

PAROLING FOR “PUBLIC BENEFIT”: AMENDING 8 U.S.C.  
§ 1182 TO ACHIEVE THE BENEFITS OF DISCRETIONARY  
PAROLE FOR ASYLUM SEEKERS

By: Hannah R. Lustman\*

I. INTRODUCTION

*“As the events of recent months make clear, the question of how this nation will treat those who come to our shores seeking refuge generates enormous debate.”*<sup>1</sup>

The lines above opened James Boarsberg’s opinion in *Damus v. Nielsen*. But to whom does he refer when he references “those who come to our shores seeking refuge?” He writes of asylum seekers,<sup>2</sup> immigrants who flee dangerous persecution in their native countries seeking discretionary protection in the

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\* J.D. Candidate 2020, University of Kansas School of Law; B.A. 2013, Washington University in St. Louis. Ms. Lustman wishes to thank Professors Rick Levy, Lumen Mulligan, and Tom Stacy for their invaluable guidance on this article. She is also grateful to the Board and staff members of the *Journal* who helped shepherd this article and its citations into its final form.

<sup>1</sup> *Damus v. Nielsen (Damus I)*, 313 F. Supp. 3d 317, 322 (D.D.C. 2018). Judge Boarsberg has issued three opinions throughout the course of the *Damus* litigation. In *Damus I*, he held the Department of Homeland Security (DHS) likely had a policy of detaining asylum seekers, which violated its own policy guidance. *Id.* He granted Plaintiffs’ motion for a preliminary injunction, which required DHS to provide individualized parole determinations per the guidance outlined in a 2009 Immigration and Customs Enforcement (ICE) parole directive. *Id.* In a separate opinion, Judge Boarsberg granted Plaintiffs’ request for discovery related to the Government’s compliance with the injunction. *See Damus v. Nielsen (Damus II)*, 328 F.R.D. 1, 2 (D.D.C. 2018). Most recently, Judge Boarsberg ruled on two motions to dismiss filed by DHS, neither affecting the substance of the findings in *Damus I*. *See Damus v. Nielsen (Damus III)*, No. 18-578, 2019 WL 1003440, at \*1 (D.D.C. Feb. 28, 2019).

<sup>2</sup> Throughout this article, I do not use the term “alien” to refer to persons detained by immigration officials. I have left the term in quotations from immigration statutes and the works of other authors, but, in my own writing, I will use the terms “asylum seekers” and “immigrants.” Use of the term “alien” is widely considered to reinforce exclusionary and discriminatory attitudes about immigrants. *See, e.g.,* Kevin R. Johnson, “*Aliens*” and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons, 28 U. MIAMI INTER-AM. L. REV. 263, 267 (1997).

United States.<sup>3</sup> One plaintiff in *Damus* endured beating and death threats for his political affiliations in Haiti; he was twice granted asylum by an immigration judge but remained detained while the government appealed.<sup>4</sup> Another fled Honduras after being harassed, assaulted, and threatened at gunpoint because he is gay.<sup>5</sup> When a criminal cartel came after their home and cattle farm, a husband and wife abandoned Mexico for Texas.<sup>6</sup> One man left El Salvador after a gang attempted to recruit him, extort his money, and threatened to murder him and his family.<sup>7</sup>

The American Civil Liberties Union (ACLU) filed *Damus* on behalf of the men and women above. The plaintiff class is composed of asylum seekers, all detained at Immigration and Customs Enforcement (ICE) facilities in Detroit, El Paso, Los Angeles, Philadelphia, and Newark.<sup>8</sup> Asylum is a form of discretionary relief from removal, which grants “indefinite status and the right to work in the United States.”<sup>9</sup> Asylum seekers are referred for interviews to determine whether they possess a “credible fear” of persecution or torture in their home countries.<sup>10</sup> Upon a finding of credible fear, the Immigration and Nationality Act (INA) requires asylum seekers detained pending “further consideration” of their applications.<sup>11</sup> The detention period can be long, though, because months—even years—may pass between the filing of an application, a hearing before an immigration judge, and any related appeals.<sup>12</sup> Nevertheless, the Government’s detention authority “is not . . . entirely inflexible.”<sup>13</sup> The *Damus* Plaintiffs alleged—and the Court agreed—that the Department of Homeland Security (DHS) was likely detaining asylum seekers in violation of its own guidance and regulations by denying them parole without individualized decisions.<sup>14</sup>

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<sup>3</sup> Eligibility for refugee or asylum status requires the applicant to meet the definition of “refugee” contained in § 101(a)(42) of the Immigration and Nationality Act (INA). The distinction between refugee and asylee is largely geographic. Applicants for refugee status are outside the United States; applicants seeking asylum are already in the United States or arriving at a United States port of entry. In part, the INA defines refugee as “a person who is unable or unwilling to return to his or her country of nationality, or of last habitual residence if stateless, and who is unable or unwilling to avail himself or herself of the protection of that country, because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” Nadwa Mossaad, ANNUAL FLOW REPORT: REFUGEES AND ASYLEES: 2018 1 (2019); see Immigration and Nationality Act § 101(a)(42), 8 U.S.C.A. § 1101(a) (West 2014).

<sup>4</sup> Complaint at 5, *Damus v. Nielsen* (*Damus I*), 313 F. Supp. 3d 317 (D.D.C. 2018) (No. 18-578).

<sup>5</sup> *Id.* at 6.

<sup>6</sup> *Id.* at 7. These plaintiffs, referred to in the *Damus* Complaint as H.A.Y. and A.M.M., were separated from one another. H.A.Y. remained in El Paso while ICE detained her husband in Chaparral, New Mexico.

<sup>7</sup> *Id.*

<sup>8</sup> *Damus I*, 313 F. Supp. 3d at 325.

<sup>9</sup> WEISSBRODT ET AL., IMMIGRATION LAW AND PROCEDURE IN A NUTSHELL 361 (7th ed. 2017).

<sup>10</sup> 8 U.S.C.A. § 1225(b)(1)(A)(ii) (West 2008); see also *Damus v. Nielsen* (*Damus III*), No. 18-578, 2019 WL 1003440, at \*1 (D.D.C. Feb. 28, 2019).

<sup>11</sup> 8 U.S.C.A. § 1225 (b)(1)(B)(ii) (West 2008).

<sup>12</sup> Complaint at 11, *Damus v. Nielsen* (*Damus I*), 313 F. Supp. 3d 317 (D.D.C. 2018) (No. 18-578).

<sup>13</sup> See *Damus I*, 313 F. Supp. 3d at 323.

<sup>14</sup> *Id.*

The Attorney General has discretionary authority to release asylum seekers from detention while they await their hearings.<sup>15</sup> That power emanates from 8 U.S.C. § 1182, which states: “[t]he Attorney General may . . . in his discretion parole into the United States . . . on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission into the United States . . .”<sup>16</sup>

The language in the Homeland Security regulation which implements § 1182 is nearly identical to the statutory language. It allows the Secretary of Homeland Security to parole individuals within certain groups on a case-by-case basis for “urgent humanitarian reasons” or “significant public benefit”—so long as they are not a security or flight risk.<sup>17</sup> A 2009 ICE directive remains the most specific guidance on determining eligibility for parole. The parole directive includes five categories of asylum seekers who should be released: (1) those with serious medical conditions, where detention would not be appropriate; (2) pregnant women; (3) certain juveniles; (4) immigrants who will be witnesses in court, administrative, or legislative proceedings; and (5) immigrants whose continued detention is not in the public interest.<sup>18</sup> It also states:

[e]ach alien’s eligibility for parole should be considered and analyzed on its own merits and based on the facts of the individual alien’s case. However, when an arriving alien found to have a credible fear establishes to the satisfaction of [Detention and Removal Operations (DRO)] his or her identity and that he or she presents neither a flight risk nor danger to the community, DRO should, absent additional factors...parole the alien *on the basis that his or her continued detention is not in the public interest*.<sup>19</sup>

At this time, the executive branch appears reluctant—perhaps unwilling—to follow its own parole-favoring policies. Although the ICE Parole Directive remains official DHS policy, *Damus* suggests the Trump Administration is indefinitely detaining asylum seekers in most cases. In Detroit, El Paso, Los Angeles, Philadelphia, and Newark, the parole rate “plummeted from over 90% to nearly zero” when President Trump’s administration took control of ICE.<sup>20</sup>

<sup>15</sup> In 2018, the Supreme Court clarified that this form of discretionary parole is the only exception to detention under the INA for affirmative asylum seekers. *See* *Jennings v. Rodriguez*, 138 S. Ct. 830, 834 (2018); Complaint at 3–4, *Damus v. Nielsen* (*Damus I*), 313 F. Supp. 3d 317 (D.D.C. 2018) (No. 18-578).

<sup>16</sup> 8 U.S.C.A. § 1182(d)(5)(A) (West 2013).

<sup>17</sup> *See* 8 C.F.R. § 212.5(b) (2019). The groups include those with serious medical conditions, pregnant women, minors in DHS custody, those who will serve as witnesses in judicial or administrative proceedings, and “[a]liens whose continued detention is not in the public interest as determined by th[e] officials” with the power to exercise the parole authority. *Id.*

<sup>18</sup> U.S. IMMIGRATION & CUSTOMS ENF’T, ICE DIRECTIVE NO. 11002.1: PAROLE OF ARRIVING ALIENS FOUND TO HAVE A CREDIBLE FEAR OF PERSECUTION OR TORTURE, (Dec. 8, 2009), para. 4.3, [https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole\\_of\\_arriving\\_alien\\_found\\_credible\\_fear.pdf](https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_alien_found_credible_fear.pdf) [<https://perma.cc/QJ9R-7WV3>].

<sup>19</sup> *Id.* para. 6.2, (emphasis added).

<sup>20</sup> *Damus I*, 313 F. Supp. 3d at 323.

Parole rates have long been inconsistent—changing with time, presidential administration, and from facility to facility.<sup>21</sup> Nevertheless, at least some research suggests “current detention rates are unprecedented.”<sup>22</sup>

An increasing detention rate for asylum seekers raises many questions about immigration law and policy. What is the humanitarian cost of detaining asylum seekers? What is the financial cost of detention? Is detention an effective immigration policy? These questions might all be synthesized using a term we find in the discretionary parole statute: can paroling asylum seekers result in “significant public benefit?”<sup>23</sup>

To answer this question, this article presents an analysis of the humanitarian, financial, and immigration enforcement concerns implicated by prolonged immigration detention and a trend toward blanket parole denials.<sup>24</sup> The analysis reveals, as the ICE Parole Directive suggests, prolonged detention of asylum seekers is not in the public interest. Nevertheless, another lesson that can be drawn from *Damus* is that the controlling statute and its attendant regulations and policy guidance do little to encourage a practice of paroling asylum seekers. The statute, 8 U.S.C. § 1182(d)(5), has gone more than twenty-two years without an amendment.<sup>25</sup> Therefore, this article closes by recommending amendments to 8 U.S.C. § 1182 and its accompanying regulations, so the “public benefits” of parole are better accounted for in their plain language. These amendments will encourage immigration officials to consistently engage in practices that raise the parole rate, so asylum seekers and all relevant stakeholders may come closer to attaining the benefits associated with releasing immigrants from prolonged detention.

## II. LITERATURE REVIEW

To understand the framework for seeking asylum in the United States, a preliminary understanding of expedited removal is necessary. Because asylum is one discretionary form of relief from removal, the analysis of this article relies

<sup>21</sup> See, e.g., Anneliese Hermann, *Asylum in the Trump Era*, CTR. FOR AM. PROGRESS (June 13, 2018, 9:02 AM), <https://www.americanprogress.org/issues/immigration/reports/2018/06/13/452025/asylum-trump-era/> [<https://perma.cc/N9VY-6CDD>]. Between January and September 2015, for example, the parole rate dropped from eighty percent to forty-seven percent. *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> 8 U.S.C.A. § 1182(d)(5)(A) (West 2013).

<sup>24</sup> See Ana Pottratz Acosta, *Sunlight is the Best Disinfectant: The Role of the Media in Shaping Immigration Policy*, 44 MITCHELL HAMLINE L. REV. 803, 855–58 (2018) (“While the number of asylum seekers released on parole decreased following the 2014 Central American Migrant Crisis, many asylum applicants continued to be released on parole during the last two years of the Obama Administration after passing a credible fear interview. . . . On the contrary, the DHS under the Trump Administration appears to have adopted a blanket policy where it will no longer release asylum seekers on parole and instead will detain asylum applicants indefinitely while their asylum case is pending before an immigration judge.”); *Damus I*, 313 F. Supp. 3d at 339 (“[D]uring the eight months from February to September 2017, ICE’s El Paso, Philadelphia, and Newark Field Offices denied 100% of parole applications.”).

<sup>25</sup> “Significant public benefit” replaced the prior statutory standard, “for reasons deemed strictly in the public interest.” See 8 U.S.C.A. § 1182(d)(5)(A) (West 1997).

in part on a wealth of scholarship examining expedited removal itself. Several contributions were particularly fundamental to formulating the background for this article, including the works of Stephen Hong and Kari Manning on access to counsel in expedited removal and Alvaro Peralta's examination of asylum seekers in the context of expedited removal.<sup>26</sup>

Scholars from law, medicine, the humanities, and various other disciplines have examined the cost of immigration detention, and more generally, incarceration. Their work shows that detention puts pressure on human health, implicates questions about constitutional and civil rights, and strains the American taxpayer. That scholarship was absolutely critical to the formulation of the policy proposals in this article. A letter sent by the American Psychological Association (APA) in response to the separation of families in immigration detention was the catalyst for the parts of this paper devoted to the humanitarian costs of immigration detention.<sup>27</sup> That letter and the sources it contained provided the vocabulary necessary to find additional resources on the health plights of refugees, including the von Werthern meta-analysis and Schonkoff testimony, which were essential in further shaping the article's analysis.

Finally, the work of journalists dedicated to reporting on immigration trends and policy developments was essential to understanding the constantly changing state of affairs in the realm of American immigration law and policy. Several contributions in particular were critical to the conclusions drawn in this paper, including the work of Caitlin Dickerson and Miriam Jordan at the *New York Times* and the extensive coverage of immigration law and its context written by journalists at the *Texas Tribune*. Ultimately, this article builds on the fundamental work of all the aforementioned authors by illuminating a "less publicized" reaction by the Trump Administration to the current asylum surge.<sup>28</sup> The hope is that it provides a valuable supplement to the understanding of the difficulties faced by asylum seekers when other policy measures (zero tolerance and the travel ban among them) have absorbed more popular attention.

### III. ASYLUM PROCEDURES IN THE UNITED STATES

In general, the INA identifies six groups of individuals subject to removal from the United States: (1) those who were inadmissible when they entered the United States, or have violated the terms of their admission; (2) those who committed certain criminal offenses; (3) those who failed to properly register, or possess falsified documents; (4) those who engaged in terrorism or threatened U.S. security; (5) those who become a public charge; and (6) those who unlawfully voted.<sup>29</sup> Removal is a non-criminal but nonetheless punitive penalty which subjects members of the aforementioned groups to expulsion from the

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<sup>26</sup> See *infra* note 29 and accompanying text.

<sup>27</sup> See *infra* note 153 and accompanying text.

<sup>28</sup> See Acosta, *supra* note 24, at 854–58.

<sup>29</sup> 8 U.S.C.A. § 1227 (West 2008).

United States.<sup>30</sup> Asylum is a discretionary protection against removal, and one of only three ways an immigrant can halt the “expedited removal” process.<sup>31</sup> In expedited removal, an immigration officer can order a non-citizen removed from the country without a hearing and (in most cases) without the opportunity for judicial review of the decision to institute removal proceedings.<sup>32</sup> Asylum can be claimed affirmatively (when an immigrant presents herself to immigration officers) or defensively (when an immigrant is already in removal proceedings).<sup>33</sup>

After a non-citizen indicates an intention to apply for asylum, the agency which apprehended the immigrant must refer him to U.S. Citizenship and Immigration Services (USCIS) asylum officers for a “credible fear interview.”<sup>34</sup> The applicant is eligible for asylum if the interview reveals he or she “satisfies the refugee definition.”<sup>35</sup> In relevant part, the INA defines “refugee” as:

. . . any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political

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<sup>30</sup> *Ng Fung Ho v. White*, 259 U.S. 276, 284, 286 (1922) (noting that deportation can result in the loss of “all that makes life worth living”); *WEISSBRODT ET AL.*, *supra* note 9, at 288 (“Even though the courts do not consider removal a criminal punishment, they recognize that it is a severe penalty.”).

<sup>31</sup> *See, e.g.*, Alvaro Peralta, *Bordering Persecution: Why Asylum Seekers Should Not Be Subject to Expedited Removal*, 64 AM. U. L. REV. 1303, 1306 (2015). Expedited removal is a controversial and increasingly utilized method for removing non-citizens from the United States. Critics describe the process as one with the “singular goal to depart at high velocity,” achieved by minimizing procedural protections for immigrants, limiting judicial intervention, and expanding executive power. Stephen Manning & Kari Hong, *Getting it Righted: Access to Counsel in Rapid Removal*, 101 MARQ. L. REV. 673, 676 (2018) (discussing the consequences of expedited removal).

<sup>32</sup> *See* Peralta, *supra* note 31; *see also* *WEISSBRODT ET AL.*, *supra* note 9, at 345 (noting the Illegal Immigration Reform and Immigrant Responsibility Act effectively barred judicial review of expedited removal, giving individual immigration officers “tremendous—and unreviewable—discretion to remove non-citizens and prevent them from reentering the United States for five years”).

<sup>33</sup> *See generally* *Obtaining Asylum in the United States*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states> [<https://perma.cc/GF6Q-UUG3>].

<sup>34</sup> 8 U.S.C.A. § 1225(b)(1)(A)(ii) (West 2008). Both the standard of “credible fear” and the procedure for credible fear interviews have come under intense scrutiny. *See generally* HUMAN RIGHTS FIRST, CREDIBLE FEAR: A SCREENING MECHANISM IN EXPEDITED REMOVAL (2018), <https://www.humanrightsfirst.org/resource/credible-fear-screening-mechanism-expedited-removal> [<https://perma.cc/2MQ8-RQ8C>] (overviewing the credible fear interview process); David L. Coats, *Credible Fear: A Manifestly Unfounded Standard?*, 46 DENV. J. INT’L L. & POL’Y 191 (2018) (criticizing the credible fear process); Alana Mosley, *Re-Victimization and the Asylum Process: Jimenez Ferreira v. Lynch: Re-Assessing the Weight Placed on Credible Fear Interviews in Determining Credibility*, 36 LAW & INEQ. 315 (2018) (criticizing the credible fear process).

<sup>35</sup> 8 U.S.C.A. § 1101(a)(42)(A) (West 2014).

opinion . . .”<sup>36</sup>

If an asylum officer determines the immigrant has a credible fear of persecution or torture, the immigrant receives a Notice to Appear (NTA) for “full consideration of the asylum and withholding of removal claims.”<sup>37</sup> At this juncture, an asylum seeker is eligible for parole consideration in accordance with 8 U.S.C. § 1182(d)(5).<sup>38</sup> If the individual receives a negative credible fear determination, he may request that an immigration judge review the asylum officer’s decision.<sup>39</sup> Pending judicial review, the individual is held in detention.<sup>40</sup> If an immigration judge agrees with the negative determination, the immigrant’s case is returned to USCIS for removal proceedings.<sup>41</sup> If the judge finds the immigrant has a credible fear of persecution or torture, the asylum officer’s determination is vacated, and the immigrant may file applications for asylum and withholding of removal.<sup>42</sup>

If an immigration judge ultimately grants a non-citizen asylum, the asylee receives several significant protections: most importantly, protection from removal to the person’s country of origin.<sup>43</sup> The asylee may also seek authorization to work and travel abroad without prior approval.<sup>44</sup>

#### IV. CURRENT ASYLUM TRENDS

In 2014, illegal crossings of the United States-Mexico Border reached historically low levels.<sup>45</sup> Between 2012 and 2015, however, immigration from the Northern Triangle countries (Honduras, Guatemala, and El Salvador) increased five-fold.<sup>46</sup> Today, unaccompanied minors and families from Central America continue to flow through Mexico with the hopes of receiving protected status in the United States in what is oft referred to as a “surge.”<sup>47</sup> The Central American humanitarian crisis is perhaps the most significant reason the United States is currently in desperate need of a functional re-evaluation of its asylum law and policies.<sup>48</sup>

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<sup>36</sup> *Id.*

<sup>37</sup> 8 C.F.R. § 208.30(f) (2019).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* § 208.30(g)(1).

<sup>40</sup> *Id.* § 208.30(g)(1)(i). Detention is also required for an individual who “refuses to either request or decline [judicial] review.” *Id.*

<sup>41</sup> *Id.* § 1208.30(g)(2)(iv)(A).

<sup>42</sup> *Id.* § 1208.30(g)(2)(iv)(B).

<sup>43</sup> 8 U.S.C.A. § 1158(c)(1) (West 2008).

<sup>44</sup> *Id.*

<sup>45</sup> Acosta, *supra* note 24, at 805–06.

<sup>46</sup> See Rocio Cara Labrador & Danielle Renwick, *Central America’s Turbulent Northern Triangle*, COUNCIL FOREIGN REL., <https://www.cfr.org/background/central-americas-violent-northern-triangle> [<https://perma.cc/WX8D-WK2L>] (last updated Oct. 1, 2019).

<sup>47</sup> Acosta, *supra* note 24, at 806; see also *Flores v. Lynch*, 828 F.3d 898, 901 (9th Cir. 2016).

<sup>48</sup> Of course, the Central American humanitarian crisis is a convoluted international problem—even

The Northern Triangle is one of the most dangerous places on earth; that danger is often attributed to a high murder rate, persistent drug trafficking, and the influence of organized crime.<sup>49</sup> In describing asylum seekers' motivations to flee Central America, Pew Hispanic Center founding director, Robert Suro, argued migrating toward family in the United States is often the only way to achieve safety: "These people have been forced from their homes by bloodshed and lost livelihoods. They seek shelter with relatives. Where would you go?"<sup>50</sup> But to attain even a chance at safety in the United States, migrants from the Northern Triangle must gamble their own wellbeing and risk their lives by enduring a journey thousands of miles long through Mexico.<sup>51</sup>

A report by the organization Doctors Without Borders paints an illustrative portrait of conditions along the migration path.<sup>52</sup> Treatment teams in the Northern Triangle observed "a pattern of violence displacement, persecution, sexual violence, and forced repatriation akin to the conditions found in the deadliest armed conflicts in the world today."<sup>53</sup> In Mexico, physicians found migrants from the Northern Triangle are "running for their lives," and experience violence in Mexico which repeats the traumatic experiences of their homelands.<sup>54</sup>

Migration through Mexico often requires "harrowing" train rides and walks through the desert, making the process both physically and emotionally grueling.<sup>55</sup> On "la bestia" ("the beast"—a name for the train on which some Central American migrants ride on their journey north through Mexico), many

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beyond its implications for immigration law in the United States. It is the subject of volumes of scholarly examination. Two works by the author Óscar Martínez, which document life in Central America and the migratory path through Mexico, provide a representative background on the experiences of Central American immigrants to the United States. *See generally* ÓSCAR MARTÍNEZ, A HISTORY OF VIOLENCE: LIVING AND DYING IN CENTRAL AMERICA (2016); ÓSCAR MARTÍNEZ, THE BEAST: RIDING THE RAILS AND DODGING NARCOS ON THE MIGRANT TRAIL (2013) [hereinafter MARTÍNEZ, THE BEAST]. The author also recommends the "Broken Border" series of *The Texas Tribune*, an online newspaper based in Austin, for collected articles on the Central American migrant surge and its impacts on life in the Southwest United States. *See Broken Border*, TEX. TRIB., <https://www.texastribune.org/series/broken-border-texas-mexico-crisis-immigration-migr/> [https://perma.cc/R2UY-PAL7].

<sup>49</sup> Labrador & Renwick, *supra* note 46.

<sup>50</sup> Robert Suro, *We Need to Offer More Than Asylum*, N.Y. TIMES (July 14, 2018), <https://www.nytimes.com/2018/07/14/opinion/sunday/migration-asylum-trump.html> [https://perma.cc/V9T7-JXAT].

<sup>51</sup> A map of migration paths from Central America to the United States appears immediately preceding Chapter 1 in *The Beast: Riding the Rails and dodging Narcos on the Migrant Trail*. MARTÍNEZ, THE BEAST, *supra* note 48.

<sup>52</sup> DOCTORS WITHOUT BORDERS, FORCED TO FLEE CENTRAL AMERICA'S NORTHERN TRIANGLE: A NEGLECTED HUMANITARIAN CRISIS 4 (2017) [hereinafter DOCTORS WITHOUT BORDERS], <https://reliefweb.int/report/mexico/forced-flee-central-america-s-northern-triangle-neglected-humanitarian-crisis> [https://perma.cc/7EAG-BAML].

<sup>53</sup> *Id.* at 4.

<sup>54</sup> *Id.* at 6.

<sup>55</sup> *See, e.g.,* Alfredo Corchado, *Central American Migrants Face Grueling Journey North*, DALL. MORNING NEWS, <http://res.dallasnews.com/interactives/migrantroute/> [https://perma.cc/WV36-5F6A].



migrants are severely injured in falls from the roof of the train cars where they ride.<sup>56</sup> The falls can result in lost limbs and even death.<sup>57</sup> Aside from the dangerous nature of the train itself, passengers face additional threats from criminals who threaten passengers with robbery, rape, and other brutal violence.<sup>58</sup> Although it may go without saying, the danger of the journey alone reflects the asylum seekers’ desperate desires to reach a safer, healthier, more hopeful life. The choice to migrate across Mexico is so treacherous that it suggests many migrants feel they have no other choice at all.<sup>59</sup>

Even in the face of seemingly insurmountable obstacles to reaching the country, Central American migrants continue to shape the current state of immigration to the United States. In a region previously predominated by immigrants from Mexico, non-Mexicans now make up a greater percentage of apprehensions than Mexicans.<sup>60</sup> In 2018, U.S. Customs and Border Patrol (CBP) apprehended 521,090 immigrants at the Southwest Border.<sup>61</sup> By fall 2019, CBP had already apprehended 851,508 individuals.<sup>62</sup> As overall apprehensions rose from 415,517 in 2017, so did apprehensions of family units. Last year, sixty percent of all asylum seekers came to the United States as part of a family unit.<sup>63</sup> The migration of family units represents a drastic change in the demographic makeup of apprehendees over the last decade. In 2018, apprehensions of family units and unaccompanied children represented approximately forty-seven percent of apprehensions overall.<sup>64</sup> In 2012, that combined figure was only twelve percent.<sup>65</sup>

Of the overall apprehensions, the proportion of immigrants who indicate an intention to pursue asylum is significant—and rising. In 2018, 93,000 immigrants claimed credible fear of persecution or torture in their native

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<sup>56</sup> MARTÍNEZ, *THE BEAST*, *supra* note 48, at 49 (“These are the tracks where the wheels of steel slice through legs, arms, and heads.”).

<sup>57</sup> Corchado, *supra* note 55.

<sup>58</sup> *Id.*

<sup>59</sup> See Suro, *supra* note 50.

<sup>60</sup> See, e.g., Kristin Bialik, *Border Apprehensions Increased in 2018—Especially for Migrant Families*, PEW RES. CTR. (Jan. 16, 2019), <http://www.pewresearch.org/facttank/2019/01/16/border-apprehensions-of-migrant-families-have-risen-substantially-so-far-in-2018/> [<https://perma.cc/V6YS-ZZDG>].

<sup>61</sup> See *Claims of Fear*, U.S. CUSTOMS & BORDER PROTECTION, <https://www.cbp.gov/newsroom/stats/sw-border-migration/claims-fear> [<https://perma.cc/5XDE-FGDZ>] (last modified Oct. 23, 2019).

<sup>62</sup> See *Southwest Border Migration FY 2019*, U.S. CUSTOMS & BORDER PROTECTION, <https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2019> [<https://perma.cc/UUC7-6V6A>] (last modified Nov. 14, 2019).

<sup>63</sup> Ron Nixon, *Asylum Claims Jump Despite Trump’s Attempt to Limit Immigration*, N.Y. TIMES (Dec. 10, 2018), <https://www.nytimes.com/2018/12/10/us/politics/trump-asylum-border-.html> [<https://perma.cc/S9VQ-DSLH>].

(“Nearly 60 percent of all foreigners asking for asylum were people in families, according to officials with Customs and Border Protection, an Agency within the Department of Homeland Security.”).

<sup>64</sup> Bialik, *supra* note 60.

<sup>65</sup> *Id.*

countries.<sup>66</sup> From 2017 to 2018, claims of credible fear in the region increased approximately seventy percent.<sup>67</sup> The annual report of the Office of Immigration Statistics (OIS) is one source for determining how many of these claims ultimately result in applications for asylum.<sup>68</sup> From 2017 to 2018, affirmative asylum filings with USCIS fell by twenty-five percent.<sup>69</sup> From Northern Triangle countries specifically, affirmative applications fell nineteen percent in 2018.<sup>70</sup> Unaccompanied children make up the majority of affirmative asylum applications from Northern Triangle countries.<sup>71</sup>

Defensive asylum applications rose for the fourth year in a row to 159,473 total filings.<sup>72</sup> This number has risen every year for five years—and is up by over 100,000 filings since 2014.<sup>73</sup> Sixty-five percent of all defensive asylum applications were filed by citizens of Northern Triangle Countries and Mexico.<sup>74</sup>

## V. POLICY REACTIONS TO ASYLUM SURGES

The Trump Administration's approach to parole lies within a network of policy approaches that often have the effect of discouraging migration to the United States and making asylum more difficult to achieve. Although this paper cannot address each asylum-related policy, a few representative examples embody the Trump Administration's asylum-restricting approach.

Just five days after his inauguration, President Trump issued three executive orders regarding immigration practices.<sup>75</sup> These executive orders signaled the Administration's attitude regarding immigration and formalized several highly-publicized campaign promises made by President Trump. They

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<sup>66</sup> Nixon, *supra* note 63. This number accounts for immigrants who “turned themselves in” at ports of entry and those who expressed their intention to apply for asylum post-apprehension for illegal crossings.

<sup>67</sup> *Id.* In 2017, approximately 56,000 immigrants claimed asylum due to fear of persecution. *Id.*

<sup>68</sup> See *Immigration Data & Statistics*, DEP'T HOMELAND SECURITY, <https://www.dhs.gov/immigration-statistics> [https://perma.cc/8QX6-YLRN] (last modified Dec. 19, 2019) (providing background on the Office of Immigration Statistics (OIS)). OIS prepares a variety of annual reports including flow reports on lawful permanent residents and naturalizations. *Id.* Beginning in 2019, OIS began preparing a “Border Security Metrics Report.” *Id.*

<sup>69</sup> Mossaad, *supra* note 3, at 6. OIS notes that this statistic reflects affirmative applications by principal applicants. *Id.* USCIS received an additional 55,089 applications from their dependents. *Id.*

<sup>70</sup> *Id.* The fall in affirmative asylum applications must be contextualized. Although the number of affirmative applications fell in 2018, it fell from a record high the prior year in which migrants from Northern Triangle countries made 31,000 affirmative asylum filings with USCIS. Furthermore, some scholars hypothesize that asylum applications are falling because of Trump Administration policies arguably designed to discourage migrants from seeking asylum. See *id.* at 11–17 (providing background information about asylum-discouraging policy measures).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 30, 2017) [hereinafter Border Security Executive Order]; Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 30, 2017); Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017).

included the “travel ban,” or “Muslim ban,” which halted immigration by citizens from seven predominantly Muslim countries for ninety days and indefinitely suspended entry for all Syrian refugees, among other measures.<sup>76</sup> They also ordered the construction of a wall along the United States-Mexico Border and allocation of “all legally available funds” to contract for, construct, monitor, and operate migrant detention centers.<sup>77</sup>

In addition, with President Trump in office, the Department of Justice (DOJ) narrowed the experiences that qualify credible fear in a June 11, 2018 memorandum from the Attorney General to USCIS interviewers.<sup>78</sup> The memo articulated that those seeking asylum based on fear of domestic abuse, gang brutality, or other violence should not be considered credibly fearful unless they can prove their home governments condoned the behavior or were powerless to stop it.<sup>79</sup> The directive appears to align directly with the reasons many immigrants are currently fleeing Central America.<sup>80</sup> Other asylum-obstructing practices include “metering,” which imposes a daily limit on the number of people who may claim credible fear at a U.S. Port of Entry each day.<sup>81</sup>

More recently, DHS began enforcing “Migrant Protection Protocols,” identifying INA § 235 as its authority to do so.<sup>82</sup> This policy has come to be known as the “Remain in Mexico” policy because it is a DHS action requiring non-citizens seeking admission to the United States and arriving by way of Mexico to await their immigration court proceedings in Mexico.<sup>83</sup> In a January 2019 statement from Secretary Kirstjen Nielsen, DHS articulated several justifications for the policy, including the increasing number of family units and minors apprehended at the Southern Border.<sup>84</sup> Primarily, DHS stated it needed Migrant Protection Protocols to counteract “[m]isguided court decisions and outdated laws,” which make it “easier” for “huge numbers of illegal migrants” to enter the United States.<sup>85</sup>

Like most other Trump Administrative asylum policies, Remain in Mexico has been fiercely criticized by immigrants’ advocates for several reasons. First, the policy makes facilitating the attorney-client relationship “nearly

<sup>76</sup> *Timeline of the Muslim Ban*, ACLU: WASH., <https://www.aclu-wa.org/pages/timeline-muslim-ban> [<https://perma.cc/4W76-2CC3>].

<sup>77</sup> Border Security Executive Order, *supra* note 75.

<sup>78</sup> *See generally* Matter of A-B-, 27 I&N Dec. 316 (A.G. 2018).

<sup>79</sup> *Id.* at 320.

<sup>80</sup> *See supra* notes 47–53 and accompanying text.

<sup>81</sup> *See The Daily: Is There a Crisis at the Border?*, N.Y. TIMES (Jan. 8, 2019), <https://www.nytimes.com/2019/01/08/podcasts/the-daily/trump-border-wall.html> [<https://perma.cc/6577-P5CW>] (providing access to a recording of the newspaper’s Podcast, “The Daily,” in which host Michael Barbaro interviews immigration reporter, Caitlin Dickerson).

<sup>82</sup> *See Migrant Protection Protocols*, DEP’T HOMELAND SECURITY (Jan. 24, 2019), <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols> [<https://perma.cc/FD7X-AT26>].

<sup>83</sup> *See, e.g.,* Julián Aguilar, *Trump’s Controversial “Remain in Mexico” Immigration Policy Expands along Texas’ Southern Border*, TEX. TRIB. (Oct. 28, 2019, 9:00 PM), <https://www.texastribune.org/2019/10/28/trump-remain-mexico-immigration-policy-expands-texas-mexico-border/> [<https://perma.cc/N7RT-8MZ5>].

<sup>84</sup> *Migrant Protection Protocols*, *supra* note 82.

<sup>85</sup> *Id.*

impossible.”<sup>86</sup> Second, the policy makes many immigrants vulnerable to brutalization and victimization as they await their hearings from Mexico.<sup>87</sup> Third, just beyond the Mexican border, many asylum seekers await their hearings in camps where health conditions are extremely poor; food, clean water, and running water are scarce.<sup>88</sup> Finally, and perhaps most significantly, Remain in Mexico appears to have drastically reduced the success rate of asylum claims by straining asylum seekers and hindering their ability to articulate their fear of persecution to judges.<sup>89</sup> As one immigration attorney told National Public Radio, “[i]t’s very clear at this point that the design of the program is to basically eviscerate asylum law as we know it.”<sup>90</sup> Undoubtedly, the Remain in Mexico policy has impacted the landscape for seeking asylum in the United States. Since it began, more than 55,000 asylum seekers have been sent to await their hearings in Mexico.<sup>91</sup> By November 2019, 24,000 of them received decisions in their cases, but only one percent succeeded in their claims.<sup>92</sup>

Embedded in the “Border Security and Immigration Enforcement Improvements” Executive Order were several parole policies “less publicized” than the aforementioned actions, but “just as harsh.”<sup>93</sup> The President wrote that the Secretary of Homeland Security should “take all appropriate action to ensure that the parole and asylum provisions of Federal immigration law are not illegally exploited to prevent removal of otherwise removable aliens.”<sup>94</sup> Additionally, he commanded that parole authority should be exercised “only on a case-by-case basis *in accordance with the plain language of the statute*.”<sup>95</sup> Parole is appropriate, President Trump wrote, only if the individual applicant could show “urgent humanitarian reasons or a significant public benefit derived from such parole.”<sup>96</sup>

This parole guidance has several significant facets. First, it illustrates how the Trump Administration appears to interpret the plain text of 8 U.S.C. § 1182 as inherently restrictive, and it justifies extremely limited parole rates—at least in part—on that interpretation. Second, it shows that the Trump Administration’s interpretation of the parole statute constitutes a dramatic departure from how the Obama Administration interpreted and implemented the same words. Evidence for the change comes from two primary sources. As discussed above, major

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<sup>86</sup> Aguilar, *supra* note 83.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*; see also Joel Rose, *Few Asylum-Seekers Winning Cases Under ‘Remain in Mexico’ Program*, NAT’L PUB. RADIO (Dec. 19, 2019, 3:46 PM), <https://www.npr.org/2019/12/19/789780155/few-asylum-seekers-winning-cases-under-remain-in-mexico-program> [<https://perma.cc/2PQDGCVN>].

<sup>89</sup> Rose, *supra* note 88.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> Border Security Executive Order, *supra* note 75, § 11; see also Acosta, *supra* note 24, at 853–57 (discussing blanket denials of parole for asylum seekers as one of the “less publicized” but “just as harsh” policies outlined by the Border Security Executive Order).

<sup>94</sup> Border Security Executive Order, *supra* note 75, § 11(a).

<sup>95</sup> *Id.* § 11(d) (citing 8 U.S.C. § 1182(d)(5)) (emphasis added).

<sup>96</sup> *Id.* § 11(d).

litigation such as *Damus* indicates DHS has a parole rate near zero, whereas under the Obama administration parole rates were much higher.<sup>97</sup> Also, the anecdotal accounts of asylum seekers and their attorneys shared with advocacy groups and in popular media suggest a similar trend.<sup>98</sup> The parole guidance triggered two significant consequences. First, parole denials cause some asylum seekers to abandon their claims altogether. In a 2017 report, Human Rights First observed that some asylum seekers prefer withdrawing their asylum applications to facing indefinite detention in ICE facilities.<sup>99</sup>

Second, parole denials necessarily mean asylum seekers spend more time in immigration detention now than they did in previous years. This article devotes the bulk of its analysis to explaining why prolonged immigration detention is against public interest. That foundation ultimately shows why statutory changes must occur. If the Trump Administration claims to rely on the plain text of the parole statute while preventing the parole of nearly all asylum seekers, it purports to act in the public interest while the consequences of its actions result in the exact opposite.

## VI. PAROLE IS IN THE PUBLIC BENEFIT

The analysis that follows articulates why paroling asylum seekers, in most cases, results in “significant public benefit.” This paper addresses the humanitarian considerations,<sup>100</sup> financial considerations,<sup>101</sup> and efficacy considerations<sup>102</sup> implicated by the parole rate of asylum seekers.

### A. Humanitarian Considerations

Paroling asylum seekers is one approach to addressing the grave humanitarian consequences of detaining immigrants. In summer 2018, increasing controversy over family separation thrust the humanitarian impact of immigration detention to the forefront of the American news cycle. For its July 2 cover that year, *Time* magazine featured a photo of a fearful, crying Honduran

<sup>97</sup> *Damus v. Nielsen* (*Damus I*), 313 F. Supp. 3d 317, 339 (D.D.C. 2018) (“While DHS may believe that such figures overcount the actual parole-denial rate, their speculation is not sufficient to rebut Plaintiffs’ assertion that the current release rate at the five ICE Field Offices is approaching zero.”). The United States District Court for the Western District of New York also considered ICE compliance with the 2009 Parole Directive in the case *Abdi v. Duke*, 280 F. Supp. 3d 373 (W.D.N.Y. 2017). In that case, Judge Elizabeth Wolford granted a preliminary injunction which requires that asylum seekers in W.D.N.Y. receive individualized parole interviews with an immigration officer, an explanation for the officer’s decision, and notice that the asylum seeker can seek reconsideration of a parole denial. *Id.*; see also Acosta, *supra* note 24, at 857–58 (discussing *Abdi v. Duke*).

<sup>98</sup> Acosta, *supra* note 24, at 856 (“Although the DHS Border Security Memo indicated that the 2009 Obama Administration policy directive remained in effect . . . reports from detained asylum seekers and attorneys indicate this is not the case.”).

<sup>99</sup> HUMAN RIGHTS FIRST, JUDGE AND JAILER: ASYLUM SEEKERS DENIED PAROLE IN WAKE OF TRUMP EXECUTIVE ORDER 4 (2017), <https://www.humanrightsfirst.org/sites/default/files/hrf-judge-and-jailer-final-report.pdf> [<https://perma.cc/K8SR-L6D7>].

<sup>100</sup> See *infra* Section VII(A).

<sup>101</sup> See *infra* Section VII(B).

<sup>102</sup> See *infra* Section VII(C).

toddler.<sup>103</sup> Editors superimposed her image next to a picture of President Trump, who appeared to peer down at her dispassionately.<sup>104</sup> The cover featured a single headline: “Welcome to America.”<sup>105</sup> The following winter, journalists encountered detained children with the flu, forced to sleep on concrete by their guards.<sup>106</sup> Agents did little to address their symptoms beyond giving them Mylar blankets and Pedialyte bottles.<sup>107</sup> These conditions are obvious affronts to physical and mental wellbeing, but at their worst, conditions in immigration detention centers are lethal. A June 2019 examination by NBC news found twenty-four people have died in ICE custody during the Trump Administration; immigrants have died in the custody of CBP as well.<sup>108</sup>

These widely publicized incidents fueled the flames of political debate over how to treat immigrants arriving at the border. But among scientists, there is little debate about the consequences of placing asylum-seeking adults and children in immigration detention.<sup>109</sup> There is near universal consensus among social scientists, medical professionals, and other experts that immigration detention is traumatizing.<sup>110</sup> Experts note that detention practices which separate children from their parents are particularly harmful.<sup>111</sup> Research warns us that as long as asylum seekers are denied parole they risk contracting severe, trauma-related disorders and struggling to adjust upon release.<sup>112</sup> When considering whether paroling asylum seekers provides a public benefit, one must account for parole’s ability to prevent some of this suffering.

#### **i. Immigration Detention Causes Severe Mental Health Consequences**

To properly assess the impact of immigration detention on asylum seekers’ mental health, one must first be aware of their pre-detention risk factors. Due to higher exposure to trauma pre- and peri-migration (during migration), refugees are more vulnerable to mental illness than the general population.<sup>113</sup> Research

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<sup>103</sup> The photo illustration described here is available with an online version of the cover story. See Karl Vick, *A Reckoning After Trump’s Border Separation Policy: What Kind of Country Are We?*, TIME (June 21, 2018), <https://time.com/5318229/donald-trump-border-separation-policy/> [<https://perma.cc/8J5X-QCAH>].

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> See *The Daily: Is There a Crisis at the Border?*, *supra* note 81.

<sup>107</sup> *Id.*

<sup>108</sup> See Hannah Rappleye & Lisa Riordan Seville, *24 Immigrants Have Died in ICE Custody During the Trump Administration*, NBC NEWS (June 9, 2019, 6:00 AM), <https://www.nbcnews.com/politics/immigration/24-immigrants-have-died-ice-custody-during-trump-administrationn1015291> [<https://perma.cc/L7LJ-Q4Z6>]; see Robert Moore et al., *Inside the Cell Where a Sick 16-Year-Old Boy Died in Border Patrol Care*, PROPUBLICA (Dec. 5, 2019, 1:30 PM), <https://www.propublica.org/article/inside-the-cell-where-a-sick-16-year-old-boy-died-in-border-patrol-care> [<https://perma.cc/U2WB-WDWA>].

<sup>109</sup> See *infra* Sections VI(A)(1) & (A)(3).

<sup>110</sup> See *infra* Sections VI(A)(1) & (A)(3).

<sup>111</sup> See *infra* Section VI(A)(3).

<sup>112</sup> See *infra* Sections VI(A)(1) & (A)(3).

<sup>113</sup> See generally M. von Werthern et al., *The Impact of Immigration Detention on Mental Health: A Systematic Review*, 18 BMC PSYCHIATRY 382 (2018).

shows that the prevalence of Post-Traumatic Stress Disorder (PTSD)<sup>114</sup> and depression<sup>115</sup> is higher in refugees than their host countries' native populations.<sup>116</sup> A study of 7,000 refugees worldwide indicated those resettling in Western countries could be as much as ten times more likely to have PTSD than non-refugees their same age.<sup>117</sup> Refugees are also more prone to non-affective psychoses and commonly exhibit suicidal and self-harm behaviors.<sup>118</sup>

Detaining asylum seekers exacerbates these pre-existing mental health difficulties.<sup>119</sup> Detention's deteriorating effect on mental health has been observed worldwide.<sup>120</sup> One particularly illustrative, multi-national study is the recent meta-analysis by von Werthern et al.<sup>121</sup> The authors compiled statistics from twenty-six studies, covering 2,099 participants.<sup>122</sup> They found "even brief detention" can negatively impact mental health.<sup>123</sup> Most studies that address detention duration suggest prolonged detention exacerbates psychological symptoms even further.<sup>124</sup> A comparative analysis of American immigration detention and detention systems abroad is beyond the scope of this article. However, results from studies specific to the United States appear consistent with those focused on other countries and studies with an international scope. For instance, a study of asylum seekers in New York, New Jersey, and Pennsylvania found seventy-seven percent of participants had symptoms of anxiety, sixty percent of depression, and fifty percent of PTSD—all symptoms

<sup>114</sup> The Diagnostic and Statistical Manual of Mental Disorders identifies the following as symptoms of PTSD: nightmares, flashbacks, emotional distress after being reminded of trauma, physical reactivity after being reminded of trauma, avoidance of trauma-related stimuli, negative thoughts and feelings, and irritability. See AM. PSYCHOL. ASS'N., DIAGNOSTICS AND STATISTICAL MANUAL OF MENTAL HEALTH DISORDERS 271 (5th ed. 2013).

<sup>115</sup> See *id.* (identifying the following as symptoms of PTSD: depressed mood, diminished interest or pleasure in activity, weight loss, slowed thoughts, fatigue, feelings of worthlessness, reduced concentration, and thoughts of death).

<sup>116</sup> STEFAN PRIEBE ET AL., HEALTH EVIDENCE NETWORK SYNTHESIS REPORT 47 8 (2016), [http://www.euro.who.int/\\_data/assets/pdf\\_file/0003/317622/HEN-synthesis-report-47.pdf?ua=1](http://www.euro.who.int/_data/assets/pdf_file/0003/317622/HEN-synthesis-report-47.pdf?ua=1) [<https://perma.cc/5BNG-49E8>]. The prevalence of PTSD in refugees is nine percent, while estimates for host country populations fall between one percent and three percent. *Id.*

<sup>117</sup> See Mina Fazel et al., *Prevalence of Serious Mental Disorder in 7000 Refugees Resettled in Western Countries: A Systematic Review*, 365 LANCET 1309, 1309 (2005).

<sup>118</sup> See von Werthern et al., *supra* note 113, at 382–83.

<sup>119</sup> *Id.* at 384 ("The experience of detention may act as a new stressor, which adds to the cumulative effect of exposure to trauma, leading to an increased likelihood of developing mental health difficulties. . . .").

<sup>120</sup> *Id.* Table 1 of the von Werthern et al. study indicates its meta-analysis includes studies regarding refugees from dozens of countries of origin and various regions of the world including the Middle East (Afghanistan, Iran, and Iraq), Eastern Mediterranean, Southeast Asia, and Pacific Africa. *Id.* at 385.

<sup>121</sup> *Id.* at 385.

<sup>122</sup> *Id.* at 389.

<sup>123</sup> *Id.* at 393.

<sup>124</sup> Von Werthern et al., *supra* note 113, at 393. Not all the studies found that duration positively correlated with symptom severity. However, the authors of the study suggest that methodology may explain the variable results. *Id.* They also noted that the two studies which did not find a significant correlation shared some similarly-patterned results to those that did: ". . . one of the two 'negative' studies indicated a significant increase of suicidal ideation with detention duration." *Id.*

“significantly correlated with length of detention.”<sup>125</sup> Notably, in its follow-up interview phase, the study found participants released since their baseline interviews had “marked reductions in all psychological symptoms” while those still in detention “were more distressed than at baseline.”<sup>126</sup>

Von Werthern et al. hypothesize that detention exacerbates refugee mental health struggles, in part, because refugees’ experiences while detained mimic experiences of oppression in their countries of origin, stating:

[t]ime spent in immigration detention in the host country is a particular post-migration stressor that entails loss of liberty and the threat of forced return to the country of origin. For many asylum seekers with a history of major trauma, it is reminiscent of contexts in their country of origin where they had been deprived of their liberty and human rights.<sup>127</sup>

Unfortunately, further studies illustrate that immigration detention not only reminds refugees of past difficulties but forms new traumatic memories associated with detention that continue to distress them. Though symptoms generally begin to alleviate upon release,<sup>128</sup> Steel et al. found that past immigration detention contributed to a risk of ongoing PTSD, depression, and mental health-related disability.<sup>129</sup> After conducting three-year follow-up interviews, researchers found former detainees continued to experience stress symptoms associated specifically with negative detention experiences (e.g., feeling extremely sad and hopeless when thinking about detention, having nightmares about experiences in detention, and becoming “nervy, sweaty, shaky and/or having rapid heartbeat when thinking about detention.”).<sup>130</sup> Even years post-detention, immigrants held for longer than six months experienced more severe distress than participants detained less than six months.<sup>131</sup>

<sup>125</sup> Allen S. Keller et al., *Mental Health of Detained Asylum Seekers*, 362 LANCET 1721, 1721 (2003).

<sup>126</sup> *Id.*

<sup>127</sup> See von Werthern et al., *supra* note 113, at 384.

<sup>128</sup> See *id.* at 393 (“Despite this, an improvement in quality of life following release was found when asking former detainees to give retrospective ratings of their quality of life during detention and current ratings following release from detention. After release, participants exhibited more satisfaction, improved mood and a decline in suicidal ideation.”).

<sup>129</sup> See Zachary Steel et al., *Impact of Immigration Detention and Temporary Protection on the Mental Health of Refugees*, 188 BRITISH J. PSYCHIATRY 58 (2006). The authors used a multi-level model, which accounted for age, gender, family clustering, pre-migration trauma and detention duration. *Id.*

<sup>130</sup> *Id.* at 59, 62.

<sup>131</sup> *Id.* Notably, refugees held longer than six months fared worse in all nine categories the researchers measured: feeling extremely sad and hopeless when thinking about detention, sudden and upsetting memories of time in detention, images of threatening or humiliating events experienced in detention, avoiding talking about detention because it causes distress, sudden attacks of anger over small things since being in detention, becoming nervy, sweaty, shaky and/or having rapid heartbeat when thinking about detention, having nightmares about things that happened in detention, avoiding interaction with other people after being in detention, feeling numb since being in detention.



Empirical data on psychological distress caused by detention suggests increased discretionary parole for asylum seekers will provide public benefit by shortening detention times. Stated simply, the longer a refugee spends in detention, the worse his or her mental health prognosis becomes. Truncating the amount of time immigrants spend in detention would be particularly beneficial for two reasons. First, paroled refugees might be spared the worsening effect time in detention has on the symptoms they are predisposed to during persecution and migration. Second, paroled refugees would be less likely to endure experiences during detention that become independent risk factors for trauma-related disorders, depression, and anxiety.

With current parole rates falling, the United States disadvantages even those immigrants who will ultimately be granted asylum.<sup>132</sup> By the time of release, asylees in the current parole climate begin their protected time in the United States when it is already too late to prevent the risk they will suffer psychologically. Given the weight of evidence suggesting the benefits of release and shorter detention times, parole is one effective post-migration procedure that would benefit the public by fostering a healthier population of refugees living in the United States.

## ii. Prolonged Detention May Result in Family Separations

Last year, over half the immigrants expressing credible fear at the Southwest Border entered the United States as family units.<sup>133</sup> The spike in family migration sets the current Administration’s parole policy on course for perpetual conflict with the *Flores* settlement, an agreement which resulted from a case in the U.S. District Court for the Central District of California.<sup>134</sup> Originally intended to only bind the federal government until relevant agencies promulgated final rules to implement the settlement, *Flores* has been the controlling standard for immigration detention of minors since 1997.<sup>135</sup>

*Flores* establishes an overarching policy for minor detention which creates a presumption favoring the release of minors<sup>136</sup> and requires the agencies to place minors in non-secure, state-licensed facilities within a maximum of five

<sup>132</sup> *Damus v. Nielsen (Damus I)*, 313 F. Supp. 3d 317, 324 (D.D.C. 2018) (noting the parole rate at five ICE Detention Centers “plummeted from over 90% to nearly zero” after President Trump took office).

<sup>133</sup> See *supra* note 62 and accompanying text.

<sup>134</sup> Stipulated Settlement Agreement, *Flores v. Reno*, No. 85-4544-RJK (C.D. Cal. Jan. 17, 1997) [hereinafter *Flores* Agreement]; see also SARAH HERMAN PECK & BEN HARRINGTON, CONG. RES. SERV., R45297, THE “FLORES SETTLEMENT” AND ALIEN FAMILIES APPREHENDED AT THE U.S. BORDER: FREQUENTLY ASKED QUESTIONS (2018), <https://fas.org/sgp/crs/homsec/R45297.pdf> [<https://perma.cc/AC4B-TM3V>].

<sup>135</sup> PECK & HARRINGTON, *supra* note 134, at 7.

<sup>136</sup> The presumption in favor of releasing minors is bolstered by the fact that the *Flores* settlement contains a list of adults children may be released to, which is not limited to their parents. The list, in order of highest preference to lowest, includes: parents, legal guardians, adult relatives (brothers, sisters, aunts, uncles, or grandparents), adult individuals or entities designated by a parent or legal guardian, a licensed program willing to accept custody, and adult individuals or entities seeking custody. See *Flores v. Lynch*, 828 F.3d 898, 903 (9th Cir. 2016).

days if they remain detained.<sup>137</sup> Those facilities must be “safe and sanitary and . . . consistent with . . . concern for the particular vulnerability of minors.”<sup>138</sup> But at a time when minors increasingly arrive in the United States accompanied by adults, “there . . . do not appear to be any qualifying facilities that can house alien minors *and* their parents.”<sup>139</sup> The Court supervising the *Flores* settlement has indicated minors can be held temporarily in unqualified facilities but only for a limited period of approximately twenty days.<sup>140</sup>

The Trump Administration’s attempts to relax its obligations under *Flores* have failed.<sup>141</sup> Its approach was two-fold. First, it moved in court to modify the *Flores* Settlement, so the government could detain families together, in unlicensed facilities, for longer periods.<sup>142</sup> While litigating that motion, the DOJ proposed, among other arguments, that a separate decision requiring the government to reunite separated families supports modifying *Flores* so those families can be reunited in detention.<sup>143</sup> The Trump Administration also attempted to promulgate regulations which would displace *Flores* and allow indefinite detention of family units.<sup>144</sup> The Settlement requires, though, that final regulations be consistent in its terms as interpreted by the district court.<sup>145</sup> If *Flores* is not legally bulletproof to change by regulation, it is close. Courts have a consistent tendency to leave *Flores* as-is. In the Trump Administration, that trend has extended to reject any interpretation of the Settlement which would indicate it allows the government to detain parents and minors indefinitely, so

<sup>137</sup> PECK & HARRINGTON, *supra* note 134, at 8, n.64. ICE operates three family detention centers; none of which holds a state license.

<sup>138</sup> *Lynch*, 828 F.3d at 902–03; *see also Flores Agreement*, *supra* note 134. At a minimum, licensed facilities must provide: (1) proper physical care and maintenance (including suitable shelter, food, clothing, and personal grooming items), (2) routine medical and dental care, (3) individualized needs assessments, (4) educational services, (5) recreation and leisure activities, (6) at least one individual counseling session per week, (7) group counseling sessions twice per week, (8) acculturation and adaptation services, (9) comprehensive orientation services upon the minor’s arrival, (10) access to religious services of the minor’s choice, whenever possible, (11) visitation and contact with family members, regardless of their immigration status, (12) a reasonable right to privacy (which includes the right to wear the minor’s own clothes, talk privately on the phone per facility rules, and receive and send uncensored mail, etc.), (13) family reunification services, and (14) legal services. *Id.*

<sup>139</sup> PECK & HARRINGTON, *supra* note 134, at 8 (emphasis in original).

<sup>140</sup> *Id.* at 9; *see also Lynch*, 828 F.3d at 902–03 (“Within five days of arrest, the INS must transfer the minor to a non-secure, licensed facility; but ‘in the event of an emergency or influx of minors into the United States,’ the INS need only make the transfer ‘as expeditiously as possible.’”).

<sup>141</sup> *See generally Flores v. Sessions*, 394 F. Supp. 3d 1041 (C.D. Cal. 2017). The Trump Administration also attempted to promulgate regulations which would displace *Flores* and allow indefinite detention of family units.

<sup>142</sup> *Id.*

<sup>143</sup> PECK & HARRINGTON, *supra* note 134, at 9–10 (discussing the government’s failed attempt to argue the preliminary injunction granted in *Ms. L. vs. U.S. Immigration & Customs Enft*, 310 F. Supp. 3d 1133, absolves *Flores* requirements insofar as they applied to accompanied minors).

<sup>144</sup> *See, e.g.,* Miriam Jordan, *Judge Blocks Trump Administration Plan to Detain Migrant Children*, N.Y. TIMES (Sept. 27, 2019), <https://www.nytimes.com/2019/09/27/us/migrant-children-flores-court.html> [<https://perma.cc/2C6J-AJZB>].

<sup>145</sup> PECK & HARRINGTON, *supra* note 134, at 13.

long as they are together.<sup>146</sup>

As a result, the Administration has two options once it apprehends a family unit: (1) release family units, or (2) separate them—detaining the parents while releasing their children after about twenty days.<sup>147</sup> Carlos Holguin, the attorney who spearheaded the original *Flores* litigation, describes the resulting predicament: “[i]f [families] want their children to have the rights that the *Flores* settlement gives them and the government is unwilling to release the parent, it’s either a choice between *Flores* rights and separation, family separation.”<sup>148</sup> This is because the Trump Administration’s parole policies appear to clearly express an unwillingness to release adults in removal proceedings as they await determinations regarding relief from removal. The reluctance to parole adult asylum seekers essentially eliminates the first option, leaving vulnerable minors to face prospect of the second, absent a swift and jarring change of course by the current Administration. The fortitude of *Flores* interpretations have little effect in this regard, though, because despite regarding the Settlement as creating a presumption in favor of release and family reunification,<sup>149</sup> the Ninth Circuit has stopped short of saying that *Flores* entitles detained parents a right to be released with their children.<sup>150</sup>

Any change of course would be jarring precisely because the Administration has already engaged in practices which cause family separations. One of the most publicized DOJ actions regarding immigration in recent years has been the “zero-tolerance” policy, which required the criminal prosecution of anyone apprehended attempting to enter the country illegally.<sup>151</sup> Once DOJ refers a parent for criminal prosecution, the government deems their children unaccompanied minors by operation of law and then transfers them to the custody of the Department of Health and Human Services.<sup>152</sup> According to information obtained by the American Immigration Council (AIC) pursuant to a Freedom of Information Act (FOIA) request, 2,726 children were separated from

<sup>146</sup> See Jordan, *supra* note 144; see also Miriam Jordan & Manny Fernandez, *Judge Rejects Long Detentions of Migrant Families, Dealing Trump Another Setback*, N.Y. TIMES (July 9, 2018), <https://www.nytimes.com/2018/07/09/us/migrants-family-separation-reunification.html> [<https://perma.cc/M7ZC-VVUX>].

<sup>147</sup> Jordan, *supra* note 144.

<sup>148</sup> *The History of the Flores Settlement and its Effects on Immigration*, NAT’L PUB. RADIO (June 22, 2018, 4:24 PM), <https://www.npr.org/2018/06/22/622678753/the-history-of-the-flores-settlement-and-its-effects-on-immigration> [<https://perma.cc/N6AD-DYTC>].

<sup>149</sup> See *Flores v. Lynch*, 828 F.3d 898, 901 (9th Cir. 2016) (“The Settlement creates a presumption in favor of releasing minors and requires placement of those not released in licensed, non-secure facilities that meet certain standards.”).

<sup>150</sup> See, e.g., Dara Lind & Dylan Scott, *Flores Agreement: Trump’s Executive Order to End Family Separation Might Run Afoul of a 1997 Court Ruling*, VOX (June 21, 2018, 10:42 AM), <https://www.vox.com/2018/6/20/17484546/executive-order-family-separation-flores-settlement-agreement-immigration> [<https://perma.cc/ALS5-D4PJ>].

<sup>151</sup> Press Release, U.S. Dep’t of Justice, Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018), <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry> [<https://perma.cc/M8MJ-82PH>].

<sup>152</sup> PECK & HARRINGTON, *supra* note 134, at 11.

their parents in the six weeks the zero tolerance policy was active.<sup>153</sup> Opposition to this practice was intense, and legal challenges to the policy were expeditious. By June 2018, the Central District of California granted injunctive relief to a class of plaintiff children separated from their parents; the order required they be reunited with their parents and allowed to regularly communicate with their parents, among other measures.<sup>154</sup> The Trump Administration suspended the zero tolerance policy in the wake of intense criticism;<sup>155</sup> even still, approximately five children per day are separated from their parents under “vague” justifications.<sup>156</sup>

How the Trump Administration will navigate the interaction between its parole policies and the *Flores* settlement remains uncertain. Nevertheless, the conflict between the two approaches to immigration policy is significant given the severe consequences which may come to children separated from their parents. The public benefit associated with paroling asylum seekers must be informed by the ability of parole to keep families together.

### iii. Family Separations Foreshadow Severe Declines in the Health and Wellbeing of Child Refugees

The *Flores* settlement has stood the test of time, in part, out of the federal courts’ continued recognition of “the particular vulnerability of minors.”<sup>157</sup> While legal advocates stepped in to litigate for separated minors, scientists spoke out with a broad and alarming consensus that immigrant children subject to the zero tolerance policy were under threat.<sup>158</sup> The APA’s President and CEO made their profession’s stance on family separation clear in a June 2018 open letter to President Trump.<sup>159</sup> They stated: “a change in immigration policy regarding the detention of immigrant families at the border is desperately needed . . . . As psychologists, we have documented multiple harmful effects of parent-child separation on children’s emotional and psychological development and well-being and urge the current policy of family separation be reversed.”<sup>160</sup>

<sup>153</sup> AM. IMMIGR. COUNCIL, FAMILY SEPARATION FOIA RESPONSE FROM HHS KEY DOCUMENTS: INSTANCES OF FAMILY SEPARATION 1 (2019), [https://www.americanimmigrationcouncil.org/sites/default/files/foia\\_documents/family\\_separation\\_foia\\_request\\_hhs\\_production\\_instances\\_of\\_family\\_separation.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/foia_documents/family_separation_foia_request_hhs_production_instances_of_family_separation.pdf) [<https://perma.cc/8HPE-BFSJ>]. Among the materials publicly shared by AIC are a 63-page spreadsheet which details every child separated from his or her parent(s) pursuant to the zero-tolerance policy. *Id.*

<sup>154</sup> See *Ms. L. vs. U.S. Immigration & Customs Enf’t*, 310 F. Supp. 3d 1133, 1149–1151 (C.D. Cal. 2018).

<sup>155</sup> Exec. Order No. 13, 841, 83 Fed. Reg. 29435 (June 20, 2018).

<sup>156</sup> See Katie Shepherd, *Up to 5 Migrant Children Are Still Separated from Their Family Every Day, New Government Data Shows*, IMMIGR. IMPACT (June 26, 2019), <https://immigrationimpact.com/2019/06/26/migrant-children-still-separated/#.XhfLOxdKgWp> [<https://perma.cc/PRQ5-XWTA>].

<sup>157</sup> *Flores v. Lynch*, 828 F.3d 898, 902–03 (9th Cir. 2016).

<sup>158</sup> See Letter from Jessica Henderson Daniel, President, Am. Psychological Ass’n, and Arthur C. Evans, Jr., Chief Exec. Officer, Am. Psychological Ass’n, to Donald Trump, President of the United States (June 14, 2018) (on file with the American Psychological Association) [hereinafter APA Letter].

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

A wealth of evidence reveals that children suffer physically, psychologically, and socially as a result of family separation. In other words, their “particular vulnerability” is especially acute when they are forcibly separated from their caregivers. Scientific analysis contextualized by the experiences of refugee children under the Trump Administration has only begun to emerge.<sup>161</sup> Nevertheless, scientists have extensively studied the effects of forced parental separation in many contexts, including in deportation proceedings and immigration detention in earlier presidential administrations.<sup>162</sup> In his February 2019 testimony before Congress, Dr. Jack Shonkoff, a Pediatrician and Director of the Center on the Developing Child at Harvard University, summed up the main takeaways from decades of research on parent-child separation:

Without exaggeration, thousands of studies converge on the following two core scientific concepts: Number one, a strong foundation for healthy development in young children requires a stable, responsive and supportive relationship with at least one parent or primary caregiver. And the second concept is that high, and persistent levels of stress activation, which is known as ‘toxic stress,’ can disrupt the architecture of the developing brain and other biological symptoms with serious negative impacts on learning, behavior, and lifelong health.<sup>163</sup>

Shonkoff’s first contention is supported by the consensus among scientists that “a child’s sense of security is rooted in relationships with familiar caregivers.”<sup>164</sup> In psychologically-oriented studies, results show that forced parental separation “disrupts this essential secure base” and leaves children vulnerable to internalizing symptoms (i.e., depression and anxiety), externalizing behaviors (i.e., aggression), social struggles, and cognitive difficulties.<sup>165</sup> Mental health experts classify forced parental separations and

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<sup>161</sup> See, e.g., Alexandra Miller et al., *Understanding the Mental Health Consequences of Family Separation for Refugees: Implications for Policy and Practice*, 88 AM. J. ORTHOPSYCHIATRY 26 (2018).

<sup>162</sup> See generally Lisseth Rojas-Flores et al., *Trauma and Psychological Distress in Latino Citizen Children Following Parental Detention and Deportation*, 9 PSYCHOL. TRAUMA: THEORY, RES., PRAC., & POL’Y 352 (2017); Kalina M. Brabeck et al., *The Psychosocial Impact of Detention and Deportation on U.S. Migrant Children and Families*, 84 AM. J. ORTHOPSYCHIATRY 495 (2014); Luis H. Zayas et al., *The Distress of Citizen-Children with Detained and Deported Parents*, 24 J. CHILD & FAM. STUD. 3213 (2015).

<sup>163</sup> See *Migrant Family Separation Policy, Hearing on Examining the Failures of the Trump Administration’s Inhumane Family Separation Policy Before the H. Comm. on Energy & Commerce Subcomm. on Oversight & Investigations*, 116th Cong. (Feb. 7, 2019) [hereinafter Shonkoff Testimony] (statement of Dr. Jack P. Shonkoff, Pediatrician and Director of the Center on the Developing Child at Harvard University), <https://developingchild.harvard.edu/about/press/migrant-family-separation-congressional-testimony-dr-jack-p-shonkoff/> [<https://perma.cc/968C-HVX8>].

<sup>164</sup> See Brabeck et al., *supra* note 162, at 500.

<sup>165</sup> *Id.*; see also APA Letter, *supra* note 158.

parental loss as Potentially Traumatic Events (PTEs).<sup>166</sup>

PTEs “are important social determinants of mental disorders,” and children that endure them are at risk for developing lasting mental illness.<sup>167</sup> In 2017, Rojas-Flores et al. found that children with detained or deported parents experience more PTEs and have more prevalent PTSD symptoms than children whose parents are lawful permanent residents or undocumented immigrants without previous contact with immigration authorities.<sup>168</sup> The effect of parental separation can continue to plague children into adolescence.<sup>169</sup> Fergusson et al. found “small but detectable increases in risks of adolescent conduct disorder, mood disorder, and substance abuse disorders,” among adolescents separated from their parents earlier in childhood.<sup>170</sup>

As discussed above, medically-oriented research reveals that separation from a parent results in ongoing elevation of the body’s stress response.<sup>171</sup> The stress response, sometimes referred to as “fight or flight,” increases heart rate and blood pressure, elevates stress hormone levels, raises blood sugar levels, and activates the body’s inflammatory responses.<sup>172</sup> The ongoing sense of danger caused by parent-child separation can prevent the body from returning to stasis and cause toxic stress.<sup>173</sup> The hormonal elevation associated with toxic stress can disrupt the brain such that memory, focus, and the ability to regulate behavior are negatively affected.<sup>174</sup> Toxic stress in childhood is also associated with other medical conditions, including heart disease, diabetes, and depression, which may continue into adulthood.<sup>175</sup>

The relationship between indefinite detention and family separations is a primary justification for the conclusion that parole is in the public benefit. The *Flores* Settlement leaves every presidential administration with a limited set of options for the detention of minors. The Trump Administration’s refusal to parole nearly all asylum seekers appears to have forcibly narrowed its options even further; there seems to be no way to indefinitely detain adults and comply with *Flores* without separating children from their indefinitely-detained caregivers. For every such child, there is a well-documented chance he or she will suffer because of separation. Parole is in the public benefit because it is a prophylactic measure against the avoidable consequences of family separation. Parole allows children to maintain their “essential secure base,” founded in their relationships with their primary caregivers. When examined from the perspective of children migrating with their parents, parole is in the public benefit because it has the ability to help them avoid chronic physical maladies

<sup>166</sup> See, e.g., Rojas-Flores et al., *supra* note 162.

<sup>167</sup> *Id.* at 352; see also APA Letter, *supra* note 158.

<sup>168</sup> Rojas-Flores et al., *supra* note 162, at 352.

<sup>169</sup> See, e.g., Fergusson et al., *Parental Separation, Adolescent Psychopathology, and Problem Behaviors*, 33 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1122 (1994).

<sup>170</sup> *Id.* at 1131–33.

<sup>171</sup> See, e.g., Shonkoff Testimony, *supra* note 163.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

and severe psychiatric illness.

## **B. Financial Considerations**

Whether parole is in the public benefit may also be examined through a financial lens. Paroling asylum seekers financially benefits the public by alleviating the taxpayer burden to support the ever-increasing budgets of administrative agencies responsible for detaining asylum seekers. Furthermore, parole could result in financial benefits to the American public by preventing strain on publicly-funded healthcare systems to provide treatment for refugees who experience trauma in immigration detention or in the process of family separations.

### **i. Asylum Seekers’ Health Difficulties Will Contribute to Rising Healthcare Costs**

The trauma-related disorders immigrants acquire in detention are costly to treat. Studies of military veterans with PTSD illuminate that patients with the disorder have more costly medical bills than their peers.<sup>176</sup> Data from the Congressional Budget Office (CBO) indicated that from 2004 to 2009, the Veterans Health Administration (VHA) spent \$1.1 billion for PTSD and traumatic brain injury (TBI) care.<sup>177</sup> The CBO estimated the VHA spent \$8,300 in the first year of treatment for patients with PTSD (with \$4,300 spent on PTSD-specific costs) while spending only \$2,400 per patient for those without PTSD symptoms.<sup>178</sup> For the first four years of treatment, PTSD-specific costs were more expensive than all combined costs for patients who did not suffer from PTSD.<sup>179</sup>

The financial responsibility for refugee healthcare is multi-faceted. While the government detains asylum seekers, it must provide them healthcare. Given that ICE is already experiencing comparatively high costs at its child and family detention centers and must provide mental health care at those facilities, it should be wary of incurring greater costs with practices that could exacerbate those costs.<sup>180</sup> Furthermore, if an asylum applicant ultimately receives refugee status, he or she is eligible for a variety of publicly-funded or publicly-subsidized healthcare options. According to the Office of Refugee Resettlement, many refugees receive short-term health insurance through the Refugee Medical

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<sup>176</sup> See, e.g., Miriama Reisman, *PTSD Treatment for Veterans: What’s Working, What’s New, and What’s Next*, 41 PHARMACY & THERAPEUTICS 623, 627 (2016).

<sup>177</sup> CONG. BUDGET OFF., THE VETERANS HEALTH ADMINISTRATION’S TREATMENT OF PTSD AND TRAUMATIC BRAIN INJURY AMONG RECENT COMBAT VETERANS 19–20 (2012).

<sup>178</sup> *Id.* at viii.

<sup>179</sup> *Id.* at 20 (“For the PTSD group, PTSD-specific care averaged almost half (46 percent) of total health care costs over four years.”).

<sup>180</sup> See, e.g., Reade Levinson et al., *Where Are the Beds? Questions Surround Trump’s Plan to Hold Families in Detention*, REUTERS (June 21, 2018, 5:59 PM), <https://www.reuters.com/article/us-usa-immigration-capacity/where-are-the-beds-questions-surround-trumps-plan-to-hold-families-in-detention-idUSKBN1JH3EH?il=0> [<https://perma.cc/CE6Q-ZA2T>].

Assistance (RMA) program.<sup>181</sup> Eligibility for RMA coverage, however, expires after eight months. Nevertheless, refugees may seek coverage through Medicaid, the Children's Health Insurance Program, or the Marketplace (a state-by-state system of subsidized plans created by the Affordable Care Act).<sup>182</sup>

Of course, taxpayer responsibility for a particular refugee's treatment costs would be variable depending on characteristics of the particular patient and the extent of their medical coverage, including whether the patient is a minor, whether the patient is eligible for government assistance, and the severity of his or her symptoms. Common sense dictates that the more severe or complex a patient's symptoms are, the more expensive it is to treat the patient. As such, symptom severity is the factor which most clearly illustrates why parole policy has an influence over the public benefit. Given the clear link between detention duration and symptom severity, paroling asylum seekers is in the public benefit because its prophylactic abilities extend to the cost for treating detention-related illnesses as well as the illnesses themselves. Naturally, this prophylactic benefit extends to the healthcare problems discussed above which specifically stem from family separations. Data on family separation suggest that if asylum-seeking parents could be paroled to care for their children, the U.S. government might avoid the cost of children's mental health problems associated with parental separation, and the cost to treat those problems through public medical benefits and care in its detention facilities for children.

## ii. Parole Is a Cost-Effective Alternative to Detention

Parole is also in the public interest because it can alleviate the high costs of detaining adults, families, and unaccompanied minors. This expenditure is already costly; the detention bed quota has steadily increased over the last decade, and the Trump Administration recently ended one of the government's alternative to detention (ATD) programs for asylum seekers.<sup>183</sup> Blanket parole denials exacerbate these forces, and burdens American taxpayers and the U.S. Government with a continual increase in the operating budgets for immigration enforcement agencies like ICE.<sup>184</sup> A continued drop in parole rates will worsen the financial burden of immigration detention.

Refusal to release asylum seekers deprives the U.S. Government of a meaningful opportunity to reduce immigration detention costs by avoiding the

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<sup>181</sup> See *Health Insurance*, OFF. REFUGEE RESETTLEMENT, <https://www.acf.hhs.gov/orr/health> [<https://perma.cc/V4KN-8PNH>] (last updated Feb. 12, 2019).

<sup>182</sup> *Id.*

<sup>183</sup> See Aria Bendix, *ICE Shuts Down Program for Asylum-Seekers*, ATLANTIC (June 9, 2017), <https://www.theatlantic.com/news/archive/2017/06/ice-shuts-down-program-for-asylumseekers/529887/> [<https://perma.cc/AKT8-KWKR>]; see, e.g., Laurence Benenson, *The Math of Immigration Detention, 2018 Update: Costs Continue to Multiply*, NAT'L IMMIGR. F. (May 9, 2018), <https://immigrationforum.org/article/math-immigration-detention-2018-update-costs-continue-multiply/> [<https://perma.cc/U3ZF-WCCD>].

<sup>184</sup> See, e.g., *Fact Sheet: Immigration and Customs Enforcement (ICE)*, NAT'L IMMIGR. F. (July 10, 2018), <https://immigrationforum.org/article/fact-sheet-immigration-and-customs-enforcement-ice/> [<https://perma.cc/QJ96-TCFD>] ("The ICE budget at its inception was only \$3.3 billion and, as of FY2018, has increased to \$7.5 billion.").



charges associated with holding immigrants in detention or ATD facilities.<sup>185</sup> ATD programs are generally viewed as more effective and humane than detention.<sup>186</sup> Whether ATD programs are meaningful cost-saving mechanisms, however, is not universally agreed upon.<sup>187</sup> Nonetheless, it is undisputed that immigration detention is expensive, and its cost rises annually.<sup>188</sup> For this reason, the National Immigrant Forum suggests: “[d]etention of non-dangerous immigrants is a budget item ripe for cost savings.”<sup>189</sup>

When ICE calculates its requests for annual appropriations funding, it uses two primary metrics to determine the money needed for detention: the “bed rate” and the average daily population (ADP) of detainees.<sup>190</sup> “Bed rate” refers to the average dollar amount needed to house one adult detainee for one day.<sup>191</sup> Thus, the final request amount is calculated by the result of multiplying bed rate by ADP by the number of days in a year.<sup>192</sup> Of course, the bed rate is also calculable by dividing the daily ICE detention budget by the number of detainees. In Fiscal Year 2018, ICE requested a daily budget of \$8.43 million.<sup>193</sup> Divided by a detention bed quota of 40,520, the daily cost to taxpayers per detainee was \$208.<sup>194</sup>

Even with this immense estimated cost, the U.S. Government Accountability Office (GAO) recently reported that ICE consistently underestimates its budgetary needs due to faulty calculation methodology.<sup>195</sup>

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<sup>185</sup> Placing an asylum seeker in an ATD program is not the same as paroling him. A collaborative memorandum from AILA, Lutheran Immigration and Refugee Service, National Immigrant Justice Center, and the Women’s Refugee Commission explains some of the differences between these two circumstances: “[f]or most asylum-seekers, release on parole, their own recognizance or a minimal bond is appropriate because they have no criminal history and, with strong family ties in the U.S. and strong legal claims, pose little flight risk. . . . Where a more substantial flight risk cannot otherwise be mitigated, proven alternatives to detention (ATDs) should be used instead of incarceration.” AM. IMMIGR. LAWS. ASS’N ET AL., *THE REAL ALTERNATIVES TO FAMILY DETENTION* 1 (2015), <https://www.womensrefugeecommission.org/images/zdocs/Real-Alternatives-to-Family-Detention.pdf> [<https://perma.cc/5DV2-BG6K>].

<sup>186</sup> See, e.g., Benenson, *supra* note 183 (“ATDs have proved to be effective, with immigrants appearing for their final hearings more than 95 percent of the time when participating in ‘full service’ ATD programs that feature case management.”); Bendix, *supra* note 183 (“While detention has long been the government’s preferred policy, experts still question the decision to shut down a more humane alternative.”).

<sup>187</sup> See Bendix, *supra* note 183. Immigrants’ rights groups often suggest that ATD programs save money, but some figures suggest that shutting down one of the most comprehensive ATD programs will save ICE \$12 million per year. *Id.*

<sup>188</sup> See, e.g., Benenson, *supra* note 183 (“Since . . . 2013, the federal government’s exorbitant spending on detaining hundreds of thousands of immigrants has continued to multiply. In that time, across presidential administrations, both the number of people held in immigration detention and the cost of detaining each one have increased.”).

<sup>189</sup> Benenson, *supra* note 183.

<sup>190</sup> GOV’T ACCOUNTABILITY OFF., *IMMIGRATION DETENTION: OPPORTUNITIES EXIST TO IMPROVE COST ESTIMATES* 2 (2018).

<sup>191</sup> *Id.* at 10.

<sup>192</sup> *Id.*

<sup>193</sup> Benenson, *supra* note 183.

<sup>194</sup> *Id.*

<sup>195</sup> See generally GOV’T ACCOUNTABILITY OFF., *supra* note 190.

When GAO examined ICE's bed rate model, it identified factors that lead to inaccurate projections, including problematic accounting for inflation and "double counting" certain costs.<sup>196</sup> In 2016, unreliable models caused ICE to underestimate the bed rate by \$5.42 per day: "[f]or illustrative purposes, underestimating the bed rate by \$5 per day, assuming an ADP of 34,000, yields a more than \$62 million underestimation in the detention budget request."<sup>197</sup>

Beyond its impact on the budget for operating detention centers, the Trump Administration's parole policies have the potential to influence the budget for constructing detention centers. Currently, the United States is detaining the highest number of migrant children in its history.<sup>198</sup> A high child detention rate required the Trump administration to expand the capacity of its available shelter facilities suitable for holding children without their parents.<sup>199</sup> For example, administration officials recently announced a plan to expand a "tent city" in Tornillo, Texas in order to house up to 3,800 immigrant children there.<sup>200</sup> Compared to DHS approved shelters which might otherwise receive minors pursuant to *Flores*, overflow detention facilities are three times as expensive, costing approximately \$750 per day, per child to operate.<sup>201</sup>

Even if children are not held separately from their parents, current parole policy could contribute to a need for new family detention centers.<sup>202</sup> New family detention centers are expensive.<sup>203</sup> In 2014, the Obama Administration contracted with the Corrections Corporation of America (CCA) to build a family detention center in Dilley, Texas, which is now known as the South Texas Family Residential Facility.<sup>204</sup> Reporting from *The Washington Post* suggested the contract between the Obama Administration and CCA was a four-year, \$1 billion deal.<sup>205</sup> Due to their funding structures, operating family detention centers can be even *more* expensive than operating adult detention centers. Increased cost is partially a consequence of the restrictions on proper conditions for the detention of minors; by some estimates, they are three times as costly as facilities which hold adults alone.<sup>206</sup> Cost to operate detention centers is also

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<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 14–15.

<sup>198</sup> Caitlin Dickerson, *Shelters Near Capacity as More Youth Migrants are Detained Than Ever*, N.Y. TIMES (Sept. 12, 2018), <https://www.nytimes.com/2018/09/12/us/migrant-children-detention.html> [https://perma.cc/RUJ4-AJVR].

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> PECK & HARRINGTON, *supra* note 134, at 12 (explaining that a "conceivable option" to detaining families for longer periods while still complying with the *Flores* Settlement "would be for the executive branch to create licensed family detention centers that comply with the *Flores* Settlement and detain families in those centers").

<sup>203</sup> See, e.g., Chico Harlan, *Inside the Administration's \$1 Billion Deal to Detain Central American Asylum Seekers*, WASH. POST (Aug. 14, 2016), [https://www.washingtonpost.com/business/economy/inside-the-administrations-1-billion-deal-to-detain-central-american-asylum-seekers/2016/08/14/e47f1960-5819-11e6-9aee-8075993d73a2\\_story.html](https://www.washingtonpost.com/business/economy/inside-the-administrations-1-billion-deal-to-detain-central-american-asylum-seekers/2016/08/14/e47f1960-5819-11e6-9aee-8075993d73a2_story.html) [https://perma.cc/W9E4-9ALU].

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

higher because the occupancy of a family detention center does not influence the payment its operator receives.<sup>207</sup> For instance, for years under the Obama Administration, family detention center operators received full contractual payments even though their facilities were not full.<sup>208</sup>

Nevertheless, sunk cost for empty beds in family detention centers no longer appears to be a factor. As Trump transitioned into his presidency, border crossings continued to increase and detention centers quickly approached capacity.<sup>209</sup> By June 2018, immigrant families already occupied eighty percent of the 3,300 beds available in family detention centers nationwide. In anticipation of reaching complete capacity, the Trump administration estimates needing at least 15,000 additional family detention beds.<sup>210</sup> Such an expansion of the family detention system could cost billions.<sup>211</sup>

The financial cost to detain asylum applicants is one of the foremost reasons 8 U.S.C. § 1182 is ripe for amendment. At this time, a court would likely consider weighing cost in each applicant’s favor in an individualized parole determination an abuse of discretion.<sup>212</sup> Nevertheless, the cost of detention is an obvious strain on what the parole statute purports it is driven by: benefitting the public. The financial cost associated with current immigration detention practices is so clear it borders on intuitive. Parole is in the public benefit because of the obvious detention savings it might provide. Public savings are particularly obvious when parole involves an unaccompanied minor or family because the expense to operate family detention centers is far greater than the cost associated with adult-only facilities.<sup>213</sup> While Congress likely cannot require immigration officers to consider cost in individualized determinations, Congress itself is certainly empowered to take action in the interest of cost savings. If the American public is to receive the financial benefits associated with parole, the controlling statute must be more favorable to release.

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<sup>207</sup> *Id.* (stating that, in adult detention centers, “federal payouts rise and fall in step with the percentage of beds being occupied”).

<sup>208</sup> *Id.* (“... CCA is paid for 100 percent capacity even if the facility is, say, half full, as it has been in recent months.”).

<sup>209</sup> *See, e.g.,* Levinson et al., *supra* note 180 (explaining that given the rate of apprehension for family units “the government will quickly run out of beds at [family detention centers], the only ones in the country set up to house families”).

<sup>210</sup> *See, e.g.,* Daniel Politi, *Trump Administration Seeking Up to 15,000 Beds to Expand Immigrant Family Detention*, SLATE (June 23, 2018, 10:44 AM), <https://slate.com/news-and-politics/2018/06/trump-administration-seeking-up-to-15-000-beds-to-expand-immigrant-family-detention.html> [https://perma.cc/V7FF-XABZ].

<sup>211</sup> *See, e.g.,* Roque Planas, *Trump’s Family Detention Policy Will Cost Billions of Dollars That ICE Doesn’t Have*, HUFFINGTON POST (June 26, 2018, 5:45 AM), [https://www.huffingtonpost.com/entry/trump-family-detention-policy-cost-billions-dollars-ice\\_us\\_5b3186eae4b0b5e692f0ba3f](https://www.huffingtonpost.com/entry/trump-family-detention-policy-cost-billions-dollars-ice_us_5b3186eae4b0b5e692f0ba3f) [https://perma.cc/THK5-7XEZ].

<sup>212</sup> *See, e.g.,* Ledesma-Valdes v. Sava, 604 F. Supp. 675, 681 (S.D.N.Y. 1985) (holding that it is an abuse of discretion to consider saved government expenditures on a particular detention as a factor in “the public interest” because government money is required for all detention).

<sup>213</sup> *See, e.g.,* Harlan, *supra* note 203.

### C. *Efficacy Considerations*

Parole also results in public benefit because it is likely to make the process for seeking asylum in the United States more effective. The following section explores two reasons why this is the case. First, parole increases access to justice for asylum seekers, making it easier for attorneys to prepare their asylum claims. Second, paroling asylum seekers does not incentivize them to avoid immigration proceedings. As such, it likely does not make the asylum system less effective by making the United States more likely to parole claimants with fraudulent claims or who pose a public safety threat.

#### i. **Parole Increases Access to Justice**

Lifting the parole freeze increases the likelihood that asylum seekers could participate in judicial proceedings with attorney assistance because detention exacerbates access to counsel problems. As a preliminary matter, cost prohibits most asylum seekers from receiving representation in their cases.<sup>214</sup> Representation is not guaranteed for claimants who cannot afford it, and the American Immigration Lawyers Association estimates that as a result, less than four out of ten claimants have legal representation in their cases.<sup>215</sup> As such, detaining asylum seekers for long periods of time exacerbates the already low representation rate.<sup>216</sup> Most ICE detention centers are more than 100 miles from the nearest legal aid provider.<sup>217</sup> One detention center in Alabama is over 400 miles from the offices of any government-listed pro bono attorneys.<sup>218</sup>

Of course, without the assistance of counsel, claimants are less capable of obtaining refugee status. After conducting surveys with immigration attorneys at family detention centers, Stephen Manning and Kari Hong wrote “there is *no doubt* that legal representation improves the accuracy of the determinations made in expedited removal proceedings.”<sup>219</sup> Their research found removal rates for immigrants with representation were ninety-seven to ninety-nine percent lower than rates for those without representation.<sup>220</sup> One of the ways the current parole regime will continue to exacerbate this efficacy problem is by making it more difficult for attorneys to learn from their clients why they left their countries of origin.<sup>221</sup> Obtaining this information is obstructed by a lack of access to clients, and appears particularly difficult for attorneys representing separated family units.<sup>222</sup> Given the link between representation and accurate adjudication of asylum claims, parole may be viewed as a measure that benefits the public because it increases the efficacy of the asylum system.

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<sup>214</sup> AM. IMMIGR. LAWS. ASS'N, NEW BARRIERS AT THE BORDER IMPEDE DUE PROCESS AND ACCESS TO ASYLUM 8 (2018) [hereinafter AILA POLICY BRIEF].

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 7–8.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 8.

<sup>219</sup> Manning & Hong, *supra* note 31, at 679 (emphasis added).

<sup>220</sup> *Id.*

<sup>221</sup> See generally Shepherd, *supra* note 156.

<sup>222</sup> *Id.*

## ii. Paroled Asylum Seekers Do Not Frequently Abscond

Supporters of expanded immigration detention argue it makes the asylum system more effective by reducing the risk asylum seekers will skirt the scrutiny of immigration courts.<sup>223</sup> President Trump frequently claims released asylum seekers fail to report for court dates: “[w]hen we release the people, they never come back to the judge, anyway—they’re gone.”<sup>224</sup> Fear of asylum seekers absconding from court proceedings is fueled in part by some Americans’ belief that the current asylum system is easily abused. Trump Administration officials, including former Secretary Nielsen, have argued bad actors receive “coaching” to present fraudulent claims of credible fear.<sup>225</sup> Others argue detention is necessary because current asylum laws incentivize human traffickers to travel with children and fraudulently present those children as their own, which under the previous administration might result in paroling the entire group to avoid running afoul of detention restrictions on minors. Others argue that, even if most claims of credible fear are legitimate, the definition of credible fear is too broad and does not separate the most deserving cases for asylum from those based on difficult, but highly common, fearful experiences (like domestic violence).<sup>226</sup>

Nevertheless, data does not support President Trump’s efficacy justification for his administration’s parole policies. Decisions *in absentia* do not represent the majority of decisions in immigration cases.<sup>227</sup> DOJ Data for Fiscal Years 2012-2016 illustrate that *in absentia* case completions were most common in Fiscal Year 2015—at twenty-eight percent.<sup>228</sup> The following year, the *in absentia* rate fell three percent.<sup>229</sup> Lifting the parole freeze would not necessarily contribute significantly to any change in the *in absentia* rate, but the rate is relevant to parole because the Trump Administration has falsely articulated a high rate of missed court dates as one justification for detention of asylum seekers.<sup>230</sup> An efficacy justification is particularly weak in light of the fact that

<sup>223</sup> See *What Happens When Individuals Are Released on Bond in Immigration Court Proceedings*, TRAC IMMIGR. (Sept. 14, 2016), <https://trac.syr.edu/immigration/reports/438/> [<https://perma.cc/8JZ8-MAYV>] (“The government argues that continued detention is needed to ensure that these individuals will not abscond and will show up for their hearing. For a smaller subset, there also may be public safety concerns.”).

<sup>224</sup> John Kruzel, *Majority of Undocumented Immigrants Show Up for Court, Data Shows*, POLITIFACT (June 26, 2018, 11:22 AM), <https://www.politifact.com/punditfact/statements/2018/jun/26/wolf-blitzer/majority-undocumented-immigrants-show-court-data-s/> [<https://perma.cc/5DRM-NTP2>].

<sup>225</sup> AILA POLICY BRIEF, *supra* note 214, at 8.

<sup>226</sup> See, e.g., Jim Geraghty, *How the Number of ‘Credible Fear’ Refugees Skyrocketed in the Obama Years*, NAT’L REV. (June 26, 2018, 10:07 AM), <https://www.nationalreview.com/the-morning-jolt/us-asylum-application-abuse-credible-fear-cases-grow/> [<https://perma.cc/94ZB-KJTW>].

<sup>227</sup> See, e.g., *Most Released Families Attend Immigration Court Hearings*, TRAC IMMIGR. (June 18, 2019), <https://trac.syr.edu/immigration/reports/562> [<https://perma.cc/7VMA-2WNR>].

<sup>228</sup> EXEC. OFF. IMMIGR. REV., U.S. DEP’T JUSTICE, FY 2016 STATISTICS YEARBOOK P1 (2017), <https://www.justice.gov/eoir/page/file/fysb16/download> [<https://perma.cc/2DL3-UWXL>].

<sup>229</sup> *Id.*

<sup>230</sup> See *Most Released Families Attend Immigration Court Hearings*, TRAC IMMIGR., *supra* note

data gathered in 2019 suggests nearly 100 percent of represented asylum seekers show up for their hearings.<sup>231</sup>

## VII. RECOMMENDATIONS

The foregoing discussion illustrates that for several reasons, paroling asylum seekers is in the public benefit. At the same time, the current statute and the controlling policy guidance for implementing that statute have done very little to ensure the American public receives the well-documented benefits of paroling those seeking refuge from violence here. Given that the Obama and Trump Administrations claimed to follow the same policies while one paroled over ninety percent of asylum seekers and the other paroled less than five percent of asylum seekers—the INA must speak more strongly to the benefits of parole.

### A. *The Proposed Change: Amend the INA's Definition Section to Define "Public Benefit"*

One way to adapt immigration law to reflect the public benefits of parole would be for Congress to amend the definitions section of the INA to include a definition of “public benefit.”<sup>232</sup> Perhaps the best starting place for lawmakers amending this portion of the INA is the 2009 Parole Directive. A suggested definition which incorporates the unambiguous language contained in the Directive could state:

For the purposes of this Act, parole for the sake of “significant public benefit” means the parole of any non-citizen applying for admission to the United States who can satisfactorily substantiate his or her identity and poses neither a flight risk or threat to public safety.

Of course, for this definition to have practical effect, 8 U.S.C. § 1182(d)(5)(A) would also require amending to include reference to the definition: “[t]he Attorney General may . . . in his discretion parole into the United States . . . on a case-by-case basis for urgent humanitarian reasons or significant public benefit, *as defined by this statute*, any alien applying for admission into the United States . . .”

An amended INA with this definition would have several advantages over the current INA in giving effect to the known benefits of paroling asylum seekers. First, it outlines the limited circumstances under which federal agencies *should not* release asylum seekers, as opposed to the current statute which only outlines limited circumstances in which the agencies *should* release asylum seekers. This reversal is significant, because it would alter the construction of

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227. At the time TRAC published this report, family units only missed immigration hearings in approximately one out of every seven cases. This lead TRAC to observe “court records directly contradict the widely quoted claim that ‘90 percent of recent asylum seekers skipped their hearings.’” *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> 8 U.S.C.A. § 1101 (West 2014).

the statute in a way which mimics the construction of language in the *Flores* settlement, which appellate courts have interpreted to create a “presumption” in favor of paroling immigrants of minority age.<sup>233</sup> Predicting whether courts would interpret the amended INA to contain a similar presumption, or what evidence they might require for the Government to rebut such a presumption, is likely impossible. Nevertheless, even if the amended statute had a more moderate impact on parole practices than *Flores*, it would provide a statutory base more favorable to parole than its predecessor. A moderate increase in release of asylum seekers, in the aggregate, might still spare hundreds of immigrants grave physical and mental harm, and could spare the Government millions in detention costs.

Similarity to *Flores* highlights a second reason the proposed amended statute is an improvement upon the current statute—it would likely make any presumption in favor of parole more resistant to alteration for political purposes. While multiple presidential administrations have gone to court seeking to relax their obligations under *Flores*, appellate courts continue to resist the argument that extenuating circumstances (such as asylum surges) justify less humane treatment of minors.

Third, a statute with the power to create a presumption in favor of paroling adults might decrease instances of family separation. Currently, the presumption favoring minors stops short of creating a presumption in favor of paroling their parents with them.<sup>234</sup> A legal obligation to parole adults which is constructed similarly to the legal obligation to parole their children suggests less families might suffer through time separated merely because of time limits.

Finally, as currently written and implemented, the parole statute requires “case by case” parole determinations.<sup>235</sup> Courts have previously found that attributing any one factor, negative or positive, to every parole determination constitutes an abuse of the discretion afforded to the Attorney General under the statute.<sup>236</sup> This hamstringing the ability of immigration officers to consider the many benefits mentioned above in any individual parole determination because they are associated with every instance of detention. Primarily, these benefits include sparing immigrants and their children severe psychological and physical harm, and saving federal agencies charged with detention the high costs associated with detaining asylum seekers. Popularly-elected members of Congress, however, can take the aggregate health benefits or financial benefits of parole into account when drafting and considering amended legislation.

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<sup>233</sup> See *Flores v. Lynch*, 828 F.3d 898, 903 (9th Cir. 2016) (citing *Flores* Settlement para.14) (“Where the INS determines that the detention of the minor is not required either to secure his or her timely appearance before the INS or the immigration court, or to ensure the minor’s safety or that of others, the INS shall release a minor from its custody without unnecessary delay[.]”).

<sup>234</sup> See discussion *supra* Section VI.A.2.

<sup>235</sup> 8 U.S.C.A. § 1182(d)(5)(A) (West 2013).

<sup>236</sup> See, e.g., *Ledesma-Valdes v. Sava*, 604 F. Supp. 675, 681 (S.D.N.Y. 1985) (holding that it is an abuse of discretion to consider saved government expenditures on a particular detention as a factor in “the public interest” because government money is required for all detention).

### **B. *Statutory Reform is the Best Approach for Addressing Variable Parole Practices***

Ideally, changes to parole practices would begin at their statutory roots. As discussed above, various Presidential administrations have utilized the discretionary parole power as written in almost shockingly variable ways.<sup>237</sup> Practically, though, this variability stands for far more than a rising and falling graphical curve. The impact on the American public, as the parole rate rises and falls, calls for the type of change that will create the most stability. Statutory reform is that type of change.

Of course, statutory reform is difficult to achieve. Perhaps the most significant obstacle to amending this statute is congressional unwillingness to reach consensus on reforming U.S. immigration law.<sup>238</sup> The last meaningful change to the INA came decades ago, and the most significant document controlling detention of minors is the *Flores* settlement, which is nearly as old.<sup>239</sup> Nevertheless, given the pressing legal, medical, and financial problems associated with low parole rates, malleable parole regulations and policy guidance seem ill-equipped to inspire parole practices other than those driven by variable immigration trends and political reactions to those trends. The ability of Congress to one day reach a consensus on parole practices would be preferable to regulatory or policy change for several reasons.

First, the consensus-building process which precedes reform of the INA could speak powerfully to the contributions immigrants make to American society. The discussion above reflects many of the benefits associated with paroling asylum seekers specifically. Even still, there are additional social and economic benefits to protecting immigrants. A comprehensive review of those benefits is beyond the scope of this article, but the potential for some to motivate political consensus on parole reform is important to explore here. Immigrants to the United States have a long history of contributing to its cultural, political, and scientific achievements.<sup>240</sup> Recent inquiries suggest immigrants contribute more to the American economy in taxes than they extract from government

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<sup>237</sup> See *supra* Section I.

<sup>238</sup> See, e.g., Maria Parbon Lopez & Natasha Ann Lacoste, *Immigration Reform in 2013-14: An Essay on the Senate's Bipartisan Plan, the House's Standards for Immigration Reform, Interest Convergence and Political Realities*, 17 HARV. LATINO L. REV. 121, 146 (2014); Elaine Kamarck & Christine Stenglein, *Can Immigration Reform Happen? A Look Back*, BROOKINGS INSTITUTION (Feb. 11, 2019), <https://www.brookings.edu/blog/fixgov/2019/02/11/can-immigration-reform-happen-a-look-back/> [<https://perma.cc/RFP2-RKX7>] ("Bipartisan deals on immigration have eluded lawmakers and presidents for three decades.").

<sup>239</sup> Manning & Hong, *supra* note 31, at 678 ("As a practical matter, there has been no immigration reform in over 20 years."); PECK & HARRINGTON, *supra* note 134, at 7 ("The *Flores* Settlement binds the parties until the federal government promulgates final regulations implementing the agreement. However, to date, no implementing regulations have been promulgated.").

<sup>240</sup> See, e.g., Charles Hirschman, *The Contributions of Immigrants to American Culture*, DAEDALUS, Summer 2013, at 26, 30-47 (discussing immigrant contributions to music, film, politics, science, and athletics, among others).



services.<sup>241</sup> Even still, perhaps the most powerful benefit of immigration is the essential contribution of immigrants to the American workforce.<sup>242</sup>

Some estimates suggest immigrant workers enhance economic output by contributing \$2 trillion annually to the American economy.<sup>243</sup> No matter the political leanings of their representatives, communities nationwide depend on immigrant labor to drive the productivity of their major industries.<sup>244</sup> Immigrant workers dominate the low-wage workforce in farm labor, meat and poultry processing, landscaping, construction, day labor, and domestic service.<sup>245</sup> In nearly every region of the country, industries that previously relied on poor white workers have transitioned.<sup>246</sup> The shift is so significant that in areas such as the “beef triangle” of Southwest Kansas, a once predominantly white population, is now majority-Hispanic.<sup>247</sup> In Minnesota, a large concentration of Somali immigrants now lives in the Twin Cities.<sup>248</sup> The constant need for a growing workforce in the United States increasingly relies on immigrants. That need does not guarantee political momentum, but it might motivate representatives of politically-opposed states to act in favor of parole in the name of their shared interest.

Second, an amended statute which includes a definition of “public benefit” would leave less room for federal agencies to manipulate the existing gap in legislation to detain large numbers of asylum seekers. As the Supreme Court noted in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, a court’s first question in reviewing an agency’s construction of a statute it administers is always whether Congress has directly spoken to the precise question at issue.<sup>249</sup> When intent of Congress is clear, “that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”<sup>250</sup> If Congress is silent on a particular matter, or its language is ambiguous, the court need only decide

<sup>241</sup> See, e.g., RYAN NUNN ET AL., A DOZEN FACTS ABOUT IMMIGRATION 13 (2018) (“For the foreign-born population as a whole, per capita expenditure on cash welfare assistance, Supplemental Nutrition Assistant Program (SNAP; formerly known as the Food Stamp Program), Supplemental Security Income (SSI), Medicaid, Medicare, and Society Security are all lower than for native-born individuals, even when restricting the comparison to age- and income-eligible individuals.”).

<sup>242</sup> *Id.* at 8 (“There is broad agreement among researchers and analysts that immigration raises total economic output. By increasing the number of workers in the labor force, immigrants enhance the productive capacity of the U.S. economy.”).

<sup>243</sup> *Id.*

<sup>244</sup> See, e.g., Frances L. Ansley, *Rethinking Law in Globalizing Labor Markets*, 1 J. BUS. L. 369, 388–89 (1999).

<sup>245</sup> *Id.* at 388.

<sup>246</sup> *Id.* at 389 (describing this shift occurring in the Southeast, Southwest, and Appalachia).

<sup>247</sup> Deborah Fallows, *New Pioneers in Southwest Kansas*, ATLANTIC (July 13, 2016), <https://www.theatlantic.com/national/archive/2016/07/new-pioneers-in-southwest-kansas/491102/> [https://perma.cc/G9TX-TU8T].

<sup>248</sup> Maya Rao, *How Did the Twin Cities Become a Hub for Somali Immigrants?*, MINNEAPOLIS STAR-TRIB. (June 21, 2019), <http://www.startribune.com/how-did-the-twin-cities-become-a-hub-for-somali-immigrants/510139341/> [https://perma.cc/J5ZB-2RP6].

<sup>249</sup> *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

<sup>250</sup> *Id.* (emphasis added).

whether the agency's construction is "based on a *permissible* construction of the statute." Legislative gaps embolden federal agencies in this regard, because the Supreme Court has noted an agency's construction is permissible so long as it is not arbitrary, capricious, or manifestly contrary to the statute.<sup>251</sup>

A statutory amendment like the one proposed above would decrease federal agencies' ability to detain asylum seekers other than for failure to verify their identities or upon evidence that they pose a public safety threat. Of course, certain portions of the proposed statute might inspire claims its language is ambiguous (for instance, its requirement to "satisfactorily substantiate" the various elements).<sup>252</sup> Taking *Chevron* into account, though, shows that if language in the INA indicated it most always is in the public benefit to release asylum seekers, the parole rate might be less susceptible to the whims of the executive.

Finally, and most significantly, a statutory change can create a durable legal framework which executive orders or agency regulations cannot.<sup>253</sup> The foregoing discussion reflects the failure of agency guidance to meaningfully shape parole practices for asylum seekers in a way that increases the likelihood of obtaining the benefits of parole.<sup>254</sup> Executive Orders, while a quicker mechanism for action, fair no better in this instance because they "bind the governed but not those who govern."<sup>255</sup> Executive Orders are vulnerable to modification and waiver by subsequent Presidents—or even an issuing President with a changing agenda.<sup>256</sup> Furthermore, Executive Orders are not judicially enforceable in civil suits, and they create no private right of action.<sup>257</sup> Therefore, while an Executive Order might proclaim improvements to the parole system for asylum seekers, this hypothetical Executive Order would leave those asylum seekers with no mechanism to enforce new parole practices. Given the significant social, economic, health, and justice outcomes, which hang in the balance for asylum seekers in times of uncertain parole rates, toothless enforcement will not suffice. The opposite parole practices of the two most recent Presidential administrations reflect a need for the type of stability in the parole system that may be impossible via regulation or executive order.

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<sup>251</sup> *Id.* at 844.

<sup>252</sup> The parole directive currently contains additional instructions to officers in determining whether an immigrant has satisfactorily proved his or her identity, and whether he or she is a flight risk. U.S. IMMIGRATION & CUSTOMS ENF'T, ICE DIRECTIVE NO. 11002.1: PAROLE OF ARRIVING ALIENS FOUND TO HAVE A CREDIBLE FEAR OF PERSECUTION OR TORTURE, (Dec. 8, 2009), para. 8.3, [https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole\\_of\\_arriving\\_alien\\_found\\_credible\\_fear.pdf](https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_alien_found_credible_fear.pdf) [<https://perma.cc/QJ9R-7WV3>].

<sup>253</sup> See, e.g., Erica Newland, *Executive Orders in Court*, 124 YALE L.J. 2026, 2075–82 (2015).

<sup>254</sup> See discussion *supra* Section I (noting the ICE Parole Directive is the most specific guidance from the executive branch regarding parole eligibility for asylum seekers); see also discussion *supra* Section IV(A)(2) (noting the failure of attempts to displace the *Flores* settlement with final regulations).

<sup>255</sup> Newland, *supra* note 253, at 2075.

<sup>256</sup> *Id.* at 2080.

<sup>257</sup> *Id.* at 2076, 2080.

### VIII. CONCLUSION

Exploring how parole can provide public benefit reveals that paroling asylum seekers reduces both humanitarian and financial costs associated with immigration detention. Given that no statutory definition for "public benefit" exists, these benefits should be considered in crafting a definition that reflects parole's proven benefits. If the benefits could guide immigration officials in their decision-making, asylum seekers may be more likely to receive parole grants, and the American public may be more likely to receive the benefit of a healthier population.