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# WHOSE CHILDREN ARE THESE? TOWARDS ENSURING THE BEST INTERESTS AND EMPOWERMENT OF UNACCOMPANIED ALIEN CHILDREN

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Over the last several years, the plight of over 8,000 unaccompanied refugee and immigrant children has received significant attention by Congress, policy-makers, the media, the public and academia. These children arrive on our shores without parents or guardians, facing arrest, detention and removal. Both experts and stakeholders have amassed substantial recommendations for systemic reform in policies, practices and procedures affecting unaccompanied children.<sup>1</sup> The significant amount of attention may be attributable to the vulnerability of these children by virtue of their status as unaccompanied, meaning that they are without parents or legal guardians.

This may be due to the United States' societal, cultural and legal construction of a child under the Immigration and Nationality Act as a subordinate quasi-appendage to an adult familial caretaker, lest he or she become a public charge.<sup>2</sup> Unaccompanied children represent an oxymoron because of the presumption that children do not and cannot have an independent existence and agency absent their relationship to adult familiar caretakers.<sup>3</sup>

Despite this attention, the children's actual voices, experiences, and perspectives have rarely been directly consulted to explicitly inform and shape legislative

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<sup>1</sup> For example, a Westlaw search on the TP-ALL database under the query "unaccompanied alien child" conducted on January 29, 2006 by the author yielded 137 items including numerous law review articles concerning this constituency.

<sup>2</sup> For an excellent analysis, see David B. Thronson, *Kids Will be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979 (2002).

<sup>3</sup> The author credits Professor David Thronson for providing this illumination at the symposium at the American Association of Law School conference in Washington, D.C. on January 6, 2005. The significant attention provided unaccompanied alien children is in contrast with the relatively limited attention provided to larger numbers of undocumented children in the United States who are not apprehended by the Department of Homeland Security pending proceedings.

proposals or larger policy decisions by the United States Congress or agencies charged with responsibilities over them.<sup>4</sup> This may be attributable to reflexive protective paternalism predicated on an unspoken assumption that children are incapable of making rational, effective contributions to larger questions about policy. This may also reflect an unspoken assumption about the propriety of alien children's participation, as they are vested stakeholders and would be potential beneficiaries of such policy changes. Additionally, this may reveal nongovernmental stakeholders' limited time and resources to engage the children in reflection concerning policies. Finally, on a psychoanalytic level, this may reflect the adult surrogates' fear of deep listening and direct learning from the children based on their unique, individual experiences.

In turn, unaccompanied children may come to be viewed as reified objects without agency and voice rather than actual, empowered participants in policy. The answer to the question "Whose children are these?" is whoever claims to represent their interests and needs. This unfortunately has led to unaccompanied children being treated as pawns often pitting different stakeholders (other than the 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.<sup>5</sup>

The paramount need is to change the discourse and approach from an inherently "alienating" immigration paradigm to a child welfare and child-centered paradigm that gives primacy to the child's perspectives, needs and involvement.<sup>6</sup> These are children first and foremost, before their status as either aliens or unaccompanied. They, in turn, need and deserve holistic, child-centered approaches premised on their individual facts and circumstances. These children further merit a shift from paternalism to youth empowerment approaches so that they may actively inform and drive the policy debates that shape their lives and futures in the United States and abroad. Paternalism may be a comfortable and instinctive antidote to the legacy Immigration and Naturalization Service's treatment of the children as

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<sup>4</sup> While many unaccompanied alien children have been interviewed for media stories, academic research and advocacy work, they have not been engaged in a process to evaluate policies and practices concerning their welfare.

<sup>5</sup> For more on children as pawns, consider, Editorial, *Dickensian America: Children must not be pawns in adults' policy debates on illegal immigration*, Hous. Chron., January 16, 2006, stating that in the context of the current debate over comprehensive immigration reform, "unprotected, solitary child migrants cannot serve as pawns. Citizens should insist that whatever legislation is passed include the Unaccompanied Child Act. Any minor who migrates here alone has been propelled by adult failures. It is the duty of all who find child refugees and child migrants to protect them."

<sup>6</sup> Regarding the construction of aliens as outsiders, see, e.g., Raquel Aldana, *"Aliens" in Our Midst Post-9/11: Legislating Outsideness within the Borders*, 38 U.C. DAVIS L. REV. 1691 (2005), recommending that "the law should focus on the humanity of 'aliens living in our midst' and incorporate an approach that does not legalize the outsidership of non-citizens, but, once non-citizens co-exist within our borders, treats them for what they are- human beings."

“juveniles” and “minors” or law enforcement’s view of the children as young adults with the agency and *mens rea* to violate the immigration laws.<sup>7</sup> Still, youth empowerment represents the next and necessary frontier for advocacy, policy-development and service delivery for these children.

In this article, I first provide a panorama of the improving state of affairs for unaccompanied children and the innovative new efforts that are underway to serve them. I then identify the current intractable issues in need of policy resolution accounting for both institutional stakeholders’ and children’s perspectives so as to chart possible harmonization and meaningful reform.

### I. A PARADIGM SHIFT IN THE CARE FOR UNACCOMPANIED ALIEN CHILDREN

The number of unaccompanied children arriving in the United States has risen from 4,600 in 2000 to over 7,000 in 2005.<sup>8</sup> These children vary in age and ethnicity, but all are seeking protection within the United States’ borders. While the majority of these children are teenaged, some are toddlers.<sup>9</sup> Most have traveled from the Central American countries of Honduras, Guatemala and El Salvador, but others’ roots are in Mexico, Brazil, Ecuador and China.<sup>10</sup> During the 2005 fiscal year, 73% were boys and 27% were girls, and 10.<sup>11</sup> Twenty six percent were below the age of 14.<sup>12</sup> Some of these children are refugees who are fleeing from persecution; some have experienced abuse, neglect and abandonment; some may have been brought by adults to the United States intent on exploiting them; and still others are looking to reunify with their parents or relatives.<sup>13</sup>

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<sup>7</sup> For the treatment of unaccompanied children by Legacy Immigration and Naturalization Service, see, *Detained and Deprived of Rights - Children in the Custody of the U.S. Immigration and Naturalization Service*, HUMAN RIGHTS WATCH, Vol. 10, No. 4 (G)) (December 1998); *Prison Guard or Parent?: INS Treatment of Unaccompanied Refugee Children* (Women’s Commission for Refugee Women and Children, May 2002); and *Why Am I Here? Unaccompanied Children in Immigration Detention* (Amnesty International, June 2003). It is notable that INS’ successor agency, the Department of Homeland Security, continues to refer to the children as “juvenile aliens”. See, e.g., *A Review of DHS’ Responsibilities for Juvenile Aliens*, (Department of Homeland Security Office of Inspector General) (, September 2005).

<sup>8</sup> See, e.g., Amanda Levinson, *Alone in America* (Aug. 23, 2005), available at <http://www.alternet.org/story/24309> (last visited on Feb. 4, 2006).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> See Office of Refugee Resettlement Division of Unaccompanied Children's Service Fact Sheet (Nov. 10, 2005) (on file with author).

<sup>12</sup> *Id.*

<sup>13</sup> See, e.g., the stories of 5 unaccompanied children from China, El Salvador, Guatemala, Honduras and Nigeria ultimately referred to *pro bono* counsel through the National Center for Refugee and Immigrant Children, available at <http://www.refugees.org/article.aspx?id=1469&subm=75&area=Participate&>. See also Brigid Schulte, *A Road Less Traveled: With Nothing to Lose and a Future to Gain, A Young Orphan from El Salvador Pursues His American Dream. Legally* (April 23,

After their arrest by the Department of Homeland Security (DHS), the children are placed in the care and custody of the Office of Refugee Resettlement (ORR) Division of Unaccompanied Children's Services (DUCS) which inherited care, custody and placement responsibilities for these children pursuant to the Homeland Security Act of 2002 ("HSA").<sup>14</sup> The children face administrative removal proceedings before the Executive Office for Immigration Review (EOIR), an agency of the Department of Justice (DOJ). These proceedings are administrative and adversarial, and pit the lone child, carrying the same burden of proof as an adult alien, against a trained DHS trial attorney before an immigration judge.<sup>15</sup> According to the American Immigration Lawyers Association, approximately 90% of the children lack representation when they are tried before the immigration court, since there is no right to government-appointed counsel and *pro bono* resources are scarce and relatively untapped in most areas of the country.<sup>16</sup>

In the HSA, Congress transferred the responsibilities for care, custody and placement of these children from the former Immigration and Naturalization Service (INS) to the ORR.<sup>17</sup> Congress had acknowledged that the INS had a poor track record in caring for the children over the last two decades, while the ORR had a demonstrated history of expertise in working with child refugees through their Unaccompanied Minor Program.<sup>18</sup> The INS suffered from a fundamental conflict of interest when acting as police officer, prosecutor and guardian of the children at the same time.<sup>19</sup> Additionally, the INS typically prioritized law enforcement considerations over child welfare considerations. For example, the INS placed one third of unaccompanied children, including those children with very minor

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2006), WASHINGTON POST (profiling Salvadoran orphan's Julio Argueta's successful quest for permanent residence in the United States). As the stories illustrate, many children have multiple motivations to come to the United States such as to flee persecution or severe abuse and to reunify with a family member. *See also* Frequently Asked Questions About the Division of Unaccompanied Children's Service (DUCS)(Lutheran Immigration and Refugee Service), *available at* <http://www.lirs.org/InfoRes/faq/DUCS.htm>, clarifying that the children "have to come to the United States for many reasons."

The author however is unaware of any social scientific and systemic study based on empirical statistical and qualitative data concerning unaccompanied alien children's migratory experiences and their underlying motivations.

<sup>14</sup> *See* The Homeland Security Act of 2002, Pub. L. No. 107-296, § 462, 116 Stat. 2153 (2002).

<sup>15</sup> *See id*; *see also* Christopher Nugent and Steven Schulman, *A New Era in the Legal Treatment of Alien Children: The Homeland Security and Child Status Protection Acts*, 80 No. 7 Interpreter Releases 233 (2003); Christopher Nugent and Steven Schulman, *Giving Voice to the Vulnerable: On Representing Detained Immigrant and Refugee Children*, 78 No. 39 Interpreter Releases 1569 (2001).

<sup>16</sup> *See supra* note 8

<sup>17</sup> *See supra* note 14

<sup>18</sup> *Id.*

<sup>19</sup> *See supra* note 7.

behavioral problems and those lacking any serious physical threat, in secure detention juvenile jails due to the lack of bed space in shelter facilities.<sup>20</sup>

Even though the ORR inherited a dysfunctional de facto detention program from the INS, the ORR has made substantial progress for reform by prioritizing child welfare considerations despite limited resources. For example, the ORR decreased the use of juvenile detention centers from twenty-three in the 2003 fiscal year to three in the 2005 fiscal year.<sup>21</sup> Furthermore, the ORR developed a continuum of care for unaccompanied children by adding a variety of housing options, such as shelter care, staff secure, foster care, and more innovative secure settings, as well as residential treatment care.<sup>22</sup> As of November, 2005, the ORR had 1150 children in its care on a daily basis.<sup>23</sup> The ORR contracts with 34 facilities around the country, the majority of which are shelters operated by non-profit organizations.<sup>24</sup> About 500 of the children are held at several facilities in Texas.<sup>25</sup> Children in the shelters receive education, health care, socialization/recreation, mental health services, family reunification and case management, including mental health and victim of trafficking assessments.<sup>26</sup> On average, the children spend forty-five days in custody.<sup>27</sup> Approximately 70% of the children are released from custody into the care of family or other sponsors, pending continued immigration proceedings in their detention site.<sup>28</sup> During the 2005 fiscal year, 21% of the children were either ordered removed or returned voluntarily to their country of origin from ORR custody.<sup>29</sup>

Conditions for the confinement and the release of the children to sponsors are governed by *Flores v. Reno Settlement Agreement*.<sup>30</sup> *Flores* ultimately provided children with limited, enforceable rights and remedies in federal court. For example, the DHS detention standards enacted in 2000 provide for rights and protections to adult detainees in immigration custody, including prohibitions against strip searches after attorney visitations absent reasonable suspicion of

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<sup>20</sup> *Id.*

<sup>21</sup> *See supra* note 11.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *See supra* note 8.

<sup>26</sup> *See supra* note 11.

<sup>27</sup> *Id.*

<sup>28</sup> *See* Caitlin Kelly, *Heartbreak Hotel*, THE NEW YORK DAILY NEWS, Sept. 3, 2005, available at <http://www.nydailynews.com/news/local/story/343214p-293088c.html> (last visited Feb. 22, 2006).

<sup>29</sup> *See supra* note 11.

<sup>30</sup> *See, e.g. Reno v. Flores*, 507 U.S. 292 (1993). The *Flores* decision is discussed in *Recent Decision*, 70 No. 12 Interpreter Releases 433 (1993). The *Flores* settlement is available online at [www.centerforhumanrights.org](http://www.centerforhumanrights.org). For more on *Flores*, see Nugent and Schulman, *supra* note 14.

contraband, liberal phone access rights, and rights to legal materials which children are not entitled to under *Flores*.<sup>31</sup>

Regulations for *Flores* are being drafted by ORR and are in the process of review within HHS.<sup>32</sup> Enforceability of *Flores* was limited to federal court actions and, even then, there has been only one reported case litigated under *Flores* involving Alfredo López-Sánchez, an indigenous Guatemalan Mayan Indian youth from the Mam ethnic group who was detained in an adult facility in Florida in contravention of *Flores*. There, the court held that, despite finding a violation of *Flores*, it could not order the child to be transferred to a children's facility.<sup>33</sup> Advocates hope that in promulgating regulations for *Flores*, *Flores* will be treated as a floor, rather than a ceiling, to provide a panoply of enforceable rights for unaccompanied children.<sup>34</sup>

Conditions of confinement for unaccompanied children have greatly improved now that ORR is responsible for their care; however, the system ORR inherited from INS warehoused children in remotely-located, medium-security shelters, beyond the regular access of counsel and observers. This puts ORR in a deficit of sorts, because INS saw all bed space as within their national governance, it often transferred children away from their counsel without notice in order to accommodate new arrivals in the facilities. Given bed space and funding constraints, ORR still detains significant numbers of children together, particularly along the Southern border. Some facilities house over 100 children in fairly institutionalized settings.<sup>35</sup> The children receive on-site education and have supervised access to the

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<sup>31</sup> See, e.g., Pritchard, Helton, and Magruder, *The American Dream Betrayed: The Plight of Detained Immigrant and Refugee Children*, 30 Int'l L. News 1 (2001). For the adult detention standards, see Christopher Nugent, *The INS Detention Standards: Facilitating Legal Representation and Humane Conditions of Confinement for Immigration Detainee*, Immigration Current Awareness Newsletter, the National Lawyers Guild, (2003), 2003 NIP-ICAN 2. The adult detention standards are also available online at <http://www.ice.gov/partners/dro/opsmanual/index.htm>.

<sup>32</sup> *Supra* note 11.

<sup>33</sup> Decision is on file with author. Alfredo was represented by the Florida Immigrant Advocacy Center and he ultimately succeeded in securing Special Immigrant Juvenile Status and permanent residence. See, *In the Interest of Lopez-Sanchez*, No. D02-16189 D002 (Fla. Cir. Ct. Dec. 3, 2002); Alfonso Chardy, *Traumatized Guatemalan Boy Stays in U.S.*, MIAMI HERALD, Dec. 4, 2002, page reference unavailable.

<sup>34</sup> See, e.g., letter from Robert Evans to Richard A. Sloan of INS concerning INS' proposed implementation of the settlement agreement in *Flores v. Reno*, 67 Fed. Reg. 1670 (January 14, 2002), INS No. 1906-98, available at <http://www.abanet.org/poladv/letters/exec/immigration031502.html>, challenging the proposed provisions regarding transfer of children as they interfere with children's abilities to secure counsel, interrupt an existing attorney-client relationship and may exacerbate the child's mental health.

<sup>35</sup> Facility information is on file with author. See, also AMERICAN BAR ASSOCIATION, STANDARDS FOR THE CUSTODY, PLACEMENT AND CARE; LEGAL REPRESENTATION; AND ADJUDICATION OF UNACCOMPANIED ALIEN CHILDREN IN THE UNITED STATES (American Bar Association August 54 (2004), at 49, comments to physical condition and [http://www.abanet.org/immigration/Immigrant\\_Childrens\\_Standards.pdf](http://www.abanet.org/immigration/Immigrant_Childrens_Standards.pdf); see also

local community.<sup>36</sup> ORR's reliance on the institutional model is driven by a variety of factors including the consideration of time since the average stay in ORR custody is 45 days coupled with history, cost, and convenience since ORR inherited this economy-of-scale approach from INS. Nevertheless, ORR is open to experimenting with facility models; their facility in Houston is much like a campus, consisting of smaller cottages, while in their Queens, New York facility, there are only twelve children at any given time.<sup>37</sup> Additionally, ORR has increased its use of foster care by 100% compared to INS by granting 100 placements intended for children who have long-term immigration cases.<sup>38</sup>

Congress has become engaged in this programming issue, as evidenced by the 2005 Labor/HHS appropriations bill directing ORR to deinstitutionalize facility care and move towards more child-centered, age-appropriate, small group, home-like environments with access to pro bono counsel.<sup>39</sup> Indeed, in Western Europe and Canada, unaccompanied children with pending immigration proceedings are often integrated into local communities and attend school with local children.<sup>40</sup>

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Facility information (on file with author). ABA Comments on operation of detention facilities advise that "children should not, for example, be provided only sweatpants and sweatshirts, nor should they be given clothing, such as flip-flops, as a means to restrict their movement. Only if the wearing of civilian clothing will pose a substantial security risk to the Child or to the Detention Facility should the Child be required to wear a uniform." See STANDARDS FOR THE CUSTODY, PLACEMENT AND CARE; LEGAL REPRESENTATION; AND ADJUDICATION OF UNACCOMPANIED ALIEN CHILDREN IN THE UNITED STATES, at 54.

<sup>36</sup> On April 20, 2006, the author toured an ORR shelter in El Paso, Texas as part of the bi-national conference entitled "Non-Citizen Children on Their Own: Binational Conference on Procedures, Protections & Due Process for Unaccompanied Children" sponsored by a variety of prominent local and national institutions and organizations. The conference agenda is available at <http://ia.utep.edu/Default.aspx?tabid=36896#AGENDA>. The author observed laudable and welcome changes in facility operations and care of the children under ORR including the facility's use of civilian attire such as sneakers, jeans and shirts, expanded educational and recreation activities and mental health services. The interactions between children and staff appeared to the author to be of mutual trust and respect.

<sup>37</sup> See *supra* note 28.

<sup>38</sup> See Office of Refugee Resettlement Division, *supra* note 11.

<sup>39</sup> See H.R. Rep. No. 109-300 (2005). "The conferees direct the Secretary of Health and Human Services to issue a report by no later than one year after the date of enactment of this Act on progress made by the Office of Refugee Resettlement and programs funded under this Act to shift children to more child-centered, age-appropriate, small group, home-like environments for unaccompanied children in its custody." H.R. Rep. No. 109-300, at 86 (2005).

<sup>40</sup> See, e.g., Terry Smith, Report: Separated Children in Europe: Policies and Practices in European Union Member States: a Comparative Analysis (Save the Children 2003), available at [http://www.separated-children-europe-programme.org/separated\\_children/publications/reports/policies\\_comparative\\_analysis.pdf](http://www.separated-children-europe-programme.org/separated_children/publications/reports/policies_comparative_analysis.pdf).



The prospect of legal representation for unaccompanied children has grown increasingly challenging post-September 11th and after the passage of the Homeland Security Act of 2002. At both the local and the national level, immigration enforcement officials often express little sympathy for unaccompanied children's predicaments and their cases for a variety of reasons. Some immigration enforcement officials carry the perception that unaccompanied children are a byproduct of, and contribute to, chain migration and greater illegal migration.<sup>41</sup> Additionally, there is a notion that treatment under the law of unaccompanied children has become too lenient.<sup>42</sup> Consider, for example, DHS' challenge in Seattle to the Executive Office for Immigration Review's (EOIR) jurisdiction to conduct bond redetermination hearings for unaccompanied children. DHS argued that the Homeland Security Act of 2002 conferred exclusive jurisdiction to ORR over the custody and release of children, notwithstanding the *Flores* settlement which explicitly provided for EOIR jurisdiction to conduct bonding hearings over unaccompanied children. Although the immigration judge initially adopted DHS' argument, the Board of Immigration Appeals reversed, finding that EOIR retained jurisdiction "over the threshold issue of whether an unaccompanied minor should be detained" at all.<sup>43</sup>

While entrusted to uphold justice and international refugee law, DHS often appeals the rare grants of asylum by immigration judges for unaccompanied children.<sup>44</sup> Even though asylum cases are adjudicated on a case-by-case basis and opinions by individual immigration judges are not published or considered as precedent, DHS often applies a strict enforcement lens to children's asylum claims in their policies. In particular, DHS may fear opening the borders to other children seeking asylum based upon novel arguments such as whether street children, gang resisters, and children facing domestic violence constitute cognizable particular social groups for asylum eligibility.<sup>45</sup> In the absence of settled case law or guidelines for child asylum-seekers to bind DHS trial attorneys and immigration judges, the perennial fear of opening the floodgates may explain the paucity of asylum grants to unaccompanied children.<sup>46</sup>

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<sup>41</sup> See, e.g., Don Barnett, *No Child Left Behind: New Rules for Unaccompanied Minor Illegal Aliens*, December, 2004 (on file with author).

<sup>42</sup> *Id.*

<sup>43</sup> See, e.g., Unpublished BIA Decision Finds IJ, Not ORR Has Jurisdiction to Determine Whether to Detain Unaccompanied Minors, 82 No. 38 INTERREL 1594 (Oct. 3, 2005) (on file with author).

<sup>44</sup> See *In re S-M-J-*, Applicant, 21 I. & N. 722, 727 (B.I.A. 1997) (explaining the role of the Immigration and Naturalization Service to uphold refugee law).

<sup>45</sup> In some jurisdictions, according to advocates interviewed by the author, DHS appeals virtually any asylum claim granted to an unaccompanied alien child.

<sup>46</sup> *New Guidelines for Children's Asylum Claims*, INS Memorandum from the Office of International Affairs (Dec. 10, 1998), discussed and reproduced in 76 Interpreter Releases 1 (Jan. 4, 1999) do not apply to or bind the Executive Office for Immigration Review and the Department of Homeland Security prosecutors in children's case. It is notable that, according to Jacqueline Bhabha, EOIR does not track asylum decisions

While unaccompanied children's cases are more exacting and more difficult to prepare by virtue of the child's development, sometimes DHS resistance and skepticism often makes representing children even more challenging, time-consuming and expensive than representing adults. Individual cases can easily become polarizing and politicized.<sup>47</sup>

Unfortunately, stakeholders compete from a deficit of child welfare expertise in elements of the adjudicatory system among non-governmental, pro bono attorneys, DHS trial attorneys and immigration judges. Ensuring actual comprehension by the child and involvement of the child in all legal actions taken in his or her case remains an essential priority for advocates.<sup>48</sup> Child-specific training, albeit without the direct participation of children, has been augmented for the bench and private bar in order to address this deficit. EOIR has published procedural guidelines for immigration judges' treatment of unaccompanied alien children's cases, but these guidelines are not binding, do not address substantive law, and are not always followed.<sup>49</sup> In its 2006 appropriation to EOIR, Congress commended EOIR for issuing these guidelines and indicated its expectation that EOIR continue to improve these guidelines and train judges and pro bono attorneys in this area.<sup>50</sup>

To address the legal representation crisis, several laudable efforts have been launched which strive to ensure competent *pro bono* counsel for unaccompanied children in removal proceedings.<sup>51</sup> For example, a generous donation by the

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involving unaccompanied alien children made by immigration judges or the Board of Immigration Appeals (comments of Jacqueline Bhabha at conference, *supra* note 36 (on file with author)).

<sup>47</sup> See, e.g., Elizabeth Amon, *The Sheltering Storm*, AMERICAN LAWYER, February 2006 (describing the odyssey of Young Zheng and Malik Jarno, Chinese and Guinean youth asylum-seekers, in the immigration system). Young Zheng's predicament was recently and successfully resolved through Special Immigrant Juvenile Status and permanent residence as an alternate remedy. See Ralph Blumenthal, *After 3-Year Battle, Chinese Teenager Is on Road to U.S. Citizenship*, New York Times, April 11, 2006.

<sup>48</sup> *Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States*, *supra* note 35, is an exceptional resource emphasizing holistic child-centered and -directed advocacy and interviewing techniques designed to ensure a child's comprehension.

<sup>49</sup> See Chief IJ Creppy Issues Interim Guidance on Cases Involving Unaccompanied Alien Children, 81 No. 40 INTERREL 1451 (October 18, 2004), for discussion of the guidelines. See The Office of the Chief Immigration Judge, *Interim Operating Policies and Procedures Memorandum 04-07*, (Sept. 16, 2004), <http://www.usdoj.gov/eoir/efoia/ocij/oppm04/04-07.pdf>.

<sup>50</sup> See H.R. REP. NO. 109-118 (2005) at 14 ("The Committee understands that EOIR has issued interim procedural guidelines to all immigration judges for the adjudication of unaccompanied alien children's cases before immigration judges. The Committee commends EOIR for this initiative. The Committee expects EOIR to continue to improve these guidelines as more experience is gained in applying these guidelines. In addition, the Committee continues to encourage EOIR to train judges and pro bono attorneys in this area.")

<sup>51</sup> See U.S. Committee for Refugees and Immigrants, *The National Center for Refugee*

United Nations High Commissioner for Refugees Goodwill Ambassador Angelina Jolie helped create the National Center for Refugee Immigrant and Children ("National Center"). The National Center is a joint project of the United States Committee for Refugees and Immigrants and the American Immigration Lawyers Association. It recruits, trains, and mentors *pro bono* attorneys to represent unaccompanied children released from custody to sponsors at their destination site. In less than one year of operations, the National Center has trained several hundred attorneys in major metropolitan cities, matched over 200 children with competent counsel in over 25 states, and helped over 300 children whose cases may require a motion for a change of venue.<sup>52</sup>

As a complimentary effort to the National Center's focus on facilitating *pro bono* representation for children released from custody, the Office of Refugee Resettlement recently awarded a contract to the Vera Institute of Justice for an innovative three year pilot program.<sup>53</sup> The program aims to develop a plan for Congress to ensure qualified legal counsel for each child by galvanizing and studying *pro bono* representations efforts for children at nine sites around the country.<sup>54</sup> Whether *pro bono* representation efforts will be capable of curing the legal representation crisis for unaccompanied children and ensuring competent counsel to each and every unaccompanied child remains a question warranting further academic consideration and empirical studies.

## II. MAPPING THE INTRACTABLE REMAINING ISSUES CONCERNING UNACCOMPANIED CHILDREN

There are intractable and unresolved issues concerning unaccompanied children arising from particular DHS immigration enforcement policies, and activities. Per the Homeland Security Act of 2002, DHS is responsible for arresting unaccompanied children, notifying and transporting children to ORR, prosecuting

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and Immigrant Children, <http://www.refugees.org/article.aspx?id=1260&subm=75&area=Participate.com>; Holland & Knight LLP, *United Nations High Commission for Refugees Reception: Video Clips*, <http://www.hklaw.com/CST/UNHCRReception.asp> (to watch the national March 8, 2005 launch of the National Center). The launch was moderated by former American Bar Association President Martha Barnett and includes presentations by UNHCR Goodwill Ambassador Angelina Jolie, Chief Immigration Judge Michael H. Creppy, Senator Sam Brownback and Justice Sandra Day O'Connor.

<sup>52</sup> See E-mail from Adriana Ysern, Senior Immigration Program Officer at the Center, January 2006 Update from the National Center for Refugee and Immigrant Children, (on file with author). See also E-Mail from Adriana Ysern, Senior Immigration Program Officer at the Center, April 2006 (on file with author).

<sup>53</sup> See Vera Institute of Justice, Announcement (Feb. 27, 2006) describing unaccompanied children project (on file with author) and as described on Vera's website available at [http://www.vera.org/project/project1\\_1.asp?section\\_id=5&project\\_id=83](http://www.vera.org/project/project1_1.asp?section_id=5&project_id=83).

<sup>54</sup> *Id.*; See detentionwatchnetwork listserve, [dwn@lists.detentionwatchnetwork.org](mailto:dwn@lists.detentionwatchnetwork.org), *Vera Institute Request for Proposals*, October 24, 2005.

their removal cases and repatriating the children when they are ordered removed or granted voluntary departure.<sup>55</sup> On the other hand, ORR is responsible for the placement, care, and legal and physical custody of unaccompanied children, as well as their release to suitable sponsors pending removal proceedings.<sup>56</sup>

However, DHS' role and responsibilities vis-à-vis unaccompanied children remain significant and expansive including the arrest and treatment of unaccompanied children in DHS custody, age-determinations, the separation of families, the lack of confidentiality in connection with children's information regarding immigration enforcement, emergency trafficking benefits, authority for consent for placement of unaccompanied children in dependency proceedings as a predicate for Special Immigrant Juvenile Status and repatriation. Both singularly and taken together, law enforcement interests may trump child welfare and protection concerns, possibly to the detriment of unaccompanied children.

#### A. DHS as Gatekeeper

As the arresting agency that first interacts with unaccompanied children, DHS acts as a gatekeeper to determine which children will ultimately be referred and transported to ORR care within seventy-two hours, as required by *Flores*.<sup>57</sup> DHS has the authority to determine whether the children are in fact under the age of eighteen and whether the children are unaccompanied or accompanied by a parent or legal guardian, triggering DHS jurisdiction over the custody. Finally, DHS has authority to release children within the first seventy-two hours in their custody to sponsors.<sup>58</sup>

DHS's fulfillment of its responsibilities to determine children's custody has been the subject of criticism. To determine children's ages, DHS utilizes dental and wrist bone forensics, which medical experts criticize as scientifically fallible because of margins of error of several years. This practice has led to the erroneous placement of children in facilities, commingled with adults and detainees pending removal proceedings. These children often are detained in remote facilities beyond the reach of attorneys and advocates who could help them both challenge the age determination and represent them in their removal claims.<sup>59</sup>

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<sup>55</sup> See *DHS, HHS Reach Agreement on Improved Care for Unaccompanied Children*, 81 Interpreter Releases 494 (April 12, 2004).

<sup>56</sup> *Id.* Although the Statement of Principles signed by DHS and HHS do not explicitly describe which agency has legal custody, the federal government has conceded that ORR in fact has legal custody of the children. This is logical considering the liability ORR incurs in the actual care of the children as well as the liability inherent in ORR's authority to release children.

<sup>57</sup> *Flores*, *supra* note 30.

<sup>58</sup> 8 C.F.R. s. 236.3 (1999) (codifies *Flores* regarding detention and release of children).

<sup>59</sup> For a thorough and excellent analysis of the age-determination issue, see Jennifer Smythe, *Age Determination Authority of Unaccompanied Alien Children and the Demand for Legislative Reform*, 81 No. 23 Interpreter Releases 753 (2004).

DHS's classification of "accompanied children" has also been somewhat inconsistent. DHS sometimes labels certain children it arrests as either "accompanied" or "unaccompanied" for its own convenience and law enforcement purposes. Since the DHS expansion of expedited removal at the borders in the summer of 2004, DHS has been identifying accompanied children as "unaccompanied" alien children for ORR care when arresting families as units.<sup>60</sup> DHS separates parents from their children, holding the parents in adult facilities and their children at ORR facilities pending removal. This presumably occurs because of a lack of DHS planning for expedited removal and a lack of family shelters. DHS's designation of these children as "unaccompanied alien children" for DHS convenience may disadvantage the narrow class of unaccompanied children who arrive on our shores without parents or guardians which ORR was originally mandated to care for under the Homeland Security Act of 2002.<sup>61</sup>

As part of the 2006 appropriations bill for DHS, the House of Representatives ordered DHS to cease this practice and directed DHS to use appropriate detention space to house families together, release them, or use alternatives to detention.<sup>62</sup> DHS recently announced that it will operate a new 500 bed facility for families in Texas.<sup>63</sup>

Quixotically, DHS also selectively labels certain children "accompanied" when they are apprehended only with parents or legal guardians physically present somewhere in the United States. Ostensibly, DHS does this for law enforcement purposes and to ensure that the children do not end up in ORR care where they would be more likely released back to their parents and guardians pending removal proceedings.<sup>64</sup> Such was the mysterious case of two sixteen-year-old girls from

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<sup>60</sup> See, e.g., Exchange between Congresswoman Lucille Roybal-Allard (D-CA) and HHS Assistant Secretary Wade Horn at the House Committee on Appropriations of the Labor/HHS, Education and Related Agencies Subcommittee hearing (March 8, 2005), 2005 WL 546701 (F.D.C.H.); see also *supra* note 8.

<sup>61</sup> *Supra* note 14.

<sup>62</sup> See H.R. REP. No. 109-079 (2005) at 38 ("The Committee is concerned about reports that children apprehended by DHS, even as young as nursing infants, are being separated from their parents and placed in shelters operated by the Office of Refugee Resettlement (ORR) while their parents are in separate adult facilities. Children who are apprehended by DHS while in the company of their parents are not in fact 'unaccompanied'; and if their welfare is not at issue, they should not be placed in ORR custody. The Committee expects DHS to release families or use alternatives to detention such as the Intensive Supervision Appearance Program whenever possible. When detention of family units is necessary, the Committee directs DHS to use appropriate detention space to house them together.")

<sup>63</sup> See *DHS closes loophole by expanding expedited removal to cover illegal alien families: New Facility in Texas Opens Today for Illegal Alien Families* (DHS Press Release, May 16, 2006), available at <http://www.ice.gov/pi/news/newsreleases/articles/060516dc.htm>.

<sup>64</sup> See *supra* note 7, DHS Office of Inspector General, A Review of DHS' Responsibilities for Juvenile Aliens, OIG 05-45 (Sept. 2005) clarifying DHS' continued jurisdiction over accompanied children.

Bangladesh and Guinea arrested by DHS on suspicions of terrorism, and subsequently whisked away to Berks County, Pennsylvania where DHS maintains a contract with a secure facility for such cases. Had the children been placed in ORR custody, they would have been releasable to their parents pursuant to *Flores*.<sup>65</sup>

In order to implement effective policy changes, DHS should recognize its lack of knowledge in child welfare, and develop its infrastructure and capacity to temporarily house children and families. While DHS is well suited to enforce immigration laws (i.e. by arresting unaccompanied children and families and conducting background checks),<sup>66</sup> DHS does not have sufficient or adequate law enforcement resources to permit it to also be in the business of child or family care. Moreover, DHS detention of unaccompanied children has not been proven to have a deterrent effect on unauthorized migration. From a child's perspective, even seventy-two hours in jail-like conditions, without access to education and recreation, feels like an eternity and can have adverse mental health consequences. Policy solutions should maximize core competencies of federal agencies, such as DHS contracting with ORR or reputable nongovernmental agencies for secure, safe and supervised temporary shelters along the border for the first seventy-two hours as well as for family detention.

#### *B. Lacunae for DHS Advantage*

There are several lacunae in existing law which DHS may use to exercise a law enforcement advantage over the children in the areas of confidentiality of children's records, its insertion into the process of determining a child's eligibility for emergency trafficking benefits, and its inconsistent placement of unaccompanied

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<sup>65</sup> The on-going report of this story in the New York Times ultimately resulted in the voluntary departure of one girl back to her native Bangladesh and the release of the Guinean girl to her community in Queens, New York. See Nina Bernstein, *Two Girls Held as U.S. Fears Suicide Bomb*, N.Y. Times, Apr. 7, 2005, at B1; Nina Bernstein, *Girl Called Would-Be Bomber was Drawn to Islam*, N.Y. Times, Apr. 8, 2005, at B1; Nina Bernstein, *Teachers and Classmates Express Outrage at Arrest of Girl, 16, as a Terrorist Threat*, N.Y. Times, Apr. 9, 2005, at B3; Nina Bernstein, *Mother Defends Girl Swept Up in an Immigration Raid, Amid Terror Claims*, N.Y. Times, Apr. 15, 2005, at B3; Nina Bernstein, *Celebration in Harlem as Girl Held in Terror Inquiry is Released*, N.Y. Times, May 7, 2005, at B1; and Nina Bernstein, *Questions, Bitterness and Exile For Queens Girl in Terror Case*, N.Y. Times, June 17, 2005, at A1. The author is also aware of another advocate's case of a Salvadoran former gang member who is being held in Berks County, Pennsylvania pending removal proceedings as an accompanied child by virtue of the fact that he bears Temporary Protected Status and his parents are in the United States.

<sup>66</sup> As in the case of the Bangladeshi and Guinean girls withheld as terrorist suspects, DHS acted within its rights and responsibilities to investigate them thoroughly. However, once the girls' identities and backgrounds were ascertained, and they cleared of any implication, DHS might have promptly transferred them to ORR.

children in state dependency proceedings as a predicate for Special Immigrant Juvenile Status.

Regarding confidentiality, DHS reportedly fails to recognize the private and confidential nature of information gathered by ORR in the course of the care, custody and placement of unaccompanied children. Information from ORR files may be used in adversarial removal proceedings before EOIR. These records typically include sensitive information gathered by clinicians and psychologists who are working at ORR shelter sites in order to assist unaccompanied alien children with their social and psychological needs. These clinicians generally have ethical obligations and privileges, often recognized under state law, that prohibit the release of such information. ORR's ability to provide full and proper care to the children in its custody may be undermined by this practice. Children cannot trust clinicians and other staff if they fear that their medical information may later be produced against them in court proceedings.<sup>67</sup>

Cognizant of the problem, Congress directed ORR to maintain the privacy and confidentiality of all information gathered in the course of the care, custody and placement of unaccompanied children.<sup>68</sup> While ORR will promulgate regulations in this area but in their absence, DHS reportedly continues to use such information against the children.<sup>69</sup>

According to a July, 2004 Memorandum of Understanding between HHS, DHS, and the Department of Justice, child trafficking victims must receive a recommendation from DHS or DOJ prior to HHS issuance of a letter of eligibility for benefits and services.<sup>70</sup> Additionally, HHS must forward to these agencies any and all evidence concerning the child victim before DOJ or DHS will provide HHS with a recommendation.<sup>71</sup> Lawmakers and advocates express concern that this creates a de facto law enforcement cooperation requirement in contravention of

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<sup>67</sup> See correspondence and memorandum from the Women's Commission for Refugee Women and Children to Dr. Nguyen Van Hahn of the Office of Refugee Resettlement dated May 31, 2005 (on file with author).

<sup>68</sup> See H.R. REP. NO. 109-143 (2005) at 127 ("The Committee urges the Office of Refugee Resettlement (ORR) to maintain the privacy and confidentiality of all information gathered in the course of the care, custody and placement of unaccompanied alien children consistent with ORR's role and responsibility under the Homeland Security Act to act as guardian *in loco parentis* in the best interests of the unaccompanied alien child. ORR should consider the needs and privacy of these children to guarantee the confidentiality of their information in order to be trusting and truthful to ORR, clinicians, and its agents for purposes of receiving appropriate quality care and placement services.").

<sup>69</sup> See letter from Dr. Van Hahn to Women's Commission (June 20, 2005) (on file with author).

<sup>70</sup> See Child Trafficking Victims' Routes to Federal Benefits (United States Catholic Conference of Bishops and Lutheran Immigration and Refugee Service), available at <http://www.usccb.org/mrs/childtraf-beneroutes032406.pdf>, at 2, referring to July, 2004 Memorandum of Understanding.

<sup>71</sup> *Id.*

section 107(b) of the Trafficking Victims Protection Act of 2000 (TVPA). The Act exempts children from requirements to cooperate with law enforcement in order to receive benefits and services.<sup>72</sup> They contend that child victims of trafficking remain trapped in life-threatening situations because they fear interrogation by law enforcement authorities. Nevertheless, HHS has not rescinded its policy because it relies on DOJ's and DHS's assistance in determining whether the individual is under the age of 18 and a victim of trafficking.<sup>73</sup>

The Homeland Security Act vests ORR with responsibility as guardian acting *in loco parentis* of the children to act in the child's best interests. Nevertheless DHS has retained the authority to consent to detained children's placement in state juvenile dependency proceedings and foster care as abused, neglected or abandoned children.<sup>74</sup> This placement allows children access to Special Immigrant Juvenile Status and lawful permanent residence.<sup>75</sup> DHS has yet to promulgate regulations regarding such consent, and there are no written or known operating policies on consent to access state dependency proceedings.<sup>76</sup> Advocates claim they have difficulty acquiring DHS consent. These advocates find law enforcement considerations trump what should be a child welfare process run by welfare

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<sup>72</sup> Victims of Trafficking and Violence Protection Act of 2000, 22 U.S.C. § 7101 (2000).

<sup>73</sup> See letter from Sam Brownback, Senator, and Frank Wolf, Joseph Pitts, Christopher Smith and Tom Lantos, Congressmen, to Michael Leavitt, HHS Secretary, (July 26, 2005); Letter from Michael Leavitt, HHS Secretary, to Congress (Sept. 23, 2005); Letter from over 50 advocacy and faith-based organizations and individuals to HHS Secretary Michael Leavitt (Jan. 3, 2006) (decrying this policy and advocating for its rescission) (on file with author).

<sup>74</sup> See Memorandum #3—Field Guidance on Special Immigrant Juvenile Status Petitions, *available at* [http://www.asistaonline.org/legalresources/SIJS/Policy\\_Memos/Yates\\_-\\_5-27-04.pdf](http://www.asistaonline.org/legalresources/SIJS/Policy_Memos/Yates_-_5-27-04.pdf), referring to DHS consent processes for unaccompanied children.

<sup>75</sup> See *F.L. v. Thompson*, 293 F. Supp. 2d 86 (D.D.C. 2003) (reaffirming that after the passage of the Homeland Security Act of 2002, although neither DHS nor HHS claimed that they retained legal custody of the children, DHS retains jurisdiction for consent for dependency proceedings since it is a matter of fraud prevention for benefits adjudication rather than a function of custody in the best interests of the child.)

<sup>76</sup> See, e.g., Memorandum from William R. Yates on Field Guidance of Special Immigrant Juvenile Status Petitions 3 (May 27, 2004) *available at* [http://uscis.gov/graphics/lawsregs/handbook/SIJ\\_Memo\\_052704.pdf](http://uscis.gov/graphics/lawsregs/handbook/SIJ_Memo_052704.pdf) (regarding SIJS petitions for children not in federal custody, but not guidance or criteria regarding consent for dependency proceedings.) See also Teleconference with AILA (regarding Special Immigrant Juvenile Status) (Dec. 1, 2005), *available at* <http://www.aila.org/Content/default.aspx?docid=17832>.



professionals.<sup>77</sup> Congress has stepped in to urge ORR to allow individual abused, abandoned or neglected children to access these dependency proceedings.<sup>78</sup>

Repatriation is another black hole where unaccompanied children easily fall through the cracks. There are no published, publicly available regulations, protocols or standards to ensure the safe and secure repatriation of children to their country of origin.<sup>79</sup> While DHS clearly has a repatriation function under its sovereign authority to expel aliens,<sup>80</sup> no agency has the role or responsibility to determine whether repatriation is in the child's best interest.<sup>81</sup> This determination is irrelevant concerning a child's removal under the Immigration and Nationality Act.<sup>82</sup> Thus, cases occur where children are removed to adverse and life-threatening circumstances without any intervention by United States authorities.<sup>83</sup>

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<sup>77</sup> See *A.A.-M. v. Gonzales*, No. C05-2012C, page 3-4 (W.D.Wash. filed Dec.6, 2005) (issuing a temporary restraining order against DHS for denying consent to dependency proceedings based on DHS' abuse of discretion.).

<sup>78</sup> See H.R. REP. NO. 109-143 (2005) at 127 ("[T]he Committee urges ORR to allow individual abused, abandoned or neglected children in its custody, when appropriate to access State dependency proceedings for ultimate care and placement in State foster care or under legal guardianship as a necessary predicate for their eligibility for special immigrant juvenile status.").

<sup>79</sup> *Supra* note 64. The OIG Report at 3 refers to a Detention and Removal Officer's Field Manual and Juvenile Protocol Manual (November 2003) but these are not publicly accessible. Additionally, the Immigration and Customs Enforcement fails to provide any information regarding policies and procedures concerning repatriation of unaccompanied children. See [www.ice.gov](http://www.ice.gov).

<sup>80</sup> *Id.*

<sup>81</sup> See, e.g., <http://www.acf.hhs.gov/programs/orr/programs/uac.htm> clarifying that The Department of Unaccompanied Children's Service's overarching objective is "To provid(ing) a safe and appropriate environment for unaccompanied alien children (UAC) during the interim period between the minor's transfer into ORR care and their release from custody or removal from the United States by the Department of Homeland Security (DHS)."

<sup>82</sup> The United States does not recognize the United Nations Convention on the Rights of the Child ("CRC"), Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1448, which would provide for additional safeguards for repatriation through consideration of the best interests of the child. In contrast, see *Save the Children and The Separated Children in Europe Programme Position Paper on Return and Separated Children* (Sept. 2004), available at [http://72.14.209.104/search?q=cache:shCs8wiXEMEJ:www.separated-children-europe-](http://72.14.209.104/search?q=cache:shCs8wiXEMEJ:www.separated-children-europe-programme.org/separated_children/publications/reports/return_paper_final.pdf+returns+and+separated+children&hl=en&gl=us&ct=clnk&cd=1&lr=lang_es)

[programme.org/separated\\_children/publications/reports/return\\_paper\\_final.pdf+returns+and+separated+children&hl=en&gl=us&ct=clnk&cd=1&lr=lang\\_es](http://72.14.209.104/search?q=cache:shCs8wiXEMEJ:www.separated-children-europe-programme.org/separated_children/publications/reports/return_paper_final.pdf+returns+and+separated+children&hl=en&gl=us&ct=clnk&cd=1&lr=lang_es), advocating for best practices in the treatment and possible repatriation of separated children from European Union nation-states. At 3, the report further clarifies some member states of the European union will only return a child when it in his/her best interests; if family tracing and assessments are conducted in the child's country of origin and if the child is assisted and protected during return. *Id.*

<sup>83</sup> See, e.g., Greg Campbell, *Death by Deportation: A Denver judge denied a 16-year-old's political asylum application and sentenced him to death*, BOULDER WEEKLY, May

Once in the United States, unaccompanied children should benefit from all procedural and legal protections available to them by their legal and physical custodian, ORR.<sup>84</sup> DHS should recognize its limitations in earning the trust and confidence of children. This lack of trust can impact psychological evaluations, benefits and repatriation purposes. Trust is essential for any cooperation whether for clinical evaluations or prosecution for trafficking. Additionally, children should not be victimized because of their status as children who have failed to secure immigration relief in the United States. The relief available is limited and may not be suitable to all children facing life-threatening harm.<sup>85</sup> In summation, DHS should confer with other federal agencies such as the Department of State and ORR to work with children and their attorneys before pursuing adverse actions against the children. There is nothing to be gained from the statistic of a child detained, denied relief and removed, especially if he meets the same fate as Edgar Chocoy.<sup>86</sup>

### III. CONCLUSION

Like the children of the Peter Pan boat lift, unaccompanied children represent the future of America. These children must have dignity and respect as required by the *Flores* settlement. They need direct representation, advocacy efforts and a central role in shaping their future. The future holds great promise if we learn to provide unaccompanied children with the tools and space for their empowerment so that their unique voices, experiences and opinions directly impact relevant policy and legal reform efforts.

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27, 2004, available at <http://www.boulderweekly.com/archive/052704/coverstory.html> (concerning the removal of Edgar Chocoy and his being killed by the MS-13 gang he had feared).

<sup>84</sup> *Supra* note 81.

<sup>85</sup> In this regard, prior to the Homeland Security Act of 2002, there was discussion with INS of the need for a hardship-related visa for children facing extreme hardship if removed absent an asylum or trafficking claim.

<sup>86</sup> *See supra* note 83. An immigration judge denied Edgar asylum. Edgar was removed to Guatemala, where he was killed by the very gang he feared. The author also spoke with former deportation officers from INS who admitted to leaving children in unknown circumstances in Asia and Central America, including imprisonment in China for illegal exit without exit documents.

