

Beyond the Reach of Juvenile Justice: The Crisis of Unaccompanied Immigrant Children Detained by the United States

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It is appalling that many officials don't understand the difference between a juvenile offender and an unaccompanied child, and that they deny these fragile young asylum seekers respect and rights. This is grossly unfair to children whose only "offense" is seeking safe haven in the US.

-Dr. William F. Schulz, Executive Director,
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Introduction

Fifteen-year-old Isau fled his home in Honduras to escape extreme physical abuse by his stepfather, persecution by government death squads, and torment by youth gangs.² Isau's stepfather beat Isau with rods, pieces of wood, and a machete handle, and burned him with numerous hot objects.³ After running away from his stepfather's home, Isau lived on the streets where he faced harassment from authorities and gangs.⁴ He fled to the United States and was apprehended by the Immigration and Naturalization Service (INS).⁵ The INS denied Isau access to

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1. *First National Survey of Children in Immigration Detention Exposes Mistreatment, Lengthy Detentions, Legal Barriers*, NEWS RELEASE (Amnesty Int'l USA), June 18, 2003, available at <http://www.unityfirst.com/pressrelease/amnestyimmigration.htm> (last visited Nov. 1, 2004).

2. AMNESTY INT'L USA, UNACCOMPANIED CHILDREN IN IMMIGRATION DETENTION 14 (2003), available at http://www.amnestyusa.org/refugee/pdfs/children_detention.pdf (last visited Oct. 12, 2004) (citing WOMEN'S COMMISSION FOR WOMEN AND CHILDREN REFUGEES (2002); Interview by Amnesty with Isau, detainee, Berks County Youth Center, Pa. (Sept. 2002); Amnesty Attorney Correspondence (Apr. 2003)).

3. *Id.*

4. *Id.*

5. *Id.*

juvenile court, which could have deemed him eligible for long-term foster care due to abuse, neglect, or abandonment⁶ and allowed him to remain lawfully in the United States.⁷ The INS then detained him for over two years.⁸

In 2001, 5,385 unaccompanied⁹ immigrant¹⁰ children¹¹ were detained by the INS in the United States.¹² Fleeing war, armed rebel forces, political persecution, child slavery, abusive families, and other perilous conditions in their native countries, or brought by child traffickers, these children seek refuge in the United States.¹³ They are in need of care, assistance, and protection.¹⁴ Arrested upon arrival, unaccompanied immigrant minors may be held in immigration detention for months or years.¹⁵ They are held for administrative reasons,¹⁶ not because they are charged with any crime.¹⁷

The INS has detained these children in a manner insensitive

6. *Id.*; see also 8 U.S.C. § 1101(a)(27)(J) (2000) (defining “special immigrant” juvenile status and the relief it affords); see *infra* notes 211-215 and accompanying text.

7. See 8 U.S.C. § 1255(h) (2003) (providing that a minor who fulfills the applicable requirements of a “special immigrant” may apply for and adjust status).

8. AMNESTY INT’L USA, *supra* note 2, at 14.

9. This Article will discuss the conditions of unaccompanied immigrant children only. Although accompanied immigrant children suffer some of the same abuses, an analysis of their situation is beyond the scope of this Article.

10. The term “immigrant” used to describe juveniles in this Article refers to non-naturalized immigrants.

11. The terms “child(ren),” “juvenile(s),” and “minor(s)” will be used interchangeably throughout this Article to refer to individuals under the age of eighteen. This definition is consistent with the current definition of “child” under the Homeland Security Act. See 6 U.S.C. § 279(g)(2)(B) (2003). *But cf.* Immigration and Nationality Act (INA), 8 U.S.C. § 1101(b)(1), (c)(1) (2000) (defining “child” as “an unmarried person under twenty-one years of age”).

12. AMNESTY INT’L USA, *supra* note 2, at 1 (citing IMMIGR. & NATURALIZATION SERV., U.S. DEP’T OF JUSTICE, INS OFFICE JUVENILE AFFAIRS FACT SHEET (2002)). This figure is more than double the 1997 figure, which was 2,375. *Id.*

13. *Id.*

14. See *id.* at 2.

15. *Id.* at 1; see also OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, UNACCOMPANIED JUVENILES IN INS CUSTODY, REP. NO. I-2001-009, ch. 4 (2001), available at <http://www.usdoj.gov/oig/inspection/INS/01-09/chapter4.htm> (last visited Oct. 12, 2004) [hereinafter OIG Report] (explaining INS policies relating to the length of time a minor can be held in custody before release).

16. The INA, codified as amended at 8 U.S.C. §§ 1101-1537 (2000), provides that aliens entering the United States may be detained for unauthorized entry. *Id.* § 1231. This is an administrative, not a criminal, detention. *Id.*

17. AMNESTY INT’L USA, *supra* note 2, at 1. This Article focuses on children who are not delinquents or criminal offenders. A discussion of appropriate policies for unaccompanied immigrant children who are delinquents or criminal offenders is beyond the scope of this Article.

to their needs and in violation of their rights.¹⁸ Human Rights Watch has found INS policies and practices to be in contravention of U.S. and international standards,¹⁹ and has summarized its findings as follows:

Nationwide, as many as one-third of children in INS detention are placed in secure detention centers for juvenile offenders. Often held with youth detained for committing violent crimes, they are denied personal possessions and held in a severely restricted, punitive environment. Children interviewed for this report were handcuffed during transport, strip searched, and subjected to other degrading treatment. We found that too often, children in INS custody do not receive adequate legal information or representation and are transferred without the knowledge of their attorneys or families. Many children are denied information about their detention or education in a language that they understand and may be confined for months at a time without direct access to a single person with whom they can converse in their own language.²⁰

Unaccompanied immigrant children challenged INS policies in a federal class action lawsuit, *Reno v. Flores*,²¹ the 1997 settlement of which established a new policy based on principles of juvenile justice.²² However, the INS stymied this policy by largely failing to implement it.²³ Responsibility for the policy's implementation currently rests with the Office of Refugee Resettlement.²⁴

18. See generally AMNESTY INT'L USA, *supra* note 2 (describing immigration detention of unaccompanied children). See *infra* Part I.

19. See HUM. RTS. WATCH, DETAINED AND DEPRIVED OF RIGHTS: CHILDREN IN THE CUSTODY OF THE U.S. IMMIGRATION AND NATURALIZATION SERVICE, 10 HUM. RTS. WATCH pt. III (1998), available at <http://hrw.org/reports98/ins2/> (last visited Sept. 24, 2004); HUM. RTS. WATCH, SLIPPING THROUGH THE CRACKS: UNACCOMPANIED CHILDREN DETAINED BY THE U.S. IMMIGRATION AND NATURALIZATION SERVICE pt. IV (1997), available at <http://hrw.org/reports/1997/uscrcks> (last visited Oct. 13, 2004). The 1998 report was a follow-up investigation of the 1997 report. HUM. RTS. WATCH (1998), *supra* pt. I. See *infra* note 175 (noting international conventions applicable to the rights of detainees and children).

20. HUM. RTS. WATCH (1998), *supra* note 19, pt. I; see also *id.* pt. IV (describing the conditions of confinement of detained children).

21. 507 U.S. 292 (1993).

22. See Stipulated Settlement Agreement, *Flores v. Reno*, 507 U.S. 292 (C.D. Cal. 1997) (Case No. CV 85-4544-RJK), available at <http://www.centerforhumanrights.org/children/Document.2004-06-18.8124043749/> (last viewed Oct. 13, 2004) [hereinafter Stipulated Settlement Agreement]; *infra* Parts I.B, II.A.

23. See *infra* Part I.C.

24. See Homeland Security Act of 2002, 6 U.S.C. § 279(a) (2003) (stating that the care of unaccompanied children vested by statute in, or performed by, the INS is transferred to the Director of the Office of Refugee Resettlement of the Department of Health and Human Services).

This Article argues that federal legislation should establish a policy for the treatment of unaccompanied immigrant minors based on juvenile justice principles. Part I of this Article will provide a background of immigration detention policies and practices regarding unaccompanied immigrant minors.²⁵ Specifically, it will discuss the INS policy towards juveniles before the *Flores* Agreement,²⁶ the terms of the *Flores* Agreement,²⁷ and the failed implementation of its provisions.²⁸ Part II of this Article will discuss legislative solutions to the ongoing crisis of the treatment of unaccompanied juvenile immigrants.²⁹ It will analyze the strengths of the proposed Unaccompanied Alien Child Protection Act of 2003 (UACPA),³⁰ which would incorporate important protective policies for minors.³¹ It will also discuss the weaknesses of the UACPA, which would create a discretionary system and provide no mechanism of policy enforcement.³² Finally, this section will propose legislation modeled on federal and state juvenile justice statutes, specifically providing for the welfare of dependent children, and suggest an implementation strategy to meet the needs and protect the rights of these children.³³

I. Policies Toward Unaccompanied Immigrant Juveniles: The 1980s to the Present

A. From No Policy to No Release: Juvenile Immigration Detention Prior to Flores

Until March of 2003, the care of unaccompanied immigrant minors rested with the INS.³⁴ The INS's primary function was to police the nation's borders by arresting and deporting unauthorized persons, including unaccompanied children.³⁵ Charged with providing custodial care to these children while also

25. See *infra* notes 34-169 and accompanying text.

26. See *infra* Part I.A.

27. See *infra* Part I.B.

28. See *infra* Part I.C.

29. See *infra* notes 170-290 and accompanying text.

30. S. 1129, 108th Cong. (2003).

31. See *id.*; *infra* Part II.B.

32. See *infra* Part II.B.

33. See *infra* Part II.C.

34. See 6 U.S.C. § 279(a) (2003).

35. See 8 U.S.C. § 1252c (2000) (authorizing the arrest of aliens); § 1231 (authorizing orders of detention and removal); § 1227 (describing deportable aliens).

seeking their removal from the United States, the INS faced a serious conflict of interest.³⁶ In its dual role as the child's caretaker and adversary,³⁷ the INS appeared ill-situated to protect the rights and serve the needs of these minors.³⁸

The INS had no formal policy for the detention and release of unaccompanied minors before 1984.³⁹ The Immigration and Nationality Act⁴⁰ provided that aliens in custody, pending a determination of deportability, could be released under bond or on conditional parole at the discretion of the Attorney General.⁴¹ However, the case of unaccompanied children was different. As the Supreme Court has stated, "the INS cannot simply send [immigrant juveniles] off into the night on bond or recognizance."⁴²

Prior to 1984, the release policy for minors was generally governed by the Juvenile Justice and Delinquency Prevention Act of 1974.⁴³ It authorized a juvenile's release "to his parents, guardian, custodian, or other responsible party (including, but not limited to, the director of a shelter-care facility)" upon certain conditions.⁴⁴ Release was contingent on a promise by the receiving party to bring the juvenile to court upon request.⁴⁵ Release could be denied if the magistrate determined, after holding a hearing at which the juvenile was represented by counsel, that "the detention of such juvenile is required to secure his timely appearance before the appropriate court or to insure his safety or that of others."⁴⁶

36. AMNESTY INT'L USA, *supra* note 2, at 4; HUM. RTS. WATCH (1998), *supra* note 19, pt. I; HUM. RTS. WATCH (1997), *supra* note 19, pt. VI; Telephone Interview with Carlos Holguín (Holguín), General Counsel, Center for Human Rights & Constitutional Law (Oct. 3, 2003) (transcript on file with the author). Holguín served as co-counsel for plaintiffs in the *Reno v. Flores* lawsuit, and continues to represent the certified class of minors who are detained in U.S. immigration custody. *Id.*

37. For example, the INS is the child's adversary in removal proceedings. *See* 8 U.S.C. § 1229 (2000) (describing removal proceedings).

38. *See infra* Part I.C.

39. HUM. RTS. WATCH (1997), *supra* note 19, pt. II; *see Reno v. Flores*, 507 U.S. 292, 324-25 (1993) (Stevens, J., dissenting) (discussing the history of INS detention practices for immigrant juveniles).

40. 8 U.S.C. §§ 1101-1537 (2000).

41. *Id.* § 1252(a)(1). The Board of Immigration Appeals had asserted that "[a]n alien generally . . . should not be detained or required to post bond except on a finding that he is a threat to the national security . . . or that he is a poor bail risk." *Flores*, 507 U.S. at 295 (quoting *Matter of Patel*, 15 I. & N. Dec. 666 (1976)).

42. *Flores*, 507 U.S. at 295.

43. 18 U.S.C. § 5034 (1992); *Flores*, 507 U.S. at 324-25 (Stevens, J., dissenting) (discussing the history of INS detention practices for immigrant juveniles).

44. 18 U.S.C. § 5034 (1992).

45. *See id.*

46. *Id.*

In 1984, the Western Regional Office of the INS⁴⁷ adopted a new release policy for minors.⁴⁸ The policy stated that "[n]o minor shall be released except to a parent or lawful guardian."⁴⁹ Exception would adhere only "in unusual and extraordinary cases."⁵⁰ The result of this policy was an increase in the detention of immigrant children, since few of them had a parent or guardian available to accept their release, and few could meet the stringent exception.⁵¹

B. The Settlement Agreement of Flores v. Reno: A New Policy

In 1985, a class-action lawsuit was filed against the INS challenging its Western Region release policy and the conditions of juveniles' detention.⁵² The class included any person under the age of eighteen detained in the legal custody of the INS.⁵³ The

47. This region consisted of Washington, Oregon, California, Arizona, Nevada, Hawaii, and Alaska. HUM. RTS. WATCH (1997), *supra* note 19, pt.II.

48. *Flores*, 507 U.S. at 296.

49. *Flores v. Meese*, 934 F.2d 991, 994 (9th Cir. 1990), *rev'd en banc*, 942 F.2d 1352 (9th Cir. 1991).

50. *Id.* In such circumstances, a juvenile could be released, at the discretion of the District Directors and Chief Patrol Agents, to "a responsible individual who agrees to provide care and be responsible for the welfare and well being of the child." *Id.*

51. HUM. RTS. WATCH (1997), *supra* note 19, pt. II.

52. *Flores v. Meese*, 942 F.2d 1352 (9th Cir. 1991); *see also Flores*, 507 U.S. 292 at 298-99 (1993) (describing the *Meese* litigation and outcome). The case was originally filed in the District Court for the Central District of California and was decided after the INS codified its release policy in 1988. *Flores*, 507 U.S. at 298-99. The codified INS policy authorized an alien juvenile to be released, at the INS's discretion, to a parent, legal guardian, or adult relative not in INS custody. *Id.* at 297. The class argued that the INS release policy was unconstitutional, and that the U.S. Constitution and U.S. immigration laws only required juveniles to be released into the custody of "responsible adults." *Id.* at 294, 300. In a brief unpublished order, the District Court ordered the INS to expand its release policy to include the category of "other responsible adult party," and invalidated the regulation in other respects. *Id.* at 299. A divided panel of the Ninth Circuit Court of Appeals reversed the decision in 1990; in 1991, an en banc court vacated the panel opinion and affirmed the District Court order in all respects. *Id.* The Supreme Court granted certiorari in 1993 on the issue of whether the INS regulation, permitting the release of detained immigrant juveniles only to relatives or legal guardians, was unconstitutional on its face. *Id.* at 299-300. The Court held that the regulation did not facially violate the substantive Due Process Clause, because the policy "is rationally connected to a governmental interest in 'preserving and promoting the welfare of the child,' and is not punitive since it is not excessive in relation to that valid purpose." *Id.* at 303 (citations omitted). The Court reversed the en banc decision of the Ninth Circuit Court of Appeals and remanded the case. *Id.* at 315. Its settlement in 1997 produced the *Flores* Agreement. *See Stipulated Settlement Agreement*, *supra* note 22.

53. Stipulated Settlement Agreement, *supra* note 22, pt. I, para. 4. Two

1997 settlement agreement of *Flores* (hereinafter the Agreement) created a nationwide policy that superceded all previous INS policies inconsistent with its terms.⁵⁴ The Agreement sets forth three main policies for the treatment, release, and detention of minors in INS custody.⁵⁵ The INS is required to appropriately train its employees and monitor their compliance with these policies.⁵⁶

1. The Agreement's Treatment Policy Requires Special Care for Minors

The Agreement establishes a sensitive treatment policy for immigrant children based on their juvenile status.⁵⁷ The policy provides that "[t]he INS treats, and shall continue to treat, all minors in its custody with dignity, respect and special concern for their particular vulnerability as minors."⁵⁸ The INS must place juveniles in safe and sanitary facilities following arrest.⁵⁹ Consistent with this policy, the INS must separate juveniles from unrelated adults whenever possible.⁶⁰ The INS may place the

exceptions to this class are "any minor who has been determined to be emancipated in an appropriate state judicial proceeding," *id.* pt. I, paras. 4, 5, and "an individual who has been incarcerated due to a conviction for a criminal offense as an adult." *Id.* pt. I, para. 4. See also *infra* notes 60 and 109 (discussing age determination techniques).

54. *Id.* pt. II, para. 9. The Agreement was scheduled to terminate within five years, or within three years after the court determines that the INS is in substantial compliance with the Agreement. *Id.* pt. XIX, para. 40.

55. See *id.* pt. IV, para. 11 (stating general treatment and detention policy); pt. VI, para. 14 (stating general release policy).

56. *Id.* pt. XIII, para. 34; pt. X, para. 28A. On an annual basis, an INS Juvenile Coordinator must review, assess, and report the INS's compliance to the court. *Id.* pt. X, para. 30. The Juvenile Coordinator must maintain an up-to-date record of all juveniles placed in proceedings and remaining in INS custody for over seventy-two hours. *Id.* pt. X, para. 28A. On a weekly basis, the Juvenile Coordinator must collect statistical information on such minors from all INS district offices and Border Patrol stations. *Id.* Statistical information must include at least the following: (1) biographical information, e.g. each juvenile's name, date of birth, and country of birth; (2) the date the juvenile was placed in INS custody; (3) each date the juvenile was placed, removed, or released; (4) the sponsor to whom and the place where the juvenile was placed, transferred, removed, or released; (5) the juvenile's immigration status; and (6) the juvenile's hearing dates. *Id.*

57. See *id.* pt. IV, para. 11.

58. *Id.*; see also *id.* pt. V, para. 12 and pt. VIII, para. 25 for references to this policy.

59. *Id.* pt. V, para. 12.

60. *Id.* The Agreement addresses the related issue of age determination for apprehended persons who may be above eighteen years of age. See *id.* pt. V, para. 13. The appropriate provision provides:

If a reasonable person would conclude that an alien detained by the INS is an adult despite his claims to be a minor, the INS shall treat the person as

minor in an INS or INS-contracted detention facility with separate accommodations for juveniles, or in a state or county juvenile detention facility that separates detained minors from delinquent offenders, if a minor cannot be immediately released.⁶¹

The Agreement also stipulates that unaccompanied minors should not be transported in vehicles with detained adults.⁶² If adherence to this policy is impracticable, the Agreement provides that "[t]he INS shall take necessary precautions for the protection of the well-being of such minors when transported with adults."⁶³ In addition, juveniles represented by counsel shall not be transferred without advanced notice to their attorneys.⁶⁴ This provision aims to protect the relationship between detained children and their counsel.⁶⁵

2. The Agreement's Release Policy Requires the Prompt Release of Minors

The Agreement has a general release policy that requires the INS to release a minor from its custody "without unnecessary delay" to one of several parties.⁶⁶ These are, in order of preference:

- A. a parent;
- B. a legal guardian;
- C. an adult relative . . . ;⁶⁷
- D. an adult individual or entity designated by the parent or legal guardian as capable and willing to care for the minor's well-being . . . ;⁶⁸

an adult for all purposes, including confinement and release on bond or recognizance. The INS may require the alien to submit to a medical or dental examination conducted by a medical professional or to submit to other appropriate procedures to verify his or her age. If the INS subsequently determines that such an individual is a minor, he or she will be treated as a minor in accordance with this Agreement for all purposes.

Id. For a discussion of age determination techniques, see *infra* note 109.

61. Stipulated Settlement Agreement, *supra* note 22, pt. V, para. 12. See *infra* Part I.B.3. (discussing the reasons a minor may be detained by the INS).

62. Stipulated Settlement Agreement, *supra* note 22, pt. VIII, para. 25.

63. *Id.*

64. *Id.* pt. IX, para. 27. Exceptions to this policy are "unusual and compelling circumstances such as where the safety of the minor or others is threatened or the minor has been determined to be an escape-risk, or where counsel has waived such notice." *Id.* In such cases, counsel must be notified within 24 hours of transfer. *Id.*

65. See *id.*

66. *Id.* pt. VI, para. 14.

67. An adult relative is defined as a brother, sister, aunt, uncle, or grandparent. *Id.*

68. This designation is confirmed by either "a declaration signed under penalty of perjury before an immigration or consular officer or . . . other document(s) that

- E. a licensed program⁶⁹ willing to accept legal custody; or
- F. an adult individual or entity seeking custody, in the discretion of the INS, when it appears that there is no other likely alternative to long term detention and family reunification does not appear to be a reasonable possibility.⁷⁰

The Agreement requires the INS to expeditiously process minors in its custody and to provide them with a notice of rights.⁷¹ Juveniles in INS custody must be transferred to a licensed program within three to five days.⁷² If there is "an emergency or influx of minors into the United States,"⁷³ the Agreement provides that juveniles shall be placed "as expeditiously as possible."⁷⁴

3. The Agreement's Detention Policy Requires the Least Restrictive Setting

The Agreement's detention policy governs minors who cannot be immediately released.⁷⁵ This applies to children for whom there is no appropriate sponsor and no licensed program available for placement.⁷⁶ In such cases, the Agreement provides that:

The INS shall place each detained minor in the least

establish(es) to the satisfaction of the INS, in its discretion, the affiant's paternity or guardianship." *Id.*

69. The Agreement provides that a "licensed program" is "any program, agency or organization that is licensed by an appropriate State agency to provide residential, group, or foster care services for dependent children, including a program operating group homes, foster homes, or facilities for special needs minors." *Id.* pt. I, para. 6. A licensed program must also meet the "Minimum Standards for Licensed Programs" set forth in Exhibit 1 of the Agreement. *Id.* Exhibit 1.

70. *Id.* pt. VI, para. 14.

71. *Id.* pt. V, para. 12. This "includ[es] the right to a bond redetermination hearing if applicable." *Id.*

72. *Id.* The three-day provision applies "if the minor was apprehended in an INS district in which a licensed program is located and has space available," while the five-day provision applies "in all other cases." *Id.* pt. V, para. B. An "influx of minors" is "defined as those circumstances where the INS has, at any given time, more than 130 minors eligible for placement in a licensed program . . ." *Id.* The INS is required to have a written plan that sets out the "reasonable efforts it will take to place all minors as expeditiously as possible" in the event of an emergency or influx. *Id.* pt. V, para. C. This plan must include the designation of eighty beds, licensed by an appropriate state agency, that may be available for INS placements. *Id.*

73. An "emergency" is "defined as any act or event that prevents the placement of minors" within the delineated time period, "[including] natural disasters . . . facility fires, civil disturbances, and medical emergencies." *Id.* pt. V, para. B. An "influx of minors" is "defined as those circumstances where the INS has, at any given time, more than 130 minors eligible for placement in a licensed program . . ." *Id.* The INS is required to have a written plan that sets out the "reasonable efforts it will take to place all minors as expeditiously as possible" in the event of an emergency or influx. *Id.* pt. V, para. C. This plan must include the designation of eighty beds, licensed by an appropriate state agency, that may be available for INS placements. *Id.*

74. *Id.* The Agreement does not define "expeditiously" further. *See id.*

75. *Id.* pt. IV, para. 11, pt. V, para. 12, pt. VII.

76. *Id.* pt. V, para. 12.

restrictive setting appropriate to the minor's age and special needs, provided that such setting is consistent with its interests to ensure the minor's timely appearance before the INS and the immigration courts and to protect the minor's well-being and that of others.⁷⁷

Thus, a detained juvenile should not be placed in a secure facility if less restrictive alternatives are available and appropriate.⁷⁸ Examples of less restrictive alternatives are a medium security facility, where intensive staff supervision and counseling services are available, or another licensed program.⁷⁹ All decisions to place a minor in a secure facility must be reviewed and approved by the regional Juvenile Coordinator.⁸⁰

The INS may continue to detain a minor under certain circumstances.⁸¹ These include circumstances where the juvenile is delinquent,⁸² has committed or credibly threatened to commit a violent or malicious act while in INS custody or in the presence of an INS officer,⁸³ or has engaged, while in a licensed program, in "unacceptably disruptive" conduct.⁸⁴ The INS may also detain a minor if the INS determines he or she "is an escape-risk."⁸⁵ Finally, a minor may be held in a secure facility for his or her own safety.⁸⁶

77. *Id.* pt. IV, para. 11.

78. *Id.* pt. VII, para. 23.

79. *Id.*

80. *Id.*

81. *See id.* pt. VII paras. 19, 21.

82. *Id.* pt. VII, para. 21.A. The Agreement provides that a minor may be held in INS custody if the minor "has been charged with, is chargeable, or has been convicted of a crime, or is the subject of delinquency proceedings, has been adjudicated delinquent, or is chargeable with a delinquent act . . ." *Id.* The provision excludes minors whose offenses are isolated petty offenses. *Id.* pt. VII, para. 21.A.i.

83. *Id.* pt. VII, para. 21.B.

84. *Id.* pt. VII, para. 21.C. The Agreement defines such conduct as conduct that has proven to be unacceptably disruptive of the normal functioning of the licensed program in which [the minor] has been placed and [as a result] removal is necessary to ensure the welfare of the minor or others, as determined by the staff of the licensed program (Examples: drug or alcohol abuse, stealing, fighting, intimidation of others, etc. This list is not exhaustive.).

Id.

85. *Id.* pt. VII, para. 21.D. "[E]scape-risk means there is a serious risk the minor will attempt to escape from custody." *Id.* pt. VII, para. 22. Factors to be considered when assessing whether a minor is an escape-risk include: whether the minor is under a final deportation or exclusion order; the minor's immigration history; and whether the minor has previously escaped or attempted to escape from INS custody. *Id.*

86. *Id.* pt. VII, para. 21.E. One example is "when the INS has reason to believe that a smuggler would abduct or coerce a particular minor to secure payment of

Every juvenile the INS places in a facility or licensed program is entitled to judicial review of his or her placement decision.⁸⁷ The INS must provide each detainee with an explanation of the right of judicial review.⁸⁸ In addition, the INS must provide every juvenile not placed in a licensed program with a notice of reasons for being placed in a detention or medium-security facility.⁸⁹ A minor may seek judicial review if she or he disagrees with the INS's placement determination, or asserts that the licensed program in which she or he was placed does not comply with the standards set forth for licensed facilities.⁹⁰ The INS is also required to give each detainee a "list of free legal service providers, compiled pursuant to INS regulation"⁹¹

C. *The Problems with Implementing the Flores Agreement*

Since the settlement of *Flores*, U.S. government and human rights reports have documented the mistreatment of unaccompanied immigrant minors in INS custody.⁹² In 2001, the Office of the Inspector General (OIG)⁹³ in the Department of Justice conducted a nation-wide evaluation of the INS's treatment, release, and detention policies and practices developed in response to the Agreement.⁹⁴ In brief, the results of the OIG Report are: "Although the INS has made significant progress since signing the *Flores* agreement, our review found that deficiencies in the

smuggling fees." *Id.*

87. *Id.* pt. VII, para. 24.B.

88. *Id.* pt. VII, para. 24.D(b). This explanation states:

The INS usually houses persons under the age of 18 in an open setting, such as a foster home or group home, and not in detention facilities. If you believe that you have not been properly placed or that you have been treated improperly, you may ask a federal judge to review your case. You may call a lawyer to help you do this. If you cannot afford a lawyer, you may call one from the list of free legal services given to you with this form.

Id. Exhibit 6.

89. *Id.* pt. VII, para. 24.C.

90. *Id.* pt. VII, para. 24.B. These standards are set forth in Exhibit 1 of the Agreement. *See id.* Exhibit 1.

91. *Id.* pt. VII, para. 24.D(c).

92. *See* OFFICE OF THE INSPECTOR GEN., *supra* note 15; AMNESTY INT'L USA, *supra* note 2; HUM. RTS. WATCH (1998), *supra* note 19; HUM. RTS. WATCH (1997), *supra* note 19.

93. Evaluations and Inspections Division, Office of the Inspector General, U.S. Department of Justice.

94. OFFICE OF THE INSPECTOR GEN., *supra* note 15, Executive Summary. The OIG Report is comprised of five chapters. *Id.* Chapter One, Introduction, Chapter Two, Compliance with Policies and Procedures, Chapter Four, Related Processes, and Chapter Five, Recommendations, will be discussed in this Article. Chapter Three, Program Oversight, is beyond the scope of this Article.

handling of juveniles continue to exist in some INS districts, Border Patrol sectors, and headquarters that could have potentially serious consequences for the well-being of juveniles.⁹⁵ Human rights reports, the most recent of which was released by Amnesty International USA (Amnesty) in 2003,⁹⁶ corroborate the OIG Report findings.⁹⁷

1. The INS Failed to Comply with the Agreement's
Treatment of Minors Policy

The OIG Report finds a deficiency of appropriate policies regarding the treatment of minors.⁹⁸ One example is the INS's failure to consistently separate non-delinquent juveniles from delinquent juveniles housed in the same secure facility.⁹⁹ The Agreement explicitly requires this separation when juveniles are temporarily placed in an INS-contracted facility,¹⁰⁰ but INS policy did not require such segregation once minors were formally placed in secure detention.¹⁰¹ According to the OIG Report, "[l]ocal and national advocacy groups cite the failure to segregate non-delinquent and delinquent juveniles as evidence that non-delinquent juveniles are unnecessarily imperiled. Some members of Congress expressed this same concern and have proposed that the INS relinquish custodial responsibility for unaccompanied juveniles."¹⁰²

The OIG Report concludes that as a general problem, the INS lacked clear and fully developed juvenile policies for custody management issues.¹⁰³ These include same-sex transport, documentation of transport and detention, escort upon release, use

95. *Id.* Executive Summary.

96. AMNESTY INT'L USA, *supra* note 2.

97. *See id.*; HUM. RTS. WATCH (1998), *supra* note 19; HUM. RTS. WATCH (1997), *supra* note 19. Information in these reports was gathered mainly from site visits to immigrant juvenile shelters and detention facilities where interviews were conducted with children, children's attorneys, immigration advocates, and local facility directors. AMNESTY INT'L USA, *supra* note 2, at 3-4; HUM. RTS. WATCH (1998), *supra* note 19, pt. I; HUM. RTS. WATCH (1997), *supra* note 19, pt. I. The Amnesty report also obtained information from a nationwide questionnaire, immigration attorneys, and organizations working to assist unaccompanied juvenile immigrants. AMNESTY INT'L USA, *supra* note 2, at 3-4.

98. *See* OFFICE OF THE INSPECTOR GEN., *supra* note 15, ch. 2.

99. *Id.*

100. *See* Stipulated Settlement Agreement, *supra* note 22, pt. V, para. 12.

101. OFFICE OF THE INSPECTOR GEN., *supra* note 15, ch. 2.

102. *Id.*

103. *Id.*

of restraints, and telephone access for juveniles in custody.¹⁰⁴ The OIG Report discusses dangers arising from a lack of clear, comprehensive policies in these areas.¹⁰⁵ For example, INS policy stated that juveniles released from INS custody will be escorted, yet some unaccompanied minors travel unescorted and risk being kidnapped.¹⁰⁶ In addition, INS policy stated that secure facilities holding juveniles do not have the authority to restrain minors, yet several secure facilities had written policies that allowed staff to handcuff and shackle juveniles, and routinely did so.¹⁰⁷

Amnesty's report documents detention conditions which contravene the Agreement's treatment policy.¹⁰⁸ These include: the commingling of immigrant children with juvenile offenders;¹⁰⁹ the use of excessive discipline, physical and verbal abuse, solitary confinement, pat-down and strip searches, and restraints;¹¹⁰ and a lack of access to exercise, open air, recreation, education, religious services, mental health services, counsel,¹¹¹ translators, and

104. *Id.*

105. *Id.*

106. *Id.* ch. 2. One unaccompanied juvenile was released to the custody of commercial airline personnel for safe passage from Phoenix, Arizona to New York City, New York, and was abducted by kidnappers when he arrived at La Guardia International Airport. *Id.*

107. *Id.*

108. See AMNESTY INT'L USA, *supra* note 2, at 23-26, 29-43.

109. *Id.* at 29-43. Amnesty also reports that "children may be housed alongside criminal adult suspects or inmates due to questionable age-determination techniques and in some instances may even find themselves housed with adults, even though the INS recognizes them as children." *Id.* at 26. Amnesty asserts that U.S. immigration authorities overemphasize the accuracy of certain age-determination techniques, such as dental or wrist-bone X rays. *Id.* According to Amnesty, scientific studies have suggested that such techniques have a margin of error of three years and "were never intended to be used for determining the exact age of a child." *Id.* The unresolved issue of age determination techniques continues to present a serious obstacle to the proper treatment of unaccompanied immigrant children. See *id.* at 26-28. For an in-depth discussion of the issue and its current status, see Jennifer Smythe, *Age Determination of Unaccompanied Alien Children and the Demand for Legislative Reform*, 81 INTERPRETER RELEASES 753 (2004).

110. AMNESTY INT'L USA, *supra* note 2, at 29-38. Amnesty discusses the use of restraints during transportation, in the courtroom, and in detention facilities. *Id.* at 34-36. The report also discusses the use of immobilizing restraints and chemical restraints. *Id.* at 37-38.

111. *Id.* at 39-46. Immigrants facing removal proceedings have the right to counsel. See 8 U.S.C. § 1229(a)(1)(E) (2000). The OIG Report found that most children did not have counsel for their removal proceedings before the Executive Office for Immigration Review (EOIR). OFFICE OF THE INSPECTOR GEN., *supra* note 15, ch. 4. Amnesty found that some of these children were not informed of their right to counsel upon arrest, nor within weeks or months of their detainment. See AMNESTY INT'L USA, *supra* note 2, at 44-45. Amnesty also reports that a number of children are placed in remote facilities, difficult for lawyers to access, and that the INS often refuses to provide details about where children are housed to

telephones.¹¹² Of the facilities housing unaccompanied immigrant children that responded to Amnesty's nationwide survey, only four out of twenty-three secure facilities and only four shelter facilities indicated that their staff are trained in the Agreement's treatment standard.¹¹³

organizations offering pro bono legal services. *Id.* at 45-46. In addition, the INS's transfer of minors from one facility to another impedes the development of an attorney-client relationship. *Id.* at 47. Amnesty explains that "transfers often undermine the child's legal case because they make effective communication with the child difficult, and since essential case preparation time is interrupted, creates [sic] problems for the already undersourced pro bono network." *Id.* Finally, Amnesty notes that sometimes, children are transferred between facilities without notification to their attorneys, which violates the Agreement. *Id.* at 48; see Stipulated Settlement Agreement, *supra* note 22, pt. IX, para. 27. It is important to note that the children's lack of access to attorneys contributes to hearing delays. AMNESTY INT'L USA, *supra* note 2, at 65 ("One reason why immigration judges are willing to delay hearings is for efforts to be made for the child to secure legal representation"). Further analysis of the serious problems facing unaccompanied immigrant children in EOIR hearings is beyond the scope of this Article. See OFFICE OF THE INSPECTOR GEN., *supra* note 15, ch. 4 for a discussion of several factors that contribute to the delay in deciding cases, including the limited availability of legal representation, the postponement of hearing the merits of cases pending the juveniles' release from custody, and the scheduling of detained minors for non-expedited hearings. See also Christopher Nugent & Steven Schulman, *Giving Voice to the Vulnerable: On Representing Detained Immigrant and Refugee Children*, 78 INTERPRETER RELEASES 1569 (2001), for a discussion of the difficulties immigrant children face in the EOIR hearings and the essential role of counsel.

112. AMNESTY INT'L USA, *supra* note 2, at 49-51. Amnesty reports that thirteen-year-old Edwin Muñoz from Honduras

was held in a commingled facility, where he was locked in his cell for approximately 18 hours a day, allowed out only a few hours a day for classes and twice a day for 20 minutes in a fenced-in area for exercise. The children had to walk silently with their hands crossed to avoid punishment. He reports that both guards and other inmates mistreated him. Edwin reported that the guards would break up fights using pepper spray, which would also sting the eyes of the children not involved in the fight. He was sprayed twice, making his eyes sting, and reports fearing he would go blind. Edwin reported losing weight and having frequent nightmares in which the guards and other boys were going to kill him. "*I cried a lot in the cell wondering why everything was turning out so bad for me in the United States and if I would ever be free.*"

Id. at 24 (citing *Hearings Before the Subcomm. on Immigr. of the Senate Comm. on the Judiciary*, 107th Cong. (2002) [hereinafter *Hearings*] (testimony of Edwin Larios Muñoz)).

113. AMNESTY INT'L USA, *supra* note 2, at 29. Thirty-three out of 115 facilities reportedly used by immigration authorities to house unaccompanied children participated in Amnesty's nationwide survey on immigrant juvenile policies, twenty-three secure facilities and ten shelter facilities. *Id.* at 3. Of these facilities, one "requested more information, and another responded that the question was 'not applicable' to its facility." *Id.* at 29.

2. The INS Failed to Comply with the Agreement's Prompt Release Policy

The OIG Report finds the INS's juvenile release policy may have impeded INS compliance with the prompt release requirement.¹¹⁴ The Agreement requires the release of minors "without unnecessary delay" to one of several appropriate sponsors.¹¹⁵ However, INS policy was to not release a minor to anyone other than a parent if the INS knew a parent was in the United States.¹¹⁶ Amnesty's report confirms this policy, stating: "The National Juvenile Coordinator told [Amnesty] that children must be released to a parent, held in INS custody, or be returned home."¹¹⁷

Additionally, the OIG Report finds that the INS also required an undocumented parent or sponsor to appear before an INS officer and to be served a Notice to Appear (NTA) before the minor could be released.¹¹⁸ The NTA initiates immigrant removal proceedings.¹¹⁹ If an undocumented parent did not come forward, the minor remained in INS custody even if a close relative with legal status was willing to accept custody of the child.¹²⁰ Immigration authorities confirmed this policy in Amnesty's report.¹²¹ Since an undocumented parent or sponsor may not come forward for fear of removal, the INS policy may have interfered with the minor's expeditious release.¹²² The OIG Report states

114. OFFICE OF THE INSPECTOR GEN., *supra* note 15, ch. 4; see Stipulated Settlement Agreement, *supra* note 22, pt. VI, para. 14 (stating general release policy); *supra* Part I.B.2.

115. Stipulated Settlement Agreement, *supra* note 22, pt. VI, para. 14.

116. OFFICE OF THE INSPECTOR GEN., *supra* note 15, ch. 4. The OIG Report notes that the National Juvenile Coordinator confirmed this policy, and that "[h]e said the policy has been communicated to the field and is clearly understood. However, it has not been formally incorporated into the *Juvenile Protocol Manual*." *Id.* The Juvenile Protocol Manual, developed by the INS Juvenile Program staff, defines the policies, procedures, and responsibilities for INS officers handling juveniles. *Id.* Executive Summary.

117. AMNESTY INT'L USA, *supra* note 2, at 54.

118. OFFICE OF THE INSPECTOR GEN., *supra* note 15, ch. 4.

119. *Id.*; see 8 U.S.C.A. § 1229(a)(2004) (providing that the "notice to appear" initiates removal proceedings).

120. OFFICE OF THE INSPECTOR GEN., *supra* note 15, ch. 4.

121. AMNESTY INT'L USA, *supra* note 2, at 54. Immigration authorities in Arizona stated that children whose parents did not come forward remained in detention, even if a relative with legal status was willing to sponsor them. *Id.* Amnesty also reported delays due to excessive paperwork required to process a request for release, particularly for children from countries with a difficult procedure for obtaining identification documentation. *Id.* at 54-55.

122. OFFICE OF THE INSPECTOR GEN., *supra* note 15, ch. 4; see also Stipulated Settlement Agreement, *supra* note 22, pt. V, para. 12 (stating the INS is required to

that "[p]ro bono legal and human rights organizations view this policy as 'holding children hostage' or using them as 'bait' to draw out the parents."¹²³

Another policy which hindered the release of juveniles was the INS's home-assessment policy.¹²⁴ The OIG Report notes that the INS required time-consuming home assessments for Chinese and Indian juveniles, which greatly delayed release and placement.¹²⁵ Due to these assessments, Chinese and Indian minors experienced longer detentions than other nationalities.¹²⁶

3. The INS Failed to Comply with the Agreement's Detention Policy

The OIG Report finds the INS's release policy may have also hindered INS compliance with the least restrictive setting detention requirement.¹²⁷ The Agreement provides that if no appropriate sponsor and no licensed program is immediately available for placement, the INS "shall place each detained minor in the least restrictive setting appropriate to the minor's age and special needs"¹²⁸ Most children whom the INS detained for long periods remained there because the INS had not found appropriate sponsors for them.¹²⁹ As a result of the INS's restrictive release policy, children may have remained in custody longer than necessary when an acceptable sponsor was available.¹³⁰ In fiscal year 2000, the INS released to a sponsor 54 percent of juveniles detained in INS custody for over 72 hours.¹³¹

"expeditiously process" minors in its custody); *supra* Part I.B.2.

123. OFFICE OF THE INSPECTOR GEN., *supra* note 15, ch. 4.

124. *Id.*

125. *Id.* The purpose of these assessments was reportedly to protect Chinese and Indian minors from smugglers and to make sure any sponsors were legitimate. *Id.*

126. *Id.* In fiscal year 2000, the average length of detention for Chinese and Indian immigrants was 146 days; for juveniles of other nationalities, it was twenty-nine days. *Id.* One Chinese juvenile was in INS custody for 631 days. *Id.*

127. *Id.* See Stipulated Settlement Agreement, *supra* note 22, pt. IV, para. 11 (stating least restrictive setting placement policy); pt. V, para. 12 (stating temporary placement policy).

128. *Id.* pt. IV, para. 11, pt. V, para. 12.

129. OFFICE OF THE INSPECTOR GEN., *supra* note 15, ch. 4.

130. *Id.*

131. *Id.* Specifically, the INS released to sponsors 2,238 of the 4,136 juveniles detained in custody for over 72 hours. *Id.* The children who had been neither released to sponsors nor retained in custody at the end of fiscal year 2000 experienced the following outcomes: 477 were given voluntary departure; 425 were removed; 282 turned eighteen years of age and were subsequently treated as adults; and the remaining 205 experienced miscellaneous consequences, including running away. *Id.* n.34.

Of these juveniles, the INS released 50 percent within three weeks of apprehension, and 60 percent within four weeks.¹³² However, of the 40 percent of children eventually released to a sponsor who were still in custody after four weeks, the INS detained 7 percent for over six months, and 1 percent for over a year.¹³³

In addition, Amnesty's report finds that "the INS overused secure detention and failed to place many children in the 'least restrictive setting required by Flores.'"¹³⁴ According to Amnesty, "approximately one-third [of children in immigration custody] are detained in harsh conditions in a secure jail-like facility designed for the incarceration of juvenile offenders."¹³⁵

In response to its principal findings, the OIG Report makes numerous recommendations.¹³⁶ First, the INS should implement various procedures to protect minors,¹³⁷ and the INS should continue to segregate juvenile non-offenders from offenders as long as the juveniles are in INS custody.¹³⁸ Specific procedures should

132. *Id.*

133. *Id.*

134. AMNESTY INT'L USA, *supra* note 2, at 18 (quoting Stipulated Settlement Agreement, *supra* note 22, Exhibit 2(b)); see Stipulated Settlement Agreement, *supra* note 22, pt. IV, para. 11. Amnesty reports that the INS identified "emergency influx" as the reason for holding most children in secure facilities for more than seventy-two hours. AMNESTY INT'L USA, *supra* note 2, at 22. The Agreement defines "emergency influx" as a time when there are more than 131 children in need of non-secure bed space. *Id.* This figure was based on the fact that the INS had 131 available non-secure bed spaces in 1997 at the time the Agreement was reached. *Id.* In 2002, the INS had almost 500 non-secure bed spaces, nearly four times as many as it had in 1997. *Id.* (citing *Hearings*, *supra* note 112 (testimony of Stuart Anderson, Executive Associate Commissioner, U.S. Immigration and Naturalization Service)). Despite the dramatic increase in non-secure bed spaces, the INS used the 1997 figure of 131 available bed spaces to characterize every year as an "influx" and thus justify its use of secure detention for juveniles. *Id.*

135. AMNESTY INT'L USA, *supra* note 2, at 1 (citing IMMIGR. & NATURALIZATION SERV., U.S. DEPT OF JUST., INS OFFICE OF JUVENILE AFFAIRS FACT SHEET (2002)). It is worth noting that while Human Rights Watch and Amnesty both report that one-third of juveniles were detained in secure facilities, the number of juvenile immigrant detainees had more than doubled in the five years between their reports. See *id.*; see also HUM. RTS. WATCH (1998), *supra* note 19, pt.I.

136. OFFICE OF THE INSPECTOR GEN., *supra* note 15, ch. 5.

137. See *id.*

138. *Id.* The formal recommendation is:

The INS should include and enforce standards in all contracts with secure detention facilities that require the segregation of non-delinquent INS juveniles from delinquent juveniles. These standards should provide for strict segregation in living quarters and no more than minimal contact in all other common areas. The facilities should be required to immediately notify the INS if they cannot meet this requirement so the INS can take immediate corrective action.

Id.

require: same-sex escort of juveniles; records with sufficient accountability of juvenile transportation and detention for all juveniles in custody of the Border Patrol districts; maintenance of physical custody of escorted minors until they are released to a sponsor; implementation of specific rules that govern the use of restraints on juveniles; and a revised policy ensuring juveniles have access to telephones.¹³⁹ Second, the INS should allow district directors discretion and provide them with guidance for the release of minors to a responsible sponsor if a parent is unwilling to appear.¹⁴⁰ Third, the INS should evaluate and streamline the home-assessment process.¹⁴¹ Finally, the INS should implement procedures that require monitoring and regular reporting of non-compliance with the placement requirement, including the reporting of justifications for overdue placements.¹⁴²

Amnesty's report makes extensive recommendations based on its findings.¹⁴³ In sum, Amnesty urges the U.S. government to stop the routine detention of unaccompanied immigrant children.¹⁴⁴ Amnesty asserts that these children should only be detained "as a last resort for the shortest possible time and in a facility appropriate to their needs."¹⁴⁵ In addition, Amnesty urges the Office of Refugee Resettlement to review all facilities housing unaccompanied children and to demand that any facility violating international law or the terms of the Agreement should rectify its violations or lose its contract.¹⁴⁶

The Agreement requires the INS to promulgate regulations incorporating the Agreement's substantive terms within 120 days of the final district court's approval of the settlement.¹⁴⁷ Almost five years later, and a few months before the Agreement was set to expire, the INS had not promulgated any regulations.¹⁴⁸ In

139. *Id.* The OIG Report notes that policies and procedures help "to protect juveniles from excessive restraint." *Id.* ch. 2.

140. *See id.* ch. 5.

141. *See id.*

142. *See id.*

143. AMNESTY INT'L USA, *supra* note 2, at 77-83. The recommendations are addressed to the U.S. government, the Department of Homeland Security, the Office of Refugee Resettlement, the immigration courts, and the international community. *Id.*

144. *See id.* at 77.

145. *Id.*

146. *Id.* For more information about the role of the Office of Refugee Resettlement in administering the care of unaccompanied immigrant children, see *infra* notes 152, 156, 163-169 and accompanying text.

147. Stipulated Settlement Agreement, *supra* note 22, pt. II, para. 9.

148. AMNESTY INT'L USA, *supra* note 2, at 17.

December, 2001, the Central District Court of California extended the Agreement, by stipulation with the INS, until 45 days after the INS adopts the Agreement's substantive provisions into final regulations.¹⁴⁹ Since the INS never adopted final regulations, the Agreement remains in effect.¹⁵⁰

*D. The Problems with the Current Care of Unaccompanied
Immigrant Children Under the Office of Refugee
Resettlement*

Recently, the Homeland Security Act (HSA)¹⁵¹ transferred the care of unaccompanied immigrant children from the INS to the Office of Refugee Resettlement (ORR).¹⁵² The HSA also abolished the INS¹⁵³ and transferred its immigration law enforcement duties to the Department of Homeland Security (DHS).¹⁵⁴ At first glance, the transfer of care-taking and law enforcement duties to two separate agencies obviates the conflict of interest inherent in the former INS.¹⁵⁵ The ORR, a social service agency whose main function is to help refugees establish sustainable lives in the United States,¹⁵⁶ appears to be better suited to meet the needs of these children. However, there are several reasons why it is unlikely that the conditions of unaccompanied juvenile detainees

149. *Id.* (citing *Flores v. Ashcroft*, Stipulation and Order, Case No. 85-4544-RJK (C.D. Cal. 2001)).

150. *See id.*

151. Homeland Security Act of 2002, Pub. L. 107-296, § 116 Stat. 2202 (2002).

152. 6 U.S.C. § 279(a) (2003). The change was effective March 1, 2003. AMNESTY INT'L USA, *supra* note 2, at 5.

153. 6 U.S.C. § 291 (2003).

154. *Id.* § 251. The HSA transferred immigration functions originally delegated to the Attorney General by the INA to the Secretary of Homeland Security. DAVID WEISSBRODT & LAURA DANIELSON, IMMIGRATION LAW IN A NUTSHELL ch. 3, § 3 (2004), at <http://www1.umn.edu/humanrts/immigrationlaw/index.html> (last visited Sept. 25, 2004). These functions are now handled by three subdivisions of the DHS: (1) the U.S. Citizenship and Immigration Services (CIS), which reviews petitions for immigration, adjustment of status, naturalization, and refugee and asylum applications; (2) the U.S. Immigration and Customs Enforcement (ICE), which is responsible for the enforcement of immigration laws within the United States, and operates immigration investigations, detention, removal, and intelligence programs; and (3) the U.S. Customs and Border Protection (CBP), which is responsible for preventing illegal entries into the United States. *Id.*

155. This conflict arose from the INS's duty to simultaneously care for and seek removal of unaccompanied minors. *See supra* notes 35-38 and accompanying text.

156. OFFICE OF REFUGEE RESETTLEMENT, ELIGIBILITY FOR REFUGEE ASSISTANCE AND SERVICES THROUGH THE OFFICE OF REFUGEE RESETTLEMENT, at <http://www.acf.hhs.gov/programs/orr/geninfo/index.htm> (last visited Sept. 25, 2004). The ORR falls under the Department of Health and Human Services, and its mission is "to assist refugees and other special populations . . . in obtaining economic and social self-sufficiency in their new homes in the United States." *Id.*

will improve significantly.

First, the law enforcement agencies of the DHS retain significant control over the treatment of unaccompanied immigrant minors.¹⁵⁷ This is evident in the operation of arrest and detainment procedures. Officials from the Customs and Border Protection (CBP) initially encounter undocumented, unaccompanied children at ports of entry, such as airports, at border crossings, or within the United States.¹⁵⁸ The children are then referred to the Immigration and Customs Enforcement (ICE), which detains them and places them in removal proceedings before the Executive Office of Immigration Review (EOIR).¹⁵⁹ The ICE must transfer custody of these detained children to the ORR in order for them to receive appropriate care and placement. However, because the HSA failed to specify a time frame for the transfer of custody, these children could remain in ICE custody

157. See AMNESTY INT'L USA, *supra* note 2, at 75-76. Holguín has aptly observed that there is an asymmetry of power between the DHS and the ORR which severely limits the ORR's ability to actualize its mission. Telephone Interview with Holguín, *supra* note 36. Holguín describes the DHS as a "huge, powerful agency," with a lot of bureaucratic clout, which "calls the shots." *Id.* He describes the ORR as its "junior partner." *Id.* This relationship is evidenced in a recent agreement reached between the DHS and the Department of Health and Human Services (DHHS) on a "Statement of Principles" regarding the Unaccompanied Alien Children Program. See DHS, HHS *Reach Agreement on Improved Care for Unaccompanied Children*, 81 No. 15 INTERPRETER RELEASES 494, 497-98 (2004) [hereinafter *Statement of Principles*]. The *Statement of Principles* notes that functions related to unaccompanied immigrant minors have been divided between the two agencies, with the DHS responsible for immigration benefits and enforcement, and the ORR responsible for care and placement. *Id.* at 497. However, the *Statement of Principles* emphasizes that the two agencies will work in conjunction to execute these functions. *Id.* at 498. For example, although the ORR will be responsible for determining whether a child will be released to a custodian until removal is imminent, the *Statement of Principles* stipulates that "[i]n making this determination, ORR will consult with DHS." *Id.* In fact, the agencies plan to consult with each other on the development of procedures, to conduct joint reviews, and to meet regularly to discuss day-to-day operations. *Id.* This calls into question the assertion made by Jessica G. Taverna that the ORR is "an agency that has complete independence from the DHS." Jessica G. Taverna, Note, *Did the Government Finally Get It Right? An Analysis of the Former INS, the Office of Refugee Resettlement and Unaccompanied Minor Aliens' Due Process Rights*, 12 WM. & MARY BILL RTS. J. 939, 968 (2004).

158. AMNESTY INT'L USA, *supra* note 2, at 75. See Nugent & Schulman, *supra* note 111, at 1569. Children apprehended within the United States are detained after crossing the border without inspection, sometimes years after entry. *Id.*

159. Nugent & Schulman, *supra* note 111, at 1569; AMNESTY INT'L USA, *supra* note 2, at 75. ICE is responsible for the enforcement of immigration laws, and therefore operates immigration detention and removal programs. See *supra* note 154. The EOIR is an administrative body within the Department of Justice that oversees immigration adjudication. See WEISSBRODT & DANIELSON, *supra* note 154, ch. 3, § 3-3. The EOIR includes the immigration courts and the Board of Immigration Appeals (BIA). *Id.*

indefinitely.¹⁶⁰ Furthermore, ICE custody is nearly indistinguishable from INS custody.¹⁶¹ The ICE is operated by former INS personnel who work out of established INS district offices where staff and facilities remain largely unchanged.¹⁶²

Second, the ORR operates in the shadow of INS policies and practices,¹⁶³ many of which continue in contravention of the *Flores* Agreement.¹⁶⁴ As Amnesty notes, "the ORR has inherited a detention system that reflects the law enforcement culture of the INS The entire contracted network of at least 115 facilities used by the former INS to house unaccompanied children . . . has been transferred to the ORR."¹⁶⁵ This entrenched and problematic system will hinder the ORR's successful administration of its resources¹⁶⁶ to unaccompanied immigrant children.¹⁶⁷

160. See 6 U.S.C. § 279. See AMNESTY INT'L USA, *supra* note 2, at 75-76.

161. Telephone Interview with Holguín, *supra* note 36; see AMNESTY INT'L USA, *supra* note 2, at 76.

162. See AMNESTY INT'L USA, *supra* note 2, at 76.

163. *Id.* at 74.

164. See *supra* Part I.C. See generally AMNESTY INT'L USA, *supra* note 2 (discussing the lack of *Flores* implementation in 2003).

165. AMNESTY INT'L USA, *supra* note 2, at 74.

166. The ORR operates an Unaccompanied Refugee Minors Program for identified refugee children living abroad who are eligible for resettlement in the United States. See OFFICE OF REFUGEE RESETTLEMENT, THE UNACCOMPANIED REFUGEE MINORS PROGRAM, at <http://www.acf.hhs.gov/programs/orr/programs/urm.htm> (last visited Sept. 25, 2004). Children receive foster care under the program which "establishes legal responsibility, under State law, to ensure that unaccompanied minor refugees and entrants receive the full range of assistance, care, and services to which all children in the State are required; a legal authority is designated to act in place of the child's unavailable parent(s)." *Id.* The ORR could help unaccompanied immigrant juvenile detainees by increasing the number of minors placed in foster care rather than secure detention. Amnesty reports that the Lutheran Immigration and Refugee Service (LIRS) and the U.S. Conference of Catholic Bishops (USCCB) have provided foster care to unaccompanied minors. AMNESTY INT'L USA, *supra* note 2, at 19. Amnesty states:

The organizations assess that there is a far wider availability of foster care settings and point out that foster care (\$55 per day) is much cheaper than detention (\$200 per day). Nevertheless, [the INS] placed only sixteen children in foster care in 2001. The INS cited security concerns and the likelihood of the children absconding as reasons for not placing more in foster care. However, LIRS and USCCB have reported that, in their experience, children do not abscond if appropriate services are in place to ensure that they are safe and cared for.

Id. (citation omitted) (citing *Hearings*, *supra* note 112 (testimony of Julianne Duncan, Director of Children's Services for Migration and Refugee services, U.S. Conference of Catholic Bishops)). The ORR could also help link these children to important state resources, such as English language classes, health and mental services, and adjustment training programs. See <http://www.acf.hhs.gov/programs/orr/programs/urm.htm> (last visited Sept. 25, 2004).

167. There is disagreement among commentators about whether the transfer of functions to the ORR will substantively improve the treatment and care of

Third, inadequate funding impedes the ORR's ability to institute change. By its own accounts, the ORR is grossly underfunded.¹⁶⁸ Assigned a multitude of duties related to the care and placement of unaccompanied immigrant children, the monitoring of facilities, and the maintenance of statistical data,¹⁶⁹

unaccompanied immigrant minors. For example, Nugent and Schulman are optimistic about the improvement of conditions for these children under the ORR. See Christopher Nugent & Steven Schulman, *A New Era in the Legal Treatment of Alien Children: The Homeland Security and Child Status Protection Acts*, 80 No. 7 INTERPRETER RELEASES 233, 233-38 (2003). Nugent and Schulman conclude that because the HSA mandates the ORR "to 'ensure that the interests of the child are considered in decisions and actions relating to the care and custody of an unaccompanied alien child[.]' [t]he overhaul thus promises a more child-friendly atmosphere and treatment for unaccompanied alien children pending their immigration proceedings." (citation omitted). *Id.* In contrast, Carolyn J. Seugling warns that "[a]lthough transferring unaccompanied minors' care and custody from the INS to the DHHS [Department of Health and Human Services] was part of the largest reorganization of the U.S. government in the last fifty years, reorganization is not a substitute for necessary substantive reforms." Carolyn J. Seugling, Note, *Toward a Comprehensive Response to the Transnational Migration of Unaccompanied Minors in the United States*, 37 VAND. J. TRANSNAT'L L. 861, 866 (2004). See also *supra* note 157 (discussing Holguín's observation that the asymmetry of power between the DHS and the ORR severely limits the ORR's ability to actualize its mission).

168. See 149 CONG. REC. S11,321 (daily ed. Sept. 10, 2003) (statement of Sen. Feinstein) ("In talking with experts who work with these children as well as with [ORR] officials, it has become evident that [the program for unaccompanied alien children] will need at least \$20 million in additional funding in order to operate effectively in fiscal year 2004."). Senator Feinstein declined to offer an amendment that would appropriate the additional twenty million and bring the total appropriation to \$54.227 million. See *id.* ("In the interest of time and in deference to the delicate balance that the committee was forced to achieve in putting together this bill, I will not offer this amendment at this time"). See also AMNESTY INT'L USA, *supra* note 2, at 74 (stating that "[Amnesty] is concerned that ORR will be hindered in its efforts due to lack of funding: ORR has a very limited budget and a skeleton staff to address the substantial challenges that it faces . . .").

169. See 6 U.S.C. § 279(a)(1). In general, the Director of the ORR is responsible for:

- (A) coordinating and implementing the care and placement of unaccompanied alien children . . . ;
- (B) ensuring that the interests of the child are considered . . . ;
- (C) making placement determinations for all . . . children . . . ;
- (D) implementing the placement determinations;
- (E) implementing policies with respect to the care and placement . . . ;
- (F) identifying a sufficient number of qualified individuals, entities, and facilities to house [the] children;
- (G) overseeing the infrastructure and personnel of facilities in which [the] children reside;
- (H) reuniting . . . children with a parent abroad in appropriate cases;
- (I) compiling, updating, and publishing at least annually a state-by-state list of professionals or other entities qualified to provide guardian and attorney representation services for unaccompanied alien children;
- (J) maintaining statistical information and other data on . . . children . . . ;

the ORR has the hefty task of executing and reforming existing policies. Without sufficient funding by the federal government, it is unlikely that the ORR will be able to acquire a powerful agency status, fulfill its duties, or actualize significant change.

II. A Persistently Grievous National Policy and Proposals for Its Reform

The INS's failure to implement the policies required by the *Flores* Agreement has perpetuated the mistreatment of unaccompanied immigrant minors in the United States. Under the practices of U.S. immigration authorities, these children are systematically deprived of due process¹⁷⁰ and human rights¹⁷¹ entitled to them under the U.S. Constitution,¹⁷² U.S. statutory provisions,¹⁷³ U.S. court orders,¹⁷⁴ and international human rights

(K) collecting and compiling statistical information from the Department of Justice, the Department of Homeland Security, and the Department of State on each department's actions relating to unaccompanied alien children; and

(L) conducting investigations and inspections of facilities and other entities in which unaccompanied alien children reside.

Id.

170. For an insightful analysis of the government's failure to provide unaccompanied immigrant children due process protection against indefinite detention, see Taverna, *supra* note 157.

171. See generally AMNESTY INT'L USA, *supra* note 2; HUM. RTS. WATCH (1997), *supra* note 19; HUM. RTS. WATCH (1998), *supra* note 19; OFFICE OF THE INSPECTOR GEN., *supra* note 15. See also AMNESTY INT'L USA, *supra* note 2, at 38-44, 49-51.

172. The Fifth and Fourteenth Amendments to the United States Constitution provide that no "person" shall be deprived "of life, liberty, or property, without due process of law." U.S. CONST. amend. V, XIV, § 1. The Supreme Court has found this protection applicable to children. *Bellotti v. Baird*, 443 U.S. 622, 633 (1979) (stating that "[a] child, merely on account of his minority, is not beyond the protection of the Constitution"); *In re Gault*, 387 U.S. 1, 13 (1967) (declaring that "[n]either the Fourteenth Amendment nor the Bill of Rights is for adults alone"). The Supreme Court has also established that noncitizens are entitled to due process protections. *Plyler v. Doe*, 457 U.S. 202, 210 (1981) (declaring that "[w]hatever his status under the immigration laws, an alien is a 'person' in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments").

173. The INA provides that an alien shall be given notice of removal proceedings against him or her, the nature and legal basis of these proceedings, and his or her right to counsel. See 8 U.S.C. § 1229(a)(1) (2000). The INA further provides that an alien in removal proceedings has the right to be represented by counsel, to examine the evidence against him or her, to present evidence on his or her behalf, to cross-examine witnesses, and requires that a complete record of the proceeding be produced. See *id.* § 1229a(a)(4).

174. See Stipulated Settlement Agreement, *supra* note 22; see also *supra* Part I.B.

provisions.¹⁷⁵ The denial of these rights is lamentable, unjustified, and must desist.

Improving the treatment of unaccompanied children in immigration custody requires Congress to take three essential steps. First, Congress must create a more protective federal policy for the care, detention, and release of these minors that fully incorporates the principles of juvenile justice. Second, Congress must create an effective means of implementing this policy by delegating the task to an appropriate and sufficiently empowered federal agency.¹⁷⁶ Third, Congress must create effective oversight of the policy's implementation. This section will present a strong policy based on juvenile justice principles and discuss two legislative proposals to improve the treatment of unaccompanied immigrant minors.

175. See The International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) (protecting human rights of detainees); the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) (protecting human rights of detainees); the United Nations Convention on the Rights of the Child, G.A. Res. 44/25, Annex, 44 U.N. GAOR Supp. No. 49, at 167, U.N. Doc. A/44/49 (1989) (protecting human rights of children); the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty, G.A. Res. 45/113, Annex, 45 U.N. GAOR Supp. No. 49A, at 205, U.N. Doc. A/45/49 (1990) (protecting human rights of children); the United Nations High Commissioner for Refugees, Note on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum, July 1997; the United Nations High Commissioner for Refugees, *Refugee Children: Guidelines on Protection and Care* (1994), available at <http://www.asylumsupport.info/publications/unhcr/refugeechildren.pdf>. See also Claire L. Workman, Note, *Kids Are People Too: Empowering Unaccompanied Minor Aliens Through Legislative Reform*, 3 WASH. U. GLOBAL STUD. L. REV. 223, 235-38 (2004) (discussing international legal principles regarding unaccompanied immigrant minors); AMNESTY INT'L USA, *supra* note 2, at 7-11 (discussing the application of international law and standards to children); HUM. RTS. WATCH (1997), *supra* note 19, pt. II (summarizing the rights of children in confinement established by international guidelines); HUM. RTS. WATCH (1998), *supra* note 19, pt. II (discussing international standards applicable to children in INS custody).

176. Holguín proposes that:

[T]he degree to which nominal juvenile detention standards will be observed in practice depends on (1) the quantity and quality of governmental resources allocated to compliance (institutional capacity), (2) the amount of specificity in nominal standards (ambiguity), and (3) where the locus of enforcement responsibility is placed (e.g., an independent child protection agency versus the INS) (conflict and institutional commitment to nominal goals).

Carlos Holguín, *Failed by Federalism: Ad Hoc Policy-Making Towards Detained Immigrant and Refugee Children* 8 (Aug. 2001) (unpublished paper), at <http://centerforhumanrights.org/children/MinorsPolicyAnalysis.pdf> (last visited Oct. 25, 2004) [hereinafter *Holguín*].

A. *A More Protective Policy Towards Unaccompanied Immigrant Children Should Fully Incorporate the Principles of Juvenile Justice*

The policies of the *Flores* Agreement are based on juvenile justice principles.¹⁷⁷ The Agreement's standards for the treatment, release, and detention of unaccompanied immigrant minors reflect juvenile justice policies codified in federal and state legislation.¹⁷⁸ These principles should be fully incorporated into an improved policy for the care of these children.¹⁷⁹

The Agreement's treatment policy reflects a founding principle of the juvenile justice system.¹⁸⁰ The policy directs that federal agencies¹⁸¹ shall treat children in their custody "with dignity, respect and special concern for their particular vulnerability as minors."¹⁸² The notion that children are vulnerable and in need of care and guardianship gave rise to the juvenile justice system.¹⁸³ The legal doctrine of *parens patriae*, State as parent, has authorized the State's intervention on behalf

177. See generally BARRY C. FELD, *JUVENILE JUSTICE ADMINISTRATION* (2000) (discussing the principles and practices of juvenile justice); BARRY C. FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* (1999) (describing the evolution of the juvenile court concept).

178. See FELD (2000), *supra* note 177, ch. 1 (discussing the origins of the juvenile justice system); ch. 5 (discussing pretrial detention); ch. 8 (discussing dispositional decisions).

179. The incorporation of juvenile justice principles in a policy towards immigrant minors is especially important because "child refugees may be traumatized by conditions of persecution they are fleeing and may be retraumatized by their conditions of confinement." Nugent & Schulman, *supra* note 111, at 1570.

180. See FELD (2000), *supra* note 177, ch. 1.

181. The policy was originally addressed to the INS, but since its dissolution in 2002, several federal agencies are now responsible for the detention, custody, and care of unaccompanied immigrant minors. See *supra* notes 151-160 and accompanying text.

182. Stipulated Settlement Agreement, *supra* note 22, pt. IV, para. 11.

183. See FELD (2000), *supra* note 177, at 1-3. The perception of children as vulnerable emerged at the end of the nineteenth century. See *id.* at 1-2 (stating that "[b]y the end of the nineteenth century . . . people increasingly viewed children as vulnerable, innocent, passive, and dependent beings . . ."); see also Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1094, 1095 (1991) (describing the emergence of "the belief that children are essentially different from adults," and stating that children "were assumed to be vulnerable, malleable, and in need of adult guidance . . ."). Many commentators assert that children require special care because of their youth. See, e.g., Nugent & Schulman, *supra* note 111, at 1569 ("Detained children are not and should not be treated as 'adults in miniature,' as they have unique vulnerabilities and special needs related to their collective condition and individual backgrounds as children.")

of children lacking adequate parental protection.¹⁸⁴ As the U.S. Supreme Court has acknowledged, "[t]he State has 'a *parens patriae* interest in preserving and promoting the welfare of the child.'"¹⁸⁵ An example of a state statute reflecting this interest is the Texas Family Code.¹⁸⁶ It lists as one of its purposes "to provide for the care, the protection, and the wholesome moral, mental, and physical development of children coming within its provisions."¹⁸⁷

As part of its original purpose "to improve the quality of juvenile justice in the United States,"¹⁸⁸ the federal Juvenile Justice and Delinquency Prevention Act (JJDPA) mandates the de-institutionalization of non-criminal juveniles.¹⁸⁹ The JJDPA requires that juveniles who have not committed a criminal offense not be detained in secure institutions.¹⁹⁰ The JJDPA specifically provides that non-offending minors who are non-naturalized immigrants or alleged to be dependent, neglected, or abused "shall not be placed in secure detention facilities or secure correctional facilities."¹⁹¹ The JJDPA encourages states to find alternatives to juvenile detention and correctional facilities.¹⁹²

The Agreement's release policy is consistent with the

184. FELD (2000), *supra* note 177, at 2; *see also* Ainsworth, *supra* note 183, at 1098 (stating that "[t]he idea that the peculiar vulnerability of children justified state control over them was analogized to the well-established chancery court principle, *parens patriae*, which gave the state authority over parentless children").

185. *Schall v. Martin*, 467 U.S. 253, 263 (1984) (quoting *Santosky v. Kramer*, 455 U.S. 745, 766 (1971)); *see also* FELD (2000), *supra* note 177, at 2 (explaining that "[t]heoretically, a child's 'best interests,' background, and welfare guided dispositions").

186. *See* TEX. FAM. CODE § 51.01(3) (1997).

187. *Id.*

188. Juvenile and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, 42 U.S.C. § 5601, § 102(B)(3) (1974).

189. 42 U.S.C. § 5633(a)(11) (1974). The Act also listed as one of its purposes "to develop and conduct effective programs . . . to provide critically needed alternatives to institutionalization." Pub. L. No. 93-415, § 102(B)(2). *See also* FELD (2000), *supra* note 177, at 865-66 (discussing the enactment of the JJDPA and its purpose to deinstitutionalize status and non-criminal offenders).

190. 42 U.S.C. § 5633(a)(11). The Act predicates the dispersal of federal funds to states upon their compliance with this requirement. *Id.* A state failing to deinstitutionalize status and non-criminal offenders will lose its eligibility to receive federal funds under the Juvenile Justice and Delinquency Prevention program. *Id.* § 5633(c).

191. *Id.* § 5633(a)(11)(B).

192. *See id.* § 5633(a)(9)(A) (stating that federal funds shall be used for "community-based alternatives . . . to incarceration and institutionalization"). The JJDPA also requires that allegedly delinquent juveniles shall be detained in a foster home or community-based facility whenever possible, shall not be detained in an institution in which they have contact with adult inmates, and shall be kept separate from adjudicated delinquents whenever possible. 18 U.S.C. § 5035 (2003).

JJDPa's mandate that non-criminal juveniles should not be institutionalized.¹⁹³ It requires the appropriate federal agency¹⁹⁴ to release "a minor from its custody without unnecessary delay" to one of several parties¹⁹⁵ in order to avoid institutionalization. The federal agency may detain minors only under certain circumstances,¹⁹⁶ and in such cases it must place juveniles in the "least restrictive setting appropriate to the minor's age and special needs."¹⁹⁷

The Agreement's "least restrictive" detention policy comports with state standards for the detention and disposition of juveniles.¹⁹⁸ For example, Michigan court rules mandate that a detained juvenile awaiting disposition be placed in the "least restrictive environment" that satisfies the needs of the minor and the public.¹⁹⁹ Similarly, West Virginia's statute for the disposition of status offenders²⁰⁰ provides that "[i]n ordering any further disposition under this section, the court is not limited to the relief sought in the department's petition and shall make every effort to place juveniles in community-based facilities which are the least restrictive alternatives appropriate to the needs of the juvenile and the community."²⁰¹

A more protective policy towards unaccompanied immigrant children should incorporate additional aspects of the juvenile justice system. One asset of juvenile courts is their exercise of jurisdiction over dependent and neglected children.²⁰² Serving as a liaison for minors in need of child welfare services, juvenile court judges connect children with appropriate resources. An unaccompanied immigrant child would come under juvenile court jurisdiction in most states because she lacks the protection of parents, legal guardians, a home, and has often suffered abuse or

193. See 42 U.S.C. § 5633(a)(11)(B) (2003); Stipulated Settlement Agreement, *supra* note 22, pt. VI, para. 14.

194. See *supra* note 181.

195. Stipulated Settlement Agreement, *supra* note 22, pt. VI, para. 14.

196. See Stipulated Settlement Agreement, *supra* note 22, pt. V, para. 12; pt. VII; *supra* Part I.B.3.

197. Stipulated Settlement Agreement, *supra* note 22, pt. IV, para. 11.

198. See MICH. R. SPEC. P. M.C.R. 3.935(D)(4) (2003); W. VA. ST. § 49-5-11a(c) (1998).

199. MICH. R. SPEC. P. M.C.R. 3.935(D)(4).

200. A status offender is a juvenile who engages in behavior permissible for adults yet prohibited for juveniles simply because of their age, such as alcohol consumption. FELD (2000), *supra* note 177, at 84.

201. W. VA. ST. § 49-5-11a(c).

202. See, e.g., MINN. STAT. § 260C.007(6) (2003) (defining a dependent or neglected child); § 260C.101(1) (2003) (declaring jurisdiction over such a child).

trauma.²⁰³ States may call such a child "dependent,"²⁰⁴ or "neglected," a "child in need of assistance" (CINA),²⁰⁵ or a "child in need of protection or services" (CHIPS).²⁰⁶ For example, Minnesota's statutory definition of such a child is:

Child in need of protection or services means a child who is in need of protection or services because the child:

- (1) is abandoned or without parent, guardian, or custodian;
- (2)(i) has been a victim of physical or sexual abuse . . . ;
- (3) is without necessary food, clothing, shelter, education, or other required care for the child's physical or mental health or morals because the child's parent, guardian, or custodian is unable or unwilling to provide that care;

...

- (13) is a runaway.²⁰⁷

Although unaccompanied immigrant minors would qualify for child welfare resources under state statutes, these minors usually do not receive such services.²⁰⁸ One reason is that juvenile courts administer child welfare through state and local governments²⁰⁹ and immigrant children in federal custody are segregated from these systems.²¹⁰ Another reason is that the federal government provides immigrant minors with limited opportunity to access juvenile courts.²¹¹ One provision of the INA permits a child to qualify as a "special immigrant"²¹² partly based on a juvenile court's assessment of the child's need for services.²¹³ A special

203. See MINN. STAT. § 260C.101(1) (stating that "[t]he juvenile court has original and exclusive jurisdiction in proceedings concerning any child who is alleged to be in need of protection or services").

204. See FLA. STAT. § 39.01(14) (2000).

205. See MD. CTS. & JUD. PROC. § 3-801(f) (2001).

206. See MINN. STAT. § 260C.007(6).

207. *Id.*

208. See *Holguín*, *supra* note 176, at 19 (observing that "[s]tate child welfare agencies have almost uniformly declined to play any meaningful role in protecting minors in INS custody [S]tate child welfare authorities are uncertain of their jurisdiction over minors whom the INS is actively moving to deport").

209. See generally FELD (2000), *supra* note 177.

210. Nugent and Schulman have observed that "[t]he immigration legal system . . . treats children as aliens first and foremost, subject to the framework of immigration law." Nugent & Schulman, *supra* note 111, at 1570. For a comparison of this approach to the Western European and Canadian systems, which employ the "best interests of the child" as a guiding principle, see *id.* n.7. For an enlightening comparison of policies towards unaccompanied immigrant and refugee minors among sixteen countries, see *Holguín*, *supra* note 176, app. A.

211. See 8 U.S.C. § 1101(a)(27)(J) (2003).

212. See *id.* This designation permits the minor to apply for and adjust her status as a "special immigrant." See *id.* § 1255.

213. See *id.* § 1101(a)(27)(J).

immigrant juvenile (SIJ) is a child who

has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State and who has been deemed eligible by that court for long-term foster care due to abuse, neglect, or abandonment.²¹⁴

Juvenile court jurisdiction to determine the custody status or placement of such a child is predicated on the Attorney General's specific consent.²¹⁵ Obtaining the Attorney General's consent may prove difficult.²¹⁶ An improved policy should provide immigrant children with easier access to juvenile courts and state child welfare services.

Unaccompanied immigrant minors also should be provided with counsel. In *In re Gault*,²¹⁷ the Supreme Court held that a juvenile is entitled to counsel in delinquency proceedings.²¹⁸ The Court's reasons for its holding are applicable to the situation of immigrant minors. First, the Court stated that a delinquency proceeding which subjects a child "to the loss of his liberty for years is comparable in seriousness to a felony prosecution."²¹⁹ The

214. *Id.* § 1101(a)(27)(J)(i). A juvenile must also meet two other requirements to qualify as a special immigrant. *Id.* The juvenile must be an immigrant present in the United States

(ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence; and

(iii) in whose case the Attorney General expressly consents to the dependency order serving as a precondition to the grant of special immigrant juvenile status[.]

Id.

215. *See id.* § 1101(a)(27)(J)(iii)(I) (stating that "no juvenile court has jurisdiction to determine custody status or placement of an alien in the actual or constructive custody of the Attorney General unless the Attorney General specifically consents to such jurisdiction"). If a juvenile court issues a dependency order for a minor in immigration custody before obtaining the Attorney General's consent to the court's jurisdiction, the order is facially invalid to secure SIJ status. Vikram K. Badrinath, *Challenging the INS on State Court Juvenile Matters*, IMMIGR. CURRENT AWARENESS NEWSL. (Nat'l Immigr. Project of the Nat'l Lawyers Guild), Sept. 16, 2002, at 3 (citing Memorandum from Thomas E. Cook, Acting Assistant Commissioner, to Regional Directors on Special Immigrant Juveniles (July 9, 1999)).

216. Badrinath, *supra* note 215, at 3. The District Director in the case's jurisdiction acts as the consenting official. *Id.* Amnesty asserts that "[m]any advocates have reported that the INS hindered or prevented many children seeking access to this form of relief by denying or delaying decisions regarding consent. . . . For example, . . . until October 2002 the INS in Florida had never given consent for a child to go to juvenile court." AMNESTY INT'L USA, *supra* note 2, at 15.

217. 387 U.S. 1 (1967).

218. *Id.* at 36.

219. *Id.*

gravity of this outcome is analogous to the prospect of deportation faced by a child in immigration proceedings.²²⁰ Second, the Court stated that "the juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it."²²¹

Unaccompanied immigrant juveniles need counsel for each of these reasons.²²² Immigrant children usually face complex proceedings alone, often in a language they do not understand.²²³ Counsel can guide these children and protect their rights throughout a foreign, protracted, and difficult immigration process.²²⁴ Immigrant minors with attorneys are more likely to attend their hearings²²⁵ and less likely to experience hearing delays.²²⁶ Counsel is especially critical for the preparation of defenses to removal proceedings, such as asylum.²²⁷ Children with valid asylum claims are more than four times as likely to be granted asylum by an Immigration Judge if they have counsel.²²⁸

220. See Nugent & Schulman, *supra* note 111, at 1569-70 ("The stakes of these proceedings are tremendous for children, literally life and death in some instances.").

221. *In re Gault*, 387 U.S. at 36.

222. See AMNESTY INT'L USA, *supra* note 2, at 62-64. Claire L. Workman argues that "the requirement of legal counsel satisfies financial, practical, and humanitarian concerns by ensuring due process of law for unaccompanied minor aliens." Workman, *supra* note 175, at 226.

223. AMNESTY INT'L USA, *supra* note 2, at 62; see Nugent & Schulman, *supra* note 111, at 1569 ("These proceedings are administrative and adversarial, pitting detained children with limited education and English language skills against trained INS attorneys.").

224. AMNESTY INT'L USA, *supra* note 2, at 62.

225. See OFFICE OF THE INSPECTOR GEN., *supra* note 15, ch. 4.

226. See AMNESTY INT'L USA, *supra* note 2, at 65 (stating that "[o]ne reason why immigration judges are willing to delay hearings is for efforts to be made for the child to secure legal representation"); HUM. RTS. WATCH (1998), *supra* note 19, pt. IV; OFFICE OF THE INSPECTOR GEN., *supra* note 15, ch. 4 (noting that "the limited availability of legal representation" contributes to the delay of EOIR hearings).

227. See HUM. RTS. WATCH (1997), *supra* note 19, pt. II (stating that without counsel, detained minors have "little chance of successfully asserting legitimate legal defenses to deportation"). For a discussion of remedies from removal that attorneys can pursue on the behalf of unaccompanied immigrant children, see Nugent & Schulman, *supra* note 111, at 1582-91. Such remedies include asylum, withholding of removal, protection under the United Nations Convention Against Torture, family-based immigration through adjustment of status, and other administrative remedies outside of immigration court. See *id.*

228. Nugent & Schulman, *supra* note 111, at 1569; see AMNESTY INT'L USA, *supra* note 2, at 61; OFFICE OF THE INSPECTOR GEN., *supra* note 15, ch. 4 (stating that "[p]ro bono attorneys said some juveniles who were removed might have made a case for relief, if they had been given time and had been able to find adequate legal representation").

In sum, as the Supreme Court recognized in *Schall v. Martin*,²²⁹ juveniles' right to counsel is an essential safeguard and a requisite of detention hearings.²³⁰

B. Legislative Proposal I: The Unaccompanied Alien Child Protection Act Incorporates Juvenile Justice Policies But Does Not Address Implementation

In May 2003, Senator Diane Feinstein of California introduced the Unaccompanied Alien Child Protection Act of 2003 (UACPA).²³¹ The bill incorporates some policies of the *Flores* Agreement, directly addresses concerns about the mistreatment of juveniles, and proposes important structural and substantive changes to the current system.²³² Many provisions of the bill are commendable. However, the bill's weaknesses are that it proposes discretionary policies, and does not provide mechanisms to ensure implementation. This can result in ad hoc policy making.²³³ For this reason, it is questionable whether the bill's reforms would effectively implement new policies.

1. The UACPA's Treatment Policy Lacks a Specific Standard

The bill has a general provision related to the treatment of juvenile detainees.²³⁴ It requires the ORR Director to promulgate regulations incorporating standards for the conditions of detention in juvenile placements.²³⁵ These standards should provide for: appropriate educational services; medical care; mental health care;²³⁶ access to telephones; access to legal services; access to interpreters; supervision by professionals trained in the care of children;²³⁷ recreational programs and activities; spiritual and

229. 467 U.S. 253 (1984).

230. See *id.* at 275 (discussing a juvenile's right to counsel while in preventative detention under the New York Family Court Act); *id.* at 279 (indicating that the right to counsel provides an essential safeguard for juveniles).

231. S. 1129, 108th Cong. (2003); 149 CONG. REC. S6981-01 (2003). Senator Feinstein had introduced a similar bill in 2001. See S. 121, 107th Cong. (2001).

232. See S. 1129, 108th Cong. (2003); 149 CONG. REC. S6981-01 (2003); see *supra* Parts I.B, D.

233. See *Holguín*, *supra* note 176, at 8.

234. See S. 1129 § 103(a)(4)(A), 108th Cong. (2003).

235. *Id.*

236. This includes the "treatment of trauma, physical and sexual violence, or abuse." *Id.* § 103(a)(4)(A)(iii).

237. This provision continues: "taking into account the special cultural, linguistic, and experiential needs of children in immigration proceedings." *Id.* § 103(a)(4)(A)(vii).

religious needs; and dietary needs.²³⁸ The bill further requires that every child receive notification of the standards both orally and in writing.²³⁹

The creation of codified standards addressing the specific needs of unaccompanied immigrant minors is necessary. Human rights groups have reported that juveniles in INS custody are often denied access to many services essential to their well-being.²⁴⁰ The bill's mandate that the ORR Director codify treatment standards is therefore crucial.

However, there are two weaknesses in the provision. First, the promulgation of the regulations is entirely within the discretion of the ORR Director and the Secretary of the DHS.²⁴¹ The bill only specifies the areas to be addressed;²⁴² it does not provide a minimum standard or a guiding principle for the standards' development. The second weakness of the provision is that it fails to specify a deadline for the promulgation of regulations.²⁴³ A deadline would expedite the issuance of standards and facilitate systematic redress. Many children will continue to suffer under deficient policies until official standards institute improvement.

The UACA also has a specific provision related to the treatment of juvenile detainees.²⁴⁴ The bill requires the ORR Director and the Secretary of the DHS to develop procedures prohibiting the "unreasonable use" of certain practices.²⁴⁵ These practices are: "shackling, handcuffing, or use of other restraints on children; solitary confinement; and pat or strip searches."²⁴⁶ The INS used all of these practices routinely and indiscriminately.²⁴⁷ Human rights groups describe them as cruel, inhuman, and degrading treatment or punishment.²⁴⁸

238. *Id.* § 103(a)(4)(A).

239. *Id.* § 103(a)(4)(B).

240. See AMNESTY INT'L USA, *supra* note 2, at 2; HUM. RTS. WATCH (1997), *supra* note 19, pt. IV; HUM. RTS. WATCH (1998), *supra* note 19, pt. IV; *supra* Part I.C.

241. See S. 1129 § 103(a)(4)(A), 108th Cong. (2003).

242. *See id.*

243. *See id.*

244. *See id.* § 103.

245. *See id.*

246. *Id.*

247. See AMNESTY INT'L USA, *supra* note 2, at 2, 32-37; HUM. RTS. WATCH (1997), *supra* note 19, pt. IV; HUM. RTS. WATCH (1998), *supra* note 19, pt. IV.

248. See AMNESTY INT'L USA, *supra* note 2, at 2, 29, 32-37; HUM. RTS. WATCH (1997), *supra* note 19, pt. IV; HUM. RTS. WATCH (1998), *supra* note 19, pt. IV; see also AMNESTY INT'L USA, *supra* note 2, at 32 (quoting Rule 67 of the UN Rules for the Protection of Juveniles Deprived of Their Liberty: "All disciplinary measures

The prohibition on the use of these practices on unaccompanied immigrant children is necessary. However, the bill's stipulation that "unreasonable use" be prohibited suggests that "reasonable use" be allowed. The definition of "unreasonable use," made by the ORR Director and the Secretary of the DHS,²⁴⁹ may be highly discretionary. For instance, if the decision to use such practices rests with the official administering them, their use will be subject to individual discretion. This is not an adequate safeguard for children who are vulnerable, dependent, and often do not understand the reasons for certain treatment.²⁵⁰ Furthermore, the bill fails to stipulate a deadline by which the prohibitive procedures should be developed.²⁵¹ A deadline is necessary to ensure the prompt curtailment of inappropriate and harmful practices. As with the promulgation of general regulations, the sooner protective standards are set, the sooner the conditions of juveniles are likely to ameliorate.

2. The UACPA's Release Policy is Promising But Discretionary

Two important provisions of the UACPA address the transfer and release of children.²⁵² First, the bill institutes a time frame for the transfer of children from U.S. immigration authorities to the ORR.²⁵³ The bill stipulates that unaccompanied immigrant children should be transferred from the CBP to the ORR no later than seventy-two hours after apprehension.²⁵⁴ This requirement addresses the current problem minors experience in prolonged immigration custody, by expediting their access to the ORR and its services.

Second, the UACPA incorporates the *Flores* Agreement's prompt release policy.²⁵⁵ The bill requires that an unaccompanied

constituting cruel, inhuman, or degrading treatment shall be strictly prohibited, including . . . closed or solitary confinement or any other punishment that may compromise the physical or mental health of the juvenile concerned").

249. See S. 1129 § 103(b), 108th Cong. (2003).

250. See AMNESTY INT'L USA, *supra* note 2, at 29, 32-37; HUM. RTS. WATCH (1998), *supra* note 19, pt. IV. The use of these practices as disciplinary measures was often a result of misunderstandings by immigrant children due to language barriers. HUM. RTS. WATCH (1998), *supra* note 19, pt. IV.

251. See S. 1129 § 103(b), 108th Cong. (2003).

252. See *id.* §§ 101(b)(3)(A), 102(a)(1).

253. See *id.* § 101(b)(3)(A)(i).

254. *Id.* Exceptions to this provision are children who have committed crimes and children who threaten national security. See also § 101(b)(1)(B).

255. *Id.* § 102(a)(1); see Stipulated Settlement Agreement, *supra* note 22, pt. VI, para. 14; *supra* Part I.B.2.

child in the ORR's custody "shall be promptly placed" with one of six listed parties, subject to the discretion of the ORR Director.²⁵⁶ The parties are those established by the *Flores* Agreement.²⁵⁷ While the formal adoption of the Agreement's release policy is positive, the bill leaves the policy's implementation to the discretion of the ORR Director. Discretionary placement of unaccompanied children will lead to inconsistent and arbitrary decisions. In light of the INS's restrictive interpretation of the same release policy,²⁵⁸ the bill should specify the process of placement. In addition, the bill should define "promptly" within a specific time frame to ensure that minors are placed expeditiously.

3. The UACPA's Detention Policy is an Improvement But Still Discretionary

The UACPA institutes a necessary prohibition on the commingling of unaccompanied immigrant children with offenders.²⁵⁹ It flatly prohibits the detention of non-offender immigrant minors in adult detention facilities or in facilities housing delinquent juveniles.²⁶⁰ This provision would alleviate the risks associated with commingling, including physical abuse.²⁶¹ In addition, the prohibition comports with the fact that unaccompanied immigrant minors are held for purely administrative reasons, and therefore do not belong in facilities with offenders. Although the *Flores* Agreement prohibits commingling, the INS had consistently housed minors in secure detention with offenders.²⁶²

The bill also maintains the "least restrictive setting" of the Agreement's detention policy.²⁶³ However, it does not provide for

256. S. 1129 § 102(a)(1), 108th Cong. (2003). Placement is subject to the Director's discretion under his or her duty to protect children from smugglers and traffickers, and to detain children who have exhibited violent or criminal behavior. *Id.*

257. See *id.*; Stipulated Settlement Agreement, *supra* note 22, pt. VI, para. 14; *supra* notes 66-70 and accompanying text.

258. See *supra* Part I.C.2.

259. S. 1129 § 103(a)(1), 108th Cong. (2003).

260. *Id.* An exception is that a "child who has exhibited a violent or criminal behavior that endangers others may be detained in conditions appropriate to the behavior in a facility appropriate for delinquent children." *Id.* § 103(a)(2).

261. See AMNESTY INT'L USA, *supra* note 2, at 24-26; OFFICE OF THE INSPECTOR GEN., *supra* note 15, ch. 2 (discussing the risks associated with commingling of non-delinquent INS juveniles with delinquent offenders).

262. See Stipulated Settlement Agreement, *supra* note 22, pt. V, para. 12; AMNESTY INT'L USA, *supra* note 2, at 23-24.

263. See S. 1129 § 103(c), 108th Cong. (2003) (stipulating that "[n]othing in [the section on appropriate conditions for detention] shall be construed to supercede

judicial review of placement decisions.²⁶⁴ The *Flores* Agreement grants children this right as a check upon a discretionary process.²⁶⁵ The lack of judicial review under the UACPA leaves minors without a recourse for challenging detrimental placements.

4. The UACPA Facilitates the Granting of SIJ Status to Children

The UACPA amends the "special immigrant juvenile" provision of the INA to increase its application.²⁶⁶ First, the bill would allow a juvenile court's dependency declaration to be binding on the Secretary of the DHS.²⁶⁷ Second, the bill would delete the requirement of the Attorney General's specific consent for the exercise of juvenile court jurisdiction.²⁶⁸ Third, the bill would allow the ORR to certify that a minor's application for SIJ status is legitimate.²⁶⁹

The bill's amendments are promising improvements to the SIJ process. In particular, the elimination of the Attorney General's specific consent provision would augment the juvenile court's exercise of jurisdiction over unaccompanied immigrant minors.²⁷⁰ This would connect more children to essential child welfare resources.

5. The UACPA Offers Children the Important Safeguard of Counsel

The UACPA grants unaccompanied immigrant minors an essential safeguard by entitling them to counsel.²⁷¹ Under the bill,

procedures favoring release of children . . . in the least secure setting possible, as defined in the . . . Agreement under *Flores v. Reno*"; see also Stipulated Settlement Agreement, *supra* note 22, pt. IV, para. 11 (stating that each detained minor shall be placed "in the least restrictive setting appropriate to the minor's age and special needs").

264. See S. 1129, 108th Cong. (2003).

265. See Stipulated Settlement Agreement, *supra* note 22, pt. VII, para. 24.B-D.

266. See S. 1129 § 301, 108th Cong. (2003); *supra* notes 211-216 and accompanying text.

267. See S. 1129 § 301, 108th Cong. (2003).

268. See *id.*

269. See *id.*

270. See *supra* notes 211-216 and accompanying text.

271. See S. 1129 § 202(a), 108th Cong. (2003). The bill also establishes a guardian ad litem program for unaccompanied children. See *id.* § 201. A discussion of a guardian ad litem program is beyond the scope of this Article; however, it is worth noting that there are differing views on whether guardians ad litem are appropriate for immigrant juveniles. For example, Holguin makes the following observation:

Appointing counsel, but not guardians ad litem, for unaccompanied minors

the ORR Director must ensure that all unaccompanied children will have "competent counsel to represent them" in immigration proceedings and matters.²⁷² This applies to children in the custody of the ORR or the CBP.²⁷³ The bill directs pro bono representation to be used "to the maximum extent practicable,"²⁷⁴ and provides for government-funded counsel.²⁷⁵ The guarantee of competent counsel is critical and long overdue.²⁷⁶

However, the UACPA's mandatory counsel provision raises an essential concern about the availability of attorneys to meet the demand. Pro bono services for unaccompanied immigrant children are scarce and overused, to the point that they are often ineffective.²⁷⁷ Sufficient government funds would have to be allocated from a greater source than provided for in the bill.²⁷⁸ From an estimated 500 children in immigration detention on any given day,²⁷⁹ attorneys and advocates estimate only a small fraction of them are represented.²⁸⁰ In addition, government-

raises difficult collateral questions: Who instructs the lawyer as to what actions to take on behalf of the minor? If the lawyer has unfettered discretion in this regard, or discretion bounded only by the rules of professional responsibility, what benefit does appointed counsel offer in cases where the appropriate course of action is a question of child welfare, and not law?

Holguin, *supra* note 176, at 13 n.5. In contrast, Claire L. Workman argues that "while the proposed appointment of a guardian ad litem may be appropriate for some children, it may be unnecessary and even invasive to require such a guardian for all children." Workman, *supra* note 175, at 226.

272. S. 1129 § 202(a)(1), 108th Cong. (2003).

273. *Id.*

274. *Id.* § 202(a)(2).

275. *Id.* § 202(a)(4). The bill states that the Director "shall enter into contracts with or make grants to non-profit agencies with relevant expertise in the delivery of immigration related legal services to children . . . to carry out the responsibilities of this Act." *Id.*

276. Advocates for immigrant children's rights have been calling for the guarantee of counsel for years. See AMNESTY INT'L USA, *supra* note 2, at 64; HUM. RTS. WATCH (1998), *supra* note 19, pt. I; HUM. RTS. WATCH (1997), *supra* note 19, pt. I.

277. See AMNESTY INT'L USA, *supra* note 2, at 62 (stating that "the voluntary agency attorneys report that only in 'exceptional circumstances' are they able to represent a juvenile or find a private attorney to take a case on a pro bono basis. Often the services to children in detention are limited to group presentations of an explanation of the hearings process and their rights."); OFFICE OF THE INSPECTOR GEN., *supra* note 15, ch. 4 (stating that "[v]ery few of the pro bono attorneys actually represented the juveniles in the hearings process").

278. The bill provides that government-funded counsel may be compensated from Health and Human Services discretionary funds. S. 1129 § 202(a)(3)(C), 108th Cong. (2003).

279. AMNESTY INT'L USA, *supra* note 2, at 17.

280. *Id.* at 61. Amnesty quotes attorney Andrew Morton's testimony before the U.S. Senate, stating: "Of these nearly 5,000 unaccompanied juveniles apprehended

funded attorneys will need to have appropriate training in immigration law to be effective. It is unclear how many qualified public defenders are available.

C. Legislative Proposal II: A Juvenile Justice Policy Should Incorporate Specific Principles, Be Implemented by an Empowered ORR, and Be Subject to Oversight

This legislative proposal addresses the need for specific policy standards, effective means of implementation, and useful mechanisms of enforcement. It aims to complement the UACPA's strengths and ameliorate its weaknesses.

1. A Stronger Policy Should Incorporate Specific Juvenile Justice Principles

Legislation that improves the current policy toward unaccompanied immigrant children should incorporate several additional juvenile justice principles. First, legislation should define the Agreement's treatment policy more precisely. In addition to requiring that the ORR treat minors "with dignity, respect and special concern for their particular vulnerability,"²⁸¹ the revised treatment policy should stipulate that the ORR shall not subject any nonoffenders in its custody to any treatment administered on criminal offenders. This includes the use of restraints, excessive discipline, pat or strip searches, and solitary confinement.

Second, Congress should amend the Agreement's release and detention policies. A new policy should explicitly adopt the JJDPA's mandate that non-naturalized immigrant juveniles "shall not be placed in secure detention facilities or secure correctional facilities."²⁸² The Agreement's release provision should continue to require the ORR to place children in one of the stipulated placement options²⁸³ within three to five days.²⁸⁴ Under the policy,

annually by the INS . . . as many as 80% appear in an immigration court without the benefit of a lawyer, guardian ad litem, or assistance or adult assistance of any kind." *Id.* (citing *Hearings*, *supra* note 112 (testimony of Andrew Morton, Attorney, Latham & Watkins)). Amnesty also notes that due to the lack of comprehensive data collected on the number of children with counsel, it is hard to know exactly how many juveniles are without legal representation. *Id.*

281. Stipulated Settlement Agreement, *supra* note 22, pt. IV, para. 11.

282. 42 U.S.C. § 5633(a)(11)(B) (2003); see *supra* notes 188-201 and accompanying text.

283. See Stipulated Settlement Agreement, *supra* note 22, pt. VI, para. 14; *supra* notes 66-70 and accompanying text.

284. See Stipulated Settlement Agreement, *supra* note 22, pt. VI, para. 15; *supra*

minors should remain entitled to judicial review of placement decisions.²⁸⁵

Third, Congress should include a provision designed to facilitate unaccompanied immigrant children's access to juvenile courts and state child welfare resources.²⁸⁶ Congress should streamline the process of obtaining SIJ status by allowing a qualified child welfare official to grant consent, or by granting all unaccompanied immigrant juveniles SIJ status.²⁸⁷ Another way to bring immigrant minors into juvenile court is to simply grant the juvenile court jurisdiction for the purpose of administering child welfare services.

2. A Stronger Policy Should Be Implemented by an Empowered ORR

Congress should include in its legislation a commitment to appropriate sufficient funding to the ORR.²⁸⁸ Initial funding should enable the ORR to comply with federal policy, and additional funding should enable it to maintain compliance and extend the benefits of its resources to unaccompanied immigrant children.²⁸⁹ In addition, Congress should appropriate separate funding for counsel appointed for immigrant children at the government's expense.²⁹⁰ This includes money for training public defenders in immigration law.

3. Stronger Policy Should Be Subject to Oversight

To ensure a quick and effective implementation of this new policy, Congress should create a task force to monitor the policy's administration. This body could be composed of federal and state legislators, private immigration attorneys, state child welfare officials, refugee social workers, juvenile judges, professors, and children's advocates. The duties of the task force would include: monitoring the ORR's compliance with federal policies; reporting on deficiencies of policy implementation; reporting on the ORR's need for resources; and proposing solutions to problems. The task force should issue a comprehensive report on the status of policy

note 72 and accompanying text.

285. See *supra* notes 87-91, 265 and accompanying text.

286. See *supra* notes 202-216 and accompanying text.

287. Telephone Interview with Holguín, *supra* note 36. Holguín proposes the granting of SIJ status to all unaccompanied immigrant minors. *Id.*

288. See *supra* note 168 and accompanying text.

289. See *supra* notes 163-167 and accompanying text.

290. See *supra* notes 277-280 and accompanying text.

implementation annually, and additional reports as it sees fit.

Conclusion

Unaccompanied immigrant children detained by the United States are victims of a grievous national policy. The INS's failure to implement the *Flores* Agreement has stalled reform and perpetuated mistreatment. Although the transfer of immigrant children's care to the ORR presents an opportunity for change, it will not, by itself, effectuate a new policy. This task belongs to Congress and involves three critical steps. First, Congress must pass legislation fully incorporating juvenile justice principles for the treatment, detention, and release of, as well as the administration of child welfare resources to, unaccompanied immigrant children. Second, Congress must appropriately fund the ORR. Third, Congress must create a task force to ensure this policy's effective implementation. Unaccompanied immigrant children have too long been denied the full benefits of juvenile justice which they deeply deserve.

