

# William & Mary Journal of Race, Gender, and Social Justice

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Volume 26 (2019-2020)

Issue 1 *First Amendment: Marketplace Morass:  
Free Speech Jurisprudence and Its Interactions  
with Social Justice*

Article 8

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November 2019

## The Forgotten Relatives in the Fight Against Family Separation: A Constitutional Analysis of the Statutory Definition of Unaccompanied Minors in Immigration Detention

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### Repository Citation

Alysa Williams, *The Forgotten Relatives in the Fight Against Family Separation: A Constitutional Analysis of the Statutory Definition of Unaccompanied Minors in Immigration Detention*, 26 Wm. & Mary J. Women & L. 191 (2019), <https://scholarship.law.wm.edu/wmjowl/vol26/iss1/8>

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THE FORGOTTEN RELATIVES IN THE FIGHT AGAINST  
FAMILY SEPARATION: A CONSTITUTIONAL ANALYSIS OF  
THE STATUTORY DEFINITION OF UNACCOMPANIED  
MINORS IN IMMIGRATION DETENTION

INTRODUCTION

- I. WHO ARE UNACCOMPANIED MINORS?
  - A. *Statutory Definitions and Rights*
  - B. *Statutory Definitions in Practice: “Accompanied” Unaccompanied Minors and Family Separation*
- II. *FLORES V. RENO* AND THE *FLORES* SETTLEMENT:  
A FOUNDATIONAL CASE FOR THE RIGHTS OF  
UNACCOMPANIED MINORS
  - A. *Initial Lawsuit*
  - B. *The Supreme Court’s Decision in Reno v. Flores*
    - 1. *Flores’ Substantive Due Process Claim*
    - 2. *Flores’ Equal Protection Claim*
    - 3. *Flores’ Procedural Due Process Claim*
  - C. *The Flores Settlement and Aftermath*
  - D. *Flores Today and Its Application to the Family Separation Crisis at the Southern Border*
- III. THE CONSTITUTION AT THE BORDER
  - A. *Constitutional Protections for Noncitizens Who Have Effected Entry into the United States*
    - 1. *Protection for Documented Noncitizen Residents: Yick Wo v. Hopkins*
    - 2. *Protection for Undocumented Noncitizen Residents in the United States: Plyler v. Doe*
  - B. *Constitutional Protections, or Lack Thereof, for Noncitizens Detained Prior to Effecting Entry: Case Precedents and Persuasive Arguments from Jean v. Nelson*
- IV. *GARZA V. HARGAN* AND THE ASSUMPTION OF CONSTITUTIONAL PROTECTIONS OVER NONCITIZENS DETAINED AT THE BORDER
- V. THE UNCONSTITUTIONALITY OF THE STATUTORY DEFINITION OF UNACCOMPANIED MINOR AND ITS INTERPRETATION BY THE GOVERNMENT
  - A. *The Right to Family Unity: Moore v. East Cleveland*
  - B. *Does the Right to Family Unity Exist in Immigration Detention?*

CONCLUSION: WHAT THE RIGHT TO FAMILY UNITY COULD MEAN FOR FAMILY DETENTION AND SEPARATION

## INTRODUCTION

In 2018 alone, the United States federal government announced that nearly 3,000 children were forcibly separated from their parents upon crossing the southern border as a result of the Trump Administration's "zero tolerance" policy and the subsequent increase in immigration detention at the border.<sup>1</sup> This number is only an estimate, however, due to the lack of an integrated data system to effectively record and track the families separated by the government.<sup>2</sup> Moreover, countless children forcibly torn apart from their families by the Department of Homeland Security (DHS) would never even be included in this system, should it exist.<sup>3</sup> According to the federal government, these families, consisting of minor children accompanied by an adult relative who is not their biological parent or legal guardian, could never be truly separated because they are not families at all.<sup>4</sup> Rather, any child crossing the border without a parent or legal guardian is defined by statute as "unaccompanied."<sup>5</sup>

One of the most pivotal lawsuits addressing family unity in immigration, as well as the detention conditions of minors within government custody, is *Reno v. Flores* from 1993.<sup>6</sup> The plaintiffs in the suit, all minors held in Immigration and Naturalization Service's (INS) custody, built a majority of their case on the argument that INS' release policy violated both substantive and procedural due process under the Fourteenth and Fifth Amendments.<sup>7</sup> Although the Supreme

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1. Miriam Jordan, *Family Separation May Have Hit Thousands More Migrant Children Than Reported*, N.Y. TIMES (Jan. 17, 2019), <https://www.nytimes.com/2019/01/17/us/family-separation-trump-administration-migrants.html> [<https://perma.cc/5SZ5-F5AS>]. The zero tolerance policy came into effect in early summer of 2018 and was promoted by Attorney General Jeff Sessions. Attorney General Jefferson Sessions, Remarks Discussing the Immigration Enforcement Actions of the Trump Administration (May 7, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions> [<https://perma.cc/E5YZ-RQU5>] ("I have put in place a 'zero tolerance' policy for illegal entry on our Southwest border. If you cross this border unlawfully, then we will prosecute you. It's that simple.")

2. Jordan, *supra* note 1.

3. See AMNESTY INT'L, USA: 'YOU DON'T HAVE ANY RIGHTS HERE': ILLEGAL PUSHBACKS, ARBITRARY DETENTION & ILL TREATMENT OF ASYLUM SEEKERS IN THE UNITED STATES 43 (2018), <https://www.amnesty.org/download/Documents/AMR5191012018ENGLISH.PDF>.

4. *Id.*

5. 6 U.S.C. § 279(g)(2).

6. See generally *Reno v. Flores*, 507 U.S. 292 (1993).

7. See *id.* at 299–300. Various federal courts have acknowledged that immigrants detained at the border, including unaccompanied minors, are afforded procedural due process rights both under the Constitution and through legislation such as the William Wilberforce Trafficking Victims Protection Reauthorization Act. See *Saravia v. Sessions*, 280 F. Supp. 3d 1168, 1194 (N.D. Cal. 2017) ("[I]t is clear, notwithstanding the government's argument to the contrary, that [unaccompanied] minors like A.H. have procedural due process rights rooted in the Constitution."); *F.L.B. v. Lynch*, 180 F. Supp. 3d 811, 820 (W.D. Wash. 2016) ("The question the Court faces in this case is not whether plaintiffs

Court did not rule favorably on the plaintiffs' constitutional claims, the subsequent litigation based on the resulting settlement, the current political and social climate regarding immigration, and recent federal immigration jurisprudence all indicate that a challenge could be made regarding the constitutionality of 6 U.S.C. § 279(g)(2)—the statute that defines unaccompanied minors—and its interpretation and enforcement by the government.<sup>8</sup>

This Note will examine some of the legal arguments surrounding the issue of family unity in immigration detention and how justice can be sought for the minors wrongfully classified by the government as “unaccompanied.” I posit that the government’s classification of minors traveling in nonparental family units as “unaccompanied” pursuant to 6 U.S.C. § 279(g)(2) unconstitutionally deprives these minors of their judicially recognized substantive due process right of family unity.<sup>9</sup> Like minors who arrive at the border in the company of their parents or legal guardians, these minors should be classified as accompanied and placed in family detention centers with their accompanying nonparental adult family members.<sup>10</sup>

First, this Note will outline the legal definition of “unaccompanied minor” according to federal statute. Part II of this Note will contextualize this legal debate by examining the foundational *Flores v. Reno* case, the constitutional arguments posed by the class of detained minors, and the Supreme Court’s response. Additionally, this Note will discuss the impact that *Flores* and the subsequent Flores Settlement have had on the current system of immigration detention for minor children and elaborate on how unaccompanied and accompanied minors fit within the *Flores* framework. Part III will analyze the application of the Fifth and Fourteenth Amendments generally in immigration case law, focusing on the differentiation made between noncitizen residents and noncitizens detained upon arrival at the border. Part IV will explore the potential of expanding the constitutional rights of unaccompanied minors in immigration detention in light of recent cases such as *Garza v. Hargan*. Finally,

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[non-admitted aliens] have procedural due process rights. Clearly they do. The question is *what* procedural rights are due to plaintiffs.”) (emphasis added).

8. 6 U.S.C. § 279(g)(2).

9. See *Moore v. East Cleveland*, 431 U.S. 494, 504–06 (1977). Although Moore specifically defines the right of extended family members outside of the nuclear family to reside together in a household, I argue that it can be properly analogized and applied to family unity in the immigration context. See discussion *infra* Section V.B.

10. This Note is by no means postulating that family detention centers are a sufficient solution for family separation. For just a few of the reasons why family immigration detention is harmful, see, for example, John Burnett, *The U.S. Has A Long, Troubled History of Detaining Families Together*, NPR (June 29, 2018, 9:10 PM), <https://www.npr.org/2018/06/29/624789871/president-trumps-new-plan-isnt-to-separate-migrant-families-but-to-lock-them-up> [<https://perma.cc/4Y8R-ZGSM>].

Part V will outline a possible constitutional challenge that could be brought against 6 U.S.C. § 279(g)(2) and what this successful challenge could mean for the preservation of family unity within the *Flores* framework.

## I. WHO ARE UNACCOMPANIED MINORS?<sup>11</sup>

### A. *Statutory Definitions and Rights*

In the 2018 fiscal year, over 50,000 unaccompanied minors were apprehended at the southwest border by U.S. Customs and Border Protection (CPB).<sup>12</sup> The majority of the United States' immigration policy regarding unaccompanied minors is governed by the Homeland Security Act (HSA) of 2002 and the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008.<sup>13</sup> The HSA provides, among several other changes to previous immigration procedures,<sup>14</sup> the statutory definition for unaccompanied minors that is used for all related legislation:

the term “unaccompanied alien child” means 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.<sup>15</sup>

A memorandum from the United States Citizenship and Immigration Services' (USCIS) Asylum Division further expounded this definition.<sup>16</sup>

11. Referred to in relevant legislation as “unaccompanied alien children” or “UAC.” 6 U.S.C. § 279(g)(2).

12. *Southwest Border Migration FY2018*, U.S. CUSTOMS AND BORDER PROTECTION, <https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2018> [<https://perma.cc/6MSA-CXWW>] (last visited Nov. 4, 2019).

13. WILLIAM A. KANDEL, CONG. RESEARCH SERV., R43599, UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW 3 (2017).

14. The HSA fundamentally altered how unaccompanied minors were administratively processed by the government. The processing and treatment of unaccompanied minors became split between the Department of Homeland Security (DHS) and the Department of Health and Human Service (HHS). *Id.* at 4. The DHS was given control over “the apprehension, transfer, and repatriation” of unaccompanied minors, while HHS’s Office of Refugee Resettlement (ORR) was granted the responsibility of “coordinating and implementing the care and placement of UAC in appropriate custody, reunifying UAC with their parents abroad if appropriate, maintaining and publishing a list of legal services available to UAC, and collecting statistical information on UAC, among other responsibilities.” *Id.*

15. 6 U.S.C. § 279(g)(2) (emphasis added).

16. Section 235(d)(7)(B) of the TVPRA grants USCIS “initial jurisdiction over any asylum application filed by” an unaccompanied minor. U.S. CITIZENSHIP & IMMIGRATION SERV., MEMORANDUM: IMPLEMENTATION OF STATUTORY CHANGE PROVIDING USCIS WITH INITIAL JURISDICTION OVER ASYLUM APPLICATIONS FILED BY UNACCOMPANIED ALIEN CHILDREN (2009), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static>

In confirming a child's unaccompanied status pursuant to 6 U.S.C. § 279, “[a] child is unaccompanied even if he or she is in the informal care and physical custody of other adults, *including family members*.”<sup>17</sup> Given the narrow language of the statute and the subsequent guidance, it is clear that the government's definition of family is restricted to that of the nuclear family.

Several years after the HSA, Congress implemented the TVPRA to further govern the rights of unaccompanied minors apprehended at the border while seeking asylum.<sup>18</sup> The TVPRA specifies how DHS and HHS should screen, process, and place into government custody unaccompanied minors depending on whether they are nationals of contiguous (Mexico and Canada) or noncontiguous countries.<sup>19</sup>

### *B. Statutory Definitions in Practice: “Accompanied” Unaccompanied Minors and Family Separation*

Because of the strict statutory definition requiring children to be accompanied by a biological or legal parent, children who travel in units with other adult family members will be classified by the DHS as unaccompanied for the purposes of administrative processing and detention.<sup>20</sup> The legal classification of these children as unaccompanied significantly changes how these minors make their way through the immigration system, especially in the context of family separation.<sup>21</sup>

In a recent report from Amnesty International on the detention and treatment of asylum-seekers in the United States, the organization decried CBP's continuing practice of separating families on the basis of “fraud” when children travel in nonparental family units.<sup>22</sup> According to this report, families that CBP separated due to “fraud” included: “(1) grandparents and others who ‘do not fit the definition of immediate family member’; (2) those whose birth certificates and

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-Files-Memoranda/2009/uac-filings-5f25mar09.pdf [hereinafter U.S. CITIZENSHIP & IMMIGRATION SERV. MEMO].

17. *Id.* (emphasis added).

18. KANDEL, *supra* note 13, at 4. Sections of the TVPRA relevant to unaccompanied minors are codified under 8 U.S.C. § 1232.

19. Compare 8 U.S.C. § 1232(a)(2), with 8 U.S.C. § 1232(a)(3). For more information on the placement of unaccompanied minors within the new immigration framework, see Wendy Shea, *Almost There: Unaccompanied Alien Children, Immigration Reform, and a Meaningful Opportunity to Participate in the Immigration Process*, 18 UC DAVIS J. JUV. L. & POL'Y 148 (2014).

20. U.S. CITIZENSHIP & IMMIGRATION SERV. MEMO, *supra* note 16; WOMEN'S REFUGEE COMM'N ET AL., BETRAYING FAMILY VALUES: HOW IMMIGRATION POLICY AT THE UNITED STATES BORDER IS SEPARATING FAMILIES 5 (2017), <https://www.judiciary.senate.gov/imo/media/doc/KIND%20-%20Betraying%20Family%20Values.pdf> [hereinafter BETRAYING FAMILY VALUES].

21. See generally BETRAYING FAMILY VALUES, *supra* note 20.

22. AMNESTY INT'L, *supra* note 3, at 43–44.

other documents CBP could not verify through consulates; and (3) those who were otherwise unable to prove their family relationships.”<sup>23</sup>

Since these separations are classified as the result of “fraudulent” relationships, CBP does not include these families in their public records documenting family separation.<sup>24</sup> Not only are these family separations not publicized to the same extent as are the cases of parental separation, but many of the legal remedies currently available to parents and children who have been separated from each other are not similarly available to separated members of nonparental family units.<sup>25</sup> Many of these remedies derive from the *Flores* litigation of the past three decades, which began after the initial case reached the Supreme Court in 1993.<sup>26</sup>

## II. *FLORES V. RENO* AND THE *FLORES* SETTLEMENT: A FOUNDATIONAL CASE FOR THE RIGHTS OF UNACCOMPANIED MINORS

### A. *Initial Lawsuit*

In 1985, four plaintiffs filed a class action lawsuit challenging both the release policy of the INS facilities where members of the class were detained and the conditions of their detention within the facilities.<sup>27</sup> The named representative in the suit was unaccompanied fifteen-year-old Jenny Lisette Flores.<sup>28</sup> She arrived at the United States border in 1985 after escaping the violent civil war in her home country of El Salvador.<sup>29</sup> Flores was detained in an INS facility in Pasadena, California for two months prior to her deportation hearing, and while in INS detention Flores was given limited recreational opportunities and the facility offered no educational programs.<sup>30</sup> Flores and other members of the class were forced to share bathrooms and sleeping areas with unrelated adults of different genders.<sup>31</sup> The class members detained in the same facility in Pasadena as Flores were also denied family visitation rights.<sup>32</sup>

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23. *Id.* at 44.

24. *Id.* at 43.

25. *See, e.g.*, Gamboa et al., *infra* note 85.

26. *See* discussion *infra* Section II.C.

27. *Reno v. Flores*, 507 U.S. 292, 296 (1993); *see also Flores v. Meese*, 934 F.2d 991, 993 (9th Cir. 1990).

28. Lisa Rodriguez Navarro, Comment, *An Analysis of Treatment of Unaccompanied Immigrant and Refugee Children in INS Detention and Other Forms of Institutionalized Custody*, 19 CHICANO-LATINO L. REV. 589, 596 (1998).

29. *Id.*; Complaint at ¶ 28, *Flores v. Meese*, 934 F. 2d 991, 993 (9th Cir. 1990) (No. 85-4544-RJK(Px)) [hereinafter *Flores Complaint*].

30. Navarro, *supra* note 28.

31. *Id.*

32. *Flores Complaint*, *supra* note 29, ¶ 45.

In addition to challenging the conditions of the facilities, the plaintiff class brought constitutional and statutory claims against the INS Western Regional Office's policy of allowing the release of unaccompanied minors only 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 can be responsible for the welfare and well being of the child.'"<sup>33</sup> It was this policy that prevented Flores from being reunited with her aunt, a United States citizen residing in Southern California.<sup>34</sup> This policy also prevented Dominga Hernandez-Hernandez, another named plaintiff in the suit, from being released into the custody of her adult brother, Deomedes, who had been with Dominga at the time of their arrest at the border but was separated from Dominga and later released on bail without her.<sup>35</sup>

In reaction to the district court's decision to grant partial summary judgment on the plaintiffs' equal protection claim,<sup>36</sup> the INS adopted an updated release policy for juvenile aliens in deportation and exclusion proceedings.<sup>37</sup> The new policy expanded the list of adults to whom unaccompanied minors could be released from INS detention, now including "(i) a parent; (ii) a legal guardian; or (iii) an adult relative (brother, sister, aunt, uncle, grandparent) who are [sic] not presently in INS detention."<sup>38</sup> Although the new regulation increased the chances for unaccompanied minors to be released on bail to family members and highlighted the importance of relationships beyond the nuclear family, the plaintiffs continued to challenge the policy's constitutionality until the United States Supreme Court granted certiorari in *Reno v. Flores*.<sup>39</sup>

### *B. The Supreme Court's Decision in Reno v. Flores*

One of the key issues in the subsequent appeals was the plaintiffs' claim that the new INS release policy facially violated the substantive and procedural elements of the due process clause and

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

34. Navarro, *supra* note 28.

35. Flores Complaint, *supra* note 29, ¶ 34.

36. *Reno*, 507 U.S. at 296–97 (1993) (The District Court granted partial summary judgment on the claim that "the INS had no rational basis for treating alien minors in deportation proceedings differently from alien minors in exclusion proceedings . . . prompt[ing] the INS to initiate notice-and-comment rulemaking . . . 'to provide a single policy for juveniles in both deportation and exclusion proceedings'").

37. *Id.* at 297.

38. *Id.*

39. *Id.* at 299. The District Court in *Meese* had granted summary judgement to the plaintiff class on "due process grounds," which was reversed by a panel of the Ninth Circuit Court of Appeals. *Id.* Upon rehearing, the court vacated the panel's opinion and reinstated the District Court's order. *Id.*

the equal protection guarantee of the Fifth Amendment.<sup>40</sup> Respondents claimed that “alien juveniles suspected of being deportable have a ‘fundamental’ right to ‘freedom from physical restraint’” and that the INS release policy violated their substantive due process rights.<sup>41</sup> They also alleged that the release policy violated the Fifth Amendment’s equal protection guarantee “because of the disparate treatment evident in (1) releasing alien juveniles with close relatives or legal guardians but detaining those without, and (2) releasing to unrelated adults juveniles detained pending federal delinquency proceedings . . . but detaining unaccompanied alien juveniles pending deportation proceedings.”<sup>42</sup> Additionally, the respondents argued that the policy violated procedural due process, “because it does not require the Service to determine, with regard to *each individual* detained juvenile who lacks an approved custodian, whether his best interests lie in remaining in INS custody or in release to some other ‘responsible adult.’”<sup>43</sup>

In a 7–2 opinion penned by Justice Scalia, the Supreme Court rejected these challenges to the INS release policy and found the regulations to be within the bounds of the Constitution.<sup>44</sup> According to Justice Scalia, the unaccompanied minors did not have a fundamental right to “freedom from physical restraint” as defined by the Court, and neither were they unconstitutionally discriminated against on the basis of alienage.<sup>45</sup> Nor were the unaccompanied minors deprived of procedural due process so long as they had the right to a hearing before an immigration judge, regardless of whether this right was exercised.<sup>46</sup>

### 1. Flores’ *Substantive Due Process Claim*

First, the Court addressed the respondents’ substantive due process claim.<sup>47</sup> The Court found that unaccompanied minors in INS detention have no fundamental right to “freedom from physical restraint” for several reasons.<sup>48</sup> According to the Court, minors in

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40. See *Meese*, 934 F.2d at 995; *Reno*, 507 U.S. at 299–300.

41. *Reno*, 507 U.S. at 299–300.

42. *Id.* at 306 (referencing 18 U.S.C. § 5034).

43. *Id.* at 300 (emphasis in original).

44. *Id.* at 315.

45. *Id.* at 302–04, 306.

46. *Id.* at 309.

47. *Reno*, 507 U.S. at 301–02. Prior to discussing the respondents’ constitutional claims, the Court chose to ignore the claims regarding the conditions at juvenile detention centers. *Id.* at 301.

48. *Id.* at 302–04. In his dissent, Justice Stevens argued that “[t]he right at stake in this case is not the right of detained juveniles to be released to one particular custodian rather than another, but the right not to be *detained* in the first place.” *Id.* at 341 (emphasis in original). He found this right to be fundamental under the Constitution according to

immigration detention were not restrained “in the sense of shackles, chains, or barred cells,” nor deprived “of a right to come and go at will” due to their status as juveniles, who are always under someone else’s custody either by their parents, legal guardians, or the government.<sup>49</sup> As such, the right could not be considered “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”<sup>50</sup> The Court feared that finding a fundamental right for children to be in a noncustodial setting could be dangerously broad if also applied in the context of government’s role in settings such as state orphanages and similar childcare institutions.<sup>51</sup> Of note is the Court’s emphasis that the government, in detaining children in these facilities, was not intending to “punish” the children as the conditions of their custody were “decent and humane.”<sup>52</sup> The purportedly nonpunitive nature of immigration detention and the government’s interest in promoting the welfare of unaccompanied minors gave the government a rational basis to essentially incarcerate these children indefinitely without triggering the constitutional protections of due process that would arise from the enforcement of punitive measures.<sup>53</sup>

Furthermore, the Court noted that even if there was merit to the respondents’ challenge to the constitutionality of the institutional custody of unaccompanied minors, “the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government.”<sup>54</sup> Under federal statute granting discretion to determine release pending deportation to the Attorney General, there is no presumption of release pending deportation proceedings.<sup>55</sup> However,

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past Supreme Court precedent, and that the INS release policy was not narrowly tailored enough to withstand higher scrutiny. *Id.* at 341–43.

49. *Id.* at 302.

50. *Reno*, 507 U.S. at 303 (internal quotations omitted).

51. *Id.* at 302–03.

52. *Id.* at 303.

53. *Id.* (quoting *Santosky v. Kramer*, 455 U.S. 745, 766 (1982)). In immigration-related jurisprudence, the Supreme Court has recognized since the nineteenth century that the imposition of a “punishment” comes with the due process constitutional protections associated with deprivations of life, liberty, or property; see *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893). I would argue that the forced separation of children from their family members, with the lifelong impacts that accompany such a separation, constitutes a punishment that should allow for protections under the Constitution.

54. *Reno*, 507 U.S. at 305 (quoting *Mathews v. Diaz*, 426 U.S. 67, 81 (1976)).

55. *Id.* at 306. The Court is referencing 8 U.S.C.S. § 1252. *Id.* Respondents argued that the release policy exceeded the Attorney General’s authority under this regulation. *Id.* at 300. The relevant language provided:

[A]ny such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (A) be continued in custody; or (B) be released under bond . . . containing such conditions as the Attorney General may prescribe; or (C) be released on conditional parole.

this does not mean that unaccompanied minors have no constitutional rights.<sup>56</sup> The government is still required to provide a rational basis for their immigration policies, although this does not appear to be a difficult bar for the government to overcome.<sup>57</sup>

### 2. Flores' *Equal Protection Claim*

Second, the Court similarly struck down the respondents' argument that the release policy violated the Fifth Amendment's equal protection guarantee based on their status as aliens.<sup>58</sup> The Court dismissed the equal protection claim because "the disparate treatment evident in (1) releasing alien juveniles with close relatives or legal guardians but detaining those without, and (2) releasing to unrelated adults juveniles detained pending federal delinquency proceedings . . . but detaining unaccompanied alien juveniles pending deportation proceedings" was allowable on the basis that, in the first instance, there is a tradition in granting custody to close relatives, and "the difference between citizens and aliens is adequate to support the [second instance]."<sup>59</sup>

### 3. Flores' *Procedural Due Process Claim*<sup>60</sup>

Finally, the Court turned to the respondents' argument that the release policy deprived the class of procedural due process because the policy did not require an individual determination that each child

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But such bond or parole . . . may be revoked at any time by the Attorney General, in his discretion . . . .

*Id.* at 295 n.1. This section of the United States Code was amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, and similar provisions can now be found in other sections of the Code. *See* 8 U.S.C. § 1226.

56. *Reno*, 507 U.S. at 306 ("[T]he INS regulation must still meet the (unexacting) standard of rationally advancing some legitimate governmental purpose—which it does . . ."). For an example of federal courts recognizing the constitutional rights of unaccompanied minors, *see Perez-Funez v. District Director, Immigration & Naturalization Service*, 619 F. Supp. 656 (1985) ("Unaccompanied alien children possess substantial constitutional and statutory rights. These rights exist in spite of the minors' illegal entry into the country.") (internal quotations omitted).

57. *Reno*, 507 U.S. at 306.

58. *Id.*

59. *Id.*

60. Procedural due process describes the constitutionally appropriate legal process that the government must follow when "depriv[ing] individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). This is in contrast to "substantive due process," an element also found within the Fifth and Fourteenth Amendments "which forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno*, 507 U.S. at 301–02.

would be better served in INS custody than released to a “responsible adult.”<sup>61</sup> The Court considered this argument to be a repackaged substantive due process claim and likewise rejected it.<sup>62</sup> The Court found that unaccompanied minors received the procedural due process to which they were entitled as they were given the right to a hearing before an immigration judge, assuming that they were not too young or too ignorant to understand the right when presented as a written form and finding no evidence that the children experienced excessive delays in receiving these hearings.<sup>63</sup>

### C. *The Flores Settlement and Aftermath*

Upon being remanded by the Supreme Court, the plaintiff class and the government agreed on a settlement in 1997 which “set . . . out nationwide policy for the detention, release, and treatment of minors in the custody of the INS.”<sup>64</sup> The Flores Settlement focuses on the quality of life of unaccompanied minors in immigration detention centers and the procedures involving their arrest, placement, and release.<sup>65</sup> The language of the Flores Settlement favors family reunification and “creates a presumption in favor of releasing minors and requires placement of those not released in licensed, non-secure facilities that meet certain standards.”<sup>66</sup> The Flores Settlement also established standards of care for minors in immigration detention, which included regulations on “food, clothing, grooming items, medical and dental care, individualized needs assessments, educational services, recreation and leisure time, counseling, access to religious services, contact with family members, and a reasonable right to privacy.”<sup>67</sup>

Even after the government voluntarily entered into the settlement agreement, the litigation has continued as the INS and its successors in immigration enforcement, the Department of Homeland Security (DHS) and Immigration and Customs Enforcement

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61. *Reno*, 507 U.S. at 308.

62. *Id.*

63. *Id.* at 309.

64. *Flores v. Lynch*, 828 F.3d 898, 901 (2016) (internal quotations omitted).

65. Stipulated Settlement Agreement at ¶ 9, *Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. Jan 17, 1997), [https://www.aclu.org/sites/default/files/field\\_document/flores\\_settlement\\_final\\_plus\\_extension\\_of\\_settlement011797.pdf](https://www.aclu.org/sites/default/files/field_document/flores_settlement_final_plus_extension_of_settlement011797.pdf) [hereinafter Flores Settlement].

66. *Lynch*, 828 F.3d at 901; *see also* Flores Settlement, *supra* note 65, ¶¶ 14, 18 (“INS shall release a minor from its custody *without unnecessary delay* . . . to: A. a parent; B. a legal guardian; C. an adult relative . . . . [T]he INS . . . shall make . . . prompt and continuous efforts . . . toward family reunification and the release of the minor . . . .”) (emphasis added).

67. *Lynch*, 828 F.3d at 903.

(ICE),<sup>68</sup> repeatedly fail to perform their obligations under the Flores Settlement.<sup>69</sup> One of the most significant takeaways following *Flores* comes from *Flores v. Lynch*, which held that the Flores Settlement applies to *all* minors in the custody of immigration authorities, both unaccompanied and accompanied.<sup>70</sup> This round of litigation arose in the context of a changing political landscape in which immigration enforcement became stricter and fewer families were released on bail.<sup>71</sup> In the 2000s, DHS began converting prisons into family detention facilities and incarcerating families indefinitely pending removal proceedings.<sup>72</sup> Flores challenged the government's new no-release policy as to Central American families and the confinement of immigrant children in these secure, unlicensed family detention centers as violations of the Flores Settlement.<sup>73</sup> The government defended their decision to indefinitely detain families in light of the "surge in family units crossing the Southwest border," an argument which the court found to be an unsatisfactory reason to amend the terms of the Flores Settlement.<sup>74</sup> The Ninth Circuit held that the Flores Settlement applied equally to the minors detained with their parents in these facilities, although it did not require the release of their parents.<sup>75</sup>

#### *D. Flores Today and Its Application to the Family Separation Crisis at the Southern Border*

Unfortunately, while the Flores Settlement is designed to promote family unity during immigration proceedings, it has never been fully incorporated as federal regulation.<sup>76</sup> The Flores Settlement was

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68. DHS and ICE are held to the same standards as the INS under the Flores Settlement. *Bunikyte v. Chertoff*, Nos. A-07-CA-164-SS, A-07-CA-165-SS, A-07-CA-166-SS, 2007 U.S. Dist. LEXIS 26166, at \*8 (W.D. Tex. Apr. 9, 2007) ("The Flores settlement is binding on ICE and DHS as successor organizations to INS.")

69. On July 9, 2018, Judge Gee issued an order denying the government limited relief to allow "an exemption from the Flores Agreement's release provisions so that [ICE] may detain alien minors who have arrived with their parent or legal guardian together in ICE family residential facilities . . ." *Flores v. Sessions*, No. CV 85-4544-DMG (AGRx), 2018 U.S. Dist. LEXIS 115488, at \*3 (C.D. Cal. July 9, 2018).

70. *Lynch*, 828 F.3d at 901.

71. *Id.* at 903.

72. *Id.* at 904. The court notes that the family detention centers recently opened by ICE operate under ICE's "Family Residential Detention Standards" and do not comply with the terms of the Flores Settlement.

73. *Id.* at 904–05.

74. *Id.* at 910.

75. *Id.*

76. *United States v. Dominguez-Portillo*, No. EP-17-MJ-4409-MAT, 2018 U.S. Dist. LEXIS 2660 at \*18 (W.D. Tex. Jan. 5, 2018). In 2008, parts of the Flores Settlement were codified by the enactment of the William Wilberforce Trafficking Victim Protection

merely intended to serve as a temporary framework until the government passed final regulations that reflected the agreements in the settlement.<sup>77</sup> The government has yet to do so.<sup>78</sup>

Under the current Trump Administration, the government has interpreted the Settlement and the ensuing litigation as justification for their practice of family separation during the implementation of a “zero tolerance” policy for offenses related to improper entry.<sup>79</sup> A key finding influencing this decision to separate families was the establishment of twenty days as the standard limit for which minors could be detained in a secure, non-licensed facility pursuant to Paragraphs 12A and 14 of the Flores Settlement.<sup>80</sup> After being separated from their parents upon initial entry, these children are then classified as unaccompanied minors and given to HHS for detainment in separate juvenile facilities while their parents remain in adult immigration detention facilities in an attempt by the government to circumvent the release presumptions in the Flores Settlement.<sup>81</sup> The Trump Administration’s policy of family separation continues to be a topic of debate to this day.<sup>82</sup>

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Reauthorization Act of 2008, which created “statutory standards for the treatment of unaccompanied minors.” *Lynch*, 828 F.3d at 904.

77. *Dominguez-Portillo*, No. EP-17-MJ-4409-MAT, 2018 U.S. Dist. LEXIS 2660 at \*18.

78. *Id.* at \*18–19 (quoting *Bunikyte*, 2007 U.S. Dist. LEXIS 26166, at \*9) (“[I]t appears that *Flores* is the only binding legal standard directly applicable to the detention of minor aliens by the United States government, despite the passage of time and the drastic changes in immigration policy since this judgment was first entered.”).

79. See Dara Lind & Dylan Scott, *Flores Agreement: Trump’s Executive Order to End Family Separation Might Run Afoul of a 1997 Court Ruling*, VOX (June 20, 2018, 3:20 PM), <https://www.vox.com/2018/6/20/17484546/executive-order-family-separation-flores-settlement-agreement-immigration> [<https://perma.cc/ZG5M-6YBV>]; see also Nila Bala & Arthur Rizer, *Trump’s Family Separation Policy Never Really Ended. This is Why.*, NBC NEWS (July 1, 2019, 12:17 PM), <https://www.nbcnews.com/think/opinion/trump-s-family-separation-policy-never-really-ended-why-ncna1025376> [<https://perma.cc/DJL7-5GK6>] (“[T]he zero tolerance and family separation policies are distinct from each other. . . . Child separation, though, is a direct result of zero tolerance, and cannot be ended without truly ending zero tolerance.”).

80. *Flores v. Lynch*, 212 F. Supp. 3d 907, 913–14 (C.D. Cal. 2015). The twenty-day standard was recently reiterated when Judge Gee denied the government’s request to permit the DHS to indefinitely detain families pursuant to President Trump’s Executive Order No. 13841. *Flores v. Sessions*, 2018 U.S. Dist. LEXIS 115488, at \*8–9 (C.D. Cal. July 9, 2018).

81. Nicholas Wu, *House Report: Trump Administration’s ‘Zero Tolerance’ Immigration Policy ‘Harmful, Traumatic and Chaotic.’* USA TODAY (July 12, 2019, 1:27 PM), <https://www.usatoday.com/story/news/politics/2019/07/12/immigration-house-report-toddlers-in-fants-separated-border/1712960001> [<https://perma.cc/AWL6-YJBN>]; see also Salvador Rizzo, *The Facts About Trump’s Policy of Separating Families at the Border*, WASH. POST (June 19, 2018), [https://www.washingtonpost.com/news/fact-checker/wp/2018/06/19/the-facts-about-trumps-policy-of-separating-families-at-the-border/?utm\\_term=.9fc68c9f42be](https://www.washingtonpost.com/news/fact-checker/wp/2018/06/19/the-facts-about-trumps-policy-of-separating-families-at-the-border/?utm_term=.9fc68c9f42be) [<https://perma.cc/E5GX-HFVH>].

82. See, e.g., Wu, *supra* note 81.

Children at the border are still repeatedly subjected to the devastating effects of being separated from their families and caretakers, and more information about the extent of this harm continues to be unearthed.<sup>83</sup> However, most of the recent cases brought against the government, as well as the majority of media reports surrounding the ongoing family separation crisis along the Mexican border, are centered on the narrative of children being separated from their biological parents.<sup>84</sup> These reports often ignore the equal harm to children who immigrate with and are separated from other adult relatives who are not their legal or biological parents, such as aunts, uncles, siblings, cousins, and grandparents.<sup>85</sup> CBP has openly stated that, both before the implementation of the zero tolerance policy and in the aftermath of the public outrage surrounding family separation, the separations of nonparental family units are not considered to be true family separations but are instead categorized under allegations of fraud.<sup>86</sup> The Trump Administration defends this classification as part of their larger justification for family separations in general by

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83. See Catherine E. Shoichet, *The US Just Revealed More Families Were Separated. Here's Why that Matters*, CNN (Oct. 26, 2018, 10:19 AM), <https://www.cnn.com/2018/10/26/politics/separated-families-reunification-update/index.html> [<https://perma.cc/4WZV-7L3Q>]; BETRAYING FAMILY VALUES, *supra* note 20, at 12–14.

84. See, e.g., *L. v. United States Immigration & Customs Enft* (“ICE”), 310 F. Supp. 3d 1133, 1149 (S.D. Cal. 2018) (enjoining government defendants “from detaining [adult parents detained in immigration custody by the DHS who have a minor child separated from them by DHS] in DHS custody without and apart from their minor children . . .”). Additionally, Trump’s Executive Order 13841, which was announced to bring an end to the family separation policy after his Administration faced intense public backlash, defines an “alien child” for the purposes of describing family separation as a minor with “a legal parent-child relationship to an alien who entered the United States with the alien child . . .” Exec. Order No. 13841, 83 Fed. Reg. 122 (June 25, 2018). Prior to the executive order, the Keep Families Together Act, introduced in the Senate on June 7, 2018 by Senator Dianne Feinstein, similarly focused only on relationships between children and parents or legal guardians. Press Release, Dianne Feinstein, *Feinstein, Colleagues Introduce Legislation to Halt Separation of Immigrant Families* (June 8, 2018), <https://www.feinstein.senate.gov/public/index.cfm/2018/6/feinstein-colleagues-introduce-legislation-to-halt-separation-of-immigrant-families> [<https://perma.cc/NA2W-DESP>].

85. See Suzanne Gamboa, et al., *Migrant Children, Parents Still Separated After Reunifications Ask, ‘What About Me?’*, NBC NEWS (July 31, 2018), <https://www.nbcnews.com/storyline/immigration-border-crisis/migrant-children-parents-still-separated-after-reunifications-ask-what-about-n895946> [<https://perma.cc/C24G-4TR6>] (“Some relatives who arrived with children—aunts, uncles, cousins, siblings, grandparents and others—are not covered by the American Civil Liberties Union lawsuit which led to Sabraw’s ruling, which only applies to adult parents, biological or otherwise, who arrived in the U.S. with their child.”).

86. Dara Lind, *Trump Is Separating an Unknown Number of Families at the Border For ‘Fraud’*, VOX (Oct. 12, 2018, 11:40 AM), <https://www.vox.com/2018/10/11/17963380/family-separation-news-still-children> [<https://perma.cc/S98C-Z69G>]; AMNESTY INT’L, *supra* note 3, at 6 (“Those statistics [released by CBP on the number of family units separated in 2017 and 2018] still seemed to omit hundreds—if not thousands—of families separated at official ports-of-entry, or with non-parental relationships (including grandparents, among others).”).

inaccurately emphasizing unfounded fears that these family units are “fraudulently trafficking children” to receive more favorable rulings in immigration proceedings.<sup>87</sup> With the government’s broad discretion to separate nonparental family units and the lack of attention and accountability placed on DHS for these separations, it seems unlikely that the children separated in this manner will receive any legal remedies. As long as these children can continue to be classified as “unaccompanied minors” under federal immigration regulations<sup>88</sup> and separated on the basis of fraud, there seems to be little recourse for them under the Flores Settlement.<sup>89</sup> As this Note will go on to suggest, however, these misclassified minors may be able to find relief under the Constitution.

### III. THE CONSTITUTION AT THE BORDER

The Supreme Court’s decision in *Reno* emphasized how difficult it can be for undocumented immigrants detained at their time of entry to receive protection under the U.S. Constitution.<sup>90</sup> Although the Court entertained the respondent class’s constitutional claims, the Court’s decision imposed high hurdles that the respondents failed to overcome.<sup>91</sup> Due to the Court’s narrow definition of the right in question and the classification of this right as nonfundamental,<sup>92</sup> as well as the significant deference to the legislature in matters of immigration, the respondents’ substantive due process and Equal Protection Clause claims were ultimately rejected.<sup>93</sup> Yet, unlawful immigration status does not always preclude constitutional challenges.<sup>94</sup>

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87. Kirstjen Nielsen, the former Secretary of Homeland Security, has repeatedly spoken about asylum fraud and used misleading statistics to indicate that fraud is a growing threat to the safety of immigrant children. See Aaron Blake, *Kirstjen Nielsen’s Mighty Struggle to Explain Separating Families at the Border, Annotated*, WASH. POST (June 19, 2018), <https://www.washingtonpost.com/news/the-fix/wp/2018/06/19/kirstjen-nielsen-tries-to-explain-separating-families-at-the-border-annotated> [<https://perma.cc/UAZ9-JHFG>]. Nielsen also called for reforms of “major loopholes” in our current immigration system, including reforms to TVPRA, to asylum laws that encourage the “systemic abuse of our asylum system,” and to the Flores Settlement to allow for family detention. *Id.* See also discussion *infra* Section V.B.

88. 6 U.S.C. § 279(g)(2).

89. See discussion *supra* Section II.D.

90. See discussion *supra* Section II.B.

91. *Reno v. Flores*, 507 U.S. 292, 315 (1993).

92. It is up to debate whether a different classification of the right would have led the Court to apply strict scrutiny rather than rational basis, and if the regulation would have survived a higher level of review. See 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, 122 (1995).

93. *Reno*, 507 U.S. at 305–06.

94. See generally *Zadvydas v. Davis*, 533 U.S. 678 (2001); *Plyler v. Doe*, 457 U.S. 202 (1982); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

*A. Constitutional Protections for Noncitizens Who Have Effected Entry into the United States*

*1. Protection for Documented Noncitizen Residents: Yick Wo v. Hopkins*

The Supreme Court has often acknowledged that “[a]liens, even aliens whose presence in this country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments” when they are living within the boundaries of a state.<sup>95</sup> This principle has survived in the judicial system for over a hundred years since the foundational holding in *Yick Wo v. Hopkins*.<sup>96</sup> In *Yick Wo*, the Supreme Court considered the constitutionality of the enforcement of an ordinance regulating the building properties of laundries.<sup>97</sup> The Court held that the imprisonment of petitioners under the ordinance violated the Fourteenth Amendment as the enforcement of the facially neutral ordinance arbitrarily, unfairly, and disproportionately targeted laundry owners of Chinese race and nationality.<sup>98</sup> In reaching this conclusion, the Court recognized that the guarantees of the Fourteenth Amendment are “not confined to the protection of citizens . . . . These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.”<sup>99</sup>

*2. Protection for Undocumented Noncitizen Residents in the United States: Plyler v. Doe*

The Supreme Court reaffirmed this interpretation of the Fifth and Fourteenth Amendments as it applies specifically to undocumented immigrants without lawful entry in *Plyler v. Doe*.<sup>100</sup> The Court

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95. *Plyler*, 457 U.S. at 210 (holding that revisions to the Texas Education Code that allowed school districts to deny enrollment in public schools to undocumented immigrant children violated the Fourteenth Amendment’s Equal Protection Clause); see also *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (“Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection [from deprivation of life, liberty, or property without due process of law].”); *Zadvydas*, 533 U.S. at 693 (“[O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”).

96. 118 U.S. at 374.

97. *Id.* at 368.

98. *Id.* at 374.

99. *Id.* at 369.

100. 457 U.S. 202, 210 (1982).

struck down legislation in Texas that allowed public school districts to deny enrollment to children not “legally admitted” to the United States and allowed the state to withhold funds from school districts that used these funds to educate undocumented students.<sup>101</sup> In his majority opinion, Justice Brennan rejected the state’s argument that undocumented aliens were not “persons within the jurisdiction” of Texas due to their immigration status.<sup>102</sup> Reiterating the legal analysis in *Yick Wo*, the Court found that “[w]hatever his status under the immigration laws, an alien is surely a ‘person’ in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments.”<sup>103</sup>

After finding that undocumented immigrants were protected under the Constitution, the Court then discussed whether the Texas legislation violated the Equal Protection Clause.<sup>104</sup> The Court has “treated as presumptively invidious those classifications that disadvantage a ‘suspect class,’ or that impinge upon the exercise of a ‘fundamental right,’” after which the government must “demonstrate that its classification has been precisely tailored to serve a compelling governmental interest.”<sup>105</sup> Certain classifications, although not facially invidious, may still be subject to a higher level of scrutiny than rational basis if they “give rise to recurring constitutional difficulties.”<sup>106</sup> In those instances, the government must prove that the legislative classification furthers a substantial state interest.<sup>107</sup>

In *Plyler*, the Court found that undocumented immigrants are not a suspect class under traditional Equal Protection Clause analysis.<sup>108</sup> Immigration status is not an immutable trait nor is it “irrelevant to any proper legislative goal.”<sup>109</sup> The children of undocumented immigrants, however, seem to be given at least some extra consideration.<sup>110</sup> The children being disenfranchised by the legislation barring their

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101. *Id.* at 205.

102. *Id.* at 210.

103. *Id.*

104. *Id.* at 216.

105. *Id.* at 216–17.

106. *Plyler*, 457 U.S. at 217.

107. *Id.*

108. *Id.* at 223.

109. *Id.* at 220. The Court does, however, acknowledge that the millions of undocumented immigrants living in the United States “raises the specter of a permanent caste of undocumented resident aliens . . . denied the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.” *Id.* at 218–19.

110. *See Plyler*, 457 U.S. at 219–20 (“[C]hildren of those illegal entrants are not comparably situated.”).

education could “affect neither their parents’ conduct nor their own status,”<sup>111</sup> and “penalizing the . . . child is an ineffectual—as well as unjust—way of deterring the parent.”<sup>112</sup>

Moreover, public education is not a fundamental or constitutional right on which infringement upon would lead to the application of a strict scrutiny standard.<sup>113</sup> However, the Court recognized that, because of the unique nature of education and the lasting effects that it has on the development of children, laws that infringe upon the right to education should receive a type of intermediate scrutiny.<sup>114</sup> By depriving an entire class of the benefits of education, the legislation irreparably and negatively impacts “the social, economic, intellectual, and psychological well-being of the individual . . . . [These impacts] and the obstacle [that the legislation] poses to individual achievement[] make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause.”<sup>115</sup> The Court’s analysis underscored the long-term costs of this legislation on the affected children and on the country as a whole:

Section 21.031 imposes a *lifetime hardship on a discrete class of children not accountable for their disabling status*. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. In determining the rationality of § 21.031, we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in § 21.031 can hardly be considered rational unless it furthers some substantial goal of the State.<sup>116</sup>

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111. *Id.* at 220 (quoting *Trimble v. Gordon*, 430 U.S. 762, 77 (1977)).

112. *Id.* (quoting *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972)).

113. *Id.* at 221.

114. *Id.* at 221–23. The Court notes that “some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.” *Plyler*, 457 U.S. at 221. The Court “cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests. *Id.*”

115. *Id.* at 222. The Court also compared their findings in this case with their interpretation of education in *Brown v. Board of Education*, 347 U.S. 483 (1954). *Id.* at 222–23.

116. *Id.* at 223–24 (emphasis added). The Court also dismisses the State’s argument that deference should be given to classifications of aliens based on Congress’ plenary power over matters of immigration because the classification was made on a state level and “in the absence of any contrary indication fairly discernible in the present legislative record,” there is no national policy justification for supporting the classification. *Id.* at 224–26.

Ultimately, the Court held that the State's justifications for the classification—to protect the State's economy, to improve the State's quality of public education, and to better serve students who are more likely to remain within the State—were not rationally related to furthering a substantial state interest.<sup>117</sup>

*B. Constitutional Protections, or Lack Thereof, for Noncitizens Detained Prior to Effecting Entry: Case Precedents and Persuasive Arguments from Jean v. Nelson*

It is established case law that immigrants detained at the border have fewer constitutional protections than immigrants who have effected entry into the United States.<sup>118</sup> One of the seminal cases that helped to define this viewpoint is the Supreme Court's 1953 decision in *Shaughnessy v. United States ex rel. Mezei*.<sup>119</sup> The Court recognized that aliens who have entered our country's borders, regardless of their legal immigration status, are afforded due process guarantees.<sup>120</sup> However, "an alien on the threshold of initial entry stands on a different footing [than aliens who have passed through our gates, even illegally]: 'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.'"<sup>121</sup> This finding was extremely deferential to the Attorney General's delegated power in determining certain immigration matters, and the Court held that they were not authorized to review this decision as a "determination of the political branch of the Government."<sup>122</sup> Throughout the years, the federal judiciary has continued this trend of skirting the issue of the constitutional protections of immigrants detained at the border as a subject under the sole authority of the legislative branch.<sup>123</sup>

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117. *Plyler*, 457 U.S. at 228–30.

118. *See, e.g.,* *Servin-Espinoza v. Ashcroft*, 309 F.3d 1193, 1198 (9th Cir. 2002) ("Our immigration law has generally treated aliens who are already on our soil (and who are therefore deportable) more favorably than aliens who are merely seeking admittance (and who are therefore excludable).") (citing *Alvarez-Mendez v. Stock*, 941 F.2d 956, 962 (9th Cir. 1991)).

119. *See* *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 207 (1953) (deciding "whether the Attorney General's continued exclusion of respondent without a hearing amounts to an unlawful detention . . .").

120. *Id.* at 212.

121. *Id.* (quoting *Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950)).

122. *Id.* at 212–16.

123. *See, e.g.,* *Castro v. United States Dep't of Homeland Sec.*, 835 F.3d 422 (3d Cir. 2016). The Third Circuit held that the District Court "lacked jurisdiction under [8 U.S.C. § 1252] to review Petitioners' claims" and that Congress has "unambiguously limited the scope of judicial review," reinforcing Congress' plenary power "over aliens at the border

On the other hand, while not binding, persuasive arguments have come from the Supreme Court indicating that cases like *Mezei* and *Knauff* should not be interpreted to so severely limit the Constitution's reach to immigrants seeking entry.<sup>124</sup> In *Jean v. Nelson*, a class of Haitians alleged that INS' parole policy violated the Fifth Amendment's Equal Protection Clause because it discriminated against immigrants on the basis of race and national origin.<sup>125</sup> In a rehearing en banc, the Eleventh Circuit held that "the Fifth Amendment did not apply to the consideration of unadmitted aliens for parole" as it fell within the Attorney General's discretionary authority under 8 U.S.C. § 1182(d)(5)(A).<sup>126</sup> The Supreme Court affirmed the judgment for remand, although they noted that it was unnecessary to address the Constitutional issue as the current statutes would provide all the relief needed.<sup>127</sup>

In his dissent with Justice Brennan, Justice Marshall argued that not only was it necessary for the court to rule on the constitutional question at issue, but that the petitioners were protected from discrimination on the basis of race or national origin under the Fifth Amendment.<sup>128</sup> He contended that the broad dicta of *Mezei* suggesting that immigrants who have not effected entry at the border are not protected by the Constitution "can withstand neither the weight of logic nor that of principle, and has never been incorporated into the fabric of our constitutional jurisprudence."<sup>129</sup> He reasoned that if immigrants detained at the border are generally accepted by the judicial system and the government to be entitled to due process rights under the Fifth Amendment in cases of criminal prosecution, it should follow that immigrants are protected in noncriminal cases as well.<sup>130</sup> Justice Marshall relied on the Court's previous holdings in cases such as *Yick Wo*, *Plyler*, and *Mathews v. Diaz* to justify his

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seeking initial admission." *Id.* at 434, 443, 450. The Court heavily relied on their prior decisions in *Knauff* and *Mezei*. *Id.* at 442–44.

124. *See* *Jean v. Nelson*, 472 U.S. 846, 858–82 (1985) (Marshall, J., dissenting).

125. *Id.* at 849.

126. *Id.* at 852.

127. *Id.* at 854–57.

128. *Id.* at 858 (Marshall, J., dissenting).

129. *Id.* at 869. Justice Marshall analyzes the dicta from cases such as *Mezei*, *Knauff*, and *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953) and outlines the potential dangers in reading these cases to hold that first-time entrants into the country are not "person[s]" under the Constitution. *Jean*, 472 U.S. at 869–72. If immigrants detained at the border have no protection under the Constitution, "the Attorney General, for example, could invoke legitimate immigration goals to justify a decision to stop feeding all detained aliens. He might argue that scarce immigration resources could be better spent by hiring additional agents to patrol our borders than by providing food for detainees." *Id.* at 874.

130. *Id.* at 873.

rationale that the Constitution is applicable to everybody within the United States' territorial jurisdiction.<sup>131</sup>

Unfortunately, these arguments, while persuasive, are not binding. However, a 2018 case out of the D.C. Circuit, while similarly nonbinding, has shown a radical departure from past precedent, and may indicate a shift in the way the federal judiciary considers the constitutional protections of minors detained at the border.

#### IV. *GARZA V. HARGAN* AND THE ASSUMPTION OF CONSTITUTIONAL PROTECTIONS OVER NONCITIZENS DETAINED AT THE BORDER

In 2017, seventeen-year-old unaccompanied minor Jane Doe was detained in an Office of Refugee Resettlement (ORR) facility in Texas after attempting to enter the United States.<sup>132</sup> Shortly thereafter, Doe discovered she was pregnant and sought an abortion while in custody.<sup>133</sup> ORR, under instruction that they were “prohibited from taking any action that facilitates an abortion without direction and approval from the Director of ORR,” refused to allow Doe to leave for the procedure unless

a third party were to indicate a willingness to serve as a sponsor for [Doe], qualify for that position under applicable legal requirements, complete the administrative review process, and obtain ORR approval; or . . . if [Doe] were to voluntarily self-deport to her home country, where Defendants conceded that abortion is illegal.<sup>134</sup>

ORR also required that Doe “undergo counseling from a religiously affiliated crisis pregnancy center,” view a sonogram, and notify Doe’s mother, whom Doe alleged was abusive, of her decision.<sup>135</sup> Rochelle Garza, Doe’s guardian ad litem, subsequently filed a class action lawsuit requesting injunctive relief “on behalf of Doe and ‘all other pregnant unaccompanied minors in ORR custody’” on the basis that ORR’s practices violated the First and Fifth Amendments.<sup>136</sup> In October 2017, the District Court granted Doe a temporary restraining

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131. *Id.* at 874–75. For further analysis of Justice Marshall’s dissent, see Alexandra Dumezich, *Development: Current Developments in the Judiciary: Garza v. Hargan, an Undocumented Minor’s Right to an Abortion*, 32 GEO. IMMIGR. L.J. 259.

132. *Azar v. Garza*, 138 S. Ct. 1790, 1791 (2018) (per curium).

133. *Id.*

134. *Garza v. Hargan*, 304 F. Supp. 3d 145, 150–51 (2018), *aff’d in part, vacated in part* by *J.D. v. Azar*, 925 F.3d 1291 (D.C. Cir. 2019).

135. *Id.* at 151.

136. *Id.* at 153; *Garza*, 138 S. Ct. at 1791.

order which was vacated by a panel of the D.C. Circuit Court of Appeals two days later after their finding that the ORR policy was not an undue burden on the minor seeking an abortion.<sup>137</sup> Later that week, the Court of Appeals reheard the case en banc and vacated and remanded the panel order.<sup>138</sup> After receiving an amended restraining order, Doe received an abortion and the government then filed a petition for certiorari.<sup>139</sup>

In vacating the decision of the panel, Judge Millet highlighted the fact that the government made no arguments whatsoever regarding Doe's immigration or detention status potentially barring her constitutional right to an abortion.<sup>140</sup> Judge Millet noted:

What has also been expressly and deliberately uncontested by the government throughout this litigation is that the Due Process Clause of the Fifth Amendment fully protects [Doe's] right to decide whether to continue or terminate her pregnancy. The government—to its credit—has never argued or even suggested that [Doe's] status as an unaccompanied minor who entered the United States without documentation reduces or eliminates her constitutional right to an abortion in compliance with state law requirements.<sup>141</sup>

The two dissents, most notably the one penned by current Supreme Court Justice Brett Kavanaugh, vehemently argued that Doe had no constitutional protections as a noncitizen who has not effected entry into the United States.<sup>142</sup> Justice Kavanaugh contended that the majority's decision was "based on a constitutional principle as novel as it is wrong: a new right for unlawful immigrant minors in U.S. Government detention to obtain immediate abortion on demand."<sup>143</sup> Judge Millet questioned the reasoning in Justice Kavanaugh's dissent:

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137. *Garza*, 138 S. Ct. at 1791–92 (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 876 (1992)).

138. *Id.* at 1792.

139. *Id.*

140. *Garza v. Hargan*, 874 F.3d 735, 737 (2017), *vacated as moot*, *Azar v. Garza*, 138 S. Ct. 1790 (2018) (Millet, J., concurring).

141. *Id.*

142. *Id.* at 743–56.

143. *Id.* at 752 (Kavanaugh, J., dissenting). For further analysis of the case law supporting Justice Kavanaugh's position and for opposing arguments to those made by this Note regarding the benefits that the ideas put forth in *Garza* may pose for unaccompanied minors in immigration detention, see generally Kaytlin L. Roholt, *Give Me Your Tired, Your Poor, Your Pregnant: The Jurisprudence of Abortion Exceptionalism in Garza v. Hargan*, 5 TEX. A&M L. REV. 505 (2018).

[I]t is unclear why undocumented status should change everything. Surely the mere act of entry into the United States without documentation does not mean that an immigrant's body is no longer her or his own. Nor can the sanction for unlawful entry be forcing a child to have a baby. The bedrock protections of the Fifth Amendment's Due Process Clause cannot be that shallow."<sup>144</sup>

Unfortunately, we will never know if the powerful words of Judge Millet's opinion would have swayed the justices of the Supreme Court. In June of 2018, after having granted the government's petition for certiorari, the Supreme Court vacated the en banc order for mootness and remanded with instructions to dismiss the individual claim for injunctive relief.<sup>145</sup> While the decision therefore cannot be used as precedent, ideally the position put forward by the D.C. Circuit Court of Appeals is indicative of an upcoming shift in the federal judiciary's willingness to recognize the constitutional rights of immigrants detained at the border upon seeking entry. Given the current political climate, the appointment of justices like Brett Kavanaugh to the Supreme Court, and the ongoing social outrage and growing media coverage of the situation at our southern border, it is difficult to discern the likelihood of a successful constitutional challenge to immigration policies. A change in the courts' interpretation of immigrants' constitutional rights along the lines of *Garza*, however, could have positive implications for immigrant minors in federal custody. If the courts begin assuming the constitutional standing of immigrants detained at the border to bring claims under the Fifth and Fourteenth Amendments, potential plaintiffs can instead focus on arguing the fundamentality of the right they wish to protect rather than whether or not they have any constitutional rights at all. In light of this possible development, this Note will now examine what kind of constitutional right could be asserted to challenge the statutory definition of an unaccompanied minor.

## V. THE UNCONSTITUTIONALITY OF THE STATUTORY DEFINITION OF UNACCOMPANIED MINOR AND ITS INTERPRETATION BY THE GOVERNMENT

### A. *The Right to Family Unity*: Moore v. East Cleveland

In 1977, Inez Moore challenged East Cleveland's new housing ordinance which limited the occupancy of a housing unit to members

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144. *Garza*, 874 F.3d at 737–38.

145. *Garza*, 138 S. Ct. at 1793.

of a strictly defined nuclear family.<sup>146</sup> Moore was criminally charged under this statute for allowing her grandson to reside with her after the death of his mother.<sup>147</sup> The Supreme Court noted that when the government “undertakes such intrusive regulation of the family,” the Court must carefully examine the government’s interest in relation to the regulation.<sup>148</sup> The freedom of “personal choice in matters of . . . family life” is a right long-recognized to be protected by the Fourteenth Amendment’s Due Process Clause.<sup>149</sup> The Court ultimately held that the city’s justifications were not strong enough to survive the challenge to the invasive regulation on family unity by arbitrarily limiting the definition to a nuclear family.<sup>150</sup> In recognizing this substantive due process right, the Court looked to the “basic values that underlie our society” regarding the “sanctity of the family . . . deeply rooted in this Nation’s history and tradition.”<sup>151</sup> According to Justice Powell:

Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition. Over the years millions of our citizens have grown up in just such an environment, and most, surely, have profited from it . . . . Out of choice, necessity, or a sense of family responsibility, it has been common for close relatives to draw together and participate in the duties and the satisfactions of a common home . . . . Especially in times of adversity . . . the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life.<sup>152</sup>

Thus, because of this heavily rooted tradition of extended family unity in the household, the challenged regulation could not survive strict scrutiny.<sup>153</sup>

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146. *Moore v. East Cleveland*, 431 U.S. 494, 496 n.2 (1977) (defining “family” as “[a] [h]usband or wife . . . [u]nmarried children . . . provided, however, that such unmarried children have no children residing with them . . . [or a] . . . father or mother of the nominal head of the household . . .”).

147. *Id.* at 497.

148. *See id.* at 499.

149. *Id.*

150. *Id.* at 499–500. The city attempted to justify the regulation as “a means of preventing overcrowding, minimizing traffic and parking congestion, and avoiding an undue financial burden on East Cleveland’s school system.” *Id.*

151. *Moore*, 431 U.S. at 503.

152. *Id.* at 504–05.

153. *Id.* at 504–06.

*B. Does the Right to Family Unity Exist in Immigration Detention?*<sup>154</sup>

Unlike the constitutional challenges in *Flores*, the claim that family separation violates immigrant children's substantive due process rights based on their unconstitutional classification as unaccompanied minors has a higher chance of success given that the right to family unity in certain contexts has been established by past precedent.<sup>155</sup> The right recognized in *Moore* is an offshoot of the well-established and consistently acknowledged right to a "private realm of family life which the state cannot enter" that has been expanded to provide constitutional protections to extended families in matters of the home.<sup>156</sup> The question then becomes whether the freedom to define family life as it relates to living arrangements is equally applicable to family unity within immigration detention, thereby requiring strict scrutiny as in *Moor e.*<sup>157</sup>

Clearly, living in a detention facility with restrictions on freedoms such as liberty of movement is different from living in a residential housing unit. However, the issue of the minors' detention should not strip them of this right to live with extended family. In the context of prison visitation regulations, the Supreme Court has refused to elaborate on whether imprisonment affects the "right to maintain certain familial relationships" as "[an] inmate does not retain rights inconsistent with proper incarceration."<sup>158</sup> However, most immigration detention is civil detention, not criminal incarceration.<sup>159</sup> Following the recent media investigations into the poor conditions at immigration

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154. For the remainder of this Note, I will assume that the government, as in *Garza*, will not challenge the constitutional standing of a class of accompanied unaccompanied minors in immigration detention [hereinafter referred to as the class] to bring a claim for the violation of their substantive due process rights under the Fifth and Fourteenth Amendments. See *Garza v. Hargan*, 874 F.3d 735, 737 (2017).

155. *Moore v. East Cleveland*, 431 U.S. 494, 506 (1977).

156. See *id.* at 499.

157. See *id.*

158. See *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003) (citing *Moore v. East Cleveland*, 431 U.S. 494 (1977)). The Court instead focused on whether the regulations restricting who could qualify as noncontact visitors violated the freedom of association. *Id.* The Court held that the regulations sufficiently promoted legitimate penological goals, including the promotion of internal security. *Id.* at 133–36.

159. See *Jennings v. Rodriguez*, 138 S. Ct. 830, 864 (2018) ("The cases before us [involving immigration detention during removal proceedings], however, are not criminal cases . . . there are not many instances of civil confinement (aside from immigration detention . . . .)") (Breyer, J., dissenting); *Arizona v. United States* 567 U.S. 387, 396 (2012) ("Removal is a civil, not criminal, matter."); *Detention Management*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, <https://www.ice.gov/detention-management> [<https://perma.cc/6BUK-S4P6>] (last visited Nov. 4, 2019).

detention centers,<sup>160</sup> ICE officials have even attempted to highlight the allegedly nonpunitive and relaxed nature of these detention centers.<sup>161</sup> According to Matthew Albence, the head of enforcement and removal operations for ICE, these family detention facilities are akin to “summer camps.”<sup>162</sup> Regardless of the reality of the prison-like conditions of immigration detention,<sup>163</sup> it would be a mistake to infer, as in the criminal incarceration context, that minors in immigration detention lose the right to live together with extended family on the basis that their liberty of movement has been restricted because of civil detention.

The Supreme Court in *Flores* feared the implications that acknowledging a right to “freedom from physical restraint” would have in other situations of government-backed juvenile custodial settings.<sup>164</sup> Justice Scalia believed that a right to freedom from physical restraint was not a fundamental right rooted in the consciousness of the American people.<sup>165</sup> However, the class in this case would not be arguing for a right to freedom from restraint or a similar right to release on bail. Here, the class would allege a violation of the judicially recognized right to freedom to live with extended family members.<sup>166</sup> The *Moore* Court extensively wrote about the fundamental and deeply rooted nature of the right, stating that “[t]he tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.”<sup>167</sup>

It is likely that the Supreme Court would again punt the constitutional questions under the guise that such a decision would intrude upon the plenary power of the legislative branch in deciding matters

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160. See, e.g., Dan Barry et al., *Cleaning Toilets, Following Rules: A Migrant Child's Days in Detention*, N.Y. TIMES (July 14, 2018), <https://www.nytimes.com/2018/07/14/us/migrant-children-shelters.html> [<https://perma.cc/276B-M783>].

161. Meagan Vazquez, *Top Immigration Official Says Family Detention Centers Are Like Summer Camp*, CNN (Aug. 1, 2018, 9:17 AM), <https://www.cnn.com/2018/07/31/politics/immigration-centers-summer-camp/index.html> [<https://perma.cc/26GB-7HGQ>].

162. *Id.*

163. See, e.g., Avery Anapol, *Immigrant Teen Describes Conditions in Phoenix ICE Detention Center*, THE HILL (June 22, 2018, 3:58 PM), <https://thehill.com/latino/393705-immigrant-teen-describes-conditions-in-ice-detention-center> [<https://perma.cc/8AA3-YP9B>]; Kate Morrissey, *Attorneys' Report Slams Conditions for Migrant Children at U.S. Detention Centers*, L.A. TIMES (July 20, 2018, 8:05 AM), <https://www.latimes.com/local/la-now/la-me-border-children-20180720-story.html> [<https://perma.cc/QS87-L9UF>]; Amy Taxin, *Immigrant Children Describe Treatment in Detention Centers*, AP (July 18, 2018), <https://apnews.com/1a8db84a88a940049558b4c450dccc8a> [<https://perma.cc/G7VG-NHHG>].

164. *Reno v. Flores*, 507 U.S. 292, 302–03 (1993).

165. *Id.*

166. *Moore v. East Cleveland*, 431 U.S. 494, 504–06 (1977).

167. *Id.* at 504 (emphasis added).

of admissibility.<sup>168</sup> This is not a case of admissibility, though. On its face, the challenge would be against the unnecessarily narrow statutory classification of unaccompanied minors and its effect on the right to family unity *in the context of immigration detention*.<sup>169</sup> While the classification of the minors in the class as accompanied could have potential impacts on the family's ultimate release on bail under a proper application of the Flores Settlement's requirements, at this stage the class is not asking for a right related to admissibility.<sup>170</sup>

Should a court find that the statutory definition of unaccompanied minor is an unconstitutional restriction on the right to family unity, the government could attempt to rebut the challenge by arguing that the statute is "narrowly tailored to serve a compelling state interest."<sup>171</sup> In defense of the statute, the government may argue that the language is tailored to prevent an increase in child trafficking that could occur if all family units were placed in family detention.<sup>172</sup> Former Secretary Nielsen, in defense of family separation, has stated: "There have been cases where minors have been used and trafficked by unrelated adults in an effort to avoid detention . . . . [I]n the last five months, we have a 314 percent increase in adults and children arriving at the border, fraudulently claiming to be a family unit."<sup>173</sup> CBP agents have similarly cited worrisome statistics concerning instances of family fraud.<sup>174</sup> Due to these concerns, DHS has even begun testing a pilot program where immigrants suspected of family fraud are DNA tested at the border using Rapid DNA technology.<sup>175</sup> DHS has alleged that the "legal loopholes" mandated by the Flores Settlement "act as a 'pull factor' for increased future illegal immigration [and have] incited smugglers to place children into the hands of adult strangers so they can pose as families and be released from immigration custody after crossing the border, creating another safety issue for these children."<sup>176</sup>

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168. *Reno*, 507 U.S. at 305; see also *Fiallo v. Bell*, 430 U.S. 787, 792 (1977).

169. See 6 U.S.C. § 279(g)(2).

170. See discussion *supra* Section II.D; see also discussion *infra* Conclusion.

171. See *Reno*, 507 U.S. at 301–02.

172. See *Blake*, *supra* note 87.

173. See *id.*

174. Linda Qiu, *Kirstjen Nielsen Justifies Family Separation by Pointing to Increase in Fraud. But the Data is Very Limited.*, N.Y. TIMES (June 18, 2018), <https://www.nytimes.com/2018/06/18/us/politics/nielsen-family-separation-factcheck.html> [<https://perma.cc/P3RD-GPSG>].

175. Pricilla Alvarez & Geneva Sands, *Exclusive: DHS to Start DNA Testing to Establish Family Relationships on the Border*, CNN (May 1, 2019), <https://www.cnn.com/2019/04/30/politics/homeland-security-dna-testing-immigration/index.html> [<https://perma.cc/K9C7-WNMW>].

176. Press Release, U.S. Dep't of Homeland Sec., *Unaccompanied Alien Children and Family Units Are Flooding the Border Because of Catch and Release Loopholes* (Feb. 15,

Yet these fears are unsupported by statistics. The over 300 percent increase in family fraud cases cited by Secretary Nielsen in the first five months of 2018 only account for about 0.6 percent of people crossing the border, and the forty-six family fraud cases in the 2017 fiscal year accounted for just 0.06 percent of families apprehended at the border.<sup>177</sup> Deputy Chief Raul Ortiz of CBP conceded that of the 600 cases of alleged family fraud recorded in the agency's Rio Grande Valley sector, none of the cases involved "human trafficking, or the illegal transportation of someone typically for sexual exploitation or forced labor."<sup>178</sup> The officer continued to admit that most fraud cases at the border involved the use of fraudulent documents where "adults tr[ie]d to pass as minors . . . [or] where someone who may be a brother, cousin or neighbor identified themselves as a parent."<sup>179</sup>

However, in light of the cultural circumstances from which these nonparental family units have come, it is highly unlikely that these instances of "fraud" are attempts to cheat the immigration system that would be prevented by the government's narrow definition of unaccompanied minor.<sup>180</sup> By labeling any familial relationship that deviates from the strict, Western concept of the nuclear family as fraudulent, the government is denying these people of their dignity and their right to define family. The overwhelming majority of individuals apprehended by DHS are from Latin America,<sup>181</sup> where the cultural perceptions of family often include members of the extended family such as "grandparents, aunts, uncles, cousins, and even persons who are neither related by blood nor affinity, such as godparents."<sup>182</sup> Under the current statute, each of these family members would be legally separated from their minor relatives upon apprehension by DHS.<sup>183</sup>

Beyond the general cultural understanding of family, the unique circumstances faced by families attempting to cross the border,

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2018), <https://www.dhs.gov/news/2018/02/15/unaccompanied-alien-children-and-family-units-are-flooding-border-because-catch-and> [<https://perma.cc/5CZF-KF65>].

177. Tim Stelloh, *Experts Cast Doubt on DHS Claim that Traffickers are Posing as Families at the Border*, ABC NEWS (June 21, 2018, 5:22 PM), <https://www.nbcnews.com/storyline/immigration-border-crisis/experts-cast-doubt-dhs-claim-traffickers-are-posing-families-border-n885241> [<https://perma.cc/Q372-DXGP>]; Qiu, *supra* note 174.

178. Stelloh, *supra* note 177.

179. *Id.*

180. *See id.*

181. Table 34, *Aliens Apprehended By Region And Country Of Nationality: Fiscal Years 2014 to 2016*, U.S. DEP'T OF HOMELAND SEC., <https://www.dhs.gov/immigration-statistics/yearbook/2016/table34> [<https://perma.cc/L9Y3-BFWN>] (last visited Nov. 4, 2019).

182. *See* Solangel Maldonado, *When Father (or Mother) Doesn't Know Best: Quasi-Parents and Parental Deference After Troxel v. Granville*, 88 IOWAL REV. 865, 908 (2003) (citing studies indicating the prevalence of multigenerational households and the importance of extended family in Latino communities).

183. 6 U.S.C. § 279(g)(2).

particularly in asylum cases, may lead to the necessity of traveling in nonparental family units.<sup>184</sup> As immigration attorney Annaluisa Padilla notes, the biological parents of these minors may have been killed in their home country, and the children placed in the care of other relatives as a result may see these relatives as their parents.<sup>185</sup> Padilla also acknowledges that the bureaucratic difficulties these relatives may face when trying to formally adopt these children could also prevent these relatives from becoming legal guardians recognized by the statute.<sup>186</sup> All of these challenges faced by nonparental family units arriving at the border echo the language used in *Moore* to justify the fundamental nature of the right to extended family unity: “*Especially in times of adversity . . . the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life.*”<sup>187</sup>

Ultimately, there is little statistical evidence that the statutory definition of unaccompanied minor is narrowly tailored to the compelling government interest of deterring child trafficking or fraud under a strict scrutiny review.<sup>188</sup>

Even if the right to family unity in the context of immigration detention is not found to be a fundamental right deserving strict scrutiny, there is still a chance that it can survive a more intermediate level of scrutiny similar to the right identified in *Plyler*.<sup>189</sup> In *Plyler*, while the right of undocumented minors to a public education was not a fundamental right deriving from the substantive Due Process Clause of the Constitution, the Supreme Court found that “[i]n light of these countervailing costs [to the Nation and to the innocent children who are its victims], the discrimination contained in § 21.031 can hardly be considered rational *unless it furthers some substantial goal of the State.*”<sup>190</sup> The Court settled on a level of scrutiny higher than rational basis because of the severe and lifelong harm that discrimination in public education would have on the affected children.<sup>191</sup>

Although the analysis performed in *Plyler* was pursuant to the application of the Fourteenth Amendment’s Equal Protection Clause rather than the substantive Due Process Clause, it is worth noting the Court’s willingness to grant a higher level of scrutiny than the government argued was necessary due to the special circumstances

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184. See Stelloh, *supra* note 177.

185. *Id.*

186. *Id.*

187. *Moore v. East Cleveland*, 431 U.S. 494, 504–05 (1977) (emphasis added).

188. See *supra* text accompanying notes 177, 179.

189. See *Plyler v. Doe*, 457 U.S. 202, 223–24 (1982).

190. *Id.* (emphasis added).

191. *Id.* at 221–24; see discussion *supra* Section III.A.2.

of the class and the severity of the harm.<sup>192</sup> The Court placed a great amount of emphasis on the impact that this discrimination would have on the children throughout the course of their lives.<sup>193</sup> Thus, it is a plausible argument that the separation of nonparental family units according to the narrow statutory definition could likewise lead to permanent physical and psychological harm to these minors, and therefore the statute deserves a comparable level of intermediate scrutiny as given the challenged legislation in *Plyler*.

While the long-term effects of family separation in the context of immigration detention have not yet been studied in depth, doctors and psychologists can look to analogous studies of similar forms of trauma to understand the possible impacts of family separation.<sup>194</sup> Recent research has shown that children separated from their family in immigration facilities may pose an increased risk of post-traumatic stress disorder (PTSD) and other lifelong psychological consequences that remain even after family reunification.<sup>195</sup> In past studies of Latino children living in the United States with one or more parents detained or deported, researchers determined that a statistically significant amount of these children suffered from symptoms of PTSD and other behavioral problems in school when compared to students whose parents have had no contact with immigration enforcement.<sup>196</sup> Importantly, psychologists have discovered that “subjecting young children to an institutional environment [such as an orphanage] can create irreversible changes in the brain” including “significantly lower volumes of the prefrontal cortex . . . [which] would lead kids

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192. *Id.* The Equal Protection Clause and the Due Process Clause can often intertwine in their identification and definition of a constitutional right. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2602–03 (2015) (“The Due Process Clause and the Equal Protection Clause connected in a profound way, though they set forth independent principles. . . . [O]ne Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge . . .”).

193. *Plyler*, 457 U.S. at 223 (“The stigma of illiteracy will mark them for the rest of their lives.”).

194. Heather Stringer, *Psychologists Respond to a Mental Health Crisis at the Border*, AM. PSYCHOL. ASS’N, <https://www.apa.org/news/apa/2018/border-family-separation> [<https://perma.cc/S3Y4-FHS9>] (last visited Nov. 4, 2019). Part of the difficulty in understanding the consequences of forced family separation is due to the inhumane nature of the practice of family separation itself. According to Megan Gunnar, the director of the Institute of Child Development at the University of Minnesota, “researchers are not allowed to do to children what was being done to children at the border . . . . For the most part, we are not even conducting experiments that force mother-infant separation on nonhuman primates anymore.” *Id.*

195. *Id.*; *see also* NAT’L CTR. FOR YOUTH LAW ET AL., *THE FLORES SETTLEMENT AGREEMENT & UNACCOMPANIED CHILDREN IN FEDERAL CUSTODY* 7 (2019), <https://youthlaw.org/wp-content/uploads/2019/02/Flores-Congressional-Briefing.pdf>.

196. Stringer, *supra* note 194.

to have trouble with executive functioning tasks, working memory, inhibition control and cognitive flexibility.”<sup>197</sup>

The effects of family separation on children can also vary depending on the age of the child. With younger children, family separation can lead to attachment issues and long-term emotional and cognitive problems.<sup>198</sup> Older, school-aged victims of family separation can often experience trouble in school and display regressive behavior as well as symptoms of anxiety, depression, and other behavioral problems.<sup>199</sup> The American Academy of Pediatrics, a vocal opponent of family separation in immigration, has expressed concern that the highly stressful experience of family separation “can cause irreparable harm to lifelong development by disrupting a child’s brain architecture,” and that this toxic stress can cause “detrimental short- and long-term health effects” on children.<sup>200</sup> Other health organizations, such as the American Public Health Association, have also criticized the practice, warning that family separation would have “a dire impact on [the children’s] health, both now and into the future,” and could lead to problems such as “alcoholism, substance abuse, depression, obesity, and suicide.”<sup>201</sup>

Although the true extent of the mental and physical harms resulting from family separation in immigration has yet to be fully documented, it is clear that many health authorities reasonably believe that it can have severely detrimental long-term health effects on children.<sup>202</sup> Like the harm discussed in *Plyler*, the effects of family separation on this innocent class of individuals are likely to “mark them for the rest of their lives” and “[impose] a lifetime hardship.”<sup>203</sup> In defending the narrow statutory definition of unaccompanied minors, the government should have to proffer a substantial state interest that could justify the enormous, debilitating, and

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197. *Id.*

198. Patty Huang, *What Are the Long-Term Effects of Separating Immigrant Children from Their Parents?*, CHILDREN’S HOSP. OF PHILA. RESEARCH INST. (Aug. 21, 2018), <https://injury.research.chop.edu/blog/posts/what-are-long-term-effects-separating-immigrant-children-their-parents#.XFuK3M9KgUs> [<https://perma.cc/FM4X-GVJX>].

199. *Id.*

200. Devin Miller, *AAP a Leading Voice Against Separating Children, Parents at Border*, AAPNEWS (June 14, 2018), [http://www.aapublications.org/news/2018/06/14/washington061418?utm\\_source=TrendMD&utm\\_medium=TrendMD&utm\\_campaign=AAPNews\\_TrendMD\\_0](http://www.aapublications.org/news/2018/06/14/washington061418?utm_source=TrendMD&utm_medium=TrendMD&utm_campaign=AAPNews_TrendMD_0) [<https://perma.cc/4EF8-78CX>]; see also NAT’L CTR. FOR YOUTH LAW ET AL., *supra* note 195, at 7.

201. Kevin Kelleher, *Doctors: Trump’s Border Separation Policy is Causing a ‘Mental Health Crisis’ for Families*, FORTUNE (June 16, 2018), <http://fortune.com/2018/06/15/doctors-trump-border-separation-policy-causing-mental-health-crisis-families/> [<https://perma.cc/JZD2-U5JF>].

202. See *id.*; NAT’L CTR. FOR YOUTH LAW ET AL., *supra* note 195, at 7.

203. *Plyler v. Doe*, 457 U.S. 202, 223 (1982).

lifelong harm forced upon these children traveling in nonparental family units.<sup>204</sup>

CONCLUSION: WHAT THE RIGHT TO FAMILY UNITY COULD  
MEAN FOR FAMILY DETENTION AND SEPARATION

A judicially recognized fundamental right to family unity in immigration detention could significantly impact how a nonparental family unit makes their way through the immigration process. As discussed in Sections II.C and II.D, the Flores Settlement stipulations apply equally to minors accompanied by their parents and held in family detention centers.<sup>205</sup> Therefore, if nonparental family units are now detained together instead of being separated pursuant to § 279(g)(2), they should also be held to the twenty-day standard limit for detention in these non-licensed family detention facilities under the federal court’s interpretation of the Flores Settlement.<sup>206</sup> Because of this standard, the government generally releases these families on bail after the twenty days with instructions to appear in court at a later date.<sup>207</sup> Keeping nonparental family units together during the immigration process could thus potentially allow these families to remain together and prevent prolonged and indefinite detention.

The practice of releasing families together on bail with orders to return to immigration court has proven to be a generally effective method, with the majority of immigrants appearing on their designated court dates despite the Trump Administration’s arguments to the contrary.<sup>208</sup> If the government is concerned that allowing families to remain together may lead to a massive exploitation of the current immigration system, there are a number of more tailored

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204. *See id.* at 230.

205. *See supra* Sections II.C and II.D.

206. *See supra* text accompanying note 80.

207. This practice has been referred to by the Trump Administration as “catch and release.” *See Lind & Scott, supra* note 79.

208. In a recent speech to the American Farm Bureau Federation in 2019, President Trump openly mocked this system, stating: “[Y]ou say, ‘Come back in three years for your trial.’ Tell me, what percentage of people come back? Would you say 100 percent? No, you’re a little off. Like, how about 2 percent? (Laughter.) And those people, you almost don’t want, because they cannot be very smart. (Laughter.)” President Donald Trump, *Remarks by President Trump at the American Farm Bureau Federation’s 100th Annual Convention in New Orleans, Louisiana* (Jan. 15, 2019), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-american-farm-bureau-federations-100th-annual-convention-new-orleans-louisiana> [<https://perma.cc/89ZC-S9AU>]. The true numbers of immigrants who attend their court dates are significantly higher. *See U.S. DEP’T OF JUSTICE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, STATISTICS YEARBOOK: FISCAL YEAR 2017 33–34* (2017), <https://www.justice.gov/eoir/page/file/1107056/download> [<https://perma.cc/5CB2-JWUX>].

methods to addressing this issue than simply separating families without cause or accountability.<sup>209</sup> Under the current statute, the government can continue to rip families apart legally and away from the prying eyes of the media and organizations who wish to hold them liable for their actions.<sup>210</sup> Until the government is no longer able to arbitrarily separate families pursuant to an oppressive and narrowly written statute, these families will continue to fall through the cracks of our justice system. These children may never again see their families, and ultimately, “[r]emember, we are talking about a child here. A child who is alone in a foreign land.”<sup>211</sup>

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209. Stuart Anderson, *There Is No Crisis At The Border—And DHS Stats Prove It*, FORBES (June 25, 2018, 12:10 AM), <https://www.forbes.com/sites/stuartanderson/2018/06/25/there-is-no-crisis-at-the-border-and-dhs-stats-prove-it/#2d628af112aa> [<https://perma.cc/25XJ-Y64Q>] (arguing for different tools that the government could use to combat the “crisis” at the border that the Trump Administration claims is occurring, including the reestablishment of the Central American Minors program and collaboration with Central American governments.)

210. AMNESTY INT’L, *supra* note 3, at 43.

211. *Garza v. Hargan*, 874 F.3d 735, 736 (2017) [judg. vacated by *Azar v. Garza*].

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