

KIDS ARE PEOPLE TOO: EMPOWERING UNACCOMPANIED MINOR ALIENS THROUGH LEGISLATIVE REFORM

Most unaccompanied, undocumented children enter the United States alone, afraid, and alienated.¹ Often abandoned in their homelands or sent away by their families, many of these children flee on their own, escaping forced military service, child marriage, female genital mutilation, or street kid abuse.² Smugglers kidnap, trick, or “buy” children (often under the guise of international adoption) and usher them into the United States for child labor or prostitution.³ Regardless of how they come to the United States, children apprehended by the government, without their parents, often must cope not only with a terrifying past but also with an uncertain future. These children find themselves trapped in detention centers, sometimes for months or even years.⁴ Many of them have no understanding of the English language or the American legal system.⁵ Current U.S. immigration law provides neither legal counsel or guardians ad litem to help unaccompanied minor aliens navigate complicated immigration proceedings.⁶

Congress recently enacted minimal provisions regarding unaccompanied minor aliens as part of the Homeland Security Act.⁷ Although these provisions reflect a promising beginning, they fail to satisfy adequately the needs and concerns of this young and vulnerable group of noncitizens.⁸ The Act seems to ameliorate the situation of

1. See AMNESTY INTERNATIONAL, “WHY AM I HERE?” CHILDREN IN IMMIGRATION DETENTION 1-7 (2003) [hereinafter AI REP.]. See also *id.* (describing excerpts of interviews Amnesty International conducted with unaccompanied minor aliens).

2. *Id.* See also *Unaccompanied Alien Child Protection Act of 2001: Hearing on S. 121 Before the Senate Judiciary Subcomm. on Immigration*, 107th Cong., 31-49 (2002) [hereinafter *Hearing*] (testimony of Wendy Young, Director of Government Relations and U.S. Programs, Women’s Commission on Refugee Women & Children), available at 2002 WL 25099544. See also David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children’s Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 998-99 (2002).

3. See Jacqueline Bhabha, *Lone Travelers: Rights, Criminalization, and the Transnational Migration of Unaccompanied Children*, 7 U. CHI. L. SCH. ROUNDTABLE 269, 271-73 (2000).

4. See AI REP., *supra* note 1, at 17.

5. *Id.* at 70.

6. *Id.* at 74.

7. Homeland Security Act, § 462, 6 U.S.C.S. § 279 (Law Co-op Supp. 2003).

8. Wendy Young, Director of Government Relations and U.S. Programs for the Women’s Commission, declared:

While shifting the care of unaccompanied refugee children to the ORR [Office of Refugee Resettlement] is a good beginning, it is only that—a beginning. Many troubling gaps remain in the protection of unaccompanied refugee children in the United States. The Women’s Commission

unaccompanied minor aliens by abolishing the Immigration and Naturalization Service (“INS”) and assigning its former duties of enforcing immigration laws and providing childcare to separate government agencies.⁹ This separation eliminates the inherent conflict of interest the INS previously faced when acting as both caregiver and law enforcement agent to unaccompanied minor aliens.¹⁰ The transition took

calls on the 108th Congress to pass a bill to make sure that these children have access to their basic rights as asylum seekers. This means they must be given pro bono legal counsel and access to guardians ad litem. These are basic protections, which are essential to ensure that these children have a fair chance at asylum.

Homeland Security Bill Is Important First Step for Unaccompanied Refugee Children, at http://www.womenscommission.org/archive/02/press_releases/1127.html. Amnesty International expressed the concern that the Department of Homeland Security (“DHS”) may focus more on its national security and law enforcement duties than on the “best interests” of the unaccompanied minor aliens with whom it interacts. See AI REP., *supra* note 1, at 75. Therefore, Amnesty International advocates for coordination between the DHS, the ORR, and all other government agencies concerned with unaccompanied minor aliens. *Id.* at 767.

9. Section (a) of the Reorganization Plan Modification of January 30, 2003, pursuant to the Homeland Security Act, established the Bureau of Immigration and Customs Enforcement (“BICE”), within the Department of Homeland Security, to take over the INS interior law-enforcement programs of detention and removal, intelligence, and investigations. *Reorganization plan modification for the Department of Homeland Security: Communication from the President of the United States transmitting a reorganization plan modification for the Department of Homeland Security pursuant to Pub. L. 107-296 § 1502(a)*, available at <http://purl.access.gpo.gov/GPO/LPS28652>. Section (b) established the Bureau of Customs and Border Protection (“BCBP”) to assume the INS functions of Border Patrol and inspections. *Id.* The Homeland Security Act also established the Bureau of Citizenship and Immigration Services (“BCIS”), within the Department of Homeland Security, to adjudicate immigrant and naturalization petitions, asylum and refugee applications, and all other matters formerly adjudicated by the INS. *Id.* § (b). With respect to immigrant children, the Act transferred the INS care-giving responsibilities to an entirely different department—the Office of Refugee Resettlement of the Department of Health and Human Services. *Id.* After having transferred all the former duties of the INS to new departments, the Act abolished the INS. § 471. *Id.* For simplification, this comment refers to all the new agencies working with unaccompanied minor aliens as “the government” or the “former INS.”

10. Before the Homeland Security Act, the Juvenile Affairs Division of the INS Detention and Removal Branch, controlled custodial care to children while simultaneously acting as law enforcement agent to remove children from the United States. *Hearing, supra* note 2, at 36 (testimony of Wendy Young). The former INS itself acknowledged that its enforcement role dominated its caregiving one. Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court, Final Rule, DOJ, INS, Supplementary Information, 58 FED. REG. 42,847 (Aug. 12, 1993). “[I]t would be both impractical and inappropriate for the Service to routinely readjudicate judicial or social service agency administrative determinations as to the juvenile’s best interest.” *Id.*

The INS’s priority on enforcement over care significantly limited the ability of many children to obtain relief. For example, children often confided in shelter staff, expecting information about their cases to remain confidential; however, the INS had full access to the shelters’ files. See AI REP., *supra* note 1, at 18, 42. See also WOMEN’S COMM’N FOR REFUGEE WOMEN & CHILDREN, PRISON GUARD OR PARENT? INS TREATMENT OF UNACCOMPANIED REFUGEE CHILDREN 23 (2002) [hereinafter WOMEN’S COMM’N]. Furthermore, some government shelter staff encouraged children to abandon their claims for relief. *Id.* at 31.

Finally, the former INS often manipulated its caregiving role by locating a child’s undocumented relatives and then using the child as “bait” to arrest his undocumented family members. *Hearing,*

effect on March 1, 2003, and it remains too early to determine whether this new division of duties will improve the situation confronting these children, particularly in light of significant budget and staffing shortages.¹¹ Although the Act contains a provision regarding the appointment of legal counsel for unaccompanied minor aliens, it is too vague.¹² The provision specifies merely that the Director of the Office of Refugee Resettlement (“ORR”) is in charge of “developing a plan . . . to ensure that qualified and independent legal counsel is timely appointed to represent the interests of each such child, consistent with the law regarding appointment of counsel.”¹³ This provision seems to preclude the appointment of counsel at the government’s expense because the current law prohibits the use of government funds in the legal representation of most noncitizens.¹⁴

supra note 2, at 37 (testimony of Wendy Young). Hopefully, the Homeland Security Act’s separation of the caregiving and law enforcement duties into different agencies will eliminate these conflict-of-interest concerns.

11. *See* AI REP., *supra* note 1, at 5, 74. In introducing proposed legislation regarding unaccompanied minor aliens, Senator Diane Feinstein remarked, “[t]he transfer of authority to the ORR—by itself—is not enough to ensure that these children are properly treated.” 149 CONG. REC. S7020 (daily ed. May 22, 2003) (statement of Sen. Feinstein). The Bush Administration allocated thirty-seven million dollars to the ORR, but Amnesty International believes the office needs fifty-three million dollars to function properly. Katrin Dauenhauer, *Child Immigrants Treated Like Offenders: Report*, INTER PRESS SERVICE, June 18, 2003. William F. Schulz, executive director of Amnesty International USA, declared:

The INS failed dismally in its mission to care for the children under its watch. . . . It will be extremely difficult for the ORR, no matter how well-intentioned, to now pick up the pieces with its meager budget. Unless the U.S. government wants to set the ORR up to fail, Congress must approve the proposed increase that would allow it to make desperately-needed changes, particularly with regard to contracted facilities.

Id.

12. Homeland Security Act, § 462(b)(1)(A), 6 U.S.C. § 279(b)(1)(A) (2002). Another provision requires the “compiling, updating, and publishing at least annually a state-by-state list of professionals or other entities qualified to provide guardian and attorney representation services for unaccompanied alien children.” *Id.* § 279(b)(1)(I).

13. *Id.*

14. *See* Immigration and Nationality Act § 292, 8 U.S.C. § 1362 (2002) (declaring an alien’s right to counsel “at no expense to the Government.”). *See also* 45 C.F.R. § 402.1 (2000) (prohibiting legal aid organizations that receive any government funds from providing legal assistance to most noncitizens, even if they receive money from other sources specifically earmarked for noncitizens). Moreover, the Supreme Court holds that attorneys may not recover fees and costs for administrative deportation proceedings under the Equal Access to Justice Act, discouraging attorneys from accepting these cases pro bono. *See* *Ardestani v. INS*, 502 U.S. 129 (1991). Finally, the Sixth Amendment right to counsel does not apply to removal hearings because they are not criminal proceedings. U.S. CONST. amend. VI. Although noncitizens may succeed in arguing that due process requires government-appointed counsel for indigent noncitizens, at least two appellate courts have rejected that argument. *See* *Magallanes-Damian v. INS*, 783 F.2d 931, 933 (9th Cir. 1986); *Aguilera-Enriquez v. INS*, 516 F.2d 565, 568 (6th Cir. 1975). *See also* Jacqueline Bhabha & Wendy Young, *Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines*, 11 INT’L J. REFUGEE L. 84, 119 (1999) (explaining that for immigrants generally, the former INS Office of General Counsel interpreted that statutory language regarding the immigrants’ right to counsel “at no expense to the

In contrast to the current law, the Unaccompanied Alien Child Protection Act of 2003 introduced in the 108th Congress, proposes more clearly defined ways to ameliorate the hardships suffered by unaccompanied minor aliens.¹⁵ This bill goes beyond the Homeland Security Act's requirement of "developing a plan" by expressly mandating that all unaccompanied alien children have counsel, even at government expense, if necessary.¹⁶ The bill also specifies counsel's duties and rights of access to the children.¹⁷ Furthermore, the bill envisions the eventual appointment of a guardian ad litem for every unaccompanied minor alien,¹⁸ and it details the qualifications, duties, and powers of such guardians.¹⁹

This Note illustrates that the requirement of legal counsel satisfies financial, practical, and humanitarian concerns by ensuring due process of law for unaccompanied minor aliens. This Note concludes that while the proposed appointment of a guardian ad litem may be appropriate for *some* children, it may be unnecessary and even invasive to require such a guardian for *all* children. Part I examines the need for legislation to ameliorate the current plight of unaccompanied minor aliens in the United States. Part II discusses the international legal principles governing unaccompanied minor aliens worldwide, which provide a useful framework for U.S. legislation. The current and proposed legislation stresses the internationally-recognized "best interests of the child" principle, while ignoring corresponding international concerns of considering a child's own views.²⁰ Part III compares the Homeland Security Act's provisions concerning unaccompanied minor aliens with those of the more comprehensive proposed bill. Part IV illustrates that an ideal law would reconcile the two international principles of a child's "best interests" and "own views." This ideal law would ensure that each child has an attorney for professional legal advice while determining the need for a guardian ad litem on an individual basis, based upon the minor's ability to make decisions regarding his own "best interests."

government" not to preclude government funding for, but merely to mean that funding was not required).

15. Unaccompanied Alien Child Protection Act, S. 1129, 108th Cong. (2003).

16. *Compare id.* § 202(a) with Homeland Security Act § 279(b)(1)(A).

17. Unaccompanied Alien Child Protection Act, § 202(b) S. 1129, 108th Cong. (2003).

18. *Id.* §§ 201(a)(1), 201(c)(2).

19. *Id.* §§ 201(a)(2-5).

20. The Homeland Security Act omits the word "best," specifying only that the "interests of the child are considered." *Compare* Homeland Security Act, § 462(b)(1)(B) with Unaccompanied Alien Child Protection Act, § 201(a)(3)(E) S. 1129, 108th Cong. (2003). *See also infra* notes 66-68 and accompanying text.

I. UNACCOMPANIED MINOR ALIENS IN THE UNITED STATES: THE CURRENT SITUATION

More than one hundred thousand children arrive unlawfully at U.S. borders each year.²¹ The government quickly returns the vast majority of these children to their country of origin, primarily Mexico.²² Moreover, each year, the government detains approximately five thousand “unaccompanied alien children.”²³ The length of a child’s detention varies from three days to two years, depending on the time it takes to resolve the child’s immigration status.²⁴ A long detention period in a frightening, confusing, and restrictive jail-like setting exacerbates a child’s trauma of separation from his parents in addition to any persecution or abuse suffered before being placed in the government’s custody.²⁵

21. OFFICE OF THE INSPECTOR GENERAL, U.S. DEP’T. OF JUSTICE, REP. NO. I-2001-009 ON UNACCOMPANIED JUVENILES IN INS CUSTODY, ch. 1 (Sept. 28, 2001), <http://www.usdoj.gov/oig/inspection/01-09/index.htm> [hereinafter *OIG REP.*]. Approximately seventy-five percent of these children are boys, and twenty-five percent are girls. *Id.*

22. *Id.* Within twenty-four hours of enduring detention in temporary holding cells, most unaccompanied Mexican children choose to return home. *AI REP.*, *supra* note 1, at 20 n.83.

23. *WOMEN’S COMM’N*, *supra* note 10, at 4. Each day, the government has custody of between four and five hundred unaccompanied minor aliens. *Id.* Although these children hail from many different countries, they come predominantly from China, Mexico, and Central America. *Id.* at 5.

The Homeland Security Act and the proposed Unaccompanied Alien Child Protection Act define an “unaccompanied alien child” as a person who: (1) is under the age of eighteen; (2) has no lawful immigration status in the United States; and (3) has no parent or legal guardian in the United States who is available to provide care and physical custody for the child. Homeland Security Act, § 462(g)(2) 6 U.S.C.S. § 279 (Law Co-op. Supp. 2003); Unaccompanied Alien Child Protection Act, § 2(a)(6),(b)(51) S. 1129, 108th Cong. (2003).

Approximately forty percent of unaccompanied alien children arrive completely alone—and without relatives in the United States. *Hearing*, *supra* note 2 (testimony of Wendy Young).

24. *WOMEN’S COMM’N*, *supra* note 10, at 9. The average length of detention is 43.5 days. *Id.* at 24.

25. *See Hearing*, *supra* note 2, (testimony of Wendy Young) (discussing the documented deterioration in mental well-being of an eight-year-old Nigerian girl who spent fifteen months in a Miami shelter).

See also Jean L. Athey, Ph.D., & Frederick L. Ahearn, Jr., D.S.W., *The Mental Health of Refugee Children: An Overview*, in *REFUGEE CHILDREN: THEORY, RES., AND SERVICES* 3, 5 (Frederick L. Ahearn, Jr. & Jean L. Athey eds., 1991) (characterizing a child’s separation from a parent as a “traumatic stressor,” and describing a study of British children during World War II, in which children sent away experienced more stress from being separated from their parents than those who remained at home in London and were exposed to bombing). *See also AI REP.*, *supra* note 1, at 7 (describing how separation from parents, flight, and often abuse renders unaccompanied alien children particularly vulnerable psychologically).

A. Past and Current Law Governing Unaccompanied Minor Aliens

In 1984, the former INS Western Region²⁶ promulgated a narrow policy, whereby juvenile aliens awaiting the outcomes of their deportation proceedings could be released only to a parent or lawful guardian, except in “extraordinary circumstances” warranting release to another responsible adult.²⁷ In 1985, two human rights legal advocacy organizations brought a class action suit on behalf of an unaccompanied minor alien named Lisette Flores, in which they challenged this policy and the conditions of detention.²⁸ Specifically, the plaintiffs claimed that the United States Constitution, international principles, and U.S. immigration laws required the release of unaccompanied minor aliens into the custody of “responsible adults.”²⁹ The district court granted the INS partial summary judgment on the statutory and international law challenges to the release policy and approved a consent decree settling all claims regarding detention conditions.³⁰ The district court then granted partial summary judgment to plaintiffs on their equal protection claim that the INS lacked a rational basis for having different release policies for alien minors in deportation and exclusion proceedings.³¹ Even after the INS replaced the policy with a more uniform federal regulation, the court invalidated it on due process grounds.³² Although a panel of the Court of Appeals for the Ninth Circuit reversed, the Court reheard the case *en banc* and affirmed the district court’s decision.³³ The U.S. Supreme Court reversed, upholding the constitutionality and reasonableness of the INS regulation

26. The former INS divided authority into three regions in which authority was largely decentralized, because the central office at the INS Juvenile Affairs Division failed to provide guidance and coordination. *Hearing, supra* note 2 (testimony of Wendy Young).

27. OIG REP., *supra* note 21 ch.1. The report provides no definition of “extraordinary circumstances.” *Id.*

28. *Reno v. Flores*, 507 U.S. 292, 296 (1993).

29. *Id.* at 294. The plaintiffs particularly objected to the INS’ release policy because of their perception of the INS’ real motive for the policy. By restricting release to parents, the INS dangled the children as “bait” to catch and deport their undocumented parents. *See Hearing, supra* note 10, at 37.

30. *Id.* at 296.

31. *Id.* In contrast to the policy regarding minor aliens in deportation proceedings, the former INS would release alien minors in exclusion proceedings to individuals other than parents and legal guardians. *Id.* Both exclusion and deportation proceedings are now called “removal proceedings,” but separate bases for inadmissibility and removability remain. *See Immigration & Nationality Act*, §§ 212(a), 237(a), 8 U.S.C. §§ 1182(a), 1227(a) (2002).

32. 507 U.S. at 299. Although the federal regulation slightly expanded the release policy, it permitted prolonged detention, even if a parent or guardian was available, in order to secure a child’s safety or ensure his appearance at immigration proceedings. OIG REP., *supra* note 21.

33. *Id.* at 299.

and remanding the case for further proceedings.³⁴

In 1997, however, the parties signed the *Flores* Settlement Agreement (the “Agreement”), which set standards for the detention, processing, and release of juvenile aliens.³⁵ This Agreement, still in force today, constitutes the prevailing law regarding treatment or detention of unaccompanied minor aliens in the United States.³⁶ Although the Agreement contains several detailed provisions, one of the most important ones [hereinafter “the least restrictive setting” requirement] states:

The INS treats, and shall continue to treat, all minors in its custody with dignity, respect and special concern for their particular vulnerability as minors. The INS shall place each detained minor in the least restrictive setting appropriate to the minor’s age and special needs, provided that such setting is consistent with its interests to ensure the minor’s timely appearance before the INS and the immigration courts and to protect the minor’s well-being and that of others.³⁷

Furthermore, the Agreement requires the government to house alien minors separately from unrelated adults and delinquent offenders.³⁸ It requires the government to notify each unaccompanied minor alien of his rights, provide him with a list of attorneys, and allow his selected counsel to visit and communicate with him.³⁹ Moreover, the Agreement specifies a hierarchical order of individuals to whom the government may release

34. *Id.* at 315.

35. Final Text of Settlement Establishing Minimum Standards and Conditions for Housing and Release of Juveniles in INS Custody, *Flores v. Meese*, No. CV85-4544-RJK (C.D. Cal. 1997), available at http://www.centerforhumanrights.org/Detained_minors/FloresSettle.html [hereinafter the *Flores* Agreement].

36. The *Flores* Agreement would have expired in early 2002, but a stipulation with the former INS extended it until forty-five days after the adoption of final regulations incorporating its major provisions. AI REP., *supra* note 1, at 17. It continues to apply to the ORR. *Id.* For the proposed regulations, see Processing, Detention, and Release of Juveniles, 63 Fed. Reg. 39759 (proposed July 24, 1998) (to amend 8 C.F.R. Pt. 236).

In 1998, the former INS promulgated its Guidelines for Children’s Asylum Claims, but these are non-binding. For the Guidelines themselves, see INS Guidelines for Children’s Asylum Claims (Dec. 1998), 76 *Interpreter Releases* 5 (Jan. 1999) [hereinafter INS Guidelines]. The Guidelines only apply to a small fraction of cases in which unaccompanied minor aliens affirmatively apply for asylum, rather than claiming it as a defense to removal charges. Thronson, *supra* note 2, at 1002 n.145. The proposed Unaccompanied Alien Child Protection Act of 2003 commends the former INS for issuing the Guidelines and urges the Executive Office for Immigration Review to adopt them. S. 1129, 108th Cong. § 401(a) (2003).

37. *Flores* Agreement, *supra* note 35, ¶ 11.

38. *Id.* ¶ 12.

39. *Id.* ¶¶ 12, 24D, 32A, Ex. 1(A) ¶ 12.

unaccompanied minor aliens.⁴⁰ Finally, the Agreement requires the government to respect each minor's "reasonable right to privacy."⁴¹

B. Government's Failure to Comply with the Flores Settlement Agreement

While the government improved its handling of unaccompanied alien children over the years, its continued failure to comply with the most essential provisions of the Agreement adversely affects these children.⁴² The former INS Juvenile Affairs' decentralized organizational framework, and resulting lack of information exchange and transparency, resulted in very little accountability and consistency across regions.⁴³ Only a few government housing facilities train their staff to follow the Agreement, which itself constitutes a violation of the Agreement.⁴⁴

Furthermore the government often ignores the Agreement's "least restrictive setting" requirement by unnecessarily choosing secure facilities over medium security facilities, non-secure facilities, or foster care, despite the availability of these alternatives.⁴⁵ The former INS attempted to

40. *Id.* ¶ 14. The *Flores* Agreement lists the following custodians in order of preference: parent; legal guardian; adult relative; adult or entity designated by the parent or legal guardian; licensed program; and "an adult individual or entity seeking custody, in the discretion of the INS, when it appears that there is no other likely alternative to long term detention and family reunification does not appear to be a reasonable possibility." *Id.*

41. *Id.* Ex. 1(A) ¶ 12.

42. See OIG REP., *supra* note 21, at ch. 1. The report notes the development of a Juvenile Protocol Manual, increased training for INS officials regarding children and improved tracking and reporting on juveniles in custody. *Id.* All facilities visited had met the *Flores* Agreement's programming requirements, yet the Report also cautions:

Although the INS has made significant progress since signing the *Flores* agreement, our review found deficiencies with the implementation of the policies and procedures developed in response to *Flores* in INS districts, Border Patrol sectors, and at headquarters. Some of the problems existed across INS districts while some problems were specific to a few districts. This report alerts senior INS managers to the existence of problems that could lead to potentially serious consequences affecting the well-being of the juveniles.

Id.

43. WOMEN'S COMM'N, *supra* note 10, at 11-12. The former INS failed to relay information to detention centers explaining why children were in custody, the status of their immigration proceedings, or whether they had special needs. *Id.* at 26. Therefore, the former INS did not comply with the *Flores* Agreement's requirement to consider the minor's "special needs" when determining where to detain him. See *Flores* Agreement, *supra* note 35, ¶ 11, Ex. 1(A)(3).

44. See *id.*, *supra* note 35, ¶ 34. Only four out of twenty-three secure facilities and four out of ten shelters that responded to Amnesty International's survey stated that they trained their staff to adhere to the *Flores* Agreement. AI REP., *supra* note 1, at 29. See *infra* note 45 for a description of secure facilities and shelter care.

45. See *Flores* Agreement, *supra* note 35. The Agreement permits detention in a "secure facility" when a minor: engages in criminal or delinquent behavior; commits or threatens to commit "a violent or malicious act"; engages in "unacceptably disruptive" conduct that endangers himself or others, constitutes an "escape-risk"; or needs protection from smugglers, for example. *Id.* ¶ 21.

justify this practice by exploiting the “emergency” or “influx” exceptions to the “least restrictive setting” requirement.⁴⁶

Additional significant violations of the Act continue to occur. For example, the government ignores or misinterprets the Agreement’s

Amnesty International found that many government facilities failed to diagnose children’s mental illnesses and provide them appropriate treatment and counseling, as the *Flores* Agreement requires. AI REP., *supra* note 1, at 41-42. *See also Flores* Agreement, *supra* note 35, Ex. 1 (A)(6)-(7) (providing that each unaccompanied minor alien have access to one individual and two group counseling sessions per week). The government’s neglect results in authorities mischaracterizing children’s behavior and inappropriately resorting to excessive punishment and use of secure facilities. AI REP., *supra* note 1, at 31. Furthermore, the *Flores* Agreement restricts the government’s authority to place a minor in a secure facility if there are “less restrictive alternatives that are available and appropriate in the circumstances.” *Flores* Agreement, *supra* note 35, ¶ 23. A medium security facility constitutes such an alternative. *Id.* The *Flores* Agreement defines “medium security facility” as one “designed for minors who require close supervision but do not need placement in juvenile correctional facilities.” *Id.* ¶ 8. “Non-secure” placements include shelters operated by nonprofit agencies as well as foster homes. AI REP., *supra* note 1, at 18. *See also WOMEN’S COMM’N*, *supra* note 10, at 23 (noting that the government has available almost five hundred non-secure placements at any given time, which is more than enough to cover its entire daily population of children). Despite this availability, in 1999, the former INS placed 1,958 of the 5,644 children in its custody in secure facilities. *Id.* at 24. Only 675 of these children fit into one of the accepted categories for secure detention. *Id.* The former INS sometimes arbitrarily labeled a child as an “escape-risk,” particularly if an Immigration Judge denied relief and the child was awaiting a decision by the Board of Immigration Appeals. *Hearing*, *supra* note 2, at 36 (testimony of Wendy Young). Moreover, the government uses foster care to a very limited extent, offering only thirty-six foster care placements nationwide. *Id.* at 40. Typically, young children, girls, children with special needs, and long-term detainees with no sponsors receive these spots. *Id.* *See also* AI REP., *supra* note 1, at 18 (describing former INS placement decisions as “arbitrary and inconsistent, with little consideration for what is in the best interests of the child”). The government also houses unaccompanied minors in hotels. *Id.* at 19-20.

The *Flores* Agreement stipulates that the INS regional juvenile coordinator must approve all placements in secure facilities. *Flores* Agreement, *supra* note 35, ¶ 23. Furthermore, it permits any minor to seek judicial review if he contests his custody placement. *Id.* ¶ 24B. Despite these provisions, some evidence suggests the former INS regional juvenile coordinator rarely reviewed secure placements. *Hearing*, *supra* note 2, at 41 (testimony of Wendy Young). Children, particularly unrepresented ones, are not likely to petition for judicial review. *Id.*

46. The *Flores* Agreement defines “emergency” as “any act or event that prevents the placement of minors . . . within the time frame provided.” *Flores* Agreement, *supra* note 35, ¶ 12B. It describes “influx” as a time when the government has more than 130 minors already placed or eligible for placement in non-secure settings. *Id.* This number corresponds to the number of non-secure beds available when the former INS negotiated the *Flores* Agreement. *WOMEN’S COMM’N*, *supra* note 10, at 25. Even though the government has expanded its non-secure detention capacity to five hundred, it has not adjusted the “influx” definition accordingly. *Id.* Therefore, it has exploited this “perpetual state of influx.” *Id.* For example, in 2000, the former INS placed 34% of the children in its custody in secure facilities. *Id.* Of these, 40% were deemed “influx” cases, 14% were “escape-risks,” and 2.3% had behavioral problems; only 17% were delinquent. *Id.* The Office of the Inspector General recommended that the government revise its definition of “influx” and ensure “influx” conditions are not used inappropriately as an excuse for detaining children in secure facilities. *OIG REP.*, *supra* note 21, ch. 5, ¶ 23. The former INS agreed to review the term’s application but maintained that under its policy “influx” had two meanings and that departmental training on “influx” would be given. *Memorandum from James W. Ziglar, Commissioner of the former INS, to Mary W. Demory, Assistant Inspector General for Evaluation and Inspections, DOJ, on Review of Unaccompanied Juveniles in INS Custody* (Sept. 2, 2001), in *OIG REP.*, *supra* note 21 [hereinafter Ziglar Memorandum].

requirement of separating non-delinquent aliens from juvenile offenders and adults.⁴⁷ The government's reluctance and unnecessary delays in following the Agreement's release policy prolongs detention, which often induces children to abandon their claims for relief.⁴⁸ Finally, some government facilities use excessive discipline against unaccompanied minor aliens, in violation of the Agreement.⁴⁹ These abusive practices violate both the "least restrictive setting" requirement and the "reasonable right to privacy" recognized in the Agreement.⁵⁰

47. See *Flores Agreement*, *supra* note 38, ¶ 12. The Office of the Inspector General reported that in 2000, out of the fifty-seven secure facilities it surveyed, thirty-four of them could not guarantee segregation of non-delinquent children from juvenile offenders. OIG REP., *supra* note 21, ch. 2. The report further critiqued the former INS' interpretation that the segregation requirement does not apply once non-delinquent minors are placed in secure facilities. *Id.* It recommended "strict segregation in living quarters and no more than minimal contact in all other common areas." *Id.* ch. 5, ¶ 1. The former INS agreed with this recommendation and noted that it had instituted a specialized residential program to house non-delinquent children who would otherwise be placed in secure facilities. Ziglar Memorandum, *supra* note 46. Although the former INS Central Regional Juvenile Coordinator assured Amnesty International that all unaccompanied minor aliens in her region are housed separately from juvenile offenders, Amnesty International's surveys and interviews with children contradicted that claim. AI REP., *supra* note 1, at 25-26. Only four of twenty-three secure facilities responding to Amnesty International's survey indicated that they house unaccompanied minor aliens separately from juvenile delinquents, and eleven stated that they house them in the same cells. *Id.* at 23-24. The organization also reports that girls are commingled with adults and juvenile offenders more often than boys because they are fewer in number. *Id.* at 43.

For disturbing accounts of dangers and fears suffered by non-delinquent children housed with juvenile offenders, see OIG REP., *supra* note 21, ch. 2. See also WOMEN'S COMM'N, *supra* note 10, at 23, 29. See AI REP., *supra* note 1, at 27 for the risks unaccompanied minor aliens face when housed with adults.

48. AI REP., *supra* note 1, at 53, 59.

49. See *Flores Agreement*, *supra* note 35, at Ex. 1(C) (stipulating that "any sanctions employed shall not adversely affect either a minor's health, or physical or psychological well-being"). Amnesty International reports that some secure government facilities force solitary confinement upon unaccompanied minor aliens for committing minor infractions. AI REP., *supra* note 1, at 31-32. Amnesty International further reports allegations of physical and verbal abuse of children by government staff. *Id.* at 30.

The government also unnecessarily subjects non-delinquent children to handcuffing or shackling upon transfer as well as pat and strip searches after receiving any visitor. See WOMEN'S COMM'N, *supra* note 10, at 35-36. See also AI REP., *supra* note 1, at 35 (describing how some children are even shackled in court). Of the facilities responding to Amnesty International's survey sixteen of the twenty-three secure facilities, (seventy percent), and three of the ten shelter facilities, (thirty percent), admitted that they conduct pat-downs or strip-searches. *Id.* at 33.

50. See *Flores Agreement*, *supra* notes 37, 41. The "reasonable right to privacy" includes, *inter alia*, the right to wear one's own clothes, talk privately on the phone, and visit privately with guests. *Id.* ¶ 12B, Ex. 1(A)(12).

Personnel at various detention centers have prevented children from exercising all of these rights. See generally WOMEN'S COMM'N, *supra* note 10 (describing how some former INS personnel have forced non-delinquent children to wear prison uniforms, used restraints in violation of guidelines, and limited access to education, recreation, telephone calls, and visitors, including attorneys). The administrator of the San Diego facility admitted that staff frequently use pepper spray to control the children. *Id.* at 35-36. Also at this facility, male guards monitor the girls' wing, while female guards

C. Lack of Legal Representation

Unaccompanied minor aliens, like all aliens, have the right to counsel during their immigration proceedings—but not necessarily at government expense.⁵¹ Although estimates vary on how many children actually receive representation, all of such estimates indicate that less than half of the children in government custody have attorneys.⁵² The assistance of counsel clearly increases an immigrant’s chances of winning his case.⁵³ Still, even when a child has an attorney, time, distance, and financial constraints often prevent counsel from providing the child with adequate representation throughout the entire process.⁵⁴

The Executive Office for Immigration Review (“EOIR”), bar associations, and other legal assistance and voluntary organizations have worked hard to recruit pro bono legal aid for unaccompanied minor aliens and have increased awareness among these children of their legal rights and the hearings process.⁵⁵ Many government facilities, however, do not

oversee the boys’ wing, despite the fact that the showers and toilets are exposed. *Id.* at 27. Only twenty-seven percent of the facilities responding to Amnesty International’s survey stated that they have female staff for girls. AI REP., *supra* note 1, at 44.

51. Immigration and Nationality Act, 8 U.S.C. § 1362 (2002). An exception formerly existed, for a minor alien who was either incompetent or under sixteen years of age and was also not accompanied by a guardian, relative, or friend. 8 C.F.R. § 242.9(b) (1997) (repealed). In such a case, the former INS District Director was supposed to appoint a general attorney to represent the minor in his removal hearing. *Id.* The extent to which the government actually appointed attorneys for these children remains unclear because one source reveals that as many as eighty percent of unaccompanied minor aliens appear in immigration court without counsel. *See Hearing, supra* note 2, at 52 (testimony of Andrew D. Morton, Esq., Associate of the law firm of Latham & Watkins). The fact that the agency in charge of removing the child also chose the child’s attorney raises doubts about the chosen counsel’s ability to advocate independently on behalf the child’s best interests. *See supra* note 10 and accompanying text. It is unclear how appointment of counsel will operate under the new provision in the Homeland Security Act. *See supra* notes 12-14 and accompanying text. It specifies merely that the ORR Director is in charge of “developing a plan . . . to ensure that qualified and independent . . . counsel is timely appointed to represent the interests of each such child . . .” HSA § 462(b)(1)(I).

52. The Office of the Inspector General reported that in 1999, 131 of 302 children, (forty-three percent), had an attorney of record. OIG REP., *supra* note 21, ch. 4. The Catholic Legal Immigration Network, Inc. (CLINIC) claims that less than eleven percent of children have representation. *Hearing, supra* note 2, at 64 (testimony of Julianne Duncan, Director of Children’s Services, U.S. Conference on Catholic Bishops).

53. For example, represented asylum seekers are four to six times more likely to win their cases than their unrepresented counterparts. *Hearing, supra* note 2, at 47-48 (testimony of Wendy Young).

The Office of the Inspector General reported that pro bono attorneys estimated ten percent of children whom the government has removed might have made a case for relief if they had been given more time and access to legal representation. OIG REP., *supra* note 21, ch. 4.

54. The Office of the Inspector General reports that pro bono attorneys frequently meet with the children and appear informally in court with them, but very few actually represent them throughout the entire hearings process. OIG REP., *supra* note 21, ch. 4.

55. *Id.*

allow organizations to conduct rights presentations, nor do they follow the *Flores* Agreement's requirement of providing such information themselves.⁵⁶ Even if children have access to information, most lack the money or ability to access counsel on their own.⁵⁷

Even if a child successfully obtains counsel, government practice often thwarts the efforts of attorneys by restricting access to detention centers, restricting children's phone calls to their attorneys, housing children in secure facilities far from legal services, and transferring children to other centers without notifying their attorneys—all in violation of the Agreement.⁵⁸ The government also frustrates attorneys' efforts to seek Special Immigrant Juvenile status for their unaccompanied minor clients.⁵⁹

56. Amnesty International reports that only forty-eight percent of the facilities responding to its survey permit organizations to conduct legal rights presentations for unaccompanied minor aliens. AI REP., *supra* note 1, at 46. Fifteen of twenty-three secure facilities responding to the survey, (sixty-five percent), acknowledged that, in violation of the *Flores* Agreement, they do not provide lists of pro bono attorneys who are willing to assist unaccompanied minor aliens. *Id.* at 45. Only thirty-five percent of the secure facilities surveyed provide children with an explanation of their right to seek judicial review over their placement in secure facilities. *Id.* at 28. See *Flores* Agreement, *supra* note 35, ¶ 24(D), Ex. 2(j).

57. See *Hearing*, *supra* note 2, at 48 (testimony of Wendy Young) (describing how children may not realize the importance of counsel and that charitable legal organizations lack the resources to serve children located in many different facilities that are often located in remote places). In one case, an eighteen month-old child appeared at a master calendar hearing before an Immigration Judge with no attorney or guardian to assist her. *Id.*

58. For the particular difficulties unaccompanied minor aliens housed in hotels confront in accessing legal representation, see AI REP., *supra* note 1, at 20.

Moreover, any former INS district could request transfer and placement of a child wherever a placement was available nationwide. *Hearing*, *supra* note 2, at 47 (testimony of Wendy Young). The *Flores* Agreement, however, requires the government to notify a child's attorney twenty-four hours in advance of such transfer except in "unusual and compelling circumstances." *Flores* Agreement, *supra* note 35, ¶ 27.

See Elizabeth Amon, *Access Denied: Children in INS Custody Have No Right to a Lawyer; Those Who Get One Risk Retaliation*, 23 NAT'L. L. J., Apr. 16, 2001, at A1 (expressing well-founded fear amongst lawyers of unaccompanied minor aliens that if they protest the conditions of detention centers, the government will respond by transferring their clients across the country to secure facilities); *Hearing*, *supra* note 2, at 45 (testimony of Wendy Young) (describing how one detention center denied an attorney access to her clients, despite prior approval). AI REP., *supra* note 1, at 47 (stating that some unaccompanied minor aliens do not have the opportunity to inform their families of their transfer until several days after it occurs).

See also OIG REP., *supra* note 21, at ch. 4 (reporting that children in secure facilities could not talk to their attorneys by phone if they could not pay for the calls themselves and if pro bono attorneys could not afford to take collect calls); AI REP., *supra* note 1, at 51 (noting that the majority of facilities responding to the survey, (twenty-five of thirty-three), monitor or record calls). Fifty-two percent of these facilities indicated that they share their records with the government or would do so if requested. *Id.* The former INS told Amnesty International that this practice protects children from smugglers, but attorneys indicated that the government uses information from such phone calls in court. *Id.*

59. WOMEN'S COMM'N, *supra* note 10, at 8. A juvenile court may deem an unaccompanied minor alien eligible for Special Immigrant Juvenile ("SIJ") status based on abuse, abandonment, or neglect. See Immigration and Nationality Act § 101(a)(27)(J)(i), 8 U.S.C. § 1101(a)(27)(J)(i) (2002).

Overall, lack of representation renders proceedings more inefficient and delays detention, increasing the financial costs to taxpayers and the trauma to the child.⁶⁰

II. INTERNATIONAL LEGAL PRINCIPLES REGARDING UNACCOMPANIED MINORS

Recognizing international respect for the legal and social rights of all children, the United Nations Convention on the Rights of the Child (“CRC” or the “Convention”) constitutes the main source of international law pertaining to unaccompanied minor aliens.⁶¹ The United States is the only United Nations member (other than Somalia) that has not ratified the Convention.⁶² Still, because the United States has signed the Convention, it is bound not to act against the treaty’s purpose while a decision to ratify is pending.⁶³

The preamble of the CRC states that children need “special safeguards and care, including appropriate legal protection”⁶⁴ Another provision specifies that children in confinement have the right to legal assistance.⁶⁵ The Convention introduces the following requirement: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative

SIJ status accords legal permanent residency upon a child and guarantees him long-term foster care. *Id.* The law requires the government’s express consent before a child may proceed to juvenile court to determine SIJ eligibility. WOMEN’S COMM’N, *supra* note 10, at 8. The government has consistently refused consent, thereby precluding this form of relief for many deserving children. *Id.*

60. See AI REP., *supra* note 1, at 62; See also *Hearing, supra* note 2 (statement of Andrew D. Morton, Esq.) (explaining how Immigration Judges may choose to detain an unrepresented child indefinitely rather than send him back to unsafe conditions, and that cost of detention can reach two-hundred fifty dollars per day); Athey & Ahearn, *supra* note 25, at 7 (describing how frequent moving from one place to another increases a child refugee’s risk of psychiatric disorder).

61. See Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, pmb., art. 2, U.N. Doc. A/44/736 (1989) [hereinafter CRC].

62. Kristine K. Nogošek, *It Takes a World to Raise a Child: A Legal and Public Policy Analysis of American Asylum Legal Standards and Their Impact on Unaccompanied Minor Asylees*, 24 HAMLINE L. REV. 1, 18-19 (2000) (also discussing some possible explanation for the U.S. refusal to ratify the CRC).

63. *Id.*

64. CRC, *supra* note 61, pmb.

65. Article 37(d) of the CRC states:

Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Id. art. 37(d).

bodies, the best interests of the child shall be a primary consideration.”⁶⁶ In addition to considering the opinions of a child’s parents, legal guardians, and community regarding the “best interests of the child,”⁶⁷ the CRC emphasizes the child’s participation in the formulation of his own “best interests.”⁶⁸ Amnesty International characterizes this as a “participatory right,” emphasizing that “children have a right to be heard and participate in decisions that affect their lives.”⁶⁹ The Convention goes on to specify that the child’s articulation of his views is particularly important when he faces legal proceedings.⁷⁰ Finally, the CRC declares that detention should “be used only as a measure of last resort and for the shortest appropriate period of time.”⁷¹

The United Nations Rules for the Protection of Juveniles Deprived of Their Liberty (“the Rules”) echoes the principles espoused by the CRC.⁷² In particular, the Rules stress a child’s right to counsel and to unrestricted, private, and confidential conversations with such counsel.⁷³ The Rules also prohibit the arbitrary transfer of juveniles from one facility to another and the use of restraints, except in “exceptional cases”.⁷⁴ Finally, the Rules give a detained child the right to an interpreter when necessary, require the separation from adults and delinquent juveniles, and emphasize respect for a child’s right to privacy.⁷⁵

The United Nations High Commissioner for Refugees (UNHCR)

66. *Id.* art. 3(1). An older U.N. convention, entitled “Declaration of the Rights of the Child,” states that “the best interests of the child shall be the paramount consideration” in the enactment of laws regarding children. United Nations Declaration of the Rights of the Child, princ. 2, G.A. Res. 1386 (XIV), U.N. GAOR 14th Sess., Supp. No. 16, at 19, U.N. Doc. A/4354 (1959).

67. CRC, *supra* note 61, arts. 3(2), 5. 1577 U.N.T.S. at 46-47.

68. “States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.” *Id.* art. 3(1); 1577 U.N.T.S. at 46.

69. AI REP., *supra* note 1, at 67.

70. Article 12(2) states: “For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial or administrative proceedings affecting the child, *either* directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.” CRC, *supra* note 61, art. 12(2); 1577 U.N.T.S. at 48.

71. *Id.* art. 37(b); 1577 U.N.T.S. at 55. The CRC also requires the separation of children and adults in detention facilities “unless it is considered in the child’s best interest not to do so.” *Id.* at art. 37(c); 1577 U.N.T.S. at 56.

72. *The United Nations Rules for the Protection of Juveniles Deprived of Their Liberty*, U.N. Doc. A/RES/45/113/Annex (1990) [hereinafter Rules]. Although these Rules do not constitute formal international law, they reflect customary international law and principles of *ius cogens*. See AI REP., *supra* note 1, at 11.

73. Rules, *supra* note 72, ¶¶ 18(a), 60. See also *id.* ¶ 24 (declaring a child’s right to a written description of his rights in a language he can understand as well as a list of organizations which provide legal assistance).

74. *Id.* ¶¶ 26, 64.

75. *Id.* ¶¶ 6, 17, 29, 87(e).

Guidelines on the Protection and Care of Refugee Children (“the Guidelines”) interpret the CRC’s “best interests” rule as applicable both in general governmental policy-making and individual decision-making.⁷⁶ Based on the Convention, the Guidelines list several factors to consider in a “best interests” analysis, including the child’s “own desires.”⁷⁷ The Guidelines also emphasize that all alien children should have access to the social and legal services that are available to native children who are separated from their parents.⁷⁸ In particular, the Guidelines advocate not only the immediate appointment of a legal representative, but also the appointment of a guardian to assist the child with non-legal matters, if necessary.⁷⁹ They also stress the importance of an interpreter at a child’s status determination interview, even when the child appears to speak the interviewer’s language.⁸⁰

The UNHCR takes the position that refugee children should not be detained at all while their asylum claims are pending.⁸¹ Instead, the UNHCR Guidelines emphasize both the use of foster care and the child’s participation in the placement decision in an attempt to best support the child’s psychological well-being.⁸² Increased children’s participation by a child helps adults reach a more informed decision, ease children’s anxiety, and helps children develop necessary decision-making skills.⁸³ The Guidelines require an individualized assessment of each child to determine the most appropriate type of placement for each child.⁸⁴

Although the UNHCR Guidelines apply specifically to *refugee*

76. United Nations High Commissioner for Refugees, *Refugee Children: Guidelines on Protection and Care*, (1994), <http://www.asylumsupport.info/publications/unhcr/refugeechildren.htm> [hereinafter UNHCR Guidelines].

77. *Id.* Other factors include: (1) the “desirability of continuity in a child’s upbringing,” especially with respect to culture and language and (2) preservation of family and nationality. CRC, arts. 8, 20.

78. UNHCR Guidelines, *supra* note 76, at 39.

79. *Id.* at 44, 54.

80. *Id.* at 44.

81. *Id.* at 37. If a country must detain refugee children, it must do so in humane conditions and have an adequate justification—not punishment or deterrence of other asylum seekers. *Id.*

82. *Id.* at 15 (declaring that “substitute family care or immediate family reunion is critical” to a child’s psychosocial well-being). The UNHCR Guidelines also stress that in determining their ultimate destination, “children must be given an opportunity to have their opinions heard and considered.” *Id.* at 39.

83. *Id.* at 7, 44 (explaining that children who understand and participate in the decision-making process are less likely to rely on rumors and bad advice that may cause them to form unrealistic expectations and falsify information).

84. *Id.* at 39. The UNHCR Guidelines specify that “age, personality, needs and preference of the child must be considered.” *Id.* Further, “every effort must be made to place children in foster families or groups of similar ethnic, cultural, linguistic, and religious background (CRC, art. 20.3).” *Id.*

unaccompanied minors, some experts in the field have suggested extending such care to *all* unaccompanied minor aliens.⁸⁵ Indeed, some countries have successfully implemented such programs.⁸⁶ Canada and most European countries ensure that each unaccompanied minor alien has legal representation, provided either at government expense or by a pro bono attorney.⁸⁷ In many of these countries, a child's state-appointed welfare advisor must obtain counsel for the child.⁸⁸ The United Kingdom generally does not detain children seeking asylum, so long as their status as minors is uncontested.⁸⁹ A European Union Council Directive incorporates both the "views of the child" and the "best interests" approaches of international law in the placement decision.⁹⁰

III. CURRENT U.S. LEGISLATION AND THE PROPOSED ALTERNATIVE

Although the Homeland Security Act incorporates some provisions to protect unaccompanied minor aliens, it lacks the comprehensiveness of the proposed Unaccompanied Alien Child Protection Act.⁹¹ Unlike the proposed legislation, the Homeland Security Act fails to codify the stipulation of the *Flores* Agreement that non-delinquent minor aliens be separated from adults and juvenile criminals.⁹² Also, unlike the bill, the Homeland Security Act omits the Agreement's "least secure setting possible" requirement and fails to codify the Agreement's release policy.⁹³ However, the Homeland Security Act encourages the use of the current

85. See Sarah Maloney, *TransAtlantic Workshop on Unaccompanied/Separated Children: Comparative Policies & Practices in North America and Europe*, 15 J. REFUGEE STUD. 102, 117 (2002). See Immigration and Nationality Act, § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2002) (defining refugee to include any person who is outside any country of such person's nationality and who is unable or unwilling to return to his country because of persecution or a well-founded fear of one of five enumerated grounds). The "Unaccompanied Alien Child Protection Act" differentiates between "unaccompanied alien child" and "unaccompanied refugee children." S. 1129, 108th Cong., § 2(b)(4)-(5) (2003).

86. Maloney, *supra* note 85.

87. *Id.* at 112-13.

88. *Id.* at 113.

89. Bhabha & Young, *supra* note 14, at 88 n.13.

90. Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving Such Persons and Bearing the Consequences Thereof, 2001 O.J. (L 212) 12, arts. 15(4), 16(2).

91. Compare Homeland Security Act, § 462, 6 U.S.C. § 279 (2002) with Unaccompanied Alien Child Protection Act, *generally*.

92. See *Flores* Agreement, *supra* note 35, ¶ 12; Compare S. 1129, § 103(a)(1) with Homeland Security Act *generally*.

93. See *Flores* Agreement, *supra* note 35, ¶¶ 11, 14. Compare S. 1129, §§ 103(c), 102(a)(1) with Homeland Security Act *generally*.

refugee children foster care system, whereas the bill contains no such provision.⁹⁴

Significantly, both the Homeland Security Act and the proposed Unaccompanied Alien Child Protection Act require that every unaccompanied minor have counsel.⁹⁵ However, unlike the bill, the Homeland Security Act does not specifically permit the government to provide counsel, at its own expense, if an unaccompanied minor alien either cannot afford an attorney or locate pro bono representation.⁹⁶ Unlike the bill, the Homeland Security Act does not specify the required counsel's qualifications and duties.⁹⁷ Instead, the bill requires only the publishing of an annual list of professionals qualified to provide guardian and legal representation services for unaccompanied minor aliens.⁹⁸ In contrast, the proposed bill specifies that children should have access to counsel, even while in detention. To further this goal, the bill does not permit a child to give valid consent to any immigration action unless first given the opportunity to speak with counsel.⁹⁹ It also prohibits the government from transferring any child to another facility without providing at least twenty-four hours' notice to the child's counsel.¹⁰⁰

Several other differences between the two pieces of legislation are noteworthy. The Homeland Security Act does not provide for the appointment of a guardian ad litem for any unaccompanied minor alien.¹⁰¹ The proposed bill accords the ORR's Director discretion to appoint a guardian ad litem for an unaccompanied child.¹⁰² It envisions the eventual appointment of a guardian ad litem for every unaccompanied alien child by calling for the implementation of a pilot program to assess the feasibility of such a plan.¹⁰³ Also, the Homeland Security Act does not call upon the EOIR to adopt officially the INS Guidelines for Children's Asylum Claims as well as model guidelines for the legal representation of unaccompanied minor aliens, where as the proposed bill does.¹⁰⁴

94. Compare Homeland Security Act, § 462(b)(3), 6 U.S.C. § 279(b)(3) with S. 1129, generally.

95. Compare Homeland Security Act, § 462(b)(1)(A), 6 U.S.C. § 279(b)(1)(A) with S. 1129, § 202(a).

96. Compare Homeland Security Act with S. 1129, § 202(a)(3).

97. Compare S. 1129 at § 201(a)(2-5) with Homeland Security Act.

98. Homeland Security Act, § 462(b)(1)(I), 6 U.S.C. § 279(b)(1)(I).

99. S. 1129, §§ 202(c)(1), (e)(2).

100. *Id.* § 202(c)(2).

101. See generally Homeland Security Act § 462, 6 U.S.C. § 279.

102. S. 1129, § 201(a)(1).

103. *Id.* § 201(c).

104. Compare *id.* §§ 202(a)(6), 401 with Homeland Security Act.

IV. PROPOSAL FOR A STATUTE MORE CONSISTENT WITH INTERNATIONAL PRINCIPLES AND DOMESTIC LAW

A. *The Need to Incorporate the “Child’s Views” and Clarify the “Child’s Best Interests”*

The Homeland Security Act and the proposed Unaccompanied Alien Child Protection Act echo the CRC’s emphasis on the need to consider the “best interests of the child” when making decisions about care and custody.¹⁰⁵ Significantly, neither mention the corresponding CRC consideration of the “views of the child.”¹⁰⁶ Only the proposed legislation explicitly refers to international law by subordinating itself to certain treaties to which the United States adheres, including the United Nations Declaration of the Rights of the Child (“the Declaration”).¹⁰⁷ Although the Declaration does rely on the “best interests” principle, it does not incorporate a corresponding “child’s views” principle.¹⁰⁸

Neither the Act nor the bill specifies from whose perspective “best interests” should be determined. Presumably, a capable child should have some say regarding his own best interests. Even if the Act or bill purport to extend the “best interests” determination solely to the state, the child’s parents, or the child’s guardian ad litem, their plain language does not preclude all consideration of the child’s own views. Just because “best interests” should be a consideration does not mean that it must be the *only* consideration.¹⁰⁹ Courts could look to other areas of law involving children’s issues for additional guidance on a “best interests” analysis.¹¹⁰

105. See *supra* note 20 and accompanying text.

106. See *supra* note 68 and accompanying text.

107. See S. 1129, § 102(a)(3)(B). See also *supra* notes 61-63 and accompanying text.

108. United Nations Declaration of the Rights of the Child, *supra* note 66, princs. 2, 7.

109. See Bhabha & Young, *supra* note 14, at 97 (explaining that a government already weighs the child’s best interests against its other “primary considerations” such as “maintaining effective immigration control, preventing abuse of asylum procedures, deterring smuggling networks, [thus] restricting the scope of the refugee definition”).

110. See, e.g., Thronson, *supra* note 2, at 1006 (describing how juvenile courts incorporate “complex legal and policy considerations inherent in child welfare matters” into the “best interests” decision involved in a Special Immigrant Juvenile status case). A debate persists in the United States between whether the child’s “best interests” or own wishes should prevail in important decisions concerning his welfare. See Donald N. Duquette & Mark Hardin, Department of Health and Human Services Children’s Bureau, *Adoption 2002: The President’s Initiative on Adoption and Foster Care Guidelines for Public Policy and State Legislation Governing Permanence for Children*, ch. VIII¶ 14, <http://www.acf.hhs.gov/programs/cb/publications/adopt02/02adpt7.htm#guid.role>. The Initiative illustrates two alternative approaches an attorney can take when representing a child: “client-directed” or “substituted judgment.” *Id.* ¶¶ 15A, 15B. Even the “substituted judgment” approach incorporates the child’s views to some extent. *Id.* ¶ 15B. Although it advocates for the child’s attorney to conduct a

One scholar suggests that the United States has failed to ratify the CRC because the American government interprets the Convention as a way for the state to usurp parental rights over a child.¹¹¹ This theory may explain why the United States embraced the Declaration, because it specifies that the responsibility for the child's best interests "lies in the first place with his parents."¹¹² Nevertheless, even if accurate, this theory for the United States' refusal to ratify the Convention fails to apply in the case of unaccompanied children, who are temporarily or permanently *parentless*. Moreover, in the absence of parents, the CRC's "child's views" principle becomes even more crucial. With no parent to make an appropriate paternalist determination of his own child's "best interests," the child himself should help fill this void—particularly in highly personal custody and immigration decisions.

In the past, U.S. immigration law silenced the voices of minor aliens by subsuming their claims under those of their parents.¹¹³ Although the law increasingly treats children's claims individually, it effectively continues to marginalize children.¹¹⁴ The same type of immigration proceedings exist for children and adults, but children often do not have the same ability or confidence to voice their concerns to immigration officials and judges.¹¹⁵ Actually, in many cases, children fare worse than adults in

"best interests" analysis, it adds, "When a mature child's view of his or her interests conflicts with those of the child's lawyer, however, the lawyer shall communicate the child's position to the court and ask the court to appoint legal counsel who shall appear in addition to the child's lawyer." *Id.*

111. Nogošek, *supra* note 62, at 19. *See also Hearing, supra* note 2, at 16 n.1 (testimony of Stuart Anderson, Executive Associate Commissioner, INS) (noting the State Department's concern that the proposed legislation's mandatory appointment of counsel provision will adversely affect rights of parents outside the United States); Amon, *supra* note 58, at A1 (quoting John Pogash, then director of Juvenile Affairs for the INS, as he critiqued the Unaccompanied Alien Child Protection Act: "It isn't very clear who speaks for the juvenile and when. Also, what about parental rights? And parental responsibilities?").

112. United Nations Declaration of the Rights of the Child, *supra* note 66, princ. 7. In contrast, the CRC focuses on the state's view of the child's "best interests." *See CRC, supra* note 61, arts. 3(2), 5; 1577 U.N.T.S. at 46-47.

113. WOMEN'S COMM'N, *supra* note 10, at 5. The government adopted this approach despite the fact that the child's family sometimes instigated or acquiesced to the abuse from which the child was fleeing. *Id.*

114. *Id.* at 6 (discussing procedural shortcomings).

115. *See AI REP., supra* note 1, at 2 (stating that "U.S. immigration laws, practices, and procedures do not significantly distinguish children and adults"). The INS Guidelines for Children's Asylum Claims created a framework for considering children's claims independently. *See generally* INS Guidelines, *supra* note 36. Without counsel or guardians ad litem, however, children are not in the same position as adults to be able to explain their situations and advocate for themselves. WOMEN'S COMM'N, *supra* note 10, at 6. *See supra* note 36 for additional concerns pertaining to the Guidelines.

asylum proceedings.¹¹⁶ A “best interests” approach that fails to consider the child’s views can adversely affect not only a child’s immigration status but also his psychological well-being.¹¹⁷ In some cases, cultural differences and traumatic experiences may discourage children from voicing their views about their “best interests,” which may differ from those of their families or the government.¹¹⁸ The assistance of government-appointed counsel, and a guardian ad litem if necessary, would best equip children to articulate their own views in these proceedings.¹¹⁹

Incorporating a “child’s views” approach into a proposed bill would not only adhere to international law but also best reflect the current U.S. law governing unaccompanied minor aliens and children generally.¹²⁰ Significantly, the *Flores* Settlement Agreement never refers to a child’s “best interests.”¹²¹ It does, however, emphasize the need to “take into consideration the wishes and concerns of the minor” when making custody placement decisions.¹²² Because the proposed bill refers to the Agreement when discussing the “least restrictive setting” requirement, courts likely will interpret “best interests” in light of the Agreement’s concern for the

116. Bhabha & Young, *supra* note 14, at 87-88. Bhabha and Young note that in the United Kingdom, children are seven times less likely to receive refugee status than applicants aged 25-29. *Id.* at 88 n.14. Furthermore, unlike adults, unaccompanied minor aliens detained in the United States are not eligible for release after posting bond. *Id.*

See also Thronson, *supra* note 2, at 995-96 (discussing the harsh consequences of failing to consider children’s views in their independent asylum claims). Thronson argues that applying the same adult procedures to children results in children being “treated worse than adults.” *Id.* at 1000-01.

117. *See* John W. Berry, *Refugee Adaptation in Settlement Countries: An Overview with an Emphasis on Primary Prevention*, in Ahearn & Athey, *supra* note 25, at 33 (explaining that “well-meaning attempts to ‘provide the best’ for refugee children can really impose unnecessary assimilative pressures on vulnerable children, leading to identity loss and a sense of marginalization”).

118. Bhabha & Young, *supra* note 14, at 96. Bhabha and Young stress the autonomy of the child by declaring that “the best interests principle . . . is important in foregrounding the child as an agent and bearer of rights rather than merely an object of adult concerns, particularly where—as in the asylum context—mechanisms for establishing the child’s own views are underdeveloped.” *Id.* *See also* AI REP., *supra* note 1, at 11 (quoting, in part, the CRC, *supra* note 68 and accompanying text):

Children are entitled to adult protection, but they are not adult property: children also have the right to make decisions on their own behalf in accordance with their maturity. Children have the right to be heard and to have their own opinions on matters affecting them taken into account “in accordance with the age and maturity of the child.”

119. *See* Jacqueline Bhabha, *supra* note 3, at 281-82 (arguing further that adequate translation services and culturally-sensitive interviewing techniques also help a child express his own views).

120. *See, e.g.,* *Hearing*, *supra* note 2, at 60 (statement of Julianne Duncan, Director of Children’s Services, United States Conference on Catholic Bishops) (arguing that the same protections given to citizen children in the Federal Adoption Assistance and Child Welfare Act of 1980 should be incorporated into the Unaccompanied Alien Child Protection Act). *See also* Duquette & Hardin, *supra* note 110. *See also* UNHCR Guidelines, *supra* notes 77, 82 and accompanying text.

121. *See generally* *Flores* Agreement, *supra* note 35.

122. *See id.* ¶ 17.

child's interests.¹²³ Furthermore, the Agreement requires facilities housing unaccompanied minor aliens to perform an "individualized needs assessment" for a child, including "an assessment of the minor's personal goals, strengths and weaknesses."¹²⁴ These requirements parallel those adopted in the UNHCR Guidelines.¹²⁵ Therefore, any proposed legislation for the protection of unaccompanied minor aliens should reflect the existing recognition of the need to consider a child's own input in care and custody decisions.¹²⁶

B. The Need to Encourage Speedy Release and Foster Care Over Detention

The Homeland Security Act does not adequately ensure that a child's best interests will be considered in custody decisions. In order to do so effectively, legislation must retain the *Flores* Agreement's stipulation that each detained minor be placed "in the least restrictive setting appropriate to the minor's age and special needs."¹²⁷ The legislation must also emphasize the Agreement's requirement that unaccompanied minor aliens be housed separately from unrelated adults and juvenile offenders.¹²⁸

Furthermore, legislation should require the expansion of the foster care system for unaccompanied minor aliens, instead of merely encouraging its use.¹²⁹ It costs only fifty-five dollars per day to place a child in foster care, compared to two hundred dollars per day for detention.¹³⁰ The former INS's reluctance to use foster care or release children to relatives stemmed from fears of increased escape, exploitation, and failure to appear at immigration proceedings.¹³¹ Studies indicate that providing legal counsel

123. The Unaccompanied Alien Child Protection Act states, "Nothing in this section shall be construed to supersede procedures favoring release of children to appropriate adults or entities or placement in the *least secure setting* possible, as defined in the Stipulated Settlement Agreement under *Flores v. Reno*." S. 1129, 108th Cong. § 103(c) (2003) (emphasis added). See also *supra* note 110.

124. *Flores* Agreement, *supra* note 35, Ex. 1(A)(3)(g).

125. See *supra* note 84 and accompanying text.

126. See *supra* note 124; UNHCR Guidelines, *supra* notes 77, 82 and accompanying text. See also Bhabha & Young, *supra* note 14, at 90. The authors quote Nurjehan Mawani, Chair of the Canadian Immigration and Refugee Board, who stresses that a "best interests" determination should be unique to each child: "This emphasis on the best interests of the child reinforces the treatment of children as individuals and not as a rigid, undifferentiated class. Every child is different. What is in the best interests of one child may not be in the best interests of another." *Id.*

127. See *Flores* Agreement, *supra* note 35, ¶ 11; S. 1129, 108th Cong. § 103(c) (2003).

128. *Flores* Agreement, *supra* note 38; S. 1129, § 103(a).

129. See *supra* note 94.

130. *Hearing*, *supra* note 2 (testimony of Julianne Duncan) (noting that the cost of foster care is twenty-five dollars per child per day, whereas the cost of detention is two hundred dollars).

131. OIG REP., *supra* note 21, app. III. In the early 1990s, the former INS placed one hundred

for every unaccompanied minor would reduce the number of unaccompanied minor aliens who fail to appear in court.¹³² Furthermore, to assuage the government's fears of abuse, the ORR could conduct more efficient child-specific assessments of potential foster homes, instead of assigning children to the homes arbitrarily.¹³³ When detention is necessary, legislation must require that detention facilities meet certain standards and prohibit the use of "unreasonable" means of punishment or restraint on children.¹³⁴

C. The Need to Require an Attorney for Every Unaccompanied Minor Alien

Appointment of counsel for every unaccompanied minor alien clearly serves the child's "best interests" in helping to navigate complex immigration laws.¹³⁵ The proposed bill incorporates most, but not all, of the key concerns surrounding legal representation.¹³⁶ Ensuring that each unaccompanied minor alien has counsel addresses due process concerns and alleviates the current imbalance that usually results when the

thirty Chinese juveniles in foster care. *Id.* Over one hundred of them left their homes, and the former INS never found them. *Id.* In addition to worries about safety and welfare, the former INS explained that shelter care and group homes are easier to manage and better equipped to provide children with supervision, language assistance, and psychological counseling. *Id.* See also AI REP., *supra* note 1, at 55 (noting that children placed in private homes and not assigned a social worker or counsel frequently fail to attend hearings). The ORR has already begun to expand the use of foster care and to release unaccompanied minor aliens to relatives more quickly than the former INS. *Id.* at 74.

132. See OIG REP., *supra* note 21, app. II (indicating that after release from custody, only thirty percent of the children failed to appear when represented by counsel, compared to the fifty-six percent without counsel).

133. *Hearing*, *supra* note 2, at 66 (testimony of Julianne Duncan). Duncan points out that the former INS lacked guidelines for determining the appropriateness of foster care for a particular child and instead put children in foster care on an *ad hoc* basis. *Id.* She also claimed, "[a]s child welfare providers, it has been the experience of LIRS and MRS/USCCB that children do not take flight if appropriate services are in place to ensure that they are safe and loved." *Id.* The Unaccompanied Alien Child Protection Act requires suitability assessments. S. 1129, 108th Cong. § 102(a)(2) (2003).

134. See *Flores Agreement*, *supra* note 35, ¶ 12 and Ex. 1(C); S. 1129, 108th Cong. § 103(a), (b). The bill further stipulates that children must be notified orally and in writing of such standards. *Id.* at § 103(a)(4)(B).

135. See UNHCR Guidelines, *supra* note 76, at 44, 54. The Guidelines state, "a legal representative, or a guardian . . . should be appointed immediately to ensure that the interests of an applicant for refugee status who is a minor are fully safeguarded." *Id.* at 44. Without an attorney, unaccompanied minor aliens may not know that they can apply for certain forms of relief, such as a defense under the Convention Against Torture, Special Immigrant Juvenile (SIJ) status, or special visas for victims of trafficking and/or child abuse. AI REP., *supra* note 1, at 12, 16. See Immigration & Nationality Act, §§ 101(a)(15)(T,U) and 101(a)(27)(J); 8 U.S.C. § 1101(a)(15)(T,U) and (a)(27)(J). See 8 C.F.R. §§ 208.16-18 (2002) for a discussion of appeal rights.

136. See generally S. 1129, 108 Cong. § 202 (2003).

government has representation in a removal case but the child does not.¹³⁷ Moreover, private pro bono attorneys are available and willing to take on these cases.¹³⁸ Unlike the Homeland Security Act's ambiguous provision about "developing a plan," the proposed legislation would coordinate the efforts of pro bono attorneys and facilitate access to their clients.¹³⁹ The bill's restriction on transferring children to other facilities would aid such efforts.¹⁴⁰ Only in rare cases would the government need to appoint an attorney, and it could easily accomplish this by removing restrictions on the Legal Services Corporation's ability to serve aliens.¹⁴¹ Finally, the assurance of counsel for every child would make proceedings more efficient because Immigration Judges would no longer feel compelled to delay the process to locate an attorney for the child.¹⁴² With the mandatory participation of counsel, cases would be prepared and executed in a more orderly fashion.

Although the proposed bill offers much more specific provisions for unaccompanied minor aliens than the Homeland Security Act does, it still leaves some questions unanswered. For example, how will attorneys be

137. See *Hearing, supra* note 2, at 50 (testimony of Andrew D. Morton, Esq.) (highlighting the irony inherent in the former INS' strict supervision of minor aliens in some contexts, but leaving many unrepresented in court). "Alarming, these same children who we do not permit to be unaccompanied in some movie theaters and department stores [but] are left to fend for themselves in a court of immigration law." *Id.* at 54-56.

138. *Id.* (discussing his own firm's efforts to represent unaccompanied minor aliens as well as those of other child advocacy groups and legal service providers). The American Bar Association has created the Detained Immigrant and Refugee Children's Emergency Pro Bono Representation Initiative, which trains pro bono attorneys and provides grants to detention centers to institute pro bono legal aid. *Id.* at 55.

139. See *supra* notes 12-13 and accompanying text.

140. See S. 1129, 108th Cong. § 202(c)(2) (2003).

141. See *Hearing, supra* note 2 (testimony of Andrew D. Morton, Esq.). See also 8 U.S.C. § 1362 (2002); Michael A. Olivas, "Breaking the Law" on Principle: An Essay on Lawyers' Dilemmas, *Unpopular Causes, and Legal Regimes*, 52 U. PITT. L. REV. 815, 832 (1991) (suggesting that the government amend the legislation governing the Legal Services Corporation to allow it to help unaccompanied minor aliens); S. 1129, 108th Cong. § 202(a)(3) (2003) (citing provisions regarding government-funded legal representation).

142. See *Hearing, supra* note 2, at 10 (testimony of Michael Creppy, Chief Immigration Judge, Executive Office for Immigration Review). Creppy emphasized that:

[M]ost Immigration Judges favor increased representation by legal counsel . . . If the Judge knew that competent counsel were assured for every juvenile respondent, the efficiency of the hearing would be greatly improved. No longer would there be a preoccupation with procedural issues such as whether pro bono counsel can be located, or whether someone can assist the juvenile in completing the relief application.

Id. See also *Hearing, supra* note 2, at 51 (testimony of Andrew D. Morton, Esq.) (testifying that providing counsel for unaccompanied minor aliens "would lead to structural improvements that will speed adjudication, and minimize both the emotional harm of detaining a child and the taxpayer cost of an inefficient system.").

selected? Will they need to meet certain eligibility requirements?¹⁴³ Moreover, who will ensure that the counsel really represents the child's interests (and not those of a smuggler or third party): the guardian ad litem, the Immigration Judge, or the child?¹⁴⁴ Who would have the power to discharge incompetent counsel?¹⁴⁵ Perhaps the creation of pilot programs, and the evaluation of the pilot programs established in 2000 to coordinate children's access to pro bono counsel would answer some of these questions.¹⁴⁶

D. The Need to Consider Appointing a Guardian Ad Litem on a Case-by-Case Basis

The Homeland Security Act, unlike the proposed legislation, lacks a provision for appointing guardians ad litem.¹⁴⁷ On the other hand, the bill's ultimate goal of automatically appointing a guardian ad litem for *every* unaccompanied minor alien eschews consideration of the child's "own views."¹⁴⁸ Where a child lacks the capacity to make informed decisions on his own, a guardian may provide critical guidance on decisions that are inappropriate for a lawyer to make on behalf of his client.¹⁴⁹ In other cases, however, an unaccompanied minor alien may not need or want the required guardian, who has no obligation to follow the child's wishes.¹⁵⁰

143. See *Hearing, supra* note 2, at 70 (statement of Michael Creppy).

144. *Id.*

145. *Id.* at 8.

146. The EOIR, along with representatives of the INS and various non-governmental organizations ("NGOs"), established a pilot program in Phoenix in the summer of 2000 to coordinate all of the agencies that deal with unaccompanied minor aliens. *Hearing, supra* note 2, at 9 (testimony of Michael Creppy). The program relied on NGOs to give legal rights presentations and established special "juvenile" dockets to provide children with greater access to pro bono counsel. *Id.* This pilot program was so successful that the EOIR expanded the "juvenile docket" system to five other cities. *Id.*

147. Compare generally Homeland Security Act, § 462, 6 U.S.C. § 279 (2002) with S. 1129 108th Cong. § 201(A)(1-5), (C)(2).

148. S. 1129, 108th Cong. § 201(c)(2)(C) (2003).

149. See *Hearing, supra* note 2, at 10 (testimony of Michael Creppy) (arguing that while a lawyer can advise an unaccompanied minor alien on legal issues such as his eligibility for relief from removal, a guardian ad litem would be better suited to advise the child about whether to try to stay in the United States or to return to family).

150. See Cynthia R. Mabry, *Coming to America: The Child's Voice in Asylum Proceedings*, 11 TEMP. POL. & CIV. RTS. L. REV. 63, 84 (identifying an "unintended consequence" of appointing a guardian ad litem in that a guardian's formulation of a child's best interests may sometimes contradict the child's own wishes; thus, a guardian does not have to abide by the child's wishes). Mabry further argues that legislation should contain more specific provisions regarding when appointment of a guardian ad litem is appropriate and the qualifications and duties of guardians. *Id.* See also 149 CONG. REC. S7021 (daily ed. May 22, 2003) (statement of Sen. Feinstein). Senator Feinstein declared, "Under

The average age of the unaccompanied minors detained in the United States is fifteen.¹⁵¹ Although age is not decisive in determining intellectual maturity, many teenagers and younger children are capable of independently expressing their own views on issues concerning their welfare.¹⁵²

The ideal law would make available the option of a guardian ad litem for every child. Before appointing a guardian, however, the law could allow for a case-specific assessment of a minor's age, maturity, decision-making ability, and preferences as well as the availability of other adults to assist him.¹⁵³ The former INS, as well as Immigration Judges and several commentators, recognize the importance of an individualized analysis.¹⁵⁴

this section, the guardian ad litem would not be working 'for the child.' . . . he or she would be an impartial observer." *Id.*

151. OIG REP., *supra* note 21, ch. 1.

152. *See, e.g.,* Polovchak v. Meese, 774 F.2d 731, 738 (7th Cir. 1985) (affirming the right of a seventeen-year-old alien minor to remain in the United States after he successfully sought asylum against his parent's wishes at the age of twelve). The Court declared, "the minor's rights grow more compelling with age . . ." *Id.* at 736-37. *See also* Gonzalez v. Reno, 212 F.3d 1338 (11th Cir. 2000). In Gonzalez, the Court deferred to the INS' policy that six-year-old children lack the capacity to file personally for asylum against their parents' wishes, "but" it noted, "[n]ot infrequently, the law does permit six-year-old children (and even younger children) to speak and, in fact, does give their words great effect." *Id.* at 1351 n.18. *See also* UNHCR Guidelines, *supra* note 76, at 64. The Guidelines state:

Unaccompanied refugee children over the age of sixteen are usually mature enough to make their own decisions about long-term solutions. Depending on their degree of maturity, children over the age of nine or ten may be able to make rational choices if provided with adequate information . . .

Children below nine or ten years of age may not be sufficiently mature to make an independent judgment, but they should always be given the chance to express their views. In each case, a minor's evolving mental maturity must be determined in the light of the personal, family, and cultural background (CRC art. 12).

Id. *See also* Bhabha, *supra* note 3, at 293 (rejecting the idea that age alone determines decision making ability).

153. Perhaps advocates of the automatic appointment of a guardian ad litem for every unaccompanied minor alien believe that children might feel overburdened and overwhelmed without a guardian to assist them. This would mirror the rationale of the "supervised judgment" approach, with respect to the role of a child's attorney in American law, which argues that the "client-directed" approach places an inappropriate burden on children who may lack the intellectual or emotional capacity to direct their counsel. *See* Department of Health and Human Services, *supra* note 110. An individualized assessment of the need for a guardian ad litem in each unaccompanied minor alien's case, however, considers whether a guardian's assistance would assist a child or be burdensome.

154. *See Hearing, supra* note 2, at 13 (testimony of Stuart Anderson, Executive Associate Commissioner, INS). Anderson states:

[T]he policies relating to juveniles must be flexible enough to permit the INS to take the appropriate steps in an individual case. While this is particularly true in custody matters, flexibility should also guide our thinking with respect to issues ranging from a child's ability to consent or speak on his own behalf to determining whether a particular case requires the initiation of removal proceedings.

Id.; *See also Hearing, supra* note 2, at 8 (testimony of Michael Creppy) (arguing for the appointment of guardians ad litem in limited circumstances).

Perhaps the former INS supported the appointment of guardians only in certain cases because it sought to conserve government resources or because it feared guardians would make its cases more challenging. To assuage these concerns an independent agency with child welfare expertise could determine the necessity of a guardian. An individualized approach would empower unaccompanied minor aliens by allowing them to assume more control over their own futures, rather than merely subjecting them to paternalistic decisions about their “best interests.”¹⁵⁵ This approach also more closely follows principles of domestic and international law.¹⁵⁶

The proposed bill clearly specifies the necessary qualifications for guardians ad litem.¹⁵⁷ Consistent with UNHCR principles, the bill requires that a guardian have some training in both child welfare and in the particular difficulties unaccompanied alien children confront.¹⁵⁸ Although a close adult friend or relative of an unaccompanied minor alien may serve

155. See Bhabha, *supra* note 3, at 286. Bhabha states:

A careful balancing of child welfare experts’ “best interests” judgements and the child’s own expressed views is required The danger of allowing an “expert’s” best interest judgement to trump the child’s own voice is that it restores decision making about children to the paternalistic context In some situations the privileging of “interest” over “voice” certainly seems more acceptable—for very young children, for children with mental disabilities, for children from the same cultural and class environment as the policy maker. But in other contexts, particularly for older children from cultural backgrounds different from the welfare expert’s—the typical situation with unaccompanied transnational migrants—this approach seems much less justifiable.

Id. See also Guy S. Goodwin-Gill, *Unaccompanied Refugee Minors: The Role and Place of International Law in the Pursuit of Durable Solutions*, 3 INT’L J. CHILD. RTS. 405 (1995). Goodwin-Gill declares, “today, the child is subject, not object.” *Id.* at 410. He later continues, “In designing, implementing and monitoring durable solutions for unaccompanied refugee minors, therefore, the approach must be both principled and yet sufficiently flexible and extensive to deal with the individuality of the child, and with local circumstances, including the ethnic, religious, cultural and linguistic background of the children concerned.” *Id.* at 415.

156. See *supra* notes 110, 120 and accompanying text. The UNHCR Guidelines stress that “cases must be thoroughly assessed on an individual basis.” UNHCR Guidelines, *supra* note 76, at 64. Furthermore, the Guidelines distinguish between the *necessity* of a legal advocate and the *possibility* of a guardian for other matters: “An unaccompanied child *should* have a legal guardian with respect to involvement in any legal proceedings and *may* need a legal guardian to advocate for the child’s interests or to make decisions on behalf of the child in other situations” [emphasis added]. *Id.* at 54. See also MODEL RULES OF PROF’L CONDUCT R. 1.14(b) (2002) (providing “[w]hen the lawyer reasonably believes that the client has diminished capacity, . . . and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action, including . . . in appropriate cases, seeking the appointment of a guardian ad litem . . .”).

157. S. 1129, 108th Cong. § 201(a)(2) (2003).

158. *Id.* See also Maloney, *supra* note 85, at 111 (stating that the UNHCR prefers that a guardian be a professional, trained in child welfare and immigration law).

as an effective guardian ad litem, often times that person has interests that conflict with those of the child.¹⁵⁹ The requirement of an independent professional would ensure the protection of the *child's* best interests. Despite the bill's detailed description of qualifications and duties of guardians ad litem, questions still remain about the scope of their power over the child and their relationship with the child's attorney.¹⁶⁰

CONCLUSION

The Homeland Security Act's provisions for unaccompanied minor aliens serve as a promising start toward protecting the rights, needs, and interests of an extremely vulnerable group of young immigrants. Yet they do not go far enough. More comprehensive legislation is still necessary to ensure that each individual child's views comprise part of a "best interests" analysis. Moreover, the United States should not only follow international principles regarding unaccompanied minor aliens, but also should take a more leading role in protecting the world's children who arrive on its doorstep.¹⁶¹ Legislation should encourage foster care over detention and must emphasize the *Flores* Agreement's "least restrictive setting" requirement.¹⁶² It must also ensure that each child has legal counsel, appointed at government expense if necessary. Finally, legislation should require a case-specific determination regarding the need to appoint a guardian ad litem, if needed, available for each child, and guardians should be required even at government expense. Ultimately, legislation should empower unaccompanied minor aliens to assume more control over

159. See Bhabha & Young, *supra* note 14, at 117 (noting that sometimes family members' lack of understanding of the asylum process as well as conflicts of interest, adversely affect a child's asylum claim).

160. See S. 1129, 108th Cong. § 201(a)(2-3) (2003). See also *Hearing*, *supra* note 2, at 10 (testimony of: Michael Creppy and Stuart Anderson) (supporting the idea of a guardian ad litem but not necessarily as envisioned by the Unaccompanied Alien Child Protection Act).

The proposed bill alludes to the attorney/guardian relationship. It states, "counsel shall be afforded an opportunity to review the recommendation by the guardian ad litem affecting or involving a client who is an unaccompanied alien child." S. 1129, § 202(f). It further states that the guardian ad litem shall "work with counsel to identify the child's eligibility for relief" by sharing information. *Id.* § 201(a)(3)(C).

161. Dr. William Schulz, Executive Director of Amnesty International in the United States, described the United States' handling of unaccompanied minor aliens, "when we treat these children harshly, they are further traumatized, and our country's credibility as a protector of rights is eroded." Chris McGann, *Young and Alone in America; U.S. Gives Harsh Welcome to Children Seeking Asylum; 'I Felt Like Everything Was Just Falling Down on Top of Me,'* SEATTLE POST-INTELLIGENCER, June 19, 2003, at A1, available at http://seattlepi.nwsourc.com/local/127345_juv19.html.

162. See *Flores* Agreement, *supra* note 37, ¶ 11.

these life-altering decisions, rather than merely reinforcing their status as helpless victims of international and domestic government and international forces.

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