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Jacqueline Bhabha, Not a Sack of Potatoes: Moving and Removing Children across Borders, 15 B.U. PUB. INT. L.J. 197 (2006).

ALWD 7th ed.

Jacqueline Bhabha, Not a Sack of Potatoes: Moving and Removing Children across Borders, 15 B.U. Pub. Int. L.J. 197 (2006).

APA 7th ed.

Bhabha, Jacqueline. (2006). Not sack of potatoes: moving and removing children across borders. Boston University Public Interest Law Journal, 15(2), 197-218.

Chicago 17th ed.

Jacqueline Bhabha, "Not a Sack of Potatoes: Moving and Removing Children across Borders," Boston University Public Interest Law Journal 15, no. 2 (Spring 2006): 197-218

McGill Guide 9th ed.

Jacqueline Bhabha, "Not a Sack of Potatoes: Moving and Removing Children across Borders" (2006) 15:2 BU Pub Int LJ 197.

AGLC 4th ed.

Jacqueline Bhabha, 'Not a Sack of Potatoes: Moving and Removing Children across Borders' (2006) 15(2) Boston University Public Interest Law Journal 197

MLA 9th ed.

Bhabha, Jacqueline. "Not a Sack of Potatoes: Moving and Removing Children across Borders." Boston University Public Interest Law Journal, vol. 15, no. 2, Spring 2006, pp. 197-218. HeinOnline.

OSCOLA 4th ed.

Jacqueline Bhabha, 'Not a Sack of Potatoes: Moving and Removing Children across Borders' (2006) 15 BU Pub Int LJ 197
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“NOT A SACK OF POTATOES”¹: MOVING AND REMOVING CHILDREN ACROSS BORDERS

JACQUELINE BHABHA*

“I’ve had a lot of experience with dealing with borders as the Governor of Texas. I know there’s a compassionate, humane way to deal with this issue.”

—President George W. Bush²

“[I]t’s hard to see little children all alone in detention. Kids who are like 5 years old. Sometimes they separate them and deport their mommies. I know, I have seen it.”

—Kasim, a teenaged asylee³

I. INSTITUTIONAL CHILD ABUSE: THE VIOLATION OF CHILD MIGRANTS’ HUMAN RIGHTS

Edgar Chocoy made two international journeys in his short life. He chose the first himself at the age of fourteen—an overland solo migration from Guatemala, via Mexico, to California. Edgar’s purpose was to find what the Convention on the Rights of the Child (CRC) stipulates for each child—a family environment, . . .

¹ Posting of Casa-Alianza.org, owner-rapid-response@casa-alianza.org to rapid-response@casa-alianza.org (May 11, 2004, 20:30 EST) (on file with Boston University Public Interest Law Journal), *available at* http://www.libertadlatina.org/Lat_Guatemala_Mexico_Immigration_Loses_13%20Year_Old_05-11-2004.htm. Describing the case of a 13-year-old Guatemalan girl “lost” by Mexican immigration authorities, Bruce Harris, Regional Director for Latin American Programs of Casa Alianza, stated: “You can’t simply ‘lose’ a girl. She is not a sack of potatoes, she is a human being [whom] Mexican and Guatemalan authorities are obligated by law to protect . . .” *Id.*

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² President’s News Conference, 41 WEEKLY COMP. PRES. DOC. 84, 94 (Jan. 26, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/01/20050126-3.html>.

³ Interview by Joanne Kelsey with Kasim (July 4, 2004), *cited in* JACQUELINE BHABHA ET AL., SEEKING ASYLUM ALONE: UNACCOMPANIED AND SEPARATED CHILDREN AND REFUGEE PROTECTION IN THE U.S. (forthcoming 2006) [hereinafter SEEKING ASYLUM ALONE: U.S.] (manuscript at 75, on file with Boston University Public Interest Law Journal). This child’s name has been changed to “Kasim” to protect his anonymity. After an age dispute, Kasim, a mentally handicapped Guinean youth, entered the United States at age sixteen and spent nearly three years in detention while seeking asylum. *See id.*

an atmosphere of happiness, love and understanding[.]”⁴ Edgar sought to leave behind the dangers and hardships of the street and gang life in Guatemala that he had been forced into after his mother abandoned him as an infant.⁵ Hoping to find her, Edgar eventually made his way to Los Angeles.⁶ After reaching the United States and reuniting with his mother, he applied at the age of sixteen for asylum as a child fleeing persecution.⁷ The U.S. government chose Edgar’s second trip: a forced removal from L.A. back to Guatemala following denial of his asylum application and a failed attempt to hang himself with his own shoelaces while in detention.⁸ He was sent back to the place he fled and the people he feared.⁹ Seventeen days after his removal from the United States, members of Edgar’s former street gang murdered him.¹⁰ Edgar’s first journey was prompted by considerations of his own “best interest,” but best interest chosen for himself and by himself without adult intervention or oversight. His second journey was decided on by government immigration officials and an immigration court judge with no regard for his “best interest.” Edgar exercised his agency to secure protection and the possibility of a viable life; the “responsible” adults intervened to send him to his death.

For many unaccompanied children seeking asylum, the outcome of international migration is not the panacea for which they hoped. Rather, as with Edgar, the process compounds the deprivation, anxiety and vulnerability that prompted migration in the first place. But Edgar’s case is atypical in some respects. First, there was no collaboration between different actors engaged in his migration: he was the sole decision maker for his journey into the United States, the state was the sole decision maker for his journey out. By contrast, three principal actors shape most child migration cases: adult family members, the child, and the state. Each of these roles has policy implications.¹¹ First, consider the function of adults. Adults usually play a key role in the child’s embarkation on international migration. This role is obvious when the adult accompanies the child across borders, such as when

⁴ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, I.L.M. 1456 (1989), at Preamble [hereinafter CRC].

⁵ Bruce Finley, *Death of a Deportee*, DENVER POST, Apr. 5, 2004, at A1.

⁶ *Id.*

⁷ *Id.*

⁸ Bruce Finley, *Deportee’s slaying spurs reform push: Advocates say teen’s fear of gangs unheeded*, DENVER POST, Apr. 8, 2004, at A1.

⁹ *Id.*

¹⁰ *Id.*

¹¹ The following discussion draws on SEEKING ASYLUM ALONE, an international research study which I co-directed. SEEKING ASYLUM ALONE researched the situation of unaccompanied and separated child asylum seekers in the United States, United Kingdom, and Australia. SEEKING ASYLUM ALONE includes one generic report, *see infra* note 12, and three country-specific studies, *see supra* note 3, *infra* notes 19-20, which will appear in four publications, forthcoming in Spring/Summer 2006. Susan Schmidt, whose contribution and expertise I would like to acknowledge, conducted much of the United States research and writing. SEEKING ASYLUM ALONE was funded by the John D. and Catherine T. MacArthur Foundation.

the child is a transnational adoptee or a member of an immigrant family migrating for work or refuge or family reunification. But, typically, adults are also the decision makers in a small but significant number of cases where the adult sends the child off unaccompanied or the adult and child become separated, forcing the child to cross borders alone. This may occur for any number of reasons: the adult may send the child off to find bare physical safety, to enjoy economic opportunities and a better life, to join relatives who have already migrated, or to be exploited for sex or labor. The child's opinion is rarely heard or even solicited in the decision-making process for international migration. As an unaccompanied Afghan child sent off to Australia by his family commented:

My father came. His eyes were full of water. Please you have to leave Afghanistan you have to go So I went Now I am here I didn't know where Australia was, I didn't know between countries. What could I have done? I did not have any choice.¹²

Children generally migrate because of decisions made by others. A correlate of the lack of agency in this choice is that child migrants are not responsible for their irregular movement. Nevertheless, the goal of sending a message to the child migrants' parents, their traffickers, or their impoverished states of origin often shapes the responses of states dealing with unaccompanied or separated children, despite their lack of individual responsibility or choice. Punishment, deterrence, detention, physical restraint, and forcible removal may be appropriate responses to intentional law breaking in the absence of countervailing justifications (e.g. entitlement to refuge). These responses have no place, however, in situations where this intention is lacking. Punishment is an inappropriate response where international law has established that the need for protection, not the motive for migration, should guide the state's decision making.¹³ Yet, when assessing migration motives and deciding on a response, states often choose to impute agency for the migration choice to the unaccompanied or separated child—a form of guilt by deduction or guilt by association with the parent or guardian's decision.¹⁴

Second, consider the role of the authorities, including immigration officials and welfare personnel. States do not typically arrive at conclusive or expeditious out-

¹² JACQUELINE BHABHA, ET AL., SEEKING ASYLUM ALONE, UNACCOMPANIED AND SEPARATED CHILDREN AND REFUGEE PROTECTION (forthcoming Summer 2006) [hereinafter SEEKING ASYLUM ALONE] (manuscript at 7), on file with Boston University Public Interest Law Journal).

¹³ *Id.* at 28, 41 (citing The High Commissioner for Refugees, *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum*, §§ 1.2, 1.4 (Feb. 1997)).

¹⁴ Jaqueline Bhabha & Wendy Young, *Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines*, 11 INT'L J. REFUGEE L. 84, 94-96 (1999) (stating that the 1989 Convention on the Rights of the Child [CRC], *supra* note 4, has been generally adopted by most countries and that the CRC establishes the child as an independent agent and bearer of rights, not merely an object of adult concerns, thereby imputing responsibility for the choice to migrate to the child).

comes in cases involving illegal child migration, in contrast to the relatively short resolution of Edgar Chocoy's case.¹⁵ Children's cases are normally mired in a Kafkaesque labyrinth of administrative complexity, bureaucratic delay and official indecision.¹⁶ The delays in resolving children's cases are not attributable only to the fact that four major government departments and sixteen different agencies share responsibility for unaccompanied or separated child migrants without any inter-agency consistency in terms of child-specific training, policy or overall practice.¹⁷

¹⁵ See AMNESTY INTERNATIONAL U.S.A., UNACCOMPANIED CHILDREN IN IMMIGRATION DETENTION, 3-4 (2003), available at http://www.amnestyusa.org/refugee/pdfs/children_detention.pdf.

¹⁶ *Id.* at 47, 61, 64; BHABHA ET AL., SEEKING ASYLUM ALONE: U.S., *supra* note 3, at 5.

¹⁷ See AMNESTY INTERNATIONAL U.S.A., *supra* note 15, at 6-7, 15-16 (describing three of the agencies responsible for unaccompanied alien children and the need for overarching guidelines for children's asylum claims).

FEDERAL GOVERNMENT ENTITIES INVOLVED WITH UNACCOMPANIED AND SEPARATED CHILDREN¹⁸			
Department	Agency	Office	Function
Department of Health and Human Services (HHS)	Administration for Children and Families	Office of Refugee Resettlement (ORR)	Responsible for the care and custody of separated children
	U.S. Public Health Service	Division of Immigration Health Services	Provides primary healthcare for children in federal custody
Department of Homeland Security (DHS)	U.S. Citizenship and Immigration Services (USCIS)	Asylum Division	Adjudicates affirmative asylum applications
		Office of the Chief Counsel	Establishes T and U visa policy
		Office of Programs and Regulation	Establishes SIJS policy and practice
		Parole and Humanitarian Assistance Branch	Responsible for Cuban / Haitian Entrant program
		Refugees Division	Responsible for overseas refugee interviews
	U.S. Coast Guard (USCG)	Alien Migrant Interdiction	Interdicts undocumented children at sea seeking entry into the U.S.
	Customs and Border Protection (CBP)	Border Patrol	Apprehends separated children at airports and major ports of entry, holds them for up to 72 hours
	U.S. Immigration and Customs Enforcement (ICE)	Office of Detention and Removal	Adjudicates consent requests for detained children seeking SIJS, executes removals

¹⁸ This chart appears in BHABHA ET AL., SEEKING ASYLUM ALONE: U.S., *supra* note 3. The chart is reproduced here by permission of co-authors Jacqueline Bhabha and Susan Schmidt.

		Office of the Principal Legal Advisor	Supervises ICE trial attorneys representing government interests in immigration court
Department of Justice (DOJ)	Executive Office for Immigration Review (EOIR)	Office of the Chief Immigration Judge (OCIJ)	Oversees all Immigration Court proceedings
		Board of Immigration Appeals (BIA)	Adjudicates appeals from immigration court cases
	U.S. Marshals Service	Justice Prisoner and Alien Transportation System	Transports children with removal orders
		Witness Security Program	Maintains custody of child witnesses against smugglers and traffickers
Department of State (DOS)	Under Secretary for Democracy and Global Affairs	Bureau for Population, Refugees and Migration (BPRM)	Oversees processing of separated children entering through the U.S. Refugee Program
		Office of Country Reports and Asylum Affairs	May review or comment on individual asylum claims; releases annual reports on global human rights abuses

The delays are also not just a matter of discrimination, as is the case in the United Kingdom, where less than half the proportion of child asylum seekers receive asylum compared with their adult counterparts.¹⁹ Nor are the delays attributable to the fact that, as in Australia, the government makes no accommodation whatsoever for this population's special needs—for shelter, advice, mentoring.²⁰ Rather, the main problem in the United States is that children tend to be invisible, and that government agencies attend to children in the migration process by default, as an afterthought or add-on. As many child advocates have noted, unaccompanied or separated children simply slip through the cracks. They are not supported by the protective networks designed to safeguard asylum seekers and refugees, and they receive inadequate representation or no representation at all from competent legal professionals due to a lack of access or government funding.²¹ As a result, the children must contend with complex procedures ill-suited to their needs (e.g., applying for asylum while unrepresented and after prolonged detention, as was the case for Edgar) and decision makers unwilling or unable to address the specificities of their situation (e.g. determining whether fleeing from gang violence may amount to persecution under the Refugee Convention).²² Often, these cases drag on by default.²³ While permanency planning is a guiding principle in established child welfare practice,²⁴ impermanency perpetuation is all too often the outcome of immigration intervention in the cases of unaccompanied or separated children.²⁵ The clear-cut out-

¹⁹ JACQUELINE BHABHA, ET AL., SEEKING ASYLUM ALONE: U.K. REPORT (forthcoming Summer 2006).

²⁰ JACQUELINE BHABHA, SEEKING ASYLUM ALONE: AUSTRALIA REPORT (forthcoming Summer 2006) [hereinafter SEEKING ASYLUM ALONE: AUSTRALIA].

²¹ See, e.g., Bhabha & Young, *supra* note 14, at 87-8; *Children Seeking Asylum Held in Detention*, WOMEN'S COMMISSION NEWS (Women's Commission for Refugee Women and Children, New York, N.Y.), Summer/Fall 2001, at 10, available at http://www.womenscommission.org/pdf/nl_sf01.pdf. See generally SIMON RUSSELL, MOST VULNERABLE OF ALL: THE TREATMENT OF UNACCOMPANIED REFUGEE CHILDREN IN THE U.K. (1999); Christopher Nugent & Steven Schulman, *Giving Voice to the Vulnerable: On Representing Detained Immigrant and Refugee Children*, 78 INTERPRETER RELEASES 1569 (2001); JO BECKER AND MICHAEL BOCHENEK, HUMAN RIGHTS WATCH, DETAINED AND DEPRIVED OF RIGHTS: CHILDREN IN THE CUSTODY OF THE U.S. IMMIGRATION AND NATURALIZATION SERVICE § 4 (1998) available at <http://www.hrw.org/reports98/ins2/>.

²² Nugent & Schulman, *supra* note 20, at 1570-71; BECKER & BOCHENEK, *supra* note 21. See also BHABHA ET AL., SEEKING ASYLUM ALONE: U.S., *supra* note 3, at 27-8.

²³ BECKER & BOCHENEK, *supra* note 21.

²⁴ U.S. DEP'T. OF HEALTH & HUMAN SERVICES, ADMIN. FOR CHILDREN AND FAMILIES, ADMIN. ON CHILDREN, YOUTH AND FAMILIES, CHILDREN'S BUREAU, REPORT TO THE CONGRESS ON KINSHIP FOSTER CARE iv, (2000), available at <http://aspe.hhs.gov/hsp/kinr2c00/full.pdf>.

²⁵ See, e.g., BHABHA ET AL., SEEKING ASYLUM ALONE: U.S., *supra* note 3, at 131-139 (describing the lengthy judicial review that follows a government appeal of a grant of asylum to a child); AMNESTY INTERNATIONAL U.S.A., *supra* note 15, at 15 (discussing lengthy detention of child asylees due to delays by INS in granting consent from Special Immigrant Juvenile status), 65 (reporting that children can spend months or years in

come of Edgar's case was unusual. The system may somewhat shield these child asylum-seekers from removal or deportation when compared to similarly placed adults, but a significant portion end up in inconclusive or, at best, temporary statuses.²⁶

Third, one must consider the child's position. We know what Edgar wanted, where his family lived, and what he left behind, but this clear picture is atypical. The relationship between the child migrant's wishes and his or her best interest is often complex, requiring exploration and investigation.²⁷ In most instances of unaccompanied or separated children, unlike Edgar's case, what the child thinks and wants is not immediately apparent. Authorities may not ask the child (remember the INS handling of Elian Gonzalez's case);²⁸ the child may be too young to articulate a view, or authorities may suspect the child of mouthing a pre-rehearsed story (consider the trafficked child Nigerian sex slaves in the United Kingdom haunted by threats of witchcraft into repeating a standard story).²⁹

The outcome of a careful "best interest" calculation may not be clear. It can require investigation, care, and time. This is particularly challenging when the migration has led to separation between the child and his or her nuclear family. Is there a bona fide argument, as is often alleged, that removal or deportation may be in the child's best interests because it will result in family reunification? This argument may be more clearly correct where a child has been kidnapped or forcibly trafficked in some other way, as in the cases of four- and five-year-old boys stolen from their Bangladeshi families to become camel jockeys in Saudi Arabia,³⁰ Albanian children smuggled into Italy to work as beggars,³¹ or Central American children hidden away as sex slaves in the United States.³² It may be evident that a child's expressed wish to stay in the destination country matches his or her best interests—as where young children are smuggled into the United States from Mexico to reunify with parents already living here; where a child has fled a war zone; or where the circumstances of their journey mean that removal will present specific dangers such as punishment by parents, imprisonment, or the risk of re-trafficking.

detention pending resolution of their immigrant status, compared to average of 160 days for adults).

²⁶ See BHABHA ET AL., *SEEKING ASYLUM ALONE: U.S.*, *supra* note 3; AMNESTY INTERNATIONAL U.S.A., *supra* note 15; *infra* text accompanying notes 71-75.

²⁷ See BHABHA ET AL., *SEEKING ASYLUM ALONE: U.S.*, *supra* note 3, at 29.

²⁸ *See id.* at 137.

²⁹ BHABHA ET AL., *SEEKING ASYLUM ALONE: U.K.*, *supra* note 19.

³⁰ Ofelia Calcetas-Santos, *Report of the Special Rapporteur on the sale of children, child prostitution and child pornography* E/CN.4/1997/95, February 7, 1997, available at <http://www.ohchr.org/english/issues/children/rapporteur/index.htm> (follow "documents" hyperlink).

³¹ For an interesting discussion of "best interest" outcomes in the removal of unaccompanied children from Italy, see *Health and Welfare of Juvenile Immigrants: Reviewing the work of a local NGO in Bologna, Italy* (unpublished manuscript on file with the author).

³² Peter Landesman, *The Girls Next Door*, N.Y. TIMES, Jan. 25, 2004, at § 6.

It often takes time and care to establish what the child thinks and wants, particularly when he or she is disoriented by the displacement from home and by current circumstances. As a child interviewed for a recent report on children seeking asylum commented about his state of mind: "Sometimes I thought it's as if you are disconnected from all world, you're just inside there and it's as if your life has stopped."³³

Even when the child's views are clear, reunification may not be the only or the overriding consideration. For unaccompanied and separated children, the government must establish clear guidelines for when it is in the child's best interests to be permanently separated from his or her nuclear family, particularly as such separation often leads to the child being exposed to the exploitative rigors of inner city life in a Western metropolis.³⁴ What sources of information apart from the child's views should be elicited? Social workers, psychologists, and trauma experts are a good place to start.

Compared to this relative complexity, Edgar's case should have been simple. He chose to leave his home environment, the street gang in Guatemala, in search of his mother; he wished to live in safety in the United States; he sought asylum from persecution by his peer group. His "best interests"—family reunification, safety, the prospects for protection, or nurturing and development—lay in being granted a permanent status in the United States. Moreover, in Edgar's case, his actions clearly articulated his wishes: he traveled across two countries alone, requested asylum, and indicated his desperation at the prospect of removal to Guatemala by attempting to hang himself.³⁵ There was no mystery about "voiced" demands, no plausible case for alleging confusion or lack of clarity about his best interests. His alternatives were stark.

II. TYPICAL CHARACTERISTICS IN THE HANDLING OF CHILD MIGRATION CASES

A. Protection Deficit

Though Edgar's case is atypical, it highlights several characteristics about the handling of children's immigration cases which are common, disturbing, and in urgent need of change. The most evident, and the subject of frequent comment, is the dramatic protection deficit—the failure of U.S. authorities to counterbalance their immigration enforcement mandate with a system for attending to the child's human rights and needs for protection.³⁶ The harshness of immigration enforcement on immigrant children is reflected in the statement by Kasim, a teenage asylee: "My first impression when I ran into the officials was that they thought I had

³³ BHABHA ET AL., SEEKING ASYLUM ALONE: U.K., *supra* note 19.

³⁴ See, e.g., BHABHA ET AL., SEEKING ASYLUM ALONE: U.S., *supra* note 3, at 124 (describing risks facing unaccompanied children seeking asylum in New York City).

³⁵ See *supra* pp. 197-8.

³⁶ AMNESTY INTERNATIONAL U.S.A., *supra* note 15, at 21, 75; Nugent & Schulman, *supra* note 21, at 1570-72.

robbed a bank or was a criminal. They yelled at me not to move and that made me very nervous. We were questioned individually.”³⁷

In the U.S. context, this deficit manifests itself in several ways. Most egregious is the absence of a guardian or other adult charged with ascertaining the best interests of children seeking asylum alone—a dereliction of the duties owed by the state in its capacity as *parens patriae*. To quote the Committee on the Rights of the Child, the body that oversees implementation of the Convention, in their recent General Comment on Unaccompanied and Separated Children:

A determination of what is in the best interests of the child requires a clear and comprehensive assessment of the child’s identity, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs. . . . *The assessment process should be carried out in a friendly and safe atmosphere by qualified professionals who are trained in age and gender sensitive related interviewing techniques.*

Subsequent steps, such as the appointment of a competent guardian as expeditiously as possible, serves as a key procedural safeguard to ensure respect for the best interests of an unaccompanied or separated child. Therefore, such a child should only be referred to asylum or other procedures after the appointment of a guardian. In cases where separated or unaccompanied children are referred to asylum procedures or other administrative or judicial proceedings, they should also be provided with a legal representative in addition to a guardian.³⁸

These defects are not particular to the U.S. system. The United Kingdom and Australia also lack an adequate system of guardianship for unaccompanied or separated children, and have yet to adopt the good practices of Canada, Norway, Luxembourg and France. As a result, the child’s overall treatment is poor because his or her wishes and interests remain unexplored at best, and are too frequently completely ignored. An experimental program in Chicago, the Immigrant Children’s Advocacy Program, has attempted to correct this defect by providing Child Protection Advocates to some unaccompanied or separated children.³⁹ One anecdote suggests that they have achieved positive results:

In one case, a 10 year old Middle Eastern boy in an ORR-funded facility was very guarded in his interactions with caseworkers and his pro bono attorney. After regular visits by his Arabic-speaking Advocate, he began to trust her and opened up about the abuse he and his mother suffered at the hands of his father. Eventually, the boy allowed the Advocate to call his mother in his home country, confirming the harsh abuse inflicted by the child’s father and the mother’s desperate decision to send him away for his own safety. The Advocate played a crucial role in eliciting painful information from the child neces-

³⁷ BHABHA ET AL., SEEKING ASYLUM ALONE: U.S., *supra* note 3, at 4.

³⁸ Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, ¶ 20-21, U.N. Doc. CRC/GC/2005/6 (September 1, 2005) (emphasis added).

³⁹ BHABHA ET AL., SEEKING ASYLUM ALONE: U.S., *supra* note 3, at 68-69.

sary for his legal case and in facilitating his reunification with a caregiver in the U.S.⁴⁰

Moreover, the absence of state funded legal representation compounds the protection deficit in predictable ways. It results in a situation where the majority of unaccompanied or separated children appear unrepresented in immigration court in the course of their removal proceedings;⁴¹ it leads to an examination of their legal claims which is cursory at best;⁴² child-specific jurisprudence remains seriously underdeveloped;⁴³ and (most regrettably and alarmingly) it leads to the unjustified removal or denial of protective status.⁴⁴ At the time of this writing, unaccompanied and separated children applying for asylum in the United States still have no right to state funded counsel. As one Ugandan youth recounted:

I received no explanation about what was going on. I did not have an interpreter and no one spoke to me in my language. I did not understand them. I did not expect that this is what would happen to me when I arrived in the United States. I was very afraid. . . .⁴⁵

It is well known that legal representation increases the likelihood that an applicant of any age will receive asylum. Asylees with legal representation are six times as likely to be granted asylum as those without an attorney.⁴⁶ Our study found that a mere 32% of all child applicants had attorneys to assist with their asylum interviews.⁴⁷ 48% of child applicants with legal representation were granted asylum, compared to 27% without legal representation.⁴⁸ Thus, representation nearly doubles the chances of a successful outcome. Delay is also endemic, reflecting the fact that there are no statutory limits on the length of time unaccompanied and separated children can be deprived of their liberty pending adjudication of their asylum claim, despite the known traumatic and long term effects of detention on children.⁴⁹

⁴⁰ *Id.* (citing Interview with Maria Woltjen, Project Director, Immigrant Children's Advocacy Project, Heartland Alliance, in Chicago, IL. (Dec. 6, 2005)).

⁴¹ *Id.*, at 118 (explaining that less than one third of all child applicants for asylum in the United States had attorneys to assist with their asylum interviews, and that only 32% had legal representation at any stage).

⁴² *Id.*, at 119-20 (explaining that represented children are granted asylum more often than unrepresented children).

⁴³ *Id.*, at 133-34.

⁴⁴ *Id.*, at 118 (explaining that legal representation is critical in situations where a child must rebut denied applications and present assertions in support of his or her claim).

⁴⁵ *Id.*, at 21 (citing Interview by Joanne Kelsey and Wendy Young with Ugandan youth who requested anonymity, in Washington D.C. (Feb. 18, 2004)).

⁴⁶ Andrew Schoenholtz & Jonathan Jacobs, *The State of Asylum Representation: Ideas for Change*, 16 GEO. IMMIGR. L.J. 739, 743 (2002).

⁴⁷ BHABHA ET AL., SEEKING ASYLUM ALONE: U.S., *supra* note 3, at 118.

⁴⁸ *Id.*

⁴⁹ *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers* 9 (Physicians for Human Rights & The Bellevue/NYU Program for Survivors of Torture, Boston, Mass. and New York, N.Y.), June 2003.

Additionally, the absence of a "best interest" standard as a primary consideration governing the unaccompanied or separated alien child's immigration proceedings contradicts recognized international standards for child asylum seekers.⁵⁰ The Immigration and Naturalization Service's 1998 guidelines state that "the internationally recognized 'best interests of the child' principle is a useful measure for determining appropriate interview procedures for child asylum seekers . . ." yet this is not the standard governing unaccompanied children seeking asylum in the United States today.⁵¹

The Executive Office for Immigration Review has taken a similar approach. The EOIR offers guidance by stating that immigration judges may use the "best interest of the child" concept at their discretion to facilitate a child-friendly courtroom atmosphere:

The concept of "best interest of the child" does not negate the statute or the regulatory delegation of the Attorney General's authority, and cannot provide a basis for providing relief not sanctioned by law. Rather, this concept is a factor that relates to the immigration judge's discretion in taking steps to ensure that a "*child-appropriate*" *hearing environment* is established, allowing a child to discuss freely the elements and details of his or her claim.⁵²

The Homeland Security Act of 2002 ("the Act") similarly adopts the "best interest of the child" concept. After transferring responsibility for the care of unaccompanied or separated alien children from the former INS⁵³ to the Office of Refugee Resettlement (ORR), the Act mandated that "the Director for the Office of Refugee Resettlement shall be responsible for . . . *ensuring that the interests of the child are considered* in decisions and actions relating to the care and custody of an unaccompanied alien child."⁵⁴

However, the Act did not address the scope of "the best interests of the child" concept. The Act fails to specify whether the child's best interests must be the

⁵⁰ This section is drawn from BHABHA ET AL., SEEKING ASYLUM ALONE: U.S., *supra* note 3; Susan Schmidt carried out the research and was primarily responsible for the drafting of this section of the report..

⁵¹ Memorandum from Jeff Weiss, the Acting Director of the Office of International Affairs, Immigration and Naturalization Service, U.S. Department of Justice, to Asylum Officers, Immigration Officers, and Headquarters Coordinators (Asylum and Refugees) 2 (December 10, 1998) (on file with the Boston University Public Interest Law Journal).

⁵² Interim Operating Policies and Procedures Memorandum 04-07: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children, Memorandum from the Office of the Chief Immigration Judge to All Immigration Judges, Court Adm'rs, Judicial Law Clerks, and Court Staff, Executive Office for Immigration Review, U.S. Dep't of Justice, 3 (2004) (emphasis added).

⁵³ Homeland Security Act of 2002 Pub. L. No. 107-296, § 462(a), 116 Stat. 2135, 2202 (2002). The Homeland Security Act of 2002 transfers the responsibility for care of unaccompanied alien children from the Immigration and Naturalization Service (INS) to the Director of the Office of Refugee Resettlement (ORR).

⁵⁴ Homeland Security Act of 2002 Pub. L. No. 107-296, § 462(b)(1)(B), 116 Stat. 2135, 2202 (2002) (emphasis added).

primary factor in performing the “consideration of a child’s interests” analysis or whether judges have complete discretion in whether or not to consider the child’s best interests.⁵⁵ This uncertainty in immigration and refugee law contrasts starkly with United States legal jurisprudence in areas like criminal law or family law where special protective treatment for minors is mandated.

This state of affairs with respect to the law regarding unaccompanied or separated alien children seems particularly egregious considering the vulnerability of the children and the gravity of what is at stake. According to a U.N. report, “given the fundamental role played by the family in the protection, physical care and emotional well-being of its members, separation from families is particularly devastating for refugee children.”⁵⁶ Yet the law inflicts even greater harm on refugee children who have already experienced acute loss and trauma.

A dramatic deficit of information compounds these legal failures. No comprehensive set of government statistics exists on the number of children that enter the United States alone every year. Further, because the immigration court (EOIR) does not record birth dates, no data exists on the number of children that undergo immigration court proceedings each year. Though the United Nations High Commissioner for Refugees (UNHCR) compiles and publishes comprehensive child asylum statistics for various countries, it does not collect data on unaccompanied or separated alien children for the United States due to problems with data comparability and availability. Lacking relevant findings on the issue that might highlight the problem of unaccompanied or separated alien children, the United States legislature has little basis on which to support a change in standards. This contrasts with the United Kingdom, which receives a similarly large undocumented population of unaccompanied or separated alien children, but where the availability of detailed statistical data from the UNHCR correlates with the establishment of high standards for the care of the migrating children.⁵⁷ As a result of the information vacuum, the United States will likely prolong and exacerbate the neglect that these migrating children experience.

B. Adult-Centered Myopia

The Edgar Chocoy case also highlights adult-centered myopia which results in two failures: an equality failure—the failure to acknowledge that the “other,” be it woman, black, homosexual, or Mexican, is a bearer of rights entitled to equal access to and protection by the law, and a difference failure—the failure to recognize that the “other” is positioned differently from the mainstream norm in his or her capacity, needs, and even rights. Critics of bias and discrimination have long

⁵⁵ See *supra* note 52; *infra* note 75.

⁵⁶ U.N.H.C.R., Refugee Children Coordination Unit, *Summary Update of Machel Study Follow-up Activities in 2001–2002* (Dec. 2003), available at <http://www.unhcr.org/cgi-bin/texis/vtx/protect/open doc.pdf?tbl=PROTECTION&id=408e04074>.

⁵⁷ BHABHA ET AL., SEEKING ASYLUM ALONE, *supra* note 12, at 20-21.

noted these consequences of majoritarian or mainstream myopia.⁵⁸ Many instances of equality failure are evident in the field of child migration, e.g., children's testimony is discounted, children's right to asylum is belittled, children's ability to initiate family reunification once granted status is denied or reduced, and children's citizenship as a basis for family residency is denied. However, the instances of difference failure are more noteworthy. One particularly troublesome occurrence is the failure to understand that child persecution is not coextensive with adult persecution. Merely witnessing violence, for example, may amount to a form of persecution for a child where it would not for an adult.⁵⁹ Therefore, a migrating child exposed to gross violations of social or economic rights may require protection from the United States in circumstances where an adult who endured the same experience might not, because for the child this may amount to persecution. Applied to the context of immigration court, a child's responses to questions, interviews and in-court cross examinations may require different interpretative strategies than the same responses from adults.

The reason for this myopia in the United States is simple: just as the children are neglected in the courtroom, they are similarly forgotten in immigration legislation. Today, the immigration courts interpret the law as subjecting children to the same proceedings and evidentiary standards as adults even though such children commonly lack the emotional support to help them cope. Often, these children are left without legal counsel in a system designed for adults. Even a former Immigration Judge admitted as much: "Children are the biggest void in all of immigration law."⁶⁰ The distinctive challenges that arise when interviewing children or relying on their evidence to construct a reliable biographical picture are illustrated by the following interview excerpt, drawn from an Australian migration interview with a young child:

(Interviewer): "Do you understand what I said?"

⁵⁸ See generally, e.g., Ayelet Shachar, *Children of a Lesser State: Sustaining Global Inequality Through Citizenship Laws* (Jean Monnet Working Paper 2/03, 2003), available at <http://www.jeanmonnetprogram.org/papers/03/030201.pdf>. Cf. Samuel R. Bagenstos, *The Americans with Disabilities Act as Risk Regulation*, 101 Colum. L. Rev. 1479, 1487 (2001) (discussing the "majoritarian bias against stigmatized groups" in general and the disabled in particular).

⁵⁹ Cf. KAETHE WEINGARTEN, *COMMON SHOCK: WITNESSING VIOLENCE EVERY DAY* 120 (Penguin Books 2004) (explaining why children of Holocaust survivors show psychological symptoms similar to those of their parents despite not having lived through the Holocaust themselves. The studies described in the book conclude that a child's sense of security is shaken when the child learns that their parent, and primary source of protection, has not always been safe. This may result in severe trauma to a child that is equivalent to direct persecution. Witnessing violence may similarly shake a child's sense of security, and also amount to persecution).

⁶⁰ Interview with Joseph A. Vail, Professor, University of Houston Law School and former Immigration Judge at the Executive Office for Immigration Review (EOIR), in Houston, Tex. (March 29, 2004).

[Statement translated]

(Participant): “Yes.”

(Interviewer): “Can you please explain to me in your own words what I said previously—to me? What you understand it to mean?”

[Statement translated]

(Participant): “Ah . . . I mean . . . my . . . own birth country . . . the village where my mum and dad was born . . . and then shifted somewhere else . . . with my parent . . . later”

(Interviewer): “It’s . . . ah . . . what I said previously . . . is . . . ah . . . what I want you to understand is that it is important that you don’t lie to me, that you tell the truth during this interview and that you don’t mislead me about anything that I ask you.”

[Statement translated]

(Participant): [No response]

(Interviewer): “Can you give me your full name?”

(Interviewer): “Do you know the names of any of these [name deleted] men?”

[Statement translated]

(Participant): “No.”

(Interviewer): “Do you know anywhere that you went in Pakistan?”

[Statement translated]

(Participant): “No.”

(Interviewer): “What do you think of Australia?”

[Statement translated]

(Participant): “Nothing.”

(Interviewer): “Do you miss your mum?”

[Statement translated]

(Participant): [No response.]⁶¹

To argue that children need special attention is not to suggest that all undocumented children should be automatically granted permanent immigration status nor that children should never be removed or deported from destination states. Though “the best interest of the child” calculation and the immigration enforcement considerations may dictate such a result, a child-centered perspective is equivalent to neither a call for open borders nor the deregulation of immigration control. Instead, the child-centered perspective postulates that the failure to acknowledge the fundamental differences between children and adults in the immigration context perversely skews decision-making. This shortcoming results in the paradoxical situation where those considered vulnerable and most in need of protection, care, and compassion may end up being particularly disadvantaged and discriminated against—objects of suspicion and fear rather than subjects with rights to dignity and due process. The Houston Chronicle reported the case of Young Zheng, a 17 year old Chinese boy whose parents arranged to have him smuggled into the United States by snakeheads:⁶²

Handcuffed and escorted by U.S. immigration officers to a plane bound for China early this year, the teen momentarily escaped and slammed his head into an airport wall so hard that he blacked out and had to be hospitalized. So intense is his fear of returning to face his smugglers in China that Zheng says he is willing to do anything to stay here.

“They will kill me if I go back,” he said

But federal attorneys say Zheng does not qualify for asylum because he is not being threatened by Chinese government officials.⁶³

The failure to adequately differentiate children from adults as a matter of law and policy is evident in several current immigration policies, highlighted in the recent three-country, funded study, “Seeking Asylum Alone.”⁶⁴ This Article will touch on two types of policies: those that equate children with adults and those that equate all children with one another.

⁶¹ BHABHA, SEEKING ASYLUM ALONE: AUSTRALIA, *supra* note 20.

⁶² Edward Hegstrom, *Teen from China Sees Asylum as Only Hope: Immigrant Fears a Smuggling Gang Will Kill Him if He Is Deported*, HOUS. CHRON., June 8, 2005, at B1. A “snakehead” is “[a] smuggler, particularly one from China, who specializes in getting people into another country without going through normal immigration channels.” Word Spy, <http://www.wordspy.com/words/snakehead.asp> (last updated Sept. 8, 1999) (citing Pamela Burdman, *How Gangsters Cash in on Human Smuggling*, SAN FRANCISCO CHRONICLE, April 28 1993, at A1).

⁶³ *Id.* Zheng has since won his claim to remain in the U.S. by securing a Special Immigrant Juvenile visa. His victory was a result of extraordinary pro bono efforts by a prominent and dedicated Houston attorney and his staff, well beyond the resources of most agencies that represent smuggled children. *After 3-Year Battle, Chinese Teenager Is on Road to U.S. Citizenship*, N.Y. TIMES, Apr. 11, 2006, at A16.

⁶⁴ See generally BHABHA ET AL., SEEKING ASYLUM ALONE, *supra* note 12.

1. Distinguishing Children from Adults

The clearest examples of this disparity are blanket rules which do not distinguish at all between adults and children. In the United States, for example, very significant numbers of unaccompanied children are repatriated across the United States/Mexico border within seventy-two hours of arrival if they are found or suspected to be undocumented Mexicans.⁶⁵ This occurs irrespective of whether they have parents or other close relatives in the United States, a clear violation of a mandatory CRC article (Art. 9 (1)), which stipulates: "States Parties shall ensure that a child shall not be separated from his or her parents against their [sic] will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child."⁶⁶ The practice of repatriating within seventy-two hours not only contravenes international human rights law; it also contradicts U.S. policy exempting children from expedited removals.⁶⁷ Yet despite this policy, in 2004, the number of repatriations just between Arizona in the United States and Sonora in Mexico exceeded six thousand.⁶⁸ During fiscal year 2004, 103,274 children were immediately returned (primarily to Mexico, very rarely to Canada).⁶⁹ It is important to note that this number includes both accompanied and unaccompanied children, as Customs and Border Protection (CBP) does not track unaccompanied children separately from accompanied children.⁷⁰

This failure to accord meaningful due process to migrant children at the border is evident in two other widely used current practices: expedited removal and the inappropriate application of a demanding "credible fear" standard to children seeking reentry after a previous removal. Both practices exemplify a less favorable adjudication regime for entrants,⁷¹ and neither is appropriate for children. Federal policy acknowledges this, albeit inconsistently; for example, when expedited removal came into effect, "the only classes excepted from expedited removal [were] Cubans arriving by plane, unaccompanied minors, and those paroled into the United States before April 1, 1997."⁷² The process of establishing whether a child is unaccompanied may be delicate and time consuming, involving subtle assessments of the na-

⁶⁵ *Id.* at 61.

⁶⁶ CRC, *supra* note 4, at 6.

⁶⁷ U.S. DEP'T. OF JUSTICE, JUVENILE REPATRIATION PRACTICES AT BORDER PATROL SECTORS ON THE SOUTHWEST BORDER, REP. NO. I-2001-010, (September 2001), available at <http://www.usdoj.gov/oig/reports/INS/e0110/centro.htm>.

⁶⁸ Daniel González, *Sonora Will Help Deported Kids*, ARIZ. REPUBLIC, Apr. 5, 2005, at B1, available at <http://www.azcentral.com/specials/special03/articles/0405kidscrossing05.html>.

⁶⁹ U.S. DEP'T. OF HOMELAND SECURITY, OFF. OF INSPECTOR GEN., A REVIEW OF DHS' RESPONSIBILITIES FOR JUVENILE ALIENS 4 (2005).

⁷⁰ *Id.* at 3 n.7.

⁷¹ Gabrielle M. Buckley, *Immigration and Nationality*, A.B.A. SECTION OF INT'L. L., IMMIGR. & NATIONALITY COMM. §§ II, III, http://www.abanet.org/intlaw/divisions/public/immigration_article1.html (last visited Feb. 26, 2006).

⁷² *Id.* at § II.

ture of the relationship between a child and an accompanying adult. An attorney working in Arizona reports that Border Patrol agents are sometimes over-inclusive in their classification of a child as accompanied, even when the relationship stated as the basis for accompaniment is dubious or distant.⁷³ This classification permits the child to be subjected to expedited removal procedures.⁷⁴ The stakes are particularly high when (as is increasingly the case) children are being trafficked or smuggled. Although fast track procedures are dangerous for this population, expedited removal was expanded on August 11, 2004 to the territory between ports of entry, with discretionary exemption of unaccompanied and separated children.⁷⁵ Significant numbers of smuggled and trafficked children may thus be subjected to expedited removal and exposed to serious risk of re-trafficking.

A related set of problems arises in the context of the "reasonable fear process for those people who have already been removed or deported on a prior occasion."⁷⁶ This is a process similar to expedited removal proceedings, applying to aliens who have been removed before the current incident.⁷⁷ The key difference is in the burden of proof on the asylum applicant. Those screened for expedited removal only have to establish a "credible fear" of persecution to gain access to the asylum procedure and avoid removal, a lower burden than the one they must eventually satisfy to obtain asylum.⁷⁸ Those already removed on a previous occasion have to establish a "reasonable fear" to gain the same access, which is a higher burden of proof, analogous to the one that is required for the ultimate grant of asylum.⁷⁹ There is no exemption for unaccompanied or separated children from the more

⁷³ Interview with Martha Rickey, Children's Attorney, Florence Immigrant and Refugee Rights Project (December 1, 2005), *cited in* SEEKING ASYLUM ALONE, *supra* note 12, at 58.

⁷⁴ *Id.*

⁷⁵ Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877, 48877-79 (Aug. 11, 2004). The regulations state:

We recognize that certain aliens, including unaccompanied minors, . . . may possess equities that weigh against the use of expedited removal proceedings. Accordingly, in appropriate circumstances and as an exercise of prosecutorial discretion, officers will be able to permit certain aliens described in this notice to return voluntarily, withdraw their application for admission, or to be placed into regular removal proceedings under section 240 of the Act in lieu of expedited removal proceedings.

Id.

⁷⁶ U.S. Citizenship and Immigration Services, Reasonable Fear Screenings (2004), available at <http://uscis.gov/graphics/services/asylum/fear.htm>. "Reasonable fear" interviews are conducted on individuals who are subject to reinstatement of a removal order, meaning they have reentered the United States illegally after a prior removal order, or they have been removed due to aggravated felony convictions.

⁷⁷ *Id.*

⁷⁸ U.S. Citizenship and Immigration Services, Obtaining Asylum in the United States: Two Paths to Asylum, (2006), <http://uscis.gov/graphics/services/asylum/paths.htm>.

⁷⁹ U.S. Citizenship and Immigration Services, *supra* note 76.

stringent reasonable fear standard (though asylum officers are reminded to review the INS Children's Guidelines when encountering a minor).⁸⁰ The problems to which this lacuna gives rise are illustrated by the following case:

A 16-year-old Honduran child was removed from the U.S. twice before entering a third time, at which point he was detained by the INS. Because he had been removed previously, the INS Office of Juvenile Affairs subjected the child to a reasonable fear interview. He was detained at the Boystown shelter facility in Miami, Florida, before being transferred to the Krome Service Processing Center's mental health unit, where he was kept in isolation because he was a minor in an adult secure detention facility. The child's attorneys established, on the basis of a psychological evaluation, that he suffered from paranoid schizophrenia. They therefore argued that he was not mentally competent to go through a reasonable fear interview. Nonetheless, the INS insisted. By the time he was interviewed, several months later, the boy was desperate to be released from detention and asked to be returned home. It was only because he had the good fortune to have legal representation that evidence establishing a reasonable fear of persecution was available and his case for remaining in the U.S. was accepted. After months in unsuitable detention, the child was eventually transferred to an adolescent mental health facility.⁸¹

The justification for applying expedited removal and reasonable fear procedures to children who have been previously removed is presumably to discourage repeat entrants. The assumption is that children needing protection have already been screened into the process. This is simply not the case. Melvin De Leon Machado, a 13-year-old Salvadoran boy "running from people who already had tried to kill him and who promised to keep trying,"⁸² attempted to enter the United States multiple times.⁸³ "It [took] more than a year and fifteen attempts before he passed the first hurdle and got to Brownsville, Texas."⁸⁴ In his initial fourteen attempts Mexican immigration officials turned him away from the border.⁸⁵ Careful scrutiny of his case would have revealed that his persistent attempts were signs of desperation, not delinquency, and that heightened protection rather than suspicion was the appropriate response. Eventually, after finally gaining entry into the United States, he successfully applied for asylum.⁸⁶ If the domestic child welfare system were to adopt this punitive approach to children seeking refuge from home on multiple occasions, they would be taken to task as derelict.

Less common, but even more shocking than removal without prior legal representation, is the persistent and inappropriate use of harsh physical restraints on mi-

⁸⁰ Interview with Georgia Papas, Asylum Office (Nov. 9, 2004).

⁸¹ Interview with Lisa Frydman, Staff Attorney, Legal Services for Children (Nov. 9, 2004), cited in *SEEKING ASYLUM ALONE*, supra note 12, at 70.

⁸² Chris McGann, *U.S. Gives Harsh Welcome to Children Seeking Asylum*, SEATTLE POST-INTELLIGENCER, June 19, 2003, at A1.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

grant children who have committed no criminal offense. According to one shelter care provider in Phoenix, Arizona, whose facility never shackles children, "most children do arrive shackled from Border Patrol."⁸⁷ Although legislation to eliminate the shackling of children is pending,⁸⁸ the practice has not disappeared.⁸⁹ One advocate reported in December 2005 that children in ORR custody held at the Marin County Juvenile Hall are shackled when they come to immigration court.⁹⁰

2. Distinguishing Among Children

While treating children as adults demonstrates one aspect of adult centered myopia, another aspect is the failure to distinguish appropriately within the category "child." Although common sense dictates that the needs and rights of a child at the age of two must be conceived of differently from those of a child of eight or seventeen, in practice immigration policy fails to enable decision makers to make appropriate discriminations. Thus, very young children can end up in prolonged detention, separated from appropriate caregivers, and without legal representation, when in fact their detentions should never have happened in the first place.⁹¹ Though Border Patrol is supposed to promptly refer unaccompanied and separated children to ORR for care, after which their legal case will proceed before the Immigration Court, our study found disturbing exceptions to this in practice.⁹² One pro bono attorney working in Arizona reports that children in Border Patrol custody in the Tucson sector are appearing in Immigration Court without attorneys; as a result, most of them receive removal orders.⁹³ Border Patrol finally transfers the children to ORR custody after Immigration Court has ordered their removal.⁹⁴ The process denies mature adolescents a real opportunity to express their views and to retain agency in decision-making about their futures.⁹⁵ In our study, children themselves report receiving advice from Immigration and Customs Enforcement (ICE) agents that they have no chance of winning in court, and that if they fight their case

⁸⁷ Interview with Ivonne Velasquez, MSW, CISW, Executive Regional Director (Southwest), Southwest Key Program, Inc., in Phoenix, AZ (May 3, 2004), *cited in* BHABHA ET AL., *SEEKING ASYLUM ALONE: U.S.*, *supra* note 3, at 72.

⁸⁸ See Unaccompanied Alien Child Protection Act of 2005, H.R. 1172, 109th Cong. § 103(b)(1).

⁸⁹ Letter from Lisa Frydman, Staff Attorney, Legal Services for Children, to author (December 1, 2005) (on file with the Boston University Public Interest Law Journal), *cited in* *SEEKING ASYLUM ALONE*, *supra* note 12, at 60.

⁹⁰ *Id.*

⁹¹ See AMNESTY INTERNATIONAL U.S.A., *supra* note 15, at 17 (describing detention of unaccompanied refugee children).

⁹² See BHABHA ET AL., *SEEKING ASYLUM ALONE: U.S.*, *supra* note 3, at 59.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ See AMNESTY INTERNATIONAL U.S.A., *supra* note 15, at 64 (describing negative effects of absence of legal representation for child refugees).

in court they will remain in jail for months or years.⁹⁶ In the process many children sacrifice their right to express their views, and with it their long term interests, in exchange for release from detention.

III. CONCLUSION

Of course, it may be true that some children's cases are destined to be unsuccessful. It is certainly true that establishing who is and who is not a child may be difficult. Merely pointing out defects with the current system does not mean that optimal solutions are easy to find. Legal scholar Martha Minow captures the challenges and pitfalls to which any use of categories, such as "child" or "unaccompanied minor," can lead:

I believe we make a mistake when we assume that the categories we use for analysis just exist and simply sort our experiences, perceptions, and problems through them. When we identify one thing as like the others, we are not merely classifying the world; we are investing particular classifications with consequences and positioning ourselves in relation to those meanings. When we identify one thing as unlike the others, we are dividing the world; we use our language to exclude, to distinguish—to discriminate Of course, there are "real differences" in the world; each person differs in countless ways from each other person. But when we simplify and sort, we focus on some traits rather than others, and we assign consequences to the presence and absence of the traits we make significant.⁹⁷

The real challenge—and it is a difficult and demanding one—is for policy makers, administrators, fact-finders and judges, to move beyond the simplistic assumption that the analytic categories used for sorting migrants—legal/illegal, Mexican/non-Mexican, honest/dishonest, worthy/unworthy, adult/child—exist as manifest real differences in the world. Instead, we need to accept that sorting is hard, that errors and doubts will occur, and that, for those considered vulnerable and deserving of additional protection, the benefit of the doubt is a critical protection. A generous and inclusive policy that prioritizes protection over penalty and inclusion over exclusion is a small price to pay for avoiding the fatal errors that led to Edgar Chocoy's tragic end.

⁹⁶ Interview with Martha Rickey, Children's Attorney, Florence Immigrant and Refugee Rights Project (December 1, 2005), *cited in* BHABHA ET AL., *SEEKING ASYLUM ALONE: U.S.*, *supra* note 3, at 59.

⁹⁷ MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW* 3 (1990).

