying new standards and enhanced scrutiny to SIJ applications, fundamentally changing the process. Soon after, it also started adjudicating all applications in the National Benefits Center, centralizing a formerly regional process in which local USCIS offices reviewed applications from their own areas. Attorneys and judges have since reported receiving far more Requests for Additional Evidence (“RFEs”) from USCIS in SIJ cases. Pointing to the October 2016 guidance, these RFEs generally ask for further proof of parental mistreatment of the child or for clarification on matters of court jurisdiction.”).

173. ROSENBLUM, *supra* note 155, at 7.

174. See *infra* notes 213–17 and accompanying text; see also ROSENBLUM, *supra* note 155, at 7.

175. 8 U.S.C. § 1362 (2012); see also 8 U.S.C. § 1229a(b)(4)(A) (2006).

convince the judge that they meet the criteria for asylum, SIJ status, or some other grounds for relief from removal.¹⁷⁶ To be granted asylum, applicants must prove an *individualized* fear of persecution.¹⁷⁷ Under current guidelines, this excludes those fleeing criminal or gang violence as a protected class.¹⁷⁸ Successful SIJ visa applicants must first be certified by a state court as a dependent of the court, and the court must also verify that it is not in the child's best interests to be returned to his or her home country, or that family reunification is not a viable option.¹⁷⁹

Thus, only those who can afford to retain a private attorney, or are fortunate enough to obtain pro bono counsel, receive legal representation. The rest must navigate the labyrinth of immigration laws and courts alone. Given the complex and adversarial nature of removal proceedings, access to legal representation is often *the* determining factor for success.¹⁸⁰ This is particularly the case for children, who carry the same burden of proof as adults and are likewise pitted against highly-trained and experienced DHS lawyers. Data from the Executive Office for Immigration Review ("EOIR") confirm a substantial difference in case outcomes for children with and without legal representation. In the past five years, children with legal representation were deported at a rate of around 15 percent, while the deporta-

176. *Mulanga v. Ashcroft*, 349 F.3d 123, 134 (3d Cir. 2003) ("[T]he burden of proof in asylum and withholding of deportation cases is on the applicant[.];" 8 U.S.C. § 1158(B)(1)(b) ("The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 1101(a)(42)(A)."); *Reyes v. Mccament*, 2017 WL 3634068 at *5 (W.D.N.C. Aug. 23, 2017) ("The burden of proof is on a petitioner to demonstrate eligibility for SIJ classification by a preponderance of the evidence.").

177. *See, e.g., Hyzoti v. Holder*, 517 Fed. Appx. 354, 358 (6th Cir. 2013) (noting "[a]sylum requires a well-founded fear of *individualized* persecution") (emphasis in original) (citing *In re Sanchez & Escobar*, 19 I.&N. Dec. 276, 284 (BIA 1985)).

178. *See Matter of A-B-*, 27 I.&N. Dec. 316, 320 (A.G. 2018) ("Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.").

179. INA § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J) (2012); *see also* SPECIAL IMMIGRANT JUVENILE STATUS BENCH BOOK: A NATIONAL GUIDE TO BEST PRACTICES FOR JUDGES AND COURTS 4 (Leslye E. Orloff & Rafaela Rodrigues eds., 2018), <http://library.niwap.org/wp-content/uploads/SIJS-Bench-book-complete.pdf> [<https://perma.cc/6HZM-BYG9>] (noting "State courts play a central fact finding role that aids USCIS in the SIJS application and adjudication process. In fact, USCIS relies on required state court findings as evidence in its process of adjudicating applications.").

180. *See Representation for Unaccompanied Children in Immigration Court*, TRAC IMMIGRATION, <http://trac.syr.edu/immigration/reports/371/> [<https://perma.cc/596B-MLGN>] ("In almost three out four (73%) of the cases in which the child was represented, the court allowed the child to remain in the United States Where the child appeared alone without representation, only 15 percent were allowed to remain in the country."); *New Data on Unaccompanied Children in Immigration Court*, TRAC IMMIGRATION, <http://trac.syr.edu/immigration/reports/359/> [<https://perma.cc/6EP8-JLFS>] (using a decade of court records, this report found that "whether or not an unaccompanied juvenile had an attorney was the single most important factor influencing the case's outcome."); *see also* ROSENBLUM, *supra* note 155, at 7 (April 2015) ("Given these evidentiary and procedural hurdles, few children successfully apply for asylum or SIJS status, particularly without the assistance of an attorney (and, as of October 2014, fewer than one in three unaccompanied minors appearing in immigration court had access to legal counsel.)").

tion rate for those without legal representation was nearly 90 percent.¹⁸¹ And yet, fewer than one in three UACs appearing in immigration court have access to legal counsel.¹⁸² While there are statutes that prescribe additional safeguards for particularly vulnerable groups of unaccompanied minors, none of them authorize government-appointed counsel. For instance, the TVPRA specifies a number of specialized procedures relating to the treatment of unaccompanied minors crossing the U.S. border, from their screening at ports of entry, to applications for political asylum, to conditions of their care and custody while under the supervision of the Office of Refugee Resettlement.¹⁸³ As to their right to appointed counsel, however, the TVPRA explicitly references the limiting language of INA § 292.¹⁸⁴

The lack of available counsel is even more troubling given the significant life and liberty interests involved in removal proceedings. Indeed, the Supreme Court has long recognized that deportation may deprive an individual of “all that makes life worth living” and that “meticulous care” is required to ensure that the depriv[ation] of liberty . . . meet the essential standards of fairness.¹⁸⁵ For many immigrants, to be sure, the forced return to their country of origin could result in persecution, abuse or torture, death, separation from family, the inability to support themselves and their family economically, and other similarly high-stakes outcomes.¹⁸⁶ Moreover, many immigrants face prolonged detention while awaiting the outcome of their cases.¹⁸⁷ The fact that most appear in court without a lawyer

181. See *Juveniles—Immigration Court Deportation Proceedings*, TRAC IMMIGRATION, <http://trac.syr.edu/phptools/immigration/juvenile> [<https://perma.cc/M627-4WBH>]; see also *Representation for Unaccompanied Children In Immigration Court*, TRAC IMMIGRATION, *supra* note 180.

182. *Representation for Unauthorized Children in Immigration Court*, TRAC IMMIGRATION, *supra* note 180 (“While the national average was that one-third (32%) of pending cases were represented, among the six courts with the largest number of these cases, representation rates varied from a low of 19 percent in the Arlington, Virginia court to a high of 43 percent in New York City.”).

183. William Wilberforce, *Trafficking Victims Protection Reauthorization Act of 2008*, Pub. L. No. 110-457, 122 Stat. 5044 (2008); see also HADDAL, *supra* note 168, at 7–8.

184. See 8 U.S.C. 1229a(b)(4)(A) (2006).

185. *Bridges v. Wixon*, 326 U.S. 135, 147, 154 (1945) (citing *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)) (“Though deportation is not technically a criminal proceeding it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty – at times a most serious one – cannot be doubted.”). See also *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010) (“We have long recognized that deportation is a particularly severe ‘penalty[.]’” (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893)); *Gastelum-Quinones v. Kennedy* 374 U.S. 469, 479 (1963) (“[D]eportation is a drastic sanction, one which can destroy lives and disrupt families.”); *Tan v. Phelan*, 333 U.S. 6, 10 (1948) (“[D]eportation is a drastic measure and at times the equivalent of banishment or exile.”).

186. DANIEL KANSTROOM, *AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA* 15–17 (2012); Jacqueline Hagan, Brianna Castro & Nestor Rodriguez, *The Effects of U.S. Deportation Policies on Immigrant Families and Communities: Cross-Border Perspectives*, 88 N.C.L. REV. 1799, 1818–20 (2010) (“Most international migration involves some form of temporary family separation, but for deportees and their families, the process is especially complicated and the consequences are especially severe . . . The trauma of reintegration, coupled with the loss of work and separation from family, has major implications for the future settlement intentions of many Salvadoran deportees[.]”).

187. ACLU Foundation Immigrants’ Rights Project, *Issue Brief: Prolonged Immigration Detention of Individuals Who are Challenging Removal 1* (2009), <https://www.aclu.org/other/issue-brief>

has resulted in lengthy delays, as judges often issue continuances or extend hearing dates to give unrepresented immigrants the opportunity to seek out an attorney. Between 2002 and 2013, the average processing time for noncitizens to move through the immigration court system more than doubled—from 250 days in 2002 to more than 511 days in 2013.¹⁸⁸ In an attempt to reduce the backlog of cases, the Obama administration introduced so-called “rocket dockets” to expedite deportation hearings involving UACs.¹⁸⁹ Under this directive, immigration courts scheduled a first hearing for UACs within twenty-one days of the court’s receiving the case.¹⁹⁰ Consequently, children had even less time to find attorneys before immigration courts move ahead with their cases. While this policy has since been reversed, most unaccompanied minors still appear in court without legal representation.¹⁹¹

Notwithstanding the significant life and liberty interests at stake, the Supreme Court has held repeatedly that deportation proceedings are civil rather than criminal in nature.¹⁹² The distinction is important, as many of the substantive and procedural safeguards available to criminal defendants do not apply in removal proceedings—most notably the Sixth Amendment

prolonged-immigration-detention-individuals-who-are-challenging-removal [https://perma.cc/RL3M-L4HK] (“The government’s hugely expanded use of immigration detention has meant that thousands of immigrants are detained for prolonged periods of time—for months, if not years, and often in inhuman and cruel conditions—while the immigration courts and federal courts resolve their cases.”).

188. *Immigration Court Processing Time by Outcome*, TRAC IMMIGRATION, https://trac.syr.edu/phptools/immigration/court_backlog/court_proctime_outcome.php [https://perma.cc/W43S-E8DQ].

189. See Memorandum, U.S. Dep’t of Justice, Exec. Office for Immigration Review, titled, “Revised Docketing Practices Relating to Certain EOIR Priority Cases” 1–2 (Feb. 3, 2016), <https://www.justice.gov/eoir/file/819736/download> [https://perma.cc/4U56-Z3QE]; Memorandum, U.S. Dep’t of Justice, Exec. Office for Immigration Review, titled, “Docketing Practices Relating to Unaccompanied Children Cases and Adults With Children Released on Alternatives to Detention Cases in Light of New Priorities” 2 (Mar. 24, 2015), <https://www.justice.gov/eoir/pages/attachments/2015/03/26/docketing-practices-related-to-uacs-and-awcatd-march2015.pdf> [https://perma.cc/E5JG-87HD].

190. Memorandum, U.S. Dep’t of Justice, Exec. Office for Immigration Review, titled, “Docketing Practices Relating to Unaccompanied Children,” *supra* note 189, at 2.

191. See Memorandum, U.S. Dep’t of Justice, Exec. Office for Immigration Review, titled, “Case Processing Priorities” (Jan. 31, 2017), <https://www.justice.gov/sites/default/files/pages/attachments/2017/01/31/caseprocessingpriorities.pdf> [https://perma.cc/K8JH-CX9G]; Caitlin Dickerson & Liz Robbins, *Justice Dept. Reverses Policy That Sped Up Deportations*, N.Y. TIMES (Feb. 2, 2017), <https://www.nytimes.com/2017/02/02/us/justice-department-deportation-trump.html> [https://perma.cc/59WX-EE7T] (“The Justice Department this week rescinded the Obama administration’s policy of speeding up hearings and deportations of families and children seeking refuge in the United States, a move applauded by immigration advocates who had called the practice unfair and ineffective.”).

192. See, e.g., *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) (“Consistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in the context of a deportation hearing.”); *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952) (“Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure.”); see also *U.S. v. Bodre*, 948 F.2d 28, 31–32 (1st Cir. 1991) (“It is well established that deportation proceedings are not criminal actions. Deportation proceedings have been consistently classified as purely civil in nature”); but see *Padilla*, 559 U.S. at 357 (“Although removal proceedings are civil, deportation is intimately related to the criminal process, which makes it uniquely difficult to classify as either a direct or a collateral consequence.”).

right to the assistance of counsel.¹⁹³ The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”¹⁹⁴ Courts historically understood that the framers did not intend to afford those charged with crimes an affirmative right to counsel, but rather the right to retain counsel at their own expense.¹⁹⁵ But subsequent interpretations of the Sixth Amendment right to counsel have gone far beyond the limitations set down by the Framers of the Bill of Rights. In *Gideon v. Wainwright*, for instance, the Supreme Court understood this to include counsel for indigent defendants in criminal prosecutions.¹⁹⁶ Despite the promise of *Gideon* and similar rul-

193. Until recently, courts generally accepted that the Sixth Amendment’s right to counsel does not apply to removal or to deportation proceedings. *See, e.g.*, *Garcia-Mendoza v. Sessions*, 734 Fed. App’x, 528, 529 (9th Cir. 2018) (rejecting petitioner’s “unsupported contention that he had a Sixth Amendment right to counsel in removal proceedings.”); *Camey v. Napolitano*, 540 Fed. App’x. 369, 370 (5th Cir. 2011) (“an alien does not have a sixth amendment right to counsel in removal proceedings”); KATE MANUEL, CONGRESSIONAL RESEARCH SERVICE, ALIEN’S RIGHT TO COUNSEL IN REMOVAL PROCEEDINGS IN BRIEF 1 (2016) (“Aliens, as a group, generally do not have a right to counsel at the government’s expense in administrative removal proceedings under either the Sixth Amendment or the INA.”). That being said, the Supreme Court recently had an opportunity, in *Padilla v. Kentucky*, to characterize the consequences of deportation, further identifying the difficulties that have plagued the courts in classifying the consequences immigrants faced under the statutory scheme. The *Padilla* court reiterated the severity of deportation as a consequence, and, as a result, held that the right to effective counsel requires an attorney to affirmatively provide advice related to the deportation consequences of being convicted of a crime. The court used the harsh consequences of deportation as a way to justify its holding, stating, “[t]he severity of deportation—the equivalent of banishment or exile—only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation.” *Padilla*, 559 U.S. at 373–4 (citations omitted). Some commentators have heralded *Padilla* as a breakthrough in the rigid, formalistic approach of characterizing deportation as a purely civil and non-punitive consequence, and, at least for certain types of deportation, a signal that the Court may be moving away from mere formalism and acquiescing to the current realism that acknowledges the ostensible similarities between deportation and criminal consequences. This may, then, cause courts to find that, at least some who are in deportation proceedings do have a Sixth Amendment right to counsel. Compare KANSTROOM, *supra* note 186, at 185 (In light of *Padilla*, Kanstroom proposes an “Amendment V1/2” model to bridge the divide between the more flexible due process standard used in Fifth Amendment jurisprudence in civil cases and the more specific guarantees of the Sixth Amendment to more fully recognize the reality that deportation consequences—which are tied directly to the criminal justice system and are highly punitive in nature—require an appropriate mix of the fundamental fairness required by the Fifth Amendment with certain specific constitutional protections (like appointed counsel) due to criminal defendants. Kanstroom argues that a model similar to what he proposes is the “best way to make complete logical sense of *Padilla*.”) with Terri Day and Leticia Diaz, *Immigration Policy and the Rhetoric of Reform: ‘Deport Felons not Families,’ Montcrieffe v. Holder, Children at the Border, and Idle Promises*, 29 GEO. IMMIGR. L.J., 181, 197–98 (2015) (“Although [*Padilla*’s holding that noncitizens have the right to effective assistance of counsel regarding the immigration consequences of a criminal conviction] is a far cry from incorporating the holding in *Gideon v. Wainwright* [372 U.S. 335 (1963)] to immigration proceedings, the holding in *Padilla* clearly recognizes that deportation is not merely a civil matter.”).

194. U.S. CONST. amend. VI.

195. *See, e.g.*, *Scott v. Illinois*, 440 U.S. 367, 370 (1979) (“There is considerable doubt that the Sixth Amendment itself, as originally drafted by the Framers of the Bill of Rights, contemplated any guarantee other than the right of an accused in a criminal prosecution in a federal court to employ a lawyer to assist in his defense.”).

196. 372 U.S. 335, 344–45 (1963). Clarence Gideon was accused of a felony charge of breaking and entering in Panama City, Florida. *Id.* at 336–37. At his trial, he requested and was denied appointed counsel, and was subsequently convicted and sentenced to five years in the state penitentiary.

ings, courts have repeatedly declined to find that immigrants have a Sixth Amendment right to appointed counsel at the government's expense in removal proceedings precisely because of deportation's civil designation.¹⁹⁷

The civil designation of deportation finds its roots in the 1893 *Fong Yue Ting v. United States* decision.¹⁹⁸ In that case, the Supreme Court considered whether three Chinese nationals were entitled to criminal procedural protections when facing deportation for failing to comply with a registration law requiring "one credible white witness."¹⁹⁹ A divided Court held that criminal constitutional protections had no application in deportation proceedings because such proceedings are "in no proper sense a trial and sentence for a crime or offense."²⁰⁰ The Court's reasoning rested largely on the earlier *Chae Chan Ping v. United States* decision of 1889, commonly known as the Chinese Exclusion Case.²⁰¹ Alongside cases like *Dred Scott v. Sandford*²⁰² and *Plessy v. Ferguson*,²⁰³ *Chae Chan Ping* has come to symbolize one of the worst episodes in Supreme Court jurisprudence because of the decision's explicit racism and xenophobia.²⁰⁴ The issue at hand was not deportation, but whether or not the federal government had the authority to exclude or prevent the entry of foreign nationals.²⁰⁵ It was in this context that the Court first articulated the doctrine of plenary power in the immigration realm, which dictates that Congress, and not the courts, has the sole power to regulate all aspects of immigration as a basic attribute of sovereignty, even though such a power is not enumerated in the Constitution.²⁰⁶ Four years later, in *Fong Yue Ting*, the Court extended the plenary doctrine power and the civil label to the deportation context, arguing that the power to expel and the power to exclude were "in truth but parts of one and the same power" and thus the power to deport was also inherent in the nature of

Id. at 337. On appeal, the Court found that it was an "obvious truth" that someone who "is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Id.* at 344.

197. *INS v. Lopez-Mendoza*, 468 U.S. at 1038; *see also* *Negusie v. Holder*, 555 U.S. 511, 526 (2009) (Scalia, J., concurring) ("This Court has long understood that an 'order of deportation is not a punishment for a crime.'" (quoting *Fong Yue Ting*, 149 U.S. at 730)); *Maher v. Eby*, 264 U.S. 32, 39 (1924) ("It is well settled that deportation, while it may be burdensome and severe for the alien, is not a punishment." (citing *Fong Yue Ting*, 149 U.S. at 730)).

198. 149 U.S. at 730.

199. *Id.* at 726–27.

200. *Id.* at 730.

201. 130 U.S. 581, 609 (1889).

202. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

203. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

204. *See, e.g.*, *Chae Chan Ping*, 130 U.S. at 606 (characterizing Chinese immigration as "foreign . . . encroachment" through "vast hordes of [the foreign nation's] people crowding in upon us").

205. *Id.* at 590.

206. Congress exercised its plenary power over immigration in the nineteenth century through the Chinese Exclusion Acts. The Exclusion Acts and cases upholding them gave birth to the plenary power doctrine. *See Fong Yue Ting*, 149 U.S. at 713 (holding that the power "to exclude or to expel aliens" is "vested in the political departments of the government"); *Chae Chan Ping*, 130 U.S. at 629 (holding that Congress has the power to exclude aliens from U.S. territory for any sufficient reason); *see also* *Matthews v. Diaz*, 426 U.S. 68, 79–80 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.").

sovereignty.²⁰⁷ Thus, the constitutional protections relevant to criminal proceedings, including the “right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, ha[d] no application.”²⁰⁸

Informed by the same politics of nativism, racism, and xenophobia that ushered in America’s closed-door era, and predicated upon an extra-constitutional plenary power doctrine which scholars and legal experts alike have since discredited,²⁰⁹ the Supreme Court’s 1893 classification of removal hearings as civil in *Fong Yue Ting* continues to serve as the basis for depriving immigrants of their constitutional rights to a fair and impartial hearing. For child migrants, in particular, who must navigate the labyrinth of immigration law alone, without appointed counsel, the classification comes at a steep price. Indeed, for child migrants who have lived in the United States for a significant amount of time, deportation can entail a lifetime sentence of banishment from the only home they know, to a place where

207. *Fong Yue Ting*, 149 U.S. at 713.

208. *Id.* at 730.

209. See, e.g., GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION* (1996) (asserting that the government should not be free to deport aliens on constitutionally suspect grounds); Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1091–92 (1994) (“Whatever rationales support it, the plenary power doctrine has often had distressing real-life consequences . . . [f]or years, scholars have characterized the plenary power doctrine as a national embarrassment and have called for its abandonment by the courts.”); Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 11 (1998) (arguing that the plenary power doctrine should be reexamined because the foundational cases are unsound); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 863 (1987) (arguing that the plenary power of Congress is subject to constitutional restraints and should be exercised in accordance with international law); Linda Kelly, *Preserving the Fundamental Right to Family Unity: Championing Notions of Social Contract and Community Ties in the Battle of Plenary Power Versus Aliens’ Rights*, 41 VILL. L. REV. 725, 782–83 (1996) (arguing that unbridled deference to the plenary power of Congress has had inhumane results and has violated the fundamental right of family unity of many who are subject to U.S. immigration law); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 256–58 (1985) (analyzing and criticizing the plenary power doctrine); Philip Monrad, Comment, *Ideological Exclusion, Plenary Power, and the PLO*, 77 CAL. L. REV. 831, 916 (1989) (arguing that the plenary power should be abandoned and “is an affront to the constitutional values of a free and tolerant society”); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 549 (1990) (arguing for a “direct and candid reassessment of plenary power as constitutional doctrine”); Cornelia T.L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in Miller v. Albright*, 1998 SUP. CT. REV. 1, 3–4 (1999) (discussing the indeterminacy of the Constitution and the plenary power doctrine); Victor C. Romero, *The Congruence Principle Applied: Rethinking Equal Protection Review of Federal Alienage Classifications After Adarand Constructors, Inc. v. Peña*, 76 OR. L. REV. 425, 441 (1997) (arguing for a narrower plenary power doctrine that would balance deference to important governmental power and the protection of individual rights); Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965, 971–72 (1993) (questioning the Court’s adherence to the plenary power doctrine through internationally changing norms); Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087, 1094–95 (1995) (arguing for the abandonment of the plenary power doctrine and discussing its incompatibility with international human rights); Frank H. Wu, *The Limits of Borders: A Moderate Proposal for Immigration Reform*, 7 STAN. L. & POL’Y REV. 35, 35 (1996) (arguing that the Court should abolish the plenary power doctrine, a doctrine from “an era of constitutional theory which has been superseded in almost all other respects.”).

they likely have no family, do not speak the language, and can face serious persecution or even death. And while the Supreme Court has repeatedly acknowledged the gravity of deportation, calling it “a savage penalty”²¹⁰ and “the equivalent of banishment or exile”²¹¹ that may result in the loss of “all that makes life worth living,”²¹² it has left the civil designation in place despite the significant life and liberty interests that removal proceedings entail.

While courts are quick to emphasize the civil nature of removal proceedings, they also recognize a potential due process right for aliens in cases in which fundamental fairness requires appointment of counsel.²¹³ The issue of an alien’s Fifth Amendment due process right to appointed counsel first arose in the Sixth Circuit’s 1975 decision in *Aguilera-Enriquez v. INS*, which involved a challenge to the constitutionality of Section 192 of the INA.²¹⁴ Mr. Aguilera-Enriquez claimed that the statute’s prohibition on the provision of appointed counsel at the government’s expense unconstitutionally deprived him of his due process rights.²¹⁵ The Court rejected the argument, but in so doing left open the possibility for appointed counsel in cases where “an unrepresented indigent alien would require counsel to present his position adequately to an immigration judge.”²¹⁶ The test for determining whether due process requires the appointment of counsel is if, “in a given case, the assistance of counsel would be necessary to provide ‘fundamental fairness – the touchstone of due process.’”²¹⁷

Although the *Aguilera-Enriquez* decision and subsequent decisions in other Circuits²¹⁸ have recognized that there *could* be a Fifth Amendment

210. *Jordan v. De George*, 341 U.S. 223, 243 (1951).

211. *Padilla*, 559 U.S. at 373 (quoting *Delgadillo v. Carmichael*, 332 U.S. 388, 390–91 (1947)).

212. *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

213. *See, e.g.*, *Wade v. Mayo*, 334 U.S. 672, 684 (1948) (“There are some individuals who, by reason of age, ignorance, or mental capacity, are incapable of representing themselves in a prosecution of a relatively simple nature. . . . Where such incapacity is present, the refusal to appoint counsel is a denial of due process of law.”).

214. 516 F.2d 565, 568 (6th Cir. 1975).

215. *Id.* (“The issue Petitioner raises here is whether an indigent alien has the right to appointed counsel in a deportation proceeding.”)

216. *Id.* at 568, n.3.

217. *Aguilera-Enriquez*, 516 F.2d at 568 (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973)); *see also* *Drax v. Reno*, 338 F.3d 98, 99 (2d Cir. 2003) (describing removal proceedings as a “labyrinthine character of modern immigration law – a maze of hyper-technical statutes and regulations that engender waste, delay, and confusion for the Government and petitioners alike.”).

218. *See, e.g.*, *Ruiz v. INS*, 787 F.2d 1294, 1297 n.3 (9th Cir. 1996) (“The fifth amendment guarantee of due process applies to immigration proceedings, and in specific proceedings, due process *could be held to require* that an indigent alien be provided with counsel despite the prohibition of section 292”) (emphasis added), *withdrawn on other grounds*, 838 F.2d 1020 (9th Cir. 1998) (en banc); *Michelson v. INS*, 897 F.2d 465, 468 (10th Cir. 1990) (“The fifth amendment guarantee of due process speaks to fundamental fairness; before we may intervene based upon a lack of representation, petitioner must demonstrate prejudice which implicates the fundamental fairness of the proceeding.”); *Barthold v. INS*, 517 F.2d 689, 690–91 (5th Cir. 1975) (“Whether the indigent alien has a right to appointed counsel has been much discussed in the federal courts, but never considered by the Supreme Court. The existence, let alone the nature and scope, of such a right has not been established.”).

due process right to appointment of counsel for individual aliens should fundamental fairness so require (i.e. in cases where the alien is incapable of representing themselves due to “age, ignorance, or mental capacity”), courts have yet to apply this constitutional protection in *actual* practice.²¹⁹ Concerning migrant children, the courts have been explicit in this matter. For example, in a 2002 case, *Gonzalez Machado v. Ashcroft*, a federal district court in Washington rejected the argument that unaccompanied alien children, as a whole, have a due process right to appointed counsel.²²⁰ In explaining its decision, the court reasoned that the “[c]ase law does not demonstrate . . . that the right to counsel is on an inevitable path of outward expansion,” a factor which the court viewed as significant since, in its view, the plaintiff would have to demonstrate that the precedents finding that aliens have no statutory right to appointed counsel at the government’s expense in removal proceedings have been “eroded” by subsequent decisions or “become anachronistic” in order to prevail in the face of the government’s motion to dismiss the complaint.²²¹

More recently, in its 2015 judgement in *J.E.F.M. v. Holder*, another federal district court in Washington ruled against a UAC plaintiff who claimed that the government’s failure to provide counsel at government expense violated the Fifth Amendment’s Due Process Clause and ran afoul of the INA’s provisions requiring a full and fair hearing.²²² The court ruled, however, not on the grounds that the plaintiff’s case was without merit, but rather that it fell outside the court’s jurisdiction.²²³ In its summary finding the court acknowledged that “[a] fundamental precept of due process is that individuals have a right ‘to be heard at a meaningful time and in a meaningful manner’ before ‘being condemned to suffer grievous loss of any kind,’” and a UAC cannot effectively exercise this right without the assistance of counsel.²²⁴ A year later, the Ninth Circuit’s decision in *J.E.F.M. v. Lynch* upheld the district court’s findings.²²⁵ The case made headlines around the country when assistant chief immigration judge Jack Weil, a witness selected by the U.S. Department of Justice who often trains other immigration judges, testified in a deposition that children as young as three

219. See THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN & HIROSHI MOTOMURA, *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 1155 (7th ed., 2012) (“research reveals no published decision applying the test set forth in *Aguilera-Enriquez* to require government-paid counsel in a deportation or removal proceeding, though many cases reiterate the fundamental fairness standard.”).

220. See *Gonzales Machado v. Ashcroft*, No. C5-02-0066-FVS, at 21 (E.D. Wash. June 18, 2002) <https://www.clearinghouse.net/chDocs/public/IM-WA-0017-0002.pdf> [<https://perma.cc/A753-NRAW>] (determining “that the plaintiff has not distinguished the interests of juveniles from those of adults generally so as to demonstrate that the Ninth Circuits holding that aliens have no right to appointed counsel should not bar his claim.”).

221. *Id.* at 17.

222. 107 F. Supp. 3d 1119, 1123, 1134 (W.D. Wash. 2015).

223. *Id.* at 1132 (concluding “the Court lacks jurisdiction over plaintiffs’ statutory [right to government-appointed counsel] claim.”).

224. *Id.* at 1126 (some internal quotation marks omitted).

225. *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1037–38 (2016).

and four can learn immigration law well enough to represent themselves in court.²²⁶ The absurdity of the claim underscores the precarious position of the tens of thousands of child migrants who must face the likes of Judge Weil as they navigate the labyrinthine maze of laws and courts alone.

In January of 2018, the Ninth Circuit dealt a further blow to the fortunes of all child migrants with its decision in *C.J.L.G. v. Sessions*,²²⁷ in which the court upheld the earlier deportation order for a young Honduran boy who had fled to the United States with his mother after a gang threatened him at gunpoint to join them. The Ninth Circuit determined that although minors are entitled to heightened protection in removal proceedings, neither the Due Process Clause of the Fifth Amendment nor the INA creates a categorical right to court-appointed counsel at government expense for alien minors.²²⁸ In so doing, however, the Court granted an *en banc* review in the matter, thus leaving the door open for future consideration. Furthermore, in a one-paragraph concurrence, Judge John Owens noted that “[t]he opinion does not hold, or even discuss, whether the Due Process Clause mandates counsel for unaccompanied minors. That is a different question that could lead to a different answer.”²²⁹ However, in light of the current political climate, it is unlikely that a different answer will come any time soon.

CONCLUSION

The fact that U.S. immigration law does not recognize a categorical right to appointed counsel for child migrants in removal proceedings is a direct violation of international human rights law,²³⁰ to say nothing of the due

226. J. Weil, Dep. 69:23–70:3, Oct. 15, 2016, <http://cdn.cnn.com/cnn/2018/images/06/29/jack-weil-deposition.pdf> [<https://perma.cc/Y5B8-XYMU>] (“I’ve taught immigration law literally to three year olds and four year olds. It takes a lot of time. It takes a lot of patience. They get it. It’s not the most efficient, but it can be done”); see also Molly Hennessy-Fiske, *This judge says toddlers can defend themselves in immigration court*, L.A. TIMES (Mar. 6, 2016), <https://www.latimes.com/nation/immigration/la-na-immigration-judge-20160306-story.html> [<https://perma.cc/FJ6F-TLT2>].

227. *C.J.L.G. v. Sessions*, 880 F.3d 1122, 1150–51 (2018), *reb’g en banc granted*, *C.J.L.G. v. Sessions*, 904 F.3d 642 (2018).

228. *C.J.L.G.*, 880 F.3d at 1150–51 (“Neither Supreme Court nor circuit precedent compels the remedy that C.J. seeks: court-appointed counsel at government expense. And to the extent the IJ failed to provide all the trappings of a full and fair hearing, any shortcomings did not prejudice the outcome because the IJ adequately developed the record on issues that are dispositive to C.J.’s claims for relief.”).

229. *Id.* at 1151 (Owens, J., concurring).

230. Several human rights treaties recognize that legal representation in immigration proceedings involving minors is essential for due process and equal treatment under the law, and necessary to ensure that the best interests of the child are safeguarded. For example, Article 37 of the Convention on the Rights of the Child (signed by the U.S. in 1995, although not ratified), specifically states, “every child deprived of his or her liberty shall have the right to legal . . . assistance.” See Convention on the Rights of the Child, art. 37, Nov. 20, 1989, 1577 U.N.T.S. 3. Similarly, Article 13 of the International Covenant on Civil and Political Rights (ratified by the U.S. in 1992) provides that immigrants must be granted access to legal counsel in their deportation hearings. For the treaty and a list of countries that have either signed or ratified it, see International Covenant on Civil and Political Rights art. 13, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171. For a record of every

process rights enshrined in the U.S. Constitution, or the lofty ideals of freedom and liberty championed by our founding fathers and inscribed on our most iconic monuments. But it is also a reaffirmation of ideologies and politics of xenophobia and exclusion which have shaped immigration policy for over a century. The arrival of tens of thousands of child migrants at the U.S.-Mexico border in recent years (largely the result of America's own foreign policy blunders in Central America in the late 1970's and 1980's) has not only renewed calls in Congress and across the country to enact meaningful immigration reform, but has also brought into question the very nature of our national identity. Are we truly a nation of immigrants, or are we a gatekeeping nation that seeks to maintain a social and political status quo in favor of an Anglo-Saxon homogeneity and hegemony, that seeks to further narrow national interests and foreign policy objectives rather than humanitarian ones, and is, in fact, actually driven by the politics and ideologies of xenophobia, racism, and exclusion as opposed to inclusion and diversity? From the Dreamers who face an uncertain future in light of Trump's renewed calls to end DACA, to the thousands of child migrants who must navigate the complex web of immigration laws and courts without the benefit of due process, America is unquestionably a gatekeeping nation. The question for Americans, then, is whether or not the country has the moral courage to remedy this injustice.

country that has either signed or ratified this treaty, see *United Nations Treaty Collection, Status of Treaties*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtsg_no=IV-11&chapter=4&lang=en [<https://perma.cc/54HA-MVYF>]. In 2014, the United Nations Committee Against Torture, which oversees the implementation of the Convention Against Torture (ratified by the U.S. in 1994), recommended that the U.S. provide "special consideration for minors" seeking asylum, and guarantee "access to counsel." See Comm. on Torture, Concluding Observations on the Combined Third to Fifth Periodic Reports of the United States of America, U.N. Doc. CAT/C/USA/CO/3-5, at 9, ¶¶18(b), (d) (Dec. 19, 2014), https://ccrjustice.org/sites/default/files/attach/2016/03/UNCAT_USReviewConcludingObservations_2014.pdf [<https://perma.cc/C8DN-RMC6>].