



DETAINING FAMILIES

A STUDY OF ASYLUM ADJUDICATION IN FAMILY DETENTION

By Ingrid Eagly, Esq., Steven Shafer, Esq., and Jana Whalley, Esq.

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This report analyzes government data on immigration court proceedings, obtained using the Freedom of Information Act (FOIA). The authors received these data for analysis through their appointments as Fellows with the Transactional Records Access Clearinghouse (TRAC), a data-gathering and research nonprofit at Syracuse University. The study of these data first appeared, in expanded form, in Ingrid Eagly, Steven Shafer & Jana Whalley, *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 Calif. L. Rev. 785 (2018), <https://doi.org/10.15779/Z38WH2DF26>.

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EXECUTIVE SUMMARY

The United States currently detains more protection-seeking families than any nation in the world. Since 2001, parents and their children have been held at various times in five different detention facilities in New Mexico, Texas, and Pennsylvania, as they seek asylum in the United States. The number of detention beds reserved exclusively for families has ballooned since the first facility opened in 2001. Between 2001 and 2016, capacity reserved exclusively for detaining families increased by an astronomical 3,400 percent. Yet, despite this growth in detention, little is known about how these families fare in the immigration court process and what barriers they face in pursuing their asylum claims. This information is particularly important as government officials and policymakers weigh the use and potential expansion of family detention.

This report presents findings from the first empirical analysis of asylum adjudication in family detention. Drawing on government data from over 18,000 immigration court proceedings initiated between fiscal years 2001 and 2016, this report documents how families detained in the United States' family detention centers proceeded through the court process.

The analysis of court data and government records presented in this report reveals an expanding system of detention that imprisons families seeking asylum, sometimes for prolonged periods, and presents serious hurdles to a fair court process. The main findings presented in the report include:

Detained families face significant barriers to seeking asylum in the court system.

Families have been detained in remote locations, have faced barriers accessing the courts, and—despite valiant pro bono efforts to assist them—have routinely gone to court without legal representation. Detained parents and children rely on volunteers and nonprofit attorneys willing to travel to remote detention centers to provide pro bono representation, which is still insufficient to serve all detained family members. During the period studied, we found:

- Families were detained in remote locations, far away from urban centers and service providers. Almost all hearings in family detention (93 percent) were conducted remotely over video, rather than in a traditional face-to-face courtroom setting.

- Families released from detention were more likely to have legal representation. At the most recent merits hearings for families in our study, 76 percent of family members who had been released from detention were represented by counsel, compared to 53 percent of family members who remained detained.
- Barriers to obtaining lawyers in detention were particularly profound at the initial stage of proceedings, where only 32 percent of detained family members found counsel.

The vast majority of families released from detention showed up for court.

Despite the challenges posed by detention, family members pursued viable claims for protection and showed up for proceedings after release from detention. During the 15 years of our study, we found:

- Family members who were released from detention had high compliance rates: 86 percent of released family members (with completed and pending cases) had attended all of their court hearings that occurred during our study period. This rate was even higher among family members applying for asylum: 96 percent of asylum applicants had attended all their immigration court hearings.
- Family members who were released from detention and obtained counsel had a relatively high rate of success in their completed cases. Half (49 percent) of family members who were released and sought legal relief from removal with the help of an attorney were allowed to stay at the completion of their case. By comparison, only 8 percent of detained family members without representation had the same success in their cases.
- Case outcomes for families varied widely, however, depending on the jurisdiction in which their cases were adjudicated. In addition to the different asylum grant rates of judges in each jurisdiction, we find that disparities in case outcomes reflect broader jurisdictional inequities, such as the availability of local attorneys and the willingness of local prosecutors to grant a case closure based on prosecutorial discretion.

Families have been subjected to overdetention by immigration officials, and the courts have served as an important check and balance in this complex system.

Our study documents the often lengthy and wasteful process associated with detention. Our review of the government’s own data supplies ample evidence that families have been subjected to overdetention by immigration officials. The study further reveals the important role immigration courts can play in protecting due process—yet these checks and balances can vary considerably across different jurisdictions. This variability results in uneven access to justice for asylum-seeking families. Analyzing immigration court data, we found:

- Immigration and Customs Enforcement (ICE) officers issued initial custody decisions that unnecessarily prolonged the detention of families. Immigration judges regularly found that family members were eligible for release, overturning detention officers’ previous decisions to keep families detained.
 - Among the detained family members ICE decided not to release, 59 percent appealed ICE’s custody decision and were provided a bond hearing in front of a judge.
 - Of these family members who had a judicial bond hearing, 57 percent of them were granted a form of release by the judge.
- DHS officials regularly refused to set bond, or issued prohibitively high bond amounts, resulting in the overdetention of families. Immigration judges systematically reversed these no-bond detention decisions by ICE. When ICE officers did set bond for detained families, immigration judges routinely found that the amount was too high.
- One-third (34 percent) of family members whose cases were completed during our study period were held in detention for the duration of the immigration court process. In some cases, these detentions lasted three or more months.

Now is a particularly crucial time to engage in a data-driven analysis of the impact that family detention has on immigration court adjudication. This understudied topic is particularly important given the Trump administration’s explicit intentions for immigration enforcement—including proposals to expand expedited removal, heighten standards for asylum claims, and increase the use of detention throughout the adjudication process. The findings presented in this report are vital to these and other policy decisions involving asylum-seeking families and the immigration courts.

This report documents how detained families fare in the immigration court process and what barriers they face in pursuing their asylum claims. The analysis of government data and records reveal that families show up for their proceedings and have viable claims for protection. Further, this report shows how the government overuses detention as a way to manage the migration of families fleeing violence in their home countries. Finally, the findings presented in the report underscore the vital role immigration courts have in maintaining—albeit unevenly—due process in asylum proceedings.

These findings provide evidence that supports the following:

- **Families must be afforded a fair day in court and due process, without being detained and subjected to fast-track deportation processes.** Families should be placed directly into proceedings before an immigration judge, rather than first subjected to a summary removal process. Expedited removal and other summary processes all too often circumvent the checks and balances that immigration courts can provide and limit the ability of individuals to fully present their case and access justice.
- **Detained families should have access to government-funded counsel in immigration court.** Despite intensive pro bono efforts, access to counsel remains a pressing issue for families in detention. Representation may be the difference between life and death for families and other individuals seeking asylum.
- **Immigration judges should have additional training, resources, and standardization for adjudicating cases of detained families.** There is significant variation among different court jurisdictions regarding the treatment of family detention cases, the rates of legal representation for families, and the number of family members who submit applications for relief. Increased training and oversight mechanisms would help minimize such variation, thereby ensuring outcomes in family cases are not adversely affected as a result of location.
- **The immigration bench must maintain judicial independence.** Immigration courts have played an important role in reviewing problematic and erroneous decisions in cases pertaining to families and ensuring individuals have a fair opportunity to present their claims. The independence of immigration courts must be protected in order to preserve their vital function in reviewing the administrative decisions of immigration authorities and asylum officers. It is also crucial that immigration judges are given sufficient time to decide their cases, without the imposition of numerical quotas for case completion.

About the Data

This report analyzes government data obtained using the Freedom of Information Act (FOIA) from the Executive Office for Immigration Review (EOIR), the division of the Department of Justice that conducts immigration court proceedings. The authors obtained these data for analysis from the Transactional Records Access Clearinghouse (TRAC), a data-gathering and research nonprofit at Syracuse University. This report identifies 18,378 immigration court proceedings that began between 2001 and 2016 in one of five family detention centers and were completed or still pending adjudication at the end of fiscal year 2016. These proceedings were associated with the five family detention centers studied: (1) Berks Family Residential Facility ($n = 4,086$); (2) T. Don Hutto Residential Center ($n = 2,928$); (3) Artesia Family Residential Center ($n = 1,316$); (4) Karnes County Residential Center ($n = 3,760$); and (5) South Texas Family Residential Center (Dilley) ($n = 6,293$).

This report also relies on other public records related to family detention obtained by the authors from EOIR and the United States Department of Homeland Security (DHS) using FOIA. These materials are available to the public in an online appendix created by the authors. See <http://libguides.law.ucla.edu/detainingfamilies>.

The analysis in this report is available in expanded form, including a detailed methodological appendix, in Ingrid Eagly, Steven Shafer & Jana Whalley, *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 Calif. L. Rev. 785 (2018).

UNDERSTANDING THE UNITED STATES' PRACTICE OF DETAINING PARENTS AND CHILDREN

The United States currently detains more migrant¹ families than any other nation in the world.² Since 2001, parents and their children have been held in five different detention facilities in New Mexico, Texas, and Pennsylvania as they seek asylum in the United States.³ Yet, despite the sustained presence of family detention, little is known about how detained families fare in the immigration court process and what barriers they face in pursuing their asylum claims. This report presents the results of the first-ever empirical study of the adjudication of immigration court cases of families held in detention.⁴

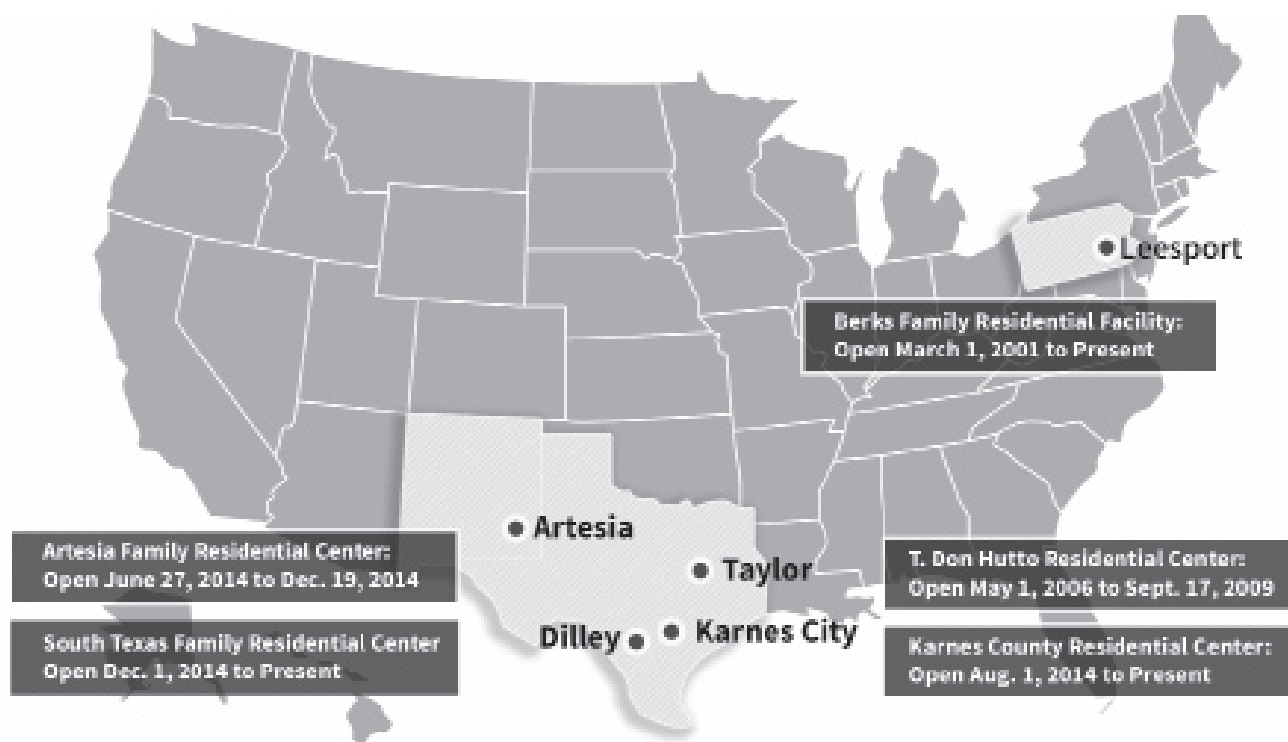
Now is a particularly crucial time to inform policy with a data-driven analysis. The practice of detaining families has been sharply criticized by academics, practitioners, federal lawmakers, bar associations, immigrant rights advocates, medical experts, and the press.⁵ In 2016, an advisory committee of independent experts appointed by the Department of Homeland Security (DHS) to evaluate family detention found that “detention is generally neither appropriate nor necessary for families.”⁶

Despite this growing consensus that family detention is a misguided policy,⁷ the administration remains interested in maintaining and possibly expanding family detention.⁸ President Donald Trump has made clear that he intends to use “all available resources” to grow “detention capabilities and capacities” at the border with Mexico.⁹ Furthermore, in the wake of public outrage denouncing the government’s 2018 decision to separate asylum-seeking families at the southern U.S. border, the administration sought to trade family separations for increased detention of families.¹⁰

The Rise of Detaining Families

Our study covers 15 years of family detention in the United States, beginning in 2001 when the government opened the first detention facility to house exclusively families.¹¹ Over the course of the period studied, the practice of detaining families changed but never disappeared. Between 2001 and 2016 there were five distinct brick-and-mortar family detention facilities in operation at different times in the United States. The names and locations of these facilities, and their dates of operation as family facilities, are displayed in Figure 1.

Figure 1. The Geography of Family Detention in the United States, 2001–2016

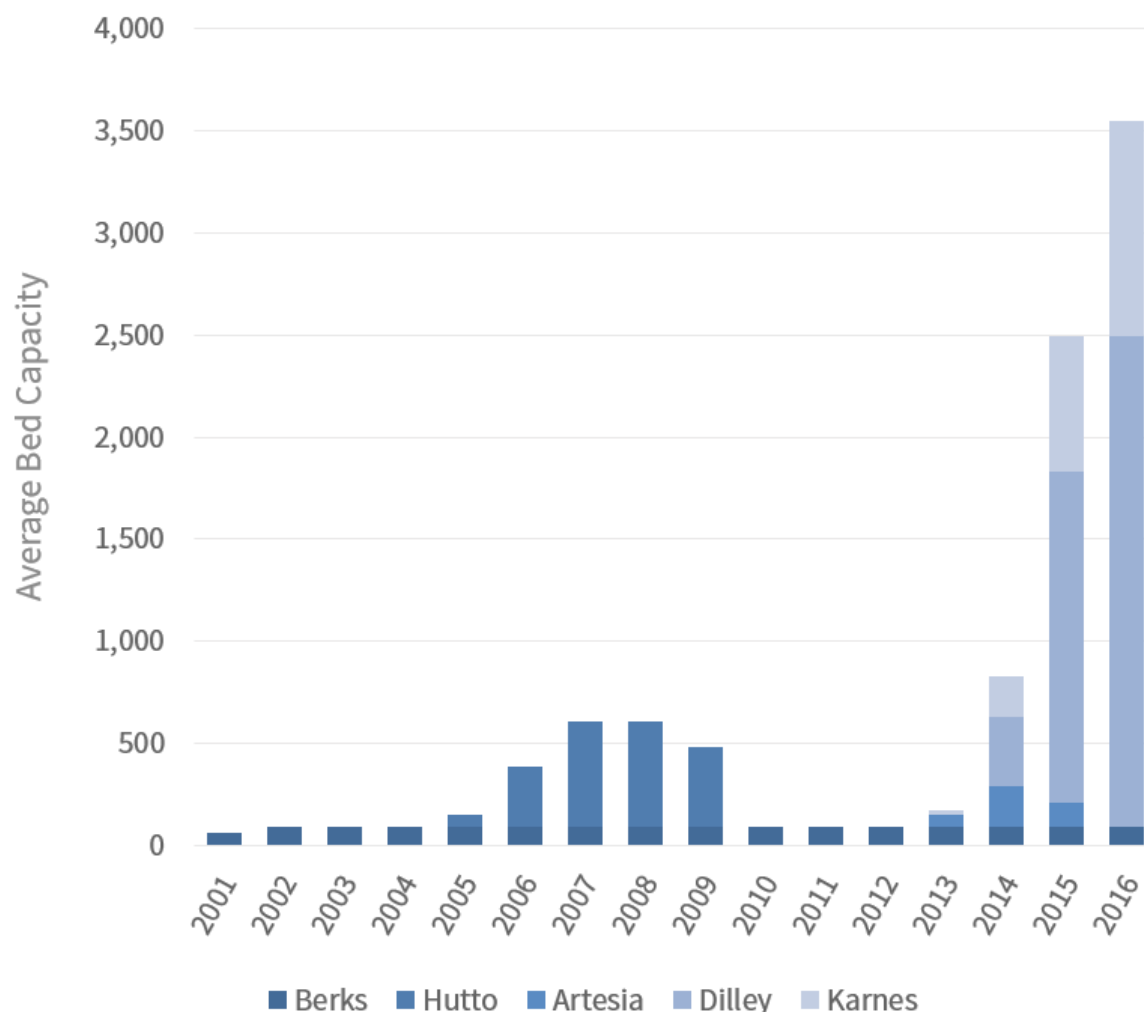


Source: Ingrid Eagly, Steven Shafer & Jana Whalley, *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 Calif. L. Rev. 785 (2018), <https://doi.org/10.15779/Z38WH2DF26>.

Two detention centers used to detain families during our study period—the T. Don Hutto Detention Center (“Hutto”) in Taylor, Texas, and the Artesia Family Residential Center (“Artesia”) in Artesia, New Mexico—were shut down after subjecting families to harsh conditions, including unreasonably cold rooms, substandard food, and inadequate medical care.¹² The other three family detention facilities in the United States—the Berks Family Residential Center (“Berks”) in Leesport, Pennsylvania; the Karnes County Residential Center (“Karnes”) in Karnes City, Texas; and the South Texas Family Residential Center (“Dilley”) in Dilley, Texas—remained in operation at the end of our study period in 2016.

Over the 15 years of our study, the number of detention beds reserved exclusively for families surged (Figure 2). Family detention capacity shot up temporarily between 2006 and 2009, the years that Hutto operated as a family facility. Family detention space again increased in 2014 when DHS repurposed a federal law enforcement training center in Artesia, New Mexico, as a temporary detention camp to hold families. The most dramatic increase began in 2015 with the opening of Dilley and Karnes. By 2016, family detention centers in the United States had the capacity to hold over 3,500 children and parents each day.

Figure 2. Monthly Average Bed Capacity in U.S. Family Detention Facilities, 2001–2016



Source: Ingrid Eagly, Steven Shafer & Jana Whalley, *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 Calif. L. Rev. 785 (2018), <https://doi.org/10.15779/Z38WH2DF26>.

The rise in family detention has far outpaced the parallel growth in detention for individuals who are not part of family units, including asylum seekers.¹³ In 2001, the year family detention began at Berks, overall federal detention capacity was set at 20,000 beds.¹⁴ In 2016, the final year of our study, Congress required federal authorities to keep at least 34,000 detention beds available each day.¹⁵ This represents an increase in general detention capacity of 70 percent. In contrast, as seen in Figure 2, family detention capacity increased during the same time period by an astronomical 3,400 percent.

This tremendous growth in detention capacity imposes significant fiscal costs on the United States. According to federal officials, the average daily cost of detention is approximately \$126 per person.¹⁶ For family members in detention, the daily average cost is even higher: approximately \$161 per person, or \$644 for a family unit of four.¹⁷ In its fiscal year 2017 budget, the federal government dedicated \$1.748 billion to run detention facilities.¹⁸

Moreover, detention exacerbates the extreme hardship and suffering many children and their families experience in their home countries and throughout the journey to the United States, where they seek protection.¹⁹ Families have endured adverse and punitive conditions inside family detention. The facilities in this study are all locked and guarded. Detained families work for as little as \$1.00 a day and must abide by strict carceral rules.²⁰ The family detention facilities in our study have also been the sites of severe medical neglect and psychological trauma and have been found to violate basic standards for detaining children.²¹ Several of these facilities are managed by private prison companies, including the GEO Group and CoreCivic—corporations that have been widely criticized for operating facilities with substandard conditions and poor accountability.²²

The trauma suffered by asylum seekers is compounded when they are locked away in isolated detention facilities and denied access to adequate healthcare or supportive services.²³ The fact that family detention has imposed such horrific conditions makes this study's findings all the more important.

About the Data: Defining Immigration Proceedings

An immigration court “proceeding” consists of at least one, and often several, court hearings in front of the immigration judge. EOIR categorizes immigration court proceedings based on the type of decision made by the judge. There are nine proceeding types handled by the immigration courts: removal, credible fear review, reasonable fear review, claimed status review, asylum only, rescission, continued detention review, Nicaraguan Adjustment and Central American Relief Act (NACARA), and withholding only. These immigration proceedings are explained in the next section.

Understanding Immigration and Asylum Law

Since 1996, the term “removal proceeding” has referred to the immigration judge’s decision to exclude persons attempting to enter the United States, as well as to deport someone already in the United States.²⁴ If the court finds that family members do not have the legal right to enter or remain in the country, they will be removed unless they apply for and are granted relief during the removal proceeding.²⁵ One such form of relief, which is common in our family detention population, is asylum.²⁶ If asylum is granted, the applicant will be allowed to remain and obtain work authorization.²⁷ After a year, asylees may apply to become lawful permanent residents.²⁸

Under the immigration law in place since 1996, individuals arrested at the border may be placed into an administrative process known as “expedited removal.”²⁹ Immigrants apprehended at a port of entry (including airports, sea ports, and within one hundred miles of a land border crossing) within two weeks of entry may be summarily expelled without ever being placed in formal removal proceedings in front of an immigration judge.³⁰ The only way that family members placed in expedited removal can eventually see an immigration judge is by expressing a fear of returning to their country, which triggers a mandatory credible fear interview by an asylum officer.³¹ If the asylum officer finds that family members do have credible fear, they will be placed into “removal proceedings” before an immigration judge.³²

If, however, the asylum officer finds the family member does not have a credible fear, deportation will result unless the individual requests a “credible fear review proceeding” in front of an immigration judge. During this proceeding, the judge reviews the claim of credible fear de novo.³³ If the judge reverses the decision and finds credible fear, then the individual is placed into a removal proceeding before an immigration judge. If the judge affirms the asylum officer’s decision, that decision is generally final.³⁴

Family members who were previously removed from the United States may face “reinstatement of removal,” an administrative procedure that reactivates the prior removal order without a right to judicial review.³⁵ However, if they express a fear of returning to their countries, they must be given a “reasonable fear interview” with an asylum officer.³⁶ If family members are found to have a reasonable fear, which is assessed under a higher standard than for credible fear, they will be placed directly

into “withholding-only proceedings” before an immigration judge.³⁷ Withholding-only proceedings are more limited than removal proceedings because the only defenses to deportation that family members may raise are (1) withholding of removal and (2) protection under the Convention Against Torture (CAT), both of which have more stringent requirements than asylum.³⁸

A family member granted withholding or CAT relief may remain in the United States, but is not granted a pathway to lawful permanent resident status (as is the case for those granted asylum).³⁹ If, on the other hand, the asylum officer makes a negative determination, the family member can request a “reasonable fear review proceeding” in front of an immigration judge, in which the judge reviews the claim of reasonable fear *de novo*.⁴⁰ The proceeding types just discussed are among those handled by the immigration courts.

About the Data: Identifying Family Detention Proceedings

By relying on EOIR court data, we were able to determine whether an EOIR court hearing occurred while a family member was detained at Artesia, Berks, Dilley, Hutto, or Karnes. We identified 18,378 immigration court proceedings that began between 2001 and 2016 and included at least one court hearing while the family member was held in a family detention facility. Throughout the report we refer to the 18,378 proceedings linked to family detention centers as **family detention (family) proceedings**. Because some families had more than one proceeding, these 18,378 proceedings correspond to 16,677 individual family members.

Importantly, our count of 16,677 family members does not reflect the total population of individuals who were held in family detention from 2001 to 2016. Because this study focuses on immigration courts, family members who were released or deported before reaching a court hearing are not part of our study.

Asylum Adjudication in Family Detention

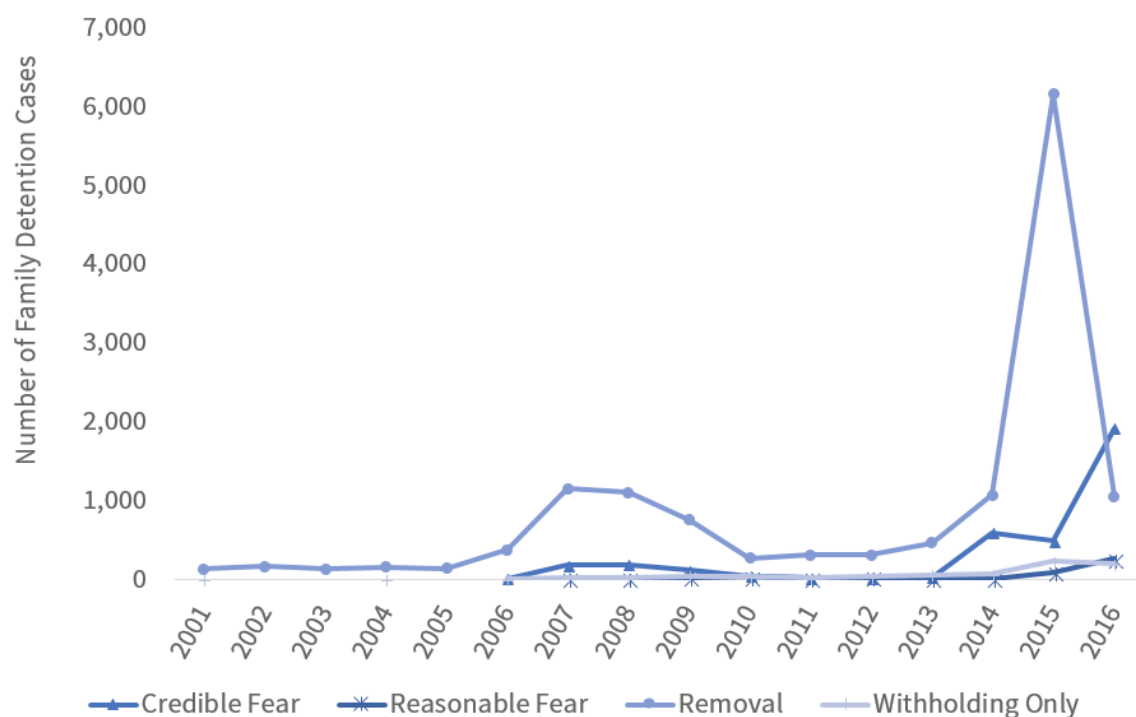
Our analysis reveals that there were four proceeding types in family detention during our study period, all of which are associated with persecution claims: credible fear review, reasonable fear review, removal, and withholding only. Some families in our study experienced more than one type of proceeding.

Out of the 16,677 family members in our study, approximately 11 percent had a removal proceeding after a credible fear proceeding, or a withholding-only proceeding after a reasonable fear proceeding. Figure 3 breaks down the family detention proceedings that occurred between 2001 and 2016 by the four proceeding types just discussed. Removal was the most common type of proceeding in our study, constituting 74 percent of the 18,378 family detention proceedings between 2001 and 2016.

In fact, removal was the only proceeding type associated with family detention between 2001 and 2006.⁴¹ Other proceeding types first emerged in the data in 2006: credible fear review, reasonable fear review, and withholding only. This shift in practice reflects the Bush administration's decision to rely on the administrative procedures of expedited removal and reinstatement of removal to speed up deportations at the border. The number of family members in credible fear proceedings rose sharply between 2014 and 2016, reflecting the Obama administration's expansion of expedited removal at the border.⁴²

Overall, as seen in Figure 3, credible fear review proceedings accounted for 19 percent ($n = 3,547$) of the family detention proceedings.⁴³ Reasonable fear review proceedings ($n = 469$) and withholding-only proceedings ($n = 694$) were less frequent, accounting for 6 percent of the family detention proceedings in our study.

Figure 3. Family Detention Proceedings, by Proceeding Type (2001–2016)



Source: Authors' analysis of Executive Office for Immigration Review data, 2001-2016.

Although removal remained the most frequent proceeding type in family detention (74 percent), it was even more prevalent in detained proceedings that did not involve families (“non-family detention proceedings,” as we discuss in the next section), where 98 percent were removal proceedings. This difference reflects the relative prevalence of expedited removal and reinstatement in the family detention context. Notably, this reliance on administrative procedures contributed to the overdetection of families. As we discuss later in the report, expedited removal and reinstatement allowed authorities to hold families in detention with no right to a bond hearing, unless and until they first successfully demonstrated a fear of returning to their home country.⁴⁴

HOW DOES DETENTION AFFECT ACCESS TO JUSTICE FOR FAMILIES?

Our study examined family detention proceedings and found serious barriers in access to justice. Namely, we highlight concerns with family detention regarding remote location, access to representation, and prolonged detention.

About the Data: Measuring Representation

The immigration court's rules require the filing of the EOIR-28 form by all attorneys and certified representatives who appear in immigration court. We measured representation based on whether an attorney filed an EOIR-28 form with the immigration court at any point prior to the conclusion of the relevant court proceeding. We also counted as represented any respondent for whom an EOIR-28 form was filed after the conclusion of the relevant proceeding, so long as court records showed that an attorney appeared on the respondent's behalf in at least one hearing during any proceeding.

Although we refer to individuals providing representation to immigrants in this study as "attorneys," representation can also be provided by "accredited representatives," non-attorneys working for nonprofit organizations who are certified to appear in immigration court.

Access to Representation and a Fair Hearing Is Limited in Detention

A threshold issue of access to justice for detained families is the remote location of their imprisonment. All five family detention centers used from 2001 to 2016 were located in small or rural cities, far from the nearest immigration courts, nonprofit organizations, social services, and pro bono attorneys.

Due to the remote location of detention facilities throughout the United States, immigration judges increasingly hear cases over a video connection without ever traveling to the detention center.⁴⁵ Analysis of our family detention proceedings

reveals that an overwhelming 93 percent of family detention hearings were handled via televideo.⁴⁶ The heavy reliance on televideo for an entire group of litigants is concerning, especially given that televideo is associated with reduced engagement by respondents in their court proceedings, including being less likely to find an attorney and less likely to seek relief, when compared to similarly situated respondents who had their hearings in person.⁴⁷

Expedited Proceedings Further Limit Access to Representation

Having a lawyer is associated with better outcomes at every stage in the immigration court process.⁴⁸ Attorney representation is particularly vital to ensuring a fair court process for parents and children who have endured violence in their countries and during their journeys. Asylum cases are particularly complex, making attorneys all the more critical for marshaling the necessary proof.⁴⁹ A DHS advisory committee studying family detention recommended in 2016 that the government provide counsel to these families.⁵⁰

The devastating conditions of family detention have encouraged pro bono attorneys to travel long distances to detention centers and offer families legal representation. Across all five facilities studied, volunteer attorneys mobilized in significant ways to provide free legal assistance and expand access to counsel for families held in detention. Yet, despite these volunteer efforts, many family members did not have representation at their hearings.

About the Data: Family Detention Proceedings vs. Non-Family Detention Proceedings

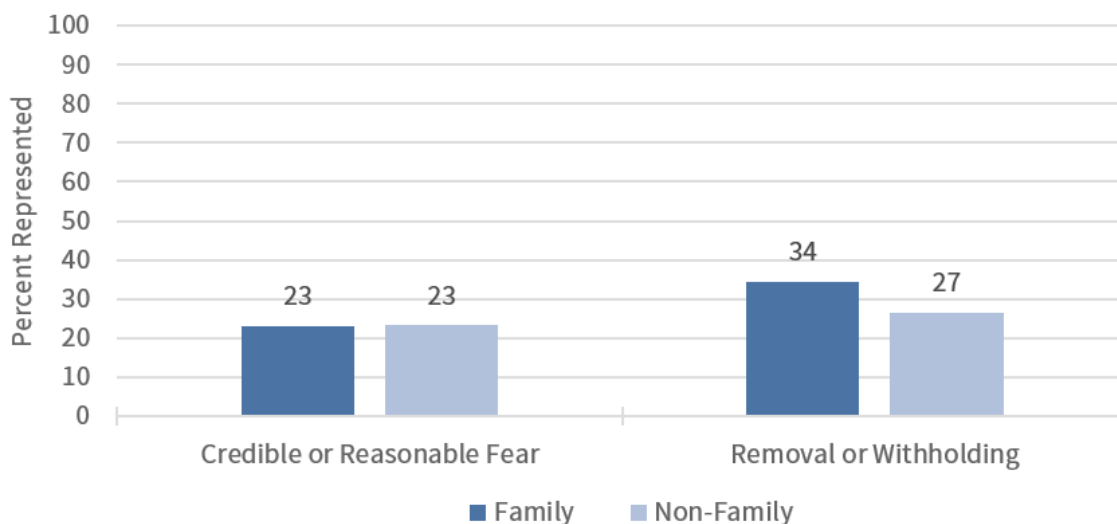
To better understand what is unique about court adjudication of family detention cases, we compared a range of outcomes in **family detention proceedings** to outcomes in detention proceedings that did not involve families, what we call **non-family detention proceedings**. We define non-family detention proceedings as including all persons detained at some point in their EOIR case adjudication who were not associated with one of the five family detention centers. In total, we find there were 2,807,814 non-family detention proceedings during the 15-year study period.

The EOIR data allow us to analyze whether family members who began their court cases in detention obtained counsel.¹ During initial proceedings for the 16,677 family members in our study, representation rates diverged based on proceeding type.⁵² As seen in Figure 4, in initial credible fear or reasonable fear review proceedings ($n = 3,943$), only 23 percent of family members were represented.⁵³ In contrast, in initial removal or withholding-only proceedings ($n = 12,734$), 34 percent of family members had representation. Across all proceeding types, only 32 percent of family members had representation at their initial proceeding.

The lower rate of representation in credible and reasonable fear proceedings could be attributed to factors beyond a family member's control. Court rules, for example, limit the role of attorneys in these proceedings. These restrictions may make some attorneys less inclined to involve themselves at this early stage, or to do so without filing an EOIR-28 form.⁵⁴

The expedited nature of credible and reasonable fear proceedings may also result in a lower rate of attorney involvement. These proceedings can occur very quickly after a negative finding by the asylum officer and are generally resolved in a single hearing, as we later discuss (Table 1). The speed of the process means that families have less time to secure counsel. In contrast, removal or withholding-only proceedings take much longer to complete and generally involve more than one hearing. This gives family members more time to find counsel.⁵⁵

Figure 4. Representation in Initial Proceedings, by Proceeding Type



Source: Authors' analysis of Executive Office for Immigration Review data, 2001-2016.

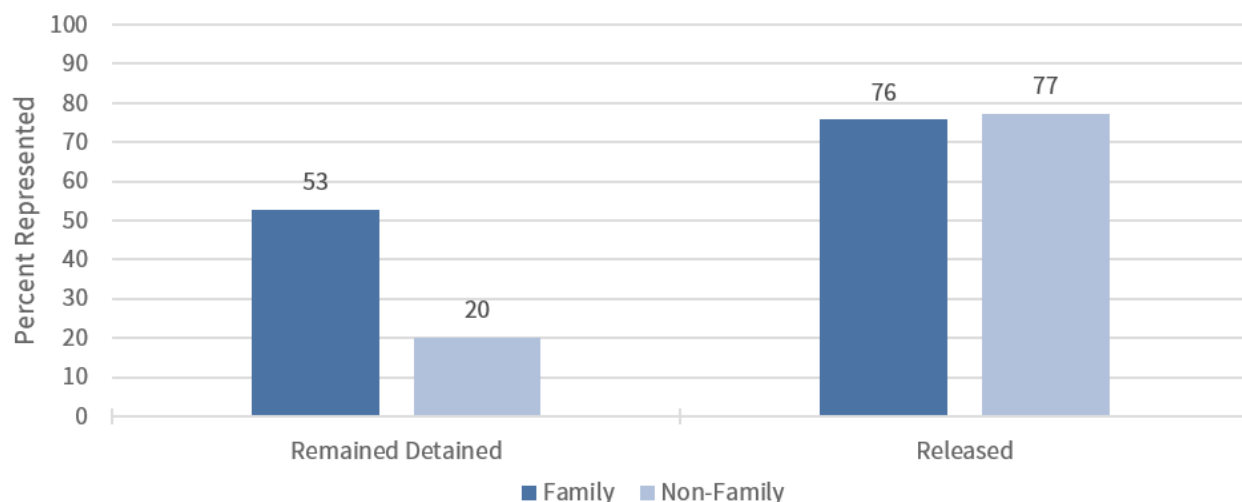
Representation Increases for Families Released from Detention

We next analyzed the percentage of family members that found counsel in their most recent removal or withholding-only proceeding. Because representation rates can vary based on detention status, we separately analyzed those family members who remained detained and those who were released at the most recent proceeding in their case history.⁵⁶

As Figure 5 shows, of those family members who remained detained ($n = 1,614$), 53 percent were represented by counsel at their most recent merits proceeding.⁵⁷ This is more than double the representation rate of 20 percent for individuals held in non-family detention who were detained at their most recent proceeding. At the same time, 47 percent of family members who remained detained during our study never found counsel.

Family members who were released were far more likely to find counsel. Of released family members ($n = 13,037$), 76 percent were represented at their most merits proceeding. This rate is almost identical to the 77 percent representation rate for respondents released from non-family detention (Figure 5). This finding is particularly significant given that more individuals held in family detention (compared to those in non-family detention) were released from custody by their final removal or withholding-only proceeding: 89 percent of individuals in family detention were released, compared to only 30 percent of non-family members.

Figure 5. Representation at Most Recent Removal or Withholding-Only Proceeding, by Detention Status



Source: Authors' analysis of Executive Office for Immigration Review data, 2001-2016.

The fact that more family detainees, compared to non-family detainees, were able to find counsel is a testament to the robust pro bono and nonprofit networks that have mobilized to provide legal services to these families. Countless volunteers and active pro bono programs have worked tirelessly to provide families with free legal assistance.⁵⁸ Attorneys practicing at private law firms, including solo practitioners, represented the lion's share of individuals who found counsel in family detention (82 percent). Law school clinics (5 percent) and nonprofit organizations (13 percent) provided the remaining 18 percent of legal representation.⁵⁹

Families Have Been Detained for Prolonged Periods

A major issue in the detention debate is the exposure of families to long-term detention. Critics condemn the detention of asylum seekers and their children as harmful to the physical and mental health of these families.⁶⁰ In addition, long-term detention raises due process concerns. In *Zadvydas v. Davis*, the Supreme Court found that a detention of six months was presumptively reasonable but warned that detention could not exceed a period “reasonably necessary to secure removal.”⁶¹

Table 1 presents our analysis of the detention times associated with completed EOIR court proceedings for family members who remained in detention throughout their court proceedings.⁶² For the 5,419 proceedings involving families that were completed in detention, the median period of detention associated with credible fear and reasonable fear proceedings was one day (with an average of three and four days, respectively). Given that these proceedings are expedited by design, the short period is unsurprising.

Detained removal and withholding-only proceedings took considerably longer. The average duration for detained removal proceedings was 87 days (median of 29 days), whereas detained withholding-only proceedings had an average duration of 132 days (median of 78 days) (Table 1).

Table 1. Duration of Proceedings for Family Members that Remained Detained, by Proceeding Type

Proceeding Type	Number of Proceedings	Average Detention Time (Days)	Median Detention Time (Days)
Credible Fear	3,422	3	1
Reasonable Fear	410	4	1
Removal	1,509	87	29
Withholding Only	78	132	78
Total	5,419	28	1

Source: Authors' analysis of Executive Office for Immigration Review data, 2001-2016.

We also analyzed the total time in detention across the multiple proceeding types of family members (e.g., credible fear review and removal). Among the 10,122 family members whose cases reached completion during our study period, 34 percent of them were detained throughout their entire case. We studied the duration of detention among these family members, finding 800 completed cases that involved detention of a month or more. We found that 397 family members were detained for more than three months and 115 were held for more than six months⁶³

Importantly, these measurements do not include the amount of time families spent in custody prior to the initiation of their court proceeding with the immigration judge. ICE reports that the average length of detention for the credible fear interview screening process is 58 days.⁶⁴ This measurement does not include the length of time that families may spend in Customs and Border Patrol (CBP) holding cells before being transferred to ICE custody to begin the credible or reasonable fear screening interview process.

Experts on family detention have found that in some cases families can spend as long as six months in ICE detention before the EOIR court process begins.⁶⁵ The federal government recently admitted as much, stating that “[i]n some instances, there is a significant period of time between issuance of the charging document by DHS, and filing the charging document with EOIR.”⁶⁶ Moreover, our measurements do not include any additional detention time associated with appealing family detention cases. Notably, several families were detained at Berks for a year-and-a-half while lawyers sought habeas review of their credible fear process in federal court.⁶⁷

Furthermore, families can continue to be held in detention after the EOIR proceedings are over until DHS deports them. By law, DHS has 90 days to remove individuals from the United States after the immigration court issues a final order of removal, and sometimes this removal period can take significantly longer.⁶⁸ This additional period of post-order detention further prolongs the detention time for families.

DO FAMILIES HAVE VIABLE CLAIMS FOR PROTECTION?

Given our findings that families held in detention face significant and concerning barriers to justice, it is important to examine case outcomes for those who remain in detention and those who are released.⁶⁹ Debate over the wisdom of family detention has relied on competing claims about case outcomes. Our findings provide evidence that, despite the challenges posed by detention, family members pursue viable claims for relief and show up for proceedings after release from detention.

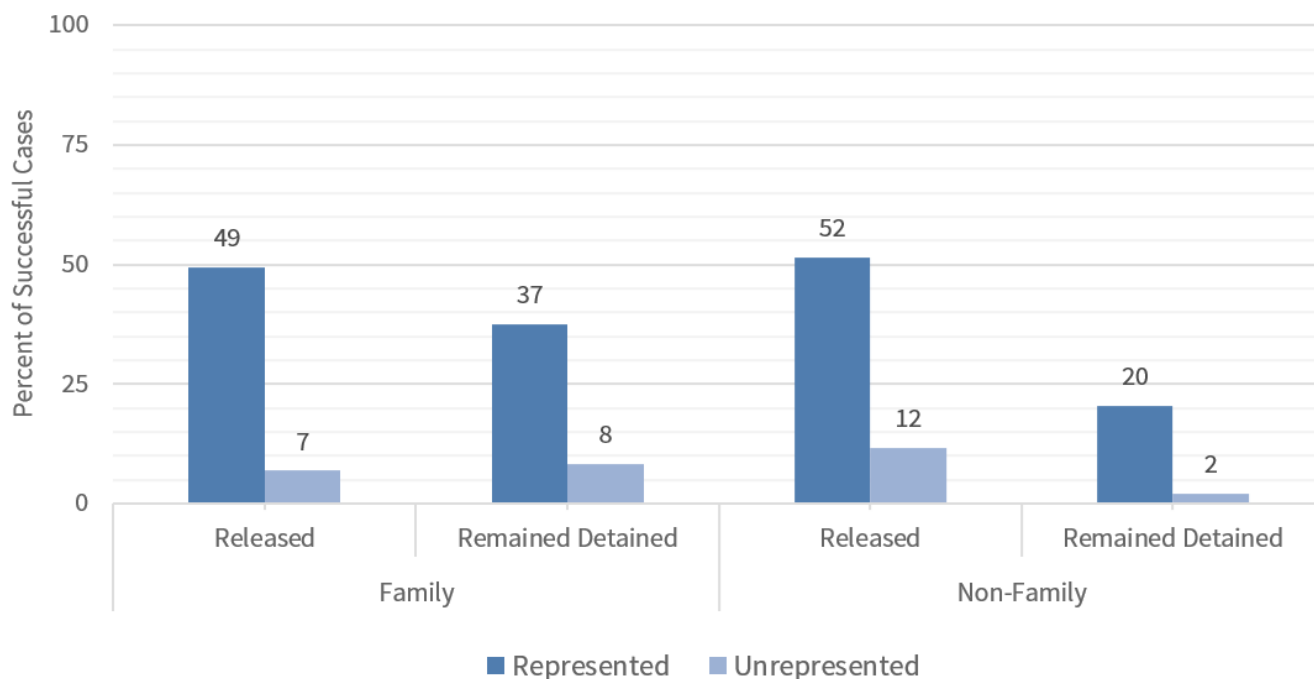
Case Success Is Relatively High for Families with Counsel

To analyze the viability of family members' asylum claims to remain in the United States, we looked at completed removal and withholding-only cases that began in family detention. We define "success" in removal and withholding-only proceedings as cases in which the judge granted an application for relief or terminated or administratively closed the case, as in both situations the family member can stay in the United States. Finally, we also count as a successful outcome those cases in which a prosecutor asked that the case be closed as an exercise of prosecutorial discretion.⁷⁰

Figure 6 summarizes our case outcome analysis, organized by detention and representation status.⁷¹ Out of the 16,677 family members in our study, 6,321 had their removal or withholding-only proceedings completed during the study period. Of these family members, 21 percent remained detained at their final merits proceeding, while 79 percent had been released. Of the 1,341 family members who remained detained, 52 percent secured counsel, compared to 71 percent of those who were released.

Overall, 49 percent of released family members with counsel were successful, as were 37 percent of represented detained family members. In comparison, for those without counsel, only 7 percent of released family members and 8 percent of detained family members had success.

Figure 6. Successful Case Outcomes in Removal and Withholding-Only Proceedings, by Detention and Representation Status



Source: Authors' analysis of Executive Office for Immigration Review data, 2001-2016.

Families Released from Detention Are Likely to Attend Future Hearings

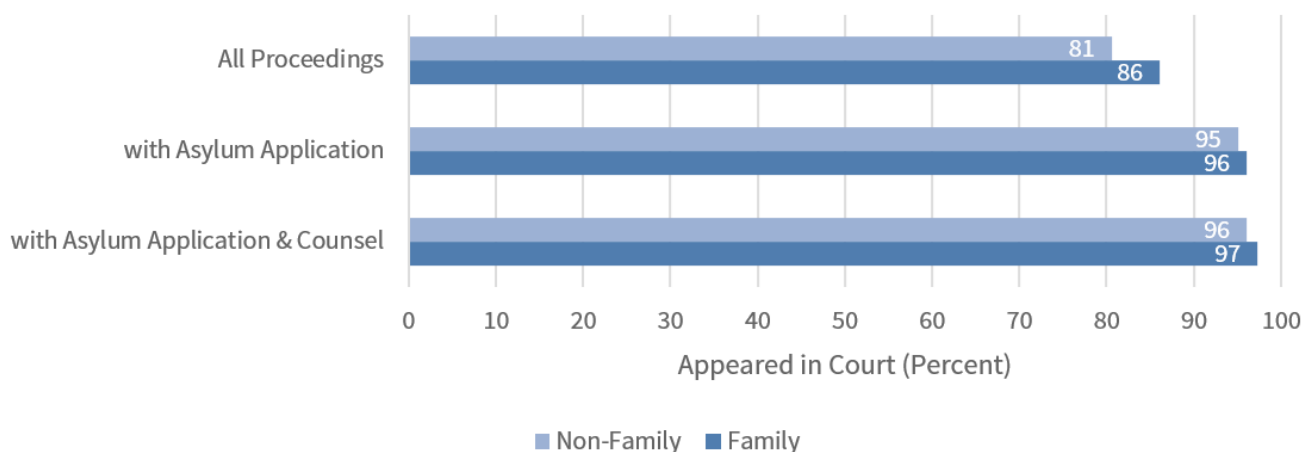
Another major issue in the debate regarding family detention concerns appearance rates in court hearings following release from detention. Former DHS Secretary Kelly, for example, directed his officers to increase detention capacity because migrants—in his words—“are highly likely to abscond and fail to attend their removal hearings.”⁷² However, we find that the EOIR data do not support this claim.

Figure 7 shows the appearance rates of families released from a detention center ($n = 13,037$).⁷³ We measure who came to court in both completed and pending cases over the 15 years of our study. We find that 86 percent of family members who were released from detention attended all their court hearings during our study period. In other words, since 2001, only 14 percent of family members in our study who were released from detention were ordered removed *in absentia*.⁷⁴

This low rate of *in absentia* removal orders is particularly noteworthy given the range of external factors that contribute to an immigrant’s failure to appear in immigration court. For example, legal service providers documented situations in which family members were ordered removed *in absentia* after ICE provided them with a wrong address for the immigration court; received unclear instructions regarding post-release legal requirements in a language families did not understand; never received the documents informing family members of their court date because the documents were sent to the wrong address; or were not able to read or understand the notices due to literacy or language barriers.⁷⁵

Furthermore, families who applied for asylum ($n = 5,867$) were especially likely to attend future court hearings, with 96 percent attending all their hearings occurring during our study period. When these asylum applicants had counsel ($n = 5,405$), they had an even higher appearance rate: 97 percent attended all their hearings (Figure 7).

Figure 7. Appearance Rates of Individuals Released from Detention, by Family and Non-Family Status



Source: Authors’ analysis of Executive Office for Immigration Review data, 2001-2016.

We find similarly striking rates of compliance when analyzing only completed cases. Table 2 shows the appearance rates for all released cases that reached completion during our study period, broken down by family status.⁷⁶ Over a 15-year period, we find that 72 percent of formerly detained family members with completed cases attended all court hearings in their case.⁷⁷

We also find that the appearance rate is even higher among families who applied for asylum. Of family members with a completed asylum case, 92 percent had appeared for all their court hearings. Finally, this appearance rate was even higher when asylum applicants had counsel: among completed cases, 94 percent of released family members with counsel in their asylum case attended all their court hearings.

Table 2. Court Appearances of Released Families and Individuals with Case Completions

Respondents with Completed Cases	Total	Appeared in Court	Ordered Removed <i>In Absentia</i>	Percent Appearing in Court
Released from Family Detention	6,587	4,773	1,814	72 %
with Asylum Application	2,824	2,594	230	92
with Asylum Application and Attorney	2,600	2,454	146	94
Released from Non-Family Detention	426,678	311,029	115,649	73
with Asylum Application	94,342	87,505	6,837	93
with Asylum Application and Attorney	87,387	82,330	5,057	94

Source: Authors' analysis of Executive Office for Immigration Review data, 2001-2016.

Case Outcomes Vary Widely by Court Location

Thus far, we have provided empirical evidence that family members released from detention are likely to show up for future court proceedings and have a high rate of success in their claims for protection, especially if they are able to obtain representation. Family members released from custody attended all of their hearings in 86 percent of cases, and half of the families who were released and found attorneys succeeded in their cases.

Our analysis also reveals troubling variation in case outcomes across court jurisdictions. In Table 3, we focus on the twenty immigration courts that received the greatest number of released family members during our study period.⁷⁸ We find wide jurisdictional variety in how these different courts handled the cases of formerly detained parents and children. First, there was wide variation in whether these family members found attorneys. For example, in Charlotte only 49 percent of family members found counsel, compared to 91 percent in Omaha and 86 percent in Orlando. We also discovered stark regional disparities in rates of applications for relief. Whereas only 22 percent of family members in San Antonio applied for relief, 67 percent filed applications in Seattle.

Jurisdiction also matters in terms of substantive case outcomes. Short of granting relief, a case can end through administrative closure, termination, or prosecutorial discretion.⁷⁹ Yet, as seen in Table 3, these different types of case closures were not evenly distributed across court jurisdictions. For example, in Los Angeles 15 percent of cases ended through administrative closure, termination, or prosecutorial discretion, as did 15 percent of cases in New Orleans. In contrast, cases resolved this way only 1 percent of the time in Denver and 2 percent of the time in Houston.

We also find jurisdictional variation in the percent of cases that had grants of relief. The lowest grant rates in the country occurred in Atlanta (1 percent), New Orleans (1 percent), and Dallas (1 percent).⁸⁰ The highest grant rates occurred in Philadelphia (22 percent) and New York (20 percent).

These findings of considerable variation throughout the asylum process raise serious concerns about the ability of families in some jurisdictions to pursue their asylum claims successfully.

Table 3. Outcomes in Pending and Completed Released Family Detention Cases, by Volume and Outcomes

	Formerly Detained Family Members			Case Status			
Base City	Total Number	with Legal Representation (Percent)	with Application for Relief (Percent)	Pending (Percent)	Received Relief (Percent)	Closed* (Percent)	Ordered Removed** (Percent)
Arlington, VA	761	68 %	49 %	78 %	3 %	5 %	14 %
Atlanta, GA	338	62	45	24	1	4	70
Baltimore, MD	632	63	38	69	5	7	19
Boston, MA	293	81	62	69	8	9	15
Charlotte, NC	327	49	29	36	3	9	52
Chicago, IL	283	77	63	62	7	6	24
Dallas, TX	501	53	38	46	1	3	50
Houston, TX	943	60	45	72	2	2	24
Los Angeles, CA	912	74	50	55	4	15	25
Memphis, TN	357	73	55	55	4	6	36
Miami, FL	685	80	56	60	9	13	18
New Orleans, LA	217	65	39	53	1	15	31
New York, NY	1109	84	64	55	20	12	13
Newark, NJ	506	75	48	67	8	8	17
Omaha, NE	121	91	63	80	2	8	10
Orlando, FL	201	86	64	50	7	9	34
Philadelphia, PA	183	80	65	43	22	13	22
San Antonio, TX	1095	50	22	47	7	3	43
San Francisco, CA	446	80	56	71	9	11	9
Seattle, WA	132	80	67	54	11	12	23

Source: Authors' analysis of Executive Office for Immigration Review data, 2001-2016.

*Includes cases ended through termination, prosecutorial discretion, or administrative closure. **Includes voluntary departures.

IS IT NECESSARY TO DETAIN FAMILIES?

A major issue in the family detention debate is the unnecessary placement of families in detention to serve the government's goal of deterring other families from seeking asylum. Critics argue that family detention now reaches beyond the purported civil organizing principles and instead functions as a punitive system of control.⁸¹ In 2014, federal officials publicly confirmed their use of family detention as a system of control when they stated that they hoped the practice of detaining mothers and their children would deter other families from making the trip to the United States.⁸² Although a deterrence strategy might be permissible in the criminal justice system, courts have made clear that it may not motivate the civil immigration system.⁸³ The established law provides that in the absence of a showing of flight risk or danger to the community, civil detainees should be released.⁸⁴

The growing detention of families seeking asylum also raises serious issues given legal restrictions on the detention of bona fide asylum seekers.⁸⁵ Article 31 of the 1951 Refugee Convention provides that countries may restrict the movement of refugees only when necessary—a standard that does not allow for detention to punish border crossers or to achieve general deterrence of asylum seekers. In addition, Article 9 of the International Covenant on Civil and Political Rights guarantees migrants freedom from arbitrary detention.⁸⁶ The United Nations Committee on the Rights of the Child and the United Nations Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families have issued joint guidance clarifying that holding children in detention, either alone or with their families, is never in the best interest of the child.⁸⁷ Finally, United States law also severely restricts the detention of migrant children.⁸⁸

Despite these standards favoring the release of children and asylum seekers, the family members in our study have all been subjected to detention. In many cases, families have been subject to overdetention, which we define as their continued detention despite no finding that they pose a danger or flight risk.⁸⁹ Central American families have increasingly been targeted for confinement in family detention centers. As a result, these families have turned to the immigration courts to reverse the decisions of DHS officials that prolong their detention.

Negative Credible and Reasonable Fear Decisions for Families Are Often Reversed

For families placed into expedited removal or reinstatement of removal, the only route to obtaining a court hearing is to express a fear of returning to their home country. If the asylum officer does not find that fear is established, the family's only option is to request a review of the decision by an immigration judge. Families can be held in detention during the entire time of the credible fear or reasonable fear review in immigration court.

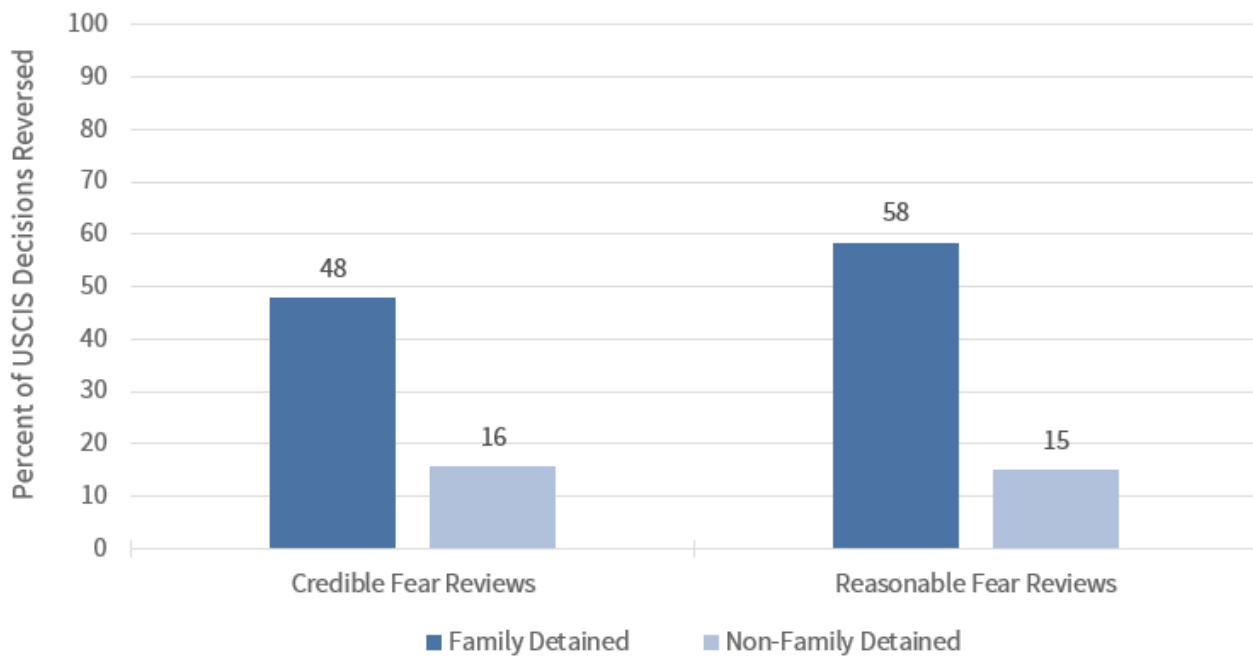
Our study finds that immigration judges frequently overturned agency decisions on credible fear for family detainees, highlighting the existing concerns about summary removal processes. Moreover, the rate of reversal rose throughout our study period. This raises serious concerns about the possible exposure of family members to overdetection. Erroneous agency decisions at the credible fear or reasonable fear stage lead to dire consequences for detained families.

The EOIR data allow us to analyze EOIR judge decisions in credible fear and reasonable fear review proceedings ($n = 4,016$). Overall, as Figure 8 highlights, immigration judges vacated 48 percent of negative credible fear findings.⁹⁰ This rate is three times higher than the 16 percent reversal rate for detained cases not involving families.

An even more striking reversal rate occurred in reasonable fear decisions. Across all five family detention centers, immigration judges overturned 58 percent of the negative reasonable fear findings of the asylum officers. In contrast, the reversal rate for non-family reasonable fear proceedings was only 15 percent. In other words, the reversal rate for reasonable fear decisions was almost four times higher in family decisions than in non-family decisions.

The family detention reversal rate in credible and reasonable fear proceedings is particularly remarkable given that family and non-family detainees both obtained lawyers at an identical rate (23 percent) during such initial proceedings (see Figure 4).

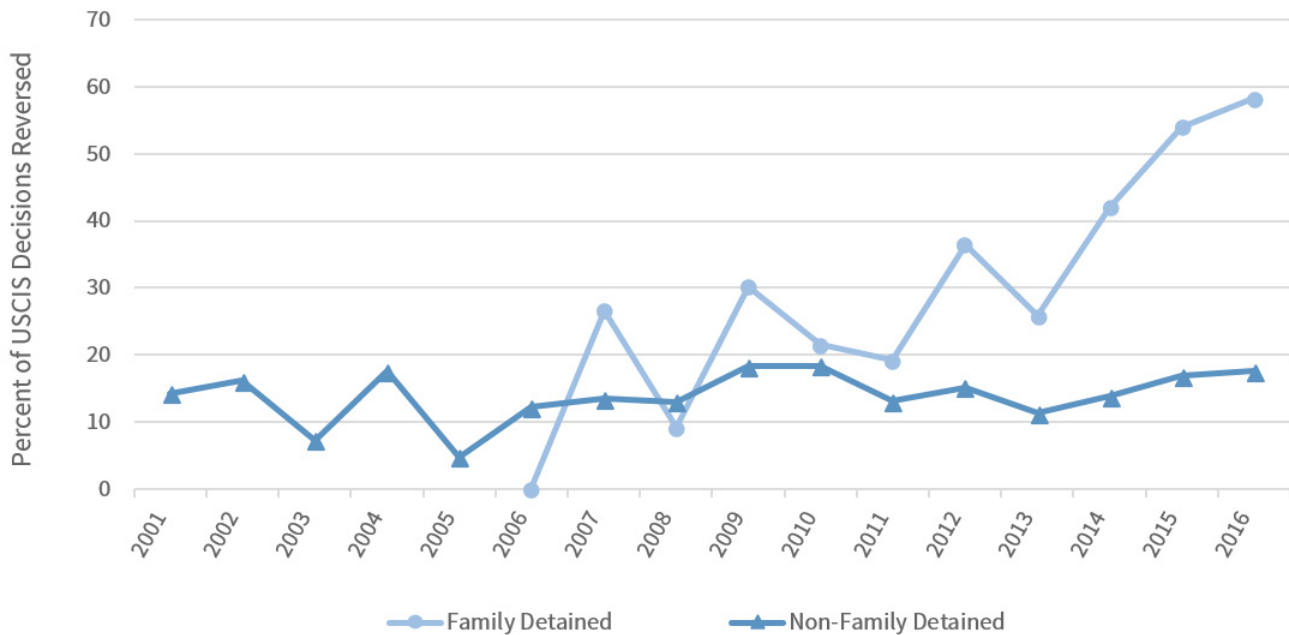
Figure 8. Rate of Reversal of USCIS Negative Credible Fear and Reasonable Fear Decisions



Source: Ingrid Eagly, Steven Shafer & Jana Whalley, *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 Calif. L. Rev. 785 (2018), <https://doi.org/10.15779/Z38WH2DF26>.

Figure 9 tracks these reversals of credible and reasonable fear denials over the 15-year period of family detention.⁹¹ It reveals that the reversal rate for family detention cases has risen dramatically since 2007 when credible fear and reasonable fear proceedings first appeared in the family detention context. By 2016, 58 percent of appealed denials were reversed by immigration judges. Figure 9 compares this rate of reversal for family detainees to that of non-family detainees, who had a much lower and relatively stable reversal rate.

Figure 9. Rate of Reversal of USCIS Negative Credible Fear and Reasonable Fear



Decisions, 2001–2016

Source: Authors' analysis of Executive Office for Immigration Review data, 2001–2016.

The credible fear and reasonable fear processes are intended to prevent the United States from erroneously returning bona fide asylum seekers to their home countries. However, these screening tools are part of summary removal processes designed to rapidly push individuals through—or skip entirely—due process protections.⁹² Legal service providers have documented situations of adverse decisions resulting from poor translation services, time or resource constraints, and interference from the very officers conducting interviews. Family members who were eligible for release during our study period remained unnecessarily detained while they pursued review before immigration judges.⁹³ Although the average court time for credible fear and reasonable fear proceedings was only three to four days, erroneous agency decisions denying credible or reasonable fear are also associated with other delays, such as the time it takes for the family to file for review with the EOIR and obtain notice of the hearing, as well as any delays in release following the judge's reversal.

DHS's Decisions to Detain Families Are Systematically Challenged and Reversed

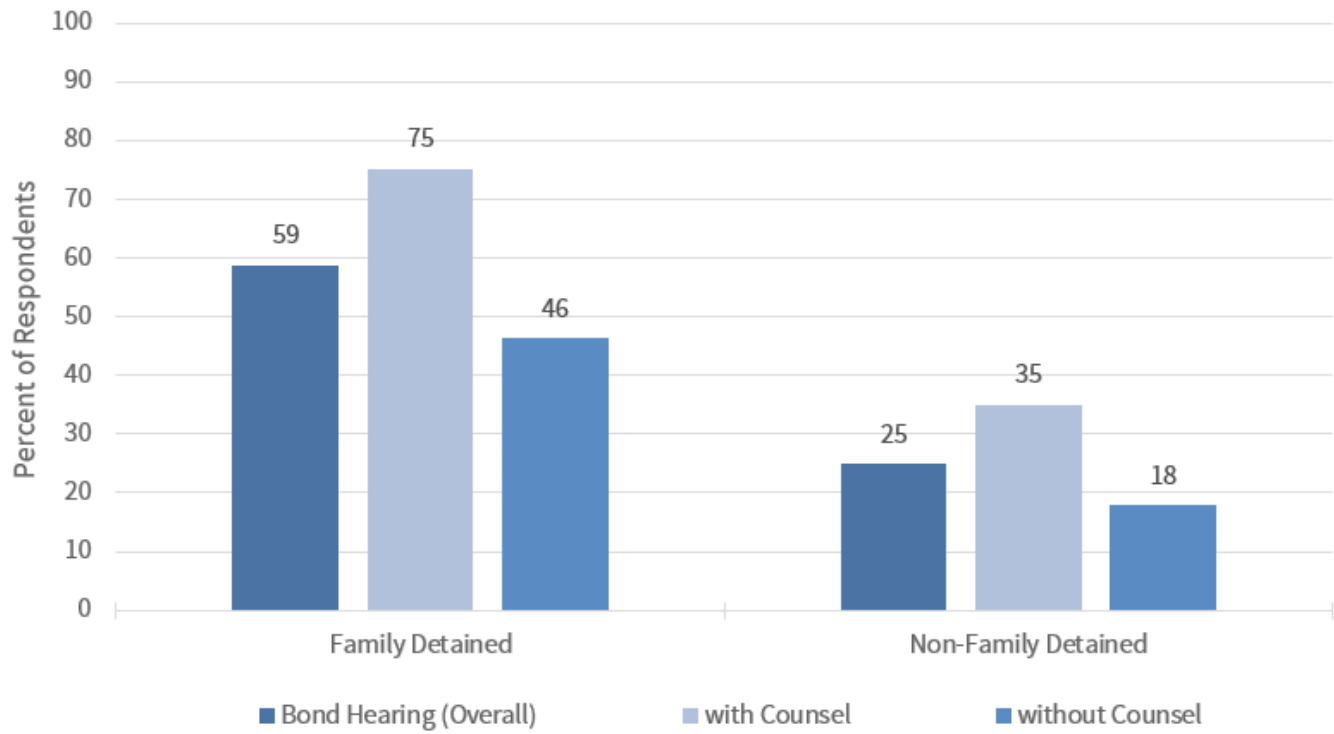
All family members going through the credible and reasonable fear screening process are held in detention without release. Those who are not found to have a credible or reasonable fear are ordered removed. However, those found to have a credible or reasonable fear of persecution are placed into removal or withholding-only proceedings. At this point, ICE has the discretion to grant their release on parole.⁹⁴ However, if immigration authorities deny parole, or require posting of an unaffordable bond amount, the family will remain detained unless an immigration judge orders their release at a bond hearing (also known as a custody hearing).⁹⁵

To identify family members who were eligible for such a hearing—but were not released by ICE—we analyzed the prevalence of bond hearings among family members in removal proceedings during our study period (completed and pending cases). Our analysis reveals that immigration courts have been called on to intervene in the detention of migrant families. Families held in the five U.S. family detention centers have been systematically more likely to request bond hearings—and to win release on bond—than other detained migrants. These and other findings suggest that agency officials subjected families to detention despite the fact that these families were ultimately found to present a low security risk and to be legally eligible for release.

Immigration Courts Regularly Ordered the Release of Detained Families

As reported in Figure 10, we find that 59 percent of the 13,668 detained family members placed in removal proceedings had at least one bond hearing, versus only 25 percent of the 2,755,862 non-family detainees in removal proceedings.⁹⁶ In other words, when compared to the rest of the detained population, family members were more likely to call on immigration judges to secure their release from detention.⁹⁷ Figure 10 also shows that these disparities between family and non-family bond hearing rates persist when we controlled for representation by counsel. These disparate rates for family and non-family bond hearings are an important indicator of the overdetention of families.

Figure 10. Prevalence of Bond Hearings in Removal Proceedings, by Family or Non-



Family Status and Representation Status

Source: Authors' analysis of Executive Office for Immigration Review data, 2001-2016.

The data also allow us to analyze the decisions made by immigration judges at bond hearings. Figure 11 presents the proportion of detained family members with bond hearings who had a successful outcome⁹⁸—meaning that the judge ordered release on a cash bond or on recognizance.⁹⁹ Overall, 57 percent of detained family members with bond hearings had a successful outcome: 19 percent were released on their own recognizance and an additional 38 percent were granted a money bond.¹⁰⁰ This success rate is higher and more favorable than in non-family detention cases with bond hearings, where only 1 percent were released on recognizance and 44 percent received a cash bond. The rates of successful outcomes also varied by detention center, with Karnes and Dilley both enjoying an overall success rate

above 80 percent.

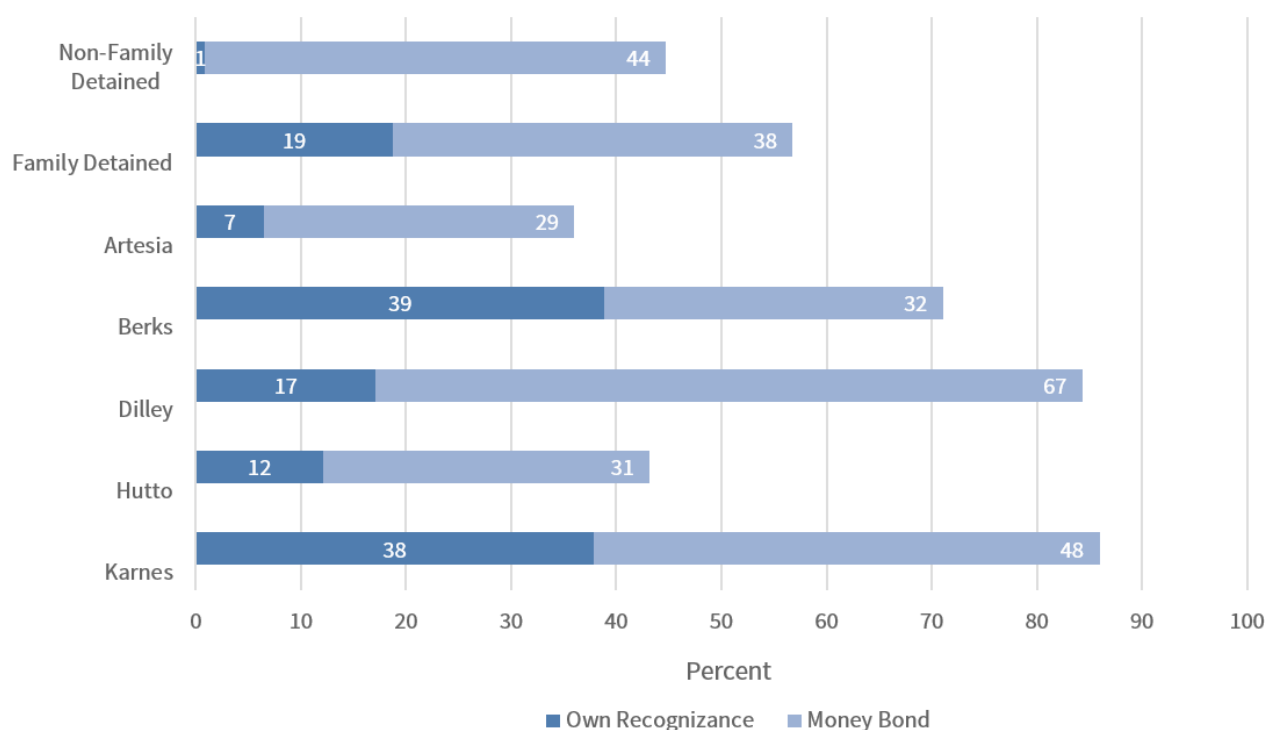


Figure 11. Successful Outcomes in Bond Hearings, by Decision Type

Source: Authors' analysis of Executive Office for Immigration Review data, 2001-2016.

Government Regularly Refused to Set Reasonable Bond for Eligible Families

We further examined the decisions immigration judges issued at bond hearings in family and non-family detention, focusing on bond amounts. Our findings raise serious questions about whether DHS subjects family detainees to overdetection.

Under immigration law, bond amounts reflect the judicial assessment of danger and flight risk.¹⁰¹ As shown in Table 4, we find that immigration judges systematically set family detention bonds at a lower amount than for non-family detention cases. This suggests that, as a group, immigration judges perceive family detainees as presenting less of a flight risk or danger than non-family detainees.¹⁰²

Over the 15 years of our study, the average bond amount set by immigration judges in family detention was \$3,226 and the median was \$2,000 (Table 4). Notably, these bond amounts were much lower than in the non-family detention context, where the average bond amount over the same period was \$11,829 and the median was \$5,000. A \$0 bond amount reflects the

judge's decision to release an individual without requiring a money bond.

**Table 4. Bond Amounts Issued by Immigration Judges,
Overall and by Family Detention Facility**

Detention Setting	Number of Bond Grants	Mean Bond Amount (\$)	Median Bond Amount (\$)
Non-Family Detained	306,197	\$ 11,829	\$ 5,000
Family Detained	4,560	3,226	2,000
Artesia	777	3,918	2,500
Berks	413	4,287	3,500
Dilley	1,211	2,459	2,000
Hutto	1,029	4,127	3,000
Karnes	1,130	2,363	0

Source: Authors' analysis of Executive Office for Immigration Review data, 2001-2016.

Immigration judges also had an important role lowering unreasonably high bond amounts for families previously set by DHS officials. Lawyers representing detained families reported that DHS refused to set bonds—or set prohibitively expensive bonds—to deter others from coming to the United States during the 2014 increase of Central American families seeking protection in the United States.¹⁰³

Using the EOIR data, we investigated these “no bond” and “high bond” policies, focusing on bond decisions at Artesia, Karnes, and Dilley.¹⁰⁴ As seen on the right side of Table 5, within these three detention centers there were a total of 3,118 court bond hearings in which the court granted bond or release on recognizance. Of those, only 524 (17 percent) had a bond set by DHS at the time of the immigration court bond hearing. In other words, at the time of the bond hearing before the immigration court, DHS still argued in favor of detention with “no bond” in 83 percent of these cases. The judicial reversals of DHS’s “no bond” decisions reveal that immigration judges play an important role in tempering agency decisions that would

otherwise subject families to overdetention.

Table 5 also reveals ICE’s general pattern of setting prohibitively high bonds. In the handful of cases in which ICE did set a bond, the average amount was high: \$7,500 in Karnes; \$6,180 in Dilley; and \$5,600 in Artesia. After the immigration judge reviewed the case, these average bond amounts decreased significantly—between 32 and 70 percent lower (in Karnes and Artesia, respectively). In Dilley, where ICE more commonly chose to set bond amounts, the average bond amount dropped by 40 percent.

Table 5. DHS vs. Judge Bond Decisions in Removal Proceedings with Bond Hearings, by Detention Facility

Facility	DHS Bond Decision				Court Bond Decision		
	Number of Cases		Bond Amount (\$)		Number of Bonds Granted	Grant Amount (\$)	
	with Bond Set	with No Bond Set	Average (SD)	Median		Average (SD)	Median
Artesia	5	772	5,600 (10,922)	0	777	3,918 (5,640)	2,500
Dilley	515	696	6,181 (4,724)	5,000	1,211	2,459 (2,045)	2,000
Karnes	4	1,126	7,500 (0)	7,500	1,130	2,363 (2,993)	0
Total	524	2,594			3,118		

Source: Authors’ analysis of Executive Office for Immigration Review data, 2014-2016.

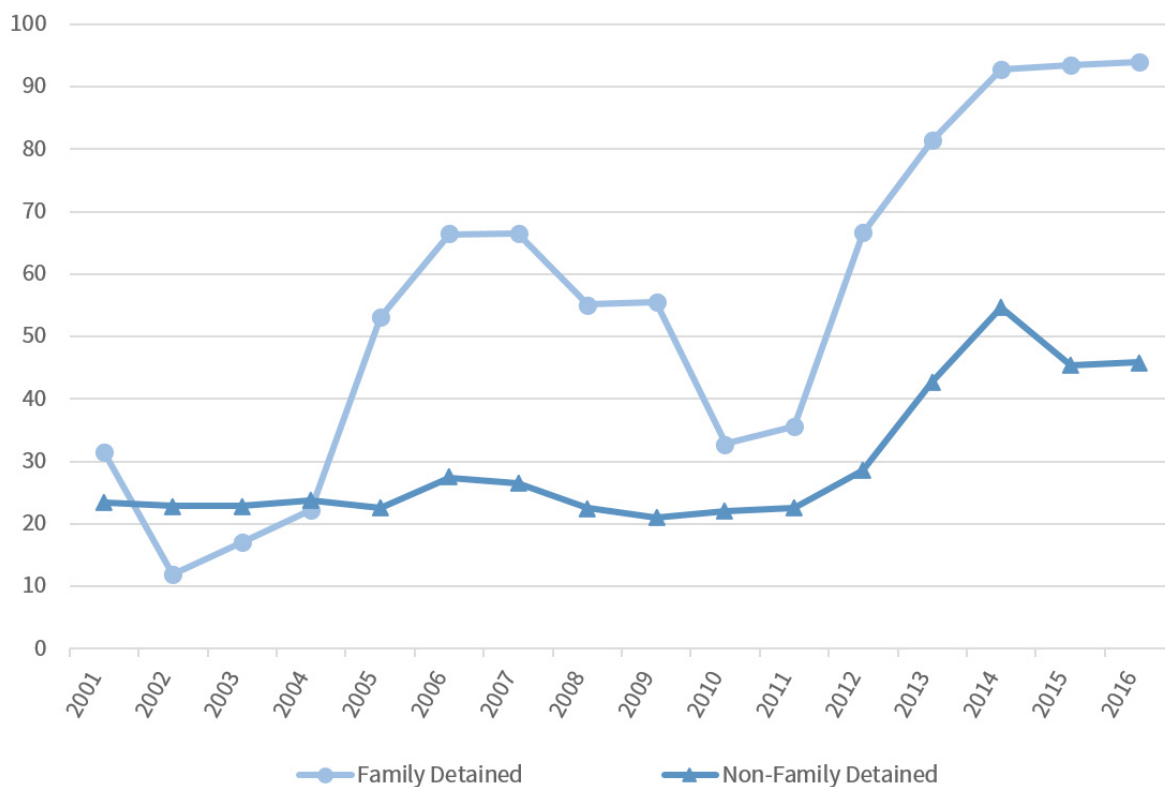
Overdetention Disproportionately Affected Central American Families

The EOIR data raise important questions as to whether Central Americans have been disproportionately subjected to family detention. We find that 80 percent of individuals in family detention proceedings over the 15-year study period were Central Americans from El Salvador (34 percent), Honduras (27 percent), and Guatemala (19 percent). The remaining 21 percent came from one of 28 different countries, with individuals from Mexico (6 percent) and China (2 percent) representing the largest shares.¹⁰⁵

Importantly, as displayed in Figure 12, we find that the national origin of family detainees has radically shifted over time.¹⁰⁶ In the first five years of family detention, family detainees came primarily from the group of 28 different countries, with very few from the Central American Northern Triangle countries of El Salvador, Honduras, and Guatemala.¹⁰⁷ Over time, the proportion of family detainees from the Northern Triangle has skyrocketed, reaching a high of 94 percent of family detainees in 2016. At the same time, the proportion of detained families from other countries has plummeted.

Our research reveals that the increase of Central Americans in family detention cases has far outpaced their presence in non-family detention cases. Figure 12 compares the percent of family detention proceedings associated with the Northern Triangle to non-family detention proceedings over the same time period. Although the proportion of Northern Triangle nationalities in non-family detention proceedings doubled during the relevant time period, it increased by thirteen times in family detention.¹⁰⁸

Figure 12. Individuals from the Northern Triangle Held in Family and Non-Family Detention, 2001–2016



Source: Authors' analysis of Executive Office for Immigration Review data, 2001–2016.

These striking patterns raise questions about why Central American families are so heavily represented in family detention. To be sure, the increase in Central American migration is in part due to the extreme levels of violence in El Salvador, Honduras, and Guatemala.¹⁰⁹ These three countries have some of the highest murder rates in the world.¹¹⁰ Central American women and children have been especially vulnerable to gang violence, domestic abuse, and sexual abuse.¹¹¹ However, Central American families have been detained to the near exclusion of families of other nationalities and at levels that are disproportionate to their presence in non-family detention during the same time period. These facts suggest that Central American families have been subjected to overdetention.

CONCLUSION

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

Our study provides empirical support for a different set of policy decisions. First, we recommend that authorities place families directly into proceedings before an immigration judge rather than first subjecting them to an administrative process. Federal immigration authorities have long had the discretion to place families directly into removal proceedings rather than rely on the expedited removal process.¹¹² Doing so would allow immigration judges to be involved in ensuring due process from the outset of the case. As our report highlights, the expedited removal process limits the ability of individuals to fully pursue their claims with the procedural and substantive protections available in regular removal proceedings before an immigration judge.

Eliminating summary removal processes, such as expedited removal, for asylum seekers and vulnerable populations would also reduce overreliance on detention, since families in removal proceedings can generally be released immediately pending a hearing. Alternatively, if it is not feasible to immediately release families following their apprehension, families in removal proceedings should be released as soon as is practicable into a less restrictive custody setting or community-based alternative to detention.¹¹³ We establish a high validity rate for the asylum claims of family members in our study, as evidenced by successful case outcomes including judicial decisions allowing released family detainees to remain in the United States. This should reassure policymakers that moving away from reliance on expedited removal and detention is a sensible policy choice. In addition, our evidence reveals that family members released from detention are unlikely to abscond. Indeed, released family members in completed and pending cases who filed claims for asylum achieved a 96 percent appearance rate at their future hearings.

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

Third, our study highlights the need for increased training and monitoring of immigration judges. Although EOIR has taken steps in the past to identify those judges with unusually high or low grant rates, a more comprehensive and independent review is necessary.¹¹⁴ We find that judges in different jurisdictions treat the cases of released family detainees quite differently. In addition, there is surprising jurisdictional variation in the rates of legal representation and applications for relief. These sorts of patterns are likely to intensify as the Trump administration hires new immigration judges that lack judicial experience,¹¹⁵ increases judicial caseloads, and cuts funding to train existing immigration judges.¹¹⁶ Future research should examine indicators of judicial decision-making beyond grant rate, including steps judges take to facilitate the filing of applications for relief, to notify respondents of their hearings, and to permit sufficient time to find competent counsel. Procedures for hearing bond claims should also be included among priority issues for training and standardization.¹¹⁷

Fourth and finally, our report underscores the vital need to maintain independence of the immigration courts.¹¹⁸ In particular, our study documents how immigration officials have delayed the timely release of families from detention and erroneously denied their claims of persecution at the asylum office's screening stage. We find, however, that immigration courts have played an important due process role in reviewing these decisions and charting a different course. Over the 15 years of our study, immigration judges reversed negative credible fear findings 48 percent of the time and reversed negative reasonable fear findings 58 percent of the time. In the current era of increased immigration enforcement, the independence of immigration courts must be protected in order to preserve their vital function in reviewing the administrative decisions of ICE and CBP authorities and asylum officers. It is also crucial that immigration judges are given sufficient time to decide their cases, without the imposition of numerical quotas for case completion.¹¹⁹

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

ENDNOTES

1. This report uses the term “migrant” to refer to family members in our study who are detained at the border while seeking entry into the United States.
2. See Global Detention Project, *United States Immigration Detention Profile* (May 2016), <https://www.globaldetentionproject.org/countries/americas/united-states>.
3. Asylum is a form of discretionary relief available to individuals who qualify as “refugee[s]” by demonstrating past “persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1101(a)(42)(A). Applicants for asylum may also be considered for relief under withholding of removal and the Convention Against Torture by satisfying a more stringent standard. 8 C.F.R. § 208.16(b)-(c).
4. For additional findings and details about the study’s methodology, see Ingrid Eagly, Steven Shafer & Jana Whalley, *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 Calif. L. Rev. 785 (2018), <https://doi.org/10.15779/Z38WH2DF26>.
5. These critiques are long-standing and moved many to publicly denounce the practice of detaining families and call for its end. This wide range of perspectives includes members of Congress, editorial boards, and service providers. Investigations by medical and mental health professionals have documented the high risk of harm associated with detention. See, e.g., Letter from Drs. Scott Allen & Pamela McPherson, Medical Subject Matter Experts to the DHS Office of Civil Rights and Civil Liberties, to Senate Whistleblowing Caucus (July 17, 2018), <https://www.wyden.senate.gov/download/doctors-congressional-disclosure-swc>. For a more robust discussion and examples, see Eagly, Shafer & Whalley, *Detaining Families*, 788-90.
6. U.S. Dep’t of Homeland Sec. (DHS), *Report of the DHS Advisory Committee on Family Residential Centers* (2016), 2, <https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf>.
7. See, e.g., Michael J. Flynn & Matthew B. Flynn, “Introduction: The Immigration Detention Puzzle in Interdisciplinary Perspective,” in Michael J. Flynn & Matthew B. Flynn eds., *Challenging Immigration Detention: Academics, Activists, and Policy-makers* (Northampton, MA: Edward Elgar Publishing, 2017).
8. See Exec. Order No. 13,841, 83 Fed. Reg. 29435, 29436 (June 20, 2018), <https://www.federalregister.gov/d/2018-13696>. President Trump’s Executive Order outlined proposals for additional “temporary detention” facilities for DHS to use to detain families. The order also directed the Attorney General to challenge a long-standing federal agreement governing the release and treatment of migrant children in the government’s custody—including restrictions on the detention of children. Stipulated Settlement Agreement (1997), *Flores v. Reno*, 507 U. S. 292 (1993), https://www.aclu.org/sites/default/files/assets/flores_settlement_final_plus_extension_of_settlement011797.pdf. The *Flores* agreement generally states that children should be released without delay (preferably to a parent) and should not be detained in secure facilities that have not been licensed by a child welfare entity. *Id.* This agreement has been upheld repeatedly by the courts, in addition to subsequent orders requiring the government to comply with the terms of the settlement. Most recently, a United States District Court denied the government’s request to be exempted from the requirements of the agreement. See *Flores v. Sessions*, No. CV 85-4544-DMG (C.D. Cal. Jul. 9, 2018), <https://www.aila.org/File/Related/14111359ac.pdf>.
9. See Exec. Order No. 13,767, 82 Fed. Reg. 8793, 8794 (Jan. 25, 2017), <https://www.federalregister.gov/d/2017-02095>.
10. Exec. Order No. 13,841 (proposing additional “temporary detention” facilities for families).
11. For more details on the history and rise of family detention, see Eagly, Shafer & Whalley *Detaining Families*, 796-800. It is important to acknowledge the practice of detaining families seeking entry into the United States existed on an ad hoc basis prior to 2001, with early instances during the First and Second World Wars. *Id.* The practice re-surfaced in the 1980s, when the Reagan administration detained Central American families who were fleeing violence and held them with other adults in federal detention facilities and in outdoor tents along the border, and again in the 1990s, when federal immigration agents at times relied on guarded hotel rooms to detain migrant families. *Id.*
12. Hutto was closed in 2009 and Artesia in 2014. See *id.* at 789, 798-800.
13. See, e.g., Olga Byrne et al., *Lifeline on Lockdown: Increased U.S. Detention of Asylum Seekers* (Human Rights First 2016), 12, <https://www.humanrightsfirst.org/sites/default/files/Lifeline-on-Lockdown.pdf>.
14. Margaret H. Taylor, “*Demore v. Kim*: Judicial Deference to Congressional Folly,” in David A. Martin & Peter H. Schuck eds., *Immigration Stories* (2005), 343, 349.
15. Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242, 2498 (2015) (directing that ICE “shall maintain a level of not less than 34,000 detention beds”). According to ICE data obtained by the authors through a FOIA request, in fiscal year 2016 ICE detained an average of 34,376 individuals each day in its detention facilities in the United States. See Eagly, Shafer & Whalley, *Detaining Families*, 801, note 76; DHS, ERO LESA Statistical Tracking Unit, “FY2016 Mandays Population by Detention Date for ICE & Family Residential Center (FRC) Populations” (2017), http://libguides.law.ucla.edu/ld.php?content_id=38162994.
16. U.S. Dep’t of Homeland Sec., *Budget-in-Brief: Fiscal Year 2017* (2016), 38, <https://www.dhs.gov/sites/default/files/publications/FY2017BIB.pdf>.
17. *Id.*
18. *Id.*
19. See, e.g., Elizabeth Kennedy, *No Childhood Here: Why Central American Children are Fleeing Their Homes* (Am. Immigration Council, 2014), <https://www.americanimmigrationcouncil.org/research/no-childhood-here-why-central-american-children-are-fleeing-their-homes>.
20. For additional discussion and examples of adverse detention conditions, see Eagly, Shafer & Whalley, *Detaining Families*, 792-95.
21. See, e.g., *Bunikyte, ex rel. Bunikiene v. Chertoff*, No. A-07-CA-164-SS, 2007 WL 1074070, at *6, *8 (W.D. Tex. Apr. 9, 2007) (finding that Hutto was unlicensed and failed to meet other requirements of the *Flores* settlement agreement); *Grassroots Leadership v. Tex. Dep’t of Family and Protective Servs.*, No. D-1-GN-15-004336, 2016 WL 9234059, at *4 (250th Tex. Jud. Dist. Ct. Dec. 16, 2016) (ordering the Texas Department of Family and Protective Service to refrain from licensing the Dilley and Karnes facilities because of the harmful conditions that these facilities imposed on children).
22. See Eagly, Shafer & Whalley, *Detaining Families*, 793.
23. See, e.g., Guillermo Cantor & Tory Johnson, *Detained, Deceived, and Deported: Experiences of Recently Deported Central American Families* (Am. Immigration Council, 2016), <https://www.americanimmigrationcouncil.org/special-reports/deported->

- central-american-families; Stephen Manning, *The Artesia Report* (Innovation Law Lab, 2015), <https://innovationlawlab.org/the-artesia-report/the-artesia-report>.
24. Prior to 1996, the Immigration and Nationality Act (INA) used the term “exclusion” for arriving immigrants and “deportation” for those already present in the United States. Compare I.N.A. §§ 212, 236, 8 U.S.C. §§ 1182, 1251 (1994), with Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 303(a), 110 Stat. 3009-546 (1996).
 25. See generally 8 C.F.R. § 1240.11 (discussing the types of relief that apply in removal proceedings).
 26. Of the 7,320 respondents in our family detention sample whose most recent proceeding was a removal proceeding, 95 percent ($n = 6,863$) had filed an asylum application at one point during their case history.
 27. 8 U.S.C. § 1158(c)(1).
 28. *Id.* § 1159(b).
 29. See 8 U.S.C. § 1225(b)(1)(A). For further discussion about the rise of deportation without judicial process, see Eagly, Shafer & Whalley, *Detaining Families*, 808, note 109.
 30. See Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877, 48,880 (Aug. 11, 2004). Under President Trump, DHS has been directed to expand the use of expedited removal. See, e.g., Memorandum from DHS Sec’y John Kelly to Kevin McAleenan, Acting Comm’r, U.S. Customs and Border Prot. (CBP) et al., *Implementing the President’s Border Security and Immigration Enforcement Improvements Policies* (Feb. 20, 2017), <https://www.dhs.gov/publication/implementing-presidents-border-security-and-immigration-enforcement-improvement-policies>.
 31. 8 C.F.R. § 235.3(b)(4). The credible fear standard requires the individual to demonstrate a “significant possibility” of establishing eligibility for asylum. *Id.* § 208.30(e)(2). For a discussion of this standard and its interpretations, see Eagly, Shafer & Whalley, *Detaining Families*, 809, note 112.
 32. 8 C.F.R. § 208.30(f). The impact of expedited removal on asylum seekers has been examined in two comprehensive studies authorized by Congress and conducted by the U.S. Commission on International Religious Freedom (USCIRF). See USCIRF, *Report on Asylum Seekers in Expedited Removal, Volume I: Findings & Recommendations, and Volume II: Expert Reports* (2005), <http://www.uscirf.gov/reports-briefs/special-reports/report-asylum-seekers-in-expedited-removal>; USCIRF, *Barriers To Protection: The Treatment Of Asylum Seekers In Expedited Removal* (2016), <http://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf>.
 33. 8 U.S.C. § 1225(b)(1)(B)(iii); 8 C.F.R. § 208.30(g).
 34. 8 C.F.R. § 1003.42(f). In some instances, an additional interview may be requested. See Memorandum from Michael A. Benson, Exec. Assoc. Comm’r for Field Operations, Immigration & Naturalization Serv., to Directors, *Additional Policy Guidance for Expedited Removal* (Dec. 30, 1997), AILA Doc. No. 98021090, <https://www.aila.org/infonet/ins-expedited-removal-guidance>.
 35. 8 U.S.C. § 1231(a)(5); 8 C.F.R. § 1241.8(a). For an excellent discussion of reinstatement and other administrative forms of removal, see Lenni B. Benson & Russell R. Wheeler, *Enhancing Quality and Timeliness in Immigration Removal Adjudication* (Report to Admin. Conf. of the United States, 2012), 10–12, <https://www.acus.gov/sites/default/files/documents/Enhancing-Quality-and-Timeliness-in-Immigration-Removal-Adjudication-Final-June-72012.pdf>.
 36. 8 C.F.R. § 208.31(c). For a discussion of reasonable fear and withholding-only claims, and their standards, see Eagly, Shafer & Whalley, *Detaining Families*, 810, notes 118-121.
 37. See 8 C.F.R. § 1208.31.
 38. *Id.* § 208.16-17.
 39. *Id.* § 208.17(b).
 40. *Id.* § 208.16, 31(f).
 41. See Eagly, Shafer & Whalley, *Detaining Families*, 811, note 125.
 42. See *id.* at 811.
 43. In contrast, credible fear review proceedings accounted for less than 1% of non-family detention proceedings during the same period. *Id.* at 812.
 44. These fast-track procedures also compound the trauma many asylum seekers carry. See, e.g., Kathryn Shepherd & Royce Bernstein Murray, *The Perils of Expedited Removal: How Fast-Track Deportations Jeopardize Asylum Seekers* (Am. Immigration Council, 2017), <https://www.americanimmigrationcouncil.org/research/expedited-removal-asylum-seekers>; Craig Haney, “Conditions of Confinement for Detained Asylum Seekers Subject to Expedited Removal,” *Report on Asylum Seekers in Expedited Removal* (USCIRF 2005), 184–87, 191–92.
 45. See generally Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 Nw. U. L. Rev. 933 (2015).
 46. This measurement is based on an analysis of hearing type (televideo or in person) for 17,271 family detention hearings held detention centers between 2007 and 2016. Prior to 2007, EOIR did not consistently record data on the medium used for court hearings. *Id.* at 946.
 47. *Id.* at 937–38.
 48. See Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 49–51 (2015).
 49. Sabrineh Ardan, *Access to Justice for Asylum Seekers: Developing an Effective Model of Holistic Asylum Representation*, 48 U. Mich. J. L. Reform 1001, 1002 (2015).
 50. DHS Advisory Committee Report, 37.
 51. We identify individuals who began their case in detention as including both those coded as “detained” and “released,” as some in this population were later released from detention. We measure representation based on EOIR-28 form filings, since immigration court rules require the filing of the EOIR-28 form by all attorneys and certified representatives who appear in immigration court. 8 C.F.R. §§ 1003.17(a), 292.2(a).
 52. Our analysis reflects one proceeding per individual case history ($n = 16,677$). For family detained respondents, “initial proceeding” captures the first proceeding associated with a family detention location in the respondent’s case history. Comparative statistics for non-family detained focus on the earliest completed proceeding in the respondent’s case history. For further detail, see Eagly, Shafer & Whalley, *Detaining Families*, app. pt. I, 859, 861-64.
 53. The four types of initial family-detention proceedings analyzed for Figure 4 include both completed cases and ones that were still pending at the time we received the data. For additional details and methodology, see Eagly, Shafer & Whalley, *Detaining Families*, 817-18, note 159.
 54. See 8 C.F.R. § 1003.42(c). Attorneys may “consult” with their clients before the hearing, but they are restricted from full participation. For a robust discussion of this matter, including how attorney participation can differ based on the judge, see Eagly, Shafer & Whalley, *Detaining Families*, 817, note 153, 819.
 55. Research has shown that family members are less likely to find a lawyer when judges gave them less time between hearings. See, e.g., David Hausman & Jayashri Srikanthiah, *Time, Due Process, and Representation: An Empirical and Legal Analysis of Continuances in Immigration Court*, 84 Fordham L. Rev. 1823, 1823 (2016).
 56. At the most recent withholding-only or removal proceeding in a case, 11 percent of individuals in the family detention sample remained detained, compared to 70 percent of the respondents in the non-family detention sample. See Eagly, Shafer & Whalley, *Detaining Families*, 819, note 168.

57. Figure 5 includes both completed cases and cases that were still pending at the time we received the data. In order to measure representation over the respondent's entire case history, we relied on a pseudo-A number provided by EOIR to link together the different proceeding types of each individual. See *id.* at 859, app. pt. I.
58. For discussion of specific pro bono initiatives, see *id.* at 816. See generally Lindsay Muir Harris, *Contemporary Family Detention and Legal Advocacy*, 21 *Harvard Latinx L. Rev.* 135 (2018). There are volunteer-oriented initiatives working to provide free legal assistance to families held at all three facilities still in operation—Berks, Dilley, and Karnes. The Dilley Pro Bono Project uses a non-traditional pro bono model of legal services that directly represents the mothers and children detained in Dilley, Texas. The Karnes Pro Bono Project has a similar model to expand access to counsel for families detained at Karnes. Both projects are partners in the CARA Family Detention Project, a collective initiative of the Catholic Legal Immigration Network, the American Immigration Council, the Refugee and Immigrant Center for Education and Legal Services, and the American Immigration Lawyers Association (AILA). The American Immigration Council has also partnered with AILA to establish the Immigration Justice Campaign to train and mentor pro bono lawyers representing detained immigrants.
59. These measurements are based on the initial proceeding that took place inside family detention. See Eagly, Shafer & Whalley, *Detaining Families*, 821.
60. See, e.g., Letter from Drs. Scott Allen & Pamela McPherson, Medical Subject Matter Experts to the DHS Office of Civil Rights and Civil Liberties, to Senate Whistleblowing Caucus (July 17, 2018), <https://www.wyden.senate.gov/download/doctors-congressional-disclosure-swc>; Alice Farmer, *The Impact of Immigration Detention on Children*, 44 *Forced Migration* 14-16 (2013).
61. *Zadvydas v. Davis*, 533 U.S. 678, 680 (2001); see also *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018).
62. Table 1 measures proceeding length (in days) among completed family detention proceedings that did not result in release. See Eagly, Shafer & Whalley, *Detaining Families*, 864, app. pt. III.A.
63. In conducting this analysis of longer-term detention, we performed additional validity checks and removed outliers. See *id.* at 864-65, note 356.
64. As reported by ICE to the USCIRF in fiscal year 2014. USCIRF, *Barriers to Protection* (2016), 38.
65. See generally Denise Gilman, *Realizing Liberty: The Use of International Human Rights Law to Realign Immigration Detention in the United States*, 36 *Fordham Int'l L.J.* 243, 209 (2013).
66. Letter from Ian H. Gershengorn, Acting Solicitor Gen., U.S. Dep't of Justice, to Hon. Scott S. Harris, Clerk, Supreme Court of the U.S., Re: *Demore v. Kim*, S. Ct. No. 01-1491 (Aug. 26, 2016), <https://online.wsj.com/public/resources/documents/Demore.pdf>.
67. For additional discussion, see Eagly, Shafer & Whalley, *Detaining Families*, 843-45, notes 264-70.
68. 8 U.S.C. § 1231(a)(1)(A) (2012); 8 C.F.R. § 241.4(g)(1)(ii) (2018). See also U.S. Gov't Accountability Office, *Immigration Enforcement: Better Data and Controls Are Needed to Assure Consistency with the Supreme Court Decision on Long-Term Alien Detention*, GAO-04-434 (2004), <https://www.gao.gov/assets/250/242498.pdf>.
69. It is worth noting that the period studied, and thus the case outcomes we analyze, pre-dates recent policy and case precedent changes at EOIR. Among them, *Matter of A-B-*, 27 I&N Dec. 316 (AG 2018), in which U.S. Attorney General Jeff Sessions overturned a Board of Immigration Appeals (BIA) decision from 2014, which had firmly established that survivors of domestic violence can be eligible for asylum under U.S. law. See *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014). The USCIS policy guidance established to comply with Sessions' decision undercuts previous decisions that were particularly relevant to many claims for asylum from families fleeing violence in Central America. USCIS, *Policy Memorandum: Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with Matter of A-B-*, PM-602-0162 (July 11, 2018), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B-.pdf>. On August 7, 2018, the ACLU and the Center for Gender & Refugee Studies brought suit against the Jeff Sessions and others on behalf of a group of asylum-seeking plaintiffs, claiming that Sessions' policy articulated in *Matter of A-B-* that domestic violence and gang violence will not establish asylum is unlawful. *Grace v. Sessions*, Case No. 1:18-CV-01853 (D.D.C. Aug. 7, 2018), <https://www.aclu.org/legal-document/grace-v-sessions-complaint>. It is not yet clear how these events will affect the viability of certain asylum claims.
70. For discussion and methodological details, see Eagly, Shafer & Whalley, *Detaining Families*, 845-46 and accompanying notes.
71. Figure 6 analyzes the outcomes in the cases of the 6,321 respondents (out of a total of 16,677) in our family detention sample who had their cases decided on the merits during the study period.
72. Sec. Kelly, *Memo on Border Security Policies*, 8.
73. Figure 7 includes completed and pending cases in our family detention and non-family detention samples.
74. If a respondent fails to appear at the hearing, the judge may decide to enter a removal order even in the family's absence. In practice, these orders are referred to as *in absentia* removal orders. Exec. Office for Immigration Review, U.S. Dep't of Justice, *FY 2015 Statistics Year Book* (2016), P1, <https://www.justice.gov/eoir/page/file/fysb15/download>.
75. See generally Letter from CARA Family Detention Pro Bono Project to Sarah Saldaña, Dir., Immigration & Customs Enft, Dep't of Homeland Sec. (July 27, 2015), <http://www.aila.org/File/DownloadEmbeddedFile/65278>; CARA Family Detention Pro Bono Project, *Update on Recent ICE Enforcement Actions Targeting Central American Families* (2016), 3-5, https://www.aila.org/infonet/cara-recent-ice-actions-targeting-central-amer?utm_source=aila.org&utm_medium=InfoNet%20Search.
76. Table 2 analyzes appearance rates for those respondents whose case was completed by the end of our study period. Our analysis of completed cases and *in absentia* orders supplements Figure 7's analysis of *in absentia* rates in completed and pending cases and did not appear in the original California Law Review publication.
77. Our analysis of completed cases and *in absentia* orders in Table 2 differs in meaningful ways from a recent analysis of *in absentia* orders published by The Asylum Seeker Advocacy Project at the Urban Justice Center (ASAP) and the Catholic Legal Immigration Network, Inc. (CLINIC). See ASAP & CLINIC, *Denied a Day in Court: The Government's Use of In Absentia Removal Orders Against Families Seeking Asylum* (2018), 14 & Fig. 2, <https://cliniclegal.org/sites/default/files/Denied-a-Day-in-Court.pdf>. For example, our study includes 15 years of data, compared to just over two years of data in the ASAP/CLINIC report. Given that complex cases such as those involving asylum often take years to fully process, our 15-year study period allows for a more complete analysis. In addition, our study linked together all proceedings of an individual respondent using pseudo-A numbers obtained through FOIA, thereby measuring more accurately the final outcome in individual cases. See Eagly, Shafer & Whalley,

- Detaining Families, 859, 864, app. pts. I., III.A.
78. Table 3 analyzes case outcomes, for pending and completed cases, in the 20 jurisdictions that handled the highest numbers of released family detention cases. For detailed methodology, see Eagly, Shafer & Whalley, *Detaining Families*, 865, app. pt. III.C.
79. For further discussion, see *id.* at 849-51, notes 287-89.
80. Human rights advocates have called these and other cities with extremely low asylum grant rates “asylum free zones” for systematically denying protection to bona fide asylum seekers. See David Baluarte et al., *Before the Inter-American Commission on Human Rights: A Special Interest Hearing on the Human Rights of Asylum Seekers in the United States* (2016), <https://clinicalegal.org/sites/default/files/resources/defending-vulnerable-populations/Human-Rights-of-Asylum-Seekers-in-US-%5BPetitioners%5D.pdf>
81. See, e.g., Lenni B. Benson, *As Old as the Hills: Detention and Immigration*, 5 Intercultural Hum. Rts. L. Rev. 11, 13-15 (2010); Mark Noferi, *Making Civil Immigration Detention “Civil,” and Examining the Emerging U.S. Civil Detention Paradigm*, 27 J. Civ. Rts. & Econ. Dev. 533, 567-75 (2014).
82. Julia Preston, *Detention Center Presented as Deterrent to Border Crossings*, N.Y. Times (Dec. 15, 2014), http://www.nytimes.com/2014/12/16/us/homeland-security-chief-opens-largest-immigration-detention-center-in-us.html?_r=0.
83. See *R.I.L.R v. Johnson*, 80 F. Supp. 3d 164, 188-89 (D.D.C. 2015) (rejecting the government’s claim that “one particular individual may be civilly detained for the sake of sending a message of deterrence to other Central American individuals who may be considering immigration”).
84. See *Matter of Patel*, 15 I. & N. Dec. 666, 666 (B.I.A. 1976); *In re Adeniji*, 22 I. & N. Dec. 1102, 1103 (B.I.A. 1999).
85. See Harvard Immigration and Refugee Clinical Program, *The Impact of President Trump’s Executive Orders on Asylum Seekers* (2017), 2, <https://today.law.harvard.edu/wp-content/uploads/2017/02/Report-Impact-of-Trump-Executive-Orders-on-Asylum-Seekers.pdf>.
86. International Covenant on Civil and Political Rights, art. 9.1 (Mar. 23, 1976), 999 U.N.T.S. 171, <https://treaties.un.org/doc/publication/unts/volume-999/volume-999-i-14668-english.pdf>.
87. While these General Comments are not binding on the United States, they are a strong articulation of the accepted state of international law. See *Comm. on the Prot. of the Rights of All Migrant Workers and Members of Their Families & Comm. on the Rights of the Child*, Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 of the Committee on the Rights of the Child on the General Principles Regarding the Human Rights of Children in the Context of International Migration, at 3, U.N. Doc. CMW/C/GC/3-CRC/C/GC/22 (Nov. 16, 2017).
88. The 1997 Flores Agreement requires that migrant children be released rather than detained, except in cases of danger or flight. If they are held, the “least restrictive alternative” must be used, meaning nonsecure, licensed facilities. See *Stipulated Settlement Agreement* (1997).
89. We credit Anil Kalhan with first using the term “overdetention” to describe the immigration system’s reliance on detention absent flight risk or danger. See Anil Kalhan, *Rethinking Immigration Detention*, 110 Colum. L. Rev. Sidebar 42, 48-49 (2010).
90. Figure 8 measures the rate of reversal in initial immigration judge decisions in credible fear and reasonable fear review proceedings. Approximately 4 percent of initial credible and reasonable fear review decisions were not on the merits (such as a change of venue) and were excluded from the analysis.
91. The use of credible fear and reasonable fear review proceeding types did not begin in family detention facilities until fiscal year 2006, when it gained a foothold in Berks. Eagly, Shafer & Whalley, *Detaining Families*, 811.
92. See, e.g., Shepherd & Murray, *The Perils of Expedited Removal*; USCIRF, *Barriers to Protection*.
93. Also concerning is that not all families will assert their right to judicial review and thus will be deported after the erroneous agency decision. These deportations of bona fide asylum seekers to home countries where they face persecution and torture can have devastating results. See, e.g., Lindsay Muir Harris, *The One-Year Bar to Asylum in the Age of the Immigration Court Backlog*, 2016 Wisconsin L. Rev. 1185 (2017), 1216-24, <http://wisconsinlawreview.org/wp-content/uploads/2017/01/Harris-Final.pdf>.
94. 8 U.S.C. § 1182(d)(5)(A) (2012); 8 C.F.R. §§ 212.5(b), 235.3(b)(2)(iii) (2018). See also U.S. Immigration & Customs Enf’t, *Directive No. 11002.1: Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture* (2009), 2, http://libguides.law.ucla.edu/ld.php?content_id=38165172 (obtained by authors through FOIA).
95. 8 U.S.C. § 1226(a) (2012); 8 C.F.R. § 1236.1(d). For further discussion, see Eagly, Shafer & Whalley, *Detaining Families*, 833-34, notes 232-36.
96. Figure 10 measures whether individuals in detention were given a bond hearing, and thus only includes detained and released removal proceedings. For expanded methodology, see Eagly, Shafer & Whalley, *Detaining Families*, 835, note 237.
97. These differences could also be due to other factors, including non-family detainees’ greater likelihood of convictions that render them ineligible for release.
98. Figure 11 measures the percent of bond hearings that resulted in a “successful outcome” for the respondent, defined as either release on personal recognizance or money bond. Immigration judges may make other types of bond decisions, which we construe as denials and thus unsuccessful outcomes for the immigrant respondent. *Id.* at 838, app. pt. III.B.
99. It is important to note that even families granted \$0 bond were often released subject to a variety of other conditions and constraints, including ankle monitors. For further details on judicial determinations, as well as alternative to detention programs, see *id.* at 96, notes 241-44.
100. The data also reveal considerable variability in judicial rules at bond hearings across family detention centers. It is important to remember that these varied outcomes were reached at different time periods, by different judges, and within facilities with remarkably different rates of representation. *Id.* at 838, note 245.
101. See *Matter of Patel*, 15 I. & N. Dec. 666, 666 (B.I.A. 1976); *In re Guerra*, 24 I. & N. Dec. 37, 40 (B.I.A. 2006).
102. Emily Ryo’s study of immigration bond hearings outside of the family detention context found that immigration judges gave significantly higher average bond amounts to detainees with felonies (\$47,133) than to those without felonies (\$20,040). Emily Ryo, *Detained: A Study of Immigration Bond Hearings*, 50 Law & Soc’y Rev. 117 (2016), 135-37.
103. For detailed discussion and documentation of the government’s strategy, see Eagly, Shafer & Whalley, *Detaining Families*, 840, note 251.
104. We focus on bond decisions between fiscal years 2014 and 2016 to analyze DHS’ deterrence policy. Hutto, which operated before this time period, is not analyzed. Berks, although open during this time period, had too few bond decisions (*n* = 82) for proper analysis. For expanded methodology applicable to Table 5, see Eagly, Shafer & Whalley, *Detaining Families*, 840-41, notes 252-53.

105. In addition to Mexico (6%) and China (2%), individuals in our study came from Iraq (1%) and Colombia (1%). The remaining 10% came from one of the following 24 countries (each representing less than 1% of the total population of families detained during our 15-year study period): Albania, Armenia, Bolivia, Brazil, Chile, Cuba, Dominican Republic, Ecuador, Eritrea, Ethiopia, Guyana, Haiti, India, Iran, Jamaica, Nicaragua, Nigeria, Pakistan, Peru, Romania, Russia, Sri Lanka, Syria, and Venezuela. See *id.* at 829.
106. Figure 12 measures the nationality of respondents in cases that originated in detention. Year is measured by the earliest proceeding date in the respondent's case history.
107. Eagly, Shafer & Whalley, *Detaining Families*, 829.
108. See *id.* at 830. The largest proportion of non-family detainees were from Mexico (52%), with smaller proportions from El Salvador (9%), Guatemala (9%), Honduras (7%), China (2%), Dominican Republic (2%), and other countries (21%).
109. See generally Jonathan T. Hiskey, Abby Córdova, Diana Orcés & Mary Fran Malone, *Understanding the Central American Refugee Crisis: Why They Are Fleeing and How U.S. Policies Are Failing to Deter Them* (Am. Immigration Council, 2016), 3, <https://www.americanimmigrationcouncil.org/research/understanding-central-american-refugee-crisis>.
110. UN Office on Drugs and Crime, *Intentional Homicide Victims* (2016), <https://dataunodc.un.org/crime/intentional-homicide-victims>.
111. See United Nations High Comm'r for Refugees (UNHCR), *Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico* (2015), 2, <http://www.unhcr.org/publications/operations/5630f24c6/women-run.html>; UNHCR, *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection* (2014), 15, <http://www.unhcr.org/en-us/about-us/background/56fc266f4/children-on-the-run-full-report.html>. See also note 69 in this report for discussion of recent changes affecting asylum seekers, particularly those fleeing violence in Central America.
112. See, e.g., CBP, *Inspector's Field Manual* (DHS, 2006), 2, § 17.15, <http://www.aila.org/File/Related/11120959F.pdf>.
113. Although ICE established a pilot Family Case Management Program for asylum-seekers with young children and other vulnerable populations, this least-restrictive alternative to detention was terminated in June 2017. Aria Bendix, *ICE Shuts Down Program for Asylum-Seekers*, *The Atlantic* (June 9, 2017), <https://www.theatlantic.com/news/archive/2017/06/ice-shuts-down-program-for-asylum-seekers/529887/>.
114. See U.S. Gov't Accountability Office, *Asylum: Variation Exists in Outcomes of Applications Across Immigration Courts and Judges* (2016), GAO-17-72, 30–42, <http://www.gao.gov/assets/690/680976.pdf> (describing previous measurement efforts implemented at EOIR); see also Hon. Denise Noonan Slavin & Hon. Dorothy Harbeck, *A View from the Bench by the National Association of Immigration Judges*, 63 *Fed. Law.* (2016), 67, 68 (recommending that immigration judges “should receive regular training . . . tailored to the extent possible to the areas in which judges have been found wanting in their respective performance evaluations”).
115. See, e.g., Press Release, U.S. Dep't of Justice, *Executive Office for Immigration Review Swears in Seven Immigration Judges* (May 8, 2017), <https://www.justice.gov/eoir/pr/executive-office-immigration-review-swears-seven-immigration-judges>.
116. See, e.g., Sarah Sherman-Stokes, *Immigration Judges Were Always Overworked. Now They'll be Untrained, Too*, *Wash. Post* (July 11, 2017), http://wapo.st/2sMxpla?tid=ss_mail&utm_term=.e17fb7600de7.
117. For example, training of immigration judges could cover the importance of considering ability to pay and the suitability of alternatives to detention. See *Hernandez v. Lynch*, No. EDCV-16-00620-JGB (KKx), 2016 WL 7116611 (C.D. Cal. Nov. 10, 2016) (granting a preliminary injunction requiring immigration judges to consider financial circumstances and alternative conditions of supervision in making bond determinations). The district court's grant of the preliminary injunction was affirmed by *Hernandez v. Sessions*, 872 F.3d 976 (9th Cir. 2017).
118. For an argument that immigration courts ought to be moved out of the Department of Justice and made into Article I courts, see Hon. Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13 *Bender's Immigr. Bull.* 3 (2008), <https://perma.cc/7Z6H-Z2PD>.
119. The National Association of Immigration Judges has objected to numerical quotas as a threat to judicial independence and due process. See Nat'l Ass'n of Immigration Judges, *Threat to Due Process and Judicial Independence Caused by Performance Quotas on Immigration Judges* (2017), https://www.naij-usa.org/images/uploads/publications/NAIJ_Quotas_in_IJ_Performance_Evaluation_10-1-17.pdf (“If EOIR is successful in tying case completion quotas to judge performance evaluations, it could be the death knell for judicial independence in the Immigration Courts.”).