

UNDER ICE: THE ‘BED QUOTA’ AND
POLITICAL RHETORIC IN AMERICAN
IMMIGRANT DETENTION

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“They should call this place the jail of broken dreams.”

- Nilson Flores, detainee at Stewart Detention Center¹

“Detention of a migrant should be a matter of last resort. It should be an exception, not the rule. The thought that someone who is expressing fear of being killed in his home country, that we would put that person in a jail-like setting, is the first sort of assumption that I would really question.”

- Grace Meng, Human Rights Watch²

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¹ Jerome Socolovsky, *Critics of US Immigrant Detention Center Go In to Support Detainees*, VOICE OF AMERICA NEWS (Oct. 6, 2014, 7:10 PM), <https://www.voanews.com/a/2474723.html> (providing relevant video footage at 0:25-0:29).

² *The Strange Death of Jose de Jesus*, NPR’S LATINO USA (July 22, 2016) (37:41-38:02; 38:06-38:19), <https://www.npr.org/2017/09/08/546821261/the-strange-death-of-jos-de-jes-s-part-2>.

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I. INTRODUCTION

The United States has the largest system of immigration detention in the world, detaining somewhere between 380,000 to 442,000 persons per year in over two hundred detention centers.³ This massive detention scheme is a result of an unfortunate convergence of multiple factors, from the legal and political to the cultural and socioeconomic. This Note focuses primarily on three such factors: the federal immigration agency's usage of a "bed quota" to fill detention centers,⁴ amendments to the Immigration and Nationality Act that require mandatory detention for a wide variety of noncitizens, and political rhetoric used to discuss irregular migration and non-citizens with criminal histories. I argue that these practices, in confluence with one another (and with others that will not be discussed here), contribute to the American public's erroneous conclusion that immigrants are more dangerous and prone to violent crime than native-born

³ *Immigration Detention Map & Statistics*, COMMUNITY INITIATIVES FOR VISITING IMMIGRANTS IN CONFINEMENT, <http://www.endisolation.org/resources/immigration-detention/> [hereinafter CIVIC].

⁴ See NATIONAL IMMIGRANT JUSTICE CENTER, *Detention Bed Quota*, IMMIGRANT JUSTICE, <https://www.immigrantjustice.org/eliminate-detention-bed-quota> ("The immigration detention bed quota refers to language in congressional appropriations law that requires U.S. Immigration and Customs Enforcement (ICE) to maintain 34,000 immigration detention beds on a daily basis.").

citizens,⁵ and that wide-scale detention should be replaced by effective, humane alternatives.

II. A GENERAL AND HISTORICAL OVERVIEW OF IMMIGRANT DETENTION

A. THE BED QUOTA

In 2009, the Chairman of the Appropriations Subcommittee on Homeland Security added the following phrase to Immigration and Customs Enforcement's ("ICE") budget in the Homeland Security Appropriations Act of 2010: "... funding made available under this heading shall maintain a level of not less than 33,400 detention beds"⁶ This unprecedented directive has become known as the "bed quota" in the sphere of immigration detention. Although various Department of Homeland Security ("DHS") officials have urged other members of Congress to interpret this mandate as something other than a quota—i.e., that this is the number of beds that should be available, not the number of people be detained⁷—some Members of Congress have made clear it clear that they want no empty beds.⁸ Accordingly, DHS currently detains approximately 41,000 immigrants each night⁹ at a cost of two billion dollars per year.¹⁰

⁵ This Note will discuss the impact of politicians and policymakers on the general public's perception of noncitizens, rather than the impact of the news media—i.e., on the creators rather than the distributors of this content. In the interest of brevity, this Note also omits an extensive discussion of how race and ethnicity play into detention and deportation decisions, though they certainly do. See generally Mary Fan, *The Case for Crimmigration Reform*, 92 N.C. L. REV. 75 (2013).

⁶ Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, 123 Stat 2142; Bethany Carson & Eleana Diaz, *Payoff: How Congress Ensures Private Prison Profits with an Immigrant Detention Quota*, Grassroots Leadership (2015), https://grassrootsleadership.org/sites/default/files/reports/quota_report_final_digital.pdf.

⁷ See Jennifer Chan, *Immigration Detention Bed Quota Timeline*, NAT'L IMMIGRANT JUSTICE CTR. (Jan. 13, 2017), <http://www.immigrantjustice.org/immigration-detention-bed-quota-timeline> ("Sarah R. Saldana, ICE Director, reiterated DHS's position that the bed quota requires DHS to maintain 34,000 beds, not detain 34,000 people per day.").

⁸ The Times Editorial Board, *Dump the immigrant detainee quota*, L.A. TIMES (May 8, 2014), <http://www.latimes.com/opinion/editorials/la-ed-immigrant-detainee-quota-homeland-security-20140509-story.html> ("Administration officials have been reprimanded when they have allowed the numbers to fall significantly below the quota.").

⁹ Grace Meng, *The US Supreme Court's Chance to Protect Immigrants' Rights*, HUMAN RIGHTS WATCH (Nov. 30, 2016), <https://www.hrw.org/news/2016/11/30/us-supreme-courts-chance-protect-immigrants-rights>.

¹⁰ Id.

No other law enforcement agency is subjected to such an arbitrary quota mandated by Congress.¹¹ And its policy implications are illogical: when ICE encounters a potentially deportable or inadmissible individual, the accompanying analysis into that individual's detention is fiscal, not judicial.¹² Even former DHS Secretary Janet Napolitano has called the quota "artificial" and stated that DHS "ought to be managing the actual detention population to risk, not to an arbitrary number."¹³ A legislatively-mandated bed quota sends a clear message to ICE that its enforcement must be aggressive—large swaths of the immigrant population must be detained nightly, whether or not their detention "makes sense from an economic or security perspective."¹⁴

The bed quota has proved stubbornly difficult to eliminate despite its unjust rationale and impact. Why? For one, treating undocumented immigrants punitively to deter would-be irregular migrants is popular in many congressional districts.¹⁵ Therefore, increasing immigrant detention has become "political shorthand for taking a strong stance on protecting U.S. borders."¹⁶ Politicians have historically and consistently conflated immigration with danger by inflating the numbers of non-citizens with criminal convictions,¹⁷ falsely claiming that immigrants perpetrate crimes

¹¹ CARSON & DIAZ, *supra* note 6 at 3.

¹² The Times Editorial Board, *supra* note 8.

¹³ Ted Robbins, *Little Known Immigration Mandate Keeps Detention Beds Full*, NPR, (Nov. 19, 2013), <https://www.npr.org/2013/11/19/245968601/little-known-immigration-mandate-keeps-detention-beds-full>.

¹⁴ Eric Brickenstein, *Making Bail and Melting ICE*, 19 LEWIS & CLARK L. REV. 229, 240 (2015).

¹⁵ See Editorial Board, *The Madness of U.S. Immigration Policy, Continued*, BLOOMBERG (Sept. 27, 2013) <https://www.bloomberg.com/view/articles/2013-09-26/the-madness-of-u-s-immigration-policy-continued> ("[P]unitive actions against undocumented immigrants are popular in some congressional districts and partly because a more rational approach would disrupt cherished revenue streams.").

¹⁶ William Selway & Margaret Newkirk, *Congress Mandates Private Jail Beds for 34,000 Immigrants*, BLOOMBERG (Sept. 23, 2013) <https://www.bloomberg.com/news/articles/2013-09-24/congress-fuels-private-jails-detaining-34-000-immigrants> (quoting North Carolina Representative David Price).

¹⁷ See, e.g., Ben Casselman, *There Aren't 2 To 3 Million Undocumented Immigrants With Criminal Records for Trump To Deport*, FIVETHIRTYEIGHT (Nov. 14, 2016) <https://fivethirtyeight.com/features/there-arent-2-to-3-million-undocumented-immigrants-with-criminal-records-for-trump-to-deport/> ("The Migration Policy Institute, a think tank, estimates that there are roughly 11 million immigrants in the U.S. illegally and that approximately 820,000 of them have criminal records.").

at higher rates than native-born Americans,¹⁸ and embracing invidious, effective rhetoric, such as the so-called “criminal alien.”¹⁹

Further, many local governments and members of Congress have demonstrated a willingness to place dollars and cents above human suffering: decreasing the number of detained immigrants would “disrupt cherished revenue streams”—money that flows both from private-prison lobbies into the campaigns for the members of Congress, and from the federal government into cities and counties where detention centers are located through intergovernmental service agreements (“IGSAs”).²⁰ This somehow trumps the fact that immigration detention is a massive burden on taxpayers, with an average expense of \$159 per person per day, for a total of two billion dollars each year.²¹ In contrast, alternative to detention (“ATD”) programs, such as ankle bracelet monitoring, home visits, and required check-ins at ICE offices, cost a fraction of that amount (as low as seventeen cents to seventeen dollars per person per day).²² These alternatives are infinitely less traumatic and have proven effective.²³

B. A BRIEF HISTORY OF IMMIGRANT DETENTION

Today, Ellis Island is often viewed “in the warm glow of nostalgia.”²⁴ It stands in our memories as the cinematic, quintessentially American emblem of our revered immigrant ancestors’ arrivals, the first stop on U.S. soil for the huddled masses yearning to breathe free. In fact, Ellis Island (or the “Island of Tears,” as it was called by detainees) served for sixty-two

¹⁸ E.g., David Bier, *Donald Trump Is Wrong – Immigrants Don’t Commit More Crimes*, TIME (Sept. 27, 2016), <http://time.com/4509413/presidential-debate-donald-trump-immigration/> (President Trump stated, “We have gangs roaming the street. And in many cases, they’re illegally here, illegal immigrants.”).

¹⁹ E.g., David A. Martin, *Trump’s Order on the Deportation of Undocumented Residents, Annotated by an Immigration Law Expert*, VOX (Jan. 31, 2017) <http://www.vox.com/the-big-idea/2017/1/28/14416616/executive-order-immigrants-sanctuary-trump> (“President-elect Trump and his staff had often emphasized that they would energize removals but would prioritize ‘criminal aliens.’”).

²⁰ See Editorial Board, *supra* note 15 (“Private-prison lobbies have pushed to keep lucrative detention centers open.”).

²¹ NAT’L IMMIGRANT JUSTICE CTR., *supra* note 4.

²² American Civil Liberties Union, *Alternatives to Immigration Detention: Less Costly and More Humane than Federal Lock-up 2* (2018), https://www.aclu.org/sites/default/files/assets/aclu_atd_fact_sheet_final_v.2.pdf.

²³ See *id.*

²⁴ Margaret Regan, *Detained and Deported XVIII* (2015).

years as the nation's first federally operated immigrant detention center, detaining around twelve million immigrants.²⁵

When Ellis Island closed in 1954, the Immigration and Nationalization Service ("INS"), ICE's predecessor, "announced that it was abandoning the policy of detention."²⁶ The Supreme Court praised this shift in policy: "Physical detention of aliens is now the exception, not the rule . . . Certainly this policy reflects humane qualities of an enlightened civilization."²⁷ For the next few decades, only a minimal number of immigrants were detained.²⁸

However, in the 1980's, the arrival of tens of thousands of Cuban and Haitian "boat people" triggered large-scale immigrant detention without individualized determinations of dangerousness or risk of absconcion.²⁹ The INS used deterrence to justify this procedural shift: would-be immigrants would be convinced to stay put in their home countries rather than risk long-term detention upon arrival.³⁰ The 1980's also saw the establishment of two colossal private prison corporations, GEO Group ("GEO") and Corrections Corporation of America ("CCA") (now rebranded as CoreCivic), that began to heavily lobby the federal government to expand detention of immigrants.³¹ CCA received its first government contract in 1983 and immediately began constructing a "massive detention infrastructure."³²

In 1996, facing public disapproval of its perceived inability to deport so-called "criminal aliens,"³³ Congress amended the Immigration and Nationality Act (INA) by passing the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)³⁴ and the Antiterrorism and

²⁵ Stephanie J. Silverman, *Immigration Detention in America: A History of its Expansion and a Study of its Significance* 4 (Univ. of Oxford Centre on Migration, Policy and Society, Working Paper No. 80, 2010).

²⁶ Arthur C. Helton, *The Imprisonment of Refugees in the United States*, 9 CTR. FOR MIGRATION STUDY OF N.Y., 130, 131 (1986).

²⁷ *Id.* (quoting *Leng May Ma v. Barber*, 357 U.S. 185, 190 (1958)).

²⁸ *Id.*

²⁹ REGAN, *supra* note 24, at xviii.

³⁰ See Helton, *supra* note 26, at 133 ("The Administration has determined that a large number of Haitian nationals and others are likely to attempt to enter the United States illegally unless there is in place a detention and parole regulation . . .") (quoting 47 Fed. Reg. 30,044 (1982)).

³¹ CIVIC, *supra* note 3.

³² REGAN, *supra* note 24, at xix.

³³ Margot Kniffin & Sarah Martin, Developments in Civil Detention: Circuit Approaches to the Reasonableness of Prolonged Detention and Interpretations of the "When Released" Clause, 10 IMMIGR. L. ADVISOR 1, May-June 2016 (citing S. Rep. No. 104-48 (1995)).

³⁴ Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (enacted as Division C of the Omnibus Appropriations Act of 1996).

Effective Death Penalty Act (AEDPA).³⁵ These laws radically changed immigration detention in the United States by “establishing broad justifications for mandatory detention of immigrants”³⁶ and doubling the government’s detention capacity.³⁷ IIRIRA and AEDPA made more people eligible for deportation by dramatically expanding the number and type of criminal offenses that cause legal immigrants to become deportable. It also fast-tracked the deportation process by denying certain classes of immigrants the chance to appear before an Immigration Judge (IJ).³⁸ These two laws led to “mandatory detention of non-citizens convicted of a wide range of offenses, including minor drug offenses,”³⁹ and restricted judicial review of administrative detention and deportation determinations.⁴⁰

IIRIRA and AEDPA were passed despite a wealth of evidence showing that detention has virtually no deterrent effect on immigrants, particularly those who flee violence and persecution in their countries of origin or those seeking to reunite with family members in the United States;⁴¹ this is evidenced by the fact that the population of undocumented immigrants in the United States grew from five million to twelve million in ten years, *after* IIRIRA and AEDPA took effect.⁴² The mandatory detention expansion led to the unnecessary detention of mentally ill individuals and LGBTQ individuals, who are more likely to face abuse and violence while detained.⁴³

³⁵ Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of Titles 8, 18, 22, 28, 40, and 42 of the United States Code).

³⁶ REGAN, *supra* note 24, at xix-xx.

³⁷ Sharita Gruberg, *How For-Profit Companies Are Driving Immigration Detention Policies*, CTR. FOR AM. PROGRESS (December 18, 2015), <https://www.americanprogress.org/issues/immigration/reports/2015/12/18/127769/how-for-profit-companies-are-driving-immigration-detention-policies/> (“After the passage of [the AEDPA and IIRIRA], detention capacity nearly doubled from 8,279 beds in 1996 to 14,000 beds in 1998.”).

³⁸ Dara Lind, *The disastrous, forgotten 1996 law that created today’s immigration problem*, VOX (April 28, 2018), <https://www.vox.com/2016/4/28/11515132/iirira-clinton-immigration>

³⁹ The American Civil Liberties Union, *Analysis of Immigration Detention Policies*, <https://www.aclu.org/other/analysis-immigration-detention-policies>.

⁴⁰ *Id.*

⁴¹ Bremer et al., *New Models for Alternatives to Detention in the US*, 44 FORCED MIGRATION REV. 50 (Sep. 2013), <http://www.fmreview.org/sites/fmr/files/FMRdownloads/en/detention.pdf>.

⁴² Lind, *supra* note 38.

⁴³ HUMAN RIGHTS WATCH, *Deportation by Default: Mental Disability, Unfair Hearings, and Indefinite Detention in the US Immigration System* (July 25, 2010), <https://www.hrw.org/report/2010/07/25/deportation-default/mental-disability-unfair-hearings-and-indefinite-detention-us>; HUMAN RIGHTS WATCH, *Do You See How Much I’m Suffering*

III. HOW DOES IMMIGRANT DETENTION WORK, AND WHAT IS IT LIKE?

The federal government, through ICE, can contract either directly with private companies or with state or local governments through IGSA's. These local or state governments may, in turn, contract with private companies to run the facilities; this is the case for the majority of detention centers, with estimates placing the number of detainees in private facilities between 60 percent⁴⁴ and 73 percent.⁴⁵ These facilities are technically not prisons, which are punitive and rehabilitative institutions; rather, they are civil detention centers, meaning that detainees are locked up solely to ensure their appearance at immigration court hearings and to comply with court orders.⁴⁶ Any non-citizen may be detained, including asylum seekers, visa holders, and even legal permanent residents who have lived in the United States for decades.⁴⁷

Since immigration detention is theoretically administrative, rather than criminal, the conditions in ICE's detention centers "are not supposed to amount to punishment."⁴⁸ However, immigration detention centers are "often similar to prisons, and the detainees . . . are often treated as badly as, or worse than, criminals."⁴⁹ In many detention centers, immigrants are

Here?: Abuse against Transgender Women in US Immigration Detention (March 23, 2016), <https://www.hrw.org/report/2016/03/23/do-you-see-how-much-im-suffering-here/abuse-against-transgender-women-us>.

⁴⁴ See, e.g., Gruberg, *supra* note 37 ("[T]oday, 62% of all immigration detention beds are operated by for-profit prison corporations.").

⁴⁵ REUTERS, *Closing Private Detention Centers for Migrants Could Raise More Problems*, FORTUNE (Sept. 9, 2016), <http://fortune.com/2016/09/09/closing-private-detention-centers-illegal-immigrants/>.

⁴⁶ See *id.* ("CBP arrests and holds migrants temporarily before they are transferred to ICE custody for a court hearing to determine whether they should be deported.").

⁴⁷ *Id.*

⁴⁸ Spencer Bruck, *The Impact of Constitutional Liability and Private Contracting on Health Care Services for Immigrants in Civil Detention*, 25 GEO. IMMIGR. L.J. 487, 489 (2011); see *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) ("And the fact that such detention interferes with the detainee's understandable desire to live as comfortably as possible and with as little restraint as possible during confinement does not convert the conditions or restrictions of detention into 'punishment.'").

⁴⁹ John T. Parry, *Torture Nation, Torture Law*, 97 GEO. L. J. 1001, 1031 (2009).

allowed to go outside for only one hour a day,⁵⁰ if at all.⁵¹ Detainees have consistently reported “lengthy periods between meals, small portions, and food quality so poor that worm- and maggot-infested food has been served.”⁵² Religious and medical dietary requests are routinely ignored.⁵³ The cost of phone calls to loved ones and attorneys is prohibitive.⁵⁴ Guards regularly refer to detainees by racial and religious epithets, use excessive force, and retaliate against those who file grievances.⁵⁵

Detained immigrant children are at a greater risk of being severely traumatized. “[I]ncarceration, even under relatively safe conditions, is damaging for immigrant children, especially those with high levels of previous trauma exposure,”⁵⁶ which is certainly not uncommon in child migrants. Child detainees are more likely to self-harm, attempt or commit suicide, or exhibit signs of depression and Post Traumatic Stress Disorder.⁵⁷ Just a short stay in detention “can undermine a child’s psychological and physical wellbeing and compromise their cognitive development.”⁵⁸ International research and scholarship has emphasized that child detention

⁵⁰ See, e.g., DETENTION WATCH NETWORK, EXPOSE & CLOSE, ONE YEAR LATER: THE ABSENCE OF ACCOUNTABILITY IN IMMIGRATION DETENTION 8 (Nov. 2013), [hereinafter ONE YEAR LATER]

<http://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20Expose%20and%20Close%20One%20Year%20Later%20Report.pdf> (discussing detainees’ access to outdoor recreation at various facilities across the United States).

⁵¹ DETENTION WATCH NETWORK, EXPOSE & CLOSE: ETOWAH COUNTY JAIL 5 (Nov. 2012), <http://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20Expose%20and%20Close%20Etowah%20County.pdf> (“Etowah [county jail] offers no outdoor recreation or access to sunlight.”).

⁵² ONE YEAR LATER, *supra* note 50, at 8.

⁵³ *Id.* at 9.

⁵⁴ DETENTION WATCH NETWORK, EXPOSE & CLOSE: THEO LACY DETENTION CENTER 4 (Nov. 2012),

<http://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20Expose%20and%20Close%20Theo%20Lacy.pdf> (“On average it costs \$330 per month to talk [on the phone] for 20 minutes a day.”).

⁵⁵ See DETENTION WATCH NETWORK, EXPOSE & CLOSE: EXECUTIVE SUMMARY (Nov. 2012), <http://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20Expose%20and%20Close%20Executive%20Summary.pdf> (“Perhaps the most universal refrain of [detainees] is the fear that complaining about their treatment or living conditions will provoke retaliation by guards, or will negatively impact their immigration cases.”).

⁵⁶ Rachel Kronick, Cecile Rousseau & Janet Cleveland, *Asylum-Seeking Children’s Experiences of Detention in Canada: A Qualitative Study*, 85 AM. J OF ORTHOPSYCHIATRY 287, 292 (2015).

⁵⁷ See INT’L DETENTION COALITION, THERE ARE ALTERNATIVES 36 (2015), <http://idcoalition.org/publication/view/there-are-alternatives-revised-edition/> (discussing the detention’s negative impact on children’s health and development).

⁵⁸ *Id.*

is never justifiable; it is a clear “violation of children’s rights” and never in their best interest.⁵⁹ Despite this, ICE has consistently maintained that family detention is a key aspect of its deterrence and enforcement agendas, even after a DHS Advisory Committee Report called family detention “neither appropriate nor necessary” and recommended its discontinuation.⁶⁰

Detainees are also subjected to arbitrary and extended solitary confinement, especially those with mental health issues and/or disabilities.⁶¹ Solitary confinement, “when used as a punishment, during pre-trial detention, indefinitely, prolonged, on juveniles or persons with mental disabilities,”⁶² has been denounced by the United Nation’s Special Rapporteur on Torture as “cruel, inhuman or degrading treatment or punishment and even torture.”⁶³ The same report urged that solitary confinement be “used only in very exceptional circumstances, as a last resort, for as short a time as possible.”⁶⁴ It also warned that placing persons with mental disabilities in solitary confinement can severely exacerbate their conditions, which may lead to “extreme acts of self-mutilation and even suicide.”⁶⁵ The United States “stands alone among Western nations in its widespread and routine use of”⁶⁶ solitary confinement of detainees.

These rampant and unchecked human rights abuses extend to a lack of even basic, life-saving medical care. A February 2016 report published jointly by the American Civil Liberties Union, Detention Watch Network, and National Immigrant Justice Center found “egregious violations of [ICE’s] own medical care standards that played a significant role in eight in-custody deaths from 2010 to 2012.”⁶⁷ And although the Office of Detention Oversight (“ODO”) ascribed these death to noncompliance with internal policies, no action was taken, disciplinary or otherwise, to prevent

⁵⁹ UN Committee on the Rights of the Child, Report of the 2012 Day of General Discussion: The Rights of all Children in the Context of International Migration 10 (2012).

⁶⁰ Claudia Morales, *Families crossing the border: ‘We are not criminals’*, CNN (Nov. 2, 2016, 1:13 PM), <http://www.cnn.com/2016/11/02/us/family-immigration-detention-centers/>.

⁶¹ *Id.*

⁶² UN General Assembly, Interim Report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment 2 (2011).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 19.

⁶⁶ Marie Gottschalk, *Staying Alive: Reforming Solitary Confinement in U.S. Prisons and Jails*, 125 YALE L.J. 253, 253 (2016).

⁶⁷ DETENTION WATCH NETWORK ET AL., *FATAL NEGLECT: HOW ICE IGNORE DEATHS IN DETENTION* 3 (2016), <https://www.aclu.org/report/fatal-neglect-how-ice-ignores-death-detention>.

similar tragedies in the future.⁶⁸ In exposés of two detention facilities in Southern California, privately-run Adelanto and government-run Theo Lacy, the Detention Watch Network found that detainees:

[A]re denied basic needs, such as contact with lawyers and loved ones, adequate food and hygiene, and access to fresh air and sunlight. They endure racial slurs and discriminatory treatment by prison staff. They are subject to sub-standard medical care and denial of specialty care, resulting in prolonged injury, sickness and/or death.⁶⁹

ICE's detention centers have been denounced as a "ramshackle network of private and public lockups, prone to abuses and lacking legally enforceable standards for how detainees are treated."⁷⁰ The bed quota, combined with political pressure to detain a massive number of immigrants each night, forces the use of jail-like facilities that have atrocious records of human rights violations, including uninvestigated deaths in custody. However, unlike jails and prisons, ICE is not accountable to any outside department or organization; when something goes wrong in a detention center, "ICE investigates itself."⁷¹

In fact, the only guidelines regulating ICE's detention scheme are the Performance-Based National Detention Standards (PBNDS) – which were drafted by ICE itself.⁷² PBNDS are nonbinding, unenforceable standards; they merely outline "expected practices" for detentions center and do not provide detainees with actionable claims, or even administrative remedies, for violations.⁷³ Further, recorded violations have not led to actual changes in detention facility management, and centers that deviate from these expected practices continue to operate.⁷⁴ While there is a process for filing

⁶⁸ See *id.* at 5 ("[I]n the eight cases where ODO death reviews concluded that violations of ICE medical standards contributed to people's deaths, ICE's deficient inspections system essentially swept those findings under the rug.").

⁶⁹ ONE YEAR LATER, *supra* note 50, at 1.

⁷⁰ The Editorial Board, *Immigrants in Solitary*, N.Y. TIMES (Apr. 1, 2013), <http://www.nytimes.com/2013/04/02/opinion/immigrants-in-solitary.html>.

⁷¹ Maunica Sthanki, *Deconstructing Detention: Structural Impunity and the Need for an Intervention*, 65 RUTGERS L. REV. 447, 448 (2013).

⁷² U.S. Immigration & Customs Enft, 2011 Operations Manual ICE Performance-Based National Detention Standards (2011), <https://www.ice.gov/detention-standards/2011>; see also Detention Watch Network, *Detention Oversight*, <https://www.detentionwatchnetwork.org/issues/detention-oversight> ("None of [the PBNDS] standards are legally codified however, meaning there is little recourse if facilities are not meeting standards.").

⁷³ Sthanki, *supra* note 71, at 464.

⁷⁴ See *id.* at 464–65 ("The standards are used primarily in ICE's annual review of each detention facility; however, the annual review process has not been effective as several facilities fail inspection and continue to house detainees.").

grievances in the PBNDS,⁷⁵ detainees who file grievances through the PBNDS process have been retaliated against for doing so.⁷⁶ In other words, there are virtually no remedial mechanisms—legal or otherwise—in place to ensure compliance with even basic requirements for detention center standards, and the nonbinding mechanisms have been proven to be mere parchment barriers that provide no protection to detainees.⁷⁷

A. STATUTORY BASIS FOR DETENTION AND JUDICIAL CHALLENGES

The federal government's power to detain immigrants stems from the Immigration and Nationality Act of 1965 (previously defined as "INA"), a comprehensive statute that governs nearly every aspect of immigration law.⁷⁸ ICE, established in 2003 as the enforcement branch of DHS,⁷⁹ is tasked with enforcing the INA.⁸⁰ This charge includes rounding up and detaining persons suspected of being removable or inadmissible under the statute.⁸¹

As discussed in Part II, the INA was amended in 1996 to add sweeping provisions requiring the mandatory detention of non-citizens with a wide array of criminal convictions.⁸² The amendments stripped DHS of its power to decline to detain individuals after they are released from criminal custody, and stripped Immigration Judges of the power to hold bond hearings within a reasonable time period to determine whether an individual

⁷⁵ U.S. IMMIGRATION & CUSTOMS ENF'T, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 2011, Section 6.2 (Feb. 2013), <https://www.ice.gov/doclib/detention-standards/2011/pbnds2011.pdf>

⁷⁶ DETENTION WATCH NETWORK, *supra* note 50.

⁷⁷ *See id.* at 465 ("Detention conditions themselves are unenforceable . . . the only 'force of law' given to [them] is in the contract where the private-prison company promises to adhere to the standards."). The Author's own experiences with visiting immigrant detention centers emphasize the idea that detention center employees do not take the PBNDS seriously and are sometimes entirely unfamiliar with them.

⁷⁸ Immigration and Nationality Act of 1965, 8 U.S.C. §§ 1101 et seq. (2012).

⁷⁹ DHS replaced the former INS in 2003 following a reorganization of Federal agencies after the September 11, 2001 attacks. U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *Our History*, USCIS (May 25, 2011), <https://www.uscis.gov/about-us/our-history>.

⁸⁰ *Who We Are*, U.S. IMMIGRATION AND CUSTOMS ENF'T, <https://www.ice.gov/about>.

⁸¹ *See* Brickenstein, *supra* note 14, at 237 ("ICE is the primary agency responsible for the enforcement of the INA, including facilitating the detention and removal of unlawful aliens.").

⁸² IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified in scattered sections of 8 U.S.C.), AEDPA, Pub. L. No. 104-132, Stat. 1214 (1996) (codified in scattered sections of 8, 18 U.S.C.)

is a danger to the community or a flight risk.⁸³ Mandatory, unreviewable detention may now be triggered for minor convictions such as marijuana possession and petty theft.⁸⁴ In the decade after these provisions were added, the number of people detained on a given day increased fivefold.⁸⁵

ICE's power to detain non-citizens is already extremely broad, and the President at times grants ICE "extra" detention powers—powers that were historically based on hypothetical threats to national security but in recent years have shifted to a justification based on broad executive authority to control immigration.⁸⁶ This is in part due to the conflation, by the government and consequently by the media, of immigrants and dangerousness.⁸⁷ Immigrant detention has been described by government agencies—in the United States as well as other Western nations—as a way to appear tough on would-be terrorists or criminals seeking to enter from abroad, or to incapacitate them upon arrival.⁸⁸

Rhetoric centered around counterterrorism has proved to be exceptionally effective in rallying public support for draconian immigrant detention policies. The circumstances surrounding AEDPA's passage is one example. In the immediate aftermath of the tragic Oklahoma City bombing of 1995, media initially disseminated a mistaken, unfounded assumption that the attack had been perpetrated by Middle Eastern terrorists.⁸⁹ Although the bomber's true identity—a white, American-born American man—was discovered quickly, the public continued to blame foreigners, pushing

⁸³ See Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 HASTINGS L. J. 363, 365 (2014) ("Because immigration judges and the [DHS] view the mandatory detention law as stripping them of discretion to determine whether detention is warranted in an individual case . . . mandatory detention bears little relation to the goals of immigration enforcement.").

⁸⁴ *Id.* at 366.

⁸⁵ *Id.* at 367.

⁸⁶ See Daniel Moeckli, *The Selective "War on Terror": Executive Detention of Foreign Nationals and the Principle of Non-Discrimination*, 31 BROOKLYN J. INT'L L. 495, 501–02 (2006) ("[D]etention based on national security has become less accepted by the international community," which could be why "another type of crisis has frequently been asserted in more recent years to justify executive detention powers: the perceived immigration crisis.").

⁸⁷ See *id.* at 512 (explaining that antiterrorism detention powers were adopted "within an immigration context" and that the powers "serve to protect national security rather than to enforce the immigration laws.").

⁸⁸ See *id.* at 512–13 ("[P]reventive detention powers . . . [serve] not only to incapacitate potential terrorists, but also to deter them from entering or staying in the first place.").

⁸⁹ See *The Significance of the Oklahoma City Bombing*, ANTI-DEFAMATION LEAGUE (Mar. 27, 2015), <https://www.adl.org/news/article/oklahoma-city-bombing> (discussing the tendency for domestic acts of terrorism to be mistaken for 9/11 style terrorist attacks).

Congress and the Clinton administration to pass AEDPA⁹⁰ to force the detention of vast numbers of immigrants.

Immigrant detention has faced various challenges in the courts, both on statutory and constitutional grounds. The Supreme Court has granted certiorari on a handful of immigrant detention cases in the Twenty-First Century, including the notable 2001 case, *Zadvydas v. Davis*.⁹¹ The Court in *Zadvydas* held that indefinite detention of non-citizens raises due process issues, and that prolonged detention not ordered under *criminal* proceedings—which no longer serves the narrow, supposedly non-punitive purpose of ensuring an immigrant’s appearance throughout removal proceedings—invades an individual’s Constitutional right to be presumptively free from government custody.⁹² However, *Zadvydas* arose in the specific context of non-citizens who were removable from the United States, but whose countries of origin refused to accept them, placing them in danger of hypothetically permanent detention.⁹³ The Court emphasized that the “indefinite, perhaps permanent” nature of the petitioners’ detention played a significant role in its decision, and that continued detention is acceptable for those whose removal remains “reasonably foreseeable.”⁹⁴ The Court went on to specify six months as the “presumptively reasonable” period of detention, after which judicial review of the detention would be warranted.⁹⁵

Two years later, in *Demore v. Kim*,⁹⁶ the Court heard a challenge to the mandatory detention provision of the INA.⁹⁷ The plaintiffs argued that the provision violated detainees’ due process rights by allowing indefinite

⁹⁰ See Liliana Segura, *Gutting Habeas Corpus: The Inside Story of How Bill Clinton Sacrificed Prisoners’ Rights for Political Gain*, THE INTERCEPT (May 4, 2016), <https://theintercept.com/2016/05/04/the-untold-story-of-bill-clintons-other-crime-bill/> (“‘We send a loud, clear message today all over the world, in your names,’ [President Bill Clinton] told families in attendance whose loved ones had died in Oklahoma City.’ America will never surrender to terror.’ Then he signed the [AEDPA].”).

⁹¹ *Zadvydas v. Davis*, 533 U.S. 678 (2001).

⁹² *Id.* at 690; see also *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (“Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.”).

⁹³ See *Zadvydas*, 533 U.S. at 691, 711 (“If [other countries’] own nationals are now at large in the United States, the nation of origin may ignore or disclaim responsibility to accept their return.”).

⁹⁴ See *id.* at 699, 701 (“[A]n alien may be held in confinement until . . . there is no significant likelihood of removal in the reasonably foreseeable future.”).

⁹⁵ See *id.* at 701 (“[A]n alien may be held in confinement until . . . there is no significant likelihood of removal in the reasonably foreseeable future.”).

⁹⁶ *Demore v. Kim*, 528 U.S. 510 (2003).

⁹⁷ 8 U.S.C. § 1226(c).

detention without an individualized determination of each detainee's potential dangerousness or risk of flight.⁹⁸ The Court relied on *Zadvydas* to reject this claim, reinforcing its ruling that mandatory detention was not facially unconstitutional when employed for a limited period and for the narrow purpose of ensuring appearances at administrative proceedings.⁹⁹ The Court cited data supplied by the Executive Office for Immigration Review about the average length of stays in detention to bolster its decision: "in 85% of the cases in which aliens are detained pursuant to § 1226(c), removal proceedings are completed in an average time of 47 days."¹⁰⁰

The Supreme Court's unclear guidance in these cases led to a circuit split regarding prolonged detention without judicial review: the Ninth and Second Circuits adopted a bright-line six-month limit, while the First, Third, Sixth, and Eleventh Circuits took a "reasonable period" approach that analyzed the circumstances of detention on a case-by-case basis.¹⁰¹ However, until recently, all circuits were in agreement that at some point, extended immigration detention violated the Fifth Amendment's due process clause and could not be continued. This changed in February 2018, when the Supreme Court broke with both of these approaches in *Jennings v. Rodriguez*¹⁰² to hold that immigrants subject to mandatory detention under the INA are not entitled to bond hearings while their removal proceedings are pending.¹⁰³

Even when judges do conduct hearings and determine that detention is no longer warranted, bond is often set at a massive amount. Unlike in federal criminal bond proceedings, immigration judges are not obligated to consider ability to pay or financial resources when making custody determinations.¹⁰⁴ This remains the case for immigrant detainees in spite of

⁹⁸ *Demore*, 528 U.S. at 514.

⁹⁹ *See id.* at 513 ("We hold that Congress, justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers, may require that persons such as respondent be detained for the brief period necessary for their removal proceedings.").

¹⁰⁰ *Id.* at 529.

¹⁰¹ Kniffin & Martin, *supra* note 33, at 11.

¹⁰² *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018).

¹⁰³ The Supreme Court's decision was based primarily on tenets of statutory interpretation rather than constitutional arguments. However, the Court remanded to the Ninth Circuit to address the constitutional challenges to the relevant portions of the statute (8 U.S.C. § 1225(b), 1226(a) and (c)).

¹⁰⁴ *But see Hernandez v. Sessions*, 872 F.3d 976 (9th Cir. 2017) ("Plaintiffs are likely to succeed on their challenge under the Due Process Clause to the government's policy of allowing ICE and IJs to set immigration bond amounts without considering the detainees' financial circumstances or alternative conditions of release.").

the Department of Justice's determination that detaining criminal defendants "solely because of their inability to pay for their release" is unconstitutional.¹⁰⁵ This is reflected in comparative prehearing detention rates: per capita, ICE's prehearing detention rate is nearly double that of a typical pretrial criminal system.¹⁰⁶

B. THE ROLE OF PRIVATE COMPANIES IN IMMIGRANT DETENTION

Due to the oversized scale of the U.S.'s immigrant detention system, "ICE has only eight detention facilities of its own,"¹⁰⁷ housing just 13 percent of immigrant detainees.¹⁰⁸ Accordingly, the vast majority of immigrants are housed in either state or local facilities through IGSAs, which in turn often contract with private, for-profit companies to manage their facilities.¹⁰⁹ The privatization of detention "hinders adherence to detention standards," because even the nonbinding PBNDS are inapplicable to private subcontractors.¹¹⁰ Private facilities are subject only to contract termination—which has occurred just three times in the history of ICE detention.¹¹¹ Although ICE maintains that its facilities are designed especially for detention purposes and are not prisons, these facilities often are located inside prisons, "were formerly prisons, or are run by private corporations who specialize in managing prisons."¹¹²

Two companies dominate this marketplace for detaining humans: CoreCivic (formerly CCA) and GEO.¹¹³ CoreCivic, "the nation's oldest and largest for-profit prison corporation," was explicitly established on the idea "that you could sell prisons 'just like you were selling cars, or real estate,

¹⁰⁵ *Walker v. City of Calhoun, Ga.*, 682 Fed. Appx. 721, Case No.: 16-10521-HH (11th Cir. 2017).

¹⁰⁶ Brief for American Civil Liberties Union as Amici Curiae Supporting Appellees, *Hernandez v. Sessions*, 872 F.3d 976 (2017).

¹⁰⁷ Brianna M. Mooty, *Solving the Crisis for Immigration Detainees: Is the Proposed Detainee Basic Medical Care Act of 2008 the Answer?*, 28 L. & INEQ. 223, 232 (2010).

¹⁰⁸ Bruck, *supra* note 48, at 491.

¹⁰⁹ See, e.g., *id.* at 492 ("All contractors seeking to do business with DHS must register under the [CCR] pursuant to the Federal Acquisition Streamlining Act ('FASA') of 1994. Thus, DHS has the opportunity to impart public norms on private corporations through contracting.").

¹¹⁰ *Id.*

¹¹¹ Sthanki, *supra* note 71, at 465 ("[A] report explained that as of 2009, only three contracts had been terminated) (citing INTER-AM. COMM'N ON HUMAN RIGHTS, REPORT ON IMMIGRATION IN THE UNITED STATES: DETENTION AND DUE PROCESS 94 (2010)).

¹¹² Riddhi Mukhopadhyay, *Death in Detention: Medical and Mental Health Consequences of Indefinite Detention of Immigrants in the United States*, 7 SEATTLE J. SOC. JUST. 693, 707 (May 2008).

¹¹³ CARSON & DIAZ, *supra* note 11.

or hamburgers.”¹¹⁴ In furtherance of this reprehensible goal, CCA and GEO spent a combined total of \$16,055,000 on federal lobbying between 2008 and 2014—the “lion’s share” of the nationwide private prison total of \$16,789,000.¹¹⁵ Over the same time period, “the industry also supplied over \$132,000 in campaign contributions” to the Congressional subcommittee responsible for enacting and protecting the lucrative bed quota.¹¹⁶

This lobbying has paid off handsomely for CCA and GEO. The federal government’s relationship with these companies has continually strengthened in recent years, with its contracts accounting for “about 43 percent, or \$752 million, of [CCA’s] 2012 revenue -- up from about 23 percent in 2000 -- including \$206 million from ICE in [2012].”¹¹⁷ The congressional and executive movement towards increasing immigration detention has been “credit[ed] with saving the private prison industry” from the brink of bankruptcy.¹¹⁸ In 2006, after President George W. Bush “proposed increasing spending on immigrant detention,” CoreCivic’s stock grew by 27%;¹¹⁹ similarly, when President Donald Trump was elected in 2016, the value of CoreCivic’s and GEO’s stock jumped by 34 and 18 percent respectively.¹²⁰

The idea that for-profit corporations are experiencing a massive financial windfall from the perpetration of human suffering is patently unconscionable to many. Yet the truth is that so long as a bed quota exists, and politicians are rewarded by their electorates for taking hardline stances on undocumented immigration, these for-profit company contracts will continue to be renewed year after year. There is simply no way for the government—whether federal, state, or local—to absorb the cost of manning and operating facilities capable of housing this volume of

¹¹⁴ HOLLY KIRBY ET AL., *The Dirty Thirty: Nothing to Celebrate About 30 Years of Corrections Corporation of America*, GRASSROOTS LEADERSHIP 1 (2013), http://grassrootsleadership.org/sites/default/files/uploads/GRL_Dirty_Thirty_formatted_for_web.pdf (quoting CCA founder Tom Beasley).

¹¹⁵ CARSON & DIAZ, *supra* note 11, at 10.

¹¹⁶ *Id.*

¹¹⁷ Selway & Newkirk, *supra* note 16.

¹¹⁸ Leslie Berestein, *Tougher Immigration Laws Turn the Ailing Private Prison Sector into a Revenue Maker*, SAN DIEGO UNION-TRIBUNE (May 4, 2008), <http://www.november.org/stayinfo/breaking08/ToughImmigration.html>.

¹¹⁹ Robert Koulisch, *Blackwater and the Privatization of Immigration Control*, 20 ST. THOMAS L. REV. 462, 477 (2008).

¹²⁰ Hanna Kozłowska & Jason Karaian, *The First Big Winners of Donald Trump’s Victory Are Private Prison Companies, Whose Stocks Are Soaring*, QUARTZ (Nov. 9, 2016), <https://qz.com/832775/election-2016-private-prison-company-stocks-cca-and-geo-group-are-surging-after-trumps-win-cxw-geo/>.

detainees.¹²¹ So the real issue is not whether the government should stop contracting with private facilities to perpetrate large-scale detention; rather, it is whether our current system of large-scale detention is desirable, rational, or necessary. History, an international comparison, and common sense demonstrate that it is none of these things.

C. IS THIS NORMAL? A MODERN DAY INTERNATIONAL CONTEXT

The United States operates the world's largest immigration detention system, with the current capacity to detain 41,000 immigrants at a time.¹²² Malaysia, the country with the second-largest immigrant detention system, detains only around one-third of that number, with an estimated capacity of around 14,000.¹²³ Most countries "do not use detention as the first option in the majority of cases," and a "number of countries rarely resort to detention, if at all."¹²⁴ In contrast, detention "is treated as a pillar of the U.S. immigration enforcement system."¹²⁵

The detention capacity of the United States dwarfs that of most European countries, even those with large numbers of undocumented immigrants.¹²⁶ For example, in 2014, Germany, a country with more than 12 million international migrants, apprehended 57,000 illegal immigrants, but only detained around 1,800 of them (its detention capacity is around that

¹²¹ See REUTERS, *supra* note 45 ("[E]nding private detention for migrants would require Congress to spend millions more dollars because government-run operations are more costly.").

¹²² HOMELAND SECURITY ADVISORY COUNCIL, REPORT OF THE SUBCOMMITTEE ON PRIVATIZED IMMIGRATION DETENTION FACILITIES, (Dec 1, 2016), <https://www.dhs.gov/sites/default/files/publications/DHS%20HSAC%20PIDF%20Final%20Report.pdf>; Further, this capacity may be soon be increasing by 7,000 beds. Alan Gomez, *Trump Plans Massive Increase In Federal Immigration Jails*, USA TODAY (Oct. 17, 2017), <https://www.usatoday.com/story/news/world/2017/10/17/trump-plans-massive-increase-federal-immigration-jails/771414001/> (ICE has requested \$1.2 billion to increase detention capacity to 48,000 in the 2018 budget); Robyn Sampson & Grant Mitchell, *Global Trends in Immigration Detention and Alternatives to Detention: Practical, Political and Symbolic Rationales*, 1 J. ON MIGRATION AND HUM. SEC.: 97-121, 101 (2013) ("'Detention capacity' is the number of people who can be detained at any given time within a country's dedicated detention facilities.").

¹²³ *Malaysia Immigration Detention*, GLOBAL DETENTION PROJECT (2018), <https://www.globaldetentionproject.org/countries/asia-pacific/malaysia>. I use detention capacity as a metric rather than the actual number of nightly detainees because the latter figure is elusive and likely nonexistent.

¹²⁴ INT'L DETENTION COALITION, *supra* note 57, at 2.

¹²⁵ U.S. Conference of Catholic Bishops' Committee on Migration, *Unlocking Human Dignity: A Plan to Transform the U.S. Immigrant Detention System* 7 (2015).

¹²⁶ See, e.g., Sampson & Mitchell, *supra* note 122, at 101.

number.)¹²⁷ In part, this is because European Union (“E.U.”) countries have shown more willingness to use cheaper and more humane ATD programs.¹²⁸ As of 2011, all E.U. member states (except Malta) “had introduced alternatives to detention into national legislation.”¹²⁹ This is partly due to an “increased interest in reducing detention,” as evidenced by European roundtable conferences hosted by the United Nations High Commissioner for Refugees (“UNHCR”) and the International Detention Coalition.¹³⁰ The United Nations General Assembly and the UNHCR have repeatedly expressed their preference for alternatives to detention and their concerns for human rights violations due to immigrant detention.¹³¹ Some countries have even codified the notion of migration as a human right, and extended constitutional protections “to all persons in the country irrespective of their legal status.”¹³²

While many countries have moved away from immigrant detention in part based on this international consensus, the United States is a notable exception. For example, the U.S. refuses to “recognize limitations placed on the detention of asylum-seekers by international human rights law.”¹³³ The only restrictions on the detention of asylum-seekers to which the United States adheres—besides some amorphous protections halfheartedly extended under the Fifth Amendment’s due process clause¹³⁴—are those

¹²⁷ *Germany Immigration Detention*, GLOBAL DETENTION PROJECT, <https://www.globaldetentionproject.org/countries/europe/germany>

¹²⁸ Leeanne Torpey, *Solutions for reducing detention*, INTERNATIONAL DETENTION COALITION (April 12, 2017), <https://idcoalition.org/news/showing-detention-is-not-necessary/> (Five European countries’ adapted ATD programs “aim to demonstrate that detention is not necessary when migrants are supported and treated as human beings in the community.”).

¹²⁹ Sampson & Mitchell, *supra* note 122, at 102.

¹³⁰ *Id.* at 102–103.

¹³¹ *See id.* at 104–105 (the UNGA “repeated its calls for States to reduce the detention of unauthorized migrants” and the UNHCR “advocates strongly for the use of effective alternatives to detention.”).

¹³² SAMPSON ET AL., *THERE ARE ALTERNATIVES* (Revised Edition) 1, 36 (2015) <http://idcoalition.org/publication/view/there-are-alternatives-revised-edition>.

¹³³ Stephen Meili, *Do Human Rights Treaties Matter?: Judicial Responses to the Detention of Asylum-Seekers in the United States and the United Kingdom*, 48 N.Y.U. J. INT’L L. & POL. 209, 212 (2015).

¹³⁴ *See, e.g., Won Win v. United States*, 163 U.S. 228, 238 (1896) (“[A]ll persons within the territory of the United States are entitled to the protections guaranteed by [the Fifth and Sixth Amendments], and that even aliens shall not . . . be deprived of life, liberty, or property without due process of law.”).

outlined in the INA.¹³⁵ In contrast, many other countries have incorporated various international norms and protections for asylum-seekers, giving relevant adjudicators “a more extensive jurisprudential toolkit” to examine national detention procedures.¹³⁶ The United States, in implementing its uniquely large-scale, quota-driven system of immigrant detention, defies the policies and rationales outlined in widely-adopted international human rights treaties and well-established international norms.¹³⁷

IV. THE IMPACT OF POLITICAL RHETORIC ON IMMIGRANT DETENTION

What makes the United States willing, or even able, to implement an immigrant detention system? For one, some politicians’ anti-immigrant rhetoric that falsely conflates immigration with crime trickles down to the citizenry.¹³⁸ In the run-up to the 2016 presidential election, for instance, Donald Trump’s and Hillary Clinton’s official stances on immigration overlapped significantly in their twin promises to deport so-called “criminal aliens”—“individuals who pose a violent threat to public safety,”¹³⁹ notwithstanding evidence showing that not only do immigrants, including undocumented immigrants, “commit fewer crimes than native-born Americans,”¹⁴⁰ but also they help to *reduce* crime rates by “infusing new

¹³⁵ See Meili, *supra* note 133, at 212 (“[T]he only restriction relevant to the detention of asylum-seekers beyond the relevant domestic statute is the broadly-worded due process protection of the 5th Amendment.”).

¹³⁶ *Id.*

¹³⁷ See *id.* at 212–13 (arguing that U.S. courts “rarely rely on international treaties in interpreting the Refugee Convention” and instead rely on “interpretations of the meaning of persecution and other relevant terms.”).

¹³⁸ Grace Meng, *How the US Talks About Immigrants and Crime*, HUMAN RIGHTS WATCH BLOG (Oct. 3, 2016), <https://www.hrw.org/blog-feed/us-election-and-human-rights#blog-294825>.

¹³⁹ *Id.* See also David Nakamura, *Clinton’s Stance on Immigration is a Major Break From Obama*, WASH. POST (March 10, 2016), https://www.washingtonpost.com/politics/clintons-stance-on-immigration-is-a-major-break-from-obama/2016/03/10/6388a1f8-e700-11e5-a6f3-21ccdbc5f74e_story.html (Hillary Clinton said to a Univision anchor, “I would not deport children. I do not want to deport family members either, Jorge. I want to, as I said, prioritize who would be deported: violent criminals, people planning terrorist attacks, anybody who threatens us. That’s a relatively small universe.”).

¹⁴⁰ Bier, *supra* note 18; see also Michelangelo Landgrave and Alex Nowrasteh, *Criminal Immigrants: Their Numbers, Demographics, and Countries of Origin*, CATO Institute Immigration Research and Policy Brief Number 1, p. 1 (March 15, 2017), https://object.cato.org/sites/cato.org/files/pubs/pdf/immigration_brief-1.pdf (“All immigrants are less likely to be incarcerated than natives relative to their shares of the population. Even illegal immigrants are less likely to be incarcerated than native-born Americans.”); Alex Nowrasteh, *Restrictionists Are Misleading You About Immigrant Crime Rates*, REASON (Feb 1, 2018),

capital into rundown areas,” working in law enforcement, and testifying at criminal trials.¹⁴¹

This information is not widely disseminated, however: only seven percent of Americans believe that immigrants make American society better “when it comes to crime,” with a solid half of them believing that immigrants make it worse.¹⁴² Studies show that this view of immigrant crime rates date back as far as the mid-nineteenth century, but even then, as now, those beliefs were incorrect.¹⁴³ At that time, Irish and Italian immigrants in particular were branded in the public eye as groups who brought crime to American urban areas; “their neighborhoods were thought to be highly disorganized and anomic, leading to higher crime rates.”¹⁴⁴ Historical studies and empirical assessments (including one completed as far back as 1931) have shown that this belief has been consistently inaccurate.¹⁴⁵

The conflation of immigration and criminality is evident in everyday jargon, notably in the pejorative nominalization of the word “illegal” to refer to a person who crosses the U.S. border without authorization.¹⁴⁶ This idea, that immigration and criminality go hand-in-hand, allows—indeed encourages—the government to lock up immigrants indefinitely while they await a hearing or removal from the country. American public opinion across the political spectrum has absorbed, and is echoing, this immigrant-

<https://reason.com/archives/2018/02/01/immigrants-and-crime> (“[T]he Alien Incarceration Report jointly released by the Departments of Justice (DOJ) and Homeland Security (DHS)...misrepresented data when it estimated that “one-in-five of all persons in the [federal] Bureau of Prisons custody were foreign born, and that 94 percent of confirmed aliens in custody were unlawfully present.... But the report had no solid basis for its conclusion because it did not have all the prison data... [F]ederal prisons house illegal immigrants who commit immigration offenses. The ones who commit more serious crimes tend to be housed in state adult correctional facilities.”).

¹⁴¹ Id.

¹⁴² PEW RESEARCH CENTER, MODERN IMMIGRATION WAVE BRINGS 59 MILLION TO U.S., DRIVING POPULATION GROWTH AND CHANGE THROUGH 2065 54 (2015), http://www.pewhispanic.org/files/2015/09/2015-09-28_modern-immigration-wave_REPORT.pdf (this statistic includes both documented and undocumented immigrants).

¹⁴³ Mary C. Waters & Marisa Gerstein Pineau, *The Integration of Immigrants Into American Society* 326 (2015), <https://www.nap.edu/read/21746/chapter/9#326>.

¹⁴⁴ Id.

¹⁴⁵ Id.

¹⁴⁶ See César Cuauhtémoc García Hernández, *What is Crimmigration Law?*, AMERICAN BAR ASSOCIATION (2015), <https://www.americanbar.org/publications/insights-on-law-and-society/2017/spring2017/what-is-crimmigration-law.html> (“In the groundbreaking article coining the term, Juliet Stumpf, a professor at Lewis & Clark University Law School, noted that the division between criminal law and immigration law ‘has grown indistinct’ such that the two ‘are merely nominally separate.’”).

as-criminal sentiment: when asked “what one word comes to mind when they think about immigrants, ‘illegal’ is cited most often.”¹⁴⁷

President Donald Trump has misleadingly stated, more than once, that between two and three million “criminal aliens” live in the United States.¹⁴⁸ Though his anti-immigrant rhetoric has certainly been particularly fierce, he is far from the first politician to falsely claim that immigrants are a disproportionately dangerous group. Looking backward, history shows that politicians’ encouragement of native-born Americans to fear immigrants is hardly new. High-ranking members of our national and subnational governments, for much of our nation’s history, have equated the safety and prosperity of the U.S. with nativist principles. S. Karthick Ramakrishnan and Pratheepan Gulasekaram aptly refer to those policymakers who promote the false immigrant-as-criminal narrative as “restrictionist issue entrepreneurs,” who work to “intensify interparty polarization and . . . ethnic nationalism” by distorting facts and highlighting a few disturbing anecdotes rather than empirical data.¹⁴⁹ The key groups targeted for fear-mongering by these issue entrepreneurs has shifted in the past few decades: Haitians and Cubans in the 1980’s,¹⁵⁰ Middle Easterners during the decade-plus following 9/11, and most recently Latin Americans, especially those from gang-ridden nations.¹⁵¹ Their tactics have continued to prove effective.

In more recent years, overt anti-immigrant sentiment has been for the most part rebranded as anti-criminal sentiment. For instance, in 2008, the Bush Administration strengthened immigration enforcement with the Secure Communities (S-Comm) program, which integrated immigration and criminal databases in order to comprehensively share information between local criminal law enforcement and federal immigration enforcement.¹⁵² S-Comm’s stated goal was to prioritize “the removal of criminal aliens by focusing efforts on the most dangerous and violent

¹⁴⁷ PEW RESEARCH CENTER, *supra* note 142.

¹⁴⁸ See, e.g., Lesley Stahl, *President-Elect Trump Speaks to a Divided Country*, CBS NEWS: 60 MINUTES (Nov. 13, 2016) <http://www.cbsnews.com/news/60-minutes-donald-trump-family-melania-ivanka-lesley-stahl/>.

¹⁴⁹ S. Karthick Ramakrishnan and Pratheepan Gulasekaram, *The Importance of the Political in Immigration Federalism*, 44 ARIZ. ST. L.J. 1431, 1473–74 (2012).

¹⁵⁰ NPR Latin America, *Marielitos’ Stories, 30 Years After the Boatlift*, (July 20, 2010), <https://www.npr.org/templates/story/story.php?storyId=128646441> (“The Mariel Boat Lift became synonymous with criminals. . .”).

¹⁵¹ *Id.* at 1473.

¹⁵² Angelica Chazaro, *Challenging the “Criminal Alien” Paradigm*, 63 U.C.L.A. L. REV. 594, 616 (2016).

offenders,”¹⁵³ branding the program as a crime-fighting measure rather than a xenophobic one. However, in 2011, the majority of immigrants removed under S-Comm either were convicted of a misdemeanor only, or had no criminal conviction at all.¹⁵⁴ Further, IIRIRA was in some ways passed as the result of a political compromise at the expense of immigrants with criminal convictions: Democrats, who wanted to block proposed restrictions on legal immigration and asylum eligibility, and Republicans, who wanted to tighten them, could both agree that beefing up policies against “criminal aliens” was an acceptable middle ground.¹⁵⁵ An inverted example would be the across-the-aisle support for “Dreamers,” who are protected from removal through the Deferred Action for Childhood Arrivals (“DACA”).¹⁵⁶ A path to citizenship for “Dreamers” is encouraged by liberals and conservatives alike – likely due, in part, to the fact that DACA is only available to individuals without any significant criminal history.¹⁵⁷

In 2014, then-President Barack Obama’s “Immigration Accountability Executive Actions” added a new category of criminal offenses as a priority for removal decisions; this category included “significant misdemeanor[s],” such as single, first-time DUI charges.¹⁵⁸ Indeed, though Mr. Obama made noteworthy strides in some areas of immigration reform, he, too, engaged in perpetrating the “criminal alien” myths that have been widely condemned by immigrants’ rights activists and scholars. For example, when announcing these Executive Actions, he told the country that the program would focus on deporting “felons, not families”—a catchy alliterative slogan no doubt, but one that has been rightfully criticized as “overly simplistic, divisive, and dehumanizing.”¹⁵⁹ When historically and politically contextualized, rhetoric like this coming from the highest-ranking official in the nation comes as no surprise—it reflects the now-ingrained governmental view

¹⁵³ *Id.* at 619 (quoting Secure Communities: A Modernized Approach to Identifying and Removing Criminal Aliens, U.S. IMMIGR. & CUSTOMS ENF’T (2010)).

¹⁵⁴ *Id.* It is worth noting that S-Comm, like many immigration enforcement programs, gave wide latitude to local law enforcement to engage in racial profiling, leading to a disproportionate impact skewed towards the detention and removal of Latino and Black immigrants. *Id.*

¹⁵⁵ Lind, *supra* note 38.

¹⁵⁶ Memorandum from Janet Napolitano, Secretary of Homeland Sec., U.S. Dep’t of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs and Border Prot.; Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs.; and John Morton, Dir., Immigration & Customs Enforcement on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

¹⁵⁷ *Id.* at 1.

¹⁵⁸ Chazaro, *supra* note 152, at 596–98.

¹⁵⁹ *Id.* at 607.

“that a criminal conviction shifts an immigrant’s identity from a possible parent or worker or child to a body to be processed for detention and deportation.”¹⁶⁰

Words matter. The widespread use of the term “criminal alien” by national and subnational politicians and policymakers—who are powerful, visible, and trusted by their audiences—plants the idea that the United States is virtually flooded with dangerous, violent immigrants and allows large-scale detention to flourish without effective oversight. This term, “for all its power on the campaign trail, embraces a vast spectrum of human character and behavior. Some such criminals are truly dangerous, but a large fraction of this class made single mistakes or had shown genuine rehabilitation and remorse.”¹⁶¹ But as politicians continue to use this term for all individuals born abroad (whether here legally on a temporary visa, as a permanent resident, or without authorization) who have committed any crime at any point while residing in the United States, politicians place shoplifters on the same platform as axe murderers, and teenage pot-smokers on equal footing with international drug lords.¹⁶² And, of course, the former examples are infinitely more common than the latter.

Compare, for instance, the dogged endurance of quota-based immigrant detention with the current de-carceration movement for citizens, a bipartisan effort¹⁶³ supported by legislators, law enforcement, and citizens¹⁶⁴ who have reached an overdue consensus that “our country incarcerates too many people, for too much time, at too much expense to

¹⁶⁰ *Id.*

¹⁶¹ David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v. Davis*, 2001 THE SUPREME COURT REVIEW 47, 64 (2001).

¹⁶² See *Forced Apart: Families Separated and Immigrants Harmed by United States Deportation Policy*, HUMAN RIGHTS WATCH (July 17, 2007), <https://www.hrw.org/report/2007/07/16/forced-apart/families-separated-and-immigrants-harmed-united-states-deportation> (The Deportation Policy “applies to all criminal aliens, regardless of the gravity of their offense. . . . whether they are murderers or petty shoplifters. An immigrant with an American citizen wife and children sentenced to 1-year probation for minor tax evasion and fraud would be subject to this procedure. And under this provision, he would be treated the same as ax murderers and drug lords.” (citing 141 CONG. REC. 7803 (1996) (Statement of Sen. Kennedy))).

¹⁶³ See Matt Apuzzo, *Holder and Republicans Unite to Soften Sentencing Laws*, N.Y. TIMES (Mar. 3, 2014), <https://www.nytimes.com/2014/03/04/us/politics/holder-and-republicans-unite-to-soften-sentencing-laws.html> (discussing bipartisan support for “an issue on which they have found common cause: eliminating mandatory minimum sentences for nonviolent drug offenders.”).

¹⁶⁴ See e.g., Drug Policy Alliance, *New Pew Poll Confirms Americans Ready to End War on Drugs* (Apr. 2, 2014), <http://www.drugpolicy.org/news/2014/04/new-pew-poll-confirms-americans-ready-end-war-drugs> (discussing results of a Pew Research Center report showing strong support for reducing “the role of the criminal justice system in dealing with people who use drugs.”).

taxpayers.”¹⁶⁵ A recent study found that two-thirds of Americans believe that the government should focus more on treatment than prosecution for citizen drug users.¹⁶⁶ This consensus has not yet been reached when it comes to detaining and deporting non-citizens. A massive number of immigrants are still placed in indefinite detention and face mandatory deportation “for a wide range of crimes, including low-level drug offenses that are increasingly seen by law enforcement officials and policymakers as deserving less punishment, not more,”¹⁶⁷ and detention and deportation for drug possession increased by 43 percent from 2007 to 2012.¹⁶⁸

Moreover, the bed quota could be contributing to the public’s incorrect inference that dangerous “criminal aliens” surround their communities. By requiring the detention of a massive swath of the country’s noncitizen immigrant population every day, the government “brands immigrants as criminals in the public’s eye and contributes to the sense that they deserve to be treated as such.”¹⁶⁹ DHS and its for-profit contractors use “the anodyne language of ‘processing’ and ‘detention’ to describe [a] system”¹⁷⁰ that is nearly indistinguishable from criminal incarceration: holding people in “facilities where their lives are governed by standards designed for criminal defendants.”¹⁷¹

Despite its impressive acrobatic lexicon, the government is, for all intents and purposes, treating many immigrants as criminals solely because they are immigrants.¹⁷² Virtually every detention center is either located inside a current or former jail, is run by a company that specializes in incarceration, or both. And the treatment of detainees reflects that reality—many detainees wear the infamous orange prison garb¹⁷³ and are escorted

¹⁶⁵ *Id.*

¹⁶⁶ Drug Policy Alliance, *supra* note 164.

¹⁶⁷ Meng, *supra* note 138.

¹⁶⁸ Human Rights Watch, *US: Drug Deportations Tearing Families Apart*, YOUTUBE (June 15, 2015), <https://youtu.be/0WREUTOIOsM>.

¹⁶⁹ U.S. CONFERENCE OF CATHOLIC BISHOPS’ COMMITTEE ON MIGRATION, *supra* note 125, at 7.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² For example, pursuant to IIRIRA, newly-arrived asylum seekers—many of whom have very recently experienced extreme trauma, and have no criminal record—are subject to mandatory detention pending a credible fear interview. IIRIRA § 302(b)(IV).

¹⁷³ Seth Freed Wessler, *Dispatch From Detention: A Rare Look Inside Our ‘Humane’ Immigration Jails*, COLORLINES (Jan. 4, 2012), <http://www.colorlines.com/articles/dispatch-detention-rare-look-inside-our-humane-immigration-jails>.

by armed guards, if not handcuffed or even shackled, when transported.¹⁷⁴ They are branded as wrongdoers in the eyes of the detention center officials upon whom they rely on for their wellbeing, judges in charge of determining their fates, and the voting public.

V. DETENTION'S IMPACT ON IMMIGRANTS' ACCESSIBILITY TO THE JUSTICE SYSTEM

Immigrants in removal proceedings, unlike criminal defendants, have no right to appointed counsel.¹⁷⁵ Despite that, immigrants facing removal from the United States face substantially similar consequences as criminal defendants—in 1945, the U.S. Supreme Court described the impact of deportation on someone's life “as great if not greater than the imposition of a criminal sentence.”¹⁷⁶ This troubling policy has been consistently reaffirmed by the judiciary. Accordingly, immigrants in removal proceedings must find (and usually finance) their own attorneys, or else “thread their way alone through the labyrinthine maze of immigration laws,”¹⁷⁷ representing themselves against highly trained government lawyers. This includes, fantastically enough, immigrant children and even infants.

The first national study of access to counsel in U.S. immigration courts, published in December 2015, found that between 2007 and 2012, just 37 percent of immigrants were represented by counsel, regardless of their detention status.¹⁷⁸ For detained immigrants, that number dropped by nearly two-thirds, to a mere 14 percent.¹⁷⁹ In other words, “nondetained respondents were almost five times more likely to obtain counsel than

¹⁷⁴ See, e.g., Jerry Iannelli, *Somali “Slave Ship” ICE Detainees Say Florida Guards Are Abusing Them, Ask Congress for Help*, MIAMI NEW TIMES (Feb. 9, 2018, 8:00 AM), <http://www.miamiherald.com/news/92-detained-somalis-say-florida-ice-guards-abusing-them-10068786> (“The feds loaded them onto an airplane, kept the immigrants chained in the sky for 48 straight hours as the plane took off from Louisiana for Somalia, stopped inexplicably in Senegal, turned around, and landed in Miami.”).

¹⁷⁵ Brief for Respondent, *Fajardo-Lopez v. Ashcroft*, 2001 WL 34154795, Case No. 01-60637 (5th Cir. 2001) (“Although aliens have the right to obtain counsel at their own expense pursuant to INA § 292 [8 USCS § 1362], an alien has no Sixth Amendment right to counsel in deportation proceedings.”) (citing *Ogbemudia v. I.N.S.*, 988 F.2d 595, 598 (5th Cir. 1993)).

¹⁷⁶ *Bridges v. Wixon*, 326 U.S. 135, 164 (1945).

¹⁷⁷ *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1040 (9th Cir. 2016).

¹⁷⁸ Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 2 (2015).

¹⁷⁹ *Id.*

detained respondents.”¹⁸⁰ Moreover, access to counsel has a remarkable impact on an immigrant’s success in the courts; a study of access to counsel in immigration court found that “among similarly situated removal respondents, the odds were fifteen times greater that immigrants with representation, as compared to those without, sought relief and five-and-a-half times greater that they obtained relief from removal.”¹⁸¹ The study also found that only 2 percent of immigrants were represented on a pro bono basis.¹⁸²

How does detention contribute to higher rates of deportation, even for immigrants who have meritorious claims to remain in the country? Detained immigrants are simply less likely to be able to acquire an attorney than their non-detained counterparts.¹⁸³ This is due to a variety of factors. For example, because it costs the government money to house detainees, they are “less likely than non-detained immigrants to be granted additional time to find counsel.”¹⁸⁴ Even when granted continuances to secure representation, detained immigrants have received continuances that were “five times shorter than those granted to immigrants who were never detained.”¹⁸⁵

Another factor is purely geographical: the majority of detention centers are located in remote areas,¹⁸⁶ often hours away from the metropolises and suburbs where most attorneys live and work. It is difficult to entice busy attorneys, even those passionate about immigrants’ rights, to take on pro bono cases that involve hours of driving just to meet with their clients. Even legal aid organizations that specialize in deportation defense are less likely to take on detainees’ cases than non-detained ones,¹⁸⁷ due to the extra time

¹⁸⁰ *Id.* at 32.

¹⁸¹ *Id.* at 2.

¹⁸² *Id.*

¹⁸³ *Id.* at 34 (“Overall, only 36% of detained respondents seeking counsel actually found counsel, versus 71% of respondents who were never detained and 65% of respondents who were released.”).

¹⁸⁴ *Id.* at 33.

¹⁸⁵ *Id.* at 36.

¹⁸⁶ U.S. IMMIGRATION AND CUSTOMS ENF’T, Detention Facility Locator, <https://www.ice.gov/detention-facilities> (interactive facility locator); see, e.g., Kyle Kim, Immigrants held in remote ICE facilities struggle to find legal aid before they’re deported, L.A. TIMES (Sept. 28, 2017), <http://www.latimes.com/projects/la-na-access-to-counsel-deportation/> (describing that one immigration attorney drove 100 miles “to the Adelanto Detention Facility to meet a client who [was] being deported.”).

¹⁸⁷ Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 FORDHAM L. REV. 541, 560-61 (2009)

and money that must be spent on travel. The situation is exacerbated by the almost nonexistent federal funding for immigration-specific legal aid.¹⁸⁸

Even if a detainee manages to secure representation, detention centers are notorious for unnecessarily complicating attorneys' visits, which can reduce the availability and quality of counsel. Attorneys who wish to meet with their clients must first get security clearance at the facility, which can take weeks. Once they receive clearance, they still "must work under the constraints of facility rules,"¹⁸⁹ which often bar laptops and other electronics. Also, attorneys may be required to wait long periods of time for a free meeting room once they arrive at the detention facility.¹⁹⁰ On their own, each of these may seem like mild inconveniences, but jointly, the "added complication of needing to visit their clients in [detention]" causes some immigration attorneys to refuse to take on detained cases.¹⁹¹

Finally, the trauma associated with being held indefinitely, often completely cut off from the outside world, discourage many immigrants (implicitly or explicitly) from seeking legal relief.¹⁹² In such an "inherently coercive environment," detainees may sign "legal documents they do not understand, often in a language they cannot read"¹⁹³ and are "discouraged or impeded from seeking asylum or similar protection despite their fear of returning to serious harm in their countries of origin."¹⁹⁴ Therefore, detention's impact on immigrants' ability to seek and obtain legal relief cuts both ways: practical/logistical impediments from the attorney side, and psychological/trauma-induced impediments from the immigrants' side.

(discussing the barriers immigration law experts face in representing detainees on a pro bono basis).

¹⁸⁸ See Elinor R. Jordan, *What we Know and Need to Know About Immigrant Access to Justice*, 67 SO. CAR. L. REV. 295, 313 (2016) (discussing how Congress has "cut funding and attached restrictions that barred recipients of federal funding from representing most noncitizens" and has "restricted organizations that took federal funding from using any of their other resources to represent most immigrant clients.").

¹⁸⁹ Eagly & Shafer, *supra* note 178, at 35

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² See, e.g., Complaint for Declaratory and Injunctive Relief at 34, *Jane Doe 1 v. Johnson*, No. CV15-250 (D. Ariz. June 8, 2015) <https://www.nilc.org/wp-content/uploads/2015/12/Jane-Doe-1-v-Jeh-Johnson-Complaint-2015-06-08.pdf> ("Defendants' practice of holding individuals in harsh conditions while severely restricting access to outside counsel compounds detainees' psychological trauma and makes individuals more susceptible to coercive tactics, such as forcing them to sign legal documents they do not understand, including removal papers.").

¹⁹³ *Id.* at 5.

¹⁹⁴ *Id.*

There may be a link between the bed quota's impact on access to counsel and the public view of immigrants: since the bed quota leads to a higher number of detained immigrants, fewer immigrants have counsel. With fewer immigrants represented by counsel, fewer immigrants are granted legal status to remain in the country. And since more immigrants are being removed, public perception of them is, at best, that they lack a legal claim to stay in the country, and, at worst, that they are violent criminals. With public perception skewed towards the faulty belief that most immigrants being detained and removed are dangerous, the bed quota—and its accompanying revenue stream for local governments and private companies—is safe. This ouroboros shows no sign of letting go of its own tail, especially when compounded by the historically-consistent, trending-upwards political rhetoric that builds the American public's fear of immigrants. Without meaningful pressure from citizens to evaluate the continued necessity of large-scale detention, there is little hope for eliminating the bed quota.

VI. ALTERNATIVES TO DETENTION: WHAT WOULD ENDING LARGE SCALE DETENTION LOOK LIKE?

“Alternative to detention” (ATD) is “any legislation, policy or practice that allows for asylum seekers, refugees and migrants to reside in the community with freedom of movement while their migration status is being resolved or while awaiting deportation or removal” from the country.¹⁹⁵ Although ICE implemented some ATD programs in 2004 and 2007 for extremely “low-risk, non-violent offenders”—including the use of “electronic monitoring devices,” home and work visits, telephone reporting requirements, and residence verification¹⁹⁶—the most up-to-date statistics show that only around 5,000 immigrants are a part of these programs.¹⁹⁷

Scholarship and advocacy efforts focused on increasing access to ATDs often are built on the presumption against detention, recognizing that a person's right to liberty is an inherent, fundamental human right that has been “enshrined in all major international and regional human rights

¹⁹⁵ Sampson & Mitchell, *supra* note 122, at 108; *see also* SAMPSON ET AL., *supra* note 132, at II (“[T]he ICD defines [ATDs] as: ‘Any law, policy or practice by which persons are not detained for reasons relating to their migration status.’”).

¹⁹⁶ Maria Mendoza, A System in Need of Repair: The Inhumane Treatment of Detainees in the U.S. Immigration Detention System, 41 N.C.J. INT’L L. & COM. REG. 405, 444–45 (2016).

¹⁹⁷ *Id.* (“As of 2009, more than 5,400 immigrants were enrolled and monitored through these programs.”).

instruments.”¹⁹⁸ The UNHCR urges that detention be used as “a measure of last resort” that “must only be applied in exceptional circumstances . . . and, where used, last only for the minimum time necessary.”¹⁹⁹ The detention determination should take place on a case-by-case basis: “detention should be used only as a last resort in exceptional cases after all other options have been shown to be inadequate in the individual case.”²⁰⁰

ATDs can involve a variety of practices and policies, and often operate in concert. The Revised Community Assessment and Placement (CAP) model, developed by the International Detention Coalition, is an acclaimed framework that provides an illustrative structure to identify and implement successful, efficient, and humanitarian ATDs.²⁰¹ The CAP model is based on two fundamental principles: the “presumption of liberty,” which gives rise to a presumption against detention, and “minimum standards,” which include respect of fundamental rights; access to legal advice and information; fair case resolution; and oversight.²⁰² Many countries have already incorporated these principles into their laws and policies, either as mandatory or recommended considerations for immigration authorities. For instance, all of the E.U. member states are required to use immigrant detention only as a last resort after all ATD options have been exhausted.²⁰³ Further, many countries flatly prohibit the detention of vulnerable populations including children, seniors, and pregnant women,²⁰⁴ as well as disabled, ill and LGBTQ persons.²⁰⁵

The range of ATDs outlined in the CAP model includes a variety of options, which differ in degrees of supervision. The preferred option is simply to release detainees into the community on a recognizance or a low bond²⁰⁶—many detained migrants and non-citizens pose virtually no danger

¹⁹⁸ SAMPSON ET AL., *supra* note 132, at VI.

¹⁹⁹ UN High Commissioner for Refugees, Global Roundtable on Alternatives to Detention of Asylum-Seekers 2 (2011).

²⁰⁰ SAMPSON ET AL., *supra* note 132, at 1.

²⁰¹ *Id.* at I (describing the CAP model).

²⁰² *Id.* at 18, 27.

²⁰³ *Id.* at 20.

²⁰⁴ *Id.* at 21.

²⁰⁵ INTERNATIONAL DETENTION COALITION, LGBTQI PERSONS IN IMMIGRATION DETENTION 4 (2016) (“It is the position of the IDC that vulnerable individuals should never be placed in immigration detention. Immigration detention is particularly harmful to individuals who are already at a heightened risk of discrimination, abuse and exploitation, including [LGBTQ] persons.”).

²⁰⁶ SAMPSON ET AL., *supra* note 132, at 59.

to the community and are highly unlikely to fail to appear for hearings.²⁰⁷ If bond is set, it must be for a reasonable amount, or else it is an irrelevant overture. Released individuals, in most cases, would be required to comply with some minimally invasive requirements: appearing at scheduled appointments and hearings, assisting with case resolution progress, and respecting conditions of release—so long as the conditions do not disproportionately limit the individual's liberty or ability to provide for his or her basic needs.²⁰⁸

Another placement option is open accommodation centers. One type of open accommodation is a government-run, "dormitory-style" center where residents may come and go as they please, potentially under the condition that they meet periodically with immigration officials to discuss their case progression.²⁰⁹ Other accommodation centers are nongovernmental, with possibilities ranging from nonprofit or religious group housing to living with friends, family, or in a private rental property.²¹⁰

In a small fraction of cases, mostly those involving individuals with a history of noncompliance or other serious concerns, the methods currently used by ICE may be justified. These individuals may be subjected to more intensive monitoring, conditional release, and stricter reporting requirements. However, ICE still needs to increase the capacities of these ATD programs to make a meaningful dent in detention.²¹¹

Both the United States and international law recognize that a government should "apply the least restrictive means necessary to achieve its legitimate interests" when it comes to restricting an individual's liberty.²¹² Large-scale immigrant detention, without preliminary individualized determinations of dangerousness or risk of absconsion, flies

²⁰⁷ Andrea Saenz, *Not Dangerous, But Too Poor To Get Out of Detention*, (Sept. 8, 2015), <http://crimmigration.com/2015/09/08/not-dangerous-but-too-poor-to-get-out-of-detention/> ("[I]mmigration judges across the country frequently rule that a noncitizen is not a danger to society and may be released on bond – but then set a bond far too high for the respondent to pay.").

²⁰⁸ See Sampson et al., *supra* note 132, at 60-61 (discussing accommodation options for detainees released back into the community).

²⁰⁹ *Id.* at 59–60.

²¹⁰ *Id.* at 60.

²¹¹ See Mendoza, *supra* note 196, at 445 ("At present, ISAP and ESR . . . can supervise 6,000 and 7,000 individuals, respectively.").

²¹² LUTHERAN IMMIGRATION AND REFUGEE SERVICE, UNLOCKING LIBERTY: A WAY FORWARD FOR U.S. IMMIGRATION DETENTION POLICY 7 (2012); see also Michael L. Perlin, "Their Promises of Paradise": Will Olmstead v. L.C. Resuscitate the Constitutional "Least Restrictive Alternative" Principle in Mental Disability Law?, 37 HOUS. L. REV. 999, 1000 (1999).

in the face of this fundamental precept. Further, a global research conducted over a two-year period found that “asylum seekers and irregular migrants rarely abscond while awaiting the outcome of [their cases].”²¹³ Understandably, immigrants are also more likely to comply with conditions of release, and even orders of removal, when they have been through a fair and efficient process, have been kept well-informed throughout the process, and have been provided with advice and resources on all possible legal options.²¹⁴

When comparing the U.S. detention system with that of other countries, including those with large numbers of asylum seekers, refugees, and irregular migrants—and those with fewer resources than the United States²¹⁵—replacing large-scale detention with ATDs emerge as the obvious choice. Not only are ATDs financially less burdensome, they also result in higher compliance rates, an increase in voluntary departure rates, and a reduction in overcrowding and lengthy detention periods.²¹⁶ Of course, their use also bolsters the crucial intangible ideal of respecting human rights and dignity.

VII. CONCLUSION

Though government officials consistently treat large-scale immigrant detention as an indispensable part of American immigration policy, in reality, the practice is an outlier in our nation’s history—and one that will surely be condemned in the future. Immigrant detention has been proven not only inhumane, but also unnecessary and inefficient. Politicians, by imposing arbitrary bed quotas and adopting immigrant-as-criminal rhetoric, significantly contribute to the degradation of non-citizens who are detained across America, who dream of the day they will regain their freedom and dignity. It is time for the United States to join the ranks of other democratic nations that follow internationally recognized human rights guidelines and properly use detention only as a last resort.

²¹³ *Id.* at 10.

²¹⁴ *See id.* (explaining that detainees respond more positively to adverse release decisions if their basic needs have been met and if they stayed updated about the proceedings).

²¹⁵ SAMPSON ET AL., *supra* note 132, at 1 (“[A] range of alternatives to detention” exists for governments to draw from, even for those “countries with large numbers of asylum seekers, refugees and migrants and fewer resources.”).

²¹⁶ LUTHERAN IMMIGRATION AND REFUGEE SERVICE, *supra* note 212, at 10.