

Mechanisms of Deterrence: Federal Immigration Policies and the Erosion of Immigrant Children's Rights

In this commentary, we highlight the US government's proposed changes to the *Flores* Settlement Agreement, a federal legal settlement from the 1990s that ensures that child welfare principles are applied to immigrant children.

We describe how *Flores* should be understood as mitigating child trauma by ensuring a baseline standard of treatment of immigrant children. We outline how children experience trauma throughout the migration course and argue that the proposed changes decrease standards of care through indefinite child detention, separation, and delicensing immigrant child detention facilities.

We draw on the Adverse Childhood Experiences Study to consider the effect these multiplying forms of trauma may have on children. (*Am J Public Health*. Published online ahead of print November 14, 2019: e1–e3. doi:10.2105/AJPH.2019.305388)

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The treatment of immigrant children in the United States is a growing public health concern. At the border, awareness of the issue spiked in April 2018 when the Trump administration's "zero tolerance" policy led to the separation of immigrant families, affecting more than 2700 children at the border. The practice was suspended two months later, but it was widely recognized as an egregious effort to deter immigration at all costs. The American Public Health Association issued a policy statement in November 2018 that labeled the separations a "public health crisis."¹ Yet the zero tolerance policy is only one of numerous emerging strategies that the Trump administration is using, ultimately using the well-being of children to deter immigration. In effect, although the family separation issue has quieted down, the crisis facing immigrant children and their families has not gone away. Rather, it has intensified and spread, laying bare a deep-seated legal paradox: by enforcing laws that ostensibly reduce and deter migration to the United States, the current immigration system increasingly violates long-standing laws intended to protect all children.

Drawing on our research with immigrant children and families, we provide additional context for this legal paradox to better capture its scope and trajectory. With the *Flores* Settlement

Agreement as a central example, we show that key policies and practices that have historically protected immigrant children and families are now under threat. We argue that this trend risks introducing new layers of trauma to the lives of immigrant children, many of whom are seeking asylum in the United States because they are too afraid to return to their country of origin.²

THE FLORES SETTLEMENT AGREEMENT

The issue of immigrant children in US detention facilities has been contested for decades, and the current protections—although insufficient—have been hard won.³ Principal among them are standards of care established by the *Flores* Settlement Agreement (*Flores*).⁴ *Flores* emerged from a class action lawsuit filed in 1985 named after 15-year-old Jenny Flores from El Salvador who was being detained indefinitely by federal immigration authorities in an adult facility. The 1997 settlement states that immigrant children in federal custody should be treated

"with dignity, respect, and special concern for their particular vulnerability."⁴ Practically, this translates into specific standards for detention facilities, the length of time children can be detained, and a mandate to house them in the "least restrictive setting," often with an adult sponsor in the community, while they undergo proceedings in immigration court.⁴

These policy guidelines were never codified into law, but the terms of the settlement state that the *Flores* court retains jurisdiction over this action until the federal government is in "substantial compliance."⁴ Therefore, although *Flores* marked a significant advancement for the protection of immigrant children, the fact that the consent decree existed for more than 20 years is evidence that its minimal standards have not been met, even under previous presidential administrations.⁵ Rather than comply with *Flores*, however, the Trump administration announced a new rule in August 2019 that eliminates *Flores* altogether.⁶

In an effort to deter migration, the Trump administration's assault on child protections is continuously evolving. *Flores* was

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used as a justification for separating immigrant families under the zero tolerance policy in 2018. Although *Flores* does not provide a definitive framework for the detention of immigrant family units, it does state that children and adults cannot be detained together. Therefore, at the time, the government reclassified children traveling with parents as “unaccompanied” and placed them in separate facilities. This justification for separating families was rejected by the *Flores* court,⁷ but the government has since introduced other mechanisms to deter families seeking asylum that have had a similar effect. In 2019, for example, the government started forcing asylum seekers to queue in Mexico instead of seeking asylum at the border, a protected right under US law. This policy, the “migrant protections protocol,” has become a new way of separating families as children are removed from their caregivers at the border and sent to detention in the United States while their parents wait in Mexico to apply for asylum.^{8–10}

Despite the inability of the government to ever fully satisfy the stipulations of *Flores*, eliminating the consent decree does not advance protections for children—it further endangers them. Eliminating *Flores* will allow the federal government to detain immigrant children indefinitely. The federal government’s misuse of *Flores* and its scheduled rollback are an alarming retreat that disregards basic principles of child welfare law. In child welfare, whether to remove children from their parents is one of the most serious decisions that is undertaken. *Flores* connects the goals of family stability and preservation—core tenets of child welfare law—to the federal immigration system.

Child welfare law recognizes that even when conducted for child safety, family separations are often traumatic, particularly when timely reunification is uncertain. The impact of separating a child from a parent able and willing to provide care is likely to result in negative long-term outcomes for both the child and the family and has been associated with emotional and behavior disorders, early substance use, poor health outcomes, lower educational attainment, and higher rates of victimization.^{11,12}

Therefore, in the child welfare system, separation occurs only when child maltreatment is serious and cannot be addressed safely while the child remains with the parent or the risk of harm in the home is high. In immigrant family separation cases, there is no such standard for separation. And although the government’s current plan to detain families together may appear to solve the inherent problems of parent–child separation, the indefinite forcible detention of family units does not have precedence in child welfare law. Perhaps the most relevant US historical reference in the past century is the internment of Japanese families in World War II—a reactionary policy at the time that has had intergenerational traumatic consequences for the children and families it affected.¹³ Indeed, it appears that the rationale of current immigration deterrence policy is to use childhood trauma as leverage, with no consideration for the consequences.

LAYERS OF TRAUMA

Trauma research provides additional insight into the complex and long-term impact of the government’s targeting of

immigrant children and their families. The Adverse Childhood Experiences Study demonstrated that the likelihood of negative consequences increases with each new form of trauma experienced.¹⁴ Children experiencing multiple forms of trauma before they are aged 18 years are more likely to experience depression, substance use disorders, risky sexual behavior, heart disease, and cancer.¹² The likelihood of these negative health consequences increases with each experience of a new form of trauma.^{11,14}

The exponential nature of trauma is particularly salient to the case of immigrant children, whether or not they have been separated from their parents or arrived unaccompanied. Many immigrant children have already experienced other forms of trauma before apprehension by the US Border Patrol.¹⁵ For families fleeing violence and seeking asylum, the stressors of war and persecution, the physical and emotional scars of torture, and the prolonged experiences of deprivation shape physical and mental health outcomes.¹⁶ Although research on child asylum seekers is limited, the findings are consistent: nearly every aspect of seeking asylum is traumatic.¹⁷ Separating families or detaining them indefinitely introduces additional trauma that harms children and parents.

THE CRISIS BEYOND FLORES AND THE BORDER

Although preserving the protections afforded by *Flores* will provide a limited buffer for undocumented immigrant children against additional trauma, the barriers they face extend beyond

the confines of federal detention facilities or the border with Mexico. For example, even with *Flores*, children seeking asylum do not have access to health insurance in most states, and they are not eligible for most federal programs or assistance until their asylum claims are adjudicated. The asylum process, and thus access to care, can take years. Consequently, children and their parents who have endured multiple traumatic events that are known to have adverse effects on health and mental health—including forcible separation at the US border—may not have access to affordable health and mental health services.

The need to protect children beyond *Flores* also requires meeting immigrant children and family’s immediate legal needs as they go through asylum or deportation proceedings. Children who migrate alone—classified by the immigration system as “unaccompanied”—are especially vulnerable in our legal system. US courts have recently ruled that children do not have a right to an appointed lawyer in immigration proceedings, including asylum processes. Currently, only 30% of unaccompanied immigrant children in deportation proceedings have legal representation. Among those with representation, 73% received a court decision that allowed them to stay in the United States. For the children without legal representation, by contrast, only 15% were allowed to remain in the United States, even though they had similar asylum claims.¹⁸ Clearly, children who enter immigration court without legal representation are at elevated risk of being deported, even when they actually have the right to stay.

Exacerbating this risk is the fact that immigration judges and

the courts over which they preside are becoming less sensitive to the rights of children. A recent US Department of Justice memo to immigration judges threatens to further divide immigration law and the hard-won legal protections for the rights of children.¹⁹ In the memo, immigration judges are advised to interpret with caution the concept of “the best interest of the child.” Moreover, the memo concludes, the concept is not a legal standard that should inform decisions concerning legal relief or protections from removal. That is, children should be treated as adults in immigration court. Yet, paradoxically, the memo recognizes that immigrant children in the courtroom present “special circumstances” and encourages judges to permit children to “bring pillows or booster seats” or “a quiet toy.” These accommodations are described as “common sense” as long as they do not “alter the serious nature of the proceedings.” In reality, however, such modifications are window dressing to an adversarial proceeding that dismisses fundamental protections afforded to children under child welfare law.

MOVING FORWARD

We are not merely witnessing a crisis at the border, nor is the threat to immigrant children simply symptomatic of a “broken immigration system.” With *Flores* and other protections under challenge, the rights of children are being sacrificed in the service of immigrant deterrence. In effect, we are witnessing a destabilization of larger US institutions that ought to protect the well-being of all children and families in this country.²⁰ The Trump administration’s new rule will eliminate *Flores*. Published in the *Federal Register* on August 23,

2019, the rule will allow immigrant children to be detained indefinitely, regardless of whether they are with their parents or unaccompanied—or deemed unaccompanied, such as the children separated from their families through the migrant protections protocol.⁶ The new rule will likely be challenged in court,⁸ but it is yet another attempt to curtail protections for children. These and other efforts—including keeping children in unlicensed detention facilities and withholding basic hygiene supplies^{2,21,22}—have significant ramifications for the lives of children.^{23,24}

Preserving *Flores* does not solve these problems, but it provides standards of child well-being and welfare that are otherwise largely absent from the immigration system. Drawing on the best aspects of child welfare law, we must extend—not erase—protections for immigrant children. Short of this, we risk layering trauma on trauma for asylum-seeking children in particular and, more generally, for the families and communities of which they are a part. Yet, instead of building on *Flores*, the arc of policy change within the immigration system is now headed in the opposite direction. With *Flores* eliminated, the creation of the migrant protections protocol, and the likelihood that such strategies will continue to emerge, the government’s efforts to “fix” the immigration system hinges on sacrificing the rights of children. **AJPH**

CONTRIBUTORS

B. J. Roth and B. L. Grace developed the section on migration. K. D. Seay developed the sections on child welfare and trauma. All authors conceptualized the commentary, approved the final article as submitted, and agree to be accountable for all aspects of the work.

CONFLICTS OF INTEREST

The authors have no conflicts of interest relevant to this commentary.

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