

“The INS Cannot Simply Send Them Off into the Night:” The Language of Detention in US
Court Cases on Migrant Child Detention

by

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Bachelors of Arts, University of Victoria, 2017

An Essay Submitted in Partial Fulfillment
of the Requirements of the

HONOURS PROGRAM

in the Department of Anthropology

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Abstract

In this paper, I argue that the language used by American court cases allows for the differential application of rights and treatment of children in detention. In wake of what the media dubbed the “Central American Refugee Crisis” between 2011 and 2014, the US-Mexico border experienced an increase in the number of unaccompanied children and family groups. Apprehended children and their families were placed in detention centers. My research combined cultural and linguistic anthropological techniques to question the mass incarceration of these children. From a selection of six court cases all pertaining to the detention of migrant children I argue that courts consideration of a child as both an “alien” and a “minor,” the ambiguous use of the principle “best interests,” and a child’s familial status all contribute to children receiving different rights while detained. This research also discusses how the experience of “the state” as a monolithic and unified entity is made manifest through the everyday actions of legal actors, including word choice.

Keywords

Migration, children, detention, best interest, minor, alien

Acknowledgements

A sincere thank you to Professor Daromir Rudnycky for your on-going guidance throughout the year. Your insight and opinions have been most valuable.

To Professor Melissa Gauthier. Thank you for all your enthusiasm and encouragement. You have set an example of excellence as a researcher, mentor, instructor, and role model. Merci beaucoup.

And to my fellow honors students; your discussion, ideas, and feedback have been invaluable. Thank you.

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Introduction

In recent years, along the US-Mexico border the number of unaccompanied children experienced meteoric growth, raising from 15,949 to 68,551 between 2011 and 2014 (Rosenblum 2015, 3). Deemed the “Central American Refugee Crisis” by the American media, President Barack Obama in 2014 addressed the “urgent humanitarian crisis” of the “influx of unaccompanied alien children across the southwest border.” The government’s proposed response to the massive increase of unaccompanied children crossing into the US was to grant federal agencies more resources providing personnel, equipment, supplies, facilities, and other technical and managerial services (Obama 2014). The response included expanding detention facilities for families and children. While the migration of children and families into the US via the southern border is not a new phenomenon, neither is the detention of children and families by the Federal Government. In this paper, I will investigate the problem of normalizing processes found in the language of court cases, specifically the court’s “best interests of a child” rhetoric, that have allowed for the mass detention of children by the U.S. government. Further, I will consider how individual court cases allow for anthropological investigation into the cognitive dissonance, the inconsistent state of thoughts, beliefs, attitudes and behavior, present within the seemingly monolithic state.

While other anthropologists have addressed issues around migration and childhood, the recent nature “Central American Refugee Crisis” and the response by the American government has led to the need for research to be done on how detention of migrant children is addressed in the US. For this research, I built on the literature on the anthropology of migration where clandestine migration across the US-Mexico border is a form of autonomous agency and the hiring of a coyote is a “weapon of the weak” (De Leon et al. 2015; Spener 2011; Heyman 1999;

Heyman 1994; Scott 1985). From the anthropology of childhood, I address how American cultural constructions of childhood interact with the detainment of a child under the principle of “best interests” (Rodriguez 2016; Kronick and Rousseau 2015; Uehling 2008; Xu 2005). I use critical discourse analysis to analyze the language used in the court cases that produces and sustains inequality (Wodak 2016; Mogashoa 2014; Blommaert and Bulcaen 2000). My data was collected from a series of six US court cases pertaining to the detention of non-citizen children. I chose to use court cases because as examples of discourse, they offer unique insight into two of the groups involved in debates about the detention of children: the judicial system which interprets the laws surrounding said detention and the agencies which detain the unaccompanied children and “family units.”

In this paper, I argue that the language used by US courts allows for the differential application of rights and treatment of children in detention. To support this, I will analyze how the legal status of a migrant child is addressed by US courts which seek to balance a child’s liminal legal status as an alien against their vulnerability as a child. I will analyze how differential application of the term “best interests of a child” used in these court cases allows for different rights and treatment of children in U.S. detention centers and finally, I will evaluate whether children are granted differential rights and treatment based on being part of a family or unaccompanied.

In the first section I will address the background of migration across the US-Mexico border and the policies that have been put in place in recent decades to restrict movement from Mexico to the US. Next, I address my research questions for this project and what I expect to find based on the literature around child detention and migration to the US. Following this I will present my three theoretical considerations: literature on the anthropology of migration, literature

on the anthropology of childhood, and critical discourse analysis. After, my methods are discussed and I explain why I chose to use court cases and how the court cases used were selected. In the next section, my results are broken into three parts. First, I will analyze how the court cases present a child as both a minor and an alien. Second, I will show the ambiguous nature of the term “best interests” as a site of translation used by legal actors to make seemingly value-free decisions. Third, I will address how a child’s agency is perceived when they are accompanied by a parent compared to when a child is unaccompanied. All three sections contribute to my argument that the language used in court cases allows for the differential distribution of rights and treatments afforded to migrant children in detention centers. Finally, in conclusion I will discuss how the language of court cases not only contributes to the unequal issuing of rights but also helps to perpetuate the experience of the state as a unified and monolithic entity.

Background

The mid-1990’s saw an increase in US border security near urban centers that effectively shifted undocumented migration into remote areas like the Sonora Desert, where the border was more penetrable but the physical conditions of crossing were more arduous (De León 2012, 479). Public attitudes against illegal immigration saw policy makers proposing stricter and stricter security measures (Andreas 2001, 112). President Bill Clinton’s campaign to “regain control” of the border lead to the dramatic increase in funding for Immigration and Naturalization Services (INS), with the border becoming an important site of growth and development (Andreas 2001, 113). The Prevention though Deterrence (PTD) policy, implemented in 1993-1994 by the INS, lead to the US-Mexico border becoming an increasingly militarized zone (De León 2012, 479).

The original implementation of the policy worked to increase the “technologies of enforcement” in high traffic urban areas and presumed that the harsh climate of the desert would act as a natural deterrent for migrants (De León 2012, 479-50).

The use of physical barriers, surveillance equipment, legal sanctions, and law enforcement agents were all attempts to stop illegal entry rather than an effort to apprehend illegal immigrants once in the US (Andreas 2001, 114). Along the US-Mexico border, the illegal crossing of families and children into the US has posed a challenge for border enforcement and immigration officials (Hawkes 2009, 172). The Department of Homeland Security (DHS) oversees US national security in general, the branch of the DHS in charge of the borders of the US, the Immigration and Customs Agency (ICE), plays the largest role in the enforcement of border policies (Hawkes 2009, 172).

Prior to September 11, 2001, families who crossed into the US were often released due to the limited space for housing family units (Hawkes 2009, 172). Following September 11, 2001, the border region saw an increase in enforcement efforts, a buildup of security along urban entrances into the US as well as increased numbers of Border Patrol Agents, and technology for detecting and apprehending migrants who try and cross clandestinely. The DHS became stricter with their policies on family release and began to separate children from the adults that they traveled with. The DHS argued this was necessary because alien smugglers had begun "renting" children to travel with illegally entering adults in hopes of passing the groups off as "families" and thus avoiding detention under the automatic family release policy” (*Bunikyte v. Chertoff* 2007). While the policy may have removed some children from dangerous situations, it also broke up legitimate family groups (*Bunikyte v. Chertoff* 2007). By 2006, Congress had called for the DHS to change its policy of family separation, the result was the conversion of a medium-

security prison to a family detention center (Hawkes 2009, 173).

As framed by the American media, the past decade has seen elevated levels of violence and widespread international gang activity in El Salvador, Honduras, and Guatemala, creating what the media deemed as a “deadly crisis” (Moulton, Leach, and Ferreira 2016, 1). In 2014, the number of arriving Central American families and children reached a peak of 137,000 migrants, the highest reported level of migrants arriving between 2011-2014 (Rosenblum 2015, 2). This is a relatively small number compared to the 51 million, refugees, asylum seekers, internally displaced persons, and other populations of “concern,” as defined by the United Nations High Commissioner for Refugees worldwide. Further more, family units and children have historically, and continue to this day, migrated across the US-Mexico border. Never less, this increase tested the United States’ ability to carry out its core immigration functions (Rosenblum 2015, 2). The US media contributed to a powerful discourse strategy, though the use of words like “crisis,” that allows for the justification and taking dynamic and unprecedented measures because of the perceived urgency to act in response to this “crisis.” Arrivals from Central America in 2014 were covered the media as having avoided “the system” and placed their entrance as a failure of border patrol. However, most families and children did present themselves to Border Patrol agents when they arrive (Rosenblum 2015, 2). The so-called failure was not due to border security, there was no evidence that there was a large increase in families and children avoiding border security, but the failure was due to the policies for processing claims of relief for migrants (Rosenblum 2015, 2).

The change in policies included a change in release proceedings for families detained by the ICE and DHS. In the past, individuals who sought asylum the US after entering illegally, being apprehended, and proving that they have “credible fear” of persecution, violence, or death

in their home country, were generally released from detention since there was a significant chance that they would be granted asylum in the US (*R.I.L.R. v. Johnson* 2015). However, following the increasing number of people fleeing from Central America into the US, the DHS adopted a “No-Release Policy” in June of 2014 (*R.I.L.R. v. Johnson* 2015). The policy was enforced by the ICE, and release was denied to Central American mothers and children in detention “in order to deter future immigration — that is, to send a message that such immigrants, coming en masse, are unwelcome” (*R.I.L.R. v. Johnson* 2015). The Prevention through Deterrence (PTD) policy implemented in 1993-4 by the INS, to the Deterrence through Detention, or the “No Release Policy,” program of 2014 leads us into the present where the detention of children and their families continues to be used as a deterrent tactic.

Research Questions

Cultural anthropologist Mieka Polanco asks, “Who better [than anthropologists] to problematize the ‘common sense-ness’ of mass incarceration?” (2015, 201). In this paper, I question the ‘common sense-ness’ of the detention of thousands of children by the US government through an anthropological lens that addresses cultural assumptions around, detention, children and the unequal relations of power found in the discourse of court cases. In this study, I will first ask how the child’s citizenship and their status as an alien interact with their status as a minor? Second, how does the ambiguous nature of the term “best interests of the child” allow for the differential distribution of rights and treatment for children in detention? Third, how the “best interests” of a family unit is different from the “best interests” of an unaccompanied child?

Based on the work of Rodriguez on “best interests” in child welfare decisions at the US-Mexico border, I expect to find that the “best interests” rhetoric will be utilized by the court system and by the departments detaining the children, Immigration and Naturalization Services (INS) and the Department of Homeland Security (DHS), to make “seemingly value-free” legal decisions for a child that perpetuate discrimination based on race, age, and citizenship (2016).

Theoretical Considerations

There are three important anthropological theoretical considerations that are incorporated into my research: literature on the anthropology of migration, literature about the anthropology of childhood, and Critical Discourse Analysis.

Anthropology of Migration

The movement of people from south to north represents a global trend that has resulted from the division of the world into “high-wage, high-wealth, high-wellbeing” regions as opposed to the “low-wage, low-wealth, and low-wellbeing” regions (Spener 2011, 158). This has been deemed a “global apartheid” where the distribution of wealth and health worldwide provides a strong correlation to race and nationality (Spener 2011, 158). The role of border enforcement plays a central role in the maintenance of these global inequalities (Haymen 1999). Social, political, and economic spaces are used to reinforce and restrict the movement of improvised populations from a location of origin to another area of higher income and a better standard of living (Spener 2011, 158).

The US-Mexico border has become a site in anthropology for the study of “inequality, power, global economies, and connections among cultures and societies” (Haymen 1994, 43).

Every year, hundreds of thousands of people enter the US via the US-Mexico border without authorization (De Leon et al. 2015, 445). The historical and contemporary operations of border enforcement that run along the US-Mexico are an example of global apartheid. This form of global apartheid not only restricts the physical movement of individuals but also denies them rights once in the US, rendering them vulnerable because of their illegal crossing and then their illegal status (Spener 2011, 159). While border enforcement attempts to stop the flow across the border, migrants exhibit individual agency as they find means to cross into the US against the desires of the US border patrol.

James C. Scott (1985) described “weapons of the weak” as being used by the dominated and exploited populations around the world as everyday forms of agency and resistance. Spener (2011) elaborates on this concept in the context of the US-Mexico border and describes how autonomous Mexican migrants’ clandestine border crossing is form of resistance. Migration to the US is also explained as a survival strategy that demonstrates migrant agency (Spener 2011, 159). This active resistance to territorial confinement in a low-wage region of the world that permits workers to support their families above the levels that of economic stability found in their home nations (Spener 2011, 159). One of the weapons of the weak that migrants use to cross into the US is the employment of coyotes, or as they are commonly referred to by statements released by the US government and media: human smugglers.

For children from Central America, their journey usually begins by buying a bus ticket to get to Mexico (Uehling 2008, 859). If a coyote has not already been arranged for them by their parents, most migrant children find them in the borderland between the US and Mexico (Spener 2011; Uehling 2008, 859). The children, guided by their coyote, then complete the journey into the US primarily by foot walking through the desert (Uehling 2008, 860). The fee for hiring a

coyote ranges from US\$1,500 to US\$12,000 depending on the distance traveled and the type of transportation (Uehling 2008, 860).

Over the past decade, US government officials and the US media have told stories about the use of coyotes by migrants to assist with their crossing (Spener 2011, 161). Coyotes are guides who are hired by migrants to help navigate, transport, and find housing during the trip across the border (Spener 2011, 160-161; Uehling 2008, 834). However, they are more commonly referred to in the US as smugglers or traffickers of “passive victims” who they treat like a “commodity” (Spener 2011, 161). Discourses around the act of *coyotaje* paint the coyotes themselves as greedy individuals with little compassion for those who employ them. They are positioned as a threat to US national security and often linked to drug smuggling and gang activity. Spener has argued that in the phenomena of *coyotaje* there is often a social relationships and level of trust between the coyotes and their employers (2011, 161). Coyotes are often socially connected to those they help to cross, either coming from the same home town or being connected through the recommendation of a mutual friend or aquatinted (Martinez and Slack 2016). Coyotes hired at the border do not have the social connection that Spener explains helps to facilitate a relationship of trust. Instead, unaccompanied children are reported to be threatened with “immigration” if they leave their coyote, and rapes are common (Uehling 2008, 860). Coyotes challenge the authority of the state as well as threatening the credibility of bureaucrats, as their actions directly undermine one of the basic prerogative of the state: the regulation of individuals across state lines (Spener 2011, 162).

A defining feature of migration across the US-Mexico border is the use by the US government of “states of exception.” A “state of exception” is not simply a place, but it is also a period of time in which the sovereign powers of the US government declare an emergency so

that legal protection and rights in an area and period of time are suspended at the same time that the power of the state is “unleashed” (De Leon et al. 2015, 447-448; Agamben 1998).

Agamben’s description of the state of exception can be simplified as the suspension of law to maintain order (1998). The detainment of migrant children by the U.S. government relies a “state of exception” in which an individual’s Fourth Amendment Rights (the rights against unreasonable searches and seizures) and Sixth Amendment Right (the right to a speedy and public trial) are suspended (Dorsey and Diaz- Barriga 2015, 204).

One of the ways the monolithic nature of the state is made manifest, is within the walls of detention centers. The detention of migrant children in the state of exception (detention centers) relies on the assumption that the Department of Homeland Security (DHS) has legitimate reason to suspend laws in order maintain border security (Dorsey and Diaz- Barriga 2015, 205). Each of the cases examined in this research are examples of the state of exception, as detention centers are enabled through the suspension of certain rights.

Anthropology of Childhood

Second, this research builds on emerging body of literature within anthropology on childhood in connection to children’s rights. This paper engages with what Uehling describes as the “tensions and contradictions” of children and childhood (2008, 835). Children offer a unique entry into conversations about politics of culture and the politics of compassion. The vulnerable status of children lends to their malleability to become symbols. This is what Uehling describes as the “symbolic power and iconography of children” (2008, 851). The position of a child within cultural and political frameworks and ideas around human rights and humanitarianism bring forth a more universal form of sympathy (Kronick and Rousseau 2015, 548). Children’s

perceived moral and emotional vulnerability makes them symbols of humanitarian aims, for who would oppose the saving of children? Childhood is however, a cultural construction and ideas and the emergence of “childhood” as a life stage is built on fifteenth to eighteenth century bourgeois concepts of family, home, privacy, and individuality. This leads to the concept of children having special needs for their emotional and educational development (Uehling 2008, 836). Ideas of child rights began to emerge after the Second World War. In the 1980’s the UN Convention on the Rights of the Child was ratified as more advocates for child rights became concerned with child maltreatment, sexual abuse and child labor (Fassin 2012 in Kronick and Rousseau 2015, 548). Children in liberal democratic states have become caught between being an object of the family and subject of state protection where adults have “ownership” over their interests (Cohen and Morley 2009, 3). Children are thus “semi-citizens without agency or voice” (Kronick and Rousseau 2015, 548).

The “best interests of the child” has become the US cultural paragon in familial decision-making and has been codified in US family law (Xu 2005, 751). The principle of “best interests” plays a central role in judicial decisions about the welfare and custody determination of a child (Rodriguez 2016, 154). This principle has the primary goals of family reunification and maintained parental rights. It has been used in decisions about child detention with regards to if, and to whom a child should be released. The principle, as explained by Joyce Dalrymple, requires that the court considers the parents interests in family unity, the states interest in the protection of a minor, and finally the child’s interest in a safe and stable family environment (2006, 114). The child welfare system in the US emphasises child protection though family reunification and maintaining parental rights, this system assumes that the “best interest” of the child is with their natal parents (Rodriguez 2016, 155). Rodriguez examines the terms as a “site

of translation” where social workers and legal actors can make “seemingly value-free legal decisions that codify perceptions” about the United States being the best place for children to be raised, disregarding of the individual circumstances of the child (2016, 154). Rodriguez argues that the lack of clarity about the content is central to its routine application, translating normative ideas of “good” parents and “ideal” citizenship (2016, 155-6). Judges then have a type of creative license for interpreting factors such as legal status and US residency for determining the “best interest” of immigrant and refugee children (Xu 2005, 754).

Naturally, the term “best interests” takes on a different meaning depending on each child it addresses, the seemingly transparent nature of the term allows for individual actors to assume that others would agree with their decision and judgement (Rodriguez 2016, 156). Emphasis is placed on family reunification and a belief that that the US is the best place for a child, these broad assumptions leave space for a variety of interpretations (Rodriguez 2016, 156).

Undocumented children in the US often have complicated relationships with the US government which tends to view these children from a constructed notion of childhood in the US which can be different from notions of childhood found in their home countries (Uehling 2008, 836). In the US, the government’s relationship with ideas of childhood often focuses on children as victims. Although children, as individual actors, have role in their transnational movement, their agency is diluted by their perceived vulnerable status due to age and intellectual ability (Hess and Shandy 2008, 767). However, undocumented migrant children to the US, especially those of color, are viewed simultaneously as some of the most vulnerable of the population and as a security risk to the US (Uehling 2008, 837). The contradiction of impulses to both protect these children as a vulnerable population and to protect US communities from the threat of rising

immigration creates a complex relationship of humanitarianism and security (Uehling 2008, 837).

Unaccompanied migrant children are arguably even more vulnerable because they have no guardian to care for them (Dalrymple 2006, 133). In US immigration law, a child is defined in relation to a parent or legal guardian and the category of child is established on the principle that a child benefits from their parents (Dalrymple 2006, 137). The passive and objectified role of children as a possession of the family is also extended to their intellectual ability which is viewed as immature (Dalrymple 2006, 139). A child that is not associated with a parent is then placed in a unique position where their identity as found in association to having a parent or legal guardian renders them instead in the eyes of the state as “unaccompanied,” “minors,” or “juveniles” (Dalrymple 2006, 183).

I use the term “children” in my research for legal and cultural reasons to refer to the class of detained, non-citizen, individuals under the age of eighteen. Legally, in the US a child is anyone under the age of eighteen. Culturally, the concept of childhood in the US is a social construction assigning social maturity based on age and my research focuses on the language used in court cases regarding children in detention in the cultural context of the US. Therefore, I sought to apply culturally appropriate terms to those I studied.

Critical Discourse Analysis

A further aim of this research is to understand how the language used in court cases allows for immigrant children held in detention to experience a differential distribution of rights, a critical analysis of discourse used is an appropriate method. The object of investigation is the written opinion of the ruling judge(s), which produce and justify certain social practices, such as

the detention of some children (Kronick and Rousseau 2015, 549). I chose critical discourse analysis (CDA) because my research specifically questions the use of language by the courts as a form of producing and sustaining inequality and it allowed me to engage with discourses regarding race, age, and nationality discrimination. CDA assumes that discourses, like court cases, are socially constructed and conditioned. Through this lens, these documents then become a source of social power in which cultural constructions around childhood, ethnicity, race, class and citizenship are complexities.

As CDA is concerned with the relations of power and inequality in language, I will use this framework to look at the “transparent structural relationships of dominance, discrimination, power and control manifested in language” (Wodak 2011, 53). Its critical nature demands that discourse be analyzed as an “opaque object of power” that can be studied as a relationship of social interactions that take place in a linguistic form (Blommaert and Bulcaen 2000, 447). While CDA has never been, or attempted to provide one specific theory, it treats language use in speech and writing as social practice that implies a relationship between an event, a situation, an institution, and the social structures that frame it (Wodak 2011, 50-1). As a methodology for understanding “pressing social issues” it provides not definite answers but expands upon understandings, shortcomings, and unacknowledged agendas (Mogashoa 105-7, 2014). Anthropologists can engage in discourse through comparative critiques and have the unique ability to point out the “crucial role of symbolic meaning and language in producing and sustaining inequalities” (Hallett and Arnold 2016).

Linguistic and cultural anthropologists can bring their expertise to question the representations of migrants. Gabriella Sanchez’s 2014 article in *Anthropology News* called into question the portrayal of children in poor living conditions in US immigration detention centers.

In her article, Sanchez describes how the discourses around immigration, for and against, divide the discourse into configuring the migrant into two symbolic figures: the “migrant victim” and the “migrant threat.” Children straddle this divide as mainstream media discourses tend to place a child as a victim of their parents’ actions, shown on the edges but never fully constituting a class of their own (Sanchez 2014). Popular discourse breaks with the migrant victim model for a child when the child is unaccompanied, and “unaccompanied minors” in discourse are focused on for their illicit and criminal actions (Sanchez 2014).

Judicial opinions are the written social practice of implementing court decisions into a document. Judicial decisions about detention are reflection of the sociocultural implementation of law, the decisions that mark acceptable and unacceptable in a society. Though critical readings of court cases, Martin showed the connection between a child’s familial status and their objectification by the US court system (2011, 482). She found that a child within a family unit was presumed to be a “‘child-object,’ property of a household, not a ‘child-subject,’ endowed with political agency (Martin 2011, 482). In comparison, “unaccompanied minors” were more problematic to immigration and court officials as they presented as type of agency that did fit within the ‘child-object’ model of children being subservient and passive (Martin 2011, 482). Literature on migration lacks attention of unaccompanied children, assuming the children’s migration is connected and dependent on that of an adult (Uehling 2008, 841). Children become reduced to objects or accessories of their parent’s households, denied the agency to migrate on their own fruition. Here, the use of terminology used to refer to a child in judicial discourse acts to separate the child coerced by their parents from the minor who acted of their own accord.

As part of looking at the language used in these legal documents, I am interested in addressing the “state-making” processes that produce an experience of the state as a monolithic

and anonymous force (Rodriguez 2016, 155; Ferguson and Gupta 2002). The recognition by anthropologists that the state plays an integral role in local communities has now lead to the investigation of the cultural practices of states themselves (Ferguson and Gupta 2002, 981). States are now being seen as “sites of symbolic and cultural production” (Ferguson and Gupta 2002, 981). The construction of migrants as “objects” of a study, anthropologists become involved in the production of the “other” and the production of the “state” that prosecutes their “illegality” (Genova 2002, 423). The “illegality” of “others” plays a key role in the creation of identity and perpetuation of monolithic ideas about citizenship linked to the state (Genova 2002, 425). The production of the state as a unified and homogenous entity relies on the daily discretions of everyday state actors and citizens that work to produce an overarching structure and authority of the state (Rodriguez 2016, 155). Gupta (1995) argues that research on a translocal entity, like “the state,” allows for anthropologists to reflect on the Eurocentric idea of the state as monolithic and unitary.

Literature in English on “illegal immigration” has primarily focused on the US, specifically on the migration of undocumented migrants from Mexico (Genova 2002, 419). Within the social sciences, large amounts of literature have been designated to the study of “illegal aliens,” “illegal immigration,” “unauthorized,” “irregular,” and “clandestine movement of people (Genova 2002, 420). But anthropologists like Genova see the use of “immigration” or “immigrant” as problematic, the language used to contribute in the production of “essentialized, generic, and singular subjects” (2002, 421). Illegality is a judicial and political status that implies a social relationship to the state and is linked to ideas of citizenship (Genova 2002, 421).

Methods

This study explores the ruling opinions interpretations of the best interests of a child, the difference of treatment given to family units or unaccompanied children, and how citizenship interacts with a child's minor status from a series of six U.S. court cases. Through my preliminary research, I found that the 1991 case of *Flores v. Meese* led to the first national set of guidelines in the United States for the detention, treatment, and release of all children held in Immigration and Naturalization Services (INS). The Flores Settlement Agreement (1997) then acted as a starting point for finding other cases related to the detention of undocumented children in U.S. custody.

The Flores Settlement Agreement was the result of over a decade of litigation that began in the 1980's following the increase of unaccompanied children crossing into the United States. The settlement requires that minors be held in the least restrictive settings possible, and that minors should be released from custody without delay to a parent, legal guardian, or other responsible adult who has agreed to take custody of the child (Lutheran Immigration and Refugee Services 2014). Today, the settlement extends to Department of Homeland Security (DHS) and Health and Human Services' Office of Refugee Resettlement (ORR) after the INS was dissolved in 2001. The Flores Agreement applies to all children, though the INS and DHS will both debate this application and claim that this agreement only applies to unaccompanied children.

I searched the American legal database Lexis Advance for cases regarding child detention, and narrowed by search using key terms: "Flores agreement," "migrant child detention," "Central America," "family detention centers," and "child detention facilities." The data base search yielded thirteen cases that met the initial criteria.

I eliminated cases where the parent was the primary defendant and the child was only mentioned briefly. In such cases, there was no discussion of family or of the rights of a child. I

also eliminated cases where adults were detained without the accompaniment of a child or when the child held in custody was by Immigration and Naturalization Services or the Department of Homeland Security was an American citizen.

My final case selection left six cases: *Flores v. Meese* (1991), *Reno v. Flores* (1993), *Flores v. Lynch* (2006), *Bunikyte v. Chertoff* (2007), *R.I.L.R. v. Johnson* (2015), and *J.E.F.M v. Lynch* (2016). Three of the six are brought before the court by unaccompanied children, *Flores v. Meese* (1991), *Reno v. Flores* (1993), and *J.E.F.M v. Lynch* (2016). The remaining, *Flores v. Lynch* (2006), *Bunikyte v. Chertoff* (2007), and *R.I.L.R. v. Johnson* (2015), include children as members of a family unit. All the cases discussed the rights of a non-citizen child held in detention by the U.S. government, and the majority pertain to children and families from Central America.

One case, *Reno v. Flores* (1993) was a Supreme Court ruling. Three of the cases were drawn from the from U.S. Court of Appeals for the Ninth Circuit, *Flores v. Meese* (1991), *Flores v. Lynch* (2016), and *J.E.F.M v. Lynch* (2016). *Bunikyte v. Chertoff* (2007) was heard on by the Western District of Texas Lower Federal Court and *R.I.L.R. v. Johnson* (2015) was heard on by the United States District Court for the District of Columbia.

The focus of data collection is from the judicial “opinion” of each case; the written view of the judge(s) who agree on a legal outcome for the case (Cornell University Law School). The opinion reflects the majority ruling on a case and it is this that sets legal precedent. Precedent is the Anglo-American common-law tradition that centers around the principle that a court's rulings should look to past decisions and stand by decided matters (Cornell University Law School). Therefore, accepted legal precedent can be seen as representing the state because future cases will often refer to them in how to proceed.

Results

My results are divided into three main sections. The first examines how the rights of a child are divided into the rights of an alien and the rights of minor. Next, how the ambiguous nature of the term “best interests” allows for the differential application of rights for children in detention. Finally, I will address how a child is treated and discussed differently when they are part of a family unit compared to whether the child is unaccompanied.

Balancing the Rights of an Alien and of a Minor

An alien is defined by the Department of Homeland Security as “any person not a citizen or national of the United States” (U.S. Department of Homeland Security). Children who cross the US-Mexico border pose a particular challenge to law and border enforcement due to the two-sided nature of their identity as aliens and as minors. Migrant children become a dichotomy: a “threatening other” that overlays a “vulnerable child” (Kronick and Rousseau 2015, 549). Their dual status hinge on the liminal legal status as an alien that is placed against their vulnerable status as a child. Their status is liminal due to the transitional and threshold status of undocumented migrants in the US. The liminality of their status is created through the state of exception in which they are detained, where the terms and conditions of their possible release or deportation are uncertain. A child has a unique position in immigration law as they hold a legal status that is not simply “alien” as is given to their adult counterparts.

The duality of their status becomes a point of contention for their persecution in *Flores v. Meese* (1991). Although Judge Mary Murphy Schroeder argued in *Flores v. Meese* (1991) that “any person present in the United States is entitled to equal justice under the law” and that

“alienage does not prevent a person from testing the legality of confinement” the entitlement to equal justice of alien minors is contended. Building on the work of Terrio (2015) who articulates the difference in plaintiff’s rights as aliens and as minors, my analysis also reveals how the rights of a minor are placed against their alien status. In *Flores v. Meese* (1991), the court demonstrates how the two sides, the alien side and the minor side, of an undocumented child are weighted against each other:

“The plaintiffs are not only aliens; they are also minors. The INS contends that this factor materially changes the nature of their liberty interest, thereby rendering the detention policy reasonable and appropriate. We therefore turn to the question of what effect the juvenile status of these plaintiffs may have on the analysis of their liberty interests and the protections that must be given to those interests.” (Flores v. Meese 1991).

The opinion of the court starts from the assumption that when considering the rights of a migrant child the INS cannot only look at the “alien,” but that they also must consider the “minor” that is being detained. A detained child’s identity is thus divided into two separate legal statuses to be considered by the court: that of an undocumented alien and that of a minor. This established the rights of an alien are not the same as the rights of a minor. The INS views these two status as mutually exclusive; if a child is an alien then their minority status is disregarded. The INS disagrees, and claims that even when considering an alien minor, their age does not and should not change their claim. The court then questions what the minority status of a child does to change an individual’s interest in liberty. The interaction of the status of a minor and an alien created a special status within law where when considering a child both must be applied.

The section above also demonstrates how the interpretive nature of the law allows for the differential application of rights for children in detention. The discrepancies and differential application of law are not deviations from normal protocol, but a way of state-making that allows for the everyday decisions of legal actors to be combined in the creation of experience of the state as a monolithic entity (Rodriguez 2016, 155). Gupta (1995) offers a critique of the conceptualization of “the state” as a monolithic and unitary entity. Analyses of the state have moved beyond the idea of the state as an overarching structure of political hierarchy (Ferguson and Gupta 2002, 982).

Children’s special status are attested to in *Reno v. Flores* (1993): “In the case of arrested alien juveniles, however, the INS cannot simply send them off into the night on bond or recognizance.” *Reno v. Flores* (1993) challenged the practice of the INS in regards to unaccompanied children and in the quote below addresses the dual status of detained children.

“In the case of each detained alien juvenile, the INS makes those determinations that are specific to the individual and necessary to accurate application of the regulation: Is there reason to believe the *alien deportable*? Is the *alien under 18 years of age*? Does the alien have an *available adult relative or legal guardian*? Is the alien's case so exceptional as to require consideration of release to someone else? The particularization and individuation need go no further than this.” (*Reno v. Flores* 1993).

This short passage allows us to see how the identity of a child is broken down into an “alien” and a “minor.” Here the alienage of the child supersedes their age with the INS first establishing if the alien is deportable, regardless of age. Then the age of the child is addressed

but once a child is established as an alien minor the following questions pertain only to their potential guardian for release. The lack of “particularization and individuation” associated with a child in detention can be interpreted as an example of what Agamben (1998) describes as “bare life” or the stripping of an individual down to their biological makeup. This stripping of individual agency, creates a class of unnamed masses who can be acted upon. Here an individual child is reduced to just that, part of a crowd of undocumented migrants who have no individual, personal identity. The personal identify of a child is limited to the four questions from the quote above (*Reno v. Flores* 1993).

Children as aliens intersect ideas of risk to national security not because of their vulnerable status as a minor, but because of the threat they as an alien. The interaction of the status of a child as both a minor and as an alien are continually weighed against each other as the court must consider both statuses when making decisions about undocumented children. The perceived risk that these children pose to US national security is tempered with the politics of compassion, which addresses these children as the “vulnerable of the vulnerable” (Uehling 2008, 837). This stance reinforces that American cultural assumption of childhood that address children as being different from adults based on their emotional and educational development (Uehligh 2008, 836). This assumption of children as vulnerable victims however, comes after then “threatening” status as an alien in *Reno v. Flores* (1993).

Children provide a lens between humanitarianism and security concerns that allows for us to see an intersection between politics and compassion (Uehling 2008, 847). While the image of a child may provoke feeling of sympathy and a desire to protect such a vulnerable population, when a child is also an alien, they become imbued with risk. Specifically, the risk they pose to the security of the US (Uehling 2008, 837).

The judicial system thus serves a kind a check that separates it from the actions of federal agencies. Interpreting the United States Constitution to the best of their individual ability, the individual actions of the judges in *Flores v. Meese* (1991) reject the claim by the INS that the best interest of child must lay in detention rather than in release. The use of language by the court though out these cases in opposition to arguments of the INS or DHS reveal that within “the state” there is not a unanimous decision of how a child should be treated or how their rights should be distributed.

Best Interests of the Child

In this section, I will explore the principle of “best interests” as a seemingly transparent idea that becomes ambiguous though its lack of definition and explanation regarding what the “best interests” of a child are. The principle reflects a standard of child care that place the needs and wellbeing a child as superior, but superior to what? Even with the agreed upon criteria that is supposedly considered by the courts, the opinions of the court cases offer a variety of outcomes when the principle of “best interest” is considered (Dalrymple 2006, 144; Rodriguez 2016, 156). The ambiguity of the principle arises from the assumption that it is transparent and that between users there is a shared understanding (Rodriguez 2016, 156). Simply put, the ambiguity arises from the assumption that legal actors would all come to the same conclusion about what the “best interest” of a child should be, this leaves many possibilities unacknowledged. This principle allows for actors to make decisions about the welfare of a child under normative in ideas of “good” parents and “ideal” families in which, in the case of detained children, a “good” parent or guardian is one who is not also in detention and who is legally in the US.

The problems arising from the ambiguity of the “best interests” metric are crystalized in judicial opinions and the application of child welfare policies. The symbol of a child as vulnerable and needing protection prompts this principle in which welfare of the child is protected by state actors. The child welfare system in the US emphasizes child protection and family reunification, but takes on different meanings depending on the circumstances of each child (Rodriguez 2016, 156). Yet within the six court cases I analyzed, I found no clear definition of what the “best interests” of a child entailed. I will show that this lack of a clear and precise definition enables this principle to be a place of discrimination on the basis of nationality and age.

In *Flores v. Meese* (1991), the blanket policy of the Immigration and Naturalization Service (INS) for the detention of unaccompanied minors was challenged as being unlawful because it did not acknowledge a child’s rights to freedom under the Forth Amendment. The principle of “best interest” is brought by the INS as a justification for the continued detention of unaccompanied children instead of their release to qualified child welfare agency or foster care system. The INS agreed that if there was an adult relative or legal guardian available the child would be released into their custody but remained adamant that if neither was available the child would not be released even if there was another responsible adult willing to care for the child.

“One of the very reasons the INS gives for detaining the plaintiffs is that it *does not have the expertise, and Congress has not given it the resources*, to do the kind of evaluation of foster care facilities that state child welfare agencies do on a routine basis. The INS reasons that since it is unable to do such an evaluation, the *best interests of the child must lie in detention rather than in release.*” (*Flores v. Meese* 1991).

The INS argued that because their agency is not an “expert” in finding foster care and because Congress has not provided enough funding for the evaluation of possible foster homes that the default best interest of the child is to remain in INS custody. The “best interests” of the child are then presented as a default custody placement due to the inability of the INS to properly review foster care facilities. The vulnerability of a child due to a perceived lack of capability to care for themselves as the opinion later notes that “because of a lack of maturity, [minors] should have some adult custody and care.” The American culturally assumed dependency of children on older and more mature individuals places the best interest of a child always in the custody of another (Uehling 2008, 836). In 2016, the court echoed this opinion in *J.E.F.M. v. Lynch* stating that children “lack the intellectual and emotional capacity of adults,” and when children are “force[d] to appear unrepresented in complex, adversarial court proceedings against trained [government] attorneys” they are discriminated against due to their minority status.

The “best interests” is rooted in principles of family reunification and maintenance of parental rights (Rodriguez 2016, 155). This example shows that when parental custody is not an option for the child, the best interest of the child changes. The interest of the child in their release is minimized and places the best interest of the child in government custody. The INS, while not experts in child care can offer the children protection from “danger of some harm.” Building on the scholarship of Rodriguez who argued that best interests’ determinations are informed by a belief that the US is the best place for US-citizen children, I further suggest that in the case of unaccompanied non-citizen children the “best interests” principle becomes translated to keep children in US government custody when the culturally assumed best custodian of a child, their

parent, is not available. Thus, the desire to keep unaccompanied children in detention centers is inextricably linked to a child's dual status as both a minor and as an alien.

In 1993 case, *Reno v. Flores*, the court expanded upon the phrase to establish that while the "best interest" was a point of consideration in the custody placement of a child in some circumstance (e.g. a divorce proceeding), it was not the only aspect considered by the court. The court establishes that it is "not the legal standard" for decisions around a child.

"Similarly, "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* 1993).

The court established that the "best interests" principle is not a legal standard that establishes a certain treatment for all children regarding custody determinations. The focus of "best interests" is in relation to the child's parents or guardians' right to custody. The rights of a child are not addressed as being part of the standard of "best interests. Here, the best interest of the child is expressed as "certain minimum requirements" where if met, the interests of the child can be considered "subordinate to the interests of other children." A child in this example can be given different rights than that of another child ("other children"), the court is allowing for the differential distribution of rights for children if "minimum requirements" are afforded to both children. By establishing that children can be treated differently if certain minimum requirements are met, the court sets precedent that allows for the best interests of a child to come after those of another child, a parent, or guardian. In this case, the guardian could be a state agency who has

assumed custody of the child. The language used here enables government agencies such as the INS to place the “best interests” of their agency above that of a child held in detention so long as a set of minimal standards are met.

The ambiguous nature of “best interests” offers legal actors a site of translation for making decisions about a child “best interest” under the assumption that this decision is self-evident. The “best interest” of a non-citizen, unaccompanied child held in detention thus becomes a default custody placement. The language used to describe this principle situates the needs of a child as being subservient to that of another child, parent, or guardian when “certain minimum standards” are met. Due to the nature of the US legal system where legal cases set precedent for further decision to be made in similar circumstances, these ruling opinions establish that the “best interests” of a child in detention are negotiable depending on family status (or in the cases above, the lack of familial association).

Unaccompanied Minor or Family Unit: The Difference of Rights and Treatment

My argument for the differential treatment of children due to classification as “unaccompanied” or “family unit” builds on the work of Martin (2011) who argues that children accompanied by a parent in detention are treated as “child objects” in their parent’s household, while unaccompanied children present a greater challenge to law enforcement as their presence cannot be as easily explained by parental coercion. The separation of “minor” into “accompanied minor” and “unaccompanied minor” plays a guiding role in executive and judicial decisions around the treatment of a child in detention, such as in guidelines around release. I will first address how the rights of a child accompanied by a parent or guardian are distributed and

secondly how an unaccompanied child faces a different distribution of rights that culminates from both legal precedent and American cultural constructions of childhood.

After 2001, immigration policy in the US fundamentally changed with policies becoming more restrictive, and the automatic release of families no longer a viable option in the eyes of the DHS (*Bunikyte v. Chertoff* 2007). A shift in policies that once meant that primarily unaccompanied were kept in detention was struck and the DHS increased the number of family units placed in detention. However, families were not kept together:

“DHS argued this was necessary because alien smugglers had begun “renting” children to travel with illegally entering adults in hopes of passing the groups off as “families” and thus avoiding detention under the automatic family release policy.” (*Bunikyte v. Chertoff* 2007).

The use of “renting” implies that a child is an object that can be acquired for a price to be used by adults to avoid detention. The objectification of a child as a “child-object” assumes that a child is “apolitical, inert, and silent” (Martin 2001, 491). The removal of agency from children accompanied by parents or guardians also renders them subject to danger on behalf of their parent’s actions.

“DHS argues that automatic release of families *encourages parents to subject their children to the dangers* of illegal immigration.” (*Bunikyte v. Chertoff* 2007).

By “subjecting” their child to the “dangers of illegal immigration” a parent places their object-child in an unnecessary risky position. The policy of family release offers parents an

insensitive to bring their object-children into the US. Parents who leave their children behind in their home country are often demonized by in US culture, which excludes that in many cases the choice to leave a child behind is an agonizing one and linked to cultural logic of being a good provider (Uehling 2008, 841). But here we see that parents are also demonized and blamed for inflicting the dangers associated with illegal immigration onto a child. The parent is thus criminalized not only for illegally crossing into the US but for risking their child safety.

When children do migrate without the accompaniment of a parent or guardian, their position in state discourse as a vulnerable victim of their parents' migration is no longer applicable. The 1993 case *Reno v. Flores* challenged the practice of the INS regarding the rights of unaccompanied children as compared to those accompanied by their parents. It is important to note that prior to 2001, families entering the US illegally who were apprehended were often released rather than detained due to the limited amount of bed space available in family housing facilities (*Bunikyte v. Chertoff* 2007).

“The parties to the present suit agree that the Service must assure itself that *someone will care for those minors* pending resolution of their deportation proceedings. That is easily done when *the juvenile's parents have also been detained and the family can be released together*; it *becomes complicated when the juvenile is arrested alone*, i.e., unaccompanied by a parent, guardian, or other related adult.” (*Reno v. Flores* 1993).

Part of the contingency of childhood is having someone who will care for you. Being a child is linked to ideas of dependency and the need for an older individual, a parent or guardian,

to assume the role of caregiver. What separates a minor from an adult is that "[j]uveniles, unlike adults, are always in some form of custody, and where the custody of the parent or legal guardian fails, the government may... either exercise custody itself or appoint someone else to do so" (*Reno v. Flores* 1993). Complications arise when a child is not accompanied by a parent or guardian because the construction of childhood implies that custody must be assumed by someone. This became visible with the sudden increase in the number of unaccompanied minors crossing the US-Mexico border between 2011-2014 with the "Central American Refugee Crisis." One of the outcomes of the high number of unaccompanied children entering these facilities was that children were not granted access to counsel during their immigration hearings. In this context, the complexities of the legal practice of precedent and American cultural assumptions around childhood become apparent.

Unaccompanied children face the predicament in immigration law as being viewed as neither fully child or fully adult. Their lack of parental custody means that their mobility cannot be explained by parental coercion yet to treat them as fully adult is not an option as discrimination by age restricts their ability to be released. In *J.E.F.M. v. Lynch* (2016) a class action suit was brought by unaccompanied children who were denied legal counsel. The argument for the children was that as children they "lack the intellectual and emotional capacity of adults," yet are "force[d] to appear unrepresented in complex, adversarial court proceedings against trained [government] attorneys." This argument compels us to consider the underlying cultural assumptions of childhood stated earlier in this paper. Specifically, that children accompanied by a parent are considered to be child-objects: apolitical, inert, and silent. While Martin's (2011) research has showed that a higher degree of agency is granted to unaccompanied children as an explanation for their migration, the children in *J.E.F.M. v. Lynch* (2016) are

stating that they too should be treated as minors lacking in maturity of adults. Here, children are arguing that they do *not* have the emotional and intellectual capacity for their own defense in immigration court. They are requesting that they be treated the same as their accompanied peers who are viewed as docile and passive. The unequal view of children accompanied by a parent vs. an unaccompanied child thus results in one having access to counsel in their defense hearing (via their parents), while the latter is treated differently.

Conclusion

In this essay, I have attempted to make visible the ways in which the language used in court cases allows for children held in US detention facilities to be treated differently, including a difference in rights that are afforded to them. Children who migrate into the US across the US-Mexico border straddle the line between alien and minor, as the judicial system and the executive branch, in the form of the INS and DHS, disagree on how these two parts of a migrant child's identity should be weighed. The lack of particularization given to detained children who are first viewed as aliens and then as minors, reduces a child down to their biological makeup and enables for their classification as one of many in an undifferentiated mass of illegal immigrants.

The "threat" that their alienage poses is only tempered by American cultural assumptions of a child's vulnerability. Here, the use of "alien" to describe these children is also problematic. Linked to Genova's (2000) argument that certain linguistic terms like "illegal" help to produce "essentialized, generic, and singular objects," the use of "alien" is an example of bare life in which the individual characteristics of these children are reduced to their citizenship, or their lack of citizenship. The use of terminology like this by both the federal and the judicial branches of government, while offering a standardized method for communication, also contributes to the

production of the state as a monolithic and unified entity. The language used by the courts creates a representation of individuals who cross into the US without documentation. The depersonalization and dehumanization of individuals to “alien” creates a form of legal personhood that is directed by “forced invisibility, exclusion, subjugation, and repression” (Genova 2002, 427).

The ambiguous nature of “best interests” offers legal actors a site of translation for making decisions about a child’s “best interest” under the assumption that this decision is self-evident. The language used to describe this principle situates the needs of a child as being subservient to that of another child, parent, guardian, or the state when “certain minimum standards” are met. The nature of this principle assumes that specific circumstance of each child differ and therefore not blanket standard of best interest can be sought. As I have argued above, in the case of a detained unaccompanied child, this often translates to assume the best interest of the child is to remain in US government custody.

My research supported the findings of Martin (2011) who argued that a child’s familial status influenced the way in which they were perceived and treated. I found that unaccompanied children were viewed in the court cases as child-object that has migrated not due to their own agency but to the coercion of their parents. For children who were unaccompanied, they were positioned as neither fully child nor as an adult. Their movement across the border could not be associated with that of a parent and so these children were seen as having a level of individual agency that was not afforded to their accompanied counterparts. In *J.E.F.M. v. Lynch* (2016), the children of the suit argued that they should not be treated differently than accompanied children based on this perceived agency which the court linked to emotional and intellectual capacity to defend themselves in immigration hearings.

For this study, I was limited by the level of the ruling court and by accesses to different voices afforded to me by the court cases. Only one of the cases I reviewed was a ruling by the Supreme Court. The others were from district courts or courts of appeal. While these cases still set precedent, and offer the current most binding juridical prudence for cases being heard by those courts, they have not effectively become national laws until affirming or rejected by the Supreme Court. Court cases in this context also offer anthropologists a unique perspective into the judicial and federal branches of the US government. However, the voices of the detained children are not given in these cases. For their protection, their identities are often obscured and while the act of helping to bring a lawsuit to court demonstrates these children's agency, their thoughts and opinions on their detention are not being told through them. Instead their voices are filtered through legal actors.

This research helps to fill the hole in the literature between the anthropology of migration and the anthropology of childhood. It addresses migrants that are also children, individuals that occupy two distinct statuses within American culture, that should not necessarily be seen as mutually exclusive. I address unaccompanied migrant children who are under represented in literature around migration. Through the use of cultural and linguistic anthropology, my research used critical discourse analysis to investigate cultural constructions imbedded in everyday legal language. The use of court cases allows anthropologists an insight into the how different branches of the state work to create the experience of the state, but the disagreements between the branches as shown in the cases reveals their heterogeneous nature.

What is missing from this paper are the voices of the detained children. Future research on this topic should include an ethnographic study where, as the researcher, I would have the opportunity to interact with these children, hear their stories, and acquire first-hand knowledge

on the distribution of their rights while in detention. This can be used in conjunction with further research on court cases, expanding the scope of the project, the range of cases from the Supreme Court, district courts, and courts of appeal. As an anthropologist looking at both migration and childhood, the documentation of these children's stories would further both the anthropology of migration, and the anthropology of childhood.

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