Detaining Families: A Study of Asylum Adjudication in Family Detention

Ingrid Eagly,* Steven Shafer,** & Jana Whalley***

The United States currently detains more families seeking asylum than any nation in the world, but little is known about how these families fare in the immigration court process. In this Article, we analyze government data from all immigration court cases initiated between 2001 and 2016 to provide the first empirical analysis of asylum adjudication in family detention. We find that families have been detained in remote locations, have faced language barriers in accessing the courts, and, despite valiant pro bono efforts to assist them, have routinely gone to court without legal representation. Only half of the family members who remained detained found counsel, fewer than 2% spoke English, and 93% had their hearings in detention adjudicated remotely over video conference, rather than in a traditional face-to-face courtroom setting.

DOI: https://doi.org/10.15779/Z38WH2DF26

Copyright © 2018 California Law Review, Inc. California Law Review, Inc. (CLR) is a California nonprofit corporation. CLR and the authors are solely responsible for the content of their publications.

* Professor of Law, UCLA School of Law.
** Research Associate, Empirical Research Group, UCLA School of Law; Staff Attorney, Immigration Center for Women and Children.
*** University of California Presidential Fellow, National Immigration Law Center. The authors thank Susan Long, Co-Director of Syracuse University’s Transactional Records Access Clearinghouse (TRAC), and the TRAC Fellows Program for their support and guidance in undertaking this research. This Article benefitted at various stages from valuable conversations with Sabrineh Ardalan, Scott Cummings, Carol Anne Donohoe, Alice Eagly, Alice Farmer, Denise Gilman, David Hausman, Barbara Hines, Tory Johnson, Jennifer Lee, Stephen Manning, Hiroshi Motomura, Jaya Ramji-Nogales, Sonya Rao, Néstor Rodriguez, Emily Ryo, and Philip Schrag. Helpful feedback was also provided by participants in the University of Southern California Gould School of Law’s Workshop on Immigration Detention, the University of Wisconsin Law School’s Human Rights Program, the UCLA School of Law’s Faculty Workshop on Criminal Justice, and the Law and Society Association’s Annual Conference. In addition, we thank Stephanie Anayah, Jodi Kruger, Manman Lu, Sasha Novis, and Phillip Shaverdian for their superb research assistance, and the members of the California Law Review for their editorial assistance. Funding for this study was generously provided by a Faculty Research Grant from the University of California.
In addition, the evidence we uncover documents the important, and underappreciated, role that immigration courts have played in limiting the overdetention of migrant families by immigration authorities at the border. During the period studied, immigration judges reversed half of the negative credible fear decisions of asylum officers and systematically lowered the bond amount set by detention officers. We also find high compliance rates among family members who were released from detention: family members seeking asylum attended their immigration court hearings in 96% of cases since 2001. Finally, we document significant regional variation in case outcomes among family members who were released from detention, including whether family members obtained attorneys and won their asylum cases. These and other findings are meaningful to current policy debates regarding the role of immigration courts in maintaining due process in asylum proceedings and the appropriate use of detention to manage the migration of families fleeing violence in their home countries.
INTRODUCTION

The United States currently detains more migrant families than any other nation in the world. Since 2001, parents and their children have been held in five different detention facilities in New Mexico, Texas, and Pennsylvania as they seek asylum in the United States. Yet, despite the sustained presence of family detention, little is known about how detained families fare in the immigration court process and what barriers they face in pursuing their asylum claims.

1. In this Article, we use the term “migrant” to refer to family members in our study who are detained at the border while seeking entry into the United States. See generally Nicholas P. De Genova, Migrant “Illegality” and Deportability in Everyday Life, 31 ANN. REV. ANTHROPOLOGY 419, 420–21 (2002) (embracing the term “migrant” as a broader and less problematic term than “immigrant,” which assumes that individuals are permanent settlers). As we explain, the migrant families we study are generally seeking asylum, and thus under the immigration law may become “asylees,” rather than “immigrants” by legal status. See generally DAVID A. MARTIN ET AL., FORCED MIGRATION: LAW AND POLICY 9–10 (2d ed. 2013) (characterizing refugees and asylum seekers as “types of forced migrants”); The IMBR Initiative, International Migrants Bill of Rights, with Commentary, 28 GEO. IMMIGR. L.J. 23, 33–35 (2013) (defining the term “migrant” as a “person who is outside of a State of which the migrant is a citizen or national,” and including “forced migrants,” such as refugees and asylum seekers, in the definition of “migrant”).


C. Case Outcomes ................................................................. 865
D. Respondent Characteristics ............................................... 867
E. Counsel ................................................................................. 867
This Article presents the findings of the first national study of the practice of detaining families as they pursue relief in United States immigration courts. The records we analyze were obtained from the Executive Office for Immigration Review (EOIR), the division of the Department of Justice that conducts immigration court proceedings, with public records requests pursuant to the Freedom of Information Act (FOIA). We focus on fifteen years of federal immigration court records—from 2001, when the United States opened the first detention facility to house exclusively families, to 2016, the final year of the Obama Administration. Our goal is to understand how migrant families detained at one of the United States’ five family detention centers proceeded through the court process. In developing our analysis, we also draw on government documentation on family detention policies and practices, site visits to two of the family detention facilities, and consultations with immigration lawyers with experience representing families held in detention.

Now is a particularly crucial time to engage in a data-driven analysis of the impact of family detention on immigration court adjudication. The practice of detaining families has been sharply criticized by academics, practitioners, and others. As we explain in the Appendix, these data were obtained from the EOIR using the FOIA by the Transactional Records Access Clearinghouse (TRAC), a data-gathering and research nonprofit organization at Syracuse University. We gained access to these data through our appointments as TRAC Fellows. List of TRAC Fellows, TRANSACTIONAL REC. ACCESS CLEARINGHOUSE, http://trac.syr.edu/fellows/fellows.html [https://perma.cc/CK65-JL8K].

As we discuss in Part I of this Article, families are currently detained in three facilities located in Berks, Pennsylvania and Karnes City and Dilley, Texas. Two additional facilities that detained families during our study period were located in Artesia, New Mexico and Taylor, Texas. See infra Figure 1.

We obtained many of these records through FOIA requests to the EOIR and the United States Department of Immigration and Customs Enforcement (ICE). We have collected these public records in an online library guide. See Detaining Families: Asylum Adjudication in Family Detention—Online Appendix, UCLA SCH. OF LAW, HUGH & HAZEL DARLING LAW LIBRARY, http://libguides.law.ucla.edu/detainingfamilies [https://perma.cc/RM9V-7LLR].

See, e.g., Danielle Hawkes, Note, Locking Up Children: Lessons from the T. Don Hutto Family Detention Center, 11 J.L. & FAM. STUD. 171, 181 (2008) (calling for congressional intervention to end the abuses of family detention); Bill Ong Hing, Contemplating a Rebellious Approach to Representing Unaccompanied Immigrant Children in a Deportation Defense Clinic, 23 CLINICAL L. REV. 167, 193–97 (2016) (describing the trauma experienced by families held in detention); Dora Schriro, Weeping in the Playtime of Others: The Obama Administration’s Failed Reform of ICE Family Detention Practices, 5 J. MIGRATION & HUM. SEC. 452, 468–71 (2017) (criticizing ICE’s expansion of privately owned, unlicensed family residential centers, where detainees face harsh confinement conditions and lack of access to counsel); Rebecca Sharpless, Cosmopolitan Democracy and the Detention of Immigrant Families, 47 N.M. L. REV. 19, 46 (2017) (revealing that the danger of family detention is that over time “the violence becomes normalized, transforming into commonsense” where inevitably it becomes logical that “children and their mothers should be jailed for having tried to enter the country unlawfully”).

federal lawmakers,\textsuperscript{10} bar associations,\textsuperscript{11} immigrant rights advocates,\textsuperscript{12} and the press.\textsuperscript{13} In 2016, an advisory committee of independent experts appointed by the Department of Homeland Security (DHS) to evaluate family detention found that “detention is generally neither appropriate nor necessary for families.”\textsuperscript{14} The advisory committee concluded that “DHS should discontinue the general use of family detention.”\textsuperscript{15} The 2016 Democratic presidential candidate Hillary Clinton campaigned on a promise to end family detention.\textsuperscript{16} Despite this growing


\textsuperscript{15} Id. Instead, the Advisory Committee recommended that family detention be reserved “for rare cases when necessary following an individualized assessment of the need to detain because of danger or flight risk that cannot be mitigated by conditions of release.” Id.

consensus that family detention is a misguided policy, the practice appears to be here to stay. President Donald Trump has made clear that he will expand and hasten deportation efforts, including by ensuring that “all available resources” are allocated to grow “detention capabilities and capacities” at the border with Mexico.

Our study contributes three major findings to the body of knowledge about family detention and asylum adjudication. First, we document that detained families face significant barriers to seeking asylum in the court system. Although other empirical studies have explored asylum adjudication, few have done so in the detention context, and ours is the first to focus on family detention. Over


18. See Jennifer M. Chacón, Immigration Detention: No Turning Back?, 113 S. ATLANTIC Q. 621, 627–28 (2014) (“In the end, notwithstanding the apparent trend in favor of immigration reform, fear of uncontrolled migrant bodies remains sufficiently strong that all viable reform proposals continue to assume the need for punitive detention for migrants as part of a criminalized immigration enforcement model.”); Kristina M. Campbell, A Dry Hate: White Supremacy and Anti-Immigrant Rhetoric in the Humanitarian Crisis on the U.S.-Mexico Border, 117 W. VA. L. REV. 1081, 1106–17 (2015) (warning that the government has no plans to curb the practice of family detention, which is fueled by white supremacists and anti-immigrant groups).

19. See Exec. Order No. 13,767, 82 Fed. Reg. 8793, 8794 (Jan. 25, 2017), https://www.gpo.gov/fdsys/pkg/FR-2017-01-30/pdf/2017-02095.pdf [hereinafter Executive Order 13767] (“The Secretary shall take all appropriate action and allocate all legally available resources to immediately construct, operate, control, or establish contracts to construct, operate, or control facilities to detain aliens at or near the land border with Mexico.”); id. at 8793 (declaring the Executive’s new policy to “expedite determinations of apprehended individuals’ claims of eligibility to remain in the United States”).


21. In their groundbreaking study of asylum adjudication, Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Philip G. Schrag focused on affirmative asylum cases on the theory that detained cases face greater obstacles and therefore are hard to compare with affirmative cases. Jaya Ramji-Nogales et al., Refugee Roulette: Disparities in Asylum Adjudication, 60 STAN. L. REV. 295, 395 (2007); see also Immigration Judges, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (July 31, 2006), http://trac.syr.edu/immigration/reports/160 [https://perma.cc/RW26-GSL7] (finding disparities in nondetained asylum cases of Chinese nationals based on the judge assigned to decide the case).

22. A 2008 study by the Government Accountability Office (GAO) found that significant variation in judicial decision-making in asylum cases controlled for whether the applicant was ever detained. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-940, U.S. ASYLUM SYSTEM: SIGNIFICANT VARIATION EXISTED IN ASYLUM OUTCOMES ACROSS IMMIGRATION COURTS AND
the fifteen years of our study, we find that families have been detained in remote locations, have faced language barriers in accessing the courts, and, despite valiant pro bono efforts to assist them, have routinely gone to court without legal representation. These findings of extreme vulnerability may not be surprising to those advocates familiar with the practice of family detention, but our study is the first to document these patterns using a complete set of all EOIR court cases initiated in family detention between 2001 and 2016.

Second, our review of the government’s own data supplies ample evidence that families have been subjected to overdetention by immigration officials. By “overdetention” we mean that families that present no flight risk or danger are unnecessarily detained.23 We document that some families have remained detained throughout the adjudication of their court case—and that this process can last for three months or longer—in addition to the often lengthy time spent in detention prior to the EOIR court process beginning or while pursuing an appeal.24 Further, we find striking patterns of immigration judges reversing the decisions of DHS officers that unnecessarily prolong the detention of families.


23 We credit Anil Kalhan with first using the term “overdetention” to describe the immigration system’s reliance on detention absent flight risk or danger. See Anil Kalhan, Rethinking Immigration Detention, 110 COLUM. L. REV. SIDEBAR 42, 48–49 (2010) (identifying a “pattern of excessiveness” in the United States detention system). Earlier work on the criminal justice system has used the term to refer to detention of individuals without penological justification, such as beyond the term of the criminal sentence imposed by the judge. See, e.g., Patricia E. Simone, A Presumptive Constitutional Time Limit for Administrative Overdetention of Inmates Entitled to Release, 81 NOTRE DAME L. REV. 719, 722 (2006). Other immigration scholars have subsequently used the term to describe the excessive reliance on immigration detention in the United States. See, e.g., Alina Das, Immigration Detention: Information Gaps and Institutional Barriers to Reform, 80 U. CHI. L. REV. 137, 146 (2013) (warning that the current institutional structure of immigration detention leads to “overdetention”); Denise Gilman, To Loose the Bonds: The Deceptive Promise of Freedom from Pretrial Immigration Detention, 92 IND. L.J. 157, 217 (2016) (arguing that “overdetention” occurs in the immigration system due to the presumption in favor of detention and monetary bond practices); Robert Koulish, Using Risk to Assess the Legal Violence of Mandatory Detention, 5 LAWS 7 (2016) (revealing that ICE’s “Risk Classification Assessment” tool is a “risk based system that over-detsains”); Mark Noferi & Robert Koulish, The Immigration Detention Risk Assessment, 29 GEO. IMMIGR. L.J. 45, 50 (2014) (arguing that incorporation of ICE’s new automated “Risk Classification Assessment” tool into immigration custody determinations “will not significantly reduce over-detention”); Alexandra Olsen, Over-Detention: Asylum-Seekers, International Law, and Path Dependency, 38 BROOK. J. INT’L L. 451, 452–53 (2012) (arguing that the decision to “categorically detain asylum-seekers” may result in “over-detention,” or detention that is “unnecessary or arbitrary”); Stumpf, supra note 17, at 96 (warning that “over-detention” can increase “the risk of erroneous deportation”).

24 As we explain, some families have been held for additional periods prior to the court process beginning or while habeas or other appeals are pending. See infra notes 260–270 and accompanying text.
Specifically, we uncover high reversal patterns involving initial decisions to detain, decisions to set high bonds, and rejections of credible and reasonable fear claims. In this respect, our study reveals the crucial and often underappreciated role of immigration courts in preserving the due process rights of asylum seekers.

Third, we track what happens to the court cases of the families that we study. In doing so, we counter some of the arguments cited in support of family detention—namely, that these families do not appear at future court hearings and lack viable claims to remain in the United States. We find that family members seeking asylum who were released from detention attended their hearings in 96% of cases that began in family detention since 2001. We also find that half (49%) of those who were released and sought legal relief from removal with the help of an attorney were allowed to stay. By tracking the family members who were released from detention, we document that the outcomes of their cases varied widely depending on the jurisdiction in which their cases were adjudicated. As other studies of adjudication have found, these variations are associated in part with disparities in judicial grant rates for asylum claims. But we find that they also reflect broader jurisdictional inequities, such as the availability of local attorneys and the willingness of local prosecutors to grant a case closure based on prosecutorial discretion.

Although our focus is on court adjudication, it is important to acknowledge the adverse and punitive conditions that children and their families have endured inside family detention. The family facilities in this study are all locked and surrounded by barbed wire and guards. Several of these facilities are managed

---

25. See infra Figures 9, 10, 11 and Table 2.
26. See infra notes 279–283.
27. See infra Figure 15.
28. See infra Figure 14. For those families who remained detained, 37% of those who sought legal relief with the assistance of counsel won their cases. Id.
29. See, e.g., Jaya Ramji-Nogales et al., supra note 21, at 296 (finding that “the chance of winning asylum was strongly affected” by factors including “the random assignment of a case to a particular immigration judge”).
by private prison companies, such as the GEO Group and CoreCivic. Family detainees wear institutional clothing, work for as little as $1.00 a day, and must abide by strict rules, the violation of which can result in even more severe carceral conditions, such as solitary confinement. The family detention facilities in our study have also been the sites of severe medical neglect and psychological trauma, and have been found to violate basic standards for


36. See Ian Urbina & Catherine Rentz, Immigrants Held in Solitary Cells, Often for Weeks, N.Y. TIMES (Mar. 23, 2013), http://www.nytimes.com/2013/03/24/us/immigrants-held-in-solitary-cells-often-for-weeks.html [https://perma.cc/ZFH-JZBM] (“On any given day, about 300 immigrants are held in solitary confinement at the 50 largest detention facilities. . . . Nearly half are isolated for 15 days or more. . . . “).


38. See, e.g., Kalina Brabeck & Qingwen Xu, The Impact of Detention and Deportation on Latino Immigrant Children and Families: A Quantitative Exploration, 32 HISP. J. BEHAV. SCI. 341, 353–55 (2010) (finding that parents’ legal vulnerability due to detention and deportation is associated with poor outcomes for their children’s emotional well-being and academic performance); Kalina M. Brabeck et al., The Psychosocial Impact of Detention and Deportation on U.S. Migrant Children and
detaining children.\textsuperscript{39} Under a 1997 legal settlement known as the \textit{Flores} settlement agreement, children must be placed in the “least restrictive setting,” can only be detained when necessary, and, if so, can only be detained in licensed, non-secure facilities for a period not to exceed five days.\textsuperscript{40} Two of the detention centers included in our study—the T. Don Hutto Detention Center (“Hutto”) in Taylor, Texas\textsuperscript{41} and the Artesia Family Residential Center (“Artesia”) in Artesia, New Mexico\textsuperscript{42}—were shut down after subjecting families to harsh conditions, including unreasonably cold rooms, substandard food, and inadequate medical care.\textsuperscript{43} In 2015, a federal judge found that a third detention center in our study (located in Dilley, Texas), exposed mothers and their children to “widespread and deplorable conditions” and “wholly failed” to provide “safe and sanitary” conditions.\textsuperscript{44} The trauma suffered by asylum seekers is compounded when they

---


\textsuperscript{40} Schirro, \textit{supra} note 8, at 454 & n.7–9. See also Stipulated Settlement Agreement \textit{\textit{v.}} 11, 14, 19, Flores \textit{v.} Meese, No. 85-4544-RKJ(Px) (C.D. Cal. Jan. 17, 1997), https://www.aclu.org/files/pdfs/immigrants/flores_v_meese_agreement.pdf [hereinafter \textit{Flores} Settlement Agreement] (stipulating requirements for the detention of minors, including that children be placed in the “least restrictive setting” and that facilities be licensed, and articulating a general policy favoring the release of minors). In an October 8, 2017 letter to leaders in the House and Senate, President Donald Trump proposed passing legislation that would “supersede” the \textit{Flores} settlement agreement. Letter from Donald J. Trump, President of the U.S., to House and Senate Leaders, § 1.B.iii (Oct. 8, 2017), https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-letter-house-senate-leaders-immigration-principles-policies [https://perma.cc/Q3EB-LU3S].


\textsuperscript{43} Hutto was closed in 2009 and Artesia in 2014. See \textit{infra} Part L.A.; see also \textit{ABA FAMILY DETENTION REPORT, supra} note 11, at 14–15, 20–21.

\textsuperscript{44} Flores \textit{v.} Johnson, 212 F. Supp. 3d 864, 881 (C.D. Cal. 2015) (finding DHS in violation of the \textit{Flores} Settlement Agreement for holding children in unlicensed and secure facilities). This decision was affirmed in the relevant part by the Ninth Circuit. See Flores \textit{v.} Lynch, 828 F.3d 898, 901 (9th Cir. 2016) (agreeing that the 1997 \textit{Flores} settlement applies to both accompanied and unaccompanied minors in detention). In 2017, United States District Judge Dolly Gee appointed a Juvenile Coordinator, finding
are locked away in isolated correctional facilities and denied access to adequate healthcare or supportive services. The fact that family detention has imposed such horrific conditions makes this study’s findings all the more important.

This Article proceeds in two parts. Part I introduces the methodology used to identify the court cases associated with detained migrant families and provides general background on the court process for asylum seekers. Next, Part II discusses our key empirical findings. We conclude by providing a set of policy recommendations that follow from our study’s empirical findings. In particular, we recommend eliminating reliance on summary removal processes for asylum seekers, funding court-appointed counsel for detained families in immigration court, training immigration judges on handling family detention cases, and maintaining the judicial independence of the immigration bench.

I. BACKGROUND AND STUDY METHODOLOGY

In this Section, we first provide important background information regarding where migrant families have been detained in the United States and situate family detention within the broader rise in detention that occurred during this period. Second, we explain our methodology for using immigration court data to track the outcomes of family detention cases and to compare family detention cases to those that do not involve families, what we call “non-family detention cases.” Finally, we provide a basic overview of the court process for detained asylum seekers.

A. The Rise of Family Detention

Our study covers fifteen years of family detention in the United States, from 2001 to 2016. We begin in 2001 because it is the year that the United States opened the first brick-and-mortar facility to detain exclusively families. It is important to acknowledge, however, that the practice of detaining families seeking entry into the United States had existed on an ad hoc basis at earlier points in history. For example, immigrant families arriving to the United States during the First and Second World Wars were held together with other migrants on Angel Island in the San Francisco Bay. In the 1980s, the Reagan Administration detained Central American families who were fleeing violence and held them in federal detention facilities with other adults, as well as in outdoor tents along the border. And, during the 1990s, federal immigration agents at times relied on guarded hotel rooms to detain migrant families.

Our investigation reveals that between 2001 and 2016 there were five distinct brick-and-mortar family detention facilities in operation in the United States. As seen in Figure 1, the first center in our study—the Berks Family Residential Center ("Berks") in Leesport, Pennsylvania—opened in March 2001. See infra note 51 and accompanying text.

46. See infra note 51 and accompanying text.
49. Fran Leeper Buss, Introduction, in FORGED UNDER THE SUN: THE LIFE OF MARIA ELENA LUCAS 6 (Fran Leeper Buss ed., 1993) (documenting that in Brownsville, Texas in 1988, “[t]housands of men, women, and children, many of them ill from their journeys, were forced to camp outdoors without food, water, or toilets”).
50. Michael Welch, Detained: Immigration Laws and the Expanding I.N.S. Jail Complex 109 (2002) (citing examples of immigration detainees held in hotel rooms during the 1990s); Lauren L. Martin, ‘Catch and Remove’: Detention, Deterrence, and Discipline in US Noncitizen Family Detention Practice, 17 GEOPOLITICS 312, 320 (2012) [hereinafter Martin, ‘Catch and Remove’] (referencing a reliance on ad hoc arrangements such as guarded hotel rooms to hold families).
2001 and still housed families at the end of our study period in 2016.52 The building is a converted nursing home with just under one hundred beds.54 At the time that Berks became a family detention facility in 2001, it was serving as an immigration detention facility housing unaccompanied children.55 During the time it has been a family detention facility, Berks has housed fathers as well as mothers, although it is believed that fathers were not present with most families held there during our study period.56


55. See Email from Bridget Cambria, Immigration Att’y, to Ingrid Eagly (Sept. 26, 2017, 9:51 AM) (on file with authors) (explaining that the Berks County Youth Center “held juvenile delinquents from the county and . . . those in federal custody, children removed from family homes in the county, [and] unaccompanied alien minors”); see also AMNESTY INT’L, UNITED STATES OF AMERICA: UNACCOMPANIED CHILDREN IN IMMIGRATION DETENTION 19, 57 n.278 (2003), https://static.prisonpolicy.org/scans/children_detention.pdf [https://perma.cc/LQ2Q-UBQC] (describing the Berks County Youth Center in Berks County, Pennsylvania as holding immigrant children prior to becoming the “first family detention center”).

56. DHS REPORT ON FAMILY DETENTION, supra note 14, at 12 (explaining that fathers and children have been assigned to Berks in the past, but during a site visit there were no fathers present); see also HUMAN RIGHTS FIRST, FAMILY DETENTION IN BERKS COUNTY, PENNSYLVANIA 9 (2015), https://www.humanrightsfirst.org/sites/default/files/HRF-Family-Det-Penn-rep-final.pdf [https://perma.cc/RZM7-ZR9F] (referring to a father detained at Berks during an August 2015 site visit). In 2017, after our study ended, there was an increase in the detention of fathers at Berks. See John Stanton, So Many Father-Led Families Are Crossing the US Border That Immigration Agents Don’t Have Room to Hold Them, BUZZFEED NEWS (Oct. 23, 2017), https://www.buzzfeed.com/johnstanton/so-many-father-led-families-are-crossing-the-us-border-that#utm_term=.e4AyLD9#t.4GeKEd [https://perma.cc/JS5F-K3AF] (quoting an ICE official explaining that Berks is the only facility that currently houses male-led families and that since March 2017 the number of fathers detained with their children at Berks has increased).
In May 2006, the United States opened a second family detention center in a converted state prison in Taylor, Texas. The T. Don Hutto Residential Center had a bed capacity of up to 512 individuals. Although Hutto housed mostly mothers and children, some fathers were also held there. In September 2009, after extended litigation over detention conditions, the Obama Administration

---

57. BERKS 2009 COMPLIANCE REVIEW, supra note 51, at 4. For additional background on the Hutto Detention Center, see LOCKING UP FAMILY VALUES, supra note 12; Hawkes, supra note 8; THE LEAST OF THESE (La Sonrisa Productions 2009).

58. See ABA FAMILY DETENTION REPORT, supra note 11, at 14 (reporting that Hutto held mothers, fathers, and their children); THE LEAST OF THESE, supra note 57 (depicting fathers as well as mothers held at Hutto with their children).

agreed to cease housing families at Hutto.\textsuperscript{60} Today, Hutto is still operated by the Corrections Corporation of America as an immigration jail, but it currently houses only single women without children.\textsuperscript{61}

In late June 2014, in response to what was characterized as a “surge” in migration from Central America, DHS opened a temporary detention camp at a federal law enforcement training center in Artesia, New Mexico.\textsuperscript{62} Prior to the opening of the Artesia Family Training Center, families were either detained in the Berks facility or released from custody and advised to report to their local field office at a later date.\textsuperscript{63} Artesia was the largest family detention facility to date, holding a high of 629 women and children in July 2014.\textsuperscript{64} This growth in family detention was met with public outcry and an unprecedented pro bono effort to represent the women and children held there.\textsuperscript{65}

The Artesia facility was closed in mid-December 2014.\textsuperscript{66} However, family detention did not decrease. Instead, in August 2014, ICE began housing mothers and children in Karnes City, Texas at the Karnes County Residential Center

---


\textsuperscript{61} Interview with Barbara Hines, Clinical Professor of Law, Univ. of Tex. Sch. of Law, in Austin, Tex. (Sept. 7, 2016).


\textsuperscript{63} See Email from ICE Enforcement and Removal Operations (ERO) Taskings to Field Office Directors and Deputy Field Office Directors for the PHI and SNA Field Offices, Admission Processing at Family Residential Centers (June 27, 2014, 1:55 PM) (response to FOIA No. 2016-ICFO-44610), http://libguides.law.ucla.edu/ld.php?content_id=38165196 [https://perma.cc/AJ6P-V7Q8] (“Due to the limited bed space [for families], ERO is currently releasing [Family Units] from custody and advising them to report to their local ERO field office within 15 days from the date of their release.”).

\textsuperscript{64} See ICE DAILY POPULATION FOIA, supra note 52.


\textsuperscript{66} According to a FOIA response received by the authors, the Artesia Family Residential Center was used as a family facility from June 26, 2014 to December 19, 2014. ICE DAILY POPULATION FOIA, supra note 52; see also Press Release, U.S. Immigration & Customs Enf’t, ICE’s New Family Detention Center in Dilley, Texas, to Open in December (Nov. 17, 2014), https://www.ice.gov/news/releases/ices-new-family-detention-center-dilley-texas-open-december [https://perma.cc/R3CW-AVYA] [hereinafter ICE Family Detention Press Release] (“ICE is transitioning out of the temporary family residential facility at the Federal Law Enforcement Training Campus (FLETC) in Artesia, New Mexico, and returning this facility full time to FLETC operations during the month of December.”).
The Karnes facility, which is privately run by the GEO Group, Inc., had previously served as an immigration detention facility for adult men. The initial bed capacity at this facility was 532, but it expanded to 1,158 beds in December 2015.

In December 2014, just over a year after Karnes became a family detention site, the federal government opened the largest-ever family detention facility in Dilley, Texas. The South Texas Family Residential Center (“Dilley”) is operated by the for-profit prison company CoreCivic. The Dilley facility had an initial capacity of 480 detainees but later expanded to hold up to 2,400 mothers and children.

67. Karnes County Residential Center: Facility Detail, GEO GRP., https://www.geogroup.com/FacilityDetail/FacilityID/58 (https://perma.cc/HU8C-ZULM) (“On July 11, 2014, the contract was modified to convert the facility from a Civil Detention Facility into a Family Residential Unit for females and their children.”).

68. One of the authors (Eagly) visited the Karnes facility on September 18, 2013 when it was holding only adult men and was known as the Karnes County Civil Detention Facility. See ICE DAILY POPULATION FOIA, supra note 52 (explaining that the Karnes County Civil Detention Facility “was operationally used as a family facility starting on August 1, 2014”); see also Press Release, U.S. Immigration & Customs Enf’t, South Texas ICE Detention Facility to House Adults with Children (July 30, 2014), https://www.ice.gov/news/releases/south-texas-ice-detention-facility-house-adults-children [https://perma.cc/2X7Y-6EDN] (stating that the Karnes facility would house adults with children beginning on August 1, 2014).

69. Billy Carr, New Specialized Transport Buses, GEO NEWS (Mar. 9, 2016), https://www.geogroup.com/News-Detail/NewsID/195 [https://perma.cc/BWY7-CWKV] (“The expansion of the Karnes County Residential Center (KCRC) was completed in early December 2015, and increased the capacity to 1,158 beds.”); GEO GRP., 2014 ANNUAL REPORT 2 (2014), http://investors.geogroup.com/Cache/1500077485.PDF?O=PDF&T=&Y=&D=&FID=1500077485&i id=4144107 [https://perma.cc/5BGF-QV22] (informing shareholders of the GEO Group that the Karnes facility would grow by 626 beds in the second half of 2015); see also Cristina Parker, Karnes County Commission Approves Expansion of GEO’s Family Detention Facility, TEX. PRISON BID’NESS (Dec. 16, 2014, 5:16 PM), http://www.texasprisonbidness.org/2014/12/karnes-county-commission-approves-expansion-geo-family-detention-facility[https://perma.cc/W54P-UDIL] (reporting that in December 2014, the Karnes County Commission voted to expand the size of the Karnes facility). According to documents obtained by the authors from ICE, the number of family members at Karnes reached a high of 761 detainees on December 23, 2015. ICE DAILY POPULATION FOIA, supra note 52.

70. ICE DAILY POPULATION FOIA, supra note 52 (explaining that Dilley “was operationally used as a family facility starting on 12/19/14”).


72. ICE Family Detention Press Release, supra note 66 (reporting that Dilley had a bed capacity of 480 in December 2014).

73. South Texas Family Residential Center, supra note 71 (reporting a bed capacity of 2,400). Data obtained through FOIA reports a high of 2,085 family members held at Dilley on July 8, 2015. ICE DAILY POPULATION FOIA, supra note 52.
As Figure 2 summarizes, over the fifteen years of our study, the number of detention beds reserved exclusively for families has surged. Family detention capacity shot up temporarily between 2006 and 2009, the years that Hutto was open. Beginning in 2014, family detention space again increased, most dramatically with the opening of Dilley and Karnes. In 2016, family detention centers in the United States had the capacity to hold over 3,500 children with their parents each day.

The rise in family detention has far outpaced the parallel growth in detention for individuals who are not part of family units, including asylum seekers. In 2001, the year family detention began at Berks, overall federal detention capacity was set at 20,000 beds. In 2016, the final year of our study, Congress required federal authorities to keep at least 34,000 detention beds available each day. This represents an increase in general detention capacity of

74. See, e.g., OLGA BYRNE ET AL., HUMAN RIGHTS FIRST, LIFELINE ON LOCKDOWN: INCREASED U.S. DETENTION OF ASYLUM SEEKERS 12 (2016), http://www.humanrightsfist.org/sites/default/files/Lifeline-on-Lockdown_0.pdf [https://perma.cc/NJ7N-DFAL] (showing that the proportion of defensive asylum seekers who are detained increased from 41% in 2010 to 57% in 2014).


76. Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242, 2498 (2015) (directing that ICE “shall maintain a level of not less than 34,000 detention beds”). According to ICE data obtained by the authors through a FOIA request, in fiscal year 2016 ICE detained an average of 34,376 individuals each day in its detention facilities in the United States. ICE DAILY POPULATION FOIA, supra note 52. The number of individuals subjected to detention is expected to continue to
70%. In contrast, as seen in Figure 2, family detention capacity increased during the same time period by an astronomical 3,400%.

This tremendous growth in detention capacity imposes significant fiscal costs on the United States. According to federal officials, the average daily cost of detention is approximately $126 per person. For family members in detention, the daily average cost is even higher: approximately $161 per person, or $644 for a family unit of four. In its fiscal year 2017 budget, the federal government dedicated $1.748 billion to run detention facilities.

At the end of our study period in 2016, there were three family detention facilities in operation in the United States: Berks, Dilley, and Karnes. All three were facing ongoing legal challenges that children are being held in violation of the 1997 *Flores* agreement. Pennsylvania’s Governor Tom Wolf and the Pennsylvania Department of Human Services were involved in an effort to revoke the state license to house children at the Berks facility. Similarly, in 2016, a judge in Austin, Texas ordered a temporary injunction against the issuance of child care licenses to Karnes and Dilley.


78. Id. The higher cost may be associated with the higher standards required for family detention facilities. For example, in keeping with court rulings, ICE has separate operating standards for its family residential facilities. *Family Residential Standards*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Jan. 3, 2018), https://www.ice.gov/detentionfamily-residential [https://perma.cc/39J-JAWB].

79. DHS 2017 BUDGET-IN-BRIEF, supra note 77.

80. See *Flores* Settlement Agreement, supra note 40, ¶ 11 (“The INS shall place each detained minor in the least restrictive setting appropriate to the minor’s age and special needs, provided that such setting is consistent with its interests to ensure the minor’s timely appearance before the INS and the immigration courts and to protect the minor’s well-being and that of others.”).


B. Identifying Family Detention Proceedings in EOIR Data

The previous Section detailed how the practice of detaining families grew dramatically between 2001 and 2016 and involved five different stand-alone facilities. In this Section, we turn to the EOIR court data to analyze the cases of detained family members. By relying on EOIR court data, we were able to determine whether an EOIR court hearing occurred while a family member was detained at Artesia, Berks, Dilley, Hutto, or Karnes. We identified 18,378 immigration court proceedings that began between 2001 and 2016 and included at least one court hearing while the family member was held in a family detention facility. Throughout this Article we refer to the 18,378 proceedings linked to family detention centers as “family detention proceedings.”

Importantlly, our count of 18,378 family detention proceedings does not reflect the total population of individuals who were held in family detention from 2001 to 2016. Because this study focuses on immigration courts, family members who were deported before reaching a court hearing are not part of our study. Similarly, family members who were released from detention before their EOIR court process began are not included in our study because they never had a hearing while they were detained.

To better understand what is unique about court adjudication of family detention cases, Part II of this Article compares a range of outcomes in family detention proceedings to outcomes in detention proceedings that do not involve families, what we call “non-family detention proceedings.” We define “non-family detention proceedings” as including all persons detained at some point in their EOIR case adjudication who were not associated with one of the five family

---

83. See infra Appendix, Part I.

84. An immigration court “proceeding” consists of at least one, and often several, court hearings in front of the immigration judge. Id.

85. If a family was involved in more than one proceeding during our fifteen-year study period (for example, a credible fear proceeding followed by a removal proceeding), we counted both proceedings as family detention proceedings if at least one hearing in each proceeding took place in family detention. Because some families do have more than one proceeding while in detention, these 18,378 court proceedings correspond to only 16,677 individual family members. Of these 16,677 respondents, approximately 40% remained in court proceedings at the end of our study period (n = 6,555), but very few were still detained (n = 98).

86. In other words, family members must have successfully asserted a claim of fear of persecution or torture in their home countries to end up in our study of immigration courts.

87. For example, U.S. Citizenship and Immigration Services (USCIS) reported that over a span of less than two years (from July 2014 to March 2016), it conducted 28,188 credible and reasonable fear interviews in family detention facilities. U.S. CITIZENSHIP AND IMMIGRATION SERVS., ASYLUM DIVISION, FAMILY FACILITIES CREDIBLE FEAR FY14–FY16, https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming National Engagements/PED_CF_RF_FamilyFacilitiesFY14_16Q2.pdf [https://perma.cc/P4UV-JKS2]. The monthly percentages of cases in which fear was found ranged from 43% to 93%. Id. Some of these individuals proceeded to a hearing in the detention facility; others were deported or released on an immigration bond before any EOIR hearing occurred. Using EOIR data, we can only associate an individual with family detention if a court hearing occurs within the facility.
detention centers. In total, we find there were 2,807,814 non-family detention proceedings during the fifteen-year study period.\textsuperscript{88}

Figure 3 presents the volume of family detention proceedings associated with each of the five family detention centers. Dilley, which is the largest family facility in the country, was predictably associated with the largest number of court proceedings ($n = 6,293$). Artesia, which was closed in 2009 for subpar conditions, had the smallest number of proceedings ($n = 1,316$).

Figure 3. Family Detention Proceedings, by Facility (2001–2016)\textsuperscript{89}

Figure 4 tracks the 18,378 family detention proceedings by fiscal year. Prior to the establishment of the first family detention facility in 2001, immigration authorities generally did not detain families. Instead, they issued families a “Notice to Appear” in immigration court at a future date.\textsuperscript{90} In some

\begin{itemize}
\item \textsuperscript{88} For additional details on how we created the non-family detention sample, see infra Appendix, Part II.
\item \textsuperscript{89} The total number of court proceedings displayed in Figure 3 is 18,383. This number exceeds the 18,378 proceedings in our sample because five family detention proceedings had hearings in two different family detention centers. Four proceedings had hearings in Berks and Hutto and one proceeding had hearings in Berks and Dilley.
\item \textsuperscript{90} Martin, 'Catch and Remove,' \textit{supra} note 50, at 319. A “Notice to Appear” is a written notice that commences removal proceedings in the immigration court. \textit{See} 8 C.F.R. §§ 1003.13, 1003.14 (2018).
\end{itemize}
cases, however, immigration authorities detained parents and children separately. 91

Family detention court proceedings first appear in our data in 2001. Between 2001 and 2005, immigration courts began approximately 117 family detention proceedings a year, all pertaining to families held at the Berks facility. 92 As Figure 4 shows, the number of family detention proceedings increased dramatically between 2006 and 2008, reaching a peak of more than 1,400 in 2008. This huge rise in family detention proceedings was due in large part to President George Bush’s new border policy to rely exclusively on detention throughout the deportation process. 93 It also followed the House Appropriations Committee’s 2005 decision to instruct DHS to house families together in detention if they were not otherwise suitable for release, rather than separating parents from their children in the detention process. 94

91. Martin, ‘Catch and Remove,’ supra note 50, at 319; Schriro, supra note 8, at 454; see also Bunkyte, ex rel. Bunikiene v. Chertoff, No. A-07-CA-164-SS, 2007 WL 1074070, at *1 (W.D. Tex. Apr. 9, 2007) (“Prior to 2001, families apprehended for entering the United States illegally were most often released rather than detained because of a limited amount of family bed space; families who were detained had to be housed separately, splitting up parents and children.”).


94. Schriro, supra note 8, at 455 (citing H.R. Rep. No. 109-79, at 38 (2005), https://www.congress.gov/109/crpt/hrpt79/CRPT-109hrpt79.pdf [https://perma.cc/VAG3-A3CE]) (“The Committee expects DHS to release families or use alternatives to detention such as the Intensive Supervision Appearance Program whenever possible. When detention of family units is necessary, the Committee directs DHS to use appropriate detention space to house them together.”).
As Figure 4 highlights, the number of family detention proceedings decreased following the 2009 closure of the Hutto facility for failure to comply with applicable legal standards. However, family detention proceedings surged again in 2014 following an increase in the number of Central American families seeking asylum at the United States border, as well as a growth in family detention capacity in the United States. After reaching an all-time high of 6,906 proceedings in 2015, the number of new family detention proceedings declined in 2016. This decline followed the closure of the Artesia facility, mounting

95. Figure 4 counts as “family detention proceedings,” those proceedings in which a family member had at least one hearing while in a family detention center. For purposes of fiscal year categorization of these proceedings, the earliest hearing date associated with the family detention location was used. In instances where no hearing-level data were available, we used the earliest date associated with the proceeding, for example input date (the date the proceeding was entered into the Case Access System for EOIR (CASE) system) or the Order to Show Cause (OSC) date.

96. See supra notes 43, 59–60.

97. U.S. CITIZENSHIP AND IMMIGRATION SERVS., supra note 87, at 1 (tracking a dramatic rise in the monthly number of credible fear interviews conducted in family detention facilities between 2014 and 2016); see also Bill Ong Hing, Ethics, Morality, and Disruption of U.S. Immigration Laws, 63 KAN. L. REV. 981, 1006–07 (2015) (explaining that the “surge” of Central American asylum seekers in 2014 “arose out of longstanding, complex problems in their home countries,” including increasing violence due to “the growing influence of youth gangs and drug cartels”).

98. See supra Figure 2.

99. Artesia Report, supra note 45 (describing the Artesia facility, which was closed on December 15, 2014, as a “deportation center” that was “designed by the Obama Administration to deport [women and children] rapidly”).
litigation challenges to detention practices, and a decrease in the number of border apprehensions.

C. Asylum Adjudication in Family Detention

EOIR categorizes immigration court proceedings based on the type of decision made by the judge. Our analysis reveals that there were four proceeding types in family detention during our study period, all of which are associated with persecution claims: credible fear review, reasonable fear review, removal, and withholding only. Some families in our study experienced more than one type of proceeding: most commonly, (1) a credible fear review proceeding followed by a removal proceeding or (2) a reasonable fear review proceeding followed by a withholding-only proceeding. Because understanding the function of each of these different categories of proceeding decisions is foundational to appreciating the analysis of family detention court cases, we now discuss the court process associated with each proceeding type.

Since 1996, the term “removal proceeding” has referred to the immigration judge’s decision to exclude persons attempting to enter the United States, as well as to deport someone already in the United States. If the court finds that family members do not have the legal right to enter or remain in the country, they will be removed unless they apply for and are granted relief during the removal proceeding. One such form of relief, which is common in our family detention population, is asylum. If asylum is granted, the family members will be

100. Schriro, supra note 8, at 464 (summarizing litigation in 2014 and 2015 that forced DHS to cease using general deterrence as a rationale for detaining families).

101. United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016, U.S. CUSTOMS & BORDER PROTECTION (Oct. 18, 2016), https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016 [https://perma.cc/TP6N-264P] (“In Fiscal Year 2016, total apprehensions by the Border Patrol on our southwest border, between ports of entry, numbered 408,870. This represents an increase over FY15, but was lower than FY14 and FY13, and a fraction of the number of apprehensions routinely observed from the 1980s through 2008.”).

102. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, FY 2012 STATISTICAL YEAR BOOK, at C1–C2 (2013), https://www.justice.gov/sites/default/files/eoir/legacy /2013/03/04/fy12sysb.pdf [https://perma.cc/B5HB-Y9BD] [hereinafter 2012 EOIR YEAR BOOK] (listing nine “case types” handled by the immigration courts: removal, credible fear review, reasonable fear review, claimed status review, asylum only, rescission, continued detention review, Nicaraguan Adjustment and Central American Relief Act (NACARA), and withholding only).

103. Approximately 11% (n = 1,820) of family detainees had a removal or withholding-only proceeding after an initial credible fear or reasonable fear proceeding, respectively.


105. See generally 8 C.F.R. § 1240.11 (2018) (discussing the types of relief that apply in removal proceedings).

106. Of the 7,320 respondents in our family detention sample whose most recent proceeding was a removal proceeding, 95% (n = 6,863) had filed an asylum application at one point during their case history. For a definition of asylum, see supra note 3.
allowed to remain and obtain work authorization. 107 After a year, asylees may apply to become lawful permanent residents. 108

Under the immigration law in place since 1996, individuals arrested at the border may be placed into an administrative process known as “expedited removal.” 109 Under this discretionary process, immigrants apprehended at a port of entry (including airports, sea ports, and within one hundred miles of a land border crossing) within two weeks of entry may be summarily expelled without ever being placed in formal removal proceedings in front of an immigration judge. 110 The only way that family members placed in expedited removal can eventually see an immigration judge is by expressing a fear of returning to their country, which triggers a mandatory credible fear interview by an asylum officer. 111 If the asylum officer finds that family members do have credible


108. Id.


110. See Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877, 48,880 (Aug. 11, 2004) (authorizing the DHS to place a designated class of immigrants in expedited removal proceedings). On January 25, 2017, President Trump issued an Executive Order directing DHS to expand the use of expedited removal to include those arrested anywhere within the United States within two years of entry. Executive Order 13767, supra note 19, at 8796 (“Pursuant to section 235(b)(1)(A)(ii)(I) of the INA, the Secretary shall take appropriate action to apply, in his sole and unreviewable discretion, the provisions of section 235(b)(1)(A)(ii) and (ii) of the INA to the aliens designated under section 235(b)(1)(A)(ii)(I).”). On February 20, 2017, DHS Secretary Kelly issued preliminary guidance on implementing the President’s Executive Order. Kelly Border Security Memo, supra note 20 (directing DHS to expand the category of individuals subject to expedited removal and directing both the U.S. Customs and Border Protection (CBP) and ICE to “conform the use of expedited removal procedures to the designations made in this notice”).

111. 8 C.F.R. § 235.3(b)(4) (2018) (“If an alien subject to the expedited removal provisions indicates an intention to apply for asylum, or expresses a fear of persecution or torture, or a fear of return to his or her country, the inspecting officer shall not proceed further with removal of the alien until the alien has been referred for an interview by an asylum officer . . . .”). For a discussion of how expedited removal has been used in the family detention context, see CATHOLIC LEGAL IMMIGRATION NETWORK, EXPEDITED REMOVAL AND FAMILY DETENTION: DENYING DUE PROCESS (2015), https://cliniclegal.org/sites/default/files/cara/Expedited-Removal-Backgrounder.pdf [https://perma.cc/S8UW-PTTB].
If, however, the asylum officer finds the family member does not have a credible fear, deportation will result unless the individual requests a “credible fear review proceeding” in front of an immigration judge; during this proceeding, the judge reviews the claim of credible fear de novo. If the judge reverses the decision and finds credible fear, then the individual is placed into a “removal proceeding.” If, however, the judge affirms the asylum officer’s decision, that decision is final and not subject to appeal.

---

112. See 8 C.F.R. § 208.30(e)(2) (2018) (“An alien will be found to have a credible fear of persecution if there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, the alien can establish eligibility for asylum . . . .”). This “significant possibility” standard has been interpreted to require a “substantial and realistic possibility of succeeding” in the asylum claim. U.S. CITIZENSHIP & IMMIGRATION SERVS., CREDIBLE FEAR LESSON PLAN OVERVIEW 15 (2014) (emphasis omitted), http://cmsny.org/wp-content/uploads/credible-fear-of-persecution-and-torture.pdf [https://perma.cc/JM2U-YWF4]. In applying the credible fear standard, the asylum officer must apply the legal interpretation most favorable to the applicant. See id. at 16 (“When there is reasonable doubt regarding the outcome of a credible fear determination, the applicant likely merits a positive credible fear determination.”); U.S. CITIZENSHIP & IMMIGRATION SERVS., CREDIBLE FEAR OF PERSECUTION AND TORTURE DETERMINATIONS LESSON PLAN OVERVIEW 17 (2017), http://www.aila.org/infonet/raio-and-asylum-division-officer-training-course [https://perma.cc/3MYP-3LBB] [hereinafter USCIS 2017 CREDIBLE FEAR LESSON PLAN] (“[W]here there is . . . disagreement among the United States Circuit Courts of Appeal as to the proper interpretation of a legal issue . . . then . . . generally the interpretation most favorable to the applicant is used when determining whether the applicant meets the credible fear standard.”).

113. 8 C.F.R. § 208.30(f) (“If an alien, other than an alien stowaway, is found to have a credible fear of persecution or torture, the asylum officer will so inform the alien and . . . [refer the case] for full consideration of the asylum claim, or the withholding of removal claim . . . .”). For a discussion of how expedited removal has impacted asylum seekers, see U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL (2005), http://www.uscirf.gov/reports-briefs/special-reports/report-asylum-seekers-in-expedited-removal [https://perma.cc/32HH-C23Y]; Donald Kerwin, Looking for Asylum, Suffering in Detention, 28 HUM. RTS. 3, 3 (2001); Michele R. Pistone & John J. Hoeffner, Rules Are Made to Be Broken: How the Process of Expedited Removal Fails Asylum Seekers, 20 GEO. IMMIGR. L.J. 167 (2006).

114. I.N.A. § 235(b)(1)(B)(iii)(II), 8 U.S.C. § 1225(b)(1)(B)(iii)(II) (2012) (providing a right to be “heard and questioned by the immigration judge” after a finding of no credible fear); 8 C.F.R. § 208.30(g) (describing the procedures for notifying immigrants of their right to review a negative credible fear finding before an immigration judge).

115. 8 C.F.R. § 1003.42(f) (2018) (“If an immigration judge determines that an alien has a credible fear of persecution or torture, the immigration judge shall vacate the order entered pursuant to section 235(b)(1)(B)(iii)(I) of the Act. Subsequent to the order being vacated, the Service shall . . . commence removal proceedings.”).

116. Id. (“No appeal shall lie from a review of an adverse credible fear determination made by an immigration judge.”). However, an asylum seeker may also request a second interview with the asylum officer in situations where there is “compelling new information concerning the case” that should be considered. Memorandum from Michael A. Benson, Exec. Assoc. Comm’r for Field Operations, Immigration & Naturalization Serv., to Directors, Additional Policy Guidance for Expedited Removal, AILA Doc. No. 98021090 (Dec. 30, 1997), http://www.aila.org/infonet/ins-expedited-removal-guidance [https://perma.cc/7XHD-6RXH].
Family members who were previously removed from the United States may face “reinstatement of removal,” an administrative procedure that reactivates the prior removal order without a right to judicial review. However, if they express a fear of returning to their countries, they must be given a reasonable fear interview with an asylum officer. If family members are found to have a reasonable fear, which is assessed under a higher standard than for credible fear, they will be placed directly into “withholding-only proceedings” before an immigration judge. Withholding-only proceedings are more limited than removal proceedings because the only defenses to deportation that family members may raise are (1) withholding of removal and (2) protection under the Convention Against Torture (CAT). A family member granted withholding or CAT relief may remain in the United States, but is not granted a pathway to lawful permanent resident status (as is the case for those granted asylum). If,

---


118. 8 C.F.R. § 208.31(c) (2018) (“The alien shall be determined to have a reasonable fear of persecution or torture if the alien establishes a reasonable possibility that he or she would be persecuted on account of his or her race, religion, nationality, membership in a particular social group or political opinion, or a reasonable possibility that he or she would be tortured in the country of removal.”); Questions & Answers: Reasonable Fear Screenings, U.S. CITIZENSHIP & IMMIGRATION SERVS. (June 18, 2013), https://www.uscis.gov/humanitarian/refugees-asylum/asylum/questions-answers-reasonable-fear-screenings [https://perma.cc/8Q5H-BUZ5] (describing the context and content of reasonable fear screenings).

119. Those who are claiming a “reasonable fear” for a withholding-only claim must demonstrate a “reasonable possibility” that they will be persecuted if they are removed, 8 C.F.R. § 208.31(c), which is a higher standard than “credible fear.” See supra note 112. The stricter reasonable fear standard follows the higher standard of proof required for withholding of removal. See generally INS v. Stevic, 467 U.S. 407, 425, 430 (1984) (holding that the “well-founded-fear standard [for asylum claims] is more generous than the clear-probability-of-persecution standard,” which applies to withholding claims).

120. See EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, FACT SHEET: ASYLUM AND WITHHOLDING OF REMOVAL RELIEF CONVENTION AGAINST TORTURE PROTECTIONS 5 (2009), https://www.justice.gov/sites/default/files/eoir/legacy/2009/01/23/AsylumWithholdingCATProtects.pdf [https://perma.cc/MT5J-F48A] (explaining the procedure for referral to withholding-only proceedings when a reasonable fear is established). In withholding-only proceedings, an immigrant is allowed to apply for withholding of removal or protection under the Convention Against Torture (CAT). Id.


122. See Michael J. Churgin, Is Religion Different? Is There a Thumb on the Scale in Refugee Convention Appellate Court Adjudication in the United States? Some Preliminary Thoughts, 51 TEX.
on the other hand, the asylum officer makes a negative determination, the family member can request a “reasonable fear review proceeding” in front of an immigration judge, in which the judge reviews the claim of reasonable fear de novo.

Figure 5 breaks down the family detention proceedings that occurred between 2001 and 2016 by the four proceeding types just discussed. Removal proceedings, as represented by the solid top line in Figure 5, constituted the most common family-detention proceeding type: 13,668 (or 74%) of all family detention proceedings. In fact, until 2006, removal was the only proceeding type associated with family detention. This finding is consistent with what we learned from practitioners, namely, that immigration authorities placed families directly into removal during the early years of family detention, rather than relying on expedited removal or reinstatement of removal.

This practice changed in 2006 when, as Figure 5 captures, the proceeding types of credible fear review, reasonable fear review, and withholding only first emerged. This shift reflects the Bush Administration’s decision to rely on the administrative procedures of expedited removal and reinstatement of removal to speed up family deportations at the border. As with a credible fear review, the judge’s decision in a reasonable fear review is final and cannot be appealed. 8 C.F.R. § 1208.31(g)(1) (2018). Notably, this reliance on expedited removal and reinstatement also allowed for authorities to hold families without a right to a bond hearing, unless and until they first successfully prevailed in demonstrating a fear of returning to their home country.

---

123. 8 C.F.R. § 208.31(f) (2018) (“If the asylum officer determines that the alien has not established a reasonable fear of persecution or torture, the asylum officer shall inform the alien in writing of the decision and shall inquire whether the alien wishes to have an immigration judge review the negative decision . . . .”).

124. Id. § 208.16. As with a credible fear review, the judge’s decision in a reasonable fear review is final and cannot be appealed. 8 C.F.R. § 1208.31(g)(1) (2018).

125. See, e.g., Interview with Barbara Hines, supra note 61.


127. See Benson, supra note 126, at 345; Nina Rabin & Roxana Bacon, Women on the Run, MS. MAG. (June 28, 2017), http://msmagazine.com/blog/2017/06/28/women-on-the-run [https://perma.cc/LU3F-DVCQ] (noting that the 2014 increase in the number of asylum-seeking families from Central America led the Obama Administration to expand the use of expedited removal).

128. For additional discussion of bond hearings in immigration court, see infra Part II.B.3.
Overall, as seen in Figure 5, credible fear review proceedings accounted for 19% \((n = 3,547)\) of the family detention proceedings.\(^{129}\) Reasonable fear review proceedings \((n = 469)\) and withholding-only proceedings \((n = 694)\) were less frequent, accounting for 6.3\% of the family detention proceedings in our study. Although removal remained the most prevalent proceeding type in family detention by far \((74\%)\), it was even more prevalent in our non-family detention proceedings, where 98\% were removal proceedings. This difference reflects the relative prevalence of expedited removal and reinstatement in the family detention context.

II.

KEY FINDINGS

Thus far, this Article has provided important background on the use of detention to hold family members pursuing asylum. It has also presented an introductory description of the volume and types of family detention proceedings that we now investigate further. In Part II, we share the key findings of our study. First, we discuss the serious barriers in access to justice that we identify in the

---

\(^{129}\) In contrast, credible fear review proceedings accounted for less than 1\% of non-family detention proceedings during the same period.
cases of family detainees. Second, we address the important issue of overdetention. Third, we conclude with a discussion of case outcomes.

A. Access to Justice

In this Part, we analyze barriers to access to justice along three axes: the location of the detention center, representation by counsel, and language.

1. Remote Location of Family Detention

A threshold issue of access to justice for detained families is the remote location of their imprisonment. All five family detention centers used from 2001 to 2016 were located in small or rural cities with populations of only a few thousand. Dilley, Taylor, and Karnes City are all located over fifty miles from the closest immigration court in San Antonio. Artesia is located 237 miles from Albuquerque, the largest city in New Mexico, again far away from practicing lawyers and other social services providers. Berks is located in Leesport, Pennsylvania, an hour-and-a-half drive from Philadelphia, where most of the state’s pro bono attorneys and nonprofit organizations are based.

The remote location of family detention facilities has become feasible for immigration judges due to the increased use of video conferencing technology for court hearings. With video conferencing, immigration judges in existing immigration court locations in major city centers (like San Antonio or Denver) can hear the cases of family detainees over a video connection without ever traveling to the detention center. Analysis of our family detention proceedings reveals that an overwhelming 93% of family detention hearings were handled via televideo. For example, in Artesia, judges sitting in Arlington, Virginia and Denver, Colorado heard the cases, while the women and children remained locked in the remote New Mexico-based facility. In Dilley, judges sitting in

130. According to the 2010 US Census, Leesport, Pennsylvania has a population of 1,918; Karnes City, Texas has a population of 3,042; Dilley, Texas has a population of 3,894; Artesia, New Mexico has a population of 11,301; Taylor, Texas has a population of 15,191. American Factfinder, U.S. CENSUS BUREAU, http://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml
133. See id. at 934.
134. This measurement is based on an analysis of hearing type (televideo or in person) for hearings located in detention centers and held between 2007 and 2016. Prior to 2007, EOIR did not consistently record data on the medium used for court hearings. Id. at 946.
Denver, Colorado and Miami, Florida were assigned. Families in Berks had their cases heard by judges in York, Pennsylvania. The heavy reliance on televideo for an entire group of litigants is concerning, especially given that televideo has been associated with reduced engagement by respondents in proceedings, including being less likely to find an attorney and less likely to seek relief, when compared to similarly situated respondents who had their hearings in person.

Parents and children in remote detention centers are also far away from nonprofit organizations, social services, and pro bono attorneys. Attorneys and advocates who travel to these facilities report difficulties accessing their clients. In addition, detainees’ access to telephones is often limited or prohibitively expensive.

138. Eagly, supra note 132, at 937–38.
139. ABA FAMILY DETENTION REPORT, supra note 11, at 38–39 (describing how the remote location of the Karnes and Dilley facilities makes regular in-person meetings with attorneys difficult); DHS REPORT ON FAMILY DETENTION, supra note 14, at 40 (finding that the remote location of Berks, Dilley, and Karnes limits access to attorneys, interpreters, and health providers).
We analyzed the addresses of the attorneys who provided representation during our study period and found that almost all traveled long distances to provide representation to family detainees. That is, almost all of the attorneys had legal practices based outside of the five cities where the family detention centers were located. The only exception was for the volunteers or legal services attorneys in Dilley and Artesia that listed the detention center as their practice address.\footnote{Except for one or two permanent attorney staff members on the ground at the CARA Family Detention Pro Bono Project, all of these individuals had practices based outside of the detention location. \textit{See generally CARA Family Detention Pro Bono Project, Volunteer, CARA, http://caraprobono.org/volunteer [https://perma.cc/T48A-W2Y8].}}

2. Limited Representation by Counsel

process for parents and children who have endured violence in their countries and during their journeys. In addition, asylum cases are particularly complex, making attorneys all the more critical for marshaling the necessary proof. As asylum expert Sabrineh Ardalan has shown, successfully presenting an asylum case in immigration court requires attorneys who can navigate trauma, language barriers, and cross-cultural differences.\(^{145}\)

The devastating conditions of family detention have encouraged pro bono attorneys to travel to family detention centers to provide legal representation. In Berks, a team of three dedicated attorneys volunteered countless hours to provide free legal assistance to hundreds of families seeking asylum.\(^{146}\) At Hutto, the University of Texas immigration clinic and other pro bono volunteers mobilized to challenge family detention practices.\(^{147}\) In 2014, a groundbreaking effort known as the Artesia Project recruited volunteers to leave their legal practices for up to two weeks to defend families held in New Mexico.\(^{148}\) In March 2015, the CARA Family Detention Pro Bono Project was founded on a volunteer model to provide legal advocacy and support for the women and children detained in Dilley, Texas.\(^{149}\) A similar volunteer-oriented project, the Karnes Pro Bono Project, works closely with the Refugee and Immigrant Center for Education and Legal Services (RAICES), a San Antonio-based nonprofit, to expand access to counsel for families detained at Karnes.\(^{150}\)

The EOIR data allow us to analyze whether family members who began their court cases in detention obtained counsel.\(^{151}\) We measure representation based on whether an attorney\(^{152}\) filed an “EOIR-28” form (also known as a


\(^{147}\) See Margaret Talbot, The Lost Children, New Yorker (Mar. 3, 2008), https://www.newyorker.com/magazine/2008/03/03/the-lost-children [http://perma.cc/H3DA-YGD7] (discussing a lawsuit brought by the University of Texas Immigration Law Clinic, the American Civil Liberties Union (ACLU), and a private law firm challenging detention practices at the Hutto facility).

\(^{148}\) See Artesia Report, supra note 45; see also Lindsay M. Harris, Contemporary Family Detention and Legal Advocacy, 21 Harv. Latino L. Rev. (forthcoming 2018) (manuscript on file with authors) (discussing pro bono efforts at Artesia and other family detention facilities).

\(^{149}\) Who, CARA, http://caraprobono.org/partners [https://perma.cc/4Z4F-FC4H]. In 2017, the CARA Family Detention Pro Bono Project was renamed the Dilley Pro Bono Project and is now operated by the Texas RioGrande Legal Aid organization. See Shepherd & Murray, supra note 45, at 27 n.9.

\(^{150}\) Id.

\(^{151}\) We identify those individuals who began their case in detention as including both those coded as “detained” and “released,” as some in this population were later released from detention.

\(^{152}\) Although we refer to immigrant representatives as “attorneys” in this Article, some immigrants were represented by “accredited representatives,” non-attorneys working for nonprofit organizations who are certified to appear in immigration court. 8 C.F.R. § 292.2(a) (2018) (permitting
“Notice of Entry of Appearance” form\(^{153}\) with the immigration court at any point prior to the conclusion of the court proceeding.\(^{154}\) The immigration court’s rules require the filing of the EOIR-28 form by all attorneys and certified representatives who appear in immigration court.\(^{155}\) As a result, the filing of this form has been used in multiple studies as well as the EOIR’s own statistical analyses to measure attorney representation.\(^{156}\) We also count as represented any respondent for whom an EOIR-28 form was filed after the conclusion of the relevant proceeding, so long as court records show that an attorney appeared on the respondent’s behalf in at least one hearing during any proceeding.\(^{157}\)

We first considered representation rates in only the initial proceeding associated with the family detention center.\(^{158}\) During these initial proceedings, representation rates diverged based on proceeding type. As seen in Figure 6, only 23% of families were represented in credible fear or reasonable fear review proceedings. In contrast, 34% of families had representation in removal or withholding-only proceedings.

\(^{153}\) See infra Appendix, Part III.E.

\(^{154}\) For a definition of “proceeding,” see supra note 84 and accompanying text.

\(^{155}\) 8 C.F.R. § 1003.17(a) (“In any proceeding before an Immigration Judge in which the alien is represented, the attorney or representative shall file a Notice of Appearance on Form EOIR-28 with the Immigration Court . . . .”); see also Exec. Office for Immigration Review, U.S. Dep’t of Justice, Immigration Court Practice Manual 17 (2016), http://libguides.law.ucla.edu/id.php?content_id=38190507 [https://perma.cc/NN2B-DRL3] (hereinafter Immigration Court Practice Manual 2016) (“All representatives must file a Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court (Form EOIR-28).”).


\(^{157}\) See infra Appendix, Part III.E.

\(^{158}\) For family detained respondents, “initial proceeding” captures the first proceeding associated with a family detention location in the respondent’s case history. We therefore ignore any earlier completed proceedings outside of the family detained context, for example, an earlier removal order that led to a reasonable fear proceeding in family detention. In contrast, comparative statistics for non-family detained focus on the earliest completed proceeding in the respondent’s case history.
The lower rate of representation in credible and reasonable fear proceedings could be because they can occur very quickly after a negative finding by the asylum officer. These proceedings are generally resolved in only one hearing.\textsuperscript{160} The speed of the process means that families have less time to secure counsel.\textsuperscript{161}

\begin{figure}
\centering
\includegraphics[width=\textwidth]{figure6.png}
\caption{Attorney Representation in Initial Family Detention Proceedings, by Proceeding Type (2001–2016)}\textsuperscript{159}
\end{figure}

\textsuperscript{159.} For purposes of Figure 6, the initial family-detention proceeding can be one of four different types: removal, withholding only, credible fear review, or reasonable fear review. Figure 6 measures “representation” in the initial proceeding as including those cases in which (1) an EOIR-28 form was filed on or before the completion of the initial proceeding that began within the detention center or (2) an EOIR-28 form was filed after the conclusion of the initial proceeding but an attorney appeared in at least one hearing during the initial proceeding. Figure 6 includes both completed cases and ones that were still pending at the time we received the data. Overall (i.e., across all proceeding types), only 36\% of family detained and 26\% of non-family detained gained access to counsel in their initial proceeding.

\textsuperscript{160.} See infra Table 4 (finding a median of only one day for both reasonable fear and credible fear proceedings).

\textsuperscript{161.} See Molly Hennessy-Fiske, \textit{Immigration: Quicker Release for Detained Migrants but Also Greater Risk}, L.A. TIMES (Oct. 15, 2015, 3:25 PM), http://www.latimes.com/nation/la-na-pa-detention-center-20151008-story.html [https://perma.cc/MA5Q-6SF6] (“Attorneys representing the immigrants said they were \textit{sic} glad to see them being released, but complained that the quick turnover leaves little time for them to find attorneys [and] fight deportation or special conditions of release such as ankle monitors.”). Credible and reasonable fear proceedings may be even quicker in the future given the deployment of additional judges to detention centers along the border. See Press Release, U.S. Dep’t of Justice, Attorney General Jeff Sessions Delivers Remarks Announcing the Department of Justice’s Renewed Commitment to Criminal Immigration Enforcement (Apr. 11, 2017), https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-announcing-department-justice-s-renewed [https://perma.cc/P2Z8-MGV5] (announcing that the Trump Administration has already “surged” twenty-five immigration judges to detention centers along the border, and will add fifty more to the bench in 2017 and seventy-five more in 2018).
In contrast, removal or withholding-only proceedings take much longer to complete and generally involve more than one hearing. This delay gives family members more time to find counsel.\textsuperscript{162}

The lower rate of attorney involvement in credible or reasonable fear proceedings could also reflect the fact that court rules limit the role of attorneys in these proceedings.\textsuperscript{163} Although attorneys may “consult” with their clients before the hearing, court rules prevent them from making “opening statements, call[ing] and question[ing] witnesses, conduct[ing] cross examinations, object[ing] to evidence, or mak[ing] closing arguments.”\textsuperscript{164} These restrictions may make some attorneys less inclined to involve themselves at this early stage, or to do so without filing an EOIR-28 form. It may also cause some judges to not record attorneys who “consult” in these hearings as present, or to not require the filing of the EOIR-28 form.\textsuperscript{165}

We next analyzed the percentage of family members that found counsel in their most recent removal or withholding-only proceeding.\textsuperscript{166} Because representation rates can vary based on detention status,\textsuperscript{167} we separately analyzed those family members who remained detained and those who were released at the most recent proceeding in their case history.\textsuperscript{168} The results of this analysis appear in Figure 7.

\textsuperscript{162}. This finding complements the important study by David Hausman and Jayashri Srikantiah, which found that family members were less likely to find a lawyer when judges gave them less time between hearings. David Hausman & Jayashri Srikantiah, \textit{Time, Due Process, and Representation: An Empirical and Legal Analysis of Continuances in Immigration Court}, 84 FORDHAM L. REV. 1823, 1823 (2016).

\textsuperscript{163}. See 8 C.F.R. § 1003.42(c) (2018) (providing that an “alien may consult with a person or persons of the alien’s choosing prior to the review,” but not during the review). In practice, however, the attorney role varies based on the judge. Some judges may limit participation to a “consultant” role, but others allow attorneys to more fully participate, including by filing briefs and documents and by making a closing statement at the end.

\textsuperscript{164}. \textit{IMMIGRATION COURT PRACTICE MANUAL} 2016, \textit{supra} note 155, at 125 (describing how “the alien is not represented at the credible fear review”).

\textsuperscript{165}. For example, one of us appeared as a consultant on behalf of a client in Dilley and the judge did not require her to file an EOIR-28 form or provide her EOIR attorney identification number so that she could be recorded as present. Thus, although the client had a lawyer with her in the hearing, the proceeding was recorded in the EOIR data as unrepresented.

\textsuperscript{166}. Sometimes family detention cases only have one proceeding, but often they have two or more. For example, a credible fear review proceeding can be followed by a removal proceeding in the same facility.

\textsuperscript{167}. Eagly & Shafer, \textit{supra} note 144, at 30–36.

\textsuperscript{168}. For the family detention sample, 11% of respondents remained detained at the most recent withholding-only or removal proceeding. In contrast, 70% of the respondents in the non-family detention sample remained detained at this point.
Overall, as Figure 7 shows, 53% of those family detainees who remained detained were represented by counsel. This is more than double the representation rate of 20% for non-family members who were detained at their most recent proceeding. This significantly higher representation rate for families speaks to the active pro bono programs, such as the CARA Family Detention Pro Bono Project, that have worked tirelessly to provide families with free legal assistance. Attorneys practicing at private law firms, including solo practitioners, represented the lion’s share of individuals who found counsel in

---

169. Figure 7 measures “representation” as occurring if (1) an EOIR-28 was filed during any of the proceedings in the respondent’s case history or (2) an EOIR-28 was filed after the conclusion of the relevant proceeding and an attorney appeared in at least one hearing during the proceeding. In order to measure representation over the respondent’s entire case history, we relied on a pseudo-A number provided by EOIR to link together the different proceeding types of each individual. See infra Appendix, Part I. Figure 7 includes both completed cases and cases that were still pending at the time we received the data.

170. In an earlier project, two of us measured a national rate of representation of 14% in detained removal proceedings between 2007 and 2012, somewhat lower than our current 20% measurement. Eagly & Shafer, supra note 144, at 32. There are several reasons why these measurements are different. Most importantly, these two studies measure different time periods.
family detention (82%). Law school clinics (5%) and nonprofit organizations (13%) provided the remaining 18% of legal representation. At the same time, 47% of family members who remained detained during our study never found counsel. As Professor Barbara Hines of the University of Texas warned at the time that Dilley and Karnes opened, “[t]here will simply not be enough legal resources to represent women and children” in these large detention centers.

Families who were released were far more likely to find counsel: 76% were represented, a rate almost identical to the 77% representation rate for non-family released respondents. However, this statistic must be understood in context: individuals in family detention are much more likely to be released from custody for their final removal or withholding-only proceeding (89% are released) than non-family members (30% are released). The fact that so many family members are released and able to find counsel is a testament to the robust pro bono and nonprofit networks that have mobilized to provide legal assistance for these families.

A DHS advisory committee studying family detention recommended in 2016 that the government provide counsel to these families. Currently, these parents and children rely on volunteers and nonprofit attorneys willing to travel to remote detention centers to provide pro bono representation. Even though representation in family cases is comparatively higher than in non-family cases, almost half of families in detention and one-quarter of families that were released never obtained a lawyer. In addition, barriers to obtaining lawyers were particularly profound in the initial stage of family detained proceedings, where only 32% of detained family members found counsel.

171. These measurements are based on the initial proceeding that took place inside family detention. Broken down by firm size, we find that 76% of representation was provided by attorneys practicing at small-sized firms, 4% by attorneys practicing at large-sized firms, and 1% by attorneys practicing at medium-sized firms. See infra Appendix, Part III.E.

172. A recent empirical study of unemployment cases found that cases with law students have similar outcomes to those of practicing attorneys. See Colleen Shanahan et al., Measuring Law School Clinics, 92 TUL. L. REV. 547 (2018).

173. It is notable that this 18% rate of involvement of nonprofit organizations and law school clinics is higher in these family detention cases than for removal in general. In a previous study of removal respondents, we found that just under 6% of legal representation was provided by nonprofits and clinics, compared to 18% in the family detention context. See Eagly & Shafer, supra note 144, at 27 fig.5.


175. DHS REPORT ON FAMILY DETENTION, supra note 14, at 37.

176. As immigration law expert Barbara Hines explains, “It is much harder to represent a detained client in immigration court than one who has been released on bond because of issues such as jail access and the client’s ability to obtain necessary evidence and witnesses to support his or her claims.” Barbara Hines, An Overview of U.S. Immigration Law and Policy Since 9/11, 12 TEX. HISP. L. & POL‘Y 9, 20 (2006).

177. See supra Figure 6.

178. See supra note 162.
3. Language Barriers

Language barriers present another layer of difficulty for detained family members. Critics have pointed to inadequate language services as limiting the ability of detainees to access medical care or other social services inside detention centers. Although telephonic interpreting services are reportedly available for non-English speakers, ICE often fails to use them effectively. Many staff members speak only English, which inhibits their ability to communicate with the families in their care. In addition, law libraries in detention centers provide limited legal materials in languages other than English, making it difficult for detainees to learn about their legal options.

Non-English speakers also face barriers in pursuing their asylum claims in immigration court. Under the law, asylum officers are required to arrange for an interpreter if the officer is not competent in the interviewee’s language. However, advocacy groups have documented DHS’s systemic failure to use interpreters. If a case reaches an immigration judge, interpreters are

---

179. See, e.g., Judge Dana Leigh Marks, Who, Me? Am I Guilty of Implicit Bias?, 54 JUDGES’ J. 20, 24 (2015) (“It has always seemed to me exceedingly difficult to determine credibility when the proceedings are taking place through a foreign language interpreter across cultures and the testimony is about unfamiliar events and social or political practices in a country that I know little about.”); SEATTLE UNIV. SCH. OF LAW INT’L HUMAN RIGHTS CLINIC & ONEAMERICA, VOICES FROM DETENTION: A REPORT ON HUMAN RIGHTS VIOLATIONS AT THE NORTHWEST DETENTION CENTER 43, 59–60 (2008), https://www.weareoneamerica.org/sites/default/files/OneAmerica_Detention_Report.pdf (discussing how the language barriers immigrants confront in detention can result in due process violations).

180. DHS REPORT ON FAMILY DETENTION, supra note 14, at 77–80.


182. See DHS REPORT ON FAMILY DETENTION, supra note 14, at 87, 97–98 (finding serious problems with available translation services due to inconsistent use of telephonic translation services and the inherent limitations of these services).

183. See, e.g., Hennessy-Fiske, supra note 181 (reporting on the misdiagnosis and treatment of an indigenous Achi speaker held in family detention at Dilley).

184. DHS REPORT ON FAMILY DETENTION, supra note 14, at 49.


186. 8 C.F.R. § 208.30(d)(5) (2018). If the individual speaks a rare language and an interpreter cannot be scheduled within 48 hours, the Asylum Office should “immediately or as soon as is practicable, issue the form, I-862 Notice to Appear (NTA) to the applicant placing the applicant in Section 240 proceedings using the charges reflected on the I-862.” Memorandum from Ted H. Kim, Acting Chief, Asylum Division, to Asylum Office Directors et al., Processing Credible Fear Cases when a Rare Language Interpreter Is Unavailable 2 (June 14, 2013), https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes from Previous Engagements/2013/July 2013/Processing-CF-RareLanguageInterpreter-Unavailable.pdf [https://perma.cc/7LLS-UBN2].

required. However, EOIR does not require that interpreters obtain a formal certification before working in the court system. Court observers have reported that interpreters at times interpret incorrectly, summarize or paraphrase respondents’ testimony, and offer inappropriate commentary on their statements. The use of telephonic or video interpreters exacerbates these difficulties, due to connectivity issues and other challenges associated with remote interpreting.

The barriers facing non-English speakers are even greater for those detainees who speak “rare” or “lesser-spoken” languages, including indigenous languages. Qualified rare-language interpreters are extremely difficult to

---

that DHS failed to provide interpreters for interactions with government officials, subcontractors (including medical staff), and service providers; DHS REPORT ON FAMILY DETENTION, supra note 14, at 94 (citing reports that USCIS decided to forgo interviews in the cases of some indigenous speakers rather than using interpretive services, sending them straight to immigration court); ELIZABETH CASSIDY & TIFFANY LYNCH, U.S. COMM’N ON INT’L RELIG. FREEDOM, BARRIERS TO PROTECTION: THE TREATMENT OF ASYLUM SEEKERS IN EXPEDITED REMOVAL, 27–28 (2016), https://www.uscirf.gov/sites/default/files/Barriers To Protection.pdf [https://perma.cc/S6AU-8P6J] (hereinafter USCIRF REPORT) (discussing credible fear interviews in which interpreters were not used, or had difficulty translating).


189. LAURA ABEL, BRENNAN CTR. FOR JUSTICE, LANGUAGE ACCESS IN IMMIGRATION COURTS 6–7 (2011), http://www.brennancenter.org/sites/default/files/legacy/Justice/LangAccess/Language_Access_in_Immigration_Courts.pdf [https://perma.cc/XYY8-J8U5]; Immigration Courts: Still a Troubled Institution, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (June 30, 2009), http://trac.syr.edu/immigration/reports/210/O0M20 [https://perma.cc/36F9-WJ7F] (“Although EOIR has stated that it has increased scrutiny of staff interpreters and implemented monitoring of contract interpreters, it has abandoned a previously stated goal of certifying interpreters externally.”).


191. See, e.g., ABEL, supra note 189, at 8–9 (describing the poor sound quality and the frustrated reaction of a judge to repeated interruptions to the telephone connection); DHS REPORT ON FAMILY DETENTION, supra note 14, at 97 (“Telephonic interpreters can have trouble hearing the speaker, and being heard . . . . Telephonic interpreters are frequently cut off. When the parties reconnect, they may or may not get the same interpreter. The result is at best delay and at worst starting all over.”); Eagly, supra note 132, at 941 (describing “challenges in communicating with interpreters not physically present in the same room”).

192. Spanish is classified as a “common” foreign language, while indigenous languages are characterized as “lesser spoken” or “rare.” See Sonya Rao, Barriers to Lessen Spoken Language Access in Los Angeles Immigration Court 2 n.1 (unpublished Ph.D. dissertation proposal, University of California, Los Angeles) (on file with authors) (noting that the Department of Justice categorizes
find.\textsuperscript{193} Even when indigenous language interpreters are available, some of them do not interpret into English. This complexity necessitates the use of two interpreters—such as one translating Ixil to Spanish and the second translating Spanish to English—further compounding the potential for inaccuracy and telephonic connectivity problems.\textsuperscript{194} Indeed, the DHS advisory committee characterized indigenous language speakers as some of the most vulnerable among the detained population.\textsuperscript{195} It concluded that the barriers were so severe that indigenous language-speaking families should generally be released, and if they remain detained, counsel should be appointed at the government’s expense.\textsuperscript{196}

The EOIR data allow for analysis of the languages spoken by detained family members in their court proceedings.\textsuperscript{197} As displayed in Table 1, an overwhelming 98% of these family detainees did not speak English. This rate is eleven percentage points higher than for the non-family detained population.

\textsuperscript{193} See Memorandum from Ted H. Kim, supra note 186, at 1 (explaining that for some rare languages, interpreters for asylum interviews are unavailable or very scarce). In order to address this issue, DHS has a policy to issue a Notice to Appear when asylum applicants are unable to find a rare language interpreter, thus placing the applicant directly in court proceedings. Id. at 2 (“If the [Asylum Pre-Screening Officer] APSO is unable to communicate with the applicant in another language or the office cannot schedule a rare language interpreter within 48 hours, the Asylum Office should immediately or as soon as is practicable, issue the form, I-862 Notice to Appear (NTA) to the applicant placing the applicant in Section 240 proceedings using the charges reflected on the I-860.”).


\textsuperscript{195} DHS REPORT ON FAMILY DETENTION, supra note 14, at 79.

\textsuperscript{196} Id. at 79–80; Memorandum from Ted H. Kim, supra note 186, at 1–2 (“[E]ffective immediately, when an Asylum Office encounters an individual requiring a credible fear interview and there is evidence that the individual speaks a language where there is no available interpreter, the Asylum Office must still schedule the applicant for an interview to determine if, in addition to the rare language, the individual is able to communicate in another language.”); AM. IMMIGRATION COUNCIL, ARTESIA FOIA HIGHLIGHTS: ACCESS TO COUNCIL FOR INDIVIDUALS IN DETENTION AND UNDERGOING CREDIBLE FEAR PROCESS 6 (2016), https://www.americanimmigrationcouncil.org/sites/default/files/foia_documents/artesia_highlights.pdf [https://perma.cc/V3RU-KJXR] (summarizing a DHS memo that requires officers to provide interpretation or close a case due to a rare language if they notice that an individual is not comprehending the proceeding).

\textsuperscript{197} See infra Appendix, Parts I, III.D (describing language coding).
Table 1. Language Distribution Among Respondents Who Began Their Cases in Detention (2001–2016)\(^\text{198}\)

<table>
<thead>
<tr>
<th>Language</th>
<th>Family n</th>
<th>Family %</th>
<th>Non-Family n</th>
<th>Non-Family %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Spanish</td>
<td>14,288</td>
<td>85.7</td>
<td>1,557,766</td>
<td>77.7</td>
</tr>
<tr>
<td>Indigenous</td>
<td>635</td>
<td>3.8</td>
<td>10,041</td>
<td>0.5</td>
</tr>
<tr>
<td>English</td>
<td>292</td>
<td>1.8</td>
<td>261,865</td>
<td>13.1</td>
</tr>
<tr>
<td>Other</td>
<td>1,462</td>
<td>8.7</td>
<td>174,209</td>
<td>8.7</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>16,677</td>
<td>100</td>
<td>2,003,881</td>
<td>100</td>
</tr>
</tbody>
</table>

Family detainees were also more likely to speak indigenous languages than the rest of the detained population. In our family detention sample, 635 detainees (4% of the total) spoke an indigenous Mexican, Central, or South American language.\(^\text{201}\) This rate of identified rare language speakers may at first seem low, but it is important to emphasize that it is almost eight times higher than the rate of rare language speakers in the non-family detained population (.05%). Moreover, given the communications challenges inherent in working with rare languages, EOIR data likely undercount the number of rare language speakers appearing in immigration court.\(^\text{202}\)

B. Overdetention

The previous Section documented three significant barriers in access to justice for detained families: the remote location of detention facilities, lack of sufficient attorneys to represent detained family members, and insufficient

---

198. Table 1 analyzes the respondent’s language as reported in the EOIR data for individuals in our family detention and non-family detention samples.

199. “Indigenous” languages in our data included the following Mexican, Central, and South American languages: Cubulco Achi; Aguacateco; Amuzgo; Cakchiquel; Chalchiteco; Chuj, San Sebastian Coatan; Chuj, San Mateo Ixtatan; Chatino, Tataltepec; Chol, Tila; Chol, Tumbala; Chinanteco; Huichol; Ixil; Jalalteco, Eastern; Jalalteco, Western (Popti); Kakchi; Konjobal, Western (Akateko); Konjobal; Mazatek; Mam; Mixteco; Mixe, Tlahuitoltepec; Maya, Yucatec; Nahuatl; Otomi Tenango; Pame, Central; Potonchic; Pokomam; Mixe, Quetzaltepec; Quechua; Quechua; Chinchorro Highland; Quiche; Sipakapense; Quichua, Salasaca Highland; Quichua, Caran Highland; Rabinal-Achi; Tepetla, Huehuetla; Tectiteco/Tectitan Mam; Tojolabal; Totonac Highland; Tlapanec; Acatepec; Tzeltal, Oxchuc; Tzotzil; Tz'utujil; Mixtec, Northern Tlaxiaco; Yaqui; Zapotec; Zapotec, Coatecas Altas; Zoque, Copainala.

200. “Other” languages in our data include Asian, African, and Middle Eastern languages, among others. In total, more than 340 different languages are included in the “other” category.

201. In addition, some detainees who recorded their language as Spanish could also be indigenous language speakers.

202. Speakers of indigenous Central American languages, for example, can be misclassified as Spanish speakers. See, e.g., Carcamo, supra note 194 (explaining how some indigenous speakers settle for Spanish interpreters who do not fully understand their cases); Letter from Karen S. Lucas et al., CARA, to Megan Mack & John Roth, Dep’t of Homeland Sec., Family Detention – Challenges Faced by Indigenous Language Speakers (Dec. 10, 2015), http://www.aila.org/advo-media/press-releases/2015/crl-complaint-challenges-faced-family-detention [https://perma.cc/2T8C-PNVB] (reporting that DHS misidentifies some indigenous language speakers as Spanish speaking, causing their credible fear interviews to be conducted in the wrong language).
interpreter services for detainees who do not speak English. This Section turns to the question of whether families have been subject to overdetention, which we define as their continued detention despite no finding that they pose a danger or flight risk.\footnote{203}

A major issue in the family detention debate is the unnecessary placement of families in detention to serve the government’s goal of deterring other families from seeking asylum.\footnote{204} Critics argue that family detention now reaches beyond the purported civil organizing principles and instead functions as a punitive system of control.\footnote{205} In 2014, federal officials publicly confirmed their use of family detention as a system of control when they stated that they hoped the practice of detaining mothers and their children would deter other families from

---

\footnote{203}{See supra note 23 (collecting sources discussing “overdetention” in immigration).}
\footnote{204}{See generally Michael Kagan, Limiting Deterrence: Judicial Resistance to Detention of Asylum-Seekers in Israel and the United States, 51 TEX. INT’L L.J. 191 (2016) (discussing whether deterrence of other would-be migrants is ever an appropriate rationale for detaining asylum seekers); Michele R. Pistone, Justice Delayed Is Justice Denied: A Proposal for Ending the Unnecessary Detention of Asylum Seekers, 12 HARV. HUM. RTS. J. 197, 235–38 (1999) (arguing that deterrence has already been achieved through IIRIRA and therefore “the use of detention for deterrence purposes has become an outdated remedy for a problem that no longer exists”).}
\footnote{205}{See, e.g., Lenni B. Benson, As Old as the Hills: Detention and Immigration, 5 INT’L HUM. RTS. L. REV. 11, 13–15 (2010) (declaring that the government uses immigration detention to assert its power and control over the border, rather than individually assessing each case); Mary Bosworth & Emma Kaufman, Foreigners in a Carceral Age: Immigration and Imprisonment in the United States, 22 STAN. L. & POL’Y REV. 429, 440 (2011) (explaining that in ICE facilities, “both the imagery and the actual mechanisms of criminal justice—such as the police and the prison—are adopted for the purposes of border control”); Chacón, supra note 18, at 623 (“The glaring problem with the legal doctrine that constructs immigration detention as nonpunitive is that it is a fiction.”); César Cuauhtémoc García Hernández, Immigration Detention as Punishment, 61 UCLA L. REV. 1346, 1349 (2014) (conceptualizing immigration detention as “punishment” because of its similarities to penal incarceration); Nicholas De Genova, Detention, Deportation, and Waiting: Toward a Theory of Migrant Detainability 3 (Glob. Det. Project, Working Paper No. 18, 2016), https://www.globaldetentionproject.org/wp-content/uploads/2016/12/De-Genova-GDP-Paper-2016.pdf [https://perma.cc/SQ9S-ADHD] (noting that although detention “is pervasively institutionalized as a merely administrative measure,” it “involves a coercive deprivation of a person’s most elementary liberties”); Kalhan, supra note 23, at 43, 46–48 (arguing that conditions of immigration detention have created “a quasi-punitive system of incarceration”); Robert E. Koulish, Systemic Deterrence Against Prospective Asylum Seekers: A Study of the South Texas Immigration District, 19 NYU REV. L. & SOC. CHANGE 529, 539 (1991) (“Conditions in the detention centers make them little better than jails.”); Stephen H. Legomsky, The Detention of Aliens: Theories, Rules, and Discretion, 30 U. MIAMI INT’L & COMP. L. REV. 531, 536 (1999) (explaining that justifications used for immigration detention, such as flight risk and danger, “correspond to the traditional justifications for pretrial detention in criminal cases.”); Mark Noferi, Making Civil Immigration Detention “Civil,” and Examining the Emerging U.S. Civil Detention Paradigm, 27 J. CIV. RTS. & ECON. DEV. 533, 567–75 (2014) (arguing that civil immigration detention is an “incarcerative” model because of the round-the-clock confinement, criminal-like due process protections, and the use of private detention facilities); Keramet Reiter & Susan Bibler Coutin, Crossing Borders and Criminalizing Identity: The Disintegrated Subjects of Administrative Sanctions, 51 LAW & SOC’Y REV. 567, 567 (2017) (drawing parallels between the treatment of immigrants in detention centers and prisoners in “supermax” prisons); Schirro, supra note 8, at 468 (calling the conflation between the criminal and civil criminal justice systems “incarceration”); Stumpf, supra note 17, at 58 (characterizing civil immigration detention as an “oxymoron” because of its “close[] connection with criminal and national security law”).}
making the trip to the United States. Although a deterrence strategy might be permissible in the criminal justice system, courts have made clear that it may not motivate the civil immigration system. The established law provides that in the absence of a showing of flight risk or danger to the community, civil detainees should be released.

The growing detention of families seeking asylum also raises serious issues given legal restrictions on the detention of bona fide asylum seekers. Article 31 of the 1951 Refugee Convention provides that countries may restrict the movement of refugees only when necessary—a standard that does not allow for detention to punish border crossers or to achieve general deterrence of asylum seekers. In addition, Article 9 of the International Covenant on Civil and Physical Rights states that "The right to liberty and security of person is inviolable. No one shall be subject to arbitrary arrest, detention or exile." This right is protected by other international instruments as well, including the American Convention on Human Rights and the European Convention on Human Rights.

In a class action filed on behalf of a nationwide class of Central American women seeking asylum, the United States District Court for the District of Columbia issued a preliminary injunction on February 20, 2015, prohibiting DHS from relying on general deterrence in making initial custody determinations for family detainees. R.I.L. v. Johnson, 80 F. Supp. 3d 164, 188–89 (D.D.C. 2015) (rejecting the government’s claim that “one particular individual may be civilly detained for the sake of sending a message” as a form of “symbolic detention” that is intended to “restore credibility” to the immigration enforcement system. Margaret H. Taylor, Symbolic Detention, 20 DEF. ALIEN 153, 154–55 (1997). As she notes, symbolic detention has been used to “discourage further migration” and “dissuade detainees from pursuing their asylum claims.” Id. at 155.

See Matter of Patel, 15 I. & N. Dec. 666, 666 (B.I.A. 1976) (“An alien generally is not and should not be detained or required to post bond except on a finding that he is a threat to the national security . . . or that he is a poor bail risk.”) (internal citation omitted); In re Adeniji, 22 I. & N. Dec. 1102, 1103 (B.I.A. 1999) (finding that “an alien ordinarily would not be detained unless he or she presented a threat to national security or a risk of flight,” or a danger to persons or property).


207. In a class action filed on behalf of a nationwide class of Central American women seeking asylum, the United States District Court for the District of Columbia issued a preliminary injunction on February 20, 2015, prohibiting DHS from relying on general deterrence in making initial custody determinations for family detainees. R.I.L. v. Johnson, 80 F. Supp. 3d 164, 188–89 (D.D.C. 2015) (rejecting the government’s claim that “one particular individual may be civilly detained for the sake of sending a message” as a form of “symbolic detention” that is intended to “restore credibility” to the immigration enforcement system. Margaret H. Taylor, Symbolic Detention, 20 DEF. ALIEN 153, 154–55 (1997). As she notes, symbolic detention has been used to “discourage further migration” and “dissuade detainees from pursuing their asylum claims.” Id. at 155.

208. See Matter of Patel, 15 I. & N. Dec. 666, 666 (B.I.A. 1976) (“An alien generally is not and should not be detained or required to post bond except on a finding that he is a threat to the national security . . . or that he is a poor bail risk.”) (internal citation omitted); In re Adeniji, 22 I. & N. Dec. 1102, 1103 (B.I.A. 1999) (finding that “an alien ordinarily would not be detained unless he or she presented a threat to national security or a risk of flight,” or a danger to persons or property).


Political Rights guarantees migrants freedom from arbitrary detention.211 The United Nations Committee on the Rights of the Child and the United Nations Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families have issued joint guidance clarifying that holding children in detention, either alone or with their families, is never in the best interest of the child.212 Finally, United States law also severely restricts the detention of migrant children.213

Despite these standards favoring the release of children and asylum seekers, the family members in our study have all been subjected to detention. As we reveal in the analysis that follows, Central American families have increasingly been targeted for confinement in family detention centers. As a result, these families have turned to the immigration courts to reverse the decisions of DHS officials that prolong their detention.


212. While these General Comments are not binding on the United States, they are a strong articulation of the accepted state of international law. See Comm. on the Prot. of the Rights of All Migrant Workers and Members of Their Families & Comm. on the Rights of the Child, Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 of the Committee on the Rights of the Child on the General Principles Regarding the Human Rights of Children in the Context of International Migration, at 3, U.N. Doc. CMW/C/GC/3-CRC/C/19 (Nov. 16, 2017), http://docstore.ohchr.org/Services/FilesHandler.ashx?enc=6QkG1d%2f2IPPRICAgqKB7yshrdB0H115979OVGB%2bWPAXjdnG1mFF%2fYGlInfb%2f6T%2f6wpc77%2fIKU9JkoeDcTWpIPoGBeMSRmFoMu58pnmzvyRGkPorcKPttaatG [https://perma.cc/D9SD ZDU9] (“States should ensure that children in the context of international migration are treated first and foremost as children.”). Comm. on the Prot. of the Rights of All Migrant Workers and Members of Their Families & Comm. on the Rights of the Child, Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return, at 2, U.N. Doc. CMW/C/G/4-CRC/C/23, http://tbinternet.ohchr.org/Treaties /CMW/Shared Documents/1_Global/CMW_C_GC 4-CRC_C_GC 23_8362_E.pdf [https://perma.cc /2N4R-NLRT] (“Every child, at all times, has a fundamental right to liberty and freedom from immigration detention.”).

213. A 1997 settlement agreement requires that migrant children be released rather than detained, except in cases of danger or flight. If they are held, the “least restrictive alternative” must be used, meaning nonsecure, licensed facilities. See Flores Settlement Agreement, supra note 40, at ¶¶ 11, 14, 19. A series of important court decisions have found family detention centers to be operating in violation of the Flores agreement. See, e.g., Flores v. Johnson, 212 F. Supp. 3d 864 (C.D. Cal. 2015).
1. Overdetention of Central American Families

The EOIR data raise important questions as to whether Central Americans have been disproportionately subjected to family detention. We find that 80% of individuals in family detention proceedings over the fifteen-year study period were Central Americans from El Salvador (34%), Honduras (27%), and Guatemala (19%). The remaining 21% were from Mexico (6%), China (2%), Iraq (1%), Colombia (1%), and twenty-four other countries (10%), each of which represented less than 1% of the total volume.214

Importantly, as displayed in Figure 8, we find that the national origin of family detainees has radically shifted over time. In the first five years of family detention, family detainees came primarily from a group of twenty-eight different countries, with very few from the Central American Northern Triangle countries of El Salvador, Honduras, and Guatemala. Over time, the proportion of family detainees from the Northern Triangle has skyrocketed, reaching a high of 94% of family detainees in 2016. At the same time, the proportion of detained families from other countries has plummeted.

Figure 8. Percent of Family and Non-Family Detained Respondents from the Northern Triangle, by Fiscal Year (2001–2016)215

214. These twenty-four other countries were Albania, Armenia, Bolivia, Brazil, Chile, Cuba, Dominican Republic, Ecuador, Eritrea, Ethiopia, Guyana, Haiti, India, Iran, Jamaica, Nicaragua, Nigeria, Pakistan, Peru, Romania, Russia, Sri Lanka, Syria, and Venezuela.

215. Figure 8 measures the nationality of respondents in cases that originated in detention. Fiscal year is measured by the earliest proceeding date in the respondent’s case history.
Our research reveals that the increase of Central Americans in family detention cases has far outpaced their presence in non-family detention cases. Figure 8 compares the percent of family detention proceedings associated with the Northern Triangle to non-family detention proceedings over the same time period. Although the proportion of Northern Triangle nationalities in non-family detention proceedings doubled during the relevant time period, it increased by thirteen times in family detention.

These striking patterns raise questions about why Central American families are so heavily represented in family detention. To be sure, the increase in Central American migrants arrested along the border is in part due to the extreme levels of violence in El Salvador, Honduras, and Guatemala. These three countries currently have among the highest murder rates in the world. Central American women and children have been especially vulnerable to gang violence, domestic abuse, and sexual abuse. However, Central American families have been detained to the near exclusion of families of other nationalities and at levels that are disproportionate to their presence in non-family detention during the same time period. These facts suggest that Central American families have been subjected to overdetention.

2. Reversal of Credible and Reasonable Fear Decisions

For families placed into expedited removal or reinstatement of removal, the only route to obtaining a court hearing is to express a fear of returning to their

---

216. During the fifteen-year period of our study, the largest proportion of non-family detainees were from Mexico (52%), with corresponding smaller proportions from other countries: El Salvador (9%), Guatemala (9%), Honduras (7%), China (2%), Dominican Republic (2%), and other countries (21%).


In those cases for which the asylum officer does not find that fear is established, the family’s only option is to request a review of the decision by an immigration judge. Families can be held in detention during the entire time of the credible fear or reasonable fear review in immigration court.

Figure 9. Rate of Reversal of USCIS Negative Credible Fear and Reasonable Fear Decisions (2001–2016)

The EOIR data allow us to analyze EOIR judge decisions in credible fear and reasonable fear review proceedings. Overall, as Figure 9 highlights, immigration judges vacated 48% of negative credible fear findings. This rate is three times higher than the 16% reversal rate for detained cases not involving families. An even more striking reversal rate occurred in reasonable fear decisions. Across all five family detention centers, immigration judges overturned 58% of the negative reasonable fear findings of the asylum officers. In contrast, the reversal rate for non-family reasonable fear proceedings was only 15%. In other words, the reversal rate for reasonable fear decisions was almost

---

220. *See supra* notes 111, 118 and accompanying text.
221. *See supra* notes 114, 123 and accompanying text.
223. USCIS is the agency within DHS that conducts credible and reasonable fear interviews. *See, e.g.*, *Credible Fear FAQ*, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/faq-page/credible-fear-faq [https://perma.cc/PG3R-6A4N]. Figure 9 measures the rate of reversal in initial immigration judge decisions in credible fear and reasonable fear review proceedings. Approximately 4% of initial credible and reasonable fear review decisions were not on the merits (such as a change of venue) and therefore were excluded from the analysis.
four times higher in family decisions than in non-family decisions. The family detention reversal rate in credible and reasonable fear proceedings is particularly remarkable given that family and non-family detainees both obtained lawyers at an identical rate (23%) during such proceedings.224

Figure 10 tracks these reversals of credible and reasonable fear denials over the fifteen-year period of family detention. It reveals that the reversal rate for family detention cases has risen dramatically since 2007 when credible fear and reasonable fear proceedings first appeared in the family detention context.225 By 2016, 58% of appealed denials were reversed by immigration judges. Figure 10 compares this rate of reversal for family detainees to that of non-family detainees, which had a much lower and relatively stable reversal rate.

Figure 10. Rate of Reversal of USCIS Negative Credible Fear and Reasonable Fear Decisions, by Fiscal Year (2001–2016)226

224. See supra Figure 6.
225. Earlier in this Article, we discussed the low number of credible fear and reasonable fear proceedings between 2001 and 2006. See supra Part I.C.
226. The use of credible fear and reasonable fear review proceeding types did not begin in family detention facilities until fiscal year 2006, when it gained a foothold in Berks with a handful of completed proceedings (not shown in Figure 10 due to the small sample size). The number of credible fear and reasonable fear proceedings is not consistent across time in all facilities, however, leading to sharp shifts in reversal rates seen in Figure 10. In fiscal year 2010, for example, only sixty-five credible or reasonable fear review proceedings were initiated in family detention, but by 2016 that number grew to 2,090. See supra Figure 5.
The credible fear and reasonable fear process is intended to prevent the United States from erroneously returning bona fide asylum seekers. However, we find that immigration judges frequently overturned agency decisions on credible fear for family detainees. Moreover, the rate of reversal rose throughout our study period. This raises serious concerns about the possible exposure of family members to overdetention. Erroneous agency decisions at the credible fear or reasonable fear stage lead to dire consequences for detained families. Family members who were eligible for release during our study period remained unnecessarily detained while they pursued review before immigration judges. Although the average court time for credible fear and reasonable fear proceedings was only three to four days, erroneous agency decisions denying credible or reasonable fear are also associated with other delays, such as the time it takes for the family to file for review with the EOIR and obtain notice of the hearing, as well as any delays in release following the judge’s reversal.

3. Court-Ordered Release from Detention

All family members going through the credible and reasonable fear screening process are held in detention without release. Those who are not found to have a credible or reasonable fear are ordered removed. However, those found to have a credible or reasonable fear of persecution are placed into removal or withholding-only proceedings. At this point, ICE has the discretion to grant their release on parole. If, however, immigration authorities deny parole, or

---


228. Also concerning is that not all families will assert their right to judicial review and thus will be deported after the erroneous agency decision. These deportations of bona fide asylum seekers to home countries where they face persecution and torture can have devastating results.

229. See infra Table 4.

230. See HARVARD ASYLUM REPORT, supra note 209, at 5–6.

231. See infra Part II.B.3 (discussing the procedure for release from custody).

232. 8 C.F.R. §§ 212.5(b), 235.3(b)(2)(iii) (2018) (allowing for parole of individuals “who have been medically certified as pregnant”); U.S. IMMIGRATION & CUSTOMS ENF’T, DIRECTIVE NO. 11002.1: PAROLE OF ARRIVING ALIENS FOUND TO HAVE A CREDIBLE FEAR OF PERSECUTION OR TORTURE 2 (2009), http://libguides.law.ucla.edu/id.php?content_id=38165172 [https://perma.cc/WXC5-RDWY] [hereinafter PAROLE OF ARRIVING ALIENS] (obtained by authors with FOIA Request #2016-ICFO-43358) (providing that arriving aliens found to have a credible fear and not presenting risk nor danger may be paroled if their continued detention is not “in the public interest”).
require posting of an unaffordable bond amount, the family will remain detained unless an immigration judge orders their release at a bond hearing.

The scheduling of bond hearings (also known as custody hearings) for family detainees is an important indicator of overdetention because it identifies family members who were eligible for a judicial bond determination but were not released by ICE. It also allows for a comparison between the ICE release decision and the judicial decision on review.

233. See I.N.A. § 236(a), 8 U.S.C. § 1226(a) (2012) (providing that “pending a decision on whether the alien is to be removed from the United States,” the Attorney General may release the migrant on a “bond of at least $1,500”); see also In Re X-K-, 23 I & N Dec. 731, 731, 2005 WL 1104422 (B.I.A. 2005) (finding that individuals are entitled to a bond redetermination hearing before an immigration judge unless the alien is a member of any of the listed classes of aliens who are specifically excluded from the custody jurisdiction). In making this decision, the ICE officer is given the discretion to release an individual who “demonstrate[s] to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding.” 8 C.F.R. § 1236.1(c)(8) (2018).

234. After passing the credible (or reasonable) fear process, detained families seeking asylum who were taken into custody inside the United States are eligible for a bond hearing before an immigration judge. See I.N.A. § 236(a)(2), 8 U.S.C. § 1226(a)(2) (2012); 8 C.F.R. § 1236.1(d). However, so-called “arriving aliens” who seek asylum at United States airports and other official ports of entry are not entitled to judicial bond hearings. 8 C.F.R. § 1003.19(h)(2)(i)(B) (2018) (“[A]n immigration judge may not redetermine conditions of custody imposed by the Service with respect to the following classes of aliens: . . . (B) Arriving aliens in removal proceedings, including aliens paroled after arrival pursuant to section 212(d)(5) of the Act . . . ”). See generally Margaret H. Taylor, Dangerous by Decree: Detention Without Bond in Immigration Proceedings, 50 LOY. L. REV. 149, 155 (2004) (discussing DHS’s “unilateral authority to detain individuals who are applicants for admission and have not yet entered the United States”). In an important recent decision, the United States Supreme Court found that nothing in the statutory text of the immigration law imposes a time limit on the detention of noncitizens seeking entry into the United States. Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (declining to reach the merits of respondents’ constitutional arguments). See generally Farrin R. Anello, Due Process and Temporal Limits on Mandatory Immigration Detention, 65 HASTINGS L.J. 363 (2014) (arguing that due process requires temporal limits on the length of immigration detention without a bond hearing).

235. Denise Gilman has argued that the initial custody determination process by ICE “results in automatic detention without meaningful individualized consideration or review.” Gilman, supra note 23, at 157.

236. Immigration judges may not determine custody status on their own motion. See Matter of P--- C--- M---, 20 I. & N. Dec. 432, 434 (B.I.A. 1991) (“The regulations . . . only provide authority for the immigration judge to redetermine custody status upon application by the respondent or his representative.”).
As reported in the set of bars on the far left of Figure 11, we find that 59% of family detainees placed in removal proceedings had at least one bond hearing, versus only 25% of non-family detainees in removal proceedings. In other words, when compared to the rest of the detained population, family members were more likely to call on immigration judges to secure their release from detention. The set of bars in the middle and far right of Figure 11 reveal that

237. Figure 11 measures whether individuals in detention were given a bond hearing, and thus only includes detained and released removal proceedings. We did not consider credible and reasonable fear proceedings because families are not eligible for bond hearings in those proceedings. We also did not consider withholding-only proceedings, given that none of the detained family members in withholding-only proceedings had bond hearings. There is ongoing dispute concerning whether individuals undergoing reinstatement of removal (and thus pursuing withholding only) are eligible for bond hearings. Circuit Courts are split on whether someone in reinstatement is detained pursuant to section 1226, and thus entitled to a bond hearing, or rather detained pursuant to section 1231, and thus may be held mandatorily without a bond hearing. Compare Guerra v. Shanahan, 831 F.3d 59, 64 (2d Cir. 2016) (“T]he language and structure of the statutes dictate the conclusion that Guerra’s detention during the pendency of his withholding-only proceedings is detention pursuant to 8 U.S.C. § 1226(a).”), with Padilla-Ramirez v. Bible, 862 F.3d 881, 886 (9th Cir. 2017) (finding that reinstated removal orders are administratively final, and that the detention of aliens subject to reinstated removal orders is governed by section 1231(a), rather than section 1226(a)). See generally MICHAEL KAUFMAN & MICHAEL TAN, AM. CIVIL LIBERTIES UNION, BOND HEARINGS FOR IMMIGRANTS SUBJECT TO PROLONGED IMMIGRATION DETENTION IN THE NINTH CIRCUIT 6 (2015). https://www.aclu.org/sites/default/files/field_document/2015.12.11_rodriguez_advisory.pdf [https://perma.cc/WH87-UCFK].

238. These differences could also be due to other factors, including non-family detainees’ greater likelihood of convictions that render them ineligible for release. In our sample, less than one-quarter of
these disparities between family and non-family bond hearing rates persist when we controlled for representation by counsel. These disparities between family and non-family bond hearing rates are another indicator of the overdetention of families.

Figure 12 traces the rate of bond hearings in removal proceedings over the fifteen years of our study. Outside of the context of family detention, the rate of bond hearings remained relatively constant, fluctuating between 20% and 30% between 2001 and 2016. In family detention, however, the percent of removal proceedings with bond hearings was erratic, shifting from a low of 2% to a high of 81%.

Figure 12. Bond Hearings in Removal Proceedings, by Family and Non-Family Status (2001–2016)

The huge spikes in family detention bond hearings in 2006 and 2014 resemble the spikes in family detention capacity discussed in Part I.240 During both time periods, family detention bed space was expanded and immigration officials instituted policies disfavoring the release of family members from detention. During both peaks in bond hearing activity, immigration officials

1% of family detainees in removal proceedings were criminally charged, compared to 21% of respondents in our non-family detention removal proceedings.

239. Figure 12 analyzes the prevalence of bond hearings in detained and released removal proceedings.

240. See supra Figure 2.
refused to grant release or consider alternatives to detention. When agency officials engage in such practices, overdetention of individuals who do not pose a flight risk or danger necessarily results.

The data also allow us to analyze the decisions made by immigration judges at bond hearings. When judges rule on a request for release, they must weigh numerous factors related to flight risk and public safety. Figure 13 presents the proportion of family detainees with bond hearings who had a successful outcome—meaning that the judge ordered release on a cash bond or on recognizance. Overall, 57% of family detention respondents with bond

---


242. Decisions of immigration judges in bond hearings are understudied. For two important exceptions, see Janet A. Gilboy, Setting Bail in Deportation Cases: The Role of Immigration Judges, 24 SAN DIEGO L. REV. 347, 369 (1987) (finding that immigration judges in Chicago, Illinois lowered bond rates in 94.6% of cases where a detained noncitizen sought a bond redetermination hearing); Emily Ryo, Detained: A Study of Immigration Bond Hearings, 50 LAW & SOC’Y REV. 117, 145–46 (2016) (finding that the major determining factors in judicial bond decisions were whether the immigrant had a lawyer and whether the immigrant had a criminal record).


244. See generally Rivera v. Holder, 307 F.R.D. 539 (W.D. Wash. 2015) (clarifying that immigration judges have the legal authority to grant release on parole in lieu of money bond). It is important to note that even families granted $0 bond were often released subject to a variety of other conditions and constraints, including ankle monitors. See generally GEO GRP., FAMILY CASE MANAGEMENT PROGRAM 1 (2016), http://libguides.law.ucla.edu/id.php?content_id =41225849 [https://perma.cc/JN33-7Q7J] (obtained by authors with FOIA Request #2016-ICFO-19525) (describing GEO Care LLC’s participation in “community based alternatives to detention” that aim “to promote compliance with immigration obligations”). Research by Mark Norferi has shown that participants in these types of alternative programs have a high compliance rate with future court dates. MARK NORFERI, AM. IMMIGRATION COUNCIL & CTR. FOR MIGRATION STUDIES, A HUMANE APPROACH CAN WORK: THE EFFECTIVENESS OF ALTERNATIVES TO DETENTION FOR ASYLUM
hearings had a successful outcome: 19% were released on their own recognizance and an additional 38% were granted a money bond.\textsuperscript{245} This success rate is higher and more favorable than in non-family detention cases with bond hearings, where only 1% were released on recognizance and 44% received a cash bond. The rates of successful outcomes also varied by detention center, with Karnes and Dilley both enjoying an overall success rate above 80%.

Figure 13. Successful Outcomes in Bond Hearings, by Decision Type (2001–2016)\textsuperscript{246}

Table 2 provides additional details about the bonds granted by immigration judges in family and non-family detention.\textsuperscript{247} Overall, the average bond amount

\textsuperscript{245} The data also reveal considerable variability in judicial rules at bond hearings across family detention centers. As Figure 13 highlights, whereas 86% of bond hearings in Karnes resulted in a successful outcome, Artesia only had a 36% success rate for bond hearings. It is important to remember that these varied outcomes were reached at different time periods, by different judges, and within facilities with remarkably different rates of representation.

\textsuperscript{246} Figure 13 measures the percent of bond hearings that resulted in a “successful outcome” for the respondent, defined as either the release of the respondent on personal recognizance or money bond. Immigration judges may make other types of bond decisions, including no action, transfer of jurisdiction to the Board of Immigration Appeals, no bond, or no change. We construe these decision types as denials of bond, and thus, unsuccessful outcomes for the immigrant respondent.

\textsuperscript{247} Our analysis of bond amounts builds on prior research in the field calculating immigration court bonds. See, e.g., Ryo, supra note 242, at 119 (finding that bond amounts for long-term detainees seeking release as part of the Rodriguez class ranged between $10,667 and $80,500 (referencing Rodriguez v. Robbins, No. CV 07-03239-TJH, 2012 WL 7653016 (C.D. Cal. Sept. 13, 2012), aff’d, 715
set by immigration judges in family detention was $3,226, and the median was $2,000. Notably, these bond amounts are much lower than in the non-family detention context, where the average bond amount over the same period was $11,829, and the median was $5,000.

Table 2. Mean and Median Bond Amounts Issued by Immigration Judges, Overall and by Family Detention Facility (2001–2016)

<table>
<thead>
<tr>
<th></th>
<th>Number Granted</th>
<th>Mean ($)</th>
<th>SD ($)</th>
<th>Median ($)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Non-Family Detained</td>
<td>306,197</td>
<td>11,829</td>
<td>1,811,993</td>
<td>5,000</td>
</tr>
<tr>
<td>Family Detained</td>
<td>4,560</td>
<td>3,226</td>
<td>4,037</td>
<td>2,000</td>
</tr>
<tr>
<td>Artesia</td>
<td>777</td>
<td>3,918</td>
<td>5,640</td>
<td>2,500</td>
</tr>
<tr>
<td>Berks</td>
<td>413</td>
<td>4,287</td>
<td>4,626</td>
<td>3,500</td>
</tr>
<tr>
<td>Dilley</td>
<td>1,211</td>
<td>2,459</td>
<td>2,045</td>
<td>2,000</td>
</tr>
<tr>
<td>Hutto</td>
<td>1,029</td>
<td>4,127</td>
<td>4,669</td>
<td>3,000</td>
</tr>
<tr>
<td>Karnes</td>
<td>1,130</td>
<td>2,363</td>
<td>2,993</td>
<td>0</td>
</tr>
</tbody>
</table>

These findings raise serious questions about whether the DHS subjects family detainees to overdetention. Under immigration law, bond amounts reflect the judicial assessment of danger and flight risk. Thus, the fact that immigration judges systematically set family detention bonds at a lower amount than for non-family detention cases suggests that, as a group, immigration judges perceive family detainees as presenting less of a flight risk or danger than non-family detainees. Despite this fact, during our study period the United States continued to build new and bigger family detention facilities and hold many families until they pursued their release in an adversarial setting before an immigration court.


248. Indeed, at Karnes the median bond amount for family members was $0, reflecting the dominant reliance on recognizance release at that facility.

249. See Matter of Patel, 15 I & N Dec. 666, 666 (B.I.A. 1976) (“An alien generally is not and should not be detained or required to post bond except on a finding that he is a threat to the national security . . . or that he is a poor bail risk.”); In re Guerra, 241 I & N Dec. 37, 40 (B.I.A. 2006) (listing nine factors that help judges determine bond amount, including “the alien’s criminal record” and “any attempts by the alien to flee prosecution”).

250. Emily Ryo’s study of immigration bond hearings outside of the family detention context found that immigration judges gave significantly higher average bond amounts to detainees with felonies ($47,133) than to those without felonies ($20,040). Ryo, supra note 242, at 135–37.
During the 2014 surge in Central American family migration, lawyers representing detained families complained that DHS refused to set bonds, or set prohibitively expensive bonds, to deter others from coming to the United States.\textsuperscript{251} Using the EOIR data, we investigated these “no bond” and “high bond” policies, focusing on recent bond decisions at Artesia, Karnes, and Dilley.\textsuperscript{252}

As seen on the right side of Table 3, within these three detention centers there were a total of 3,118 court bond hearings in which the court granted bond or release on recognizance. Of those, as seen on the left side of Table 3, only 524 (17%) had a bond set by DHS at the time of the immigration court bond hearing. In Artesia, only five of the 777 family members granted bond by the court were given a bond by DHS; in Karnes, DHS set bonds for only four out of 1,130 family members granted bond by the court; and, in Dilley, DHS set bonds for only 515 out of 1,211 family members granted bond by the court. In other words, at the time of the bond hearing before the immigration court, DHS still argued in favor of detention with “no bond” in 83% of these cases. These judicial reversals of DHS’s “no bond” decisions reveal that immigration judges play an important role in tempering agency decisions that would otherwise subject families to overdetention.

Table 3 also reveals ICE’s general pattern of setting prohibitively high bonds. As seen on the left side of Table 3, in the few cases in which ICE did set a bond in Dilley, Artesia, or Karnes, the average amount was high: $7,500 in Karnes; $6,180 in Dilley; and $5,600 in Artesia. After the immigration judge reviewed the case, these average bond amounts decreased significantly to $2,363 in Karnes; $2,459 in Dilley; and $3,917 in Artesia. Importantly, in Dilley where

\textsuperscript{251} In an affidavit filed in court in Artesia by the government, an ICE official attested that the government was in fact pursuing a “no bond” or “high bond” strategy, so as to “significantly reduce the unlawful mass migration of Guatemalans, Hondurans, and Salvadoran(s).” Edwards, supra note 241 (citing an affidavit filed by ICE with the court in defense of this policy). See also AM. IMMIGRATION LAWYERS ASS’N, AILA INFONET DOC. NO. 14092254, STOP THE OBAMA ADMINISTRATION FROM DENYING BOND TO ALL MOTHERS AND CHILDREN FROM CENTRAL AMERICA 1 (2014), http://www.aclu.org/file/downloadembeddedfile/58204 [https://perma.cc/W86T-6777] (“DHS is refusing asylum seekers bond, release on recognizance, supervised release, or any form of ATD [alternative to detention], regardless of individual circumstances.”). In R.I.L-R v. Johnson, advocates challenged DHS’s “no bond” policy as unconstitutional, leading DHS to revise the procedure in May 2015 to include a review process for families detained beyond ninety days. See R.I.L-R v. Johnson, 80 F. Supp. 3d 164 (D.D.C. 2015); RILR v. Johnson, AM. CIVIL LIBERTIES UNION (July 31, 2015), https://www.aclu.org/cases/rilr-v-johnson [https://perma.cc/9X9F-9FVC] (describing DHS’ practice of categorically detaining families and denying their release on bond before May 2015); ICE Announces Enhanced Oversight for Family Residential Centers, U.S. IMMIGRATION & CUSTOMS ENFORC. (May 13, 2015), https://www.ice.gov/news/releases/ice-announces-enhanced-oversight-family-residential-centers [https://perma.cc/6777-Y7NH] (announcing ICE’s decision to “implement a review process for any families detained beyond 90 days, and every 60 days thereafter, to ensure detention or the designated bond amount continues to be appropriate” while their immigration proceedings are pending).

\textsuperscript{252} We focus on bond decisions between fiscal years 2014 and 2016 to analyze DHS deterrence policy. Hutto, which operated before this time period, is not analyzed. Berks, although open during this time period, had too few bond decisions (n = 82) for proper analysis.
ICE more commonly chose to set bond amounts, the median bond amount dropped from $5,000 to a judge-granted $2,000.

Table 3. Mean and Median DHS and Judge Bond Amounts in Removal Proceedings with Bond Hearings, by Facility (2014–2016) 253

<table>
<thead>
<tr>
<th>Facility</th>
<th>No Bond Set</th>
<th>Bond Set</th>
<th>Mean (SD)</th>
<th>Median</th>
<th>No Bond Set</th>
<th>Bond Set</th>
<th>Mean (SD)</th>
<th>Median</th>
</tr>
</thead>
<tbody>
<tr>
<td>Artesia</td>
<td>772</td>
<td>5</td>
<td>5,600</td>
<td>0</td>
<td>777</td>
<td>5</td>
<td>3,918</td>
<td>2,500</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>(10,922)</td>
<td></td>
<td></td>
<td></td>
<td>(5,640)</td>
<td></td>
</tr>
<tr>
<td>Dilley</td>
<td>696</td>
<td>515</td>
<td>6,181</td>
<td>5,000</td>
<td>1,211</td>
<td>2,459</td>
<td>2,000</td>
<td>(2,045)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>(4,724)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Karnes</td>
<td>1,126</td>
<td>4</td>
<td>7,500</td>
<td>7,500</td>
<td>1,130</td>
<td>2,363</td>
<td>0</td>
<td>(2,993)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>(0)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>2,594</td>
<td>524</td>
<td>3,118</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

In conclusion, the analysis just presented reveals that immigration courts have been called on to intervene in the detention of migrant families. Families held in the five United States family detention centers have been systematically more likely to require bond hearings—and to win release on bond—than other detained migrants. These and other findings suggest that agency officials subject families to detention despite the fact that these families are ultimately found to present a low security risk and to be legally eligible for release.

4. Prolonged Detention

A major issue in the detention debate is the exposure of families to long-term detention. 254 Critics condemn the detention of asylum seekers and their children as harmful to the physical and mental health of these families. 255 In

253. For purposes of Table 3, if there was no entry as the initial bond amount, we categorized DHS as declining to set a bond. This approach follows one adopted by researchers at TRAC. See What Happens When Individuals Are Released on Bond in Immigration Court Proceedings?, TRANSACTIONAL REC. ACCESS CLEARINGHOUSE (Sept. 4, 2016), http://trac.syr.edu/immigration/reports/438 [https://perma.cc/3TZ4-S6A] (analyzing bond data from EOIR and concluding that when court records show no entry for initial bond amount, it can be read as indicating that DHS took the position that the individual should not be released).

254. See, e.g., HUMAN RIGHTS FIRST, LONG-TERM DETENTION OF MOTHERS AND CHILDREN IN PENNSYLVANIA 2 (2016), http://www.humanrightsfirst.org/sites/default/files/HRF-Long-Term-Detention-Brief.pdf [https://perma.cc/3C7B-6UWE] (“Several families had been held for nearly a year, with at least four families reaching the one-year mark in August.”).

addition, long-term detention raises due process concerns. In *Zadvydas v. Davis*, the Supreme Court found that a detention of six months was presumptively reasonable but warned that detention could not exceed a period “reasonably necessary to secure removal.”

Table 4. Proceeding Length Duration for Family Members that Remained Detained, by Proceeding Type (2001–2016)

<table>
<thead>
<tr>
<th>Proceeding Type</th>
<th>Number of Proceedings</th>
<th>Mean Detention Time (Days)</th>
<th>Standard Deviation (Days)</th>
<th>Median (Days)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Credible Fear</td>
<td>3,422</td>
<td>3</td>
<td>10</td>
<td>1</td>
</tr>
<tr>
<td>Reasonable Fear</td>
<td>410</td>
<td>4</td>
<td>11</td>
<td>1</td>
</tr>
<tr>
<td>Removal</td>
<td>1,509</td>
<td>87</td>
<td>274</td>
<td>29</td>
</tr>
<tr>
<td>Withholding Only</td>
<td>78</td>
<td>132</td>
<td>250</td>
<td>78</td>
</tr>
<tr>
<td>Overall</td>
<td>5,419</td>
<td>28</td>
<td>152</td>
<td>1</td>
</tr>
</tbody>
</table>

Table 4 presents our analysis of the detention times associated with completed EOIR court proceedings for family members who remained in detention throughout their court proceedings. For the 5,419 family detention proceedings completed in detention, the average period of detention associated with credible fear and reasonable fear proceedings was three and four days respectively. Detained removal and withholding-only proceedings took considerably longer. On average, detained removal proceedings took eighty-seven days to conclude, and detained withholding-only proceedings took 132 days.

In a supplemental analysis on case history duration, we totaled the time of the family detainees’ multiple court proceedings (e.g., credible fear review and removal) to determine the overall period of detention associated with their entire

---


257. Table 4 measures proceeding length (in days) among completed family detention proceedings that did not result in release. In instances where individuals had more than one proceeding of the same type, for example two removal proceedings in a row, we measured proceeding length across all proceedings of the same type. See infra Appendix, Part III.A.

EOIR case adjudication. In total, one in five of the 16,677 family members in our study remained in detention either throughout their completed case or were still detained at the end of our study period. For the 10,122 family members in our study whose cases were completed, 34% of them were detained throughout their entire EOIR case. We found that 800 of these family members—or 23% of those who remained detained throughout their court process—spent more than a month detained while undergoing their court proceeding with EOIR. Of these family members, 397 were detained for more than three months, and 115 were held for more than six months.

Importantly, these measurements do not include the amount of time families spent in custody prior to the initiation of their court proceeding with the immigration judge. ICE reports that the average length of detention for the credible fear interview screening process is fifty-eight days and this measurement does not include the length of time that families may spend in Customs and Border Patrol (CBP) holding cells before being transferred to ICE custody to begin the credible or reasonable fear screening interview process. Experts on family detention have found that in some cases families can spend as long as six months in ICE detention before the EOIR court process begins. Indeed, the federal government recently admitted in a letter filed before the United States Supreme Court that “[i]n some instances, there is a significant period of time between issuance of the charging document by DHS, and filing the charging document with EOIR.”

Moreover, our measurements do not include any additional detention time associated with appealing family detention cases. Notably, several families

259. See infra Appendix, Part IIIA.

260. USCIRF REPORT, supra note 187, at 38 (reporting that in fiscal year 2014, ICE detained credible fear applicants for an average of fifty-eight days and that 90% were detained for ninety days or less); see also IMMIGRATION & CUSTOMS ENF’T, DETAINEDASYLUM SEEKERS: FISCAL YEAR 2009 AND 2010 REPORT TO CONGRESS (Aug. 8, 2012), https://www.ice.gov/dodlib/foia/reports/detained-asylum-seekers2009-2010.pdf [https://perma.cc/JDT9-HP2H] (stating that in fiscal year 2010, individuals found to have met the credible fear screening standard were detained on average of sixty-six days).

261. These holding cells are referred to as “hierlas,” or ice boxes, due to their freezing temperatures. GUILLERMO CANTOR, AM. IMMIGRATION COUNCIL, HIERLAS (ICEBOXES) IN THE RIO GRANDE VALLEY SECTOR: LENGTHY DETENTION, DEPLORABLE CONDITIONS, AND ABUSE IN CBP HOLDING CELLS 1 (2015), https://www.americanimmigrationcouncil.org/sites/default/files/research/hierlas_iceboxes_in_the_rio_grande_valley_sector.pdf [https://perma.cc/GC6Z-ZKZL] (describing CBP facilities as “extremely cold, frequently overcrowded, and routinely lacking in adequate food, water, and medical care”).

262. See generally Gilman, supra note 258, at 309 (explaining that migrants can spend up to six months in ICE detention before beginning EOIR court proceedings).


were detained at Berks for a year and a half while lawyers sought habeas review of their credible fear process in federal court.\textsuperscript{265}

We investigated how frequently family detention cases were appealed to the Board of Immigration Appeals (BIA).\textsuperscript{266} Overall, as seen in Table 5, only 5\% of these cases involved an appeal to the BIA.\textsuperscript{267} However, among those cases that took the immigration judge more than two months to decide, appeal rates were significantly higher—almost one in four included an appeal to the BIA. This statistic reveals that cases that are the most time consuming at the trial level also are more likely to be followed by an appeal, further prolonging detention.

Table 5. Rates of Appeal Among Family Detainees Who Remained Detained, by EOIR Case History Length (2001–2016)\textsuperscript{268}

<table>
<thead>
<tr>
<th>EOIR Case Length</th>
<th>Appeals</th>
<th>Total</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>0 to 1 month</td>
<td>13</td>
<td>2,634</td>
<td>0.5%</td>
</tr>
<tr>
<td>1 to 2 months</td>
<td>11</td>
<td>213</td>
<td>5.2%</td>
</tr>
<tr>
<td>2 to 6 months</td>
<td>109</td>
<td>480</td>
<td>23.0%</td>
</tr>
<tr>
<td>6 or more months</td>
<td>35</td>
<td>134</td>
<td>26.0%</td>
</tr>
<tr>
<td>Total</td>
<td>168</td>
<td>3,461</td>
<td>4.9%</td>
</tr>
</tbody>
</table>

Finally, after the EOIR proceedings are over, families can continue to be held in detention until DHS deports them. By law, DHS has ninety days to remove individuals from the United States after the immigration court issues a final order of removal,\textsuperscript{269} and sometimes this removal period can take

\textsuperscript{265}. Petitioners argued that DHS’s credible fear evaluation process when issuing expedited removals was inadequate, and that they had a constitutional right to judicial review of expedited removal orders under the writ of habeas corpus. Castro v. U. S. Dep’t of Homeland Sec., 163 F. Supp. 3d 157, 158 (E.D. Pa. 2016), aff’d, 835 F.3d 422 (3d Cir. 2016), cert. denied, 137 S.Ct. 1581 (2017). The District Court dismissed the claims for lack of subject matter jurisdiction and also denied the Petitioners’ Emergency Motions for Stay of Removal, finding Petitioners had no likelihood of success on the merits. Id. at 175. The Third Circuit Court of Appeals affirmed. Castro, 835 F.3d at 425.

\textsuperscript{266}. The Board of Immigration Appeals, or BIA, is an administrative body with fifteen members that reviews immigration appeals. Decisions of the BIA are binding on all immigration judges and DHS officers. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, BOARD OF IMMIGRATION APPEALS FACT SHEET 1 (2014), https://www.justice.gov/sites/default/files/eoir/legacy/2014/02/04/BIA_Bios_February2014.pdf [https://perma.cc/A8ZP-22FC].

\textsuperscript{267}. This 5\% represents the 168 out of 3,430 family members who remained in detention after their most recent court proceeding.

\textsuperscript{268}. Table 5 analyzes the completed cases of family members who remained detained at their most recent proceeding. Appeals to the Board of Immigration Appeals were measured by whether an appeal was filed at any time during the respondent’s case history. For a discussion of case history length measurements, see infra Appendix, Part III.A.

\textsuperscript{269}. I.N.A. § 241.1(a)(1)(A), 8 U.S.C. § 1231(a)(1)(A) (2012) (“Except as otherwise provided in this section . . . the Attorney General shall remove the alien from the United States within a period of 90
significantly longer. This additional period of post-order detention further prolongs the detention time for families.

C. Outcomes

Debate over the wisdom of family detention has relied on competing claims about case outcomes. The pro-enforcement side argues that family detainees do not have viable claims and are likely to abscond if released. In response, critics of family detention contend that federal detention practices interfere with detained families’ worthy claims. In this final Section, we contribute a data-driven perspective to this discussion.

1. Successful Case Outcomes

Do family members have viable asylum claims to remain in the United States? To analyze this question, we looked at completed removal and withholding-only cases that began in family detention. We define “success” in removal and withholding-only proceedings as cases in which the judge granted an application for relief. In addition, we include in our measurement of case success those instances in which the judge terminated or administratively closed the case, as in both situations the family member can stay in the United

---


272. See, e.g., Artesia Report, supra note 45 (discussing how the remote detention facility in Artesia was used to rapidly deport women and children with valid asylum claims); SHEPHERD & MURRAY, supra note 45, at 1–2 (finding that family detention inhibits individuals’ ability to bring asylum claims, including through adverse psychological effects of family separation itself and limited language access in detention facilities).


274. Memorandum from Brian M. O’Leary, Chief Immigration Judge, Exec. Office for Immigration Review, U.S. Dep’t of Justice, to All Immigration Judges et al., Operating Policies and Procedures Memorandum 13-01; Continuances and Administrative Closure 3 (Mar. 7, 2013),
Finally, we also count as a successful outcome those cases in which a prosecutor asked that the case be closed as an exercise of prosecutorial discretion. 275

Figure 14 summarizes our case outcome analysis, organized by detention and representation status. Overall, 49% of released family members with counsel were successful, as were 37% of represented detained family members. In comparison, for those without counsel, only 7% of released family members and 8% of detained family members had success. 276 We do not claim based on this study of EOIR court data that representation causes better outcomes in

https://www.justice.gov/sites/default/files/eoir/legacy/2013/03/08/13-01.pdf [https://perma.cc/YT2A-FVYH] (explaining that administrative closure “is a docketing tool” that judges can use to close the case; however, at a later date “[e]ither party may request to ‘reactivate’ the case through the filing of a motion to recalendar”).

275. See generally WADHA, supra note 30.

276. Figure 14 analyzes the outcomes in the cases of the 6,321 respondents (out of a total of 16,677) in our family detention sample who had their cases decided on the merits during the study period. Of these 6,321 respondents, 21% \( (n = 1,341) \) remained detained at their final merits proceeding, while 79% \( (n = 4,980) \) had been released. Of those respondents who remained detained, 52% \( (n = 697) \) secured counsel, compared to 71% of released respondents \( (n = 3,545) \).

277. A recent empirical study finds that an individual’s unrepresented status may itself negatively influence judicial perceptions about the quality of their claims. See Victor D. Quintanilla et al., The Signaling Effect of Pro Se Status, 42 LAW & SOC. INQUIRY 1091 (2016).
immigration cases. Rather, we present here a descriptive story that reveals that—at least when counsel is involved—families have a relatively high success rate in their cases.

2. **Compliance with Future Hearings**

Another major issue in the family debate concerns appearance rates in court hearings following release from detention. Former DHS Secretary Kelly directed his officers to increase detention capacity because, in his words, migrants “are highly likely to abscond and fail to attend their removal hearings.” However, we find that the EOIR data do not support this conclusion.

Figure 15. Appearance Rates of Released Families by Proceeding Type (2001–2016)

![Figure 15](image)

The EOIR data allow us to independently analyze when families released from detention appeared for their hearings. Figure 15 provides breakdowns as to the appearance rates of released families and compares those rates to the

---

278. There are many reasons why cases with successful outcomes may be more likely to have counsel. For example, attorneys may screen cases for their merit or clients may be less likely to pay for counsel if they do not have a reasonable chance of success on the merits. For a discussion of the methodological challenges to studying the effect of representation on case outcomes, see D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118, 2191–96 (2012).


280. Figure 15 includes completed and pending cases in our family detention and non-family detention sample.
population of released non-family cases. As seen in the top set of bars, we find that 86% of family detainees attended all their court hearings during our study period. In other words, since 2001, only 14% of the family detainees released from detention have been ordered removed in absentia.281 Furthermore, as the middle set of bars highlights, families who applied for asylum were especially likely to attend future court hearings, with 96% attending all their hearings.282 As displayed in the third set of bars, asylum applicants with lawyers had an even higher appearance rate: 97% attended all their hearings during our study period.283

3. Jurisdictional Variation

The previous Subsections provided empirical support for the view that family detainees have bona fide asylum claims and are likely to attend court hearings after their release. Family members released from custody attended all of their hearings in 86% of cases. In addition, one half of the released families who were released and found attorneys succeeded in their cases. In this last Subsection, we add complexity to this descriptive account by revealing troubling variation in case outcomes across court jurisdictions.

281. If a respondent fails to appear at the hearing, the judge may decide to enter a removal order even in the family’s absence. In practice, these orders are referred to as “in absentia” removal orders. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, FY 2015 STATISTICS YEAR BOOK P1 (2016), https://www.justice.gov/eoir/page/file/fysb15/download [https://perma.cc/LA4C-9E2F] (hereinafter 2015 EOIR YEAR BOOK) (“When an alien fails to appear for a hearing, the immigration judge may conduct a hearing in the alien’s absence (in absentia).”).


283. A range of external factors often contributes to immigrants’ failure to appear in immigration court. See, e.g., Letter from CARA Family Detention Pro Bono Project to Sarah Saldana, Dir., Immigration & Customs Enf’t, Dep’t of Homeland Sec. (July 27, 2015), http://www.aila.org/File/DownloadEmbeddedFile/65278 [https://perma.cc/ZFD2-6M6A] (critiquing ICE’s release practices that lead to in absentia orders, such as providing unclear instructions regarding post-release legal requirements in a language families do not understand); CARA FAMILY DETENTION PRO BONO PROJECT, UPDATE ON RECENT ICE ENFORCEMENT ACTIONS TARGETING CENTRAL AMERICAN FAMILIES 3–5 (2016), http://www.aila.org/infonet/cara-recent-ice-actions-targeting-central-amer?utm_source=aila.org&utm_medium=InfoNet Search [https://perma.cc/WZ3S-WECA] (documenting situations where families were deported in absentia because they did not have access to counsel, they received the wrong address to the immigration court from ICE, or they were illiterate and so did not understand the Notice to Appear); Jonathan D. Montag, Report of In Absentia Removal Orders of Unaccompanied Children Ring True in a System Not Functioning Fairly, MONTAG L. (Mar. 8, 2015), https://www.montaglaw.com/2015/03/08/report-of-in-absentia-removal-orders-of-unaccompanied-children-ring-true-in-a-system-not-functioning-fairly [https://perma.cc/2FWN-ES2A] (explaining how in absentia orders may be issued due to ICE’s failure to communicate a released detainee’s information to the immigration court, a problem that especially affects released women and children).
When the families in our study were released from detention, their cases were transferred to the immigration court nearest to their residence.\textsuperscript{284} For example, family members released from detention in Dilley, Texas who moved to Atlanta had their case heard by the immigration court in Atlanta.\textsuperscript{285}

In Table 6, we focus on the twenty immigration courts that received the greatest number of released family members during our study period.\textsuperscript{286} We find wide jurisdictional variety in how these different courts handled the cases of formerly detained parents and children. First, there was wide variation in whether these family members found attorneys. For example, in Charlotte only 49% of family members found counsel, compared to 91% in Omaha and 86% in Orlando. We also discovered stark regional disparities in rates of applications for relief. Whereas only 22% of family members in San Antonio applied for relief, 67% filed applications in Seattle.

\textsuperscript{284} Although initial jurisdiction lies with the court where the charging document was filed, see 8 C.F.R. § 1003.14 (2018), respondents who are released from detention may ask that their case be moved to the immigration court closest to their new home, see 8 C.F.R. § 1003.20 (2018).


\textsuperscript{286} Table 6 analyzes case outcomes in the twenty jurisdictions that handled the highest numbers of released family detention cases. Table 6 includes both pending and completed cases. Respondents who received voluntary departure were characterized as receiving an order of removal. For a definition of voluntary departure, see infra Appendix, Part III.C.
Table 6. Outcomes in Pending and Completed Released Family Detention Cases, by Volume and Outcomes (2001–2016)

<table>
<thead>
<tr>
<th>Base City</th>
<th>Number of Respondents</th>
<th>Legal Representation</th>
<th>Application for Relief</th>
<th>Pending Case</th>
<th>Termination / Prosec. Discretion / Admin. Closure</th>
<th>Received Relief</th>
<th>Ordered Removed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arlington, VA</td>
<td>761</td>
<td>68%</td>
<td>49%</td>
<td>78%</td>
<td>5%</td>
<td>3%</td>
<td>14%</td>
</tr>
<tr>
<td>Atlanta, GA</td>
<td>338</td>
<td>62%</td>
<td>45%</td>
<td>24%</td>
<td>4%</td>
<td>1%</td>
<td>70%</td>
</tr>
<tr>
<td>Baltimore, MD</td>
<td>632</td>
<td>63%</td>
<td>38%</td>
<td>69%</td>
<td>7%</td>
<td>5%</td>
<td>19%</td>
</tr>
<tr>
<td>Boston, MA</td>
<td>293</td>
<td>81%</td>
<td>62%</td>
<td>69%</td>
<td>9%</td>
<td>8%</td>
<td>15%</td>
</tr>
<tr>
<td>Charlotte, NC</td>
<td>327</td>
<td>49%</td>
<td>29%</td>
<td>36%</td>
<td>9%</td>
<td>3%</td>
<td>52%</td>
</tr>
<tr>
<td>Chicago, IL</td>
<td>283</td>
<td>77%</td>
<td>63%</td>
<td>62%</td>
<td>6%</td>
<td>7%</td>
<td>24%</td>
</tr>
<tr>
<td>Dallas, TX</td>
<td>501</td>
<td>53%</td>
<td>38%</td>
<td>46%</td>
<td>3%</td>
<td>1%</td>
<td>50%</td>
</tr>
<tr>
<td>Houston, TX</td>
<td>943</td>
<td>60%</td>
<td>45%</td>
<td>72%</td>
<td>2%</td>
<td>2%</td>
<td>24%</td>
</tr>
<tr>
<td>Los Angeles, CA</td>
<td>912</td>
<td>74%</td>
<td>50%</td>
<td>55%</td>
<td>15%</td>
<td>4%</td>
<td>25%</td>
</tr>
<tr>
<td>Memphis, TN</td>
<td>357</td>
<td>73%</td>
<td>55%</td>
<td>55%</td>
<td>6%</td>
<td>4%</td>
<td>36%</td>
</tr>
<tr>
<td>Miami, FL</td>
<td>685</td>
<td>80%</td>
<td>56%</td>
<td>60%</td>
<td>13%</td>
<td>9%</td>
<td>18%</td>
</tr>
<tr>
<td>New Orleans, LA</td>
<td>217</td>
<td>65%</td>
<td>39%</td>
<td>53%</td>
<td>15%</td>
<td>1%</td>
<td>31%</td>
</tr>
<tr>
<td>New York, NY</td>
<td>1109</td>
<td>84%</td>
<td>64%</td>
<td>55%</td>
<td>12%</td>
<td>20%</td>
<td>13%</td>
</tr>
<tr>
<td>Newark, NJ</td>
<td>506</td>
<td>75%</td>
<td>48%</td>
<td>67%</td>
<td>8%</td>
<td>8%</td>
<td>17%</td>
</tr>
<tr>
<td>Omaha, NE</td>
<td>121</td>
<td>91%</td>
<td>63%</td>
<td>80%</td>
<td>8%</td>
<td>2%</td>
<td>10%</td>
</tr>
<tr>
<td>Orlando, FL</td>
<td>201</td>
<td>86%</td>
<td>64%</td>
<td>50%</td>
<td>9%</td>
<td>7%</td>
<td>34%</td>
</tr>
<tr>
<td>Philadelphia, PA</td>
<td>183</td>
<td>80%</td>
<td>65%</td>
<td>43%</td>
<td>13%</td>
<td>22%</td>
<td>22%</td>
</tr>
<tr>
<td>San Antonio, TX</td>
<td>1095</td>
<td>50%</td>
<td>22%</td>
<td>47%</td>
<td>3%</td>
<td>7%</td>
<td>43%</td>
</tr>
<tr>
<td>San Francisco, CA</td>
<td>446</td>
<td>80%</td>
<td>56%</td>
<td>71%</td>
<td>11%</td>
<td>9%</td>
<td>9%</td>
</tr>
<tr>
<td>Seattle, WA</td>
<td>132</td>
<td>80%</td>
<td>67%</td>
<td>54%</td>
<td>12%</td>
<td>11%</td>
<td>23%</td>
</tr>
</tbody>
</table>
Jurisdiction also matters in terms of substantive case outcomes. Short of granting relief, a case can end through administrative closure, termination, or prosecutorial discretion. Yet, as seen in Table 6, these different types of case closures were not evenly distributed across court jurisdictions. For example, in Los Angeles 15% of cases ended through administrative closure, termination, or prosecutorial discretion, as did 15% of cases in New Orleans. In contrast, cases resolved this way only 1% of the time in Denver and 2% of the time in Houston.

Finally, we also find jurisdictional variation in the percent of cases that had grants of relief. The lowest grant rate in the country occurred in Atlanta (1%).
New Orleans (1%), and Dallas (1%). Philadelphia (22%) and New York (20%) observed the highest grant rates.

Prior research on asylum adjudication has focused almost exclusively on variation in final outcomes based on the assigned judge. Our analysis of what happens to detained families contributes a more nuanced understanding of an immigration court system with considerable jurisdictional variability. Our focus is not on the decisions of individual judges, but rather on decisional patterns in the cluster of judges within a court jurisdiction. Moreover, we show that jurisdictional variability does not occur just at the level of the final court decisions, but also occurs in whether the individual obtains an attorney, whether an asylum application is filed, and whether the case results in administrative closure or relief. These findings of considerable variation throughout the asylum process raise serious concerns about the ability of families in some jurisdictions to pursue their asylum claims successfully.

CONCLUSION

Relying on data obtained through public records requests, this Article reveals an expanding system of detention facilities that imprisons families seeking asylum, sometimes for prolonged periods. We also document some of the serious challenges that families face in pursuing their asylum claims inside family detention. The merger of detention and adjudication is understudied, yet more important than ever given the Trump Administration’s explicit enforcement plans to expand expedited removal, heighten standards for asylum claims, and maintain all migrants in detention throughout the adjudication process.

291. Human rights advocates have called these and other cities with extremely low asylum grant rates “asylum free zones” for systematically denying protection to bona fide asylum seekers. See DAVID BALUARTE ET AL., BEFORE THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS: A SPECIAL INTEREST HEARING ON THE HUMAN RIGHTS OF ASYLUM SEEKERS IN THE UNITED STATES (2016), https://cliniclegal.org/sites/default/files/resources/defending-vulnerable-populations/Human-Rights-of-Asylum-Seekers-in-US-%5BPetitioners%5D.pdf [https://perma.cc/U6JM-S6H8] (“In certain jurisdictions in the United States, immigration judges and prosecutors use open and notorious sub-regulatory rules that have no normative legal legitimacy to create asylum free zones, spaces where asylum seekers are systematically denied protection.”).

292. A decade ago, scholars studying asylum adjudication compared case outcomes based on the judge assigned to the case. Their major finding was that some immigration judges have much lower grant rates than others in asylum cases, even when similar types of asylum cases are analyzed. See Ramji-Nogales et al., supra note 21, at 296.

293. For a discussion of the different types of decisions that judges can make in asylum cases beyond “grant” or “deny,” see Banks P. Miller et al., Beyond Grant or Deny: A More Nuanced Ordering of U.S. Asylum Outcomes, 97 JUDICATURE 172 (2014).

294. See supra notes 19, 110 and accompanying text.
Our study provides empirical support for a different set of policy decisions. First, we recommend that authorities place families directly into proceedings before an immigration judge rather than first subjecting them to an administrative process. Federal immigration authorities have long had the discretion to place families directly into removal proceedings rather than rely on the expedited removal process. Doing so would allow immigration judges to be involved in ensuring due process from the outset of the case. As our Article highlights, the expedited removal process limits the ability of individuals to present critical evidence that supports their claims and curtails access to the procedural and substantive protections available in regular removal proceedings before an immigration judge.

Eliminating summary removal processes, such as expedited removal, for asylum seekers and vulnerable populations would also reduce overreliance on detention, since families in removal proceedings can generally be released immediately pending a hearing. Alternatively, if it is not feasible to immediately release families following their apprehension, families in removal proceedings should be released as soon as is practicable into a less restrictive custody setting or community-based alternative to detention. We establish a high validity rate for the asylum claims of family members in our study, as evidenced by grants of relief issued by immigration judges, which should reassure policymakers that moving away from reliance on expedited removal and detention is a sensible policy choice. In addition, our evidence reveals that family

295. See, e.g., U.S. CUSTOMS & BORDER PROT., INSPECTOR’S FIELD MANUAL 2, § 17.15 (2006), http://www.aila.org/File/Related/11120959F.pdf [https://perma.cc/BCF3-7DEC] (advising immigration officials that “[u]nder section 235(b)(1) of the Act, expedited removal proceedings may be applied to two categories of aliens” and that section 235(b) of the INA “permits” and provides the DHS Secretary discretion in applying expedited removal); see also ELEANOR ACER & OLGA BYRNE, HUMAN RIGHTS FIRST, FAMILY DETENTION: STILL HAPPENING, STILL DAMAGING 10 (2015), http://www.humanrightsfist.org/sites/default/files/HRF-family-detention-still-happening.pdf [https://perma.cc/4G7V-D25C] (explaining that “[t]he Board of Immigration Appeals and DHS agree that section 235(b) of the INA does not limit the discretion of DHS to place arriving aliens in regular removal proceedings before an immigration judge”).


297. Although ICE established a pilot Family Case Management Program for asylum-seekers with young children and other vulnerable populations, this least-restrictive alternative to detention was terminated in June 2017. GEO CARE, GEO GRP., SUMMARY REPORT: FAMILY CASE MANAGEMENT PROGRAM, SEPT. 21, 2015–JUNE 20, 2017 (2017) (on file with authors) (“After a little more than a year of operation, the new administration discontinued the program.”).
members are unlikely to abscond. Indeed, family members who filed claims for asylum achieved a 96% appearance rate at their future hearings.298

Second, we recommend funding for court-appointed counsel.299 At a minimum, the government should provide attorneys for immigrants who are especially vulnerable, including detained families and individuals, and generally should not move forward with a case until counsel may be obtained. Despite intensive pro bono efforts, we find that access to counsel remains a pressing issue for families in detention. The facilities detaining parents and children are located in remote areas, far away from city centers.300 A shocking 68% of parents and children in our study remained unrepresented in their initial family detention proceeding.301 Those who continued beyond this stage were more likely to obtain counsel, but still, nearly half of those who remained detained went without lawyers.302 These findings are troubling given that representation in immigration court is strongly correlated with better outcomes,303 and success in these cases can mean the difference between life and death.304 Short of funding for appointed counsel, addressing the dearth of counsel would require expanding nonprofit and law school clinic resources, which currently are unable to handle the high volume of family detention cases. It would also require recruiting more pro bono volunteers and providing them with the support and training necessary to take on this work.305

Third, our study highlights the need for increased training and monitoring of immigration judges. Although EOIR has taken steps in the past to identify those judges with unusually high or low grant rates,306 a more comprehensive


299. See supra Figure 15.

300. See supra Figure 1.

301. See supra note 159 (explaining that across all types of initial proceedings “only 32% of family detained and 26% of non-family detained gained access to counsel”).

302. See supra Figure 7.

303. See supra Figure 14. See also Eagly & Shafer, supra note 144, at 50 (showing that representation by counsel was associated with a higher rate of success for respondents in removal cases).


305. For example, the nonprofit organization Human Rights First matches asylum seekers with pro bono lawyers and provides volunteers with “mentoring, training, and guidance throughout the representation” to ensure high quality representation. Asylum, HUMAN RIGHTS FIRST, http://www.humanrightsfirst.org/asylum [https://perma.cc/8KA2-3UT5].

review is necessary. We find that judges in different jurisdictions treat family detention cases quite differently. In addition, there is surprising jurisdictional variation in the rates of legal representation and applications for relief. These sorts of patterns are likely to intensify as the Trump Administration hires new immigration judges that lack judicial experience, increases judicial caseloads, and cuts funding to train existing immigration judges. Further research should examine indicators of judicial decision-making beyond grant rate, including steps judges take to facilitate the filing of applications for relief, to notify respondents of their hearings, and to permit sufficient time to find competent counsel. Procedures for hearing bond claims should also be included among priority issues for training and standardization.

Fourth and finally, our Article underscores the vital need for independence of the immigration courts. In particular, our study documents how immigration officials have delayed the timely release of families from detention and erroneously denied their claims of persecution at the asylum office’s screening stage. We find, however, that immigration courts have played an important due process role in reviewing these decisions and charting a different course. We find that over the fifteen years of our study immigration judges

307. See Hon. Denise Noonan Slavin & Hon. Dorothy Harbeck, A View from the Bench by the National Association of Immigration Judges, 63 FED. L.AW. 67, 68 (2016) (recommending that immigration judges “should receive regular training. . . . tailored to the extent possible to the areas in which judges have been found wanting in their respective performance evaluations”).

308. See supra Table 6.

309. Id.


311. Sarah Sherman-Stokes, Immigration Judges Were Always Overworked. Now They’ll Be Untrained, Too, WASH. POST (July 11, 2017), https://www.washingtonpost.com/opinions/immigration-judges-were-always-overworked-now-theyll-be-untrained-too/2017/07/11/e71bb1fa-4e93-11e7-a186-60c031eab44_story.html?utm_term=.2e8782a4e35d [https://perma.cc/65W3-QBSZ] (expressing concern that the Trump Administration simultaneously increased immigration judges’ caseloads and cancelled their annual education program, leaving judges without training or support).

312. See, e.g., Hausman & Srikanthiah, supra note 162, at 1842–43 (arguing that immigration judges should grant continuances that allow a reasonable period of time for an immigrant to search for and retain counsel).

313. For example, training of immigration judges could cover the importance of considering ability to pay and the suitability of alternatives to detention in making bond determinations. See Hernandez v. Lynch, No. EDCV-16-00620-JGB (KKx), 2016 WL 7116611 (C.D. Cal. Nov. 10, 2016) (granting a preliminary injunction requiring immigration judges to consider financial circumstances and alternative conditions of supervision in making bond determinations). The district court’s grant of the preliminary injunction was affirmed by Hernandez v. Sessions, 872 F.3d 976 (9th Cir. 2017).

314. For an argument that immigration courts ought to be moved out of the Department of Justice and made into Article I courts, see Hon. Dana Leigh Marks, An Urgent Priority: Why Congress Should Establish an Article I Immigration Court, 13 BENDER’S IMMIGR. BULL. 3 (2008), http://nieman.harvard.edu/wp-content/uploads/pod-assets/image/microsites/immigration2013/resources/Urgent%20Priority%20FINAL%201-1-08.pdf [https://perma.cc/7Z6H-B236]; see also Slavin & Harbeck, supra note 307, at 70 (advocating the creation of an “independent agency or Article I court”).

315. See supra notes 223, 226 and accompanying text.
reversed negative credible fear findings 48% of the time and reversed negative reasonable fear findings 58% of the time. In the current era of increased immigration enforcement, the independence of immigration courts must be protected in order to preserve their vital function in reviewing the administrative decisions of immigration authorities and asylum officers. It is also crucial that immigration judges are given sufficient time to decide their cases, without the imposition of numerical quotas for case completion.

In conclusion, although the United States has detained families in prison-like facilities since 2001, this study is the first to empirically analyze how these families fared in the immigration court process. We identify multiple barriers that families experience in pursuing asylum and highlight the underappreciated role that immigration courts have played in securing their release from custody and award of asylum. These and other findings are meaningful to current policy debates regarding the role of immigration courts in maintaining due process in the asylum process and the appropriate use of detention to manage the migration of families fleeing violence in their home countries.

APPENDIX

The immigration court data analyzed in this Article were originally collected by the Executive Office for Immigration Review (EOIR), the Justice Department division responsible for administering the United States immigration court system. We obtained these data for analysis from the Transactional Records Access Clearinghouse (TRAC) at Syracuse University. Researchers at TRAC obtained the data from EOIR by submitting requests pursuant to the Freedom of Information Act (FOIA). The court data comes from EOIR’s electronic case management systems—the Automated Nationwide System for

316. See supra Figure 9.
318. For more background on TRAC and its process for gathering public records, see About Us, TRANSACTIONAL REC. ACCESS CLEARINGHOUSE, http://trac.syr.edu/aboutTRACgeneral.html [https://perma.cc/87E3-Q86V].
Before beginning our analysis, we first reviewed the EOIR data for completeness and accuracy. We performed validity checks by comparing the data with the EOIR’s annual statistical reporting of the same data. In addition, we independently filed a FOIA request with EOIR for records from the CASE system for individuals held in family detention centers, and used the data we obtained from EOIR to perform additional validity checks. We also reviewed government and expert witness declarations filed in litigation that relied on EOIR data.

In analyzing the coding used in the EOIR database, we relied on other interpretative materials obtained from EOIR through FOIA requests. These included EOIR’s data coding lookup tables, data management training.

---


321. See generally EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, CASE ACCESS SYSTEM FOR EOIR TRAINING MANUAL, VERSION 4.0 1-1 (2003), http://libguides.law.ucla.edu/ld.php?content_id=38118633 [https://perma.cc/2VME-QD4N] (obtained by authors with FOIA Request #2013-15030) (“CASE is an electronic information management system providing comprehensive support to Immigration Judges (IJ), Board of Immigration Appeals (BIA), and case management support staff. CASE is designed to manage all consolidated records of a case including type, alien information, attorney representation, schedules, rulings and relevant history.”).

322. Each year, EOIR publishes a lengthy statistical report. See, e.g., 2015 EOIR YEAR BOOK, supra note 281.

323. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, FREEDOM OF INFORMATION ACT REQUEST ABOUT DETAINED ADULTS WITH CHILDREN AT FAMILY DETENTION CENTERS (2016) (obtained by authors with FOIA Request #2016-26553) (on file with authors). We thank EOIR’s Associate General Counsel Paul Rodrigues for working with us to obtain these data.


325. Through FOIA requests, TRAC obtained EOIR lookup files that serve as keys for abbreviations and codes used in the database. For a detailed explanation of EOIR’s use of lookup tables, see Declaration of Benjamin B. McDowell at 2, Rodriguez v. Robbins, No. CV 07-3239-TJH (RNBx).
We benefitted enormously from earlier reports and studies about family detention. One of the authors visited the detention facility in Karnes City, Texas and two of the authors visited the detention facility in Dilley, Texas, while volunteering with the CARA Family Detention Pro Bono Project. See CARA, supra note 149.
I. FAMILY DETENTION SAMPLE

This Article studies an analytical sample of individual immigration court proceedings in which one or more hearings in the case history took place at a family detention center. Preparation of the EOIR data for analysis included several coding steps to identify family members that were detained in one of the five family detention facilities studied.

**Family Detention Facilities.** Through our research, we identified five family detention centers that operated in the United States between 2001 and the end of our study period in 2016. These five facilities and their dates of operation as family detention facilities are: (1) Berks Family Residential Facility in Leesport, Pennsylvania, from March 1, 2001, to the end of our study period; (2) T. Don Hutto Residential Center in Taylor, Texas, from May 1, 2006, to September 17, 2009; (3) Artesia Family Residential Center in Artesia, New Mexico, from June 27, 2014, to December 19, 2014; (4) Karnes County Residential Center in Karnes City, Texas, from August 1, 2014, to the end of our study period; and (5) South Texas Family Residential Center in Dilley, Texas, from December 19, 2014 to the end of our study period.  

**Proceedings, Case Identification Numbers, and Pseudo-A Numbers.** EOIR immigration court data are divided into “proceedings,” which are composed of one or more hearings. Sometimes, a single case has more than one proceeding of the same type (e.g., credible fear, reasonable fear, removal, or withholding only), which EOIR links via a unique case identification number (“idncase”). For example, a respondent whose removal proceeding is closed due to administrative reasons (e.g., transfer) may have another removal proceeding opened; both proceedings are linked via the same idncase.

An individual respondent with multiple proceeding types, however, will have different idncase numbers in the EOIR data for each proceeding type. As explained in this Article, multiple proceeding types are not uncommon for detained families. For example, detained families’ cases often begin with a credible fear or reasonable fear review proceeding that, upon adjudication, may lead to a removal or withholding-only proceeding. Up until now, however, EOIR has not provided researchers with a means of connecting the case history of an individual respondent.

In order to address this issue in our research, we worked with TRAC to submit a FOIA request asking for a linking identification number (“pseudo-A number”). Using the respondent-level pseudo-A numbers provided by EOIR, we were able to connect a respondent’s entire case history, spanning more than

---

332. ICE confirmed the dates of operation these facilities in a public record response. See ICE DAILY POPULATION FOIA, supra note 52.

333. Respondents in immigration court are identified with an “alien number,” commonly referred to as an A number; the pseudo-A number does not reveal the individual identity of any given respondent.
one proceeding type. We refer to the final set of linked proceedings as a “case history.”

Fiscal Year. We began with a population of 5,496,991 idncases comprising 7,257,990 unique immigration proceedings in the EOIR database, spanning fiscal year 1950 to proceedings completed or awaiting adjudication at the end of fiscal year 2016. 334 Because our area of interest was the adjudication of cases involving families in detention, a practice that began in 2001, we kept only those idncases and associated proceedings that had the first hearing in fiscal year 2000 or later. 335 Using this method, 3,772,898 individual idncases remained, comprising 5,032,565 unique proceedings and 3,757,092 individual case histories.

Hearing Location and Date. Each EOIR proceeding is composed of one or more scheduled hearings. We coded hearings based on the location of the scheduled hearing, as well as the date of the scheduled hearing. We used these codes to find those proceedings associated with the five family detention centers. We considered a proceeding to have been scheduled in a family detention facility if the location code for either the hearing or the proceeding was associated with one of the five facilities. 336

We note that the hearing location code for Hutto (HUT) only began to be used by EOIR in May 2007, despite the fact that the facility opened and began to house families on May 1, 2006. We therefore relied on the San Antonio Detained (SAD) location code, along with other relevant case information, to identify early Hutto family detainees. 337

334. The federal government’s fiscal year begins on October 1 and ends on September 30 of the following year. The population of proceedings we received included ninety-three proceedings that were completed on October 3, 2016, the start of fiscal year 2017. Where applicable, we include these proceedings in our tallies for fiscal year 2016.

335. To categorize the start date of the idncase, we relied on the earliest hearing date. For those cases without hearing-level data, we used the earliest date that data was input into the CASE system, for example input date (date the proceeding was entered into the CASE system), comp date (completion date of the proceeding), or OSC date (“Order to Show Cause” date).

336. We operationalized the location of a scheduled hearing by relying on both hearing-level and proceeding-level data. At the proceeding level, EOIR chooses one hearing location to represent each proceeding, even if hearings were scheduled in multiple locations. In addition, at the hearing level, EOIR provides information on where each hearing was scheduled. Only slightly more than 2.5% of our family detention proceedings (n = 496) and 3.6% of our non-family detention proceedings (n = 101,929) lacked hearing-level data. In these instances, we relied on the hearing location designated at the proceeding level to make our family-detention proceeding categorization.

337. Prior to May 1, 2006, there were almost no proceedings in SAD that were administratively linked to other family members with a “lead-rider code” (indicating a family, see infra Appendix, Part I, Lead–Rider Code). After May 1, 2006, however, the proportion of proceedings connected to other family members jumped to upwards of 25%, before dropping to almost nonexistence after May 2007, when EOIR began using the HUT code. Therefore, for the period before EOIR officially recognized the HUT hearing location code, we utilize the SAD code as a proxy for HUT for these types of administratively linked family cases (n = 898). Because we find that the lead–rider coding at other
Mixed Facilities. Three of the five facilities (Berks, Hutto, and Karnes) had detained populations other than families in the past. Therefore, in coding cases with hearings in those facilities as family detention cases, we only included those hearings scheduled during the specific dates that these locations operated as a family detention center. 338

We learned from experts in the field that single women were added to the Hutto facility during the final months that it operated as a family detention facility, beginning in approximately January 2009 through to September 17, 2009 (when families were removed entirely from the facility). 339 We deleted these single-woman proceedings from our analytical sample by excluding proceedings that lacked a lead–rider code during this time frame. 340

We were informed by immigration attorneys who practiced at Berks that in the first few years that the facility operated as a family detention facility it held families as well as unaccompanied immigrant children. 341 We were not able to reliably distinguish the Berks cases of families and unaccompanied children in the EOIR data for these years. Therefore, it is possible that the EOIR data we analyzed for these early years included both families and unaccompanied children.

Detention Status. The EOIR data classify each case and its related proceedings with one of three codes for custody status. A detained respondent is coded as “D.” A respondent who is initially detained but later released—on bond or some alternative type of condition—is coded as “R.” If EOIR has no record of a respondent ever having been detained, the code “N” is used. Because we were interested in studying families subject to detention, only those proceedings coded as “D” or “R” were included in our sample.

Proceeding Type. Immigration proceedings are processed according to one of nine different proceeding types. 342 Families subject to detention in our sample

338. Families were held at Berks from March 1, 2001 to the present, at Hutto from May 1, 2006 to September 17, 2009, and at Karnes from August 1, 2014 through the end of our study period. See supra Figure 1.

339. Telephone Interview with Kate Lincoln-Goldfinch, Attorney, Lincoln Goldfinch Law (Apr. 11, 2017) (explaining that unaccompanied children were removed from the facility around 2007).

340. For a discussion of lead–rider coding, see infra notes 344–347 and accompanying text.

341. Telephone Interview with Carol Anne Donohoe, supra note 137. See also Alfonso Chardy, Rights Groups Pleading for Young Guatemalan, HERALD, 3B, Apr. 4, 2002, http://d3n8a8pro7vhmx.cloudfront.net/aijustice/pages/269/attachments/original/1390426310/Childrens Report(pg26-50).pdf?1390426310 [https://perma.cc/64MS-5QW7] (discussing a Guatemalan unaccompanied teenager held in the Berks facility after it started operating as a family facility); Martin, The Geopolitics of Vulnerability, supra note 59, at 484 (noting that the Berks facility “opened as an extension of an existing juvenile detention program which was in compliance with the Flores settlement agreement”).

342. See 2012 EOIR YEAR BOOK, supra note 102, at C1–C4 (defining nine different proceeding types present in the EOIR data: removal, credible fear review, reasonable fear review,
were only subject to four specific proceeding types: credible fear review, reasonable fear review, withholding only, and removal.

Final Family Detention Sample. In total, we identified 18,378 family detention proceedings. Each of these proceedings was associated with the five centers studied: (1) Berks Family Residential Facility (n = 4,086); (2) T. Don Hutto Residential Center (n = 2,928); (3) Artesia Family Residential Center (n = 1,316); (4) Karnes County Residential Center (n = 3,760); and (5) South Texas Family Residential Center (n = 6,293).

These 18,378 family detention proceedings were divided across four different proceeding types: 19% credible fear review (n = 3,547); 3% reasonable fear review (n = 469); 4% withholding only (n = 694); and 74% removal (n = 13,668). They included 12,785 released and 5,593 detained proceedings. In total, these 18,378 proceedings represented the unique case histories for 16,677 individual respondents.

Our study analyzed family detention—that is, an adult detained together with at least one child. To assess the ability of our coding strategy to identify these family detention proceedings, we relied on two additional types of coding: lead–rider codes and adults-with-children priority codes.

Lead–Rider Code. EOIR’s case management system allows the proceedings of multiple individuals to be grouped together. When individuals are grouped together in this way, one case becomes the “lead case” and all others belonging to the group become “rider cases.” A case can become a rider at the time it is created in EOIR’s system (called “Adding a Rider”), or after it is already established as a single case (called “Joining a Rider”). Although a hearing can be scheduled for a rider without his or her lead, the lead and rider are often scheduled together.

Adults-with-Children Priority Codes. On July 9, 2014, EOIR announced that it would begin to assign “priority codes” to children and families, so that immigration judges would prioritize these cases. Since this priority code

claimed status review, asylum only, rescission, continued detention review, NACARA, and withholding only).

343. Five cases were associated with two different facilities due to transfers from one facility to another. These cases are analyzed once in aggregate family-detention statistics but are analyzed multiple times for each family detention facility with which they are associated.
344. See LEAD AND RIDER GUIDE, supra note 326, at I-2; 2013 UNIFORM DOCKETING MANUAL, supra note 326, at I-2.
345. LEAD AND RIDER GUIDE, supra note 326, at 1.
346. Id. at 7.
347. Id. at 15.
348. A priority code is assigned to an individual by DHS with the Notice to Appear. Exhibit E, Plaintiffs’ Complaint, Lawyers’ Committee for Civil Rights of the San Francisco Bay Area v. Exec. Office for Immigration Review, Case 4:16-cv-00544-KAW, at 5 (filed Feb. 2, 2016) (discussing how AWC codes are assigned in FOIA response from the U.S. Department of Justice Executive Office for
system only began in 2014, it did not cover all of our data. However, for the time period following July 2014, we were able to rely on two codes in identifying family units: adults with children in detention (AWC/D) and adults with children released through alternatives to detention (AWC/ATD).

Using both lead–rider and adults-with-children priority codes, we were able to further evaluate the validity of our data sample. Of the 16,677 respondents associated with family detention, 92% had either a lead–rider code or adult-with-children priority code associated with their case history. This provides additional evidence that our coding strategy captured individuals who experienced family detention.

II. NON-FAMILY DETENTION SAMPLE

This Article relies on a sample of non-family detention cases to compare against the profile of our family detention sample. We define non-family detention cases as those individuals who were detained at some point in their case adjudication but were not associated with one of the five family detention centers. We took several steps to create this “non-family detention” sample.

We began with the same population of 5,032,565 unique EOIR proceedings (with their initial hearing in fiscal year 2001 or later) that we discussed in Part I of this Appendix. Next, we limited the sample to detained or released


350. In our analysis, we found that cases retained the initial priority code designation, regardless of the subsequent custody status. See generally Exec. Office for Immigration Review, U.S. Dep’t of Justice, EOIR Docketing and Scheduling Quick Reference Sheet, http://libguides.law.ucla.edu/id.php?content_id=38119027 [https://perma.cc/4RQ2-YDN2] (obtained by authors with FOIA Request #2016-26552) (setting forth how priority cases are identified in the coding); Exec. Office for Immigration Review, U.S. Dep’t of Justice, Prioritization of Cases in Immigration Court, http://libguides.law.ucla.edu/id.php?content_id=38119048 [https://perma.cc/6GJV-GQU2] (obtained by authors with FOIA Request #2016-26552) (“Last summer, EOIR and ICE created four priority categories of individuals who crossed the border after May 1, 2014: (1) unaccompanied children; (2) families placed in an ICE family residential unit; (3) families not placed in an ICE family residential center but identified for potential enrollment in an Alternatives to Detention (ATD) program; and (4) other border crossers, primarily single males, placed in detention by ICE.”).

351. To categorize the start date of the idncase, we relied on the earliest hearing date. For those cases without hearing-level data, we used the earliest date that data was input into the CASE system (input date, comp date, or OSC date).
proceedings and to the same four proceeding types as found in our family detention sample: credible fear review, reasonable fear review, withholding only, and removal. Finally, we removed all individuals whose case history included a family detention proceeding. After following these steps, we had 2,807,814 non-family detention proceedings remaining in the sample. These proceedings were 55% detained throughout the entire case (n = 1,553,037), and 98% comprised of removal proceedings (n = 2,755,862).

III. ADDITIONAL CODING

This Part describes additional EOIR coding that we relied on in our analysis for this Article.

A. Proceeding and Case History Duration

We measured the duration of concluded proceedings as the time between the initial hearing and the last hearing adjournment date in the proceeding. In the few cases where no hearing data were available, we measured the time between the earliest date associated with the proceeding in the EOIR database and the completion date of the proceeding to measure the duration of the relevant proceeding.

Because a respondent’s case history may entail multiple proceeding types (e.g., credible fear and removal), we looked across the respondent’s entire case history to measure case history duration. Using the pseudo-A number, we measured the total case history duration as the time between the initial hearing in the case and the last adjournment date of the last proceeding type in the case history. In situations where no hearing data were available for the earliest or last proceeding, we used the earliest date entered into the EOIR database and the completion date of the proceeding.

352. In total, these 2,807,814 proceedings represent the unique case histories for 2,003,896 individual respondents.

353. Although we refer to this sample as non-family detention proceedings, it is important to note that a very small number may have family members associated with their case. In total, 1.5% of these proceedings had a lead–rider code (n = 43,459) and less than 0.5% had an adults-with-children priority code (n = 9,074). The fact that lead–rider codes rarely appear in the non-family detained context (and in greater proportion for family detained) suggests that our coding strategy effectively distinguished between family detained and non-family detained respondents.

354. In instances where there were multiple proceedings of the same type in a row (for example, two removal proceedings), we measured the duration from the initiation of the first to the completion of the last proceeding.

355. Specifically, we subtracted the last scheduled hearing date for the most recent hearing from the earliest listed date in the respondent’s case history (hearing date or, if missing, comp date, OSC date, or input date). For those cases completed in one hearing, we calculated the case history length as one day. For a small number of cases that lacked hearing-level data at the most recent proceeding (n = 31), we used the completion date as a proxy for the latest scheduled hearing date.
completion date of the latest proceeding. Finally, in measuring case history duration, we conducted additional validity checks on detention periods in never-released cases in our family detention sample that involved detention periods of six months or longer.356

B. Bond Hearings

We counted a proceeding as having a bond (custody) hearing if there was an entry in the associated data table provided by EOIR containing bond data associated with a respondent’s proceeding.357 We treated two decision codes (dec_code) as successful outcomes for the respondent: (1) “new amount” (i.e., the bond amount changed after the custody hearing) and (2) “own recognizance” (i.e., respondent was released on recognizance without a cash bond). For respondents with multiple bond hearings, we analyzed the outcome of the last bond hearing. We are especially grateful to Sue Long of TRAC for her guidance with this analysis.

C. Case Outcomes

Application for Relief. We considered family members as having applied for relief if they submitted at least one affirmative application for relief.358 The major types of relief pursued by families housed in one of the five family detention facilities are: asylum,359 withholding under the Convention Against

356. Based on these validity checks, we manually adjusted the start date in thirteen cases in which individuals reentered the country following an initial removal that incorrectly appeared as a longer period of detention due to our linking process. We also adjusted the start date in twelve other cases in which there were two separate periods of detention, but not as a result of a reentry. In addition, we adjusted the release date in fifteen cases in which the detention period ended prior to the recorded end date. In cases where the individual appeared to have been released—for example, where a low bond was granted and the following hearing occurred at a nondetained hearing location—we used three proxies for release date. Namely, we counted the release date as the date bond was granted, the date of a hearing with the adjournment code “Alien Released from DHS/Corrections Custody,” or the date of the last hearing at a detained hearing location. If multiple dates were available, we used the earliest one. For example, where a bond of $0 was granted and the case was transferred to a nondetained hearing location, we counted the individual as released as of the bond grant date. This approach, however, likely undercounts detention length, since it can take days for an individual to be released, even after the judge has granted bond. Finally, based on this analysis, we dropped eleven cases from our case history length analysis, as well as from our family detention data set, that did not appear to follow family detention patterns.

357. We counted all types of bond hearings present in the data (for example, motions for bond determination, motions for subsequent bond determination, and motions for custody determination).

358. Note that if the respondent withdrew a relief application before the judge ruled on the merits of the application, we still counted the respondent as having sought relief.

Grant of Relief. We counted a respondent as receiving relief in a removal or withholding-only proceeding if the case was coded at the proceeding level as receiving relief.\textsuperscript{363}

Voluntary Departure. A noncitizen in removal proceedings may apply for permission to leave the United States “voluntarily,” instead of by order of an immigration judge. Voluntary departure avoids certain harsh consequences of a judge-issued removal order, such as bars to lawful readmission.\textsuperscript{364} However, given that respondents granted voluntary departure must leave the country, we treated voluntary departure as a form of removal (rather than relief) and did not consider an application for voluntary departure as an application for relief.\textsuperscript{365}

In Absentia Removal. Immigration judges have the authority to enter removal orders against respondents who fail to appear at their hearings.\textsuperscript{366}

360. Under the U.S. Department of Justice’s regulations implementing the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), noncitizens in removal proceedings must not be removed to a particular country if it is “more likely than not” that they will be tortured there. 8 C.F.R. § 208.17(b)(1) (2018).

361. Section 241(b)(3) withholding of removal is a form of relief that must be granted for noncitizens whose lives would be threatened if they returned to their country of origin, based on race, religion, nationality, membership in a particular social group, or political opinion. I.N.A. § 241(b)(3), 8 U.S.C. § 1231(b)(3) (2012).

362. Section 240A(a) cancellation of removal, commonly known by the application form name EOIR-42a, is a form of relief from removal available to noncitizens who have been lawfully admitted for permanent residence for at least five years and have resided continuously in the United States for seven years after lawful admission, as long as they have not been convicted of an “aggravated felony,” as defined in I.N.A. § 101(a)(43). I.N.A. § 240A(a), 8 U.S.C. § 1229b(a) (2012). Section 240A(b) cancellation of removal, commonly known by the application form name EOIR-42b, is a form of relief from removal available to noncitizens without legal status who have been physically present in the United States for a continuous period of ten years and who have not been convicted of various offenses, including crimes involving moral turpitude, drug offenses, or falsification of documents. I.N.A. § 240A(b)(1), 8 U.S.C. § 1229b(b)(1). To qualify, the applicant must demonstrate that removal would cause exceptional and extremely unusual hardship to a citizen or lawful permanent resident spouse, parent, or child. I.N.A. § 240A(b)(1)(D), 8 U.S.C. § 1229b(b)(1)(D).

363. In withholding-only cases, family members may not apply for asylum, but rather are limited to applying for withholding of removal or Convention Against Torture relief. These forms of relief do not result in a permanent-resident status and continue only as long as the noncitizen demonstrates eligibility. Richard Steel, Steel on Immigration Law § 8:15 (2014). Geoffrey Heeren has characterized these forms of relief as conferring only “nonstatus,” a type of relief that is discretionary, temporary, and does not confer full rights associated with lawful status. Geoffrey Heeren, The Status of Nonstatus, 64 Am. U. L. Rev. 1115, 1142–46 (2015).

364. See I.N.A. § 240B, 8 U.S.C. § 1229c (2012) (permitting an alien to leave the United States voluntarily with permission of the Attorney General instead of being found deportable); see also 8 C.F.R. § 1240.11(b) (2018) (“The alien may apply to the immigration judge for voluntary departure in lieu of removal pursuant to section 240B of the Act . . . .”).

365. This approach follows that adopted by EOIR, which defines voluntary departure as “a form of removal, and not a type of relief.” 2015 EOIR Yearbook, supra note 281, at O1.

enter a removal order in absentia, the government must present “clear, unequivocal and convincing evidence” that the respondent is removable.\footnote{\textit{8 C.F.R.} \S\ 1003.26 (2018).}

\textbf{D. Respondent Characteristics}

In conducting the analysis presented in this Article, we also coded the EOIR data for additional respondent characteristics.

\textit{National Origin.} Each respondent was coded in the EOIR data for a single national origin. The respondent’s nationality did not vary across idnecases or proceeding types for a single pseudo-A number. Individuals who were stateless or had no known nationality comprised less than 1\% of the family detention sample and were categorized as “Other” for the purpose of our national origin analysis.

\textit{Language.} Each respondent was coded in the EOIR data at the respondent level for a single language. In total, proceedings with no reported language comprised less than one-quarter of 1\% of our samples \((n = 7)\) family detained proceedings and \(n = 9,990\) non-family detained proceedings. These proceedings were categorized as “Other” for the purpose of our language analysis.

\textbf{E. Counsel}

\textit{Attorney Information.} EOIR maintains a database of attorney-level characteristics for each attorney who appears in immigration court. These characteristics include attorney name, firm name, and firm address, as well as the same unique EOIR attorney identification code as included in the hearing-level data (eoirattorneyid).

\textit{Attorney Type.} To characterize the type of attorney representing each respondent, we coded each attorney as being involved in one of several organizational types: nonprofit (including religious organizations and public defenders providing immigration services); law school clinic; large firm (more than 100 attorneys); medium firm (from 11 to 100 attorneys); small firm (10 or fewer attorneys).

\textit{Representation by Counsel.} We measured proceeding-level representation as occurring if (1) the respondent had a Notice of Entry of Appearance form (known as an “EOIR-28”) filed with the court prior to the completion of the relevant proceeding; or (2) an EOIR-28 form was filed after the completion date of the relevant proceeding, but an attorney appeared in at least one hearing during the relevant proceeding.\footnote{This methodology follows that established in an earlier study by Eagly and Shafer. See Eagly & Shafer, \textit{supra} note 144, at 15.} For purposes of measuring whether an attorney appeared in court on behalf of a respondent, we relied on the EOIR attorney identification code entry at the hearing level (eoirattorneyid). Approximately 3\% of the family detained (and 4\% of the non-family detained) respondents lacked
hearing-level data. In these instances, we relied solely on the filing of the EOIR-28 form prior to the completion of the relevant proceeding to measure whether an attorney provided representation.