LEGAL CHALLENGES TO PROLONGED DETENTION OF FAMILIES

by Virginia Marie Raymond

Refugees, immigrants, and their advocates dispute the authority of the U.S. Department of Homeland Security (DHS) and Immigration Control and Enforcement (ICE), a DHS agency, to hold refugees or immigrants for prolonged periods of time. We insist that refugees and immigrants who pose no danger to individual people, communities, or national security, should be released on their own recognizance, parole, or bond, while they await hearings. The arguments for release apply even more forcefully to children: we know that detention, even for relatively short periods of time (and even under conditions of relative safety), damages children and interferes with healthy development.

Lawyers in federal court in California are attempting to enforce the settlement terms of an old lawsuit, *Jenny Lisette Flores, et al., v. Attorney General of the U.S. Janet Reno, et al.* (earlier, *Flores v. Meese*) which required that children not be detained unless there was no less restrictive alternative that would provide for their safety and that of the community. That settlement also required many protections for children who were detained. The current incarceration of children at Karnes and Dilley does not meet these standards. Neither detention facility (or "residential center," if you accept ICE and GEO terms) is licensed as a child care facility. DHS says that *Flores* only applies to unaccompanied minors, not to children who are with parents. Kudos to local heroes, Professor Ranjana Natarajan, director of the Civil Rights Clinic at the UT law school, and her students, for their critical role.

In the fall, lawyers also filed a lawsuit against the DHS "no-bond" policy for Central American families. On February 20, 2015, Judge James E. Boasberg of the U.S. District Court for the District of Columbia issued temporary orders in *R.I.L.-R. , et al., v. Jeh Charles Johnson, et al.* The order is worth celebrating: it prevents DHS from denying release on bond or otherwise to Central American women and children refugees, based on the belief that this entire group pose a national security threat to the U.S. Instead, DHS is supposed to consider on an individual basis whether a particular person is a "flight risk" (will she appear at scheduled court hearings and keep ICE informed of her whereabouts, or will she disappear?), danger to the community, or national security. Judge Boasberg's decision is deeply conservative in a very good sense: it insists that DHS follow constitutional due process and make decisions whether to deprive a person of her liberty based on her individual history and circumstances, rather than making judgments about entire classes of people. Kudos to local hero Denise Gilman, clinical professor of law and co-director of the Immigration Law Clinic at UT law school, whose labor and brain power fueled this lawsuit.

The temporary orders in R.I.L.-R. v. Johnson do not "fix" the problem of family detention, however. First, the judge did not issue a condemnation against family detention on principle; he merely tried to limit the practice. Second, ICE and DHS may be obeying the letter of the order but certainly not the spirit. It has just started setting bonds for most women refugees who came with their children at $7500. In principle, and for some people, $7500 is a huge improvement over no bond at all, but for many others, $7500 is also a near-absolute barrier to release. Third,

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the order only applies to women who have never been removed (deported) from the U.S. before. A great many refugees come to the U.S. seeking sanctuary, but are or have been deported without ever knowing how to ask for asylum, and without having any legal assistance. Fourth, the decision only applies to women whom asylum officers have determined have a "credible fear" of returning home. Some women who speak Mayan languages, however, and who have little or no facility in Spanish or another European language may not even have such interviews. There simply aren't enough interpreters to go around. Finally, although many women may still go to immigration judges to request lower bonds, and although the San Antonio immigration judges frequently grant these requests, women and children who are deemed "arriving aliens" do not have the right to have judges review the bond amounts.

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In immigration court, we have begged judges to review the custody of families who have been detained for many months, —up to 9 or 10 months, at present, for some. DHS argues that it must detain people who have been removed (deported) from the U.S. before, because people in this category have final orders of removal. That statement is just plain false: DHS *always* has the discretion, on a case-by-case basis, to release people on parole. Moreover, women whom asylum officers have determined have "reasonable fear" of returning do not currently have "final orders of removal." They would not be in court if they had final orders of removal! They are pursuing claims for "withholding of removal" and for protection under the Convention Against Torture (CAT). We also argue that *Flores v. Reno* requires the release of the children, and that the law and regulations allow for release of parents (even parents who have been deported before). And we remind immigration judges that even "mandatory" detention does not mean mandatory *forever.* Indefinite detention is unconstitutional. While some federal courts have required review of even "mandatory" detention after a person has been locked up for 6 months, other courts have said that there is not a single fixed time when they must review detention. That decision, too, should be case-by-case. We argue that the 6-month rule was set in cases involving adults, and typically adults who had been convicted of certain delineated crimes. Six months may be the outside limit for adults—but it's certainly far too long to wait for judicial review of children!

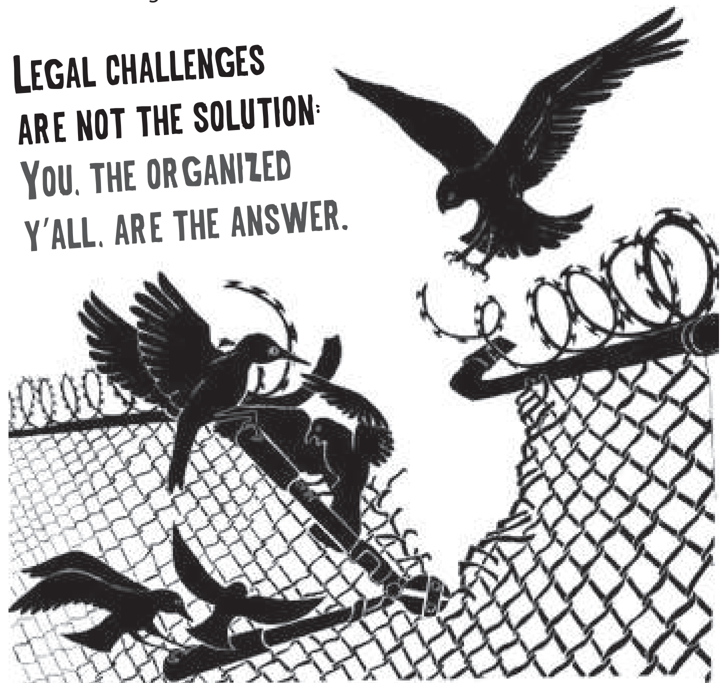
On March 30, several families who've spent close to eight months in Karnes asked an immigration judge to release them, making all of these arguments. They could have found no more effective advocate than Javier Maldonado. The judge acknowledged the compelling arguments for their release but decided that he did not have jurisdiction to do anything. (That night, women began their fast.)

It's not that immigration judges don't recognize that the situation is very, very bad. It's that they are not "regular" judges but administrative law judges. I am privileged to practice immigration law before smart and good judges, but these immigration judges are *not* sworn to uphold the U.S. Constitution. The are *not* empowered to say that detention in any given case is unconstitutional. Rather, they are only allowed to look at immigration law, the statute itself, as interpreted by the Board of Immigration Appeals (BIA), which is part of the Department of Justice, an executive agency. Unlike "regular" judges, immigration judges report to the Executive Office of Immigration Review (EOIR), which is part of the US Department of Justice, which is part of the executive branch of government. In other words, there is no separation of powers: immigration judges ultimately answer to the President. They are not members of the judicial branch of government.

On April 9, Professor Ranjana Natarajan, already busy trying to enforce the *Flores* settlement, and her students Julia Furlong, Seth Manetta-Dillon, and Sofia Meissner filed a habeas corpus petition in the U.S. District Court for the Western District of Texas, San Antonio Division. Maria Estela Marquez Marquez has been locked up in Karnes with her 3 daughters since August 5th. Jackie, Carmen, and Melissa marked their 11th, 14th, and 16th birthdays in immigration jail. DHS says they can leave, as soon as their mother pays a bond—a bond that the immigration judge and DHS say only DHS can set—and that DHS refuses to set.

Will a federal judge release this family? We don't know. Stay tuned, but don't passively wait for the answer. We do know *this:* the most effective way to seek social justice is through creativity (opening hearts), education (telling the truth, countering false assumptions and lies), and organizing. Legal challenges are not the solution: *You, the organized y'all, are the answer.*

Sing, paint, perform, write poetry. Teach. Assemble. Demand justice. ❖ *Bio: Virginia is a lawyer in Austin, TX who is, on a pro bono basis, representing refugees and immigrants who would otherwise be left without legal assistance.*



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been teaching a ground-breaking Chicano/African-American Studies class for the past seven years at Animo South Los Angeles High School - notes that the United Farm Worker's movement itself was heavily supported by both King and members of Student Nonviolent Coordinating Committee. In *To March for Others*, Lauren Araiza chronicles these alliances, which included all the major Black civil rights organizations supporting the struggle of the UFW. Most Native American activists of that era also joined in supporting the UFW's movement.

Today, too, the silencing and invisibilization of subject populations is unacceptable. The federal government, elected officials, the states, municipalities and other institutions that hold power over law enforcement must be confronted. The mass media must also be confronted: Silencing and invisibilization also take place as a result of where the lens is focused or where the microphones are placed. As the Zapatistas have proclaimed in their struggle: "Never again a world without us." ❖

Bio: Roberto Rodríguez, assistant professor in Mexican-American studies at the University of Arizona, is the author of Justice: A Question of Race and Our Sacred Maiz Is Our Mother among other books. Contact him at: xcolumn@gmail.com. Sources for this article can be obtained from lavoz@esperanzacenter.org