



**PRACTICE ADVISORY**  
**ACLU Border Litigation Project<sup>1</sup>**  
**November 2015**

**REPRESENTING IMMIGRANT CHILDREN**  
**FOLLOWING RELEASE FROM BORDER PATROL CUSTODY**

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**INTRODUCTION**

This practice advisory provides a guide for attorneys working with immigrant children who have previously been detained by U.S. immigration officials and placed in removal proceedings. In light of well-documented abuses and consistently brutal conditions in U.S. Customs and Border Protection (CBP) facilities—including Border Patrol’s infamous detention centers, commonly referred to as the *hieleras*, or “ice boxes”—as well as the U.S. government’s recent efforts to fast track the removal of child immigrants, this advisory encourages attorneys working with formerly detained children to carefully consider how past mistreatment—even commonly reported forms of neglect—by U.S. government officials may impact clients’ eligibility for relief.

Part I of this advisory summarizes the long history of systemic mistreatment of children by U.S. officials, particularly Border Patrol, and cites some of the extensive documentary sources that may be relied upon to bolster the credibility of a client’s testimony of past abuse and/or in support of a child’s application for relief. Part II considers how Border Patrol’s abusive treatment of children in its custody may impact potential forms of legal relief available to immigrant children. Forms of legal relief discussed below include U visa status, Termination and Suppression Motions, and Requests for Prosecutorial Discretion. This advisory also discusses related civil rights actions which may increase clients’ chances of qualifying for immigration relief, including Federal Tort Claims Act (FTCA) actions and administrative complaints submitted to Department of Homeland Security (DHS) oversight agencies, and encourages advocates to coordinate these and other advocacy efforts to prevent more children from being abused in federal custody.

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## I. The Systemic Abuse of Detained Immigrant Children

Countless immigrant children arrive to the United States having already experienced trauma and abuse in their home countries. Many experience additional harms, including sexual assault, robberies, and kidnappings while in transit to the U.S.<sup>2</sup> In far too many cases, the same children experience additional ill-treatment and neglect upon arrival while in government custody—particularly (though not exclusively) U.S. Border Patrol custody.

The deplorable conditions and abuses long associated with Border Patrol hold rooms<sup>3</sup> — frequently referred to as *hieleras* on account of the bone-chilling cold temperatures at which they are maintained—are well-documented. For example, in June 2014, the ACLU and partner organizations submitted an administrative complaint on behalf of 116 children to Department of Homeland Security (DHS) oversight agencies, alleging abuse, mistreatment, and prolonged detention in Border Patrol custody.<sup>4</sup> Nearly one in four children reported physical assault, including sexual assault, beatings, and the use of

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<sup>2</sup> See Erin Siegal McIntyre and Deborah Bonello, *Is Rape the Price to Pay for Migrant Women Chasing the American Dream?*, FUSION (Sept. 10, 2014), <http://fus.in/1zyJDIN>; CTR. FOR GENDER & REFUGEE STUDIES AND KIDS IN NEED OF DEFENSE, *A TREACHEROUS JOURNEY: CHILD MIGRANTS NAVIGATING THE U.S. IMMIGRATION SYSTEM* (Feb. 2014), available at <http://bit.ly/1vH5hQd>; AMNESTY INT’L, *INVISIBLE VICTIMS: MIGRANTS ON THE MOVE IN MEXICO* (2010), available at <http://bit.ly/1DonyKD>.

<sup>3</sup> Abuse of children in the custody of U.S. immigration officials pre-dates the creation of DHS in 2002. See, e.g., DEP’T OF JUSTICE OFFICE OF THE INSPECTOR GEN., REPORT NUMBER I-2001-009: UNACCOMPANIED JUVENILES IN INS CUSTODY (Sept. 28, 2001), available at <http://1.usa.gov/UmJOLa> (“[D]eficiencies in the handling of juveniles continue to exist in some INS districts, Border Patrol sectors, and headquarters that could have potentially serious consequences for the well-being of the juveniles.”); HUMAN RIGHTS WATCH, *DETAINED AND DEPRIVED OF RIGHTS: CHILDREN IN THE CUSTODY OF THE U.S. IMMIGRATION AND NATURALIZATION SERVICE* (Dec. 1998), available at <http://bit.ly/1D4IvnC> (finding roughly one-third of detained children are held in punitive, jail-like detention centers); HUMAN RIGHTS WATCH, *SLIPPING THROUGH THE CRACKS: UNACCOMPANIED IMMIGRANT CHILDREN DETAINED BY THE U.S. IMMIGRATION AND NATURALIZATION SERVICE* (Apr. 1997), available at <http://bit.ly/1ozItLG> (conditions for children in detention “are typically extremely poor” and “violate the children’s rights under international law, the U.S. Constitution, U.S. statutory provisions, INS regulations, and the terms of court orders binding on the INS.”). This advisory focuses on Border Patrol abuse because it is extremely common; as noted *infra*, however, children less frequently report abuse and neglect in the custody of other federal agencies, including the Office of Refugee Resettlement (ORR) and Immigration and Customs Enforcement (ICE). Advocates should not limit their inquiry to a client’s experience in Border Patrol custody, as the strategies discussed herein would apply equally to abuses arising in the custody of those other agencies.

<sup>4</sup> See Letter from ACLU et al. to Megan H. Mack, Officer for Civil Rights & Civil Liberties, Dep’t of Homeland Sec. and John Roth, Inspector Gen., Dep’t of Homeland Sec. 2 (June 11, 2014), available at <http://bit.ly/XqyyOt>. In response to these complaints, officials tended to attribute problems to the large number of children arriving to the United States. See *Unaccompanied Minor Children*, CSPAN, June 12, 2014, available at <http://cs.pn/YWfJEr>. As noted in the ACLU’s letter, however, these complaints were documented between March and May 2014—well in advance of the peak of child arrivals over the summer of 2014—and similar complaints have been reported for years.

stress positions<sup>5</sup> by Border Patrol agents. More than half reported various forms of verbal abuse, including death threats. Roughly the same number reported denial of medical care, including several who eventually required hospitalization. Many children reported being detained without blankets and having to sleep on the floors of unsanitary, overcrowded, and frigid cells, and more than 80 percent described inadequate provision of food and water. Roughly 70 percent of the children were not transferred to Office of Refugee Resettlement (ORR) custody within 72 hours, as required by the Trafficking Victims Protection Reauthorization Act of 2008.<sup>6</sup>

These children's complaints are consistent with hundreds of others, going back years. Published human rights reports include more than 1,500 documented allegations of child abuse and/or neglect in CBP custody since 2008.<sup>7</sup> In response to a 2015 ACLU Freedom of Information Act (FOIA) lawsuit, DHS has identified more than 50,000 pages of records related to complaints of child mistreatment in Border Patrol custody

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<sup>5</sup> See, e.g., *supra* note 4 at 10 (“A CBP official forced J.A. to kneel and hold his hands up against the walls of the holding cell for almost twenty minutes as punishment for laughing. The CBP official screamed at J.A. that the official was ‘the one in charge’ and that J.A. would have to remain kneeling in a stress position ‘until it hurts.’”).

<sup>6</sup> 8 U.S.C. § 1232(b)(3).

<sup>7</sup> See NAT’L IMMIGRANT JUSTICE CTR., UNACCOMPANIED IMMIGRANT CHILDREN: A POLICY BRIEF 3 (2014), available at <http://bit.ly/1o2RT4B> (based on interviews with 224 children reporting neglect and mistreatment in Border Patrol hold rooms); AMERICANS FOR IMMIGRANT JUSTICE, THE HIELERAS (2013), available at <http://bit.ly/1AcleW> (based on interviews with former detainees as young as 6 years old describing Border Patrol hold rooms as unbearably cold, with temperatures that caused detainees’ fingers and toes to turn blue and their lips to chap and split; a lack of blankets and no beds or mattresses so that detainees were forced to sleep on the floor; a lack of basic hygiene supplies such as toothbrushes, soap, combs or ample sanitary napkins; an inability to shower or change clothing; and inadequate food and water); WOMEN’S REFUGEE COMMISSION, FORCED FROM HOME: THE LOST BOYS AND GIRLS OF CENT. AM. 22 (2012), available at <http://bit.ly/1idNuUo> (based on interviews with 151 children, nearly all of whom reported mistreatment in Border Patrol custody, including verbal and physical abuse by agents and destruction of personal property); NO MORE DEATHS, A CULTURE OF CRUELTY: ABUSE AND IMPUNITY IN SHORT-TERM U.S. BORDER PATROL CUSTODY 8 (2011), available at <http://bit.ly/1HfBwIz> (based in part on interviews with 801 children reporting extremely cold temperatures in detention facilities, severe overcrowding, unsanitary detention conditions, verbal and physical abuse, and denial of food, water and medical treatment); FLORENCE IMMIGRANT AND REFUGEE RIGHTS PROJECT, SEEKING PROTECTION, ENDURING PROSECUTION: THE TREATMENT AND ABUSE OF UNACCOMPANIED UNDOCUMENTED CHILDREN IN SHORT-TERM IMMIGRATION DETENTION 7–14 (2009), available at <http://bit.ly/1prCKx> (based on interviews with 124 children, 85 percent of whom had been held in excessively cold rooms, while 33 percent received food fewer than three times per day, and 25 percent were not offered water); WOMEN’S REFUGEE COMMISSION, HALFWAY HOME: UNACCOMPANIED IMMIGRANT CHILDREN IN IMMIGRATION CUSTODY 9–11 (2008), available at <http://bit.ly/1hvPc8M> (based on interviews with more than 200 children reporting overcrowded facilities where children were made to sleep on cold floors with minimal or no bedding, denied adequate food and water, and refused access to showers and telephones for days on end, as well as multiple accounts of verbal and physical abuse by Border Patrol agents).

from 2009 to 2014 alone.<sup>8</sup> Still, every indication is that the reported abuses represent only a small fraction of total incidents. Border Patrol’s *hieleras* have generated extensive litigation and media attention, as well as congressional testimony and proposed legislation, and yet the same problems that have been reported for years persist.<sup>9</sup> In June 2015, the ACLU and other groups filed a class action lawsuit asserting conditions in Border Patrol’s Tucson Sector detention facilities violate the U.S. Constitution as well as Border Patrol’s own policies.<sup>10</sup> In July 2015, a federal court found that Border Patrol held children in “widespread deplorable conditions” and “wholly failed” to provide the “safe and sanitary” conditions required under the terms of the *Flores v. Reno* settlement agreement.<sup>11</sup>

DHS has acknowledged “recurring problems”<sup>12</sup> and oversight failures<sup>13</sup> that jeopardize the safety and well-being of children in CBP detention facilities.<sup>14</sup> Still, CBP fails to

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<sup>8</sup> See *ACLU of Arizona et al v. Office for Civil Rights and Civil Liberties et al.*, No. 15-00247 (D. Ariz. filed Feb. 11, 2015). One component alone, the DHS Office for Civil Rights and Civil Liberties (CRCL), acknowledged possessing roughly 18,000 pages of records responsive to the ACLU’s request. Though CRCL’s perfunctory investigations are regularly delegated to the same Border Patrol facilities from which complaints originate, in its annual report to Congress CRCL only discloses complaints it “accepts” for investigation—and not total complaints received—a distinction that results in a skewed and misleading account of civil rights violations by federal agencies. See, e.g., OFFICE FOR CIVIL RIGHTS AND CIVIL LIBERTIES, FISCAL YEAR 2014 ANNUAL REPORT TO CONGRESS 7 (July 28, 2015), available at <http://1.usa.gov/1ECifmp> (“In FY 2014, CRCL opened for investigation 87 new complaints involving children, including opening two complaints concerning family facilities, and closed 12 complaints.”).

<sup>9</sup> See, e.g., Brianna Lee, *Child Migrants Report Freezing in “Icebox” U.S. Border Patrol Centers*, International Business Times, Aug. 1, 2014, available at <http://bit.ly/1EKfQET>; (“Immigrants’ stories of falling sick and being unable to sleep for several days because of the cold have become part of broader allegations of abuse and poor conditions in Border Patrol facilities. A group of immigration advocacy organizations filed a series of lawsuits against [CBP] last year, saying that freezing temperatures were part of ‘inhumane conditions’ in the centers.”); *Meeting on Unaccompanied Immigrant Children*, CSPAN, July 29, 2014, available at <http://cs.pn/1xiPffZ> (including testimony of 12-year-old Mayeli Hernandez: “My little sister’s lips even turned blue We were shivering the whole time that we were there. We were there for four very cold days.”); Senate Amendment 1260 (submitted June 13, 2013) to S.744—Border Security, Economic Opportunity, and Immigration Modernization Act, available at <http://1.usa.gov/1EQYdzU> (amendment to a Senate immigration reform bill, S.B. 744, requiring improved CBP detention standards, including hold room capacity limits, adequate climate control, “[s]leeping arrangements” for detainees held overnight, and access to hygiene items and medical care, among other reforms.); H.R. 3130—Protect Family Values at the Border Act (introduced Sept. 18, 2013), available at <http://1.usa.gov/1A6nt5r> (concerning similar reforms to CBP detention conditions.).

<sup>10</sup> See *Doe v. Johnson*, No. 15-00250 (D. Ariz. filed June 8, 2015). Case materials are available here: <http://bit.ly/1eo53pN>.

<sup>11</sup> Julia Preston, *Judge Orders Release of Immigrant Children*, N.Y. TIMES, July 25, 2015 available at <http://nyti.ms/1FNtBzv>. See also note 21 *infra*.

<sup>12</sup> Press Release, Dep’t of Homeland Security, Office of Inspector Gen., *Improvements Continue at Det. Ctr’s.*, Oct. 6, 2014, available at <http://1.usa.gov/1oKw2Kq>; see also Interview by Steve Inskeep, Nat’l Pub. Radio, with R. Gil Kerlikowske, Comm’r, U.S. Customs and Border Prot., NPR, July 18, 2014, available at <http://n.pr/1s9pEDh> (In response to unaccompanied



follow its already inadequate detention standards,<sup>15</sup> and DHS has declined to promulgate standards under the Prison Rape Elimination Act (PREA) specific to unaccompanied children.<sup>16</sup> The persistence of many of these problems is clearly a function of a broader culture of abuse and impunity within the agency. According to CBP's own former head of Internal Affairs, the Border Patrol views itself as a paramilitary force that operates without "constitutional constraints" and rejects outside scrutiny.<sup>17</sup> It is also likely a function of Border Patrol's perverse "Consequence Delivery

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children's complaints of abuse and neglect in CBP custody that he characterized as "being put in excessively uncomfortable rooms, being left with the lights on all night so that they couldn't sleep, being denied medical care," CBP Commissioner Gil Kerlikowske acknowledged those complaints were "absolutely spot on.").

<sup>13</sup> DHS oversight agencies have been criticized for routinely failing to investigate civil rights complaints, which are classified as lower priority, "non-mission-compromising corruption." Garrett M. Graff, *The Green Monster: How the Border Patrol Became America's Most Out-of-Control Law Enforcement Agency*, POLITICO, Nov./Dec. 2014, available at <http://politi.co/151KVV6>. These complaints include many cases of children mistreated by agents. See Damien Cave, *Complaints of Abuse by Border Agents Often Ignored, Records Show*, N.Y. TIMES, May 5, 2014, available at <http://nyti.ms/1iTzDY5>.

<sup>14</sup> Memorandum to Dep't of Homeland Sec. Secretary Jeh C. Johnson from Dep't of Homeland Sec. Inspector Gen. John Roth on Oversight of Unaccompanied Alien Children 2-3 (July 30, 2014), available at <http://1.usa.gov/1r3Myd1> (noting CBP's system for documenting compliance with guidelines for detaining unaccompanied children is "unreliable due to frequent system outages which have resulted in inconsistent reporting. As a result, [it] is not a reliable tool for CBP to provide increased accountability for [children's] safety and well-being during all phases of CBP's custody process."). Despite these findings, OIG downplayed the extent of the problems and discontinued its investigation. See Emily Creighton, *Inspector General Falls Short in Documenting Border Detention Conditions*, AM. IMMIGR. COUNCIL BLOG (Sept. 16, 2014) <http://bit.ly/1r3VSoe> ("Considering the extensive documentation of abusive conditions in hieleras—which include the testimonials of those held in these facilities—it is difficult to take the OIG reports seriously.").

<sup>15</sup> See *Bunikyte ex rel. Bunikiene v. Chertoff*, 2007 WL 1074070 at \*2 (W.D.Tex. 2007) ("The Flores Settlement was intended as a stopgap measure until the United States could promulgate reasonable, binding standards for the detention of minor[s] ... Despite the passage of just over a decade, neither DHS nor Congress has yet promulgated binding rules regarding standards for the detention of minors.").

<sup>16</sup> Standards To Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities; 79 Fed. Reg. 13, 115, 13116 (Mar. 7, 2014) (to be codified at 6 C.F.R. pt. 115), available at <http://1.usa.gov/1B6ndFo> ("A number of comments recommended additional protection for unaccompanied children and families in family facilities specifically. The former NPREC Commissioners recommended that DHS separate provisions dealing with unaccompanied minors from provisions dealing with families ... DHS has considered these comments and declines to make the suggested changes to the proposed standard.").

<sup>17</sup> Andrew Becker, *Border Agency's Former Watchdog Says Officials Impeded His Efforts*, WASH. POST, Aug. 16, 2014, available at <http://wapo.st/1wGHdc9> (describing CBP as an agency "rife with coverups and corruption" where officials have "distorted facts to try to hide any missteps.").

System”—a policy designed to inflict punishment on immigrants in order to deter future migration.<sup>18</sup>

Unfortunately, abuse of child immigrants is not limited to Border Patrol custody. Children who arrive to the United States unaccompanied by a parent or guardian are supposed to be transferred to the custody of the Office of Refugee Resettlement (ORR) prior to release.<sup>19</sup> Indeed, it was in large part due to the inability of then-Immigration and Naturalization Service (INS) to protect children from harm that responsibility for the care of unaccompanied children was transferred to ORR,<sup>20</sup> following years of litigation and the *Flores v. Reno* settlement agreement.<sup>21</sup> There are, however, numerous documented cases of ORR care providers abusing children in government-contracted shelters.<sup>22</sup> An investigation of ORR facilities by the *Houston Chronicle* revealed scores of cases of physical abuse, including children sexually assaulted, shoved, kicked, punched and threatened with deportation by shelter workers.<sup>23</sup> ORR has itself documented allegations of mistreatment of children in Border Patrol custody, though it

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<sup>18</sup> See Jeremy Slack et al., *In Harm's Way: Family Separation, Immigration Enforcement Programs and Security on the US-Mexico Border*, *Journal on Migration and Human Security*, JMHS Volume 3 Number 2 (2015): 109-128, available at <http://bit.ly/1GxFMUg> (Border Patrol's Consequence Delivery System, announced in its "2012-2016 Border Patrol Strategic Plan," marks a "shift from the deterrent strategy that, in the 1990s that relied heavily on the dangers of the natural terrain to dissuade unauthorized border crossers, to one that actively punishes, incarcerates, and criminalizes them."). With so many children describing verbal abuse by Border Patrol agents—"You deserve to be hurt for coming to the US illegally," or "You think because you came to this country we are going to treat you well?"—it appears agents have internalized the punitive intent of these policies. See Letter from ACLU, *supra* note 4 at 8, 11.

<sup>19</sup> More specifically, children from non-contiguous countries, and children from Mexico and Canada who pass an initial screening, are supposed to be transferred to ORR custody within 72 hours. See 8 U.S.C. § 1232(b)(3).

<sup>20</sup> 6 U.S.C. § 279(a); see also WOMEN'S COMM'N FOR REFUGEE WOMEN AND CHILDREN, PRISON GUARD OR PARENT? INS TREATMENT OF UNACCOMPANIED REFUGEE CHILDREN (May 2002), available at <http://bit.ly/1CS55PC>.

<sup>21</sup> See *Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997).

<sup>22</sup> See, e.g., Susan Carroll, *Children's Shelter Tried to Cover Up Assault Feds Claim*, HOUSTON CHRON., Sept. 24, 2011, available at <http://bit.ly/1yeqpsK> ("Senior management with Catholic Charities attempted to mislead federal officials about a sexual assault at St. Michael's Home for Children, doctoring incident reports and failing to seek medical treatment for the child victim for days, according to a federal report.").

<sup>23</sup> A Freedom of Information Act (FOIA) request submitted by the *Houston Chronicle* uncovered abuse allegations involving ORR contractors detailed in 101 "special incident reports" from March 2011 to March 2013. See Susan Carroll, *Crossing Alone: Children Fleeing to U.S. Land in Shadowy System*, HOUSTON CHRON., May 29, 2014, available at <http://bit.ly/1GfHpS6> ("During the past decade, state childcare licensing investigators in Texas have documented more than 100 serious incidents in shelters and foster programs that held only ORR detainees. Dozens of workers were fired or disciplined in connection with sexual, physical and verbal abuses, maltreatment, inadequate supervision and inappropriate behavior and relationships. 'This is just the tip of the iceberg,' said Michelle Brane, director of the Migrant Rights and Justice program for the Women's Refugee Commission, which has monitored the detention system for unaccompanied children for more than a decade. 'I imagine there are many cases we don't know about.'").

appears ORR has been inconsistent in reporting those abuse allegations to law enforcement.<sup>24</sup> While this advisory is primarily concerned with Border Patrol abuse, which is far more common, attorneys should screen unaccompanied child clients regarding their experiences in ORR custody as well.

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The government's maltreatment of immigrant children in its custody is so longstanding and so common that in some quarters—even among advocates—these abuses have come to be seen as almost an accepted, albeit unfortunate, price that many children have to pay in the course of apprehension and detention.<sup>25</sup> That it has become routine, however, should not obscure the fact that much of what passes for accepted practice in Border Patrol custody violates the U.S. Constitution and the agency's own policies.

It also likely qualifies as child abuse under state and federal law. For example, the Victims of Child Abuse Act of 1990 (VCAA); 42 U.S.C. § 13031(c)(1), adopted to enhance investigation and prosecution of child abuse, defines “child abuse” as “the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child.” The term “negligent treatment” means “the failure to provide, for reasons other than poverty, adequate food, clothing, shelter, or medical care so as to seriously endanger the physical health of the child.” 42 U.S.C. § 13031(c)(7). As noted, Border Patrol's routine failure to provide child detainees with adequate food, clothing, shelter and medical care, among other harms, is a consistent, almost fundamental aspect of Border Patrol detention. Rarely is it reported to the appropriate investigatory officials,<sup>26</sup> as required under the VCAA.<sup>27</sup>

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<sup>24</sup> The FOIA records obtained by the *Houston Chronicle* and made public last year contain scores of allegations of abuse and neglect by immigration officials, the vast majority involving U.S. Border Patrol. See Jessica Garrison, *Exclusive: Immigrant Minors Alleged Mistreatment by U.S. Border Officials*, BUZZFEED, June 9, 2014, available at <http://bzfd.it/1JYsdi5>; see also Jessica Bakeman, *New York quietly expands role in caring for immigrant children*, CAPITAL NEW YORK, Oct. 20, 2014, available at <http://bit.ly/1wn2zOU> (“When the children arrive at New York-area airports from the federal facilities, they often require extensive medical care for broken bones that healed improperly or illnesses such as appendicitis and pneumonia, nonprofit officials said ... ‘Some of them have not eaten for long periods of time,’ said Henry Ackermann, chief development officer at [ORR subcontracted] Abbott House ... ‘They come to us malnourished. They come to us sometimes with unset broken arms or legs, with bronchial or respiratory issues.’”).

<sup>25</sup> See, e.g., Amy Bracken, *Immigrants, Legal Groups Allege Harsh Treatment at U.S. Border*, PRI, Aug. 1, 2014, available at <http://bit.ly/1zdjAGL> (“In response to complaints of overcrowding and punitive conditions in Border Patrol hold rooms in Texas, Border Patrol spokesman Enrique Mendiola stated: “It is what it is ... That’s basically one of the consequences of entering the country illegally.”).

<sup>26</sup> See, e.g., AP, *Border Agent Seen Punching Teen Went Unpunished*, USA TODAY, Oct. 2, 2014, available at <http://usat.ly/1vohymN> (describing a Border Patrol agent seen punching a teenager in the stomach who continued to work and went unpunished for nearly eight months after federal investigators saw videos of the assault).

<sup>27</sup> 42 U.S.C. § 13031(a) (“A person who, while engaged in a professional capacity or activity described in subsection (b) of this section on Federal land or in a federally operated (or contracted) facility, learns of facts that give reason to suspect that a child has suffered an

Given the Border Patrol's notorious culture of abuse, attorneys can and should draw upon the VCAA and other authorities—including the government's own policies, discussed *infra*, favoring immigration relief where civil rights violations are at issue—to win redress for children in removal proceedings.

These considerations are particularly critical at a time when the U.S. government is intensifying efforts to strip children of basic due process rights in order to rapidly deport them. As the Obama administration fights efforts to secure the right to counsel for children in removal proceedings,<sup>28</sup> it is also fast-tracking the deportation of recently arrived children with such ferocity that immigration judges in some jurisdictions are ordering unrepresented children deported *in absentia*, in many cases absent any notice of hearing.<sup>29</sup> Rather than respond to the widespread mistreatment of children in federal custody, some in government have indicated an intention to further compound those harms: in February 2015, the House Judiciary Committee took up H.R. 5143, which would have permitted DHS to wait up to 30 days before transferring unaccompanied children to ORR custody, thereby effectively extending the time that children would remain in deplorable conditions.<sup>30</sup>

Given this grim climate and the pervasiveness of government misconduct, this advisory urges that attorneys working with formerly detained immigrant children not ignore the unfortunate possibility their clients have suffered prior abuse or neglect in custody, and

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incident of child abuse, shall as soon as possible make a report of the suspected abuse to the agency designated under subsection (d) of this section”); 28 C.F.R. § 81.3 (“For federal lands, federally operated facilities, or federally contracted facilities where no agency qualifies for designation under § 81.2, the Federal Bureau of Investigation is hereby designated as the agency to receive and investigate reports of child abuse made pursuant to 42 U.S.C. 13031 until such time as another agency qualifies as a designated agency under § 81.2.”).

<sup>28</sup> See *J.E.F.M. v. Lynch*, No. 2:14-cv-01026 (W.D. Wash. July 9, 2014.); David Rogers, *DOJ Squelches Request for Video in Immigration Case*, POLITICO, Feb. 19, 2015, available at <http://politi.co/1ODzVAb> (“[T]he administration ordered immigration judges last summer to quickly arraign the new arrivals, and from mid-July to Oct. 21 they held an average of more than 800 ‘master calendar’ hearings per week for the children ... In that same three-month period, 94 percent of the 1,542 removal orders fell on children without attorneys ... [Deputy Assistant Attorney General] Fresco painted a dire picture of what would result if [the judge hearing *J.E.F.M.*] granted the plaintiffs’ request for a preliminary injunction requiring every child to have counsel in any deportation proceeding ... In the same hearing, Fresco denied that the administration intended to create ‘rocket dockets’ for the children.”).

<sup>29</sup> Richard Gonzales, *Immigration Courts ‘Operating in Crisis Mode’ Judges Say*, NPR, Feb. 23, 2015, available at <http://n.pr/1yfsiWi> (“By prioritizing the cases of the unaccompanied minors, the administration fast-tracked their court hearings, creating a shortage of lawyers as legal service providers are swamped with cases ... ‘Many of the children are actually never properly notified of the date when their court hearing is, and that problem has been going on for months,’ says Ahilan Arulanantham, an attorney with the ACLU’s Immigrants’ Rights Project.”); see also David Rogers, *Child Migrants Without Lawyers Pay a High Price*, POLITICO, Apr. 27, 2015, available at <http://politi.co/1DF9Szi>.

<sup>30</sup> See H.R.5143 – Protection of Children Act of 2014, available at <http://1.usa.gov/1HSoym6>.



take seriously their professional responsibility to weigh the potential impact of such mistreatment on clients' rights and remedies.

## II. Legal Relief Available to Children Mistreated in Custody

Because of the pervasive abuse and neglect of immigrant children by U.S. Border Patrol, and because such maltreatment can influence the rights and remedies available to immigrant children, advocates representing formerly detained children should screen their clients for these common forms of abuse and neglect, and determine whether those harms give rise to any form of legal relief. This practice advisory discusses several such forms of potential relief that attorneys working with immigrant children should consider. This advisory does not discuss all potential types of relief that may be available to children, but focuses only on relief that is specifically related to misconduct by U.S. government officials.<sup>31</sup>

### U Visa

Assaults of immigrant children by Border Patrol and other federal agents are common: anywhere from 10 to 25 percent of the children described in the complaints and reports cited herein reported physical abuse by immigration officials.<sup>32</sup> Given the alarming rate of physical abuse of children in government custody, advocates should be sure to screen their clients to assess U visa eligibility.

The U visa allows victims of certain crimes who have been, or will likely be, helpful in the investigation and prosecution of those crimes to remain in the United States for up to four years. After three years the recipient may, if certain conditions are met, adjust status. In order to qualify for a U visa, the individual must have been the victim of one of the enumerated crimes in the statute.<sup>33</sup> Among the crimes listed are assault and sexual assault.<sup>34</sup> Advocates should screen not only for principal eligibility, but also

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<sup>31</sup> The National Immigrant Justice Center has a compilation of resources addressing other forms of relief for noncitizen children, *available at* <http://bit.ly/1HZ3p5J>, as does the Immigration Advocates Network: <http://www.immigrationadvocates.org/>.

<sup>32</sup> See ACLU Letter *supra* note 3 at 2 (one in four children reported physical abuse, including sexual assault, beatings, and the use of stress positions by Border Patrol agents); No More Deaths *A Culture of Cruelty*, *supra* note 5 at 25-26 (finding that 10 percent of children reported suffering physical abuse while detained by Border Patrol); Florence Project *Seeking Protection, Enduring Prosecution*, *supra* note 5 at 10 (finding that approximately 15 percent of the children interviewed had been physically abused by Border Patrol during their apprehension or detention).

<sup>33</sup> 8 U.S.C. § 1101(A)(15)(U). The other enumerated crimes include: rape; torture; trafficking; incest; domestic violence; abusive sexual contact; prostitution; sexual exploitation; stalking; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; witness tampering; obstruction of justice; perjury; fraud in foreign labor contracting (as defined in section 1351 of Title 18); or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes, or any similar activity in violation of Federal, State, or local criminal law. *Id.*

<sup>34</sup> *Id.*

derivative eligibility based on family members having been the direct or indirect victim of qualifying criminal activity, as the derivative petitioner provisions are relatively expansive.<sup>35</sup>

In addition to requiring that a child be the victim of an enumerated crime, a certifying official must verify that the victim has been, or will be, helpful in the investigation of the crime. Certifying agencies include traditional “law enforcement” such as police departments and prosecutors, but also include child and family assistance agencies, judges (including civil judges who issue restraining orders), the Department of Labor, the Equal Employment Opportunity Commission, ICE, CBP, and others. The individual must possess information about the criminal activity of which he or she was a victim. For children under 16, a parent, guardian or next friend may possess the information.<sup>36</sup>

While it may be difficult to convince a law enforcement agency to sign a U visa certification based on the investigation of crimes committed by Border Patrol or ORR shelter staff,<sup>37</sup> utilizing the existing child protection framework may be useful. Specifically, attorneys may rely upon existing child protection laws which require that child abuse allegations are reported to investigators. By confirming or initiating such an investigation—important in its own right—advocates can identify the investigating entity or entities from which to seek U visa certification.

For example, under the VCAA and its implementing regulations, covered professionals<sup>38</sup> working in a federally operated or contracted facility—including detention facility employees, social workers, and counselors—who learn of “facts that give reason to suspect that a child has suffered an incident of child abuse”<sup>39</sup> are required to report

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<sup>35</sup> 8 U.S.C. 1101(a)(15)(U)(ii). For example, a child was apprehended at the border and has never lived in the U.S. before or been a victim of a crime abroad that provides for extraterritorial jurisdiction (such as the PROTECT Act), but the child’s step-father was a victim of a robbery in 1988 and reported the crime to the authorities. Robbery is a form of felonious assault, a U qualifying crime. The child may qualify as a U-3 derivative of the step-father and step-father and child may apply for U Nonimmigrant Status.

<sup>36</sup> 8 U.S.C. § 1101(a)(15)(U)(i)(II).

<sup>37</sup> Nonetheless, advocates have succeeded in obtaining U visa certifications on the basis of investigations into government officials’ misconduct. For example, in *Villegas v. Metro. Gov’t of Nashville*, the court certified a plaintiff’s U visa because the sheriff’s office, which was holding the plaintiff pursuant to an ICE detainer, shackled the plaintiff during the final stages of labor and denied her use of a breast pump. 907 F. Supp. 2d 907 (M.D. Tenn. 2012).

<sup>38</sup> 42 U.S.C. § 13031(b) enumerates categories of mandated reporters, which include: medical professionals and “persons performing a healing role;” mental healthcare professionals; “[s]ocial workers, licensed or unlicensed marriage, family, and individual counselors;” “[t]eachers, teacher’s aides or assistants, school counselors and guidance personnel, school officials, and school administrators;” “[c]hild care workers and administrators;” “[l]aw enforcement personnel, probation officers, criminal prosecutors, and juvenile rehabilitation or detention facility employees;” and foster parents. The law also requires dissemination of a standard abuse reporting form to all mandated reporter groups. 42 U.S.C. § 13031(e).

<sup>39</sup> 42 U.S.C. § 13031(c)(1) defines “child abuse” as “the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child.” The term “negligent treatment” means “the

those facts to state law enforcement, child protective services, and/or the Federal Bureau of Investigation (FBI). Absent a formal written agreement that non-federal entities will investigate child abuse allegations in federal facilities, the VCAA designates the FBI as the appropriate investigatory agency.<sup>40</sup>

There is no temporal or geographic limitation on the VCAA's reporting requirement—covered professionals must report suspected abuse allegations, regardless of when or where the abuse occurred.<sup>41</sup> Failure to timely report suspected child abuse is a criminal offense.<sup>42</sup> These provisions and their requirements extend to all federal personnel, including CBP, ORR, and federal contractors, each of whom may be subject to additional obligations under applicable state child protection laws.<sup>43</sup>

Advocates can utilize child protection laws like the VCAA to confirm or (if such an investigation has not already been conducted) demand investigations into clients' reports of abuse or neglect in Border Patrol detention facilities. By law, mandated reporters must relay abuse allegations to the appropriate investigatory agency. This is critical for preventing future harm to other children, but it can also benefit a client who experienced past abuse directly because any law enforcement agency or other authority that has responsibility for the investigation or prosecution resulting from prior abuse has the authority to certify a U visa.<sup>44</sup> This includes state child protective service agencies, any federal, state, or local law enforcement agency, and any federal, state, or local judge—all of whom have the authority to certify a U visa based upon the information provided by a child abused or neglected in Border Patrol custody.<sup>45</sup> While DHS and CBP officials may be unwilling to certify a U visa for abuses committed in Border Patrol custody, other agencies may be more willing to do so.<sup>46</sup>

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failure to provide, for reasons other than poverty, adequate food, clothing, shelter, or medical care so as to seriously endanger the physical health of the child.” 42 U.S.C. § 13031(c)(7).

<sup>40</sup> 42 U.S.C. § 13031(d); 28 C.F.R. § 81.2–81.3.

<sup>41</sup> See U.S. Dep't of Justice, Office of Legal Counsel, Assistant Atty. Gen.'s Memorandum for the Gen. Counsel, United States Department of Veteran's Affairs 5 (May 29, 2012), *available at* <http://1.usa.gov/1p2OX39> (“[S]ection 13031 is best read to impose a reporting obligation on all persons who, while engaged in the covered professions and activities on federal lands or in federal facilities, learn of facts that give reason to suspect that child abuse has occurred, *regardless of where the abuse might have occurred or where the suspected victim is cared for or resides.*”)(emphasis added).

<sup>42</sup> Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 209, 120 Stat. 587, 615; 18 U.S.C. § 2258.

<sup>43</sup> U.S. Dep't. of Justice, Attorney Gen. Guidelines for Victim and Witness Assistance, Office of Justice Programs, Office for Victims of Crime 18 (May 2005), *available at* <http://1.usa.gov/1ChGXng> (“All Federal law enforcement personnel have obligations under State and Federal law to report suspected child abuse”).

<sup>44</sup> 8 C.F.R. § 214.14.

<sup>45</sup> *Id.*

<sup>46</sup> Additionally, some jurisdictions have adopted policies to facilitate U Visa certification. See, e.g., Patrick McGreevy, *Immigrant Crime Victims Get Help from California Governor*, L.A. TIMES, Oct. 9, 2015, *available at* <http://lat.ms/1GPVo2w> (“[L]egislation signed Friday by Gov. Jerry Brown ... requires law enforcement officials to certify in writing that an immigrant crime

In addition to the VCAA, PREA places affirmative reporting obligations on all staff of detention facilities.<sup>47</sup> Under PREA, staff must immediately report “any knowledge, suspicion, or information regarding an incident of sexual abuse or sexual harassment that occurred in an agency lockup.”<sup>48</sup> The agency must report all allegations of sexual abuse to a designated investigator. Like the VCAA, the framework set forth in PREA can be utilized not only to ensure that appropriate investigations are conducted and to prevent future abuses, but also to potentially obtain certification for a qualifying client’s U visa from the entity to which the abuse is reported.

Advocates should note that initiating an investigation into past abuse or mistreatment will likely require the child’s participation, and there may be circumstances in which such an approach is simply not in a child client’s best interest—for example, if it could lead to an investigation of family members. Attorneys should therefore not undertake any abuse reporting without first obtaining the advised consent of their client. Nonetheless, given the high numbers of abuse allegations involving Border Patrol agents, it is likely that the U visa is underutilized in this context. Advocates may also consider a coordinated strategy to pursue multiple applications together, rather than as isolated requests, to establish U visas incident to Border Patrol abuse as a necessary and recognized avenue of relief.

### Motions to Terminate

While not every client will qualify for a U visa on the basis of past mistreatment in government custody, many forms of neglect that are not enumerated crimes for purposes of U visa eligibility may still form the basis for suppression of evidence and/or termination of removal proceedings. While this advisory provides only a brief summary of these strategies, for a comprehensive analysis of motions to terminate and suppress—along with an appendix of sample motions and briefs—practitioners are encouraged to consult the Vera Institute for Justice’s *Strategies for Suppressing Evidence and Terminating Removal Proceeding for Child Clients*.<sup>49</sup>

Removal proceedings may be terminated when the government violates certain rights, policies, or laws. In *Matter of Garcia-Flores*, the Board of Immigration Appeals (BIA) held that where the government violates a regulation intended to benefit a noncitizen and the violation causes prejudice to the interests of the noncitizen, termination of

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victim has been helpful in an investigation of crimes including sexual assault and domestic violence.”).

<sup>47</sup> 28 C.F.R. § 115.161.

<sup>48</sup> *Id.*

<sup>49</sup> Helen Lawrence, et. al., *Strategies for Suppressing Evidence and Terminating Removal Proceedings for Child Clients*, Vera Institute for Justice (Mar. 2015), available for download here: <http://bit.ly/1J4x1Uh>. For more information on potential forms of legal relief for unaccompanied minor children, see Capital Area Immigrants’ Rights, *Practice Manual for Pro Bono Attorneys Representing Unaccompanied Immigrant Children* (Jan. 2014), available at <http://bit.ly/1J4ldO6>.



removal proceedings is appropriate.<sup>50</sup> Prejudice is presumed where “compliance with the regulation is mandated by the Constitution” or where the agency violates a procedural framework “designed to insure the fair processing of an action.”<sup>51</sup>

There are several child-specific and detention-related regulations,<sup>52</sup> policies,<sup>53</sup> and other laws, the violation of which could potentially support a motion for termination. For example, CBP’s National Standards on Transport, Escort, Search and Detention<sup>54</sup> dictate minimum standards for children held in Border Patrol custody, including but not limited to the requirement that children must be provided with hygiene products and clean bedding;<sup>55</sup> clean drinking water and cups;<sup>56</sup> and snacks and meals every six hours, two out of every three of them hot;<sup>57</sup> and that hold rooms have “adequate temperature controls and ventilation.”<sup>58</sup> Unaccompanied children must be transferred to ORR custody within 72 hours.<sup>59</sup>

These policies largely track the terms established in the *Flores* settlement agreement, which Border Patrol’s policy acknowledges are binding, and violations of which may also form the basis for termination.<sup>60</sup> Nonetheless, as discussed *supra*, children held in short-term detention routinely report violations of these and other requirements in Border Patrol’s detention standards.<sup>61</sup>

Attorneys working with immigrant children should also consider applicable child protection laws such as the VCAA, which requires officials to report child abuse as well as negligent treatment, which is defined by the VCAA as “failure to provide, for reasons other than poverty, adequate food, clothing, shelter, or medical care.”<sup>62</sup> On its face, this definition encompasses many standard practices in Border Patrol detention facilities. Any covered entity—including any CBP detention facilities or ORR shelter—that fails to report abuse violates the VCAA.<sup>63</sup> Attorneys should elicit detailed descriptions of detention conditions and determine whether deprivations or mistreatment experienced

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<sup>50</sup> *Matter of Garcia-Flores*, 17 I. & N. Dec. 325, 328 (BIA 1980).

<sup>51</sup> *Id.* at 329.

<sup>52</sup> *See, e.g.*, 8 C.F.R. § 236.3(h) (Service of Form I-770, Notice of Rights and Disposition); 8 CFR § 103.8(c)(2)(ii) (Service of Form I-862, Notice to Appear); 8 CFR § 1240.10(c) (Admissions of Removability).

<sup>53</sup> *See, e.g.*, William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Pub. L. No. 110-457, 122 Stat. 5044, § 235 (codified at 8 U.S.C. § 1232); Victims of Child Abuse Act (VCAA), 42 U.S.C. § 13031.

<sup>54</sup> U.S. Customs and Border Protection: National Standards on Transport, Escort, Search and Detention, available at <http://1.usa.gov/1Lt664s>. *See also* Lawrence, *supra* note 49 at 12-13.

<sup>55</sup> *Id.* at 5.6.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *See Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997).

<sup>61</sup> *See supra* note 7.

<sup>62</sup> *Supra* note 39.

<sup>63</sup> *Supra* note 27.

in government custody fall within the scope of the VCAA, or violate other state or federal laws. Such violations might serve as the basis for terminating proceedings.<sup>64</sup>

Finally, there are good arguments that abusive treatment and the conditions in Border Patrol's *hieleras* violate detainees' Fourth and/or Fifth Amendment rights.<sup>65</sup> Border Patrol's routine deprivation of beds, bedding, blankets, hygiene supplies, showers, and inadequate food, water and medical care, along with the common use of frigid temperatures and denial of access of legal counsel—and the inherently coercive nature of those conditions—all provide arguments for constitutional violations supporting termination of removal proceedings.<sup>66</sup>

In sum, given the high incidence of abuse and generally deplorable conditions in Border Patrol facilities—and the inherently coercive environment that results—attorneys should carefully screen all formerly detained clients for potential violations of regulations, policies, and constitutional rights that would support a motion for termination.

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<sup>64</sup> For an example of a Motion to Terminate based on DHS violation of the VCAA because of DHS's failure to report holding the child in a crowded, unsanitary cell without adequate food, water, clothing, or shelter for 96 hours *see* In the Matter of \_\_\_\_\_ (Suppression and Termination Practice Advisory, *supra* note 49, Appendix p. 87).

<sup>65</sup> Due process violations arising out of Border Patrol's detention policies and practices are at issue in ACLU litigation currently pending in federal district court. *See* note 10, *supra*.

<sup>66</sup> *See, e.g., United States v. Minero-Rojas*, No. Case No. 11CR3253-BTM, 2011 U.S. Dist. LEXIS 127193, \*1-2 (S.D. Cal. Nov. 3, 2011). In *Minero-Rojas*, a criminal defendant challenged the government's practice of delaying the presentment of defendants before a magistrate judge and subjecting pretrial arrestees to substandard conditions of confinement in Border Patrol custody. *Id.* In entering an order to address those delays, the court acknowledged that the information about "substandard conditions of confinement at various Ports of Entry and Border Patrol stations" including lack of beds, hygiene products, and adequate food caused the court "great concern." Though the court declined to find a constitutional violation—reasoning the resolution in the delays would shorten detainees' time in the CBP holding stations—it stated that Border Patrol detention conditions were improper, including the fact that detainees were forced to sleep and eat in the same cell with exposed toilets and were not provided any hygiene items even after using the toilet or before eating, and that a claim under the Fifth Amendment Due Process Clause would have merit. *Id.* at \*14. *See also Gillis v. Litscher*, 468 F.3d 488, 493 (7th Cir. 2006) (Under the Eighth Amendment, "life's necessities include shelter and heat ... as well as hygiene items."); *Alvarez-Machain v. United States*, 107 F.3d 696, 701 (9th Cir. 1996) (pre-trial detainees entitled to adequate food, clothing, shelter, sanitation); *Hallstrom v. Garden City*, 991 F.2d 1473 (9th Cir. 1993) (overturning summary dismissal of a claim based on lack of hygienic conditions in pretrial detention); *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1448 (9th Cir.1989) (denial of bed or mattress to pre-trial detainee "unquestionably constitutes a cognizable Fourteenth Amendment claim."); *Lyons v. Powell*, 838 F.2d 28, 31 (1st Cir. 1988) (explaining that "subjecting pre-trial detainees to the use of a floor mattress for anything other than brief emergency circumstances may constitute an impermissible imposition of punishment."); *Anela v. Wildwood*, 790 F.2d 1063, 1067 (3d Cir. 1986) (allegation that City failed to provide bed or mattress, along with food and water, to pre-trial detainees for overnight period states actionable due process claim); *Lareau v. Manson*, 651 F.2d 96, 105 (2d Cir. 1981) (prison's use of floor mattresses for pre-trial detainees unconstitutional "without regard to the number of days for which a prisoner is so confined.").

## Motions to Suppress<sup>67</sup>

Statements obtained in violation of the Constitution generally may not be used in court, and courts have repeatedly ruled that evidence in immigration proceedings can be excluded based on egregious or widespread constitutional violations.<sup>68</sup> For example, where evidence is obtained through conduct that would render use of the evidence “fundamentally unfair” and in violation of the Fifth Amendment, the evidence may be suppressed.<sup>69</sup> In *Matter of Ramirez-Sanchez*, the BIA suggested that physical abuse, extended interrogation, or denial of food or drink would establish that any statements were not made voluntarily, and therefore suppression of the statements would be required.<sup>70</sup> In *Matter of Garcia*, the BIA held that suppression was appropriate where statements were made by an individual who “was led to believe that his return to Mexico was inevitable, that he had no rights whatsoever, that he could not communicate with his attorney, and that he could be detained without explanation of why he was in custody.”<sup>71</sup>

The coercive tactics at issue in these cases are not unique.<sup>72</sup> Children and other detainees frequently report Border Patrol agents’ failing to explain legal documents that they were told to sign, intimidating and threatening those who refuse to sign, and telling

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<sup>67</sup> For additional resources covering Motions to Suppress see *Motions to Suppress in Removal Proceedings: A General Overview*, AMERICAN IMMIGRATION COUNCIL, (updated Jan. 26, 2015), available at <http://bit.ly/1IsJnGb>; *Motions to Suppress in Removal Proceedings: Fighting Back Against Unlawful Conduct by U.S. Customs and Border Protection*, AMERICAN IMMIGRATION COUNCIL, (Nov. 13, 2013), available at <http://bit.ly/1Mqjk24>.

<sup>68</sup> See, e.g., *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984) (recognizing that egregious or widespread Fourth Amendment violations could justify exclusion of evidence in removal proceedings); *Matter of Garcia*, 17 I. & N. Dec. 319, 321 (BIA 1980) (suppressing evidence based on due process violation).

<sup>69</sup> *Matter of Toro*, 17 I. & N. Dec. 340, 343 (B.I.A. 1980).

<sup>70</sup> *Matter of Ramirez-Sanchez*, 17 I. & N. Dec. 503, 506 (BIA 1980) (noting that such findings, while not present in this case, would constitute a violation of the Fifth Amendment).

<sup>71</sup> 17 I. & N. Dec. 319, 321 (BIA 1980).

<sup>72</sup> For example, CBP and Border Patrol’s widespread practice of coercing detained individuals into signing removal papers in southern California was the subject of the class action lawsuit *Lopez-Venegas v. Napolitano*, No. 13-3972 (S.D. Cal. settlement agreement filed Aug. 18, 2014). In a recent settlement in that case, the agencies agreed to “supplement their existing procedures” in southern California with additional due process protections. Richard Marosi, *Feds to Allow Some Immigrant Deportees to Return Under New Settlement*, L.A. TIMES (Aug. 27, 2014), <http://lat.ms/1rBcv5K>. In addition, detainees regularly sign paperwork relating to criminal prosecution without access to counsel, as well as “Hold Harmless and Release Agreements,” wherein, to have any chance of recovering their confiscated property, detainees must release and forever discharge the government from liability for losing that property. See Ted Robbins, *Some Deportees Return to Mexico, But Their Stuff Stays In the U.S.*, NPR (Dec. 10, 2014), <http://n.pr/1CJczjl>; Daniel E. Martínez, et al., BORDERING ON CRIMINAL: THE ROUTINE ABUSE OF MIGRANTS IN THE REMOVAL SYSTEM, PART II: POSSESSIONS TAKEN AND NOT RETURNED (Dec. 2013), <http://bit.ly/1A6nW7S>; see also, ACLU, AMERICAN EXILE: RAPID DEPORTATIONS THAT BYPASS THE COURTROOM (Dec. 2014), available at <http://bit.ly/1Dv4oXK>; HUMAN RIGHTS WATCH, YOU DON’T HAVE RIGHTS HERE: U.S. BORDER SCREENING AND RETURNS OF CENTRAL AMERICANS TO RISK OF SERIOUS HARM (Oct. 2014), available at <http://bit.ly/1OZG339>.

detainees that they “have no rights.”<sup>73</sup> Coercive interrogations are facilitated by the harsh and degrading detention conditions in which children are often held for days. Attorneys can and should argue that any statements made by children under these or similar conditions are the result of coercive conditions and are thus fundamentally unfair and should be suppressed. If granted, a motion to suppress may result in the government being unable to meet its burden to establish alienage, resulting in termination of proceedings.

In arguing fundamental unfairness, advocates should emphasize the age and other particular vulnerabilities of children. The Supreme Court has repeatedly emphasized the developmental differences between children and adults,<sup>74</sup> and in a series of related, unpublished decisions, the BIA held that immigration officials’ detention of minors for nine hours, threats to deport them to Mexico that night, and denial of phone calls to parents and lawyers violated the Fifth Amendment, and that suppression of evidence was appropriate.<sup>75</sup>

### Prosecutorial Discretion

Notwithstanding the government’s efforts to “fast-track” the removal of recently arrived children,<sup>76</sup> attorneys can still argue for the exercise of prosecutorial discretion for children who have been abused by government officials or detained in abusive conditions.

As of November 20, 2014, DHS guidance on immigration enforcement lists as priorities for removal “new immigration violators,” that is, unlawfully present individuals who

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<sup>73</sup> See, e.g., Florence Project *Seeking Protection, Enduring Prosecution*, supra note 5 at 14 (finding that forty-nine percent of children interviewed were not allowed to call family, their country’s consulate, or a lawyer).

<sup>74</sup> See, e.g., *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012) (finding that “making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence,” creates too great a risk of disproportionate punishment); *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2403 (2011) (finding that a reasonable child subjected to police questioning will sometimes feel pressured to submit in circumstances where a reasonable adult would feel free to go); *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (finding that “scientific and sociological studies” show that juveniles often make “impetuous and ill-considered actions and decisions”); see also Lauren Gottesman, *Protecting Juveniles’ Right to Remain Silent: Dangers of the Thompkins Rule and Recommendations for Reform*, 34 Cardozo L. Rev. 2031, 2055 (2013) (finding that juveniles are more likely to make false confessions when subjected to police interrogations); Beth Caldwell, *Banished for Life: Deportation of Juvenile Offenders As Cruel and Unusual Punishment*, 34 Cardozo L. Rev. 2261 (2013) (arguing that under recent Supreme Court decisions deportation of a juvenile based on a conviction in adult court is cruel and unusual).

<sup>75</sup> In re: Oscar J. Corona, 2006 Immig. Rptr. LEXIS 7854, 3-5 (Nov. 29, 2006); In re: Jaime H. Damian, 2006 Immig. Rptr. LEXIS 7890, 3-5 (Nov. 29, 2006); In re: Yuliana Huicochea, 2006 Immig. Rptr. LEXIS 8420, 3-5 (Nov. 29, 2006); In re: Luis Migual Nava, 2006 Immig. Rptr. LEXIS 8918, 3-5 (Nov. 29, 2006).

<sup>76</sup> See note 29 supra.



entered after January 1, 2014.<sup>77</sup> Although the enforcement memo explicitly rescinded and superseded several prior policies related to the exercise of prosecutorial discretion—including direction to give “particular consideration” to minors<sup>78</sup>—others remain intact. In particular, a June 2011 memorandum provides that it is explicitly against ICE policy to remove anyone who has been the victim or witness to a crime, or individuals who are in the “midst of a legitimate effort to protect their civil rights.”<sup>79</sup> This includes people who are “in non-frivolous lawsuits regarding civil rights or liberties violations” and “individuals engaging in a protected activity related to civil or other rights.”<sup>80</sup> Likewise, the new guidance lists as a factor in considering whether to exercise prosecutorial discretion the respondent’s status as a victim, witness or plaintiff in civil or criminal proceedings.<sup>81</sup>

While encouraging ICE attorneys to initiate grants of prosecutorial discretion themselves, these memoranda can be relied on when clients are engaged in legal or administrative efforts to vindicate their civil rights, even where ICE does not affirmatively offer to exercise discretion.<sup>82</sup> Further, if ICE is unwilling to grant prosecutorial discretion, advocates can direct requests for administrative closure directly to the court.<sup>83</sup> In one case, an immigration judge denied DHS’s request to re-calendar, and instead administratively closed the proceedings, because the respondent, a client of the New Orleans Workers’ Center for Racial Justice, had a pending administrative complaint with the DHS Office for Civil Rights and Civil Liberties (CRCL) related to his arrest.<sup>84</sup> The judge specifically cited ICE’s prosecutorial discretion policy, stating that because CRCL was currently investigating the respondent’s complaint that his civil and constitutional rights were violated when he was arrested, administrative closure until the investigation was complete was appropriate (CRCL complaints are addressed separately, below).

ICE itself has affirmatively closed cases in light of civil rights concerns, even where the individuals in removal proceedings did not undertake any administrative or civil rights

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<sup>77</sup> Memorandum from Jeh Johnson, Sec., DHS, on Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants (Nov. 20, 2014), available at <http://1.usa.gov/1QudY5r>.

<sup>78</sup> Memorandum from John Morton, Dir., ICE, on Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens, to All Field Office Dirs., All Special Agents in Charge, and All Chief Counsel 2 (June 17, 2011), available at <http://1.usa.gov/1zg2way>.

<sup>79</sup> Memorandum from John Morton, Dir., ICE, on Prosecutorial Discretion: Certain Victims, Witnesses and Plaintiffs, to All Field Office Dir., All Special Agents in Charge, and All Chief Counsel 1-2 (June 17, 2011), available at <http://1.usa.gov/1b7hyUf>.

<sup>80</sup> *Id.* at 2.

<sup>81</sup> *Supra* note 77 at 7.

<sup>82</sup> For a fuller discussion of the impact of the new guidance on prosecutorial discretion, see American Immigration Council and American Immigration Lawyers Association, *Practice Advisory: Prosecutorial Discretion Requests Under the Johnson Enforcement Priorities Memorandum*, updated May 4, 2015, available at <http://bit.ly/1its1x4>.

<sup>83</sup> See *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012).

<sup>84</sup> See Order of the Immigration Judge, In the Matter of \_\_\_\_\_, available at <http://bit.ly/1dlmrLa>.

complaint themselves. ICE in North Carolina closed a number of pending deportation proceedings after the Department of Justice issued a report finding that the Alamance County Sheriff's Department engaged in widespread racial profiling of Latinos.<sup>85</sup>

Though ICE is unlikely to take similar action in the context of newly arrived immigrant children experiencing deplorable detention conditions in Border Patrol facilities, many formerly detained children can pursue valid civil rights complaints and rely on them as another basis for seeking prosecutorial discretion consistent with the government's own policies. A brief discussion of some of those available remedies follows.<sup>86</sup>

### Federal Tort Claims Act

The Federal Tort Claims Act (FTCA)<sup>87</sup> authorizes suits for money damages against the United States based on the negligent acts or omissions of its employees, and intentional misconduct by federal investigative or law enforcement employees.<sup>88</sup> Although the FTCA specifically provides for monetary compensation, settlement of an FTCA claim may also include non-monetary benefits affecting the claimant's immigration situation.

In the immigration context, common state torts underlying FTCA claims include negligence (including negligent infliction of emotional distress and negligent medical care), false arrest, false imprisonment, assault, battery, intentional infliction of emotional distress, abuse of process, and malicious prosecution. Attorneys representing immigrant children should also consider the affirmative reporting obligations imposed by the VCAA as it may relate to a client's FTCA claim. Specifically, if the state has a mandatory reporting statute analogous to the VCAA, an FTCA claim can be brought on the basis of failure to report.<sup>89</sup> Further, some states recognize the breach of a statutory duty as negligence per se.<sup>90</sup>

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<sup>85</sup> Jason A. Cade, *Policing the Immigration Police: ICE Prosecutorial Discretion and the Fourth Amendment*, 113 COLUM. L. REV. SIDEBAR 180, 181-84 (2013); see also Press Release, U.S. Dep't of Justice, Justice Department Releases Investigative Findings on the Alamance County, N.C., Sheriff's Office, Sept. 18, 2012, available at <http://1.usa.gov/1bWaQSI>; Billy Ball, *Deportations Dropped in Alamance County, But How Many?*, INDY WEEK, Nov. 21, 2012, available at <http://bit.ly/1HL7kpu>.

<sup>86</sup> For more information on seeking prosecutorial discretion for your client, see *Prosecutorial Discretion: How to Advocate for your Client*, AMERICAN IMMIGRATION COUNCIL (Updated Mar. 18, 2015), available at <http://bit.ly/1OrH2ti>.

<sup>87</sup> 28 U.S.C. §§ 1346(b), 2671 et seq.; 28 C.F.R. §§ 14.1-14.11.

<sup>88</sup> 28 U.S.C. § 1346(b)(1) (negligent torts); 28 U.S.C. § 2680(h) (intentional torts).

<sup>89</sup> Several courts have held that while the FTCA cannot be used to vindicate purely federal rights, where the federal right has a state law analogue, a claim based on the violation of a federal right can be maintained. See, e.g., *Johnson v. Sawyer*, 47 F.3d 716, 727 (5th Cir.1995); *Gelley v. Astra Pharmaceutical Prods. Inc.*, 610 F.2d 558, 562 (8th Cir.1979) (“[F]ederally imposed obligations, whether general or specific, are irrelevant to our inquiry under the FTCA, unless state law imposes a similar obligation upon private persons.”); *Zabala Clemente v. United States*, 567 F.2d 1140, 1149 (1st Cir.1977) (“... even where specific behavior of federal employees is required by federal statute, liability to the beneficiaries of that statute may not be founded on the Federal Tort Claims Act if state law recognizes no comparable private liability”); *Zimmerman ex rel.*

Initiating an FTCA action is a relatively straightforward process. FTCA claims proceed in two steps. First, the claimant files an administrative complaint (Standard Form 95 “Claim for Injury, Damage, or Death”)<sup>91</sup> with the federal agency responsible for the harm. Some claims settle at the administrative stage. If the agency denies the claim or fails to act on it within six months, the claimant has six months to file a lawsuit in federal district court. While detailed guidance on FTCA claims is outside the scope of this advisory, there are resources available for advocates seeking to vindicate their clients’ rights using the FTCA.<sup>92</sup>

Some former detainees have filed FTCA administrative claims and lawsuits in response to abuses by immigration officials, including individuals subject to harsh and abusive detention conditions. For example, in May 2014 a former Border Patrol detainee filed an FTCA lawsuit after she was detained for several days in overcrowded Border Patrol holding cells without beds, mattresses, or other bedding; was denied medical care, hygiene supplies, and the ability to bathe; and was subjected to extreme temperatures.<sup>93</sup>

In addition to enabling recovery for damages, filing an FTCA claim may assist clients in avoiding removal or improving their immigration status. As noted, it is against ICE policy to remove individuals who are in the midst of a “legitimate effort to protect their civil rights or civil liberties” and ICE is directed to exercise prosecutorial discretion when individuals are “in non-frivolous lawsuits regarding civil rights or liberties violations.”<sup>94</sup> An FTCA claim is such an action. Accordingly, and for the reasons explained above, filing an FTCA claim should increase the chances of obtaining prosecutorial discretion, for example, in the form of cancellation of a Notice to Appear

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*Zimmerman v. United States*, 171 F. Supp. 2d 281, 293 (S.D.N.Y. 2001) (allowing an action for violation of § 13031 because there was an analogous New York state reporting statute).

<sup>90</sup> See, e.g., *Zimmerman ex rel. Zimmerman v. U.S.*, 171 F.Supp.2d 281, 293 (S.D.N.Y.2001), (holding that the minor daughter of a military officer could sue the defendant military officers in state court on a negligence claim for violation of 42 U.S.C. § 13031); *Cline v. U.S.*, No. 3:13-CV-0776, 2014 WL 4667118, at \*8 (M.D. Tenn. Sept. 18, 2014) (suggesting that Tennessee’s mandatory reporting statute, when combined with 42 U.S.C. § 13031, could justify an FTCA claim against military investigators for failing to report to a reason to believe the plaintiff’s husband was sexually abusing the plaintiff’s child). Plaintiffs’ negligence claims in both *Zimmerman* and *Cline* involved prior incidents of abuse of other individuals that were not reported as required by law, which plaintiffs alleged resulted in their subsequent abuse. While practitioners may not always be aware of specific agents or facilities where abusive conditions should have been reported and were not, there is a growing body of public information on abuse allegations involving children which could help to support future claims. The ACLU is currently litigating a FOIA request to obtain such records for 2009-2014. See note 8 *supra*.

<sup>91</sup> Standard Form 95 is available at <http://1.usa.gov/1b7SxID>.

<sup>92</sup> See, e.g., Priya Patel, *Federal Torts Claims Act: Frequently Asked Questions for Immigration Attorneys*, NATIONAL IMMIGRATION PROJECT (Jan. 24, 2013), <http://bit.ly/1KozqXd>.

<sup>93</sup> *Quinonez Flores v. U.S.A.*, No. 14-3166 (E.D.N.Y. filed May 20, 2014), complaint available at <http://bit.ly/1QUJtqh>; see also *Sanchez v. Rowe*, 651 F. Supp. 571 (N.D. Tex. 1986) (authorizing an FTCA claim against an ICE agent for hitting plaintiff on the face and head every time he refused to sign his voluntary departure forms), complaint available at <http://bit.ly/1JvmtgC>.

<sup>94</sup> *Supra* note 79.

as improvidently issued, issuance of a stay of removal, administrative closure, or, possibly, U visa certification.<sup>95</sup>

In addition to or in lieu of FTCA claims, children whose rights have been violated by federal officials may also consider pursuing a *Bivens* claim for money damages.<sup>96</sup> Again, such claims are outside the scope of this advisory but like FTCA, *Bivens* claims can be a useful tool for vindicating the rights of child clients.

### Administrative Complaints

Advocates whose clients have been abused or neglected may also wish to submit an administrative complaint to DHS oversight agencies. While such complaints are strictly administrative and carry no possibility of monetary compensation—and are also extremely unlikely to result in a meaningful investigation or discipline for abusive agents<sup>97</sup>—they are still an important means of documenting abuse and should form the basis for requesting prosecutorial discretion or administrative closure.

Advocates can easily submit complaints online and/or in written form to various DHS oversight entities, including CBP Internal Affairs,<sup>98</sup> the DHS Office of Inspector General (OIG),<sup>99</sup> and CRCL.<sup>100</sup> In our experience, CBP Internal Affairs may be a marginally preferable avenue for pursuing administrative complaints—CRCL’s mandate is limited to policy recommendations and CRCL officials have no authority to hold individual agents accountable for abuse—though none of these offices is likely to undertake a meaningful investigation in response to a civil rights complaint, or to criticize other DHS components for civil rights abuse. Regardless of whether DHS takes any action in response to a complaint, however, as with FTCA claims, simply initiating the process can provide a basis for requesting the various forms of relief outlined above. And, over

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<sup>95</sup> Memorandum from Peter S. Vincent, Principal Legal Advisor, to OPLA Attorneys, p. 1 (Sep. 25, 2009), available at <http://1.usa.gov/1QBtTr>.

<sup>96</sup> See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

<sup>97</sup> Approximately 97 percent of the 809 abuse complaints filed against Border Patrol agents between January 2009 and January 2012 resulted in the classification “no action” taken. See Daniel Martinez et al., NO ACTION TAKEN: LACK OF CBP ACCOUNTABILITY IN RESPONDING TO COMPLAINTS OF ABUSE, AMERICAN IMMIGRATION COUNCIL (May 2014), <http://bit.ly/1ozFidd>. The ACLU is still waiting for substantive responses to multiple CBP-related civil rights complaints filed with OIG and CRCL—including a January 15, 2014, complaint filed on behalf of fifteen individuals describing abuse and harassment at Border Patrol interior checkpoints; an October 9, 2013, complaint on behalf of five individuals alleging rights violations arising from Border Patrol “roving patrol” operations; and a complaint filed May 9, 2012, on behalf of eleven individuals reporting various abuses by CBP agents at southern Ports of Entry.

<sup>98</sup> Complaints to CBP Internal Affairs can be filed here: <http://1.usa.gov/1QUruQX>. A written copy can and should be submitted to: CBP INFO Center, OPA - MS1345, U.S. Customs and Border Protection, 1300 Pennsylvania Ave., N.W. Washington, DC 20229.

<sup>99</sup> OIG complaints can be filed here: <http://1.usa.gov/1Kvvsek>. A written copy can and should be submitted to DHS Office of Inspector General/MAIL STOP 0305, Attn: Office of Integrity & Quality Oversight – Hotline, 245 Murray Lane SW, Washington, DC 20528-0305.

<sup>100</sup> CRCL complaints can be filed here: <http://1.usa.gov/1V6gjKI>. A copy of the form can and should be saved and emailed to CRCL at [CRCLCompliance@hq.dhs.gov](mailto:CRCLCompliance@hq.dhs.gov).



time, the sheer volume of such complaints may become increasingly difficult for the government to ignore.

### **III. Conclusion**

In light of the U.S. government's harsh response to recent child immigrants, as well as those children's common experience of abuse and neglect in government custody, attorneys should carefully screen<sup>101</sup> their clients and consider all available remedies based on their mistreatment. In many cases, the most viable strategy may be one based upon past mistreatment in government custody (conversely, if a child has a strong claim for legal relief, advocates should consider whether pursuing these strategies could prolong or otherwise negatively impact the client's case).

Finally, advocates are encouraged to share the effectiveness of these and other strategies with other practitioners and look for ways to collaborate and coordinate their many efforts to establish more robust relief options for children in removal proceedings. Legal service organizations representing significant numbers of immigrant children are particularly well-positioned to systematically document these abuses and should consider whether coordinated data collection, administrative complaints, or other advocacy strategies may help prevent future clients from suffering mistreatment in federal custody.

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<sup>101</sup> The VERA advisory noted above includes a helpful discussion on child-sensitive interview techniques. *See* note 49 *supra*.