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Seeking 'Alternatives to Detention' : Unaccompanied Immigrant Children in the U.S. Immigration System

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Seeking 'Alternatives to Detention':

Unaccompanied Immigrant Children in the U.S. Immigration System



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Précis

In the 21st century, the issue of unaccompanied immigrant children remains the source of controversy in the United States. Polarized between the concerns of child welfare advocacy groups and those of immigration security supporters, the question of what to do with these children finds no easy answer in the discussion of enacting comprehensive immigration reform. But while the debate continues to gain momentum, unaccompanied immigrant children are thrown into a broken system that fails to protect their wellbeing.

Through the findings of a series of scholars, organizations, and community activists, this paper investigates the plight of unaccompanied immigrant children and recommends that the use of immigration detention centers must be eliminated. My research reveals how contradictory congressional mandates prevent federal immigration agencies from acting in accordance to the best interest principle. I also expose how the move to privatize the detention center system and the inherent federal concern to address national security makes it impossible to prioritize the interests of children.

In demonstrating that the detainment of unaccompanied immigrant children is inefficient, inhumane, and unnecessary, I argue that the United States government must seek to enact and enforce 'alternatives to detention' programs. Through these initiatives, the immigration system can guarantee that the best interests of unaccompanied immigrant children will be of main concern. Since the U.S. fails to move in this direction, it violates the very principles it sets out to maintain.

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Acronyms and Abbreviations

AAP	Appearance Assistance Project
ACLU	American Civil Liberties Union
AI	Amnesty International
BI	Behavioral Interventions
CBP	Customs and Border Protection
CBSA	Canada Border Services Agency
CRC	Convention on the Rights of the Child
CRS	Community Related Service
DHS	Department of Homeland Security
DOJ	Department of Justice Department
DROC	Declaration of the Rights of Children
EOIR	Executive Office of Immigration Review
DUCS	Division of Unaccompanied Children's Services
FOIA	Freedom of Information Act
Flores Settlement	Flores Settlement Agreement
HHS	Department of Health and Human Services
HSA	Homeland Security Act of 2002
ICE	Immigration and Customs Enforcement
INS	Immigration and Naturalization Service
ISAP	Intensive Supervision Appearance Program
NGO	Nongovernmental organization
MOU	Memorandum of Understanding
OIG	Office of Inspector General
ORR	Office of Refugee Resettlement
SAVE	Secure America through Verification and Enforcement Act of 2008
UNHCR	Office of the United Nations High Commissioner for Refugees

INTRODUCTION

On Thursday, October 22, 2009, Rose Marie Arce, senior producer at CNN ran a story titled, *Detained Immigrant Children Face Legal Maze in the U.S.* to expose how Marta, a twelve year old girl from Central America who, in hopes of finding her mother, entered the U.S. illegally and was imprisoned for three years in a U.S. detention center.¹ Only after an attorney, Michelle Abarca, took the girl's case did she receive a U.S. visa and was transferred to a foster home.² Arce revealed through Marta the harsh truth of over 7,200 unaccompanied immigrant children who are detained by the U.S. each year and must face the complex immigration system alone.³

In the year 2010, the question of what to do with the thousands of unaccompanied immigrant children in U.S. detention centers finds no easy answer in the divisive national debate. Those interested in reforming immigration policies are polarized between the concerns of child welfare advocacy groups and those of immigration security advocates. For instance, child welfare advocates voice concern over the custodial duty of federal immigration agencies over unaccompanied immigrant children because the immigration system is set up to prioritize national security issues, and not the best interests of children. Immigration security supporters, on the contrary, argue that the detainment of

¹ Arce, Rose Marie. *Detained Immigrant Children Face Legal Maze in the U.S.* CNN. 22 October 2009. <<http://www.cnn.com/2009/US/10/22/lia.detained.children/index.html>>.

² *Ibid.*

³ *Office of Refugee Resettlement. U.S. Department of Health and Human Services.* 24 January 2010. <http://www.acf.hhs.gov/programs/orr/programs/unaccompanied_alien_children.htm>.

Statistics available on the number of detained immigrant children vary. For instance, in the Freedom of Information Act Request 51676 granted to the Women's Refugee Commission, ICE gave the following statistics on the number of children detained between the period January 1, 2005 and the present: FY05—9,996, FY06—10,647, and FY07—9,586. These numbers however, account for minors emancipated or adjudicated as adults.

unaccompanied immigrant children is aligned with maintaining national security and the insurance of their wellbeing. But even while bipartisan consensus on immigration policy seems farfetched, the federal government has recognized the plight of unaccompanied immigrant children and its responsibility to protect them. Growing interest among government officials and community members to secure the best interests of children proves hopeful in enacting institutional changes in favor of children.⁴

With the help of scholars, activists, and legal advocates, awareness about the conditions and treatment of detained unaccompanied immigrant children succeeded in pressuring government and judicial officials to adopt reformative detention guidelines. The enforcement of documents in line with human rights principles and constitutional laws, however, rarely occurs.⁵ Recent reports and academic research indicate that the government trend has been to increase the privatization of the detention center system and to increase national security measures, such as detention and deportation. Consequently, these government actions fail to consider how unaccompanied immigrant children's status as children and as migrants demands special protections suitable to their conditions.⁶ In reality, as caretaker and prosecutor of these children, the U.S. immigration system is unable and unwilling to take full responsibility for their best interest and needs. The governmental

⁴ Bhabha, Jacqueline. *Crossing Borders Alone: The Treatment of Unaccompanied Children in the United States*. Immigration Policy Center. January 2004. <<http://www.immigrationpolicy.org/index.php?content=20040102>>.

⁵ Seugling, Carolyn J. *Toward a Comprehensive Response to the Transnational Migration of Unaccompanied Minors in the United States*. Center for Human Rights & Constitutional Law. 16 April 2004.

⁶ Bhabha, Jacqueline. *Not a Sack of Potatoes: Moving and Removing Children Across Borders*. Boston University Public Interest Law Journal. September 2006. <<http://www.bu.edu/law/central/jd/organizations/journals/pilj/vol15no2/documents/15-2BhabhaArticle.pdf>>.

focus on national security prevents a prioritization of the best interest of unaccompanied immigrant children.

In attempts to grapple with the issue of unaccompanied immigrant children in the U.S. immigration system, I focus my research on the implications of detaining children. I argue that the U.S. federal government must enact and enforce ‘alternatives to detention’ immigration policies, as articulated and proposed by activists and nongovernmental organizations, because the use of detention facilities does not uphold the best interest of unaccompanied immigrant children. I plan to do this by explaining how limited research and studies on the issue of unaccompanied immigrant children reveals a necessity for government action and support to ensure the best interest principle. I also examine the overlapping jurisdiction of the Department of Homeland Security, the Department of Justice, and the Department of Health and Human Services in the U.S. immigration system which works against unaccompanied immigrant children. By discussing the setbacks of imprisoning unaccompanied immigrant children in detention centers, the escalating privatization of the detention system, and the lack of detention standard enforcement, such as with the Flores Settlement Agreement, I highlight how the current immigration system fails to uphold the best interest of unaccompanied immigrant children.

By emphasizing the success of ‘alternatives to detention’ programs and the potential found in recommendations made by scholars and nongovernmental organizations in the field, I hope to show the need to secure full federal responsibility over unaccompanied immigrant children in a manner that prioritizes their welfare. I believe that the government should completely alter the way that the DHS, the DOJ, and the HHS interact. The DHS must focus on its responsibility to investigate and apprehend in attempts to safeguard the nation

while transferring all screening and caretaking roles to the DOJ and the HHS because these agencies are better equipped to handle child welfare issues. With this new set up, 'alternatives to detention' of unaccompanied immigrant children can be made a priority in the United States.

BACKGROUND INFORMATION

Unaccompanied Immigrant Children

Unaccompanied immigrant children migrate to the United States from a diverse range of countries from around the world. Most children, however, come from Central and South America. In 2008, the ORR indicated that children primarily originated from Honduras (30.8%), Guatemala (27.4%), El Salvador (23.4%), and Mexico (10.6%).⁷ The majority of these children are boys between the ages of 15 and 17, but immigration officials have been found to maintain children under their custody as young as a day old.⁸ Under current immigration legislation, an unaccompanied immigrant child is defined as “a child who has no lawful immigration status in the United States; has not attained 18 years of age; and with respect to whom there is no parent or legal guardian in the United States; or no parent or legal guardian in the United States is available to provide care and physical custody.”⁹ Susan Schmidt, along with other scholars, prefer to use the term ‘separated children’ to categorize all children who are separated from their parents or caregivers,

⁷ *Office of Refugee Resettlement. U.S. Department of Health and Human Services*. 24 January 2010. <http://www.acf.hhs.gov/programs/orr/programs/unaccompanied_alien_children.htm>.

It is important to note that the number of Mexican unaccompanied immigrant children is less in spite of the fact that over 50% of immigrants that enter the U.S. each year come from Mexico because a large number of children choose to be ‘voluntarily returned;’ Children are left to decide, very frequently without an attorney’s legal counseling, between staying in a detention center to await the outcome of their immigration case (i.e. attending court proceedings, speaking to judges, and monitoring their case) or leaving the country through immediate deportation to their home countries before a judge looks at their immigration case. Also, ICE tends to immediately deport Mexicans due to their categorization as Mexicans. The three aforementioned countries are under the category of “Other than Mexican” (OTMs).

⁸ Bhabha, Jacqueline, and Susan Schmidt. *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in the U.S.* The Journal of the History of Childhood and Youth. Winter 2006.

About 78% of unaccompanied immigrant children are male and 26% are female, and 80% being between the age of 15-18 and 20% between the age of 0-14.

⁹ *Homeland Security Act of 2002*. 6 U.S. C.A. 462 (2008). <http://www.dhs.gov/xlibrary/assets/hr_5005_enr.pdf>.

regardless of whether they were accompanied by an adult when crossing an international border, so as to create a more inclusive term. The use of ‘minor,’ ‘juvenile,’ ‘child,’ ‘refugee,’ ‘accompanied,’ ‘alien child,’ along with other terms used in the law and academia, are often used interchangeably and has caused immense inconsistency in the categorization of children in the United States.¹⁰

Children often become classified as ‘unaccompanied’ when they reach the U.S. border (land or sea) and are apprehended by Immigration and Custom Enforcement (ICE) officials or Customs and Border Patrol (CBP) agents.¹¹ Within the U.S., worksite enforcement operations (also known as raids) conducted by ICE officials also affect children. “Just three worksite raids in 2006 and 2007 affected 501 children.”¹² Some children also become unaccompanied when they are separated from family members who are subjected to detainment or deportation by immigration officials. Others on their way to the United States might become separated from their parents due to unexplainable circumstances.

Most unaccompanied immigrant children leave their home countries to escape war and conflict, a natural disaster, or civil, political, or economic upheavals. At times, they leave to avoid gang, crime or drug-related violence and the journey to the United States seems like the only alternative. Some children, however, seek entry to the United States in attempts to reunite with their families.

¹⁰ Thronson, David B. *Kids Will Be Kids? Reconsidering Conceptions of Children’s Rights Underlying Immigration Law*. Ohio State Law Journal. 2006.

¹¹ Bhabha, Jacqueline, and Susan Schmidt. *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in the U.S.* The Journal of the History of Childhood and Youth. Winter 2006.

¹² Garcia, Marisela. *Unaccompanied Children in the United States: Challenges and Opportunities*. <<http://www.latinopolicyforum.org/assets/Unaccompanied%20Children%20Article.pdf>>.

The journey to the United States is filled with dangers and hardships for a migrant child.¹³ Without the protection of an adult, they easily fall victim to predatory behaviors of smugglers and traffickers who abuse them physically and sexually and use them as vehicles of transportation and labor. Facing starvation, exhaustion, and exploitation is also not uncommon for children undergoing the rigorous migration by foot. Many migrant girls in particular report being raped by other migrants or law enforcement officials.¹⁴

Most unaccompanied immigrant children who arrive at the U.S. border endeavor the arduous path only to discover the hardships of being an immigrant in America. Of the 80,000 unaccompanied immigrant children seeking entrance to the United States each year, for example, approximately 75,000 are deported upon arrival. These children confront U.S. state and immigration officials who tend to be “oppressive and terrifying rather than reassuring and protective.”¹⁵ The few that are allowed to stay are transferred to the Office of Refugee Resettlement Division of Unaccompanied Children’s Services, but some children are thrown into detention facilities where they must await the outcomes of their immigration cases behind bars.

Many unaccompanied immigrant children in detention, in particular those of Mexican descent, are forced by ICE and CBP officials to make legal decisions upon detention; these children must choose between filing for asylum to remain in the country

¹³ Bhabha, Jacqueline. *Crossing Borders Alone: The Treatment of Unaccompanied Children in the United States*. Immigration Policy Center. January 2004. <<http://www.immigrationpolicy.org/index.php?content=20040102>>.

¹⁴ Garcia, Marisela. *Unaccompanied Children in the United States: Challenges and Opportunities*. <<http://www.latinopolicyforum.org/assets/Unaccompanied%20Children%20Article.pdf>>.

¹⁵ Bhabha, Jacqueline. *Crossing Borders Alone: The Treatment of Unaccompanied Children in the United States*. Immigration Policy Center. January 2004. <<http://www.immigrationpolicy.org/index.php?content=20040102>>.

or signing 'voluntary departures.'¹⁶ "Accepting voluntary departure does not affect future applicants for entry to the United States. A person who is deported must wait a decade before returning to this country or face a possible federal prison term."¹⁷ These children depend on an attorney to file for asylum, to explain the complexities of their immigration case, and to provide advice that would resolve their cases in the best possible manner. But without money to hire an attorney, unaccompanied immigrant children rely on pro bono (voluntary) attorneys to counsel and represent them. The limited number of pro bono attorneys and their limited capacity to take on new cases, however forces over fifty percent of unaccompanied immigrant children to go through the immigration process without legal aid.¹⁸ In fact, about sixty percent of children who are reunified or released to a sponsor are generally not assigned an attorney.¹⁹ Very seldom, ICE and CBP officials explain to children under their custody what the immigration process entails or the consequences of making a particular decision. Consequently, most ICE and CBP officials are not legally educated to make those type of suggestions. Forcing a child who may barely comprehend the

¹⁶ 'Voluntary departure' agreements allow ICE and BPS officials to deport children immediately without having them go before an immigration judge.

¹⁷ Teichroeb, Ruth. *Jail Alternative Safeguards Teen Aliens*. Seattle Post-Intelligencer Reporter. 2 December 2004. <http://www.seattlepi.com/local/202002_carson02.html>.

¹⁸ Limon, Lavinia. *The National Center for Refugee and Immigrant Children*. American College of Trial Lawyers. 2005. <<http://www.actl.com/AM/Template.cfm?Section=Home&TEMPLATE=/CM/HTMLDisplay.cfm&CONTENTID=2761>>.

The number of pro bono attorneys or voluntary legal counseling is very limited. Overall, an estimated 90 percent of the detained people go unrepresented due to poverty. The National Center for Refugee and Immigrant Children highlights that "without the assistance of the pro bono attorneys, judges are left to determine if a child is competent enough to understand the proceedings and argue their cases, which becomes extremely inefficient and time consuming. The assignment of a trained attorney ensures that children are aware of their legal options and affords each child their due process rights."

¹⁹ *Halfway Home: Unaccompanied Children in Immigration Custody*. Women's Refugee Commission and Orrick Herrington & Sutcliffe LLP. February 2009.

immigration process and who may encounter difficulty understanding due to language barriers and other disabilities prevents them from obtaining a fair chance in the system. It becomes problematic when a child is given an ultimatum to decide whether or not they prefer to sign a binding ‘voluntary departure’ upon apprehension. Frequently, children are coerced by immigration officials into signing ‘voluntary departure’ agreements. An example of this occurring took place in a 1985 case where Mr. Perez-Funez, a Mexican sixteen year old boy, “claimed that the INS presented him with a voluntary departure consent form without advising him of his rights in a meaningful manner.”²⁰ The court responded by preventing the Immigration and Naturalization Service (INS) from obtaining voluntary departure agreements from children without notifying first a guardian or a nonprofit organization. The court decision in the *Perez-Funez v. District Director* case highlights the need to inform immigrant children of their rights under the supervision of an adult or organization. Most children are not prepared to make such difficult legal decisions on their own accord. A child’s fate belongs under the protection and care of an adult that looks after their interests. And yet, under current immigration policy, unaccompanied immigrant children do not own the right to free legal counsel nor are their best interests secured at the hands of immigration officials. This severely conflicts with the assurance of upholding a child’s best interests.

²⁰ *Perez-Funez V. District Director. INS, 619 F. Supp. 656 - Dist. Court, CD California (1985).*

The Best Interest Principle

Towards the middle of the twentieth century, the concept of children owning individual rights began to capture international attention. “Most legal codes regarded children as property of their parents, with no legal identity of their own.”²¹ The Declaration of the Rights of Children (DROC), adopted by the General Assembly at the United Nations in 1959, became the foundation to thereafter domestic and international legislation that emphasized the human rights of children.²² The DROC coined the ‘best interests of the child’ principle (also known as the best interest principle) and has been used legally to ensure the welfare of children. It states, “The child, by reason of his [or her] physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth, . . . [and that] the child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him [or her] to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity.”²³ In 1989, the UN Convention on the Rights of the Child (CRC) became the first unanimously adopted

²¹ Byrne, Olga. *Unaccompanied Children in the United States: A Literature Review*. Vera Institute of Justice. April 2008.

²² International documents that protect the rights of children: the UN Charter, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Right.

²³ *The Declaration of the Rights of the Child*. UN General Assembly Resolution 1386 (XIV). United Nations. 10 December 1959. <<http://www.un.org/cyberschoolbus/humanrights/resources/child.asp>>.

international document that bound signatories to uphold the rights of children and to “refrain from conduct which would defeat the objectives of the convention.”²⁴

In the United States, the best interest principle is undeniably tied to U.S. family laws which view children as legal persons with individual rights.²⁵ Professor Berta Hernandez-Truyol and Justin Luna, scholars on international human rights laws, emphasize that regardless of a child’s immigration status, they are children above all; as children, they are beings with special needs and protections.²⁶ Tuyol and Luna suggest that “legal developments in this country seem to reinforce the premise . . . that there is societal obligation to provide certain services to assure basic human needs regardless of their legality of the documented status of a person.”²⁷ For example, the case *Memorial Hospital v. Maricopa County* 415 U.S. 250 (1974) declared that basic preventive health care is a human necessity and not to be determined based on immigration status. Also in *Plyer v. Doe* 457 U.S. 202 (1982), the U.S. Supreme Court declared that the denial of any undocumented

²⁴ Bhabha, Jacqueline. *Crossing Borders Alone: The Treatment of Unaccompanied Children in the United States*. Immigration Policy Center. January 2004. <<http://www.immigrationpolicy.org/index.php?content=20040102>>.

²⁵ Byrne, Olga. *Unaccompanied Children in the United States: A Literature Review*. Vera Institute of Justice. April 2008.

The usual assumption is that parents act in their child’s best interest, but a state court applying the best interest principle must take into consideration, the following: 1) “the parent’s interest in family integrity; 2) the state’s interest in protecting the child; and 3) the child’s interest in safety and a stable family environment.”

²⁶ Hernandez-Truyol, Berta, and Justin Luna. *Children and Immigration: International, Local, and Social Responsibilities*. 2006. <<http://www.bu.edu/law/central/jd/organizations/journals/pilj/vol15no2/documents/15-2Hernandez-TruyolandLunaArticle.pdf>>.

²⁷ Akram, Susan M. *Are They Human Children or Just Border Rats?* Boston University Public Interest Law Journal. September 2006. <<http://www.bu.edu/law/central/jd/organizations/journals/pilj/vol15no2/documents/15-2AkramArticle.pdf>>.

student to their right to enroll in public schools was unconstitutional because it was a denial of equal protection under the U.S. constitution. Finally, Truyol and Luna argue that the *Gregorio Jose T. v. Wilson E. League of United Latin American Citizens* 59 F.3d 1002 (9th Cir. 1995) case struck down Proposition 187 in California which had tried to deny public education and healthcare to undocumented children. The aforementioned cases legitimized and upheld the rights of immigrant children in the United States. Judicial reasoning on these cases focused on the best interest principle. These decisions highlight that a refusal to protect the rights of immigrant children is unconstitutional and violates the human rights of children protected under international laws.²⁸ Keeping this in mind, internationally recognized scholar on immigration law and children's rights, Professor Jacqueline Bhabha, aside from publishing extensively on the issue of unaccompanied immigrant children, in 2006 along with Susan Schmidt published an extensive report titled, *Seeking Asylum Alone*, which critically brought to light two key issues in the U.S. immigration system that makes children vulnerable under its custody.²⁹ 1) Bhabha declares the entire U.S. system, including criminal, family, immigration and international laws, to have a 'protection deficit' for not prioritizing the human rights and best interests of children; and 2) Bhabha also argues that the system has 'Adult-Centered Myopia' because the immigration and criminal system is designed for adults. "Children are at a special disadvantage and suffer extreme

²⁸ Hernandez-Truyol, Berta, and Justin Luna. *Children and Immigration: International, Local, and Social Responsibilities*. 2006.
<<http://www.bu.edu/law/central/jd/organizations/journals/pilj/vol15no2/documents/15-2Hernandez-TruyolandLunaArticle.pdf>>.

²⁹ Bhabha, Jacqueline, and Susan Schmidt. *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in the U.S.* *The Journal of the History of Childhood and Youth*. Winter 2006.

discrimination in a system that virtually ignores who they truly are.”³⁰ As Bhabha and Akram point out, United States immigration laws need immediate implementation of the best interest principle to ensure the welfare of immigrant children under their domain.

Legal precedents clearly dictate that there is a universal obligation to protect children under the best interest principle. But with the exception of a few policies, “the US Congress, which regulates immigration policy by enacting immigration laws, has failed to incorporate the best interest principle into substantive U.S. immigration laws.”³¹ Finding the best ‘alternatives to detention’ for unaccompanied immigrant children is not only essential to maintain the dignity of the U.S. Constitution but also to secure the credibility and accountability of an immigration system that today remains broken. Without emphasizing the best interest principle in immigration legislation, unaccompanied immigrant children are at risk and vulnerable to neglect and abuse from a system designed to detain and deport persons for the purpose of national security. In accordance to the best interest principle, the detention center system is not the place for children as it is designed to incarcerate and punish criminals.

³⁰ Bhabha, Jacqueline, and Susan Schmidt. *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in the U.S.* The Journal of the History of Childhood and Youth. Winter 2006.

³¹ Byrne, Olga. *Unaccompanied Children in the United States: A Literature Review*. Vera Institute of Justice. April 2008.

ANALYSIS

Governmental Noncompliance to the Best Interest Principle

In light of international recognition to protect the human rights of unaccompanied immigrant children, governments across the globe enacted legislation with aims to underscore these principles. As previously discussed, reformative attempts to fix the current immigration system in the United States have failed to enforce the best interest principle. This governmental noncompliance to underscore humanitarian standards for children prevents unaccompanied immigrant children from obtaining treatment and resources to alleviate their traumatic experiences and the opportunity of living a normal life. To date, these children fall victim to human right violations which as children should be safeguarded from the dysfunctions of detention.

In this section, I will discuss how various opinions of the shared responsibility of the DHS and the ORR delineate their inadequacy and problematic structure which prevents it from upholding the best interest principle. The federal paradox that results from this shared responsibility led to passage of reformative legislature, particularly the Flores Settlement, yet the federal government lacks in its ability to enforce them. Before passing this legislation however, civil rights groups and child welfare advocates fought fervently to expose the devastating conditions and treatment unaccompanied immigrant children were receiving in detainment. But even while Congress pushed DHS to comply with improvements, they were not effectively implement and are simply not enough.

I also consider how the embedded interest in privatizing the detention center system and the creation of the DUCS facilities maintain the use of punitive environments in spite of improvements made to conditions and treatment of these children. By doing so, I

reveal the reasons why the federal government must reexamine the benefits of 'alternative to detention' programs and implement these supervision methods in the immigration system. Hence, reforming the immigration system means finding ways to end the unnecessary detention of unaccompanied immigrant children and highlighting the best interest principle.

The Shared Responsibility of the DHS and the ORR

As with all children, unaccompanied immigrant children need the protection of a caretaker to ensure their best interests. Traditionally, when children fall under the hold of immigration officials, the federal immigration system undertakes the duty of caretaker. In attempts to improve the accountability for unaccompanied immigrant children under one agency, the government split responsibility between two agencies; however, this attempt was flawed because it did not fulfill those goals.

During the 1980s, the Community Relations Service (CRS), a division within the Department of Justice, was solely responsible for the everyday care of immigrant children detained by immigration officials. In 1987, the CRS and the INS made an agreement to share this responsibility in particular to provide care and services to immigrant children. Years later due to budget cuts, the sole responsibility over immigrant children transferred over to the INS. But with the passage of the HSA in 2002, which created three new agencies, the Department of Homeland Security (DHS), the Immigration and Customs Enforcement (ICE), and the Customs and Border Patrol (CBP), to do the work of the previous INS, it divided the responsibility of caring and protecting for unaccompanied immigrant children between two agencies once again, but this time between the DHS and the ORR. The distinct mission of two agencies prevents their shared responsibility over unaccompanied immigrant children from being a successful government proposition. In fact, it is because the two agencies encompass very different aims and goals of taking care of children that they are unable to uphold the best interest principle. For example, the DHS focuses on apprehension, transfer and repatriation in attempts to fulfill its mission of

enforcing national security while the ORR under the HHS provides long-term detention and foster placement for refugees and children.³² Placing children under the domain of two agencies that clash with each other's mandates is problematic when the DHS owns maximum authority to decide the fate of children. This conflict of interest makes it extremely arbitrary which children end up in a detention facility and which children end up in an ORR's DUCS facility. While this governmental action aimed to improve accountability over unaccompanied immigrant children, the shared responsibility of the DHS and the ORR fails to prioritize the welfare of children because it gives maximum authority to the DHS over children.

In March 2003, the ORR created the Division of Unaccompanied Children's Services (DUCS) in order to provide special care and services to unaccompanied immigrant children.³³ Because the ORR operates federally-funded programs for both refugee and non-refugee children, it is better equipped to manage and care for these children. Under ORR supervision, children receive housing, food, education, and health care. It is also important to note that while conditions and treatment of unaccompanied immigrant children improved when transferred under ORR custody, the shared responsibility of the DHS and

³² Haddal, Chad C. *Unaccompanied Alien Children: Policies and Issues*. Congressional Research Service Report for Congress. 1 March 2007.

"The 2002 Homeland Security Act (HSA) transferred custody of unaccompanied [immigrant] children from the former Immigration and Naturalization Service (INS) to the Office of Refugee Resettlement (ORR)."

³³ *The Homeland Security Act of 2002*. H.R. 5005. The Library of Congress. <<http://thomas.loc.gov/cgi-bin/query/z?c107:h.r.5005.enr:>>.

Section 4629(b)(1)(J) of the Homeland Security Act of 2002 dictates that the ORR must keep record of statistical information and other data on unaccompanied immigrant children, including "biographical information, such as a child's name, gender, date of birth, country of birth, and country of habitual residence; the date on which the child came into Federal custody by reason of his or her immigration status; information relating to the child's placement, removal, or release from each facility in which the child has resided; in any case in which the child is placed in detention or released, an explanation relating to the detention or release; and the disposition of any actions in which the child is the subject."

the ORR continues to be challenged and questioned because of the authority DHS owns over the fate of children.

Generally, the DHS, ICE, and CBP apprehend and hold unaccompanied immigrant children prior to transferring them over to the ORR. These federal immigration agencies determine whether a child can be identified as an ‘unaccompanied’ immigrant child. The age of a child, their criminal record, and their country of origin are investigated to help the DHS indicate when and if they are to be transferred to the ORR. If the DHS finds “that a person is either not under the age of 18 or not unaccompanied, that person remains in the custody of DHS.”³⁴ Usually, it takes approximately a 3-5 day timeframe to move these children from the DHS to the ORR, even though 72 hours is the set required standard. According to the HHS Office of Inspector General (OIG), “84 percent of unaccompanied children are admitted to DUCS facilities within three days.”³⁵ It remains a mystery why immigration officers have failed to transfer the remaining 16 percent over to the HHS under that time period. What is clear is that during the 72 hour holding stage, unaccompanied immigrant children under the CBP or ICE are placed in “large, open cells that afford no rest or privacy . . . consist of an open concrete room with concrete benches built into the wall.”³⁶ These cold, crowded, and dangerous cells, which at times fail to

³⁴ Byrne, Olga. *Unaccompanied Children in the United States: A Literature Review*. Vera Institute of Justice. April 2008.

³⁵ Levinson, Daniel R. *Division of Unaccompanied Children’s Services: Efforts to Serve Children*. Department of Health and Human Services Office of Inspector General. March 2008. <<http://oig.hhs.gov/oei/reports/oei-07-06-00290.pdf>>.

³⁶ *Halfway Home: Unaccompanied Children in Immigration Custody*. Women’s Refugee Commission and Orrick Herrington & Sutcliffe LLP. February 2009.

separate children from adults, and girls from boys, leaves unaccompanied immigrant children vulnerable to abuse, violence, and other forms of exploitation.³⁷

Many scholars, including Jacqueline Bhabha, Susan Schmidt, and Christopher Nugent disagree with the shared responsibility of the DHS and the ORR. For example, Christopher Nugent is deeply alarmed over this new, yet problematic relationship between the DHS and the ORR. He argues that, “this has led to unaccompanied immigrant children being treated as pawns often pitting different stakeholders (other than children themselves) with competing interests such as law enforcement versus child welfare while failing to explicitly include the children’s voices and perspectives in determining what is in their best interests.”³⁸ The shared responsibility between the DHS and the ORR over the welfare of unaccompanied immigrant children makes it difficult to ensure credibility and accountability of either agency, particularly when the rights of children are known to have been violated. More often than not, the needs and concerns of these children remain in the shadows of society. Others, like Chad Haddal, analyst in immigration policy at the Domestic Social Policy Division, argue that the problem lies in the inefficient relationship and lack of communication between the DHS and the ORR. He claims that “interagency tensions [derives from] the lack of a Memorandum of Understanding (MOU) between DHS and ORR.” A previously written *Statement of Principles* between DHS and HHS was too broad and does not address interagency issues.³⁹

³⁷ *Ibid.*

³⁸ Nugent, Christopher. *Whose Children Are These? Towards Ensuring the Best Interests and Empowerment of Unaccompanied Alien Children*. 2006.

³⁹ Haddal, Chad C. *Unaccompanied Alien Children: Policies and Issues*. Congressional Research Service Report for Congress. 1 March 2007.

Professor Christopher Nugent points to the DHS's conflict of interest that neglects the rights of unaccompanied children.⁴⁰ Allowing the DHS to serve as the gatekeeper for admission to ORR custody is a serious dilemma. It becomes detrimental when an institution that is supposed to work with another institution (that does support the best interests of the child) has no desire to support the best interest of the child. The DHS's focus on national security prevents it from committing to the Flores Settlement standards and makes it impossible to work harmoniously with the ORR. This denies unaccompanied immigrant children the protection they require at all times. In agreement with this reasoning, many scholars go as far as to claim that full responsibility of apprehension, detention, and release should be delivered to the ORR.⁴¹ This way the gatekeeper is eliminated and an agency whose main purpose centers on aiding and supporting vulnerable populations of persons, especially those seeking asylum, becomes the main protective agency of unaccompanied immigrant children. Sensibility and consciousness of the needs of children would be secured. However, I believe that apprehension is inherently a national security issue which should reside under the authority of the DHS as it is best equipped for this duty. Conversely, the ORR is qualified to aid in children welfare, and as such must be given full control over the supervision and release of unaccompanied immigrant children. That is why the detention of these children in 'prison-like' punitive

The Statement of Principles between the Department of Homeland Security and the Department of Health and Human Services titled Unaccompanied Alien Children's Program is only a formal agreement to share responsibility over unaccompanied immigrant children between the two agencies. "Issues such as information sharing, location of facilities, release notification, age determination, and UAC classification" have yet to be discussed in a more in depth and formal agreement.

⁴⁰ Nugent, Christopher. *Whose Children Are These? Towards Ensuring the Best Interests and Empowerment of Unaccompanied Alien Children*. 2006.

⁴¹ Haddal, Chad C. *Unaccompanied Alien Children: Policies and Issues*. Congressional Research Service Report for Congress. 1 March 2007.

environments, which is commonly used by the DHS, and at times by the ORR as a last resort, should be completely eliminated. Holding innocent unaccompanied immigrant children in detention centers neither serves to guarantee national security nor the best interest principle.

Quite differently, Jessica Taverna argues that the transfer of children to the ORR was excessive, particularly because immigration security advocates claim that the rights of unaccompanied immigrant children should not supersede their possible threat to national security.⁴² Alternatively, Wendy Young and Megan McKenna voice concerns about the ORR's ability to protect and care for unaccompanied immigrant children; they suggest improving internal management and increasing federal sponsorship would make the system more efficient.⁴³ The diverse opinions of the DHS's and ORR's shared responsibility do not make it easy to push forth reformative measures. However, while the conditions of children under ORR custody have unquestionably improved, it is also clear that the lack of federal funding, bed space, housing, and therapeutic resources, especially health and educational services, makes the ORR's monitoring of unaccompanied immigrant children extremely complicated and still lacking.

⁴² Taverna, Jessica G. *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*. William & Mary Bill of Rights Journal. 2004.

⁴³ Young, Wendy and Megan McKenna. *The Measure of a Society: The Treatment of Unaccompanied Refugee and Immigrant Children in the United States*. Harvard Civil Rights-Civil Liberties Law Review. 2010.

The Flores Settlement Agreement

Deeply aware of the complex DHS and ORR shared responsibility over unaccompanied immigrant children as well as the federal paradox, community legal advocacy groups helped reshape INS detention policies around the country and continue to voice their concerns. In particular, the success of the Flores Settlement Agreement raised national recognition on the needs of unaccompanied immigrant children. The Flores Settlement became the first official document to delineate detention center standards in partial accordance with the best interest principle.

The adoption of the Flores Settlement occurred after the Center for Human Rights and Constitutional Law in Los Angeles and the National Center for Youth Law in San Francisco, California filed a class-action suit in 1985 on behalf of Jenny Lisette Flores known as *Flores v. Meese* 934 F. 2d 991 (CA9 1990). They wanted to challenge “the detention, release, and treatment of minors in INS custody in hopes of improving the conditions and treatments faced by detained unaccompanied immigrant children and ending their detainment.”⁴⁴ *Flores v. Meese* disagreed with the national INS policy which declared that “even if parents or guardians were available, detention could be continued to secure the juvenile's presence in immigration proceedings, or to ensure their safety.”⁴⁵ Victoriously, in 1988, the U.S. District Court for the Central District of California ruled in favor of *Flores*, but this win was cut short when the INS and Attorney General appealed to the United States Court of Appeals for the Ninth Circuit in 1990. In *Janet Reno v. Flores* 507

⁴⁴ Young, Wendy A. *Refugee Children At Risk*. American Bar Association. <<http://www.abanet.org/irr/hr/winter01/young.html>>.

⁴⁵ *Unaccompanied Juveniles in INS Custody*. United States Department of Justice. 28 September 2001. <<http://www.justice.gov/oig/reports/INS/e0109/chapter1.htm>>.

U.S. 292 (1993), the Court of Appeals reversed the findings in *Flores v. Meese*.⁴⁶ In 1996, the plaintiffs and the INS reached a settlement, which became known as the Flores Settlement Agreement. It delineated three main principles: 1) Release children from immigration detention without unnecessary delay; 2) Place children in the “least restrictive setting appropriate to their age and any special needs;” and 3) Implement standards to secure the care and treatment of children in immigration detention centers.⁴⁷ These standards required former INS (and today’s HHS and DHS) to handle immigrant children in accordance to their best interests—the welfare of unaccompanied immigrant children had to be the priority.

In 2002, under the provision of the HSA, the DHS and the HHS were forced to accommodate and protect unaccompanied immigrant children under the mandates of the Flores Settlement. This settlement became the foundation to improvements in the U.S. detention center system. “Flores stipulates various requirements relating to standards of treatment, including transportation arrangements, legal representation, telephone access, health care, counseling, education, recreation, and religious services.”⁴⁸ It made living conditions and treatment more bearable for unaccompanied immigrant children.

⁴⁶ Janet Reno v. Jenny Lisette Flores. 507 U.S. 292 (1993).
<http://www.aclu.org/files/pdfs/immigrants/flores_v_meese_agreement.pdf>.

⁴⁷ The Center for Human Rights and Constitutional Law encompass the full text of the Flores Settlement Agreement. <<http://centerforhumanrights.org/children/Document.2004-06-18.8124043749>>.

While the Flores Settlement Agreement was eventually adopted in 1997, the U.S. Supreme Court upheld the constitutionality of the challenged INS regulations in the case *Reno v. Flores*, 507 U.S. 292 (1993), but it remanded the case the district court. That is why the Flores Settlement Agreement was reached.

⁴⁸ Garcia, Marisela. *Unaccompanied Children in the United States: Challenges and Opportunities*.
<<http://www.latinopolicyforum.org/assets/Unaccompanied%20Children%20Article.pdf>>.

But, these standards, as previously indicated, are not always implemented nor put into practice. The DHS's inherent interest in national security escalated after the 9/11 terrorist attacks. With the declared 'War on Terror,' and the fight against drug-cartels and gang-related violence, the public associated unauthorized migration into the country with terrorism and considered it a threat.⁴⁹ In accordance, the spokesman for the Bureau of Citizenship and Immigration Services stated, "Because of the events of Sept. 11th, the way that we deal with administering immigration benefits and services has changed. . . . Everything they do is aimed at national security."⁵⁰ However, associating undocumented immigrants to terrorism is not well-founded. In fact, "Not a single terrorist has been caught crossing the U.S.-Mexican border. All 9/11 hijackers entered the country legally."⁵¹ Hence, children, like Elvira Arellano's four year old son who was detained after she was found to own a fake social security number to work, are arrested by DHS and falsely accused of terrorism.⁵² Also, the DHS does not fully comply with the Flores Settlement as it continues to engage in government contracts with privatized detention facilities. While these contracts are a huge expense on the federal budget, government support for corporate-profit explains that it is not invested in the welfare of children. Quite contrary, it supports the growth of private businesses. In addition, because of the DHS's relationship with the

⁴⁹ Barnard, Alexander. *Points of Migration: Myths and Realities of Illegal Immigration*. Center for Migration and Development. 25 June 2007. <http://cmd.princeton.edu/files/POM_june2007.pdf>.

⁵⁰ Bernstein, Nina. *Children Alone and Scared, Fighting Deportation*. The New York Times. 28 March 2004. <<http://www.nytimes.com/2004/03/28/nyregion/children-alone-and-scared-fighting-deportation.html?pagewanted=1>>.

⁵¹ Barnard, Alexander. *Points of Migration: Myths and Realities of Illegal Immigration*. Center for Migration and Development. 25 June 2007. <http://cmd.princeton.edu/files/POM_june2007.pdf>.

⁵² Kaneya, Rui. *Terrorism Sting Busts Immigration*. The Chicago Reporter. 2008. <http://www.chicagoreporter.com/index.php/c/Cover_Stories/d/Terrorism_Sting_Busts_Immigrants>.

ORR, the DHS assumes that the ORR should take care of all welfare issues, which is why the 16 percent of children who remain in ICE facilities deserve to be under the care of the ORR. And yet, the ORR's use of detention centers is inefficient to the needs of children. Their employment of secure facilities and at times of local prisons as well as the lack of resources prevents them from creating a nurturing environment for children.

The unwillingness and inability of the DHS to prioritize the welfare of children prevents the full enforcement of the Flores Settlement and makes it difficult for the best interest principle to be upheld. In recent years, the Flores Settlement functions as a means to measure the effectiveness of detention centers and the treatment of detainee immigrant children. Several reports conclude that the DHS's conflict of interest and that of its contracted partners prevent the immigration detention system from fully enforcing legislation in favor of children. In fact, its role as parent and prosecutor makes it impossible.

Conditions and Treatment of Children in Detention Centers

Prior to the enactment of the Flores Settlement, unaccompanied immigrant children were confined to terrible conditions and subjected to comparable treatment as criminal offenders. “More than one-third of these children were held in juvenile detention facilities intended for the incarceration of youth offenders.⁵³” Many unaccompanied immigrant children in detainment were handcuffed and shackled, forced to wear prison garbs, locked in prison cells, given less than an hour of recreational activities, limited education and access to the outdoors, and de facto denied access to legal and social services to demand asylum or other forms of relief.

On January 6, 2000, Jo Becker, the Director of Children’s Rights Advocacy for Human Rights Watch published the article, *The Other Immigrant Child*, to raise awareness on the fear and disciplinary sanctions imposed on detained children and the problems they encountered under INS custody. She reveals the story of a 15-year-old girl named Xiao Ling who was sent to a secure detention facility. INS housed this girl side-by-side children accused of murder, rape, and drug trafficking. “She was forbidden to wear her own clothes or keep any possessions, jewelry, hair ties, perfume, and deodorant, in her cell. She was forbidden to laugh or speak in her native language.”⁵⁴ Unable read or write in her native language, or speak English, her unawareness of her legal rights, and her isolation from a

⁵³ *Halfway Home: Unaccompanied Children in Immigration Custody*. Women’s Refugee Commission and Orrick Herrington & Sutcliffe LLP. February 2009.

⁵⁴ Becker, Jo. The Other Immigrant Children. Human Rights Watch. 6 January 2000. <<http://www.hrw.org/english/docs/2000/01/07/usdom12803.htm>>.

familiar face, Xiao told Becker that she cried every day. “I never thought I’d end up in a jail like this.”⁵⁵

Many children like Xiao are afraid, anxious, and depressed as they spend days, months, and sometimes years awaiting a legal court order. Dr. Linda Piwowarczyk in her paper, *Our Responsibility to Unaccompanied and Separated Children in the United States: A Helping Hand*, argues that jail-like detention environments affect the health of adult-detainees severely and even more so the health of children. While considering previous factors that may affect detainee immigrants, Piwowarczyk argues that children develop mood disorders, major depression, posttraumatic stress disorder, anxiety disorders, and suicidal tendencies while in detainment. “Physical effects included the failure to thrive, an unwillingness to eat (which led to weight loss), sleeping problems, respiratory difficulties, and skin complaints.”⁵⁶ Comparable to adults, her research showed that the impact of detainment on immigrant children was approximately 5 times higher.⁵⁷ Imprisonment prevents children from living normal lives, especially when they have already fallen victim to abuse and violence in their home countries.⁵⁸

⁵⁵ Becker, Jo. The Other Immigrant Children. *Human Rights Watch*. 6 January 2000. <<http://www.hrw.org/english/docs/2000/01/07/usdom12803.htm>>.

⁵⁶ Piwowarczyk, Linda A. *Our Responsibility to Unaccompanied and Separated Children in the United States: A Helping Hand*. *Boston University Public Interest Law Journal*. September 2006. <<http://www.bu.edu/law/central/jd/organizations/journals/pilj/vol15no2/documents/15-2PiwowarczykArticle.pdf>>.

⁵⁷ *Ibid*.

⁵⁸ From the children that underwent Piwowarczyk’s study, she revealed that 74% were torture survivors, 67% were imprisoned in their native country, 59% had a family member or friend murdered, 26% experienced sexual assault and almost all at 97% thought that their lives would be in danger if they were forced to return to their own countries.

Physical and psychological trauma is highly increased when immigration laws and policies are unable to segregate nondelinquent youth from juvenile and adult offenders. In 2001, the U.S. Department of Justice Department of OIG found that 34 out of 57 secure juvenile detention centers did not have standard procedures to separate unaccompanied immigrant children from criminals in their facilities.⁵⁹ This makes noncriminal children vulnerable to abuse from inmates with a criminal history.

Detainment of unaccompanied immigrant children becomes exceptionally problematic when children are disciplined and restrained, detained indefinitely, and are unable to voice their existence to external families or organizations. The limited access to information particularly to legal services prevents children from making the best possible decisions over their fate. Despite the crucial importance of giving children the right to counsel, unlike criminal cases, children are not guaranteed legal representation to represent them in an immigration court.

Also, the inefficient communication between federal immigration agencies makes it difficult to monitor the number of children who enter and leave detention facilities. In fact, an article by Emily Ramshaw in the Texas Tribune voiced concern for a girl who had been under the custody of Texas Child Protective Services and was then detained by federal agents because, as Ramshaw emphasizes, “the child’s fate is unknown.”⁶⁰ It is unclear what happens to children when there is a lack of accountability on behalf of the agencies that

⁵⁹ Knight, Danielle. *Waiting in Limbo, Their Children Lost*. U.S. News & World Report. 7 March 2004. <<http://www.usnews.com/usnews/culture/articles/040315/15asylum.htm>>.

⁶⁰ Ramshaw, Emily. *Broken Border, Part Two: The Checkpoint Conundrum*. The Texas Tribune. 9 November 2009. <<http://www.texastribune.org/stories/2009/nov/09/trapped-along-border/>>.

hold the responsibility to protect them. Little statistical data and information is released by federal immigration offices, and most is attained through legal petitions.

Detention centers around the country continue to be noncompliant in upholding federally requested standards for children. This intricate obstacle makes detainment unbearable and exploitive for unaccompanied immigrant children. A nationwide survey conducted by Amnesty International (AI) in 2002 asked the 115 detention center facilities across the country to release information about the detained immigrant children they held in their custody.⁶¹ The survey revealed that there is a reliance of detention facilities on the use of punitive detention standards for immigrant children in spite of judicial and federal recognition of their rights.⁶² For instance, 12 facilities out of the 33 detention centers that responded to AI's survey claimed that their personnel failed to provide children with appropriate access to translators, education, exercise, and telephones and only 17 percent of secure facilities declared that they housed unaccompanied children separately from the juvenile offender population.⁶³ In fact, 48 percent of the facilities reported that they housed children in the same cells as juvenile offenders. More than 72 percent of children in the facilities reported that they were restrained by leg shackles and handcuffs and 61 percent detailed how they were subjected to routinely strip searches.⁶⁴ The AI report exposed the unfair handling that children receive in detention center facilities and their persistence to treat them as criminals regardless of the notion that they are noncriminal detainees.

⁶¹ *Why Am I Here? Children in Immigration Detention*. Amnesty International. 2007. <http://www.amnestyusa.org/refugee/pdfs/children_detention.pdf>.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Ibid.*

As children spend months or even years in detention facilities, the U.S. government standards of detainment for immigrant children are often ignored. Even when relatives of other adults are willing to care for these children or other permissible arrangements are allowed and preferred by the U.S. government, these detention facilities fail to release children in a timely manner. More disturbing is the extensive physical abuse used as a punitive and disciplinary method on noncriminal children.

A clear example of the imprisonment and the inhumane treatment of these children was the issuance of the controversial family detention centers opened under the request of President George W. Bush. The T. Don Hutto Family Residential Facility in Taylor, Texas run by the private company, Corrections Corporation of America under a “2.8 million-a-month-contract with Wilson County,” became the second detention facility to hold families where over 400 parents and their children awaited their immigration hearings or their deportation notices within this medium-security state prison.⁶⁵ Texas Unite for Families, the ACLU, the Texas Civil Rights Project, and other community groups, created a strong collaborative effort to demand the closure of the detention center which imposed a restrictive and punitive environment for its detainees.

Danny Coronado, a spokesman for the corrections company stated that “a laser beam alerts guards if anyone leaves a room after bedtime—9 p.m. for children and 10 p.m. for adults. The detainees wear ‘outfits of green and blue’ (prison garbs).”⁶⁶ Sylvia Moreno, a Washington Post Staff Writer was appalled by the treatment that Mustafa Elmi received at Hutto. While the DHS claims that Hutto is “an effective alternate and humane alternative”

⁶⁵ Blumenthal, Ralph. *U.S. Gives Tour of Family Detention Center That Critics Liken to Prison*. The New York Times. 10 February 2007. <<http://www.nytimes.com/2007/02/10/us/10detain.html>>.

⁶⁶ *Ibid.*

to keep immigrant families together, Mustafa experienced something quite contrary to those allegations.⁶⁷ “The day Mustafa turned 3 years old he had to report to his cell three times for headcount... [got] one hour of recreation inside a concrete compound sealed off by metal gates and razor wire...[and had to] pin his picture ID to his uniform.”⁶⁸ Mustafa spent 7 months at Hutto after having fled with his mother from political persecution in Somalia.⁶⁹

In 2009, Clark Lyda and Jessica Lyda released the documentary titled *The Lease of These: Family Detention in America* to highlight the inhumane conditions of immigrant children at the T. Don Hutto Residential Center and presented how the frustrations and concerns of community advocacy groups against the facility succeeded in pressuring government officials to close the site in the summer of 2009. It also gave credit to the 2007 ACLU lawsuit brought against ICE because it declared that Hutto refused to comply with federal detention standards for children and their families. Demonstrating how this neglectful decision affected children and other noncitizens housed under their authority, Hutto was forced to transfer the children under their custody over to the Berks Family Residential Center in Pennsylvania.

The works of community activists, media outlets, legal advocates and academic scholars have been crucial to raising awareness about the conditions and treatment of children and supporting recent legislative reforms and new developments attempting to secure the rights of children. Without the attention to the issue of children and families

⁶⁷ Moreno, Sylvia. *Detention Facility for Immigrants Criticized*. The Washington Post. 22 February 2007. <<http://www.washingtonpost.com/wp-dyn/content/article/2007/02/21/AR2007022101661.html>>.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

imprisoned in detention centers, their voices would be trapped within the solitude of their cells. Placing emphasis on the principle that detainment does not uphold the best interests of unaccompanied immigrant children, children advocacy groups attempt to hold the U.S. federal government and private corporations accountable when they are given custody of these children.⁷⁰ Without national guidelines that safeguard children from the conflicting self-interests (national security and profit oriented institutions) of the federal government's immigration system, unaccompanied immigrant children easily fall victim to human right violations, abuse, and exploitation. The passage of federal legislation protecting the rights of children, while still in great need, has however dictated the importance of ensuring the best interest of children. It is the refusal to comply with federal mandates that prevents clear evaluation of federal programs and denies children the protection from a standard policy that secures their welfare.

⁷⁰ Gilman, Denise L., and Elise T. Harringer. *T. Don Hutto Residential Center, Taylor Texas. The University of Texas School of Law Immigration Clinic*. 8 October 2007. <http://www.utexas.edu/law/academics/clinics/immigration/briefing_paper.pdf>.

The Privatization of the Detention Center System

While the Hutto case was resolved and its outcome ceased to detain undocumented families in the Texas detention center, it underscores that privatization is an ongoing problem. A major reason for the inability of the DHS to uphold the best interest principle is its 'Jekyll and Hyde' paradox commanded by the Congress. On the one hand, the DHS is told to seek the welfare of unaccompanied immigrant children and passage of federal policies reflects an attempt to align with the best interest principle. And on the other, every year the federal government increases the number of private contracts to handle the imprisonment of immigrants and gives ICE the responsibility to "strengthen the nation's capacity to detain and remove criminal and other deportable aliens."⁷¹ How can the same agency that seeks to deter immigration and imprison immigrants be responsible for finding the best means possible of gaining their residency and their release? This paradox makes it impossible for DHS to prioritize both the welfare of children under their custody and national security issues where ICE finds "[it] a key component of the comprehensive strategy to deter illegal immigration."⁷²

A disastrous failed attempt to uphold this paradox can be observed in the Secure America through Verification and Enforcement (SAVE) Act of 2008. In spite of strong opposition from human rights groups and community activists, President George W. Bush endorsed the passage of this act, which explicitly demanded the creation of an

⁷¹ *Immigration. The Department of Homeland Security*. Washington D.C. <<http://www.dhs.gov/ximgtn/>>.

⁷² *Ibid.*

unprecedented number of family detention center facilities.⁷³ The U.S. federal government under this act called for “bids from private detention companies for up to 4,000 new prison beds, which could be worth hundreds of millions of dollars in contracts for private corrections firms to keep families together while they await their immigration proceedings.”⁷⁴ This resulted in the further expansion of the privatized prison system particularly for immigration purposes. The federal government gave county governments and private companies the ability to make millions of dollars from the imprisonment of immigrants. In 2009, for example, ICE publicly announced that it was open to accept “new bids” for the creation of up to three new detention centers that could house as many as 600 men, women, and children who are currently fighting deportation cases.⁷⁵ “This shows that we have become addicted to incarceration as a method to solving our problems, which it is obviously not,” stated Ahilan Arulanantham, a Southern California attorney.⁷⁶

In a 2009 report from the National Immigration Forum, statistical data revealed the extent of the expense and allocation of the DHS’s budget for the immigration detention program. They reported that “the \$1.7 billion budget for Custody Operations provides ICE

⁷³ Spina, Christopher. *Organizations Voice Opposition to Legislation Detaining Immigrant Children*. CAUSA: Oregon’s Immigrant Rights Coalition. 22 April 2008. <<http://causaoregon.blogspot.com/2008/04/organizations-join-in-opposition-to.html>>.

In April 2008, “over 80 federal, state, and local organizations,” such as First Focus, the National Council of La Raza, the National Education Association, the Lutheran Immigration and Refugee Service, and the Episcopal Church, sent a letter to the U.S. House of Representatives to oppose the Secure America through Verification and Enforcement (SAVE) Act (H.R. 4088) of 2008. This bill specifically called for the creation of family detention facilities, which as a result “imprisoned innocent children” in secure prison facilities instead of a “nurturing home environment.”

⁷⁴ Trubey, J. Scott. *New Residential Boom: Privately Run Prisons*. Orlando Business Journal. 28 November 2008. <<http://orlando.bizjournals.com/orlando/othercities/atlanta/stories/2008/12/01/story1.html>>.

⁷⁵ Gorman, Anna. *Family Detention Sites in Works*. Los Angeles Times. 18 May 2008. <<http://articles.latimes.com/2008/may/18/nation/na-detention18>>.

⁷⁶ *Ibid.*

with funding to maintain its current detention capacity of 33,400 people in over 500 facilities on any given night, including operation expenses.”⁷⁷ Within this analysis, the National Immigration Forum report stresses that not only has the Custody Operations budget doubled since 2003 but also how ICE continues to attain funding from the federal government for the addition of detention bedspace. Also, a Human Rights First report declared that “between 2005 and 2008 alone, ICE increased detention beds by 78 percent” and as of 2009 there are more than 33,400 jail beds reserved for immigrant detainees.⁷⁸ The increased reliance of detention facilities and the move to privatize ICE-administered detention facilities reasserts the extensive self-interest that aims to neither protect immigrant children nor improve the broken immigration system. Billions of federal dollars (taxpayer money) is being used to support a model that does not work in favor of children.

The move to detain and imprison unaccompanied immigrant children prevents the immigration system from upholding the best interests of children. A corporation seeking to increase its profits by increasing the number of facilities while reducing costs (labor, infrastructure, and space) makes it clear that their interest is profit oriented. It is the duty of the federal government to enforce legislation, such as the Flores Settlement, to dictate the standards of detainment for children. Not holding privately-owned detention centers (which are contracted with the federal or local governments) accountable forces immigrant children down a dead-end street. The paradox of the U.S. federal government’s immigration policies (national security and profit versus child welfare and human rights) fails to prioritize the best interests of children. And yet, unaccompanied immigrant children need

⁷⁷ *The Math of Immigration Detention*. The National Immigration Forum. 7 July 2009. <<http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf>>.

⁷⁸ *U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison*. Human Rights First. 2009. <<http://www.humanrightsfirst.org/pdf/090429-RP-hrf-asylum-detention-sum-doc.pdf>>.

the protection and custody that will ensure and fight for their welfare. The DHS and the detention center system are clearly not capable of enforcing that responsibility.

The Division of Unaccompanied Children's Services (DUCS)

Many scholars view the transfer of unaccompanied immigrant children over to DUCS as a move in the right direction. The enactment of the HSA and Flores Settlement improved means of management and treatment of detention centers under the DHS. Recent reports on the performance of the ORR and the DUCS show the increase in quality and quantity of education, health care, social activity, access to pro bono litigation, and recreation, provided for unaccompanied immigrant children.⁷⁹ For example, the use of secure detention facilities for children dropped from 32 in FY2003 to 4 in FY2007. This drastically changed previous standards that prioritized the placement of children in secure detention facilities.⁸⁰ Currently, there are 30 DUCS facilities used to maintain unaccompanied immigrant children; a mixture of federal, local, and private-run detention facilities.

However, there is strong criticism of the DUCS's slow enforcement of the Flores Settlement and other measures which limit its ability to fully implement the best interest of children. The majority of children moved under the protection of the DUCS are still housed in a range of licensed facilities, including foster care, group homes, transitional housing, mental health centers, detention facilities, juvenile and adult jails and locked hotel rooms.⁸¹ Very limited bed space and funding is allocated for the use of shelters and fosters homes for

⁷⁹ Nugent, Christopher. *Whose Children Are These? Towards Ensuring the Best Interests and Empowerment of Unaccompanied Alien Children*. 2006.

⁸⁰ Byrne, Olga. *Unaccompanied Children in the United States: A Literature Review*. Vera Institute of Justice. April 2008.

⁸¹ *Unaccompanied Immigrant and Refugee Minors*. The National Conference of State Legislatures. 11 August 2005. <<http://www.ncsl.org/default.aspx?tabid=13128>>.

children. In fact, the speedy creation of the DUCS made “the development of the new program model based entirely on child welfare principles unrealistic.”⁸²

Under the authorization of the HSA, the ORR’S DUCS was created in 2003 with seven staff members and approximately \$35 million in federal funding to begin the transfer of children under its custody.⁸³ As of 2009, the number of unaccompanied immigrant children transferred has risen by 225 percent because the program has “grown to 18 headquarters staff, 11 field staff and a budget of about \$132.6 billion.”⁸⁴ This increase in responsibility over a small timeframe prevented the DUCS from gaining the adequate resources and services to provide children under its authority with essential necessities.

Most DUCS facilities are constructed or contracted along U.S. Border States, such as Texas, Arizona, and California. A few others are located in New York, Oregon, Virginia, Indiana, Florida, and Washington. Because of their location, in mostly rural areas, they lack access to services making it difficult to provide children with essential resources, family visitations, and access to external aid. Also, higher reliance on the institutionalization of larger DUCS facilities to control the large number of children makes them impersonal to children’s needs.”⁸⁵ South West Key (Mesa) staff-secure facility and Northern Virginia Juvenile Detention Home (NOVA) in Alexandria, Virginia are examples of two DUCS facilities with limited and under-trained staff on policies and procedures that gave inadequate care to immigrant children. As the report declares, “both care and safety are

⁸² *Halfway Home: Unaccompanied Children in Immigration Custody*. Women’s Refugee Commission and Orrick Herrington & Sutcliffe LLP. February 2009.

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

compromised by this reliance on large facilities, as it is difficult for staff to give children the individualized attention necessary given their high level of trauma and vulnerability.”⁸⁶

In February 2009, the Women’s Refugee Commission published a detailed report, titled *Halfway Home: Unaccompanied Children in Immigration Custody*, evaluating the DHS and the DUCS treatment of unaccompanied immigrant children. It released 2007 data from the ORR and ICE on the number of immigrant children imprisoned in detention centers around the country through a Freedom of Information Act (FOIA) and exposed the number of bed space available in each of the ORR’s 30 facilities, ICE, CBP, private-owned facilities and local prison that are set up for unaccompanied immigrant children. It listed the number of children in ORR facilities to be no more than 1,216.⁸⁷ This suggests that there are a huge number of children still placed under DHS custody or that they are either placed in local prison cells or adult immigration detention centers. While statistical data is essential to keep record of when and where these children are placed and to hold the DHS and the ORR accountable for children under their supervision, it lacks the consistency to track and monitor all children in the immigration system. Moreover, Congress has indicated that when there is a lack of bedding and other resources, the ORR must continue to send children to local prisons and/or juvenile detention centers.⁸⁸ This government action is contradictory to the best interest principle as well as the U.S. Constitution. It is unclear as to why Congress mandates the use of prisons when DUCS facilities reach their maximum capacity as it also mandates the inclusion of the Flores Settlement under

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ Haddal, Chad C. *Unaccompanied Alien Children: Policies and Issues*. Congressional Research Service Report for Congress. 1 March 2007.

detention center standards and demanded the DHS to hold immigrants in the least punitive environment. These federal mandates, which dictate the ways in which unaccompanied immigrant children must go about their immigration proceedings, are contradictory. On the one hand, the U.S. Congress administers and funds the creation of DUCS facilities in attempts to improve the conditions and treatment of unaccompanied immigrant children while on the other; it continues to privatize the immigration detention system and to use secure facilities to house children. As previously discussed, the creation of DUCS facilities has not solved the problem of detaining children. Government contradictory mandates, inaccessible statistical data on the number of children in the system, and the inability to comply with the Flores settlement and human rights principles makes it clear that the best interest principle still needs to be enforced.

'Alternatives to Detention'

Between 1997 and 2002, during the same time that the *Reno v. Flores* case was being disputed, the Flores Settlement was achieved, the passage of the HSA, and the creation of the DUCS, the United States federal government showed interest in finding 'alternatives to detention' in light of information released on the dilemma of unaccompanied immigrant children under DHS and DUCS custody. The U.S. Congress asked the Vera Institute of Justice to conduct pilot programs known as the Appearance Assistance Project (AAP) to find 'alternatives to detention' and to test their success rates. In part, the Vera Project took place because the federal government wanted to find ways to decrease the cost of building new detention centers. In funding the pilot programs, the INS considered implementing effective 'alternatives to detention' used by the criminal justice system to secure court proceedings, appearances, and compliances to court orders. The government also wanted to make certain that immigrants obeyed immigration notifications because "statistics showed that those not detained pending their required departure from the country had a compliance rate [to court orders] of 11%."⁸⁹ But AAP findings concluded that over 96 percent of immigrants under the supervision of 'alternative to detention' programs complied with judicial court orders and immigration requests.⁹⁰ The Vera Institute exposed through the AAP that the detention center system is an excessive punitive and expensive method for supervising immigrants.⁹¹

⁸⁹ *Appearance Assistance Project (AAP) Evaluation Report*. Vera Institute of Justice. <<http://www.vera.org/download?file=615/finalreport.pdf>>.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

The congressional interest in the Vera Project to find ‘alternatives to detention,’ contradicts with its mandate to send unaccompanied immigrant children to local prisons and to increase the number of detention centers to hold immigrants in the United States. Conversely, congressional authorization forces ICE to release immigrant children and their families and to use ‘alternatives to detention’ when possible. These clashing federal mandates deny the immigration system clear and enforceable guidelines that would ensure the welfare of unaccompanied immigrant children. It remains unclear why the U.S. Congress continues to enact legislation that conflicts with the interests of different agencies. In turn, these congressional contradictions make it impossible to enforce immigration policies in accordance to the best interest principle.

When it decided to allocate federal funds to ‘alternatives to detention,’ Congress declared, “Families with children should not be housed in penal-like settings, nor should children detained by ICE be denied access to recreation or the opportunity to receive basic education instruction,” including in situations where family detention is unavoidable until the conclusion of their immigration proceedings.⁹² Indisputably, however the DHS, ICE, and CBP have intentionally prioritized the utilization of detention centers for holding children while relying heavily on expedite proceedings of removal. The DHS’s use of ‘penal-like settings’ for unaccompanied immigrant children is prevalent in spite of congressional requests to do so as a last resort. The adoption of the Flores Settlement and the increased financial support for the DUCS, for example, indicates a federal recognition and inclination to adopt immigration policies in line with human rights principles and constitutional laws.

⁹² *110th Congress Report House of Representatives: Department of Homeland Security Appropriations Bill*. [Thomas Library of Congress](http://thomas.loc.gov). 2008. <<http://thomas.loc.gov>>.

In fact, the use of DUCS facilities is deemed as a ‘less restrictive environment’ for children. But, these facilities lack the appropriate housing, recreational, educational, medical, legal, and nurturing resources that would fully implement the best interest principle.

Wendy Young, the director of Government Relations and U.S. Program at the Women’s Commission for Refugee Women and Children, insists that the ‘move forward’ that Congress has taken is not enough. Since 1997, the U.S. federal government increased dramatically the number of immigrant children in INS custody and the number of detention center facilities. Young is concerned with the lack of adequate shelter bed space and disciplinary environment to accommodate the increased rate of immigrants entering the system. The INS “often resorts to detaining children in juvenile correction facilities” to house unaccompanied immigrant children.⁹³ Her point indicates that DUCS facilities encompass restrictive elements of detainment, such as the use of secure detention facilities and local prisons. The facts demonstrate that the federal government is concerned not with finding ‘alternatives to detention,’ but rather increasing support for ‘alternative *forms* of detention.’⁹⁴

In 2006, the Office of the United Nations High Commissioner for Refugees (UNHCR) defined ‘alternatives to detention’ as “alternative means of *increasing the appearance and compliance* of individual asylum seekers with the asylum procedures and of meeting other legitimate concerns which States have attempted to address, or may otherwise attempt to

⁹³ Young, Wendy A. *Refugee Children At Risk*. American Bar Association. <<http://www.abanet.org/irr/hr/winter01/young.html>>.

⁹⁴ *Alternatives to Detention: Briefing Materials—UN SR Visit*. Lutheran Immigration and Refugee Service and the Detention Watch Network. <<http://www.immigrantsolidarity.org/Documents/DWN/12.%20Alternatives%20to%20Detention%20UNSR%20Materials.pdf>>.

address, through recourse to detention.”⁹⁵ While this definition is used to highlight the needs of asylum-seekers and refugees, it set the stage internationally for countries to create and implement ‘alternatives to detention’ to improve treatment of all immigrant detainees. Government concern over whether or not to release or detain undocumented immigrants primarily resides with need to guarantee that undocumented immigrants will “appear and comply” with court orders and federal notifications.⁹⁶ Hence, the main goal of ‘alternatives to detention’ practices is to guarantee federal accountability for people that go through the immigration process, especially those that receive deportation notifications. “Under human rights principles, detention should be used as a last resort and only when that level of restriction is necessary to meet the legal objectives for which it is intended.”⁹⁷ The operation of secure detention facilities therefore becomes an excessive and inhumane form of imprisonment for noncriminal unaccompanied immigrant children when the sole purpose is to monitor their whereabouts.

That is why the government commissioned initiative through the Vera Project is of importance here. It highlighted the efficiency of ‘alternatives to detention’ programs that would benefit the entire country—child welfare advocates and immigration security supporters alike. Moreover, the Vera Project studied over 500 participants who fell under three categories: asylum seekers, lawful permanent residents facing removal due to a

⁹⁵ *Alternatives to Detention of Asylum Seekers and Refugees*. UNHCR Division of International Protection Services, Legal, and Protection Policy Research Series. Orphelia Field. April 2002.

⁹⁶ *Alternatives to Detention: Briefing Materials—UN SR Visit*. Lutheran Immigration and Refugee Service and the Detention Watch Network. <<http://www.immigrantsolidarity.org/Documents/DWN/12.%20Alternatives%20to%20Detention%20UNSR%20Materials.pdf>>.

⁹⁷ *Ibid.*

criminal conviction, and undocumented workers caught at work sites.⁹⁸ Not surprisingly, “alternatives saved the federal government almost \$4,000 per person while showing 93% appearance rate for asylum seekers at all court hearings.”⁹⁹ This government sponsored and nongovernmental organization (NGO) conducted project proved that ‘alternatives to detention’ are cost-effective and in line with humanitarian standards. In fact, it served as a model for ‘alternative to detention’ pilot projects thereafter. When appropriating funds to DHS, Congress has indicated its intent to fund programs modeled after the Vera Project. “In FY2006, Congress appropriated a record funding of \$43, 600,000 to the DHS for ‘alternatives to detention’ for detained adults.”¹⁰⁰

It remains ambiguous, however as to why the federal government did not fully replace the use of detention centers to house noncriminal immigrants with ‘alternatives to detention.’ The Vera Project demonstrated to be successful in supervising immigrants and verified that ‘alternatives to detention’ would be a drastic improvement over the status quo. Two main types of alternatives that have been suggested by Congress as methods to monitor immigrants have been the Intensive Supervision Appearance Program (ISAP) and the US NGO-Based Alternative programs. However, there is indication that ISAP is an ‘alternative form of detention’ while the US NGO-Based Alternative Programs are successful ‘alternatives to detention’ and the closest in model to the Vera Project. For example, privatized supervision programs, such as the detention center system and ISAPs, have stakeholders who are not interested in prioritizing human rights principles. Instead, they

⁹⁸ *Appearance Assistance Project (APP) Evaluation Report*. Vera Institute of Justice. <<http://www.vera.org/download?file=615/finalreport.pdf>>.

⁹⁹ *Ibid.*

¹⁰⁰ House of Representatives. 109-699. 2006 cited in *Alternatives to Detention*.

are concerned with improving systems of detainment to generate the most revenue possible out of these government contracts. Distinctively, US NGO-Based Alternative programs conducted by nongovernmental organizations collaborate with the federal government and own the adequate resources and support systems to manage persons undergoing the immigration process, especially children. Owning a distinct interest in promoting humanitarian assistance rather than for-profit mandates, US NGO-Based Alternative programs serve as a hopeful method to address the issue of unaccompanied immigrant children.

Intensive Supervision Appearance Program (ISAP)

ISAP is an ‘alternative form of detention’ that supervises immigrants through the usage of electric monitoring (bracelets), home visits, work visits and reporting by telephone in attempts to release persons who would otherwise be detained.¹⁰¹ ISAPs have demonstrated that “more than 93 percent of immigrants . . . attended their immigration hearings through a combination of telephone reporting and home visits.”¹⁰² The Department of Homeland security contracted Behavioral Interventions (BI), a private company experienced in monitoring criminals under house arrest, to implement the program.¹⁰³ Forcing undocumented immigrants to post bonds or wear electronic monitors has reduced costs to around \$12 per day¹⁰⁴ This is a huge difference taking into consideration the rate of approximately \$95 per day to hold a person in detainment.

ISAP forces undocumented immigrants who await their immigration proceedings to wear ankle bracelets that send a signal to a transmitter installed on their home telephone. This way BI monitors them when they are in their house and alerts the company if they leave those premises. There are three phases to the ISAP process. 1) in the first phase, adults and children remain under house arrest for a predetermined 12 hours a day, must

¹⁰¹ *Detention and Removal Operations: Alternatives to Detention. Immigration and Customs Enforcement*. 14 July 2004. <www.ice.gov/pi/news/factsheets/061704detFS2.htm>.

¹⁰² Hines, Barbara. *New ICE Family Detention Centers a Step Wrong Direction. The Dallas Morning News*. 18 June 2008. <http://www.dallasnews.com/sharedcontent/dws/dn/opinion/viewpoints/stories/0616edi_hines.cbe545f.html>.

¹⁰³ Taiara, Camille T. *House Arrest: The Bush Administration Finds A New Way To Make Life Miserable For Immigrants.* *San Francisco Bay Guardian Online*. <http://www.sfbg.com/39/13/news_immigrants.html>.

¹⁰⁴ *A Resolution to Study Immigration Detention in the United States from the Advocacy Committee for Women’s Concerns (ACSWP)*. Recommendations made to the 218th 2008 General Assembly. <<http://www.pcusa.org/acwc/awcw-immigrationdetention2008ga.pdf>>.

report to the local BI office in person three times a week, and must provide an hour-by-hour schedule of their activities ahead of time; 2) in the second phase, BI removes the ankle bracelets of immigrants; 3) in the third phase, immigrants in the ISAP program must report to BI just twice a month.¹⁰⁵ To support this program, Congress gave ICE \$11 million dollars to implement ISAPs in 2004.

The ISAP system cannot be considered an ‘alternative to detention’ because the program lacks transparency, humiliates noncriminal immigrants, and tends to be used on detainees who would otherwise be released from detention without supervision.¹⁰⁶ The Catholic Legal Immigration Network, Inc. argues that many participants do not receive information about the conditions and terms of the program nor of their release. “This has contributed to innocent violations of the program that have resulted in unnecessary re-detention ... [and the use of] overly restrictive release conditions . . . confining them to their homes during significant portions of the day.”¹⁰⁷

¹⁰⁵ Taiara, Camille T. *House Arrest: The Bush Administration Finds A New Way To Make Life Miserable For Immigrants.* *San Francisco Bay Guardian Online*. <http://www.sfbg.com/39/13/news_immigrants.html>.

¹⁰⁶ *Alternatives to Detention—A Step Ahead, A Step Back*. *Human Rights First*. <http://www.humanrightsfirst.org/asylum/libertys_shadow/LS_6_Alternatives.pdf>.

¹⁰⁷ Catholic Legal Immigration Network, Inc. <<http://cliniclegal.org/Advocacy/detentionalternatives.html>>. cited in *Alternatives to Detention: Briefing Materials—UN SR Visit*.

US NGO-Based Alternative Programs

US NGO-Based Alternative programs are ‘alternatives to detention’ that have been successful in monitoring and aiding immigrants through their immigration cases. These programs allow nongovernmental organizations (NGOs) to hold the main responsibility of supervising and housing immigrants after they have been apprehended by DHS. They also collaborate with government agencies to be hand over if they are to be deported. This cooperation between NGOs and the government in dealing with immigration enforcement operations for children would be a drastic improvement from the current shared responsibility of the DHS and the ORR. While these measures have neither been enacted nor enforced, pilot projects that test this dynamic prove successful.

Most of their triumph is linked to their ability to uphold human rights principles and immigrant children’s rights protected by the U.S. constitution. The involvement of NGOs in handling immigrant detainees is a more efficient way to monitor and provide them with care. “NGOs have provided supervision, and in some cases, housing in community shelters and assistance in locating pro bono attorneys to help with their claims.”¹⁰⁸

The collaboration between DHS and NGOs would drastically improve conditions for immigrants that would otherwise end up in a detention center or under other forms of detainment. For instance, the DUCS provides shelters and foster care for some children under their care, yet most children are not guaranteed full protection and care as they would under a US NGO-Based Alternative program. These organizations tend to be better

¹⁰⁸ *Alternatives to Detention: Briefing Materials—UN SR Visit. Lutheran Immigration and Refugee Service and the Detention Watch Network.*
<<http://www.immigrantsolidarity.org/Documents/DWN/12.%20Alternatives%20to%20Detention%20UNSR%20Materials.pdf>>.

equipped to work closely with community members and provide adequate resources, management, and training. Under the Vera Project, US NGO-Based Alternative programs “have achieved 96% appearance” at immigration court hearings, achieved cost-effective measures, and uphold human rights principles.¹⁰⁹

In a report in 2008, the Lutheran Immigration and Refugee Service (LIRS), a national agency that works on issues of immigration and refugee resettlement and treatment, and the Detention Watch Network (DWN) examined six US NGO-Based Alternative programs that underwent the Vera Project. They determined that they were successful in ensuring court appearances and court orders of immigrants and demanded their full implementation.

NGOs use a range of methods to handle their clients that supersede their treatment and care under detention center standards. For instance, the Refugee Immigration Ministries in Boston, Massachusetts used the ‘cluster model’ to support each of the people under their custody. “These clusters are made up of church congregation members and volunteers” to support their clients with “legal representation, access to medical care, transportation, community support, and assistance with becoming self-sufficient.”¹¹⁰ In a different, but also efficient manner, the Freedom House in Detroit, Michigan provides refugees and asylum seekers with support services, transitional housing when released, and legal assistance. As an emergency housing resource, the International Friendship House in York, Pennsylvania houses released asylum seekers and refugees. Currently, they house 11 released detainees and aid them in attaining employment authorization

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

documents and other short-term housing opportunities. La Casa de San Juan in San Diego, California, however “is a residential facility run by the Catholic Diocese of San Diego that provides a safe haven for individuals in U.S. Marshals’ custody who are material witnesses in human trafficking cases.” They also provide health care and education, religious needs, and legal referrals to women and children under their custody. Their program offers in particular one-to-one attention and support. To aid refugees waiting to enter Canada, VIVE Inc. operates La Casa shelter in Buffalo, New York and also offers medical and legal services; however, unlike the other shelters they have a unique relationship with the Canada Border Services Agency (CBSA) because 99 percent of all asylum-seekers aiming to enter Canada go through VIVE.¹¹¹ And finally, La Posada Providencia in San Benito, Texas gives “shelter to persons from countries with terrorist or oppressive regimes or those experiencing natural disasters.”¹¹²

These nongovernmental organizations demonstrate that community and nurturing shelter-like environments are better suited to handle immigrants undergoing the complexities of the immigration system, especially children. The Vera Project suggests that the federal government would not only save expenses on these programs but also guarantee the welfare of noncriminal immigrant. Their provision of housing, education, healthcare, and legal services is beneficial to their clients. More importantly, the non-punitive environment and the children-welfare oriented interest would best uphold the best interest principle. In addition, their experience with handling disadvantaged communities of people and their priority to aid disadvantaged unaccompanied immigrant

¹¹¹ *Ibid.*

¹¹² *Ibid.*

children makes them the ideal agencies to hold the responsibility for the fate of immigrant minors undergoing the immigration process. The pilot programs' successes indicate that US NGO-Based Alternative programs are the perfect environment for unaccompanied immigrant children.

Opposition

The Department of Homeland Security and other anti-immigrant civilians defend the conventional use of the detention center system with great success. In spite of congressional and community opposition, immigration authorities claim that detention centers “ensure that immigrants show up for their court hearings and leave the country when ordered.”¹¹³ However, the uses of alternatives demonstrate that most families and children outside of detention centers show up for their court hearings and are deported when their case is no longer valid. Others argue that they see fewer people coming across the border because detention centers serve as deterrents for potential immigrants.¹¹⁴ Yet, the demand for cheap labor and statistical data shows that people have not stopped immigrating to the United States. ICE officials claim that detention centers prevent the smuggling of children and the fleeing of immigrants from ICE supervision before their court or deportation dates. In addition, they argue that detention centers prevent families from subjecting their children to the dangers of an illegal immigration journey. However, none of the arguments justifies the utilization of detention centers as appropriate because prisons neither work to maintain families together nor to protect children.¹¹⁵ Prison facilities criminalize children and forbid them from experiencing a normal lifestyle and the services that ensure their welfare. Attempting to escape hardships in their home countries,

¹¹³ Gorman, Anna. *Immigration Agency Plans New Family Detention Centers*. Los Angeles Times. 18 May 2008. <<http://articles.latimes.com/2008/may/18/national/na-detention18>>.

¹¹⁴ Goodwin-Gill, Guy S. *International Law and the Detention of Refugees and Asylum Seekers*. International Migration Review. The Center for Migration Studies of New York. Summer, 1986.

¹¹⁵ Gorman, Anna. *Immigration Agency Plans New Family Detention Centers*. Los Angeles Times. 18 May 2008. <<http://articles.latimes.com/2008/may/18/national/na-detention18>>.

enduring the difficult and dangerous journey to the U.S. and then, having to stay in prisons while they await possible legalization, unaccompanied immigrant children face immense hardship and obstacles. Congress emphasizes that the detention center system should be used as a last resort because prisons forbid children from evading lives filled with fear of persecution and push them into the shadows of society—unvoiced and without rights.¹¹⁶

¹¹⁶ *110th Congress Report House of Representatives: Department of Homeland Security Appropriations Bill*. Thomas Library of Congress. 2008. <<http://thomas.loc.gov>>.

Recommendations

In attempts to implement the use of US NGO-Based Alternative programs, the LIRS and the DWN submitted a proposal to Congress. They recommended five key elements to a successful alternative to detention program in hopes of providing immigrant detainees with information and resources about their rights and legal cases to facilitate the immigration process.¹¹⁷ I believe that the federal government must further enact and enforce the following methods for unaccompanied immigrant children.

1) *Group screening in detention by nonprofit agencies:* With the collaboration of the DHS, ICE and the Executive Office for Immigration Review (EOIR) under the DOJ, NGOs conduct ‘Know-Your-Rights’ presentations for detainees in detention centers. This allows NGOs to gather information and present legal orientation so as to explain to detainees how to organize effective services and to evaluate their release options. In support of this awareness campaign, the EOIR in March 2003 created the Legal Orientation Program (LOP) based on the Flores Immigrant and Refugee Rights Project to provide legal presentations to detainees. Sadly, “75% of detainees [are] not reached by LOPs.”¹¹⁸ Also important to note, is that ‘Know-Your-Rights’ presentations continue to be problematic for children, even when administered by NGOs. It is not rare for adult detainees to be confused by the complexities of the immigration system, especially when there are language barriers, illiteracy, and other traumas. For unaccompanied immigrant children this becomes even more difficult. In

¹¹⁷ *Alternatives to Detention: Briefing Materials—UN SR Visit. Lutheran Immigration and Refugee Service and the Detention Watch Network.*
<<http://www.immigrantsolidarity.org/Documents/DWN/12.%20Alternatives%20to%20Detention%20UNSR%20Materials.pdf>>.

¹¹⁸ *Ibid.*

fact, children should not be forced to comprehend the complexities of the immigration system, their rights, or how to make life altering decisions based on a legal presentation. But because unaccompanied immigrant children are not entitled to free legal services, NGOs attempt to simplify the immigration system for children to understand. An example of this effort can be observed in a pro bono information manual for children created by the Midwest Immigration and Human Rights Center in 2004, titled *Immigration and You*.¹¹⁹ This document exposes how children are expected to understand a system that is complex and difficult to explain. While it is an attempt to aid children, unaccompanied immigrant children across all ages and situations require the right to legal representation.

2) *Individual screening before release to an alternative*: To date, “ICE has the authority to decide which immigrants it allows to be released to an ‘alternative to detention’ program.”¹²⁰ But NGOs are known to influence ICE decisions decreasing the chances of a child ending up in detention. By engaging ICE in interviews with NGO representatives, potential participants in the ‘alternative to detention’ programs are explained the program criteria and delineate the responsibilities that each person must agree to uphold. In fact, the involvement of NGOs has increased the number of children being released to family and other relatives rather than engaging them in any time of supervision program. However, I believe that this suggestion can be pushed even further. By allowing NGOs to aid in the screening process and giving them higher decision-making power and a more weighted vote, unaccompanied immigrant children will have a better

¹¹⁹ *Immigration and You*. Midwest Immigration and Human Rights Center. January 2004.

¹²⁰ *Alternatives to Detention: Briefing Materials—UN SR Visit*. Lutheran Immigration and Refugee Service and the Detention Watch Network. <<http://www.immigrantsolidarity.org/Documents/DWN/12.%20Alternatives%20to%20Detention%20UNSR%20Materials.pdf>>.

chance at being placed in the appropriate environment while waiting for their immigration cases to conclude.

3) *Provision of service to individuals release to the alternative*: It is widely known that providing assistance upon release from ICE apprehension, “such as legal, social, medical, mental health and job placement services, is crucial to ensure an individual’s appearance for immigration proceedings and their compliance with a final order.”¹²¹ Plus, the needs of each detainee are different. The services made available to unaccompanied immigrant children must be in accordance to their best interest and a guarantee from the federal government. When releasing children and providing them with the appropriate services that are cheaper for the system than detainment methods, the immigration process becomes more efficient and humane. Hence, the use of detention center facilities becomes an excessive means of supervision that lacks the adequate resources for unaccompanied immigrant children.

4) *On-going assistance, monitoring, and information*: The immigration system is complex and difficult to navigate alone. Unaccompanied immigrant children demand a comprehensive support system that guides them through it. NGOs offer children the opportunity to trust persons who work to underscore their welfare and interests. Being able to ask questions and discuss concerns about their cases as well as having someone to remind them of hearings and scheduled check-ins with ICE, children benefit from the NGO involvement. And yet, there is a crucial need to afford unaccompanied immigrant children with free legal representation so that their interests are best advocated for and made a priority.

¹²¹ *Ibid.*

5) *Enforcing final orders of deportation*: The main apprehension of immigration agencies to release immigrants is the worry that they will not appear to their court hearings and final notices of deportation. But, as the Vera Project showed, US NGO-Based Alternatives serve as the best model to administer this concern. Immigrants under NGO supervision “are more likely to stay legally in the United States.”¹²² To ensure that immigrants under NGO supervision follow through their final orders of deportation, DHS and ICE must then enforce the removal orders. These methods have partially permitted NGOs to work with DHS, ICE and the EOIR to administer methods of ‘alternatives to detention’ as found in the Vera Project. Their success in maintaining constitutional rights of migrants and human rights principles deserve recognition and praise. They are a crucial step up from the use of detention centers in the United States.

But as previously noted there is great need for federal enactment and enforcement of ‘alternatives to detention.’ Further investment in pilot projects will demonstrate that the federal government should refocus their funding and support for new methods of supervising immigrants, especially unaccompanied immigrant children. There is great room to further investigate which ‘alternatives to detention’ are best suited for children. It is in upholding the best interest principle that must force the United States government to take this crucial step.

¹²² *Ibid.*

CONCLUSION

In the United States, the idea that government is responsible of protecting the public interest remains a founding principle to this democratic nation. With this in mind, the U.S. government has maintained, along with the international community, that *children are above all children* with special needs and interests. Therefore, it becomes imperative for the U.S. government to uphold its duty to protect and safeguard children regardless of their status and origin.

In discovering the best methods to address the controversial issue of unaccompanied immigrant children, the United States must reevaluate its current immigration system and push forward the programs that uphold the best interest principle. In doing so, the system will aim to prevent the harsh realities of detainment which deny children their existence and opportunities of a normal life. From transferring the parental role of government over to the DOJ and the HHS to implementing the Flores Settlement, and finding 'alternatives to detention,' like the US NGO-Based Alternative programs, the United States will achieve a comprehensive immigration reform that is cost-effective (less centered on private interest), humane, and just.

As a society, we cannot permit that the discussion on immigration be polarized between treating immigrants humanely and treating them as criminals. Even while national security and the cost of public services are a concern to persons against the prevalent influx and stay of migrants, the United States must creatively, economically, and humanely invest in methods of security enforcement and supervision that protect the rights of all people as people.

In an era where civil and human rights are internationally recognized as indisputable, the detention of innocent unaccompanied immigrant children must not be permitted. In fact, the United States cannot afford to further detain unaccompanied immigrant children for to do so, the government would legitimize legislation moving backwards on the issue of immigration. The tragic stories of children released from the shadows of detainment highlight that the immigration system must find new ways to deal with their migration. As the discussion on comprehensive immigration reform emerges in the 21st century under the Obama administration, propositions of new legislation must uphold the best interest principle and the rights of children bestowed by the U.S. Constitution.

There is no turning back; the status quo is failing. 'Alternatives to detention,' as described by the Vera Project, hold the key to immigration policies that must be enacted and enforced in accordance to the best interest principle. In pushing for a better tomorrow and progressive ideals for humanity, the United States must remember to uphold the rights and needs of unaccompanied immigrant children. Only after the immigration system is revolutionized can the future of these children be secured.