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Immigration Detention: Perspectives from Maine Law Students Working on the Ground at the Laredo Detention Center in Texas

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IMMIGRATION DETENTION: PERSPECTIVES FROM MAINE LAW STUDENTS WORKING ON THE GROUND AT THE LAREDO DETENTION CENTER IN TEXAS

Joann Bautista, Katie Bressler, & Nora Bosworth

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IMMIGRATION DETENTION: PERSPECTIVES FROM MAINE LAW STUDENTS WORKING ON THE GROUND AT THE LAREDO DETENTION CENTER IN TEXAS

Joann Bautista, Katie Bressler,** & Nora Bosworth****

ABSTRACT

Since 2017, students enrolled in the University of Maine School of Law Refugee and Human Rights Clinic have traveled to Laredo, Texas to participate in a program, sponsored and run by the law firm Jones Day in collaboration with Texas RioGrande Legal Aid, to provide representation for women in the Laredo Detention Center. Alongside Jones Day attorneys, the students conduct client intake interviews, draft memos detailing each woman's experiences and any potential legal claims, and assist in the representation of clients. This article will provide a glimpse into the experiences of three Maine Law student attorneys during their time in Laredo, Texas, and will survey issues in the contemporary immigration landscape: first, an overview of the political climate surrounding the immigration debate, current immigration trends, and statistical figures; second, stories providing context for why people are seeking to immigrate to the U.S., and the persecution and challenges faced by immigrant women; third, the shortage of representation for immigrants, whether detained or non-detained; and finally, one of the most challenging and poignant issues encountered by student attorneys participating in the Laredo Project—the separation of immigrant mothers from their children.

I. INTRODUCTION

Marked only by a sign with the red CCA emblem and the words “Laredo Processing Center,” the Laredo Detention Center is almost indistinguishable from the industrial buildings so common in the outskirts of Laredo, Texas—a small town only ten minutes from the U.S.-Mexico border. However, upon closer inspection, this building's grim purpose becomes clear.

Surrounded by a strengthened perimeter fence and a barren landscape, this detention center is run by CCA, a “full-service corrections management provider”

* Joann Bautista attended the University of Maine School of Law, graduating *cum laude* in 2018. Many thanks to the Executive Board of the *Maine Law Review* for allowing the authors to bring to light the stories of the brave women of the Laredo Detention Center.

** Katie Bressler attended the University of Maine School of Law, graduating *summa cum laude* in 2018. She was a student attorney in the Refugee and Human Rights Clinic in Fall 2017 and travelled to Laredo, Texas, during that time. She expresses her gratitude to Professor Anna Welch for the invaluable opportunity to work in the Refugee and Human Rights Clinic as a student attorney and for her thoughtful guidance and support throughout Ms. Bressler's law school experience.

*** Nora Bosworth has worked in immigrants' rights since 2011, beginning with an internship at Kids in Need of Defense. She currently lives in Los Angeles, with her dog and partner. As she prepares to take the California Bar in February, she is volunteering with Esperanza, an immigrants' rights organization that serves unaccompanied minors.

and the “fifth-largest corrections system in the nation, behind only the federal government and three states.”¹ On any given day, nearly 300 women and men are held in the Laredo Detention Center for immigration-related concerns, ranging from those apprehended shortly after crossing the border into the United States to individuals arrested in the interior who have often lived and worked within the United States for years. Many of these detainees—and especially those who have recently entered the country after fleeing violence or persecution in their home country—are actively seeking asylum and remain in detention as they await legal proceedings to determine bond or even the outcome of their case.

In contrast to its fairly nondescript exterior, the interior of the detention center is unmistakably prison-like. A harsh void of concrete and metal, the building exudes a sense of hostility. Detainees are kept in dormitories—open living spaces designed to house 50 to 75 individuals at a time. Privacy is unheard of in these dorm rooms filled with bunkbeds as the detainees eat, sleep, and spend a majority of their days locked in this one bleak space. Kept at an uncomfortably cool temperature—especially for the detainees who wear only thin, orange jumpsuits—the detention center seems to be devoid of happiness or hope.

Visits by family members of detainees are rare and restricted to extremely limited windows of time. More common are visits by attorneys to detainees who are either seeking representation or who are currently represented. Although comparatively commonplace, coordinating these attorney-client visits is often a test of patience and perseverance. Attorneys wishing to enter the detention center must first receive clearance from both the U.S. Department of Justice and Immigration and Customs Enforcement. Once clearance is received, an attorney must present himself or herself at the Detention Center and often must wait for hours at a time before they are allowed to enter. After providing various credentials at the front desk and surrendering any keys, phones, or other items that could be passed to detainees, attorneys are escorted by guards through layers of security and multiple locked doors to one of two small, windowless attorney-client rooms. Visitors and detainees are closely monitored during these visits. It is in these cold, unforgiving rooms that the detainees are forced to relive their very worst memories in the hope that their past suffering is sufficient to qualify them for a future in the United States.

Although haunting to those who enter the detention center, this facility and the women who pass through it are not unique—they are but one small chapter in the ever-evolving story of immigration detention in America today.

A. The Laredo Project

Amidst the backdrop of ever-increasing detention and deportation in the United States, the international law firm Jones Day, in collaboration with Texas RioGrande Legal Aid, began the Laredo Project. With the goal of “provid[ing] representation to women with claims for immigration relief”—particularly those arising from “gender- or gang-related persecution”—Jones Day established a “full-time presence” in Laredo, Texas.²

1. *Who We Are*, CCA, <http://staging.cca.com/who-we-are> [<https://perma.cc/5TVJ-QG5J>].

2. *The Jones Day Laredo Project*, JONES DAY (March 2018), <https://www.jonesday.com/the-jones-day-laredo-project-03-15-2018/>.

1. *The Jones Day Presence*

As part of the Laredo Project, the firm and its attorneys host weekly “Know Your Rights” presentations for detained women, meet with and screen potential cases, and, if a woman has a colorable claim, provide full representation—free of charge.³ Throughout each interaction, the firm’s attorneys aim to educate the women regarding their rights within the immigration system, help them understand the asylum process, and prepare them for the hurdles they will face as their case is processed.

As of April 2018, the firm has met with over 1,400 detainees to determine whether or not they have a viable claim.⁴ As of March 2018, the firm has “engaged over 200 clients out of Laredo, assisting them with their legal needs inside the detention facility, including by representing them at Master Calendar and bond hearings, and—for those women who are not eligible for release—by handling the expedited trials to adjudicate their claims for immigration relief.”⁵

2. *Jones Day and Maine Law—A Meaningful Partnership*

In summer 2017, Professor Anna Welch, the founder and director of the University of Maine School of Law Refugee and Human Rights Clinic, contacted Jones Day regarding its program providing representation for women in the Laredo Detention Center. In conjunction with Laura Tuell, Jones Day’s pro bono counsel, Professor Welch forged a partnership between the Clinic and Jones Day.

As part of this ongoing relationship, each student enrolled in Maine Law’s Refugee and Human Rights Clinic has the opportunity to travel to Laredo for one week at a time to assist Jones Day attorneys in their efforts to provide representation and support to women in the Laredo Detention Center. Throughout each interaction, these student attorneys apply the skills and knowledge they have gathered through working with their own clients in the Refugee and Human Rights Clinic. As part of the Jones Day team, they conduct client intake interviews, draft memos detailing each woman’s experiences and any potential legal claims, and assist in the firm’s representation of clients.

3. *The Laredo Experience*

This article will provide a glimpse into the experiences of Maine Law student attorneys during their time in Laredo, Texas. First, this article will provide a high-level overview of the contemporary immigration landscape, focusing on the political climate surrounding the immigration debate and then turning to a review of current immigration trends and statistical figures. Second, the article will highlight the stories heard time and time again from the women detained in Laredo. Sharing the common thread of incredible violence and perseverance, these stories provide context for the “why” of unauthorized immigration by illuminating the persecution

3. *Id.*

4. Laura Castro, *Offering Help to Detained Central Americans*, NAT’L L. J. (Apr. 30, 2018), <https://www.law.com/nationallawjournal/2018/04/30/offering-help-and-hope-for-detained-central-americans/> [<https://perma.cc/5ER2-GWS8>].

5. *Id.*

these women faced in their home countries, the dangers they encountered on their journey to the United States, and the challenges they must overcome upon their arrival in the United States. Third, this article will review the staggering lack of representation for both detained and non-detained immigrants, underscoring the vital importance of access to legal information and counsel when pursuing an asylum claim. Finally, this article will turn to one of the most challenging and poignant issues encountered by student attorneys participating in the Laredo Project—the separation of immigrant mothers from their children.

On the trail to “[m]ake America great again,”⁶ Donald Trump polarized the American public throughout the 2016 presidential campaign, especially regarding his stance on immigration reform. Adopting an uncompromising approach, he bluntly stated that America must stop “put[ting] the needs of other nations ahead of our own.”⁷ President Trump’s campaign statements propelled the issue of immigration to the forefront of American political discourse and consciousness, resulting in a media firestorm that has continued throughout his presidency as his administration has determinedly pursued his pre-election campaign goals.

To provide context for the world in which the student attorneys found themselves while volunteering in the Laredo Detention Center, this section will first give a brief overview of the Trump Administration’s more notable efforts to effectuate widespread reform in the United States’ immigration system. Then, this section will examine the tangible results of the Trump Administration’s efforts by reviewing current immigration statistics and trends.

II. IMMIGRATION TODAY

As noted by various immigration scholars, immigration detention is not a new technique or tactic for countries to deploy in their attempts to combat the influx of immigrants.⁸ Indeed, the United States has an extensive track record of utilizing immigration detention as a deterrent—from detaining European immigrants at Ellis Island, to Asian immigrants at Angel Island, to Cuban and Haitian immigrants at Guantánamo Bay.⁹ Although monumental in their impact, these historic uses of detention pale in comparison—and particularly in scope—to the contemporary system of “mass detention” that continues to grow and expand, encouraged by the current political climate, prevailing attitudes regarding immigration, and the growing

6. TRUMP PENCE, <https://www.donaldjtrump.com> [<https://perma.cc/4DZ2-U8ZN>].

7. Donald J. Trump, *Immigration Reform That Will Make America Great Again*, TRUMP PENCE 4, <https://assets.donaldjtrump.com/Immigration-Reform-Trump.pdf> [<https://perma.cc/HHS8-WF9D>]

8. See generally *A History of Immigration Detention*, FREEDOM FOR IMMIGRANTS, <https://www.freedomforimmigrants.org/detention-timeline/> [<https://perma.cc/FPX9-B8EJ>]; *United States Immigration Detention*, GLOB. DET. PROJECT., <https://www.globaldetentionproject.org/countries/americas/united-states> [<https://perma.cc/9UXV-SNYJ>].

9. J. Rachel Reyes, *Detention Conditions*, CTR. FOR MIGRATION STUD., <http://cmsny.org/publications/virtualbrief-detention/> [<https://perma.cc/TMN5-T2GP>].

number of immigrants in the United States today.¹⁰

A. Political Climate

Early on in his contentious bid for candidacy, President Trump took a hardline stance regarding immigration and particularly illegal immigration.¹¹ In his divisive pre-election campaign statements, President Trump outlined three primary goals regarding immigration reform: the necessity of securing the borders of America, the need for strict enforcement of immigration laws, and the requirement that any new immigration policies “serve [the nation’s] own citizens” instead of the immigrants against whom the policies would be enforced.¹²

Once in office, President Trump immediately began to pursue his pre-election immigration objectives amidst a deeply divided Congress, judiciary, and populace. In furtherance of his campaign goals, President Trump quickly signed two executive orders that prioritized the arrest, detention, and deportation of all unauthorized immigrants living in the United States—a dramatic departure from the Obama Administration’s priorities that focused on noncitizens who had committed crimes within the United States or had recently crossed the border.¹³ The first of these divisive executive orders declared that “[c]ontinued illegal immigration presents a clear and present danger to the interests of the United States” and emphasized the “significant strain” illegal immigrants place on the Federal Government as well as local communities.¹⁴ To combat this “clear and present danger,” President Trump directed executive departments and agencies “to deploy all lawful means to secure the Nation’s southern border, to prevent further illegal immigration into the United States, and to repatriate illegal aliens swiftly, consistently, and humanely.”¹⁵

Throughout his presidency, President Trump has continued to pursue his immigration goals by issuing, as of October 2018, nine total Executive Orders and Presidential Proclamations concerning immigration—each of which echoes the first in its “zero tolerance” tone and aims.¹⁶ In accordance with these executive directives,

10. See GLOB. DET. PROJECT, *supra* note 8.

11. See Trump, *supra* note 7.

12. *Id.* at 1.

13. Border Security and Immigration Enforcement Improvements, Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017) [hereinafter Executive Order 13767]; Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017) [hereinafter Executive Order 13768]; Muzaffar Chishti, Sarah Pierce, & Jessica Bolter, *The Obama Record on Deportations: Deporter in Chief or Not?*, MIGRATION POLICY INST. (Jan. 26, 2017), <https://www.migrationpolicy.org/article/obama-record-deportations-deporter-chief-or-not> [<https://perma.cc/54AY-BJPP>].

14. See Executive Order 13767, *supra* note 13, at 8793.

15. *Id.*

16. See *id.* (outlining plans for the building of a border wall, increasing resources for deportation activities, terminating the “catch and release” program, and providing additional mechanisms for expedited removal); see also Executive Order 13768, *supra* note 13 (focusing on enforced enhancement of immigration law, including a broadening of enforcement priorities and calling for funding restrictions for “sanctuary cities”); Protecting the Nation from Foreign Terrorist Entry into the United States, Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 6, 2017) (replacing Executive Order 13769 and suspending both the approval of visas for individuals from Iran, Libya, Somalia, Sudan, Syria, and Yemen and also the US Refugee Admissions Program while simultaneously lowering the number of refugees to be admitted to the United States); Buy American and Hire American, Exec. Order No. 13788, 82 Fed. Reg.

the agencies responsible for the administration and enforcement of immigration law, such as U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), U.S. Citizenship and Immigration Services (USCIS), and the Department of Homeland Security (DHS), have kept stride with the Trump Administration by promulgating various memorandums and guidance.¹⁷ As noted by immigration law commentators, while less provocative, these “subtle” departmental policy “adjustments” are the force that ultimately “move[s] the United States toward the administration’s ultimate goals of decreasing immigrant admissions and expanding deportations.”¹⁸

While the Trump Administration has been met with resistance in achieving many of its more visible immigration reform goals,¹⁹ it has nevertheless succeeded

18837 (Apr. 18, 2017) (reforming the H-1B visa program); Resuming the United States Refugee Admissions Program with Enhanced Vetting Capabilities, Exec. Order No. 13815, 82 Fed. Reg. 50055 (Oct. 24, 2017) (resuming the United States Refugee Admissions Program and establishing new policies for the program); Maintaining Enhanced Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats, Pres. Proc. 9723, 83 Fed. Reg. 15937 (Apr. 10, 2018) (modifying Proclamation 9645 and removing entry suspensions and limitations on individuals from Chad); Affording Congress an Opportunity To Address Family Separation, Exec. Order No. 13841, 83 Fed. Reg. 29435 (June 25, 2018) (ordering DHS to take steps to limit family separation and expressing a preference for detaining “alien families together where appropriate and consistent with law and available resources.”); Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats, Pres. Proc. No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017) (establishing additional visa restrictions); Protecting the Nation from Foreign Terrorist Entry into the United States, Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017) [hereinafter Executive Order 13769] (lowering the number of refugees admitted to the United States, and suspending admission of refugees from specific countries).

17. See, e.g., *Memorandum: Enforcement of the Immigration Laws to Serve the National Interest*, U.S. DEP’T OF HOMELAND SEC. (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf [https://perma.cc/48AF-74U4] [hereinafter “DHS Memorandum: National Interest”] (providing guidance, in the form of an implementation memorandum, for the enforcement and application of Executive Order 13768); *Memorandum: Implementing the President’s Border Security and Immigration Enforcement Improvements Policies*, U.S. DEP’T OF HOMELAND SEC. (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf [https://perma.cc/68C9-CXCG] (“implement[ing] new policies designed to stem illegal immigration and facilitate the detection, apprehension, detention, and removal of aliens who have no lawful basis to enter or remain in the United States.”).

18. Sarah Pierce, Jessica Bolter & Andrew Selee, *U.S. Immigration Policy Under Trump: Deep Changes and Lasting Impacts*, MIGRATION POL. INST. 1 (July 2018), <https://www.migrationpolicy.org/research/us-immigration-policy-trump-deep-changes-impacts> [https://perma.cc/Y8GC-2R3J]. These “subtle adjustments” have helped dramatically shaped the immigration sphere and include policies such as: “mandating interviews for all visa applicants (including all green-card applicants), limiting the ability of noncitizens to receive continuances of their cases in immigration court, suspending admissions of some spouses and minor children of refugees already in the country, and increasing scrutiny applied to temporary visa applicants.” Sarah Pierce & Andrew Selee, *Immigration Under Trump: A Review of Policy Shifts in the Year Since the Election*, MIGRATION POL. INST. 1 (Dec. 2017), <https://www.migrationpolicy.org/research/immigration-under-trump-review-policy-shifts> [https://perma.cc/Z8FR-7YFB].

19. See, e.g., Glenn Kessler, *President Trump Says His ‘Beautiful Wall’ is Being Built. Nope.*, WASH. POST (Apr. 5, 2018), <https://www.washingtonpost.com/news/fact-checker/wp/2018/04/05/president-trump-says-his-beautiful-wall-is-being-built->

in its pursuit to redefine immigration law at its core. Most notably, the Trump Administration has succeeded in dramatically expanding deportation priorities,²⁰ narrowing the criteria that qualifies one for asylum,²¹ drastically reducing the total number of refugees admitted into the United States,²² and implementing country-specific screening for refugee admissions.²³ In its time, each policy change has elicited both harsh criticism by those who believe the Trump Administration's rhetoric has "created a culture of fear amongst immigrant communities"²⁴ and praise by those who, like President Trump, view immigration as a threat to the United States' national security.²⁵

nope/?utm_term=.85abea8915f1 [https://perma.cc/3WP4-873G] (discussing and dismissing the Trump Administration's claims regarding the border wall).

20. See Executive Order 13768, *supra* note 13; see also DHS Memorandum: National Interest, *supra* note 17, at 2 (expanding ICE's enforcement priorities to include unauthorized immigrants who "(1) have been convicted of any criminal offense; (2) have been charged with any criminal offense that has not been resolved; (3) have committed acts which constitute a chargeable criminal offense; (4) have engaged in fraud or willful misrepresentation in connection with any official matter before a governmental agency; (5) have abused any program related to receipt of public benefits; (6) are subject to a final order of removal but have not complied with their legal obligation to depart the United States; or (7) in the judgment of an immigration officer, otherwise pose a risk to public safety or national security."). John Sandweg, former acting ICE director, has raised concerns regarding the elimination of previous removal priorities, stating: "The problem is, when you remove all priorities, it's like a fisherman who could just get his quota anywhere. It diminishes the incentives on the agents to go get the bad criminals. Now their job is to fill the beds." See Nick Miroff, *Trump Takes 'Shackles' Off ICE, Which is Slapping Them on Immigrants Who Thought They Were Safe*, WASH. POST (Feb. 11, 2018), https://www.washingtonpost.com/world/national-security/trump-takes-shackles-off-ice-which-is-slapping-them-on-immigrants-who-thought-they-were-safe/2018/02/11/4bd5c164-083a-11e8-b48c-b07fea957bd5_story.html?noredirect=on&utm_term=.93933efe3699 [https://perma.cc/J9XW-KR58].

21. In July 2018, USCIS published a memorandum regarding the recent case, *In re A-B-*, which dramatically reduces the possibility of victims of domestic violence and gang violence obtaining asylum. See *Memorandum: Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with Matter of A-B-*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (July 11, 2018), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B.pdf> [https://perma.cc/M99T-EE4Y].

22. In Executive Order 13769, President Trump temporarily suspended the refugee resettlement program for 120 days and then reduced the refugee admission ceiling from 110,000 to 50,000. See Executive Order 13769, *supra* note 16, at 8979. Under this new quota, only 53,716 refugees were admitted during 2017. See *Interactive Reporting: Admissions and Arrivals*, REFUGEE PROCESSING CTR., <http://www.wrapsnet.org/admissions-and-arrivals/> [https://perma.cc/7UJB-7UMX]. The refugee admission ceiling has been further lowered to 45,000 refugees permitted in fiscal year 2018. Memorandum for the Secretary of State: Presidential Determination on Refugee Admissions for Fiscal Year 2018, Pres. Determination No. 2017-13, 82 Fed. Reg. 49083 (Sept. 29, 2017), <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-secretary-state-4/> [https://perma.cc/8SW6-XXBZ].

23. See Executive Order 13769, *supra* note 16, at 8978-88.

24. Dalal Hillou, *A Climate of Fear: The Social Impact of the Trump Administration's Immigration Policies*, AM. U. J. GENDER SOC. POL. & L. (Mar. 5, 2017), <http://www.jgspl.org/climate-fear-social-impact-trump-administrations-immigration-policies/> [https://perma.cc/R39B-F3KQ].

25. See Hans A. Von Spakovsky, Opinion, *Supreme Court Trump Travel Ban Decision Is An Important Victory for Our National Security*, FOX NEWS (June 26, 2018), <https://www.foxnews.com/opinion/supreme-court-trump-travel-ban-decision-is-an-important-victory-for-our-national-security> [https://perma.cc/A2D9-BH53]; Kendall Karson, *DHS Secretary Nielsen Casts Immigration Crisis As 'A National Security Issue'*, ABC NEWS (June 21, 2018),

The Trump Administration's policies have undoubtedly propelled the issue of immigration to the forefront of American politics, economics, and society. However, questions of immigration and immigration policy will continue to play a substantial role in shaping and defining both this nation and its citizens for years to come, especially in the face of increasing international unrest and the substantial number of immigrants seeking refuge and opportunity in the United States.

B. Immigration and Detention Under Trump: A Look at the Numbers

Upon first glance, current immigration statistics would lead casual observers to the conclusion that the Trump Administration has been foiled in its attempts both to combat the influx of immigrants and to increase the deportation of unauthorized immigrants.

For example, in an April 2017 report, the Pew Research Center estimated that nearly 11.3 million unauthorized immigrants currently reside in the United States.²⁶ As of November 2018, immigration courts in the United States had 1,098,468 cases pending.²⁷ Thus, according to these figures, less than one tenth of all unauthorized immigrants residing in the United States are currently involved in ongoing legal proceedings regarding their immigration status. Furthermore, from January through September, 2018, 269,387 new deportation proceedings were filed in United States immigration courts,²⁸ but only 215,569 cases were completed during that same time period.²⁹ From these figures, it is clear that U.S. immigration courts are overwhelmed and continue to develop a substantial backlog, despite the Trump Administration's renewed focus on immigration enforcement and deportation.³⁰

Along a similar vein, statistics reveal that overall apprehensions and deportations of unauthorized immigrants have decreased since President Trump's election. Of the roughly 11 million unauthorized immigrants nationwide,³¹ U.S. Border Patrol agents apprehended only 310,531 individuals in 2017—a decrease

<https://abcnews.go.com/Politics/dhs-secretary-nielsen-casts-immigration-crisis-national-security/story?id=56057714> [<https://perma.cc/3S8G-PSU5>].

26. Jebb Manuel Krogstad et al., *5 Facts About Illegal Immigration in the U.S.*, PEW RESEARCH CTR. (Apr. 27, 2017), <http://www.pewresearch.org/fact-tank/2017/04/27/5-facts-about-illegal-immigration-in-the-u-s/> [<https://perma.cc/8TNB-CQYW>].

27. *Immigration Court Backlog Surpasses One Million Cases*, TRAC IMMIGRATION (Nov. 6, 2018), <http://trac.syr.edu/immigration/reports/536/> [<https://perma.cc/XVQ8-2KA2>].

28. *Details on Deportation Proceedings in Immigration Court*, TRAC IMMIGRATION (September 2018), <http://trac.syr.edu/phptools/immigration/nta/> [<https://perma.cc/P2UB-FEPB>].

29. *Immigration Court Processing Time by Outcome*, TRAC IMMIGRATION (September 2018), http://trac.syr.edu/phptools/immigration/court_backlog/court_proctime_outcome.php [<https://perma.cc/EC2B-XS6Q>].

30. TRAC IMMIGRATION, *supra* note 27.

31. It is important to note that the demographics of these individuals detained is changing over time. While previous years have been marked by a majority of immigrants from Mexico, a recent CPB report noted that approximately 58 percent of the apprehensions in fiscal year 2017 were of individuals from countries other than Mexico—primarily from El Salvador, Guatemala, and Honduras. *CBP Border Security Report, Fiscal Year 2017*, U.S. CUSTOMS & BORDER PROT. 2 (Dec. 5, 2017), <https://www.cbp.gov/sites/default/files/assets/documents/2017-Dec/cbp-border-security-report-fy2017.pdf> [<https://perma.cc/4JGP-GFY8>] [hereinafter *CBP 2017 Report*].

from the 415,816 apprehended in 2016.³² Additionally, 226,119 individuals were removed in 2017—a six percent decrease from the previous year.³³

Although these figures seem to run contrary to the Trump Administration's goal to "swiftly repatriate unauthorized immigrants,"³⁴ the effect of the current administration's policies are nevertheless apparent upon closer inspection.

First, although fewer individuals were removed in 2017, it is important to note that the percentage of those arrested without criminal convictions more than doubled³⁵—a direct result of the Trump Administration's new and expanded enforcement priorities. Meanwhile, ICE continued to seek out immigrants with criminal convictions, arresting 105,736 immigrants—a twelve percent increase from the previous year's figures.³⁶

Furthermore, a greater proportion of these arrests were made in the interior of the country rather than at the border, as indicated by a 2017 U.S. Customs and Border Patrol report, which noted the "lowest level of illegal cross-border migration on record, as measured by apprehensions along the border and inadmissible encounters at U.S. ports of entry."³⁷ To offset this decrease in illegal border-crossing during 2017, ICE removed twenty-five percent more unauthorized immigrants as a result of "interior enforcement activities" than they did in the previous year.³⁸

As a result of these efforts, detention rates in the United States are at an all-time high.³⁹ According to a November 2017 report released by ICE (following a Freedom of Information Act Request by the Immigrant Legal Resource Center), the average daily population for United States detention centers during Fiscal Year 2018 was 39,322.⁴⁰ As of November 2017, ICE maintained 1,478 adult detention centers—both publicly and privately operated—with a minimum of two facilities in each state.⁴¹ However, as revealed in the November 2017 FOIA report, privately operated detention centers, like the Laredo Detention Center, dominate the detention landscape, holding nearly seventy-one percent of those detained in Fiscal Year

32. *Id.* at 1; *CBP Border Security Report, Fiscal Year 2016*, U.S. CUSTOMS & BORDER PROT. 1 (Dec. 30, 2016), <https://www.cbp.gov/sites/default/files/assets/documents/2018-Mar/CBP-fy2016-border-security-report.pdf> [<https://perma.cc/WA5V-RRCC>].

33. *Fiscal Year 2017 ICE Enforcement and Removal Operations Report*, U.S. IMMIGRATION & CUSTOMS ENF'T (Jan. 3, 2018), www.ice.gov/sites/default/files/documents/Report/2017/iceEndOfYearFY2017.pdf [<https://perma.cc/F4UE-GDYX>] [hereinafter *2017 ICE Report*].

34. See Executive Order 13767, *supra* note 13, at 8793.

35. In 2016, 4,200 individuals were arrested despite the fact they had no criminal convictions. In fiscal year 2017, 10,800 individuals were arrested without criminal convictions. *ICE ERO Immigration Arrests Climb Nearly 40%*, U.S. IMMIGRATION & CUSTOMS ENF'T (Nov. 2, 2017), <https://www.ice.gov/features/100-days> [<https://perma.cc/E33T-ZTKC>].

36. See *2017 ICE Report*, *supra* note 33, at 3.

37. See *CBP 2017 Report*, *supra* note 31, at 1.

38. See *2017 ICE Report*, *supra* note 33, at 12.

39. Tara Tidwell Cullen, *ICE Released Its Most Comprehensive Immigration Detention Data Yet. It's Alarming.*, NAT'L IMMIGRANT JUST. CTR. (Mar. 13, 2018), <https://immigrantjustice.org/staff/blog/ice-released-its-most-comprehensive-immigration-detention-data-yet> [<https://perma.cc/Q4CP-RKK4>].

40. *ILRC Freedom of Information Act Request*, IMMIGRANT LEGAL RESEARCH CTR. (June 22, 2017), https://immigrantjustice.org/sites/default/files/content-type/page/documents/2018-03/2017-6-22_ILRC_FOIA_to_ICE_FINAL.pdf [<https://perma.cc/2W9T-6H5D>].

41. *Detention Facility Locator*, U.S. IMMIGRATION & CUSTOMS ENF'T, <https://www.ice.gov/detention-facilities> [<https://perma.cc/SD4R-NRN3>].

2018.⁴²*C. Immigration, Detention, and the Laredo Project*

It is into this world of mass detention that the student attorneys participating with the Laredo Project plunged. Immediately upon their arrival, these students were faced with the real-world effects of the Trump Administration's immigration policies as they met with woman after woman in the Laredo Detention Center. Each interaction brought into clear focus the realities and implications of the current immigration debate as large-scale political arguments and statistical trends were reduced down to their lowest-common denominator: the individual. The students' time in the Laredo Detention Center was the story of the individual—for it was upon the individual that these student attorneys focused and it will be upon the individual that the consequences of both national immigration policies and the student attorney's efforts will rest.

In response to the high number of women being detained in the Laredo Detention Center along the southern border, Jones Day, in collaboration with Texas RioGrande Legal Aid, established the Laredo Project.⁴³ The aim of the Project was to bridge the gap between undocumented women and access to legal counsel.⁴⁴ With the help of Jones Day associates and partners, along with law students participating in the Refugee and Human Rights Clinic at the University of Maine School of Law, the women of Laredo, many of them fleeing gender- and gang-based violence, finally had the opportunity to receive pro bono legal assistance. The Laredo Project gave both attorneys and students not only a first-hand account of how the immigration system plays out at the U.S.-Mexico border but also exposed them to the horrific driving forces that push women out of their home countries to the United States. This section will discuss some of the principle reasons why the women at the Laredo Detention Center left everything behind in their home countries, the journey undertaken by many to get to the United States, and the challenges these individuals face upon crossing the southern border into the U.S.

III. STORIES FROM LAREDO

What causes an individual to forsake everything and everyone they know and put their life in imminent peril? Perhaps an even bigger question: why would an individual subject not only themselves but also their child, sibling, or parent to a dangerous journey to the United States? There are an estimated 11.3 undocumented individuals living in the United States.⁴⁵ Of these, approximately seventy-one percent come from Central America and Mexico.⁴⁶ Although the reasons behind why these individuals abandon their home country vary, the same goals remain:

42. See Cullen, *supra* note 39.

43. JONES DAY, *supra* note 2.44. *Id.*45. Krogstad et al., *supra* note 26.46. *Id.*

safety and survival.

A. *Underlying Root Causes of Migration*

Critics of the immigration system often ask why these individuals cannot simply “wait their turn” rather than enter the country “illegally.” Politicians have also questioned what is perceived to be a lack of patience on the part of undocumented individuals. In an interview, Kansas Secretary of State Kris Kobach suggested young immigrants protected by Deferred Action for Childhood Arrivals (DACA) should “go home and get in line” to come to the United States.⁴⁷ However, the sequence of waiting in line to apply for legal status, getting permission to enter the U.S., then entering the U.S. legally, oversimplifies a process that has become increasingly difficult to navigate due to an outdated immigration system, quotas and caps on the number of visas available,⁴⁸ and wait-times spanning up to decades, depending on the type of case.⁴⁹ International migration is typically caused by push factors, situations that push an individual out of their home country, and pull factors, such as social, economic, or safety reasons.⁵⁰ This subsection will discuss several principal push and pull factors.

1. *Economic Hardship*

Despite economic growth in the 2000s, “one in four Latin Americans today remain poor.”⁵¹ The Northern Triangle, comprised of Guatemala, Honduras, and El Salvador, faces the most extreme poverty in Central America.⁵² Of those in poverty, a majority are considered chronically poor—born into poverty and unable to breakout.⁵³ In Guatemala, over half of the population lives below the poverty line and of that group, indigenous people make up about seventy-five percent.⁵⁴

47. Christopher Ingraham, ‘Go Home and Get in Line’: Fact-Checking Kris Kobach on DACA, WASH. POST (Sept. 7, 2018), https://www.washingtonpost.com/news/wonk/wp/2017/09/07/go-home-and-get-in-line-fact-checking-kris-kobach-on-daca/?noredirect=on&utm_term=.b618f1801283 [<https://perma.cc/G89R-TRFH>].

48. See NAT’L IMMIGRATION REFORM, FACT SHEET: REASONS IMMIGRANTS ARE UNDOCUMENTED IN THE U.S. (May 31, 2017), <https://immigrationforum.org/article/fact-sheet-reasons-immigrants-undocumented-u-s/> [<https://perma.cc/4PJM-TVJV>].

49. Priscilla Alvarez, *What the Waiting List for Legal Residency Actually Looks Like*, ATLANTIC (Sept. 21, 2017), <https://www.theatlantic.com/politics/archive/2017/09/what-the-waiting-list-for-legal-residency-actually-looks-like/540408/> [<https://perma.cc/T7Y2-J3D4>].

50. Austin T. Fragomen & Careen Shannon, *Border Security and Immigration Reform*, 15 No. 20 IMMIGR. BUS. NEWS cmt. 10 (2013).

51. RENOS VAKIS, JAMELE RIGOLINI & LEONARDO LUCCHETTI, LEFT BEHIND: CHRONIC POVERTY IN LATIN AMERICA AND THE CARIBBEAN 7 (2015), http://www.worldbank.org/content/dam/Worldbank/document/LAC/chronic_poverty_overview.pdf [<https://perma.cc/UQS6-NGM2>].

52. See Sirenia Jimenez, *The Route of Death for Central and South American Illegal Immigrants Can Come to an End with a Change in the United States’ Policy*, 25 MCGEORGE GLOBAL BUS. & DEV. L.J. 447, 450 (2012).

53. See VAKIS ET AL., *supra* note 51, at 7.

54. REID HAMEL, CTR. FOR STRATEGIC & INT’L STUDIES, FOOD INSECURITY IN GUATEMALA REACHES CRISIS LEVELS (June 2017), <https://medium.com/center-for-strategic-and-international-studies/food-in-guatemala-reaches-crisis-levels-65b639b950dd> [<https://perma.cc/CSM9-C24D>].

Agriculture is the country's largest employer, employing roughly thirty-one percent of the population.⁵⁵ However, farm workers face the highest poverty rates due to "inadequate systems of transit, irrigation, energy supply, and other infrastructure in rural areas, which thwarts both productive capacity and potential linkages to aggregators, processors, and markets."⁵⁶ Hondurans face similar economic hardships with approximately half of the population living on less than \$1.90 USD per day.⁵⁷ In Mexico, many cross the southern border "primarily [as] a result of inadequate employment opportunities" in their home country.⁵⁸ Additionally, despite reforms, an increase in economic growth in Mexico seems unlikely due to corruption, decreases in oil production and oil prices, and low productivity.⁵⁹ Bleak economic realities are one of the reasons that many individuals from these countries come to the United States in search of more optimistic futures.

2. *Gang Violence*

To get to school, Marta,⁶⁰ a young Salvadoran woman, had to ride the bus.⁶¹ It was not uncommon for gang members to board Marta's bus in order to target young women and verbally harass them.⁶² Marta often attracted the gang's attention; different gang members would tell Marta that she was going to become one of their girlfriends, whether she liked it or not.⁶³ Marta's mother feared for her daughter's life.⁶⁴ She even pleaded with her daughter to stop attending school, hoping to end the harassment.⁶⁵ Things escalated when, in February of 2018, Marta was forced off the bus on her way home by two *Barrio 18* members (also known as "Mara-18" or "18th Street gang," among others) and taken to a side street.⁶⁶ When one of the gang members attempted to sexually assault her, she pushed him away and ran home.⁶⁷ But even at home, Marta was not safe.⁶⁸ While telling her mother what happened, the same two gang members appeared on her doorstep.⁶⁹ They demanded money

55. *Guatemala*, WORLD FACT BOOK, CIA, https://www.cia.gov/library/publications/the-world-factbook/geos/print_gt.html [https://perma.cc/X43R-9KCN].

56. HAMEL, *supra* note 54.

57. *Honduras*, WORLD BANK (Apr. 16, 2018), <http://www.worldbank.org/en/country/honduras/overview> [https://perma.cc/JA9V-GBM4].

58. Molly E. Kammien, *No More Band-Aid Solutions – Improving Immigration Reform by Addressing the Root Causes of Mexican Migration and Refining Foreign Direct Investment*, 80 BROOK. L. REV. 503, 504 (2015) (quoting MICHAEL GRAYBEAL, CTR. FOR STRATEGIC & INT'L STUDIES, MEXICO'S ECONOMIC POLICY AND MIGRATION: DEALING WITH THE CAUSES (2011), <https://www.csis.org/analysis/mexicos-economic-policy-and-migration> [https://perma.cc/H6FU-7F3N]).

59. *Mexico*, WORLD FACT BOOK, CIA, https://www.cia.gov/library/publications/the-world-factbook/geos/print_mx.html [https://perma.cc/Q7KU-NMJR].

60. This name has been changed for privacy and safety concerns.

61. Interview conducted in 2018 with a woman detained at the Laredo Detention Center.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

from her mother, and stated that if she did not pay they would murder her and take Marta, as well as her sixteen-year-old sister, as payment.⁷⁰ Marta, her mother, and her little sister abandoned their home that night, sold what they could to get money, and within two days, the family had fled the country.⁷¹ In a country like El Salvador, Marta's story is not unique.

The three countries in the Northern Triangle have consistently been ranked as some of the world's most violent countries.⁷² Of the three countries, El Salvador has risen above as the homicide capital of the world and, in 2015, lived up to this title when the homicide rate surpassed that of a country in war, not including countries like Syria.⁷³ In response to women and families fleeing these countries, President Trump threatened to dispatch National Guard troops to prevent Central Americans from entering the U.S., and Homeland Security Secretary Kirstjen M. Nielsen issued a statement warning these individuals that they would face prosecution should they try and enter the U.S.⁷⁴ For women like Victoria,⁷⁵ who was drugged, raped, and beaten while pregnant by members of Mara-18 because the child she was carrying did not belong to a gang member, the need to survive outweighed these threats and they came to the U.S. anyway.⁷⁶

The gang violence pushing many in the Northern Triangle to seek refuge in the United States can be traced to the streets of Los Angeles.⁷⁷ In the early 1980s, children of Salvadoran immigrants escaping the U.S.-backed civil war raging back home banded together in search of identity and protection.⁷⁸ These teens went on to form Mara Salvatrucha ("MS-13") to rival the gang initially formed by Mexicans, Barrio 18.⁷⁹ Similarly, Guatemalans were fleeing the genocide of indigenous people that was occurring in their country and also being supported by the U.S.⁸⁰ As U.S. law enforcement began targeting these gangs through the INS Violent Gang Task Force and other initiatives, the deportation of gang members back to the war-ravaged countries was inadvertently enabling an international criminal enterprise to form and

70. *Id.*

71. *Id.*

72. Rocio Cara Labrador & Danielle Renwick, *Central America's Violent Northern Triangle*, COUNCIL ON FOREIGN RELATIONS (June 26, 2018), <https://www.cfr.org/background/central-americas-violent-northern-triangle> [<https://perma.cc/N63S-FPTS>].

73. Jonathan Watts, *One Murder Every Hour: How El Salvador Became the Homicide Capital of the World*, GUARDIAN (Aug. 22, 2015), <https://www.theguardian.com/world/2015/aug/22/el-salvador-worlds-most-homicidal-place> [<https://perma.cc/9UCB-R8TH>].

74. Stuart Anderson, *Why Shouldn't Central American Mothers Flee from Violent Street Gangs?* FORBES (May 1, 2018), <https://www.forbes.com/sites/stuartanderson/2018/05/01/why-shouldnt-central-american-mothers-flee-from-violent-street-gangs/#27c11c4210aa> [<https://perma.cc/UM8N-U9Y4>].

75. This name has been changed for privacy and safety concerns.

76. Interview conducted in 2018 with a woman detained at the Laredo Detention Center.

77. See Daniel Denvir, *Deporting People Made Central America's Gangs—More Deportations Won't Help*, WASH. POST (July 20, 2017), https://www.washingtonpost.com/news/posteverything/wp/2017/07/20/deporting-people-made-central-americas-gangs-more-deportation-wont-help/?utm_term=.d387fd21f002 [<https://perma.cc/6WHN-N6ZE>].

78. Jose Miguel Cruz, *Central American Gangs Like MS-13 Were Born Out of Failed Anti-Crime Policies*, CONVERSATION (May 8, 2017), <http://theconversation.com/central-american-gangs-like-ms-13-were-born-out-of-failed-anti-crime-policies-76554> [<https://perma.cc/A982-RNE3>].

79. Denvir, *supra* note 77.

80. *Id.*

spread.⁸¹ Today, these gangs have splintered and evolved where “each country developed what they call their own ‘program’”⁸² but where the intent is the same—to gain control of their respective territories at whatever cost.

One way gangs in Central America attempt to maintain their power is through the recruitment of young men. Elena⁸³ is a twenty-year-old Guatemalan woman whose nineteen-year-old brother, Edgar,⁸⁴ was targeted for recruitment by the 18th Street gang.⁸⁵ When her brother refused to join the gang, they kidnapped him and tortured him, chopping off one of his fingers.⁸⁶ Elena and her family feared for their lives so they moved to a different neighborhood thinking they would be safe, but even relocating did not protect the family.⁸⁷ The gang found them and turned their attention from Edgar to Elena, stalking and threatening her with rape and murder if she did not become a girlfriend of the gang.⁸⁸ On one occasion when Elena was walking home from church, a gang member sexually assaulted her. As he was doing so, he detailed all of the horrible things he would do to her if she did not become a girlfriend of the gang, and even made threats to sexually assault her mother.⁸⁹ Because of the 18th Street gang’s stronghold in Guatemala, Elena’s family knew there was nowhere to hide and the threats would not stop unless Elena succumbed to the gang’s threats or was killed.⁹⁰ Having only enough money to get Elena and Edgar to the United States, the rest of the family remains in Guatemala in hiding to this day.⁹¹

For many citizens living in El Salvador, Honduras, or Guatemala, where gangs reign supreme, going to local law enforcement for help or protection is not an option. Where there is an “occasional lack of cooperation between the police, prosecutors, and corrections,”⁹² and inadequate resources, many Salvadorans have come to distrust the police. After Elena’s brother, Edgar, was released by his kidnappers, the family went to file a report at the local police station. Rather than offer help, the police dismissed them, telling them that kidnapping was routine for the gangs and there was nothing they could do.⁹³

Even being a police officer does not preclude that person from becoming a gang target. Yolanda,⁹⁴ a twenty-one-year old woman from El Salvador, was married to

81. *Id.*

82. Carlos Garcia, *6 Common Misconceptions About the MS13 Street Gang*, INSIGHT CRIME (Feb. 25, 2016), <https://www.insightcrime.org/news/analysis/6-common-misconceptions-ms13-gang/> [<https://perma.cc/J46U-5B26>].

83. This name has been changed for privacy and safety concerns.

84. This name has been changed for privacy and safety concerns.

85. Interview conducted in 2018 with a woman detained at the Laredo Detention Center.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *El Salvador 2018 Crime & Safety Report*, U.S. DEP’T OF STATE – BUREAU OF DIPLOMATIC SEC. (May 11, 2018), <https://www.osac.gov/Pages/ContentReportDetails.aspx?cid=24052> [<https://perma.cc/8FGK-QU54>].

93. Interview conducted in 2018 with a woman detained at the Laredo Detention Center

94. This name has been changed for privacy and safety concerns.

the son of a local police officer.⁹⁵ Approximately three or four years ago, in order to quell the threat they felt by police presence, members of MS-13 began to target and kill local police officers for bringing charges against gang members.⁹⁶ Yolanda's father-in-law, a police officer for about thirty-five years, was believed to be primarily responsible for the prosecution of local gang members. As a result, in the fall of 2017, the gang found and brutally beat Yolanda's husband and father-in-law.⁹⁷ Neither filed a police report because they suspected the police in their area to be controlled by the gangs.⁹⁸ After the attack, MS-13 members threatened to go after Yolanda and the other women in the family.⁹⁹ Knowing what MS-13 was capable of accomplishing, the family dispersed.¹⁰⁰ Yolanda and her husband fled to the United States while the rest of the family left for an unknown location.¹⁰¹

3. Domestic Violence

While the gang problem in Central America is an issue that has sent men, women, and children alike to the United States in droves, violence against women and girls has also been a driving force for many in Latin America. In 2016, one in three Central American women stated they were fleeing gender violence, and one in four undocumented individuals apprehended by Customs and Border Patrol was female.¹⁰² One of the underlying causes of domestic violence in this region of the world is due to *machismo*, seen as “a set of cultural expectations for men” which include characteristics like “pride, honor, courage” as well as “imply[ing] sexual prowess and aggressive behavior.”¹⁰³

Pilar,¹⁰⁴ from El Salvador, is all too familiar with machismo culture.¹⁰⁵ Her relationship with her common-law husband, Moises, began when she was only fourteen years old and at first, their relationship started like any other.¹⁰⁶ It was only after Moises returned from the military that his personality changed, and he became physically and sexually violent towards Pilar.¹⁰⁷ The use of drugs only exacerbated Moises's aggression—often raping Pilar while on methamphetamine and not allowing her to leave the house or have contact with anyone, including her family.¹⁰⁸ The violence heightened when Moises found out that a friend of Pilar's brothers had

95. Interview conducted in 2018 with a woman detained at the Laredo Detention Center.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. Nina Lakhani, “He Will Kill Me If He Sees Me Again”: Abused Women Seek Refuge in Mexico, *GUARDIAN* (June 7, 2017), <https://www.theguardian.com/global-development/2017/jun/07/women-refugees-domestic-violence-mexico> [<https://perma.cc/T3SU-CFZB>].

103. Patricia M. Hernandez, *The Myth of Machismo: An Everyday Reality for Latin American Women*, 15 *ST. THOMAS L. REV.* 859, 862 (2003).

104. This name has been changed for privacy and safety concerns.

105. Interview conducted in 2018 with a woman detained at the Laredo Detention Center.

106. *Id.*

107. *Id.*

108. *Id.*

fallen in love with her.¹⁰⁹ This fact sent Moises into a tailspin, resulting in verbal insults, raping Pilar multiple times a day, and making statements like he would rather see her dead than with another man.¹¹⁰ When Pilar attempted to seek a restraining order from the local court, Moises threatened to hurt her and her family.¹¹¹ At the time Pilar attempted to seek the restraining order, she was living with her family, but once her family heard that Moises was threatening them too, they stopped supporting Pilar and made her go back to him out of fear that he would harm or kill them.¹¹² Left without anyone's protection, and as the only way to end the abuse, Pilar left El Salvador for the U.S.¹¹³

In Guatemala, Susana¹¹⁴ faced a similar story. Within days of marrying her husband, Ricardo, Susana was subjected to vicious physical abuse. Ricardo grabbed her by the hair and slammed her against the wall while stating that he would kill her.¹¹⁵ Ricardo lashed out in this manner after he found out that Susana had simply exchanged pleasantries with another man earlier that day.¹¹⁶ After that initial incident, Ricardo regularly perpetrated abuse, often multiple times daily. Ricardo routinely punched Susana in the face if she refused to have sex with him, held a knife to her throat, and slammed her against the wall or the floor.¹¹⁷ After the birth of their son, the abuse did not slow down; in fact, it accelerated, with Ricardo physically and mentally abusing their son as well.¹¹⁸

In addition to the mistrust many Central Americans have towards the gangs, there is also a deep mistrust of police regarding the reporting of violence against women. In Honduras, where every sixteen hours a woman is murdered, a report by the United Nations stated that “[ninety-five] percent of cases of sexual violence and femicide . . . were never even investigated.”¹¹⁹ Gloria¹²⁰ found this statistic to be frighteningly true on several occasions. After being beaten with a belt and raped by her husband, Ignacio, Gloria went to the police station to file a police report.¹²¹ The police did arrest Ignacio but released him after twenty-four hours.¹²² On another occasion, after Ignacio had raped Gloria, she told him that she was planning to file a sexual assault report.¹²³ Ignacio responded by telling Gloria that she was his wife, and that the police do not care what a husband does sexually to his wife.¹²⁴ Gloria

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. This name has been changed for privacy and safety concerns.

115. Interview conducted in 2018 with a woman detained in the Laredo Detention Center.

116. *Id.*

117. *Id.*

118. *Id.*

119. Juju Chang et al., “Men Can Do Anything They Want to Women in Honduras”: *Inside One of the Most Dangerous Places on Earth To Be a Woman*, ABC NEWS (May 03, 2017), <https://abcnews.go.com/International/men-women-honduras-inside-dangerous-places-earth-woman/story?id=47135328> [<https://perma.cc/RBY8-B4M8>].

120. This name has been changed for privacy and safety concerns.

121. Interview conducted in 2018 with a woman detained at the Laredo Detention Center.

122. *Id.*

123. *Id.*

124. *Id.*

decided against filing the report.

Lucy,¹²⁵ a young Salvadoran woman, also suffered physical, sexual, and verbal abuse at the hands of her partner, Raymundo.¹²⁶ In addition to the abuse, Raymundo exercised control over Lucy, locking her in the house, breaking her cell phone, and disconnecting the landline telephone. This left Lucy isolated and alone for days on end.¹²⁷ One time, after Lucy went to the police to file a report, the police stated they would look for Raymundo but this did not happen.¹²⁸ After attempting to go to the police for a second time, Raymundo found out about her attempt and in anger pulled out a gun, putting it to Lucy's head.¹²⁹ Raymundo yelled that the next time he got her alone, he was going to kill her and no one would ever be able to find the body.¹³⁰ Knowing she would not be safe even if she relocated to a different part of the country, Lucy set out for the United States within days of being threatened with death.¹³¹ Even after making it to the United States, Raymundo continued to threaten her—harassing her family members and telling them that if she ever returned to El Salvador he would find her and murder her.¹³²

Women in Guatemala also face excessive amounts of gender violence and femicide. In 2012, a survey reported that gender violence within the country had reached “epidemic levels” and the United Nations also reported that in Guatemala two women were being killed daily.¹³³ On four different occasions after being physically abused by her husband, a well-known man in the community, Cristina¹³⁴ unsuccessfully sought a protection order from local law enforcement.¹³⁵ At a hearing, Cristina recounted an incident where her husband choked her almost to the point of death in front of their young children.¹³⁶ When she started crying, the judge asked what she was crying for and even stated that he did not believe her.¹³⁷ As the abuse worsened, and after the government in Guatemala evinced they were unwilling to protect her from further abuse, Cristina felt she had to leave.¹³⁸

B. Journey to the United States

For many individuals, escaping abuses they encountered in their home country is just the beginning—the journey to get to the United States brings about additional challenges. Before many can set out for the U.S., they must gather funds to pay *el coyote*, or “the guide.” Gloria’s mother took out a \$5,000 loan to pay for part of her

125. This name has been changed for privacy and safety concerns.

126. Interview conducted in 2018 with a woman detained at the Laredo Detention Center.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. Julia Guinan, *Nearly 20 Years After Peace Pact, Guatemala's Women Relive Violence*, CNN (Apr. 07, 2015), <https://www.cnn.com/2015/04/02/world/iyw-guatemala-gender-violence/index.html> [<https://perma.cc/BB6J-XGCP>].

134. This name has been changed for privacy and safety concerns.

135. Interview conducted in 2018 with a woman detained at the Laredo Detention Center.

136. *Id.*

137. *Id.*

138. *Id.*

journey,¹³⁹ but there are some individuals who pay up to \$10,000, or more, per person.¹⁴⁰ Most of the time coyotes are the sole reason immigrants make it all the way to the United States but, unfortunately, not everyone is so lucky. Stories of coyotes who abandon their charges in the desert of Mexico or refuse to complete the journey unless an additional amount is paid are not unheard of.¹⁴¹

To get to the United States, most Central Americans must first travel through Mexico. As straight-forward as that sounds, the reality is far from it—especially for women. Upon stepping foot in Mexico, Central Americans become increasingly susceptible to extortion, cartels, robbery, and kidnapping.¹⁴² Of the Central American girls and women who journey through Mexico, eighty-percent of them are raped.¹⁴³ There are even areas along the route many take through Mexico that are well-known for having a high rate of rape and sexual assault. These areas are so notorious that women will take birth control beforehand to prevent a pregnancy if they get raped.¹⁴⁴

The most common mode of transportation for many poor Central Americans is by riding atop a string of freight trains dubiously called *La Bestia*, or “the Beast.” Riding the Beast is risky, since there are no passenger cars and individuals must ride on top of the train cars. This subjects individuals to extreme heat during the day and brutal cold at night, the possibility of losing their grip, falling off, and losing a limb or life, and the threat of cartel members coming aboard to extort or abuse migrants.¹⁴⁵

Those who manage to make it through Mexico, having evaded the cartels, kidnapping, and other dangers along way, often arrive at the U.S.-Mexico border dehydrated, malnourished, and incredibly exhausted from a journey that typically takes one month to complete.¹⁴⁶

C. What Happens at the Border?

Upon reaching the border, some continue to their final destination to reunite with family members while others turn themselves in to CBP. CBP officials are required to send cases where individuals express a fear of persecution in their home country

139. *Id.*

140. Damia S. Bonmati, *A Day in the Life of a Coyote: Smuggling Migrants from Mexico to the United States*, UNIVISION NEWS (Dec. 21, 2016), <https://www.univision.com/univision-news/immigration/a-day-in-the-life-of-a-coyote-smuggling-migrants-from-mexico-to-the-united-states> [<https://perma.cc/6VBP-X6FQ>].

141. *Id.*

142. Salil Shetty, *Most Dangerous Journey: What Central American Migrants Face When They Try to Cross the Border*, AMNESTY INT’L, <https://www.amnestyusa.org/most-dangerous-journey-what-central-american-migrants-face-when-they-try-to-cross-the-border/> [<https://perma.cc/873U-VYJU>].

143. Deborah Bonello & Erin Siegal McIntyre, *Is Rape the Price to Pay for Migrant Women Chasing the American Dream?*, SPLINTER NEWS (Sept. 10, 2014), <https://splinternews.com/is-rape-the-price-to-pay-for-migrant-women-chasing-the-1793842446> [<https://perma.cc/9B84-PV3C>].

144. *Id.*

145. Sonia Nazario, *Enrique’s Journey—Chapter Three: Defeated Seven Times, A Boy Again Faces ‘the Beast,’* L.A. TIMES (Oct. 02, 2002), <http://www.latimes.com/nation/immigration/la-fg-enriques-journey-chapter-three-mainbar-story.html> [<https://perma.cc/4PNT-BDGS>].

146. Eric Levenson, Khushbu Shah & Catherine E. Shoichet, *The Caravan of Migrants has Reached the US-Mexico Border—So What’s Next?*, CNN (Apr. 30, 2018), <https://www.cnn.com/2018/04/30/world/caravan-migrants-us-border-next/index.html> [<https://perma.cc/T55A-NPH4>].

or an intent to apply for asylum to the appropriate Asylum Office for a credible fear interview (CFI).¹⁴⁷ Where an asylum officer has determined there is a “significant possibility” that an individual has established a case for asylum and is eligible,¹⁴⁸ the officer will refer the case to an immigration judge so that a full hearing on the merits can be conducted.¹⁴⁹

Despite the fact that anyone present at the border has a statutory right to apply for asylum,¹⁵⁰ there is a debate whether this right constitutes a substantial liberty interest and thus triggers due process rights. The Eleventh Circuit has determined that because asylum is at the discretion of an official, “there is no creation of a substantive interest protected by the Constitution” but rather “only a right to petition for asylum.”¹⁵¹ On the other hand, the Ninth Circuit stated that there are certain factors that may be “particularly important in determining the interest affected by any deprivation of rights”¹⁵² according to the *Mathews v. Eldridge* balancing test.¹⁵³ Such factors include “evidence of overall political violence and human rights abuses in foreign countries in the adjudication of asylum claims.”¹⁵⁴ Nevertheless, harrowing reports have emerged from the southern border about CBP officers turning away asylum seekers without conducting screenings of cases and even, in some instances, blatantly lying by stating that the U.S. was no longer accepting applications for asylum.¹⁵⁵ This has resulted in many asylum seekers being stuck in a limbo-like state, sleeping on the streets, and relying on the kindness of others outside ports of entry.¹⁵⁶

Another blow for asylum seekers came this past summer after a decision in which former Attorney General Jeff Sessions overruled *In re A-R-C-G*.¹⁵⁷ This decision has made it increasingly difficult for domestic violence survivors and victims of gang violence to be eligible for asylum.¹⁵⁸ In his opinion, Attorney General Sessions stated that “[t]he mere fact that a country may have problems effectively policing certain crimes—such as domestic violence or gang violence . . . cannot itself establish an asylum claim.”¹⁵⁹ In light of this change, practitioners are now revising the way that they approach these types of cases, including by gathering

147. 8 U.S.C. §§ 1225(b)(1)(A)(ii), (b)(1)(B) (2012); 8 C.F.R. § 235.3(b)(4) (2018).

148. 8 C.F.R. § 208.30(e)(3) (2018).

149. 8 U.S.C. § 1225(b)(1)(B)(ii) (2012); *see* 8 C.F.R. § 208.30(e)(4) (2018).

150. 8 U.S.C. § 1158(a)(1) (2012).

151. *Jean v. Nelson*, 727 F.2d 957, 981 (11th Cir. 1984).

152. *Orantes-Hernandez v. Messe*, 685 F. Supp. 1488, 1503 (9th Cir. 1988).

153. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

154. *Orantes-Hernandez*, 685 F. Supp. at 1503.

155. *See* HUMAN RIGHTS FIRST, CROSSING THE LINE – U.S. BORDER AGENTS ILLEGALLY REJECT ASYLUM SEEKERS 5 (2017), <http://www.humanrightsfirst.org/sites/default/files/hrf-crossing-the-line-report.pdf> [<https://perma.cc/J7BP-KPH6>].

156. Simon Romero & Miriam Jordan, *On the Border, a Discouraging New Message for Asylum Seekers: Wait*, N.Y. TIMES (June 12, 2018), <https://www.nytimes.com/2018/06/12/us/asylum-seekers-mexico-border.html> [<https://perma.cc/4J94-QZE5>].

157. *In re A-R-C-G*, 26 I. & N. Dec. 388, 388-89 (2014) (recognizing married Guatemalan women, who are unable to leave their husbands, as a distinguishable particular social group).

158. *See In re A-B-*, 27 I. & N. Dec. 316 (Op. Att’y Gen. 2018).

159. *Id.* at 320.

extensive amounts of evidence to corroborate every single claim.¹⁶⁰

The work done by Jones Day and Texas RioGrande Legal Aid in the Laredo Detention Center will undoubtedly be affected, since the Laredo Project primarily works with women who have fled gender or gang-based persecution in their home countries.¹⁶¹

The collateral consequences of entering the United States as a migrant seeking refuge, either at or between a port of entry, are countless. Some asylum seekers who have reached the border describe the experience as an agonizingly bathetic one,¹⁶² where a years-old idea of the United States collides with the harsh realities of the southern border. For them, the mental and physical toll of the journey cannot simply evaporate at the border.

The defining nature of pressing forward, though, begins to shift after crossing. For the thousands of asylum seekers who are apprehended, the journey to refuge is no longer defined by physical movement as it is by legal movement. As in the physical journey north, there is a wide variance in the amount of time the legal journey will take for a seeker of a humanitarian form of immigration relief in the U.S.¹⁶³ And, likewise in this new legal journey, individual successes will differ. But unlike the physical journey north, there is only one path for asylum seekers to dramatically increase their chances of moving forward once they are here in the U.S.: accessing counsel and legal information.

IV. PROMOTING FAIRNESS AND EFFICIENCY IN IMMIGRATION PROCEEDINGS THROUGH ACCESS TO COUNSEL AND LEGAL INFORMATION

Unlike criminal defendants in the United States, individuals with cases in American immigration courts are not protected by a constitutional right to the assistance of counsel. As a result, immigrants who face deportation and are unable to secure counsel must represent themselves at their own removal proceedings. Removal defense, a complex area of litigation, is challenging even for skilled trial attorneys, let alone individuals who may have no formal legal training. For those who are detained pending the outcome of their case, the additional challenges posed by the location of the detention itself can make successful *pro se* representation an

160. NAT'L IMMIGRANT JUST. CTR., ASYLUM PRACTICE ADVISORY – APPLYING FOR ASYLUM AFTER MATTER OF A-B- 25 (2018), <https://www.immigrantjustice.org/sites/default/files/content-type/resource/documents/2018-06/Matter%20of%20A-B-%20Practice%20Advisory%20-%20Final%20-%206.21.18.pdf> [<https://perma.cc/ES3D-U949>].

161. JONES DAY, *supra* note 2.

162. See Kirk Semple, *Migrants' Emotional Ties to U.S. Expressed in Flags, Tombs and Fancy Homes*, N.Y. TIMES (Sept. 9, 2018), <https://www.nytimes.com/2018/09/09/world/americas/guatemala-migration.html> [<https://perma.cc/C5ST-R2QV>]; Elliot Spagat, *Long Odds and Slow Lines Await Migrant Caravan at US Border*, ASSOCIATED PRESS (Oct. 25, 2018), <https://www.apnews.com/0a7bc31355cc42419f68f78eba489f83> [<https://perma.cc/26CB-R6E2>].

163. NINA SIUL ET AL., VERA INST. OF JUST., LEGAL ORIENTATION PROGRAM EVALUATION AND PERFORMANCE AND OUTCOME MEASUREMENT REPORT, PHASE II (May 2008), <https://www.justice.gov/sites/default/files/eoir/legacy/2008/05/15/LOPEvaluation-final.pdf> [<https://perma.cc/H9JU-ZS8T>].

especially challenging feat.

For at least the past decade, a significant number of individuals with cases in immigration courts across the country have not had lawyers to represent them. This includes a clear majority of immigrants who are detained pending trial continuing to go without legal representation, and well over a quarter of non-detained immigrants who are likewise unable to secure counsel. Given the major disparity in the success rates between represented and unrepresented immigrants with immigration cases, the impact of widespread *pro se* representation cannot be overlooked.

The foundation of our current immigration counsel crisis is late nineteenth century Supreme Court precedent, which affixed deportation trials as squarely within the civil realm and, by that logic, undeserving of the Sixth and Eighth Amendment protections that are afforded to criminal defendants. These critical rights include the right to assistance of counsel and the right to a jury trial. The Supreme Court, however, held in 1893 that constitutional protections afforded to criminal defendants are simply inapplicable in immigration court. The Court declared:

The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority, and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty, or property without due process of law; and the provisions of the constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures and cruel and unusual punishments, have no application.¹⁶⁴

In the absence of a right to counsel afforded to immigration court respondents, certain governmental entities, in conjunction with participating legal nonprofits, have taken action over the past decade to provide these individuals access to legal resources. Some of the most notable resources are funded by the Executive Office of Immigration Review (EOIR), an office within the Department of Justice (DOJ). EOIR's Office of Legal Access Programs (OLAP) runs a variety of initiatives including, most notably, the Legal Orientation Program (LOP) and the Legal Orientation Program for Custodians of Unaccompanied Children (LOPC). The Vera Institute of Justice (Vera) claims that "eighty-four percent of detained individuals in removal proceedings do not receive legal representation," and, because of this, "LOP fills a critical gap in this system by providing access to justice for thousands of individuals each year."¹⁶⁵ LOP, first funded in 2002, is administered through a contract with Vera and implemented through various subcontracting nonprofits at thirty-eight detention facilities nationwide. LOP most notably includes group orientations sessions which:

[A]re designed to give detained persons—regardless of whether they have access to legal representation—a general overview of immigration law, their legal rights, and the immigration removal process. These orientations explain the removal hearing

164. *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893).

165. Marina Caeiro, *Legal Orientation Program*, VERA INST. OF JUST., <https://www.vera.org/projects/legal-orientation-program> [<https://perma.cc/46SL-MAZW>].

process and provide general information about the statutory requirements for various defenses and forms of legal relief.¹⁶⁶

Vera asserts that “LOP participants move through the courts faster” and “receive fewer *in absentia* removal orders.”¹⁶⁷ LOPC, which is structured through a similar contracting framework as LOP, “provide[s] legal orientation presentations to the adult caregivers (custodians) of unaccompanied children in EOIR removal proceedings.”¹⁶⁸

Access to *actual* legal counsel, however, is naturally seen as even more important by immigration activists and community stakeholders who have pushed for years for the realization of universal access. One such initiative, the first of its kind, is the New York Immigrant Family Unity Project (NYUFIP). NYUFIP is a public-defender style program that is funded by the New York City Council and implemented through three New York City public defender organizations: the Legal Aid Society, the Bronx Defenders, and Brooklyn Defender Services. First piloted in 2013, NYUFIP provides near universal access to counsel to detained immigrants with cases at the Varick Street Immigration Court in lower Manhattan.¹⁶⁹

Additionally, certain populations of immigrants (those not defined necessarily by their geography) have moved closer to being afforded universal access to counsel. For example, in 2013, following a landmark ruling¹⁷⁰ out of the Central District of California, the federal government introduced a policy that has provided additional safeguards for the protection of “unrepresented immigration detainees with serious mental disorders or conditions.”¹⁷¹ The policy affords “qualified representatives” to individuals who have been declared incompetent by an immigration court.¹⁷² Notably, however, “qualified representatives” do not necessarily include attorneys.

A. *The Current Immigration Counsel Crisis*

Beyond the aforementioned programs, however, the clear majority of immigrants who are placed in removal proceedings continue to lack any legal assistance. Data compiled through address records by the Transactional Records Access Clearinghouse (TRAC) at Syracuse University indicates a dire situation in terms of representation for individuals with cases in immigration courts across the country. In Texas, for example, there were 91,664 people in immigration court as of

166. STULC ET AL., *supra* note 163.

167. *Id.*

168. *Legal Orientation Program for Custodians of Unaccompanied Alien Children*, U.S. DOJ., <https://www.justice.gov/eoir/legal-orientation-program-custodians-unaccompanied-alien-children> [<https://perma.cc/8X3B-VMR9>].

169. JENNIFER STAVE ET AL., VERA INST. OF JUST., *EVALUATION OF THE NEW YORK IMMIGRANT FAMILY UNITY PROJECT: ASSESSING THE IMPACT OF LEGAL REPRESENTATION ON FAMILY AND COMMUNITY UNITY* (Nov. 2017), <https://www.vera.org/publications/new-york-immigrant-family-unity-project-evaluation> [<https://perma.cc/EUH7-XARP>].

170. *Franco-Gonzalez v. Holder*, No. 10-02211, 2013 WL 3674492, at *15 (C.D. Cal. Apr. 23, 2013).

171. U.S. DOJ, Notice: Department of Justice and the Department of Homeland Security Announce Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions (Apr. 2013), <https://www.justice.gov/eoir/pages/attachments/2015/04/21/safeguards-unrepresented-immigration-detainees.pdf> [<https://perma.cc/B6YM-44BS>].

172. *Id.*

August 2018.¹⁷³ However, only 52,955 (57%) of those individuals were represented by counsel.¹⁷⁴ The situation in New Jersey was not much better, with only 26,470 (64%) of the 40,863 individuals in immigration court represented.¹⁷⁵ California, which has the greatest number of people with immigration cases out of any state, had 138,061 individuals in immigration court in August of 2018, of which only 96,494 (70%) were represented.¹⁷⁶

The rate of representation is notably lower for individuals in detention, hovering around a nationwide average of thirty percent over the last few years.¹⁷⁷ Other studies and sources of data, however, have determined this rate to be even lower.¹⁷⁸

Although subject to notable fluctuations, the rate at which individuals, detained and non-detained alike, have been represented in immigration court has been consistently poor for at least the last decade. A 2015 study published by the University of Pennsylvania Law Review “[d]rawing on data from over 1.2 million deportation cases decided between 2007 and 2012” found that “only 37% of all immigrants, and a mere 14% of detained immigrants, secured representation.”¹⁷⁹

There are a number of factors which may contribute to the fact that non-detained individuals with immigration cases are significantly more likely to obtain counsel than detained immigrants.¹⁸⁰ The inability of a detained immigrant to maintain an income, and, as such, an inability to pay for private counsel, is perhaps one of the more obvious reasons for the disparity.

Furthermore, some have argued the comparatively challenging nature of the practice of removal defense itself—“a much more labor intensive, unpredictable, and time-consuming endeavor” than other areas within the practice of immigration law—may detract would-be removal defense attorneys from the practice.¹⁸¹ Even if an immigration attorney does choose to take on removal defense cases, he or she may be incentivized to take on only non-detained clients due to the time and travel necessary to represent a detained client.¹⁸² Additionally, if an individual is detained in a remotely located detention facility, the distance between the facility and the nearest affordable immigration attorney may render legal representation

173. *Individuals in Immigration Court by Their Address: Pending Cases with and Without Attorneys*, TRAC IMMIGRATION, <http://trac.syr.edu/phptools/immigration/addressrep/> [<https://perma.cc/APF4-HGL7>].

174. *Id.*

175. *Id.*

176. *Id.*

177. *Who Is Represented in Immigration Court?*, TRAC IMMIGRATION (Oct. 2017), <http://trac.syr.edu/immigration/reports/485/> [<https://perma.cc/6D93-GUYW>].

178. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 2 (2015) (note: alternate sources of data report noticeably lower representation rates, in part due to their definition of “represented” meaning that the individual was represented throughout their entire immigration court proceedings).

179. *Id.*

180. *Id.*

181. Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 FORDHAM L. REV. 541, 549 (2009).

182. Eagly & Shafer, *supra* note 178, at 35.

impracticable.¹⁸³

B. The Difference Counsel Makes

Detained immigrants who have secured counsel are ten times more likely to see a successful outcome to their case than *pro se* detainees.¹⁸⁴ The NYUFIP in New York City provides a unique example. According to the Vera Institute of Justice, only 4% of detained cases ended successfully for respondents at the Varick Street Immigration Court before implementation of NYUFIP. Post-implementation success rates for NYUFIP clients, however, are around 48%, representing a 1,100% increase in the rate of success for these detained cases.

There are a myriad of explanations for the extraordinary difference made by access to counsel, most of which center around the very simple fact that it is not easy in any circumstance for a non-lawyer to walk into court and litigate on his or her own behalf. And even for those immigrants who themselves are lawyers or law-related professionals in other countries, the field of American immigration law is, to many them, foreign law written in a foreign language. According to the Vera Institute of Justice:

[T]he majority of individuals facing deportation—and indeed the public writ-large—lack the training, resources, or understanding to effectively identify and exercise their legal rights, particularly those which permit them to remain in the country. This is significant, given that the consequences of deportation can often be a matter of life or death.¹⁸⁵

The circumstances surrounding detention itself also contribute to the way in which access to counsel makes an extraordinary difference for detained immigrants. Putting together a claim for asylum, for example, typically requires the gathering of country conditions reports, affidavits from witnesses, medical reports, documentary evidence, the composition of a personal declaration from the respondent herself, and the payment of a translator who will translate everything into English. Procuring these documents is extraordinarily difficult without a lawyer. And, for detained immigrants, even those who end up in detention centers with exemplary law libraries, the task of putting together any viable legal defense without a lawyer is even harder.

C. Why Counsel is Important Even When Individuals Have No Cognizable Legal Avenue to Relief from Removal

Concerning detained individuals with no legal pathway, a case can also be made that increased access to counsel is also important in terms of preservation of government resources. An often overlooked aspect concerning access to counsel and legal resources is the fact that detained and unrepresented immigrants in removal

183. Patrick G. Lee, *Immigrants in Detention Centers Are Often Hundreds of Miles From Legal Help*, PRO PUBLICA (May 16, 2017), <https://www.propublica.org/article/immigrants-in-detention-centers-are-often-hundreds-of-miles-from-legal-help> [https://perma.cc/R85C-L65V].

184. S. POVERTY LAW CTR., SHADOW PRISONS: IMMIGRANT DETENTION IN THE SOUTH (Nov. 21, 2016), https://www.splcenter.org/sites/default/files/ijp_shadow_prisons_immigrant_detention_report.pdf [https://perma.cc/44YJ-SVBQ].

185. STAVE ET AL., *supra* note 169, at 22.

proceedings, and in particular those who do not have any viable legal pathway to avoid removal, may choose to stipulate to their own removal upon understanding what, if any, legal pathways they have.

Pro se cases . . . drain critical resources from ICE. There are a significant percentage of cases in the immigration courts where the outcome is certain from the outset and respondents have no avenue to escape deportation. With competent counsel, such cases are often resolved at an initial master calendar appearance with a grant of voluntary departure. However, *pro se* litigants and litigants who do not receive complete and accurate advice from their attorneys will often make the unwise choice to fight their deportation cases for months or even years, sometimes while sitting in immigration detention.¹⁸⁶

Some of these detainees, of course, would otherwise have stipulated to their own removal if only they had known their legal predicament, thus conserving taxpayer dollars afforded to detention. Beyond access to counsel, there is also evidence that access to legal resources more generally also saves the federal government money. According to a 2012 DOJ “LOP Cost Savings Analysis,” LOP participants between fiscal years 2009-2011 “completed their detained immigration court proceedings an average of 12 days faster than those who did not participate in the LOP,” and spent an average of six fewer days in ICE custody.¹⁸⁷ The report claims that, because of LOP, “ICE saved on average roughly \$677 in detention costs for each LOP participant” during fiscal year 2011.¹⁸⁸

In addition to lack of access to counsel, family separation was a dominant theme in the Laredo Detention Center, and in immigration detention centers nationwide. The following section provides an overview of family separations at the border, and offers various legal arguments against a deleterious and far-reaching practice.

V. WHEN REFUGE BECOMES PURGATORY: A LOOK AT THE TRUMP ADMINISTRATION’S SEPARATION OF PARENTS AND CHILDREN AT THE BORDER

The separation of parents from their children at the U.S.-Mexico border and within the United States, absent a justifiable child protection grounds, is so fundamentally unconscionable it defies countless international and domestic laws on child welfare, human rights and refugees.¹⁸⁹

186. Markowitz, *supra* note 181, at 545-46.

187. U.S. DEPT. OF JUST., COST SAVING ANALYSIS – THE EOIR LEGAL ORIENTATION PROGRAM (2012), https://www.justice.gov/sites/default/files/eoir/legacy/2013/03/14/LOP_Cost_Savings_Analysis_4-04-12.pdf [<https://perma.cc/34RH-4S46>].

188. *Id.*

189. AL OTRO LADO ET AL., THE SEPARATION OF FAMILY MEMBERS APPREHENDED BY OR FOUND INADMISSIBLE WHILE IN U.S. CUSTOMS AND BORDER PROTECTION (CBP) CUSTODY AT THE U.S.-MEXICO BORDER 5 (Dec. 11, 2017), <https://www.womensrefugeecommission.org/images/zdocs/Family-Separation-Complaint-FINAL-PUBLIC-12-11-17.pdf> [<https://perma.cc/J2XF-HUUZ>].

A young Salvadoran woman stood in line at a U.S.-Mexico border checkpoint, holding her ten-month-old son, and watched as the mothers who stood before her were ushered off along with their young children to family detention centers. She had escaped severe domestic abuse, including most recently a beating during pregnancy that had caused her to miscarry. The trip from El Salvador through Mexico had been full of its own terrors. After an arduous journey, she presented herself lawfully at the border, holding her baby. She sought asylum for both of them. But when it was her turn to be processed the officials took her son from her arms, amidst the child's wails and her desperate pleas, and ordered her onto a bus that would eventually leave her in the Laredo Detention Center. When a legal team from the Laredo Project met this woman several days later, she had no idea where they had taken her child, or if she would ever see him again.

The domestic abuse this woman described was brutal, including battery and rape, but her trauma from this violence seemed to pale in comparison with the pain she was currently enduring from the seizure of her son. Generally, when interviewing asylum-seekers, the client must unearth deeply scarring memories in telling her story to see if she qualifies for legal relief. This was, however, the rare instance in an asylum screening where the interviewee seemed to suffer more from the reality that she was currently living than from the brutal past she was recounting. Her foremost fear was being deported without her son. Indeed, the attorneys and volunteers could not tell her with any certainty that if sent back to El Salvador, she would see her son again. A few months later, in May 2018, the Trump Administration would announce family separations as official policy.

This section briefly traces the evolution over the last year of the current government's practice of separating detained immigrant parents and their minor children, the most pertinent organizational and political responses in the last months—including the ACLU's class action suit against the Trump administration, and then provides an analytical overview of the legal issues this practice raised.

A. The Situation: Family Separations and Humanitarian Responses

In the last year, numerous reports emerged noting an apparent increase in separations of detained immigrant parents from their children, purported plans to officialize the practice as a deterrent and punitive measure, and subsequent responses on the part of humanitarian organizations and politicians to try to halt the practice.

In November, 2017, two immigrants' rights organizations, *Al Otro Lado* and *Pueblos Sin Fronteras*, released a report documenting an influx in U.S. CBP officers taking minor children from their parents who crossed the border seeking asylum from Mexico and Central America.¹⁹⁰ The cases they found involved children as young as one year old.¹⁹¹ In some instances, immigration officials called the children in alone for questioning, and then, simply, “the parent did not see the child again.”¹⁹²

Once the immigration system separates children from their detained immigrant parents, the minors are then designated as “unaccompanied alien children” and

190. AL OTRO LADO & PUEBLO SIN FRONTERAS, REPORT ON CHILD-PARENT SEPARATION BY CBP IN CALIFORNIA (Nov. 28, 2017).

191. *Id.*

192. *Id.*

transferred to a shelter run by the Office of Refugee Resettlement (ORR).¹⁹³ The children's immigration cases are processed separately from the cases of their parents and, depending on their circumstances, the children may be released to a relative, guardian, or custodial organization such as foster care or a group home.¹⁹⁴ The American Pediatrics Association has explicitly condemned separating children from their parents.¹⁹⁵ The American Civil Liberties Union (ACLU) has stated the family separation policy is an affront to the "overwhelming body of scientific literature that is replete with evidence of the irreparable harm and trauma to children caused by separation from their parents."¹⁹⁶

Practically speaking, since the child is placed in his own distinct immigration proceedings, this means that a detained parent whose child is taken away, may later (or shortly) be sent back to her country without her son or daughter; we now know this indeed occurred with at least 366 children, as discussed below.

As discussed *supra*, the great majority of parents who flee with their minor children and reach the border are coming from Honduras, El Salvador, Guatemala, and Mexico.¹⁹⁷ El Salvador, Guatemala, and Honduras are regularly listed as countries with the highest homicide rates in the world.¹⁹⁸ "El Salvador became the world's most violent country not at war in 2015, when gang-related violence brought its homicide rate to 103 per hundred thousand."¹⁹⁹ Unsurprisingly, a primary motive for minors and families who flee these countries is to escape gang violence and cartels.²⁰⁰ Coupled with the well-documented dangers of the journey itself, parents who choose to escape with their children are often compelled by desperation.²⁰¹

In December 2017, the Women's Refugee Commission and seven other major immigrants' rights organizations filed a complaint with DHS, on behalf of families who were separated at the border in federal custody.²⁰² The complaint stated a visible increase in this practice, the ensuing harm and violation of legal obligations, and sought a (DHS) investigation to halt such separations when used as methods of deterrence and punitiveness.²⁰³

That same month, the New York Times reported that the Trump administration

193. AL OTRO LADO ET AL., *supra* note 189, at 17.

194. AM. IMMIGRATION COUNCIL, A GUIDE TO CHILDREN ARRIVING AT THE BORDER: LAWS, POLICIES AND RESPONSES 9 (2015), <https://www.americanimmigrationcouncil.org/research/guide-children-arriving-border-laws-policies-and-responses> [<https://perma.cc/V6MU-GWCC>].

195. Am. Acad. of Pediatrics, *AAP Statement Opposing Separation of Mothers and Children at the Border* (Mar. 4, 2017), <https://www.aap.org/en-us/about-the-aap/aap-press-room/Pages/immigrantmotherschildreparation.aspx> [<https://perma.cc/UER2-YUF5>].

196. Petitioner-Plaintiff's Memorandum in Support of Motion for Preliminary Injunction with (Corrected) Exhibits, *Ms. L v. U.S. Immigration & Customs Enf't*, No. 18-cv-00428-DMS-MDD, 12 (S.D. Cal. Mar. 3, 2018) (quotation omitted).

197. AM. IMMIGRATION COUNCIL, *supra* note 194, at 1; *see also supra* Section IV.

198. Labrador & Renwick, *supra* note 72.

199. *Id.*

200. AM. IMMIGRATION COUNCIL, *supra* note 194, at 2.

201. *See* Amanda Holpuch, *Migrant Deaths at US-Mexico Border Increase 17% this Year, UN Figures Show*, GUARDIAN (Aug. 5, 2017), <https://www.theguardian.com/us-news/2017/aug/05/migrants-us-mexico-border-deaths-figures> [<https://perma.cc/K84A-R886>]; AM. IMMIGRATION COUNCIL, *supra* note 194, at 2.

202. AL OTRO LADO ET AL., *supra* note 189, at 1.

203. *Id.*

was planning on discouraging illegal immigration by separating parents who crossed the border without documentation from their children, rather than holding them together in family detention centers.²⁰⁴ While the Administration had not yet announced family separations as official policy, and in fact had previously stated they would not officialize such a practice,²⁰⁵ organizations all over the country that serve detained immigrants had documented cases of these separations.²⁰⁶

In January 2018, over 200 child welfare organizations sent an “urgent appeal” to DHS to stop any such plans, citing both the legal violations and the “ample evidence that separating children from their mothers or fathers leads to serious, negative consequences to children’s health and development.”²⁰⁷

In February 2018, seventy-one members of Congress signed a letter to DHS, expressing concern over the various reports on separations of children from their immigrant parents, and opposing the practice.²⁰⁸ A few weeks later, the ACLU filed a national class action against DHS over the separation of a Congolese mother from her daughter and other similarly situated plaintiffs.²⁰⁹ The government released the named plaintiff several weeks later, reuniting her with her child, however, the case continues.²¹⁰

On May 7, 2018, former Attorney General Jeff Sessions announced that the federal government would formally be separating parents from their children at the U.S.-Mexico border as a method for deterring these crossings.²¹¹ His announcement

204. Caitlin Dickerson & Ron Nixon, *Trump Administration Considers Separating Families to Combat Illegal Immigration*, N.Y. TIMES (Dec. 21, 2017), <https://www.nytimes.com/2017/12/21/us/trump-immigrant-families-separate.html> [<https://perma.cc/A5K6-MLBB>].

205. See Tal Kopan, *Kelly Says DHS Won’t Separate Families at the Border*, CNN (Mar. 29, 2017), <http://www.cnn.com/2017/03/29/politics/border-families-separation-kelly/index.html> [<https://perma.cc/XCY4-CRVW>]; see also Elise Foley & Roque Planas, *Trump Administration Won’t Routinely Separate Families at the Border After All*, HUFF. POST (Apr. 5, 2017), http://www.huffingtonpost.com/entry/dhs-separating-familiesborder_us_58e50d4fe4b0f4a923b448b7 [<https://perma.cc/6ZTT-LB7F>]; see generally *Ending the Crisis: America’s Borders and the Path to Security: Hearing Before the S. Comm. On Homeland Sec.*, 115th Cong. (2017) (statement of John Kelly, Secretary, U.S. Department of Homeland Security).

206. AL OTRO LADO ET AL., *supra* note 189, at 5-6.

207. Letter from National Organizations to Kirstjen M. Nielsen, Sec’y, U.S. Dep’t of Homeland Sec. (Jan. 16, 2018) https://static1.squarespace.com/static/597ab5f3bebabf0a625aaf45/t/5a5e55cf0d9297a44bbb8d3e/1516131791958/2018_01_16+Child+Welfare+Juvenile+Justice+Opposition+to+Parent+Child+Separation+Plan.pdf [<https://perma.cc/FZN9-BKUX>].

208. Letter from Democratic Members, U.S. Congress, to Kirstjen M. Nielsen, Sec’y, U.S. Dep’t of Homeland Sec. (Feb. 8, 2018) <http://www.aila.org/advo-media/whats-happening-in-congress/congressional-updates/democratic-members-tells-dhs-that-separations> [<https://perma.cc/8D3E-LCRK>].

209. See Complaint at 1, *Ms. L v. ICE et al.*, No. 18CV0428-DMS-MDD (S.D. Cal. 2018); *Ms. L v. ICE*, Memorandum in Support of Motion for Class Certification (Mar. 9, 2018), <https://www.aclu.org/legal-document/ms-l-v-ice-memorandum-support-motion-class-certification> [<https://perma.cc/9Q88-5NU3>].

210. *Ms. L v. ICE*, ACLU (Sept. 28, 2018), <https://www.aclu.org/cases/ms-l-v-ice> [<https://perma.cc/2YWG-3EE9>].

211. Benjamin Hart, *Trump Administration Will Separate Parents from Children at Border*, N.Y. MAG., May 7, 2018, <http://nymag.com/daily/intelligencer/2018/05/trump-administration-to-separate-parents-children-at-border.html> [<https://perma.cc/Z3G3-9ZZH>].

made official what many advocates on the ground had already been witnessing and fighting for months.

Then on June 26, in a victory for immigrant rights, a federal judge issued a preliminary injunction in the ACLU's case, ordering the government to reunite all children under the age of five with their parents by July 10, and all children over the age of five by July 26.²¹² The judge also enjoined ICE from deporting any more parents or children prior to their reunification.²¹³ The deadline was not met. As of August 21, more than 500 children remained separated from their parents.²¹⁴ 366 of these children's parents have already been deported.²¹⁵ Various government agencies, along with the ACLU and other non-profits are working on locating the deported parents to get their children back to them. The ACLU, however, has stated that the process remains uncertain given that many parents are unreachable and presumably in hiding, having been returned to a country they originally fled.²¹⁶

B. Legal Arguments Against Separating Detained Immigrant Parents from Children

There are numerous legal arguments against using separation from one's minor children as a deterrent and punishment for crossing the border to seek asylum. The foremost one, which this article focuses on, is that such a practice, particularly when used to deter illegal immigration, is a substantive and procedural violation of the Due Process Clause of the Fifth Amendment. The practice also violates federal asylum law and the Administrative Procedure Act.

1. Violation of the Fifth Amendment's Due Process Clause

The Due Process Clause of the Fifth Amendment, providing that, "[n]o person . . . shall be deprived of life, liberty, or property, without due process of law," applies to all persons on United States soil, regardless of citizenship or legal status.²¹⁷ As the Supreme Court has stated, "[w]hatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."²¹⁸ Thus, the Due Process clause of the Fifth Amendment applies to immigrant parents detained by Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP), both agencies of the federal government.

Under this constitutional protection, detained immigrants, like all persons within the United States, have a liberty interest in remaining united with their natural

212. *L v. ICE*, 310 F. Supp. 3d 1133, 1149-50 (S.D. Cal. 2018) (order granting plaintiffs' motion for classwide preliminary injunction).

213. *Id.*

214. Amrit Cheng, *More Than 500 Children Are Still Separated. Here's What Comes Next*, ACLU BLOG (Aug. 21, 2018), <https://www.aclu.org/blog/immigrants-rights/immigrants-rights-and-detention/more-500-children-are-still-separated-heres> [<https://perma.cc/G7NK-VXP9>].

215. *Id.*

216. *See id.*

217. *Plyler v. Doe*, 457 U.S. 202, 210 (1982).

218. *Id.*

children. The Fifth Amendment's Due Process Clause, like its Fourteenth Amendment counterpart, "guarantees more than fair process."²¹⁹ The provision includes a substantive component that grants heightened protection against government interference with "certain fundamental rights and liberty interests."²²⁰ Such liberty interests include the right to conceive and raise children.²²¹ The liberty interest of parents in the "care, custody, and control of their children" is arguably the oldest of the fundamental liberty interests recognized by the Supreme Court.²²² Because staying united with one's natural child has long been recognized as a fundamental right protected by the Due Process clause, "it is a right that is extended to everyone, including both legal and illegal immigrants, provided they are physically present in the country."²²³

The government's invasion of a fundamental right, such as the right to custody of one's child, receives heightened judicial scrutiny.²²⁴ Under this standard of review, the practice of separating children from their detained parents is unconstitutional. As the Supreme Court stated in *Washington v. Glucksberg*, the Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests."²²⁵ In *Lassiter v. Department of Social Services*, the Court stated that its "decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to 'the companionship, care, custody and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'"²²⁶ Moreover, the sole justification that the Court has found suitable for depriving parents of their fundamental right of custody is protecting the child's welfare.²²⁷ Immigrant children, however, are being separated from their parents without any purported concern for the child's welfare, and indeed at the cost of the child's welfare.²²⁸ This practice is thus an unconstitutional deprivation of an essential right.

Lastly, should the government assert that its justification is national security, with the goal of deterring illegal immigration through the fear of losing one's child, such a tenuous link would fail the tailoring required when invading a fundamental right.²²⁹ A compelling justification can still be constitutionally indefensible where

219. *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997).

220. *Id.* at 720.

221. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

222. *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

223. S. Adam Ferguson, *Not Without My Daughter: Deportation and the Termination of Parental Rights*, 22 GEO. IMMIGR. L. J. 85, 92 (2007).

224. *Glucksberg*, 521 U.S. at 720.

225. *Id.*

226. *Lassiter v. Dep't of Soc. Servs. of Durham Cty.*, 452 U.S. 18, 27 (1981).

227. See *Stanley*, 405 U.S. at 652; see also Ferguson, *supra* note 223, at 94. See generally Petitioner-Plaintiff's Memorandum in Support of Motion for Preliminary Injunction with Corrected Exhibits at 8, Ms. L v. U.S. ICE, 18-cv-00428-DMS-MDD (S.D. Cal. Mar. 3, 2018), 2018 WL 3155679.

228. Petitioner-Plaintiff's Memorandum in Support of Motion for Preliminary Injunction and Corrected Exhibits at 10, Ms. L, 2018 WL 3155679 ("The government has provided no reason at all for separating Ms. L. and her child Its complete failure to explain such a consequential decision is quintessential arbitrary government action.").

229. See *Stanley*, 405 U.S. at 652.

the means are not narrowly tailored to further the ends.²³⁰ The “Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition.”²³¹ Rupturing this institution, in the hopes that it will discourage families fleeing unspeakable violence from making a treacherous journey, is an unconstitutional violation of the substantive rights endowed by the Due Process Clause of the Fifth Amendment.

Taking immigrant children away from their detained parents to deter illegal immigration is also a violation of procedural due process; it is done without a hearing or any procedural safeguards. “Procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth Amendment.”²³² Accordingly, when the State intervenes to terminate a relationship between a parent and their child, this action must be done through procedural safeguards that fulfill the requirements of the Due Process Clause,²³³ thus protecting the parent from being erroneously denied his or her fundamental right to raise their child.²³⁴ Many parents detained in the immigration system receive no process before they are separated from their children.

2. Violation of Asylum Law

Legal practitioners also cite this practice as a violation of U.S. asylum law, arguing that it impedes asylum-seekers’ access to the asylum process in several ways: separation scatters evidence, divides asylum cases, and obstructs a family’s ability to present asylum claims.

This practice can critically affect an asylum-seeker’s ability to gather evidence necessary to their claims. “When asylum-seeking families are divided between different detention centers, certain family members may have difficulty obtaining evidence that may be crucial to their cases. As a result, adjudicators may only hear fragments of their stories and rule on incomplete facts.”²³⁵ In the December 2017 complaint filed by the Women’s Refugee Commission and seven other major immigrant rights’ organizations, the parties explained that

[T]he practice of dividing family units at the border leads to the unlawful result of depriving asylum seekers of access to the asylum process—as a result of the deterrent effect of family separation and due to the unavailability of critical legal evidence and witnesses—and stripping them of their right to seek asylum under U.S. law.²³⁶

In addition, splitting up parents and children divides asylum cases, often forcing

230. *See id.*

231. *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977).

232. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

233. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

234. *Ferguson*, *supra* note 223, at 95–96.

235. LEIGH BARRICK, DIVIDED BY DETENTION: ASYLUM-SEEKING FAMILIES’ EXPERIENCES OF SEPARATION, AM. IMMIGRATION COUNCIL (Aug. 31, 2016), <https://www.americanimmigrationcouncil.org/research/divided-by-detention-asylum-seeking-families-experience-of-separation> [<https://perma.cc/WE43-8JK4>].

236. *AL OTRO LADO ET AL.*, *supra* note 189, at 5.

family members to pursue separate asylum claims when legally their claim should be joined as one. “[W]hen families are detained in different federal facilities, there is no way to regularly monitor this or inform the detainee where another family member is located, making it nearly impossible to reunite or pursue a joint asylum claim without counsel.”²³⁷ Accordingly, those families who escaped their country together, fleeing the same danger, may proceed to have their cases heard “by different judges, on distinct timeframes, and even in separate federal circuits governed by disparate case law. This also creates administrative inefficiencies for the immigration courts and worsens the courts’ tremendous backlog.”²³⁸

Legal advocates have also maintained that these separations detract from the parents’ abilities to seek asylum because the trauma and panic over reuniting with their children eclipses the parents’ ability to focus on their cases—70% of which are already proceeding without legal representation and thus require vast attention from the *pro se* asylum-seekers.²³⁹ But even for represented clients, the American Immigration Council has stated that, “[a]ttorneys working in the family detention context report the difficulty that their clients have in focusing on their own cases when they are preoccupied with investigating the whereabouts and well-being of their loved ones.”²⁴⁰ Indeed, this psychological effect was evident when interviewing the aforementioned mother at the Laredo Detention Center; her despair over her son’s whereabouts meant she struggled to listen to the attorney’s questions as she was single-mindedly intent on reuniting with her child, even if that meant returning to the dangers she had escaped.²⁴¹ Both our domestic and international legal obligations under asylum law are thus thwarted by this practice.

3. *Violation of the Administrative Procedure Act*

The Department of Homeland Security’s detention of immigrant parents from their children, when carried out with no procedural safeguards and for objectives other than the child’s welfare, is also a violation of the Administrative Procedure Act (APA) as it is arbitrary and capricious agency action. Under the APA, a court reviewing agency action must hold such action unlawful when it is found to be “arbitrary [and] capricious.”²⁴² An action fails this standard when the agency gives no reason for their decision.²⁴³ In numerous documented instances, including that of the named plaintiff in the ACLU’s suit, no explanation was given for the children being taken away.²⁴⁴ As the ACLU stated in Ms. L’s case, “the government has provided no reason at all for separating Ms. L. and her child. Its complete failure to

237. BARRICK, *supra* note 235, at 18.

238. *Id.* at 19.

239. *See id.* at 17.

240. *Id.* at 18.

241. In addition, a guard at the detention center had told this woman to self-deport if she wanted to see her son again, which the attorneys at the Laredo Project explained was erroneous advice—however, if that was what it took to see her ten-month-old again, she was clearly willing to do so.

242. 5 U.S.C. § 706(2)(A) (2012).

243. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016).

244. Petitioner-Plaintiff’s Memorandum in Support of Motion for Preliminary Injunction with (Corrected) Exhibits at 4, Ms. L. v. U.S. ICE, No. 18-cv-00428-DMS-MDD (S.D. Cal. Mar. 3, 2018), 2018 WL 3155679.

explain such a consequential decision is quintessential arbitrary government action.”²⁴⁵ For the aforementioned reasons, much of the implementation of DHS’s unofficial practice can also be challenged under the APA.

C. Recommendations

The more humane, lawful, and efficient approach would be a return and expansion of community-based alternatives. On June 20, 2017, the Trump administration closed the Family Case Management Program that had housed hundreds of asylum-seeking families with particularly vulnerable situations: pregnant women, mothers who were nursing, and families with very young children.²⁴⁶ These were “full-service” programs, composed of supervision, monitoring, and case management resources.²⁴⁷ The facilities looked less like prisons and more like counseling centers. They came with social workers who connected the asylum-seekers with attorneys, linked them with healthcare and housing, guided them through the nebulous court system, and helped children access schooling.²⁴⁸ Contrary to fears that such a program would result in a lack of individual compliance with the legal immigration system, U.S. government data reports that 95% of those participating in these programs appeared for their scheduled court hearings.²⁴⁹ These alternative programs shielded families and children from the trauma of detention, in addition to sparing asylum-seekers of all ages from the unspeakable pain of being torn from one’s child, or from one’s parent.

Non-profit organizations have also advocated for a legal system that protects immigrant children without “unduly delaying decision making” and with proper procedural protections.²⁵⁰ Such recommendations have included incorporating a “best interests of the child” standard into all levels of the system’s contact with the child, providing additional resources to immigration courts to decrease the often inhumane backlog, instituting court-appointed attorneys, and an increase in “asylum officers, and additional post-release caseworker services, to protect children, assist families, and ensure attendance at proceedings.”²⁵¹

Those who make it to U.S. borders seeking refuge under domestic and international law should neither be punished nor re-traumatized, nor deprived of their fundamental human right to custody of their children, nor of their right to seek asylum under international and domestic law. The administration’s recent practice was both unlawful and unconscionable. Its ramifications continue to affect both

245. *Id.* at 10.

246. Aria Bendix, *ICE Shuts Down Program for Asylum Seekers*, ATLANTIC (Jun. 9, 2017), <https://www.theatlantic.com/news/archive/2017/06/ice-shuts-down-program-for-asylum-seekers/529887/> [<https://perma.cc/CP6H-J7LG>].

247. AM. IMMIGRATION COUNCIL, A GUIDE TO CHILDREN ARRIVING AT THE BORDER: LAWS, POLICIES AND RESPONSES 10 (June 2015), https://www.americanimmigrationcouncil.org/sites/default/files/research/a_guide_to_children_arriving_at_the_border_and_the_laws_and_policies_governing_our_response.pdf [<https://perma.cc/QK9A-Z3DS>].

248. *Id.*

249. *Id.*

250. *Id.* at 14.

251. *Id.* at 13-14.

those children who are once again with their parents yet still traumatized, and those who remain separated from their parents with no sure end in sight.²⁵²

VI. CONCLUDING NOTE FROM PROFESSOR ANNA WELCH²⁵³

To date, over a dozen Maine Law students enrolled in Maine Law's Refugee and Human Rights Clinic have volunteered with the Laredo Project dedicating thousands of hours to help ensure that the due process rights of immigrants detained at the Laredo Detention Center are upheld. This work is part of a larger effort among immigration lawyers who have mobilized across the country to help address the acute legal needs of immigrants caught up in our ever-growing immigration detention system.²⁵⁴ Despite this mobilization, the supply of licensed lawyers around the country simply cannot meet the need for legal representation among immigrants. Law school students have helped bridge this gap by volunteering through their law school clinical programs seeking to ensure that immigrants can access the relief to which they may be eligible.

The opportunity for law students to volunteer at the border has proven invaluable both to the immigrants they serve and to the students themselves. For the immigrants, those with access to counsel are much more likely to win their cases in immigration court than those who are forced to go it alone.²⁵⁵ For the law students, the educational benefit cannot be overstated. Students take what they have learned in the classroom and see how U.S. immigration laws and policies are playing out on the ground. Students also witness firsthand the critical role lawyers play in impacting real lives. The opportunity is also life changing: many Maine Law students have continued to volunteer with the Laredo Project for an additional week or even for a full semester, and return from their work at the southern border inspired to continue to advocate on behalf of vulnerable populations.

252. Abril Valdes & Imelda Mejia, *'My Son is Traumatized': One Separated Family's Reunion*, ACLU BLOG (Aug. 24, 2018, 5:30 PM), <https://www.aclu.org/blog/immigrants-rights/immigrants-rights-and-detention/my-son-traumatized-one-separated-family>s [https://perma.cc/UM3H-QUFL].

253. Sam L. Cohen Refugee and Human Rights Clinical Professor, University of Maine School of Law.

254. See, e.g., Tania Karas, *A Growing Lawyer "Army" Is Banding Together to Protect Immigrants*, NATION (Nov. 23, 2017), <https://www.thenation.com/article/a-growing-lawyer-army-is-banding-together-to-protect-immigrants/> [https://perma.cc/A8FY-CTV4].

255. See *supra* Section IV.B.

