The Fragile Victory for Unaccompanied Children's Due Process Rights After *Flores v. Sessions*

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Introduction

Hector was first detained when he was fifteen years old.[1] During his sixteen-month detention, his mother lived in Los Angeles.[2] Despite her repeated attempts to be reunited with him, Hector was unable to leave.[3] While in the custody of Immigration and Customs Enforcement ("ICE"), Hector was held in a cell every night at a juvenile hall which he likened to a "real prison."[4] Another child, Byron, was detained at the same juvenile hall, but was promised release upon good behavior after thirty days.[5] Despite his mother's attempts to obtain his release, Byron remained across the country in juvenile detention until he turned eighteen and was transferred to an adult facility.[6] After his transfer, Byron was granted a bond hearing where the immigration judge "concluded that Byron was not a flight risk or a danger to himself or others, and found him eligible for release on bond."[7]

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1. Flores v. Sessions, 862 F.3d 863, 872 (9th Cir. 2017) (Plaintiffs submitted declarations of unaccompanied minors.).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id*. at 873.
6. *Flores*, 862 F.3d at 873.
7. *Id*. at 873–74.

In legal terms, both Hector and Byron are referred to as unaccompanied children. An unaccompanied child, also referred to by government agencies as an unaccompanied alien child ("UAC"), is

> [O]ne who has no lawful immigration status in the United States; has not attained 18 years of age, and with respect to whom; 1) there is no parent or legal guardian in the United States; or 2) no parent o[r] legal guardian in the United States is available to provide care and physical custody.[8]

When unaccompanied children are apprehended at the United States-Mexico border, they are apprehended by officers of Customs and Border Patrol ("CBP"), an agency within the Department of Homeland Security ("DHS").[9] At the border, CBP makes a determination on whether the individual is an unaccompanied minor, using the criteria above.[10] If the child meets the criteria, CBP transfers the children into the custody of the Office of Refugee Resettlement ("ORR"), which handles the cases of unaccompanied youth, within 72 hours.[11] DHS's Immigration and Customs Enforcement ("ICE") facilitates the physical transfer to ORR custody.[12] ORR then is responsible for determining appropriate detention placement for unaccompanied children.[13]

The Ninth Circuit Court of Appeals reviewed ORR's detention policies in 2017 in *Flores v. Sessions*.[14] Hector and Byron's stories were considered during this proceeding, and included in the opinion.[15] *Flores v. Sessions* reviewed the procedural requirements for ORR's detention of children like Hector and Byron when they come to the United States.[16] Specifically, *Flo-*

8. *Who We Serve*, OFFICE OF REFUGEE RESETTLEMENT (Aug. 15, 2017), https://www.acf.hhs.gov/orr/resource/who-we-serve-unaccompained-alien-children.

9. WILLIAM A. KANDEL, CONGR. RESEARCH SERV., R43599, UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW 1 (2017).

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id. See also* Olga Byrne, Elise Miller, *The Flow of Unaccompanied Children Through the Immigration System: A Resource for Practitioners, Policy Makers, and Researchers*, CENTER ON IMMIGRATION AND JUSTICE, VERA INSTITUTE OF JUSTICE (March 2012).

14. *Flores*, 862 F.3d at 866.

15. *Id.*

16. *Id.*

res v. Sessions found that when the Government decides to detain an unaccompanied child, that child has the right to request a review of his or her custody before an immigration judge.[17]

The court in *Flores v. Sessions* characterized the decision as a "straighforward" case of "statutory construction."[18] Though, by allowing admission and consideration of personal anecdotes of affected parties, the court appears to understand the impact that its decision will have on the provision of true due process protections for immigrant youth in detention, and ultimately on the individual children's lives. This is particularly important given the trauma of detention for children.[19]

In *Flores v. Sessions*, the court considered the relationship between a twenty-year-old settlement and two congressional acts. The case hinged on whether the Homeland Security Act ("HSA") and the Trafficking Victims Protection Reauthorization Act ("TVPRA"), together, invalidated the 1997 Settlement borne out of *Reno v. Flores*.[20] Specifically, the court was asked, "whether these statutory changes terminated the *Flores* Settlement's bond-hearing requirement" for children who cross the border alone.[21] The Ninth Circuit decided in 2017 that the *Flores* Settlement remains in effect despite the new statutory scheme, and therefore continues to require that bond hearings for unaccompanied children in detention be conducted by immigration judges.[22] This means that children like Byron should be afforded a neutral hearing in front of an immigration judge to question prolonged detention "in a facility with such poor air conditioning that it was difficult to sleep at night, with flooding toilets and unusable showers, and in which guards threatened him with pepper spray and locked him in his room."[23]

This Note examines the extent to which the Due Process Clause affords protection to children like Byron and Hector in immigrant custody in the form of bond hearings, which have just begun at the time of this Note. In Section I, this Note explores the due process rights of immigrants generally, looking specifically at bond hearings as important procedural protections.

17. *Flores*, 862 F.3d at 880–81.

18. *Id.* at 866 ("[I]n this case we apply the straightforward tools of statutory construction in order to determine what the statutes before us are designed to do and not to do.").

19. *See infra* text accompanying notes 178–182.

20. Reno v. Flores, Stipulated Settlement Agreement, Case No. CV 85-4544-FJK(Px) http://www.aila.org/File/Related/14111359b.pdf [hereinafter *Flores* Settlement] (The *Flores* Settlement "sets out nationwide policy for the detention, release, and treatment of minors in the custody of the INS."). Note that the recent *Flores v. Sessions* case began as an enforcement measure for the *Flores* Settlement, but is otherwise unrelated.

21. *Flores*, 862 F.3d at 874.

22. *Id.* at 881.

23. *Id.* at 873.

Section II provides background on unaccompanied children: who they are and where they are from, including the 2014 "surge" in the United States, where an unprecedented number of migrants, mostly women and children, fled Central America due to domestic and gang violence. Section III looks at the *Flores* Settlement Agreement, which created a baseline for the mandated care of unaccompanied children for the past twenty years. Section IV discusses the other two main sources of law governing care of unaccompanied children: The Homeland Security Act and the Trafficking Victims Protection Reauthorization Act. Section V discusses the reality of detention for unaccompanied children, despite the policies' goal of a "safe and timely release." Section VI analyzes the arguments made by each side in *Flores*, and the Ninth Circuit Court of Appeals' decision, including its limits. Finally, this Note concludes by emphasizing the importance of securing due process rights for children in detention in the short term, and the long term need for comprehensive reform surrounding immigration detention.

I. Due Process Rights Afforded to Immigrants in Detention are "Imperfect"

> [T]he fact that the rights afforded by such hearings may be imperfect does not mean that the government may simply strip them from unaccompanied minors. Indeed, the fact that the plaintiffs are so vigorously fighting to retain the bond hearings, and the government so vigorously fighting to abolish them, may offer some indication that the hearings remain of practical importance.[24]

> Sometimes what is considered an alternative to deprivation of liberty may in fact simply be an alternative form of deprivation of liberty.[25]

The court in *Flores v. Sessions* noted the "dramatic changes to the bureaucratic landscape of immigration law" in the past two decades, specifically in relation to statutes which "address[] the care and custody of unaccompanied children."[26] These "dramatic changes," however, are also due to the paradigm shift in immigration detention in the United States since the

24. *Flores*, 862 F.3d at 868.

25. U.N. CHILDREN'S FUND, ADMINISTRATIVE DETENTION OF CHILDREN: A GLOBAL REPORT 61 (2011) [hereinafter ADMINISTRATIVE DETENTION OF CHILDREN].

26. *Flores*, 863 F.3d at 869.

original *Flores* Settlement Agreement in 1997.[27] The expansion of the government's ability to legally detain immigrants through increased enforcement methods has resulted in an administrative detention scheme that looks and feels more like criminal detention, yet lacks procedural due process rights afforded criminal defendants.[28] The result is a system that is "both excessive and unconstitutional."[29]

The Due Process Clause of the Fifth Amendment to the United States Constitution states, "No *person* shall . . . be deprived of life, liberty, or property, without due process of law."[30] Historically, constitutional rights of immigrants have been described as falling along an "ascending scale."[31] As the individual immigrant "increases his identity with our society," so too does his or her access to protection under the Constitution.[32] "For more than one hundred years, the Supreme Court has consistently recognized and afforded due process protections to individuals who are apprehended inside the United States, regardless of their immigration status."[33]

Immigrant detention is civil detention; the deprivation of liberty is based on a violation of a civil statute, the Immigration and Nationality Act ("INA").[34] "[I]mmigrant detention has always been deemed 'civil,' mostly because it is embedded within a process—deportation—that itself has never been considered to be punishment."[35] The fact that deportation is not equated with the punishment of criminal custody is used to justify the fact that indi-

27. Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 472 (2007) (discussing the "import [of] criminal justice norms into a domain built upon a theory of civil regulation" as well as the asymmetric incorporation of the criminal model into immigration law over the past twenty years).

28. Legomsky, *supra* note 27.

29. Whitney Chelgren, *Preventative Detention Distorted: Why It Is Unconstitutional to Detain Immigrants Without Procedural Protections*, 44 LOY. L. REV. 1477, 1494 (2011).

30. U.S. CONST. amend. V. (emphasis added).

31. Johnson v. Eisentrager, 339 U.S. 763, 770 (1950). This begins with entry—constitutional rights in the United States apply only to those who have entered. In some situations, this has led to the '"entry fiction'" in which policies consider immigrants who have entered to have not entered so that they will not be afforded constitutional rights.

32. *Id.*

33. Brief of Amici Curiae Safe Passage Project Clinical Course at New York Law School and Twenty-Three Professors in Law School Clinics and Clinical Courses Throughout the United States Who Represent Unaccompanied Immigrant Youth, in Support of Plaintiffs-Appellees at 17, Flores v. Sessions, 862 F.3d 863 (Mar. 17, 2017) (No. 17-55208) (citing Kaoru Yamataya v. Fisher, 189 U.S. 86, 101 (1903)).

34. 8 U.S.C. § 1226 (2006).

35. Mary Holper, *The Beast of Burden in Immigration Bond Hearings*, 67 Case W. Res. L. Rev. 75, 95 (Fall 2016).

viduals in deportation proceedings are not afforded the same rights and protections as criminal defendants.[36] However, "with only a few exceptions, the facilities that [ICE] uses to detain aliens were built, and operate, as jails and prisons to confine pre-trial and sentenced felons."[37] As of 2009, half of the immigrant detention facilities in the United States are "non-dedicated or shared use" county jails, meaning immigrants are detained alongside pre-trial and post-trial criminal populations.[38] While the Supreme Court has ruled that immigrant detention cannot exceed the "period reasonably necessary to bring about that alien's removal from the United States," the introduction of recent immigration reform policies has increased the likelihood and length of detention for immigrants.[39] This comes as a result of an increase in the number of criminal offenses that automatically lead to a deportation order or mandatory detention under the INA.[40] The expansion of the types and number of offenses for which an immigrant can be deported, in effect, "*guarantees* a large detention population" who "are incarcerated without the opportunity to ask for release, oftentimes for crimes that would trigger constitutional protections for U.S. citizens."[41]

Detention facilities exist because ICE has the authority to detain individuals who are awaiting removal proceedings.[42] Bond hearings are the only opportunity for those individuals to meaningfully challenge their detention, which are separate proceedings from regular removal proceedings in which individuals can present defenses against deportation.[43] If an individual is detained under a nonmandatory detention provision of the INA, which means

36. Holper, *supra* note 35.

37. Dora Schriro, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 2–3 (2009).

38. Schriro, *supra* note 37.

39. Zadvydas v. Davis, 533 U.S. 678, 679 (2001).

40. Maria Baldini-Potermin, *Immigration Detention and Custody Redeterminations: The Evolution of IIRAIRA to Current Procedures and Strategies*, 15-05 Immigr. Briefings 1 (Westlaw) (2015) ("The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [(IIRIRA]) created a new expansive legal framework permitting the detention of noncitizens by immigration officials. A new statutory provision was created, INA § 236, including the now infamous "mandatory detention" provision under INA § 236(c), which authorizes detention of noncitizens who are inadmissible for certain criminal activity or deportable based on specified criminal convictions without the opportunity to be released under bond pending completion of removal proceedings, including misdemeanor offenses for which a noncitizen does not serve any time in jail.").

41. Esna Abdulamit, *Contract Reform in the U.S. Immigration Detention System*, 46 PUB. CONT. L. J. 117, 121 (2016) (emphasis added).

42. Emily Ryo, *Detained: A Study of Immigration Bond Hearings*, 50 LAW & SOC'Y REV. 117, 120 (2016).

43. *Id.*

their detention is discretionary, he or she can challenge ICE's detention decision by proving they are not a danger to society or a flight risk.[44]

In those hearings, "ICE may release the noncitizen on conditional parole or on a bond of *at least* $1,500 while his or her immigration case is pending."[45] As of the Ninth Circuit's 2013 decision in *Rodriguez v. Robbins*, adults in immigration detention (within the Ninth Circuit jurisdiction) are entitled to bond hearings every six months they spend in detention.[46] However, until the recent challenge to the *Flores* Settlement, there was no protocol for children that mirrored that for adults in *Rodriguez*.[47]

A purely administrative immigrant detention model would involve a safe, nonpunitive space to detain immigrants while legal claims are evaluated. However, the reality in the United States and abroad does not conform to the aspiration. Administrative detention of children can be defined as, situations where a child is deprived of his or her liberty under the power or order of the executive branch of government.[48] Regarding administrative immigrant detention for all ages, Human Rights First notes that "[a]round the world, states are detaining refugees, asylum seekers and migrants in immigration detention in ways that are inconsistent with human rights conventions and standards."[49] Further, the study finds that those in detention "are often detained without individualized assessments of the need for detention, without access to prompt and independent court review, and in some states are held in jail-like facilities with penal conditions even though their detention is considered 'administrative' detention."[50] This holds true for the United States, and demonstrates the conflation of the two models. The administrative model quickly transforms to a criminal model of detention, with a focus of "retribution, deterrence, and incapacitation" as well as "apprehension, arrest, and preventative detention."[51] The fusion of these two models exposes the worst aspects of each, evidenced by the fact that immigrant detention centers are increasingly under fire for human rights abuses and lack

44. Ryo, *supra* note 42, at 119–20.

45. *Id.* at 121 (emphasis added).

46. Rodriguez v. Robbins, 715 F.3d 1127 (9th Cir. 2013) (certiorari granted by Jennings v. Rodriguez, 136 S.Ct. 2489 (2016) (holding that automatic bond hearings at six- month intervals are required for certain individuals in immigration custody who are subjected to prolonged detention).

47. *See infra* text accompanying notes 103–115.

48. ADMINISTRATIVE DETENTION OF CHILDREN, *supra* note 25.

49. *See* HUM. RTS. FIRST, *Immigration Detention and the Human Rights of Migrants and Asylum Seekers: Key Challenges*, SUBMISSION TO UN SPECIAL RAPPORTEUR ON THE HUMAN RIGHTS OF MIGRANTS 2 (2012).

50. *Id.*

51. Legomsky, *supra* note 27, at 474–75.

of accountability.[52] Analysis of immigrant detention, particularly that of unaccompanied children, through this lens exposes the need for comprehensive reform in order to address the root causes of due process violations for those who remain detained.

II. Unaccompanied Children in Detention Today Have Fled Violent Homes and Countries, and the Majority Qualify for Legal Protection in the United States

In 2016, unaccompanied children arriving in the United States consisted primarily of fifteen-year-olds and sixteen-year-olds fleeing an unprecedented increase in gang violence in the "Northern Triangle" area—a region that includes Honduras, El Salvador, and Guatemala.[53] These children flee alone from countries with the highest homicide rates in the world[54] and where violent gangs control communities and recruit children at a young age.[55]

In the 1980s, an influx of unaccompanied children fled Central America due to civil wars in the region.[56] This period created the "geographic bridge"

52. ACLU, *Sexual Abuse in Immigration Detention Facilities* (Apr. 10, 2017), https://www.aclu.org/map/sexual-abuse-immigration-detention-facilities; *see also*, Esna Abdulamit, *Nothing Human is Alien: The Re-humanization of The U.S. Immigration Detention System Through Contract Reform*, 46 PUB. CONT. L. J. 117, 118 (2016-2017) (arguing that the increasing use of private facilities for immigrant detention has resulted in a lack of accountability caused by "poor contractor administration and oversight"); ALCU, *Fatal Neglect: How ICE Ignores Death in Detention* (Apr. 10, 2017), https://www.aclu.org/report/fatal-neglect-how-ice-ignores-death-detention.

53. U.N. HIGH COMM'R ON REFUGEES, CHILDREN ON THE RUN: UNACCOMPANIED CHILDREN LEAVING CENTRAL AMERICA AND MEXICO AND THE NEED FOR INTERNATIONAL PROTECTION (2014) [hereinafter CHILDREN ON THE RUN].

54. Alan Gomez, *El Salvador: World's New Murder Capital*, USA TODAY, Jan. 7, 2016, http://www.usatoday.com/story/news/world/2016/01/07/el-salvador-homicide-rate-honduras-guatemala-illegal-immigration-to-united-states/78358042/.

55. *Femicide in Latin America*, UN WOMEN (Apl. 4, 2017), http://www.unwomen.org/en/news/stories/2013/4/femicide-in-latin-america#edn1; *see also* CHILDREN ON THE RUN, *supra* note 53; Global Detention Project, *infra* note 207 (discussing the situation of unaccompanied minors from Mexico, who are treated differently at the border because of policies distinguish between minors from noncontiguous countries. The Inter-American Court on Human Rights found that there was a presumption that children arriving from Mexico were not in need of international protection, which may have contributed to the fact that just over ninety-five percent are returned to Mexico without an opportunity to see a judge.); *Sexual and Gender Based Violence (SGBV) & Migration Fact Sheet*, KIDS IN NEED OF DEFENSE (KIND) (Jan. 2017), https://supportkind.org/wp-content/uploads/2017/02/SGBV-and-Migration-Fact-Sheet.pdf (for more information on the prevalence of sexual violence in Central America).

56. Sarah J. Mahler & Dusan Ugrina, *Central America: Crossroads of the Americas*, MIGRATION POLICY INSTITUTE (Apr. 1, 2006), www.migrationpolicy.org/article/central-america-crossroads-americas/.

for Central Americans to move north to seek asylum in the United States.[57] Instability in the region was largely a response to failed industrialization and divided class structure, resulting in an increase in revolutionary and counter revolutionary movements.[58] Another root cause for violence and instability in the region is the reality that "Central America has become one of the main transshipment routes for illicit drugs making their way to the United States."[59] The demand for drugs in the United States has paved the way for corrupt governments and gang-controlled communities in Latin American countries.[60]

During the "surge" in 2014, the unprecedented numbers of women and children crossed the southern border between Mexico and the United States.[61] While the issue of processing unaccompanied children at the border and litigation surrounding their treatment in detention started decades earlier, the 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;[62] President Barack Obama described the situation a "humanitarian crisis."[63]

In 2017, El Salvador, Honduras, and Guatemala remain the world's most violent countries not at war.[64] The murder rate in El Salvador increased dramatically in 2015, following the unraveling of a truce between rival gangs and increased enforcement by local police, which has led to "a level of violence not seen since the end of the country's civil war."[65] However, the exposure to violence does not end once the child makes the difficult decision to leave home. Among refugee populations, unaccompanied children are

57. Mahler & Ugrina, *supra* note 56.

58. *Id.*

59. Adriana Beltrán, *Children and Families Fleeing Violence in Central America*, WASH. OFF. ON LATIN AM. (Feb. 21, 2017), https://www.wola.org/analysis/people-leaving-central-americas-northern-triangle/.

60. *Id.*

61. Adam Isacson, *Migration Patterns in 2016, in Child and Family Migration from Central America*, WASH. OFF. ON LATIN AM. (2016) ("What we have seen for nearly a year and a half is a steady rise: many months of gradual increases in arrivals.").

62. KANDEL, *supra* note 9; *see also* Isacson, *supra* note 61, at 4.

63. EXEC. OFFICE OF THE PRESIDENT, LETTER FROM THE PRESIDENT – EFFORTS TO ADDRESS THE HUMANITARIAN SITUATION IN THE RIO GRANDE VALLEY AREAS OF OUR NATION'S SOUTHWEST BORDER (2014).

64. Beltrán, *supra* note 59.

65. *Id.*

among the most vulnerable population to sexual violence in their home countries, during their journey fleeing violence, and upon arrival.[66]

It is not surprising, then, that fifty-eight-percent of the children interviewed for the 2014 United Nations report, *Children on the Run*, were in need of "international protection."[67] This means the child's government could no longer protect his or her basic human rights.[68] This is the standard by which the international community has agreed to provide protection to refugees arriving at the border.[69] One child reported, "[m]y grandmother wanted me to leave. She told me: '[i]f you don't join, the gang will shoot you. If you do, the rival gang . . . or the cops will shoot you. But if you leave, no one will shoot you.'"[70] International treaties prohibit the United States from deporting an individual who faces persecution in his or her home country.[71]

The most common types of legal relief for unaccompanied children once in the United States include asylum, special immigrant juvenile status ("SIJS"), U-visas, T-visas, and family-based petitions for legal permanent residence.[72] To qualify for asylum, the unaccompanied child must establish that he or she was persecuted or fears future persecution based on his or her "race, religion, nationality, membership in a particular social group, or political opinion"; that the child's government cannot protection him or her, and that internal relocation is not reasonable—subject to certain ineligibility bars.[73] For both children and adults who apply for asylum with an attorney, the rate of approval (meaning the applicant is granted asylum and permitted to stay in the United States) is about fifty percent; without representation, it drops to ten percent.[74] SIJS is available only to children "whose reunification with 1 or both of the immigrants' parents is not viable due to abuse,

66. Linda Piwowarczyk, *Seeking Asylum: A Mental Health Perspective*, 16 GEO. IMMIGR. L. J. 155 (2011).

67. CHILDREN ON THE RUN, *supra* note 53, at 6.

68. *Id*.

69. *See Convention Relating to the Status of Refugees*, July 28, 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention].

70. CHILDREN ON THE RUN, *supra* note 53.

71. *See* Refugee Convention, *supra* note 69; *see also* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, 1465 U.N.T.S. 85 ("No State party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.").

72. Byrne, *supra* note 13.

73. 8 U.S.C. § 1158(a) (2006).

74. TRAC Immigration, Syracuse University, *Continued Rise in Asylum Denial Rates: Impact of Representation and Nationality* (Dec. 13, 2016), http://trac.syr.edu/immigration/reports/448/.

neglect, abandonment, or a similar basis" and "that it would not be in the [child's] best interest to be returned to the [child's] or parent's previous country of nationality or country of last habitual residence."[75] U-visas are available to noncitizens who were victims of certain violent crimes in the United States, suffered substantial physical or mental abuse, and cooperate with law enforcement.[76] T-visas are available for noncitizens who have been victims of severe forms of trafficking, and would suffer extreme hardship if deported.[77]

Most unaccompanied children who are not granted relief return to their home country through a process called voluntary departure, which does not result in a "deportation" on their record should they return to the United States in the future—a small consolation for what is likely a devastating situation for any child or their family.[78] Voluntary departure is granted "in lieu of removal" under certain circumstances.

In 2013, plaintiffs brought a class action lawsuit against the Department of Homeland Security based on the routine "unknowing and involuntary election of 'voluntary departure'" that occurred "as a result of the misstatements, omissions, pressure, and/or threats of . . . . Border Patrol agents."[79] Plaintiffs alleged that Border Patrol agents "regularly fail to inform individuals of the consequences of taking voluntary departure, and regularly use misstatements, pressure, coercion, and threats in the administration of voluntary departure in Southern California."[80]

Although this case was settled in 2014,[81] the prevalence of voluntary departure among unaccompanied children is worrisome due to the percentage who qualify for international protection. This suggests, as individual stories show, that after a child agrees to so-called "voluntary" departure, the danger remains high upon return, for the same reasons the children came to

75. 8 U.S.C. §1153 (designating a certain percentage of visas to "special immigrants," and Special Immigrant Juveniles are defined in INA §101(a)(27)(J)(i) and (ii)); *see also* 8 C.F.R. § 204.11.

76. 8 U.S.C. § 1101(a)(15)(U).

77. *Id*. *See also* 8 USC § 1101(a)(15)(T).

78. Byrne, *supra* note 13, at 2624.

79. First Amended Complaint for Declaratory and Injunctive Relief and Petition for Writ of Habeas Corpus, at 18, 20, 22, 24, 27, 29, 31, 32, 34, 36, 37, https://www.aclu.org/legal-document/lopez-venegas-v-johnson-complaint.

80. *Id.* at 45.

81. Settlement Agreement for Lopez-Venegez v. Johnson, 13-cv-03972 (C.D. Cal. Aug. 20, 2014).

the United States.[82] The decision to "voluntary[ily] return to countries in which they know their lives and freedom will be in jeopardy," arises out of the "profound helplessness and despair" felt by youth in detention.[83] As the court notes in *Flores v. Sessions*, "[s]uch evidence raises the alarming possibility that children who may have legitimate claims to asylum or other forms of relief from removal are being sent back to countries where they face danger, and even death. Left in bureaucratic limbo, without any opportunity to be heard, these children lose hope."[84] Possibly the most solemn sentence of the *Flores v. Sessions* opinion lies at the end, in a footnote, where the Court recognizes that "[u]naccompanied minors today face an *impossible* choice between, what is, in effect, indefinite detention in prison, and agreeing to their own removal and possible persecution."[85]

III. The *Flores* Settlement Provides a Twenty-Year-Old Baseline from Which Advocates Enforce Basic Rights for Unaccompanied Children

The *Flores* Settlement originated with a 1985 challenge to the prolonged detention of children brought in the Central District of California, and eventually heard before the United States Supreme Court.[86] The Settlement represented a culmination of ten years of litigation regarding the treatment of children in government detention.[87] In *Reno v. Flores*, the Supreme Court considered the due process rights of unaccompanied children who were eligible for release from immigration detention, but were not allowed to leave

82. *See, e.g.*, Sibylla Brodzinsky and Ed Pilkington, *US Government Deporting Central American Migrants to their Deaths*, THE GUARDIAN (Oct. 12, 2015), https://www.theguardian.com/us-news/2015/oct/12/obama-immigration-deportations-central-america ("The Guardian has confirmed three separate cases of Honduran men who have been gunned down shortly after being deported by the US government. Each was murdered in their hometowns, soon after their return—one just a few days after he was expelled from the US. Immigration experts believe that the Guardian's findings represent just the tip of the iceberg. A forthcoming academic study based on local newspaper reports has identified as many as eighty-three US deportees who have been murdered on their return to El Salvador, Guatemala and Honduras since January 2014."); *see also* Cindy Carcamo, *In Honduras, US Deportees Seek to Journey North Again*, L. A. TIMES (Aug.16, 2014), http://www.latimes.com/world/mexico-americas/la-fg-honduras-deported-youths-20140816-story.html ("'There are many youngsters who only three days after they've been deported are killed, shot by a firearm,' said Hector Hernandez, who runs the morgue in San Pedro Sula. 'They return just to die.'"); Roque Planas, *Children Deported to Honduras Are Getting Killed: Report*, HUFF. POST (Aug. 20, 2014), http://www.huffingtonpost.com/2014/08/20/minors-honduras-killed_n_5694986.html).

83. *Flores*, 862 F.3d at 877 n.11.

84. *Id.*

85. *Id.*

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

87. *Id.*

because they did not have a parent or family member with whom to live.[88] The plaintiffs in *Reno* were a class of unaccompanied children who were determined to pose no threat of harm or flight risk, but suffered continued detention in INS facilities because the adults willing to take care of them upon release were not their parents, close relatives, or legal guardians.[89] At the time, the INS policy did not permit the release of the children to anyone other than the aforementioned adults.[90] This policy was the central issue in the case.[91]

The plaintiffs in *Reno* asserted that their continued detention violated their right to due process.[92] Plaintiffs also claimed that they were deprived of procedural due process because the ORR did not conduct individualized custody hearings.[93] The Supreme Court rejected the plaintiffs' due process claims, asserting that INS was permitted to hold them indefinitely because "[t]he period of custody is inherently limited by the pending deportation hearing."[94] The Supreme Court also held that the procedures afforded to immigrant juveniles were in accordance with fundamental due process rights, and the Court asserted that the placement of juveniles was more aptly characterized as "legal custody," distinguishing the detention facilities from "correctional institutions" because of their adherence to "state licensing requirements."[95] The Court's characterization of the facilities is important to assess the constitutionality of their use for detention of unaccompanied children today. The Court in *Reno v. Flores* characterized the children's detention as civil, administrative detention.[96] However, detention of unaccompanied children was much less pervasive when the Supreme Court confronted

88. *Reno*, 507 U.S. at 296.

89. *Id.*

90. *Id.* at 292 ("Respondents are a class of alien juveniles arrested by the Immigration and Naturalization Service (INS) on suspicion of being deportable, and then detained pending deportation hearings pursuant to a regulation, promulgated in 1988 and codified at 8 CFR § 242.24, which provides for the release of detained minors only to their parents, close relatives, or legal guardians, except in unusual and compelling circumstances.").

91. Reno v. Flores, 507 U.S. 292, 292 (1993).

92. *Id.* at 300.

93. *Id.*

94. *Id.* at 314.

95. *Id.* at 298.

96. Reno v. Flores, 507 U.S. at 298 (stating that "'[l]egal custody' rather than 'detention' more accurately describes the reality of the arrangement, however, since these are not correctional institutions but facilities that meet 'state licensing requirements for provision of shelter care, foster care, group care, and related services to dependent children . . . in an open type of setting without a need for extraordinary security measures.'").

the issue in 1993 than when the Ninth Circuit considered the same issue in 2017.[97]

The 1997 *Flores* Settlement established minimum treatment standards that the INS, the precursor to the Department of Homeland Security, must follow when detaining and releasing unaccompanied children.[98] The settlement agreement was extensive, and affirmed, in pertinent part, the commitment of the INS to an efficient processing system for children. This included custody that is consistent with the particular vulnerabilities of children and a general policy favoring release if detention is not deemed necessary.[99] The settlement agreement looks to the ORR "placement tool" for guidelines regarding the transfer of children to secure, restrictive facilities, like the one in which Hector and Byron were detained.[100]

The *Flores* Settlement notes that a child shall not be placed in a secure facility if "less restrictive alternatives are available and appropriate."[101] However, about half of the children in secure confinement placements are there due to lack of space.[102] Paragraph 24A of the *Flores* Settlement, the applicability of which was at the crux in *Flores v. Sessions*, states: "A minor in deportation proceedings shall be afforded a bond redetermination hearing before an immigration judge in every case, unless the minor indicates on the Notice of Custody Determination form that he or she refuses such a hearing."[103] However, this rule has not been honored by ORR, which "does not recognize courts as a place where children can challenge their detention."[104]

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97. *See e.g.*, Rebecca M. Lopez, *Codifying the Flores Settlement Agreement: Seeking to Protect Immigrant Children in U.S. Custody*, 95 MARQ. L. REV. 1635, 1651 (Summer 2012) (discussing how since the *Flores* Settlement was passed, "INS compliance . . . was inconsistent" and "INS reported the number of unaccompanied children detained in the United States increased twofold from 1997, when INS detained 2,375 children, to 2001, when the INS reported that it detained 5,385 children.).

98. Stipulated Settlement Agreement for Flores v. Reno, CV 85-4544-FJK(Px) (C.D. Cal. Jan. 17, 1997).

99. Flores v. Reno Stipulated Settlement agreement, *supra* note 20.

100. Flores v. Reno Stipulated Settlement agreement, *supra* note 20.

101. Flores v. Reno Stipulated Settlement agreement, *supra* note 20.

102. CEN. FOR HUM. RTS. & CONST. L, FAILED FEDERALISM: AD HOC POLICY-MAKING TOWARD DETAINED IMMIGRANT AND REFUGEE MINORS 11 [hereinafter FAILED FEDERALISM] (2001). *See also* UNACCOMPANIED MINORS, *infra* note 158 ("Occasionally children may have been placed in staff-secure care facilities when less restrictive placement options were unavailable. During our site visits, staff at one staff-secure facility reported that they received about 15 to 20 children who could have been placed in less-restrictive settings, but were not because such types of shelter beds were not available.").

103. Reno v. Flores, Stipulated Settlement Agreement, Case No. CV 85-4544-FJK(Px) http://www.aila.org/File/Related/14111359b.pdf.

104. Tyche Hendricks, *Hundreds of Migrant Teens Are Being Held Indefinitely in Locked Detention*, KQED NEWS: THE CALIFORNIA REPORT (Apr. 11, 2016).

This leaves unaccompanied children in detention with only an assessment called the Further Assessment Swift Tract ("FAST") as recourse for challenging their detention.[105] FAST is a thirty-day internal process in which the ORR reevaluates the child's placement based on behavior in custody.[106] As the administrative and criminal detention models collide, the need for neutral custody determinations becomes crucial to avoiding prolonged or unnecessary detention of unaccompanied children.

In 2013 the Ninth Circuit Court of Appeals held in *Rodriguez v. Robbins* that certain adult immigrants in detention are entitled to a bond hearing after six months.[107] At the time of the *Rodriguez* decision, the most recent statistics indicated that over 429,000 individuals were detained by ICE—an average of 33,000 each day.[108] The *Rodriguez* decision represents a significant victory for detained adults and those fighting for accountability in the detention centers within the Ninth Circuit.[109] In the decision, the court asserted that a bright line rule (of a bond hearing every six months) protects the due process rights of noncitizens who are subject to detention.[110] Without this rule, the court argued, the definitions of "prolonged detention" are volatile,[111] including the factors that courts consider in determining whether a detention was prolonged.[112] Overall, the six-month rule provides for administrative ease by eliminating the need for other, more lengthy procedures, and a stronger guarantee of due process through direct contact with an immigration judge.[113]

105. *Flores*, 862 F.3d at 868.

106. Office of Refugee Resettlement, *Children Entering the United States Unaccompanied: Section 1*, U.S. DEPT. OF HEALTH AND HUM. SERVS., ADMIN. FOR CHILDREN AND FAMILIES Section 1.4.2 (Jan. 30, 2015), https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-1.

107. Rodriguez v. Robbins, 715 F.3d at 1127, 1145 (9th Cir. 2013).

108. *Id.* at 1131.

109. *Id.*

110. *Id.*

111. Michelle Firmacion, *Protecting Immigrants from Prolonged Pre-Removal Detention: When "It Depends" Is No Longer Reasonable*, 42 HASTINGS CONST. L.Q. 601, 618–9 (2015) ("As a result, courts have held that a twenty-month detention was unreasonably prolonged even though the delay was attributable to the alien's two appeals, while also having held that a fifteen-month detention of an alien whose appeal had been pending for four months was not unreasonably prolonged.").

112. Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 HASTINGS L. J. 363, 396 (2014).

113. Firmacion, *supra* note 111, at 620.

In her writing, Michelle Firmacion points out the elephant in the room—the normalization of six months in detention prior to a bond hearing.[114] This is particularly poignant when considering the psychological impact of detention on children.[115] Additionally, in the wake of *Rodriguez*, juveniles were afforded *fewer* rights to challenge detention than adults because of ORR's refusal to allow minors to contest their detention in court. While adults qualified for a custody redetermination hearing every six months, no such opportunity was offered to the hundreds of juveniles in prolonged detention. The district court in *Flores v. Lynch* addressed this anomaly in its decision on January 20, 2017.[116] The district court noted, "Boteo is looking forward to his eighteenth birthday, but not so that he can enjoy the newfound freedoms that traditionally come with casting off the shackles of adolescence. Rather, for him, entering adulthood means he will be eligible for a bond hearing, a process afforded only to adults under Defendants' proposed construction."[117]

IV. In Detention, Unaccompanied Children Confront the "Bureaucratic Limbo" of the United States Immigration System

The three main sources of law which govern treatment of unaccompanied children today are the *Flores* Settlement Agreement, discussed above, the Homeland Security Act ("HSA"), and the William Wilberforce Trafficking Victims Protection Reauthorization Act ("TVPRA"). Upon arrival and determination that the child is unaccompanied by an official from DHS, the custody of the child is transferred to ORR.[118] This is where the plaintiffs in *Flores v. Sessions* encountered the "bureaucratic maze of alphabet agencies" with "overlapping statutory duties."[119] Originally, ORR assumed custody of

114. Firmacion, *supra* note 111, at 620.

115. Julie M. Linton et al., *Detention of Immigrant Children*, 139 PEDIATRICS 1, 4 (2017).

116. Flores v. Lynch, 212 F. Supp. 3d 907 (C.D. Cal. 2015) *aff'd in part, rev'd in part and remanded*, 828 F.3d 898 (9th Cir. 2016). *See also Flores*, 862 F.3d at 868.

117. Flores, et al. v. Lynch, et al., Dkt. No. 212 F. Supp. 3d 907CV 85-4544DMG (AGR), Doc. No. 318 (C.D. Cal. 2015) (Jan. 20, 2017).

118. *See* Byrne, *supra* note 13, at 9 fig. 2 (providing a comprehensive chart of the process for UACs upon arrival or apprehension in the United States).

119. *Flores*, 862 F.3d at 877 n.11.

the unaccompanied children from the Immigration and Naturalization Service ("INS"), which was dissolved in 2003.[120] The functions of the INS transferred to Citizenship and Immigration Services ("CIS"), ICE, and CBP.[121]

The HSA of 2002[122] and the TVPRA of 2008,[123] transferred the functions of the INS to ORR—an agency under the Department of Health and Human Services ("HHS")—regarding "care and placement of unaccompanied [] children."[124] ORR and HHS have remained in charge of the custody and release of unaccompanied children since this transfer.[125] When children are apprehended at the border, they must be transferred from CBP or ICE custody to ORR/HHS custody within seventy-two hours.[126] The seventy-two hours are usually spent in a Border Patrol holding cell, known colloquially as a *hielera* ("icebox") for its reputation as an extremely cold, bare room.[127] The Court notes in *Flores v. Sessions*, "[i]n enacting the HSA and TVPRA, Congress desired to *better* provide for unaccompanied minors."[128]

For the first nine years after ORR was allocated responsibility of unaccompanied children, the agency served 7,000 to 8,000 children annually.[129] In 2012, however, that number rose to 13,625.[130] In 2014, that number more than quadrupled to 57,496 children.[131] Once CBP or ICE transfer children

120. DEP'T OF HOMELAND SEC., *Creation of the Department of Homeland Security* (Sept. 24, 2015), https://www.dhs.gov/creation-department-homeland-security (explaining that DHS was created eleven days after September 11, 2001, and integrated twenty-two federal departments and agencies. "With the passage of the Homeland Security Act by Congress in November 2002, the Department of Homeland Security formally came into being as a stand-alone, Cabinet-level department to further coordinate and unify national homeland security efforts, opening its doors on March 1, 2003.").

121. U.S. CITIZENSHIP AND IMMIGR. SERVS., *Our History*, https://www.uscis. gov/about-us/our-history (Apr. 9, 2017).

122. Homeland Security Act, Pub. L. 107-296 (H.R. 5005), 6 U.S.C. § 279.

123. 8 U.S.C. § 1232.

124. Office of Refugee Resettlement, *Unaccompanied Children's Services*, U.S. DEPT. OF HEALTH AND HUMAN SERVS., ADMINISTRATION FOR CHILDREN AND FAMILIES (Aug. 15, 2017), https://www.acf.hhs.gov/orr/programs/ucs.

125. Office of Refugee Resettlement, *supra* note 106.

126. 8 U.S.C. § 1232(b)(3).

127. Guillermo Cantor, *Hieleras (iceboxes) in the Rio Grande Valley Sector*, AMERICAN IMMIGRATION COUNCIL, (Dec. 17, 2015), https://www.americanimmigrationcouncil.org/research/hieleras-iceboxes-rio-gra-grande-valley-sector.

128. *Flores*, 862 F.3d at 867.

129. Office of Refugee Resettlement, *Unaccompanied Minor Fact Sheet*, DEP'T OF HEALTH AND HUM. SERVS., ADMIN. FOR CHILDREN AND FAMILIES (Jan. 2016), https://www.acf.hhs.gov/sites/default/files/orr/orr_uc_updated_fact_sheet_1416.pdf.

130. *Id.*

131. *Id.*

to ORR, deportation proceedings are initiated.[132] The initiation of deportation proceedings means the unaccompanied child must appear in court (whether or not they have an attorney) and, if they cannot contest their deportability by proving that they qualify for some legal status in the United States (discussed above), they will be ordered removed.[133]

The majority of unaccompanied children are released to a parent or guardian within a few days or weeks of arriving in the United States, where they are permitted to remain for the duration of their appearances in immigration court.[134] Those who do not have a parent or guardian with whom they can live, however, are placed in more restrictive facilities, such as locked group homes or juvenile halls.[135] While in custody, ORR has three levels of detention: (1) shelter,[136] (2) staff secure,[137] and (3) secure facilities.[138] In addition, there are residential treatment facilities and other "therapeutic" placements that ORR can to place an unaccompanied child.[139] If

132. Byrne, *supra* note 13, at 9 fig. 2.

133. Piwowarczyk, *supra* note 66, (explaining how mental health issues common in the refugee community prevent many individuals from successfully adjudicating their claims).

134. Byrne, *supra* note 13, at 19 fig. 7.

135. Byrne, *supra* note 13, at 19 fig. 7.

136. Office of Refugee Resettlement, *Children Entering the United States Unaccompanied: Guide to Terms*, DEP'T OF HEALTH AND HUM. SERVS., ADMIN. FOR CHILDREN AND FAMILIES (Mar. 2016), https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-guide-to-terms ("A shelter is a residential care provider facility in which all of the programmatic components are administered on-site, in the least restrictive environment.").

137. *Id.* ("A staff secure care provider is a facility that maintains stricter security measures, such as higher staff to unaccompanied alien children ratio for supervision, than a shelter in order to control disruptive behavior and to prevent escape. A staff secure facility is for unaccompanied alien children who may require close supervision but do not need placement in a secure facility. Service provision is tailored to address an unaccompanied alien child's individual needs and to manage the behaviors that necessitated the child's placement into this more restrictive setting. The staff secure atmosphere reflects a more shelter, home-like setting rather than secure detention. Unlike many secure care providers, a staff secure care provider is not equipped internally with multiple locked pods or cell units; however, the staff secure provider may have a secure perimeter with a 'no climb' fence.").

138. *Id.* ("A secure care provider is a facility with a physically secure structure and staff able to control violent behavior. ORR uses a secure facility as the most restrictive placement option for an unaccompanied alien child who poses a danger to self or others or has been charged with having committed a criminal offense. A secure facility may be a licensed juvenile detention center or a highly structured therapeutic facility.").

139. *Id.* ("Therapeutic foster care is a foster family placement funded by ORR for unaccompanied alien children whose exceptional needs cannot be met in regular family foster care homes and consists of intensive supportive and clinical services in the homes of specially trained foster parents. Foster care programs work in collaboration with foster parents to provide interventions, treatment, protection, care, and nurturance to meet the medical, developmental, and/or psychiatric needs of unaccompanied alien children. The unaccompanied alien child typically attends public school and receives community based services.").

reunification with a parent or legal guardian is not possible, ORR is supposed to place the child in long term foster care.[140] In 2015, 28,531 children were placed in shelters, 4,514 were placed in long term foster care, 618 were placed in locked group homes/juvenile detention, and sixty-three were placed in therapeutic settings.[141] Juvenile detention centers represent the immigrant detention facilities that most closely resemble the criminal model.[142]

V. The "Safe and Timely" Release Policy in Practice for Unaccompanied Children in Secure Detention

In 2010, a study by the Vera Institute of Justice estimated that eight percent of unaccompanied children were placed in secure or staff-secure facilities, totaling 1,123 minors in restrictive placements between October 1, 2008, to September 30, 2010.[143] Currently, it is estimated by counsel in *Flores v. Sessions* that roughly two hundred to three hundred unaccompanied children are in secure (including staff-secure) facilities throughout the country.[144]

ORR policy emphasizes the goal of "safe and timely release" of unaccompanied children from its custody.[145] For those who remain in custody, the policy aspires to create "a setting that promotes public safety and ensures that sponsors are able to provide for the physical and mental well-being of children."[146] That means that as soon as possible, unaccompanied children should be released from custody to live with a parent or guardian. From its inception, ORR, the government agency responsible for refugee *resettlement*, was focused on the quick reunification of families and providing safe shelters.[147] Originally, with much fewer children under the agency's care, that goal may have been achievable. However about twenty percent of minors

140. *Byrne*, *supra* note 13, at 14; Hendricks, *supra* note 104.

141. Hendricks, *supra* note 104.

142. *See Yolo County Juvenile Hall Detention Facility*, YOLO COUNTY, http://www.yolocounty.org/ Home/ShowDocument?id=15992 ("[i]t Grand Jury Inspection, as Required by California Penal Code Section 919(b)." "It is one of the most secure juvenile detention facilities on the west coast.").

143. Byrne, *supra* note 13, at 14 (staff-secure care is permitted for "children with a history of nonviolent or petty offenses or who present an escape risk." Secure care is permitted for "children with a history of violent offenses or who pose a threat to themselves or others."); *id.* at 15 ("Figure 5: Initial Placements, by type, October 1, 2008 Through September 30, 2010.").

144. Order re Plaintiffs' Motion to Enforce at 4, Flores, et al. v. Lynch, et al., Dkt. No. CV 85-4544DMG (AGR), Doc. No. 4544 DMG318 (C.D. Cal. Jan. 20, 2017), ECF) at 8. 318.

145. Office of Refugee Resettlement, *Children Entering the United States Unaccompanied: Section 2*, DEPT. OF HEALTH AND HUM. SERVS., ADMIN. FOR CHILDREN AND FAMILIES (Jan. 30, 2015), https://www.acf.hhs.gov/orr/resource/children-entering-the- united- states-unaccompanied-section-2.

146. *Id.*

147. U.S. CITIZENSHIP AND IMMIGR. SERVS., *supra* note 121.

remain in custody longer than four months, and those who spend the longest time in custody are in the most restrictive settings.[148] This spurred the *Flores v. Sessions* litigation in 2017, where "Plaintiffs submit[ed] evidence showing that, in practice, ORR detains unaccompanied minors for months, and even years, without providing them with any opportunity to be heard before a neutral person with authority to review the basis for the detention."[149]

ORR reports that the average stay for juveniles in shelter or foster care placements is thirty-four days.[150] The agency does not provide data for the average stay for children in the more restrictive or therapeutic settings. A March 2012 report by the Vera Institute of Justice reported that the average stay in any placement of ORR custody was sixty-one days.[151] This suggests that children placed in the more restrictive settings stay in those placements longer than those placed in less restrictive settings. The Vera report showed that in 2010 about 143 children were detained for more than one year.[152] One attorney reports that her client was detained for more than thirteen months at a juvenile hall facility that is not licensed to care for children, without any explanation for prolonged detention.[153] Another child at the same facility was held for eleven months.[154]

ORR staff consider the following factors for a child's placement: "[a] juvenile or adult criminal history, [p]rior acts of violence or threats in government custody, [g]ang involvement, [p]rior escape(s) or attempted escape(s) from government custody, [h]uman trafficking or [s]muggling, [and d]rug smuggling."[155] The children are then provided with a "placement score" which determines the level of security required for their placement.[156] Despite these policies' intentions to place children "in the least restrictive setting that is in the best interests of the child,"[157] a report by the Center for Human Rights and Constitutional Law found that "approximately 32 percent

148. Byrne, *supra* note 13.

149. *Flores*, 862 F.3d at 872.

150. *Facts and Data: General Statistics*, OFF. OF REFUGEE RESETTLEMENT (Dec. 21, 2016), https://www.acf.hhs.gov/orr/about/ucs/facts-and-data.

151. Byrne, *supra* note 13, at 17 fig. 55.

152. Byrne, *supra* note 13, at 16 fig. 6.

153. Order re Plaintiffs' Motion to Enforce, *supra* note 144, at 4. Flores, et al. v. Lynch, et al., Dkt. No. CV 85-4544DMG (AGR), Doc. No. 318 (C.D. Cal. Jan. 20, 2017) at 8.

154. *See* Karen de Sá, *Legislators Demand Answers on Honduran Boy's Detention*, S.F. CHRON. (Mar. 18, 2017), http://www.sfchronicle.com/bayarea/article/Legislators-demand-answers-on-refugee-boy-s-11012343.php.

155. Office of Refugee Resettlement, *supra* note 106.

156. Office of Refugee Resettlement, *supra* note 106.

157. Office of Refugee Resettlement, *supra* note 106.

of detained minors spent time in secure lockups."[158] Furthermore, the report found, "the most common reason (47 percent of all minors securely confined) for secure confinement was *lack of space in licensed facilities* (influx)."[159] This begs the question: Is the placement tool a well-intentioned instrument that is misapplied by the authorities (ORR and DHS), or is the tool itself inherently problematic?

The children who are placed in locked group home/juvenile detention are spread out throughout the country.[160] The issue of custody redetermination hearings is particularly important for children in locked group home/juvenile halls as they are housed in the facilities that represent the most severe deprivation of liberty, and the highest risk of re-traumatization.[161] The Yolo County Juvenile Detention Facility ("YCJDF") in Woodland, California, is one of two secure juvenile detention placements for unaccompanied children.[162] The second facility is the Shenandoah Valley Juvenile Center in Harrisonburg, Virginia.[163] The detention of unaccompanied children at these facilities is pursuant to a contractual agreement with HHS/ORR, who receives referrals from DHS.[164] A 2010-2011 inspection of the Yolo County facility found, "YCJDF provides the level of security normally seen in high-level adult facilities."[165] The decision to pursue and renew contracts with these types of facilities may be due to an influx of arrivals, but also suggests a move towards the criminalization of unaccompanied minors.

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158. FAILED FEDERALISM, *supra* note 102.

159. *Id.* (emphasis added). *See also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-180, UNACCOMPANIED MINORS: HHS CAN TAKE FURTHER ACTIONS TO MONITOR THEIR CARE 14 [hereinafter UNACCOMPANIED MINORS] (2016) ("Occasionally children may have been placed in staff-secure care facilities when less restrictive placement options were unavailable. During our site visits, staff at one staff-secure facility reported that they received about 15 to 20 children who could have been placed in less-restrictive settings, but were not because such types of shelter beds were not available.").

160. *Detention Facility Reports*, TRAC IMMIGR., (Apr. 9, 2017), http://trac.syr.edu/cgi-bin/detention.pl?stat_type=exit&stat_type=exit&reptime=201509&sortcol=facility_name&sortdir=asc&facility_type=JUV&facility_state=&facility_name=%28Enter+any+part+of+facility+name%29&stat_timebucket=3_last12&stat_lower=1&stat_upper=30000&submit=Update+List (TRAC Immigration Project is a project supported by the JEHT Foundation, the Ford Foundation, the Carnegie Corporation of New York, the Evelyn and Walter Haas Jr. Fund, and Syracuse University. The project takes government data on immigration and makes it accessible to the public. This data is current through Sept. 2015.).

161. Linton, *supra* note 115.

162. *See* Yolo County Juvenile Hall Detention Facility Grand Jury Inspection, as Required by California Penal Code Section 919(b), *supra* note 142.

163. *Id.*

164. Office of Refugee Resettlement, *supra* note 145, Section 2.8.7.

165. *See* Yolo County Juvenile Hall Detention Facility Grand Jury Inspection, as Required by California Penal Code Section 919(b), *supra* note 142.

The ORR grant to the Yolo County juvenile hall totaled $2,797,229 for the 2015 fiscal year.[166] The county Board of Supervisors announced that the money gained from the ORR grant would be spent to "ensure safe and crime-free communities" and, notably, to reduce the amount of local tax required to fund the juvenile hall.[167] This information provides insight into one of the lucrative grants provided by the government agency (ORR) throughout the country to (former or current) criminal pre-trial detention facilities to house immigrant detainees—a trend that will likely continue.[168] Additionally, placement of immigrant children (and adults) in facilities meant for pretrial or convicted criminal defendants corroborates public allegations[169] that immigrants commit crimes and are criminals, a view that has been consistently proven untrue.[170]

Management of government grants by DHS to create more capacity for immigrant detention is difficult and haphazard.[171] Unorganized management leads to limited accountability and oversight, which increases the susceptibility of minors to abuse in immigrant detention facilities.[172] Children report abuses by staff in juvenile facilities, including the use of solitary confinement, pepper spray, and wrist and ankle restraints.[173] In March 2017, a reporter described one boy's experience in the Yolo County facility: "[d]uring his 11 months in jail, much of it spent alone in his cell, he has repeatedly

166. Brent Cardall, *ORR Grant Amendment*, YOLO COUNTY BOARD OF SUPERVISORS (Oct. 13, 2015), http://yoloagenda.yolocounty.org:8085/agenda_publish.cfm?id=&mt=ALL&get_month=12&get_year=2016&dsp=agm&seq=4377&rev=0&ag=364&ln=43565&nseq=&nrev=&pseq=&prev=#ReturnTo43565.

167. *Id.*

168. *See* Abdulamit, *supra* note 41 (discussing the prevalence of contracts between the Department of Homeland Security and private immigrant detention facilities).

169. Christine Wang, *Trump Calls for New Government Agency for 'Victims of Crime' by Immigrants*, CNBC POL. (Feb. 28, 2017), http://www.cnbc.com/2017/02/28/trump-calls-for-new-government-agency-for-victims-of-crime-by-immigrants.html.

170. KRISTIN F. BUTCHER & ANNE MORRISON PIEHL, NAT'L BUREAU OF ECON. RES., WHY ARE IMMIGRANTS' INCARCERATION RATES SO LOW? EVIDENCE ON SELECTIVE IMMIGRATION, DETERRENCE AND DEPORTATION 28 (2007).

171. Abdulamit, *supra* note 41.

172. *Id.*

173. Azadeh Shahshahani and Ayah Natasha El-Sergany, *Challenging the Practice of Solitary Confinement in Immigration Detention in Georgia and Beyond*, 16 CUNY L. REV. 243, 245–46 (2013) (discussing of the use of solitary confinement in immigration detention); *see also* Karen de Sá, *Honduran Boy, 14, Wins U.S. Asylum but Remains in Jail*, S.F. CHRON., (Mar. 5, 2017), http://www.sfchronicle.com/bayarea/article/Honduran-boy-14-wins-U-S-asylum-but-remains-in-10977616.php (discussing the use of Pepper spray and hand and wrist restraints in the Yolo County Juvenile Detention Center).

tried to harm himself and has lashed out at times, causing staff in the facility to douse him with pepper spray or bind his wrists and ankles."[174]

To challenge their initial detention, unaccompanied minors may look to the ORR review process, which is governed by a merely advisory manual the agency posts on its website.[175] The court in *Flores v. Sessions* elaborates:

> Under the policies, the initial decision about whether to release a minor to a particular sponsor is made by the local federal field specialist. If the field specialist denies release, the parent or legal guardian (but not, apparently, any other sponsor) has 30 days to request an appeal to the Assistant Secretary for Children and Families. If the parent or guardian requests a hearing, one will be scheduled via teleconference or video conference, at which point the parent or guardian "may explain the reasons why he or she believes the denial was erroneous." While the policy states that "[t]he Assistant Secretary will consider the testimony and evidence presented at the hearing," it does not guarantee any right to present evidence. Nor does it provide any rules for admissibility, evidentiary burdens, or standards of proof. The policy also does not protect the right of the parent or guardian to be represented by counsel at the hearing. Perhaps most important, minors—as opposed to parents or guardians—can appeal a detention decision only "[i]f the sole reason for denial of release is concern that the unaccompanied alien child is a danger to himself/herself or the community."
>
> Even if that is the sole reason for detention, the minor's right to appeal is predicated on the parent not having requested an appeal, and detained minors have no apparent right to be present at or participate in—on their own behalf or through counsel—an appeal filed by a parent or guardian.[176]

If this process proves unsuccessful for the child, the sole form of recourse to challenge detention is the FAST internal assessment conducted by ORR.[177] The ORR manual specifies, "[e]very 30 days, the care provider staff, in collaboration with the Case Coordinator and the ORR/FFs, reviews the placement of a UAC into a secure or staff secure facility to determine

174. Karen de Sá, *Honduran Boy, 14, Wins U.S. Asylum but Remains in Jail*, S.F. CHRON. (Mar. 5, 2017), http://www.sfchronicle.com/bayarea/article/Honduran-boy-14-wins-U-S-asylum-but-remains-in-10977616.php.

175. *Flores*, 862 F.3d at 879.

176. *Flores*, 362 F.3d at 871-72 (internal citations omitted).

177. Office of Refugee Resettlement, *supra* note 106.

whether a new level of care is more appropriate."[178] This is insufficient; due process requires more than the process described above or an internal determination of custody for a detained child.

Prolonged detention affects the children significantly. It results in more delays in release and treatment, and re-traumatizes these children. Prolonged detention can exacerbate preexisting emotional damage a child fleeing her home country may bring with her or may suffer during the journey. Generally, "even brief detention can cause psychological trauma and induce long-term mental health risks for children."[179] As the American Academy of Pediatrics' Council on Community Pediatrics pointedly observes, "there is *no* evidence indicating that *any* time in detention is safe for children."[180]

Studies have found that detained unaccompanied children have "high rates of posttraumatic stress disorder, anxiety, depression, suicidal ideation, and other behavioral problems."[181] However, "[v]isits to family detention centers in 2015 and 2016 by pediatric and mental health advocates revealed discrepancies between the standards outlined by ICE and the actual services provided, including inadequate or inappropriate immunizations, delayed medical care, inadequate education services, and limited mental health services."[182] In addition, the lack of recourse a child has to address the reasons for her detention has profound negative effects. As an attorney for one of the *Flores v. Sessions* plaintiffs notes, "[the detained minor's] aspect has transformed from one of optimism and hope to depression and hopelessness . . . . He reports suffering from fatigue, despair, and insomnia . . . ."[183]

VI. *Flores v. Sessions* Represents a Temporary Victory for Unaccompanied Minors

On February 17, 2017, the Department of Justice under the Trump Administration filed an Emergency Motion to Stay the District Court's Order, which required bond hearings for minors.[184] The motion alleged that the

178. Office of Refugee Resettlement, *supra* note 106.

179. Linton, *supra* note 115.

180. *Id*. at 6.

181. *Id*. (emphasis added).

182. Linton, *supra* note 115, at 5.

183. Plaintiffs'/Appellees' Opposition to Emergency Motion to Stay Order Enforcing Settlement of Class Action at 6, Jenny Lisette Flores, et al. v. Jefferson B. Sessions, 862 F.3d 863 III, et al., No. 17-55208 (9th Cir. Feb. 20, 2017).

184. Emergency Motion to Stay District Court Order, Jenny Lisette Flores, et al. v. Jefferson B. Sessions, 862 F.3d 863 (9th Cir. 2017) (III, Attorney General of the United States, et al., No. 17-55208 (Feb. 17, 2017).

requirement of bond hearings for unaccompanied children "significantly infringes upon HHS's express statutory directive and implementing guidance, places serious, statutorily unauthorized burdens on the Executive Office of Immigration Review ("EOIR") and its immigration judges, and conflicts with lawful statutes, regulations, and Ninth Circuit and Board of Immigration Appeals ("BIA") precedent."[185] The government also argued that the imposition of bond hearings on the courts would cause "irreparable harm," sufficient to satisfy the standard for a stay of proceedings pending appeal.[186] Plaintiffs countered that a stay would, in fact, result in irreparable harm to the detained children, and that it is in the public interest to provide an opportunity to unaccompanied minors to have "neutral and detached oversight of the reasons for their confinement."[187]

Flores v. Sessions has three main holdings: (1) that the HSA and TVPRA allow for the requirement that children have bond hearings, as stated in paragraph 24A of the *Flores* Settlement, (2) that immigration judges have the authority to determine whether children should remain in a particular level of restriction while in custody, and (3) that the TVPRA does not preclude the immigration judge's authority to conduct such a bond hearing.[188]

The court employed "straightforward tools of statutory construction in order to determine what the statutes before us are designed to do and not do."[189] The opinion looked first to the words of the statutes, then to the intent of the statutes themselves, and finally to the congressional intent, emphasizing the general goal that in passing the HSA and TVPRA "Congress sought to better provide for UACs."[190]

However, the Ninth Circuit implicitly and explicitly acknowledges and upholds limits to the extent of protection provided to unaccompanied children by the decision.[191] Interestingly, the decision does not mention *Rodriguez*, or any six-month time frame in which the bond hearings must be conducted, nor does paragraph 24A provide any timeline for periodic custody redeterminations. The decision notes that the hearings are distinct from an

185. Emergency Motion to Stay District Court Order, Jenny Lisette Flores, et al. v. Jefferson B. Sessions, 862 F.3d at 1.

186. Plaintiffs'/Appellees' Opposition, *supra* note 183, at 16–18 ("In short, the Order will cause significant immediate harm to the government by undermining and impeding Defendants' efforts to oversee the care and custody of UACs in accordance with the TVPRA, and to enforce federal immigration laws and efficiently adjudicate cases in immigration court.").

187. Plaintiffs'/Appellees' Opposition, *supra* note 183, at 16–18.

188. *Flores*, 862 F.3d at 877–78.

189. *Id.* at 866.

190. *Id.* at 880.

191. *Id.*

ordinary bond hearing because no bail is set.[192] If a child is determined to be in an incorrect ORR placement based on the evidence or lack thereof that the child poses a danger to the community, him or herself, or is considered a flight risk, the government then must "identify a safe and secure placement."[193]

Conclusion

Because of the due process rights violations that occur during prolonged detention, it is necessary to implement meaningful opportunities for children to contest their detention before a neutral magistrate, as the court decided in *Flores v. Sessions*.[194] Appellees assert that at least $121,000 was spent by ORR to detain a class member who was released to his mother after eight months in detention and $157,000 for another class member who was detained for more than twenty months.[195] The costs of overburdened immigration judges could be offset by the release of unaccompanied children held in "seemingly interminable detention."[196] Furthermore, Plaintiffs in *Flores v. Sessions* emphasize the irreparable harm in the form of emotional distress for the children subject to detention and deprivation of their constitutional rights.[197]

The two briefs in this most recent *Flores* litigation expose the fundamental disagreements between advocates and enforcement agencies regarding the purpose of detaining unaccompanied children.[198] Advocates argue that the settlement agreement holds the government responsible for enforcing an administrative, civil detention model.[199] The philosophy behind the administrative model is directly at odds with the criminal justice model. This is the crux of the issue of immigrant detention, and will continue to shape the debate, particularly given the Trump administration's explicit and promised policy reforms on immigration.[200]

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192. *Flores*, 862 F.3d at 867.

193. *Id.* at 866.

194. *Id.* at 881.

195. Plaintiffs'/Appellees' Opposition, *supra* note 183, at 15.

196. *Id.*

197. *Id*. at 17.

198. Emergency Motion, *supra* note 184 (citing "public interest" factors); *see also* Plaintiffs'/Appellees' Opposition, *supra* note 183 (arguing that the interest as asserted by the defendant [(the government]) is not synonymous with the public's interest).

199. Plaintiffs'/Appellees' Opposition, *supra* note 183.

200. *See e.g.*, Philip Desgranges, *Trump is Locking up and Threatening to Deport Children Based on Mere Suspicion of Gang Affiliation" New York Civil Liberties Union*, ACLU (Aug. 2, 2017), https://www.aclu.org/blog/immigrants-rights/immigrants-rights-and-detention/trump-locking-and-threatening-deport-children?redirect=blog/speak-freely/trump-locking-and-threatening-deport-children-based-mere-suspicion-gang (discussing how the new Trump Administration policy has targeted "children who have not even been accused of any crime" and "The New York Civil

Administrative detention for minors can be utilized by the government legitimately to accomplish certain ends. However, to do so, it must "ensure[] certain procedural guarantees" to avoid bypassing the procedural safeguards of the criminal justice system.[201] The abuses that occur in immigrant detention in the United States have been well documented for the past decade,[202] for children and adults.[203] Despite ORR's commitment to release children from detention and offer the least restrictive environment, unaccompanied children can be moved to more restrictive settings for a variety of reasons, or for no reason at all.[204] The transfer of children and the time they spend in secure, restrictive facilities suggests that the administrative model quickly transforms into criminal model in response to capacity. Resources should not impede basic due process for children.

Immigrant detention presents serious constitutional questions due to the fact that it is "excessive in light of its stated purpose."[205] It is imperative that the executive and legislative branches settle on a model and purpose for a system to serve as the baseline for analysis of its constitutionality. This is particularly important in light of due process concerns, for "Due Process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."[206]

Reforms should address the unsustainable reality that the United States has the world's largest immigrant detention system, and that past changes in policies has not affected the number of immigrants fleeing to the United States.[207] The rhetoric of the Trump administration surrounding immigrants

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Liberties Union warned the Office of Refugee Resettlement (ORR) . . . that placing minors in highly restrictive detention without adequate cause or process violates the agency's obligations under the *Flores* consent degree and federal law.").

201. ADMINISTRATIVE DETENTION OF CHILDREN, *supra* note 25.

202. Karen Tumlin et al., *A Broken System*, NAT'L IMMIGR. LAW CTR. (2009), https://www.nilc.org/wp-content/uploads/2016/02/A-Broken-System-2009-07.pdf (as a 2009 comprehensive study on immigrant detention conditions found, "The results reveal substantial and pervasive violations of the government's minimum standards for conditions at such facilities. As a result, over 320,000 immigrants locked up each year not only face tremendous obstacles to challenging wrongful detention or winning their immigration cases, but the conditions in which these civil detainees are held often are as bad as or worse than those faced by imprisoned criminals.").

203. *See supra* Section III.

204. *See* FAILED FEDERALISM, *supra* note 102 ("[T]he most common reason (47 percent of all minors securely confined) for secure confinement was *lack of space in licensed facilities* (influx).").

205. Whitney Chelgren, *Preventative Detention Distorted: Why it is Unconstitutional to Detain Immigrants Without Procedural Protections*, 44 LOY. L.A. L. REV. 1477, 1494 (2011).

206. Jackson v. Indiana, 406 U.S. 715, 738 (1972).

207. Daniel Wilsher, *Immigrant Detention, the Right to Liberty, and Constitutional Law*, Global Detention Project, Working Paper No. 22, 2017, ("They may demand individualized rather than group detention. A second and related question is the extent to which *any* government policy

has resulted in empowering enforcers of immigration law to overstep their bounds.[208] A successful approach will address the needs of unaccompanied children. This must include reasonable limits to detention and the ability to contest decisions which keep children in ORR/ICE custody. Detention itself must be age-appropriate, not punitive or retraumatizing, and truly in the least restrictive manner possible.

In the wake of *Flores v. Sessions*, ORR will now inform all unaccompanied children in staff-secure and secure placements of their right to a bond hearing, and schedule one if requested.[209] However, advocates remain cautious of the limits of this victory. In a Practice Alert, the Immigrant Legal Resource Center notes, "[g]iven the peculiarities of bond hearings for detained UCs, it remains to be seen how they will play out in practice," and have already "seen conflicting interpretations of the Ninth Circuit's opinion."[210] As this article is being published, bond hearings are beginning to be held for unaccompanied children in staff-secure and secure placements. ORR will represent the government, and will appear telephonically in "all but exceptional cases," opposite an unrepresented unaccompanied child.[211] In the hearing, the burden is on the child to prove he or she is not dangerous.[212] A finding by the judge in favor of the child will be considered as "one factor" in the decision for his or her release—but the decision remains with ORR.

Ultimately, the *Flores v. Sessions* decision presents the opportunity for ORR and, more generally, the executive branch to be fulfill the Due Process

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of imposing hardship on irregular migrants is always to be characterized as an exercise of the migration power even if it does not clearly lead to any measurable change in migration numbers. Such measures are, of course, always asserted to have deterrent effects.").

208. John Burnett, *In Their Search for Asylum, Central Americans Find the U.S. is Closing its Doors*, NAT'L PUB. RADIO (Mar. 13, 2017), http://www.npr.org/2017/03/13/519662321/in-their-search-for-asylum-central-americans-find-the-u-s-is-closing-its-doors ("Reports of immigration officials telling immigrants that 'there was no room' or 'they weren't processing asylum applications anymore.'").

209. *Notice of Right to a Bond Hearing*, U.S. DEPT. OF HEALTH AND HUM. SERVS., ADMIN. FOR CHILDREN AND FAMILIES, https://www.acf.hhs.gov/sites/default/files/orr/notice_of_right_to_a_bond_hearing.pdf (Sept. 1, 2017).

210. Rachel Prandini & Alison Kamhi, *Practice Alert on Flores v. Sessions*, IMMIGRANT LEGAL RES. CTR. (2017), https://www.ilrc.org/sites/default/files/resources/flores_v._sessions_practice_alert_final.pdf.

211. Center for Human Rights and Constitutional Law, Bond Hearings for youth in Immigration-related custody – Practice Advisory (Sept. 6, 2017), http://centerforhumanrights.org/PDFs/Flores_Para24A_PracticeAdvisory090617.pdf (noting that ORR has notified legal service providers that "it considers representation at bond hearings to be out of the scope of our contract." Plaintiffs counsel for *Flores* has noted concerns that children will "ill-advisedly" request bond hearings, for which "without counsel [they have] poor chances of success.").

212. *Id.*

rights of immigrant youth in detention. Given what we know about the experiences endured by these minors and the fragile, often traumatized state in which they arrive in the United States, an individualized, neutral assessment is crucial. This will require persistent advocacy.[213]

213. Jacqueline Bhabha, *"Not a Sack of Potatoes": Moving and Removing Children Across Borders*, 15 B.U. PUB. INT. L.J. 197, 204 (2006) (for a look at the importance, and difficulty, of a "best interest" calculation for minors).

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