Marquette Law Review

Volume 95
Issue 4 *Summer 2012*

Article 16

Codifying the *Flores* Settlement Agreement: Seeking to Protect Immigrant Children in U.S. Custody

Rebeca M. López

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr

Part of the Law Commons

Repository Citation
Rebeca M. López, *Codifying the Flores Settlement Agreement: Seeking to Protect Immigrant Children in U.S. Custody*, 95 Marq. L. Rev. 1635 (2012).
Available at: http://scholarship.law.marquette.edu/mulr/vol95/iss4/16

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

CODIFYING THE *FLORES* SETTLEMENT AGREEMENT: SEEKING TO PROTECT IMMIGRANT CHILDREN IN U.S. CUSTODY

The increase in enforcement actions undertaken by the federal government over the last thirty years has resulted in a broad net of enforcement that has captured vulnerable populations not previously subjected to detention, such as non-criminal immigrant children and their families. The detained children have been subjected to inhumane conditions and abuse by federal authorities and contractors. Unfortunately, few procedural safeguards exist to protect these children. For this reason, the United States government's treatment of non-criminal immigrant children who are in detention and removal proceedings is of paramount concern.

Since 1997, the treatment of children in federal custody has been governed by the Flores v. Reno *Settlement Agreement (FSA). As the INS often did not comply with the requirements, Congress twice passed legislation to reform the immigration system as it applied to unaccompanied children. Later, the Department of Homeland Security began detaining children and their families in violation of the standards set forth in the FSA. Another settlement was reached to address the treatment of those children.*

This Comment reviews the history of the detention of unaccompanied minors, the legislation passed by Congress that implemented a system to protect unaccompanied minors in immigration custody, and finally, the recent history of detaining accompanied children and their families. Arguably, the current system does not ensure adequate protection for all children. Moreover, the DHS continues to have broad discretion to again open family detention facilities in the future. Therefore, congressional action is needed to ensure that all children are protected and have access to necessary services. Congress should pass legislation that codifies the settlement agreements into federal law, thereby establishing a clear national policy for the treatment of immigrant children in federal immigration custody.

I. INTRODUCTION 1637
II. THE HISTORY AND EVOLUTION OF THE UNITED STATES STRUCTURE FOR DETAINING UNACCOMPANIED CHILDREN .1646
A. The Flores *Settlement Agreement*.....1648
B. Homeland Security Act of 2002 1651
C. The Trafficking Victims Protection Reauthorization Act of 2008 1653
III. "KEEPING FAMILIES TOGETHER": THE RECENT HISTORY OF DETAINING IMMIGRANT FAMILIES IN MEDIUM-SECURE AND SECURE FACILITIES 1655
A. Flores *in Action: Use of* Flores *to Reach the Don T. Hutto Settlement Agreement* 1658
B. Post-Hutto DHS Reforms 1661
IV. DESPITE PROGRESS, ABUSES PERSIST: THE SHORTCOMINGS OF RELYING ON SETTLEMENT AGREEMENTS AND CONGRESSIONAL DIRECTIVES, PRESENT DAY CLAIMS OF FSA VIOLATIONS, AND THE FUTURE OF FAMILY DETENTION FACILITIES 1662
A. The FSA Lacks Enforceable Standards and Does Not Create "Rights" for Immigrant Children 1662
B. Congressional Recognition of Continuing Problems with the Detention of Non-Criminal Immigrant Children 1664
C. The DHS's Attempts to Reform Immigrant Detention Fall Short 1665
D. The Future of Family Detention.....1666
V. THE NEED FOR CONGRESSIONAL ACTION: CONGRESS SHOULD ACT TO INCLUDE FSA AND HUTTO SETTLEMENT STANDARDS IN LEGISLATION TO CREATE A UNIFORM SYSTEM FOR SECURING IMMIGRANT CHILDREN IN FEDERAL CUSTODY.....1667
A. Codify the Standards Set Forth in the FSA.....1670
B. Incorporate the Best Interests of the Child Standard 1671
C. Detention of Children as a Last Resort 1672
D. Create an Oversight and Enforcement Body 1674
E. Challenges and Barriers to Implementation 1676
VI. CONCLUSION 1676

> *"There is no trust more sacred than the one the world holds with children. There is no duty more important than ensuring that their rights are respected, that their welfare is protected, that their lives are free from fear and want and that they can grow up in peace."*
> —Kofi A. Annan[1]

I. INTRODUCTION

In the last ten years, the number of deportations has nearly doubled.[2] In 2010, Immigration and Customs Enforcement (ICE) announced that it reached a new deportation record, deporting nearly 400,000 undocumented immigrants.[3] The increase in enforcement efforts during the past decade has translated into "considerable growth" in ICE's detention of undocumented immigrants.[4] The federal detention system is ill equipped to address the additional needs associated with the

1. Kofi A. Annan, *Foreword* to U.N. CHILDREN'S FUND [UNICEF], THE STATE OF THE WORLD'S CHILDREN 2000, at 4 (2000). Children cannot wait. "To [a child] we cannot answer 'Tomorrow.' His name is 'Today.'" FLOR PIÑEIRO DE RIVERA, UN SIGLO DE LITERATURA INFANTIL PUERTORRIQUENA/ A CENTURY OF PUERTO RICAN CHILDREN'S LITERATURE 3 (1987) (quoting Gabriela Mistral).

2. Kyung Jin Lee, *U.S. Deportations Double over 10 Years*, MEDILL REPORTS (Feb. 23, 2010), http://news.medill.northwestern.edu/chicago/news.aspx?id=157904&print=1.

3. Elise Foley, *Obama Administration Sets Deportation Record*, HUFFINGTON POST (Oct. 11, 2011), http://www.huffingtonpost.com/2011/10/18/deportations-customs-remove-record-number_n_1018002.html. Interestingly, commentators originally speculated that the 2011 Republican-controlled House of Representatives would "shelve[] [immigration reform] for streamlined [immigration] enforcement" measures, which would translate into additional increases in the detention and removal of undocumented immigrants. *See* Gary Martin, *Republicans to Shelve Immigration Reform for Enforcement*, SAN ANTONIO EXPRESS-NEWS, (Nov. 3, 2010), http://www.mysanantonio.com/news/politics/republicans_to_shelve_immigration_reform_for_enforcement_106643788.html. However, Congress has not yet addressed this issue. Instead the Obama Administration has led the enforcement-focused direction of ICE over the last four years.

4. *ICE Announces Major Reforms to Immigration Detention System*, IMMIGR. LITIG. BULL. (U.S. Dep't of Justice, Wash., D.C.), June–July 2009, at 7. An undocumented immigrant is an unauthorized alien:

> The three main components of the unauthorized resident alien population are (1) aliens who overstay their nonimmigrant visas, (2) aliens who enter the country surreptitiously without inspection, and (3) aliens who are admitted on the basis of fraudulent documents. In all three instances, the aliens are in violation of the Immigration and Nationality Act (INA) and subject to removal.

RUTH ELLEN WASEM, UNAUTHORIZED ALIENS RESIDING IN THE UNITED STATES: ESTIMATES SINCE 1986, at 1 (2011) (footnote omitted).

increased detention of individuals,[5] and as a result, the United States has been forced to rely upon local penal facilities and private contractors to detain undocumented immigrants.[6]

The increase in enforcement actions undertaken by the federal government has resulted in a broad net of enforcement that has captured vulnerable populations not previously subjected to detention.[7] Increasingly, undocumented children have immigrated to the United States.[8] Increases in immigration enforcement over the last thirty years have swept up non-criminal immigrant children and their families, and those detainees have been subjected to inhumane conditions and abuse.[9] Unfortunately, few procedural safeguards exist to protect these children.[10] For this reason, the United States government's treatment of vulnerable populations—such as non-criminal immigrant children[11]—in detention and removal proceedings is of paramount concern.

---

5. *ICE Announces Major Reforms to Immigration Detention System*, *supra* note 4, at 7.

6. ICE has increasingly depended upon private contractors to detain undocumented immigrants because of both the increase in the number of immigrant detainees and the lack of ICE facilities to hold them. In 2009, on average, forty-nine percent of adult undocumented immigrant detainees were held in privately run detention centers. *The Influence of the Private Prison Industry in Immigration Detention*, DETENTION WATCH NETWORK http://www.detentionwatchnetwork.org/privateprisons (last visited May 10, 2012). The U.S. Census Bureau refers to undocumented immigrants as unauthorized immigrants. Unauthorized immigrants are defined as "foreign-born persons who entered the United States without inspection or who were admitted temporarily and stayed past the date they were required to leave. Unauthorized aliens who have applied for but have not yet received approval to lawfully remain in the United States are considered to be unauthorized." U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2010, at 47 (129th ed. 2009).

7. In fact, it has been reported that ICE deported more non-criminal aliens than criminal aliens last year. Andrew Becker, *ICE Deporting More Immigrants Than Ever . . . Or Are They?*, HUFFINGTON POST (Aug. 27, 2010), http://www.huffingtonpost.com/andrew-becker/ice-deporting-more-immigr_b_696522.html ("The latest figures—as of Aug. 23—show ICE has removed a total of 343,883 people, of which 167,742 are convicted criminals . . . . That means the agency has deported more noncriminals—176,141, to be precise—than criminals so far this year."). Originally, vulnerable populations—such as families—were not detained. Rather, they were caught and released with a notice to appear for their hearing. As will be discussed, the catch and release policy was terminated due to a lack of compliance and for security reasons. *See infra* Part III.

8. *See infra* Parts II–III.

9. *See, e.g.*, AMNESTY INT'L, UNITED STATES OF AMERICA: HUMAN RIGHTS CONCERNS IN BORDER REGION WITH MEXICO (INCLUDING ERRATAM) 29 (1998), *available at* http://www.amnesty.org/en/library/asset/AMR51/003/1998/en/b0c4df92-e821-11dd-9deb-2b812946e43c/amr510031998en.html.

10. *See infra* Parts II–III.

11. The Immigration and Nationality Act defines "child" to be "an unmarried person

Undocumented presence in the United States is not a criminal offense, it is a civil infraction.[12] Nonetheless, the immigration system in the United States is increasingly following a criminal model, as opposed to a civil adjudication model. Underlying the issue of the detention of non-criminal immigrant children is a tension between the civil classification of immigration infractions and the criminal enforcement model used to address immigration violators. As Stephen H. Legomsky notes, "[I]mmigration law has been absorbing the theories, methods, perceptions, and priorities of the criminal enforcement model while rejecting the criminal adjudication model in favor of a civil regulatory regime."[13] What this means is that, increasingly, the United States' immigration laws have "imported" the criminal justice model as a means of regulating immigration without implementing any of the procedural safeguards, such as the right to counsel, into the process.[14]

Moreover, ICE has increased the detention of vulnerable populations, such as asylum seekers and children, as a preventative measure, despite countervailing international norms and treaty obligations stating that non-criminal immigrants should be treated more humanely than criminal immigrants.[15] This criminal model is also evident in the powers granted to the administrative agencies responsible for overseeing and enforcing United States immigration laws. The Department of Homeland Security (DHS) has the authority to detain

under twenty-one years of age." 8 U.S.C. § 1101(b)(1) (2006). This Comment addresses the detention of *non-criminal* immigrant children and does not attempt to address the detention of criminal immigrant children.

12. DORA SCHRIRO, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION AND CUSTOMS ENFORCEMENT, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 4 n.2 (2009), *available at* http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf. Schriro explains, "Immigration proceedings are civil proceedings and immigration detention is not punishment." *Id.* (citing Zadvydas v. Davis, 533 U.S. 678, 690 (2001)).

13. Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 472 (2007) (emphasis omitted).

14. *See id.* at 471–98 (discussing the incorporation of the criminal law model and process into the immigration enforcement system and the lack of procedural safeguards). Professor Legomsky argues that the "stringent procedural safeguards" are necessary because the consequences of "criminal convictions are potentially so severe." *Id.* at 473. Deportation is likewise a severe consequence and, therefore, "severing the enforcement norms from the corresponding adjudication norms is problematic." *Id.*

15. *Id.* at 493–94. *See generally* Kimberly R. Hamilton, *Immigrant Detention Centers in the United States and International Human Rights Law*, 21 BERKELEY LA RAZA L.J. 93 (2011) (discussing human rights abuses in immigration detention).

and to deport immigrants by holding many of them in penal-like institutions.[16]

Unaccompanied immigrant children[17] and undocumented children who immigrate with their families[18] and who are placed in immigration custody or detention[19] are particularly vulnerable, and comprise a secluded population within the larger detention framework.[20] Advocates have written extensively about the need for federal reforms in the detention and removal of unaccompanied and accompanied children.[21] And several advocates, including Professor Barbara Hines, have proposed eliminating the detention of immigrant children

16. 8 U.S.C. § 1226 (2006).

17. An unaccompanied alien child (hereinafter "unaccompanied child" or "unaccompanied children") is a child who is "less than 18 years old who arrive[s] in the United States without a parent or legal guardian and [is] in the temporary custody of federal authorities because of their immigration status." U.S. DEP'T OF HOMELAND SEC., OFFICE OF THE INSPECTOR GENERAL, CBP'S HANDLING OF UNACCOMPANIED ALIEN CHILDREN 1 (2010), *available at* http://www.oig.dhs.gov/assets/Mgmt/OIG_10-117_Sep10.pdf.

18. For the purposes of this Comment, an accompanied alien child (hereinafter "accompanied children" or "accompanied child") is an immigrant child under the age of 18 who entered the country with a parent or relative.

19. Immigration Detention is defined as follows:

> the authority ICE has to detain aliens who may be subject to removal for violations of administrative immigration law. As a matter of law, Immigration Detention is unlike Criminal Incarceration.
>
> [Moreover,] Immigration Detention and Criminal Incarceration detainees tend to be seen by the public as comparable, and both confined populations are typically managed in similar ways. Each group is ordinarily detained in secure facilities with hardened perimeters in remote locations at considerable distances from counsel and/or their communities. With only a few exceptions, the facilities that ICE uses to detain aliens were originally built, and currently operate, as jails and prisons to confine pre-trial and sentenced felons. Their design, construction, staffing plans, and population management strategies are based largely upon the principles of command and control. Likewise, ICE adopted standards that are based upon corrections law and promulgated by correctional organizations to guide the operation of jails and prisons. Establishing standards for Immigration Detention is our challenge and our opportunity.

SCHRIRO, *supra* note 12, at 4.

20. Carla L. Reyes, *Gender, Law, and Detention Policy: Unexpected Effects on the Most Vulnerable Immigrants*, 25 WIS. J.L. GENDER & SOC'Y 301, 304, 315–16 (2010).

21. *See, e.g.*, Danielle Hawkes, *Locking Up Children: Lessons from the T. Don Hutto Family Detention Center*, 11 J.L. & FAM. STUD. 171, 172 (2008); *see also* Alejandra Lopez, Seeking 'Alternatives to Detention': Unaccompanied Immigrant Children in the U.S. Immigration System 2 (May 1, 2010) (unpublished thesis, Pace Univ., Pforzheimer Honors College), *available at* http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1104&context=honorscollege_theses.

completely to reflect a broader policy that non-criminal children should not be detained.[22] Arguably, such advocates represent the view that the enforcement of immigration laws on non-criminal immigrant children should follow a social worker approach, providing oversight of the larger enforcement framework and specific protections for the children.[23]

---

22. *See Family Detention: Immigration Detention Policies Are Excellent First Step*, WOMEN'S REFUGEE COMMISSION, http://womensrefugeecommission.org/programs/detention/806-the-detention-of-immigrant-families (last visited Apr. 11, 2012) (advocating that ICE should "[d]iscontinue the detention of families in penal institutions"). As posed by Professor Hines, University of Texas School of Law Immigration Clinic, "[S]hould children be detained? Should they be detained but in better conditions? And that is the fundamental question. And my answer is no." THE LEAST OF THESE: FAMILY DETENTION IN AMERICA, A DOCUMENTARY FILM BY CLARK LYDA AND JESSE LYDA (IndiePix Films 2009) [hereinafter THE LEAST OF THESE]. This debate underscores the increase in the detention of immigrants, as well as the lack of protections afforded to non-criminal immigrants in U.S. custody. However, the debate over the detention of non-criminal immigrant children is not confined to the United States. Over the last several years, campaigns have been raised against the detention of immigrant children and asylum seeking children in other countries. *See, e.g.*, THE INT'L DETENTION COAL., CAPTURED CHILDHOOD: INTRODUCING A NEW MODEL TO ENSURE THE RIGHTS AND LIBERTY OF REFUGEES, ASYLUM SEEKERS AND IRREGULAR MIGRANT CHILDREN AFFECTED BY IMMIGRATION DETENTION 19 (2012), *available at* http://idcoalition.org/wp-content/uploads/2012/03/Captured_Childhood-report.pdf; *About Us*, INT'L DETENTION COAL., http://idcoalition.org/aboutus/ (last visited May 30, 2012). There has also been a very public debate over the issue of the detention of immigrant children in the United Kingdom and in Australia. *See, e.g.*, HUMAN RIGHTS & EQUAL OPPORTUNITY COMM'N, A LAST RESORT? NATIONAL INQUIRY INTO CHILDREN IN IMMIGRATION DETENTION 856–57 (2004), *available at* http://www.hreoc.gov.au/human_rights/children_detention_report/report/PDF/alr_complete.pdf (advocating for the release of children in Australian detention and that detention of children should be a measure of last resort as a matter of Australian law) [hereinafter AHRC, A LAST RESORT]; Amelia Gentleman, *Child Detention: Has the Government Broken Its Promise to End It?*, THE GUARDIAN (Oct. 17, 2011), http://www.guardian.co.uk/uk/2011/oct/17/child-detention-government-broken-promise (discussing the United Kingdom's promise to end the detention of asylum seeking children while opening a new residential-like center for detainees); Tom Whitehead, *Children Should Not Be Held in Immigration Centres, Says Watchdog*, THE TELEGRAPH (Feb. 17, 2010), http://www.telegraph.co.uk/news/uknews/immigration/7250981/Children-should-not-be-held-in-immigration-centres-says-watchdog.html.

23. CHAD C. HADDAL, UNACCOMPANIED ALIEN CHILDREN: POLICIES AND ISSUES, at Summary (2009) ("The debate over [unaccompanied children] policy has polarized in recent years between two camps: child welfare advocates arguing that the [unaccompanied children] are largely akin to refugees by being victims of abuse and economic circumstances, and immigration security advocates charging that unauthorized immigration is associated with increased community violence and illicit activities."). The social worker model is exemplified by advocates who successfully championed the William Wilberforce Trafficking Victim Protection Act (TVPRA) of 2008, as well as the Australian Human Rights Commission, which advocated for the appointment of independent guardians or advocates in order to ensure the children received support and guidance during the immigration process. *See, e.g.*,

Since 1997, the treatment of unaccompanied children and accompanied children in federal custody[24] has been governed by the *Flores v. Reno* Settlement Agreement (FSA).[25] The FSA established standards for the detention of immigrant children, and detailed the responsibilities of the federal agency responsible for the detention of immigrant children—the Immigration and Naturalization Service (INS).[26] Unfortunately, the INS often did not comply with the requirements and the agency was routinely criticized for violating the FSA.[27]

Finally, after more than a decade, Congress twice passed legislation to reform the immigration system for detaining unaccompanied children.[28] Following these two reforms, the DHS was required to place the unaccompanied children in the care of the Office of Refugee and Resettlement (ORR).[29] The legislation also implemented tracking procedures to ensure that the federal agencies would utilize alternatives to detention for unaccompanied children in federal custody, and to ensure those children would no longer be subjected to prolonged periods of detention.[30]

AHRC, A LAST RESORT, *supra* note 22, at 857 ("An independent guardian should be appointed for unaccompanied children and they should receive appropriate support."); Matthew Mesa, *KIND Advocates for TVPRA*, KIDS IN NEED OF DEFENSE (June 3, 2009), http://www.supportkind.org/blog/about-us/index.php?option=com_content&view=article&id=39-:kind-advocates-tvpra&catid=13:blog&Itemid=107 (last visited Apr. 11, 2012) ("KIND is advocating . . . for child advocates to protect vulnerable children's best interests."). These appointed advocates can arguably be likened to social workers as it is their responsibility to advocate for the best interests of the child.

24. "[C]ustody refers 'to actual physical restraint or confinement within a given space.'" Sarah Byrd, *Alternatives to Detention and Immigration Judges' Bond Jurisdiction: Considering* Matter of Aguilar-Aquino *and* Matter of Garcia-Garcia, IMMIGR. L. ADVISER, Apr. 2010, at 1, 3, *available at* http://www.justice.gov/eoir/vll/ILA-Newsleter/ILA%202010/vol4no4.pdf (quoting *Matter of Aguilar-Aquino*, 24 I&N Dec. 747, 752 (BIA 2009)).

25. *See* HADDAL, *supra* note 23, at 2.

26. Stipulated Settlement Agreement at 3, 7–18, 20, Flores v. Reno, No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997), *available at* http://www.aclu.org/files/pdfs/immigrants/flores_v_meese_agreement.pdf [hereinafter *Flores Settlement Agreement*].

27. *See, e.g.*, Wendy Young & Megan McKenna, *The Measure of a Society: The Treatment of Unaccompanied Refugee and Immigrant Children in the United States*, 45 HARV. C.R.-C.L. L. REV. 247, 250–51 (2010).

28. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008).

29. 6 U.S.C. § 279 (2006).

30. *Id.*

Within the same time period that the system for unaccompanied children was being reformed, the DHS began detaining undocumented immigrant children with their families[31] in a secure facility,[32] the Don Hutto Family Detention Center (Hutto). According to reports, the detention center did not meet standards and the children at the facility were treated like prisoners; as a result, child advocates brought a class-action lawsuit against the DHS.[33] The parties reached a settlement agreement, and eventually the facility was converted to a women's only detention facility.[34]

Since reassigning Hutto, the DHS has not opened any new facilities to detain families, and Congress has directed the DHS to detain families in "non-penal, home-like" facilities and appropriated funds for an "Alternatives to Detention program" (ATD).[35] While this is welcome news to advocates for undocumented children, no federal legislation yet exists that would prevent the DHS from opening a new facility in the future, nor does any legislation exist that would govern the treatment of children who could be held within those facilities. Various human rights organizations and scholars have expressed concern that, without legal rights afforded to the undocumented minors in custody and without greater oversight and transparency, those children could be at risk again in the future.[36]

31. Hawkes, *supra* note 21, at 173.

32. Secure facilities are "state or county licensed juvenile detention facilities or [DHS]-contract facilities that have separate accommodations for juveniles." U.S. DEP'T OF JUSTICE, UNACCOMPANIED JUVENILES IN INS CUSTODY (2001) [hereinafter UNACCOMPANIED JUVENILES], *available at* http://www.justice.gov/oig/reports/INS/e0109/chapter1.htm.

33. Settlement Agreement at 1–2, *In re* Hutto Family Detention Center, No. A-07-CA-164-SS (W.D. Tex. Aug. 26, 2007) [hereinafter Hutto Settlement Agreement], *available at* http://www.clearinghouse.net/chDocs/public/ IM-TX-0005-0033.pdf.

34. *Id.*; *Detention Reform Accomplishments*, IMMIGRATION & CUSTOMS ENFORCEMENT, http://www.ice.gov/detention-reform/detention-reform.htm (last visited June 1, 2012).

35. H.R. REP. NO. 110-181, at 42 (2008).

36. *See generally* OLGA BYRNE, VERA INST. OF JUSTICE, UNACCOMPANIED CHILDREN IN THE UNITED STATES: A LITERATURE REVIEW, at iii (2008), *available at* http://www.f2f.ca.gov/res/pdf/UnaccompaniedChildren-US.pdf (reviewing books and scholarly articles regarding the treatment of unaccompanied children in the United States). "The literature on unaccompanied children in the United States has identified a handful of broad concerns. These include . . . the failure of U.S. immigration law to adopt sufficient child-specific standards . . . ." *Id.*

Simply stated, the DHS continues to have wide discretion to determine whether it will open any family detention facilities in the future and to set the conditions under which undocumented children will be held.[37] This is problematic for many reasons. First, children are vulnerable and need protection. Immigrant children often speak a foreign language, are unable to express their needs or protect themselves against abuse, are unfamiliar with our legal system, and are unable to advocate for themselves. Second, accompanied children may rely only on an outdated settlement agreement if they are harmed or mistreated in immigration detention. The FSA has rarely been enforced. Moreover, reliance on a settlement agreement is a poor way to set out policies to ensure children are protected from abuse. The settlement agreement confers no rights to the children and does not provide an enforcement mechanism for the agency's compliance. Although the DHS has set forth detention guidelines, the DHS largely polices itself.

Finally, if Congress continues to rely on appropriations bills to direct the DHS and fails to pass legislation explicitly outlining the standards for detaining all children, then it is possible that—under a different administration—accompanied children could again suffer the same fate as the children of Hutto. For these reasons, Congress should codify the FSA, set forth minimum standards for the detention of all immigrant children, and mandate procedural safeguards and oversight mechanisms to ensure that all immigrant children are properly treated in all of the DHS's actions.

37. *See* DEP'T OF HOMELAND SEC., OFFICE OF THE INSPECTOR GEN., IMMIGRATION AND CUSTOM ENFORCEMENT DETENTION BEDSPACE MANAGEMENT 2 (2009), *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_09-52Apr09.pdf. *See generally* Carrie Acus Love, *Balancing Discretion: Securing the Rights of Accompanied Children in Immigration Detention* 19–30 (Columbia Univ. Law Sch., Working Paper, Feb. 13, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1375645 (discussing the DHS's exercise of discretion in detaining children). Love argues that under the current system, the agency is largely unfettered in its operation of the detention system; this broad discretion has resulted in human rights abuses. Love, *supra*, at 23–30. She proposes, as I do, that Congress should pass comprehensive legislation and set forth regulations. *Id.* at 31–36. She states that legislation and regulations will "cabin[]" agency discretion. *Id.* at 36. Although I agree with the suggestions set forth by Love, I alternatively propose that Congress begin by codifying the standards set forth in the FSA and that Congress also mandate, through legislation, that alternatives to detention be used to secure accompanied children as a first resort, that advocates be appointed for all detained children, and that Congress implement an oversight mechanism to track the agency's compliance with the new standards. This Comment also thoroughly reviews the history of detaining unaccompanied and accompanied children.

This Comment discusses the history of detaining unaccompanied minors and Congress' later actions to implement a system that protects unaccompanied minors in immigration custody. Part II reviews the history of the FSA and the two legislative initiatives that were eventually passed by Congress to address the abuse of detained, unaccompanied children and to ensure their protection while in custody. Part III focuses on the recent history of detaining immigrant families. The accounts of the mistreatment of the Hutto children in this section demonstrate the shortcomings of the FSA in protecting immigrant children in detention. Ultimately, legislation is needed to protect *all* children, including accompanied children, in immigration custody.[38] Part IV reviews recent claims of FSA violations, the DHS's current efforts to reform the detention center, and recent developments regarding the DHS's request for bids to open new family detention facilities.

Finally, in Part V, I lay out my recommendations that Congress change the detention system for non-criminal immigrant children by (1) memorializing the FSA through the passage of legislation and thereby codifying the settlement, (2) using the "best-interests" language in the legislation to protect the best interests of children in federal custody,[39] (3) directing the DHS and ORR to develop an ATD program for all non-criminal children in immigration custody[40] so that the detention of

38. Although much attention has been given to the treatment of unaccompanied children, I expand on that discussion and argue that basic protections granted to unaccompanied minors should be broadened to protect accompanied children. *See, e.g.*, Lopez, *supra* note 21, at 23.

39. The "best interests of the child" is an important national and legal standard that provides judges with the discretion to act in the best interests of the child in a legal proceeding. *See generally* Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & FAM. STUD. 337 (2008). A discussion regarding the specific meaning of the current standard is beyond the scope of this Comment because the definition and meaning of the phrase, and corresponding guidelines, are not agreed upon. As described by one author, "[w]hat is quite remarkable about this standard . . . is its persistence taken along side [sic] of its complete lack of definite, or seemingly necessary, content." Susan A. Wolfson, *Children's Rights: The Theoretical Underpinning of the 'Best Interests of the Child,' in* THE IDEOLOGIES OF CHILDREN'S RIGHTS 7, 7 (Michael Freeman & Philip Veerman eds., 1992). Nonetheless, I propose that any legislation should include a directive that judges should consider the best interests of the child when determining if the child should be detained. Moreover, legislation should include specific guidelines for consideration, such as whether alternatives to detention best suit the child's needs.

40. *See* Lopez, *supra* note 21, at 2 (proposing alternatives to detention program for unaccompanied children). I propose that any "alternatives to detention program" should be codified and broadened to include all non-criminal children in immigration custody, not just

children will be a last resort, and (4) creating both a coordinated database to specifically collect data on children in immigration custody and an oversight body to report to Congress.

II. THE HISTORY AND EVOLUTION OF THE UNITED STATES STRUCTURE FOR DETAINING UNACCOMPANIED CHILDREN

Historically, single men immigrated to the United States to work, and then returned to their country of origin after each season or after they saved enough money to provide for their families in their country of origin.[41] During the late 1980s and into the 1990s, unaccompanied minors began migrating to the United States in increasing numbers to escape Central American conflicts, to be reunited with separated relatives, and to seek economic opportunities.[42] Often, due to backlogs and processing requirements, it took weeks, months, or years for the federal government to resolve an individual's immigration status. Therefore, a determination regarding their status could not be made immediately and, as a result, the U.S. government detained undocumented immigrants while their immigration status was resolved.[43]

---

unaccompanied children.

41. *See* Lisa Rodriguez Navarro, Comment, *An Analysis of Treatment of Unaccompanied Immigrant and Refugee Children in INS Detention and Other Forms of Institutionalized Custody*, 19 CHICANO-LATINO L. REV. 589, 589 (1998).

42. *See id.*

43. *See* JOYCE VIALET, IMMIGRATION FUNDAMENTALS (1999) (describing the immigration process and stating that various categories of immigration petitions are subject to processing backlogs); Press Release, U.S. Dep't of Justice, Asylum Reform: Five Years Later (Feb. 1, 2000), *available at* http://www.uscis.gov/files/pressrelease/Asylum.pdf.

> Asylum reform was implemented in 1995 after a severe backlog developed in the early 1990s. By 1992, almost two-thirds of all claims became part of a burgeoning backlog due to a lack of resources and effective procedures for processing those claims. By 1993, the asylum system was in a crisis, having become a magnet for abuse by persons filing applications in order to obtain employment authorization. As a result, most claims languished in the backlog for years, without being processed. By the end of Fiscal Year (FY) 1994, there were almost 425,000 cases in the backlog, nearly double what it had been two years earlier.

Press Release, Asylum Reform: Five Years Later, *supra*. This continues to be a major issue and backlogs are reaching record delays. *See* Suzy Khimm, *A Record Backlog in Immigration Courts*, WASH. POST, Aug. 24, 2010, http://voices.washingtonpost.com/ezra-klein/2010/08/a_record_backlog_in_immigratio.html (discussing current record backlog of deportation and asylum cases due to ramped-up enforcement measures and shortage of immigration judges); *Backlog in Immigration Cases Continues to Climb*, TRAC IMMIGRATION (Mar. 11, 2011), http://trac.syr.edu/immigration/reports/225/ (discussing the backlog of immigration cases in immigration courts and attributing prolonged processing

Originally, the Department of Justice (DOJ) was the agency responsible for the "care and placement" of unaccompanied immigrant children.[44] The DOJ's Community Relations Office oversaw the placement of unaccompanied children; however, when increasing numbers of unaccompanied minors entered the United States in the 1980s, the DOJ's INS assumed the responsibility for the care of the children.[45]

The INS was also responsible for enforcement of the immigration laws. When the INS assumed guardianship of the unaccompanied children, the agency took an enforcement-heavy approach to "caring" for the children.[46] Although the children were in civil proceedings, they were detained in "prison-like settings."[47] The INS relied upon secure and, to a lesser extent, non-secure[48] facilities to detain children before determining if the child was removable from the United States. This conflict of interest led to the prolonged detention of the vulnerable unaccompanied children in inhumane conditions. The INS "applied the same model of punitive detention to children as it did to adults."[49] The children detained by the INS were placed in cells with unrelated adults of both sexes, detained in penal-like settings, and some were victims of abuse by guards and other prisoners.[50] These conditions persisted for years. Finally, in 1985, the American Civil Liberties Union (ACLU) filed a class action lawsuit that exposed the lack of standards for detaining immigrant children and the punitive conditions of their detention.

---

times, in part, to the shortage of immigration judges).

44. M. Aryah Somers, *Constructions of Childhood and Unaccompanied Children in the Immigration System in the United States*, 14 U.C. DAVIS J. JUV. L. & POL'Y 311, 334 (2010).

45. *Id.* at 334–35.

46. *Id.* at 334.

47. Hawkes, *supra* note 21, at 172; UNACCOMPANIED JUVENILES, *supra* note 32.

48. Children in immigration custody were "held in four types of facilities: foster homes, shelter care facilities, medium-secure facilities, and secure detention facilities." UNACCOMPANIED JUVENILES, *supra* note 32. Foster care was rarely used. *See id.* Shelter facilities were defined as licensed facilities or programs that operated through a contract with the INS to provide services for the unaccompanied children. *See id*. Medium-secure facilities were defined as "state-licensed facilities designed for juveniles who require close supervision but not secure detention. . . . Secure facilities are state or county licensed juvenile detention facilities or INS-contract facilities that have special accommodations for juveniles." *Id.*

49. Young & McKenna, *supra* note 27, at 250.

50. *See, e.g.*, AMNESTY INT'L, *supra* note 9 (discussing reports of human rights abuses, including sexual assaults and injuries resulting from interactions with border patrol).

A. *The* Flores *Settlement Agreement*

The FSA was the first document to establish guidelines for the treatment of children in the immigration detention system. The case originated with Jenny Lisette Flores, a 15-year-old child from El Salvador who came to the United States in 1985.[51] Jenny fled the violence of El Salvador to be reunited with her aunt, who was living in the United States; however, she never made it to her aunt's home.[52] The INS apprehended and arrested Jenny at the border: She was "handcuffed, strip searched, and placed . . . in a juvenile detention center where she spent the next two months waiting for her deportation hearing."[53] The INS placed Jenny in a facility that did not provide educational, nor many recreational opportunities.[54] Furthermore, some of the minors in the facility had to share "bathrooms and sleeping quarters with unrelated adults of both sexes."[55]

Although Jenny had no criminal history, was not a flight risk, and was not a threat to anyone, the INS would not release Jenny to her aunt because the INS did not allow unaccompanied minors to be released to "third-party adults."[56] On July 11, 1985, the ACLU and four minors, including Jenny, filed a class action lawsuit against the INS, the INS Commissioner, and two private operators of INS detention facilities.[57] The lawsuit sought to address the treatment and detention of unaccompanied minors, as well as

> challenge [the] (a) INS policy to condition juveniles' release on bail on their parents' or legal guardians' surrendering to INS agents for interrogation and deportation; (b) the procedures employed by the INS in imposing a condition on juveniles' bail that their parents' or legal guardians' surrender to INS agents for interrogation and deportation; and (c) *the conditions maintained by the INS in facilities where juveniles are incarcerated*. . . . The plaintiffs alleged that the new policy resulted in lengthy incarceration of juveniles in substandard conditions, without education, supervised recreation, or reasonable visitation

51. Navarro, *supra* note 41, at 596.
52. *Id.*
53. *Id.* (footnote omitted).
54. *Id.*
55. *Id.*
56. *Id.* at 593–97.
57. Flores v. Meese, 681 F. Supp. 665, 666 (C.D. Cal. 1988).

> opportunities, unreasonably subjected them to strip and body cavity searches, and served as a thinly-veiled device to apprehend the parents of the incarcerated juveniles and to punish the children.[58]

The minors claimed that they had a fundamental constitutional right to due process, which included the right to be released to "the custody of 'responsible adults.'"[59]

The court certified the class, and the resulting litigation spanned more than nine years.[60] The parties engaged in extensive discovery requests and filed various appeals.[61] The case eventually reached the United States Supreme Court.[62] The Court found that the release procedures did not violate the minors' substantive or procedural due process rights, and that the Attorney General was acting within his discretion.[63] Additionally, the Court "described the arrangements as 'legal custody' and not 'detention' because the facilities in which immigrant minors [were] detained [were] 'not correctional institutions, but facilities that meet state licensing requirements for the provision of shelter care, foster care, group care, and related services to dependent children.'"[64] The Court remanded the case to the district court. The parties reached a settlement agreement before the district court could make a final determination on the case.[65]

The resulting FSA established a "nationwide policy for the detention, release, and treatment of minors in the custody of the INS."[66] The FSA required that "immigration officials detaining minors provide (1) food and drinking water, (2) medical assistance in the event of emergencies, (3) toilets and sinks, (4) adequate temperature control and ventilation, (5) adequate supervision to protect minors from others, and

58. *Case Profile:* Flores v. Meese, CIVIL RIGHTS LITIG. CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=9493 (last visited Apr. 11, 2012) (emphasis added).

59. Reno v. Flores, 507 U.S. 292, 294 (1993).

60. *Flores Settlement Agreement*, *supra* note 26, at 3.

61. *Id.*

62. *Id.*

63. Navarro, *supra* note 41, at 597.

64. *Id.* at 597–98 (quoting *Flores*, 507 U.S. at 298).

65. 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, 953 (2004).

66. *Flores Settlement Agreement*, *supra* note 26, at 6.

(6) separation [of children] from unrelated adults whenever possible." Additionally, the FSA required that the INS

> (1) ensure the prompt release of children from immigration detention; (2) place children for whom release is pending, or for whom no release option is available, in the "least restrictive" setting appropriate to the age and special needs of minors; and (3) implement standards relating to care and treatment of children in U.S. immigration detention.[67]

Pursuant to a 2001 Stipulation and Order amending the FSA, the FSA was to remain in effect until forty-five days after the INS passed regulations that would ensure the agency's compliance with the FSA.[68] Although the INS issued interim regulations in 1998,[69] the INS, and later the DHS, have not passed final regulations and therefore the FSA is still "in effect."[70] Moreover, the FSA has never been fully implemented in practice.[71]

The FSA laid out rights for all children detained by the INS, but INS compliance with the FSA was inconsistent.[72] The INS began detaining

---

67. *See* Taverna, *supra* note 65, at 953 (quoting AMNESTY INT'L USA, UNITED STATES OF AMERICA: UNACCOMPANIED CHILDREN IN IMMIGRATION DETENTION 17 (2003)).

68. Walding v. United States, No. SA-08-CA-124-XR, 2009 U.S. Dist. LEXIS 26546, at *54 (W.D. Tex. Mar. 30, 2009); Bunikyte v. Chertoff, Nos. A-07-CA-164-SS, A-07-CA-165-SS, A-07-CA-166-SS, 2007 U.S. Dist. LEXIS 26166, at *9 (W.D. Tex. Apr. 9, 2007) (citing Stipulated Order Extending Settlement Agreement). Originally, the agreement was only to remain in effect for five years after the agreement was accepted by the court or in three years from the date the court found that the INS was in "substantial compliance" with the terms of the agreement, whichever was sooner. *Flores Settlement Agreement*, *supra* note 26, at 22.

69. 10 HUMAN RIGHTS WATCH, DETAINED AND DEPRIVED OF RIGHTS: CHILDREN IN THE CUSTODY OF THE U.S. IMMIGRATION AND NATURALIZATION SERVICE, Part II (1998), http://www.hrw.org/legacy/reports/reports98/ins2/berks98d-01.htm.

70. Areti Georgopoulos, *Beyond the Reach of Juvenile Justice: The Crisis of Unaccompanied Immigrant Children Detained by the United States*, 23 LAW & INEQ. 117, 135 (2005). The DHS has since passed detention guidelines for the detention of immigrants generally. *Detention Reform Accomplishments*, *supra* note 34.

71. *See* BYRNE, *supra* note 36, at 20–21.

72. See UNACCOMPANIED JUVENILES, *supra* note 32, at 6, stating that

> [a]lthough the INS has made significant progress since signing the *Flores* agreement, our review found deficiencies with the implementation of the policies and procedures developed . . . . This report alerts senior INS managers to the existence of problems that could lead to potentially serious consequences affecting the well-being of the juveniles.

more and more children. The INS reported that the number of unaccompanied children detained in the United States increased two-fold from 1997, when the INS detained 2,375 children, to 2001, when the INS reported that it detained 5,385 children.[73] In 2001, the DOJ issued a report that found that the INS made "progress" in complying with the FSA; however, the review found "deficiencies with the implementation of the policies and procedures developed in response to" the FSA.[74]

Six years later, in 2003, Amnesty International USA filed an independent report claiming that children in immigration detention facilities were "routinely deprived of their rights."[75] Amnesty International found that non-criminal unaccompanied children were housed in a facility designed to hold juvenile offenders.[76] Children spent months, and sometimes years, in detention even though they had a relative or other responsible adult available to care for them.[77] Some districts continued to exhibit "'deficiencies in the handling of juveniles.'"[78] Amnesty International ultimately found that the INS made progress in complying with the FSA, but inconsistently followed FSA requirements in the detention facilities that the organization's representatives visited.[79] The Amnesty International report was released "just as fundamental changes were being made to the structural custodial framework for unaccompanied children."[80]

B. Homeland Security Act of 2002

In 2002, Congress passed the Homeland Security Act of 2002 (HSA).[81] The HSA was passed in response to the September 11, 2001 attacks. The bill's sponsors acknowledged a need for better coordination and structure of the nation's security system. As a result, the HSA reorganized several agencies and created the DHS.[82] The INS was taken out of the DOJ and incorporated into the DHS. The HSA divided the historic INS responsibilities into three agencies: the United

73. AMNESTY INT'L USA, *supra* note 67, at 1.
74. UNACCOMPANIED JUVENILES, *supra* note 32, at 6.
75. AMNESTY INT'L USA, *supra* note 67, at 2.
76. *Id.* at 1.
77. *Id.* at 17, 53–55.
78. *Id.* (quoting remarks made by the Department of Justice).
79. *See id.*
80. *See* Somers, *supra* note 44, at 339.
81. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).
82. *See* 6 U.S.C. § 111 (2006).

States Citizenship and Immigration Services,[83] ICE, and the United States Customs and Border Patrol (CBP). CBP and ICE assumed the historic INS responsibilities of border protection, detention, and removal responsibilities.[84] As a result, the FSA was, and is, binding on ICE and CBP as successor organizations to INS.[85] Moreover, the HSA included a section that specifically addressed the rights of unaccompanied minors.[86]

The HSA transferred the responsibility for all unaccompanied minors in "federal custody" to the Office of Refugee Resettlement (ORR) under the Department of Health and Human Services (DHHS).[87] The ORR was directed to create a national plan for the coordination of the care and the placement of unaccompanied children and to create a plan "to ensure that qualified and independent legal counsel" would be appointed to represent the children.[88] The HSA also required the ORR to ensure that the interests of the child[89] are

83. The United States Bureau of Citizenship and Immigration Service is responsible for overseeing and adjudicating all applications and petitions filed in the United States for naturalization, legal permanent residence, adoption, work and travel authorization, and asylum and refugee status. Homeland Security Act of 2002 § 451, 6 U.S.C. § 271 (2006).

84. 6 U.S.C. § 251 (assigning immigration enforcement duties).

> Although Section 442 of the Homeland Security Act established a Bureau of Border Security within the Border and Transportation Security Directorate, it did not fully delineate its responsibilities, nor did the November 25, 2002, reorganization plan. The January 2003 plan renamed the Bureau of Border Security as the Bureau of Immigration and Customs Enforcement (now known as U.S. Immigration and Customs Enforcement, or ICE), incorporating parts of the Immigration and Naturalization Service (INS), the Customs Service, and the Federal Protective Service (FPS) and outlined its functions: to enforce immigration and customs laws within the interior of the United States and to protect specified federal buildings.
>
> The January 2003 plan also renamed the U.S. Customs Service as the Bureau of Customs and Border Protection (now known as U.S. Customs and Border Protection, or CBP).

ELIZABETH C. BORJA, DEP'T OF HOMELAND SEC., BRIEF DOCUMENTARY HISTORY OF THE DEPARTMENT OF HOMELAND SECURITY 2001–2008, at 12 (2008), *available at* www.hsdl.org/?view&did=37027.

85. Bunikyte v. Chertoff, No. A-07-CA-164-SS, No. A-07-CA-165-SS, No. A-07-CA-166-SS, 2007 U.S. Dist. LEXIS 26166, at *8 (W.D. Tex. Apr. 9, 2007).

86. Homeland Security Act of 2002 § 462, 6 U.S.C. § 279(a) (2006) (including a section titled "Children's Affairs").

87. 6 U.S.C. § 279(b)(1)(B).

88. *Id.* § 279(b)(1)(A).

89. Advocates for the unaccompanied children were critical that the HSA did not

considered in decisions and actions relating to the care and custody of the child. Finally, the ORR was charged with making and implementing placement determinations, overseeing the facilities where the children are residing, "reuniting unaccompanied alien children with a parent abroad in appropriate cases[,]" and developing statistical data on unaccompanied minors who are processed through the ORR.[90]

The HSA marked the creation of a new structure and a new approach to dealing with unaccompanied children. The ORR was an agency that had experience dealing with vulnerable refugees and had a vast network of resources, for this reason the delegation of authority to the ORR held tremendous promise for unaccompanied children.

Yet while the new structure was an improvement, several deficiencies still existed in the DHS process of taking unaccompanied minors into custody. The DHS did not "provide legislative instruction to, or oversight of, DHS on unaccompanied children, whether in the form of oversight or through the requirement to subcontract with other organizations."[91] Furthermore the HSA created a "powerful new agency . . . capable of exerting substantial influence over the evolving structure" without legislative oversight or procedural safeguards.[92] Finally, the HSA did not assert any rights for unaccompanied minors, and immigration law continued to treat children in immigration custody as adults.[93] Special protections acknowledging children as vulnerable and potential victims of trafficking were passed six years later.

C. The Trafficking Victims Protection Reauthorization Act of 2008

Congress passed the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) in 2008.[94] The underlying purpose of the original bill, and the subsequent reauthorization of the bill, was to prevent and protect against the illegal

mandate that the "best interests" of the child be taken into account. The "best interests" language originally appeared in the FSA, but was not used in the HSA. The TVPRA clarified that the "best interests," not just "the interests," of the child should be taken into account when dealing with unaccompanied minors who are victims of trafficking or if the child is seeking asylum.

90. Homeland Security Act of 2002 § 462, 6 U.S.C. § 279 (2006).

91. *See* Somers, *supra* note 44, at 353.

92. *Id.*

93. Young & McKenna, *supra* note 27, at 256.

94. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008).

trafficking of human beings.[95] Various provisions of the TVPRA address the care and treatment of unaccompanied children in federal custody, and specifically address unaccompanied children in the custody of the DHHS.[96] The TVPRA states that "an unaccompanied child in DHHS custody 'shall be promptly placed in the least restrictive setting that is in the best interests of the child.'"[97] Additionally, the TVPRA allows the DHHS to identify and to appoint independent advocates for the unaccompanied children to "effectively advocate for the best interests of the child."[98] In this respect, the TVPRA goes further than just considering the interests of the child; it requires that appointed advocates work in the *best* interests of the child.

Another advancement produced by the TVPRA is that the Secretary of the DHHS is responsible for the care, custody, *and detention* of unaccompanied children, not just the coordination of the children's care and placement.[99] Additionally, the TVPRA requires that the DHS advise the ORR regarding the "apprehension or discovery of an unaccompanied child" and any claim made by someone in custody that they are under the age of eighteen.[100] Furthermore, the TVPRA requires that the DHS turn over unaccompanied minors to the ORR within seventy-two hours of taking the child into custody.[101]

Despite the progress made by the TVPRA, the protection offered by the legislation has been stunted by internal procedural processes and a lack of implementation.[102] Furthermore, there is no uniform tracking system in place to follow children from their first contact with the DHS to their eventual placement under ORR custody. As a result, hard numbers do not exist to follow the DHS's implementation of the TVPRA or its compliance with these legislative mandates.

The DHSA and the TVPRA have made large strides in reforming the framework for dealing with unaccompanied children, but the protections afforded by the legislation are limited to unaccompanied children. As a result, children who travel with a relative or their family

95. *Id.*
96. Young & McKenna, *supra* note 27, at 252–53.
97. *Id.* at 253 (quoting TVPRA § 235(c)(2)).
98. *Id.* (quoting TVPRA § 235(c)(6)).
99. *See* Somers, *supra* note 44, at 353–54.
100. *Id.* at 354.
101. TVPRA § 235(b)(3), 122 Stat. at 5077.
102. Young & McKenna, *supra* note 27, at 252–53.

are not afforded the same protections or oversight by the ORR. Historically, that was not an issue: When families were caught, they largely were not subject to detention.[103] However, during the same time that Congress was passing legislation to protect unaccompanied children who were subjected to detention, the DHS ended the catch and release policy for children and their families, and began detaining them in a penal-like institution.[104]

III. "KEEPING FAMILIES TOGETHER": THE RECENT HISTORY OF DETAINING IMMIGRANT FAMILIES IN MEDIUM-SECURE AND SECURE FACILITIES

Families historically have migrated to the United States to escape civil strife, persecution, conflict, and economic hardship.[105] Some families who enter the United States without documentation are composed of women escaping domestic violence with their children.[106] The INS originally implemented a "catch and release policy" whereby families who were caught in the United States without legal documentation were processed and then released into the community with a notice to appear before an immigration judge for a hearing.[107]

The purpose of an immigration hearing is to determine if the family members are eligible to remain in the United States or should be deported. Immigration hearings are held before a judge who reviews the case against the immigrant before the court.[108] The judge is required to advise the immigrant if there are any applications the immigrant may file to remain in the United States. The judge then makes a determination regarding whether the immigrant may remain in the United States.[109] If an immigrant receives a notice to appear and then fails to appear, the Court orders a default judgment against him or her

103. *See infra* note 107 and accompanying text.

104. *See infra* note 111–112 and accompanying text.

105. MALDWYN ALLEN JONES, AMERICAN IMMIGRATION 82, 83 (2d ed. 1992).

106. THE LEAST OF THESE, *supra* note 22; *see also* Lily Keber, *Family Detention*, SAN DIEGO IMMIGRANT RIGHTS CONSORTIUM (Jan. 11, 2010), http://immigrantsandiego.org /2010/01/11/hello-world/ (recounting story of woman and her child who fled an abusive partner in Honduras).

107. Hawkes, *supra* note 21, at 172.

108. *Immigration Court: Frequently Asked Questions*, JUSTICE.GOV, http://www.justice.gov/eoir/sibpages/mia/faq.htm (last visited May 25, 2012).

109. *Id.*

for deportation. An authorized DHS officer issues a warrant of removal for the immigrant's detention and removal.[110]

ICE ended the catch and release process for *all* undocumented immigrants crossing the U.S.–Mexico border in 2006.[111] Following the September 11, 2001 attacks on the United States, ICE made security a priority and promptly focused on the catch and release program as an inefficient means of securing undocumented individuals.[112] The DHS Secretary Michael Chertoff stated that most individuals who were caught and released did not appear for their hearings.[113] ICE changed this policy for families in 2006 because the agency stated that families would often fail to appear for their hearing.[114] ICE also stated a concern that human traffickers would start renting children or taking children across the border so that they could "attempt[] to pass the groups off as family units."[115] ICE never released any data to support the latter

110. 8 C.F.R. § 241.2 (2012).

111. DEP'T OF HOMELAND SEC., FACT SHEET: ICE ACCOMPLISHMENTS IN FISCAL YEAR 2006, at 1 (2006), *available at* http://immigration.procon.org/sourcefiles/ice2006 achievements.pdf (announcing the end of the catch and release program along the U.S.–Mexico border); *see also Comprehensive Immigration Reform II: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 6, 25 (2005) (statement of Michael Chertoff, DHS Secretary) [hereinafter *Comprehensive Immigration Reform II*] (commenting on the need to end the catch and release policy and implement a "catch-and-remove" policy); Scott Miller, *U.S. Officials Outline Efforts to Curb Illegal Immigration*, AMERICA.GOV ARCHIVE (Oct. 18, 2005), http://www.america.gov/st/washfile-english/2005/October/20051018164849ASrelliM8.239383e-02.html#ixzz1D8V07l00 (reporting that Secretary Chertoff has set a goal of forever ending the catch and release policy).

112. *Comprehensive Immigration Reform II*, *supra* note 111, at 6, 13 (statements of Michael Chertoff, DHS Secretary, and Sen. John Cornyn).

113. *Id.* at 25 (statement of Michael Chertoff, DHS Secretary).

114. *See* Denise L. Gilman & Elise T. Harriger, T. Don Hutto Residential Center, Taylor, Texas: Briefing Paper for the Inter-American Commission on Human Rights 4 (Briefing Paper for the Inter-Am. Comm'n on Human Rights, Oct 12, 2007), *available at* http://www.utexas.edu/law/clinics/immigration/briefing_paper.pdf (noting that the ICE recognizes that detention center policies could restrict families from participating in proceedings); Press Release, Dep't of Homeland Sec. Immigration and Customs Enforcement, DHS Closes Loophole by Expanding Expedited Removal to Cover Illegal Alien Families (May 15, 2006), http://www.aila.org/content/default.aspx?bc=1016|6715|12053|26286|26307|19408; *see also Fact Sheet: Overview: Comprehensive Immigration Reform*, THE WHITE HOUSE (May 15, 2006), http://georgewbush-whitehouse.archives.gov/news/releases/2006/05/20060515-7.html ("For many years, the government did not have enough space in our detention facilities to hold illegal immigrants while the legal process unfolded. *Most were released back into society and asked to return for a court date, but did not show up when the date arrived. . . .* The President will ask Congress for additional funding and legal authority to permanently end catch and release at the southern border once and for all.").

115. Gilman & Harriger, *supra* note 114, at 4 (internal quotation marks omitted).

claim.[116] "In 2005, 2006, and 2007, Congress directed the DHS to keep immigrant families together, and either to release such families altogether or to use alternatives to detention."[117] ICE interpreted that directive as a decree that it should detain whole families in detention centers.[118]

As a result of the new ICE policy, the Bush Administration established family detention facilities to detain the families that were caught within the United States or at the border.[119] The facilities were opened in Pennsylvania and in Texas.[120] In 2001, ICE established the Berks Family Residential Facility (Berks)—a converted, modest-sized nursing home in the quiet town of Leesport, Pennsylvania.[121] Berks was and continues to be a licensed facility that has eighty-five beds for families detained for immigration proceedings.[122] The facility houses immigrants by age and gender in dormitory-like settings, but allows children under the age of five to remain with their parents.[123] Families have freedom of movement and get recreational and educational opportunities.

ICE converted an abandoned Texas corrections institution into a detention center for families, run by a private for-profit corrections company.[124] The Don T. Hutto facility (Hutto), run by Corrections Corporation of America,[125] began taking in detainees in 2006 under a

116. *Id.* at 4 n.10.

117. *Case Summary in the ACLU's Challenge to the Hutto Detention Center*, ACLU (Mar. 6, 2007), http://www.aclu.org/immigrants-rights/case-summary-aclus-challenge-hutto-detention-center.

118. *Id.*

119. WOMEN'S COMM'N FOR REFUGEE WOMEN & CHILDREN, LUTHERAN IMMIGRATION & REFUGEE SERV., LOCKING UP FAMILY VALUES: THE DETENTION OF IMMIGRANT FAMILIES 6, 11 (2007) [hereinafter LOCKING UP FAMILY VALUES], *available at* http://womensrefugeecommission.org/docs/ famdeten.pdf.

120. *Id.* at 11.

121. THE NAKAMOTO GROUP, BERKS FAMILY RESIDENTIAL CENTER BI-ANNUAL COMPLIANCE REVIEW REPORT 4 (2009), *available at* http://www.ice.gov/doclib/foia/dfra-ice-dro/compliancereportberksfamilyresidentialcenter0714172008.pdf.

122. *Id.*

123. *See* LOCKING UP FAMILY VALUES, *supra* note 119, at 11. This Comment focuses on the family detention at the Hutto Detention Facility. The Hutto facility, as will be discussed, was a penal-like institution, whereas Berks was a residential center and did not take a punitive approach to detaining the families.

124. Ralph Blumenthal, *U.S. Gives Tour of Family Detention Center That Critics Liken to a Prison*, N.Y. TIMES, Feb. 10, 2007, http://www.nytimes.com/2007/02/10/us/10detain.html#.

125. Many immigrant advocates have criticized the increased use of private, for-profit detention companies to detain non-criminal immigrants who are awaiting a determination on

contract worth $2.8 million per month.[126] The facility was much larger than the Berks facility in Pennsylvania. The Hutto facility could hold up to 400 undocumented immigrants, which included an average of 170 children (who were housed with their families).[127] The facility was never licensed to detain children by any local government agencies.

The majority of families detained at Hutto were women and children seeking asylum in the United States. The families were seeking protection from genital mutilation, severe domestic abuse, and gang recruitment, among other horrors;[128] families were housed under prison-like conditions despite having no criminal background.[129]

A. Flores *in Action: Use of* Flores *to Reach the Don T. Hutto Settlement Agreement*

Reports began surfacing in late 2006 about the prison-like conditions of Hutto.[130] Children were forced to wear prison uniforms (including prison "onesies" for infants), were threatened with separation from their parents as a disciplinary tool, received little or no recreational or educational opportunities, and were detained for months.[131]

Parents reported that they had to meet with their attorneys as a family, in the presence of their children. This was problematic for asylum seekers who wished to shield their children from their horrible experiences of being tortured, raped, and abused in their country of

their immigration status. The companies use a criminal law approach to regulating the civil offenders and have been accused of employing a penal model of treating detainees in their custody. *See, e.g.*, Press Release, Am. Civil Liberties Union, ACLU of Arizona Files Lawsuit on Behalf of Transgender Woman Sexually Assaulted by CCA Guard (Dec. 5, 2011), *available at* http://www.aclu.org/immigrants-rights-lgbt-rights-prisoners-rights/aclu-arizona-files-lawsuit-behalf-transgender-woman (alleging that CCA guards sexually abused women held at the Eloy Detention Center).

126. Blumenthal, *supra* note 124.

127. *Id.*

128. THE LEAST OF THESE, *supra* note 22.

129. Blumenthal, *supra* note 124.

130. Press Release, Am. Civil Liberties Union, Court Says ACLU Likely to Prevail on Claims Regarding Immigrant Children Detained at Hutto Facility in Texas (Apr. 10, 2007) [hereinafter Court says ACLU Likely to Prevail], *available at* http://www.aclu.org/immigrants-rights/court-says-aclu-likely-prevail-claims-regarding-immigrant-children-detained-hutto-.

131. *See* Hawkes, *supra* note 21, at 174–75; *see also* Susan Carroll & Stewart Powell, *ICE Will No Longer Hold Families at Converted Prison*, HOUS. CHRON. (Aug. 7, 2009), http://www.chron.com/news/article/ICE-will-no-longer-hold-families-at-converted-1739579.php (mentioning "infant onesies").

origin.[132] Additionally, children and their parents had to use open air toilets without privacy screens and they were unable to leave their cells. One family reported that their nine-year-old son was humiliated when he had to use the bathroom in front of his mother and when she had to do the same in front of him.[133] Moreover, the families were subject to headcounts seven times a day.[134]

The Hutto Facility was not overseen by the DHS, as it was run by the for-profit Correctional Centers of America. As is apparent from the conditions, Hutto followed a penal model of detaining the families. There was nothing posted on the walls, no pictures, and the detainees were given only fifteen minutes to eat. There was little variety in the food provided, and families had no leeway if they were unable to feed themselves and their children in the short allotted time.

The Hutto Facility came under fire in 2007 for violating the FSA: in March 2007, the ACLU and the University of Texas School of Law filed lawsuits "on behalf of ten immigrant children, ages three to [sixteen], who were detained with their parents who were awaiting immigration determinations."[135] The lawsuits were filed against the DHS Secretary Michael Chertoff and six ICE officials.[136] Notably, although the FSA was developed in response to a case involving unaccompanied minors in INS custody, the detention standards set forth in the FSA applied to all children in INS, and subsequently the DHS, custody.[137] Therefore, the court found that the FSA applied to the detained accompanied children at Hutto and that the conditions of detention were problematic.[138]

Although the judge agreed that the conditions at the facility likely violated the FSA, the judge did not believe that detaining the non-criminal children in the secure facility violated the agreement.[139] The FSA does not prohibit the detention of children; it only sets forth the standards for detaining children and encourages the use of alternatives to detention whenever possible.[140] The judge asked the parties to enter

132. THE LEAST OF THESE, *supra* note 22.

133. *Id.*

134. *Id.*

135. Court Says ACLU Likely to Prevail, *supra* note 130.

136. *Id.*

137. *Id.*

138. *Id.*

139. THE LEAST OF THESE, *supra* note 22 (interview with Vanita Gupta, lead attorney for the ACLU in the Hutto lawsuit, explaining why the plaintiffs decided to settle the case).

140. *Id.*

voluntary mediation. The attorneys who worked on the case stated that the Judge was concerned about the conditions at the Hutto facility, but the attorneys determined it was in the best interests of their clients to enter mediation and to settle.[141]

The Hutto Settlement included provisions that required children to be given more time outdoors and more educational programming.[142] Additionally, the facility had to provide the children with pens, pencils, and paper in their rooms, and the children no longer had to wear prison uniforms.[143] Furthermore, guards could not "discipline children by threatening to separate them from their parents."[144] The settlement also bound ICE to:

- allow children over the age of 12 to move freely about the facility;
- provide a full-time, on-site pediatrician;
- eliminate the count system which forces families to stay in their cells 12 hours a day;
- install privacy curtains around toilets;
- offer field trip opportunities to children;
- supply more toys and age- and language-appropriate books
- improve the nutritional value of food;
- be subject to external oversight to ensure their performance.[145]

Detention Watch[146] applauded the settlement agreement; nonetheless, the organization remained concerned about the lack of "national family standards and alternatives to detention."[147]

141. *Id.*

142. Press Release, Am. Civil Liberties Union, ACLU Challenges Prison-Like Conditions at Hutto Detention Center (Mar. 6, 2007), http://www.aclu.org/immigrants-rights-racial-justice/aclu-challenges-prison-conditions-hutto-detention-center.

143. *Id.*

144. *Id.*

145. *Id.*

146. Detention Watch is a "national coalition of organizations and individuals working to educate the public and policy makers about the U.S. immigration detention and deportation system and advocate for humane reform." *Who We Are*, DETENTION WATCH NETWORK, http://www.detentionwatchnetwork.org/whoweare (last visited May 29, 2012).

147. *Hutto Settlement a Good First Step; Lack of National Family Standards and Alternatives to Detention Remain a Concern*, DETENTION WATCH NETWORK (Aug. 27, 2010), http://www.detentionwatchnetwork.org/node/361.

The class action lawsuit was specific to the conditions at Hutto. Thus, the Hutto Settlement explicitly stated that the agreement only applied to children in the Hutto facility. The Agreement did not extend to children and families in the Berks facility, nor to facilities that may be utilized by ICE for detaining families in the future. Unlike the FSA, which was filed to address systemic problems with the detention of children as a whole, the Hutto lawsuit was location specific.[148]

B. Post-Hutto DHS Reforms

Following the settlement agreement, opponents of the family detention facility launched a public advocacy campaign and the Obama Administration requested the DHS review its internal policies.[149] After making many changes to the facility, the Obama Administration determined that the DHS should no longer use the secure facility to detain families.[150]

The DHS released a report in late 2009 following the internal review and recommended significant reformation of the immigration system.[151] ICE announced major reforms to the immigration detention system in June 2009 and asserted a desire to "ensur[e] the security, safety and well-being of individuals in [its] custody."[152] As part of the reforms, ICE discontinued using the Hutto facility to detain families, and stated that it would house families only at the Berks facility. Hutto was converted into a women-only facility. The DHS also established an office of detention oversight and conducted a comprehensive review of the detention system "while allowing ICE to maintain a significant, *robust* detention capacity."[153] Nonetheless, promises for reform have been empty. Significant changes to the detention of immigrant children have yet to be implemented.[154]

---

148. THE LEAST OF THESE, *supra* note 22; *see also* Hutto Settlement Agreement, *supra* note 33.

149. Nina Bernstein, *U.S. to Overhaul Detention Policy for Immigrants*, N.Y. TIMES, Aug. 6, 2009, at A1.

150. *Id.* (reporting that the Obama Administration will end family detention at the Hutto facility).

151. *See* SCHRIRO, *supra* note 12, at 3.

152. *ICE Announces Major Reforms to Immigration Detention System*, *supra* note 4, at 7.

153. *Id.* (emphasis added).

154. *See, e.g.*, Michelle Brané, *Let's Not Give Up on Immigration Detention Reform Quite Yet*, HUFFINGTON POST (Oct. 9, 2011, 10:14 AM), http://www.huffingtonpost.com /michelle-bran/lets-not-give-up-on-immig_b_1000972.html; Elise Foley, *A Year After Review, Immigrant Detainees Still Treated Like Prisoners*, WASH. INDEP. (Oct. 18, 2010),

IV. DESPITE PROGRESS, ABUSES PERSIST: THE SHORTCOMINGS OF RELYING ON SETTLEMENT AGREEMENTS AND CONGRESSIONAL DIRECTIVES, PRESENT DAY CLAIMS OF FSA VIOLATIONS, AND THE FUTURE OF FAMILY DETENTION FACILITIES

From 1997 until 2007, various organizations and law review articles argued that unaccompanied minors, and minors detained with their families, were being held in conditions that violated the FSA.[155] Additionally, cases were filed against the INS, and later the DHS, claiming that the agency was violating the terms of the FSA.[156]

A. The FSA Lacks Enforceable Standards and Does Not Create "Rights" for Immigrant Children

Litigation settlements can be a very useful and effective tool to establish protections for vulnerable classes of people; however, according to the courts, the FSA did not establish any "rights" for the vulnerable class affected by the settlement. The recent cases that have emerged have alleged that the DHS, DHS Officers, and private facilities contracting with the DHS continue to violate the FSA.

In *Fabian v. Dunn*, the plaintiffs were minors who entered the United States without inspection, were apprehended, and were detained at the Abraxas Hector Garcia Center.[157] The minors claimed that they were held in conditions that violate the FSA.[158] Another case, *Walding v. United States*, was also filed in early 2009. In *Walding*, twelve young men from Central America were caught by federal agents in the United States and were placed in immigration detention to await their court hearings.[159] All twelve of the plaintiffs were minor children when they were detained in a private, licensed facility in Nixon, Texas, called "Away from Home, Incorporated."[160]

---

http://washingtonindependent.com/100914/a-year-after-review-immigrant-detainees-still-treated-like-prisoners.

155. *See, e.g.*, Hawkes, *supra* note 21, at 174–75.

156. *See, e.g.*, Bunikyte v. Chertoff, No. A-07-CA-164-SS, No. A-07-CA-165-SS, No. A-07-CA-166-SS, 2007 U.S. Dist. LEXIS 26166, at *8 (W.D. Tex. Apr. 9, 2007).

157. Fabian v. Dunn, No. SA-08-cv-269-XR, 2009 U.S. Dist. LEXIS 72348, at *4 (W.D. Tex. Aug. 14, 2009).

158. *Id.* at *13.

159. Walding v. United States, No. SA-08-CA-124-XR, 2009 U.S. Dist. LEXIS 26552, at *4 (W.D. Tex. Mar. 31, 2009).

160. *Id.*

The young men claimed that they "suffered 'grave and repeated sexual, physical and emotional abuse' at the facility."[161] The young men alleged that the DHS violated FSA's specific terms. For example, the young men did not have doors on their bedrooms, they "were constantly subjected to humiliating and improper punishments, including being deprived of meals and being forced to sleep in the hallways, and were subject to derision and insults because of their undocumented status."[162] The young men and their counsel alleged that the operators of the facility deprived them of the property and liberty rights that were guaranteed in the FSA "by knowingly and intentionally refusing and failing to halt the rampant physical/sexual abuses at the Nixon facility or to otherwise protect the Plaintiffs."[163]

The court dismissed the original claim because the court found that the FSA did not grant the minors any constitutional rights. The court stated that

> it was apparently undisputed that the *Flores* settlement agreement, which is in effect a remedial decree, *does not in and of itself confer any constitutional rights upon the plaintiffs*, and that Fifth Circuit case law is clear that remedial decrees confer no such rights. . . .
>
> . . . [T]he plaintiffs failed to allege that they were deprived of a protected entitlement established by the *Flores* Agreement . . . . With regard to many of the entitlements claimed by the plaintiffs, the Court found they were not sufficiently mandatory to limit officials' discretion. . . . [T]o the extent the *Flores* Agreement requires "safe conditions," it speaks only in broad terms and does not provide fact-based, objective criteria, instead involving intangible assessments and discretionary factors. . . . [T]he Agreement's intent was to create minimum guidelines and requirements regarding the minors' conditions of confinement to try to ensure their well being and safety, and it *does not purport to guarantee prevention of the episodic acts of abuse* by program staff such as occurred here. . . .

161. *Id.*

162. Walding v. United States, No. SA-08-CA-124-XR, 2009 U.S. Dist. LEXIS 116932, at *11 (W.D. Tex. Dec. 15, 2009).

163. *Id.* at *8, 13 (quoting language from the Second Amended Complaint).

> [T]he plaintiffs failed to show that they were deprived of any entitlement to "safe conditions" created by the Agreement.[164]

The young men filed a new complaint. They alleged that the new claim was different from the original case because "the *Flores* entitlement claim here cover[ed] a broad array of violations . . ., all of the children suffered [those] violations," and ultimately the defendants "often interfered with their attorney client relationships and communications as . . . punishment," all violating the *Flores* requirements.[165]

The court maintained the same position that it held in the original case. The court held that the plaintiffs could not maintain a claim for damages and could not seek "remedies greater than those expressed in the Agreement."[166] Additionally, the court was reluctant to allow damages actions against the defendants for violating provisions of the FSA.[167] The court stated it would only allow for damages for "violations that amount to constitutional deprivations."[168]

B. Congressional Recognition of Continuing Problems with the Detention of Non-Criminal Immigrant Children

Increasingly, Congress has recognized that the system for dealing with immigrant children needs additional reformation. Congress has acknowledged reports about abuse and mistreatment in the detention facilities in several appropriations bills since 2005 and has directed ICE to use alternatives to detention.[169] The Committee on Appropriations has expressed concern and opposition to the conditions of detention of children and families, and has encouraged ICE to comply with its own published standards.[170] Congress has also "suggested," and later directed, that the DHS use the least restrictive settings possible and develop an ATD program for non-criminal immigrants.[171] Moreover, one member of Congress has twice introduced legislation that addresses

164. *Id.* at *12–14 (emphasis added) (citations omitted).
165. *Id.* at *15.
166. *Id.* at *17.
167. *Id.* at *16.
168. *Id.* at *17.
169. H.R. REP. NO. 109-79, at 38 (2005); H.R. REP. NO. 109-476, at 43 (2006).
170. H.R. REP. NO. 110-181, at 42 (2008).
171. *Id.*

the treatment of immigrant detainees generally, proposes legally enforceable detention standards, and promotes ATD programs.[172] Unfortunately, her proposal has languished in committee.[173] Congress' reliance upon appropriations bills and its failure to fully consider proposed legislation has rendered their directives ineffective and inefficient.[174]

C. The DHS's Attempts to Reform Immigrant Detention Fall Short

Under the Obama Administration, the DHS has taken steps to address the immigration detention system as a whole. Notably, in March 2010, ICE appointed regional detention managers and created a Detention Monitoring Council (DMC) to "engage[] ICE senior leadership in the review of detention facility inspection reports, assessment of corrective action plans, and the follow-up."[175] The oversight committee established by ICE is comprised of former ICE managers and directors. The DMC reports directly to the ICE director, rather than to Congress or the DHS leadership.

Therefore, while the DHS's creation of the DMC oversight process is commendable, very little information regarding this oversight body and its work is readily available to the public. Various immigration advocacy groups released a report that stated that the DMC and regional managers have not increased transparency or accountability.[176]

---

172. *See* Immigration Oversight and Fairness Act of 2009, H.R. 1215, 111th Cong. (2009); Immigration Oversight and Fairness Act of 2011, H.R. 933, 112th Cong. (2011).

173. *See Bill Summary & Status, 112th Congress (2011–2012), H.R.933*, THOMAS.GOV, http://thomas.loc.gov/cgi-bin/bdquery/z?d112:H.R.933: (last visited Apr. 12, 2012) (reporting that the last major action was that it was "[r]eferred to the Subcommittee on Immigration Policy and Enforcement" on March 21, 2011); *Bill Summary & Status 111th Congress (2009–2010), H.R.1215*, THOMAS.GOV, http://www.thomas.gov/cgi-bin/bdquery/z?d111:h.r.01215: (last visited Apr. 12, 2012) (reporting that the last major action was that it was "[r]eferred to the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law" on March 16, 2009). Arguably, legislation narrowly tailored to address children in immigration could have more success, as evidenced by Congress' passage of the TVPRA.

174. *See supra* Part III.

175. *Detention Reform Accomplishments*, *supra* note 34.

176. NAT'L IMMIGRANT JUSTICE CTR. ET AL., YEAR ONE REPORT CARD: HUMAN RIGHTS & THE OBAMA ADMINISTRATION'S IMMIGRATION DETENTION REFORMS 2 (2010), *available at* http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/ICE%20report%20card%20FULL%20FINAL%202010%2010%2006.pdf. "[T]here is little evidence that ICE leadership's intention to improve oversight practices and precipitate a cultural shift within the agency has been meaningfully achieved to protect immigrants from human rights violations and to ensure that issues are identified and resolved expeditiously at the local level." *Id.* at 3.

ICE's own internal reports have also revealed that the oversight mechanisms are neither sufficiently robust, nor effective in monitoring private detention contractors' treatment of detainees.[177] Second, there is little or no transparency in the oversight of the detention of immigrants generally. Third, the ATD program that has been established by the DHS has been poorly implemented and is not sufficiently broad.[178] As discussed below, despite the appointment of this committee, problems still persist.

D. The Future of Family Detention

Although the DHS and Congress have acknowledged the problems in the detention system as they pertain to children over the last several years and have appointed an ICE oversight committee, human rights organizations have investigated and produced reports documenting continued problems with the DHS's detention of children. For example, the Women's Refugee Commission reported in 2009 that, although the treatment of unaccompanied minors had greatly improved, "significant child protection challenges remain under the current system."[179] Additionally, the National Immigrant Justice Center recently filed a Freedom of Information Act action against the DHS alleging that the DHS possibly illegally detained 2,000 or more immigrant children for up to 450-day spans between 2008 and 2010 and the DHS was refusing to release relevant records pertaining to the allegation.[180]

177. Susan Carroll, *ICE Paints Bleak Picture of Detention System*, HOUS. CHRON. (Oct. 10, 2011), www.chron.com/news/houston-texas/article/ICE-paints-bleak-picture-of-its-detention-system-2209428.php#page-1.

178. *Alternatives to Detention*, AM. IMMIGRATION LAWYERS ASS'N POSITION PAPER, http://www.aila.org/content/default.aspx?docid=25874 (last visited May 29, 2012).

179. WOMEN'S REFUGEE COMM'N & ORRICK HERRINGTON & SUTCLIFFE LLP, HALFWAY HOME: UNACCOMPANIED CHILDREN IN IMMIGRATION CUSTODY 1 (2009), *available at* http://www.womensrefugeecommission.org/docs/halfway_home.pdf. Notably, the report indicated that the changes passed in the TVPRA would likely enhance the protections offered to children and that the DHHS was the best agency to have custody of the children. *Id.*

180. Complaint at 1–2, Nat'l Immigrant Justice Ctr. v. Dep't of Homeland Sec., No. 12-cv-637 (N.D. Ill. Jan. 30, 2012); Press Release, Nat'l Immigrant Justice Ctr., NIJC Sues Department of Homeland Security for Details about Children Illegally Held in Adult Detention Centers (Jan. 30, 2012), *available at* http://immigrantjustice.org/press_releases/nijc-sues-department-homeland-security-details-about-children-illegally-held-adult-de.

Furthermore, reports surfaced in late 2011 that the DHS planned to close the Berks Facility and had solicited requests for proposals to open up several new family detention facilities in Texas.[181] Immigration advocacy organizations became aware of the plans and wrote an open letter to the DHS secretary to urge the DHS not to open new family detention centers.[182] The DHS decided in February 2012 to keep the Berks facility open and cancelled the bids for the new Texas facilities without any further explanation.[183] As these developments indicate, despite the Congressional directives in the appropriations bills and the DHS's creation of an ATD, children are not fully protected and the DHS may open family detention centers in the future.

V. THE NEED FOR CONGRESSIONAL ACTION: CONGRESS SHOULD ACT TO INCLUDE FSA AND HUTTO SETTLEMENT STANDARDS IN LEGISLATION TO CREATE A UNIFORM SYSTEM FOR SECURING IMMIGRANT CHILDREN IN FEDERAL CUSTODY

Children who immigrate to the United States with their families are arguably less vulnerable than unaccompanied minors; however, all children detained by immigration are vulnerable and have special needs as a result of their age, foreign status, language barriers, and inability to protect themselves.[184] As recognized by the United States Supreme Court, children are unable to object to their unlawful entry—as they are minors and brought across the border by adult—and they should not be imputed with their parents' decision to enter the United States without documentation.[185] Moreover, the children's families are often unable to

181. Erica Aguilar, *Immigrant Family Detention Could Return to Texas*, KUT (Jan. 11, 2012), http://kut.org/2012/01/immigrant-family-detention-could-return-to-texas/.

182. Teddy Wilson, *Activists Praise ICE Decision Not to Open New Family Detention Center in Texas*, AM. INDEP. (Feb. 8, 2012), http://www.americanindependent.com/211187/activists-praise-ice-decision-not-to-open-new-family-detention-center-in-texas.

183. Jason Buch, *ICE Drops Plan for Texas Family Detention Center*, MYSANANTONIO.COM (Feb. 8, 2012), http://www.mysanantonio.com/news/local_news/article/ICE-drops-plan-for-Texas-family-detention-center-3124221.php.

184. *See generally* Michael A. Olivas, *Unaccompanied Refugee Children: Detention, Due Process, and Disgrace*, 2 STAN. L. & POL'Y REV. 159, 162 (1990); Sharon Finkel, Comment, *Voice of Justice: Promoting Fairness Through Appointed Counsel for Immigrant Children*, 17 N.Y.L. SCH. J. HUM. RTS. 1105, 1105–07 (2001); *Child Welfare Services and Humane Treatment of Children and Immigrant Families*, AM. HUMANE ASS'N POSITION STATEMENT, http://www.americanhumane.org/children/programs/child-welfare-migration/position-statement.html (last visited Apr. 13, 2012).

185. Plyler v. Doe, 457 U.S. 202, 220 (1982).

advocate for the children and are intimidated by federal officials and detention officers. More importantly, the United States has expressly acknowledged the need to provide special protections for all immigrant children in U.S. custody: the United States reached the FSA with the plaintiffs in the *Flores* case, and in doing so, acknowledged the special needs of children in detention.[186] Furthermore, unlawful presence in the United States is not itself a criminal violation but, instead, a civil infraction. Therefore, whenever possible, non-criminal immigrant children should not be held in detention. They should be secured through alternative means until a final decision regarding their immigration status is adjudicated by the appropriate decision-maker.

As history has demonstrated, the INS and the DHS unnecessarily prolonged reforming the system for handling and treating unaccompanied minors in federal custody. The INS, and later the DHS, has been bound to comply with the FSA as early as 1997. The FSA laid out basic treatment standards and requirements. Had the INS, and later the DHS, complied with the FSA, later abuses by the agencies would not be an issue today. However, true reform in the treatment of unaccompanied children did not materialize until Congress passed legislation that transferred responsibility for unaccompanied children from the DHS to the ORR. This legislation explicitly stated that the best interests of the child should be considered when addressing each child's immigration claim.

Unfortunately, these protections do not help children who have immigrated with relatives. Moreover, recent court decisions have asserted that the FSA did not create any "rights" for children in immigration detention.[187] Furthermore, attorneys have found that many immigration judges are hesitant to hold that the detention of immigrant children is unacceptable under current law, despite the FSA's mandate that alternatives should be used whenever possible. This hesitation reflects federal judges' aversion to create policy: judges prefer to enforce policy determinations made by Congress. However, Congress has failed to meaningfully take up this issue; and since the Hutto controversy, it has fallen to the wayside of more contemporary matters, such as the economy and foreign relations. As a result of Congress' inaction, children who are abused in immigration detention lack adequate legal protections and remedies.

186. THE LEAST OF THESE, *supra* note 22.

187. *See supra* Part III.A.

As is apparent from the history of the detention of non-criminal immigrant children, settlement agreements are neither appropriate long-term solutions, nor substitutes for law-making. The FSA failed to employ sufficient oversight and enforcement mechanisms to ensure that the INS and the DHS followed and complied with the terms agreed upon by the parties. Additionally, reliance on the settlement agreements is unpredictable and offers no certainty to the children in United States' custody. It is unclear what rights, if any, they have and the settlement provides few remedies when a party violates the agreement. Moreover, the Hutto agreement is inapplicable to any future facilities opened by the DHS. Perhaps "reform" through class action is a preferable means of resolving abuses for the DHS; however, it has been an inefficient long-term approach.

In effect, the class action settlements set *aspirational* goals and provided a tool for addressing abuses after they have occurred, but they have not done enough to prevent abuse from occurring. As a society, we should seek to protect non-criminal immigrant children while a determination is made regarding their status. We should demand the protection of non-criminal immigrant children who are in the temporary custody of our government. For the reasons already outlined, statutory reform is preferable and necessary.

The United States Congress should pass identifiable statutory *minimum* standards which would allow for clear implementation and enforcement. To ensure that the FSA is carried out and adequately protects children, Congress must act to codify the FSA through legislation that standardizes the process of securing all non-criminal children in federal custody. Codification will empower judges to better enforce the standards set forth in the FSA and will enable the courts to provide remedies for children who suffer abuse while in detention. Although such standards could open the agency to litigation for abuses in the future, the possibility of litigation serves as an additional enforcement mechanism to ensure the agency's compliance.

There are four changes Congress should make to immediately protect children in immigration detention and ensure implementation: Congress should (1) pass legislation to codify the FSA, and specifically require the DHS and private contractors who run immigration detention facilities to comply with the standard; (2) use the "best interests" language in the statute to allow judges to consider the best interests of children in federal custody; (3) mandate detention be used as a last resort and prioritize an ATD program for all children; and (4) create a database to monitor all children in custody, and appoint an ombudsman

and an oversight committee to oversee all of the data collected. I will address each recommendation in turn.

A. Codify the Standards Set Forth in the FSA

First, Congress should include the provisions of the FSA in federal legislation. Congress should require the prompt release of children from immigration detention, and require placement of children for whom release is pending, or for whom no release option is available, in the "least restrictive" setting appropriate. When determining what settings are appropriate, the decision-maker—whether it is a DHS officer or a judge—should take into account the age and special needs of the child. Furthermore, the standards for children who are held in detention should mirror and define the FSA and Hutto Settlement standards. These standards include the requirements that the DHS provide children daily recreational opportunities, medical attention, and educational formation during the time that they are in federal custody.

All facilities run by the DHS to detain children should have clear nutritional guidelines and standards that address the nutritional needs of children and pregnant women. The need for these standards is highlighted by the experience of an immigrant housed at Hutto, named Denia.[188] Denia was an immigrant who fled an extremely abusive husband who attempted to kill her. Denia reached the United States with a young daughter and pled for asylum; ICE detained Denia and placed her in detention at the Hutto Facility. Denia was pregnant when she was placed in detention, but due to the lack of medical care and the detention policies (under which families were only allowed fifteen minutes to eat) Denia was malnourished.[189] There were few meal options and Denia did not receive pre-natal care at the Hutto Facility.[190]

When the Hutto Settlement was finally reached, the facility allowed more time for families to eat and provided better medical care for the detained families. Denia's story highlights the need for specific standards. For example, the DHS should be required to allow a minimum of one hour for families to eat so that parents and children have ample times to finish their meals. Congress should also establish minimum medical care requirements for the treatment of children and pregnant women in immigration detention.

188. THE LEAST OF THESE, *supra* note 22.
189. *Id.*
190. *Id.*

Congress should also be clear that the legislation binds the DHS and all facilities contracted by the DHS to detain immigrant children. Congress must also be clear that all facilities detaining children should follow state licensing requirements. Also, as has been discussed, the DHS increasingly is contracting with private corporations to run immigration detention facilities.[191] For example, Hutto was run by a private, for-profit corporation and was not licensed. Imposing such standards on the facilities that detain children and requiring them to be licensed will uniformly address all facilities and help increase oversight from local licensing agencies.

B. Incorporate the Best Interests of the Child Standard

Second, Congress should expand some of the TVPRA protections to cover accompanied children. Congress should require that all federal agencies and immigration judges consider the "best interests of the child" when determining the placement of children in immigration custody and when considering individual child immigration cases. And Congress should appoint advocates to represent accompanied children. One such consideration is that unaccompanied children in DHHS custody are to be immediately placed in settings more likely to meet their best interests.[192] Accompanied immigrant children should also be placed in the least restrictive setting possible that is in their best interest. Incorporation of the best interests standard in legislation should include direction that the prolonged detention of non-criminal immigrant children is not in the child's best interest.[193]

191. *See, e.g.*, Graeme Wood, *A Boom Behind Bars: Private Jail Operators Like the Corrections Corporation Are Making Millions Off the Crackdown on Illegal Aliens*, BLOOMBERG BUS. WK. (Mar. 17, 2011), http://www.businessweek.com/magazine/content/11_13/b4221076266454.htm.

192. Young & McKenna, *supra* note 27, at 253.

193. In fact, Congress has recognized this point as it applies to unaccompanied immigrant children. As stated by Kelly Ryan, DHS Acting Deputy Assistant Secretary of Immigration and Border Security, "[The] DHS recognizes that holding UAC in our facilities for a prolonged period is not in the best interest of children, especially the very young, and strives to ensure swift transfers to DHHS to mitigate any adverse impacts." *Trafficking Victims Protection Reauthorization Act: Renewing the Commitment to Victims of Human Trafficking: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 10 (2011) (statement of Kelly Ryan).

The TVPRA also allows specially appointed advocates to argue for the best interests of the child at hearings for unaccompanied children.[194] Currently, there is no legislation requiring that the DHS or the ORR appoint advocates for accompanied children. Congress should require the advocate to represent the "best interests" of the child when representing a child detention and removal proceedings so that the decision-maker can consider this information in his final determination. Old INS procedures that remain in place today prevent judges from considering the best interests of the accompanied child when determining whether a child should be deported.[195] The lack of a qualified advocate coupled with the restrictive procedural mechanism prevents accompanied children from obtaining a fair hearing because the judge may not consider the child's best interests when determining if the child is deportable or if the child should be detained. Therefore, including this language will help expand the TVPRA protections to protect accompanied children in immigration proceedings.

C. Detention of Children as a Last Resort

Third, Congress should mandate family detention as a last resort. As Congress has expressed in various appropriations bills, the DHS should prioritize families for the ATD program, and when "family detention is unavoidable, . . . [families should be housed] together in non-penal, home-like environments."[196] Congress must restate their directive that families be kept together to include a preference that families be detained in the least restrictive settings possible. This clarification will prevent the DHS from detaining families, under the auspices of maintaining family unity, in penal-like institutions in the future.

The DHS can satisfy its security objective while ensuring the humane treatment of children. As demonstrated by the success of the DHS ATD program, alternatives are much less costly to the

194. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(c)(6), 122 Stat. 5044, 5078 (2008). *But see* Reyes, *supra* note 20, at 315 (arguing that, despite Congress' inclusion of the best interest directive, the ORR has been unable to act in the best interest of children because the DHS's security mandate creates an "incongruence" of priorities).

195. *See* Young & McKenna, *supra* note 27, at 253 (stating that the guidelines prevent the "best interests of the child standard" from being considered by judges when determining a child's status).

196. H.R. REP. NO. 110-181, at 42 (2008).

government. The cost of detaining immigrants at secure facilities can cost hundreds of dollars per day, whereas the cost of alternatives to detention ranges from just a few dollars per day to approximately $50 dollars per day.[197] There are various alternative methods the DHS may use to monitor and secure families. The DHS currently has employed the use of electronic and telephone monitoring, and global positioning devices (GPS).[198] The DHS may also allow families to live in multi-unit homes and have ICE personnel frequently visit the families,[199] or require families to regularly "check-in" with ICE district offices through phone calls.

ATD have also been proven as effective means of ensuring that undocumented immigrants appear for their court hearings.[200] Immigrants in the ATD program have more than a 90% compliance

197. THE LEAST OF THESE, *supra* note 22; *see also* NAT'L IMMIGRATION FORUM, THE MATH OF IMMIGRATION DETENTION: RUNAWAY COSTS FOR IMMIGRATION DETENTION DO NOT ADD UP TO SENSIBLE POLICIES (2011), *available at* http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf; Press Release, U.S. Dep't of Homeland Security, ICE Detention Reform: Principles and Next Steps (Oct. 6, 2000), *available at* http://www.dhs.gov/xlibrary/assets/press_ice_detention_reform_fact_sheet.pdf (stating that alternatives can cost as little as $14 a day); *The Money Trail*, DETENTION WATCH NETWORK, http://detentionwatchnetwork.org/node/2393 (last visited June 5, 2012) (stating that private contractors have been able to charge as much as $200 a day to detain undocumented immigrants).

198. Byrd, *supra* note 24, at 2.

199. THE LEAST OF THESE, *supra* note 22 (explaining that many families from the Hutto facility were released to residential homes with other families and were monitored by ICE personnel).

200. Byrd, *supra* note 24, at 2. Note also,

> A study conducted in the U.S. by the Vera Institute of Justice, entitled the Appearance Assistance Project (hereinafter "Vera Project"), found that alternatives saved the federal government almost $4,000 per person and boasted an overall 91% appearance rate of non-citizens at all required hearings and a 93% appearance rate for asylum seekers. The Vera Project demonstrated that community ties, either previously established or those facilitated by community-based organizations, were a necessary component of assuring appearance.

DETENTION WATCH NETWORK, ALTERNATIVES TO DETENTION FACT SHEET (2011), http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/background%20fact%20sheets.pdf. *But see Holiday on Ice: The U.S. Department of Homeland Security's New Immigration Detention Standards: Hearing Before the H. Comm. for the Judiciary*, 112th Cong. 1 (2012) (statement of Jessica M. Vaughn, Center for Immigration Studies), *available at* http://judiciary.house.gov/hearings/Hearings%202012/Vaughan%2003282012.pdf (arguing that the ATD statistics are inflated and that recent changes to detainee treatment result in "pamper[ed]" detainees).

rate among immigrants in U.S. custody.[201] Therefore, the DHS can ensure that families appear for their court appearances and, when necessary, for removal, without expending millions of dollars on secure facilities.[202] The DHS will continue to have the ability to question and detain families temporarily to verify that children are with their relatives. Furthermore, the DHS may detain a family longer if the agent finds that the family poses a security threat. However, those families who do not pose such a security threat or flight risk should be released and monitored through alternative methods. For these reasons, it is in Congress' best interest to include ATD in legislation and advocate for the use of ATD whenever feasible.

D. Create an Oversight and Enforcement Body

Finally, Congress should enlist an ombudsman to oversee the creation of a database to be shared between the DHS, DHHS, and the ombudsman's office. One of the most challenging aspects of assessing the number of children detained and the conditions of detention has been the lack of a streamlined process for compiling information. The DHS agencies, including ICE and CBP, must be required to report through this new reporting system. I recommend the use of a shared national computer system whereby CBP, ICE, and local law enforcement will be required to register any immigrant child who has been taken into custody. The system should be easy to use and should allow the various enforcement agencies to update the system when the child has been released or transferred to another agency. The DHS currently uses a similar system to monitor and track criminal aliens who come into contact with local law enforcement.[203]

201. *Alternatives to Detention*, *supra* note 178.

202. *See id.*

203. Law enforcement and ICE already share information regarding individuals taken into custody through the Secure Communities Program. For example, Secure Communities creates cohesiveness between the DHS and state and local law enforcement by allowing state and local police that fingerprint arrestees to compare information against the DHS immigration databases. *See, e.g.*, *Secure Communities*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities/ (last visited May 30, 2012); *Secure Communities*, NAT'L IMMIGRATION FORUM, http://www.immigrationforum.org/images/uploads/Secure_Communities.pdf (last visited May 30, 2012). Persons who are identified as non-United States citizens are fingerprinted and their fingerprints are "checked against FBI criminal history records . . . [and the] DHS immigration records. If fingerprints match DHS records, ICE determines if immigration enforcement action is required, considering the immigration status of the alien, the severity of the crime[,] and the alien's criminal history."

The DHS's collection of data will not alone prevent abuses. For this reason, Congress should implement a process of assessing the information to ensure the compliance of the agencies that may take custody of immigrant children. Congress should appoint a small independent committee of child welfare, consisting of immigration and human rights advocates and statistical experts. The committee will be responsible for regularly reviewing the DHS's handling of children taken into custody and reporting the information to the ombudsman. The committee should review the processing time of children who are apprehended and transferred to another agency, and investigate claims of abuse. The committee should have access to all detention facilities and the ability to meet with facility staff and detainees.

The ombudsman should also be responsible for monitoring the data for children who are secured in the ATD program. The ombudsman will be available to provide the findings to Congress through reports and to testify at hearings. Through the work of this committee and the ombudsman, the DHS will be scrutinized and have further incentive to comply with Congress' mandates.

Although the DHS appointed the Detention Monitoring Counsel, it has not been transparent or accountable. A small independent oversight committee that reports directly to Congress would most efficiently address oversight of the detention of children.[204] The committee and ombudsman's reports to Congress would be public and would make certain that both ICE and private contractors comply with the standards set forth in the legislation. Additionally, it is vital to have an independent body review the information to guarantee that there is no incentive to obscure any violations or problems revealed in the reviews.

State Criminal Alien Assistance Program (SCAAP), BUREAU OF JUSTICE ASSISTANCE (2011), https://www.bja.gov/Funding/11SCAAP_Guidelines.pdf.

204. Even if Congress cannot agree to appoint an independent oversight committee and ombudsman, at a minimum, Congress should guarantee that an outside human rights organization has access to investigate and review the detention of non-criminal immigrant children annually. In this way, a third-party organization can review the DHS's compliance with the legislative standards.

E. Challenges and Barriers to Implementation

Admittedly, any form of immigration reform is challenging. First, any immigration proposal will be considered a "hot-button" issue.[205] It is a politically divisive subject. However, given the support and passage of the TVPRA and the proposal's narrow tailoring to prevent the abuse and detention of children in U.S. custody, it is more likely to gain support than comprehensive reform. Second, undocumented immigrants generally lack sufficient political capital: they are unable to vote and are in the country without documentation. Nonetheless, advocacy organizations were successful in garnering public support for the TVPRA and to oppose the conditions at Hutto. It is likewise possible that advocacy organizations could work to garner support from voting age Americans through public advocacy campaigns that highlight the stories of the immigrant children in detention.

Finally, this legislation may require funding. Given the current budgetary constraints and the economic hardships faced by Americans, any added cost to the budget could present a challenge to passage. However, ATD programs are more cost-effective than detention. Moreover, the potential decrease in liability may offset any future short-term costs. It would be necessary to publish this information to the public. Although these reasons may make enacting my espoused proposal challenging, legislation is feasible and necessary.

VI. CONCLUSION

The United States has come a long way in the treatment of children in federal immigration custody over the last thirty years; however, congressional action is still needed to ensure that children are protected and have access to necessary services. Immigration enforcement has increasingly followed a criminal law model, while affording little or no protections to the immigrants. Until recently, children were treated as adults in the larger immigration detention framework. Children were placed in detention cells with unrelated adults and subjected to punishment and abuse. Likewise, the current system does not ensure adequate protection for children, and the DHS continues to have broad discretion to open family detention facilities in the future.

205. Robin Keats, *Immigration: Now and in the Future*, UCLA MAG., Apr. 1, 2012, *available at* http://magazine.ucla.edu/features/immigration-now-and-in-the-future/.

For these reasons, Congress should pass legislation that incorporates the settlements into federal law, thus establishing a clear national policy for the treatment of immigrant children in federal immigration custody. Congress should act to maintain necessary oversight and protections for all children in immigration custody. Only through comprehensive congressional legislation can we ensure that all immigrant children will be protected from inhumane detention practices.

REBECA M. LÓPEZ*

* J.D., 2012, Marquette University Law School; B.A., 2004, Marquette University. I would like to thank Professor Edward Fallone for his insight and guidance, and for his assistance in helping me focus my thesis. I would also like to thank Associate Dean Matthew J. Parlow for his direction and support during the writing process. Most importantly, I would like to thank my husband, Marco, my daughter, Aerial, my parents, and family for their unending love, support, and encouragement throughout the writing process. Finally, I would like to thank the editorial staff of the *Marquette Law Review* for their invaluable assistance in refining this Comment.