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The Paradox of Immigrant Children's Rights

*Laila L. Hlass**

The American Law Institute is set to release a first ever Restatement of the Law in the area of Children and the Law to address the increasingly convoluted treatment of children across legal systems.[1] Children's rights scholars have long critiqued law's historic treatment of children as mere objects, instead of subjects.[2] While the Supreme Court has acknowledged children are persons with constitutional protections,[3] the scope and substance of their rights are murky and at times, even contradictory.[4] Catherine Smith argues that jurisprudence has

* Associate Professor of Law, Tulane University Law School. This Essay benefited from the excellent research assistance of Katia Leiva, as well as helpful insights and suggestions from Adam Feibelman, Lindsay M. Harris, Allison Korn, Lisa V. Martin, and Emily Suski. Thank you in particular to Catherine Smith and participants in the Duke Constitutional Law & Public Policy Journal Symposium "Children's Equality Law: Engaging the Work of Professor Catherine Smith," where I conceived of and shared some of the ideas presented in this Essay.

1. Press Release, Am. L. Inst., Restatement of the Law, Children and the Law Is Approved (May 17, 2024), https://www.ali.org/news/articles/american-law-institutes-restatement-law-children-and-law-approved [https://perma.cc/B98A-9W92].
2. *See, e.g.*, Barbara Bennett Woodhouse, *The Courage of Innocence: Children as Heroes in the Struggle for Justice*, 2009 U. ILL. L. REV. 1567, 1577; *see also* Anne C. Daily & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448, 1456–57 (2018) (describing how children's rights are often subject to the authority of their parents and the state, and less frequently to their own authority).
3. *See, e.g.*, *In re* Gault, 387 U.S. 1, 55 (1967) (affording minors the constitutional privilege against self-incrimination).
4. *See* Catherine E. Smith, Brown*'s Children's Rights Jurisprudence and How it Was Lost,* 102 B.U. L. REV. 2297, 2300 (2022) ("[C]hildren's equal protection law lacks focus, vision, substance, and unifying principles.").

conceptualized rights-bearers as adults, people who are "autonomous, rational, individualistic, [and] income-generating," creating cavernous gaps in equal protection and other constitutional rights recognition for children.[5] In short, the law often presumes children are adults such that they are not accommodated; paradoxically, the law also prohibits children from accessing legal systems equally to adults.[6] Scholars and courts have noted children in this way may receive "the worst of both worlds" in legal systems.[7]

Constitutional jurisprudence is not the only arena where the paradoxical adult rights-bearing archetype has surfaced, and where children's unique qualities, characteristics, and needs have been ignored. This happens routinely within statutory frameworks and practices that comprise the juvenile,[8]

5. Catherine E. Smith, *The Adult Rights-Bearing Archetype and How It Stifles Young People's Equal Protection*, 19 DUKE J. CONST. L. & PUB. POL'Y 139, 139 (2024).

6. *See* Lisa V. Martin, *No Right to Counsel, No Access Without: The Poor Child's Unconstitutional Catch-22,* 71 FLA. L. REV. 831, 833–34, 887–88 (2018); Lisa V. Martin, *Modernizing Capacity Doctrine*, 73 FLA. L. REV. 821, 823, 826–27 (2021).

7. BARRY C. FELD, THE EVOLUTION OF THE JUVENILE COURT: RACE, POLITICS, AND THE CRIMINALIZING OF JUVENILE JUSTICE, pt. IV, at 224 (2017) ("Two competing images of youth influence court procedures and assure that they receive the worst of both worlds."); Kent v. United States, 383 U.S. 541, 556 (1966) ("There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.").

8. *See* Kristin Henning, *What's Wrong with Victims' Rights in Juvenile Court?: Retributive Versus Rehabilitative Systems of Justice*, 97 CALIF. L. REV. 1107, 1132, 1134–35 (2009) (describing distinct negative effects of victim impact statements on judicial evaluations of juvenile offenders' diminished capacity and reduced culpability).

family regulation,[9] and immigration legal systems.[10] Building upon Smith's call for children's equality law "that accommodates young people's qualities, characteristics, and needs,"[11] this Essay explores how the adult rights-bearing archetype surfaces in the web of laws, regulations, guidance, and practice comprising the immigration legal regime as well as how it may harm children in concert with the school-to-deportation pipeline and adultification.

The immigration legal system provides a distinct case study of an arena that has not meaningfully recognized or effectuated children's rights and perspectives.[12] Children comprise an often-invisible core of those impacted by the immigration enforcement regime.[13] Since 2012, more than half a million immigrants facing deportation in immigration court have been children under the age of eighteen.[14] Yet, the immigration legal

9. *See generally* JANE M. SPINAK, THE END OF FAMILY COURT: HOW ABOLISHING THE COURT BRINGS JUSTICE TO CHILDREN AND FAMILIES (2023) (exploring failures of family court and its harm to children).

10. *See generally* Laila L. Hlass, *The Adultification of Immigrant Children*, 34 GEO. IMMIGR. L.J. 199 (2020) (casting light on disproportionate impacts of the immigration legal system on children and proposing a reimagined system that recognizes children's vulnerabilities).

11. Smith, *Jurisprudence*, supra note 5, at 2327.

12. *See* David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 980 (2002) ("Immigration law and decisions continue to reflect conceptions of children that limit their recognition as persons and silence their voices.").

13. *C.f.* Laila L. Hlass, Rachel Leya Davidson & Austin Kocher, *The Double Exclusion of Immigrant Youth*, 111 GEO. L.J. 1407, 1419 (2023) ("[I]mmigrant youth occupy an important yet under-examined position within the U.S. immigration system . . . .").

14. Chiara Galli & Tatiana Padilla, *New Data on Unaccompanied Minors in US Immigration Court (2009–2023)*, INT'L MIGRATION REV. (ONLINEFIRST), March 28, 2025, at 1, 2, https://journals.sagepub.com/doi/10.1177/01979183251316528 [https://perma.cc/4AUZ-REPH]; *see also One-Third of New Immigration Court Cases Are Children; One In Eight Are 0–4 Years Of Age*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE: IMMIGR. (Mar. 17, 2022),

system was built predominantly for adults, not children.[15] Children confront the same immigration legal and policing regime as adults, experiencing arrest, detention, and deportation proceedings, and they do so without necessary accommodations and with fewer rights.[16]

Smith has raised how some children may be particularly vulnerable to harm due to their race, immigration status, and the fact that their parents "lack[] political power to halt discriminatory practices" impacting their children.[17] Within the immigration system, children are largely children of color who may face bias and disparate immigration outcomes related to race—from challenges "earning" discretionary protections to prohibitions based on contact with police.[18] In many cases, immigrant children "find themselves in the crosshairs of both [an] unforgiving immigration enforcement [system] and aggressive law enforcement."[19] In both systems, racial biases may influence outcomes which parents lack power to change, impacting "the likelihood that immigrant youth will find themselves entangled in the

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https://web.archive.org/web/20241212050822/https://trac.syr.edu/immigration/reports/681/ [https://perma.cc/4WJL-RHV9].

15. *See* David B. Thronson, *Entering the Mainstream: Making Children Matter in Immigration Law*, 38 FORDHAM URB. L.J. 393, 396, 400–01 (2010) ("U.S. immigration law fails to fully recognize children as individuals with independent rights and interests.").

16. *See* Laila Hlass, *The School to Deportation Pipeline*, 34 GA. ST. U. L. REV. 697, 746–47 (2018).

17. Catherine E. Smith, "*Children's Equality Law" in the Age of Parents' Rights*, 71 U. KAN. L. REV. 539, 540 (2023).

18. *See* Dalia Castillo-Granados, Rachel Leya Davidson, Laila 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, 1787–90, 1809–17 (2022) (describing how some children of color face over-policing and allegations of gang affiliation, which may lead to immigration detention and attempted revocation of immigration protections).

19. Hlass, *Pipeline*, *supra* note 16, at 700.

criminal and juvenile [legal] systems, [forced into immigrant detention,] pushed out of schools, and facing negative immigration consequences," including deportation.[20] This perfect storm has been termed the school-to-deportation pipeline.[21]

Children's identity as young people may influence their experience in paradoxical ways in the immigration regime. At times they are infantilized—their voices are silenced by excluding their testimony or, in a purported effort to protect them, they are provided fewer rights than adults due to their status as children.[22] However, in most circumstances laws, policies, and practices tend to adultify child migrants and thereby fail to address their unique qualities, characteristics, and needs.[23] Adultification is the phenomenon whereby children of color are perceived as more adult-like than white peers and, as a result, suffer disparate harms across a variety of systems.[24] These perceptions have been laid bare in public discourse, such as when former Attorney General Sessions called immigrant children "wolves in sheep clothing,"[25] and then President Trump said:

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20. *Id.*

21. *Id.* (citing Maritza Perez, *Q&A: Seizing the Moment to Tackle the School-to-Prison-to-Deportation Pipeline*, OPEN SOC'Y FOUNDS. (Sept. 7, 2016), https://www.opensocietyfoundations.org/voices/seizing-moment-tackle-school-prison-deportation-pipeline [https://perma.cc/7WXG-9DQT]).

22. Thronson, *supra* note 12, at 995–97; *see also* Medha D. Makhlouf, *Theorizing the Immigrant Child: The Case of Married Minors*, 82 BROOK. L. REV. 1603, 1646–47 (2017) (arguing for a child-centered approach to immigration reform).

23. *See generally* Hlass, *Adultification*, *supra* note 10 (arguing that immigration law discriminates against children by ignoring their unique vulnerabilities).

24. REBECCA EPSTEIN, JAMILIA J. BLAKE & THALIA GONZÁLEZ, GEO. L. CTR. ON POVERTY & INEQ., GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS' CHILDHOOD 4–6 (2017).

25. Josh Saul, *Sessions: Young Immigrants are "Wolves in Sheep Clothing,"* NEWSWEEK (Sep. 22, 2017, at 11:18 ET),

"They look so innocent. They're not innocent."[26] These perceptions may lead to negative immigration outcomes, both because many forms of immigration relief require a positive exercise of discretion, and because over-policing of children of color in the juvenile justice system can result in disqualification or barriers to obtaining immigration protection.

Adultification may stem not only from how individual children of color are viewed, but how laws, policies, and practices have baked-in assumptions about whose rights are at stake. Legislators and policymakers, as well as immigration enforcement agents and adjudicators, may fall into some of the same analytical traps that Smith has identified in a variety of children's rights cases, resulting in the limitation of children's equal protection.[27] Each analytical trap relies on conceptions of rights-bearers as prototypical adults—"autonomous, rational, individualistic, income-generating grown people."[28]

This Essay considers the paradox of immigrant children's rights, using Smith's concept of the adult rights-bearing archetype which provides deeper understanding of the phenomena of adultification and infantilization for immigrant children. While Smith contemplates six categories of analytical traps, this Essay focuses on how three of them—Adult Doctrinal-Design, Adult-as-Proxy, and Adult Legal-Imputation[29]—present specifically in the immigration legal landscape to treat children as

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https://www.newsweek.com/ms-13-gangs-sessions-unaccompanied-minors-trump-boston-669494 [https://perma.cc/SN3U-7K3C].

26. Seung Min Kim, *Trump Warns Against Admitting Unaccompanied Migrant Children: 'They're Not Innocent'*, WASH. POST (May 23, 2018, at 17:11 ET), https://www.washingtonpost.com/politics/trump-warns-against-admitting-unaccompanied-migrant-children-theyre-not-innocent/2018/05/23/e4b24a68-5ec2-11e8-8c93-8cf33c21da8d_story.html [https://perma.cc/TZG2-C83B].

27. *See generally* Smith, *Archetype*, *supra* note 5.

28. *Id.* at 196.

29. *Id.* at 142.

adults and thus deprive them of rights. Lastly, it calls for an interrogation of how the broad spectrum of legal systems ignores and discriminates against children.

Turning to the first category, the "Adult Doctrinal-Design" concept captures how courts have developed constitutional frameworks solely based on adult qualities and characteristics.[30] A corollary in the immigration realm is how lawmakers have developed immigration law with adults in mind, as well as how agencies have interpreted statutes through rulemaking and immigration officials have implemented these laws.[31] The Immigration and Nationality Act was seemingly drafted with the adult rights-bearer in mind; most of the meager child protections that exist in current law were the result of class action litigation or reserved for a smaller subset of unaccompanied minors.[32] Children confront an immigration legal regime shaped with an autonomous, literate, income-generating person in mind—someone who can effectively navigate a complex system presumably through hiring a lawyer. For example, in deportation proceedings, children are subject to adversarial proceedings, facing an experienced prosecutor.[33] Children do not have a statutory right to appointed counsel and a large portion are

30. *Id.*

31. *See* Thronson, *supra* note 12, at 1002 ("Children are treated as adults not because they are determined to be sufficiently mature to effectuate rights without special procedures or supports. Rather, they simply are not 'children' under immigration law and no provision is made to distinguish them from adults.").

32. *See* Hlass, *Adultification*, *supra* note 10, at 217–22.

33. AHILAN ARULANANTHAM, TALIA INLENDER & ELIZABETH BIRD, UCLA SCH. OF L. CTR. FOR IMMIGR. L. & POL'Y, NO FAIR DAY: THE BIDEN ADMINISTRATION'S TREATMENT OF CHILDREN IN IMMIGRATION COURT 5 (2023), https://law.ucla.edu/sites/default/files/PDFs/Center_for_Immigration_Law_and_Policy/No_Fair_Day_Children_in_Immigration_Court_White_Paper.pdf [https://perma.cc/ZD8D-UTEK].

unrepresented.[34] In order to win relief, children bear the burden of proving their case, and must articulate their legal defense, follow evidentiary rules, and comply with service regulations.[35] Agency officials have defended the law and practice, and an immigration judge who had oversight over vulnerable populations including children claimed that children are capable of effectively representing themselves: "I've taught immigration law literally to 3-year-olds and 4-year-olds."[36]

A second concept, "Adult-as-Proxy,"[37] may help explain why the youth-related protections that do exist in immigration law are mostly reserved for the smaller subset of unaccompanied minors. In the context of equal protection jurisprudence, Smith describes how courts have relied on "an unnuanced parents' rights doctrine as a proxy for children's rights,"[38] often assuming parents can exercise their political will and other rights as a

34. *See Unaccompanied Juveniles—Immigration Court Deportation Proceedings*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE: IMMIGR., https://tracreports.org/phptools/immigration/juvenile/ [https://perma.cc/YYT9-55M2] (reporting that, between the 2005 and 2017 fiscal years, 106,894 of a total of 293,179 cases involving unaccompanied juveniles were unrepresented). However, there have been growing movements to fund more representation and provide advocates for some children. *See Fact Sheet: The President's Budget Secures Our Border, Combats Fentanyl Trafficking, and Calls on Congress to Enact Critical Immigration Reform*, THE WHITE HOUSE: BRIEFING ROOM (Mar. 11, 2024), https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2024/03/11/fact-sheet-the-presidents-budget-for-fiscal-year-2025/ [https://perma.cc/88ES-T45T] (describing appropriations for representing children).

35. *See* Hlass, *Adultification*, *supra* note 10, at 256.

36. Molly Hennessy-Fiske, *This Judge Says Toddlers Can Defend Themselves in Immigration Court*, L.A. TIMES: WORLD & NATION (March 6, 2016, at 03:00 PT), https://www.latimes.com/nation/immigration/la-na-immigration-judge-20160306-story.html [https://perma.cc/S67J-GQJ3].

37. Smith, *Archetype*, *supra* note 5, at 163.

38. *Id.* at 142.

substitute for their children. Smith points out this concept can fail children in a few ways—when their parents lack the political power assumed by this logic, as well as when children's interests may be in conflict with their parents'.[39]

Adult-as-Proxy thinking may underlie the decisions of legislators and administrative agencies to reserve the few accommodations that exist within the immigration system almost exclusively to minor children who are not accompanied by a parent or legal guardian; I have referred to this trend in immigration law as "unaccompanied minor exceptionalism."[40] For example, the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 carved out a number of procedures such as eliminating the restrictive one-year filing deadline in asylum cases for unaccompanied minors, as well as allowing unaccompanied minors in removal proceedings the opportunity for a non-adversarial asylum interview as a first step instead of the adversarial process in front of the immigration judge.[41] While some protections have expanded to accompanied minors or children more broadly, such as courts' interpretation of detention standards for all minors,[42] many protections and

39. *Id.* at 164–65.

40. Hlass, *Adultification*, *supra* note 10, at 204, 217–22.

41. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044, 5077, 5080–81 (codified in scattered sections of 8 U.S.C., 22 U.S.C.).

42. Flores v. Lynch, 828 F.3d 898, 905–08 (9th Cir. 2016) (affirming application of the *Flores* settlement to accompanied as well as unaccompanied minors). There has also been a recent move to encourage the expansion of "juvenile dockets" with purportedly child-friendly procedures for almost all children, not only unaccompanied minors, although there has been no research regarding the efficacy of such dockets. Memorandum on Children's Cases in Immigration Court from David L. Neal, Dir., Exec. Off. Immigr. Rev., Dep't of Just., to Exec. Off. of Immigr. Rev. Adjudicators and Pers. 5 (Dec. 21, 2023), https://www.justice.gov/d9/2023-12/dm-24-01.pdf [https://perma.cc/UXP4-PYCW]; *see also* Gianna Borroto, *New EOIR Memo Updates Protections for Children in Immigration Court*, AM.

resources, including legal representation, continue to be allocated primarily to unaccompanied minors.[43]

Lastly, "Adult Legal-Imputation" is another way to understand how the adult rights-bearing archetype presents itself.[44] With this, Smith describes how, as a matter of law, children are imputed with adult characteristics and qualities. In the context of equal protection law, Smith writes that lower federal courts "reflexively" apply rational basis review under a catch-all age classification, instead of understanding children as a distinct, insular group.[45] Essentially, courts treat children the same as adults of varying ages under the guise of an "age-blind" standard.[46]

This type of age-blind analysis steeped in adult-legal imputation could help explain the Board of Immigration Appeals' approach to denying asylum claims involving children based upon their youthfulness, finding groups involving "youth" to be too amorphous and indistinct to satisfy the requirements to qualify as a particular social group worthy of protection. Under asylum law, courts may grant asylum if the asylum-seeker fears persecution due to race, religion, nationality, political opinion or, importantly, their membership in a particular social group.[47]

IMMIGR. COUNCIL (Jan. 18, 2024), https://www.americanimmigrationcouncil.org/blog/eoir-updates-protections-children-immigration-court/ [https://perma.cc/8GNY-26J7] (describing how the DOJ memo has expanded which children can access juvenile dockets).

43. For example, many pro bono legal service providers for immigrant children restrict representation to unaccompanied minors. Exec. Off. of Immigr. Rev., *List of Pro Bono Legal Service Providers*, U.S. DEP'T OF JUST. (Oct. 2025), https://www.justice.gov/eoir/file/probonofulllist/dl [https://perma.cc/EDJ5-UYAS].

44. Smith, *Archetype*, *supra* note 5, at 168.

45. *Id.*

46. *Id.*

47. Immigration & Nationality Act (INA) § 208(a), 8 U.S.C. § 1158(a); INA § 101(a)(42), 8 U.S.C. § 1101(a)(42).

Under case law, the Board of Immigration Appeals has further required that a legally sufficient particular social group be "particular," with clear benchmarks for who is included and excluded, as well as "socially distinct," meaning that society perceives the proposed group as a group.[48] In a series of cases, the Board of Immigration Appeals has declined to recognize particular social groups involving children or has remanded the issue for further determination, often referencing that the overall proposed group was not or might not be found particular or socially distinct.[49] To be clear, courts have not explicitly denied childhood as a basis for asylum;[50] instead they have reflexively considered groups involving "youth" to be amorphous and indistinct.[51] While the decisions do not delineate exactly why the group is indistinct, the analysis may be similar to that offered by courts in the equal protection context, where children are

48. *In re* W-G-R-, 26 I. & N. Dec. 208, 214, 216 (B.I.A. 2014), *aff'd in part, rev'd in part sub nom.*, Reyes v. Lynch, 842 F.3d 1125 (9th Cir. 2016).

49. *In re* S-E-G-, 24 I. & N. Dec. 579, 584–88 (B.I.A. 2008) (denying the particular social group of "male children who lack stable families and meaningful adult protection, who are from middle and low income classes, who live in the territories controlled by the MS-13 gang, and who refuse recruitment"); *In re* E-A-G-, 24 I. & N. Dec. 591, 593–96 (B.I.A. 2008) (denying asylum claim based on the particular social group of "youth and affiliation or perceived affiliation with gangs"); *In re* M-E-V-G-, 26 I. & N. Dec. 227, 228, 252–53 (B.I.A. 2014) (remanding for further consideration a case involving "Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose the gangs").

50. However, the Immigration and Naturalization Service stated in old guidance on children's asylum claims that the law regarding "age-based" social group claims is "scarce." Memorandum on Guidelines for Children's Asylum Cases from Jeff Weiss, Acting Dir., Off. of Int'l Affs., Dep't of Just., 24–25 (Dec. 10, 1998), https://www.uscis.gov/sites/default/files/document/memos/ChildrensGuidelines121098.pdf [https://perma.cc/UK8S-YPT3] ("[A]n age-based claim grounded solely in the applicant's status as a child or a child from a particular country is unlikely to be sufficiently discrete.").

51. *Id.* (quoting Gomez v. I.N.S., 947 F.2d 660, 664 (2d Cir. 1991)).

ignored as a distinct, insular group, subsumed under an age-blind analysis.

While this Essay resists an attempt to comprehensively situate all forms of the adult rights-bearing archetype analytical traps within the immigration legal system, the saliency of these examples suggests Smith's frameworks could and should be used to surface the distinct ways children's rights have been limited in a host of legal systems. As children's rights advocates envision possible futures, they should be attentive to children's intersecting identities—including race, ethnicity, immigration status, gender, and class—and how they may inform children's experiences and perspectives, as well as their unique needs. Exposing these analytical traps reveals how the adult rights-bearing archetype drives laws, and it demands a reorientation toward children's "equality law." Smith has imagined children's equality law as including young people's substantive due process rights, equal protection, right to dignity, as well as a host of "social and civil rights, including many that have yet to be advanced or recognized."[52]

In the case of immigrant children, a children's equality framework begs a host of new questions, such as: How can immigration laws and legal systems reorient towards pathways of inclusion, rather than their current orientation towards removability and exclusion? How can questions of worthiness and discretion be removed as elements to achieve lawful permanent residency? How can the legal system be transformed to assist children in achieving permanency and stability rather than burdening children to articulate and prove all elements to defend against their removal? How can children's voices and perspectives be solicited, heard, and relied upon to change immigration laws, policy, and practice? A children's equality law framework also requires a fundamental reorientation of the immigration

52. Smith, *Equality Law*, *supra* note 17, at 540.

system. It demands that all children—regardless of their accompanied or minor status—have full access to child-responsive accommodations, instead of allocating resources to only those deemed vulnerable enough. A children's equality framework does not treat children as miniature adults but acknowledges that children have particular needs and characteristics. A children's equality framework does not sacrifice children's rights under the auspices of protecting children. A children's equality framework would disrupt the school-to-deportation pipeline as well as carceral systems that impact children more broadly. Ultimately, this Essay joins the rallying call to create new children's equality frameworks to disrupt discriminatory systems and support the expansion of children's rights.[53]

53. *See, e.g.*, *id.*