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## Immigrant Families Behind Bars: Technology Setting Them Free

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# Immigrant Families Behind Bars: Technology Setting Them Free

## ABSTRACT

*In July of 2015, Judge Dolly Gee from the US District Court for the Central District of California ordered that all immigrant women and children currently detained in a federal family detention facility be released immediately. She described the conditions of these detention centers as “deplorable” and stated that detention of these women and children directly violated the 1997 Flores Agreement. However, the practice of immigrant family detention remains alive and well in this country. Why? This Note provides an answer to this question and proposes a cost-effective and more efficient solution to the problem: electronic monitoring.*

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Yancy Mejia decided that enough was enough after she was kidnapped by a Salvadorian gang, had her fingers broken and wrist dislocated.<sup>1</sup> She took a risk and escaped her home country with her children in search of a better, safer life in America. Little did she know that the United States would not welcome her with open arms. Instead, she and her children were detained at the South Texas Residential Center owned by Corrections Corporation of America (CCA) located in Dilley, Texas.<sup>2</sup> When she expressed the intense pain she was experiencing in her wrist and fingers to the detention center's doctor, he recommended that she drink water.<sup>3</sup>

L., a Honduran woman seeking asylum, was detained with her young son at a family detention center in Artesia, New Mexico, for three months.<sup>4</sup> They were forced to stay in a room with four other immigrant families, and the young son became very ill, eventually requiring hospitalization.<sup>5</sup>

Unfortunately, the stories of Mejia and L. are not outliers. Hundreds of immigrant families' dreams are shattered when they make it to the "promised land," only to be held in limbo at family detention centers pending immigration proceedings. Data from 2008 to 2012 demonstrates that "[the Department of Homeland Security] detained children for periods ranging from three days to more than one year, and more than 800 children spent at least one week in adult

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1. Cristina Costantini, *Five Mothers Detained at Family Detention Center File Claims Against Government for \$10 Million*, FUSION (Aug. 11, 2015), <http://fusion.net/story/180946/mothers-immigration-center-10-million-govt-claim/> [<https://perma.cc/N2UA-2TV8>].

2. *See id.*

3. *See id.*

4. Wil S. Hylton, *The Shame of America's Family Detention Camps*, N.Y. TIMES (Feb. 4, 2015), [http://www.nytimes.com/2015/02/08/magazine/the-shame-of-americas-family-detention-camps.html?\\_r=0](http://www.nytimes.com/2015/02/08/magazine/the-shame-of-americas-family-detention-camps.html?_r=0) [<https://perma.cc/CH4X-Y6S5>] (recounting the story of various immigrant women and their children detained at different federal facilities in the country).

5. *See id.* (explaining that L.'s young son first had the chicken pox, then tonsillitis, and was eventually hospitalized with a high fever).

custody.”<sup>6</sup> These mothers and children have not been charged with any crimes—immigration violations are civil in nature.

Judges and members of Congress alike have expressed distaste for the practice of immigrant family detention.<sup>7</sup> Why, then, is the United States choosing detention, the outdated option, over the more cost-effective alternative of electronic monitoring? This Note tackles these questions head-on in an effort to spark change. Part I discusses the history of immigrant detention in the United States, with particular focus on the Flores Settlement Agreement’s application to accompanied children. Part II analyzes how electronic monitoring is used by the criminal justice system and compares it to electronic monitoring in the immigration system. Part III proposes that the Flores Settlement Agreement be extended to accompanied children and that the US Immigration and Customs Enforcement (ICE) Agency use electronic monitoring as a more cost-effective and humane alternative to family detention. It also provides suggestions for improving the system, such as recruiting more attorneys to the immigration bar so that more women and children have representation in front of an immigration judge. In 2014, US Border Patrol detained 68,445 immigrant families.<sup>8</sup> These 68,445 families (and counting) can be set free through existing technology.

## I. A HISTORY OF IMMIGRANT DETENTION IN THE UNITED STATES

Families have fled their native countries in search of a better life in the United States for centuries. Many have done so in order to escape life-threatening situations, civil strife, persecution, conflict, and economic hardship.<sup>9</sup> In the past, it was more common for the

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6. NAT’L IMMIGRANT JUSTICE CTR., FACT SHEET: CHILDREN DETAINED BY THE DEPARTMENT OF HOMELAND SECURITY IN ADULT DETENTION FACILITIES 1 (May 2013), <http://www.immigrantjustice.org/sites/immigrantjustice.org/files/NIJC%20Fact%20Sheet%20Minors%20in%20ICE%20Custody%202013%2005%2030%20FINAL.pdf> [<https://perma.cc/Q34N-X9GL>].

7. See Molly Hennessy-Fiske, *Immigrant Family Detention Centers Are Prison-Like, Critics Say, Despite Order to Improve*, L.A. TIMES (Oct. 23, 2015), <http://www.latimes.com/nation/nationnow/la-na-immigration-family-detention-20151020-story.html> [<https://perma.cc/4TWB-PWP3>] (“U.S. Rep. Raul M. Grijalva (D-Ariz.) said the Texas detention centers he visited this summer were ‘very moving and very, very depressing — and for our country, very embarrassing.”); see also Roque Planas, *Judge Fighting Family Detention Has Personal Connection to Immigration*, HUFFINGTON POST (Aug. 24, 2015), [http://www.huffingtonpost.com/entry/judge-dolly-gee\\_us\\_55db850ae4b04ae49704188e](http://www.huffingtonpost.com/entry/judge-dolly-gee_us_55db850ae4b04ae49704188e) [<https://perma.cc/B3ZG-YNNH>] (explaining Judge Dolly Gee’s stance on the United States’ immigration policies).

8. Lazaro Zamora, *What You Need to Know: Immigrant Family Detention*, BIPARTISAN POL’Y CTR. (Aug. 27, 2015), <http://bipartisanpolicy.org/blog/what-you-need-to-know-immigrant-family-detention/> [<https://perma.cc/ES6F-KDH6>].

9. Rebeca M. Lopez, *Codifying the Flores Settlement Agreement: Seeking to Protect Immigrant Children in U.S. Custody*, 95 MARQ. L. REV. 1635, 1655 (2012).

patriarch of the family to immigrate to the United States to work and send money to his family members who remained in their native country.<sup>10</sup> In the late 1980s and early 1990s, there was a marked shift in immigration patterns whereby women and children immigrated to the United States to reunite with their husbands and fathers rather than maintaining a long-distance relationship.<sup>11</sup> During this time, Congress operated under a “catch and release” policy, releasing immigrants into cities and towns pending their immigration proceedings.<sup>12</sup>

### A. Immigrant Detention Today

After the September 11, 2001, terrorist attacks, Congress initiated a “get tough on immigration” movement, enacting stricter laws and practices.<sup>13</sup> The government began to treat undocumented presence in the United States as a criminal offense when, in reality, it amounted only to a civil infraction.<sup>14</sup> Among the new practices was family detention, described at the time as a “disturbing new development.”<sup>15</sup> It made vulnerable populations, such as undocumented women and children who posed no threat to national security, detainable. The Department of Homeland Security (DHS) is responsible for the operation of the family detention centers.<sup>16</sup>

Prior to the “get tough on immigration” movement, there were approximately ninety to one hundred detention beds in the United States reserved for mothers and their children.<sup>17</sup> This number has increased—by more than 4,000 percent—to approximately 3,800 available beds today.<sup>18</sup> According to then-DHS Secretary Jeh Johnson, family detention centers were created “to quickly deport people and deter future migrants.”<sup>19</sup> He describes it as a “rapid

10. See *id.* at 1646.

11. See *id.*

12. See *id.* at 1655.

13. See Danielle Hawkes, *Study Note: Locking up Children: Lessons from the T. Don Hutto Family Detention Center*, 11 J.L. & FAM. STUD. 171, 172–73 (2008).

14. THE CONSTITUTION PROJECT, RECOMMENDATIONS FOR REFORMING OUR IMMIGRATION DETENTION SYSTEM AND PROMOTING ACCESS TO COUNSEL IN IMMIGRATION PROCEEDINGS 8 (2009), <http://www.constitutionproject.org/wp-content/uploads/2012/10/359.pdf> [<https://perma.cc/Y6GT-Q3FE>].

15. See generally NAT'L IMMIGRANT JUSTICE CTR., COSTLY FAMILY DETENTION DENIES JUSTICE TO MOTHERS AND CHILDREN (Mar. 2015), [https://www.immigrantjustice.org/sites/default/files/Family%2520Detention%2520Factsheet%25202015\\_03\\_09.pdf](https://www.immigrantjustice.org/sites/default/files/Family%2520Detention%2520Factsheet%25202015_03_09.pdf) [<https://perma.cc/3XM5-4TGK>].

16. Zamora, *supra* note 8.

17. See *id.*

18. See NAT'L IMMIGRANT JUSTICE CTR., *supra* note 15.

19. See *id.*

deportation process” with one clear message to those thinking of entering the country illegally: “We will send you back.”<sup>20</sup>

Scholars considering this issue have compared the practice of family detention to the Japanese Internment program that began on February 19, 1942, and eventually detained over 120,000 Japanese Americans.<sup>21</sup> After the fact, it was clear that the Japanese Americans were not detained due to military necessity.<sup>22</sup> Rather, the US government detained Japanese Americans for “non-compelling reasons,” such as “racial prejudice, war hysteria, and a failure of political leadership.”<sup>23</sup> Considering the negative view of Japanese Internment today, it is puzzling that Congress has chosen such a reminiscent policy for dealing with immigrant women and children.

### 1. A Look Inside a Family Detention Center

US District Judge Dolly Gee of Los Angeles described the conditions at these detention centers as “deplorable.”<sup>24</sup> Her July 2015 order demanded that all children and mothers who are not a flight or national security risk be released because their detention was a blatant violation of the 1997 Flores Settlement Agreement.<sup>25</sup> Judge Gee, the daughter of immigrant parents and an advocate for immigrants and minorities in the state of California, wholeheartedly disagrees with the practice of family detention, one that she calls an “avoidance” policy with little added benefit to anyone in society.<sup>26</sup> Judge Gee has stated:

Leveling blame at immigrant or minority communities, imposing harsher penalties and constructing more jails are desperate solutions of shortsighted policy-makers who do not have the energy or resources to tackle problems of poverty, ignorance,

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20. Hylton, *supra* note 4 (“We have already added resources to expedite removal, without a hearing before an immigration judge, of adults who come from these three countries (Honduras, Guatemala and El Salvador) without children,’ the secretary of Homeland Security, Jeh Johnson, told a Senate committee in July. ‘Then there are adults who brought their children with them. Again, our message to this group is simple: We will send you back.’”).

21. Hawkes, *supra* note 13, at 176.

22. *See id.*

23. *See id.* (“In 1980, a committee ‘composed of former members of Congress, the Supreme Court, and the Cabinet . . . unanimously concluded that the factors that shaped the internment decision were racial prejudice, war hysteria, and a failure of political leadership, rather than military necessity.’”); *see also* Geoffrey R. Stone, *Civil Liberties v. National Security in the Law’s Open Areas*, 86 B.U. L. REV. 1315, 1324 (2006).

24. Cindy Carcamo & Molly Hennessy-Fiske, *Detained Immigrant Mothers and Children Trapped in Legal Limbo*, L.A. TIMES (Aug. 7, 2015), <http://www.latimes.com/nation/nationnow/la-na-nn-detained-immigrants-20150807-story.html> [https://perma.cc/2VK9-RVGF].

25. *Id.*

26. *Id.*

racism [,] and the misallocation of resources. Neither victims of crime nor society as a whole benefit from such policies of avoidance . . . .<sup>27</sup>

Many immigrant detention facilities, family detention centers included, lack the oversight needed to ensure that the detainees are treated properly and that there are no constitutional violations. ICE voluntarily adopted a list of National Detention Standards to which it adheres in order to ensure the “safe, secure[,] and humane treatment” of immigrant detainees.<sup>28</sup> However, this regime lacks proper monitoring, which removes any hoped-for assurance that these standards are being met.<sup>29</sup>

## 2. Growing Cost of Immigrant Detention

Statistics demonstrate that more than 300,000 immigrants are currently detained in the United States and that this number has increased since the post-9/11 “get tough on immigration” movement.<sup>30</sup> Somehow, the United States is detaining more immigrants even though there has been a marked decline in illegal immigration into the country.<sup>31</sup>

Most of the US immigration detention facilities are run by private prison companies like CCA. The United States enters into contracts with these companies, which make approximately a one-time \$95 profit per immigrant detainee who is to be housed in their facilities.<sup>32</sup> Each year, Congress has had to increase ICE’s budget in order to comply with the contract agreements and keep up with the growing number of immigrant detainees.<sup>33</sup> For instance, in just one year, ICE’s budget increased from \$5.5 billion in 2008 to \$5.93 billion in 2009.<sup>34</sup> Running immigrant detention facilities alone consumes about \$2.5 billion of that budget.<sup>35</sup> The government does not even see much of this money as it primarily benefits the private detention companies.<sup>36</sup> In fact, audits have shown that these companies tend to

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27. Planas, *supra* note 7.

28. AM. BAR ASS’N DELEGATION TO THE PASSAIC CTY. JAIL, MEMORANDUM: REPORT REGARDING IMPLEMENTATION OF ICE DETENTION STANDARDS AT THE PASSAIC COUNTY JAIL 1 (Aug. 23, 2005), <https://www.ice.gov/doclib/foia/dfra/2005/passaiccountyjailpatersonnjaugust12005.pdf> [<https://perma.cc/8255-5HPM>].

29. Kimberly R. Hamilton, *Immigrant Detention Centers in the United States and International Human Rights Law*, 21 BERKELEY LA RAZA L.J. 93, 119 (2011).

30. *See id.* at 97–98.

31. *Id.*

32. *See id.* at 101.

33. *See id.* at 100.

34. *See id.*

35. *See id.*

36. *See id.*

overcharge for each detainee.<sup>37</sup> For instance, one company charged \$60 per detainee per day<sup>38</sup> when, in reality, the cost of housing the detainee was only \$37.<sup>39</sup> This demonstrates a need for the government to devise a more cost-efficient mechanism for handling the issue of illegal family immigration.

### 3. Family Detention for Deterrence Purposes

One of DHS's justifications for continuing the practice of family detention is to prevent another surge in immigration like the one experienced in the summer of 2014.<sup>40</sup> In just one year, there was a 361 percent increase in the number of families that entered the United States illegally.<sup>41</sup> Most of these immigrants were women and children from Central America.<sup>42</sup> Yet the government thought that if it detained these women and children at the border, it would deter others from coming.<sup>43</sup> However, in *R.I.L-R, et al v. Johnson*, the District Court for the District of Columbia enjoined the government from detaining women and children in family detention centers for this purely deterrence purpose.<sup>44</sup>

Now, ICE justifies the practice of family detention as a way to keep families together.<sup>45</sup> Without family detention, ICE argues, it would "have no choice but to separate mothers and children."<sup>46</sup> In reality, research shows that detention actually diminishes a parent's authority over his or her child.<sup>47</sup> ICE also expresses concern "that human traffickers would start renting children or taking children across the border so that they could 'attempt to pass the groups off as family units.'"<sup>48</sup> There is no data, however, to support that detention would prevent human trafficking from happening. And there are less restrictive means of preventing human trafficking of immigrant children, with the most effective being electronic monitoring.

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37. *See id.* at 101.

38. *See id.*

39. *See id.*

40. *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 170, 175 (D.D.C. 2015).

41. *Zamora*, *supra* note 8.

42. *See NAT'L IMMIGRANT JUSTICE CTR.*, *supra* note 15.

43. *See id.*

44. *R.I.L-R*, 80 F. Supp. 3d at 191.

45. *NAT'L IMMIGRANT JUSTICE CTR.*, *supra* note 15.

46. *Id.*

47. *See id.*

48. *Lopez*, *supra* note 9, at 1656.



## II. ANALYSIS

A. *Legal Issues Surrounding Family Detention Centers*

As then-DHS Secretary Jeh Johnson described, family detention centers were specifically set up to be swift removal facilities or “deportation mills.”<sup>49</sup> One of the most serious consequences of these facilities is that the immigrants housed within them are afforded little-to-no due process. Immigration proceedings are supposed to be in conformance with the Fifth Amendment right to Due Process—immigrants facing deportation must be afforded a “full and fair hearing” and a “reasonable opportunity to present evidence on [their] behalf.”<sup>50</sup> However, most of these detention centers are located in the southern region of Texas where legal services for immigrants are overburdened.<sup>51</sup> Unfortunately, US immigration policies have become stricter with the growing number of immigrants entering the country illegally. Without the assistance of an attorney, immigrant mothers have trouble understanding the requirements for obtaining protection in the United States.<sup>52</sup> Even families fortunate enough to be appointed an attorney face the difficulty of accessing their legal assistance from within the confines of the detention center. Attorneys on the outside struggle to get in touch with their clients, which, in turn, affects case preparation and their ability to obtain favorable relief for their clients.<sup>53</sup>

Because family detention centers were set up specifically as expedited removal systems, they often do not afford families that have valid claims for “credible fear” of persecution in their native countries the meaningful opportunity to pursue asylum claims.<sup>54</sup> These families are often deported before an attorney can assist them in setting up a “credible fear interview” (CFI)—a necessary screening process for asylum-seeking applicants.<sup>55</sup> The CFI is used by DHS as a way of evaluating whether the immigrant has a “fear of return” that warrants him or her being granted asylum in the United States.<sup>56</sup> The

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49. John Burnett, *Immigrant Advocates Challenge the Way Mothers Are Detained*, NPR (Oct. 15, 2014, 5:07 PM), <http://www.npr.org/2014/10/15/356419939/immigrant-advocates-challenge-way-mothers-are-detained> [<https://perma.cc/T4BJ-AMC5>]; see NAT'L IMMIGRANT JUSTICE CTR., *supra* note 15.

50. *Gutierrez v. Holder*, 662 F.3d 1083, 1091 (9th Cir. 2011); *Colmenar v. INS*, 210 F.3d 967, 972 (9th Cir. 2000).

51. NAT'L IMMIGRANT JUSTICE CTR., *supra* note 15.

52. *See id.*

53. *See id.*

54. *See id.*

55. *See id.*

56. *See id.*

immigrant has the burden of establishing that “there is a ‘significant possibility’ that he or she could establish in front of an Immigration Judge that he or she would be subject to torture, as defined in the Convention Against Torture (CAT) if returned to his or her country.”<sup>57</sup>

Article 1 of the CAT defines “torture” as:

Severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.<sup>58</sup>

The CAT also requires that “the individual be in the torturer’s control or custody, and that harm arising only from, inherent in, or incidental to lawful sanctions generally is not torture.”<sup>59</sup> It is difficult for an immigrant mother to navigate these complex laws without meaningful assistance of counsel. A study found that representation by counsel is “the single most important non-merit factor” in determining the outcome of removal proceedings.<sup>60</sup> For illustration, an immigrant who is represented by counsel is five times more likely to be granted asylum than one who proceeds pro se.<sup>61</sup>

Detention further hinders asylum proceedings by requiring immigrant parents’ CFIs to take place in the detention center in front of their children.<sup>62</sup> Mothers may be deterred from being candid about the traumatic events they experienced in order to shield their children.<sup>63</sup> Finally, it has been reported that the asylum officers interviewing in the family detention centers rush the interviews, limiting the asylum applicant’s responses.<sup>64</sup>

Immigrant non-citizens have constitutional rights.<sup>65</sup> Although they are not afforded all of the same rights as a US citizen, certain rights are conferred, such as the Fifth Amendment right to Due Process of law.<sup>66</sup> There are also human rights treaties that, although

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57. U.S. Dep’t of Homeland Sec., *U.S. Citizenship and Immigration Services Credible Fear FAQ*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/faq-page/credible-fear-faq#t12831n40004> [<https://perma.cc/2TFT-MYR3>] (last updated Sept. 26, 2008).

58. CONVENTION AGAINST TORTURE, art. 1, 8 C.F.R. § 208.18 (2016).

59. See U.S. Dep’t of Homeland Sec., *supra* note 57.

60. Hamilton, *supra* note 29, at 110.

61. See *id.* at 110–11.

62. See NAT’L IMMIGRANT JUSTICE CTR., *supra* note 15.

63. See *id.*

64. See *id.*

65. Hamilton, *supra* note 29, at 112.

66. *Id.*; see also U.S. CONST. amends. V, XIV.

not binding, apply to immigrant detainees and provide guidance on how they are to be treated.<sup>67</sup> For instance, Article 2 of the Universal Declaration of Human Rights (UDHR), which was adopted by the United Nations (UN) in 1948, states the following:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.<sup>68</sup>

This means that a foreign detainee in the United States has the same rights and freedoms as a US citizen being detained.<sup>69</sup>

Additionally, Article 9 of the UDHR states that “no one shall be subjected to arbitrary arrest, detention or exile.”<sup>70</sup> In using the broad term “no one,” it can be argued that Article 9 also applies to immigrant detainees. The International Covenant on Civil and Political Rights (ICCPR) also provides protection for immigrants by prohibiting arbitrary arrest and detention.<sup>71</sup> Kimberly Hamilton of Berkeley Law School argues that detaining immigrants can be a violation of international human rights law because many of these people have only violated administrative immigration laws.<sup>72</sup> Under human rights law, “administrative detention should not be punitive in nature.”<sup>73</sup>

Aside from the due process hurdles that family detention centers present, detention also has grave physical and mental health consequences for the detained families, specifically for children, who are particularly vulnerable.<sup>74</sup> According to the National Immigrant Justice Center, children who were detained at the family detention center in Artesia, New Mexico, suffered from “weight loss, gastrointestinal problems and suicidal thoughts.”<sup>75</sup> Studies have also shown that children housed in detention centers generally suffer

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67. See, e.g., G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

68. *Id.*

69. Hamilton, *supra* note 29, at 111.

70. *See id.*

71. *See id.* at 112.

72. *Id.*

73. *Id.*

74. *Id.*

75. See NAT'L IMMIGRANT JUSTICE CTR., *supra* note 15. The Family Detention Center in Artesia, New Mexico, has since been shut down. See Associated Press, *U.S. to Close Immigrant Detention Center in Artesia*, SANTA FE NEW MEXICAN (Nov. 18 2014), [http://www.santafenewmexican.com/news/u-s-to-close-immigrant-detention-center-in-artesia/article\\_056a06ab-6044-5f04-950f-822b22779462.html](http://www.santafenewmexican.com/news/u-s-to-close-immigrant-detention-center-in-artesia/article_056a06ab-6044-5f04-950f-822b22779462.html) [https://perma.cc/97T4-AUTV].

permanent psychological trauma and mental health issues.<sup>76</sup> Even though the DHS claims that family detention is best for family members because it allows them to stay together, it has been found that “family relationships are more likely to break down the longer families are detained.”<sup>77</sup> As one example, a mother’s authority over her children depreciates as it is limited by the detention center’s rules and regulations.<sup>78</sup>

### 1. Treatment of Unaccompanied Immigrant Children: A Framework for Treatment of Accompanied Immigrant Children

The law sheds some light on how to deal with the issue of unaccompanied immigrant children. However, the law does not provide clarity about what should be done in the case of immigrant children who enter the United States accompanied by a parent or guardian. In practice, the general policy for dealing with unaccompanied immigrant children is to favor release when it is feasible and safe to do so. While great strides have been made, there is still a lack of federal legislation specifically banning the detention of immigrant children, leaving the DHS with wide discretion to change its policies.

As a result of a class action lawsuit filed against the Immigration and Naturalization Service (INS) in 1985, *Flores v. Meese*,<sup>79</sup> the Flores Settlement Agreement was reached in 1997.<sup>80</sup> The agreement set the “national policy regarding the detention, release, and treatment of children in [INS] custody” and is codified at 8 C.F.R. §§ 236.3, 1236.3.<sup>81</sup> This was the first document that provided guidance on the detention of immigrant children.<sup>82</sup> The case was brought on behalf of Jenny Lisette Flores, a fifteen-year-old Salvadorian girl who fled her native country to avoid persecution, along with three other children with similar stories.<sup>83</sup> Although intending to reunite with her aunt who was living in the United States, Jenny was apprehended at the border and held in a detention facility for two months awaiting her deportation hearing.<sup>84</sup> INS refused to release her to her aunt’s custody because the policy at the

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76. See NAT’L IMMIGRANT JUSTICE CTR., *supra* note 15.

77. *See id.*

78. *Id.*

79. *Flores v. Meese*, 681 F. Supp. 665, 665 (C.D. Cal. 1988).

80. See NAT’L IMMIGRANT JUSTICE CTR., *supra* note 15.

81. *See id.*

82. Lopez, *supra* note 9, at 1648.

83. *See id.*

84. *See id.*

time did not permit the release of unaccompanied minors to “third-party adults.”<sup>85</sup>

The children in this class action lawsuit argued that “they had a fundamental constitutional right to due process, which included the right to be released to the ‘custody of responsible adults.’”<sup>86</sup> Additionally, the children complained of the conditions within the detention center.<sup>87</sup> Among the conditions reported, the center did not provide educational or recreational opportunities, the children were subjected to intrusive body cavity searches, and they were forced to share living facilities with adults of both sexes.<sup>88</sup> This was a clear violation of the Juvenile Justice and Delinquency Prevention Act (JJDP), federal legislation requiring sight and sound separation of juveniles housed in detention facilities where adults are present.<sup>89</sup>

When the case reached the United States Supreme Court, the Court held that the INS policies dictating release procedures for unaccompanied children did not violate any of the minors’ rights, and it remanded the case to the district court.<sup>90</sup> However, the parties in the suit decided to negotiate rather than continue to litigate the issue. As a result, the Flores Settlement Agreement was reached, specifically requiring that “immigration officials detaining minors provide (1) food and drinking water, (2) medical assistance in the event of emergencies, (3) toilets and sinks, (4) adequate temperature control and ventilation, (5) adequate supervision to protect minors from others, and (6) separation [of children] from unrelated adults whenever possible,” applying the JJDP to the immigration context.<sup>91</sup> Additionally, it required that INS “(1) ensure the prompt release of children from immigration detention; (2) place children for whom release is pending, or for whom no release option is available, in the ‘least restrictive’ setting appropriate to the age and special needs of minors; and (3) implement standards relating to care and treatment of children in U.S. immigration detention.”<sup>92</sup> It articulated a clear preference for releasing children whenever it was possible and safe to do so.

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85. *Id.*

86. *Id.* at 1649.

87. *Id.* at 1648.

88. *Id.*

89. Coal. for Juvenile Justice, *Sight and Sound Separation*, <http://www.juvjustice.org/juvenile-justice-and-delinquency-prevention-act/sight-and-sound-separation> [<https://perma.cc/PQ3S-6U5W>] (last visited Dec. 16, 2016).

90. Lopez, *supra* note 9, at 1649.

91. *Id.* at 1649–50.

92. *Id.* at 1650.

Though the Flores Settlement Agreement appeared on its face to be a victory for unaccompanied children immigrating to the United States, statistics show otherwise. The number of children detained by INS almost doubled from 2,375 children in 1997 to 5,385 children in 2001.<sup>93</sup> In 2003, the Homeland Security Act (HSA or “the Act”) attempted to further clarify how detained children should be treated.<sup>94</sup> This Act restructured the INS by removing it from the purview of the Department of Justice (DOJ) and placing it under the then-newly created agency, DHS.<sup>95</sup> It also shifted responsibility of unaccompanied minor detention from the DOJ to the Office of Refugee Resettlement (ORR) within the Department of Health and Human Services (DHHS).<sup>96</sup> Congress deemed the ORR the best agency to deal with this population because it was the agency with the most experience working with vulnerable refugees.<sup>97</sup>

Despite the restructuring of the various agencies and departments, ICE assumed INS’s responsibility as the successor organization and was, therefore, bound by the Flores Settlement Agreement.<sup>98</sup> Congress assigned the ORR the task of creating a national plan “to ensure that qualified and independent legal counsel would be appointed to represent the children.”<sup>99</sup> Additionally, Congress required the ORR to consider the interests of the child when deciding whether or not the unaccompanied child should be kept in custody or be released to family members.<sup>100</sup> While it was definitely a more organized system, the state of affairs after the HSA did not significantly improve the situation for unaccompanied children. The Act did not include any provisions that set up legislative oversight or procedural safeguards.<sup>101</sup> Unaccompanied children still proceeded without the assistance of qualified and independent legal counsel, and ICE continued to treat them as if they were adults.<sup>102</sup>

Six years later, the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) was passed, which included some provisions addressing unaccompanied children in US custody.<sup>103</sup>

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93. *See id.* at 1651.

94. Homeland Security Act of 2002, Pub. L. No. 107-296, § 101, 116 Stat 2135.

95. Lopez, *supra* note 9, at 1651.

96. *See id.* at 1652.

97. *See id.* at 1653.

98. *See id.* at 1652.

99. *Id.*

100. *See id.* at 1652–53.

101. *Id.* at 1652.

102. *See id.* at 1653.

103. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 7107, 122 Stat 5044.

For example, it mandated that unaccompanied children “be promptly placed in the least restrictive setting that is in the best interests of the child” and that advocates be appointed to them.<sup>104</sup> This expanded the protections of the HSA of 2002 one step further. However, because the TVPRA was only applicable to unaccompanied children, *accompanied* children were left unprotected.<sup>105</sup>

The TVPRA of 2008 did not address those undocumented children traveling to the United States with parents or guardians because, at the time it was passed, family detention was not as common as it is today.<sup>106</sup> Until 2001, INS had a “catch and release” policy in place.<sup>107</sup> Under this policy, immigrant families detected at the border were processed and subsequently released with a notice to appear before an immigration judge.<sup>108</sup> At a hearing, an immigration judge would determine whether or not the family qualified for some type of relief, such as asylum, or whether the family should be deported to its native country.<sup>109</sup> If the “alien[s]” failed to appear on the date of their hearing, an order of deportation would be issued.<sup>110</sup>

As previously noted, after the 9/11 terrorist attacks, the US government made national security a priority and, as a consequence, toughened its immigration laws by instituting the family detention policy.<sup>111</sup> The government justified this harsher policy with the rationale that, without it, immigrant families would remain undetected and would not appear at their hearings.<sup>112</sup> The practice of releasing children did not make sense in the accompanied children context because separating them from their families would only make the situation worse from ICE’s perspective, so detaining the family unit became the practice.

To implement this policy, the Bush Administration quickly created family detention centers. One particular facility, the T. Don Hutto facility in Taylor, Texas, came under fire in late 2007 when reports were released describing the conditions to which families were subjected as “prison-like.”<sup>113</sup> The children were forced to wear prison uniforms, the rooms were very cold, and the healthcare was

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104. *Id.*

105. Lopez, *supra* note 9, at 1652.

106. *See id.* at 1655.

107. *See id.*

108. *See id.*

109. *Id.*

110. *Id.*

111. *See id.* at 1656.

112. *Id.*

113. *See id.* at 1658–59.

inadequate.<sup>114</sup> This, too, resulted in a lawsuit against DHS and ICE.<sup>115</sup> It was in this case that the presiding court, the District Court for the Western District of Texas, finally held that the Flores Settlement Agreement of 1997 applied to accompanied children, as well, stating that it “applies to *all* minors in the custody of ICE and DHS.”<sup>116</sup> The lawsuit also resulted in the Hutto Settlement Agreement, which was meant to improve conditions for children living in the family detention centers.<sup>117</sup> It required a facility to provide educational and recreational opportunities.<sup>118</sup> However, the main drawback of the Hutto Settlement Agreement was that it was applicable only to the Hutto facility and not to any of the other family detention centers in existence due to the court’s limited jurisdiction.

### *B. Parallels Between Nonviolent Criminals and Immigrants*

In trying to find a solution to the problem of immigrant family detention, it is important to recognize the parallels between nonviolent criminals and immigrants. Nonviolent criminals, such as those convicted of property crimes, are often electronically monitored because it is an effective way to keep track of their whereabouts without further crowding America’s jails and prisons. The solution to the immigrant family detention crisis may already exist in the criminal context.

#### 1. Electronic Monitoring in the Criminal Context

The DOJ estimates that about two-thirds of inmates in jails are non-dangerous and are only in custody because they cannot afford to bond out.<sup>119</sup> While defendants are sitting in jail awaiting their upcoming court dates, they often lose their jobs and their dependents are left to fend for themselves.<sup>120</sup> In addition, the American bail system is known to be ineffective at ensuring that defendants attend their court hearings.<sup>121</sup> On top of that, holding these inmates in jail

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114. *Bunikyte v. Chertoff*, Nos. A-07-CA-164-SS, A-07-CA-165-SS, A-07-CA-166-SS, 2007 WL 1074070, at \*5, \*14 (W.D. Tex. Apr. 9, 2007).

115. *See id.*

116. *See id.*

117. Brief for Petitioner, *Castro v. United States*, 131 S. Ct. 902 (No. 10-309), 2010 WL 3905538, at \*21.

118. *In re Hutto Family Det. Ctr.*, No. A-07-CA-164-SS (W.D. Tex. 2007).

119. Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1352 (2014).

120. *See id.* at 1356–57.

121. About 15 percent of defendants who make bail fail to attend at least one of their court dates. *See id.* at 1361.



while awaiting trial costs taxpayers approximately \$9 billion per year.<sup>122</sup> Samuel Wiseman, an Assistant Professor of Law at Florida State University College of Law and a scholar published in the *Yale Law Review*, strongly advocates for a right to be monitored electronically in the pretrial phase of a criminal prosecution, rather than detained.<sup>123</sup> While saving money that could be spent more productively, electronic monitoring balances the governmental interests of protecting the public and ensuring that a defendant attends his or her court dates. It reduces the need for flight-based pretrial detention, which is the precise concern with both criminal defendants and immigrant women and children.

Wiseman argues that electronic monitoring has not gained popularity due to privacy concerns.<sup>124</sup> However, he thinks that these concerns are overstated.<sup>125</sup> While electronic monitoring does significantly diminish the individual right to privacy, GPS monitors would be placed on people that the government technically has the right to detain. Compared to being held in jail in the criminal context or a detention facility in the immigration context, electronic monitoring is the less restrictive method—it is “increasingly efficient, inexpensive, and nearly invisible.”<sup>126</sup>

## 2. Electronic Monitoring in the Immigration Context

Electronic monitoring has already been used in the immigration context in the past. However, the government is currently failing to use it as is evidenced by the expansion of immigrant detention centers. Since the 1990s, ICE has had an Alternatives to Detention (ATD) program in place that implements the use of electronic ankle monitors.<sup>127</sup> The ATD program was expanded in 2004 with the creation of the Intensive Supervision Appearance Program (ISAP).<sup>128</sup> Through ISAP, ICE contracted with private corporation Behavioral Interventions Incorporated (BI) to “hold contracts with the incarceration industry to track and monitor those on house arrest or awaiting trial.”<sup>129</sup> Those immigrants monitored

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122. *See id.* at 1346.

123. *See id.* at 1349.

124. *See id.*

125. *See id.* at 1376.

126. *See id.*

127. Kyle Barron & Cinthya Santos Briones, *No Alternative: Ankle Monitors Expand the Reach of Immigration Detention*, NACLA (Jan. 6, 2015), <https://nacla.org/news/2015/01/06/no-alternative-ankle-monitors-expand-reach-immigration-detention> [<https://perma.cc/9RQB-SCAR>].

128. *See id.*

129. *Id.*

through ISAP must provide notification of their whereabouts to a designated case specialist by phone and are subjected to random visits by the case specialist without warning to ensure that they are living where they claim to be.<sup>130</sup> The two primary advantages of the ATD program are that electronic monitoring is more cost effective and more humane than detention. Immigration attorney Amy Gottlieb stated that “while immigrant detention costs approximately \$122 a day, supervision by the electronic ankle monitor costs the government about \$20 a day.”<sup>131</sup> Today, ICE also contracts with a company called GEO Care, a BI subsidiary, to handle electronic monitoring of 10,000 immigrants.<sup>132</sup> In 2015, the government paid GEO Care \$56 million for its services.<sup>133</sup> The government pays private prison companies like CCA over \$2 billion each year for immigrant detention alone.<sup>134</sup>

### III. SOLUTIONS

While it is understandable that DHS is detaining women and children to ensure that they are present for their immigration proceedings, DHS is not only violating existing law, but also committing an exorbitant amount of resource waste. The immigrant women and children are *not* criminals. These families do not pose a threat to the community. They are simply committing a civil infraction for morally defensible reasons—to escape persecution in their native countries or to seek a better life for their families. Ankle monitors cost “an average of \$5 a day per person,” whereas detention costs “an average of \$130 per day per person, and can cost over \$330 at some detention centers.”<sup>135</sup> This Note strongly urges that, in the same way that Congress has delineated a clear intent to keep immigrant families together rather than separating them, it should have a clear policy against detention of women and children. Family detention centers should be shut down, and electronic monitoring should become the primary way to handle immigration issues.

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130. *Id.*

131. *Id.*

132. John Burnett, *As Asylum Seekers Swap Prison Beds for Ankle Bracelets, Same Firm Profits*, NPR (Dec. 3, 2014), <http://www.npr.org/2015/11/13/455790454/as-asylum-seekers-swap-prison-beds-for-ankle-bracelets-same-firm-profits> [<https://perma.cc/968Y-K5ZU>].

133. *See id.*

134. Brianna Lee, *The Expensive Business of Immigrant Detention in the U.S.*, INT'L BUS. TIMES (Sept. 11, 2014), <http://www.ibtimes.com/expensive-business-immigration-detention-us-1685018> [<https://perma.cc/Q45K-AJDL>].

135. Molly Hennessy-Fiske, *Immigrants Object to Growing Use of Ankle Monitors After Detention*, L.A. TIMES (Aug. 2, 2015), <http://www.latimes.com/nation/immigration/la-na-immigrant-ankle-monitors-20150802-story.html> [<https://perma.cc/3Z7B-VMGR>].

### A. Economic Benefits of Electronic Monitoring

While the citizenry may not want to get involved, the issue of detaining non-dangerous defendants and, similarly, non-dangerous immigrant women and children is a societal problem that economically burdens all taxpayers. This is because detention centers are largely funded by taxpayer dollars.<sup>136</sup> To reiterate, ankle monitoring costs significantly less than detention. In fact, using electronic monitoring would result in over 95 percent savings on what is currently being spent on detention, including the initial cost of acquiring the electronic monitors.<sup>137</sup>

### B. Forms of Electronic Monitoring

There are two types of electronic monitoring to choose from, either of which would produce better and more economically efficient results than detention in the immigration context. The first is the continuous-signal curfewed monitoring systems, whereby “individuals wear a tag on their ankle, which sends a signal to a receiver attached to the individual’s phone.”<sup>138</sup> This monitoring system typically requires the person being monitored to stay confined to his or her home during certain hours of the day, and it has the capability to determine if someone has tampered with the equipment.<sup>139</sup> However, it seems extreme to confine innocent immigrant women and children to their homes. It would prevent women from searching for jobs in order to provide for their children. It would not serve any greater purpose to monitor them twenty-four hours a day.

The other available form of electronic monitoring does not require the individual to be confined to the home but requires “periodic check-ins through ‘voice verification’ or another means of proving location.”<sup>140</sup> This form is significantly less invasive than the aforementioned continuous-signal curfewed monitoring system and, as such, is better suited to the immigration context. Illegal immigration is a civil infraction; therefore, undocumented women and children should not be treated like criminals.

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136. *The Math of Immigration*, NAT’L IMMIGR. F. (Aug. 22, 2013), <http://immigrationforum.org/blog/themathofimmigrationdetention/> [https://perma.cc/7PJA-RJQ6] (“The House of Representatives endeavors to spend even more taxpayer money, their authorized amount annually exceeding what DHS requests, on the detention operations of ICE. For Fiscal Year 2014, the House of Representatives approved a budget of \$5.4 billion for ICE operations, \$2.04 billion for Custody Operations.”)

137. *Id.*

138. *See* Wiseman, *supra* note 119, at 1365.

139. *See id.*

140. *Id.*

On a positive note, this solution has been instituted in some contexts, excluding the immigrant family context. Immigration officials have recently begun to use this type of GPS tracking, typically using the BI ExacuTrack One monitor, as opposed to the BI HomeGuard 200, which required confinement to the home.<sup>141</sup> BI is currently “the largest and most tenured community corrections provider of electronic monitoring and services in the world,” and DHS is one of its most loyal customers.<sup>142</sup>

While this is one step in the right direction, more can and should be done. Immigrant detention should only be utilized for those immigrants who commit crimes while they are illegally residing in the United States.

### *C. Disadvantages of Electronic Monitoring*

Some human rights activists have exhibited dissatisfaction with the alternative of electronic monitoring of immigrants.<sup>143</sup> They have taken issue with the fact that the same for-profit prison company that held immigrants in family detention centers is handling the cases after the families’ release.<sup>144</sup> Additionally, immigrant women themselves are complaining about having to wear the devices that they call *grilletes*, which directly translates to “shackles” in English.<sup>145</sup> Their release is conditioned upon them wearing the ankle monitors at all times, even when showering.<sup>146</sup> They complain that the ankle monitors are uncomfortable and make them feel embarrassed.<sup>147</sup> For example, 28-year-old Carolina Menjivar from Honduras commented the following about the ankle monitor that she is forced to wear: “It makes me ashamed, because they only put them on criminals, and I’m

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141. Barron & Santos Briones, *supra* note 127; *GPS Tracking Becomes System of Choice in Community Corrections*, BI INSIGHT (Nov. 19, 2012) [hereinafter BI INSIGHT], <https://bi.com/blog/bi-insight/gps-tracking-becomes-system-of-choice-in-community-corrections/> [https://perma.cc/V2V5-93SW].

142. See BI INSIGHT, *supra* note 141 (listing the advantages of the ExacuTrack One as heard from customers: “one-piece unit streamlines inventory management and reduces ‘out of range’ alerts, AFLT compatible enables reliable indoor and urban canyon tracking, omni-directional antenna delivers dependable signal reception and tracking, event pairing capability enables officers to focus on critical alerts, field-replaceable battery saves time, money and keeps equipment in the field”).

143. See Burnett, *supra* note 132.

144. See *id.*

145. Hennessy-Fiske, *supra* note 135.

146. See *id.*

147. *Id.*

not a criminal yet.”<sup>148</sup> Victor Cruz, a Salvadorian immigrant, complains, “[I]t bothers me—it hurts my skin.”<sup>149</sup>

Maria Hinojosa and Marlon Bishop from LatinoUSA discuss the disadvantages of ankle monitoring in the immigration context in their podcast *Why are Immigrant Mothers Wearing Ankle Monitors?*<sup>150</sup> They describe ankle monitoring as a way of “being locked up in a very different way.”<sup>151</sup> The ankle monitor itself is about the size of an iPhone but twice as thick and bulky.<sup>152</sup> Karina from Honduras, one of the women that Hinojosa and Bishop interviewed on their podcast, expressed that wearing the ankle monitor makes her feel bad—emotionally and psychologically.<sup>153</sup> She stated that she “never thought it would be like this, [she] came looking for freedom, fleeing violence and abuse.”<sup>154</sup> She thought the United States was a place to get ahead, but instead, it turned out to be a *cruel* place.<sup>155</sup>

Is electronic monitoring a good alternative to family detention, then? Anecdotes from the immigrants who have to wear the uncomfortable devices suggest that it might be as abysmal as family detention. This Note argues, however, that while it is unfortunate that these immigrants have to endure this nuisance, it remains a much better alternative to being detained. The detention centers are crowded and “prison-like.” Electronic monitoring is more humane, allowing immigrant families to stay in homes, while taking into account the government’s interest in preventing illegal immigration.

### 1. Technological Discrimination

One aspect of electronic monitoring that the scholar Wiseman delves into that may prove to be relevant in the immigration context is the concept of technological discrimination or inequality.<sup>156</sup> The American Bar Association has flatly expressed the view that “detaining persons simply because they cannot afford bail is unwarranted,” yet this happens daily in the American criminal justice

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148. See Burnett, *supra* note 132.

149. See *id.*

150. Maria Hinojosa & Marlon Bishop, *Why Are Immigrant Mothers Wearing Ankle Monitors?*, END FAM. DETENTION (Oct. 31, 2015), <http://endfamilydetention.com/why-are-immigrant-mothers-wearing-ankle-monitors/> [<https://perma.cc/CYW7-JBYU>].

151. *Id.* (describing the ankle monitors as a form of prison rather than an alternative to prison).

152. See *id.* (describing the ExacuTrack GPS tracking system physically).

153. *Id.*

154. See *id.* (translating the conversation with Karina, an immigrant to the United States from Honduras).

155. *Id.*

156. See Wiseman, *supra* note 119, at 1380.

system.<sup>157</sup> If electronic monitoring is only offered to those who can afford it, the current state of affairs will not change significantly. If defendants cannot afford bail, they likely cannot afford the cost of electronic monitoring and “the economic discrimination of the current system is maintained.”<sup>158</sup> Wiseman asserts that the advent of this type of expensive, less intrusive technology only exacerbates the discrimination problem. Rich, high-flight-risk defendants can avoid detention whereas indigent, low-flight-risk defendants remain in jail. Wiseman states that, while this is not an ideal result, GPS monitoring is still a better alternative to detention and should continue to be used.<sup>159</sup>

Illegal immigrants tend to leave behind impoverished, third-world countries and enter the United States with no resources. The very reason they come to this country is to try to better their lives by working and earning money to support their families. If the government is to offer electronic monitoring as an alternative to detention, it must do so free of charge to immigrants, in the same way that the government pays for the operation of the detention centers, or else it really is not offering it at all.

#### *D. Alternative Solutions*

Family detention is not beneficial to any of the actors involved in the situation. It has detrimental effects on detainees, it does not prevent an influx of immigration, and it costs the US government a substantial amount of money to run the facilities.<sup>160</sup> While ankle monitoring is likely the most appealing alternative to the government because it allows the United States to balance its interests in keeping track of illegal immigrants and ensuring that women and children do not fall victim to human trafficking, there other viable alternatives that warrant, at the very least, some consideration.

##### 1. Home Rentals

One solution that has been proposed by scholars is the idea of renting detained families a home for the duration of their immigration proceedings.<sup>161</sup> Through family detention, ICE is spending approximately \$11,400 a month to detain a family of four.<sup>162</sup> If ICE

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157. *See id.* at 1360.

158. *See id.* at 1380.

159. *Id.*

160. *See generally* Hamilton, *supra* note 29.

161. *See* Hawkes, *supra* note 13, at 180.

162. *See id.*

provided them with housing that cost them, hypothetically, \$1,500 a month, it would save almost \$10,000 a month and it is likely that the family will not go anywhere.<sup>163</sup> Realistically, it will be difficult to gain sufficient support for a practice like this. One major criticism is that this practice would actually cause a massive influx of immigration to the United States because families would essentially be rewarded for the civil infraction that they are committing.<sup>164</sup>

## 2. Comprehensive Plans

Another viable solution would be the implementation of a comprehensive plan, which includes the use of ankle monitoring on adults, the assignment of a social worker to each family's case, subsidized housing near the immigration court hearing the case, a language interpreter, health insurance for the entire family, and an appointed lawyer or legal advocate.<sup>165</sup> The plan tackles "the many problems that arise when working with immigrant families, including: legal proceedings, flight risk, poverty, language barriers, etc."<sup>166</sup> This solution would be the most ideal for ensuring that immigrant families have the best outcome in their cases; however, it is more costly than electronic monitoring alone. The best approach is to ask Congress for one improvement at a time. The priority right now should focus on eradicating family detention centers by exclusively employing electronic monitoring.

## 3. Access to Assistance of Counsel

The Honorable Robert Katzmann, Chief Judge of the US Court of Appeals for the Second Circuit, argues that, unfortunately, family detention centers will be around for at least a number of years into the future.<sup>167</sup> If Judge Katzmann is correct, the current state of affairs can nevertheless be improved by ensuring that detained women and

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163. *Id.*

164. *Id.*

165. *See id.* ("The plan should be comprehensive and adequately address the many problems that arise when working with immigrant families, including: legal proceedings, flight risk, poverty, language barriers, etc. Such a plan should include a caseworker for each family, ankle bracelets on adults for tracking purposes, subsidized housing to help families remain nearby until their proceedings are complete, interpreters to ease the process, health insurance for all family members, and legal advocates to work on behalf of the family.")

166. *See id.* (explaining what a comprehensive plan would look like and consist of).

167. Conversation with Judge Robert Katzmann, Chief Judge of the United States Court of Appeals for the Second Circuit, Burch room at Vanderbilt Law School (Feb. 18, 2016) (discussing the future of family detention with Vanderbilt law students interested in pursuing a career in immigration law).

children are adequately represented by counsel so that they can obtain more favorable forms of relief.

During his career on the bench, Judge Katzmann has witnessed first-hand the tremendous need for improvements in the immigration bar. Very few immigrants going through the court system are represented by counsel because they do not have a constitutional right to counsel and cannot afford to retain one on their own. In hopes of better understanding the issue, Katzmann conducted the New York Immigrant Representation Study, which demonstrated that, in New York City alone, 60 percent of immigrants facing deportation do not have counsel and having representation makes a world of difference in terms of the outcome.<sup>168</sup>

In an effort to recruit more pro bono immigration attorneys and to improve the immigration bar, Judge Katzmann founded the Immigrant Justice Corps (IJC) fellowship program “dedicated to meeting the need for high-quality legal assistance for immigrants seeking citizenship and fighting deportation.”<sup>169</sup> Since 2014, the IJC has awarded forty fellowships to recent law school graduates to assist in this effort.<sup>170</sup>

#### IV. CONCLUSION

Each year, the American dreams of thousands of women and children are shattered when they arrive to the United States in search of a better, safer life and instead are placed behind bars. Judge Dolly Gee’s July 2015 order requiring that all undocumented children held in DHS custody be released should be strictly enforced by the Executive Branch. The order should also be extended to the families of these children.

Undocumented presence in the United States has never been considered more than a civil infraction and was certainly never meant to be treated as a crime. Reality suggests otherwise, however, as

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168. IMMIGRANT JUSTICE CORPS, *The Crisis of Inadequate Legal Representation*, <http://justicecorps.org/our-story/#crisis> [<https://perma.cc/C4YD-E8S2>] (last visited Dec. 16, 2016) (“Legal services have a real impact. Individuals facing deportation who are not detained are successful in their cases 74% of the time when they have counsel, and only 13% of the time when they don’t.”).

169. IMMIGRANT JUSTICE CORPS, *Our Story*, <http://justicecorps.org/our-story/> [<https://perma.cc/DEX6-WFK2>] (last visited Dec. 16, 2016) (“Inspired by Chief Judge Robert Katzmann of the U.S. Court of Appeals for the Second Circuit, IJC brings together the country’s most talented advocates, connects them to New York City’s best legal and community institutions, leverages the latest technologies, and fosters a culture of creative thinking that will produce new strategies to reduce the justice gap for immigrant families, ensuring that immigration status is no longer a barrier to social and economic opportunity.”).

170. IMMIGRANT JUSTICE CORPS, *The Beginning*, <http://justicecorps.org/our-story/#begin> [<https://perma.cc/J4NB-DU3A>] (last visited Dec. 16, 2016).



immigrants are placed in facilities that are “deplorable” and “prison-like.”<sup>171</sup>

While, on their face, laws like the Homeland Security Act of 2002 and Trafficking Victim Protection Reauthorization Act of 2008, as well as settlements like the 1997 Flores Settlement Agreement, have made great strides in improving the treatment of illegal women and children entering the United States, that has not been the case in practice. Women and children are still being detained for extended periods of time, significantly diminishing their opportunity to make a valid asylum claim before an immigration judge.

Technology can put an end to this tragedy. Not only is electronic monitoring a more cost-effective alternative to family detention, it also ensures that every immigrant woman accompanied by her children is accounted for. Due to the overwhelming advantages, it is clear that there is only one solution to the issues surrounding immigrant family detention: the exclusive use of electronic monitors to set innocent women and children free, free to chase their American dream.

*Jennifer Blasco\**

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171. See Carcamo & Hennessy-Fiske, *supra* note 24; Burnett, *supra* note 132.

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