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Children Of A Lesser God: Reconceptualizing Race In Immigration Law

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Children Of A Lesser God: Reconceptualizing Race In Immigration Law

Sarah L. Hamilton-Jiang*

ABSTRACT

The increased public exposure to the experiences of Latinx unaccompanied children seeking entry at the United States southern border has revealed the lived reality of the nation's pernicious immigration laws. The harrowing experiences of unaccompanied children are amplified by their interaction with a legal system plagued by a legacy of systemic racism and sustained racial caste. While immigration law currently affords minimal legal protections for these children, in application, the law continues to fall egregiously short of providing for the safety of unaccompanied children. Though critics have long attested to the legal system's neglect of unaccompanied children, subsequent legal analysis has overlooked the intersectional role of race as it pertains to their attempts to navigate entry. This Article uses the concept of racialization to explore the legal treatment of Latinx unaccompanied children as they navigate entry to the United States. This Article demonstrates that the legal framework creates structural inequality for Latinx unaccompanied children through a concept known as "adultification." Further, racist social and political narratives are incorporated into the law which contribute to the racialization of Latinx unaccompanied children and challenges the very vulnerability that lies at the foundation of the legal protections available for children. The Article concludes with a proposed intersectional vulnerability framework that reconceptualizes race and strengthens the rights and protections of unaccompanied children.

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INTRODUCTION

“I am no longer Jose, but now I am a male, Latino, undocumented, person of color.”¹

— *An unaccompanied child who entered the United States.*

“Children are an essential but often overlooked bounty in the regulation of race, culture, and rights.”²

— *Annette Appell*

From the viral images of distressed young children at the southern border of the United States, to widespread allegations of abuse in detention facilities, accounts of children seeking to enter the borders of the United States have exposed the impact of the nation’s pernicious immigration laws.³ Conversely, discourses exhorting the dire need to restrict and exclude migrants crossing the border have prioritized stringent laws and policies as a panacea to fraudulent asylum claims, criminal activity, and migration control at large.⁴ Since the numbers of children on the move have increased throughout the years, unaccompanied children⁵ have come to personify the nation’s immigration quandary.⁶

Unaccompanied children arriving in the United States are defined as “[u]naccompanied alien children” if they meet the following criteria: “(A) have no lawful immigration status in the United States; (B) have not attained 18 years of age; and (C) with respect to whom — (i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody.”⁷

While unaccompanied children from Mexico have been crossing the southern border for a number of years, the numbers of unaccompanied children reached an unprecedented

¹ FORDHAM UNIVERSITY SCHOOL OF LAW, & VERA INST. OF JUSTICE, UNACCOMPANIED IMMIGRANT YOUTH IN NEW YORK: STRUGGLE FOR IDENTITY AND INCLUSION—A PARTICIPATORY ACTION RESEARCH STUDY 22 (2015), https://storage.googleapis.com/vera-web-assets/downloads/Publications/struggle-for-identity-and-inclusion-unaccompanied-immigrant-youth-in-new-york-city/legacy_downloads/unaccompanied-youth-nyc-technical_01.pdf (statement from a participant, whose name was adapted in a study of unaccompanied children in the United States).

² Annette R. Appell, “*Bad*” Mothers and Spanish-Speaking Caregivers, 7 NEV. L.J. 759, 759 (2007) (explaining the invisibility of discussing child welfare and the role of race).

³ See, e.g., Marina Pitofsky, *The Story Behind the Viral Photo of a Crying Toddler at the U.S. Border*, USA TODAY June 19, 2018), <https://www.usatoday.com/story/news/world/2018/06/19/photo-crying-toddler-united-states-border-goes-viral-raices/715840002/html>; see also Matthew Haag, *Thousands of Immigrant Children Said they Were Sexually Abused in U.S. Detention Centers, Report Says*, N.Y. TIMES (Feb. 27, 2019), <https://www.nytimes.com/2019/02/27/us/immigrant-children-sexual-abuse.html>.

⁴ For a summary, see Jennifer M. Chacon, *Immigration and the Bully Pulpit*, 130 HARV. L. REV. F. 243 (2017).

⁵ For the purpose of this article, the term ‘unaccompanied children’ will be used as opposed to “Unaccompanied Alien Children” defined in the Immigration and Nationality Act, 6 U.S.C. § 279(g) (2012).

⁶ See LESLIE VELEZ ET AL., UN HIGH COMM’R FOR REFUGEEES, *Children on the Run: Unaccompanied Children Leaving Central America And Mexico and the Need for International Protection* (Pamela Goldberg ed., 2014), <https://www.unhcr.org/56fc266f4.html> [hereinafter UNHCR] (explaining the increase in children on the move throughout the Americas).

⁷ 6 U.S.C. § 279(g) (2012).

peak of 67,339 in 2014.⁸ This was attributed to the large increase of Latinx unaccompanied children from El Salvador, Guatemala, and Honduras (the Northern Triangle).⁹ Although the number of unaccompanied children somewhat decreased after reaching its peak in 2014, in fiscal year 2018, unaccompanied children from Mexico, El Salvador, Guatemala, and Honduras still accounted for 96.5% of the 50,036 apprehensions at the Southwest border.¹⁰ As a result, with their heightened vulnerable status, these unaccompanied children frequently bear the brunt of the nation’s harshest immigration policies as they contend with a legal system plagued by a legacy of systemic racism.

Current law—primarily enacted through the 1997 Flores Settlement Agreement, the 2008 William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA), and selected other tailored policies for legal decision makers—affords minimal legal protections to unaccompanied children.¹¹ Yet, in practice, these laws are plagued with deficiencies and are insufficient in scope.¹² Critics have long attested to the legal system’s neglect of unaccompanied children, decrying both the limited procedural rights and the lack of differentiated substantive standards in the law.¹³ Child migration scholar David Thronson observed that these challenges stem from a fundamentally flawed legal structure that “slots” children into an existing adult framework.¹⁴

⁸ The United Nations High Commissioner for Refugees (UNHCR) reported a 435% regional increase of asylum applications from both adults and children from the Northern Triangle in Mexico, Panama, Nicaragua, Costa Rica and Belize from 2008 to 2014. UNHCR, *supra* note 6, at 4.

⁹ For ease of reference, the term “Northern Triangle” will be used for the three countries, and “Latinx unaccompanied children” will be used to also include children from Mexico. The Article however acknowledges the multiple forms of identity within this group and by using this reference does not suggest that they are monolithic. In addition, while this is not the focus of the Article, there are also smaller numbers of children of color at the border (particularly from Haiti and Brazil). NANCY ADOSSI ET AL., BLACK ALLIANCE FOR JUST IMMIGRATION, BLACK LIVES AT THE BORDER (Opal Tometi ed., 2018), <https://baji.org/wp-content/uploads/2018/03/Black-Lives-At-The-Border-Report.pdf>. Note, numbers of Latinx unaccompanied children from the Northern triangle first began to vastly increase in 2012. Cited statistics from Customs and Border Patrol (CBP) reveal that in fiscal year 2013, 17,240 unaccompanied children from Mexico were apprehended at the border compared to 20,805 unaccompanied children from the Northern Triangle countries. By fiscal year 2018, 10,136 unaccompanied children were apprehended from Mexico compared to 37,412 from the Northern Triangle. *U.S. Border Patrol Southwest Border Apprehensions by Sector FY2018*, U.S. CUSTOMS & BORDER PROTECTION, <https://www.cbp.gov/newsroom/stats/usbp-sw-border-apprehensions> (last visited Mar. 7, 2019).

¹⁰ *Id.* CBP statistics demonstrate the figures declining after 2014.

¹¹ See Stipulated Settlement Agreement, *Flores v. Reno*, No. 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997), <https://www.aclu.org/legal-document/flores-v-meese-stipulated-settlement-agreement-plus-extension-settlement> [hereinafter Flores Agreement]; William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Pub. L. No. 110-457, §235(a)(4), 122 Stat. 5044, 5076 (2008) (codified as 8 U.S.C. §1232(a)(4)(2012) [hereinafter TVPRA]. For selected policies, see, e.g., EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUST., OPERATING POLICIES AND PROCEDURES MEMORANDUM 07-01, Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children (2007), <https://perma.cc/HJ4P-JQ9M> (providing specific child-sensitive guidelines for immigration judges concerning unaccompanied children).

¹² See discussion *infra* Part I.A for further discussion on how the law falls to short of protecting unaccompanied children.

¹³ See discussion *infra* Part I.B.

¹⁴ See David B. Thronson, *The Legal Treatment of Immigrant Children in the United States*, in PROTECTING MIGRANT CHILDREN: IN SEARCH OF BEST PRACTICE 259 (Mary Crock & Lenni B. Benson eds., 2018) [hereinafter Thronson (2018)]; *Kids will be Kids? Reconsidering Conceptions of Children’s Rights*

Yet, as the majority of unaccompanied children entering the borders of the United States are overwhelmingly children of color, the challenges associated with race must also be considered. While there is an array of scholarship dedicated to race and adults in immigration law,¹⁵ the salience of race and intersectionality as it pertains to unaccompanied children has yet to be explored.¹⁶ Furthermore beginning in 2017, the Trump administration seized upon the existing legal deficiencies and launched an untenable assault against Latinx unaccompanied children at the border. Through a barrage of capricious immigration policies, the Trump administration has exacerbated the undue influence of race in the lives of Latinx unaccompanied children.¹⁷

Using the concept of racialization—a sociological term describing the process of how racial identities are constructed—this Article maintains that the law’s inequitable structure contributes to the racialization of Latinx unaccompanied children. Racialization is evinced in part by the draconian approach of fitting unaccompanied children into an adult legal framework. This framework legitimizes the socialized process of “adultification,” which contributes to the unique racialization of Latinx unaccompanied children. In addition, deafening racial narratives influence the law and augment the biases of legal decision makers, challenging the very concept of vulnerability that lies at the foundation of the legal protections available for children. Combined, these processes contribute to a racialized construction of Latinx unaccompanied children as children of a lesser god: less vulnerable and less worthy of protection.

Underlying Immigration Law, 63 OHIO ST. L.J. 979 (2002) [hereinafter Thronson Kids (2002)] (explaining that immigrant children are subjected to adult procedures and adult laws experiencing the “worst of both worlds.” The law does not regard immigrant children in the same light as citizen children); Jacqueline Bhabha, “*Not a Sack of Potatoes: Moving and Removing Children Across Borders*,” 15 B.U. PUB. INT’L L. J. 197, 203 (2006) [hereinafter Bhabha Potatoes (2006)] (presenting a multi-country perspective of child migration and the invisibility of unaccompanied child rights); Jacqueline Bhabha & Wendy Young, *Not Adults in Miniature: Unaccompanied Children Asylum Seekers and the New U.S. Guidelines*, 11 INT’L J. REFUGEE L. 84 (1999) [hereinafter Bhabha & Young] (explaining that US immigration laws unfairly treat children as adults and that historical analysis has largely ignored the plight of migrant children); Lauren R. Aronson, *The Tipping Point: The Failure of Form Over Substance In Addressing the Needs of Unaccompanied Immigrant Children*, 18 HARV. LATINO L. REV. 1 (2015) (explaining the lack of substantive analysis for unaccompanied children seeking entry).

¹⁵ See e.g., Kevin R. Johnson, *Race the Immigration Laws, and Domestic Race Relations: A Magic Mirror into the Heart of Darkness*, 73 IND. L.J. 1111 (1998) [hereinafter Johnson Mirror (1998)]; Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 L. & CONTEMP. PROBS. 1 (2009) [hereinafter Johnson Class (2009)]; Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998); Jennifer Gordon & R.A. Lenhardt, *Citizenship Talk: Bridging the Gap Between Immigration and Race Perspectives*, 75 FORDHAM L. REV. 2493 (2007); Richard Boswell, *Racism and U.S. Immigration Law: Prospects for Reform After “9/11?”* 7 J. GENDER RACE & JUST. 315, 321–322 (2003).

¹⁶ See Bhabha Potatoes (2006), *supra* note 15, at 203 (explaining that child migrants have been largely invisible in law in the United States). See also OLGA BYRNE, VERA INST. OF JUST., UNACCOMPANIED CHILDREN IN THE UNITED STATES: A LITERATURE REVIEW 38 (2008), https://storage.googleapis.com/vera-web-assets/downloads/Publications/unaccompanied-children-in-the-united-states-a-literature-review/legacy_downloads/UAC_literature_review_FINAL.pdf [hereinafter Byrne Lit. Rev. (2008)] (describing the neglected history in the conclusion).

¹⁷ See discussion in HUMAN RIGHTS FIRST, REFUGEE BLOCKADE: THE TRUMP ADMINISTRATION’S OBSTRUCTION OF ASYLUM CLAIMS AT THE BORDER (2018), https://www.humanrightsfirst.org/sites/default/files/December_Border_Report.pdf [hereinafter HUMAN RIGHTS FIRST].

This Article then provides a nuanced framework to strengthen the rights and protections of Latinx unaccompanied children. While structural racism is deeply engrained in immigration law, this Article presents two recommendations that can both facilitate greater equity of treatment and reduce the harm imposed on unaccompanied children seeking entry. First, this Article proposes a new reconceptualized legal framework that emphasizes the intersectional vulnerabilities associated with race, class, age, and other demographics. Second, this Article proposes the development of evidence-based race-conscious principles for existing policies and guidelines, to assist legal decision makers as they determine the fate of unaccompanied children.

Some may be unconvinced that race plays a significant role for unaccompanied children and may further question whether a racialized analysis benefits legal outcomes for these children. This Article acknowledges the empirical limitations with identifying racism in the immigration process. While other forms of discrimination are certainly prevalent and perhaps easier to locate, this Article notes that ignorance of the intersectional and pervasive role of race leads to uncritical ways of thinking about rights and protections in immigration law. This Article seeks to address these concerns by using a multidisciplinary approach to illustrate the comparative racialization of citizen children of color in the juvenile justice and family welfare systems. In doing so, this Article concludes that legal systems that fail to consider the systemic role of race will omit a crucial aspect of sustainable reform.

This Article will detail these contributions in four parts: Part I explores the legal protections for unaccompanied children at the U.S. southern border and the legal deficiencies that have a detrimental impact upon Latinx unaccompanied children. Part II describes the salience of race and intersectionality and the Trump administration's role in perpetuating the undue influence of race in the lives of Latinx unaccompanied children seeking entry to the United States. Part III explores the structural racialization of Latinx unaccompanied children through adultification, racial narratives and the bias of legal actors. Part IV provides recommendations for a reconceptualized legal framework based upon vulnerability.

I. THE LAW FALLS EGREGIOUSLY SHORT OF PROTECTING LATINX UNACCOMPANIED CHILDREN AT THE UNITED STATES BORDER

The following Part explores the primary legal protections available to unaccompanied children at the U.S. southern border. The Part then explores the legal deficiencies of these protections that hinder unaccompanied children and their attempts to successfully navigate the immigration system. While these deficiencies apply to all unaccompanied children at the border, the majority of these children are Latinx. As a result, Latinx unaccompanied children overwhelmingly suffer significant harm and neglect due to the inadequacies of the current immigration system.

A. The Current Legal Protections for Unaccompanied Children

Once children are determined to be “unaccompanied alien children,” the law provides limited differentiated protections for their treatment, and urges government actors to treat all “minors in its custody with dignity, respect and special concern for their

particular vulnerability as minors.”¹⁸ Protections for children are primarily found in the 1997 Flores Settlement Agreement (Flores Agreement), the 2002 Homeland Security Act, and the 2008 TVPRA.¹⁹ Together, the three instruments provide pivotal protections that affect unaccompanied children during their entry, treatment in detention, resettlement and repatriation, where applicable.

The Flores Agreement was the result of a decade-long battle in the courts.²⁰ In the 1980s many Salvadoran and Guatemalan unaccompanied children faced horrific conditions in detention.²¹ In *Reno v. Flores*, the Supreme Court reviewed the constitutionality of detaining a 15 year old girl from El Salvador with no parents or legal guardian in the United States.²²

While the Court justified the detention of unaccompanied children as necessary for immigration enforcement,²³ the resulting Flores Agreement set forth minimum obligations regarding the treatment of unaccompanied children in detention.²⁴ Based upon the stated special vulnerability of children, the three broad pillars of the agreement include the following: that children must be released without unnecessary delay to a parent, a designate of the parent, or a responsible adult within a specified timeframe; the assurance that children are held in the “least restrictive setting” according to their age and special needs; and the inclusion of standards upholding the care and treatment of children in detention.²⁵

The TVPRA codifies many of the provisions in the Flores Agreement, and adds additional child-friendly protections for unaccompanied children. The TVPRA requires that after initial apprehension by U.S. Customs and Border Protection (CBP), unaccompanied children are transferred to the care of the Office of Refugee Resettlement (ORR), a specialized agency within the Department of Health and Human Services (HHS), for care and further screening within 72 hours.²⁶ The TVPRA also includes provisions

¹⁸ Flores Agreement, *supra* note 11, at 11.

¹⁹ The Homeland Security Act transferred care of unaccompanied children to the Office of Refugee Resettlement (ORR). Homeland Security Act of 2002; Reorganization Plan for the Department of Homeland Security, 2003, H.R. Doc. No. 108-32 (2003) (also set forth as a note to 6 U.S.C. § 542). *See* Flores Agreement, *supra* note 11; and *see also* TVPRA, *supra* note 11.

²⁰ A court settlement was eventually reached in order to end the extensive and lengthy litigation. The agreement was reached between the government Immigration and Naturalization Service (INS) and the plaintiffs who brought the class action suit. Flores Agreement, *supra* note 11 at 3.

²¹ *See* Sarah Rogerson, *The Politics of Fear: Unaccompanied Immigrant Children and the Case of the Southern Border*, 61 VILL. L. REV. 843, 878-880 (2016) (discussing the treatment of Central American Latinx children and adults seeking entry to the United States in the 1980s and 1990s and noting that this raised inferences of racial and national origin discrimination); *see also* Perez-Funez v. District Director, INS, 611 F. Supp. 990 (CD. Cal., 1984) (the court found that Immigration Naturalization Service (INS) agents had coerced several unaccompanied children from El Salvador into accepting voluntary departure from the United States and that this was indeed a violation of their due process rights); *see also* Julie M. Linton et al., *Detention of Immigrant Children*, 139 AM. ACAD. OF PEDIATRICS 5 (2017) (describing the history of abuse against Salvadorian and Guatemalan children in detention).

²² *Reno v. Flores*, 507 U.S. 292 (1993).

²³ *Id.*

²⁴ Flores Agreement, *supra* note 11.

²⁵ *Id.*

²⁶ *See* TVPRA, *supra* note 11, at § 235(b)(3), 122 Stat. 5044, 5077 (codified as amended 8 U.S.C. § 1232(b)(3)).

advising HHS to provide legal counsel for children, inform children of their due process rights, and appoint a child rights advocate for trafficked and vulnerable children.²⁷

However, a critical challenge is that to access the protections under the Flores Agreement and the TVPRA, unaccompanied children have the burden of proving their child status because the differentiating legal protections are conditional upon evidence of age.²⁸ The legitimacy of their child identity is therefore questioned at every stage—from initial apprehension by CBP, to when they are placed in ORR custody, and to when they are considered for resettlement or repatriation.²⁹

Proving one's age can be a challenging process as many unaccompanied children enter the United States without documentation.³⁰ The implications of this requirement can severely reduce the legal protections available to unaccompanied children. Without proof of age, unaccompanied children are denied protections reserved for children and are instead treated as adults.³¹

B. The Legal Deficiencies of the Current Protections and the Impact on Latinx Unaccompanied Children

While these protections are significant, the following subpart will summarize three legal deficiencies previously acknowledged by scholars of immigration law. First, the legal protections do not address the draconian rights that exclude unaccompanied children from the larger child rights movement. This subpart notes however, that even if they were given equivalent rights to citizen children, it is doubtful that unaccompanied children of color would receive the same level of protection. Second, with minor exceptions, unaccompanied children are required to meet the same substantive requirements as adults in order to remain in the United States. Finally, the legal protections fail to protect Latinx unaccompanied children from significant abuse and harm.

1. The Limited and Draconian Rights of Unaccompanied Children of Color

The Flores Agreement and the TVPRA are relatively recent legal developments. Yet historically, the general legal treatment of unaccompanied children received little national or international attention.³² Writing in 2006, international child migration scholar Jacqueline Bhabha expressed that the unique legal treatment of child immigrants in the

²⁷ TVPRA, *supra* note 11, at § 235(c)(5), 122 Stat. 5044, 5079 (codified as amended at 8 U.S.C. § 1232(e)(5)).

²⁸ See OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., AGE DETERMINATION PRACTICES FOR UNACCOMPANIED ALIEN CHILDREN IN ICE CUSTODY (2009), at 2 (https://www.oig.dhs.gov/assets/Mgmt/OIG_10-12_Nov09.pdf [hereinafter OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC.]).

²⁹ *Id.*

³⁰ Mary Anne Kenny & Maryanne Loughry, *Addressing the Limitations of Age Determination for Unaccompanied Minors: A Way Forward*, 92 CHILD. AND YOUTH SERV. REV. 15, 17 (2018) (explaining that many migrant children were born in countries with low birth registration and that reliance upon physical evidence is in itself a form of discrimination by industrialized (primarily Western) countries that rely upon formal documentation to prove age status).

³¹ OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., *supra* note 28, at 2.

³² See generally JACQUELINE BHABHA AND SUSAN SCHMIDT, *SEEKING ASYLUM ALONE: UNACCOMPANIED AND SEPARATED CHILDREN AND REFUGEE PROTECTION IN THE U.S.* (2006).

United States renders them largely “invisible;” as such, child immigrants are essentially incorporated within the immigration system by default.³³ While the Flores Agreement and the TVPRA offer minimal protections for unaccompanied children, the instruments have done very little to amend the archaic and draconian rights of unaccompanied children.

When the first group of unaccompanied children arrived at the borders of the United States in 1892,³⁴ they were subjected to the same legal rights as citizen children.³⁵ Citizen children were viewed as “passive dependents” and had minimal rights under the law.³⁶ All children without responsible parents or legal guardians were governed by the common law *parens patriae* doctrine, which empowered the state to act on their behalf as guardian of their rights and protections.³⁷ Children thus held fewer rights than adults and were not considered independent rights-holders.

This perspective changed with the advent of the global children’s rights movement, which began to view children as vulnerable, regardless of their class status.³⁸ This societal shift inspired lawmakers in the late 1800’s to treat children as autonomous, rights-bearing individuals, independent of their parents and the state.³⁹ By 1944, the Supreme Court in *Prince v. Massachusetts* explicitly confirmed the importance of differentiating children from adults; it explained that children face different harms than adults, have a higher degree of vulnerability, and are in greater need of protection.⁴⁰ In *Bellotti v. Baird*, the Court recognized “the peculiar vulnerability of children” and “their inability to make critical decisions in an informed, mature manner.”⁴¹ This perspective was then reflected in the juvenile justice system, which developed a separate court system and separate legal standards to ensure that children would be given greater legal protections compared to adults.⁴² The Court’s jurisprudence began to reflect the notion that “[citizen] children have a very special place in life which law should reflect.”⁴³

However, despite the Court’s previous observations, the growth of protections for children did not extend to immigration law. Unlike children in the juvenile justice system,

³³ Bhabha Potatoes (2006), *supra* note 14, at 203.

³⁴ The first unaccompanied children arrived at Ellis Island and were Irish orphans. See Elżbieta M. Goździak: *What Kind of Welcome? Integration of Central American Unaccompanied Children Into Local Communities*, INST. FOR THE STUDY OF INT’L MIGRATION AT GEO. U. (Feb. 2015), <https://isim.georgetown.edu/sites/isim/files/files/upload/Kaplan%20UAC%20Report.compressed%20%282%29.pdf>.

³⁵ Thronson (2018), *supra* note 14.

³⁶ *Id.* at 263.

³⁷ See *Parens Patriae*, *Black’s Law Dictionary* (10th ed. 2014). *Parens Patriae* translates to “parent of the country ... [t]he state regarded as a sovereign; the state in its capacity as provider of protection to those unable to care for themselves.”

³⁸ See Byrne Lit. Rev. (2008), *supra* note 16, at 12; see also Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children’s Rights*, 9 HARV. WOMEN’S L.J. 1, 10 (1986) (detailing the shift in understanding rights-based approaches to children’s rights).

³⁹ *Id.* at Minow.

⁴⁰ *Prince v. Massachusetts*, 321 U.S. 158 (1944) (involving the legal responsibility of an adult who gave magazines to a child knowing the child would unlawfully sell them on the street).

⁴¹ *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (challenging the constitutionality of a statute regulating access of minors to abortions).

⁴² See Kim Taylor-Thompson, *Minority Rule: Redefining the Age of Criminality*, 38 N.Y.U. REV. L. & SOC. CHANGE 143, 147–53 (2014).

⁴³ *May v. Anderson*, 345 U.S. 528, 536 (1953) (Concurring opinion).

unaccompanied children were not granted a separate court system or separate substantive standards to facilitate their legal entry. The same remains true today; unaccompanied children are still bound by the paternalistic and draconian notions of *parens patriae* and child dependency.⁴⁴ Thus, unaccompanied children are still reliant upon the state for their rights, freedoms, and protection.⁴⁵ Unaccompanied children exist therefore as “property of the state,” with no bargaining power to enforce their legal rights.⁴⁶ This strongly suggests that unaccompanied children are considered as less vulnerable than citizen children and are therefore less worthy of the rights and protections afforded to citizen children.

However, this observation must be considered with a caveat. While the law usually reserves the highest degree of protection for white citizen children, the law continues to disproportionately fail citizen children of color, who are typically treated more severely than their White citizen counterparts. For example, family law and criminal law—legal systems that involve particularly vulnerable citizen populations—provide legal frameworks that purport to provide distinguishing higher protections and rights for children based upon their inherent vulnerability.⁴⁷ Yet in practice, these systems are plagued by racial discrimination and continue to disadvantage citizen children of color.⁴⁸

It follows therefore that Latinx unaccompanied children may also experience systematic racial discrimination as they navigate the immigration system. Therefore, even if the legal rights of unaccompanied children were equivalent to that of citizen children, by virtue of their race it is likely that in practice, unaccompanied children are perceived as less vulnerable and less worthy of protection when compared to white citizen children.

2. Unaccompanied Children are Required to Meet the Same Substantive Requirements as Adults in Order to Remain in the United States

The Flores Agreement and the TVPRA provide guidance relating to the treatment of unaccompanied children, but the instruments do not provide additional options for unaccompanied children to remain in the United States. Rather, options for relief remain generally the same as the options for adults. Legal decision makers are required to judge unaccompanied children by the same substantive standards as adults when determining whether they should remain or be repatriated.⁴⁹ This is problematic because unaccompanied children remain restricted to the limited structures created for immigrant adults.

For Latinx unaccompanied children who arrive at the border, these forms of relief are limited, despite the worsening country conditions in El Salvador, Guatemala and

⁴⁴ Thronson (2018), *supra* note 14, at 263.

⁴⁵ Thronson Kids (2002), *supra* note 14, at 982–83.

⁴⁶ *Id.*

⁴⁷ For an understanding of the theoretical systems, and their use in practice against children of color in the criminal justice system, see Taylor-Thompson, *supra* note 42; see also, Tamar R. Birkhead *Justice and the Role of the Defense Attorney*, 58 BOS. C. L. R. 379, 401, 404 (2017) (providing a summary of the juvenile justice system’s history and current racialized treatment of Black boys). For an understanding of family law, see DOROTHY E. ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (N.Y. Basic Books, 2002) (describing the disproportionate impact that family removal and the welfare and foster system has upon poor African American children and families); see also Appell, *supra* note 2.

⁴⁸ *Id.*

⁴⁹ Thronson Kids (2002), *supra* note 14.

Honduras.⁵⁰ In fact, the options for relief—namely asylum, T and U visas, and Special Immigrant Juvenile Status (SIJS)—are so severely limiting that the vast majority of Latinx unaccompanied children from the Northern Triangle are unlikely to be successful.

i. Asylum

The most common form of relief that unaccompanied children who enter the United States border may utilize is to pursue a claim of asylum. Under the Refugee Act of 1980, individuals, including children, can be granted asylum if individuals can prove that they have a “well-founded fear of persecution” in their home country.⁵¹ For the purpose of making this determination, the law does provide child-sensitive policies and guidelines encouraging decision makers to adopt child-friendly procedures, such as child-sensitive interviews.⁵² However, the legal standards applicable to substantive asylum law do not differentiate between children and adults.⁵³

One of the particularly challenging aspects of successfully securing asylum is that while immigrants have the right to counsel, there is no obligation upon the government to provide counsel.⁵⁴ This is largely due to the fact that immigration proceedings are categorized as civil procedures and theoretically trigger due process rights;⁵⁵ however, the Executive’s plenary powers render these rights virtually nonexistent in practice.⁵⁶

The Homeland Security Act also requires ORR to develop a plan to ensure that unaccompanied children receive counsel; yet, in practice many children continue to appear unrepresented in court.⁵⁷ Figures from Transactional Records Access Clearinghouse (TRAC) at Syracuse University in 2014 revealed that when unaccompanied children were

⁵⁰ The multifarious reasons attributable to this large migration of children from the Northern Triangle stem from widespread instability in the region, and Honduras, El Salvador, and Guatemala specifically have histories of long, protracted civil wars. The situation is paralyzing for male children in the region who are targeted and kidnapped by local gangs and recruited for drug distribution. Children are also victims of severe physical violence and abuse. Human Rights Watch recorded accounts of children age thirteen and younger found tortured or murdered. Girls under fifteen-years-old are particularly at risk of sexual violence including gang rape, sex trafficking, and prostitution. Unaccompanied children cite these very reasons - as well as extortion, poverty and family reunification - as their central reasons for leaving. See UNHCR, *supra* note 6, at 23, 32-7; see also HUMAN RIGHTS WATCH, MEXICO’S FAILURE TO PROTECT CENTRAL AMERICAN REFUGEE AND MIGRANT CHILDREN, (2016), available at <https://www.hrw.org/report/2016/03/31/closed-doors/mexicos-failure-protect-central-american-refugee-and-migrant-children>.

⁵¹ Refugee Act as incorporated in the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A).

⁵² See e.g., interviewing procedures for minor applicants on USCIS website. Asylum officers are instructed to conduct child appropriate interviews. U.S. Citizenship and Immigration Services, *Minor Children Applying for Asylum By Themselves*, <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/minor-children-applying-asylum-themselves>.

⁵³ Thronson Kids (2002), *supra* note 14.

⁵⁴ §292 of the Immigration Nationality Act. As re-incorporated Pub. L. 104–208, §371(b)(9) (1996); See also the TVPRA which states that immigrant children should have counsel. TVPRA *supra* note 11, at §(c)(5).

⁵⁵ See *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212, 213–14 (1953) (finding that an immigrant cannot be deprived of due process, but there are no further constitutional protections to noncitizens).

⁵⁶ Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 392 (2006).

⁵⁷ Homeland Security Act, *supra* note 19, at § 462(b).

represented in asylum proceedings in court, 73% were allowed to remain in the United States, and that children were ordered removed in just 12% of these cases.⁵⁸ Yet representation rate in immigration court stood at a mere 32%.⁵⁹

ii. T and U visas

Like adults, unaccompanied children are also eligible for T visas if they are victims of trafficking, and U visas if they are victims of substantial mental or physical abuse.⁶⁰ Both visas provide successful applicants with the right to remain in the United States for three years;⁶¹ however, these visas have annual numerical limits.⁶² In addition, researchers believe that in practice only a fraction of victims of these offenses are able to use these forms of relief, due to the extremely sensitive nature of claims.⁶³

iii. Special Immigrant Juvenile Status

One form of relief that is distinguishable from adults is the SIJS available to children who have been neglected, abandoned, or mistreated by a parent.⁶⁴ While SIJS is the only substantive ground for relief that calls on decision makers to consider the “best interests of the child,” success is to a great extent dependent upon the ability to secure and pay for legal counsel.⁶⁵ Success is also dependent upon geographic location. According to a report by the Vera Institute of Justice, legal providers had little-to-no success securing this status in state court in some parts of the country.⁶⁶ Finally, this category of relief is subject to annual country-of-origin quotas which has caused severe challenges for children from the Northern Triangle.⁶⁷

⁵⁸ See *Representation for Unaccompanied Children in Immigration Court Juveniles*, TRAC IMMIGRATION (Nov. 25, 2014), <https://trac.syr.edu/immigration/reports/371/>.

⁵⁹ *Id.*

⁶⁰ Victims of Trafficking and Violence Protection Act of 2000 Pub. L. No. 106-386, 114 Stat 1464 (October 28, 2000). §102 (a); §1513 (a)(2)(A).

⁶¹ U.S. Citizenship and Immigration Services, *Questions and Answers: Victims of Human Trafficking, T Nonimmigrant Status*, <https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status/questions-and-answers-victims-human-trafficking-t-nonimmigrant-status>. See also U.S. Citizenship and Immigration Services, Archive <https://www.uscis.gov/archive/archive-news/uscis-approves-10000-u-visas-6th-straight-fiscal-year>.

⁶² *Id.* T visas have a limit of 5,000, and U visas have a limit of 10,000 (discussing U-visa eligibility).

⁶³ Byrne Lit Rev (2008), *supra* note 16, at 22.

⁶⁴ SIJS, created by the Immigration Act of 1990, allows certain undocumented children to obtain lawful permanent residency. Immigration Act of 1990, Pub. L. No. 101-649, § 153, 104 Stat. 4978, 5005–06.

⁶⁵ See discussion regarding the best interests of the child in *infra* Part IV.A. See also Austin Rose, *For Vulnerable Immigrant Children, A Longstanding Path to Protection Narrows*, MIGRATION POLICY INST. (July 25, 2018), <https://www.migrationpolicy.org/article/vulnerable-immigrant-children-longstanding-path-protection-narrows>.

⁶⁶ OLGA BYRNE & ELISE MILLER, VERA INST. OF JUST., *THE FLOW OF UNACCOMPANIED CHILDREN THROUGH THE IMMIGRATION SYSTEM: A RESOURCE FOR PRACTITIONERS, POLICY MAKERS, AND RESEARCHERS* 26 (2012).

⁶⁷ Ann L. Estin, *Child Migrants and Child Welfare: Toward a Best Interests Approach*, 17 WASH. U. GLOBAL STUD. L. REV. 589, 610 (2018).

3. Latinx Unaccompanied Children Experience Significant Abuse and Harm as a Result of the Legal Deficiencies

Even with the protections in the Flores Agreement and the TVPRA, Latinx unaccompanied children continue to experience significant harm as they navigate entry to the United States. This is due to both the lack of compliance by government actors and a lack of accountability when such instances occur. While the following accounts include Latinx accompanied and unaccompanied children, this subpart demonstrates the disproportionate harm and suffering experienced by Latinx immigrant children at the U.S. southern border.

In 2018, a report issued by the ACLU found multiple violations of *Perez-Funez v. District Director INS*,⁶⁸ providing numerous examples of CBP officers who had coerced children into accepting voluntary departure.⁶⁹ Though the scale of coerced voluntary departures is difficult to ascertain, the large discrepancy between the numbers of children with plausible claims and the small number who actually apply for and receive asylum indicates that coercion can still be a prevalent concern.⁷⁰

The explicit mistreatment of Latinx immigrant children has received the most public condemnation and has been described as “child abuse.”⁷¹ After the Flores Agreement, practices in detention did improve, but there continue to be grave concerns about the treatment of unaccompanied children in detention.⁷² Several reports have revealed the regular abuse of predominantly Latinx children detained at the southern border. One 2018 report by the ACLU detailed the use of verbal threats, derogatory abuse, and excessive physical force against children in detention.⁷³ In early 2019, the HHS documented approximately 4500 allegations of sexual abuse against immigrant children in ORR custody over a four year period.⁷⁴ Another report in 2019 by Freedom for Immigrants found that abuse experienced by immigrants in detention is regularly racial in nature.⁷⁵

The ACLU’s report, as well as subsequent media reports, have also found that conditions at detention centers are exceedingly poor. These reports documented that

⁶⁸ *Perez-Funez*, 611 F. Supp., at 1004 (finding that the prior to consenting to removal, children must be advised of and understand the alternatives to voluntary departure. The Court ordered the Immigration Naturalization Service (INS) to adopt procedures to ensure that children were meaningfully advised of their rights).

⁶⁹ The AMERICAN CIVIL LIBERTIES UNION, NEGLECT AND ABUSE OF UNACCOMPANIED IMMIGRANT CHILDREN BY U.S. CUSTOMS AND BORDER PROTECTION, 31 (2018), <https://www.aclusandiego.org/civil-rights-civil-liberties/> [hereinafter ACLU Border Protection].

⁷⁰ Michael G. Bochenek, *No Way to Treat Children Fleeing Danger*, 38 HARV. INT’L. REV. (2017).

⁷¹ Democrat House Speaker Nancy Pelosi described the immigrant situation in 2019 as “child abuse.” See Sarah Ferris, et.al, *House Passes Border Spending Package in Win for Pelosi*, POLITICO, (Jun. 25, 2019), <https://www.politico.com/story/2019/06/25/nancy-pelosi-border-spending-package-1382038>.

⁷² Byrne Lit. Rev. (2008), *supra* note 16, at 23.

⁷³ ACLU Border Protection, *supra* note 69, at 12–13.

⁷⁴ Haag, *supra* note 3 (While 1,303 of these allegations were referred to DOJ, 178 involved ORR staff members).

⁷⁵ Freedom for Immigrants also found that most immigrants experience racial abuse while detained. The report noted that racial abuse included incidents of detained immigrants being referred to as animals and included lack of access to language services and the prevention of people of color from filing grievances. FREEDOM FOR IMMIGRANTS, PERSECUTED IN U.S. IMMIGRATION DETENTION: A NATIONAL REPORT ON ABUSE MOTIVATED BY HATE 6 (2018), <http://freedomforimmigrants.org/report-on-hate>.

unaccompanied children faced deplorable conditions that could amount to violations of the Fifth Amendment,⁷⁶ including poor hygiene conditions such as waste in cells and unsanitary restrooms, inattention to basic care such as rotten food, or withholding food, lack of bedding and lack of medical care, and extremely cold cells known as “iceboxes.”⁷⁷ In addition, a June 2019 report from a Texas children’s detention facility highlighted similarly dangerous and neglectful conditions that were likely in violation of the Flores Agreement.⁷⁸ These abhorrent conditions included outbreaks of the flu, lice, overcrowding, and children sleeping on the floor.⁷⁹ In response to a visit to this particular facility, one lawyer stated that “[a]ll of these children are in government custody, and those very basic standards are being violated.”⁸⁰ Finally, unaccompanied children are supposed to be transferred to ORR custody within 72 hours as mandated by the TVPRA, but several accounts confirm that this period of time is often much longer.⁸¹

The deaths of mostly Latinx immigrant children expose the most tragic consequences of their mistreatment.⁸² In 2018 in a matter of weeks, a seven year old girl from Guatemala died of dehydration and shock in a detention center,⁸³ an eight year old boy from Guatemala died from a flu infection,⁸⁴ and a twenty month old toddler died after contracting a severe infection in detention.⁸⁵ The Guardian has also recorded the known deaths of ninety seven children since 2003 at the border itself, most of whom were children of color.⁸⁶ Those children include sixteen year old Cruz Velazquez who died after being encouraged by border officials to drink concentrated liquid methamphetamine, twelve year old Lourdes Cruz Morales who was run over and killed by border patrol officers while crossing the U.S.

⁷⁶ ACLU Border Protection, *supra* note 69.

⁷⁷ *Id.*

⁷⁸ Isaac Chotiner, *Inside a Texas Building Where the Government is Holding Immigrant Children*, THE NEW YORKER (Jun. 22, 2019), <https://www.newyorker.com/news/q-and-a/inside-a-texas-building-where-the-government-is-holding-immigrant-children>.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ ACLU Border Protection, *supra* note 69.

⁸² In addition, Johnson notes several deaths that occur at the U.S.–Mexico border due to the difficult isolated terrains that migrants travel in order to immigrate to the United States. Johnson quotes a figure of one person a day who dies on migrant trails at the border. Kevin R. Johnson, *A Case Study of Color-Blindness: The Racially Disparate Impacts of Arizona's S.B. 1070 and The Failure of Comprehensive Immigration Reform*, 2 U.C. IRVINE L. REV. 313, 349–50 (2012).

⁸³ Michael Brice-Saddler, *The 7-Year-Old Girl Who Died in Border Patrol Custody Was Healthy Before She Arrived, Father Says*, WASH. POST (Dec. 15, 2018), <https://www.washingtonpost.com/nation/2018/12/15/year-old-girl-who-died-border-patrol-custody-was-healthy-before-she-arrived-father-says/>.

⁸⁴ Miriam Jordan, *8-Year-Old Migrant Child from Guatemala Dies in U.S. Custody*, N.Y. TIMES (Dec. 25, 2018), <https://www.nytimes.com/2018/12/25/us/guatemalan-boy-dies-border-patrol.html>.

⁸⁵ Liam Stack, *Mother Whose Child Died After ICE Detention Sues for \$60 Million*, N.Y. TIMES (Nov. 28, 2018), <https://www.nytimes.com/2018/11/28/us/migrant-child-wrongful-death-lawsuit.html>.

⁸⁶ Sarah Macaraeg, *Fatal Encounters: 97 Deaths Point to Pattern of Border Agent Violence Across America*, THE GUARDIAN (May 2, 2018), <https://www.theguardian.com/us-news/2018/may/02/fatal-encounters-97-deaths-point-to-pattern-of-border-agent-violence-across-america>. *See also* link to spreadsheet below, https://docs.google.com/spreadsheets/d/1KRrkBcPjVrZjdyHL_ce5awsN3xJcuinIYF5iXCM5_40/edit-gid=682861705.

border with her father, and sixteen year old Juan de Jesus Rivera Cota who was shot and killed by border patrol officers.⁸⁷

The U.S. government has quietly forked out more than \$9 million to settle a portion of these cases.⁸⁸ Yet, as exemplified by the outcome of the six year case of *Rodriguez v. Swartz*, border patrol officials are rarely held criminally accountable for the deaths of Latinx children at the border, and the majority of children killed by border patrol officials remains unknown.⁸⁹ In response to *Rodriguez v. Swartz* the government issued a “Use of Force Policy”⁹⁰ to reduce the excessive use of force at the border, but the nonprofit network the Southern Border Communities Coalition reported little change in border patrol deaths since the implementation of the new policy.⁹¹

Given the concentration of this abuse at the border and its disproportionate impact upon Latinx immigrant children, this form of state sanctioned institutional abuse against a community of color can be construed as racial in nature.⁹² Though theoretically protected in the law, race mitigates their vulnerability and in like manner the worth of the lives of Latinx unaccompanied children is also devalued. The lack of accountability when such abuses occur further suggests that race also mitigates the culpability of those responsible for such abuse.⁹³

Finally, the TVPRA requires that unaccompanied children from Mexico and Canada must be repatriated directly from the border under the following circumstances: if they are not being trafficked; if they are not at risk for human trafficking; if they do not fear persecution upon return; or if they are able to make an independent decision to withdraw their request for admission to the United States.⁹⁴ In practice, border patrol agents repatriated 93% of unaccompanied children from Mexico under the age of fourteen between 2009 and 2014 who lacked documentation to support potential resettlement in the United States.⁹⁵ Given the exceedingly small numbers of Canadian children crossing the

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Rodriguez v. Swartz*, 899 F.3d 719 (9th Cir. 2018). Sergio Adrian Hernandez Guereca was one of the only cases where someone was held accountable. Reece Jones, *Death in the Sands: The Horror of the US-Mexico Border*, THE GUARDIAN (Oct. 4, 2016), <https://www.theguardian.com/us-news/2016/oct/04/us-mexico-border-patrol-trump-beautiful-wall>.

⁹⁰ OFFICE OF TRAINING AND DEVELOPMENT, U.S. CUSTOMS AND BORDER PROTECTION, USE OF FORCE POLICY, GUIDELINES AND PROCEDURES HANDBOOK (2014), <https://www.cbp.gov/sites/default/files/documents/UseofForcePolicyHandbook.pdf>.

⁹¹ *Deaths by Border Patrol Since 2010*, SOUTHERN BORDER COMMUNITIES COALITION (last updated June 7, 2019), http://www.southernborder.org/deaths_by_border_patrol.

⁹² Samantha Sabo et. al., *Everyday Violence, Structural Racism and Mistreatment at the US-Mexico Border*, 109 SOC. SCI. & MED., 66 (2014).

⁹³ See for example the general impunity surrounding police killings of racial minorities and the lack of accountability in the United States. WRITTEN SUBMISSION PREPARED BY THE INTERNATIONAL HUMAN RIGHTS CLINIC AT SANTA CLARA UNIVERSITY FOR THE THEMATIC HEARING ON, LACK OF ACCOUNTABILITY FOR POLICE KILLINGS OF MINORITIES AND OTHER VULNERABLE POPULATIONS IN THE UNITED STATES, (DEC. 7, 2017), https://www.aclu.org/sites/default/files/field_document/santa_clara_171205_santa_clara_written_submission_for_thematic_hearing_on_police_killings.pdf.

⁹⁴ TVPRA *supra* note 11, at §235 (2).

⁹⁵ U.S. GOVERNMENT ACCOUNTABILITY OFFICE, UNACCOMPANIED ALIEN CHILDREN: ACTIONS NEEDED TO ENSURE CHILDREN RECEIVE REQUIRED CARE IN DHS CUSTODY 24 (2015), <http://www.gao.gov/assets/680/671393.pdf>; see also UNITED NATIONS HIGH COMMISSIONER FOR

border, immigration scholar Deborah Weissman maintains that the law was intended to discriminate against Mexican unaccompanied children.⁹⁶

Although the TVPRA instructs that unaccompanied children must be safely repatriated, many unaccompanied children who are repatriated risk greater harm and even death upon their return.⁹⁷ Though it is difficult to ascertain the exact numbers of these cases, one morgue director in Honduras tragically summarized this by commenting, “[t]hey return just to die.”⁹⁸

II. THE SALIENCE OF RACE AND INTERSECTIONALITY IN THE TRUMP ADMINISTRATION’S POLICIES DIRECTED TOWARDS LATINX UNACCOMPANIED CHILDREN

Despite these limitations, the TVPRA and the Flores Agreement still provide the most comprehensive protections for unaccompanied children under U.S. immigration law. Yet still, the protections fail to provide for the relevance and salience of race. The following Part explores the gap in intersectional racial analysis concerning unaccompanied children. It notes that this has led to uncritical ways of thinking about race and vulnerability in immigration law, resulting in the creation and enforcement of laws and policies that disproportionately impact Latinx unaccompanied children. The Part then explores the Trump administration’s untenable assault on Latinx unaccompanied children which has exacerbated the existing deficiencies discussed in Part I.

A. A Critical Gap in Intersectional Legal Analysis

In the founding years of the United States, restrictive immigration laws evolved against a backdrop of “genocide-at-law” against Native American populations and the enslavement of Black Africans, cementing white hegemony and racial caste in the new nation.⁹⁹ As remarked by historian Mae Ngai, “the law constructed a white American race” and “transform[ed] immigration law into an instrument of mass racial engineering.”¹⁰⁰ The

REFUGEES, FINDINGS AND RECOMMENDATIONS RELATING TO THE 2012–2013 MISSIONS TO MONITOR THE PROTECTION SCREENING OF MEXICAN UNACCOMPANIED CHILDREN ALONG THE U.S.–MEXICO BORDER, (2014), http://www.immigrantjustice.org/sites/immigrantjustice.org/files/UNHCR_UAC_Monitoring_Report_Final_June_2014.pdf.

⁹⁶ See Deborah M. Weissman, *The Politics of Narrative: Law and the Representation of Mexican Criminality*, 38 FORDHAM INT’L L.J. 141, 172–180 (2015). This statement could now be extended to include children from Central America too given the increase in numbers.

⁹⁷ ACLU Border Protection, *supra* note 69 at 29–31; see also Bochenek, *supra* note 70, at 21.

⁹⁸ These numbers are unknown, but one example can be seen by the tragic publicized case of Edgar Chocoy Guzman, killed by gangs seventeen days after his return to Guatemala. Sergio De Leon, *Guatemalan Youth Slain 17 Days after Being Deported from U.S.*, LA TIMES (May 9, 2004), <http://articles.latimes.com/2004/may/09/news/adfg-deport9>. See also Roque Planas, *Children Deported to Honduras Are Getting Killed: Report*. HUFFINGTON POST (Aug. 20, 2014), http://www.huffingtonpost.com/2014/08/20/minors-honduras-killed_n_5694986.html.

⁹⁹ See Rennard J. Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 U. KAN. L. REV. 713 (1986). See generally KENNETH M. STAMPP, *THE PECULIAR INSTITUTION*, NY VINTAGE BOOKS 192–236 (1956).

¹⁰⁰ MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 27 (2004) (documenting US immigration law since the discriminatory quotas in the Immigration and

right to racially exclude immigrants of color was encapsulated in the “plenary powers” doctrine, established by the Supreme Court in *Chae Chan Ping v. United States* and *Fong Yue Ting v. United States*.¹⁰¹ Citing the Executive’s sovereign powers to exclude immigrants, the plenary powers doctrine was described by the Court in *Fong Yue Ting* as “the right of a nation to expel or deport foreigners... [it] is absolute and unqualified.”¹⁰²

The plenary powers doctrine still stands today and scholars of law, history and sociology have rigorously explored the damning history of race and immigration law as it pertains to adults.¹⁰³ However, the same cannot be said for the unique impact that immigration law had upon unaccompanied children of color.¹⁰⁴ Immigration scholars have rarely assessed the situation of unaccompanied children through the lens of ‘intersectionality’—a term describing the multiple dimensions of identity that converge and manifest structural oppression for different social groups.¹⁰⁵

Critical Race Theorist Kimberlé Crenshaw explained that intersectionality is rarely acknowledged in the law, and therefore certain groups silently suffer from the effects of multiple subordination.¹⁰⁶ The failure to explore intersectional issues such as the race and age of unaccompanied children has left the law and reform efforts severely bereft of critical examination and has erased a key part of their vulnerability. As noted by Roberts and Brooks in the context of child welfare and the courts, “court reform aimed at expediting processes and increasing efficiency, without attention to social justice will only intensify the race and class disparities.”¹⁰⁷

The lack of intersectional analysis in child immigration law has led to the presumption that the law’s racial impact upon unaccompanied children is synonymous to that of adults. This erroneous presumption is rebutted by Bhabha and Young who state that “child persecution is not coextensive with adult persecution.”¹⁰⁸ To demonstrate this, Bhabha and Young recall the situation of Black South African children living in Soweto in the midst of apartheid, who were specifically targeted by the government based upon their

Nationality Act of 1924 to post World War II immigration reform, including a detailed history of the law’s discrimination against Chinese, Japanese, Filipino and Mexican immigrants).

¹⁰¹ Known as the Chinese exclusion cases, *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889) and *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), both involved Chinese laborers who challenged the constitutionality of the federal Chinese Exclusion Act 1882 which prohibited Chinese people from entering the United States.

¹⁰² *Fong Yue Ting*, 149 U.S. at 707.

¹⁰³ See e.g., Ngai, *supra* note 103; David B. Oppenheimer et al., *Playing the Trump Card: The Enduring Legacy of Racism in Immigration Law*, BERKELEY LA RAZA L.J. 26, 28 (2016); Johnson Mirror (1998) *supra* note 15; ERIKA LEE, AT AMERICA’S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882 - 1943 (Chapel Hill: University of North Carolina Press, 2003); David Cook-Martín and David Fitzgerald, *Liberalism and the Limits of Inclusion: Race and Immigration Law in the Americas, 1850-2000*, 41 J. OF INTERDISC. HIST. 7, 11–12, 2 (2010).

¹⁰⁴ Note however, Rogerson’s work is one of the few to begin to explore the intersection of race and immigrant children. See generally, Rogerson, *supra* note 21.

¹⁰⁵ The term intersectionality was first coined by Kimberlé Crenshaw. See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, And Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1249–52 (1991).

¹⁰⁶ *Id.*

¹⁰⁷ Susan L. Brooks & Dorothy E. Roberts, *Social Justice and Family Court Reform*, 40 FAM. CT. REV. 453, 455 (2002).

¹⁰⁸ Bhabha Potatoes (2006), *supra* note 14, at 210.

intersectional race and age, rendering them subject to unique forms of persecution.¹⁰⁹ Indeed, the South African Truth and Reconciliation Commission found “that it was the youth who bore the brunt of gross human rights violations.”¹¹⁰ This example demonstrates that children are frequently exposed to situations that are exploitative to children alone.¹¹¹ Equating experiences of adults to that of children can obscure the differentiating impact that racial persecution has upon unaccompanied children.

The particularly aggressive nature of the Trump administration’s approach to Latinx unaccompanied children demonstrates the salience of intersectionality and race more powerfully than in previous administrations. While many of the challenges discussed in Part I predate the Trump administration’s tenure, the administration has magnified these challenges, exacerbating the racial impact upon Latinx unaccompanied children.¹¹² Indeed, the Trump administration’s response highlights the fact that ignorance to the intersectional and pervasive role of race leads to uncritical ways of thinking about vulnerability in immigration law, resulting in the creation and enforcement of laws and policies that are based upon mythical political propositions and hyperbole.

For example, the majority of unaccompanied children arriving at the southern border used to be predominantly adolescent male youth, but the demographics have changed throughout the years. In 2017, 17% of unaccompanied children were under the age of twelve compared to 11% of children in the same age group in 2012.¹¹³ The number of families crossing the border has also increased, which heightens the potential for younger children to become separated from their families.¹¹⁴ The southern border has also seen an increase in the arrival of girls and pregnant youth.¹¹⁵ However, because there is a significant gap in intersectional analysis, the rhetoric and responding policies emerging from the border continue to target male adolescents.¹¹⁶ Upon visiting the southern border in November 2018, President Trump stated that there were “a lot of young men, strong men [at the border]. And a lot of men that maybe we don’t want in our country.”¹¹⁷ This homogenization of Latinx unaccompanied children ignores the complex multi-faceted identities of those crossing the border and in doing so fails to provide for their unique rights and protections.¹¹⁸

¹⁰⁹ Bhabha & Young, *supra* note 14, at 108-9.

¹¹⁰ *Id.*

¹¹¹ Rachel Bien, “*Nothing to Declare but their Childhood*”: Reforming U.S. Asylum Law to Protect the Rights of Children, 12 J. L. & POL’Y 797–841 (2004).

¹¹² See Roberts and Brooks quote discussed *supra* note 110.

¹¹³ Jens M. Krogstad et al., *Children 12 and Under Are Fastest Growing Group of Unaccompanied Minors at the U.S. Border*, PEW RESEARCH CTR. (Jul. 22, 2014), <http://www.pewresearch.org/fact-tank/2014/07/22/children-12-and-under-are-fastest-growing-group-of-unaccompanied-minors-at-u-s-border/>.

¹¹⁴ *Id.*

¹¹⁵ See generally UNHCR, *supra* note 6.

¹¹⁶ CECILIA MENJIVAR ET.AL, IMMIGRANT FAMILIES, at 46 (Cambridge Polity Press, 2016).

¹¹⁷ *White House Briefing Statements, Remarks by President Trump on the Illegal Immigration Crisis and Border Security* (Nov. 2, 2018), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-illegal-immigration-crisis-border-security/>.

¹¹⁸ See Murray’s article for an explanation of how legal (and social) definitions of Mexican ethnicities and races are conflated and other Latino nationals are consequently submerged within this understanding. Yxta Maya Murray, *The Latino-American Crisis of Citizenship*, 31 U.C. DAVIS L. REV. 503 (1998).

B. *The Trump Administration's Policies Against Unaccompanied Latinx Children*

Ignorance to the salience of race and intersectionality may also lead to the proliferation of facially neutral laws that have a targeted and disproportionate impact on a racial group.¹¹⁹ The rise of laws and policies targeting Latinx unaccompanied children at the U.S. southern border suggests that the role of race and intersectionality should be of pivotal concern to reform advocates. Beginning in 2017, the Trump administration launched “a systematic attack on children” by diminishing the protections provided by the TVPRA and the Flores Agreement.¹²⁰ The Trump administration’s policies came in direct response to the number of Latinx unaccompanied children seeking entry at the southern border—despite the reduction in numbers since 2014.¹²¹ The policies undoubtedly target the inherent vulnerability of Latinx unaccompanied children and seek to delegitimize former legal protections. While this Article cannot cover the extent of these policies, some of these changes are discussed below.

1. Executive Changes to the TVPRA and the Flores Agreement

According to the White House policy document “Immigration Principles and Policies,” the administration proposed the removal of protections under the TVPRA, the removal of provisions for USCIS asylum officers to determine asylum status, and the creation of additional restrictions to the SIJS.¹²² In May 2019, the administration confirmed one of these changes in a memo directed to USCIS asylum officers.

The Executive has proposed and introduced a number of changes to existing policy, weakening the protections in the TVPRA and Flores Agreement. One such change includes reducing opportunities for unaccompanied children to successfully claim asylum status.¹²³ Prior to May 2019, unaccompanied children who were assessed and deemed to be younger than 18 years old by border patrol officers at the time of entry could later apply for asylum directly with USCIS.¹²⁴ USCIS officers could rely upon age assessments made by border patrol officers to help them determine their application for asylum. This process was an important safeguard because it allowed children to be treated differently than adults and to be assessed in a less adversarial setting with trained asylum

¹¹⁹ Birkhead *supra* note 47, at 412–14 (discussing that racial codes are often used to mask racialized laws).

¹²⁰ KIDS IN NEED OF DEFENSE (KIND), DEATH BY A THOUSAND CUTS: THE TRUMP ADMINISTRATION’S SYSTEMATIC ASSAULT ON THE PROTECTION OF UNACCOMPANIED CHILDREN 1 (2018), https://supportkind.org/wp-content/uploads/2018/05/Death-by-a-Thousand-Cuts_May-2018.pdf.

¹²¹ See *infra* accompanying n.9.

¹²² THE WHITE HOUSE, IMMIGRATION PRINCIPLES AND POLICIES (2017), POLITICO (Mar. 9, 2019), <https://www.politico.com/f/?id=0000015e-fe3d-dc15-a3fe-ff3d27fb0000>.

¹²³ USCIS Memorandum, UPDATED PROCEDURES FOR ASYLUM APPLICATIONS FILED BY UNACCOMPANIED ALIEN CHILDREN (May 31, 2019), https://www.uscis.gov/sites/default/files/USCIS/Refugee%2C%20Asylum%2C%20and%20Int%271%20Ops/Asylum/Memo_-_Updated_Procedures_for_I-589s_Filed_by_UACs_5-31-2019.pdf. [hereinafter USCIS Memo (May 2019)].

¹²⁴ Memorandum from Ted Kim, Acting Chief Asylum Division of U.S. Citizenship and Immigration Services, to All Asylum Office Staff (May 28, 2013), <https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Minor%20Children%20Applying%20for%20Asylum%20By%20Themselves/determ-juris-asylum-app-file-unaccompanied-alien-children.pdf>.

officers. If unaccompanied children were unsuccessful in their asylum applications before a USCIS officer, they had another opportunity to present their application before an immigration judge.¹²⁵ However, a memo issued in May 2019 made significant changes to this process. First, the memo instructed that USCIS asylum officers should re-assess and re-determine the age of unaccompanied children, based upon the time of filing their asylum application, as opposed to relying on the determination provided by border patrol officers at their time of entry.¹²⁶ Second, it instructed that if USCIS determines that they are in fact 18 years old or older at the time of filing, they are no longer eligible to have their asylum application assessed by USCIS and must have their application assessed by an immigration judge.¹²⁷ In other words, many children who are considered to be “unaccompanied children” at the time of entry may no longer be considered as unaccompanied children by the time they file their application to USCIS.

Moreover, the Administration has issued a proposal to repudiate the protections in the Flores Settlement altogether, seeking to detain children in detention indefinitely.¹²⁸

2. The Removal of the Central American Minors Program

In 2017, the Trump administration ended the Central American Minors Program (CAM) instituted by the Obama administration in 2014.¹²⁹ CAM provided in-country visas to children living in El Salvador, Guatemala, and Honduras provided they had parents lawfully residing in the United States.¹³⁰ Though the program had challenges, including backlogs and reduced numbers of eligible applicants, it provided one additional avenue for Latinx unaccompanied children seeking to enter the United States.¹³¹

3. Weakening Child-Sensitive Procedures

The Trump administration weakened the few practices that called attention to the inherent vulnerability of Latinx unaccompanied children at the border.¹³² A December 2017 memo directed at immigration judges at the Executive Office for Immigration Review (EOIR) called for the removal of child-appropriate safeguards including removing the

¹²⁵ TVPRA, *supra* note 11.

¹²⁶ USCIS Memo (May 2019), *supra* note 126, at 4.

¹²⁷ *Id.*

¹²⁸ Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 Fed. Reg. 45486 (proposed Sept. 7, 2018) (to be codified at 45 C.F.R pt. 410). The rule was published in the Federal Register in August 2019.

¹²⁹ U.S. DEP’T OF STATE, PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 2018 42–43 (2017), <https://www.state.gov/wp-content/uploads/2018/12/Proposed-Refugee-Admissions-for-Fiscal-Year-2018.pdf> (explaining that the Central American Minors Program would be phased out beginning Fiscal Year 2018).

¹³⁰ CAM was proposed through the following report. U.S. DEP’T OF STATE, U.S. DEP’T OF HOMELAND SECURITY, & U.S. DEP’T OF HEALTH & HUMAN SERVS., REPORT TO THE CONGRESS ON PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 2016 iv (Oct. 1, 2015), <http://www.state.gov/documents/organization/247982.pdf>.

¹³¹ For challenges associated with CAM *see* Aronson, *supra* note 14, at n.30.

¹³² EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUST., OPERATING POLICIES AND PROCEDURES MEMORANDUM 17-03: *GUIDELINES FOR IMMIGRATION COURT CASES INVOLVING JUVENILES, INCLUDING UNACCOMPANIED ALIEN CHILDREN* 3 (Dec. 20, 2017) [hereinafter EOIR 17-03].

necessity for age-appropriate language and tone and emphasized that “legal requirements including credibility standards and burdens of proof are not relaxed or obviated for juvenile respondents.”¹³³

4. Diminishing Protections for All Migrant Children at the Border

The administration instituted additional policies that directly impacted all migrant children primarily entering at the border. These included a November 2018 policy instituted to stop asylum applications at the border all together, impacting thousands of unaccompanied children.¹³⁴ The administration also drastically reduced the number of children admitted through refugee admissions each year through the Unaccompanied Refugee Minors Program, which has facilitated entry for approximately 13,000 unaccompanied children since 1980.¹³⁵ Other policies include: the practice of holding unaccompanied children in cages;¹³⁶ teargassing children and families at the border;¹³⁷ and upholding racial and ethnic profiling.¹³⁸

The controversial “zero-tolerance policy” instituted in June 2018 received great media and public attention.¹³⁹ The policy included the acceleration of criminal prosecutions and detention of adults at the border, which led to the separation of children who were travelling with their parents.¹⁴⁰ This separation was seen as a ‘tough deterrent’ to prevent immigrants coming to the United States, emphasized by then-Attorney General Sessions who stated, “If you don't like that, then don't smuggle children over *our* border.”¹⁴¹ The policy was instituted despite numerous violations of law, including court jurisprudence in the following cases: in *R.I.L-R v. Johnson*, when the court found that immigration detention may not be used as a general deterrent,¹⁴² and in *Troxel v. Granville*, when the Supreme

¹³³ *Id.* at 7.

¹³⁴ HUMAN RIGHTS FIRST, *supra* note 17.

¹³⁵ The Unaccompanied Refugee Minors Program was instituted as part of the Refugee Act of 1980, allowing unaccompanied minors to apply for refugee status in their country of origin. Goździak, *supra* note 34, at 6.

¹³⁶ Rosie Perper, *Side-By-Side Photos Show Migrant Children Locked Up in Cages Under Both Trump and Obama*, BUSINESS INSIDER (June 20, 2018), <https://www.businessinsider.com/photos-migrant-children-policy-under-trump-obama-2018-6>.

¹³⁷ Tim Elfrink & Fred Barbash, *‘These Children are Barefoot. In Diapers. Choking on Tear Gas.’ Images of Migrant Children Being Tear-Gassed at the San Ysidro Border Crossing Provoked Outrage*. WASH. POST (Nov. 26, 2018), <https://www.washingtonpost.com/nation/2018/11/26/these-children-are-barefoot-diapers-choking-tear-gas/>.

¹³⁸ Sabo, *supra* note 92, at 67 (referring to institutionalized profiling of Mexican immigrants).

¹³⁹ See Memorandum from U.S. Attorney General to Federal Prosecutors Along the Southwest Border, Zero-Tolerance for Offenses Under 8 U.S.C. § 1325(a) (Apr. 6 2018), <https://www.justice.gov/opa/press-release/file/1049751/download>.

¹⁴⁰ Pete Williams, *Sessions: Parents, Children Entering U.S. Illegally Will Be Separated*, NBC NEWS (May 7, 2018), <https://www.nbcnews.com/politics/justice-department/sessions-parents-children-entering-us-illegally-will-be-separated-n872081>.

¹⁴¹ *Id.* (emphasis added).

¹⁴² Denise Gilman, *Donald Trump is Ignoring the Immigration Laws That Protect Children and Families*, USA TODAY (July 17, 2018), <https://www.usatoday.com/story/opinion/2018/07/17/trump-ignores-immigration-laws-protecting-families-children-asylum-seekers-column/776788002/>. See also *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 188-191 (D.D.C. 2015) (The Court found that while there may be certain

Court held that the government is bound by the Fourteenth Amendment to adhere to family integrity and uphold parental rights in child separation cases.¹⁴³ The public's outcry and rejection of the zero-tolerance policy led to its revocation by an Executive Order issued six weeks after its initial implementation.¹⁴⁴

As of December 2018, the number of unaccompanied children processed at the border had decreased by 61%.¹⁴⁵ This is partially attributable to “bottle-neck” policies introduced to prevent unaccompanied children from presenting asylum claims at the border.¹⁴⁶

5. Simply Managing Numbers or Racially Motivated?

The Trump administration has blamed human trafficking and the high numbers of individuals at the border as reasons for such strict policies.¹⁴⁷ Reports indicate that overall, border apprehensions reached a six year high in 2018, and monthly reports in early 2019 recorded a 434% increase in apprehensions when compared to previous years.¹⁴⁸ This increase is in large part due to the increase in families and the continued flow of unaccompanied children at the El Paso sector of the southern border.¹⁴⁹ Given the number of children from the Northern Triangle, some may question whether racism has a role in the treatment of unaccompanied children and whether the laws put forth are simply about management. In addition, these arguments are strengthened given that many Latinx unaccompanied children at the southern border can be considered racially ambiguous and some may be visibly perceived as white.

While the situation at the border certainly needs to be addressed, the importance of racism should not be obscured. For Latinx unaccompanied children of color, the rare but nonetheless significant preferential treatment of known lighter-skinned Latinx immigrants such as Cuban immigrants brings the importance of race and intersectionality to the forefront.¹⁵⁰ Thronson remarked:

instances that justify civil detention as deterrence, the deterrence used in this case was far too general for the government to rely upon this as a legitimate justification).

¹⁴³ *Troxel v. Granville*, 530 U.S. 57, 66–67 (2000).

¹⁴⁴ President Donald Trump & Vice President Mike Pence, Remarks at Signing of Executive Order Affording Congress an Opportunity to Address Family Separation (June 20, 2018), (transcript available at, <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-signing-executive-order-affording-congress-opportunity-address-family-separation/>).

¹⁴⁵ HUMAN RIGHTS FIRST, *supra* note 17.

¹⁴⁶ *Id.*

¹⁴⁷ Robert Moore, *Trump Administration Working to Close Immigration ‘Loopholes’—But Border is Still a Crisis, Officials Say*, WASH. POST (Oct. 29, 2019), https://www.washingtonpost.com/immigration/trump-administration-says-it-is-closing-immigration-loopholes-but-border-is-still-a-crisis/2019/10/29/99bbc9ac-fa62-11e9-ac8c-8ecedd29ca6ef_story.html.

¹⁴⁸ Kristen Bialik, *Border Apprehensions Increased in 2018—Especially For Migrant Families*, PEW RESEARCH CTR. (Jan. 16, 2019), <http://www.pewresearch.org/fact-tank/2019/01/16/border-apprehensions-of-migrant-families-have-risen-substantially-so-far-in-2018/>; *see also* Robert Moore, *Border Patrol Apprehensions Are At An 11-Year High, Most Are Families and Children*, TEXAS MONTHLY, (Mar. 5, 2019), <https://www.texasmonthly.com/news/border-patrol-apprehensions-are-at-an-11-year-high-most-are-families-and-children/>.

¹⁴⁹ *Id.* at Moore.

¹⁵⁰ Rogerson, *supra* note 21, at 869-74. The disparate treatment of Haitian unaccompanied children (together with adults) has been widely condemned as discriminatory when compared to the more favorable

Lest it be thought that the lack of responsiveness to children is due to the larger scale and sheer numbers of child migrant arrivals, it is worth noting that with little fanfare or concern ‘[d]uring the first 10 months of fiscal year 2016, 46,635 Cubans have entered the US via ports of entry—already surpassing full fiscal year 2015’s total of 43,159, according to US Customs and Border Protection data obtained through a public records request.’¹⁵¹

Furthermore, while only a small fraction of the unaccompanied children at the U.S. southern border are from predominantly white countries,¹⁵² legal findings of racial discrimination do not have to be based upon comparative racial groups.¹⁵³

It is therefore clear that the Trump administration’s approach is not merely about management but demonstrates racially motivated animus towards Latinx unaccompanied children. Indeed, many of President Trump’s statements have been explicitly condemned as racist—both socially and in the courts. While some of these statements were not restricted to children, they nonetheless demonstrate clear racial animus behind the administration’s immigration policies.

In one of the most overt expressions of racism from the Trump administration, President Trump questioned why the country accepts immigrants from “s***hole countries” such as Haiti and countries in Africa, and expressed his desire to admit more immigrants from countries like Norway.¹⁵⁴ Federal judges throughout the country have found that this statement, among others, could amount to evidence of the racial animus inherent in the administration’s immigration policies.¹⁵⁵ In *Ramos v. Nielson*, the judge relied upon *Arlington Heights* to conclude that one need not rely upon a comparative racial

treatment of predominantly White Cubans. The United States detained Haitian unaccompanied children in deplorable conditions at Guantanamo Bay and repatriated them in large numbers while granting asylum to the majority of Cuban unaccompanied children. For discussion of this, see Johnson Mirror (1998), *supra* note 15, at 1142-545; Bob Herbert, *In America; Guantanamo’s Kids*, N.Y. TIMES (May 10, 1995), <https://www.nytimes.com/1995/05/10/opinion/in-america-guantanamo-s-kids.html>; see also A. Naomi Paik, *US Turned Away Thousands of Haitian Asylum-Seekers and Detained Hundreds More in the 90s*, THE CONVERSATION (June 28, 2018, 6:39AM), <https://theconversation.com/us-turned-away-thousands-of-haitian-asylum-seekers-and-detained-hundreds-more-in-the-90s-98611>.

¹⁵¹ Thronson (2018), *supra* note 14, at 261 n.8.

¹⁵² See TRAC web-based tool detailing immigration cases by nationality. *Juveniles – Immigration Court Deportation Proceedings*, TRAC IMMIGRATION, <https://trac.syr.edu/phptools/immigration/juvenile/>.

¹⁵³ See *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-71 (1977) (Regarding a re-zoning decision that disproportionately disadvantaged communities of color. The court distinguished *Washington v. Davis*, 426 U.S. 229 (1976) which stated that racially disproportionate impact was not sufficient to establish racial discrimination. The court focused instead upon purpose, noting that there does not need to be a comparative racial group in order to find racial discrimination. The court did not however find that the facts in this case amounted to discriminatory purpose).

¹⁵⁴ Ali Vitali, et al., *Trump Referred to Haiti and African Nations as ‘Shithole’ Countries*, NBC NEWS (Jan. 11, 2018), <https://www.nbcnews.com/politics/White-house/trump-referred-haiti-african-countries-shithole-nations-n836946>.

¹⁵⁵ In addition, although this concerned religion, Supreme Court Justice Sotomayor’s dissent in *Trump v. Hawaii*, explained that the administration’s discriminatory intent purpose against Muslim immigrants in the Executive ordered “Travel Ban” against seven predominately Islamic countries, was so apparent that the “reasonable observer” could attest to its animus. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2433 (2018) (Sotomayor, J., dissenting).

group in order to ascertain racial discrimination.¹⁵⁶ The judge temporarily blocked the cancellation of Temporary Protected Status (TPS) for nationals from El Salvador, Nicaragua, Haiti, and Sudan and found that the President's continuous slew of racial epithets substantiated circumstantial evidence that racial animus was a motivating factor.¹⁵⁷

Finally, in 2017, the Trump administration declared its intention to phase out the Deferred Action for Childhood Arrivals Act (DACA).¹⁵⁸ Established in 2012, the DACA Act provided legal protections for undocumented individuals brought to the United States as young children, who were later given the popular title of "Dreamers."¹⁵⁹ President Trump's threatened removal of the DACA program could cause 800,000 Dreamers to lose legal protections, the vast majority of whom are Latinx, from Mexico, El Salvador, Guatemala and Honduras, although people of color from other countries will also be affected.¹⁶⁰ In a series of cases seeking to challenge the proposal, many federal judges found evidence of racial animus behind the decision.¹⁶¹ In one of those cases, *Batalla Vidal v. Nielsen*, a federal district court ordered the administration to resume accepting applications for DACA.¹⁶² Again, relying upon racial statements from President Trump and members of his administration, Judge Alsup concluded that the statements "raise a plausible inference that racial animus towards Mexicans and Latinos was a motivating factor in the decision to end DACA."¹⁶³

The increase of unaccompanied children at the border has prompted an increase of laws and policies that appear to be based upon management and therefore are facially neutral, but have a disproportionate, and thus racial, impact upon Latinx unaccompanied children.¹⁶⁴ As unaccompanied children continue to cross borders, laws and policies will increasingly have important intersecting racial and age impacts.

¹⁵⁶ *Ramos v. Nielson*, 321 F. Supp. 3d 1083, 1124–25 (N.D. Cal. 2018); *Arlington Heights* *supra* note 155 at 265-71.

¹⁵⁷ Temporary Protected Status is a temporary status granted to eligible nationals of specific countries as designated by the U.S. Department of Homeland Security. Temporary Protected Status is reserved for nationals from countries that have ongoing conflicts, environmental disasters or disasters, or other extraordinary conditions. *Ramos*, 321 F. Supp. 3d at 1125.

¹⁵⁸ Michael D. Shear and Julie H. Davis, *Trump Moves to End DACA and Calls on Congress to Act*, N.Y. TIMES (Sept. 5, 2017), <https://www.nytimes.com/2017/09/05/us/politics/trump-daca-dreamers-immigration.html>.

¹⁵⁹ The June 2012 Memorandum established the DACA program. This was also later incorporated into the Dream Act Bill. Memorandum from Janet Napolitano, Sec'y of Homeland Security, to Acting Comm'r of U.S. Customs & Border Protection et al. on *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

¹⁶⁰ Approximately 618,342 from Mexico, 28,371 from El Salvador, 19,762 from Guatemala and 18,262 from Honduras. Eugene Scott, *Dreamers' Aren't Just Coming from Latin America*, THE WASH. POST (Sept. 7, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/09/07/dreamers-arent-just-coming-from-latin-america/?utm_term=.bcf4f17b1941

(noting that this highlights the importance of racialization within borders too).

¹⁶¹ See *Regents of Univ. of Cal. v. Nielson*, 279 F. Supp. 3d 1011 (N.D. Cal. 2018); *Batalla Vidal v. Nielsen*, 291 F. Supp. 3d 260, 275 (E.D.N.Y. 2018).

¹⁶² *Nielsen*, 291 F. Supp. at 275.

¹⁶³ See Josh Gerstein, *Judge: Trump Racism May Have Been Key to Ending DACA*, POLITICO (Jan. 12, 2018), <https://www.politico.com/story/2018/01/12/trump-racism-daca-dreamers-judge-339512>.

¹⁶⁴ Johnson, *supra* note 15.

III. THE RACIALIZATION OF LATINX UNACCOMPANIED CHILDREN IN THE LAW

The following Part will explore the role of race as it pertains to Latinx unaccompanied children. The Part explains that race neutralizes the vulnerability of Latinx unaccompanied children and further inhibits their ability to gain access to legal protections. The Part begins with a description of racism and racialization—a concept used in the field of sociology—and considers that racialization challenges the very concept of vulnerability and can therefore give rise to unique forms of persecution in the lives of unaccompanied children. The Part then explores how Latinx unaccompanied children are racialized in our immigration system through three avenues: through the use of adultification as a way to legitimize the poor legal protections in place, through the unique use of narratives and racially coded language,¹⁶⁵ and through the biases of legal actors. In doing so, the Part compares the situation of Latinx unaccompanied children to the situation of citizen children of color caught in the criminal justice system.

A. *Understanding Racism and Racialization*

Racism can be defined as “prejudice, discrimination, or antagonism directed against someone of a different race *based on the belief that one's own race is superior.*”¹⁶⁶ But race and racism are fluid categories that are created and sustained by societal beliefs and attitudes.¹⁶⁷ Racism is therefore a social construction, molded and experienced differently in accordance to a particular time, and particular social group and the law contributes to, shapes, and reflects societal notions of race, and racism.¹⁶⁸ At the same time, critical race theorist Derrick Bell and other scholars attest to the permanence of race, arguing that it is embedded within our systems, institutions and our very social fabric.¹⁶⁹ As a result, while the manifestation of racism may have evolved in the United States, race and racism continue to provide the avenue to maintain white supremacy and sustained racial caste.¹⁷⁰ The systemic permanency of race alone suggests that race may be intertwined with the experiences of Latinx unaccompanied children entering the border.¹⁷¹

Racialization—a term originating in sociology—refers to the methods and process by which race imposes differential and prejudicial meaning upon different groups,

¹⁶⁵ Emily Ryo, *On Normative Effects of Immigration Law*, 13 STAN. J. CIV. RTS. & CIV. LIBERTIES 95, 111 (2017).

¹⁶⁶ Racism, *Oxford Dictionary Online*, Oxford University Press (2nd edition) <https://en.oxforddictionaries.com/definition/racism>.

¹⁶⁷ IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 152 (2006) (“Race is often seen in fixed terms, either as a biological given or a static social category. However, as the debates about race at the turn of the century demonstrate, racial categorization is a fluid process that turns not only on prejudice, but also on factors ranging from dubious science to national honor”).

¹⁶⁸ *Id.* (discussing the notion that law has shaped race through three main avenues coercion, ideology, and legal decision makers. Concerning coercion, Lopez notes that the law defined, and continues to define the parameters of race).

¹⁶⁹ See e.g., DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACE* (NYU PRESS 1992) (noting the permanence of racism as an integral and permanent part of American society. Specifically, Bell notes African American struggles for equality that will not be overcome unless White people recognize their complicity in this).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

constructing a racial identity.¹⁷² The methods of racialization are varied, but this Article explores methods that include proxies for racism and racial discrimination, and negative social narratives and stereotypes directed towards a racial group. As the law continues to be instrumental in “changing notions of race,”¹⁷³ racialization is a useful frame as it explores *how* racial identity is constructed for different groups, and thus reveals the process in which racial discrimination occurs.

Racialization explores the role of proxies for race, which is particularly helpful in the immigration context. Given the limited racial data collected at the border and in immigration proceedings, there are significant challenges with identifying explicit racial discrimination in immigration law.¹⁷⁴ However, proxies for race can be relied upon to decipher racialization. For instance, national origin is frequently used as a proxy for race, as noted by historians analyzing the racialized impact of the 1920’s National Origin quotas.¹⁷⁵ In addition, sociologists have suggested that the targeting of undocumented Latinx immigrants implies that legal status can also now be considered as a proxy for race.¹⁷⁶ Using an expanded understanding of racialization is particularly useful as modern day manifestations of racism and racialization in the law are increasingly more subtle than in times past.¹⁷⁷

An example of racialization in the law can be seen by reflecting on the situation of Latinx adult immigrants and the impact of the 1965 Immigration and Nationality Act. Sociologist Douglas Massey explains that while the 1965 Immigration and Nationality Act removed former racial restrictions on immigration from Mexico and Central America,¹⁷⁸ the increased visibility of immigrants from these countries quickly prompted the enactment of intensive legal enforcement mechanisms enacted to restrict their entry.¹⁷⁹ Such enforcement mechanisms derived chiefly from reductions in opportunities for poor

¹⁷² See also *Racialize*, American Heritage Dictionary of the English Language (5th ed. 2016). Sociologists Michael Omi and Howard Winant first coined the term which has since been used widely by critical race theorists. MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* (1st ed. Routledge, 1986).

¹⁷³ Banks and Eberhardt note that this relationship is mutually reinforcing. R. Richard Banks & Jennifer L. Eberhardt, *Social Psychological Processes and the Legal Bases of Racial Categorization*, in *CONFRONTING RACISM: THE PROBLEM AND THE RESPONSE* 54, 56 (Jennifer L. Eberhardt & Susan T. Fiske eds., 1998).

¹⁷⁴ The closest that data collection relates to national origin only.

¹⁷⁵ See e.g., Ngai, *supra* note 103, at 42–115.

¹⁷⁶ Menjivar, *supra* note 119, at 45.

¹⁷⁷ During the Civil Rights Act sought to eradicate explicit manifestations of racism, but since then the concept of the law being “colorblind” has led to a belief that racism is less prevalent in the law. The legal origin of the law being colorblind was put forward by Justice Harlan: *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (“Our constitution is color-blind, and neither knows nor tolerates classes among citizens.”). See generally Destiny Peery, *The Colorblind Ideal in a Race-Conscious Reality: The Case for a New Legal Ideal for Race Relations*, 6 NW. J.L. & SOC. POL’Y 473 (2011) (noting the arguments against colorblindness).

¹⁷⁸ The 1965 Immigration and Nationality Act 1965 in fact lifted many of the restrictions and exclusions placed upon many immigrants of color seeking entry to the United States by abolishing the quota system based on national origin. This change vastly accelerated immigration from a variety of countries throughout the globe. Immigration Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965).

¹⁷⁹ Douglas S. Massey, *The New Latino Underclass: Immigration Enforcement as Race-Making Institution* STAN. CTR. ON POVERTY AND INEQUALITY 5, https://inequality.stanford.edu/sites/default/files/media/_media/working_papers/massey_new-latino-underclass.pdf.

Mexican immigrants to migrate legally,¹⁸⁰ and in the form of the 1990's Anti-Terrorism and Effective Death Penalty Act (AEDPA), the Personal Responsibility and Work Opportunity Reconciliation Act, and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).¹⁸¹ Combined, these laws introduced provisions that centered on the criminalization of Latinx immigrants at the southern border by authorizing the funding for additional fencing,¹⁸² for increased military technology, and for additional Border Patrol agents, while the statutes also expanded the list of crimes that would lead to deportation.¹⁸³

Heightened immigration enforcement also increased within the interior of the United States.¹⁸⁴ In *Brignoni-Ponce*, the Court permitted reliance upon national origin and ethnicity as a legitimate reason to stop and search Latinx immigrants, stating that this was not a violation of the Fourth Amendment.¹⁸⁵ The Court found that the “likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor.”¹⁸⁶ This had the effect of legalizing the use of racial profiling near the U.S. border.

In other words, while the immigration system introduced facially neutral, seemingly objective laws, these laws were part of a system that had a larger effect of targeting a specific racial group.¹⁸⁷ Further, these laws influenced public opinion, contributing to narratives that Latinx immigrants were “criminals.”¹⁸⁸ Massey adds that these legal mechanisms and social narratives both contributed to the racialization of Latinx

¹⁸⁰ *Id.* (explaining the end of the Bracero Program).

¹⁸¹ The Antiterrorism and Effective Death Penalty Act, (1996), Pub. L. No. 104-132, 110 Stat. 1214; The Personal Responsibility and Work Opportunity Reconciliation Act, (1996) Pub. L. No. 104-193, 110 Stat. 2105; Illegal Immigration Reform and Immigrant Responsibility Act, (1997) Pub. L. No. 104-208, 110 Stat. 3009.

¹⁸² Antiterrorism and Effective Death Penalty Act of 1996, § 442, 110 Stat. at 1279-80 (local law enforcement permitted to arrest and detain illegal aliens); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 102-104, 110 Stat. at 3009-554 to 556 (increasing border patrol); § 321, 110 Stat. at 3009-627 to 628 (expanding definition of aggravated felonies for immigration purposes); § 236, 110 Stat. at 3009-585 to 587 (identification of criminal aliens); Subtitle C, 110 Stat. at 3009-635 to 641 (additional grounds of inadmissibility and deportability); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 110 Stat. at 2260-74 (§401 to 412 limited public benefits to undocumented immigrants).

¹⁸³ Illegal Immigration Reform and Immigration Responsibility Act, Pub.L. 104-208, 110 Stat. 3009-546, enacted September 30, 1996, §101-112. 8 U.S.C. 1103.

¹⁸⁴ For a summary of the policies and laws implemented throughout the years to militarize the border see Cynthia Pompa, *President Trump Is Accelerating the Militarization of the Southwest Border*, ACLU (Dec. 5, 2018), <https://www.aclu.org/blog/immigrants-rights/president-trump-accelerating-militarization-southwest-border/>.

¹⁸⁵ *United States v. Brignoni Ponce*, 422 U.S. 873 (1975) (Involving a Border Patrol officer and whether he could legally stop vehicles near the Mexican border and question the occupants about their immigration status).

¹⁸⁶ *Id.* at 887. *Contra* *United States v. Montero-Camargo*, 208 F.3d 1122, 1133 (9th Cir. 2000) (finding that race is not a legitimate factor in making an immigration stop, and distinguishing *Brignoni-Ponce*).

¹⁸⁷ Birkhead, *supra* note 47, at 412–14 (discussing that racial codes are often used to mask racialized laws).

¹⁸⁸ *See* Massey *supra* note 182.

populations and can be compared to the way that the criminal justice system has affected black populations.¹⁸⁹

B. Structural Inequality: Adultification as Racialization

This subpart explores the role of adultification, contributing to racialization in both the legal structural framework, and implementation of the law as unaccompanied children attempt to navigate in entry.

1. An Adult Legal Framework

Despite acknowledging the inherently coercive situation of unaccompanied children,¹⁹⁰ the law fails to create differentiating structures for children and relegates them to an adult legal framework. Thronson describes this as providing children with “hand-me-downs,” leaving them to stretch or squeeze their need for protection into laws and procedures that were developed for adults, with adult perspectives in mind.¹⁹¹ This underlying legal structure is one of the most challenging aspects of the laws governing unaccompanied children as it creates structural inequality.¹⁹²

For example, as noted in Part I, the options for relief available to unaccompanied children are substantively equivalent to adults. In particular, the failure to require legal counsel for unaccompanied children illustrates the desire to restrict unaccompanied children to the confines of an adult framework in the law, despite the inherent differences in cognitive abilities between children and adults. Legal scholar Sharon Finkel observes:

The very characteristics that are frequently held to diminish children’s legal rights indicate that children cannot present their own court cases and therefore ought to have a special claim to appointed counsel. These characteristics establish that, in most instances, minors lack the ability to gather facts and deal with issues, handle their cases, understand legal issues, or conduct cross-examinations without guidance from an attorney. Youth itself may be regarded as ‘a special factor’ suggesting that the appointment of a lawyer will make a just determination more likely. Youth is frequently a form of judicial shorthand for characteristics that interfere with the ability to prosecute a claim.¹⁹³

The juvenile justice system has begun to rely upon social science research to prove Finkel’s point, attesting to the developmental and cognitive differences between children

¹⁸⁹ via Menjivar *supra* note 119, at 45.

¹⁹⁰ *Perez-Funez*, 611 F.Supp. at 1,002–1004.

¹⁹¹ *Id.* at 259.

¹⁹² Thronson Kids (2002), *supra* note 14, at 1003 (explaining that because of this adult framework, unaccompanied children experience “the worst of both worlds”). *See also* Bhabha Potatoes (2006), *supra* note 14, at 213.

¹⁹³ Sharon Finkel, *Voice of Justice: Promoting Fairness Through Appointed Counsel for Immigrant Children*, 17 N.Y.L. SCH. J. HUM. RTS. 1105, 1123–25 (2001).

and adults.¹⁹⁴ This recognition instigated by the seminal capital punishment case *Roper v. Simmons*, has, in certain instances, mitigated the culpability of youth and reduced criminal sentences for juveniles.¹⁹⁵ In *Roper*, the Supreme Court acknowledged that “[juveniles’] own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment.”¹⁹⁶ Though this same sentiment is inferred in the TVPRA,¹⁹⁷ there has been little practical recognition of this developmental difference for unaccompanied children.

In failing to carve out a separate structure to account for the vulnerable status of children, the legal structure blurs the differences between adults and children, eradicating the vulnerability of unaccompanied children in the law.¹⁹⁸ It further creates the conditions for decision-makers to perceive and treat unaccompanied children as adults. The impact of this is illustrated by the comments of one immigration judge who stated “I’ve taught immigration law literally to 3-year-olds and 4-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.”¹⁹⁹

2. Adultification

The process of perceiving children as adults, known as ‘adultification’ can manifest in different forms. Sociologist Linda Burton, described one form of adultification that explains how and why children may present and even identify as adults.²⁰⁰ Based upon children living in the United States, Burton found that several physical environmental factors can contribute to this self-perceived adultification.²⁰¹ These factors include family transitions, movement into adult roles such as independent living, stress experienced through physical abuse, exposure to violence, and living in unsafe neighborhoods.²⁰² Children who self-identify as older often present as adults, appear more mature, and are more likely to be perceived as adults.²⁰³ Separate studies confirm that this type of phenomenon is particularly prevalent among poor, children of color.²⁰⁴

¹⁹⁴ Note the brief submitted in *Miller v. Alabama*, 567 U.S. 460 (2012) (confirming the emerging body of research in psychology and neuroscience that confirms the cognitive and developmental differences of children when compared to adults). Brief for Am. Psychological Ass’n, An. Psychiatric Ass’n & Nat’l Ass’n of Soc. Workers, as Amici Curiae 3 Supporting Petitioners.

¹⁹⁵ *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham, v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, 567 U.S. 460 (2012).

¹⁹⁶ *Roper*, 543 U.S. at 570 (striking down the death penalty individuals under the age of 18).

¹⁹⁷ TVPRA, *supra* note 11 (The TVPRA makes references throughout to the “specialized needs of unaccompanied children” and their vulnerability).

¹⁹⁸ *See, e.g.*, Taylor-Thompson, *supra* note 42, at 153–58 (argument with respect to the juvenile justice context).

¹⁹⁹ Bochenek, *supra* note 70, at 21 (citations omitted).

²⁰⁰ Linda Burton, *Childhood Adultification in Economically Disadvantaged Families: A Conceptual Model*, 56 FAM. REL. 329, 330–31 (2007).

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *See, e.g.*, ANN A. FERGUSON, *BAD BOYS: PUBLIC SCHOOLS IN THE MAKING OF BLACK MASCULINITY*. (University of Michigan Press, 2001); BETTY HART & TODD R. RISLEY, *MEANINGFUL DIFFERENCES IN EVERYDAY EXPERIENCES OF YOUNG AMERICAN CHILDREN*, (Paul H Brookes Pub., 1995); Suzanne

The second form of adultification observes that children of color are more likely to be perceived as adults when compared to their white counterparts. Sociologist Phillip Goff and his colleagues explored this form of adultification concerning black boys and their interactions with the juvenile justice system.²⁰⁵ Goff's research in 2016 revealed that black and Latino boys were more likely than white boys to be seen as older by law enforcement and legal actors.²⁰⁶ Such an example can be seen in the tragic case of twelve year old Tamir Rice, a black boy who was shot and killed by police officers who had presumed that he was twenty years old.²⁰⁷

Goff's study found evidence to suggest that black and Latinx youth's intermediate position between childhood and adulthood reduces the presumed need for them to depend upon protections under the law.²⁰⁸ Goff states "consequently, a child felony suspect is most at risk of being misperceived as an adult because of her or his intermediate developmental stage and the severity of her or his offense."²⁰⁹

Another study undertaken by Human Impact in 2017 found that youth of color are more likely to be tried as adults in the criminal justice system than their white counterparts, even when charged with similar crimes.²¹⁰ The report found that 57.9% of Latinx youth in California had adult court dispositions compared to just 12% of white youth.²¹¹

Goff's and Human Impact's study suggest that adultification is a unique phenomenon restricted to youth of color and can in part contribute to the high numbers of black and Latinx citizen youth who are disproportionately harmed and abused by the criminal justice system.²¹²

3. Adultification Contributes to the Racialization of Latinx Unaccompanied Children

These findings suggest that for children of color, adultification is intrinsically linked to race and could even be considered a proxy for race. For Latinx unaccompanied children, the sustained use of an adult framework not only "slots" children into an adult system but can also facilitate the ease of racialization. If unaccompanied children are racialized, they become less vulnerable which both justifies and encourages the continued use of an adult framework and becomes an additional barrier to potential reform. The adult legal structure

Shanahan, *Lost and Found: The Sociological Ambivalence Towards Childhood*, 33 ANN. REV. OF SOC. 407 (2007).

²⁰⁵ Phillip A. Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. OF PERSONALITY & SOC. PSYCHOL. 4, 526 (2014).

²⁰⁶ *Id.*

²⁰⁷ German Lopez, *Police Thought 12-year-old Tamir Rice was 20 When They Shot Him. This Isn't Uncommon*, VOX, (Nov. 26, 2014), <https://www.vox.com/2014/11/26/7297265/tamir-rice-age-police>.

²⁰⁸ Goff, *supra* note 206, at 527-9.

²⁰⁹ *Id.* at 528.

²¹⁰ HUMAN IMPACT, *JUVENILE INJUSTICE: CHARGING YOUTH AS ADULTS IS INEFFECTIVE, BIASED, AND HARMFUL* (Feb. 2017), https://humanimpact.org/wp-content/uploads/2018/10/HIP_JuvenileInJusticeReport_2017.02.pdf.

²¹¹ *Id.* at 8.

²¹² *Id.* See also Goff, *supra* note 206, at 540. See also NATIONAL ASSOCIATION OF SOCIAL WORKERS, *THE COLOR OF JUVENILE TRANSFER: POLICY & RECOMMENDATIONS*, SOCIAL JUSTICE BRIEF (2018), <https://www.socialworkers.org/LinkClick.aspx?fileticket=30n7g-nwam8%3d&portalid=0> (explaining the disproportionate number of Black youth tried as adults in criminal justice proceedings).

then provides the avenue to racialize children, challenging the very concept of vulnerability and depriving them of protections under the law.

This could have critical implications for Latinx unaccompanied children who are dependent upon their child status to gain access to the rights and protections under the Flores Agreement and the TVPRA. Yet these are the very children who are likely to exhibit the type of adultification discussed by Burton.²¹³ Coming from situations of stress, violence, abuse and travelling alone, it follows that the “reasonable person” may perceive that unaccompanied children are more mature and therefore conclude that unaccompanied children are in fact adults.²¹⁴

More disturbingly, Goff’s research suggests that regardless of how they present themselves, by virtue of their race alone, adolescent Latinx unaccompanied children may be perceived as adults and therefore be denied critical protections under the Flores Agreement and the TVPRA. Indeed, the law facilitates the ease of this. The TVPRA explicitly forbids the use of an unaccompanied child’s testimony as proof of their age,²¹⁵ and guidance in the Flores Agreement states that if a “reasonable person” would conclude that a detained individual “is an adult despite his claims to be a “minor” they should be treated as an adult.”²¹⁶

Instead, as noted in Part I, the law places a heavy requirement upon proof of age in order for children to access these legal protections proof which is increasingly difficult for children on the move to provide.²¹⁷ Those with documentation are frequently questioned and disbelieved by CBP officers.²¹⁸ Those without documentation, are subjected to an age verification process known as age determination.²¹⁹ To assist with this age determination process, the TVPRA directs that “at minimum” officers can use radio-graphs and dental x-rays to assist with age determination but disfavors the exclusive use of these methods to establish a person’s age.²²⁰ The CBP age assessment manual instructs officers to take a similar approach.²²¹ Despite this guidance, advocates have found that both CBP and ORR officers frequently rely solely on these findings.²²²

For unaccompanied children of color who comprise the overwhelming majority of children at the border, the practice of relying on medical assessments to prove that an individual is over the age of eighteen is particularly problematic. Medical experts have heavily criticized these assessments as inaccurate, condemning the use of outdated European/Caucasian data to determine the age of children of color from vastly different

²¹³ Burton, *supra* note 203.

²¹⁴ See Flores Agreement, *supra* note 11, at § 5 (c) (13) (referring to reliance on the “reasonable person” called for in Flores).

²¹⁵ TVPRA, *supra* note 11, at § 235(b)(4).

²¹⁶ Flores Agreement, *supra* note 11, at § 5 (c)(13).

²¹⁷ See *infra* Part I.A. See generally Gregor Noll, *Junk Science? Four Arguments against the Radiological Age Assessment of Unaccompanied Minors Seeking Asylum*, 28 INT’L J. OF REFUGEE L. 2, 234 (2016).

²¹⁸ ACLU Border Protection, *supra* note 69, at 30 (2018).

²¹⁹ TVPRA, *supra* note 11, at § 235(b)(4).

²²⁰ *Id.*

²²¹ OFFICE OF INSPECTOR GEN., U.S. DEP’T OF HOMELAND SEC, *supra* note 28.

²²² Maya Srikrishnan, *Two Migrants Held for Months Say Ice is Ignoring Evidence They’re Minors*, VOICE OF SAN DIEGO (Apr. 23, 2019), <https://www.voiceofsandiego.org/topics/government/two-migrants-held-for-months-say-ice-is-ignoring-evidence-they-theyre-minors/>.

cultural, socio-economic, and ethnic backgrounds.²²³ This is especially challenging for youth aged between fifteen to eighteen years old, who comprise the majority of youth entering the U.S. southern border.²²⁴ At these ages, the margin of error could be as much as five years either side.²²⁵

Numerous accounts by non-governmental organizations and researchers have alluded to the high likelihood that many unaccompanied children are denied the rights and protections under the Flores Agreement and the TVPRA and are based on an assessment of them as adults.²²⁶ Unfortunately it is impossible to ascertain the scale of these errors because the DHS does not collect this data.²²⁷ However, a few examples demonstrate the severity of what could amount to be a racial presumption of adulthood. Since 2004 there have been continuous reports and cases of unaccompanied children of color who were classed as adults based upon erroneous doctor's evaluations and subsequently spent a significant amount of time in adult detention.²²⁸ One such case, *BIC v. Asher*, involved a seventeen year old unaccompanied child from Somalia who successfully argued that the ORR's age determination was unlawful as it was solely based upon erroneous evaluations of dental x-rays.²²⁹ By time the court came to a decision, the child had been kept in an adult detention center for a number of years.²³⁰

There is need for caution in age assessment at the border. Other countries have reported several instances of individuals claiming status as unaccompanied children, which were later exposed as false.²³¹ Yet, perceptions influenced by racialization will only serve to delegitimize the claims of Latinx and other unaccompanied children of color. This approach will invariably justify the continued use of an adult framework for unaccompanied children.

Some may question the relevance of racialization if children are restricted to an adult framework regardless. As demonstrated, existing policies and guidelines do provide protections for unaccompanied children.²³² While these are insufficient as explained in Part I, they nonetheless provide minimal protections that are vital to facilitate their entry. Anything that diminishes the intrinsic vulnerability of children ought to be challenged.²³³ In addition, as unaccompanied children of color continue to seek entry to the United States, racialization may continue to unduly inform the development of legal reforms. Without

²²³ Kenny & Loughry, *supra* note 30, at 17–18.

²²⁴ *Id.* at 17.

²²⁵ *Id.*

²²⁶ See Byrne Lit. Rev. (2008), *supra* note 16, at 18.

²²⁷ OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., *supra* note 28, at 7.

²²⁸ Jennifer A. Smythe, *I Came to the United States and All I Got Was This Orange Jumpsuit – Age Determination Authority of Unaccompanied Alien Children and the Demand for Legislative Reform*, 24 CHILD LEGAL RTS. J. 28, 32 (2004).

²²⁹ *BIC v. Asher*, No C16-132-MJP-JPD, 2016 U.S. Dist. LEXIS 32647, at *2 (W.D. Wash. Feb. 19, 2016).

²³⁰ *Id.*

²³¹ Famously in the U.K. and Sweden, the media reported that some refugees who were age assessed were found to be adults. See, e.g., Peter Walker, *Two Thirds of Disputed Calais 'Child Refugees' are Adults, Home Office Figures Reveal*, INDEPENDENT (Oct. 19, 2016), <https://www.independent.co.uk/news/uk/home-news/child-refugees-migrants-two-thirds-home-office-dental-teeth-david-davies-a7369186.html>.

²³² See *infra*, Part I.A. for further clarification.

²³³ Finkel, *supra* note 196, at 1127.

acknowledging racialization, we lose the ability to critically deconstruct these laws and advocate for race-conscious policies that reduce the risk of racializing children.

C. Racialized Narratives and Language

Narratives are “not only an expression of social attitudes and nativist sentiments, they also develop in tandem with and within the law and legal discourse.”²³⁴ At times, the law becomes the catalyst for the creation of societal racial narratives, and at other times the media and prominent political leaders can drive powerful narratives, leading to legal reform that disproportionately targets racial groups. The result is that narratives can produce, reproduce, and sustain racialization.

Latinx adults have long buffeted an onslaught of dangerous, racialized narratives. As described previously, Latinx populations have been subject to “a systematic process of racialization – a dedicated campaign of psychological framing and social boundary construction intended to position them as a stigmatized out-group in American social cognition.”²³⁵ Additionally, studies have found that the enactment of anti-immigration laws can create false perceptions of Latinx immigrants as unintelligent and law-breaking; conversely, pro-immigration laws do not promote positive attitudes towards Latinx immigrants.²³⁶ Anti-immigration laws can act “as an invisible constraint on people’s cognitions and value systems.”²³⁷ Indeed, a study by legal sociologist Emily Ryo found that participants were reluctant to express attitudes that could be perceived as racial towards Latinx populations, but these same individuals were more likely to express anti-immigrant attitudes towards Latinx populations.²³⁸

Yet as noted previously, while Latinx unaccompanied children may also be encompassed by these narratives, child persecution is different to that experienced by adults. In fact, the persecution experienced by unaccompanied children through narratives and discourse may be even greater, given that they belong to a social group that would normally invite attitudes of pathos and protection.

The following subparts explore the evolution of racial narratives directed to Latinx unaccompanied children, by drawing parallels with citizen children of color in the U.S. juvenile justice system. The narratives discussed focus primarily on inherent youth criminality and dehumanization through coded-language.

1. Inherent Youth Criminality

As described previously, Latinx immigrants have long been subjected to mythical narratives of criminality.²³⁹ For the majority of U.S. history, many scholars have observed

²³⁴ Weissman, *supra* note 99, at 146.

²³⁵ Massey, *supra* note at 182, at 2.

²³⁶ Ryo, *supra* note 168, at 122.

²³⁷ *Id.* at 110–11 (quoting Susan S. Sibley, *After Legal Consciousness*, 1 ANN. REV. L. & SOC. SCI. 323, 331 (2005)).

²³⁸ *Id.*

²³⁹ See discussion *infra* Part III.A.

that Latinx immigrants have been socially labelled as “illegal border crossers.”²⁴⁰ As one scholar observed “[t]he very act of Mexican border crossing provides the exemplary theater for staging the spectacle of ‘the illegal alien’ that the law produces.”²⁴¹

The rise of “crimmigration” has exacerbated criminalized perceptions and legal constructions of immigrants of color. Juliet Stumpf, one of the first scholars to coin the term, explained that crimmigration describes the state of modern immigration law where, “immigration violations have become federal criminal violations and criminal law has come to dominate the development of the law of deportation.”²⁴² This occurs predominately in three main instances: “(1) the substance of immigration law and criminal law increasingly overlaps; (2) immigration enforcement has come to resemble criminal law enforcement; and (3) the procedural aspects of prosecuting immigration violations have taken on many of the earmarks of criminal procedure.”²⁴³

Over the years societal narratives towards Latinx immigrants have expanded beyond ‘illegality’ to include serious violent crimes, coupled with claims that immigrants “threaten[] our safety.”²⁴⁴ President Trump repeatedly accused predominately Mexican but also Central American immigrants of being rapists, drug dealers, gang members, and terrorists.²⁴⁵ In a tweet relating to a large group of migrants approaching the U.S. southern border in October 2018 (known as the ‘migrant caravan’), President Trump falsely claimed “criminals and unknown Middle Easterners are mixed in...this is a national emerg[ency]. Must change laws!”²⁴⁶

The Trump administration also directed such narratives to unaccompanied children, referring to them as members of notorious gang MS-13 and proliferating narratives of inherent youth criminality.²⁴⁷ Speaking of the rise in unaccompanied children at the U.S. southern border at a roundtable in May 2018, President Trump stated, “[T]hey exploited the loopholes in our laws to enter the country as unaccompanied alien minors. They look so innocent; they’re not innocent.”²⁴⁸ Through these narratives and accompanying policies

²⁴⁰ For a succinct analysis of Latinx individuals and the narrative of criminality, see Weissman, *supra* note 98, at 180. See generally Massey, *supra* note 182; Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L. J. 207 (2012).

²⁴¹ Nicholas DeGenova, *The Legal Production of Mexican/Migrant Illegality*, 2 LATINO STUD. 177 (2004).

²⁴² Stumpf, *supra* note 56, at 378.

²⁴³ *Id.* at 381.

²⁴⁴ Julia Preston, *Trump Administration Wants to Shut Door on Abused Women*, POLITICO MAG. (Apr. 17, 2018), <https://www.politico.com/magazine/story/2018/04/17/trump-administration-wants-to-shut-door-on-abused-women-218005>.

²⁴⁵ Katie Reilly, *Here Are All the Times Donald Trump Insulted Mexico*, TIME MAG. (Aug. 31, 2016), <http://time.com/4473972/donald-trump-mexico-meeting-insult/>.

²⁴⁶ Alan Gomez, *Tracking Trump’s Many Threats, Claims on Immigration, Caravan Ahead of Midterm Elections*, USA TODAY (Nov. 3, 2018), <https://www.usatoday.com/story/news/politics/elections/2016/2018/11/01/donald-trump-immigration-migrant-caravan-central-america-asylum-midterm-elections/1846817002/>.

²⁴⁷ *President Donald Trump*, Remarks at a Roundtable Discussion in Bethpage, New York on Immigration, (May 23, 2018) (transcript available at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-roundtable-discussion-immigration-bethpage-ny/>).

²⁴⁸ *Id.* President Trump and DHS have issued several statements stating this. See, e.g., Press Release, Dep’t of Homeland Security, Unaccompanied Alien Children and Family Units Are Flooding the Border Because of Catch and Release Loopholes (Feb. 15, 2018), <https://www.dhs.gov/news/2018/02/15/unaccompanied-alien-children-and-family-units-are-flooding-border-because-catch-and>.

discussed previously, the Trump administration has delegitimized the vulnerability of unaccompanied children.

As noted previously, such hyperbolic narratives can and do influence laws and policies surrounding Latinx unaccompanied children.²⁴⁹ For example, in *L.V.M. v. Lloyd*, the court reviewed a policy decision that rendered all releases from ORR custody subject to the personal approval of the director. The court found that the policy decision was “likely arbitrary and capricious,” causing “unconscionable delay” to the release of unaccompanied children in detention and was likely based upon “unidentified news reports on criminal gang activities involving immigrant minors.”²⁵⁰ The judge found that this policy was unlawful and noted that the policy caused “suffering and irreparable injury” to children.²⁵¹

In fact, political and societal narratives of criminality directed to Latinx unaccompanied children reflect similar narratives of criminality surrounding citizen children of color in the United States. Goff’s study highlighted the long sustained societal belief of the innate criminality and presumed criminal culpability of children of color.²⁵² For example, narratives of black youth criminality have been particularly virulent throughout history, epitomized by political scientist John J. Dilulio’s famously coined term “superpredator” used to describe black youth in the 1990s. Dilulio’s hyperbolic (and later repudiated) paper became the catalyst for the “superpredator” societal narrative that produced negative images and narratives of black and Latinx youth.²⁵³ This narrative, combined with the “tough on crime” policies of the 1990’s, enabled the law to crystalize a dichotomy through the analogy of war—criminalizing and vilifying youth of color on one side while elevating and victimizing the rest of white America on the other.²⁵⁴ These policies laid the foundation for continued disproportionate minority contact, the mass incarceration of youth of color, and a juvenile court system that lays claim to black and Latinx criminality.²⁵⁵ A 2017 report by the Sentencing Project found that black youth were 500% more likely than their white counterparts to be incarcerated, and while Latinx youth do not match the outrageously high numbers of black youth, the same report found that Latinx youth were 65% more likely to be incarcerated than white youth.²⁵⁶

The Trump administration’s cruel “zero tolerance” policies are reminiscent of the “tough on crime” policies of the 1990s. Just as children of color were vilified as “juvenile

²⁴⁹ See *infra* Part II.A.

²⁵⁰ *L.V.M. v. Lloyd*, 318 F. Supp. 3d 601, 618- 619 (S.D.N.Y. 2018).

²⁵¹ *Id.* at 609.

²⁵² Goff, *supra* note 208, at 528–40 (noting that black boys were even more likely than Whites to be seen as adultified). See also Birkhead, *supra* note 47, at 401 (referring to the inherent criminality of black boys).

²⁵³ Joseph Margulies, *Deviance, Risk, and Law: Reflections on the Demand for the Preventive Detention of Suspected Terrorists*, 101 J. CRIM. L. & CRIMINOLOGY 729, 746–51 (2011) (describing the superpredator phenomenon as a new era of criminology as social control); see also Clyde Haberman, *When Youth Violence Spurred ‘Superpredator’ Fear*, N.Y. TIMES, April (Apr. 6, 2014),

<https://www.nytimes.com/2014/04/07/us/politics/killing-on-bus-recalls-superpredator-threat-of-90s.html>.

²⁵⁴ See Birkhead for a detailed description of the tough on crime policies instituted in the 1990s.

Birkhead, *supra* note 47, at 408-411.

²⁵⁵ *Id.* at 413.

²⁵⁶ THE SENTENCING PROJECT, BLACK DISPARITIES IN YOUTH INCARCERATION (2017),

<https://www.sentencingproject.org/publications/black-disparities-youth-incarceration/>; see also THE

SENTENCING PROJECT, LATINO DISPARITIES IN YOUTH INCARCERATION (2017),

<https://www.sentencingproject.org/publications/latino-disparities-youth-incarceration/>.

delinquents,” immigration law has similarly come to present a juxtaposition of “sides” through the analogy of war. Indeed, the resignation letter of a former advisor to the Department of Homeland Security Elizabeth Holtzman declared that “DHS has been transformed into an agency that is making war on immigrants and refugees.”²⁵⁷

2. Dehumanization

While criminal narratives have long been used as a racial tool against Latinx immigrants, dehumanization is also becoming a prevalent part of racial narratives. Sociologists have long recognized dehumanizing narratives as a first step in a process of racialization that can give rise to increased prejudice, racism, and even mass crimes against targeted groups in society.²⁵⁸ Dehumanization objectifies and frequently animalizes racial and ethnic groups in order to reduce the humanity and vulnerabilities of social groups.²⁵⁹ It can therefore allow the societal ease and acceptance of laws and policies that are abhorrent and can fundamentally change our understanding of social groups.²⁶⁰

Like the black youth “superpredator” rhetoric of the 1990’s, Latinx unaccompanied children at the border have increasingly been described in animalistic terms. At a speech to local law enforcement in Boston in 2017, then-Attorney General Jeff Sessions described unaccompanied children from the Northern Triangle “as wolves in sheep clothing.”²⁶¹ President Trump has also liberally applied animalistic references to all Latinx immigrants, accusing them of “infesting” the country,²⁶² and explicitly using the term “animals” to refer to members of gang MS-13—a term that was later endorsed by the White House itself.²⁶³ Combined with references to “tracking” children, connoting a hunter and animal analogy, these animalistic phrases contribute to the dehumanization of unaccompanied children.²⁶⁴

Another example of dehumanization may be found in the media’s repetitive use of racially coded but facially neutral terminology. As the numbers of Latinx unaccompanied children increased in 2014, media narratives perpetuated fears of a crisis looming on the nation, stoking fears of the United States becoming “overrun” by unaccompanied

²⁵⁷ David Nakamura, ‘Morally Repugnant:’ *Homeland Security Advisory Council Members Resign over Immigration Policies*, WASH. POST (July 17, 2018), <https://www.washingtonpost.com/news/post-politics/wp/2018/07/17/morally-repugnant-homeland-security-advisory-council-members-resign-over-immigration-policies/>.

²⁵⁸ Nick Haslam, *Dehumanization: An Integrative Review*, 10 PERSONALITY & SOC. PSYCHOL., 252 (2006).

²⁵⁹ *Id.*

²⁶⁰ Goff, *supra* note 208, at 527.

²⁶¹ Attorney General Jeff Sessions, *Remarks to Federal Law Enforcement in Boston about Transnational Criminal Organizations* (Sept. 21, 2017) (transcript available at <https://www.justice.gov/opa/speech/attorney-general-sessions-gives-remarks-federal-law-enforcement-boston-about>).

²⁶² Brooke Seipel, *Trump: Dems Want Illegal Immigrants to ‘Infest Our Country’*, THE HILL (June 19, 2018), <https://thehill.com/homenews/administration/392977-trump-dems-want-illegal-immigrants-to-infest-our-country>.

²⁶³ Brian Resnick, *Donald Trump and the Disturbing Power of Dehumanizing Language*, VOX (Aug. 14, 2018), <https://www.vox.com/science-and-health/2018/5/17/17364562/trump-dog-omarosa-dehumanization-psychology>.

²⁶⁴ Theresa Catalano, *When Children Are Water: Representation of Central American Migrant Children in Public Discourse and Implications for Educators*, 16 J. OF LATINOS & EDUC. 124, 131 (2017).

children.²⁶⁵ A study of newspapers in Nebraska found that the repetition of provocative words to describe the movement of unaccompanied children across the border, including “seeping,” “spilled,” and “flooding,” contributed to the dehumanization of unaccompanied children in the eyes of the general public.²⁶⁶ Such rhetoric is reminiscent of the fears portrayed by the Supreme Court in the 1889 *Chae Chan Ping* decision, now widely considered as racist.²⁶⁷ Noting the fear of an increase in Chinese immigrants, the Court upheld the racially discriminatory Chinese Exclusion Act seeking to avoid “the danger that at no distant day [a] portion of our country would be overrun by [Chinese].”²⁶⁸

The Nebraskan study also revealed that even news articles that were sympathetic to the plight of unaccompanied children continued to use words such as “flooding” and “influx” as a contextual backdrop to personal stories of unaccompanied children.²⁶⁹ The study found that this dehumanizing rhetoric is so ingrained within the nation’s immigrant narrative that it is even used unconsciously by advocates of child rights and immigration reform.²⁷⁰

Even the law perpetuates the use of dehumanizing language to describe unaccompanied children. The very legal title, “unaccompanied ‘alien’ child” is dissociative and has the effect of “othering” unaccompanied children. International Human Rights practitioners Farrugia and Touzenis explain that “[w]hile official policy may declare, for example, that the child is a child first and an asylum seeker second, the notion of child is mediated through the notion of alien and this may have a bearing on the treatment the child receives.”²⁷¹ In sum, the impact of this terminology acts as another form of dehumanization, separating unaccompanied children from their inherent vulnerability.

D. Racial Bias Exercised by Legal Actors

As demonstrated, adultification and narratives are two processes that can contribute to racialization, imposing differential and prejudicial meaning upon Latinx unaccompanied children. Racialization has significance for legal actors who must apply the law and determine the fate of unaccompanied children. Specifically, racialization can affect legal decision-makers by igniting personal implicit and explicit biases, impacting their impartiality and objectivity in decision-making. As gatekeepers for unaccompanied

²⁶⁵ For an example of one such report, see Dara Lind, *The 2014 Central American Migrant Crisis*, VOX October (Oct. 10, 2014), <https://www.vox.com/2014/10/10/18088638/child-migrant-crisis-unaccompanied-alien-children-rio-grande-valley-obama-immigration>. See also Trump (Nov. 2018), *supra* note 16 (commenting on the border being “violently overrun”).

²⁶⁶ Catalano, *supra* note 267, at 129–30 (Catalano find that these words are comparable to the movement of water, which “is problematic but a successfully subtle way for those opposing immigration issues (and those unwittingly borrowing their terminology) to dehumanize, stereotype, and simplify the issue.”).

²⁶⁷ See Johnson Mirror (1998), *supra* note 15, at 1119.

²⁶⁸ *Chae Chan Ping v. United States*, 130 U.S. 581, 595 (1889).

²⁶⁹ Catalano, *supra* note 267, at 130.

²⁷⁰ *Id.* at 130, 137 (Discussing examples of attempts to humanize migrants by telling compelling stories, but still using phrases such as “a flood of kids at the borders”).

²⁷¹ Ruth Farrugia and Kristina Touzenis also note that even “the terms ‘immigrant’, ‘refugee’ and ‘migrant’ give rise to conceptions of ‘others’ as fundamentally different, and serve the interests designed to promote and protect the interests and privilege of ‘not other.’” Ruth Farrugia & Kristina Touzenis, *The International Protection of Unaccompanied and Separate Migrant and Asylum-Seeking Children in Europe in Migrating Alone: Unaccompanied and Separated Children’s Migration to Europe*, 21 UNESCO (2010).

children, EOIR judges, CBP actors and ORR actors are most susceptible to these racial influences, but the following subpart focuses specifically on EOIR judges.

In recent years legal scholars and social-psychologists have analyzed the role and significance of unconscious (or implicit) bias in decision-making in the law.²⁷² EOIR immigration judges decide cases that “render them especially prone to undue influence by implicit bias.”²⁷³ Their extensive and heavy workload diminishes their ability to make informed and unbiased decisions. Indeed, studies have shown that bias and stereotypes have a stronger impact when decisions are made under time pressure.²⁷⁴ Adding to this demand, in October 2018, Attorney General Sessions imposed quotas on immigration judges demanding that they complete at least 700 cases a year.²⁷⁵ In addition, compliance to this standard has become central to a judge’s performance evaluation.²⁷⁶ The National Association of Immigration Judges stated that this policy will drastically affect due process.²⁷⁷ Finally, legal academic Fatma Marouf’s study of immigration judges also suggests that reliance upon implicit bias can be exacerbated by the nature of immigration proceedings that provide limited opportunities for administrative and judicial review.²⁷⁸

Empirical evidence of bias decision making in immigration is difficult to obtain, but researchers have found wide regional disparities in asylum acceptance rates in regional asylum offices, immigration court, and federal appeals court.²⁷⁹ Critically, in a concluding report researchers at Georgetown University Law Center found that these wide disparities in asylum acceptance rates “raise[d] serious questions about whether the adjudicator is imposing his or her own philosophical attitude (or personal level of skepticism about applicants’ testimony) to the cases under consideration.”²⁸⁰

Yet deciphering more subtle biases such as racialized adultification and the influence of racial narratives is significantly more difficult to ascertain. Marouf provides an example of criminality, suggesting that perceptions relating to the criminality of people of color may lead judges to read hostility into the facial expressions of people of color, make negative evaluations of ambiguous actions by racial and ethnic minorities, and disproportionately question the credibility of their claims.²⁸¹ Further as previously discussed, adultification

²⁷² See generally Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); Samuel R. Bagenstos, *Implicit Bias, “Science,” and Antidiscrimination Law*, 1 HARV. L. & POL’Y REV. 477 (2007); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

²⁷³ Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417, 419 (2011).

²⁷⁴ *Id.* at 431

²⁷⁵ Julia Preston, *The Immigration Crisis Jeff Sessions Leaves Behind*, THE MARSHALL PROJECT (Nov. 7, 2018), <https://www.themarshallproject.org/2018/11/07/the-immigration-crisis-jeff-sessions-leaves-behind> [hereinafter Preston, MARSHALL PROJECT].

²⁷⁶ *Id.*

²⁷⁷ Aaron Reichlin-Melnick, *As Immigration Court Quotas Go Into Effect, Many Call For Reform*, IMMIGRATION IMPACT (Oct. 1, 2018), <http://immigrationimpact.com/2018/10/01/immigration-court-quotas-call-reform/>.

²⁷⁸ Marouf, *supra* note 276, at 440.

²⁷⁹ Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 372–76 (2007).

²⁸⁰ *Id.* at 378.

²⁸¹ Marouf, *supra* note 276, at 438–39.

can impact black and Latinx children to a much greater degree compared to their white counterparts, which alters perceptions of the legitimacy of their identity as children.

Yet unlike other areas of law, all actors in the immigration system are subject to the federal government and the inherent sovereign powers of the Executive. As such, even those actors who desire to act without reliance upon personal biases are bound to act within the restrictions set by the federal government. Marouf observes that the weak, informal structures tying EOIR judges to the Department of Justice prevents them from embracing judicial independence and impartiality.²⁸² These conditions have increased with the Trump administration. During the first three years of the administration, former-Attorney General Sessions substantially intervened in judicial decision making, limiting judges' options in deportation cases, limiting prosecutorial discretion, and excessively usurping the decisions of immigration judges.²⁸³

IV. RECONCEPTUALIZING RACE: TOWARDS AN INTERSECTIONAL VULNERABILITY FRAMEWORK FOR UNACCOMPANIED CHILDREN

The recommendations included in this Part center on incorporating the salience of race, addressing the archaic framework that lays claim to the racialization of Latinx unaccompanied children.

The following recommendations are introduced with a caveat. Structural racism is deeply engrained within the nation's institutions and systems. The permanency of race suggests that attempts to dismantle racial inequality in one system alone will be insufficient. Approaches to sustainable racial equality must be holistic, reaching across systems and institutions. Nevertheless, this Article presents two recommendations that could facilitate greater equity of treatment and reduce the racial harm experienced by unaccompanied children seeking entry.

A. A Reconceptualized Vulnerability Framework

First, any attempt at reform must eradicate discredited conceptions of unaccompanied children of color.²⁸⁴ A reconceptualized framework based upon a child's intersectional vulnerability, would eradicate the reliance upon age, and encompass notions of race that at present, hinder unaccompanied children as they navigate entry. By neglecting the unique vulnerabilities resulting from a child's race, age, migratory status, nationality, gender, etc., the law compounds the marginalization and discrimination experienced by unaccompanied children of color. An intersectional vulnerability framework would re-insert humanity back into the unaccompanied child system. A vulnerability framework would also distinguish between children and adults while not relying upon chronological age alone.

A vulnerability framework would replace the current adult framework and standard of review that guides our legal understanding of unaccompanied children. In practice, this would mean that an individual who presented as an unaccompanied child at the border would no longer be screened and assessed based upon proof of age, but rather based upon

²⁸² *Id.* at 428–30.

²⁸³ See Preston, MARSHALL PROJECT, *supra* note 278.

²⁸⁴ Thronson Kids (2002), *supra* note 14, at 1014.

their vulnerability. Factors of vulnerability for decision makers to consider would be holistic and intersectional, including stated age, race, national origin, gender, sexuality, disability, and maturity. For example, this could be facilitated by the use of Vulnerability Screening Tools²⁸⁵—tools which could identify factors of vulnerability to be considered in screening interviews, as well as applications for relief.

The vulnerability framework would also apply to substantive legal procedure. A finding of vulnerability would mandate fundamental rights and protections such as the right to counsel and would become the new legal standard for actors to determine whether unaccompanied children can remain in the United States or be repatriated. At the same time, due to their legally recognized vulnerable status, all legal actors and decision makers would be held to a strict standard of accountability.

Critically, a vulnerability framework could reduce the insidious influence of racialization. By structurally separating unaccompanied children from adults and explicitly recognizing their inherent vulnerability, the law would begin to rectify some of the structural inequalities created by a legal system that devalues the worth and protections of unaccompanied children of color. By removing the reliance upon proof of chronological age, the law would also reduce the reliance upon adultification. In addition, the intentional inclusion of race as a standard of vulnerability would allow decision makers to more fully consider the racial animus behind narratives and dehumanizing discourse used to devalue and influence legal policies governing unaccompanied children. It could also instigate the reduction of criminalistic procedures and therefore move away from racialized perceptions of immigrant child criminality.²⁸⁶

At present, while there is no legal precedent for relying upon vulnerability in domestic immigration law, the jurisprudence of some regional human rights courts have, at times, relied upon the concept of vulnerability in order to enhance protections for migrant children.²⁸⁷ The Inter-American Court of Human Rights have considered the situation of *especially* vulnerable groups within indigenous communities (such as children, pregnant women and the elderly) and in another case considered the unique vulnerability of girls who were Dominicans of Haitian descent.²⁸⁸ Rather than applying this as a separate framework, the European Court of Human Rights endorsed this approach as a compliment to the existing “best interests of the child” standard.²⁸⁹

The proposed vulnerability framework is a unique approach to address issues of race in immigration and enhances existing recommendations concerning the treatment of unaccompanied children. Scholars in many disciplines have repeatedly emphasized the

²⁸⁵ Kenny & Loughry, *supra* note 30, at 18-19.

²⁸⁶ See *e.g.*, Keyes’s discussion of the “immigrant as criminal” narrative, noting that changing the systemic framework, and stepping away from criminal narratives both in court and socially (*e.g.*, in media) would vastly improve the immigration system. Keyes, *supra* note 243, at 250–56.

²⁸⁷ Ana Beduschi, *Vulnerability on Trial: Protection of Migrant Children’s Rights in the Jurisprudence of International Human Rights Courts*, 36 B.U. INT’L L. J. 55, 57–59 (2018).

²⁸⁸ *Sahoyamaya Indigenous Community v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶¶ 189–91 (Mar. 29, 2006).*

²⁸⁹ Beduschi, *supra* note 290, at 70–71.

need to not only address procedural rights but also to focus on the doctrinal foundations of the laws governing unaccompanied children.²⁹⁰

International legal scholars Bhabha, Olga Byrne, and the larger international community, have also proposed that the legal framework in the United States should be guided by the best interests of the child standard enshrined in international law.²⁹¹ The United Nations Convention on the Rights of the Child (CRC), implores states to consider the “best interests of the child [as a] primary consideration” in child welfare, including in immigration.²⁹² Known as the “best interests” standard, states that have ratified the international treaty must consider the best interests of the child substantively, procedurally, and as a tool for legal interpretation.²⁹³ In immigration and asylum proceedings, this requires states to apply the best interests’ standard in actions by “administrative authorities and legislative bodies.”²⁹⁴

The “best interests” standard is not binding on the United States as it has signed, but has yet to ratify the CRC (and remains the only country in the world yet to do so).²⁹⁵ American family law does maintain the “best interests” standard as the overarching principle, but immigration law has not followed suit.²⁹⁶ Although the TVPRA calls for some consideration of this standard, the United States has in fact explicitly rejected the “best interests” standard in immigration.²⁹⁷

Suggestions for its application in the United States were incorporated by a framework developed by a working group of non-profit legal organizations, including the Young Center for Immigrant Children’s Rights, the University of Chicago Law School, and Georgetown University Law Center.²⁹⁸ The Working Group compiled a framework that incorporates the best interests standard at each stage from entry to apprehension through to settlement or repatriation. The recommendations include the consideration of a central

²⁹⁰ See, e.g., Thronson Kids (2002), *supra* note 14, at 1014; Bhabha Potatoes (2006), *supra* note 14; Aronson, *supra* note 14.

²⁹¹ See generally Olga Byrne, *Promoting a Child Rights-Based Approach to Immigration in The United States*, 32 GEO. IMMIGR. L. J. 59. See also, Ana Beduschi, *supra* note 289 (discussing the best interests of the child standard and vulnerability in international human rights law) [hereinafter Byrne (2017)].

²⁹² Convention on the Rights of the Child art. 3(1), Nov. 20, 1989, 1577 U.N.T.S. 3.

²⁹³ Comm. On the Rights of the Child., General Comment No. 14 on the Right of the Child to Have His or Her Interests Taken as a Primary Consideration, ¶ 6, U.N. Doc. CRC/C/GC/14 (2013). States have a requirement to use the best interests’ standard as they apply, practice, and interpret judicial principles.

²⁹⁴ Estin, *supra* note 67, at 594.

²⁹⁵ See Byrne (2017), *supra* note 294, 61 n.8.

²⁹⁶ This is another example of the poor treatment of immigrant children when compared to citizen children. See discussion *infra* Part I.B.1.

²⁹⁷ In *Flores*, Supreme Court Justice Scalia pronounced that: “‘the best interests of the child’ is not the legal standard that governs parents’ or guardians’ exercise of their custody: So long as certain minimum requirements of child care are met, the interests of the child may be subordinated to the interests of other children, or indeed even to the interests of the parents or guardians themselves.” *Reno v. Flores*, 507 U.S. 292, 304 (1993). Furthermore, in a December 2017 memo for immigration judges under the Executive Office for Immigration Review (EOIR), immigration judges were explicitly instructed to disregard the best interests standard for unaccompanied children and juveniles removing the discretion previously afforded in its use. EOIR 17-03, *supra* note 135.

²⁹⁸ Framework for Considering the Best Interests of Unaccompanied Children, Subcommittee on Best Interests of the Interagency Working Group on Unaccompanied and Separated Children, at 10 (May 2016), <https://www.law.georgetown.edu/human-rights-institute/wp-content/uploads/sites/7/2017/07/Best-Interests-Framework.pdf> [hereinafter Working Group Framework 2016].

body within DHS and the incorporation of child welfare standards in screening and detention.²⁹⁹

These proposals are profound recommendations, but they do not incorporate an intersectional framework that accounts for race. By way of example, the application of the best interests' standard in child family welfare has been widely criticized for failing to consider race and intersectionality.³⁰⁰ The "best interests of the child" standard is not always applied with equal measure for children of color. Family law scholar Wendy Fitzgerald posits that because the "best interests of the child" standard is so vague, it sets the stage for "race, class, and cultural bias upon judicial interpretation."³⁰¹

Proposing a "best interests" framework without considering race and intersectionality could maintain the same subjective biases that already pervade the immigration system. In addition, the "best interests of the child" standard is still reliant upon age to define the child. As demonstrated, unaccompanied children of color face unique burdens in proving their child status, and the challenges with age determination mean that they may still be subject to adultification. As described, a vulnerability framework would address these outstanding concerns.

Centering vulnerability and race at the crux of immigration law and ultimately providing greater rights for unaccompanied children may be met with resistance. A child-centered approach could ultimately be construed as a more lenient approach that would allow more unaccompanied children to obtain entry and legal stay in the United States. This could also heighten the possibility of more fraudulent cases. More practically, increasing numbers will require more resources and capacity in an already overburdened system.

However, in response to this potential resistance, a vulnerability approach does not have to be a more lenient approach. Rather, a vulnerability approach becomes a fairer child-centered approach, in line with national and international recommendations, allowing unaccompanied children to be treated with dignity, respect, and care. This approach seeks to change draconian doctrines that have long prevented racial equity for unaccompanied children, holding them to a lesser standard than citizen children. It would address procedural deficiencies that would allow decision makers to more fully understand the situation of the child. A vulnerability approach could therefore mean that children are repatriated. However, it would ensure that there are mechanisms in place to facilitate their safe return. Finally, unaccompanied children will continue to cross borders; therefore, facilitating a more equitable process for children will ensure that their integration or repatriation is safe and support their long-term development, far out-weighting the initial costs to support changes to the system.

B. Evidence-Based Race-Conscious Principles

²⁹⁹ *Id.* at 13–15.

³⁰⁰ See, e.g., Wendy A. Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. R. 11, 57–69 (1994) (critiquing the "best interests of the child" a myth that is always subjected to the interests and constitutional claims of the parents; obscured by the subjective biases of judges; or substituted for the interests of the state); Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 260 (1975); see also MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS (2007).

³⁰¹ Fitzgerald, *supra* note 301, at 62.

As a reconceptualized framework would ultimately require legislative reform, therefore the second recommendation suggests that a first and more feasible step would be to obtain more research on the role of race as unaccompanied children navigate entry. Evidence-based research is pivotal to incorporating more race-conscious principles into the law. As racial data is not tracked or collected at the U.S. southern border, proxies such as national origin must be relied upon in order to deduce the role of race in immigration, yet even relying upon national origin is challenging. While immigrants may hail from the same country, they may not be from the same racial or ethnic group, illustrated by immigrants of Afro-Latinx descent such as the Garifuna population, and those of indigenous descent who are also entering the U.S. southern border.³⁰²

Evidence-based research would include collecting racial and ethnic data during entry and analyzing some of the critical points discussed in this article including: the race and ethnicity of unaccompanied children who are subject to further age assessment procedures; the race and ethnicity of unaccompanied children who are assessed incorrectly and presumed to be adults; the race and ethnicity of children who have legal counsel; the race and ethnicity of children who are repatriated (as well as those who are not); and an analysis of the treatment and questioning of unaccompanied children of color by decision-makers including CBP officers and EOIR judges. Results from this type of research can then inform race-conscious principles for legal decision makers including more informed implicit bias training for legal decision makers, highlighting the critical concerns for unaccompanied children of color, with the aim of holding decision makers more accountable.³⁰³

CONCLUSION

Nelson Mandela stated that “there can be no keener revelation of a society’s soul than the way in which it treats its children.”³⁰⁴ This Article has demonstrated that the treatment of Latinx unaccompanied children at the southern border reflects the perennial stain of racism embedded in the nation’s psyche.

Unaccompanied children of color continue to be subjected to an immigration system that perpetuates structural inequality and fails to fully recognize their inherent vulnerability. While laws and policies such as the Flores Agreement and the TVPRA provide minimal protections for this group, the protections remain severely deficient and consistently under attack.

Critically, the failure to explore intersectional issues such as race, has left the law bereft of thorough critical analysis and susceptible to racial influence. While substantial

³⁰² The Garifuna (mainly in Honduras) and indigenous populations in Guatemala and El Salvador, experience widespread discrimination and violence. See MINORITY RIGHTS GROUP INTERNATIONAL, WORLD DIRECTORY OF MINORITIES AND INDIGENOUS PEOPLES — HONDURAS: GARIFUNA (2018), <https://www.refworld.org/docid/5b9f70157.html>; MINORITY RIGHTS GROUP INTERNATIONAL, WORLD DIRECTORY OF MINORITIES AND INDIGENOUS PEOPLES — GUATEMALA: MAYA (2018), <https://www.refworld.org/docid/49749d163c.html>.

³⁰³ Indeed, the recommendations suggest that EOIR judges collaborate with NGOs to develop training that would include vulnerability. Working Group Framework 2016, *supra* note 301, at 18.

³⁰⁴ NELSON MANDELA CHILDREN’S FUND, NELSON MANDELA QUOTES ABOUT CHILDREN (2015), <http://www.nelsonmandelachildrensfund.com/news/nelson-mandela-quotes-about-children> (last visited Dec. 2018).

reforms have been proposed, the salience of race has been missed from these efforts, leaving a fundamental gap in the analysis.

By analyzing the process of racialization as it pertains to Latinx unaccompanied children, this Article demonstrates that adultification plays a pivotal role in the immigration system. Latinx unaccompanied children entering the U.S. southern border must navigate an adult legal framework that racializes children and strips them of their vulnerability. Consequently, these children are then denied critical rights and protections that can facilitate safe, and equitable entry, or repatriation. In addition, political and societal narratives continue to perpetuate racial perceptions of Latinx unaccompanied children, influencing both the law and legal decision makers.

Ultimately, the legal framework governing unaccompanied children needs to be reconceptualized, centering the vulnerability of unaccompanied children at the crux of substantive and procedural immigration law. This approach would allow the intersections of race, maturity, and age to be considered as a central part of a child-centered approach to unaccompanied children. As a first step, supplementing current guidance with evidence-based race-conscious principles would support interim reform efforts.

While the recommendations presented would not entirely eliminate the undue influence of race, they would mitigate the racialization experienced by Latinx unaccompanied children. In essence, the recommendations would contribute to the evolution of a legal system that sees all children as children of the same God.