

## NOTE<sup>1</sup>

# CHILDREN AT THE BORDER: EXISTING TOOLS FOR EFFECTIVE ADVOCACY

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### I

#### INTRODUCTION

As a way of dealing with extensive immigration into the United States via the southern border, the United States Department of Customs & Border Patrol (CBP)<sup>1</sup> detains entire families or unaccompanied minors and places them, together or separately, in either government-run or for-profit detention centers. These centers often have the look and feel of a federal prison. Although most countries at least formally agree—by virtue of having ratified the United Nations Convention on the Rights of the Child (CRC)—that the detention of children should be used very rarely and only as a last resort,<sup>2</sup> the United States has made it a regular practice.

In an effort to encourage a continued and effective fight against the detention of migrant children at the border—with or without their parents—this note first examines the history of detaining and institutionalizing children in the United States and the harms these institutionalizations have typically entailed, including physical, mental, emotional, and developmental harm, as well as invasions of privacy. This note then argues that human rights advocacy—while certainly justified in the context of child detention at the border—is unlikely to be as effective as existing state and federal laws and standards that cover these harms due to the nature of the surrounding political debate. To establish this point, it

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1. The United States Department of Homeland Security (DHS) is a federal agency that includes U.S. Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforcement (ICE). Before these agencies existed, their duties were performed in part by the United States Immigration and Naturalization Service (INS), which has ceased to exist under that name.

2. Sarah Mehta, *There's Only One Country That Hasn't Ratified the Convention on the Rights of the Child: the US*, ACLU (Nov. 20, 2015), <https://www.aclu.org/blog/human-rights/treaty-ratification/theres-only-one-country-hasnt-ratified-convention-childrens> [<https://perma.cc/C5B5-YE7N>]; see also Convention on the Rights of the Child art. 37, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter G.A. Res. 44/25] (proclaiming that “[t]he arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.”).

ends with a comparison of CRC provisions with the aforementioned laws and administrative standards.

## II

### THE HISTORY OF CHILD DETENTION AND INSTITUTIONALIZATION

Public acceptance of the policy choice to institutionalize certain categories of children is not new. This acceptance hails from a long history of detaining children with and without other family members in immigration and other contexts. This Part introduces three contexts that are in some ways analogous to the ongoing detentions and institutionalizations of children who enter the country as migrants at the southern border. All three involve the discriminatory treatment of children and families that were considered problematically “other” in relation to majority or preferred children and families. First, this Part discusses the forced removal of Native American children from their families and reservations for placement in westernized boarding schools. Second, this Part broadly depicts juvenile detentions as a means of effecting criminal justice through institutionalization. Third, this Part highlights the detention of children alongside their families in Japanese internment camps as an example of family institutionalization. This Part concludes with an overview of immigrant detention over time, with specific attention paid to families and unaccompanied minors.

Institutionalization in general is broadly defined: One dictionary describes it as “the state of being placed or kept in a residential institution.”<sup>3</sup> Another provides that “to institutionalize” is “to place in or commit to the care of a specialized institution (such as a psychiatric hospital).”<sup>4</sup> The federal government characterizes institutionalization in similar terms: “any facility or institution” that is “owned, operated, or managed by, or provides services on behalf of any State or political subdivision of a State” and is, for juveniles, a place where they are held “awaiting trial,” “for purposes of receiving care or treatment,” or “for any State purpose in such facility or institution” including “providing skilled nursing, intermediate or long-term care, or custodial or residential care.”<sup>5</sup>

According to these definitions, child and family detention centers are appropriately classified as a form of institutionalization. Simply put, the residential nature of immigrant detention centers, built to house migrant families and children that are in state custody, makes them institutions as the term is understood by the federal government and advocacy groups. According to one advocacy group, family detention is “the practice of holding immigrant families, including children and babies, in prison-like detention centers with their

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3. *Institutionalization*, OXFORD ENGLISH DICTIONARY, <https://en.oxforddictionaries.com/defin/institutionalization> [<https://perma.cc/HPO8-NHHP>] (last visited Oct. 12, 2018).

4. *Institutionalize*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/institutionalize> [<https://perma.cc/NZG3-S9CG>] (last visited Oct. 12, 2018).

5. Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 (1980).

parents.”<sup>6</sup> Similarly, migrant children are being kept in detention centers without adults, whether or not adults originally accompanied them to the border.<sup>7</sup> In both situations, children with and without their families have been committed to specialized residential institutions—the detention facilities—while the arduous legal immigration processes take place.

### A. Native American Boarding Schools

The practice of institutionalizing children who are considered “other” is not new. During the late nineteenth century, as the United States struggled to rebuild and expand post-Civil War, the federal government was concerned about the continued relocation of Native people, fearing that eventually they would run out of space.<sup>8</sup> Because “there was no more Western territory to push them towards, the U.S. decided to remove Native Americans by assimilating them.”<sup>9</sup> As a result, in 1871, Native peoples were deemed to be “wards of the government.”<sup>10</sup>

To “assimilate Indian people into the melting pot of America,”<sup>11</sup> the federal government forcibly removed Native American children from their homes and placed them in government-run or sanctioned boarding schools,<sup>12</sup> where they were deprived of their family environment, access to cultural growth, and privacy.<sup>13</sup> They were forced to learn and to speak only in English and were taught industrial skills while being robbed of their own culture and heritage.<sup>14</sup> They received contrary religious training as well as education about capitalist

6. *The Facts about Family Detention*, GRASSROOTS LEADERSHIP (Feb. 29, 2016), <https://grassrootsleadership.org/facts-about-family-detention> [<https://perma.cc/JVF2-LHNB>].

7. See Caitlin Dickerson, *Detention of Migrant Children Has Skyrocketed to Highest Levels Ever*, N.Y. TIMES (Sept. 12, 2018), <https://www.nytimes.com/2018/09/12/us/migrant-children-detention.html> [<https://perma.cc/3F34-DQTH>] (reporting a recent rise in the number of unaccompanied alien children in U.S. detention centers); see also Edwin Delgado, *Texas Detention Camp Swells Fivefold with Migrant Children*, THE GUARDIAN (Oct. 3, 2018, 1:00 AM), <https://www.theguardian.com/us-news/2018/oct/02/texas-detention-camp-swells-fivefold-with-migrant-children> [<https://perma.cc/7K6V-V762>] (reporting a recent expansion of undocumented minors in U.S. detention centers).

8. See Becky Little, *How Boarding Schools Tried to ‘Kill the Indian’ Through Assimilation*, HISTORY.COM (Aug. 16, 2017), <https://www.history.com/news/how-boarding-schools-tried-to-kill-the-indian-through-assimilation> [<https://perma.cc/A2VE-Y634>] (“As white population grew in the United States and people settled further west towards the Mississippi in the late 1800s, there was increasing pressure on the recently removed groups to give up some of their new land.”).

9. *Id.*

10. F.G.B., Book Review, HARVARD EDUCATIONAL REVIEW (2018), [http://hepg.org/her-home/issues/harvard-educational-review-volume-68-issue-2/herbooknote/education-for-extinction\\_174](http://hepg.org/her-home/issues/harvard-educational-review-volume-68-issue-2/herbooknote/education-for-extinction_174) [<https://perma.cc/S9BJ-UMWP>] (reviewing DAVID WALLACE ADAMS, *EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875-1928* (1995)).

11. Carolyn J. Marr, *Assimilation Through Education: Indian Boarding Schools in the Pacific Northwest*, UNIV. WASH. <https://content.lib.washington.edu/aipnw/marr.html#movement> [<https://perma.cc/C9KE-JJGM>].

12. See *History and Culture: Boarding Schools*, NORTHERN PLAINS RESERVATION AID, [http://www.nativepartnership.org/site/PageServer?pagename=airc\\_hist\\_boardingschools](http://www.nativepartnership.org/site/PageServer?pagename=airc_hist_boardingschools) (“The police would continue to take children until the school was filled.”).

13. *See id.*

14. *Id.*

American ideals which were usually adverse to the ideals held by their parents and tribes.<sup>15</sup> The schools gave them white names, standard uniforms, and new hairstyles.<sup>16</sup> As a result, Native American children lost the ability to make choices for themselves, and their parents lost their right to make choices for their children.<sup>17</sup> Throughout the 1900s, Native American parents “banded together to withdraw their children en masse.”<sup>18</sup> However, it was not until the passage of the 1978 Indian Child Welfare Act<sup>19</sup> that parents gained the “legal right to deny their children’s placement in off-reservation schools.”<sup>20</sup>

By that time, however, much of the damage had been done: Children who were removed from their homes and placed in boarding schools suffered tremendously. As one survivor explained: “the pain, and the loneliness, and the – the anger, will always be with me.”<sup>21</sup> For boarding school attendees and their families after them, “the emotional fallout from these schools is a constant presence in their lives.”<sup>22</sup> For example, “the children and grandchildren of survivors talk about the lack of affection from their elders . . . that is the almost-inevitable outcome for families where the parents grew up in institutional settings having never been truly parented.”<sup>23</sup> Furthermore, one study of mental health and substance abuse among former boarding school attendees found that the attendees exhibited “higher rates of current illicit drug use . . . and [] were significantly more likely to have attempted suicide and experienced suicidal thoughts in their lifetime compared to non-attendees.”<sup>24</sup> Attendees also suffered from higher rates of alcohol abuse.<sup>25</sup>

## B. Youth Detention as a Form of Criminal Justice

Minors have also historically been institutionalized as a means of effecting criminal justice. Youth have been confined in jails and penitentiaries since the 1800s,<sup>26</sup> when “social reformers began to create special facilities for troubled

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15. *Id.*

16. *Id.*

17. *See id.*

18. *Id.*

19. Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901–1963 (1978).

20. History and Culture: Boarding Schools, *supra* note 12.

21. Native American Rights Fund, *Boarding School Healing*, YOUTUBE (Jan. 25, 2017), <https://www.youtube.com/watch?v=8HZgmJmdpf8> [<https://perma.cc/JV3Q-GRNF>].

22. Curt Guyette, *Chain of Sorrow*, DETROIT METRO TIMES (Sep. 21, 2011), <https://www.metrotimes.com/detroit/chain-of-sorrow/Content?oid=2148058> [<https://perma.cc/7J5L-ZWHB>].

23. *Id.*

24. Teresa Evans-Campbell et al., *Indian Boarding School Experience, Substance Use, and Mental Health among Urban Two-Spirit American Indian/Alaska Natives*, 38 AM. J. DRUG & ALCOHOL ABUSE 421, 421 (2012).

25. *Id.*

26. *Juvenile Justice History*, CTR. ON JUV. & CRIM. JUST., <http://www.cjcj.org/education1/juvenile-justice-history.html> [<https://perma.cc/ZS5R-2W2C>] (last visited Nov. 3, 2018).

juveniles, especially in large cities.”<sup>27</sup> Juvenile courts and reform schools formed with the purpose to “rehabilitate rather than [] punish juvenile offenders.”<sup>28</sup> These schools and courts were based on the legal doctrine of *parens patriae*, which “gives the state the power to serve as the guardian (or parent) of those with legal disabilities, including juveniles.”<sup>29</sup> The juvenile courts could “order that young offenders be removed from their homes and placed in juvenile reform institutions as part of their rehabilitation program.”<sup>30</sup>

As concern grew about the effectiveness of the juvenile court system in the mid-1900’s, the United States Supreme Court began imposing due process requirements in juvenile cases.<sup>31</sup> For example, the Court held that a formal hearing is necessary for a juvenile to be relegated to long-term confinement.<sup>32</sup> However, a “tough-on-crime” approach that started to dominate American public opinion in the 1960s<sup>33</sup> led to an increased use of institutional confinements even for minor crimes in the mid-1990s.<sup>34</sup>

During this time, recognition that “youth correctional facilities across the country were overcrowded and [that] conditions were deplorable” began to grow.<sup>35</sup> A 1993 study conducted for the Office of Juvenile Justice and Delinquency Prevention found that detention facilities were pervasively overcrowded, which is associated with “higher rates of institutional violence, suicidal behavior, and greater reliance on the use of short term isolation.”<sup>36</sup> Researchers also concluded that “serious and widespread problems existed in the areas of living space, health care, institutional security and safety, and control of suicidal behavior.”<sup>37</sup> In 2005, the United States Department of Justice, through the Office of Juvenile Justice and Delinquency Prevention, published a bulletin opining that “detaining youth in facilities prior to adjudication should be an option of last resort only for serious, violent, and chronic offenders and for those

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27. *Dialogue on Youth and Justice*, A.B.A. DIV. PUB. EDUC. 5, <https://www.americanbar.org/content/dam/aba/migrated/publiced/features/DYJpart1.authcheckdam.pdf> [<https://perma.cc/5N2S-EGJR>].

28. *Id.*

29. *Id.*

30. *Id.*

31. *See id.*

32. *See In re Gault*, 387 U.S. 1, 27–28 (1967) (holding that when “proceedings may result in incarceration in an institution of confinement, “it would be extraordinary if our Constitution did not require the procedural regularity and exercise of care implied in the phrase ‘due process.’”).

33. *See* Dennis D. Loo & Ruth-Ellen M. Grimes, *Polls, Politics, and Crime: The “Law and Order” Issue of the 1960s*, 5 W. CRIMINOLOGY REV. 50, 50 (2004) (“For most of the 1960s, the Democratic and Republican parties disagreed with each other over how to address the ‘street’ crime issue, although since that time both parties have spoken in essentially one voice on crime: ‘let’s get tough.’”).

34. *See Juvenile Justice History*, *supra* note 26.

35. *Id.*

36. Barbara Allen-Hagen, *Conditions of Confinement in Juvenile Detention and Correction Facilities*, NAT’L CRIM. JUST. REFERENCE SERV. (Apr. 1993), <https://www.ncjrs.gov/txtfiles/fs-9301.txt> [<https://perma.cc/DMG7-QMJA>].

37. *Id.*

who repeatedly fail to appear for scheduled court dates.”<sup>38</sup> Further, the bulletin advised that “[s]ecure detention and confinement are almost never appropriate for status offenders and certain other small groups of offenders—those who are very young, vulnerable, first-time offenders; those charged with nonserious offenses; and those with active, involved parents or strong community-based support systems.”<sup>39</sup> Overall, rates of juvenile detention for youthful offenders have declined in the recent period.<sup>40</sup>

### C. Japanese Internment Camps

After the attack on Pearl Harbor in 1941, then-President Franklin D. Roosevelt ordered the detention of 120,000 persons of Japanese ancestry, the vast majority of whom were in the United States legally.<sup>41</sup> Around half of the detained were children.<sup>42</sup> Families “were taken into custody as a military measure on the ground that espionage and sabotage were especially to be feared from persons of Japanese blood.”<sup>43</sup> The families were held in prison-like conditions “far from their homes, and for lengthy periods—several years in many cases.”<sup>44</sup>

Parents and children alike suffered physical and psychological harms from their time in internment camps. “Some Japanese Americans died . . . due to inadequate medical care and the emotional stresses they encountered.”<sup>45</sup> Families “lived in substandard housing, had inadequate nutrition and health care, and had their livelihoods destroyed; many continued to suffer psychologically long after their release.”<sup>46</sup> Children were especially affected: “[t]raumatic stress was buffered by culturally constructed coping mechanisms that were less inculcated in the younger detainees. They reported more post-traumatic stress symptoms of unexpected and disturbing flashback experiences than those who were older at the time of incarceration.”<sup>47</sup>

The detentions are recognized today as egregious violations of global human rights principles, and of domestic legal norms. In recognition of this, Congress

38. James Austin, Kelly Dedel Johnson, & Ronald Weitzer, *Alternatives to the Secure Detention and Confinement of Juvenile Offenders*, U.S. DEP’T JUST. OFF. JUV. JUST. & DELINQ. PREVENTION 1 (Sept. 2005), <https://www.ncjrs.gov/pdffiles1/ojjdp/208804.pdf> [<https://perma.cc/X8HJ-JU3Z>].

39. *Id.* at 1–2.

40. *Key facts about juvenile incarceration*, CHILD TRENDS, <https://www.childtrends.org/indicators/juvenile-detention> [<https://perma.cc/T5ZA-V5S6>].

41. *Internment History*, PBS, <http://www.pbs.org/childofcamp/history/> [<https://perma.cc/D7DV-Y96H>] (last visited Nov. 13, 2018).

42. *Id.*

43. Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489, 490 (1945).

44. *Id.*

45. *Internment History*, *supra* note 41.

46. COMM’N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED xii (2012).

47. *Internment History: Health Impact*, PBS, <https://www.pbs.org/childofcamp/history/health.html> (last visited Feb. 2, 2019) (citing Gwendolyn M. Jensen, *The Experience of Injustice: Health Consequences of the Japanese American Internment*, 58 DISSERTATION ABSTRACTS INT’L SEC. A: HUMAN. & SOC. SCI. 2718 (1998)).

passed the Civil Liberties Act of 1988, which specifically acknowledges “the fundamental injustice of the evacuation, relocation, and internment of United States citizens and permanent resident aliens of Japanese ancestry during World War II,” and “apologize[s] on behalf of the people of the United States for the evacuation, relocation, and internment of such citizens and permanent resident aliens.”<sup>48</sup> An accompanying statement by Congress recognized that the detentions were “motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership.”<sup>49</sup>

#### D. Immigrant Detention

On average, each day during Fiscal Year 2017, United States Immigration and Customs Enforcement (ICE) held approximately 40,500 immigrants in detention.<sup>50</sup> We do not know the exact numbers, but many of these detainees were children. Children comprise about one-quarter of all immigrants worldwide and are particularly vulnerable to exploitation or abuse.<sup>51</sup> They migrate to the United States in a variety of ways and for a variety of reasons, including to escape violence or gang activity, to be reunited with family members, or because they are uncertain about their futures.<sup>52</sup>

Detention of immigrant children at the border is not new. For example, in 1907, the federal government passed legislation allowing immigration services to detain unaccompanied minors for “special inquiry” until their status was determined.<sup>53</sup> Even after early immigration centers such as Ellis Island closed down, detention facilities continued to be used as way to hold families while their immigration status was pending.<sup>54</sup> Modern immigration practices in this respect took shape when “Reagan-era [Immigration and Naturalization Service] began systematically apprehending undocumented migrants from certain countries and opened a number of new detention centers in Puerto Rico and the U.S. mainland to cope with the resulting surge in detainees.”<sup>55</sup>

In 1997, the Flores Stipulated Settlement Agreement [the Flores Settlement] specifically delineated the rights of unaccompanied children detained by ICE.<sup>56</sup>

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48. Civil Liberties Act of 1988, Pub. L. No. 100-383, § 1, 102 Stat. 903, 903 (1988).

49. *Id.* at § 2.

50. HUM. RTS. WATCH, CODE RED (June 20, 2018), <https://www.hrw.org/report/2018/06/20/code-red/fatal-consequences-dangerously-substandard-medical-care-immigration> [<https://perma.cc/CCU7-Y4LT>].

51. *Id.*

52. François Crépeau, *Children on the Move: Administrative Detention of Children is a Violation of Children's Rights*, UNICEF OFF. RES.-INNOCENTI, <https://www.unicef-irc.org/article/1393-administrative-detention-of-children-is-a-violation-of-childrens-rights.html> [<https://perma.cc/54WX-3A4D>].

53. *See* Immigration Act of 1907, 34 Stat. 898, 901 (1907).

54. *United States Immigration Detention Profile*, GLOBAL DETENTION PROJECT (May 2016), <https://www.globaldetentionproject.org/countries/americas/united-states> [<https://perma.cc/G98E-5CN8>].

55. *Id.*

56. Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997). For cases culminating in the settlement agreement, see *Flores v. Meese*, No. 85-4544-RJK(Px)

The agreement placed three main obligations on immigration authorities. First, they had to “release children from immigration detention without unnecessary delay in order of preference beginning with parents and including other adult relatives as well as licensed programs willing to accept custody.”<sup>57</sup> Second, “[w]ith respect to children for whom a suitable placement is not immediately available, the government is obligated to place children in the ‘least restrictive’ setting appropriate to their age and any special needs.”<sup>58</sup> Finally, the settlement required the government to “implement standards relating to the care and treatment of children in immigrant detention.”<sup>59</sup> These standards include a “notice of rights, safe and sanitary facilities, toilets and sinks, drinking water and food, medical assistance, temperature control, supervision, and contact with family members, along with other requirements.”<sup>60</sup>

In 2001, the first modern detention center for families was established in Berks County, Pennsylvania.<sup>61</sup> Because the Flores Settlement set standards for minors in custody, its terms applied to the Berks County facility. Nevertheless, in this facility, ICE “routinely separated older children from their parents and assigned them to rooms with non-familial adults of the same sex.”<sup>62</sup> Similarly, the T. Don Hutto Family Residential Facility in Taylor, Texas began housing detained families in 2006.<sup>63</sup> The facility was “functionally and structurally a prison.”<sup>64</sup> Children were “required to wear prison garb, [and] receive[d] only one hour of recreation a day.”<sup>65</sup> The remainder of the time, they were detained in small cells for twelve hours each day, and were allowed few personal items or privacy.<sup>66</sup> When the deplorable conditions at the Hutto facility were challenged, the federal government agreed to close it down in 2009.<sup>67</sup>

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(C.D. Cal. Nov. 30, 1987); *Flores v. Meese*, No. 85-4544-RJK(Px) (C.D. Cal. May 25, 1988); *Flores v. Meese*, 934 F.2d 991 (1990); *Flores v. Meese*, 942 F.2d 1352 (1992); and *Reno v. Flores*, 507 U.S. 292 (1993).

57. HUM. RTS. FIRST 1 (Oct. 2018) [hereinafter *The Flores Settlement and Family Incarceration*], [https://www.humanrightsfirst.org/sites/default/files/FLORES\\_SETTLEMENT\\_AGREEMENT.pdf](https://www.humanrightsfirst.org/sites/default/files/FLORES_SETTLEMENT_AGREEMENT.pdf) [<https://perma.cc/75EL-CGW9>].

58. *Id.*

59. *Id.*

60. Abbie Gruwell, *Unaccompanied Minors and the Flores Agreement: What to Know*, NAT’L CONF. ST. LEGIS.: THE NCSL BLOG (Oct. 30, 2018), <http://www.ncsl.org/blog/2018/10/30/unaccompanied-minors-and-the-flores-settlement-agreement-what-to-know.aspx> [<https://perma.cc/2HJK-HNKZ>].

61. Dora Schriro, *Weeping in the Playtime of Others: The Obama Administration’s Failed Reform of ICE Family Detention Practices*, 5 J. ON MIGRATION & HUM. SECURITY 452, 454 (2017).

62. *Id.*

63. LUTHERAN IMMIGRATION & REFUGEE SERV. AND WOMEN’S REFUGEE COMM’N, LOCKING UP FAMILY VALUES, AGAIN 1 (Oct. 2014), [https://web.archive.org/web/20170214183442/http://lirs.org/wp-content/uploads/2014/11/LIRSWRC\\_LockingUpFamilyValuesAgain\\_Report\\_141114.pdf](https://web.archive.org/web/20170214183442/http://lirs.org/wp-content/uploads/2014/11/LIRSWRC_LockingUpFamilyValuesAgain_Report_141114.pdf) [<https://perma.cc/85P5-CPKQ>].

64. *ACLU Challenges Illegal Detention of Immigrant Children Held in Prison-Like Conditions*, AM. C.L. UNION (Mar. 6, 2007), [http://www.aclu.org/immigrants/detention/28865prs\\_20070306.html](http://www.aclu.org/immigrants/detention/28865prs_20070306.html) [<https://perma.cc/LV6V-Z8WQ>].

65. *Id.*

66. *Id.*

67. *The Flores Settlement and Family Incarceration*, *supra* note 57, at 2.



In 2014, “an increase in the arrivals of mothers and children fleeing violence in Central America” prompted the Obama Administration to begin a large-scale expansion of prolonged family detention.<sup>68</sup> Over a year’s time, the government “apprehended 68,334 family members at the southwest border, representing a 361% increase in the number of family apprehensions over the previous fiscal year.”<sup>69</sup> In an effort to “stem the flow” by sending a clear message designed to deter migration,<sup>70</sup> the government “began detaining these families at unprecedented levels,” which required expanding the number of family detention beds.<sup>71</sup>

In 2015, the U.S. District Court for the Central District of California ruled that the federal government’s policy of family detention violated the Flores Settlement.<sup>72</sup> Consistent with the terms of the settlement, this same order also required, among other things, that “[i]n situations where a child may cannot be released promptly to an adult family member,” they “may not be held in a ‘secure’ facility, defined as ‘a detention facility where individuals are held in custody and are not free to leave.’”<sup>73</sup> The court also ordered that detention facilities be monitored and the standards for their operation improved.<sup>74</sup> In 2017, the same court again determined that the federal government was failing to comply with obligations under the Flores Agreement.<sup>75</sup> Notwithstanding these rulings, because current federal immigration law gives ICE broad latitude to detain migrants, federal courts have limited ability to intervene.<sup>76</sup>

Undocumented children typically become involved in immigration proceedings in three ways. First, they may be apprehended or arrested inside the United States after having lived here for a period of time.<sup>77</sup> Second, they may be apprehended after attempting to cross the border without an adult. Thousands of unaccompanied children attempt to cross the border each year. In Fiscal Year 2017, for example, approximately 41,435 unaccompanied children tried to enter the country.<sup>78</sup> Finally, children may be apprehended after trying to enter with

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68. LUTHERAN IMMIGRATION & REFUGEE SERV. AND WOMEN’S REFUGEE COMM’N, *supra* note 63, at 1.

69. *Id.* at 3.

70. *Id.* at 2.

71. *Id.*

72. *The Flores Settlement and Family Incarceration*, *supra* note 57, at 2.

73. *Id.* at 3.

74. *Id.*

75. *Id.* at 4.

76. Lauren Martin, *The Geopolitics of Vulnerability: Children’s Legal Subjectivity, Immigrant Family Detention and US Immigration Law and Enforcement Policy*, 18 GENDER, PLACE, & CULTURE 477, 478 (2011).

77. See AM. IMMIGRATION COUNCIL, A GUIDE TO CHILDREN ARRIVING AT THE BORDER: LAWS, POLICIES, AND RESPONSES, (Jun 26, 2015), <https://www.americanimmigrationcouncil.org/research/guide-children-arriving-border-laws-policies-and-responses> [<https://perma.cc/BAB8-HKY3>].

78. See U.S. CUSTOMS AND BORDER PROT., UNITED STATES BORDER PATROL SOUTHWEST FAMILY UNIT SUBJECT AND UNACCOMPANIED ALIEN CHILDREN APPREHENSIONS FISCAL YEAR 2016 (2016), <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016> [<https://perma.cc/9FGC-VA3R>].

their families. Again in 2017, approximately 75,622 family units arrived at the southern border.<sup>79</sup> Being apprehended by immigration authorities in any of these three situations can lead to detention, either of entire immigrant families or of the unaccompanied minors.<sup>80</sup> Currently, immigrant families are being detained in three different detention centers: the South Texas Family Residential Center in Dilley, Texas; the Karnes County Residential Center in Karnes City, Texas; and the Berks Family Residential Center in Leesport, Pennsylvania.<sup>81</sup>

The Trump Administration has “sought to expand and entrench the use of family incarceration.”<sup>82</sup> In 2018, the Administration announced a “zero-tolerance” policy for border crossings that would “result in parents and children being separated, rather than keeping them together in detention centers.”<sup>83</sup> This policy was intended to “ramp-up criminal prosecution of people caught entering the United States illegally.”<sup>84</sup> In turn, the prosecutions led to the widespread separation of children from their parents who were charged with illegal entry.<sup>85</sup> During the spring of 2018, approximately 2,000 children were separated from adults at the border and held in make-shift detention facilities, including a converted Walmart in Texas.<sup>86</sup>

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79. See U.S. CUSTOMS AND BORDER PROT., U.S. BORDER PATROL SOUTHWEST BORDER APPREHENSIONS BY SECTOR FY2017 (2017), <https://www.cbp.gov/newsroom/stats/usbp-sw-border-apprehensions-fy2017> [<https://perma.cc/ZQL4-4BXD>].

80. What occurs when immigration authorities apprehend children varies depending on how they arrive, i.e., with other family members or unaccompanied. Many families are placed in removal proceedings before an immigration judge or are removed through a summary, out-of-court proceeding. The government has increasingly used various facilities to house entire families (largely women and children) while they are awaiting immigration proceedings. Unaccompanied children are treated differently and must be transferred to the custody of Health and Human Services within seventy-two hours of their original detention, and instead of being kept in family detention centers are generally “housed through a network of state-licensed . . . providers.” See AM. IMMIGRATION COUNCIL, *supra* note 77. See also *Family Detention: Background Information*, DETENTION WATCH NETWORK, <https://www.detentionwatchnetwork.org/sites/default/files/DWN%20Family%20Detention%20Backgrounder%20and%20Talking%20Points.pdf> [<https://perma.cc/FH53-7D4T>] (noting that “approximately 70% of immigrants are subject to mandatory detention”).

81. AM. IMMIGRATION COUNCIL, *supra* note 77.

82. *The Flores Settlement and Family Incarceration*, *supra* note 57, at 4.

83. Maya Rhodan, *Here Are the Facts About President Trump’s Family Separation Policy*, TIME (last updated June 20, 2018, 10:57 AM), <http://time.com/5314769/family-separation-policy-donald-trump/> [<https://perma.cc/5DNW-2XLT>].

84. *Q&A: Trump Administration’s “Zero-Tolerance” Immigration Policy*, HUM. RTS. WATCH, (Aug. 16, 2018, 8:00 AM), <https://www.hrw.org/news/2018/08/16/qa-trump-administrations-zero-tolerance-immigration-policy> [<https://perma.cc/6V2P-VDC6>].

85. See *Id.* [ (“The government’s position seemed to be that the prosecutions required the parents to serve time in criminal custody, and thus due to rules on holding children in either criminal or immigrant detention, the separations were the logical result.”)].

86. See Amanda Arnold, *What to Know About the Detention Centers for Immigrant Children Along the U.S.-Mexico Border*, THE CUT (Jun. 21, 2018), <https://www.thecut.com/2018/06/immigrant-children-detention-center-separated-parents.html>.

## III

## THE RISKS AND HARMS OF INSTITUTIONALIZATION

Not all instances of institutionalization are harmful to children – indeed, some are recognized as beneficial. For example, each year, many parents send their children to week- or month-long summer camps, recognizing that the separation from home and lessons learned from a chance at independence can be good for developing minds. Additionally, both private and public boarding schools are popular in some areas of the country for those who can afford them. Still, there are risks inherent in the nature of even good institutions. For young children, the absence of a primary caregiver can create attachment issues: “even apparently ‘good’ institutional care can have a detrimental effect on children’s ability to form relationships later in life.”<sup>87</sup> One essay describes the difference between growing up in a family environment and growing up in a boarding school: “in normal development the ‘good enough’ family adapts with the child as he or she grows. For the child in boarding school this process is reversed; the child has to adapt to an inflexible system.”<sup>88</sup> This different environment can result in a “form of psychological splitting in which the child apparently becomes self-sufficient. This armoring [is] initially acquired to save the vulnerable child from further insults to its autonomy. . . .”<sup>89</sup> And, beyond psychological harms from separation, the lack of a parental presence at “good” institutions might make some abuses more likely to occur.<sup>90</sup>

The special nature of and conditions in detention centers only add to the possibility of serious physical and psychological detriment.<sup>91</sup> Although the American Bar Association’s (ABA) Civil Immigration Detention Standards presumes the use of “least restrictive means”<sup>92</sup> to meet the “limited underlying purpose of detention,”<sup>93</sup> family detention centers are often operated by for-profit companies that also operate private prisons. Because these companies have borrowed the latter model, the family detention centers have a prison-like

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87. See Rebecca Johnson et al., *Young Children in Institutional Care at Risk of Harm*, 7 TRAUMA, VIOLENCE & ABUSE 34, 42 (2006).

88. Joy Schaverien, *Boarding School Syndrome: Broken Attachments A Hidden Trauma*, 28 BRITISH J. PSYCHOTHERAPY 138, 139 (2011).

89. *Id.*

90. See, e.g., Alex Renton, *The Damage Boarding Schools Do*, THE GUARDIAN (Jul. 19, 2014), <https://www.theguardian.com/society/2014/jul/20/damage-boarding-school-sexual-abuse-children> [<https://perma.cc/A98B-9MRA>] (describing different instances of psychological trauma, physical and sexual abuse, and the concept of being a “boarding school survivor.”).

91. Crépeau, *supra* note 52.

92. There is similar language regarding unaccompanied minors elsewhere in federal law. For example, the Trafficking Victims Protection Reauthorization Act, aimed at enhancing measures to combat trafficking in persons, requires that unaccompanied, trafficked children must be placed in the “least restrictive setting that is in the best interest of the child.” William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(c)(2), 122 Stat. 5044, 5078 (2008).

93. COMM’N ON IMMIGR., AM. BAR ASS’N, ABA CIVIL IMMIGRATION DETENTION STANDARDS 7 (2012).

atmosphere:<sup>94</sup> walls are made of cinderblocks; families are held behind heavy, locked doors; infraction notices are constantly given by guards; and families are not able to leave and re-enter the facility.<sup>95</sup> There are credible reports of inadequate medical and mental health care, weight loss by children, regimented daily schedules, a lack of educational and recreational resources, and a lack of oversight and inspection of conditions.<sup>96</sup>

Overall, children face psychosocial and developmental problems during and after detention due to a myriad of factors. These include, but are not limited to: previous trauma faced in their home country or during immigration itself, disruption in their family unit, and the conditions of detainment, such as a lack of basic necessities, including food.<sup>97</sup> The next sections explore in more detail three of the ways in which institutionalization as a means of immigrant detention can be harmful to children: the risk of poor or unsafe conditions resulting in physical harms; invasions of lifestyle and privacy; and the risk of psychological and developmental harms due to stress.

#### A. Physical Harms from Poor or Unsafe Conditions

Because migrant children are usually detained in jail-like detention centers, often run by companies that operate for-profit prisons,<sup>98</sup> they are subject to the same physical risks that inherently accompany this type of confinement, as well as others that arise from lack of funding, oversight, and compassion. Although there are many risks, those of principal concern include death or harm due to a lack of proper medical care, unsanitary and unsafe food and water practices, and sexual and physical abuse.

Since 2003, 176 immigrant adults have died in ICE custody.<sup>99</sup> Experts have “determined that medical care lapses contributed or led to 23 [of these] deaths[,]”<sup>100</sup> while Human Rights Watch<sup>101</sup> contends that “most” of the death reports they have looked at since 2010 “include evidence of dangerous and

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94. COMM’N ON IMMIGR., AM. BAR ASS’N, FAMILY IMMIGRATION DETENTION: WHY THE PAST CANNOT BE PROLOGUE 11 (2015).

95. *Id.* at 30.

96. *See* Family Detention: Background Information, *supra* note 80, at 1. *See also* INTER-AM. COMM’N ON HUMAN RIGHTS, ORG. OF AM. STATES, REPORT ON IMMIGRATION IN THE UNITED STATES 85–118 (2010) (describing the various conditions found in U.S. detention centers).

97. INT’L DET. COAL., CAPTURED CHILDHOOD 47 (2012).

98. *See, e.g.*, Morgan Simon, *What Do Big Banks Have To Do With Family Detention?* #FamiliesBelongTogether Explains, FORBES (Sep. 25, 2018), <https://www.forbes.com/sites/morgansimon/2018/09/25/what-do-big-banks-have-to-do-with-family-detention-familiesbelongtogether-explains/#76092c792b6a> [<https://perma.cc/2D2K-4EP9>] (describing the phenomenon of for-profit prisons and detention centers).

99. *Id.*

100. *See id.* (explaining how lack of staff training and medical care contributed to deaths of those held within ICE custody).

101. Human Rights Watch is a prominent international non-governmental organization that reports on human rights crises around the world. For more information, see HUMAN RIGHTS WATCH, <https://www.hrw.org/> [<https://perma.cc/4JTP-EKCS>].

subpar medical practices.”<sup>102</sup> Though none of these particular reports included a child under the age of eighteen, “they raise serious concerns about ICE’s ability to detect, appropriately respond to, and correct serious deficiencies in medical care that arise in many of these facilities.”<sup>103</sup> Indeed, two migrant children died recently while in ICE custody,<sup>104</sup> and there have been numerous reports of conditions in detention facilities leading to the death of children post-confinement.<sup>105</sup> One woman detained at the now-closed Artesia, New Mexico facility with her young son reported that another mother at that facility “asked for medical assistance for her son but it never came. She was deported, and her son died just a few months later.”<sup>106</sup> In a different case, a mother made news by retaining a law firm after her child “tragically died after being detained by ICE in unsanitary conditions at the South Texas Family Residential Center in Dilley.”<sup>107</sup> The toddler “developed a cough, congestion, and fever in the facility” and died of “viral pneumonitis six weeks after being released from the facility.”<sup>108</sup>

Though death is arguably the most extreme outcome, subpar medical care in detention centers presents a very real possibility of serious physical injury, pain, and suffering. Human Rights Watch compiled an extensive report detailing dangerous medical practices in detention centers such as “overreliance on unqualified medical staff, delays in emergency responses, and requests for care unreasonably delayed.”<sup>109</sup> As explained by one Human Rights Watch director, “ICE’s record of providing inadequate care to adults does not bode well if the agency is put in charge of providing care to increasing numbers of children.”<sup>110</sup> There are many reports of child health concerns that were dismissed by health

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102. Code Red, *supra* note 50, at 3.

103. *Id.* at 7.

104. Miriam Jordan, *8-Year-Old Migrant Child From Guatemala Dies in U.S. Custody*, N.Y. TIMES (Dec. 25, 2018), <https://www.nytimes.com/2018/12/25/us/guatemalan-boy-dies-border-patrol.html?login=smartlock&auth=login-smartlock> [<https://perma.cc/KCE3-N745>].

105. Code Red, *supra* note 50, at 3.

106. Anonymous, *What My 6 Year-Old Son and I Endured in Detention*, N.Y. TIMES (Jun. 25, 2018), <https://www.nytimes.com/2018/06/25/opinion/family-detention-immigration.html> [<https://perma.cc/9V5X-B77R>].

107. Geneva Sands, *Texas Opens Investigation Into Reported Death of Child After Leaving ICE Custody*, ABC NEWS (Aug. 10, 2018), <https://abcnews.go.com/US/texas-opens-investigation-reported-death-child-leaving-ice/story?id=57132554> [<https://perma.cc/9B2Z-RPPF>].

108. Emma Platoff, *Report: Toddler Died After Contracting Infection at ICE Family Detention Facility*, TEXAS TRIBUNE (Aug. 27, 2018), <https://www.texastribune.org/2018/08/27/toddler-died-ICE-custody-vice-news-dilley/> [<https://perma.cc/D6EJ-BYHD>].

109. MITCH BLUNT, HUMAN RIGHTS WATCH, SYSTEMIC INDIFFERENCE: DANGEROUS & SUBSTANDARD MEDICAL CARE IN U.S. IMMIGRATION DETENTION (May 8, 2017), <https://www.hrw.org/report/2017/05/08/systemic-indifference/dangerous-substandard-medical-care-us-immigration-detention> [<https://perma.cc/WL79-3HX9>].

110. Shefali Luthra & Marisa Taylor, *Immigrant Families Placed in Detention Centers Face Health Care Challenges*, WASH. POST (Jul. 2, 2018), [https://www.washingtonpost.com/national/health-science/immigrant-families-placed-in-detention-centers-face-health-care-challenges/2018/07/02/291410b6-7e2a-11e8-a63f7b5d2aba7ac5\\_story.html?utm\\_term=.468673d5adf3](https://www.washingtonpost.com/national/health-science/immigrant-families-placed-in-detention-centers-face-health-care-challenges/2018/07/02/291410b6-7e2a-11e8-a63f7b5d2aba7ac5_story.html?utm_term=.468673d5adf3) [<https://perma.cc/H6LR-R3JV>].

officials in immigration facilities.<sup>111</sup> One former spokesperson for the Department of Health and Human Service said that he was “unfamiliar with any protocols to ensure kids receive adequate vaccinations, or consultations with child psychologists or social workers.”<sup>112</sup>

Food and drink conditions in detention facilities also create various physical health issues. Reports from detainees at the Dilley facility indicate that “the water smells and tastes bad and sometimes makes them sick.”<sup>113</sup> One mother reported that “food was often expired, the milk was spoiled, and we weren’t provided with snacks for our children between meals.”<sup>114</sup> Saving meals to give to their children later was not allowed.<sup>115</sup> Most strikingly, “children went to bed hungry.”<sup>116</sup> Official statements bolster these claims: for example, the Inspector General for the Department of Homeland Security “criticized several immigration detention facilities for having spoiled and moldy food. . . .”<sup>117</sup> Children face risks of improper nutrition in detention facilities regardless of whether they are detained with parents or without.

Finally, further harm exists in the possibility of physical and sexual abuse. Power dynamics in detention facilities generally create the conditions where abuse can flourish, and immigration detention facilities are no exception. This can be for a number of reasons: detainees are afraid to report, children are without parental supervision, or the sheer number of detained families and unaccompanied minors creates problems for effective oversight. From 2013 to 2017, ICE reported 1,310 claims of sexual abuse from detainees,<sup>118</sup> but “watchdog organizations estimate the occurrence of sexual abuse to be significantly higher.”<sup>119</sup> There is a dearth of data indicating the age and gender of sexual assault victims in ICE custody; nevertheless, a human rights clinic was able to

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111. See Bree Bernwanger & Gracie Willis, *Family Detention Is Not the Answer to Family Separation. It's a Failure and a Disgrace*, USA TODAY (Jul. 23, 2018), <https://www.usatoday.com/story/opinion/2018/07/23/family-detention-centers-no-remedy-separated-families-column/796328002/> [<https://perma.cc/HW96-WQCR>] (describing the story of a six-year old girl who was told she was “menstruating” after she had a high fever and began to bleed from her vagina); see also *What My 6-Year-Old Son and I Endured in Detention*, *supra* note 106 (noting that one mother was told that she “should have thought about that before she came to the United States” after trying to seek medical help for her daughter’s asthma).

112. Luthra & Taylor, *supra* note 110.

113. Sharon Lerner, *Mother’s Day in an ICE Detention Center*, THE INTERCEPT (May 14, 2017), <https://theintercept.com/2017/05/14/mothers-day-in-an-ice-detention-center/> [<https://perma.cc/65GB-7EW2>].

114. *What My 6-Year-Old Son and I Endured in Detention*, *supra* note 106.

115. *Id.*

116. *Id.*

117. Maria Sacchetti, *Watchdog Report Finds Moldy Food, Mistreatment in Immigrant Detention Centers*, WASH. POST (Dec. 17, 2017), [https://www.washingtonpost.com/local/immigration/watchdog-report-finds-moldy-food-mistreatment-in-immigrant-detention-centers/2017/12/15/c97b380a-e10d-11e7-89e8-edec16379010\\_story.html?utm\\_term=.5f4790d77a1d](https://www.washingtonpost.com/local/immigration/watchdog-report-finds-moldy-food-mistreatment-in-immigrant-detention-centers/2017/12/15/c97b380a-e10d-11e7-89e8-edec16379010_story.html?utm_term=.5f4790d77a1d) [<https://perma.cc/SX7Q-4VTZ>].

118. Emily Kassie, *Sexual Assault Inside ICE Detention: 2 Survivors Tell Their Stories*, N.Y. TIMES (Jul. 17, 2018), <https://www.nytimes.com/2018/07/17/us/sexual-assault-ice-detention-survivor-stories.html> [<https://perma.cc/B2GW-L6PC>].

119. *Id.*

obtain official records detailing “federal officials’ verbal, physical, and sexual abuse of migrant children.”<sup>120</sup> For example, one male care worker was recently charged with molesting at least eight young unaccompanied minors over a year’s time at a shelter in Mesa, Arizona.<sup>121</sup>

Other physical abuse is also prevalent. The ACLU reported on documented abuses of minors including punching a child in the head three times, using a stun gun on a boy, kicking a child in the ribs, and denying children permission to stand or move.<sup>122</sup> One mother described experiencing frigid temperatures and explained that, although her daughter “was purple from how cold she felt,” they were still not given blankets.<sup>123</sup> Other reports detailed a lack of air conditioning in hot Texas summers, and various juveniles reported that the facilities “dos[ed] children with cocktails of psychotropic drugs described as vitamins.”<sup>124</sup> At a youth detention center in Shenandoah Valley, Virginia, a John Doe described having his hands put behind his back, pens poked into his ribs, and other physical manhandling.<sup>125</sup> According to John Doe, the detention center officials went as far as handcuffing him and tying him to a chair with “a restraint placed over his face with holes so he could breathe.”<sup>126</sup> Other children reported the same punishment.<sup>127</sup>

The risk of physical harms to minors in ICE custody presents itself in a variety of ways. Improper medical care presents risk of death, illness, and discomfort. Poor nutrition is another concern, with reports of unsafe and unsanitary drinking water and a shortage or spoilage of food. Finally, for a number of reasons, physical and sexual abuse can flourish in detention centers and these risks for children are serious, prevalent, and should be addressed.

## B. Invasions on Lifestyle and Privacy

Because prison-like conditions are pervasive in immigrant detention centers, children naturally suffer from invasions of their privacy, and their movements are abnormally restricted. As one former DHS spokesperson described: “DHS’ . . . facilities] were designed to hold people, and not let them out . . . [They are] not

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120. AM. CIV. LIBERTIES UNION, ACLU OBTAINS DOCUMENTS SHOWING WIDESPREAD ABUSE OF CHILD IMMIGRANTS IN U.S. CUSTODY (May 22, 2018), <https://www.aclu.org/news/aclu-obtains-documents-showing-widespread-abuse-child-immigrants-us-custody> [<https://perma.cc/6ZQL-VR3M>].

121. Tophers Sanders & Michael Grabell, *Worker Charged With Sexually Molesting Eight Children at Immigrant Shelter*, PROPUBLICA (Aug. 2, 2018), <https://www.propublica.org/article/worker-charged-with-sexually-molesting-eight-children-at-immigrant-shelter> [<https://perma.cc/E2JD-N4KW>].

122. ACLU OBTAINS DOCUMENTS SHOWING WIDESPREAD ABUSE OF CHILD IMMIGRANTS IN U.S. CUSTODY, *supra* note 120.

123. Lerner, *supra* note 113.

124. Blake Ellis, Melanie Hicken, & Bob Ortega, *Handcuffs, Assaults, and Drugs Called ‘Vitamins’: Children Allege Grave Abuse at Migrant Detention Facilities*, CNN (Jun. 21, 2018), <https://www.cnn.com/2018/06/21/us/undocumented-migrant-children-detention-facilities-abuse-invs/index.html> [<https://perma.cc/4785-YNHX>].

125. *Id.*

126. *Id.*

127. *Id.*

in any way designed to protect the health and well-being of families and young children.”<sup>128</sup> The overarching goal of keeping detainees on lockdown is used indirectly to justify restrictions on movement and privacy.

One report on conditions in family detention centers stated that “families were detained in small cells with little privacy and were prohibited from keeping food, toys, or writing utensils in their cells.”<sup>129</sup> Another reporter observed that one now-closed family detention center forced children to live in “dormitory housing, [and] to use toilets exposed to public view.”<sup>130</sup> Other women reported that they “were not allowed access to the bathroom” and bathroom doors were chained shut.<sup>131</sup> And beyond just physical privacy, families are under constant watch, stripping children of the otherwise presumed benefits that flow from parental decision-making.

Restrictions on movement go hand-in-hand with privacy invasions. The Karnes facility was described as a “secure detention center run with a rigid schedule, including set meal times, wake-up and lights-out times, and multiple body counts and room checks during the day and night.”<sup>132</sup> A photo from the McAllen, Texas detention center shows children contained in cages (though Border Patrol is “uncomfortable” with the term “cages”).<sup>133</sup> During the night, guards have been known to shine flashlights into the eyes of sleeping children.<sup>134</sup> All evidence points to an atmosphere similar to that of the military or a prison, but instead of culpable adults or voluntary public servants, the atmosphere is enforced against unwitting children of all ages.

ICE detention standards further provide that “all children residing in an ICE Residential Family Facility . . . shall be provided with educational services and programming appropriate to the minor’s level of development and communication skills in a structured classroom setting.”<sup>135</sup> However, “individuals with firsthand knowledge of the child detention facilities have reportedly

128. Luthra & Taylor, *supra* note 110.

129. JESSICA CHICCO ET. AL., SOC’Y FOR CMTY. RESEARCH & ACTION, STATEMENT ON THE INCARCERATION OF UNDOCUMENTED MIGRANT FAMILIES 1 (Jul. 2016).

130. Wil S. Hyton, *The Shame of America’s Family Detention Camps*, N.Y. TIMES (Feb. 4, 2015), <https://www.nytimes.com/2015/02/08/magazine/the-shame-of-americas-family-detention-camps.html> [<https://perma.cc/79TD-GZ3T>].

131. Lerner, *supra* note 113.

132. FAMILY IMMIGRATION DETENTION: WHY THE PAST CANNOT BE PROLOGUE, *supra* note 94, at 21.

133. Gabriella Paiella, *Border Patrol ‘Very Uncomfortable’ Using the Word ‘Cages’ to Describe Cages*, THE CUT (Jun. 18, 2018), <https://www.thecut.com/2018/06/border-patrol-very-uncomfortable-with-word-cages.html> [<https://perma.cc/3JRE-3EDW>].

134. Bernwanger & Willis, *supra* note 111.

135. More specifically, ICE’s Education Policy dictates that all eligible juveniles will be provided with a minimum of “one-hour daily instruction in each of the core subjects,” and that children “with disabilities and/or in need of special education . . . [should be] referred to an appropriate agency for intervention.” They are also entitled to translation services or an education in a language that they understand. U.S. IMMIGR. AND CUSTOMS ENF’T, ICE FAMILY RESIDENTIAL STANDARDS: EDUCATION POLICY 1 (Jan. 3, 2018), [https://www.ice.gov/doclib/dro/family-residential/pdf/rs\\_educational\\_policy.pdf](https://www.ice.gov/doclib/dro/family-residential/pdf/rs_educational_policy.pdf) [<https://perma.cc/AX99-9KYM>].



described the education offered there as uneven, and in some cases, starkly inadequate.”<sup>136</sup> Some teachers are not certified, many cannot effectively communicate in Spanish, and the age range in classrooms is extremely broad.<sup>137</sup> Ultimately, however, due to access restrictions for many shelters, “the overall quality of the education they provide largely remains a mystery because much of what happens in the shelters is rarely seen by the public.”<sup>138</sup>

Perhaps most importantly, institutionalized migrant children are also denied the ability to grow and develop through a “home life.” Home life has always been recognized as integral to healthy child development. In 1909, the White House held its first conference on children.<sup>139</sup> One key takeaway from this conference was that “home life is the highest and finest product of civilization. Children should not be deprived of it except for urgent and compelling reasons.”<sup>140</sup> The conference-goers went a step further to explain that “if a child had to be placed outside his or her home, then foster-family care was the option of choice. Institutional care was a distant third.”<sup>141</sup> Even though many detained children are still cared for by their mothers, no serious argument can be made that a detention center is “home life.”<sup>142</sup> In the words of one Japanese-American survivor interned with her family, “it was a prison indeed.”<sup>143</sup> Children lose the comfort and stability of a household, neighborhood, support network, and community. Continuity of upbringing is surely disrupted when a child is uprooted from their family home and relative freedom and subsequently held under lock and key, whether it be in boarding schools, juvenile detention centers, internment camps, or inside a family detention facility.

### C. The Risk of Developmental Harms Due to Stress

One of the most certain, and imminent, risks of institutionalizing children in detention centers is stress that may inhibit healthy neurological development. This can come from being separated from parents, being in an unknown and

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136. Dana Goldstein & Manny Fernandez, *In a Migrant Shelter Classroom, 'It's Always Like the First Day of School'*, N.Y. TIMES (Jul. 6 2018), <https://www.nytimes.com/2018/07/06/us/immigrants-shelters-schools-border.html> [https://perma.cc/946U-ZMAQ].

137. *Id.*

138. *Id.*

139. Marshall B. Jones, *Decline of the American Orphanage*, 67 SOC. SERV. REV. 459, 460 (1993).

140. *Proceedings of the Conference on the Care of Dependent Children* (S. Doc. No. 721, 60th Cong., 2d sess.) (1909).

141. Jones, *supra* note 139, at 464.

142. For comparison, imagine making the argument that children in concentration camps, though sometimes kept with family members, were experiencing “home life.” In his book titled *Asylums*, Erving Goffman makes the point that institutions are “a place of residence and work where a large number of like-situated individuals, cut off from the wider society for an appreciable period of time, together lead an enclosed, formally administered round of life.” Jones, *supra* note 139, at 470 (quoting Erving Goffman, *ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES* xiii (1959)). Under this definition of institution, orphanages, concentration camps, and detention centers can all be considered institutions.

143. Cordelia Hebblethwaite, *Pain and Redemption of WW11 Interned Japanese-Americans*, BBC NEWS (Feb. 18, 2012), <https://www.bbc.com/news/magazine-17080392> [https://perma.cc/8F7C-LGZD].

uncomfortable living environment, witnessing violence, mistreatment of parents or siblings within the facilities, prolonged hunger, or other sources of stress that occur due to the nature of detention itself or the specific policies and actions of those in charge. Research has shown that multiple stressful and unpredictable events experienced in childhood can have cumulative effects on a child that impact health and well-being throughout their life and may even impact subsequent generations.”<sup>144</sup>

Childhood stress has been defined as “events or conditions that threaten, or are perceived to threaten, physiological equilibrium.”<sup>145</sup> This stress can manifest itself in different ways: increases in heart rate, stress hormones, blood pressure, or inflammatory activation.<sup>146</sup> Some stressful experiences can be positive because they help a child learn how to manage and control their emotions.<sup>147</sup> However, the type of stress known as toxic stress “carries no benefits and is physically and psychologically destructive to children.”<sup>148</sup> Toxic stress is a “strong, frequent, or prolonged activation of the body’s stress response systems in the absence of the buffering protection of a supportive, adult relationship.”<sup>149</sup> This kind of stress is especially applicable to minors who are unaccompanied, who are separated from their parents in detention, or who are detained in the same facility as their parents but not allowed to be with them at particularly difficult moments.

Toxic stress can be especially harmful for development. During early stages of life, it is “likely to affect developing brain circuits and hormonal systems in ways that lead to poorly controlled stress response systems that will be overly reactive or slow to shut down. . . .”<sup>150</sup> Toxic stress caused by separation from their parents “dramatically increases the risk of long-term physical and psychological injuries in children.”<sup>151</sup> Children are able to develop best when they have reliable and consistently available nurturing relationships.<sup>152</sup> Because of this, “the need

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144. Experts refer to these experiences as adverse childhood experiences (ACEs). Howard A. Zucker, et al., *Potential Child Health Consequences of the Federal Policy Separating Immigrant Children From Their Parents*, 320 JAMA 541, 542 (2018).

145. Michelle M. Loman & Megan R. Gunner, *Early Experience and the Development of Stress Reactivity and Regulation in Children*, 34 NEUROSCI. & BIOBEHAV. REV. 867, 868 (2010).

146. NAT’L SCI. COUNS. ON THE DEVELOPING CHILD, EXCESSIVE STRESS DISRUPTS THE ARCHITECTURE OF THE DEVELOPING BRAIN 1 (2009).

147. Usually, this occurs when stress is “activated in an environment that includes supportive parental relationships” because “the stress effects are buffered by those parental relationships and the child’s biological stress response returns to its baseline levels.” The buffering afforded by a proper parental response “leads to the development of a child’s healthy stress response system.” Brief for Reyna et al. as Amici Curiae supporting Plaintiff-Appellants, Reyna et al. v. Hott, *appeal docketed* (4<sup>th</sup> Cir.) (Case No. 1:17-cv-01192-LO-TCB) at 5, summarizing Melissa Nachmias & Megan Gunnar et al., *Behavioral Inhibition and Stress Reactivity: The Moderating Role of Attachment Security*, 67 CHILD DEV. 508 (1996).

148. Reyna, Brief of Amici Curiae, *supra* note 147, at 5.

149. Jack P. Shonkoff et al., *The Lifelong Effects of Early Childhood Adversity and Toxic Stress*, 129 AM. ACAD. OF PEDIATRICS e232, e235 (2012).

150. Reyna, Brief of Amici Curiae, *supra* note 147, at 6 (citing *Early Experience*, *supra* note 145 at 867-76).

151. Reyna, Brief of Amici Curiae, *supra* note 147, at 13.

152. *Id.* at 8.

for intimate contact between young children and their parents is not fulfilled through occasional phone calls and/or letter writing with parents held in far-off detention centers.”<sup>153</sup> Children need touch and tactile stimulation so they do not experience developmental delays or impaired cognitive development.<sup>154</sup>

Toxic stress caused by separation from a parent or a stable parental relationship can lead to an array of mental and physical health problems.<sup>155</sup> Adverse mental health outcomes include depression, anxiety disorders, alcoholism, and drug abuse.<sup>156</sup> Physical health issues may take the form of cardiovascular disease, diabetes, and stroke.<sup>157</sup> Impaired cognitive development may also occur because toxic stress can affect a child’s ability to “successfully navigate fear triggering events” and thus a child’s learning capabilities.<sup>158</sup> Finally, toxic stress can effect emotion regulation and the performance of executive functions, such as inhibiting impulsive behaviors and developing the ability to incorporate new information into decision-making.<sup>159</sup> These effects are not limited to early childhood: studies also show that “adolescent brains appear to be especially vulnerable to prolonged periods of stress.”<sup>160</sup> Thus, stress caused by conditions of confinement or separation from parents may lead to future mental, physical, and developmental problems for many children in detention.

#### IV

#### CRC IDEALS EMBEDDED IN DOMESTIC LAW

The United States has institutionalized children for various reasons over time. Holding undocumented migrant families and unaccompanied minors in detention is the latest iteration of this policy choice. For various practical and ideological reasons, advocates fighting child detention use the U.N. Convention on the Rights of the Child (CRC) to make human rights arguments.<sup>161</sup> One reason

153. *Id.*

154. Zucker et al., *supra* note 144, at 542.

155. Reyna, Brief of Amici Curiae, *supra* note 147, at 15.

156. See Bruce S. McEwen, *Central Effects of Stress Hormones in Health and Disease: Understanding the Protective and Damaging Effects of Stress and Stress Mediators*, 583 *EURO. J. PHARMA.* 174 (2008).

157. *Id.*

158. Reyna, Brief of Amici Curiae, *supra* note 147, at 15. (summarizing NAT’L SCI. COUNS. ON THE DEVELOPING CHILD, PERSISTENT FEAR AND ANXIETY CAN AFFECT YOUNG CHILDREN’S LEARNING AND DEVELOPMENT 5 (2010)).

159. Other limitations on executive functions include those for making, following, and altering plans; and controlling and focusing attention. See PERSISTENT FEAR AND ANXIETY CAN AFFECT YOUNG CHILDREN’S LEARNING AND DEVELOPMENT, *supra* note 158.

160. Reyna, Brief of Amici Curiae, *supra* note 147, at 17 (citing Sonia J. Lupien et al., *Effects of Stress Throughout the Lifespan on the Brain, Behavior, and Cognition*, 10 *NAT. REV. NEUROSCI.* 434 (2009)).

161. See, e.g., Olga Byrne, *Promoting a Child Rights-Based Approach to Immigration in the United States*, 32 *GEO. IMMIGR. L.J.* 59, 61 (2018) (arguing that “immigration policymakers, activists, and programs should implement a child rights-based approach. . . .”); N.Y.C. BAR COMM. REP., *Criminal Prosecution, Separation, and Detention of Families Seeking Asylum* (Jul. 6, 2018), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/criminal-prosecution-separation-and-detention-of-families-seeking-asylum> [https://perma.cc/B9N7-TC57] (arguing that “family separation and family detention violate children’s rights, U.S. child welfare

for reliance on human right arguments is that there is a significant dearth of domestic case law on the topic.<sup>162</sup> Additionally, the CRC is potentially persuasive as soft law. However, because it is not applicable as a binding authority in this country,<sup>163</sup> and because substantive aspects of the document are widely rejected as a political matter,<sup>164</sup> this route is unlikely to be very effective. As one scholar put it: “Perhaps the CRC’s influence is most deeply felt in the not-easily-quantifiable area of soft law, as its very existence prompts norm-influencing discussions . . . .”<sup>165</sup> The influence of American jurisprudence on the drafting of the CRC points to perhaps a better basis for legal argument: existing domestic law that incorporates many of the same principles.<sup>166</sup> To support this argument, this paper uses ICE’s standards of detention in its discussion of applicable federal administrative laws, and the laws of the State of Texas because this is where the majority of children are detained.<sup>167</sup>

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standards, and U.S. obligations under human rights and refugee law”); Craig B. Mousin, *Rights Disappear When US Policy Engages Children as Weapons of Deterrence*, 21 A.M.A. J. ETHICS 58 (2019) (exploring the “ethical and health implications of the United States’ failure to ratify the CRC with an emphasis on refugees”); B. Shaw Drake & Megan Corrarino, *U.S. Stands Alone: Not Signing U.N. Child Treaty Leaves Migrant Children Vulnerable*, HUFFINGTON POST (Oct. 13, 2016), [https://www.huffingtonpost.com/b-shaw-drake/children-migrants-rights\\_b\\_8271874.html](https://www.huffingtonpost.com/b-shaw-drake/children-migrants-rights_b_8271874.html) [<https://perma.cc/T7B8-M9KE>] (describing why the CRC is important for protecting children from family detention).

162. This is most likely due to lack of legal resources afforded migrant children. A 2014 study showed that at most one-third of unaccompanied minors are represented by legal counsel. See TRAC IMMIGRATION REPORT, REPRESENTATION FOR UNACCOMPANIED CHILDREN IN IMMIGRATION COURT (Nov. 25, 2014), <http://trac.syr.edu/immigration/reports/371/> [<https://perma.cc/HUD9-EXAY>]. Additionally, only twenty-seven percent of women with children have representation. See TRAC IMMIGRATION REPORT, REPRESENTATION IS KEY IN IMMIGRATION PROCEEDINGS INVOLVING WOMEN WITH CHILDREN (Feb. 18, 2015), <http://trac.syr.edu/immigration/reports/377/> [<https://perma.cc/6U8K-RZQP>]. Furthermore, most of the represented parties in immigration cases are likely contesting the threshold questions of detention and removal – not the standards of living in residential detention facilities. Flores, mentioned *supra*, is the case most frequently referenced with regard to the conditions of immigrant detention.

163. The United States has signed, but not ratified, this treaty. CONVENTION OF THE RIGHTS OF THE CHILD: FREQUENTLY ASKED QUESTIONS, [https://www.unicef.org/crc/index\\_30229.html](https://www.unicef.org/crc/index_30229.html) [<https://perma.cc/H5WY-3RVS>], (last visited Dec. 2, 2018).

164. See, e.g., Joe Lauria, *Why Won’t the US Ratify the UN’s Children’s Rights Convention?* HUFFINGTONPOST (Jan. 25, 2015), [https://www.huffingtonpost.com/joe-lauria/why-wont-the-us-ratify-th\\_b\\_6195594.html](https://www.huffingtonpost.com/joe-lauria/why-wont-the-us-ratify-th_b_6195594.html) [<https://perma.cc/3EET-ZAFH>].

165. Howard Davidson, *Does the U.N. Convention on the Rights of the Child Make a Difference?*, 22 MICH. ST. INT’L L. REV. 497, 512 (2014).

166. Many of the proposed provisions by the United States for incorporation into the CRC mirrored ideals found in American jurisprudence, such as freedom of religion, freedom of expression, family reunification, freedom of association and assembly, right to privacy, protection from abuse, and the periodic review of placement for children. See, e.g., Cynthia Price Cohen, *Role of the United States in Drafting the Convention on the Rights of the Child: Creating a New World for Children*, 4 LOYOLA POVERTY L.J. 9 (1998) (describing the role played by the U.S. in drafting the CRC and arguing that “the most significant changes in the world view of children’s rights can be directly attributed to proposals tabled by the United States delegation.”).

167. For a breakdown of where migrant children are being detained, see, e.g., Sarah Almukhtar et al., *Where Migrant Children Are Being Held Across the U.S.*, N.Y. TIMES (Jun. 21, 2015), <https://www.nytimes.com/interactive/2018/06/21/us/where-are-the-border-children.html> [<https://perma.cc/Y3A5-E7GF>]. Another rationale for choosing Texas as an example lies in the fact that

### A. Texas State Law

The Texas Family Code offers protection from physical, sexual, and emotional abuse as well as neglect. The Texas Penal Code addresses the violation of the civil rights of persons in custody, and the Texas Department of Family and Protective Services regulates through its administrative code the residential child-care conditions and child custody requirements. Taken together, advocates can use these provisions to assist detained children instead of relying on those provisions enumerated in the CRC.

The Texas Family Code attempts to protect children from abuse in the same manner as the CRC. Texas outlaws child abuse and defines it to include mental or emotional abuse that impairs a child's development,<sup>168</sup> "physical injur[ies] that result in substantial harm,"<sup>169</sup> failure to reasonably protect a child against physical injury by another,<sup>170</sup> "compelling or encouraging the child to engage in sexual conduct,"<sup>171</sup> and causing or permitting the trafficking of a child or the engagement in narcotic consumption.<sup>172</sup> Additionally, the Texas code prohibits child neglect and defines such neglect as including leaving a child where they are exposed to risk of harm,<sup>173</sup> placing a child in (or failing to remove a child from) situations that require them to make choices beyond their maturity or that would expose

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it is a conservative state, and even with historically prominent notions of "small government" in Texas, the legislature has still enacted code to address what is happening in immigration detention facilities.

168. Specifically, abuse is partially defined as "mental or emotional injury to a child that results in an observable and material impairment in the child's growth, development, or psychological functioning. . . ." TEX. FAM. CODE ANN. § 261.001(1)(A) (West 2017).

169. Physical abuse is defined in the Texas Family Code as "physical injury that results in substantial harm to the child, or the genuine threat of substantial harm from physical injury to the child. . . ." *Id.* § 261.001(1)(C).

170. The statute specifically provides that abuse includes "failure to make a reasonable effort to prevent an action by another person that results in physical injury that results in substantial harm to the child." *Id.* § 261.001(1)(D).

171. There are multiple sub-provisions under the definition of abuse that specifically deal with sexual abuse. 1(E) defines abuse to include "sexual conduct harmful to a child's mental, emotional, or physical welfare, including conduct that constitutes the offense of continuous sexual abuse of young child or children . . . indecency with a child . . . sexual assault . . . or aggravated sexual assault." *Id.* § 261.001(1)(E). Provision 1(F) describes that abuse includes the "failure to make a reasonable effort to prevent sexual conduct harmful to a child." *Id.* § 261.001 (1)(F). 1(H) outlaws "causing, permitting, encouraging, engaging in, or allowing the photographing, filming, or depicting of the child if the person knew or should have known that the resulting photograph, film, or depiction of the child is obscene . . . or pornographic." *Id.* § 261.001(1)(H).

172. Specifically, it is illegal to "comp[el] or encoura[ge] the child in a manner that constitutes an offense of trafficking of persons. . . ." *Id.* § 261.001(1)(G). Abuse is also defined to include "causing, expressly permitting, or encouraging a child to use a controlled substance as defined [elsewhere]." *Id.* § 261.001(1)(J).

173. One possible definition of neglect is "the leaving of a child in a situation where the child would be exposed to a substantial risk of physical or mental harm, without arranging for necessary care for the child, and the demonstration of an intent not to return. . . ." *Id.* § 261.001(4)(A)(i).

them to abuse,<sup>174</sup> failing to obtain reasonable medical care,<sup>175</sup> and failing to provide the necessary items to “sustain the life or health of the child.”<sup>176</sup> Importantly, while the federal government agencies that operate immigrant detention centers are not normally subject to state law, the Children’s Bureau of the U.S. Department of Health and Human Services (HHS) mandated this particular state law, making state and federal law effectively the same in this context. And, albeit in summary wording, the CRC suggests similar protections for children from forms of physical, mental, and sexual violence as well as neglect.<sup>177</sup>

The Texas Penal Code contains a provision addressing the violation of the civil rights of a person in custody.<sup>178</sup> The provision presumably applies to violations of children’s civil rights since it addresses employees of juvenile facilities and secure detention facilities.<sup>179</sup> In Texas, it is illegal for officials of such facilities to unlawfully deny the protection of certain rights and specifically to “engage in sexual contact . . . with an individual in custody.”<sup>180</sup> The CRC contains a similar provision in Article 3, which requires that “institutions, services and facilities responsible for the care and protection of children shall conform with applicable standards . . . particularly in the areas of safety, health . . . suitability of staff, as well as competent supervision.”<sup>181</sup>

The Texas Department of Family and Protective Services also regulates residential child-care operations.<sup>182</sup> Notably, Chapter 748 of the state’s administrative code includes a provision recognizing the right of a child to “liv[e] a normal life” including the right to receive appropriate educational services and the right to participate in childhood activities “including unsupervised childhood

174. Neglect also includes “placing a child in or failing to remove a child from a situation that a reasonable person would realize requires judgment or actions beyond the child’s level of maturity, physical condition, or mental abilities and that results in bodily injury or a substantial risk of immediate harm to the child. . . .” *Id.* § 261.001(4)(A)(ii)(a).

175. Specifically, neglect constitutes “failing to seek, obtain, or follow through with medical care for a child, with the failure resulting in or presenting a substantial risk of death, disfigurement, or bodily injury or with the failure resulting in an observable and material impairment to the growth, development, or functioning of the child. . . .” *Id.* § 261.001(4)(A)(ii)(b).

176. Another possible definition of neglect is “the failure to provide a child with food, clothing, or shelter necessary to sustain the life or health of the child, excluding failure caused primarily by financial inability unless relief services had been offered and refused. . . .” *Id.* § 261.001(4)(A)(ii)(c).

177. Article 19 of the CRC provides that “Parties should take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.” G.A. Res. 44/25, *supra* note 2, art. 19.

178. TEX. PENAL CODE ANN. § 39.04 (West 2017).

179. *Id.*

180. *Id.* § 39.04(a)(1)(2).

181. G.A. Res. 44/25, *supra* note 2, art. 3.

182. Although it is not clear if detention facilities are considered “residential child-care operations” under the meaning of the statute, they are not expressly exempted from coverage under these administrative regulations.

activities away from the operation and caregivers.”<sup>183</sup> The CRC expresses similar ideals: Article 28 recognizes “the right of the child to education,”<sup>184</sup> Article 27 recognizes the right of a child to a standard of living adequate for their physical and mental development,<sup>185</sup> and Article 31 recognizes the right of the child to “rest and leisure, to engage in play and recreational activities appropriate to the age of the child . . . .”<sup>186</sup> The aforementioned chapter of the Texas Administrative Code also protects children from “any harsh, cruel, or unusual . . . treatment or punishment”<sup>187</sup> and Article 37 of the CRC proscribes that “no child shall be subjected to torture or other cruel, inhuman, or degrading treatment or punishment.”<sup>188</sup>

Finally, the standards for determining child custody in Texas are helpful indicators of what domestic law requires for a child to be, for lack of a better term, “okay.” In child custody cases, the “best interests” of the particular child is the key inquiry.<sup>189</sup> Similarly, the CRC considers the best interests of the child to be paramount: the phrase is used repeatedly throughout the Convention.<sup>190</sup> Some of the factors that help to establish a child’s best interest in custody situations can likewise be used to help argue for the best interest of children in detention: the desires of the child, the emotional and physical needs of the child in the present and future, the emotional and physical danger to children now and in the future,

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183. 40 TEX. ADMIN. CODE § 748.1101(b)(3) (2017).

184. G.A. Res. 44/25, *supra* note 2, art. 28.

185. *Id.* art. 27.

186. *Id.* art. 31.

187. ADMIN. § 748.1101(b)(4)(A).

188. G.A. Res. 44/25, *supra* note 2, art. 37.

189. *Holley v. Adams*, 544 S.W.2d 367, 368 (1976).

190. The “best interests” of children are mentioned in the following articles throughout the CRC: Article 3 (“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”); Article 9 (“States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child . . . States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests”); Article 18 (“Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern”); Article 20 (“A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State”); Article 21 (“States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration. . . .”); Article 37 (“In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so. . . .”); and Article 40 (“To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child. . . .”). G.A. Res. 44/25, *supra* note 2.

and the stability of the home or proposed placement.<sup>191</sup> These are the most applicable but are not an exhaustive list.<sup>192</sup>

In summary, the Texas family, penal, and administrative codes contain provisions that define abuse and neglect using language similar to the CRC. Both the Convention and the state laws recognize that, in general, children—including institutionalized children—have the right to grow up free from physical, mental, and emotional harm, in a manner that is beneficial for their social and psychological development, and with rights to education, recreation, and freedom from cruel or unusual punishment. Lawyers and advocates are likely to be more persuasive in both legal and public forums arguing from these binding authorities.

### B. Federal Administrative Law

U.S. Immigration and Customs Enforcement (ICE) also maintains standards for family detention centers. Although none of its standards directly mirror the wording found in the CRC, like Texas state law, they do reflect some of the same ideals. For example: Article 37 of the CRC provides that “every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person . . . .”<sup>193</sup> ICE standards provide that all searches in detention centers should be completed in a manner that “preserve[s] the dignity of residents”, and if body searches are necessary, “the least intrusive practicable search method will be employed.”<sup>194</sup> Residents are also protected from “discipline or punishment that is considered to be harsh, cruel, unusual, unnecessary, demeaning, or humiliating.”<sup>195</sup> This tracks closely the language of Article 37 of the CRC, which forbids forms of cruel and unusual punishment.<sup>196</sup>

Like the Texas family and penal codes, ICE requires that detention facility officials act affirmatively to “prevent sexual abuse and assault on residents.”<sup>197</sup> This standard also requires that “if sexual abuse or assault of any resident occurs, the medical, psychological, safety, and social needs of the victim will be promptly and effectively met.”<sup>198</sup> This is again consistent with Article 19 of the CRC, which

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191. *Holley*, 544 S.W.2d at 372.

192. *Id.*

193. G.A. Res. 44/25, *supra* note 2, art. 37.

194. U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, FAMILY RESIDENTIAL STANDARDS: SEARCHES OF RESIDENTS 1 (Jan. 3, 2018), [https://www.ice.gov/doclib/dro/family-residential/pdf/rs\\_searches\\_of\\_residents.pdf](https://www.ice.gov/doclib/dro/family-residential/pdf/rs_searches_of_residents.pdf) [https://perma.cc/6BKT-8GUZ].

195. U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, FAMILY RESIDENTIAL STANDARDS: DISCIPLINE AND BEHAVIOR MANAGEMENT 2 (Jan. 3, 2018), [https://www.ice.gov/doclib/dro/family-residential/pdf/rs\\_discipline\\_and\\_behavior\\_management.pdf](https://www.ice.gov/doclib/dro/family-residential/pdf/rs_discipline_and_behavior_management.pdf) [https://perma.cc/U4K7-93L7].

196. The cruel and unusual punishment provision of the CRC provides that “no child shall be subjected to torture or other cruel, inhuman, or degrading treatment or punishment.” G.A. Res. 44/25, *supra* 2, art. 37.

197. U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, FAMILY RESIDENTIAL STANDARDS: SEXUAL ABUSE AND ASSAULT 1 (Jan. 3, 2018), [https://www.ice.gov/doclib/dro/family-residential/pdf/rs\\_sexual\\_assault\\_prevention-intervention.pdf](https://www.ice.gov/doclib/dro/family-residential/pdf/rs_sexual_assault_prevention-intervention.pdf) [https://perma.cc/9U39-ZRHV].

198. *Id.*



requires parties to take appropriate measures to protect children from “all forms of physical or mental violence . . . maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.”<sup>199</sup> And, Article 39 provides that parties “shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse . . .”<sup>200</sup>

ICE standards also address the living conditions of detainees. For example, they require that “residents are provided a nutritionally balanced diet”<sup>201</sup> and that “residents have access to health care maintenance services, including those related to mental health, dental care, prevention, health education, and emergency care in a timely and efficient manner.”<sup>202</sup> They also have extensive standards for resident personal hygiene.<sup>203</sup> Relatedly, although again in more general terms, the CRC suggests certain standards of living. Article 3 requires that states “ensure that institutions, services, and facilities responsible for the care or protection of children . . . conform with the standards established by competent authorities, particularly in the areas of safety, health. . . .”<sup>204</sup> And Article 27 dictates more broadly “the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral, and social development.”<sup>205</sup>

Finally, ICE standards address children’s educational and recreational development. First, the standards expect that detainees “[have] access to recreational and exercise program and activities” and more specifically, that “facilities provide recreational activities that are age appropriate for children, including children with disabilities.”<sup>206</sup> With regard to education, ICE detention standards provide that “all children residing in an ICE Residential Family

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199. G.A. Res. 44/25, *supra* note 2, art. 19.

200. *Id.* art. 39.

201. U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, FAMILY RESIDENTIAL STANDARDS: FOOD SERVICES 1 (Jan. 3, 2018), <https://www.ice.gov/doclib/dro/family-residential/pdf/rs-food-service.pdf> [<https://perma.cc/4YCV-9SJE>].

202. U.S. CUSTOMS AND IMMIGR. ENFORCEMENT, FAMILY RESIDENTIAL STANDARDS: MEDICAL CARE 1 (Jan. 3, 2018), [https://www.ice.gov/doclib/dro/family-residential/pdf/rs\\_medical\\_care.pdf](https://www.ice.gov/doclib/dro/family-residential/pdf/rs_medical_care.pdf) [<https://perma.cc/NGL8-PMS8>].

203. The personal hygiene standards require that “each resident is able to maintain personal hygiene practices through the provision of adequate bathing facilities, and the issuance and exchange of clothing, bedding, linens, towels, and personal hygiene items.” Further, residents are “allowed freedom in personal grooming, unless a valid safety, security, or medical interest requires an exception that is justified and documented.” U.S. CUSTOMS AND IMMIGR. ENFORCEMENT, FAMILY RESIDENTIAL STANDARDS: PERSONAL HYGIENE 1, 3 (Jan. 3, 2018), [https://www.ice.gov/doclib/dro/family-residential/pdf/rs\\_personal\\_hygiene.pdf](https://www.ice.gov/doclib/dro/family-residential/pdf/rs_personal_hygiene.pdf) [<https://perma.cc/V2CB-8UEL>].

204. G.A. Res. 44/25, *supra* note 2, art. 3.

205. *Id.* art. 27.

206. The standards give examples of activities for children that may meet requirements. Some are dance, intellectually stimulating activities, organized sports, arts and crafts, and music. *See* U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, FAMILY RESIDENTIAL STANDARDS: RECREATION 1 (Jan. 3, 2018), [https://www.ice.gov/doclib/dro/family-residential/pdf/rs\\_recreation.pdf](https://www.ice.gov/doclib/dro/family-residential/pdf/rs_recreation.pdf) [<https://perma.cc/5LT7-3K7A>].

Facility . . . shall be provided with educational services and programming appropriate to the minor's level of development and communication skills in a structured classroom setting."<sup>207</sup> Articles 28 and 31 of the CRC similarly provide for the right to education,<sup>208</sup> and the right to engage in "play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts."<sup>209</sup>

## V

### CONCLUSION

Federal detention centers are no place for children. Advocacy focused on the harms of this form of institutionalization is valiant and necessary as we continue to witness human rights violations occurring in real-time on the border and throughout the United States. But this advocacy is likely to be more effective if it is based in existing state and federal law, rather than in arguments from human rights law. The United Nations Convention on the Rights of the Child prescribes standards meant to protect children from harm, including from the harms that result from institutionalization; but its terms are not directly enforceable in the United States. Moreover, while there is real disagreement among policymakers and citizens about the Convention in particular, there is broad and deep support in general for child protection as it is expressed in standard American law. Advocates set up potentially harmful hurdles for themselves when they push the former rather than the latter. State and national-level standards provide the basis for grounding complicated human rights arguments in existing, enforceable legal mechanisms.

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207. More specifically, ICE's Education Policy dictates that all eligible juveniles will be provided with a minimum of "one-hour daily instruction in each of the core subjects," and that children "with disabilities and/or in need of special education . . . [should be] referred to an appropriate agency for intervention." They are also entitled to translation services or an education in a language that they understand. U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, FAMILY RESIDENTIAL STANDARDS: EDUCATION POLICY 1 (Jan. 3, 2018), [https://www.ice.gov/doclib/dro/family-residential/pdf/rs\\_educational\\_policy.pdf](https://www.ice.gov/doclib/dro/family-residential/pdf/rs_educational_policy.pdf) [<https://perma.cc/H232-N6LJ>].

208. G.A. Res. 44/25, *supra* note 2, art. 28.

209. *Id.* art. 31.