

# Immigration Detention of Children: U.S. Policies in Global Context and the Urgency of Adopting Effective Alternatives



**WORLD Policy Analysis Center**

## Introduction

- In 2019, families accounted for over half of those detained at the U.S.'s southwest border; the U.S. also detained over 76,000 unaccompanied children<sup>1</sup>
- In recent years, the scale and conditions of migrant detention in the U.S.—and in particular the detention of children—have garnered greater attention from the media and the public, particularly as COVID-19 cases spike in detention facilities
- Yet while the Trump administration's "zero tolerance" immigration enforcement policy escalated the crisis, the detention of migrant children and adults is a longstanding and ongoing human rights issue in the U.S. and globally
- This brief puts U.S. laws in context, drawing on a systematic study of the legislation related to child migrants, refugees, and asylum-seekers in the 150 most populous United Nations member countries
- While the detention of both migrant children and adults pose grave human rights concerns, this study focuses on laws

addressing children, given the escalation in child detention in the U.S. as well as the global consensus about the need to end the practice

- The physical, mental, and emotional harms to child detainees are well documented
  - Children who have been detained experience high levels of depression, anxiety, and post-traumatic stress disorder<sup>2 3 4</sup>
  - Children housed in crowded conditions face higher risks of communicable diseases, including not only COVID-19 but also influenza and gastroenteritis; between January 2017 and March 2020, 22 Immigration and Customs Enforcement (ICE) detention centers experienced 79 outbreaks of influenza, varicella, or mumps<sup>5</sup>
  - Moreover, routine illnesses can become serious or even fatal in the context of inadequate medical care: during the fall and winter of 2018, three children tragically died of influenza while in custody of U.S. Customs and Border Protection (CBP)<sup>6</sup>
  - Detained children are also routinely denied access to education, threatening their development and long-term opportunities<sup>7</sup>



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With these data, **WORLD** informs policy debates; facilitates comparative studies of policy progress, feasibility, and effectiveness; and advances efforts to hold decision-makers accountable.

## ABOUT THE DATA

For more information on the global data and findings, please see:

Heymann J, Raub A, Pierce B, McCormack M, Post C, Sprague A. **Preventing immigration detention of children: a comparative study of laws in 150 countries.** *International Journal of Human Rights.* July 2021.

## CONTACT US

**WEBSITE**  
[worldpolicycenter.org](http://worldpolicycenter.org)

**EMAIL**  
[world@ph.ucla.edu](mailto:world@ph.ucla.edu)

● **Child detention based solely on migration status violates widely ratified international human rights treaties**

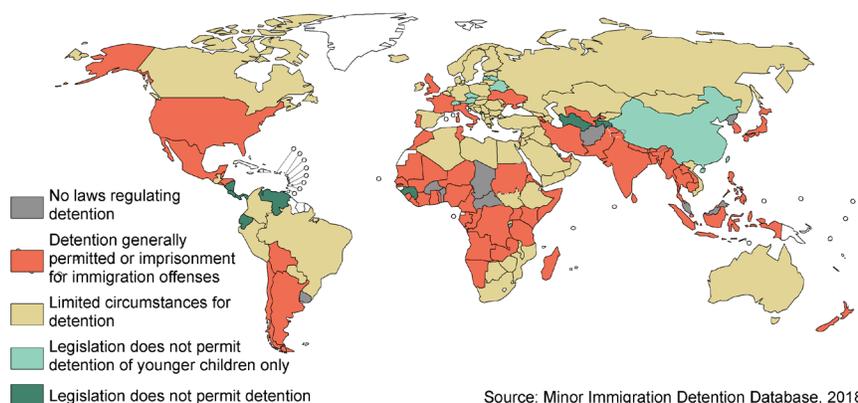
- The **U.N. Convention on the Rights of the Child**, signed by the U.S. and ratified by all countries globally, protects children’s rights to liberty and family unity, and clarifies that the detention of any child can only be used “as a measure of last resort and for the shortest appropriate period of time”<sup>8</sup>
  - In a 2017 General Comment—official guidance on interpreting the CRC—the Committee on the Rights of the Child urged that “*children should never be detained for reasons related to their or their parents’ migration status and States should expeditiously and completely cease or eradicate the immigration detention of children. Any kind of child immigration detention should be forbidden by law and such prohibition should be fully implemented in practice.*”<sup>9</sup>
- The **1951 Refugee Convention**, which the U.S. is bound to observe due to its adoption of the 1967 Protocol, guarantees the right to seek asylum and bans countries from imposing “penalties” on asylum-seekers of any age; the U.N. High Commissioner for Refugees has clarified that “**detention for the sole reason that the person is seeking asylum is not lawful**”<sup>10</sup>
- Under the **International Covenant on Civil and Political Rights**, ratified by the U.S. in 1992, automatic or indefinite detention based solely on migration status is considered “arbitrary,” and therefore a violation of the right to liberty<sup>11 12</sup>
- **Moreover, all children have fundamental rights guaranteed under international law**

- In addition to liberty and protection against family separation, the CRC guarantees all children’s rights to health services and education, regardless of their or their parents’ national origin
- Likewise, the **Universal Declaration of Human Rights**, which is binding on all countries due to its status as “customary international law,” guarantees all children’s rights to medical care, education, liberty, protection against arbitrary interference with their family, and the right to seek asylum
- **A first step toward realizing these rights is translating their commitments into enforceable national laws**
  - While in some countries international treaties are directly enforceable in domestic courts, most—including the U.S.—require implementing legislation
  - Strong protections for the rights of migrant children and adults in federal laws, rather than in case law alone, can establish more comprehensive, detailed, and transparent legal standards that offer more enduring protections

**Findings**

- **Protections Against Child Detention**
  - Unlike most high-income countries globally, the U.S. does not have national legislation explicitly prohibiting or limiting the detention of children migrating or seeking asylum along with their parents

**Do countries generally permit the detention of accompanied minor migrants?**



- Nearly three-quarters of high-income countries (72%) prohibit or limit the detention of accompanied asylum-seeking children
- Two-thirds of high-income countries (66%) prohibit or limit the detention of accompanied migrant children
- The U.S. also only offers limited protections against the detention of unaccompanied children; in contrast, 36% of high-income countries do not permit the detention of unaccompanied asylum-seekers, while 26% do so for other unaccompanied minor migrants
- **Protections of Detained Children’s Fundamental Rights**
  - Among high-income countries that allow for the detention of migrant children in some circumstances, nearly half (44%) guarantee accompanied migrant children’s access to healthcare while in detention
  - Similarly, one-third—34%—guarantee access to education for accompanied migrant children while detained
  - U.S. legislation does not clearly establish a right to education or health for detained migrant children

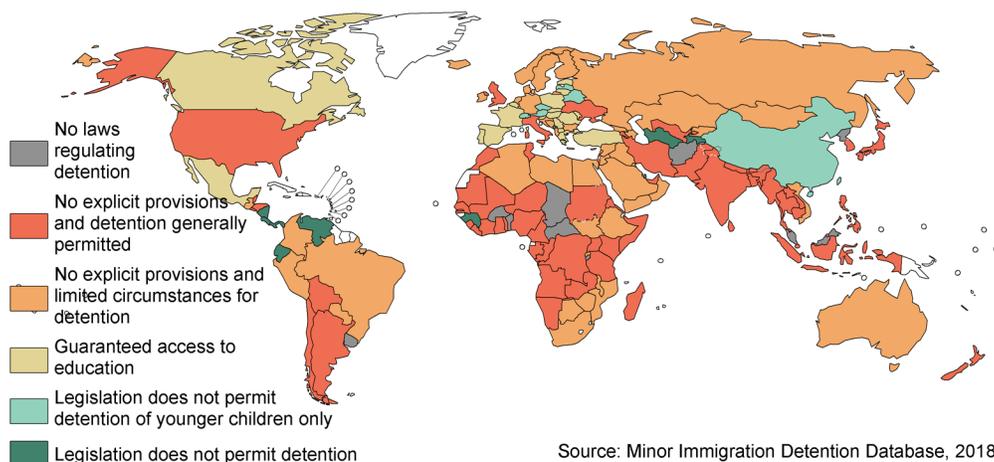
● **practicability, efficiency, and effectiveness:**

- For children and families, common ATDs include placement with vetted host families, their release to a designated residence, or release on own recognizance with community-based case management
- In Germany, Canada, and pilots undertaken in the U.S., ATDs that provided case management and community-based living demonstrated 95%-98% compliance including with immigration interviews and court appearances<sup>13 14 15</sup>
- The Family Case Management Program, a short-lived social services-based ATD in the U.S., cost just \$38.47 per family per day compared to between \$237.60-\$318.79 for family detention, while reporting a 99% compliance rate<sup>16 17</sup>
- **In the absence of clear legislation restricting child detention, case law has had some important impacts:**
  - *Flores v. Reno*, a class action lawsuit, led to a 1997 settlement agreement instituting limits on the amount of time and conditions in which unaccompanied minors could be detained<sup>18</sup>
  - A 2016 court decision clarified that the settlement covered both unaccompanied and accompanied children, but did not establish a right to release for their parents<sup>19</sup>

**Discussion**

- **The U.S. lags behind the majority of high-income countries in protecting migrant children from detention, and in ensuring access to education and needed health care**
- **Successful alternatives to detention (ATDs) adopted by other countries and even piloted in the U.S. demonstrate**

**Are accompanied minor migrants guaranteed access to education in detention?**



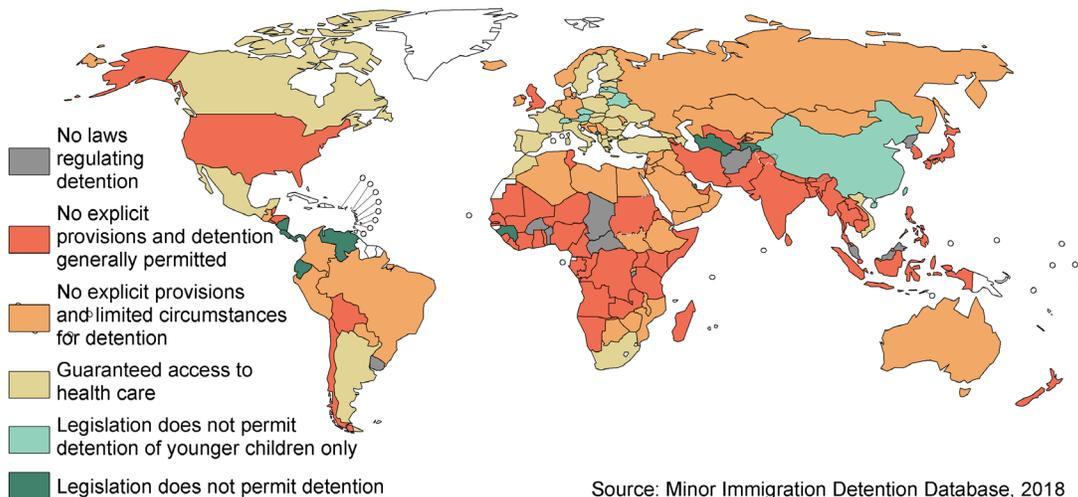


- Aspects of the settlement were also codified in the Trafficking Victims Protection Reauthorization Act, but this legislation only covers unaccompanied minors
- **While valuable, judicial rulings are not a substitute for comprehensive legislation prohibiting all detention based solely on migration status; fully protecting migrant children’s rights to health, education, and family unity; and establishing social services-based alternatives to detention**
- In 2019, the Department of Justice attempted to summarily withdraw from *Flores*—while this effort was blocked by a judge, it underscores the potential risks of relying on a single court decision rather than a detailed law enacted by Congress, particularly following shifts in administrations
- Moreover, even under the expanded protections against detention for all migrant children established by the 2016 *Flores* ruling, with no such protections for adults, the separation of migrant families is likely to continue: as recently as July 2020, parents detained with their children were given the choice to either release their child to a sponsor or waive their child’s right to be released<sup>20 21</sup>
- Adopting dedicated legislation has normative value, and would represent a powerful step by the U.S. toward realizing its international human rights obligations and national commitments

**Conclusion**

- The U.S.’s widespread and systematic detention of migrant families and asylum-seeking families solely because of their migration status violates international law, and the detention of migrant children—as well as children’s separation from their families—has extensive and long-term consequences for children’s health and wellbeing
- Adopting comprehensive legislation that prohibits detention of all migrant children and families, provides for effective and social services-based alternatives, and ensures children are not denied access to education and health is critical to creating a healthy, thriving society that upholds human rights standards for all
- Addressing child detention alone is not enough: to protect all migrants’ human rights and end the separation of families, the U.S. needs to end immigration detention more broadly and replace the current approach to immigration enforcement with effective alternatives that respect each person’s humanity

**Are accompanied minor migrants guaranteed access to health care in detention?**





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