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## **Death in Detention: Medical and Mental Health Consequences of Indefinite Detention of Immigrants in the United States**

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By Riddhi Mukhopadhyay<sup>1</sup>

My hope of a land of liberty has been transformed into a nightmare. To this is added moral suffering due to detention, for I do not know how long I will spend in this detention center. It is as if I am living through a bad dream, and soon will wake and finally reach this land of freedom that I still seek.

*Rwandan refugee and detainee*<sup>2</sup>

Escaping civil war in El Salvador, Francisco came to the United States with his mother and siblings when he was ten years old.<sup>3</sup> While a refugee in the country, his mother died of cancer before she could apply for legal immigration status for her family.<sup>4</sup> Francisco tried to go to school and support his siblings, and he ended up working in construction.<sup>5</sup> As an adult, he landed in immigration detention after he spent time in jail for minor drug charges.<sup>6</sup> While in custody of immigration authorities, Francisco informed them of painful lesions on his penis. His complaints were ignored and his medical care was delayed.<sup>7</sup> On his first medical appointment, the doctor wanted to admit Francisco immediately for a biopsy, believing he was experiencing the first stages of cancer. The immigration authority refused, wanting to seek a more cost-effective treatment.<sup>8</sup> This cost-effective treatment was a daily prescription of aspirin, despite Francisco's symptoms of bleeding into his underwear and suffering on a daily basis. Doctors urgently recommended a biopsy and circumcision, which immigration authorities deemed to be elective surgery.<sup>9</sup> Only after the American Civil Liberties Union intervened on his behalf was Francisco able to receive the

medical biopsy and treatment for what had become penile cancer—eleven months after he was placed in immigration detention.<sup>10</sup>

Francisco's story is not unique. On any given day, there are over thirty thousand immigrants placed in privately run detention facilities around the country who are unable to access appropriate medical and mental health support or services.<sup>11</sup> Additionally, with no right to appointed counsel, it is mostly poor and working-class detainees who face daunting impediments to getting out of detention. For those whose medical needs or mental illness are exacerbated or induced by the conditions of detention, fighting deportation often proves impossible. Detention can become a death sentence.

Francisco Castañeda paid the price with his life, dying from penile cancer on February 16, 2008.<sup>12</sup> In response, Representative Zoe Lofgren (D-CA) and Senator Robert Menendez (D-NJ) introduced the Detainee Basic Medical Care Act in May 2008.<sup>13</sup> This legislation would have forced the Department of Homeland Security (DHS) to implement a basic standard of care in detention facilities. Despite urgent need, the bill never moved on the floor, although it is being reintroduced in 2009. In addition, the Detainee Basic Medical Care Act did not address the insurmountable hurdles most detainees face once placed in the detention process, causing them to lose hope, dignity, and occasionally their lives.

According to the U.S. Immigration and Customs Enforcement (ICE)<sup>14</sup>—a division of DHS—detention is not classified or defined as punitive, but instead acts as a short-term administrative measure to ensure that noncitizens appear at their immigration hearing.<sup>15</sup> Yet federal detention policies are penalizing in nature and practice. This article argues that the current U.S. policy of detaining immigrants and asylum seekers disproportionately criminalizes them, intentionally contributing to and compounding the medical and mental trauma they have already experienced. It thus prevents their ability to fight to stay in the country and “pursue their dreams and enrich our civic culture and society.”<sup>16</sup> Current

government practices place a deliberate, undue, punitive burden on immigrant detainees that restricts their opportunity to challenge their deportation and that complicates their transition into civic life. This article does not attempt to draw a distinction between detained immigrants and asylum seekers, as both communities overlap in their mental health and medical needs, the problems they face in the immigration system, and the treatment they receive in detention.

Section I examines current federal immigration laws and government practices that place undocumented immigrants and asylum seekers, who provide no threat to society, into prison-like detention centers. This section documents the development of the recent mandatory detention process and the ways in which it criminalizes and creates barriers for immigrants. Section II studies the aftermath of these laws through the costs—financial, physical, social, and moral—that society carries, and that immigrants pay, to live the American dream. This section also highlights the successful push for increased detention of immigrants by private companies. Additionally, this section looks at the emotional and physical toll on immigrants who are unprepared or unable to cope with detention.

Section III discusses the broad discretion afforded to untrained DHS officials regarding sensitive immigration cases at the border or in detention centers. The consequences of this discretion further discourage detainees to fight their removal, especially for those already battling medical and mental health problems. Section IV considers relevant international law and federal decisions that address the detention process.

Section V concludes by suggesting that the convoluted immigration process and criminalization of immigrants in detention prohibits *pro se* challenges to individual detention and that reforms should be instituted requiring every detainee to have court-appointed counsel. Furthermore, the creation of legally binding regulations by DHS will allow for a more just process in determining whether an individual or family should be detained at a facility while providing greater uniformity of treatment. Finally, the

conclusion examines alternatives to detention, some of which are currently in practice in smaller communities. These alternatives would decrease the costs of maintaining detention facilities while respecting basic human rights, thus providing immigrants with better medical and mental health treatment and allowing them a healthier transition into American society.

#### I. ANTI-IMMIGRATION LEGISLATION AND ITS CONTINUATION

The United States has been a safe haven for countless refugees and immigrants who have helped shape American history in both the public and private sphere. Some of the most well-known immigrants in this country include scientist Albert Einstein, artist Max Ernst, journalist Joseph Pulitzer, and, more recently, Secretaries of State Madeleine Albright and Henry Kissinger. Within popular culture, artists such as Ang Lee, Wyclef Jean, and Gloria Estefan have also enriched our nation's cultural heritage. Yet hesitation remains about granting immigrants entry into the United States due to xenophobic rhetoric about the undermining of American culture and national security.

The current hostile climate promoting indefinite detention of immigrants adversely affects many sections of the population and has a particularly discriminatory and devastating impact on many of the most vulnerable immigrant groups. These groups include children and unaccompanied minors, Haitian and other Afro-Caribbean immigrants who are seeking asylum but who face a racially discriminating system, and since September 11, immigrants who are (or are perceived to be) of Muslim, South Asian, or Middle Eastern descent.<sup>17</sup> Since 1996, immigration law has taken a new twist—it has become outright racist by directly discriminating against certain nationalities and ethnicities and has led to the unfair criminalization of many immigrants.<sup>18</sup>

Though the immigration process may have been straightforward and easy at one point, it has been overshadowed by recent immigration reforms under the Antiterrorism and Effective Death Penalty Act (AEDPA), the Illegal

Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), and the more recent Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) as discussed below.<sup>19</sup>

In response to the USA PATRIOT Act, the Bush administration abolished the Immigration and Naturalization Service (INS) and placed its duties under DHS, whose mission was to prevent and reduce vulnerability of citizens to terrorist attacks.<sup>20</sup> Many of the policies regarding detention of immigrant detainees are couched in language depicting immigrants as a “threat to national security.”<sup>21</sup> With the restructuring of DHS, immigration—including asylum law—now unfortunately falls under the domain of a department created to keep immigrants out of the United States. This restructuring becomes increasingly problematic for most noncitizens, especially asylum seekers who are seeking entry into the United States and require urgent protection.

#### *A. The Asylum Process*

The terms *asylum seeker* and *refugee* are often used interchangeably. In the United States, one can be an asylum seeker and refugee, but not just a refugee.<sup>22</sup> Asylum is a claim of last resort for a person who, although not forcibly removed, is compelled to leave her or his home because of fear of persecution.<sup>23</sup> Under U.S. asylum laws, a person may claim asylum after meeting the definition of a refugee.<sup>24</sup> An individual qualifies as a refugee when (1) there is persecution or a well-founded fear of persecution (2) in the person’s homeland or country of last residence (3) based on race, religion, nationality, membership in a particular social group, or political opinion.<sup>25</sup> Once deemed a refugee, an individual may apply for asylum or legal permanent status.<sup>26</sup>

To be eligible for asylum, a person must be arriving or already physically present in the United States.<sup>27</sup> Once in the United States, the asylum seeker usually has a year to file for asylum; however, most asylum seekers who

follow the process of reporting for asylum do not reach this one-year mark.<sup>28</sup> Many asylum seekers are detained and questioned before being able to initiate this process due to their method of entry into the United States: by crossing the border, arriving by boat, or through falsified travel documents, if they have any at all.<sup>29</sup> Even when asylum seekers do arrive with proper documentation, its validity is oftentimes called into question by immigration and border inspectors.<sup>30</sup> As a result, the restrictions in immigration law, in combination with the arbitrary discretion given to border inspectors, leave many asylum seekers and immigrants either turned away at the border or immediately detained.

#### *B. Legislative Restrictions on Immigrants*

Current restrictions on immigration may create the illusion that 9/11 was the catalyst for such change. However, immigration restrictions began much earlier.<sup>31</sup> In order to analyze the post-9/11 immigration reality, one must consider the immigration laws enacted in the years leading up to 2001. Many of the restrictions on immigrants' rights stem not from the USA PATRIOT Act but from legislation adopted in 1996, the year Congress passed two of the most restrictive immigration bills in the history of the United States: the AEDPA and IIRIRA.<sup>32</sup>

While the AEDPA referenced antiterrorism and the death penalty in its title, many of its immigration provisions were not related to terrorism and certainly not related to death penalty issues. Instead, the AEDPA limited the availability of waivers from deportation<sup>33</sup> and judicial review for long-term U.S. permanent residents who had been convicted of crimes, including minor misdemeanors.<sup>34</sup> Shortly thereafter, Congress enacted even more sweeping legislation—IIRIRA. The title of the law indicated the shift in immigration policy toward becoming tougher on immigrants, stopping illegal immigration, and blaming immigrants for criminal and welfare problems.<sup>35</sup> Among other things, IIRIRA and the AEDPA penalized persons who entered the United States illegally and remained in the country,

allowed retroactive deportation for relatively minor criminal offenses committed years before the passage of the law, further curtailed waivers from deportation and judicial review, mandated detention of immigrants during their deportation proceedings, and limited immigrants' access to public benefits.<sup>36</sup> IIRIRA instigated the wave of antirefugee and anti-immigrant policy currently in place today.

### *C. USA PATRIOT Act*

As discussed, although the events of 9/11 were not the catalyst for immigration restrictions, they did bring any chance of immigration reform to an abrupt halt. Congress responded to the attacks by passing the PATRIOT Act and suspending federal efforts to legalize undocumented workers or reconsider the restrictive nature of the 1996 immigration laws.<sup>37</sup> The act addressed a broad range of legal issues, including the expansion of criminal terrorism laws, wiretapping, banking regulations, and the sharing of information between various foreign and domestic governmental intelligence agencies. With regard to immigration, the "PATRIOT Act expanded the government's ability to detain and deport suspected terrorists, greatly increased the budget for immigration enforcement, and tripled the number of U.S. Border Patrol agents on the Canadian border."<sup>38</sup> In 2005, the former secretary of DHS ended the "catch-and-release" policy, which had allowed identified undocumented immigrants to remain free inside the country while they waited for an appearance in court under the previous Immigration and Nationality Act (INA).<sup>39</sup>

The major statutory change of the PATRIOT Act involved the expansion of the definition of deportable "terrorist activity." Before the act, a noncitizen could be deported for engaging in or supporting terrorist activities, but not for mere association with a terrorist organization.<sup>40</sup> After the act, if a noncitizen provided material support—such as donations, money, or shelter—to a terrorist organization, he could be deported as long as the government could establish that he "knew or should have known"



that the support would assist the organization in carrying out terrorist activities.<sup>41</sup> Thus, the PATRIOT Act broadened the category of activities required for deportation. Additionally, the act broadened the definition of a terrorist organization to include any group of two or more individuals—whether organized or not—that commits or incites to commit terrorist activity, plans a terrorist activity, or gathers information for potential targets of terrorist activity.<sup>42</sup> This new definition makes a noncitizen deportable if he provides support or solicits members for an organization that is considered a terrorist organization by the United States, regardless of whether such support is used for terrorist activities.<sup>43</sup>

As an example of how broadly the current definition of a terrorist organization could be applied, “had the USA PATRIOT Act been on the books in 1980, a person today who had supported the African National Congress’s anti-apartheid political wing could be deported under the act’s provisions, since the ANC also engaged in violent military actions against the South African government.”<sup>44</sup> Thus, the act abruptly stopped the pendulum swing favoring immigrants’ rights that advocates had hoped for in response to IIRIRA before 2001 and instead continued the restrictions from 1996.<sup>45</sup> Though these laws have passed under the veil of national security, their broad applications in the immigration system have created a process that can be described as inherently unfair and xenophobic in nature, especially given its implementation through the detention of immigrants.

## II. THE RISING COST OF DETENTION

U.S. history tells a story of a nation built on providing a safe haven to those who have been persecuted and a new home to those who seek a better life. However, current U.S. immigration policies completely overlook what most immigrants and asylum seekers have gone through to reach the United States.<sup>46</sup> Immigrants, in general, are one of the most resourceful populations, often contributing to society through innovation and entrepreneurship and encouraging subsequent generations to excel in their

new homeland. Asylum seekers are, in turn, one of the strongest populations in the immigrant community with their ability to persevere through incredible odds; at the same time, they are the most vulnerable in their lack of resources. They have no home to return to for if they return, the consequences may be unthinkable. The United States should work to protect—not prosecute—one of its most vulnerable and voiceless communities. Instead, it has implemented a system that targets the immigrant community and burdens the taxpayers by facilitating profit for the private corporations who run detention facilities.

Promoted by ICE as the ideal immigration detention center, the T. Don Hutto Residential Center (Hutto) in Texas is unique because it is considered a family-based detention center. Created by ICE, the facility has been heralded by DHS as innovative and humanitarian.<sup>47</sup> As opposed to other detention centers where it is common for one undocumented parent to be separated and detained while another undocumented parent would be allowed to take care of their children, ICE believes that a “family-based” detention nurtures the family unit and promotes American family values.<sup>48</sup>

In reality, men, women, and children wear uniforms and are housed separately at the center—hardly a nurturing familial environment. A substantial number of the detainees are asylum seekers from Iraq, Somalia, Iran, or Romania.<sup>49</sup> With more than five hundred beds, nearly half of the detainees at Hutto are children whose ages range from one to sixteen years.<sup>50</sup> These children have limited access to education, playtime, and their parents.<sup>51</sup> Often they are withheld from seeing their parents or visiting relatives as a form of control and discipline by the guards.<sup>52</sup> Detainees have no privacy; they are forced to use toilets in public.<sup>53</sup> All are guarded by employees of the Corrections Corporations of America (CCA), a private corporation that maintains many prisons around the United States.<sup>54</sup>

*A. Privatizing Human Suffering*

The privatization of detention centers is appealing to the government. Private companies can build prisons faster and cheaper and pay their employees less than the government could largely because they do not require voter or legislative approval.<sup>55</sup> Private companies became involved in the detention/prison business in the 1980s when the widespread public sentiment was that almost any private operation was inherently more efficient than a government one.<sup>56</sup> These companies started out by building prisons. Two of the largest corporations that have pushed for private detention facilities are the GEO Group and CCA, who built the first private prison in 1984 in Houston.<sup>57</sup> However, a series of well publicized troubles—riots in the prisons, prisoner escape, state legislation refusing to privatize its entire prison system—all culminated in a drastic drop in CCA's stocks by 93 percent in 2000 and a loss in confidence of the privatization process.<sup>58</sup>

When post-9/11 immigration reform looked to detention as a solution to undocumented immigrants, private prison companies like GEO and CCA eagerly offered their empty beds, and the industry was revitalized.<sup>59</sup> Over the years, GEO and CCA have strengthened political ties, contributing nearly three hundred thousand dollars during the 2006 election and more than one hundred thousand dollars in 2008, overwhelmingly to the Republican Party.<sup>60</sup> CCA's chairman and CEO have been generous donors to Republican senatorial and presidential candidates.<sup>61</sup> In addition, former vice president Dick Cheney's son-in-law, who served as general counsel for DHS between 2005 and 2007, lobbied for CCA while in private practice.<sup>62</sup> Therefore, though detention may not be the best option for addressing the issue of undocumented immigrants, it is the option that has had the most financial backing by well-connected political action committees (PACs). To comprehend why private firms like CCA and GEO lobby so aggressively, an understanding of the government financial support granted to these businesses is needed.

*B. Detention for Many, Profits for Few*

Private detention is a profitable industry. For example, in Tacoma, Washington, GEO charges nearly \$36 million a year to run the Northwest Detention Center.<sup>63</sup> With plans to expand the facility by the end of 2009, the company will eventually charge the government nearly \$58 million per year.<sup>64</sup> CCA charges the government almost \$34 million a year just to run the Hutto facility in Texas.<sup>65</sup> While close supervision of a released immigrant costs only about twelve dollars per day, incarceration costs on average ninety-five dollars per day per capita.<sup>66</sup> Immigration detention costs the U.S. government \$1.2 billion per year, with the budget increasing every year as the number of beds expands.<sup>67</sup> DHS's budget for bed space skyrocketed to \$945 million last year, up from \$641 million in fiscal year 2005.<sup>68</sup> As the number of immigrants detained increases and private corporations cut costs to services and maintenance, profits continue to rise at the expense of the taxpayer.

Even though Congress has requested detention statistics and received no response from DHS, it continues to fund the agency. DHS's budget for detention and removal is \$1 billion per year, with a yearly cost of over \$600 million to detain noncitizens.<sup>69</sup> According to ICE, the detainee population jumped to nearly 27,900 nationwide in fiscal year 2007, up from about 19,700 the previous year.<sup>70</sup> Immigration detention costs approximately ninety-five dollars per person per day, with taxpayers footing the nearly \$130 million bill each year. Without proper federal oversight, the high cost of detention results in high profits for private corporations who are able to cut corners in detainee treatment.

*C. Traumatic Cost on Detainees*

Detainees suffer so that the federal government can maintain its detention program and private corporations can maintain their profits. After spending five months in the federal detention center in Arizona, fifty-two-year-old Yong Sun Harvill signed documentation for her deportation back to South

Korea despite wanting to stay in the United States to be with her family.<sup>71</sup> Harvill suffered from arthritis and had developed a painful lump in her knees while in detention.<sup>72</sup> After a basic exam by the detention physician, Harvill was not allowed any further follow-ups that would have facilitated timely treatment of her medical issues.<sup>73</sup> Being detained became more painful when she was transferred to the Arizona facility, preventing her family in Florida from visiting her.<sup>74</sup> Feeling physically and emotionally defeated, Harvill agreed to be deported back to Korea so she could get out of detention.<sup>75</sup> Like Harvill, many immigrants who have never been incarcerated before cannot withstand the stress of lengthy imprisonment and give up their right to a deportation hearing simply to get out of detention.

Though DHS claims detention is to be short term in order to guarantee that immigrants appear for their hearings, in reality, it becomes a long, unbearable process for most. For example, in 2008 ICE reported an average stay of thirty-one days for all immigrant detainees.<sup>76</sup> However, “asylum seekers granted refugee status spend an average of ten months in detention, with the longest period in one case being three-and-a-half years.”<sup>77</sup> Immigrant detainees actually spend an average of five months in detention, with the longest recorded period being almost four years.<sup>78</sup> A 2008 exposé by the *Washington Post* found that many detainees slip through the cracks due to lack of representation or family to whom they can stay connected while in detention.<sup>79</sup> Therefore, the presence of detainees who have been in detention much longer than any of the publicized cases is highly likely.<sup>80</sup> The length of detention negatively affects detainees’ physical and mental health, which can often be resolved only through release or proper legal representation.

Unfortunately, many immigrants have been denied access to the very legal process that they had hoped to negotiate successfully by obtaining asylum or residency. Detainees at the San Pedro Processing Center on Terminal Island often had difficulty getting access to phones, other immigrants, and their attorneys.<sup>81</sup> At the Northwest Detention Center,

phones often do not work properly, preventing detainees from contacting family or obtaining legal representation.<sup>82</sup> Additionally, many detainees are unable to communicate with their attorneys in confidence, as guards will illegally go through detainees' legal correspondence.<sup>83</sup> Understandably, with limited access to family, medicine, and other services to sustain a healthy life, detainees who are able to receive legal counsel can become wary of openly communicating the problems they face in detention if they are not afforded privacy with their attorneys.

The deleterious impact of detention on the psychological and physical health of most immigrants can also hinder an immigrant's asylum or removal claim itself. Permanent residents—some of whom were asylees—who have completed their prison term or successfully complied with probation are astonished and disheartened to learn that they must continue to remain in detention pending their deportation cases.<sup>84</sup>

Inhumane and prison-like detention conditions can hinder an immigrant's ability to discuss his or her claim by contributing to the poor mental health and suspicion of the process that caused detention in the first place. For example, a female asylum seeker who has suffered sexual torture in her country of origin and who does not receive proper counseling and therapy may encounter great difficulty in explaining the persecution she suffered. If the asylum seeker is unable to testify about the persecution she suffered, an asylum officer or immigration judge may inaccurately conclude that the asylum seeker is not credible and is therefore ineligible for asylum. In order to justly advocate and appeal their removal and detention, detainees must be provided the proper medical and mental health support.

Furthermore, as immigration is a civil matter and does not fall under criminal law, asylum seekers do not have the right to an attorney. Even if they are able to find an attorney who is willing to assist them, it is difficult for the asylum seeker to meet and work with the attorney due to the isolated location of many detention facilities. The lawyer must be very dedicated to the asylum seeker and know how to navigate through an elaborate,

bureaucratic structure in order to visit a client in detention. Finally, even if an asylum seeker did have an attorney and felt comfortable enough to communicate freely, a detained asylum seeker is unable to assist in the preparation of evidence for the case to be presented. She is unable to freely contact her attorneys or witnesses who would strengthen her claim for asylum by providing evidence of ties to the community, thus preventing her from assisting in the preparation of her own case.

Of course, there are cases where immigrants are able to access the legal process. However, even if an immigrant is able to work with his attorney and arrange a hearing before a judge, the wide discretion exercised by immigration judges can be disheartening to lawyers and disastrous for immigrants—especially for those who face threats to their lives if they are forced to return to their country of origin.<sup>85</sup> Moreover, since immigration law is created under federal law, some uniformity should be expected in judicial rulings across the country.<sup>86</sup> Yet there are vast differences in the handling of claims with generally comparable factual circumstances, depending on the location of the court and the sex and background of the judge.<sup>87</sup> Overall, though the government may not keep records of the number of applicants who applied for asylum, records indicate that the number of people granted asylum in the United States has declined, dropping by about 12 percent from 28,684 in 2003 to 25,257 in 2005, the last year when complete figures were available.<sup>88</sup> The number of detainees who are removed or deported has also increased exponentially. In Washington State alone, the number has increased by 38 percent this past year.<sup>89</sup>

### **1. Loss of Dignity and Loss of Life**

Besides the barriers to legal access placed on detainees and the financial burden shouldered by taxpayers, there are also the disturbing physical and emotional tolls detainees must bear, including loss of dignity and—in extreme cases—loss of life. The story of Francisco Castañeda's death

discussed at the beginning of this article is not unique. DHS may claim that the immigrant detainees are kept in facilities made especially for detention and not prisons; however, many of these facilities were formerly prisons or are run by private corporations who specialize in managing prisons.<sup>90</sup> For example, the two-hundred-bed detention facility in Queens, New York, (run by GEO) has previously faced multiple lawsuits for violating the rights of detained immigrants and inadequately maintaining the facilities.<sup>91</sup> Many of the detention facilities currently maintained by DHS in Florida, California, and Texas were former prisons.<sup>92</sup> As described earlier with Hutto, these civil detention centers are run as prisons but are not subject to the oversight and accountability of state-run prisons. Therefore, deaths and mistreatment in detention are not always properly investigated by the government or other bodies of federal oversight. So far, there have been eighty-three recorded immigrant detainees deaths in the past five years, thirty of which would have been preventable with proper medical care; however, there are estimates that there have been more deaths that have never been investigated or recorded because no system has been put in place to provide oversight.<sup>93</sup>

Some advocates of current immigration policy may argue that detention is an appropriate method of processing immigrant detainees because they receive food and shelter. However, asylum seekers usually flee their country not for food and shelter, but for life, liberty, and safety. Most detainees obtained their food and shelter prior to detention through work and family. Detention only erodes what dignity of life these individuals may have left. The guards at Hutto conduct as many as seven headcounts per day, which require all detainees, including toddlers, to remain in place by their beds for the completion of the count; in practice, this can take up to twelve hours per day.<sup>94</sup> Immigrant detainees are treated like prisoners, subject to verbal abuse and mistreatment at the hands of the facility officers.<sup>95</sup> Women have been abused sexually, physically, and verbally while in all-women detention facilities such as the Krome facility in Miami, Florida.<sup>96</sup> Detainees have



been strip searched, deprived of sleep, and denied personal religious objects like rosaries.<sup>97</sup> Such abusive treatment has a serious, damaging effect on the physical and mental health of the detainees, the impact of which has only recently been documented and researched.<sup>98</sup>

Immigration detention centers have no legally binding medical standards.<sup>99</sup> The consequence of this legal loophole can be illustrated by the case of Victor Arellano, a Mexican immigrant who died while in a San Pedro detention center.<sup>100</sup> Arellano, a twenty-three-year-old transgender AIDS patient, was taken into custody in May 2005 and died two months later.<sup>101</sup> Family and fellow detainees claimed that Arellano was repeatedly denied medical care by staff at the detention center.<sup>102</sup> Arellano died too weak to stand, shackled to a hospital bed.<sup>103</sup> This tragic case highlights how, under the current nonbinding detention medical standards, immigration officers and detention guards have arbitrary discretion to provide assistance to detainees for their medical needs. In this case, Arellano had a medical condition and family in the community, which should have allowed him to be paroled under DHS guidelines. Yet he remained in detention and was denied proper medical treatment until his death. Though death is infrequent in detention centers, more pervasive are the ever-present effects of detention that have eroded the family structure and created psychological trauma for the detainees.

The government may defend its actions by asserting that these facilities follow strict guidelines on the treatment of detainees and that it does not attempt to run detention centers like prisons.<sup>104</sup> However, without binding federal standards, the evidence is to the contrary. Immigrant detainees throughout the nation are stripped of their clothing, expected to wear prison uniforms, transported in shackles, often not allowed visitors, and are limited in their movement as well as their access to legal and medical help.<sup>105</sup> Immigrants detained by DHS find themselves in either DHS Service Process Centers, facilities run by private corporations, U.S. Bureau of Prisons facilities, or local jails.<sup>106</sup> No uniform standards exist for

determining how or where immigrant detainees are placed and treated in the different detention facilities.<sup>107</sup> Depending on where the immigrant detainee is detained, he may reasonably fear abuse by guards, inadequate access to legal resources, and exposure to criminals.<sup>108</sup> Detention conditions are often abysmal; overcrowding, poor air quality and lighting, noise pollution, and insufficient bathroom facilities are common.<sup>109</sup> Without proper medical care and mental health resources, these factors compound to make detention a nightmare for any individual.

## **2. Compounding Trauma**

The prison-like conditions and treatment in detention facilities can be particularly traumatizing for asylum seekers who are survivors of torture, rape, and persecution.<sup>110</sup> Contact visits are not allowed at most detention centers: visiting family must sit behind Plexiglas partitions and talk through phones in the converted prison visiting rooms.<sup>111</sup> The ACLU commissioned a psychiatrist to investigate the conditions at Hutto, and unsurprisingly, the resulting report documented depression and fearfulness among children housed there.<sup>112</sup> Even the simplest daily concern is compounded in detention into sources of fear and trauma. When chicken pox broke out among the children at Hutto, parents were afraid to tell officials about the rashes they found on their children because they thought it would prevent them from being released.<sup>113</sup> Without proper tools and resources to handle these reactions in detention, the consequences can become dire.

In nations where immigrants are warehoused at detention centers as a part of government policy, detainees have a higher suicide risk.<sup>114</sup> The increased incidence of depression and risk of suicide has been widely documented.<sup>115</sup> Immigrants in detention usually have clinically significant symptoms of depression.<sup>116</sup> ICE conservatively estimates that 15 percent of the detainee population suffers from depression and other mental health conditions.<sup>117</sup> According to a report by Physicians for Human Rights, nearly 77 percent of asylum seekers suffered from anxiety and over half suffered from

posttraumatic stress disorder (PTSD).<sup>118</sup> Most facilities do not have onsite mental health staff and must rely on outside consultants, who have limited availability.<sup>119</sup> Detention works as a disincentive for asylum seekers to discuss or report their mental health issues because they fear being placed in isolation or being deported.<sup>120</sup>

In addition, at Hutto and detention centers like it, parents and children are often separated at the discretion of the detention officials.<sup>121</sup> This creates the obvious physical fracture of the family structure along with the break of parental authority, preventing parents from controlling or protecting their children. Parents are humiliated and left helpless while immigration officers have the authority to punish or discipline children, compounding the trauma and fear these children have suffered while being persecuted by authorities or by having watched their parents suffer at the hands of officials in their country of origin.

The restrictions on freedom placed on asylum seekers usually triggers disturbing memories of the persecution from which they sought asylum. The possibility of indefinite detention further aggravates these fears.<sup>122</sup> In a 1999 report on refugee detention, the Committee on Religious Freedom found that

the unnecessary detention of already traumatized victims of religious persecution, as well as other types of persecution, should be examined with the goal of providing release. Serious concerns have been raised over the length of time these traumatized individuals are spending in detention facilities, the conditions they are being kept in, the types of detention facility that are being used and the variation in policies from district to district.<sup>123</sup>

Medical experts have only recently begun documenting the fact that refugees often suffer from PTSD, major depression, or other illnesses.<sup>124</sup> These studies have found that the mental health of immigrant detainees was extremely poor and worsened the longer the individuals were in detention; that high levels of anxiety, depression, and PTSD could be attributed to the

length of detention time; that access to mental health services was limited; and that many of the study participants also believed that their mental health worsened while in detention.<sup>125</sup>

Asylum law allows for an immigrant detainee to be released in the community if they have community ties, medical needs, and a well-founded fear of persecution requiring special attention.<sup>126</sup> However, at the end of 2006, there was a 79 percent drop in the number of asylum seekers released from detention into the community.<sup>127</sup> The disintegrating quality of life for immigrants in mandatory detention raises the question of how the United States came to implement such a harsh policy for such a vulnerable community. The answer can be found in the level of discretion given to untrained immigration officials, which promotes unhealthy and traumatic conditions that encourage detainees to self-deport instead of staying.

### III. THE DANGER OF DISCRETION

Current federal policies provide untrained immigration officials with high levels of discretion in determining whether an immigrant should be detained and deported, adding to an already xenophobic detainee system. Restrictions enacted under IIRIRA, and the lack of prudence given DHS under the PATRIOT Act, have complicated and expedited the process of removing refugees and detainees who are at the footsteps of America's door. Under both laws, immediate deportation is at the immigration official's discretion whether or not the individual has the proper traveling documents, as the validity of authentic documents are often questioned or challenged by officials.<sup>128</sup> In a system that intentionally designates specific nationalities and races as better candidates for deportation, the degree of discretion granted to inspectors allows for a cascade of mistakes.<sup>129</sup>

#### *A. Discretionary Detention and Deportation of U.S. Citizens*

The story of Sharon McKnight, a U.S. citizen, highlights the problem with granting immigration officers wide discretion under the current

system.<sup>130</sup> In 2000, McKnight, a thirty-five-year-old woman with the mental capacity of a young child, was stopped at JFK International Airport when she returned from Jamaica—where she had gone to stay with her dying grandfather.<sup>131</sup> She was questioned on the authenticity of her U.S. passport, and the inspector refused to grant McKnight’s waiting relatives permission to see her, dismissed the birth certificate her mother presented (documenting her birth at a Long Island hospital) as a fake, and shackled McKnight overnight.<sup>132</sup> At the discretion of one inspector, without a chance to contact her family in the United States, McKnight was deported to Jamaica the next morning.<sup>133</sup>

This level of discretion has proven dangerous for not only immigrants but also citizens who belong to communities of color. As recently as August 2008, the Northwest Immigrant Rights Project has uncovered nearly twenty-one U.S. citizens who have been placed in detention at the Northwest Detention Center, all individuals from Latino and black communities.<sup>134</sup> Under this level of discretion, which allows for the unwarranted deportation of a U.S. citizen, many immigrants are deported through the process of “expedited removal”<sup>135</sup> before they have a chance to claim asylum.<sup>136</sup> Turning McKnight away at the airport and deporting her to Jamaica, whether or not she has community ties, resources, or family, is an example of this expedited removal process made all the more egregious as she is a U.S. citizen. The fact that expedited removal can occur to a citizen heightens the injustice suffered by refugees and immigrant detainees.

The detention process is an extension of the arbitrary, prejudiced nature of the current immigration system. Even if an inspector authorizes entry for an individual, IIRIRA still allows for mandatory detention of anyone who has been tagged by inspectors at the airport or border as entering the country without proper documentation.<sup>137</sup> Once placed in detention, the detainee may only be eligible for parole—not release—on a case-by-case basis if she can show a “credible fear of persecution” or show that she is not a threat to the community.<sup>138</sup> Usually, a credible fear of persecution means

that the individual or her family has been or will be targeted should they return to their country of origin.<sup>139</sup>

For detainees, especially those seeking asylum, the interview is the first opportunity that they have to demonstrate that they have met these general guidelines.<sup>140</sup> These interviews are one of the only chances for an asylum seeker to be paroled, and a denial of parole cannot be appealed.<sup>141</sup> Once an immigrant is detained, the process of seeking parole is difficult, since current parole criteria are not formal regulations but rather mere guidelines set out in various DHS memoranda.<sup>142</sup> Under the current system, DHS has the sole authority to parole an asylum seeker, and no decision can be appealed to an independent judge.<sup>143</sup>

Current detention policies target asylum seekers of the Haitian, Iraqi, Arab, and Muslim communities for denial of parole.<sup>144</sup> For example, many Haitians—would-be refugees or immigrants that arrive in the United States by boat—are not eligible for parole.<sup>145</sup> Former Attorney General John Ashcroft instituted a regulation requiring that immigrants arriving by boat be detained pending proceedings—a policy that is more pertinent to Haitian nationals who arrive by boat off the coast of Florida but can affect any nationality arriving in this manner.<sup>146</sup>

If refugees and other arriving immigrants are detained, they may seek parole from DHS; however, an immigration judge does not have jurisdiction over the custody status of these detained individuals.<sup>147</sup> The judge may only review whether or not the individual will be granted asylum.<sup>148</sup> Policies regarding custody of arriving immigrants are becoming increasingly strict. A noncriminal asylum seeker is unlikely to be paroled from custody during pending removal proceedings<sup>149</sup> unless he has immediate relatives in the community or a medical condition, as well as the ability to provide proof of financial support.<sup>150</sup> Despite a showing of community connections, medical health, and financial stability, an immigrant may nevertheless be denied parole due to the broad discretion available to ICE. This final decision without a chance of appeal makes the system inherently unjust.

*B. Further Barriers in an Unfair System*

In November 2007, ICE issued a new directive specifically regarding the detention and parole of asylum seekers in the United States.<sup>151</sup> The directive rescinds prior guidelines stating that asylum seekers would be considered for parole if they satisfied a set of requirements, such as establishing their identities and presenting no risk of flight or harm to the community.<sup>152</sup> The new directive “appears to be aimed at further limiting the release of asylum seekers from U.S. immigration” detention.<sup>153</sup> This process of reform suggests that the government seems to have disregarded any consideration of the full experience many immigrants go through in simply trying to reach the United States: the widespread exploitation and abuse of noncitizens working without authorization in an underground economy; hundreds of immigrants dying in the desert each year as they attempt to cross the border from Mexico illegally; and lengthy and painful separation of family members when mothers, fathers, sons, and daughters of citizens and lawful residents are unable to obtain visas or overcome visa backlogs to legally immigrate.<sup>154</sup> Furthermore, the government seems aware of the problems with detaining immigrants—the lengthy periods of detention in crowded, remote detention centers where asylum seekers are isolated from family members, treated like criminals, subject to abuse and harassment, unable to access necessary medical care and psychological counseling, and unable to find legal representation—which leaves many detained immigrants desperate and defeated.<sup>155</sup>

As mentioned above, the lack of consideration given to the mental and physical health of detained immigrants has led many to contemplate or attempt suicide. Others, unable to bear the pain and degradation of further detention, have abandoned their claims for release or asylum and have asked to be returned home despite the fear of persecution or no knowledge of the place to which they are being deported.<sup>156</sup> For example, after being separated from their young children during mandatory detention, many parents have abandoned their asylum claim and returned to countries they

had escaped, despite fearing for their own safety.<sup>157</sup> The level of discretion granted to untrained ICE agents and private guards has contributed to abuse and trauma for asylum seekers. The trauma of past persecution, coupled with the pain of family separation and lack of support in detention, forces many asylum seekers to choose to return to a life of continued persecution and violence. This return, as a result of unregulated discretion by immigration authorities, is tantamount to a violation of both domestic and international law.

#### IV. INTERNATIONAL LAW AND FEDERAL DECISIONS

International human rights law has consistently denounced the unreasonable detention of refugees and immigrants. As early as a century ago, U.S. courts agreed with international standards on detention of refugees and immigrants and ruled that detention of both was unreasonable as “both removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious. Where detention is incident to removal, the detention cannot be justified as punishment nor can the confinement or its conditions be designed in order to punish.”<sup>158</sup>

Recently, Congresswoman Lucille Roybal-Allard (D-CA) introduced the Immigration Oversight and Fairness Act of 2009, which attempts to establish legally enforceable detention standards based on basic international human rights principles.<sup>159</sup> To date, the legislation is still pending. Though there are no Senate cosponsors of the bill, this legislation has been applauded as a step in the right direction by the international community.<sup>160</sup>

##### *A. International Covenant on Civil and Political Rights (ICCPR)*

International law that is binding on the United States for the treatment of immigrants and detention falls under the International Covenant on Civil and Political Rights (ICCPR). Article 13 of the ICCPR establishes a right to fair deportation procedures, including cases where the lawful presence of



the immigrant in question is in dispute. The United States has signed, ratified, and is obligated to follow the ICCPR, but its current deportation policies violate this binding document.<sup>161</sup> These deportation policies—particularly those applied to immigrants lawfully in the United States who have been convicted of crimes—also violate (1) international legal standards on proportionality; (2) the right to a private life, provided for in Article 17 of the ICCPR; and (3) Article 33 of the Convention Relating to the Status of Refugees, prohibiting the return of refugees to places where they fear persecution (with very narrow exceptions).<sup>162</sup> Similarly, Article 8(1) of the American Convention on Human Rights, which the United States signed in 1977, states that “[e]very person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law . . . for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.”<sup>163</sup> The determination of what constitutes the “reasonable time” a person can be detained is dependent on the crime they are accused or found guilty of committing. When immigrants are detained for administrative purposes—as is the case with asylum seekers—or for civil infractions (such as lack of documentation) for long periods of time, the detention becomes unreasonable and inhumane.

Domestic courts have also found that unreasonable or indefinite detention of asylum seekers is unconstitutional, often by referring to international treaties to which the United States is a party.<sup>164</sup> For example, as stated above, the United States is a party to the ICCPR. Under Article 9(4) of the ICCPR, “anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”<sup>165</sup> The ICCPR also provides that “any national law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, politics, national or social origin,

property, birth, or other status.”<sup>166</sup> The current policy of targeting Arab, Muslim, Haitian, and other ethnoreligious groups for immediate removal or indefinite detention is in direct violation of this statement.

*B. United Nations High Commissioner for Refugees (UNHCR)*

The United Nations High Commissioner for Refugees (UNHCR) has recognized the discriminatory practices by the U.S. government and provided detention guidelines that call for procedural guarantees such as automatic judicial or administrative review—independent of review by the detaining authorities.<sup>167</sup> The Supreme Court in *Zadvydas v. Davis* referred to the UNHCR guidelines and held that indefinite detention of noncitizens whom had been admitted to the United States, yet were later deported, would raise serious concerns under the Constitution.<sup>168</sup> The Court found that there is an implicit reasonable time requirement for how long a detainee could be held, which they set at six months.<sup>169</sup> Again referring to the guidelines provided by the UNHCR, the Court held that

there should be a presumption against detention. Where there are monitoring mechanisms which can be employed as viable alternatives to detention (such as reporting obligations or guarantor requirements), these should be applied first unless there is evidence to suggest that such an alternative will not be effective in the individual case. Detention should therefore only take place after a full consideration of all possible alternatives, or when monitoring mechanisms have been demonstrated not to have achieved the lawful and legitimate purpose.<sup>170</sup>

This ruling has been affirmed by the 2003 *Denmore v. Kim* case, which held that a noncitizen is entitled to due process of the law for deportation hearings under the Fifth Amendment.<sup>171</sup> Yet, despite rulings at the Supreme Court providing immigrant detainees due process of the law and a maximum period for detention, practices by DHS have proven otherwise, which becomes especially problematic for asylum seekers.

In part because of asylum seekers' particular vulnerabilities, the UNHCR has condemned their detention except in the most limited circumstances.<sup>172</sup> The UNHCR noted that detention is inherently undesirable as it can have a significant impact on detainees' ability to access the asylum process, and can be a traumatizing experience.<sup>173</sup> Barriers to access make it more difficult for asylum seekers and refugees to secure legal counsel, communicate with family members, obtain legal materials, and find interpreters to assist in preparing their claims. These obstacles particularly affect vulnerable groups such as single women, children, unaccompanied minors, and those with special medical or psychological needs.

In addition, the UNHCR has denounced the mandatory detention of asylum seekers as an arbitrary deprivation of liberty, calling instead for an individualized determination of necessity before ordering detention.<sup>174</sup> Such a determination is in accordance with international human rights law and refugee protection standards, which require a relationship between the exercise of detention and the purported ends to be achieved by the detention.<sup>175</sup> Therefore, each case must consist of a personalized analysis of the need to detain a particular individual. The United States should not detain an entire group of asylum seekers on the formal basis that they are likely to abscond prior to a determination of their asylum claims. Even when domestic law allows for detention in the event that an individual is likely to abscond, international standards dictate that there must be some substantive basis for such a conclusion in the individual case.<sup>176</sup> There must be a compelling need to detain that is based on the personal history of each individual asylum seeker.

### *C. Ninth Circuit and Other Federal Decisions*

The Immigration and Nationality Act (INA) provides that ICE can detain for the period necessary to bring about actual deportation, only after the final order of removal has been issued.<sup>177</sup> Additionally, two recent U.S. Supreme Court decisions—*Zadvydas v. Davis*<sup>178</sup> and *Clark v. Martinez*<sup>179</sup>—

further limits on the allowable duration of detention. As a result of these decisions, if there is no significant chance of deportation in the foreseeable future because, for example, the home country refuses repatriation, ICE cannot detain an individual for longer than six months after the issuance of a final removal order.<sup>180</sup>

In response to the Court ruling in *Zadvydas*—that alternatives should be visited prior to detention—the government has interpreted the *Zadvydas* ruling as not applying to arriving asylum seekers who have been placed in detention, but to detainees who are in detention for possible deportation.<sup>181</sup> In addition, the U.S. government concluded that the 1951 United Nations Convention Relating to the Status of Refugees (1951 Convention) and the 1967 Protocol Relating to the Status of Refugees (1967 Protocol), as interpreted and codified in U.S. law, control the fate of asylum seekers entering the United States.<sup>182</sup> In practice, the INS (what ICE was known as prior to the restructuring of DHS) applied the 1980 Refugee Act and the INA in the asylum determination process.<sup>183</sup> Under these international and federal laws, asylum seekers may be detained only long enough to determine their identity. However, IIRIRA and current DHS policies have overshadowed these past practices, and are now indefinitely detaining many asylum seekers until either their asylum is granted or they are deported back to the country of their persecution. As a result of long detention periods without proper mental and medical care, conditions become intolerable for many asylum seekers.

In October 1998, the inhumane and abusive conditions suffered by detained asylum seekers prompted a New Jersey federal district court to allow asylum seekers to sue the U.S. federal government for damages under the Alien Tort Claims Act.<sup>184</sup> In deciding that asylum seekers detained by the INS have the right to sue the U.S. government for the cruel, inhumane, and degrading treatment they suffer in detention, the court distinguished between detainees awaiting a hearing on their applications for political asylum from post-trial detainees, i.e., criminals.<sup>185</sup> Moreover, the court

agreed that the alleged treatment suffered by the plaintiff asylum seekers violated their right to be free from cruel, inhumane, or degrading treatment during detention.<sup>186</sup> In addition, the court stated that any nation that allowed for prolonged, arbitrary detention violated international customary law.<sup>187</sup> Though the *Jama* case allows for the Alien Tort Claims Act as an avenue for collecting damages against the U.S. government for abuse while in detention,<sup>188</sup> the court still would not provide what the detainee originally sought when coming to the United States—asylum. Thus, for many in detention, the persecution continues.

In October 2008, the Ninth Circuit came out with several decisions that supported the rights of immigrants in detention, denouncing conditions in detention centers and finding in favor of detained petitioners.<sup>189</sup> After his death, the family of Francisco Castañeda pursued a Bivens claim for damages against the government.<sup>190</sup> A Bivens claim allows for monetary damages for constitutional violations committed by federal agents, otherwise severely limiting action that can be taken against federal officials for malicious, vicious, or depraved actions.<sup>191</sup> In ruling for the Castañeda family, the court held that the federal government could not be absolved of its duty and had no right to violate the Constitution without consequence.<sup>192</sup> Since the media exposed similar deaths throughout other detention facilities, the *Castañeda* decision has allowed for a domestic remedy that previously had not been available to many detainees and their families for the suffering caused by the detention process.<sup>193</sup> Nonetheless, though pursuing a Bivens claim may provide relief to some who have lost a loved one in detention, more humane alternatives to detention would guarantee that no more immigrant families would have to suffer the tragic loss of a member through callous treatment in detention.

## V. ALTERNATIVES TO DETENTION

Alternatives to detention exist and are being practiced in smaller U.S. communities at the grassroots level. Yet despite the international and

domestic laws prohibiting indefinite detention, these alternatives are not common under current DHS procedures.<sup>194</sup> Rather, DHS has dedicated itself to expanding the current detention process, instead of exploring more cost-effective or humane alternatives.<sup>195</sup> The U.S. Commission on International Religious Freedom, which advocates on behalf of asylum seekers and refugees escaping religious persecution, called for safeguards during the expedited removal process to protect those fleeing persecution.<sup>196</sup> The Justice Department, which oversees immigration courts, was praised by the commission for training immigration judges on asylum law, increasing the number of legal orientation programs for detained immigrants, and efforts to improve immigration court decisions.<sup>197</sup>

However, the “commission also found no indication that DHS had taken steps to ensure that immigrants were not treated like criminals while their claims were being evaluated.”<sup>198</sup> DHS stated that it would be “too burdensome to create a separate detention program for asylum seekers and that such a system might create incentives for people to claim that they were fleeing persecution.”<sup>199</sup> However, DHS has been unable to provide statistical or financial proof of this burden. Instead, given the existence of alternatives, the illegality of the current detention system under international law, and the devastating psychological and financial toll of DHS detainee structure, a summary dismissal of the alternatives will not suffice. These alternatives must be explored.

Several alternatives are available and viable for implementation. Community and local programs that allow for supervised parole such as the Intensive Supervised Appearance Program (ISAP) or Assisted Appearance Program (AAP) allow for accountability on the part of the asylum seeker or noncitizen immigrant, without being an excessive financial burden on the government and taxpayers. Resuming the implementation of preexisting procedures that have been halted by detention—such as allowing release on monetary bonds or codifying current procedures—would also create greater

accountability by the government and the private companies running the detention centers.

#### *A. Court-Appointed Legal Representation*

As discussed in this article, the current detention process is so cumbersome and exploitative that many detainees give up and will self-deport instead of fighting their removal, though they may have been successful if they had remained. Additionally, the labyrinth of immigration law proves to be confusing and disheartening for any pro se immigrant, particularly those without resources due to their detention. Lack of representation also prevents detainees from airing grievances and ensuring humane treatment while they are in detention. Given that the detention system has replicated the criminal system in many ways, it should also create a process to require a court-appointed attorney for every detainee, making sure that the immigration and detention process conforms to constitutional procedures and ideals of justice.

#### *B. Codify Detention Guidelines*

Although there are federal laws prohibiting discrimination, there is no national legislative and policy framework implementing protection for the human rights of immigrants, creating greater accountability in DHS. Programs must be implemented to evaluate and assess which federal and local programs are respecting the human rights of immigrants.<sup>200</sup> As a result, first and foremost, DHS must codify the detention guidelines it provides its officers. This will ensure greater accountability on the part of the government regarding its treatment of a vulnerable population. By creating binding guidelines instead of suggested standards, detention centers and officials can be held responsible for clear violations of administrative regulations. This becomes especially crucial as many detention centers are run through private contracts.

Whereas private prisons are legally obligated to provide incident reports on assaults, escapes, deaths, or rapes, private prison companies are not.<sup>201</sup> Because immigration detention centers are run by private companies who are not guided by government regulation or public accountability, “it is easier to gain access to the death row section of most publicly run prisons than it is to most privately run detention centers—unless you are a detainee or an employee.”<sup>202</sup> The broad discretion of DHS officials, combined with the lack of accountability for private companies, has played a fundamental role in the administration of detention and deportation. The discretion given to immigration officers is manifested in the general deference to administrative decisions and unavailability of judicial review in cases of detention.

As long as detention guidelines are not codified into regulations, local DHS officials are free to ignore the guidelines.<sup>203</sup> Federal regulations, and the public accountability that accompanies them, would ensure greater uniformity of action in the treatment of asylum seekers. Arbitrary application of the guidelines increases occurrences of abuse and discrimination, leading to tragic results such as the deaths of Francisco Casteñeda and Victor Arellano, or the deportation of Sharon McKnight. Furthermore, arbitrary application of the guidelines leaves the government exposed to liability under the Alien Tort Claims Act as applied in *Jamas*. Following the example of detention centers in European countries, there must be an independent judicial review of the detention.<sup>204</sup> In crafting regulations, DHS must allow judicial review of removal or detention prior to the actual asylum hearing, preventing future arbitrary decision making that has allowed the tragic death and mistreatment of so many.

### *C. Reestablishing Monetary Bonds*

Prior to 1996, most immigrants arrested and detained for a deportation hearing were released upon the payment of a monetary bond.<sup>205</sup> Though the bond process had negative impacts on the poorer asylum seekers, at least



the law provided a release mechanism.<sup>206</sup> However, “after 1996, the law required the detention of all immigrants and permanent residents facing deportation for most criminal violations until the final resolution of the case.”<sup>207</sup> Currently, it would seem that many of the implemented regulations prevent asylum seekers from getting parole and should be replaced with the opportunity to be released on payment of a bond. This option does present a financial burden for the asylum seeker; however, it is a much more viable solution than allowing the government to invest further funds into creating more detention facilities. In addition, when paroled through a bond, asylum seekers are given the opportunity to decide which community they would enter and can start establishing those very vital community connections prior to the decision on their status.

*D. Intensive Supervision Appearance Program (ISAP)*

The detention program is a concern for the government. In a 2005 report, the House Appropriations Committee recommended alternatives to detention such as ISAP.<sup>208</sup> ISAP “allows people awaiting disposition of their immigration cases to be released into the community, provided that they are closely tracked by means such as electronic monitoring bracelets, curfews, and regular contact with a caseworker.”<sup>209</sup> Pilot programs established by the government in twelve cities indicate that more than 90 percent of the people enrolled in the pilot programs show up for their court dates.<sup>210</sup> This ISAP option utilizing “alternatives to detention” has already been implemented in some larger cities in response to the lack of available detention space and should be expanded nationally.<sup>211</sup> As an alternative to detention, ISAP allows greater freedom of movement and ensures family unity by incorporating electronic monitoring through an ankle bracelet, home curfews, periodic home visits, and weekly reporting to an ISAP office.

*E. Appearance Assistance Program (AAP)*

A less rigorous process that is being tried as a test case is the Appearance Assistance Program, in which asylum seekers are released and required to report to the detention center regularly, either in person or by phone.<sup>212</sup> Individuals are informed of the consequences of failing to comply with U.S. immigration laws—such as immediate deportation with no chance of reentry—and their whereabouts are monitored.<sup>213</sup> According to the Vera Institute, which has been piloting the AAP project, there is a 93 percent appearance rate for asylum seekers.<sup>214</sup>

*F. Shelter Release*

A final alternative to detention can be found in a project, conducted by the Lutheran Immigration and Refugee Service, which sought to have ICE release asylum seekers from detention to shelters in several communities.<sup>215</sup> The shelters reminded participants of hearings, scheduled check-ins with ICE, and helped organize transportation to parole meetings and court hearings.<sup>216</sup> This project achieved a 96 percent appearance rate.<sup>217</sup> This final alternative is perhaps the most humane and best suited to respond to the personal experiences of an asylum seeker prior to her arrival in the United States and application for asylum. This shelter release program allows asylum seekers—both individuals and families—to build a community and access local resources prior to receiving asylum.

VI. CONCLUSION

In a March 2008 report to the House Judiciary Committee, DHS emphasized the necessity of taking appropriate actions to assimilate immigrants living in the United States “into the rich tapestry of American culture and society.”<sup>218</sup> Discussing American immigration policy, DHS secretary stated that “[W]e must continue to welcome new generations of immigrants to the United States to pursue their dreams and enrich our civic culture and society.”<sup>219</sup> Though reports from DHS speak of the desire to

welcome new immigrants, practice indicates otherwise—especially with the present policy of targeting immigrant communities and placing them in federal immigration detention for indefinite periods.

In his testimony to the U.S. Senate Committee on the Judiciary about the current detention and asylum process, the vice-chair of Refugee Council U.S.A. stated that

this state of limbo has already lasted several years for some asylum seekers, causing delays that have left many families divided, stranding refugee children seeking to join their parents in the United States in difficult and dangerous circumstances abroad, and forcing many asylum seekers to endure long periods of detention. In some cases, asylum applicants have now remained incarcerated for a year or more, even though immigration judges have ruled that they are otherwise deserving of asylum.<sup>220</sup>

The state of limbo has not only divided families, it has compounded the trauma and disregarded the experiences suffered by most immigrants and asylees in detention. The chance of an asylum seeker recovering from past persecutions, or of a detained immigrant returning to normal life and becoming a productive citizen in the future, is nearly impossible under current standards of detention.

The government has further blurred lines, creating its own catch-22 in allowing the immediate detention of legal permanent residents, undocumented immigrants, and asylum seekers.<sup>221</sup> The mandatory detention of immigrants who come forward seeking documentation, or who are picked up without any proper due process, prompts many to stay in the shadows illegally rather than pursue available legal methods for several reasons.<sup>222</sup> Mandatory detention unfairly restricts the freedom of immigrants and breaks apart immigrant communities. It also fails to guarantee a clear answer as to when a decision may be granted on the detainee's status, leaving an immigrant indefinitely in detention without any support. Moreover, detention facilities do not provide adequate services

needed by immigrants—such as mental and medical health services—instead treating them like prisoners.

The process of gaining legal residency in the United States is extremely difficult. The current detention process only makes it more complicated, rendering the immigration process nearly unbearable for most. Recent legislation, such as the Detainee Basic Medical Care Act of 2008 and the Immigration Oversight and Fairness Act of 2009, attempt to address the horrible conditions of detention and the treatment of detained immigrants. However, as of yet, none of these bills have passed, and there is no guarantee that DHS, which has thus far ignored previous legislative initiatives concerning detention mistreatment, would actually implement new procedures to protect immigrant detainees. Additionally, many speculate that there will be upcoming reforms in the immigration system and changes to the system of detention under the Obama administration and the ushering in of new appointments at DHS.<sup>223</sup> However, until changes are actually implemented, continued advocacy is needed for medical and mental health support and greater accountability.

Only by considering viable alternatives to detention will the government be able to (1) cut the costs required to build and maintain detention facilities; (2) make sure that former detainees who have had their basic rights violated are receiving the proper medical and community support during the immigration process; and (3) ensure that should they be granted residency, these individuals and families will transition into American society as healthy, productive citizens. Finally, by introducing alternatives to detention, the United States will not only regain international respect as a true leader in human rights, but also revive its original reputation as the land of liberty, a place that welcomed with open arms the huddled masses yearning to breathe free.

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<sup>2</sup> Statement of a Rwandan refugee and Human Rights First client who had been in detention for several months prior to being granted asylum. HUMAN RIGHTS FIRST, IN LIBERTY'S SHADOW: U.S. DETENTION OF ASYLUM SEEKERS IN THE ERA OF HOMELAND SECURITY 1 (2001), available at [http://www.humanrightsfirst.org/asylum/libertys\\_shadow/Libertys\\_Shadow.pdf](http://www.humanrightsfirst.org/asylum/libertys_shadow/Libertys_Shadow.pdf).

<sup>3</sup> *Detention and Removal: Immigration Detainee Medical Care: Hearing on Medical Care and Deaths in ICE Custody Before the H. Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law*, 110th Cong. 1 (2007) (statement of Francisco Castañeda), available at [http://www.aclu.org/images/asset\\_upload\\_file841\\_32062.pdf](http://www.aclu.org/images/asset_upload_file841_32062.pdf).

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

<sup>5</sup> *See id.*

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

<sup>7</sup> *Id.* at 1–2.

<sup>8</sup> *Id.* at 1.

<sup>9</sup> *Id.* at 1–2.

<sup>10</sup> *Id.* at 2–3.

<sup>11</sup> SEATTLE UNIV. SCH. OF LAW INT'L HUMAN RIGHTS CLINIC & ONEAMERICA (FORMERLY HATE-FREE ZONE), VOICES FROM DETENTION: A REPORT ON HUMAN RIGHTS VIOLATIONS AT THE NORTHWEST DETENTION CENTER IN TACOMA, WASHINGTON (2008), available at <http://www.law.seattleu.edu/documents/news/archive/2008/DRFinal.pdf> [hereinafter VOICES FROM DETENTION].

<sup>12</sup> Bob Egelko, *Court Says Immigrant's Family Can Sue*, S.F. CHRON., Oct. 3, 2008, at B4.

<sup>13</sup> H.R. 5950, 110th Cong. (2008); S. 3005, 110th Cong. (2008).

<sup>14</sup> The Immigration and Customs Enforcement (ICE) is the immigration enforcement branch of the newly formed Department of Homeland Security (DHS). The creation of DHS and the responsibilities of ICE will be discussed further in the article.

<sup>15</sup> *See* U.S. Immigration and Customs Enforcement, Office of Detention and Removal, <http://www.ice.gov/pi/dro/index.htm> (last visited Mar. 15, 2009).

<sup>16</sup> *Homeland Security Oversight: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. 17 (2008) (statement of Michael Chertoff, Secretary, U.S. Dep't of Homeland Security), available at [http://www.dhs.gov/xnews/testimony/testimony\\_1204746985090.shtm](http://www.dhs.gov/xnews/testimony/testimony_1204746985090.shtm) [hereinafter Testimony of Secretary Michael Chertoff].

<sup>17</sup> The Special Rapporteur, *Addendum to the Report of the Special Rapporteur on the Human Rights of Migrants*, at 2, delivered to the Human Rights Council, U.N. Doc. A/HRC/7/12/Add.2 (Mar. 5, 2008) (prepared by Jorge Bustamante), available at [http://65.36.162.162/files/Bustamante\\_MigrantReport\\_030508.pdf](http://65.36.162.162/files/Bustamante_MigrantReport_030508.pdf) [hereinafter The Special Rapporteur].

<sup>18</sup> HUMAN RIGHTS FIRST, *supra* note 2, at 24–25.

- <sup>19</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208, 110 Stat. 3009-546 (codified in scattered sections of 8 U.S.C.); Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 28 U.S.C.); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, 351 (codified at 8 U.S.C. §1226) (2006)).
- <sup>20</sup> Lisa M. Seghetti, *Immigration and Naturalization Service: Restructuring Proposals in the 107th Congress*, RPT. TO CONG. (Cong. Res. Serv., Washington, D.C.), Dec. 11, 2002, at 1, 1, available at <http://fpc.state.gov/documents/organization/16174.pdf>.
- <sup>21</sup> USA PATRIOT Act, 115 Stat. 272, 351.
- <sup>22</sup> 8 U.S.C. § 1153 (2002) (refugees may seek either asylum or legal permanent status once entering the United States).
- <sup>23</sup> Michael G. Heyman, *Asylum, Social Group Membership and the Non-State Actor*, 36 U. MICH. J.L. REFORM 767, 772 (2003).
- <sup>24</sup> 8 U.S.C. § 1158(b)(1) (2000); 8 C.F.R. § 208.13(a) (2003).
- <sup>25</sup> 8 U.S.C. § 1101(42)(A) (2000); Immigration and Nationality Act (INA) § 101(a)(42)(A), 8 U.S.C. § 1158 (2005).
- <sup>26</sup> 8 USC § 1153.
- <sup>27</sup> Immigration and Nationality Act (INA) § 208(a), 8 U.S.C. § 1158(a) (2005).
- <sup>28</sup> U.S. Citizenship and Immigration Services, The Affirmative Asylum Process, <http://www.uscis.gov/portal/site/uscis> (follow “Services & Benefits” hyperlink; then follow “Humanitarian Benefits” hyperlink; then follow “Asylum” hyperlink; then follow “The Affirmative Asylum Process” hyperlink) (last visited Apr. 3, 2009).
- <sup>29</sup> See Barbara Hines, *An Overview of U.S. Immigration Law and Policy Since 9/11*, 12 TEX. HISP. J.L. & POL’Y 9, 18 (2006); Dep’t of Homeland Security Inspection of Persons Applying for Admission Rule, 8 C.F.R. § 235 (2008).
- <sup>30</sup> See HUMAN RIGHTS FIRST, *supra* note 2, at 12.
- <sup>31</sup> Hines, *supra* note 29.
- <sup>32</sup> See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208, 110 Stat. 3009-546 (codified in scattered sections of 8 U.S.C.); Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 28 U.S.C.).
- <sup>33</sup> Once a detainee has been denied legal residence, at the discretion of the DHS officer, the detainee may still receive a waiver of deportation which prevents him or her from be deported. AEDPA, 110 Stat. 1214.
- <sup>34</sup> *Id.* at §§ 411, 423.
- <sup>35</sup> Hines, *supra* note 29, at 11.
- <sup>36</sup> IIRIRA, 110 Stat. 3009-546.
- <sup>37</sup> See Hines, *supra* note 29, at 12.
- <sup>38</sup> *Id.* at 12.
- <sup>39</sup> Margaret Talbot, *The Lost Children*, NEW YORKER, Mar. 3, 2008, at 58.
- <sup>40</sup> 8 USC § 1227(a)(4)(B) (2000).
- <sup>41</sup> USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, 351 (codified at 8 U.S.C. §1226) (2006)).

<sup>42</sup> *Id.*

<sup>43</sup> Hines, *supra* note 29, at 13.

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

<sup>45</sup> *Id.*

<sup>46</sup> Berta Esperanza Hernandez-Truyol, *Asking the Family Question*, 38 FAM. L.Q. 481, 492–99 (2004).

<sup>47</sup> See *Unaccompanied Alien Child Protection Act: Hearing on S. 121 before the Subcomm. on Immigration, Border Security, and Citizenship*, 107th Cong. (2002) (statement of Stuart Anderson, Executive Assoc. Comm’r, U.S. Immigration and Naturalization Serv.); WOMEN’S COMM’N FOR REFUGEE WOMEN AND CHILDREN & LUTHERAN IMMIGRATION AND REFUGEE SERV., LOCKING UP FAMILY VALUES: THE DETENTION OF IMMIGRANT FAMILIES (2007), available at <http://www.lirs.org/LockingUpFamilyValues.pdf> [hereinafter LOCKING UP FAMILY VALUES].

<sup>48</sup> *Id.*

<sup>49</sup> Talbot, *supra* note 39, at 60.

<sup>50</sup> *Id.*

<sup>51</sup> See SETTLEMENT ANNOUNCEMENT, AMERICAN CIVIL LIBERTIES UNION, ACLU CHALLENGES PRISON-LIKE CONDITIONS AT HUTO DETENTION CENTER (2007), <http://www.aclu.org/immigrants/detention/hutto.html> [hereinafter ACLU Settlement Announcement].

<sup>52</sup> *Id.*

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

<sup>54</sup> *Id.* at 58.

<sup>55</sup> Talbot, *supra* note 39, at 66.

<sup>56</sup> *Id.* at 58.

<sup>57</sup> *Id.* at 60.

<sup>58</sup> *Id.* at 58, 66.

<sup>59</sup> *Id.* at 58.

<sup>60</sup> *Id.* at 66.

<sup>61</sup> *Id.* at 66.

<sup>62</sup> *Id.*

<sup>63</sup> VOICES FROM DETENTION, *supra* note 11, at 14.

<sup>64</sup> Manuel Valdes, *Washington Activist Fights Immigration Detention Center*, SEATTLE TIMES, Feb. 23, 2009, available at [http://seattletimes.nwsources.com/html/localnews/2008774486\\_apwadetentioncenterexpansion.html](http://seattletimes.nwsources.com/html/localnews/2008774486_apwadetentioncenterexpansion.html).

<sup>65</sup> Talbot, *supra* note 39, at 64.

<sup>66</sup> VERA INST. OF JUSTICE, LEGAL ORIENTATION PROGRAM: EVALUATION AND PERFORMANCE AND OUTCOME MEASUREMENT REPORT, PHASE II, 51 n.60 (2008), available at [http://www.vera.org/publication\\_pdf/475\\_874.pdf](http://www.vera.org/publication_pdf/475_874.pdf). See also The Special Rapporteur, *supra* note 17, at 11.

<sup>67</sup> The Special Rapporteur, *supra* note 17, at 11.

<sup>68</sup> Anna Gorman, *Immigration Detainees are at Record Levels*, L.A. TIMES, Nov. 5, 2007, at B1, B6.

- <sup>69</sup> HUMAN RIGHTS FIRST, *supra* note 2, at 38.
- <sup>70</sup> *Id.*
- <sup>71</sup> Amy Goldstein & Dana Priest, *In Custody, in Pain; Her Health Problems Worsening as She Fights Deportation, A U.S. Resident Struggles to Get the Medical Care She Needs*, WASH. POST, May 12, 2008 (Met 2 Ed.), at A1.
- <sup>72</sup> *Id.*
- <sup>73</sup> *Id.*
- <sup>74</sup> *Id.*
- <sup>75</sup> *Id.*
- <sup>76</sup> ICE 2008 Detention Management factsheet, available at [http://www.ice.gov/pi/news/factsheets/detention\\_mgmt.htm](http://www.ice.gov/pi/news/factsheets/detention_mgmt.htm)
- <sup>77</sup> The Special Rapporteur, *supra* note 17, at 11.
- <sup>78</sup> VOICES FROM DETENTION, *supra* note 11, at 14.
- <sup>79</sup> See Amy Goldstein & Dana Priest, *Careless Detention: Medical Care in Immigrant Prisons*, WASH. POST (SPECIAL SERIES), May 11–14, 2008.
- <sup>80</sup> See *id.*
- <sup>81</sup> Gorman, *supra* note 68.
- <sup>82</sup> See VOICES FROM DETENTION, *supra* note 11, at 18.
- <sup>83</sup> *Id.* at 36.
- <sup>84</sup> See Hines, *supra* note 29.
- <sup>85</sup> Julia Preston, *Big Disparities in Judging Asylum Cases*, N.Y. TIMES, May 31, 2007, at A14.
- <sup>86</sup> *Id.*
- <sup>87</sup> *Id.*
- <sup>88</sup> *Id.*
- <sup>89</sup> *Id.*
- <sup>90</sup> See generally Talbot, *supra* note 39; HUMAN RIGHTS FIRST, *supra* note 2; NAT'L NETWORK FOR IMMIGRANT AND REFUGEE RIGHTS, OVER-RAIDED, UNDER SIEGE: U.S. IMMIGRATION LAWS AND ENFORCEMENT DESTROY THE RIGHTS OF IMMIGRANTS (2008) [hereinafter UNDER SIEGE].
- <sup>91</sup> See HUMAN RIGHTS FIRST, *supra* note 2.
- <sup>92</sup> *Id.* at 34.
- <sup>93</sup> Nick Miroff, *ICE Facility Detainee's Death Stirs Questions*, WASH. POST, Feb. 1, 2009, at C1.
- <sup>94</sup> Talbot, *supra* note 39, at 60 (describing a story about a six-year-old detainee who asked guards for permission to go to the bathroom during the count and was continuously denied until the girl "smelled of urine.").
- <sup>95</sup> PHYSICIANS FOR HUMAN RIGHTS & NYU/BELLEVUE CTR. FOR SURVIVORS OF TORTURE, FROM PERSECUTION TO PRISON 106–107 (2002) [hereinafter FROM PERSECUTION TO PRISON]; HUMAN RIGHTS FIRST, *supra* note 2, at 36.
- <sup>96</sup> HUMAN RIGHTS FIRST, *supra* note 2, at 36.
- <sup>97</sup> WOMEN'S COMM'N ON REFUGEE WOMEN & CHILDREN, INNOCENTS IN JAIL 9–11 (2001); WOMEN'S COMM'N ON REFUGEE WOMEN & CHILDREN, BEHIND LOCKED DOORS 19–21 (2000).
- <sup>98</sup> See FROM PERSECUTION TO PRISON, *supra* note 95.



<sup>99</sup> See Sandra Hernandez, *House Hearing Reviews Deaths in Detention*, DETENTION WATCH NETWORK, Oct. 5, 2007, <http://www.detentionwatchnetwork.org/node/405>.

<sup>100</sup> See *id.*

<sup>101</sup> See *id.*

<sup>102</sup> See *id.*

<sup>103</sup> See *id.*

<sup>104</sup> See UNDER SIEGE, *supra* note 90; HUMAN RIGHTS FIRST, *supra* note 2; LOCKING UP FAMILY VALUES, *supra* note 47.

<sup>105</sup> HUMAN RIGHTS FIRST, *supra* note 2, at 35.

<sup>106</sup> Barbara Cochrane Alexander, *Detention of Asylum Seekers in the United States*, 7 NO. 2 HUM. RTS. BRIEF 20 (2000), available at <http://www.wcl.american.edu/hrbrief/07/2detention.cfm>.

<sup>107</sup> See Hines, *supra* note 29.

<sup>108</sup> Alexander, *supra* note 106.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Talbot, *supra* note 39, at 60.

<sup>112</sup> *Id.* at 62.

<sup>113</sup> *Id.* at 64.

<sup>114</sup> See *Asylum Detainees 'Suicide Risk,'* BBC NEWS, Feb. 5, 2006, <http://news.bbc.co.uk/2/hi/health/4673556.stm>.

<sup>115</sup> See FROM PERSECUTION TO PRISON, *supra* note 95.

<sup>116</sup> *Statement on Immigration Detainee Medical Care, Hearing on Detention and Removal: Immigration Detainee Medical Care Before the H. Comm. on the Judiciary's Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law*, 110th Cong. 2 (2007) (statement of Allen S. Keller, M.D.), available at <http://www.survivorsoftorture.org/files/pdf/TestimonyforHouseHearing-AllenKeller.pdf> [hereinafter Testimony of Allen S. Keller, M.D.].

<sup>117</sup> Florida Immigrant Advocacy Center, *Dying for Decent Care: Bad Medicine in Immigration Custody*, 33 (2009).

<sup>118</sup> FROM PERSECUTION TO PRISON, *supra* note 95.

<sup>119</sup> See *id.*

<sup>120</sup> Testimony of Allen S. Keller, M.D., *supra* note 116, at 2.

<sup>121</sup> See ACLU Settlement Announcement, *supra* note 51.

<sup>122</sup> See PERSECUTION TO PRISON, *supra* note 90, at 106–107; HUMAN RIGHTS FIRST, *supra* note 2, at 34.

<sup>123</sup> ADVISORY COMM. ON RELIGIOUS FREEDOM ABROAD, FINAL REPORT TO THE SECRETARY OF STATE AND TO THE PRESIDENT OF THE UNITED STATES 48 (1999).

<sup>124</sup> PERSECUTION TO PRISON, *supra* note 90, at 3; Mechele Pistone & P. Schrage, *The New Asylum Rule: Improved But Still Unfair*, 16 GEO. IMMIGR. L.J. 1, 49 n.272–73 (2001).

<sup>125</sup> PERSECUTION TO PRISON, *supra* note 90, at 5.

<sup>126</sup> 8 U.S.C. § 1158 (2005); 8 U.S.C. § 1225(b)(1)(B) (2007).

<sup>127</sup> Talbot, *supra* note 39, at 58.

<sup>128</sup> See HUMAN RIGHTS FIRST, *supra* note 2, at 12.

<sup>129</sup> See *supra* notes 17-18.

<sup>130</sup> Ian James, *INS Sued over U.S. Woman Agents Shackled, Called Liar and Deported*, L.A. TIMES, Sept. 3, 2000, at A17.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Andrew Becker and Patrick J. McDonnell, *U.S. Citizens Caught Up in Immigration Sweeps*, L.A. TIMES, April 9, 2009.

<sup>135</sup> The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) authorized the INS to quickly remove certain inadmissible aliens from the United States. The authority covers aliens who are inadmissible because they have no entry documents or because they have used counterfeit, altered, or otherwise fraudulent or improper documents. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub.L. 104-208, 110 Stat. 3009-546 (codified in scattered sections of 8 U.S.C.).

<sup>136</sup> IIRIRA, 110 Stat. 3009-546.

<sup>137</sup> *Id.*

<sup>138</sup> Immigration and Nationality Act (INA) § 235(b)(1)(B), 8 U.S.C. § 1158 (2005).

<sup>139</sup> 8 USC § 1151 (2007).

<sup>140</sup> 8 U.S.C. § 1101(42)(A) (2000).

<sup>141</sup> 8 U.S.C. § 1151.

<sup>142</sup> HUMAN RIGHTS FIRST, *supra* note 2, at 8 n.9.

<sup>143</sup> 8 U.S.C. § 1151.

<sup>144</sup> HUMAN RIGHTS FIRST, *supra* note 2, at 3; Dep't of Homeland Security Inadmissible Aliens and Expedited Removal Rule, 8 C.F.R. § 235.3(b) (2008).

<sup>145</sup> 8 USC § 1158 (2007); 8 USC § 1182 (2008).

<sup>146</sup> Dep't of Justice Immigration Court Rules of Procedure, 8 C.F.R. § 1003.19(c)(3)(h)(1)(i)(D) (2005); Dep't of Justice Detention of Aliens Prior to Order of Removal Rule, 8 C.F.R. § 1236.1(c)(1)(i) (2003).

<sup>147</sup> 8 C.F.R. § 1003.19(c)(3)(h)(1)(i)(D).

<sup>148</sup> 8 C.F.R. § 1003.19(c)(3)(h)(1)(i)(D); 8 C.F.R. § 1236.1(c)(2).

<sup>149</sup> Removal proceedings is defined as the time between denial of residence and actual deportation.

<sup>150</sup> 8 C.F.R. §§ 1236.1(3), (6)(i).

<sup>151</sup> *New U.S. Detention Directive May Leave Asylum Seekers in U.S. Immigration Jails for Even Longer*, HUM. RTS. FIRST, Jan. 7, 2008, [http://www.humanrightsfirst.org/asylum/asylum\\_03.htm](http://www.humanrightsfirst.org/asylum/asylum_03.htm).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> Elizabeth McCormick, *Hospitality: How a Biblical Virtue Can Transform Immigration Law*, 83 U. DET. MERCY L. REV. 857, 859 (2006).

<sup>155</sup> See Oversight Hearing: *U.S. Refugee Admissions and Policy Before the Subcomm. on Immigration, Border Security and Citizenship of the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Father Kevin Gavin S.J., Vice-Chair, Refugee Council U.S.A).

and National Director Jesuit Refugee Service U.S.A.), *available at* [http://judiciary.senate.gov/hearings/testimony.cfm?id=2343&wit\\_id=6036](http://judiciary.senate.gov/hearings/testimony.cfm?id=2343&wit_id=6036) [hereinafter Testimony of Father Kevin Gavin, S.J.]; The Special Rapporteur, *supra* note 17.

<sup>156</sup> See LAWYERS COMM. FOR HUMAN RIGHTS, REFUGEE WOMEN AT RISK: UNFAIR LAWS HURT ASYLUM SEEKERS 12 (2005), *available at* [http://www.humanrightsfirst.org/refugees/reports/refugee\\_women.pdf](http://www.humanrightsfirst.org/refugees/reports/refugee_women.pdf).

<sup>157</sup> *Id.*

<sup>158</sup> *Zadvydas v. Davis*, 533 U.S. 678, 721 (2001) (citing *Wong Wing v. United States*, 163 U.S. 228 (1896)).

<sup>159</sup> H.R. 1215, 111th Cong. (2009).

<sup>160</sup> Letter of support for the Immigration Oversight and Fairness Act, sent to Congress, dated February 26, 2009, cosigned by nearly 50 national and international NGOs.

<sup>161</sup> Barbara Macgrady, *Resort to International Human Rights Law in Challenging Conditions in U.S. Immigration Detention Centers*, 23 BROOK. J. INT'L. 271, 273 (1997).

<sup>162</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), UN GAOR, Supp. No. 16, UN Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR]; Convention Relating to the Status of Refugees art. 33, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S.

<sup>163</sup> Organization of American States, American Convention on Human Rights art. 8, Nov. 22, 1969, 1144 U.N.T.S. 123.

<sup>164</sup> See *Zadvydas v. Davis*, 533 U.S. 678 (2001); *Demore v. Kim*, 538 U.S. 510 (2003); *Wong Wing v. United States*, 163 U.S. 228, 232–34 (1896).

<sup>165</sup> ICCPR, *supra* note 162. See also *Torres v. Finland*, CCPR/C/38/D/291/1988, UN Human Rights Committee (HRC) (1990), *available at* <http://www.unhcr.org/refworld/docid/47fdaf5d.html> (holding that detention without ability to appeal violated ICCPR).

<sup>166</sup> ICCPR, *supra* note 162.

<sup>167</sup> U.N. High Comm'r for Refugees, Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers (Feb. 26, 1999), *available at* <http://www.unhcr.org/refworld/docid/3c2b3f84.html>.

<sup>168</sup> *Zadvydas v. Davis*, 533 U.S. 678 (2001) (This case involved a U.S. resident alien born of Lithuanian parents, who was in a German displaced persons camp and was deported based on his criminal record. Germany and Lithuania refused to accept him because he was not a citizen of their countries. When he remained in custody after the removal period expired, he filed a habeas petition).

<sup>169</sup> *Id.* at 701; HUMAN RIGHTS FIRST, *supra* note 2, at 12.

<sup>170</sup> U.N. High Comm'r for Refugees, *supra* note 167, at 3–4; *Zadvydas*, 533 U.S. at 721.

<sup>171</sup> *Demore v. Kim*, 538 U.S. 510, 553 (2003).

<sup>172</sup> The Special Rapporteur, *supra* note 17, at 20.

<sup>173</sup> See *id.*

<sup>174</sup> U.N. High Comm'r for Refugees, *supra* note 167.

<sup>175</sup> *Id.* at 4.

<sup>176</sup> *Id.*

<sup>177</sup> The Special Rapporteur, *supra* note 17, at 9.

<sup>178</sup> *Zadvydas v. Davis*, 533 U.S. 678 (2001).

<sup>179</sup> *Clark v. Martinez*, 543 U.S. 371 (2005).

- <sup>180</sup> The Special Rapporteur, *supra* note 17, at 9. See *Zadvydas*, 533 U.S. at 701; *Clark*, 543 U.S. at 378.
- <sup>181</sup> HUMAN RIGHTS FIRST, *supra* note 2, at 12.
- <sup>182</sup> *Id.* at 5.
- <sup>183</sup> Alexander, *supra* note 106.
- <sup>184</sup> 28 U.S.C.A. § 1350 (2003).
- <sup>185</sup> See *Jama v. INS*, 22 F. Supp. 2d 353, 363 (D.N.J. 1998).
- <sup>186</sup> *Id.*
- <sup>187</sup> *Id.* (citing Restatement (Third) of Foreign Relations Law of the United States § 702).
- <sup>188</sup> *Id.* at 363–64.
- <sup>189</sup> See *Castaneda v. United States*, 546 F.3d 682 (9th Cir. 2008).
- <sup>190</sup> *Castaneda*, 546 F.3d at 687.
- <sup>191</sup> See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).
- <sup>192</sup> *Castaneda*, 546 F.3d at 698–700.
- <sup>193</sup> See *supra* notes 12, 90, 93, 103.
- <sup>194</sup> The Special Rapporteur, *supra* note 17, at 2.
- <sup>195</sup> Press Release, Homeland Security, Fact Sheet: Secure Border Initiative (Nov. 2, 2005), available at [http://www.dhs.gov/xnews/releases/press\\_release\\_0794.shtm](http://www.dhs.gov/xnews/releases/press_release_0794.shtm).
- <sup>196</sup> Rachel L. Swarns, *U.S. May Be Mishandling Asylum Seekers*, N.Y. TIMES, Feb. 8, 2007, at A17.
- <sup>197</sup> *Id.*
- <sup>198</sup> *Id.*
- <sup>199</sup> *Id.*
- <sup>200</sup> The Special Rapporteur, *supra* note 17, at 2.
- <sup>201</sup> Talbot, *supra* note 39, at 61.
- <sup>202</sup> *Id.* (describing the story of Jorge Bustamante, U.N. Special Rapporteur on Human Rights of Migrants, being denied access to Hutto).
- <sup>203</sup> HUMAN RIGHTS FIRST, *supra* note 2, at 13.
- <sup>204</sup> See LAWYERS COMM. FOR HUMAN RIGHTS, REVIEW OF STATES' PROCEDURES AND PRACTICES RELATING TO DETENTION OF ASYLUM SEEKERS (2002), available at [http://www.humanrightsfirst.org/refugees/reports/cntry\\_rev\\_02/Full\\_countryreview.pdf](http://www.humanrightsfirst.org/refugees/reports/cntry_rev_02/Full_countryreview.pdf).
- <sup>205</sup> Hines, *supra* note 29, at 17.
- <sup>206</sup> Hines, *supra* note 29, at 17.
- <sup>207</sup> *Id.*
- <sup>208</sup> Talbot, *supra* note 39, at 60.
- <sup>209</sup> *Id.*
- <sup>210</sup> *Id.*
- <sup>211</sup> See LOCKING UP FAMILY VALUES, *supra* note 47; UNDER SIEGE, *supra* note 90.
- <sup>212</sup> HUMAN RIGHTS FIRST, *supra* note 2, at 42.
- <sup>213</sup> *Id.*
- <sup>214</sup> VERA INST. OF JUSTICE, *supra* note 66.
- <sup>215</sup> See LOCKING UP FAMILY VALUES, *supra* note 47.
- <sup>216</sup> See *id.*

<sup>217</sup> Ester Ebrahimian, *The Ullin 22: Shelters and Legal Service Providers Offer Viable Alternatives to Detention*, DETENTION WATCH NETWORK NEWS, Aug./Sept. 2000, at 8.

<sup>218</sup> Testimony of Secretary Michael Chertoff, *supra* note 16, at 17.

<sup>219</sup> *Id.*

<sup>220</sup> Testimony of Father Kevin Gavin, S.J., *supra* note 155.

<sup>221</sup> HUMAN RIGHTS FIRST, *supra* note 2, at 25.

<sup>222</sup> *See id.*; LOCKING UP FAMILY VALUES, *supra* note 47; UNDER SIEGE, *supra* note 90; Talbot, *supra* note 39; FROM PERSECUTION TO PRISON, *supra* note 95.

<sup>223</sup> *See Secretary Seeks Review of Immigration Raid*, N.Y. TIMES, Feb. 26, 2009, at A19; Carrie Johnson & Spencer Hsu, *Pragmatic Pair Chosen to Confront Terrorism Threat*, WASH. POST, Dec. 2, 2008, at A11.