

# WHEN WE LOCK UP OUR OWN: THE DETENTION OF UNACCOMPANIED U.S. CITIZEN CHILDREN FOR IMMIGRATION PURPOSES

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During the summer of 2014, news of minors fleeing violence in Central America and ending up in U.S. federal custody popped up everywhere.<sup>1</sup> Mainstream media reported on the huge waves of children crossing the border, and the federal government's meager attempts to catch-up to the crisis.<sup>2</sup> Although there were reports and concerns about the federal government's ability to provide basic services such as housing and food through the Office of Refugee Resettlement (ORR), there is one incredibly important and vulnerable community everyone failed to address: what does the government do when it apprehends a U.S. citizen child?

First, it is important to understand the general layout of the immigration detention of unaccompanied minors.<sup>3</sup> When the Department of Home-

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1. Tom Wong, *Statistical Analysis Shows that Violence, Not Deferred Action, Is Behind the Surge of Unaccompanied Children Crossing the Border*, CTR. FOR AM. PROGRESS (July 8, 2014), <https://www.americanprogress.org/issues/immigration/news/2014/07/08/93370/statistical-analysis-shows-that-violence-not-deferred-action-is-behind-the-surge-of-unaccompanied-children-crossing-the-border/>; Muzaffar Chishti & Faye Hipsman, *Dramatic Surge in the Arrival of Unaccompanied Children Has Deep Roots and No Simple Solutions*, MIGRATION POLICY INST. (June 13, 2014), <http://www.migrationpolicy.org/article/dramatic-surge-arrival-unaccompanied-children-has-deep-roots-and-no-simple-solutions>.

2. Cindy Carcamo, *Children Crossing Border Alone Create 'Urgent Humanitarian Situation'*, L.A. TIMES (June 2, 2014), <http://www.latimes.com/nation/nationnow/la-na-nn-ff-children-crossing-border-alone-20140602-story.html>; Laura Meckler & Colleen McCain Nelson, *White House Seeks Emergency Funds to Counter Border Surge*, THE WALL ST. J. (July 8, 2014), <http://www.wsj.com/articles/white-house-seeks-emergency-funds-to-counter-border-surge-1404834485>; Nicole Flatow, *Feds Rush To Provide Basic Supplies For Surge Of Migrant Kids Held In Make-shift 'Warehouses'*, THINKPROGRESS (June 8, 2014), <https://thinkprogress.org/feds-rush-to-provide-basic-supplies-for-surge-of-migrant-kids-held-in-makeshift-warehouses-3199234afb0#.z0nnhx5ue>.

3. The term "unaccompanied minor" has the same meaning as the term "unaccompanied alien child" (UAC) or "unaccompanied child" used by ORR. 6 U.S.C. § 279(g)(2) (2008) defines an unaccompanied alien child as

A child who-

- (A) has no lawful immigration status in the United States;
- (B) has not attained 18 years of age; and

land Security (DHS), through its agencies Custom and Border Protection (CBP) and Immigration and Customs Enforcement (ICE), apprehends a minor who does not have a parent or legal guardian present, the child must be transferred to ORR custody, which falls under the Department of Health and Human Services (DHHS).<sup>4</sup> There are several rules and regulations that dictate when, where, and how a minor is then released from ORR custody to a sponsor. The most important guidelines for these processes lie in the 1997 *Flores v. Reno* Settlement Agreement<sup>5</sup> and in the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA).<sup>6</sup> Generally, children must be placed in the least restrictive setting possible and should be released safely to an appropriate sponsor, allowing them to pursue immigration remedies in immigration court from outside of a detention setting.<sup>7</sup> ORR also publishes guidance as to how they make decisions with regard to placement settings and reunification.<sup>8</sup> Assuming that all is well, children should not be detained for more than a month or two before being released to a sponsor. Unfortunately for many children, it is not so simple.

During my time as an attorney for children detained in ORR custody, I came across a handful of children who did not quite fit the definition of an unaccompanied minor.<sup>9</sup> To be classified as an unaccompanied minor, the most basic premise is that the child is an immigrant and not a U.S. citizen. I represented several children who were U.S. citizens at birth, either because they were born here or they met the requirements for the acquisition of

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(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.

4. See OLGA BYRNE & ELISE MILLER, VERA INST. OF JUST., THE FLOW OF UNACCOMPANIED CHILDREN THROUGH THE IMMIGRATION SYSTEM 8-12 (Mar. 2012) (describing the apprehension of unaccompanied children by DHS and referral to ORR).

5. See Stipulated Settlement Agreement, *Flores v. Reno*, 507 U.S. 292 (1993), available at <http://www.aila.org/File/Related/14111359b.pdf> (discussing the nationwide policies for the detention, release, and treatment of minors in government custody).

6. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457 (2008).

7. BYRNE & MILLER, *supra* note 4, at 13-18.

8. See *Children Entering the United States Unaccompanied*, OFF. OF REFUGEE RESETTLEMENT (Jan. 30, 2015), <http://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied> (providing links to different sections within the ORR Guide).

9. From September 2012 until April 2014, I worked as a staff attorney in the unaccompanied minors program of the St. Frances Cabrini Center for Immigration Legal Assistance at Catholic Charities of the Archdiocese of Houston-Galveston. From May 2014 until January 2016, I worked as a staff attorney in the unaccompanied minors program of Catholic Charities Community Services of the Archdiocese of New York. While at both programs, I was funded through a subcontract managed by the VERA Institute of Justice, issued by ORR, to provide legal services to detained unaccompanied minors.

citizenship.<sup>10</sup> Despite their claims to U.S. citizenship, they languished in detention for months, in some cases more than a year, while under ORR custody.

E.R. was born in the United States. When he was very young, he traveled to with his parents to their home country in Central America. Years later, when E.R. was 12 years old, his parents sent him on the treacherous journey north, not knowing that he could enter the United States lawfully with his U.S. birth certificate. When he was apprehended by CBP, he stated that he was born in the United States, but because he had lost his birth certificate and did not speak English, they decided to refer him to ORR custody anyway. During his time in ORR custody, everyone who worked with him knew that he was born in the United States. In fact, ICE declared from the beginning that they would not place him in removal proceedings because he was a U.S. citizen. Despite this, ORR failed to release him swiftly, resulting in his detention for several months. Due to his age, the shelter staff at his facility and I both had problems obtaining his birth certificate directly from the state. It was not until I enlisted the help of ICE that ICE was able to assist with the investigation of his birth records and pressure ORR into releasing the minor.

A.M. was born abroad to a U.S. citizen father. A.M.'s father was earnest to assist A.M. and helped demonstrate A.M.'s acquired citizenship from early on in the case. Unfortunately, because of alleged (separate) criminal activity both A.M. and his father were involved with, A.M.'s case was prejudiced from the start, even though criminal activity has nothing to do with acquisition of citizenship. We advocated strongly for A.M.'s release, and successfully convinced ICE to agree to terminate their Enforcement and Removal Operations (ERO) case against A.M.<sup>11</sup> Despite this, ORR still refused to take action to release A.M. When we were able to prove to the immigration court, after several hearings and motions, that there was insufficient evidence to maintain a removal case against A.M., ORR was finally

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10. Pursuant to the Immigration and Nationality Act (INA) §§ 301, 309, a child of a U.S. citizen father born out of wedlock abroad acquires citizenship at birth if at the time of the birth if the father is a U.S. citizen and was physically present in the United States for at least five years, including at least two years after 14 years of age; a blood relationship between the child and the father is established by clear and convincing evidence; the child's father has agreed in writing to provide financial support for the child until the child reaches 18 years of age; and, one of the following criteria is met before the child reaches 18 years of age: The child is legitimated under the law of his or her residence or domicile; the father acknowledges in writing and under oath the paternity of the child; or the paternity of the child is established by adjudication of a competent court.

11. During the course of A.M.'s removal proceedings, it was understood that ERO termination indicated that ICE would not attempt to remove A.M. from the United States.

forced to release him. Even then, ORR refused to release A.M. directly to his father, and instead used A.M.'s grandmother as his sponsor.

These two cases highlight huge gaps in protections for U.S. citizen minors. First, there is no published policy guiding CBP, ICE, or ORR when an *unaccompanied minor* might be a U.S. citizen. ICE does have clear policies with regard to those in ICE custody as adults or family units. ICE recognizes the severity of detaining a U.S. citizen for immigration purposes for even one day, because the federal government has been sued on numerous occasions for making that exact mistake.<sup>12</sup> ICE requires expedited and escalated investigation of any claims to U.S. citizenship.<sup>13</sup> In cases where ICE investigates claims made by unaccompanied minors, the agency is impotent when it comes to forcing the release of these children as they are in ORR custody, not ICE custody.

Second, when it is clear that a minor is most likely a U.S. citizen, there is no law requiring ORR to release the child immediately, nor are there policies or procedures guiding such a release. During A.M.'s hearings, the immigration judge agreed that if A.M. were proven to be a U.S. citizen, ORR would have no authority to detain him because ORR only has authority to detain unaccompanied *non-U.S. citizen* minors. In the same breath, the immigration judge also stated that she believed that she did not have authority to order ORR to release A.M.

Third, ORR's decisions have thus far not been subject to review by a neutral third party. If ORR's sole role is to detain minors while they await decisions during their removal proceedings, then why are immigration judges so hesitant to order children released either on bond or their own recognizance? While there is a great deal of law and policy regarding the standards of care and release policies and procedures for unaccompanied children, 6 U.S.C. § 279(c) clearly states that nothing regarding the responsibilities of ORR in caring for, transferring, and releasing unaccompanied children "may be construed to transfer the responsibility for adjudicating benefit determinations under the Immigration and Nationality Act (8 U.S.C. §§ 1101 et seq.) from the authority of any official of the Department of Justice, the Department of Homeland Security, or the Department of State."<sup>14</sup> Although ORR fails to publish information regarding its ability to

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12. Jeanne Kuang, *Some Citizens Face Immigration Arrests Because of Weak Legal Protections, Experts Say*, CHI. TRIB. (June 7, 2016), <http://www.chicagotribune.com/news/local/breaking/ct-citizens-detained-immigration-met-20160605-story.html>.

13. See Memorandum by John Morton, Assistant Secretary, Immigration & Customs Enforcement, Dep't of Homeland Sec., *Superseding Guidance on Reporting and Investigating Claims to United States Citizenship* 1 (Nov. 19, 2009), available at <https://www.ice.gov/doclib/foia/prosecutorial-discretion/reporting-investigating-us-citizen-claims.pdf> (directing that claims involving potential U.S. citizenship should be treated "with the utmost care and highest priority").

14. See 6 U.S.C. § 279(a-b) (2008).

issue bonds, an ICE policy memorandum states that ORR does in fact have that power.<sup>15</sup> So, ORR is silent and evasive when it comes to the issue of bond, and both ICE and the immigration court throw their hands up in the air, crying out “not me!” while pointing to ORR for answers. This forces advocates to consider *habeas corpus* petitions, which thus far have not garnered much success in forcing the release of minors.<sup>16</sup>

My fourth and final point relates to my (former) compromised role as an attorney for detained unaccompanied minors. The TVPRA mandates that certain legal services be given to detained unaccompanied minors: know-your-rights presentations, legal screenings, and in some cases, full legal representation. These legal services are funded by ORR through contracts managed by the VERA Institute of Justice, which then subcontracts local legal service organizations to perform the actual services. As a VERA subcontractor, my ability to advocate for my clients depended a great deal on the stakeholder relationships I maintained with ORR and ORR-managed shelters. Consequently, this meant that I was limited in how zealously I advocated for individual clients when stakeholders, namely ORR, were the adversaries. If I pushed too hard on any one case, ORR became more difficult to work with. Although not written anywhere, there was also a general belief that we could not become too confrontational with ORR, such as by filing a petition for writ of *habeas corpus*, as we would be biting the hand that feeds us and risking future contracts and funding. Accordingly, the ethical implications of such conflict are diverse and heavy.

There is an endless list of issues affecting unaccompanied minors unaddressed by advocates, judges, immigration detainers and enforcers, and policy makers. The detention of U.S. citizens, however, is an issue with a very clear, unanimous goal: don't detain U.S. citizens for immigration purposes. Unaccompanied U.S. citizen minors are just as deserving of this fundamental right as any adult, if not more so.

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15. See Memorandum by Victor Cerda, Acting Director, Immigration & Customs Enforcement, Dep't of Homeland Sec., *New Release Procedures for Unaccompanied Alien Children Placed with and Cared for by the Office of Refugee Resettlement* (July 29, 2004) available at [https://www.ice.gov/doclib/foia/dro\\_policy\\_memos/newreleaseproceduresforunaccompaniedalienchildrenplacedwithandcaredforbytheofficeofrefugeesettlement07292004.pdf](https://www.ice.gov/doclib/foia/dro_policy_memos/newreleaseproceduresforunaccompaniedalienchildrenplacedwithandcaredforbytheofficeofrefugeesettlement07292004.pdf) (“ORR is responsible for making decisions related to the care and custody of [unaccompanied immigrant children] in their charge. This includes decisions regarding release to include bond and reporting requirements.”).

16. See, e.g., *D.B. v. Cardall*, No. 15-1993, 2016 WL 3387884 at 3, 49 (4th Cir. 2016) (affirming the district court's denial of petition for a writ of *habeas corpus* with respect to the statutory and substantive due process claims).