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The Legality of Denying State Foster Care to Illegal Alien Children: Are Abused and Abandoned Children the First Casualties in America's War on Immigration

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COMMENT

THE LEGALITY OF DENYING STATE FOSTER CARE TO ILLEGAL ALIEN CHILDREN: ARE ABUSED AND ABANDONED CHILDREN THE FIRST CASUALTIES IN AMERICA'S WAR ON IMMIGRATION?

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I. INTRODUCTION

Many of our nation's citizens have begun a war on immigration, resulting in a backlash against the immigrant population.¹ This backlash has been clearly evident in California where voters approved Proposition 187 in November of 1994.² Proposition 187 denies illegal immigrants

1. Historically, America has been known as a nation of immigrants. As President Franklin Roosevelt once said, "Remember, remember always that all of us, and you and I especially, are descended from immigrants." Brown, *Shut out Immigrants? No; The United States Must Be a Beacon of Hope to the Oppressed. But Changes in Our Immigration Policies and Practices are Needed*, ORLANDO SENTINEL, July 6, 1993, at A6. However, "during times of economic uncertainty and social disrepair, immigrants are always among the first (and easiest) targets of public antipathy." William J. Bennet, *Immigration: Making Americans; 'Our Collective Cultural Task Is to Remember What We Were and What We Still Are.'* WASH. POST, Dec. 4, 1994, at C7. Recent national opinion polls show that a majority of Americans has become increasingly antagonistic toward immigrants and refugees. By ratios ranging from 2-1 to 3-1, people are saying that fewer outsiders should be allowed into the United States and that they should receive little or no assistance after they arrive. Frank Wright, *Legislative War Waged on Immigrants, Refugees; Foreigners Seeking Haven Will Bear Brunt as Congress Pursues Ways to Cut Budget*, STAR TRIB., June 4, 1995, at 15A. One editorialist has asserted that the current attitude of many Americans is "Out damned immigrants! Legal or illegal, old or young, you're not welcome in the land of the free. Blow up the Statute of Liberty. Torch America's soul. This is the home of the brave, and we're bravely ordering you huddled masses to breathe free somewhere else." James G. Driscoll, *Legal But Ailing? Too Bad. Tough New America Doesn't Have Place For You*, SUN-SENTINEL (Ft. Lauderdale), Dec. 4, 1994, at 7G.

2. Proposition 187 is now codified at CAL. EDUC. CODE §§ 48215, 66010.8 (1995); CAL. GOV'T CODE § 53069.65 (1995); CAL. HEALTH & SAFETY CODE § 130 (1995); CAL. PENAL CODE §§ 113-14, 843(b) (1995); CAL. WELF. & INST. CODE § 10001.5 (1995). California voters approved Proposition 187 by a vote of 60% to 40%. Bill Stall & Cathleen Decker, *Wilson and Prop. 187 Win*, L.A. TIMES, Nov. 9, 1994, at A20. One journalist has termed Proposition 187 "the

many social services, including public education, nonemergency health care, and public benefits.³ Advocates of Proposition 187 have pushed for such initiatives in other states, including Florida, where similar measures are under consideration.⁴

In the war against immigration, two of the states most affected by the immigration influx, Florida and California,⁵ have also waged a battle of their own against the federal government. Seeking reimbursement for the high costs of providing social services to immigrants, Florida Governor Lawton Chiles filed suit against the United States in federal court,⁶ and California Governor Pete Wilson threatened to do the same.⁷ The Florida suit was recently dismissed by the court, primarily because it raised political, not legal, questions.⁸

Concurrently with its nationally publicized lawsuit against the federal government, Florida also began taking internal measures to reduce its expenditures on immigrants. In a move that drew nationwide attention,⁹ Florida officials chose to aim the first round of cuts at the most

most far-reaching anti-immigrant measure ever enacted in this nation of immigrants." Chris Goodwin, *Mad Vlad Finds a Place in the Sun*, SUNDAY TIMES, Nov. 13, 1994. Another journalist has asserted that "A[merica's] war on immigration knows no bounds, and the California ballot initiative code-named 'Save Our State' [Proposition 187] is the most mean-spirited action yet." Gary Delgado, *Calif.'s Latest Proposition Should Be Deported*, BALTIMORE SUN, July 25, 1994, at 7A.

3. For a detailed analysis of Proposition 187, see *Decision '94 / Special Guide to California's Elections: Prop. 187; 187: Denies Services to Illegal Immigrants*, L.A. TIMES, Oct. 30, 1994, at W9.

4. On March 7, 1995, bills similar to Proposition 187 were introduced in the Florida Legislature. FLA. S.B. 262, 1995 Reg. Sess.; FLA. S.B. 476, 1995 Reg. Sess.; FLA. H.B. 245, 1995 Reg. Sess.; see also *Prop. 187 Luncheon Draws Cries of Racism*, MIAMI HERALD, Jan. 11, 1995, at B1.

5. According to United States Immigration and Naturalization Service ("INS") estimates, 1.6 million undocumented immigrants live in California and 345,000 undocumented immigrants live in Florida. Marjorie Lambert, *Immigrant Backlash: Will Florida Be Next?; California's Approval of Proposition 187 Raises Questions About Our State and Its Similar Problems*, ORLANDO SENTINEL, Nov. 11, 1994, at A1.

6. *Chiles v. United States*, 874 F. Supp. 1334 (S.D. Fla. 1994). A report funded by the Department of Justice "estimated [that] Florida's annual expenditures for (1) public schools for undocumented aliens in 1993-94 was \$424 million; (2) emergency services under Medicaid for undocumented aliens in 1993 was \$22.5-\$29.1 million; and (3) incarcerating illegal aliens in 1994 will be \$11.8 million." *Id.* at 1335 n.2.

7. *California May Sue U.S.*, N.Y. TIMES, Feb. 11, 1994, at A14.

8. *Chiles*, 874 F. Supp. at 1344.

9. See, e.g., *Choosing What Child Suffers*, ST. PETERSBURG TIMES, Feb. 12, 1994, at 4B; *Florida Denies Foster Care to Illegal Immigrants' Kids*, STAR TRIB., Feb. 12, 1994, at 9A; *Florida Governor Tells of Alien Woes*, DALLAS MORNING NEWS, Feb. 12, 1994, at 4A; *Florida Governor Tells U.S.: Pay for Aliens*, ST. LOUIS POST-DISPATCH, Feb. 12, 1994, at 13B; *Illegal Immigrants Cost Florida More Than \$1 Billion a Year*, L.A. TIMES, Feb. 12, 1994, at 30A; Larry Rohter, *Florida Opens New Front in Fight on Immigrant Policy*, N.Y. TIMES, Feb. 11, 1994, at 14A; Aurelio Rojas, *Florida Today—California Tomorrow*, S.F. CHRON., Apr. 22, 1994, at A1; *Sharing the Cost of Immigrants*, BOSTON GLOBE, Mar. 30, 1994, at 16; Deborah Sharp, *Refugees*

vulnerable immigrant class—abused and abandoned immigrant children. The Florida Department of Health and Rehabilitative Services (“HRS”) began to deny foster care to undocumented alien children who were abused or abandoned by their natural families.¹⁰ The denial of foster care to these children is part of the ongoing battle between the state and federal governments over the costs of illegal immigration.¹¹ In fact, the *New York Times* referred to Florida’s move to deny foster care to immigrant children as opening a “new front in that battle with Washington.”¹²

As a result of Florida’s action, attorneys filed suit in both state court¹³ and federal court¹⁴ on behalf of these immigrant children. The state court action was voluntarily dismissed when the plaintiff turned eighteen, which rendered him ineligible to be declared dependent on the state.¹⁵ However, the federal court litigation recently culminated in a settlement agreement, in which HRS agreed to provide foster care services to children without regard to their immigration status.¹⁶ Yet, advocates for these children recognize that foster care services for immigrant children continue to remain in jeopardy nationwide.

If Proposition 187 is enforced in California, illegal alien children would be denied foster care.¹⁷ California’s social services officials and

Drain Florida Resources/Silent Invasion’ Puts State in Caring Vs. Cost Quandary, USA TODAY, Mar. 2, 1994, at 9A; Andres Viglucci, *Foster Care Denied to Immigrant Teen*, MIAMI HERALD, Feb. 12, 1994, at B1.

10. See sources cited *supra* note 9.

11. Jim Towey, Secretary of Florida’s Department of Health and Rehabilitative Services said “[t]he state of Florida has been criticized for its ‘cruel decision.’ But I think what’s really cruel is how kids are being pitted against each other because of the federal government’s failure to fund the consequences of the presence of illegal alien children.” *Choosing What Child Suffers*, ST. PETERSBURG TIMES, Feb. 12, 1994, at 4B. However, it appears to be Mr. Towey’s department that has pitted the kids against each other.

12. Rohter, *supra* note 9, at A14. For a discussion of the battle between the states and the federal government, see Jahan Segatol-Islami, *Mr. Jefferson Must Be Smiling: How State Challenges to Immigration Policy May Prompt Re-Evaluation of Federalism as a Core Concept of Our Republic*, 26 INTER-AMERICAN L. REV. 51 (1994).

13. *R.G. v. Florida Dep’t of Health and Rehabilitative Servs.*, No. 94-00779 (Fla. 3d DCA June 3, 1994).

14. Complaint for Injunctive Relief, *Doe v. Towey*, No. 94-1696-CIV-FERGUSON (S.D. Fla. filed Aug. 17, 1994).

15. Interview with Ester Cruz and Juan Carlos Gomez, attorneys with the American Immigration Lawyers Association Pro Bono Project of Legal Services of Greater Miami (Dec. 9, 1995).

16. Stipulation of Settlement, *Doe v. Towey*, No. 94-1696-CIV-FERGUSON (S.D. Fla. filed Feb. 14, 1995).

17. CAL. WELF. & INST. CODE § 10001.5 (West 1995); see also *Decision ‘94 / Special Guide to California’s Elections: Prop. 187; 187: Denies Services to Illegal Immigrants*, L.A. TIMES, Oct. 30, 1994, at W9. After Proposition 187 was approved by California voters, a *New York Times* editorial asked if “Californians really want the people who run child-welfare agencies to abandon children already abandoned by their parents, or to evict abused children now in foster care?” *Why Proposition 187 Won’t Work*, N.Y. TIMES, Nov. 20, 1994, § 4, at 14.

foster care providers are worried that abused and abandoned immigrant children would have no place to go if funding for their foster care placements were actually withdrawn.¹⁸ In fact, the director of one California county's social services agency told the *Los Angeles Times*: "We're concerned because these kids are victims of abuse and neglect Federal and state law requires us to protect all these kids and legal status isn't mentioned. Does 187 change that? If so, what are we to do with the kids in our system who we find are undocumented?"¹⁹ Undocu-

18. Greg Hernandez, *Fate of Foster Children Unclear After Prop. 187*, L.A. TIMES, Nov. 12, 1994, at A1. The director of the Los Angeles County children and family services, Peter Digre, said "[i]t's unimaginable that the voters meant for us to ignore battered, molested or starving two-year-olds just because they are undocumented." Margot Hornblower, *Making and Breaking Law; California's Sweeping Ballot Initiative Against Illegal Immigrants Wins Big Before Landing in Court*, TIME, Nov. 21, 1994, at 68. "I can't believe the public in any way intends if we find a battered 2-year-old toddler that we not remove the toddler from the situation," said Digre. "Our responsibilities are outlined in great detail in (federal law) . . . and we have a whole network of court orders that tell us what to do." Paul Feldman, *Uncertainty, Lawsuits Would Greet Prop. 187*, L.A. TIMES, Oct. 31, 1994, at A1. The Director of the Placer County Welfare Department, Ray Merz, said that under Proposition 187, services now rendered by county health and welfare departments would have to be withheld until citizenship is proven. Merz was also concerned about the affect of Proposition 187 on Child Protective Services: "No social services to abused kids. If you did provide, it would be at county expense instead of state and federal funds Kids could not be placed in foster care until we verify citizenship." Molly Kinetz, *Schools, Hospitals Wonder at Prop. 187 Effects*, SACRAMENTO BEE, Oct. 30, 1994, at N12. In seemingly stark contrast to California state welfare officials who opposed the denial of state care for abused and abandoned immigrant children, HRS officials in Florida actually initiated a directive that discriminated against such children based on their alienage. See Complaint for Injunctive Relief, Exhibits A & B, Doe v. Towey, No. 94-1696-CIV-FERGUSON (S.D. Fla. filed Aug. 17, 1994).

19. Hernandez, *supra* note 18 (quoting Larry Leaman, director of Orange County's foster care system). Leaman also stated, "[i]f you let your imagination run wild, you can envision kids who are victims with no ability of government to spend money to help them Maybe there's something in the fine print of 187 that says nothing changes." *Id.*

Peter Schey, President of the Center for Human Rights and Constitutional Law, referred to the inappropriateness of "taking a 3-year-old child, who is being battered or sexually abused by his or her parent, and telling that child that they're [sic] not eligible for foster care placement." *Larry King Live*, (CNN television broadcast, Nov. 10, 1994). In response, California Attorney General Dan Lungren claimed that "we have humanitarian exceptions with respect to situations like that." *Id.* However, as Schey noted, "they're not set forth in this bill." *Id.*

Indeed, one of the measure's co-authors, Harold Ezell, a former western regional commissioner of the INS, said even he isn't sure how the proposition will affect foster kids. Hernandez, *supra* note 18. According to Ezell, "[i]t's something we don't have a set answer on You put these broad parameters out there and the refinement is done in the regulations. But whether a child or young adult is a ward of the court or in foster care doesn't change their immigration status." *Id.*

Another coauthor of Proposition 187, attorney Alan Nelson, was also unclear about the measure's intent on abused and abandoned children, because he did not draft that section. "But if they are illegally in the country, they shouldn't be getting publicly funded benefits and that would include foster care," Nelson said. Feldman, *supra* note 18. Ezell did say that illegal immigrant foster children may require special attention if the law is implemented. Hernandez, *supra* note 18. "If they have been orphaned or abandoned or delinquent, all of that has to be taken into consideration with an immigration judge They may have to go before an immigration judge and ask for a stay of deportation." *Id.* Thus, it appears that the authors of

mented alien children in California's foster care system²⁰ are themselves concerned about what will happen to them in light of Proposition 187.²¹

In the meantime, nothing in California is slated to change immediately. The constitutionality of Proposition 187 has been challenged in court,²² and a federal district court has issued a preliminary injunction, blocking enforcement of Proposition 187 until the legal challenges against it are resolved.²³ Legal experts predict that this could take up to

Proposition 187 would have America eventually deport orphaned and abused immigrant children back to foreign countries that they may have no tie to, other than birth, while denying these children foster care in the interim.

20. California records reveal several examples of children who were brought to the state illegally, then abused, neglected or abandoned. Among them are:

* A 14-year-old boy who was sent by his family in Mexico to California to live with his older brother. The brother abandoned the youth, who went to work as a live-in maid for an Orange County family and then was fired from that job. The homeless youngster jumped off a bridge, but survived and was placed in a group home.

* A 12-year-old boy whose mother moved to North Carolina to find work, leaving him in the care of her boyfriend. A short time later, the boyfriend abandoned the child, who is now in a group home.

* An 8-year-old girl who was brought to California from Romania in 1990 by her adoptive mother. She was abandoned and left in an abusive situation with the adoptive mother's relatives. The child is now living in a group home.

* A 16-year-old boy from England, who was neglected and exploited by his father. The boy received a large settlement from an auto accident and the father tried to use the money for his own personal gain while refusing to seek medical and psychological care for his son.

* A 14-year-old boy whose mother held his hand over a burning stove, cut him with a kitchen knife and struck him with a broom and metal tubing.

Hernandez, *supra* note 18.

21. "These are kids who are so fragile and have been injured emotionally, physically and spiritually," said Mary Ann Xavier, director of the Florence Crittenton Center in Fullerton [California], a residential treatment center for 180 troubled children and youth. "They've already been totally uprooted and put into another environment and now another fear has been thrown into them."

"These are really damaged kids and we'd like them to be at ease", Xavier added. "It's real scary to them. We have been taking their emotional pulse. We have kids who are asking how they can become legal. We also have girls who are illegal but have babies who are legal and that creates a real complication."

Xavier said that other children are concerned because some of their relatives are illegal immigrants. "Wherever their families are, they may not be there when they go looking for them," she said.

Id.

22. Paul Feldman & James Rainey, *U.S. Judge Orders Ban on Prop. 187*, L.A. TIMES, Nov. 23, 1994, at B1.

23. Nearly one year after the preliminary injunction was issued, the federal district court judge granted in part plaintiffs' motion for summary judgement on the ground that parts of the initiative were preempted by the federal government's exclusive constitutional authority over the regulation of immigration. *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995) (consolidating five actions filed in the United States District Court for the Central District of California). Because the court's ruling with respect to the motions did not fully dispose of the case, the preliminary injunction remains in effect until further order of the court. *Id.*

three years as both sides vow to take the matter all the way to the United States Supreme Court.²⁴ Among the many legal issues that will need resolution is the constitutionality of denying foster care services to illegal alien children.

The recent cases in Florida provided the opportunity to address this very issue in court. However, because the cases were withdrawn or settled, there are no rulings on the constitutionality of denying foster care to immigrant children. As California begins to litigate Proposition 187, this issue will undoubtedly be addressed.

Moreover, this issue is also being addressed in another context. The Republican Party's "Contract With America" promised congressional passage of the Personal Responsibility Act which would significantly curtail public benefits to American citizens and noncitizens.²⁵ The Personal Responsibility Act, introduced in the House of Representatives in January of 1995,²⁶ contains a provision that would deny foster care to alien children.²⁷ The House of Representatives passed the Personal Responsibility Act, including this provision, in March of 1995.²⁸

Thus, immigrant children who are abused or abandoned are at risk

at 787; see also Kenneth B. Noble, *Initiative on Aliens Suffers Its Biggest Setback Yet*, N.Y. TIMES, Dec. 15, 1994, at A18.

24. Maura Dolan, *Parts of Prop. 187 May Be Blocked 2 or More Years*, L.A. TIMES, Nov. 16, 1994, at 1A.

25. The Contract With America asserts that one of the main goals of the Personal Responsibility Act is to cut spending for welfare programs. See Republican Contract With America, available in LEXIS, News Library. The Contract With America has been sharply criticized as being "anti-children", among other things. Representative Pat Schroeder, *The GOP's 'Dismantlementarianism'; Democratic Rep. Pat Schroeder Deconstructs the Contract. Her Conclusion: 'Anti-Children, Anti-Poor, Anti-Worker, Anti-Legal Immigrant, Anti-Consumer, and Anti-Environment'*, ROLL CALL, Jan. 9, 1995.

26. H.R. 4, 104th Cong., 1st Sess. (1995).

27. *Id.* § 401 (Ineligibility of Aliens for Public Welfare Assistance). Among the 52 programs for which the Act seeks to render aliens ineligible are the "program of foster care and adoption assistance under part E of title IV of the Social Security Act" and the "child welfare services program under part B of title IV of the Social Security Act." *Id.*

Going much further than the scope of Proposition 187, the federal bill not only renders illegal aliens ineligible for social service programs, but also renders *lawful* permanent residents ineligible for assistance. *Id.* Thus, "[w]hat began as a crackdown on illegal aliens is rapidly escalating into a war against legal immigration" as well. *The War on Immigration*, DETROIT NEWS, June 25, 1995.

28. Robert Pear, *House Backs Bill Undoing Decades of Welfare Policy*, N.Y. TIMES, Mar. 25, 1995, at 1. In addition, under the House bill, states would get a total of \$15.4 billion dollars a year for family assistance. Robert Pear, *Clinton Objects to Key Elements of Welfare Bill*, N.Y. TIMES, Mar. 26, 1995, at 1. The states could not award this money to aliens, but could structure their own welfare programs, setting other eligibility criteria and benefit levels as they saw fit. *Id.* However, Senator John Chafee (R-R.I.) said, "'You'll find us in the Senate a little more skeptical of the states' ability to run these programs in such a splendid fashion. Their handling of foster care has not been very good.'" *Id.* The bill was eventually vetoed by President Clinton. See Robert Pear, *Battle Over the Budget: The Legislation*, N.Y. TIMES, Jan. 10, 1996, at B7.

of being denied foster care on two levels—at the state level under Proposition 187 and copycat legislation²⁹ and at the federal level under the Personal Responsibility Act.³⁰ Florida, however, has been the first to actually deny immigrant children foster care benefits by refusing to accept them into the foster care system.³¹

Although Florida's litigation ended with a settlement agreement, the legal issues raised in court documents shed light on the resolution of the ultimate issue—the constitutionality of denying foster care to immigrant children. Part II of this Comment examines the litigation in Florida and addresses the legality of denying foster care to illegal alien children under Florida law. Part III of this Comment examines the federal constitutionality of Florida, California, or any other state denying foster care to illegal alien children. This part focuses on *Plyler v. Doe*, in which the United States Supreme Court struck down as unconstitutional a Texas statute that sought to deny a free public education to illegal alien children. The Comment applies the reasoning of *Plyler v. Doe*

29. Under one of the proposed Florida bills: "A person may not receive any public social services or benefits to which the person is otherwise entitled, until the legal status of that person has been verified" as a citizen, a lawful permanent resident, or a person who is otherwise authorized under federal law to be present within the United States. FLA. H.B. 245, 1995 Reg. Sess.; FLA. S.B. 262, 1995 Reg. Sess. In addition, if a local or state agency determines that a person who applies for public social services or benefits does not possess legal status, then the agency "must notify the person in writing of his apparent illegal immigration status and that the person must obtain legal status or leave the United States." *Id.* Furthermore, INS shall be notified of the person's apparent illegal status. *Id.* Thus, if this proposed bill were passed, abandoned or abused illegal alien children would be denied foster care by the state of Florida and would then be reported to INS. Such legislative action would supercede the court settlement in *Doe v. Towey*, Stipulation of Settlement, Exhibit A, *Doe v. Towey*, 94-1696-CIV-FERGUSON (S.D. Fla. filed Feb. 14, 1995), and once again place Florida's immigrant children in jeopardy.

30. One child advocate has asserted that "the passage of California Proposition 187 prohibiting health care, child protection and education to undocumented children, [as well as] efforts to reduce the federal budget disproportionately against children . . . reflect an increasing 'demonization' and harshness toward children." Bernardine Dohrn, *Listen to the Children*, CHI. TRIB., Aug. 27, 1995, at 6.

31. At the American Bar Association's 1995 Midyear Meeting, held in Miami on February 13-14, the Steering Committee on the Unmet Legal Needs of Children presented "a resolution urging that federal, state, local and territorial governments recognize the rights of and not discriminate against any child based on the child's citizenship or immigration status or that of the child's parents and oppose efforts to restrict or deny equal access to such children to public education, health care, foster care or social service." Michael S. Greco, *The House of Delegates' Midyear Meeting*, MASS. LAW. WKLY, May 1, 1995, at 24. The resolution garnered a great deal of support and was approved by voice vote of the House of Delegates, the legislative policy-making body of the ABA. *Id.* "The resolution made no specific recommendation regarding U.S. immigration policy but simply sought to preclude using children as pawns in the policy debate." *ABA Says No to Litigation 'Reforms' in Republican Contract With America*, 63 U.S.L.W. 2506, 2510 (U.S. Feb. 21, 1995). Catherine J. Ross, of the Boston College of Law, stated, "'Children should not become the victims of the public debate on immigration policy.'" *Id.* Mary Hernandez, president of the Hispanic National Bar Association, added that "'picking on innocent children is not a civilized way for a society to address immigration policy.'" *Id.*

to the present issue and maintains that the denial of foster care to illegal alien children is similarly unconstitutional. Part IV examines United States statutory laws mandating cooperative federalism in attending to the needs of immigrant children who have been abandoned or abused. It notes the lack of cooperation that states have claimed to have received from the federal government, but concludes nevertheless that the states cannot violate the rights of these children by denying them the equal protection of the laws under the federal Constitution.

II. THE ISSUE ADDRESSED IN FLORIDA

Until December 1993, the practice of HRS had been to take abused and abandoned immigrant children into state custody, have them declared dependent in juvenile court, and provide them with state foster care benefits.³² However, without any formally announced change in policy, actions by HRS began to indicate that its policy toward illegal alien children had changed.³³

In the cases of two alien children represented by Legal Services of Greater Miami, HRS submitted motions to the juvenile court in Dade County to dismiss petitions for dependency made on behalf of these children.³⁴ In both cases, the children lived in the United States without their parents, who were either deceased or whose whereabouts were unknown.³⁵ The core of the HRS argument was that the state court lacked jurisdiction over these children.³⁶ HRS maintained that INS was the legal custodian of these alien children and that it and the federal government, not HRS and the state government, were responsible for the care of these children.³⁷

In both cases, the juvenile court granted the HRS motions to dis-

32. Interview with Ester Cruz & Joan Carlos Gomez, Attorneys with the American Immigration Lawyers Association Pro Bono Project of Legal Services of Greater Miami (Dec. 19, 1995); *see also* Rohter, *supra* note 9.

33. Christina Zawisza, director of the Children First project at Legal Services of Greater Miami, said that since 1990 her organization successfully handled . . . the cases of more than 100 immigrant children in state custody who were seeking permanent legal residency through special juvenile visas. 'Now, all of a sudden we get these cases, and [HRS officials] are balking,' she said.

Rohter, *supra* note 9.

34. Motion to Dismiss Petition for Dependency, *In re* R.R., No. 94-15030 D003 (Fla. 11th Cir. Ct. Dec. 9, 1993); Motion to Dismiss Petition for Dependency, *In re* R.G., No. 93-15754 D003 (Fla. 11th Cir. Ct. Dec. 9, 1993). Initials are being utilized to protect the confidentiality of the children. Juvenile court records are not available to the public; however, copies of all court documents, with the children's names deleted, are on file with the author.

35. *See* sources cited *supra* note 34; *see also* Rohter, *supra* note 9.

36. *See* sources cited *supra* note 35.

37. *See* sources cited *supra* note 35.

miss the dependency petitions.³⁸ Legal Services subsequently appealed the case of one child to Florida's Third District Court of Appeal.³⁹ Legal Services later voluntarily dismissed the appeal because the child turned eighteen years old during the pendency of the appeal, rendering the dependency case moot.⁴⁰

However, HRS's new unwritten policy of refusing foster care to alien children did not escape legal challenge. Its handling of another alien child's case in Dade County led to a local law firm filing suit in the United States District Court for the Southern District of Florida in August of 1994.⁴¹ In this case, HRS agreed to take custody of an abused fourteen-year-old Haitian girl.⁴² The detention petition filed by HRS alleged that the girl had suffered repeated physical abuse, sexual abuse, and neglect, and HRS subsequently placed the girl in a state shelter.⁴³ However, HRS declined to file a dependency petition to have her placed in foster care.⁴⁴

Through her court-appointed guardian ad litem, the child, referred to as Jane Doe, brought an action for injunctive relief under 42 U.S.C. § 1983.⁴⁵ In *Doe v. Towey*, the child maintained that HRS was discriminating against her on the basis of alienage and denying her the equal protection of the laws.⁴⁶ The child's attorney later added another plain-

38. Order Dismissing Petition for Dependency, *In re R.R.*, No. 94-15030 D003 (Fla. 11th Cir. Ct. Feb. 16, 1994); Order Dismissing the Petition for Dependency and Denying Motion for Appointment of a Guardian Ad litem, *In re R.G.*, No. 93-15754 D003 (Fla. 11th Cir. Ct. Feb. 23, 1994).

39. *R.G. v. Florida Dep't of Health and Rehabilitative Servs.*, No. 94-00779 (Fla. 3d DCA June 3, 1994). INS transferred the second child to another state and, thus, jurisdiction was lost. Interview with Cruz & Gomez, *supra* note 32.

40. Interview with Cruz & Gomez, *supra* note 32.

41. Complaint for Injunctive Relief, *Doe v. Towey*, No. 94-1696-CIV-FERGUSON (S.D. Fla. filed Aug. 17, 1994).

42. *Id.* at 2-3.

43. *Id.* at 3.

44. *Id.* at 5.

45. Section 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1988).

46. Complaint for Injunctive Relief, *Doe v. Towey*, No. 94-1696-CIV-FERGUSON, at 3. The complaint stated that HRS was violating "[p]laintiff's right protected under the Fifth and Fourteenth Amendments to the Constitution of the United States to the equal protection of the laws, specifically Florida Statutes, Chapter 39," as well as "[p]laintiff's right protected under the Eighth and Fourteenth Amendments to the Constitution of the United States to be free from cruel and unusual punishment, and physical and emotional harm occurring under color of state law." *Id.* at 1-2.

tiff who had also been denied foster care,⁴⁷ and subsequently filed a motion to certify the class of abused and abandoned immigrant children being discriminated against by HRS.⁴⁸

Before the motion to certify the class was heard by the court, HRS agreed to settle the case and to issue an emergency rule stating that it would not discriminate against children based on their immigration status.⁴⁹ Reporting on the settlement, a Miami newspaper stated that HRS "conceded defeat" in the lawsuit.⁵⁰ However, Dade County's district director of HRS claimed that the suit was settled strictly to avoid litigation costs and that it was "totally without merit."⁵¹ Nevertheless, the issues raised in the litigation merit consideration in examining the legality of denying foster care to alien children under state and federal law.

In Florida, Chapter 39 of the Florida Statutes governs child dependency cases.⁵² Among the purposes of this chapter are to provide for the care and protection of children, to ensure secure and safe custody of children, to ensure enforcement of children's constitutional and other legal rights, and to provide judicial procedures through which children are assured fair hearings.⁵³ Nowhere in Chapter 39 is any distinction made based on the alienage of a child.

In fact, as four United States Immigration Court judges noted, "most state laws, including those of Florida, make no distinction between a child who is a foreign national or a Florida resident. This is premised on the notion that the state has an overriding social and humanitarian interest in the welfare of *all* children, no matter what their citizenship or nationality, if they fall within the jurisdiction of the state."⁵⁴ Perhaps anticipating the issue at hand, the judges asserted that "[i]n Florida, the Department of Health and Rehabilitative Services normally has an affirmative duty to take steps for an unprotected minor, regardless of their legal residency or citizenship."⁵⁵

In the initial state court litigation, however, HRS alleged that the Florida state courts lack jurisdiction to adjudicate the cases of alien chil-

47. Amended Complaint for Injunctive and Declaratory Relief, *Doe v. Towey*, No. 94-1696-CIV-FERGUSON (S.D. Fla. filed Sept. 22, 1994).

48. Plaintiffs' Motion for Class Certification, *Doe v. Towey*, No. 94-1696-CIV-FERGUSON (S.D. Fla. filed Sept. 26, 1994).

49. Stan Yarbo, *HRS Agrees to Provide Equal Foster Care*, MIAMI DAILY BUS. REV., Feb. 17, 1995, at B1.

50. *Id.*

51. *Id.* at B5.

52. FLA. STAT. ch. 39 (1995).

53. FLA. STAT. § 39.001(1)(a), (b) (1995).

54. Judge J. Daniel Dowell et al., *Protection and Custody of Children in United States Immigration Court Proceedings*, 16 NOVA L. REV. 1285, 1295 (1992).

55. *Id.* at 1296.

dren.⁵⁶ The jurisdiction of the juvenile division of the state court is set forth in Chapter 39, which states that “[t]he circuit court shall have exclusive original jurisdiction of all proceedings” in which a child is alleged to be dependent.⁵⁷

Under Chapter 39, a child means “any unmarried person under the age of 18 . . . alleged to be dependent, in need of services, or from a family in need of services.”⁵⁸ In the instant cases, the alien children were unmarried persons under the age of eighteen who were alleged to be dependent and in need of services. Hence, the juvenile court would indeed have jurisdiction over them. The question then turns to what is necessary to adjudicate these children dependent and, thus, eligible for foster care benefits?⁵⁹

Florida Statutes define a “child who is found to be dependent” as one who is found by the court “[t]o have been abandoned, abused, or neglected by the child’s parents or other custodians.”⁶⁰ The alien children in the instant case have all been abandoned, abused, or neglected by their parents or other custodians. Consequently, these children would be considered dependent within the meaning of the statute.⁶¹

56. Motion to Dismiss Petition for Dependency, *In re* R.R., No. 94-15030 D003 (Fla. 11th Cir. Ct. Dec. 9, 1993); Motion to Dismiss Petition for Dependency, *In re* R.G., No. 93-15754 D003 (Fla. 11th Cir. Ct. Dec. 9, 1993).

57. FLA. STAT. § 39.40(2) (1995).

58. *Id.* § 39.01(10) (1995).

59. With regard to petitions for dependency, Chapter 39 provides that “[a]ll proceedings seeking an adjudication that a child is dependent shall be initiated by the filing of a petition by an attorney for [HRS], or any other person who has knowledge of the facts alleged or is informed of them and believes that they are true.” FLA. STAT. § 39.404(1) (1995). Thus, under the laws of Florida, it is not necessary for HRS to initiate a petition to declare a child dependent; any person with knowledge of the facts may file a dependency petition.

With regard to the contents of dependency petitions, the Florida Rules of Juvenile Procedure state: “A dependency petition may be filed as provided by law. Each petition shall be entitled a petition for dependency and shall allege sufficient facts showing the child to be dependent based upon applicable law.” FLA. R. JUV. P. 8.310. By moving to dismiss the dependency petitions in the instant cases, HRS argued that the petitions did not allege sufficient facts showing the children to be dependent based on applicable law.

60. FLA. STAT. § 39.01(14)(a) (1995).

61. In the cases of the children represented by Legal Services of Greater Miami, HRS maintained that any acts of dependency inflicted on these children by their parents, custodians, or legal guardians, occurred outside the United States. Motion to Dismiss Petition for Dependency, *In re* R.R., No. 94-15030 D003 (Fla. 11th Cir. Ct. Dec. 9, 1993); Motion to Dismiss Petition for Dependency, *In re* R.G., No. 93-15754 D003 (Fla. 11th Cir. Ct. Dec. 9, 1993). Consequently, HRS maintained that there was no basis for a dependency finding in Florida. HRS further maintained that INS was the children’s custodian in Florida and that the dependency petitions did not allege that INS abused, neglected, or abandoned them. See cases cited *supra*.

However, according to Chapter 39 of the Florida Statutes:

“Abandoned” means a situation in which the parent or legal custodian of a child or, in the absence of a parent or legal custodian, the person responsible for the child’s welfare, while being able, makes no provision for the child’s support and

The responsibility of HRS to dependent children is set forth in Chapter 409 of the Florida Statutes, which provides that "[HRS] shall conduct, supervise, and administer a program for dependent children and their families."⁶² The goals toward which the services of HRS are to be directed include "[t]he permanent placement of children who cannot be reunited with their families or when reunification would not be in the best interest of the child" and "[t]he protection of dependent children or children alleged to be dependent, including provision of emergency and long-term alternate living arrangements."⁶³

Where the parents and family members of alien children are deceased or their whereabouts are unknown, the children cannot be reunited with their families. When parents or family members of alien children have abused or neglected the children, reunification may not be in the best interests of the children. Consequently, under Florida law, HRS is responsible to these children for permanent placement, provision of emergency and long-term alternate living arrangements, and foster care services. Thus, by denying foster care to alien children, HRS was not meeting its responsibility to these children under state law.⁶⁴

makes no effort to communicate with the child, which situation is sufficient to evince a willful rejection of parental obligations. If the efforts of such parent or legal custodian, or person primarily responsible for the child's welfare to support and communicate with the child are, in the opinion of the court, only marginal efforts that do not evince a settled purpose to assume all parental duties, the court may declare the child to be abandoned.

FLA. STAT. § 39.01(1) (1995).

The children in these instant cases would meet the statutory definition of being declared abandoned by their parents. Even if INS were their present custodian, the children would still meet the statutory definition of being abandoned. INS is not assuming all parental duties for these children, nor is it responsible or able to do so. The only agency responsible and able to assume all parental duties for these children is HRS.

62. FLA. STAT. § 409.145(1) (1995).

63. *Id.*

64. HRS had initially argued that I.N.S. was responsible for the care of alien children and that these children could receive equally good care in I.N.S. custody. Motion to Dismiss Petition for Dependency, *In re R.R.*, No. 94-15030 D003 (Fla. 11th Cir. Ct. Dec. 9, 1993); Motion to Dismiss Petition for Dependency, *In re R.G.*, No. 93-15754 D003 (Fla. 11th Cir. Ct. Dec. 9, 1993). However, there are numerous protections and benefits of state foster care that are not provided by INS.

Federal law mandates that as a condition for receiving funds for foster care, states must have a case plan and case review system for each child receiving foster care maintenance payments. 42 U.S.C. § 671(a)(16) (1994). The case plan must include a written description of the programs and services being offered to the child, 42 U.S.C. § 675(1) (1994), and the status of each child must be reviewed at least once every six months. 42 U.S.C. § 675(5)(B) (1994).

In accordance with this federal mandate, Chapter 39 of the Florida Statutes sets forth the state requirements for the foster child's case plan and case review system. FLA. STAT. §§ 39.4031, 39.451 (1995). Moreover, the Florida Administrative Code delineates the numerous rights and benefits of children who are declared dependent on the state. *See, e.g.*, FLA. ADMIN. CODE Rule 10-M-6.128 (1995). Alien children who are denied state foster care are denied the state benefits and services awarded to children who are not aliens. They are denied the federal protections of a

Through the settlement agreement in *Doe v. Towey*, HRS finally acknowledged its responsibility to alien children under the law.⁶⁵ In settling the case, HRS promulgated an emergency rule affirming that HRS has the same statutory obligations to alien children as it does to other children.⁶⁶ The rule stated that "[t]he immigration status of a child shall have no bearing on either the care or service rendered by HRS to a child or on judicial proceedings undertaken by HRS on behalf of the child."⁶⁷ This rule has since been adopted as final and incorporated into the Florida Administrative Code.⁶⁸

Thus, as a result of this litigation, the state of Florida now has a specific rule mandating that all children who have been abused, neglected or abandoned are to be treated the same, regardless of their immigration status.⁶⁹ Florida's new rule acknowledges that "Chapters 39, 409 and 415 apply to all children in Florida without regard to alienage or immigration status except where alienage or immigration status is explicitly referred to as a statutory condition of coverage or eligibility."⁷⁰

The question still exists, though, whether Florida's laws could be amended in order to make legal immigration status a statutory condition of eligibility for foster care services. This is exactly how the citizens of California voted to amend California's laws through Proposition 187.⁷¹ Moreover, just one month after Florida's promulgation of the alien children rule, a local citizen group announced its plans to pursue a ballot initiative, similar to California's Proposition 187, which would deny almost all social services to undocumented aliens in Florida.⁷² However, the question remains whether the Federal Constitution permits a state to deny foster care services to children based on their illegal alienage.

case plan and case review system given to children who are not aliens. Quite simply, they are denied the equal protection of the laws.

65. Stipulation of Settlement, *Doe v. Towey*, No. 94-1696-CIV-FERGUSON (S.D. Fla. filed Feb. 14, 1995).

66. Alien Children, Rule 10MER95-2, Fla. Admin. Weekly, Mar. 10, 1995, at 1438.

67. *Id.* at 1439.

68. FLA. ADMIN. CODE Rules 10M-47.001, 10M-47.002, 10M-47.003 (1995). The full text of Rule 10M-47.003 is set out in the appendix to this Comment.

69. *Id.*

70. *Id.* Rule 10M-47.001 (1995).

71. Hernandez, *supra* note 18.

72. See Karen Branch, *Florida's Prop. 187 Bill Loses Some Bite*, MIAMI HERALD, Mar. 13, 1995, at 1B; see also FLA. H.B. 245, 1995 Reg. Sess. FLA. S.B. 262.

III. *PLYLER V. DOE*. THE UNITED STATES SUPREME COURT
ADDRESSES THE DENIAL OF EDUCATION TO ILLEGAL ALIEN
CHILDREN

While no court has specifically analyzed the constitutionality of denying illegal alien children foster care benefits, the United States Supreme Court has analyzed the constitutionality of denying illegal alien children a public education. In *Plyler v. Doe*,⁷³ the Court struck down as unconstitutional a Texas statute preventing undocumented alien children from receiving a free public education.⁷⁴ The plaintiff in *Doe v. Towey* asserted that she was likely to succeed on the merits of her case under the law as enunciated in *Plyler*.⁷⁵ In fact, she maintained that "[f]or a child who has suffered the type of abuse alleged by HRS in this case," the state's denial of foster care is "qualitatively at least as egregious as locking the schoolhouse door."⁷⁶

Like education, child welfare is traditionally a state, rather than federal, responsibility. Yet, like educational programs, a state's child welfare programs must be administered in accordance with the United States Constitution. Thus, in reviewing the federal constitutionality of a state's denial of foster care to illegal alien children, a court should look to the teachings of *Plyler*. It is important, therefore, to examine those teachings and determine how they apply to the present issue.

In *Plyler*, the United States Supreme Court established that illegal aliens are entitled to the equal protection of the laws under the Fourteenth Amendment to the United States Constitution.⁷⁷ In reviewing state legislative action under the Equal Protection Clause, the Court has treated as presumptively invidious those classifications that disadvantage a suspect class or that impinge upon a fundamental right.⁷⁸ In this narrow class of cases, the Court has applied a standard of strict scrutiny, requiring the state to demonstrate that its classification is narrowly tai-

73. 457 U.S. 202 (1982).

74. *Id.* at 230.

75. Motion for Leave to Conduct Expedited Discovery at 4, *Doe v. Towey*, No. 94-1696-CIV-FERGUSON (S.D. Fla. filed Aug. 17, 1994).

76. *Id.* at 5.

Plaintiff should succeed on the merits of her claim since, in this case, unlike *Plyler*, the state legislature has not endorsed Defendants' discriminatory acts, thereby depriving Defendants' conduct of any pretense of legitimacy as a matter of state action, and second, since the discrimination is being practiced by the child's around-the-clock substitute parent and not merely the child's educator. The harm is likewise more grievous.

Id. at 4-5.

77. 457 U.S. at 210. The Fourteenth Amendment provides in pertinent part that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protections of the laws." U.S. CONST. amend. XIV.

78. 457 U.S. at 216-17.

lored to serve a compelling government interest.⁷⁹

The *Plyler* Court rejected the claim that illegal aliens are a suspect class,⁸⁰ and also rejected the claim that public education is a fundamental right.⁸¹ Yet, the special circumstances present in the case persuaded the Court to apply a standard of intermediate scrutiny,⁸² requiring a showing of a "substantial state interest" that Texas could not meet.⁸³ The special circumstances surrounding the denial of education to illegal alien children appear to be similarly present in the denial of foster care to these children. Thus, it is important to carefully analyze *Plyler* to see if its rationales apply equally to the present issue.

After determining that illegal aliens were entitled to the protection of the Fourteenth Amendment, the *Plyler* Court determined that children were special members of the illegal alien "underclass".⁸⁴ The Court stated that those who enter the United States illegally should be prepared to bear the consequences but recognized that the children of illegal entrants are not "comparably situated."⁸⁵ The Court focused on the fact that the children could not control their parents' conduct and thus were not at fault for their illegal status.⁸⁶ Consequently, the Court held that "legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice."⁸⁷

This reasoning seems particularly applicable to the state's denial of foster care to alien children. In *Plyler*, the misconduct of the parents consisted solely of their illegal entrance into the country. In the case of alien children in need of foster care, however, there is additional misconduct of the parents that is even more onerous. It seems inconceivable that denying foster care to innocent children who have been abused, neglected, or abandoned by their parents could "comport with fundamental conceptions of justice."

However, a large part of *Plyler* focused specifically on the significance of education in our society and the disability imposed by illiteracy.⁸⁸ The Court did not hold that education was a fundamental right, but believed education to be an important prerequisite for the exercise of fundamental rights.⁸⁹ Like education, foster care is not a fundamental

79. *Id.* at 217.

80. *Id.* at 219 n.19.

81. *Id.* at 221.

82. *Id.* at 218-24.

83. *Id.* at 230.

84. *Id.* at 219.

85. *Id.* at 220.

86. *Id.*

87. *Id.*

88. *Id.* at 221-23.

89. *Id.*

right. Yet, unlike education, foster care is not an express prerequisite for exercising fundamental rights. This may be a crucial distinction between the denial of foster care and the denial of education.

However, the *Plyler* Court also discussed substantial policy reasons for invalidating the denial of education to children, and these reasons are also applicable to the denial of foster care. The Court cited the "inestimable toll" that depriving children of an education would have on the children's "social, economic, intellectual, and psychological well-being."⁹⁰ Depriving abused and abandoned children of care would no doubt have an even greater toll on the social and psychological well-being of these children. In fact, the foster care system exists specifically to protect the well-being of children.

In addition to the effect that the denial of an education would have on the alien children, the *Plyler* Court was also concerned about the effect such a denial would have on the nation, noting that it would "surely add[] to the problems and costs of unemployment, welfare, and crime."⁹¹ Similarly, denying alien children foster care would also add significantly to these problems, as well as to the problems of homelessness and AIDS. On the streets, runaway children often turn to drugs and prostitution⁹² and fall victim to crime⁹³ and AIDS⁹⁴ at alarming rates. If alien children who are abandoned or abused are denied foster care, they will have nowhere to go. Just as "alien children should not be left on the streets uneducated,"⁹⁵ so should alien children not be left on the streets period.

In *Plyler*, the Court did identify three colorable state interests that might support discriminatory action by a state.⁹⁶ First, a state, as Texas asserted, may have an interest in protecting itself from an influx of illegal immigrants.⁹⁷ However, the *Plyler* Court stated that "[t]he dominant

90. *Id.* at 222.

91. *Id.* at 230.

92. D. KELLY WEISBERG, *CHILDREN OF THE NIGHT: A STUDY OF ADOLESCENT PROSTITUTION* (1985); Magnus J. Seng, *Child Sexual Abuse and Adolescent Prostitution: A Comparative Analysis*, 24 *ADOLESCENCE* 665 (1989).

93. JULEE H. KRYDER-COE ET AL., *HOMELESS CHILDREN AND YOUTH* 45 (1991); Les B. Whitbeck & Ronald L. Simons, *Life on the Streets: The Victimization of Runaway and Homeless Adolescents*, 22 *YOUTH & SOCIETY* 108 (1990).

94. Patricia Hersen, *Coming of Age on City Streets*, *PSYCHOL. TODAY*, Jan. 1988, at 28; Fern Shen, *An Entrenched AIDS Incubator; In This Ugly Urban War, Urban Blight Is Enemy's Breeding Ground*, *WASH. POST*, Apr. 13, 1992, at A1.

95. 457 U.S. at 238 (Powell, J., concurring). "If the resident children of illegal aliens were denied welfare assistance, made available by government to all other children who qualify, this also—in my opinion—would be an impermissible penalizing of children because of their parents' status." *Id.* at 239 n.3.

96. *Id.* at 227-30.

97. *Id.* at 228.

incentive for illegal entry into the State of Texas is the availability of employment; few if any illegal immigrants come to this country . . . in order to avail themselves of a free education."⁹⁸ Florida has asserted a similar state interest, maintaining that a court ruling forcing Florida to provide foster care to alien children " 'would send a signal to parents in Cuba, Haiti, Guatemala and elsewhere that there exists a new right to foster care and a better life for their kids.' "⁹⁹ However, it seems no more likely that the dominant incentive for alien migration is foster care than education, especially since availability of foster care depends on abuse by parents.

The second colorable interest asserted in *Plyler* was that alien children are appropriately singled out for exclusion because of the special burdens they impose on the state's ability to provide high-quality education.¹⁰⁰ However, the *Plyler* Court rejected this argument, noting that "the record in no way supports the claim that exclusion of undocumented children is likely to improve the overall quality of education in the State."¹⁰¹

The state of Florida similarly claimed that it needed to deny foster care to illegal immigrant children in order to be able to afford foster care for citizen children.¹⁰² According to Jim Towey, the Secretary of HRS: "I'm administering a state program for 9,000 foster kids, and we can barely provide a standard of living for children who are citizens."¹⁰³ However, Towey later admitted that, of the 9000 children then in state foster care, approximately seventy-five were illegal aliens.¹⁰⁴ Consequently, illegal immigrant children made up a mere .8% of Florida's foster care population.¹⁰⁵

It is unclear how the care of seventy-five children, who compose less than 1% of the total number of Florida's foster children, can have a significant effect on the state's foster care system.¹⁰⁶ Thus, support for the claim that the exclusion of undocumented alien children would improve the overall quality of foster care in Florida is lacking.¹⁰⁷

98. *Id.*

99. Rohter, *supra* note 9.

100. 457 U.S. at 229.

101. *Id.*

102. Rohter, *supra* note 9.

103. *Id.*

104. Rado, *supra* note 9.

105. Out of 3000 foster children in California's Orange County, the state found that approximately 67 were undocumented aliens. Hernandez, *supra* note 18.

106. It is clear, though, that the denial of care to these children can be used to attract attention to the state's plea for more federal money.

107. The *Plyler* Court noted

even if improvement in the quality of education were a likely result of barring some

The third colorable interest asserted by the state of Texas in *Plyler* was that "undocumented children are appropriately singled out because their unlawful presence within the United States renders them less likely than other children to remain within the boundaries of the State, and to put their education to productive social or political use within the State."¹⁰⁸ However, the *Plyler* Court rejected this argument, noting that "[t]he State has no assurance that any child, citizen or not, will employ the education provided by the State within the confines of the State's borders."¹⁰⁹ Similarly, there is no assurance that any foster child, citizen or not, will remain within the state's borders as an adult and put to use the services that the state has provided.

The *Plyler* Court concluded that "whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation."¹¹⁰ Similarly, whatever savings might be achieved by denying foster care to abused or abandoned alien children, they likewise seem insubstantial when compared to the costs.

Still, a court may not be willing to take those costs into account. A court could rule that these are relevant legislative, as opposed to judicial, considerations. In *Plyler*, the dissent argued that assessing social costs is the job of Congress and not the courts.¹¹¹ Chief Justice Burger, writing for the dissent, stated,

Were it our business to set the Nation's social policy, I would agree without hesitation that it is senseless for an enlightened society to deprive any children—including illegal aliens—of an elementary education. . . . However, the Constitution does not constitute us as "Platonic Guardians" nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, "wisdom," or "common sense."¹¹²

The dissent strongly cautioned that "[w]e trespass on the assigned function of the political branches under our structure of limited and separated powers when we assume a policymaking role as the Court does

number of children from the schools of the State, the State must support its selection of *this* group as the appropriate target for exclusion. In terms of educational cost and need, however, undocumented children are "basically indistinguishable" from legally resident alien children.

Plyler, 457 U.S. at 229. This same reasoning would apply to the exclusion of undocumented alien children from foster care.

108. *Id.* at 229-30.

109. *Id.* at 230.

110. *Id.*

111. *Id.* at 242 (Burger, C.J., dissenting).

112. *Id.*

today."¹¹³

While the *Plyler* Court focused on the protection of children and our society, the dissent focused on the protection of our political processes. According to one commentator: "You are not likely to find a more absorbing exposition anywhere of the competing doctrines of judicial compassion and judicial restraint."¹¹⁴ Invalidating a state's denial of foster care to abandoned and abused children may involve an exercise of judicial compassion. However, the Court's holding in *Plyler v. Doe* is solid precedent for such judicial compassion.¹¹⁵ Moreover, *Plyler* firmly establishes that the protections of our Constitution extend to illegal alien children, as well.

IV. UNITED STATES STATUTORY LAW: A SYSTEM OF COOPERATIVE FEDERALISM

Beyond constitutional considerations, a state's denial of foster care to immigrant children contravenes federal statutes that require cooperation between the state and federal governments. Under federal immigration law, an abused or abandoned immigrant child may become a lawful permanent resident of the United States by obtaining special immigrant juvenile status.¹¹⁶ To be eligible for this, a child must meet two main qualifications. First, the child must be "declared dependent on a juvenile court located in the United States" and "deemed eligible by that

113. *Id.*

114. James J. Kilpatrick, *Judicial Compassion vs. Restraint*, SAN DIEGO UNION-TRIB., Dec. 26, 1994, at B6.

115. Actually, the backers of Proposition 187 are hoping that the Court will reverse *Plyler v. Doe*. One component of Proposition 187 denies public education to illegal alien children. CAL. EDUC. CODE § 48215 (Deering Supp. 1996). This is in direct conflict with the holding of *Plyler*. "The purpose of the initiative is to have the Court revisit and reconsider the *Plyler* decision," said Alan Nelson, coauthor of Proposition 187. "Passage of the initiative will provide that vehicle." Feldman, *supra* note 18. Only three of the justices involved in *Plyler* remain on the bench: John Paul Stevens, who sided with the majority, and William Rehnquist and Sandra Day O'Connor, who dissented. Nelson has asserted that "[t]here's nothing new about getting decisions reversed when circumstances have changed, and in immigration terms, we are a world away from 1982." Herman Schwartz, *The Constitutional Issue Behind Proposition 187*, L.A. TIMES, Oct. 9, 1994, at M1. However one constitutional law scholar has noted:

The 'changed circumstance' [the backers of Proposition 187] may be relying on is the markedly changed composition of the court since 1982. Justices Brennan, Thurgood Marshall and Powell, in the majority on *Plyler*, have been succeeded by conservative justices Clarence Thomas and Anthony M. Kennedy. But a reversal is still unlikely. The key justice is likely to be Kennedy, and he has shown himself reluctant to overrule cases establishing rights, most notably in the 1992 abortion decision, *Planned Parenthood vs. Casey*.

Id. Admittedly, the present composition of the Court does not bode well for further extension of *Plyler*. However, "the simple justice and sound policy that underlay *Plyler vs. Doe*," *id.*, should still be followed today.

116. 8 U.S.C. § 1101(a)(27)(J) (1994); 8 C.F.R. § 204.11 (1994).

court for long-term foster care.”¹¹⁷ Second, it must be “determined in administrative or judicial proceedings that it would not be in the alien’s best interests to be returned to the alien’s or parent’s previous country of nationality or country of last habitual residence.”¹¹⁸

Thus, the ability of an abused or abandoned alien child to meet the first requirement depends entirely on the cooperation of the state. A state’s refusal to have an alien child declared dependent on the state and eligible for long-term foster care renders that child ineligible for lawful permanent residency through special immigrant juvenile status. This contravenes the scheme of state and federal cooperation set forth in this statute and makes this federal provision of law meaningless.

In *Plyler*, the Court noted that Texas’ denial of education to illegal alien children did not operate harmoniously within the general federal immigration policy.¹¹⁹ Even more so here, a state’s denial of foster care to illegal alien children who have been abused or abandoned does not operate harmoniously within the federal program created specifically to enable such children to legalize their status. In fact, this action by the state frustrates the federal immigration statute, thereby unlawfully usurping Congress’ plenary authority over immigration matters.¹²⁰

In the rules implementing special immigrant juvenile status, INS stated that it “believes that a child in need of the care and protection of the juvenile court should not be precluded from obtaining special immigrant status because of the actions of an irresponsible parent or other adult.”¹²¹ Neither should such a child be precluded from obtaining lawful immigration status because of the actions of irresponsible state officials who refuse to comply with federal law.

In addition to providing for immigration status adjustment for abused and abandoned children, federal law also provides federal reimbursement to states for their foster care. Under Subchapter IV-E of the Social Security Act,¹²² the federal government can appropriate funds to the states to enable them to provide foster care to children who would

117. *Id.* § 1101(a)(27)(J).

118. *Id.*

119. 457 U.S. at 226.

120. U.S. CONST. art. I, § 8, cl. 4; see also *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 419 (1948); *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 786 (C.D. Cal. 1995) (determining that parts of Proposition 187 are unconstitutional because they are preempted by the federal government’s exclusive constitutional authority over the regulation of immigration and Congress’ exercise of that power through the Immigration and Nationality Act). “[T]he authority to regulate immigration belongs exclusively to the federal government and state agencies are not permitted to assume that authority. The State is powerless to enact its own scheme to regulate immigration.” 908 F. Supp. at 786.

121. 58 Fed. Reg. 42,847 (1993).

122. 42 U.S.C. §§ 670-679a (1994).

otherwise be eligible for Aid to Families with Dependent Children (AFDC) benefits.¹²³ To be eligible for AFDC, an applicant must either be a citizen or "an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law."¹²⁴

The term "permanently residing under color of law," is a criterion for determining whether an alien is eligible for benefits under several federal public welfare programs in addition to AFDC, including Medicaid and Supplemental Security Income.¹²⁵ As one court noted: "Congress has provided little help in fixing the content of this clause."¹²⁶ Consequently, courts have been forced to define the phrase.

In *Holley v. Lavine*,¹²⁷ the state of New York denied AFDC benefits to Holley, an alien residing illegally in the United States, and her six U.S. citizen children.¹²⁸ However, Holley was residing in the United States with the knowledge and permission of INS.¹²⁹ In fact, INS had notified the New York State Department of Social Services that "'deportation proceedings have not been instituted . . . for humanitarian reasons' and [INS] 'does not contemplate enforcing her departure from the United States at this time.'"¹³⁰

The court reasoned that Holley's stay was sanctioned by the discretionary refusal of INS to use its enforcement powers to deport her.¹³¹ Under these circumstances, the court concluded that the alien was "permanently residing in the United States under color of law."¹³²

Similarly, for humanitarian reasons, INS declined to initiate deportation proceedings against the abused and abandoned immigrant children who were the subject of the litigation in Florida.¹³³ In fact, in one case, an INS official appeared before the juvenile court judge and was willing to turn the child over to the HRS officials who were refusing to take custody.¹³⁴ Thus, the stay of these children has been sanctioned by the

123. *Id.* § 670.

124. *Id.* § 602(a)(33).

125. *See, e.g.*, 42 U.S.C. § 1382c(a)(1)(B)(i)(II) (1994), 20 C.F.R. § 416.1618(a) (1995); 42 C.F.R. § 435.408(a), (b) (1995).

126. *Sudomir v. McMahon*, 767 F.2d 1456, 1459 (9th Cir. 1985).

127. 553 F.2d 845 (2d Cir. 1977), *cert. denied*, 435 U.S. 947 (1978). As one state supreme court noted, *Holley* "is the leading case on this issue and has been cited with approval throughout the country." *Gillar v. Employment Div.*, 717 P.2d 131, 136 (Or. 1986).

128. *Id.* at 848.

129. *Id.* at 849.

130. *Id.*

131. *Id.* at 850.

132. *Id.*

133. Interview with Cruz & Gomez, *supra* note 32.

134. *Id.*; *see also* Order Dismissing Petition for Dependency, *In re R.R.*, No. 94-15030 D003 (Fla. 11th Cir. Ct. Feb. 16, 1994).

discretionary refusal of INS to deport them. Similar to Holley, they are permanently residing in the United States under color of law. Consequently, the state should qualify to receive federal reimbursement for their foster care.

Moreover, once a state-dependent alien child attains lawful permanent residency through special immigrant juvenile status, the child becomes eligible for a host of additional federal financial benefits, including Medicaid, housing, food stamps, and school food programs.¹³⁵ As the court in *League of United Latin American Citizens v. Wilson* noted, "the public benefits scheme in this country is predominately a cooperative federal-state effort based on voluntary state participation in federally-funded public benefits programs such as AFDC, Medicaid, and Food Stamps and the states' optional provision of state funded public benefits not within the federal scheme."¹³⁶ Thus, under U.S. law, the federal government and the state government cooperate to provide for the care of immigrant children.

According to Governors Wilson and Chiles, though, the federal government is not sufficiently cooperating. Shortly before filing suit against the federal government for reimbursement costs, Governor Chiles testified before the federal Commission on Immigration Reform and demanded reimbursement for federally-required social services for immigrants.¹³⁷ He asserted that the federal government inadequately funded programs that were supposed to reimburse states for those costs, forcing Floridians to pick up a one billion dollar difference.¹³⁸

The same day that Governor Chiles addressed the Commission on Immigration Reform, the state of Florida went to court to defend its policy of refusing foster care to undocumented alien children.¹³⁹ About the same time, Florida's Secretary of HRS said, "I'm happy to care for [illegal aliens in foster care]. I just think the feds need to be putting their money where their laws are."¹⁴⁰

Although the broader issue before the states is apparently one of money, the narrow issue before the courts is precisely one of law. "[S]tates are precluded from applying *more restrictive* eligibility standards than those required by federal law" for federally funded public

135. See NATIONAL IMMIGRATION LAW CENTER GUIDE TO ALIEN ELIGIBILITY FOR FEDERAL PROGRAMS (1991).

136. *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755, 776 n.14 (C.D. Cal. 1995).

137. *Florida Governor Tells U.S.: Pay for Aliens*, ST. LOUIS POST-DISPATCH, Feb. 12, 1994, at 13B.

138. *Id.*

139. *Id.*

140. Rado, *supra* note 9.

welfare programs.¹⁴¹ In fact, in reviewing Proposition 187, the court in *League of United Latin American Citizens v. Wilson* determined that to the extent that Proposition 187 "would deny public social services to persons entitled to receive them under federal law, [Proposition 187] conflicts with federal law."¹⁴² Moreover, the U.S. Supreme Court has

141. *Sudomir v. McMahon*, 767 F.2d 1456, 1465 (9th Cir. 1985).

142. *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 780 (C.D. Cal. 1995). The court specifically noted that there is a conflict between Proposition 187 and the provision of child welfare services. *Id.* at 781 (citing 42 U.S.C. § 625).

Child welfare services are defined under federal law as public social services directed toward child well-being, including programs to protect and promote child welfare generally, to prevent, or remedy neglect, abuse, exploitation and delinquency of children, to restore children to their families after protective removals and to place children and assure adequate care in suitable adoptive or other homes.

Id. at 781 n.26. These services are provided to children under federal law, "regardless of immigration status." *Id.* at 780-81.

The defendants contended that child welfare services are entirely outside the scope of Proposition 187 as a matter of statutory construction, *id.* at 781, arguing that Proposition 187 applied only to public social service programs to which persons voluntarily and affirmatively apply. They argued that because child welfare services are generally extended to children who are involuntarily placed in the protective custody of the state and are not benefits for which a person voluntarily applies, [Proposition 187] is inapplicable to child welfare services.

Id. However, the court determined that

some children do affirmatively seek state intervention (either personally or through a representative). Thus, defendants' construction of [Proposition 187] would deny benefits to children who actively seek placement with child welfare services, while granting the same services to children who wait for the state to intervene. Because this absurd result could not have been contemplated by the voters and because child welfare services fall squarely within California's definition of public social services, child welfare services are not excluded from [Proposition 187's] coverage.

Id. Thus, the court determined that Proposition 187's benefits denial provision, "as applied to child welfare services, conflicts with federal law." *Id.*

The court also determined, however, that "to the extent that [Proposition 187] denies benefits under wholly state-funded programs and under federal-state cooperative programs such as Medicaid, Food Stamps and AFDC, eligibility for which Congress has already conditioned on lawful immigration status, [Proposition 187] does not appear to conflict with federal law." *Id.* at 782. Unlike the federal child welfare services general program, the federal foster care program contains the same immigration eligibility criteria as the AFDC program. See *supra* text accompanying notes 128-30. Thus, the court's language in *League of United Latin American Citizens* seems to suggest that a state could deny foster care benefits to children who do not meet the federal AFDC immigration eligibility requirements. However, as discussed *supra*, abandoned and abused immigrant children should meet these federal requirements by permanently residing under color of law. In addition, these children would also be able to become lawful permanent residents soon after their entrance into state care through the federal grant of special immigrant juvenile status.

Moreover, the denial of foster care to abused and abandoned undocumented children conflicts with the reasoning of *Plyler v. Doe*. As the court in *League of United Latin American Citizens* noted:

The Supreme Court's reasoning and ruling in *Plyler* appears to compel a finding that [Proposition 187's] denial of health care services, as applied to undocumented children, is equally without "rational justification" and offensive to the principles of

struck down state laws that are inconsistent with federal welfare provisions in situations where the state law denied benefits to individuals who were otherwise eligible under federal standards.¹⁴³ Thus, where abused and abandoned immigrant children are otherwise eligible for services under federal standards, the state cannot selectively deny them those services.

V. CONCLUSION

In dismissing Florida's law suit against the federal government, the U.S. District Court concluded by recognizing that "the State of Florida is suffering under a tremendous financial burden due to the methods in which the Federal Government has chosen to enforce the immigration laws. The State of Florida is in desperate need of relief from this overwhelming burden it is being unfairly forced to bear. . . . But recognizing these facts does not create a *legal* theory under which this Court may grant relief."¹⁴⁴

Similarly, recognizing these facts does not create a legal basis under which Florida, California, or any other state may deny foster care to abused and abandoned children because of their alien status. Even if the federal government is not effectively enforcing the immigration laws and not properly reimbursing the states for immigration expenditures, the states cannot violate the legal rights of innocent children present within their jurisdictions. In the war on immigration, the states cannot make abused and abandoned children the first casualties.

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equal protection. Although the Court declines at this time to rule on this extension of *Plyler*, it does note that [Proposition 187], to the extent it denies health care services to undocumented children, appears to be in direct conflict with federal law.

908 F. Supp. at 785 n.37 (citations omitted). Similarly, a denial of foster care services to undocumented children would also be in direct conflict with the principles of *Plyler*.

143. See, e.g., *Carleson v. Remillard*, 406 U.S. 598, 604 (1972); *Townsend v. Swank*, 404 U.S. 282, 291 (1971); *Rosado v. Wyman*, 397 U.S. 397, 419 (1970); *King v. Smith*, 392 U.S. 309, 312 n.3 (1968).

144. *Chiles v. United States*, 874 F. Supp. 1334, 1344 (S.D. Fla. 1994); see also *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 786 (C.D. Cal. 1995) ("The California voters' overwhelming approval of Proposition 187 reflects their justifiable frustration with the federal government's inability to enforce the immigration laws effectively. No matter how serious the problem may be, however, the authority to regulate immigration belongs exclusively to the federal government and state agencies are not permitted to assume that authority.").

* I salute the extraordinary work done by attorney Alan Mishael, who obtained Florida's new alien children rule through his litigation of *Doe v. Towey*, and by the Legal Services of Greater Miami attorneys who tirelessly advocated on behalf of R.G. and R.R. I dedicate this Comment to my mother, Adele Salisbury; my late grandparents, Janet Platt & Irving Platt; my uncle, Marvin Parker; my mentor, Professor Wes Daniels; and my guardian angel, Dean Jeannette

APPENDIX

10M-47.003 Procedure for Handling Alien Children Alleged to Be Abused, Neglected or Abandoned.

(1) All calls received by the statewide HRS Abuse hotline ("Hotline") will be screened without regard to the immigration status of the alleged victim or family/household of the victim, pursuant to the procedures established in Chapter 10M-29, FAC [Florida Administrative Code]. A child's immigration status may be determined through SAVE ["Systematic Alien Verification for Entitlements Unit"] only, concurrent with the ongoing investigation into allegations of abuse, abandonment or neglect, and only in an effort to promote the child's best interests which includes ascertaining, in good faith, a child's eligibility for public benefits or need for a special immigrant juvenile visa. No such status check or other contact shall be made for the purpose of seeking the child's or the family's detention by INS or the initiation or resumption of deportation or exclusion proceedings against the child or the child's family, irrespective of the outcome of the dependency proceeding. No HRS staff member may attempt to place any alien child in INS custody. The immigration status of a child shall have no bearing on either the care or service rendered by HRS to a child or on judicial proceedings undertaken by HRS on behalf of the child. In the event an abuse report is determined to be unfounded, HRS shall not thereafter communicate with the INS concerning the child or the child's family.

(2) Absent an immediate and life-threatening emergency, no call will be accepted by the Hotline for alleged abuse, abandonment, or neglect of an undocumented alien child who is documented to be in INS custody. Such callers will be referred to the appropriate officials within the United States Department of Justice to investigate and to take appropriate remedial steps if any are necessary. Such referrals shall, however, be promptly documented by the Hotline. All other calls of alleged abuse, abandonment or neglect will be taken by the Hotline and investigated by HRS, regardless of a child's immigration status.

(3) HRS Protective Investigators will respond to the scene to determine the safety of the child, without regard to immigration status, and will stabilize the situation, whenever possible, pursuant to Chapter 10M-29, FAC.

(4) HRS shall not place in a dependency petition reference to a child's alienage or immigration status, or to the INS unless such refer-

ence is in good faith material to the grounds for the petition's allegation of abuse, neglect or abandonment.

(5) Nothing contained in this rule shall preclude HRS from, following appointment for the child of legal counsel and a Guardian Ad Litem, requesting the assistance of a private international social service agency in determining the appropriateness of reunification of the child with family members abroad, in accordance with criteria established by Florida law for determining the appropriateness of reunification within the United States. No child shall depart the United States under this provision prior to exhaustion of all judicial appeal periods following a court order authorizing same, absent agreement on behalf of the child by his or her counsel.

(6) No extension of time to comply with Chapter 39's deadline for filing a dependency petition shall be sought by HRS to ascertain a child's immigration status. Nothing contained in this paragraph shall preclude HRS from seeking reasonable extensions of time when necessary to promote the best interests of the child to the extent authorized by statute or the Florida Rules of Juvenile Procedure.

(7) When an undocumented or PRUCOL ["People residing in the United States under color of law"] alien child is adjudicated dependent and deemed eligible for long term foster care and it is determined to be in the child's best interest to remain in the United States, HRS shall promptly seek a special interest order from the Circuit Court on the child's behalf. If HRS determines that such child, who has been adjudicated dependent, does not meet the criteria for entry of a special interest order, the HRS official making that decision shall advise the child, if of suitable age, the child's Guardian Ad Litem, and counsel, if any, in writing of the specific factual or legal basis for the decision. A copy of this notice shall become part of the child's case file.

(8) HRS shall either (a) directly or pursuant to service contract handle the application for a special juvenile immigrant visa on behalf of a child for whom a special interest order has been obtained by HRS or (b) ensure that a volunteer attorney for HRS submits the visa application within sixty (60) days of the entry of the special interest order, failing which the obligation to do so shall revert to HRS.

(9) In the event a working group and/or committee is established between INS and HRS with respect to actual or prospective dependent children who are undocumented and/or PRUCOL aliens, the district administrator whose district participates in such group or committee shall invite a representative of the Guardian Ad Litem program and legal services or legal aid agency, if any, to at least become an observer, if not a participant of that group or committee.

(10) HRS shall promptly furnish a complete copy of this rule to each of its personnel responsible for discharging HRS's obligations under Chapters 39,409 and 415.

Specific Authority 39.12, 409.026(8), 415.514 FS. Law Implemented 39.001(l), 409.145, 415.501, 415.5016, 415.502 FS. History—New 6-12-95.