AN ANALYSIS OF TREATMENT OF UNACCOMPANIED IMMIGRANT AND REFUGEE CHILDREN IN INS DETENTION AND OTHER FORMS OF INSTITUTIONALIZED CUSTODY

LISA RODRIGUEZ NAVARRO†

I. INTRODUCTION

"Over the past decade, the number of refugees throughout the world has more than doubled, and the number continues to grow."[1] At least half of the world's refugees are estimated to be children below the age of eighteen.[2] Traditionally, the flow of immigration consisted of single men who came to the United States to work and then returned to the families they had left behind.[3] Increasingly, entire families and unaccompanied minors are migrating to the United States due to the worsening conflicts in Central America.[4] In the United States, the Immigration and Naturalization Service (INS) arrests thousands of immigrant minors each year. More than 8,500 minors were detained by the INS in 1990, and as many as 70% of them were unaccompanied.[5] "Most of these minors are boys in their mid-teens, but perhaps 15% are girls and the same percentage 14 years of age or younger."[6]

Immigrant minors usually arrive in the United States unaccompanied because they "either fled their country without adults, were sent ahead by family members in the hope that they would emigrate

---

† J.D., 1997, Boalt Hall School of Law, University of California, Berkeley. American Jurisprudence Award for Refugee Law. B.A., 1993, Political Science, with honors, Stanford University. I would like to thank my family for their constant love and support. I would also like to give a special thanks to Professor Carolyn Blum for inspiring this research and providing me with the guidance necessary to develop this Article.

1. *Marginal Living Conditions for Millions: Hearing on Refugees Before the Select Comm. on Hunger of the House of Representatives*, 102nd Cong. 4 (1991).

2. *Id.*

3. *An Interim Report on the Conditions of Minors in INS Detention in South Texas*, 1990 *Conditions of Minors in INS Detention* 1 [hereinafter *Conditions of Minors in INS Detention*].

4. *Id.*

5. Reno v. Flores, 507 U.S. 292, 295 (1993).

6. *Id.*

more safely, or became accidentally separated from adults during flight. The separation often occurs in southern Mexico. . . ."[7]

Thousands of unaccompanied minors who have endured violence in their home countries or while en route to the United States have been, and are still, detained in United States detention centers, refugee camps, or other facilities. These centers, camps, and facilities have a history of housing immigrant minors in disgraceful conditions without access to education, health care, legal services, or other basic necessities.[8] These children are especially vulnerable, yet they possess no "statutory or common law right to appointed counsel or guardians."[9] The INS detention policy only perpetuates this pattern of abuse of immigrant minors.[10]

For the purposes of this paper, I will focus on the INS detention policy's impact on refugee children in particular. Due to the conditions that refugee children have already experienced in their war-torn and ravaged home countries before arriving in the United States, these children, more so than immigrant children, are at a greater risk of psychological damage. I will provide an analysis of how the INS detention policy jeopardizes the health and well-being of refugee minors, rather than protecting their interests while they undergo deportation or asylum adjudication proceedings. Alternatives to INS detention, such as church-sponsored shelters or foster home programs, may not be available due to a lack of funding, or as the INS claims, due to its lack of expertise in placing immigrant minors in alternative custody. However, if refugee minors are to remain indefinitely in INS detention, serious changes must be made to improve: (1) conditions in INS detention centers and in other government facilities contracted by the INS to detain immigrant minors, such as criminal juvenile detention centers; and (2) the INS's policy of detaining unaccompanied minors while they undergo deportation or asylum adjudication proceedings. The INS has not put forth a viable, compelling reason for not releasing these children to responsible unrelated adults, such as family friends, who may be the only ties that immigrant minors have to the United States.

Section II begins this analysis with a historical overview of the law and policy behind the INS detention of unaccompanied minors undergoing deportation or asylum adjudication proceedings. It concludes with a view of the INS's current regulation and detention of immigrant minors.

---

7. Michael A. Olivas, *Unaccompanied Refugee Children: Detention, Due Process, and Disgrace*, 2 STAN. L. & POL'Y REV. 159, 160 (1990).

8. *Id.*

9. *Id.* at 159.

10. *Id.* at 160.

Section III describes the consequences of INS detention of immigrant minors by depicting the conditions of INS detention and deportation centers. The section then describes the long-term psychological effects of such detention on these children. In light of these conditions, this section concludes by delineating the arguments in support of the INS policy to detain immigrant minors, followed by some views regarding the INS's primary justifications for its policy.

Section IV discusses the overcrowded housing conditions of criminal juvenile detention centers, and their effects on juveniles in general. Immigrant and refugee children are sometimes detained in these centers when INS detention centers are not available. Therefore, the conditions of these centers have great bearing on the physical and psychological welfare of immigrant and refugee children.

Section V reviews the international standards for the detention of refugee children. It looks at some recommendations for international guidelines on protecting the psychological welfare of refugee children. Finally, this section examines the United Nations Convention on the Rights of the Child which addresses childrens' rights that have not previously been protected by an international treaty.

II. HISTORICAL OVERVIEW OF LAW AND POLICY OF INS DETENTION OF UNACCOMPANIED MINORS

A. *Pre-1984 INS Western Regional Office Detention Policy*

Before the 1984 INS detention policy, many refugees seeking asylum were quickly processed in mass adjudication, usually admitting their deportability and being deported or repatriated.[11] Unaccompanied refugee minors awaiting an adjudication were released to family members, church groups, or other community assistance organizations.[12] In providing for the release of such minors, the INS Western Region adhered to the practice followed by federal magistrates and the INS in the rest of the country when administering Section 504 of the Juvenile Justice and Delinquency Prevention Act of 1974.[13] Pursuant to Section 504, a juvenile charged with an offense may be released as follows:

> [T]o his parents, guardian, custodian, or other responsible party . . . upon their promise to bring such juvenile before the appropriate court when requested by such court unless the magistrate determines, after hearing, at which the juvenile is represented by counsel, that the detention of such juvenile is required to secure

11. Olivas, *supra* note 7, at 160.
12. *Id.*
13. Reno v. Flores, 507 U.S. at 324-25.

his timely appearance before the appropriate court or to insure his safety or that of others.[14]

Therefore, the pre-1984 INS practice allowed the release of unaccompanied minors who had been apprehended for violating immigration laws to a responsible adult on the assurance that the adult would bring the child to court when necessary.[15] As evidenced by this practice, alien minors are considered to possess some constitutional rights.[16]

B. *1984 INS Western Regional Office Detention Policy*

In order to manage the custody and detention of minors flowing into California, to assure the maintenance of the minors' welfare and safety, and to protect the INS from possible legal liability, the INS Western Regional Office implemented a separate policy in 1984, especially for minors.[17] It limited the release of detained minors to "a parent or lawful guardian," except in "unusual and extraordinary cases," when the juvenile could be released to "a responsible individual who agrees to provide care and be responsible for the welfare and well being of the child."[18]

Individuals and interest groups, including various church groups, Amnesty International, Lawyers' Committee for Human Rights, International Human Rights Law Group, and Defense for Children International, became concerned by this policy because it resulted in INS detention of many unaccompanied immigrant minors "who posed no apparent risk to the community and whose presence at their respective hearings could be ensured by responsible individuals" other than the minors' parents or legal guardians.[19] These groups disputed the INS' alleged concern that its detention policy was meant to promote the minors' welfare and safety. The INS could point to no case in which an immigrant minor was abused by an unrelated responsible adult who assumed custody of the minor in lieu of INS detention. The "responsible adults" that had been taking custody of immigrant minors, in the absence of parents, legal guardians, or close relatives, were primarily human rights and child welfare organizations whose records of child care were spotless.[20]

---

14. 18 U.S.C. § 5034 (1988).

15. Gail Quick Goeke, *Substantive and Procedural Due Process for Unaccompanied Alien Juveniles*, 60 MO. L. REV. 221, 224 (1995).

16. *Id.*

17. Flores v. Meese, 942 F.2d 1352, 1355 (9th Cir. 1991) [hereinafter Flores II] (en banc), *rev'd*, 113 S.Ct. 1439 (1993). This was confirmed by former Western Regional Commissioner Harold Ezell.

18. Flores v. Meese, 934 F.2d 991, 994 (9th Cir. 1990) [hereinafter Flores I] *vacated*, 942 F.2d 1352 (1991).

19. Flores II, 942 F.2d at 1355.

20. Michael G. Bersani, *Flores v. Meese: Playing Hide and Seek with the Right to*

C. *8 C.F.R. §242.24*

During the *Flores I* litigation, the INS codified its Western Regional policy into 8 C.F.R. §242.24. The Western Regional policy was enjoined by the United States District Court for the Central District of California because it promulgated disparate treatment of minors in deportation proceedings and minors in exclusion proceedings.[21] The INS permitted minors in exclusion proceedings to be released, in some circumstances, to adults other than parents or legal guardians, including other relatives and friends.

This new nationwide rule for the detention and release of juveniles provides for the release of minors to adult relatives, other than parents and legal guardians, and release and custody of minors to unrelated responsible adults in "unusual and compelling circumstances."[22] For example, if the child's parents are not in the United

---

Physical Freedom—Children Teach the INS the ABC's of Due Process, 43 SYRACUSE L. REV. 867, 872 (1992) (citing *Flores II* at 1356-57).

21. Flores I, 934 F.2d at 995-96; *see also* Reno v. Flores, 507 U.S. at 296-97. Deportable individuals are those who are caught after having fraudulently entered the United States, or those who have violated or failed to extend their visas. Excludable individuals are those who have never been granted leave to enter the United States. Jacqueline Bhabha, *Deterring Refugees: The Use and Abuse of Detention in US Asylum Policy*, 6 IMMIGR. & NATIONALITY L. & PRAC. 117, 118 (1992).

22. 8 C.F.R. §242.24 provides as follows:

> Detention and release of juveniles.
>
> (a) Juveniles. A juvenile is defined as an alien under the age of eighteen (18) years.
>
> (b) Release. Juveniles for whom bond has been posted, for whom parole has been authorized, or who have been ordered released on recognizance, shall be released pursuant to the following guidelines:
>
> (1) Juveniles shall be released, in order of preference, to: (i) A parent; (ii) legal guardian; or (iii) adult relative (brother, sister, aunt, uncle, grandparent) who are not presently in INS detention, unless a determination is made that the detention of such juvenile is required to secure his timely appearance before the Service or the immigration court or to ensure the juvenile's safety or that of others.
>
> In cases where the parent, legal guardian or adult relative resides at a location distant from where the juvenile is detained, he or she may secure release at an INS office located near the parent, legal guardian, or adult relative.
>
> (2) If an individual specified in paragraph (b)(1) of this section cannot be located to accept custody of a juvenile, and the juvenile has identified a parent, legal guardian, or adult relative in INS detention, simultaneous release of the juvenile and the parent, legal guardian, or adult relative shall be evaluated on a discretionary case-by-case basis.
>
> (3) In cases where the parent or legal guardian is in INS detention or outside the United States, the juvenile may be released to such person as designated by the parent or legal guardian in a sworn affidavit, executed before an immigration officer or consular officer, as capable and willing to care for the juvenile's well-being. Such person must execute an agreement to care for the juvenile and to ensure the juvenile's presence at all future proceedings before the Service or an immigration judge.
>
> (4) In unusual and compelling circumstances and in the discretion of the district director or chief patrol agent, a juvenile may be released to an

States and an adult relative is not available, the minor may be released to an unrelated responsible adult only if the parents travel to a United States consulate and sign a sworn statement before the consular officer which names the responsible adult.[23] This process is extremely burdensome, if not impossible, for many parents in poor and war-torn countries. It also presents a "special problem for orphans, abandoned children, and children who cannot locate their parents" since it is impossible for these minors to determine their parents' whereabouts, much less obtain their sworn statement.[24]

Even though the INS regulation theoretically allows minors to be released to unrelated responsible adults in "compelling circumstances," INS officials in Texas, for example, have asserted that being an orphan does not constitute a "compelling circumstance," and that such minors will not be released from INS custody except for emergency medical treatment or similar reasons.[25] Furthermore, in some Texas cases, the INS imposes severe restrictions on relatives named in the regulation who applied for the minor's release. For example, in one instance, the INS would not accept the relative's driver's license and INS-issued Alien Registration Card with photo as proof of the relative's identity.[26]

If the minor is not released,[27] a juvenile coordinator is assigned to locate "suitable placement . . . in a facility designated for the occupancy of juveniles."[28] The INS can briefly detain the minor in an INS facility designed for juveniles, but the INS must place immigrant juveniles, within 72 hours of their arrest, in a facility meeting or exceeding standards established for the care of immigrant minors.[29] The INS expects that immigrant minors will remain in its custody an average of only 30 days.[30]

---

adult, other than those identified in paragraph (b)(1) of this section, who executes an agreement to care for the juvenile's well-being and to ensure the juvenile's presence at all future proceedings before the INS or an immigration judge.

23. *See Conditions of Minors in INS Detention, supra* note 3, at 3.

24. *Id.*

25. *Id.* at 3-4 (citing statement by Harlingen, Texas INS District Director Omer Sewell, Apr. 1990).

26. *Id.* at 4.

27. The minor's release must satisfy 8 C.F.R. §242.24 (a) & (b).

28. 8 C.F.R. §242.24(c).

29. 8 C.F.R. §242.24(d). The standards for the care of alien minors were established by the Alien Minors Care Program of the Community Relations Service, Department of Justice, 52 Fed. Reg. 15569 (1987). Memorandum of Understanding Re Compromise of Class Action: Conditions of Detention, Flores v. Meese, No. 85-4544-RJK (Px) (C.D. Cal., 1987) (incorporating the Community Relations Service notice and program description), reprinted in App. to Pet. for Cert. 148a-205a [hereinafter Juvenile Care Agreement].

30. Reno v. Flores, 507 U.S. at 314 (citing Juvenile Care Agreement 178a).

In promulgating this regulation, the INS considered the likelihood of the appearance of immigrant minors at future proceedings if they were released.[31] However, it claimed that its principal reason for the regulation was the theory that unless it was able to conduct a comprehensive home study of the proposed child custodian, the child's own interests would be better served by INS detention.[32] The INS claimed that if it released a child to an unrelated adult based on a determination made without a home study, it could be subject to liability if the child were harmed.[33]

The same civil liberties organizations who challenged the INS Western Regional policy also challenged the INS' claim that detaining immigrant minors would protect the INS from possible legal liability.[34] This argument was rejected by the *en banc* panel of the Ninth Circuit reviewing *Flores II*. It found little indication that the INS would be subject to liability for releasing a minor to an unrelated adult without a home study, because such a study is "concededly beyond the [INS'] expertise."[35]

The *Flores II* court also ruled that the INS may not determine that detention serves the best interests of immigrant minors in the absence of evidence that release would place the minors in danger of harm.[36] It relied on the United States Supreme Court's decision in *DeShaney v. Winnebago County Department of Social Services*.[37] The *DeShaney* court held that a state agency would not be held liable for leaving a minor in the custody of an adult despite evidence that the minor could be harmed.[38] Here, it is important to note that the INS has less child welfare expertise than the state agency in *DeShaney*. The *DeShaney* court held that a "[s]tate does not become the permanent guarantor of an individual's safety by having once offered him shelter."[39]

---

31. Flores II, at 942 F.2d. at 1356.

32. *Id.* The INS specifically stated that, "[a]s with adults, the decision of whether to detain or release a juvenile depends on the likelihood that the alien will appear for all future proceedings. However, with respect to juveniles a determination must also be made as to whose custody the juvenile should be released. On the one hand, the concern for the welfare of the juvenile will not permit release to just any adult. On the other hand, the Service has neither the expertise nor the resources to conduct home studies for placement of each juvenile released." 53 Fed. Reg. at 17449.

33. Flores II, 942 F.2d. at 1363.

34. *Id.* at 1355.

35. *Id.* at 1363.

36. *Id.*

37. 489 U.S. 189 (1989).

38. *Id.* at 201. The Court held that the fact that a child was previously in state custody did not matter because the state is not necessarily responsible for a child's well-being by virtue of having previously had custody of the child. *Id.*

39. *Id.* However, in *DeShaney*, the court dealt with returning a child to a parent, rather than releasing a child to the custody of a responsible third party, which may pose a greater threat of liability to the state. In the latter situation, the state would have acted affirmatively to place the child in a home from which the child did not come, rather than

D. *Reno v. Flores*[40]

Reno v. Flores was a class action suit initiated to enjoin the blanket detention of immigrant minors at INS detention facilities. Jenny Lisette Flores was 15 when she fled the violence of El Salvador and came to the United States in 1985.[41] She hoped to join her aunt who was an American citizen living near Los Angeles.[42] However, she was arrested by the INS which handcuffed, strip searched,[43] and placed her in a juvenile detention center where she spent the next two months waiting for her deportation hearing.[44] Furthermore, the INS facility in which Flores and other minors were detained provided few opportunities for recreation, had no educational programs, and some of the minors had to share bathrooms and sleeping quarters with unrelated adults of both sexes.[45]

According to the INS, Flores had not been convicted of any crime, and was not a flight risk or a threat to herself or the community.[46] However, her aunt, who was a blood relative, was not among the class of adults to whom the INS, at the time, would release unaccompanied minors.[47] The United States District Court ordered the INS to release Flores on bond after she challenged the regulation against the release of immigrant minors to third party

returning the child to the same home. The court reasoned that by returning a child to the same home, the child would be in "no worse position than that in which he would have been had [the state] not acted at all." *Id.*

40. 507 U.S. 292 (1993).

41. David Holley & Elizabeth Lu, *Judge Orders INS to Free 2 Children: Advocates Say Ruling Could Aid Hundreds of Illegals*, L.A. TIMES, July 20, 1985, at A21; *see also* Judith Cummings, *U.S. Debating New Policy on Alien Minors' Rights*, N.Y. TIMES, Nov. 4, 1985, at B8 (describing the *Flores* cause of action and other suits against the INS for alleged mistreatment of minors).

42. *See generally* Holley & Lu, *supra* note 41; Cummings, *supra* note 41.

43. All undocumented minors who were arrested and detained in the Western Region were strip searched immediately upon arrest, as well as after every visit with anyone other than their attorneys. Flores initiated a class action to enjoin the INS strip search policy arguing that it violated the Fourth Amendment prohibition against unreasonable searches and seizures. The United States granted summary judgment for the plaintiffs, stating that the policy's alleged purpose of confiscating weapons had turned up no contraband. The court prohibited future strip searches except upon reasonable suspicion. Flores v. Meese, 681 F.Supp. 665, 669 (C.D. Cal. 1988).

44. Holley & Lu, *supra* note 41, at 21.

45. Flores I, 934 F.2d. at 1014.

46. Flores II, 942 F.2d. at 1357.

47. The INS policy in effect when Flores was arrested allowed the release of alien minors to third party adults only under "unusual and extraordinary" circumstances. 8 C.F.R. §242.24(b)(4) (1984). This regulation did not permit minors to be released to adult relatives such as grandparents, siblings, aunts, or uncles. 8 C.F.R. §242.24(b)(1) (1984). Due to this litigation, the regulation was amended to include these blood relatives, but the "unusual and extraordinary" circumstances requirement still exists. 8 C.F.R. §242.24(b)(1) (1992). *See also* Erin Eileen Gorman, *Reno v. Flores: The INS' Automatic Detention Policy for Alien Children*, 7 GEO. IMMIGR. L.J. 435, 471 (1993).

adults. Flores' suit also accused the INS of using detained minors as "bait" to lure illegal immigrant parents into custody.[48]

Overall, the district court ordered the INS to substantially improve its treatment of detained immigrant minors. A compromise in the form of a Juvenile Care Agreement provided more favorable detention conditions, but did not expand the class of responsible adults to whom detained immigrant minors could be released. The Ninth Circuit Court of Appeals upheld the district court's order, but the Bush administration appealed to the United States Supreme Court in the hopes of returning to the policy enjoined by the district court.[49]

In *Reno v. Flores*,[50] the Supreme Court held that: (1) the regulation allowing detained immigrant minors to be released only to their parents, legal guardian, or close relative, except in unusual and compelling circumstances, does not facially violate substantive due process; (2) INS procedures do not deny immigrant minors procedural due process; and (3) the regulation does not facially exceed the Attorney General's discretion to set terms for the release of arrested minors.[51] The *Reno* court described the arrangements as "legal custody" and not "detention" because the facilities in which immigrant minors are detained are "not correctional institutions, but fa-

48. Gorman, *supra* note 47, at 436; *see also* Holley & Lu, *supra* note 41, at 21.

49. Gorman, *supra* note 47, at 436.

50. For more discussion on *Reno v. Flores*, see Nancy Burnell, *Due Process Does Not Compel Pre-Hearing Release of Alien Juveniles to Adults Other Than Parents or Legal Guardians, Reno v. Flores, 113 S.Ct. 1439*, 18 SUFFOLK TRANSNAT'L L. REV. 359 (1995); Denise E. Choquette, *Reno v. Flores and the Supreme Court's Continuing Trend Toward Narrowing Due Process Rights*, 15 B.C. THIRD WORLD L.J. 115 (1995); Daniel D'Angelo, *Reno v. Flores: What Rights Should Detained Alien Juveniles be Afforded?*, 21 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 463 (1995); George Michael C. Ranalli, *Reno v. Flores: Plenary Power Over Immigration Alive and Well*, 45 Mercer L. Rev. 889 (1994); Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087 (1995); Pamela Theodoredis, *Detention of Alien Juveniles: Reno v. Flores*, 12 N.Y.L. SCH. J. HUM. RTS. 393 (1995).

For more discussion on *Flores v. Meese* (*Flores II*), see Judge J. Daniel Dowell et al., *Protection and Custody of Children in the United States Immigration Court Proceedings*, 16 NOVA L. REV. 1285 (1992); Michael S. Satow, *A Journey Through the Fog: Due Process Analysis of I.N.A. Section 242(a)(2)*, 5 GEO. IMMIGR. L.J. 677 (1991); Lawyers Committee for Human Rights, *The Detention of Asylum Seekers in the United States: A Cruel and Questionable Policy* 1989. It should be noted that *Flores II* was the appellate court opinion precedent to the Supreme Court opinion in *Reno v. Flores*. Once again, the action began when a class of alien minors challenged the INS regulation governing the release of detained alien minors. The United States District Court for the Central District of California granted summary judgment to the alien minors. An appeal was taken where a panel of the Court of Appeals in *Flores I* reversed the district court decision. On rehearing *en banc* in *Flores II*, the Court of Appeals ruled that the INS regulation: (1) did not facially violate the minors' substantive or procedural due process, and (2) was within the scope of the Attorney General's statutory discretion to proceed with custody over alien minors.

51. Reno v. Flores, 507 U.S. at 301-14.

cilities that meet 'state licensing requirements for the provision of shelter care, foster care, group care, and related services to dependent children.'"[52] Furthermore, they are "operated 'in an open type of setting without a need for extraordinary security measures.'"[53] The facilities must conform with "'applicable child welfare statutes and generally accepted child welfare standards, practices, principles and procedures.'"[54] They must also be equipped with services such as physical care and maintenance, individual and group counseling, education, family reunification services, recreation and leisure-time activities, access to religious services, visitors, and legal assistance.[55]

The Court addressed the issue of whether a minor who has no available parent, legal guardian, or close relative, and for whom the government is responsible, has the right to be placed in the custody of a willing and capable unrelated adult rather than in a government-operated or government-chosen child-care institution.[56] It concluded that, besides the case at bar which was reversed, no other court:

> [H]as ever held that a child has a constitutional right not to be placed in a decent and humane custodial institution if there is available a responsible person unwilling to become the child's legal guardian but willing to undertake temporary legal custody . . .; the alleged right certainly cannot be considered 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.' Where a juvenile has no available parent, close relative, or legal guardian, where the government does not intend to punish the child, and where the conditions of governmental custody are decent and humane, such custody surely does not violate the Constitution.[57]

Overall, the Court determined that as long as institutional custody is not unconstitutional in itself, it does not become unconstitutional because it is considered less desirable than another arrangement for a particular child.[58] Moreover, the Constitution does not require child care institutions operated by the state to substitute, wherever possible, private non-adoptive custody for institutional care.[59] The Constitution does require that minimum standards of institutional custody be met, and that a child's fundamental rights cannot be harmed.[60] In conclusion, the court ruled that a decision to go beyond those basic requirements, and to give a particular child's ad-

52. *Id.* at 298 (citing Juvenile Care Agreement 176a).
53. *Id.* (citing Juvenile Care Agreement 173a).
54. *Id.* (citing Juvenile Care Agreement 157a).
55. *Id.* (citing Juvenile Care Agreement 159a, 178a-185a).
56. *Id.* at 302.
57. *Id.* at 303 (citation omitted).
58. *Id.* at 303-04.
59. *Id.* at 304.
60. *Id.*

ditional interests "priority over other concerns that compete for public funds and administrative attention . . . is a policy judgment rather than a constitutional imperative."[61]

E. *Current Regulation and Detention of Minors*

Due to the INS's current detention policy, many unaccompanied immigrant minors cannot arrange for an adult—to whom the INS will release custody—to provide them assistance and a temporary home during deportation or asylum adjudication proceedings.[62] Therefore, these children are incarcerated for months and often for more than a year until their hearings.[63] The boredom and institutional setting often overwhelm the minors, and force them to abandon their asylum requests and seek voluntary deportation.[64] Although there is no substantive evidence that routine strip searches of immigrant minors are still conducted, conditions in INS detention centers effectively remain as they were before the *Flores I* and *II* litigation.

III. CONSEQUENCES OF INS DETENTION FOR IMMIGRANT AND REFUGEE CHILDREN

A. *INS Detention Conditions*

The INS detention policy has created an expansion of detention facilities in rural Florence, Arizona and El Centro, California, along with six facilities in South Texas: Los Fresnos, Raymondsville, Port Isabel, Rio Hondo, Brownsville, and San Benito.[65] Collectively, these facilities are reportedly uninhabitable, unsafe, and have failed to guarantee a right of access to legal counsel for detainees.

1. *Habitability*

Generally, INS detention facilities are comparable to minimum and medium security prisons, but many asylum-seekers are detained in conditions far worse than those of criminal inmates, often for more than one year.[66] One site in Texas has been termed "*El Corralon*" (The Corral), while another was once a Department of Agri-

61. *Id.* at 304-05. Regarding public funds and administrative capacity, the INS asserted that it did not have the means to investigate the living environment of every prospective, unrelated, adult custodian. Richard A. Karoly, *Flores v. Meese: INS' Blanket Detention of Minors Invalidated*, 22 GOLDEN GATE U. L. REV. 183, 191 (1992).

62. Gorman, *supra* note 47, at 440.

63. *Id.*; *see also* Bhabha, *supra* note 21, at 118.

64. Gorman, *supra* note 47, at 440.

65. Olivas, *supra* note 7, at 160.

66. Bhabha, *supra* note 21, at 118.

culture pesticide storage facility. Many immigrants are detained in fenced-in shacks, tents, and makeshift shelters that are barely habitable and quite dangerous.[67] Some detention facilities also operate above their capacity. For example, on October 3, 1994, the INS Daily Population Report stated that the Krome, Florida facility had a capacity of 200 people but it held 445 detainees.[68] Similarly, the same report stated that the Los Fresnos, Texas facility had a capacity of 350 people but it held 674 detainees.[69]

2. *Security*

INS detention facilities have also proven unsafe, particularly for minors. For instance, in 1989, an INS guard was convicted of sexually assaulting detained immigrant minors.[70] There are also reports from immigrant minors in detention in Texas INS facilities that they are grabbed, pushed, shoved to the ground, verbally abused by staff and threatened with deportation.[71] Minors also report fear of other detainees. Some immigrant minors have been robbed, threatened, roughed-up and harassed at night by other detainees in these INS facilities.[72]

3. *Prison-like Conditions*

Each INS detention facility also maintains prison-like conditions which may prove threatening to immigrant minors. Each facility is locked and secured, generally with fences and barbed wire.[73] The INS detention facility in San Diego, California is the most prison-like. Each of its barracks is secured by fences, barbed wire, automatic locks, and observation areas. Furthermore, the entire complex is secured by a high security fence (16–18 feet high) and barbed wire, and watched by uniformed guards.[74]

4. *Access to Counsel*

While in INS detention, immigrant minors have traditionally been afforded little access to legal assistance, telephones, or other means to prepare their legal cases.[75] For instance, in 1990, over

67. Olivas, *supra* note 7, at 160.
68. Taylor, *supra* note 50, at 1116.
69. *Id.* at 1115.
70. Lisa Baker, *INS Guard Pleads Guilty to Molesting Two Teenagers*, BROWNSVILLE HERALD, Aug. 31, 1989, at 1.
71. *Conditions of Minors in INS Detention, supra* note 3, at 5.
72. *Id.* at 6.
73. Gorman, *supra* note 47, at 471 (citing testimony of Paul DeMuro, consulate from the United States Justice Department's Office of Juvenile Justice and Delinquency Prevention).
74. *Id.*
75. A lack of access to legal counsel or other means to prepare their cases is a com-

65% of the detained immigrant minors in Texas reported very limited access to phones, and were usually allowed to use them only at night, when legal offices were closed.[76] When minors do talk on the phone or meet with legal counsel, International Educational Services[77] staff frequently listen in on other phone extensions, or ask the minors what they discussed with their counsel.[78]

5. *Delays in Adjudication*

With respect to their asylum processes or deportation hearings, minors often face long delays, largely due to case rescheduling and uncoordinated dockets, during hearing and appeal proceedings. A great deal of pressure is put on these children in an attempt to force them to adjudicate quickly.[79] Otherwise, they could be detained for more than a year.[80]

Besides all of the above, the INS treats unaccompanied minors like common criminals by handcuffing them during transit and by requiring that they wear jail clothes.[81] Even though present INS detention conditions have mildly improved over recent years, they still fail to provide minors with the protection and rights that they deserve while awaiting deportation or asylum adjudication.[82]

It is extremely difficult to gage the degree to which changes in INS detention conditions have been thoroughly made and properly followed. For example, it is stipulated that, even with the standards of detention mandated in *Reno v. Flores* and the lower courts, minors as young as five years old, with unrelated responsible adults willing to assume custody of them, are still detained under prison-like conditions in INS camps and lock-up facilities.[83]

These conditions are particularly harmful to immigrant minors who have no family members in the United States to protect their

---

mon complaint of all detainees, adults and children alike.

76. *Conditions of Minors in INS Detention, supra* note 3, at 4; *see also* Olivas, *supra* note 8.

77. International Educational Services is an organization under contract with the INS to operate detention facilities. *Conditions of Minors in INS Detention, supra* note 3, at 2.

78. *Id.* at 4.

79. Olivas, *supra* note 7, at 162.

80. Bhaba, *supra* note 21, at 118.

81. Olivas, *supra* note 7 , at 162.

82. Previously, the INS' detention practices also included subjecting minors to strip and body cavity searches. The district court in *Flores I* ordered the INS to stop strip searching minors unless it reasonably suspected that the minors were concealing weapons or contraband. Also, minors were detained indefinitely, deprived of education, recreation, and visitation rights, and detained with unrelated adult men and women. In *Flores I*, the INS agreed to provide education, recreation, and reasonable visitation rights, and stop housing minors with unrelated adults of both sexes. Flores I, 934 F.2d. at 1014 (Fletcher, J., dissenting).

83. *The Supreme Court, 1992 Term—Leading Cases*, 107 HARV. L. REV. 144, 185 n.1 (1993).

interests, and who know nothing of the rights to which they are entitled under United States law. The INS is not an expert in child care or welfare, and should not bear the sole responsibility of providing for immigrant minors pending their respective cases.

B. *Long-Term Effects of Detention on Minors*

Even after release from detention, studies indicate that minors continue to suffer physical and psychological problems. Generally, immigrant minors are at a great risk of psychological damage due to the traumatic circumstances they have experienced in their home countries and during their travels to the United States. Upon arrival in this country, at least 50% of these children already suffer from clinically significant levels of post-traumatic stress disorder.[84] The INS claims that its detention policy provides minors with the requisite "comprehensive and professional" care that they need.[85] However, access to psychiatric care is a frequently cited problem at INS detention facilities.[86]

In an informative study, South African health officials studied the physical and psychological effects of detention on some of the 9,800 minors detained in South Africa's 1986 "state of emergency." Their studies determined that minors continued to suffer from physical and psychological problems long after their release from detention. This study is relevant because the detention conditions of the minors in South Africa were incredibly similar to the detention conditions in INS detention facilities.[87] Therefore, the concern is that detained alien minors in INS detention facilities may suffer the same or similar psychological and physical effects as those suffered by the detained minors in South Africa.

Detention by the government also stigmatizes minor children even if they are later proven to be citizens, legal immigrants, or entitled to political asylum.[88] For those minors who are or will be erroneously institutionalized or detained, the consequences that they will suffer are tragic. "Children in INS detention centers enjoy, at

84. N. RODRIGUEZ & X. URRITIA-ROJAS, UNDOCUMENTED AND UNACCOMPANIED: A MENTAL-HEALTH STUDY OF UNACCOMPANIED, IMMIGRANT CHILDREN FROM CENTRAL AMERICA 58-59 (1990).

85. Gorman, *supra* note 47, at 471 n.214.

86. Taylor, *supra* note 50, at 1117. Prolonged detention affects detainees' psychological health and interferes with their ability to present their asylum cases. Frustration and despair during prolonged detention have caused suicide attempts and mass hunger strikes. Arthur Helton, *The Legality of Detaining Refugees in the United States*, 14 N.Y.U. REV. L. & SOC. CHANGE 353, 365 (1986).

87. Bersani, *supra* note 20, at 882 (citing Elena Nightengale et al., *Apartheid Medicine; Health and Human Rights in South Africa*, 264 J. AM. MED. ASS'N 2097 (1990)).

88. Flores II, 942 F.2d. at 1367-68 (quoting from Flores I, 934 F.2d at 1014 (Fletcher, J., dissenting)).

best, very limited educational and recreational opportunities. They are away from family and friends; every aspect of their daily life is regulated by strangers. They have very little privacy, may be shackled and handcuffed, and lead a very regimented life."[89] These potential harmful effects of detention are precisely one reason why federal policy regarding juvenile detention for criminal conduct (rather than suspicion of deportability or illegal immigrant status) allows release to responsible, unrelated adults, and not simply the narrow list of parents, close relatives, or legal guardians to whom the INS allows the release of unaccompanied immigrant minors.[90]

Childhood is a vulnerable time, and those who are erroneously institutionalized during these sensitive and impressionable years may bear scars for the rest of their lives.[91] Therefore, protecting an immigrant minor's psychological welfare is possibly the most important goal in guarding the minor's overall well-being. Refugee immigrant minors have already endured abuse while in their home countries and while en route to the United States. Their psychological welfare should be of primary concern to those deemed responsible for their custody pending the adjudication of their immigration or asylum cases.

C. *Arguments in Support of INS Detention of Alien Minors*

Despite the evidence that immigrant minors have traditionally been mistreated and harmed as a result of INS detention, there still exist arguments in favor of INS detention of unaccompanied immigrant minors. The first is that detention of alien minors is not punishment, but a "potential solution to an urgent societal problem,"[92] presumably that of high levels of legal and illegal immigration into the United States. People are concerned that the United States has

89. *Id.* at 1368 (citation omitted).

90. Reno v. Flores, 507 U.S. at 324-28 (Stevens, J., dissenting). Justice Stevens cites the Juvenile Justice and Delinquency Prevention Act of 1974 which authorized release of juveniles charged with crimes "to his parents, guardian, custodian, or other responsible party." *Id.* at 326 (citing 18 U.S.C. §5034 (1988)). Justice Stevens also listed a number of model acts and standards which advocate such a release policy; *see also Conditions of Minors in INS Detention, supra* note 3, at 2.

91. Parham v. J.R., 442 U.S. 584, 627-628 (1979).

92. D'Angelo, *supra* note 50, at 475 (citing United States v. Salerno, 481 U.S. 739, 747 (1987)); *see also* Bell v. Wolfish, 441 U.S. 520 (1979) (holding that placement of two detainees in a room designed for single occupancy was not meant as punishment). However, it should be noted that U.S. v. Salerno addresses legislation governing the pretrial detention of arrestees charged with serious felonies, and not the detention of unaccompanied immigrant minors whose only violation was that of an immigration law. Salerno, 481 U.S. at 739. Moreover, the "pressing societal problem" in U.S. v. Salerno was the possibility of crimes committed by felons on release, and not illegal immigration into the United States. *Id.* Thus, one can presume that the "pressing societal problem" includes high levels of legal and illegal immigration into the United States.

lost control of its borders.[93] With large numbers of undocumented immigrant minors arriving in the United States, the current regulation of immigrant minors helps to control and update the number of immigrants in custody.[94] There is a clear congressional desire to discourage immigrant minors from entering the United States illegally. The Attorney General has determined that the wave of undocumented immigrants and "their effect on social services, economic resources, and the availability of statutory avenues of relief, have caused the need for strict applicability" of the current regulation.[95] Furthermore, the Attorney General has complete control over immigration matters because of national safety and sovereignty concerns; border control and immigrant detention is part of this power.[96]

Second, there is the argument that the federal government's goal of regulating community safety and the safety of immigrant minors takes precedence over the immigrant minor's individual liberty interests.[97] It is believed that the INS's detention policy is rationally related to a governmental interest in "'preserving and promoting the welfare of the child.'"[98]

Third, it is assumed that the "release of an immigrant juvenile could potentially affect United States foreign relations if the child is harmed."[99] As stated earlier, however, there is little indication that such release places minors in danger of harm.[100]

Fourth, "the INS could also be held liable for releasing a juvenile to an unrelated adult."[101] The INS claims that if it releases a child to an unrelated adult based on a determination made without a comprehensive home study of the proposed custodian's home, it could be subject to liability if the child is harmed."[102]

Fifth, children are subject to parental control, and if this fails, the state has a *parens patriae* role.[103] The government's power and obligation to care for juveniles in the absence of their parents or guardians has been recognized "through the customs and traditions of the United States."[104]

Finally, even though institutional custody authorizes full liability for the immigrant minor, it also provides full control. This way,

93. D'Angelo, *supra* note 50, at 464.
94. *Id.* at 482.
95. *Id.*
96. *Id.* at 483.
97. Salerno, 481 U.S. at 748.
98. D'Angelo, *supra* note 50, (quoting Santosky v. Kramer, 455 U.S. 766 (1982)).
99. D'Angelo, *supra* note 50, at 475.
100. Flores II, 942 F.2d at 1363.
101. D'Angelo, *supra* note 50, at 475.
102. Flores II, 942 F.2d. at 1363.
103. Schall v. Martin, 467 U.S. 253, 265 (1984).
104. D'Angelo, *supra* note 50, at 476-77.

the INS will know at all times where the minor is and how he or she is being treated, and it does away with concern over whether or not the minor will appear for his or her immigration hearing.[105]

D. *The Alleged Real Reasons Behind INS Detention of Alien Minors*

Despite these arguments in favor of detention of immigrant minors, documented conditions in INS camps or facilities and other institutions contracted by the INS to detain unaccompanied immigrant minors indicate that the INS's primary justification for detention is not the minors' interest. It is not apparent that the safety of immigrant minors, which the INS is presumably so concerned about, is being protected. The INS's primary reasons for the detention of unaccompanied immigrant minors are apparent.

As indicated above, the United States experiences a wave of immigrants entering its borders each year. Therefore, the proponents of the current detention regulation argue that the detention of immigrant minors is intended by the INS to control their numbers, and presumably their effect on social services and economic resources.[106] However, opponents of the current detention regulation argue the regulation is intended to deter immigrant minors from even entering the country at all. Furthermore, opponents argue the regulation is meant to lure the undocumented parents of detained immigrant minors into the government's custody.[107]

IV. DETENTION OF JUVENILE DELINQUENT CITIZENS

An examination of juvenile detention facilities for delinquent citizens is relevant here. Numerous immigrant minors are detained in juvenile detention facilities under contract with the INS while they await the adjudication of their deportation or asylum hearings. However, in most cases, the only thing immigrant minors are guilty of is either their immigrant status,[108] or being suspected of being deportable.[109] In response to arguments by advocates of immigrant minors that these minors should not be detained in criminal juvenile detention centers, Justice Stevens, dissenting in *Reno v. Flores*, stated:

> These juveniles do not want to be committed to institutions that the INS and the Court believe are 'good enough' for aliens simply because they conform to standards that are adequate for the incar-

105. Youngberg v. Romeo, 457 U.S. 307, 315-16 (1982) (holding that, while in state custody, a person's safety is ensured by the state).

106. D'Angelo, *supra* note 50, at 482.

107. Gorman, *supra* note 47, at 436; *see also* Holley & Lu, *supra* note 41, at 21.

108. Flores I, 934 F.2d. at 1014 (Fletcher, J., dissenting).

109. Flores II, 942 F.2d. at 1365 (Tang, J., dissenting).

> ceration of juvenile delinquents. They want the same kind of liberty that the Constitution guarantees similarly situated citizens.[110]

Unfortunately, the standards of incarceration for juveniles are generally not met, and the conditions of criminal juvenile detention centers are often neither healthier nor safer than conditions in actual INS detention facilities.

A. *Purposes & Standards of Detention Halls*

Under California guidelines, a juvenile hall is specifically intended to provide temporary care for children pending court dispositions or transfers to another jurisdiction or agency. Such temporary care involves four basic functions: 1) secure physical care that prevents the damaging effects of confinement; 2) constructive individual and group activities, including a well-balanced school program; 3) counseling and guidance to help the child with any problem she or he may encounter in detention; and 4) study and observation to produce a professional report that provides a better understanding of the child to the probation department and the court.[111]

At a minimum, every juvenile hall must provide each minor a place to: a) sleep; b) eat; c) study and go to school; d) play, both indoors and outdoors; e) visit with parents; f) talk in private with the police, the probation officer, the juvenile hall staff, and other concerned professional staff; g) obtain needed medical attention; h) attend to personal hygiene; and for i) worship.[112] A juvenile hall environment must also be designed to assure that a minor is guaranteed his or her individual dignity and privacy, and it must provide safety, protection, and proper supervision for each detained minor.[113]

B. *Overcrowding in Juvenile Detention Facilities*

Despite the applicable standards, juvenile detention facilities continue to be far too overcrowded—to the detriment of the juvenile residents. It has been found that overcrowding increases disciplinary infractions, recidivism, escape attempts and violence in overcrowded facilities.[114] A 1986 report found that violent, gang-oriented environments control overcrowded detention facilities of the

---

110. Reno v. Flores, 507 U.S. at 348 (Stevens, J., dissenting).

111. STATE OF CALIFORNIA DEPARTMENT OF THE YOUTH AUTHORITY, STANDARDS FOR JUVENILE HALLS 5 (1973).

112. *Id.* at 7.

113. *Id.* Section 509 of the Welfare and Institutions Code, enacted in 1969, makes it mandatory for the Youth Authority to adopt and apply minimum standards for juvenile hall operation and maintenance. *Id.* at 4.

114. STATE OF CALIFORNIA DEPARTMENT OF THE YOUTH AUTHORITY, OVERCROWDING IN JUVENILE DETENTION FACILITIES AND METHODS TO RELIEVE ITS ADVERSE EFFECTS 8 (1983).

California Youth Authority (CYA).[115] The problem is so severe that CYA staff cannot protect its inmates from being beaten or intimidated by other inmates.[116] With limited resources, inappropriate facility design, and increased crowding, the CYA staff are incapable of stopping many fights and assaults.[117]

At CYA detention facilities, there is generally one guard to watch over 50 or 60 inmates.[118] Some episodes of violence are so extreme in the CYA facilities, that a single guard is instructed to drop a tear gas grenade into the dormitory, and watch over the choking minors until more guard squads arrive to clear the dormitory.[119]

One CYA juvenile detention facility, the Youth Training School (YTS) in Chino, California, is so violent that it is compared to an adult prison.[120] Security is very strict—nothing like what the *Reno v. Flores* Court envisioned when it stated that institutionalized custody for unaccompanied immigrant minors shall be provided in "an open type of setting without a need for extraordinary security measures."[121] As a show of force, guards who form tactical teams to break up disturbances drill with helmets and uniforms in front of the inmates, and helicopters are periodically brought in. Also, dogs are used to sniff out narcotics, and tasers are used to incapacitate abusive or disobedient inmates.[122] A former Assistant Superintendent of YTS described the difference between violence inside YTS and the streets of Los Angeles: "It's like the difference between shooting a gun inside or outside; there are more ricochets inside. You can't get away from people you don't like."[123]

Besides the violence that they are subjected to, minors are not even ensured living arrangements mandated by law. Despite court decisions that prohibit the use of mattresses for overflow sleeping on floors, overcrowding continues to be so bad that sometimes as many as 80 minors will sleep on a gymnasium floor at the same time.[124]

---

115. STEVE LERNER, THE CYA REPORT PART TWO, BODILY HARM: THE PATTERN OF FEAR AND VIOLENCE AT THE CALIFORNIA YOUTH AUTHORITY 11 (Commonwealth Research Institute 1986).

116. *Id.* at 12.

117. *Id.*

118. *Id.*

119. *Id.*

120. Lerner, *supra* note 115, at 11.

121. Reno v. Flores, 507 U.S. at 298 (citing Juvenile Care Agreement 173a).

122. Lerner, *supra* note 115, at 26-27.

123. *Id.* at 29.

124. *Id.* at 13; *see also* Rutherford v. Pitchess, 713 F.2d. 1416 (9th Cir. 1983); Lareau v. Mason, 651 F.2d 96 (2nd Cir. 1981); Capps v. Atlyeh, 495 F. Supp. 802 (Or. 1980); Manney v. Cabell, CV75-3305 (C.D. Cal. 1979).

Immigrant minors are also disliked by other inmates.[125] With conditions such as these, immigrant minors are just as incapable of obtaining health care, education, and recreation, to which they are entitled by United States law, in juvenile detention centers as they are in INS detention facilities.

C. *Recommendations for Overcrowding*

Factors that contribute to overcrowding include increasing numbers of juvenile detainees, delays in transferring minors to disposition programs, population growth, and lengthy court continuances. Unfortunately, new juvenile hall construction is simply not affordable in many counties.[126]

In July 1982, the California Youth Authority appointed a 22-member External Fact-Finding Committee on Juvenile Hall Overcrowding and Related Issues. Although this study is dated, it still provides a comprehensive look at overcrowding in juvenile detention centers, and offers realistic recommendations for remedying the problem. The committee's recommendations are particularly valuable because they can be enacted by inexpensive structural modifications, adjustments in the use of staff, and program options other than major remodeling or new construction.[127] Its recommendations are grouped into four general areas:

> "1) allow more flexibility in the Youth Authority's policy of finding juvenile halls unsuitable for being overcrowded, provided that all health and safety standards are met; 2) retain the existing minimum space requirements in the juvenile hall standards; 3) develop information on alternative programs to reduce juvenile hall detention; 4) study the effects of overcrowding and recommend ways to reduce its bad effects on minors and juvenile hall programs."[128]

If the above changes can be made, immigrant minors at risk of being indefinitely detained in juvenile detention centers may be able to at least receive the education, recreation, and medical and psychological attention that they deserve. Without such changes, it is highly improbable that immigrant minors in juvenile detention centers will be protected from physical or psychological damage.

---

125. Lerner, *supra* note 115, at 27.

126. *See* OVERCROWDING IN JUVENILE DETENTION FACILITIES AND METHODS TO RELIEVE ITS ADVERSE EFFECTS, *supra* note 114, at 5.

127. *Id.* at 6.

128. *Id.* at 5.

V. INTERNATIONAL STANDARDS FOR THE DETENTION OF REFUGEE CHILDREN

No international convention specifies rules for the treatment of unaccompanied refugee minors. This is primarily due to a desire not to interfere in matters which are essentially domestic in nature. For instance, Article 2(7) of the Charter of the United Nations states: "Nothing contained in the present Charter shall authorize the United Nations to intervene on matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present Charter."[129] Hence, the Office of the United Nations High Commissioner for Refugees (UNHCR) does not have the legal ability to act on behalf of minors contrary to the territorial sovereign.[130]

Therefore, nations generally apply the law of the state of the minor's residence for the time being—regardless of her connections to her home country—to govern the protective measures concerning the minor and her property.[131] In taking protective measures on behalf of the minor, adjudicators generally begin with the minor's best interests. To start elsewhere could conflict with public policy in public international law—since the best interests test is found in the Declaration of the Rights of the Child, the Draft Convention on the Rights of the Child, the Draft Declaration on Foster Placement and Adoption, and the Adoption and Child Abduction Conventions of the Hague Conference on Private International Law. The best interests test is also seen in the UNHCR Guidelines for Durable Solutions.[132]

Although this is the logical place to start when determining the protective measures to be taken on behalf of a refugee minor, the best interests test lacks definition and criteria. There is no international agreement on the factors to consider in defining best interests, or on whose values to attach to the factors.[133] Perhaps some factors to consider are the minor's age and wishes, the family's wishes, the possibility of repatriation within the minor's childhood, the possibility of resettlement and happy placement, difficulties with family reunification, psychological bonding, and cultural issues.[134] Nonetheless, the value judgments and impressions of those responsible for determining the immigration or refugee status, or the custodial ar-

129. E. Diane Pask, *Unaccompanied Refugee and Displaced Children: Jurisdiction, Decision-Making and Representation*, 1 INT'L J. REFUGEE L. 199, 207 n.2 (1989).

130. *Id.* at 208.

131. Wähler Klaus, *The Convention on the Protection of Infants and the Judicial Practice in West German Courts*, *in* THE CHILD AND THE LAW 507, 507-17 (F. Bates ed., 1976).

132. Pask, *supra* note 129, at 211-12; *see* UNHCR, *Handbook for Social Services* (provisional ed., 1984).

133. Pask, *supra* note 129, at 212.

134. *Id.* at 217.

rangements of immigrant minors, can potentially interfere with the application of the best interests test.

Although no international conventions specify rules for the treatment of refugee minors, such rules can be inferred from provisions in international conventions, documents and declarations or resolutions.[135] For instance, the Fourth Geneva Convention of 1949, and Protocols I and II of 1977, illustrate progress toward international standards for the treatment of unaccompanied refugee children. They "emphasize the general and special protection of children as members of the civilian population, the protection of family ties, the child's cultural environment and rights to education, personal respect and preferential treatment. The movement has been . . . towards a recognition that unaccompanied refugee and displaced minors have interests of their own to be taken into account . . . ."[136]

A. *Recommendations for International Guidelines on Protecting the Psychological Welfare of Refugee Children*

Although no formal United Nations conventions or declarations speak directly to the treatment of refugee minors in general, particularly while in detention facilities, United Nations organizations have been called upon to mobilize adequate assistance to unaccompanied minors in the areas of relief, education, health, and psychological rehabilitation.[137] Because protecting an immigrant minor's psychological welfare is possibly the most important goal in guarding the minor's overall well-being, special emphasis must be placed on establishing international standards for improving conditions in detention facilities, and access to psychological rehabilitation.

The psycho-social needs of refugee minors must be addressed at all stages of their respective refugee cases.[138] To fail to satisfy the

---

135. *Id.* at 199. The treatment of unaccompanied refugee minors can also be inferred from the family and child welfare law of the country in which the minor seeks refuge. *Id.* Some countries apply their own laws concerning children to refugee or alien minors. The countries that ignore their own laws presumably do so: a) because alien minors are refugees, not local citizens, and thus not part of the national responsibility; and b) out of concern that local child protection systems applied to alien minors would jeopardize their refugee status if they had any. *Id.* at 200.

136. *Id.* at 206-7.

137. *Assistance to Unaccompanied Refugee Minors*, U.N. GAOR, 49th Sess., Supp. No. A/49/49, at 190, U.N. Doc. 49/172 (1994).

138. International Catholic Child Bureau, *Recommendations of the Seminar on the Psychological Well-Being of Refugee Children organized by International Catholic Child Bureau*, 4 INT'L J. REFUGEE L. 285, n.2 (1992). The International Catholic Child Bureau recommends that, in order to sufficiently address the psycho-social needs of refugee minors at all stages of their asylum cases, nations must decrease the violence in refugee camps. They may do so by regrouping refugees along ethnic and social lines, and by developing programs that work to maximize protection to refugee minors (and women).

psycho-social needs of refugee minors can be interpreted as psychological abuse, in which international institutions share responsibility.[139] Regarding international institutional responsibility to effectively protect the rights of refugee minors, it is vital to the child's psycho-social well-being to identify the factors that control the minor's ability to manage and adjust to past and current events and conditions. Institutions should consider the "overall context in which the children are functioning, the interaction between different systems, and the ways in which, individually and collectively, they have an impact on the children, will be most likely to secure a positive developmental outcome."[140]

Furthermore, it is essential to the social and psychological development of an undocumented minor to give her the opportunity to freely express her views, even if, in some cases, her views are demands that are impossible to meet.[141] The value of listening to minors' views is not limited simply to their value as suggestions for how decisions concerning their well being should be made.

B. *United Nations Convention on the Rights of the Child*

The United Nations Convention on the Rights of the Child contains children's rights that have not previously been protected by an international treaty. Among those rights are the rights to identity, to foster care, to adoption, and to special treatment as a juvenile offender.[142] The Convention of the Rights of the Child also establishes that the child has rights of individual personality—rights particular to the individual, such as freedom of expression, religion, association, assembly, and the right to privacy—rather than rights of a group of immigrants or refugees.[143] This supports an argument that refugee children must be afforded individualized hearings and home studies to determine whether temporary custody with responsible unrelated adults would better protect these individual rights that refugee children enjoy under the Convention on the Rights of the Child.

---

139. Margaret McCallin, *The Convention on the Rights of the Child as an Instrument to Address the Psychosocial Needs of Refugee Children*, 3 INT'L J. REFUGEE L. 82, 83 n.1 (1991).

140. *Id.* at 95.

141. Daniel O'Donnell, *Resettlement or Repatriation: Screened-Out Vietnamese Child Asylum Seekers and the Convention of the Right of the Child*, 6 INT'L J. REFUGEE L. 382, 397-398 n.3 (1994).

142. Cynthia Price Cohen, *The United Nations Convention on the Rights of the Child: Implications for Change in the Care and Protection of Refugee Children*, 3 INT'L J. REFUGEE L. 675, 681 n.4 (1992). The Convention of the Rights of the Child was adopted by the United Nations General Assembly on Nov. 20, 1989. *Id.*

143. *Id.* at 675-76; *see also* U.N. GAOR, 44th Sess., Supp. No. A/44/49, at 13, U.N. Doc. 44/25 (1989).

The Convention on the Rights of the Child has significant consequences for the rights of refugee children. For instance, article 22, paragraph 1 stipulates that accompanied and unaccompanied refugee minors are entitled to protection and assistance in order to enjoy the rights in the Convention and in other international human rights or humanitarian documents.[144] Paragraph 2 provides a means of tracing the refugee minor's parents or other family members, and for alternative care where no relatives can be found.[145] Although paragraph 2 of the Convention does not specify if and when "alternative care" refers to institutionalized custody or the custody of an unrelated responsible adult, the position has been taken that it encompasses foster care and adoption set forth in articles 20 and 21 of the Convention.[146] Article 2 of the Convention promulgates that all of the Convention's rights shall apply to refugee children without discrimination.

VI. CONCLUSION

Most unaccompanied immigrant minors will be detained for at least a few days. It is imperative that these few days—or possibly months or years—in INS detention facilities not forever damage a child's psychological health. Upon entering the United States, immigrant children have already suffered more than most children and adults can even begin to comprehend. It is simply not fair to allow more abuse to come to them while in INS detention facilities, regardless of what their immigration or refugee status may be. Whatever their reasons for coming to the United States, they are still just children.

144. U.N. GAOR, 44th Sess., Supp. No. A/44/49, art. 22, para. 1, U.N. Doc. 44/25 (1989); *see also* Cohen, *supra* note 142, at 681.

145. U.N. GAOR, 44th Sess., Supp. No. A/44/49, art. 22, para. 2, U.N. Doc. 44/25 (1989); *see also* Cohen, *supra* note 142, at 681.

146. *Id.*