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Rebecca Sharpless

*University of Miami School of Law*, [rsharpless@law.miami.edu](mailto:rsharpless@law.miami.edu)

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# COSMOPOLITAN DEMOCRACY AND THE DETENTION OF IMMIGRANT FAMILIES

Rebecca Sharpless\*

July 10, 2014: *[O]ur message to [people who unlawfully cross the Mexican border with their children] is simple: We will send you back. We are building additional space to detain [families] and hold them until their expedited removal orders are effectuated.*<sup>1</sup>

Jeh Johnson, Secretary of the U.S. Department of Homeland Security

June 24, 2015: *I have reached the conclusion that we must make substantial changes in our detention practices with respect to families and children . . . [L]ong-term detention is an inefficient use of our resources and should be discontinued.*<sup>2</sup>

Jeh Johnson, Secretary of the U.S. Department of Homeland Security

## I. INTRODUCTION

In late 2014, the United States heralded the opening of a 2,400-bed immigration detention center—the nation’s largest—to incarcerate Central American women and children who had unlawfully crossed the U.S. border with Mexico. Immigration authorities detained approximately 5,000 children and their mothers between the summer of 2014 to the summer of 2015 and, during that period, most were held for at least a month and some were held over a year.<sup>3</sup> In just one year, the United States had increased family detention by over 3000 percent.<sup>4</sup> Responding to what it labeled a “surge” in unauthorized border crossings by Central American families and unaccompanied children, the United States sought to secure the

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1. Press Release, Jeh Johnson, Sec’y, Dep’t of Homeland Sec., Statement Before the Senate Committee on Appropriation (July 10, 2014), <https://www.dhs.gov/news/2014/07/10/statement-secretary-homeland-security-jeh-johnson-senate-committee-appropriations>.

2. Suzanne Gamboa, *DHS Secretary: Detention of Immigrant Families, Children Should End*, NBC NEWS (June 24, 2015, 11:13 AM), <http://www.nbcnews.com/news/latino/dhs-secretary-detention-immigrant-families-children-should-end-n380911>.

3. *Family Immigration Detention: Why the Past Cannot be Prologue*, COMMISSION ON IMMIGRATION (Am. Bar Ass’n.), Jul. 31, 2015, at 21, [https://www.americanbar.org/content/dam/aba/publications/commission\\_on\\_immigration/FINAL%20BA%20Family%20Detention%20Report%202015-19-15.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/FINAL%20BA%20Family%20Detention%20Report%202015-19-15.authcheckdam.pdf).

4. See Am. Bar Ass’n, *supra* note 3, at 23, 28.

southwest border and deter additional people from making the dangerous crossing from Mexico.<sup>5</sup>

The vast majority of the women and children were seeking asylum, a domestic law protection based on the international law principle of non-refoulement. Non-refoulement forbids countries from returning people to a place where they would likely suffer persecution.<sup>6</sup> With numbers topping 16,000 a month, the flow of families and unaccompanied children was dubbed the “largest refugee crisis on U.S. soil” since the Mariel boatlift in the early 1980s.<sup>7</sup> The media broadcast chilling

5. See Julia Preston & Randal C. Archibold, *U.S. Moves to Stop Surge in Illegal Immigration*, N.Y. TIMES (Jun. 20, 2014), <http://www.nytimes.com/2014/06/21/us/us-plans-to-step-up-detention-and-deportation-of-migrants.html>; *Southwest Border Sectors: Family Unit and Unaccompanied Alien Children (0-17) Apprehensions FY 14 Compared to FY 13*, U.S. BORDER PATROL, <https://www.cbp.gov/sites/default/files/documents/BP%20Southwest%20Border%20Family%20Units%20and%20UAC%20Apps%20FY13%20-%20FY14.pdf> (last visited Oct. 8, 2016) (noting that in fiscal year 2014, U.S. immigration authorities apprehended a total of 68,541 unaccompanied children and 68,445 families, which represented a 77% increase in the number of arrivals of unaccompanied children and a 361% increase in families over fiscal year 2013).

6. See, e.g., Convention Relating to the Status of Refugees art. 10, July 28, 1951, 189 U.N.T.S. 2545 (entered into force April 22, 1954); see also Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 24841; Protocol to Amend the Convention Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 8791.

7. Moni Basu, *Daniel's Journey: How Thousands of Children Are Creating a Crisis in America*, CNN (June 19, 2014, 5:42 PM), <http://www.cnn.com/2014/06/13/us/immigration-undocumented-children-explainer>. Administration officials attributed the border crossings “primarily to economic hardship and an increase in drug-related violence in El Salvador, Guatemala and Honduras.” Josh Gerstein, *Biden to Discuss Child Migrants*, POLITICO (Jun. 15, 2014, 5:47 PM), <http://www.politico.com/story/2014/06/joe-biden-child-migrants-latin-america-107880>. Critics contend that the great majority is seeking protection from intimate partner abuse and violence at the hands of armed criminal groups. See Inter-Am. Comm’n H.R., Org. Am. St. [OAS], *Refugees and Migrants in the United States: Families and Unaccompanied Children*, at 9, OAS/Ser.L/V/II 155 Doc. 16 (July 24, 2015), <http://www.oas.org/en/iachr/reports/pdfs/Refugees-Migrants-US.pdf>. The United Nations High Commissioner for Refugees reports that 136 of the 160 women interviewed for its report “stated that they lived in neighborhoods controlled by criminal armed groups,” which “pose[] particular dangers for women,” who are often raped and abused by gang members. U.N. High Comm’r for Refugees [UNHCR], *Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico* (October 2015), <http://www.unhcr.org/en-us/publications/operations/5630f24c6/women-run.html>. The report further stated that “[d]omestic violence in [El Salvador, Guatemala, and Honduras] is commonplace.” *Id.* The American Bar Association reported that the “three major factors” driving the flows of migrants were “(1) increased gang and other violence; (2) extreme poverty; and (3) a desire for family reunification,” but states that “[v]iolence seemed the single most important motivation, even for those who also cited one of the other factors.” Am. Bar Ass’n, *supra* note 3, at 16–17 (citing ELIZABETH KENNEDY, AMERICAN IMMIGRATION COUNCIL, NO CHILDHOOD HERE: WHY CENTRAL AMERICAN CHILDREN ARE FLEEING THEIR HOMES 1 (July 1, 2014), [https://www.americanimmigrationcouncil.org/sites/default/files/research/no\\_childhood\\_here\\_why\\_central\\_american\\_children\\_are\\_fleeing\\_their\\_homes.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/no_childhood_here_why_central_american_children_are_fleeing_their_homes.pdf); AMERICAN IMMIGRATION COUNCIL, CHILDREN IN DANGER: A GUIDE TO THE HUMANITARIAN CHALLENGE AT THE BORDER (Jul. 10, 2014)). Criminal armed groups and intimate partner violence is rampant and three out of the five highest murder rates in the world are from Honduras, El Salvador, and Guatemala. U.N. Office on Drugs and Crime [UNODC], *Global Study on Homicide*, at 50 (2011), [https://www.unodc.org/documents/congress/background-information/Crime\\_Statistics/Global\\_Study\\_on\\_Homicide\\_2011.pdf](https://www.unodc.org/documents/congress/background-information/Crime_Statistics/Global_Study_on_Homicide_2011.pdf).

images of children being packed into crowded holding rooms.<sup>8</sup> Over half of the children were age six or younger.<sup>9</sup>

The response of U.S. officials to the unauthorized arrival of women traveling with their children was swift and unequivocal. Vice President Biden told the entrants, “[W]e’re going to send the vast majority of you back.”<sup>10</sup> On July 10, 2014, Secretary of Homeland Security Jeh Johnson sought emergency supplemental funding of \$3.7 billion from the Senate Committee on Appropriations in light of the increase in border arrivals.<sup>11</sup> He assured the Committee that the United States would “adhere to domestic and international law, due process, and the basic principles of charity, decency, and fairness.”<sup>12</sup> At the same time, he echoed the Vice President’s words: “our message to [adults who brought their children] is simple: we will send you back. We are building additional space to detain [women and their children] and hold them until their expedited removal orders are effectuated.”<sup>13</sup> The New York Times reported that the Secretary told elected officials at a temporary detention camp in Arizona that the Department of Homeland Security will “ship [the families] back” just “[a]s soon as [it] get[s] them.”<sup>14</sup>

Yet six months after opening the new mammoth family detention center in December 2014, Secretary Johnson announced that the U.S. government was making “substantial changes to [its] detention practices when it comes to families.”<sup>15</sup> In a statement issued shortly after the Secretary’s announcement, U.S. Immigration and Customs Enforcement stated that it “will generally not detain mothers with children, absent a threat to public safety or national security, if they have received a positive finding for credible or reasonable fear [of returning to their home country] and the individual has provided a verifiable residential address.”<sup>16</sup> Detention centers would

8. Brandon Darby, *Leaked Images Reveal Children Warehoused in Crowded U.S. Cells, Border Patrol Overwhelmed*, BREITBART (Jun. 5, 2014), <http://www.breitbart.com/Texas/2014/06/05/Leaked-Images-Reveal-Children-Warehoused-in-Crowded-US-Cells-Border-Patrol-Overwhelmed>.

9. Am. Bar Ass’n, *supra* note 3.

10. Joel Gehrke, *Joe Biden Discusses Immigration Reform with Central American Leaders*, NAT’L REVIEW (Jun. 21, 2014), <http://www.nationalreview.com/corner/380918/joe-biden-discusses-immigration-reform-central-american-leaders-joel-gehrke>.

11. Johnson, *supra* note 1.

12. *Id.*

13. *Id.*

14. Wil S. Hylton, *The Shame of America’s Family Detention Camps*, N.Y. TIMES (Feb. 4 2015), [http://www.nytimes.com/2015/02/08/magazine/the-shame-of-americas-family-detention-camps.html?\\_r=1](http://www.nytimes.com/2015/02/08/magazine/the-shame-of-americas-family-detention-camps.html?_r=1); *see also*, Juan Carlos Llorca, *Fed Says They Will Expedite Deportations to 10-15 Days at N.M. Facility*, SEATTLE TIMES (June 26, 2014), <http://www.seattletimes.com/nation-world/fed-says-they-will-expedite-deportations-to-10-15-days-at-nm-facility/> (reporting that in June 2014, a senior government official told reporters that “the goal is to process the immigrants and have them deported within 10 to 15 days to send a message back to their home countries that there are consequences for illegal immigration”).

15. Press Release, Jeh Johnson, Sec’y, Dep’t of Homeland Sec., Family Residential Centers (June 24, 2015), <http://www.dhs.gov/news/2015/06/24/statement-secretary-jeh-c-johnson-family-residential-centers>.

16. Press Release, Am. Immigration Lawyers Ass’n, ICE Announcement on Detention of Mothers and Children (Jul. 13, 2015), <http://www.aiala.org/infonet/ice-detention-mothers-children>. Previously, in May 2015, the Department announced that it would review the detention status of anyone in family detention over 90 days. Press Release, Am. Immigration Lawyer’s Ass’n, ICE Announces Series of

be used for the most part as processing centers for initial screenings for asylum and other claims for protection. Advocates and House Democrats characterized the more liberal release policy as a “long-overdue step.”<sup>17</sup> According to government statistics, at least eighty-six percent of those detained have now established a significant possibility of winning asylum.<sup>18</sup> As families continue to flee Central America, U.S. officials, at least for now, are abiding by their promise to refrain from the en masse, lengthy detention of women and their children.

Cosmopolitanism is a form of democratic political theory that resonates with scholars and advocates who favor better treatment of immigrants both at the border and inside the country.<sup>19</sup> While the exact origins of cosmopolitanism are in dispute, many point to the writings of the Cynic Greek philosopher Diogenes, who famously proclaimed himself as a *kosmopolites* (“a citizen of the world”), and the Ancient Stoics, who placed value on serving humankind rather than simply one’s own polis.<sup>20</sup> Immanuel Kant’s highly influential *Toward a Perpetual Peace* called for a voluntary league of states and for states to respect the rights of both citizens and foreigners as “citizens of the world.”<sup>21</sup> In the 1990s, Martha Nussbaum popularized a form of liberal cosmopolitan political theory with her essay *Patriotism and Cosmopolitanism*, in which she argued that people have “moral obligations to the world.”<sup>22</sup>

In general, cosmopolitans embrace the core tenets that the individual is the fundamental unit of concern, each person is of equal worth, and people have duties to one another as human beings and only secondarily as members of a community or

Actions Related to Family Detention Centers (May 13, 2015), <http://www.aila.org/infonet/ice-actions-related-to-family-detention-center>; see also Gamboa, *supra* note 2.

17. Press Release, Am. Immigration Lawyers Ass’n, Release of Refugee Families is Long-Overdue Step (July 13, 2015), <http://www.aila.org/advo-media/press-releases/2015/release-of-refugee-families-positive-overdue-step>; see also Press Release, Representative Roybal-Allard, Representative Gutierrez & Representative Lofgren, U.S. Congress, Statement on ICE Release of Some Detained Families (Jul. 14, 2015), <http://roybal-allard.house.gov/news/documentsingle.aspx?DocumentID=397876>.

18. U.S. CITIZENSHIP AND IMMIGRATION SERV., FAMILY FACILITIES CREDIBLE/REASONABLE FEAR (2014–16), [https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED\\_CF\\_RF\\_FamilyFacilitiesFY14\\_16Q2.pdf](https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_CF_RF_FamilyFacilitiesFY14_16Q2.pdf).

19. By cosmopolitanism, I mean “the concern for the world as if it were one’s *polis*.” SEYLA BENHABIB, RIGHTS OF OTHERS: ALIENS, RESIDENTS AND CITIZENS 174 (2004) [hereinafter RIGHTS OF OTHERS]. Some prefer the distinct but related term “transnationalism.” See Cristina M. Rodriguez, *The Citizenship Paradox in A Transnational Age*, 106 MICH. L. REV. 1111, 1117 (2008) (defining transnationalism as “some combination of plural civic and political memberships, economic involvements, social networks, and cultural identities that reach across and link people and institutions in two or more nation-states in diverse, multilayered patterns” (quoting Peggy Levitt & Mary C. Waters, *Introduction* to THE CHANGING FACE OF HOME: THE TRANSNATIONAL LIVES OF THE SECOND GENERATION 1, 5 (Peggy Levitt & Mary C. Waters eds., 2002) (internal quotations omitted))).

20. See, e.g., Martha C. Nussbaum, *Patriotism and Cosmopolitanism*, in FOR LOVE OF COUNTRY: DEBATING THE LIMITS OF PATRIOTISM 4 (Joshua Cohen ed., 1997); see also SEYLA BENHABIB, DIGNITY IN ADVERSITY: HUMAN RIGHTS IN TROUBLED TIMES 5 (2011) [hereinafter DIGNITY IN ADVERSITY] (citing historical sources claiming that Socrates replied that he was from “the world” rather than Athens when asked where he was from) (internal quotations and citations omitted).

21. IMMANUEL KANT, TOWARD A PERPETUAL PEACE: A PHILOSOPHICAL ESSAY 137 (M. Campbell Smith trans., 3rd ed. 1917) (1795).

22. Martha C. Nussbaum, *Patriotism and Cosmopolitanism*, BOS. REV. (Oct. 1, 1994), <http://bostonreview.net/martha-nussbaum-patriotism-and-cosmopolitanism>.

state.<sup>23</sup> While cosmopolitans are pluralists and “celebrate[] the fact that there are different local human ways of being,” they owe primary “allegiance . . . to the worldwide community of human beings.”<sup>24</sup> Cosmopolitans typically subscribe to the view that a person’s life opportunities should not be dictated by where she was born.<sup>25</sup>

This Article employs the cosmopolitan political theory of Seyla Benhabib as a framework for understanding the U.S. government’s shifting decisions about family detention and immigration policy more generally. Although Benhabib is a leading political theorist, few have used her work to analyze particular immigration policies or laws. This Article begins to fill that gap. Benhabib has much to offer scholars and advocates who envision a world of expanded opportunities for immigrants seeking to enter and for those already here. She calls for increasingly porous, but not open, borders, providing a middle-ground between utopian open-border positions and the exclusionary bent of liberal communitarianism.<sup>26</sup> Benhabib’s embrace of periodic amnesty for undocumented immigrants, her critique of strong insider/outsider claims and her optimism that liberal democracies are becoming more cosmopolitan supply an architecture for ambitious pro-immigrant politics.<sup>27</sup>

As applied to the detention of Central American families, Benhabib’s theory regards the United States’ changing detention policies as a reflection of a constitutive tension of liberal democracies—the tension between adherence to principles of universal application, like respect of dignity and freedom of movement, and a concern for the particular, including self-determination and the practical necessity of maintaining a territorial border.<sup>28</sup> The United States’ decision to build the nation’s largest immigration detention center to hold women and children until their legal claims are processed, followed by the significant (but not complete) retreat from long-term detention less than a year later, can be understood as attempts to navigate these contradictory impulses in the context of a globalizing world order. The initial U.S. response to the flow of families through the southeast border was an aggressive assertion of sovereignty that communicated a racial and class message about American identity. Ironically, the government’s exclusionary response was an attempt, at least in part, to garner political support for granting temporary status to undocumented immigrants already inside the United States. In contrast, the United States’ subsequent shift away from long-term family detention represents a withdrawal from territoriality in favor of universal human dignity—a move consistent with a more cosmopolitan view of the world. Although the United States has done its best to maintain the outsider status of released Central American

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23. See *infra* text accompanying notes 32–35.

24. Martha C. Nussbaum, *Patriotism and Cosmopolitanism*, in FOR LOVE OF COUNTRY: DEBATING THE LIMITS OF PATRIOTISM 4 (Joshua Cohen ed., 1997); see also KWAME ANTHONY APPIAH, THE ETHICS OF IDENTITY 25 (2005). In taking individuals as the fundamental unit of concern, cosmopolitans contrast with communitarians. See, e.g., CHARLES JONES, GLOBAL JUSTICE: DEFENDING COSMOPOLITANISM 16 (2001) (discussing how cosmopolitans contrast with communitarians).

25. Nussbaum, *supra* note 24, at 4; see also APPIAH, THE ETHICS OF IDENTITY, *supra* note 24, at 25.

26. See *infra* text accompanying notes 32–83.

27. *Id.*

28. RIGHTS OF OTHERS, *supra* note 19, at 2.

families, the dialing back of long-term family detention has redrawn the insider/outsider lines and laid the groundwork for expansion of the polity to include the families.

A key question for cosmopolitans is how to ensure that the tension between universality and territoriality is increasingly resolved in favor of a more open society. Benhabib is a discourse theorist in the tradition of Jürgen Habermas. Under discourse theory, “only those norms and normative institutional arrangements are valid which can be agreed to by all concerned under special argumentation situations named discourses.”<sup>29</sup> Discourses contrast with other forms of communication where the conditions for deliberative dialogue are not present.<sup>30</sup> Benhabib argues that creating the conditions under which true discourse can occur will help to ensure increasing cosmopolitanism. However, as discussed below, nondiscursive processes, like strategic bargaining, assertions of power, and resistance, were largely responsible for the move toward respecting the dignity of the Central American families. The family detention example illustrates the dynamic nature of the relationship between strategic maneuvering and rationale dialogue during struggles that rebalance universality and territoriality.

Cosmopolitans envision a world in which national border crossings are decriminalized and territorial boundaries are more fluid. Although the decision to recede from long term family detention was a victory for the immigrants and their advocates, it is far from clear that the change is permanent or that it indicates a general move toward a more forgiving U.S. border. Immigration enforcement at the border is more militarized than ever, and the last two decades have seen a four-fold increase in immigration detention. Trading on fear of immigrants and immigration, Donald Trump has become President.<sup>31</sup> Moreover, all gains for the detained families were secured within the limited legal framework of refugee protection.

This Article discusses the limitations, and radical possibilities, of immigrants and their advocates working within the rule of law—including refugee law and human rights norms—to edge the United States toward the realization of Benhabib’s cosmopolitan world order populated by democracies with porous boundaries. Following this Introduction, Part II summarizes Benhabib’s political theory and the paradox of closure at the heart of liberal democracies that is

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29. RIGHTS OF OTHERS, *supra* note 19, at 13 (citing JÜRGEN HABERMAS, MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION (1983)) (internal quotations omitted).

30. *Id.*

31. Michelle Ye Hee Lee, *Donald Trumps False Comments Connecting Mexicans and Crime*, WASH. POST (July 8, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime> (statement of President Donald Trump) (“When Mexico sends its people, they’re not sending their best. They’re not sending you. They’re sending people that have lots of problems. They have problems, and they’re bringing those problems with us. They’re bringing drugs. They’re bringing crime. They’re rapists. And some, I assume, are good people.”). President Trump has called for the end of birth right citizenship and questioned a judge’s objectivity because of his Mexican descent. Max Ehrenfreund, *Understanding Trump’s Plan to End Citizenship For Undocumented Immigrants’ Kids*, THE WASHINGTON POST (Aug. 17, 2015), [https://www.washingtonpost.com/news/wonk/wp/2015/08/17/understanding-trumps-plan-to-end-citizenship-for-undocumented-immigrants-kids/?utm\\_term=.a4754531e7b6](https://www.washingtonpost.com/news/wonk/wp/2015/08/17/understanding-trumps-plan-to-end-citizenship-for-undocumented-immigrants-kids/?utm_term=.a4754531e7b6); Theodore Schleifer, *Trump Defends Criticism of Judge with Mexican Heritage*, CNN (June 5, 2016), <http://www.cnn.com/2016/06/03/politics/donald-trump-tapper-lead/>.

responsible for the constitutive tension between universality and territoriality. Parts III and IV contain a brief history of the detention of immigrant families in the United States and an explanation of the key events during the flow of Central American families across the U.S. border. Part V applies Benhabib's political theory to the phenomenon of the detention of the Central American families. Part VI considers whether advocating within the legal system is capable of bringing about Benhabib's cosmopolitan world. The vision of such a world allows reimagining of the U.S. response to the Central American families.

## II. BENHABIB'S COSMOPOLITAN DEMOCRACY

Benhabib is a leading proponent of cosmopolitanism in the Kantian tradition, which she describes as "the emergence of norms that ought to govern relations among individuals in a global civil society."<sup>32</sup> Grounded in the equal worth of every human being, Benhabib's cosmopolitanism takes the central question to be "how we can fashion political and legal institutions to govern ourselves, all together, on this earth."<sup>33</sup> Like Kant, Benhabib endorses the idea of a world federation but not a world government.<sup>34</sup> Democratic states are valuable sites of pluralism and self-

32. SEYLA BENHABIB, *ANOTHER COSMOPOLITANISM* 20 (2006) [hereinafter *ANOTHER COSMOPOLITANISM*].

33. Robert Post, *Introduction to SEYLA BENHABIB, ANOTHER COSMOPOLITANISM I* (Robert Post ed., 2006). The concern for all individuals stems from Kant's categorical imperative; see also SIMON CANEY, *JUSTICE BEYOND BORDERS* 158 (2005) (characterizing as a cosmopolitan norm the idea that "persons have a democratic right to be able to affect those aspects of the social economic political system in which they live that impact on their ability to exercise their rights" (emphasis in original)); Jeremy Waldron, *What Is Cosmopolitan?*, 8 J. POL. PHIL. 227, 238 (2000) ("Cosmopolitan right was understood primarily in terms of a set of constraints governing what a people was entitled to do . . . as they came alongside strangers, or what they were entitled to do as strangers moved closer to them."). See generally Nussbaum, *supra* note 24, at 2; APPIAH, *THE ETHICS OF IDENTITY*, *supra* note 24, at 25; KWAME ANTHONY APPIAH, *COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS* (2006); ULRICH BECK, *COSMOPOLITAN VISION* (2006); CHARLES R. BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* 153 (1979); MICHAEL GREEN & IRIS MARION YOUNG, *CITIZENSHIP, INCLUSION AND DEMOCRACY* (Mitja Sardoc ed., 2006); Charles R. Beitz, *Bounded Morality: Justice and the State in World Politics*, 33 INT'L ORG. 405 (1979); Noah Feldman, *Cosmopolitan Law?*, 116 YALE L.J. 1022, 1056-71 (2007); Thomas W. Pogge, *Cosmopolitanism and Sovereignty*, 103 ETHICS 48, 51 & n.9 (1992); Thomas Pogge, *Rawls and Global Justice*, 18 CAN. J. PHIL. 227 (1988).

34. *ANOTHER COSMOPOLITANISM*, *supra* note 32, at 24 (citing IMMANUEL KANT, *PERPETUAL PEACE* 155-56 (M. Campbell Smith trans., 1st. ed. 1903) (1795)) (endorsing a world federation, which values republican self-governance, not world government, which would result in "soulless despotism"); see also NANCY FRASER, *SCALES OF JUSTICE: REIMAGINING POLITICAL SPACE IN A GLOBALIZING WORLD* 139 (2009) (discussing the critique that "new global institutions lack democratic accountability and serve the interests of the global elite."); ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 8-9 (2004) (discussing the "governance dilemma," namely that institutions are needed but potentially oppressive); IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* 236 (2000) ("Many people rightly distrust projects of cosmopolitan governance . . . on grounds of cultural homogenization or dangers of domination of some people by others. This chapter takes such suspicions seriously."); Thomas W. Pogge, *Cosmopolitanism and Sovereignty*, 103 ETHICS 48, 63 (1992) ("While a world state could lead to significant progress in terms of peace and economic justice, it also poses significant risks of oppression."). For an argument in favor of a world government, see LUIS CABRERA, *POLITICAL THEORY OF GLOBAL JUSTICE: A COSMOPOLITAN CASE FOR THE WORLD STATES* (1st. ed. 2004).



governance and embody cosmopolitan norms in different ways.<sup>35</sup> What Benhabib calls “cosmopolitan federalism” is the idea that “between the norms of international law and the actions of individual democratic legislatures, multiple ‘iterations’ are possible and desirable.”<sup>36</sup> As described more fully below, Benhabib uses the concept of iteration to describe how universal cosmopolitan norms translate in different ways into actual democracies.

This vision is both normative and descriptive: not only should states incorporate universal norms, such as human dignity and freedom of movement, into their positive law, but, over time, they increasingly do.<sup>37</sup> Benhabib saw “in the spread of the institutions of the European Union and the disaggregation of citizenship rights an advance toward legal and political cosmopolitanism.”<sup>38</sup> At the same time, she recognizes that the path toward cosmopolitanism is not perfect: “[i]n some cases, no normative learning may take place at all, but only a strategic bargaining among the parties.”<sup>39</sup> Moreover, there is always the risk that iterations will not work in the direction of cosmopolitanism. Societies sometimes reject cosmopolitanism and devolve into restrictionism and xenophobia, as is arguably the case in Europe and the United States today.<sup>40</sup>

For Benhabib, democracy thrives on a polity whose membership is constantly renegotiated and whose members have multiple and diverse democratic attachments at the national, subnational, and transnational levels. Critical to Benhabib’s political theory is her separation of a society’s *ethnos* from its *demos*. The *ethnos* is the core community that is bound together by a shared past and culture, whereas the *demos* is the broader group of society that has the right to vote and participate in political life.<sup>41</sup> Unlike communitarian liberals, Benhabib does not believe that democracy depends on the *ethnos* and the *demos* being coextensive.<sup>42</sup> Moreover, the boundaries of the *ethnos* and *demos* are fluid. The *demos* can be expanded, and the *ethnos* can, and should, “reconstitute[] itself in more universalistic

35. See, e.g., MARTHA C. NUSSBAUM, FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP 262 (2006) (state sovereignty “express[es] . . . human choice and autonomy”); Kwame Anthony Appiah, *Cosmopolitan Patriots*, 23 CRITICAL INQUIRY 617, 621 (1997) (cosmopolitanism “celebrates the fact that there are different local human ways of being”).

36. RIGHTS OF OTHERS, *supra* note 19, at 176.

37. *Id.* at 177 (making the descriptive claim that “[c]osmopolitan norms today are becoming embedded in the political and legal culture of individual polities”); see also DIGNITY IN ADVERSITY, *supra* note 20, at 22 (“Democratic iterations is a normative concept with empirical import.”); *id.* at 151 (“Democratic iterations provides us with an idealized account of political legitimacy” and the “concept has both an empirical and a normative component.”).

38. ANOTHER COSMOPOLITANISM, *supra* note 32, at 166.

39. *Id.* at 50; see also DIGNITY IN ADVERSITY, *supra* note 20, at 152 (the concept of democratic iterations “is concerned to analyze how real processes of democratic discourse within and across state boundaries can create or fail to create justification through legitimation” (italics removed)).

40. ANOTHER COSMOPOLITANISM, *supra* note 32, at 171; DIGNITY IN ADVERSITY, *supra* note 20, at 194 (urging us not to “forget the potential dystopias of our times”).

41. ANOTHER COSMOPOLITANISM, *supra* note 32, at 63 (explaining that the *ethnos* is “a community bound together by the power of shared fate, memories, solidarity, and belonging”).

42. *Id.* at 68 (“The constitution of ‘we, the people’ is a far more fluid, contentious, contested and dynamic process than either Rawlsian liberals or decline-of-citizenship theorists would have us believe.”).

terms.”<sup>43</sup> Over time, immigrants become part of the *ethnos*, simultaneously carrying on and reinventing the traditions of the *ethnos*.

Cosmopolitans take as a central focus “the predicament of the stranger” and the “accident of where one is born.”<sup>44</sup> For Benhabib, Kantian hospitality forms the basis of the duty that people have to outsiders.<sup>45</sup> People should be “fundamental[ly] . . . welcoming toward the other.”<sup>46</sup> At a minimum, hospitality requires that states give strangers temporary entry into a community if the denial of entry would cause the death of the stranger.<sup>47</sup> The widely accepted international law principle of nonrefoulement—the principle that states must not return people to countries where they would likely be persecuted—has roots in Kantian hospitality.

Benhabib theorizes not only about refugees but unauthorized entrants. As a matter of morality, she argues that people should strive for “‘infinite receptivity’ toward and respect in the face of the other.”<sup>48</sup> But she accepts that in the real world, “limits are set, boundaries are established and protected with violence.”<sup>49</sup> Although states can regulate their borders, they must not criminalize unauthorized entry because freedom of movement is a universal human right. Moreover, while states may currently have no obligation to permit non-refugee migrants to enter, once they are present, Benhabib urges that polities eventually incorporate them into the *demos* through amnesty.<sup>50</sup>

### A. The Paradox of Democratic Closure

Democracies must exclude to exist, at least according to standard cannons of liberal political theory.<sup>51</sup> But exclusion poses a paradox for democracies.<sup>52</sup> Two

43. ANOTHER COSMOPOLITANISM, *supra* note 32, at 174.

44. Noah Feldman, *Cosmopolitan Law?*, 116 YALE L.J. 1022, 1069 (2007).

45. ANOTHER COSMOPOLITANISM, *supra* note 32, at 107, 111 (referring to *To Perpetual Peace: A Philosophical Sketch*, in IMMANUEL KANT, PERPETUAL PEACE AND OTHER ESSAYS ON POLITICS, HISTORY, AND MORALS 11 (Ted Humphrey trans., 1983)).

46. *Id.* at 157.

47. *Id.* at 22 (citing Kant, who describes hospitality “as the right of an alien not to be treated as an enemy upon his arrival in another’s country. If it can be done without destroying him, he can be turned away; but as long as he behaves peaceably he cannot be treated as an enemy.” (quoting *To Perpetual Peace: A Philosophical Sketch*, in IMMANUEL KANT, PERPETUAL PEACE AND OTHER ESSAYS ON POLITICS, HISTORY, AND MORALS 11 (Ted Humphrey trans., 1983))).

48. *Id.* at 157.

49. *Id.*

50. *Id.* at 174 (discussing “the renegotiation of the boundaries between *ethnos* and *demos* such that the core nation reconstitutes itself in more universalistic terms . . . [including] provid[ing] amnesty for undocumented aliens”); DIGNITY IN ADVERSITY, *supra* note 20, at 149 (“It is unjust to deny eventual membership to anyone who has been absorbed into the civil society and market of a particular community for a certain period of time.”).

51. See Linda Bosniak, *Being Here: Ethical Territoriality and the Rights of Immigrants*, 8 THEORETICAL INQUIRIES L. 389, 396 (2007) (describing this phenomenon as “hard-on-the-outside and soft-on-the-inside”); Cristina M. Rodríguez, *The Citizenship Paradox in A Transnational Age*, 106 MICH. L. REV. 1111, 1125 (2008) (noting that “[Michael] Walzer, along with most liberal political theorists, assumes the democratic legitimacy of border closure”).

52. See, e.g., ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 119–31 (1989); Frederick G. Whelan, *Prologue: Democratic Theory and the Boundary Problem*, in NOMOS XXV: LIBERAL DEMOCRACY 13–47 (J. Ronald Pennock & John W. Chapman eds., 1983); see also LINDA BOSNIAK, THE CITIZEN AND THE

fundamental principles of democracy are that consenting members of the polity fashion the rules of governance and that these rules apply universally. However, actual democracies are born of historic contingencies, including wars, conquests, and arbitrary line drawing. Universality runs up against territoriality because the rights and privileges of membership exist only within a bounded community. Benhabib points to the lack of legitimacy at the heart of democracy: “The democratic people constitutes itself as sovereign over a territory only through such historically contingent processes, and these attest to the violence inherent in every act of self-constitution.”<sup>53</sup> Most insiders have not consented to the social contract and outsiders have no voice in determining the rules of exclusion. Democratic principles thus have little to do with determining who is a member and has a voice. As one might expect, the human rights regime reflects the paradox of closure. The Universal Declaration of Human Rights recognizes the right to leave a country but not the right to enter a country that is not one’s own.<sup>54</sup>

Democracy’s false claim to the universality of its principles leads some to question the morality of territorial boundaries. Joseph Carens, among others, argues that the inequality of opportunity that flows from the mere fact of one’s place of birth is arbitrary and unjustifiable.<sup>55</sup> For Benhabib, however, the paradox at the heart of democracy does not compel open borders, a position she rejects as utopian and as denying the pluralistic value of bounded, self-governing communities.<sup>56</sup> She instead argues for more porous borders: “While we can never eliminate the paradox that those who are excluded will not be among those who decide upon the rules of exclusion and inclusion, we can render these distinctions fluid and negotiable through processes of continuous and multiple democratic iterations.”<sup>57</sup> In her view,

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ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP (2006); CHANTAL MOUFFE, *THE DEMOCRATIC PARADOX* (2000).

53. RIGHTS OF OTHERS, *supra* note 19, at 175; *see also id.* at 175 (The “territorial delimitation [of democratic principles] involves war as well as conquest, negotiation as well as bargaining.”).

54. ANOTHER COSMOPOLITANISM, *supra* note 32, at 30 (noting “a series of internal contradictions between universal human rights and territorial sovereignty are built into the logic of the most comprehensive international law document in the world, [the Universal Declaration of Human Rights]”).

55. Joseph H Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. OF POL. 251 (1987) (employing Rawls’ “veil of ignorance” to analyze the application of distributive justice principles across borders); *see also* JOSEPH CARENS, *THE ETHICS OF IMMIGRATION* (2013); PHILLIP COLE, *PHILOSOPHIES OF EXCLUSION, LIBERAL POLITICAL THEORY AND IMMIGRATION* (2000); TERESA HAYTER, *OPEN BORDERS: THE CASE AGAINST IMMIGRATION CONTROLS* 149–72 (2000); SATVINDER SINGH JUSS, *INTERNATIONAL MIGRATION AND GLOBAL JUSTICE* (2006); THOMAS W. POGGE, *REALIZING RAWLS* (1989); JACQUELINE STEVENS, *STATES WITHOUT NATIONS: CITIZENSHIP FOR MORTALS* (2010); Arash Abizadeh, *Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders*, 36 POL. THEORY 37 (2008); Thomas Christiano, *Immigration, Political Community, and Cosmopolitanism*, 45 SAN DIEGO L. REV. 933, 954 (2008); Chandran Kukathas, *The Case for Open Immigration*, in *CONTEMPORARY DEBATES IN APPLIED ETHICS* 207–220 (Andrew I. Cohen & Christopher Heath Wellman eds., 2005). For an argument against applying distributive principles internationally, *see* DAVID MILLER, *AGAINST GLOBAL EGALITARIANISM* 55 (2005).

56. Treating migrants more favorably does not require a commitment to open borders. *See* KOK-CHOR TAN, *JUSTICE WITHOUT BORDERS: COSMOPOLITANISM, NATIONALISM, AND PATRIOTISM* 80 (2004); Veit-Michael Bader, *Fairly Open Borders*, in *CITIZENSHIP AND EXCLUSION* 28 (Veit-Michael Bader ed., 1997); Eric Cavallero, *An Immigration-Pressure Model of Global Distributive Justice*, 5 POL., PHIL. & ECON. 97 (2006).

57. RIGHTS OF OTHERS, *supra* note 19, at 177–78.

“potentially all practices of democratic closure are open to challenge, resignification, and deinstitutionalization.”<sup>58</sup> The balance between the competing democratic commitments of self-determination and universality can be refigured. Outsiders can become insiders.

Because the treatment of unauthorized entrants directly raises the conflict between universality and territoriality, Benhabib characterizes border issues as “crucial test[s] for the moral conscience as well as political reflexivity of liberal democracies.”<sup>59</sup> Globalization has intensified borders as sites of contestation where nations, primarily prosperous ones, assert their sovereignty and resist rights assertions by others. By increasing the free flow of capital and goods, globalization has reordered and sometimes decimated foreign economies, generating migratory flows from poorer countries to richer ones. Commentators have detailed the ways in which U.S. policy is implicated in the violence and economic pressures of Mexico and Central American countries.<sup>60</sup> More importantly for Benhabib, globalization has also called into question the viability of the nation state as a way of structuring the world.<sup>61</sup> Linda Bosniak has similarly observed, “territory itself no longer organizes social and political life in the determinative way it once did.”<sup>62</sup> People have developed layers of supranational and subnational attachments, including along ethnic lines.<sup>63</sup> Economic interdependence demands openness among states.<sup>64</sup> As Benhabib notes, there is “incongruity between the level of commercial, technological

58. *Id.* at 17.

59. SEYLA BENHABIB, *CLAIMS OF CULTURE* 177 (2002).

60. *See, e.g.,* Deborah Weissman & Chantal Thomas, *Labor Migration as an Unintended Consequence of Globalization in Mexico, 1980-2000*, in *SOCIAL REGIONALISM IN THE GLOBAL ECONOMY* 273 (Adelle Blackett et al. eds., 2011).

61. *See* Paul Schiff Berman, *Dialectical Regulation, Territoriality, and Pluralism*, 38 *CONN. L. REV.* 929, 932 (2006) (“Territoriality may be eroding as an organizing social force”); *id.* at 934 (“We can no longer think of communities as culturally unified groups naturally tied to a territory”). For discussions relating to globalization and cosmopolitanism, *see* GILLIAN BROCK, *GLOBAL JUSTICE: A COSMOPOLITAN ACCOUNT* 45–83 (2009); DAVID KINLEY, *CIVILISING GLOBALISATION* (2009); Anthony McGrew, *A Global Society?*, in *MODERNITY AND ITS FUTURES* 61–116 (Stewart Hall et al. eds., 1992).

62. Linda Bosniak, *Being Here: Ethical Territoriality and the Rights of Immigrants*, 8 *THEORETICAL INQUIRIES L.* 389, 409 (2007); *see also* FRASER, *supra* note 34, at 12–29 (discussing the “demise of Westphalian view” of sovereignty); ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 166 (2004) (discussing the “disaggregated world order, in which national government institutions rather than unitary states are the primary actors”).

63. LINDA BASCH, NINA GLICK SCHILLER & CRISTINA SZANTON BLANC, *NATIONS UNBOUND: TRANSNATIONAL PROJECTS, POSTCOLONIAL PREDICAMENTS, AND DETERRITORIALIZED NATION-STATES* (1994); Peggy Levitt, Josh DeWind & Steven Vertovec, *International Perspectives on Transnational Migration: An Introduction*, 37 *INT’L MIGRATION REV.* 565 (2003). *But see* Nancy Foner, *Engagements Across National Borders, Then and Now*, 75 *FORDHAM L. REV.* 2483, 2483 (2007) (“Contemporary immigrants . . . are not the first newcomers to live what scholars call transnational lives.”); Alejandro Portes, *Conclusion: Theoretical Convergences and Empirical Evidence in the Study of Immigrant Transnationalism*, 37 *INT’L MIGRATION REV.* 874 (2003) (arguing that transnationalism is a new analytical perspective not a new phenomenon); Jonathan Weinberg, *The End of Citizenship?* 107 *MICH. L. REV.* 931, 941 (2009) (arguing that “the phenomenon of immigrants maintaining active involvement in, and ties to, their homelands—is not a new thing”).

64. James F. Hollifield, Valerie F. Hunt & Daniel J. Tichenor, *Immigrants, Markets, and Rights: The United States as an Emerging Migration State*, 27 *WASH. U. J.L. & POL’Y* 7, 7 (2008). For a discussion of how the movement of people is not like the movement of goods, *see* Jennifer Gordon, *People Are Not Bananas: How Immigration Differs from Trade*, 104 *NW. U. L. REV.* 1109 (2010).

and functional interdependence of the world community on the one hand and the continuing role of sovereign statehood in defining the juridical status of individual human beings on the other.<sup>65</sup> While borders have always marked insiders from outsiders, this expressive function has become even more critical to countries like the United States as the saliency of sovereignty wanes in economic and social contexts. Some have theorized that the intensification of border controls, or “hypersovereignty,” “compensate[s] for [the] loss” of sovereignty.<sup>66</sup> Migration laws may represent the last “bastion” of sovereignty, to which globalization poses a challenge.<sup>67</sup>

## B. Discourse Theory

Benhabib shares intellectual roots with Jürgen Habermas. Both Habermas and Benhabib advance theories of “discourse ethics,” the idea that “only those norms and normative institutional arrangements are valid which can be agreed to by all concerned under special argumentation situations named discourses.”<sup>68</sup> Discourses require certain prerequisites, namely “the equality of each conversation partner,” the participants’ “symmetrical entitlement to speech acts,” and the “reciprocity of communicative roles—each can question and answer, bring new items to the agenda, and initiate reflection about the rules of discourse itself.”<sup>69</sup> Discourses contrast with other forms of communication where the conditions for deliberative dialogue are not present, such as “bargaining, cajoling, brainwashing, or coercive manipulation.”<sup>70</sup>

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65. ANOTHER COSMOPOLITANISM, *supra* note 32, at 175; *see also, e.g.*, SASKIA SASSEN, GUESTS AND ALIENS 133 (1999) (“National governments still have sovereignty over many matters, but they are increasingly part of a web of rights and regulations that are embedded in other entities – from EC institutions to courts defending the human rights of refugees.”); BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW LEGAL COMMON SENSE 167–68 (2d ed. 2002) (explaining that as “not only . . . an economic process, but also . . . a political and cultural one,” globalization has challenged the nation-state, which “appears to have lost its traditional centrality as the privileged unit of economic, social and political initiative.”); Linda Bosniak, *Being Here: Ethical Territoriality and the Rights of Immigrants*, 8 THEORETICAL INQUIRIES L. 389, 409 (2007) (“[T]erritoriality is beginning to fray . . . largely because territory itself no longer organizes social and political life in the determinative way it once did.”); Akhil Gupta, *The Song of the Nonaligned World: Transnational Identities and the Reinscription of Space in Late Capitalism*, in CULTURE, POWER, PLACE: EXPLORATIONS IN CRITICAL ANTHROPOLOGY 179, 196 (1997) (“[M]igration, displacement, and deterritorialization are, increasingly, sundering the fixed association between identity, culture, and place.”); James F. Hollifield, Valerie F. Hunt & Daniel J. Tichenor, *Immigrants, Markets, and Rights: The United States as an Emerging Migration State*, 27 WASH. U. J.L. & POL’Y 7, 14 (2008) (noting a “liberal paradox” as “the economic logic of liberalism is one of openness, but the political and legal logic is one of closure.”). *But see* Miles Kahler, *Territoriality and Conflict in an Era of Globalization*, in TERRITORIALITY AND CONFLICT IN AN ERA OF GLOBALIZATION 1, 2 (Miles Kahler & Barbara F. Walter eds., 2006) (“No universal shift in the location of governance has taken place. Rather, national governments, which have remained bounded territorial units, have adapted in order to retain the effectiveness and accountability demanded by their constituents.”).

66. WENDY BROWN, WALLED STATES, WANING SOVEREIGNTY 67 (2010).

67. CATHERINE DAUVERGNE, MAKING PEOPLE ILLEGAL 2 (2008). For a discussion of the Westphalian conception of the nation state, *see* CABRERA, *supra* note 34, at 72–73.

68. RIGHTS OF OTHERS, *supra* note 19, at 13 (citing JÜRGEN HABERMAS, MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION 66, 93 (Christian Lenhardt & Shierry Weber Nicholens trans., 1990)) (internal quotations omitted).

69. DIGNITY IN ADVERSITY, *supra* note 20, at 71 (emphasis removed).

70. *Id.*

While the difference in kind between discourse and strategic communication is critical to discourse theory, these forms of communication often intermix in practice.<sup>71</sup> At bottom, however, Benhabib contends that authentic discourses can, and do, occur in the classic venues of democratic government, including the courts and legislature, as well as in the media and in society at large.<sup>72</sup>

Universal cosmopolitan norms increasingly translate into actual democracies through a dynamic process Benhabib calls “democratic iteration.”<sup>73</sup> A term borrowed from Jacques Derrida, iteration signifies that meaning is not fixed, that each utterance generates new meaning.<sup>74</sup> As applied to the political sphere, the term connotes a discursive process through which democracies interpret and reinterpret universal norms, thereby giving them content.<sup>75</sup> Iterations are the multiple “processes whereby cosmopolitan norms and the will of democratic majorities can be reconciled, though never perfectly, through public argumentation and deliberation. . . .”<sup>76</sup> Benhabib describes iterations as dialectical because they involve the “interplay” between official political and legal institutions as well as the “unofficial public sphere of citizens’ actions and social movements.”<sup>77</sup> This process is “jurisgenerative.”<sup>78</sup> Official and civil society actors give specific content to

71. Telephone Interview with Seyla Benhabib, Professor of Political Sci. & Philosophy, Yale Univ. (Aug. 9, 2016).

72. See RIGHTS OF OTHERS, *supra* note 19, at 19–20 (contending that these discourses occur in real life and are not solely aspirational). See generally DIGNITY IN ADVERSITY, *supra* note 20, at 89 (discussing the difference in kind between “a de facto consensus” and “a rationally motivated one”) (emphasis removed). Benhabib describes iterations as “complex processes of public argument, deliberation, and exchange through which universalist rights claims are contested and contextualized, invoked and revoked, posited and positioned throughout legal and political institutions, as well as in the associations of civil society.” *Id.* at 16 (emphasis added). She states that these iterations “can take place in the ‘strong’ public bodies of legislatures, the judiciary and the executive, as well as in the informal and ‘weak’ publics of civil society associations and the media.” *Id.* at 112.

73. ANOTHER COSMOPOLITANISM, *supra* note 32, at 47–48.

74. *Id.* at 47 (citing Jacques Derrida, *Signature Event Context*, in LIMITED INC. (Samuel Weber & Jeffrey Mehlman trans., 1977)).

75. *Id.* at 159 (“When rights are appropriated by new political actors and filled with content drawing on experiences that could not have guided those rights in their initial formulation, they open up new worlds and create new meanings.”); see also DIGNITY IN ADVERSITY, *supra* note 20, at 73 (“The discourse of democracies . . . is necessarily caught in the tension generated by the context- and community-transcending validity dimension of human rights, on the one hand, and the historically formed, culturally generated, and socially shaped codifications and legislation of existing juridico-civil communities, on the other.”).

76. Seyla Benhabib, *Democracy, Demography, and Sovereignty*, 2 L. & ETHICS HUM. RTS. 8, 13 (2008).

77. ANOTHER COSMOPOLITANISM, *supra* note 32, at 163.

78. DIGNITY IN ADVERSITY, *supra* note 20, at 15 (internal quotations omitted). Benhabib adopts the term “jurisgenerative” from Frank Michelman, who, in turn, took it from Robert Cover. It refers to the law’s capacity to generate transformative, alternate meaning, even outside formal lawmaking procedures; see also Benhabib, *Claiming Rights Across Borders: International Human Rights and Democratic Sovereignty*, 103 AM. POL. SCI. REV. 691, 696 (2009) (defining “jurisgenerativity” as the law’s “capacity to create a normative universe of meaning that can often escape the ‘provenance of formal lawmaking,’” (citing Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 18 (1983))). Benhabib identifies her notion of iteration with Judith Resnik’s idea of the “migration” of international law norms “across state boundaries and institutional jurisdictions.” BENHABIB, *supra* note 20, at 112 (internal quotations omitted).

universal norms, and they do so through both “formal lawmaking” and informal processes that impart meaning to the law.<sup>79</sup> People become not only the “subjects” but the “authors” of the laws by which they are bound.<sup>80</sup> Cosmopolitanism, for Benhabib, thus does not consist of a static group of governing principles.<sup>81</sup> Rather, through the embrace of the flux of iteration, cosmopolitanism is “a negative ideal aimed at blocking false totalization.”<sup>82</sup> Benhabib discusses the French debate about headscarves in schools and the German controversy about extending voting rights to noncitizen residents as examples of “complex legal, political, and cultural phenomena through which democratic iterations have occurred.”<sup>83</sup>

### III. IMPRISONING FAMILIES

The United States has a long history of imprisoning immigrant families. Even when the national border was at its most permeable, the deprivation of people’s liberty figured prominently in U.S. immigration policy.<sup>84</sup> Ellis Island, long a symbol of America’s receptivity to the world’s “poor,” “tired,” and “huddled masses,” was also a site of unsettling state violence against newcomers seeking entry.<sup>85</sup> Immigrants, male and female, young and old, endured public probing of their naked bodies.<sup>86</sup> Those who were not immediately permitted to enter were detained, sometimes for lengthy periods of time.<sup>87</sup> Children, including young ones, were sometimes separated from family members during detention.<sup>88</sup> In a rare, candid account of conditions at Ellis Island, an official in charge described “so much filth and dirt on the floor that one would actually slip in the slime while walking, and yet little children were playing on the floor.”<sup>89</sup>

After relatively open U.S. borders became a thing of the past, detention centers served less as a place for entry screening and more as an ancillary to deportation from the interior or exclusion at the border. Families were not routinely detained. In the 1990s, some families were confined in questionable conditions in

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79. See DIGNITY IN ADVERSITY, *supra* note 20, at 15 (internal quotations omitted).

80. ANOTHER COSMOPOLITANISM, *supra* note 32, at 49.

81. See DIGNITY IN ADVERSITY, *supra* note 20, at 74 (distinguishing her approach from those of Martha Nussbaum and others, which “proceed from a philosophical view of human nature or agency to a specific schedule of rights”).

82. DIGNITY IN ADVERSITY, *supra* note 20, at 2 (internal quotations omitted) (citing David J. Depew, *Narrativism, Cosmopolitanism, and Historical Epistemology*, 14 CLIO 357, 375 (1985)).

83. RIGHTS OF OTHERS, *supra* note 19, at 181.

84. The United States’ detention of families has extended outside the immigration context. In the early 19<sup>th</sup> Century, authorities detained Native American families in military forts during their removal from their historic lands. During World War I and World War II, the United States detained families of U.S. citizens and immigrants of Japanese descent in internment camps.

85. EMMA LAZARUS, *THE NEW COLOSSUS* (1883).

86. RONALD H. BAYOR, *ENCOUNTERING ELLIS ISLAND: HOW EUROPEAN IMMIGRANTS ENTERED AMERICA* 48–49 (2014). Families were also detained at Angel Island on the west coast. *Id.* at 69.

87. *Id.* at 39–40.

88. *Id.* at 49–50, 84.

89. Frederick A. Wallis, *Treating Incoming Aliens as Human Beings*, 14 CURRENT HIST. 434, 442 (1921).

hotel rooms near the airport for days, weeks, or longer.<sup>90</sup> Outside U.S. territorial boundaries, U.S. authorities detained families that were part of mass exoduses. After the 1991 coup d'état in Haiti that toppled Jean Bertrand Aristide, U.S. authorities interdicted at sea and detained thousands of Haitian nationals, including families, at the U.S. naval base in Guantanamo, Cuba.<sup>91</sup> Families who were part of the 1994 exodus from Cuba were also detained at Guantanamo.<sup>92</sup> In early 2001, immigration authorities converted a former nursing home in Berks County, Pennsylvania into Berks County Family Residential Center, the first dedicated family detention center.<sup>93</sup> While families detained at Berks were kept together, immigration authorities detained some children apart from their parents at other locations.<sup>94</sup>

After the post-September 11 expansion of immigration law enforcement, U.S. officials increasingly invoked their authority to detain and separate children from their parents. A 2005 report of the U.S. House of Representatives expressed concern about the practice of separating children—"even as young as nursing infants"—from their parents.<sup>95</sup> The House Committee directed the Department of Homeland Security (DHS) "to release families or use alternatives to detention such as the Intensive Supervised Appearance Program whenever possible."<sup>96</sup> The Committee further stated that "[w]hen detention of family units is necessary, the Committee directs DHS to use appropriate detention space to house them together."<sup>97</sup> Rather than expand alternatives to detention for families, however, DHS embarked on its first experiment with large-scale family detention. In May 2006, the Department contracted with Williamson County, Texas to open the T. Don Hutto Residential Center, a former medium-security prison in Taylor, Texas run by the Corrections Corporation of America.

With the capacity to hold over 500 women, men, and children, Hutto was the first large-scale U.S. family detention center. Government officials described the facility as "represent[ing] a clear departure from historical detention settings."<sup>98</sup>

90. See WOMEN'S COMM'N FOR REFUGEE WOMEN AND CHILDREN, *BEHIND LOCKED DOORS: ABUSE OF REFUGEE WOMEN AT KROME DETENTION CENTER* 8 (2000), <https://www.womensrefugeecommission.org/joomlatools-files/docman-files/krome.pdf>.

91. HUMAN RIGHTS WATCH, *HAITI: HUMAN RIGHTS AFTER PRESIDENT ARISTIDE'S RETURN* (vol. 7, no. 11, Oct. 1995), <https://www.hrw.org/reports/1995/Haiti3.htm>.

92. Mireya Navarro, *Last of Refugees from Cuba in '94 Flight Now Enter U.S.*, N.Y. TIMES (Feb. 1, 1996), <http://www.nytimes.com/1996/02/01/world/last-of-refugees-from-cuba-in-94-flight-now-enter-us.html>; see also Silvia Pedraza, *Cuba's Revolution and Exodus*, 5 J. INT'L INST. (1998), <http://hdl.handle.net/2027/spo.4750978.0005.204>.

93. *Family Immigration Detention: Why the Past Cannot be Prologue*, COMMISSION ON IMMIGRATION (Am. Bar Ass'n), Jul. 31, 2015, at 13, [https://www.americanbar.org/content/dam/aba/publications/commission\\_on\\_immigration/FINAL%20ABA%20Family%20Detention%20Report%208-19-15.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/FINAL%20ABA%20Family%20Detention%20Report%208-19-15.authcheckdam.pdf) (explaining that with only 84 beds, the Berks facility has only limited capacity, although a planned expansion would double its capacity).

94. See *infra* note 95 and accompanying text.

95. H.R. REP. NO. 109-79, at 12 (2005).

96. *Id.*

97. *Id.*

98. Press Release, Immigration and Customs Enf't (Nov. 7, 2011), <http://www.ice.gov/factsheets/facilities-hutto>; see also *Family Residential Standards*, U.S. IMMIGR. &



Detained families enjoyed what the government described as “free and open movement, recreational and educational participation, food services and medical and mental health care.”<sup>99</sup> Advocates painted a very different picture.<sup>100</sup> They reported that families were imprisoned in small cells with two twin bunks and an exposed toilet, usually for 11-12 hours a day.<sup>101</sup> Children were required to wear prison uniforms and had limited access to fresh air.<sup>102</sup> Guards disciplined the children by threatening to separate them from their parents.<sup>103</sup> Medical, mental health, and dental care were inadequate, as was the children’s access to schooling.<sup>104</sup>

In 2007, advocates alleged that the government’s detention of children at Hutto violated the terms of the 1997 settlement agreement in *Flores v. Meese*, a case that had established ground rules for detaining children.<sup>105</sup> The consent decree requires that children be released when possible and that any detention be in the least restrictive setting.<sup>106</sup> The government settled the legal challenge and, in late 2009, the Obama Administration announced new detention priorities and agreed to halt detaining children at the prison.<sup>107</sup> Large-scale detention of families was in hiatus until the summer of 2014.

CUSTOMS ENFORCEMENT, <https://www.ice.gov/detention-standards/family-residential/> (last visited Oct. 26, 2016).

99. Press Release, Immigration and Customs Enf’t (Nov. 7, 2011), <http://www.ice.gov/factsheets/facilities-hutto>.

100. See generally Margaret Talbot, *The Lost Children*, THE NEW YORKER (Mar. 3, 2008), <http://www.newyorker.com/magazine/2008/03/03/the-lost-children> (describing the conditions at the T. Don Hutto Residential Center).

101. Complaint for Declaratory and Injunctive Relief at 16–17, *Bunikyte v. Chertoff*, No. A-07-CA-164-SS, 2007 WL 1074070 (W.D. Tex. 2007), <http://www.clearinghouse.net/chDocs/public/IM-TX-0005-0001.pdf>.

102. *Id.* at 3.

103. *Id.*

104. See *id.* at 3, 20.

105. *Id.* at 1–2, 4 (proposing three “humane and cost-effective” alternatives to Hutto: “the Intensive Supervision Assistance Program, a program that utilizes electronic monitoring as a way to supervise immigrants released into the community, and for which Congress *specifically allocated funding*,” the Casa San Juan, “a 24-hour care facility run by Catholic Charities in San Diego, with which the U.S. Marshal Service has a contract,” and Casa Marianella, a refugee home in Austin, Texas (emphasis in original)); see also Settlement Agreement, *Flores v. Meese*, 942 F.2d 1352 (1991) (No. 88-6249), [https://www.aclu.org/files/pdfs/immigrants/flores\\_v\\_meese\\_agreement.pdf](https://www.aclu.org/files/pdfs/immigrants/flores_v_meese_agreement.pdf).

106. Complaint for Declaratory and Injunctive Relief at 2, *Bunikyte v. Chertoff*, No. A-07-CA-164-SS, 2007 WL 1074070 (W.D. Tex. 2007), <http://www.clearinghouse.net/chDocs/public/IM-TX-0005-0001.pdf>. The judge in the case said he found “it inexplicable that [the government has] spent untold amounts of time, effort and taxpayer dollars to establish the Hutto family-detention program, knowing all the while that *Flores* is still in effect.” *Bunikyte v. Chertoff*, No. A-07-CA-164-SS, 2007 WL 1074070, at \*8 (W.D. Tex. Apr. 9, 2007).

107. Settlement Agreement, *In re Hutto Family Detention Center*, No. 1:07-CV-00164-SS (W.D. Tex. Aug. 26, 2007), consolidated with *Bunikyte v. Chertoff*, No. A-07-CA-164-SS, 2007 WL 1074070 (W.D. Tex. Apr. 9, 2007), [https://www.aclu.org/sites/default/files/field\\_document/hutto\\_settlement.pdf](https://www.aclu.org/sites/default/files/field_document/hutto_settlement.pdf), DORA SCHIRRO, IMMIGRATION AND CUSTOMS ENF’T, DEP’T OF HOMELAND SEC., IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS (Oct. 6, 2009), <https://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf>.

#### IV. CONTAINING THE “SURGE” OF FAMILIES

In 2012, the number of people seeking unauthorized entry across the U.S.-Mexico border was on the upswing.<sup>108</sup> In the fall of 2013, the White House received information that tens of thousands of unaccompanied minors and families from Central America would seek to cross the border in the summer of 2014.<sup>109</sup> As many as 16,000 women with their children started arriving on a monthly basis.<sup>110</sup> Many communities reacted with an outpouring of support for the migrants.<sup>111</sup> However, some journalists portrayed the women and children as threats to our health and security, calling them gang members and drug dealers and suggesting that they carried diseases and could facilitate the entry of terrorists.<sup>112</sup> Reacting in line with this media message, one group of people in Southern California demonstrated against federal buses carrying migrants, forcing the buses to turn around.<sup>113</sup> The Ku Klux Klan stated that the border crossers were a threat to the “white homeland” and anti-immigrant militia experienced a surge in membership.<sup>114</sup>

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108. From January 2012 to March 2012, the number of apprehensions at the southwest U.S.- Mexico border jumped from 25,714 apprehensions to 42,218. U.S. CUSTOMS AND BORDER PROT., FY 2000-FY 2015, BP TOTAL MONTHLY APPS BY SECTOR AND AREA (2015), <https://www.cbp.gov/sites/default/files/documents/BP%20Total%20Monthly%20Apps%20by%20Sector%20and%20Area,%20FY2000-FY2015.pdf>.

109. NAT'L CTR. FOR BORDER SEC. AND IMMIGRATION, UNIV. OF TEX. AT EL PASO, UNACCOMPANIED ALIEN CHILDREN PROJECT (Mar. 20 2014), <http://www.scribd.com/doc/233623001/National-Center-for-Border-Security-Final-Report-March-20-2014>.

110. *U.S. Border Arrests of Children, Families Surge 52% in August*, WALL STREET J. (Sept. 21, 2015), <http://www.wsj.com/articles/u-s-border-arrests-of-children-families-surge-52-in-august-1442884799>.

111. For example, Governor Patrick of Massachusetts stated that he was “deeply moved by the outpouring of support” of over 1,600 people for children who crossed the border fleeing violence and he pledged his state’s willingness to help. Steve Annear, *Massachusetts Will Not House Children Fleeing Central America*, BOS. MAG. (Aug. 5, 2014, 5:27 PM), <http://www.bostonmagazine.com/news/blog/2014/08/05/immigrant-children-massachusetts-governor-patrick/>; see also *2 Massachusetts Facilities Offered to Shelter Illegal Immigrant Kids*, WCVB BOS. (July 18, 2014, 5:25 PM), <http://www.wcvb.com/news/patrick-no-final-decision-on-sheltering-migrants/27013260>.

112. Esther Yu Hsi Lee, *Lawmakers Say Migrant Children Are Diseased, Should Be Denied Shelter*, THINK PROGRESS, <http://thinkprogress.org/immigration/2014/07/11/3456878/are-central-american-child-refugees-bringing-in-diseases/> (last updated July 11, 2014).

113. Michael Martinez & Holly Yan, *Showdown: California Town Turns Away Buses of Detained Immigrants*, CNN (July 3, 2014, 9:47 AM), <http://www.cnn.com/2014/07/02/us/california-immigrant-transfers/>.

114. Keegan Hanks, *KKK Joins Immigration Debate With Calls for “Corpses” on the Border*, SOUTHERN POVERTY L. CTR., <https://www.splcenter.org/hatewatch/2014/07/31/kkk-joins-immigration-debate-calls-corpses-border> (last updated July 30, 2014).

### A. “No Bond” Policy

On May 12, 2014, DHS Secretary Johnson announced that the Department had reached its limit to deal with the situation,<sup>115</sup> and the White House appointed the Federal Emergency Management Agency to coordinate the response to the increased migratory flow.<sup>116</sup> U.S. authorities responded with unyielding detention practices, quickly converting part of a training camp for federal officers in the remote town of Artesia, New Mexico into a temporary facility to hold 700 women and children as families.<sup>117</sup> In June 2014, a senior government official told reporters visiting the facility that “the goal is to process the immigrants and have them deported within 10 to 15 days to send a message back to their home countries that there are consequences for illegal immigration.”<sup>118</sup> Asylum officers engaged in rapid-paced screenings of the women’s claims for asylum.<sup>119</sup> Of the 952 women and children who passed through the temporary Artesia detention center between the end of June 2014 and the beginning of October 2014, 306 were deported.<sup>120</sup> The deportations slowed considerably after volunteer attorneys and law students mobilized to represent the

115. See Press Release, U.S. Dep’t of Homeland Sec., Written Testimony of DHS Secretary Jeh Johnson for a House Committee on Homeland Security Hearing Titled “Dangerous Passage: The Growing Problem of Unaccompanied Children Crossing the Border” (June 24, 2014), <http://www.dhs.gov/news/2014/06/24/written-testimony-dhs-secretary-jeh-johnson-house-committee-homeland-security>.

116. Press Release, U.S. Dep’t of Homeland Sec., Statement by Secretary Johnson on Increased Influx of Unaccompanied Immigrant Children at the Border (June 2, 2014), <http://www.dhs.gov/news/2014/06/02/statement-secretary-johnson-increased-influx-unaccompanied-immigrant-children-border>; Press Release, The White House, The Obama Administration’s Government-Wide Response to Influx of Central American Migrants at the Southwest Border (Aug. 1, 2014), <https://www.whitehouse.gov/the-press-office/2014/08/01/obama-administration-s-government-wide-response-influx-central-american->.

117. Press Release, U.S. Dep’t of Homeland Sec., Fact Sheet: Artesia Temporary Facility for Adults with Children in Expedited Removal (June 20, 2014), <https://www.dhs.gov/news/2014/06/20/fact-sheet-artesia-temporary-facility-adults-children-expedited-removal#>. Immigration authorities closed down the temporary Artesia Residential Family Center on December 15, 2014. See Alicia A. Caldwell, *U.S. to Close Family Detention Center in New Mexico*, BOS. GLOBE (Nov. 19, 2014), <https://www.bostonglobe.com/news/nation/2014/11/18/close-family-detention-center-new-mexico/OATfFczRA0PzRGRn5i659O/story.html>; Jeremy Redmon, *ICE to Close Controversial Immigration Detention Center in New Mexico*, ATLANTA J. CONST. (Nov. 18, 2014), <http://www.myajc.com/news/state-regional-govt-politics/ice-to-close-controversial-family-immigration-dete/nh9hj/>.

118. Juan Carlos Llorca, *Fed Says They Will Expedite Deportations to 10-15 Days at N.M. Facility*, SEATTLE TIMES (June 26, 2014), <http://www.seattletimes.com/nation-world/fed-says-they-will-expedite-deportations-to-10-15-days-at-nm-facility/>.

119. *Family Immigration Detention: Why the Past Cannot be Prologue*, COMMISSION ON IMMIGRATION (Am. Bar Ass’n), Jul. 31, 2015, at 20, [https://www.americanbar.org/content/dam/aba/publications/commission\\_on\\_immigration/FINAL%20ABA%20Family%20Detention%20Report%208-19-15.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/FINAL%20ABA%20Family%20Detention%20Report%208-19-15.authcheckdam.pdf) (reporting that “attorneys reported that critical government screening interviews . . . were conducted by government officials at a pace of no fewer than 20 interviews a day, seven days a week” and that attorneys characterized Artesia as “ground zero for the evisceration of due process” (internal quotations and citations omitted)).

120. Melinda Henneberger, *When an Immigration Detention Center Comes to a Small Town*, WASH. POST (Oct. 1, 2014), <http://www.washingtonpost.com/news/storyline/wp/2014/10/01/when-an-immigration-detention-center-comes-to-a-small-town/>.

women in late July. With lawyers, the pace of removals fell 80 percent within one month and within two months it had fallen 97 percent.<sup>121</sup>

In immigration court, lawyers for the United States argued for no bond or a prohibitively high bond by citing national security concerns.<sup>122</sup> The government contended that permitting bond would encourage migration and human smuggling, which diverts resources needed elsewhere “to deal with other threats to public safety, including national security threats.”<sup>123</sup> Government attorneys also directly linked the migrants and national security, arguing that a no-release or high bond policy would give the government time to “screen the detainees and have a better chance of identifying any present threats to our public safety and national security.”<sup>124</sup> At no point, however, did the government allege that any of the women and children, as individuals, constituted a threat to national security. After legal advocates challenged the national security argument in U.S. district court, the government pledged not to take general deterrence into account when making release decisions regarding the surge families.<sup>125</sup>

In August 2014, immigration authorities started detaining women and children at Karnes County Civil Detention Center in Karnes City, Texas, a private detention center with 608 beds that was designed to hold adults.<sup>126</sup> Four months later, officials opened the nation’s largest immigration detention center, the South Texas Family Residential Center, in the remote town of Dilley, Texas.<sup>127</sup> The new massive

121. Stephen Manning, *Ending Artesia*, INNOVATION LAW LAB (Dec. 20, 2014) <https://innovationlawlab.org/the-artesia-report-story/>.

122. *R.I.L.-R v. Johnson*, 80 F. Supp. 3d 164, 175–76 (D.D.C. 2015). In this case, the declarations of high-ranking immigration officials confirmed that implementation of “no bond” or “high bond” policies were intended to reduce the migration of Guatemalans, Hondurans, and Salvadorans to the United States. See Department of Homeland Security’s Submission of Documentary Evidence, (Aug. 7, 2014), <http://www.aila.org/infonet/dhs-blanket-policy-no-release>. In support of this position, the government’s lawyers cited to a Board of Immigration Appeals decision. See *In re D-J-*, 23 I. & N. Dec. 572, 581 (B.I.A. 2003) (upholding a general deterrence rationale in an individual bond hearing). The government asserted that the families were motivated to come to the United States because they did not think that they would be detained, or detained for very long. Declaration of Philip T. Miller, ¶¶ 9, 14, <http://nationofimmigrants.wp.lexblogs.com/wp-content/uploads/sites/224/2014/12/ICE-Bond-copy.pdf>.

123. Declaration of Philip T. Miller, *supra* note 122, ¶ 13.

124. *Id.* ¶ 14.

125. Press Release, U.S. Immigration and Customs Enft, ICE Announces Enhanced Oversight for Family Residential Centers (May 13, 2015), <https://www.ice.gov/news/releases/ice-announces-enhanced-oversight-family-residential-center>. See generally, *R.I.L.-R v. Johnson*, 80 F. Supp. 3d 164, 176 (D.D.C. 2015).

126. See Press Release, U.S. Immigration and Customs Enft, ICE Opens Its First-Ever Designed-and-Built Civil Detention Center (Mar. 13, 2012), <http://www.ice.gov/news/releases/ice-opens-its-first-ever-designed-and-built-civil-detention-center> (the detention center was “designed to house adult, male, low-risk, minimum security detainees.”). Officials changed the name to the Karnes Residential Center once families began to be detained at the facility. Karnes is slated to expand its capacity to 1,158. Press Release, The GEO Group, The GEO Group Announces 626-Bed Expansion of the Karnes County Residential Center in Texas (Dec. 19, 2014), <http://www.businesswire.com/news/home/20141219005408/en/GEO-Group-Announces-626-Bed-Expansion-Karnes-County>.

127. The express purpose of the Center was “to increase [the government’s] capacity to detain and expedite the removal of adults with children who illegally crossed the Southwest border.” See Press Release, U.S. Immigration and Customs Enft, ICE’s New Family Detention Center in Dilley, Texas to Open in December (Nov. 17, 2014), <https://www.ice.gov/news/releases/ices-new-family-detention-center-dilley-texas-open-december>.

detention center is a private prison built and operated by the Corrections Corporation of America, the largest for-profit prison company in the world.

Between July 2014 and the end of May 2015, the height of the “surge,” immigration authorities detained 6,381 women and children.<sup>128</sup> Approximately 58 percent were eventually released and 687 were removed.<sup>129</sup> Of the 1,835 women and children who remained detained at the end of May 2015, 74 percent had been detained less than 30 days and 15 percent had been detained between 30 and 59 days.<sup>130</sup>

## B. Detention Conditions

U.S. immigration authorities defend their family detention centers as “effective and humane,” stating that they “operate in an open environment, which includes medical care, play rooms, social workers, educational services, and access to legal counsel.”<sup>131</sup> Opponents argue that the only humane solution is to end family detention entirely.<sup>132</sup> When Democrats from the U.S. House of Representatives visited the border detention centers in June 2015, they characterized the facilities “prison camps,” described one of the family detention centers as “more locked down than juvenile jails,” and reported that the children were suffering “terrible psychological damage” from being detained.<sup>133</sup> One hundred thirty six members of the House of Representatives and 35 Senators publicly oppose family immigration detention.<sup>134</sup> The American Academy of Pediatrics “express[ed] . . . concern[] for the health and well-being of children and mothers who are being detained in family

128. Press Release, U.S. Immigration and Customs Enft, ICE Statement (June 23, 2015), [http://www.ksat.com/news/ice-statement\\_2015073008401534](http://www.ksat.com/news/ice-statement_2015073008401534).

129. *Id.*

130. *Id.*

131. Press Release, U.S. Immigration and Customs Enft, ICE’s New Family Detention Center in Dilley, Texas to Open in December (Nov. 17, 2014), <https://www.ice.gov/news/releases/ices-new-family-detention-center-dilley-texas-open-december>.

132. See HUMAN RIGHTS FIRST, FAMILY DETENTION STILL HAPPENING, STILL DAMAGING 4 (Oct. 2015), <http://www.humanrightsfirst.org/sites/default/files/HRF-family-detention-still-happening.pdf> (recommending that the “Obama Administration . . . end family detention once and for all.”). On May 15, 2015, Senator Reid stated that “[e]nding family detention is the only answer,” after federal authorities announced that they would improve oversight over family detention but would not end it. Press Release, Harry Reid, Senate Minority Leader, U.S. Senate, Senator Reid Statement on Administration’s Decision to Review Family Detention Policies (May 15, 2015), <http://www.aila.org/infonet/senator-reid-statement-review-family-detention>.

133. Michael Oleaga, *Immigration Reform News: House Democrats’ Concern of Immigrant ‘Prison Camps’ in Texas Continues*, LATIN POST (Jun. 25, 2015, 2:05 PM) <http://www.latinpost.com/articles/61946/20150625/immigration-reform-news-house-democrats-deep-concern-immigrant-prison-camps.htm>. The Inter-American Commission on Human Rights, after a visit of some of its Commissioners to McAllen, Harlingen, and Karnes in 2014, expressed “concern[] over allegations of sexual, physical, and verbal abuse by U.S. border officials committed while migrant and refugee children and families are in [U.S.] custody as well as the inadequate detention conditions at border and port of entry stations and family immigration detention centers.” Inter-Am. Comm’n H.R., *supra* note 7, at 10.

134. See HUMAN RIGHTS FIRST, *supra* note 132, at 5.

detention centers in Texas and Pennsylvania.”<sup>135</sup> According to the American Bar Association, family detention “violates applicable laws, standards, and human rights norms.”<sup>136</sup> The United Nations High Commissioner for Refugees and Inter-American Commission on Human Rights have urged the United States to cease detaining families.<sup>137</sup>

Advocates allege that the family detention centers suffer from the same problems as prior ones.<sup>138</sup> The Karnes facility operates like a prison, with heavy security, limited visitation, body counts, and strict rules and schedules.<sup>139</sup> Detainees allege that they have been sexually assaulted and denied medical care for serious

135. Letter from Sandra G. Hassink, President, Am. Academy of Pediatrics, to Jeh Johnson, Sec’y, U.S. Dep’t of Homeland Sec. (July 24, 2015), <https://www.aap.org/en-us/advocacy-and-policy/federal-advocacy/Documents/AAP%20Letter%20to%20Secretary%20Johnson%20Family%20Detention%20Final.pdf>; see also Kronick et al., *Asylum-Seeking Children’s Experiences of Detention in Canada: A Qualitative Study*, 85 AM. J. OF ORTHOPSYCHIATRY 287, 292 (2015) (“any incarceration, even under relatively safe conditions, is damaging for immigrant children, especially those with high levels of previous trauma exposure”); Allen S. Keller & Amanda K. Winchester, NYU Ctr. for Health and Human Rights, *Health Impact of Family Immigration Detention: A Case Study*, in HUMAN RIGHTS FIRST, FAMILY DETENTION STILL HAPPENING, STILL DAMAGING 18 (Oct. 2015), <http://www.humanrightsfirst.org/sites/default/files/HRF-family-detention-still-happening.pdf>.

136. See Am. Bar Ass’n, *supra* note 3, at 6 (referring to the three remaining family detention centers in Karnes City, Dilley, and Berks County). The American Bar Association has called for DHS not to renew its contracts with the Karnes, Dilley, and Berks detention centers. *Id.* at 6. The American Bar Association Civil Immigration Detention Standards state that children should not be detained except as a last resort. *Id.* at 32.

137. See UNHCR, *supra* note 7, at 9 (stating that “[d]eprivation of liberty must be a last resort used only after individualized determination, and the best interests of the child must guide all actions taken in regard to children.”). The UNHCR guidelines say that children “should in principle not be detained at all.” United Nations High Comm’r for Refugees, *Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention*, at 34 (2012) [hereinafter *Guidelines*]. The Inter-American Commission on Human Rights has “urge[d] the [United States] to end its practice of automatic and arbitrary immigration detention of families.” Inter-Am. Comm’n H.R., *supra* note 7, at 11. With respect to adult asylum seekers, the Office of the United Nations High Commissioner for Refugees has interpreted the Convention on Refugees as requiring “that the detention of asylum-seekers should be a measure of last resort with liberty being the default position.” *Guidelines, supra*, at 13. The United States’ policy of detaining asylum seekers has fallen under heavy international criticism. The United Nations Working Group on Arbitrary Detention has stated that “detention shall be the last resort and permissible only for the shortest period of time.” Rep. of U.N. Working Group on Arbitrary Detention, ¶ 67, U.N. Doc. A/HRC/10/21 (Feb. 16, 2009), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G09/110/43/PDF/G0911043.pdf?OpenElement>.

138. See Ian Gordon, *Inside Obama’s Family Deportation Mill*, MOTHER JONES (Dec. 19, 2014, 7:15 AM), <http://www.motherjones.com/politics/2014/12/family-detention-artesia-dilley-immigration-central-america>; Hylton, *supra* note 14; Tierney Sneed, *New Immigrant Detention Centers Have Old Problems*, U.S. NEWS (Oct. 30, 2014, 5:35 PM), <http://www.usnews.com/news/articles/2014/10/30/immigrant-detention-centers-in-texas-new-mexico-have-old-problems-report-finds>.

139. See RANJANA NATARAJAN ET AL., REPORT REGARDING GRAVE RIGHTS VIOLATIONS IMPLICATED IN FAMILY IMMIGRATION DETENTION AT THE KARNES COUNTY DETENTION CENTER 11–12 (2014), [https://law.utexas.edu/wp-content/uploads/sites/11/2015/04/2014-10-IC-IACHR\\_Karnes\\_Report.pdf](https://law.utexas.edu/wp-content/uploads/sites/11/2015/04/2014-10-IC-IACHR_Karnes_Report.pdf); see also Ed Pilkington, *‘Soul-Destroying’: One Migrant Mother’s Story of Life at Dilley Detention Center*, THE GUARDIAN (May 22, 2015), <http://www.theguardian.com/us-news/2015/may/22/immigrant-mothers-dilley-family-detention-center-texas>.

conditions.<sup>140</sup> Some women attempted suicide.<sup>141</sup> Women and children have filed complaints under the Federal Tort Claims Act alleging serious abuse while detained.<sup>142</sup>

Critics report that many of the women and children have suffered severe and long-term effects from being detained, including post-traumatic stress disorder, major depressive disorder, and persistent depressive disorder.<sup>143</sup> Women have reported a range of different effects on their children, including weight loss, crying at night, insomnia, nightmares, aggression, disobedience, separation anxiety, bed-wetting, headaches, and diarrhea.<sup>144</sup> The effects are particularly acute for those women and children who have suffered trauma in their home country or in crossing the border.<sup>145</sup>

An advocate's report on conditions at the temporary detention center in Artesia stated that 88 percent of the women and children detained at that facility suffered from post-traumatic stress disorder and several children engaged in self-harm.<sup>146</sup> One attorney described many of the children at Artesia as "gaunt" and

140. Detainees alleged that officials sexually abused them late at night and in the early morning and that they kissed, fondled, and groped them in front of other detainees, including children. See Letter from Marisa Bono, Staff Attorney, Mexican Am. Legal Def. & Educ. Fund, to Jeh Johnson, Sec'y, U.S. Dep't of Homeland Sec. (Sept. 30, 2014), [http://www.maldef.org/assets/pdf/2014-09-30\\_Karnes\\_PREA\\_Letter\\_Complaint.pdf](http://www.maldef.org/assets/pdf/2014-09-30_Karnes_PREA_Letter_Complaint.pdf); Marisa Bono, Staff Attorney, Mexican Am. Legal Def. & Educ. Fund, PREA and Complaints of Sexual Abuse at ICE Karnes Facility, at 2 (Jan. 30, 2015), [http://www.usccr.gov/OIG/Marisa\\_Bono\\_WrittenStatement\\_FINAL.pdf](http://www.usccr.gov/OIG/Marisa_Bono_WrittenStatement_FINAL.pdf); Maurice Chammah, *Long Shorts and Baggy Shirt*, THE MARSHALL PROJECT (Apr. 17, 2015, 5:19 PM), <https://www.themarshallproject.org/2015/04/17/long-shorts-and-baggy-shirts>. The Department of Homeland Security investigated the allegations and found that they were unsubstantiated. See Memorandum from John Roth, Inspector Gen., Office of the Inspector Gen., to Jeh C. Johnson, Sec'y, U.S. Dep't of Homeland Sec. (Jan. 7, 2015), [https://www.oig.dhs.gov/assets/Mga/OIG\\_mga-010715.pdf](https://www.oig.dhs.gov/assets/Mga/OIG_mga-010715.pdf).

141. See Franco Ordoñez & Sandra Cuffe, *Teen Mom Who Attempted Suicide Speaks Out After Deportation*, MCCLATCHYDC (June 17, 2015, 2:50 PM), <http://www.mcclatchydc.com/news/national/world/national/article25186393.html>.

142. See Roque Planas, *Detainees in Family Detention File \$10M In Medical Neglect Claims*, HUFFINGTON POST (Aug. 12, 2015, 7:32 PM), [http://www.huffingtonpost.com/entry/detainees-in-family-detention-file-for-10m-in-damage-claims\\_55ca5b85e4b0f73b20baf282?kvcommref=mostpopular](http://www.huffingtonpost.com/entry/detainees-in-family-detention-file-for-10m-in-damage-claims_55ca5b85e4b0f73b20baf282?kvcommref=mostpopular); *Migrants Were Allegedly Abused, Neglected, and Traumatized*, THINK PROGRESS (Aug. 11, 2015), <http://thinkprogress.org/immigration/2015/08/11/3690253/10-million-tort-migrant-women-detention/>; Letter from R. Andrew Free, to Office of the Gen. Counsel, U.S. Dept. of Homeland Sec. (Aug. 10, 2015), <https://cbpabusestest2.files.wordpress.com/2015/09/10m-ftca-complaint-on-behalf-of-5-mothers-andrew-free.pdf> (administrative Federal Tort Claim Act claims); see also Allie Yee, *Conditions at For-Profit Immigrant Detention Facilities in Texas Draw Legal Action*, FACING SOUTH (Feb. 19, 2015), <https://www.facingsouth.org/2015/02/conditions-at-for-profit-immigrant-detention-facil>.

143. See HUMAN RIGHTS FIRST, *supra* note 132, at 8–9; see also UNIV. OF ARIZONA, UNSEEN PRISONERS: A REPORT ON WOMEN IN IMMIGRATION DETENTION FACILITIES IN ARIZONA 23 (2009). Human Rights First reports that doctors who met with families in immigration detention concluded that "family detention cannot be implemented in a way that does not jeopardize the mental well-being of children and their parents." HUMAN RIGHTS FIRST, *supra* note 132, at 8.

144. See HUMAN RIGHTS FIRST, *supra* note 132, at 9.

145. See *id.* (noting that "[m]any of these asylum seekers are survivors of domestic violence and have experienced a number of severe, life threatening traumas during their lives, including early childhood physical, sexual, and emotional abuse.").

146. See Manning, *supra* note 121.

“malnourished” and “really sick.”<sup>147</sup> Mothers reportedly held children, “even the older ones, . . . like babies.”<sup>148</sup> Some were “screaming and crying” and some were “lying there listlessly.”<sup>149</sup> Another attorney said she saw a mother bottle-feeding her seven-year-old.<sup>150</sup> Detainees said they were made to sleep eight to a room and that there was little opportunity for exercise or stimulation.<sup>151</sup> Artesia had a classroom for the children to attend school, but it only operated sporadically.<sup>152</sup>

Legal advocates have filed complaints on behalf of 32 families with DHS’s Office of Civil Rights and Civil Liberties and the Office of Inspector General alleging inadequate medical and mental health care at Dilley, one of the permanent family detention centers.<sup>153</sup> In June 30, 2015, advocacy groups filed a complaint with the Department of Homeland Security’s Office of Civil Rights and Civil Liberties detailing the “psychological harm caused when mothers and children seeking asylum in the U.S. are detained in jail-like facilities.”<sup>154</sup> The complaint contained documentation from mental health professionals who evaluated the women and children.<sup>155</sup>

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147. Hylton, *supra* note 14.

148. *Id.*

149. *Id.*

150. *See id.*

151. *See id.*

152. *See id.*

153. *See* Letter from Lindsay M. Harris, Michelle N. Mendez, Karen S. Lucas, and Amy Fischer, CARA Pro Bono Project, to Megan Mack, Off. of C.R. and C.L., Dep’t of Homeland Sec., and John Roth, Off. of Inspector Gen., Dep’t of Homeland Sec. (Oct. 6, 2015) (on file with Am. Immigr. Lawyers Ass’n); *see also* Letter from Karen Lucas, Katharina Obser, and Beth Werlin from American Immigr. Lawyers Association, Women’s Refugee Commission, and American Immigration Council, to Megan Mack, Off. of C.R. and C.L., Dep’t of Homeland Sec. (June 30, 2015) (on file with American Immigration Lawyers Association).

154. Press Release, Am. Immigration Lawyers Ass’n, Traumatizing Impact of Family Detention on Mental Health of Children and Mothers (Jun. 30, 2015), <http://www.aiala.org/advo-media/press-releases/2015/impact-family-detention-mental-health>.

155. Concerns about medical care at Dilley include the accidental overdosing of children with an adult hepatitis A vaccine. Over a period of five days in early July 2015, detention officials gave approximately 250 children an adult dose of hepatitis A vaccine. *See* Press Release, Am. Immigration Council, Vaccine Overdose to Detained Children Another Sign that Family Detention Must End (Jul. 4, 2015), <http://www.americanimmigrationcouncil.org/newsroom/release/vaccine-overdose-detained-children-another-sign-family-detention-must-end>. Detention officials reportedly “dragged [children] from their beds at 4:00 am to be given shots while their mothers . . . st[ood] helplessly by without being told what is going on or being allowed a say in the matter.” *Id.* An advocate spoke with a mother of a child who had received shots who reported that “her 4-year-old was feverish, not eating, having trouble walking and complaining of the pain in his leg.” Amy Martyn, *Texas Immigrant Prison Accidentally Gave a Bunch of Kids an Adult Strength Vaccine*, THE DALLAS OBSERVER (July 9, 2015, 1:33 PM), <http://www.dallasobserver.com/news/texas-immigrant-prison-accidentally-gave-a-bunch-of-kids-an-adult-strength-vaccine-7381479>.



### C. The June 24, 2015 Policy Change

About the same time that advocates filed the complaints with DHS's Office of Civil Rights and Civil Liberties and the Office of Inspector General, the United States announced that it would back away from its hardline approach to family detention. On June 24, 2015, Secretary Johnson stated that he would make "substantial changes" to family detention and that the United States would stop holding families who had passed their initial asylum interviews in "long-term detention."<sup>156</sup>

This announcement came four months after advocates had commenced litigation seeking to enforce the *Flores* consent decree, the same agreement that formed the basis of the 2007 challenge to the Hutto family detention center.<sup>157</sup> The action alleged that Dilley and Karnes were not accredited to detain children and that children were not being released as required by *Flores*. On July 24, 2015, a month after the Secretary declared the policy shift on family detention, the U.S. district court issued a preliminary injunction finding that the *Flores* consent decree unambiguously applies to all children and ordered the government to comply with the settlement provisions "without unnecessary delay."<sup>158</sup>

While the large-scale, long-term detention of families may be, for now, a thing of the past, the United States continues to detain large numbers of families until the completion of their initial asylum screenings, usually about twenty days. Advocates allege that the government is dragging its feet on complying with the district court order under *Flores* and that twenty days is still too long for the families to be detained.<sup>159</sup> Immigration authorities subject most released women to electronic surveillance through ankle bracelets and put their cases on special rocket dockets in immigration court. If the women are ordered removed, authorities prioritize their re-

156. Gamboa, *supra* note 2.

157. The motion to enforce *Flores* was filed on February 2, 2015. *Flores v. Lynch*, No. CV 85-04544 DMG, 2015 LEXIS 112911, at \*24, (C.D. Cal. Aug. 21, 2015), *aff'd in part, rev'd in part*, No. 15-56434, 2016 U.S. App. LEXIS 12439 (9th Cir. July 6, 2016). The government defended its actions by arguing that *Flores* only applies to unaccompanied children. See Hylton, *supra* note 14 (quoting a government lawyer as saying that "[t]he *Flores* settlement comes into play with unaccompanied minors [only]").

158. Order Re Plaintiffs' Motion to Enforce Settlement of Class Action and Defendants' Motion to Amend Settlement Agreement at 24–25, *Flores v. Lynch*, No. CV 85-04544 DMG, 2015 LEXIS 112911, (C.D. Cal. Aug. 21, 2015), *aff'd in part, rev'd in part*, No. 15-56434, 2016 U.S. App. LEXIS 12439, (9th Cir. July 6, 2016); *Flores*, 2015 LEXIS 112911, at \*24. The order mandates that an accompanying parent can only be detained if there is a significant flight risk or public safety threat that cannot be mitigated by alternatives to detention like bond and supervision. In the case of an emergency or influx of children where there is no licensed facilities and no suitable adult to whom to release a child, the court order permits the government to extend the detention of the child beyond five days. But the government must seek to release the child "as expeditiously as possible." The U.S. Court of Appeals for the Ninth Circuit upheld this part of the judge's order. *Flores v. Lynch*, No. 15-56434, 2016 U.S. App. LEXIS 12439, at \*7, \*28, (9th Cir. July 6, 2016). The U.S. Commission on Civil Rights urged the Administration to comply with the U.S. District Court's order. See Letter from U.S. Comm'n on Civil Rights, to President Obama, (Sept. 11 2015), [http://www.usccr.gov/press/2015/PR\\_Flores\\_Letter\\_9-11-15.pdf](http://www.usccr.gov/press/2015/PR_Flores_Letter_9-11-15.pdf).

159. Advocates state that the government routinely holds children longer than five days in detention and forty percent of families are still detained for longer than twenty days. Officials take the position that children are eligible for release with their parent only after the parent passes a credible fear interview and that the asylum office backlog in credible and reasonable fear interviews has made it difficult to release the families within five days, as the court in *Flores* has ordered.

detention and deportation. Women who do not pass the initial asylum screening are detained until they are deported, a process that can take many months or over a year.<sup>160</sup> In protest of their lengthy detention, some detained women have engaged in hunger strikes.<sup>161</sup> Moreover, despite disavowing general deterrence as a justification for family detention, the government persisted in arguing in the *Flores* enforcement action in court that family detention “dis-incentivizes future surges of families crossing the Southwest order,” a claim that the district court judge characterized as “speculative at best, and, at worst fear-mongering.”<sup>162</sup>

The United States continues to jail approximately 2,000 women and their children on any given day. This high rate of family detention occurs in the midst of what critics have dubbed an incarceration “binge” in the United States.<sup>163</sup> The daily average number of people in immigration detention has grown from 6,600 in 1996 to over 26,000 in 2015.<sup>164</sup> In 2013, the United States detained a total of more than 440,000 people in over 250 facilities, including private prisons and county jails.<sup>165</sup> Per capita, this rate of civil detention is the highest in the world.<sup>166</sup> The federal government spends about \$1.84 billion a year on immigration detention, approximately \$159 a day per every detained noncitizen.<sup>167</sup> Detaining families is

160. HUMAN RIGHTS FIRST, LONG-TERM DETENTION OF MOTHERS AND CHILDREN IN PENNSYLVANIA (Aug. 19, 2016), <http://www.humanrightsfirst.org/sites/default/files/HRF-Long-Term-Detention-Brief.pdf>.

161. See Renée Feltz, *Mothers at US Immigration Center on Hunger Strike to Protest Year in Custody*, THE GUARDIAN (Aug. 15, 2016), <https://www.theguardian.com/us-news/2016/aug/15/immigration-women-hunger-strike-pennsylvania-berks-county>.

162. Defendants’ Response to the Court’s Order to Show Cause Why the Remedies Set Forth in the Court’s July 24, 2015 Order Should Not Be Implemented at 24, *Flores v. Lynch*, No. CV 85-04544 DMG, 2015 LEXIS 112911, (C.D. Cal. Aug. 21, 2015), *aff’d in part, rev’d in part*, No. 15-56434, 2016 U.S. App. LEXIS 12439, (9th Cir. July 6, 2016); *Flores*, 2015 LEXIS 112911, at \*19.

163. See generally JAMES AUSTIN, IT’S ABOUT TIME: AMERICA’S IMPRISONMENT BINGE (2011); see also Robyn Sampson & Grant Mitchell, *Global Trends in Immigration Detention and Alternatives*, 1 J. ON MIGRATION & HUMAN SEC. 97, 100-101 (2013) (“comparing other countries’ rates of immigration detention to the United States”).

164. Michelle Ye Hee Lee, *Clinton’s Inaccurate Claim That Immigrant Detention Facilities Have a Legal Requirement to Fill Beds*, WASH. POST (May 15, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/05/15/clintons-inaccurate-claim-that-immigrant-detention-facilities-have-a-legal-requirement-to-fill-beds/> (stating that the “average daily detainee population in fiscal 2015 was 26,374, according to DHS”); see *INS Deportation, Detention, MIGRATION NEWS* (June 1998), <https://migration.ucdavis.edu/mn/more.php?id=1547>.

165. Migration & Refugee Serv., U.S. Conf. of Catholic Bishops & Ctr. for Migration Studies, *Unlocking Human Dignity: A Plan to Transform the Immigrant Detention System*, 3 J. ON MIGRATION & HUM. SEC. 159, 162,169 (2015); see generally, JOHN F. SIMANSKI, U.S. DEP’T OF HOMELAND SEC., IMMIGRANT ENFORCEMENT ACTIONS: 2013, ANNUAL REPORT 1 (Sept. 2015), [http://www.dhs.gov/sites/default/files/publications/ois\\_enforcement\\_ar\\_2013.pdf](http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf).

166. See *United States Immigration Detention Profile*, GLOBAL DETENTION PROJECT, <http://www.globaldetentionproject.org/countries/americas/united-states/introduction.html> (last updated Sept. 2016) The United States maintains the largest immigration detention infrastructure in the world. An official Immigration and Customs Enforcement database, obtained under the Freedom of Information Act, showed a U.S. detainee population of 32,000 on the evening of January 25, 2009. *Id.*

167. DR. DORA SCHIRRO, U.S. DEP’T OF HOMELAND SEC., IMMIGRATION AND CUSTOMS ENF’T, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 10 (2009), <http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf>; JOHN F. SIMANSKI, U.S. DEP’T OF HOMELAND SEC., IMMIGRANT ENFORCEMENT ACTIONS: 2012, ANNUAL REPORT (Dec. 2013),

more costly at approximately \$266 per person a day.<sup>168</sup> Much of the funding for detention goes to private prison companies.<sup>169</sup>

The United States' penchant for immigration detention cannot be explained by high levels of unauthorized border crossings. Even during the height of the 2014-2015 flow of Central American families into the United States, unauthorized crossings in the aggregate were at an annual rate of 480,000, a historic low since the 1970s.<sup>170</sup> Moreover, the number of border crossers in the family and unaccompanied minor migration since 2014 pales in comparison to unauthorized migratory flows into other countries. For example, the civil war in Syria has forced over four and a half million people to seek refuge in neighboring countries.<sup>171</sup> In Turkey alone, the number of displaced Syrians is approximately 2.5 million.<sup>172</sup> In Lebanon, Syrians

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[http://www.dhs.gov/sites/default/files/publications/ois\\_enforcement\\_ar\\_2012\\_1.pdf](http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2012_1.pdf), *The Math of Immigration Detention: Runaway Costs for Immigration Detention Do Not Add Up to Sensible Policies*, NAT'L IMMIGRATION FORUM (Aug. 22, 2013), <http://immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf> ("This funding level would amount to \$5 million per day spent on immigration detention or \$159 per day per person."). The United States, "spends more on immigration enforcement agencies than on all its other principal criminal federal law enforcement agencies combined." DORIS MEISSNER ET AL., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 9 (2013), <http://www.migrationpolicy.org/research/immigration-enforcement-united-states-rise-formidable-machinery>.

168. Press Release, U.S. Senate Comm. on Appropriations, Chairman Mikulski Releases Summary of Emergency Supplemental Funding Bill (Jul. 23, 2014), <http://www.appropriations.senate.gov/news/minority/chairwoman-mikulski-releases-summary-of-emergency-supplemental-funding-bill>; see also, AM. CIVIL LIBERTIES UNION, ALTERNATIVE TO IMMIGRATION DETENTION: LESS COSTLY AND MORE HUMANE THAN FEDERAL LOCK-UP, [https://www.aclu.org/sites/default/files/assets/aclu\\_atd\\_fact\\_sheet\\_final\\_v2.pdf](https://www.aclu.org/sites/default/files/assets/aclu_atd_fact_sheet_final_v2.pdf). Human Rights First estimates that family detention will cost the government over \$400 million a year if it proceeds with its plan to expand family detention beds to 3,700. HUMAN RIGHTS FIRST, *supra* note 132, at 5. The New York Times reported that a government funded study "of more than 500 detainees between 1997 and 2000, found that 93 percent will appear in court when placed in a monitoring program" and that "[t]he savings of such a program for the 2,400 detainees at Dilley would be about \$250 million per year." Wil S. Hylton, *The Shame of America's Family Detention Camps*, N.Y. TIMES (Feb. 4, 2015), <http://www.nytimes.com/2015/02/08/magazine/the-shame-of-americas-family-detention-camps.html>.

169. See *The Influence of the Private Prison Industry in Immigration Detention*, DETENTION WATCH NETWORK (May 2011), <http://www.detentionwatchnetwork.org/privateprisons> (reporting that in 2009 forty-nine percent of immigration detainees were held in private detention centers); see also Cristina Parker et al., *For Profit Family Detention: Meet the Private Prison Corporations Making Millions by Locking Up Refugee Families*, GRASSROOTS LEADERSHIP (Oct. 2014), <http://grassrootsleadership.org/reports/profit-family-detention-meet-private-prison-corporations-making-millions-locking-refugee#1>.

170. Press Release, Dept. of Homeland Sec., Statement by Secretary Johnson Regarding Today's Trip to Texas, (Dec. 15, 2014), <http://www.dhs.gov/news/2014/12/15/statement-secretary-johnson-regarding-today%E2%80%99s-trip-texas> (also stating that unauthorized crossings peaked in 2000 at 1.6 million).

171. *Syrian Regional Refugee Response*, REGIONAL REFUGEE AND RESILIENCE PLAN (Sept. 26, 2016), <http://data.unhcr.org/syrianrefugees/regional.php> (last updated Sept. 26, 2016).

172. *Syrian Regional Refugee Response Turkey*, REGIONAL REFUGEE AND RESILIENCE PLAN, <http://data.unhcr.org/syrianrefugees/country.php?id=224> (last updated Sept. 26, 2016). The United States has offered to resettle 10,000 Syrian refugees for fiscal year 2016 and has given \$4.5 billion in aid to help with the Syrian refugee crisis. Gardiner Harris, David E. Sanger & David M. Herszhanhorn, *Obama Increases Number of Syrian Refugees for Resettlement to 10,000*, N.Y. TIMES (Sept. 10, 2015), <http://www.nytimes.com/2015/09/11/world/middleeast/obama-directs-administration-to-accept-10000-syrian-refugees.html>; Carol Morello, *U.S. Gives \$419 Million More to Aide Syrian Refugees*, WASH. POST

fleeing the civil war compose approximately 20 percent of the country's population.<sup>173</sup> In contrast, the approximate 300,000 Central American families and unaccompanied minors who have entered the United States since January 2014 constitute a mere .08 percent of the total U.S. population.<sup>174</sup>

## V. TERRITORIALITY, UNIVERSALITY, IDENTITY

The United States' shifting decisions regarding detention of Central American families reflect the fundamental democratic tension identified by Benhabib between the commitment to universal principles, such as human dignity and freedom of movement, and the necessity of maintaining sovereignty through a territorial boundary. Government officials initially propounded a strong message that the United States would enforce its borders by detaining the families until their claims were processed, asserting "we will send you back."<sup>175</sup> In contrast, the decision to cease the long-term detention of families that had made an initial showing of asylum refigured the balance between respecting the universal principle of human dignity and enforcing the border, tipping the nation toward the former. The significant scaling back of long-term detention of immigrant families aligns with the cosmopolitan view that people should not be criminalized for moving across borders between countries.

At the height of the border crossings in 2014, the United States brought to bear the full force of its massive law enforcement apparatus, spending \$340,746 per day on the detention of women and children.<sup>176</sup> In Benhabib's terms, the families—as "poor migrant[s]"—"bec[ame] the symbol of the continuing assertion of sovereignty."<sup>177</sup> The extraordinary lengths taken by the United States to enforce its territoriality are apparent from its decision to engage in the large-scale detention of a vulnerable and non-threatening population. Because children, particularly young ones, are viewed as innocents, the action of detaining them represents a radical assertion of sovereign control, with consequences beyond the harm to those detained.

The national security rationale advanced by lawyers representing the United States to justify the detention of women and their children further illustrates the brazen nature of the government's position. The fact that the government for many months maintained a national security rationale to justify "no" or "high" bond detention of families demonstrates the extreme lengths to which the United States

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(Sept. 21, 2015), [https://www.washingtonpost.com/world/national-security/us-gives-419-million-more-to-aid-syrian-refugees/2015/09/21/7f0157c6-607e-11e5-8e9e-dce8a2a2a679\\_story.html](https://www.washingtonpost.com/world/national-security/us-gives-419-million-more-to-aid-syrian-refugees/2015/09/21/7f0157c6-607e-11e5-8e9e-dce8a2a2a679_story.html).

173. *Syria's Refugee Crisis in Numbers*, AMNESTY INT'L (Feb. 3, 2016), <https://www.amnesty.org/en/latest/news/2016/02/syrias-refugee-crisis-in-numbers/>.

174. See *United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016*, U.S. CUSTOMS AND BORDER PROTECTION, <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016> (last updated Sept. 9, 2016).

175. Press Release, Jeh Johnson, Sec'y, Dep't of Homeland Sec., Statement Before the Senate Committee on Appropriation (July 10, 2014), <https://www.dhs.gov/news/2014/07/10/statement-secretary-homeland-security-jeh-johnson-senate-committee-appropriations>.

176. NAT'L IMMIGRANT JUSTICE CENTER, COSTLY FAMILY DETENTION DENIES JUSTICE TO MOTHERS AND CHILDREN (Aug 2014), <http://grassrootsleadership.org/sites/default/files/uploads/Family%20Detention%20Factsheet.pdf>.

177. DIGNITY IN ADVERSITY, *supra* note 20, at 102.

was willing to go to assert its sovereignty and further entrenched the country's carceral approach to resolving social and political challenges.

Detention, even under decent conditions, banishes people to living what Giorgio Agamben has called "bare life" and dehumanizes the jailed and the jailer alike.<sup>178</sup> But the danger of detention is not simply that it imperils the dignity of both the victim and the perpetrator. Rather, the fear is that, over time, the violence becomes normalized, transforming into commonsense.<sup>179</sup> It seems logical, even inevitable, that thousands of children and their mothers should be jailed for having tried to enter the country unlawfully.<sup>180</sup>

But the tough talk and mass detention of poor Central American families did more than privilege sovereignty over human dignity. The actions also proclaimed U.S. national identity as middleclass and white rather than economically diverse and multicultural.<sup>181</sup> As Benhabib has noted, "[m]igrations are the site of intense conflicts over . . . identities."<sup>182</sup> While U.S. officials conveyed concern about people, especially children, making the dangerous journey to cross the border, the subtext to their message was that the arriving families were unwelcome lawbreakers. Detention, especially when conducted on a large scale, communicates that the group characteristics of the people detained are deviant or undesirable. The hyperincarceration of poor black men in the criminal justice system marks young black men as a group as potential deviants. The detention of poor Latinos similarly stigmatizes all Latinos as having questionable immigration status. As the Inter-American Commission on Human Rights has recognized, "immigration detention . . . works to criminalize migration, which has multiple, negative effects on the protection of migrants' rights and society's perception of migrants, and may encourage xenophobia."<sup>183</sup> The detention of children conveys a particularly potent message: the deviancy must be particularly severe to justify the government's overriding of its normal, protective stance towards children.

178. GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* 174 (Daniel Heller-Roazen trans., 1998) (referring to the detention of immigrants as establishing a "camp" marked by the existence of "bare life").

179. See generally Jacques Rancière, *The Aesthetic Dimension: Aesthetics, Politics, Knowledge*, *CRITICAL INQUIRY*, Autumn 2009, at 3, 11.

180. The harms of our carceral nation are considerable. For discussion of the collateral consequences of criminal hyperincarceration, see generally Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CAL. L. REV. 1023 (2010); Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457 (2010); Dorothy E. Roberts, *Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement*, 34 U.C. DAVIS L. REV. 1005 (2001); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004). For discussion of the collateral consequences of both criminal and civil hyperincarceration, see Rebecca Sharpless, "Immigrants Are Not Criminals": *Respectability, Immigration Reform, and Hyperincarceration*, 53 HOUS. L. REV. 101, 119–32 (2016).

181. States "exert[] absolute control over its borders, in the name of identity, or community, or simple power." DAUVERGNE *supra* note 67, at 37.

182. DIGNITY IN ADVERSITY, *supra* note 20, at 102.

183. Inter-Am. Comm'n H.R., *Refugees and Migrants in the United States: Families and Unaccompanied Children*, at 9, OAS/Ser.L/V/II.155 (July 24, 2015), <http://www.oas.org/en/iachr/reports/pdfs/Refugees-Migrants-US.pdf>.

The relabeling of the women and children as illegal entrants not only required abstraction and dehumanization. It relied on, and perpetuated, a racial and class message. When the United States detains thousands of poor Central American women and children, it projects a national image of middleclass whiteness. The image of poor and dark-skinned detainees stands in implicit contrast with a national image of whiteness. One need look no further than the conservative news media coverage for the express articulation of this subterranean imagery. As discussed above, some of the media coverage portrayed the women and children as gang members, drug dealers, and threats to national security and public health.<sup>184</sup> The protest against migrants being bused into a California town also sent the message that the border crossers were unwelcome strangers.<sup>185</sup> The racial coding of the “surge” was also apparent in the reinvigoration of extreme anti-immigrant groups that had been active during the debate surrounding immigration reform ten years earlier. The surge prompted people to join militias and the Ku Klux Klan issued a statement that the border crossers threatened the “white homeland.”<sup>186</sup> The United States’ position on family detention thus aligned with, and reinforced, the expressly racial statements and imagery of the far political right.

### A. Insiders Versus Outsiders

The United States’ strong message of exclusion was also significant for what it took as a silent premise: that the current members of the polity, acting through the executive branch, could legitimately exclude this latest group of outsiders. While this assumption is by no means extraordinary, it became clear that government’s definition of insiders who constitute the polity included not only U.S. citizens and lawful permanent residents but also undocumented immigrants who had entered the country before January 1, 2014.

The decision to engage in the large-scale and lengthy detention of families classified as outsiders was driven in part by the White House’s desire to be viewed as tough on immigration enforcement in order to shore up popular support for the legalization of people already inside the United States. At the time of the surge, the Administration had implemented Deferred Action for Childhood Arrivals, an administrative program to give temporary permission to remain in the United States, and a work permit, to people who had arrived before they were sixteen.<sup>187</sup> Immigration officials also had begun to exercise prosecutorial discretion to refrain

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184. Esther Yu-His Lee, *Lawmakers Say Migrant Children Are Diseased, Should Be Denied Shelter*, THINK PROGRESS (July 11, 2014), <http://thinkprogress.org/immigration/2014/07/11/3456878/are-central-american-child-refugees-bringing-in-diseases/>.

185. Michael Martinez & Holly Yan, *Showdown: California Town Turns Away Buses of Detained Immigrants*, CNN (July 3 2014), <http://www.cnn.com/2014/07/02/us/california-immigrant-transfers/>.

186. Keegan Hanks, *KKK Joins Immigration Debate with Calls for ‘Corpses’ on the Border*, SOUTHERN POVERTY L. CTR. (July, 30 2014), <https://www.splcenter.org/hatewatch/2014/07/31/kkk-joins-immigration-debate-calls-corpses-border>.

187. *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Aug. 03, 2015), <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca>.

from deporting people considered low priorities for removal.<sup>188</sup> Republicans blamed the White House for being lax on law enforcement and for broadcasting a message that undocumented youth would be treated leniently.<sup>189</sup> In June 2014, in the midst of the border surge, the Republican-controlled House Judiciary Committee held a hearing entitled “An Administration-Made Disaster.”<sup>190</sup> A driving force behind the decision to detain families en masse was thus to rebut the charge that the United States was slack on immigration enforcement and signal that unauthorized newcomers would be subject to the full force of U.S. deportation law.<sup>191</sup>

To engender support for its programs to permit groups of already present undocumented people to stay (and its push for eventual legislative reform), the White House reacted to the surge of border crossers by drawing a bright line between outsiders and insiders, namely the newcomers and those already here. The decision to detain and engage in expedited deportations of women and children amounted to the political theater of marking these recent entrants as outsiders. The insider/outsider distinction could not have been clearer when Secretary Johnson announced:

Our new policies therefore draw a sharp distinction between past and future. Those who came here illegally in the past, have been here for years, have committed no serious crimes, and have become integrated members of American life, are not priorities for removal. But, all those who came here illegally after Jan. 1, 2014, in other words, beginning of this year, are now priorities for

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188. Memorandum from Jeh Charles Johnson, Sec’y, Dep’t of Homeland Sec., on Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants to the U.S. Immigration and Customs Enforcement, U.S. Customs and Border Protection, and U.S. Citizenship and Immigration Services, (Nov. 20, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf).

189. House Speaker John Boehner declared the surge a “humanitarian disaster” encouraged by the Obama administration’s actions. Letter from Speaker John Boehner, U.S. Congress, House of Representative, to President Obama (Jun. 20, 2014), <http://www.speaker.gov/sites/speaker.house.gov/files/06-20-14-Letter-to-POTUS-on-Border-Crisis.pdf>. House Judiciary Chairman Bob Goodlatte issued a statement blaming President Barack Obama’s “lax immigration enforcement policies” for the crisis. Statement from Patrick Leahy, U.S. Senate Committee on the Judiciary, Hearing on Oversight of the Department of Homeland Security (Apr. 28, 2015), <http://www.judiciary.senate.gov/meetings/oversight-of-the-department-of-homeland-security>; Statement from Chuck Grassley, U.S. Senate Committee on the Judiciary, Hearing on Oversight of the Department of Homeland Security (Apr. 28, 2015), Arizona Governor Jan Brewer sent a letter to congressional leaders blaming the crisis on Obama’s “refusal to enforce our nation’s immigration laws” and urging them to “take action, get answers and stop the lawlessness that is unfolding.” *Brewer to Obama: Stop ‘Unconscionable’ Policy of Dumping Illegal Immigrants in Ariz. Cities*, FOX NEWS (June 3, 2014), <http://www.foxnews.com/politics/2014/06/03/brewer-to-obama-stop-unconscionable-policy-dumping-illegal-immigrants-across/>.

190. *An Administration Made Disaster: Hearing on the South Texas Border Surge of Unaccompanied Alien Minors*, H.R. Comm. on the Judiciary, 113th Cong. Sess. 2, (2014), <https://judiciary.house.gov/hearing/hearing-an-administration-made-disaster/>.

191. The White House blamed rumors in Central America that new childhood arrivals would qualify for the administrative program of 2012 granting deferred action and sent the Vice President to Central America to correct the message. Sahil Kapur, *White House: New Child Migrants Won’t Get Legal Status*, TPM (June 16, 2014), <http://talkingpointsmemo.com/dc/white-house-child-migrants-wont-get-legal-status>.

removal to their home countries. This must be clear going forward: Our borders are not open to illegal migration.<sup>192</sup>

The Secretary thus called for treating newcomers harshly in the hopes that the nation would accept those already here as members of the polity.<sup>193</sup> Although pre-January 1, 2014 undocumented immigrants are not citizens, or even lawful permanent residents, they enjoy some form of insider status as eligible to stay in the United States as a matter of prosecutorial discretion.<sup>194</sup> In Benhabib's terms, Johnson was laying the groundwork to extend the *demos*. But he was doing it by excluding the families who had arrived after the January 2014 date.

The "insider" cut-off date illustrates Benhabib's insights regarding the paradox of democratic closure and the contingency of insider and outsider status. While the arbitrariness of the January 1, 2014 date is readily apparent, what is less obvious is that the membership distinction drawn by this date is similar to historic events that have conferred membership in the past. The history of the United States is the story of an immigrant founder whose taking of power later becomes shrouded in the legitimacy of the law.<sup>195</sup> The United States thus lacks a principled way of distinguishing among today's surge families, pre-January 1, 2014 unlawful entrants, and non-Native American U.S. born citizens. From this point of view, Secretary Johnson's message "we will send you back" is an expression of coercive power to detain and deport, exercised by people whose status as insiders is as historically contingent as the "outsider" status of the women and children.

The paradox of democratic closure thus contains a prescription. It destabilizes strong claims to exclusion, teaching us to aspire to looking upon outsiders with "infinite receptivity," to react with skepticism to strong insider/outsider claims, and to understand all such claims as contestable and contingent.<sup>196</sup> In the context of family detention, the paradox suggests that we should act as if today's detained women and children may be tomorrow's members of the *demos* and, eventually, the *ethnos*.<sup>197</sup>

## B. Discourse Theory In Action?

Having argued that the dialing back of family detention represented a rebalancing of the competing concerns of universality and territoriality, I here consider whether rationale dialogue was the driving force behind the policy shift. As explained above, Benhabib posits that discourse in the form of "argument, contestation, revision, and rejection" within U.S. legal and political institutions and in civil society is the engine that should (and often does) drive democratic change.<sup>198</sup>

192. Press Release, Dept. of Homeland Sec., Statement by Secretary Johnson Regarding Today's Trip to Texas (Dec. 15, 2014), <http://www.dhs.gov/news/2014/12/15/statement-secretary-johnson-regarding-today%E2%80%99s-trip-texas> (also stating that unauthorized crossings peaked in 2000 at 1.6 million).

193. See *id.*

194. See Memorandum from Jeh Charles Johnson, *supra* note 188.

195. See generally BONNIE HONIG, *DEMOCRACY AND THE FOREIGNER* (2003).

196. ANOTHER COSMOPOLITANISM, *supra* note 32, at 157.

197. See HIROSHI MOTOMURA, *IMMIGRATION OUTSIDE THE LAW* (2014) (discussing the view that undocumented immigrants are "Americans in waiting").

198. BENHABIB, *RIGHTS OF OTHERS*, *supra* note 19, at 181.



As discussed below, the shift in family detention may have been partially the result of this type of discourse. But strategic bargaining and dynamics of power and resistance were decisive.<sup>199</sup>

*i. Democratic Dialogue*

Democratic dialogue played a role in the retreat from long-term family detention. Senate and House Democrats began an important public discourse regarding family detention. From the earliest moments of the surge, Democratic leaders were vocal about treating the border crossers with dignity. On July 9, 2014, the U.S. Senate Committee on Homeland Security and Governmental Affairs held a hearing on the situation at the border.<sup>200</sup> Senator Dianne Feinstein compared the U.S. government's treatment of the unaccompanied minors and families to the American refusal to accept Jewish refugees from Nazi Germany aboard the *MS St. Louis*.<sup>201</sup> In May 15, 2015, Senator Reid issued the unequivocal statement that "[e]nding family detention is the only answer," after immigration officials said they would improve oversight over family detention but would not end it.<sup>202</sup> His words reflected a concern with human dignity: "[d]etaining mothers and their children who are fleeing extreme poverty, persecution, abuse and violence is unacceptable and goes against our most fundamental values."<sup>203</sup> In the summer of 2015, a group of House Democrats embarked on highly publicized trips to the detention centers and held a Congressional hearing on family detention that was widely covered in the press.<sup>204</sup>

Discussion of the harms of family detention in the media may also have influenced U.S. government officials. For example, in February 2015, the *New York Times Magazine* featured a lengthy expose on family detention. The article, entitled *The Shame of America's Family Detention Camps*, was highly critical of the Administration's decision to detain the Central American families.<sup>205</sup> The article highlighted information from advocates about conditions at the detention centers, detailed the sympathetic nature of the detainee's legal claims, and questioned the decision to build the nation's largest detention center to hold women and children.

199. See *infra* notes 210-220 and accompanying text.

200. *Challenges at the Border: Examining the Causes, Consequences, and Responses to the Rise in Apprehensions at the Southern Border: Hearing Before Dep't of Justice Comm. On Homeland Sec. and Gov. Affairs*, 113th Cong. (Jul. 9, 2014), <http://www.hsgac.senate.gov/hearings/challenges-at-the-border-examining-the-causes-consequences-and-responses-to-the-rise-in-apprehensions-at-the-southern-border>; see *id.* (statement of Craig Fugate, Administrator, Federal Emergency Management Agency) ("We are talking about large numbers of children, without their parents, who have arrived at our border—hungry, thirsty, exhausted, scared and vulnerable.").

201. *Report: Feinstein Compares Immigrant Children to Jews Fleeing Nazi Germany*, CBS NEWS WASH. (Jul. 10 2014), <http://washington.cbslocal.com/2014/07/10/report-feinstein-compares-immigrant-children-to-jews-fleeing-nazi-germany/>.

202. Press Release, Am. Immigration Lawyers Ass'n, Senator Reid Statement on Administration's Decision to Review Family Detention Policies (May 15, 2015), <http://www.aila.org/advo-media/whats-happening-in-congress/congressional-updates/senator-reid-statement-review-family-detention>.

203. *Id.*

204. See *supra* note 133 and accompanying text.

205. Wil S. Hylton, *The Shame of America's Family Detention Camps*, N.Y. TIMES (Feb. 4, 2015), <http://www.nytimes.com/2015/02/08/magazine/the-shame-of-americas-family-detention-camps.html>.

While these political and media discussions may have played some role in convincing the Administration to back down from its headline detention position, perhaps the most significant force was the combined effect of the lawsuits in U.S. district court brought by advocates. The lawsuits challenged the use of deterrence rationale as a basis for detention and alleged violations of the 1997 *Flores* consent decree that governs the detention and release of children.<sup>206</sup> For Benhabib, the judicial branch can be a site of deliberative discourse, as opposed to strategic bargaining.<sup>207</sup> As a result of the first lawsuit, the government agreed to cease making generalized national security arguments to block release of the families.<sup>208</sup> The second lawsuit led to a court hearing in April 2015 that likely prompted the Secretary to announce the policy shift retreating from long-term detention in June 2015. In a lengthy decision, the court ordered the children released “without unnecessary delay” a month after the announcement.<sup>209</sup>

## ii. *Strategy and Resistance*

While democratic dialogue in the executive branch, courts, legislature, and civil society had some role in the shift away from long-term family detention policy, strategic bargaining and resistance strategies were more influential. A standard critique of discourse theories is that they are overly optimistic about rationality and consensus building and fail to account for the role of power and non-rational action.<sup>210</sup> Many have argued that the pre-conditions for true deliberative dialogue rarely exist.<sup>211</sup> Power dynamics, including a multitude of crosscutting acts of authority and resistance, pervade democratic processes. As Michel Foucault has observed, “human relations,” including communication, always involves a power relationship.<sup>212</sup> This critique portrays political theories that focus on rationality as naive and as giving an incomplete descriptive and normative account of human communication and relations. Where discourse theory sees reason and mutual understanding, its critics see only assertions of power and resistance struggles. Moreover, reasonable minds can disagree about whether certain activities constitute rational deliberation or strategic bargaining. For example, the dialogue among

206. See Manning, *supra* note 121; *supra* note 157 and accompanying text.

207. See *supra* note 72 and accompanying text.

208. See *supra* note 125.

209. *Flores v. Lynch*, No. 15-56434, 2016 U.S. App. LEXIS 12439 (9th Cir. July 6, 2016).

210. See, e.g., Bent Flyvbjerg, *Habermas and Foucault: Thinkers for Civil Society*, 49 BRIT. J. SOCIOLOGY 211, 215 (1998) (explaining that Habermas’ project “is rooted in an insufficient conception of power.”); see also *id.* (summarizing differences between Foucault and Habermas).

211. See, e.g., Johanna E. Bond, *Gender, Discourse, and Customary Law in Africa*, 83 S. CAL. L. REV. 509, 554 (2010) (“Many discourse ethicists, such as Jurgen Habermas, however, insufficiently theorize the effect of power on discourse.”); Iris Marion Young, *Activist Challenges to Deliberative Democracy*, 29 POL. THEORY 670, 672 (2001) (criticizing deliberative democracy theorists as “bracket[ing]” “power differentials”). But see A. Michael Froomkin, *Habermas@discourse.net: Toward A Critical Theory of Cyberspace*, 116 HARV. L. REV. 749 (2003) (arguing that the internet community’s creation of standards for online communication qualifies as a Habermasian discourse).

212. Raul Fonet-Betancourt et al., *The Ethic of Care for the Self as a Practice of Freedom: An Interview with Michel Foucault*, in THE FINAL FOUCAULT 1, 11, 18 (J.D. Gauthier trans., James Bernauer & David Rasmussen eds., 1988).

legislative leaders and in the media, described above, could be recast as strategic rather than rational.

Some would also claim that litigation consists mainly of strategic bargaining. But even if the two high profile victories in U.S. district courts, discussed above, were illustrations of rational dialogue, these cases were only two of the many courtroom battles to influence the shift in family detention policy. Equally important was the mobilization by lawyers and law students to represent the individual women and children in the detention centers.

Lawyers descended in the hundreds into the remote detention centers, offering representation in immigration court to each and every detained woman and child. These lawyers succeeded in crippling the executive branch's well-oiled deportation machinery. Employing what could be described as Gary Bellow's "case aggregation" approach, the lawyers asserted en masse their clients' rights to release and asylum, making it impossible for the government to proceed with its original plan to deport the families quickly.<sup>213</sup>

Before the lawyers were present at Artesia, the temporary border family detention center, only thirty-eight percent of the detained women were passing their credible fear interviews, the first step to applying for asylum.<sup>214</sup> The rate rose to ninety percent after the advocates got involved. In the twenty-one weeks that volunteer lawyers were present in Artesia, they completed 3,200 client appointments and more than 600 hearings. Lawyers litigated fifteen cases to the final merits stage, winning all but one.<sup>215</sup> A coalition of nonprofit organizations now runs a full-time project at Dilley to represent the families.<sup>216</sup> Similarly, advocates provide representation to detainees at Karnes.<sup>217</sup>

Advocates also filed additional lawsuits and administrative complaints that may have added to the pressure on the government to retreat from long-term family detention, even though they were unsuccessful or unresolved.<sup>218</sup> These tactics, while unlikely to succeed as individual actions, were part of an overall plan to keep the plight of the Central American families in the public eye and to seek leverage with the government. While it is possible to characterize these legal maneuvers as deliberative, it may be more accurate to call them strategic.

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213. See Gary Bellow, *Steady Work: A Practitioner's Reflections On Political Lawyering*, 31 Harv. C.R.-C.L. L. Rev. 297 (1996).

214. See Manning, *supra* note 121.

215. *Id.* More cases were not litigated to the final hearing in the detention centers because the women who pass initial threshold asylum interviews are released, usually after 20 days.

216. At Dilley, the pro bono representation is coordinated by CARA Family Detention Pro Bono Project, a collaboration among the Catholic Legal Immigration Network, the American Immigration Council, the Refugee and Immigrant Center for Education and Legal Services, and the American Immigration Lawyers Association. The University of Texas Immigration Clinic and pro bono attorneys provide legal services to women and children detained at Karnes. See generally CARA FAM. DETENTION PRO BONO PROJECT, <http://caraprobono.org> (last visited Oct. 10, 2016) (for more information about the CARA coalition).

217. *Family Immigration Detention: Why the Past Cannot be Prologue*, COMMISSION ON IMMIGRATION (Am. Bar Ass'n), Jul. 31, 2015, at 21, [https://www.americanbar.org/content/dam/aba/publications/commission\\_on\\_immigration/FINAL%20BA%20Family%20Detention%20Report%208-19-15.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/FINAL%20BA%20Family%20Detention%20Report%208-19-15.authcheckdam.pdf).

218. See *supra* notes 140, 154-155 and accompanying text.

Similarly, some of the political dynamics in play were manifestly strategic rather than discursive. When the surge started to garner media attention in the summer of 2014, democrats were gearing up for the fall 2014 interim elections. President Obama, concerned about how the border issue would play in electoral politics, felt pressure to come out swinging with a heavy-handed enforcement agenda. As mentioned above, he also sought to preserve whatever popular support existed to create a pathway to permanent residency for those already inside the country by drawing a clear line in the sand between insiders and new entrants. After the fall elections, President Obama had less reason to pander to Americans' panic about the border. By the time of Secretary Johnson's June 2015 announcement about scaling back family detention, the number of border crossers had dipped and it appeared that the surge was over.<sup>219</sup> Without the pressure of an ongoing crisis, more moderate approaches were possible and the political space opened for President Obama to retreat from his earlier stance on family detention.

The policy shift was also the result of behind-the-scene dialogue among executive branch staff and between these insiders and advocates. A significant number of White House staffers and officials in the Department of Homeland Security are individuals with considerable field experience, including former public interest attorneys. These officials, who are often in dialogue with immigration advocates, exerted influence over decision-makers to convince them that long-term family detention should not be one of the Administration's legacies.

Because of the limited role of discourse in causing the policy shift, the retreat from long-term family detention could be described as tactical and bereft of what Benhabib would call "normative learning."<sup>220</sup> The immigrants and their supporters achieved gains outside of a wholly discursive process, making the change fall short of a true iteration and rendering ephemeral any claimed progress toward Benhabib's cosmopolitanism. However, skeptics of discourse theory might see a different lesson in the family detention example. The struggle against family detention could demonstrate the failure of discourse theory to fully account for the workings of power and resistance. In this view, the message for cosmopolitan agents of social change is that they must not rely on discourse alone to ensure that the balancing of territoriality against universality increasingly favors human dignity and the freedom of movement.

## VI. TOWARD MORE POROUS BORDERS?

The story of the 2014-2015 Central American border crossings illustrates both the limitations and radical possibilities of using the rule of law to bring about Benhabib's vision of a world in which border crossings are decriminalized and territorial boundaries are porous. Secretary Johnson chose his words carefully when

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219. See Christian von Preysing, *A Look at the Immigration Surge One Year Later*, KGNS.TV (June 14, 2015), <http://www.kgns.tv/home/headlines/A-Look-at-the-Immigration-Surge-One-Year-Later-307319761.html>; *Southwest Border Unaccompanied Alien Children Statistics FY 2015*, U.S. CUSTOMS AND BORDER PROTECTION, <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2015> (last updated Nov. 24, 2015).

220. ANOTHER COSMOPOLITANISM, *supra* note 32, at 50 ("In some cases, no normative learning may take place at all, but only a strategic bargaining among the parties.").

he tempered his message that the surge families would be deported with the assurance that the United States would “adhere to domestic and international law, due process, and the basic principles of charity, decency, and fairness.”<sup>221</sup> Although the Secretary characterized his message as “simple,” his statements belied an underlying tension. If the detained families were entitled to raise legal claims like asylum, what made the Secretary so sure that the families would be deported? The Secretary’s message was an attempt to boldly assert the U.S. government’s sovereign right to exclude while recognizing that U.S. law allows people to apply for protection from persecution. The reference to “charity, decency, and fairness” evokes Kantian hospitality, discussed above as the prohibition on returning refugees to a place where they are likely to be persecuted. The universal principle of nonrefoulement thus placed a limit on the United States’ sovereign attempt to send everyone back.

While the June 2015 policy shift away from long-term family detention may have recast the balance between universality and territoriality, it remained firmly within the ambit of the rules of refugee protection. But the principle of non-refoulement is just one of many possible ways of resolving the conflict between maintaining a territorial boundary and subscribing to universal principles. If territoriality sometimes gives way to universality, this balance could be struck differently to recognize a fuller range of outsider rights and protections, either through ruptures in domestic law or an expansion of human rights protections. As explained below, a cosmopolitan world order with porous borders between states appears to depend upon expansions of the *demos* to include unauthorized entrants who are not refugees.

### A. The Limits of Refugee Law

Non-refoulement, the basis of U.S. asylum and protection law, enjoys wide acceptance among nations, forbidding a country from returning people to a country where they would likely suffer persecution.<sup>222</sup> It, however, does not confer the right to permanently remain. Moreover, its protection is confined to people who are likely to be tortured or who meet the refugee definition, which mandates that the feared persecution be on account of political opinion, race, nationality, religion, or particular social group.<sup>223</sup> Non-refoulement thus places only a narrow restriction on sovereignty and rests on the assumption that democracy is consistent with territorial limitations on the freedom of movement.

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221. Press Release, Jeh Johnson, Sec’y, Dep’t of Homeland Sec., Statement Before the Senate Committee on Appropriation (July 10, 2014), <https://www.dhs.gov/news/2014/07/10/statement-secretary-homeland-security-jeh-johnson-senate-committee-appropriations> (“We will send you back.”).

222. See Convention Relating to the Status of Refugees art. 33, Jul. 28, 1951, 189 U.N.T.S. 137; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture] (adopting the principle of non-refoulement).

223. Convention Relating to the Status of Refugees, *supra* note 222, at 33 (“No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”); Convention Against Torture, *supra* note 222, at 3 (“No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”).

Without detracting from the hard fought victories of the women and children detained at the U.S.-Mexico border, it is critical to understand that all gains occurred within the framework of the refugee definition and in the context of family detention. Arguments for the asylum seekers tended to exceptionalize them, counterposing them against economic or social migrants. Claims were not made where there were no existing rights. Popular support for asylum seekers who are women and children does not necessarily indicate greater acceptance of non-refugee, unauthorized border crossers. The fact that the dialing back of family detention was directed only at bona fide asylum seekers renders elusive any trajectory toward the general decriminalization of movement across fluid territorial boundaries.

Government officials and advocates alike have operated on the assumption that nothing other than the standards for asylum govern the families' claims to be released and remain. U.S. officials have made clear that people who fail to make a threshold showing of a fear of persecution have no claim for release or protection and will be deported. Attempts to persuade the Administration to protect a broader class of persons under the Temporary Protection Status statute—used to grant temporary status to immigrants from civil unrest or natural disasters in their home countries—have failed.<sup>224</sup>

Many, though not all, advocates worked at all times within the asylum paradigm. They consistently characterized the women and children as refugees, expressly premising their claims on this exceptional status.<sup>225</sup> Some objected to the families being described as migrants rather than refugees.<sup>226</sup> Reports written about the surge families have also emphasized, or been limited to, refugees.<sup>227</sup>

Advocacy for the women and children also focused on their unique vulnerabilities. The mobilization of democrats in the legislature, high-end media like the New York Times, and volunteer lawyers sprang in part from people's visceral reaction to the detention of families, including very young children and women who had been subject to appalling abuse in their home countries.<sup>228</sup> The move to exceptionalize the families and play for sympathy was effective and the only viable

224. See 8 U.S.C. § 1254 (repealed 1996) (statute authorizing temporary protected status); Alfonso Chardy, *Obama Urged to Grant Temporary Protected Status to Central American Immigrants*, MIAMI HERALD (Jan. 25, 2016), <http://www.miamiherald.com/news/local/immigration/article56439945.html>.

225. See, e.g., HUMAN RIGHTS FIRST, U.S. DETENTION OF FAMILIES SEEKING ASYLUM: A ONE YEAR UPDATE (Jun. 2015), <https://www.humanrightsfirst.org/sites/default/files/hrf-one-yr-family-detention-report.pdf>; Press Release, Am. Immigration Lawyers Ass'n, Release of Refugee Families is Long-Overdue Step (Jul. 13, 2015), <http://www.aila.org/advo-media/press-releases/2015/release-of-refugee-families-positive-overdue-step>.

226. See *Your Questions Answered About Europe's Migrant Crisis*, NPR (Aug. 24, 2015), <http://www.npr.org/sections/parallels/2015/08/24/434282807/facebook-q-a-europes-migrant-crisis> (providing a similar discussion relating to terminology used to describe refugees and migrants in Europe).

227. A notable exception is the 2015 report of the Inter-American Commission on Human Rights, which recognized the "mixed" nature of the group and was equally concerned with the treatment of all of the surge families. Inter-Am. Comm'n H.R., *supra* note 7, at 9.

228. See generally Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. LAW REV. 1, 4–5 (1991) (discussing the portrayal of women and children as victims needing our protection—in implicit contrast to men—as relying on outmoded gender politics).

option. At the same time, it meant that successes were confined to this highly particularized context, what Catherine Dauvergne has called a “confined niche.”<sup>229</sup>

Circumscribing the women and children’s rights claims to only what domestic asylum law already provides makes perfect strategic sense in light of the lack of meaningful alternatives. At the same time, any general theory of a cosmopolitan or transnational view of the world must engage with the situation of people who are not refugees. So-called economic immigrants “may face as much danger as those who have been singled out for persecution.”<sup>230</sup> Moreover, although advocates might wish it to be otherwise, not all of the detained women and children are refugees, even under the term’s broadest definition.<sup>231</sup> Poverty and a desire to reunite with family in the United States are powerful and understandable drivers of migration. An important test for any claim that membership or borders has been reconceptualized is the treatment of non-refugee outsiders. Refugee law, while capacious in many ways, is too thin of a reed to support Benhabib’s normative vision of a cosmopolitan world with porous borders between countries.

## B. The Possibility of Rupture

While broader frames exist, they typically focus on unauthorized entrants already within a country’s borders. Many in the DREAMer movement, which was originally focused on undocumented youth, have expanded their mission to include a wide range of undocumented immigrants.<sup>232</sup> Similarly, the “#Not1More” movement categorically opposes all deportations. As is typical of claims by outsiders, these movements are framed beyond the bounds of existing domestic law. Perhaps recognizing that Kantian hospitality is insufficient to promote porous borders, Benhabib encourages ruptures in the law, such as amnesties for undocumented people. Incrementally inclusive definitions of the *ethnos* and the *demos* are part of Benhabib’s trajectory toward cosmopolitanism.

Amnesties reflect the paradox of closure that lies at the heart of democracy. Like the initial drawing of a nation’s borders, amnesties redefine membership. Both establishing territorial borders and granting membership status involve the claiming of rights where none previously existed—a practice with a long history in liberal democracies. As Bonnie Honig argues, the “practice of taking rights and privileges rather than waiting for them to be granted by a sovereign power

229. DAUVERGNE, *supra* note 67, at 35; see also Elizabeth Keyes, *Defining American: The DREAM Act, Immigration Reform and Citizenship*, 14 NEV. L.J. 101 (2013) (pointing to the dangers of promoting exceptionally sympathetic cases in the context of the DREAMer movement).

230. Susan Bibler Coutin, *The Rights of Noncitizens in the United States*, 7 ANN. REV. L. & SOC. SCI. 289, 294 (2011) (citing Elizabeth Kay Harris, *Economic Refugees: Unprotected in the United States by Virtue of an Inaccurate Label*, 9 AM. U. J. INT’L. L. POL’Y 269 (1999)); see also Howard Adelman, *From Refugees to Forced Migration: The UNHCR and Human Security*, 35 INT’L. MIGRATION 7 (2001) (questioning the distinction between being forced to move and having a choice).

231. Inter-Am. Comm’n H.R., *supra* note 7, at 9 (describing the group as a “diverse group of persons” in “mixed migratory movements” which include “migrants, asylum-seekers and refugees, women, children, families, and other vulnerable persons and groups.”).

232. See Peter Nyers, *No One is Illegal Between City and Nation*, 4 STUDS. IN SOC. JUST. 127, 134 (2010). See generally Chantal Thomas, *What Does the Emerging International Law of Migration Mean for Sovereignty?*, 14 MELBOURNE J. INT’L L. 392 (2013).

is . . . quintessentially democratic . . . .”<sup>233</sup> Rousseau posited a foreigner as a founder of democracy.<sup>234</sup> America was born when colonists seized sovereign authority.<sup>235</sup> Honig thus urges us to “reassess[.] . . . the much-reviled figure of the bad immigrant taker[.]” reframing immigrant takers as agents of the “(re)founding” of America.<sup>236</sup> In Benhabib’s terms, immigration amnesties reproduce the constitutive paradox of closure, broadening the *demos* and redefining its limits. Of course, even amnesty laws “endlessly reproduce categories of illegal at its boundaries,” making it difficult to “us[e] law to alleviate illegality.”<sup>237</sup>

Amnesties or exceptions to the law thus appear to be a major driver toward cosmopolitanism. Now that many surge families have been released into the interior of the United States, they can pursue rights that do not formally exist. They can seek inclusion in the “#Not1More” movement to halt all deportations and help bring about future ruptures in the law that regularize the status of the undocumented. Viewed in this way, the decision to end long-term, largescale family detention has done more than advance the principle of human dignity. The release of families from detention has added people to the category of potential future members of the polity. This reality is not lost on U.S. immigration authorities, who have vigorously sought to maintain the outsider status of the families by affixing electronic monitors on the women, expediting their claims in court, and prioritizing their deportation if they have a final order of removal.<sup>238</sup>

### C. The Promise of Human Rights

Somewhere between narrow Kantian hospitality and the radical rupture of amnesty lie human rights restrictions on sovereign authority to deport based on such rights as family unity, due process, and health. Unlike U.S. law, human rights law recognizes limits on sovereignty beyond the principle of non-refoulement. Human rights tribunals and bodies have increasingly interpreted human rights standards as

233. HONIG, *supra* note 195, at 99.

234. JEFFREY H. EPSTEIN, *DEMOCRACY AND ITS OTHERS* 123 (2016). Honig notes that, “Immigrants re-enact the original consent to the social contract, reinscribing the myth of the immigrant founding (a myth that obscures the violence and conquest of the nation’s origins).” HONIG, *supra* note 195, at 99.

235. *Id.* at 99–100 (citing ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Henry Reeve trans., 1900)).

236. *Id.* at 73, 101.

237. DAUVERGNE, *supra* note 67, at 27, 37; *see also* RIGHTS OF OTHERS, *supra* note 19, at 65–66 (discussing the “lingering paradox that every act of republican constitution establishes new ‘insiders’ and ‘outsiders’”).

238. John Burnett, *As Asylum Seekers Swap Prison Beds For Ankle Bracelets, Same Firm Profits*, National Public Radio (Nov. 13, 2015), <http://www.npr.org/2015/11/13/455790454/as-asylum-seekers-swap-prison-beds-for-ankle-bracelets-same-firm-profits> (discussing electronic monitoring); Philip E. Wolgin, *Ensuring Due Process Protections for Central American Refugees*, Center for American Progress (Feb. 1, 2016), <https://www.americanprogress.org/issues/immigration/news/2016/02/01/130294/ensuring-due-process-protections-for-central-american-refugees/> (discussing expedited dockets for the Central American families and prioritization of their deportation); Safia Samee Ali, *Obama’s ‘Rocket Docket’ Immigration Hearings Violate Due Process, Experts Say*, NBC News (Oct. 27, 2016), <http://www.nbcnews.com/news/us-news/obama-s-rocket-docket-immigration-hearings-violate-due-process-experts-n672636> (discussing due process concerns relating to the “rocket dockets” for the families).



restricting the sovereign power to deport, at least from a country's interior.<sup>239</sup> The Inter-American Commission on Human Rights has recognized that "all immigration policies, laws, and practices must be respectful of and guarantee the human rights of all persons, including migrants and other non-nationals and persons in an irregular migratory situation."<sup>240</sup> A small but growing body of decisional law in international forums has interpreted human rights to family life, due process and nondiscrimination, personal liberty and protection from arbitrary arrest, and health as constraining nations' sovereign authority to expel people who are living inside a country, with or without status. As Jaya Ramji-Nogales has noted, "[t]he right to family unity offers the most promise in protecting undocumented migrants against deportation."<sup>241</sup>

In 2010, the Inter-American Commission held in *Wayne Smith, Hugo Armendariz, et al.* that the 1996 amendments to U.S. immigration law repealing discretionary relief for lawful permanent residents convicted of an aggravated felony violated the human rights to family life and due process.<sup>242</sup> The Commission found that the petitioners "had no opportunity to present a humanitarian defense to deportation or to have their rights to family duly considered before deportation. Nor were the best interests of their . . . U.S. citizen children taken into account by any decision maker."<sup>243</sup> Similarly, the UN Human Rights Committee and the European Court of Human Rights have ruled that countries cannot deport individuals, including undocumented ones, in violation of the right to family.<sup>244</sup> One of the guiding

239. GUY S. GOODWIN-GILL, INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES 212 (1978) (noting that international law constrains how states treat foreign nationals); DAVID WEISSBRODT, THE HUMAN RIGHTS OF NON-CITIZENS 45-77 (2008) (noting several examples where international laws restrict the ability of states to deport immigrants).

240. Inter-Am. Comm'n H.R., *supra* note 7, at 29.

241. Jaya Ramji-Nogales, 'The Right to Have Rights': *Undocumented Migrants and State Protection*, 63 KAN. L. REV. 1045, 1055 (2015).

242. *Smith v. United States*, Case 12.562, Inter-Am. Comm'n H.R., Report No. 81/10 ¶¶ 60, 64-65 (2010). In 1996, the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 440-42, 110 Stat. 1214 (codified as amended in scattered sections of 8 U.S.C.), and the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, Div. C, 110 Stat. 3009 (1996) (codified as amended in scattered sections of 8 U.S.C.), restricted and then repealed the discretion of immigration judges to halt removal under former section 8 U.S.C. §1182(c).

243. *Smith*, Inter-Am. Comm'n H.R., Report No. 81/10, ¶ 59. According to the Commission, "a balancing test" was required to "reach a fair decision between the competing individual human rights and the needs asserted by the State." *Id.* at ¶ 58; *see also* Inter-Am. Comm'n H.R., *Report on the Situation of Human Rights of Asylum Seekers Within the Canadian Refugee Determination System*, ¶ 166 (2000), <http://www.cidh.oas.org/countryrep/Canada2000en/canada.htm> (stating "separation of a family . . . may only be justified where necessary to meet a pressing need to protect public order, and where the means are proportional to that end.").

244. *See Amrollahi v. Denmark*, App. No. 56811/00, Eur. Ct. H.R., ¶¶ 41, 43-44 (2002) (holding that Denmark would violate the right to family life if it deported a man with a serious drug offense because his family would face "serious difficulties"); *Boultif v. Switzerland*, App. No. 54273/00, Eur. Ct. H.R., ¶ 47 (2001) (ruling that an immigrant convicted of a violent crime could not be deported because the sovereign right to deport for a criminal record must be put in "fair balance" with right to family life); *Madafferi v. Australia*, Communication No. 1011/2001, Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights [Hum. Rts. Comm. under ICCPR], U.N. Doc. CCCR/C/81/D/1011/2001, ¶ 9.8 (2004) (finding a violation of the right to family life if immigrant was deported because of hardship to his family who had lived in Australia for many years); *see*

international principles is the principle of the best interests of the child, a standard that appears in U.S. law but not in key areas of U.S. immigration law.<sup>245</sup>

Less clear is whether human rights norms limit the sovereign right to exclude at the border. Despite the growing acceptance of social and economic rights, these rights have yet to be construed to constrain the sovereign decision to deny entry.<sup>246</sup> However, as standards evolve, one could imagine the recognition of the right to move freely across borders, at least when entry is needed to secure economic and social human rights. While such an evolution may be unlikely in the near future, no conceptual barrier prevents it.

As currently constructed, human rights law, like U.S. domestic law, evinces the classic tension of liberal democracy between universality and territoriality. Although human rights norms claim to take people as the fundamental unit of concern, they, in reality, balance the rights of individuals against sovereignty, including the power to exclude from the border and expel from the interior. The right to freedom of movement thus currently exists only within the boundaries of sovereign states. As Hannah Arendt noted decades ago, the essential problem, as illustrated by stateless people, is that human rights only have meaning as defined by sovereigns.<sup>247</sup> Catherine Dauvergne has similarly observed, “Rights talk in the absence of other forms of privilege is often just that: talk.”<sup>248</sup>

Applying Hannah Arendt’s insight to undocumented people, Jaya Raya-Nogales has discussed human rights law’s false claim to universality, mapping the ways in which current human rights instruments expressly and implicitly omit undocumented individuals. She argues: “[e]ven defined narrowly, the right to territorial security is not supported in any international human rights treaty or any soft law produced by human rights treaty bodies” and “treaties and interpretive bodies have consistently stated that they do not extend the right to territorial security to undocumented migrants.”<sup>249</sup> In particular, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families expressly declines to recognize the right of migrants to “regulariz[e]” their status.<sup>250</sup>

also Human Rts. Comm., *Views: Communication No 930/2000*, annex, UN Doc CCPR/C/72/D/930/2000 (Aug. 16, 2001) (“Views of the Human Rights Committee under Article 5, Paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights”) (suspending deportation of failed asylum seekers who were parents of a 13 year old son who had been born in Australia).

245. Inter-Am. Comm’n H.R., *supra* note 7, at 32 (stating that “in interpreting and applying the American Declaration, its provisions should be considered in the context of the broader international and Inter-American human rights systems to include the incorporation of the principle of the best interests of the child”). See generally David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children’s Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979 (2002).

246. But see James A. R. Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT’L L., 804 (1983).

247. HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 292–96 (1951).

248. DAUVERGNE, *supra* note 67, at 22.

249. Ramji-Nogales, *supra* note 241, at 1051.

250. *Id.* Catherine Dauvergne has made the same point regarding the migrant worker’s convention and the human rights of undocumented persons generally. DAUVERGNE, *supra* note 67, at 22; see also *id.* at 35 (“[T]he difficulties of meaningfully extending [human rights] standards to those without migration status reveals a vital problem with being ‘merely human.’”). The United Nations International Law Commission has drafted articles aimed at protecting undocumented migrants. While the Draft Articles on the Expulsion of Aliens apply to both lawfully present and unlawfully present immigrants and recognizes

A key question is whether human rights norms are inherently incapable of protecting undocumented people from exclusion and expulsion. It is possible to imagine the vanishing point of sovereignty, as discussed above. But the disappearance of sovereignty raises the issue of whether authority for law can derive from anything other than nation states.<sup>251</sup> Answers to this question might lie only in a reconceived, de-nationalized system of human rights or global law.<sup>252</sup> But as long as the world is ordered into separate sovereigns, it is unclear how far human rights law could evolve to restrain sovereign authority to control the border, especially with respect to the exclusion of new arrivals.

While it is possible to theorize the disappearance of national control over borders, it is less clear whether this is a good idea. As commentators have noted, some amount of regulation of the border may be needed for sovereigns to safeguard the human rights of individuals already present, including the right to self-determination.<sup>253</sup> At some tipping point, opening borders imperils the human rights of existing residents. More generally, it remains to be seen whether a world of weak nations would be better at promoting human rights. Austen Parrish, for example, argues that “territorial sovereignty . . . achieves an underappreciated balance between state and individual rights that often serves as a foundational prerequisite for human rights to flourish.”<sup>254</sup> It is an open question whether a stable and effective anchor for the rule of law besides sovereign nations could exist.<sup>255</sup> There may be considerable downsides to decentering sovereignty, including for the protection of human rights.

Law, including human rights law, is thus an enforcer of the border, the creator of illegal people and bounded nations. At the same time, the law is malleable and dynamic, and it provides emancipatory possibilities through amnesties and expanding conceptions of human rights. The possibilities are radical, permitting reimagination of the U.S. reaction to the arrival of the Central American families. In a more cosmopolitan world, the women and children would not have been detained or required to meet the refugee definition. They would have been accepted as having

limits on a state’s sovereign right to deport, the articles recognize robust sovereign authority to exclude and expel. Int’l Law Comm’n, Draft Articles on the Expulsion of Aliens, U.N. Doc. A/69/10 at 44 (2014).

251. DAUVERGNE, *supra* note 67, at 37 (stating the question is “whether law can draw its authority from any source other than the nation”).

252. LUIS CABRERA, *POLITICAL THEORY OF GLOBAL JUSTICE: A COSMOPOLITAN CASE FOR THE WORLD STATE* 71–72 (1st. ed., 2004).

253. See Berta Esperanza Hernandez-Truyol, *Globalized Citizenship: Sovereignty, Security and Soul*, 50 VILL. L. REV. 1009, 1015 (2005) (discussing “the relationship of human rights to the state’s sovereign obligation to defend its citizens”); James F. Hollifield et al., *Immigrants, Markets, and Rights: The United States as an Emerging Migration State*, 27 WASH. U. J.L. & POL’Y 7, 14 (2008) (“If too many foreigners reside on the national territory . . . the citizenry or the demos may be transformed in such a way as to violate the social contract, undermine the legitimacy of the government, and challenge the sovereignty of the state itself.”); John Rawls, *The Law of Peoples*, 20 CRITICAL INQUIRY 36, 47 (1993) (arguing that liberal principles cannot not apply internationally because there is little institutional enforcement).

254. Austen L. Parrish, *Rehabilitating Territoriality in Human Rights*, 32 CARDOZO L. REV. 1099, 1105 (2011); see also DIGNITY IN ADVERSITY, *supra* note 20, at 90 (“the state is the principal public actor that still has the responsibility to see to it that human rights norms are both legislated and actualized”).

255. NICO KRISCH, *BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW* 4 (2010) (arguing that national and international law have become blurred such that “the national sphere retains importance, but it is no longer the paradigmatic anchor of the whole order”).

asserted their human dignity by fleeing violence and poverty, or as simply seeking a better life by exercising their right to move freely. We would regard the families not as refugees or even as women and children but as people engaging in a fundamental act of humanity by moving across the globe, spurred by a multiplicity of motivations. In the words of Pope Francis: “[T]housands of persons are led to travel north in search of a better life for themselves and for their loved ones, in search of greater opportunities. Is this not what we want for our own children?”<sup>256</sup>

#### D. Making Cosmopolitan Change

Cosmopolitan change is not inevitable. The hard work of realizing cosmopolitan democracy falls to politicians, advocates, and immigrants themselves, employing the full range of communicative tools in “speech situations” that are often less than ideal.<sup>257</sup> The specter of failure looms large. Benhabib’s optimism that history is bending toward her vision of the world is tempered by her acknowledgement that the rebalancing of territoriality and universality sometimes involves regression, even descent into xenophobia.<sup>258</sup> The hostile reaction to the plight of the Central American families, the continued growth of immigration detention capacity, and the rise of Donald Trump to the Presidency may well signal that the United States is moving away from Benhabib’s cosmopolitanism.

Whatever the current direction of the trajectory, Benhabib’s political theory holds important teachings for those seeking to make our society more open to immigrants. The tension between our competing commitments to universality and territoriality means that any claim to more favorable rules of entry must recognize the legitimacy of at least minimal territoriality claims. Those seeking to move us along a continuum toward cosmopolitanism must acknowledge, and operate within, the two poles of universality and territoriality.

Benhabib’s treatment of the paradox of democracy gives theoretical grounding to those pushing for more porous borders and periodic amnesties. As discussed above, democracies may need to exclude to exist, but this exclusion entails that democracy’s claimed universality is not truly universal and that outsiders have no say in the rules of exclusion.<sup>259</sup> This lack of legitimacy at the heart of democracy requires that insider/outsider distinctions be fluid and contestable. Immigrants asking for inclusion act as authentic democratic subjects when they claim rights not yet recognized under current law.

It may be that ideal-type discourse theory only considers legitimate those norms and practices that emerge from rationale dialogue under ideal speech situations. As theorized by Benhabib, however, discourse theory recognizes the legitimacy of democratic norms that emerge in the real world. She acknowledges that agents of change in social movements are strategic actors. As illustrated by the

256. Teresa Welsh, *Pope Francis Stresses Immigration, Climate Change in Address to Congress*, U.S. NEWS AND WORLD REPORT (Sept. 24, 2015, 12:05 PM), <http://www.usnews.com/news/articles/2015/09/24/pope-francis-stresses-immigration-climate-change-in-address-to-congress>.

257. JURGEN HABERMAS, *THEORY OF COMMUNICATIVE ACTION* (Thomas McCarthy trans., 1984).

258. See *supra* note 40 and accompanying text.

259. See *supra* 51-67 and accompanying text.

legal and political gains of the family detention resistance movement, movement actors legitimately employ both discursive and non-discursive methods, including mobilization, strategic litigation, and messaging, to secure the political will needed to create a more cosmopolitan society.<sup>260</sup>

## VII. CONCLUSION

The United States' detention of children and their mothers raises the issue of human dignity in stark terms. But rather than read family detention as exceptional, we should regard it as making plain the dehumanization that inheres in all detention and border control. Some minimal amount of state violence may be inevitable, as democracies may need to exclude at least some to survive. But if exclusion is necessarily part of democracy, the question becomes how far a nation is willing to go to enforce exclusion. Universality and territoriality collide not simply as abstractions but as principles that guide competing policy choices about when, how, and to what degree, a nation should deprive human beings of their basic dignity. How democratic states resolve the tension between universality and territoriality shapes their national identity.

By abandoning mass long-term detention of Central American families who have made an initial asylum showing, the United States redrew the line between enforcing sovereignty and respecting human rights and between insiders and outsiders. To be sure, the extent of the shift should not be overstated, as U.S. officials continue to detain families. Women who fail to pass initial screenings are detained with their children for many months to over a year pending appellate review and many released women are subject to intrusive electronic surveillance. Moreover, the policy change was largely the result of strategic bargaining through the mobilization of lawyers and acts of resistance, rather than democratic dialogue. At bottom, however, the 2015 cessation of large-scale long-term, family detention of asylum seekers who make a threshold showing was a significant rebalancing of universality over territoriality.

The United States' message to poor Central American families invoked law to both exclude and protect. Although the government's initial hope and expectation was that the rule of law would largely be used to send the families back, it is clear that this prediction was incorrect, given the high percentage of women with compelling asylum claims. But the more radical suggestion lurking in the cosmopolitan vision is that even more emancipatory potential for refiguring the conflict between sovereignty and universality exists beyond domestic asylum law and within the realm of human rights and ruptures in domestic law, like amnesties.

Once we accept that recent unauthorized border crossers have staked out a legitimate claim to dignity, distinctions of all types, including the legitimacy of current insiders' claim to membership, become suspect. The paradox of democratic closure calls into question hard and fast lines between insiders and outsiders. Today's detained mother and child could be, and by Benhabib's lights should be, tomorrow's neighbor and voting member of the polity.

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260. See generally Sameer Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CAL. L. REV. 1879 (2007) (providing a discussion of this mode of advocacy).

As applied to the phenomenon of the border surge, Benhabib's cosmopolitanism suggests more ambitious courses of action than what the detained families and their advocates could pragmatically claim. But central to Benhabib's theory of democratic change is the recognition that the march toward a more open and multicultural society is imperfect and incremental. Only time will tell whether the Obama Administration's retreat from long-term family detention represents a step in the direction of an increasingly cosmopolitan democracy with more porous borders, or just a transient concession to effective mobilization and strategic bargaining by the detained immigrants and their allies. Either way, Benhabib's analysis of borders and her cosmopolitan vision add depth to our understanding of how immigration and immigrants are essential to democracy and provide an enduring guidepost for immigrants and advocates. But, for now, Benhabib's normative vision of a world order with porous national borders that recasts membership in increasingly universal terms exists only at the edge of imagination.