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FROM KAFKA TO WILBERFORCE: IS THE U.S. GOVERNMENT'S APPROACH TO CHILD MIGRANTS IMPROVING?

by

Jacqueline Bhabha and Susan Schmidt**

"If you would deport children without knowing why they would make the journey to this country, you may be deporting them to death, when all they were looking for was life." - Pedro (detained unaccompanied minor who ultimately received Special Immigrant Juvenile Status)¹

It has been several years since we published the first comprehensive report on the treatment of unaccompanied and separated² children in the United States in 2006. Entitled "Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in the U.S." (hereinafter "Seeking Asylum Alone"),³ our study documented the complex and inconsistent system confronting child migrants to the United States, a system we described as "Kafkaesque" because of its labyrinthine and disturbing character. Since the time when we conducted the research for that report, significant legal and institutional changes have taken place. New legislation directed at addressing the most exploitative aspects of current migration practice, and incorporating some of the child protective recommendations contained in Seeking Asylum Alone, has been enacted. Titled the William Wilberforce Trafficking Victims Protection and Reauthorization Act (TVPPRA)⁴ to highlight its anti-slavery mission, the legislation targets trafficking in persons including children, a key aspect of contemporary slavery. Has the U.S. system for dealing with child migration moved, in the past five years, from sinister to rights enhancing, from Kafka to Wilberforce? This *Briefing* attempts to answer this question. In the process, it documents some of the most significant changes to policy and practice regarding child migrants in the U.S. since our previous report was published.

The number of unaccompanied and separated children in federal custody has remained steady (7,509 unaccompanied children in fiscal year 2010), despite a marked decline in overall immigration enforcement apprehensions (Customs and Border Protection noted a 23% decline from 2008 to 2009⁵ (see Appendix 1: Tables 1-2). Like migrant adults, children arrive for a range of reasons, part of a huge contemporary phenomenon of mixed migration. Some immigrate with legal permission, having been approved for family reunification entry or as refugees⁶ prior to their journey; some enter seeking refugee protection but without having secured permission to migrate before coming to the U.S. and apply for asylum after arrival.⁷ Other children cross the border without prior permission to seek family reunification with parents or other relatives already in the U.S., employment opportunities, or safety from a range of oppressive situations at home. They come into the U.S. by presenting false documents at the point of entry or they enter clandestinely, evading any form of border inspection.⁸ Some of these children enter alone; others travel with the assistance of professional smugglers, paid to facilitate the border crossing. Yet others are trafficked into the country for purposes of labor or sexual exploitation. Like the smuggled children, the child victims of trafficking may cross the border clandestinely without any inspection by border officials, or traffickers may secure their entry using false documents. Contemporary child migration, in other words, is a complex and varied phenomenon.

Child migrants traveling alone continue to face hurdles, complexities and inconsistencies entering developed destination states. This situation persists despite the recent 20th anniversary observance of the trend-setting 1989 U.N. Convention on the Rights of the Child (CRC), a speedily and very widely ratified international human rights treaty that establishes binding protection obligations owed by ratifying states towards child migrants, and despite a decade of helpful official child migration guidance,⁹ and advocacy directed specifically at securing the rights of child migrants. Nowhere is this clearer than in the United States.

Historically, the U.S. has adopted a disparate approach to these diverse child migrant populations, an approach that reflects the fundamental tension between two inconsistent yet overriding policy goals that go to the heart of the system: on the one hand a child welfare mandate, which acknowledges the government's responsibility as "parens patriae" to provide care for all vulnerable children within its jurisdiction irrespective of their legal status or national origin; and on the other hand, a law enforcement approach, which addresses the obligation to protect national security, defend the country's territorial borders, and implement its immigration control legislation. As one of only two countries not having ratified the CRC, the U.S. has no binding international obligation (unlike its Canadian and European counterparts) to ensure that the child protection obligation trumps the immigration control pressure.¹⁰ Instead, its conflicting mandate continues to result in a bifurcated set of policies which straddle and oscillate between two views of migrant children: innocent victims of harsh circumstances in need of protective care on the one hand, and delinquent and potentially dangerous outsiders requiring detention, punishment and expulsion on the other.

These contrasting mandates have been clearly visible in ambivalent, existing policies. The U.S. has welcomed child refugee status-holders with specialized services and benefits on the one hand, but has at the same time treated children lacking legal status with punitive firmness. Most notably, perhaps, it has made extensive use of detention in its dealings with unaccompanied and separated child migrants, and it has subjected them to complex legal proceedings, identical to those used for adult migrants, without affording the children any guarantee of legal advice or representation.

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** Jacqueline Bhabha, J.D., M.Sc., is the Jeremiah Smith Jr. Lecturer in Law at Harvard Law School, a Lecturer in Public Policy at the Kennedy School, and Director of Research at the François-Xavier Bagnoud Center for Health & Human Rights at Harvard University. Susan Schmidt, MSSW, LGSW, is a consultant on the intersection of migration and child welfare issues, working with organizations such as Bridging Refugee Youth and Children's Services, the Immigrant Child Advocacy Project, and the MN Department of Human Services, and volunteering as a guardian ad litem (GAL) for children in Ramsey County (MN) juvenile court.

¹ M. Aryah Somers (Summer 2010). "Constructions of Childhood and Unaccompanied Children in the Immigration System in the United States," U.C. Davis Journal of Juvenile Law & Policy, 14(2), p. 319.

² *Unaccompanied* children are those who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so. *Separated* children are those who are apart from both parents, or previous caregivers, but they may be accompanied by other adult family members. Inter-Agency, Inter-Agency Guiding Principles on Unaccompanied and Separated Children (January 2004), 13, <http://www.unhcr.org/refworld/docid/4113abc14.html>.

³ Jacqueline Bhabha and Susan Schmidt, *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in the U.S.*, (2006), http://www.humanrights.harvard.edu/images/pdf_files/Seeking_Asylum_Alone_US_Report.pdf. Versions of this report were also published in two volumes of *Immigration Briefings*: Bhabha and Schmidt, "Kafka's Kids: Children in U.S. Immigration Proceedings, Part I: Seeking Asylum Alone," 07-01 *Immigration Briefings* 1 (Jan. 2007) and "Kafka's Kids: Children in U.S. Immigration Proceedings, Part II: Beyond and Besides Asylum," 07-02 *Immigration Briefings* 1 (Feb. 2007).

⁴ The TVPRA can be viewed at: <http://www.usdoj.gov/olp/pdf/wilberforce-act.pdf>.

⁵ DHS, Office of Immigration Statistics (August 2010). "Immigration Enforcement Actions: 2009," p. 1.

⁶ Since 1980, almost 13,000 children have been resettled in the U.S. as unaccompanied refugee minors. See http://www.acf.hhs.gov/programs/orr/programs/unaccompanied_refugee_minors.htm.

⁷ An accurate count of child asylum applicants in the U.S. is yet to be conducted, unlike in many other developed destination countries. The Asylum Office maintains data on child asylum applicants, but the Immigration Court has not made such child-specific data available, though some portion of the children appearing before EOIR are assumed to apply for asylum (See Appendix I: Tables 7-9).

⁸ The numbers of children entering the U.S. in this way are substantial. Many are never detected, so the exact size of this population is unknown. We do know, however, that the numbers of irregularly entering child migrants intercepted by the authorities was increasing through 2008. According to ICE, whereas 8,415 minors were apprehended in FY 2004, this number had risen to 10,899 by FY 2008 (See Appendix I: Table 1).

⁹ For useful guidelines produced by international bodies see: UNHCR, Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum (February 1997), <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&docid=3ae6b3360>; U.N. Committee on the Rights of the Child, General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, CRC/GC/2005/6 (September 2005), <http://www.unhcr.org/refworld/docid/42dd174b4.html>; UNHCR, Guidelines on Determining the Best Interests of the Child, Geneva (May 2008), <http://www.unhcr.org/refworld/docid/48480c342.html>; Inter-agency Guiding Principles on Unaccompanied and Separated Children (supra note 2); UNHCR, Guidelines on International Protection: Child Asylum Claims under Articles 1(A)(2) and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees. HCR/GIP/09/08 (22 December 2009).

¹⁰ For example, the Executive Office for Immigration Review (EOIR) Operating Policies and Procedures Memorandum 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children states, "The concept of 'best interest of the child' ... cannot provide a basis for providing relief not sanctioned by law" (p. 4).