

ABOLITION OF IMMIGRANT FAMILY DETENTION: TRACING AN EVOLVING STANDARD OF DECENCY FROM SEPARATION THROUGH IMPRISONMENT

*Daniel Hatoum**

I. INTRODUCTION

For me those months were so desperate. I didn't even eat or sleep. I felt traumatized and the worst was when I looked at them and asked for my child the first thing they said was that he had been given up for adoption. I just cried and cried. We left our country to protect our children and to offer them a better future, not so that they would separate us from them and not for them to treat us like criminals. The mark left on each of us the mothers and children from having lived this torment is one of the saddest things in our lives. I thank God for giving me the strength, hope, and will to keep fighting for God. There is no more beautiful miracle than knowing that outside there are people who are supporting us and that we are not alone.¹

The above account is by one of the hundreds of mothers separated from their children and placed in immigration detention pursuant to the federal government's "zero tolerance" policy.² This policy, enacted in the spring of 2018 to deter immigrant arrivals, led to the swift separation of hundreds of arriving immigrant parents from their children.³ While it was

* Attorney and Civil Rights Fellow. I'm grateful for the encouragement of my mentors, such as Ranjana Natarajan and Denise Gilman, who have always encouraged me to fight injustice wherever I see it. I would also like to thank Gail Weinstein—an M&A attorney who took it upon herself to help immigrants in need, and for drafting me into service of this cause once again. Finally, I'm grateful to the *Hofstra Law Review* staff, who have worked hard and been a phenomenal team to work with on this piece.

1. Tal Kopan, 'I Wouldn't Wish It Even on My Worst Enemy': Reunited Immigrant Moms Write Letters from Detention, CNN (Sept. 30, 2018), <https://www.cnn.com/2018/09/30/politics/separated-mothers-reunited-letters/index.html>.

2. *Id.*

3. See Luis Sanchez, *Homeland Security Docs Show Admin Thought Zero Tolerance Policy*

happening, advocates, lawyers, and psychologists documented the extreme pain that the separation inflicted on immigrant families.⁴ It was akin to torture.⁵ Luckily, the response from the public was swift as well. Activists, including people who had never organized before, mounted massive protests in opposition to the policy.⁶ In response to the public outcry, President Donald Trump signed an executive order in June 2018 ending the Administration's policy that separated immigrant children from their parents.⁷

The overwhelming protests demonstrated that the Administration's actions offended the country's collective sense of moral responsibility towards immigrant families. Yet, lurking in the executive order was an expansion of another dark practice—Immigration Family Detention—a practice of placing immigrant children in detention with their parents.⁸ The Trump Administration has dramatically implemented immigration family detention. Today, “[f]amilies are being imprisoned on a mass scale, the largest instance of family detention by the U.S. government since the internment of Japanese-Americans during World War II.”⁹ Yet, “[e]ven ignoring its questionable legality, detaining entire families does not make our communities safer. What it does is make children suffer.”¹⁰

Would Deter Border Crossers: Report, THE HILL (June 18, 2018), <https://thehill.com/homenews/administration/392794-private-dhs-documents-show-zero-tolerance-policy-has-not-deterred>; Leslie Shapiro & Manas Sharma, *How Many Migrant Children Are Still Separated from Their Families?*, WASH. POST (Aug. 30, 2018), https://wapo.st/2OSNJwa?tid=ss_mail.

4. See Kevin Loria, *Trump Now Claims Migrant Children Will Be Reunited With their Families. Here Are the Lifelong Psychological Consequences These Kids Face*, BUS. INSIDER (June 21, 2018), https://www.businessinsider.com/how-family-separation-and-detention-affect-children-2018-6?utm_source=copy-link&utm_medium=referral&utm_content=topbar&utm_term=desktop (documenting the impacts of family separation).

5. *USA: Policy of Separating Children from Parents Is Nothing Short of Torture*, AMNESTY INT'L (June 18, 2018), <https://www.amnesty.org/en/latest/news/2018/06/usa-family-separation-torture>.

6. Gillian Flaccus & Amy Taxin, *Family Separations Push New Protesters to Join Immigrant Activists*, PBS (June 29, 2018), <https://www.pbs.org/newshour/nation/family-separations-push-new-protesters-to-join-immigrant-activists>.

7. Louise Radnofsky, Siobhan Hughes, & Sadie Gurman, *Trump Retreats After Fury Over Border Separations*, WALL ST. J. (June 20, 2018), <https://www.wsj.com/articles/donald-trump-pledges-to-order-end-of-immigrant-family-separations-1529511546>. See generally Politico Staff, *Full Text: Trump's Executive Order Ending Family Separations*, POLITICO (June 20, 2018), <https://www.politico.com/story/2018/06/20/full-text-trump-executive-order-family-separations-transcript-658639>.

8. Politico Staff, *supra* note 7.

9. Lynnette Arnold & Miranda Cady Hallett, *Locking Up Families Is Inhumane—and Unconstitutional*, SAPIENS (Mar. 17, 2017), <https://www.sapiens.org/culture/family-detention-unconstitutional>.

10. Art Acevedo & Mark Prosser, *Family Detention Is Not the Solution to Family Separation*, THE HILL (June 28, 2018), <https://thehill.com/opinion/immigration/394732-family-detention-is-not>

Specifically, children and parents in immigration detention experience severe and lifelong adverse psychological harm from detention, on par with the harms of being separated.¹¹ This is not just caused by the act of detention, but also by deplorable conditions. It is also because family detention forces migrants to watch their loved ones suffer in incarceration as well. Despite the harm detention causes, past legal challenges have been unsuccessful in abolishing the practice altogether.

Yet, this Article argues that there is a legal justification to judicially abolish immigrant family detention.¹² Specifically, in the wake of the political response to family separation, and recent responses to immigration detention, there is a new path to arguing that the practice is constitutionally suspect: the internment of immigrant children with their parents violates an evolving standard of decency, which is enshrined in the Fifth Amendment Due Process Clause.¹³ Accordingly, courts are empowered to end the practice.

An evolving standard of decency originally comes from the Eighth Amendment, which applies to criminal detention.¹⁴ Under this standard, a court would ask whether society has evolved beyond a particular punishment or prison condition of confinement, and if society has evolved beyond that point, then the punishment is no longer constitutionally tolerable.¹⁵ While immigration detention is civil, a careful reading of case law demonstrates that the standard used to evaluate immigration detention conditions under the Fifth Amendment must also be an evolving standard of decency, albeit, one that is even higher than that used to evaluate prison conditions.¹⁶ Because an evolving standard applies, courts should apply the same factors used to determine whether society has evolved beyond a particular punishment to determine if society has evolved beyond family detention, but also give more deference to the detainees. Those factors are the decisions of international and domestic rule makers, as well as empirical research to determine what current decency demands. Under

the-solution-to-family-separation.

11. Jamie Ducharme, *Separating Kids from Parents Can Cause Psychological Harm. But Experts Say Detaining Them Together Isn't Much Better*, TIME (June 21, 2018), <http://time.com/5317762/psychological-effects-detaining-immigrant-families>.

12. See *infra* Part III.

13. U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty or property without due process of law”).

14. U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”); see Adam Ortiz, *Cruel and Unusual Punishment: The Juvenile Death Penalty Evolving Standards of Decency*, AM. BAR ASS’N JUV. JUST. CTR. (Jan. 2004), https://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_juvjus_EvolvingStandards.authcheckdam.pdf.

15. Ortiz *supra* note 14.

16. See *infra* Part III.A.

such an analysis, the detention of immigrant children with their parents cannot conform to our current standard of decency—especially in light of viable alternatives—and should be judicially abolished.

Part II of this Article describes the horror of immigrant family detention and its history, including the Trump Administration’s expansion of post-family separation.¹⁷ This section serves two purposes: first, it provides helpful background information; and second, it serves to chronicle the inhumanity of family detention—a necessary component to argue that such conditions violate current standards of decency.¹⁸ Part III discusses the evolving standard of decency, and how it is jurisprudentially applied.¹⁹ Finally, Part III also discusses the application of the evolving standard of decency to civil immigration family detention and concludes that under this standard, the practice must be abolished.²⁰

II. HOW DID WE GET TO THIS POINT?

Immigration detention is the process whereby immigrants are incarcerated in what are essentially immigration prisons.²¹ They are considered secure facilities, are manned by guards, and have limited access to the outside world.²² The prison-like nature of immigration detention facilities is further demonstrated by the fact that scores of contracts to operate immigration detention facilities are with well-established private prison companies.²³

Family immigration detention is immigration detention whereby parents are detained with their children.²⁴ Some facilities are exclusive to mothers and their children, and some house men.²⁵ Through family detention, the United States incarcerates children, including babies and toddlers.²⁶ Antonio Ginatta, the advocacy director for Human Rights

17. See *infra* Part II.

18. See *infra* Part II.

19. See *infra* Part III.

20. See *infra* Part III.

21. Livia Luan, *Profiting from Enforcement: The Role of Private Prisons in U.S. Immigration Detention*, MIGRATION POL’Y INST. (May 2, 2018), <https://www.migrationpolicy.org/article/profitting-enforcement-role-private-prisons-us-immigration-detention>.

22. See generally *id.*

23. *Id.*

24. Amanda Sakuma, *The Failed Experiment of Immigrant Family Detention*, MSNBC (Aug. 3, 2015, 10:45 AM), <http://www.msnbc.com/msnbc/failed-experiment-immigrant-family-detention>.

25. See Jacob Pramuk, *A Controversial Detention Center in Pennsylvania Could Be a Model as Trump Looks to Detain Migrant Families Together*, CNBC (July 17, 2018, 11:43 AM), <https://www.cnbc.com/2018/07/17/berks-county-pennsylvania-detention-center-could-be-model-for-trump.html> (noting that the Berks family detention facility is the only facility to hold fathers).

26. See Wendy Cervantes, *Fact Sheet: Baby Jails Are Not Child Care*, CLASP (Feb. 2018), <https://www.clasp.org/sites/default/files/publications/2018/02/Baby%20Jails%20are%20not%20Chi>

Watch, had this to say after his visit to one such facility: “Karnes [Immigration Family Detention Center] was quite the visit for me. There’s nothing like walking into a prison and the first thing you hear is a crying baby.”²⁷

Still, others have argued that the immigration detention centers are internment camps, comparable to those used to imprison Japanese Americans during World War II—especially the family detention facilities.²⁸ For example, Satsuki Ina, Professor Emeritus at California State University, is a survivor of Japanese Internment.²⁹ After visiting a family detention facility, she penned a statement for the American Civil Liberties Union, saying that “I certainly never expected to see other families incarcerated just as my own family had been 73 years ago [during Japanese Internment],” but “I know an American internment camp when I see one.”³⁰

A. *The United States’ Initial Implementation of Immigration Detention*

The United States government has the world’s largest and most robust system of immigration detention.³¹ “In 2016, the United States government detained nearly 360,000 people in a sprawling system of over 200 immigration jails across the country.”³² Arguably the first detention center was on Ellis Island. Ellis Island was established pursuant to federal immigration powers bestowed on the executive branch by the Immigration Act of 1882.³³ And in 1893, Congress passed laws requiring

ld%20Care.pdf.

27. LUTHERAN IMMIGRATION & REFUGEE SERV. & WOMEN’S REFUGEE COMM’N, LOCKING UP FAMILY VALUES, AGAIN: THE CONTINUED FAILURE OF IMMIGRATION FAMILY DETENTION I (Oct. 2014), http://lirs.org/wp-content/uploads/2014/11/LIRSWRC_LockingUpFamilyValuesAgain_Report_141114.pdf [hereinafter LOCKING UP FAMILY VALUES, AGAIN].

28. See, e.g., Daniel Hatoum, *Supreme Court’s Jennings Ruling Darkly Echoes WWII Japanese Internment Camps*, KANSAS CITY STAR (Mar. 12, 2018; 4:27 PM), <https://www.kansascity.com/opinion/readers-opinion/guest-commentary/article204399744.html>; Laila Lalami, *How the Trump Administration Is Normalizing Immigrant Internment Camps*, THE NATION (July 20, 2018), <https://www.thenation.com/article/trump-administration-normalizing-immigrant-internment-camps>; Erin Rubin, *A Revival of Internment Camps? Proposal Floated for Indefinite Family Detention*, NONPROFIT QUARTERLY (Sept. 13, 2018), <https://nonprofitquarterly.org/2018/09/13/a-revival-of-internment-camps-proposal-floated-for-indefinite-family-detention>.

29. Satsuki Ina, *I Know an American ‘Internment’ Camp When I See One*, ACLU (May 27, 2015; 10:45 AM), <https://www.aclu.org/blog/speak-freely/i-know-american-internment-camp-when-i-see-one>.

30. *Id.*

31. *United States Immigrant Detention Profile*, GLOBAL DETENTION PROJECT (May 2016), <https://www.globaldetentionproject.org/countries/americas/united-states>.

32. *Immigration Detention 101*, DETENTION WATCH NETWORK, <https://www.detentionwatchnetwork.org/issues/detention-101> (last visited Sept. 17, 2019).

33. Immigration Act of 1882, ch. 376, 22 Stat. 214 (1882); *United States Immigrant Detention*

detention of persons not entitled entry to the United States.³⁴ The federal government, however, retained discretion in order to release certain individuals—which remains the scheme today.³⁵

Initially, after Ellis Island closed in 1954, the practice of immigration detention faded, only to experience a resurgence in the 1980s.³⁶ Following an increased use of incarceration in the United States, the federal government opened detention facilities to hold an increasing number of Cuban and Haitian refugees coming to the United States.³⁷ Also, in the 1980s, private prison companies, such as the Corrections Corporation of America (now called CoreCivic)³⁸ and Geo Group, Inc. (“Geo Group”),³⁹ began to win government contracts to operate the facilities.⁴⁰ In 1985, the Corrections Corporation of America, in conjunction with the federal government, opened the first facility to detain immigrant infants and children.⁴¹

Then, during the height of the War on Drugs in 1988, Congress passed new laws that required the detention of immigrants with certain criminal convictions.⁴² This was later expanded in 1996 by the Anti-terrorism and Effective Death Penalty Act to include broader categories of mandatory detention, including those with minor drug offenses.⁴³ The 1996 Illegal Immigration Reform and Immigrant Responsibility Act also expanded the crimes that required mandatory detention.⁴⁴ Ultimately, these mandatory detention laws meant a serious expansion of immigrant detention, because such individuals must be detained and United States Immigration and Customs Enforcement (“ICE”) cannot even exercise discretion to release them.⁴⁵

Profile, *supra* note 31.

34. *A History of Immigration Detention*, FREEDOM FOR IMMIGRANTS, <https://www.freedomforimmigrants.org/detention-timeline> (last visited Sept. 17, 2019).

35. *Id.*; ACLU Analytics and Immigrants’ Rights Project, *Discretionary Detention by the Numbers*, ACLU, <https://www.aclu.org/issues/immigrants-rights/immigrants-rights-anddetention/discretionary-detention>. (last visited Sept. 17, 2019).

36. *Immigration Detention 101*, *supra* note 32; *see also A History of Immigration Detention*, *supra* note 34.

37. *Immigration Detention 101*, *supra* note 32.

38. CORECIVIC, <http://www.corecivic.com> (last visited Sept. 17, 2019).

39. THE GEO GROUP, INC., <https://www.geogroup.com> (last visited Sept. 17, 2019).

40. *A History of Immigration Detention*, *supra* note 34.

41. *Id.*

42. *Id.*

43. Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214; *Analysis of Immigration Detention Policies*, ACLU, <https://www.aclu.org/other/analysis-immigration-detention-policies> (last visited Sept. 17, 2019).

44. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546; *Analysis of Immigration Detention Policies*, *supra* note 43.

45. *Analysis of Immigration Detention Policies*, *supra* note 43.

B. How Is Someone Placed in Immigration Detention?

Detainees end up in immigration detention in one of two ways. First, the detainee could arrive at an official port-of-entry and declare that they have a credible fear of returning home.⁴⁶ Alternatively, the immigrant is apprehended in the United States, discovered to be undocumented, and is placed in deportation proceedings.⁴⁷ In both instances, after initial apprehension, the immigrant is sent to a temporary holding facility. The immigrant could be held in a county jail, although most commonly, the immigrant is detained in a United States Customs and Border Protection facility.⁴⁸

These facilities are known as “*hieleras*,” or “iceboxes,” because they are extremely cold and sparse.⁴⁹ Immigrants feel as if they have been dropped in an icebox. Detainees in *hieleras* are “held for days in rooms kept at temperatures so low that men, women[,] and children have developed illnesses associated with the cold, [and detainees have also suffered from] lack of sleep, overcrowding, and inadequate food, water[,] and toilet facilities.”⁵⁰ However, detention in such facilities is intended to be short, and after a few days, immigrants are typically taken to detention facilities.⁵¹ It is at these facilities that the immigrants will languish as they await the results of their immigration legal battles, and if they lose, continue to wait as their deportation is processed.⁵²

Being a legal proceeding, asylum adjudication is not exactly hyper-efficient. Initially, while detained at the facility, the immigrant will receive a “credible fear interview” (“CFI”).⁵³ The purpose of this interview is to determine if the immigrant has a credible fear of returning to their home country, and it is conducted by an employee of the Department of Homeland Security (“DHS”) known as an “asylum officer.”⁵⁴ If the immigrant passes this interview, then they are entered into formal asylum proceedings before an immigration judge and receive

46. Daniel Hatoum, *America’s Modern Day Internment Camps: The Law of War and the Refugees of Central America’s Drug Conflict*, 21 TEX. J. C.L. & C.R. 61, 65 (2015).

47. See Sara Wise & George Petras, *The Process of Deportation*, COMMERCIAL APPEAL (June 25, 2018), <https://www.commercialappeal.com/pages/interactives/graphics/deportation-explainer/>.

48. Hatoum, *supra* note 46, at 65.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 66.

53. *Id.* at 65.

54. Jack Herrera, *Trump Wants to Train Border Patrol to Conduct Asylum Interviews*, PAC. STANDARD (May 1, 2019), <https://psmag.com/news/trump-wants-to-train-border-patrol-to-conduct-asylum-interviews>.

a formal court date.⁵⁵ If an asylum officer determines an immigrant does not have a credible fear of return, then the immigrant can go before an immigration judge to have the determination overturned.⁵⁶ While awaiting this proceeding, an immigrant can seek a stay of deportation. The judge can either affirm the decision, reverse it and demand a new interview, or find that the immigrant had a credible fear of returning to their home country.⁵⁷ If the judge affirms a negative decision, an immigrant can file a Request for Reconsideration (“RFR”) directly with the asylum officer to have them reconsider the initial decision.⁵⁸ Like with an appeal, while an initial RFR is being considered the immigrant can seek a stay of deportation.⁵⁹ Even if the immigrant receives a negative response to the first RFR, the immigrant may renew the request.⁶⁰

What was just described comprises the very beginning of the process, so it is understandable that these processes can sometimes take long stretches of time. After that is over, the immigrant is put in formal proceedings.⁶¹ Such proceedings will involve multiple hearings, and following the hearings, the possibility of appeal.⁶² It can even take years to schedule an asylum hearing because immigration courts are horribly backed up.⁶³

Both the immigrant and the government can appeal a decision to the Board of Immigration Appeals (“BIA”) if either disagrees with the results of the asylum hearing.⁶⁴ The parties can appeal the BIA’s decision to the Federal Circuit Court with jurisdiction.⁶⁵ So even if an immigrant wins their initial asylum hearing, that decision could be reversed by the BIA, a new hearing held, appealed, affirmed by the BIA, and reversed by the Court of Appeals for a new hearing, and so on and so forth. Accordingly,

55. Hatoum, *supra* note 46, at 65.

56. *Id.* at 66.

57. *Id.*

58. Katherine Shattuck, Comment, *Preventing Erroneous Expedited Removals: Immigration Judge Review and Requests for Reconsideration of Negative Credible Fear Determinations*, 93 WASH. L. REV., 459, 500-05 (2018).

59. *Id.* at 504. (noting that until 2014 there was a “gentlemen’s agreement” that while an RFR was pending removal would be stayed).

60. See ASYLUM SEEKER ADVOCACY PROJECT, VINDICATING THE RIGHTS OF ASYLUM SEEKERS AT THE BORDER AND BEYOND 47 (2018), <https://asylumadvocacy.org/wp-content/uploads/2018/06/ASAP-Expedited-Removal-Guide.pdf>.

61. Hatoum, *supra* note 46, at 65-66.

62. *Id.*

63. Nolan Rappaport, *Even with No New Arrests, It Would Take Four Years to Eliminate Immigration Court Backlog*, THE HILL (Aug. 6, 2018), <https://thehill.com/opinion/immigration/400627-is-the-drop-in-credible-fear-findings-an-omen-that-hard-times-are>.

64. Hatoum, *supra* note 46, at 65-66.

65. *Id.*

immigrants can, and do, languish for long periods of time in immigration detention awaiting the determination of their legal cases.

C. *The Flores Litigation*

Also relevant to understanding the history leading to family detention, is the seminal authority governing conditions of immigrant children, *Reno v. Flores*,⁶⁶ and the Flores Settlement Agreement, which resulted from that litigation.⁶⁷ Jenny Lisette Flores was a teenage immigrant from El Salvador held in an immigrant juvenile detention facility in the 1980s.⁶⁸ Jenny's mother lived in the United States without documentation, and Jenny's father had been killed in El Salvador, leading her to seek refuge in the United States.⁶⁹ As part of her detention, she was subject to horrible conditions, handcuffing, and strip searches.⁷⁰ Jenny's facility was a 1950s-style hotel surrounded by chain-link fences.⁷¹ Usually, four kids were kept to a room.⁷² Unrelated adults of both sexes were also housed with the children.⁷³ There was no school, and really no accommodations for children.⁷⁴

The government refused to release Jenny to her cousin, who was residing in the United States with documentation, saying that, per government regulations, an immigrant juvenile may only be released to a parent, legal guardian, grandparent, or aunt or uncle.⁷⁵ Several organizations sued, bringing a class action on behalf of Jenny and similarly situated children in detention, with Jenny Flores as the named representative.⁷⁶ To be aggressively clear: *Flores* is about juveniles held in detention without their parents, but some of its most lasting impacts have been on family detention.⁷⁷ Relevant for this Article's analysis, the advocates argued, among other things, that children's substantive due process rights under the Fifth Amendment were violated—mainly the children's right to be free from detention—by the refusal to release

66. 507 U.S. 292 (1993).

67. Elizabeth Elkin & Emily Smith, *What Is the Flores Settlement?*, CNN (July 10, 2018), <https://www.cnn.com/2018/07/10/politics/flores-settlement-history/index.html>.

68. *Id.*

69. All Things Considered, *The History of the Flores Settlement and Its Effects on Immigration*, NPR (June 22, 2018), <https://www.npr.org/2018/06/22/622678753/the-history-of-the-flores-settlement-and-its-effects-on-immigration>.

70. *See generally id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Reno v. Flores*, 507 U.S. 292, 294 (1993).

77. Elkins & Smith, *supra* note 67.

juveniles as soon as possible.⁷⁸ For example, by failing to release Jenny to the care and custody of her cousin.

The United States Supreme Court held that there was no due process violation by refusing to release the children as soon as possible.⁷⁹ As an initial matter, the Court held that any information on the deplorable conditions was not before the Court, and therefore, the question of release was not affected by the deplorable conditions.⁸⁰ Instead, the issues of the case were based on the liberty interests the children could have.⁸¹ The Court noted that the liberty interest of freedom “to come and go at will” was not at issue, since “juveniles, unlike adults, are always in some form of custody.”⁸² Instead, the Court stated that the specific issue was whether juveniles were entitled to be released to persons other than those the regulations currently allowed release to, and again, those regulations allowed release to parents, grandparents, aunts, and uncles.⁸³

The Court reasoned that for such a right to exist, it must be part of the children’s fundamental rights guaranteed under the Fifth Amendment.⁸⁴ For it to be a fundamental right, the right must have an established history.⁸⁵ The Court found that there did not appear to be such an established history and therefore there was no right under law to allow children to be released to other adults so that they could walk free.⁸⁶ Important for this Article’s analysis, the Court stated:

If there exists a fundamental right to be released into what respondents inaccurately call a “non-custodial setting,” . . . we see no reason why it would apply only in the context of government custody incidentally acquired in the course of law enforcement. It would presumably apply to state custody over orphans and abandoned children as well, giving federal law and federal courts a major new role in the management of state orphanages and other child-care institutions The mere novelty of such a claim is reason enough to doubt that “substantive due process” sustains it[.]⁸⁷

Further, without the right, the federal government was under no constitutional mandate to consider the best interest of the child in making

78. *Flores*, 507 U.S. at 299-302, 315.

79. *Id.* at 302-03, 306.

80. *Id.* at 301.

81. *Id.* at 301-02.

82. *Id.* at 302 (internal quotation omitted).

83. *Id.*

84. *Id.* at 302-03.

85. *Id.* at 303.

86. *Id.*

87. *Id.* at 302-03.

detention decisions.⁸⁸ After this holding, the case was reversed to the lower court for decisions consistent with this reasoning.⁸⁹

Even though the advocates lost before the Supreme Court, their continued efforts to prosecute the case eventually brought about the Flores Settlement Agreement. While this did not release children, it created a set of minimum conditions that the government must comply with if it is to detain children, whether it is with their parents or not.⁹⁰ Children in detention were to be released without unnecessary delay whenever possible.⁹¹ Facilities detaining children must be appropriately licensed by the state.⁹² Further, the settlement requires:

- Facilities provide children in their custody with access to sanitary and temperature-controlled conditions, water, food, medical assistance, ventilation, adequate supervision, and contact with family members;
- Facilities ensure that children are not held with unrelated adults;
- The government release children from detention without unnecessary delay to parents or other approved sponsors; and
- If a child cannot be released from care, the child is to be placed in the “least restrictive” setting appropriate, based on his or her age and needs.⁹³

The Flores Settlement Agreement continues to be the seminal authority on conditions in immigration detention.

This Article discusses the *Flores* litigation for two reasons. First, because it is difficult to understand the history of family detention without first knowing of the *Flores* litigation, as this has often been a stumbling block for family detention.⁹⁴ The second reason though, is what *Flores* failed to accomplish in front of the Supreme Court, namely, the failure to establish a significant liberty interest for children to be freed from detention.⁹⁵ It is this failure that this Article seeks to redress, by offering

88. *Id.* at 303-05.

89. *Id.* at 315.

90. *The Flores Settlement: A Brief History and Next Steps*, HUM. RTS FIRST (Feb. 19, 2016), <https://www.humanrightsfirst.org/resource/flores-settlement-brief-history-and-next-steps>.

91. *Id.*

92. SARAH HERMAN PECK & BEN HARRINGTON, CONG. RESEARCH SERV., R45297, THE “FLORES SETTLEMENT” AND ALIEN FAMILIES APPREHENDED AT THE U.S. BORDER: FREQUENTLY ASKED QUESTIONS 1 (2018) [hereinafter THE “FLORES SETTLEMENT” AND ALIEN FAMILIES APPREHENDED AT THE U.S. BORDER].

93. *Frequently Asked Questions on the Flores Agreement Settlement*, JUST. FOR IMMIGRANTS, <https://justiceforimmigrants.org/wp-content/uploads/2018/08/Flores-Agreement-Settlement-1.pdf> (last visited Sept. 17, 2019).

94. *See supra* Part II.C.

95. *See supra* Part II.C.

another theoretical justification to release children subject to family detention.⁹⁶

Luckily for this author, in rejecting the Fifth Amendment due process claim, the Supreme Court does establish when a different outcome would be possible. First, the due process right would have to be stated differently than children's right to be free from custody.⁹⁷ That is one reason why this Article proposes to focus on the right to be free from cruel conditions that are not in line with current and evolving standards of decency. Such a right is distinct from the right to be free from any custody, as it zones in on the type of custody. Additionally, for such a due process right to be recognized to protect immigrant children, the Supreme Court states that it would need to be applicable solely to immigrants, as opposed to children held in orphanages.⁹⁸ As this piece will later explain, the evolving standard of decency arises in relation to our improving view of immigrants and is therefore also solely related to immigrants.⁹⁹ Finally, the Court excludes conditions from its analysis.¹⁰⁰ However, an evolving standard of decency would require the Court to observe such conditions in determining whether children should be released. Thus, the proposal of this Article is distinguishable from prior failures to end family detention.

D. The United States' History of Erecting Family Detention Facilities

The first family detention center, where parents are detained with their children, was opened on March 1, 2001.¹⁰¹ Family detention originally arose as an alternative to family separation during the W. Bush Administration.¹⁰² Following 9/11, immigration enforcement was ramped up.¹⁰³ As a result, the Bush Administration was hostile to past policies that called for the release of families that arrive together.¹⁰⁴ The Administration claimed that "the practice of releasing families

96. See *infra* Parts III.B–C. The theoretical underpinnings of this Article could apply to general immigration detention, or immigration detention that is solely meant for immigrant children. Those two issues, however, are a discussion for another day, or a much longer article.

97. *Reno v. Flores*, 507 U.S. 292, 302-03 (1993).

98. *Id.*

99. See *infra* Part III.

100. *Flores*, 507 U.S. at 301.

101. Jennifer Chan & Katharina Obser, *The Complex History and Tragic Return of Family Detention*, NAT'L IMMIGRANT JUST. CTR. (July 9, 2015), <https://www.immigrantjustice.org/staff/blog/complex-history-and-tragic-return-family-detention>.

102. LUTHERAN IMMIGRATION & REFUGEE SERV. & WOMEN'S REFUGEE COMM'N, LOCKING UP FAMILY VALUES: THE DETENTION OF IMMIGRANT FAMILIES 5 (Feb. 2007), <https://womensrefugeecommission.org/joomlatools-files/docman-files/famdeten.pdf> [hereinafter LOCKING UP FAMILY VALUES].

103. *Id.*

104. *Id.*

encouraged undocumented immigration because prospective migrants would ‘rent’ children to accompany them on the border crossing, thereby ensuring that they would be released on their own recognizance should they be caught.”¹⁰⁵ In response, the Administration sought to detain both children and their parents.¹⁰⁶

However, because of bed capacity issues, the children were separated from their parents, or any other adult they arrived with, and placed in an Office of Refugee Resettlement (“ORR”) shelter, while the parent or arriving adult was placed in a detention facility.¹⁰⁷ Interestingly enough, while family separation was certainly happening, there was not a huge outcry from the public. Instead, the congressional appropriations committee expressed concerns over the practice in a report, which eventually led the Administration to change its strategy.¹⁰⁸ Specifically, the Administration began experimenting with detaining parents and children together, in family detention facilities.

The first facility was the Berks Family “Residential Center” (“Berks”).¹⁰⁹ The facility is a former nursing home in Leesport, Pennsylvania, and the eighty-five-bed facility detained even children who were still nursing, as well as toddlers.¹¹⁰ The Berks facility is open to this day and has the capacity to hold ninety-six people, including adults who are housed with related and unrelated children.¹¹¹

Despite this initial experiment with family detention, after four years ICE began also experimenting with an Alternative to Detention Program, known as the Intensive Supervision Appearance Program (“ISAP”).¹¹² Pursuant to this proposal, ICE would release immigrant families back into the community while the immigrants were awaiting their court hearings.¹¹³ In order to ensure appearances at those hearings, the ISAP included check-ins with caseworkers, curfews, and electronic

105. *Id.*

106. *Id.*

107. *Id.* at 6.

108. *A Guide to Children Arriving at the Border*, AM. IMMIGR. COUNCIL, (June 26, 2015), <https://www.americanimmigrationcouncil.org/research/guide-children-arriving-border-laws-policies-and-responses>.

109. Chan & Obser, *supra* note 101; see Anthony Orozco, David Mekeel & Karen Shuey, *What You Need to Know About the Residential Center Holding Immigrant Families in Berks County*, READING EAGLE (June 23, 2018), <https://www.readingeagle.com/news/article/berks-detention-center-again-in-spotlight>.

110. Chan & Obser, *supra* note 101.

111. Orozco, Mekeel & Shuey, *supra* note 109.

112. Memorandum from Wesley J. Lee, Acting Director, U.S. Immigration and Customs Enforcement, to Field Officer Director (May 11, 2015), https://www.ice.gov/doclib/foia/dro_policy_memos/dropolicymemoeligibilityfordroisapanemdproms.pdf.

113. *Id.*

monitoring.¹¹⁴ At the time of this proposal, the vast majority of families were being released, as opposed to detained in the very small Berks detention facility, or separated and sent to child and adult facilities respectively.¹¹⁵

Without evaluating whether the ISAP program was successfully accomplishing the enforcement goals for which it was created, the W. Bush Administration unveiled a new family detention facility in 2006.¹¹⁶ The T. Don Hutto Family “Residential Facility” (“Hutto”) contained 600 beds and was the centerpiece of the W. Bush Administration’s tough stance on immigration enforcement.¹¹⁷ It was a former prison.¹¹⁸ In 2007, reports documenting the conditions inside Berks and Hutto family detention facilities began to surface.¹¹⁹

Initially, the reports noted that the Hutto facility was still prisonlike, since it was still surrounded with razor wire and contained prison cells to house detainees.¹²⁰ Further, “[p]eople in detention displayed widespread and obvious psychological trauma. Every woman [the investigators] spoke with in a private setting cried.”¹²¹ Despite the trauma detention imposed on these women and children, the site’s mental health care was inadequate.¹²² The 600-bed facility only had one licensed mental health worker.¹²³ There were no regular mental health meetings, and a combination of factors discouraged detainees from accessing the already meager care.¹²⁴ For example, while a counselor could be available, that counselor could not speak Spanish, and there would not be translation services available to facilitate the meeting.¹²⁵

Physical medical care was also deficient. Families reported several days delay in receiving medical care.¹²⁶ Sometimes, care was impossible to access. For example, when one mother had a swollen jaw, she was told she could not see a dentist because the dental care was only for children.¹²⁷ Medicine was very rarely prescribed, even when children had serious

114. *Id.*

115. LOCKING UP FAMILY VALUES, *supra* note 102, at 1.

116. Chan & Obser, *supra* note 101.

117. Nina Bernstein, *U.S. to Overhaul Detention Policy for Immigrants*, N.Y. TIMES, Aug. 6, 2009, at A4, <https://www.nytimes.com/2009/08/06/us/politics/06detain.html?pagewanted=all>.

118. LOCKING UP FAMILY VALUES, *supra* note 102, at 2.

119. *See generally id.* at 1-3.

120. *Id.* at 2.

121. *Id.*

122. *Id.* at 23-24.

123. *Id.* at 23.

124. *Id.* at 23-24.

125. *Id.*

126. *Id.* at 21.

127. *Id.* at 22.

symptoms, such as vomiting or rashes.¹²⁸ Typically, in response to medical issues, families were told to simply have their child drink more water.¹²⁹

Pregnant women would receive inadequate prenatal care.¹³⁰ Even after confirming a female detainee was pregnant, the facility would often wait months for further exams or treatment to confirm the health of the mother and child.¹³¹ In at least one instance, a pregnant detainee fainted, was seen by a doctor, was diagnosed with a kidney infection, and was merely told “she should drink lots of water.”¹³² She was not given antibiotics.¹³³ Further, women were not provided with prenatal vitamins or even nutritious foods to help with prenatal development, such as milk.¹³⁴

General food services were also so woefully inadequate that it led to widespread health problems in the facilities.¹³⁵ There was not enough sufficient food to allow for proper child development.¹³⁶ The food quality was also poor, and at least one child reported that the food made him vomit almost every day.¹³⁷ The DHS Inspector General authored a report decrying the lack of compliance with food standards, noting the food was undercooked, unclean, and stored at improper temperatures.¹³⁸ Many children and pregnant women reported losing weight as a result.¹³⁹ Further, families were only given twenty minutes to acquire their food and eat.¹⁴⁰ So even when food was edible, the families would have difficulty actually eating it.

Also important for proper child development is appropriate recreation.¹⁴¹ However, young children rarely had access to toys since no toys were allowed in cells.¹⁴² Even when children were allowed to access toys, Hutto did not have access to age-appropriate toys, especially for the youngest children who generally have the most urgent developmental

128. *Id.*

129. *Id.*

130. *Id.* at 2, 20-21.

131. *Id.* at 21.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 38.

136. *Id.*

137. *Id.* at 22.

138. *Id.* at 19.

139. *Id.* at 38.

140. *Id.*

141. See Ester Entin, *Recreational Play Can Be Far More Important Than Academics*, ATLANTIC MONTHLY (Jan. 16, 2012), <https://www.theatlantic.com/health/archive/2012/01/recreational-play-can-be-far-more-important-than-academics/251150>.

142. LOCKING UP FAMILY VALUES, *supra* note 102, at 26-27.

needs.¹⁴³ Children technically had access to books, but both facilities had very few books available in other languages besides English.¹⁴⁴ Further, families were not permitted to spend any time outside on the weekends.¹⁴⁵

It was also observed that serious problems existed in relation to discipline.¹⁴⁶ Family detention staff members would encourage parents to keep their children quiet by telling the families that if the child does not listen to the staff, the child would be separated from the parent.¹⁴⁷ Children were punished for what amounted to very normal behavior, such as running, making noises, and climbing on couches.¹⁴⁸ Parents and children were also told that any act of misbehavior would be “written up,” and then, such information would be used against the parent and child in their asylum proceedings.¹⁴⁹

Instances of verbal and physical abuse were also reported.¹⁵⁰ One child reported being pushed by detention staff.¹⁵¹ Immigrants reported being told that “they were worthless, stupid or dirty immigrants.”¹⁵² Several examples also exist where children would be punished by being told they were prohibited from speaking to anyone else at the facility but their immediate family for weeks.¹⁵³ The guards threatened that, if during that extended time that prohibition was broken, then the child would be separated from their parents.¹⁵⁴

In March 2007, following reports of the deplorable conditions, ten individual lawsuits (representing ten plaintiffs) were filed against the Hutto facility alleging violations of the Flores Settlement Agreement.¹⁵⁵ These cases were settled in August 2007.¹⁵⁶ Per the settlement, substantial reforms were called for including: “free movement around the facility for children over age 12; providing a full-time, on-site pediatrician; eliminating count systems that require families to stay in their cells 12 hours a day; and improve[ment of] the nutritional value of [the] food.”¹⁵⁷

143. *Id.* at 26.

144. *Id.* at 27.

145. *Id.*

146. *Id.* at 29.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 30.

152. *Id.* at 31.

153. *Id.* at 30.

154. *Id.*

155. *Case Summary in the ACLU's Challenge to the Hutto Detention Center*, ACLU, <https://www.aclu.org/other/case-summary-aclus-challenge-hutto-detention-center> (last visited Sept. 17, 2019).

156. Chan & Obser, *supra* note 101.

157. *Id.*

Judge Austin, a federal magistrate judge, was assigned to be the special monitor of the facility.¹⁵⁸ In December 2007, following a compliance visit, Judge Austin found that the Hutto facility was already in violation of the settlement agreement signed months earlier.¹⁵⁹

Despite attempts at improving, the Hutto facility continued to fall short of compliance standards.¹⁶⁰ In 2009, Judge Austin conducted another site visit and found that standards were still below those of the settlement agreement.¹⁶¹ After his second visit, Judge Austin concluded that “it seems fundamentally wrong to house children and their . . . parents this way.”¹⁶² However, because the use of family detention itself was not in violation of the Flores or Hutto Settlement Agreement, Judge Austin believed that he was deprived of the power to shut down the facility.¹⁶³ This demonstrates that the compliance with the settlement was relegated to an endless roundabout of the Hutto facility falling short, being reprimanded or sanctioned by the court, attempting to improve, and yet, continuing to fail to provide proper conditions. In the meantime, hundreds of families were still subject to the suffering of detention in the facility.

1. President Obama Takes Office

Luckily for advocates, in August 2009 the Obama Administration began shutting down family detention.¹⁶⁴ Specifically, the Administration indicated that it would no longer send families to the Hutto facility, and it shut down plans to open three other family detention facilities.¹⁶⁵ At this point, it seemed theoretically possible that with the right president, the practice could effectively be ended. And while administrations change, there was likely at least hope that an administration that was hostile to family detention would limit the infrastructure, such that it would be more difficult for an administration amenable to family detention to start up the

158. *Id.*

159. *Id.*

160. *Id.*; *see generally* Report to Parties of Periodic Review of Facility, *In Re* Hutto Family Detention Center, No. A-07-CA-164-SS (W.D. Tex. Dec. 27, 2007) (detailing the findings of non-compliance with the settlement agreement uncovered during the December 12, 2007, inspection of the facility).

161. *See generally* Report to Parties of Periodic Review of Facility, *In Re* Hutto Family Detention Center, No. A-07-CA-164-SS (W.D. Tex. June 27, 2008) (detailing the findings of non-compliance with the settlement agreement uncovered during the June 10, 2008, inspection of the facility).

162. *See* Report to Parties of Periodic Review of Facility at *In Re* Hutto Family Detention Center, No. A-07-CA-164-SS (W.D. Tex. July 2, 2009) (detailing the findings of non-compliance with the settlement agreement uncovered during the June 1, 2009, inspection of the facility).

163. *Id.*

164. Bernstein, *supra* note 117.

165. *Id.*

practice again. In other words, in August 2009, it did not seem necessary to have a constitutional prohibition on family detention, because the politics of the time had already dubbed the practice inhumane.

Yet, the practice reared its ugly head again during the Obama Administration. From 2009 to 2014, gang and lethal domestic violence in Honduras, El Salvador, and Guatemala increased substantially.¹⁶⁶ The nature of the violence, led many people, especially children, to seek refuge in the United States.¹⁶⁷ In June 2014, the Obama Administration declared the influx of refugee children and families a humanitarian crisis.¹⁶⁸ In response to this “crisis,” the Administration reversed its course on family detention.¹⁶⁹

It was the view of the Administration that family detention was necessary in order to speed up deportations and deter arrivals.¹⁷⁰ Of course, we have since learned that such rationale is ludicrous. Deterrence efforts consistently fail to limit migration, because the driver of migration is the conditions of the home country, mainly, the threat of death if the migrants chose to stay.¹⁷¹ Further, “[a]s of March 2015, 88 percent of mothers and their children who had asked for protection were found to have legitimate grounds for asylum.”¹⁷² This means that deportations could not be “sped up” or effectuated through detention, because the vast majority of people were people with valid claims, for example, people who could not be deported.

Regardless of the past failures of detention, the Administration requested emergency funds for immigration detention.¹⁷³ The Administration housed the mothers and children in three facilities over the

166. Chan & Obser, *supra* note 101.

167. *Id.*

168. *Id.*

169. *Id.*

170. EXPOSE & CLOSE: ARTESIA FAMILY RESIDENTIAL CENTER, NEW MEXICO, DETENTION WATCH NETWORK 1-2 (2014), <https://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20Expose%20and%20Close%20Artesia%20Report.pdf> [hereinafter EXPOSE & CLOSE]; Julia Preston & Randal C. Archibold, *U.S. Moves to Stop Surge in Illegal Immigration*, N.Y. TIMES, June 21, 2014, at A12, https://www.nytimes.com/2014/06/21/us/us-plans-to-step-up-detention-and-deportation-of-migrants.html?_r=0.

171. *New Mexico Immigration Detention Center Artesia Draws Criticism from All Sides*, FOX NEWS (Dec. 29, 2016), <https://www.foxnews.com/politics/new-mexico-immigration-detention-center-artesia-draws-criticism-from-all-sides>; Anna Oltman, *Does Separating Families at the Border Discourage Immigration? Here's What the Research Says*, WASH. POST (May 31, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/05/31/does-separating-families-at-the-border-discourage-immigration-heres-what-the-research-says/?utm_term=.5eb811e3dd6d.

172. Chan & Obser, *supra* note 101.

173. *Id.*

course of its expansion of family detention.¹⁷⁴ The first facility the Administration relied on was the Artesia Family Residential Center (“Artesia”) in Artesia, New Mexico.¹⁷⁵ It had a capacity of 672 detention beds.¹⁷⁶ It was known colloquially as the “deportation mill.”¹⁷⁷ Despite the different facility and new Administration, it quickly became obvious that the conditions in Artesia were no better than those in previous family detention centers.¹⁷⁸ Advocates reported, “toddlers fenced inside a hot facility in the middle of a desert, mothers without knowledge of their basic legal rights, and children rapidly losing weight due to malnutrition, anxiety, and depression.”¹⁷⁹ Bonds for release were set unreasonably high, as much as \$25,000 or \$30,000—which was five times the national average.¹⁸⁰

One anonymous mother explained the deplorable conditions she was subject to in an op-ed entitled “What My 6-Year Old Son and I Endured in Family Detention.”¹⁸¹ She explained that the food was putrid, and even the water made the detainees sick.¹⁸² Food was also heavily restricted, preventing parents from properly keeping children fed.¹⁸³

To say medical care was inadequate is an understatement. One mother whose child had asthma asked for assistance and was told “she should have thought about that before she came to the United States.”¹⁸⁴ Another mother stated that she “asked for medical assistance for her son but it never came.”¹⁸⁵ She was deported, and her son died shortly thereafter.¹⁸⁶ Further, in the above-mentioned op-ed, the mother described that the act of detention also heavily traumatized children who had already suffered crippling mental injuries.¹⁸⁷ Hearing the stories of families in

174. See Wendy Cervantes, Madhuri Grewal & National Journal, *Family Detention for Central American Refugees Is Inhumane*, ATLANTIC MONTHLY (Sept. 16, 2014), <https://www.theatlantic.com/politics/archive/2014/09/family-detention-for-central-american-refugees-is-inhumane/431313>.

175. *New Mexico Immigration Detention Center Artesia Draws Criticism from All Sides*, *supra* note 171.

176. EXPOSE & CLOSE, *supra* note 170, at 2.

177. *Id.*

178. Cervantes, Grewal & National Journal, *supra* note 174.

179. *Id.*

180. *New Mexico Immigration Detention Center Artesia Draws Criticism from All Sides*, *supra* note 171.

181. Anonymous, *What My 6-Year Old and I Endured in Family Detention*, N.Y. TIMES, June 27, 2018, at A23, <https://www.nytimes.com/2018/06/25/opinion/family-detention-immigration.html>.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

Artesia makes clear that the conditions in family detention did not and could not improve, even following the failed experiment of Hutto.

The second facility to be built was the Karnes Family Residential Center (“Karnes”), which is still open today.¹⁸⁸ Karnes is operated by the private prison company, GEO Group.¹⁸⁹ Karnes originally had 532 beds, and the government later expanded it to include 626 beds.¹⁹⁰ In what should now be considered a cliché, the conditions in Karnes have been terrible since its opening. Food has been inadequate.¹⁹¹ For example, even when milk was provided to mothers with infants and babies, the mothers were not permitted to warm the milk, which is a basic need.¹⁹² Parents consistently reported major weight loss experienced by their detained children.¹⁹³ Mothers reported a severe lack of access to medical and mental health care, comparable to those experienced by detainees at the Hutto facility.¹⁹⁴ Guards continued to abuse inmates, just as they had at Hutto.¹⁹⁵ There were also reports of sexual abuse.¹⁹⁶ It was now painfully obvious, after so many iterations of family detention, that “family detention cannot be carried out humanely.”¹⁹⁷

That did not stop the government from trying again. In 2015, the Artesia facility was closed down, and in its place, the government created the South Texas Family “Residential Center” in Dilley, Texas (“Dilley”), which also continues to operate today.¹⁹⁸ Dilley is run by the private prison company, CoreCivic.¹⁹⁹ This facility is the most ambitious yet, and the Administration set the target of holding 2400 immigrants in Dilley.²⁰⁰

188. *Family Detention: The Unjust Policy of Locking Up Immigrant Mothers with Their Children*, DETENTION WATCH NETWORK, <https://www.detentionwatchnetwork.org/issues/family-detention> (last visited Sept. 17, 2019) [hereinafter *Family Detention*].

189. LOCKING UP FAMILY VALUES, AGAIN, *supra* note 27, at 4.

190. *The Geo Group Announces 626-Bed Expansion of the Karnes County Residential Center in Texas*, BUSINESSWIRE (Dec. 19, 2014), <https://www.businesswire.com/news/home/20141219005408/en/Geo-Group-Announces-626-Bed-Expansion-Karnes-County>.

191. LOCKING UP FAMILY VALUES, AGAIN, *supra* note 27, at 5-10.

192. *Id.* at 8.

193. *Id.* at 6.

194. *Id.* at 8.

195. *Id.* at 8-9.

196. *Groups File Complaints Detailing Sexual Abuse, Extortion, Harassment of Women at ICE Facility in Texas*, MALDEF (Oct. 2, 2014), <https://www.lexisnexis.com/LegalNewsRoom/immigration/b/outsidenews/posts/groups-file-complaints-detailing-sexual-abuse-extortion-harassment-of-women-at-ice-facility-in-texas>.

197. LOCKING UP FAMILY VALUES, AGAIN, *supra* note 27, at 2.

198. *Family Detention*, *supra* note 188.

199. Nomaan Merchant, *New Deal Keeps Open Facility that Detains Immigrant Families*, ASSOCIATED PRESS (Oct. 17, 2018), <https://www.apnews.com/cfe75057db534f28aec0a01e04f9786>.

200. *South Texas Immigration Detention Center Set to Open*, CBS NEWS (Dec. 15, 2014), <https://www.cbsnews.com/news/south-texas-immigration-detention-center-set-to-open>.

Instead of a single concrete building, the Dilley facility was originally an oil field workers camp and is made up of many small buildings and trailers.²⁰¹ Advocates refer to Dilley as “baby jail,” because of the hundreds of extremely young children held there.²⁰²

Unsurprisingly, since it was opened, Dilley has been plagued with terrible conditions. Detainees do not have access to clean water because of a mix of arsenic and E. coli in the water.²⁰³ Advocates have indicated that medical care is horribly inadequate in Dilley.²⁰⁴ At least one child died shortly after being detained in Dilley.²⁰⁵ One mother described the conditions as “soul destroying.”²⁰⁶ This particular mother also described being forced to watch her child’s mental and physical health deteriorate rapidly, which eventually drove the mother to attempt to commit suicide.²⁰⁷ It is clear, that with Dilley, not much has improved from the past iterations of family detention.

Once again, advocates fought back. In September 2014, advocates filed a complaint with ICE, which outlined the inhumane conditions in Karnes.²⁰⁸ This was followed by a motion to enforce the Flores Settlement Agreement filed in February 2015, that pertained to all detention facilities.²⁰⁹ The lawsuit alleged that the Government’s “no-release policy—*i.e.*, the policy of detaining all female-headed families, including children, for as long as it takes to determine whether they are entitled to remain in the United States—violates material provisions of the [Flores Settlement] Agreement.”²¹⁰ The federal government argued that the Flores Settlement Agreement only applied to unaccompanied children, not

201. *Id.*

202. Nara Milanich, *Dispatches from “Baby Jail” in South Texas*, NACLA (June 28, 2017), <https://nacla.org/news/2017/06/28/dispatches-%E2%80%9Cbaby-jail%E2%80%9D-south-texas>.

203. Amanda Doroshow & Simone Harstead, *Dilley Diary: Updates from South Texas Family Residential Center*, HER JUST., <https://herjustice.org/dilley-diary-updates-from-south-texas-family-residential-center/> (last visited Sept. 17, 2019); *Navigating the ‘Sick’ and ‘Horrific’ Conditions in Family Detention Centers*, WNYC STUDIOS (June 26, 2017), <https://www.wnycstudios.org/story/navigating-law-and-inhumane-conditions-family-detention-centers>.

204. Nomaan Merchant, *Advocates Say Immigrant Child Died After Leaving ICE Custody in Texas*, CHI. TRIBUNE (Aug. 1, 2018), <https://www.chicagotribune.com/news/nationworld/ct-immigrant-child-death-20180801-story.html>.

205. *Id.*

206. Ed Pilkington, ‘Soul-Destroying’: One Migrant Mother’s Story of Life at Dilley Detention Center, THE GUARDIAN (May 22, 2015), <https://www.theguardian.com/usnews/2015/may/22/immigrant-mothers-dilley-family-detention-center-texas>.

207. *Id.*

208. Chan & Obser, *supra* note 101.

209. *Id.*

210. *Flores v. Johnson*, 212 F. Supp. 3d 864, 870 (C.D.Cal. 2015), *aff’d in part, rev’d in part sub nom. Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016).

accompanied children.²¹¹ And in any event, even if the children's rights under the Flores Settlement were violated, the agreement was inapplicable to their parents.²¹²

The district court ruled against the government, recognizing that the agreement did not make any distinction between accompanied and unaccompanied children, and therefore, plainly included accompanied children.²¹³ Further, the district court held that it included the children's parents as well.²¹⁴ To reach that conclusion, the court pointed to this regulation:

- (i) Juveniles may be released to a relative (brother, sister, aunt, uncle, or grandparent) not in Service detention who is willing to sponsor a minor and the minor may be released to that relative notwithstanding that the juvenile has a relative who is in detention.
- (ii) If a relative who is not in detention cannot be located to sponsor the minor, the minor may be released with an accompanying relative who is in detention.²¹⁵

The district court held this regulatory context demonstrated that the parties contemplated the release of accompanied minors into the custody of their accompanying parent, who therefore must also be out of detention.²¹⁶

The Ninth Circuit Court of Appeals affirmed in part and reversed in part.²¹⁷ The Ninth Circuit recognized that the agreement plainly encompasses accompanied minors.²¹⁸ But the Court also held that the agreement does not require the government to release parents.²¹⁹ It noted that "[t]he Settlement does not explicitly provide any rights to adults."²²⁰ And while the settlement certainly gives a preference to a release of parents, that preference should only be read as a first choice if the parent is available.²²¹ Further, if the parent is not available, and no other reasonable adult is, the Flores Settlement Agreement does allow the child to be held in a licensed facility. Accordingly, the agreement does not mandate the release of parents with their children, and the Ninth Circuit substantially limited the ability to free children who had parents in the

211. *Id.* at 871.

212. *Id.*

213. *Id.* at 872-73.

214. *Id.*

215. *Id.* (citing 8 C.F.R. § 212.5(a)(3) (1997)).

216. *Id.* at 872-73.

217. *Flores v. Lynch*, 828 F.3d 898, 910 (9th Cir. 2016).

218. *Id.* at 905-06.

219. *Id.* at 908-09.

220. *Id.* at 908.

221. *Id.*

United States.²²² Further, the only way to release the children would be to then separate them from their parents.

Curiously enough, all of this means that if you are willing to separate the child from the parent it is now much easier to detain the parent. At least some have theorized that this means that the Flores Settlement Agreement can be read to encourage separating children from their parents so that the government can continue to detain the parents.²²³ However, at least to this author, such reading seems to run afoul of the spirit of the agreement.

Despite the Ninth Circuit ruling, which functionally increased the number of adults and children who could be detained, a problem still remained for family detention facilities. The facilities, a hybrid of adult and childcare, could not necessarily get licensing from the states.²²⁴ Again, this is a requirement under the Flores Settlement Agreement, and as a result, the district court held such facilities to be in material breach of this requirement because they were not licensed.²²⁵ The district court made it clear that failing to meet this requirement could result in the closure of the facilities.

Yet, complying with this requirement was difficult for the government to do because the settlement requires state licensing, and the states did not seem to have apparatuses for licensing facilities that house children and adults.²²⁶ This was especially true for Texas, which has overwhelmingly the largest family detention population between Karnes and Dilley. In fact, when the Texas Department of Family and Protective Services attempted to issue a license to family detention facilities, a state judge issued an injunction stopping it.²²⁷ Essentially, the state judge held that it was beyond the purview of the Texas Department of Family and

222. *See id.*

223. *See* Chuck Grassley, Thom Tillis & Ted Cruz, *Fixing Flores Agreement Is the Only Solution to Immigrant Family Separation and Detention*, USA TODAY (July 29, 2018), <https://www.usatoday.com/story/opinion/2018/07/29/fix-flores-agreement-solution-immigrant-family-separation-detention-column/841342002>.

224. Roque Planas, *Family Immigrant Detention Centers Struggle to Get Child Care Licenses*, HUFFINGTON POST (Apr. 6, 2017), https://www.huffpost.com/entry/family-immigrant-detention-texas_n_58e6930be4b05894715f103b.

225. Julia Preston, *Judge Orders Release of Immigrant Children and Mothers Released from Detention*, N.Y. TIMES, July 26, 2015, at A14, <https://www.nytimes.com/2015/07/26/us/detained-immigrant-children-judge-dolly-gee-ruling.html>.

226. Planas, *supra* note 224.

227. Madlin Mekelburg, *Judge Blocks State from Licensing Family Detention Center*, TEX. TRIBUNE (May 4, 2016), <https://www.texastribune.org/2016/05/04/judge-blocks-states-licensing-detention-center>.

Protective Services to issue a license to a facility that also housed adults.²²⁸

Following the legal losses on licensing, in May 2016 the Obama Administration began acquiescing to demands from the plaintiffs seeking to enforce the Flores Settlement Agreement.²²⁹ Families could only be held in unlicensed facilities for a total of twenty days.²³⁰ It would also be possible to detain families for longer periods of time in certain situations.²³¹ At the end of the Obama Administration, family detention had been successfully curbed.

2. Family Separation and Family Detention Expansion During the Trump Administration.

In November 2016, the United States elected President Trump, who campaigned largely on a message of being tough on immigration.²³² Further, after his election, President Trump chose Jeff Sessions as Attorney General, who historically had a hardline stance on immigration.²³³ Soon after his confirmation, Jeff Sessions implemented a “zero tolerance” policy, under which any person caught crossing the border illegally would be referred to federal prosecution.²³⁴ Under prior administrations, parents arriving with children were not referred for prosecution.²³⁵ Under the “zero tolerance” policy, even parents were subject to prosecution.²³⁶ Pursuant to the arrest for the federal offense, parents would be sent to a federal jail.²³⁷ Because such facilities do not (nor should they) house children, the children would be taken from the

228. *Id.*

229. *Id.*

230. See Muzaffar Chishti & Sarah Pierce, *Trump Administration’s New Indefinite Family Detention Policy: Deterrence Not Guaranteed*, MIGRATION POL’Y INS. (Sept. 26, 2018), <https://www.migrationpolicy.org/article/trump-administration-new-indefinite-family-detention-policy> (explaining that the federal government is limited to detaining immigrants in family detention for only twenty days).

231. *Id.*

232. *Id.*

233. Jonathan Blitzer, *Jeff Sessions Is Out, but His Dark Vision for Immigration Policy Lives On*, NEW YORKER (Nov. 8, 2018), <https://www.newyorker.com/news/news-desk/jeff-sessions-is-out-but-his-dark-vision-for-immigration-policy-lives-on>.

234. Julieta Chiquillo, *How Trump’s Zero-Tolerance Policy Differs from the Ways Bush and Obama Treated Immigrant Families*, DALL. MORNING NEWS (June 18, 2018), <https://www.dallasnews.com/news/immigration/2018/06/18/trumps-zero-tolerance-policy-differs-ways-bush-obama-treated-immigrant-families>.

235. *Id.*

236. *Id.*

237. Carter Sherman, *How Trump’s “Family Separation” Policy Actually Works*, VICE NEWS (June 18, 2018), https://news.vice.com/en_us/article/3k4epw/how-trumps-family-separation-policy-actually-works.

parents.²³⁸ The children would then be sent to an ORR facility.²³⁹ Accordingly, the “zero tolerance” policy resulted in family separation.

The outcry from the public was monumental. As *The Atlantic* put it,

“[t]he main reason that this story has received so much attention is simple: It is awful. Of course, most of the American voters who were shown images of crying children or who heard audio recordings of them calling out for their parents had an intensely negative reaction.”²⁴⁰ After appearing in the *New York Times*, the story picked up traction over social media.²⁴¹

The story became so popular it prompted a congressional investigation, including a hearing, and visits from sitting senators.²⁴² The United Nations Human Rights Council then pleaded with the Administration to end the policy.²⁴³ International leaders, from Canadian Prime Minister Justin Trudeau, to Pope Francis, to then British Prime Minister Theresa May, condemned the practice.²⁴⁴

The public also donated large sums of money to organizations opposing the practice.²⁴⁵ For example, one Texas-based organization that represents immigrants reported earning twenty million dollars in donations as a result of family separation.²⁴⁶ Protests erupted across the country.²⁴⁷ One Saturday saw over 600 marches across the country, culminating in a rally in Washington D.C. entitled “Families Belong Together,” where parents, children, faith leaders, and *Hamilton* composer

238. *Id.*

239. Emily Stewart, *The Multibillion-Dollar Business of Sheltering Migrant Children, Explained*, VOX (June 25, 2018), <https://www.vox.com/2018/6/23/17493380/family-separation-shelter-money-children-southwest-key>.

240. Alexis C. Madrigal, *The Making of an Online Moral Crisis*, ATLANTIC MONTHLY (June 19, 2018), <https://www.theatlantic.com/technology/archive/2018/06/the-making-of-a-moralproblem/563114>.

241. *Id.*

242. *Id.*

243. *Id.*

244. Fionnuala Ní Aoláin, *Global Responses to President Trump’s Family Separation Via “Zero-Tolerance” Detention Policy*, JUST SECURITY (June 30, 2018), <https://www.justsecurity.org/58783/global-responses-president-trumps-family-separation-zero-tolerance-detention-policy>.

245. Teo Armus, *A Nonprofit Received \$20 Million to Reunite Families. It Wants DHS to Use That Money*, WASH. POST (July 10, 2018), https://www.washingtonpost.com/local/immigration/texas-nonprofit-raices-now-has-20-million-to-help-separated-families/2018/07/10/bdc083e6-8444-11e8-8553-a3ce89036c78_story.html?utm_term=.1d0356b371ab.

246. *Id.*

247. Phil McCausland, Patricia Guadalupe & Kalhan Rosenblatt, *Thousands Across U.S. Join ‘Keep Families Together’ March to Protest Family Separation*, NBC NEWS (June 30, 2018), <https://www.nbcnews.com/news/us-news/thousands-across-u-s-join-keep-families-together-march-protest-n888006>.

and writer Lin-Manuel Miranda, spoke out against the practice.²⁴⁸ The public pressure was so tremendous, the Trump Administration signed an executive order ending family separation.²⁴⁹

While the policy officially ended the practice of family separation, the policy replaced it with a regime of expanded family detention.²⁵⁰ To do this, the executive order directed the Attorney General to file a motion to modify the Flores Settlement Agreement.²⁵¹ It also directed the DHS and ICE to detain the parents with their children throughout the pendency of any criminal proceedings against the parents for illegal entries.²⁵² Next, the Secretary of Defense was tasked with building additional facilities for the families.²⁵³ Finally, the Attorney General was also directed to prioritize the adjudication of cases involving detained families.²⁵⁴

Not content with merely attempting to modify the Flores Settlement Agreement, the Trump Administration also tried to eliminate it by other means. The Flores Settlement Agreement indicates that it will expire forty-five days after the passage of regulations that implement the agreement.²⁵⁵ In September 2018, the Trump Administration promulgated for comment regulations purporting to adopt the Flores Settlement Agreement in spirit.²⁵⁶ Claiming that the goals are to keep families together, the regulations call for the indefinite detention of immigrant parents and children together.²⁵⁷ As a result, the number of people in detention will skyrocket.²⁵⁸ For example, pursuant to the new regulations, the Trump Administration has already made a request for 15,500 new detention beds in Texas alone.²⁵⁹ Further, like past administrations, the regulations purport to adopt standards for the physical and mental well-

248. *Id.*

249. Miles Parks, Scott Detrow & Kelsey Snell, *Trump Signs Order to End Family Separations*, NPR (June 20, 2018), <https://www.npr.org/2018/06/20/621798823/speaker-ryan-plans-immigration-votes-amid-doubts-that-bills-can-pass>.

250. Richard Gonzales, *Trump's Executive Order on Family Separation: What It Does and Doesn't Do*, NPR (June 20, 2018), <https://www.npr.org/2018/06/20/622095441/trump-executive-order-on-family-separation-what-it-does-and-doesnt-do>.

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. THE "FLORES SETTLEMENT" AND ALIEN FAMILIES APPREHENDED AT THE U.S. BORDER, *supra* note 92, at 14-15.

256. Caitlin Dickerson, *U.S. Aims to Ease Rules on Detaining Children*, N.Y. TIMES, Sept. 7, 2018, at A20, <https://www.nytimes.com/2018/09/06/us/trump-flores-settlement-regulations.html>.

257. *Id.*

258. Jolie McCullough & Chris Essig, *The Trump Administration Is Making Plans to Detain More Immigrants in Texas. Here's Where They Would be Held*, TEX. TRIBUNE (Aug. 2, 2018), <https://www.texastribune.org/2018/08/02/trump-administration-texas-migrant-detention-facilities-map>.

259. *Id.*

being of detainees, standards that, as in the past, will not feasibly be implemented in the facilities.²⁶⁰ This is especially true considering the increased size of the detention population, which will make it much more difficult to provide the proper care to all detainees.

In order to avoid the problems of the facilities being unlicensed—the fatal blow to the facilities under the Obama Administration—the new regulations purport to create a scheme of federal self-licensing.²⁶¹ Even if this federal licensing scheme is found to still violate the Flores Settlement Agreement, in November 2018 a Texas appeals court ruled that the Texas Department of Family and Protective Services can license the family detention facilities.²⁶² Essentially, the strongest arguments advocates had for limiting family detention have been eviscerated, which ultimately leads to our current expansion of the practice.

This history is important for several reasons. First, it chronicles the horrors of detention, demonstrating that in each iteration, it could not be done without forcing cruel conditions on the detainees. Additionally, it demonstrates that family detention is a “zombie policy.” Family detention comes back, and the cruelty that accompanies it, because there is no prohibition on detention itself. Accordingly, a constitutional prohibition is not only consistent with the law, as argued *infra*,²⁶³ but also, the constitutional prohibition is necessary in order to end the United States’ imposed anguish of immigrant parents and children. And of course, under an evolving standard of decency, even if family detention was once an accepted practice, that may no longer be the case.

E. There are Alternatives to Family Detention

Before discussing the law, it is important to briefly mention that alternatives to detention exist, and in fact, DHS has implemented such alternatives in the past with grand success.²⁶⁴ DHS has used several Alternative to Detention (“ATD”) programs, including GPS monitoring, in-person reporting or telephonic check-ins, case management, or some combination of the three.²⁶⁵ For example, ICE recently implemented the

260. See Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 Fed. Reg. 45,486, 45,492-95 (proposed Sept. 7, 2018) (to be codified at 8 C.F.R. §§ 212, 236 and 45 C.F.R. § 410) (discussing standards in ICE regulations).

261. *Id.* at 45,488.

262. *Id.* at 45,496-97 n.13 and accompanying text.

263. See *infra* Part III.

264. Andrew Desiderio, *ICE Scrapped Effective Immigration Program Because It Didn’t ‘Remove’ Enough People*, DAILY BEAST (June 23, 2018), <https://www.thedailybeast.com/ice-scrapped-effective-immigration-program-because-it-didnt-remove-enough-people>.

265. *The Real Alternatives to Detention*, IMMIGRANT JUST. CTR., <https://www.immigrantjustice.org/sites/default/files/content-type/research-item/documents/2018->

Family Case Management Program (“FCMP”).²⁶⁶ Under this program, families were released on their own recognizance and “provided case management, referrals for support services, and legal orientation, in partnership with community-based non-governmental organizations, in order to make sure that vulnerable families’ most urgent needs were met and they had the information they needed to comply with legal obligations.”²⁶⁷ The program had a ninety-nine percent effectiveness rate, which means nearly everyone enrolled in the program showed up for all of their immigration meetings and court hearings.²⁶⁸

As to the FCMP, the program was also “fiscally responsible—just \$36 per day per family, compared to \$319 per day per person for family detention.”²⁶⁹ Further, not all families need the full resources FCMP offers, and for such families, the alternatives to detention can be even cheaper. In the fiscal year 2018 for example, DHS estimated that the average cost of ATD programs would be \$4.50 per person per day.²⁷⁰ Again, compared to \$319 per person per day in family detention.²⁷¹ The fact that viable, humane, and fiscally responsible alternatives to detention exist underscores the cruelty of the current system.

III. A LEGAL FRAMEWORK FOR JUDICIAL ABOLITION OF FAMILY DETENTION UNDER AN EVOLVING STANDARD OF DECENCY

Courts have the constitutional authority to abolish family detention under an evolving standard of decency, a similar standard to that applied to prison conditions litigation. To reach this conclusion, this Article first describes the evolving standard of decency as it applies to other forms of detention and criminal litigation, such as prisons and capital punishment.²⁷² Next, this Article argues that immigration should also be evaluated under its own evolving standard of decency, and in fact, case law demands such an interpretation.²⁷³ This standard, while parallel to the

06/The%20Real%20Alternatives%20to%20Detention%20FINAL%2006.17.pdf (last visited Sept. 17, 2019).

266. Desiderio, *supra* note 264.

267. Ruthie Epstein, *The Tried-And-True Alternatives to Detaining Immigrant Families*, ACLU (June 22, 2018), <https://www.aclu.org/blog/immigrants-rights/immigrants-rights-and-detention/tried-and-true-alternatives-detaining>.

268. *Id.*

269. *Id.*

270. DEP’T OF HOMELAND SECURITY, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, BUDGET OVERVIEW FOR FISCAL YEAR 2018, CONGRESSIONAL JUSTIFICATION 179-80 (2018), <https://www.dhs.gov/sites/default/files/publications/ICE%20FY18%20Budget.pdf>.

271. *See supra* note 269 and accompanying text.

272. *See infra* Part III.A.

273. *Id.*

standard under the Eighth Amendment, affords immigrant civil detainees a higher level of protection than granted to criminal detainees.²⁷⁴ Finally, this Article argues that, under such a standard, family detention must be abolished.²⁷⁵

A. How Courts Apply an Evolving Standard of Decency

Most challenges to prison conditions arise under the Eighth Amendment of the United States Constitution.²⁷⁶ The Eighth Amendment reads: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”²⁷⁷ The Supreme Court’s first application of an evolving standard of decency to determine if a punishment was cruel and unusual was in *Trop v. Dulles*.²⁷⁸ In that case, a soldier was court-martialed and convicted of wartime desertion.²⁷⁹ The soldier was American born, and for his sentence he had his citizenship stripped from him.²⁸⁰ He filed a declaratory action in district court, seeking a declaration that he was still a citizen of the United States.²⁸¹ He argued that under the Eighth Amendment, being stripped of his citizenship was cruel and unusual.²⁸²

The Supreme Court agreed. In reaching its conclusion, the Court acknowledged that “[t]he exact scope of the constitutional phrase ‘cruel and unusual’ has not been detailed by this Court.”²⁸³ However, based on tracing the amendment from the English Declaration of Rights of 1688, the Court concluded that the Eighth Amendment was created to enshrine the “dignity” of persons.²⁸⁴ Further, the definition of “dignity” changes with civilized standards.²⁸⁵ And civilized standards are not static; accordingly, the reading of “cruel and unusual” “must draw its meaning from the *evolving standards of decency* that mark the progress of a maturing society.”²⁸⁶ The United States Supreme Court ultimately held

274. See *infra* Part III.B.

275. See *infra* Part III.C.

276. See JOHN BOSTON & DANIEL E. MANVILLE, PRISONERS’ SELF-HELP LITIGATION MANUAL 8 (4th ed. 2010) (“The Eighth Amendment, which forbids ‘cruel and unusual punishments,’ governs the treatment of convicted prisoners.”).

277. U.S. CONST. amend. VIII.

278. 356 U.S. 86 (1958).

279. *Id.* at 87.

280. *Id.* at 88.

281. *Id.*

282. See *generally id.* at 101-03 (discussing the soldiers’ punishment in relation to the Eighth Amendment).

283. *Id.* at 99.

284. *Id.* at 100.

285. *Id.*

286. *Id.* at 101 (emphasis added).

that under this evolving standard, stripping someone of their citizenship is unconstitutional.²⁸⁷ The Court stated, stripping someone of their citizenship “is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development.”²⁸⁸

Nearly twenty years after *Trop v. Dulles*, the Court held in *Estelle v. Gamble*²⁸⁹ that the Eighth Amendment applies to deprivations that arise during detention, and not merely deprivations that arose as a sentence.²⁹⁰ In that case, the Supreme Court held that under an evolving standard of decency the government has an “obligation to provide medical care for those whom it is punishing by incarceration.”²⁹¹ This is important because it demonstrates that when evaluating the standards of decency, one does not only look to the stated punishment, for example, the sentence, but courts must also evaluate the practical effect of the sentence being carried out.²⁹² Thus, if a particular condition of confinement, causes “unnecessary and wanton infliction of pain,” it could run afoul of an evolving standard of decency.²⁹³

1. What Is the Current Standard?

Indicating that an evolving standard of decency exists, however, merely begs the question: What is the current (evolved) standard of decency that a court should apply? And moreover, how does the court determine what that standard is? Unsurprisingly, there is not one single method that courts have universally applied. The Supreme Court has never developed a firm factor test to answer this question, but a review of the case law will demonstrate that they generally rely on three factors: (1) international comparative law, (2) the decisions of domestic rule makers, and (3) empirical research.²⁹⁴ The following section briefly traces the caselaw of the evolving standard of decency to demonstrate past reliance on these factors.²⁹⁵

287. *Id.*

288. *Id.*

289. 429 U.S. 97 (1976).

290. *Id.* at 102-03 (noting that the Eighth Amendment pertains to prison conditions).

291. *Id.* at 103.

292. *Id.* at 103-05.

293. *Id.* at 104-05.

294. See also Mathew C. Matusiak et. al., *The Progression of “Evolving Standards of Decency” in U.S. Supreme Court Decisions*, 39 CRIM. J. REV. 253, 259-62 (2014) (identifying different factors courts have used in reaching their determination of the current standard of decency).

295. There are factors specific to criminal law that the Supreme Court certainly considers, such as jury verdicts. Because asylum cases are always a bench trial, it would be useless to consider such a factor for purposes of this project. *Id.*

In *Trop*, discussed above, the Supreme Court relied on international comparative law. The Court looked to other “civilized nations of the world” and recognized that they “are in virtual unanimity that statelessness is not to be imposed as punishment for crime.”²⁹⁶ This is because the practice of stripping citizenship “subjects the individual to a fate of ever-increasing fear and distress.”²⁹⁷ The plaintiff in *Trop* would be subject to this fear because “[h]e is stateless, a condition deplored in the international community of democracies,” which could lead to deportation, discrimination, or an inability to access social services from anywhere.²⁹⁸ In other words, in finding that the practice violated an evolving standard of decency, the court relied on international comparative law, by looking to other nations’ laws and rationales.

In *Estelle v. Gamble*,²⁹⁹ also discussed above, the Court cut out comparative law and looked to the decisions of domestic rule makers. To reiterate, the Supreme Court held that, under an evolving standard of decency, state prisons must provide proper medical care to their prisoners.³⁰⁰ The Supreme Court reaches its conclusion by recognizing that most states have codified laws requiring prisoners be provided medical care.³⁰¹ The rationale for such laws is that an absence of them would lead to wanton infliction of pain, as prisoners would have to languish with painful, and potentially fatal medical issues, without ever being able to get relief.³⁰² Because so many states have, therefore, passed laws to prevent this wanton infliction of pain, the evolving standard of decency must demand that prisons provide such care to their prisoners.³⁰³

Another major case from the 1970s to evaluate an evolving standard of decency is *Gregg v. Georgia*, a seminal case upholding the constitutionality of the death penalty.³⁰⁴ Before the Court was the question of whether the death penalty violates the evolving standard of decency.³⁰⁵ In upholding the death penalty, the Court substantially expands its use of factors for determining an evolving standard of decency. The Court looked to (1) domestic rule makers, especially state legislatures, and (2) penological goals as backed up by empirical social science research. As to legislative actions, the Supreme Court noted that thirty-five states had

296. *Trop v. Dulles*, 356 U.S. 86, 102 (1958).

297. *Id.*

298. *Id.*

299. 429 U.S. 97 (1976).

300. *Id.* at 103.

301. *Id.* at 103-04.

302. *Id.*

303. *Id.*

304. *Gregg v. Georgia*, 428 U.S. 153, 169 (1976).

305. *Id.* at 173.

enacted new laws in the last four years upholding, updating, or expanding the death penalty.³⁰⁶ The Court reasoned that society must not have evolved beyond the death penalty if so many lawmakers were still willing to support it.³⁰⁷

In turning to penological goals, the Supreme Court discusses at length the potential deterrent effect of the death penalty.³⁰⁸ In this discussion of penological goals, the Court cites to studies that demonstrate that the death penalty could have a deterrent effect.³⁰⁹ Yet, what is interesting about this case, is that the Court does not take a position on the conclusions of the social science, that is, whether the death penalty actually deters crime. Instead, it merely states that the existence of such studies supports the idea that the legislatures are best equipped for determining what science to trust when making their decisions.³¹⁰ Since the Court could not demonstrate that legislatures were incorrect in their policy goals of deterring crime with the death penalty, the Court did not feel it was its place to overturn the practice.³¹¹ So it can be said that empirical research played a role in the case, albeit it was a very small one.

Fast forwarding several years to 2002, the Court begins to take empirical research more seriously in reaching its decisions on what constitutes an evolving standard of decency. In *Atkins v. Virginia*,³¹² the Supreme Court was asked to consider whether the death penalty was constitutional for a defendant who, at the time of the murders, was mentally disabled.³¹³ It is important to note that the Supreme Court had previously upheld this practice in *Penry v. Lynaugh*.³¹⁴ Now, thirteen years later, the Supreme Court reached a different conclusion, that sentencing someone with a severe mental disability to the death penalty did not comport with the then-current standard of decency.³¹⁵ In reaching this decision the Supreme Court relied on (1) the decisions of domestic rule makers and (2) empirical research.³¹⁶

As to decisions by domestic rule makers, the Supreme Court discussed the enactment of laws, starting in 1988, that banned the execution of people with severe mental disabilities, even when such states

306. *Id.* at 179-80.

307. *Id.* at 180-81.

308. *Id.* at 183-86.

309. *Id.* at 184 n.31.

310. *Id.* at 183-86.

311. *Id.* at 186.

312. 536 U.S. 304 (2002).

313. *Id.* at 306-08, 313-17.

314. 492 U.S. 302 (1989).

315. *Atkins*, 536 U.S. at 313-16.

316. *See generally id.*

would otherwise apply the death penalty.³¹⁷ The Court noted that seventeen states and the federal government had all enacted such laws since 1988.³¹⁸ And while this was not a majority of legislative bodies in the country, the Court stated “[i]t is not so much the number of these States that is significant, but the consistency of the direction of change.”³¹⁹ Because states had consistently moved away from this method, the tides of bill passage demonstrated that the practice no longer comported with the then-current standard of decency. However, despite this conclusion, the Supreme Court also stated: “in cases involving a consensus, our own judgment is ‘brought to bear,’ . . . by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators.”³²⁰ This leads the Court to then also consider empirical research in reaching its decision. The implication is that empirical research could lead the court to exercise its “own judgment” to act in a different direction of domestic rule makers.

The Court looked to clinical descriptions of severe mental disabilities, and noted that persons with such disabilities have “significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18.”³²¹ The Court further noted “[t]here is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders.”³²² In reaching this conclusion, the Court cited to multiple studies.³²³

Based on such studies, the penological goals of culpability, retribution, and deterrence, are not served by executing someone with severe mental disabilities.³²⁴ The Court noted that because of mental deficiencies, the defendant in this instance would not be as culpable because they would not be as capable of perceiving the problematic nature of their actions.³²⁵ Additionally, “[w]ith respect to retribution—the interest in seeing that the offender gets his ‘just desserts’—the severity of the appropriate punishment necessarily depends on the culpability of the offender.”³²⁶ Yet, in the case of someone with severe mental disabilities,

317. *Id.*

318. *Id.*

319. *Id.* at 315.

320. *Id.* at 313.

321. *Id.* at 318.

322. *Id.*

323. *Id.* at 318 n.24.

324. *Id.* at 318-20.

325. *Id.* at 318.

326. *Id.* at 319.

their conscious mind is not as capable of producing a motive that is “materially more ‘depraved’” than that of any person guilty of murder.³²⁷ Similarly, they would not be as capable of contemplating the consequences of their actions, and thus, they could not be adequately deterred from their actions.³²⁸

There are two important lessons from *Atkins*. The first, as discussed above, is that the domestic rule makers factor is not merely a poll, but instead, is about evaluating the direction rule makers are moving towards, both at the state and federal level.³²⁹ Additionally, *Atkins* underscores a significant increased use of empirical research in reaching the Court’s decision. In fact, when the Court states that it is its job to bring its own judgment to bear in the face of consensus,³³⁰ it is heavily implying that empirical research alone could be enough to find a practice does not comport with an evolving standard of decency. And in fact, in two more recent cases, the Supreme Court seems to make its decision based purely on empirical research.

First is the 2011 case *Brown v. Plata*.³³¹ The case concerned overcrowding in California’s prison system.³³² For at least eleven years, the state of California’s prisons operated at or around 200 percent capacity.³³³ As a result, “[p]risoners [were] crammed into spaces neither designed nor intended to house inmates.”³³⁴ The severe crowding also resulted in a lack of resources, which meant that mental and medical care was grossly inadequate, which created wanton infliction of pain on the inmates who needed such services.³³⁵ The consequences of such were identified as “increased, substantial risk for transmission of infectious illness” and the suicide rate “approaching an average of one per week.”³³⁶ Even the governor of California acknowledged that “immediate action is necessary to prevent death and harm caused by California’s severe prison overcrowding.”³³⁷

In reaching its conclusion that the overcrowding must be remedied under the Eighth Amendment, the Supreme Court relied on empirical

327. *Id.* at 319.

328. *Id.* at 319-20.

329. *Id.* at 315-16.

330. *Id.* at 313.

331. 563 U.S. 493 (2011).

332. *Id.* at 502.

333. *Id.*

334. *Id.*

335. *Id.* at 502-03.

336. *Id.* at 503.

337. *Id.*

research, both already in the record and from outside the record.³³⁸ In detail, the Court chronicled the effects of overcrowding, such as the delays in medical and mental health care, unsafe and unsanitary living conditions that one expert described as “toxic,” increased violence, and the inability of wardens to organize to correct any such problems, such that the problems continue to spiral out of control.³³⁹ What is important for our purposes, is that in this seminal case, the Court focuses almost exclusively on the empirical research detailing these harms to conclude that California must improve its conditions in prisons.³⁴⁰ Accordingly, it demonstrates that empirical research alone can be such a powerful factor, as to sway a court that detention conditions are unconstitutional.

Finally, in the 2012 case *Moore v. Texas*,³⁴¹ the Supreme Court solidified the importance and weight of empirical research as a factor for determining the proper standard of decency to apply. At issue in *Moore* was what standards a court must apply to determine if one is intellectually disabled for purposes of the death penalty.³⁴² In that case, over thirty years prior to the case reaching the Supreme Court, defendant Moore was convicted of capital murder for a botched robbery of a store clerk that resulted in the store clerk’s death.³⁴³ In 2014, a state habeas court conducted a hearing on whether Moore was intellectually disabled because, as the court ruled in *Atkins*, such a person could not be executed.³⁴⁴ Two days of testimony revealed that Moore had:

significant mental and social difficulties beginning at an early age. At 13, Moore lacked basic understanding of the days of the week, the months of the year, and the seasons; he could scarcely tell time or comprehend the standards of measure or the basic principle that subtraction is the reverse of addition.³⁴⁵

Moore also had an average IQ score of 70.66.³⁴⁶ In determining his intellectual capabilities, the habeas court relied on the eleventh edition of the American Association on Intellectual and Developmental Disabilities (“AAIDD-11”) clinical manual, and on the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders published by the American

338. *Id.* at 517-23.

339. *Id.* at 521-22.

340. *Id.* at 521-22, 545.

341. 137 S. Ct. 1039 (2017).

342. *Id.* at 1044, 1048.

343. *Id.* at 1044.

344. *Id.* at 1045-46.

345. *Id.* at 1045.

346. *Id.*

Psychiatric Association.³⁴⁷ Based on the evidence, the habeas court recommended Moore's sentence be reduced to life in prison, or grant him a new trial on the issue of intellectual disability.³⁴⁸

The Court of Criminal Appeals ("CCA"), the highest criminal court in Texas, rejected the habeas court's recommendation.³⁴⁹ The CCA noted that its prior precedent, *Ex parte Briseno*,³⁵⁰ applied the ninth edition of the American Association on Mental Retardation manual to determine intellectual disability.³⁵¹ This manual is the predecessor to the AAIDD-11 that the habeas court used and lacked the same recent scientific advances that went into the more recent addition.³⁵² "The habeas judge erred, the CCA held, by 'us[ing] the most current position, as espoused by AAIDD, regarding the diagnosis of intellectual disability rather than the test . . . in *Briseno*.'"³⁵³ Under the *Briseno* test, the CCA determined that Moore was not intellectually disabled because he was educated in "normal classrooms," Moore's father's testimony that Moore was just "stupid," and Moore's sister's testimony that Moore was smarter than he appeared.³⁵⁴ CCA also reasoned that childhood abuse detracted from a finding that Moore was intellectually disabled, believing that such factors were really related to "a personality disorder."³⁵⁵

The Supreme Court granted certiorari and reversed.³⁵⁶ The Supreme Court noted that *Atkins* had left it to the states to determine when someone was intellectually disabled for the purposes of determining if the defendant could be sentenced to the death penalty.³⁵⁷ However, such discretion was not unfettered, and it is possible for a state's standards to be so terrible as to violate the Eighth Amendment.³⁵⁸ Reviewing modern medical science, the Supreme Court indicated that the factors the CCA wished to apply were more closely associated with a lay definition of intellectual disability.³⁵⁹ To reach the conclusion that such definition violates the Eighth Amendment, the Court relied heavily on current medical practices.³⁶⁰ First, the Court reviewed Moore's IQ, and applying

347. *Id.*

348. *Id.* at 1046.

349. *Id.* at 1046-47.

350. 135 S.W.3d 1 (Tex. Crim. App. 2004).

351. *Moore*, 137 S. Ct. at 1046.

352. *Id.*

353. *Id.*

354. *Id.* at 1045, 1051-52.

355. *Id.* at 1051.

356. *Id.* at 1048, 1053.

357. *Id.* at 1048.

358. *Id.* at 1052-53.

359. *Id.* at 1046.

360. *Id.* at 1051.

research on standard errors, concluded that Moore's IQ was low enough that clinical practices required further review to determine if Moore was intellectually disabled.³⁶¹ The Court then acknowledge that the next step was to view Moore's adaptive reasoning, again, in line with current research.³⁶² The Supreme Court also chastised the CCA for not recognizing that the abused Moore suffered "risk factors" that further demonstrate intellectual disability according to modern clinical standards.³⁶³ Accordingly, the Court found that Texas's use of the *Briseno* factors violated the Eighth Amendment.³⁶⁴

It is important to note that at the time *Moore* was decided, there was no national consensus between the states as to how to determine if one was intellectually disabled, and in fact, the states had different standards across the board, with some standards that were functionally worse than *Briseno*.³⁶⁵ There really was no single direction the Supreme Court could devise in order to reach a conclusion on what the evolving standard of decency demanded. Yet, even without a consensus from domestic rule makers, the Court still found that utilizing the *Briseno* factors ran afoul of the Eighth Amendment. This is because the Supreme Court had another factor to weigh—empirical research.³⁶⁶ At least one commenter reacted to *Moore* by stating:

In *Moore*, the court (sic) looked nearly exclusively to the opinions of professional organizations like the American Psychological Association to determine what now transgresses the Eighth Amendment. This deference to professional groups completes a 15-year arc of slowly turning away from the states and their enacted legislation as the gold standard for gauging society's views.³⁶⁷

This again underscores the weight that empirical evidence can have in making a determination that a practice violates an evolving standard of decency.

Accordingly, in reviewing the case law, we are left with several factors for analyzing whether a practice violates an evolving standard of decency: (1) international comparative law, (2) decisions of domestic rule

361. *Id.* at 1049.

362. *Id.* at 1050.

363. *Id.* at 1051.

364. *Id.* at 1053.

365. *Id.* at 1057 (Roberts, C.J., dissenting).

366. *Id.*

367. Dominic Draye, *Death-Penalty Symposium: Evolving Standards for "Evolving Standards"*, SCOTUSBLOG (June 27, 2017), <http://www.scotusblog.com/2017/06/symposium-evolving-standards-evolving-standards>.

makers, and (3) modern empirical research.³⁶⁸ After reviewing the case law, it is also clear that the most significant factors the Court currently applies are the factors of (1) domestic rule makers' decisions and (2) modern empirical research.³⁶⁹ Either of these two factors could spell the end of family detention. However, before analyzing such factors, this Article must first conclude that the evolving standard of decency applies to immigration detention.³⁷⁰

*B. The Evolving Standard of Decency Applies to
Immigration Family Detention*

As outlined above, the constitutional standards that apply to convicted prisoners are well established under the Eighth Amendment.³⁷¹ The Eighth Amendment, however, only applies to detention that resulted from a conviction.³⁷² Immigrant detainees are civil detainees.³⁷³ Protections for federal civil detainees are derived from the due process clause of the Fifth Amendment.³⁷⁴ Further, under due process, it is well established that civil detainees retain greater liberty protections than criminal detainees.³⁷⁵

Accordingly, instead of a prohibition on “cruel and unusual punishment” under the Eighth Amendment, under the Fifth Amendment governments are forbidden from subjecting civil detainees merely to “punishment.”³⁷⁶ There are two situations where a civil detainee’s detention may amount to punishment: “(1) where the challenged restrictions are expressly intended to punish, or (2) where the challenged restrictions serve an alternative, non-punitive purpose but are nonetheless excessive in relation to the alternative purpose, or are employed to achieve objectives that could be accomplished in so many alternative and less harsh methods.”³⁷⁷

368. *Estelle v. Gamble*, 429 U.S. 97, 102-03 (1976); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976); *Trop v. Dulles*, 356 U.S. 86, 102 (1958).

369. *Gregg*, 428 U.S. at 179, 183-86; *Trop*, 356 U.S. at 102.

370. *See infra* Part III.B.

371. *See infra* Part III.A; Tom Jawetz, *Litigating Immigration Detention Conditions*, ACLU NAT'L PRISON PROJECT 1 (July 18, 2008), https://law.ucdavis.edu/alumni/alumni-events/files/mcle-files/jawetz_detention_conditions.pdf.

372. *Edwards v. Johnson*, 209 F.3d 772, 777-78 (5th Cir. 2000).

373. *Rodriguez v. Marin*, 909 F.3d 252, 253, 257 (9th Cir. 2018).

374. *Id.* at 257.

375. *See Youngberg v. Romeo*, 457 U.S. 307, 321-24 (1982) (noting that civil detainees retain greater liberty protections than individuals detained under criminal process).

376. *Jones v. Blanas*, 393 F.3d 918, 931-32 (9th Cir. 2018).

377. *Id.* at 932.

While administrations have adopted family detention as a form of deterrence, to arguably punish and therefore demonstrate to other immigrants they should not arrive, the government continues to claim other rationales as well.³⁷⁸ Specifically, the government argues that detention is also for the process of making sure immigrants appear in court.³⁷⁹ That means that, under the standard outlined above, the pivotal question for determining if family detention is constitutional is to ask whether family detention is excessive. It is here that the evolving standard of decency steps in to determine what is and is not excessive.

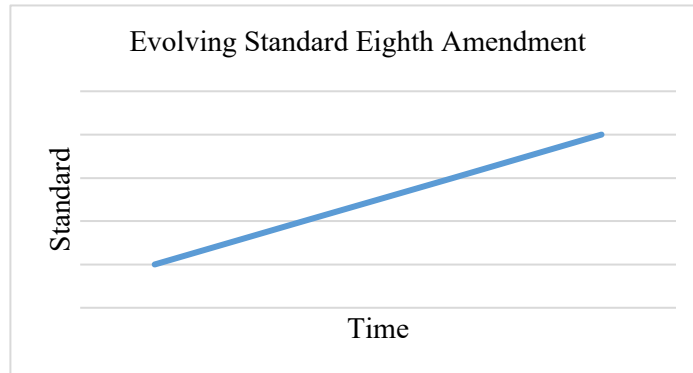
When determining what detention conditions are prohibited by the Due Process Clause, a court's analysis is typically tied closely to Eighth Amendment jurisprudence that prohibits cruel and unusual punishment.³⁸⁰ Intuitively, this makes sense. If something is cruel and unusual punishment under the Eighth Amendment, then it follows that such actions are at least "punishment," which is prohibited by the Due Process Clause. Therefore, if what qualifies as cruel and unusual punishment changes with the times, it must be that what qualifies as punishment must also be evolving.

378. See generally Jessica M. Vaughan, Andrew R. Arthur & Dan Cadman, *A One-Sided Study on Detention of Illegal-Immigrant Families: Here's the Other Side of the Coin*, CTR. FOR IMMIGR STUD. (Sept. 14, 2018), <https://cis.org/Vaughan/OneSided-Study-Detention-IllegalImmigrant-Families> (arguing that family detention should be used as a mechanism to guarantee immigrants attendance to removal proceedings).

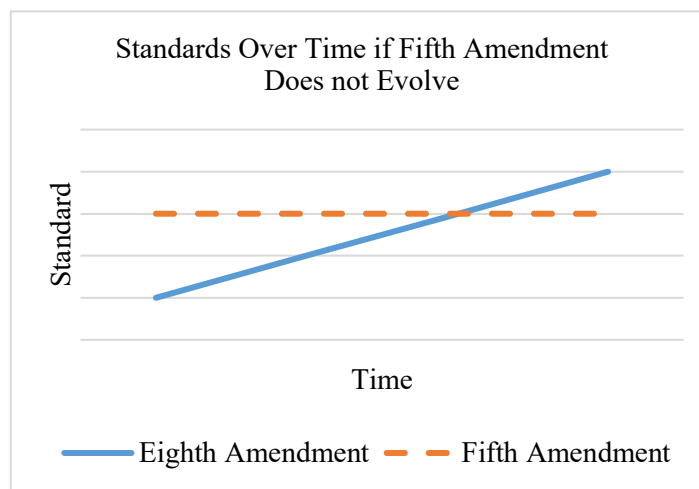
379. Dara Lind, *A New Study Blows Up Trump's "Catch-and-Release" Myth*, VOX (July 11, 2018), <https://www.vox.com/policy-and-politics/2018/7/11/17525006/catch-release-families-border-trump>.

380. See Jawetz, *supra* note 371, at 1-2 (noting the close tie between Eighth Amendment jurisprudence and immigration conditions litigation).

Put differently (and visually), one can think of the standards for conditions litigation under the Fifth and Eighth Amendments as two lines on a chart. The y-axis would be the improved standard as it evolves, and the x-axis would be for the continuance of time. Accordingly, as society evolves, the line defining the Eighth Amendment's standards of decency would necessarily form a slope going up, as so:



Considering that the Fifth Amendment offers broader protection than the Eighth Amendment, it cannot be that due process does not also evolve, otherwise, charting the lines would eventually end in a point where the lines were perpendicular, and due process offered less protection than the Eighth Amendment. Visually it would look like this:



The intersection of the lines symbolizes the point where the protections of the Eighth Amendment would improve beyond those protections of the Fifth Amendment.³⁸¹ However, case law indicates that the Fifth Amendment is supposed to offer a greater amount of protection. And again, this makes sense because the Fifth Amendment protects civil detainees, whose liberty interests are higher than those of criminal detainees. Accordingly, the Fifth Amendment is to hover above the Eighth Amendment, and that requires that the Fifth Amendment standard also be an evolving standard of decency, albeit, a higher one. We can call this standard “Evolving Standard of Decency+.”³⁸²

It is important that this standard applies because even if the practice has been used in the past, and viewed as constitutional under an evolving standard, the practice may later be found to be unconstitutional. Take what happened in *Atkins* discussed above.³⁸³ To reiterate, in that case, the issue was whether an intellectually disabled person could be sentenced to death.³⁸⁴ Despite the fact that the Supreme Court had previously held that this practice was constitutional, the evolving standard allowed the Supreme Court to forbid the practice without overruling its past precedent.³⁸⁵ Similarly, despite the fact that the United States has a history of family detention and despite courts’ rulings allowing it, an evolving standard of decency analysis could still find that the practice violates the Constitution.

Additionally, acknowledging that an Evolving Standard of Decency+ applies gives us a helpful way to evaluate whether family detention is “excessive” for the purposes of determining if courts should characterize it as “punishment” in violation of the Fifth Amendment. Specifically, it gives courts factors to apply in making the determination—those factors used under an evolving standard of decency under the Eighth Amendment are: (1) international comparative law, (2) decisions by domestic rule makers, and (3) modern empirical research.³⁸⁶ Albeit, while applying these factors, courts should be more deferential to the civil detainee’s rights. The next section will analyze these factors, and ultimately conclude that family detention can no longer stand under the Fifth Amendment.³⁸⁷

381. *Id.*

382. *See supra* Parts I, III (explaining an “evolving standard of decency”).

383. *See supra* Part III.A.1.

384. *Atkins v. Virginia*, 536 U.S. 304, 307-10 (2002).

385. *Id.* at 318-21.

386. *See supra* Part III.A.1.

387. *See supra* Part III.C.

C. *Society Has Evolved Beyond Family Detention*

In comparing the United States' current policy and reality of immigration detention with the important factors for an evolving standard of decency, a court should conclude that the United States can no longer practice family detention in compliance with that standard. As to international comparative law and legislative action, there is evidence that the direction of such bodies is moving against family detention. This paper does conclude, however, that the first two factors, by themselves, are not enough to abolish the practice.³⁸⁸ Instead, family detention should be abolished based on the empirical research on the practice, and such research is buoyed by the first two factors.³⁸⁹

1. Nations Are Moving Away from Detaining Children

An examination of international comparative law demonstrates that nations have evolved beyond family detention, that is, detention of parents with their children.³⁹⁰ The United Nations Committee on the Rights of the Child has called on member states to “expeditiously and completely cease the detention of children on the basis of their immigration status.”³⁹¹ This would necessitate the end of family detention where parents and children are detained together. Nations have shown a willingness to comply with this request. This is best demonstrated by the recent trend of adopting ATD policies. ATD policies are legislative initiatives to limit current detention numbers, avoid detention entirely for certain groups, and introduce community-based supervision options.³⁹²

A wave of nations have adopted such policies. By the end of 2011, all member states of the European Union, except Malta, had adopted alternatives to detention legislation.³⁹³ Belgium has ended its detention of immigrant children entirely.³⁹⁴ Finland, Poland, and the UK have all made similar commitments.³⁹⁵ Outside of the United States, Japan has released all of its immigrant children in detention and banned the practice of detaining children.³⁹⁶ Even less-developed nations, such as Thailand,

388. *See supra* Part III.C.

389. *See supra* Part III.A–B.

390. *See* Robyn Sampson & Grant Mitchell, *Global Trends in Immigration Detention and Alternative to Detention: Practical, Political and Symbolic Rationales*, 1 J. MIGRATION & HUM. SECURITY 97, 103-04 (2013) (describing global trend moving away from immigration detention).

391. *Id.* at 103.

392. *Id.* at 102-04.

393. *Id.* at 102.

394. *Id.* at 103-04.

395. *Id.* at 104.

396. *Id.* at 103.

Malaysia, and Tanzania have recently sought to adopt policies that would end the detention of children.³⁹⁷

It is true that many nations still detain children. However, as articulated above, when evaluating legislative enactment for evolving standards of decency purposes, it is important to look at whether such enactments are working in a consistent direction.³⁹⁸ When reviewing legislative enactments, nations are moving away from detaining children. This would militate towards abolishing the practice.

While helpful to the analysis, this factor alone is likely not enough to abolish family detention. As becomes clear upon evaluating the evolution of an evolving standard of decency, international comparative law has fallen out of favor with courts.³⁹⁹ Instead, one seeking to abolish the practice must either demonstrate that domestic rule makers are turning against the practice or that modern empirical research demonstrates that the practice is so cruel as to amount to punishment.⁴⁰⁰ These next two factors are evaluated below.⁴⁰¹

2. Actions by Congress, the Executive Branch, and the States

In evaluating the second factor of decisions by domestic rule makers, two conclusions will become clear. The first is that this factor does not militate in favor of abolishing family detention, because there has been much back-and-forth among U.S. rule makers on this issue, including support for family detention. Yet, for similar reasons, the second conclusion is that this factor does not militate against abolishing the practice because rule makers have also been increasingly hostile towards family detention. In other words, we have a situation similar to what the Court was faced with in *Moore*, where there was no real consensus among the states, and the Court instead relied on empirical research to reach its decision.⁴⁰² To further explore this lack of consensus for or against family detention, this paper will first discuss family detention at the state level, and then discuss rule makers' decisions at the federal level.⁴⁰³

397. *Id.* at 104.

398. *See* Penry v. Lynaugh, 492 U.S. 302, 331 (1989).

399. *See supra* Part III (outlining the evolution of an evolving standard of decency).

400. *See supra* Part III.A.1 (indicating that the most important factors for an evolving standard of decency currently are empirical research and legislative enactments).

401. *See supra* Part III.C.2.

402. *See supra* notes 357-58 & 362-63 and accompanying text.

403. *See supra* Part III.C.2.a-b.

a. States and Their Policies on Family Detention

A theoretical difficulty arises when examining rulemaking at the state level for immigration detention that does not arise when considering criminal law at the state level. This is because states have relatively little reason or authority to enact rules on immigration policy, whereas, with criminal law, each state is compelled to have legislation addressing an issue, such as the death penalty. Such legislation, under the typical Eighth Amendment analysis, would help courts “poll” whether a practice was widely accepted.

To be sure, we can ask which states currently have policies to support family detention. Out of the fifty states, there are only two with family detention facilities: Texas and Pennsylvania.⁴⁰⁴ And while Texas has made moves to approve of the facilities by granting licensing, rule makers in Philadelphia, Pennsylvania have already passed a resolution calling for the end of family detention in that state.⁴⁰⁵ The California legislature has also taken a strong stance against family detention by enacting legislation that bans any new immigration detention centers which, of course, encompasses banning any new family detention facilities.⁴⁰⁶ So, insofar as there is recent action at the state and local level, those actions seem against family detention.

It is fair to review recent legislative action and say that the “direction” of state and local rule makers is moving against family detention. However, such examples are still fewer than those examples used in *Atkins*, *Estelle*, and *Gregg* whereby the court used state legislatures as the gold standard to divine the current evolving standard of decency. So, in an effort to be conservative, it is prudent to not jump to abolition from these few examples. Instead, it is important to analyze how the federal government has re-evaluated its stance on family detention since the federal government is more involved with immigration decisions.

404. See Emily Kassie & Eli Hager, *Inside Family Detention, Trump’s Big Solution*, MARSHALL PROJECT (June 22, 2018), <https://www.themarshallproject.org/2018/06/22/inside-family-detention-trump-s-big-solution> (naming the locations of family detention facilities).

405. Colin Deppen & Sarah Anne Hughes, *Why PA’s Controversial Berks Detention Center for Immigrant Families Is Still Open*, BILLY PENN (June 22, 2018), <https://billypenn.com/2018/06/22/why-pas-controversial-detention-center-for-immigrant-families-is-still-open>.

406. Jorge Rivas, *Ban on Immigration Detention Centers Sneaks into California State Budget and Gets Approved*, SPLINTER (June 28, 2017), <https://www.splinternews.com/ban-on-immigration-detention-centers-sneaks-into-califo-1796100157>.

b. Federal Government Actions and an Evolving Standard of Decency

Another set of domestic rule makers worth evaluating are federal rule makers, such as Congress and the Executive Branch. There is a history of Congress attempting to end the practice of family detention. During the Bush Administration, the Congressional Appropriations committee recommended an end to family detention in a memo accompanying its budget proposal for ICE.⁴⁰⁷ Further, during the Obama Administration, 178 democratic legislators wrote a letter to the president—a member of their own party—calling for the end of the Administration’s practice of detaining families.⁴⁰⁸

Regardless, none of these actions actually ended the practice. Further, Congress continued to fund ICE’s request to pay for family detention.⁴⁰⁹ Accordingly, these actions are not strong enough to conclude family detention should be abolished under an evolving standard of decency. In fact, as the history of family detention outlined in the first section explains, in the last three administrations the Executive Branch of the federal government has radically expanded family detention.⁴¹⁰

There is an argument that the recent family separation battle provides evidence that favors abolishing family detention. This is because the national fight on family separation informs us that our national stance towards immigrant families is improving. Specifically, during the Bush Administration, as discussed above, we had a similar situation whereby the Bush Administration was separating immigrant children and adults that arrived together. Yet, there was not a massive national outcry to the practice. To be clear, the practice did end, but the Bush Administration was not forced to end it by public pressure. Instead, after some mild disapproval by Congress in a congressional budget approval, the Bush Administration began to explore alternatives to family separation.

By contrast, President Trump, who made being “tough” on immigration a central theme of his campaign, experienced massive public opposition to family separation.⁴¹¹ In fact, even when the Trump

407. H.R. Rep No. 109-79, at 38 (2005).

408. Press Release, United States Congresswoman Zoe Lofgren, 178 House Democrats to DHS: End Family Detention Now (July 31, 2015), <https://lofgren.house.gov/media/press-releases/178-house-democrats-dhs-end-family-detention-now>.

409. Department of Homeland Security Appropriations Act, Pub. L. No. 109-90, 119 Stat. 2064, 2068-69 (2005); *see also* Department of Homeland Security Appropriations Act, Pub. L. No. 111-83, 123 Stat. 2142, 2148-49 (2009).

410. *See supra* Part II.D (describing the radical expansion of family detention since the Bush Administration).

411. Richard Gonzales, *Trump’s Executive Order on Family Separation: What It Does and Doesn’t Do*, NPR (June 20, 2018), <https://www.npr.org/2018/06/20/622095441/trump-executive->

Administration blamed the opposition party for the policy and called for ending the Flores Settlement Agreement as a way to alleviate family separation, public outrage continued to hold the Trump Administration accountable for family separation.⁴¹² In other words, the Trump Administration did not end the practice because it thought it was its responsibility to do so—it was forced to. The fact that an administration that is hostile to immigrants was forced to sign an executive order that called for the improved conditions of immigrant families, demonstrates that, in general, our standard of decency towards the way we treat such families has improved.

But this author concludes that such an argument is not enough to end family detention on its own. First, the Executive Order President Trump signed calls for an expansion of detention. Additionally, merely because standards have improved, it does not necessarily mean that the standards have improved beyond family detention.

From reviewing rule makers actions at the federal level, it is inconclusive that this factor weighs in favor or against abolishing family detention. While there are certainly actions that demonstrate that the evolving standard of decency has improved, a conservative analysis suggests that such evidence may not be strong enough to abolish family detention altogether based on this factor alone. Accordingly, it is imperative to look at whether recent empirical research demonstrates the depravity of family detention, and if so, if that depravity is so great as to warrant the abolition of family detention.

3. Empirical Research Has Come Out Heavily Against Family Detention

As iterated above, it only takes one factor strongly in favor of abolishing a practice under an evolving standard of decency in order to conclude that the practice must be ended.⁴¹³ In the instance of family detention, empirical research has concluded overwhelmingly that family detention—the imprisonment of already suffering immigrant children with their parents—is so cruel as to amount to at least a form of punishment for those in detention. Accordingly, such research can serve

order-on-family-separation-what-it-does-and-doesnt-do.

412. Julie Hirschfeld Davis, *Trump Again Falsely Blames Democrats for His Child-Separation Policy*, N.Y. TIMES, June 17, 2018, at A19, <https://www.nytimes.com/2018/06/16/us/politics/trump-democrats-separation-policy.html>.

413. See *supra* Part III.A.1 (noting the importance of the sole factor of empirical evidence in making the Court's determination).

as a reason under an “independent evaluation of the issue” that justifies ending the practice.⁴¹⁴

In 2017 the Academy of American Pediatricians released a policy statement, stating “that immigrant children seeking safe haven in the United States should never be placed in detention facilities.”⁴¹⁵ The Academy observed that “there is no evidence that any amount of time in detention is ‘safe’ for children,” and “even short periods of detention can cause serious psychological trauma” that lead to long-term mental health problems in immigrant children.⁴¹⁶ This includes “anxiety, depression and post-traumatic stress disorder.”⁴¹⁷ And these symptoms are merely associated with the act of detention; deplorable conditions in detention facilities, such as those documented above, can further the psychological harm caused to detained immigrant children.⁴¹⁸ The president of the American Academy of Pediatrics, Dr. Colleen Kraft, explained to media outlets that detention can be just as detrimental to children’s health as separating them from their parents.⁴¹⁹

The American Immigration Lawyers Association (“AILA”) and American Immigrant Council (“AIC”) recently noted that “a systematic review of studies investigating the impact of immigration detention on the mental health of children and adults found that ‘high levels of mental health problems in detainees’ was reported in all ten of the studies reviewed.”⁴²⁰ A number of different mental health issues were commonly reported, including anxiety, depression, post-traumatic stress disorder, and even suicidal ideation.⁴²¹ The studies demonstrated that there was “a strong correlation between the length of time in detention and the severity of distress.”⁴²² As to suicidal ideation, another study found that ideation developed in more than half of young immigrant detainees, and that for a

414. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

415. Devin Miller, *Pediatricians Speak Out: Detention Is Not the Answer to Family Separation*, AM. ACAD. PEDIATRICS PUBLICATIONS (July 24, 2018), <http://www.aappublications.org/news/2018/07/24/washington072418>.

416. *Id.*

417. *Id.*

418. *Id.*

419. Catherine E. Shoichet, *Doctors Decry Plans to Detain Immigrant Kids with Parents*, CNN (June 27, 2018), <https://www.cnn.com/2018/06/27/health/immigrant-family-detention-children/index.html>.

420. AM. IMMIGRATION LAW. ASS’N, ALIA AND THE COUNCIL SUBMIT COMMENTS OPPOSING FLORES REGULATIONS 14 (Nov. 6, 2018), <https://www.aila.org/infonet/aila-council-submit-comments-opposing-flores>.

421. *Id.* at 14-15.

422. *Id.* at 15.

third of those exhibiting self-harm, they had never sought to do so prior to detention.⁴²³

Researchers have also noted that detaining children with their parents creates specific negative impacts on immigrant children and their parents.⁴²⁴ In order to understand and make sense of the world around them, children rely on their parents.⁴²⁵ And for young children, one of the biggest indicators of post-traumatic stress disorder is witnessing a threat to a parent.⁴²⁶ One such threat is watching their parents languish in detention, and suffer their own mental and physical consequences as a result.⁴²⁷ And certainly, being forced to watch their children languish in detention is also detrimental to the mental health of immigrant parents.⁴²⁸

And while detention certainly does enough harm on its own, research also shows it exacerbates previously experienced trauma that is common in immigrants seeking asylum, in both parents and children alike.⁴²⁹ Jodi Berger Cardoso, Assistant Professor of Social Work at the University of Houston, has studied immigrant children and noted that they have, on average, been subjected to eight traumatic life events, “a clinical category that includes experiences like kidnapping, sexual assault, and witnessing violent crimes.”⁴³⁰ In addition, “[a]bout 60% of those [children] met the criteria for PTSD and 30% for depressive disorder.”⁴³¹ Additionally, AILA and AIC noted that “[n]umerous forensic evaluations of the [detained family detention] clients detained at [Dilley] recognized that most of them already were severely traumatized when they arrived in the U.S. and that the detention itself was an additional, independent, and severe stressor.”⁴³²

This empirical research demonstrates the cruelty of family detention. As the Supreme Court has indicated, such research is key to determining whether a practice violates an evolving standard of decency, and can, even on its own, be enough to demonstrate a constitutional violation. Considering the weight of the evidence of the cruelty of family detention

423. *Id.*

424. *Id.*

425. *Id.*; see Jamie Ducharme, *Separating Kids from Parents Can Cause Psychological Harm. But Experts Say Detaining Them Together Isn't Much Better*, TIME (June 21, 2018), <http://time.com/5317762/psychological-effects-detaining-immigrant-families>.

426. Loria, *supra* note 4 (documenting the impacts of family separation).

427. *Id.*

428. *Id.*

429. *Id.*

430. *Id.*

431. *Id.* (PTSD is defined as post-traumatic stress disorder).

432. AM. IMMIGRATION LAW. ASS'N, *supra* note 420, at 14.

and noted absence of counter-evidence, there is enough empirical evidence to justify judicial abolition of family detention.

But it is not alone; courts can always choose to rely on those calls by domestic rule makers to end family detention as a way to further bolster justifications to abolish the practice. Further, the force of the empirical evidence is buoyed by current international practices, which have moved away from detaining immigrant children. Accordingly, there is ample support justifying the judicial abolition of family detention.

IV. CONCLUSION

In the wake of ending family separation, the federal government expanded the use of family detention. Family detention is a system whereby we place immigrant parents and children together in immigration prisons, forcing them to suffer together rather than separately. This is likely why pediatricians have concluded that detention together is just as bad as separation. While the consequences of separation are more immediate and shocking, the prolonged agony of detention can and does build to the point of inflicting the same level of suffering on immigrant detainees. It does so by chipping away at their mental health—by forcing them to not only continually suffer, but watch their loved ones suffer as well.

Yet, there is a theoretical framework for judicial abolition of family detention. Under the Fifth Amendment, courts must apply an evolving standard of decency to practices that could amount to punishment of immigrant detainees. And while similar to an evolving standard of decency under the Eighth Amendment, this standard is undoubtedly a higher standard. Under this higher standard, courts look to international actions, decisions by domestic rule makers, and empirical evidence to determine if a practice is so cruel as to amount to punishment. After evaluating such factors, it is clear that some international and domestic lawmakers have already sought abolition of the practice, and that the empirical evidence independently supports such abolition. It is evident that family detention inflicts wanton cruelty on those who are detained, and therefore, it cannot comply with our current standards of decency.