

Arendt's Children: Do Today's Migrant Children Have a Right to Have Rights?

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ABSTRACT

Large numbers of child migrants today—here referred to as “Arendt’s children”—are functionally stateless, whether or not they have a legal nationality. The fundamental rights to protection, family life, education, and health care that these children have, in theory, under international law are unenforceable in practice. Moreover, their access to state entities willing and able to protect them is tenuous at best. This article surveys the obstacles to rights enforcement across a range of jurisdictions and contexts. It argues that, given their disenfranchised and precarious situation, these children have a stronger claim than has so far been acknowledged to effective advocacy and enforcement of their human rights within the states where they live.

[I]t turned out that the moment human beings lacked their own government and had to fall back upon their minimum rights, no authority was left to protect them and no institution was willing to guarantee them . . . [What was] supposedly inalienable, proved to be unenforceable.¹

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1. HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 291–92, 293 (1966).

I. INTRODUCTION

With characteristic foresight, Hannah Arendt recognized the fundamental human rights challenge of our age: supposedly “inalienable” rights are unenforceable for individuals who “lack . . . their own government.” To “lack one’s own government” is a status neither precise nor transparent. At a minimum, though, it includes the situation captured by the definition of statelessness in international law: a person is stateless if “not considered as a national by any State under the operation of its law.”² The international community has acknowledged Arendt’s insight about the perils of this situation by enshrining and widely supporting three interrelated principles: the right to a nationality,³ the right to a legal identity,⁴ and the obligation to reduce child statelessness.⁵ Yet, over half a century since Arendt wrote about the unenforceability of human rights, and despite the proliferation of human rights institutions, regional agreements, diasporic identities, and celebrations of global citizenship, child statelessness appears to be a growing problem.

In 2006, the United Nations High Commissioner for Refugees (UNHCR) announced that 5.8 million people were stateless.⁶ Even though this figure is already more than double the number identified in any prior year, UNHCR emphasized that “the *real total* is believed to be nearer 15 million.”⁷ The disjuncture between the two figures is revealing. The first represents those who are technically stateless—people who do not have a nationality according to the international law definition cited above. But, those in the second group (nearly three times the size of the first according to UNHCR) also “lack their own government” in Arendt’s sense: they are *de facto* or functionally stateless, unable to enforce rights that are supposedly inalienable. A peculiarly disenfranchised population that clearly illustrates this functional statelessness and its dire consequences is the subset of child migrants who lack their own

2. Convention Relating to the Status of Stateless Persons, *adopted* 28 Sep. 1954, art. 1(1), 360 U.N.T.S. 117 (*entered into force* 6 Jun. 1960).
3. Universal Declaration of Human Rights (UDHR), *adopted* 10 Dec. 1948, G.A. Res. 217A (III), U.N. GAOR, 3d Sess. (Resolutions, pt. 1), at 71, art. 15, U.N. Doc. A/810 (1948), *reprinted in* 43 Am. J. Int’l L. 127 (Supp. 1949).
4. International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, art. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* 23 Mar. 1976).
5. Convention on the Rights of the Child (CRC), *adopted* 20 Nov. 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, arts. 6, 7, U.N. Doc. A/44/49 (1989) (*entered into force* 2 Sept. 1990), *reprinted in* 28 I.L.M. 1448 (1989).
6. U. N. HIGH COMM’R FOR REFUGEES (UNHCR), *STATISTICAL YEARBOOK 2006: TRENDS IN DISPLACEMENT, PROTECTION AND SOLUTIONS* 7 (Dec. 2007), *available at* <http://www.unhcr.org/statistics/STATISTICS/478cda572.html> (figures disaggregated for child statelessness are not available).
7. UNHCR, *PROTECTING REFUGEES & THE ROLE OF UNHCR 2007–08*, at 31 (Sept. 2007), *available at* <http://www.unhcr.org/basics/BASICS/4034b6a34.pdf> (emphasis added).

government. I will call this population Arendt's children. This article explores their ambiguous position between inalienable and unenforceable rights. It inquires what it means—to invoke Arendt again—to assert that these migrant children, like all children, have a right to have rights. First, it discusses what statelessness means for children today and how legal and functional statelessness impinge on their lives. It enquires into the rights that children are entitled to as a matter of law and contrasts this with the enforcement capabilities of states in practice. It also examines the effect of treaty ratification on rights realization and investigates particular areas of relevant policies such as age determination and information gathering. The discussion then turns to the consequences of rights denial, including detention and expulsion, and the efficacy of litigation as a rights enforcement strategy. Migrant children's access to economic and social rights, particularly education and health care, is reviewed. Finally, the article investigates what is required to reduce the functional statelessness of migrant children, concluding with a discussion of whether Arendt's children can be considered citizens and the consequences of their compromised status.

II. STATELESSNESS FOR CHILDREN TODAY

The above-cited definition of a stateless person in international law is straightforward. It divides the universe into two groups of people—those who are “considered nationals” by a state and those who are not. But the reality of child statelessness today is anything but straightforward. The unenforceability of fundamental rights related to nationality impinges on a heterogeneous group of children that includes undocumented immigrants, “irregular” migrants, and trafficking victims. By some accounts, the group also includes children whose birth is never registered and who therefore lack a legal identity or the ability to prove one—a group that encompasses approximately forty percent of annual births globally.⁸ One can argue that it also includes some citizens,⁹ who are at least functionally or potentially

8. The UNICEF Innocenti Research Center cites an estimate that 36 percent of all births are unregistered. INNOCENTI RESEARCH CTR., UNICEF, BIRTH REGISTRATION AND ARMED CONFLICT 2 (2007), available at <http://www.unicef-irc.org/publications/pdf/insight-br-eng.pdf>. In some countries, the figures of unregistered births are even higher; in Bangladesh, for example, only 7–10 percent of children have their birth registered. ASIAN DEV. BANK, LEGAL IDENTITY FOR INCLUSIVE DEVELOPMENT vii (Caroline Vandenabeele & Christine V. Lao eds., June 2007).

9. Others have also explored the statelessness of some groups of citizens. Audrey Macklin has an interesting discussion of the internally displaced person (IDP) as the embodiment of “the citizen without a state.” Audrey Macklin, *Who is the Citizen's Other? Considering the Heft of Citizenship*, 8 THEORETICAL INQUIRIES IN L. 333, 353 (2007).

stateless.¹⁰ Many terms are used to describe members of this population, including “semi-citizens,”¹¹ liminal or “in between citizens,”¹² and “alien citizens.”¹³ The group is fluid and dynamic. Child migrants who begin their journeys or residences “statefully” (to coin a phrase) with regular visitor, asylum seeker, or student status, for example, can become irregular by overstaying or otherwise failing to comply with the restrictive requirements of their visas. By doing so, they may lose access to key state protections. Conversely, children who start their journeys as irregular migrants occasionally acquire lawful status through changes in domestic law (e.g., amnesty), in their personal situation (e.g., marriage), in their legal position (e.g., successful asylum application), or in their nationality through international treaties (e.g., the redrawing of state boundaries)—and thereby join the “state people” that Arendt described.¹⁴

III. WHO ARE ARENDT'S CHILDREN? THE DEFINITIONAL ISSUE

Despite their differences in legal status, location, gender, race, religion, nationality, and class, in my conception, Arendt's children all share three defining characteristics: they are minors;¹⁵ they are, or they risk being, separated from their parents or customary guardians; and they do not in fact (regardless of whether they do in law) have a country to call their own because they are either noncitizens or children of noncitizens. Therefore, the group includes children in a variety of circumstances: migrant children who have traveled alone across borders, first-generation citizen children whose immigrant parents have been deported, citizen or migrant children living in so-called “mixed status” or “undocumented” families, and unregistered or stateless children living in the country of their birth with their immigrant parents.¹⁶ However, it does not include stateless children living in their

10. What was true for the interwar and postwar periods described by Arendt is still true today: “the number of potentially stateless people is continually on the increase.” ARENDT, *supra* note 1, at 279.

11. A suggestive and helpful term which I explore below and owe to personal communications with Elena Rozzi.

12. Cecilia Menjivar, *Liminal Legality: Salvadoran and Guatemalan Immigrants' Lives in the United States*, 111 AM. J. SOC. 999 (2006); Karen Cebulko, Documented, Undocumented and Somewhere “In-Between”: The Effects of Documentation Status on Children of Brazilian Immigrants (unpublished paper, on file with author).

13. MAE NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 2 (2004).

14. ARENDT, *supra* note 1, at 270.

15. I use the term “minor” interchangeably with the term “child,” and follow the definition of a child in Article 1 of the 1989 UN Convention on the Rights of the Child: “a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.” CRC, *supra* note 5, art. 1.

16. LAURA VAN WAAS, IS PERMANENT ILLEGALITY INEVITABLE? THE CHALLENGES TO ENSURING BIRTH REGISTRATION AND THE RIGHT TO A NATIONALITY FOR THE CHILDREN OF IRREGULAR MIGRANTS: THAILAND AND THE DOMINICAN REPUBLIC (2006), cited in Laura van Waas, *The Children of Stateless Migrants: A Stateless Generation?*, 25 NETHERLANDS Q. HUM. RTS. 437 (2007).

country of origin with their parents, such as the tens of thousands of Russian children denied citizenship in Estonia and Latvia after independence from the Soviet Union¹⁷ because there is no risk of separation from their families. Nor does the category include "left behind" children who receive remittances from parents who have migrated abroad for work. These children may be cared for by grandparents or other relatives, and will typically have access to all the state services available to children in the community. However, "left behind children" whose parents have fled as refugees and whose home communities are decimated certainly fall within the category of "Arendt's children"—lacking familial or effective state protection, they too have no country to call their own.

Therefore, although "Arendt's children" is a broad category that includes disparate populations, it is not synonymous with some common classifications of vulnerable migrant children. It includes children living in families; thus it is broader than the widely-used category "unaccompanied or separated children," which encompasses citizen, unauthorized, and stateless children.¹⁸ The term is also more inclusive than the categories "child asylum seekers" or "child refugees." Because it requires children not to have a country they can call their own, it excludes unregistered children (those whose births have not been officially registered and who are thus not "seen" by the state) living with their families in their own home countries.¹⁹

When combined, each of the three characteristics that define Arendt's children brings with it the potential for some kind of rightlessness. First, children are disproportionately represented among the world's poor.²⁰ Second, children who are separated or unaccompanied face a far greater risk of abuse, exploitation, or neglect than their accompanied counterparts.²¹ Finally, being functionally stateless, whether by virtue of "alienage" or familial noncitizen status, also brings with it economic, social, and psychological dangers.²² For Arendt's children, burdened with this triple disadvantage, the

17. James R. Hughes, "Exit" in *Deeply Divided Societies: Regimes of Discrimination in Estonia and Latvia and the Potential for Russophone Migration*, 43 J. COMMON MARKET STUD. 739 (2005).
18. Or the European equivalents, "*minori stranieri non accompagnati*" in Italy, "*mineurs étrangers isolés*" in France, and "*menores o niños separados*" in Spain, for example.
19. Indeed, recent research shows that the fact of non-registration does not, per se, preclude access to certain key state services, such as vaccination and primary education. See ASIAN DEV. BANK, *supra* note 8, at 5–6.
20. UNICEF, POVERTY REDUCTION BEGINS WITH CHILDREN 2, 41 (Mar. 2000), available at http://www.unicef.org/pub_poverty_reduction_en.pdf.
21. In the case of armed conflict, it is true that unaccompanied children are more likely to suffer harm than are accompanied children, according to UN reports. See *Impact of Armed Conflict on Children, Report of the Expert of the Secretary-General, Ms. Gracia Machel*, U.N. GAOR, 51st Sess., Provisional Agenda Item 108, ¶¶ 67–69, U.N. Doc. A/51/306 (1996).
22. *Id.* UNICEF agreed with the report: "Of the millions of children displaced by war, unaccompanied children are at the greatest risk. They are the likeliest to lack the most basic

risk of some form of rightlessness is stark and the effect is marked, even in wealthy, industrialized, democratic states that generally celebrate children's rights to protection and autonomy.

Consider, for example, the 1.8 million unauthorized²³ children currently living in the United States.²⁴ They live with the daily threat of raids by the immigration authorities. Contact with state authorities in schools or hospitals may lead to unwanted inquiries into their status. Educational aspirations for college and university are forcibly truncated at the end of high school, irrespective of academic performance. They enjoy, at best, a partial or fractured citizenship; they may perceive their situation as living *between* rather than *within* states, despite the seamless division of the earth's territory into states—they can never fully belong where they are. The same is true of the thousands of Roma children living and working on the streets of Europe's capitals. Despite their EU citizenship, they are effectively disenfranchised, sometimes even confined to destitution in segregated "nomad camps." Sixty years after the signing of the 1948 Universal Declaration of Human Rights (UDHR), nearly twenty years after the near universal ratification of the 1989 UN Convention on the Rights of the Child (CRC), and several generations into what Louis Henkin has memorably called an "age of rights,"²⁵ these children's right to have rights is tenuous at best and frequently unenforceable in practice.

An inquiry into what their "right to have rights" consists of can be broken down into two more specific questions. First, to what social protections and services are these children entitled as a matter of public policy and law? Or, phrased differently, when do they have a right to have rights? Second, what does their social membership deliver to them in practice? What indicators do states use to define social membership, and what are the consequences of these choices? For states to act like states, they have to see and categorize like states.²⁶ In other words, they have to establish workable classifications among a diverse population. But historically, most states have overlooked or looked away from the needs of this group.

means of survival and to have their rights violated, the likeliest to be killed, tortured, raped, robbed and recruited as child soldiers." UNICEF, Information: Impact of Armed Conflict on Children, available at <http://www.unicef.org/graca/alone.htm>.

23. Many nouns and adjectives are used to describe individuals who lack a legal migration status: alien, immigrant, migrant, entrant, noncitizen, foreigner, illegal, unlawful, irregular, and undocumented. The term "unauthorized migrant" will be preferred here, where accurate ("undocumented" may not be, e.g., for those who overstay visas), over more value-laden alternatives.
24. JEFFREY S. PASSEL, THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE US: ESTIMATES BASED ON THE MARCH 2005 CURRENT POPULATION SURVEY 8 (Mar. 2006), available at <http://pewhispanic.org/files/reports/61.pdf>.
25. LOUIS HENKIN, THE AGE OF RIGHTS (1990).
26. JAMES C. SCOTT, SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED 76–83 (1998).

IV. DO ARENDT'S CHILDREN HAVE A RIGHT TO HAVE RIGHTS? POLITICAL PRONOUNCEMENTS

In the political domain, no consensus exists on whether Arendt's children have a right to have rights, even at the level of abstract entitlement. Progressive and official spokespersons may agree with the European Commission's statement that "children are vested with the full range of human rights" and that states are obliged to "[give] all children equal opportunities, regardless of their social background."²⁷ They may also agree with the famous 1982 US Supreme Court ruling in *Plyer v. Doe* that unauthorized migrant children were people "in any ordinary sense of the term" and therefore entitled to state-funded education.²⁸ Many commentators, however, have challenged this liberal assumption of social inclusiveness, arguing against automatic access to welfare benefits and basic public goods. According to a senior US immigration officer, unaccompanied child asylum seekers are "run-aways or throw-aways," petty criminals in the making.²⁹ Because of their harsh backgrounds and their different conceptions of the roles of adults and children, the argument goes, these young migrants are not like "our children," and there is no reason not to treat them like adults. Tom Tancredo, Republican Congressman from Colorado, echoes this perspective from a more instrumental standpoint: "Denying social services to them is something you have to do to stop the magnet effect that all of these combined things have, the health care, free schooling. This is all a magnet that draws people into this country and I'm trying to demagnetize it."³⁰ Some scholars have questioned the legitimacy of their social membership, which effectively challenges the rights claims advanced by citizen children born to unauthorized migrants. For example, Peter Schuck has argued:

If mutual consent is the irreducible condition of membership in the American polity, questions arise about a practice that extends birthright citizenship to the native-born children of such illegal aliens. . . . [I]f the society has refused to consent to [the parents'] membership, it can hardly be said to have consented to that of their children who happen to be born while their parents are here in violation of American law.³¹

27. *Communication from the Commission: Towards an EU Strategy on the Rights of the Child*, ¶ 1.1, COM (2006) 0367 (4 July 2006).

28. *Plyer v. Doe*, 457 U.S. 202 (1982).

29. Jacqueline Bhabha, *Minors or Aliens? Inconsistent State Intervention and Separated Child Asylum-Seekers*, 3 EUR. J. MIGRATION & L. 283, 295 (2001).

30. Brian Padden, *Health Care for Illegal Immigrants in USA Remains Point of Contention*, VOA News, 28 Apr. 2006.

31. PETER H. SCHUCK, *CITIZENS, STRANGERS AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP* 212 (1998).

This perspective is not the preserve of US nativism. According to the premier of the Canary Islands, Adán Martín Menis, the Moroccan migrant children arriving alone on Spanish territory should not be protected, but rather treated like adults and detained or returned to their country of origin.³²

Unlike judges, politicians, or scholars, state functionaries are not permitted to publicly declare their views, but their actions often speak louder than words, indicating that their beliefs mirror the opinions of some of the most rights-averse public spokespersons. Border patrol and immigration officials are perhaps the most notorious. Consider the behavior of UK immigration officers toward child migrants: in 2004, as many as 43 percent of those applying for asylum as unaccompanied or separated children had their cases "age disputed," and while authorities examined further age evidence, the applicants were denied additional child protections. Many of these children ended up in detention alongside adults in such harsh conditions that, on 26 January 2007, British Home Secretary John Reid admitted publicly that the government had been operating an unlawful policy towards child asylum seekers.³³ In this light, the European Commissioner for Human Rights was perhaps too generous when he said:

[D]ecision-making politicians appear sometimes to be confused about how to treat migrant children. On the one hand, they state their full support of the idea that children do have rights and also recognize that our aging continent will need migration, not least young migrants. On the other hand a number of them appear not to be able to draw the *necessary conclusions* [about the rights of migrant children].³⁴

Other public employees working away from the border evince similar attitudes and the same inability to draw "the necessary conclusions." Despite court rulings condemning French police violence against migrants,³⁵ brutality against migrant children persists. In the words of an unauthorized, homeless fifteen-year-old Romanian living on the streets of Paris, "It was eleven at night. Four police cars came after us. I did eighteen hours of detention. They don't touch your face, they beat you in the ribs, on the legs, the feet, everywhere."³⁶ Officials working outside immigration and law enforcement, including those in the welfare departments, also question the legitimacy of migrant children's basic rights claims. A recent study of asylum-seeking children in the United Kingdom produced the following case study:

32. LIZ FEKETE, *THEY ARE CHILDREN TOO: A STUDY OF EUROPE'S DEPORTATION POLICIES* 14 (2007).

33. *Asylum Seekers Policy "Unlawful,"* BBC News, 26 Jan. 2007, available at http://news.bbc.co.uk/2/hi/uk_news/politics/6302919.stm.

34. Thomas Hammerberg, Comm'r for Human Rights, Council of Europe, Address at the Save the Children Sweden Conference (20 Mar. 2007) (emphasis added).

35. See *Selmouni v. France*, App. No. 25803/94, 29 Eur. H.R. Rep. 403 (1999) (emphasis added). Cases before the European Court of Human Rights are available at <http://echr.coe.int/echr/en/hudoc>.

36. MARINE VASSORT, *PAROLES D'ERRANCE* 13 (2006) (author's translation).

"Y" was a 16-year-old boy from Chad. He claimed asylum on a Friday and the Asylum Screening Unit in Croydon told him that they did not believe that he was a child. It referred him to the Refugee Council's Children's Panel in Brixton. The Panel referred him on to the local social services department, who had closed their offices by the time he arrived there. He returned to the Refugee Council to discover that it too was closed. He spent the weekend living on the street.³⁷

Access to basic shelter, subsistence level welfare payments, and in-kind benefits is as fundamental to modern conceptions of rights in general, and children's rights in particular, as is protection from physical violence. The same is true for access to such social and economic rights as education and health care, as the Committee on the Rights of the Child has frequently noted in its concluding observations on states parties' periodic reports.³⁸ Yet here too, public officials operate under personal codes of conduct that translate into dramatic rights denials. Sylvia da Lomba has remarked, "Curtailments of social rights for irregular migrants in host countries have become essential components of restrictive immigration policies. . . . The threat of destitution as a deterrent against irregular migration generates acute tensions within host states between immigration laws and human rights protections."³⁹ Consider this Spanish case:

Sixteen-year-old 'Abd al Samad R. has been in Ceuta [an autonomous Spanish city located on the Moroccan coast] for about five years, including two and a half years living at the San Antonio Center. While at San Antonio he was diagnosed as suffering from renal disease, a potentially life-threatening medical

condition, and he received medical treatment. Then, in October 2001 he was told to leave San Antonio, apparently for disciplinary infractions. When we interviewed 'Abd al Samad on November 8, 2001, he was living with a group of other children and youth in makeshift hovels squeezed between a breakwater and piles of ceramic tiles and other building supplies. He had received no medical treatment since leaving San Antonio, although he was frequently in severe pain. "The pain comes often, when it is cold, or when someone hits me," he said. "I tried to go to the hospital when I was in pain but they wouldn't admit me. *They won't accept you at the hospital unless some one from San Antonio comes with you.* When the pain comes I can't move so who will come to take me to the hospital?"⁴⁰

Without official confirmation of the child's social entitlements, he remained outside the categories established by the state—in effect not a person before the law. These exclusionary attitudes were translated directly into rightlessness. The acute risks to which this willful exclusion, combined with the fear of detection as an irregular migrant by state officials, can give rise were noted by the European Court of Human Rights in the case of *Siliadin v. France*. In this case, an unaccompanied child from Togo, "unlawfully present in [France] and in fear of arrest by the police . . . was . . . subjected to forced labour . . . [and] held in servitude," compelled to carry out housework and child care for fifteen hours a day without holidays.⁴¹ The Court commented that the applicant "was entirely at [her employers'] mercy, since her papers had been confiscated . . . [S]he had no freedom of movement or free time. As she had not been sent to school . . . the applicant could not hope that her situation would improve."⁴² Irregular migration status increases the risk of invisibility and thus gross rights violations. As the Court pointed out, states parties must recognize this serious risk and act "with greater firmness . . . in assessing the infringements of the fundamental values of democratic societies."⁴³ In other words, according to the Court, states have an obligation to "see"⁴⁴ Arendt's children—willful and selective blindness is not a legitimate option.

37. JACQUELINE BHABHA & NADINE FINCH, SEEKING ASYLUM ALONE: UNACCOMPANIED AND SEPARATED CHILDREN AND REFUGEE PROTECTION IN THE U.K. 56 (Nov. 2006), available at <http://www.ilpa.org.uk/seeking%20asylum%20alone.pdf>.

38. In response to the Belgian report, the Committee commented: "The Committee is concerned at . . . the disparities in the enjoyment of economic and social rights, particularly health and education, experienced by . . . non-Belgian children, including unaccompanied minors." *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Concluding Observations of the Committee on the Rights of the Child: Belgium*, U.N. ESCOR, Comm. on Rts. of the Child, 30th Sess., ¶ 18, U.N. Doc. CRC/C/15/Add.178 (2002). Regarding Denmark, "the Committee notes that all children who have had their asylum requests rejected but who remain in the country have had their rights to health care and education provided de facto but not de jure." *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Concluding Observations of the Committee on the Rights of the Child: Denmark*, U.N. ESCOR, Comm. on Rts. of the Child, 8th Sess., ¶ 14, U.N. Doc. CRC/C/15/Add.33 (1995). Concerning Italy, the Committee criticized the state's "insufficient data in some areas covered by the Convention," and it expressed concern over "the disparities in the enjoyment of economic and social rights, particularly in the fields of health, social welfare, education and housing, experienced by . . . Roma Children, non-Italian children, including unaccompanied minors." *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Concluding Observations of the Committee on the Rights of the Child: Italy*, U.N. ESCOR, Comm. on Rts. of the Child, 32d Sess., ¶¶ 16, 20, U.N. Doc. CRC/C/15/Add.198 (2003).

39. Sylvia da Lomba, quoted in RYSZARD CHOLEWINSKI, IRREGULAR MIGRANTS: ACCESS TO MINIMUM SOCIAL RIGHTS 17 (2005).

40. HUMAN RIGHTS WATCH (HRW), NOWHERE TO TURN: STATE ABUSES OF UNACCOMPANIED MIGRANT CHILDREN BY SPAIN AND MOROCCO (May 2002), available at <http://www.hrw.org/reports/2002/spain-morocco/spnmorc0502.pdf> (emphasis added).

41. *Siliadin v. France*, App. No. 73316/01, ¶¶ 118–21, 2005–VII Eur. Ct. H.R. 333 (2005).

42. *Id.* ¶¶ 126–28.

43. *Id.* ¶ 121.

44. James Scott discusses the tension between these two state approaches to categorizing the complexities of social reality by simplification and what he calls "seeing like a state," writing that "our ideas about citizenship, public-health programs, social security, transportation, communication, universal public education, and equality before the law are all powerfully influenced by state-created, high-modernist simplifications . . . [but] [w]hat has proved truly dangerous to us and to our environment . . . is the combination of universalist pretensions of epistemic knowledge and authoritarian social engineering." JAMES C. SCOTT, SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED 339–40 (1999).

V. DO ARENDT'S CHILDREN'S HAVE A RIGHT TO HAVE RIGHTS? THE LEGAL FRAMEWORK

If *public policy* approaches to the rights claims of Arendt's children differ, does *the law* offer a clearer answer? What does it mean for a rights claim to be asserted by or on behalf of Arendt's children? There are at least three correct, yet mutually contradictory, answers to the question: "Do Arendt's children have a right to have rights?" The first answer is an unqualified "yes"; the second, a resounding "no"; and the third, a cautious, even diffident "sometimes," "perhaps," or "it depends." Each answer finds support in the empirical record, though regrettably this is somewhat of an "evidence-free zone." The paucity of statistics and official data makes individual vignettes useful.

In a straightforward sense, Arendt's children have human rights: the normative framework of positive international human rights law encompasses all children. The UDHR, the founding document of modern international human rights, unequivocally states: "Everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind such as . . . social origin, . . . birth or other status."⁴⁵ Indeed, all thirty articles in the UDHR are age-neutral except Article 16, which articulates the right to marry and found a family. They are addressed to "everyone" (e.g., "Everyone has the right to life, liberty and security of person.")⁴⁶ or "no one" (e.g., "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.")⁴⁷ They contain no minimum age requirement, no developmental maturity criterion, no citizenship, or even "legality" requirement. Undocumented and noncitizen children seem to fall clearly within the scope of universal protection.

Apart from a single reference in the UDHR to children's special needs for protection within the article proclaiming the right to health,⁴⁸ there is no acknowledgment of children's distinctive status. The approach of the UDHR is to mandate nondiscrimination, rather than to directly promote substantive equality. Because of this approach, as with women's rights, civil society pressure to promote children's rights led to the formulation of a subject-specific convention. If the drafting of the UDHR signaled a general, though implicit, acknowledgment that children's rights were human rights, because all children are part of the "human family," then the CRC expanded the normative perspective to promote awareness of children's agency and individuality. If

45. UDHR, *supra* note 3, art. 2.

46. *Id.* art. 3.

47. *Id.* art. 5.

48. "Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection." *Id.* art. 25(2).

the UDHR laid the foundation for acceptance of Arendt's children's human rights vis-à-vis the state, then the CRC, albeit cautiously, added the platform for these children to assert their human rights vis-à-vis their families,⁴⁹ their teachers,⁵⁰ and their communities.⁵¹

Formally, this exercise in international norm-building and standard-setting resulted in spectacular success, proving that even detailed and expansive articulations of children's rights were acceptable across continents, cultures, and religions. Indeed, as the Child Rights Information Network website proudly proclaims:

Since its adoption in 1989 after more than 60 years of advocacy, the United Nations Convention on the Rights of the Child has been ratified more quickly and by more governments (all except Somalia and the US) than any other human rights instrument. This Convention is also the only international human rights treaty that expressly gives non-governmental organisations (NGOs) a role in monitoring its implementation (under Article 45a). The basic premise of the Convention is that children (all human beings below the age of 18) are born with fundamental freedoms and the inherent rights of all human beings.⁵²

Even those who criticize aspects of the twentieth century children's rights movement, particularly as a dispute resolution framework, concede that this rights-based approach provides a crucial baseline for relations between children and states.⁵³ International moves have been followed by regional adoption of similar principles, most vigorously in Europe, where children's rights are not only recognized in the European Charter of Fundamental Rights,⁵⁴ but also identified by the European Commission as one of its main strategic objectives between 2005 and 2009.⁵⁵

This discussion shows that, formally, there could be no clearer affirmative answer to the question posed above. A central feature of positive international human rights law is children's rights, including those of Arendt's children. This leads to other aspects of the international human rights machinery: regular reports by states parties to the Committee on the Rights of the Child (the

49. For an example of the careful balancing act between children's and parental rights engaged in by the CRC, see CRC, *supra* note 5, art. 14(1), (2). Not only are states parties required to respect the child's freedom of thought, conscience, and religion, but also the rights and duties of parents to provide direction to the child.

50. "States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity." *Id.* art. 28(2).

51. "States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children." *Id.* art. 24(3).

52. Child Rights Information Network, Convention on the Rights of the Child, available at <http://www.crin.org/resources/treaties/CRC.asp?catName=International+Treaties&flag=Iegal&iD=6>.

53. See MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS xi (2006).

54. Charter of Fundamental Rights of the European Union, art. 24, 2000 O.J. (C 364) 1.

55. *Communication from the Commission*, *supra* note 27.

treaty body overseeing the CRC); investigations of child-specific human rights violations by UN special rapporteurs, other internationally appointed experts, and domestic human rights institutions; recitation of children's international legal rights in both domestic and international migration and social welfare policy; the preparation of general comments on detailed aspects of Arendt's children's rights by the CRC Committee;⁵⁶ and the opportunity to challenge state practices affecting Arendt's children through litigation.⁵⁷

But the fact of near universal and speedy ratification of the CRC does not, in and of itself, prove that Arendt's children's rights are enforced as effectively as general, adult human rights set out in less universally ratified treaties, or that children enjoy greater protection of their human rights after the CRC's ratification than before. For one thing, there is a major gap in the near universal ratification of the Convention: despite having signed the CRC, the United States has not ratified it, so it has a limited obligation to bring its domestic law into conformity. This rightlessness in law reveals itself in practice:

"You are a nobody in society," commented an undocumented Brazilian youth in Boston to a researcher; another respondent confirmed this: "You are already a minority, and already treated differently. Imagine people finding out you were an illegal minority? None of my friends ever knew. I probably wouldn't have had the ones I had if they had known."⁵⁸

Even in states that have ratified the CRC, the situation is less than encouraging. Several states have entered broad reservations that exonerate them from applying many of the articles to noncitizen children.⁵⁹ Moreover, if the gap between theory and practice, between the normative framework and concrete enforcement, is notorious in law as a whole, then it is particularly egregious within the human rights field. For children who generally depend on intermediaries to secure their rights and who may lack the skills and political status necessary to protest rights violations, the problem of implementation is heightened. The UN Special Rapporteur on the human rights of migrants has complained that

56. See *General Comment No. 3: HIV/AIDS and the Rights of the Children*, U.N. ESCOR, Comm. on the Rts. of the Child, 32d Sess., U.N. Doc. CRC/GC/2003/3 (2003); *General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, U.N. ESCOR, Comm. on the Rts. of the Child, 33d Sess., U.N. Doc. CRC/GC/2003/4 (2003).

57. *Nsona v. Netherlands*, App. No. 23366/94, 1996-V Eur. Ct. H.R. 1979; *Mayeka v. Belgium*, App. No. 13178/03, 2006-XI Eur. Ct. H.R.

58. Cebulko, *supra* note 12, at 11-12.

59. Examples include Brunei Darussalam, Djibouti, and Liechtenstein (reservation to Article 7); and Switzerland (reservation to Articles 7 and 10). U.N. High Comm'r for Human Rights, *Declarations and Reservations, Convention on the Rights of the Child*, available at http://www.unhcr.ch/html/menu3/b/treaty15_asp.htm.

accompanied and unaccompanied children are often detained in punitive conditions, deprived of the care, protection and rights to which they are entitled under the Convention on the Rights of the Child and other international human rights norms, including the right to education, physical and mental health, privacy, information, and rest and leisure, among others.⁶⁰

A recent case illustrates the huge gap between rights guarantees and deliverables in practice. It highlights a critical, child-specific issue—the indispensability of adult intermediaries as conduits to children's rights—and the vacuum between international law mandates and domestic realization of effective access to such rights mediators.

Amnesty International has spoken to "John" who arrived in Italy as an unaccompanied minor fleeing a life as a child soldier . . . After arriving on Lampedusa, he was taken to a detention centre and ordered to get undressed for a body check. He told them that he was only 16 years old, yet he was detained at the Lampedusa centre for 2 days where he slept in a room with 6 adult men. He was later transferred to another centre in southern Italy where he had to share a room with 12 adults for a month. "John" eventually found accommodation in a reception centre for minors. However, 5 months after his arrival in Italy, a guardian had still not been appointed to represent him.⁶¹

This situation is not a small oversight. It is a pervasive institutional fact, the subject of general comments by the Committee on the Rights of the Child, of complaints and testimony before the US Congress, and of numerous advocacy reports and briefs. The absence of guardianship and representation neutralizes a child's claim to special treatment and obliterates social acknowledgment of his or her rights, including child asylum seekers' claims to international protection as a refugee. In other words, the absence of a person who acts "*in loco parentis*" and of an advocate who is charged with unlocking the protective promises contained in statutes essentially fixes Arendt's children in their radical otherness. It guarantees functional statelessness across key dimensions of social and economic need. It also undermines the holistic scope of rights claims by reducing the ability of a class of rights bearers to exercise their formal entitlements. Indeed this radical otherness, this deracination from the "normal" structures of a society, can even threaten one's basic claim to human dignity, and return one to the "nakedness of being human," a nakedness no longer abstract but frighteningly concrete. The world is sadly familiar with this scenario: in the refugee

60. *Specific Groups and Individuals: Migrant Workers, Report of the Special Rapporteur Ms. Gabriela Rodríguez Pizarro*, U.N. ESCOR, Comm'n on Hum. Rts., 58th Sess., Provisional Agenda Item 14(a), ¶ 47, U.N. Doc. E/CN.4/2003/85 (2002).

61. AMNESTY INT'L, *INVISIBLE CHILDREN: THE HUMAN RIGHTS OF MIGRANT AND ASYLUM-SEEKING MINORS DETAINED UPON ARRIVAL AT THE MARITIME BORDER IN ITALY* (Feb. 2006), available at <http://web.amnesty.org/library/index/engEUR300012006>.

camps in Chad, the internally-displaced person camps in Darfur, the HIV/AIDS orphanages in Ethiopia. But in the heart of Europe? In the middle of London? Global mobility and desperation are removing the comfortable distance of geographical separation and importing the challenge of translating children's rights into human rights onto our doorsteps.⁶² Paraphrasing Arendt, one might want to argue that the "heart of darkness" representing Europe's imperial plunder of Africa has now struck home, revealing the brutal hand of the imperial state toward noncitizens within its own borders.⁶³ The following is the experience of a young girl, interviewed in 2005, who found herself alone and unaccompanied in the United Kingdom.

I was a female asylum seeker from Guinea who fled after being imprisoned and tortured with her mother and brother on account of her father's political activities. The Asylum Screening Unit disputed her age and her local authority told her that it would not support her until she obtained medical confirmation of her age and the Immigration and Nationality Directorate accepted that she was a minor. She commented, "Social services treated me like a dog . . . because the Home Office said I was not under 18. They just told me to go away. I was so sad. *They need to treat people as humans* and give them food and shelter."⁶⁴

L is one of an estimated 100,000 separated children living in Europe,⁶⁵ all facing daily hardships in the struggle to survive.

Unaccompanied children are not the only ones who have experienced this radical rightlessness. Arendt's children living with their parents also routinely experience serious infringements of the fundamental protections established by international standards. Some of these infringements arise out of brutal or mindless deportation policies. Consider the following case: in 2002, the European Court of Human Rights promoted a friendly settlement between Italy and a gypsy family of unknown nationality, which included a child with Down Syndrome who had recently undergone heart surgery. The family was rounded up at gunpoint in the middle of the night from a travelers' camp near Rome because they lacked residence permits, and they were deported to Sarajevo. Eventually, in response to allegations of inhuman treatment, Italy revoked the deportation orders and, on humanitarian grounds, allowed the family to remain in the country and the child to benefit from

Italian medical care.⁶⁶ Six years later, the Court is dealing with a similar case in the United Kingdom: a three-year-old child with a serious kidney disorder, who was born in the United States but "has lived almost her entire life in London" with her asylum seeker mother, was issued deportation papers to the United States, even though she has no relatives there.⁶⁷

Other infringements, conversely, are caused by detention policies that fail to take into account the needs of young children. For example, the Human Rights Committee, the treaty body overseeing implementation of the International Covenant on Civil and Political Rights, has ruled against past Australian practice in this area, criticizing the prolonged detention of families because of severe consequences for the health of detained children. In the *Bakhtiyari* case, for example, the Committee observed that the "children have suffered demonstrable, documented and on-going adverse effects of detention" and ordered the release of the mother and the children and payment of compensation to the family.⁶⁸ A UK case involving the detention of a single-parent family consisting of a mother and two children, aged five and two, led to serious health consequences for both children, resulting in serious weight loss and eventual hospitalization of the two-year-old.⁶⁹

The right to rights has frayed at the margins. Was Arendt's deep pessimism about the international system an accurate and sober reflection on the inevitable primacy of the nation-state? Or, to quote Seyla Benhabib, can one find a way out from the conclusion that Arendt's "moral cosmopolitanism founders on [her] legal and civic particularism,"⁷⁰ a conclusion that seems to undercut the whole project of post-war human rights. So, to return to the heart of the matter, in what sense do these children have rights?

VI. MAKING LAWS VERSUS MAKING A DIFFERENCE: THE ENFORCEMENT GAP

Formulating and passing laws, despite its complications and protracted frustrations, is probably the easiest step in the journey from aspirational principle to practical realization. Indeed, some argue that states knowingly sign on to human rights instruments without any serious political commitment to changing their practices, precisely because they realize that there is so little accountability and that the diplomatic kudos of signing is not offset by any

62. Recall Arendt's reflection on an identical problem in a different historical moment:

The full implication of this identification of the rights of man with the rights of peoples in the European nation-state system came to light only when a growing number of people and peoples suddenly appeared whose elementary rights were as little safeguarded by the ordinary functioning of nation-states in the middle of Europe as they would have been in the heart of Africa.

ARENDT, *supra* note 1, at 291.

63. SEYLA BENHABIB, *THE RIGHTS OF OTHERS* 52 (2004).

64. BHABHA & FINCH, *supra* note 37, at 60 (emphasis added).

65. TERRY SMITH, *SEPARATED CHILDREN IN EUROPE PROGRAMME, SEPARATED CHILDREN IN EUROPE: POLICIES AND PRACTICES IN EUROPEAN UNION MEMBER STATES: A COMPARATIVE ANALYSIS* 5 (2003).

66. *Sulejmanovic v. Italy*, App. Nos. 57574/00, 57575/00 (2002).

67. Robert Verkaik, *Battle to Halt Deportation of Girl, 3, Puts Spotlight on UK Asylum Policy*, INDEPENDENT (U.K.), 2 Jan. 2008, at 10.

68. *Communication No. 1069/2002 (Bakhtiyari v. Australia)*, U.N. ESCOR, Hum. Rts. Comm., 79th Sess., ¶¶ 9.7, 11, U.N. Doc. CCPR/C/79/D/1069/2002 (2003).

69. Liz Fekete, *Detained: Foreign Children in Europe*, 49 RACE & CLASS 93, 100-01 (2007).

70. BENHABIB, *supra* note 63, at 66.

corresponding costs for non-enforcement.⁷¹ The examples discussed above certainly illustrate the "law-to-practice-translation" failures.

Proving the impact of treaty making and monitoring on rights enforcement is not easy. Nor is it as clear as some assume that these are self-evidently good mechanisms for increasing the political will to secure change. As a scholar pertinently reflected, "What if claims made in the name of universal rights are not the best way to protect people?"⁷² The amount of time spent on treaty ratification and legal strategies might divert effort from more concrete and specific approaches to rights enforcement.⁷³ On the other hand, it might be a key factor in limiting the scope of rights violations by states and strengthening public accountability. Assessing the relative impact of such strategies is a complex matter. Expert opinions on the topic are divided between the radical skeptics, who argue that "the costs and the benefits of [treaty ratification] are very small,"⁷⁴ and the human rights triumphalists, who see treaty ratification as a crucial piece of rights enforcement. The different assessments often reflect differing analytic methodologies, with qualitative studies portraying a more optimistic account of the impact of human rights advocacy than quantitative assessments.⁷⁵ A recent systematic survey of human rights convention ratifications, including the CRC, and the subsequent state practice concludes that:

[O]nce made, formal commitments to treaties can have *noticeably positive consequences*. . . . Treaties signal a seriousness of intent that is difficult to replicate in other ways. They reflect politics, but they also shape political behavior, setting the stage for new political alliances, empowering new political actors, and heightening public scrutiny.⁷⁶

What are the "noticeably positive consequences" for Arendt's children? The picture is mixed. To ascertain whether abstract rights—to protection, refugee status, and care—are translated into practice, one has to look beyond the generality of domestic law toward implementing policies, procedures, and practices. This approach is the only way to test the efficacy of general rights claims. On the one hand, one can point to the development of rights-respecting policies, which clearly reflect the thinking contained in the CRC, particularly in Articles 3 (establishing the primacy of the "best

interests of the child" principle) and 22 (requiring states parties to the CRC to "take appropriate measures to ensure that a child who is seeking refugee status . . . receive[s] appropriate protection and humanitarian assistance."⁷⁷ For example, if one compares different destination states' treatment of child asylum seekers and plots it against human rights obligations, some common deficiencies and interesting differences can be observed.

As discussed, many states fail to provide comprehensive guardianship and effective legal representation to unaccompanied or separated child migrants, despite unambiguous calls for these protections by the Committee on the Rights of the Child.⁷⁸ In the United States, for example, neither publicly funded legal representation nor access to guardianship or any form of individualized and consistent mentorship exists. Even six-year-old Cuban survivor Elian Gonzalez, whose case provoked vigorous legal sparring between interested adult parties with divergent views of Elian's best interests, lacked legal representation or guardianship, independent from his adult interlocutors.⁷⁹ In the United Kingdom, Arendt's children are entitled to publicly funded legal representation, but no system of guardianship exists. By contrast, in other EU states, such as Germany, Belgium, Spain, and France, domestic legislation or regulations stipulate guardianship for these children, though the practical impact of these provisions is unequal and inconsistent.⁸⁰ Two other areas of policy that impinge on decision making regarding Arendt's children, age determination and child interviewing procedures, also reflect divergent state practice.

An effective, reliable, and consistent mechanism for ascertaining the age of an applicant is obviously a necessary condition precedent for protecting children's rights; without it, child-specific protections will not reach their intended recipients. Yet despite years of advocacy, no such mechanism is uniformly in place. In the United States, the Netherlands, and Australia, for example, to establish whether the migrant applicant is under eighteen, and therefore entitled to child-specific procedures, the state relies on mechanistically implemented physical tests—dental, wrist, or clavicle X-rays, or rule of thumb personal assessments. Generally, these mechanisms yield results that ignore the physical variability of children from different social, economic, and ethnic backgrounds.⁸¹ By contrast, in the United Kingdom, a holistic test

71. See generally Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002).

72. Kenneth Cmiel, *quoted in* Emily Haffner-Burton & James Ron, Can the Human Rights Movement Achieve its Goals? (2004) (unpublished manuscript, on file with author).

73. For an interesting critique of the legal approach to rights enforcement, see GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 1991).

74. JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 132 (2005).

75. Haffner-Burton & Ron, *supra* note 72.

76. BETH SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* 2 (2009).

77. CRC, *supra* note 5, arts. 3, 22.

78. General Comment No. 6: *Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, U.N. ESCOR, Comm. on the Rts. of the Child, 39th Sess., ¶ 24, U.N. Doc. CRC/GC/2005/6 (2005).

79. See Comment, *US Court of Appeals for the 11th Circuit: Elian Gonzalez v. Reno (1 June 2000)*, 12 INT'L J. REFUGEE L. 430 (2000).

80. Daniel Senovilla Hernández, Report on Treatment of Unaccompanied Child Asylum Seekers in Europe 40–41 (May 2008) (prepared for Migrinter International Conference) (paper on file with author).

81. JACQUELINE BHABHA & MARY CROCK, *SEEKING ASYLUM ALONE: UNACCOMPANIED AND SEPARATED CHILDREN AND REFUGEE PROTECTION IN AUSTRALIA, THE U.K., AND THE U.S.* 82–85 (2006).

has been developed (though not yet implemented) in response to persistent advocacy on the topic.⁸² This is an example of a rights-respecting approach approved by the courts,⁸³ which takes into account the child's "best interests" and his or her own views.⁸⁴ The holistic test creates a psychologically and socially nuanced tool for assessing age, which complements the raw indicators of physical development. Decision makers function with the social constructs embedded in their society—because childhood is one such construct, they need to unpack its elements to effectively map its categories and its relationship to chronological age onto subjects with novel backgrounds. As the UK Royal College of Paediatrics and Child Health points out:

[A]ge determination is extremely difficult to do with certainty . . . [it] is an inexact science and the margin of error can sometimes be as much as 5 years either side. . . . Estimates of a child's physical age from his or her dental development are [only] accurate to within + or - 2 years for 95% of the population.⁸⁵

Until recently, government officials have frequently ignored this statistic. According to one study, 50 percent of asylum applicants who were age disputed turned out to be minors; as a result, they were denied the child-specific protections they should have been accorded during the investigative process. A child asylum seeker "reported becoming very upset when immigration staff were rude and kept laughing at him when he showed them his birth certificate and said that he was 16."⁸⁶ Others have endured prolonged periods in detention until authorities accepted their original claim to be children. A holistic policy obligates the state official undertaking the age assessment to not rely solely on the child's physical appearance, but instead to consider his or her demeanor, ability to interact with adults, cultural background, social history, life experiences, educational history, as well as the views of foster caregivers, residential workers, teachers, and interpreters. This approach is a good way to explore whether someone is a child and to afford him or her a meaningful right to have rights. Regrettably, despite the open opposition of the British Dental Association, the UK government still has not implemented a holistic test, and instead is considering the use of dental X-rays to ascertain the age of asylum seekers.⁸⁷

A complex set of questions arises regarding the merits of different strategies used to elicit information from Arendt's children. Adversarial interroga-

tions, such as those conducted in the United States and Australia for asylum-seeking children, undoubtedly run counter to the children's best interests, particularly when interrogations are conducted in alienating settings such as formal courtrooms or detention centers. On the other hand, does the practice of states such as Canada and the United Kingdom, which refrain from any direct questioning by immigration authorities and prefer written submissions by legal representatives resulting from multiple, child-friendly interviews, prevent children from having a voice? How should states construe the child rights principle that "the child . . . capable of forming his or her own views [should have] the right to express those views freely in all matters affecting the child"?⁸⁸ Indirect representation of young children's views by advocates and guardians may be preferable to an obligation to appear before formal a decision maker. Older children, however, may benefit from the opportunity to directly express their views in a non-adversarial setting, particularly if they are afforded competent advice in preparing for the interview. Recent developments in participatory child rights, which emphasize the importance and impact of direct child engagement,⁸⁹ may lead to different conclusions than those from the more protective approach, which substitutes an adult's voice for that of the child. The dramatic impact of first person narratives by some of Arendt's children illustrates the point.⁹⁰ No sustained debate on the merits of these differing approaches has taken place within the advocacy or policy communities, nor is it clear which outcome is more in accordance with a child rights mandate. The issue illustrates the challenges of translating Arendt's children's rights in law into rights in practice, a challenge that is not only political but also conceptual. As this example illustrates, crafting the right to have rights for various children, who are confronting imponderable variables in unfamiliar surroundings, is not a mechanistic rolling out of pre-established entitlements but an evolving toolkit of strategies specifically tailored for change. Efforts to overcome these rights challenges are in their infancy.

88. CRC, *supra* note 5, art. 12.

89. See, e.g., GERISON LANSDOWN, INT'L INST. FOR CHILD RIGHTS & DEV., EVOLVING CAPACITIES AND PARTICIPATION (n.d.), available at <http://web.uvic.ca/iicrd/graphics/CIDA%20CAP%20Report%20-%20-%20Evolving%20Capacity%20and%20Participation.12.03.pdf> (prepared for the Canadian International Development Agency Child Protection Unit).

90. WOMEN'S COMM'N FOR REFUGEE WOMEN & CHILDREN, PRISON GUARD OR PARENT?: INS TREATMENT OF UNACCOMPANIED REFUGEE CHILDREN (May 2002), available at http://www.womenscommission.org/pdf/ins_det.pdf; AUSTRALIAN HUMAN RIGHTS COMM'N, A LAST RESORT? NATIONAL INQUIRY INTO CHILDREN IN IMMIGRATION DETENTION (2004), available at http://www.hreoc.gov.au/human_rights/children_detention_report/index.html.

82. For a general discussion of age determination within the UK asylum system, see BHABHA & FINCH, *supra* note 37, at 55-65.

83. R v. London Borough of Merton, [2003] EWHC 1689 (Admin).

84. CRC, *supra* note 5, arts. 3, 12.

85. ROYAL COLLEGE OF PAEDIATRICS AND CHILD HEALTH, THE HEALTH OF REFUGEE CHILDREN: GUIDELINES FOR PAEDIATRICIANS ¶¶ 5.6, 5.6.3 (1999).

86. BHABHA & FINCH, *supra* note 37, at 56, 57.

87. Andy Tate, *X-Ray Verdict Put on Hold*, DENTISTRY (U.K.), 21 Dec. 2007, available at http://www.dentistry.co.uk/news/news_detail.php?id=915.

VII. OUTCOMES OF RIGHTLESSNESS:

ARENDT'S CHILDREN IN THE SPACE OF EXCEPTION

A balance sheet of the right to have rights for Arendt's children caught up in asylum adjudication in developed states yields mixed outcomes. On the one hand, children's rights in international law have had some influence on the formulation of state policies and practices in some of the countries examined, for example, with respect to holistic age determination procedures or appointments of guardians. These rights also have found their way into the adjudication of children's asylum cases through the development of the notion of child-specific persecution—gang violence, child abuse, forced marriage, recruitment as child soldiers⁹¹—as a strategy for applying to children the more generic concept of “well founded fear of persecution” that defines a refugee in international law.⁹²

Yet, the predictability and uniformity of treatment that one would expect of a rights-respecting regime is still largely absent. In addition to the lack of a comprehensive guardianship system for Arendt's children and the devastating consequences that brings for successful realization of legal rights or social acculturation, there is the more generalized and pervasive climate of suspicion that permeates developed states' approaches to Arendt's children. For example, in the United Kingdom, this climate of suspicion results in extraordinarily high refusal rates for child asylum applications—only 2 percent granted in 2004 and 5 percent in 2005.⁹³ The lack of a rights-respecting framework has also led to policies of forcibly returning children to their countries of origin, even when no best interest assessment has taken place. Plans to implement such a system in Albania are reported to be well advanced.⁹⁴ But the most serious and lingering problem is that many of Arendt's children end up in detention—whether, as in the United Kingdom, because their age is disputed or because this is the policy of the destination country. Detention has devastating effects on children, not only because of its harshness and inappropriately punitive impact but also because of the indeterminacy and isolation that accompany it. It is the clearest example of the consequences of functional statelessness and of the impact this status has on rights access. For some children, detention in developed destination states follows refugee camp life or the rigors of street life in their regions of origin. This is the experience of a child held in a US “secure facility” who had a pending asylum claim:

91. BHABHA & CROCK, *supra* note 81, at 159.

92. Convention Relating to the Status of Refugees, *supra* note 2.

93. BHABHA & FINCH, *supra* note 37, at 127.

94. *Id.* at 136–37.

My first couple of days there, I didn't like it. . . . I couldn't sleep. At 5 a.m. when they opened the cells for us to take showers, there was a table with clothes assigned to us by name. It didn't take into account our size, so I got shoes that didn't even fit me. . . . The rights we had in this facility depended on what color our shirt was. After three days, I had a gray shirt and the right to sit and eat with others. . . . I asked if I could call my family, but they told me not until I had been there for 25 days was I allowed to make a call. . . . Sometimes at night when it became very hot—they left the lights on—we would take off our shirts. We would be yelled at because they wanted us to wear our shirts so they would know what color they were and what privileges we had.⁹⁵

Across the Atlantic, in the southern Mediterranean, pressures to rigidly enforce immigration control in a security driven political environment lead to similarly coercive situations. North African children trying to escape from the child immigration detention in Spain have reported being hit by the staff when caught, as described by a thirteen-year-old Moroccan boy to Human Rights Watch:

One time we escaped, three of us, when a boy took a piece of metal and broke the door [of the punishment room]. One of the older boys caught us and hit us. They took us and put us in another room and locked the door and then [one of the educators] came and hit us with a baton like the police use. He hit me on the head and the face and leg.⁹⁶

These arbitrary detention processes, apparently beyond the reach of domestic structures of accountability or the international oversight of monitoring bodies, such as the Committee on the Rights of the Child, function according to a completely different metric of “rights.” The situation recalls Giorgio Agamben's provocative analogy between the treatment of refugees in camps and the archetypal experiment of encampment, the concentration camp: “The paradoxical status of the camp as a space of exception must be considered. The camp is a piece of land placed outside the normal juridical order, but it is nevertheless not simply an external space. . . . The camp is thus the structure in which the state of exception—the possibility of deciding on which founds sovereign power—is realized *normally*.”⁹⁷ This is the extreme situation of rightlessness—the normalized state of exception—which governs the status of Arendt's children in detention centers at the periphery of Europe or in the heart of the US desert. Like children detained in airport facilities or border lockups, these children, though firmly within the confines of the state, nevertheless exist in a liminal space outside it.

95. JACQUELINE BHABHA & SUSAN SCHMIDT, SEEKING ASYLUM ALONE: UNACCOMPANIED AND SEPARATED CHILDREN AND REFUGEE PROTECTION IN THE U.S. 88 (2006).

96. HRW, *supra* note 40, at 15.

97. GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE 169–70 (Daniel Heller-Roazen trans., 1998).

If human rights in general, and children's rights in particular, are essentially about redistributing political justice and social/economic resources in favor of the disadvantaged, then the most effective and visible positive outcome is a treaty that gives individuals the right to challenge state failure to implement their rights by bringing a case before a court. The CRC does not afford this opportunity, but other human rights treaties do, and in the process of using them, advocates make reference to the children's rights principles of the CRC. Of course, the Moroccan children in Ceuta, off the African Mediterranean coast, or the sub-Saharan children on Lampedusa, off the coast of Italy, have no access to effective legal representation. That is what the normalized state of exception is—a space outside the law. But some of Arendt's children have managed to capitalize on their rights by using human rights instruments and courts. These litigation successes provide some support for the general claim that these children can assert a right to rights. Retrospectively, at least, gross violations that come to light are recognized as such. Sometimes legal strategies do appear to deliver a right to rights.

VIII. AN EXAMPLE: TABITHA—THE TIP OF AN ICEBERG

The recent case of Tabitha Kaniki Mitunga, a five-year-old citizen of the Democratic Republic of Congo (DRC) who found herself alone in Belgium, is emblematic. Tabitha is one of the many thousands of Arendt's "left behind" children.⁹⁸ Her mother fled the DRC as a refugee after Tabitha's father was killed, and Tabitha continued to live in the DRC with relatives while her mother sought asylum in Canada. Once her mother was able to legally bring Tabitha to join her, she asked her brother, a Dutch national living in the Netherlands, to collect the child. At the airport in Brussels, despite her age, Tabitha was separated from her Dutch uncle, who tried unsuccessfully to claim that he was her father in order to keep her with him. Because she was traveling without documents, Belgian authorities detained her in the remand center near the airport, where she spent two months in the presence

98. This is a category that applies to a very diverse group of children whose parents leave home in search of work or safety, often planning to reunify by returning home or sending for their children to join them. As stated above, not all "left behind" children are functionally stateless; those whose parents are migrant workers sending back remittances and eventually planning to return may be in a relatively satisfactory situation. (The picture is complex, and the evidence on the impact of parental migration on children left behind shows that while some groups benefit from the enhanced income and related opportunities, others suffer from isolation, lack of supervision, and other difficulties.) However, children whose parents are refugees and who are left behind pending family reunification are likely to be marginalized by the home state and to lack access to protection and fundamental rights. In this sense, they too can be considered "Arendt's children."

of unknown adults. During this time, her frantic mother tried to secure her release, and lawyers applied (without receiving any response from the authorities) for her to be placed in foster care. Eventually, the child was deported back to the DRC with no investigation into the suitability of arrangements for receiving her. No guardian was appointed, but an air hostess was assigned to look after her on the return flight, and a DRC official took charge of the child only after she waited six hours at the Kinshasa airport.

Tabitha's ordeal illustrates the effect of functional statelessness on migrant children when the state lacks a safety net of rights-respecting procedures. Without the automatic appointment of a guardian to represent Tabitha's legal rights, Belgium (the capital seat of the European Union) functioned as a state of exception, beyond the pale of the law. Considering that there are approximately 100,000 unaccompanied or separated Arendt's children presently in Europe, a high likelihood exists that others are exposed to comparable treatment. Fortunately, because of Tabitha's competent and vigilant mother, her case came to light and eventually found its way to Europe's highest human rights court. In October 2006, the European Court of Human Rights commented on the gratuitous *vide juridique* or legal vacuum in which the Belgian authorities' action had placed Tabitha, criticizing the prolonged and abusive detention, and ruled that Tabitha's treatment by the Belgian authorities amounted to "inhuman treatment," a violation of Article 3 of the ECHR.⁹⁹ The Court also found Belgium in violation of several other articles of the ECHR.¹⁰⁰ Breaking with the European Court's custom of low financial awards, it awarded Tabitha and her mother a total of €35,000 in addition to reimbursement of their significant legal costs.

Like thousands of other undocumented migrants per year, Tabitha had been detained in Belgium's notorious no man's land detention facilities for several months. As a result of this case, changes have been made to Belgian law, which now prohibits the detention of unaccompanied child migrants and requires the appointment of a guardian in each case,¹⁰¹ propelling Belgium from one of the least to one of the most rights-respecting EU states for Arendt's children.

99. *Mayeka v. Belgium*, App. No. 13178/03, 2006–XI Eur. Ct. H.R.

100. *Id.* ¶¶ 87, 105, 114. See European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 Nov. 1950, arts. 3, 5(1), 5(4), 8, 213 U.N.T.S. 221, Europ. T.S. No. 5 (entered into force 3 Sept. 1953).

101. Programmawet of 24 Dec. 2002, Voogdij over niet-begeleide minderjarige vreemdelingen [Program Law of 24 Dec. 2002, Guardianship on the Unaccompanied Foreign Minors], Title XIII, Ch. 6 (Belg.). Belgian law allows undocumented migrants to be detained for five months without charge or other legal procedures. Each time the migrant resists removal or deportation, the clock restarts. As a result, many migrants endure long periods in this state of exception, including the 1,000 to 2,000 unaccompanied minors who arrive in Belgium each year. See *Platforme Mineurs en Exile*, available at <http://www.mena.be>.

Tabitha's case can be contrasted with a 1996 decision of the European Court, *Nsona v. Netherlands*,¹⁰² in which the Court considered the applicability of the European Convention to the typical circumstances of Arendt's children for the first time. In that case, the Court criticized the speedy removal of a nine-year-old girl from the Netherlands, via Zurich, back to Zaire, and the Dutch government's willingness to hand over all responsibility for her welfare to others, especially the airline, once she left Dutch soil.¹⁰³ However, the Court did not go so far as to find a violation of the ECHR. It held that the arduous journey that the child endured, mostly unaccompanied and including time spent in airport nurseries and with unknown airline officials, was unsatisfactory but did not rise to the level of "inhuman or degrading treatment" required by Article 3 of the ECHR. The Court appears to have penalized the child for the fact that her aunt initially attempted to secure her entry into the Netherlands by means of deceit (using a falsified passport) and yet exonerated the member state for removing her without adequately inquiring into the circumstances that awaited her in Zaire. Like the European Commission on Human Rights, which heard the case prior to its referral to the full Court, perhaps the European Court justices were more concerned by the policy implications of appearing to approve irregular means of securing the admission of unaccompanied child migrants into destination states¹⁰⁴ than by the lack of attention to children's best interest considerations by governments seeking to remove them.

Tabitha's case illustrates the powerful reach of the law, while at the same time highlighting its partial impact. Once the state of exception was subjected to the full scrutiny of the legal mainstream, previously "binding obligations" were translated into new legal provisions, guaranteeing their implementation. On their own, the obligations had proved toothless. Many children, first detained in harsh conditions on the Canary Islands,¹⁰⁵ the island of Lampedusa,¹⁰⁶ and in Malta and Cyprus, and then summarily returned to their home countries without any best interest assessment, would benefit from the implementation of this judgment on their behalf. Other court decisions are relevant to their circumstances as well. For example, the European Court held in 2002:

As regards the types of "treatment" which fall within the scope of Article 3 of the Convention, the Court's case-law refers to "ill-treatment" that attains a minimum

level of severity and involves actual bodily injury or intense physical or mental suffering. *Where treatment humiliates or debases an individual, showing lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of Article 3.* The suffering which flows from naturally occurring illness, physical or mental, may be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible.¹⁰⁷

This statement is a challenge to the human rights advocacy community.

IX. SOCIAL AND ECONOMIC RIGHTS: TO HAVE AND NOT TO HAVE

As a matter of domestic and international law, Arendt's children are entitled to protection from torture and from cruel, inhuman, or degrading treatment or punishment, along with other civil and political harms. As the discussion above has demonstrated, enforcing these protections has not always been possible in practice. Arendt's children are also entitled to several fundamental economic and social rights. With these rights, however, the picture is more complex than it is for civil and political rights. States' implementation of economic and social rights is more divergent, and, until very recently, little attention was paid to the ability of Arendt's children to access these rights. As the number of Arendt's children has grown, their length of residence as independent or unaccompanied child migrants has increased, and the determination of destination states to remove them to their countries of origin has escalated. Therefore, the access of Arendt's children to effective economic and social rights protections has become a central concern.

Discriminatory attitudes lead to exclusionary pressures to reduce these children's access to basic child protections in different ways. Interestingly, in some countries such as Denmark, this has resulted in de jure differences in eligibility for health care, which are not followed in practice by health care providers.¹⁰⁸ More common is the converse situation, where legal entitlements are unrealized in practice, sometimes for the reasons already discussed. For example, in December 2007, the UK government announced plans to pilot

102. *Nsona v. Netherlands*, App. No. 23366/94, 1996-V Eur. Ct. H.R. 1979

103. *Id.* ¶ 103.

104. Ursula Kilkelly, *Nsona v. the Netherlands: The Treatment of Minors and the European Convention on Human Rights*, 8 INT'L J. REFUGEE L. 640, 646 (1996).

105. *Canary Islands Face Migrant Crisis*, AL JAZEERA, 26 July 2007, available at <http://english.aljazeera.net/NR/exeres/14F3FEC3-052C-4D6B-B969-0AE7059A9D3F.htm>.

106. See, e.g., Rutvica Andrijasevic, *Lampedusa in Focus: Migrants Caught Between the Libyan Desert and the Deep Sea*, 82 FEMINIST REV. 120 (2006).

107. *Pretty v. U.K.*, App. No. 2346/02, 35 Eur. H.R. Rep. 1, ¶ 52 (2002) (emphasis added) (citations omitted).

108. For example in February 1995, the CRC Committee commented, in its final observations on the report submitted by Denmark, that rejected child asylum seekers still in the country had "their rights to health care and education provided de facto but not de jure." *Concluding Observations of the Committee on the Rights of the Child: Denmark*, supra note 38, ¶ 18. The Committee considered this situation "not fully compatible with the provisions and principles of articles 2 and 3 of the Convention." *Id.* ¶ 14.

a new, improved scheme for children under state care, which would allow them to remain in foster care until age twenty-one, but at the same time it proposed measures to place unaccompanied minors in more independent living from the age of sixteen. As a member of the House of Lords remarked, "Sadly, the proposition appears to have more to do with preparing the child for removal than with meeting the young person's needs."¹⁰⁹ Moreover, there is alarming evidence of children being trafficked to work under exploitative conditions,¹¹⁰ begging or prostituting themselves on the streets of Western cities, and lacking access to education, shelter, or adequate health care.¹¹¹ At the same time, the desperation of many of Arendt's children to leave their home countries and indigent families and try for a better life with the possibility of education or employment elsewhere complicates the simple (sometimes convenient) official assumption that their "best interests" are automatically served by returning them to their countries of origin.¹¹² Widespread child abuse, grinding poverty, and lack of opportunities must surely compel the immigration and welfare officials making child repatriation decisions to question their assumptions and engage in individualized, evidence-based best interest assessments tailored to the circumstances of each case. As Arendt remarked with prescience half a century ago, "Nonrecognition of statelessness always means repatriation, *i.e.*, deportation to a country of origin."¹¹³ A first-person account of the serious push factors driving a fifteen-year-old Romanian to leave home follows:

I was the youngest of all my brothers. I did nothing there. . . . At ten, I was all alone. My brothers, they had all left, traveled to Germany, Austria, Italy. . . . I was all alone. I did nothing. So I said: "I have nothing here." My father and mother, what could they say to me? My father, he has a farm. I had to work with him. Are you mad? . . . My father came to me from time to time, slapped me around the head. "Wait. Leave me alone! I'm going." That's how it started. "I'm leaving home."¹¹⁴

The reality of poverty, child abuse, and lack of opportunities reinforces the determination to exit, to make a bid for adventure, to "put some air in

109. Maria Ahmed, *Peers Want Equal Status for Asylum-Seeking Children*, Communitycare.co.uk, 6 Dec. 2007, available at <http://www.communitycare.co.uk/Articles/2007/12/06/106693/peers-want-equal-status-for-asylum-seeking-children.html>.
110. Save the Children Italia, *L'Identificazione dei minori vittime di tratta e sfruttamento* [The identification of child victims of trafficking and exploitation] (draft report, on file with author).
111. For an excellent collection of first person narratives by children in these circumstances in France, see VASSORT, *supra* note 36.
112. I am grateful to Elena Rozzi for drawing my attention to this issue and usefully illuminating it in her unpublished article, *La valutazione dell'interesse del minore nella scelta tra accoglienza in Italia e rimpatrio* [The evaluation of the best interests of the child in the choice between residence in Italy and removal] (May 2008).
113. ARENDT, *supra* note 1, at 279.
114. VASSORT, *supra* note 36, at 11 (author's translation).

your head,"¹¹⁵ even if the journey is known to be arduous, the risks great, and the guarantees of success minimal.

Every day in the port of Tangiers, at any time of the day or night, a fierce battle takes place; like a flock of birds, dozens of children try to squeeze into a trailer, a container or some other vehicle, with the sole objective of reaching Europe. The police pursue them relentlessly, and beat them up if they catch them. . . . They persist, constant, another time. . . . Some have made the return journey several times.¹¹⁶

And the numbers show no signs of abating. According to the authorities in the Canary Islands, for example, from 346 children arriving unaccompanied on the island in 2003, the number grew to 829 in 2006 and reached 931 by December 2007.¹¹⁷ Some have called this increasing flow of child and teenage exiles, this flight from the hopelessness of "ados,"¹¹⁸ a "third wave" of contemporary migration, following the mid-twentieth century migration led by single men and the later pattern of mass female migration.¹¹⁹ Certainly, the decision to leave home in search of opportunity and livelihood complicates the child protection challenge facing law enforcement and welfare agencies. Because their migration is fueled by a desire to work, large numbers of Arendt's children placed in open child welfare shelters or institutions leave shortly after their placement. For example, the Caritas reception center for migrant youth in Rome reported in 2005 that about 80 percent of accommodated minors left without authorization.¹²⁰ Like previous generations of

115. "Tu vas rester ici comme un paysan? Ors un peu. Va voir d'autres pays. Mets de l'air dans ta tête. Meme si on n'arrive pas la première fois, on va arriver un jour." *Id.*
116. El Mirador De Tánger, A los niños les mataron los pájaros (19 Dec. 2007), available at <http://blogs.20minutos.es/oriente-occidente/post/2007/12/19/a-niaaos-les-mataron-paajaros> (author's translation, with thanks to Ana Colbert). See generally Col-lectiu DRARI d'Investigació Acció Participativa pels Drets de l'Infant, available at <http://www.DRARI-Col-lectiu-IAP-Drets-Infant.blogspot.com>.
117. Dory Merino, *Canarias alcanza la cifra récord de 931 menores extranjeros acogidos en centros*, *El Día* (Islas Canarias), 12 Dec. 2007.
118. French patois abbreviation of "adolescents."
119. "Il y a eu la première vague des migrants dans les années 60, des hommes seuls. Puis, les femmes ont rejoint les hommes, c'est la 2ème vague. Voici aujourd'hui la 3ème vague : les jeunes, enfants ou ados. Ils sont toujours plus nombreux à s'exiler seuls vers une vie qu'ils imaginent meilleure. Ils ont le plus souvent entre 15 et 18 ans, mais ils sont aussi âgés parfois d'à peine 10 ou 12 ans." ["There was the first wave of migrants during the sixties, single men. Then, women joined the men, that was the second wave. Today we have the third wave: young people, children or adolescents. There are always more of them, exiling themselves towards a life they imagine will be better. They are usually between 15 and 18, but sometimes they are only 10 or 12."] Television Suisse Romande, *L'Exil a 15 Ans*, 21 Dec. 2007, available at <http://www.DRARI-Col-lectiu-IAP-Drets-Infant.blogspot.com> (author's translation).
120. PROGETTO EQUAL PALMS, "PERCORSI DI ACCOMPAGNAMENTO AL LAVORO PER MINORI STRANIERI NON ACCOMPAGNATI," PRATICHE DI ACCOGLIENZA I: AGGANCIO, INSERIMENTO, MEDIAZIONE E RIMPATRIO 7 (author's translation).

unwanted but ultimately employable migrants,¹²¹ these children frequently end up in the most exploited occupations, such as agricultural laborers, factory hands, prostitutes, or petty criminals, when other options are not available. To use Mae Ngai's phrase, they constitute an imported "proletariat outside the polity."¹²² Save the Children Italy has described the recruitment conditions of some of these children: Adolescent and post-adolescent males of Maghreb and sub-Saharan origin employed in the agricultural sector for primarily seasonal work, particularly in Puglia, Calabria, and Sicily. Normally the employer uses recruiters (called corporals) to make daily contact with the workers (including the minors) for work in the black economy at wages far below union rates and without required security guarantees. In addition, the "corporal" normally supervises the conduct of work, using extreme verbal insults which undermine the workers' dignity to accelerate the pace of work as much as possible (preventing breaks or pauses, even in very adverse weather conditions) and demands from each worker a percentage of daily earnings. The contact between the recruiter and the minor takes place in public places where the workers gather every morning waiting for the "corporal," who only offers work on a daily basis.¹²³

Again a complex "best interest" calculus arises, one not yet adequately explored by officials and advocates engaged in the issues. Some state authorities, in the United States and Belgium¹²⁴ for example, have resorted to locked shelters to prevent the escape of unauthorized child migrants. This detention is also justified by a concern to protect the minors from traffickers or other sources of exploitation. Detention for protection is a suspect approach, discredited in most situations: victims of domestic abuse and children at risk of abduction are not incarcerated. One therefore can only wonder whether immigration control mandates contribute significantly to these policy choices. On the other hand, those such as the Italian and Spanish authorities, who do not detain unauthorized child migrants, acknowledge that a best interest calculation might justify more stringent supervision measures, as large proportions of at-risk children, many suspected of having been

121. An interesting comparison, from a quite different time and place, can be made with Filipino migrants to the United States in the 1920s: "Despite official efforts to discourage Filipinos from traveling to the United States, migration increased dramatically in the late 1920s. . . . In California, Filipinos, along with Mexicans, became the mainstay of migratory agricultural labor." NGAI, *supra* note 13, at 103–04.

122. *Id.* at 13.

123. SALVATORE FACHILE, *SAVE THE CHILDREN ITALIA, L'IDENTIFICAZIONE DEI MINORI VITTIME DI TRATTA E SFRUTTAMENTO* (2007); *SAVE THE CHILDREN ITALIA, PROGRAMMA AGIS 2005—DEVELOPMENT OF A CHILD RIGHTS METHODOLOGY TO IDENTIFY AND SUPPORT CHILD VICTIMS OF TRAFFICKING*, JLS/2005/AGIS/045, at 31–32 (2007).

124. Personal communication with Gaele Buysschaert, Belgian Representative, Belgium UNICEF National Committee Meeting: Children on the Move (29–30 Nov. 2007). UNICEF Belgium, personal communication, Zurich meeting.

trafficked, disappear from state provisions within days of being placed.¹²⁵ There is an acute tension between the infantilization of autonomous youth making decisions in suboptimal situations and the dereliction of duty toward exceedingly vulnerable child populations liable to severe abuse. Moreover, even if it were possible for destination states to establish that repatriating the child would be in his or her best interests, the country of origin may pose obstacles. Senegal, for example, has recently refused to accept the return of some of its irregular minor migrants because lack of birth registration and adequate documentation makes it impossible for the Senegalese authorities to confidently reunite them with their families.¹²⁶ Arendt's children's functional statelessness converts them into virtual citizens from the perspective of the home country and into stateless illegals from that of the host state.

Despite these impediments, international law clearly establishes a limited set of economic and social rights that are binding on states, even for their most "impossible subjects," to use Ngai's haunting term. Among these obligatory rights, two are key for Arendt's children: (1) "primary education shall be compulsory and available free to all," and (2) there should exist recognition of everyone's right to "the enjoyment of the highest attainable standard of physical and mental health."¹²⁷ States have interpreted their obligations in different ways.

X. A COMPARATIVE EDUCATION SNAPSHOT

As a matter of widely respected international law, primary education must be compulsory and freely available to all children, irrespective of their status. States also are encouraged to make secondary education accessible to all.¹²⁸ Preschool and tertiary education do not fall within the scope of these protections. Most states have established comprehensive entitlements for Arendt's children that match those of domestic children and mirror the obligations set out in international law.¹²⁹ This is certainly true in the European Union,

125. Ireland has faced a similar problem. Over the last seven years, 388 children placed in the care of the Irish authorities as suspected victims of trafficking have gone missing and have never been traced. Stanislaus Kennedy, *Who Cares About the Disappeared Children?*, IRISH TIMES, 23 May 2008, available at <http://www.irishtimes.com/newspaper/opinion/2008/0523/1211461644896.html>.

126. Dory Merino, *Senegal tiene dificultades para aceptar a sus menores acogidos en Canaria*, EL DIA (Islas Canarias), 31 Dec. 2007.

127. International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, arts. 13(2)(a), 12(1), U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (entered into force 3 Jan. 1976); CRC, *supra* note 5, art. 24.

128. ICESCR, *supra* note 127, arts. 2(2), 13; CRC, *supra* note 5, art. 28.

129. For a survey of six EU member states, see Daniel Senovilla Hernández, *supra* note 80, at 38.

where member states are signatories to the CRC. For example, all migrant minors in Italy, whether authorized or not, enjoy the same legal right/obligation to attend compulsory education as the domestic population,¹³⁰ as do those in Spain, France, the United Kingdom, Belgium, and Germany. In practice, however, access to educational facilities may be problematic for a variety of reasons. Sometimes parents require children to work, preventing them from attending school. This is true of Roma children, many of whom are now to be found begging, cleaning car windows, or prostituting themselves on the streets of large cities. "Roma children from Romania are led into prostitution [in Italy] by adults, often belonging to the same family, who in addition to being responsible for organizing and running their work, keep all the earnings."¹³¹

Others are victims of trafficking, some in conditions of absolute servitude where their movements are closely controlled by their exploiters. Yet others, destitute and living on the streets, have little access to public services and facilities, such as schools, welfare support, and health care. A young, undocumented Albanian migrant in France describes how this happens:

The best thing is school. Yes, school. In Tirana, I did well in school, I spoke Italian, English, Albanian. I also speak a bit of Turkish. I had good grades. Then, because of my family problems—I am a bit sensitive, I can't stand misery—I was forced to leave home. I never imagined I'd end up in France, because already in school French was difficult and I didn't like it. . . . Then I said to myself, this is my fate, you've got make the best of it and move on. When my family problems started—my mother had problems with my father—I couldn't go to school. I was good but I just couldn't go to school at all. If you don't go to school, you just hang around in the street; if you hang around without money, you end up stealing, and you'll be picked up and land in trouble. No one wants to steal, I just decided to leave. I didn't speak a word of French when I arrived . . . no papers; it'll be a stroke of luck if I am allowed to stay.¹³²

Despite the existence of a general right to education for migrant children, obstacles to securing it in practice are common. The situation in Poland illustrates this point. According to the 2005 Amendment to the Act on Educational Systems, children of foreigners have the right to education in Poland, and schooling is obligatory until the age of eighteen. As a result, children of parents whose status has become "irregular" (e.g., through the overstaying of visas, a failure to prolong a permit, or overdue tax payments) can enroll in public primary schools without any obstacles. However, other categories of Arendt's children in Poland do not have such access. Children of asylum seekers and individuals granted "tolerated stay permits" are granted the right

130. Consolidated Text 286/98 on Immigration, art. 19, § 2(a) (Italy).

131. Fachile, *supra* note 123, at 15.

132. VASSORT, *supra* note 36, at 46–47 (author's translation).

to education on similar conditions as Polish citizen children as long as they pass a Polish language test before being enrolled. Undocumented children have access to public schools but have to pay appropriate fees.¹³³

Because the United States has not ratified the International Covenant on Economic, Social and Cultural Rights, or the CRC, international law does not impose obligations on the US government regarding core social and economic rights. Nevertheless, as a result of a leading US Supreme Court case decided in June 1982,¹³⁴ all children in the United States, whatever their status, are entitled to state-funded public education for primary and secondary schooling. A statement by Justice Brennan in that case carries considerable contemporary relevance: "It is difficult to understand precisely what the State hopes to achieve by promoting the creation of a perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime."¹³⁵ Interestingly, the Court also argued that "charging tuition to undocumented children constitutes a ludicrously ineffectual attempt to stem the tide of illegal immigration."¹³⁶ Despite a virulent resurgence of nativism in the United States and a dramatic increase in the population of undocumented migrants,¹³⁷ it appears that a majority of the US population still support this inclusive policy,¹³⁸ which may benefit the approximately 7,000 unaccompanied migrant children entering the United States each year.¹³⁹ However, the current climate of growing immigration enforcement detracts from this positive legal framework and

133. ZORANA MEDARIĆ & ANDREJA KOPITAR (DAPHNE/EUROPEAN COMM'N), THE RISK GROUP OF UNACCOMPANIED MINORS: PROTECTION MEASURES IN AN ENLARGED EUROPEAN UNION, COUNTRY REPORT: POLAND 18 (2007). This follows Council Framework Decision 629/JHA, 2002 O.J. (L 203) 1, and Council Directive 2004/81/EC, 2004 O.J. (L 261) 19. See also Polskie Forum Migracyjne, available at <http://www.forummigracyjne.org/pl/aktualnosci.php?news=78&wid=26>.

134. The US Supreme Court held in 1973, in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), that education was not a human right. Following this ruling, the Texas education code was amended to allow school districts to charge tuition for undocumented children in primary and secondary schools. Michael A. Olivas, Plyler v. Doe, the Education of Undocumented Children, and the Polity, in IMMIGRATION STORIES 197, 198–202 (David A. Martin & Peter H. Schuck eds., 2005). Nine years later, the Supreme Court revisited the question and reversed in the key case of *Plyler v. Doe*, 457 U.S. 202 (1982).

135. *Plyler*, 457 U.S. at 230.

136. *Id.* at 228.

137. The current undocumented population is estimated at an all time high of between 11.5 and 12 million, of which an estimated 1.8 million are under eighteen. PASSEL, *supra* note 24, at 2, 8.

138. A March 2006 survey by the Pew Research Center found that 71 percent of Americans support allowing the children of illegal immigrants to attend public schools. PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, AMERICA'S IMMIGRATION QUANDARY 26 (2006), quoted in Note, *Federal Funding for Newcomer Schools: A Bipartisan Immigrant Education Initiative*, 120 HARV. L. REV. 799, 813 (2007).

139. National Center for Refugee and Immigrant Children, available at <http://www.refugees.org/article.aspx?id=1260>.

impacts the rights of Arendt's children. Evidence reveals that the escalation of workplace raids and arrests in particular¹⁴⁰ is having an impact, not only on family unity (with increasing numbers of deportations) and family security (with growing fear, trauma, and anxiety) but also on children's education. Although no systematic research exists, reports suggest that fear of further searches and arrests has led to declining school attendance in several school districts in North Carolina.¹⁴¹

XI. THE CHALLENGE OF SECURING HEALTH CARE¹⁴²

Similar to the right to education, as a matter of international law, all children are theoretically entitled to comprehensive health care on par with the domestic population.¹⁴³ The European Court of Human Rights has even held that denial of the right to health for irregular migrants may constitute a violation of Article 3 of the European Convention, which prohibits inhuman and degrading treatment: "The suffering which flows from naturally occurring illness, physical or mental, may be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether from *conditions of detention, expulsion or other measures*, for which the authorities can be held responsible."¹⁴⁴

In practice, however, the health needs of some of the most vulnerable groups, including undocumented children, are elusive. This makes catering to them very challenging for policymakers and health care providers. In some cases, problems arise because of discriminatory or administrative barriers. There are reports of irregular children living outside shelters or reception centers in Spain who have been denied treatment because they do not have documents and are not accompanied by official caregivers.¹⁴⁵ As stated earlier, the British government shocked observers by ordering the removal of an unaccompanied three-year-old child with a serious kidney disorder while her mother was in immigration detention. The child, a US citizen, was informed that she was ineligible for medical treatment because she was an alien. The European Court granted an injunction to prevent the

140. Arrests have risen from 445 in FY 2003 to over 5000 in FY 2008. U.S. Immigration and Customs Enforcement, U.S. Dep't of Homeland Security, Fact Sheet: Worksite Enforcement (25 Nov. 2008), available at <http://www.ice.gov/pi/news/factsheets/worksite.htm>.

141. See generally Elizabeth de Ornellas, *Immigrants Feel the "Shadow of Fear,"* DAILY TAR HEEL, 30 Oct. 2007, available at <http://www.dailytarheel.com/2.3568/1.160005>.

142. I am extremely grateful to Dr. Natalie Mooten for her meticulous research assistance with this section.

143. CRC, *supra* note 5, art. 24.

144. *Pretty v. U.K.*, App. No. 2346/02, 35 Eur. H.R. Rep. 1, ¶ 52 (2002) (emphasis added).

145. HRW, *supra* note 40, at 2.

child's removal pending an investigation of the case.¹⁴⁶ In many other cases, Arendt's children fail to secure necessary health care because of language or other cultural barriers or because they are unable to comply with other administrative requirements. In some cases, the denial of access to health care is a consequence of domestic legal restrictions, like in Europe, where "there is a growing tendency . . . to restrict access to health care for undocumented migrants and to reinforce the link between access to health services and immigration control policies."¹⁴⁷

EU member states have adopted a broad range of approaches to providing health care for undocumented populations including children. The spectrum includes policies in Austria and Sweden, which generally require payment for treatment (with some exceptions, including treatment for rejected child asylum seekers), to those in Hungary and Germany, where limited free health care is available, but public personnel have an obligation to inform the authorities about undocumented patients. It also encompasses policies in France, Belgium, and the Netherlands, where undocumented migrants are treated in the mainstream health care system, although a parallel administrative/financial system exists for them. The most protective country is Spain where, despite practical gaps and obstacles, the spirit of the law and much of the practice is generally inclusive.

There are, however, some exceptions to this broadly satisfactory situation. Undocumented children in Ceuta (the Spanish enclave on the northern coast of Morocco) are entitled to health care if they can produce a government-issued health card. The procedure for obtaining a health card makes children completely dependent on the supervisory state officials; identification data has to be verified by social service officials before the document can be issued. According to a Human Rights Watch report:

Ala gives his age as thirteen but he looks younger. When he arrived in Ceuta in the last quarter of 2000, police took him to the Mediterraneo Center, a residential center for children age ten and younger. Though he spent three months at the center before running away he was never issued with a health card. Staff refused to readmit him to the center and he lived on the streets, sniffing solvents and developing several serious health problems. Doctors in the health clinic refused to treat him because he lacked a health card. When HRW interviewed the child a year after he arrived in Ceuta, "he was not receiving medical care and was visibly ill."¹⁴⁸

In Italy, children over age six without a residence permit are not entitled to anything except emergency health care and inpatient care for contagious

146. Verkaik, *supra* note 67.

147. EVE GEDDIE, CHRISTINA OIKONOMOU & MICHELE LeVOY, PICUM, ACCESS TO HEALTH CARE FOR UNDOCUMENTED MIGRANTS IN EUROPE 7 (Nov. 2007).

148. HRW, *supra* note 40, at 20.

diseases.¹⁴⁹ In some cases, even these restrictive entitlements are violated. Thus, according to a report by Médecins du Monde: "In some regions, like Lombardia, children have to pay tickets because pediatricians are wrongly categorized as secondary health care."¹⁵⁰ Moreover, NGOs report significant regional disparities in the provision of health care; in the major cities and where NGO organization is strong, access is easier and standards are higher.

Limiting health care to emergency or urgent care, while narrower than the scope of protection envisaged in the CRC, is in conformity with the position set out in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW):

Migrant workers and members of their families shall have the right to receive any medical care *that is urgently required* for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment.¹⁵¹

However, by limiting health care for irregular migrants to emergency treatment, the CMW seems to establish "narrower [protection of social rights] than corresponding rights afforded to *all persons, including those without legal status*, in general international human rights law as interpreted by the competent treaty bodies."¹⁵² The Parliamentary Assembly of the Council of Europe has identified problems that arise from this restrictive approach:

Irregular migrants, as they are often in a vulnerable situation, have a particular need for the protection of their human rights, including basic civil, political, economic and social rights . . . [S]tates should seek to provide *more holistic care*, taking into account, in particular, the specific needs of vulnerable groups such as children.¹⁵³

Moreover, the interpretation of what counts as "emergency medical care" is inconsistent and ad hoc, both between and within states. The European Committee of Social Rights, the body responsible for monitoring the application of the European Social Charter of the Council of Europe, decided that

a 2002 French law about the rights of undocumented migrants to health care was not sufficiently precise in its use of the term "emergencies and life-threatening conditions." It concluded that the law violated access to health care, especially for irregular children, by restricting its use to emergency and life-threatening conditions.¹⁵⁴ It also has refused to limit medical care to Arendt's children, holding that France had violated the European Social Charter's guarantee of care and assistance to all children: "[L]egislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State Party, even if they are there illegally, is contrary to the Charter."¹⁵⁵ In short, state services do not yet uniformly reflect legal entitlements to economic and social rights for Arendt's children.

XII. ARE CHILDREN CITIZENS?

Tabitha's abusive and traumatic separation from her family by the Belgian authorities, the Albanian boy's lack of access to schooling in France, and the unaffordable health care for migrant children in northern Italy, illustrate some of the many obstacles to rights enforcement that confront Arendt's children. In Tabitha's case, the absence of a responsible adult compounded the disadvantages she faced as a noncitizen, with no country to call her own. The Albanian child could not re-enroll himself in school once he left Tirana; migrant children in Italy have no right to register for the National Italian Health Service and consequently depend on NGOs if their cases fall outside the limited exceptions in domestic law. None of these problems would have arisen had these children been citizens. But, as I suggested earlier, not all of Arendt's children are noncitizens. Citizen children can also find themselves summarily separated from family members, helpless in the face of serious human rights violations. To some extent, this is because the epiphany that took place in the realization and centralization of women's rights following the Bosnian War, the Vienna and Beijing Human Rights conferences, and the concerted and effective activism of a global women's movement, has no equivalent in the children's rights field. As a result, it is not an exaggeration to claim that, in many spheres—geographic, socioeconomic, and normative—children's rights do not translate into effective human rights. In fact, children are disproportionately disadvantaged and neglected with respect to similarly situated adults,¹⁵⁶ as the evidence presented above

154. PICUM, Council of Europe on Health Care for Undocumented Migrants (Mar. 2005), available at <http://www.picum.org/HOMEPAGE/BreakingNews1.htm>.

155. See Int'l Fed'n of Human Rights v. France, Complaint No. 14/2003, ¶ 32, available at http://www.coe.int/t/dghl/monitoring/socialcharter/complaints/cc14merits_en.pdf.

156. In the United States, The Nation's Food Bank Network provides "emergency" service for 24 to 27 million people each year. About 36 percent of them are under the age of

149. *Id.* at 52.

150. *Id.* at 55.

151. Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted 18 Dec. 1990, U.N. GAOR, 69th plenary mtg., art. 28, U.N. Doc. A/RES/45/158 (1990) (entered into force 1 July 2003) (emphasis added).

152. Ryszard Cholewinski, Protection of the Human Rights of Migrant Workers and Members of Their Families Under the UN Migrant Workers Convention as a Tool to Enhance Development in the Country of Employment 14 (2005), available at <http://www2.ohchr.org/english/bodies/cmw/docs/cholewinski.doc> (emphasis added).

153. Parliamentary Assembly of the Council of Europe Resolution 1509, Human Rights of Irregular Migrants, ¶¶ 5, 13.2 (2006).

suggests. Law enforcement is carried out by adults and the lack of a child-centered focus needs to be specifically targeted. Consider the slow progress towards recognition of women's rights, which stemmed largely from the male-dominated perspective in law enforcement, an instructive precedent for child rights advocates today.

Moreover, as with women, claims arising out of the special, unique circumstances of children have been neglected. For example, because children's agency in migration generally is not acknowledged, children are considered dependent rather than independent; in other words, the concept of "the child" as an autonomous entity does not exist in immigration law.¹⁵⁷ This reality has some perverse consequences: migrant children traveling alone are more likely to have an illegal status than adults because the law does not accommodate their independent migration. Even citizen children can find themselves functionally stateless within their own country. This seemingly paradoxical situation is the product of two distinctive child characteristics: their prolonged, enforced dependency and their political and legal disenfranchisement.

A clear illustration of this situation can be found in the child's "citizenship deficit." In what sense is a child a "real" citizen?¹⁵⁸ He or she cannot vote or stand for public office. In many countries, a child cannot use his or her citizenship to guarantee continued family life at home. A child's citizenship does not block the deportation, removal, or summary arrest of a noncitizen parent. In other words, it does not protect the child against de facto or constructive deportation. As Bosniak has pointed out, citizenship turns out to have an ambiguous, hybrid, even inconsistent meaning: citizenship status does not convey citizenship rights.¹⁵⁹ Noncitizen adults have the right to permanent residence and access to welfare benefits, irrespective of citizenship—a citizenship right by most accounts. By contrast, citizen children (who have status) lack one of the cardinal rights of citizenship, non-deportability, in the sense just described.¹⁶⁰

The difference between American and European legal protections also evidences an obstacle to rights enforcement. Because an international hu-

eighteen. Almost all recipients are US citizens. America's Second Harvest, *Hunger Study 2006*, available at http://www.hungerinamerica.org/key_findings/.

157. See generally David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEVADA L.J. 1165 (2006).

158. Jacqueline Bhabha, "The Mere Fortuity of Birth?" *Children, Mothers, Borders, and the Meaning of Citizenship*, in MIGRATIONS AND MOBILITIES: CITIZENSHIP, BORDERS, AND GENDER 187 (Seyla Benhabib & Judith Resnick eds., 2008).

159. LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* 14, 30, 37, 38 (2006).

160. Technically, of course, citizen children are not deportable, any more than any other citizen, but the deportability of noncitizen parents nullifies this important protection for affected children.

man rights regime does not oversee the US immigration control system, its exclusionary impetus is much less qualified by rights concerns. The European system, by contrast, has been shaped by the supervision of the European Court of Human Rights. The US test for families resisting deportation on the basis of a child's best interest in staying home allows far less leeway. Whereas citizen adults generally have the right and the ability to bring and keep their noncitizen dependents in their home country, citizen children have no such equivalent right; thus the right to respect for family life is asymmetric.¹⁶¹ Where noncitizen parents of citizen children face removal or deportation (3 million US children have undocumented parents),¹⁶² their children's citizenship generally does not afford any legal protection.¹⁶³ In other words, children's ties to their home country are considered less legally significant than those of adults. Whether this policy is based on a principled presumption of infantile adaptability, or on a pragmatic calculus about the dangers of encouraging reproductive behavior for immigration status, does not matter. The US test is particularly harsh: unless it can be shown that there is "exceptional and extremely unusual hardship"¹⁶⁴ affecting the citizen child, the parent(s) will be removed.¹⁶⁵ The "usual" compassionate factors, such as radical disruption of schooling, linguistic difficulties, loss of kinship and friendship networks, decline in standard of living, and unfamiliarity with new surroundings, are not sufficient to protect family unity. Exceptional situations, such as rare medical conditions untreatable away from the child's home country, are the only impediments to deportation. In normal cases, therefore, the child is forced to confront the Hobson's choice between home and family.

The fallout of a recent immigration raid on a factory in southern Massachusetts starkly illustrates the rightlessness of the citizen child and how he or she becomes one of Arendt's children. Similar raids, both in workplaces and within the homes of migrant workers, have since taken place on a regular basis. On 6 March 2007, the US Department of Homeland Security raided an equipment and clothes factory after months of prior undercover investigation and arrested 361 low-paid workers, who were then taken by plane to detention centers in Texas.¹⁶⁶ These events traumatized several hundred US citizen children whose parents were involved. Most of the arrested

161. Thronson, *supra* note 157.

162. PASSEL, *supra* note 24, at 8.

163. See generally THE URBAN INST., *PAYING THE PRICE: THE IMPACT OF IMMIGRATION RAIDS ON AMERICA'S CHILDREN* (2007).

164. 8 U.S.C. § 1229b(b)(1)(D) (2006).

165. Recognition of the severity of the US test and its devastating fallout for US citizen children led to the proposal of the Child Citizen Protection Act, introduced in Congress in March 2006 by Congressman Jose Serrano.

166. Jason Szep, *Workers Sue U.S. Factory After Immigration Raid*, REUTERS, 15 May 2007.

workers were young Guatemalan women, many single parents. Among the predictable fallout of the raid was the hospitalization of a seven-month-old US baby, dehydrated because of separation from the breast-feeding mother, and a distraught US seven-year-old, who returned home from school to find no trace of his mother. Though many of the women eventually were released from detention pending determination of their cases, the citizenship of their children will have no effect in retaining them in the United States, just as it did not prevent the parents' unnecessary and summary incarceration.

Within Europe, the test for resisting deportation of parents of citizen children is not quite as harsh because European human rights law has tempered some of the draconian policies of member states. Article 8 of the ECHR affords everyone the right to respect for their "private and family life, [their] home and . . . correspondence." It also requires states not to interfere with the exercise of this right except where this is "necessary in a democratic society." Whereas the asymmetry between adults and children in regards to the impact of citizenship on family reunion still exists—adults can bring dependents to join them, but children cannot bring relatives on whom they are dependent to join them—states are required to balance the competing interests of the state in enforcing immigration control and in protecting the individual's right to respect for his or her family life.¹⁶⁷

But, the relative rightlessness of Arendt's children regarding family reunion still persists in Europe. As a rule, states tend to look at retrospective ties to place rather than at prospective disadvantages to which loss of place may lead; so the impact of the loss of ties, familiarity with societal norms and customs, education, and language skills on older children is weighed more heavily than are the similar impacts on younger children. And yet the place of residence has a pervasive influence even for very young children; it affects children's life expectancy, their physical and psychological development, material prospects, and general standard of living. The fact of belonging to a country fundamentally affects a child's family and private life, during childhood and beyond. Yet children, particularly young children, are often considered parcels that move easily across borders with their parents and without particular cost. They inexorably become children with no country to call their own.

A particularly interesting development concerns Romanian child migrants within the European Union.¹⁶⁸ Since the entry of Romania into the European Union on 1 January 2007, nearly all Romanian citizens within it have become de facto non-deportable. As Elena Rozzi points out,¹⁶⁹ this

167. See e.g., *Berrehab v. Netherlands*, App. No. 10730/84, 11 Eur. Ct. H.R. (ser. A) 322 (1988).

168. I am completely indebted to Elena Rozzi for the thoughts and material set out in this paragraph.

169. Personal communication from Elena Rozzi (5 May 2008) (on file with the author).

community status can be considered a form of "semi-citizenship" ("*semi-cittadinanza*") because, even though it does not automatically afford EU citizens access to citizenship of the EU host state, it does severely limit their chances of being deported. Unless public order or security justifies it, or the EU citizens cannot demonstrate the ability to support themselves without reliance on public funds after an initial three months' stay, all EU citizens have an indefinite right to remain in any EU state. This has complex and somewhat paradoxical impacts on the protection of some of the most exploited Romanian child migrants. Save the Children Italy has found that young Romanian prostitutes have been much more difficult to include in social protection programs since their immigration "regularization" because they no longer need to obtain a residence permit to avoid the risk of deportation or removal.¹⁷⁰ Semi-citizenship thus perversely emancipates these Arendt's children from the social support networks with which they might otherwise be forced into contact. This in-between state, both legal and rightless, recalls other such liminal legal positions—of alien citizens, invisible children, and missing girls.

This depletion of children's citizenship, and disregard for the destructive impact of constructive deportation on their lives, are serious indicators of the lack of rights, a lack that sharply distinguishes children from adults. Family reunion is one of the bedrocks of contemporary immigration policy—the major source of legal immigration—and yet children are afforded no independent access to it; as with women in an earlier era, they are assumed to be dependent entities that follow rather than bring in a family. An intention to use a child's immigration status as a basis for adult migration is routinely dismissed as illegitimate, a deceitful abuse of the child as an "anchor." This asymmetry is one example of radical rightlessness for children. In an age of global migration and increased scrutiny of the position of migrants, protection from the possibility of deportation is one of, if not the, cardinal attributes of citizenship. Yet for Arendt's children, this salient citizenship benefit, one of the few that children are theoretically entitled to, is compromised.

XIII. CONCLUSION

Arendt's children regularly live their lives in the zone of exception. Where advocacy is weak, the rights holder weaker still, and political will absent, de facto rightlessness is the norm. Human rights instruments, however, have provided a framework for advancing claims for conceptualizing these children's entitlements apart from the approaches of law enforcement officials and politicians. In some cases, they also have fueled redistribution of

170. PROGETTO EQUAL PALMS, *supra* note 120.

resources and protections, as in the case of Tabitha's claim to family reunion in Canada, expansions in some US jurisdictions of the notion of persecution in refugee law to include child-specific persecution, and European advances in children's asylum processing. More often, the rights enumerated are imperfect or inchoate rights awaiting realization. Children's rights are human rights, but they need much more thought, effort, and political will to function as the tools they were designed to be. As the discussion on the merits of requiring direct interviews of child asylum seekers by state officials demonstrates, the connection between human rights provisions and policies that actually respect rights must be crafted, not assumed. We have developed parts of the initial toolkit and have left it for children—migrant children, stateless children, Arendt's children—to use effectively. Yet when these children choose to further their chances of effectively buttressing their abstract claims to rights, whether by migrating across borders *sua sponte* or escaping from punitive detention "shelters" to create independent living situations, they are punished. They are forcibly returned "home" to their country of origin or are denied access to basic public services.

By virtue of both international law and domestic regulations, the system entitles undocumented migrant children to primary education and health care, even though they lack legal residency status. Their undocumented status does not render them officially rightless.¹⁷¹ For example, foreign nationals generally have rights to public education enshrined in domestic law. Yet, as several of the case studies have demonstrated, in reality, Arendt's children lack access to services because entitlement depends on production of a government-issued document, which migrant children are not given. So the state still retains the monopoly of determining eligibility, despite the universalist aspirations of the human rights tradition.

These children are not rightless because they are disqualified by their age, as is the case for citizen children seeking family reunion, nor are they rightless because they are not recognized as persons before the law, as is the case for children whose birth is not registered. Rather they are rightless because the structures of inequality embedded in society are not adequately corrected by the available resources. This situation is not going to be rectified by the denigration of rights favored by some radical skeptics¹⁷² any more than

by gratuitous recitation of human rights treaty provisions. Clearly Arendt's children depend more on naming, shaming, and aggressive mobilization of advocacy strategies than the general population of children who have parents or fellow citizens watching out for them. Bottom-up mobilization is essential for the success of top-down litigation because without the former the latter is trumped by nativist and xenophobic sentiments, particularly in a post-9/11 climate of suspicion. Thus rights believers have their work cut out for them as opinion-formers, whistle-blowers, and concerned members of civil society. Most of all, they have an obligation to raise and stimulate discussion of the difficult and contentious issues that arise in actualizing migrant children's right to have rights. They need to address the ambivalence that policymakers feel, torn between sympathy and hostility, between a concern to protect and a pressure to punish, rather than minimize or ignore it. Human rights instruments will never deliver on their aspirations without the political honesty and the mobilizing muscle that transform them into live demands. Alas, there are no short-cuts to justice.

171. CRC, *supra* note 5, art. 24; ICESCR; *supra* note 127; Convention Against Discrimination in Education, adopted 14 Dec. 1960, 429 U.N.T.S. 93 (entered into force 22 May 1962). The Committee on Economic, Social and Cultural rights has interpreted the principle of non-discrimination to extend "to all persons residing in the territory of a State part, including non-nationals, and irrespective of their legal status." *General Comment No. 13: The Right to Education*, U.N. ESCOR, Econ., Soc. & Cult. Rts. Comm., 21st Sess., ¶ 34, U.N. Doc. E/C.12/1999/10 (1999). For domestic Spanish law, see Organic Law 4/2000 of Jan. 11, Regarding the Rights and Freedoms of Foreign Nationals Living in Spain and Their Social Integration, as amended by Organic Law 8/2000 of 22 Dec.

172. See, e.g., David Kennedy, *When Renewal Repeats: Thinking Against the Box*, in *LEFT LEGALISM/LEFT CRITIQUE* 373 (Janet Halley & Wendy Brown eds., 2002).