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*Each year the U.S. Immigration and Naturalization Service detains approximately 4,700 unaccompanied immigrant and refugee juveniles. These minors often spend substantial periods in federal custody awaiting the outcome of administrative proceedings to determine whether they will be removed from the United States. This article explores the politics affecting this population.*

*Congress has enacted no law regulating the detention, housing, care or release of these minors. The federal judiciary and the states have declined to play anything more than a peripheral role in protecting this population, and within the executive, there is no specialized agency charged with responsibility for the child protection. The near-complete failure of all other governmental actors to undertake policy making toward unaccompanied minors has left the INS, a law enforcement agency whose bureaucratic culture reflects its primary mission—securing the borders against unauthorized entrants and to remove those who enter without authorization—to fashion an ad hoc child welfare policy as it sees fit.*

*This article sets out the demographics of this population, traces the history of U.S. policy and practice affecting unaccompanied immigrant and refugee minors, and compares the treatment unaccompanied minors experience in the U.S. against domestic and international norms. The article concludes that detained unaccompanied minors, a powerless yet sympathetic group, fall within a typology in which government can be expected to provide symbolic benefits even as it acquiesces in the imposition of substantive burdens upon the subject population. The article argues that policy toward detained immigrant and refugee children is an example of challenges to democratic governance in an age of increasingly permeable borders and growing populations of formally powerless migrants.*

## I INTRODUCTION

Federal law directs the U.S. Immigration and Naturalization Service (INS) to arrest and detain persons upon probable cause to believe they are present in or attempting to enter the U.S. in violation of the Immigration and Nationality Act (U.S. Code 2000a). The law makes no exception for minors. If not released on bond or recognizance, the law directs that juveniles be confined until proceedings to determine their removability (deportability) are completed, a process that may take years.

Between October 1, 1999, and September 30, 2000, the most recent period for which statistics are available, the INS apprehended over 4,200 unaccompanied immigrant and refugee children (INS 2000). The most celebrated of these minors was Elian Gonzalez, whose rescue off the Florida coast on November 25, 1999, brought rare attention to unaccompanied immigrant and refugee children, even as Elian himself became more and more a pawn in a public relations face-off between Cuba and its critics (Arthur 1999). For better or worse, what most Americans know of unaccompanied immigrant and refugee

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children is drawn from the example of Elian Gonzalez.

However disturbing Elian's case, his experience and treatment in the United States was palpably atypical. He was promptly released to the custody of his great uncle, who obtained a state court order naming him Elian's guardian. The INS dispatched personnel to Cuba to interview Elian's father and determine his fitness as a parent. Multiple lawyers appeared to represent the boy in prosecuting a claim for political asylum and, later, to challenge in federal court the INS's refusal to recognize Elian's uncle's authority to request political asylum for the boy (Boyer and Lubet 2000, 281 *ff*).

INS policies and practices applied to the average juvenile are far different. Such minors routinely spend substantial periods in federal detention. Government furnishes them no legal counsel, and state courts and child protective services agencies nearly always decline jurisdiction over minors undergoing removal (deportation) proceedings. Congress has never enacted legislation fixing policies toward apprehended immigrant and refugee minors nor does the federal government operate a child protective services delivery system or dependency court. In 1992, the U.S. Supreme Court decided that the federal courts would do very little remedy administrative malfeasance affecting detained minors (*Reno v. Flores* 1993). As a result, the INS—an agency whose primary mission is securing the borders against unauthorized entrants—has been left to fill the policy vacuum as it sees fit. By most accounts, the agency's record toward juveniles is mixed at best.

The publicity surrounding Elian's case has enabled religious and philanthropic organizations to place public policy toward unaccompanied immigrant and refugee minors on the legislative agenda (Milbank 2001). The Unaccompanied Alien Child Protection Act of 2001, introduced in the United States Senate as S.121 on January 1, 2001, by Senators Dianne Feinstein (D-Cal.)

and Bob Graham (D-Fl.), and in the House on May 17, 2001, by Representatives Zoe Lofgren (D-Cal.) and Chris Cannon (R-Ut), would, *inter alia*, establish an office of children's services, set minimum standards for the custody of unaccompanied alien children, require the appointment of counsel and guardians ad litem for minors undergoing removal (deportation) proceedings.

This paper has two broad objectives. The first is descriptive and has two sub-parts: first, to describe the demographics of the population of detained immigrant and refugee juveniles. This description is drawn from a preliminary systematic sample of all juveniles detained by the INS between October 1, 1999 and September 30, 2000 for longer than 72 hours. The raw data for this sample was compiled by the INS and provided to the author pursuant to a settlement reached in *Flores v. Meese* (1993), a nation-wide class action that challenged the constitutionality of INS policies on the release and housing of detained juveniles. The second descriptive task is to set out the various federal and state spheres of responsibility and to describe the statutory and regulatory framework guiding the exercise of their responsibility. The second objective is normative: that is, to compare U.S. policies toward immigrant and refugee minors against domestic and international standards and thereby identify major shortcomings and to examine why those shortcomings have developed and endured.

Placing policy toward unaccompanied minors into a theoretical framework is itself problematic. The problem starts in the lack of a fully developed, consensual theory of the policy process and implementation (Schlager and Blomquist 1996, Lester and Goggin 1998).

Schlager and Blomquist (1996, 652-53) argue that the "stages heuristic," the theory of agenda setting, and comparative policy research, even when supplemented by studies of particular institutions and actors involved in the policy process, still fail to furnish a general theory of the policy process. The

authors suggest, however, that three frameworks—the advocacy coalitions framework (AC), the politics of structural choice (SC), and institutional rational choice theory (IRC)— are "relatively well-developed frameworks which show promise of blossoming into general political theories of the policy process" (652).

According to IRC theorists, public policies are "institutional arrangements—rules permitting, requiring, or forbidding actions on the part of citizens and public officials. Policy change results from actions by rational individuals trying to improve their circumstances by altering institutional arrangements" (653).

IRC is in part a refinement of the rational choice model of group behavior. Mancur Olsen's (1965) The Logic of Collective Action, and Garrett Hardin's (1968) article, "The Tragedy of the Commons," reason from the fundamental assumption of economics—that people are utility maximizers—to infer group behavior. When presented with certain choices, an actor will choose among them in accordance with relative benefits or expected utility each choice offers.

According to Olsen, group action is directed toward producing "collective" goods (Olsen 1968, 9-16).[1] He argues that ideological motives alone are insufficient to sustain the continuing commitment of a large group of people to the production of collective goods; that maximization of individual well-being is the driving force of all sustained, collective human activity (12-15).[2]

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[1] Public goods, the benefits of legislation, for example, are not excludable—people cannot be prevented from using the good—nor are they rival: that is, one person's using the good does not diminish the availability of the good to others (Mankiw 1998, 220). Standard economic theory because public goods are not excludable, people have an incentive to be "free riders": that is, to enjoy the benefit without paying for it (222).

[2] Olsen argues that free-rider problems inevitably undermine collective action in the absence of coercion and bureaucratic control. Schlager and Blomquist (1996, 654), however, argue that "[s]ubstantial empirical work based on the IRC framework ... demonstrates that common pool resource users are not trapped in

For present purposes, the differences between the IRC framework and rational choice orthodoxy appear inconsequential. Both theories predict that groups of individuals who stand to benefit or lose economically as a result of a particular policy would likely weigh in during the legislative process and that the intensity of their involvement (i.e., the "cost" of participating) will be roughly proportionate to their economic stake in the policy outcome.

These theories offer little explanatory power when it comes to the formulation and implementation of policies that affect an economically and politically powerless group, in this case non-citizen children. Advocacy on behalf of unaccompanied immigrant and refugee children is dominated by religious and humanitarian groups without an identifiable economic stake in policy reform. Understanding the involvement of non-economic actors in the policy process is little aided by conventional rational choice theory. Olsen (1965, 159-61), for example, concedes that rational choice theory is insufficient to explain the behavior of lobbies with social, political, religious, or philanthropic objectives. "The theory is not at all sufficient where philanthropic lobbies, that is, lobbies that voice concern about some group other than the group that supports the lobby, or religious lobbies are concerned" (160).

The advocacy coalition (AC) framework conceives of policy change as a function of three groups of variables:

1) The "interaction of competing advocacy coalitions within a policy subsystem" Schlager and Blomquist (1996, 656).

2) Changes "external to the subsystem (e.g., in socioeconomic conditions)" (656).

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an inevitable 'tragedy of the commons' from which they can be rescued only by bureaucratic control..."

3) The "effects of relatively stable system parameters (e.g., constitutional rules, basic social structure)" (656).

AC theory explains policy change as a result of "changing preferences or beliefs on the part of critical actors..." (658). Regarding the causes of change in beliefs and preferences, AC theory contends that the individual is "procedurally rational": that is, the "individual engages in a limited search processes, makes choices based on his or her subjective representations of the situation, and satisfices" (660). In essence AC theory posits that individuals are subjectively, rather than objectively or substantively, rational. Rather than make assumptions about qualities inherent in procedural rationality, AC theorists empirically test hypotheses concerning the structure and content of actual belief systems (661). AC theory, then, seems to offer some advantages over rational choice theory in explaining the role of lobbies that voice concerns unrelated to their own identifiable interests.

SC theorists "conceive of public policies as institutional arrangements" (Schlager and Blomquist 1996, 654). Because SC theory focuses on institutional arrangements and assumes individuals are substantively rational, the theory appears to offer more insight into why a nominal policy succeeds or fails at the implementation stage than it does to explain why a policy is initially adopted. This is not to downplay the significance of implementation to the task at hand: As implementation of existing standards on the housing and release of unaccompanied minors demonstrates, it is not enough to adopt nominal standards. Those standards must also be observed in practice.

Consensus in policy implementation theory, like consensus in policy theory generally, is elusive. Two major schools of thought—"top-downers" and "bottom-uppers"—provide opposite conceptual frameworks "based on the theoretical significance of ambiguity and conflict" (Lester and Goggin 1998, 2).

Lester and Goggin's (1998) survey of implementation theory does, however, offer useful insights. Perhaps most promising are theoretical frameworks based on contingencies (CF) and the "ambiguity-conflict" model (ACM).

Drawn from empirical work on state governments' implementation of environmental policy, CF holds that successful policy implementation depends on (1) a government's overall commitment to the nominal policy goals, and (2) the government's institutional capacity to implement those goals (5).

ACM theory predicts that congruence between nominal policy goals and implementation is a function of two variables, ambiguity and conflict. The theory yields a four-part typology: "1) administrative implementation, characterized by low levels of conflict and ambiguity; 2) political implementation, characterized by high conflict and low ambiguity; 3) experimental implementation, characterized by low conflict and high ambiguity; 4) symbolic implementation, characterized by high levels of conflict and ambiguity" (5).

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

Perhaps more useful is the typology of target populations explicated by Schneider and Ingram (1991), among others. The typology proceeds from the assumption that "elected officials almost uniformly believe they will face a formidable opponent in the next election, especially if they are not sensitive to the wishes of their constituents, and that anything they do as an elected official may be discovered by an opponent and used against them (6)." Therefore,

"elected officials believe they must explain and justify their policy positions to the electorate by showing how their positions are logically connected to widely shared public values ... based on cultural norms of fairness, right, wrong, equality, and so forth (6)." In this view, policy reflects the conjunction of (1) the target population's political and economic power, and (2) the degree to which the electorate as a whole views the target population as deserving of benefits or burdens (7).

In this typology, policy will provide substantive benefits to, and place few burdens upon, powerful groups with positive images (e.g., the elderly, small business). Policy toward groups that are powerful, but perceived negatively (e.g., big business, the rich), tends to be substantively beneficial and symbolically burdensome. Powerless, negatively viewed populations (e.g., criminals, drug users, flag burners), will receive burdens and only very rarely benefits, which in any event are provided grudgingly on the rationale that they are rights.

Finally, there are powerless, but positively viewed groups: among others, children. "These groups present a dilemma for elected officials, who want to be aligned with their interests but who find it difficult or impossible to direct resources toward them due to the claims for resources made by those who are much more powerful and the unwillingness of other groups to permit tax increases that would be used for the needed public programs (14)." "Thus, there is an abundance of symbolic policy directed at these groups, but much of the substantive policy they need is simply not on the agenda (15)."

As will be seen, there is much evidence that unaccompanied immigrant and refugee minors are an example of this typological grouping. The INS itself is quick to proclaim its concern for this population, but slow to dedicate resources toward the care of the population commensurate with its nominal sympathy. The judiciary has concluded that a symbolically beneficial policy, however

substantively burdensome, is all that is constitutionally required. The failure of Congress to legislate respecting minors taken into INS custody, coupled with the reluctance of state child welfare and dependency courts to exercise jurisdiction over such minors, leaves vulnerable children in a legal and political limbo. In effect, federalism and comity become ideological excuses to deprive these children of protections that are routinely provided to juveniles in virtually all other circumstances.

Such an outcome is largely consistent, then, with political theory. The United States' treatment of immigrant and refugee minors is an example of a seemingly intractable political problem: that is, powerless groups, no matter how sympathetic, fare poorly when, in Laswell's celebrated formulation, it comes to deciding who gets what, where, when and how.

## II SELECTED DEMOGRAPHIC INDICATORS OF DETAINED UNACCOMPANIED MINORS: FY 1999-2000.[3]

During the 1999-2000 federal fiscal year (October 1, 1999 to September 30, 2000) the INS detained 4736 unaccompanied minors for longer than 72 hours. The population has the following characteristics:

- Approximately 74.5 percent of detained minors were male, and 25.5 percent, female.
- The average age of all detained minors was approximately 15.26 years.

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[3] Because of constraints on time and resources, the reported figures are derived from systematic sampling of INS data entries on only 1 percent of detained minors for the referenced period. Accordingly, the statistics reported in the text should be taken as approximations only. The INS produces data on detained minors semi-annually in hard copy. Although the agency generates these reports from a computerized data base, the agency refuses to provide data in an electronic format. Analysis of the complete data set, as well as analysis of data for the 1997-98 and 1998-99 fiscal years, will become available within the next few months. The author wishes to express appreciation to the law firm of Latham & Watkins for its generous assistance in computerizing this data set.

The average age of female detainees was approximately 14.25 years; the average age of males, 15.6 years.

- The average number of days spend by minors in detention was 77.21. Males spent an average of 89.94 days in detention; females, averaged approximately 40.08 days in detention.
- Approximately 32 percent of detained minors spent time in secure lock-ups. The most common reason (47 percent of all minors securely confined) for secure confinement was lack of space in licensed facilities (influx).

By country of origin (avg. age/avg. days detained):

- Guatemala: 19 percent (16.33 yrs./29.78 days).
- El Salvador: 17 percent (15.88 yrs./51.63 days).
- Honduras: 17 percent (16 yrs./52.38 days).
- Mexico: 17 percent (14.88 yrs./20.14 days).
- China: 12.8 percent (15.33 years/188.67 days).
- Haiti: 6 percent (insufficient sample size).
- Sri Lanka: 4 percent (insufficient sample size).
- Other: 7.2 percent (insufficient sample size).

## III FEDERAL AND STATE GOVERNANCE AND DETAINED IMMIGRANT AND REFUGEE MINORS.

A reasonably comprehensive set of government policies toward this population would cover four broad areas:

1) Identifying minors who are unaccompanied by an adult qualified to make decisions on the minor's behalf.
2) Appointing advocates for minors who are unaccompanied by an adult qualified to make decisions on the minor's behalf.
3) Procedures for the care, housing and release of detained minors pending completion of procedures to determine their right to be or remain in the

United States.

4) Procedures to ensure that minors removed from the United States receive reasonably competent and humane treatment following removal.

As will be seen, federal and state policies are little developed in any of these areas. Policy-making on items 1, 2 and 4 has been left almost entirely to ad hoc formulation by the INS. The agency has promulgated no regulations on any of these matters, and there is virtually no enforceable law with respect to any of the three. With respect to item 3, the judiciary has only adumbrated the outer bounds of INS discretion to fashion ad hoc policy.

**A Congress**

Congress has enacted no law establishing any policy on minors arrested, detained, or deported by the INS. In the Juvenile Justice and Delinquency Prevention Act (U.S. Code 2001b) (JJDPA), Congress prescribes standards for the care, housing and release of delinquent minors, but these standards generally apply only to the states as a condition of receiving federal funds for local juvenile justice programs. The JJDPA does make clear that minors arrested by federal officials for acts of delinquency should be detained only if a magistrate "determines, after hearing, ... that detention of such juvenile is required to ... insure his safety or that of others (U.S. Code 2001c)," but that provision does not apply to the INS (*Flores* 1993, 306).[4]

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[4] Congress now has under consideration a bill to fill this legislative gap. The Unaccompanied Alien Child Protection Act of 2001 (UACP) would leave the INS with responsibility for identifying unaccompanied children, but would thereafter transfer authority for the care of such minors to a new office of children's services. The UACP would place responsibility for custody and release decisions, management of foster and shelter care facilities, in the children's services office. The bill would end the practice of routinely detaining minors pending removal (deportation) proceedings. The bill would also provide for the appointment of guardians ad litem and counsel for children undergoing removal proceedings. Finally, the bill would expand children's opportunities to qualify for lawful permanent residence and require that certain precautions be taken to ensure that

### B The judiciary

The judiciary has on several occasions taken up the rights of juveniles in INS custody.

In *Perez-Funes v. INS* (1985), a federal district court held that the INS must permit unaccompanied minors apprehended in the immediate vicinity of the border and who reside permanently in Mexico or Canada to make a telephone call to a parent, close relative, or friend, or to an organization providing free legal services before the INS may deport them pursuant to agreements to "voluntarily depart" the United States. With respect to all other unaccompanied minors, the court ordered the INS to ensure that the minor in fact communicates, by telephone or otherwise, with a parent, close adult relative, friend, or with legal services organization before a minor may be removed pursuant to a voluntary departure agreement. The plaintiffs abandoned their initial claim that alien minors are constitutionally entitled to appointed counsel and guardians ad litem in immigration proceedings. The court nevertheless observed in dicta that appointed counsel would not be constitutionally required.

In *Johns v. Department of Justice* (1980), a federal court of appeals held that an alien minor undergoing deportation proceedings had a due process right to the appointment of a guardian ad litem, but did so only upon a showing of particularized individual need.[5]

In *Gonzalez v. Reno* (2000), a federal appellate court upheld the INS's

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minors are not harmed following deportation.

[5] Appointing counsel, but not guardians ad litem, for unaccompanied minors raises difficult collateral questions: Who instructs the lawyer as to what actions to take on behalf of the minor? If the lawyer has unfettered discretion in this regard, or discretion bounded only by the rules of professional responsibility, what benefit does appointed counsel offer in cases where the proper course of action is a question of child welfare, and not law?

authority to determine by "informal adjudication" whom was authorized to speak for Elian Gonzalez. The court began by holding that the judiciary owes "some deference" to ad hoc INS decisions regarding who speaks for a minor because the Immigration and Nationality Act is silent on question. The court continued, however, that the level of deference due the INS is "considerable" because of the foreign policy implications of administrative decisions dealing with immigration.

In *Reno v. Flores* (1993), the U.S. Supreme Court narrowly circumscribed the judiciary's role in reviewing INS procedures for the care, housing and release of detained minors pending completion of procedures to determine their right to be or remain in the United States. The Court held that the INS has broad discretion to restrict juvenile's release to particular categories of adult custodians. The majority held that a general policy of refusing to release detained minors to anyone but a close adult relative need only be minimally rational because such restriction infringe upon no fundamental constitutional right. The Court refused to construe the detention of unaccompanied minors as involving the fundamental right to freedom from physical restraint. Instead, the Court held, a "lesser interest"—the right to be released to unrelated adults—was at stake:

> But narrow tailoring is required only when fundamental rights are involved. The impairment of a lesser interest (here, the alleged interest in being released into the custody of strangers) demands no more than a "reasonable fit" between governmental purpose (here, protecting the welfare of the juveniles who have come into the Government's custody) and the means chosen to advance that purpose. This leaves ample room for an agency to decide, as the INS has, that administrative factors such as lack of child-placement expertise favor using one means rather than another. There is, in short, no constitutional need for a hearing to determine whether private placement would be better, so long as institutional custody is ... good enough.
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> If we harbored any doubts as to the constitutionality of institutional custody over unaccompanied juveniles, they would surely be eliminated as to those juveniles (concededly the overwhelming majority of all involved here) who are aliens. "For reasons long recognized as valid, the

> responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government" (305).

**C The executive**

Until September 1984, the INS had no uniform practice toward the release or detention of juveniles. For the most part, the agency tended to release minors to their parents or other responsible adults, upon their promise to care for them and, most importantly, assure their availability for deportation. Though applied inconsistently, this practice was generally in accord with federal and local standards on the detention of minors.

On September 6, 1984, then-INS Regional Commissioner Harold Ezell ended this practice in the agency's Western Region with the following memorandum:

> No minor shall be released except to a parent or lawful guardian. *This is necessary to assure that the minor's welfare and safety is [sic] maintained* and that the agency is protected against possible legal liability.
>
> District Directors and Chief Patrol Agents are authorized, in unusual and extraordinary cases, to release a minor to a responsible individual who agrees to provide care and be responsible for the welfare and well being of the child (*Flores* record 1993, 3(41)).

Ezell's memorandum all but eliminated the discretion INS officials had previously exercised to release minors. INS field officers simply stopped releasing children to anyone but a parent or guardian (16(870-71)).[6] Although the ostensible reason for the policy change was to protect children, the INS refused to determine whether detention would actually be in a child's best interests. Nor did the agency provide procedures by which its initial, automatic detention

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[6] Releasing minors needing medical care was, in fact, the *only* actual use of the "unusual and extraordinary" exception the agency ever identified.

orders could be regularly reviewed.[7]

For juveniles without a parent or guardian to come for them, the blanket detention policy and procedural void meant prolonged incarceration.

As noted, the U.S. Supreme Court approved the INS's detention policy as consistent with due process. Following remand from the Supreme Court, the INS nevertheless entered into a nationwide settlement in which the agency agreed to house the general population of detained minors in facilities licensed for the care of dependent (as contrasted with delinquent) juveniles (*Flores* settlement 1997). The settlement sets minimum standards for INS facilities in which it houses juveniles and sets up a policy favoring release to an expanded set of adult relatives and juvenile shelters unless the INS has evidence that the minor is a delinquent or serious escape-risk. The *Flores* agreement appears to regulate these matters only until February 2001, whereupon the INS will again have broad authority over policy affecting detained minors. In important respects, however, the *Flores* standards have proved largely symbolic.

In 1997, Human Rights Watch (HRW) reported "numerous violations of children's rights, in breach of the U.S. Constitution, U.S. statutory provisions, INS regulations, the terms of court orders binding on the INS, and international law (Human Rights Watch 1998)." In a 1998 follow-up investigation, HRW found:

> Nationwide, as many as one-third of children in INS detention are placed in secure detention centers for juvenile offenders. Often held with youth detained for committing violent crimes, they are denied personal

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[7] Although INS regulations provide that evidence must be presented to an INS district director or designated subordinate "for a determination as to whether there is prima facie evidence" that a prisoner is deportable, 8 C.F.R. § 287.3, the INS has *no* procedure—whether before a district director, immigration judge, or anyone else—whereby *the cause for detaining* a child must be reviewed. The agency even lacked procedures by which to give children notice of the purportedly "protective" restrictions on their release.

> possessions and held in a severely restrictive, punitive environment. Children interviewed for this report were handcuffed during transport, strip searched, and subjected to other degrading treatment. We found that too often, children in INS custody do not receive adequate legal information or representation and are transferred without the knowledge of their attorneys or families. Many children are denied information about their detention or education in a language that they understand and may be confined for months at a time without direct access to a single person with whom they can converse in their own language (4-5).

Among HRW's recommendations was that the Inter-American Commission on Human Rights of the Organization of American States investigate the treatment and conditions of confinement of children in INS detention in the United States. The organization argued that the INS's treatment of minors violated, *inter alia*, the International Covenant on Civil and Political Rights (1992) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1994).

More recently, attorneys with the Center for Human Rights and Constitutional Law and the nationwide law firm Latham and Watkins have visited a number of INS -contracted detention centers. Minors report wide-spread violations of the *Flores* detention standards, including strip searching, denial of educational services, and needlessly placing minors into lock-ups designed for serious juvenile offenders.[8]

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[8] One Chinese girl interviewed by the author in the Tulare County (California) Juvenile Detention Center reported that the INS had actually released her to her aunt, with whom she thereafter lived for the next few months while removal proceedings were completed. As a condition of her release, the girl was required to report to the INS's Long Island district office. As she had done voluntarily for months, she reported one day only to be re-arrested as a "flight-risk." The agency had no particular reason to believe she was actually a flight-risk. Rather, her re-arrest took place pursuant to an INS policy holding that all minors against whom an administrative order of removal has been issues are automatically deemed flight-risks. The girl was permitted to telephone her aunt before being shipped across country to the Tulare County facility. Under the Flores standards, whether a minor is the subject of an administrative order of removal is only one factor to be considered in determining whether *an individual minor* is a flight-risk.

### E The states

State and local governments have long had primary responsibility over child welfare and juvenile justice. As a general matter, the states have relatively well developed child welfare standards and dependency systems.

State child welfare agencies have almost uniformly declined to play any meaningful role in protecting minors in INS custody. However deplorable life in INS detention facilities, state child welfare authorities are reluctant to conclude that the federal government is abusing or neglecting children. Further, state child welfare authorities are uncertain of their jurisdiction over minors whom the INS is actively moving to deport.

## IV ANALYSIS AND CRITIQUE OF POLICY FORMATION AND IMPLEMENTATION

Standard juvenile justice practice—as reflected in model standards developed by the American Bar Association, the National Advisory Committee for Juvenile Justice and Delinquency Prevention, the National Conference of Commissioners on Uniform State Laws, the National Advisory Commission on Criminal Justice Standards and Goals, and the U.S. Department of Health, Education and Welfare, among others[9]—provide that children should only be detained upon a reasoned determination that confinement is strictly necessary. With respect to juveniles taken into federal custody outside the immigration context, Congress has provided that federal magistrates should release minors whenever possible to reputable adults regardless of blood relationship (U.S.

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[9] U.S. Department of Health Education and Welfare, *Model Acts for Family Courts and State-Local Children's Programs* (1974); National Advisory Committee for Juvenile Justice and Delinquency Prevention, *Standards for the Administration of Juvenile Justice* (1982); National Advisory Commission on Criminal Justice Standards and Goals, *Corrections* (1973); Institute of Judicial Administration/American Bar Association, *Standards Relating to Noncriminal Misbehavior* (1982), and *Standards Relating to Interim Status* (1982); National Conference of Commissioners on Uniform State Laws, *Uniform Juvenile Court Act* (1968).

Code 2001c).

Child welfare theorists are unanimous that routinely institutionalizing children endangers their mental health and progress toward productive adulthood. Empirical evidence confirms the damage detention works upon children's ability to form close personal relationships, upon their social maturity, performance on intelligence and developmental tests, ability to function in non-institutional settings, and self-concept (North American Council on Adoptable Children 1990, 8-12; Wald, *et al.*, 1985, 10). At best, detention creates "needless idleness, boredom, acute anxiety, fear, depression, and hostility. Idle, unattended confined children present special supervisory problems. They frequently become destructive and cause physical harm to each other, or their surroundings" (*D.B. v. Tewksbury* 1982, 904).

Virtually every state juvenile justice scheme distinguishes between detention conditions appropriate for minors who have come under state custody because they have no one to supervise them—"dependent" or "non-delinquent" children—and conditions appropriate for minors who have committed criminal acts—"juvenile delinquents" or "youthful offenders."[10] This distinction reflects the well-accepted principle of juvenile justice that children who have not committed crimes should not be treated as delinquents lest they become so.

In order to ensure that facilities meet these standards, California law

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[10] *See* Cal. Welf. & Institution Code §§ 206 & 207; Arizona Revised Statutes § 8-226; Arizona Attorney General Opinion No. I 82-037. Even with respect to youth accused of criminal wrongdoing, California law, for example, requires a law enforcement official to place the child in "the alternative which least restricts the minor's freedom of movement, provided that alternative is compatible with the best interests of the minor and the community." Cal. Welf. & Inst. Code § 626. *See also* Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. § 5633(a)(12)(A) (requiring states to provide that "alien juveniles in custody, or such non-offenders as dependent or neglected children, shall not be placed in secure detention facilities or secure correctional facilities").

demands that facilities caring for dependent children be *licensed* under the Community Care Facilities Act (Cal. Health and Safety Code 2001a). The state has promulgated comprehensive regulations implementing this Act and providing detailed standards for the operation of residential facilities for dependent children (Cal Admin Code 2001a). Juvenile halls, in contrast, are prohibited from holding a license under this Act (Cal. Welf. and Inst. Code 2001a).[11] California specifically prohibits the housing of dependent children in juvenile halls and similarly secure facilities (Cal. Welf. and Inst. Code 2001b).

Similarly, under Arizona law the Department of Public Welfare is responsible for the licensing of facilities for dependent children (Arizona Rev. Stats. 2001a). Like California, Arizona expressly excludes detention facilities from the group care licensing standards for foster children (Arizona Department of Economic Security 2001).

## VI CONCLUSION

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[11] Juvenile halls are certified by the California Youth Authority (CYA) under Welf. & Inst. Code § 210. CYA is a department of the Youth and Adult Correctional Agency, which has authority over delinquent children. Cal. Welf. & Inst. Code §§ 1710 & 1712.

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Appendix A. Policies re: unaccompanied immigrant and refugee minors: a comparison of selected countries.

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[12] Source: *Report on Unaccompanied Minors: Overview of Policies and Practices in IGC Participating States.* July 1997 IGC, Secretariat of the Inter-governmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia.