

# Introduction

In January 2019, many federal agencies were shuttered for weeks, federal services were curtailed, and 800,000 federal workers were furloughed because President Donald J. Trump refused to approve a budget plan unless it included funding for a wall between the United States and Mexico. In the midst of the turmoil caused by the closure of vital federal agencies, Trump sent a letter to Congress outlining the two “most pressing legal changes” that he wanted legislators to enact in order to deter people, including asylum-seekers, from trying to come to the United States.<sup>1</sup> These were, first, to “terminate the Flores Settlement Agreement,” and, second, to “amend the Trafficking Victims Protection Reauthorization Act (TVPRA)” that Congress had unanimously passed, and that President George W. Bush had signed, in 2008. The Flores agreement is a 1997 legal settlement under which the United States had agreed not to jail migrant children for more than a few days. The TVPRA reinforced the Flores agreement by preventing the Border Patrol from holding unaccompanied children in its custody for more than seventy-two hours and by providing procedural protections for those who applied for asylum.

The Flores agreement and the TVPRA had limited, but not entirely ended, the incarceration of migrant children. The TVPRA required that

the government transfer *unaccompanied* children promptly to the custody of the Department of Health and Human Services, which then reunited them with parents or other family members in the United States or, failing that, housed them in shelters where they were usually well cared for. But the TVPRA did not apply to *accompanied* children, those who arrived in the United States with a parent or other adult.

The Obama administration hired private prison companies to build two large jails in Texas for the mothers and children in these families. A court interpreted the Flores settlement agreement to mean that the children could not be incarcerated in those jails for more than twenty days. But the Trump administration wants to be able to jail these asylum-seeking families for years,<sup>2</sup> until the backlogged immigration courts can hear their claims. It has sought, successively, to persuade Congress to terminate the Flores agreement, to get a court to reinterpret it, to repeal it by regulation, and to circumvent it by making Central American families wait for their hearings in Mexico rather than allowing them to enter the United States.

This book arose out of my brief volunteer experience in one of the family jails. In the fall of 2015, I left the comfort zone of my Georgetown University office for a few days to provide legal services to mothers and children confined in the immigration detention center in Dilley, Texas. The place I visited was no ordinary jail. The women and children had not been charged with crimes. Each of the mothers with whom I talked had fled dreadful violence in Central America. They had come north, making an arduous trip through Mexico, to seek the safety afforded by the United States and its asylum law. After crossing the Rio Grande, they were quickly apprehended by the Border Patrol. Initially, they were confined in the Border Patrol's holding facilities in what they described as miserable conditions. Then they were put into the custody of Immigration and Customs Enforcement (ICE), which transported them to what was euphemistically called the "South Texas Family Residential Center," a name suggesting some kind of resort. It was in fact a corporation's private jail, operated under a contract with ICE.

Along with several other lawyers, I worked in a trailer set aside for conversations between the women and attorneys. While we talked, their children, most of whom seemed to be between three and eight years old, played with a few toys on the floor. It was hard for me to get my head

around the idea of a jail full of toddlers, but there they were. The children also looked longingly at the vending machine that was stocked with candy for the legal representatives, but they were not allowed to have any. In fact, the lawyers had asked for the vending machine to be removed, but ICE had refused. The mothers reported that many of their children were ill. Conjunctivitis seemed rampant among the confined youngsters. The mothers also said that children who developed fevers or diarrhea had to wait for a long time to see a nurse or doctor, and then were most often told that the children should drink water. Many of the children seemed terrified of being in jail after their harrowing trips through Mexico, often at least partly on foot.

The role of the lawyers was to prepare the mothers for screening interviews conducted by asylum officers of the Department of Homeland Security (DHS). These interviews were called “credible fear” interviews, because to avoid deportation, the mother would have to show that she had a “credible fear” of persecution. “Credible fear” was a term of art, signifying the asylum officer’s determination of whether the mother had no case at all or whether she could seek asylum in immigration court. An asylum officer could find that a mother had “credible fear” if the officer thought that, in a court hearing months or years later, an immigration judge might well conclude that she was telling the truth about her experiences in her home country, and that she reasonably feared being persecuted, if deported, on account of one of the grounds identified as acceptable in U.S. law.

For example, a mother who persuaded an asylum officer that she did have credible fear of being persecuted because of her political opinions might be released from the jail, along with her children, so that the family could live with a friend or relative until an immigration court hearing took place. But if she could not persuade the officer that she had credible fear, her family would remain in jail until deportation, which could take place within days. In that case, there was one last chance. The day after the asylum officer interview, she could make a teleconference appeal to an immigration judge, who could either affirm or reverse the asylum officer’s finding that she lacked credible fear. Immigration law permitted a lawyer to prepare her for the asylum officer’s interview and the appeal, and to sit with her in front of the camera and the video screen, but it barred the lawyer from “representing” her.

Most of the mothers were very anxious about these legal proceedings, in which they had to relate—and relive—horrible experiences, including knifings and rapes. Their small children were equally unnerved by the process. One video hearing that I attended with a six-year-old child's mother had to be postponed because the boy would not leave her side even for the mother's half-hour court appearance. After the child screamed for forty-five minutes, a guard tore the child, still screaming, from his mother's arms. The distraught mother had to go directly from that scene to the courtroom, where she would testify to a camera. There her fate was decided, on the spot, by a judge in Miami, Florida, more than a thousand miles away.

The mothers related experiences in El Salvador, Honduras, and Guatemala that are almost unimaginable in the extremity of the violence visited upon them. One of the women I advised, whom I will call Maria, had been eleven years old when her father, who was employed but very poor, refused to give a portion of what little money he had to the local gang. One night, Maria was sitting in their small house holding her two-year-old sister on her lap. There was a knock on the door. Her father called out to find out who it was. A male voice said that the group had come for its money. Maria's mother rushed from the living room into the bedroom to collect the family's meager savings. Her father tried to stop her, refusing on principle to pay extortion money. He wanted to bar the front door with furniture. Her mother insisted on paying, to avoid danger to the family. Her parents scuffled in the living room. Maria's mother broke free and was carrying the money to the door when the gang members became impatient and fired several shots through it. She was killed instantly. A bullet hit Maria's baby sister, but the wound was superficial, perhaps caused by a ricochet. Maria herself suffered a graze on her arm. Her father was also hit. He did not die right away, but he later perished from the wound because he could not afford medical care. Her aunt heard the shots and called the police. When the shooters heard the siren, they fled. Maria took care of her father until he died and then moved in with her grandmother. Years later, when she was an adult, a gang extorted money from her. She was raped and threatened with death. At that point, she fled to the United States with her youngest child, leaving three other children behind with her grandmother because she didn't have enough money for them to make the trip.

Hundreds of volunteer lawyers were taking turns providing legal advice to the mothers in this facility. Along with its sister jail in Karnes City, Texas, and a very small facility in Berks County, Pennsylvania, Dilley was then one of the three facilities in the United States known to immigration lawyers as “baby jails.”<sup>3</sup> Most of the lawyers who volunteered at Dilley traveled to Texas for a week at a time to counsel the detainees, prepare them for the screening interviews, and help them with their last-chance videoconference appeals.

Dilley started housing mothers and children only in 2014, but mothers and children fleeing for their lives to the United States have been detained for decades. Lawyers had been trying to prevent the incarceration of migrant children ever since 1985, when Peter Schey, a California lawyer, was asked to help Jenny Lisette Flores, a Salvadoran teenager. Jenny was languishing in a Los Angeles motel that the Immigration and Naturalization Service (INS) had converted to a jail by surrounding the building with barbed wire.

When Schey agreed to represent Flores, he could have had no inkling that her case would go to the United States Supreme Court or that it would still be going on thirty-five years after it began. Nor could he have predicted that the settlement he would eventually negotiate on behalf of migrant children would become a significant target for an American president intent on making it much more difficult for Salvadorans and other victims of violence abroad to obtain asylum in the United States.

This book is a history of the Flores case, its aftermath (including related legislation and litigation) and, more generally, of the efforts by lawyers, legislators, and others to end the detention of migrant children and to alleviate the conditions of their detention. These efforts often have been successful, at least for periods of time. Though the long-term trend of political and legal developments has favored the interests of the children, there were also many setbacks for the children, their parents, and their advocates. The federal government’s decades-long effort to keep immigrant children in jail, among other harsh measures to deter them from seeking asylum, has become extreme under the Trump administration. It first attempted to separate families (keeping the mothers in jail while sending the children to shelters or foster care) and then, after an international outcry, it concluded that it would be better to keep entire families imprisoned for years. More than three decades after Jenny Flores became a plaintiff, the issue of what to do with migrant children, including

those who have fled to the United States to escape persecution and violence, remained a controversial legal and political issue.

In 1980, Congress made asylum available to almost anyone in the United States or at its border who could prove that he or she had a well-founded fear of persecution on at least one of five specified grounds.<sup>4</sup> Hundreds of thousands of people subsequently sought and won protection. Under the law, even those who entered the United States without visas can seek asylum, though people apprehended for entering the United States surreptitiously, or who ask for asylum at a border crossing, can be detained—jailed—until their cases are heard. Many immigration advocates oppose the jailing of adults pending their asylum hearings because it is very difficult for those confined in ICE facilities to obtain legal representation or to collect evidence to corroborate their claims. It is also very costly to house and feed migrants in ICE's detention facilities. Special considerations apply to children, because the consensus among mental health professionals is that jailing children, even for relatively short periods of time, can cause permanent developmental and emotional damage. Children have fled to the United States from Central America at least since the early 1980s, sometimes by themselves and sometimes with an adult. Since 2005, and particularly since 2013, the numbers of such children have been substantial, presenting successive administrations with the problem of what to do with them until their claims could be adjudicated.

One way to avoid detaining children would be to station judges at the border to decide within days whether their claims for asylum were valid. But this would be unfair to the children and their relatives, because it is difficult to win an asylum case without a legal representative who can assemble corroborating evidence. It can take several months for an indigent migrant to find a lawyer who will provide free representation, after which the process of collecting evidence often takes many weeks. In the clinic that I co-direct at Georgetown Law, my students, working day and night on a single case, need about three months to obtain enough evidence to persuade an immigration judge of the validity of a client's claim. If either the government or the client appeals the judge's decision, the case can go on for as long as three years.<sup>5</sup>

A second possibility would be to release the children (and any accompanying relatives) to live in the community until their cases can be heard, perhaps monitoring them electronically or through periodic required visits to ICE officials to ensure that they will appear for their hearings. Monitored release is actually what the government does with many families, because it doesn't have enough space in its family jails to house all of them, even for the twenty days permitted by a court order in the Flores case. A third option is to incarcerate the children (together with an accompanying parent) until the hearing; a fourth is to jail the parents until then, but to release the children, thereby separating families. The government has used all of these approaches—humanitarian release, long-term detention, and family separation—from time to time. Indeed, as this book shows, these three “solutions” to the problem of what to do with children awaiting hearings on their asylum claims have been the subjects of advocacy by numerous administration officials, legislators, judges, and immigrants' advocates for more than three decades. The TVPRA requires that with rare exceptions, unaccompanied children should promptly be taken out of detention and placed in the “least restrictive setting possible.” The treatment of children who arrive with family members, on the other hand, remains the subject of fierce political contestation.

Chapters 1, 2, and 3 of this book relate the early history of the Flores case, which is remarkable in two respects. First, although the case hasn't quite set the record for longevity, it is still alive after nearly thirty-five years. Second, after eight years of litigation, the case was decided by the United States Supreme Court. Usually, a case that goes to the Supreme Court ends shortly thereafter, because there can be no appeal from that court's decision. In its decision in *Flores*, the Supreme Court decided that children did not have a constitutional right to be placed with a responsible adult who was unrelated to them, but it left open one aspect of the case. It assumed that the government was honoring an agreement it had signed regarding the conditions of confinement for migrant children, an assumption that turned out to be incorrect. Ms. Flores's lawyers drove a truck through the small opening created by the government's failure to honor its initial agreement. They first obtained a second settlement of that aspect of the case,

four years after the Court's decision. They then enforced the settlement through motions, beginning in 2015, that challenged the government's policy of long-term detention of families with children. Chapter 1 tells the story of Jenny Flores's incarceration, how the case began, and its initial, partial settlement in 1987. Chapter 2 explains the appellate history of the case, including the Supreme Court's decision. Chapter 3 reveals how, even after the Supreme Court ruled against Ms. Flores, the case resulted in the second settlement, against which President Trump would rail more than twenty years later.

Chapter 4 concerns the first intervention by Congress, largely at the initiative of Senator Dianne Feinstein. In its 2002 Homeland Security Act, Congress began to address the issue of confinement of unaccompanied migrant children. It divested the Immigration and Naturalization Service of responsibility for their custody and transferred that duty to the Office of Refugee Resettlement in the Department of Health and Human Services. This change led to a much more humane system for the care of these children until their cases could be decided.

In Chapter 5, the book briefly explores the law of asylum and explains the alterations that Congress made in 1996 in the process for adjudicating asylum claims for migrants who arrived without visas. The 1996 amendments to the immigration law created the expedited removal procedure. This process for summarily deporting some asylum seekers was never imposed on unaccompanied children, but it was an important change for mothers and fathers who arrived with one or more children, adding an additional obstacle to their obtaining asylum.

Chapter 6 discusses the establishment of the nation's first large family detention center during the administration of President George W. Bush, and of the lawsuit that sought to shut it down. The judge in that case declined to end family detention, but his orders did bring about substantial reforms in children's treatment.

In Chapter 7, I explore how Congress revisited and expanded the rights of unaccompanied migrant children who seek asylum or other relief from deportation,<sup>6</sup> extending them beyond the provisions of the 1997 Flores settlement. Through several provisions of the TVPRA, Congress limited the amount of time that those children could be kept in rough border facilities and provided that full hearings on their asylum claims



should be conducted by DHS asylum officers, who receive specialized training in interviewing children, rather than by immigration judges.

During his first year in office, President Barack Obama closed the family detention center that the Bush administration had opened. Five years later, however, after the arrival of many more families and children seeking asylum because of gang violence and domestic violence in Guatemala, Honduras, and El Salvador, the Obama administration opened three new family detention centers, first in New Mexico and then, in 2014 and 2015, in Texas. Chapters 8, 9, and 10 reveal how the community of immigration advocates, assisted by an Internet that did not exist when the Flores case began, rallied to the defense of the incarcerated families, and how the settlement came back to life to prevent their long-term detention.

Chapter 11 concerns the small family detention center in Berks County, Pennsylvania. It had operated since 2001, but because of its size (only eighty-four beds) and the rapidity with which it released most of the children held there, it initially attracted little attention. That changed in 2015, when the government started sending families to Berks to avoid having to release them, pursuant to a court order in the Flores case, from imprisonment in Texas. At that point, litigation in Pennsylvania over state licensing of the Berks facility began to parallel ongoing litigation in Texas.

Chapter 12 surveys the policies of the Trump administration on detention of migrant children.<sup>7</sup> The administration has sought to reverse nearly all of the reforms of the previous thirty years. As part of a broad anti-immigrant effort, it tried to deter migrants, including children and families with children, from coming to the United States to seek asylum. It called for repeal of the protective provisions of the 2008 law that Congress passed to assure humanitarian conditions for unaccompanied children awaiting hearings. It unsuccessfully sought reversal of the 2015 court decision that held that the Flores settlement applied to accompanied and unaccompanied migrant children. When that failed, the government embarked on a politically and legally disastrous program of criminally prosecuting mothers who brought their children to the United States. This had the effect of separating children from their parents. In many instances, the government failed to keep records of where the children were sent. When a court ordered that the children be returned to their parents, this failure made the order difficult to implement.

Unable to persuade Congress either to amend the 2008 law or to overturn the Flores settlement, the administration sought to overturn it unilaterally by issuing an administrative regulation, an initiative guaranteed to lead to many more years of litigation. Attorney General Jeff Sessions also issued an edict purporting to bar most victims of domestic violence or gang violence from asylum, prompting a lawsuit that enjoined DHS from implementing his decision. President Trump followed with a regulation withholding asylum from immigrants who cross the border without permission, even as his administration prevented more than a limited number of people from seeking asylum at legal border crossings. The administration also adopted a plan to force Central American families to “remain in Mexico” for months or years while waiting for immigration court hearings. It also threatened to impose crippling tariffs on Mexican goods unless Mexico curbed the number of migrants transiting through that country or signed a “safe third country” agreement with the United States. Under U.S. law, the existence of such an agreement could deny asylum to any non-Mexican refugee who passed through Mexico. Central American as well as other refugees would instead have to seek asylum in Mexico, even though Mexico lacks the resources to process or protect very many refugees. Mexico resisted signing such a pact. But the Trump administration pressured the government of Guatemala to agree to accept the transfer of all non-Guatemalan adults whose asylum claims the Trump administration does not want to consider.

A conclusion assesses the impact of the Flores case and the state of play in the continuing struggle between the government and immigrants’ advocates over the duration and conditions of confinement of children who seek safety in the United States. It includes my recommendations for reforming a system that over the years has caused anguish and trauma for parents and children alike in our nation’s baby jails.