



4-2017

Child Prisoners: Asylum-Seeking Detainees in the U.S. and the Violation of the Flores Settlement Agreement

Miriam L B Sweeney
miriam.bay.sweeney@gmail.com

Follow this and additional works at: <https://scholarsarchive.byu.edu/byuplr>

 Part of the [Law Commons](#), and the [Social and Behavioral Sciences Commons](#)

BYU ScholarsArchive Citation

Sweeney, Miriam L B (2017) "Child Prisoners: Asylum-Seeking Detainees in the U.S. and the Violation of the Flores Settlement Agreement," *Brigham Young University Prelaw Review*: Vol. 31 , Article 13.
Available at: <https://scholarsarchive.byu.edu/byuplr/vol31/iss1/13>

This Article is brought to you for free and open access by the All Journals at BYU ScholarsArchive. It has been accepted for inclusion in Brigham Young University Prelaw Review by an authorized editor of BYU ScholarsArchive. For more information, please contact scholarsarchive@byu.edu, ellen_amatangelo@byu.edu.

CHILD PRISONERS: ASYLUM-SEEKING DETAINEES IN THE U.S. AND THE VIOLATION OF THE FLORES SETTLEMENT AGREEMENT

*Miriam Bay Sweeney*¹

Milagros's mother was panicked. Her 11-year-old child had left over an hour ago to pick up some soda pop for lunch at a store down the street. She had not seen her daughter since.

She alerted the neighbors and a search began. Milagros was found in a gutter several blocks away. Her wrists were tied together and she was bloodied and bruised. On her way to the store, she had been gang-raped and beaten. Her attackers did not mean to leave Milagros alive.

Milagros's mother knew she had to protect her daughter from another such attack. Leaving everything she owned behind, she and her daughter fled the country to be with her aunt in North Carolina. They were on their way to safety.

At least, they *believed* they were on their way to safety. Once they crossed the southern border of the U.S., they were placed in a detention center, built and operated for asylum-seekers.

These detention centers are intended to provide a place to hold asylum-seeking immigrants until an asylum officer can determine whether they have a credible fear of returning home. Depending on

1 Miriam Bay Sweeney is an English major with an editing minor at Brigham Young University. She anticipates graduating with honors in April 2018. She would like to thank her faithful editors, Tyler Garrett and Anne-Greyson Long, for their patience and investment in this article. Tyler is majoring in English language and Anne-Greyson is majoring in public relations. They both intend to matriculate in law school in 2018. Miriam would also like to thank Alan Harker for donating the funds for the ORCA grant that made the research for this article possible and Carolina Núñez for mentoring her through the publication process.

the decision, they are either released so that they may seek asylum in the U.S. or are deported. Until then, they are kept in a place where many who emerge report physical abuse, a lack of decent medical care, and negative psychological repercussions. Psychologist Luis Zayas explained that many mothers in detention centers are “distraught in thinking that they had brought their children from one nightmarish situation to another.”²

Many of these detainees escaped unlivable circumstances in their native countries, including gang violence, extortion, sex trafficking, and government corruption.³ Minors⁴ rightfully flee their situations to seek refuge, as international law permits.⁵ People like Milagros leave their homes to seek safety in the U.S., yet they are now detained in a place that is hardly safe for anyone and certainly not safe for minors.

The Flores Settlement Agreement states that “to ensure the minor’s safety or that of others, the Immigration and Naturalization Service (INS) shall release a minor from its custody without unnecessary delay.”⁶ I assert that a minor’s safety within the detention center system is circumstantially compromised. Because family detention centers are violating this ruling, they are therefore operating in opposition to the law. They must be shut down.

This article will proceed as follows: Section I presents the background information detailing the circumstances of the asylum-seeking minor and lays out the current process for being allowed to leave

2 Luis Zayas, “Declaration of Luis H. Zayas.” Pg. 9. https://lofgren.house.gov/uploadedfiles/declaration_of_luis_zayas.pdf.

3 D. M. Ortega, L. Graybill & C. N. Lasch, *Enacting and Sustaining Trauma and Violence Through Policy Enforcement: Family Immigration Detention*, 30 *AFFILIA* 281–285, 285 (2015).

4 A minor, for our purposes, constitutes a person under the age of eighteen.

5 Universal Declaration of Human Rights, UNITED NATIONS, <http://www.un.org/en/universal-declaration-human-rights/index.html> (last visited Dec. 6, 2016) (see article 14).

6 *JENNY LISETTE FLORES vs. JANET RENO*, Attorney General of the U.S., (1997) (see article VI) https://www.aclu.org/files/pdfs/immigrants/flores_v_meese_agreement.pdf.

the detention center through asylum or deportation. Section II provides information on the Flores Settlement Agreement, specifically its role in securing the rights of safety and release for migrant minors and how it is clearly violated in the current system of detainment. Section III details the harm being done by the detention centers, including an examination of physical, emotional, and psychological safety within the facilities. Finally, Section VI asserts that the Flores Settlement Agreement is being violated and suggests alternative approaches to the process of getting asylum-seekers to their credible fear interviews.⁷

I. BACKGROUND

A. Understanding the Status of an Asylum-Seeker

According to the Immigration and Nationality Act, a refugee is someone who has been granted refugee status, meaning that he or she has been persecuted or fears that he or she will be persecuted “on account of race, religion, nationality, and/or membership in a particular social group or political opinion.”⁸ Asylum status is an additional form of protection given to people who “are refugees, are already in the U.S., and are seeking admission at a port of entry.”⁹

The Universal Declaration of Human Rights, adopted by the United Nations in 1948, guarantees “the right to seek and enjoy asylum in other countries.”¹⁰ Additionally, the international law of non-refoulement states that no one can return an asylum-seeker with

7 All stories in this article are true. They come from my peers’ and my own experience interviewing asylum-seekers in both the Dilley and Karnes facilities in Texas. All names of detainees have been changed to preserve their privacy.

8 INA § 212(a)(5)(A), 8 U.S.C. § 1192(a)(5)(A).

9 *Id.*

10 Article 14 of <http://www.un.org/en/universal-declaration-human-rights/>.

credible fear to her country of origin.¹¹ So, if an asylum-seeker can prove that her fear is credible—in other words, that going home would mean she would be killed or targeted as a member of a social group—she may be released from detention and given the opportunity to pursue asylum status in the U.S.

Many families and even unaccompanied children flee circumstances ranging from unstable to deadly in search of security. In 2016, almost 60,000 unaccompanied children crossed the southern U.S. border along with 77,674 family units.¹² At least half the world's refugees are estimated to be under the age of eighteen.¹³ Because this category of vulnerable individuals is overwhelmingly large, it is important to examine the precedent that has specifically dealt with children living in the U.S. who are not from the U.S.. Whether or not a minor is a citizen of the U.S., the government views him or her as someone to protect. *Plyler v. Doe* encouraged such behavior towards children when the Supreme Court struck down a law that would prevent the government from funding the education of the children of illegal immigrants. The verdict insisted that children who may very well become permanent residents or citizens someday should not occupy a lower bracket of society because their parents chose to come to a different country illegally; the conditions of immigration were

-
- 11 “Non-refoulement is a concept which prohibits States from returning a refugee or asylum-seeker to territories where there is a risk that his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion.” See generally <http://www.unhcr.org/en-us/publications/legal/419c75ce4/refugee-protection-international-law-scope-content-principle-non-refoulement.html>.
- 12 U.S. Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016, U.S. BORDER PATROL SOUTHWEST FAMILY UNIT SUBJECT AND UNACCOMPANIED ALIEN CHILDREN APPREHENSIONS FISCAL YEAR 2016 | U.S. CUSTOMS AND BORDER PROTECTION, <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016> (last visited Dec 6, 2016).
- 13 An Analysis of Treatment of Unaccompanied Immigrant and Refugee Children in Ins Detention and Other Forms of Institutionalized Custody <http://heinonline.org/HOL/LandingPage?handle=hein.journals/chiclat19&div=31&id=&page=>(last visited Dec. 6, 2016)

out of the children's hands. Similarly, the corrupt nature of minors' native countries can hardly be blamed on the minors. Following this precedent, children generally are not punished for their oppressed circumstance and should not be in the case of seeking asylum.

B. Circumstances of the Asylum-Seeking Minor

In order to insist that punishing children for their circumstance is unnecessary, I will define the form that punishment takes in the case of asylum-seeking minors. The children who seek asylum, whether they are with parents or not, are detained in one of several privately-owned, for-profit detention centers that are run by the GEO Group or CoreCivic—which operate a large percentage of privately-owned prisons and correctional facilities in the U.S.¹⁴ Two such facilities are the Karnes County Residential Center, which holds 800 women and children at any given time and is operated by The GEO Group, Inc., and the South Texas Family Residential Center in Dilley, Texas, which holds 2,400 and is operated by CoreCivic.¹⁵

Children are detained with their mothers in facilities with inconsistent educational resources, poor access to medical care, and insufficient living quarters.¹⁶ It's important to note that children in the circumstance of detention often witness violence inflicted on their parents or siblings.¹⁷ Whether or not they are victims of abuse by detention guards, they suffer as if they were victims; research has shown that children who witness violence upon loved ones “experience the

14 CoreCivic was rebranded as such in November 2016. Before, it was known as Corrections Corporation of America. <http://www.cca.com/who-we-are>. See also the About Us page on http://www.geogroup.com/who_we_are.

15 Family Detention, RAICES, <https://www.raicestexas.org/pages/karnes> (last visited Dec. 6, 2016).

16 Shadow Prisons: Immigrant Detention in the South, SOUTHERN POVERTY LAW CENTER, https://www.splcenter.org/sites/default/files/leg_ipp_shadow_prisons_immigrant_detention_report.pdf (last visited Dec. 6, 2016).

17 Zachary Steel et al., *Psychiatric status of asylum seeker families held for a protracted period in a remote detention centre in Australia*, 28 AUSTRALIAN AND NEW ZEALAND JOURNAL OF PUBLIC HEALTH 527–536, 527-536 (2004).

same psychological distress symptoms as those who are actually abused.”¹⁸

C. Getting Out of Detention Is No Small Matter

Asylum-seekers begin the detention process when they state a fear of returning home after entering the United States. They are then committed to a detention center, where they await a credible fear interview. During the interview, a detainee has to prove that she has a credible fear of returning home. A negative interview result usually leads to the deportation of the detainee. Children without representation are five times more likely to be deported, so non-profit organizations have banded together to provide pro bono attorneys to represent minors who are up for asylum or deportation.¹⁹

Getting a detainee released, even after an asylum official has determined that an immigrant has credible fear, is an intensive process. First, one must find out whether Immigration and Customs Enforcement (ICE) has set a bond, which is similar to bail in criminal courts and is intended to guarantee that the detainee will show up for future court dates. Bonds can range from \$1,500 to \$20,000 as of early 2016, and the removal process can take months.²⁰ Many relatives of asylum-seekers cannot afford to pay the bond, which further complicates the issue of detention.

18 Dep’t of Services for Children, Youth, and Their Families v. Fowler, No. 681, 2014, SUPREME COURT OF DELAWARE, 122 A.3d 778; 2015.

19 The injustice of deporting children without representation, LOS ANGELES TIMES, <http://www.latimes.com/opinion/op-ed/la-oe-villagra-migrant-children-immigration-court-20160317-story.html> (last visited Dec. 6, 2016); see also the CARA website: <http://caraprobono.org/>

20 NOLO is a company that provides information to immigrants and their families about the immigration process in the U.S. See Kristina Gasson, Immigration Detention 101: Information for Detainees’ Family and Friends, NOLO, <http://www.nolo.com/legal-encyclopedia/immigration-detention-101-information-detainees-family-friends.html> (last visited Dec. 6, 2016).

D. Introducing Flores

The detention system is designed to make it difficult to allow asylum-seekers to await their interviews elsewhere. Take Jenny Lisette Flores's case as an example. In 1985, Jenny, fifteen years old at the time, escaped from her hometown in El Salvador, where rampant violence caused her to fear for her life. Her aunt lived in the U.S. and wanted to take care of her. Jenny was arrested in California and placed in a detention center for several months, where she was strip searched and housed with adults she did not know. Although her aunt insisted Jenny be released to her custody, Immigration and Naturalization Services would not allow Jenny be released to anyone but her own parents, whose whereabouts were unknown. Jenny continued to be detained and subjected to regular strip searches.²¹

A class action lawsuit was filed on Jenny's behalf. After almost an entire decade, the parties entered into a settlement agreement. The Flores Settlement Agreement of 1997 asserts that release is the general policy for migrant minors. Section VI.14 of the settlement agreement says, "[T]o ensure the minor's safety or that of others, the INS shall release a minor from its custody without unnecessary delay."²² It goes on to say that minors will be released immediately to one of the following (in order of preference): a parent, a legal guardian, an adult relative, an adult designated by the parent, a willing licensed program, or an adult individual who is willing to be an alternative to long-term detention.

II. ARGUING FOR JENNY: THE FLORES SETTLEMENT AGREEMENT

The Immigration and Naturalization Service does not follow the terms of the Flores Settlement Agreement. When minors enter the U.S., the custom is to detain them in detention centers that do not

21 When Migrant Children Were Detained Among Adults and Strip Searched, Suzanne Gamboa, NBCNews.com (2014) <http://www.nbcnews.com/storyline/immigration-border-crisis/when-migrant-children-were-detained-among-adults-strip-searched-n161956> (last visited Dec. 6, 2016).

22 Jenny Lisette Flores vs. Janet Reno, Attorney General of the U.S., (1997)

offer the safety the Flores Settlement Agreement ensures them. For instance, the settlement agreement requires that a child be detained if detention is required to secure his or her timely appearance before an immigration court. However, data shows that the majority of minors *do* appear for their court proceedings, whether or not they are detained beforehand.²³

According to the settlement agreement, children in short-term custody are entitled to “safe and sanitary facilities with toilets, sinks, drinking water, food, [and] medical assistance in case of emergency services.”²⁴ The Department of Homeland Security has failed to comply with these terms on multiple occasions.²⁵

The Flores Settlement Agreement allows for the release of minors who are in conditions that are not considered safe. As I detail in this paper and particularly in section IV, detention centers simply are not complying with the standards set forth in the Flores Settlement Agreement. Detention circumstances must be changed in order that this settlement agreement be upheld.

III. WHY DETAINING CHILDREN DOES MORE HARM THAN GOOD

A. *Plyler v. Doe*

Before delving into the unsafe circumstances of detention centers, it is significant to note that migrant children can and do receive attention from the American government. *Plyler v. Doe* involves a city

23 New Data on Unaccompanied Children in Immigration Court, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (TRAC) - COMPREHENSIVE, INDEPENDENT, AND NONPARTISAN INFORMATION ON FEDERAL ENFORCEMENT, STAFFING AND FUNDING, <http://trac.syr.edu/immigration/reports/359/> (last visited Dec 6, 2016).

24 Jenny Lisette Flores vs. Janet Reno, Attorney General of the U.S., (1997) (paragraph 12)

25 Ashley Huebner et. all, Systemic Abuse of Unaccompanied Immigrant Children by U.S. Customs and Border Protection, NATIONAL IMMIGRANT JUSTICE CENTER, <http://www.acluaz.org/sites/default/files/documents/DHS%20Complaint%20re%20CBP%20Abuse%20of%20UICs.pdf> (last visited Dec. 6, 2016).

in Texas that began denying K-12 education to undocumented immigrants. The school district began to charge unauthorized immigrants a tuition fee of \$1,000. The logic was reasonable: the district claimed that, by educating undocumented immigrants, the state was losing money by spending on those who did not contribute to educational funding.

The court, however, recognized the potential impact of an additional obstacle to education on these children. It recognized that denying education to a certain group of people who could potentially remain in the U.S., eventually even as citizens, could unintentionally create a socially and economically inferior class. The decision of *Plyler v. Doe* declared that, if children of undocumented immigrants were denied access to public education, then the result would be “the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime.”²⁶

In this case, the court recognized the children of undocumented immigrants as potential contributors to society. Since asylum-seekers have the right to be in the country in which they seek asylum,²⁷ they should be treated at least as well as illegal immigrants. If the children of those who are residing illegally in this country are guaranteed the freedom to learn so that they can become upright residents, it logically follows that the children of those who are legally in this country ought to have those rights, too.

B. The American Foster Care System

It is hard to determine what legal precedent can be used as a comparable example to asylum-seekers, but I submit that the circumstances of asylum-seeking minors are emotionally and physically similar to the circumstances of minors in the foster care system. In both circumstances, children are powerless to control their situation or improve it. In both circumstances, children have left that unstable circumstance.

26 *Plyler v. Doe*, 457 U.S. 202 (1982).

27 Universal Declaration of Human Rights, UNITED NATIONS, <http://www.un.org/en/universal-declaration-human-rights/> (last visited Dec 6, 2016).

In both circumstances, children are involuntarily committed to the system. In both circumstances, children are under the jurisdiction of the U.S.. While the circumstances surrounding the mistreatment of the minor are different, both parties (asylum seekers and children in foster care) are similar in their need of being protected. Therefore, laws regarding the safety of children in foster care should also be applied to children in detention centers.

The Fostering Connections to Success and Increasing Adoptions Act increased the opportunity for adult relatives to step in and be involved when the state takes custody of children.²⁸ In the case of detained minors, 61 percent have one or both parents waiting for their arrival from within the States, and many others have other relatives waiting for them.²⁹ When a child is compelled to enter the foster care system, it is now easier for extended family to be involved; the same treatment can and should be applied to children who would otherwise be sent to detention. In addition, failing to provide for a child's psychological safety (or mental health) is classified as neglect.³⁰ Children should be provided for whether they're in the foster care system or not, yet—as detailed in section IV.iii—asylum-seeking minors suffer negative psychological conditions because of their circumstances in detention. This analogous situation clearly demonstrates that the child care in detention centers is inadequate.

C. LaShawn A. v. Dixon and Other Protections

Both detainee minors and minors in foster care are under the jurisdiction of the district. They rely on the district for their immediate needs and well being. Both are involuntarily committed to this

28 Fostering Connections to Success and Increasing Adoptions Act of 2008 (P.L. 110-351).

29 Vulnerable Children Face Insurmountable Odds, NATIONAL IMMIGRANT JUSTICE CENTER, <http://www.immigrantjustice.org/sites/default/files/content-type/research-item/documents/2016-11/NIJC%20Policy%20Brief%20-%20Unaccompanied%20Immigrant%20Children%20FINAL%20Winter%202014>. (last visited Dec. 6, 2016).

30 Appellant v. Janet Fowler, John Tower, and unknown father, 681 U.S. (2014)

system. According to *Lashawn A. v. Dixon*, those who are “involuntarily committed . . . have a right to reasonably safe placements in which they will not be harmed. This right is not limited to safety from physical harm. . . . This right extends to safety from psychological and emotional harm.”³¹

While *LaShawn A. v. Dixon* extends the definition of safety from referring to physical harm to including psychological and emotional harm. *Carey v. Piphus* describes this in more detail: “Mental and emotional distress caused by denial of procedural due process,” meaning that psychological or emotional trauma caused by the lack of the necessary care that Immigration and Customs Enforcement or The GEO Group, Inc. are obligated to give is considered an “injury.”³²

Bringing it all together: Asylum-seeking minors cannot control the circumstances of their safety, so they are involuntarily committed to the detention system. They are therefore in a circumstance similar to that of minors in foster care. Minors in foster care have a right to be in circumstances in which they are not harmed. They should be protected from physical, psychological, and emotional harm. When these protections are not provided, then those who are charged with their care are held responsible. The same ought to be applied to the minors held in detention centers.

The law is on the child’s side in cases of physical and emotional safety. Several detention centers for asylum-seeking families are found in Texas. These facilities in Texas operated³³ as licensed child care facilities. This means that they had to comply by the Minimum Standards set forth by the Texas Department of Family and Protective Services. In these Minimum Standards, *abuse* is defined as anything “that causes or may cause emotional harm or physical injury to, or the death of, a child served by the facility or program as further

31 *LeShawn A. v. Dixon* 762 F. Supp. 959 (1991)

32 *Carey v. Piphus*, 435 U.S. 247 (1978).

33 In December 2016, a Texas judge revoked the child care licenses of these centers.

described by rule or policy.”³⁴ Both physical and emotional harm are listed as results of abuse, and both physical and emotional harm occur in detention centers.

D. Physical Harm

Greg Hansch is the public policy director at the National Alliance on Mental Illness of Texas. He has been looking into the conditions of children in Texas detention centers, which are the most relevant to this paper. He reported that children in the detention centers are regressing in their health. Others testified in a hearing that children were “losing weight and shedding hair at an alarming rate.”³⁵ Women from Honduras who came to the U.S. to escape violence organized a complaint to Homeland Security based on the unsafe conditions of detention that they and their children were subject to. Among their complaints were that a child vomiting blood was not referred to off-site medical care for three days, 250 children were given adult doses of a Hepatitis A vaccine, and on-site medical professionals refused to issue prescribed medication to a five-year-old who had been transferred off-site for medical treatment various times during detention.³⁶ These issues were not isolated; such complaints occur regularly.³⁷ These issues reflect not only the dangerous health circumstance of many asylum-seeking children, but the indifference and unprofessional treatment they receive while in detention. The Flores Settlement Agreement entitles detainees to medical assistance. Yet Marta, a detainee, reported that “if someone is in

34 Minimum Standards for Child Care Centers, TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES 197 (2016) https://www.dfps.state.tx.us/Child_Care/documents/Standards_and_Regulations/746_Centers.pdf

35 Jordan Rudner, Emotional Testimony Targets Plan to License Detention Centers, THE TEXAS TRIBUNE (2015), <https://www.texastribune.org/2015/12/09/state-considers-licensing-detention-centers-childc/> (last visited Dec. 6, 2016).

36 Mother who fled Honduras ‘to escape abuse mistreatment’ says ‘it’s the same in the U.S.’ (2015) <http://www.latimes.com/nation/la-na-immigrant-detention-complaint-20150730-story.html> (last visited Dec. 6, 2016)

37 *Id.*

debilitating pain, that is not reason enough to seek immediate medical attention. If it's not deemed an emergency, then you have to wait until sick call to get attention."³⁸

The president of the American Academy of Pediatrics wrote to the Secretary of Homeland Security about child detention. She said, "The act of detention or incarceration itself is associated with poorer health outcomes, higher rates of psychological distress, and suicidality, making the situation for already vulnerable women and children even worse."³⁹

The Minimum Standards from the Texas Department of Family and Protective Services extends to medical safety. These standards include immediate response to children becoming ill while in care.⁴⁰ Detention centers do not comply with those standards. A Texas judge recognized this and, in December of 2016, revoked Texas family detention centers' child care licenses. However, the state has appealed the ruling and is claiming its right to detain children as an emergency situation.⁴¹ CoreCivic and The GEO Group, Inc. are fighting to continue child detention. Their licenses to be child care facilities should not be renewed.

Before arriving at the detention centers, many asylum-seekers—including minors—are held temporarily in cells nicknamed *hieleras*,

38 Shadow Prisons: Immigrant Detention in the South, SOUTHERN POVERTY LAW CENTER, 14, https://www.splcenter.org/sites/default/files/leg_ipp_shadow_prisons_immigrant_detention_report.pdf (last visited Dec. 6, 2016).

39 Original quote cited here: Physicians for Human Rights and Bellevue/NYU Program for Survivors of Torture. From persecution to prison: The health consequences of detention for asylum seekers, 2003. See letter here: <http://grassrootsleadership.org/sites/default/files/uploads/AAP%20Letter%20to%20Secretary%20Johnson%20Family%20Detention%20Final%20%281%29.pdf>

40 Minimum Standards for Child Care Centers, TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES 131-133 (2016) https://www.dfps.state.tx.us/Child_Care/documents/Standards_and_Regulations/746_Centers.pdf

41 Texas: For-Profit Detention Centers Continue Holding Families, Despite Judge's Ruling. https://www.democracynow.org/2016/12/8/headlines/texas_for_profit_detention_centers_continue_holding_families_despite_judges_ruling

meaning *freezers* or *iceboxes* in Spanish. A 2009 report published that 85 percent of all apprehended unaccompanied children had been kept in excessively cold holding cells, and 25 percent were never offered water before being transported to detention centers.⁴² In addition, the report identified eighteen cases of physical abuse. I spoke with a four-year-old whose mother was receiving legal counsel who said the worst part had been when some angry men took her and her mother to a cold room, made her take off her shoes and jacket, and left them to sleep on the floor. “It was so cold that I shivered like this,” she explained, wrapping her arms around her body and knocking her teeth together.

One may ask how these centers can get away with such treatment. The detention centers in the U.S. are largely privately-owned and for-profit. That means that, even though taxpayer money is pouring into its operation,⁴³ details about the living conditions of the residents are generally kept private. Pro bono attorneys and their translators are permitted to visit the prison-like facilities after an in-depth screening process and clearances involving strict confidentiality. The general public must depend on those who emerge from the detention process to hear about living conditions there.⁴⁴ Reports about detention center conditions are often retrospective and filed by those who have been released from detention.

42 Ashley Huebner et. al, *Systemic Abuse of Unaccompanied Immigrant Children by U.S. Customs and Border Protection*, NATIONAL IMMIGRANT JUSTICE CENTER, 6, <http://www.acluaz.org/sites/default/files/documents/DHS%20Complaint%20re%20CBP%20Abuse%20of%20UICs.pdf> (last visited Dec. 6, 2016).

43 “A Review of the Department of Homeland Security’s Policies and Procedures for the Apprehension, Detention, and Release of Non-Citizens Unlawfully Present in the U.S.,” AMERICAN IMMIGRATION LAWYERS ASSOCIATION, <https://oversight.house.gov/wp-content/uploads/2015/02/25-2015-Joint-Hearing-on-DHS-Policies-re-Non-Citizens-Chen.pdf> (see generally the section that describes taxpayer money for for-profit detention to fund about \$18.5 billion annually).

44 SOUTH TEXAS FAMILY DETENTION CENTER, <https://ccamericastorage.blob.core.windows.net/media/Default/documents/Facility-Info-Sheets/South%20Texas%20Information%202015.01.pdf> (see generally instructions for visitation to the residential center).

E. Emotional and Psychological Harm

Physical harm is not the only danger for detained asylum-seekers. After helping her prepare for her credible fear interview, I asked a detained asylum seeker how her stay in Karnes had been. She replied, “I’m mostly worried about my son. He’s only fifteen. We’ve been here for forty days. He’s eating less and less and hardly speaks. When he does speak, he only talks about getting out of here.”

This fifteen-year-old was exhibiting behaviors consistent with depression and was psychologically harmed by the circumstance of detention. A study solidifies the situation of the well being (or lack thereof) of detained children. It concluded that most had inappropriate or incomplete access to medical care. The researchers concluded, “Retrospective comparisons indicated that adults displayed a threefold and children a tenfold increase in psychiatric disorder subsequent to detention.”⁴⁵ “Detention,” they determined, “seems to be injurious to the mental health of asylum seekers.”⁴⁶

After researching detainees in the Karnes facility, psychologist Luis Zaya declared, “The impacts of detention are exacerbated by the fact that families have already experienced serious trauma in their home countries and in the course of their journey to the U.S.”⁴⁷ There is currently no process of differentiating the psychological damage that occurs because of detention center circumstances from the damage that occurs because of the conditions surrounding asylum-seeking.

Psychological harm is a real threat to the future of the minors and their mothers in detention. Luis Zayas concluded, “The psychological traumas experienced by these mothers and children . . . will

45 Zachary Steele, *Psychiatric status of asylum seeker families held for a protracted period in a remote detention centre in Australia*, 28 AUSTRALIA AND NEW ZEALAND JOURNAL OF PUBLIC HEALTH, 527, 533 (2004).

46 *Id.* Although this study was conducted in Australia, the detainees come from similar circumstances and the same process of detaining children happens in the U.S. We can assume that the results of the study are equally applicable.

47 Luis Zaya, “Declaration etc.” Section II.10. <http://grassrootsleadership.org/sites/default/files/uploads/Declaration%20of%20Luis%20Zayas.pdf>

require years of mental health services to alleviate. . . . [Detention] contributes to the development of chronic illness in ways that may be irreversible.”⁴⁸

F. Witnesses of Abuse

Even when they are not the subject of traumatic abuse, minors in migrant detention witness it often, and research has shown that children who witness violence upon loved ones “experience the same psychological distress symptoms as those who are actually abused.”⁴⁹ Additionally, many detained children are firsthand witnesses of self-harm and hunger strikes.

There are some provided protections embedded in the detention system that should protect both the affected minors and their abused family members. For instance, the Prison Rape Elimination Act (PREA) protects inmates. The act “provide[s] for the analysis of the incidence and effects of prison rape in Federal, State, and local institutions and to provide information, resources, recommendations and funding to protect individuals from prison rape.”⁵⁰ Although this act was put into practice to protect inmates specifically, it was recently extended to residents of detention centers holding asylum-seekers.⁵¹ The fact that lawmakers find it necessary to extend this policy to detention centers shows that these facilities are unfit for children, as they will likely experience or be exposed to sexual assaults. This is yet another reason detention centers are unfit to care for children.

Cases of physical and sexual abuse are far from unheard of in detention centers. Various reports have alleged that detention center

48 Luiz Zayas, “Declaration etc.” sec. II.11. <http://grassrootsleadership.org/sites/default/files/uploads/Declaration%20of%20Luis%20Zayas.pdf>

49 Dep’t of Services for Children, Youth, and Their Families v. Fowler, No. 681, 2014, SUPREME COURT OF DELAWARE, 122 A.3d 778; 2015.

50 PRISON RAPE ELIMINATION ACT, <https://www.prearesourcecenter.org/about/prison-rape-elimination-act-prea> (last visited Dec. 6, 2016).

51 David M. Hernandez, *Unaccompanied Child Migrants in “Crisis”:* *New Surge or Case of Arrested Development?*, 27 HARVARD JOURNAL OF HISPANIC POLICY 11, 11-17 (2014/2015) (discussing the status of unaccompanied asylum-seeking minors).

guards have called the detainees “novias,” meaning *girlfriends*, and fondled them in the presence of the detainees’ children.⁵² They also have extracted women from their cells and taken them to parts of the detention center that were not under surveillance to engage in sexual activity in exchange for empty promises of asylum.⁵³

Perhaps the PREA is helping to investigate reported incidents of rape within prisons and detention centers, but there are incidents of sexual abuse that don’t specifically qualify as rape, and detained children are not shielded from them. A woman who arrived in the Dilley detention center in late 2016 informed her translator that, while she was being processed, a male officer told her to take off her shirt. She hesitated. He insisted that, unless she remove her shirt and her bra, she would be expelled from the asylum-seeking process. She complied. The officer stared at her naked upper body for several minutes without saying anything. The woman’s seven-year-old son witnessed the entire affair.⁵⁴

This exchange could not be tried under the PREA, but it is indefinitely imprinted in the seven-year-old’s memory. This and all of these cases are examples of violations of the Flores Settlement Agreement.

V. THERE ARE OTHER OPTIONS

Physical and psychological conditions clearly make detention unsafe for children. The Flores Settlement Agreement entitles minors to be removed from unsafe circumstances. Minors should be excluded entirely from the migrant detention system.

If conditions—both physical and psychological—make residence unsafe for minors in detention, then it must be considered that family detention may also be unsafe for women. Women are not specifically protected under the Flores Settlement Agreement, which provides for the removal of minors from detention in the case of unsafe conditions. But if women are to be kept in detention while

52 *Id.*

53 *Id.*

54 E-mail from Luisa Patoni-Rees, BYU law student, to Miriam Sweeney (Nov. 16, 2016, 12:26 MDT) (on file with author).

minors are removed because of unsafe conditions, one must ask why they are kept there at all. If they were kept there for their own protection, detention could serve a useful purpose. But family detention centers were not originally implemented as a means to protect the victims they housed.

The Department of Homeland Security held women and minors in detention as part of an “aggressive deterrence strategy” that the Obama administration requested in June of 2014.⁵⁵ This meant that people rightfully seeking help in the form of asylum in the U.S. were held in detention in order to convince people who were considering crossing the border that seeking asylum isn’t such a good idea. After a court case called *RILR v. Johnson*, it was understood that a policy of holding people in detainment just to deter others from future actions was a violation of immigrant rights, and the Immigration and Customs Enforcement announced it would no longer consider deterrence as a reason to detain families.⁵⁶

If family detention is no longer intended to deter future asylum-seekers, what, then, is it for? It is certainly not a service providing shelter for incoming families, as Luis Zayas, a psychologist researching the conditions of family detention, said that every family included in his research “identified at least one family member who resided in the U.S.”⁵⁷ As for the few people who may admit to knowing no one in the U.S., non-profit organizations, such as RAICES, are at the ready to provide temporary housing situations through such relationships as the Interfaith Coalition. If housing incoming asylum-seekers is the purpose of family detention, then family detention is excessively unnecessary.

-
- 55 David Nakamura, *Obama calls for ‘aggressive deterrence strategy’ for border crossers*, WASHINGTON POST, June 30, 2014, at <https://www.washingtonpost.com/news/post-politics/wp/2014/06/30/obama-calls-for-aggressive-deterrence-strategy-for-border-crossers/>.
- 56 *RILR V. JOHNSON*, <https://www.aclu.org/cases/rilr-v-johnson> (last visited Dec. 6, 2016).
- 57 Luiz Zayas, “Declaration of Luis H. Zayas,” https://lofgren.house.gov/uploadedfiles/declaration_of_luis_zayas.pdf

The main function, then, could only be to ensure that the asylum-seekers are present for the interview that will determine whether or not they will be granted permission to pursue asylum. This has also been rendered unnecessary recently. Asylum-seeking migrants can enroll in the Intensive Supervision Appearance Program, during which they are required to wear an electronic ankle bracelet for three months.⁵⁸ This electronic anklet broadcasts audio messages as reminders to the wearer of check-in appointments and dates and locations for interviews. It has a GPS system, so Immigration and Customs Enforcement knows where the asylum-seekers are. This system has had a 93 percent success rate of participants showing up to their scheduled hearing.⁵⁹ It also allows incoming asylum-seekers to locate legal representation. Wearing an anklet would be preferable to being kept in a prison-like environment for an indefinite period of time, and victims of abuse—whether they are adult women or their children—deserve at least that measure of decency.

The anklet system has worked and will continue to work for adults. However, minors cannot reasonably be released without some kind of adult supervision. The National Immigration Justice Center has drawn up a plan that the Department of Homeland Security could implement that involves the postponement of immigration hearings in court until a minor is released to either a family member or a sponsor.⁶⁰ This would bypass the detention system entirely for minors and render the centers unnecessary.

-
- 58 Mem. from Wesley J. Lee on Eligibility Criteria for Enrollment into the Intensive Supervision Appearance Program (ISAP) and the Electronic Monitoring Device (EMD) Program. See generally https://www.ice.gov/doclib/foia/dro_policy_memos/dropolicymemoeligibilityfordroisapan-demdprograms.pdf.
- 59 *Ignoring Alternatives & Increasing Detention of Families*, ARETZ & CHISHOLM IMMIGRATION, LLC, <http://www.immigrationdenver.com/10/ignoring-alternatives-increasing-detention-of-families/>.
- 60 Vulnerable Children Face Insurmountable Obstacles (National Immigration Justice Center, Chicago, IL.) Jan. 2014. (see generally “Policy Recommendations” at <http://www.immigrantjustice.org/sites/default/files/content-type/research-item/documents/2016-11/NIJC%20Policy%20Brief%20-%20Unaccompanied%20Immigrant%20Children%20FINAL%20Winter%202014.pdf>)

VI. CONCLUSION

Movements and even laws to improve detention centers have come and gone without enacting the change that needs to happen. When the Obama Administration announced in August of 2016 that private prisons would be phased out, advocates for the phasing out of the private detention industry expressed hope that such a verdict would extend beyond conventional prisons.⁶¹ However, on November 30, 2016, the Department of Homeland Security announced that this change in policy would not affect privately run detention centers.⁶²

When dealing with the sticky issues surrounding immigration, it's important to recognize that any time lost means more damage to human lives. A woman told UNHCR, "The things I lived through in detention have marked me for life. Please remember that we are also human beings. I didn't want to come here, but for me it was a question of life and death." Another added, "They should help facilitate the asylum process so that one doesn't suffer in detention centers. They shouldn't be causing more harm."⁶³

In accordance with the research that has consistently insisted that detention facilities are unsafe, the Department of Homeland Security and individual states must cease to license detention centers as child care facilities and acknowledge that they have run their course. There are better alternatives for people like Milagros to find safety in the land of the free.

61 Charlie Savage, *U.S. to Phase Out Use of Private Prisons for Federal Inmates*, N.Y. TIMES, August 19, 2016 at A11.

62 Brian Bennett and Joseph Tanfani, *Immigration detainees should be held in for-profit prisons, panel says*, LA TIMES, Dec. 1, 2016, at <http://www.latimes.com/nation/la-na-forprofit-immigrants-20161201-story.html>.

63 Violence and Insecurity in the Northern Triangle of Central America: Dangerous Choices for Women and Girls. Pg. 3. <https://www.futureswithoutviolence.org/wp-content/uploads/5th-US-CSWG-Policy-Brief-December-312c-2017-v7.pdf> (last visited March 4, 2017).