

These Kids Need Lawyers: Why and How the United States Must Provide the Right to Appointed Counsel for Detained Unaccompanied Children

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I. INTRODUCTION: DETAINED UNACCOMPANIED CHILDREN

Children throughout the world are fleeing home situations of violence and seeking safety in the United States. Some children begin their migration with their families, only to find that some family members do not survive the journey, while others are separated by the United States government upon

arrival. Some children are so driven by fear and desperation that they flee without family at all. Alone in the United States, unaccompanied children are a hyper vulnerable population. Exacerbating matters, upon encountering law enforcement, they are locked and contained within “secure facilities,” or detention centers. What can be done to aid detained unaccompanied children? This Comment identifies the atrocities unaccompanied children face in detention and proposes that greater due process rights of appointed counsel are necessary to end the problem of mass detention of unaccompanied children in the United States.

In the United States, the Constitution, statutory law, and case law are largely silent on whether an unaccompanied child has a right to counsel—they only guarantee protections for children in juvenile delinquency. At the same time, however, the United States has also pledged to uphold international law, and those responsibilities cannot be forgotten. Namely, the United Nations Convention Relating to the Status of Refugees speaks directly to the detention of unaccompanied children.

International law demands far more protection than what the U.S. law currently provides. And fortunately, the U.S. does have comparable frameworks in place, specifically from the Sixth Amendment constitutional protections traditionally extended to children in the juvenile delinquency system. Still, the U.S. law has several options, and a long way to go, to align itself with international standards.

A. Where They Come From & Why They Leave

To understand why unaccompanied children deserve protection, background on where these children come from and why they flee is important. In the select Latin American countries where the majority of unaccompanied children flee from, there is sweeping crime, violence, gang related activity, and kidnapping; governments have failed to respond to these dangers.¹ In El Salvador, murder, assault, and rape are common while gang activity is widespread.² In Guatemala, drug trafficking and

1. David Agren, *More Than Two Thirds of Migrants Fleeing Central American Region Had Family Taken or Killed*, THE GUARDIAN (Feb. 11, 2020, 12:06 PM), <https://www.theguardian.com/world/2020/feb/11/migrants-fleeing-central-america-guatemala-honduras-el-salvador-family-taken-killed-study> [https://perma.cc/988L-SPV6].

2. *El Salvador Travel Advisory*, U.S. DEP'T OF STATE, <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/el-salvador-travel-advisory.html> [https://perma.cc/8TGF-YLZD].

organized crime are especially uncontrolled and rampant.³ In Honduras, the high levels of danger are exacerbated by weak infrastructures, limited government services, and scarce military presence.⁴ In Mexico, armed groups are known to target and rob, kill, or kidnap those who are most vulnerable.⁵ What is more, the prevalence of murder is exacerbated in these four countries; despite being smaller than the United States in population and size, the rate of intentional homicides can be five to ten times higher.⁶

Tensions run high in Central America for the reasons discussed above and more. In place of or in addition to these circumstances, a child may have personal reasons for fleeing their home country, such as seeking protection from persecution or abuse.⁷ “They’re fleeing Central America often to save their own lives.”⁸ But instead of being received with empathy and care when they arrive in the United States, unaccompanied children are subject to experiences that heighten post-traumatic stress, depression, anxiety, and even disease from adversity faced during the migration process.⁹

Unfortunately, there is no indication that this problem will cease any time soon. In part, children will continue to be in danger as long as the political climate in their home countries remains similar or the same. These issues could ultimately take years of work to remedy—a timeline the United States has little control over.

There are constant, imminent predictions of when the next group of unaccompanied children will arrive and where they will come from. In 2018, a caravan of more than 5,000 individuals trekked across several countries in Central America and through Mexico, relying on nothing but the kindness and generosity of the towns they passed by; an estimated

3. *Guatemala Travel Advisory*, U.S. DEP’T OF STATE, <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/guatemala-travel-advisory.html> [https://perma.cc/SU9S-95BU].

4. *Honduras Travel Advisory*, U.S. DEP’T OF STATE, <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/honduras-travel-advisory.html> [https://perma.cc/9GB2-FLQX].

5. *Mexico Travel Advisory*, U.S. DEP’T OF STATE, <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html> [https://perma.cc/B64X-QU2G].

6. *Intentional homicides (per 100,000 people) - El Salvador, Guatemala, Honduras, Mexico, United States*, THE WORLD BANK, <https://data.worldbank.org/indicator/VC.IHR.PSRC.P5?locations=SV-GT-HN-MX-US> [https://perma.cc/JKQ3-Q837].

7. See Christopher Sherman, Martha Mendoza, & Garance Burke, *US Held Record Number of Migrant Children in Custody in 2019*, ASSOCIATED PRESS (Nov. 12, 2019), <https://apnews.com/article/015702afdb4d4fbf85cf5070cd2c6824> [https://perma.cc/CT75-9DZY].

8. *Id.*

9. *Id.*

2,300 from this group were children.¹⁰ “Many of the children and families in the caravan were fleeing gang and gender-based violence, extortion, poverty, and limited access to quality education and social services in their home countries of northern Central America—El Salvador, Guatemala, and Honduras.”¹¹ In 2020, a group of an estimated 3,000 immigrants coming from Honduras to the United States traveled by foot because of the safety in numbers from criminal gangs and corrupt police.¹² The sustained and persistent migration are an indication that migration is not going to stop, despite changes in presidency or policy. In January 2021, another caravan made its way to the United States border and by the end of March, numbers greater than 18,500 broke new records.¹³ “The truth of the matter is: Nothing has changed,” says President Biden.¹⁴ “It happens every single, solitary year.”¹⁵

Most migrants feel as though they have little choice but to seek out a new country to live in.¹⁶ Media attention highlights the primary reason families escape their home countries with their children or send their children: they “don’t want to suffer further.”¹⁷ But equally important, these families’ struggles continue well after they’ve left their home countries, both with the long and tiring journey to the United States and the immigration legal process that awaits them.¹⁸ Nonetheless, families attempt the treacherous

10. Press Release, UNICEF, An Estimated 2,300 Children Traveling with Migrant Caravan in Mexico Need Protection and Essential Services (Oct. 26, 2018), <https://www.unicef.org/press-releases/estimated-2300-children-traveling-migrant-caravan-mexico-need-protection-and> [<https://perma.cc/4E77-QDW6>].

11. *Id.*

12. Juan Montes & José de Córdoba, *New Migrant Caravan from Honduras Heads Towards U.S. Border*, THE WALL ST. J. (Oct. 1, 2020, 11:37 PM), <https://www.wsj.com/articles/new-migrant-caravan-from-honduras-heads-toward-u-s-border-11601583375> [<https://perma.cc/CB9T-KXXQ>].

13. Jason Beaubien, *Migrant Caravan: Thousands Move Into Guatemala, Hoping to Reach U.S.*, NAT’L PUB. RADIO (Jan. 18, 2021, 3:50 PM), <https://www.npr.org/2021/01/18/958092745/migrant-caravan-thousands-move-into-guatemala-hoping-to-reach-u-s> [<https://perma.cc/C8AC-33WM>]; Julia Ainsley, *Record Number of Unaccompanied Children Crossed the Border in March*, NBC NEWS (Apr. 2, 2021, 8:30 AM), <https://www.nbcnews.com/politics/immigration/record-number-unaccompanied-children-crossed-border-march-n1262901> [<https://perma.cc/RM7T-QBD8>].

14. Ainsley, *supra* note 13.

15. Ainsley, *supra* note 13.

16. Beaubien, *supra* note 13.

17. Beaubien, *supra* note 13.

18. Montes & de Córdoba, *supra* note 12.

migration process, hopeful the United States immigration system will offer protection.¹⁹

II. IDENTIFYING THE PROBLEM: THE MASS DETENTION OF UNACCOMPANIED CHILDREN IN THE UNITED STATES

A. *Recent Atrocities in Detention Centers*

Warren Binford, an international children's rights scholar visiting a detention center holding unaccompanied children at the United States Mexico border:

This was, by far, the worst situation that I've seen not just by the conditions but by the sheer number of children who are being kept at this facility[.] . . . [O]ne of the children said that, currently, there are 100 children in his cell and that when he first arrived there, there were 300 children in the cell.

Many of them are sleeping on concrete floors, including infants, toddlers, preschoolers. They are being given nothing but instant meals, Kool-Aid and cookies—many of them are sick. We are hearing that many of them are not sleeping. Almost all of them are incredibly sad and being traumatized. Many of them have not been given a shower for weeks. Many of them are not being allowed to brush their teeth except for maybe once every 10 days. They have no access to soap. It's incredibly unsanitary conditions, and we're very worried about the children's health . . . It's nothing that I ever imagined seeing in the United States of America.²⁰

Media coverage provides but a small glimpse of insight into what happens to detained unaccompanied children, but there are also untold horrors. For anyone who learns of such deplorable living conditions, the question arises: how can we help these children? Although one's instinct or moral compass may indicate that something about these situations is inherently wrong, the problem has persisted for decades and across several presidential administrations. This seems to suggest that detention of unaccompanied children is not an anomaly that will soon pass. Instead, we are in danger of normalizing the detention of unaccompanied children in the United States; with every year the problem categorically worsens. By the very nature of these migrants being children, however, it is impossible to address this detention problem without an attorney.

19. Beaubien, *supra* note 13.

20. Weekend Edition Sunday, *Law Professor Describes Poor Conditions Where Migrant Children are Held*, NAT'L PUB. RADIO (June 23, 2019, 8:17 AM), <https://www.npr.org/2019/06/23/735191289/law-professor-describes-poor-conditions-where-migrant-children-are-held> [<https://perma.cc/964B-9AHT>] [hereinafter Weekend Edition Sunday].

B. Detention Numbers Across the Years

*1. Unaccompanied Children Southwest Land Border Encounters
by Month and Fiscal Year²¹*

MONTH	YEAR			
	2018	2019	2020	2021
OCTOBER	3,808	5,418	3,201	4,810
NOVEMBER	4,698	5,662	3,677	4,591
DECEMBER	4,995	5,104	3,639	4,965
JANUARY	3,922	5,515	3,076	5,820
FEBRUARY	3,759	7,243	3,490	9,402
MARCH	5,244	9,380	3,221	18,870
APRIL	5,331	9,265	741	17,067
MAY	7,192	11,861	1,008	14,052
JUNE	5,606	7,678	1,691	15,230
JULY	4,406	5,846	2,509	18,594
AUGUST	4,880	4,119	3,103	18,806
SEPTEMBER	4,819	3,543	3,883	14,358
TOTAL ENCOUNTERS	58,660	80,634	33,239	146,925

Numbers above reflect fiscal years 2018 – 2020 and fiscal year (FY) 21 to date on October 14, 2021.

The number of unaccompanied children migrating to the United States has increased the past few years. And though migration has persisted, in 2020, there was an anomalous low amount of documented land borders encounters of unaccompanied children for two reasons. First, generally, the coronavirus pandemic resulted in closing borders, restricting non-essential travel, and denying admissions based on health concerns.²² Second, because of the coronavirus pandemic, in March 2020, the federal government began expelling immigrants without valid travel documents that entered

21. *Southwest Land Border Encounters*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters> (set Demographic filter to “UC/Single Minors” and apply to graph) [<https://perma.cc/5JUB-V5HH>].

22. *See generally, Impacts of COVID-19 on the Immigration System*, A.B.A., https://web.archive.org/web/20210426222734/https://www.americanbar.org/groups/public_interest/immigration/immigration-updates/impact-of-covid-19-on-the-immigration-system/.

the United States seeking protection, based on the idea that they presented a threat to public health.²³ This expulsion included unaccompanied children until February 2021—thus producing artificially low encounters in 2020.

Still, high numbers of unaccompanied children migration persists. In just the first eight months of the 2021 fiscal year the United States saw more than twice the number of total encounters with unaccompanied children in 2020, and about equal the number of total encounters in the entire 2019 fiscal year.²⁴

2. *Unaccompanied Children Southwest Land Border Encounters Migrating From Four Countries*²⁵

COUNTRY	YEAR							
	FY 2014	FY 2015	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020	FY 2021
EL SALVADOR	16,404	9,389	17,512	9,143	4,949	12,021	2,189	15,473
GUATEMALA	17,057	13,589	18,913	14,827	22,327	30,329	8,390	58,571
HONDURAS	18,244	5,409	10,468	7,784	10,913	20,398	4,454	39,731
MEXICO	15,634	11,012	11,926	8,877	10,136	10,487	14,359	24,129
TOTAL ENCOUNTERS	67,339	39,399	58,819	40,631	38,325	73,235	29,392	137,904

Numbers above reflect fiscal years 2014 – 2020 and fiscal year (FY) 2021 to date on October 14, 2021.

The majority of unaccompanied children arriving to the United States migrate from just four countries in Latin America—more than ninety-five

23. See *What Is Title 42 and How Does It Impact Children and Families?*, YOUNG CTR. FOR IMMIGRANT CHILDREN’S RTS. (Oct. 12, 2021), <https://www.theyoungcenter.org/stories/2021/10/12/what-is-title-42-and-how-does-it-impact-children-and-families> [https://perma.cc/4JHR-5PDA] (for an explanation of how the federal law 42 U.S.C. § 265 introduced in March 2020 impacted the number of unaccompanied children allowed to enter the United States during the height coronavirus pandemic, by expelling them to Mexico when crossing at the United States Mexico border. In 2021, this law exempted children from expulsion, but continues to apply to adults, forcing families to elect a tough decision and thus still affecting the numbers of unaccompanied children encounters).

24. See *U.S. Border Patrol Southwest Border Apprehensions by Sector*, U.S. CUSTOMS AND BORDER PROT., <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters/usbp-sw-border-apprehensions> [https://perma.cc/K385-42HK] [hereinafter *Encounters by Country*].

25. *Id.*; *Southwest Land Border Encounters (By Component)*, U.S. CUSTOMS AND BORDER PROT., <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters-by-component> [https://perma.cc/PUM2-MMEG] [hereinafter *Southwest Land Border Encounters*].

percent.²⁶ Though totals fluctuate drastically year by year, more than 29,000 unaccompanied children migrated to the United States, from these four countries, in any given year within the last seven years—averaging over 50,000 unaccompanied children each year.²⁷

From the time that the Department of Health and Human Services first established a formal detention program in 2003 and throughout its first decade of operation, it consistently oversaw about 8,000 children per year.²⁸ In stark contrast, in its second decade of operation, from 2013 to present the Department has established a record minimum of 29,000 children in one year.²⁹ Even more alarming, 2021 numbers have more than quadrupled the number of unaccompanied children that entered the United States in 2020.³⁰ This illustrates that one cannot isolate the migration counts from one year to the next and find relief if the number of unaccompanied children has decreased.

Immigration law defines an “influx of minors into the United States” as anytime “when the INS has, at any given time, more than 130 minors eligible for placement in a licensed program.”³¹ With numbers in the thousands, current situations have escalated well beyond an influx and into a massive national problem. The current migration of unaccompanied children and the response from the federal government (or lack thereof) is concerning.

26. *Encounters by Country*, *supra* note 24. In addition to these four countries, unaccompanied children migrate from all over the world. In fiscal year 2021, this same source reports 6,930 unaccompanied children southwest land border encounters from countries other than El Salvador, Guatemala, Honduras, and Mexico.

27. *Encounters by Country*, *supra* note 24.

28. U.S. DEP'T OF HEALTH & HUM. SERV., *Latest UC Data – FY2020*, [https://www.hhs.gov/programs/social-services/unaccompanied-children/latest-uc-data-fy2020/index.html#:~:text=The%20Office%20of%20Refugee%20Resettlement,Unaccompanied%20Children%20\(UC\)%20Program.&text=For%20its%20first%20nine%20years,children%20annually%20in%20this%20program](https://www.hhs.gov/programs/social-services/unaccompanied-children/latest-uc-data-fy2020/index.html#:~:text=The%20Office%20of%20Refugee%20Resettlement,Unaccompanied%20Children%20(UC)%20Program.&text=For%20its%20first%20nine%20years,children%20annually%20in%20this%20program) [https://perma.cc/N5QU-3384]. Though detention of unaccompanied children occurred before 2003, this analysis limits data discussion to publicly available information starting in 2003.

29. *See Encounters by Country*, *supra* note 24.

30. *See Southwest Land Border Encounters*, *supra* note 25.

31. Stipulated Settlement Agreement from *Reno v. Flores*, Stipulation 24(A). https://www.aclu.org/sites/default/files/assets/flores_settlement_final_plus_extension_of_settlement011797.pdf [hereinafter FSA].

3. Percent of Unaccompanied Children in Detention with the Office of Refugee Resettlement by Country of Origin³²

COUNTRY	YEAR								
	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020
EL SALVADOR	27%	26%	29%	29%	34%	27%	12%	18%	14%
GUATEMALA	34%	37%	32%	45%	40%	45%	54%	45%	48%
HONDURAS	27%	30%	34%	17%	21%	23%	26%	30%	25%
MEXICO	8%	3%	<2%	6%	3%	<3%	3%	2%	6%
ALL OTHER	4%	5%	<3%	3%	2%	3%	<5%	5%	8%

Next evaluating overall detention numbers, the same four countries represent where the majority of detained unaccompanied children come from.³³ In 2020, ninety-two percent of detained unaccompanied children were from Honduras, Guatemala, El Salvador, or Mexico.³⁴

4. Referrals of Unaccompanied Children to the Office of Refugee Resettlement From the Department of Homeland Security³⁵

	YEAR								
	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020
TOTAL REFERRALS	13,625	24,668	57,496	33,726	59,170	40,180	49,100	69,488	15,138

The number of referrals of unaccompanied children reflects the number of unaccompanied children the federal government has identified as having entered the United States. The number of referrals above is the total number of unaccompanied children which the federal government office responsible for detention, the Office of Refugee Resettlement, is then responsible for—from all countries, not just the four major Latin American countries highlighted above.

32. OFF. OF REFUGEE RESETTLEMENT, *Facts and Data, Country of Origin*, <https://www.acf.hhs.gov/orr/about/ucs/facts-and-data> [<https://perma.cc/Q4JH-DXGJ>].

33. *Id.*

34. *Id.*

35. OFF. OF REFUGEE RESETTLEMENT, *Facts and Data, Referrals*, <https://www.acf.hhs.gov/orr/about/ucs/facts-and-data> [<https://perma.cc/Q4JH-DXGJ>].

5. *Unaccompanied Children Released to a Sponsor*³⁶

	YEAR						
	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017	FY 2018
TOTAL RELEASES	27,840	52,147	42,497	34,953	72,837	16,837	92,484

Numbers above are sum totals of release data by state for Fiscal Years 2015 – 2020 and FY 21, from October 2020 to July 2021, current as of September 30, 2021.

A release occurs when a child exits federal detention or custody and is placed with a sponsor outside of the federal government. Thus, children released to a sponsor are no longer held in detention or in custody of the federal government. In the chart above, the difference between the number of referrals and the number of releases is presumed to be the number of unaccompanied children held in detention, however, because referrals (or children identified) may come from other sources, it does not definitely provide the number of total detained unaccompanied children.

C. Options Other Than Detention While Remaining in the United States

There are alternatives to detention available. Sponsors are United States citizens capable of providing care at levels far greater than detention centers have to offer. According to Binford, “over 70% of [children in detention centers] have sponsors in the United States.”³⁷ Sponsors willingly love and care for these children, and better yet, “most of those sponsors are parents or other family members.”³⁸ This means that children would not only be in good hands but would also feel the sense of security they so desperately long for, deserve, and likely fled their home countries looking for.

Whether a child will be placed with a sponsor and not at a detention center is decided at a judicial hearing before an immigration judge. This custodial placement hearing is one that all unaccompanied children affirmatively have the right to receive. Nonetheless, it is an adversarial

36. OFF. OF REFUGEE RESETTLEMENT, *Unaccompanied Alien Children Released to Sponsors by State*, (June 24, 2021), <https://www.acf.hhs.gov/orr/grant-funding/unaccompanied-alien-children-released-sponsors-state> [<https://perma.cc/QR7N-Z58W>].

37. Weekend Edition Sunday, *supra* note 20.

38. Weekend Edition Sunday, *supra* note 20.

hearing before a court. Presenting facts before the judge are the two parties: the child and the United States government. Notably however, there is only one attorney—on behalf of the United States Government. Detained unaccompanied children have no right to court-appointed representation in immigration proceedings.³⁹ The United States government, however, is always represented by a lawyer from the Department of Homeland Security.⁴⁰ Children may choose to have an attorney present and while some do, children have no way to contact, communicate with, or hire a lawyer.⁴¹ Thus, for the vast majority, representation of the child is rare.

A toddler-age little boy walks into court and a court reporter places headphones on his head to hear the voice of an interpreter. The headphones are far too big for his head. The toddler sits at a big wooden table and chair where respondents typically sit. The toddler's toes don't touch the floor. The judge begins questioning.

“Are you a little nervous this morning? . . . Si?”

“Do you know what these proceedings here in court are all about?”

“Do you know what a lawyer is? . . . No?”

“Do you have a lawyer? . . . No?”

*After each question, the toddler only shakes his head to indicate yes or no. His eyes are glazed and he does not respond verbally. After the last question he looks away from the judge and zones out.*⁴²

D. International Criticisms

The hundreds of thousands of unaccompanied children migrating to the United States have not gone unnoticed by the rest of the world. As such, the atrocities that await children once they arrive in the United States have been subject to great criticism. “Detention is never in the best interests of the child and always constitutes a child rights violation,” says one United Nations human rights leader.⁴³ And though, yes, there are unique challenges

39. Linda Freedman, *UNACCOMPANIED: Alone in America*, YOUTUBE (June 30, 2018), <https://www.youtube.com/watch?v=6ztlvPsJmlcU&t=36s> [https://perma.cc/BYS9-TFKE] [hereinafter *UNACCOMPANIED*, YOUTUBE].

40. *Id.*

41. Linda Freedman, *UNACCOMPANIED: Alone in America, A Note from the Film-Maker*, <https://www.unaccompaniedchildren.org/about> [https://perma.cc/D2LB-5NMC].

42. *UNACCOMPANIED*, YOUTUBE, *supra* note 39.

43. Stephanie Nebehay, *U.S. Should Stop Detaining Migrants, Separating Children: U.N.*, REUTERS (June 5, 2018, 3:09 AM), <https://www.reuters.com/article/us-usa-immigration-un/u-s-should-stop-detaining-migrants-separating-children-u-n-idUSKCN1J114A> [https://perma.cc/FRN5-PDEZ].

that receiving thousands of immigrants can bring, no other country in the world separates families, leaving children detained alone.⁴⁴

In the United States, when parents and children arrive together, parents are criminally prosecuted for a first-time border crossing offense; the children are not.⁴⁵ Thus, prosecution of border entry made international headlines when it spiked in 2018, going from zero cases to more than 800 in just six months.⁴⁶ This timing correlated with spikes in the numbers of unaccompanied children referrals. While parents commence criminal proceedings and serve a penalty sentence in prison, they are not permitted to be detained with their children.⁴⁷ “Human rights groups . . . have sharply [criticized] the separations, warning of the long-term trauma on the children . . . [T]he UN Human Rights Office called on the US to ‘immediately halt’ them.”⁴⁸

In Mexico, the government recently pooled resources to create a center where unaccompanied children returned to Mexico from the United States immigration authorities can reside.⁴⁹ With advice from the United Nations on how to set up this model, Mexico is able to prioritize taking care of children from Mexico, Guatemala, and all over Central America, as far as Ecuador.⁵⁰ The solution is temporary and ultimately works towards family reunification.⁵¹

In the European Union, which faced its worst migrant crisis in 2015, families were held together in detention-like reception centers while their immigration requests were processed.⁵² In Australia, there is no policy that permits isolating children throughout immigration proceedings.⁵³ In

44. *Why the US is Separating Migrant Children from Their Parents*, BBC NEWS (June 15, 2018), <https://www.bbc.com/news/world-us-canada-44503514> [<https://perma.cc/765T-M6TT>] [hereinafter *Why the US is Separating*].

45. Sophia Tareen, *AP Explains: The Law Criminalizing Improper Border Crossings*, AP NEWS (June 28, 2019), <https://apnews.com/article/2584b7cbfc4948cd9b828df0c1161a57> [<https://perma.cc/S5QQ-PMF4>].

46. *Id.*

47. *Why the US is Separating*, *supra* note 44.

48. *Why the US is Separating*, *supra* note 44.

49. Julian Resendiz, *Border Shelter Will House Unaccompanied Minors Returned from U.S.*, BORDER REP. (Jan. 12, 2021, 7:15 PM), <https://www.borderreport.com/hot-topics/immigration/border-shelter-will-house-unaccompanied-minors-returned-from-u-s/> [<https://perma.cc/L6KW-6H6Q>].

50. *Id.*

51. *Id.*

52. *Why the US is Separating*, *supra* note 44.

53. *Why the US is Separating*, *supra* note 44.

Canada, there are no policies that allow children to be forcibly separated from their families.⁵⁴

In other words, United States' treatment of unaccompanied children is an international outlier.⁵⁵ Thus, advocating for an alternative to detaining unaccompanied children in the United States is a pressing, relevant, and worldly matter.

III. APPLICABLE LAW: WHAT DO UNITED STATES LAW AND INTERNATIONAL LAW PROVIDE DETAINED UNACCOMPANIED CHILDREN?

Legal representation is a solution that can advocate for alternatives to detention and secure American and international rights for unaccompanied children. Both American law and international law provide the right to appointed legal representation in judicial proceedings for unaccompanied children in the United States.

A. *United States Law*

1. *The United States Constitution*

a. *Fifth Amendment*

The Fifth Amendment of the United States Constitution provides in part: “No person shall be . . . deprived of life, liberty, or property, without due process of law.”⁵⁶ Due process incorporates an idea of “procedural due process,” concerning the fairness and lawfulness of decision making methods used by the courts and the executive.⁵⁷ Governmental actors violate due process when they frustrate the fairness of proceedings.⁵⁸ At the most basic level, this type due process includes fair notice and the opportunity to be heard in criminal, civil, and other proceedings.⁵⁹

“Aliens,” (here used interchangeably with immigrants), are encompassed within the definition of the word “person” for the purposes of the Fifth Amendment, including undocumented immigrant children.⁶⁰ The Supreme Court has also confirmed “It is well established that the Fifth Amendment

54. *Why the US is Separating*, *supra* note 44.

55. *Why the US is Separating*, *supra* note 44.

56. U.S. CONST. amend. V.

57. Roger A. Farifax & John C. Harrison, *Common Interpretation, The Fifth Amendment Due Process Clause*, INTERACTIVE CONST., <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-v/clauses/633> [<https://perma.cc/LBX3-RQ4P>].

58. *Id.*

59. *Id.*

60. *See generally* Plyler v. Doe, 457 U.S. 202, 210 (1982).

entitles aliens to due process of law in deportation proceedings” as the removal implicates that person’s liberty interest.⁶¹ Thus, these Fifth Amendment constitutional protections should extend to unaccompanied children.

b. Sixth Amendment

The Sixth Amendment of the United States Constitution provides in part: “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”⁶² This generally means that a defendant in a criminal case, even if he does not have enough money to pay for it, will have the right to be represented by the lawyer of his choice. Furthermore, the Supreme Court interpreted the Sixth Amendment to mean that in any case where the defendant faces possible prison time, he is entitled to a court-appointed lawyer, paid for by the government.⁶³

This extends to children as well, requiring that with respect to juvenile delinquency proceedings “which may result in commitment to an institution in which the juvenile’s freedom is curtailed, the child and his parents must be notified of the child’s right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.”⁶⁴ These Sixth Amendment constitutional protections traditionally extended to children in the juvenile delinquency system should extend to unaccompanied children as well.

2. Statutes

a. The Immigration Nationality Act

The Immigration Nationality Act (INA) was first enacted in 1952 and is an extensive collection of laws that regulate immigration in the United States.⁶⁵ One section, as codified in the United States code, addresses in relevant part: “In any removal proceedings before an immigration judge and in any appeal proceedings[,] . . . the person concerned shall have the privilege of being represented (at no expense to the Government) by . . .

61. *Reno v. Flores*, 507 U.S. 292, 306 (1993).

62. U.S. CONST. amend. VI.

63. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

64. *In re Gault*, 387 U.S. 1, 41 (1967).

65. *Immigration and Nationality Act*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/laws-and-policy/legislation/immigration-and-nationality-act> [<https://perma.cc/3YKK-99TH>].

counsel, authorized to practice in such proceedings, as he shall choose.”⁶⁶ In other words, INA provides a due process right to have counsel present during removal proceedings, but that counsel can only be secured if privately retained. Counsel is not appointed or provided for by the government by the language of the statute. This is the source of the problem for, and potentially a prospective area for applying a solution to, unaccompanied children.

b. Additional Due Process Statutes Throughout the United States Code That Influence Detention of Unaccompanied Children

Other provisions provide additional special rights for special populations, namely unaccompanied children. All problems and solutions raised in this paper are specific to this special population of “unaccompanied children”—a legal term of art. The United States Code uses the term “unaccompanied alien child” (used interchangeably with “unaccompanied child” or “UC”), to describe a child who:

(A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom (i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody.⁶⁷

A child migrating to the United States is usually first classified as an unaccompanied child by the Department of Homeland. An unaccompanied child can be identified surreptitiously, upon “the apprehension or discovery of an unaccompanied alien child . . . or any claim or suspicion that an [immigrant] in the custody [of the government] . . . is under 18 years of age.”⁶⁸ Once a child is identified as an unaccompanied child, the identifying government agency must refer the child and notify the Department of Health and Human Services (HHS) within 48 hours and transfer custody within 72 hours.⁶⁹ Thus, a child reaches their first location of custody within 3 days at most; the first destination of custody need not be the final destination.

Once referred and transferred to HHS, unaccompanied children are under the care and responsibility of the Office of Refugee Resettlement (ORR).⁷⁰ The ORR, by definition, is responsible for promoting a *child’s*

66. 8 U.S.C. § 1362.

67. 6 U.S.C. § 279(g)(2).

68. 8 U.S.C. § 1232(b)(2).

69. *Id.* at (2)–(3).

70. 6 U.S.C. § 279(a)(1); *Accord* Homeland Security Act of 2002, Pub. L. No 107–296, § 452, 116 Stat. 2135 (2002) (for an explanation of the shift of responsibility from INS to ORR, though not affecting the process).

best interests in all placement and custody decisions.⁷¹ The child's protected interests state that: "an [unaccompanied child] in the custody of the Secretary of Health and Human Services shall be promptly placed in the least restrictive setting that is in the best interest of the child."⁷² Though "best interest" is a legal term of art, interests are hardly defined in this context.

ORR also uses its expertise to consider placement that will ultimately protect the *state's interest*—something inherent to its role as a government agent, but still potentially creating a conflict of interest. To determine a placement appropriate, ORR must draw three affirmative conclusions in the state's interest and confirm that children:

1. are likely to appear for all hearings or proceedings in which they are involved;
2. are protected from smugglers, traffickers, or others who might seek to victimize or otherwise engage them in criminal, harmful, or exploitive activity; and
3. are placed in a setting in which they are not likely to pose a danger to themselves or others.⁷³

To fulfill their dual responsibilities, the law provides that ORR's final placement determination should be made in consultation with "juvenile justice professionals, the Director of the Bureau of Citizenship and Immigration Services, and the Assistant Secretary of the Bureau of Border Security."⁷⁴

All interests considered, ORR has two options for an unaccompanied child's placement. First, they can place a child under the care of a sponsor in the following order of preference: (1) parent, (2) legal guardian, (3) an adult relative (brother, sister, aunt, uncle, grandparent, or first cousin), (4) an adult individual or entity designated by the parent or legal guardian (through a signed declaration or other document that ORR determines is sufficient to establish the signatory's parental/guardian relationship), (5) a licensed program willing to accept legal custody, or (6) an adult individual

71. 6 U.S.C. § 279(b)(1).

72. 8 U.S.C. § 1232(c)(2)(A).

73. 6 U.S.C. § 279(b)(2)(A).

74. *Id.*

or entity seeking custody when it appears that there is no other likely alternative to long term ORR care and custody.⁷⁵

Second, the ORR can alternatively “place a child in a shelter facility, foster care or group home (may be therapeutic), staff secure or secure care facility, residential treatment center, or other special needs care facility.”⁷⁶ In other words, some form of detention in custody.⁷⁷

Though facility options for unaccompanied children do not include the traditional jail or prison that one associates with detainment, the freedom of these children is heavily curtailed. Though the federal government insists they take health, safety, and welfare very seriously, children will exit these facilities ill-cared for with trauma, suicidal tendencies, induced seizures, severe weight loss, and bodily injury.⁷⁸ The fencing, monitoring, and locking of metal doors that purport to “protect the children from strangers who are not [family]” also keep children from leaving.⁷⁹ Even if a child was able to leave the facility, the Department of Homeland Security acknowledges that leaving the facility may adversely impact immigration status and even lead to arrest.⁸⁰

When deciding placement, the ORR may *not* decide to release an unaccompanied child upon their own recognizance, upon the illusion the child will attend to immigration proceedings and federal government requests on their own.⁸¹ Releasing children with no person or entity does not satisfy either the child’s interest or the state’s interest.⁸² Thus, releasing a child from custody on their own recognizance is not a solution proposed in this paper. After all, unaccompanied children are still minors in need of care—the underlying premise of proposed law requiring appointed counsel to secure appropriate placement amongst other rights.

Between the two options of releasing a child to a sponsor or keeping a child in detention, detention in custody is and always should be the last

75. *Children Entering the United States Unaccompanied: Section 2, Safe and Timely Release from ORR Care*, OFF. OF REFUGEE RESETTLEMENT, <https://www.acf.hhs.gov/orr/policy-guidance/children-entering-united-states-unaccompanied-section-2#2.2.1> [https://perma.cc/2RAT-QN99].

76. *Children Entering the United States Unaccompanied: Section 1, Placement in ORR Care Provider Facilities*, OFF. OF REFUGEE RESETTLEMENT, <https://www.acf.hhs.gov/orr/policy-guidance/children-entering-united-states-unaccompanied-section-1#1.1> [https://perma.cc/65YX-FUN5].

77. *Id.*

78. Gretchen Frazee, *A Look Inside the Facilities Where Migrant Families are Detained*, PBS NEWS HOUR (Aug. 26, 2019, 5:44 PM), <https://www.pbs.org/newshour/nation/new-trump-rules-would-detain-families-longer-this-is-where-they-would-stay> [https://perma.cc/9G5A-4ZBK].

79. *Id.*

80. *Id.*

81. 6 U.S.C. § 279(b)(2).

82. *See id.*

resort. For the sake of the child, detention should be avoided as much as possible because it is the most restrictive. Absent a determination that a child (1) “poses a danger to self or others or (2) has been charged with having committed a criminal offense[.]” the government shall not place a child in a secure facility.⁸³ The law reflects the general distaste for detention centers, as even if a child is placed in a secure facility, “the placement of a child in a secure facility shall be reviewed, at a minimum, on a monthly basis, in accordance with procedures prescribed by the Secretary, to determine if such placement remains warranted.”⁸⁴

A placement hearing in this context, termed a “bond hearing” for unaccompanied children, is not an ordinary bond hearing because it does not result in the setting of bail as in the adult bail system.⁸⁵ Instead, “[t]hese proceedings do not provide UCs the same rights that are ordinarily available through a bond hearing.”⁸⁶ In adult criminal court, a bond hearing considers whether to accept a bond “given to a court by a criminal defendant’s surety to guarantee that the defendant will duly appear in court in the future and, if the defendant is jailed, to obtain the defendant’s release from confinement.”⁸⁷ In an adult immigration law setting, a bond hearing asks an immigration judge to consider eligibility for release if a bond will “ensure that the detainee shows up to all immigration hearings.”⁸⁸

A bond hearing for unaccompanied children under current law differs from both a criminal bond hearing and an adult immigration bond hearing, primarily in that a favorable bond hearing does not compel nor entitle a child’s release and does not control the custody of minors.⁸⁹ Success for a child is not reached by asking: Was there a bond or not? Instead, we ask: Will the child be held in custody or not?

If an immigration judge rules in favor of the government, then the court agrees that there is a need for detention. Then, “if the immigration judge

83. 8 U.S.C. § 1232(c)(2)(A).

84. *Id.*

85. *Flores v. Sessions*, 862 F.3d 863, 867 (9th Cir. 2017).

86. Rachel Prandini & Alison Kamhi, *Practice Alert on Flores v. Sessions: Ninth Circuit Holds that All Detained Children Have the Right to a Bond Hearing*, IMMIGRANT LEGAL RES. CTR. (July 2017), https://www.ilrc.org/sites/default/files/resources/flores_v_sessions_practice_alert_final.pdf [<https://perma.cc/ZQ2Q-7N7F>] [hereinafter Prandini & Kamhi].

87. Bail Bond, Black’s Law Dictionary (11th ed. 2019).

88. *How Immigration Bail Bonds Work*, ABOUT BAIL, <https://www.aboutbail.com/pages/how-immigration-bail-bonds-work> [<https://perma.cc/KB4P-VH6R>].

89. *Flores v. Sessions*, 862 F.3d at 867–68.

determines that the form of detention ORR has imposed is improper,” the next step will require that “the government . . . identify a safe and secure placement into which the child can be released.”⁹⁰ No change in custody occurs until this safe and secure placement has been pre-determined. In other words, “even if an [immigration judge] finds that a child does not pose a flight risk and is not a danger to the community, the child still might not be released unless or until ORR can ensure that they have a safe and suitable placement to whom they can release the child (e.g., a parent, relative, adult friend, or stranger who has been vetted to serve as the child’s “sponsor”).”⁹¹ The exception is when ORR has already approved a sponsor. In this case, unless the immigration judge sustains a finding in the bond hearing that the child should not be released due to dangerousness, the youth must be released to the pre-identified and approved sponsor.⁹²

3. Case Law

If a child must be detained, case law establishes a floor of minimums for appropriate detention in many of the areas where legislatures have not.

a. The Family of Flores Cases

Details of an unaccompanied child’s care, custody, and placement are governed by the Flores Settlement Agreement (FSA), regardless of where the child is placed.⁹³ What began in the Central District of California with *Flores v. Meese*, was eventually challenged all the way to the United States Supreme Court in *Flores v. Janet Reno*. Utilizing the widespread impact of class actions, the Flores counsel certified a class of “[a]ll minors who are detained in the legal custody of the INS.”⁹⁴ The resulting remedy was the Flores Settlement Agreement: a list of standards of appropriate placement and treatment, originally crafted for Jenny Lissette Flores but now protecting an ever-growing class of detained migrant children. The class certification in the original *Flores* case implies that the FSA has nationwide impact on all similarly situated minors.⁹⁵ Thus, the FSA is the consent decree governing the treatment of minors since 1997.⁹⁶ What is

90. *Id.* at 867.

91. *Prandini & Kamhi*, *supra* note 86.

92. *Prandini & Kamhi*, *supra* note 86.

93. 45 C.F.R. § 410.100 (2002).

94. *See generally* *Flores v. Meese*, 681 F. Supp. 665, 666 (C.D. Cal. 1988), *aff’d sub nom.* *Flores by Galvez-Maldonado v. Meese*, 942 F.2d 1352 (9th Cir. 1991), *rev’d sub nom.* *Reno v. Flores*, 507 U.S. 292(1993).

95. FSA, *supra* note 31 at Stipulation 10.

96. *Flores v. Sessions*, 862 F.3d at 863.

more, the FSA has only become stronger, and more complex, evolving with years of subsequent litigation.

Beginning at the lower court level, courts acknowledged that greater protections must be afforded to vulnerable populations.⁹⁷ The court, acknowledging the statistics indicating where unaccompanied children come from and why they flee, reasoned:

It is true that many of these plaintiffs may come from unfortunate situations where their lives and liberties had little protection. However, they have come to the United States by more than mere happenstance. Many carry with them the expectation of liberty, opportunity, and a better life, the embodiment of which is our Constitution. They have reason to expect its protections.⁹⁸

At the United States Supreme Court, the policy behind *Flores* stemming from lower court decisions even persuaded infamous conservative originalist Justice Scalia to admit in his majority opinion that detention “becomes complicated when the juvenile is arrested alone, i.e., unaccompanied by a parent, guardian, or other related adult” and that “[t]his problem is a serious one.”⁹⁹ This statement carries weight for two reasons in this analysis. For one, it confirms that detaining children in government facilities is comparable to an arrest, quasi-criminal. This lends to the application of Fifth and Sixth Amendment law. Second, it emphasizes the seriousness of the problem that migrant children face and the urgency to find a solution—even almost twenty-five years later.

Stamped with Supreme Court approval, the FSA’s current precedential power is no small feat. The *Flores* Settlement Agreement extends to all minors who are detained in the legal custody of HHS.¹⁰⁰ To date, the FSA holds serious implications of protection for unaccompanied children and has proven its stature against consistent challenges. A few points of the FSA are discussed next.

First, relevant to the analysis in this paper, the FSA codifies the process that a child goes through when identified as an unaccompanied child. Under paragraph 24A of the FSA, “[a] minor in deportation proceedings

97. See generally *Flores v. Meese*, 681 F. Supp. at 665.

98. *Id.* at 688–89.

99. *Reno v. Flores*, 507 U.S. at 295.

100. FSA, *supra* note 31, at Stipulation 10. The stipulation is addressed towards the Immigration and Naturalization Service—the agency detaining children in the 1980s. However, this agency has since been disbanded. Starting in 2003, and the responsibilities now fall on the Department of Health and Human Services, as described in the Applicable Law section above.

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.”¹⁰¹ While ruling that a minor should be held in custody is one potential outcome, the purpose of bond hearings under the FSA includes finding a solution “even if the immigration judge determines that the form of detention ORR has imposed is improper.”¹⁰² “[T]he government must still identify a safe and secure placement into which the child can be released.”¹⁰³ Therefore, “a favorable finding in a bond hearing does not entitle minors to be released.”¹⁰⁴ Where a child is recommended for and placed in custody, there still remains the right to future bond hearings for redetermination of placement.¹⁰⁵

Second, when a child is placed in custody, he or she is given the “right to counsel.” “The INS shall promptly provide each minor not released with (a) INS Form 1-770, (b) an explanation of the right of judicial review as set out in Exhibit 6, and (c) the list of free legal services available in the district pursuant to INS regulations (unless previously given to the minor).”¹⁰⁶ In other words, having an attorney is permissible, but not guaranteed. The federal government may provide resources on how to obtain a lawyer, but the federal government does not provide or fund the lawyer itself.

Almost 32 years since the original litigation, and 23 years since the Flores Settlement Agreement was written, the parameters of care and custody for unaccompanied children in detention are still litigated endlessly; both sides continue to tirelessly argue the value of the Flores Settlement Agreement and its appropriate reach.

Fortunately for unaccompanied children and for children’s rights advocates, the Flores Settlement Agreement and the case law from the line of Flores appeals remains good law. In this law, in enforcing the terms of the Flores Settlement Agreement, “[c]ourts must interpret contractual language in a manner that gives force and effect to every provision, and not in a way that renders some clauses nugatory, inoperative or meaningless.”¹⁰⁷ As of March 2021, courts continue to affirm the same protections.¹⁰⁸

Despite major pushback from the Trump presidential administration, courts have held strong and prohibited regulations inconsistent with the

101. *Id.* at Stipulation 24(A) (emphasis added).

102. *Flores v. Sessions*, 862 F.3d at 867–69.

103. *Id.* at 866–67.

104. *Id.* at 866.

105. FSA, *supra* note 31, at Stipulation 24(A).

106. FSA, *supra* note 31, at Stipulation 24(D).

107. *Flores v. Barr*, 407 F. Supp. 3d 909, 924 (C.D. Cal. 2019).

108. *Flores v. Rosen*, 984 F.3d 720, 729 (9th Cir. 2020).

FSA.¹⁰⁹ In response to inappropriate action from the executive and from the legislative branch, court jurisprudence has shaped most of the law for unaccompanied children. This separation of decision-making powers will likely persist because of the Flores Settlement Agreement's unique sunset clause: "The Flores Agreement terminates only upon [the governments'] publication of final regulations implementing this Agreement."¹¹⁰ In other words, the Flores Settlement Agreement remains indefinitely binding unless the federal government publishes the relevant and substantive terms of FSA into statute. Therefore, to sunset the Flores Settlement Agreement, the federal government *must* publish the relevant and substantive terms of the FSA into statute.

B. International Law

International law provides a more explicit and favorable right to appointed legal representation for "unaccompanied minors," here used interchangeably with unaccompanied children.¹¹¹ Perhaps most important for the legal representation of unaccompanied children is the United Nations Convention Relating to the Status of Refugees, adopted in 1951 to widely recognize the need for protection of refugees.¹¹² Since the 1951 Convention, the law has only been subject to one amendment referred to as the 1967 Protocol.¹¹³ The 1967 Protocol reaffirmed the necessary protection of refugees, but removed the geographic and temporal limits of the 1951 Convention, effectively giving universal protections to unaccompanied children.¹¹⁴

1. United Nations Convention Relating to the Status of Refugees

a. Article 31

Article 31 of the United Nations Convention Relating to the Status of Refugees (UNCRSR) governs persons unlawfully entering a country but seeking asylum; this includes unaccompanied children.¹¹⁵ The UNCRSR

109. Flores v. Barr, 407 F. Supp. 3d at 925.

110. *Id.*

111. G.A. Res. 2198 (XXI), at 2, United Nations Convention Relating to the Status of Refugees and Stateless Persons (July 28, 1951).

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at art. 31. See also Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-penalization, Detention and Protection*, DEP'T OF

provides an ultimate blanket of protection for unaccompanied children by promoting the highest level of international human rights. The United Nations Commissioner of Human Rights (UNHCR), parent to the United Nations Convention Relating to the Status of Refugees, defines detention as “confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory.”¹¹⁶

The UNCRSR begins with the presumption that “[t]he detention of asylum seekers is, in the view of UNHCR[,] inherently undesirable. This is even more so in the case of vulnerable groups such as . . . children, [and] unaccompanied minors.”¹¹⁷ “Freedom from arbitrary detention is a fundamental human right and the use of detention is, in many instances, contrary to the norms and principles of international law.”¹¹⁸ Facility detention of unaccompanied minors falls precisely within the inherently undesirable, arbitrary detention that UNHCR seeks to avoid. Therefore, when deciding on whether an unaccompanied child should be detained, “there should be a presumption against detention.”¹¹⁹ The text of the UNCRSR provides as a rule that unaccompanied minors should not be detained.¹²⁰

According to UNCRSR, “permissible exceptions to the general rule that detention should normally be avoided must be prescribed by law.”¹²¹ For example, the law may prescribe detention in limited circumstances:

- (i) to verify identity, (ii) to determine the elements on which the claim for refugee status or asylum is based, (iii) in cases where asylum seekers have destroyed their travel and /or identity documents or have used fraudulent documents in order to mislead the authorities of the State, in which they intend to claim asylum, and (iv) to protect national security and public order.¹²²

Under international law, one way to protect against unnecessary or prolonged detentions is “fair and expeditious procedure” for determining refugee status, “subject to judicial or administrative review.”¹²³ This

INT’L PROT. FOR THE UNHCR GLOBAL CONSULTATIONS (Oct. 2001), <https://www.unhcr.org/3bcfd164.pdf> [<https://perma.cc/S7HL-ALJH>] [hereinafter Goodwin-Gill] (for an interpretation of Article 31 in a paper prepared at the request of the Department of International Protection for the UNHCR Global Consultations).

116. Goodwin-Gill, *supra* note 115, at 52.

117. Goodwin-Gill, *supra* note 115, at 50.

118. Goodwin-Gill, *supra* note 115, at 50.

119. Goodwin-Gill, *supra* note 115, at 52.

120. Goodwin-Gill, *supra* note 115, at 56.

121. Goodwin-Gill, *supra* note 115, at 53.

122. Goodwin-Gill, *supra* note 115, at 53–54.

123. Goodwin-Gill, *supra* note 115, at 39–40.

review is not merely a formality, but one that is effective and grants courts “the power to order release ‘if the detention is not lawful.’”¹²⁴ In other words, the powers of the court and judge are empowered with real merit. That “[UN member] states have been able to [utilize the UNCRSR to] manage their asylum systems and their immigration program[s] without recourse to physical restraint [is], for example, through the use of *bonds* and reporting requirements.”¹²⁵

During these processes of judicial review, the following placements should be considered in the following order of priority:

[w]here possible [unaccompanied children] should be released into the care of family members who already have residency within the asylum country. Where this is not possible, alternative care arrangements should be made by the competent childcare authorities for unaccompanied minors to receive adequate accommodation and appropriate supervision. Residential homes or foster care placements may provide the necessary facilities to ensure their proper development, (both physical and mental), is catered for while longer term solutions are being considered.¹²⁶

If detention must be used as a measure of last resort, it should be for the shortest period of time possible.¹²⁷

To assist with this decision process, a legal guardian or adviser should be appointed for unaccompanied children.¹²⁸ Whenever one is detained, as unaccompanied children are in the United States, they should benefit from “fundamental procedural safeguards, including prompt and full advice of the detention decision and the advice of the right to counsel and free legal assistance, wherever possible.”¹²⁹

b. 1967 Protocol

As originally written, the Convention was a short-term solution, set to expire by 1967. Recognizing its importance, the United Nations drafted the 1967 Protocol as an amendment providing that “equal status should be enjoyed by all refugees covered by the definition in the Convention, irrespective of the date limitations that were imposed by the original

124. Goodwin-Gill, *supra* note 115, at 42.

125. Goodwin-Gill, *supra* note 115, at 36.

126. Goodwin-Gill, *supra* note 115, at 56–57.

127. Goodwin-Gill, *supra* note 115, at 57.

128. Goodwin-Gill, *supra* note 115, at 70.

129. Goodwin-Gill, *supra* note 115, at 70.

document.”¹³⁰ The 1967 Protocol does not exist without the 1951 CRSR because the 1967 Protocol exists solely to extend protection of the 1951 CRSR.

Though the United States did not sign the original short-term Convention, the United States affirmed its importance by signing on to the 1967 Protocol.¹³¹ Therefore, when the United States acceded to the 1967 Protocol, it acceded to the Convention’s obligations as well.¹³² This paper proceeds under the presumption that the United States is bound to the protections offered in the 1951 CRSR, as is supported by the condemnations of the UNHCR on United States practices. The same presumption is consistently made throughout comparable international law analysis.¹³³

IV. LEGAL ANALYSIS: WHERE ARE THE GAPS IN UNITED STATES LAW AND WHAT CAN INTERNATIONAL LAW PROVIDE?

Current practice in the United States does not provide the maximum amount of protection for unaccompanied children under United States law. Unaccompanied children do not have the right to an appointed attorney during any part of their immigration proceedings. Combining United States law with the influence of international law can reform current practice to provide an affirmative right to counsel provided by the government.

A. The United States Does Not Currently Provide Unaccompanied Children Adequate Due Process

So long as the ORR is the only purported representative available for children, it is not possible to secure rights for children. As an extension of the federal government, the ORR’s duties to children are diametrically opposed to the ORR’s responsibility to the United States. On one hand, the child wants nothing more than to be released from detention where they are isolated and alone. If the children are old enough to understand their journey and why they fled to the United States, they would likely wish to remain in the United States. On the other hand, the government, and especially immigration law enforcement officers, have a strict duty to

130. Goodwin-Gill, *supra* note 115, at 51.

131. G.A. Res. 2198, *supra* note 111.

132. *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol*, U.N. HIGH COMM’R FOR REFUGEES, <https://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf> [<https://perma.cc/X2B4-XVWJ>].

133. See, e.g., *American Courts and the U.N. High Commissioner for Refugees: A Need for Harmony in the Face of a Refugee Crisis*, 21 HARV. L. REV. 1399, 1401 (Mar. 9, 2018), <https://harvardlawreview.org/2018/03/american-courts-and-the-u-n-high-commissioner-for-refugees-a-need-for-harmony-in-the-face-of-a-refugee-crisis/> [<https://perma.cc/5FBH-XJBE>].

uphold federal laws that criminalize unlawful migration to the United States.

Understanding who benefits from having children detained and knowing the sheer number of detentions, it becomes clear that ORR is not an impartial office. ORR works in consult with the Director of the Bureau of Citizenship and Immigration Services and the Assistant Secretary of the Bureau of Border Security. While this seems appropriate to the ORR's duty to the government, this raises questions about whether these partnerships are consistent with making decisions in the best interest of detained unaccompanied children. ORR is either failing to provide loyalty and care to the unaccompanied children or it is failing to provide the same to the federal government, ORR cannot accomplish both. Even if at its inception ORR could indeed manage these responsibilities, skyrocketing encounters and detentions reveal that is not the current case.

The numbers suggest that ORR is *only* acting on behalf of the federal government by detaining children when it is in the government's best interest without regard or sensitivity to the trauma an unaccompanied child will go through. ORR is not fulfilling its duties to the unaccompanied child. Only an attorney representing the child would be able to fulfill loyalty and care without conflicts of interests.

1. The United States Constitution

Historically, neither Fifth Amendment nor Sixth Amendment jurisprudence have provided unaccompanied children with the right to appointed counsel. Still, advocates use both amendments as a springboard to reach that conclusion that the United States Constitution *does* support providing the right to appointed government counsel. For example, recent advocacy compares the conditions of a juvenile delinquency detention facility to those of a detention center for unaccompanied children. If the connection can be made that detaining unaccompanied children is much like detaining arrested youth, then detaining unaccompanied children also involves a liberty interest that triggers higher due process—including appointed counsel.

2. Statutes

a. The Immigration and Nationality Act

Under a textualist approach, unaccompanied children do not have the right to appointed counsel under the INA. The text explicitly revokes this

idea, leaving little room for interpretation. Thus, advocates for greater due process do not turn to the INA as it stands, but instead consider whether amendments to the INA might provide more protection in the future.

3. Case Law

Case law has largely established the outer parameters of interpretation and expansion of the Constitution and statutes. Overall, there has been a trend of expansion in due process. The right to bond hearing is celebrated by child advocates because it ensures that unaccompanied children are not held in secure detention without cause.¹³⁴ “[Bond] hearings compel the [government] to provide its justifications and specific legal grounds for holding a given [child].”¹³⁵ This burden of persuasion requiring the government to first prove its case is significant because “concrete information [revealed] in the government’s case can [also] be utilized to advocate for the child’s release.”¹³⁶

Bond hearings are also treasured because “such a hearing does provide minors with meaningful rights and practical benefits,” including “a forum in which a child has the right to be represented by counsel, and to have the merits of his or her detention assessed by an independent immigration judge” and “an opportunity for counsel to bring forth the reasons for the minor’s detention, examine and rebut the government’s evidence, and build a record regarding the child’s custody.”¹³⁷ These two rights are on par with some of the highest level of due process that a child can receive. By allowing an immigration judge to assess the merits of a child’s ongoing detention, bond hearings provide ORR with valuable information that helps the agency determine the appropriate custody of unaccompanied minors in a fairer and less arbitrary manner.

The ruling from a bond hearing is also a prized tool. Ideally, the favorable verdict guides ORR in making placement determinations for unaccompanied minors. Without this tool, unaccompanied children are held in bureaucratic limbo, left to rely upon the agency’s alleged benevolence as a protection against “perfunctory and ad hoc determinations” and opaque decision making.¹³⁸ An alleged agency benevolence that, in practice, is missing.

Directly impacting the effectiveness of bond hearings though, is whether children have counsel representing them or not. Even with an automatic

134. Flores v. Sessions, 862 F.3d at 867.

135. *Id.* at 868

136. *Id.*

137. *Id.* at 868.

138. *Id.*

bond hearing secured as soon as a child comes into custody, there is still the worry of whether the child will make good use of the hearing at all. Unable to communicate, and much less litigate, thousands of children have given up the opportunity to meaningfully plead their valid cases while qualified sponsors await. Without counsel, there are thousands of children sad, scared, and alone because alternatives to detention were not explored for them. The premise that children are somehow capable of defending their rights in courts is contrary to the Constitution's due process guarantee. Case law reflects the importance of counsel and the perils of going without counsel.

a. The Family of the Flores Cases

In *Flores v. Sessions* (*Sessions*), the government asserted that the Congressional legislation that applied to unaccompanied children terminated the bond-hearing requirement of the Flores Settlement with respect to unaccompanied minors.¹³⁹ However, the Ninth Circuit affirmed that all unaccompanied children have the right to a bond hearing and in its analysis the court provided the rights that bond hearings seek to protect and specified why bond hearings are so important.¹⁴⁰

Any other decision-making process outside of presenting to judicial magistrate will not “consider the testimony and evidence presented at the hearing, nor guarantee any right to present evidence.”¹⁴¹ For example, a young boy Hector was detained for over a year and ORR never provided him or his attorney with an explanation for his continued secure detention, gave any indication of when he might be released, or presented him for a hearing before an immigration judge.¹⁴² Suddenly, after sixteen months, ORR decided to allow him to leave the facility with no explanation as to the delay, though his desire had been expressed time and time again.¹⁴³

Byron, another unaccompanied child, was living with family in Texas when he was arrested and sentenced to a juvenile detention facility.¹⁴⁴ After completing his juvenile sentence, Byron was suddenly identified as an unaccompanied child and was immediately transferred to a detention

139. *Id.* at 866.

140. *Id.*

141. *Id.* at 872.

142. *Id.*

143. *Id.* at 873.

144. *Id.*

facility for immigrant children.¹⁴⁵ His mother advocated for his release, and guards communicated he would “be released in a couple of weeks.” Yet, a couple of weeks passed and Byron was never released; he was forced to be transferred to an adult facility at age eighteen, a place an already traumatized child would likely dread.¹⁴⁶ Only as a criminally prosecuted adult he was able to take his bond request before a judge.¹⁴⁷

Sessions held that the ORR review process which must be affirmatively invoked was insufficient.¹⁴⁸ Lacking a hearing before a judge, a child does not get a determinate answer nor accountability for an answer to their request for placement. Timeliness also becomes irrelevant without the court system.

In *Flores v. Rosen*, the federal government’s actions were challenged after limiting a child’s due process access to a bond hearing.¹⁴⁹ However, the Court found “the distinction between the Agreement’s opt-out process for obtaining a bond hearing and the regulations’ opt-in process [was] significant for some unaccompanied minors.”¹⁵⁰ A bond hearing process that must be affirmatively invoked is contrary to the FSA because children often lack the knowledge and ability to request a hearing on their own. For example, by requiring a five-year-old child to fill out a form in a language they cannot read, speak, or understand frustrates the purpose of the hearing in the first place. Now, every unaccompanied child referred to the ORR is scheduled a bond hearing, regardless of whether it is personally requested (or prepared).

While *Rosen* and preceding cases confirm proper placement is exceedingly important by at least providing a bond hearing as a legal right for every single detained child, the problem is not cured. So long as children do not have legal representation of counsel in these placement hearings, the dangers of improper placement remain.

b. The Most Recent Interpretation of the Law

In *Lucas R. v. Azar*, a complaint was filed in a class action of unaccompanied minors, claiming that the right to an attorney, not just the right to be represented by one, is a crucial protection.¹⁵¹ In *Lucas*, advocates suggested the present situation in which children simply have the right to have an

145. *Id.*

146. *Id.*

147. *See id.* at 879.

148. *Flores v. Rosen*, 984 F.3d 720, 735 (2020).

149. *Id.*

150. *See generally* *Lucas R. v. Azar*, No. CV 18-4741 DMG (PLAx), 2018 U.S. Dist. LEXIS 220970 (C.D. Cal. Dec. 27, 2018).

151. *Id.*

attorney present is hollow and insufficient.¹⁵² Advocates instead proposed unaccompanied children should have appointed counsel to represent their interests in legal matters to provide a fair chance of protection from detention.¹⁵³ With such a demand, the litigation sought to obtain the most definitive response to the question: do unaccompanied children have the right to appointed counsel?

The most recent challenge to detention of children in *Flores v. Rosen* turned out to be helpful adjudication towards securing legal counsel by addressing and denying government justifications for deviating from current protections afforded by law. Though the court did not rule that every child has a right to appointed counsel, the court made four findings on the status of the detention, treatment, and rights of unaccompanied children.

First, by codifying FSA protections for unaccompanied minors into statute, Congress did not leave the treatment of accompanied minors in detention up to DHS's discretion.¹⁵⁴ FSA requirements on humane child treatment remain good law while infractions of FSA requirements are violations of the law.

Second, though the FSA includes a sunset clause providing the FSA will terminate upon codification of the Agreement into law, the executive branch cannot unilaterally bring about the termination of the FSA through the promulgation of *inconsistent* regulations for unaccompanied children.¹⁵⁵ Here, HHS attempted to broaden the circumstances in which a minor may be placed in a secure facility.¹⁵⁶ For example, up until *Rosen* HHS "required unaccompanied minors held in secure or staff-secure placements to request a [bond] hearing, rather than providing a hearing to those minors automatically unless they refuse[d] one."¹⁵⁷ "These departures undermine the Agreement's core 'presumption in favor of releasing minors,'" which otherwise only require detention as a last resort.¹⁵⁸ So long as the FSA remains good law, any executive action must be *consistent* with the FSA.

Third, the Court rejected the government's argument that an unprecedented increase in family migration is so onerous, unworkable, and detrimental

152. *Id.*

153. *Id.*

154. *Flores v. Rosen*, 984 F.3d at 726.

155. *Id.*

156. *Id.* at 733.

157. *Id.* at 736.

158. *Id.* at 737.

to the public interest that it warrants termination of the FSA.¹⁵⁹ “According to the government, ‘irregular family migration’ has increased by 33 times since 2013, and in 2019, more than 500,000 people traveling as families reached the southwest border.”¹⁶⁰ But, the government did not show how this justified that they must detain accompanying minors.¹⁶¹

The government has three primary options for purposes of immigration custody: (1) [when a family arrives together] release all family members into the United States; (2) detain the parent(s) or legal guardian(s) and either release the juvenile to another parent or legal guardian or transfer the juvenile to HHS as an unaccompanied minor; or (3) detain the family unit together as a family by placing them at an appropriate family detention center during their immigration proceedings.¹⁶²

The government’s actions revealed that the government prefers the third option.¹⁶³ “The government views the first option as problematic, both because it creates incentives for bringing children on the dangerous journey to cross the border” and justifies avoiding the second option when possible because it generates significant litigation which consumes judicial resources.¹⁶⁴ Perhaps the most important public policy conclusion from *Rosen* is that: “the Agreement flatly precludes that approach.”¹⁶⁵ Instead “the Agreement requires DHS to . . . release rather than detain minors who do not present a safety or flight risk, as long as a suitable custodian is available,” and if this is unavailable, “to place minors who are not released in a non-secure, state-licensed facility.”¹⁶⁶

Fourth, despite changes in size and applicability to this powerful class action suit, the government waived its ability to challenge the class certification when it settled the case and is unable to provide that as an argument to terminate the FSA.¹⁶⁷

Given the most recent interpretations of the landmark law governing detention of unaccompanied children, the findings of *Lucas* are preliminary conclusions to reach the solutions proposed in this paper. Though *Rosen* looks to United States law alone to support its arguments, it provides an outline of where international law can fill the gap.

159. *Id.* at 743.

160. *Id.* at 742.

161. *Id.* at 744.

162. *Id.* at 742.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 744.

*B. International Law Does Provide the Right to
Appointed Legal Counsel*

Freedom from arbitrary detention is a fundamental human right and the use of detention is, in many instances, contrary to the norms and principles of international law.¹⁶⁸ Unlike United States law, the United Nations High Commissioner for Refugees outright condemns detention.¹⁶⁹ In this context, “UNHCR’s position is that children should not be detained for immigration related purposes, irrespective of their legal/migratory status or that of their parents, and that detention is never in their best interests.”¹⁷⁰ International law violations put in question a State’s compliance with generally accepted standards of treatment, including the prohibition on cruel, inhumane, or degrading treatment; the special protection due to the family and to children; and the general recognition given to basic procedural rights and guarantees.¹⁷¹ In this case, the United States’ actions are suspect and subject to international scrutiny.¹⁷² The United States’ detention of unaccompanied children will often deprive the asylum seeker of an opportunity to present his or her case or to have the assistance of counsel.¹⁷³ The United Nations guidelines *do* and *should* especially benefit vulnerable groups of refugees, like minors, in the United States.¹⁷⁴ The United States should follow the standards of the United Nations and ensure that unaccompanied children who are lawfully detained are treated in accordance with international standards.

1. United Nations Convention Relating to the Status of Refugees

According to Article 31 of the 1951 Convention Relating to the Status of Refugees, “if ever detained, asylum seekers should benefit from fundamental procedural safeguards, including . . . automatic review of the detention decision by a judicial or administrative authority, and periodic reviews thereafter of the continuing necessity, if any, of the detention; [and] opportunity to

168. Goodwin-Gill, *supra* note 115, at 50.

169. *UNHCR’s Position Regarding the Detention of Refugee and Migrant Children in the Migration Context*, U.N. HIGH COMM’R REFUGEES (Jan. 2017), <https://www.unhcr.org/en-us/58a458eb4> [<https://perma.cc/C5AA-RRSS>].

170. *Id.*

171. Goodwin-Gill, *supra* note 115, at 64.

172. Goodwin-Gill, *supra* note 115, at 64.

173. Goodwin-Gill, *supra* note 115, at 29.

174. Goodwin-Gill, *supra* note 115, at 50.

challenge the necessity of detention.”¹⁷⁵ Although the language in the UNCRSR does not explicitly use the term “bond hearing,” the particular attention paid to the need for “guarantees as to the competence, impartiality and independence of the ‘judicial or other authority’ ordering or reviewing both the lawfulness and the necessity of detention” is precisely the purpose of bond hearings for unaccompanied children.¹⁷⁶ When discussing placement, the UNCRSR also recognizes that a “balance of interests can require that alternatives to detention be fully explored, such as fair, efficient, and expeditious procedures for the resolution of claims.”¹⁷⁷ In other words, to promote fair resolution of placement, there is heavy reliance on an impartial decision-making where the child has an advocate that can argue the necessity of detention.

a. Article 31

According to Article 31 of the 1951 CRSR, “if ever detained, asylum seekers should benefit from fundamental procedural safeguards, including . . . advice of the right to counsel and free legal assistance, wherever possible.”¹⁷⁸ The United Nations makes clear that the high level protection of unaccompanied children includes the right to legal assistance.¹⁷⁹ What is more, “[a] legal guardian or adviser should be appointed for unaccompanied minors.”¹⁸⁰ The emphasis on appointment leaves no room for accepting situations where unaccompanied minors do not have anyone to represent them in legal proceedings. Similarly, it does not permit representation from someone like the ORR who is neither a legal guardian nor an advisor. Under international law, it is beyond ORR’s responsibilities to advocate for the child. Only an appointed attorney can provide professional, effective, legal assistance catered to the needs of the child.

175. Goodwin-Gill, *supra* note 115, at 40.

176. Goodwin-Gill, *supra* note 115, at 43.

177. Goodwin-Gill, *supra* note 115, at 44.

178. Goodwin-Gill, *supra* note 115, at 40.

179. Goodwin-Gill, *supra* note 115, at 57.

180. Goodwin-Gill, *supra* note 115, at 57.

V. SOLUTIONS TO THE PROBLEM: UNDER INFLUENCE OF
INTERNATIONAL LAW, THE UNITED STATES MUST
EXTEND A DUE PROCESS RIGHT TO COUNSEL
TO DETAINED UNACCOMPANIED CHILDREN

As a solution to the mass detention of unaccompanied children in the United States, the United States needs to provide the right to appointed counsel for representation of unaccompanied children. Visceral reactions from the United States public and in the international sphere suggests that continuing to detain these children without representation is not an option. The United States *can* extend due process for unaccompanied migrant children because United States Constitutional Amendments, statutes, policy, and precedent all support the legality under current frameworks and the United States is accountable to this heightened responsibility under international law. The United States *should* also extend due process in response to the aforementioned horrors as a matter of public policy. Therefore, demands that the United States *must* extend due process to detained unaccompanied children is a reasonable and feasible solution. Finally, this paper explores the most feasible approach and presents implementation strategies.

A. Proposed Changes in the United States

The Young Center for Immigrant Children's Rights has written an extensive report reimagining legal representation for immigrant children.¹⁸¹ Applying the Young Center's research, this paper expands on the two major options to source counsel for unaccompanied children.

1. The Local Representation Model

The *local representation model* closely mirrors how some unaccompanied children obtain representation today. Children use a non-government attorney (or at least only partially government-funded attorneys) as they are available in their local communities.

181. See generally *Reimagining Children's Immigration Proceedings: A Roadmap for an Entirely New System Centered Around Children*, YOUNG CTR. FOR IMMIGRANT CHILDREN'S RTS. (Oct. 2020), <https://static1.squarespace.com/static/597ab5f3beba60a625aaf45/t/5f9acdc38fc5b520e882eb1/1603980749320/Reimagining+Children%E2%80%9999s+Immigration+Proceedings+Young+Center+for+Immigrant+Children%27s+Rights.pdf> [<https://perma.cc/UQ3W-5FPL>] [hereinafter YOUNG CENTER].

One benefit of this model is the likelihood of attorney representation with immigration specialties or expertise. Though the Young Center specifically calls for expertise training in the actors making decisions,¹⁸² the same argument can be made for counsel representing children’s interests. An attorney who already has “agency training and expertise in understanding how children communicate, how trauma impacts children and affects their memory and communication, and how children perceive and experience danger” avoids risks that would undermine children’s right to fair due process.¹⁸³

One potential hurdle is sourcing local representation where there is no pre-established working standard. The Young Center recognizes this model would require a significant investment for “supervising generous pro bono attorneys who often lack experience working with child clients or with the special procedures or forms of protection available to certain children.”¹⁸⁴

2. *The Public Defender Model*

Alternatively, the *public defender model* is a government funded appointment system.¹⁸⁵ If one views the detention of unaccompanied children like the child advocates in *Lucas R.*, bond hearings for unaccompanied children are quasi-criminal and qualify for representation under Fifth and Sixth Amendment protections much like children in the juvenile delinquency system. This approach acknowledges the need to provide counsel to indigent populations and appropriately shifts the burden of funding to the government.

One benefit of this program would be the ease of following the public defender system already in place. For example, by adding a “juvenile immigration” unit akin to the juvenile delinquency and juvenile dependency splits in most public defender offices. This is already happening in the United States as can be seen by Cook County establishing an immigration unit in its public defender office after unanimous funding approval.¹⁸⁶ There is also the Public Defenders’ Coalition for Immigration Justice, “a group of 39 government offices across the United States who represent

182. *Id.* at 28.

183. *Id.*

184. *Id.* at 42.

185. *Id.*

186. Rachel Hinton, *Cook County Approves Nearly \$7 Billion Budget and Braces for Yet ‘Another Tough Budget Year’ Ahead*, CHI. SUN TIMES (Updated Nov. 24, 2020, 7:06 PM), <https://chicago.suntimes.com/politics/2020/11/24/21663484/cook-county-6-9-billion-budget-preckwinkle-coronavirus-covid-19-health-care-criminal-justice> [<https://perma.cc/R7XN-9QQZ>]; see also Elvia Malagón, *Public Defenders Push for Program to Provide Immigrants Access to Attorneys*, CHI. SUN TIMES (Jan. 13, 2021, 5:03 PM), <https://chicago.suntimes.com/2021/1/13/22229318/chicago-immigration-ice-deportation-biden-public-defender> [<https://perma.cc/MH22-ET38>].

immigrants in criminal and/or immigration proceedings—including the National Association for Public Defense (NAPD) and public defense offices from Alabama, Arizona, California, Florida, Georgia, Illinois, Louisiana, Maryland, Massachusetts, New York, Nebraska, Oregon, Tennessee, and Texas.”¹⁸⁷ Together they are pushing for the federal government and the president to embrace a plan to adopt a *public defender model* nationwide.¹⁸⁸

One downfall of this model is the potential over-burdening of an already woefully under-resourced public defender system.¹⁸⁹ Public defenders face high pressures from growing caseloads but lack of money, time, and knowledge to handle them.¹⁹⁰ The Young Center highlights “tremendous concerns regarding burnout and secondary trauma for lawyers working with highly traumatized children—not just in the immigration system, but in family, child welfare and juvenile justice courts” also handled by government attorneys.¹⁹¹

Though both models have merit, this paper suggests the *public defender model* as most congruent to established United States law. Furthermore, this model accomplishes the aforementioned demands for government-appointed counsel.

3. Implementation

Implementation of this solution cannot be explored without a brief acknowledgement of the recent political climate. The 2016-2020 Donald Trump presidential administration expressed a strong disdain for providing

187. Office of the Public Defender, *Public Defenders Nationwide Announce Plan for Immigration Justice, Provide Ten-Point Plan to Biden Administration By Office of the Public Defender*, S.F. PUB. DEF. (Jan. 13, 2021), <https://sfpublicdefender.org/news/2021/01/public-defenders-nationwide-announce-plan-for-immigration-justice-provide-ten-point-plan-to-biden-administration/#:~:text=The%20Public%20Defenders'%20Coalition%20for%20Immigration%20Justice%20consists%20of%2039,%2C%20Florida%2C%20Georgia%2C%20Illinois%2C> [https://perma.cc/DY6M-LQS7] [hereinafter *Public Defenders Nationwide*].

188. *Id.*

189. *ACLU Report: L.A. Public Defender's Office Ill-Equipped to Handle Noncitizen Cases*, ACLU S. CAL. (May 15, 2018), <https://www.aclusocal.org/en/press-releases/aclu-report-la-public-defenders-office-ill-equipped-handle-noncitizen-cases> [https://perma.cc/8LS3-GGCG].

190. Phil McCausland, *Public Defenders Nationwide Say They're Overworked and Underfunded*, NBC NEWS (Dec. 11, 2017, 2:22 AM), <https://www.nbcnews.com/news/us-news/public-defenders-nationwide-say-they-re-overworked-underfunded-n828111> [https://perma.cc/V7KN-3TD5].

191. YOUNG CENTER, *supra* note 181, at 42.

rights to unaccompanied minors.¹⁹² With numbers of unaccompanied minors being detained increasing dramatically, the Trump administration was operating under pressure to simply put a stop to it all.¹⁹³ Acting on behalf of the executive, the United States Attorney General made several attempts to terminate the Flores Settlement Agreement, both in part and as a whole. Trump spoke of the Flores Settlement with a “vigorous need to terminate;” expanding rights was not on the executive’s agenda.¹⁹⁴ The election of President Joseph Biden and Democratic control of the Presidency, House, and Senate, has recently made expanding due process rights to unaccompanied children feasible.

Applying parameters established by precedent, and especially though of *Flores v. Rosen*, there are several points to implementing appointed counsel for unaccompanied children in the United States.

First, the federal government can begin the expansion of due process by codifying the right to appointed counsel into statute as permitted in the Flores Settlement Agreement.

Second, to remain in line with the sunset clause and *Flores v. Rosen*, any statute would have to remain consistent with any current protections to unaccompanied children provided by the FSA. The federal government could not, for example, attempt to limit the number of unaccompanied children eligible. The appointment would be most beneficial if triggered at the point of encounter or referral to ORR. This would encompass the greatest number of unaccompanied children in need, allowing an attorney to be present immediately after the point of identification and minimizing the time of detention.

Third, though legitimate opposition would be considered, only reform that is not onerous, unworkable, and detrimental to the public interest would fail—a high bar according to *Rosen*. Criticism of reform at a time with unprecedented immigration numbers would not suffice. Administrative burdens in establishing a *public defender model* would also be unpersuasive. In fact, selecting this model over the *local presentation model* streamlines implementation. Evidence can be found in the thirty-nine public defense offices already implementing similar changes.¹⁹⁵ Opponents would need to explain how either of these two hurdles, or others, are not just difficult

192. Anna Flagg & Andrew R. Calderón, *500,000 Kids, 30 Million Hours: Trump’s Vast Expansion of Child Detention*, THE MARSHALL PROJECT (Oct. 30, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/10/30/500-000-kids-30-million-hours-trump-s-vast-expansion-of-child-detention> [<https://perma.cc/DJ5M-VMWD>].

193. *Id.*

194. *Id.*

195. See *Public Defenders Nationwide*, *supra* note 187.

but actually justify placement decisions where the child has no counsel representation.

B. Conclusion

Unaccompanied children flee dangerous parts of the world and arrive to the United States in hopes of finding security and safety. They deserve, at a minimum, a fair chance of obtaining this protection. Instead of being placed in detention centers upon being identified, unaccompanied children should receive government appointed counsel who can advocate for an appropriate non-detention placement. Children cannot advocate for themselves. With diametrically opposed interests, the federal government cannot be their advocate either.

United States law already provides the framework for providing the right to appointed counsel to unaccompanied children. International law holds the United States accountable for meeting that basic human right. By implementing a government appointed system under the *public defender model*, the United States can act within established legal precedent while avoiding international rights violations.

