

CONTEMPORARY FAMILY DETENTION AND LEGAL ADVOCACY

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INTRODUCTION:

This essay explores the contemporary practice of detaining immigrant women and children —the vast majority of whom are fleeing violence in their home countries and seeking protection in the United States —and the response by a diverse coalition of legal advocates. In spite of heroic advocacy, both within and outside the detention centers from the courts to the media to the White House, family detention continues. By charting the evolution of family detention from the time the Obama Administration resurrected the practice in 2014 and responsive advocacy efforts, this essay maps the multiple levels at which sustained advocacy is needed to stem crises in legal representation and ultimately end family detention.

Due to a perfect storm of indigent detainees without a right to appointed counsel, remote detention centers, and under-resourced nonprofits, legal representation within immigration detention centers is scarce. While the Obama Administration largely ended the practice of family detention in 2009,¹ the same administration started detaining immigrant families en masse just five years later. In response to the rise in numbers of child migrants seeking protection in the United States arriving both with and without their parents, and with the purported aim of deterring future flows, the Obama administration reinstated the policy of detaining families.² The Administration calls these detention centers “family residential centers,” while advocates use the term “baby jail.”

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¹ For a discussion of the U.S. history of detaining families, stretching back to Ellis Island, see Rebecca Sharpless, *Cosmopolitan Democracy and the Detention of Immigrant Families*, 47 N.M.L. Rev. 19, 19–21 (2017); see also AM. BAR ASSOC’N COMM’N ON IMMIGR., FAMILY IMMIGRATION DETENTION: WHY THE PAST CANNOT BE PROLOGUE (2015), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/FI-NAL%20ABA%20Family%20Detention%20Report%208-19-15.authcheckdam.pdf, archived at <https://perma.cc/M42W-VNL4>.

² Statements from high-level officials, including then-Secretary of the Department of Homeland Security, Jeh Johnson, along with then-Vice President Joe Biden, made it clear that the arrival of women traveling with their children was unwelcome and that they would be sent back to their countries of origin. See Sharpless, *supra* note 1, at 32–34.

The response from the advocate community was swift and overwhelming. Lawyers and law students from all over the country traveled to the detention centers, in remote areas of New Mexico and later Texas, to meet the urgent need for representation of these asylum-seeking families. This essay calls for continued engagement by attorneys throughout the nation in filling the justice gap and providing representation to these asylum-seeking families and other detained immigrants.

The crisis in representation for detained immigrants is deepening. Given the success of intensive representation at the family detention centers discussed in this article, advocates are beginning to experiment with the same models in other locations. For example, at the Stewart Detention Center in Lumpkin, Georgia,³ the Southern Poverty Law Center, in conjunction with four other organizations,⁴ launched the Southeast Immigrant Freedom Initiative in 2017. This initiative enlists and trains lawyers to provide free legal representation to immigrants detained in the Southeast who are facing deportation proceedings. The American Immigration Lawyers Association and the American Immigration Council have partnered to create the Immigration Justice Campaign, where pro bono attorneys are trained and mentored when providing representation to detained immigrants in typically underserved locations.⁵ Given the expansion of the volunteer model of providing legal services to detained immigrants,⁶ opportunities will continue to

³ According to Eagly & Shafer's national access to counsel study, although 42,006 removal cases were completed at Lumpkin immigration court between 2007 and 2012, there were zero practicing immigration attorneys in the city. See Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 42 (2015). Southeast Immigrant Freedom Initiative (SIFI) has changed that and has had a lead attorney, a direct services attorney, and a project attorney at Lumpkin since April. In February 2017, private immigration attorney Martin Rosenbluth set up an office of the Polanco Law Firm in Lumpkin. E-mail from Brian Hoffman, SIFI Lead Attorney, to author (Oct. 2, 2017) (on file with author).

⁴ These organizations include the American Immigration Lawyers Association, the American Immigration Council, the Innovation Law Lab, and the American Immigration Representation Project. Details are included in the SPLC's press release from March 7, 2017. See S. POVERTY L. CTR., *SOUTHEAST IMMIGRANT FREEDOM INITIATIVE* (2017), <https://www.splcenter.org/our-issues/immigrant-justice/southeast-immigrant-freedom-initiative>, archived at <https://perma.cc/L46K-LPV9>. The Project began at the Stewart detention center in Lumpkin, Georgia, and has already expanded to other immigration detention centers throughout the Southeast. As of October 2017, the Project has a presence at the Irwin County Detention Center in Ocilia, GA, at the LaSalle Detention Center in Jena, LA, and aims to launch at the Folkston ICE Processing Center, in Folkston, GA, by January 2018. E-mail from Brian Hoffman, SIFI Lead Attorney, to author (Oct. 2, 2017) (on file with author); E-mail from Maggie Schuman, SPLC, to author (Oct. 30, 2017) (on file with author).

⁵ See IMMIGRATION JUSTICE CAMPAIGN, <http://immigrationjustice.us/>, archived at <https://perma.cc/9L4U-7S32>.

⁶ Several organizations collaborated to launch the American Immigrant Representation Project (AIRP) to provide representation to detained immigrants. See *Affiliated Organizations*, AM. IMMIGRANT REPRESENTATION PROJECT, <https://airp.law/affiliated-organizations/>, archived at <https://perma.cc/6S6T-N5PW>. Since 2013, in New York, the New York Immigrant Family Unity Project, a collaboration of several organizations, has worked to provide universal representation for respondents appearing before the New York City Varick Street Immigration Court without an attorney who meet income threshold criteria. See NAT'L IMMIGRATION L. CTR., *BLAZING A TRAIL: THE FIGHT FOR RIGHT TO COUNSEL IN DETENTION AND BEYOND*, 14-17

arise for lawyers, law students, and others to engage in crisis lawyering and advocacy.⁷ This article provides the background to understand the government's practice of detaining families, to the extent that it can be understood, and to emphasize a continuing need for legal services for this population.

The introduction explains the population of asylum seekers and the law and procedure governing their arrival, detention, and release into the United States. The essay then traces the evolution of the U.S. government's most recent experiment in detaining families from the summer of 2014 to present. The next part outlines the access to counsel crisis for immigrant mothers and children in detention and highlights the difference that representation makes. The article concludes with a call to action to attorneys and non-attorney volunteers nationwide to commit and re-commit to providing services to detained immigrant families and individuals.

IMMIGRANT FAMILIES SEEKING PROTECTION AT THE BORDER

This section explains the current trends in terms of immigrants arriving at the U.S. Southern border to seek protection and the procedures to which they are subjected. The vast majority of families arriving at the southern border of the United States in the last three to four years have been asylum seekers fleeing violence in Central America.⁸ The region known as the "Northern Triangle," which includes Guatemala, Honduras, and El Salvador, has experienced extreme violence and instability, producing high numbers of asylum-seeking families at the U.S.-Mexico border.⁹ Central

(2016), <https://www.nilc.org/wp-content/uploads/2016/04/Right-to-Counsel-Blazing-a-Trail-2016-03.pdf>, archived at <https://perma.cc/X8JL-CWS3>. The Project has been expanded to representation to a detention center in Buffalo, New York. *Id.* at 18; see also JENNIFER STAVE ET AL., VERA INST. OF JUST., EVALUATION OF THE NEW YORK IMMIGRANT FAMILY UNITY PROJECT: ASSESSING THE IMPACT OF LEGAL REPRESENTATION ON FAMILY AND COMMUNITY UNITY (2017) [hereinafter Vera Institute NYIFUP]. Also in the Northeast, in New Jersey the American Friends Service Committee (AFSC) launched the Friends Representation Initiative of New Jersey (FRINJ), a pilot project offering representation to all detained immigrants who appear before the Elizabeth, NJ, immigration court 2 days a week. See NAT'L IMMIGRATION L. CTR., *supra*, at 18.

⁷ See generally Lindsay M. Harris, *Learning in Baby Jail: Lessons from Law Student Engagement in Family Detention Centers*, CLINICAL L. REV. (forthcoming Fall 2018).

⁸ Back when USCIS was still releasing statistics publicly on these matters, 86% of families passed the threshold test to establish asylum eligibility, the credible fear interview, discussed below. U.S. CITIZENSHIP & IMMIGRATION SERV., CREDIBLE FEAR AND REASONABLE FEAR FAMILY FACILITIES FY14-FY16 (2016), https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_CredibleFearReasonableFearFamilyFacilitiesFY14_16.pdf, archived at <https://perma.cc/3XGC-78F8>.

⁹ In the first quarter of FY 2017, CBP apprehended 21,321 UACs and 44,843 families at the border, which is 23% more UACs and 109% more family units than apprehended during the same months of the previous year. See *Southwest Border Migration FY2017*, U.S. CUSTOMS AND BORDER PROTECTION (Dec. 15, 2017), <https://www.cbp.gov/newsroom/stats/sw-border-migration-fy2017>, archived at <https://perma.cc/6SXZ-66X8>. For a discussion of the root causes of this migration, see Scott M. Rempell, *Credible Fears, Unaccompanied Minors, and the Causes of the Southwestern Border Surge*, 18 CHAP. L. REV. 337, 353-364 (2015)

Americans fleeing violence and unrest continue to arrive and seek asylum.¹⁰ Asylum seekers are individuals forced to flee their countries because they fear or have suffered persecution on account of their race, religion, nationality, political opinion, or membership in a particular social group.¹¹

In 2014, the number of unaccompanied minors¹² and mothers with children fleeing from Central America and crossing the U.S. border to seek protection increased exponentially, in what the Government likes to call a “surge.”¹³ Indeed, in 2014 over 68,000 unaccompanied minors,¹⁴ largely

(discussing homicide rates, the rise of transnational gangs, and violence in the Northern Triangle).

¹⁰ *United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016*, U.S. CUSTOMS AND BORDER PROTECTION (Oct. 18, 2016), <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016>, archived at <https://perma.cc/DJP8-N9A3>; see also Inter-American Comm’n on Human Rights (IACHR) II, *Human Rights Situation of Refugee and Migrant Families and Unaccompanied Children in the United States of America*, OEA/Ser.L/II.155 Doc. 16, 9 (2015); See U.N. HIGH COMM’R FOR REFUGEES, WOMEN ON THE RUN: FIRST-HAND ACCOUNTS OF REFUGEES FLEEING EL SALVADOR, GUATEMALA, HONDURAS, AND MEXICO (2015), <http://www.refworld.org/docid/56307e2a4.html>, archived at <https://perma.cc/6CHR-B8EV>; see also U.N. HIGH COMM’R FOR REFUGEES, CHILDREN ON THE RUN: UNACCOMPANIED CHILDREN LEAVING CENTRAL AMERICA AND MEXICO AND THE NEED FOR INTERNATIONAL PROTECTION (2014), <http://www.unhcr.org/en-us/about-us/background/56fc266f4/children-on-the-run-full-report.html>, archived at <https://perma.cc/WLK2-CECN>.

¹¹ The Immigration and Nationality Act defines a refugee as:

[A]ny person who is outside any country of such person’s nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

Immigration and Nationality Act (INA) of 1965 § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42) (2012).

¹² This article focuses on the detention of children accompanied with their parents when crossing the border. The detention of unaccompanied minors is overseen by the Department of Health and Human Service’s Office of Refugee Resettlement and is an entirely different system. For a compelling read, including careful reporting of the journey north from Central America, see LAUREN MARKHAM, *THE FAR AWAY BROTHERS: TWO YOUNG MIGRANTS AND THE MAKING OF AN AMERICAN LIFE* (2017); see also Erin B. Corcoran, *Getting Kids Out of Harm’s Way: The United States’ Obligation to Operationalize the Best Interest of the Child Principle for Unaccompanied Minors*, 47 CONN. L. REV. 1 (2014) (calling for the creation of a “Child Protection Corps” to represent unaccompanied minors); Rempell, *supra* note 9 (reviewing the data and attempting to understand the reasons for the increase in unaccompanied minors crossing the border); KATE M. MANUEL & MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., UNACCOMPANIED ALIEN CHILDREN – LEGAL ISSUES: ANSWERS TO FREQUENTLY ASKED QUESTIONS (2016), <https://fas.org/sgp/crs/homesecc/R43623.pdf>, archived at <https://perma.cc/8RZA-5VUD>.

¹³ The author declines to use this terminology. “Surge” connotes a military invasion of some sort when in fact we are describing a migration of children and adult human beings fleeing violence from their home countries and seeking protection in another country.

¹⁴ AM. IMMIGRATION COUNCIL, *A GUIDE TO CHILDREN ARRIVING AT THE BORDER: LAWS, POLICIES AND RESPONSES 2* (2015), https://www.americanimmigrationcouncil.org/sites/default/files/research/a_guide_to_children_arriving_at_the_border_and_the_laws_and_policies_governing_our_response.pdf, archived at <https://perma.cc/EK9D-2FU9>; Haeyoun Park, *Q. and A.: Children at the Border*, N.Y. TIMES (Oct. 21, 2014), http://www.nytimes.com/interactive/2014/07/15/us/questions-about-the-border-kids.html?_r=0, archived at <https://perma.cc/D8D7-UYQZ>.

from Central America, crossed the border, along with around the same number of mothers and children.¹⁵ Although these numbers dipped in 2015, to close to 40,000 unaccompanied children and 40,000 family units, they increased again in 2016 with close to 60,000 unaccompanied children apprehended after crossing the border and over 77,000 family units.¹⁶

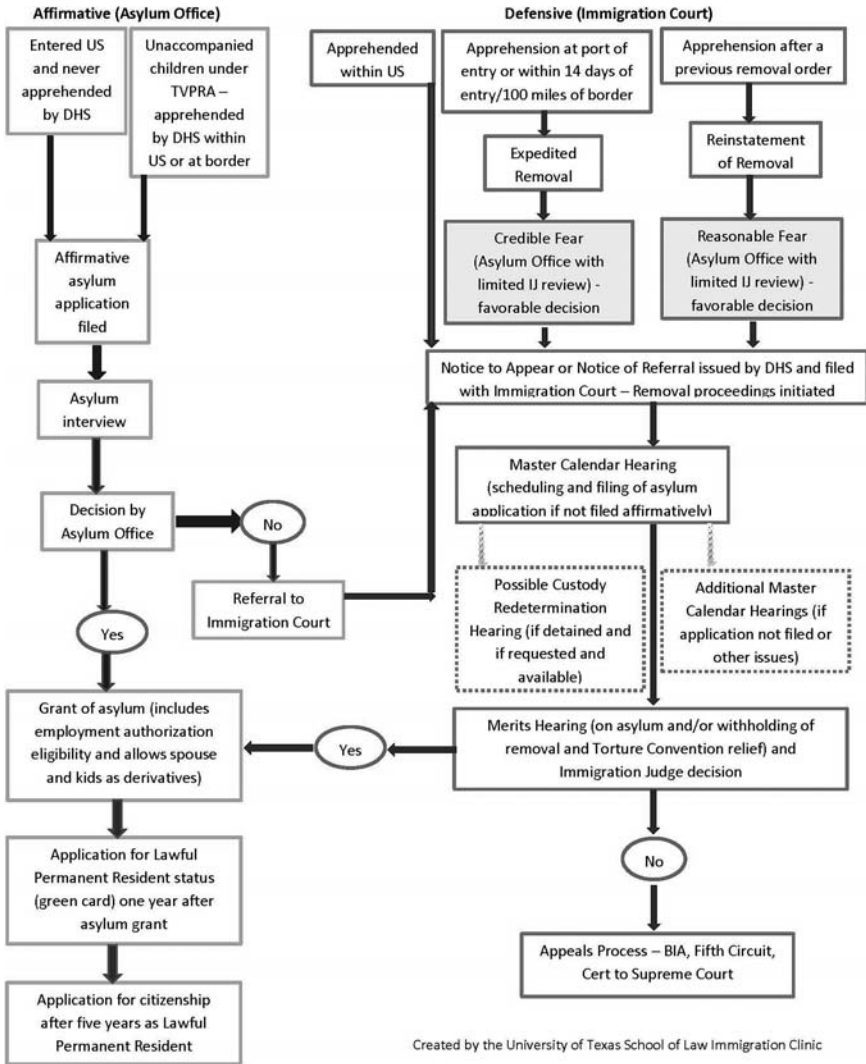
The processes to which these asylum-seeking families are subjected are complex, but a basic understanding of them will facilitate an understanding of the advocacy that has taken place both within and outside family detention centers in recent years. In an attempt to provide clarity, two flow charts are included below, along with a written explanation of the processing and detention of asylum seekers arriving at the border.¹⁷

¹⁵ U.S. CUSTOMS AND BORDER PROTECTION, *supra* note 10.

¹⁶ *Id.*

¹⁷ University of Texas School of Law Immigration Clinic, Asylum Process Flow Chart (unpublished document) (on file with author); University of Texas School of Law Immigration Clinic, Custody Process Flow Chart (unpublished document) (on file with author).

ASYLUM PROCESS FLOW CHART



Congress created the expedited removal system in 1996¹⁸ to more quickly deport recent migrants found at or near the border.¹⁹ In theory, how-

¹⁸ 8 U.S.C. § 1225(b)(1)(A)(i), (B)(iii)(I) (2012) (setting up the expedited removal system).

¹⁹ The use of expedited removal has rapidly expanded since its initial implementation. Originally, expedited removal was only implemented at ports of entry, but expanded to beyond the border in 2004. In 2004, Congress passed the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 7210(d)(1), 118 Stat. 3852 (codified as amended at 8 U.S.C. § 1225a(a)(4)). Now, expedited removal proceedings may be applied to individuals who are apprehended within one hundred miles of the border and are unable to establish that they have been continuously physically present in the United States for the preceding fourteen-

ever, immigrant families seeking protection at the border should benefit from the humanitarian protections carved out of the expedited removal system to prevent those who may be persecuted or tortured from being deported, contrary to our international and domestic legal obligations to protect those individuals.

Once an individual, who was either apprehended within the U.S. shortly after crossing the border or who presented herself to CBP at the border, expresses a fear of return to their home country or an intention to apply for asylum, she must be referred for a “credible fear interview” or a reasonable fear interview²⁰ with a USCIS asylum officer. However, this statutorily mandated process does not always operate according to law, and some asylum-seeking families and individuals are wrongfully removed without an opportunity to undergo a “credible fear interview” (CFI) or “reasonable fear interview” (RFI).²¹ Where fear is expressed, Immigration and Customs En-

day period. *See* Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877 (Aug. 11, 2004). The statute permits the use of expedited removal anywhere in the U.S. within two years of entry, and the Trump administration has indicated intent to use the statute as broadly as possible moving forward. *See* 8 U.S.C. § 1225(b)(1)(A)(iii)(II) (limiting expedited removal to those who cannot establish two years of continuous physical presence); Border Security and Immigration Enforcement Improvements, 82 Fed. Reg. 8793 (2017). For an explanation of the expansion of the use of expedited removal, *see generally* Geoffrey A. Hoffman, *Contiguous Territories: The Expanded Use of Expedited Removal in the Trump Era*, MD. J. INT'L L. (forthcoming May 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=%203107737, archived at <https://perma.cc/MG4M-V7RW>.

²⁰ 8 U.S.C. § 1225(b)(1)(A)(ii); 8 C.F.R. § 253.3(b)(4) (2016). Individuals who DHS believes are ineligible for asylum because of a criminal conviction, for example, or very commonly because of a prior removal order, will be referred for a “reasonable fear interview,” rather than a credible fear interview. Under 8 U.S.C. § 1230, an individual with a prior removal order who attempts reentry will be subject to detention and “reinstatement” of the original removal order. These individuals are provided with a reasonable, rather than credible, fear interview, and if successful, they are referred to “withholding only” proceedings under 8 U.S.C. §241(b)(3).

²¹ It is important to note that this process often does not function as statutorily required. Serious reports and news stories detail CBP’s utter disregard for the protocol and statutorily mandated procedures for protection. *See, e.g.*, Letter from American Immigration Council et al. to Megan Mack, Officer for Civil Rights and Civil Liberties, U.S. Dep’t of Homeland Sec., and John Roth, Inspector General, U.S. Dep’t of Homeland Sec. 1 (Jan. 23, 2017), https://www.americanimmigrationcouncil.org/sites/default/files/general_litigation/cbp_systemic_denial_of_entry_to_asylum_seekers_advocacy_document.pdf, archived at <https://perma.cc/L7GR-P28A>; U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, BARRIERS TO PROTECTION: THE TREATMENT OF ASYLUM SEEKERS IN EXPEDITED REMOVAL 1 (2016), <https://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf>, archived at <https://perma.cc/YD8G-VFLD>; HUMAN RIGHTS FIRST, CROSSING THE LINE: U.S. BORDER AGENTS ILLEGALLY REJECT ASYLUM SEEKERS 1 (2017), <http://www.humanrightsfirst.org/sites/default/files/hrf-crossing-the-line-report.pdf>, archived at <https://perma.cc/9DRH-SEP6>; Michael Garcia Bochenek, *US Turning Away Asylum Seekers at Mexican Border: Central Americans Who Flee for Their Lives Denied Entry by US Border Guards*, HUMAN RIGHTS WATCH (May 3, 2017), <https://www.hrw.org/news/2017/05/03/us-turning-away-asylum-seekers-mexican-border>, archived at <https://perma.cc/8SGN-KH4E>; *see also* Vivian Yee, ‘They Treated Us Like Criminals’: U.S. Border Crossers Report Severe Reception, N.Y. TIMES (May 1, 2017), https://www.nytimes.com/2017/05/01/us/customs-airports-trump.html?_r=1, archived at <https://perma.cc/L6B6-ENYF>; Dickerson & Jordan, *supra* note 122. Indeed, a lawsuit is pending in the Central District of California alleging that CBP and DHS are violating domestic and international law, along with asylum seekers’ due process rights under the Fifth Amendment to the

forcement (ICE) detains asylum-seeking families, transporting them from CBP holding facilities²² to family detention centers, where they await and undergo the credible or reasonable fear interview. During the credible fear interview, an asylum seeker must establish a significant possibility that she will establish eligibility for asylum at a later full hearing.²³

If the asylum officer determines that the asylum seeker meets this threshold test, the officer issues charging documents, in the form of a “Notice to Appear” (NTA). The NTA lays out the factual and legal allegations against the asylum seeker and places her into regular removal proceedings, where she may later apply for asylum as a defense to removal.²⁴ If the asylum-seeking individual or family does *not* receive a positive result following a credible or reasonable fear interview, she has the opportunity to go before an immigration judge for a “negative credible fear review” within seven days²⁵ or “negative reasonable fear review” within ten days.²⁶ Representation of counsel is permitted for reasonable fear review,²⁷ while counsel’s presence is merely tolerated for credible fear review.²⁸ The immigration

U.S. Constitution. Complaint for Declaratory and Injunctive Relief at 1–3, *Al Otro Lado, Inc. v. Kelly*, No. 2:17-cv-5111 (C.D. Cal. July 12, 2017), https://americanimmigrationcouncil.org/sites/default/files/litigation_documents/challenging_custom_and_border_protections_unlawful_practice_of_turning_away_asylum_seekers_complaint.pdf, archived at <https://perma.cc/9ZXP-RQ9A>.

²² Conditions within these CBP holding facilities have been challenged in both Arizona and Texas. *See Doe v. Johnson*, No. 15-00250, (D. Ariz. June 8, 2015) (deciding a class action lawsuit challenging Tuscon Sector Border Patrol treatment of immigrants within CBP holding facilities in violation of the U.S. Constitution and CBP policy); *see also* GUILLERMO CANTOR, HIELERAS (ICEBOXES) IN THE RIO GRANDE VALLEY SECTOR: LENGTHY DETENTION, DEPLORABLE CONDITIONS, AND ABUSE IN CBP HOLDING CELLS (2015), https://www.americanimmigrationcouncil.org/sites/default/files/research/hieleras_iceboxes_in_the_rio_grande_valley_sector.pdf, archived at <https://perma.cc/VP7B-3QT6>; GUILLERMO CANTOR & WALTER EWING, STILL NO ACTION TAKEN: COMPLAINTS AGAINST BORDER PATROL AGENTS CONTINUE TO GO UNANSWERED (2017), https://www.americanimmigrationcouncil.org/sites/default/files/research/still_no_action_taken_complaints_against_border_patrol_agents_continue_to_go_unanswered.pdf, archived at <https://perma.cc/WDV6-9M3J>.

²³ 8 U.S.C. § 1225(b)(1)(B)(v).

²⁴ 8 U.S.C. § 1229a(a)(1) (2012). Although the asylum seeker is not informed of the one-year filing deadline for asylum, she is obligated to submit an I-589 Application for Asylum within one year of her most recent entry into the U.S. in immigration court. *See* Lindsay M. Harris, *The One-Year Bar to Asylum in the Age of the Immigration Court Backlog*, 1183 *Wis. L. REV.*, 1213–24 (2017) (describing the 2016 policy change regarding filing an asylum application in immigration court and providing two examples of the difficulties facing asylum seekers in meeting this deadline operationally).

²⁵ 8 C.F.R. § 1003.42(e).

²⁶ 8 U.S.C. § 208.31(g).

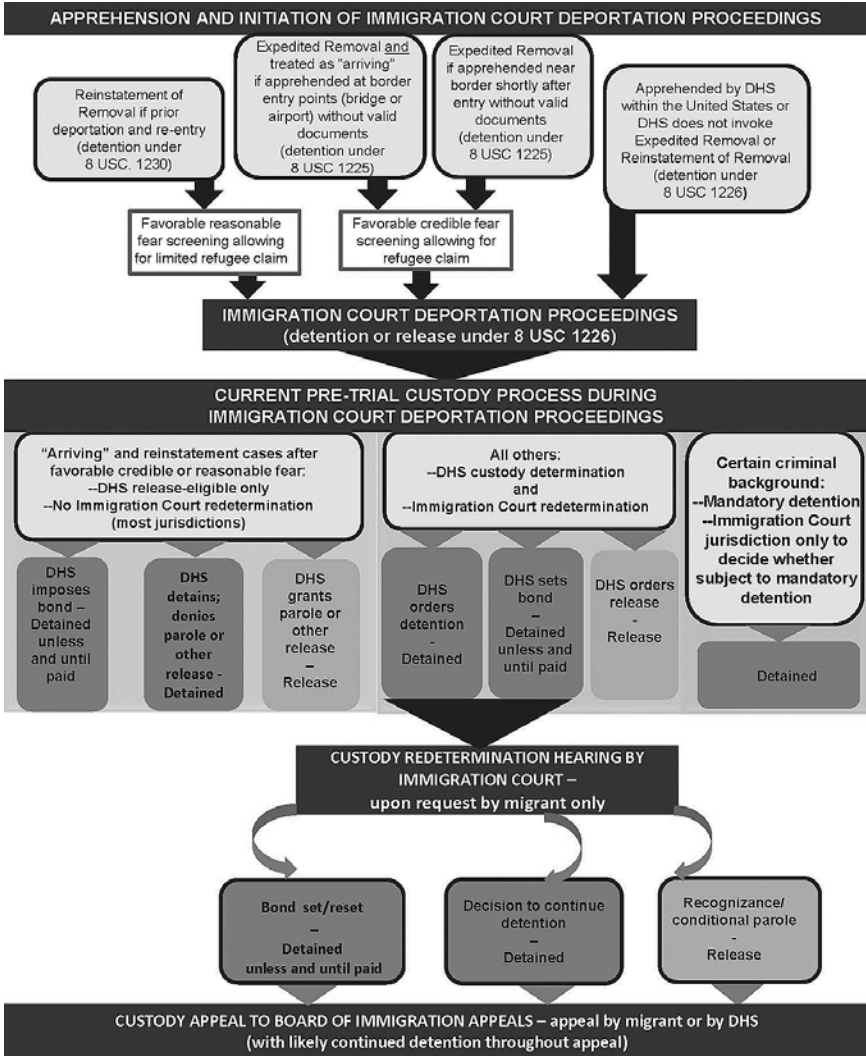
²⁷ *See* Immigration Court Practice Manual Chapter 7.4(e)(iv)(c) (“Subject to the Immigration Judge’s discretion, the alien may be represented during the reasonable fear review at no expense to the government.”).

²⁸ *See* Immigration Court Practice Manual Chapter 7.4(d)(iv)(c) (“Prior to the credible fear review, the alien may consult with a person or persons of the alien’s choosing. In the discretion of the Immigration Judge, persons consulted may be present during the credible fear review. However, the alien is not represented at the credible fear review. Accordingly, persons acting on the alien’s behalf are not entitled to make opening statements, call and question witnesses, conduct cross examinations, object to evidence, or make closing arguments.”).

judge reviews the decision of the asylum officer *de novo* and decides whether to affirm or vacate the decision. If the decision is affirmed, no additional judicial review of an expedited removal order is permitted, and the family is typically quickly removed from the U.S. Advocates, have, however at various stages in the history of family detention, following the judge affirming a negative CFI or RFI, had some success in filing a request for reconsideration (RFR) with the asylum office.²⁹ In response to this filing, the asylum office has, somewhat inconsistently, asked ICE to effectuate a stay while the RFR has been considered, and at times, has granted an RFR and given a new interview to the asylum seeker, which can result in a positive credible fear finding.

Some asylum seekers are eligible for release on bond, while others are not. It depends how the asylum seeker entered the country and came to the attention of immigration authorities. Ironically, individuals who entered without inspection, evading detection by border authorities, and are later apprehended within the U.S. interior, are in a better position in terms of release from detention than those who declare themselves to be asylum seekers at the airport or border patrol station. So called “arriving aliens,” those who are apprehended at border entry points —the airport or otherwise —without valid documents to remain in the U.S., are subject to detention under 8 U.S.C. § 1225. If those individuals pass a credible fear interview, they are typically not permitted to go before an immigration judge to determine release eligibility, but are only subject to release on parole at DHS’ discretion. Individuals who did *not* present themselves at a point of entry without documents undergo a custody review by DHS officials, but also have the opportunity to seek custody re-determination in immigration court before an immigration judge. The immigration judge can determine that continued detention is necessary, adjust the amount of the bond set by DHS, or authorize conditional release. A chart summarizing the custody process is included below:

²⁹ This is based on the asylum office’s regulatory authority to reconsider. *See* 8 U.S.C. § 1208.30(g)(2)(iv)(A).



Created by the University of Texas School of Law Immigration Clinic

Currently, ICE releases most asylum-seeking families (under a system called "parole") after a positive result at the credible or reasonable fear interview from either an asylum officer or after a review by an immigration judge, allowing them to await the adjudication of their asylum claim in court outside of a detention center, wearing a cumbersome ankle monitor³⁰ and

³⁰ See, e.g., Marouf, *supra* note 119 at 121–124 (discussing how ankle monitors are restrictive, an invasion of privacy, and an affront to dignity); see also Tiziana Rinaldi, *Many Women Seeking Asylum in the US Have Been Released from Detention — But With Ankle*

with other supervision requirements. Release following a positive credible fear determination was not always the case, however, and this process and the practices surrounding release has changed dramatically over the course of the last few years of the government's experiment in detaining families. These changes are discussed below and provide context for the work in which lawyers and law students have been engaging in this work in family detention centers. Outlined below are four phases of family detention work.

THE U.S. RESPONSE TO ASYLUM SEEKING FAMILIES: DETENTION

In response to the exponential increase in mothers and children³¹ seeking protection in the United States, the Obama administration launched three initiatives, one of which was re-instituting the policy of detaining families. This essay focuses on family detention, but will briefly explain the other two prongs of this three-pronged reaction to increased Central American migration.

First, the Obama Administration announced the Southern Border Plan, (*Programa Frontera Sur*) which essentially increased border enforcement

Monitors, PRI'S THE WORLD (Mar. 10, 2016), <https://www.pri.org/stories/2016-03-10/many-women-asylum-seekers-have-been-released-detention-ankle-monitors>, archived at <https://perma.cc/AFN6-Q62P>; Emily Gogolak, *Ankle Monitors Weigh on Immigrant Mothers Released from Detention*, N.Y. TIMES (Nov. 15, 2015), https://www.nytimes.com/2015/11/16/ny-region/ankle-monitors-weigh-on-immigrant-mothers-released-from-detention.html?_r=0, archived at <https://perma.cc/53AX-TFBN>. It is also notable one of the same private prison contractors who profits from the detention of families, the GEO Group at Karnes, also benefits when women are released on ankle monitors, as they own the BI Corporation, which contracts with the government to oversee alternatives to detention, including ankle monitors. John Burnett, *As Asylum Seekers Swap Prison Beds For Ankle Bracelets, Same Firm Profits*, NPR (Nov. 13, 2015), <http://www.npr.org/2015/11/13/455790454/as-asylum-seekers-swap-prison-beds-for-ankle-bracelets-same-firm-profits>, archived at <https://perma.cc/WWD8-VGVS>; see also Molly Hennessy-Fiske, *Immigrants object to growing use of ankle monitors after detention*, L.A. TIMES (Aug. 2, 2015), <http://www.latimes.com/nation/immigration/la-na-immigrant-ankle-monitors-20150802-story.html>, archived at <https://perma.cc/WWD8-VGVS>.

³¹ From 2014 to 2017, we largely saw mothers arriving with children. There has, however, particularly in recent months, been an uptick in fathers arriving with children in the United States. John Stanton, *So Many Father-Led Families are Crossing the U.S. Border that Immigration Agents Don't Have Room to Hold Them*, BUZZFEED (Oct. 23, 2017), https://www.buzzfeed.com/johnstanton/so-many-father-led-families-are-crossing-the-us-border-that?utm_term=.JyRwK36ey#.feWpPZMN8, archived at <https://perma.cc/J4AC-LGS2>. While some fathers arrived before this time, some were detained in Berks, Pennsylvania with their children, while more often than not, fathers were sent to one institution and mothers and children to another, or where the child traveled with only the father, reports state that the children have been separated from the father and entered into system as unaccompanied minors in the custody of the Office of Refugee Resettlement. See LEIGH BARRICK, AM. IMMIGRATION COUNCIL, DIVIDED BY DETENTION: ASYLUM-SEEKING FAMILIES' EXPERIENCES OF SEPARATION 10 (2016), <https://www.americanimmigrationcouncil.org/research/divided-by-detention-asylum-seeking-families-experience-of-separation>, archived at <https://perma.cc/4DX3-KKHC>; WOMEN'S REFUGEE COMM'N ET AL., BETRAYING FAMILY VALUES: HOW IMMIGRATION POLICY AT THE UNITED STATES BORDER IS SEPARATING FAMILIES 9 (2017), <https://www.womensrefugeecommission.org/rights/gbv/resources/1450-betraying-family-values>, archived at <https://perma.cc/6PLW-FBHZ>.

and security in Mexico.³² The Obama Administration provided training for Mexican border officials, along with an infusion of financial assistance and supplies to support Mexican border enforcement efforts. Signs point to this program having the desired effect.³³ Indeed, Mexican border officials apprehended 85% more immigrants in the first two years of the program from July 2014 to June 2016 than before the program began.³⁴ Increased apprehensions results in increased deportations from Mexico to Guatemala, Honduras, and El Salvador.

Second, the Obama administration launched a public awareness campaign, largely through television and radio advertising, in the Northern Triangle. The campaign emphasized the dangers of the journey to the United States along with the likelihood of deportation and encouraged families to “*quedate!*” (stay in place).³⁵

The third prong in the Obama administration’s strategy in response to the humanitarian crisis was to detain mothers and children upon arrival. This is the main focus of this essay and has been the target of sustained and varied advocacy. The contemporary history of family detention divides into four main phases.

A. *Phase 1: Artesia: The “Deportation Mill” (June-December 2014)*

In the summer of 2014, the Obama Administration responded to what it termed the “surge” of unaccompanied children and mothers with their children fleeing Central America by reinstating the policy of detaining children

³² ADAM ISAACSON ET AL., MEXICO’S SOUTHERN BORDER: SECURITY, CENTRAL AMERICAN MIGRATION, AND U.S. POLICY, 7–11 (2017) https://www.wola.org/wp-content/uploads/2017/06/WOLA_Mexicos-Southern-Border-2017-1.pdf, archived at <https://perma.cc/25FJ-AJCF> (explaining the U.S. support for Mexican border enforcement including biometric data sharing, enhanced judicial, police, communications, and drug interdiction capacity, and more).

³³ The Ombudsman for U.S. Citizenship and Immigration Services (USCIS) attributed a drop in UAC apprehensions in FY2015 to “the Mexican government’s increased interception of minors attempting to reach the United States, rather than a decrease in the attempts themselves.” USCIS OMBUDSMAN, RECOMMENDATION ON THE CENTRAL AMERICAN MINORS REFUGEE/PAROLE PROGRAM 8 (2016), <https://www.dhs.gov/sites/default/files/publications/Citizenship%20and%20Immigration%20Service%20Ombudsman.pdf>, archived at <https://perma.cc/VH6R-QN87>.

³⁴ See ISAACSON ET AL., *supra* note 32, at 3.

³⁵ See MARKHAM, *supra* note 12, at 191.; See also Press Release, The White House, The Obama Administration’s Government-Wide Response to Influx of Central American Migrants at the Southwest Border (Aug. 1, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/08/01/obama-administration-s-government-wide-response-influx-central-american->, archived at <https://perma.cc/LSK7-39UG> (“On July 3, DHS, under the U.S. Customs and Border Protection (CBP), launched the *Dangers Awareness Campaign*, an aggressive Spanish language outreach effort and an urgent call to action to community groups, the media, parents and relatives in the U.S. and Central America to not put the lives of children at risk by attempting to illegally cross the southwest border”). Specific efforts were launched by the Guatemalan First Lady: “Guatemala’s First Lady launched the “*Quédate!*” campaign discouraging illegal immigration to the United States. Through public statements she is noting the dangers of the journey and urged parents not to send their children illegally to the United States.” *Id.*

with their mothers.³⁶ In 2009, the Obama Administration, after reviewing the program, ended the use of the T. Don Hutto Detention Center for families.³⁷ But, just five years later, in 2014, the administration repurposed a Customs and Border Patrol training barracks in Artesia, New Mexico, as a detention center and began efforts to process and deport the newly arriving Central American families as quickly as possible.³⁸

Artesia represents an extreme example of the problems posed by immigration detention centers throughout the country. Artesia, like the majority of detention centers nationwide, is located in a remote location, far from urban centers where access to attorneys could be more easily secured.³⁹ Indeed, no immigration attorneys were located within three hours of Artesia.⁴⁰

As with detention centers throughout the United States, a lack of representation for the women and children in Artesia dramatically undermined their chances of being able to remain in the United States.⁴¹ Immigrants, detained or free, have no right to legal representation at the government's expense in the United States.⁴² Despite the fact that a liberty interest is often at stake, immigration detention is categorized as "civil" rather than "criminal," meaning that the right to appointed counsel for indigent individuals, under the 6th Amendment and *Gideon v. Wainwright*,⁴³ does not attach.⁴⁴

³⁶ Julia Preston & Randal C. Archibold, *U.S. Moves to Stop Surge in Illegal Immigration*, N.Y. TIMES (June 21, 2014), https://www.nytimes.com/2014/06/21/us/us-plans-to-step-up-detention-and-deportation-of-migrants.html?_r=0, archived at <https://perma.cc/N2JB-WDRQ>.

³⁷ Hutto was a former medium-security prison in Taylor, Texas, run by the Corrections Corporation of America, and able to hold up to 500 detained men, women, and children. In 2007, advocates brought a challenge to the government's detention of children at Hutto as a violation of the 1997 *Flores* settlement, which established minimum standards for the detention of immigrant children. See Complaint for Declaratory and Injunctive Relief, *Bunikyte v. Chertoff*, No. A-07-CA-164-ss, 2007 WL 1074070 (W.D. Tex. 2007). The Government reached a settlement agreement in the case, and, in August 2009, the Obama Administration ended the detention of families at Hutt. For more on the issues surrounding the T. Don Hutto facility, see *THE LEAST OF THESE* (La Sonrisa Productions Inc. 2009).

³⁸ Press Release, U.S. Dep't of Homeland Sec., Fact Sheet: Artesia Temporary Facility for Adults with Children in Expedited Removal (June 20, 2014), <https://www.dhs.gov/news/2014/06/20/fact-sheet-artesia-temporary-facility-adults-children-expedited-removal>, archived at <https://perma.cc/7MMN-7CLZ>.

³⁹ Eagly & Shafer, *supra* note 3 at 8 ("Immigrants with court hearings in large cities had representation rates more than four times greater than those with hearings in small cities or locations.").

⁴⁰ Eagly & Shafer, *supra* note 3, at 42 (reporting that in a database of attorneys appearing in the 1.2 million cases analyzed in Eagly & Shafer's national access to counsel study, not one attorney listed an address in Artesia, New Mexico); see also STEPHEN MANNING, IMMIGRANT LAW GROUP PC, *THE ARTESIA REPORT* (2015), <https://innovationlawlab.org/the-artesia-report/the-artesia-report/>, archived at <https://perma.cc/W4XH-GHDN> (last visited Dec. 16, 2017) (explaining that there were only ten lawyers in Artesia, none of whom were immigration lawyers).

⁴¹ See MANNING, *supra* note 40 (explaining how the credible fear passage rate for women and children in Artesia plummeted to 38% from 77%, until lawyers got involved).

⁴² See I.N.A. § 292, 8 U.S.C. § 1362 (2012) ("In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel. . . as he shall choose").

⁴³ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

Further, due to restrictions in funding, legal aid organizations that have filled this representation vacuum are often very limited in the scope of services that they can provide to indigent immigrants.⁴⁵ Most non-profit organizations are unable to provide representation to detained immigrants. Even those who can engage in representation of detained immigrants often do so on a limited basis. The Executive Office of Immigration Review's Legal Orientation Program permits access to chosen non-profits to provide legal orientation services at a limited number of detention centers, but there are strict limits on actual representation of detained immigrants under this funding as well as challenges in actually accessing and interacting with detained clients.⁴⁶ This vacuum of legal representation in detention centers, combined with the sudden mass incarceration of children and their mothers, created a desperate need for legal services, resulting in rather unique activism, engagement, and organizing by immigration attorneys to step in and fill the justice gap.⁴⁷

Back in 2014, in Artesia, as word of the marooned island of detained children and mothers spread, attorneys from nearby states—and soon all over the country—traveled to remote southeastern New Mexico where they began providing services to the detained families.⁴⁸ Between June and October 2014, 306 of the 952 women and children passing through Artesia were

⁴⁴ For a discussion of the debates around establishing a *Gideon*-type right to counsel in immigration courts, see generally Ingrid V. Eagly, *Gideon's Migration*, 122 YALE L.J. 2282 (2013); Lucas Guttentag & Ahilan Arulanantham, *Extending the Promise of Gideon: Immigration, Deportation, and the Right to Counsel*, 39 HUM. RTS. 14 (2013).

⁴⁵ For a comprehensive discussion of funding restrictions on non-profits in providing representation to non-citizens, see Geoff Heeren, *Illegal Aid: Legal Assistance to Immigrants in the United States*, 33 CARDOZO L. REV. 619, 648–54 (2011).

⁴⁶ The LOP program was established in 2002. For a detailed assessment of the program, see generally NINA SIULC ET AL., VERA INST. OF JUSTICE LEGAL ORIENTATION PROGRAM: EVALUATION AND PERFORMANCE OUTCOME MEASUREMENT REPORT, PHASE II (2008) (analyzing cases beginning between the beginning of January and the end of August 2006 in detained immigration courts, with a focus on cases where LOP services were received).

⁴⁷ Also worth mentioning, of course, are the valiant efforts of attorneys to secure the right to legal representation for vulnerable immigrant populations. A class-action suit in California, *F.L.B. v. Sessions*, sought to provide appointed counsel for children, but failed when the Ninth Circuit denied class certification. *F.L.B. v. Lynch* (J.E.F.M. v. Holder), No. 2:14-cv-01026 (W.D. Wash. filed July 9, 2014). These suits are now proceeding on an individual basis. See Karolina Walters, *The Fight for Appointed Counsel for Immigrant Children Continues*, IMMIGRATION IMPACT (Aug. 10, 2017), <http://immigrationimpact.com/2017/08/10/fight-counsel-immigrant-children-continues/>, archived at <https://perma.cc/464J-BAH7>. Attorneys have secured a right to representation individuals found to be mentally incompetent in immigration court. See, e.g., *Franco-Gonzalez v. Holder*, 767 F. Supp. 2d 1034 (C.D. Cal. 2010) (holding that that ICE, the Attorney General and EOIR are required to provide legal representation to immigrant detainees with mental disabilities who are unable to represent themselves in California, Arizona and Washington State); see generally, Sarah Sherman-Stokes, *Sufficiently Safeguarded?: Competency Evaluations of Mentally Ill Respondents in Removal Proceedings*, 67 HASTINGS L.J. 1023 (2016).

⁴⁸ See MANNING, *supra* note 40 (detailing the involvement of pro bono attorneys at Artesia, just ten days after the detention center opened). For a good overview of stage one of family detention, at Artesia from June to December 2014, see Kit Johnson & Margaret Taylor, "Vast Hordes. . . Crowding In Upon Us:" *The Executive Branch's Response to Mass Migration and the Legacy of Chae Chan Ping*, 68 OKLA. L. REV. 185 (2015).

deported,⁴⁹ but the rate of deportation slowed substantially once volunteer attorneys and law students⁵⁰ arrived to provide representation. With representation, the pace of removals fell eighty percent within a month and ninety-seven percent within two months.⁵¹ Although Artesia was only in existence as a family detention center from June 24 to December 15, 2014,⁵² during that brief period lawyers and even law students began to meaningfully engage and to provide legal services to the detained mothers and children.⁵³ Rebecca Sharpless posits that this mode of engagement, “lawyers assert[ing] en masse their clients’ right to release and asylum,” could be described as Gary Bellow’s “case aggregation approach.”⁵⁴ As Stephen Manning describes in *The Artesia Report*, although 300 lawyers and other individuals were involved in providing representation at Artesia for over twenty-one weeks, only fourteen lawyers were actually in Artesia on average at any one time. This operation was successful because of a few “tweaks,”

⁴⁹ Melinda Henneberger, *When an Immigration Detention Center Comes to a Small Town*, WASH. POST (Oct. 1, 2014), https://www.washingtonpost.com/news/storyline/wp/2014/10/01/when-an-immigration-detention-center-comes-to-a-small-town/?utm_term=.9a9aa351aab7, archived at <https://perma.cc/JV42-EEGM>.

⁵⁰ See MANNING, *supra* note 40, at Acknowledgments (“Law students from New Mexico; Denver; Washington, D.C., and Maine brought good student energy at critical moments in the project and provided a watchful eye at the Denver Immigration Court”). Students also traveled from DePaul University School of Law in Chicago. See Karla McKanders, *Final AALS Artesia Presentation*, YOUTUBE (June 28, 2017), <https://www.youtube.com/watch?v=JWvEUW6U7WE&feature=youtu.be>, archived at <https://perma.cc/N3KC-B6HF>.

⁵¹ MANNING, *supra* note 40, at ch. 10; see also, Stephen Manning, Remarks at TEDx Mt. Hood, *How to Crowdsource a Refugee Rights Strategy* (June 29, 2016), <https://www.youtube.com/watch?v=9Fz5JFuU>, archived at <https://perma.cc/4CEW-KP63>.

⁵² *Id.*

⁵³ American University’s Washington College of Law’s International Human Rights Clinic and Immigrant Justice Clinic students traveled twice in the fall of 2014 with their professors to Artesia. See *Where Justice Hits the Road: Clinic Students in Artesia, New Mexico*, AM. U. CLINIC BLOG (Oct. 24, 2014), <https://auwclclinic.org/2014/10/24/where-justice-hits-the-road-clinic-students-in-artesia-nm/>, <https://perma.cc/JF9W-ZJDY>; *Libre Soy*, AM. U. CLINIC BLOG (Oct. 31, 2014), <https://auwclclinic.org/2014/10/31/libre-soyl>, archived at <https://perma.cc/7N8E-A8PX>; *Some Things Should Never Be Normal*, AM. U. CLINIC BLOG (Dec. 14, 2014), <https://auwclclinic.org/2014/12/08/some-things-should-never-be-normal/>, archived at <https://perma.cc/2VMS-6DLY>. Students from the University of Maine College of Law, the University of Tennessee School of Law, and the Sturm College of Law also traveled to Artesia. See Judy Harrison, *‘Most Shocking Thing Was Seeing Toddlers, Babies in Jail’: UMaine Law Students Share Their Experience as Volunteers at Immigration Detention Center*, BANGOR DAILY NEWS (Dec. 1, 2014, 7:58 AM) <http://bangordailynews.com/2014/12/01/news/portland/most-shocking-thing-was-seeing-toddlers-babies-in-jail-umaine-law-students-share-their-experience-as-volunteers-at-immigration-detention-center/>, archived at <https://perma.cc/F7HP-TRDS>; Karla McKanders, *New Mexico Immigration Trip*, YOUTUBE (Nov. 25, 2015), <https://www.youtube.com/watch?v=LLqwGJfDvTg&feature=youtu.be>, archived at <https://perma.cc/W3XS-BYDR> (detailing University of Tennessee School of Law’s trip to Artesia); Lisa Graybill & Meghan Howes, *Working for Justice: Denver Law Students Assist with Asylum Cases on the Border*, U. DENVER MAG. (May 7, 2015, 6:22 AM), <https://magazine.du.edu/academics-research/working-for-justice-denver-law-students-assist-with-asylum-cases-on-the-border/>, archived at <https://perma.cc/9EGZ-92G9> (detailing the work of two law students with families at Artesia in late 2015 and Denver student’s planned Spring Break work in Dilley in 2015).

⁵⁴ Sharpless, *supra* note 1, at 52 (citing Gary Bellow, *Steady Work: A Practitioner’s Reflections on Political Lawyering*, 31 HARV. C.R.-C.L.L. REV. 297 (1996)).

such as “centralized volunteer registration, case management protocols applied to all claims, a simplified system for accessing clients, and open participatory strategic decision-making.”⁵⁵

Ultimately, advocates in Artesia slowed the deportation mill and the government closed the detention center,⁵⁶ moving detained families elsewhere.

B. Phase 2: Dilley & Karnes – Indefinite Detention (January – July 2015)

With the closure of Artesia, DHS quickly shifted the detention of immigrant families to the purpose-built detention center in Dilley, Texas,⁵⁷ and at the former medium-security prison for men, in Karnes City, Texas. Indeed, DHS began detaining families at Karnes even before the closure of Artesia.⁵⁸ Both “family residential centers,” as ICE refers to them, are operated through contracts awarded to private prison corporations — GEO Group in Karnes City and Core Civic (formerly known as Corrections Corporation of America) in Dilley.⁵⁹ And, fitting with the remote location of immigrant detention centers, both family detention centers are located at least an hour’s drive from San Antonio and over two hours from Austin.

Where the family detention centers began to differ from the adult detention centers, however, was in the response of attorneys in organizing and engaging in representation within those detention centers.

⁵⁵ MANNING, *supra* note 40, at ch. 9.

⁵⁶ A lawsuit was filed against the Department of Homeland Security in federal district court in Washington, D.C., alleging that DHS had instituted new policies regarding credible fear interviews at Artesia, resulting in a dramatic drop in positive determinations and violating the Constitution and conflicting with the Immigration and Nationality Act. See *M.S.P.C. v. Johnson*, No. 1:14-cv-01437-ABJ (D.D.C. voluntarily dismissed Jan. 30, 2015). This suit resulted in a preliminary injunction stating that the government could not have a “no bond” policy for the purposes of deterring future migration. Significant negative press around the detention of families at Artesia may also have propelled the Administration towards the closure of that particular detention center. See, e.g., Julia Preston, *In Remote Detention Center, A Battle on Fast Deportations*, N.Y. TIMES, (Sept. 5, 2014); see also DETENTION WATCH NETWORK, EXPOSE AND CLOSE: ARTESIA FAMILY RESIDENTIAL CENTER, NEW MEXICO 1–3 (2014).

⁵⁷ See Jeh Johnson, Secretary, Dep’t of Homeland Sec., Statement at South Texas Family Residential Center in Dilley, Texas (Dec. 15, 2014), <https://www.dhs.gov/news/2014/12/15/statement-secretary-johnson-regarding-todays-trip-texas>, archived at <https://perma.cc/X2HC-QZDU> (announcing the opening of the family detention center in Dilley).

⁵⁸ According to the GEO Group, who operate the Karnes detention center, on July 11, 2014, the contract was modified from a civil detention facility to a family detention center. See *Karnes County Residential Center*, THE GEO GROUP, INC., <https://www.geogroup.com/FacilityDetail/FacilityID/58>, archived at <https://perma.cc/S9J3-FZ7G> (last visited Dec. 16, 2017).

⁵⁹ For an examination of for-profit prison business and its intersection with family detention, see generally Mariela Olivares, *Intersectionality at the Intersection of Profiteering & Immigration Detention*, 94 NEB. L. REV. 963 (2016). Note that Corrections Corporation of America had also been contracted to detain immigrant families at the T. Don Hutto detention center. See Sylvia Moreno, *Detention Facility for Immigrants Criticized*, WASH. POST (Feb. 22, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/21/AR2007022101661.html>, archived at <https://perma.cc/FQW8-HX6H>.

In Karnes City, the initial response and representation of families at Karnes was organized by University of Texas Law Professors Barbara Hines and Denise Gilman, who were at Karnes in early August 2014 for the first bond hearings.⁶⁰ Hines and Gilman formed the Karnes Pro Bono Project, mobilizing their former students, largely based in Austin, local lawyers, and eventually large law firms Akin Gump and Morgan Lewis to meet the urgent demand for representation.⁶¹ In late 2014, the Project started to transition to San Antonio-based non-profit Refugee and Immigrant Center for Education and Legal Services (RAICES), who stepped in to fill the intense and daily need for legal services at Karnes.⁶²

In January 2015, ICE began sending families to Dilley before construction on the detention center — essentially trailers on the Sendero Ranch property, formerly used to drill for natural gas — was even complete. Dilley is not only the largest family detention center, but the largest immigration detention center overall, holding up to 2400 children and mothers.

In those early days, one law professor and her students played a key role in shaping the immigrant advocacy's community's understanding of the dire need for legal services at Dilley. Columbia Law School Professor Elora Mukherjee led a team of students to Dilley to engage in representation of detained families in bond hearings. She partnered with RAICES, who was just starting to receive requests for representation at Dilley. Upon return to Columbia, Professor Mukherjee and her students wrote a white paper detailing the urgent need for representation at Dilley and shared it with anyone in the advocacy community who would listen.⁶³ By March 2015, four organizations had formally mobilized to provide legal services at the Dilley detention center. The CARA Project, a partnership of these four non-profit organizations,⁶⁴ was created to provide daily legal services to the detained families.⁶⁵

In addition to dedicated staff members with the Karnes Pro Bono Project/RAICES and the CARA Project/Dilley Pro Bono Project, operations at both detention centers have relied heavily on attorneys, law students, and other volunteers traveling from all over the country to provide legal services to the families, often in week-long stints. Notably, however, both operations also receive repeat local volunteers, including local attorneys, clergy members, and law students from Texas-based law schools.

⁶⁰ Phone call between Barbara Hines and author (Oct. 6, 2017) (notes on file with author).

⁶¹ *Id.*

⁶² *Id.*; see also *Karnes Volunteers*, RAICES, <https://www.raicestexas.org/pages/karnes-volunteers>, archived at <https://perma.cc/Z3GM-WUM8> (last visited Dec. 16, 2017).

⁶³ E-mail from Elora Mukherjee to author (July 6, 2017) (on file with author).

⁶⁴ These organizations are the Catholic Legal Immigration Network, Inc. (CLINIC), the American Immigration Lawyers Association (AILA), the Refugee and Immigrant Center for Education and Legal Services (RAICES), and the American Immigration Council.

⁶⁵ Operations at the Dilley, Texas, detention center are now known as the Dilley Pro Bono Project, with contributions from Texas RioGrande Legal Aid, the American Immigration Council, CLINIC, and AILA. See *Dilley Pro Bono Project Volunteer Portal*, DILLEY PRO BONO PROJECT, <https://www.surveymonkey.com/r/dilleyprobonoproject>, archived at <https://perma.cc/J7VW-GMAK> (last visited Dec. 16, 2017).

The substantive legal work in which staff and volunteers engage in the family detention centers has shifted dramatically over time, as has the population of detained families held at the detention centers. During certain months in 2015, for example, there were more than 2,000 women and children detained in the Dilley detention center,⁶⁶ while, in early 2017, at times the numbers were lower than 100, but the numbers have since risen. At the time of writing there are approximately 1,500 mothers and children detained at Dilley and approximately 550 detained at Karnes.

In addition to providing near universal representation to detained families in Dilley and Karnes, advocates working within and outside the detention centers brought litigation on a grander scale.⁶⁷ At Artesia and after the shift in detaining families at Dilley and Karnes, the government set no bond for the families, initially forcing each release case to be fought as a bond case.⁶⁸ Before an immigration judge, the government then argued against bond eligibility for families, citing the rationale that detaining families would deter future migration from the Northern Triangle to the U.S.⁶⁹ Families languished in detention under an apparent “no bond” or “high bond” policy. This policy was challenged in federal district court in D.C., in *R.I.L.R. v. Johnson*,⁷⁰ which resulted in a preliminary injunction, followed by the government’s commitment not to consider general deterrence as a factor in making release decisions concerning detained families.⁷¹ It also then led to quicker release for families who received positive results in credible fear interviews.⁷²

⁶⁶ For a detailed account of volunteering within the Dilley detention center in December 2015, see Valeria Gomez & Karla Mari McKanders, *Refugee Reception and Perception: US Detention Camps and German Welcome Centers*, 40 *FORDHAM INT’L L.J.* 523, 531–40 (2017) (Valeria Gomez describes operations at the South Texas Family Residential Center in Dilley, Texas, in December 2015).

⁶⁷ Included in this was litigation specifically focused on the government’s treatment of families detained at Artesia. See *M.S.P.C. v. Johnson*, No. 1:14-cv-01437-ABJ (D.D.C. voluntarily dismissed Jan. 30, 2015) (advocates alleged that the government systemically denied rights to families detained at Artesia).

⁶⁸ For more in-depth discussion of the *R.I.L.R.* litigation and this policy, see Johnson & Taylor, *supra* note 48, at 201–06.

⁶⁹ See *DHS Declarations from High-Ranking Immigration Officers on Blanket Policy of “No Release”*, AM. IMMIGRATION LAWYERS COUNCIL (Aug. 7, 2014), <http://www.aiala.org/in-fonet/dhs-blanket-policy-no-release>, archived at <https://perma.cc/ZASP-ASZW>.

⁷⁰ *R.I.L.R. v. Johnson*, 80 F. Supp. 3d 164, 175–76 (D.D.C. 2015).

⁷¹ Press Release, U.S. Immigration and Customs Enforcement, ICE Announces Enhanced Oversight for Family Residential Centers (May 13, 2015), <https://www.ice.gov/es/news/releases/ice-announces-enhanced-oversight-family-residential-centers>, archived at <https://perma.cc/42SN-W93Z>; see also *R.I.L.R. v. Johnson*, 80 F. Supp. 3d 164, 176 (D.D.C. 2015).

⁷² Also around this time, in April 2015, advocates filed a class-action lawsuit against the government and GEO Group alleging violations of the First Amendment. The women participated in a hunger strike at the facility to protest their prolonged detention and claimed that the retaliation against them violated the First Amendment. See Complaint at 2, *Pineda Cruz v. Thompson*, No. 5:15-cv-00326 (W.D. Tex. voluntarily dismissed Sep. 9, 2015), <https://www.clearinghouse.net/chDocs/public/IM-TX-0040-0001.pdf>, archived at <https://perma.cc/6W4T-RMSH>.

C. *Phase 3: Karnes & Dilley – “Twenty Days” of Detention (July 2015 – January 2017)*

In July and August 2015, Judge Dolly Gee, in the Central District of California, issued two orders in the *Flores* case. The *Flores* settlement, originally signed in 1997, sets out the minimum standards of care for the detention of immigrant children.⁷³ In February 2015, in response to the detention of immigrant children and their parents in Artesia, Dilley, and Karnes, *Flores* counsel brought a motion to enforce the settlement agreement.⁷⁴ Judge Gee’s orders made clear that the government could *not* hold immigrant children—regardless of whether the children are accompanied by their parents—in secure, unlicensed detention centers.⁷⁵ Instead, the Judge confirmed that the *Flores* settlement required their release within 3-5 days.⁷⁶ The Court allowed the Government to release children “as expeditiously as possible,” defined as within twenty days, only in the case of an emergency or “influx” of children where no licensed facility exists and there is no suitable adult to whom the child could be released.⁷⁷

The Government’s deadline to comply with the 2015 orders in *Flores* was October 23, 2015. Approaching this date, DHS started to release families who had received a positive result following a credible or reasonable fear interview. The majority of these families were encouraged, outside the presence of counsel, to accept an electronic ankle monitor⁷⁸ (which the women called a “*grillete*” in Spanish and advocates have referred to as a shackle) as a term of their release. These more routine releases on an ankle monitor after twenty days shifted the advocacy within the detention centers. When families were held for longer periods of time, volunteers and staff members at the Pro Bono Projects at Dilley and Karnes focused their efforts on preparing for bond hearings and even merits hearings for detained families. In light of the new release policy, staff and volunteers began to focus their efforts more exclusively on intake interviews, continuing to prepare families for CFI/RFI interviews and representation at negative CF/RF reviews before an immigration judge. Advocates also spent time conducting

⁷³ See Settlement Agreement at 12–18, *Flores v. Reno*, No. 2:85-CV-04544 (C.D. Cal. filed Jan. 1, 1997), https://www.aclu.org/files/pdfs/immigrants/flores_v_meese_agreement.pdf, archived at <https://perma.cc/2A3D-EKHL>. For a discussion of the *Flores* litigation earlier in its history, see Laura Lichter & Ari Weitzhandler, *Families Behind Bars: The Intersection of Politics, Law, and Detention, Part II*, 15-10 IMMIGR. BRIEFINGS 1, 1–2 (2015).

⁷⁴ See *Flores v. Lynch*, No. 2:85-CV-04544, 212 F. Supp. 3d 907, 908 (C.D. Cal. 2015), *aff’d in part, rev’d in part*, No. 15-56434, 828 F.3d 898 (9th Cir. 2016).

⁷⁵ *Id.* at 915.

⁷⁶ *Id.* at 913.

⁷⁷ *Id.* at 914.

⁷⁸ See Letter from Lindsay M. Harris et al., CARA Pro Bono Project, to Megan Mack, Officer for Civil Rights and Civil Liberties, U.S. Dep’t of Homeland Sec., and John Roth, Inspector General, U.S. Dep’t of Homeland Sec. 2 (Sept. 30, 2015), <http://www.acla.org/advocacy-media/press-releases/2015/coercion-intimidation-detained-mothers-children/complaint-regarding-residential-center-in-dilley>, archived at <https://perma.cc/W9T4-4Z9Z> (“Re: Complaint Regarding Coercion and Violations of the Right to Counsel at the South Texas Family Residential Center in Dilley, Texas”).

intake and exit orientations. As the population of detained families grew, the advocates at Dilley began to experiment with these group orientations, which they termed “charlas” (“chats”).⁷⁹ The intake charlas focused on general information that each family needed to know about the credible or reasonable fear interview process and bond. The exit charlas focused on sharing information about post-release events and obligations, and also attempted to negotiate terms of release (largely focused on the ankle monitors) with ICE. Intense advocacy on conditions of confinement, including sub-standard medical care,⁸⁰ inadequate treatment of survivors of trauma,⁸¹ and failure to adequately provide for indigenous language speakers,⁸² developed. Volunteers and staff also spent significant time advocating for specific cases that were delayed for one reason or another within the USCIS/ICE/EOIR system.

1. Phase 3a: The Raids Phase

January to March 2016 can be sub-categorized as “the raids phase.” In very early January 2016, the Obama administration launched the New Year’s Raids.⁸³ As a result of the raids, ICE detained 121 women and children, re-

⁷⁹ In part, the word “charla” was used, rather than “orientation,” in order to distinguish what the Dilley Pro Bono Project was doing from the Legal Orientation Program overseen at Dilley by American Gateways, who have and had a contract with the Executive Office of Immigration Review to provide know your rights style orientation programming for detained families. Email from Brian Hoffman, former CARA Pro Bono Project Managing Attorney (Nov. 25, 2017) (on file with author).

⁸⁰ See Letter from Lindsay M. Harris et al., CARA Pro Bono Project, to Megan Mack, Officer for Civil Rights and Civil Liberties, U.S. Dep’t of Homeland Sec., and John Roth, Inspector General, U.S. Dep’t of Homeland Sec. (Oct. 6, 2015), <http://www.aila.org/advo-media/press-releases/2015/crcl-complaint-family-detention/cara-jointly-filed-a-complaint>, archived at <https://perma.cc/8NYQ-2UY9> (“RE: ICE’s Continued Failure to Provide Adequate Medical Care to Mothers and Children Detained at the South Texas Family Residential Center”).

⁸¹ Karen Lucas, Am. Immigration Lawyers Ass’n, Katharine Obser, Women’s Refugee Comm’n, and Beth Werlin, Am. Immigration Council, to Megan Mack, Officer for Civil Rights and Civil Liberties, U.S. Dep’t of Homeland Sec. (June 30, 2015), <http://www.aila.org/advo-media/press-releases/2015/impact-family-detention-mental-health/complaint-crcl>, archived at <https://perma.cc/X75R-3KKQ> (“RE: The Psychological Impact of Detention on Mothers and Children Seeking Asylum”); see also Letter from Lindsay M. Harris et al., CARA Pro Bono Project, to Megan Mack, Officer for Civil Rights and Civil Liberties, U.S. Dep’t of Homeland Sec., and John Roth, Inspector General, U.S. Dep’t of Homeland Sec. (Mar. 28, 2016), <http://www.aila.org/advo-media/press-releases/2016/cara-crcl-complaint-concerns-regarding-detention>, archived at <https://perma.cc/7WT6-MAHY> (“RE: Ongoing Concerns Regarding the Detention and Fast-Track Removal of Detained Children and Mothers Experiencing Symptoms of Trauma”).

⁸² Letter from Karen Lucas et al., CARA Pro Bono Project, Megan Mack, Officer for Civil Rights and Civil Liberties, U.S. Dep’t of Homeland Sec., and John Roth, Inspector General, U.S. Dep’t of Homeland Sec. (Dec. 10, 2015), <http://www.aila.org/advo-media/press-releases/2015/crcl-complaint-challenges-faced-family-detention>, archived at <https://perma.cc/KA5W-FNT9> (“RE: Family Detention – Challenges Faced by Indigenous Language Speakers”).

⁸³ See, e.g., S. POVERTY LAW CTR., FAMILIES IN FEAR: THE ATLANTA RAIDS (2016), https://www.splcenter.org/sites/default/files/splc_families_in_fear_ice_raids_3.pdf, archived at <https://perma.cc/5P8W-5RFS> (detailing the stories of families swept up in the January 2, 2016 raids in Atlanta); Lisa Rein, *U.S. Authorities Begin Raid, Taking 121 Illegal Immigrants Into*

detaining families who had already been released from one of the family detention centers.⁸⁴ As these returning families were detained, mostly at Dilley, extensive CARA Project staff and volunteer time was spent advocating on their behalf. The CARA Project (now the Dilley Pro Bono Project) was allowed to see twelve families, totaling thirty-three mothers and children. All but one family had a claim for protection that had not been properly adjudicated or explored. Appeals and stays of removal were filed for eleven families with the Board of Immigration Appeals;⁸⁵ all of the stays were granted. During this time, a group of law students from the University of Minnesota volunteered at Dilley and worked intensively on behalf of the raids families.⁸⁶ The January 2016 raids were certainly not the last time that the government has targeted families who had previously been released from family detention centers to re-detain, but it has been the largest re-detention effort to date.⁸⁷

D. Detention in Pennsylvania: The Berks Phase

Before sharing the current situation with regards to family detention at all three detention centers, it is worth mentioning the detention of immigrant families in at the Berks Family Residential Center (“Berks”), in Berks County, Pennsylvania. Advocacy at Berks has certainly changed and fluctuated over the course of this most recent iteration of detaining families, starting in June 2014, but it has retained a distinct character throughout. The detention center in Leesport, Pennsylvania, within Berks County is much smaller than its Texas counterparts, with only ninety-six beds in this former

Custody Over the Weekend, WASH. POST (Jan. 4, 2016), https://www.washingtonpost.com/news/federal-eye/wp/2016/01/04/u-s-authorities-begin-raids-taking-121-illegal-immigrants-into-custody-over-the-weekend/?utm_term=.964bf3cb2432, archived at <https://perma.cc/97QL-HC48>.

⁸⁴ Most families who were re-detained had received in absentia removal orders, or removal orders with underlying ineffective assistance of counsel.

⁸⁵ See CARA FAMILY DETENTION PRO BONO PROJECT, UPDATE ON RECENT ICE ENFORCEMENT ACTIONS TARGETING CENTRAL AMERICAN FAMILIES 2–3 (2016), <https://cliniclegal.org/sites/default/files/advocacy/CARA-Raids-Update-Public-Documents-FINAL.pdf>, archived at <https://perma.cc/MYR3-62KT>; Wendy Feliz, *Cases Show U.S. Policies Failing Central American Refugee Families*, IMMIGRATION IMPACT (June 17, 2016), <http://immigrationimpact.com/2016/06/17/central-american-refugee-families/>, archived at <https://perma.cc/PKD5-QP7E>; Press Release, Am. Immigration Lawyers Ass’n, Eight of the Twelve Families Targeted by ICE Have Been Released (Feb. 9, 2016), <http://www.aila.org/advo-media/press-releases/2016/eight-of-twelve-families-targeted-by-ice-released>, archived at <https://perma.cc/746L-ADYW>.

⁸⁶ See *Center for New Americans Defends Asylum Seekers Targeted by Federal Immigration Raids*, UNIV. MINN. LAW SCH. (Jan. 12, 2016), <https://www.law.umn.edu/news/2016-01-12-center-new-americans-defends-asylum-seekers-targeted-federal-immigration-raids>, archived at <https://perma.cc/XHB4-7WFB>.

⁸⁷ Press Release, Am. Immigration Lawyers Ass’n, Federal Government Steps Up Efforts to Deport Central American Mothers and Children without Due Process (May 25, 2016), <http://www.aila.org/advo-media/press-releases/2016/feds-steps-up-efforts-to-deport-ca-mothers-children>, archived at <https://perma.cc/B2KG-8YXX>.

residential nursing home.⁸⁸ Berks detention center is currently the only place where ICE can hold fathers and their children.⁸⁹ ICE has actually used Berks to detain families since 2001, but on a much smaller scale and typically for those families who had nowhere to go or could not be released during the pendency of their asylum proceedings⁹⁰ because they had no documentation to establish their identities. Following orders in the *Flores* case from the summer of 2015, however, Berks began to take on a different role.

As discussed above, in July and August 2015, the *Flores* court ordered that children should generally be released as expeditiously as possible and should not be held in an unlicensed, secure facility. The court allowed, however, that in situations of an “influx,” it may be permissible for DHS to hold children for up to twenty days.⁹¹ Because both detention centers in Texas lacked a license and are “secure” facilities, DHS started transferring families held beyond twenty days to Berks, which was, at the time, licensed as a childcare facility.⁹²

This has resulted in the prolonged detention of families in Pennsylvania, which also led to a lawsuit filed by the ACLU in conjunction with local attorneys Bridget Cambria, Carol Anne Donohoe, and Jacqueline Kline, with the Eastern District of Pennsylvania. The *Castro* case made it up to the Third Circuit, but the Supreme Court denied certiorari.⁹³ Advocates for the Berks families, and indeed the mothers themselves,⁹⁴ have mounted

⁸⁸ See generally HUMAN RIGHTS FIRST, LONG-TERM DETENTION OF MOTHERS AND CHILDREN IN PENNSYLVANIA (2016), <https://www.humanrightsfirst.org/resource/long-term-detention-mothers-and-children-pennsylvania>, archived at <https://perma.cc/DZ3Q-KY22>.

⁸⁹ There has been a recent increase in the number of fathers arriving with their children to seek protection. See Stanton, *supra* note 31.

⁹⁰ AM. BAR ASSOC'N COMM'N ON IMMIGR., *supra* note 1, at 13.

⁹¹ This is a complicated matter and the Government and advocates differ over what constitutes an “influx.” See CARA FAMILY DETENTION PRO BONO PROJECT, AILA DOC. NO. 15102332, THE FLORES LITIGATION AND THE IMPACT ON FAMILY DETENTION 2 (2015), <http://www.aila.org/advo-media/press-releases/2015/fact-sheet-flores-litigation-family-detention>, archived at <https://perma.cc/E4M5-7LR7> (“The *Flores* Agreement defines ‘influx’ as a circumstance where the government has ‘at any given time, more than 130 minors eligible for placement in a licensed program under Paragraph 19 [of the Settlement Agreement], including those who have been so placed or are awaiting placement.’ As a threshold matter, only those children who have nowhere else to go – that is, who cannot be released to a parent or other family member or friend pursuant to Paragraph 14 of the Agreement – are in fact ‘eligible for placement in a licensed program’ under Paragraph 19. Because this does not describe the children held in family detention – who have not only the mother with whom they were apprehended, but very often other family or friends here in the United States willing to sponsor them – these children should not be counted toward the ‘influx’ exception.”).

⁹² Berks has been the site of a protracted licensing battle between Berks County and the state of Pennsylvania’s Department of Health and Human Services. See Claire Sasko, *Wolf Pushes to Revoke License of Berks County Immigration Detention Center*, PHILA. MAG. (May 8, 2017, 12:21 PM), <http://www.phillymag.com/news/2017/05/08/wolf-berks-county-immigration-detention-center/>, archived at <https://perma.cc/2WXD-AY9B>.

⁹³ See *Castro v. Department of Homeland Security*, ACLU (Apr. 17, 2017), <https://www.aclu.org/cases/castro-v-department-homeland-security>, archived at <https://perma.cc/8ZAF-SVY8>; see also *Castro v. United States Dep’t of Homeland Sec.*, 835 F.3d 422 (3d Cir. 2016), cert. denied, 137 S. Ct. 1581 (Mem) (April 17, 2017).

⁹⁴ In August 2016, the Berks mothers (#MadresBerks) launched a hunger strike. See Human Rights First, *supra* note 88; Liz Robbins, 22 *Migrant Women Held in Pennsylvania*

various campaigns in an attempt to secure the release of these asylum-seeking families.⁹⁵ Typically, volunteers have not spent intensive weeks at Berks, but law students have provided valuable remote support, with translation, interpretation, declaration, motion, and brief drafting.⁹⁶

Most recently, in the wake of another decision in *Flores*, making clear that accompanied children have a right to a bond hearing,⁹⁷ Berks advocates have fought successfully for the release of children from detention. One three-year-old child and his mother, for example, were detained for more than 655 consecutive days when an immigration judge finally granted release on recognizance in August 2017.⁹⁸ The immigration judge lamented:

Diego, now all of 3-years-old, has gone from diapers to detention in his young life with no understanding or exposure to life beyond secure custody. Even discounting the conditions of the youngster's custody as his attorneys allege, it is simply unconscionable for this child to have been held beyond 650 days before DHS released him and his mother, reluctantly, pursuant to this court's order.⁹⁹

As Berks advocates have successfully obtained release for some of the longer-term families detained at Berks, DHS has now started to send families undergoing the credible and reasonable fear process to Berks. In response, the ALDEA People's Justice Center, founded in 2016 to serve detained families at Berks¹⁰⁰ in the past few years, has been training volunteers nationwide in monitoring credible and reasonable fear interviews by phone. Indeed, in Fall 2017, Vermont Law School partnered with ALDEA to host an in-person and online training to prepare volunteers to provide this service. Faculty from at least two law schools, Columbia University and the

Start a Hunger Strike to Protest Detention, N.Y. TIMES (Sept. 2, 2017), <https://www.nytimes.com/2016/09/03/nyregion/22-migrant-women-held-in-pennsylvania-start-a-hunger-strike-to-protest-detention.html>, archived at <https://perma.cc/2LS8-GCTE>.

⁹⁵ In 2017, Amnesty International launched a campaign asking Ivanka Trump to #ShutDownBerks. See *Ivanka: Tell Your Dad to Stop Putting Little Kids In Jail. #ShutDownBerks*, AMNESTY INT'L, <https://act.amnestyusa.org/ea-action/action?ea.client.id=1839&ea.campaign.id=70352>, archived at <https://perma.cc/AX8T-BEQ9> (last visited Nov. 11, 2017); see also Human Rights Zamb, *supra* note 88.

⁹⁶ Indeed, one student, Adriana Zambrano, from the Michigan State University College of Law, spent more than six months working as the "on the ground" advocate at Berks in conjunction with the Pennsylvania Immigrant Resource Center. She had spent six weeks in Dilley in the summer of 2015 prior to serving at Berks from June 2016–January 2017.

⁹⁷ *Flores v. Sessions*, No. 2:85-CV-04544 (C.D. Cal. June 27, 2017) (order granting in part and denying in part plaintiffs' motion to enforce and appoint a special monitor), <http://www.aila.org/File/Related/14111359v.pdf>, archived at <https://perma.cc/2CN8-CCDJ>; see also *Flores v. Sessions*, 862 F.3d 863, 877 (9th Cir. 2017).

⁹⁸ See *Three-Year-Old Immigrant Child Released After Two Years of Detention*, IMMIGRATION IMPACT (Aug. 9, 2017), <http://immigrationimpact.com/2017/08/09/immigrant-child-released-detention/>, archived at <https://perma.cc/DAJ8-96XE>; see also Decision of Immigration Judge Walter A. Durling, Aug. 16, 2017 (On file with author).

⁹⁹ Decision of Immigration Judge Walter A. Durling, 6, Aug. 16, 2017 (On file with author).

¹⁰⁰ See *About Us*, ALDEA, <http://aldeapjc.org/#about>, archived at <https://perma.cc/2BZ8-KHQM> (last visited Dec. 14, 2017) (explaining that "Aldea" means "village" in Spanish).

author's own institution, University of the District of Columbia – David A. Clarke School of Law, are planning to travel with law students to provide services to detained families at Berks in March 2018.

E. Phase 4: Family Detention Under a New Administration (January 2017 – Present)

Unsurprisingly, the election of Donald J. Trump as President of the United States has not changed the fact that the U.S. government continues to detain families. Attempted universal representation of the immigrant families detained at Dilley, Karnes, and Berks is ongoing. In the first few months of the new administration, the population of the detained families was much lower than most of 2015 and 2016,¹⁰¹ but at the time of writing, numbers have picked up and the detention centers are near capacity in Fall 2017. Volunteers engage in much the same work as they did in phases 2 and 3. This includes intake, preparation for CFIs and RFIs, representation in court at negative RF and CF reviews before a judge, preparing RFRs, and advising families about their rights and responsibilities upon release. During the times in which the population has been lower, volunteers have provided more frequent in-person representation during credible and reasonable fear interviews.

In addition to individual representation within the family detention centers, advocates continue to engage in national efforts to highlight the plight of detained families. In May 2016, *Flores* counsel brought a second motion to enforce the Settlement Agreement, alleging continued breaches of the Settlement following the Judge's July and August 2015 orders.¹⁰² The motion alleged that the Government continued to violate the terms of the Settlement with egregious conditions of detention in CBP custody for children in the Rio Grande Valley Sector.¹⁰³ Further, the Government did not make efforts to release children and routinely held children for longer than 20 days in secure, unlicensed facilities.¹⁰⁴ The motion further called for the appointment of a special monitor to oversee compliance with the Settlement Agreement.¹⁰⁵ In June 2017, the District Court again ruled in the plaintiffs' favor, finding that the Government had continued to violate the terms of the settlement.¹⁰⁶ At the time of writing, in November 2017, *Flores* counsel is or-

¹⁰¹ Theories abound as to why this may be the case, including potentially that the heightened anti-immigrant rhetoric has deterred families from seeking protection, that border crossings tend to be reduced during the winter months, but also an increase in the border patrol abuses in turning away genuine asylum seekers at the border. See discussion *supra* note 21, explaining widespread allegations of CBP's failure to properly process asylum seekers.

¹⁰² See Plaintiffs' Motion to Enforce at 4, *Flores v. Sessions*, No. 2:85-CV-04544 (C.D. Cal. June 27, 2017), <http://www.aila.org/File/Related/14111359t.pdf>, archived at <https://perma.cc/V7P3-RKCM>.

¹⁰³ See *id.* at 5–10.

¹⁰⁴ *Id.* at 12.

¹⁰⁵ *Id.* at 22.

¹⁰⁶ *Flores v. Sessions*, No. 2:85-CV-04544 (C.D. Cal. June 27, 2017), <http://www.aila.org/File/Related/14111359v.pdf>, archived at <https://perma.cc/RGN6-SDLH>.

ganizing a round of site visits to Dilley, Karnes, Berks, and CBP facilities within the RGV sector to monitor compliance with the Settlement in late November and early December 2017.¹⁰⁷

VOLUNTEERING WITHIN FAMILY DETENTION CENTERS

As with other crisis-lawyering contexts,¹⁰⁸ the ways in which volunteers engage in assistance has varied over time. Furthermore, the models at Dilley and Karnes are quite distinct. The differences exist for various reasons, but probably largely because at Dilley, a project emerged specifically to provide representation at the new detention center, whereas at Karnes, services for the newly purposed detention center were eventually folded into operations at an existing non-profit to provide permanent structural support for the Karnes Pro Bono Project.

Both Karnes and Dilley volunteers participate in a phone orientation before arriving at the detention centers. This covers a variety of issues, including training on using the Innovation LawLab's case management software (LawLab), which is used at all three family detention centers as a centralized case management system. This software also assists in shaping and supporting advocacy on a national level to end family detention and to raise issues within the system.

At Dilley, the Dilley Pro Bono Project, now including the Texas RioGrande Legal Aid (TRLA), consists of six staff members who work daily within the detention centers, including a Managing Attorney, staff attorneys, an advocacy coordinator, and a volunteer coordinator. First-time volunteers typically arrive on a Sunday and take part in a lengthy orientation to the work and a group dinner to prepare them for the week. On Monday morning, volunteers arrive at the detention center by around 7am and begin engaging with families shortly afterwards. Typically, volunteers have remained in the visitation trailer, where the Pro Bono Project has secured space to meet with detained families, until 7pm or later. After leaving the detention center, volunteers often work on motions to be filed in court, declarations to support negative credible or reasonable fear reviews or requests

¹⁰⁷ E-mail from Peter Schey, *Flores* counsel, to author (Nov. 9, 2017) (on file with author).

¹⁰⁸ The author refers to crisis-lawyering to include legal responses, including massive engagement of law school volunteers, in response to natural disasters, including the outpouring of support in the aftermath of Hurricane Katrina. Law student engagement in family detention centers will be explored in a companion article to this piece, but for those interested in exploring crisis-lawyering, see generally Rachel Van Cleave et al., *Engaging the Legal Academy in Disaster Response*, SEATTLE J. FOR SOC. JUST., Fall/Winter 2011, at 211; Laurie Morin & Susan Waysdorf, *Teaching the Reflective Approach Within the Service-Learning Model*, 62 J. LEGAL EDUC. 600 (2013); Laurie Morin & Susan Waysdorf, *The Service-Learning Model in the Law School Curriculum*, 56 N.Y.U. L. REV. 561 (2011); Melissa Gibson Swain & JoNel Newman, *Helping Haiti in the Wake of Disaster: Law Students as First Responders*, 6 INTERCULTURAL HUM. RTS. L. REV. 133, 146–154 (2010); Kelly Alison Behre, *Motivations for Law Student Pro Bono: Lessons Learned from the Tuscaloosa Tornado*, 31 BUFF. PUB. INT. L.J. 1 (2012).

for reconsideration, entering case notes into LawLab, or other work. Twice a week, although somewhat inconsistently, project staff facilitate a “big table” meeting, during which volunteers debrief on the day’s challenges and highlights.¹⁰⁹ Guided by staff members, who facilitate the discussion, volunteers share experiences, including high points and low points of the day or week, troubleshoot issues, and often generate ideas or solutions to improve operations for the next day’s work.

At Karnes, RAICES staff members typically rotate the days in which they work at the family detention center, providing services at the center from Monday to Thursday. Because Karnes less routinely sees large groups of weekly volunteers, staff developed a more ad hoc way of preparing volunteers. RAICES developed regular phone orientations to discuss logistics, the work, and to answer questions. Monday mornings have become an informal orientation to the work week. Staff members lead in person trainings with local partners such as the University of Texas and St. Mary’s School of Law, who often cover legal services at Karnes on Fridays. RAICES has also developed materials available on their website to guide volunteers, including an intake form, retainer agreement, scripts for preparing families for credible and reasonable fear interviews, and scripts to guide families through the post-release process for asylum seekers.¹¹⁰ Volunteers at Karnes also work within the detention center daily and meet with clients either within or around the margins of the center’s five visitation rooms.

Both RAICES at Karnes and the Dilley Pro Bono Project still actively seek attorney and non-attorney volunteers. On a busy day at Dilley, staff and volunteers may see 150 families in one day. As discussed below, the need for volunteers is urgent and the difference they can make is life-changing.

THE NEED FOR REPRESENTATION OF DETAINED MOTHERS AND CHILDREN

This Part explains how representation, like that discussed above in family detention centers from 2014 to present, improves outcomes for immigrants. Detention, however, tends to dramatically lower the rates of legal representation.

Access to legal counsel is a determinative factor in whether an individual immigrant is granted relief.¹¹¹ In short, lawyers make a difference. As

¹⁰⁹ For a description of the “Big Table” concept, see MANNING, *supra* note 40, at ch. 10 (“Big Table was a nightly meeting of all the advocates on-the-ground that would last until the early morning hours. It was a meeting held in round-table fashion in which each advocate at the table spoke in equal measure on the day’s successes and failures, on critiques of the arguments and case theories, on mapping strategy for difficult fact patterns, and on setting a plan for the next day.”).

¹¹⁰ These documents are on file with the author.

¹¹¹ See Eagly & Shafer, *supra* note 3, at 9 (“Among similarly situated respondents, the odds were fifteen times greater that immigrants with representation, as compared to those without, sought relief and five-and-a-half times greater that they obtained relief from removal.”).

Professors Eagly & Shafer find, “[I]mmigrants who are represented by counsel do far better at every stage of the court process – that is, their cases are more likely to be terminated, they are more likely to seek relief, and they are more likely to obtain the relief they seek.”¹¹²

The difference for immigrants with and without representation is particularly stark for detained immigrants – according to Eagly & Shafer’s study, detained immigrants represented by counsel obtain a successful outcome in 21% of cases, which is *ten times* greater than the 2% success rate for those without representation.¹¹³ Similarly, the recent evaluation of the New York Immigrant Family Unity Project found that detained immigrants were 1,100% more likely, or 12 times more likely to obtain a successful outcome when represented.¹¹⁴ When detained immigrants have legal representation, they are also more likely to be released from detention.¹¹⁵

Detention serves as a tool for the administration to meet its intended hardline immigration enforcement efforts because detention is proven to undermine access to legal counsel, and such access increases an immigrant’s chance of remaining in the country. Indeed, in a study of rates of representation from 2007-2012, only 14% of detained individuals were represented, versus 66% of non-detained individuals in immigration court, meaning that non-detained immigrants are almost five times more likely to obtain counsel than their detained counterparts.¹¹⁶

In an era of aggressive immigration enforcement¹¹⁷ and increased collaboration between private prison companies and the U.S. government, we can only anticipate that increasingly more immigrants will be detained as

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ See Vera Institute NYIFUP, *supra* note 6, at 5–6, 25 (finding that only 4% of detained, unrepresented immigrants at the Varick Street detention center resulted in a successful outcome, but estimating that with representation through the New York Immigrant Family Unity Project, 48% of detained immigrants will receive a successful outcome resulting in an ability to remain in the U.S.). Nationwide, the Vera Institute reports that while only 6% of unrepresented detained immigrants will secure relief, 46% of those with legal representation will enjoy success. *Id.* at 24.

¹¹⁵ *Id.* at 9; see also *id.* at 6 (“NYIFUP clients obtain bond and are released from detention at close to double the rate of similarly situated unrepresented individuals at comparable courts (49 percent for NYIFUP versus 25 percent for unrepresented individuals at similar courts)”).

¹¹⁶ Eagly & Shafer, *supra* note 3, at 32. Eagly and Shafer posit that the disparity in representation rates may arise because of the difficulties of representing detained immigrants. In addition to the distance attorneys must usually travel to meet with detained clients, they face onerous security rules and restrictions at the detention centers, in addition to potentially long wait times to meet with their clients. *Id.* at 35.

¹¹⁷ One of Trump’s very first actions in office was to issue an Executive Order on immigration enforcement. See Exec. Order No. 13767, 82 Fed. Reg. 8793, § 5 (Jan. 25, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/25/executive-order-border-security-and-immigration-enforcement-improvements>, archived at <https://perma.cc/AC7W-AYTG>. For an analysis of how the interior enforcement and border enforcement orders affect asylum seekers, see Amy Wolz & Deborah Anker, *The Impact of President Trump’s Executive Orders on Asylum Seekers*, in 17-05 IMMIGR. BRIEFINGS 1 (2017).

they await adjudication in a backlogged and overburdened immigration court system.¹¹⁸

Already, federal funding mandates around 34,000 noncitizens to be detained at any one time.¹¹⁹ The Trump administration's stated intent and efforts to date have been to secure additional detention beds.¹²⁰ Given this reality, advocates are mobilizing to provide representation within adult detention centers. Numbers of individuals in family detention centers dropped sharply at the beginning of 2017, ostensibly because fewer families were seeking protection in the United States. The reasons for this drop in families seeking protection are many — one is that families may feel too afraid to come.¹²¹ Another is that a problem that existed before and during the Obama administration has only worsened in the Trump era: Customs and Border Protection routinely turns away asylum seekers,¹²² contrary to international law.¹²³

¹¹⁸ See Harris, *supra* note 24 at 1204–08 (describing the immigration court backlog).

¹¹⁹ See JENNIFER CHAN, NAT'L IMMIGRATION JUSTICE CTR., IMMIGRATION DETENTION BED QUOTA TIMELINE, (2017), <https://www.immigrantjustice.org/staff/blog/immigration-detention-bed-quota-timeline>, archived at <https://perma.cc/N5SC-VBHK> (detailing the history of the various Congressional Appropriations Acts that established the 34,000 “immigration detention bed quota” for the Immigration and Customs Enforcement agency). For an exploration of the harm caused by detaining immigrants, to those detained themselves and their children, along with the cost to U.S. taxpayers, see Fatma Marouf, *Alternatives to Immigration Detention*, 38 CARDOZO L. REV. 101 (2017).

¹²⁰ One of Trump's first Executive Orders directed DHS to allocate “all legally available resources” or establish contracts to “construct, operate, or control facilities to detain aliens at or near the land border with Mexico.” See Exec. Order No. 13767, *supra* note 117 at § 5. The increased detention of asylum seekers in particular has been documented recently. See HUMAN RIGHTS FIRST, JUDGE AND JAILER: ASYLUM SEEKERS DENIED PAROLE IN WAKE OF TRUMP EXECUTIVE ORDER (2017), <https://www.humanrightsfirst.org/sites/default/files/hrf-judge-and-jailer-final-report.pdf>, archived at <https://perma.cc/JRL9-GGFT>. More immigrant women are in detention than ever before. See WOMEN'S REFUGEE COMM'N, PRISON FOR SURVIVORS: THE DETENTION OF WOMEN SEEKING ASYLUM IN THE UNITED STATES (2017), <https://www.womensrefugeecommission.org/rights/resources/1528-prison-for-survivors-women-in-us-detention-oct2017>, archived at <https://perma.cc/Q57Y-C9GW>.

¹²¹ Earlier in 2017, then-DHS Secretary John Kelly publicly contemplated separating children from their parents upon arrival in the United States. See Samantha Schmidt, *DHS is Considering Separating Mothers and Children Who Cross the Border Illegally*, WASH. POST (March 7, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/03/07/dhs-is-considering-separating-mothers-and-children-who-cross-the-border-illegally/?utm_term=.D49ad53145d8, archived at <https://perma.cc/2AES-83GT>.

¹²² See, e.g., U.S. Comm'n ON INT'L RELIGIOUS FREEDOM, *supra* note 21; HUMAN RIGHTS FIRST, CROSSING THE LINE, *supra* note 21; Michael Garcia Bochenek, *US Turning Away Asylum Seekers at Mexican Border: Central Americans Who Flee for Their Lives Denied Entry by US Border Guards*, HUMAN RIGHTS WATCH (May 3, 2017, 2:57 PM), <https://www.hrw.org/news/2017/05/03/us-turning-away-asylum-seekers-mexican-border>, archived at <https://perma.cc/97XG-C425>; Caitlin Dickerson & Miriam Jordan, *'No Asylum Here': Some Say U.S. Border Agents Rejected Them*, N.Y. TIMES (May 3, 2017), <https://www.nytimes.com/2017/05/03/us/asylum-border-customs.html>, archived at <https://perma.cc/9SY5-KH9G>.

¹²³ United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137; Protocol Relating to the Status of Refugees, July 28, 1967, 606 U.N.T.S. 267. The U.S. ratified the 1967 Protocol in 1968, which incorporates most provisions of the original 1951 Convention. See UNITED NATIONS HIGH COMM'R FOR REFUGEES, STATE PARTIES TO THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND THE 1967 PROTOCOL 4 (2015), <http://www.unhcr.org/3b73b0d63.pdf>, archived at <https://perma.cc/XZ6V-9PGC>.

At the time of writing, however, the family detention centers are nearing capacity once more. Services are still very much needed to assist families who make it across the border in asserting their claims for protection. At the same time, recognizing the gains made by the “on the ground”¹²⁴ model within family detention centers and the dire need for representation for detained immigrants throughout the country, advocates also must expand the focus and resources on providing representation within adult detention centers located throughout the country.

CONCLUSION

We are in an era of incredible need for immigration legal services. That need is most acute within detention centers located outside of major metropolitan areas, including within the family detention centers.

Ultimately, neither the Trump nor the Obama administration can claim to have won or be “winning” with the policy of family detention. The vast majority of women and children still receive a positive result during their credible fear interviews, because they are indeed individuals fleeing persecution under the Refugee Convention. It is a poor use of resources, then, to continue to detain this population. Instead, tax-payer dollars, government energy, and resources, should be invested in providing representation and case management for this population to ensure that they appear in court and follow all required procedures to pursue their claims for protection.¹²⁵ In the current era of intense immigration enforcement, combined with the Trump Administration’s plans to increase detention bed space and Attorney General Jefferson Beauregard Sessions’s clear attacks on asylum-seekers,¹²⁶ family detention is, however, likely here to stay.

¹²⁴ The author purposely declines to use the terminology “on the ground” to refer to work within detention centers. As Professor Elissa Steglich so wisely pointed out in reviewing a draft of this article, our border is militarized enough as it is, without labeling lawyers as soldiers. E-mail from Elissa Steglich to author (Oct. 17, 2017) (on file with author). While the author appreciates the intense, fraught nature of detention center work, the frenetic pace and often life and death consequences to lawyering in this context, lawyers being physically present with clients should be the norm, despite the Government’s persistence in locating detention centers in remote locations, stifling access to counsel.

¹²⁵ See generally Marouf, *supra* note 119 (discussing the various alternatives to immigration detention).

¹²⁶ See, e.g., Jeffrey Sessions, U.S. Att’y Gen., Remarks before the Executive Office of Immigration Review (Oct. 12, 2017), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review>, archived at <https://perma.cc/T8A9-AYAY> (claiming an increase in fraudulent asylum claims and lambasting “dirty immigration lawyers” for arming asylum-seekers with “magic words” to claim asylum protection). For fact-based responses to these remarks, see Jeffrey Chase, *In Response to the A.G.’s Claims Regarding Asylum Fraud*, JEFFREY S. CHASE BLOG (Oct. 26, 2017), <https://www.jeffreyschase.com/blog/2017/10/26/in-response-sessions-claims-regarding-asylum-fraud>, archived at <https://perma.cc/YU5G-ZGKN>; Lindsay M. Harris, Opinion, *Sessions Fundamentally Misses the Mark on Asylum Seekers*, THE HILL (Oct. 17, 2017, 11:40 AM) <http://thehill.com/opinion/immigration/355734-sessions-fundamentally-misses-the-mark-on-the-asylum-system#bottom-story-socials>, archived at <https://perma.cc/S4KX-3ENR>; Michelle Mendez & Swapna Reddy, Commentary, *Why Sessions is Wrong About Asylum Seekers*, CHI. TRIB.

In light of this reality, crowdsourcing refugee rights, as Stephen Manning articulates, is more important than ever.¹²⁷ It is heartening to see the expansion of the model of lawyering within immigration detention centers expand to centers in Georgia and Louisiana, where asylum grant rates are dismal, conditions of detention dire, with a historical extreme lack of access to counsel. Lawyers are needed to ensure that individuals can properly access their due process rights and to help the immigration court system run more smoothly.¹²⁸

Lawyers, specialized in immigration or not, must arm themselves with the knowledge and tools to join this fight. Just as non-immigration lawyers quickly rose to a call to action in January at the airports,¹²⁹ lawyers must again rise, and continue rising, to provide representation for families and individuals held in immigration detention. This is our time to act and proudly join the brigade of “dirty immigration lawyers” to ensure protection and due process for the most vulnerable.

(Oct. 23, 2017, 2:05 PM), <http://www.chicagotribune.com/news/opinion/commentary/ct-per-spec-asylum-sessions-immigration-1024-20171023-story.html>, archived at <https://perma.cc/E6VQ-4YWX>.

¹²⁷ See Manning, Remarks *supra* note 51.

¹²⁸ See Vera Institute NYIFUP, *supra* note 6, at 34–35 (discussing how lawyers make the court process run more smoothly).

¹²⁹ See Jonah Engel Bromwich, *Lawyers Mobilize at Airports Following Trump’s Order*, N.Y. TIMES (Jan. 29, 2017), https://www.nytimes.com/2017/01/29/us/lawyers-trump-muslim-ban-immigration.html?_r=0, archived at <https://perma.cc/5MY9-9ATZ>; Lucy Westcott, *Thousands of Lawyers Descend on U.S. Airports to Fight Trump’s Immigrant Ban*, NEWSWEEK (Jan. 29, 2017), <http://www.newsweek.com/lawyers-volunteer-us-airports-trump-ban-549830>, archived at <https://perma.cc/N96U-Q5SU> (reporting that more than 4000 lawyers mobilized across the country to provide legal services in the wake of the first travel ban).