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## THE DETAINMENT OF FAMILIES: MORAL IMPLICATIONS LACKING IN LEGAL JUSTIFICATIONS

*Stephanie Costa*

### I. INTRODUCTION

In 1985, when most fifteen year-old girls in the United States were singing along to Madonna's "Material Girl," Jenny Lisette Flores was making the journey from El Salvador to the United States alone, with the hope of reuniting with her mother.<sup>1</sup> Nearing the end of her grueling journey, feeling as though the savage violence of the Salvadoran Civil War was behind her and she was safe at last, Immigration and Nationality Service (INS)<sup>2</sup> apprehended Jenny.<sup>3</sup> Her mother, being undocumented and fearing deportation, never came for Jenny.<sup>4</sup> Thus, Jenny was placed in a detention facility in Pasadena, California for two months.<sup>5</sup> Jenny shared sleeping quarters with twelve unrelated women—five of who were adults.<sup>6</sup> Jenny was subjected to multiple humiliating strip searches while in detention.<sup>7</sup> The Pasadena detention facility was a bleak prison that prohibited visitors other than the detainees' attorneys.<sup>8</sup> Jenny and the few other children detained in Pasadena had neither recreational nor educational opportunities.<sup>9</sup> The detention facility did not even provide reading materials to help pass the time.<sup>10</sup> In the summer of 1985, the National Center for Immigrants' Rights, Inc., the National Center for Youth Law, and the American Civil Liberties Union Foundation of Southern California filed a class action lawsuit on behalf of Jenny and eight other children who INS detained amongst the adults in Pasadena.<sup>11</sup> Upon the filing of the complaint, INS released Jenny and the other children from detention.<sup>12</sup> Litigation on the merits of their detainment went on for over a decade. In 1997, the parties finally came to an agreement, and the California Federal Court approved the Flores Class

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<sup>1</sup> Suzanne Gamboa, *When Migrant Children Were Detained Among Adults, Strip Searched*, NBC NEWS (Jul. 24, 2014), <http://www.nbcnews.com/storyline/immigration-border-crisis/when-migrant-children-were-detained-among-adults-strip-searched-n161956>.

<sup>2</sup> INS was the predecessor to many of the component agencies within the U.S. Department of Homeland Security (DHS) such as Immigration and Customs Enforcement (ICE), Customs and Border Enforcement (CBP), and U.S. Citizenship and Immigration Services (USCIS). U.S. Citizenship & Immigr. Serv., Our History, <https://www.uscis.gov/about-us/our-history> (last visited Sept. 22, 2017).

<sup>3</sup> Gamboa, <http://www.nbcnews.com/storyline/immigration-border-crisis/when-migrant-children-were-detained-among-adults-strip-searched-n161956>.

<sup>4</sup> Gamboa, <http://www.nbcnews.com/storyline/immigration-border-crisis/when-migrant-children-were-detained-among-adults-strip-searched-n161956>.

<sup>5</sup> Brief for Petitioner at 5, *Flores v. Reno*, (C.D. Cal. 1985), No. CV 85-4544-RJK(Px), <http://www.clearinghouse.net/chDocs/public/IM-CA-0002-0001.pdf>.

<sup>6</sup> *Id.* at 16.

<sup>7</sup> *See generally Id.* at 23.

<sup>8</sup> *Id.* at 16.

<sup>9</sup> *Id.* at 3.

<sup>10</sup> *Id.*

<sup>11</sup> 5 Brief for Petitioner at 1, *Flores v. Reno*, (C.D. Cal. 1985), No. CV 85-4544-RJK(Px), <http://www.clearinghouse.net/chDocs/public/IM-CA-0002-0001.pdf>.

<sup>12</sup> Gamboa, <http://www.nbcnews.com/storyline/immigration-border-crisis/when-migrant-children-were-detained-among-adults-strip-searched-n161956>.

Action Settlement Agreement, which required that the government hold children in non-restrictive and age-appropriate facilities.<sup>13</sup>

Unfortunately, nearly three decades after Jenny was in detention and two decades after finally reaching an agreement, the United States is still struggling with the right way to process families fleeing Central America to seek asylum at the U.S. border. Immigration and Customs Enforcement (ICE), the enforcement component agency under the U.S. Department of Homeland Security (DHS), is nevertheless detaining children in questionable conditions, and there is still litigation surrounding the Flores Settlement. This paper contends that the three family detention facilities—South Texas Family Residential Center in Dilley, Texas,<sup>14</sup> Karnes County Residential Center in Karnes City, Texas,<sup>15</sup> and Berks County Family Residential Center in Leesport, Pennsylvania—are operating in violation of the Flores Settlement, the Fifth Amendment Due Process Clause, and the Immigration and Nationality Act (INA). To detain families in a lawful manner would require drastic and unfeasible changes to the current system in place. Part II will give a background on the demographics of the families in detention and the families' experiences within the three detention facilities; Part III will analyze the legality of family detention; and Part IV will argue that the use of alternatives to detention are better suited for enforcing U.S. immigration laws.

## II. FAMILY DETENTION: IMPRISONMENT OF ASYLUM-SEEKING MOTHERS AND THEIR CHILDREN

In 2014 there was a surprising resurgence of family detention.<sup>16</sup> DHS established a new 2,400-bed facility for mothers and their children in Dilley, Texas soon after it closed the highly controversial family detention facility in Artesia, Texas by its own accord.<sup>17</sup> ICE generally utilizes four types of facilities to detain immigrants: ICE-owned and operated facilities;<sup>18</sup> contract detention facilities; local and state facilities housing criminal inmates from whom ICE rents bed space under an intergovernmental service agreement (IGSA); and Bureau of Prisons facilities.<sup>19</sup> Today, Corrections Corporation of America (CCA) is DHS's largest contract.<sup>20</sup> CCA runs thirty-seven percent of all private prisons in the United States and has annual revenue of over \$1.7 billion, making it the largest private prison company in the country.<sup>21</sup> GEO Group, Inc.

<sup>13</sup> Stipulated Settlement Agreement, *Flores v. Reno*, Case No. CV 85-4544-RJK(Px) (C.D. Cal. 1997), [http://www.aclu.org/files/pdfs/immigrants/flores\\_v\\_meese\\_agreement.pdf](http://www.aclu.org/files/pdfs/immigrants/flores_v_meese_agreement.pdf).

<sup>14</sup> CCA FACILITY FINDER, <http://www.cca.com/locations> (last visited April 30, 2016).

<sup>15</sup> See generally GEO'S OPERATIONAL RECORD ON IMMIGR., [https://www.geogroup.com/Industry\\_leading\\_Standards](https://www.geogroup.com/Industry_leading_Standards) (last visited Sept. 22, 2016).

<sup>16</sup> DETENTION WATCH NETWORK, FAMILY DETENTION BACKGROUND (2015), <https://www.detentionwatchnetwork.org/sites/default/files/DWN%20Family%20Detention%20Backgrounder%20and%20Talking%20Points.pdf>.

<sup>17</sup> *Id.*

<sup>18</sup> ICE-owned and operated facilities are also called service-processing centers. U.S. IMMIGR. & CUSTOMS ENFT., SEMI-ANNUAL REPORT ON COMPLIANCE WITH ICE NATIONAL DETENTION STANDARDS (2007), <https://www.ice.gov/doclib/about/offices/opr/pdf/semiannual-dmd.pdf> at 3.

<sup>19</sup> U.S. DEP'T OF JUSTICE, FINANCING DETENTION FACILITIES (2009), <http://www.justice.gov/archive/ofdt/ofdt-handbook-20090422.pdf>.

<sup>20</sup> See generally CCA FACILITY FINDER, <http://www.cca.com/locations> (last visited April 22, 2016).

<sup>21</sup> See Press Release, Correction Corporations of America, Updates Full-Year 2015 Guidance at 7 (Nov.4 2015), <http://www.cca.com/press-releases?section=Investors>.

(GEO) is the country's second largest for-profit private detention company in the United States and runs 22% of the private prisons in the country.<sup>22</sup>

There are currently three family detention facilities: CCA runs the facility in Dilley,<sup>23</sup> GEO runs the facility in Karnes,<sup>24</sup> and Berks County runs its facility through an IGSA with ICE.<sup>25</sup> The Berks facility is the smallest but oldest facility.<sup>26</sup> The Berks facility was once a nursing home but opened up as a family detention center in 2001 with 85 beds.<sup>27</sup> The facility in Dilley was formerly an oil field worker camp and is the largest family detention facility, with the capacity to house 2,400 people.<sup>28</sup> The Karnes County facility was once a prison and can accommodate up to 532 people.<sup>29</sup>

The administration's justification for family detention is paradoxical. An ICE press release stated, "[Family detention] facilities will help ensure more timely and effective removals that comply with our legal and international obligations, while deterring others from taking the dangerous journey and illegally crossing into the United States."<sup>30</sup> Additionally, DHS Secretary Jeh Johnson asked the Senate Committee on Appropriations for support on "an aggressive deterrence strategy focused on the removal and repatriation of recent border crossers."<sup>31</sup> These public statements make clear that the administration presumed that using detainment as a means of deterrence was lawful and appropriate. In the 2006 appropriations bill, Congress included more funding for family detention.<sup>32</sup> Congress argued that family detention gave mothers the option to keep their family units in tact in detention instead of remaining in detention alone while government placed their children with a relative or the Office of Refugee Resettlement.<sup>33</sup> The 2006 appropriations bill notes that the Appropriations Committee would rather ICE use

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<sup>22</sup> GEO'S OPERATIONAL RECORD, [https://www.geogroup.com/Industry\\_leading\\_Standards](https://www.geogroup.com/Industry_leading_Standards) (last visited Sept. 22, 2016).

<sup>23</sup> CCA FACILITY FINDER, <http://www.cca.com/locations> (last visited April 30, 2016).

<sup>24</sup> *Karnes County Residential Center*, The GEO Group, Inc., <https://www.geogroup.com/FacilityDetail/FacilityID/58> (last visited Sept. 6, 2017).

<sup>25</sup> COUNTY OF BERKS, *About Department*, <http://www.co.berks.pa.us/Dept/BCRC/Pages/AboutDepartment.aspx> (last visited April 22, 2016).

<sup>26</sup> *Id.*

<sup>27</sup> The Nakamoto Inc., *Berks Family Residential Center: Biannual Compliance Review Report* (2009), <https://www.ice.gov/doclib/foia/dfra-ice-dro/compliancereportberksfamilyresidentialcenter0714172008.pdf> (last modified Feb. 27, 2009).

<sup>28</sup> See Press Release, Immigration and Customs Enforcement, ICE's New Family Detention Center in Dilley, Texas to Open in December (Nov. 17, 2014), <https://www.ice.gov/news/releases/ices-new-family-detention-center-dilley-texas-open-december#wcm-survey-target-id>; see also Will Weissert, *South Texas Immigration Detention Center Set to Open*, CBS NEWS (Dec. 15, 2014), <http://www.cbsnews.com/news/south-texas-immigration-detention-center-set-to-open/>.

<sup>29</sup> THE GEO GROUP, INC., <https://www.geogroup.com/FacilityDetail/FacilityID/58>.

<sup>30</sup> Press Release, Immigration and Customs Enforcement, ICE to Open Additional Facility in South Texas to House Adults with Children (Sept. 21, 2014), <http://www.ice.gov/news/releases/ice-open-additional-facility-south-texas-house-adults-children>.

<sup>31</sup> Jeh Johnson, Sec'y, Homeland Security, Statement to Senate Committee Appropriations Committee (July 10, 2014), *in* <https://www.dhs.gov/news/2014/07/10/statement-secretary-homeland-security-jeh-johnson-senate-committee-appropriations>.

<sup>32</sup> H.R. REP. NO. 109-79, at 38 (2006), <https://www.congress.gov/109/crpt/hrpt79/CRPT-109hrpt79.pdf>.

<sup>33</sup> *Id.*

alternatives to detention, but the Committee nevertheless funded family detention—thus reluctantly, yet explicitly, supporting the use family detention.<sup>34</sup>

The vast majority of the families in the detention facilities are fleeing gang violence in Central America and seeking political asylum in the United States. Asylum officers from U.S. Citizenship and Immigration Services (USCIS), the service component agency under DHS, are responsible for making the determination of an asylum applicant's credible fear of persecution in their home country. As of January 27, 2015, asylum officers have conducted 2,625 Credible Fearing Interviews (CFI) at family detention facilities, and 69% of families have successfully established they have a credible fear of returning to their country of origin.<sup>35</sup> Most of the women and children in the detention facilities are either from El Salvador, Guatemala, or Honduras.<sup>36</sup> El Salvador has the highest rate of gender-based violence against women in the world.<sup>37</sup> Guatemala and Honduras follow closely behind, ranking third and seventh, respectively.<sup>38</sup> Guatemala and El Salvador also have the highest rates of child murder in the world.<sup>39</sup> The families' fears of returning to Central America are genuine and justified. The May 2015 statistics USCIS released show that from January through March 2015, 88% of families in detention proved that they had a credible fear of persecution in their home country and passed their CFI.<sup>40</sup> A desolate testament to the legitimacy of the asylum applications is the fact that, since 2014, roughly 80 people DHS deported were murdered after their return to Guatemala, Honduras, or El Salvador.<sup>41</sup>

While in detention, families have a difficult time communicating with attorneys. Less than 30% of the families in detention have legal representation.<sup>42</sup> All three of the detention facilities are located in rural locations, making access to them from neighboring cities cumbersome.<sup>43</sup> Making calls from the facilities is also an obstacle, with phone calls costing over one dollar a minute in the Karnes facility.<sup>44</sup> Additionally, the facilities do not allow family members and attorneys to call the facility to speak with the detainees.<sup>45</sup> Attorneys in Dilley have reported encountering

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<sup>34</sup> *Id.*

<sup>35</sup> U.S. CITIZENSHIP & IMMIGR. SERV., ASYLUM AND CREDIBLE FEAR DATA (2015), <http://www.uscis.gov/sites/default/files/USCIS/Outreach/PED-CF-RF-family-facilities-Jul2014-Jan2015.pdf>.

<sup>36</sup> GENEVA DECLARATION, *Global Burden of Armed Violence 2011*, 119 [http://www.genevadeclaration.org/fileadmin/docs/GBAV2/GBAV2011\\_CH4\\_rev.pdf](http://www.genevadeclaration.org/fileadmin/docs/GBAV2/GBAV2011_CH4_rev.pdf).

<sup>37</sup> *Id.* at 120.

<sup>38</sup> *Id.*

<sup>39</sup> UNICEF, *Hidden in Plain Sight: A statistical analysis of violence against children* 37 (2014), [http://files.unicef.org/publications/files/Hidden\\_in\\_plain\\_sight\\_statistical\\_analysis\\_EN\\_3\\_Sept\\_2014.pdf](http://files.unicef.org/publications/files/Hidden_in_plain_sight_statistical_analysis_EN_3_Sept_2014.pdf).

<sup>40</sup> U.S. CITIZENSHIP & IMMIGR. SERVS., USCIS ASYLUM DIVISION FAMILY FACILITIES REASONABLE FEAR (2015), <https://www.uscis.gov/sites/default/files/USCIS/Outreach/PED-CF-RF-family-facilities-FY2015Q2.pdf>.

<sup>41</sup> Esther Yu-Hsi Lee, *6 Facts That Erase Any Doubt U.S. Officials Know They Are Deporting People To Their Deaths*, THINKPROGRESS (Feb. 6, 2016), <http://thinkprogress.org/immigration/2016/02/06/3746646/us-refugees-central-america/>

<sup>42</sup> TRACIMMIGRATION, REPRESENTATION IS KEY IN IMMIGRATION PROCEEDINGS INVOLVING WOMEN WITH CHILDREN (2015), <http://trac.syr.edu/immigration/reports/377/>.

<sup>43</sup> See Tracy Huling, *Building A Prison Economy In Rural America*, THE NEW PRESS 1, 2 (2002) (discussing the trend of building prisons in rural areas), [http://www.prisonpolicy.org/scans/huling\\_chapter.pdf](http://www.prisonpolicy.org/scans/huling_chapter.pdf).

<sup>44</sup> Letter from Ranjana Natarajan, C.R. Clinic Dir., The U. of Tex. Sch. of L., to ICE Directors, 2 (Sept. 25, 2014) [http://www.maldef.org/assets/pdf/2014-09-25\\_ICE\\_Letter\\_re\\_Karnes\\_Conditions.pdf](http://www.maldef.org/assets/pdf/2014-09-25_ICE_Letter_re_Karnes_Conditions.pdf).

<sup>45</sup> *Id.*

peculiar obstacles while attempting to meet with detainees.<sup>46</sup> Attorneys were required to undergo clearance checks to enter the Dilley facility, including a volunteer who previously visited the Karnes facility and the West Wing of the White House.<sup>47</sup> Another attorney was kept from entering the Dilley family facility—a facility filled with women and children—because her heels were too high.<sup>48</sup> When she inquired again, the guard said her heels were fine but that her blouse was too sheer.<sup>49</sup> When she requested to read the facility dress code, the guards refused to show her a copy.<sup>50</sup> An attorney with clients at the Berks facility has also complained of cumbersome policy. The Berks facility has a policy that requires attorneys to make an appointment—with a list of all the clients they wish to meet with—days in advance of their trip to the facility.<sup>51</sup> The requirement prevents attorneys from meeting with new detainees and from providing quick and flexible service to clients upon their case status updates.<sup>52</sup> Although 30% of families with attorneys were able to avoid deportation, ICE has deported nearly a 100% of all families without an attorney.<sup>53</sup> Ultimately, going through this process without an attorney is unfeasible.

Detention facilities are not ideal for raising children. Families are sleep deprived, because, in both Berks and Dilley, guards will conduct room checks at least every half hour, 24 hours a day.<sup>54</sup> When conducting the room check, the guards shine their flashlight in the room, waking anyone who is sensitive to light while they sleep.<sup>55</sup> The guards are predominately male and have no childcare background, yet they are often tasked with the duty to watch the children while their mothers are away.<sup>56</sup> Complaints of the Karnes facility unveiled the facility's poor meal planning. Karnes has rigid meal times that are not conducive to the sporadic eating habits of the children in its care.<sup>57</sup> Also, the food Karnes serves is often too spicy for children.<sup>58</sup>

The medical services at the facilities are not adequate for asylum seeking children and their parents. Five families who were detained in family detention facilities have filed a tort claim against the U.S. government for \$10 million in damages for gross negligence because of the limited medical services available at Dilley facility, which led to issues ranging from depression

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<sup>46</sup> Pet'rs' Ex. at 23-24, *Flores v. Johnson*, No. CV 04544-DMG-AGR, (C.D. Cal. 2015), <http://www.aila.org/File/Related/15082320f.pdf>.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Pet'rs' Ex. at 31, *Flores v. Johnson*, No. CV 04544-DMG-AGR, (C.D. Cal. 2015), <http://www.aila.org/File/Related/15082320f.pdf>.

<sup>52</sup> *Id.*

<sup>53</sup> TRACIMMIGRATION, REPRESENTATION MAKES FOURTEEN-FOLD DIFFERENCE IN OUTCOME: IMMIGRATION COURT "WOMEN WITH CHILDREN" CASES (2015), <http://trac.syr.edu/immigration/reports/396/>.

<sup>54</sup> See generally Sister Kathleen Erickson, *Detention of Women, Children Must End Says Catholic Sister*, CHRISTIAN POST (June 10, 2015), <http://www.christianpost.com/news/detention-of-women-children-must-end-says-catholic-sister-140253/#dy3Z5XMi78xXdd03.99>; HUMAN RIGHTS FIRST, FAMILY DETENTION IN BERKS COUNTY, PENNSYLVANIA, at 2 (2015), <http://www.humanrightsfirst.org/sites/default/files/HRF-Family-Det-Penn-rep-final.pdf>.

<sup>55</sup> See Erickson, <http://www.christianpost.com/news/detention-of-women-children-must-end-says-catholic-sister-140253/#dy3Z5XMi78xXdd03.99>; HUMAN RIGHTS FIRST, at 2.

<sup>56</sup> Natarajan, at 2.

<sup>57</sup> Natarajan, at 1-2.

<sup>58</sup> Natarajan, at 1.

to miscarriage.<sup>59</sup> Unrelated to the lawsuit, the medical staff at Dilley made another detrimental mistake in 2015 when it gave 250 children an adult dosage of the hepatitis A vaccine.<sup>60</sup> The mothers at the Karnes and Berks facility have also complained of the inadequacies of the medical care.<sup>61</sup> The facility in Karnes does not have an on-site doctor or practitioners who can handle larger medical issues such as chronic ailments.<sup>62</sup> The facility in Berks was found to prescribe only water to children with fevers and yogurt to children experiencing weight-loss issues; children not experiencing weight-loss issues did not get yogurt on a regular basis.<sup>63</sup>

Cognitive development suffers when children are raised in detention. Studies show that weight-loss, depression, post-traumatic stress disorder (PTSD), stunted language development, regressive behavior, suicidal thoughts, and other behavioral issues are common amongst children in detention.<sup>64</sup> Affidavits from the Berks and Dilley facilities seem to support those studies findings: In both facilities, weight-loss, depression and anxiety are more common than not.<sup>65</sup> The Karnes facility prohibits many activities beneficial to child development.<sup>66</sup> Children at Karnes cannot play with toys in the living quarters.<sup>67</sup> Parents at Karnes must hold their infants at all times, because Karnes prohibits crawling.<sup>68</sup> Karnes does not provide any educational opportunities for children under the age of four.<sup>69</sup> Children over the age of 13 are often placed in different living quarters than their mothers at Karnes.<sup>70</sup> This type of separation is known to leave lifelong negative psychological effects.<sup>71</sup> Studies show the long-term mental health effects of detention on children are anxiety, nightmares, and poor academic performance.<sup>72</sup>

In general, detention exacerbates the mental health issues in all asylum seekers.<sup>73</sup> Asylum seekers typically enter detention after having experienced trauma in their country of origin and, not uncommonly, on their journey to the United States.<sup>74</sup> An Australian study showed that all

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<sup>59</sup> Pet'rs' Compl., [10 Undisclosed Parties] v. U.S. Dep't of Homeland Sec. (2015), <http://big.assets.huffingtonpost.com/claims.pdf> (submitting a complaint for a class action tort suit).

<sup>60</sup> See Jason Buch, *Children at Dilley Immigration Detention Center Get Adult Dose of Vaccine*, MYSA (July 4, 2015), <http://www.mysanantonio.com/news/local/article/Children-at-Dilley-immigration-detention-center-6365815.php>; see also Pet'rs' Ex. at 19-20 (describing medical mishaps at Dilley).

<sup>61</sup> Natarajan, at 3; see generally HUMAN RIGHTS FIRST, at 2 .

<sup>62</sup> *Id.*

<sup>63</sup> HUMAN RIGHTS FIRST, at 8.

<sup>64</sup> Janet Cleveland, Cécile Rousseau, & Rachel Kronick, *The harmful effects of detention and family separation on asylum seekers' mental health in the context of Bill C-31 4* (2012), [https://www.csssdelamontagne.qc.ca/fileadmin/csss\\_dlm/Publications/brief\\_c31\\_final.pdf](https://www.csssdelamontagne.qc.ca/fileadmin/csss_dlm/Publications/brief_c31_final.pdf)

<sup>65</sup> See generally HUMAN RIGHTS FIRST, HEALTH CONCERNS AT THE BERKS FAMILY DETENTION CENTER, (2016) <http://www.humanrightsfirst.org/sites/default/files/HRF-Berks-Brief-final.pdf>; Pet'rs' Compl., [10 Undisclosed Parties] v. U.S. Dep't of Homeland Sec. (2015), <http://big.assets.huffingtonpost.com/claims.pdf> (submitting a complaint for a class action tort suit (alleging negligence in the Dilley detention facility).

<sup>66</sup> Natarajan, at 2.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Natarajan, at 3.

<sup>71</sup> Cleveland et al., at 4.

<sup>72</sup> *Id.*

<sup>73</sup> See generally *id.*

<sup>74</sup> *Id.*

asylum seekers were shown to exhibit high levels of PTSD and depression three years after being released.<sup>75</sup>

### III. THE LEGAL FRAMEWORK SHAPING FAMILY DETENTION

The government is detaining families in a manner that violates U.S. law. Although these families are attempting to enter the United States without inspection and without proper documentation, ICE should not place them in expedited removal and subject them to mandatory detention, because the families are asylum seekers. Supposing the families were not asylum seekers, family detention is nevertheless inappropriate, because there are no family detention facilities operating in a manner that complies with the Flores Settlement. None of the facilities have licenses to operate as family detention facilities, and, in general, none of the facilities are equipped to provide the care the particularly vulnerable and traumatized families they are detaining need. Moreover, the financial and procedural obstacles the detention facilities place on the families when the families attempt to contact people outside of the detention facility is a due process violation.

The government cannot lawfully use deterrence as a justification for family detention. In *Zadvydas v. Davis*, the Supreme Court observed that immigration detention could be justifiably used for migrants who pose a flight risk or are a danger to society, but only for a period reasonably necessary to secure the alien's removal after the initial 90-day removal period.<sup>76</sup> However, the Supreme Court in *Kansas v. Crane* reiterated that retribution or general deterrence are functions of criminal law and do not provide a valid justification for civil detention.<sup>77</sup> Civil detention is only permissible when a person demonstrates dangerous behavior that she is unable to control and that threatens public safety.<sup>78</sup> In *R.I.L.-R. v. Johnson*, ten mothers without criminal records and who had passed their CFI's brought suit against DHS for refusing bond after an ICE custody hearing.<sup>79</sup> The government conceded in press releases and Senate hearings that the increase in migrant detention, especially of families, was an attempt to deter undocumented migrants from making the journey to enter the United States through the U.S.-Mexican border.<sup>80</sup> The U.S. District Court for the District of Columbia confirmed that use of deterrence as a rationale for detaining families or as a factor in custody determinations is unconstitutional.<sup>81</sup> Thus, the government cannot claim the necessity to deter migration as a rationale for placing families or anyone not serving a criminal conviction sentence in detention. Deterrence is an unconstitutional reason to detain migrants or anyone in violation of civil law, because those types of violations cannot require punitive measures.

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<sup>75</sup> Cleveland et al., at 8.

<sup>76</sup> *Zadvydas v. Davis*, 533 U.S. 678, 690-91 (2001); see also *Chavez-Alvarez v. Warden York Cty. Prison*, 783 F.3d 469, 478 (3d Cir. 2015) (furthering restrictions of immigration detention).

<sup>77</sup> See *Kansas v. Crane*, 534 U.S. 407, 412 (2002) (discussing the justifications for civil commitment the constitution allows when deciding that a mentally disturbed sex offender should be committed indefinitely because he posed a threat to public safety).

<sup>78</sup> See *id.* at 412.

<sup>79</sup> *R.I.L.-R v. Johnson*, 80 F. Supp. 3d 164, 172 (D.D.C. 2015).

<sup>80</sup> *Id.* at 175.

<sup>81</sup> *Id.* at 190.

Deterrence is not that only issue surrounding family detention; there are more nuanced issues the courts have yet to fully explore. In order to determine the legality of family detention, this paper will analyze (A) the mandatory detention of asylum seekers entering without inspection; (B) the Flores Settlement and compliance issues; (C) licensing issues surrounding the detention of children; and (D) possible due process rights violations.

#### A. *Mandatory Detention of Asylum Seekers Entering Without Inspection*

Victims of inescapable domestic violence are eligible for political asylum.<sup>82</sup> In the *Matter of A-R-C-G- et al.*, the Board of Immigration Appeals (BIA) found that married women in Guatemala who are unable to leave their relationships are clearly identifiable members of a social group eligible for asylum or withholding of removal claims under sections 208(a) and 241(b)(3) of the INA found in title 8 of the United States Code in sections 1158(a) and 1231(b)(3).<sup>83</sup> The husband of the lead respondent in this case regularly physically and sexually abused her, but the police ignored her requests for help, claiming they did not want to interfere in marital matters.<sup>84</sup> This decision is important because it gives legitimacy to the asylum claims of the mothers in family detention that experienced daily abuse that their communities ignored because of cultural views on private family matters.

The original purpose of immigration detention was to ensure accountability in removal proceedings for non-citizens who pose a risk to public safety or are a flight risk, but immigration reform in the 1990s changed the language in the INA. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and the Antiterrorism and Effective Death Penalty Act (AEDPA) expanded the criteria for which non-citizens could become subject to mandatory detention — allowing for the government to place asylum seekers in mandatory detention.<sup>85</sup> Section 235 of the INA has language that comes directly out of IIRIRA & AEDPA:<sup>86</sup>

##### i. Conduct by asylum officers

An asylum officer shall conduct interviews of aliens referred under subparagraph (A)(ii), either at a port of entry or at such other place designated by the Attorney General.

##### ii. Referral of certain aliens

If the officer determines at the time of the interview that an alien has a credible fear of persecution (within the meaning of clause (v)), the alien shall be detained for further consideration of the application for asylum.

##### iii. Removal without further review if no credible fear of persecution

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<sup>82</sup> See generally *Matter of A-R-C-G- et al.*, 26 I&N Dec. 388 (BIA 2014), <https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/26/3811.pdf>.

<sup>83</sup> See *id.* at 388.

<sup>84</sup> See *id.* at 389.

<sup>85</sup> See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, §301, 110 Stat. 3009, 546 (1996); see also Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996).

<sup>86</sup> Compare AEDPA and IIRIRA with Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, § 235, 66 Stat. 163 (1952); 8 U.S.C. § 1225 (2017).

[...]

#### IV. Mandatory detention

Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed.<sup>87</sup>

The ambiguous language in section 235 of the INA allows for a broad interpretation of which asylum seekers are subject to mandatory detention. If an immigration officer determines that a migrant is inadmissible because she does not have suitable travel documents and is otherwise attempting to enter the United States without inspection, the officer must place the migrant in an expedited removal process without a hearing or review.<sup>88</sup> However, if the migrant seeks to apply for asylum or discloses a fear of persecution, the immigration officer will have to refer the detainee to an asylum officer.<sup>89</sup> The asylum officer will then conduct a CFI with the migrant to ensure asylum claim is legitimate.<sup>90</sup> The discrepancy in DHS's protocol comes from the ambiguity in sections 235(b)(1)(B)(ii), which discusses referral for further review of asylum application, and 235(b)(1)(B)(iii)(IV), which discusses mandatory detention of certain asylum seekers.<sup>91</sup> ICE has interpreted section 235 of the INA to require that it keep the migrants in detention upon establishment of credible fear, with discretion to parole into the United States, on a case-by-case basis, certain migrants who meet the standards outlined in title 8, section 212.5(b) of the Code of Federal Regulations (C.F.R.).<sup>92</sup>

The standards listed in 8 C.F.R. section 212.5(b) are easy to meet. Typically, ICE will only keep migrants who are a threat to public safety, as the release of anyone whose continued detention is not in the public interest is a justifiable parole.<sup>93</sup> Additionally, the code specifically states that ICE can release a juvenile with an accompanying relative who is in detention if ICE cannot locate a relative who is not in detention.<sup>94</sup> The regulations give ICE the discretion to either keep families who pass their CFI in detention or release them. However, the statutory language seems to favor release. Thus, ICE's choice to maintain families in detention seems problematic.

A majority of the families in detention are eligible for political asylum and should be promptly released from detention upon passing their CFI. Most of the women and children in family detention are fleeing the very real and gender-targeted violence in Guatemala, Honduras, and El Salvador. *Matter of A-R-C-G- et al.* confirmed that this type of gender-based violence creates eligibility for political asylum. Thus, the fact that 88% percent of families pass their CFI is unsurprising. What is surprising is that, upon approval of their CFI, ICE maintains many of the families in detention. Although ICE interprets section 235 of the INA to give them discretion when release is appropriate, the language of INA section 235(b)(1)(B)(iii)(IV), which states that,

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<sup>87</sup> INA, § 235 (b)(1)(B)(i) - (iii); 8 U.S.C.S. § 1225(b)(1)(B)(i)-(iii).

<sup>88</sup> See INA § 235; 8 U.S.C. § 1225; see also *United States v. Barajas-Alvarado*, 655 F.3d 1077, 1080 (9th Cir. 2011).

<sup>89</sup> See INA § 235, §212(a)(7); 8 U.S.C. §1182 (a)(7), §1225.

<sup>90</sup> INA § 235.

<sup>91</sup> INA § 235(b)(1)(B)(iii)(IV); 8 U.S.C. § 1225 (b)(1)(B)(iii)(IV).

<sup>92</sup> IMMIGR. & CUST. ENFT, PAROLE OF ARRIVING ALIENS FOUND TO HAVE A CREDIBLE FEAR OF PERSECUTION OR TORTURE (2009), [https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole\\_of\\_arriving\\_aliens\\_found\\_credible\\_fear.pdf](https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_aliens_found_credible_fear.pdf)

<sup>93</sup> 8 C.F.R. § 212.5(b)(5)(2011).

<sup>94</sup> 8 C.F.R. § 212.5(b)(3)(ii)(2011).

“Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution,” seems to favor release upon a finding of credible fear. Even supposing that the language of section 235 only gives the ability to release detainees if the criteria in 8 C.F.R. section 212.5(b) is met, ICE’s choice to maintain families in detention after an asylum officer made a finding of credible fear still seems inappropriate. 8 C.F.R. section 212.5(b) specifically states that release from detention is appropriate for people who do not pose a threat to public safety, are not a flight risk, and are either pregnant, a juvenile, or a relative of a juvenile without other relatives outside of detention or whose continued detention is of no public interest. 8 C.F.R. section 212.5(b) seems to apply directly to the vast majority of the families in family detention.

The regulations surrounding the treatment of asylum seekers should mitigate the fact that the families are entering the United State without inspection—behavior that typically leads to expedited removal and mandatory detention of non-asylum seekers. Every section of U.S. law on migration and detention seems to have an implicit reminder that detention was not intended for children and their mothers, especially not after a finding of credible fear of returning to their country of origin. By detaining families after the families have an approved CFI, DHS is arguably in violation of INA section 235 and 8 C.F.R. section 212.5(b).

### *B. Flores Settlement Compliance Failures*

There are certain guidelines that the government must meet when handling children as a result of the Flores Settlement: (1) Children must reside in facilities that are capable of providing basic child welfare needs such as education and healthcare; (2) U.S. law entitles children to release, and ICE must release children without “unnecessary delay;” (3) children cannot reside in adult detention facilities or with unrelated adults and delinquent offenders; (4) when release is not an option, DHS should hold children in the least restrictive setting and favor shelters over detention facilities; (5) children must reside in facilities that have licenses; (6) DHS must allow minors to contact the family members they were detained with; and (7) minors must have access to attorney-client visits.<sup>95</sup> Although Jenny Flores was an unaccompanied minor, the Central District of California ruled that the Flores Settlement applies to all children faced with detention.<sup>96</sup> The licensing and attorney-client requirements bring about larger legal issues, which this paper will discuss in sections (C) and (D).

The Flores Settlement has been successful at closing family detention facilities in the past. CCA operated the 600-bed, T. Don Hutto Family Residential Facility.<sup>97</sup> The Hutto facility was a former medium-security prison in Taylor, Texas, and it operated as a family detention facility from May 2006 until August 2009.<sup>98</sup> The ACLU and University of Texas School of Law

<sup>95</sup> See Stipulated Flores Settlement Agreement, *Flores v. Reno*, Case No. CV 85-4544-RJK(Px) (C.D. Cal. 1997) [http://www.aclu.org/files/pdfs/immigrants/flores\\_v\\_meese\\_agreement.pdf](http://www.aclu.org/files/pdfs/immigrants/flores_v_meese_agreement.pdf).

<sup>96</sup> Order of Compliance, *Flores v. Johnson*, No. CV 04544-DMG-AGR, 5 (C.D. Cal. 2015), <http://www.aila.org/infonet/district-court-finds-dhs-breach-flores-agreement>; see also *Flores v. Lynch*, 2015 U.S. Dist. LEXIS 112911, 3 (C.D. Cal. 2015) <http://www.aila.org/File/Related/14111359p.pdf>.

<sup>97</sup> See generally Settlement Agreement, *In re Hutto Family Detention Center*, No. A-07- CA-164-SS, [https://www.aclu.org/files/pdfs/immigrants/hutto\\_settlement.pdf](https://www.aclu.org/files/pdfs/immigrants/hutto_settlement.pdf).

<sup>98</sup> Nina Bernstein, *U.S. to Reform Policy on Detention for Immigrants*, N.Y. TIMES, (Aug. 5, 2009) [http://www.nytimes.com/2009/08/06/us/politics/06detain.html?\\_r=0](http://www.nytimes.com/2009/08/06/us/politics/06detain.html?_r=0).

Immigration Clinic brought a suit against the Hutto facility for violating every provision of the Flores Settlement: Children wore prison uniforms, were detained in small cells, did not have access to suitable medical and mental healthcare, did not have sufficient educational opportunities, and were inappropriately disciplined and threatened by guards.<sup>99</sup> The suit resulted in the Hutto Agreement, which set improvement standards.<sup>100</sup> Because the detention facility failed to implement the standards, it was forced to close.<sup>101</sup>

In July 24, 2015, the Central District of California confirmed the validity of the Flores Settlement requirements and ordered DHS to comply with the Flores Settlement in family detention facilities, but the government is currently fighting this order.<sup>102</sup> Losing the motion to reconsider, the government has appealed to the United States Court of Appeals for the Ninth Circuit.<sup>103</sup> None of the three facilities are in the Ninth Circuit. Be that as it may, if either party appeals the Ninth Circuit decision to the Supreme Court, the Supreme Court may be able to finally settle the question of whether or not family detainment can be done in a manner that does not violate the Flores Settlement.

None of the three detention facilities are capable of providing children with the care they need to develop mentally; this deficit is more than unfortunate or unfair—it is a violation of the Flores Settlement and unlawful. Assuming the children had not experienced traumatic events before residing in one of the three family detention facilities, the facilities provide a less than ideal educational setting for the children. Although the children are attending classes, the education the children receive is subpar, because the classes are not age specific and not cognizant of the children's diverse language needs. The lack of educational resources will lead to poor academic performances compared to children raised outside of detention. Studies confirm that former detainees go on to perform poorly in academic settings.<sup>104</sup> Detention facilities are not equipped to provide the age-appropriate educational environment actual schools are able to provide. Additionally, these children have undergone traumatic experiences, meaning that even if the detention facilities were able to meet the minimum requirements of an actual school, it would still be insufficient to meet the needs of these particularly vulnerable, traumatized children, many of whom have diverse linguistic and cultural needs.

Detention is detrimental to the mental development of a child, especially one seeking asylum. Although the detention facilities have access to psychologists and chaplains, the stress and discomfort of detention only exacerbates the various mental health issues these children are experiencing as a result of the tumultuous and distressing experiences they had before arriving at one of the facilities. The psychological harm the children experience as a result of their detainment is a strong indicator that the detention facilities are in violation of the Flores

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<sup>99</sup> See Hutto Settlement Agreement, No. A-07- CA-164-SS.

<sup>100</sup> See generally *id.*

<sup>101</sup> Bernstein, [http://www.nytimes.com/2009/08/06/us/politics/06detain.html?\\_r=0](http://www.nytimes.com/2009/08/06/us/politics/06detain.html?_r=0).

<sup>102</sup> See generally Order of Compliance, *Flores v. Johnson*, No. CV 04544-DMG-AGR, 5 (C.D. Cal. 2015), <http://www.aila.org/infonet/district-court-finds-dhs-breach-flores-agreement>; see also *Flores v. Lynch*, 2015 U.S. Dist. LEXIS 112911, 3 (C.D. Cal. 2015), <http://www.aila.org/File/Related/14111359p.pdf>.

<sup>103</sup> See Appellant's Br., *Flores v. Lynch*, 2015 U.S. Dist. LEXIS 112911, (C.D. Cal. Aug. 21, 2015), <http://www.aila.org/File/Related/14111359s.pdf>.

<sup>104</sup> Cleveland et al., at 5.

Settlement, because the facilities cannot provide the proper mental healthcare the children need for their wellbeing.

None of the three detention facilities are capable of providing children with the care they need to be physically healthy, which is another example of how the detention facilities are unable to comply with the Flores Settlement. Reports from all three facilities show negligent behavior ranging from incorrect vaccinations at Dilley, fevers being treated with water at Berks, to general inability to address any chronic ailments at Karnes. In order to comply with the Flores Settlement, the facilities need to provide basic healthcare to the detainees. Considering the complaints of the poor healthcare each facility is providing, the facilities are likely failing to comply with the healthcare requirement of the Flores Settlement. Dilley, possibly because of its size, is without question failing to comply with the Flores Settlement, as it disastrously provided children with incorrect vaccinations last year and is in the process of being sued for other negligent behavior dealing with detainee medical services.

Detention facilities are overly restrictive for children. The children in detention facilities are asylum seekers, not juvenile delinquents. The Flores Settlement took the children's innocence into account when it prohibited the restrictive detainment of children. In prohibiting babies from crawling, children from playing with toys in their living quarters, and enforcing a strict meal regiment, the Karnes facility is violating the requirement of the Flores Settlement calling for a nonrestrictive environment. Although there is no official record, similar restrictions are likely enforced at Dilley and Berks as well. Additionally, there is record of children older than 13 being separated from their mothers and detained with strangers. This, too, is a violation of the Flores Settlement that occurs at Karnes.

The Ninth Circuit will likely agree with the lower court and require the government to comply with the Flores Settlement as interpreted by the California District Court. Immigration detention, especially family detention, is not meant to be punitive or prison-like. Yet, ICE chose to contract with two private prison companies and make an IGSA with an entity accustomed to running prisons. The Berks facility opened four years after the release of the Flores Settlement in 1997 and was the government's first, and arguably most genuine attempt to comply with the terms of the Flores Settlement. Should the California District Court Order appeal ever make its way to the Supreme Court, the Court would likely rule in favor of enforcing the Flores Settlement, which could possibly result in the termination of family detention.

### *C. Licensing*

The Flores Settlement requires that all facilities housing children be licensed. Currently, none of the facilities have proper licenses to detain children, and the issuing bodies will likely reject their applications. While the appeal to the California District Court's order to comply with the Settlement is pending, the facilities are operating without licenses. However, all three of the detention facilities are attempting to obtain a license in case they lose the appeal. The Berks facility had a license that expired in February 2016 and must now have the Pennsylvania Department of Human Services issue a new license for the facility. The facilities in Karnes and Dilley have never had any license to detain children and their parents but are now attempting to acquire one from the Department of Family and Protective Services (DFPS) in Texas.

The DFPS is the childcare facility licensing body in Texas; the DFPS sets out rigid requirements for the facilities it licenses.<sup>105</sup> DFPS must abide by the Texas Administrative Code (TAC), which sets out basic requirements for childcare facilities, including medical standards, nutrition standards, and activity requirements.<sup>106</sup> The TAC highlights the importance of age-appropriate food, an adequate variety of food options, and providing a menu of the meal options.<sup>107</sup> The TAC requires that infants have the opportunity to crawl and take naps.<sup>108</sup> The TAC requires that toddlers have the daily opportunities for outdoor play and for the development of thinking skills, language, and self-help skills.<sup>109</sup> The TAC mandates that facilities provide nutritional counseling for pregnant women.<sup>110</sup> The DFPS does provide resources to help child care providers understand and meet its licensing standards.<sup>111</sup>

The facilities in Karnes and Dilley will likely not be able to meet the DFPS licensing standards, even with DFPS consulting on necessary changes. Although the Dilley facility, a former oil field worker camp, has the structural resources to meet all of the licensing requirements, its history of providing medical services to detainees is abhorrent.<sup>112</sup> The facility is notorious for the negligent and dangerous medical services it provides the children in the facility. The Karnes facility, a former prison, does not even have the structural benefits of Dilley. Many of the policies at Karnes are in direct conflict with the TAC's minimum requirements, let alone DFPS's licensing requirements. The detainees at Karnes are also often complaining of inadequate medical care. The Karnes facility prohibits infants from crawling—a direct violation of the TAC.<sup>113</sup> Karnes, as it operates now, is unable to comply with the statutory requirement of providing toddlers with proper educational opportunities because it offers no opportunities to children under the age of four.<sup>114</sup> Karnes meeting the minimum statutory requirements for providing age-appropriate nutritional food is unlikely as well considering that there are many reports of children at Karnes losing weight because the food is too spicy for children and the children do not receive many snacks, if any.<sup>115</sup>

The Berks County Family Residential Center will likely not be able to regain its licensing agreement with the Pennsylvania Department of Human Services. The Pennsylvania Department of Human Services sent a letter to officials at the Berks facility notifying them that the facility has until February 2016 to stop detaining families or it will revoke the facility's license.<sup>116</sup> The

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<sup>105</sup> TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES, 2015 ANNUAL REPORT, [http://www.dfps.state.tx.us/About\\_DFPS/Data\\_Books\\_and\\_Annual\\_Reports/2015/Interactive\\_Version/CCL/default.asp](http://www.dfps.state.tx.us/About_DFPS/Data_Books_and_Annual_Reports/2015/Interactive_Version/CCL/default.asp).

<sup>106</sup> 40 TAC § 748.1531 (2017).

<sup>107</sup> 40 TAC §§ 748.1693, 748.1703 (2007).

<sup>108</sup> 40 TAC § 748.1759 (2007).

<sup>109</sup> 40 TAC § 748.1795 (2007).

<sup>110</sup> 40 TAC § 748.1821 (2007).

<sup>111</sup> TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES, TEXAS CHILD CARE LICENSING (CCL), [http://www.dfps.state.tx.us/child\\_care/](http://www.dfps.state.tx.us/child_care/).

<sup>112</sup> *See generally* Pet'rs' Ex. at 19-20.

<sup>113</sup> *Compare* Natarajan, at 2 *with* 40 TAC § 748.1759 (2007).

<sup>114</sup> *Compare* Natarajan, at 2 *with* 40 TAC § 748.1795 (2007).

<sup>115</sup> *Compare* Natarajan, at 2 *with* 40 TAC §§ 748.1693, 748.1703 (2007).

<sup>116</sup> Letter from Matthew J. Jones, Director, Pennsylvania Department of Human Services to Diane Edward, Executive Director, Berks County Residential Center (Jan, 27, 2016), <http://www.aila.org/infonet/letter-revoking->

Berks facility's original license only allowed for the housing of children; thus, the Pennsylvania Department of Human Services felt that the detainment of families was outside of the license's scope.<sup>117</sup> The Berks facility is remaining open pending the determination of its appeal to the Pennsylvania Department of Human Services.<sup>118</sup>

#### D. Due Process

The Fifth Amendment Due Process Clause entitles all people within the United States to their legal rights.<sup>119</sup> In situations where the risk of erroneous deprivation exists, courts customarily use the three-prong *Mathews v. Eldridge* test to determine if a due process violation is present. Under this test, the courts look at (1) the private interest at stake in the administrative action; (2) the risk of an erroneous deprivation of this interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirements would entail.<sup>120</sup> A court has yet to apply this due process right to migrants in the form of government appointed counsel for an immigration proceeding.<sup>121</sup>

Courts have heavily disputed the extension of the Sixth Amendment right to counsel through the Fifth Amendment Due Process Clause. The Supreme Court's decision in *Gideon v. Wainwright* established that the Sixth Amendment granted the right to a court-appointed attorney for all indigent persons in criminal proceedings.<sup>122</sup> In *In Re Gault*, the Supreme Court held that, because of the risk of physical deprivation of liberty, the Fifth Amendment Due Process Clause—as opposed to the Sixth Amendment right to counsel—entitles defendants to a court-appointed attorney even in juvenile delinquency proceedings. However, indigent non-citizens in immigration proceedings do not have the right to a government-provided attorney, even when faced with certain detainment and risk of deportation.<sup>123</sup> In *Perez-Funez v. District Director*, the California District Court even refused to extend that right to unaccompanied minors.<sup>124</sup> However, the Supreme Court has acknowledged that deportation is a severe punishment.<sup>125</sup>

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berks-county-residential-license?utm\_source=Recent%20Postings%20Alert&utm\_medium=Email&utm\_campaign=RP%20Daily.

<sup>117</sup> *Id.*

<sup>118</sup> *Berks Immigrant Detention Center Will Begin Operating Without a License*, FOX NEWS (Feb. 23, 2016), <http://latino.foxnews.com/latino/news/2016/02/23/berks-immigrant-detention-center-will-begin-operating-without-license/print>.

<sup>119</sup> *Padilla v. Kentucky*, 130 S.Ct. 1473, 1481 (2010) (“We have long recognized that deportation is a particularly severe ‘penalty’”) (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893)).

<sup>120</sup> *Mathews v. Eldridge*, 424 U.S. 319 (1976).

<sup>121</sup> *Cf. Gonzalez Machado v. Ashcroft*, No. CS-01-0066-FVS at 13 (E.D. Wash. June 18, 2002) (granting Motion to Dismiss); *Perez-Funez v. District Director*, 619 F. Supp. 656 (C.D. Cal. 1985) (finding that the government's practices in obtaining voluntary departure agreements from unaccompanied children violated due process, but also noting that unaccompanied children do not have a right to appointed counsel).

<sup>122</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).<sup>[17]</sup>

<sup>123</sup> INA § 292; 8 U.S.C. § 1362; *see also* INA § 240 (b)(4)(A); 8 U.S.C. § 1229a (b)(4)(A) (explaining how administrative detention of immigrants differs from criminal detention).

<sup>124</sup> *Cf. Gonzalez Machado v. Ashcroft*, No. CS-01-0066-FVS at 13 (E.D. Wash. June 18, 2002) (Granting Motion to Dismiss) [https://www.splcenter.org/sites/default/files/d6\\_legacy\\_files/gonzalezvashcroft\\_dismissal.pdf](https://www.splcenter.org/sites/default/files/d6_legacy_files/gonzalezvashcroft_dismissal.pdf); *Perez-Funez v. District Director*, 619 F. Supp. 656 (C.D. Cal. 1985).

<sup>125</sup> *Padilla v. Kentucky*, 130 S.Ct. at 1481.

Although extending the right of a government appointed counsel in some situations, courts have refused to extend the right to free legal counsel to non-citizens in immigration proceedings. Immigrants do have an unequivocal right to paid counsel, however the distinction between criminal and immigration detention that denies migrants the right to free, court-appointed counsel is embedded in code.<sup>126</sup> Although courts have found children vulnerable enough to render the government's practices of obtaining voluntary departure agreements from unaccompanied children a violation of due process, that reasoning has yet to extend to granting unaccompanied children, let alone migrant families, the right to appointed counsel.<sup>127</sup>

The resources to fight detainment are necessary in the exercise of due process rights. All three of the family detention facilities are in rural locations where there is a low concentration of immigration attorneys, especially those with the capacity to take on cases pro bono. The Karnes facility charges over a dollar a minute to make a phone call, so calling attorneys can be an unaffordable task for many families. There is no indication that phone calls from Berks or Dilley are free.<sup>128</sup> Unsurprisingly, the vast majority of the families detained—70%—cannot find legal representation.<sup>129</sup> Supposing families in detention can overcome the challenges of affording an attorney or locating a pro-bono attorney, they are met with obstacles when attempting to meet their attorneys. Berks requires attorneys to make appointments with specific detainees before visiting the facility, and Dilley has attorneys and other legal representatives go through arbitrary obstacles to meet with their clients.<sup>130</sup> These obstacles are not merely an inconvenience or even simply a violation of one of the provisions of the Flores Settlement; to prevent a person from properly accessing their attorney is a due process right violation.

Forcing a detainee to navigate through the complexities of U.S. Immigration law without the viable option to receive assistance from professional counsel is a violation of that detainee's substantive due process rights. Applying the *Mathews* test, the first prong of the test is satisfied because an immigrant has a large private interest at stake in the administrative action when facing detention, deportation, and possibly even death upon arrival in her home country.<sup>131</sup> The second prong of the test is also satisfied because the detainment process does pose a risk of an erroneous deprivation of the immigrant's interest in her liberty and there are procedural safeguards—such as adequate representation or the switch to an alternative to detention—that would not deprive families of their liberty.<sup>132</sup> The last prong of the test examines the government's interest.<sup>133</sup> Providing adequate representation would create a fiscal burden to the government because the government would need to pay the attorneys, but it would alleviate administrative burdens because professional counsel would be more efficient in proceeding than *pro se* immigrants. Even if a finding of government appointed attorneys is not a due process

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<sup>126</sup> INA §§ 240 (b)(4)(A), 292; 8 U.S.C. §§ 1229a(b)(4)(A), 1362.

<sup>127</sup> Perez-Funez, 619 F. Supp. at 656; *see also* Gonzalez Machado, No. CS-01-0066-FVS at 17 (granting Motion to Dismiss).

<sup>128</sup> Natarajan, at 2.

<sup>129</sup> TRACIMMIGRATION, REPRESENTATION IS KEY IN IMMIGRATION PROCEEDINGS INVOLVING WOMEN WITH CHILDREN (2015), <http://trac.syr.edu/immigration/reports/377/>.

<sup>130</sup> Pet'rs' Ex. at 23-24.

<sup>131</sup> *See generally* Mathews v. Eldridge, 424 U.S. 319 (1976).

<sup>132</sup> *See generally id.*

<sup>133</sup> *See generally id.*

violation, the arbitrary obstacles families face in attempting to contact their attorneys is a due process violation.

#### IV. RECOMMENDATION

The families in detention are sympathetic, but opening U.S. borders and audaciously welcoming everyone into the United States is unfeasible. Accountability for who is permitted to enter the United States and enforcement of U.S. immigration laws is still needed. The detainment of families, however, is extreme and inhumane. Fortunately, there are highly effective alternatives to detention. In 2004, ICE executed the Alternative to Detention (ATD) program as an economical alternative to placing immigrants in detention, and the program has steadily grown.<sup>134</sup> In 2013, the average daily cost of the ATD program was \$10.55, which was substantially less expensive than the staggering \$158 average daily cost of detention in fiscal year 2013.<sup>135</sup>

Because ATD is less expensive than detention and nearly as effective, ATD is ideal for holding families accountable while their asylum process or removal proceedings are pending.<sup>136</sup> GEO, which runs the Karnes facility, owns Behavioral Interventions, which operates the Intensive Supervision Appearance Program (ISAP II).<sup>137</sup> ISAP II supervises participants through use of electronic ankle monitors, biometric voice recognition software, unannounced home visits, employer verification and in-person reporting.<sup>138</sup> In 2013, ISAP II supervised 40,613 people at an estimated cost of \$0.17 to \$17 per person per day.<sup>139</sup> Compliance rates for immigrants the court held deportable were 99.6% for court attendance and 79.4% for removal orders.<sup>140</sup> ISAP II is an example of a successful government contract for an ATD with formal monitoring programs that is far more appropriate than detention.<sup>141</sup> Additionally, a switch to ATD would alleviate fiscal and administrative burden, and it is ultimately ideal as a due process safeguard against the erroneous deprivation of liberty.

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<sup>134</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-26, ALTERNATIVES TO DETENTION: IMPROVED DATA COLLECTION AND ANALYSES NEEDED TO BETTER ASSESS PROGRAM EFFECTIVENESS (2014), <http://www.gao.gov/assets/670/666911.pdf>.

<sup>135</sup> U.S. DEP'T OF HOMELAND SEC., BUDGET-IN-BRIEF (2015), <https://www.dhs.gov/sites/default/files/publications/FY15BIB.pdf>; *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-26, ALTERNATIVES TO DETENTION: IMPROVED DATA COLLECTION AND ANALYSES NEEDED TO BETTER ASSESS PROGRAM EFFECTIVENESS (2014) (stating the average daily cost of a detention bed is \$158), <http://www.gao.gov/assets/670/666911.pdf>.

<sup>136</sup> U.S. DEP'T OF HOMELAND SEC., <https://www.dhs.gov/sites/default/files/publications/FY15BIB.pdf>;

<sup>137</sup> Press release, Business Wire, The GEO Group Awarded Contract by U.S. Immigration and Customs Enforcement for the Continued Provision of Services under Intensive Supervision and Appearance Program (Sept. 10, 2014), <http://www.businesswire.com/news/home/20140910005643/en/GEO-Group-Awarded-Contract-U.S.-%20Immigration-Customs#.VCzPTCtJNh5>.

<sup>138</sup> *Id.*

<sup>139</sup> Intensive Supervision Appearance Program II: Contract Year 2013 Annual Report (BI Incorp. 2013); U.S. DEP'T OF HOMELAND SEC., BUDGET-IN-BRIEF (2015).

<sup>140</sup> Intensive Supervision Appearance Program II: Contract Year 2013 Annual Report (BI Incorp. 2013); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-26, ALTERNATIVES TO DETENTION: IMPROVED DATA COLLECTION AND ANALYSES NEEDED TO BETTER ASSESS PROGRAM EFFECTIVENESS (2014).

<sup>141</sup> Intensive Supervision Appearance Program II: Contract Year 2013 Annual Report (BI Incorp. 2013)(stating that Behavioral Interventions (BI) operates GEO's detention alternative program, Intensive Supervision Appearance Program (ISAP II)).

## V. CONCLUSION

The South Texas Family Residential Center, Karnes County Residential Center, and Berks County Family Residential Center are operating in violation of the law. Subjecting the families to mandatory detention is at best a poor interpretation of section 235 of the INA. Additionally, all three facilities are in violation of the Flores Settlement, as none of them are able to provide adequate healthcare and education in a non-restrictive environment. Additionally, none of the facilities are properly licensed, which is a violation of the Flores Settlement and of local administrative law. Finally, all three facilities make communication with attorneys cumbersome—a violation of the Flores Settlement and a Fifth Amendment Due Process Right violation. Overall, there is likely not a lawful way to detain families. Thus, DHS should abandon the use of family detention in favor of alternatives to detention.