

IMMIGRANT DETENTION CENTERS IN THE UNITED STATES AND INTERNATIONAL HUMAN RIGHTS LAW

Kimberly R. Hamilton*

I. INTRODUCTION

The immigrant detention system in the United States is plagued with problems due to the large number of immigrants and the lack of facility space to house immigrants in detention.¹ The use of immigrant detention centers in the United States has expanded significantly in the past decade.² Part of the effort to meet increased demands for immigrant detention facilities has involved the use of contracting with non-federal detention facilities.³ This subcontracting method, however, leads to problems and challenges for an already strained system. For instance, subcontracting distances the federal government from the daily detention center operations and can potentially lead to abuse within the system due to a lack of oversight and monitoring.

Recent non-governmental organization (NGO) reports and media exposures unveiled serious problems in the U.S. detention system.⁴ For example, a report on

* Candidate for Doctor of Jurisprudence, May 2011, University of Tennessee, College of Law. The author would like to thank Fran Ansley, Robert Blitt, and Karla McKanders for their support and comments on earlier drafts. She would also like to thank Laurence and Lesley Eaton for their continued support and encouragement.

1. Analyzing the U.S. immigration system as a whole is beyond the scope of this paper. However, the U.S. immigration system is broken and immigrant detention is an example of one of the areas where this brokenness is very clear.

2. THE CONST. PROJECT, RECOMMENDATIONS FOR REFORMING OUR IMMIGRATION DETENTION SYSTEM AND PROMOTING ACCESS TO COUNSEL IN IMMIGRATION PROCEEDINGS at 14 (2009). Increased immigration enforcement in the United States, particularly since the September 11, 2001 terrorist attacks, has led to an increased number of immigrants in detention. As this number grows, the federal government has addressed the need for increased detention facilities.

3. U.S. DEP'T OF HOMELAND SEC. OFFICE OF INSPECTOR GEN., IMMIGRATION AND CUSTOMS ENFORCEMENT DETENTION BEDSPACE MANAGEMENT (Apr. 2009), available at http://www.dhs.gov/xoig/assets/mgmttrpts/OIG_09-52_Apr09.pdf.

4. See, e.g., AMNESTY INT'L, JAILED WITHOUT JUSTICE: IMMIGRATION DETENTION IN THE USA (Mar. 25, 2009) available at <http://www.amnestyusa.org/uploads/JailedWithoutJustice.pdf>; KAREN TUMLIN & RANJANA NATARAJAN, NAT'L IMMIGRATION LAW CTR. & ACLU OF S. CAL. A BROKEN SYSTEM: CONFIDENTIAL REPORTS REVEAL FAILURES IN U.S. IMMIGRATION DETENTION CENTERS (2009), available at <http://www.nilc.org/immlawpolicy/arrestdet/A-Broken-System-2009-07.pdf>; HUMAN RIGHTS FIRST, U.S. DETENTION OF ASYLUM SEEKERS: SEEKING PROTECTION, FINDING PRISON (2009), available at <http://www.humanrightsfirst.org/pdf/090429-RP-hrf-asylum-detention-report.pdf>; U.S. DEP'T OF HOMELAND SEC. OFFICE OF INSPECTOR GEN., *supra* note 3; FLA. IMMIGRANT ADVOCACY COAL., DYING FOR DECENT CARE (2009), available at <http://www.fiacfla.org/reports/DyingForDecentCare.pdf>; Lornet Turnbull, *Report Charges Abuse of Immigrant Detainees at Tacoma Center*, THE SEATTLE TIMES, July 16, 2008; Jacqueline Stevens, *America's Secret ICE Castles*, THE NATION, Jan. 4, 2010; Nina Bernstein, *Officials Hid Truth of Immigrant Deaths in Jail*, N.Y. TIMES, Jan. 10, 2010, at A1; *Secrets of the Immigration Jails*, N.Y. TIMES, Jan. 20, 2010, at A20;

recommendations for reforming the detention system by the Constitution Project concludes, “the important and legitimate role of immigration enforcement is undermined when we fail to provide . . . fundamental protections.”⁵ Some concerns raised by advocates include: lack of access to legal representation, frequent transfers of detainees without providing notification to family members or attorneys, the absence of a registration system for subcontracted detention centers, and use of detention facilities in remote locations—often thousands of miles from the immigrant’s home community in the U.S.⁶ In addition, there are several groups within the detained immigrant population who are at increased risk for human rights abuses.⁷ These groups include children (in particular unaccompanied children), women, asylum seekers, trafficking victims, the elderly and the sick.⁸

In addition, Immigration and Customs Enforcement (ICE) announced an overhaul of the immigrant detention system in 2009. While it may be too soon to judge whether such planned changes have reformed the strained system, this announcement demonstrates a potential for ICE to correct and improve many issues that have surfaced in previous years regarding human rights abuses in immigrant detention facilities throughout the United States.⁹ NGOs and law school legal clinics have played an important role in bringing attention to human rights issues in immigrant detention centers.¹⁰ ICE has already responded to some specific demands from various NGOs and human rights activists.¹¹

This paper explores whether immigrant detainees in subcontracted detention facilities face greater risks of human rights abuses than immigrants held at ICE detention facilities. Surveying the current immigrant detention system in the United

5. THE CONST. PROJECT, *supra* note 2, at iv.

6. HUMAN RIGHTS WATCH, *LOCKED UP FAR AWAY: THE TRANSFER OF IMMIGRANTS TO REMOTE DETENTION CENTERS IN THE UNITED STATES* at 3-5 (2009), available at <http://www.hrw.org/nodc/86789>.

7. AMNESTY INT’L, *supra* note 4, at 3.

8. *Id.*

9. U.S. IMMIGR. & CUSTOMS ENFORCEMENT, *FACT SHEET, 2009 IMMIGRATION DETENTION REFORMS* (Aug. 6, 2009)

<http://www.ice.gov/news/library/factsheets/reform-2009reform.htm> (“The present immigration detention system is sprawling and needs more direct federal oversight and management.”).

10. Through reporting on human rights abuses, media outreach, and representing immigrant detainees, several NGOs and law school legal clinics have been successful at pressuring ICE to address some of the severe deficiencies in the immigration detention center system; see, e.g., Sw. Inst. for Research on Women & Bacon Immigration Law and Policy Program, Univ. of Ariz., *UNSEEN PRISONERS: A REPORT ON WOMEN IN IMMIGRATION DETENTION FACILITIES IN ARIZONA* (Jan. 2009), available at <http://www.law.arizona.edu/depts/clinics/ilc/UnseenPrisoners.pdf>; SEATTLE UNIV. SCH. OF LAW INT’L HUMAN RIGHTS CLINIC IN COLLABORATION WITH ONEAMERICA, *VOICES FROM DETENTION: A REPORT ON HUMAN RIGHTS VIOLATIONS AT THE NORTHWEST DETENTION CENTER IN TACOMA, WASHINGTON* (July 2008), available at <http://www.law.scattleu.edu/documents/news/archive/2008/DRFinal.pdf>; N.Y. UNIV. SCH. OF LAW IMMIGRANT RIGHTS CLINIC, *LOCKED UP BUT NOT FORGOTTEN: OPENING ACCESS TO FAMILY & COMMUNITY IN THE IMMIGRATION DETENTION SYSTEM*, (Apr. 2010), available at http://www.law.nyu.edu/cecm_dlv3/groups/public/@nyu_law_website_news_media/documents/documents/cecm_pro_065626.pdf.

11. U.S. IMMIGR. & CUSTOMS ENFORCEMENT, *ICE DETENTION REFORM ACCOMPLISHMENTS*, available at <http://www.ice.gov/detention-reform/detention-reform.htm> (stating that ICE discontinued family detention at the T. Don Hutto family facility and created a female only detention center). NGOs, law school legal clinics, and grassroots organizations have been influential in bringing the issues of the U.S. detention system to the surface. For example, ICE discontinued family detention after the ACLU brought a lawsuit concerning the conditions at the facility. See *Settlement Agreement, In re Hutto Family Det. Ctr.*, No. A-07-164-SS (W.D. Tex. Aug. 26, 2007).

States and analyzing ICE's standards and guidelines in an international human rights law context exposes potential abuses that result from existing standards. Consequently, whatever standards ICE adopts must be enforced. The exercise is useful for assessing the overall health of the detention system in the United States. Also helpful, in the context of potential human rights abuses, is assessing whether effective enforcement and monitoring mechanisms used to oversee the ICE subcontracted facilities exist in practice.

This paper will focus on several pressing human rights issues: access to counsel, transfer of detainees, monitoring of detention centers, and lack of enforceable detention standards. The focus is centered on these four concerns because they are central issues in the context of sub-contracted and private detention facilities. The increasing number of immigrants held in detention and the limited space in ICE detention facilities make it necessary to move detainees around to create space in facilities, resulting in frequent transfers. The frequency and depth to which the non-ICE facilities are monitored potentially leads to huge gaps in oversight and enforcement of ICE standards. The lack of legally enforceable standards provides ICE with complete discretion over the management of detention centers with little to no mechanisms for accountability. In addition to analyzing a few of the most pressing issues, this paper will also assess the effectiveness and enforceability of the current standards in addressing these matters. Finally, this paper will conclude with several recommendations for improving ICE's standards and minimizing the likelihood of human rights abuses in contracted detention centers in the United States.

II. RECENT TRENDS IN IMMIGRANT DETENTION CENTERS IN THE UNITED STATES

A. ICE Structural Organization

The Department of Homeland Security (DHS) was created in response to the September 11 attacks in 2001 to create a comprehensive national strategy to guard against terrorist attacks.¹² In 2003, the Department of Homeland Security Act dismantled the Immigration and Naturalization Service (INS) and delegated what was previously INS responsibility to three bureaus: Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), and Citizenship and Immigration Services (USCIS).¹³ ICE is comprised of five operational divisions: the Office of Detention and Removal (DRO), the Office of Investigations, the Federal Protective Service, the Office of Intelligence, and the Office of International

12. U.S. DEP'T OF HOMELAND SEC. HISTORY OFFICE, BRIEF DOCUMENTARY HISTORY OF THE DEPARTMENT OF HOMELAND SECURITY: 2001-2008 at 4 (2008), available at http://www.dhs.gov/xlibrary/assets/brief_documentary_history_of_dhs_2001_2008.pdf.

13. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135; U.S. DEP'T OF HOMELAND SEC. HISTORY OFFICE, *supra* note 12, at 12; U.S. DEPT. OF HOMELAND SEC., HISTORY: WHO BECAME PART OF THE DEPARTMENT?, available at http://www.dhs.gov/xabout/history/editorial_0133.shtm; U.S. CITIZENSHIP & IMMIGR. SERVICES, OUR HISTORY, available at <http://www.uscis.gov/portal/site/uscis/mcnuitem.cb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=c00c0b89284a3210VgnVCM100000b92ca60aRCRD&vgnnextchannel=c00c0b89284a3210VgnVCM100000b92ca60aRCRD>.

Affairs.¹⁴ ICE has an annual budget of more than \$5 billion, employs approximately 17,000 individuals, and is responsible for enforcing hundreds of U.S. federal statutes.¹⁵

DRO is the primary enforcement arm within ICE and is responsible for identifying, apprehending, and removing “aliens” from the United States.¹⁶ One of the main goals of ICE, specifically the DRO, is to “remove illegal aliens.”¹⁷ DRO is responsible for securing bed space in detention facilities and monitoring these facilities to ensure compliance with ICE standards.¹⁸ The standards are published in the *Detention Operations Manual - 2008 Performance Based Standards* and specify appropriate conditions for detention centers.¹⁹ The *Detention Operations Manual* establishes uniform policies and procedures concerning the treatment of individuals in ICE detention.²⁰

Immigrant detainees are held primarily in three types of facilities: Service Processing Centers (SPCs), Contract Detention facilities (CDFs), and Intergovernmental Service Agreement facilities.²¹ ICE owns several SPCs operated by the private sector.²² Additionally, ICE has seven contract detention facilities and also uses state and local jails to meet its needs for detention facilities.²³ The state and local jails are reimbursed on a daily basis.²⁴ Major expansion initiatives are in the works at ICE to enhance DRO’s detention capabilities.²⁵

The Office of Detention Policy and Planning (ODPP) is responsible for designing civil immigration facilities, which includes determining the location of and standards for such facilities.²⁶ In designing facilities for ICE to use for detention and considering where to place them, the ODPP takes into account factors such as access

14. U. S. IMMIGR. & CUSTOMS ENFORCEMENT, FISCAL YEAR 2008 ANNUAL REPORT at 1, available at <http://www.ice.gov/doclib/news/library/reports/annual-rpt/2008annual-report.pdf>.

15. *Id.* (stating that ICE’s work expands beyond the borders of the U.S. and ICE has more than 50 international offices around the world).

16. *Id.* at 32.

17. *Id.* at iii.

18. U.S. IMMIGR. & CUSTOMS ENFORCEMENT, FACT SHEET, DETENTION MANAGEMENT (Nov. 20, 2008), available at <http://www.ice.gov/news/library/factsheets/detention-mgmt.htm>.

19. U.S. IMMIGR. & CUSTOMS ENFORCEMENT, 2008 OPERATIONS MANUAL ICE PERFORMANCE BASED NATIONAL DETENTION STANDARDS (PBNS), available at <http://www.ice.gov/detention-standards/2008>.

20. Memorandum from John P. Torres, Acting Director of the Office of Detention and Removal Operations, Detention and Deportation Officer’s Field Manual Update (Mar. 27, 2006), available at http://www.ice.gov/doclib/foia/dro_policy_memos/09684drofieldpolicymanual.pdf.

21. TURLIN ET AL., *supra* note 4, at 7; see also HUMAN RIGHTS WATCH *supra* note 6, at 1 (noting “only a few of the [300 detention] facilities are under the full operational control of ICE – the majority are jails under the control of the state and local governments that subcontract with ICE to provide detention bed space.”).

22. DR. DORA SCHIRO, U.S. DEP’T OF HOMELAND SEC., IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS, 10 (Oct. 6, 2009), available at <http://www.ice.gov/doclib/about/offices/odpp/pdf/icc-detention-rpt.pdf> (“These include seven Service Processing Centers (SPC) owned by ICE and operated by the private sector; seven dedicated Contract Detention Facilities (CDF) owned and operated by the private sector; and seven dedicated county jail facilities, with which ICE maintains intergovernmental agency service agreements (IGSA).”).

23. *Id.*

24. *Id.* at 11.

25. U.S. IMMIGR. & CUSTOMS ENFORCEMENT, *supra* note 9.

26. *Id.*

to legal services, emergency rooms and transportation hubs, among other things.²⁷ According to ICE, the ODPP is charged with evaluating the entire detention system with seven areas of focus.²⁸ The seven areas include population management, detention management, programs management, health care management, alternatives to detention management, special populations management, and accountability.²⁹

The ODO, part of the OPR, is an independent office that reports directly to the assistant secretary.³⁰ According to ICE, the ODO will inspect facilities more frequently, review complaints about facility conditions, review detainee grievances not resolved by DRO or the Division of Immigrant Health Services, and report to OPR's acting director.³¹ In the 2009 Immigration Detention Reforms press release, ICE announced several changes it intended to implement.³² These changes included a move away from the "jail-oriented" approach toward a civil detention system and the move away from relying on "excess capacity in penal institutions."³³ ICE will design facilities specifically for immigrant detention use in the next three to five years.³⁴ With these reforms, ICE is hopeful that there will be improvements in "medical care, custodial conditions, fiscal prudence, and ICE's critical oversight of the immigration detention system."³⁵

B. Increased Use of Detention

More than 300,000 immigrants are annually held in immigration detention in the United States.³⁶ The number of immigrants in detention has rapidly risen in recent years.³⁷

27. *Id.*

28. Press Release, U.S. Immigr. & Customs Enforcement, ICE Announces Major Reforms to Immigration Detention System (Aug. 6, 2009), available at <http://www.ice.gov/news/releases/0908/090806washington.htm>.

29. *Id.*

30. U.S. IMMIGR. & CUSTOMS ENFORCEMENT, *supra* note 9.

31. *Id.*

32. Press Release, *supra* note 28.

33. *Id.*

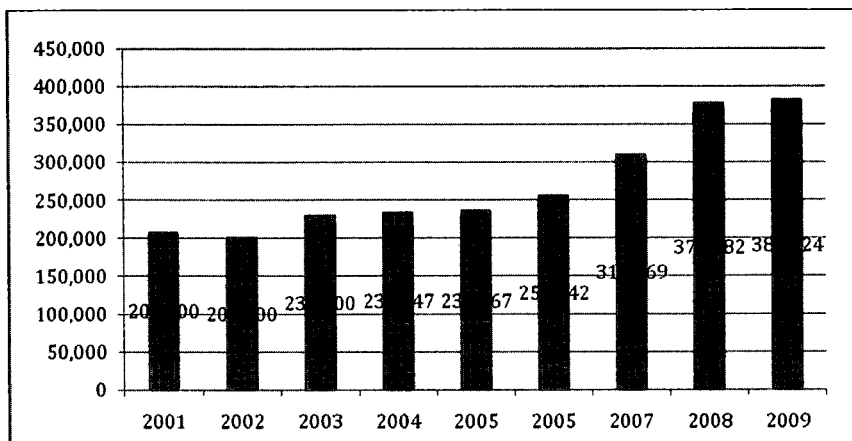
34. *Id.*

35. *Id.*

36. THE CONST. PROJECT, *supra* note 2, at 1; DET. WATCH NETWORK, ABOUT THE U.S. DETENTION AND DEPORTATION SYSTEM, available at <http://www.detentionwatchnetwork.org/aboutdetention> (stating that in 2009 approximately 380,000 people were detained in immigration custody).

37. U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, IMMIGRATION ENFORCEMENT ACTIONS: 2008, 3 (2009) available at http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_08.pdf (noting that in 2008 there was a 22 percent increase in detained noncitizens from 2007).

NUMBER OF DETAINEES PER YEAR, 2001- 2009³⁸



This increase in immigrant detention, however, has not correlated with an increase in immigration to the United States.³⁹ According to the Pew Hispanic Center, the number of unauthorized immigrants arriving in this country has declined in recent years.⁴⁰ The weakening of the U.S. economy and increased immigration enforcement efforts in the United States are possible reasons for this decrease.⁴¹

Yet another factor leading to an increase in immigrant detainees is the recent practice of enforcing the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).⁴² In a collaborative report by the American Bar Association and Leadership Conference on Civil Rights Education, the authors describe IIRIRA as a law that “place[s] obstacles in the path of desperate, and often confused, asylum seekers, and contain[s] provisions that strip immigrants of many of the rights to fair hearings, judicial review, and relief from unreasonable detention that U.S. citizens take for granted.”⁴³

By expanding the definition of “aggravated felony” IIRIRA’s amendments to the INA broadened the crimes that resulted in mandatory detention and deportation.⁴⁴ Crimes such as “[h]air pulling, a high school brawl . . . shoplifting,

38. U.S. DEP’T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, YEARBOOK OF IMMIGRATION STATISTICS, various years, available at <http://www.dhs.gov/files/statistics/publications/yearbook.shtm>.

39. PEW HISPANIC CTR. REPORT, TRENDS IN UNAUTHORIZED IMMIGRATION: UNDOCUMENTED INFLOW NOW TRAILS LEGAL INFLOW at 2 (Oct. 2, 2008), available at <http://pewhispanic.org/files/reports/94.pdf>.

40. *Id.*

41. *Id.* at (ii).

42. Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996); THE CONST. PROJECT, *supra* note 2, at 13-14.

43. AM. BAR ASS’N COMM’N ON IMMIGR., AMERICAN JUSTICE THROUGH IMMIGRANTS’ EYES, 1 (2004) available at http://www.civilrights.org/publications/american-justice/american_justice.pdf; see also DONALD KERWIN AND SERENA YI-YING LIN, MIGRATION POLICY INST., IMMIGRANT DETENTION: CAN ICE MEET ITS LEGAL IMPERATIVES AND CASE MANAGEMENT RESPONSIBILITIES? at 4, (Sept. 2009), available at <http://www.migrationpolicy.org/pubs/detentionreportSept1009.pdf>.

44. AM. BAR ASS’N COMM’N ON IMMIGRATION, *supra* note 43, at 23 (“[The] term [aggravated felony] was first applied to only truly serious crimes such as murder, drug trafficking, and trafficking in

joy riding, passing bad checks and other relatively minor offenses” are now included in the definition of “aggravated felonies” and can result in detention and deportation.⁴⁵

In addition to expanding the crimes that make immigrants deportable, many immigrants now face automatic deportation regardless of certain factors that used to be taken into consideration in the deportation process.⁴⁶

The strict mandatory detention rules outlined in IIRIRA, coupled with the increased immigration enforcement as a result of the terrorist attacks of September 11, 2001, have increased the use of detention in the United States.⁴⁷ The increase in the number of immigrants in detention facilities is part of a nationwide “crackdown” to remove undocumented immigrants.⁴⁸ These efforts, however, not only remove undocumented immigrants, but also remove immigrants who are lawful permanent residents.⁴⁹

III. AN OVERVIEW OF THE CURRENT U.S. IMMIGRATION DETENTION SYSTEM

A. Composition of Immigrant Detainees

Immigrant detainees consist of individuals, families, and unaccompanied minors including a broad range of ages, races, and immigration statuses.⁵⁰ A large majority of immigrant detainees earn less than the national average.⁵¹ Immigrant detainees who are being detained are non-citizens who are allegedly deportable.⁵² The immigrant detainees are both documented and undocumented, many of whom

firearms or destructive devices. The 1996 expansion added even more types of offenses, many of which are neither ‘aggravated’ nor ‘felonies.’ A ‘conviction’ for any of these, however, now results in automatic ‘removal,’ as deportation is presently called, and permanent expulsion.”).

45. *Id.* at 23-24.

46. *Id.* at 33 (“[M]any legal permanent residents face automatic deportation regardless of their individual circumstances. Factors that once were considered important in the deportation process – such as length of U.S. residence, hardships to spouses and children, employment history, military service, community ties, evidence of rehabilitation, and other equities – now are irrelevant in the vast majority of cases involving permanent residents with convictions.”).

47. THE CONST. PROJECT, *supra* note 2, at 13-14; *see also* AM. BAR ASS’N COMM’N ON IMMIGRATION, *supra* note 43, at 1.

48. *See* Meredith Kolodner, *Immigration Enforcement Benefits Prison Firms*, N.Y. Times, July 19, 2006; *see also* U.S. DEP’T OF HOMELAND SEC. OFFICE OF INSPECTOR GEN., *supra* note 3, at 2-3.

49. AMNESTY INT’L, *supra* note 4, at 20; *see also* AM. BAR ASS’N COMM’N ON IMMIGRATION, *supra* note 43, at 46 (“Many legal permanent residents who leave the United States even briefly are being detained and denied readmission because of old crimes. In some cases, the offenses for which they are stopped are so minor they would not be a basis for deportation if they had not left the United States. This change has come as a huge shock to many long term residents who had traveled in and out of the United States over the years without incident.”).

50. *See* DET. WATCH NETWORK, *supra* note 36.

51. AMNESTY INT’L, *supra* note 4, at 30, n.114 (“[I]mmigrants earn on average wages that are well below the national average. Based on data from the March 2005 Current Population Survey, the average weekly earnings for unauthorized males who arrived between 2000 and 2005 was approximately \$480 (roughly amounting to \$25,000 per year) (citing PEW HISPANIC CTR., FACT SHEET, THE LABOR FORCE STATUS OF SHORT-TERM UNAUTHORIZED WORKERS, (Apr. 13, 2006), available at <http://pewhispanic.org/files/factsheets/16.pdf>).

52. THE CONST. PROJECT, *supra* note 2, at 1.

may have been in the United States for several years.⁵³ Immigrant detainees include asylum seekers, torture survivors, human trafficking victims, longtime lawful permanent residents, and parents of U.S. citizen children.⁵⁴

Half of all immigrant detainees held in detention have no criminal record at all.⁵⁵ The remainder may have committed some crime in the past, but have already served time for prior convictions.⁵⁶ ICE does not imprison non-citizens for criminal convictions.⁵⁷ All of the immigrant detainees are being detained for immigration purposes only.⁵⁸ Immigrant detainees with criminal convictions first serve their criminal sentences and only after that are they placed in ICE custody for deportation.⁵⁹

B. The Rising Cost of Detention

The increased use of detention with respect to immigrants results in higher costs to the United States. However, it does not follow that increased spending on the United States detention system due to the increased costs and federal attention leads to detention facilities improvements. The U.S. immigration detention system relies heavily on subcontracting with the private prison industry and with local jails and prisons. The United States spends nearly \$6 billion on ICE operations alone and government funding for ICE has steadily increased each year.⁶⁰ In 2008, ICE's budget was \$5.58 billion, and in 2009, the budget increased to \$5.93 billion.⁶¹ The annual cost of detention alone in 2009 was nearly \$2.5 billion.⁶² Much of the money from the cost of detention has directly benefited the private prison industry.⁶³

In a report submitted to the United Nations Special Rapporteur on the Right of Migrants, Judy Greene and Sunita Patel argue that “[b]oth private prison executives and local jailers have eagerly joined in the ‘immigrant gold rush,’ raking in cash payments at an average per diem rate of \$95 for each immigrant held under contract for ICE.”⁶⁴ The private prison industry has a powerful lobby influence⁶⁵ and

53. AMNESTY INT'L, *supra* note 4, at 7.

54. AMNESTY INT'L, *supra* note 4, at 3.

55. DET. WATCH NETWORK, *supra* note 36.

56. *See* KERWIN, *supra* note 43, at 4.

57. *Id.*; *see also* SEGHETTI ET AL., *infra* note 84, at 1 (“States and localities bear the primary responsibility for defining and prosecuting crimes.”).

58. DET. WATCH NETWORK, *supra* note 36.

59. KERWIN, *supra* note 43, at 4.

60. U.S. IMMIGR. & CUSTOMS ENFORCEMENT, ICE FISCAL YEAR 2010 ENACTED BUDGET (2009), available at <http://www.ice.gov/news/library/factsheets/> (follow “Chief Financial Officer – Management and Administration” hyperlink under “Management and Administration”; then follow “Budget Fact Sheet – Fiscal Year 2010” hyperlink).

61. U.S. IMMIGR. & CUSTOMS ENFORCEMENT, FACT SHEET, FISCAL YEAR 2008 (2007), available at <http://www.ice.gov/doclib/news/library/factsheets/pdf/2008budgetfactsheet.pdf>; U.S. IMMIGR. & CUSTOMS ENFORCEMENT, FACT SHEET, FISCAL YEAR 2009 (2008), available at <http://www.ice.gov/news/library/factsheets/> (follow “Chief Financial Officer – Management and Administration” hyperlink under “Management and Administration”; then follow “Budget Fact Sheet – Fiscal Year 2009” hyperlink).

62. *Id.* at 2.

63. *See* DET. WATCH NETWORK, *supra* note 36. *See also* Kolodner, *supra* note 48. The federal government pays private prisons or local jails and prisons under contract with ICE a daily rate per detainee. Because the demand has increased so significantly for detention space, several of these private and local jails and prisons have benefitted financially.

64. Judy Greene & Sunita Patel, *The Immigrant Gold Rush: The Profit Motive Behind*

even predicted a boom in their business after the September 11, 2001 terrorist attacks.⁶⁶

As a result of the increased demand for detention facilities and the use of private prison contracts to fill gaps, the private prison industry can demand higher prices per detainee,⁶⁷ and also provide counties with substantial profits.⁶⁸ Government audits have revealed that the ISGA facilities often overcharge ICE for detention services, in some cases, quite substantially.⁶⁹ For example, as Greene and Patel state: “York County officials publically boasted about raking in \$60 a day per detainee until the Inspector General of the Department of Justice audited the books and determined that the actual *cost* of housing the detainees in the York jail was just \$37 per day.”⁷⁰

In many ways, privatization of the detention system creates pressure for the increased use of detention.⁷¹ Correction Corporations of America is one of the largest private prison operators in the United States.⁷² In 2006, Correction Corporations of America was in charge of running eight of the 16 federal detention centers.⁷³ Privatizing immigrant detention centers increases the risk of substandard conditions. ICE facilities run by private detention facilities often escape ICE oversight or, in some cases, are not effectively monitored.⁷⁴ Therefore, difficulties arise in assessing conditions in these private detention facilities and ensuring that these private detention facilities implement ICE standards. Often motives center around making profits, as opposed to providing a quality detention service focused on strict adherence to ICE standards and policies.

C. ICE's Role in U.S. Detention Facilities

There are about 350 immigrant detention facilities located across the United States with over 32,000 detention beds available.⁷⁵ In 2009, the detention facilities

Immigrant Detention at 2, submitted to the UN Special Rapporteur on the Rights of Migrants, available at <http://www.immigrantjustice.org/view-document/44-unsr-profit-motives.html>.

65. *Id.* (“Private prison companies employ some of the best lobbyists money can buy to hook lucrative contracts, and it is clear that they command the ‘top dollar’ for lease of their detention beds.”).

66. *Id.* (“[T]he chairman of Cornell Companies – a mid-sized private prison company based in Houston, Texas – excitedly told stock analysts that the massive terrorist strike was going to boost his business. ‘It is clear that since September 11 there’s a heightened focus on detention. More people are gonna get caught. So I would say that’s positive. The federal business is the best business for us, and September 11 is increasing that business.’”).

67. *Id.* at 3.

68. *See id.* at 5 (For example, a jail in New Jersey received \$17.7 million from ICE in 2004 (74% of the sheriff department’s total revenue), however, the facility was closed the following year after news reports revealed abusive treatment of detainees.).

69. *Id.* at 6.

70. *Id.*

71. *Id.* at 9.

72. *Id.* at 2.

73. Meredith Kolodner, *Private Prisons Expect a Boom: Immigration Enforcement to Benefit Detention Companies*, N.Y. TIMES, July 26, 2006, available at http://newsinitiative.org/story/2006/07/26/private_prisons_expect_a_boom.

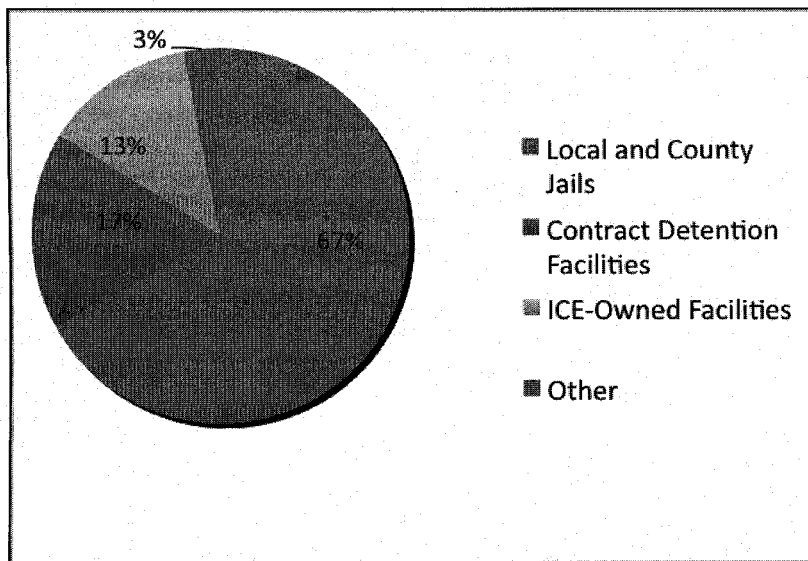
74. TUMLIN ET AL., *supra* note 4, at 7 (“In addition to identifying a plethora of violations of the standards at individual facilities, ICE’s own reports and those of independent agencies reveal systemic problems with the procedures used for ICE annual reviews and the inadequacy of ICE’s procedures for identifying and correcting noncompliance with the standards.”).

75. U.S. IMMIGR. & CUSTOMS ENFORCEMENT, *supra* note 9.

with the largest number of detainees included facilities in Lumpkin, Georgia, Eloy, Arizona, Lancaster, California, and Raymondville, Texas.⁷⁶ The majority of these facilities are designed for penal detention, not civil detention, and ICE employees do not run these subcontracted facilities.⁷⁷

ICE contracts with local jails and prisons operated by county authorities and with detention centers operated by private contractors to purchase bed space from over 300 prisons nationwide under intergovernmental service agreements.⁷⁸ These subcontracted facilities hold over 67% of detained immigrants.⁷⁹

PERCENTAGE OF DETAINEES IN FIVE TYPES OF DETENTION FACILITIES, 2009⁸⁰



In total, ICE has seven contract detention facilities that hold 17% of detained immigrants.⁸¹ ICE holds only 13% of detained immigrants in ICE-owned

76. See KERWIN, *supra* note 43, at 14 (stating that the Stewart Detention Center in Lumpkin, Georgia, held 1,757 detainees; the Eloy Federal Contract Facility in Eloy, Arizona, held 1,526 detainees; the South Texas Detention Complex in Pearsall, Texas, held 1,387 detainees; The Mira Loma Detention Center in Lancaster, California, held 1,357 detainees; and the Willacy County Detention Center in Raymondville, Texas, held 1,291 detainees).

77. U.S. IMMIGR. & CUSTOMS ENFORCEMENT, *supra* note 9.

78. U.S. IMMIGR. & CUSTOMS ENFORCEMENT, *supra* note 18.

79. *Id.*

80. U.S. IMMIGR. & CUSTOMS ENFORCEMENT, *supra* note 18.

81. *Id.*

facilities.⁸² Finally, 3% of detained immigrants are held in facilities, such as Bureau of Prisons facilities, funded through congressional appropriations to the Bureau of Prisons or through ICE reimbursements.⁸³

D. Immigrant Detainees Are Not All Criminal Detainees

A violation of an immigration law pertaining to legal status is a civil violation, not a criminal violation.⁸⁴ Entering the United States or remaining in the United States after the expiration of a visa is a civil violation.⁸⁵ Dr. Dora Schriro, former Director of ICE Office of Detention Policy and Planning, underscores the key difference between civil and criminal proceedings: “Immigration proceedings are civil proceedings and immigration detention is not punishment.”⁸⁶

Although immigration status violations are civil offenses, immigrants held at the subcontracted facilities are mixed with the local prison population.⁸⁷ Immigrant detainees are often held with criminal detainees who are accused or convicted of committing violent crimes.⁸⁸ Not only is this contrary to international standards, but this also increases the risk of physical harm to immigrant detainees.⁸⁹ Amnesty International states that mixing the immigrant detainee population with the criminal detainee population results in “inappropriate and excessive use of restraints, inadequate access to healthcare including mental health services, and inadequate access to exercise for ICE detainees.”⁹⁰ Additionally supporting the use of separate facilities, Dr. Schriro describes the difference in the demeanor of civil immigrant detainees:

The demeanor of the Immigration Detention population is distinct from the Criminal Incarceration population. The majority of the population is motivated by the desire for repatriation or relief, and exercise exceptional restraint. According to reports provided by contract monitors and submitted by the field, relatively few detainees file grievances, fights are infrequent, and assaults on staff are even rarer.⁹¹

Although immigrants held in detention are charged only with civil violations of the law, the detention facilities are very much like jails.⁹² In fact, a 2005 report on asylum seekers in expedited removal describes the ICE civil detention standards as “identical to [and] modeled after correctional standards for criminal

82. *Id.*

83. *Id.*

84. LISA M. SEGHELLI ET. AL., CONGRESSIONAL RESEARCH SERV., ENFORCING IMMIGRATION LAW: THE ROLE OF STATE AND LOCAL LAW ENFORCEMENT at 4 (Mar. 11, 2009), available at <http://fpc.state.gov/documents/organization/122461.pdf> (“Mere illegal presence in the U.S. is a *civil*, not criminal, violation of the INA, and subsequent deportation and associated administrative processes are civil proceedings.”).

85. See AMNESTY INT’L, *supra* note 4, at 4.

86. SCHRIRO, *supra* note 22, at 4, n.2 (citing *Zadvydas v. Davis*, 533 U.S. 678, 609 (2001)).

87. See AMNESTY INT’L, *supra* note 4, at 37.

88. See THE CONST. PROJECT, *supra* note 2, at 15.

89. See AMNESTY INT’L, *supra* note 4, at 37.

90. AMNESTY INT’L, *supra* note 4, at 29.

91. SCHRIRO, *supra* note 22, at 21.

92. See Ralph Blumenthal, *U.S. Gives Tour of Family Detention Center that Critics Liken to a Prison*, N.Y. TIMES, Feb. 10, 2007; see also Mukhopadhyay *infra* note, 159 at 709 (“The prison-like conditions and treatment in detention facilities can be particularly traumatizing for asylum seekers who are survivors of torture, rape, and persecution.”).

populations.”⁹³ For example, some facilities contain all of the detainees together in one large, windowless, locked, and brightly lit room.⁹⁴ Other facilities lack significant opportunities for detainees to participate in recreational or unstructured activities.⁹⁵ Frequently, facilities provide only “a small outdoor space surrounded by high concrete walls or a chain link fence.”⁹⁶ Finally, detainees wear prison uniforms.⁹⁷

Immigrants are entitled to due process rights, including a trial on whether they are deportable or whether they can stay in the United States.⁹⁸ During this process, immigrants may be detained until their immigration statuses are determined.⁹⁹ Before 2005, immigrants awaiting their court dates were not usually detained. But, ICE’s recent focus on detention and removal has significantly increased the number of detained immigrants in the United States.¹⁰⁰ In addition, increased use of 287(g) agreements has expanded federal immigration enforcement authority to local law enforcement officers, which has also led to increases in the number of individuals detained.¹⁰¹

E. The Path to Detention

The time period for detention can be as short as a few days or as long as several years.¹⁰² The length of detention varies depending on whether an immigrant detainee seeks relief, such as political asylum, or whether an immigrant pursues voluntary removal.¹⁰³ On average, detention lasts 30 days.¹⁰⁴

In addition to detaining unauthorized immigrants who are present in the United States without proper documentation, ICE increasingly detains immigrants who have lived and worked as lawful permanent residents for several years in the

93. U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL, vol. 1, FINDINGS AND RECOMMENDATIONS 60 (2005).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 61.

98. See SEGHETTI ET AL., *supra* note 84, at 3-4 (“Congress has enacted . . . the INA —a comprehensive set of rules for legal immigration, naturalization, deportation, and enforcement. Concomitant to its exclusive power to determine which aliens may enter and which may stay, the federal government also has power to proscribe activities that subvert these rules (e.g., alien smuggling) and to set criminal or civil penalties for those who undertake these activities.”); see also Immigration and Nationality Act 8 U.S.C. §§ 1101 *et seq.*

99. SEGHETTI ET AL., *supra* note 84, at 3.

100. See U.S. DEP’T OF HOMELAND SEC. OFFICE OF INSPECTOR GEN., *supra* note 3, at 2 (“Since 2005, ICE has pursued a comprehensive interior enforcement strategy . . . [that] focuses on ending the practice of “catch and release” of apprehended aliens. Whereas more than 113,000 aliens were released in FY 2005, by mid FY 2007 that number was nearly zero.”); see also KERWIN, *supra* note 43, at 7.

101. See U.S. IMMIGR. & CUSTOMS ENFORCEMENT, FACT SHEET: DELEGATION OF IMMIGRATION AUTHORITY SECTION 287(G) IMMIGRATION AND NATIONALITY ACT, available at <http://www.ice.gov/news/library/factsheets/287g.htm>. The 287(g) program permits state and local law enforcement agencies to enter into agreements with the federal government under a Memorandum of Agreement delegating immigration enforcement authority to such state and local agencies. The 287(g) agreements are discussed in more detail in section V.b.

102. KERWIN, *supra* note 43, at 16-20.

103. SCHRIO, *supra* note 22, at 6.

104. U.S. IMMIGR. & CUSTOMS ENFORCEMENT, *supra* note 18.

United States as a result of tightened immigration laws since September 11, 2001.¹⁰⁵ Although IIRIRA, which was passed in 1996, increased mandatory detention for many immigrants, enforcement has been low until recently. More importantly, some lawyers do not inform their clients of the immigration consequences of criminal charges. As a result, many enter into plea agreements in exchange for probation or less jail time.¹⁰⁶ These charges, which in some cases occurred ten to twenty years ago, result in mandatory detention, even for legal permanent residents who have well-established lives in the United States.¹⁰⁷

Because of the retroactive effect of IIRIRA, some crimes were not deportable offenses at the time they were committed, yet they are now considered a basis for deportation.¹⁰⁸ Many lawful permanent residents with prior convictions were not aware of the immigration consequences of accepting a plea bargain to avoid jail time.¹⁰⁹ In many cases, their lawyers were either unaware of the immigration consequences of these convictions or the convictions did not have immigration consequences at the time.¹¹⁰ The Supreme Court recently held in *Padilla* “that counsel must inform her client whether his plea carries a risk of deportation.”¹¹¹ This requirement will hopefully improve immigrants’ access to information about the immigration consequences of their pleas.

A large part of the immigration debate focuses on undocumented immigrants. However, increased immigration enforcement also affects individuals who are in the country legally, especially lawful permanent residents who are removable based on their past convictions.¹¹² This trend in immigration enforcement has made many legal permanent residents fearful of law enforcement officers, fearful of traveling, and hesitant to apply for citizenship.¹¹³

105. Danny Hakim & Nina Bernstein, *New Paterson Policy May Reduce Deportations*, N.Y. TIMES, May 4, 2010, at A1 (“For years after the law’s passage, immigration authorities had neither the resources nor the political will to track down or detain legal permanent residents with relatively minor convictions.”).

106. *Id.*

107. *Id.* (“So many legal permanent residents are being arrested and detained based on trivial convictions – the guy being deported for swiping a MetroCard when he fell on hard times . . . people who shoplifted in a moment of weakness.”); see also AM. BAR ASS’N COMM’N ON IMMIGRATION, *supra* note 43, at 111.

108. See AM. BAR ASS’N COMM’N ON IMMIGRATION, *supra* note 43, at 111 (“The 1996 laws are being applied retroactively. The new deportation grounds are being used to deport people for acts they took long before 1996 and which did not make them deportable at that time, and to deprive them of remedies for which they previously were eligible.”).

109. *Id.*; see also Cassie L. Peterson, *An Iowa Immigration Raid Leads to Unprecedented Criminal Consequences: Why ICE should rethink the Postville Model*, 95 IOWA L. REV. 323, 337 (2009) (“When offering a plea bargain, a prosecutor typically offers to remove a more serious charge in exchange for a lesser charge and guilty plea.”).

110. Peterson, *supra* note 109, at 334 (“Because immigration law is complex and constantly changing, the detainees and some of their criminal-defense attorneys likely did not know that accepting a plea for a felony involving fraud has immense immigration consequences, most notably that the detainee can never become a U.S. citizen.”); see also AM. BAR ASS’N COMM’N ON IMMIGRATION, *supra* note 43, at 51 (noting the retroactive effect of IIRIRA).

111. *Padilla v. Kentucky*, 130 S.Ct. 1473, 1486 (2010) (“Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.”).

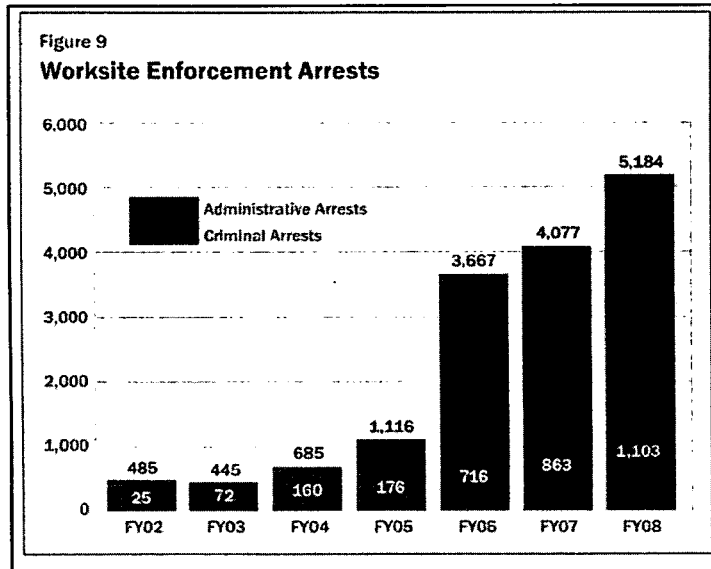
112. *Id.*

113. *Id.* (“Thousands of New Yorkers with green cards – like other legal immigrants elsewhere – are now afraid to travel or apply for citizenship for fear that they will be detained and deported based on an old conviction.”).

F. Increase in Workplace Raids

In addition to stricter enforcement of IIRIRA's mandatory detention laws, an increase in workplace raids across the country has also resulted in more immigrants held in detention facilities.¹¹⁴ There was a twelve-fold increase in worksite arrests between 2002 and 2008.¹¹⁵

WORKSITE ENFORCEMENT ARRESTS ¹¹⁶



114. DET. WATCH NETWORK, *supra* note 36.

115. *Id.*; see generally Peterson, *supra* note 109.

116. U.S. IMMIGR. & CUSTOMS ENFORCEMENT, *supra* note 14, at 17.

One reason for this trend is to use “identity theft” charges, such as using a false social security card, to put immigrants in the category of “criminal alien,” making them easier to deport.¹¹⁷ ICE boasts increased arrests as part of *improved* immigration enforcement.¹¹⁸ However, the unintended consequences of increasing such enforcement efforts are often overcrowding of detention facilities and huge economic costs for ICE, as it is required to pay a per diem rate for each immigrant held in detention at private prison facilities or subcontracted local jails and prisons.¹¹⁹

One scholar, Lorraine Schmall, argues that much of ICE’s “cracking down on illegal immigration” by using worksite raids has been “superficial.”¹²⁰ Two of the main reasons for heightened immigration enforcement were to target terrorists and to ensure that employers were not taking advantage of employees.¹²¹ However, very few of these raids unveiled terrorist threats, and employees, not employers, were the targets of the arrests.¹²²

Schmall notes that the ICE raids were criticized as “exhibiting institutional racial bias”¹²³ and that “[r]acism and xenophobia emanated from and were instigated by the raids.”¹²⁴ While ICE announced that it would focus on targeting employers “with the goal of ‘reducing the pull of the “jobs magnet” that draws illegal workers across the border,’”¹²⁵ ICE did not do this in practice.¹²⁶ Since the Obama Administration policy shift of the agency in 2009, there has been increased focus on “criminal prosecution of employers who knowingly hire illegal workers” and less of a focus on worksite enforcements or raids.¹²⁷

G. Release on Bond

Immigrant detainees who do not pose a threat to public safety and national security may be eligible to obtain release on bond while they await their removal proceedings.¹²⁸ The immigration bond process is overseen by DRO’s Bond Management Unit (BMU) and by Immigration Judges.¹²⁹ The average posted bond

117. DET. WATCH NETWORK, *supra* note 36; *see also* Flores-Figueroa v. United States, 129 S. Ct. 1886 (2009).

118. U.S. IMMIGR. & CUSTOMS ENFORCEMENT, *supra* note 14, at iv (“ICE worksite enforcement actions continue to garner outstanding results, with 1,103 criminal arrests and 5,184 administrative arrests in FY08—taken together, an increase of 27 percent over the previous year’s worksite arrests.”).

119. DET. WATCH NETWORK, *supra* note 36.

120. Lorraine Schmall, *ICE Effects: Federal Worksite Non-Enforcement of U.S. Immigration Laws*, 44 U.S.F. L. Rev. 373, 347 (2009).

121. *Id.*

122. *Id.*

123. *Id.* (noting that a disproportionate number of people arrested had minority surnames).

124. *Id.* at 382.

125. *Id.* at 379.

126. *Id.* at 385 (explaining that of the 6527 arrests examined in the case study only 151 were employers).

127. *Id.* at 390.

128. KERWIN, *supra* note 43; *see also* 8 C.F.R. § 236.1(c)(8) (2006) (explaining that release on bond or parole is permitted if an individual demonstrates that he or she “would not pose a danger to property or persons, and . . . is likely to appear for any future proceeding.”).

129. *Id.*

amount for all DRO field offices is around six thousand dollars.¹³⁰ Release on bond is likely not an option for the majority of detained immigrants who are eligible to receive it because of the high cost.¹³¹

While DHS has the authority to detain non-citizens, this decision is primarily discretionary.¹³² Alternatives to detention, such as electronic monitoring and home visits, can be just as effective as detention and are considerably cheaper.¹³³ According to ICE, alternatives to detention allow for supervision of aliens during removal proceedings whose detention is not required by statute, who present a low risk of flight, and who pose no danger to the community.¹³⁴ Because these individuals would otherwise be held in detention facilities during removal proceedings, this saves ICE a substantial amount of money.¹³⁵ Some methods that ICE uses in the alternative to detention efforts include electronic monitoring, check-in telephone calls, house visits, and restrictions on movement.¹³⁶ The average cost of using an alternative method to detention can be as little as \$12 a day.¹³⁷

H. ICE Standards

In September 2000, ICE adopted and implemented the initial thirty-six National Detention Standards (NDS).¹³⁸ ICE revised these standards in 2008 by implementing the new Performance Based National Detention Standards (PBNDS), comprised of forty-one standards.¹³⁹ In 2008, four new standards were added: news media interviews and tours (formerly part of visitation), searches of detainees, sexual abuse and assault prevention and intervention, and staff training. NGOs contributed substantial input during the review process.¹⁴⁰

Although the PBNDS were intended to replace the previous standards,¹⁴¹ several of the immigrant detention facilities are currently still bound by the prior NDS because many of the detention facilities use long-term contract agreements.¹⁴² In addition, many of the provisions of the PBNDS “are specifically applicable to only facilities directly operated by ICE or by private companies under contract with

130. AMNESTY INT’L, *supra* note 4, at 17.

131. *Id.*; see also Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 492 (2007) (“The government also began to impose release conditions that it knew the person would be unable to meet (for example, imposing a high bond amount)” (citing Thomas Hutchins, *Detention of Aliens: An Overview of Current Law*, IMMIGRATION BRIEFINGS, Apr. 2003, at 1, 10)).

132. KERWIN & LIN, *supra* note 43, at 26.

133. See *id.* at 31 (“Based on partial and incomplete data, ICE estimates that its three alternative programs cost far less than hard detention and enjoy relatively high rates of success as measured by the percentage of participants who abscond.”); see also AMNESTY INT’L, *supra* note 4, at 27.

134. U.S. IMMIGR. & CUSTOMS ENFORCEMENT, *supra* note 14, at 20.

135. AM. BAR ASS’N COMM’N ON IMMIGRATION, *supra* note 43, at 70.

136. AMNESTY INT’L, *supra* note 4, at 27.

137. See DET. WATCH NETWORK, *supra* note 36.

138. U.S. IMMIGR. & CUSTOMS ENFORCEMENT, FACT SHEET: PERFORMANCE BASED NATIONAL DETENTION STANDARDS (2008), http://www.ice.gov/news/library/factsheets/facilities_pbnbs.htm.

139. *Id.*

140. HUMAN RIGHTS WATCH, *supra* note 6, at 24-25.

141. Telephone Interview with Andrew Strait, National Community Outreach Coordinator, United States Immigrations and Customs Enforcement (July 7, 2010).

142. *Id.*

ICE.”¹⁴³ There is also a provision that allows IGSA’s to use alternative procedures in place of implementing the PBNDS.¹⁴⁴ Because ICE owns and operates so few facilities, and because the majority of immigrant detention facilities are private IGSA’s, the majority of the immigrant detention facilities are not directly required to adhere to the exact PBNDS.

The new PBNDS were phased in and were to apply by January 2010 to all facilities that hold immigrant detainees for more than 72 hours.¹⁴⁵ These standards, however, are only internal agency guidelines and do not have the binding authority of federal law.¹⁴⁶

The current standards, as well as a new set of 2010 PBNDS, which the agency planned to release in the fall of 2010, are both internal agency guidelines and ICE does not have plans to make the standards enforceable or transform them into regulations.¹⁴⁷ Quality standards are crucial for both ICE owned and operated detention facilities as well as the subcontracted facilities—particularly in light of the fact that the standards are merely internal agency guidelines.¹⁴⁸

IV. HUMAN RIGHTS AND IMMIGRANT DETENTION CENTERS IN THE UNITED STATES

A. Sources of International Human Rights Law

International human rights law applies to the United States through a variety of treaties and sources of international law and is particularly relevant to the treatment of detained individuals in detention centers.¹⁴⁹ Moreover, the majority of immigrants detained are held in non-government run facilities, which questions whether the ad-hoc detention system is living up to the standards of international law.

There are numerous sources of international human rights law that relate to the rights of immigrants detainees in the United States. The following are examples of some of these important sources: the Universal Declaration of Human Rights (UDHR),¹⁵⁰ the International Covenant on Civil and Political Rights (ICCPR),¹⁵¹ the

143. TUMLIN ET AL., *supra* note 4, at 4; Strait, *supra* note 140 (“explaining that a facility under a contract stipulating that they use the NDS is not required to implement the PBNDS.”).

144. TUMLIN ET AL., *supra* note 4, at 5 (“ISGAs must conform to these procedures or adopt, adapt or establish alternatives, provided they meet or exceed the intent represented by these procedures.”) (citation omitted).

145. TUMLIN ET AL., *supra* note 4, at 4.

146. *Id.* at 5.

147. Strait, *supra* note 141. As this paper goes to press, ICE has yet to release any new standards.

148. Deficient conditions and standards in ICE facilities exist as well, demonstrating that ICE facilities are not necessarily the exclusive solution to the issues and concerns surrounding detention centers in the U.S. See, e.g., Riddhi Mukhopadhyay, *Death in Detention: Medical and Mental Health Consequences of Indefinite Detention of Immigrants in the United States*, 7 SEATTLE J. FOR SOC. JUST. 693 (2009).

149. See generally AMNESTY INT’L, *supra* note 4; see also Beth Lyon, *The Unsigned United Nations Migrant Worker Rights Convention: An Overlooked Opportunity to Change the “Brown Collar” Migration Paradigm*, 42 N.Y.U. J. INT’L L. & POL. 389, 415 (2010) (explaining that the majority of the treaties that the U.S. ratifies are “non-self-executing,” which means that they are not enforceable in U.S. courts until Congress takes action).

150. Universal Declaration of Human Rights, G.A. Res. 217A (III), at 71, U.N. Doc. A/810

Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment (CAT),¹⁵² and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICPRM).¹⁵³

B. Human Rights Concerns in the Immigrant Detention System

i. Access to Counsel

For many immigrant detainees, barriers to legal representation may exist even before they end up in detention due to economic constraints, language barriers, or unfamiliarity with the U.S. legal system.¹⁵⁴ Notably, immigrants in detention are even less likely to be represented by counsel.¹⁵⁵ Of the immigrants who do obtain legal representation, there is a risk that the representation that they receive is inadequate due to the complex nature of immigration law and the possibility that some attorneys may take advantage of vulnerable immigrants.¹⁵⁶ Representation is crucial for immigrants facing deportation and, according to one study, “the single most important non-merit factor” in determining the outcome of removal proceedings.¹⁵⁷

Detained asylum seekers are particularly affected by the lack of access to counsel, and those that do manage to secure legal representation inevitably face many challenges in preparing their cases.¹⁵⁸ A report by Amnesty International “found that individuals are five times more likely to be granted asylum if they are

(Dec. 12, 1948). available at <http://www.un.org/en/documents/udhr> (explaining that while the UDHR is only a declaration, it is binding on all nations by way of customary international law).

151. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966), available at <http://www2.ohchr.org/english/law/ccpr.htm> [hereinafter ICCPR].

152. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), G.A. Res. 39/46, U.N. Doc. A/39/51 (Dec. 10 1984), available at <http://www2.ohchr.org/english/law/cat.htm>.

153. The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, G.A. Res. 45/158, U.N. Doc. A/RES/45/158 (Dec. 18, 1990), available at <http://www2.ohchr.org/english/law/cmw.htm>. Currently there are 31 signatories and 44 parties and most of the countries that have ratified the ICPRM are countries of origin. UN Treaty Collection, Multilateral Treaties Deposited with the Secretary-General (Feb. 4, 2011), http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en.

154. AM. BAR ASS'N COMM'N ON IMMIGRATION, *supra* note 43, at 53.

155. Andrew I. Schoenholtz & Hamutal Bernstein, *Improving Immigration Adjudications Through Competent Counsel*, 21 GEO. J. LEGAL ETHICS 55, 56 (2008).

156. Peter L. Markowitz, *Barriers to Representation for Detained Immigrants facing Deportation: Varick Street Detention Facility, A Case Study*, 78 FORDHAM L. REV. 541, 541 (2009) (“Even those respondents who do secure counsel are at substantial risk of encountering the all-too-prevalent elements of the immigration bar that are either incompetent or unscrupulous.”); see also Pat Schneider, *A Tangled Web. Immigration Law is Confusing and Complex. What's Worse, Good Legal Advice is Out of Reach for Many*, CAP. TIMES, Jan. 20, 2010.

157. Schoenholtz & Bernstein, *supra* note 155, at 55; see also CHARLES H. KUCK, U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, LEGAL ASSISTANCE FOR ASYLUM SEEKERS IN EXPEDITED REMOVAL: A SURVEY OF ALTERNATE PRACTICES 232, 239 (2004); Jill E. Family, *Pro Bono in Action*, BUS. LAW TODAY, at 42.

158. Riddhi Mukhopadhyay, *Death in Detention: Medical and Mental Health Consequences of Indefinite Detention of Immigrants in the United States*, 7 SEATTLE J. FOR SOC. JUST. 693, 706 (2009) (“[An Asylum seeker] 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.”).

represented.”¹⁵⁹ Other studies have also set forth an additional benefit of legal representation for immigrants in court proceedings: improvement in the efficiency of the cases overall.¹⁶⁰

Another persuasive reason to ensure that immigrant detainees are afforded access to legal representation is the strain on immigration courts and inefficiencies that result from respondents proceeding pro se in removal proceedings.¹⁶¹ As one case study found, “[p]ro se cases require more adjournments, require more time in court for judges to question respondents to evaluate available defenses, and often require judges to spend additional time out of court researching legal issues without the benefit of counseled briefing.”¹⁶² The former head of ICE was in agreement with the need for legal representation: “Immigrants representing themselves . . . can mean confusion and delay . . . Aliens having representation . . . could be the most positive thing for immigration courts that we can really see.”¹⁶³ Furthermore, when immigrants are represented, their cases are resolved at an initial stage and they are able to avoid detention entirely by taking voluntary departure. And individuals who are represented are less likely to fail to appear.¹⁶⁴ Access to counsel for immigrants facing removal, benefits not only the immigrant, but also the judicial system and ICE.¹⁶⁵

Although non-national immigrant detainees are not afforded all of the same protections that U.S. citizens are, they are protected by the Constitution.¹⁶⁶ Non-citizens are afforded Fifth Amendment procedural due process regardless of their immigration status.¹⁶⁷

In addition, instruments of international human rights law, such as the UDHR, protect immigrant detainees. The UDHR was adopted by the United Nations (UN) in 1948¹⁶⁸ and “was the first international recognition that all human beings have fundamental rights and freedoms.”¹⁶⁹ There are thirty articles in the UDHR that

159. AMNESTY INT’L, *supra* note 4, at 31 (“Representation by legal counsel can have a significant impact on the outcome of an individual’s case. Unrepresented individuals may unknowingly give up valid claims that would allow them to remain in the United States legally.”).

160. Susan Martin & Andrew Schoenholtz, *Asylum in Practice: Successes, Failures, and the Challenges Ahead*, 14 GEO. IMMIGR. L.J. 589, 595 (2000) (“[W]hen aliens are represented in proceedings, cases move more efficiently, economically, and expeditiously through the system. Issues presented for decision by the immigration courts and on appeal are more readily narrowed.”).

161. Markowitz, *supra* note 156, at 544.

162. *Id.* at 545; see also *Immigration Crackdown Overwhelms Judges*, NAT’L PUB. RADIO, Feb. 9, 2009, <http://www.npr.org/templates/story/story.php?storyId=100420476>.

163. Markowitz, *supra* note 156, at 545 (quoting Julie Myers-Wood, former head of Immigration and Customs Enforcement).

164. *Id.* at 545-546.

165. The immigration judges would be able to handle cases more efficiently and ICE would be able to allocate resources to other areas if more immigrants were represented and fewer immigrants were placed in detention.

166. David Colc, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?* 25 T. JEFFERSON L. REV. 367, 369 (“In particular, foreign nationals are generally entitled to the equal protection of the laws, to political freedoms of speech and association, and to due process requirements of fair procedure where their lives, liberty, or property are at stake.”).

167. *Zadvydas v. Davis*, 533 U.S. 687, 693 (2001).

168. See Universal Declaration of Human Rights, *supra* note 150.

169. Dept. of Pub. Info., U.N., 60th Anniversary of the Universal Declaration of Human Rights (2008), <http://www.un.org/events/humanrights/udhr60>.

set out specific human rights.¹⁷⁰ Articles 2, 5, and 9 are relevant for issues related to detention of immigrants. Article 2 is particularly relevant in the context of immigration detention given that it declares that *all* individuals are to be afforded the same rights and freedoms without regard to nationality.¹⁷¹ Thus, a foreign national who is detained in the United States should have the same rights as a U.S. citizen who is detained in the United States. Finally, Article 9 states, “No one shall be subjected to arbitrary arrest, detention or exile.”¹⁷²

The use of detention itself in some cases violates international human rights law, due process, and a detainee’s right to a trial.¹⁷³ This might be particularly true in cases when the only violation alleged is a violation of an immigration law; yet, immigrant detainees are often held for several months or even years.¹⁷⁴ Under the UDHR, one could make the argument that such use of detention subjects immigrant detainees to arbitrary detention in violation of Article 9. Also, under international human rights law, “administrative detention should not be punitive in nature.”¹⁷⁵

The ICCPR is another important source of international human rights law, which was adopted and ratified in 1966 and came into effect in 1976.¹⁷⁶ The United States signed the ICCPR in 1977 and ratified it in 1992.¹⁷⁷ The Human Rights Committee monitors compliance of member states by reviewing country reports, conducting country visits, and adjudicating individual claims.¹⁷⁸ While the decisions of the Human Rights Committee are not binding on member states, they are highly persuasive.¹⁷⁹ Article 9 of the ICCPR states that “1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”¹⁸⁰

170. See Universal Declaration of Human Rights, *supra* note 150.

171. *Id.* at art. 2 (“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.”).

172. *Id.* at art. 2.

173. See AMNESTY INT’L, *supra* note 4, at 11 (“Detention of migrants will only be lawful when the authorities can demonstrate in each individual case that it is necessary and proportionate to the objective being achieved, that alternatives will not be effective, that it is on grounds prescribed by law, and where there is an objective risk of the person absconding.”); see also Erik Camayd-Freixas, *Interpreting After the Largest ICE Raid in US History: A Personal Account*, N.Y. TIMES, June 13, 2008, at 10, available at <http://graphics8.nytimes.com/images/2008/07/14/opinion/14cd-camayd.pdf>.

174. AMNESTY INT’L, *supra* note 4, at 11 (“Detention should only be used as a measure of last resort; it must be justified in each individual case and be subject to judicial review. Detention is only appropriate when authorities can demonstrate in each individual case that it is necessary and proportionate to the objective being achieved and on grounds prescribed by law, and that alternatives (such as reporting requirements, bail or financial deposits) would not be effective.”).

175. *Id.* at 29 (“However, in reality, conditions of detention frequently violate fundamental human rights. Immigration detainees are often detained in jail facilities with barbed wire and cells, alongside those serving time for criminal convictions.”).

176. See ICCPR, *supra* note 151.

177. *Id.*

178. Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966).

179. See SARAH JOSEPH ET AL., THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 8 (2004).

180. ICCPR, *supra* note 151.

Finally, Article 9 of the ICCPR asserts, “5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.” U.S. immigrant detention violates the ICCPR where immigrants are unlawfully arrested or detained. Proving that a detainee was in fact unlawfully arrested or detained, with what little evidence is available to a detained immigrant, is extremely challenging. Next, there is likely an economic barrier because the majority of immigrant detainees likely do not have the financial means to afford the amount of the bond payment, much less bring such cases or conduct the necessary investigation and will likely not come forward with information on potential violations.¹⁸¹

The use of immigrant detention itself could be considered in the United States as a potential violation of human rights of immigrant detainees because in some cases detention is disproportionate to the offense of a civil violation of an immigration law.¹⁸² Moreover, as previously stated, immigrant detainees lack adequate access to legal representation. Thus, for some immigrants in detention, challenging human rights abuses is not a feasible option.

ii. Transfer of Immigrant Detainees

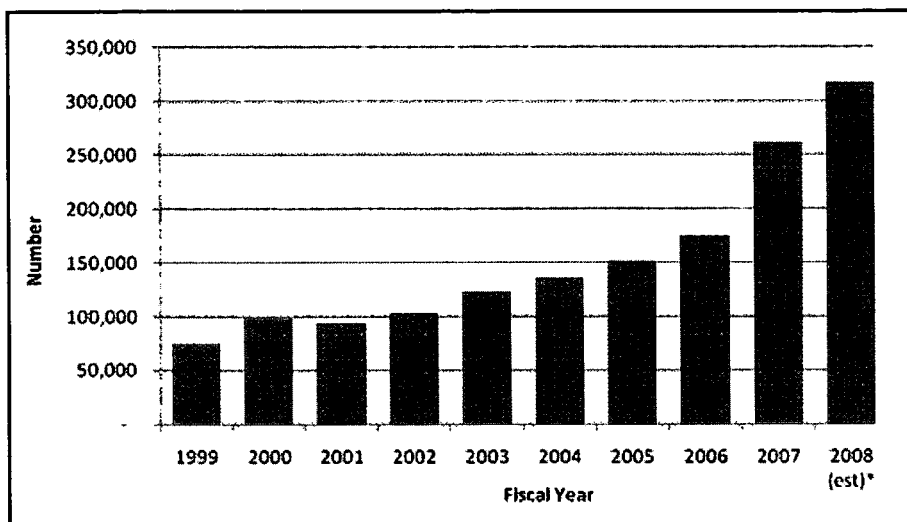
The transfer of immigrant detainees poses certain risks to human rights abuses of immigrant detainees because immigrant detainees are frequently transferred to remote locations.¹⁸³ As the demand for detention space has increased, so has the frequency with which detainees are transferred.

181. See Legomsky, *supra* note 131.

182. AM. BAR ASS’N COMM’N ON IMMIGRATION, *supra* note 43, at 23 (“By adopting a ‘zero tolerance’ approach toward immigrants who have committed even minor crimes, the 1996 laws all but ignore the principle that ‘the punishment should fit the crime.’ Virtually anyone can be deported for any error made at almost any time in life. Some small offenses are penalized as severely as monstrous crimes so that even long time legal immigrants with extensive ties to the United States have almost no prospect of remaining here.”); *see also*, AMNESTY INT’L, *supra* note 176 and accompanying text.

183. *See generally* HUMAN RIGHTS WATCH, *supra* note 6.

NUMBER OF TRANSFERS BY FISCAL YEAR¹⁸⁴



Such transfers often have dire consequences on a detainee's ability to secure legal representation.¹⁸⁵ For example, as reported by Human Rights Watch, "[t]ransfers erect often insurmountable obstacles to detainees' access to counsel, the merits of their cases notwithstanding. Transfers impede their rights to challenge their detention, lead to unfair midstream changes in the interpretation of laws applied to their cases, and can ultimately lead to wrongful deportations."¹⁸⁶ While immigrant detainees are first held in a local facility, "they are routinely transferred by ICE hundreds or thousands of miles away to remote detention facilities."¹⁸⁷ Transfers in state and federal prisons, in contrast to transfers in detention centers, are "better regulated" and have more "checks" than in civil detention facilities.¹⁸⁸ Article 9 of the ICCPR states:

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of

184. HUMAN RIGHTS WATCH, *supra* note 6, at 30.

185. Nina Bernstein, *Immigrant Jail Tests U.S. View of Legal Access*, N.Y. TIMES, Nov. 1, 2009 (Lawyers working with clients in the Varick Street Detention Center in Greenwich Village noted that "detainees with a legal claim to stay in the United States are routinely transferred to more remote jails before they can be helped.")

186. HUMAN RIGHTS WATCH, *supra* note 6, at 1.

187. *Id.*; see also THE CONST. PROJECT, *supra* note 2, at 36 ("In cases where bond is denied, non-citizens are often moved to whichever detention facility happens to have available bedspace—such facility could be located a considerable distance away.")

188. *Id.*

the judgment.¹⁸⁹

The U.S. criminal system affords more safeguards to immigrants in the criminal system than to those in the civil detention system.¹⁹⁰ Article 9 of the ICCPR further adds, “4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.” The implementation of such a policy in the context of the immigrant detention system in the United States could be challenging because of the “delay” factor. As immigrants are frequently transferred, their court case changes dates and venues, delaying the entire process. In addition, lack of access to legal counsel slows the process as well because the cases are not presented as efficiently as possible.¹⁹¹

The transfer of detainees is included in ICE’s standards, however, under the 2004 Standards, ICE was only required to give “a vague set of reasons for which ICE may transfer detainees, which included medical needs, change of venue, recreation, security, and ‘other needs of ICE.’”¹⁹² ICE did not have to give a specific reason for the transfer.¹⁹³ In addition, ICE did not have to give advanced notice to a detainee regarding the transfer and detainees were not permitted to make or receive a phone call before the transfer.¹⁹⁴ Detainees’ attorneys were not notified until the detainee was en route to a new facility.¹⁹⁵

The 2008 revised standards were not much of an improvement over the 2004 standards with respect to the rights of detainees because in some cases the standards were and are essentially the same as they were before; furthermore, the revised standards are not codified in the federal register as enforceable regulations.¹⁹⁶ ICE still has discretion as to whether a transfer is necessary, and as stated in the 2008 PBNDS, “[t]he determining factor in deciding whether or not to transfer a detainee is whether the transfer is required for operational needs, for example, to eliminate overcrowding.”¹⁹⁷ Also, ICE does not have to give notice to the detainee, and “the detainee shall normally not be permitted to make or receive any telephone calls.”¹⁹⁸ The 2008 PBNDS further limits notice to attorneys of detained immigrants by changing the requirement from “en route” to “after arrival.”¹⁹⁹

Even with standards in place to establish a procedure for transferring

189. *Id.*

190. SEGHETTI ET AL., *supra* note 84, at 3; *see also* Peterson, *supra* note 109, at 341 (“The U.S. Constitution guarantees all noncitizens, both documented and undocumented, who live within the United States the same due-process protections as citizens in criminal proceedings.”).

191. HUMAN RIGHTS WATCH, *supra* note 6, at 8.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*; U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, ICE DETENTION STANDARD, DETAINEE TRANSFER 1, June 16, 2004, <http://www.ice.gov/doclib/pi/dro/opsmanual/DefTransStdfinal.pdf> (last visited on June 5, 2010) (“For security purposes, the attorney shall not be notified of the transfer until the detainee is en route to the new detention location.”).

196. HUMAN RIGHTS WATCH, *supra* note 6, at 27.

197. *Id.*; U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, ICE/DRO DETENTION STANDARD, TRANSFER OF DETAINEES 2, http://www.ice.gov/doclib/dro/detention-standards/pdf/transfer_of_detainees.pdf (last visited on June 5, 2010).

198. U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, *supra* note 197, at 3.

199. *See Id.*

immigrant detainees, violations of such standards persist.²⁰⁰ One study noted that facilities continue “to [fail] to provide detainees with completed Detainee Transfer Notification Sheets, to inform detainees or their attorneys that they were responsible for notifying their families of their transfer, [and] to *fully* notify detainees or their attorneys that they were being transferred.”²⁰¹ Because of the potential risks associated with transfers and the fact that transfers can be extremely traumatic for a detainee, compliance with this standard is crucial.²⁰²

iii. ICE Standards and Trainings

ICE standards and trainings must not only include protections against human rights violations, but must be enforced and implemented in a systematic fashion. While the 2008 PMNDS do contain certain adequate safeguards and procedures, if these standards are not implemented, human rights abuses may occur. Article 9 of the ICCPR states, “Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.”²⁰³ For many non-citizen detainees this would include being informed in a language that the detainee is able to understand in a timely manner. The 2008 PBNDS include this requirement,²⁰⁴ yet ICE has documented reports of where this standard was and is not implemented.²⁰⁵ The use of interpreters is inconsistent and while ICE requires DRO officers to have certain language skills, there is no such requirement for local law enforcement officials in 287(g) agreements.²⁰⁶

Another important source of international law that pertains to ICE’s standards and trainings is the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which was adopted in 1984 and entered into force in 1987.²⁰⁷ The United States signed the CAT in 1988 and ratified it in 1994.²⁰⁸ Article 10 of CAT requires that *all* law enforcement officials be properly trained on the topic of torture.²⁰⁹ Despite that, a recent report by DHS concludes that training of employees is inadequate in many detention centers.²¹⁰ Article 10 states,

1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the

200. TUMLIN ET AL., *supra* note 4, at 65.

201. *Id.*

202. *Id.*

203. *Id.*

204. ICE/DRO Det. Standard, Voluntary Work Program (Dec. 2, 2008), *available at* http://www.ice.gov/doclib/dro/detention-standards/pdf/voluntary_work_program.pdf (“The applicable content and procedures in this Standard will be communicated to the detainee in a language or manner which the detainee can understand.”).

205. DEP’T OF HOMELAND SEC., OFFICE OF THE INSPECTOR GEN., *The Performance of 287(g) Agreements* at 33 (2010), *available at* http://www.dhs.gov/xoig/assets/mgmttrpts/OIG_10-63_Mar10.pdf.

206. *Id.* at 33-34. (“One 287(g) officer said that he does not speak any Spanish, but used what is referred to as a ‘cheat sheet’ of questions in Spanish to determine aliens’ removability during interviews. Another 287(g) officer admitted to being reluctant to speak Spanish due to his minimal grasp of the language, but served warrants and read non-English-speaking aliens their rights in Spanish.”).

207. *See* CAT, *supra* note 152.

208. *Id.*

209. *Id.*

210. *See* DEP’T OF HOMELAND SEC., *supra* note 205.

training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment. 2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person.²¹¹

Article 11 requires that each state incorporate the prevention of torture in its rules, instructions, methods, and practices for detention.”²¹² Article 11 is important in the context of ICE standards because it requires that ICE take the prevention of torture into account in formulating its rules and procedures.

iv. Lack of Monitoring and Oversight

Because all oversight of immigrant detention facilities is done by local ICE field offices, many detention facilities lack adequate monitoring and oversight.²¹³ The ICE August 2009 report by Dr. Dora Schriro, former Director of ICE Office of Detention Policy and Planning, serves as a guiding document for ICE.²¹⁴ ICE asserts that monitoring and oversight have greatly improved with the creation of the new detention service monitors, which places an ICE employee at each facility to oversee compliance with ICE detention standards and policies.²¹⁵ As Andrew Strait, ICE National Community Outreach Coordinator, explained, “even if there is contracted personnel, ICE oversees them.”²¹⁶ In addition, “ICE OPO conducts annual investigations and can do other investigations as well.”²¹⁷ But, as some critics have noted, “deposition testimony reveals that the monitoring practices of individual ICE officers varied in many ways from the procedures spelled out in the [Detention Management Compliance Program] (DMCP) manual.”²¹⁸ Because of these varied practices, the DMCP manual is more of an “aspirational document rather than a definitive representation of ICE’s monitoring structure.”²¹⁹ The reality of the immigrant detention system, as with many other systems, is that each employee will vary as to how she implements the agency’s policies. The key to effective and uniform application of policies is comprehensive training of employees and regular oversight and monitoring of policy implementation.

ICE’s internal monitoring procedures reveal inaccuracies and leniency in reporting the true conditions of immigrant detention facilities.²²⁰ For example,

211. CAT, *supra* note 152.

212. *Id.*

213. Strait, *supra* note 141.

214. *Id.* (referring to Dr. Dora Schriro, *Immigration Detention Overview and Recommendations* (August 2009)).

215. *Id.* (These ICE employees are stationed at the detention facilities in a full time position and monitor the facility each day.)

216. *Id.*; See CAT, *supra* note 152 (“Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.”).

217. Strait, *supra* note 141.

218. TUMLIN ET AL., *supra* note 4, at 5.

219. *Id.*

220. *Id.*

detention centers may be rated “acceptable” even if that particular detention facility was “deficient” with respect to several specific standards.²²¹ Moreover, “[a]n ICE officer who had supervised several detention facility reviews testified that she would mark a facility ‘acceptable’ as to a standard when it either complied with the intent of the standard or indicated that it would agree to make changes to comply with the standard in the future.”²²² Budgetary constraints and lack of sufficient staff in detention facilities creates further challenges for ICE.²²³

These practices, including improper reporting, suggest that true compliance with ICE’s standards, overall is lacking. If ICE’s internal monitoring efforts do not accurately reflect what is actually occurring on the ground, the purpose and efficacy of monitoring is undermined, and the internal reports will lack legitimacy and trustworthiness.

Given the challenges of overseeing immigrant detention facilities, monitoring ICE owned and operated facilities is more feasible due to the centrality and structure of such a system. First, government detention centers are usually listed in a format that is made available to the public.²²⁴ Second, the employees of government run detention centers receive uniform training, which includes cultural sensitivity training.²²⁵ There is no training, however, on international human rights law.²²⁶ Finally, the standards employed in government detention centers are uniform, and there is no risk of mixing local rules and procedures with the federal government’s rules and procedures.²²⁷

Private detention centers and local contracted detention centers are not under the direct supervision of ICE, and the potential for human rights abuses is greater in subcontracted or private detention facilities due to the distance and lack of uniformity. The ad-hoc system decentralizes the detention system as a whole and leads to decreased oversight of detention conditions. The United States government, through DHS or ICE, cannot ignore human rights laws by subcontracting detention facilities out to private companies.²²⁸

While the private facilities that enter into contracts with ICE are required to adhere to ICE’s standards as stated in the 2008 Performance Based National Detention Standards,²²⁹ questions remain as to whether ICE is able to monitor these

221. *Id.*

222. *Id.*

223. TUMLIN ET AL., *supra* note 4, at 5-6 (“[D]ue to budgetary limitations in the year following the standards’ release, INS could not hire sufficient staff to enable effective monitoring of facility compliance.”).

224. In fact, ICE has such a list on its website for the ICE facilities, <http://www.ice.gov/detention-facilities/>; However, there are only a few ICE facilities, so if you were trying to locate an individual in a detention center that was held in a non-government facility it would be very difficult. The New York Times has also compiled a complete list online at <http://www.nytimes.com/interactive/2010/02/23/nyregion/20100223-immig-table.html>.

225. Strait, *supra* note 141.

226. *Id.* (As Strait explained, there is no need to include information on international human rights law in the trainings for ICE employees or employees of contracted or private detention facilities because if there is a violation of international human rights law, for example the Vienna Convention, it would be the government’s responsibility not the contracted facility’s responsibility.)

227. Although, as noted previously, just because the standards are uniform does not mean that they will necessarily be implemented in a uniform fashion.

228. Draft Articles on the Responsibility of States for Internationally Wrongful Acts art.4, G.A. Res. 56/83, at 43, U.N. GAOR 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (Dec. 12, 2001).

229. ICE/DRO DETENTION STANDARD, Detainee Handbook, *available at*

numerous facilities and verify that they are meeting these requirements.²³⁰ It would take numerous ICE employees due to the numerous detention centers for ICE to effectively monitor such facilities. For now, ICE has positioned one employee at each detention facility with the sole purpose of monitoring.²³¹ The size of some of the detention centers, however, suggests that more than one person may be needed.²³²

In an IGSA, an Intergovernmental Service Agreement, with Davidson County in Nashville, Tennessee, under Article V DHS/ICE Detention Standards, the contract states “The Service Provider is required to house detainees and perform related detention services in accordance with the most current edition of ICE National Detention Standards (http://www.ice.gov/partners/dro/opsmanual/index.htm). ICE inspectors will conduct periodic inspections of the facility to assure compliance with the ICE National Detention Standards.”²³³ The contract does not specify how often these inspections will occur.²³⁴ But, ICE can visit a facility at any time and performs annual inspections of detention facilities.²³⁵

v. Lack of Enforceable Detention Standards

Like previous ICE standards, the 2008 standards are not legally binding: “Not only are the 2008 standards unacceptably vague, they are also not codified as federal regulations, and cannot be enforced in court.”²³⁶ DHS refuses to turn the standards into enforceable regulations.²³⁷ According to Jane Holl Lute, Deputy Secretary of DHS, “the 2008 standards are preferable to enforceable regulations because they provide the ‘necessary flexibility to enforce standards that ensure proper conditions of confinement.’”²³⁸

ICE is of the opinion that the new “‘performance-based standards’ monitored by private contractors, ‘provide adequately for both quality control and accountability.’”²³⁹ But, activists, such as Paromita Shah, associate director of the National Immigration Project of the National Lawyers Guild, argue, “[the] lack of enforceable rules is at the heart of persistent problems of mistreatment and medical neglect.”²⁴⁰ In Shah’s view, “[ICE] has demonstrated a disturbing commitment to

http://www.ice.gov/doclib/PBND/ pdf/detainee_handbook.pdf.

230. See, e.g., DEP’T OF HOMELAND SEC. OFFICE OF THE INSPECTOR GEN., *supra* note 205.

231. Strait, *supra* note 215 and accompanying text.

232. KERWIN, *supra* note 43, at 15 (For example, the Stewart Detention Center in Georgia, which is an IGSA facility, has bed space for 1,752 detainees); see also Section V. b.

233. ICE, FOIA Electronic Reading Room, <http://www.ice.gov/doclib/foia/isa/igsadavidsoncountyjail.pdf>.

234. *Id.*

235. Strait, *supra* note 141.

236. HUMAN RIGHTS WATCH, *supra* note 6, at 27.

237. *Id.* at 27-28.

238. *Id.* at 28.

239. Nina Bernstein, *U.S. Rejects Changes in Detainee Rules*, N.Y. TIMES, July 29, 2009, at A17.

240. *Id.*; see also Mukhopadhyay, *supra* note 158, at 708 (“[U]nder the current nonbinding detention medical standards, immigration officers and detention guards have arbitrary discretion to provide assistance to detainees for their medical needs.”).

policies that have cost dozens of lives.”²⁴¹ ICE’s reasoning for not codifying its standards into regulations are not persuasive. As Matt Chandler, a spokesman for the Department of Homeland Security explained, “[t]he rule-making process can take months, if not years and the administration believes that reforming our immigration detention system needs to happen much faster than that.”²⁴² DHS believes that transforming these standards into regulations will take too long and that change needs to occur much faster. While urgent changes are necessary, if such changes are to be long-standing and effective, enforceable standards are crucial. Advocates and critics emphasize, “standards without teeth are doomed to fail.”²⁴³ Moreover, ICE has routinely violated its own standards with seemingly no consequences.²⁴⁴ Karen Tumlin, a lawyer with the National Immigration Law Center in California, asserts, “The ‘performance-based’ standards the Obama administration has now embraced have no penalties and are not significantly different from what failed in the past.”²⁴⁵

vi. A Potential Source of International Human Rights Law for Migrants

The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICPRM) was adopted in 1990 and entered into force in 2003.²⁴⁶ The United States and other developed nations have not signed—nor are they parties.²⁴⁷ Given that no other developed nations have ratified the ICPRM, it is also unlikely that the United States will ratify the treaty in the near future and even if the United States signed onto the treaty it would be limited in its effect.²⁴⁸ Even though the United States has not signed onto this treaty, it is worth analyzing some of the provisions that could be used to offer examples of various rights concerning detention in the United States.

The ICPRM is a lengthy document that gives migrant workers substantial rights.²⁴⁹ Article 17 of the ICPRM grants migrant workers several explicit rights:

5. During detention or imprisonment, migrant workers and members of their families shall enjoy the same rights as nationals to visits by members of their families. 6. Whenever a migrant worker is deprived of his or her liberty, the competent authorities of the State concerned shall pay attention to the problems that may be posed for members of his or her family, in particular for spouses

241. Bernstein, *supra* note 239.

242. *Id.*

243. *Id.* (“[S]tandards without teeth are doomed to fail, said lawyers for two other national immigration law organizations, one in Los Angeles and another in Chicago.”).

244. *Id.* (FOIA requests revealed ICE documents that “showed that the government had routinely violated its own minimum monitoring standards and ignored findings of deficiencies for year.” Some reports documented complaints to guards from detainees of medical neglect and threats of physical violence, which were ignored.).

245. *Id.*

246. See ICPRM, *supra* note 153.

247. *Id.*

248. Lyon, *supra* note 149, at 470 (“[R]eservations, understandings, and declarations with which the United States is likely to limit ratification would rob the treaty of virtually any immediate enforceability.”).

249. See ICPRM, *supra* note 153.

and minor children.²⁵⁰

Article 17 is unclear as to how authorities are to incorporate and respond to the problems that may be posed for family members. Most likely, these challenges will include financial burdens on family members, which raise the question of how to address such problems. Developed nations are likely hesitant to grant explicit rights to migrants in these contexts because not only would this require states to treat migrant workers on equal footing as their nationals, but also most developed nations have very large migrant populations.²⁵¹ Allowing migrant workers access to the courts could result in an inundation of cases where migrants wish to challenge the lawfulness of their detention.

V. ICE OPERATIONS EXAMINED

A. Timeline

In March 2004 ICE announced “Operation Endgame,” a strategic plan that set out a ten-year goal to “remove all removable aliens” from the United States.²⁵² In August 2006 DHS secretary, Michael Chertoff, announced a policy of mandatory detention for immigrants apprehended along the border, ending ICE’s “catch and release” policy.²⁵³ This policy shift led to a significant increase in immigrant detention in the United States.²⁵⁴

In November 2008 ICE created the Detention Facility Inspection Group (DFIG) within the Office of Professional Responsibility (OPR) to “independently validate detention inspections conducted by DRO by performing quality assurance over the review process, ensuring consistency in application of detention standards

250. *Id.*

251. U.N. DEP’T ECON. & SOC. AFFAIRS: POPULATION DIVISION, *International Migration Report 2006: A Global Assessment*, xiv, U.N. Doc. ESA/P/WP.209 (2009), available at http://www.un.org/csa/population/publications/2006_MigrationRep/exec_sum.pdf. (illustrating that the United States hosts more migrants than any other nation.)

252. U.S. DEP’T OF HOMELAND SEC., BUREAU OF IMMIGRATION & CUSTOMS ENFORCEMENT, *ENDGAME Office of Detention and Removal Strategic Plan, 2003-2012: Detention and Removal Strategy for a Secure Homeland* at 1-2 (2003), available at http://www.thenyic.org/images/uploads/ICE_Endgame_Strategic_Plan.pdf; see also Memorandum from Anthony S. Tangeman for Deputy Assistant Dir., Field Operations Div., Office of Detention and Removal (DRO) Strategic Plan 2003-2012: Endgame (June 27, 2003) available at http://www.thenyic.org/images/uploads/ICE_Endgame_Strategic_Plan.pdf (“[The Office of Detention and Removal] provides the endgame to immigration enforcement and that is the removal of all aliens. This is also the essence of our mission statement and the ‘golden measure’ of our success. We must endeavor to maintain the integrity of the immigration process and protect our homeland by ensuring that every alien who is ordered removed, and can be, departs the United States as quickly as possible and as effectively as practicable. We must strive for a 100% removal rate.”).

253. Statement of the Honorable Michael Chertoff, Sec’y U.S. Dep’t of Homeland Sec. Before the U.S. Senate Judiciary Comm. (February 28, 2007) available at http://www.dhs.gov/xnews/testimony/testimony_1172853501273.shtm; see also *The Washington Times*, *Chertoff Hails End of Let-Go Policy*, July 28, 2006, available at <http://www.washingtontimes.com/news/2006/jul/28/20060728-123022-6096r>.

254. U.S. DEP’T OF HOMELAND SEC. OFFICE OF INSPECTOR GEN., *supra* note 3, at 2 (“Detaining versus releasing aliens increased the demand for detention bedspace. ICE reported an increase in its average daily detention population from more than 28,000 in FY 2007 to nearly 34,000 in FY 2008.”).

and verifying corrective actions.”²⁵⁵ The creation of the PBNDS was the most notable ICE action in 2008.²⁵⁶ Previously, ICE’s detention standards were based on policies and procedures focusing “solely on what was to be done.”²⁵⁷ ICE revised and redrafted the detention standards into a performance-based format so that the standards are set with respect to the results or outcomes of each standard.²⁵⁸ By describing the outcome of successfully performing each standard, ICE was able to accomplish this performance-based format. The performance-based standards represent the end result of performing each standard, and therefore leave nothing assumed or implied regarding the standards focus.²⁵⁹

In August 2009, the Obama administration announced a plan to overhaul the immigrant detention system in the United States to address numerous complaints about immigration detention.²⁶⁰ The plan reflected an ambitious effort to move detention away from the “jail-oriented approach” to a “civil detention” system.²⁶¹ ICE plans to design facilities in the next three to five years that are located and operated for the sole purpose of immigrant detention.²⁶² By creating facilities specifically for detention purposes, ICE may need to rely less on local jails and prisons to meet its demand for detention. With these reforms, ICE is hopeful that there will be improvements in a variety of areas, including medical care, custodial conditions, fiscal prudence, and ICE oversight.²⁶³

ICE has already identified many of the areas of concern that it will focus on as part of these reform efforts:

Recognizing that the purpose of immigration detention is not punitive and the importance of providing our detainees with quality care, ICE is engaged in a broad detention reform effort. This includes creating a civil detention system that reduces transfers, maximizes access to counsel, visitation, and recreation, improves conditions of confinement, and ensures quality medical, mental health, and dental care.²⁶⁴

ICE has issued a number of policies to address specific issues. For example, one policy aims to reduce the risk that ICE will place U.S. citizens in proceedings or detention.²⁶⁵ Another noteworthy policy is a new memorandum of agreement seeking to ensure that the 287(g) program aligns with ICE priorities.²⁶⁶ But, these changes could take years to complete.²⁶⁷ Other proposed changes include reviewing the government’s contracts with local jails and prisons with efforts aimed at holding

255. U.S. IMMIGR. & CUSTOMS ENFORCEMENT, *supra* note 18.

256. U.S. IMMIGR. & CUSTOMS ENFORCEMENT, *supra* note 138.

257. *Id.*

258. *Id.*

259. *Id.*

260. U.S. IMMIGR. & CUSTOMS ENFORCEMENT, *supra* note 9.

261. *Id.*; see also Bernstein, *supra* note 239.

262. U.S. IMMIGR. & CUSTOMS ENFORCEMENT, *supra* note 9.

263. *Id.*

264. ICE Detention and Policy Reforms, Immigration Daily, available at <http://www.ilw.com/immigrationdaily/news/2010,0830-detention.shtml>.

265. *Id.*

266. *Id.*

267. Nina Bernstein, *U.S. Overhauls Detention Policy for Immigrants*, N.Y. TIMES, August 6, 2009, at A1 (“Details are sketchy, and even the first steps will take months or years to complete.”).

detainees in more suitable locations.²⁶⁸ Included in the proposed changes is a plan to build more ICE-operated detention centers, to create a more centralized authority over the entire system, and to improve direct oversight of detention centers.²⁶⁹

The agency also announced the creation of the Office of Detention Policy and Planning, the Office of Detention Oversight, and clarified the role of these new branches along with the revised role of DRO.²⁷⁰ ICE announced in August 2009 that it will take a series of immediate actions, which include creating two advisory groups comprised of local and national organizations, appointing twenty-three detention managers to work in the largest detention facilities, and employing experts in health care administration and detention management.²⁷¹

B. 287(g) Agreements

In July 2009 ICE revised its Memorandum of Agreement (MOA) used to enter into partnerships and agreements with local law enforcement agencies.²⁷² In addition, ICE announced eleven new agreements with law enforcement agencies from around the country.²⁷³ Section 287(g), which was added to the Immigration and Nationality Act in 1996 by IIRIRA,²⁷⁴ “authorizes the DHS Secretary to enter into agreements with state and local law enforcement agencies to perform immigration officer functions.”²⁷⁵ The 287(g) provision is characterized by “significant flexibility permitting states to “tailor an agreement . . . to meet local needs.”²⁷⁶ The 287(g) provision also requires state officers to be knowledgeable of and adhere to federal immigration laws, in addition to requiring specific training on enforcement of immigration laws.²⁷⁷

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. Press Release, U.S. Dep’t of Homeland Sec., Secretary Napolitano Announces New Agreement for State and Local Immigration Enforcement Partnerships & Adds 11 New Agreements (July 10, 2009) (“This new agreement supports local efforts to protect public safety by giving law enforcement the tools to identify and remove dangerous criminal aliens,” said Secretary Napolitano. “It also promotes consistency across the board to ensure that all of our state and local law enforcement partners are using the same standards in implementing the 287(g) program.”), available at http://www.dhs.gov/ynews/releases/pr_1247246453625.shtm.

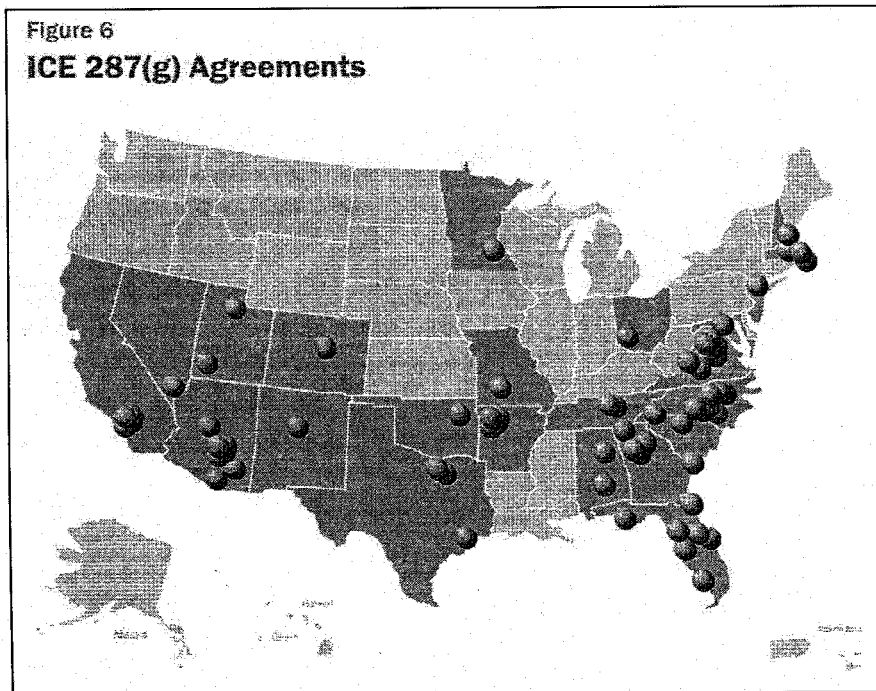
273. *Id.*

274. See INA § 287 (8 U.S.C. § 1357(g)); See also Hakim & Bernstein, *supra* note 105 (“Federal immigration laws enacted in 1996 greatly expanded the categories of legal immigrants subject to mandatory deportation . . . including people who had pleaded guilty of misdemeanor[s] . . . many people years ago pleaded guilty to criminal charges in exchange for probation or no jail time.”).

275. Press Release, U.S. Dep’t of Homeland Sec., *supra* note 272; SEGHEITTI ET AL., *supra* note 84, at 14 (“This authority was given new urgency following the terrorist attacks in September 2001.”).

276. SEGHEITTI ET AL., *supra* note 84, at 12.

277. INA § 287(g)(2) (8 U.S.C. § 1357(g)(2)); SEGHEITTI ET AL. *supra* note 84, at 12.



LOCATION OF ICE 287(G) AGREEMENTS²⁷⁸

The 287(g) agreements have been the subject of much controversy.²⁷⁹ Immigration enforcement and the promulgation of immigration laws is the exclusive responsibility of the federal government.²⁸⁰ The federal government's plenary power of immigration laws stems from the Supremacy Clause of the Constitution.²⁸¹ Congress has plenary power to enact immigration laws and preempt inconsistent state and local laws.²⁸² Even with 287(g) agreements, "federal law preempts inconsistent state law where concurrent jurisdiction exists."²⁸³

Civil rights are a main concern of the 287(g) agreements because there is a higher risk for civil rights violations when state and local police do not have the proper knowledge, training, and experience enforcing immigration laws.²⁸⁴ Another

278. U.S. IMMIGR. & CUSTOMS ENFORCEMENT, *supra* note 14, at 7.

279. SEGHETTI ET AL., *supra* note 84 at ii ("Some observers contend that the federal government does not have adequate resources to enforce immigration law and that state and local law enforcement entities should be utilized. Others, however, question what role state and local law enforcement agencies should have in light of limited state and local resources and immigration expertise.").

280. *Mathews v. Diaz*, 426 U.S. 67 (1976); SEGHETTI ET AL., *supra* note 84, at 3 ("The power to prescribe rules as to which aliens may enter the United States and which aliens may be removed resides solely with the federal government.") (citing U.S. Const., Art. 1, § 8, cl. 3, 4).

281. SEGHETTI ET AL., *supra* note 84, at 4 ("[T]he Supremacy Clause of the Constitution[. . .] provides that 'the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'").

282. *Id.*

283. *Id.*

284. *Id.* at 20.

concern is racial profiling where local law enforcement officials target individuals based on race or ethnicity under the assumption that certain minority groups are more likely to be in violation of immigration laws.²⁸⁵ Moreover, the lack of sufficient detention space, which has been a long-standing problem, will continue to be a challenge as state and local law enforcement officials enforce immigration law.²⁸⁶

Another critique of the 287(g) program is that allowing local law enforcement officials to enforce immigration laws could “undermine the relationship between local law enforcement agencies and the communities they serve.”²⁸⁷ In addition to the concern that local crime enforcement would suffer from such 287(g) arrangements, there is also the possibility that national security could be compromised by “forc[ing] many undocumented aliens to go underground, thus making it more difficult to solicit their cooperation in criminal investigations, which could also include terrorist-related investigations.”²⁸⁸

The eleven 287(g) agreements newly authorized in July 2009 include jurisdictions in Georgia, New Jersey, Rhode Island, Delaware, Texas, Nevada, Arizona, North Carolina and South Carolina.²⁸⁹ The 2009 Memoranda of Agreement (MOA) emphasize that the purpose of local law enforcement agencies performing immigration officer functions is to improve consistency and remove “criminal aliens,” not merely to increase the detention of non-criminal immigrants.²⁹⁰ As DHS Secretary Janet Napolitano explained, consistency in the standards applied is one of the central objectives of the MOA:

This new agreement supports local efforts to protect public safety by giving law enforcement the tools to identify and remove dangerous criminal aliens. It also promotes consistency across the board to ensure that all of our state and local law enforcement partners are using the same standards in implementing the 287(g) program.²⁹¹

Almost a year after the 287(g) Memoranda of Agreement the Office of the Inspector General of DHS released a report in March 2010 outlining several areas of concern with the implementation of the 287(g) program.²⁹² As the *New York Times* editorialized, DHS “has affirmed what sheriffs, police chiefs, civil-rights lawyers and immigrant advocates have said for years: Outsourcing immigration enforcement to an ill-trained and poorly supervised assortment of state and local law enforcement

285. *Id.*; see also Nicholas D. Michaud, *From 287(G) to SB 1070: The Decline of the Federal Immigration Partnership and the Rise of State-Level Immigration Enforcement*, 52 ARIZ. L. REV. 1083, 1101 (2010).

286. SEGHETTI ET AL., *supra* note 84, at 21 (“Some contend that a possible unintended consequence of permitting state and local law enforcement entities to enforce immigration law would lead to more aliens being detained, which could pose a resource problem for ICE.”).

287. SEGHETTI ET AL., *supra* note 84, at 21 (“For example, potential witnesses and victims of crime may be reluctant to come forward to report crimes in fear of actions that might be taken against them by immigration officials.”); see also Michaud, *supra* note 285, at 1101.

288. SEGHETTI ET AL., *supra* note 84, at 22.

289. Michaud, *supra* note 285, at 1103.

290. *Id.*

291. Press Release, U.S. Dep’t of Homeland Sec., *supra* note 272.

292. See U.S. DEP’T OF HOMELAND SEC., *supra* note 205, at 1. (making “33 recommendations for Immigration and Customs Enforcement to strengthen management controls and improve its oversight of 287(g) agreements.”).

agencies creates a lot of problems.”²⁹³ The report “paints a portrait of 287(g) agencies as a motley posse of deputies who don’t know Spanish, who don’t know or care about the dangers of racial profiling and who operate well beyond the control of the federal agency that they are supposed to be working for.”²⁹⁴ Some of the issues revealed in the report include lack of adequate and consistent trainings,²⁹⁵ lack of proper supervision by ICE,²⁹⁶ lack of sufficient oversight,²⁹⁷ and lack of protections for civil rights.²⁹⁸ The report recommends that ICE establish 287(g) data collection and reporting requirements to address the civil rights issues.²⁹⁹

For example, in one case an accident victim was brought after the accident to a participating county jail and detained “not to be charged with an offense, but rather to have a 287(g) officer determine the victim’s deportability.”³⁰⁰ Furthermore, as the report notes, the 298(g) agreements lack training in the area of civil rights.³⁰¹ The report emphasizes that collecting data on such incidents will assist in evaluating and identifying civil rights abuses.³⁰²

The report also shows that ICE has entered into Intergovernmental Service Agreements with facilities that did not meet ICE standards.³⁰³ The report also underscores the conclusion that public safety is undermined when local officials enforce federal immigration laws.³⁰⁴ As noted in the report, the purpose of the 287(g)

293. Editorial, *Too Broken to Fix*, N.Y. TIMES, Apr. 9, 2010, at A26.

294. *Id.*

295. U.S. DEP’T OF HOMELAND SEC., *supra* note 205, at 8 (“MOAs indicate that ICE will train 287(g) officers on the terms and limitations of the MOA and on public outreach and complaint procedures. However, 287(g) officers informed us that ICE instructors have not consistently delivered training on these topics during their basic training course.”).

296. *Id.* at 10 (“[W]e observed inconsistencies in the level and type of supervision over 287(g) program officers and related activities in participating jurisdictions. This inconsistency could jeopardize the integrity of the 287(g) program and its ability to perform immigration enforcement activities appropriately.”).

297. *Id.* at 14 (“ICE has not used [oversight] methods effectively to enhance oversight of 287(g) operations and activities. As a result, ICE has limited its ability to ensure that local jurisdictions are conducting 287(g) activities as intended.”).

298. *Id.* at 22 (“The current process for reviewing applications for 287(g) program participation does not include an appropriate level of emphasis on civil rights issues.”)

299. *Id.* at 25-26 (“To address concerns regarding arrests of individuals for minor offenses being used as a guise to initiate removal proceedings, DHS officials said that the MOA requires participating LEAs to pursue all criminal charges that originally caused an individual’s arrest. However, ICE does not require LEAs to collect and report on the prosecutorial or judicial disposition of the initial arrests that led to aliens’ subsequent immigration processing under the 287(g) program. This information could help to establish how local prosecutors and judges regarded an officer’s original basis for arresting aliens. Without this type of information, ICE cannot be assured that law enforcement officers are not making inappropriate arrests to subject suspected aliens to vetting by 287(g) officers for possible removal.”).

300. *Id.* at 26.

301. *Id.* at 28.

302. *Id.* at 26-27.

303. *Id.* at 43 (“Before entering into an IGSA, ICE conducts a physical inspection of the facility to ensure compliance with ICE detention standards, and examines the cost-effectiveness of the agreement. Thereafter, ICE conducts annual inspections of facilities authorized to house ICE detainees. These annual inspections assess the facilities’ compliance with ICE custody standards to ensure safe, secure, and humane conditions for detainees. According to data ICE provided us, it has detained aliens identified through the 287(g) program at three facilities that were not authorized by ICE, and therefore not subject to inspection.”).

304. *Id.* at 36-37; *see also* Editorial, *Too Broken To Fix*, *supra* note 293 (“Police officers can’t fight crimes when communities they serve fear and avoid them.”).

program was to identify individuals for removal who pose a public safety concern.³⁰⁵ Local law enforcement officials are only permitted to use 287(g) authority when individuals are arrested for violating local criminal laws.³⁰⁶ Nevertheless, 287(g) officers have arrested individuals for federal immigration violations without prior arrests on local charges.³⁰⁷ The data gathered in the report reveal that approximately half of all of the arresting offenses were not high-risk crimes, showing that the 287(g) resources were not actually focused on individuals “who pose the greatest risk to the public.”³⁰⁸ ICE has mostly concurred with the recommendations from the report, with the notable exception of collecting data to monitor potential civil rights abuses.³⁰⁹ While these recommendations have the potential to address areas with critical problems, critics believe DHS should end the failed 287(g) program.³¹⁰

In 2008 ICE implemented Secure Communities, a new program intended to assist local communities with the identification and removal of “criminal aliens,” including federal detention facilities, but focusing on state and local prisons and jails.³¹¹ The four goals of this program are to: (1) identify and process all criminal aliens in detention subject to removal, (2) enhance ICE detention strategies, (3) reduce the time that a detainee stays in ICE custody before removal, and (4) maximize cost-effectiveness and long-term success through reduced recidivism.³¹² The main goal of the Secure Communities program is to remove criminal non-citizens who pose the greatest threat to public safety.³¹³ The program enables the Department of Justice and the Department of Homeland Security to share data and allows jails to submit fingerprints not only to criminal databases, but also to immigration databases.³¹⁴

305. U.S. DEP’T OF HOMELAND SEC., *supra* note 205, at 8.

306. *Id.* at 36-37.

307. *Id.* at 37.

308. *Id.* at 9.

309. *Id.* at 53 (“ICE Response: ICE does not concur, but is assessing the goal of this recommendation to ensure that ICE’s 287(g) partners protect the civil liberties of every individual they encounter. OIG recommends the collection of data similar to a consent decree applicable to agencies that have engaged in racial profiling. This would require the collection of data beyond that which DHS and DOJ require of their own law enforcement officers and agencies. Although ICE strongly opposes racial profiling and adheres fully to all data collection requirements of federal law, the collection of this data raises logistical issues including whether a TFO would report all interactions, just interactions predicated solely on 287(g) authority, and how the TFO would distinguish in a meaningful way while performing his or her daily duties.”).

310. Editorial, *Too Broken to Fix*, *supra* note 293 (“We are skeptical that the 287(g) program can ever be fixed. And we are sure that the returns are too low and the costs – in abuses and undermining law enforcement – are too high to make it worth trying. The Homeland Security Department should pull the plug on the 287(g).”); see also Brown, *Student’s Arrest Tests Immigration Policy*, N.Y. TIMES, May 15, 2010, A14 (quoting Mary Bauer, legal director for the Southern Poverty Law Center, “This is a civil rights disaster . . . We call on the Obama administration to end 287(g).”); see also Mimi E. Tsankov & Christina J. Martin, *Measured Enforcement: A Policy Shift in the ICE 287(G) Program*, 31 U. LA VERNE L. REV. 403, 427 (2010) (“In the fall of 2009, a large and diverse group of immigrant rights, civil rights, and community organizations submitted a letter to President Obama calling for an end to the 287(g) program.”).

311. U.S. IMMIGR. & CUSTOMS ENFORCEMENT, *supra* note 14, at 5.

312. *Id.*

313. *Id.* (“Secure Communities is targeting the worst of the worst, including criminals convicted of major drug crimes and/ or violent offenses such as robbery, rape and murder.”).

314. U.S. IMMIGR. & CUSTOMS ENFORCEMENT, SECURE COMMUNITIES, *available at* http://www.ice.gov/secure_communities/ (“[T]he fingerprints of everyone arrested and booked are not only checked against FBI criminal history records, but they are also checked against DHS immigration

DHS plans to expand the Secure Communities program, which likely will lead to an increase in the number of individuals detained.³¹⁵ An increased use of detention probably could lead to an increase in the number of human rights abuses.³¹⁶ Therefore, it seems that the expansion of Secure Communities and the 287(g) program will likely result in very large increases in the number of immigrants in detention facilities, as more and more local law enforcement officials and local jails collaborate with ICE to enforce immigration laws.

The 287(g) program has room for improvement, and the recently released Department of Homeland Security report on 287(g) agreements should help address many of the problems.³¹⁷ Since the number of detained immigrants will likely increase, there are additional concerns that the increased use of 287(g) agreements will raise the potential for human rights abuses in detention centers. The internal reports conducted by DHS are of great significance and demonstrate DHS's intention to improve the immigrant detention system. These reports document data and information that nonprofit organizations and NGOs often have difficulty collecting. With plans to introduce new standards in 2011, ICE is continuing its efforts to improve the immigrant detention system and attempting to address many of the concerns raised by critics. According to Andrew Strait, the new standards are a tremendous improvement over the current standards.³¹⁸ Yet, as previously noted, ICE does not plan to make the new standards legally enforceable.³¹⁹ ICE wants the flexibility and the ability to make changes if needed.³²⁰ As Strait explains, if ICE were to make its standards into regulations it would not be able to make changes because the process takes too long.³²¹ Unlike the current system, the lengthy regulatory process would prevent ICE from making any timely, necessary changes and reforms.³²²

VI. RECOMMENDATIONS

A. *Enforceable Standards*

The most crucial and urgent recommendation for the improvement of the detention system is to make ICE standards enforceable and legally binding. This will

records.”).

315. Anil Kalhan, *Rethinking Immigrant Detention*, 110 COLUM. L. REV. SIDEBAR 42, 57 (2010) (“By 2013, DHS hopes to implement Secure Communities in every local jurisdiction nationwide. As the government expands these enforcement initiatives, the number of potential detainees will continue to increase dramatically. In this context, the government will face considerable pressures not only to hold more noncitizens in custody, but to do so at minimal cost.”).

316. Stephen H. Legomsky, *The Detention of Aliens: Theories, Rules, and Discretion*, 30 U. MIAMI INTER-AM. L. REV. 531, 547 (citing an argument against mandatory detention based on the premise that pressure to find increased bedspace for detainees “forces INS to rely increasingly heavily on contracts with privately run facilities where some of the least humane conditions prevail.”).

317. See generally, U.S. DEP’T OF HOMELAND SEC., *supra* note 205.

318. Strait, *supra* note 141 (explaining that there is substantial improvement in cultural sensitivity and religious issues in the new standards; for example, specific dietary restrictions in observance of religious practices are outlined and explained).

319. *Id.*

320. *Id.*

321. *Id.* (explaining that if the 2008 Standards had been made into enforceable regulations, ICE would not be able to carry out detention reform like it is currently doing).

322. *Id.*

increase the legitimacy of the detention system by improving accountability and allowing detainees recourse, if and when they suffer human rights abuses. While ICE may contend that it is capable of policing itself, none of their actions up through the present supports this contention. Until ICE's internal reports begin to show effective monitoring, oversight, and compliance, questions regarding ICE's ability to carry out this task will remain.³²³ Furthermore, enforceable standards will assist in identifying ICE officers, as well as local law enforcement officers who enforce federal immigration laws, who are not in compliance with the standards and correct such behavior patterns or permanently remove such individuals from office.

As an alternative to making ICE's PBNDS legally enforceable, ICE could provide legally enforceable standards such as medical care and leave other standards as discretionary. This provides ICE the flexibility that it wants, yet still protects crucial areas where discretion is dangerous by providing legally enforceable standards.³²⁴ Until the current ICE standards are converted into enforceable regulations, the current ICE standards should be monitored more effectively. ICE has begun to do this and it is reflected in its annual reports. This is an important measure because ICE sets forth what it asserts is an honest assessment of the current state of its standards enforcement. Nevertheless, non-ICE groups should have access to detention facilities to monitor the implementation of the new standards as a way to check against ICE's standards enforcement.

B. Training

Another extremely important aspect of these new standards is to ensure that the subcontracted and private-prison-contracted facilities are clear on what the new standards entail, and that ICE train them regarding the implementation of such standards. This is especially important given that the majority of detainees are held in non-ICE facilities. ICE could station employees at these facilities to have more direct oversight and to decrease the distance existing between ICE and non-ICE facilities.

In addition to making sure that the subcontracted facilities and private prison officers receive the necessary training, it is crucial that ICE officers receive adequate training. This includes expanded cultural sensitivity and international human rights law trainings. Even though ultimately ICE is responsible for violations of international human rights law, it is important that ICE employees or subcontracted employees are aware of such international norms, and it is equally important that these norms are included in ICE's standards and policies.

Another area where training is imperative is in the implementation of the 287(g) agreements. As a report from the Congressional Research Services noted, "[s]ince federal immigration law is a complex body of law, it requires extensive training and expertise to adequately enforce."³²⁵ The need for training is particularly

323. Editorial, *Secrets of the Immigration Jails*, The N.Y. Times, Jan. 20, 2010, at A20 ("[The agency] is still resisting adequate outside oversight and the adoption of legally binding detention standards, insisting instead that it can best change its own rules and police itself. The new disclosures about the agency's deep-set culture of shameful secrecy do not inspire confidence.").

324. See Mukhopadhyay *supra* note 158, at 708-709.

325. SEGHETTI ET AL., *supra* note 84, at 22 ("Some argue that there are a variety of documents that allow someone to be legally present in the United States and state and local enforcement officials do not have the necessary training on how to differentiate between those documents.").

important in the context of local law enforcement officials taking on the enforcement of immigration laws. Moreover, improved standards' implementation monitoring will create an ongoing process by revealing information about other areas that need improved training.

C. Improving Access to Legal Representation

Non-citizens do not have access to government appointed and funded, legal representation in immigration proceedings.³²⁶ If the federal government were to offer legal representation to indigent non-citizens or to improve immigrant detainees' access to legal representation, basic due process rights would be guaranteed, and the process of removal would become more efficient and less costly.³²⁷ Analyzing the problems associated with immigrants not having the right to appointed counsel when faced with removal proceedings, one report notes, "It is somewhat counterintuitive that . . . an indigent immigrant who has lived [in the United States] legally since childhood is entitled to a lawyer when he faces a night in jail for a minor criminal offense but when that same person faces lifetime exile from the U.S. citizen family, his career, and his home, he is not entitled to any legal assistance at all."³²⁸

The Constitution Project report suggests a list of situations where an immigration judge should be required to appoint counsel for indigent non-citizens in removal proceedings.³²⁹ This includes situations where legal and factual issues are complex, where non-citizen children are unaccompanied by an adult, and where non-citizens are unable to represent themselves due to mental illness, extreme emotional distress, or other disability.³³⁰ It also includes situations where non-citizens seek relief under the Convention Against Torture where removal would impose a greater than usual hardship due to the extent of the non-citizen's ties to the United States, and/or lack of ties to the individual's country of origin.³³¹ This last factor is particularly relevant for non-citizens who immigrated to the United States at a very young age and have lived in the United States for most of their lives, and do not have ties to their country of origin and may not even speak the language of that country.³³²

Effective communication is an essential part of ensuring that detainees receive adequate legal representation. If attorneys are ill equipped to address language barriers, they are required to get a translator or interpreter. Creating a network of translators and interpreters along with a community list of lawyers would be a huge asset for many of the detainees who have legitimate cases but lack the necessary language abilities.

Finally, the bond system could be improved. If the amount of bond required were reduced to reflect the economic realities of the majority of individuals who end up in detention centers, it could improve the detainees' ability to obtain legal

326. HUMAN RIGHTS WATCH, *supra* note 6, at 8.

327. *Id.*

328. Markowitz, *supra* note 156, at 547.

329. THE CONST. PROJECT, *supra* note 2, at 9.

330. *Id.*

331. *Id.*

332. Brown, *supra* note 310 (explaining that a 21 year-old college student who was brought to the U.S. by her parents at age 11 was arrested in Atlanta, Georgia for driving without a license. She was detained while facing deportation. The local officials were authorized to enforce federal immigration laws under a 287(g) agreement).

representation because it is much more difficult to secure legal representation from inside a detention facility.³³³

D. Increased Use of Alternative Methods to Detention

The expanded use of immigrant detention is characterized by substantial monetary costs and human rights abuses.³³⁴ An increased focus on alternative methods to detention can reduce both these costs. For example, allowing immigrant detainees to remain in their home communities increases the chances that they will be able to secure legal representation and assist in the preparation of their case. By allowing immigrants to remain in their home communities, ICE could use telephone check-ins or house visits as alternatives. Also, electronic monitoring, such as ankle bracelets, could be used for individuals who may require increased monitoring. ICE should explore various alternatives to detention, not only because it can reduce costs, but also because detention may be unnecessary for some individuals.³³⁵

VII. CONCLUSION

While ICE contends that human rights abuses are no worse in non-ICE immigrant detention facilities than ICE facilities, the fact that the majority of the immigrant detention centers are non-ICE facilities creates unavoidable challenges and distances for ICE with respect to direct oversight and monitoring. The new Performance Based National Detention Standards may be a great improvement over the current standards; however, until ICE has direct control and oversight of immigrant detention centers, the increasing potential for human rights abuses looms.³³⁶

Even if ICE owned and operated all immigrant detention centers, the risk of potential human rights abuses would still be present. Nevertheless, it would be an easier task to implement ICE standards and policies in ICE facilities employed by ICE staff than in private prisons or subcontracted detention facilities. The nature of contract law and the practice of mixing the private prison industry with the government's immigrant detention role transforms immigrant detainees from human beings to commodities with a price tag per person per night.

Furthermore, the potential that employees of local jails and prisons lack the adequate training and background to run immigrant detention facilities is a great concern, even if such employees receive some ICE training and are given copies of the ICE standards that bind them. Because ICE is a unified governmental agency, the training and policies, both internal and external, have a certain level of quality control that is not present in the mixture of ad-hoc detention facilities.

It is likely that ICE does not have the resources or the budget to transform the entire immigrant detention system into one that ICE owns and operates entirely. However, an increased emphasis on alternatives to detention will allow ICE to

333. See Schoenholtz, *supra* note 155.

334. Legomsky, *supra* note 316, at 541 ("Probably the most self-evident cost of detention is the human cost. By definition, detention is a deprivation of liberty. Detainees cannot work, cannot go to school, cannot meaningfully socialize, cannot travel beyond the bounds of their facilities, and are cut off from family and friends.").

335. See AM. BAR ASS'N COMM'N ON IMMIGRATION, *supra* note 182 and accompanying text.

336. At the time that this article went to press, ICE had yet to release new PBNDS.

maintain its immigrant detention and removal objectives and save a substantial amount of money that could be used to build more ICE immigrant detention facilities.

With an effective long-term plan ICE may be able to eventually shift the current immigrant detention system so that it owns and operates the majority of immigrant detention centers instead of subcontracting or using private prison facilities. Until then, improved PBNDS enforceable standards, and increased oversights are important factors to eliminate human rights abuses in immigrant detention centers in the United States.