



IMMIGRANT DETENTION IN AMERICA- CIVIL OFFENSE, CRIMINAL DETENTION

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Prologue

We have all, at least in the Latino community, heard anecdotes and horror stories of people being deported after an arrest or stop by the police. As one of these Latinos, my stake in the subject is personal.

In 2008, like many other Latinos, I felt honored and thrilled to have Barack Obama as our new President. I was so excited that I flew to Washington D.C. for his inauguration, and despite the freezing temperatures, I could not have been more proud standing in front of our nation's Capitol in order to welcome our new President. In 2008, the Latino community voted for President Obama in throngs, largely in part due to the promise of comprehensive immigration reform. Many of us knew that change would not come easily given the political landscape, but I don't think that the Latino community ever expected things to worsen drastically, as they did, upon Obama's re-election. Since Obama's election in 2008, deportations have reached record highs, rising to approximately 400,000 deportations per year since 2009. This has left countless families in pieces, and has touched every Latino/a in America.

As a naturalized citizen, I am one of the lucky ones. Unlike the generation of Dreamers, each of whom have worked just as hard, if not harder than myself to get ahead and make something of themselves in this new country, I am lucky in that I do not have to fear that everything I have worked for could be taken at a moment's notice. I do not have to live in fear that my parents might be deported, leaving me to fend for myself. I do not have to fear that upon completing my degree I may not be able to find a job because of my undocumented status. To some extent, I got to breeze through the system, but even so, I have not been able to turn a blind eye to the nightmare that many of those who still carry the undocumented label have had to endure. Going through my undergraduate career, I heard stories of undocumented classmates who had to sleep on the streets, or wherever they could find a safe space, because they could not qualify for financial aid and so were totally on their own to secure funding for their education. In recent months we have heard of Dreamers "coming out," an idea that was borrowed from the LGTB movement, and just like the Dreamers who recently "came out," these students for years had to keep their undocumented status hidden from friends and professors.

The reality of this new immigration regime became crystal clear when I worked as a teacher in San Jose, CA, as part of my Teach for America service. I know that as a teacher you are not supposed to have favorite students, but I could not help myself. Juan, one of my favorites, was always a ray of sunshine in my classroom. His jokes always made the whole class laugh, myself included, and although he was more talkative than I would have liked being his teacher, our class as a whole was better because he was in it.

One day after school, Juan's dad came to visit. My kiddos knew that I had hopes of going to law school so I could become an attorney, and Juan's dad came to me for advice when he received a phone call informing him that his wife, Juan's mom, was being held in detention awaiting her deportation. Juan's dad thought I could help, but as a 22-year-old with hopes of going to law school, I did not know what to do, and my impotence in the face of the situation enveloped me. This was a family that was very united and that I knew well – having spent various afternoons in their home eating delicious Salvadorian food as Juan's mom and I discussed Juan's "travesuras," (classroom mischief). It was obvious that Juan's mom was the strongest pillar of the family, and I could not have imagined that this family would, like so many others, be torn apart due to cruel immigration policies.

After Juan's mom was deported, the family fell apart. Juan became depressed and started acting out in class, while Juan's older brothers were being cooed by local gangs. Juan's dad was having a really hard time playing bread-winner and mom at the same time. Not being able to do much to help the family, when Juan's dad asked me if I could accompany him to speak to an immigration attorney, I did not hesitate in saying yes. Juan's dad informed me that his family had already spent tens of thousands of dollars on attorney's fees. Juan's dad and siblings all had valid visas to live in the U.S., but Juan's mom, because no-one had explained to her the potential immigration consequences of criminal convictions, was not so fortunate.

What Juan's mom, and countless other undocumented persons who have encounters with law enforcement, did not know was that by taking a guilty plea, she would be expediting her deportation process due to the Obama administration's radical expansion of a program by the name of Secure Communities. Secure Communities has furthered the criminalization of immigration in America, arguably in a drastic manner. Furthermore, when Juan's mom had her encounter with the law, Padilla v. Kentucky had not yet been decided and defense

attorneys had no duty to explain to their clients the negative repercussions that might follow for undocumented persons who were charged with crimes.² What Juan's mom was told was that it would be better for her to take a guilty plea, pay a fee, and go on with her life. What she did not know, and no one informed her of, was that taking a guilty plea would make her a "criminal alien," and thereby she would be targeted by the government as a deportation priority. U.S. Immigration and Customs Enforcement (ICE) recently published their FY 2012 deportation figures and proudly boasts that 55% of deportations were criminal alien deportations and that 96% of deportations were priority removals. And yet, I have a hard time seeing how Juan's mom fits the picture of the type of criminal aliens that should be targeted for deportation.

As we anxiously wait for news of impending comprehensive immigration reform, it is important that we keep in mind how Secure Communities will come into play. The current enforcement of the program is not compatible with substantive comprehensive immigration reform. Additionally, we cannot continue to have a deportation target of 400,000 people per year and expect to have real "comprehensive immigration reform."

² It should be noted that prosecutors have no such duties.

"The bosom of America is open to receive not only the opulent and respectable stranger, but the oppressed and persecuted of all nations and religions, whom we shall welcome to a participation of all our rights and privileges, if by decency and propriety of conduct they appear to merit the enjoyment."

-George Washington, December 2, 1783.

I. INTRODUCTION

In the following pages I will describe the current state of deportations and detention centers in the United States, highlighting important statistics and discussing political and practical implications raised by the changing face of deportations in the U.S.

I will tie in the current state of deportations and detention centers in America to the recent radical expansion of Secure Communities, a government program that has greatly facilitated the recent exponential deportations surge. I will start by briefly describing Secure Communities, and then ground the program it in a historical context. I will then explain the technicalities of how the program is implemented, discuss its effect in furthering the criminalization³ of immigration, and offer some practical ideas of what can be done to rectify the harm caused thus far by the program.

³ In this paper I will be arguing that Secure Communities works to further the criminalization of immigration. Various legal scholars have written extensively about the criminalization of the immigration process, and so the main focus of the argument of this research paper is not to argue that Secure Communities is the only force that is criminalizing how immigration is handled in America, but to argue that the reach and extent of the program will work to greatly increase the already present criminalization of the system. To learn more about the criminalization of immigration generally, see Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH & LEE L. REV. 469, 482-89 (2007), Juliet P. Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, American University Law Review, Vol. 56, p. 367, (2006); Jennifer M. Chacón, *Overcriminalizing Immigration*, Journal of Criminal Law and Criminology, Vol. 102, No. 3 (2012); Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 613 (2003); Adam B. Cox & Thomas J. Miles, *Policing Immigration*, (Electronic copy available at: <http://ssrn.com/abstract=2109820>), among others.

I will also look into the current state of detention facilities in the United States, and will argue that a system that is supposed to be civil in nature and have civil consequences (it is not supposed to be punishment) is actually criminal in substance. I will argue that conditions in detention facilities across America are criminal in nature, and thus the protections and rights that apply to criminal punishment should also attach to civil detention for immigration violations, especially now that it seems that Secure Communities' implementation will be mandatory throughout the nation.⁴

Finally, I will argue that the current state of immigration detention in the United States is in clear violation of international treaty obligations, and will offer practical and easy-to-implement ideas as to how to better the current state of detention in America so we can abide by our international treaty obligations.

A. THE CURRENT STATE OF DEPORTATIONS IN THE UNITED STATES

Since President Barack Obama came into office in 2008, deportation numbers in the United States have reached historic highs. During President Obama's first term in office

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approximately 1.5 million people were deported,⁶ and some in the media have gone so far as to refer to President Obama as "Deporter-in-Chief."⁷ The dramatic surge in deportations

In doing my research, I did not find many others who had worked on the criminalization of immigration and Secure Communities from the perspective of my research paper, which is why I decided to spend the time writing about such an important matter. There were others who looked at the criminalization of Immigration, and mentioned Secure Communities briefly (see Angelica Chazaro, Rolling Back the Tide: Challenging the Criminalization of Immigrants in Washington State, *Seattle Journal for Social Justice*, 11 *Seattle J. for Soc. Just.* 127, (2012)).

⁴ See Memorandum re: Secure Communities- Mandatory in 2013, U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement, October 2, 2010.

⁶ See ICE Total Removals Through August 25th, 2012, U.S. Immigration and Customs Enforcement,

can be explained in part by a new U.S. Immigration and Customs Enforcement (ICE) agency “goal,”⁸ or as some in the media have called it, “quota,” of 400,000 removals per year.⁹ ICE has argued that because it has the funding to deport 400,000 people, that figure is a Congress-mandated target that ICE is obligated to meet.¹⁰

In 2012, ICE not only successfully met its set agency target, but surpassed it by approximately 10,000 deportations – having removed 409,849 individuals for the year. ICE states that “ninety-six percent of these removals fell into one of ICE’s enforcement priorities, a record high.”¹¹ Although facially this seems like quite a feat, one needs to analyze these figures more carefully.

Of the 409,849 individuals who were deported in 2012, 225,390 (55%) were reported to be felons.¹² A breakdown of the offenses that individuals were deported for shows that 1,215 (0.3%) were convicted of homicide; 5,557 (1.3%) were deported for sexual offenses; 40,448 (9.9%) of drug offenses –a large bulk of all deportations; and

<https://www.ice.gov/doclib/about/offices/ero/pdf/ero-removals1.pdf>, accessed 2/15/13.

⁷ See Alex Nowrasteh, President Obama: Deporter-In-Chief, Forbes Op-Ed, 7/30/2012, (<http://www.forbes.com/sites/alexnowrasteh/2012/07/30/president-obama-deporter-in-chief/2/> accessed 2/15/13); Bryan Llenas, Ad Paints Obama as ‘Deporter-in-Chief’, Fox News Latino, August 8, 2012, (<http://latino.foxnews.com/latino/politics/2012/08/08/spanish-ad-paints-obama-as-deporter-in-chief/>, accessed 2/15/13); see also “Deporter in Chief” video, (<http://videos.huffingtonpost.com/the-deporter-in-chief-517438996>, accessed 2/15/13)

⁸ See DRO Taskings Removal Goals Memo, Message from James M. Chaparro to Field Office Directors and Deputy Office Directors, February 22, 2010.

⁹ Spencer S. Hsu and Andrew Becker, ICE officials set quotas to deport more illegal immigrants, Washington Post, March 27, 2010, (http://www.washingtonpost.com/wp-dyn/content/article/2010/03/26/AR2010032604891_2.html?sid=ST2010032700037 accessed 02/15/2013); Jeff Smith, Filling Quotas or Setting Priorities? ICE Announcement to Increase Deportations Raises Concerns, GRIID, January 29, 2013, (<http://griid.org/2013/01/29/filling-quotas-or-setting-priorities-ice-announcement-to-increase-deportations-raises-concerns/>, accessed 2/9/13); ICE Scandal of the Week- 400,000 Deportations Goal in FY10, New York Civil Liberties Union, (<http://www.nyclu.org/content/ice-scandal-of-week-400000-deportations-goal-fy10>, accessed 2/9/13).

¹⁰ Deportation Hits Another Record Under Obama Administration, Elise Foley, 12/21/2012, Huffington Post, (http://www.huffingtonpost.com/2012/12/21/immigration-deportation_n_2348090.html, accessed 2/17/13).

¹¹ ICE Enforcement and Removal, Removal Statistics, (<http://www.ice.gov/removal-statistics/>, accessed 2/9/13).

¹² ICE Enforcement and Removal, Removal Statistics, Criminal Aliens, (<http://www.ice.gov/removal-statistics/>, accessed 2/9/13).

36,166 (8.8%) for D.U.I.s.¹³ Falling under the non-criminal deportees, 69,957 (17.1%) were recent border crossers, and 96,828 (23.6%) aliens were either “repeat egregious immigration violators” or immigration fugitives.¹⁴

These numbers show that a large number of individuals were deported for drug and D.U.I. offenses, or for being recent or repeat immigration violators, and not for more serious crimes. This raises serious concerns as to the proportionality of the punishment that follows such types of offenses. Our criminal system is supposed guided by the principles of proportionality, necessity, and legality- and punishments for immigration law violations should not be exempt from these expectations just because the immigration law violations are labeled as civil, rather than criminal, punishments. It is questionable whether the punishment for immigration law violations, as it is applied today, is necessary or even remotely proportional.

The recent surge in deportations does not just have political implications – there are also important practical implications that come into play with such a dramatic increase in the number of deportees. An important question that the recent surge of detainees raises (whether they are awaiting deportation or their immigration hearing) is where these thousands of individuals will be kept, and under what conditions.

¹³ ICE Enforcement and Removal, Removal Statistics, Criminal Aliens, (<http://www.ice.gov/removal-statistics/>, accessed 2/9/13).

¹⁴ ICE Enforcement and Removal, Removal Statistics, Repeat and Egregious Immigration Law Violators and Immigration Fugitives, (<http://www.ice.gov/removal-statistics/>, accessed 2/9/13).

B. THE CURRENT STATE OF DETENTION FACILITIES IN AMERICA

Immigrant detention facilities are the fastest growing incarceration system in the United States. In the past decade, about 3 million immigrants have been detained in detention centers.¹⁶ Since 2008, immigration detention centers have housed an average of approximately 34,000 detainees per day, and today's daily average stands at approximately

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36,000 per day.¹⁷ The U.S. Department of Homeland Security (DHS), through immigration detention, now incarcerates more people on an annual basis than any other state or federal agency.¹⁸

Individuals detained by ICE for immigration violations are in “civil detention,” meaning that they are incarcerated to ensure their presence at their deportation hearing, as well as to make sure they comply with the hearing’s order. Once behind bars, individuals caught up in the immigration detention machinery could spend anywhere from months to years locked away, many of them being torn from their families at a moment’s notice (and many times away from their U.S. citizen children and family members), while awaiting their deportation hearings.

¹⁶ Map: The U.S. Immigration Detention Boom, (<http://www.pbs.org/wgbh/pages/frontline/race-multicultural/lost-in-detention/map-the-u-s-immigration-detention-boom/> accessed 02/12/13).

¹⁷ Map: The U.S. Immigration Detention Boom, (<http://www.pbs.org/wgbh/pages/frontline/race-multicultural/lost-in-detention/map-the-u-s-immigration-detention-boom/>, accessed 2/11/13).

¹⁸ Unlocking Immigrant Detention Reform, Robert Koulish and Mark Noferi, The Baltimore Sun, 02/20/2013, (http://articles.baltimoresun.com/2013-02-20/news/bs-ed-immigrant-detention-20130220_1_mandatory-detention-immigration-detention-detention-costs, accessed 2/21/2013).

A detention center can range anywhere from a massive, privately run facility, to a couple of beds in a county jail. Individuals held in detention facilities can be there for a myriad of reasons – having been caught crossing the border, being an asylum seeker, being a person with or without criminal records that was stopped by ICE and was found to be illegally in the country, and “sometimes legal permanent residents detained on suspicion of being in the country illegally.”¹⁹

In 2012, DHS incarcerated over 429,000 non-citizens who were waiting for their detention hearing or to be deported – the cost to taxpayers for their detention coming at over \$2 billion a year.²⁰ ICE lists 81 detention facilities on their website, with California and Texas having the bulk of detention centers.²¹ Although these reported detention centers are indeed utilized by ICE, about 350 other facilities²² including privately run facilities, county jails, and other establishments all around the country are also employed, at a high cost to tax-payers, in the deportation of non-citizens who find themselves being deported or held in detention prior to a deportation hearing. According to the Detention Watch Network, about 50% of all immigration detention beds are run by private facilities, the same facilities that lobby immigrant detention laws and policies at the state and federal levels.²³

¹⁹ Map: The U.S. Immigration Detention Boom, (<http://www.pbs.org/wgbh/pages/frontline/race-multicultural/lost-in-detention/map-the-u-s-immigration-detention-boom/>, accessed 2/11/13).

²⁰ Unlocking Immigrant Detention Reform, Robert Koulisch and Mark Noferi, The Baltimore Sun, 02/20/2013, (http://articles.baltimoresun.com/2013-02-20/news/bs-ed-immigrant-detention-20130220_1_mandatory-detention-immigration-detention-detention-costs, accessed 2/21/2013).

²¹ U.S. Immigration and Customs Enforcement, Detention Facilities, (<http://www.ice.gov/detention-facilities/> accessed 2/13/13).

²² Fact Sheet: 2009 Immigration Detention Reforms, U.S. Immigration and Customs Enforcement, (<http://www.ice.gov/news/library/factsheets/reform-2009reform.htm>, accessed 3/2/13).

²³ Expose and Close, Report (2012), Detention Watch Network, p. 4.

The budget for detention centers now stands at more than \$2 billion, having increased by 134% since 2005.²⁴ According to the National Immigrant Justice Center, the federal government pays private detention centers, which run about 50% of all immigration detention beds,²⁵ between \$80 and \$120 per detainee per day, some estimates have that number at \$166 per day,²⁷ though actual detention bed “costs are in the \$30 range.”²⁸ ICE projects that for FYE 2012, the costs of bed per day will be around \$122.²⁹

Although the budget for detention centers has increased rapidly in recent years, the funding of deportation efforts is still a highly contentious subject.³⁰ Many see deportation funding as a burden on local and state government to act as an enforcer of federal civil immigration law. States, such as Texas and Arizona, have complained that they are alone being left to cover the cost of incarcerating undocumented persons, a burden that should be covered by the federal government.³¹ Illustrating such complaints is a letter that Texas Governor Rick Perry sent to Homeland Security Secretary Napolitano, in which he requested \$349 million to cover the cost of incarcerating undocumented persons in Texas.

²⁴ See ICE, Fact Sheet—Fiscal Year 2005, available at <http://www.ice.gov/doclib/news/library/factsheets/pdf/2005budgetfactsheet.pdf>; see also Map: The U.S. Immigration Detention Boom, (<http://www.pbs.org/wgbh/pages/frontline/race-multicultural/lost-in-detention/map-the-u-s-immigration-detention-boom/>), accessed 2/11/13)

²⁵ Expose and Close, Report (2012), Detention Watch Network.

²⁷ Unlocking Immigrant Detention Reform, Robert Koulisch and Mark Noferi, The Baltimore Sun, 02/20/2013, (http://articles.baltimoresun.com/2013-02-20/news/bs-ed-immigrant-detention-20130220_1_mandatory-detention-immigration-detention-detention-costs), accessed 2/21/2013).

²⁸ Map: The U.S. Immigration Detention Boom, (<http://www.pbs.org/wgbh/pages/frontline/race-multicultural/lost-in-detention/map-the-u-s-immigration-detention-boom/>), accessed 2/11/13).

²⁹ Department of Homeland Security, Fiscal Year 2012 Congressional Budget Justification, U.S. Immigration and Customs Enforcement, Salaries and Expenses, Custody & Operations, p. 57. The daily cost of \$122 includes costs of beds, healthcare, guard contracts, facility costs, and administrative overhead; see also HRF Jails and Jumpsuits at p. 13.

³⁰ See also Memorandum of Law in Support of Plaintiff’s Motion for Preliminary Injunction Compelling Defendants to Produce Limited “Opt-Out” Records Responsive to Plaintiff’s FOIA Requests- *Harm to States Determining Whether to Implement Secure Communities & Harm to Localities Trying to Opt-Out of Secure Communities*, National Day Laborer Organizing Network v. United States Immigration and Customs Enforcement Agency (filed 10/28/10), Case 1:10-CV-3488 (SAS)(KNF).

³¹ See Janet Napolitano: Deportation Numbers Will Be ‘Very Robust’ Under New Policy, Huffington Post, 8/30/11, (http://www.huffingtonpost.com/2011/08/30/janet-napolitano-deportation-undocumented-immigrants_n_941804.html), accessed 2/17/13).

³² This letter was uncannily similar to a letter that Napolitano herself sent to DHS for the very same reasons before becoming Homeland Security Secretary.³³

Not only is this a concern for states who are finding themselves having to cover the costs of employing what is largely understood to be a federal endeavor, but tax payers should also be concerned about having to bear the brunt of the cost of detaining hundreds of thousands of individuals on a daily basis, especially when there are workable alternatives to detention (discussed in later sections).

B.1. Moving Forward- There is Hope

In the following pages I will argue that there are numerous cost-effective alternatives to detention, especially since the deployment of information sharing programs,

In 2012, the Obama administration spent approximately \$18 billion on immigration enforcement, “significantly more than its spending on all the other major federal law enforcement agencies combined.”

such as Secure Communities, within DHS. The current method of addressing immigration violation concerns is not only tearing families apart and coming at a high cost to personal dignity and liberty interests as well as eroding our legal legitimacy,³⁴ but it also is quite

literally coming at a very high cost to states and tax-payers. In general, the current application and enforcing immigration law is expensive. Just in 2012, the Obama administration spent approximately \$18 billion on immigration enforcement, “significantly

³² Janet Napolitano: Deportation Numbers Will Be 'Very Robust' Under New Policy, Huffington Post, 8/30/11, (http://www.huffingtonpost.com/2011/08/30/janet-napolitano-deportation-undocumented-immigrants_n_941804.html), accessed 2/17/13).

³³ Janet Napolitano: Deportation Numbers Will Be 'Very Robust' Under New Policy, Huffington Post, 8/30/11, (http://www.huffingtonpost.com/2011/08/30/janet-napolitano-deportation-undocumented-immigrants_n_941804.html), accessed 2/17/13).

³⁴ For Example see Hirokazu Yoshikawa & Jenya Kholopstseva, Unauthorized Immigrant Parents and Their Children’s Development- a Summary of the Evidence (March 2013), Migration Policy Institute.

more than its spending on all the other major federal law enforcement agencies combined,” and an amount about 15 times greater than what was spent 1986 on immigration enforcement.³⁵

The take-away is that it does not have to be this way. There are many more humane, ethical, legal, and cost-effective tools that Congress and the Executive ought to be utilizing, especially now that the possibility of comprehensive immigration reform is closer to becoming a reality. The challenge will be for Congress and the Executive to study and utilize these tools, as well as for every single one of us to demand that a more humane and moral alternative to detention be applied.

C. SECURE COMMUNITIES- THE CRIMINALIZATION OF IMMIGRATION

For ICE to meet its stated agency goal of 400,000 annual deportations, the United States has not only needed a place to house the increased number of detainees prior to their deportation, but has also needed to find foot-soldiers to help in reaching the desired deportation numerical target. In recent years, the number of immigration enforcement agents on the ground has increased rapidly, especially at the border.³⁶ Along with increasing the number of detention beds and immigration enforcement agents, the government consequently also needed a way to expand its access to as many undocumented individuals as possible- its solution was the radical expansion of Secure Communities.

³⁵ Julia Preston, Huge Amounts Spent on Immigration, Study Finds, Jan. 7, 2013, New York Times (available at: http://www.nytimes.com/2013/01/08/us/huge-amounts-spent-on-immigration-study-finds.html?_r=0, accessed on 05/09/2013); U.S. Spends More on Immigration Enforcement than on FBI, DEA, Secret Service & All Other Federal Criminal Law Enforcement Agencies Combined, Press Release, Migration Policy Institute (available at: www.migrationpolicy.org/news/2013_1_07.php, accessed 05/09/2013).

³⁶ Remarks by President Barack Obama on Comprehensive Immigration Reform, The White House, Office of the Press Secretary, Jul 1, 2010 (available at: www.whitehouse.gov/the-press-office/remarks-president-comprehensive-immigration-reform).

While assessing policies for the removal of undocumented persons, the government made it a point to prioritize the tracking-down and removal of those with criminal convictions.³⁷ To achieve this goal, the Obama administration seriously revamped Secure Communities – a program that was started by the Bush Administration in March 2008.³⁸ John Morton, the present ICE Director, describes Secure Communities as “an important tool in ICE’s efforts to focus its immigration enforcement resources on the highest- priority individuals who pose a threat to public safety or national security, as well as on other priority individuals.”

C.1. Historical Context of Secure Communities

In 2003, ICE, along with other governmental agencies, were formed under the then new Department of Homeland Security (DHS). The U.S. Customs Service and the Immigration and Naturalization Service (INS) were merged to create ICE, which is today DHS’s principal investigative body and the second largest investigative agency of the federal government.³⁹ The Enforcement and Removal Operation (ERO) component of ICE is charged with enforcing the U.S.’s civil immigration laws and with immigrant removals.⁴¹

³⁷ A recent report by the Migration Policy Institute concludes that immigration control has become “the federal government’s highest criminal law enforcement priority,” given the vast resources that the government has devoted to the monitoring, detention, and deportation of individuals. *See* U.S. Spends More on Immigration Enforcement than on FBI, DEA, Secret Service & All Other Federal Criminal Law Enforcement Agencies Combined, Press Release, Migration Policy Institute (available at: www.migrationpolicy.org/news/2013_1_07.php, accessed 05/09/2013).

³⁸ Secure Communities by the Numbers: An Analysis of Demographics and Due Process, Aarti Kohli, Peter L. Markowitz, and Lisa Chavez (October 2011), The Chief Justice Earl Warren Institute on Law and Social Policy-University of California, Berkeley Law School, p. 1.

³⁹ U.S. Immigration and Customs Enforcement, John Morton Statement Regarding a Hearing on “U.S. Immigration and Customs Enforcement Fiscal Year 2013 Budget Request” Before the U.S. House of Representatives Committee on Homeland Security Subcommittee on Homeland Security, March 8, 2012, p. 2.

⁴¹ U.S. Immigration and Customs Enforcement, John Morton Statement Regarding a Hearing on “U.S. Immigration and Customs Enforcement Fiscal Year 2013 Budget Request” Before the U.S. House of Representatives Committee on Homeland Security Subcommittee on Homeland Security, March 8, 2012, p. 3.

According to ICE, since the restructuring of agencies charged with immigration enforcement that led to ICE's creation, the agency has focused its energy on the removal of individuals falling into the agency's highest priorities criteria— "namely aliens

When ICE was placed within the structure of DHS, the result was that the distinctions between civil and criminal immigration enforcement were blurred.

who pose dangers to national security or risks to public safety; recent illegal entrants; repeat violators of immigration law; and aliens who are fugitives from justice or otherwise obstruct immigration controls."⁴² Unfortunately, when ICE was placed within the structure of DHS, the result was that the distinctions between civil and criminal immigration enforcement were blurred,⁴³ leading to many of the problematic aspects of immigration law that we now face.

Since the restructuring of the immigration framework, ICE has been hard at work making sure that it fulfills its mandate to locate, monitor, and remove persons deemed to be illegally in the U.S. Since 1996, annual deportations have increased over 400%, and since ICE's inception, deportation figures have more than doubled.⁴⁴ Current deportation figures

Since 1996, annual deportations have increased over 400%.

stand at an all time high. Naturally, to meet the higher agency-set deportation targets, DHS had to increase the number of agents responsible for carrying out these deportations. Since 2004, the number of border patrol agents increased by nearly

⁴² U.S. Immigration and Customs Enforcement, John Morton Statement Regarding a Hearing on "U.S. Immigration and Customs Enforcement Fiscal Year 2013 Budget Request" Before the U.S. House of Representatives Committee on Homeland Security Subcommittee on Homeland Security, March 8, 2012, p. 10.

⁴³ Map: The U.S. Immigration Detention Boom, (<http://www.pbs.org/wgbh/pages/frontline/race-multicultural/lost-in-detention/map-the-u-s-immigration-detention-boom/>, accessed 2/11/13).

⁴⁴ Secure Communities by the Numbers: An Analysis of Demographics and Due Process, Aarti Kohli, Peter L. Markowitz, and Lisa Chavez (October 2011), The Chief Justice Earl Warren Institute on Law and Social Policy-University of California, Berkeley Law School.

85%⁴⁵ – not surprisingly, the increase of boots on the ground led to higher numbers of people being detained, which consequently coincided with the increase in demand for immigrant detainees beds.

Also feeding the demand for more beds to house detainees, was the end to “catch and release” – a program that had been enforced until its termination in 2005. Under this program, illegal immigrants without criminal records were given a summons to attend their immigration hearing, and consequently released back into the community, not held in detention as is the current practice. The end of “catch and release” came at great cost to states and tax-payers. Immigrants, rather than being allowed back into the community until their hearing date, were now to be held in detention until their deportation hearing. The cost of enforcing Secure Communities to Los Angeles County alone is \$26 million a year.⁴⁶ Since the end of catch and release, the number of beds utilized for detention in the Southwest increased by 85% – from 18,000 beds in 2005 to 33,000 in 2011.⁴⁷

The cost of enforcing Secure Communities to Los Angeles County alone is \$26 million a year.

C.2. Immigration Enforcement circa 2013

Secure Communities was created in a post-9/11 context, with the goal of facilitating collaboration between law enforcement agencies and the FBI in order to better detect national security threats. Since the beginning of Secure Communities, its form and function has radically changed, especially under the new Obama Administration. Whereas in 2008

⁴⁵ Map: The U.S. Immigration Detention Boom, (<http://www.pbs.org/wgbh/pages/frontline/race-multicultural/lost-in-detention/map-the-u-s-immigration-detention-boom/>, accessed 2/11/13).

⁴⁶ Secure Communities Costs Los Angeles County More Than \$26 Million A Year: Report, 8/23/2012 http://www.huffingtonpost.com/2012/08/23/secure-communities-los-angeles_n_1824740.html

⁴⁷ Map: The U.S. Immigration Detention Boom, (<http://www.pbs.org/wgbh/pages/frontline/race-multicultural/lost-in-detention/map-the-u-s-immigration-detention-boom/>, accessed 2/11/13).

Secure Communities was only implemented in 14 U.S. jurisdictions,⁴⁸ today implementation stands at 97% (3,074 out of 3,181 jurisdictions).⁴⁹ By the end of 2013, Secure Communities is expected to have been activated in 100% of U.S. jurisdictions.⁵⁰

Today, implementation of Secure Communities stands at 97%. By the end of 2013, Secure Communities is expected to be activated in 100% of U.S. jurisdictions and according to legal memoranda, is projected to be mandatory across the country.

Another significant difference in the current form of the program is that whereas before, states and individual jurisdictions could “opt-out”⁵¹ from participating in Secure Communities, the program is projected to be mandatory across the U.S starting in 2013,⁵² although the legal rationale for the legality of the mandatory nature of the program is shaky at best.⁵³

Secure Communities has raised many concerns in its wake. Concerns include the disconcerting disregard for the principles of proportionality and necessity, that have traditionally operated as a guide for our legal system. A report by Berkeley Law’s Chief Justice Earl Warren Institute on Law and Social Policy sheds light on the fact that over one third of those arrested under Secure Communities has a U.S. spouse or child;⁵⁵ 88,000

⁴⁸ U.S. Immigration and Customs Enforcement, John Morton Statement Regarding a Hearing on “U.S. Immigration and Customs Enforcement Fiscal Year 2013 Budget Request” Before the U.S. House of Representatives Committee on Homeland Security Subcommittee on Homeland Security, March 8, 2012, p. 11.

⁴⁹ ICE Documents Library, Activated Jurisdictions, Nationwide Cumulative Numbers, ICE Secure Communities, (www.ice.gov/doclib/secure-communities/pdf/sc-activated2.pdf accessed 02/08/13).

⁵⁰ See ICE Documents Library, Activated Jurisdictions, Nationwide Cumulative Numbers, ICE Secure Communities, (www.ice.gov/doclib/secure-communities/pdf/sc-activated2.pdf accessed 02/08/13).

⁵¹ For more information see “Opt Out” Background, ICE FOIA 10-2674.0002927 (available at ccrjustice.org/files/Opt-Out-Background.pdf).

⁵² See Memorandum re: Secure Communities- Mandatory in 2013, U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement, October 2, 2010. (images.politico.com/global/2012/01/icefoiaoptoutdocs.pdf, accessed 2/08/13).

⁵³ See also Memorandum of Law in Support of Plaintiff’s Motion for Preliminary Injunction Compelling Defendants to Produce Limited “Opt-Out” Records Responsive to Plaintiff’s FOIA Requests, National Day Laborer Organizing Network v. United States Immigration and Customs Enforcement Agency (filed 10/28/10), Case 1:10-CV-3488 (SAS)(KNF).

⁵⁵ See also Hirokazu Yoshikawa & Jenya Kholopstseva, Unauthorized Immigrant Parents and Their Children’s Development- a Summary of the Evidence (March 2013), Migration Policy Institute, arguing: “[T]here are a

- Over 1/3 of those arrested under Secure Communities has a U.S. spouse or child;
- Approximately 88,000 families with U.S. citizen members have been impacted by Secure Communities deportations;
- Approximately 3,600 individuals detained under Secure Communities were U.S. citizens.

estimated families with U.S. citizen members have been impacted by Secure Communities deportations; and approximately 3,600 individuals detained under Secure Communities were U.S. citizens.⁵⁶ These facts all point to a broken immigration system does not pay due respect to the principles of necessity or proportionality.

Some prosecution offices in the nation, such as the Seattle City Attorney’s office, have instituted policies to protect against this radical departure from adherence to the principle of proportionality that has caused more harm than good for our communities.⁵⁷ Prosecutors in the Seattle City Attorney’s office have requested courts to sentence defendants to a maximum of 364 days in jail for a gross misdemeanor instead of 365 days, thereby shielding “noncitizen defendants from the possibility of being deported on a single charge because receiving a sentence of 365 days or more, even if a defendant does not

substantial number of children, including many born in the United States, who are affected by current enforcement of immigration laws and would be affected by legalization of the unauthorized. According to recent estimates, 5.5 million US children reside with at least one unauthorized immigrant parent, and 4.5 million of these children are US-born. Given that children with unauthorized parents constitute nearly one-third of all children with immigrant parents and about 8 percent of all US children, *their well-being holds important implications for US society.*” (emphasis added)

⁵⁶ Secure Communities by the Numbers: An Analysis of Demographics and Due Process, Aarti Kohli, Peter L. Markowitz, and Lisa Chavez (October 2011), The Chief Justice Earl Warren Institute on Law and Social Policy-University of California, Berkeley Law School.

⁵⁷ For examples of the types of harm caused see footnote 43 above, Hirokazu Yoshikawa & Jenya Kholopstseva, Unauthorized Immigrant Parents and Their Children’s Development- a Summary of the Evidence (March 2013), Migration Policy Institute.

spend a day in jail, triggers an automatic notice to ICE, which can lead to deportation proceedings.”⁵⁸

In 2012, California Governor Brown vetoed an immigration bill that would address the many concerns raised by the implementation of Secure Communities, under which approximately 93,500 Californians have been deported.⁵⁹ The bill is now back in the public

Approximately **93,500** Californians have been deported under Secure Communities.

arena and is making its way to the California legislature. Immigration activists hope that Governor Brown will support the new version of the Trust Act, so California can also have a fairer and more proportional detention and deportation apparatus.⁶⁰ The new version of the Trust Act limits the amount of time local authorities can hold people for ICE, and honors ICE detainer requests only for undocumented citizens who have serious or violent felony convictions.⁶¹

Such policies, examples of which we have seen all around the country, evidence how the implementation of Secure Communities has caused more harm than good in

⁵⁸ Jason Cruz, What Difference a Day Makes: The City Attorney’s New Guidelines Aim to Protect Immigrants From Unjust Deportation, October 7, 2010, Northwest Asian Weekly (<http://www.nwasianweekly.com/2010/10/what-a-difference-a-day-makes-the-city-attorney%E2%80%99s-new-guidelines-aims-to-protect-immigrants-from-unjust-deportation/> accessed 04/21/13).

⁵⁹ See Sandra Lilley, Trust Act Approved by California Assembly Committee, 04/09/2013, NBC Latino (<http://nbclatino.com/2013/04/09/trust-act-approved-by-california-assembly-committee/> accessed 04/21/13); see also California Governor Vetoes Trust Act, Signs Driver’s License and Child Custody/Immigration Status Bills, Oct. 8, 2012, Reuters, 89 NO. 39 Interpreter Releases 1907.

⁶⁰ See Sandra Lilley, Trust Act Approved by California Assembly Committee, 04/09/2013, NBC Latino (<http://nbclatino.com/2013/04/09/trust-act-approved-by-california-assembly-committee/> accessed 04/21/13).

⁶¹ Sandra Lilley, Trust Act Approved by California Assembly Committee, 04/09/2013, NBC Latino (<http://nbclatino.com/2013/04/09/trust-act-approved-by-california-assembly-committee/> accessed 04/21/13).

communities throughout the United States, and shed light to how important it is that any comprehensive immigration reform plan address the harm caused by Secure Communities.

C.3. How does Secure Communities Work?

ICE describes Secure Communities as being a “biometric information sharing capability” program.⁶² In essence, Secure Communities is a program by which police officers and other local law enforcement agents facilitate individuals’ deportation by enabling ICE to identify individuals who have committed crimes, regardless of gravity, as well as to have access to the criminal records of anyone who was stopped, fingerprinted, and later found to not have committed a crime and subsequently released.⁶³

The cornerstone of Secure Communities is information sharing. For criminal justice purposes, state and local law enforcement agencies submit fingerprint information to the FBI. This information is then sent to, and shared between, the U.S. Department of Justice and DHS. ICE utilizes this information to then determine whether to send a detainer request so the person can be held until ICE can take custody over the person and determine their deportability.⁶⁴

⁶² ICE Documents Library, Activated Jurisdictions, Nationwide Cumulative Numbers, ICE Secure Communities, (www.ice.gov/doclib/secure-communities/pdf/sc-activated2.pdf accessed 02/08/13).

⁶³ *See also* U.S. Immigration and Customs Enforcement, John Morton Statement Regarding a Hearing on “Secure Communities” Before the U.S. House of Representatives Committee on Homeland Security Subcommittee on Border and Maritime Security, July 10, 2012.

⁶⁴ For more information *see* Immigration and Customs Enforcement Secure Communities Standard Operating Procedures- Distributed for adoption by participating country and local law enforcement agencies, Department of Homeland Security (available at: epic.org/privacy/secure_communities/securecommunitiesops93009.pdf); *see also* Hannah Weinstein, S-Comm: Shattering Communities, 10 *Cardozo Pub. L. Pol’y & Ethics J.* 395 (2012).

C.4. Technical Ins and Outs of Secure Communities

The following is an attempt to describe the complex machinery that is at play when an individual is stopped by local law enforcement and fingerprinted in jurisdictions where Secure Communities has already been deployed.

When an individual is stopped, usually via an arrest, and fingerprinted by a state or local law enforcement agent on criminal charges in an “active jurisdiction,” their fingerprints are scanned and submitted to a State Identification Bureau (SIB). Fingerprints are then submitted to the FBI Criminal Justice Information Services Division (CJIS) to check against the Integrated Automated Fingerprint Identification System (IAFIS), a national fingerprint and criminal history system, as well as DHS’s immigration database (IDENT). If the fingerprints match a record in the DHS US-VISIT database, which has biometrics⁶⁵ on individuals who have had previous encounters with immigration officials, the FBI will send an Immigration Alien Query (IAQ) to ICE’s Law Enforcement Support Center (LESC) to determine the person’s immigration status and criminal history.⁶⁶ LESC personnel will analyze data to gather a “more complete criminal history record of current and prior criminal offenses” for ICE personnel to examine. (At this step of the process it is important to note that although there are legal procedures in place that must be followed by law enforcement agents that work to guard against officers indiscriminately choosing

⁶⁵ **Biometrics** are the measurable biological (anatomical and physiological) or behavioral characteristics used for identification of an individual. Fingerprints are a common biometric modality, but others include things like DNA, irises, voice patterns, palmprints, and facial patterns. The Federal Bureau of Investigation, Fingerprints and Other Biometrics, (http://www.fbi.gov/about-us/cjis/fingerprints_biometrics, accessed 02/24/13).

⁶⁶ U.S. Immigration and Customs Enforcement, John Morton Statement Regarding a Hearing on “Secure Communities” Before the US House of Representatives Committee on Homeland Security Subcommittee on Border and Maritime Security, July 10, 2012.

whomever they fancy for fingerprinting, there are currently no legal checks on the officer's motives, or subjective reasons, for fingerprinting an individual⁶⁷).

Once a match has been determined, LESC staff will use the ACRIME⁶⁸ system to sift through various databases in reaching a determination of whether the individual is removable. If removable, LESC will create an Immigration Alien Response (IAR), including the individual's immigration status and criminal conviction history which will be sent to ICE's field office responsible for the geographic area from which the fingerprints were sent from, as well as to the FBI, which will route the response back to the LEA. The ICE field office will then decide whether or not to send a detainer request to the LEA (LEAs include federal, state, local, and tribal criminal justice systems). ICE officers have the option to exercise prosecutorial discretion⁶⁹, and have guidelines as to what has been identified as a priority, but they are not forced to act in strict adherence to those standards.⁷⁰

Once the detainer request⁷¹ has been sent to the LEA and the LEA chooses to honor the detainer request, the subject in question can be detained up to 48 hours for ICE to take

⁶⁷ See Dan Kesselbrenner & Lory Rosenberg, *Immigration Law and Crimes*, *Immigr. Law & Crimes* § 8:6 (2012).

⁶⁸ ACRIME is an information system used by ICE to receive and respond to immigration status inquiries from federal, state, and local law enforcement agencies about individuals arrested, subject to background checks, or otherwise encountered by those agencies. Source: Report to the Ranking Member Committee on Homeland Security, House of Representatives; *Criminal Alien Removals Increased, but Technology Planning Improvements Needed*; U.S. Government Accountability Office, July 2012.

⁶⁹ It is arguable that prosecutorial discretion is rarely exercised. Furthermore, some have raised the question of whether prosecutors, by prosecuting in the way they are currently operating, especially in making decisions during plea negotiations that will have immigration penalty consequences later on, are acting improperly or unethically by "interfering with functions that should be left to the federal government." See Heidi Altman, *Prosecuting Post-Padilla: State interests and the Pursuit of Justice for Noncitizen Defendants*, 101 *Geo. L.J.* 1, at p.22 (2012). See also U.S. Immigration and Customs Enforcement, John Morton Statement Regarding a Hearing on "Secure Communities" Before the U.S. House of Representatives Committee on Homeland Security Subcommittee on Border and Maritime Security, July 10, 2012.

⁷⁰ ICE Memorandum re: *Civilian Immigration Enforcement: Guidance on the Use of Detainers in the Federal, State, Local, and Tribal Criminal Justice Systems*, December 21, 2012.

⁷¹ See APPENDIX V, *Immigration Detainer Form*.

custody.⁷² Additionally, ICE requests local jails inform them when a noncitizen in custody is going to be released and asks that the jail hold individuals for an additional 48 hours to give ICE an opportunity to pick them up.⁷³

Once ICE picks up individuals that have been targeted for deportation, these individuals are taken to detention centers where they will be held until their deportation or deportation hearing. ICE states that both “the receiving agency and alien will know the specific basis for the detainer,”⁷⁴ although in practice, law enforcement agents are not mandated to provide the detained individual with a copy of the detainer form, nor do they have to inform him/her of the reasons for the detention. Many times deportation centers are hours and hundreds to thousands of miles away from where the person was initially picked up by ICE. Furthermore, abominable detention conditions that detainees are held in have raised serious concerns in the media, among civil rights groups, and even within the government itself. Individuals are then kept in detention, often in deplorable conditions and for unreasonable periods of time, until they are deported or have an immigration hearing.

*(for a visual graphic of the Secure Communities immigration
detention process described above, please see [Appendix I](#))*

⁷² Although ICE requests that law enforcement officials provide the subject with a detainer copy, officials from CRCL and ICE ERO have stated that ICE does not have the authority to require police department or jails to give a detainer form copy to the arrested subjects. *See* Report to the Ranking Member Committee on Homeland Security, House of Representatives; Criminal Alien Removals Increased, but Technology Planning Improvements Needed; U.S. Government Accountability Office, July 2012.

⁷³ Rolling Back the Tide: Challenging the Criminalization of Immigrants in Washington State, Angelica Chazarro, Seattle Journal for Social Justice, 11 Seattle J. for Soc. Just. 127, p. 6.

⁷⁴ ICE Memorandum re: Civilian Immigration Enforcement: Guidance on the Use of Detainers in the Federal, State, Local, and Tribal Criminal Justice Systems, December 21, 2012.

D. CURRENT CONDITIONS IN DETENTION CENTERS- Civil Designation, Criminal Detention

Immigration offenses for the most part are not criminal in nature, and thus the tools that the government employs in dealing with individuals that are caught breaking immigration laws should, at least in theory, be different from those that are employed in addressing criminal law violations.⁷⁵ Because the response to immigration law violations is technically civil and not criminal in nature, individuals caught up in the immigration system are not able to benefit from the many rights and protections that have been built into the criminal law system throughout our country's history.⁷⁶

This would be a fair and just system if the immigration system was really civil in nature both technically and in substance, and non-citizen detainees received the treatment that they are entitled to receive by law. However, there are very important, and problematic, inconsistencies in the immigration machinery as it currently operates in the U.S. due to the civil versus criminal designation.⁷⁷ Not only are non-citizens caught up in the immigration system apparatus devoid of the constitutional safeguards that protect defendants in the criminal system, but the terms and

ICE itself has acknowledged that most of the facilities that it uses for immigrant detention are facilities that are "largely designed for penal, not civil, detention."

⁷⁵ See Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH & LEE L. REV. 469, 482-89 (2007). Legomsky looks at the various definitions attributed to the term of "criminalization" with relation to immigration, and discusses the phenomenon by which criminal justice norms are applied to areas of civil regulation, such as immigration. Criminalization, as discussed by Legomsky and other legal scholars, refers also to the ever-more expansive scope of federal prosecution of immigration-related offenses.

⁷⁶ The result is often mandatory deportation, without the possibility of review or appeal, even in the case of minor violations. See Heidi Altman, *Prosecuting Post-Padilla: State interests and the Pursuit of Justice for Noncitizen Defendants*, 101 Geo. L.J. 1, at p. 5 (2012).

⁷⁷ For example, see Heidi Altman, *Prosecuting Post-Padilla: State interests and the Pursuit of Justice for Noncitizen Defendants*, 101 Geo. L.J. 1 (2012).

conditions of their detention are uncannily similar to that of those in the criminal justice system although they ought to be vastly different given their very different nature.⁷⁸ ICE itself has acknowledged that most of the facilities that it uses for immigrant detention are facilities that are “largely designed for penal, not civil, detention.”⁷⁹

Locking up immigrants behind bars, as opposed to employing other alternatives that do not require incarceration, has led to a long list of human rights violations in immigration detention centers all around the country.⁸⁰ There are varying degrees as to the severity of the human and civil right violations that have become endemic in the immigration detention apparatus, and certain detention centers are more notorious than others in the deplorable conditions that exist behind bars. But what is true regardless of the detention center, is that the state of incarceration undoubtedly causes great suffering and violates the basic human dignity amongst all that are unfortunate enough to get caught up in the system.

Deplorable conditions in immigrant detention centers are sadly not the exception, but the rule. Detention Watch Network published a report in 2012 in which it identified the ten worst facilities in which individuals are kept for immigration violations. In the ten

“These facilities are typically surrounded by multiple perimeter fences topped with razor wire, barbed wire, or concertina coils. They have a range of conditions that are identical or similar to those in criminal correctional facilities”
—*Human Rights First 2011 Report*

identified facilities people reported “waiting weeks or months for medical care; inadequate,

⁷⁸ See *Jailed Without Justice- Immigration Detention in the USA*, Amnesty International Report (2009).

⁷⁹ Fact Sheet: 2009 Immigration Detention Reforms, U.S. Immigration and Customs Enforcement, (<http://www.ice.gov/news/library/factsheets/reform-2009reform.htm>, accessed 3/2/13).

⁸⁰ Due to the civil versus criminal distinction, due process rights are said to not apply. It has been argued, and I believe, that the criminal nature of the punishment for immigration law violations should make due process protections apply as well.

and in some cases a total absence, of any outdoor recreation time or access to sunlight or fresh air; inadequate and nutritionally lacking food; the use of solitary confinement as punishment” as well as the extreme remoteness of the facilities themselves, which means that both families and attorneys have to employ herculean efforts just to see the person being held in detention.⁸¹ Often, detention facilities where immigrants are held for detention do not even meet the United States’ own minimum standards for correctional facilities.⁸²

Although the report highlights conditions in what it regards to be the worst ten detention centers, the reality is that acute and chronic human rights violations take place in detention centers all over the nation. Sadly, stories of someone being robbed of their most basic civil and human rights are not hard to find. Families are routinely torn apart callously, some immigrants caught up in detention, like Jose Antonio Vargas,⁸³ face the possibility of being sent to a country they do not remember and where a language they don't speak is spoken.

While individuals wait in detention for their deportation hearing many lose their jobs, livelihoods, and often even their homes. Both men and women report various instances of sexual and physical abuse while in detention.⁸⁴ Complaints of racial epithets and discrimination are common.⁸⁵ Asylum seekers, people who often come to the U.S.

⁸¹ Detention Watch Network Letter to President Obama by 300+ Organizations Asking Obama to Close Ten Detention Facilities, November 28, 2012, (<http://www.detentionwatchnetwork.org/ExposeAndClose>, accessed 03/03/13).

⁸² Expose and Close, Report (2012), Detention Watch Network.

⁸³ See “Watch Jose Antonio Vargas Testimony on Comprehensive Immigration Reform,” (<http://www.youtube.com/watch?v=mqXpAKiTTug>, accessed 03/03/13).

⁸⁴ See Expose and Close, Report (2012), Detention Watch Network; Lost in Detention Documentary.

⁸⁵ See Report on Immigration in the United States: Detention and Due Process, Inter-American Commission on Human Rights (December 2010), p. 32; See Expose and Close, Report (2012), Detention Watch Network; Lost in Detention Documentary, p. 3.

fleeing violence and persecution, when caught in the immigration detention complex, are often faced with many of the conditions that led them to try to flee from their country of origin in the first place.⁸⁶ Persons held in immigration detention almost universally expressed the fear they all felt that if they spoke up or complained about their living conditions there would be some sort of retaliation, or their case could suffer because of the complaint.⁸⁷

D.1. Criminal Nature of Immigrant Detention

The most obvious example of how immigrant civil detention is problematically similar to the criminal system, is the very act of incarceration, or detention, whereby detained individuals are stripped of their liberty interest – arguably an individual’s most important interest.⁸⁸ If the current system of detention were truly civil,⁸⁹ the number of people in detention awaiting deportation or their deportation hearing would be less than that of the criminal system- but such is not the case.⁹⁰

In the criminal law context, hundreds of years of jurisprudence have resulted in a system where defendants benefit from various safeguards to their liberty interests. These safeguards attach early on in the process of a defendant’s interaction with the criminal justice system, and continue to be present throughout the rest of the process.

⁸⁶ See Human Rights First, U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison, p. 13 (April 2009), available at [//www.humanrightsfirst.org/pdf/090429-RP-hrf-asylum-detention-report.pdf](http://www.humanrightsfirst.org/pdf/090429-RP-hrf-asylum-detention-report.pdf); Expose and Close, Report (2012), Detention Watch Network, p. 3.

⁸⁷ See Expose and Close, Report (2012), Detention Watch Network, p. 3.

⁸⁸ See Jailed Without Justice- Immigration Detention in the USA, Amnesty International Report (2009).

⁸⁹ What do civil facilities look like? Some examples that we might consider are senior centers, student dormitories, asylum facilities.

⁹⁰ For example, see Unlocking Immigrant Detention Reform, Robert Koulish and Mark Noferi, The Baltimore Sun, 02/20/2013, (http://articles.baltimoresun.com/2013-02-20/news/bs-ed-immigrant-detention-20130220_1_mandatory-detention-immigration-detention-detention-costs, accessed 2/21/2013).

From 2005 through 2010, 80% of ICE arrestees in N.Y. were denied bond, and fewer than 1% were released with no bond. This is in stark contrast to the criminal system, where in criminal cases that continued past arraignment, only 1% were not granted bail, while 68% were released with no bail.

Unfortunately, because of the distinction of criminal versus civil, many, if not most, of these assurances, are not available for those caught in the immigration detention context.⁹²

D.1.1. Right to Bail

One very important safeguard that is available to those in the criminal context is an individual's right to bail.⁹³ Whereas the criminal context allows the possibility of bail, because immigration law is deemed to be civil in nature, no such automatic assurances attach in the immigrant detention context.⁹⁴ The right to bail has deep historical roots in the criminal justice system, and its importance is such that the founders included it in the Bill of Rights.⁹⁵

The right to bail is in essence supposed to protect a defendant's pretrial liberty interest while still ensuring society's interest in having the defendant appear at trial.⁹⁶ The interests that are being balanced in detaining non-citizens prior to their deportation or immigration are flight risk and potential public danger to society versus the non-citizen's liberty interest. While the criminal system allows for the protection of the defendant's pretrial liberty, the immigration detention context provides no such protections for individuals caught up in the system, especially if detainees fall within the category of

⁹² For example, *see* Secure Communities by the Numbers: An Analysis of Demographics and Due Process, Aarti Kohli, Peter L. Markowitz, and Lisa Chavez (October 2011), The Chief Justice Earl Warren Institute on Law and Social Policy- University of California, Berkeley Law School; Report on Immigration in the United States: Detention and Due Process, Inter-American Commission on Human Rights (December 2010), p. 32; See Expose and Close, Report (2012), Detention Watch Network; Lost in Detention Documentary, p. 3.

⁹³ *See generally* Secure Communities by the Numbers: An Analysis of Demographics and Due Process, Aarti Kohli, Peter L. Markowitz, and Lisa Chavez (October 2011), The Chief Justice Earl Warren Institute on Law and Social Policy- University of California, Berkeley Law School; UNHCR Detention Guidelines, Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention (2012), <http://www.unhcr.org/refworld/docid/503489533b8.html>; Jailed Without Justice- Immigration Detention in the USA, Amnesty International Report (2009).

⁹⁴ Noncitizens who are not subject to mandatory detention may be released on bonds of a minimum of \$1,500. To be released on bond, the alien must prove that he is not a threat to people or property, and will appear at all future immigration proceedings. INA §236(a)(2)(A).

⁹⁵ Eight Amendment of the U.S. Constitution.

⁹⁶ The Eight Amendment and the Right to Bail: Historical Perspectives, Donald B. Verrilli, Jr., March 1982, 82 Colum. L. Rev. 328.

“mandatory detention.”⁹⁷ Although Mr. Morton, the head of DHS/ICE has acknowledged that the purpose of the system was to remove immigration violators from the country, not imprison them, he stated that detention is “is aimed at those who pose a serious risk of flight or danger to the community.”⁹⁸

Currently, “criminal aliens”⁹⁹ and other groups of detainees in the immigration detention system require mandatory detention and cannot benefit from bail, even for

⁹⁷ The law requires the detention of:

- criminal aliens national security risks (INA §212(a)(3)(B) and §237(a)(4)(B));
- asylum seekers, without proper documentation, until they can demonstrate a “credible fear of persecution”;
- arriving aliens subject to expedited removal (The regulations define an arriving alien as an applicant for “admission to or transit through the United States.” 8 C.F.R. §1.1(q).);
- arriving aliens who appear inadmissible for other than document related reasons; and
- persons under final orders of removal who have committed aggravated felonies, are terrorist aliens, or have been illegally present in the country.

⁹⁸ U.S. to Reform Policy on Detention for Immigrants, Nina Bernstein, New York Times, 08/05/2009

(http://www.nytimes.com/2009/08/06/us/politics/06detain.html?pagewanted=all&_r=0, accessed 02/24/13).

⁹⁹ Immigration and Nationality Act (INA)- “Criminal aliens include those who are inadmissible on criminal-related grounds as well as those who are deportable due to the commission of certain criminal offenses while in the United States.

An alien is inadmissible for:

- (1) crimes of moral turpitude;
- (2) controlled substance violations;
- (3) multiple criminal convictions with aggregate sentences of five years or more;
- (4) drug trafficking;
- (5) prostitution and commercialized vice; and
- (6) receipt of immunity from prosecution for serious criminal offenses (INA §212(a)).

*Any alien who is found in the United States who is inadmissible is deportable.

An alien is deportable for the following offenses:

- (1) crimes of moral turpitude;
- (2) aggravated felonies;
- (3) high speed flight;
- (4) controlled substance violations;
- (5) certain firearm offenses; and
- (6) crimes of domestic violence, stalking, and child abuse (INA §237(a)(2)).

Only the following groups of criminal aliens who are inadmissible or deportable are not subject to mandatory detention:

- (1) aliens convicted of a single crime of moral turpitude who were sentenced to less than one year;
- (2) aliens convicted of high speed flight; and
- (3) aliens convicted of crimes of domestic violence, stalking, and child abuse or neglect.”

Immigration-Related Detention: Current Legislative Issues, Alison Siskin, Congressional Research Service Report for Congress, 01/12/2012.

minor criminal offenses or offenses that they committed many years ago.¹⁰⁰ New York data provides us with an example of these inefficient and costly policies. From 2005 through 2010, 80% of ICE arrestees in N.Y. were denied bond, and fewer than 1% were released with no bond. This is in stark contrast to the criminal system, where in criminal cases that continued past arraignment, only 1% were not granted bail, while 68% were released with no bail.¹⁰¹

Current immigration law does not allow DHS and immigration judges to grant bail even though DHS's access to flight-risk information has been greatly enhanced in recent years and doing so would be ***feasible, efficient, and would greatly reduce costs.***

But unlike in the criminal context, current immigration law does not allow for the consideration of factors that would allow DHS and immigration judges to grant bail. This is the case even though DHS's access to flight-risk information has been greatly enhanced in recent years and doing so would be feasible, efficient, and would

greatly reduce costs. The White House in early 2013 stated that by enhancing infrastructure and technology DHS can "better focus its detention resources on public safety and national security threats by expanding alternatives to detention and reducing overall detention costs,"¹⁰² but so far this has not translated into concrete policies or laws.

¹⁰⁰ See Hannah Weinstein, S-Comm: Shattering Communities, 10 Cardozo Pub. L. Pol'y & Ethics J. 395 (2012); Unlocking Immigrant Detention Reform, Robert Koulish and Mark Noferi, The Baltimore Sun, 02/20/2013, (http://articles.baltimoresun.com/2013-02-20/news/bs-ed-immigrant-detention-20130220_1_mandatory-detention-immigration-detention-detention-costs, accessed 2/21/2013).

¹⁰¹ Unlocking Immigrant Detention Reform, Robert Koulish and Mark Noferi, The Baltimore Sun, 02/20/2013, (http://articles.baltimoresun.com/2013-02-20/news/bs-ed-immigrant-detention-20130220_1_mandatory-detention-immigration-detention-detention-costs, accessed 2/21/2013).

¹⁰² FACT SHEET: Fixing our Broken Immigration System so Everyone Plays by the Rules, The White House, Office of the Press Secretary, 01/29/2013 (<http://www.whitehouse.gov/the-press-office/2013/01/29/fact-sheet-fixing-our-broken-immigration-system-so-everyone-plays-rules>, accessed 2/23/13).

It doesn't seem that the Obama administration plans on scaling back the application of Secure Communities, and that being the case, the nation and those caught up in the detention system, would benefit if the information that DHS now has access to through their biometric information system was used so the consequences attached to immigration law violations were less criminal in nature, and more proportional to the offense committed while keeping in mind the potential harm to society.

D.1.2. Access to counsel

The vast majority of individuals caught up in detention have to navigate the overwhelmingly complex system of immigration law without any access to legal counsel.¹⁰³ Even where a person is somehow able to secure the exorbitant funds needed to hire an attorney, nevertheless, a myriad of obstacles that obstruct persons' access to legal counsel still work to deprive immigrants of access to justice. Many detention centers are located in extremely remote places, and so attorneys must drive for hours on end just to visit their clients.¹⁰⁴

Additionally, many times visiting hours are at very inconvenient times, often making it almost impossible for attorneys to be able to speak to their client.¹⁰⁵ In other instances, when individuals are being detained in local jails, attorneys are turned away and immigrant detainees are told that they cannot speak to their attorney. This happens most often at spaces that are used for purposes other than detention, and thus the facility's staff really are not to blame since they are just following orders as they know them, and no one

¹⁰³ See also Heidi Altman, *Prosecuting Post-Padilla: State interests and the Pursuit of Justice for Noncitizen Defendants*, 101 *Geo. L.J.* 1, at p.6 (2012).

¹⁰⁴ See *HRF Jails and Jumpsuits*, at p. 31; see also US Commission on International Religious Freedom, *Expedited Removal Study Report Card: Two Years Later* (Washington, DC: USCIRF, 2007), at p. 240.

¹⁰⁵ See *HRF Jails and Jumpsuits*, at p. 38.

has trained them as to how they should treat immigration detainees differently. Additionally, concerns have been raised about the rise in the use of video-conferencing hearings, which have gained popularity given the geographic isolation of many detention facilities.¹⁰⁶

Access to legal counsel is an important part of access to assistance and support. Having legal assistance may have a substantive impact on the outcome of one's case. Furthermore, international law mandates that countries provide individuals in detention with information about their rights as well as how they should go about in securing those rights.¹⁰⁷

The Transactional Records Access Clearinghouse's Immigration Project of Syracuse University (TRAC) conducted a study in which they found that asylum applicants were five times more likely to succeed in their claims if they had legal representation rather than if they represented themselves.¹⁰⁸ And although immigration courts must provide a list of pro bono and low-cost non-governmental organizations, as well as of attorneys, to unrepresented immigrants in proceedings, these lists are often unhelpful. Amnesty International investigated the actual assistance that these lists provided and found that individuals might only be able to find representation from one or two, and often none, of the organizations or attorneys included in the list.¹⁰⁹ Also, not only was representation

¹⁰⁶ See HRF Jails and Jumpsuits; Human Rights First, U.S. Detention of Asylum Seekers, p. 59-61; *see also* Rusu v. INS, 296 F.3d 316, 323 (4th Cir 2002) and Frank M. Walsh and Edward M. Walsh, Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings, 22 Geo. Immgr. L.J. 259, 271 (2008).

¹⁰⁷ See Article 9(2) ICCPR; UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 1988.

¹⁰⁸ See The Transactional Records Access Clearinghouse's Immigration Project of Syracuse University (TRAC) , Table 1, available at: <http://trac.syr.edu/immigration/reports/160/>.

¹⁰⁹ See Jailed Without Justice- Immigration Detention in the USA, Amnesty International Report (2009), p. 31.

hard to secure, but it was also hard to even get in touch with the organizations, as most of them did not accept collect calls.¹¹⁰

In the United States, individuals in deportation proceedings have the “privilege” to an attorney, but not if the government has to secure legal counsel.¹¹¹ Legal representation for immigration proceedings is very expensive, often costing thousands and tens of

Legal representation for immigration proceedings is very expensive, often costing thousands and tens of thousands of dollars.

thousands of dollars.¹¹² Because legal representation is prohibitively expensive, the government does not guarantee access to legal counsel, and immigrants tend to earn wages that are well below the national average (around \$25,000 a year¹¹³), the majority of immigrants in detention are on their own in navigating the immigration legal system.¹¹⁴ The U.S. Department of Justice reported that in 2007 about 58% of individuals in deportation proceedings did not have an attorney during their removal proceedings.¹¹⁵ This figure rises to a shocking 84% for those in detention.¹¹⁶

In 2009, Attorney General Michael Mukasey departed from common practice and declared that individuals in immigration court would not longer have the right to effective counsel. Mukasey reasoned that since no constitutional or statutory right to counsel existed,

¹¹⁰ See *Jailed Without Justice- Immigration Detention in the USA*, Amnesty International Report (2009), p. 31.

¹¹¹ By statute, a person has the “privilege” of counsel. See INA § 240(b)(4)(A).

¹¹² See *Jailed Without Justice- Immigration Detention in the USA*, Amnesty International Report (2009), Fn. 114.

¹¹³ See *Jailed Without Justice- Immigration Detention in the USA*, Amnesty International Report (2009), Fn. 114, citing Pew Hispanic Center Fact Sheet, *The Labor Force Status of Short-term Unauthorized Workers*, 13 April 2006, available at: <http://pewhispanic.org/files/factsheets/16.pdf>.

¹¹⁴ See *Jailed Without Justice- Immigration Detention in the USA*, Amnesty International Report (2009), p. 31.

¹¹⁵ Department of Justice, *FY 2007 Statistical Yearbook*, Executive Office for Immigration Review, April 2008, Figure 9 at G1, available at: <http://www.usdoj.gov/eoir/statpub/fy07syb.pdf>.

¹¹⁶ See *Jailed Without Justice- Immigration Detention in the USA*, Amnesty International Report (2009), Fn. 116, citing Nina Siulc, Zhifen Cheng, Arnold Son, and Olga Byrne, *Improving Efficiency and Promoting Justice in the Immigration System: Lessons from the Legal Orientation Program*, Report Summary, Vera Institute of Justice, May 2008, available at: http://www.vera.org/publication_pdf/477_877.pdf.

no such right needed to be honored. The ramifications of this departure have surely been catastrophic to some individuals. Whereas before, if an attorney made a mistake that affected the individual's case, he or she at least had the opportunity of legal remedy.¹¹⁷ Since this momentous shift in policy, individuals will no longer have access to this important legal tool, and reopening a case due to ineffective assistance will be virtually impossible.

E. VIOLATION OF INTERNATIONAL TREATY OBLIGATIONS

In thinking of the conditions of immigrant detention, we also ought to keep in mind international treaty obligations, as well as international customary law, in

Rights protected by International Law

- Right to liberty
- Right to freedom of movement
- Right to security

determining whether our current standards and conditions of detention are in compliance with international law requirements for these foreign persons.

The rights to liberty, security of person, and freedom of movement¹¹⁸, are just a few of many rights that should be considered in the policy-setting stage and in the actual implementation of whatever immigration detention programs actually are deployed. As highlighted in a UNHCR publication on detention guidelines, these “rights apply to all

¹¹⁷ See *Matter of Enrique Salas Compean*; *Matter of Sylla Bangaly*; *Matter of J-E-C-*, et al. 24 I&N Dec. 710 (A.G. 2009).

¹¹⁸ See Articles. 3 and 9, UDHR; Article 9, ICCPR; Articles 1 and 25, ADRDM; Article 6, ACHPR; Article 7 ACHR; Article 5, ECHR; Article 6, CFREU; See also See, for example, Article 12, ICCPR, covers the right to freedom of movement and choice of residence for persons lawfully staying in the territory, as well as the right to leave any country, including one's own. See, also, Article 12, African Charter on Human and Peoples' Rights, 1981 (ACHPR); Article 22, American Convention on Human Rights, 1969 (ACHR); Article 2, Convention for the Protection of Human Rights and Fundamental Freedoms (as amended), 1950 (ECHR); Article 2, Protocol No. 4 to the ECHR, Securing Certain Rights and Freedoms Other Than Those Already Included in the Convention and the First Protocol Thereto, 1963; Article 45, CFREU.

Detention is only acceptable

when it is:

- necessary
- proportional
- reasonable
- not unnecessarily prolonged

human beings, regardless of their immigrant, refugee, asylum-seeker, or other status.”¹¹⁹ The detention guidelines set out by the UNHCR are a great place to not only find the laws that are applicable to immigrant detention, but to also find

alternatives to detention. The UNCHR also points out that detention ought to be employed as a last resort, and should not be the default practice employed by governments.¹²⁰ Both U.S. law and international law hold that individuals’ illegal entry should not be met with punitive action, but in application, this is exactly what the U.S. system does.¹²¹

E.1. Arbitrary Detention

According to international law, mandatory or automatic detention, the current mode of operation in the United States, is deemed arbitrary and thereby unlawful since it is not based on a determination of the need for detention for that particular case.¹²² Indefinite detention for immigration purposes is deemed as being arbitrary, and therefore unlawful as a matter of international human rights law.¹²³ International law also requires that any detention determination must hastily and effectively¹²⁴ be addressed by a judicial body¹²⁵

¹¹⁹ UNHCR Detention Guidelines, Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention (2012), <http://www.unhcr.org/refworld/docid/503489533b8.html>.

¹²⁰ See UNHCR Detention Guidelines.

¹²¹ See Art. 31, Refugee Convention.

¹²² See *A v. Australia*, HRC, Comm. No. 560/1993, 3 April 1997, available at:

<http://www.unhcr.org/refworld/docid/3ae6b71a0.html>; *C v. Australia*, HRC, Comm. No. 900/1999, 28 October 2002, available at: <http://www.unhcr.org/refworld/docid/3f588ef00.html>; See also ICCPR, art. 9(4).

¹²³ See UNHCR Detention Guidelines at p. 26; *A v. Australia*, above note 35, ¶ 9.2; *Mukong v. Cameroon*, HRC Comm. No. 458/1991, 21 July 1994, ¶ 9.8, available at: <http://www.unhcr.org/refworld/docid/4ae9acc1d.html>.

¹²⁴ See e.g. *A v. Australia*, U.N. Human Rights Comm. Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (Apr. 30, 1997), ¶ 9.5, (stating “what is decisive for the purposes of article 9, ¶ 4, is that such review is, in its effects, real and not merely formal.”); see also Acer and Goodman, *Reaffirming Rights*, p. 519-20.

¹²⁵ See ICCPR, art. 9(4) (emphasis added); See UN General Assembly Resolution, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 11, A/RES/43/173, (Dec. 9,

and must ensure objectivity and independence from the detaining agency,¹²⁶ in this case ICE. The U.N. High Commissioner for Refugees, U.N. Special Rapporteur on the Human Rights of Migrants, and the Inter-American Commission on Human Rights have also called for effective and speedy judicial or administrative review in a detention determination.¹²⁷ As it currently stands, ICE acts as both jailor and judge.¹²⁸

For the purposes of asylum cases, detention is prohibited if the reason for detention is to determine whether the person will be ousted from the country following finding on their asylum claim. Given that the rationale behind an asylum claim and a detention hearing determination are analogous, this same rationale should also apply in the case of immigrant detention. Based on the law that applies to asylum cases which is largely applicable to immigrant detention, an argument can be made that detention for the purposes of determining the outcome of an immigration detention hearing is also unlawful given international law standards, and thus should be applied only as a last resort, or if other important policy interests, that have been outlined by the country's legislature, are applicable for that specific case.¹²⁹

Additionally, strict limits of detention for purposes such as identification, should be set not by ICE memoranda, but by the legislature in an unequivocal statement of what those time limits are, as well as an explanation of the rationale as to why this permitted detention period ought to be allowed in the first place. The UNHCR detention guidelines hold that

1988), available at <http://www.unhcr.org/refworld/docid/3b00f219c.html> (hereinafter cited as UN Body of Principles).

¹²⁶ See *Torres v. Finland*, UN GAOR, 45th Sess., Supp. No. 40, UN Doc. A/45/40 (1990), ¶ 7.2 (Article 9, ¶ 4, “envisages that the legality of detention will be determined by a court so as to ensure a higher degree of objectivity and independence...”); see Acer and Goodman, *Reaffirming Rights*, p. 518-24.

¹²⁷ UNHCR, UNHCR’s Revised Guidelines, Guideline 5(iii); UNHCR, Mission to the United States of America, ¶ 122-23; IACHR Report, ¶ 139, 418, 529, 431.

¹²⁸ See HRF *Jails and Jumpsuits*, at p. 26.

¹²⁹ See Rule 54(1) of the Standard Minimum Rules for the Treatment of Prisoners.

national legislations should set maximum detention period limits to guard against detention arbitrariness. The UNHCR further includes minimum procedural standards that ought to be employed in determining whether or not to detain asylum-seekers, and these procedural standards should also be held to apply to immigrant detention in the United States.¹³⁰

In general, the principle of proportionality should be strictly adhered to in determining what detention ought to be permissible according to legitimate, and pre-determined, state purposes. The decision of whether to hold an individual in detention ought to be a determination based on balancing the necessity,¹³¹ reasonableness, and proportionality of detention,” along with alternatives to detention that may be more appropriate for that specific case.¹³² In the specific context of deportation and immigrant detention, some have argued that the punishment of deportation and detention is much more costly than the consequences of serving time in jail or being on probation, and thus the proportionality calculus is vastly inaccurate as it currently operates.¹³³ In *Padilla v. Kentucky*, the Supreme Court actually pronounced that deportation is a penalty in its own right.¹³⁴

Before ICE officials decide to hold someone in detention or decide to deport someone, it should be required to show that in light of the individual’s particular

¹³⁰ See UNHCR Detention Guidelines, Guideline 7- Decisions to detain or to extend detention must be subject to minimum procedural safeguards at p. 27,

¹³¹ Article 31(2), 1951/Refuge Convention.

¹³² UNHCR Detention Guidelines, at p. 22.

¹³³ See Heidi Altman, Prosecuting Post-Padilla: State interests and the Pursuit of Justice for Noncitizen Defendants, 101 Geo. L.J. 1 (2012).

¹³⁴ *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

circumstances, no less invasive or coercive means existed to achieve the same purported goals coloring the initial impetus to detain the individual.¹³⁵

E.1.1. Alternatives to Detention and International Law

In thinking of alternatives to detention, “[l]egal regulations ought to specify and explain the various alternatives available, the criteria governing their use, as well as the authority(ies) responsible for their implementation and enforcement.”¹³⁶ Furthermore, when alternatives apply, these alternatives should be part of a system that allows for timely access to an effective complaints mechanism and remedies.¹³⁷

According to the UNHCR alternative best practices have shown that alternatives are most successful when people are:

- Treated with dignity, humanity and respect throughout the asylum procedure;
- Informed clearly and concisely at an early stage of their rights and duties associated with the alternative to detention as well as the consequences of non-compliance;
- Given access to legal advice throughout the asylum procedure;
- Provided with adequate material support, accommodation and other reception conditions, or access to means of self-sufficiency (including the right to work); *and*
- Able to benefit from individualized case management services related to their asylum claim.

¹³⁵ See UNHCR Detention Guidelines, at p. 22; See also Jailed Without Justice- Immigration Detention in the USA, Amnesty International Report (2009), p. 44.

¹³⁶ See UNHCR Detention Guidelines, at p. 22; UNHCR and the Office of the High Commissioner for Human Rights (OHCHR), Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons: Summary Conclusions, May 2011 (Global Roundtable Summary Conclusions), ¶ 2, available at: <http://www.unhcr.org/refworld/docid/4e315b882.html>.

¹³⁷ See UNHCR Detention Guidelines, at p. 22; Global Roundtable Summary Conclusions, above note 48, ¶ 31.

E.1.2. Detention Conditions Must be Humane and Dignified

One of the most important standards that the UNHCR identifies in its Detention Guidelines Publication is that “conditions of detention must be humane and dignified.” Especially given the concerns that have been raised by numerous reports on immigration detention centers around the US,¹³⁸ as well as the controversy surrounding the application of programs like Secure Communities and 287(g)¹³⁹, ICE needs to be steadfast in its adherence to the requirement that detention conditions be humane and dignified.¹⁴⁰

The UNHCR, in its Detention Guidelines, outlined a list of minimum conditions that are required for detention conditions to be humane and dignified (See Appendix I). ICE and the U.S. government should adhere to these minimum standards as well in order to ensure its adherence to international human rights law requirements.

¹³⁸ See Lost in Detention, ...also other newspaper articles

¹³⁹ For more information *see* Secure Communities, National Immigration Forum (available at: www.immigrationforum.org/images/uploads/secure_communities.pdf); *see also* DHS Plan to Provide Training to State and Local Law Enforcement in the Secure Communities Program, DHS Office for Civil Rights and Civil Liberties in partnership with U.S. Immigration and Customs Enforcement (May 2012); *see also* Hannah Weinstein, S-Comm: Shattering Communities, 10 Cardozo Pub. L. Pol’y & Ethics J. 395 (2012).

¹⁴⁰ For an example of such concerns *see* Lawyer’s Committee and ACLU Sue ICE, Homeland Security for Shackling Non-Violent Detainees During Immigration Proceedings, Aug. 15, 2011, (available at https://www.aclunc.org/news/press_releases/lawyers%27_committee_and_aclu_sue_ice_homeland_security_for_shackling_non-violent_detainees_during_immigration_proceedings.shtml).

E.1.3. Rights of Children in the Context of Detention

Children have a right to family unity,¹⁴² and to not be separated from their parents against their will,¹⁴⁴ a right that has continuously been violated in the U.S. given the way that immigrant detention and deportations are carried out.

Children have a right to family unity, and to not be separated from their parents against their will.

Furthermore, as per Article 20 of the United Nations Convention on the Rights of the Child (CRC), when a child is deprived of their family, the child is entitled to special protection and assistance. When children must be separated from their parents for the purposes of detention, “both parents and child are entitled to essential information from the State on the whereabouts of the other unless such information would be detrimental to the child.”¹⁴⁵

Current immigration law, as it is applied and enforced, does not honor and protect the rights of children and families. More can be done, and needs to be done, to protect the social fabric of the United States – a country that has, since its inception, been a country of immigrants. Estimates point to the fact that approximately 11 million people in the U.S. are undocumented, and over one third of those arrested under Secure Communities has a U.S. citizen spouse or child.¹⁴⁶ According to recent figures, approximately “5.5 million U.S.

¹⁴² United Nations Convention on the Rights of the Child (CRC), 1990, inter alia, Articles 5, 8 and 16.

¹⁴⁴ Article 9, CRC.

¹⁴⁵ See UNHCR Detention Guidelines, at p. 35; Art. 9(4), CRC.

¹⁴⁶ See also Hirokazu Yoshikawa & Jenya Kholopstseva, Unauthorized Immigrant Parents and Their Children’s Development- a Summary of the Evidence (March 2013), Migration Policy Institute, arguing: “[T]here are a substantial number of children, including many born in the United States, who are affected by current enforcement of immigration laws and would be affected by legalization of the unauthorized. According to recent estimates, 5.5 million US children reside with at least one unauthorized immigrant parent, and 4.5 million of these children are US-born. Given that children with unauthorized parents constitute nearly one-third of all children with immigrant parents and about 8 percent of all US children, *their well-being holds important implications for US society.*” (emphasis added)

children reside with at least one unauthorized immigrant parent, and 4.5 million of these children are U.S.-born.”¹⁴⁷ Furthermore, children with “unauthorized parents constitute nearly one-third of all children with immigrant parents and about 8 percent of all U.S. children.”¹⁴⁸

As pointed out by various scholars,¹⁴⁹ immigration law is tearing at the social fabric of our great nation, and it’s time that immigration reform recognize and address the rights of these children and families as well.

E.1.4. Rights of Women in Detention

In the context of asylum seekers, special protections apply to women. These same protections should apply to women caught up in the immigration detention system.

Protections that apply specifically to women are extremely important in the context of immigrant detention in the U.S., especially given the epidemic of stories of sexual and physical abuse that women have been subject to in the immigration detention complex.¹⁵⁰ To

“Ultimately, the inhumane conditions and treatment at these facilities are too extreme, and too entrenched, to be addressed through the kinds of piecemeal reforms that ICE has tried to undertake in the past three years.”

ensure that women are safe, when the last resort of detention is employed, human rights standards should be adhered to. Furthermore, the bipartisan federal National Prison Rape

¹⁴⁷ Hirokazu Yoshikawa & Jenya Kholopstseva, Unauthorized Immigrant Parents and Their Children’s Development- a Summary of the Evidence (March 2013), Migration Policy Institute.

¹⁴⁸ Hirokazu Yoshikawa & Jenya Kholopstseva, Unauthorized Immigrant Parents and Their Children’s Development- a Summary of the Evidence (March 2013), Migration Policy Institute.

¹⁴⁹ See footnote above.

¹⁵⁰ See Expose and Close, Report (2012), Detention Watch Network; Lost in Detention Documentary.

Elimination Commission relating to standards for facilities holding immigration detainees should be adopted.¹⁵¹

Every attempt should be made to make sure that women are detained in separate facilities from men, and that the guards and warders are also female where possible. Specific measures that safeguard against sexual and gender-based violence should be developed and enforced. Women's hygiene needs should be taken into consideration in thinking of detention facilities.¹⁵² Staff that work with women detainees should be trained as to women's gender-specific needs as well as the human rights of women.¹⁵³ Women in detention who report abuse should receive "immediate protection, support and counseling, and their claims must be investigated by competent and independent authorities, with full respect for the principle of confidentiality."¹⁵⁴ Furthermore, women in detention that have been sexually abused "need to receive appropriate medical advice and counseling, including where pregnancy results, and are to be provided with the requisite physical and mental health care, support and legal aid."¹⁵⁵

E.1.5. Access to legal assistance and support

All detainees should have increased access to legal assistance and legal materials. The Executive Office for Immigration Review (EOIR) contracts with some non-governmental organizations to present on "basic information on forms of relief from removal, how to represent themselves in proceedings, and how to obtain legal

¹⁵¹ National Prison Rape Elimination Commission, National Prison Rape Elimination Commission Report (Washington, DC: 2009), Ch. 9, available at <https://www.ncjrs.gov/pdffiles1/226680.pdf>.

¹⁵² See UN, Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules), A/C.3/65/L.5, 6 October 2010, Rule 42, available at: <http://www.unhcr.org/refworld/docid/4dcbb0ae2.html>.

¹⁵³ See UNHCR Detention Guidelines, at p. 37.

¹⁵⁴ See UNHCR Detention Guidelines, at p. 37.

¹⁵⁵ Rule 25(2), Bangkok Rules.

representation.”¹⁵⁶ These presentations often make a difference in individual’s ability to represent themselves, and ultimately on the hearing’s outcome. Given the proven success of such education and the lack of alternate access to legal knowledge and materials, at a very minimum, the federal government should increase the number of contracts with such non-governmental organizations so more detainees will have access to this vital information.

Also, ICE’s very own Detention Standards require that detainees be allowed no less than five hours per week to “law libraries, legal material and related materials.”¹⁵⁷ ICE also requires that facilities give every detainee a copy of the ICE National Detainee Handbook as well as one concerning the facility itself.¹⁵⁸ In conducting an investigation on the actual detention center practices Amnesty International found that many detainees never received the required handbook, and various detention facilities informed Amnesty International that they do not provide an ICE National Detainee Handbook. Furthermore, ICE should ensure that adequate interpretation and translation services, especially in the case of someone who has to represent him or herself.

Another source of information for detainees is ICE staff. As Amnesty International accurately points out in *Jailed Without Justice*, the fact that often times the only source of information to detainees is ICE staff presents a troublesome conflict of interests.¹⁵⁹ ICE undoubtedly is seeking to deport these individuals, and so there should be adequate alternate sources of information so detainees will not be dependent on ICE officials.

¹⁵⁶ See *Jailed Without Justice- Immigration Detention in the USA*, Amnesty International Report (2009), p. 33.

¹⁵⁷ ICE/DRO Detention Standards: Law Libraries and Legal Material, p.8, *December 2, 2008* available at: http://www.ice.gov/doclib/PBNDS/pdf/law_libraries_and_legal_material.pdf.

¹⁵⁸ See ICE/DRO Detention Standards: Law Libraries and Legal Material, available at: http://www.ice.gov/doclib/PBNDS/pdf/law_libraries_and_legal_material.pdf.

¹⁵⁹ See *Jailed Without Justice- Immigration Detention in the USA*, Amnesty International Report (2009), pp. 33-34.

F. ALTERNATIVES TO INCARCERATION

Alternatives to detention are not only cost-effective, and more humane, they are also required by international law that the United States is subject to.¹⁶⁰ Alternatives to incarceration are much more economical than detention, estimates pointing to approximate costs of \$14, or less, per day.¹⁶¹ Examples of alternatives to detention include home arrest, check-in by telephone, electronic tracking, wrist or ankle bracelets,¹⁶² movement restrictions, and community supervision.¹⁶³ Secure Communities actually makes accurate risk assessment of civil immigration detainees more feasible, and this increased feasibility should make it so any comprehensive immigration reform compromise that is arrived at includes detention as being the very last resort. Another option that exists is to bring back catch and release, or implement a program resembling it.

The list of alternatives mentioned above is by no means an exhaustive list of alternatives. However, given the mandatory enforcement of Secure Communities throughout the U.S., it is imperative that more than ever alternatives to detention are regarded to be the primary way to address immigration law violations.

G. RECOMMENDATIONS

The following is a non-exhaustive list of recommendations that policy makers and community leaders should consider in shaping immigration reform.

¹⁶⁰ See Convention relating to the Status of Refugees, 1951 (1951 Convention) as amended by the Protocol relating to the Status of Refugees, 1967; International Covenant on Civil and Political Rights (ICCPR);

¹⁶¹ Robert Koulisch & Mark Noferi, Unlocking Immigrant Detention Reform, Feb. 20, 2013, The Baltimore Sun, (available at: http://articles.baltimoresun.com/2013-02-20/news/bs-ed-immigrant-detention-20130220_1_mandatory-detention-immigration-detention-detention-costs, accessed in March, 2013).

¹⁶² *But see* UNHCR Detention Guidelines, at p. 24. (“While phone reporting and the use of other modern technologies can be seen as good practice, especially for individuals with mobility difficulties,⁶⁷ other forms of electronic monitoring – such as wrist or ankle bracelets – are considered harsh, not least because of the criminal stigma attached to their use;⁶⁸ and should as far as possible be avoided.”)

¹⁶³ *See* Jailed Without Justice- Immigration Detention in the USA, Amnesty International Report (2009), p. 27.

G.1. Recommendations, generally

- 1. Detention Should be the Absolute Last Resort.**¹⁶⁴
- 2. Set Limits Should be Established for Length of Detention.**¹⁶⁵

G.2. Recommendations, as applied to judicial proceedings.

3. Detailed Judicial Decision Should be Required Before Detention.

Overly lengthy detention violates the Convention Against Torture.¹⁶⁶ Limits as to the appropriate length of detention should be set by the legislature or addressed by comprehensive immigration reform.

- 4. Basic Due Process Safeguards Must be Strictly Adhered to and Should Apply to Immigration Violation Procedures.**¹⁶⁷
- 5. Appeal/Review Procedure Should be Established for Detention Determinations not Made by Immigration Judge.**¹⁶⁸

Individuals are precluded from requesting that an immigration judge review an initial detention determination made at a US airport or border.¹⁶⁹ Currently, once parole is denied, this decision is not appealable (even by immigration judges). Such automatic detention and lack of review of the detention decision is arbitrary, and in violation of international law.¹⁷⁰

6. Detainees Should Have Adequate Access to Legal Assistance and Support.¹⁷¹

¹⁶⁴ See 1951 Convention Relating to the Status of Refugees and its Protocol; International Covenant on Civil and Political Rights; Organization of American States, Inter-American Commission on Human Rights, Report on Immigration in the United States: Detention and Due Process, OEA/Ser.L/V/II. Doc 78/10, December 30, 2010 (hereinafter cited as IACHR Report); Gabriel Rodriguez Pizarro, UN Special Rapporteur on the Human Rights of Migrants, Report of the Special Rapporteur on the Human Rights of Migrants (Geneva: UNHCR, 2002), E/CN.4/2003/85., ¶ 54 (“[a]dministrative detention should never be of a punitive nature.”) (hereinafter cited as 2002 UN Special Rapporteur Report).

¹⁶⁵ See UNHCR Detention Guidelines, Guideline 6, at p. 26.

¹⁶⁶ See *Jailed Without Justice- Immigration Detention in the USA*, Amnesty International Report (2009), p. 35. (“A detainee from Guyana was reportedly transferred between ten facilities as far apart as Alabama, Virginia and New Jersey during his six and a half years in detention. He was released in December 2006 after he was granted relief under the Convention Against Torture.”)

¹⁶⁷ See *Jails and Jumpsuits, Transforming the U.S. Immigration Detention System—A Two-Year Review*, Human Rights First (2011), at p.ii. Report states that basic due process rights are missing from present immigration detention system.

¹⁶⁸ See *Jailed Without Justice- Immigration Detention in the USA*, Amnesty International Report (2009), p. 25; UNHCR Detention Guidelines, at p. 31.

¹⁶⁹ See Council on Foreign Relations Independent Task Force on U.S. Immigration Policy, Independent Task Force Report No. 63—U.S. Immigration Policy (New York: CFR, 2009), (hereinafter cited as CFR Report on Immigration Policy) § 1003.19 and § 212.5, as well as at § 208.30 and § 235.3

¹⁷⁰ See ICCPR, art. 9(4); *A v. Australia*, HRC, Comm. No. 560/1993; UNHCR Detention Guidelines at p. 26; *A v. Australia*, above note 35, ¶ 9.2; *Mukong v. Cameroon*; *C v. Australia*, HRC, Comm. No. 900/1999.

¹⁷¹ See section E.1.5., *infra*.

G.3. Recommendations, as applied to Detention Conditions

7. If Detained, Immigration Detainees Should be Held in Non-Penal-Like Conditions.

Currently, the vast majority of immigration detainees are housed in jail-like conditions.¹⁷² A Human Rights First report noted that facilities where immigration detainees are held are “in most critical respects... structured and operated much like standardized correctional facilities,” resembling “in every essential respect, conventional jails.”¹⁷³

ICE should look to model detention facilities, such as the Berks Family Residential Center in Pennsylvania. This facility “allows detainees to move freely within certain areas of the facility, it permits contact visits and extended outdoor access, detainees enjoy privacy in toilets and showers, and detainees can wear their own clothing.”¹⁷⁴ Other model facilities to learn from are the Broward Transitional Center in Florida and the Hutto Detention Center in Texas.¹⁷⁵

8. Increased Freedom of Movement.¹⁷⁶

Freedom of movement is a basic human right of all human beings. This right is violated on a daily basis for immigration detainees caught in detention.

9. Detainees Should not be Required to Wear Prison Uniforms/Attire.¹⁷⁷

The Inter-American Commission on Human Rights and the UN Special Rapporteur on the Human Rights of Migrants have identified the requirement that immigrant detainees use uniforms as part of what makes their detention punitive.¹⁷⁸

10. Detainees Should Have Adequate Access to Phones.¹⁷⁹

¹⁷² See *Jails and Jumpsuits, Transforming the U.S. Immigration Detention System—A Two-Year Review*, Human Rights First (2011), at p.iii. According to the Human Rights First report, facilities in which immigrant detainees are held are “surrounded by multiple perimeter fences usually topped with razor wire, barbed wire, or concertina coils. Detainees typically wear color-coded prison uniforms and live in conditions that are characteristic of penal facilities— their freedom of movement and outdoor access are highly limited; they often visit with friends and loved ones separated by Plexiglas barriers; and they have little or no privacy in toilets and showers.”

¹⁷³ *Jails and Jumpsuits, Transforming the U.S. Immigration Detention System—A Two-Year Review*, Human Rights First (2011), at p.ii.

¹⁷⁴ *Jails and Jumpsuits, Transforming the U.S. Immigration Detention System—A Two-Year Review*, Human Rights First (2011), at p.v.

¹⁷⁵ See *Jails and Jumpsuits, Transforming the U.S. Immigration Detention System—A Two-Year Review*, Human Rights First (2011), at p.v.

¹⁷⁶ See *Jailed Without Justice- Immigration Detention in the USA*, Amnesty International Report (2009), p. 3; See UNHCR Detention Guidelines, at p. 38.

¹⁷⁷ See also *Jails and Jumpsuits, Transforming the U.S. Immigration Detention System—A Two-Year Review*, Human Rights First (2011), at p.49.

¹⁷⁸ See Organization of American States, Inter-American Commission on Human Rights, Report on Immigration in the United States: Detention and Due Process, OEA/Ser.L/V/II. Doc 78/10, December 30, 2010; Gabriel Rodriguez Pizarro, UN Special Rapporteur on the Human Rights of Migrants, Report of the Special Rapporteur on the Human Rights of Migrants (Geneva: UNHCR, 2002), E/CN.4/2003/85.

¹⁷⁹ See *Jailed Without Justice- Immigration Detention in the USA*, Amnesty International Report (2009), p. 35.

ICE Guidelines provide for detainees to be able to make free calls for pro bono legal services, but in practice access to phone, or other means of communication is severely limited, almost to the point of being practically non-existent.¹⁸⁰

11. Staff Training Should be Required for Staff of Facilities That are not Mainly Detention Immigration Facilities.¹⁸¹

12. Detainees Should Have Access to Nutritious Food.¹⁸²

13. Detainees Should be Allowed Weekly Contact Visits.¹⁸³

14. Detainees' Privacy Concerns Should be Respected.¹⁸⁴

Especially with regards to using the toilet and showering, special attention should be paid to the privacy needs of detainees. This is even more important when taking into consideration the hygiene and personal needs of women.

15. If Detained, Detainees Should be Held in Separate Facilities From Convicted Criminals.¹⁸⁵

16. Use of Restraints in Transporting Detainees Should be Prohibited.¹⁸⁶

Although the use of restraints in the transportation of immigration detainees is barred by international law, this practice is commonplace. Furthermore, ICE detention standards also restrict the use of restraints for women and children- a restriction that is not often heeded.¹⁸⁷ Restraints are also to be limited when appearing before a judicial or administrative authority as per international law, but again, this is routinely violated.¹⁸⁸

17. Isolation of Detention Facilities.¹⁸⁹

If the federal government is going to pay for the construction of any more detention facilities, the government should be required to look for detention facility locations that are not so isolated from metropolitan centers.

¹⁸⁰ See US Government Accountability Office, Report GAO-07- 85, Alien Detention Standards: Telephone Access Problems Were Pervasive at Detention Facilities; Other Deficiencies Did Not Show A Pattern of Noncompliance, July 2007 available at: <http://www.gao.gov/new.items/d07875.pdf>.

¹⁸¹ See UNHCR Detention Guidelines, at p. 45; Jailed Without Justice- Immigration Detention in the USA, Amnesty International Report (2009), fn. 30.

¹⁸² See UNHCR Detention Guidelines, at p. 31.

¹⁸³ See UNHCR Detention Guidelines, at p. 30.

¹⁸⁴ See UNHCR Detention Guidelines, at p. 30.

¹⁸⁵ See Jailed Without Justice- Immigration Detention in the USA, Amnesty International Report (2009), p. 29.

¹⁸⁶ See Rule 33, UN Standard Minimum Rules for the Treatment of Prisoners; Jailed Without Justice- Immigration Detention in the USA, Amnesty International Report (2009), p. 29.

¹⁸⁷ ICE/DRO Detention Standards, Transportation (By Land), available at: http://www.ice.gov/doclib/PBNDs/pdf/transportation_by_land.pdf.

¹⁸⁸ Rules 33 and 34, UN Standard Minimum Rules for the Treatment of Prisoners; See Jailed Without Justice- Immigration Detention in the USA, Amnesty International Report (2009), p. 39 Section 5.2.2.

¹⁸⁹ See Secure Communities by the Numbers, at p. 7.

18. Access to Medical Care.¹⁹⁰

International standards and ICE detention standards¹⁹¹ set out that whenever necessary, detainees shall have access to medical care and treatment.¹⁹² In the past five years, seventy-four people died while in immigration detention, and the lack of adequate access to medical care has raised concerns over immigrant detainee medical care in the media.¹⁹³ The December 2010 Inter-American Commission on Human Rights report on U.S. detention practices also raised concerns of detainees' adequate access to medical care.¹⁹⁴ Access to adequate mental health services should also be adequate.¹⁹⁵

19. Detainees Should Have Access to Exercise While in Detention.¹⁹⁶

20. Contracts With Private Facilities Should not be Entered Into Unless Facility Agreed to Adhere to International Law Standards, ICE Detention Standards, to Regular Monitoring of Facility, and Has Provided Plan as to how This will be Accomplished.¹⁹⁷

-Immediate Cessation of Contracts With Facilities That do not Meet international law Standards.

21. Independent Body Monitoring of Facilities Where Immigrant Detainees are Held.¹⁹⁸

¹⁹⁰ See UNHCR Detention Guidelines, at p. 30; Jailed Without Justice- Immigration Detention in the USA, Amnesty International Report (2009), at p. 39.

¹⁹¹ ICE detention standards provide that detainees should be provided with initial medical screening, cost-effective primary care, and emergency care.

¹⁹² Principle 24, UN Body of Principles for All Persons under Any Form of Detention or Imprisonment.

¹⁹³ See US Immigration and Customs Enforcement, Mortality rates at ICE detention facilities, 17 July 2008, available at: http://www.ice.gov/pi/news/factsheets/detention_facilities_mortality_rates.htm; Nina Bernstein, Few Details on Immigrants Who Died in Custody, The New York Times, 5 May 2008, available at: http://www.nytimes.com/2008/05/05/nyregion/05detain.html?_r=1&pagewanted=all.

¹⁹⁴ Organization of American States, Inter-American Commission on Human Rights, Report on Immigration in the United States: Detention and Due Process, OEA/Ser.L/V/II. Doc 78/10, December 30, 2010; See also Jails and Jumpsuits, at p. 25.

¹⁹⁵ See HRF Jails and Jumpsuits, at p. 25 citing Physicians for Human Rights, "Dual Loyalties: The Challenges of Providing Professional Health Care to Immigration Detainees," March 2011; DHS Office of the Inspector General, Management of Mental Health Cases in Immigration Detention, OIG-11-62 (Washington, DC: DHS, March 2011), available at http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_11-62_Mar11.pdf; Texas Appleseed, Justice for Immigration's Hidden Population: Protecting the Rights of Persons with Mental Disabilities in the Immigration Court and Detention System (Austin: Texas Appleseed, 2010), available at http://www.texasappleseed.net/index.php?option=com_docman&task=doc_download&gid=313&Itemid.; DHS Office of the Inspector General, The U.S. Immigration and Customs Enforcement Process for Authorizing Medical Care for Immigration Detainees (Washington, DC: DHS Office of the Inspector General, 2009); Florida Immigrant Advocacy Center, Dying for Decent Care: Bad Medicine in Immigration Custody (Miami: FiAC, 2009); Human Rights Watch, Detained and Dismissed: Women's Struggles to Obtain Health Care in United States Immigration Detention (New York: Human Rights Watch, 2009); Amnesty International, Jailed Without Justice;" Amy Goldstein and Dana Priest, "In Custody, In Pain," Washington Post, May 12, 2008; Physicians for Human Rights and Bellevue/NYU Program for Survivors of Torture, From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers (New York: Physicians for Human Rights and Bellevue/NYU Program for Survivors of Torture, 2003).

¹⁹⁶ See Rule 21(1), UN Standard Minimum Rules for the Treatment of Prisoners.

¹⁹⁷ See UNHCR Detention Guidelines, at pp. 31-32.

22. Make sure detainees receive ICE National Detainee Handbook.¹⁹⁹

23. Access to Adequate and Regular Interpretation Services.²⁰⁰

24. Access to Complaint Mechanism Without Fear of Retaliation, as well as Ensure That Complaints are Immediately and Satisfactorily Addressed.²⁰¹

25. Accountability for Facilities and Individual Actors that Violate International Human Rights Standards.²⁰²

26. Regular Monitoring of Facilities Should be Required.²⁰³

27. Law Enforcement Agents Should be Mandated to Provide the Detained Individual With a Copy of the Detainer Form and Inform Detainee of the Reasons for Detention.²⁰⁴

H. CONCLUSION

In the context of an immigration system that is now inextricably linked to the reality of Secure Communities, law makers and civil rights advocates will need to be creative in how they link Secure Communities enhanced information capabilities to the harsh reality of detention conditions. It is very likely that Secure Communities will not go anywhere as a program that has been enthusiastically revamped by the Obama administration, and so it is up to us to delineate the contours of its application. Today, enhanced access to individuals' data allows ICE officials to know a great deal about everyone who comes into contact with the U.S.'s immigration apparatus. For this very reason, ICE and the government have less

¹⁹⁸ See UNHCR Detention Guidelines, at pp. 31-32.

¹⁹⁹ See Jailed Without Justice, at p. 29.

²⁰⁰ See Jailed Without Justice, at p. 45.

²⁰¹ See UNHCR Detention Guidelines, at p. 37.

²⁰² See Jailed Without Justice, at p. 46.

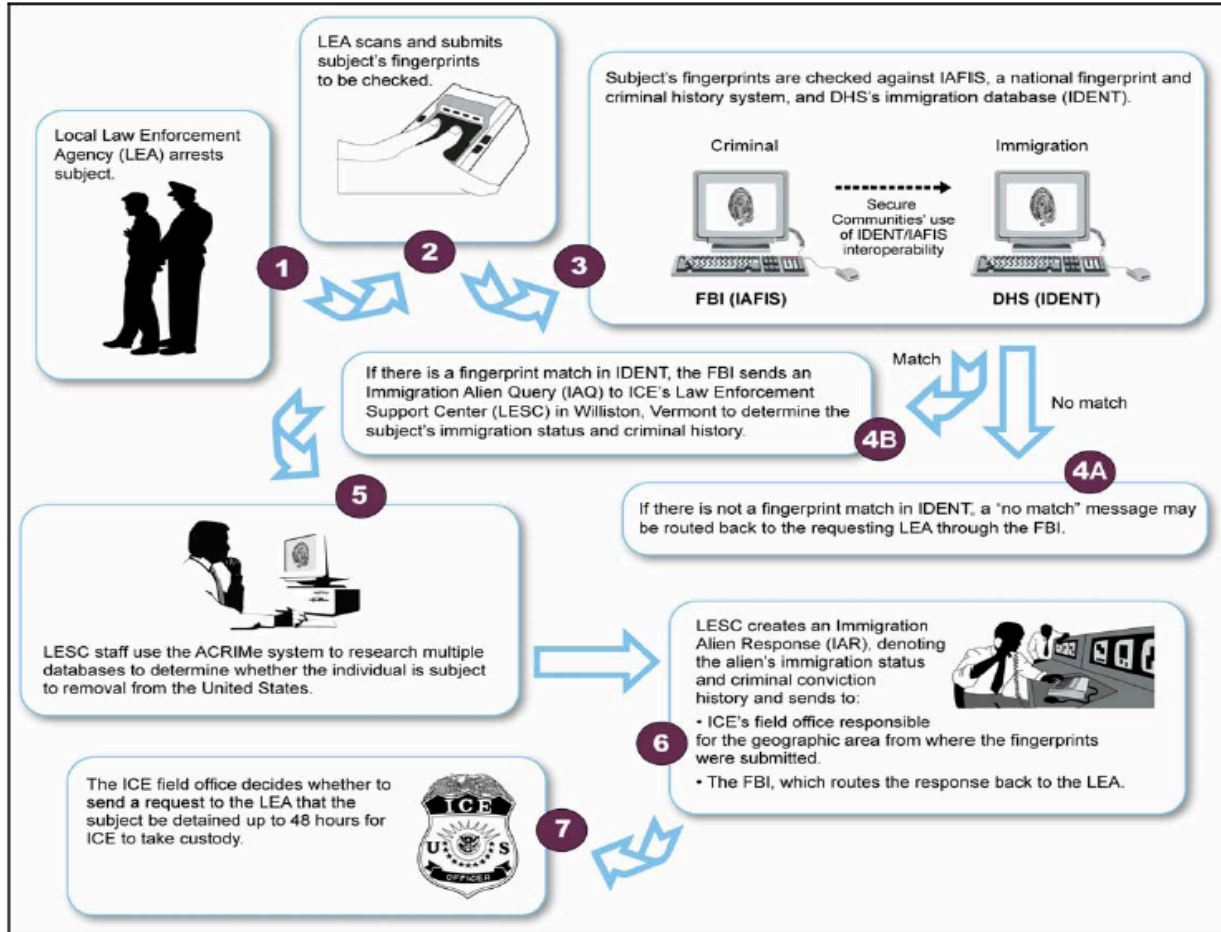
²⁰³ See UNHCR Detention Guidelines, Guideline 10, at p. 40.

²⁰⁴ See Immigration and Customs Enforcement Secure Communities Standard Operating Procedures- Distributed for adoption by participating country and local law enforcement agencies, Department of Homeland Security (available at: epic.org/privacy/secure_communities/securecommunitiesops93009.pdf).

reasons for which to incarcerate individuals for immigration law violations at great expense to states and tax-payers, and in violation of our international law obligations.

APPENDIX I- The Secure Communities Process (Infographic)

Figure 1: The Secure Communities Process



(See Report to the Ranking Member Committee on Homeland Security, House of Representatives; Criminal Alien Removals Increased, but Technology Planning Improvements Needed; U.S. Government Accountability Office, July 2012.)

APPENDIX II- UNHCR Detention Guidelines, Guideline 8

Conditions of Detention Must be Humane and Dignified

If detained, asylum-seekers are entitled to the following minimum conditions of detention:

(i) Detention can only lawfully be in places officially recognized as places of detention. Detention in police cells is not appropriate.²⁰⁵

(ii) Asylum-seekers should be treated with dignity and in accordance with international standards.²⁰⁶

(iii) Detention of asylum-seekers for immigration-related reasons should not be punitive in nature.²⁰⁷ The use of prisons, jails, and facilities designed or operated as prisons or jails, should be avoided. If asylum-seekers are held in such facilities, they should be separated from the general prison population.²⁰⁸ Criminal standards (such as wearing prisoner uniforms or shackling) are not appropriate.

(iv) Detainees' names and the location of their detention, as well as the names of persons responsible for their detention, need to be kept in registers readily available and accessible to those concerned, including relatives and legal counsel. Access to this information, however, needs to be balanced with issues of confidentiality.

(v) In co-sex facilities, men and women should be segregated unless they are within the same family unit. Children should also be separated from adults unless these are relatives.²⁰⁹ Where possible, accommodation for families ought to be provided. Family accommodation can also prevent some families (particularly fathers travelling alone with their children) from being put in solitary confinement in the absence of any alternative. Appropriate medical treatment must be provided where needed, including psychological

²⁰⁵ Abdolkhani and Karimnia v. Turkey (No.2), (2010), ECtHR App. No.50213/08, available at: <http://www.unhcr.org/refworld/docid/4c5149cf2.html>, which found a violation of Article 3 of the ECHR on account of the detention of refugees for three months in the basement of police headquarters.

²⁰⁶ A number of human rights provisions are specifically relevant to conditions in detention, such as Articles 7 (prohibition against torture and cruel, inhuman or degrading treatment), 10 (right to humane conditions in detention) and 17 (right to family life and privacy) of the ICCPR. See, also, UN Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, General Assembly resolution 43/173 of 9 December 1988, available at: <http://www.unhcr.org/refworld/docid/3b00f219c.html>; UN Standard Minimum Rules for the Treatment of Prisoners, 1955, available at: <http://www.unhcr.org/refworld/docid/3ae6b36e8.html>; UN Rules for the Protection of Juveniles Deprived of their Liberty, 1990, A/RES/45/113, 14 December 1990, available at: <http://www.unhcr.org/refworld/docid/3b00f18628.html>.

²⁰⁷ Inter-American Commission on Human Rights, Human Rights of Migrants, International Standards and the Return Directive of the EU, resolution 03/08, 25 July 2008, available at: <http://www.unhcr.org/refworld/docid/488ed6522.html>; Abdolkhani and Karimnia v. Turkey, above note 87.

²⁰⁸ WGAD, Report to the Seventh Session of the Human Rights Council, above note 54.

²⁰⁹ Muskhadzhiyeva and others v. Belgium, (2010), ECtHR, App. No. 41442/07, available at: <http://www.unhcr.org/refworld/docid/4bd55f202.html>, in which it was held inter alia that detaining children in transit facilities designed for adults not only amounted to inhuman or degrading treatment in contravention of Article 3 of the ECHR, it also rendered their detention unlawful.

counseling. Detainees needing medical attention should be transferred to appropriate facilities or treated on site where such facilities exist. A medical and mental health examination should be offered to detainees as promptly as possible after arrival, and conducted by competent medical professionals. While in detention, detainees should receive periodic assessments of their physical and mental well-being. Many detainees suffer psychological and physical effects as a result of their detention, and thus periodic assessments should also be undertaken even where they presented no such symptoms upon arrival. Where medical or mental health concerns are presented or develop in detention, those affected need to be provided with appropriate care and treatment, including consideration for release.

(vii) Asylum-seekers in detention should be able to make regular contact (including through telephone or internet, where possible) and receive visits from relatives, friends, as well as religious, international and/ or non-governmental organizations, if they so desire. Access to and by UNHCR must be assured. Facilities should be made available to enable such visits. Such visits should normally take place in private unless there are compelling reasons relevant to safety and security to warrant otherwise.

(viii) The opportunity to conduct some form of physical exercise through daily indoor and outdoor recreational activities needs to be available; as well as access to suitable outside space, including fresh air and natural light. Activities tailored to women and children, and which take account of cultural factors, are also needed.²¹⁰

(ix) The right to practice one's religion needs to be observed.

(x) Basic necessities such as beds, climate-appropriate bedding, shower facilities, basic toiletries, and clean clothing, are to be provided to asylum-seekers in detention. They should have the right to wear their own clothes, and to enjoy privacy in showers and toilets, consistent with safe management of the facility.

(xi) Food of nutritional value suitable to age, health, and cultural/ religious background, is to be provided. Special diets for pregnant or breastfeeding women should be available.²¹¹ Facilities in which the food is prepared and eaten need to respect basic rules on sanitation and cleanliness.

(xii) Asylum-seekers should have access to reading materials and timely information where possible (for example through newspapers, the internet, and television).

(xiii) Asylum-seekers should have access to education and/or vocational training, as appropriate to the length of their stay. Children, regardless of their status or length of stay,

²¹⁰ UN, Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules), A/C.3/65/L.5, 6 October 2010, Rule 42, available at: <http://www.unhcr.org/refworld/docid/4dcbb0ae2.html>.

²¹¹ Rule 48, Bangkok Rules, *ibid.* 94 Article 22, 1951 Convention; Art. 26, UDHR; Art. 13 and 14, ICESCR; Art. 28, CRC; Art.10, CEDAW.

have a right to access at least primary education.²¹² Preferably children should be educated off-site in local schools.

(xiv) The frequent transfer of asylum-seekers from one detention facility to another should be avoided, not least because they can hinder access to and contact with legal representatives.

(xv) Non-discriminatory complaints mechanism (or grievance procedure) needs to be in place,⁹⁵ where complaints may be submitted either directly or confidentially to the detaining authority, as well as to an independent or oversight authority. Procedures for lodging complaints, including time limits and appeal procedures, should be displayed and made available to detainees in different languages.

(xvi) All staff working with detainees should receive proper training, including in relation to asylum, sexual and gender-based violence,²¹³ the identification of the symptoms of trauma and/or stress, and refugee and human rights standards relating to detention. Staff-detainee ratios need to meet international standards;²¹⁴ and codes of conduct should be signed and respected.

(xvii) With regard to private contractors, subjecting them to a statutory duty to take account of the welfare of detainees has been identified as good practice. However, it is also clear that responsible national authorities cannot contract out of their obligations under international refugee or human rights law and remain accountable as a matter of international law. Accordingly, States need to ensure that they can effectively oversee the activities of private contractors, including through the provision of adequate independent monitoring and accountability mechanisms, including termination of contracts or other work agreements where duty of care is not fulfilled.²¹⁵

(xviii) Children born in detention need to be registered immediately after birth in line with international standards and issued with birth certificates.²¹⁶

²¹² See, UN General Assembly, Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power, 29 November 1985, A/RES/40/43 available at: <http://www.un.org/documents/ga/res/40/a40r034.htm>.

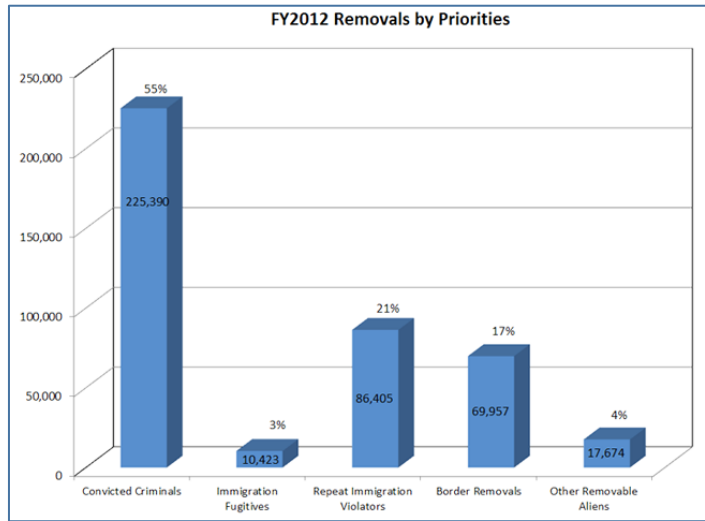
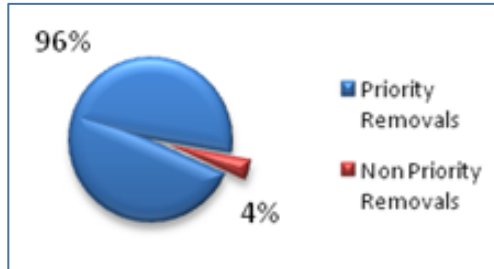
²¹³ UNHCR ExCom, Conclusion on Refugee Women and International Protection, No. 39 (XXXVI) – 1985, available at: <http://www.unhcr.org/3ae68c43a8.html> and UNHCR ExCom, Conclusion on Women and Girls at Risk, No. 105 (LVII) – 2005, available at: <http://www.unhcr.org/refworld/docid/45339d922.html>.

²¹⁴ Council of Europe Committee on Prevention of Torture Standards, December 2010, available at: <http://www.cpt.coe.int/en/documents/eng-standards.pdf>.

²¹⁵ UN, Guiding Principles on Business and Human Rights, A/HRC/17/31, 21 March 2011, ¶ 5; Global Roundtable Summary Conclusions, above note 48, ¶ 14.

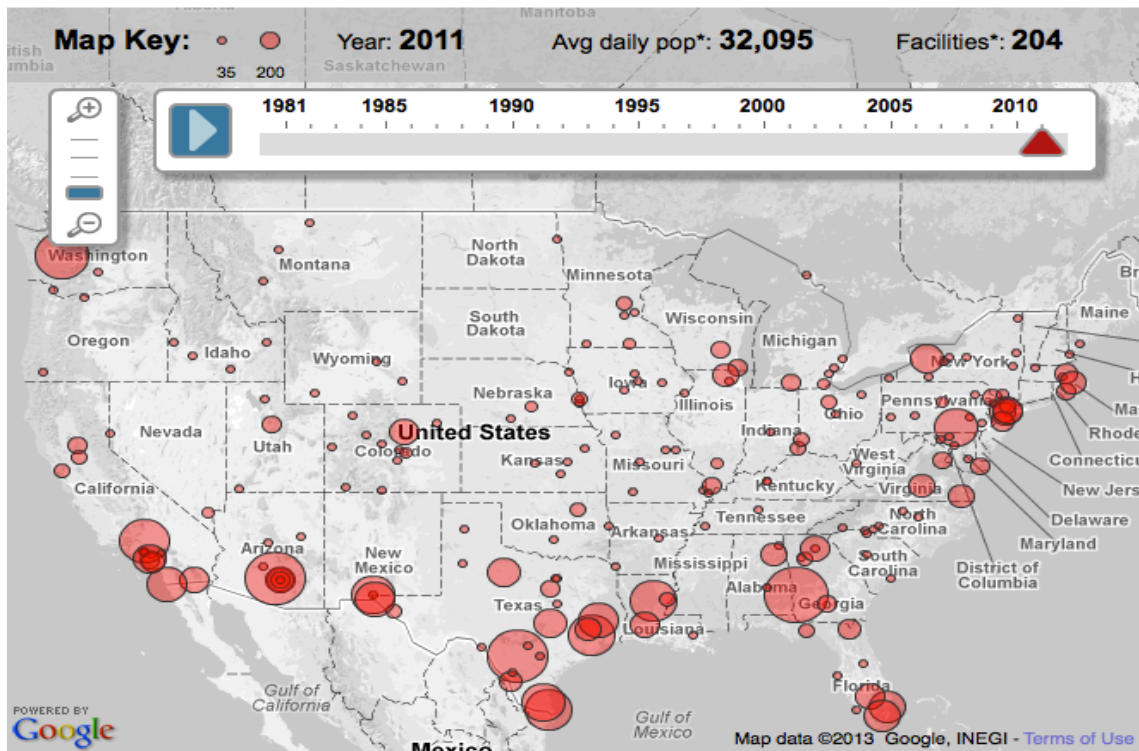
²¹⁶ Article 7(1), CRC and Article 24(2), ICCPR. See, also, UNHCR ExCom, Conclusion on Refugee Children, No. 47 (XXXVIII) – 1987, para. (f) and (g), available at: <http://www.unhcr.org/refworld/docid/3ae68c432c.html>; UN Human Rights Council, Resolution on Rights of the Child, 20 March 2012, A/HRC/19/L.31, paras. 16(c) and 29-31, available at: <http://www.unhcr.org/refworld/docid/502e10f42.html>; UN Human Rights Council, Resolution on Action on Birth Registration and the Right of Everyone to Recognition Everywhere as a Person Before the Law, 15 March 2012, A/HRC/19/L.24, available at: http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/19/L.24.

APPENDIX III- Useful Charts and Information



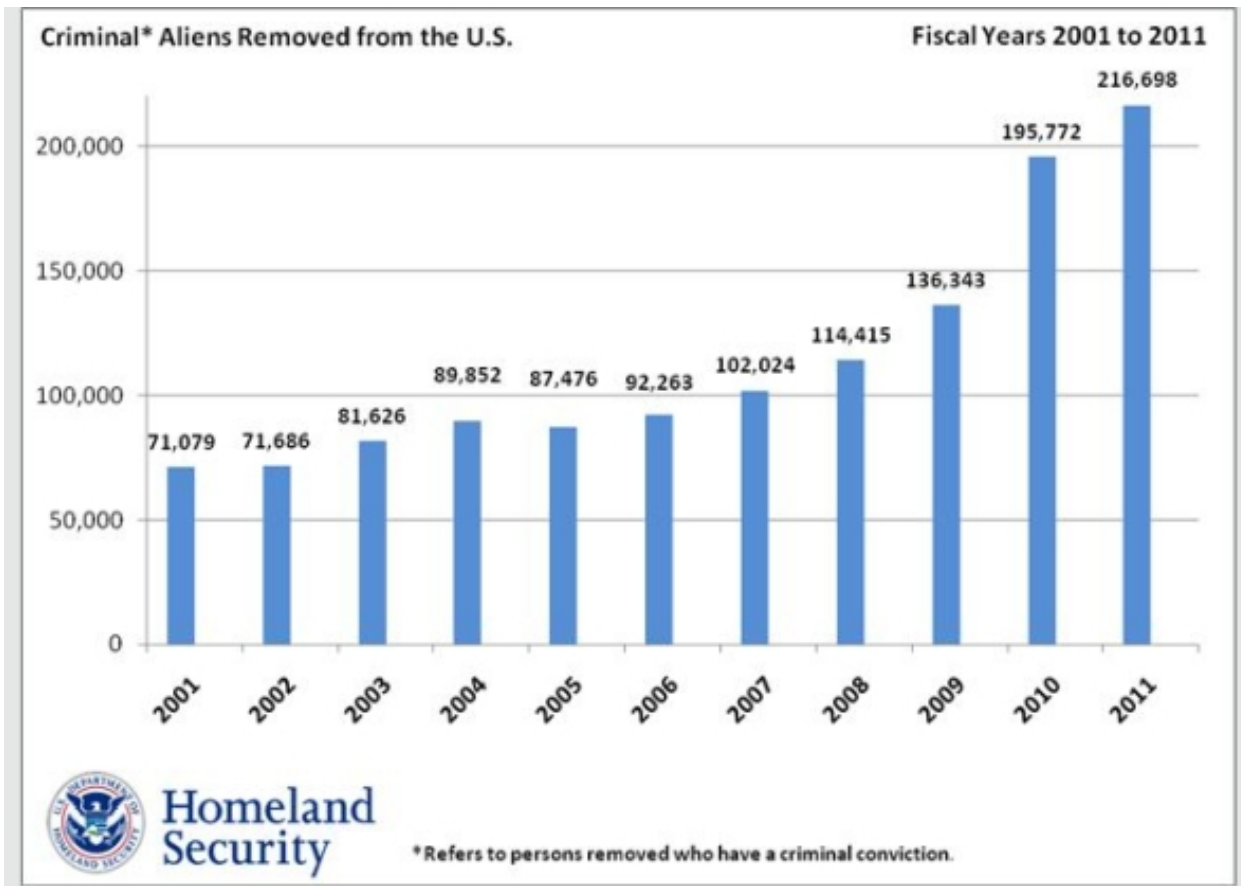
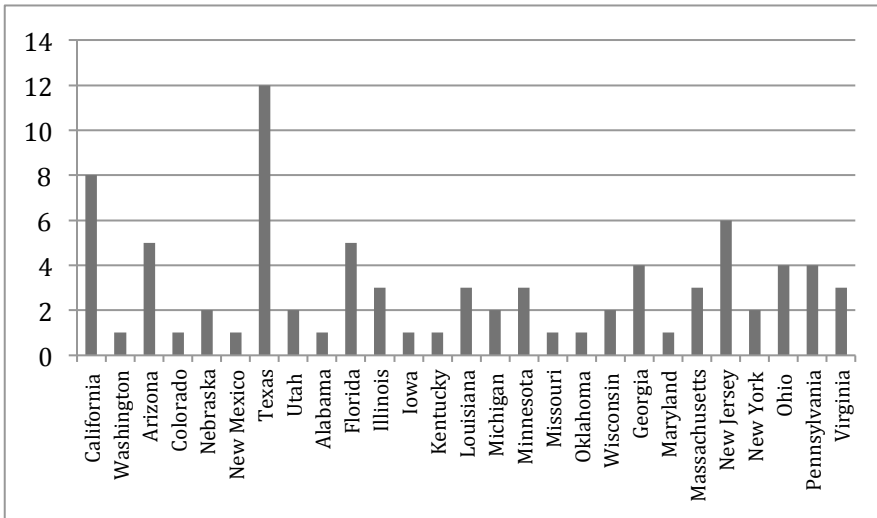
(See <http://www.ice.gov/detention-facilities/>)

Detention Facilities Across the U.S. in 2011¹



¹Only facilities with an average daily population of 1 or more detained immigrants are included. Data for 2011 is through Sept. 9. Credits: [Jacob Fenton](#), [Catherine Rentz](#), Stokely Baksh and Lisa Hill. Source: ICE.

Number of ICE Listed Detention Facilities in Individual States¹



APPENDIX IV- Secure Communities Levels and Offense Categories by NCIC Code

Source: Immigration and Customs Enforcement Secure Communities Standard Operating Procedures

Secure Communities Levels and Offense Categories by NCIC Code

Level 1 Crimes (NCIC Code)	Level 2 Crimes (NCIC Code)	Level 3 Crimes (NCIC Code)
National Security* (0101-0199, 1602, 5204-5299)	Arson (2001-2099)	Military (0201, 0299)
Homicide (0901-0999)	Burglary (2201-2299)	Immigration (0301-0399)
Kidnapping (1001-1099)	Larceny (2301-2399)	Extortion (2102-2199)
Sexual Assault (1101-1199)	Stolen Vehicles (2401-2411, 2499)	Damage Property (2901-2903)
Robbery (1201-1299)	Forgery (2501-2599)	Family Offenses (3801, 3804-3899)
Aggravated Assault (1301-1399)	Fraud (2601-2699)	Gambling (3901-3999)
Threats (1601)	Embezzlement (2701-2799)	Commercialized Sex Offenses (4001-4099)
Extortion –Threat to Injure Person (2101)	Stolen Property (2801-2899)	Liquor (4101-4199)
Sex Offenses (3601-3699)	Damage Property w/Explosive (2904-2906)	Obstructing the Police (4802-4899)
Cruelty Toward Child, Wife (3802,3803)	Traffic Offenses (5402-5499)	Bribery (5101-5199)
Resisting an Officer (4801)	Smuggling (5801-5899)	Health and Safety (5501-5599)
Weapon (5201-5203)	Money Laundering (6300)	Civil Rights (5699)
Hit and Run (5401)	Property Crimes (7199)	Invasion of Privacy (5701-5799)
Drugs (Sentence >1 year)	Drugs (Sentence < 1 year)	Elections Laws (5999)
		Conservation (6201-6299)
		Public Order Crimes (7399)

*National Security violations include the NCIC coded offenses of Sabotage, Sedition, Espionage, and Treason (0101-0199); Terrorist Threats (1602); and Weapons, Arson/Incendiary Devices, and Bombing offenses (5204-5299).

APPENDIX V- Immigration Detainer Form

U.S. Department of Homeland Security

Immigration Detainer – Notice of Action

Subject ID :
Event No:
File No. A
Date: September 4, 2008

TO: (Name and title of institution) JAIL	From: (Office address) WASHINGTON, DC, (HQ) DOCKET CONTROL OFFICE DOCKET CONTROL OFFICE HEADQUARTERS 425 I STREET NW WASHINGTON, DC 20535
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Name of alien: _____
 Date of birth: _____ Nationality: _____ Sex: _____

You are advised that the action noted below has been taken by the U.S. Department of Homeland Security concerning the above-named inmate of your institution:

- Investigation has been initiated to determine whether this person is subject to removal from the United States.
- A Notice to Appear or other charging document initiating removal proceedings, a copy of which is attached, was served on _____ (Date)
- A warrant of arrest in removal proceedings, a copy of which is attached, was served on _____ (Date)
- Deportation or removal from the United States has been ordered.

It is requested that you:

Please accept this notice as a detainer. This is for notification purposes only and does not limit your discretion in any decision affecting the officer's classification, work, and quarters assignments, or other treatment which he or she would otherwise receive.

- Federal regulations (8 CFR 237.7) require that you detain the alien for a period not to exceed 48 hours (excluding Saturdays, Sunday's and Federal holidays) to provide adequate time for DHS to assume custody of the alien. You may notify DHS by calling _____ during business hours or _____ after hours in an emergency.
- Please complete and sign the bottom block of the duplicate of this form and return it to this office. A self-addressed stamped envelope is enclosed for your convenience. Please return a signed copy via facsimile to _____ (Area code and facsimile number)

Return fax to the attention of _____ of _____ (Name of officer handling case) (Area code and phone number)

- Notify this office of the time of release at least 30 days prior to release or as far in advance as possible.
- Notify this office in the event of the inmate's death or transfer to another institution.
- Please cancel the detainer previously placed by this Office on _____

SHAWN L. BYERS _____ **DETENTION AND DEPORTATION OFFICER**
 (Signature of Immigration Officer) (Title of Immigration Officer)

Receipt acknowledged:

Date of last conviction: _____ Latest conviction charge: _____
 Estimated release date: _____
 Signature and title of official: _____