

“Deleting” Family Units: The Need to Codify the *Flores* Settlement Agreement

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I. INTRODUCTION

When a federal judge ordered the Trump administration to reunify migrant families separated at the border, the government’s cleanup crews faced an immediate problem. They weren’t sure who the families were, let alone what to call them. Customs and Border Protection databases had categories for ‘family units,’ and ‘unaccompanied alien children’ who arrive without parents. They did not have a distinct classification for more than 2,600 children who had been taken from their families and placed in government shelters. So agents came up with a new term: “deleted family units.”¹

In 1985, 15-year-old Jenny Lisette Flores fled civil war in her home country of El Salvador and arrived in California, hoping to be reunited with her mother who was working as a housekeeper in the United States.² Once in the United States, Flores was arrested as an

1. Nick Miroff, Amy Goldstein & Maria Sacchetti, *‘Deleted’ Families: What Went Wrong with Trump’s Family-Separation Effort*, WASH. POST (July 28, 2018), https://www.washingtonpost.com/local/social-issues/deleted-families-what-went-wrong-with-trumps-family-separation-effort/2018/07/28/54bcdcc6-90cb-11e8-8322-b5482bf5e0f5_story.html?arc404=true.

2. Interview with Carlos Holguin, Attorney, All Things Considered, *The History of The Flores Settlement and Its Effects on Immigration*, NPR (June 22, 2018, 4:24 PM), <https://www.npr.org/2018/06/22/622678753/the-history-of-the-flores-settlement-and-its-effects-on-immigration>.

undocumented alien³ and sent to a detention center in Pasadena.⁴ The detention center had no special accommodations for child detainees.⁵ Authorities at the center forced Flores and other child detainees to share rooms with adults of the opposite sex, frequently strip searched the minors, denied them of educational opportunities, and often did not provide the minors with adequate food.⁶

Flores became trapped in this detention center due to an Immigration and Naturalization Service (“INS”) policy that prohibited minors from being released into the custody of non-custodial relatives.⁷ Although Flores’s mother was living in Los Angeles, she was hesitant to pick her daughter up at the center due to her own immigration status,⁸

3. The terminology that should be used to refer to the specific population of children who are not U.S. citizens, but who arrive at U.S. borders seeking long-term entry into (and/or possibly eventual citizenship from) the United States, is subject to some controversy; in this Note the terms “unaccompanied alien child” and “alien child” are utilized, although they are acknowledged to be problematic. *See, e.g.*, Stephen Hiltner, *The Terms of Immigration Reporting*, N.Y. TIMES, Mar. 10, 2017, at A2; Alex Nowrasteh, “*Illegal Alien*” Is One of Many Correct Legal Terms for “*Illegal Immigrant*,” CATO INST. (Oct. 14, 2019, 11:02 AM), <https://www.cato.org/blog/illegal-alien-one-many-correct-legal-terms-illegal-immigrant>. Many immigration advocates dislike the term “alien” in particular as it seems to have developed a negative connotation in recent years, and various other terms that may be preferable can be used without sacrificing clarity. However, despite its acknowledged political (and partisan) connotations and charged nature, “unaccompanied alien child” and “alien child” are also the official classifications used by the government for children fitting into particular legal categories, as well as the names by which the Office of Refugee Resettlement refers to the minors in its custody that fit those legal descriptions; thus, for the sake of legal clarity, those are the terms which will be utilized in this Note. *See Who We Serve—Unaccompanied Alien Children*, OFFICE OF REFUGEE RESETTLEMENT (Oct. 2, 2012), <https://www.acf.hhs.gov/orr/resource/who-we-serve-unaccompanied-alien-children> (defining unaccompanied alien child).

4. *See* Interview with Carlos Holguin, *supra* note 2.

5. *See Flores Settlement Agreement: Why Is the Administration Proposing New Regulations?*, KIND (Oct. 1, 2018), https://supportkind.org/wp-content/uploads/2019/11/FloresProcedureFactSheet_9.19.18.pdf.

6. *Id.*; *see also* Interview with Carlos Holguin, *supra* note 2.

7. Rebeca M. López, Comment, *Codifying the Flores Settlement Agreement: Seeking to Protect Immigrant Children in U.S. Custody*, 95 MARQ. L. REV. 1635, 1648 (2012).

8. Miriam Jordan, *The History of Migrant Children Protection in America Started with Two Girls in Los Angeles*, N.Y. TIMES (Aug. 20, 2019),

and the government refused to release Flores into the custody of her non-custodial cousin, who lived in the United States legally with Flores's aunt.⁹

Immigration and child advocates used Flores's case as the basis for a 1985 lawsuit aimed at forcing stronger safeguards for unaccompanied alien children ("UAC").¹⁰ The resulting suit, *Reno v. Flores* ("Flores"), was decided in part and remanded in part by the Supreme Court in 1993.¹¹ Then, in 1997, rather than continue litigation on the remanded issues, both parties agreed to a stipulated settlement now known as the Flores Settlement Agreement ("FSA").¹² Since that

<https://www.nytimes.com/2019/08/20/us/flores-migrant-children-detention.html> ("Jenny Lisette Flores, whose mother was also undocumented and living in Los Angeles, had arrived at the border and been sent to the Pasadena motel. Her mother, too, was afraid to pick up her daughter because of her immigration status. 'Children were being indefinitely detained. The government was using them as bait to arrest their parents[.]'").

9. See Interview with Carlos Holguin, *supra* note 2.

10. *The Flores Settlement and Family Incarceration: A Brief History and Next Steps*, HUMAN RIGHTS FIRST 1 (2018), https://www.humanrightsfirst.org/sites/default/files/FLORES_SETTLEMENT_AGREEMENT.pdf.

11. 507 U.S. 292 (1993).

12. Stipulated Settlement Agreement, *Flores v. Meese*, 681 F. Supp. 665 (C.D. Cal. 1997) (No. 85-4544), <https://www.aclu.org/legal-document/flores-v-meese-stipulated-settlement-agreement-plus-extension-settlement>. As pointed out by Peter Margulies, the Supreme Court actually was generally deferential to the government in the *Flores* decision, most notably on the constitutional rights violation claims that underpinned the plaintiffs' challenge to the federal government's rule against non-custodial release. Peter Margulies, *What Ending the Flores Agreement on Detention of Immigrant Children Really Means*, LAWFARE BLOG (Aug. 29, 2019, 5:39 PM), <https://www.lawfareblog.com/what-ending-flores-agreement-detention-immigrant-children-really-means>; see also Dara Lind & Dylan Scott, *Flores Agreement: Trump's Executive Order to End Family Separation Might Run Afoul of a 1997 Court Ruling*, VOX (June 21, 2018, 10:42 AM), <https://www.vox.com/2018/6/20/17484546/executive-order-family-separation-flores-settlement-agreement-immigration> ("The case went through several federal courts before reaching the Supreme Court in 1993, and the high court mostly sided with the government."). Despite the favorable outcome of the base decision, the government initially made the decision to settle during the continuing remanded litigation, thus creating the FSA. As explained in *The New Yorker*, "[b]y 1997, two Presidential Administrations later, the government decided to settle. Doris Meissner, who was then the head of the Immigration and Naturalization Service, said, 'If there are real issues surrounding the detention of minors, and the government is being held

time, the terms of the resulting FSA have provided the basis for determining the national standards of care for UAC in government custody.¹³

However, the FSA has been challenged repeatedly in the nearly three decades since it has been in effect.¹⁴ Never intended to be a permanent solution, the FSA was set to expire after five years, with the understanding that within that period it would be replaced with more thorough protections for UAC set by federal law.¹⁵ The lack of subsequent superseding federal regulation or statute means that the general protections provided by the FSA have already extended far past the originally intended time frame.¹⁶ Further, the vagaries of each successive presidential administration’s national immigration policies also contribute to a general apprehension about the continued strength

responsible for poor conditions, why are we litigating in favor of what we are doing wrong?” Jonathan Blitzer, *The Trump Administration’s Sustained Attack on the Rights of Immigrant Children*, NEW YORKER (Aug. 22, 2019), <https://www.newyorker.com/news/news-desk/the-trump-administrations-sustained-attack-on-flores-agreement-rights-of-immigrant-children>.

13. NAT’L CTR. FOR YOUTH L., *THE FLORES SETTLEMENT AGREEMENT & UNACCOMPANIED CHILDREN IN FEDERAL CUSTODY* 3 (Feb. 2019), <https://youthlaw.org/wp-content/uploads/2019/02/Flores-Congressional-Briefing.pdf>. As of 2016, the provisions of the FSA were found to apply to all children in government custody. See *Flores v. Sessions* *infra* note 65.

14. See NAT’L CTR. FOR YOUTH L., *supra* note 13.

15. The original settlement was scheduled to naturally expire in five years following its approval by the court. Conversely, under the original terms of the settlement, if the government had been found to be in substantial compliance with the FSA before that time, it could have expired even sooner (within three years). However, the government never proved compliance sufficient to trigger the early expiration, and before the five-year time limit could be reached on the natural expiration, the FSA was amended by stipulation in 2001 to read that the FSA would terminate forty-five days following the government’s final publication of regulations that would replace or supersede the FSA, whenever that should happen. As this has never happened to date, the FSA has remained in place for nearly thirty years despite having originally been written as a “temporary” measure. See *Stipulated Settlement Agreement*, *supra* note 12; see also Natalie Lakosil, Note, *The Flores Settlement: Ripping Families Apart Under the Law*, 48 GOLDEN GATE U.L. REV. 31, 37 (2018).

16. Areti Georgopoulos, *Beyond the Reach of Juvenile Justice: The Crisis of the Unaccompanied Immigrant Children Detained by the United States*, 23 L. & INEQ. 117, 134–35 (2005).

of the FSA,¹⁷ and under the Trump Administration the FSA was challenged by the government more than ever since its inception.¹⁸ As immigration policy becomes an increasingly partisan issue in the United States, the likelihood grows that challenges to the FSA will not only continue but increase.

This Note will examine the FSA, particularly through the lens of the Trump Administration, and posit that the protections that the FSA provides to alien children (“AC”) are currently in grave danger of being completely stripped unless congressional action is taken quickly.¹⁹ Specifically, this Note will explain that there is an urgent

17. See generally Daniel Hatoum, *Abolition of Immigrant Family Detention: Tracing an Evolving Standard of Decency from Separation Through Imprisonment*, 47 HOFSTRA L. REV. 1229, 1233–35, 1240–47, 1252–58 (2019), for an illustration of how national immigration policies change due to current events and the subsequent reactions of various executives to those events. Hatoum discusses how Ellis Island (“[a]rguably the first detention center”) was established by executive order following the Immigration Act of 1882 and how that Act also gave the executive branch the general discretion over various aspects of immigration policy, such as the ability to release individuals held in immigration detention camps. *Id.* He also discusses the relationship between the government and the companies that operate detention centers during times of high immigration, as well as how the volume of immigration detentions has historically increased during times of heavily crime-focused executive initiatives, such as during President Reagan’s “War on Drugs.” *Id.* Finally, he explains the impact of the post-9/11 Bush Administration’s executive policy on immigration, which led to the shifting immigration policies of President Obama and finally to the hardline anti-immigration stance of the Trump Administration. *Id.* See also Anthony W. Fontes, *The Long, Bipartisan History of Dealing with Immigrants Harshly*, WORLD (July 9, 2019, 11:30 AM), <https://www.pri.org/stories/2019-07-09/long-bipartisan-history-dealing-immigrants-harshly>, for an overview of the political sentiments underpinning various executive immigration policies since the advent of immigration quotas in 1924.

18. See Katie Reilly & Madeleine Carlisle, *The Trump Administration’s Move to End Rule Limiting Detention of Migrant Children Rejected in Court*, TIME (Sept. 30, 2019, 1:16 PM), <https://time.com/5657381/trump-administration-flores-agreement-migrant-children/>.

19. It is important here to note the distinction between AC and UAC. The term AC refers to all minors who are not U.S. citizens or U.S. nationals, whether they are accompanied by a parent or guardian or not. It is based on the general definition of “alien” provided in the Immigration and Nationality Act of 1952, Pub. L. No. 82-414 (codified as amended at 8 U.S.C. § 1101(a)(3)). The term UAC is more specifically defined in statute as children who lack lawful immigration status in the United States, who are under the age of eighteen and are without a parent or legal guardian in the United States who is willing or able to provide care or custody of them. 6 U.S.C. §

need for further legislation that will permanently codify and strengthen the protections granted to AC by the FSA. However, this Note will also show that any federal legislation or regulation must be drafted using an international human rights law model as a basis and template, to properly hold the United States to a more stable international human rights standard, rather than to the capricious domestic standards that form the base of immigration policy currently in the United States.

This Note will illustrate that if regulations are enacted to replace the FSA—a move which is being called for with increased urgency from both sides of the political spectrum²⁰—then that legislation must be written in a way as to comply with the international standards set by the United Nations Convention on the Rights of the Child (“UNCRC”) to allow the United States to continue to comply with both international and federal law. Additionally, creating a statutory standard of care for AC that meets or exceeds international guidelines and criteria would create a more permanent, stable basis for our domestic immigration policies as they pertain to those children. This in turn would beneficially make those policies less vulnerable to the whims of each new executive administration. Only by creating a level of accountability (and visibility) on the international stage can the U.S. government be trusted to cease using AC as political pawns and instead to begin to behave in such a way that actually would be socially responsible toward the children who are not just at our borders but also at our mercy.

Section II.A of this Note will begin by discussing the general history of the FSA and the changes to immigration policy made during

279(g)(2). The determination of what constitutes being “willing or able” to provide UAC proper care is subject to some debate and has been interpreted both broadly and narrowly by differing administrations. The Trump Administration assessed a parent or guardian’s ability to provide care very narrowly, and in doing so, children who would have been categorized as AC under former administrations were often considered UAC. *See infra* Section II.A.2. For this reason, the FSA must be strengthened to ensure rights to AC as a whole.

20. *See, e.g.*, Leigh Ann Caldwell & Frank Thorp V, *No Clear Path Forward in Congress to End Family Separations*, NBC NEWS (June 19, 2018, 6:37 AM), <https://www.nbcnews.com/politics/congress/no-clear-path-forward-congress-end-family-separations-n884541>; Camila DeChalus, *Lawmakers Renew Efforts to Pass Family Separation Bill*, ROLL CALL (July 27, 2018, 4:09 PM), <https://www.rollcall.com/news/politics/lawmakers-renew-effort-pass-family-separation-bill>.

the Trump Administration. Section II.B will examine the results of those changes and discuss the various possible threats to the FSA under Trump Administration policies. Part III will briefly examine human rights models in international immigration law, focusing on the UNCRC in 2012, which resulted in the formation of international policies concerning the rights of all children in the context of international migration.

Part IV explains why the most effective protective measures within the current social and political climate are measures which will force the United States to adopt a higher, international level of accountability toward migrating children. Finally, Part V suggests a solution that outlines what a codification of the FSA would need to include to bring the FSA into compliance with current international law and standards.

II. HISTORY AND BACKGROUND

To fully understand why the FSA is currently threatened, we must briefly examine the history of the settlement in general. U.S. immigration law has undergone rapid changes during the last thirty years, as the policies shift in alignment with the social climate of each era and each administration. Currently in the post-9/11 populist landscape, immigration is highly regulated and highly criminalized; but it is important to keep in mind that this was not always the case in our country.

A. The History of the Flores Settlement Agreement—How We Got Here

As Carlos Holguin, one of the original *Flores* attorneys, pointed out in a 2018 interview, before *Flores* “it was essentially the Wild West. There . . . were no standards whatsoever that the INS adhered to, or that they were required to adhere to, with respect to detention of minors.”²¹ This is not terribly surprising, as up until that point minors had not generally contributed to overall U.S. immigration statistics,²²

21. Interview with Carlos Holguin, *supra* note 2.

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

and the few minors that arrived unaccompanied in immigration situations were assigned to the Department of Justice (“DOJ”) for “care and placement.”²³ The relatively low incidence of children immigrating began to change in the mid-to-late 1980s as an increasing number of minors—both unaccompanied and in family units—began arriving at the U.S. southern border, all fleeing the civil strife, war, and poverty rampant in their home countries.²⁴ Immigrant families who arrived with minor children during this time were “most often released rather than detained” pending their immigration review due to a lack of adequate housing facilities for family detainees.²⁵ However, the UAC could not be released because they were minors without family members.

When the DOJ found that the higher volume of UAC began to outpace its ability to provide care, the INS assumed this task.²⁶ As the “enforcement” body of immigration, the INS unsurprisingly took a more “enforcement-heavy” approach toward guardianship and began to detain UAC in more “prison-like settings,”²⁷ such as the one in which Jenny Flores came to be confined in 1985.²⁸ This unfortunate situation

(“Traditionally, the flow of immigration consisted of single men who came to the United States to work and then returned to the families they had left behind.”).

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

24. Sarah J. Mahler & Dusan Ugrina, *Central America: Crossroads of the Americas*, MIGRATION POL’Y INST. (Apr. 1, 2006), www.migrationpolicy.org/article/central-america-crossroads-americas/ (“Central America transformed from a minor to a major player during a decade of armed conflicts in the 1980s. . . . [C]ivil strife in El Salvador, Nicaragua, and Guatemala produced significantly higher rates of emigration. . . . Warfare not only killed thousands and displaced millions, it also institutionalized a migration pattern that heretofore had been very minor: emigration to *El Norte*.” However, the “United States sided with conservative governments in El Salvador and Guatemala, labeling its actions anticommunist, and invested billions of dollars. When hundreds of thousands of Salvadorans and Guatemalans fled their homelands and sought asylum in the United States, this aid became the primary reason for denying the refugees’ tales of torture, forced recruitment, and other crimes. To accord them political asylum would have undermined the U.S. government’s policies.”).

25. *Flores v. Lynch*, 828 F.3d 898, 903 (9th Cir. 2016).

26. Somers et al., *supra* note 23, at 334–35.

27. López, *supra* note 7, at 1647.

28. *See supra* Part I.

resulted in the initial filing of the 1985 *Reno v. Flores* suit in the United States District Court for the Central District of California, which resulted in the FSA in 1997.²⁹

The original suit was fundamentally two-fold.³⁰ First, it claimed that the INS's release policy—which only allowed the plaintiffs to be released into the care of a custodial guardian—violated the plaintiffs' Fifth Amendment due process rights.³¹ Second, the suit made several additional claims challenging the overall deplorable conditions of the plaintiffs' confinement while at the INS facility.³² The resulting FSA addressed aspects of both claims. Establishing itself as setting a “nationwide policy for the detention, release, and treatment of minors in the custody of the INS,”³³ the FSA provided first and foremost that the INS must have a “general policy favoring release” of minors.³⁴

29. See *supra* Part I; NAT'L CTR. FOR YOUTH L., *supra* note 13. The FSA remains under the judicial supervision of U.S. District Judge Dolly Gee in the Ninth District. *Id.*

30. Holguin, an original *Flores* attorney, recalls, “So the lawsuit basically argued two things. One is that the INS should screen other available adults and release children to them if they appeared to be competent and, you know, not molesters and things of that nature, and that—secondly, that the government needed to improve the conditions existing in facilities in which it held minors to meet minimum child welfare standards.” Interview with Carlos Holguin, *supra* note 2.

31. *Reno v. Flores*, 507 U.S. 292, 296 (1993). However, the Supreme Court held that the INS did not violate substantive due process under the Fifth Amendment, with Justice Scalia writing, “If there exists a fundamental right to be released into what respondents inaccurately call a ‘non-custodial setting’ . . . we see no reason why it would apply only in the context of government custody incidentally acquired in the course of law enforcement. It would presumably apply to state custody over orphans and abandoned children as well, giving federal law and federal courts a major new role in the management of state orphanages and other child-care institutions. . . . We are unaware, however, that any court . . . has ever held that a child has a constitutional right not to be placed in a decent and humane custodial institution if there is available a responsible person unwilling to become the child's legal guardian but willing to undertake temporary legal custody. The mere novelty of such a claim is reason enough to doubt that ‘substantive due process’ sustains it[.]” *Id.* at 302–03.

32. *Id.* at 301.

33. Stipulated Settlement Agreement, *supra* note 12, at 6.

34. *Id.* at 9–10. Further, the FSA provides an “order of preference” list of possible people to whom the minor can be released. *Id.* at 10. This list expands the “custodial adult only” release policy that the INS was using prior to 1985, as it enumerates several potential people that can take custody of UAC. The list begins with “parent” and ends with “an adult individual or entity seeking custody, in the

However, if apprehension and custody is deemed necessary, the minor must be maintained in “the least restrictive setting appropriate to the minor’s age and special needs[.]”³⁵ While the FSA acknowledged that the setting must also be consistent with the INS’s interests to “ensure the minor’s timely appearance before the INS and the immigration courts,” it also reinforced the need to protect the minor’s well-being while doing so.³⁶ The facilities holding minors must be “safe and sanitary,” with access to toilets, sinks, drinking water, food, medical assistance, and adequate temperature control.³⁷ The FSA also ensured that minors will be segregated from unrelated adults and delinquent offenders and will never be detained with an unrelated adult for more than twenty-four hours.³⁸ Within three to five days, detained minors must be transferred to the custody of a qualifying adult or to a “non-secure” facility that has been licensed by the state to provide service for dependent children, unless there is an “event of an emergency or influx of minors into the United States[.]”³⁹ Not only must the facility be licensed and non-secure, but the FSA further stated that a minor cannot be placed in a “secure” facility if there are less restrictive alternatives available.⁴⁰ Finally, the INS was mandated to

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.* at 10.

35. *Id.* at 7.

36. *Id.*

37. *Id.*

38. *Id.* at 8.

39. *Id.* at 5, 8. An “influx of minors” is further defined as, “those circumstances where the INS has, at any given time, more than 130 minors eligible for placement” in a licensed facility. *Id.* at 9. During times where the INS has an “influx of minors,” the FSA does not specifically define the amended amount of time in which placement of minors must be made, except to say that placement must be made “as expeditiously as possible.” *Id.* at 8. However, further rulings on the FSA have clarified that these time extensions must be “*de minimis*” and based on individual (rather than general or global) circumstances. In 2015, during a subsequent FSA claim, a court found that a twenty-day extension may qualify as “*de minimis*” and could be acceptable after the government testified that it would need to detain families for an average of twenty days for screening. *See* Order Re Response to Order to Show Cause at 1,10, Flores v. Lynch, 212 F. Supp. 3d 907 (C.D. Cal. 2015) (No. 85-04544), <https://www.aila.org/File/Related/14111359p.pdf>. The twenty-day time frame has since become the norm for the extension period.

40. Stipulated Settlement Agreement, *supra* note 12, at 14.

maintain up-to-date records, including full biographical information, of all minors placed in proceedings or in INS custody for over seventy-two hours.⁴¹

Unfortunately, although the FSA was to take effect immediately, immigration advocates and human rights organizations repeatedly reported that the INS did not comply with the terms of the agreement; this claim was largely confirmed by an internal report from the DOJ's Office of the Inspector General.⁴² From the time that the FSA was signed in 1997 until the major revision of U.S. immigration policies early in the next decade, numerous lawsuits were brought to attempt to force the INS into compliance with the FSA.⁴³

1. The Ninth Circuit and the Present Controversy

The treatment of UAC (and of immigrants in general) in the U.S. was altered significantly following the attacks on the Twin Towers in New York.⁴⁴ “In the wake of September 11, 2001 . . . immigration policy fundamentally changed,’ with ‘more restrictive immigration controls, tougher enforcement, and broader expedited removal of illegal aliens,’ which ‘made the automatic release of families problematic.’”⁴⁵

41. *Id.* at 16–17.

42. *See, e.g., The Flores Settlement and Family Incarceration: A Brief History and Next Steps, supra* note 10; Lind & Scott, *supra* note 12; *see also* López, *supra* note 7, at 1668 (“The INS, and later the DHS, has been bound to comply with the FSA as early as 1997. The FSA laid out basic treatment standards and requirements. Had the INS, and later the DHS, complied with the FSA, later abuses by the agencies would not be an issue today.”).

43. *See generally* Georgopoulos, *supra* note 16.

44. Michelle Mittlestadt et al., *Through the Prism of National Security: Major Immigration Policy and Program Changes in the Decade Since 9/11*, MIGRATION POL’Y INST. (Aug. 2011), https://www.migrationpolicy.org/sites/default/files/publications/FS23_Post-9-11policy.pdf.

45. *Flores v. Lynch*, 828 F.3d 898, 903 (9th Cir. 2016) (quoting *Bunikyte ex rel. Bunikiene v. Chertoff*, No. 1:07-cv-00164-SS, 2007 U.S. Dist. LEXIS 26166, at *5 (W.D. Tex. Apr. 9, 2007)).

The major change in post-9/11 immigration policy came with the passage of the Homeland Security Act ("HSA") in 2002.⁴⁶ The HSA reconfigured the entire immigration system by removing the INS from the DOJ completely and incorporating it into the newly established Department of Homeland Security ("DHS").⁴⁷ The HSA then divided the previous duties of the INS into three new sections: (1) the U.S. Bureau of Citizenship and Immigration Service, which would now be responsible for processing immigration claims; (2) the new U.S. Immigration and Customs Enforcement Agency ("ICE"), which would handle immigration enforcement and policing; and (3) the previously existing United States Customs and Border Patrol Agency ("CBP"), which would work in tandem with ICE.⁴⁸ The FSA remained in place throughout these changes; however, now its provisions govern ICE and CBP "as successor organizations to [the] INS."⁴⁹

The HSA now provides specifically for UAC in the section entitled "Children's Affairs,"⁵⁰ marking the first time that any of the provisions of the FSA were formally protected by codification rather than just by stipulation. The HSA also shifts the responsibility for the care and placement of children to the Office of Refugee Resettlement ("ORR") in the Department of Health and Human Services ("HHS").⁵¹ Unfortunately, the HSA only applied to UAC; it did not address the issue of how to care for AC, who were suddenly subject to being held

46. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135. It is worth noting, however, that although critical changes in immigration occurred with the passage of the HSA, the move toward more stringent policing of immigration was already underway before 9/11. This is evidenced in the 1996 passage of both the Illegal Immigration Reform and Immigrant Responsibility Act and the Antiterrorism and Effective Death Penalty Act, which together began to formally codify a shift toward a more criminal view of immigration by allowing for longer periods of detention of immigrants and lower standards for deportation. *See* INTER-AM. COMM'N H.R., REP. ON IMMIGR. IN THE U.S.: DETENTION AND DUE PROCESS, at 3 (2010).

47. Lopez, *supra* note 7, at 1651.

48. *Id.* at 1652.

49. *Id.*

50. Homeland Security Act of 2002 § 462, 6 U.S.C. § 279.

51. Lopez, *supra* note 7, at 1652. "The HSA marked the creation of a new structure and a new approach to dealing with unaccompanied children. The ORR was an agency that had experience dealing with vulnerable refugees and had a vast network of resources, for this reason the delegation of authority to the ORR held tremendous promise for unaccompanied children." *Id.* at 1653.

with their parents by DHS for indefinite lengths of time in non-licensed facilities.⁵²

The second partial codification of the FSA following 9/11 came in the form of the William Wilberforce Trafficking Victims Provision Reauthorization Act of 2008 (“TVPRA”).⁵³ This Act was a by-product of social concern that UAC may be vulnerable to predation by sex-trafficking rings. As such, it formally codified the FSA provision that children would be expediently removed from adult facilities and “promptly placed in the least restrictive setting that is in the best interest of the child.”⁵⁴ The TVPRA also provided that the Secretary of the HHS is responsible for the care, custody, and detention of children placed with them.⁵⁵ However, once again, the TVPRA codified the FSA only as it applied to UAC, not for AC within family units.

This discrepancy between UAC and AC changed in 2015 following a second large surge at the U.S. southern border, predominantly comprised of women and children.⁵⁶ This second surge of refugee family units arriving from Central America led to what is still being referred to as an (ongoing) “border crisis.”⁵⁷ A greater

52. “Because the 2003 legislation requiring the transfer of custody from INS to ORR only applied to unaccompanied children, the situation of children who arrive with a parent or legal guardian—‘accompanied’ children—remained largely under the radar in the first decade of the Agreement.” *The Flores Settlement and Family Incarceration: A Brief History and Next Steps*, *supra* note 10, at 2.

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

54. *Id.* “Promptly placed” was defined by the TVPRA as being a seventy-two-hour window that begins at the moment ICE takes custody of the minor. *Id.* at 5077.

55. *Id.* at 5044.

56. “During the ‘surge’ in 2014, . . . unprecedented numbers of women and children crossed the southern border between Mexico and the United States. . . . [T]he number of children that crossed into the United States in 2014 has been attributed to an increase in gang violence in the region. This led to a total of 68,541 apprehensions of unaccompanied children; President Barack Obama described the situation a ‘humanitarian crisis.’” Elizabeth P. Lincoln, Note, *The Fragile Victory for Unaccompanied Children’s Due Process Rights After Flores v. Sessions*, 45 HASTINGS CONST. L.Q. 157, 165 (2017).

57. “Starting in 2011, unauthorized border crossings by immigrant families accelerated, with a spike in FY 2014 from a few thousand to 68,445 family unit apprehensions; an even steeper climb in FY 2018 to 107,212 units; and a sharp upturn

percentage of immigrants that arrive at border stations are with children, creating a backlog of cases that cannot be processed for asylum or immigration purposes within the twenty-day timeline stipulated by the FSA.⁵⁸ In desperation, the Obama Administration pursued a short-lived aggressive policy of using “family detention” as a deterrent to immigration.⁵⁹ As a part of this policy, new “family residential centers” opened to hold entire family units in detention together during their immigration proceedings; however, these centers were not appropriately licensed before they were put into use.⁶⁰ Further, holding an entire family during immigration processing

thus far in FY 2019 to a staggering 390,308 family unit apprehensions.” Margulies, *supra* note 12.

58. *Id.*; see also Stipulated Settlement Agreement, *supra* note 12, at 8.

59. “The arrival of families and children seeking the protection of the U.S. government along the southwest US border from Central America in the summer of 2014 triggered an immediate and severe response by the administration. . . . Characterizing this humanitarian situation as a threat to national security, the administration responded with a statement from DHS Secretary Johnson, who emphasized the need for marked increases in detention and deportation in order to send a ‘message’ to deter future migration.” Dora Schriro, *Weeping in the Playtime of Others: The Obama Administration’s Failed Reform of ICE Family Detention Practices*, 5 J. ON MIGRATION & HUM. SEC. 452, 459–60 (2017). According to Human Rights First the Obama Administration incarcerated “thousands of families” for over a year while simultaneously also attempting to block their bond or parole, claiming that the Administration did not give up their “policy of blanket detention to deter Central American families from coming to the United States to seek asylum” until they were enjoined to cease the policy by the U.S. District Court for the District of Columbia in *RILR v. Johnson. The Flores Settlement and Family Incarceration: A Brief History and Next Steps*, *supra* note 10, at 2. When advocates for detained families complained that families were being held in detention without bond or parole, ICE attorneys replied that “a ‘no bond’ or ‘high bond’ policy was necessary to ‘significantly reduce the unlawful mass migration of Guatemalans, Hondurans and Salvadorans.’” Schriro, *supra* at 463; see also Pamela Constable, *U.S. Holding Families in Custody to Keep Others From Crossing the Border*, WASH. POST (Mar. 5, 2016), https://www.washingtonpost.com/local/social-issues/us-holding-families-in-custody-to-keep-others-from-crossing-the-border/2016/03/05/14fc9fb6-da6d-11e5-891a-4ed04f4213e8_story.html?utm_term=.522d04eaabfa. See generally, REPORT OF THE DHS ADVISORY COMMITTEE ON FAMILY RESIDENTIAL CENTERS (Sept. 30, 2016), <https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf>.

60. Schriro, *supra* note 59, at 464.

usually necessitated a detention period that was longer than the FSA-proscribed twenty days for minors.⁶¹

This was immediately challenged in court as being a dual violation of the FSA. The plaintiffs sought to not only have the children who were being held in the family centers released but also to have at least one accompanying parent be released with each child as well.⁶² The government's defense was that the FSA regulations applied only to UAC and not to AC within family units.⁶³ The subsequent ruling on appeal found that the FSA "unambiguously" applies to both AC and UAC, but the FSA did *not* "create affirmative release rights for [the AC's] parents."⁶⁴

This split decision created an immediate paradox for immigrant parents who arrived at the border with their children, forcing them to decide between essentially waiving the rights to their children (so that the children could be classified as UAC and released into the custody of another family member or placed into a licensed child detention center while their cases were pending) or essentially waiving the child's rights under *Flores* (which allowed the parents to retain custody of them—but within a non-licensed, secure center for adults for an indefinite amount of time).⁶⁵ The general discomfort about this morally

61. *Id.*

62. *Flores v. Lynch*, 828 F.3d 898, 901 (9th Cir. 2016).

63. *Id.* at 901–02.

64. *Id.* at 901–08. "Previously, no court has held that the Settlement applied to *accompanied* minors in detention. . . . The Ninth Circuit reasoned that, even though the Settlement grants minors the right to preferential release to a parent, the government does not have to make a parent available by also releasing them." Lakosil, *supra* note 15, at 42–43 (emphasis added).

65. *Flores v. Sessions*, No. CV 85-4544-DMG (AGRx), 2018 U.S. Dist. LEXIS 115488, at *12–13 (C.D. Cal. July 9, 2018) (stating that immigrant parents have the right to "opt out" of the protections provided to their children by the FSA). "What it really does is it foists upon these families an extremely difficult choice. If they want their children to have the rights that the *Flores* settlement gives them and the government is unwilling to release the parent, it's either a choice between *Flores* rights and separation, family separation. To foist upon a parent the choice between separating from my child or having my child treated in accordance with the *Flores* settlement seems to me to be extremely cruel. And so my guess is that that's where we'll see the Trump Administration placing these families, forcing them into making that kind of choice. That sort of choice is not something that the *Flores* settlement itself addresses or prevents the government from forcing upon families. . . ."

questionable practice led the Obama Administration to abandon the use of family detention centers within a year, returning to the original policy of recognizance release or bonded release for families⁶⁶ and the expansion of non-secure, licensed shelters for UAC who were still necessarily detained in DHS custody.⁶⁷

2. “Zero Tolerance”—The Trump Administration and Immigration

Since the onset of the Trump Administration, the difficult choice that immigrant parents faced during the beginning of the Obama Administration has been replaced by a policy of “no choice at all.” After running a campaign based largely on nativism and nationalism,⁶⁸

Interview with Carlos Holguin, *supra* note 2 (statement in interview by Carlos Holguin, one of the original *Flores* attorneys).

66. This practice of bonded release has been assigned the nickname “catch and release” by many critics of immigration, with the term being used derisively and frequently by President Trump and his supporters. See Rick Su, *Making Room for Children: A Response to Professor Estin on Immigration and Child Welfare*, 17 WASH. U. GLOBAL STUD. L. REV. 633, 636 (2018). However, the term is not a Trump invention. Post 9/11, DHS Secretary Michael Chertoff testified that his agency intended to end the “catch and release” policy in favor of implementing a catch and remove policy. *Comprehensive Immigration Reform II: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2005), https://www.judiciary.senate.gov/imo/media/doc/chertoff_testimony_10_18_05.pdf (statement of the Hon. Michael Chertoff, Secretary of the Department of Homeland Security).

67. “When the surge of migrant children began arriving in 2014, the Obama Administration tried some of the same tactics as the Trump Administration. The Obama Administration housed migrant children in temporary camps on military bases. And it pushed for long-term detention of migrant families while their asylum cases played out in immigration court, though federal courts blocked that policy. But then, those tactics shifted. Under Obama, the federal government eventually spent billions of dollars in response to the migrant surge. For instance, the administration greatly expanded the network of shelters contracted by the Department of Health and Human Services that house unaccompanied children. These shelters house the children until they can be placed with a parent or other relative already living in the U.S.” Joel Rose, *President Obama Also Faced a ‘Crisis’ at the Southern Border*, NPR (Jan. 19, 2019, 2:29 PM), <https://www.npr.org/2019/01/09/683623555/president-obama-also-faced-a-crisis-at-the-southern-border>.

68. Eugene Scott, *Trump’s Most Insulting—and Violent—Language is Often Reserved for Immigrants*, WASH. POST (Oct. 2, 2019, 2:21 PM),

President Trump was eager to identify immigration as his administration's foremost concern,⁶⁹ and he asserted that strict immigration reform was needed to reduce the number of immigrants to the United States in general.⁷⁰ Just two months after Trump was sworn into office, his Secretary of Homeland Security John Kelly announced that the administration was developing a new "deterrence" plan that would immediately separate children from their parents if they arrived at the southern border illegally.⁷¹ This deterrence plan was

<https://www.washingtonpost.com/politics/2019/10/02/trumps-most-insulting-violent-language-is-often-reserved-immigrants/>.

69. Four months into his presidency, administration officials explained to Trump why his desire to completely close the border with Mexico was out of the question. His response, reportedly, was, "You are making me look like an idiot! . . . I ran on this. It's my issue." Michael D. Shear & Julie Hirschfeld Davis, *Shoot Migrants' Legs, Build Alligator Moat: Behind Trump's Ideas for Border*, N.Y. TIMES (Oct. 2, 2019), <https://www.nytimes.com/2019/10/01/us/politics/trump-border-wars.html>.

70. However, many researchers studying immigration issues suggest that this is not true. "To keep people out of the country, Trump favors physical measures and the threat of force: a wall, the deployment of armed U.S. troops, the separation of families and the possibility of closing the border entirely. The problem with this view of border enforcement, current and former officials say, is that it won't work. The measures that could actually deter migration are less bruising and physically obvious, veering off instead into a world that is legal, technical and bureaucratic—and could take months or years to show results." Nick Miroff, Maria Sacchetti & Josh Dawsey, *Trump Wants 'Toughness' to Deter Migration, but Physical Measures Keep Failing*, WASH. POST (May 4, 2019, 2:52 PM), https://www.washingtonpost.com/immigration/trump-wants-toughness-to-deter-migration-but-physical-measures-keep-failing/2019/05/04/a14495a2-6d16-11e9-8f44-e8d8bb1df986_story.html.

71. Daniella Diaz, *Kelly: DHS Is Considering Separating Undocumented Children from Their Parents at the Border*, CNN (Mar. 7, 2017, 7:33 AM), <https://www.cnn.com/2017/03/06/politics/john-kelly-separating-children-from-parents-immigration-border/index.html>. The development of this policy by the administration is described to *The New Yorker* later by an unnamed whistleblower. During a brainstorming session on how to deter illegal immigration, the idea of child separation was brought up as a possible deterrent, but that suggestion, as well as some others, "got bogged down in the clearance process, because of how difficult and controversial it was . . . [a]nd yet every few months . . . [i]t would rear its head again." Jonathan Blitzer, *How the Trump Administration Got Comfortable Separating Immigrant Kids from Their Parents*, NEW YORKER, (May 30, 2018), <https://www.newyorker.com/news/news-desk/how-the-trump-administration-got-comfortable-separating-immigrant-kids-from-their-parents>. When asked why the

implemented a few months later in a non-publicized, limited trial program in El Paso.⁷² Although this plan was being executed, it was not mentioned formally to the press again until a year later. In April of 2018, then Attorney General Jeff Sessions finally introduced the plan as policy and gave it a name, heralding it as the administration’s new “Zero Tolerance Policy” for immigration offenses.⁷³

This Zero Tolerance Policy is effectively the Trump Administration’s attempt to skirt the legal requirements of the FSA.⁷⁴ The policy relies heavily on the conventional wisdom that crossing the U.S. border is an “illegal” act, hence the common term “illegal immigration.”⁷⁵ This is an overstatement, however, as it fails to differentiate between an “illegal” civil offense and an “illegal” criminal offense. In practice, Zero Tolerance meant that *every* immigrant who entered the United States outside of a border checkpoint would be criminally prosecuted as a deterrence tactic.⁷⁶ This policy was the basis

policy was finally adopted despite controversy, the whistleblower responded that Trump’s frustration about the rising number of illegal border crossings was responsible for the decision. *Id.* “What you’re seeing now is the President’s frustration with the fact that the numbers are back up . . . [t]he only tools the Administration has now, in the absence of legislation, is to make life miserable for people.” *Id.* James D. Nealon, a former DHS policy advisor, was also present in the meeting and spoke to *The Washington Post* about his memory of the day, saying, “Some of us didn’t think it would be good policy. Not because it wouldn’t be effective, but because it doesn’t reflect American values and because it would bring a huge blowback.” Miroff, Goldstein & Sacchetti, *supra* note 1. In the same article, Assistant Homeland Security Secretary Stewart Verdery, under President Bush reveals that the agencies involved with the policy were even against it: “I think CBP and ICE would have preferred a plan that was more incremental, starting in certain locations, or with specific groups . . . [s]omething that could be done in a ratcheted way, so you could know exactly where people were physically and with respect to litigation status.” *Id.*

72. See Lisa Riordan Seville & Hannah Rappleye, *Trump Admin Ran ‘Pilot Program’ for Separating Migrant Families in 2017*, NBC NEWS (June 29, 2018, 3:30 AM), <https://www.nbcnews.com/storyline/immigration-border-crisis/trump-admin-ran-pilot-program-separating-migrant-families-2017-n887616>.

73. Memorandum from the Att’y Gen. to Fed. Prosecutors Along the Southwest Border (Apr. 6, 2018), <https://www.justice.gov/opa/press-release/file/1049751/download>.

74. Blitzer, *supra* note 12.

75. *Id.*

76. “I have put in place a ‘zero tolerance’ policy for illegal entry on our Southwest border. If you cross this border unlawfully, then we will prosecute you. It’s

for President Trump to circumvent the “catch and release” aspect of the FSA that he found unacceptable.⁷⁷

Further, the previous practice that allowed parents to waive their child’s FSA rights so that the child could remain with their parent in an adult immigration detention center was no longer an option. This is because *criminally* processed parents are not usually detained in immigration detention centers; instead, they are detained in fully secure *federal* prisons.⁷⁸ By law, a child cannot be held in a federal prison, even if parents waive their rights under the FSA.⁷⁹

Thus, while parents were “necessarily” criminally detained according to Zero Tolerance, their children still had to be “necessarily” expediently *released* according to the FSA. The Trump Administration interpreted this discrepancy as serving to convert the child’s immigration status from “accompanied” to “unaccompanied.”⁸⁰ Therefore, by the provisions of the HSA and the TVRPA, rather than release a minor into society “unattended,” a UAC *must* be placed by

that simple. If you smuggle illegal aliens across our border, then we will prosecute you. If you are smuggling a child, then we will prosecute you and that child will be separated from you as required by law. . . . So if you’re going to come to this country, come here legally. Don’t come here illegally.” Jeff Sessions, Att’y Gen., Dep’t of Just., Remarks Discussing the Immigration Enforcement Actions of the Trump Administration (May 7, 2018), <https://perma.cc/A6NW-EBDJ>.

77. When the Obama Administration faced a similar influx of immigrating family units at the southern border, that administration determined through trial and error that the only way to process the population effectively and yet still comply with the terms of the FSA was through maintaining a “general policy favoring release.” *See supra* Section II.A.1. However, this tactic was not considered to be a satisfactory option under Zero Tolerance.

78. According to an internal memo in the Trump Administration (as well as various news sources), parents were also being charged with federal “child smuggling” for attempting to bring their children with them over the border. *See* Memorandum from John Kelly, Sec’y of Homeland Sec., to Kevin McAleenan, Acting Comm’r, U.S. Customs and Border Prot. et al. (Feb. 20, 2017), <https://perma.cc/FLF5-98LF>. This additional charge served to further lengthen the time that they could be incarcerated. *See id.*; John Burnett, *How the Trump Administration’s ‘Zero Tolerance’ Policy Changed the Immigration Debate*, NPR (June 20, 2019, 4:21 PM), <https://www.npr.org/2019/06/20/734496862/how-the-trump-administrations-zero-tolerance-policy-changed-the-immigration-deba>.

79. 18 U.S.C. § 5032.

80. WILLIAM KANDEL, CONG. RSCH. SERV., R45266, THE TRUMP ADMINISTRATION’S “ZERO TOLERANCE” IMMIGRATION ENFORCEMENT POLICY 2 (2019).

the ORR in a non-secure, licensed facility for minors without delay.⁸¹ As *The New Yorker* pointed out, it was a perfect solution for the Trump Administration, as “[t]he government could thus hold the parents indefinitely and penalize the entire family, [while] the children were kept in conditions that were *notionally* consistent with the terms of *Flores*.”⁸²

Unfortunately, under Zero Tolerance, once a child’s status was converted to UAC and the child was sent into ORR custody for placement, the provisions of the FSA were not able to offer much of its promised relief. Despite the FSA’s general policy favoring the release of minors, the policies of the Trump Administration ensure that children—whether they are UAC or AC removed from their parents—are largely *not* released.⁸³ The option of releasing the detained child into the care of a family member or family friend is generally not being utilized,⁸⁴ with advocates reporting that family members are hesitant to present themselves at detention centers for fear that they themselves will be detained in the process of obtaining custody of the minor.⁸⁵

This fear of detention ensured that a record number of children remained in detention centers, creating dangerously overcrowded facilities.⁸⁶ A July 2019 report from DHS’s own Office of the Inspector

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

82. Blitzer, *supra* note 12 (emphasis added).

83. Caitlin Dickerson, *Detention of Migrant Children Has Skyrocketed to Highest Levels Ever*, N.Y. TIMES (Sept. 12, 2018), <https://www.nytimes.com/2018/09/12/us/migrant-children-detention.html>. The population of children detained under President Trump “shot up more than fivefold” from the onset of his administration, and the population increase was “due not to an influx of children entering the country, but a reduction in the number being released . . .” *Id.*

84. “[R]ed tape and fear brought on by stricter immigration enforcement [has] discouraged relatives and family friends from coming forward to sponsor children.” *Id.*

85. Jonathan Blitzer, *To Free Detained Children, Immigrant Families Are Forced to Risk Everything*, NEW YORKER, (Oct. 16, 2018), <https://www.newyorker.com/news/dispatch/to-free-detained-children-immigrant-families-are-forced-to-risk-everything>.

86. Zolan Kanno-Youngs, *Squalid Conditions at Border Detention Centers, Government Report Finds*, N.Y. TIMES (July 2, 2019),

General warns that following the implementation of Zero Tolerance, the detention system was stressed from caseload overflow that had led to “prolonged detention of unaccompanied alien children” in violation of the FSA standards.⁸⁷ The report further warns that the centers were violating the FSA standards by insufficiently providing access to toilets, sinks, drinking water, food, medical assistance, and adequate temperature control, and that the centers were not generally safe or sanitary.⁸⁸ Perhaps most disturbingly, children separated from their parents under Zero Tolerance were not adequately tracked by INS,⁸⁹ as required by the FSA’s provision that full biographical information be recorded for all minors placed in INS custody for over seventy-two hours.⁹⁰ In the rush to implement Zero Tolerance, DHS and HHS had not coordinated how to manage and share the files of the children who were removed from their parents. As a result, “[t]he parents didn’t

<https://www.nytimes.com/2019/07/02/us/politics/border-center-migrant-detention.html>.

87. OFF. OF THE INSPECTOR GEN., DEP’T OF HOMELAND SEC., OIG-19-51, MANAGEMENT ALERT – DHS NEEDS TO ADDRESS DANGEROUS OVERCROWDING AND PROLONGED DETENTION OF CHILDREN AND ADULTS IN THE RIO GRANDE VALLEY (REDACTED) (2019), <https://int.nyt.com/data/documenthelper/1358-ig-report-migrant-detention/2dd9d40be6a6b0cd3619/optimized/full.pdf#page=1>.

88. “[C]hildren at three of the five Border Patrol facilities we visited had no access to showers, despite . . . requiring that ‘reasonable efforts’ be made to provide showers to children approaching 48 hours in detention. At these facilities, children had limited access to a change of clothes; Border Patrol had few spare clothes and no laundry facilities. While all facilities had infant formula, diapers, baby wipes, and juice and snacks for children, we observed that two facilities had not provided children access to hot meals—as is required . . . — until the week we arrived.” *Id.*

89. See Miroff, Goldstein & Sacchetti, *supra* note 1; see also Jonathan Blitzer, *A New Report on Family Separations Shows the Depths of Trump’s Negligence*, NEW YORKER (Dec. 6, 2019), <https://www.newyorker.com/news/news-desk/a-new-report-on-family-separations-shows-the-depths-of-trumps-negligence> (“[A] parent and a child were each assigned a number for tracking, but the numbers were not linked. When an official at HHS looked up a child in its custody, he had no way of knowing where the child’s parent was. As the numbers of separated families exploded, in May and June of 2018, agents were forced to use Excel spreadsheets, which they couldn’t readily share with other agencies, or white boards that could get erased or smudged. ICE, which was responsible for the detention of separated parents, could not read Border Patrol’s family-separation data. ‘Without this information,’ according to the report, ICE officers ‘were unable to identify which adults in their custody had actually been separated from their children.’”).

90. Stipulated Settlement Agreement, *supra* note 12, at 16–17.

know where the children were, and the children didn’t know where the parents were. And the government didn’t know either.”⁹¹

B. Flores at the Moment—Where We Stand

The FSA is still legally binding, even though implementing Zero Tolerance has allowed the Trump Administration to ignore most of the protections for immigrant children that the FSA provides. However, the current threat to the FSA is real. President Trump openly stated that one of the most pressing goals of his administration is to terminate the FSA.⁹² Following the inevitable media backlash from Zero Tolerance family separation, President Trump responded to a press question about the separation of children by saying, “[t]he Democrats forced that law upon our nation. I hate it. I hate to see separation of parents and children. . . . We need border security. We got to get rid of catch-and-release. . . . We’ve got to change our laws.”⁹³ In a separate news briefing, then-White House Press Secretary Sarah Sanders responded to a question asking about the separation of children by saying, “the separation of . . . illegal alien families is the product of the same legal loopholes that Democrats refuse to close. And these laws are the same that have been on the books for over a decade. And the President is simply enforcing them. . . . [I]t’s the law. And that’s what the law states.”⁹⁴ Despite the repetition of this assertion by the Trump Administration, that is not what the law states.⁹⁵

91. Miroff, Goldstein & Sacchetti, *supra* note 1.

92. *President Trump Sends a Letter on Border Security to Congress*, WHITE HOUSE (Jan. 4, 2019), <https://www.aila.org/infonet/president-trump-sends-letter-to-congress-on-border>.

93. *Remarks by President Trump in Press Gaggle*, WHITE HOUSE (June 15, 2018), <https://apnews.com/article/c597b0fafa194f9d8ab23238c9b7be86>.

94. *White House Holds Daily Press Briefing*, YOUTUBE (June 14, 2018), <https://www.youtube.com/watch?v=k84QQEIEbLI> (press briefing by then Press Secretary Sarah Sanders).

95. “These claims are false. . . . The Trump Administration implemented this policy by choice and they could end it by choice. No law or court ruling mandates family separations. . . . The attorney general also suggested on June 7 that legal developments are forcing his hand. ‘Because of the Flores consent decree and a 9th Circuit Court decision, ICE can only keep families detained together for a very short period of time,’ Sessions said. But as we’ve explained, this is misleading. Neither the consent decree nor the court ruling forces the government to separate families.

1. The “Deleted” Families—The End Result of Zero Tolerance

The Trump Administration’s steadfast claim that the FSA *requires* family separation serves two purposes.⁹⁶ It undermines public support for the FSA as a whole,⁹⁷ and it also allows the administration to deflect the blame for family separation, which quickly garnished extensive criticism on the international stage.⁹⁸ When media coverage of overcrowded detention centers filled with crying children began to be aired in mid-2018, it triggered “outrage and widespread protest,” with public condemnations of the policy coming from political leaders, religious bodies, and human rights organizations.⁹⁹ This global criticism proved effective. On June 20, 2018, President Trump publicly signed an executive order ceasing family separation.¹⁰⁰

What they do provide is accommodations for children that the government could extend to parents if it wanted to.” Salvador Rizzo, *The Facts About Trump’s Policy of Separating Families at the Border*, WASH. POST (June 19, 2018, 2:00 AM), <https://www.washingtonpost.com/news/fact-checker/wp/2018/06/19/the-facts-about-trumps-policy-of-separating-families-at-the-border/>.

96. Anthony Zurcher, *Migrant Children: Global Outcry Rises Over US Border Separations*, BBC NEWS (June 20, 2018), <https://www.bbc.com/news/world-us-canada-44550972>.

97. Manuela Tobias, *Donald Trump Blames Democrats for Own Immigration Policy Separating Families*, POLITIFACT (May 29, 2018), <https://www.politifact.com/truth-o-meter/statements/2018/may/29/donald-trump/trump-blames-democrat-own-policy-separating-family/>.

98. *See, e.g.*, Conor Finnegan, *Global Outcry from US Allies Grows Against Trump Border Policy*, ABC NEWS (June 20, 2018, 12:11 PM), <https://abcnews.go.com/Politics/global-outcry-us-allies-grows-trump-border-policy/story?id=56027088>.

99. Brian Root, *Family Separation: A Flashpoint in the Global Migrant Crisis*, HUMAN RIGHTS WATCH (June 29, 2018, 11:15 AM), <https://www.hrw.org/news/2018/06/29/family-separation-flashpoint-global-migrant-crisis#>. Many political allies of the United States were quick to distinguish the immigration practices in their own countries from the separation policy carried out under Zero Tolerance. Further, Pope Francis characterized the policy as immoral, stating that it was “contrary to . . . Catholic values,” and the United Nations Human Rights Council denounced it as “government-sanctioned child abuse.” Finnegan, *supra* note 98.

100. Exec. Order No. 13841, *Affording Congress an Opportunity to Address Family Separation*, 83 Fed. Reg. 29435 (June 25, 2018). However, this executive order did *not* end Zero Tolerance as a whole. “The Executive Order states that it ‘is the policy of this administration to rigorously enforce our immigration laws,’ by

On June 21, 2018, Sessions filed a motion with the *Flores* court arguing that the government must be released from the FSA provisions prohibiting family detention and requiring state licensure for detention facilities.¹⁰¹ While this motion was pending, the Southern District of California issued a preliminary injunction against ICE, mandating that it reunify separated families as part of the class-action lawsuit *Ms. L. v. U.S. Immigration & Customs Enf’t* (“*Ms. L.*”).¹⁰² The district court judge granted class certification (in part),¹⁰³ mandated unification of families already separated, and enjoined the government from further separating families.¹⁰⁴

Although *Ms. L.* was brought on due process grounds rather than on FSA violations, the Trump Administration used the *Ms. L.* mandate prohibiting family separation as their rationale to justify detaining family units together.¹⁰⁵ The injunction in *Ms. L.* prompted Sessions to

criminally prosecuting those who seek to enter the country unlawfully. . . . However, instead of separating children from their parents, the Executive Order signals an intention to ‘detain alien families together throughout the pendency of criminal proceedings for improper entry or any removal or other immigration proceedings.’” *President Trump’s Executive Order and the Flores Settlement Explained*, REFUGEES INT’L (June 28, 2018), <https://www.refugeesinternational.org/reports/2018/6/28/trumps-executive-order-and-the-flores-settlement-explained-bswdt>.

101. “[T]he Government respectfully asks this Court to . . . : (1) exempt DHS from the Flores Settlement Agreement’s release provisions so that ICE may detain alien minors who have arrived with their parent . . . together in ICE family residential facilities; and (2) exempt ICE family residential facilities from the Agreement’s state licensure requirement. The Government is not asking to be relieved from the substantive language of the Agreement on the conditions of detention in these facilities.” Defendants’ Memorandum of Points and Authorities in Support of *Ex Parte* Application for Relief from the *Flores* Settlement Agreement at 21, *Flores v. Sessions*, No. 85-4544 (C.D. Cal. June 21, 2018), <https://www.aila.org/File/Related/14111359z.pdf>.

102. *Ms. L. v. ICE*, 310 F. Supp. 3d 1133, 1149 (S.D. Cal. June 26, 2018).

103. *Ms. L. v. ICE*, 331 F.R.D. 529, 541 (S.D. Cal. June 26, 2018).

104. “Defendants, and their officers, agents, servants, employees, attorneys, and all those who are in active concert or participation with them, are preliminarily enjoined from removing any Class Members without their child, unless the Class Member affirmatively, knowingly, and voluntarily declines to be reunited with the child prior to the Class Member’s deportation, or there is a determination that the parent is unfit or presents a danger to the child.” *Ms. L.*, 310 F. Supp. 3d at 1150.

105. The government argued that in order to comply with the FSA, it was compelled to choose between “(1) releasing the family together and (2) releasing the

file an *ex parte* application for relief with the *Flores* court, as well.¹⁰⁶ Sessions argued that the injunction to cease family separation in *Ms. L* now necessitated that the government house family units together indefinitely despite the FSA stipulation against the practice.¹⁰⁷ On July 9, 2018, the *Flores* court denied the government's application, stating:

Absolutely nothing prevents [the government] from reconsidering their current blanket policy of family detention and reinstating prosecutorial discretion. . . .

. . . .

It is apparent that Defendants' Application is a cynical attempt, on an *ex parte* basis, to shift responsibility to the Judiciary for over 20 years of Congressional inaction and ill-considered Executive action that have led to the current stalemate. The parties voluntarily agreed to the terms of the *Flores* Agreement more than two decades ago. The Court did not force the parties into the agreement nor did it draft the contractual language. Its role is merely to interpret and enforce the clear and unambiguous language to which the parties agreed, applying well-established principles of law.¹⁰⁸

Following this ruling, the Trump Administration quietly reinstated family separation.¹⁰⁹ According to the ACLU, the

alien child while the adult family members remain in detention until removal proceedings have concluded." SARAH HERMAN PECK & BEN FISHER, CONG. RSCH. SERV., R45297, THE "FLORES SETTLEMENT" AND ALIEN FAMILIES APPREHENDED AT THE U.S. BORDER: FREQUENTLY ASKED QUESTIONS 1 (2018).

The Trump Administration found the first option to be against their Zero Tolerance policy, and the ruling in *Ms. L* enjoining the separation of families prohibited the second option. In response to *Ms. L*, "the government notified the Flores court that it would begin detaining alien family units together in DHS facilities until a family's immigration proceedings had been completed." *Id.* at 2.

106. SARAH HERMAN PECK & BEN HARRINGTON, CONG. RSCH. SERV., R45297, THE "FLORES SETTLEMENT" AND ALIEN FAMILIES APPREHENDED AT THE U.S. BORDER: FREQUENTLY ASKED QUESTIONS 2 n.10 (citing Defendants' Notice of Compliance at 4, *Flores v. Sessions*, No. 2:85-CV-85-4544 (C.D. Cal. June 29, 2018)).

107. *Id.*

108. Order Denying Defendants' "Ex Parte Application for Ltd. Relief from Settlement Agreement" at 5,7, *Flores v. Sessions*, No. CV 85-4544-DMG (AGRx) (C.D. Cal. July 9, 2018), <https://www.politico.com/f/?id=00000164-8176-d66b-a166-8bf6cdaa0000>.

109. Richard Gonzales, *ACLU: Administration is Still Separating Migrant Families Despite Court Order to Stop*, NPR (July 30, 2019, 7:15 PM),

government continued to separate children even following the injunction in *Ms. L.*, justifying the separation as permissible due to the “criminal histories” of immigrant parents.¹¹⁰ Despite the protections of the FSA, this brings the number of children separated by the Trump Administration to an estimated total of over 5,400 at this time.¹¹¹

On September 7, 2018, DHS issued a notice that due to the “border crisis” and the inability of DHS and ICE to process immigrant

<https://www.npr.org/2019/07/30/746746147/aclu-administration-is-still-separating-migrant-families-despite-court-order-to->. The hope of returning to a system that released immigrants on bond was dashed further with the April 2019 directive from the Attorney General that suggested that based on the ruling in the case *Matter of M-S-*, 27 I. & N. Dec. 509 (A.G. 2019), “asylum-seekers who demonstrate a credible fear of persecution are no longer eligible for parole or reasonable bond.” Thomas M. McDonnell & Vanessa H. Merton, *Enter at Your Own Risk: Criminalizing Asylum-Seekers*, 51 COLUM. HUM. RTS. L. REV. 1, 31 (2019).

110. “When Sabraw ordered an end to family separations in June 2018, he ‘carved out’ exceptions for parents whose criminal histories or communicable diseases posed a risk to their children. The ACLU said the government is abusing its discretion by ‘separating young children based on such offenses as traffic violations, misdemeanor property damage, and disorderly conduct violations. Some of the separations are for offenses that took place many years ago. And some are for mere allegations or arrests without convictions.’ Administration officials acknowledge that families are still being separated.” Gonzales, *supra* note 109.

111. *More Than 5,400 Children Split at Border, According to New Count*, NBC NEWS (Oct. 25, 2019, 3:58 AM), <https://www.nbcnews.com/news/us-news/more-5-400-children-split-border-according-new-count-n1071791>. This calculation has been disputed, as Amnesty International estimates the number of family units separated to be much higher. Amnesty International reports that between April and August of 2018, CBP separated over 6000 people, and that this figure still excluded an undisclosed number of families whose separations were not properly recorded, such as grandparents or other non-immediate family members, whose relationships authorities categorize as “fraudulent” and do not count in their statistics. In total, the Trump administration has now admitted to separating approximately 8,000 family units since 2017. AMNESTY INTERNATIONAL, USA: ‘YOU DON’T HAVE ANY RIGHTS HERE’ 1, 42–43 (2018), <https://www.amnestyusa.org/wp-content/uploads/2018/10/You-Dont-Have-Any-Rights-Here.pdf>. As of November of 2020, a steering committee appointed to reunite the separated children with their families reported that at least 666 children remain separated up to two years following their initial separation. Jacob Soboroff & Julia Ainsley, *Lawyers Can’t Find the Parents of 666 Migrant Kids, a Higher Number than Previously Reported*, NBC NEWS (Nov. 9, 2020, 3:32 PM), <https://www.nbcnews.com/politics/immigration/lawyers-can-t-find-parents-666-migrant-kids-higher-number-n1247144>. Twenty percent of the separated children were under five years of age at the time of their separation. *Id.*

family units in compliance with the FSA,¹¹² it was moving to propose regulations that would terminate the FSA entirely.¹¹³ These regulations were summarized by the government as being “parallel” to the “relevant and substantive terms of the FSA [and] consistent with the HSA and TVPRA . . . [and] therefore would terminate the FSA.”¹¹⁴ Unfortunately, the proposed regulations also enable DHS to detain family units together for the length of the entire family’s immigration proceedings, despite the twenty-day time-cap placed on minor detentions by the FSA.¹¹⁵ Further, the regulations were to create an “alternative federal licensing scheme” for detention centers that would have replaced the FSA mandate for state-licensed centers.¹¹⁶

On September 27, 2019, the *Flores* court issued an injunction blocking the government from finalizing these new regulations just short of their scheduled date of implementation, largely on the grounds that the regulations were fundamentally inconsistent with the substantive terms of the FSA.¹¹⁷ Ninth Circuit Judge Dolly Gee stated,

112. “Unlike laws, which are passed by Congress, regulations are written by unelected officials who work in federal agencies. To make regulations, an agency must first publish a draft of the new regulations and give the public time—typically between thirty and sixty days—to send in comments about whether the regulations should take effect. The agency must evaluate and respond to the comments before finalizing any regulation. If finalized, the regulations can be challenged in court, where judges will review whether the agency did in fact take public comments into account.” *Flores Settlement Agreement: Why Is the Administration Proposing New Regulations?*, *supra* note 5.

113. *Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children*, 83 Fed. Reg. 45486 (Sept. 7, 2018) (to be codified at 45 C.F.R. pt. 410).

114. *Id.*

115. PECK & FISHER, *supra* note 105, at 2.

116. *Id.*

117. *Flores v. Barr*, 407 F. Supp. 3d 909 (C.D. Cal. 2019). Had the *Flores* court not issued an injunction against the proposed regulations, the regulations would have been challenged in court. A Complaint for Declaratory and Injunctive Relief to prevent implementation of the regulation had already been filed against the proposed regulations in federal court on August 26, 2019, by nineteen states as well as the District of Columbia. The basis of this complaint was constitutional in nature, as the states claimed that the creation of a parallel federal licensing scheme for detention centers intruded on the sovereign interests of the states to enforce their own child welfare standards. Complaint for Declaratory and Injunctive Relief, *California v.*

“[d]efendants cannot simply ignore the dictates of the consent decree merely because they no longer agree with its approach as a matter of policy. . . . Defendants cannot simply impose their will by promulgating regulations that abrogate the consent decree’s most basic tenets. That violates the rule of law.”¹¹⁸

III. INTERNATIONAL HUMAN RIGHTS LAW AND THE FSA

In the United States, debates about immigration often fail to consider the viewpoint of immigrants themselves. Rather, most of the debate concerning immigration seems to center on national partisan issues. Further, the tension between the role of state, federal, and judicial branches concerning immigration issues complicates the ability of the United States to find a solution to the difficulties with the FSA. As a result of the plenary power doctrine and “immigration exceptionalism,” immigration policy has generally been the province of the executive branch,¹¹⁹ which has wide discretion to develop new

McAleenan, No. 2:19-cv-07390 (C.D. Cal. Aug. 26, 2019), https://oag.ca.gov/system/files/attachments/press_releases/Flores%20Complaint.pdf.

118. *Barr*, 407 F. Supp. 3d at 931.

119. Plenary power is roughly defined as power over a topic or area of government that is held exclusively by the federal branches. “The plenary power doctrine is . . . a cornerstone of immigration law.” Natsu Taylor Saito, *Will Force Trump Legality After September 11? American Jurisprudence Confronts the Rule of Law*, 17 GEO. IMMIGR. L.J. 1, 50 (2002). There are not many areas in our three-branch system of government where plenary power applies, but immigration policy is often cited as one of the few. Federal policy on immigration was founded on the concept of plenary power, as immigration was seen as a question of national security. *Id.* at 60. Thus, the legislative and executive branches necessarily were believed to need to hold the sole power over creating and regulating immigration law. *Id.* Immigration exceptionalism is tied to this idea. Since immigration is viewed as a “plenary” power, having to do with national safety issues, the courts tend to treat immigration issues as “exceptional,” and therefore outside of the normal boundaries of constitutional law. “Immigration law exceptionalism thus permits constitutional rights that attach to citizen families . . . to be dismissed through reference to plenary powers in the immigration law context. Indeed, [immigration law exceptionalism] contemplates that the plenary powers doctrine produces a regulatory regime that, in the Court’s own words, ‘would be unacceptable if applied to citizens.’” Kelly McGee, Note, *What’s so Exceptional About Immigration and Family Law Exceptionalism? An Analysis of Canonical Family and Immigration Law as Reflective of American Nationalism*, 20 GEO. J. OF GENDER & L. 699, 703 (2019) (quoting *Mathews v. Diaz*, 426 U.S. 67, 80 (1976)).

policies and interpret preexisting policies in ways that are in accordance with each administration's view on immigration issues as a whole.¹²⁰ This power imbalance favoring the executive branch has been the standard rule in immigration since the mid-nineteenth century; however, this imbalance is being increasingly challenged.¹²¹

The recent challenges have played out in various ways. Some challenges have come in the form of public battles in the media and the courtroom over the legal creation of "sanctuary cities" that attempt to insulate isolated geographic areas from the effects of restrictionist federal immigration policies.¹²² Other challenges have been attempted at the state level, as some state legislatures propose legislation to regulate immigration even more strictly than the existing federal statutes. North Carolina's attempt to pass a statute requiring sheriffs to collaborate with federal ICE agents to detain immigrants¹²³ and Arizona's proposed "Safe Neighborhoods Act" requiring immigrants to carry documentation papers at all times are two such examples.¹²⁴

Finally, as it pertains to this Note, some challenges to the immigration status quo have been arising at the nexus of child law and immigration law, as they highlight the confusion concerning where the ultimate responsibility for children rests. Although immigration policy may fall under the general umbrella of federal power, child welfare and protection is the responsibility of each individual state.¹²⁵ As a result, "noncitizen children are often seen first as 'migrants' and only

120. See, e.g., David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U.L. REV. 583, 600–07 (2017).

121. *Id.* at 600.

122. See CONG. RSCH. SERV., R44795, "SANCTUARY" JURISDICTIONS: FEDERAL, STATE, AND LOCAL POLICIES AND RELATED LITIGATION, at Summary (2019).

123. North Carolina House Bill 370 was proposed by a Republican-led General Assembly, but vetoed by their Democrat Governor Roy Cooper. Editorial, *The Governor Stands with Sheriffs Against a Misguided NC Immigration Bill*, RALEIGH NEWS & OBSERVER (Aug. 22, 2019, 6:58 AM), <https://www.newsobserver.com/opinion/article234229597.html>.

124. See Fernanda Santos, *U.S. and Arizona Yield on Immigration*, N.Y. TIMES (May 30, 2014), <https://www.nytimes.com/2014/05/31/us/us-and-arizona-yield-on-immigration.html>.

125. "[W]hile immigration control is a federal matter, child protection laws are generally governed by the states, making the legal discord even more prominent." Olga Byrne, *Promoting a Child Rights-Based Approach to Immigration in the United States*, 32 GEO. IMMIGR. L.J. 59, 63 (2018).

secondarily as children entitled to special protections and considerations."¹²⁶ One solution to resolving this is to bypass the power struggle between federal and state law completely and to ground child immigration policies in international human rights law, focusing on the global citizen instead.¹²⁷

A. Immigration Law IS Human Rights Law

Ironically, the exclusionist sentiment responsible for mass immigrant detention has grown in the United States alongside the growth of the seemingly antithetical concept of universal "human rights law" on the international legal stage.¹²⁸ As the United States detains immigrants in ever-larger numbers for ever-smaller infractions, international human rights bodies are developing cogent standards for the fair treatment of immigrants that reflect the general human rights standards introduced as early as the Universal Declaration of Human Rights in 1948.¹²⁹ By the 1990s, human rights law was providing the filter through which international immigration law was being formulated by the U.N. and other international human rights bodies.¹³⁰

The foundation of international human rights law is based in three fundamental principles. The first principle is that the individuals themselves must claim their rights, while the duty-bearers meet their

126. "[E]ven when official policies aim to treat immigrant and citizen children equally, discriminatory notions of 'otherness' may influence practices in ways that fail to uphold immigrant children's rights." *Id.*

127. "A human rights framework humanizes non-citizens, making clear that they are not simply economic beings, and in this way helps to prevent mistreatment of immigrants." Jaya Ramji-Nogales, *A Global Approach to Secret Evidence: How Human Rights Law Can Reform Our Immigration System*, 39 COLUM. HUM. RTS. L. REV. 287, 345 (2008).

128. See Denise Gilman, *Realizing Liberty: The Use of International Human Rights Law to Realign Immigration Detention in the United States*, 36 FORDHAM INT'L L.J. 243, 274–78, 260–62 (2013); Michelle Brane & Christiana Lundholm, *Human Rights Behind Bars: Advancing the Rights of Immigration Detainees in the United States Through Human Rights Frameworks*, 22 GEO. IMMIGR. L.J. 147, 147 (2008).

129. This development was slow, however. The assertion of individual human rights necessarily displaces theories of state sovereignty, and for some time, "sovereignty conceptions continued to reign supreme in connection with a state's power to control its borders and all related areas, including detention of immigrants." See Gilman, *supra* note 128, at 260–62.

130. See *id.* at 263–64.

obligations to those individuals.¹³¹ The second principle states that both the individuals claiming rights and the responsible duty-bearers must move out of a “philanthropic” or “charity-driven” mindset or approach and move toward an approach that is centered in honoring the fundamental rights of children as humans, independent of their “need.”¹³² Finally, the end result of the application must be able to be evaluated in a quantitative way and must be shown to be effective.¹³³ In general, these three principles can make it difficult to create a nexus between immigration law and child law, as federal immigration laws often do *not* adopt a child rights perspective and state child protection laws (which *are* more likely to adopt a “best interests of the child/child’s rights” standard) often miss the specific concerns and nuances related to immigrant children.¹³⁴

The first step in creating a human rights-based, child-centered immigration policy is to acknowledge that immigrant children fundamentally have separate rights and needs as *children*, as well as rights and needs as *immigrants*, that might differ from whatever rights that may be afforded to their immigrant parents.¹³⁵ Historically, this has been a stumbling block in the United States, as the concept that children have human rights of self-determination is very new; traditionally, children have been seen as only having those rights that derive directly from the rights afforded to their parents.¹³⁶

This attitude is even more problematic when combined with the second principle of human rights law, as immigrant children not only must fight to be seen as sentient right-holders but also must fight to be

131. Byrne, *supra* note 125, at 72.

132. *Id.*

133. *Id.*

134. *Id.* at 68.

135. *Id.* at 73.

136. See Roger J.R. Levesque, *The Internationalization of Children’s Human Rights: Too Radical for American Adolescents?*, 9 CONN. J. INT’L L. 237, 259 (1994). The notion that children had no inherent right unto themselves is not an American concept, however. Historically, “[f]or several centuries children were regarded as mere personal property, subject to the powerful authority of their fathers. The period known as childhood was not recognized until very recently, because in most societies children were consistently treated as though they were invisible. These attitudes were reflected in European laws, policies and social practices, dating back to at least the Middle Ages.” Rebeca Rios-Kohn, *The Convention on the Rights of the Child: Progress and Challenges*, 5 GEO. J. FIGHTING POVERTY 139, 140 (1998).

seen as more than mere objects of pity.¹³⁷ As Human Rights First researcher Olga Byrne points out, the idea that immigrant children are vulnerable and in need of “saving” can actually hinder their ability to secure their rights, as society concentrates only on very limited areas of charity for those children that they consider to be sympathetic victims.¹³⁸ “Unfortunately, immigrant children are even less likely to be treated as rights-holders, not only due to being viewed through a paternalistic lens, but as a result of their status as migrants and the prioritization of immigration enforcement measures.”¹³⁹

Under this “charity model,” donors may supply basic, immediate needs to the poor and marginalized, but “once these immediate needs were met, the poor and marginalized continued to be poor and marginalized, and became increasingly dependent on such charitable donations.”¹⁴⁰ Migration in general, and migration of children specifically, must be seen less as a political or social ill to be fixed and more as a human rights issue to effectively apply a human rights-based approach to immigration law.¹⁴¹ A human rights-based approach is more concerned with addressing the root causes of the inequalities that inform these issues and attempts to provide a more global solution to the underlying problem.¹⁴²

Finally, a human rights-based immigration policy must provide a way to systematically measure and assess the advancement that it is expected to foster.¹⁴³ There must be models of measurement in place to track and evaluate any progress made in the implementation of human rights-based immigration laws or policies.¹⁴⁴ Unfortunately, the United States is lagging in this area.¹⁴⁵ Even the Organization of American States (“OAS”)—the regional organization tasked with

137. Byrne, *supra* note 125, at 73.

138. *Id.*

139. *Id.*

140. *Id.* at 74.

141. John Rautenbach, *Mainstreaming a Human Rights-Based Approach to Migration Within the High Level Dialogue*, IOM (Sept. 4, 2013), <https://www.iom.int/speeches-and-talks/mainstreaming-human-rights-based-approach-migration-within-high-level-dialogue>.

142. *See* Byrne, *supra* note 125, at 73.

143. *See id.* at 76.

144. *See id.*

145. *See* Gilman, *supra* note 128, at 248.

promoting human rights throughout the Americas—only began to consider and study immigration detention issues a little more than a decade ago.¹⁴⁶ While studies *have* been made on human rights-based immigration detention policies in place internationally,¹⁴⁷ those studies do not address any of the specific issues inherent in U.S. immigration policy.¹⁴⁸ Thus far, human rights-based immigration policies, especially as applied to child immigration, have been largely untested and untried in the United States.

B. *The UNCRC and Other International Law Treaties*

The most pertinent international treaty related to children's rights that has been developed thus far using the human rights-based mode is the UNCRC. This treaty was built upon the foundation of the 1959 United Nation's Declaration of the Rights of a Child ("the Declaration"), one of the first human rights-based documents to specifically address the rights of children.¹⁴⁹ The Declaration also

146. *See id.* at 264.

147. *See generally* GALINA CORNELISSE, IMMIGRATION DETENTION AND HUMAN RIGHTS: RETHINKING TERRITORIAL SOVEREIGNTY (2010) (considering the human rights-based immigration policies in Europe); Daniel Thym, *Respect for Private and Family Life Under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?* 57 INT'L & COMP. L.Q. 87 (2008) (discussing the application of Article 8 of the European Convention of Human Rights to Australian Immigration Policy); Cathryn Costello, *Human Rights and the Elusive Universal Subject: Immigration Detention Under International Human Rights and EU Law*, 19 IND. J. GLOB. LEGAL STUDS. 257 (2012) (discussing the interaction between human rights law and the European Union in immigration policy); DANIEL WILSHER, IMMIGRATION DETENTION: LAW, HISTORY, POLITICS (2012) (describing the interplay of human rights law and immigration detention in Europe); Stephen Meili, *When Do Human Rights Treaties Help Asylum Seekers? A Study of Theory and Practice in Canadian Jurisprudence Since 1990*, 51 OSGOODE HALL L.J. 627 (2014) (studying how human rights approaches have been applied in recent Canadian immigration law).

148. *See* Gilman, *supra* note 128, at 248–49.

149. Adopted first as a declaration by the Assembly of the League of Nations in 1924, this document began to be drafted as a treaty in the 1940s. It was finally adopted as a U.N. treaty in 1959, although the majority of U.N. member states at that time were opposed to giving it the status of a binding treaty. *See* Rios-Kohn, *supra* note 136, at 140. This document was not only the first to use the term "rights" in the context of a treatise about children, but it also introduced the concepts of civil rights and political rights for children for the first time. *See* Levesque, *supra* note 136, at 267.

introduced the “best interest of the child” standard, which is now the accepted standard that frames most human rights-based law concerning children.¹⁵⁰ In 1979, the U.N. celebrated the twentieth anniversary of the Declaration by announcing a campaign titled “The International Year of the Child.”¹⁵¹ This campaign served as the impetus to update the Declaration and form it into the UNCRC, a binding, comprehensive international treaty that was presented for U.N. member ratification in 1989.¹⁵²

The UNCRC was adopted by the U.N. and has since been ratified by 196 nations. The United States now stands alone as the only member of the U.N. to have *not* ratified the treaty.¹⁵³ Although the

150. In the last few years, there has been an abundance of scholarship concerning the need for the FSA to be codified against the “best interest of the child” standards. This need has increased tremendously under the Trump Administration, and it is now imperative that this scholarship is revisited to craft a suitable replacement to the quickly eroding protections provided by the FSA. *See, e.g.*, Byrne, *supra* note 125, at 84–86; Lizbeth M. Chavez et al., *The Need to Open Doors and Hearts: The Detention of Unaccompanied Minors Seeking Asylum in the United States and Mexico*, 42 U. DAYTON L. REV. 359, 362–63 (2017); Lakosil, *supra* note 15, at 72; Lopez, *supra* note 7, at 1668; Michelle Anne Paznokas, *More than One Achilles’ Heel: Exploring the Weaknesses of SIJS’s Protection of Abused, Neglected, and Abandoned Immigrant Youth*, 9 DREXEL L. REV. 421, 431–32 (2017); Megan Smith-Pastrana, Note, *In Search of Refuge: The United States’ Domestic and International Obligations to Protect Unaccompanied Immigrant Children*, 26 IND. INT’L & COMP. L. REV. 251, 263–67 (2016). However, the “best interest of the child” standard itself has also been criticized in recent scholarship due to its undefined and subjective nature. “Primary concerns about this principle include questions of who decides what is in the best interests of the child, and what criteria are used to determine what is in the best interests of the child. Some argue that it is not a viable standard because it relies too heavily on culture and social context. One expert comments that the choice is inherently value-laden; all too often there is no consensus about what values should inform this choice[.]” Jonathan Todres, *Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and Its Early Case Law*, 30 COLUM. HUMAN RIGHTS L. REV. 159, 172–73 (1998).

151. Rios-Kohn, *supra* note 136, at 140–41.

152. *Id.*

153. Karen Attiah, Opinion, *Why Won’t the U.S. Ratify the U.N.’s Child Rights Treaty?*, WASH. POST (Nov. 21, 2014, 3:12 PM), <https://www.washingtonpost.com/blogs/post-partisan/wp/2014/11/21/why-wont-the-u-s-ratify-the-u-n-s-child-rights-treaty/>. In fact, the UNCRC is now the most signed human rights treaty in the world. *See* Paznokas, *supra* note 150, at 431. The United States’ refusal to sign the treaty is somewhat ironic, considering the United States was

United States has not *ratified* the UNCRC, it has *signed* it, and as a signatory, the United States is bound to not take actions that would “defeat the object and purpose” of the Convention.¹⁵⁴ The refusal of the United States to actually ratify the treaty is largely due to the lobbying power of special-interest groups in the United States.¹⁵⁵ Moreover, in drafting the UNCRC, the United States unsuccessfully urged that a limitation be placed on the scope of the Convention to ensure that it applied *only* to children who were *legally* within a state’s territory.¹⁵⁶ Instead, the final draft of the UNCRC reads, “The U.N. Convention on the Rights of the Child applies to all children equally, irrespective of migration status or citizenship.”¹⁵⁷

Although the convention “neither focuses on child migration nor defines the migrant child, its provisions are of the highest relevance to ensure the adequate protection of all children in all circumstances,

one of the more active members of the committee in drafting the document. See Adam Lopatka, *An Introduction to the United Nations Convention on the Rights of the Child*, 6 TRANSNAT’L L. & CONTEMP. PROBS. 251, 260 (1996).

154. Vienna Convention on the Law of Treaties, art. 18, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

155. One such special-interest group warned that the United Nations was promoting—through the CRC . . . a “counterculture” that would lead to undesirable outcomes, such as more out of wedlock marriages and adolescent sexual promiscuity. See generally PATRICK F. FAGAN, HOW U.N. CONVENTIONS ON WOMEN’S AND CHILDREN’S RIGHTS UNDERMINE FAMILY, RELIGION, AND SOVEREIGNTY (2001), http://thf_media.s3.amazonaws.com/2001/pdf/bg1407.pdf. Another vocal lobbyist against the UNCRC is Michael Farris, the president of ParentalRights.org. Farris actively campaigns against the UNCRC, claiming that acknowledging children’s rights by necessity threatens the rights of parents. Farris said in an interview, “[o]ur constitutional system gives the exclusive authority for the creation of law and policy on issues about families and children to state governments. Upon ratification, this nation would be making a binding promise in international law that we would obey the legal standards created by the UNCRC. American children and families are better served by constitutional democracy than international law.” Attiah, *supra* note 153. Farris also warned that allowing children to legally be endowed with “rights” will lead to a breakdown of parental authority and could mean that children would be allowed to choose their own religion or petition the government in some way to enforce their desires over the wishes of their parents. See *id.*

156. Byrne, *supra* note 125, at 68 (citing Avinoam Cohen, *From Status to Agency: Defining Migrants*, 24 GEO. IMMIGR. L.J. 617, 622 (2010)).

157. *Id.* at 67.

including therefore all stages of the migration process."¹⁵⁸ Thus, the UNCRC provides clear minimum standards and a conceptual framework for enforcing children's human rights in the context of migration.¹⁵⁹ The Committee on the Rights of a Child convened in 2012 to more specifically address the rights of children in the context of international immigration, at which point the committee formulated several international standards dealing with issues directly concerning the rights of AC and asylum-seekers.¹⁶⁰ Unfortunately, these standards have been largely ignored by policymakers in the United States, as well.

Nations that ratified the UNCRC are bound to it by international law, and compliance is generally monitored by the U.N. Committee on the Rights of the Child.¹⁶¹ However, there are some limitations to the strength of the UNCRC. First, the UNCRC is a self-governing treaty, meaning that each ratifying country must self-report how the treaty is being implemented and enforced within their legal system.¹⁶² This creates certain limitations of use; as there is no objective international court system to oversee or enforce the treaty, this means that domestic courts are the first forum available to those wishing to bring charges of an UNCRC-based human rights violation.¹⁶³ Therefore, lawsuits

158. *Id.* at 61 n.8 (citing Jorge Bustamante (Special Rapporteur on the Human Rights of Migrants), *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶ 31, U.N. Doc. A/HRC/11/7 (May 14, 2009)).

159. Jacqueline Bhabha, UNICEF Innocenti Research Ctr., *Independent Children, Inconsistent Adults: International Child Migration and the Legal Framework*, in INNOCENTI DISCUSSION PAPER NO. IDP 2008-02 (2008).

160. Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-21/14, Inter-Am. Ct. H.R. (ser. A) (Aug. 19, 2014). The provisions of the UNCRC regarding child immigration issues were heavily informed by the international standards previously set forth in 1951 United Nations Convention Relating to the Status of Refugees ("the Convention"), and the 1967 Protocol Relating to the Status of Refugees ("the Protocol"). *Id.*

161. G.A. Res. 44/25, Convention on the Rights of the Child (Nov. 20, 1989).

162. *See* Todres, *supra* note 150, at 181.

163. "[V]ictims of human rights violations primarily seek remedies in the domestic courts. This is especially true of CRC violations, since the Convention does not have any mechanism for handling individual complaints or even state-to-state complaints." *Id.* at 192. This is a change from previous conventions and treaties, and it weakens the UNCRC. "[T]he Convention is a fundamentally weak document

alleging violations of the UNCRC must be brought through the domestic court system of the country *in which the violation was said to have occurred*. Further, that can only happen within a country that is actually bound by the treaty, and the United States is not one of those countries.¹⁶⁴ Therefore, although the UNCRC offers a strong model for the basis of shaping U.S. policy, it cannot be relied upon to provide the entire solution to our current crisis with the FSA. As the most comprehensive body of international law addressing the issue of children in migration, the United States must look to the UNCRC for guidance, but not salvation.

IV. ANALYSIS

Salvation, however, is necessary, as the fate of AC in the United States is currently in more peril than it has been in decades. While the ability of the United States to safeguard the rights of children at its borders has never been strong, the current immigration policies under the Trump Administration have undermined what little protection these children had finally gained through years of litigation. The United States is further impaired by a general paralysis of action about any possible solution. Specifically, there is a seeming inability to successfully formulate a consistent domestic policy to address the issues of immigrant children paired with a simultaneous unwillingness to accept the bridle of international law to create a solution. Rather, in lieu of a binding, clear policy, the United States has instead had to deal with a succession of policies that continuously shift depending on the whim of the executive branch in power at that moment.

The FSA is a fundamentally weak document which was only meant to be a temporary “quick-fix” rather than a permanent solution, and the supposed “inconsistencies” within the agreement itself have now caused it to be used as a weapon against the very population that it seeks to protect. International law provides poor relief for AC as

which places focus on individual Nation States enforcing the Convention themselves, rather than using the more traditional approach of having Nation States guard each other. . . . Further, the Convention lacks a complaint mechanism for children to claim violations: there is no right to individual petition. In addition to not offering a proper means to petition and claim violations and offer voices to children, the Convention offers no remedies.” Levesque, *supra* note 136, at 272–73.

164. See Todres, *supra* note 150, at 182.

well, as there is some dispute over international law’s domestic application and ability to protect this vulnerable population.

A. *Flores Is Generally Ineffective as Law*

However, settlement agreements are generally not supposed to be long-term substitutes for law, so the FSA is no better of a solution to protect vulnerable children, either.¹⁶⁵ Further, when FSA violations *are* brought into the courtroom to be adjudicated, “immigration judges are hesitant to hold that the detention of immigrant children is unacceptable under current law, despite the FSA’s mandate . . . [due to] federal judges’ aversion to create policy: judges prefer to enforce policy determinations made by Congress.”¹⁶⁶

The FSA has never provided the strong support for AC that the drafters hoped it would, as the FSA was never fully complied with from the moment it was signed.¹⁶⁷ The stipulations as to the standard of welfare for children while in DHS care and to the state licensing of detention facilities have often been unevenly enforced and not met with consistency.¹⁶⁸ Further, the FSA offers no recourse for accountability; the agreement does not confer rights to AC specifically, and it confers no standing for AC to sue.¹⁶⁹ There was no oversight built into the FSA to ensure that DHS was in continual compliance with the agreement, allowing DHS to “police itself” on compliance, which is rarely effective.¹⁷⁰

Lawsuits that have been brought into court under the FSA have resulted in rulings that supported the theory of immigration exceptionalism, as well. Constitutional due process challenges at issue

165. “[S]ettlement agreements are neither appropriate long-term solutions, nor substitutes for law-making. . . . Class action settlements set aspirational goals and provide[] a tool for addressing abuses after they have occurred, but they [do] not [do] enough to prevent abuse from occurring.” *See Lopez, supra* note 7, at 1669.

166. *Id.* at 1668.

167. For a history of violations of the FSA from the time of its signing until 2019, see *Documents Relating to Flores v. Reno Settlement Agreement on Minors in Immigration Custody*, AM. IMMIGRANT L. ASS’N (Sept. 17, 2019), <https://www.aila.org/infonet/flores-v-reno-settlement-agreement>.

168. *See generally id.* (showing numerous instances of documented noncompliance with the FSA since 1993).

169. *See Lopez, supra* note 7, at 1669.

170. *Id.*

in FSA cases have thus far all failed, beginning with the due process claim in *Reno v. Flores* itself.¹⁷¹ The Court in *Flores* did not view immigration custody for children to be “detention,” but rather “legal custody,” and thus not worthy of due process protection.¹⁷² The Court’s rationale for this was that AC were to be placed in state-licensed “detention facilities” rather than “correctional institutions,” thereby making their detention “civil and administrative” rather than punitive.¹⁷³ Ironically, this emphasis on state-licensed facilities became part of the FSA provisions themselves, effectively stipulating AC out of any ability to further claim constitutional rights.¹⁷⁴

Subsequent cases brought under the FSA continued to reinforce the *Flores* due process decision. For example, in 2003, several UAC filed suit against federal officials in *Walding v. United States*, alleging “that the provisions of the *Flores* Agreement created liberty and property interests protected by the Due Process Clause of the Fifth Amendment, and thus due process was violated when the *Flores* Agreement’s provisions were violated” as a result of their treatment in a DHS detention facility.¹⁷⁵ However, the court ruled that the FSA was “in effect a remedial decree” and as such could not confer constitutional rights on the plaintiffs.¹⁷⁶

171. Lincoln, *supra* note 56, at 169.

172. *Reno v. Flores*, 507 U.S. 292, 298 (1993). Indeed, “when the detention of children for immigration purposes was first litigated in the 1993 Supreme Court case, *Reno v. Flores*, the Court ruled in favor of the former INS, finding that its policy of detaining immigrant children did not violate substantive or procedural due process, nor did it exceed the Attorney General’s authority under immigration law. In the majority opinion, children were seen first and foremost as an immigration enforcement priority rather than as individuals with rights.” Byrne, *supra* note 125, at 70–71.

173. Lincoln, *supra* note 56, at 169.

174. *Id.* 169–70.

175. 2009 U.S. Dist. LEXIS 116932, at *9 (W.D. Tex. Dec. 15, 2009).

176. *Walding*, 2009 U.S. Dist. LEXIS 116932, at *9; *see also* Smith-Pastrana, *supra* note 150, at 280. The Western District of Texas came to a similar decision in 2007 with *Bunikyte v. Chertoff*. This FSA case filed against DHS also ended in a mixed decision. The court granted that the defendants had violated the FSA because the detention center in question was unlicensed and operating under substandard conditions. However, the court also found that the plaintiffs had no recourse to any Fifth Amendment claims, and they could not use the FSA as the basis for their release. *See Bunikyte v. Chertoff*, Nos. A-07-CA-164-SS, A-07-CA-165-SS, A-07-CA-166-SS, 2007 U.S. Dist. LEXIS 26166, at *52–53 (W.D. Tex. Apr. 9, 2007). In 2009, another Western District of Texas case involved a claim for an FSA violation, a *Bivens*

While the FSA has had limited success as a means to improve facility conditions at detention centers, it has not been effective from its very inception in securing fundamental, constitutional rights for AC. This is simply a reinforcement of previous immigration law, which is based in plenary power and immigration exceptionalism doctrines, and thus holds that immigrants at the border possess few constitutional rights.¹⁷⁷ Although the concept of plenary power has been challenged in numerous court cases and eulogized for some time in law journals as being outdated and in “demise,” it has not ever entirely gone away, but rather has waxed and waned with various administrations.¹⁷⁸ Under the Trump Administration, plenary power experienced a revival.¹⁷⁹

B. *International Law Alone Is Ineffective*

While plenary power is being used to reinforce the current administration’s populist stance, international law is experiencing some fundamental criticisms and critiques. Specifically, scholars have called the effectiveness of international human rights law into question.¹⁸⁰ This critique creates complications for those who would

claim, and a Fifth Amendment claim all brought against the supervisors at the detention center. *Fabian v. Dunn*, No. SA-08-cv-269-XR, 2009 U.S. Dist. LEXIS 72348, at *5 (W.D. Tex. Aug. 14, 2009). The plaintiffs argued that the defendant’s failure to oversee the detention facility created a breach of constitutional rights. *Fabian*, 2009 U.S. Dist. LEXIS 72348, at *28. Again, this was unsuccessful, as the court found that “failure to supervise-type claims” lack legal merit because respondeat superior liability is not available in a *Bivens* action, and thus dismissed their claims. *Id.* at *16.

177. Gilman, *supra* note 128, at 316.

178. See generally Catherine Y. Kim, *Plenary Power in the Modern Administrative State*, 96 N.C.L. REV. 77 (2017); David A. Martin, *Why Immigration’s Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29 (2015); Rubenstein & Gulasekaram, *supra* note 120.

179. See generally Ali Shan Ali Bhai, Note, *A Border Deferred: Structural Safeguards Against Judicial Deference in Immigration National Security Cases*, 69 DUKE L.J. 1149 (2020); Kevin R. Johnson, *Immigration and Civil Rights in the Trump Administration: Law and Policy Making by Executive Order*, 57 SANTA CLARA L. REV. 611 (2017); Shalini Bhargava Ray, *Plenary Power and Animus in Immigration Law*, 80 OHIO ST. L.J. 13 (2019).

180. See generally ERIC A. POSNER, *THE TWILIGHT OF HUMAN RIGHTS LAW* (2014); SURYA SUBEDI, *THE EFFECTIVENESS OF THE UN HUMAN RIGHTS SYSTEM:*

look to international law for guidance for immigration issues. Just how effective is an appeal to international human rights-based law if “[v]iolations of international human rights law have become rampant, ranging from failures to comply with administrative reporting requirements to gross violations of human dignity[?]”¹⁸¹

Despite these criticisms, recent scholarship argues persuasively that the United States should move to ratify the UNCRC because doing so will formally bind the United States to the provisions of the treaty, thereby enabling the United States to better secure rights for AC in U.S. custody.¹⁸² However, the current criticisms of international human rights law, as well as the very nature of the UNCRC as a self-governing convention, tends to suggest that this may be an overly optimistic conclusion.¹⁸³ The self-executing rights enumerated in the UNCRC are largely either rights that are already in place in the United States through other treaties or rights which the United States might very well attempt to deny by reservation anyway.¹⁸⁴ Conversely, the rights that are not self-executing would need to be codified in some way by legislation to go into effect, even if the UNCRC was ratified.¹⁸⁵ Thus, ratifying the UNCRC alone would likely gain the United States little by way of expanding enforceable children’s rights; that ratification would still need to be supplemented with codification of some form to be effective.¹⁸⁶

There is a means available for non-ratified treaties to become binding law for a State (i.e., a foreign government) despite their non-ratified status, however. As Roger Levesque notes in his work on children’s human rights law, there is the possibility that the UNCRC could qualify as “customary international law,” which would make certain provisions of the UNCRC binding through customary use within a State rather than through formal ratification.¹⁸⁷ However,

REFORM AND THE JUDICIALIZATION OF HUMAN RIGHTS (2017); Ingrid Wuerth, *International Law in the Post-Human Rights Era*, 96 TEX. L. REV. 279 (2017).

181. Wuerth, *supra* note 180, at 282.

182. See, e.g., Byrne, *supra* note 125; Levesque, *supra* note 135; Smith-Pastrana, *supra* note 150; Paznokas, *supra* note 150.

183. Levesque, *supra* note 136, at 279, 282.

184. *Id.* at 279–80.

185. *Id.*

186. *Id.* at 281.

187. *Id.*

most courts are hesitant to invoke customary international law, and thus the value of the UNCRC as customary law is “unclear at best.”¹⁸⁸ Further, for customary law to be viewed as “customary” and thus be enforceable, it must actually be actively practiced and followed in that State and not just merely condoned in theory.¹⁸⁹ This prerequisite would present a barrier to the UNCRC qualifying as customary international law, as the practices of children’s law in the United States, especially in the areas of law dealing with AC, do not align with the rights granted to children in the UNCRC.

This sentiment is bolstered by leading immigration scholar James C. Hathaway, who notes in his text *The Rights of Refugees Under International Law* that “[t]he treatment a state metes out to its own population has not usually been understood to be an ongoing process of negotiating acceptable international standards of conduct. It may, however, be possible to locate the required appreciation of legal significance in the Charter’s good faith undertaking to act in support of human rights.”¹⁹⁰ Hathaway goes on to explain that if that simple commitment of conduct can be seen as a sufficient signal, then this could be used as evidence of customary international law, although this use would be rare.¹⁹¹ Rather than argue for the presence of customary international law, the stronger case can be made by searching for “universal human rights” within a country’s general principles of law.¹⁹² As Hathaway notes, “[I]n keeping with accepted modes of international lawmaking, the relevant test of a general principle of law is whether the proposed universal standard has been pervasively recognized in the domestic laws of states.”¹⁹³

However, recently scholars such as Ingrid Wuerth have argued that the standards for determining what constitutes customary international law have actually widened significantly, with the accompanying critique that the actual conduct of a country is not

188. *Id.* at 282.

189. Christiana Ochoa, *The Individual and Customary International Law Formation*, 48 VA. J. INT’L L. 119, 161 (2007).

190. JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 35 (2005).

191. *Id.* at 35–36.

192. *Id.* at 39.

193. *Id.*

weighed as heavily as is the country's public statement of intent.¹⁹⁴ Wuerth notes:

This change means that customary international law corresponds less to the actual conduct of states, which in turn means there will be more violations at the point in time when the norm crystalizes into customary international law. . . . [B]asing custom on state declarations rather than on their actions is an issue that extends beyond human rights. Nevertheless, human rights have unmistakably pushed customary international law towards what some call a "tremendous implementation gap."¹⁹⁵

Evidence of this trend has also been noted by scholar Ralph G. Steinhardt, who states that "[i]n human rights cases . . . when the content of customary international law was at issue, some courts have given evidentiary weight to declarations and guidelines as well as treaties that had been signed by the United States but never ratified."¹⁹⁶ If this premise is to be accepted, then a case could be made that the United States is already bound by the provisions of UNCRC through customary international law, despite not having formally ratified the Treaty.¹⁹⁷

194. See Wuerth, *supra* note 180, at 324. Wuerth, however, does not view this widening as a positive, despite the fact that this view would be beneficial to the application of international human rights law in U.S. immigration.

195. *Id.* at 324–25.

196. Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1181 (1990). Steinhardt suggests that this is due to the same theory that undergirds the "Charming Betsy" principle which prohibits the United States from interpreting domestic laws in ways that would contradict international law; "[i]t is perhaps surprising, therefore, that some courts have consulted standards that do not readily qualify as the law of nations and have done so in apparent accord with the values implicit in the *Charming Betsy* principle. This practice has been especially true in cases raising human rights issues, as well as cases determining the extraterritorial reach of statutes on the basis of international comity." *Id.*

197. This premise has been tested in at least one domestic case thus far, as well. The UNCRC was cited as an influential basis for the decision in *Batista v. Batista*, No. FA 92 0059661, 1992 WL 156171, at *6 (Conn. Super. Ct. June 18, 1992). The

V. SOLUTION

The FSA no longer protects immigrant children who arrive at the U.S. borders. In fact, the Trump Administration uses the FSA as a weapon against the very children that it was created to protect. The FSA does not have the “teeth” it needs to survive immigration exceptionalism, and it does not confer any necessary due process rights to children throughout their encounters with the U.S. government. Further, the FSA does not conform to the current guiding principles of human rights law and is actually more reflective of outdated, domestic, parent-based child law that was practiced several decades ago.

While international human rights-based law considers the child in a more modern way and affords due process rights to children, neither applicability nor enforceability are guaranteed in the United States as international law stands today. The best human rights-based charter to cover the rights of immigrant children at the moment—the UNCRC—exists in a legal gray-area in the United States. It has not been tested as law in the United States and may not withstand such a test if it was subject to one.

Caught between the shortcomings of both solutions, the immigrant children at the U.S. borders are suffering horrible mistreatment. In order to effectively protect those children, the strongest aspects of both the FSA and of international human rights law must be combined into legislation that codifies the protections of the FSA using the legal framework and theory of human rights laws (specifically the UNCRC).

A. The Codification Must be Human Rights-Based

Congress must first look to implement a human rights-based model when drafting new legislation to replace the FSA. This mandate is given directly as an Advisory Opinion from the Inter-American Court of Human Rights, which said: “[T]he Court finds that, when designing, adopting and implementing their immigration policies for persons under the age of 18 years, the State must accord priority to a human rights-based approach, from a crosscut perspective that takes into consideration the rights of the child and, in particular, the

Batista court cited Article 12 of the UNCRC in its decision. *Rios-Kohn*, *supra* note 136, at 160.

protection and comprehensive development of the child.”¹⁹⁸ Further, in 2012, the Committee on the Rights of the Child addressed the rights of children in the context of international migration and concluded that child rights-based approaches must be mainstreamed into national migration laws and practices.¹⁹⁹

To draft legislation that is authentically human rights-based, the proposed bill must contain the three fundamental principles of human rights law.²⁰⁰ First, the legislation must seek to obtain rights for the protected children themselves, without those rights being based on the rights of immigrants in general, nor based on the rights of the child’s parents. As recognized by the United States Supreme Court, children are unable to object to their unlawful entry—as they are minors brought across the border by adults—and they should not be imputed with their parents’ decision to enter the United States without documentation.²⁰¹

This principle was addressed in the Report from the 2012 Committee on the Rights of the Child as well, which states, “Children should not be criminalized or subject to punitive measures because of their or their parents’ migration status. The detention of a child because of their or their parent’s migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child.”²⁰² As individual rights holders, they also must be heard: “[a]ll children, including children accompanied by parents or other legal guardians, must be treated as individual rights-holders, their child-specific needs considered equally and individually”²⁰³

Second, the legislation must address that the rights of AC must be met out of duty to the AC as rights-holders rather than out of a sense of philanthropic feeling or charity. The legislation must take into

198. Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-21/14, Inter-Am. Ct. H.R. (ser. A) No. 21, ¶ 68 (Aug. 19, 2014).

199. See generally Comm. on the Rights of the Child, Rep. of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration (2012), <https://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2012/DGD2012ReportAndRecommendations.pdf>.

200. See *supra* Section III.A.

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

202. Comm. on the Rights of the Child, *supra* note 199, at ¶ 78.

203. *Id.* at ¶ 75.

account the circumstances from which the AC is coming in his/her home country, as well as the ways that the AC must be treated while he/she is in the care of the United States. The charitable inclination to provide a child in need a quick fix, hot bath, or meal can overshadow larger and more fundamental needs based in human rights, such as the need for safety, autonomy, and the ability to have a decent standard of living. Provisions that ensure that AC have a comfortable and secure shelter with ample food while they are being cared for by the government during the immigration process are indeed important, but they cannot overshadow or replace the larger, fundamental human right of freedom from confinement and the liberty to live autonomously.

Finally, the proposed legislation must contain a means for quantitative or qualitative assessment. Three subsets of assessment were proposed by Byrne in her work on child rights-based immigration: (1) structural indicators (are the laws on the books in line with international treaty obligations and do institutional mechanisms exist to protect rights?); (2) process indicators (are there sufficient implementation mechanisms in place to ensure realization of rights?); and (3) outcome indicators (what is the reality on the ground?).²⁰⁴

However, the most vital human right that legislation can protect and grant for AC is the unambiguous, uncontested right to due process. While the plenary power doctrine has chipped away at the due process rights of immigrants,²⁰⁵ immigrant children have even less of a chance to access fundamental due process rights due to the double disadvantage of their immigrant status and their underage status. Even so, the right to due process is a fundamental international human rights standard: “Due process is not a burden; it is a human right.”²⁰⁶ Any legislation written to protect AC must first and foremost address due

204. Byrne, *supra* note 125, at 75.

205. “The idea that Congress can limit due process however it likes for those seeking entry, has in part been justified by the premise that admission to the country is a privilege not a right and the federal government has plenary power over who enters the country. After a long period asserting the plenary power of Congress over immigration law, often tinged with discriminatory undertones, courts began to suggest that due process may attach in circumstances where there is a liberty or property interest. Then, Congress largely reset the rules with the creation of expedited removal and a new procedural framework in 1996.” B. Shaw Drake & Elizabeth Gibson, *Vanishing Protection: Access to Asylum at the Border*, 21 CUNY L. REV. 91, 106–07 (2017).

206. *Id.* at 105.

process concerns and clearly state that children are entitled to due process regardless of their age or immigration status.

Additionally, the human rights-based “best interest of the child” standard should be in place in *any* new legislation dealing with AC, ensuring that the best interests of the child take priority over migration and other administrative considerations. While there may be criticisms of the “best interest of the child” standard, it nonetheless remains the best standard in place to take into account the particular circumstances and needs of children. Further, it corresponds with the standard already in place in many states as the basis for most domestic family laws.

B. The Codification Must Include the Protections of both the FSA and the UNCRC

Once human rights factors are addressed, the codification must address the protections that the FSA and the UNCRC both individually attempt to secure for AC. The most important of these protections is the shared presumption against detention that can be found in both the FSA and the UNCRC. The FSA stipulated that children should be released from custody within seventy-two hours (expanded to twenty days for needed extensions).²⁰⁷ The UNCRC goes further to provide that “[n]o child shall be deprived of his or her liberty unlawfully or arbitrarily,” and that “detention or imprisonment of a child shall be . . . used only as a measure of last resort.”²⁰⁸ Additionally, legislation must include the general rule of international human rights law: detention of immigrants should never involve punitive purposes. The codification of this provision alone would effectively make Zero Tolerance illegal.

Another important safeguard found in both the FSA and the UNCRC is the provision that the government must maintain up-to-date records on all children in its custody.²⁰⁹ The FSA stipulates that full biographical records be kept on any minors in INS custody for over seventy-two hours, although this stipulation was not adhered to under Zero Tolerance.²¹⁰ The UNCRC states that the government “should ensure concrete measures for enhancing and expanding data collection

207. See *supra* note 39.

208. G.A. Res. 44/25, at 37, *Convention on the Rights of the Child* (Nov. 20, 1989), <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

209. See Stipulated Settlement Agreement, *supra* note 12, at 16–17.

210. See *supra* note 111.

and analysis on the conditions and impact of migration on children. Such data should be disaggregated by, inter alia, age, sex, country of origin, education . . . migration status, issuance of entry . . . and changes in nationality.”²¹¹ The codification of this provision would ensure that children no longer become “lost” or “deleted” while in government care.

Another right stressed by the UNCRC that should also be incorporated into new legislation is the right of the child to remain with their family. The UNCRC states that the government must “ensure that their migration policies, legislation and measures respect the right of the child to family life and that no child is separated from his/her parents by State action or inaction unless in accordance with his/her best interests.”²¹² Further:

States should refrain from detaining and/or deporting parents if their children are nationals of the destination country. Instead, their regulari[z]ation should be considered. Children should be granted the right to be heard in proceedings concerning their parents’ admission, residence, or expulsion, and have access to administrative and judicial remedies against their parents’ detention and/or deportation order, to ensure that decisions do not negate their best interests. Alternatives to detention and deportation in accordance with the child’s best interests, including regulari[z]ation, should be established by law and through practice.²¹³

Including this vital right in any new codification will effectively put an end to family separation and require U.S. immigration policies to return to the “parole/bond/bailment” standard.

Finally, provisions must remain in place to protect those children who must—for whatever reason—remain in government custody. The FSA stipulations requiring detention centers to be state-licensed and maintained in a “safe and sanitary” way (i.e. with access to toilets, sinks, drinking water, food, medical assistance, and adequate temperature control) should be carried over from the FSA to any new

211. Comm. on the Rights of the Child, *supra* note 199, at ¶ 63.

212. *Id.* at ¶ 83.

213. *Id.* at ¶ 84.

legislation, as should the requirements that minors are not housed with adults.²¹⁴ Additionally, any legislation created should seek to surpass the former FSA stipulations by providing guidelines for clear implementation and enforcement of the legislation. This would prevent the legislation from merely being a set of largely unenforceable suggestions, as critics accused the FSA of being. Codification would thus allow the courts to directly provide remedies to those immigrant children who suffer abuses while in government detention. The possibility of litigation would serve as a compliance mechanism to ensure that human rights abuse of children does not happen in government custody.

VI. CONCLUSION

The United States has long been viewed as a country of infinite possibility, affording all children the opportunity to seek out the “American Dream.” As a result of this image, multitudes of parents arrive on U.S. shores and borders with their families daily, hoping to make a better life for their children. Unfortunately, what those families encounter when they finally arrive is far from a dream. Depending on the vagaries of any given presidential administration, the experiences of an immigrant family who arrives intent on pursuing the American Dream vary widely. Often what they end up encountering can seem like more of a nightmare than a dream.

By aligning U.S. national policies on immigrant child welfare with the U.N.’s human rights-based standards accepted by almost every country in the world, the United States can codify and stabilize immigration conditions for children who arrive seeking the American Dream. However, time is of the essence. The political football of immigration is a battle being fought on a day-to-day basis. Congress must act quickly to codify the provisions of the FSA against the backdrop of international human rights law, so that the children of the world who make their way to the United States are treated with the respect and humanity that they deserve. As it stands today, many immigrants in the United States seek salvation just to have their whole family “deleted” at the whim of one leader. It does not have to be this way.

214. See Stipulated Settlement Agreement, *supra* note 12, at 7.