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## YALE LAW & POLICY REVIEW

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### Second-Wave DREAMers

By Nina Rabin\*

*This Article compares and contrasts two waves of child migrants that have shaped the U.S. immigration policy agenda and debate over the past twenty years, in order to draw lessons about how public schools and policymakers can best serve today's immigrant students. The first wave of undocumented children, who arrived in the two decades after 1986 and are often referred to as DREAMers, experienced schools as a place of refuge, where they could spend their formative years without distinctions drawn based on immigration status. This experience was the result of the Supreme Court's decision in Plyler v. Doe, 457 U.S. 202 (1982), which held that immigration status has no place in the context of K-12 education. In sharp contrast, immigrant children arriving since 2014 do not experience schools as a place of refuge. This Article describes these recent newcomer children as "second-wave DREAMers." Unlike "first-wave" DREAMers, recent child migrants tend to arrive at an older age, separated from family, and immediately after experiencing trauma both in their home country and in their protracted migration journeys. Importantly, most of today's child migrants are entangled with immigration enforcement from the moment of their arrival. This stands in striking contrast to the previous generation of immigrant children, who largely arrived as small children with their families and lived undetected by the immigration bureaucracy until the creation of the Deferred Action for Childhood Arrivals Program. As a result of the current controversy over unaccompanied minors and asylum-seeking families, much of the advocacy and media surrounding recently arrived child migrants focuses on their*

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*treatment at the border and in immigration court. But their growing numbers in school classrooms and communities calls for additional focus on their lives beyond the border—and requires a new, modernized reading of Plyler. Drawing lessons from the vibrancy of the DREAMer movement but also its devastating inconclusiveness, schools must take a different approach to this new generation of child migrants. This approach can be conceptualized as shifts along three key axes of the Plyler decision: from assimilation to inclusion, from formally equal to equitable education, and from innocence to collective responsibility. These shifts are not simply rhetorical; they result in pragmatic and specific programs and policies, which if implemented systematically would formulate a central role for schools in creating a path toward full social integration of today’s immigrant children.*

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## SECOND-WAVE DREAMERS

### I. INTRODUCTION

Over the past twenty years, two waves of child migrants have been at the heart of U.S. immigration law, policy, and advocacy. They are epitomized by two images. First, the undocumented high school graduate, in cap and gown with fist in the air, demanding justice for a generation of children who arrived in this country as small children. Second, the separated child migrant, crying as she is torn from her parent, or wrapped in foil blankets in a tent camp for detained unaccompanied minors.

At varying times, these images and the populations they evoke have captivated the nation's attention, shaped fierce debates, and led to policy agendas and certain reforms. Yet year in and year out, whether in the headlines or more often not, undocumented immigrant youth sit in school classrooms and join the workforce. Their experiences and future trajectories are often shaped by these oversimplified profiles rather than the reality of their complex lives.

Thus, the first wave of undocumented children, for better or for worse, came to be understood as the DREAMers. This paper uses the term “first-wave DREAMers” to refer to immigrants who entered the United States as children between 1986 and 2007. For reasons I discuss, this was a unique period in U.S. immigration law and policy that created a sizable population of undocumented children often referred to as DREAMers. I use the term “DREAMers” well aware that it is controversial and politically fraught, given all that has transpired since it was first adopted by advocates for undocumented immigrant youth in the early 2000s.<sup>1</sup> As the discussion of this population will make clear, “first-wave DREAMers” is intended to encapsulate the aspirations and certain shared characteristics of this group, as well as the troubling ways in which it essentialized and separated young people from the broader community of undocumented immigrants. As a category, DREAMers have been the subject of repeated attempts at legislative reform and the implementation of administrative reform in the form of the Deferred Action for Childhood Arrivals Program (DACA).

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1. See, e.g., WE ARE NOT DREAMERS: UNDOCUMENTED SCHOLARS THEORIZE UNDOCUMENTED LIFE IN THE UNITED STATES (Leisy J. Abrego & Genevieve Negrón-Gonzales eds., 2020); see also Jesús A. Rodríguez, *The Supreme Court Case that Created the ‘Dreamer’ Narrative*, POLITICO MAG. (Oct. 31, 2021 7:00 AM EDT), <https://www.politico.com/news/magazine/2021/10/31/dreamers-undocumented-youth-forever-children-516354> [https://perma.cc/3GPT-P8JS] (quoting one immigrant activist often referred to as a DREAMer, saying, “I’ve never personally identified myself as a Dreamer. That was a label that was pasted onto me for political purposes.”).

This paper uses a new term for the second group of child migrants, those who have entered the country since 2014: “second-wave DREAMers.” Most of the focus of policy advocacy when it comes to this second group of child migrants has focused on their treatment at the border.<sup>2</sup> As a category, they are identified by very different characteristics: their desperate flight, their demands on the immigration system, and the pressure they place on U.S. border policies. While public attention and policy advocacy have focused largely on their immediate processing at the border, their numbers grow in schools and communities, with very little focus on the longer-term future of this population. And yet with current backlogs and trends, a significant portion of these young people will come of age unauthorized to live in this country, and eventually raise urgent questions about their social incorporation.

This Article compares and contrasts these two waves of child migrants—first- and second-wave DREAMers—in furtherance of two goals. The first is descriptive. I offer a more robust depiction of newcomer children today than what is often portrayed in media accounts or policy analyses. Comparing the two populations conceptualizes recently arrived immigrants as more than a transitory population. All too often, when it comes to today’s child migrants, much of the attention of legal scholars, policymakers, and journalists tends to focus on their treatment at the border, their experience in the immigration detention system, and their need for legal representation.<sup>3</sup> There is good reason to focus on these issues, given the

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2. This paper includes in this second group of recent arrivals both children arriving on their own (unaccompanied minors) and in family units. Lawyers often make a distinction between the two because of differences in the way the two populations are handled in the legal system. This paper, however, addresses recently arrived child migrants as a single group, without regard to whether they crossed the border on their own or with family members. As elaborated in Part III, most of the key characteristics and challenges of child migrants are shared by both subgroups once they are released from detention into schools and communities.
  3. One notable exception is investigative journalism by the *New York Times* that provided an in-depth account of the experiences of child migrants in the low-wage labor force. See Hannah Dreier, *Alone and Exploited, Migrant Children Work Brutal Jobs Across the U.S.*, N.Y. TIMES (Feb. 25, 2023), <https://www.nytimes.com/2023/02/25/us/unaccompanied-migrant-child-workers-exploitation.html> [<https://perma.cc/HK3C-K8Y6>]. While the article focused on particularly egregious cases of labor violations, it is in fact just the extreme end of common experiences in the workforce for newcomer children, discussed in detail *infra* Section III.B.

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shocking mishandling of children at the border in recent years, and the stark injustice of detaining and prosecuting children without a guaranteed right to counsel.

But the fact is that many young people leave immigration detention after a matter of weeks, and then encounter years of different but equally profound challenges as they struggle to integrate into communities and schools. While part of this struggle is due to their lack of representation in immigration court, this Article aims to widen the lens, to consider their experiences and trajectories more broadly. Comparing their experience with first-wave DREAMers is illuminating in this regard. For years before DREAMers became a known social category and before DACA was created, many undocumented children lived in a social context in which their individual struggles were borne out silently, in schools and communities where any mention of immigration status was taboo. Through the DREAM movement, undocumented students emerged from this social isolation through political activism and solidarity that enabled them to demand greater social inclusion. DACA is one imperfect but highly significant outcome of their mobilization.

In some ways, today's newcomer youth face a lonely struggle that is similar to that of the DREAMers before DACA. They, too, must forge their way in a new country in schools that are ill-equipped to meet their needs, and in a society that lacks a policy framework to address their vulnerability. Yet this Article's descriptive account illustrates crucial differences between the two groups and their likely future trajectories. Central to this contrast is the case *Plyler v. Doe*,<sup>4</sup> arguably the most significant legal framework shaping the experiences of immigrant children in U.S. society.

*Plyler*, issued by the Supreme Court in 1982, held that undocumented immigrant students have a right to public education without any distinctions drawn based on their immigration status. This Article contrasts the experiences of these two waves of child migrants through the lens of *Plyler*. Three critical aspects of *Plyler*'s implementation by public schools are particularly illuminating. First, *Plyler*'s holding that immigration status has no place in the school context created not just a legal rule, but a school culture that views assimilation as the primary goal of schools vis-à-vis immigrant students. Second, this commitment to assimilation results in a focus on formally equal treatment in the classroom. Teachers and school administrators are acculturated to focus their efforts on ensuring that no distinctions are drawn between immigrant students and their nonimmigrant peers. This is most often manifest in an aversion to any overt

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4. 457 U.S. 202 (1982).

references to students' migration histories or current legal status. Third and finally, *Plyler* was premised in part on the innocence of undocumented children. While the Court's reasoning was also grounded in justifications that would apply broadly to immigrants of all ages, the innocence rationale has been particularly emphasized in the years since *Plyler*. Innocence continues to be a deep social norm shaping schools' approach to immigrant children. This, too, results in a school culture that is reluctant to engage with the distinctive challenges immigrant students face as a result of their migration journeys, as this is associated with "culpable" behavior.

For first-wave DREAMers, assimilation, education, and innocence came to be defining characteristics of the DREAMer social movement.<sup>5</sup> This paper's descriptive account illustrates how the implementation of *Plyler* for this generation of undocumented youth was both a blessing and a curse. On the one hand, it created schools as a place of refuge from matters of immigration status, which proved to be a crucial formative experience for undocumented students.<sup>6</sup> At the same time, the insistence on assimilation and innocence is at the heart of the intractable state of limbo in which these now young adults find themselves.

For today's child migrants, second-wave DREAMers, this paper's descriptive account aims to show how the key tenets of *Plyler*'s holding apply very differently, and with far more significant downsides. In light of their migration histories and the current social and legal context, today's newcomer students are not well-served by a school culture that views immigrant children through a lens of assimilation, formally equal education, and innocence. Many schools see it as part of their mission to avoid drawing attention to the migration journeys and legal challenges their students face. Yet today's recently arrived children are not like the undocumented immigrant children for whom this approach was tailored. Most are already in removal proceedings and face urgent legal, economic, and social challenges. Many would benefit from adult intervention rather than silence when it comes to their immigration status. As a result of these realities, the

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5. See WALTER J. NICHOLLS, *THE DREAMERS: HOW THE UNDOCUMENTED YOUTH MOVEMENT TRANSFORMED THE IMMIGRANT RIGHTS DEBATE* 24-29 (2013), discussed along with additional citations *infra* Section II.B.

6. See e.g., Roberto G. Gonzales, *Left Out but Not Shut Down: Political Activism and the Undocumented Student Movement*, 3 *Nw. J. L. & Soc. Pol'y* 219, 223, 229, 230 (2008); Leisy J. Abrego, *Legal Consciousness of Undocumented Latinos: Fear and Stigma as Barriers to Claims-Making for First- and 1.5-Generation Immigrants*, 45 *L. & Soc'y Rev.* 337, 343 (2011). The link between *Plyler* and DREAMers' political activism is discussed at greater length *infra* Section III.C.

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school culture created by *Plyler* no longer provides a place of refuge and thriving for today’s child migrants.

The final section of the Article takes up my second goal: to propose an alternative, modernized reading of *Plyler* for schools, policymakers, and advocates for immigrant children. Over the years since the Supreme Court issued its decision, there has been extensive scholarly discussion of *Plyler*’s jurisprudential basis.<sup>7</sup> This commentary is more important now than ever, when the decision’s future before the current Supreme Court is at high risk.<sup>8</sup> This Article, however, is not a proposal for a new doctrinal justification for *Plyler*’s holding. Rather, it offers new guideposts for implementation of *Plyler*’s holding by public schools. Whatever happens to *Plyler* in the courts, school districts throughout the country will continue to grapple with how best to serve recently arrived child migrants in their classrooms. In fact, many schools around the country have already recognized the need for new approaches to effectively educate immigrant students in light of the unique characteristics of today’s child migrants. Yet these efforts are currently the exception to the rule. A new, updated understanding of *Plyler* is needed for more robust and systematic implementation of these measures.

This Article conceptualizes the need for change in the form of shifts along all three of the prior guideposts that shaped schools’ implementation of *Plyler*: from assimilation to inclusion, from formally equal to equitable education, and from innocence to collective responsibility. The shifts I propose are summarized in the chart below. They are elaborated at greater length in the remainder of the paper.

	GOAL	MEANS	JUSTIFICATION
First-wave DREAMers	Assimilation	Equal Education	Innocence

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7. See, e.g., HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 19-30, 52-55 (2014); Rachel F. Moran, *Personhood, Property, and Public Education: The Case of Plyler v. Doe*, 123 COLUM. L. REV. 1271, 1273-74 (2023); Matthew Patrick Shaw, *The Public Right to Education*, 89 U. CHI. L. REV. 1179, 1220-26 (2022); Steven G. Calabresi & Lena M. Barsky, *An Originalist Defense of Plyler v. Doe*, 2017 B.Y.U. L. REV. 225, 230; see also *infra* notes 26-40 and accompanying text (discussing the Supreme Court’s reasoning in *Plyler*).
  8. See, e.g., J. David Goodman, *Texas Governor Ready to Challenge Schooling of Migrant Children*, N.Y. TIMES (May 5, 2022), <https://www.nytimes.com/2022/05/05/us/texas-schools-undocumented-immigrants-supreme-court.html> [<https://perma.cc/7NMZ-JWET>] (describing Governor Abbot’s talk of overturning *Plyler* as a response to the recent Supreme Court’s willingness to overturn decades-old precedent such as *Roe v. Wade*, 410 U.S. 113 (1973)).

Second-wave DREAMers	Inclusion	Equitable Education	Collective Responsibility
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This Article is rooted in my experience representing young immigrant clients in a legal clinic based in a large public school in Los Angeles. As described further in the final section of the Article, the clinic itself is a model of what a shift in *Plyler*'s implementation can look like. Rather than a culture of silence when it comes to students' immigration status, our clinic is embedded in the school community as a safe place for immigrant students and their families to address their legal needs. In close partnership with teachers, administrators, and school social workers, we have been providing legal services to immigrant students and their families since 2019. In those years, we have had the opportunity to serve both waves of child migrants I describe in this Article. The bulk of our docket is made up of recently arrived young people, whom I refer to in this Article as second-wave DREAMers. In addition, due to tumultuous changes and uncertainty with regard to the DACA program in recent years, we have also had the tail end of the first-wave DREAMers come through our clinic's doors.

These clients form the backbone of this Article, which proceeds as follows. Part II opens with three brief profiles of first-wave DREAMers the clinic has served. It then describes the migration dynamics that created this population, and the social context in which they grew up. Part III opens with three profiles of second-wave DREAMers our clinic represents, followed by a description of the migration patterns and social context that account for the sharp contrast between these clients and those in the preceding section. This is the paper's descriptive account.

Part IV proposes a new reading of *Plyler* for schools, policymakers, and advocates for immigrant children. It argues for a shift to inclusion, equity, and collective responsibility as the goals, means, and justification animating public schools' approach to immigrant students. These alternatives reenvision *Plyler*'s legal command in modern terms that learn from our past and acknowledge our current reality. It grounds these conceptual shifts in specific measures some schools and school districts around the country have already implemented to better serve today's newcomers. With sufficient resources and political will, these could be more widely adopted. The Article closes with a call for policies that allow schools to lead the way, as they did for first-wave DREAMers, in serving as a catalyst for the greater recognition and social integration of today's immigrant children.



## SECOND-WAVE DREAMERS

### II. FIRST-WAVE DREAMERS

- *Diego<sup>9</sup> was born in Guanajuato, Mexico, and entered the United States with his parents in 2000 at the age of two. Diego's parents drove across the U.S.-Mexico border. On their first attempt to cross, immigration officials apprehended the family, and they were briefly detained. On their second attempt, they entered undetected and have not left the country since. Diego believes his parents moved to the United States for financial reasons. He graduated from high school in 2018. He currently attends community college and works as a waiter in a museum café in Los Angeles.*
- *Laura was born in Oaxaca, Mexico, in 2003 and came to the United States as a baby in 2004. She was too little to remember the crossing, but her stepfather has told her she was waived through a port of entry. She currently lives with her mother and stepfather (both undocumented), as well as two U.S.-citizen siblings. Laura graduated from high school in 2021. She currently attends community college, where she studies child development. She hopes to transfer to a four-year university next year.*
- *Juan was born in Tijuana, Mexico, in 2003. His mother brought him to the United States when he was three months old, after his father abandoned her while she was pregnant. She walked for two days through the desert with Juan on her back, a single mother in search of work. They settled in Los Angeles, and eventually she met a new partner and had three U.S.-citizen children. Juan graduated from high school in 2021 and currently is studying psychology at California State University, Los Angeles. He helps his stepdad with construction during the summer and hopes to become a therapist when he graduates.*

These brief descriptions are typical of the information we have about the migration journeys of our clinic's DACA clients. Each of these students has a lengthier file filled with more expansive facts related to their lives here in the United States, but their immigration histories are sparse. This is not to diminish the bravery and risk that each family surely experienced decades ago when their parent or parents made the choice to bring them, as babies or toddlers, to the United States. But it stands in striking contrast to the immediacy of the trauma, violence, and protracted migration journeys of the recently arrived immigrant youth described in Section III.

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9. I have used pseudonyms for the names of all individual clients referenced in this Article.

*A. Migration Context: Global Patterns and Legal Policies, 1986-2007*

Many accounts have detailed the migration dynamics that shaped the life histories of Diego, Laura, and Juan and created the large population of undocumented children in the United States whom I refer to as first-wave DREAMers.<sup>10</sup> In broad strokes, these families migrated to the United States during a period when U.S. immigration policy incentivized entry and then provided immigrants with virtually no means of obtaining lawful immigration status. These dynamics were particularly at play for Mexican migrants.

Immigration from Mexico has long historical roots, but two key developments in 1964 and 1965 set the stage for decades of skyrocketing growth of undocumented Mexican immigrants. First, in 1964, the government terminated the Bracero Program, a program that began in World War II to bring temporary workers from Mexico to the United States. Although the program ended, labor demands did not subside, and Mexican workers continued to migrate north.<sup>11</sup>

Second, with the passage of the Immigration and Nationality Act of 1965, for the first time, the United States placed a numerical limit on the number of immigrants permitted from the Western Hemisphere.<sup>12</sup> The new country caps did not stem the flow of immigrants, who continued to arrive in response to the unchanged labor demands. But it did change the social context of their reception. Increasingly, Mexican immigrants arrived without lawful admission and were portrayed as “illegals” and “criminals.”<sup>13</sup> As Douglas S. Massey and his coauthors describe in an Article about border enforcement in these years, practically speaking, “little had changed between the late 1950s and the late 1970s: similarly sized flows of migrants were circulating across the border and going to the same destinations in the same U.S. states.” However, in symbolic terms, the new border policies

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10. See, e.g., MOTOMURA, *supra* note 7, at 43-46; Jorge Durand & Douglas S. Massey, *Evolution of the Mexico-U.S. Migration System: Insights from the Mexican Migration Project*, 684 ANNALS AM. ACAD. POL. & SOC. SCI. 21 (2019). For historical accounts of the preceding decades that shaped prior generations of Mexican migration, see generally MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* (2004); and KELLY LYTTLE HERNÁNDEZ, *MIGRA! A HISTORY OF THE U.S. BORDER PATROL* (2010).

11. Jorge Chapa, *A Demographic and Sociological Perspective on Plyler’s Children, 1980-2005*, 3 NW. J. L. & SOC. POL’Y 186, 194-95 (2008).

12. MOTOMURA, *supra* note 7, at 43.

13. HERNÁNDEZ, *supra* note 10, at 205.

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resulted in a dramatic shift, “for now the vast majority of the migrants were ‘illegal’ and thus by definition ‘criminals’ and ‘lawbreakers.’”<sup>14</sup>

Politicians soon latched onto this new categorization of Mexican immigrants as threats and criminals and used it “to cultivate a new politics of fear.”<sup>15</sup> During this period, the racist undertones of the immigration policy debate were laid bare.<sup>16</sup> As anti-Latino politics and rhetoric grew, states and localities began to mobilize and create increasingly sophisticated and organized anti-immigrant advocacy networks.<sup>17</sup> The passage of Proposition 187 in California in 1994, which sought to deny social services to undocumented children and families, exemplifies the power and reach of the anti-immigrant—and anti-Mexican—fervor in this period.

In 1996, the Clinton Administration attempted to preempt these state and local efforts by passing a series of measures to enhance border security and vastly expand the border enforcement bureaucracy. Ironically, increased border militarization actually increased the size of the undocumented population. By raising the costs and risks of attempting unlawful entry, border militarization led Mexican immigrants to shift from circular patterns of migration to unidirectional movement. For generations in the southwest, the migration flow was largely “circular,” with Mexican laborers coming for seasonal work and then returning to their families in Mexico. But with the increase in border enforcement, once here, few Mexican migrants were willing to return to Mexico and face the risks of

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14. Douglas S. Massey, Jorge Durand & Karen A. Pren, *Why Border Enforcement Backfired*, 121 AM. J. SOCIO. 1557, 1560 (2016); see also Douglas S. Massey, *Immigration Enforcement as a Race-Making Institution*, in IMMIGRATION, POVERTY, AND SOCIOECONOMIC INEQUALITY 257, 259 (David Card & Steven Raphael eds., 2013) (explaining that, despite immigration caps imposed in the 1960s and 1970s, “the demand for Mexican workers did not change,” “inevitabl[y] result[ing]” in “a sharp rise in undocumented migration”).
  15. Massey, Durand & Pren, *supra* note 14, at 1560.
  16. See generally Kevin R. Johnson, *Proposition 187 and Its Political Aftermath: Lessons for U.S. Immigration Politics After Trump*, 53 U.C. DAVIS L. REV. 1859, 1861-74 (2020) (discussing the passage of California’s Proposition 187 in 1994 and the racialized campaign leading up to it); Ruben J. Garcia, Comment, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 CHICANO-LATINO L. REV. 118 (1995) (arguing that Proposition 187 was motivated, at least in part, by a desire among California residents to maintain “cultural and racial homogeneity”).
  17. NICHOLLS, *supra* note 5, at 23.

reentry. This has been called the “caging effect.”<sup>18</sup> As a result, families increasingly settled here, often those including young Mexican national children. Many went on to have additional children who were U.S. citizens by virtue of birthright citizenship.

At the time—and to this day—the undocumented parents and siblings in these mixed-status families had no means of applying for legal immigration status. Many Mexican immigrants in the previous generation had benefited from the Immigration Reform and Control Act of 1986 (IRCA), a large-scale legalization program enacted by Congress that provided a means of obtaining legal permanent residency to roughly 2.7 million immigrants. There has been no broad legalization program since, and the existing legal admissions structure gives families who enter without admission extremely few viable pathways to legal status. Under the federal immigration statute, U.S. citizens cannot apply for family-based petitions until they reach the age of twenty-one.<sup>19</sup> Even when this day arrives, many parents are unable to benefit from family-based petitions because of bars to becoming a legal permanent resident for people who have lived in the United States for years without legal status.<sup>20</sup> Family-based petitions are even less viable for undocumented siblings of U.S. citizens, who face decades-long waits due to caps on second-degree family members.<sup>21</sup>

Diego, Laura, and Juan, whose profiles opened this section, exemplify these patterns. Each of them described crossing a border that was not heavily regulated as infants or very small children with their parents. Each was the oldest child, with younger U.S. citizen siblings born in this country. Laura’s stepfather and Juan’s mother initially came to our clinic on behalf of their eighteen-year-old children, Laura and Juan. They came in search of a legal pathway for their oldest children, who had been raised side-by-side with their younger siblings but were now facing daunting prospects as they approached high school graduation.

In the nineties and early 2000s, the population of first-wave DREAMers grew. By 2008, approximately 1.5 million undocumented children lived in the United States, making up about sixteen percent of the total

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18. Douglas S. Massey et. al., *Explaining Undocumented Migration to the U.S.*, 48 INT’L MIGRATION REV. 1028, 1031 (2014).

19. 8 U.S.C. § 1151(b)(2)(A)(i).

20. 8 U.S.C. § 1182(a)(9)(B).

21. 8 U.S.C. § 1151(b). For further discussion, see David B. Thronson, *Unhappy Families: The Failings of Immigration Law for Families That Are Not All Alike*, in THE NEW DEPORTATIONS DELIRIUM: INTERDISCIPLINARY RESPONSES 33, 41 (M. Brinton Lykes & Daniel Kanstroom eds., 2015).

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undocumented population.<sup>22</sup> They were a distinctive population of immigrant children from the generation that preceded them, many of whom had benefited from IRCA's legalization. At the same time, they grew up in a country where legal immigration status was becoming ever more polarizing, racialized, and politically fraught.

### *B. Social Context: Schools, Plyler, and the Birth of the DREAM Movement*

In the first decade of the twenty-first century, a recurring narrative emerged as many of these children became young adults. They described growing up unaware of their lack of legal status, only to discover it as they approached milestones associated with adolescence. Sociologist Roberto Gonzalez conducted extensive interviews with DREAMers, and described that his subjects “uniformly noted a jolting shift at around age 16, when they attempted to move through rites of passage associated with their age.”<sup>23</sup> As these teens began to take many of their initial steps into adulthood—getting a driver's license, looking for part-time work, applying to college—they suddenly realized they could not access any of these opportunities without a Social Security number. This was a life-changing moment, in which they realized that their lack of legal status would exclude them from the broad range of future activities they had envisioned for themselves.

The reason these young people were able to proceed through much of their childhoods unaware of their legal status is because of *Plyler's* holding that all children have a right to free public education in the United States without regard to immigration status.<sup>24</sup>

The Supreme Court issued *Plyler v. Doe* in 1982, in response to a state ordinance in Texas that permitted school districts to charge tuition to undocumented children to attend public school.<sup>25</sup> While immigration in the

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22. NICHOLLS, *supra* note 5, at 27.

23. Roberto Gonzales, *Learning to Be Illegal: Undocumented Youth and Shifting Legal Contexts in the Transition to Adulthood*, 76 AM. SOCIO. REV. 602, 609 (2011); see also Jose Antonio Vargas, *My Life as an Undocumented Immigrant*, N.Y. TIMES (June 22, 2011), <https://www.nytimes.com/2011/06/26/magazine/my-life-as-an-undocumented-immigrant.html> [<https://perma.cc/V37Q-XHV3>] (describing the author's experience not learning that he was undocumented until he was unable to obtain a learner's permit).

24. 457 U.S. 202 (1982).

25. For in-depth treatments of the historical context of the decision, see MOTOMURA, *supra* note 7, at 1-3; MICHAEL OLIVAS, NO UNDOCUMENTED CHILD LEFT

1970s was not yet a polarizing issue on a nationwide basis, it was a growing cause of controversy and resentment in towns like Tyler, Texas, where the case had its origins. In 1975, the Texas legislature quietly adopted an ordinance that permitted school districts to bar undocumented children from public school or charge them tuition. Some school districts continued enrollment without distinctions drawn on immigration status, but several districts, including Tyler, began charging tuition, and others barred undocumented children outright.<sup>26</sup>

The Mexican American Legal Defense and Education Fund (MALDEF) identified the Texas ordinance as a key litigation vehicle to challenge the pervasive social exclusion of Mexican-origin families in the southwest.<sup>27</sup> Efforts to address these inequities in the context of education had suffered a major setback in the 1973 case *San Antonio Independent School District v. Rodriguez*, in which the Supreme Court rejected a constitutional challenge to the unequal results of Texas's public school financing system.<sup>28</sup> The 5-4 decision in *Rodriguez* had rejected an equal protection challenge to the wealth-based disparities resulting from the property tax-based financing system. In reaching this conclusion, the Court rejected the argument that education is a fundamental right—an argument that would have required a higher level of judicial scrutiny of the state financing scheme.<sup>29</sup>

In the Texas ordinance challenged in *Plyler*, MALDEF saw a new opportunity to raise the rampant inequities facing Mexican-origin schoolchildren. On behalf of four undocumented families from Mexico, it sued the school district of Tyler, Texas, for charging tuition for the undocumented children in these families, all of whom also had U.S. citizen children who attended school free of charge.<sup>30</sup> MALDEF's suit was eventually combined with another lawsuit brought against the county of

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BEHIND: *PLYLER V. DOE* AND THE EDUCATION OF UNDOCUMENTED SCHOOLCHILDREN 9-19 (2012); and Barbara Belejack, *A Lesson in Equal Protection: The Texas Cases that Opened the Schoolhouse Door to Undocumented Immigrant Children*, TEX. OBSERVER (July 13, 2007), <https://www.texasobserver.org/2548-a-lesson-in-equal-protection-the-texas-cases-that-opened-the-schoolhouse-door-to-undocumented-immigrant-children> [<https://perma.cc/9CC2-JE2U>].

26. OLIVAS, *supra* note 25, at 9-10.

27. *Id.*; MOTOMURA, *supra* note 7, at 2.

28. 411 U.S. 1 (1973).

29. *Id.* at 18.

30. Belejack, *supra* note 25.

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Houston, which was also charging tuition for undocumented students. Both cases argued that the Texas ordinance violated the U.S. Constitution.<sup>31</sup>

When the *Plyler* case reached the Supreme Court, the Court struck down the state law in a 5-4 decision, holding that the Texas ordinance discriminated against immigrant children in violation of the Equal Protection Clause. Justice Brennan, writing for the majority, laid the groundwork for the decision with a discussion of the uniquely important role of public education in furthering the social integration of immigrants in U.S. society. Explaining this central role for public schools, the *Plyler* Court quoted extensively from *Brown v. Board*:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship . . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.<sup>32</sup>

Despite these soaring lines, the majority opinion did not base its decision wholly on the unique nature of public education, but instead offered what one Article has recently described as “a *mélange* of reasons” for its holding.<sup>33</sup> Writing for the majority, Justice Brennan had to navigate carefully in order to square the decision with the Court’s precedent in *Rodriguez* that education was not a fundamental right.

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31. The cases raised claims under both the Fourteenth Amendment’s Equal Protection Clause and federal preemption, but the Supreme Court only reached the equal protection claim. MOTOMURA, *supra* note 7, at 7; OLIVAS, *supra* note 25, at 21.

32. *Plyler v. Doe*, 457 U.S. 202, 222-23 (1982) (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

33. Moran, *supra* note 7, at 1273-74. Mark Tushnet offers a more critical assessment of the decision’s reasoning, describing it as having “almost no generative or doctrinal significance because it invoked too many considerations.” Mark Tushnet, *Justice Lewis F. Powell and the Jurisprudence of Centrism*, 93 MICH. L. REV. 1854, 1873 (1995).

Justice Powell, who authored *Rodriguez*, was the crucial swing vote in *Plyler*. Analysis of communications and exchanges of draft opinions between Justice Powell and Justice Brennan make clear that Brennan went to great lengths to draft a decision that would garner Powell's vote.<sup>34</sup> Both Justices agreed that the immigrant children in this case merited a more robust intervention by the Court than rational-basis review. But Justice Powell was also anxious to avoid a holding that could extend to claims for constitutional protection by undocumented immigrants in other realms.

To win over Justice Powell, the majority emphasized the innocence of undocumented children. This innocence rationale permitted the Court to limit the implications of its holding to children. *Plyler* was explicit that its reasoning did not extend to the parents of undocumented students, who were the "guilty" illegal border-crossers. The Court explained its reasoning:

Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct. These arguments do not apply with the same force to classifications imposing disabilities on the minor *children* of such illegal entrants . . . Their parents have the ability to conform their conduct to societal norms, and presumably the ability to remove themselves from the State's jurisdiction; but the children who are plaintiffs in these cases can affect neither their 'parents' conduct nor their own status.<sup>35</sup>

Other key aspects of Justice Brennan's reasoning in the majority opinion in *Plyler* did not turn on innocence.<sup>36</sup> In particular, the Court wrote that the denial of public education to immigrant children "raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits

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34. The back-and-forth between Justice Powell and Justice Brennan is discussed extensively in Tushnet, *supra* note 33, at 1862-73. For a discussion on Justice Powell's "concern[]" about the fate of the children," see also MOTOMURA, *supra* note 7, at 5-6.

35. *Plyler*, 457 U.S. at 219-20 (internal quotation marks and citations omitted).

36. MOTOMURA, *supra* note 7, at 106; see also Hiroshi Motomura, *Children and Parents, Innocence and Guilt*, 128 HARV. L. REV. F. 137, 143 (2015) (describing the *Plyler* decision as emphasizing immigration as contract and affiliation and immigrant children as "Americans in waiting").



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that our society makes available to citizens and lawful residents.”<sup>37</sup> The Court described how denial of education to this specific subclass of the population would impose “significant social costs” on the country as a whole, and that the creation of this type of underclass would be problematic in “a Nation that prides itself on adherence to principles of equality under law.”<sup>38</sup>

Commentators on *Plyler* have noted the antisubordination rationale of these portions of the Court’s decision and argued that this line of reasoning could be extended to realms beyond education.<sup>39</sup> Yet in the years since *Plyler*, this is not what has happened. Instead, schools became a unique refuge in the United States, one of the only places where there is an outright ban on any consideration of immigration status. In the school context, the decision has largely succeeded, though not without the need for federal regulations and litigation to block efforts by states and localities to narrow or infringe on this protection in K-12 schools.<sup>40</sup> As a result, to a significant extent, schools are a place where undocumented children can live, grow, and develop for years without questions being asked about their legal status.<sup>41</sup> Yet they do so in a larger societal context in which *Plyler*’s holding requires silence by schools and secrecy by students, in order to protect students from the legal reality that awaits them in every other walk of life outside the schoolhouse doors.

This sheltered existence created the key ingredients for the population of DREAMers that came to political prominence in the first decade of the 2000s. Walter Nicholls has chronicled the remarkable development of DREAMers as a political group.<sup>42</sup> While the population of undocumented

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37. *Plyler*, 457 U.S. at 218-19.

38. *Plyler*, 457 U.S. at 219-21.

39. See, e.g., Owen M. Fiss, *The Immigrant as Pariah*, in *A COMMUNITY OF EQUALS* (Joshua Cohen & Joel Rogers eds., 1999); Victor C. Romero, *Immigrant Education and the Promise of Integrative Egalitarianism*, 2011 MICH. ST. L. REV. 275 (2011); MOTOMURA, *supra* note 7, at 11-12 (identifying integration rather than subordination as a key theme in *Plyler* and describing it as part of an “ethos” regarding immigration policy that should be applied broadly beyond the realm of education).

40. See generally Julie Sugarman, *Policy Brief: Legal Protections for K-12 English Learner and Immigrant-Background Students*, MIGRATION POLICY INSTITUTE (2019) (describing efforts to ensure equal access to schools for children regardless of background).

41. OLIVAS, *supra* note 25, at 35-62 (describing the implementation of *Plyler*).

42. NICHOLLS, *supra* note 5.

children grew over the course of decades since 1986, throughout the twentieth century, they were not explicitly recognized as a social group. It was not until the introduction in 2001 of legislation entitled the Development, Relief and Education for Alien Minors (DREAM) Act that individual immigrant students suddenly began to “come out” as members of a group with a name and identity.<sup>43</sup> Until then, they had largely lived invisibly, carefully navigating their lives to avoid disclosing their lack of immigration status. In less than a decade, by the year 2010, DREAMers were a “major political presence,” a “central player in immigration debates,” and “a driving force of the immigrant rights movement.”<sup>44</sup> Nicholls describes how the group’s rapid development and popular reception was due to a carefully crafted rhetoric, which stressed three key points about DREAMers: their assimilation, their education, and their innocence.<sup>45</sup>

The next three subsections describe how assimilation, education, and innocence became defining characteristics of the DREAMers and how this, in turn, was tightly connected to *Plyler*’s implementation by public schools. Examining how the DREAMer movement was shaped by these three themes reveals their paradoxical impact. On the one hand, assimilation, educational achievement, and innocence were the key ingredients that led to social recognition of DREAMers and administrative relief in the form of DACA. But at the same time, these same concepts are at the heart of the inability of DREAMers to reach their ultimate goal: a pathway to citizenship for themselves and their families.

### 1. Assimilation

First and foremost, the DREAMer movement emphasized the ways in which this group of immigrants were “true” Americans, indistinguishable in all meaningful ways from U.S. citizens. National groups advocating for the passage of the DREAM Act “stressed the youths’ deep cultural and social ties to the United States and their ongoing contributions to the country.”<sup>46</sup> They represented them as “virtuous Americans” and “sources of economic, civic, and moral rejuvenation . . . They are cheerleaders, they love the Lakers, they

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43. Rose Cuison Villazor, *The Undocumented Closet*, 92 N.C. L. REV. 1, 5-6 (2013) (describing the parallels between DREAMers’ decisions to “come out” about their undocumented statuses and the LGBTQ rights movement).

44. NICHOLLS, *supra* note 5, at 48.

45. *Id.* at 15.

46. *Id.* at 49.

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speak perfect English, and they dream of becoming middle class, just like any ‘normal’ person.”<sup>47</sup> Professor Angela Banks has described this framing of DREAMers as a prime example of a “respectability narrative,” a strategy deployed in efforts by excluded groups to make claims for inclusion by emphasizing the ways the group identifies with mainstream values, norms, and practices.<sup>48</sup>

These young people could convincingly adopt this narrative because it was not just rhetoric; it was true to their experience. As Nicholls describes, DREAMers were unlike recent immigrants. “[T]hey did not have to learn new cultural rules and how to convincingly deploy these cultures in the public sphere. Most were able to tap cultural codes and express them easily through their speech, acts, and performances. They could make believable claims about being good Americans because they were American.”<sup>49</sup> They had experienced such complete acculturation because of their experience in schools, where teachers and administrators were required by *Plyler* to treat them like any other student.

Yet even as it led to their social recognition—and to an extent, integration—the goal of assimilation has increasingly been recognized as problematic in several ways. First, historically, assimilation has often referenced a process of “cultural subtraction,” whereby one’s ethnic and cultural identity are replaced by that of the dominant and mainstream culture.<sup>50</sup> As a result, assimilation can lead educators to adopt a deficit-oriented stance towards the communities from which immigrant students come.<sup>51</sup>

In addition to concerns about cultural erasure and prejudice, critical-race scholars have long recognized that assimilation’s goal of becoming

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47. *Id.* at 51.

48. Angela M. Banks, *Respectability & the Quest for Citizenship*, 83 BROOK. L. REV. 1, 3 (2017).

49. NICHOLLS, *supra* note 5, at 102.

50. Cristina L. Lash, *Making Americans: Schooling, Diversity, and Assimilation in the Twenty-First Century*, 4 RUSSELL SAGE FOUND. J. SOC. SCIS. 99, 101 (2018); *see also* MOTOMURA, *supra* note 7, at 95 (“‘Assimilation’—a term widely used in earlier eras, notably the first half of the twentieth century—sometimes connotes pressure from the native majority for immigrants to cut ties with their cultures, languages, or societies of origin.”).

51. One example is the frequency with which immigrant students are referred to special education programs. *See* Emma Curran Donnelly Hulse, *Disabling Language: The Overrepresentation of Emergent Bilingual Students in Special Education in New York and Arizona*, 48 FORDHAM URB. L.J. 381, 418-19 (2021).

“more American” does not always indicate a move towards equality. In the specific context of the immigrant experience, Devon Carbado has described the way assimilation for immigrants of color means becoming part of the racist hierarchy and systemic subordination of American society.<sup>52</sup> Related sociology research demonstrates how assimilation for Latinx immigrants does not necessarily mean incorporation into the upwardly mobile, white middle class.<sup>53</sup>

DREAMers as a social movement capitalized on the assimilationist goal of *Plyler*. Both the students themselves and increasingly their advocates used it to justify their demands for inclusion. But at the same time, undocumented children clearly suffered harm from this focus on assimilation. It often forced DREAMers to separate their “American” identities from their ethnic minority language identity, or not to deeply identify as American at all.<sup>54</sup> It also required students to “cover”—avoiding mention of their immigration history and roots at all costs—which comes with significant psychological impacts even as it provides opportunities for inclusion.<sup>55</sup>

## 2. Education

At the same time that the rhetorical narrative about DREAMers emphasized that they were just like other Americans, it also highlighted their exceptional educational achievements. The profiles of DREAMers that became the face of the group were high-achieving students, valedictorians, leaders of clubs and organizations, and highly career-oriented youth.<sup>56</sup>

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52. See generally Devon Carbado, *Racial Naturalization*, 57 AM. Q. 633 (2005) (describing the author’s own experience acquiring American citizenship as a Black immigrant from the United Kingdom).

53. ALEJANDRO PORTES & RUBÉN G. RUMBAUT, IMMIGRANT AMERICA: A PORTRAIT 18-20, 57-85 (1990), discussed in Sylvia R. Lazos Vargas, *Foreword: Emerging Latina/o Nation and Anti-Immigrant Backlash*, 7 NEV. L.J. 685, 699-701 (2007).

54. Lash, *supra* note 50, at 111-12.

55. Stella Burch Elias, *Immigrant Covering*, 58 WM. & MARY L. REV. 765, 855 (2017) (“Immigration status covering may hold great promise for the integration of immigrants in the short- and medium-term, but it may simultaneously harm their long-term ability to fully assimilate into American society.”).

56. Elizabeth Keyes describes this aspect of the movement in *Defining American: The DREAM Act, Immigration Reform and Citizenship*, 14 NEV. L.J. 101, 109 (2013): “The typical DREAMer narrative is one of success against great odds.

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Their skills and professional goals were emphasized, leading to the conclusion that only their immigration status prevented them from achieving their dreams.

This rhetoric did not fully capture the reality for the population of undocumented immigrant youth, many of whom were not thriving in high school. Research in the first decade of 2000 revealed as few as five to ten percent of undocumented high-school graduates ever reached postsecondary institutions, and those that did largely attended community colleges.<sup>57</sup> *Plyler's* protective shield could only go so far, and many students lowered their aspirations as they realized the obstacles they would face upon graduation.

Even within the K-12 school context, undocumented students were not all well-served by the insistence on formally equal treatment. This came to the fore primarily in the context of language acquisition. While not all immigrants are non-English speakers, and conversely, not all English-language learners are immigrants, a sizable proportion of immigrant students enter the public school system with a native language other than English.<sup>58</sup> While *Plyler* required schools to take an “immigration status blind” approach to their students, a prior Supreme Court case from 1974, *Lau v. Nichols*, mandated that schools provide services to help language minority students overcome the language barriers to education.<sup>59</sup> *Lau* framed its holding in terms of civil rights, finding that the San Francisco

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In this narrative, the DREAMer, despite having no legal status, has graduated from an American high school and done something of great note: he or she has finished school despite enormous health or family struggles, risen to leadership positions, cared for ailing relatives, engaged in significant community activism and community service, and so forth.”

57. Gonzales, *supra* note 23, at 611; Leisy J. Abrego, “*I Can’t Go to College Because I Don’t Have Papers*”: *Incorporation Patterns of Latino Undocumented Youth*, 4 *LATINO STUD.* 212, 223 (2006).
58. According to census data, the majority of students categorized as ELLs are U.S. citizens. Kristen Bialik et al., *6 Facts About English Language Learners in U.S. Public Schools*, PEW RSCH. CTR. (Oct. 25, 2018), <https://www.pewresearch.org/fact-tank/2018/10/25/6-facts-about-english-language-learners-in-u-s-public-schools> [https://perma.cc/Q4VW-XWJZ]. At the same time, of the undocumented population in the U.S., an estimated 46% speak English “not well” or “not at all.” DATA HUB: PROFILE OF THE UNAUTHORIZED POPULATION IN THE UNITED STATES, MIGRATION POLICY INSTITUTE (2019), <https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US> [https://perma.cc/9WT6-SQAC].
59. 414 U.S. 563, 566 (1974).

School District's failure to provide language resources for non-English speaking students violated their rights under Title VI of the Civil Rights Act.<sup>60</sup> As one educational researcher describes it, *Lau* became "the major civil rights framework for the incorporation of immigrants."<sup>61</sup> Yet despite its strong language finding language discrimination to be a form of national-origin discrimination, the Court declined to specify remedies, leaving it to school districts to determine the best way to approach providing access to limited English speakers.<sup>62</sup>

In the years since *Lau*, litigators argued for more rigorous federal requirements for English language acquisition. These arguments repeatedly failed to gain traction in the courts.<sup>63</sup> As a result, schools have been left to address the complex task of language access at the local and state levels, which has led to polarizing debates and widely differing approaches to teaching English as a second language.<sup>64</sup> The majority of schools have adopted an assimilationist approach here, too, framing the issue as a language *problem*, rather than viewing multilingual children as resources or rights-holders.<sup>65</sup> Under most schools' interpretation of *Lau*, "[t]he role of the public schools in Americanizing immigrants is to take 'non-English speaking' or 'LEP' [another acronym for English Language Learners] students and make them fluent English speakers. Schools label and serve immigrant students expressly in terms of their English language fluency."<sup>66</sup>

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60. Julie F. Mead & Mark A. Paige, *Building a Wall Around the Schoolhouse? Education and Immigration in the Trump Age*, 48 J.L. & EDUC. 449, 455 (2019).

61. Laurie Olsen, *Learning English and Learning America: Immigrants in the Center of a Storm*, 39 THEORY INTO PRACTICE 196, 197 (2010).

62. Patricia Gándara, Rachel Moran & Eugene Garcia, *Legacy of Brown: Lau and Language Policy in the United States*, 28 REV. RSCH. EDUC. 27, 29-30 (2004).

63. See, e.g., *Horne v. Flores*, 557 U.S. 433 (2009). For an overview of this litigation, see Hannah Feldman, *Education Federalism in Action: English Learner Education Policy*, 109 CAL. L. REV. 2465, 2468-69 (2021).

64. Feldman, *supra* note 63, at 2468-69.

65. See Gándara, Moran & Garcia, *supra* note 62, at 36-37; see also Nina Rabin, Mary Carol Combs & Norma Gonzalez, *Understanding Plyler's Legacy: Voices from Border Schools*, 37 J.L. & EDUC. 15, 32-35 (2008) (describing school personnel's views that English language learners were a liability for the school).

66. Olsen, *supra* note 61, at 197; see also Gándara, Moran & Garcia, *supra* note 62, at 30 (describing how even a state with a progressive approach like California viewed the challenge facing English learners as a language problem, rather than viewing language as a right or a resource).

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DREAMers, who entered U.S. schools at a very young age, tended to be initially classified as English Language Learners (ELLs) in elementary school. By the time they reached middle or high school, many gained sufficient proficiency to lose this designation. This trajectory of DREAMers from young ELLs to “mainstreamed” high-school students helps explain why the majority of ELLs are not immigrants but U.S. citizens.<sup>67</sup> In fact, “immigrant students or the children of immigrants tend to outperform” second-generation immigrant students academically.<sup>68</sup> As Professor Patricia Gándara explains, “[r]esearchers tend to explain this phenomenon as one of motivation. The newcomers are acutely aware of the sacrifices their parents have made to come to the United States and often articulate a desire to pay them back by doing well in school. They strive to lift themselves and their parents out of poverty. As a result, they become real believers in the American dream.”<sup>69</sup>

Educational achievement became a defining aspect of the DREAMer movement, as encapsulated in the image of the undocumented student in cap and gown. Despite the fact that the majority of the DREAMers struggled to graduate, and few went on to higher education, high-achieving students became the face of the DREAMer leadership. Outside the context of language acquisition, public schools’ “immigration-status-blind” approach furthered students’ self-conception as Americans. Once immigrant students left the ELL classrooms, they received all the same information and opportunities as any other student. As a result, they often planned and prepared for careers and goals unshaped by limitations posed by their legal status, until they hit critical stages where it suddenly became a barrier.

### 3. Innocence

The fact that this group of young people illegally crossed the border “through no fault of their own” was another recurring and crucial theme in the rise of the DREAMer movement.<sup>70</sup> Again and again, politicians, advocates, and the media emphasized that this group was deserving because *they* were not the ones who chose to cross the border illegally; it was their parents’ decision. For example, a website of Senator Dick Durban

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67. Bialik et al., *supra* note 58.

68. Patricia Gándara, *The Potential and Promise of Latino Students*, AM. EDUCATOR, Spring 2017, at 4, 6.

69. *Id.* at 7 (footnote omitted).

70. NICHOLLS, *supra* note 5, at 55 (internal quotation marks omitted).

that featured stories of DREAMers stated, “These young people were brought to the U.S. as children and should not be punished for their parents’ mistakes.”<sup>71</sup> On the other end of the political spectrum, archconservative television host Bill O’Reilly expressed the same view in more strident terms. In an interview with one of the poster children of the DREAMer movement, Jose Antonio Vargas, O’Reilly expressed sympathy for Vargas and others, whom he described as “dragged across the border.”<sup>72</sup> President Obama embraced the same innocence narrative in his support for the DREAM Act. In one revealing statement, he commented, “[i]t is heartbreaking . . . [t]o have kids, our kids, classmates of our children, who are suddenly under this shadow of fear, through no fault of their own.”<sup>73</sup>

This dimension of the DREAMer narrative, more than any other, proved to be increasingly controversial, and was not fully embraced by DREAMers themselves.<sup>74</sup> Reflecting on the tendency of the movement to portray young immigrants as innocent victims, one activist shared that many undocumented advocates “feel like we sort of shot ourselves in the foot . . . [b]ecause we started that narrative like, ‘I was brought here by my parents, not my fault, poor me, I was here as a child’”—in this way, creating a culture of blame towards their own parents.<sup>75</sup> Yet national advocacy groups and the immigrants’ rights movement repeatedly returned to this argument, which clearly resonated with broadly held views about undocumented immigrants as criminals and guilty “illegals.”<sup>76</sup>

The “innocence” aspect of the narrative was explicitly tied to *Plyler*, which, as noted above, specifically premised its holding in part on the innocence of children as compared to their parents. By emphasizing this aspect of the Court’s reasoning, as opposed to other arguments in *Plyler* that would have had broader application to undocumented immigrants, schools

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71. *Id.* at 57 (emphasis removed) (internal quotation marks omitted).

72. *The O’Reilly Factor: Jose Antonio Vargas Talks to Bill O’Reilly* (Fox News television broadcast June 19, 2012), <http://video.foxnews.com/v/1697317877001/jose-antonio-vargas-talks-to-bill-oreilly> [https://perma.cc/4GR3-5JV]; see also Keyes, *supra* note 56, at 111 (discussing O’Reilly’s interview with Vargas).

73. NICHOLLS, *supra* note 5, at 55 (internal quotation marks omitted).

74. See NICHOLLS, *supra* note 5, at 58; see also *supra* note 1.

75. Marcela Valdes, *Is It Possible to Resist Deportation in Trump’s America?*, N.Y. TIMES (May 23, 2017), <https://www.nytimes.com/2017/05/23/magazine/is-it-possible-to-resist-deportation-in-trumps-america.html> [https://perma.cc/G524-YJ3L] (quoting activist Erika Andiola).

76. Keyes, *supra* note 56, at 142-43.



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were cast as a site where immigration status had no place because of the innocent children inside. This allowed undocumented students to experience schools as a place of refuge, but one that contrasted sharply with the adult world outside the schoolhouse walls. In this way, innocence played a critical and increasingly problematic role in the societal conception of first-wave DREAMers. The next section describes how this tension grew as DREAMers asserted themselves and demanded social recognition outside the classroom.

### *C. A Path Forward for First-Wave DREAMers*

Through a powerful story of assimilation, educational achievement, and innocence, the DREAMer movement became a driving force in the U.S. immigration-policy landscape. The DREAM Act, first introduced in 2001, was one central focus of their advocacy.<sup>77</sup> This legislation, which has been reintroduced in Congress at least eleven times over the past twenty years, has undergone minor adjustments, but its basic structure has remained unchanged: it seeks to “provide[] a pathway to legal status for undocumented people who came to this country as children.”<sup>78</sup> “Some versions have garnered as many as 48 co-sponsors in the U.S. Senate and 152 in the House of Representatives.”<sup>79</sup> Yet “[d]espite bipartisan support for each iteration of the bill, none have become law.”<sup>80</sup>

In the mid- to late-2000s, the DREAM Act was most often framed as one piece of a larger package, as leading national advocacy groups focused their efforts on comprehensive immigration reform (CIR).<sup>81</sup> As it became clear that CIR was failing, and as the devastating impacts of the Obama Administration’s ramped-up enforcement efforts grew, divisions grew in the immigrants’ rights movement, and DREAMers played a key role in demanding a different approach, both substantively and tactically.<sup>82</sup>

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77. S. 1291, 107th Cong. (2001).

78. *The Dream Act: An Overview*, AM. IMMIGR. COUNCIL 1 (2021), <https://www.americanimmigrationcouncil.org/research/dream-act-overview> [<https://perma.cc/36TY-R2VV>].

79. *Id.* (citing S. 1545, 108th Cong. (2003) & H.R. 1648, 108th Cong. (2003)).

80. *Id.*

81. NICHOLLS, *supra* note 5, at 76.

82. See NICHOLLS, *supra* note 5, at 74-98; see also Sameer M. Ashar, *Movement Lawyers in the Fight for Immigrant Rights*, 64 UCLA L. REV. 1464, 1474 (2017).

Youth leaders coordinated acts of civil disobedience—marches, hunger strikes, sit-ins—that gained national attention.<sup>83</sup> They also shifted from a singular focus on federal legislation to advocacy on state and local campaigns.<sup>84</sup> They demanded an end to aggressive immigration enforcement through state and local partnerships with ICE and fought for state-level bills to support immigrant integration.<sup>85</sup> In many ways, they succeeded. Their activism was central to the Obama Administration’s shift to a more nuanced approach to immigration enforcement.<sup>86</sup> Advocacy on the federal level culminated in the announcement by President Obama of the Deferred Action for Childhood Arrivals Program (DACA), which the President announced on the thirtieth anniversary of *Plyler* on June 15, 2012, in a nod to the decision’s central importance to the DREAMer movement.<sup>87</sup>

Deferred action refers to a form of temporary reprieve from deportation that the executive branch can offer as a form of prosecutorial discretion. The government has offered this type of reprieve on both a case-by-case and a categorical basis for decades, although not always under the name “deferred action.”<sup>88</sup> When Obama announced the Deferred Action for Childhood Arrivals Program, he described it as a “temporary stopgap measure that lets us focus our resources wisely while giving a degree of relief and hope to talented, driven, patriotic young people.”<sup>89</sup> He

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83. See Ashar, *supra* note 82, at 1484.

84. *Id.* at 1474-82.

85. *Id.*

86. *Id.*; NICHOLLS, *supra* note 5, at 151-56.

87. Kristina M. Campbell, *Dreamers Deferred: The Broken Promise of Immigration Reform in the Obama Years*, 25 TEX. HISP. J.L. & POL’Y 1, 5 (2018) (quoting Julia Preston & John H. Cushman Jr., *Obama to Permit Young Migrants to Remain in U.S.*, N.Y. TIMES (June 15, 2012), <https://www.nytimes.com/2012/06/16/us/us-to-stop-deporting-some-illegal-immigrants.html> [<https://perma.cc/APU7-LZUY>] (“White House officials said they chose Friday for the policy shift because it is the 30th anniversary of a Supreme Court decision, *Plyler v. Doe*, that effectively established that all children, regardless of immigration status, were entitled to public education through high school.”).

88. See generally Shoba Sivaprasad Wadhia, *The History of Prosecutorial Discretion in Immigration Law*, 64 AM. U. L. REV. 1285 (2015) (examining the history of executive discretion in immigration law and its relation to certain Obama Administration enforcement policies).

89. President Barack Obama, *Remarks by the President on Immigration* (June 15, 2012), <https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration> [<https://perma.cc/E5EQ-G842>].

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emphasized it as a short-term strategy to deploy until Congress passed a more durable legislative solution for their plight. Yet the Congressional paralysis continued, year after year. To this day, DACA remains the sole type of legal status available to most DREAMers. It provides limited temporary relief from deportation for undocumented immigrant youth, with the opportunity to renew in two-year increments, so long as the program remains in effect.<sup>90</sup>

Over the last ten years, first-wave DREAMers have become DACAmented adults. Over its history, the program has approved over 800,000 applicants.<sup>91</sup> As of December 2021, there were 611,470 current DACA recipients.<sup>92</sup> As of 2020, the average age of DACA recipients was twenty-seven.<sup>93</sup> Approximately 81% of current DACA recipients are from Mexico, and nearly one-third live in California.<sup>94</sup> A survey reported that the median age of entry was six years old.<sup>95</sup>

In 2017, President Trump attempted to rescind the program, which halted all new applications, although renewals continued due to federal-

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90. See Memorandum from Janet Napolitano, Sec’y, Dep’t of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot.; Alejandro Mayorkas, Dir., U.S. Citizenship & Immigr. Servs. & John Morton, Dir., U.S. Immigr. & Customs Enf’t (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/6D9R-JDBE>].
91. CONG. RSCH. SERV., R46764, DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA): BY THE NUMBERS 18 (Apr. 14, 2021) [hereinafter CRS DACA BY THE NUMBERS]; see also Muzaffar Chishti & Julia Gelatt, *At Its 10th Anniversary, DACA Faces a Tenuous Future Despite Societal Benefits*, MIGRATION POL’Y INST. (June 9, 2022), <https://www.migrationpolicy.org/article/daca-10th-anniversary> [<https://perma.cc/EQ5V-5G8A>] (“The Migration Policy Institute (MPI) estimates that 1.2 million unauthorized immigrants who entered the United States before age 16 and met the program’s other criteria were eligible to apply, suggesting that more than two-thirds of those eligible enrolled at one point or another during the past decade.”).
92. Chishti & Gelatt, *supra* note 91.
93. CRS DACA BY THE NUMBERS, *supra* note 91, at 12.
94. *Id.* at 10-11.
95. Alicia Parlapiano & Karen Yourish, *Typical ‘Dreamer’ Lives in Los Angeles, Is from Mexico and Came to the U.S. at 6 Years Old*, N.Y. TIMES (Jan. 23, 2018), <https://www.nytimes.com/interactive/2017/09/05/us/politics/who-are-the-dreamers.html> [<https://perma.cc/EM2K-LN48>].

court litigation.<sup>96</sup> In December 2020, the Supreme Court invalidated the Trump Administration's effort to rescind the program, and the federal government reopened the program and began accepting new applications.<sup>97</sup> But just over six months later, in July 2021, it was shut down again by a federal district court in Texas, a decision that the court of appeals affirmed in October 2022.<sup>98</sup> As a result, at the time of this writing, the program is not open for new applications, but renewal applications continue to be accepted.<sup>99</sup>

Through the twists and turns of the program's contentious history, its eligibility requirements have remained unchanged. As a result, the population of DACA-eligible youth has dwindled, because the temporal eligibility requirements have not shifted since the program's creation in 2012. The program still requires that applicants must have been under age thirty-one and physically present in the United States on June 15, 2012; must have entered the United States no later than June 15, 2007; must have continuously resided in the United States since 2007; and must have been under age sixteen at the time of initial entry.<sup>100</sup>

Diego, Juan, and Laura, whose profiles opened this section, were the last high school students our clinic has assisted with DACA. As of June 2022, there were no new applicants in the under-fifteen age group because they would not have been born in 2007. Strikingly, there are more undocumented students enrolled in U.S. colleges today who lack DACA eligibility than who are eligible for it (approximately 246,000 versus 181,000).<sup>101</sup>

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96. The sequence of events is recounted in the factual summary provided by the Supreme Court in *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891, 1903-04 (2020).

97. *Id.* at 1916.

98. *Texas v. United States*, 50 F.4th 498 (5th Cir. 2022).

99. For an overview of the litigation involved, see *Texas v. United States: A Timeline of the Fight to Protect DACA*, MEXICAN AM. LEGAL DEF. & EDUC. FUND (Oct. 27, 2021), <https://www.maldef.org/2021/10/texas-v-united-states-a-timeline-of-the-fight-to-protect-daca> [<https://perma.cc/MDW3-CCFS>].

100. DACA eligibility requirements are provided on the website of U.S. Citizenship and Immigration Services. *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/DACA> [<https://perma.cc/CN3Y-Q2QF>] (last visited Oct. 4, 2023).

101. William C. Kidder, *Dreaming with Dreamers When DACA Is at Risk: An Innovative and Legally Defensible Student-Community Partnership Model to*

## SECOND-WAVE DREAMERS

The summer of 2022 marked the tenth anniversary of DACA. At this moment, assessing the current state of first-wave DREAMers is both inspiring and deeply concerning. On the one hand, DACA recipients have experienced concrete gains in their economic stability and social integration. They report higher wage earnings, an increased ability to pursue higher education, and greater psychological relief and support than when they were undocumented.<sup>102</sup> Data gathered during the pandemic showed a large proportion of DACA recipients in jobs deemed “essential,” including in healthcare and education.<sup>103</sup> Combined, they contribute billions in tax revenues.<sup>104</sup> They also galvanized the immigrants’ rights community and have been central in the fight against aggressive immigration-enforcement tactics.<sup>105</sup>

Yet there is no question that first-wave DREAMers’ plight is also a warning tale. This is all the truer as increasing numbers of students without immigration status now fill high-school classrooms without access to DACA. The rollout of a more recent deferred-action program for these newly arrived youth is a window into the complex legacy of DREAMers. On March 7, 2022, the U.S. Citizenship and Immigration Services quietly announced a policy that provides “deferred action”—the same form of reprieve from

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*Bolster Financial Support for Undocumented College Students*, 36 GEO. IMMIGR. L.J. 571, 581 (2022) (citing *Undocumented Students in Higher Education: How Many Students Are in U.S. Colleges and Universities, and Who Are They?*, AM. IMMIGR. COUNCIL & PRESIDENTS’ ALL. ON HIGHER EDUC. & IMMIGR. 1-2 (Mar. 2021), <https://www.higheredimmigrationportal.org/wp-content/uploads/2021/02/Undocumented-Students-in-Higher-Education-Updated-March-2021.pdf> [<https://perma.cc/RD68-Z354>]).

102. Roberto G. Gonzales, Sayil Camacho, Kristina Brant & Carlos Aguilar, *Special Report on the Long-Term Impact of DACA: Forging Futures Despite DACA’s Uncertainty*, IMMIGR. INITIATIVE AT HARV. 4 (2019), <https://immigrationinitiative.harvard.edu/brief/special-report-on-the-long-term-impact-of-daca> [<https://perma.cc/P7GC-N3WF>].

103. Nicole Prchal Svajlenka & Trinh Q. Truong, *The Demographic and Economic Impacts of DACA Recipients: Fall 2021 Edition*, CTR. FOR AM. PROGRESS (Nov. 24, 2021), <https://www.americanprogress.org/article/the-demographic-and-economic-impacts-of-daca-recipients-fall-2021-edition> [<https://perma.cc/WSM7-MM8J>].

104. *Id.*

105. See Kevin R. Johnson, *Lessons About the Future of Immigration Law from the Rise and Fall of DACA*, 52 U.C. DAVIS L. REV. 343, 376-77 (2018). (“In turn, the implementation of DACA helped reaffirm, energize, and consolidate the political movement.”); *id.* at 377.

deportation that forms the basis of DACA—to tens of thousands of immigrant children from Central America and Mexico.<sup>106</sup> The announcement addressed a specific population of children, approximately 44,000 as of April 2021, who had already received an approved visa based on Special Immigrant Juvenile Status (SIJS).<sup>107</sup> SIJS is a humanitarian visa available to children who have been abused, abandoned, or neglected by one or both of their parents in their home countries.<sup>108</sup> Children in this group had met eligibility requirements but were unable to receive the visa because of country caps on visas available that had been reached for Central America and Mexico. They faced years of waiting in limbo for the visa to become available.<sup>109</sup> With deferred action, they can now receive work authorization during this interim period.

The announcement was made with little fanfare, and while it was extremely significant for the directly impacted youth themselves and their advocates, it did not attract broad public attention. It contrasts sharply with the announcement ten years previously, in June 2012, of “deferred action” for first-wave DREAMers. DACA was rolled out with great fanfare—in the Rose Garden with an emotional speech by President Obama. Surely part of the difference in the public messaging around the two programs for deferred action is the numbers involved—tens of thousands of SIJS beneficiaries as compared to hundreds of thousands of DACA recipients. But in addition, the contrast between the two programs is a telling window into the different politics and conceptions of these two populations of young people. Central to the identity of the first group was the move from “undocumented” to socially recognized DREAMers. In contrast, SIJS beneficiaries are a subset of a large and growing population of children who are likely to be “documented” from the moment of their arrival, because they are nearly all immediately placed in removal proceedings upon crossing the border. Thus, these child migrants are not “undocumented,”

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106. *USCIS to Offer Deferred Action for Special Immigrant Juveniles*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Mar. 7, 2022), <https://www.uscis.gov/newsroom/alerts/uscis-to-offer-deferred-action-for-special-immigrant-juveniles> [https://perma.cc/DB4C-KQ3X].

107. Dalia Castillo-Granados, Rachel Leya Davidson, Lalia L. Hlass & Rebecca Scholtz, *The Racial Justice Imperative to Reimagine Immigrant Children’s Rights: Special Immigrant Juveniles as a Case Study*, 71 AM. U. L. REV. 1779, 1817 (2022).

108. 8 U.S.C. § 1101(a)(27)(J); 8 C.F.R. § 204.11 (2022).

109. Nina Rabin, *Legal Limbo as Subordination: Immigrants, Caste, and the Precarity of Liminal Status in the Trump Era*, 35 GEO. IMMIGR. L.J. 567, 588-89 (2021).

## SECOND-WAVE DREAMERS

but they are also not arriving here with legal status. Like the DREAMers who preceded them, they will spend their formative years in this country without legal status, and for many who are not among the lucky minority who obtain SIJS or another form of immigration relief, they will face the long-term prospect of life in the shadows. The next section addresses the distinct challenges facing this growing group of newcomers, second-wave DREAMers.

### III. SECOND WAVE DREAMERS

- *Dario fled Honduras at age 16 with his mother and six-year old brother. The family lived in a gang-infested part of the city, and had experienced years of terrifying encounters with rival gangs. They witnessed drug deals, shootings, and violent clashes in their neighborhood on a daily basis. Dario's grandfather was killed by a gang. His sister was subjected to an attempted kidnapping. His mother was forced to pay an ever-increasing "quota" to keep the family safe. On top of all this, Dario was sexually molested for years by a gang member and stayed silent about it, because he was so terrified of what the gang might do to him or his little brother if he spoke out. When the family finally fled, they reached Tijuana in June 2019. As a result, they were subject to the "Migrant Protection Protocol" Program in Mexico. They lived for nearly two years in a shelter run by a local church in Tijuana. For almost a year, Dario and his family lived in a state of hiding. He and his brother did not attend school and hardly left the shelter. They were terrified of running into the Zetas in Mexico, a cartel with connections to gangs in Honduras who they feared would identify them. After the first year, the shelter arranged for an educational program for the children in the shelter. They enlisted Dario to help out as a teacher's aide. He did this for nearly another year until the family finally received humanitarian parole to enter the U.S. Upon entry, they were immediately placed in removal proceedings.*
- *Edgar fled Honduras by himself at age 16. His mother and older brother had left for the United States three years earlier, desperate to find a way to keep the family economically afloat and escape domestic violence by Edgar's father. They left Edgar and his two younger brothers with caregivers who subjected them to abuse and neglect. Edgar's father, too, continued to abuse them. Edgar journeyed to the U.S. on his own, a trip he describes as "scary," but refuses to talk about in detail. When he reached the border in January 2021, he was briefly detained, and then reunited with his mother and older brother. When his mother learned about the conditions for her remaining children in Honduras, she traveled back to*

retrieve her youngest two sons. The three of them were paroled into the U.S. in the summer of 2021. Since then, the family has been living in Los Angeles. Edgar dropped out of school after the first few months, and moved out of the house. He struggles with hair loss, stomach aches, and depression. Meanwhile, the family is all in separate removal proceedings, with court hearings in both Texas and California due to their different dates and places of entry.

- *Susana was born in 2015 in Guatemala. When she was four years old, she fled with her mother and eighteen year old sister after her mother and sister were victims of sexual assault and violence by her mother's domestic partner. A distant relative offered to help them migrate to the U.S. by covering the costs of their journey, with the understanding that she would help them find work to pay off the debt once they were in the U.S. Upon arrival, Susana and her family were apprehended and briefly detained before being released to their distant relative in a southern state. Susana's mother and sister began working extremely long hours to pay off the debt. For Susana, this meant for nearly a year she spent long days on her own, not enrolled in school, often bullied and mistreated by others in the household while her mother was working. When they finally escaped, they moved to California, but their removal proceedings remained in the southern state where they had initially been released. Susana enrolled in kindergarten in the school where the legal clinic is based.*

These profiles of recent clients of our clinic capture the salient characteristics of the recently migrated children in our schools today. As compared to undocumented children twenty years ago, these young people have already experienced significant trauma before they even enter the door of a U.S. school. They are more likely to have experienced family separation, have more immediate economic pressures to join the workforce immediately, and are much more likely already to be in removal proceedings. Key to understanding these differences is to contrast the migration dynamics and policies that created this population with those of earlier child migrants.

#### *A. Migration Context: Global Patterns and Legal Policies, 2008–Present*

With the recession in 2008, a marked shift occurred in migration from Mexico that has never subsided. Single adult migrants, who had been the



## SECOND-WAVE DREAMERS

vast majority of immigrants to the U.S. for decades, sharply declined.<sup>110</sup> Yet at around this same time, a new migration population emerged: children and families from Central America.

Between 2013 and 2014, the numbers of unaccompanied minors from Central America shot up, increasing by 90 percent,<sup>111</sup> and reaching what was then a record level of approximately 69,000.<sup>112</sup> Since then, the number has remained high, with some fluctuations. It set a new record of 76,020 in 2019, and then, after a temporary drop due to COVID-19, hit yet another record in 2021, nearly doubling to reach 144,834.<sup>113</sup>

The number of family units from Central America has similarly grown dramatically over the past decade. The border patrol did not even publish apprehension statistics on family units until 2012. That year, Border Patrol reported apprehending about 11,000 families, which made up 3% of total border patrol encounters.<sup>114</sup> Of these family encounters, about 80% were Mexican.<sup>115</sup> By 2019, family units had increased both in proportion and quantity, with about 470,000 encounters, making up 55% of all apprehended migrants at the Southwest border.<sup>116</sup> The countries of origin shifted dramatically as well. In 2012, about 80% of the families apprehended by Border Patrol were Mexican. By 2021, they made up just four percent, with 58% from Honduras, El Salvador, and Guatemala, which are often referred to as the Northern Triangle.<sup>117</sup>

Scholars and researchers have documented the economic, social, environmental, and political reasons for this shift in countries of origin.

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110. AM. IMMIGR. COUNCIL, RISING BORDER ENCOUNTERS IN 2021: AN OVERVIEW AND ANALYSIS (2022) <https://www.americanimmigrationcouncil.org/rising-border-encounters-in-2021> [<https://perma.cc/FY4L-96GC>].

111. Muzaffar Chishti & Faye Hipsman, *Dramatic Surge in the Arrival of Unaccompanied Children Has Deep Roots and No Simple Solutions*, MIGRATION POL'Y INST. (June 13, 2014), <https://www.migrationpolicy.org/article/dramatic-surge-arrival-unaccompanied-children-has-deep-roots-and-no-simple-solutions> [<https://perma.cc/6GAX-AHPW>].

112. CONG. RSCH. SERV., R46999, IMMIGRATION: APPREHENSIONS AND EXPULSIONS AT THE SOUTHWEST BORDER 11 (2021), <https://sgp.fas.org/crs/homesec/R46999.pdf> [<https://perma.cc/P88E-869Z>].

113. *Id.*

114. *Id.* at 9.

115. *Id.* at 10.

116. *Id.*

117. *Id.*

With regard to Mexico, the decline in single adult male migrants tracks the economic impacts of the Great Recession, beginning in 2007, as job opportunities decreased particularly steeply in sectors that relied heavily on immigrant labor.<sup>118</sup> In addition, Mexico's declining fertility rate has played an important role in migration patterns. As Mexico's population has aged, the number of young male migrants has declined, both as a proportion of border apprehensions and in total volume.<sup>119</sup>

At the same time, Central American migration increased in both proportion and volume over the past decade. Although perceived as an unprecedented surge in 2014, the roots of the increase in Central American asylum-seekers go back decades.<sup>120</sup> Migrants from the Northern Triangle countries have been coming in significant numbers since the 1980s, initially fleeing civil wars in El Salvador, Guatemala, and Nicaragua. Numerous scholars have tracked the direct ties between U.S. military intervention and the resulting violence and economic upheaval that led to these asylum-seekers in the 1980s.<sup>121</sup> As part of one of the last proxy conflicts of the Cold War, the U.S. government supported the governments in El Salvador and Guatemala, spending millions of dollars on military and paramilitary units who committed mass atrocities in the name of fighting communism.<sup>122</sup> As a result, "between 1981 and 1990, approximately one million Salvadorans

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118. Andrés Villarreal, *Explaining the Decline in Mexico-U.S. Migration: The Effect of the Great Recession*, 51 DEMOGRAPHY 2203, 2204-05 (2014).

119. See Jorge Durand & Douglas S. Massey, *Debacles on the Border: Five Decades of Fact-Free Immigration Policy*, 684 ANNALS OF THE AM. ACAD. OF POL. AND SOC. SCI. 6, 11 (2019); Jeffrey S. Passel & D'Vera Cohn, *Mexicans Decline to Less than Half the U.S. Unauthorized Immigrant Population for the First Time*, PEW RSCH. CTR. (June 12, 2019), <https://www.pewresearch.org/fact-tank/2019/06/12/us-unauthorized-immigrant-population-2017/> [<https://perma.cc/ZD9F-G8JZ>].

120. Roberto Suro, *A Migration Becomes an Emergency: The Flight of Women and Children from the Northern Triangle and Its Antecedents*, in HUMANITARIANISM AND MASS MIGRATION: CONFRONTING THE WORLD CRISIS 60, 61 (Marcelo Suarez-Orozco ed., 2019); Sarah Sherman-Stokes, *Reparations for Central American Refugees*, 96 DENV. L. REV. 585, 598 (2019).

121. See, e.g., Suro, *supra* note 120, at 63-64; Sherman-Stokes, *supra* note 120, at 598-99.

122. Suro notes the conflict in Guatemala was less explicitly ideological. Suro, *supra* note 120, at 64.

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and Guatemalans fled their home countries to try to find safety in the United States.”<sup>123</sup>

Once here, the vast majority of these asylum claims were rejected in the 1980s, leading to litigation, eventual settlement agreements, and Congressional action.<sup>124</sup> As a result, a portion of Guatemalan and Salvadoran migrants received legal status, mostly in the form of Temporary Protected Status. Yet even after the wars subsided, in the 1990s, Guatemalan and Salvadoran migrants continued to come, drawn now by the additional pull of family networks that were established from the initial influx.<sup>125</sup> Migration from Honduras also started around this time. Here, the central push factor has been environmental degradation and poverty, beginning in 1998 when Hurricane Mitch displaced nearly a quarter of the country’s population.<sup>126</sup>

Thus, the “surges” that began in 2014 have deep roots in migration patterns that go back decades. The escalation of violence and instability in the Northern Triangle countries beginning in 2014 was also the product of this history. In the years after the civil war, Central American members of street gangs originally formed in Los Angeles were deported in large numbers back to Central America.<sup>127</sup> These deportations themselves were the product of U.S. immigration policies established in 1996 that created extremely harsh penalties for criminal convictions and resulted in mass deportations of Central Americans. Many young men returned to homes and families that they hardly knew in El Salvador, Honduras, and Guatemala.<sup>128</sup> In these Central American countries, gangs found easy targets for recruitment amongst the many children left behind by relatives who had migrated to the U.S.<sup>129</sup> In the context of pervasive economic and social instability, the gangs grew rapidly in size and complexity.<sup>130</sup>

At the same time, weak and corrupt governments and the culture of impunity that had grown in the wake of the civil wars furthered the gangs’ power and control.<sup>131</sup> In addition, severe drought led to food insecurity and

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123. Sherman-Stokes, *supra* note 120, at 593.

124. *Id.* at 593-97.

125. Suro, *supra* note 120, at 70.

126. *Id.* at 64.

127. *Id.* at 66; Sherman-Stokes, *supra* note 120, at 598-600.

128. Sherman-Stokes, *supra* note 120, at 599.

129. *Id.* at 598.

130. Suro, *supra* note 120, at 66; Sherman-Stokes, *supra* note 120, at 598-99.

131. Sherman-Stokes, *supra* note 120, at 599-600.

the collapse of local economies.<sup>132</sup> As women and children experienced these intersecting crises, they turned to family members in the United States for help. These family networks provided not just the possibility of reunification in a safer place, but also the concrete requirements to successfully relocate: remittances to cover the costs of migration and information about known migration routes from prior journeys.<sup>133</sup>

As succinctly summarized by Douglas Massey,

... the available evidence suggests that out-migration from Central America to the United States was initially caused by the U.S. political and military intervention of the 1980s, that it persists because the region has never recovered from the lethal violence and economic havoc that the intercession unleashed, and that people are able to make the trip northward by drawing on migrant networks that were another by-product of the U.S. intervention.<sup>134</sup>

Little of this rich history comes through in the media and political reaction to the influx of child migrants and family units from Central America. Instead, the U.S. government and the general public has conceived of these migrants as a “border crisis.”<sup>135</sup> In 2014, when numbers of children and families began to notably rise, on one end of the spectrum, anti-immigrant groups described the influx as a threat to national security and an invasion.<sup>136</sup> On the other end of the spectrum, even those who emphasized the humanitarian aspects of the population focused on policies to expedite processing and deter future migrants. This approach is exemplified in a White House memorandum on the “Influx of Unaccompanied Alien Children” in June 2014 in which President Obama described an “urgent humanitarian situation.”<sup>137</sup> In response, he increased

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132. Suro, *supra* note 120, at 68-69.

133. *Id.* at 72-73.

134. Douglas S. Massey, *The Real Crisis at the Mexico-U.S. Border: A Humanitarian and Not an Immigration Emergency*, 35 SOCIO. F. 787, 800 (2020).

135. For examples and discussion of the language used to describe the influx of child migrants in 2014 as a crisis, see Jaya Ramji-Nogales, *Migration Emergencies*, 68 HASTINGS L.J. 609, 619-20 (2017).

136. Kristina M. Campbell, *A Dry Hate: White Supremacy and Anti-Immigrant Rhetoric in the Humanitarian Crisis on the U.S.-Mexico Border*, 117 W. VA. L. REV. 1081, 1121 (2015).

137. Shani M. King, *Child Migrants and America's Evolving Immigration Mission*, 32 HARV. HUM. RTS. J. 59, 89 (2019) (discussing Presidential Memorandum,

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law enforcement resources to the border, expanded detention facilities for family units, established “rocket docket” for the expedited processing of family units claims, and attempted to develop a public messaging campaign emphasizing the costs and dangers associated with an unlawful journey to the United States.<sup>138</sup>

There was a clear political calculus in this approach. Throughout his presidency, Obama paired efforts to legalize the undocumented population already present in the country with efforts to ramp up border enforcement. He was often very explicit about this strategy. For example, in his speech introducing an expansion of DACA to include undocumented parents, he laid out a three-step process, the first step of which was to “build on our progress at the border with additional resources for our law enforcement personnel so that they can stem the flow of illegal crossings and speed the return of those who do cross over.”<sup>139</sup> The second step was to make it easier for high-skilled workers to stay and contribute to the economy, and the third step was “to deal responsibly with the millions of undocumented immigrants who already live in our country.”<sup>140</sup> An interview with a former DHS official captured the same calculus with regard to efforts to pressure Congress for legislative reform: “[t]here was certainly a thought early on that . . . serious enforcement focused on recent violators . . . would lay the groundwork for getting comprehensive immigration reform.”<sup>141</sup>

In her analysis of these politics in the Obama Administration, Professor Sharpless describes the White House strategy of “drawing a bright line between outsiders and insiders, namely the newcomers and those already here.”<sup>142</sup> The Administration’s desire to engender support for policies to permit undocumented people already here to stay shaped its reaction to the

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Response to the Influx of Unaccompanied Alien Children Across the Southwest Border, The White House (June 2, 2014)).

138. *Id.*

139. President Barack Obama, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-President-address-nation-immigration> [<https://perma.cc/9K8J-ACWR>].

140. *Id.*

141. Christine Cimini & Doug Smith, *An Innovative Approach to Movement Lawyering: An Immigrant Rights Case Study*, 35 GEO. IMMIGR. L.J. 431, 466 (2021) (quoting Interview with Avery, Former Obama Administration DHS Official (Jan. 17, 2020) (transcript on file with authors Cimini and Smith)).

142. Rebecca Sharpless, *Cosmopolitan Democracy and the Detention of Immigrant Families*, 47 N.M. L. REV. 19, 48 (2017).

surge of border crossers. The detention and expedited removals of women and children at the border can be understood as an act of “political theater . . . marking these recent entrants as outsiders.”<sup>143</sup>

Immigrants’ rights advocates responded to the aggressive enforcement tactics employed by the government with litigation and advocacy focused on the rights of the recent migrants to freedom from detention and due process in their asylum claims. Lawyers filed individual cases and class actions to prevent long-term detention, assert the rights of asylum-seekers to a fair process, and advocate for a right to counsel to vulnerable migrants, particularly children.<sup>144</sup> These efforts were remarkably successful in dramatically scaling back the detention of children and families, and in some cases shutting down detention centers altogether.<sup>145</sup> Yet the advocacy reinforced the focus on due process for this population, a framework that leaves little room for discussion of integration.

These dynamics only grew more pronounced in the years after the initial surge in 2014. In the campaign of 2016, recent border arrivals became a central issue, with even Hillary Clinton, the Democratic Party candidate, supporting the forced return of child migrants to “send a message” to others considering the trip.<sup>146</sup> Trump came into office after a campaign filled with promises of intensifying border enforcement. This culminated in the infamous family separation policy, first quietly implemented in 2017 along the border in Texas and then officially announced by the Department of Justice in 2018 as a “zero tolerance” policy.<sup>147</sup> Under the policy, the government imprisoned adult asylum-

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143. *Id.*

144. *See, e.g.*, Stephen Manning & Juliet Stumpf, *Big Immigration Law*, 52 U.C. DAVIS L. REV. 407 (2018) (describing an influx of pro bono attorneys to remote family detention centers to represent individual asylum-seekers’ claims); *R.I.L.-R v. Johnson*, 80 F. Supp. 3d 164, 172 (D.D.C. 2015) (class action on behalf of mothers and children in family detention arguing for a right to individualized bond determinations); *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1029 (9th Cir. 2016) (class action on behalf of immigrant children arguing for a right to appointment of counsel).

145. Manning & Stumpf, *supra* note 144, at 431.

146. Suro, *supra* note 120, at 75.

147. *Family Separation Under the Trump Administration - A Timeline*, S. POVERTY L. CTR. (Mar. 23, 2022), <https://www.splcenter.org/news/2022/03/23/family-separation-timeline> [<https://perma.cc/9UDB-LZRT>]; Mariela Olivares, *Family Detention and Family Separation: History, Struggle, and Status*, 9 BELMONT L. REV. 512, 533 (2022).

## SECOND-WAVE DREAMERS

seekers at the border, and transferred any accompanying children to the custody of the U.S. Department of Health. Hundreds of the children separated from their parents were under the age of five.<sup>148</sup>

For a brief period in 2018, the country was riveted by the shocking images of young children in cages, screaming for their parents, and stories of anguished parents desperate to find their children.<sup>149</sup> Public outrage and litigation eventually shut down the official zero tolerance policy, although separations continued for months afterwards and many families were never reunited.<sup>150</sup> The Trump Administration's brutal detention policies and practices for both families and children continued to be a focus of advocacy and litigation in 2019.<sup>151</sup> When the pandemic led to dramatic shifts in migration patterns in 2020, the numbers of unaccompanied minors declined.<sup>152</sup> The Trump Administration seized on this moment to implement a total ban on entries under a purported public health rationale.<sup>153</sup> In the early years of the Biden Administration, the numbers of migrants surged again.<sup>154</sup> To date, much of the advocacy on behalf of

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148. S. POVERTY L. CTR., *supra* note 147.

149. *Id.*

150. *Interagency Task Force: Initial Progress Report*, DEP'T OF HOMELAND SECURITY (June 2021) (reporting over 2,000 children who may still not have been reunified), [https://www.dhs.gov/sites/default/files/publications/21\\_0602\\_s1\\_family-reunification-task-force-120-day-progress-report.pdf](https://www.dhs.gov/sites/default/files/publications/21_0602_s1_family-reunification-task-force-120-day-progress-report.pdf) [<https://perma.cc/X62U-V59P>].

151. *See, e.g., 500,000 Kids, 30 Million Hours: Trump's Vast Expansion of Child Detention*, MARSHALL PROJECT (Oct. 2020), <https://www.themarshallproject.org/2020/10/30/500-000-kids-30-million-hours-trump-s-vast-expansion-of-child-detention/> [<https://perma.cc/PET6-SBZD>]; Miriam Jordan, *Judge Blocks Trump Administration Plan to Detain Migrant Children*, N.Y. TIMES (Sept. 27, 2019), <https://www.nytimes.com/2019/09/27/us/migrant-children-flores-court.html> [<https://perma.cc/ESV4-DA9V>].

152. William Kandel, *Increasing Numbers of Unaccompanied Alien Children at the Southwest Border*, CONG. RSCH. SERV. IN11638 (Aug. 5, 2021).

153. *Order Suspending Introduction of Certain Persons from Countries where a Communicable Disease Exists*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Mar. 2020), [https://www.cdc.gov/quarantine/pdf/CDC-Order-Prohibiting-Introduction-of-Persons\\_Final\\_3-20-20\\_3-p.pdf](https://www.cdc.gov/quarantine/pdf/CDC-Order-Prohibiting-Introduction-of-Persons_Final_3-20-20_3-p.pdf) [<https://perma.cc/2HDC-QXLA>].

154. Kandel, *supra* note 152.

unaccompanied minors and family units has continued to focus largely on policies and practices at the border.<sup>155</sup>

Meanwhile, largely as a result of policy advocacy and litigation to limit the detention of children and families, thousands of immigrant children have eventually been released into communities each year since 2014. According to federal data, the numbers of unaccompanied minors released to sponsors since 2014 has ebbed and flowed, but has consistently numbered in the tens of thousands.<sup>156</sup> There were roughly 27,000 unaccompanied minors released to sponsors in 2014. This figure nearly doubled the next year, and continued to grow until it briefly dipped to 16,000 during the pandemic, and then shot up to 107,000 in FY 2021.<sup>157</sup> The removal rate of the roughly 170,000 unaccompanied minors apprehended between FY 2017-2019 was just 9.2 percent, meaning well over 150,000 unaccompanied minor children remained in the U.S. before the influx in FY 2021.<sup>158</sup>

On top of this, many immigrant children have entered in family units. The number of family units is difficult to track over time because of the dearth of government data on families. One analysis of federal data estimated that between September 2018 and May 2019, a total of 65,691 adults and children were in immigration court.<sup>159</sup> This number has increased substantially in the years given that over 350,000 family units

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155. *See, e.g.*, *ImmDef v. DHS*, Case No. 2:21-cv-00395 (C.D. Cal. 2021) (lawsuit filed on behalf of unaccompanied children arguing border policies violate their statutory and constitutional rights); *Ramirez v. U.S. Immigr. & Customs Enf't*, 568 F. Supp. 3d 10, 20 (D.D.C. 2021) (national class action on behalf of unaccompanied minors arguing government policies regarding transfer of youth after their eighteenth birthdays violated their statutory rights); *Huishah-Huishah v. Mayorkas*, 27 F.4th 718, 721 (D.C. Cir. 2022) (class action on behalf of asylum-seeking families arguing Title 42 violates their rights).

156. *Unaccompanied Children Released to Sponsors by State*, OFFICE OF REFUGEE RESETTLEMENT, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES (Sept. 2023), <https://www.acf.hhs.gov/orr/grant-funding/unaccompanied-children-released-sponsors-state> [<https://perma.cc/H8WF-9BJR>].

157. *Id.* Numbers refer to fiscal year counts, not calendar years.

158. FISCAL YEAR 2019 ENFORCEMENT AND REMOVAL OPERATIONS REPORT, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT 20 [hereinafter "ERO FY2019 Report"], <https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf> [<https://perma.cc/W2SW-ZEEC>].

159. *Most Released Families Attend Immigration Court Hearings*, TRAC IMMIGR. (June 18, 2019), <https://trac.syr.edu/immigration/reports/562/> [<https://perma.cc/8WTB-TDAV>].



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were apprehended by Border Patrol and put in removal proceedings in FY 2021 alone.<sup>160</sup> Most of these families proceed with their cases from outside detention.<sup>161</sup> ICE reports that of the over 650,000 family unit members apprehended between 2017 and 2019, its removal rate was just 9.2 percent.<sup>162</sup> Another indication of the large numbers of child migrants in the country comes from immigration court data, which shows that in the first part of 2022 alone, the government initiated removal proceedings against at least 81,000 children under the age of 17.<sup>163</sup>

### B. Social Context: Schools and Today's Newcomer Students

Section II described how *Plyler's* creation of schools as a place of refuge for immigrant students was key to the creation of the DREAMers as a political movement. In the sheltered environment of primary and secondary schools, undocumented immigrants could experience their formative years in many ways indistinguishable from their peers. This environment was critical to the three defining characteristics of DREAMers that shaped, to varying degrees, both their own self-conception and the public's perception of them: their assimilation, their education, and their innocence. While *Plyler's* holding remains the law—at least for the time being<sup>164</sup>—its sheltering effect has lessened considerably for today's immigrant children. Many do not experience schools as a place of refuge and certainly do not experience a childhood unaware of their own legal status. To understand why, it is helpful to consider each of the three defining characteristics of first-wave DREAMers and why each plays out so differently for today's child migrants.

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160. CONG. RSCH. SERV., *supra* note 112, at 10-11.

161. See AM. IMMIGR. COUNCIL, *supra* note 110, at 10.

162. ERO FY2019 Report, *supra* note 158, at 20.

163. *One-Third of New Immigration Court Cases Are Children; One in Eight Are 0-4 Years of Age*, TRAC IMMIGR. (Mar. 17, 2022), [https://trac.syr.edu/immigration/reports/681/\\_](https://trac.syr.edu/immigration/reports/681/_)[<https://perma.cc/8WTB-TDAV>]. These counts underestimate the actual number of children, since for an additional fifteen percent, the age was unknown.

164. Goodman, *supra* note 8.

## 1. Assimilation

First-wave DREAMers were considered by politicians and the general public to have assimilated because they were largely fluent in English, understood the cultural norms of communication, and were familiar with U.S. political structures and power dynamics. In addition, they repeatedly self-identified as Americans.

This defining aspect of DREAMers was largely because, by definition, they had arrived in this country when they were very young. There is an extensive sociological literature on the impact that age of arrival has on assimilation, defined in terms of language acquisition, economic mobility, and social integration. In an economic study of migrants in the first half of the twentieth century, the authors found a larger wage gap and evidence of lesser social assimilation for immigrants who entered the country in their late teens as compared to those who entered in early childhood.<sup>165</sup>

Analysis of more recent data shows the same pattern. Sociologist Ruben Rumbaut has demonstrated significant differences in linguistic assimilation, acculturation, and self-identity among immigrants depending on whether migration occurred during early childhood (ages 0-5), middle childhood (6-12), or adolescence.<sup>166</sup> He describes the first group of earliest arrivals as “the 1.75 generation” and explains that “their experience and adaptive outcomes are closer to that of the U.S. born second generation . . . [They] are pre-school children who retain virtually no memory of their country of birth, were too young to go to school to learn to read or write in the parental language in the home country (and typically learn English without an accent), and are almost entirely socialized here.”<sup>167</sup> In contrast, the 1.5 generation—those who arrive in middle childhood—“have learned (or begun to learn) to read and write in the mother tongue at schools abroad, but [their] education is largely completed here.”<sup>168</sup> Finally, the 1.25 generation are those who arrive during adolescence. This group tends to

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165. Rohan Alexander & Zachary Ward, *Age at Arrival and Assimilation During the Age of Mass Migration*, 78 J. ECON. HIST. 904 (2018).

166. Ruben G. Rumbaut, *Ages, Life Stages, and Generational Cohorts: Decomposing the Immigrant First and Second Generations in the United States*, 38 INT'L MIGRATION REV. 1160 (2004).

167. *Id.* at 1167.

168. *Id.*

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have “experiences and adaptive outcomes . . . closer to the first generation of immigrant adults than to the native-born second generation.”<sup>169</sup>

This research confirms the common-sense intuition that immigrants who arrive early in life are more likely to meet traditional conceptions of assimilation. While data tracking the age of arriving immigrant children is scarce, there is no doubt that the average child migrant today is significantly older than those who arrived as first-wave DREAMers, given that so many more arrive on their own at a later life stage. Approximately 72% of unaccompanied minors in the last four years have been between 15 and 17 years old at the time of entry.<sup>170</sup> Notably, this figure does not even include the many young immigrants who arrive after the age of 18 but before 21, who do not meet the legal definition of “unaccompanied minors” but are still considered to be juveniles in many social and legal contexts. It also does not count the many older children who arrive in family units.<sup>171</sup> Thus, many more of today’s child migrants arrive at an older age than DREAMers, and this shapes their educational experiences and trajectories in profound ways.

### 2. Education

Section II described how educational success became a key part of the DREAMers’ narrative, even as it did not fully reflect the challenges they faced. For today’s newcomer students, language acquisition poses a more daunting hurdle because recently arrived youth enter school at an older age. But this is not the whole story. There are three additional reasons why today’s newcomers experience school differently than first-wave DREAMers: (1) the likelihood of prior educational disruption, (2) the

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169. *Id.*

170. See OFF. OF REFUGEE RESETTLEMENT, U.S. DEP’T OF HEALTH AND HUM. SERVS., <https://www.acf.hhs.gov/orr/about/ucs/facts-and-data> [<https://perma.cc/9D3G-TEGD>].

171. There is scarce data on the composition of family units apprehended by border patrol. One small window into the age compositions of migrant families is a recent governmental report tracking family separations in the Biden Administration. Of the ninety-four children involved in a family separation during a six-month period, twenty were between the ages of thirteen and seventeen, suggesting that older children are a small but not insignificant portion of the children entering in family units. *Family Unit Actions Report, October 1, 2021-May 31, 2022*, OFF. OF STRATEGY, POL’Y, AND PLANS, DEP’T OF HOMELAND SEC. 9 (Sept. 2022), [https://www.dhs.gov/sites/default/files/2022-11/2022\\_0920\\_plcy\\_family\\_unit\\_actions\\_report\\_may\\_2022\\_508.pdf](https://www.dhs.gov/sites/default/files/2022-11/2022_0920_plcy_family_unit_actions_report_may_2022_508.pdf) [<https://perma.cc/3EJM-YQ2W>].

prevalence of recent trauma, and (3) their urgent economic responsibilities. All three of these factors grow out of the migration patterns and border policies that shaped their experiences before they enter the schoolhouse door.

First, both older teens and younger child migrants who are recent arrivals are likely to have experienced severe disruptions in their previous schooling before entering a classroom in the U.S. Education researchers have long recognized this challenge in working with immigrant and refugee students and developed the term Students with Limited or Interrupted Formal Education (“SLIFE”) as a subset of English Language Learners with particular needs.<sup>172</sup>

The three profiles of recently arrived youth that opened this section illustrate how educational disruptions result from both upheaval in home countries as well as prolonged migration journeys. For example, after fleeing gang violence in Honduras, Dario and his little brother had no ability to attend school whatsoever for the first year of their stay in Tijuana while they waited for permission to enter the U.S. and pursue their asylum claims. Once COVID hit, the wait extended to an entire second year, during which time Dario worked as a teacher’s aide in the Mexico-based migrant shelter rather than attend school himself. Before Edgar enrolled in high school in Los Angeles, he had spent months only attending school sporadically in Honduras due to gang threats and spent additional weeks in transit through Mexico and detention in the U.S. Even after Susana entered the U.S., she did not attend a full year of school while she and her mother were trapped in the house of the family’s traffickers.

In addition (and related) to prior educational disruption, the second key difference for today’s recent arrivals is the likelihood that they have experienced high levels of stress and trauma given the conditions leading to their flight and the severity of recent border enforcement policies.<sup>173</sup> In his book, *Through Iceboxes and Kennels: How Immigration Detention Harms Children and Families*, Professor Luis Zayas draws on empirical research he conducted with immigrant families recently released from detention to

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172. See, e.g., ANDREA DECAPUA, HELAINE W. MARSHALL & LIXING FRANK TONG, MEETING THE NEEDS OF SLIFE: A GUIDE FOR EDUCATORS (2d ed. 2020). For further discussion and citations, see *infra* notes 218-222 and accompanying text.

173. Mark Greenberg et al., *Strengthening Services for Unaccompanied Children in U.S. Communities*, MIGRATION POL’Y INST. 15-16 (June 2021) [hereinafter “MPI Strengthening Services”], [https://www.migrationpolicy.org/sites/default/files/publications/mpi-unaccompanied-children-services\\_final.pdf](https://www.migrationpolicy.org/sites/default/files/publications/mpi-unaccompanied-children-services_final.pdf) [<https://perma.cc/3MLV-4Z33>] (discussing the mental health needs of children recently released from ORR custody).

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provide one harrowing account after the next of the migration journeys of recently arrived families.<sup>174</sup> He synthesizes their experiences to create a schematic four-stage process of Central American migration: the pre-migration experience, which can last years or decades, leading to trigger events that result in the migration journey, which can take weeks or months, followed by detention, which can last days or weeks, and eventually, post-detention settlement and adjustment. He traces how each of these stages pose psychological stressors on children and families, and describes how, for children, the impact depends in part on their developmental stage.

Miguel, an eight-year old migrant from Honduras, spoke to Zayas's research team shortly after he was reunified with his mother after a period of separation and detention at the Texas border. He told the researchers that he was scared of school buses, because he remembered the buses that took him to detention. As a result, "a sympathetic neighbor now drives him to school to lessen his anxiety about riding the bus to school."<sup>175</sup> As this interview captures, immigrant children released from detention inevitably bring the stress and trauma of their recent experiences into their experiences as students in school classrooms.

A third reason today's recently arrived immigrant children enter schoolrooms differently situated than the generation that preceded them is the urgency of their economic responsibilities. It is certainly not the case that first-wave DREAMers grew up without financial stress. To the contrary, many were expected to contribute financially to their households. Research on the higher school drop-out rate of undocumented students as compared to the national average before 2014 identified financial pressures as a key factor.<sup>176</sup> Those with less financial pressure were far more likely to have the time and means necessary to pursue postsecondary training.<sup>177</sup>

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174. LUIS ZAYAS, *THROUGH ICEBOXES AND KENNELS: HOW IMMIGRATION DETENTION HARMS CHILDREN AND FAMILIES* (2023).

175. *Id.* at 124.

176. Gonzales, *Learning to be Illegal*, *supra* note 23, at 612 (reporting that in his study of undocumented students in Los Angeles, nearly all respondents contributed money to their families, averaging nearly \$300 per month).

177. Roberto G. Gonzales & Stephen P. Rusczyk, *The Legal Status Divide Among the Children of Immigrants*, 150 *DÆDALUS* 135, 139 (2021) ("Those undocumented youth who manage to make successful transitions to postsecondary education—a very small proportion—are able to delay aspects of the transition to illegality by avoiding low-wage work and remaining in supportive community and institutional contexts.").

There are several reasons why second-wave DREAMers are even more likely to experience economic responsibilities that force them to prioritize low-wage work over education. For those who arrive as unaccompanied minors, many live with extended family members or friends who expect them to pitch in for living expenses.<sup>178</sup> Often, they or their family members likely had to borrow a significant sum of money to finance their travel from home country to the U.S., which they now have to repay. Many also came for the express purpose of working and sending money home, so they are under pressure to earn money not just for their living expenses here, but also to support family members abroad.<sup>179</sup>

Thus, many newcomer students—particularly those who arrive at an older age—face severe financial pressure to prioritize work over education. This was painstakingly documented in a recent investigative journalist account of the prevalence of child migrant laborers through the U.S.<sup>180</sup> These economic realities compound the effects of disrupted schooling and the likely experience of recent trauma. In the clinic I run, we have seen firsthand how these factors combine to lead many of our clients, like Edgar, to drop out of school. There is very little formal data collection on the population of newcomer students in schools, making it difficult to go beyond these anecdotal accounts to determine how these students fare writ large. The main proxy for tracking immigrant students is through those classified as English Language Learners (“ELLs”). As noted, this is a highly imperfect measure since the majority of ELLs are in fact U.S. citizens. Yet even among this broad group of students, the difference in graduation rates is stark. For example, in 2018-2019, 86% of students graduated from high school, yet only 69% of students classified as “limited English proficient” did so.<sup>181</sup>

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178. MPI Strengthening Services, *supra* note 173, at 20.

179. Stephanie L. Canizales, *Work Primacy and the Social Incorporation of Unaccompanied, Undocumented Latinx Youth in the United States*, 101 Soc. FORCES 1372, 1388 (2022); Stephanie L. Canizales, *How Unaccompanied Youth Become Exploited Workers in the U.S.*, THE CONVERSATION (Mar. 13, 2017), <https://theconversation.com/how-unaccompanied-youth-become-exploited-workers-in-the-us-73738> [<https://perma.cc/3JL9-WVJB>].

180. Dreier, *supra* note 3.

181. Table 219.46, DIGEST OF EDUC. STATS., NAT'L CTR. FOR EDUC. STATS., [https://nces.ed.gov/programs/digest/d20/tables/dt20\\_219.46.asp](https://nces.ed.gov/programs/digest/d20/tables/dt20_219.46.asp) [<https://perma.cc/7P36-3N3U>]; see Julie Sugarman, *The Impacts on English Learners of Key State High School Policies and Graduation Requirements*, MIGRATION POL'Y INST. 3 (Nov. 2021), <https://www.migrationpolicy.org/>

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As described, neither *Plyler* nor *Lau* have been interpreted to require schools to take specific steps to address the needs of immigrant students. Instead, choices about the extent to which school adjust their practices to account for the distinctive characteristics of immigrant youth are left to local school districts, or in some cases, state policies. A handful of states and localities have developed innovative approaches specifically tailored to the needs of newcomer students, some of which are described in the final section of this paper. But most schools have no specialized efforts tailored to newcomers. In a recent joint letter to Secretary of Education Cardona, a group of concerned educators called on the Department of Education to provide more funding for newcomer education. The letter opens with the following:

We, a group of concerned educators, administrators, researchers, and advocates, believe that national collaboration and investment is necessary to properly serve our newcomer English learners - those students who are relatively new to U.S. schools. While newcomers are grouped in with the large and heterogeneous English learner category, they have distinct needs that are often unmet by programs and instruction offered to English learners, especially those who enter U.S. schools in middle or high school. Consequently, newcomers around the country are unable to access the appropriate public education that is their civil right.<sup>182</sup>

These educators are sounding the alarm that the current educational infrastructure is ill-equipped to meet the needs of today's immigrant youth. Yet in most policy circles and even among immigrants' rights advocates, these concerns are not at the forefront of the movement. This is because of the third and final characteristic of newcomer children that sets them apart from DREAMers: the very different way in which society views their culpability for their immigration status.

### 3. Innocence

The innocence narrative that was so central to the first-wave DREAMers is far more complex for today's child migrants. First and foremost, unlike

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sites/default/files/publications/high-school-policies-els-2021\_final.pdf  
[<https://perma.cc/5PV4-7YA>].

182. Letter to Secretary Miguel Cardona, U.S. Department of Education (August 2022) (on file with author).

the DREAMers who arrived as very small children with their parents, unaccompanied minors arrive on their own. As a result, the shifting of blame to parents—invoked by the *Plyler* court and repeatedly in the decades that followed—does not operate to shield recently arrived youth from blame for their unlawful entries.

Professor Susan Terrio captures this contrast in her analysis of Jane Doe, an unaccompanied minor whose request for an abortion while she was detained in a Texas shelter led to a legal battle over her constitutional rights.<sup>183</sup> Terrio compares the political and media reaction to this story to the debates over DREAMers going on at the very same time. Dreamers and DACA recipients almost uniformly receive a sympathetic portrayal in media accounts, which Terrio ties to the fact that the “original sin” of unlawful entry is absolved by their young age when they first arrived. In stark contrast, unaccompanied children like Jane Doe, “are presumptively guilty, a fact that is confirmed when they cross the border without parents or documents, are apprehended for breaking immigration law, and placed in both mandatory custody and deportation proceedings.”<sup>184</sup>

It is not only because recently arrived youth “chose” to come on their own that they are more likely to be viewed by the public as guilty. Just as importantly, the border crossing itself is different for this generation immigrants, because they are far more likely to be ensnared in the immigration enforcement apparatus from the very moment of their arrival. As described in Section II, during the time that DREAMers crossed into the U.S., most succeeded in entering without apprehension. As a result, they lived for years “under the radar.” DHS data suggests that it was not until 2012 that Border Patrol apprehended a majority of people crossing the border.<sup>185</sup> In contrast to first-wave DREAMers, today’s recently arrived immigrants are far more likely to be “on the radar” of the government from the start, having been apprehended at the border and placed in removal proceedings. Thus, even for young children who arrive with their parents as family units and may not be perceived to have “chosen” to migrate, they are still immediately framed as guilty rather than innocent by the fact that they are in the immigration enforcement system. They are thus likely to spend their formative years fighting to prove they merit a grant of asylum or deserve to stay in the country for some other humanitarian reason.

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183. Susan Terrio, *The Curious Case of Jane Doe*, in UNACCOMPANIED MIGRANT CHILDREN: SOCIAL, LEGAL, AND ETHICAL PERSPECTIVES (Hille Haker & Molly Greening eds., 2019).

184. *Id.* at 103.

185. AM. IMMIGR. COUNCIL, *supra* note 110, at 2.



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Take the case of Dario's six-year-old younger brother, Jose, or four-year-old Susana, both described at the outset of this section. Both arrived in this country with parent and siblings, and were immediately placed in removal proceedings. They may or may not remember the experience of going to immigration court, but certainly will be shaped on some level by their families' anxiety and uncertainty with each approaching hearing. Most likely, they will spend a substantial portion of their formative years awaiting a decision on whether or not they can stay in the country. Since 2014, immigration courts have been taking over 500 days to issue a decision on relief from deportation (and nearly twice as long since 2021).<sup>186</sup> For those who eventually win, the average time is far longer: well over 900 days, or three years.<sup>187</sup> Thus, for a significant period of time from their initial entry into the country, these young migrants' self-conception will be as an outsider awaiting permission to come in. This contrasts sharply with the abrupt discovery of outsider status that DREAMers experienced after living for years assuming they were part of the community.

How this process ends will obviously have enormous implications for these young people's self-identities and future trajectories. With our clinic's representation, Susana and Jose both eventually received humanitarian visas. Roughly three years after entering the country, Susana received a T visa based on her family's experience as survivors of trafficking. After two years trapped in Mexico and one year in the U.S., Jose received a provisional grant of Special Immigrant Juvenile Status based on his abandonment by his father. Both these visas will eventually allow Susana and Jose to apply for legal permanent residency, and after that, they can apply to naturalize. Thus, within several years of their arrival, these young people are on a pathway to citizenship. Even so, the pathway is long, and it remains to be seen how the protracted process will shape their capacity for integration in the long-term.

More importantly, many young undocumented children will not have the same luck. Data on asylum claims of children in family units show that they were granted asylum only about 20 percent of the time in 2020.<sup>188</sup> The

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186. *Immigration Court Processing Time by Outcome*, TRAC IMMIGR., [https://trac.syr.edu/phptools/immigration/court\\_backlog/court\\_proctime\\_outcome.php](https://trac.syr.edu/phptools/immigration/court_backlog/court_proctime_outcome.php) [<https://perma.cc/V6AJ-E92K>].

187. *Id.*

188. *The Impact of Nationality, Language, Gender and Age on Asylum Success*, TRAC IMMIGR. (Dec. 7, 2021), <https://trac.syr.edu/immigration/reports/668> [<https://perma.cc/E2J5-H9G4>]. The report notes the grant rate for children is

likelihood of an asylum grant went up somewhat in 2021 but still suggests that the sizable majority of children in family units are losing their asylum cases.<sup>189</sup> The denial rate has been particularly striking for a subset of families assigned to an expedited docket for asylum-seeking families created by the Biden Administration in May of 2021.<sup>190</sup> One study of the operation of the docket in Los Angeles found that only 449 of the roughly 2,400 cases assigned to the docket were completed by February of 2022.<sup>191</sup> Of these, over 99% resulted in removal orders, most in the form of in absentia orders, and many issued for children under the age of six.<sup>192</sup> More recent national data continue to show a much higher denial rate for families on this docket than other asylum cases.<sup>193</sup> While this is a recent program and only impacts a subset of immigrant children, it is a window into the many obstacles facing children in asylum-seeking families and their low odds of success.

Data on unaccompanied minors show equally grim prospects for relief. One analysis of government data found that between 2017 and 2021, over sixty percent of cases completed in immigration court resulted in removal.<sup>194</sup> Here, too, most of these removals were issued in absentia for

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far below the overall average grant rate of twenty-nine percent for asylum cases in the same year.

189. *Id.*

190. *DHS and DOJ Announce Dedicated Docket Process for More Efficient Immigration Hearings*, OFF. OF PUB. AFFS., DEP'T OF JUST. (May 28, 2021), <https://www.justice.gov/opa/pr/dhs-and-doj-announce-dedicated-docket-process-more-efficient-immigration-hearings> [<https://perma.cc/WXE7-KYN9>].

191. *The Biden Administration's Dedicated Docket: Inside Los Angeles' Accelerated Court Hearings for Families Seeking Asylum*, UCLA CTR. FOR IMMIGR. L. & POL'Y 1, 4 (May 2022), [https://law.ucla.edu/sites/default/files/PDFs/Center\\_for\\_Immigration\\_Law\\_and\\_Policy/Dedicated\\_Docket\\_in\\_LA\\_Report\\_FINAL\\_05.22.pdf](https://law.ucla.edu/sites/default/files/PDFs/Center_for_Immigration_Law_and_Policy/Dedicated_Docket_in_LA_Report_FINAL_05.22.pdf) [<https://perma.cc/RP5X-QTUW>].

192. *Id.* at 1-2.

193. *A National Assessment of the Biden Administration's Dedicated Docket Initiative*, TRAC IMMIGR. (Dec. 6, 2022), <https://trac.syr.edu/reports/704> [<https://perma.cc/3LTQ-7QQ5>] (reporting only seven percent of closed cases were granted asylum).

194. William A. Kandel, *Unaccompanied Alien Children: An Overview*, CONG. RSCH. SERV. 16-17 (Sept. 1, 2021), <https://sgp.fas.org/crs/homsec/R43599.pdf> [<https://perma.cc/SZ27-EEXA>].

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children who had failed to show up for their court hearing.<sup>195</sup> Furthermore, the other forty percent of case completions did not all receive a grant of legal status. On the contrary, only four percent received some sort of relief. The remainder were either terminated—meaning the child is no longer in removal proceedings but also has not yet obtained any form of status—or granted voluntary departure.<sup>196</sup>

ICE does not release data on the number of removals by age. It is clear, however, that the high number of *removal orders* does not in fact reflect high numbers of *removals*.<sup>197</sup> Instead, many children ordered removed remain here in the U.S. after losing their case. Now, however, they are not just undocumented. Many have final removal orders pending against them. Under existing immigration laws, this means that once they become adults, nearly all pathways to legal status will be unavailable.<sup>198</sup> Not only that, but they will live in a state of heightened fear, since immigrants with final orders of removal are subject to expedited removal if they are apprehended.<sup>199</sup> Even for those without final removal orders, the fact that they are already in the immigration system surely heightens their sense of vulnerability and precarity.<sup>200</sup>

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195. *Id.* at 17 (noting that seventy-five percent of the removals were in absentia, meaning the child did not show up at the hearing).

196. *Id.* These data do not capture the portion of those terminated while another affirmative visa application is pending but not yet approved. Presumably, a portion of these terminated cases have SIJS applications pending that will eventually lead to legal status.

197. See ERO FY2019 Report, *supra* note 158, at 20 (reporting a 9.2 percent removal rate of unaccompanied minors apprehended 2017-2018).

198. 8 U.S.C. § 1229(a)(7) (requiring that after entry of an in absentia order, an immigrant is not eligible for discretionary relief for ten years after the date of the removal order); 8 U.S.C. § 1231(a)(5) (requiring that immigrants with prior removal orders who reenter illegally are not eligible for any relief and will be subject to “reinstatement” of their prior removal order); 8 U.S.C. § 1182(a)(9)(C) (determining that immigrants with prior removal orders are “inadmissible”).

199. 8 U.S.C. § 1231(a)(5).

200. Asad, *On the Radar: System Embeddedness and Latin American Immigrants’ Perceived Risk of Deportation*, 54 LAW & SOC’Y REV. 133 (2020); Rabin, *supra* note 109 (identifying that the extent to which immigrants live in a subordinating state of precarity depends in part on the likelihood that proceedings could be initiated at any given time).

As the previous section described, the innocence narrative provided first-wave DREAMers and their advocates with a means of acknowledging their undocumented status with some protection from blame and ostracization. Grounding their deservingness in this conception of innocence has proven problematic, but it did operate as a key component of their path to greater social inclusion. In contrast, second-wave DREAMers face a social context that makes their legal status even more of a liability. They must grapple with shame and fear about their unauthorized status from the very moment of their arrival. This shapes their experiences in and treatment by schools and, as the next section describes, also renders it far less likely that they conceive of themselves as leaders and agents of change in their new country.

### C. *A Path Forward for Second Wave DREAMers*

Section II traced the ways in which the political activism of DREAMers led to the creation of DACA, an accomplishment that surely would not have happened were it not for the willingness of young people to organize and demand change. Schools played a crucial role in creating the conditions that allowed for the remarkable political mobilization of immigrant youth. Roberto Gonzalez has directly connected the undocumented student movement to *Plyler*, describing that “[i]nvestments in education over the years made possible by *Plyler* and the support of their families, teachers, and community provide[d] [undocumented students] with the impetus to make the most of those opportunities. Moreover, leadership experiences in school . . . provided the necessary skills to actualize their organizing and advocacy pursuits.”<sup>201</sup> Thus, the refuge schools provided for undocumented children to grow up—shielded from immigration status—allowed them to develop skills and ambitions that led some, as young adults, to become fierce and effective advocates for policy change.

Along similar lines, Leisy Abrego has analyzed the striking contrast between the activism of young immigrants, members of the “1.5 generation,” and the reluctance of most of their parents to be politically involved.<sup>202</sup> Schools play a central role in the analysis. Abrego conceptualizes youth activism as “claims-making” behavior that was

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201. Roberto G. Gonzales, *Left Out but Not Shut Down: Political Activism and the Undocumented Student Movement*, 3 Nw. J. L. & Soc. Pol’y 219, 239 (2008).

202. Leisy J. Abrego, *Legal Consciousness of Undocumented Latinos: Fear and Stigma as Barriers to Claims-Making for First- and 1.5-Generation Immigrants*, 45 LAW & SOC’Y REV. 337 (2011).

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critically shaped by the legal consciousness this generation developed because they spent their formative years in the protected setting of public schools. Their parents, as adult undocumented immigrants, primarily spent their waking hours in the workforce, where they were “constantly aware of their unlawful and unwelcome presence at work,” and thereby developed legal consciousness pervasively shaped by fear.<sup>203</sup> In contrast, members of the 1.5 undocumented immigrant generation first encountered the law not as a source of fear but rather stigma. They associated discovery of the concept of legality with embarrassment, exclusion, and shame, but not with the deep sense of fear that shaped their parents’ legal consciousness.<sup>204</sup>

Abrego also ties the different generations’ legal consciousness to age of arrival. She notes that for immigrants who came as adults, “[u]nderstandably, their legal consciousness is strongly shaped by their memories of the journey and a concrete fear of ever having to live through that dreadful experience again should they be deported. Immigrants who arrive as children, on the other hand, remembered little to nothing about their migration journeys.”<sup>205</sup> Since unauthorized immigration status has not played the same central role in their daily life and past lived experience, they may not have the same deep sense of fear associated with it. As a result, they are more willing to make demands for inclusion and integration.<sup>206</sup>

This deeper analysis of the reasons for the undocumented student activism that paved the way for DACA does not bode well for the likelihood of a similar path forward for today’s newcomer youth. The previous section detailed the many reasons why *Plyler’s* protections are no longer sufficient to create schools as a place of refuge for today’s newcomer students. For high school-age youth, both those arriving as unaccompanied minors and older teens arriving in family units, their linguistic and cultural differences will set them apart from their peers, making assimilation less easily achieved. Moreover, many arrive at an age in which they are likely to be straddling both the worlds of school and work at once. This will fundamentally lessen the extent to which the schoolhouse, even if it is immigration status blind, will wholly shape their legal consciousness.

In addition, the liberating space schools offered to undocumented children is harder to replicate when students are entangled with immigration enforcement from the moment of arrival. Whatever messages

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203. *Id.* at 352.

204. *Id.* at 353.

205. *Id.* at 351.

206. *Id.* at 363.

they receive in school about the legal regime in which they live will likely be outweighed by the anxiety and fear they experience with each upcoming court date or check-in with ICE. Newcomer students immediately encounter the legal system as an apparatus designed to determine their fate: whether they will receive permission to stay in the United States or be deported. As a result, unlike the student activists who fought for the DREAM Act, these young people are more likely to equate the law primarily with fear rather than stigma. Over time, their encounters with poor treatment by guards or ICE officials, arbitrariness of the courts and agencies adjudicating their claims, disorienting or hostile hearings, and unenforced removal orders may also foster legal cynicism.<sup>207</sup> This, in turn, may lessen their interest in engaging in social activism to bring about legal change.

If so many factors cut against youth engagement and activism among today's recently arrived immigrant students, what does that mean for their path forward? It cannot mean that we are simply to accept that these young people will age into the ranks of an ever-growing undocumented immigrant workforce. Their resilience and potential are just as powerful as the generation that preceded them. But the contrast between the legal landscape now and in the past is a useful means to identify key ingredients to a pathway towards greater inclusion and societal flourishing. The final section begins to sketch out the roles that schools and policymakers have in paving this path.

#### IV. SCHOOLS, DREAMS, AND INTEGRATION: ENDING THE DEFERRAL OF DREAMS FOR ALL DREAMERS

*Plyler's* vision of equality of opportunity for all children, regardless of citizenship status, requires a different approach by schools serving immigrant families today than it did a generation ago. The previous section detailed why ensuring equality of educational opportunity for all students, citizens, and noncitizens alike, requires more than *Plyler's* insistence that schools are immigration status blind. The distinctive characteristics of today's newcomers require schools to develop tailored resources and programs that serve their needs. In addition, the obstacles first-wave DREAMers have hit in achieving complete integration underscores the need for a new paradigm. There is a need for new guideposts that learn from the

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207. See Emily Ryo, *Fostering Legal Cynicism Through Immigration Detention*, 90 S. CAL. L. REV. 999, 1024, 1047-49 (2017) (describing how negative experiences with the legal system by immigrants in detention create legal cynicism, with the potential for long-lasting societal effects).

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past and are attentive to the realities of today's migration patterns and the lived experiences of newcomers. The next three subsections suggest a shift along each of the themes that came to define first-wave DREAMers: from assimilation to inclusion, from equal to equitable education, and from innocence to collective responsibility.

### A. *From Assimilation to Inclusion*

*Plyler's* conception of schools emphasized their central institutional role in social assimilation. According to Plyler, education plays a "pivotal role . . . in sustaining our political and cultural heritage," "maintaining the fabric of our society," and assuring that all children "absorb the values and skills upon which our social order rests."<sup>208</sup> For first-wave DREAMers, this conception of schools vis-à-vis immigration insisted on a future-oriented stance, which prohibited any consideration of how students' migration history or current legal status might render undocumented students unique or distinctive.

Section II described how assimilation has increasingly been recognized as a problematic term.<sup>209</sup> Still, to the extent that assimilation stands for a commitment to treating all students in the classroom as equal members of the community, casting it aside would be extremely ill-advised. If schools were to make immigration status a relevant and distinguishing feature, this would strike a devastating blow to the educational wellbeing of newcomer children. It is well-documented that information-gathering related to immigration status deters immigrant families from enrolling in school.<sup>210</sup> In fact, anti-immigrant advocates have seized on this vulnerability in the years

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208. *Plyler v. Doe*, 457 U.S. 202, 221 (1982).

209. *See supra* notes 50-55 and accompanying text.

210. *See* Civil Rights Division, Office for Civil Rights & Office of the General Counsel, *Dear Colleague Letter from Assistant Secretary Catherine E. Lhamon, Deputy General Counsel Philip H. Rosenfelt & Acting Assistant Attorney General Jocelyn Samuels*, U.S. DEP'T OF JUST. & U.S. DEP'T OF EDUC. 3 (May 8, 2014) (hereinafter "DOJ/DOE Dear Colleague Letter"), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201405.pdf> [<https://perma.cc/5M9F-T4FR>] (advising school districts to review the documents required for school enrollment "to ensure that the requested documents do not have a chilling effect on a student's enrollment in school."); *see also* Dan Baczyński, *Education Connection: The Chilling Effects of Student Immigration Tracking Systems Violate Plyler*, 33 CHILD. LEGAL RTS. J. 212, 216 (2013) (explaining how tracking systems in Alabama, Arizona, and Texas deter parents from registering their undocumented children in public schools).

since *Plyler*, attempting in several states to undermine its holding by ordering school officials to gather data on the immigration status of students and families.<sup>211</sup> Such efforts have been repeatedly struck down by courts. They have also been countered by guidance from the U.S. Department of State and Department of Justice that has disclaimed the relevance of requiring information related to immigration status.<sup>212</sup> California has recently incorporated this into state law, issuing legislation that prohibits schools from inquiring about immigration and citizenship status.<sup>213</sup>

Thus, nothing in the foregoing discussion of the shortcomings of schools with regard to today's newcomer children suggests rethinking the bright line rule that prohibits schools from asking questions or gathering data related to immigration status. However, *Plyler* should be understood in modern terms not as a demand for *assimilation* as the mission of public schools, but rather, *inclusion*. This reframing recognizes that immigrant children come to the classroom with significantly different backgrounds and experiences. These should not be ignored in the name of assimilation. Instead, they should be recognized in furtherance of inclusiveness.

Inclusion, in contrast to assimilation, places the onus on schools and society to create welcoming spaces for those often deemed outsiders, rather than demanding that these "outsiders" assimilate to mainstream culture and society. While switching from "assimilation" to "inclusion" may sound like merely a rhetorical shift, in fact it requires very pragmatic measures to enable schools to proactively create inclusiveness. For a school to be inclusive, it must adjust its practices and policies to meet the diverse population it serves. This requires utilizing information systems and data, ensuring that individual students are matched with appropriate services and programs, and researching and understanding effective inclusive policies.

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211. For a description of efforts by Arizona, Alabama, and Maryland to order state departments of education to gather information on immigration status, see Jenna D. Tidwell, *Out of the Shadows: Undocumented Children's Access to Education in the United States and Germany*, 27 MICH. ST. INT'L.L. REV. 165, 180-82 (2018). All three efforts were eventually struck down due to *Plyler*.

212. DOJ/DOE Dear Colleague Letter, *supra* note 210.

213. CAL. EDUC. CODE § 234.7 (2018) (prohibiting school officials and employees of a local educational agency from collecting information or documents regarding citizenship or immigration status, except as required by state or federal law).



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The fact is that much of this data is already collected without requiring invasive or sensitive questioning by school officials. The Every Student Succeeds Act (ESSA), passed in 2015, is the most recent federal legislation to address English Language Learners.<sup>214</sup> It requires states to provide data on the number of English Language Learners in order to receive federal grants. As noted previously, the definition of English Language Learners encompasses many students who are not newcomers. But under Title III of ESSA, the Department of Education includes the sub-group “recent immigrant,” which is eligible for specific subgrants.<sup>215</sup> The group is defined as a student between the ages of 3 and 21, who was not born in the U.S., and who has not attended a U.S. school for more than three full academic years. Thus, under ESSA, school districts already collect this data.<sup>216</sup> Not all of it is widely publicly available, particularly for recent years. However, a special request from an educational think tank obtained recent data from California that allowed for revealing estimates of the newcomer population served by public schools in the state in 2020-2021.<sup>217</sup>

Some states have further recognized the need for specialized services for another subset of English Language Learners: Students with Limited or Interrupted Formal Education (“SLIFE”) (also sometimes referred to as

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214. Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802 (2015) (codified in scattered sections of 20 U.S.C.).

215. See *FY 2023 Budget Request for English Language Acquisition*, U.S. DEP’T OF EDUC. 7, [https://www2.ed.gov/about/overview/budget/budget23/justifications/g-ela.pdf?fbclid=IwAR1Bbkc\\_eNLu16c8BiNkb\\_zKSlkgnlr2xkXC7\\_zVM9cCziSizBNVjOYsGCM](https://www2.ed.gov/about/overview/budget/budget23/justifications/g-ela.pdf?fbclid=IwAR1Bbkc_eNLu16c8BiNkb_zKSlkgnlr2xkXC7_zVM9cCziSizBNVjOYsGCM) [<https://perma.cc/Y34D-7BPM>].

216. *Biennial Report to Congress on the Implementation of the Title III State Formula Grant Program, School Years 2016-18*, U.S. DEP’T OF EDUC., OFF. OF ENG. LANGUAGE ACQUISITION (2021), <https://ncela.ed.gov/sites/default/files/legacy/files/biannual-reports/OELA-BiReport16-18.508.pdf> [<https://perma.cc/LD2M-H4MV>].

217. Sam Finn, *Newcomer Education in California*, POL’Y ANALYSIS FOR CAL. EDUC. 2 (May 2023), [https://edpolicyinca.org/sites/default/files/2023-05/r\\_finn-may2023.pdf](https://edpolicyinca.org/sites/default/files/2023-05/r_finn-may2023.pdf) [<https://perma.cc/7BA3-UCVE>] (arguing the lack of data makes it difficult to address the needs of newcomer students, and referencing specially requested data revealing that there are 151,996 newcomer students in California, “more than the combined K-12 enrollment of 23 California counties, . . . [yet] newcomers do not show up as a distinct subgroup in most state and local education data systems”).

SIFE).<sup>218</sup> School districts and departments of education in several states have implemented efforts to identify SLIFE for targeted services.<sup>219</sup> As one recent analysis by the Massachusetts Department of Education explained, “To ensure that SLIFE, as a group of students within ELs, receive equitable treatment and meaningful education, it is essential to identify SLIFE and provide language and content support tailored to their needs.”<sup>220</sup> While there is no standard national definition of SLIFE in the U.S., the Department of Education provides the following widely used definition: “Students in grades four through 12 who have experienced disruptions in their education in their native countries and/or the United States, and/or are unfamiliar with the culture of schooling.”<sup>221</sup> At least six states systematically collect SLIFE information in their data systems, and twenty provide a definition of this group of students on their state websites.<sup>222</sup>

The current efforts underway at federal, state, and local levels demonstrate that many tools and approaches are already in place that strike a balance between the need for protection and privacy of immigrant families, on the one hand, and data collection and tracking of newcomers’ experiences in the education system, on the other. These efforts are a start, but there is clearly a need for more uniform and rigorous tracking of the population of newcomer students. This information gathering is the crucial first step in shifting from assimilation to inclusion. It places the onus on

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218. MONISHA BAJAJ ET AL., *HUMANIZING EDUCATION FOR IMMIGRANT AND REFUGEE YOUTH: 20 STRATEGIES FOR THE CLASSROOM AND BEYOND* 55 (2022) (arguing that identifying SLIFE is a key strategy to serving newcomer students and providing examples of schools that specifically serve the needs of SLIFE).

219. *Id.*; see also *Students with Interrupted/Inconsistent Formal Education (SIFE)*, N.Y. STATE EDUC. DEP’T, <http://www.nysed.gov/bilingual-ed/students-interruptedinconsistent-formal-education-sife> [<https://perma.cc/NBL2-X4B7>] (in New York State); *SLIFE*, MINN. DEP’T OF EDUC., <https://education.mn.gov/MDE/dse/el/slif> [<https://perma.cc/G5ZL-ACNA>] (in Minnesota).

220. *Understanding and Supporting Students with Limited or Interrupted Formal Education (SLIFE) in Massachusetts: A Review of Literature*, CTR. FOR APPLIED LINGUISTICS 2 (Nov. 4, 2022), <https://www.doe.mass.edu/ele/slife/literature-review.pdf> [<https://perma.cc/2K3F-JVCL>].

221. *Id.* at 3.

222. *Id.* at 4-6 (listing definitions for the 20 states who provide this information in documents posted on their website). The six states that systematically collect SLIFE information are Massachusetts, Minnesota, Oregon, New York State, Rhode Island, Virginia. Presentation by Julie Sugarman, Migration Policy Institute (on file with author).

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schools to affirmatively acknowledge the newcomer population and adopt a more proactive orientation to immigrant students. This stands in striking contrast to the culture of silence imposed by an assimilationist orientation.

Explicitly recognizing newcomer students through data collection and systems of accountability will enable schools to undertake a host of substantive interventions to create inclusiveness. In this regard, inclusiveness overlaps with the next section's discussion of specific policies and programs that schools can implement to best serve this distinctive population of children.

### *B. From Formally Equal to Equitable Education*

As Section III.B.2 described, schools tend to approach the education of immigrant students through a focus on English language learning. Often, with scant federal guidance or oversight about ELL instruction, schools adopt an assimilationist lens that views languages other than English as simply obstacles to be overcome. This leads to a one-size-fits-all approach that fails to recognize newcomers are just a small subset within the larger ELL population. For all the reasons previously noted, instructional methods and approaches developed for ELLs in general are likely to fail to address their distinctive needs.

Around the country, some schools and districts have recognized the need to develop specific programs and policies to adequately serve newcomers, in the context of the ELL classroom and beyond. Similar to the shift from assimilation to inclusion, this marks a shift from a focus on formally equal treatment to equitable education.<sup>223</sup> Both shifts in terminology recognize that an equal approach to all may not be the best way to serve newcomer students. Instead, schools may need to implement specifically targeted policies and programs to ensure that newcomer

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223. The contrast between formal equality and equity is helpful terminology in the specific context of newcomers because it captures the contrast between a simple one-size-fits-all approach and more tailored approaches. It is important to note, however, that equity in education is a complex term with implications and dimensions well beyond the scope of this paper. For an overview of some of the relevant literature, see Liam Shields, Anne Newman & Debra Satz, *Equality of Educational Opportunity*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Mar. 17, 2023), <https://plato.stanford.edu/archives/spr2023/entries/equal-ed-opportunity> [<https://perma.cc/G4LZ-96WW>]. See also Meira Levinson, Tatiana Geron & Harry Brighthouse, *Conceptions of Educational Equity*, AERA OPEN, Jan.-Dec. 2022 (defining and challenging conceptions of equity in education).

students have the same opportunities for educational flourishing as other students who are not recent arrivals. This section provides examples of specific measures schools and districts have adopted to serve newcomer students.

To begin with school enrollment, here *Plyler's* protections remain particularly critical. As noted, newly arriving immigrant families will approach enrollment with trepidation, so it is essential that they can complete the registration process without any fear of questions about immigration status. At the same time, however, enrollment is a critical juncture for newcomers, because it determines the specific school and grade in which they are placed. This, in turn, will determine whether they are engaged in an educational program that will maximize their chance of success.

To address this key moment, some districts have developed centralized locations or welcome centers for linguistically or culturally diverse families.<sup>224</sup> Others have a district newcomer specialist who can be called upon by neighborhood schools to assist with enrollment at the local level. Enrollment practices specifically designed to assess the needs and circumstances of newly arrived families can avoid common pitfalls that further the marginalization of the population. In particular, school districts sometimes push older students towards alternative programs and adult education rather than enrolling them in high school.<sup>225</sup> While some students may prefer this route, it should not be presumed as the best alternative, given the many benefits of full-time schooling and a high school diploma. On the other end of the spectrum, some schools place students with interrupted schooling in ninth grade, regardless of their age, so that they can access the full high school course of study. Again, while some may prefer this opportunity, others may find it humiliating.<sup>226</sup> Older students may be more likely to drop out if they are thrown into a classroom with much younger classmates. Thoughtful guidance by enrollment specialists is a critical intervention to help families and students make informed choices about where and how to get started in the school system.

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224. Julie Sugarman, *Beyond Teaching English: Supporting High School Completion by Immigrant and Refugee Students*, MIGRATION POL'Y INST. 11, 19-20 (2017), <https://www.migrationpolicy.org/research/beyond-teaching-english-supporting-high-school-completion-immigrant-and-refugee-students> [<https://perma.cc/46PX-MQ5W>] (hereinafter "MPI Beyond Teaching English").

225. *Id.* at 12.

226. *Id.* at 11, 24.

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Beyond enrollment policies, some school districts have developed standalone schools specifically designed for newcomers.<sup>227</sup> Others have tracks for newcomers that complement the learning they do in mainstream classrooms. There are a range of instructional approaches designed to be attentive to the linguistic and cultural background of newcomer students.<sup>228</sup> There are also different approaches to graduation requirements, including some states that have created flexibility with state requirements for newcomers that gives them additional time or adjusted requirements in order to graduate.<sup>229</sup> There are even a few specialized high schools that have created flexible scheduling, including evening classes, to accommodate older working newcomers, and others that have developed partnerships with community colleges.<sup>230</sup>

In addition to these instructional measures, some schools have also established community partnerships to address newcomers' socioemotional and medical needs.<sup>231</sup> Oakland Unified School District has made all its campuses full-service community schools, where schools are a hub for onsite health and mental health clinics, afterschool programs, and social work services.<sup>232</sup> Schools have also hired community liaisons to connect families with resources and support. In some cases, these positions are legally required for homeless and foster youth, and schools have expanded on this infrastructure to serve newcomer students as well.<sup>233</sup> Some districts have adopted the term "trauma-sensitive schools" to signal a commitment to extensive mental health support. These schools emphasize

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227. The most developed of these is the "Internationals Network for Public Schools," which has been around for decades and has 27 schools in five states plus the District of Columbia. *Id.* at 18.

228. Bajaj et al., *supra* note 218.

229. MPI Beyond Teaching English, *supra* note 224, at 22-24.

230. *Id.* at 25.

231. Beier et al., *Issue Brief: Four Strategies to Improve Community Services for Unaccompanied Children in the United States*, MIGRATION POLICY INSTITUTE & UNICEF 9 (Dec. 2022), <https://www.unicef.org/reports/four-strategies-improve-community-services-unaccompanied-children-united-states> [<https://perma.cc/GN76-Q45W>].

232. MPI Beyond Teaching English, *supra* note 224, at 15.

233. Christopher Cruz, *The Learn Act: A Bipartisan Legislative Proposal to Advance Educational Opportunities for Immigrants and English Learners*, 59 HARV. J. ON LEGIS. 223, 248 (2022).

hiring educators trained to understand trauma and its impact on students.<sup>234</sup>

As captured by the foregoing examples, efforts vary from individual schools and district-level programs all the way to statewide laws and policies. Yet there is widespread agreement among advocates and educators of immigrant children that much work remains to be done to have more robust and comprehensive programs and policies in place. In part, the scattered nature of current efforts reflects the minimal data and tracking described in Subsection A. It is also tied to the pervasive culture of silence when it comes to immigration in the school context, the topic of the next and final section.

### C. *From Innocence to Collective Responsibility*

Of the three defining aspects of schools' approach to DREAMers, this final one may be the most profound. Shifting from assimilation to inclusion, and from equal to equitable education, involves conceptual and pragmatic adjustments that are significant, but do not fundamentally alter what schools already do to best serve their students. This is evidenced by the fact that many school districts around the country have already begun to undertake this work to a significant degree.

Shifting away from the innocence narrative, however, is not adding to existing building blocks; it is adopting a new paradigm. It requires not simply a modernizing of *Plyler*, but an outright departure from one of the core aspects of its decision that has long been understood to be central to its holding. Yet here it is important to note that innocence was only one thread in *Plyler's* analysis. The decision also relied on the country's historic commitment to anti-subordination and equality of opportunity for all.<sup>235</sup> The questions raised by *Plyler's* equal protection analysis rapidly transcend the context of K-12 education. In the years since *Plyler's* holding, its innocence rationale has been the subject of widespread criticism by activists and scholars for the ways in which it has framed immigration reform as a matter of moral deservingness and blameworthiness.<sup>236</sup> Outside

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234. *Id.*

235. *Plyler*, 457 U.S. 202, 218-19 (1982).

236. For just a few examples of scholarship addressing and critiquing this approach, see Keyes, *Defining American*, *supra* note 56; Stephen Lee, *Book Review: Immigration Outside the Law*, 128 HARV. L. REV. 1405 (2015); Motomura, *supra* note 7, at 183-84; Muneer I. Ahmad, *Beyond Earned Citizenship*, 52 HARV. C.R.-C.L. L. REV. 257 (2017).

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the academy, the history of the DREAM Act, summarized in Section II, captured the ways in which DREAMers themselves rejected the exclusionary outcomes of the innocence rationale as they voiced their demands for social inclusion outside the confines of school.

These debates about immigration reform writ large are beyond the scope of this paper, but in the specific context of immigrant children in public education, I propose as an alternative to innocence the concept of collective responsibility. When schools conceive of their role as one of responsibility for their students, the migration of young people like Dario, Edgar, and Susana are viewed not as matters of illegality or shame, but rather, as relevant experiences to which schools must be attentive. When viewed through this lens, child migrants are not innocent babies but survivors and members of complex transnational families. Schools have a collective responsibility to recognize and respond to the unique assets and challenges of these children in order to prepare them for their futures as contributing members of U.S. society.

Collective responsibility also encompasses a different orientation towards the migration history of immigrants in our communities. In Section III's account of the reasons for the influx of child migrants over the past ten years, the central role of the United States in creating the conditions that have led to mass migration of unaccompanied minors and asylum-seeking families is unmistakable.<sup>237</sup> A narrative of innocence and blame seems particularly misaligned with the "choices" children and families are forced to make in the context of circumstances that are not only outside their control, but directly connected to U.S. policies and interventions. The same could certainly be said of prior waves of migration. In fact, *Plyler* itself gestured at this when it described the "shadow" population of undocumented immigrants as the result of this country's own policies and practices.<sup>238</sup> Schools today have an opportunity to be at the forefront of long

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237. *See, e.g., supra* notes 120-133 and accompanying text.

238. Specifically, the opinion opens its constitutional analysis with the following recognition of the role of U.S. policies in creating the problem: "Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial 'shadow population' of illegal migrants—numbering in the millions—within our borders. This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents. The existence of such an

overdue shifts in societal conceptions of current migration patterns and demographics.

On the whole, this reorientation has yet to take place.<sup>239</sup> As a result, there is a striking disconnect between the myriad innovations at the school, district, and state level that aim to put newcomers on a path to social mobility, and what could be the greatest single factor to determine their future path: their legal status. To my knowledge, very few schools other than the one where our clinic is located have embraced a central role for immigration-related legal services on the school site. Exceedingly few school administrators, policymakers, and teachers understand their students' legal situation, let alone consider interventions to address it.

To an extent, this is the desired product of *Plyler*, which over decades has created a deep-seated institutional culture that insists that immigration status has no place in the school context. Due to the social and cultural focus on *Plyler's* innocence rationale in the years since its holding, schools cast children as innocent of their parents' blameworthy border-crossing, and therefore insist that teachers and administrators make no mention of immigration status. Yet ironically, this outcome of *Plyler* may be diserving many newcomer students, who would benefit from school-based interventions that directly address their legal status. Unlike DREAMers, today's newcomers are blamed for their border-crossing from the moment they arrive. Unaccompanied minors came on their own, and therefore their undocumented status cannot be framed as "a legal characteristic over which children can have little control."<sup>240</sup> Newcomer children who arrived with their parents are nearly all in removal proceedings, too, given the high rates of apprehension at the border.

As a result, whereas most first-wave DREAMers were nowhere in the federal government's bureaucracy and faced significant risks if they were to be "outed," many of today's newcomer students would benefit from adults

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underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law." *Plyler*, 457 U.S. at 218-19.

239. Recent scholarship has pushed for this shift outside the context of public schools. See, e.g., E. Tendayi Achiume, *Empire, Borders, and Refugee Responsibility Sharing*, 110 CAL. L. REV. 1011, 1016 (2022); Sherman-Stokes, *supra* note 120; Ahmad, *supra* note 236, at 304. In addition, greater acknowledgment of the racist history behind U.S. immigration and border policies has increasingly surfaced in caselaw and advocacy outside the asylum context, so this shift would be of a piece with related efforts. See, e.g., *United States v. Carrillo-Lopez*, 555 F. Supp. 3d 996, 1004 (D. Nev. 2021) (appeal pending before the Ninth Circuit).

240. *Plyler*, 457 U.S. at 220.



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in their lives who could recognize their urgent legal needs. The urgency is in part because so many are already in removal proceedings, making it likely that an immigration judge will issue a removal order if they do not obtain representation. In addition, many immigrant children are in fact eligible for pathways to legal status that would transform their life prospects,<sup>241</sup> but these options will lapse if not identified in time. Specifically, Special Immigrant Juvenile Status (“SIJS”), a humanitarian visa available to children who have been abused, abandoned, or neglected by one or both of their parents in their home countries, is only available to children under the age of 21.<sup>242</sup> It requires a state court to make specific findings before the child can apply to the federal government for the visa. Many unaccompanied minors qualify for SIJS, but it is virtually impossible to obtain it without legal representation, given complex procedural requirements that involve practice in both state and federal systems.<sup>243</sup> In addition, asylum-seeking children have special procedural and substantive advantages that are age-dependent.<sup>244</sup>

While there are legal service providers serving immigrant children outside the schoolhouse doors, the disconnect between schools and legal services matters. Only 64 percent of unaccompanied children in proceedings between 2005 and 2017 obtained counsel at some point during

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241. Laila L. Hlass, *Minor Protections: Best Practices for Representing Child Migrants*, 47 N.M. L. REV. 247, 256-57 (2017).

242. 8 U.S.C. § 1101(a)(27)(J)(i). In some states, young people will “age out” when they turn eighteen, because they will not be able to establish state court jurisdiction over the custody matter, a requirement to apply for the visa. Hlass, *supra* note 241, at 281-82.

243. *See generally* Hlass, *supra* note 241; *see also* Alyssa Snider & Rebecca DiBennardo, *Representation Matters: No Child Should Appear in Immigration Proceedings Alone*, VERA INSTITUTE OF JUSTICE (Dec. 2021), <https://www.vera.org/downloads/publications/representation-matters.pdf> [<https://perma.cc/G95P-RKBU>].

244. The William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA), Pub. L. 110-457, 122 Stat. 5044, provides numerous protections for unaccompanied children. One particularly important one is that USCIS has initial jurisdiction over their asylum applications. TVPRA § 235(d)(7)(B), codified at 8 U.S.C. § 1158(b)(3)(C), INA § 208(b)(3)(C). However, the law related to when this determination is made has been in a state of flux in recent years, and children in removal proceedings are at risk of losing the right to an affirmative application if they wait to apply until after they are eighteen. *See Matter of M-A-C-O-*, 27 I&N Dec. 477 (BIA 2018); *J.O.P. v. U.S. Dep’t of Homeland Sec.*, 338 F.R.D. 33 (D. Md. 2020) (appeal pending to Fourth Circuit).

their cases.<sup>245</sup> In 2018, data showed only 47% of newcomer Central American juveniles had an attorney.<sup>246</sup> Initiatives to increase these numbers have focused largely on litigation and policy advocacy to boost local, state, and federal efforts to build the capacity of legal service providers.<sup>247</sup> Without a doubt, expanding the resources devoted to individual representation is a crucial component of the legal landscape for newcomer children.<sup>248</sup>

Yet the challenge is not only a matter of capacity. Newcomer youth, and particularly unaccompanied minors, face additional significant barriers to accessing legal services due to their challenging life circumstances upon release from ORR custody.<sup>249</sup> Language and cultural barriers, logistical challenges, and a climate of fear all make it difficult for newcomer students to successfully navigate connecting with trustworthy legal service providers.<sup>250</sup> One research study of legal assistance and barriers faced by

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245. Unaccompanied Juveniles Immigration Court Deportation Proceedings, TRAC IMMIGRATION, <https://trac.syr.edu/phptools/immigration/juvenile/> [<https://perma.cc/X2M7-96KF>]; see also Snider & DiBennardo, *supra* note 243.

246. Dennis Stinchcomb & Jodi Berger, Working Paper: *Newcomer Central American Immigrants' Access to Legal Services*, CENTER FOR LATIN AMERICAN & LATINO STUDIES, AMERICAN UNIVERSITY 4 (2018), <https://www.houstonimmigration.org/wp-content/uploads/2018/09/Newcomer-Central-American-Immigrant-Access-to-Legal-Services.pdf> [<https://perma.cc/ECY8-MHJP>].

247. See, e.g., *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1039 (9th Cir. 2016) (statutory and constitutional claims of right to counsel for undocumented immigrant children dismissed on jurisdictional grounds); Carlee Goldberg, *Legal Aid for Unaccompanied Children in the U.S. Illegally*, NATIONAL CONFERENCE OF STATUTE LEGISLATURES (Sept. 2020), <https://www.ncsl.org/immigration/legal-aid-for-unaccompanied-children-in-the-us-illegally> [<https://perma.cc/5GQS-JJZW>] (summary of state efforts to provide legal representation to immigrant children).

248. The need for greater representation for immigrant children has been the focus of extensive scholarly and media commentary. See, e.g., Shani M. King & Nicole Silvestri Hall, *Unaccompanied Minors, Statutory Interpretation, and Due Process*, 108 CAL. L. REV. 1, 6 (2020); Amanda Kavita Sewanan, *The Right to Appointed Counsel: The Case for Unaccompanied Immigrant Children*, 41 CARDOZO L. REV. 317, 323 (2019); Christina Jewett & Shefali Luthra, *Immigrant Toddlers Ordered to Appear in Court Alone*, TEXAS TRIBUNE, June 27, 2018.

249. MPI Strengthening Services, *supra* note 173, at 12-18.

250. *Id.* at 14.

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recent Central American migrants described the particular challenges for newcomer families:

Newcomer parents and sponsors are often struggling to simultaneously get children enrolled in school, address immediate medical needs, find housing, and manage a household while trying to work one or more jobs. Amidst this seemingly endless cascade of demands on their time and resources, many newcomers and their caretakers are unable to prioritize legal needs.<sup>251</sup>

The same study also described how susceptible such newcomers are to fraud and exploitation by *notarios* (non-lawyers providing immigration services) and private immigration attorneys who lack familiarity with complex immigration remedies available to juveniles like SIJS.<sup>252</sup>

Research on effective service delivery for newcomer families has identified schools as a key site because of the unique, trusted space they occupy in immigrant children's lives.<sup>253</sup> This resonates with what I have seen firsthand in the school-based clinic I direct. Most of our clients are not otherwise connected with legal service providers. Many of the unaccompanied minors and newcomer families who become our clients were not actively seeking out legal counsel before the clinic came to their classroom and provided legal orientation workshops, or a trusted teacher or counselor brought them to our clinic for a consultation. For example, Susana's mother was referred to our clinic by another parent at the school just a week after Susana enrolled in kindergarten. Susana's mother had just recently arrived in California after escaping nearly a year of captivity by traffickers in another state. She had no idea where or when her removal proceedings were taking place and had no familiarity with the possibility of a "T visa" until we were able to provide her with information about it.

Others have hired private attorneys who they only came to understand were not adequately representing them after a consultation with our clinic. For example, Edgar's mother initially hired an attorney who charged her eight thousand dollars to handle her removal proceedings, and then failed to file any application in immigration court or identify that her children

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251. Stinchcomb & Cardoso, *supra* note 246, at 10.

252. *Id.* at 22.

253. Gillian Huebner & Rhonda Fleischer, *Building Bridges for Every Child*, UNITED NATIONS CHILDREN'S FUND 35 (Feb. 2021), <https://www.unicef.org/media/94341/file/Building%20Bridges%20for%20Every%20Child.pdf> [<https://perma.cc/LQ6M-RAZF>].

were eligible for SIJS. The school social worker connected her with our clinic, where she learned about where and when her court date was and decided to retain the clinic to handle all four of her children's SIJS applications and removal proceedings.

In addition to increasing the likelihood that newcomer students will successfully obtain legal counsel, school-based legal service delivery has the further benefit of combining legal representation with comprehensive services that recognize the multi-faceted needs of newcomer families. It opens up the possibility of pairing legal support with other forms of holistic advocacy and organizing that can make schools a transformational experience along the lines of what some first-wave DREAMers encountered. For example, school-based legal services can identify a newcomer student like Susana early in her educational trajectory—in her case, in kindergarten—and intervene to put her on a path to legal status well before she faces decisions about her professional and educational future. This, combined with social services and mental health support responsive to the traumatic circumstances of her flight from Guatemala and extended time in captivity by her traffickers, can provide her with support at a critical juncture that will transform the remainder of her experience as a student and future citizen.

For a student like Edgar, who was nearly eighteen by the time he connected with our clinic, the school-based social services available to him proved insufficient to address the extent of his trauma. He had stopped going to school before our clinic began to work with him, and despite the eventual success of his legal case, he continued to struggle with serious mental and physical health concerns and did not return to school. His case is a reminder of the need for robust interventions above and beyond what most schools are currently equipped to provide. For older teens, schools must pair legal support with targeted programs and curriculum, examples of which were described in the previous section, to create a space where recently arrived students can genuinely envision a future unlimited by immigration status.

Providing these types of comprehensive services to newcomer students requires that schools shift away from the “innocence” narrative that required immigrant children to cover up their families' migration histories in order to claim equal treatment amongst their peers.

## V. CONCLUSION: BEYOND THE SCHOOLHOUSE

One final unmistakable lesson from the history of first-wave DREAMers is that the ability of schools to enable social integration can only go so far. Section I demonstrated how, thanks in large part to *Plyler*, schools

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functioned as a site of and catalyst for integration of first-wave DREAMers into society. For DREAMers, the integration has been real, but also incomplete. DACA—deferral of action on deportation—is the literal instantiation of the DREAMers’ ongoing struggle for complete social membership. Without a pathway to citizenship, this generation of undocumented immigrants continues to live in limbo. The role of schools as engines of social equality and bulwarks against caste has been greatly limited by the many other social spheres in which DREAMers have been unable to live unfettered by their lack of permanent legal status. Their ongoing struggle for full social membership has brought into stark relief the limitations of the innocence narrative.

The prospects of social integration for second-wave DREAMers is even more daunting, particularly because the vast majority of immigrants’ rights advocacy addresses the needs of today’s young people on an individualized basis, fighting for due process and fair treatment in the court and by immigration enforcement. By not drawing attention to the growing ranks of children without immigration status on a community and population level, these children’s numbers grow inexorably larger with little attention to long-term prospects for social integration.

If schools do not shy away from implementing and advocating for policies and practices explicitly designed to serve the distinctive needs of newcomer students, they can again play a key role as a catalyst for social recognition of the population of undocumented young people and families. This, in turn, can lead to greater efforts to address undocumented young people’s social integration and fight against marginalization.

Schools today are true to *Plyler’s* holding when they understand their responsibilities for child migrants as an active, resource-intensive undertaking that does not attempt to ignore the migration histories and future trajectories of immigrant students. This, in turn, may pave the way for immigrants’ rights advocates and policymakers to recognize the growing population of newcomer children in schools who, with resources and security, could bring myriad contributions to society, as do first-wave DREAMers. Last time around, young people demanded social recognition. This time around, schools and policymakers must recognize their responsibility to today’s child migrants, to provide them the same space to become agents of change in their communities and U.S. society.