Macalester College
DigitalCommons@Macalester College

Honors Projects | Political Science Department

5-3-2010

Think Outside the Cell: Are Binding Detention Standards the Most Effective Strategy to Prevent Abuses of Detained Illegal Aliens?

Federico D. Burlon
Macalester College, federico.burlon@gmail.com

Follow this and additional works at: http://digitalcommons.macalester.edu/poli_honors

Part of the American Politics Commons, Criminology and Criminal Justice Commons, and the Immigration Law Commons

Recommended Citation
Burlon, Federico D., "Think Outside the Cell: Are Binding Detention Standards the Most Effective Strategy to Prevent Abuses of Detained Illegal Aliens?" (2010). *Honors Projects*. Paper 26.
http://digitalcommons.macalester.edu/poli_honors/26

This Honors Project is brought to you for free and open access by the Political Science Department at DigitalCommons@Macalester College. It has been accepted for inclusion in Honors Projects by an authorized administrator of DigitalCommons@Macalester College. For more information, please contact scholarpub@macalester.edu.

Think Outside the Cell: Are Binding Detention Standards the Most Effective Strategy to Prevent Abuses of Detained Illegal Aliens?

Honors Thesis

Political Science Department

Federico D. Burlon

Prof. Zornitsa Keremidchieva

Abstract

In the last twenty years the U.S. government has increasingly utilized detention to control illegal immigration. This practice has become controversial because it has caused numerous in-custody abuses and deaths of immigrants, asylum seekers, refugees and even citizens. Immigrant rights advocates have called for the passage of binding detention standards to prevent in-custody abuses. This thesis's policy analysis reveals, however, that while they may finesse the practice of immigration detention, such binding standards would be ineffective in protecting immigrants' rights. Instead this policy analysis calls for and explains the feasibility of discontinuing the practice of mass immigrant detention.

"We are a nation of laws, and we must enforce our laws. We're also a nation of immigrants, and we must uphold that tradition…"

George Bush – 05/15/2006

"We are a nation of laws and a nation of immigrants, and we must reconcile those traditions."

Barack Obama – 4/14/2008

"America is a nation of immigrants – and it is the Department of Homeland Security's role to manage America's borders in a way that furthers this heritage, promoting legal immigration and cross-border commerce, while upholding the rule of law"

Janet Napolitano (Secretary of DHS) – 01/30/2009

Acknowledgements

I am very much indebted to Prof. Zornitsa Keremidchieva at Macalester College for her advice and for supervising this project. I also offer sincere thanks to Prof. Wendy Weber and Prof. James von Geldern at Macalester College for their input and for participating in the oral examination committee. I thank Emily Good and Michele McKenzie at The Advocates for Human Rights for supervising my year-long internship at the organization's Refugee and Immigrant Program, which served as a primary inspiration for this thesis. I am particularly grateful to Elizabeth Larson for her unconditional invaluable support.

Table of Contents

Abstract i

Epigraphs ii

Acknowledgements iii

Table of Contents iv

List of Abbreviations vi

1. The Crisis of Mass Alien Detention 1
    1.1. Literature Review: Charting the Scope and Meaning of the Crisis of Immigration Detention
        1.1.1. Mass Detention as a Domestic Response to Globalization
            1.1.1.1. Individual Accountability and the Process of Criminalization
            1.1.1.2. Border Control and the Process of Securitization
        1.1.2. Mass Detention as a Failure of the International Human Rights Regime
    1.2. Method: Policy Analysis

2. Discursive and Structural Origins of the Mass Detention Policy for Undocumented Aliens 37
    2.1. The 1980s: Crime and drugs rhetoric
    2.2. The 1990s: The Transition from Criminalization to Securitization
    2.3. The 2000s: Security and Terrorism Rhetoric Post-9/11
    2.4. The Current Legacies of the Criminalization and Securitization Paradigms

3. Past and Current Proposals to Address the Crisis in Alien Detention 66
    3.1. The First Set of Standards
    3.2. The National Detention Standards
    3.3. The Performance-Based Standards and a Denied Petition
    3.4. Policies under the Obama Administration

4. Obstacles to Implementing Legally Binding Detention Standards 102
4.1. ICE's Decentralized Structure
4.2. ICE's Outsourcing of Services
4.2.1. Contract Detention Facilities and Local Jails
4.2.2. Immigration Law Enforcement by Local Police under 287(g) Program
4.3. Conclusion

5. Going Forward: Reconsidering the Policy of Mass Detention of Undocumented Aliens 133
5.1. Reconsidering Mass Immigration Detention Will Address the Root of the Problem
5.2. Reconsidering Mass Immigration Detention Will Prevent Abuses of Asylum Seekers, Refugees and Citizens
5.3. Reconsidering Mass Immigration Detention Will Subdue Its Lasting Psychological Consequences
5.4. Reconsidering Mass Immigration Detention Will Reduce Cost to Taxpayers
5.5. Beyond Mass Immigration Detention

Bibliography 164

List of Abbreviations

ABA: American Bar Association

ACA: American Correctional Association

ACLU: American Civil Liberties Union

AEDPA: Antiterrorism and Effective Death Penalty Act

ATD: Alternative(s) to Detention

BOP: Bureau of Prisons

CAT: Convention Against Torture

CCA: Corrections Corporation of America

CDF: Contract Detention Facilities

CERD: International Convention on the Elimination of All forms of Racial Discrimination.

CFR: Code of Federal Regulations

DHS: Department of Homeland Security

DIHS: Division of Immigration Health Services

DRO: Office of Detention and Removal Operations

EM: Electronic Monitoring

ESR: Enhanced Supervision Reporting

GAO: Government Accountability Office

ICE: Immigration and Customs Enforcement

ICCPR: International Covenant on Civil and Political Rights

ICESCR: International Covenant on Economic, Social and Cultural Rights

IGSA: Inter-Governmental Service Agreements

IIRIRA: Illegal Immigration Reform and Immigrant Responsibility Act

INA: Immigration and Nationality Act

INS: Immigration and Naturalization Service

ISAP: Intense Supervision Appearance Program

MOA: Memorandum of Agreement

NDS: National Detention Standards

ODPP: Office of Detention Policy and Planning

OIG: Office of the Inspector General

PBNDS: Performance-Based National Detention Standards

SPC: Service Processing Centers

UCR: Uniform Crime Reports

UDHR: Universal Declaration of Human Rights

USA PATRIOT Act: Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism

USC: United States Code

USCIS: United States Citizenship and Immigration Service

1. The Crisis of Mass Alien Detention

Human rights abuses plague the immigration detention system in the United States. In the last twenty years, two interrelated trends have made such abuses possible and have brought immigration detention under the limelight. First, the inflow of undocumented aliens to the United States has grown significantly.[1] Second, immigration policies have become more restrictive. Since the 1990s, the government has increasingly relied on the practice of detention to control illegal immigration.[2] As a result of the interplay between these phenomena, the number of illegal aliens in custody skyrocketed. The average daily detention population increased from over 8,000 in 1997 to over 31,000 in 2009.[3] Similarly, the total annual number of individuals detained multiplied from 155,000 in 1997 to 380,000 in 2009.[4] In the last decades, immigration laws have

---

[1] The number of undocumented aliens is an estimation, which varies according to the source. The Department of Homeland Security estimates that in 1996 there were between 4.6 and 5.4 million illegal aliens. (U.S. Department of Homeland Security, "Illegal Alien Resident Population," http://www.dhs.gov/xlibrary/assets/statistics/illegal.pdf (accessed February 11, 2010), 1). Hoeffer, Rytina and Cambpbell estimate that ten years later, in 2006 there were 11.6 million. (Michael Hoffer, Nancy Rytina and Christopher Campbell – U.S. Department of Homeland Security, "Estimates of the Unauthorized Immigrant Population in Residing in the United States: January 2006," http://www.dhs.gov/xlibrary/assets/statistics/publications/ill_pe_2006.pdf (accessed February 11, 2010), 1). In January 2009, Hoeffer, Rytina and Baker estimated that the unauthorized immigrant population had decreased to 10.8 million. (Michael Hoeffer, Nancy Rytina and Brian C. Baker, "Estimates of the Unauthorized Immigrant Population in Residing in the United States: January 2009," U.S. Department of Homeland Security, http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2009.pdf (accessed February 11, 2010), 1).

[2] According to United States laws, "alien" is the correct term to denote persons who are not citizens or nationals of the United States (8 USC 1101 (a) (3)). Nevertheless, for the sake of simplicity, "immigrant" and "alien" will be used interchangeably in this thesis. Aliens are placed in detention when the United States government believes that they are deportable or inadmissible to the United States (8 USC 1226 (c) (1)).

[3] Exact figures for the number of immigrants in detention vary according to the source. According to Chris Hedges from the *New York Times* indicates that in 1997 the average daily detained population was 8,200. (Chris Hedges, "Policy to Protect Jailed Immigrants is adopted by the U.S.," *New York Times*, January 2, 2001). According to Associated Press journalist Michelle Roberts's investigation, on the night of January 25, 2009 there were 32,000 immigration detainees. (Michelle Roberts, "Immigrants Face Detention, Few Rights," *The Associated Press*, March 15, 2009). On September 1, 2009 there were 31,075 aliens in detention according to a report released by Dora Schriro. (Dora Schriro, *Immigration Detention Overview and Recommendations*, October 6, 2009, www.ice.gov/doclib/091005_ice_detention_report-final.pdf (accessed March 24, 2010), 2).

[4] Schriro, *Immigration Detention Overview*, 6.

progressively demanded the detention of illegal aliens irrespective of whether they have a criminal record or pose a serious threat to the United States. Consider that whereas sixty-six percent of the aliens who were in the government's custody on September 1, 2009, were under mandatory detention, only fifty-one percent had a criminal record, and only eleven percent had committed serious crimes, namely, Part 1 crimes under the Uniform Crime Report system.[5] This essay refers to the increasing incarceration of criminal and non-criminal aliens as *mass immigration detention*.

Although detention has become a central immigration control tool, the immigration detention system is barely regulated. The absence of guidelines to govern detention conditions led to in-custody abuses and mistreatment. The fact-finding and advocacy work of human and immigrant rights organization put pressure on the federal government to find a solution to the crisis of abuses in immigration detention. In 1998, the Immigration and Naturalization Service (INS) published a set of detention guidelines. However, abuses of alien detainees' rights continued because the guidelines were not legally enforceable and applied only to a subset of detention facilities. The government expanded the guidelines in 2001 and in 2008; yet, the standards remained mere suggestions. Consequently, alien detainees have remained disempowered, in-custody abuses have continued to be an everyday reality, and the list of in-custody deaths has become more extensive. As a response to the crisis, immigrant rights advocates suggested the codification of detention guidelines into legally binding detention standards.

---

[5] The Uniform Crime Report (UCR) system was created in 1929 and is used to classify and account for crimes in the United States. The UCR divides crimes into Part I and Part II. Crimes under Part I are the most serious crimes such as: Criminal homicide, forcible rape, robbery, aggravated assault, burglary, larceny-theft, motor vehicle theft, and arson. Crimes under Part II include, *inter alia*, fraud, vandalism, sex offenses, drug abuse, drunkenness, vagrancy, and disorderly conduct. Schriro, *Immigration Detention Overview*, 6.

Notwithstanding advocates' perseverance, legally enforceable standards have not come into being. In this context, the question arises: Are binding detention standards the most effective strategy to prevent abuses of illegal aliens in pre-deportation detention?

This thesis analyzes and evaluates the strategy of developing legally enforceable immigration detention standards in terms of the extent to which it helps to prevent violations of alien detainees' rights. The aim of this policy analysis is to minimize human rights violations in immigration detention. This thesis argues that the policy of establishing legally binding immigration detention standards is an impractical solution to the problem of violations of aliens' rights and suggests that what is needed is a thorough reconsideration of the practice of mass immigration detention itself and the expansion of alternative to detention (ATD) programs. In other words, the advancement of aliens' human rights necessitates that policy makers think outside the cell.

This policy analysis argues that immigration detention standards are impractical and ineffective in protecting the rights of illegal aliens for two reasons. The first reason is that Immigration and Customs Enforcement (ICE), the agency that manages immigration detention, is highly decentralized. As a consequence, coordination among its different organizational levels is poor and detention practices vary across the country. The second reason is that ICE outsources two of its most important functions, immigration detention and immigration law enforcement, to third parties. In the case of immigration detention, the majority of detained aliens are housed in facilities that are neither owned nor operated by ICE. In terms of immigration law enforcement, the agency allows local police departments to fully enforce immigration laws – a prerogative of the federal government – through *inter alia* the 287(g) program. Because local police departments lack

perspective and have different priorities, the 287(g) program has led to anti-immigration raids and cases of racial profiling. ICE's decentralized structure and its outsourcing of detention and enforcement functions make immigration detention a heterogeneous practice and prevents the systematic enforcement of binding detention standards across the country.

This thesis favors the reconsideration of mass immigration detention vis-à-vis the codification of detention guidelines. Abolishing the practice of mass immigration detention will address the roots of the problem, namely the framing of undocumented aliens as criminals and security threats, will prevent the incarceration of asylum seekers, refugees and United States citizens, will subdue the lasting psychological impacts of detention, and will reduce the cost to taxpayers. As an all-encompassing analysis of the immigration detention system, this thesis intends to target issues in the long run rather than to find palliatives to today's troubles. The aim of this project is to foster an immigration detention policy-making concerned with and informed by human rights imperatives. As such, the analysis is targeted towards policy-makers. While this thesis's recommendations part ways with the suggestions that advocates for immigrant rights put forward, this does not imply a dismissal of advocates' work, which is essential in many fundamental respects. Without immigrant rights advocates' investigations little information about the immigration detention system would be available. Without advocates support, many of aliens in detention would not be aware of their rights and would be inevitably powerless in the face of a detention system that frames aliens as criminals and security threats. However, advocates' efforts will hardly keep up with the

pace at which the problem is growing. For this reason, a more systemic approach to alien detention is warranted.

Before considering the crisis of immigration detention, some clarification points are in order. First, the sort of detention to which this project refers is pre-removal (pre-deportation) detention. Second, illegal immigration is not a crime but a civil offense. Therefore, immigration detention is administrative because it only serves to ensure the alien's presence throughout the removal proceeding. This means that immigration detention should not be punitive in nature. The non-punitive nature of immigration detention is supported by case law. In *Bell v Wolfish* the United States Supreme Court stated, "a detainee may not be punished prior to the adjudication of guilt in accordance with due process of law."[6] In *Zadvydas v Davis* the Supreme Court indicated that civil proceedings such as immigration detention are to be "nonpunitive in purpose and effect."[7] Third, this thesis refers to foreigners as "aliens," which is the legal term.[8] According to the United States Code, the "alien" refers to an individual who is neither a citizen, nor a national of the United States.[9] Yet, it is important to underscore that such term carries a negative connotation and has been used to other non-citizens. Within the category of aliens, this thesis considers the case of illegal or undocumented aliens. Notably, there is no definition of illegal alien in federal laws. According to the Government Accountability Office, an illegal alien is "a person who enters the United States without legal permission or who fails to leave when his or her permission to

---

[6] *Bell v. Wolfish*, 441 U.S. 520, 535 (1979); Kelsey Papst, "Protecting the Voiceless: Ensuring ICE's Compliance with Standards that Protect Immigration Detainees," *McGeorge Law Review* 40 (2009), 266
[7] *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).
[8] Although some authors use the term "immigrant," it refers to individuals whose legal status reflects the reality that they have come to the United States to stay and have the right to do so.
[9] 8 U.S.C § 1101(a)(3).

remain in the country expires."[10] Fourth, for the purpose of this project, the term "immigrant rights" comprises both human rights under international laws and aliens' rights under the United States domestic laws. While the next section focuses on the international human rights regime, consider that both the United States Constitution and case law protect certain aliens' rights as well.[11]

To understand how both criminal and non-criminal aliens alike end up in immigration detention consider the following example. If a Mexican citizen enters in the United States illegally and does not have a criminal record, he will be detained and given

---

[10] U.S Government Accountability Office, *Undocumented Aliens: Questions Persist about Their Impact on Hospitals' Uncompensated Care Costs*, http://www.gao.gov/new.items/d04472.pdf (accessed January 14, 2010), 1; Linda S. Bosniak, "Human Rights, State Sovereignty and the Protection of Undocumented Migrants Under the International Migrants' Workers Convention," In *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, ed. Barbara Bogusz, Ryszard Cholewinski, Adam Cygan and Erika Szyszczak, (Leiden: Martinus Nijhoff Publishers, 2004), 317.

[11] Aliens detained in removal proceedings are entitled to the due process of law enshrined in the Fifth, Sixth and Fourteenth Amendments as established in *Yick Wo v. Hopkins* (118 US 369 (1886)) and in *Wong Wing v. United States* (163 US 228 (1896)). The last case states "all persons within the territory of the United States are entitled to the protection guarantied by [the Fifth and Sixth] amendments, and that even aliens shall not be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty or property without due process of law." (*Wong Wing v. United States* 163 US 228, 238 (1896)). According to Margaret Taylor, immigrants' ability to challenge the conditions of confinement is limited by great deference that the Supreme Court has given the executive and legislative branches of government over immigration (Papst, "Protecting the Voiceless," 265). This deference, which has existed since the late nineteenth century, is called the plenary power doctrine. However, Papst argues that Congress' choices are subject to constitutional limitations. Indeed, in *Zadvydas v. Davis*, the Supreme Court held that although "Congress has 'plenary power' to create immigration law, and the Judicial Branch must defer to Executive and Legislative Branch decision-making in this area [,] that power is subject to important constitutional limitation" (*Zadvydas v. Davis*, 533 US 678, 695 (2001)). Although the Supreme Court in *Zadvydas v. Davis* circumscribed the plenary power of the executive and legislative branches over the length of detention of immigrants with deportation orders, it issued no limitations in terms of conditions of detention (Papst, "Protecting the Voiceless," 266). In *Youngberg v Romeo* the U.S. Supreme Court suggested that civil detainees are entitled to "adequate food, shelter, clothing, and medical care" (*Youngberg v. Romeo*, 457 U.S. 507, 315 (1982)). In fact, in *Jones v. Blanas* the Ninth Circuit Court of Appeals held that a civil detainee is "entitled to 'more considerate treatment' than his criminally detained counterparts" (*Jones v. Blanas*, 393 F3d 918, 932 (2004)). Moreover, the Court stated that when a civil or pretrial detainee is "confined in conditions identical to, similar to, or more restrictive than, those in which his criminal counterparts are held, we presume that the detainee is being subjected to 'punishment'" (*Jones v. Blanas*, 393 F3d 918, 932 (2004)). What case law suggests with respect to the detention of illegal aliens in removal proceedings is that they are indeed entitled to protections under the Fifth, Sixth and Fourteenth Amendments. In other words, by virtue of being civil detainees, they are entitled to nonpunitive and adequate conditions of detention. In terms of codifying immigration detention standards, the rights that, according to the judiciary, immigration detainees enjoy are already in existence. Thus, the argument goes that making detention standards legally binding would not require the creation or reinterpretation of a set of rights, but the provision to detainees of an adequate tool to claim their rights.

a right to bail. Yet, because bonds are usually set at between $5,000 and $10,000, few illegal aliens are able to afford posting bail. As a result, he must sit in detention until deportation occurs. If the alien comes from Mexico, removal takes place within a few days. However, if the alien is from any other country, he has to wait for weeks or months until he obtains a travel document and the United States government is able to arrange a flight to the alien's country of removal. If the alien is from a country where they cannot be deported because the United States government has no deportation agreements or diplomatic relations (for instance Somalia or Laos), the alien will be in ICE custody for ninety days and then will be granted a Custody Review that may or may not result in his release. If the alien has a criminal record, depending on the type of crime, he may have a higher bond, may be detained without bond until Custody Review occurs, or may be detained indefinitely. If an alien with a criminal record, which may consist only of a misdemeanor, seeks to challenge removal by requesting asylum, cancellation of removal, or adjustment of status, he will stay in detention until his case is adjudicated, which may take months or years. Though these are only few of the ways in which aliens may end in detention, it is evident that aliens do not have to be criminals to end up in ICE custody. The next section considers the secondary literature relevant to immigration detention, to properly understand the context in which mass immigration detention emerges and operates.

1.1. Literature Review: Charting the Scope and Meaning of the Crisis of Immigration Detention

This section considers scholarly perspectives in the literature to understand the roots of the United States government hostility towards illegal aliens and the ensuing crisis in immigration detention. The following paragraphs argue that the current crisis in the detention system occurs at the intersection of domestic reactions to globalization and of the limited impact of the international human rights regime. The reason why a multiplicity of voices informs this project is that, being mass immigration detention a recent practice, the body of literature devoted to this issue is limited. This thesis borrows from the work of experts in the fields of human rights, migration studies, refugee studies, political science, economics, and communication and rhetorical studies. The interrelated and diverse insights that inform the debate are an advantage and an opportunity for this project to contribute to the establishment a body of literature focused specifically on the subject of immigration detention. This section suggests that, while compelling, existent approaches offer little in terms of pragmatic solutions to the problems that beset immigration detention. Thus, presenting and supporting a long-term humane solution to the immigration detention crisis in the United States is the main contribution this thesis makes to the debate.

1.1.1. Mass Detention as a Domestic Response to Globalization

Globalization has increased the movement of people. As a result, there are more foreigners attempting to enter affluent countries. Developed states in general and the United States in particular, understand this phenomenon as a challenge to their sovereign

right to regulate the admission and expulsion of foreigners and deliver a hostile response by cracking down on illegal immigration. To stem illegal immigration, the United States has devised policies that emphasize border control and individual accountability on the part of aliens. The tightening of border control has led to the framing of illegal aliens as criminals and drug traffickers, a process called *criminalization*. The demand for individual accountability has led to the framing of illegal aliens as potential terrorists and existential security threats to the nation, a process called *securitization*. In addition to othering illegal aliens, the processes of criminalization and securitization have demanded and justified restrictive and punitive immigration policies, resulting in the increasing use of detention as an immigration control tool. Consequently, illegal aliens have been othered and detained en masse. These two phenomena have led to violations of aliens' human and constitutional rights in detention centers and, in turn, to the current crisis of immigration detention. This section of the literature review considers immigration policies in terms of border control and in terms of the demand for individual accountability.

In order to understand the way in which the United States' response to globalization has led to mass immigration detention, it is important to begin with the effects of globalization on international migration. Jan A. Scholte defines globalization as the "spread of transplanetary … connections between people" resulting from a reconfiguration of social space, which among many other things, has interlinked countries' economic systems and has facilitated international travel.[12] These links have increased the international flow of money and people. According to the analysis of David

[12] Jan Aart Scholte, *Globalization, a Critical Introduction*, 2nd ed. (New York: Palgrave Macmillan, 2005), 69.

Held et al, the present migration trends under globalization are likely to outdo previous migration patterns in both intensity and extensity.[13] By expanding the frontiers for the transboundary movement of people, goods, and services, globalization has also resulted in more individuals knocking on affluent states' doors. The number of undocumented aliens in the United States has steadily increased sine 1980.[14] Between 1990 and 2009, the number of illegal aliens in the United States tripled from 3.5 to 10.8 million.[15] The unprecedented number of aliens without legal immigration status has called into question the state's ability to regulate the ingress and permanence of foreigners. As Seyla Benhabib argues, globalization has reconfigured the Westphalian model of the state, according to which the state had full capacity to exercise its authority over the land and the people.[16]

According to Saskia Sassen and Catherine Dauvergne, affluent states see the rising inflow of aliens as a threat to their right to regulate the admission of expulsion of foreigners. Thus the question rises, do states have such right? The maxim that states have the power to set their own immigration policy and the right to deny entry to aliens is today an established principle in international law. The publicist Emerich de Vattel tersely stated it in his 1758 treatise *The Law of Nations*.[17] A United States court first

---

[13] David Held, Anthony McGrew, David Goldblatt and Jonathan Perraton, *Global Transformations: Politics, Economics and Culture* (Stanford, CA: Stanford University Press, 1999).

[14] As underscored in the introduction, no exact figures exist and all the figures are estimations, which vary according to the source.

[15] Note that these figures are estimates. Because the U.S. census does not ask for immigration status, it is impossible to define the exact number of illegal aliens in the country.

[16] Seyla Benhabib, "Political Theory and Political Membership in a Changing World," In *Political Science: The State of the Discipline* ed. Ira Katznelson and Helen V. Milner, 404-434. (Washington DC: American Political Science Association, 2002), 407.

[17] Vattel says: "The sovereign may forbid the entrance of his territory either to foreigners in general, or in particular cases, or to certain persons, or for certain particular purposes, according as he may think it advantageous to the state." Emerich de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and*

applied the principle in *Nishimura Ekiu v. United States* in 1892.[18] In addition, the principle is enshrined in two international treaties. One of them is the Convention on Certain Questions Relating to the Conflict of Nationality Laws of 1930, also known as The Hague Convention of 1930.[19] The other is the Universal Declaration of Human Rights, which Article 13(2) protects the right to leave a country but not the right to enter another.[20] Yet, the right of the state to control the admission and removal of foreigners has a recent pedigree. As John Torpey indicates, passports were introduced as means of state surveillance only in the early twentieth century.[21] Thus, scholars such as James Nafziger,[22] David Matas,[23] and Teresa Hayter,[24] have challenged this principle. Although

---

Nature of Natural Law on Luxury, ed. Béla Kapossy and Richard Withmore (Indianapolis, IN: Liberty Fund), http://oll.libertyfund.org/title/2246 (accessed March 18, 2010), §94.

[18] *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892). See James Nafziger, "The General Admission of Aliens Under International Law," *The American Journal of International Law*, 77 no. 4 (1983), 804.

[19] Article 1 reads: "it is for each State to determine under its own law who are its nationals." See League of Nations, *Convention on Certain Questions Relating to the Conflict of Nationality Law*, April 13, 1930, League of Nations, Treaty Series, vol. 179, p. 89, No. 4137, http://www.unhcr.org/refworld/docid/3ae6b3b00.html (accessed March 19, 2010), Article 1.

[20] United Nations General Assembly, *Universal Declaration of Human Rights*, www.un.org/en/documents/udhr/ (accessed March 19, 2010), article 13(2).

[21] John Torpey, *The Invention of the Passport, Surveillance, Citizenship and the State* (Cambridge: Cambridge University Press, 2000); Catherine Dauvergne, *Making People Illegal* (New York: Cambridge University Press, 2008), 2.

[22] James Nafziger posits that they have a qualified duty to admit aliens instead. He argues against the principle that states have a right to exclude aliens because; first, because it is based on a mistaken reading of Emerich de Vattel's 1758 treatise *The Law of Nations*. Second, the right of exclusion is inconsequential because states do admit aliens in practice. Third, Nafziger argues that the right of exclusion emerged at a particular and juncture in the history of the nation-state. Rather than being an ancient maxim, Nafziger shows that the idea that states can bar the ingress of foreigners developed from discrete court cases in the United States between 1888 ad 1893 in which attorneys failed to make a compelling case against it. Because the right of exclusion is based on the practice of common law countries, it has ignored the argument of publicists in Europe and Latin America. See Nafziger, "The General Admission," 804-847.

[23] David Matas argues that international freedom of movement is a fundamental human right, which does not negate states' control of their borders any more than other principles of human rights override states' sovereignty over their internal affairs. See David Matas, "Freedom of Movement: The International Legal Framework," in *Still Moving: Recent Jewish Migration in Comparative Perspective*, ed. Daniel J. Elazar and Marton Weinfield (New Brunswick, NJ: Transaction Publishers, 2000).

[24] In *Open Borders: The Case Against Immigration Controls*, Hayter directly advocates for the lifting of all barriers to international migration. She argues that current controls do not work because aliens can always circumvent them, states often cannot return migrants to their home countries because they are sometimes reluctant to accept them, and because abolishing restrictions to migration will not significantly increase the

their arguments are compelling, the maxim of state sovereignty over the admission and stay of aliens has remained unmoved.

Because states have a sovereign right to control the entry and permanence of foreigners, the United States government sees the presence of undocumented aliens in its territory as a direct challenge to its sovereignty. For this reason, Dauvergne asserts, "in the present era of globalisation, control over the movement of people has become the last bastion of sovereignty."[25] The reason why states seek to protect their sovereignty by controlling the movement of people is, according to Dauvergne, that people are inextricably linked to the territory. In summary, Sassen, Dauvergne, and Reza Barmaki suggest that the United States government's response to growing extralegal immigration has been a hostile attitude towards undocumented aliens, in other words a "crackdown" on illegal immigration.[26] The policy with which the government is cracking down on illegal aliens is two-pronged. On the one hand, it underscores border control and on the other it demands individual accountability from aliens. The following sub-sections explain how those approaches led to the criminalization and securitization of aliens respectively.

1.1.1.1. Individual Accountability and the Process of Criminalization

According to Sassen, immigration policy constructs illegal immigration as the product of individual decisions on the part of aliens and makes their bodies the site for

---

number of migrants. See Teresa Hayter, *Open Borders: The Case against Immigration Controls* (London: Pluto Press, 2000).

[25]Saskia Sassen, *Losing Control? Sovereignty in the Age of Globalization* (New York: Columbia University Press, 1996), 60; Catherine Dauvergne, "Sovereignty, Migration and the Rule of Law in Global Times," *The Modern Law Review* 67 no. 4 (2004): 588-615; Dauvergne, *Making People Illegal.*

[26] Dauvergne, "Migration and the Rule of Law," 594, 595; Reza Barmaki, "Criminals/Refugees in the Age of Welfareless States: Zygmut Bauman on Ethnicity, Asylum and the new 'Criminal,'" *International Journal of Criminology and Sociological Theory* 2, no. 1 (2009), 260.

the reassertion of state sovereignty.[27] In other words, the state sees the individual as fully responsible for his immigration status and demands individual accountability. Therefore, rather than targeting illegal aliens as a social group by excluding them from services such as health care, education or social security, the state uses detention to make everyone pay. Immigration detention has a direct impact on the body of aliens because it restricts their freedom of movement. The state's demand for individual accountability crystallized in the criminalization process because, by shaping the public perception of aliens and immigration laws, criminalization demanded and justified the mass detention of illegal aliens.

The criminalization paradigm, which equates illegality and criminality, governed policy making in the area of illegal immigration between the 1980s and the mid-1990s. Criminalization is, above all, a discursive process that frames illegal aliens as law-breakers and drug traffickers. Like the securitization process discussed below, criminalization operates and emerges through acts of speech; it crystallizes in the language used in the interactions between policy makers and the masses. In this regard, Gallya Lahav and Virginie Guiraudon indicate that the criminalization discourse is the outcome of "compromises between different interest groups, mediated by media pressure and party politics."[28] As a discursive process, it affects policy, shapes aliens' identities and serves as logical connection between their presence in the United States and their detention.[29] In other words, criminalization both demands and justifies the mass detention of illegal aliens. Because it is a discourse in which policy makers, the media, and the

---

[27] Sassen, *Losing Control?*, 67.
[28] Gallya Lahav and Virginie Guiraudon, "Actors and Venues in Immigration Control: Closing the Gap between Political Demands and Policy Outcomes," *West European Politics* 29, no. 2 (2006), 204.
[29] Dina Siegel and Frank Bovenkerk, "Crime and Manipulation of Identity among Russian-Speaking Immigrants in the Netherlands," *Journal of Contemporary Criminal Justice* 16, no 4 (2000), 427.

public participate, criminalization shapes immigration policy, and constructs reality, knowledge and values.[30] For this reason, this thesis refers to criminalization also as a paradigm, as a specific way of looking and understanding reality.

Criminalization discourse sees the presence of illegal aliens as conducive to crime, and assumes a positive correlation between aliens' illegality and criminality.[31] Scholars point to four main roots of the criminalization process. First, Godfried Engbersen and Joanne van der Leun argue that criminalization arises from natives' feelings of insecurity in the face of economic globalization.[32] Second, taking a more comprehensive approach, Jonathan Inda analyzes the "ethnopolitics" of immigration and asserts that aliens are characterized as unethical beings unable to manage themselves, and as lawbreakers, job takers, and public burdens.[33] Inda contends that illegality suggests the failure of conducting oneself ethically. While Engbersen and van der Leun see criminalization as driven by natives' feelings, Inda argues that criminality derives from the construction of aliens as intrinsically ethically rotten individuals, as anti-citizens.[34] The framing of illegal aliens as unethical beings rather than as persons nurtures the idea

---

[30] "postmodernism," *Encyclopaedia Britannica*; Hans-Jörg Albrecht, "Fortress Europe? Controlling Illegal Immigration," *European Journal of Crime, Criminal Law and Criminal Justice*, 10 no 1 (2001), 19; Paul Minderhoud, "Coping with Irregular Migration: The Dutch Experience," in *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* ed. by Barbara Bogusz, Ryszard Cholewinski, Adam Cygan and Erika Szyszczak 387–406 (Leiden: Martinus Nijhoff Publishers, 2004).
[31] Engbersen and van der Leun, "The Social Construction of Illegality and Criminality," *European Journal of Criminal Policy and Research* 9 (2001): 51-70, 54; Klaus F. Zimmermann, "Tackling the European Migration Problem," *The Journal of Economic Perspectives* 9, no 2 (1995), 46.
[32] Engbersen and van der Leun, "Social Construction," 55; Albrecht, "Fortress Europe?" 5,6; Bill Jordan and Frank Düvell, *Irregular Migration: The Dilemmas of Transnational Mobility* (Northampton, Mass.: Edward Elgar Publishing Inc., 2002).
[33] Jonathan Xavier Inda, *Targeting Immigrants,* (Malden, MA: Blackwell Publishing, 2006), 64. Inda's perspective echoes Godfried Engbersen and Joanne van der Leun's claim that policy-makers in the United States perceive immigrants as dependent on public welfare (Engbersen and van der Leun, "Social Construction," 55.)
[34] Inda, *Targeting Immigrants,* 63.

that they have fewer human rights and renders the protection of aliens' rights a difficult task.

A third approach, that of Noah Pickus and Peter Skerry, considers criminality as a direct result of migration flows. In the United States, the inflow of aliens has undergone two transformations. First, it has steadily grown since the thirties.[35] Second, the abolition of national origins quotas in 1965 allowed a higher number of non-Europeans to immigrate, thus changing the racial composition of the alien population.[36] Moreover recent years have seen a shift from the influx of Central American refugees to an influx of Mexico's poor.[37] Pickus and Skerry researched the feelings the public expressed as immigration reform gathered momentum in 2005 and found two kinds of fears: first, fear that immigration is out of control; second, fear that aliens are taking advantage of the system.[38] While these findings are congruent with those of the scholars mentioned above, the novelty is that fears do not arise from aliens' illegality but from their number.[39] Pickus and Skerry point to common complaints made about illegal aliens, for instance that they overwhelm public schools and hospitals, and argue that these complaints have nothing to do with aliens' immigration status. Instead, the complaints are a consequence of the number of aliens present in the country.[40]

---

[35] Migration Policy Institute, "Immigration to the United States by Decade," *MPI Data Hub*, http://www.migrationinformation.org/DataHub/charts/final.immig.shtml (accessed November 18, 2008).
[36] Bill Ong Hing, *Defining America Through Immigration Policy* (Philadelphia: Temple University Press: 2004), 95.
[37] The US received an influx of refugees from the Vietnam War in the seventies followed by Cuban refugees of the Mariel boatlift in 1980 and later by Central American refugees and Mexico's poor (James Goldsborough, "Out-of-Control Immigration," *Foreign Affairs* 79, no. 5 (2000), 92).
[38] Noah Pickus and Peter Skerry, "Good Neighbors and Good Citizens," in *Debating Immigration*, ed. Caron M. Swain, (New York: Cambridge University Press, 2007), 97.
[39] Pickus and Skerry, "Good Neighbors," 103.
[40] Pickus and Skerry, "Good Neighbors," 103.

A fourth approach is that of Michael Welch and Liza Schuster, who utilize David Garland's analysis of social responses to crime and the development of a crime complex in the United States and the United Kingdom.[41] Although Garland's theory is not about migration, it is attentive to "how today's crime control arrangements reproduce a certain kind of social order" and affirms that new crime control policies conceive the poor as an "undeserving underclass."[42] Indeed, undocumented aliens are part of the underclass in the United States. Garland argues that, as a consequence of the new criminal challenges that policy-makers and the public have confronted in late modernity, a contradictory set of strategies has developed in the last thirty years to deal with crime. Garland contends that the United States and the United Kingdom are experiencing the coexistence of reactive (tough-on-crime) and proactive (focused on communal crime prevention) strategies. Since the 1970s, the traditional conceptualization of crime as a consequence of poverty has been challenged by two contrasting sets of criminologies: criminologies of everyday life and criminologies of the other. The latter are of particular importance to this thesis because immigration policy has othered aliens.

According to Garland, the criminology of the other is anti-modern respect to its late-modern counterpart, the criminology of everyday life, which takes crime as written in the fabric of contemporary social and economic life and emphasizes pragmatic, instrumental, and rational solutions.[43] The criminology of the other "re-dramatizes crime – depicting it in melodramatic terms, viewing it as a catastrophe, framing it in the

---

[41] Michael Welch and Liza Schuster, "Detention of Asylum Seekers in the US, UK, France, Germany and Italy: A Critical View of the Globalizing Culture of Control," *Criminal Justice* 5 (2005), 334.
[42] David Garland, *The Culture of Control*, (Chicago, IL: University of Chicago Press, 2001), x and xii.
[43] Garland, *The Culture of Control*, 182.

language of warfare and social defence."[44] It attempts to resolve the crime problem by questioning and changing the values upon which societies are built and is dehumanizing because it frames illegal aliens as "intrinsically evil" and assumes that there can be no understanding "between 'us' and 'them.'"[45] Garland's perspective echoes Sassen's argument and is a reason why undocumented immigration is seen as a matter of personal choice of the individual. Because undocumented aliens are illegal by choice, they are unethical. Thus, according to Welch and Schuster, Garland's criminology of the other constructs aliens through a net of "images, archetypes and anxieties."[46] In conclusion, although scholars' interpretations differ at the margin, they all point to a basic set of factors pertaining to the criminalization paradigm that has paved the road to the practice of mass immigration detention: domestic factors (natives' anxiety about the global economy), factors related to aliens' nature (the depiction of illegal aliens as unethical beings), and factors related to the process of migration (the size of the inflow of aliens).

Because criminalization is a discursive process, it spreads through media and government statements.[47] Consider the following example: a GAO report in 1993 states that illegal aliens are of concern to policy-makers because they are lawbreakers.[48] While illegal immigration is a violation of the law, criminalizing statements equate criminal offenses with violations of immigration laws. In so doing, they create the fear that undocumented aliens are a threat for the personal safety of United States citizens. In addition, consider the issue of how undocumented aliens are labeled. A 1995 report defines illegal alien as "a person who is in the United States in violation of US

---

[44] Garland, *The Culture of Control*, 184.
[45] Garland, *The Culture of Control*, 184.
[46] Welch and Schuster, "Detention of Asylum Seekers," 334.
[47] Inda, *Targeting Immigrants,* 109.
[48] Inda, *Targeting Immigrants,* 109

immigration laws."[49] The choice of "illegal" in lieu of "undocumented" further conflates a civil offense such as overstaying a visa with criminal behavior. While "undocumented" suggests an offense circumscribed to the realm of immigration law, "illegal" refers to a fundamental problem with the individual's demeanor. This imputed behavior, Inda contends, is the reason why illegal aliens are framed as ethically improper subjects.[50]

The criminalization of undocumented aliens has both immediate and profound consequences. In the short-term criminalization leads to policies that are exclusionary, restrictive, and punitive.[51] Exclusionary and restrictive policies set limits on the social benefits and programs to which aliens have access and fall beyond the scope of this project. The subject matter of this thesis is punitive policies, that is, policies aimed to punish aliens for their lack of immigration status. Criminalization has also long-lasting negative consequences. First, it makes illegal immigration a unidirectional process by sealing the border and increasing the costs of being caught without legal immigration status. For this reason, abolishing mass immigration detention will help de-criminalize aliens and therefore reduce the incentives for aliens to resort to the informal sector. Second, criminalization forecloses the possibilities of undocumented aliens ever being able to exercise responsible citizenship by denying them opportunities to openly contribute to society. Third, criminalization shapes aliens' identities: rather than challenging the criminality they are ascribed, they assimilate it as their *modus vivendis*. In this respect, Inda's study of the United States reaches a conclusion similar to that of Diana Sigel and Frank Bovenkerk, who analyze the criminalization process in the

---

[49] U.S. Government Accountability Office, *Illegal Aliens: National Net Cost Estimates Vary Widely*, July 25, 1995, http://www.gao.gov/archive/1995/he95133.pdf (accessed March 15, 2010), 1.
[50] Inda, *Targeting Immigrants,* 109.
[51] Inda, *Targeting Immigrants,* 63.

Netherlands. The scholars demonstrate that aliens exposed to criminalization tend to internalize their identities as criminals.[52] Thus, these processes push aliens into a downward spiral of dependence on the informal sector and the underground economy, further exacerbating natives' fears.[53] The consequences of the criminalization process thus create conditions for human rights violations to occur.

1.1.1.2. Border Control and the Process of Securitization

According to Sassen, the second prong of immigration policy is border enforcement.[54] A clear example is the Secure Fence Act of 2006, which expanded and reinforced hundreds of miles of the fence located on the border with Mexico.[55] Yet, the erection of walls is not the only way of securing the border. This thesis focus on the framing of illegal aliens as existential security threats to the American nation, a process called securitization, as an example of border enforcement.

Securitization frames illegal aliens as an existential security threat to the United States nation and calls for exceptional measures to manage the menace. This process began affecting immigration policy in the mid-1990s. According to Barry Buzan, Ole Weaver and Jaap de Wilde, authors of the securitization theory used in this project,

---

[52] Inda, *Targeting Immigrants,* 110; Siegel and Bovenkerk, "Crime and Manipulation," 424-444.
[53] According to Engbersen and van der Leun, the degree of involvement in criminal activities is partially explained by the embeddedness in their respective ethnic groups. Criminalization has increased irregular immigrants' reliance on their ethnic group while overwhelming the latter. "Thus, legal forms of exclusion by the State and informal forms of exclusion by ethnic groups may encourage illegal immigrants to go further underground" (Engbersen and van der Leun, "Social Construction," 62, 63, 64).
[54] Sassen, *Losing Control?*, 65. Saskia Sassen, "Beyond Sovereignty: Immigration Policy Making Today," in *Immigration: A Civil Rights Issue*, edited by Susanne Jonas and Suzie Dod Thomas, 15-26 (Wilmington, DE: Scholarly Resources, Inc., 1999), 16.
[55] *Secure Fence Act of 2006*, Public Law 109-367, U.S. Statutes at Large 120 (Oct 26, 2006), 2638.

securitization is the most extreme form of politicization.[56] An issue is securitized when an actor (the securitizing actor) identifies it as a threat (to a referent object) and attempts to break free of established procedures in order to control it.[57] The applicability of a securitization framework to immigration detention derives from Buzan, Weaver and de Wilde's development of a "wide" approach to security studies. Traditionally, securitization was limited to the field of military studies, but the development of the environmentalist movement and concerns with identity issues in the last three decades brought other areas under its scope. This motivated the authors to create a framework for the analysis of threats to referent objects other military ones.[58] Like criminalization, securitization is a discursive process. According to Buzan, Weaver and de Wilde, the identification of what constitutes a security issue depends on how the concept is deployed and used.[59] Because the securitization of an issue depends only on subjective understandings, the scholars argue that an effective way to study securitization is through the study of discourse.[60]

The securitization framework is not a novelty to the migration literature. Although they use different terminology, Zygmunt Bauman, B. S. Chimni, and Reza Barmaki, coincide that the end of the Cold War and the emerging North-South divide eroded refugee's geopolitical significance and, as a result, governments began framing them as security threats.[61] In the United States, the securitization discourse emerged in the mid-

---

[56] Barry Buzan, Ole Weaver and Jaap de Wilde, *Security: A New Framework for Analysis* (Boulder, CO: Lyenne Rienner Publishers, 1998), 23.
[57] Buzan, Weaver and de Wilde, *Security: A New Framework*, 25.
[58] Buzan, Weaver and de Wilde, *Security: A New Framework*, 4.
[59] Buzan, Weaver and de Wilde, *Security: A New Framework*, 24.
[60] Buzan, Weaver and de Wilde, *Security: A New Framework*, 24 and 25.
[61] Zygmunt Bauman, *Work, Consumerism and the New Poor*, 2nd ed (New York: Open University Press, 2005), 71 and 78-82; B. S. Chimmi, "Globalization, Humanitarianism and the Erosion of Refugee Protection," *Journal of Refugee Protection* 13, no 3 (2000), 245; Barmaki, "Criminals/Refugees," 259.

1990s. According to David Bacon, the immigration hysteria that securitization fuelled resulted in the reinterpretation of previously accepted phenomena.[62] One example is border crossings in small towns along the Mexican border. For many years, it was common for people to across the border every day to go to work. However, as anxiety over undocumented immigration grew, these crossings were seen as a sign that the border was out of control.[63] Thus, even scholars who do not apply a specific securitization framework point out that illegal aliens are perceived as a threat to the nation.

Securitization has immediate and also long-term consequences. In the short-run, it leads to uncommonly harsh policies such as indefinite detention, the expansion of the category of aggravated felonies – which mandates the detention of illegal aliens without the right to bail – to include minor misdemeanors, and the outsourcing of immigration law enforcement to local authorities. These policies drive aliens deeper into the shadow of illegality, increase their vulnerability to mistreatment, instill fear and distrust of the police among aliens, and as Welch and Schuster indicate, detract attention from more progressive criminology.[64]

Considering the nature and effects of criminalization and securitization, it is hard to miss the similarities among them. For the purpose of this thesis it suffices to point out that both discourses are at the roots of the United States' hostile attitude toward illegal aliens. Criminalization and securitization demanded and justified the practice of mass detention of undocumented aliens, which led to poor detention conditions and to the mistreatment of immigration detainees. Therefore, the discourses jeopardize respect for

---

[62] David Bacon, "For an Immigration Policy Based on Human Rights," in *Immigration: A Civil Rights Issue*, ed. Susanne Jonas and Suzie Dod Thomas (Wilmington, DE: Scholarly Resources Inc, 1999), 166.
[63] Bacon, "For an Immigration Policy," 166.
[64] Bacon, "For an Immigration Policy," 169; Welch and Schuster, "Detention of Asylum Seekers," 345; Welch and Schuster, "Detention of Asylum Seekers," 348.

the rights of illegal aliens and detract attention from alternatives to detention. In addition the effects of these paradigms are detrimental to the United States because they drive aliens into the shadows of the informal economy and exacerbate ethnic and racial divides. It is precisely because these paradigms are deeply embedded in immigration policy that legally binding detention standards will not be able to neutralize the injurious impact of criminalization and securitization on illegal aliens and on the United States.

1.1.2. Mass Detention as a Failure of the International Human Rights Regime

This thesis argues that the current crisis in immigration detention – the recurrent instances of abuses of aliens' rights – occurs at the intersection of the domestic responses to globalization and the limited impact of the international human rights regime on United States' immigration policy. This section considers the latter aspect, namely, the ineffectiveness of the international human rights framework to uphold alien detainees' rights.

Rather than considering human rights law as a set of freestanding treaties, it is more practical to see human rights as an international regime. Stephen Krasner defines regimes as "sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations."[65] A regime approach helps individualize the pertinent rules and decision-making procedures and relates international rules and domestic politics, since the former

[65] Principles are "beliefs of fact, causation and rectitude". Norms are "standards of behavior defined in terms of rights and obligations". Rules are "specific prescriptions or proscriptions for actions". Decision-making procedures are "prevailing practices for making and implementing collective choice" (Stephen D Krasner, "Structural Causes and Regime Consequences: Regimes as Intervening Variables," *International Organization* 36, no 2 (1982), 186). Another definition of regime is that provided by Haas, according to whom regimes are "norms and decision-making procedures accepted by international actors to regulate an issue area" (qtd. in Jack Donnelly, "International Human Rights: A Regime Analysis." *International Organization* 40, no. 3 (1986), 602).

are collectively created but individually implemented by states.[66] The human rights regime is unable to solve the crisis in immigration detention for two main reasons: shortcomings intrinsic to the regime and the United States' indifference towards international human rights law.

The international human rights regime has two key components: the institutional framework (what Krasner calls decision-making mechanisms, the organisms and international bodies) and the normative framework (the treaties). While the regime counts with operating institutional arrangements, their work is undermined by problems in the normative framework and by the United States attitude towards international law in the area of migration. The institutional framework of the international human rights regime, what Krasner calls decision-making mechanisms, is divided into charter-based institutions and institutions authorized by a charter organ legislate on human rights norms on the one hand, and treaty-based institutions monitor states' compliance on the other hand.[67] While the codification of human rights takes place in the framework of the General Assembly, treaty-based organs are in charge of monitoring activities.[68] To begin with, the United States has accepted the legitimacy of two treaty-monitoring bodies: the Human Rights Committee and the Committee against Torture.[69] In the specific case of

---

[66] According to Juss, "a rights approach offers a normative vocabulary that facilitates both the framing of claims and the identification of the rights holder. The power of rights dialogue lies in its use of a normative language to make moral claims" (Satvinder Singh Juss, *International Migration and Global Justice* (Burlington, VT.: Ashgate Publishing Company, 2006), 7; Donnelly, "International Human Rights," 617.
[67] Charter-based institutions are for example the Economic and Social Council and the General Assembly. Institutions authorized by the latter bodies are for instance the Office of the High Commissioner for Human Rights and the Sub Commission of the Promotion and Protection of Human Rights. Treaty-based organs are for instance the ICCPR Committee and the ICESCR Committee.
[68] United Nations High Commissioner for Human Rights, "Monitoring Civil and Political Rights," http://www2.ohchr.org/english/bodies/hrc/index.htm (accessed November 16, 2008).
[69] Pursuant art 41 of the ICCPR and Art 21 par 1 of the CAT respectively.

migrants, the Special Rapporteur on the human rights of migrants monitors compliance.[70] The Rapporteur's mandate was created by the Commission on Human Rights in 1999, was renewed for three years in 2005 and was expanded by the Human Rights Council in 2008. Apparently, the Rapporteur has an ample degree of maneuver: they monitor all countries' actions regardless of whether they are party to the Convention on Migrants, and his or her action does not require the exhaustion of domestic remedies. Revealingly, the two individuals who served as Special Rapporteurs to date have come from the global south: Gabriela Rodríguez Pizarro from Costa Rica served between 1999 and 2005 and Jorge A. Bustamante from Mexico has served since 2005. The Rapporteur conducted two visits to the United States: one to the border with Mexico in 2002 and another to detention centers in the interior of the country. The Rapporteur's report after the latter visit revealed persistent and concerning problems in detention facilities.

As stated above, the first significant obstacle to the impact of the international human rights regime on United States immigration detention policies is the shortcomings in the regime's normative framework. The cornerstone of the norms that are applicable to detained irregular migrants is the International Bill of Human Rights. Its three components – the Universal Declaration of Human Rights (UDHR),[71] the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on

---

[70] This position was created in 1999 by the Commission on Human Rights. See United Nations High Commissioner for Human Rights, "Special Rapporteur of the Commission on Human Rights on the human rights of migrants," http://www2.ohchr.org/english/issues/migration/rapporteur/ (accessed November 16, 2008).

[71] As a Declaration, the UDHR is a "recommendation by the General Assembly to Member States" pursuant Article 13 of the UN Charter, rather than a convention submitted to member states for ratification (Henry J. Steiner, Philip Alston, Ryan Goodman, *International Human Rights in Context: Law, Politics and Morals*. 3rd ed. (New York: Oxford University Press, 2007), 135). Despite being not legally-binding, the UDHR has become the "springboard to treaties" and "remains the constitution of the entire [human rights] movement" (Henry J. Steiner, Philip Alston, Ryan Goodman, *International Human Rights in Context: Law, Politics and Morals*. 3rd ed. (New York: Oxford University Press, 2007), 135).

Economic, Social and Cultural Rights (ICESCR) – apply to everyone without discrimination, including illegal aliens.[72] Pursuant Article 2 of the ICCPR the United States is bound to grant the rights enshrined in that convention to "all individuals within its territory and subject to its jurisdiction."[73] A key document related to migrants is the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Convention on Migrants), which entered into force on July 1, 2003. In spite of his pretentious name, the Convention on Migrants has had a negligible impact on international migrants, and thus requires a more detailed discussion.

According to Bosniak and Dauvergne, the Convention on Migrants does more to reaffirm state sovereignty than to promote migrants' rights.[74] First, only a scant thirty-one countries have signed the Convention, as of March 2010.[75] Moreover, all of them are sending countries. Second, the Convention defines migrants in economic terms. The title of the document proclaims that it is intended for the protection of the rights of migrant workers. Even if only at a nominal level, this definition of migrant leaves undocumented aliens out of the scope of the Convention. Third, some of the most important provisions in the Convention exclude undocumented aliens. Dauvergne indicates that the Convention omitted immigration status from the grounds for nondiscrimination.[76] Fourth, many of the rights in the Convention are already enshrined in other human rights treaties. In fact, Dauvergne suggests that the only provisions strictly related to immigrants are in Articles 21 and 22, which prohibit the destruction of identity and travel documents and

---

[72] UDHR Art 2; ICCPR Art 2.1; ICESCR Art 2.2
[73] ICCPR Art 2.1.
[74] Bosniak, "Human Rights, State Sovereignty," 315; Dauvergne, *Making People Illegal, 22*-28.
[75] As of March 2010, there are only 31 signatories and 41 parties to the convention, which entered into force on July 1, 2003. See United Nations, Treaty Collection Database, http://treaties.un.org/Pages/DB.aspx?path=DB/MTDSG/page1_en.xml (accessed March 23, 2010).
[76] Catherine Dauvergne, *Making People Illegal* (New York: Cambridge University Press, 2008), 23.

collective expulsion respectively.[77] Fifth, the Convention grants more rights to legal immigrants than to illegal aliens. According to Bosniak, the Convention allows states to discriminate between legal and illegal migrants *inter alia* in terms of the rights to family unity, liberty of movement, trade union rights.[78] Sixth, Bosniak and Dauvergne coincide in that the Convention is a "staunch manifesto in support of state territorial sovereignty."[79] Article 68 requests inter-state collaboration to eradicate illegal migration and the employment of illegal aliens. Article 69 calls upon states to ensure that illegal immigration does not persist. These articles are problematic because it is the function of every state to define the meaning of illegality. Therefore, the Convention does not grant illegal aliens significant protection relative to other international legal instruments and it grants states a significant amount of discretion to combat illegal migration. For this reason, the Convention does more to reaffirm state sovereignty than to protect aliens. In short, the absence of receiving states among signatory countries makes the Convention currently ineffective. Yet, even if all developed states signed onto it, the Convention would still do little to prevent the mistreatment of undocumented migrants in detention.

The second obstacle to the impact of the international human rights regime on United States immigration detention policies is the latter's indifference towards international human rights law in the realm of illegal immigration. The United States has significantly limited the domestic impact of international law. First, it has neglected to ratify the ICESCR or to sign the Convention on Migrants. Second, it has declared the Convention on the Elimination of Racial Discrimination (CERD), Articles 1 through 27 of the ICCPR, and Articles 1 through 16 of the Convention Against Torture as non-self-

[77] Dauvergne, *Making People Illegal*, 25.
[78] Bosniak, "Human Rights, State Sovereignty," 316.
[79] Bosniak, "Human Rights, State Sovereignty," 316; Dauvergne, *Making People Illegal*, *26*-27.

executing. As Louis Henkin indicates, the guiding principle behind declaring treaties to be non-self-executing is that changes in domestic law must be the outcome of a democratic process rather than a treaty.[80] Yet, he argues, "this argument impugns, of course, the democratic character of every treaty made or that shall be made by the President with the consent of the Senate."[81] Moreover, Human Rights Watch argues that the reservations expressed by the United States to the CERD have limited the impact of the treaty, subordinating it to the United States Constitution.[82] This would contravene the purpose of international law as well as Article VI, Clause 2, of the United States Constitution.[83] Furthermore, the United Nations Human Rights Committee found the United States' reservations to the ICCPR as incompatible with purpose of the treaty and thus invalid.[84]

As Henking, Sassen, and Dauvergne indicate, the United States has been resistant to embrace international human rights norms in the context of migration. Scholars provide sufficient evidence of the United States' indifference to human rights laws when it comes to migration. First, they point out that immigration detention guidelines (see

---

[80] Louis Henkin, "U.S. Ratification of Human Rights Convention: The Ghost of Senator Bricker," *The American Journal of International Law* 89, no. 2 (1995), 346.
[81] Louis Henkin, "The Ghost of Senator Bricker," 346.
[82] Human Rights Watch, *A Violent Education*, August 2008, http://www.hrw.org/reports/2008/us0808/ (accessed November 16, 2008), 109.
[83] According to Human Rights Watch, the subordination of international law to the US Constitution is evident in the reservations and declarations made about the CERD "nothing in the Convention shall be deemed to require or to authorize legislation or other action by the United States of America incompatible with the provisions of the Constitution of the United States of America" (United Nations, Treaty Collection Database, http://treaties.un.org/Pages/DB.aspx?path=DB/MTDSG/page1_en.xml (accessed March 30, 2009)). This contravenes Article VI, Clause 2 of the Constitution, which reads: "This Constitution, and the Laws of the US which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the US, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding" ("The Constitution of the United States," Article 6, Clause 2).
[84] Willem van Genugten, "The United States reservations to the ICCPR: International law versus God's own constitution," *Kluwer Law International*, (1998), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=969438 (accessed November 16, 2008), 35

chapter two) are based on domestic criminal detention policies and on the input of the Department of Justice and other United States-based organizations. Second, Michelle Brane and Christina Lundholm indicate that both the Department of Homeland Security and the Department of Justice "have been fairly unmoved by arguments based on international human rights law."[85]

The attitude of the United States towards human rights conventions epitomizes what Julie Mertus calls 'exceptionalism.' Exceptionalism is the assumption on the part of the government that "the United States should and will receive special treatment when human rights are applied in practice."[86] Mertus's concept of exceptionalism echoes Peter J. Spiro's concept of 'New Sovereigntism,' which suggests that rather than becoming isolationist, the United States chooses to endorse only those international conventions that are convenient to its purposes and rejects the rest.[87] The subordination of international treaties to the Constitution and the fact that a significant number of articles are not self-executing makes the international human rights system, in the words of Jack Donnelly, promotional in nature: normatively strong but procedurally weak.[88] For these reasons, although the United States played a crucial role in the development of the international human rights regime, its indifference towards human rights norms regarding

---

[85] Michele Brane and Christiana Lundholm, "Human Rights behind Bars: Advancing the Rights of Immigration Detainees in the United States Through Human Rights Frameworks," *Georgetown Immigration Law Journal*, 22 (2008), 169.

[86] Exceptionalism, according to Mertus, is the use of double standards whereby "human rights are something the US encourages for other countries, whereas the same international standards do not apply in the same manner in the US." Julie Mertus, *Bait and Switch*, 2nd ed (New York: Routledge, 2008), 2.

[87] Peter J. Spiro, "The New Sovereigntists: American Exceptionalism and Its False Prophets," *Foreign Affairs*, November/December 2000.

[88] John Gerard Ruggie, "Human Rights and the Future International Community," *Daedalus* 112, no. 4 (1983), 104; Donnelly, "International Human Rights," 608, 614; Richard Plender, "Recent Trends in National Immigration Control," *The International and Comparative Law Quarterly* 35, no 3 (1986), 537; Andrew Moravcsik, "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe," *International Organization* 54, no. 2 (2000), 217; Bosniak, "Human Rights, State Sovereignty," 316; and Eric Neumayer, "Do International Human Rights Treaties Improve Respect for Human Rights?" *The Journal of Conflict Resolution* 49, no. 6 (2005), 926.

migration make it impossible for the regime to prevent the mistreatment of immigration detainees.

The review of the literature demonstrated that policy makers can place the crisis of immigration detention at the intersection of the United States' responses to the globalization of migration (individual accountability and border enforcement) and the limited impact of the international human rights regime over immigration detention policies and practices. While the secondary literature offers a valuable scheme of the crisis, it says nothing about how to solve it. That is precisely the vacuum that this thesis seeks to fill. The next section explains the method with which this project seeks and evaluates potential solutions to the crisis of immigration detention.

1.2. Method: Policy Analysis

In its approach, this thesis is a policy analysis. Policy analysis is a distinct field of study and practice, which according to Garry Brewer and Peter DeLeon, seeks to deal with intricate social problems that necessitate policy responses.[89] That immigration detention is an intricate problem goes without saying: a hundred and seven aliens have died in the government's hands since October 2003, in-custody abuses are continuously reported, and immigration detention costs almost two billion of taxpayers' dollars per year. This policy analysis considers the solution that immigrant rights advocates proposed – the codification of detention guidelines into legally binding standards – with the aim of solving the ongoing crisis in immigration detention.

[89] Garry D. Brewer and Peter DeLeon, *The Foundations of Policy Analysis* (Homewood, IL: The Dorsey Press, 1983), 4-5.

The policy sciences integrate theory (knowledge of) and practice (knowledge in) and aim to improve them for human benefit. For this reason, this thesis utilizes human rights as the standpoint from which to evaluate the solution that immigrant rights advocates proposed. Following Wayne Parsons, this thesis is concerned with "how issues and problems come to be defined and constructed and how they are placed on the political and policy agenda."[90] Thus, it utilizes the criminalization and securitization discourses to chart the current crisis in immigration detention and to demonstrate that these processes have become so deeply embedded in immigration policy that binding detention standards are not an effective strategy to protect aliens' human and constitutional rights. From the multiplicity of models for policy analysis, this thesis uses Parson's method to study whether the codification of immigration detention standards is a viable strategy to prevent in-custody abuses of immigration detainees.

Policy analysis is a complex discipline of salient characteristics. The following are some of the attributes that Harold Lasswell ascribes to it.[91] First, the policy orientation is multi-method. Brewer and DeLeon share such idea and assert, "problems designate theory and methods, not the reverse."[92] This is precisely why this thesis is focused specifically on the problem of the mistreatment of alien detainees in immigration detention. Second, policy analysis is multi-disciplinary. In this respect, Ira Sharkansky defines public policy as driven by the economy, popular demands and political culture, and by individual actors and institutions.[93] Therefore, the analysis of the policy of binding standards that immigrant rights advocates propose and the introduction of the

---

[90] Wayne Parsons, *Public Policy* (Brookfield, VT: Edward Elgar Publishing Ltd., 1995), xv.
[91] Parsons, *Public Policy*, xvi.
[92] Brewer and DeLeon, *The Foundations of Policy Analysis*, 13.
[93] Ira Sharkansky, ed. *Policy Analysis in Political Science* (Chicago: Markham Publishing Company, 1970), 8-13.

alternate policy of abolishing the practice of mass immigration detention take into consideration human rights imperatives, economic arguments and practicality. Third, policy analysis is problem-focused; thus, Brewer and DeLeon argue that the discipline is better able to make sense of situations that the scientific method cannot comprehend.[94] For this reason, the analysis goes beyond the text of immigration laws and pays careful attention to statements and acts of speech. This is not only because the processes driving the practice of mass immigration detention, namely criminalization and securitization, are discursive practices, but also because the analysis of discourse facilitates the understanding of the rationale underlying policy.

Fourth, policy analysis is "concerned to map the contextuality of the policy process, policy options and policy outcomes."[95] For this reason, this thesis pays particular attention to the discursive process through which the United States government presents and justifies mass immigration detention. The processes of criminalization and securitization, which demand and justify the detention of all aliens regardless of whether they pose a serious threat to the community or whether they are serious criminals, are indeed discursive processes. As such, they form part of the context in which immigration detention grows.

Fifth, policy analysis' goal is to produce and utilize knowledge to enhance decision-making. Thus, the literature informing this project comes from a variety of distinct and interrelated fields, which shine different lights on immigration detention practices in the United States. Sixth, notwithstanding the disagreement among scholars, it is important to add to this list the fact that policy analysis has an important normative

---

[94] Brewer and DeLeon, *Foundations of Policy Analysis*, 3.
[95] Harold Lasswell, qtd. in Parsons, *Public Policy*, xvi.

dimension.[96] According to Brewer and DeLeon, the discipline is deeply concerned with the value of human dignity.[97] For Frank Fischer, policy analysis must seek to evaluate not only the accomplishment of a goal, but also whether that goal was worth pursuing.[98] In this respect, this thesis seeks to maximize the protection of human rights. In other words, it analyzes the policy proposed by immigrant rights advocates and proposes and presents an alternative following a human rights imperative. Finally, some scholars argue that policy analysis is an argumentative practice shaped by the institutional environment, relations of power and analysts' choices. Fischer and John Foster see policy analysis as a "practical process of argumentation," in which analysts delineate the problem in particular ways and exercise a degree of agenda-setting power.[99] In other words, the scholars see practitioners' work as having a significant impact on the issue under analysis, an impact that derives from analysts' use of language. For this reason, it is important to keep in mind the standpoint and the aim of this thesis as being the protection of aliens' human and constitutional rights.

The structure of policy analysis varies between authors. According to Parsons, policy analysis is divided into four levels: meta analysis, meso analysis, decision analysis, and delivery analysis. Meta analysis is the study of analysis itself.[100] Meso analysis is concerned with the way in which problems are framed and become items in the policy agenda.[101] Decision analysis seeks to explain the way in which policy decisions are made (analysis of) and the way in which policy decisions ought to be made

---

[96] Lawrence E. Lynn Jr., "A Place at the Table: Policy Analysis, Its Postpositivist Critics, and the Future of the Practice," *Journal of Policy Analysis and Management* 18, no. 3 (1999): 411-425.
[97] Brewer and DeLeon, *Foundations of Policy Analysis*, 5.
[98] Frank Fischer, *Evaluating Public Policy* (Chicago, IL: Nelson-Hall Publishers, 1995), 6.
[99] Frank Fischer and John Foster, eds., *The Argumentative Turn in Policy Analysis and Planning* (Durham: Duke University Press, 1993), 2, 5, 6.
[100] Parsons, *Public Policy*, 1.
[101] Parsons, *Public Policy*, 85.

(analysis for).[102] In the words of Lasswell, decision analysis is about "who gets what, when [and] how."[103] Delivery analysis is concerned with the implementation of policies and with the question of why well-crafted policies sometimes fail.[104] Among these levels, this thesis uses Parson's decision analysis method. It explains why there is a crisis in immigration detention (how the practice of mass immigration detention developed), and argues that in light of the failure of current and proposed policies to prevent the mistreatment of alien detainees, policy making in the realm of immigration detention should seek to uphold the human and constitutional rights of aliens.

As Parsons indicates, a variety of disciplines inform policymaking. In analyzing decision-making, Parsons groups the different disciplines into five major approaches: power, rationality, public choice, institutional frameworks, and informational and psychological.[105] This thesis borrows from those five distinct approaches because immigration detention policymaking is the outcome of the interaction of a multiplicity of factors such as politics, economics, international and domestic law, and culture or public attitudes.

This policy analysis is based on reports of non-governmental organizations, reports of government agencies such as the Office of the Inspector General (OIG) and the GAO, statements made by members of the government such as the President, the

---

[102] Parsons, *Public Policy*, 246.
[103] Harold Lasswell, qtd. in Parsons, *Public Policy*, 246.
[104] Parsons, *Public Policy*, 257-58.
[105] Parsons, *Public Policy*, 247-48. Power approaches see decision-making as a function of power structures. Rationality sees this process as a result of, on the one hand, the availability of information and the individual's ability to make decisions, and on the other, the structure of organizations (Parsons, *Public Policy*, 272). The public choice approach to decision making is focused on "the rationale and motivations of agencies and government departments" (Parsons, *Public Policy*, 307). Institutional approaches developed as a reaction to the excessive weight that other approaches placed on individuals, executives and legislatures (Parsons, *Public Policy*, 323). Informational and psychological approaches look at how factors such as human emotions, personality, and the individual ability to recognize problems, utilize information, and make choices affect decision-making (Parsons, *Public Policy*, 337).

Attorney General, members of Congress, officials from INS, DHS and ICE in speeches, congressional hearings, press releases and government websites, newspaper articles, and the text of the petition to initiate rule-making that immigrant rights advocates sent to DHS in 2007.

The process of analysis involved the following steps. First, it considered all the available arguments on the subject of the detention of illegal aliens. Second, it identified and isolated the arguments and processes that justified the expansion of detention and the perpetuation of the status quo. Third, it identified the logics underlying the discourses of criminalization and securitization, and the institutional practice of mass immigration detention. It paid particular attention to the processes that have prevented extant non-binding standards from effectively preventing in-custody abuses of aliens. The study of the arguments made on the subject of immigration detention and of the immigration system's decentralized structure, the outsourcing of immigration law enforcement services to local agents, and the punitive, unjust and costly nature of detention from a human rights perspective, leads to the conclusion that the most effective path to uphold aliens' human and constitutional rights is to dismantle the practice of immigration detention.

The chapters that follow analyze the policy that immigrant rights advocates proposed to solve the crisis in immigration detention. They demonstrate that the current crisis in immigration detention is undisputed. The problems of recurrent in-custody abuses are conspicuous: first because the number of reports documenting deaths and instances of mistreatment constantly grows; second because the government has admitted that, notwithstanding the marked differences between criminal and immigration

detention, the government treats alien detainees as criminal prisoners.[106] Paradoxically, the analysis of the proposed binding standards also demonstrates that neither current detention guidelines, nor the proposed legally enforceable detention standards will solve the crisis in immigration detention. For this reason, this policy analysis favors the abolition of the practice of mass immigration detention, the retreat to pre-1996 detention policies, and the expansion of ATD programs.

The argument is laid out as follows: chapter two argues that immigration laws are deeply rooted in and have been significantly affected by the processes of criminalization (individual accountability) and securitization (emphasis on border enforcement). The idea that illegal aliens are criminals and an existential threat to the nation has led to punitive and restrictive policies, in particular, to the mass detention of irregular aliens in removal proceedings. Chapter three argues that criminalization and securitization have prevented the existent non-binding immigration detention standards from effectively preventing in-custody mistreatment. Chapter four argues that the legally binding detention standards that immigrant rights advocates propose are unlikely to solve the current crisis in immigration detention because of ICE's decentralized structure and because the agency outsources immigration detention and law enforcement to local agents and private firms. The outsourcing of services has created great discrepancies in the way in which the law is applied across the country and in some case has exacerbated the abuse of aliens' rights. Chapter five argues that the most effective strategy to protect the rights of illegal aliens is that policy makers reconsider the practice of mass immigration detention. This strategy is effective because it addresses the root of the problem, it will prevent the unnecessary

[106] Dora Schriro, House Homeland Security Subcommittee on Border, Maritime and Global Counterterrorism, *Moving Toward Effective Immigration Detention Management*, 111th Cong., 1st sess., December 10, 2009.

detention of asylum seekers, refugees and United States citizens, will subdue the long-lasting psychological effects of detention, and will reduce the economic burden on taxpayers. This chapter concludes by emphasizing the complementary roles of advocates and civil society in dismantling the criminalization and securitization paradigms, and of policy-makers in abolishing mass immigration detention and expanding ATD schemes.

2. Discursive and Structural Origins of the Mass Detention Policy for Undocumented Aliens

The problem of in-custody abuses in immigration detention facilities is complex. The first thing to consider when discussing immigration detention is the root of the problem. The root of the problem of in-custody abuses of alien detainees is tough immigration laws that the criminalization and securitization paradigms fuelled. These laws, a product of discursive processes that frame undocumented aliens as criminals and security threats, have caused the unprecedented growth of the alien detention population. As the detention population has kept growing, the agencies in charge of immigration detention have become unable to manage the inflow of detainees. Consequently, the government has resorted to private and local (state and county) facilities. Overcrowding and the lax oversight of detention facilities have led to abuses of aliens' rights, such as the denial of medical treatment resulting in deaths, sexual and verbal harassment, and beatings.

This chapter identifies the key factors fuelling these trends and makes two important points. First, it argues that criminalization and securitization have profoundly affected immigration policies and the public perception of illegal aliens. Second, it contends that these processes have bolstered mass immigration detention since the 1980s. Thus, the structures of mass immigration detention are recent but are also deeply rooted in paradigms that other aliens as criminals and existential security threats to the nation. Because of its recent but deep roots, neither non-binding nor legally enforceable standards will effectively address the crisis in immigration detention. The most effective

path to address the crisis of immigration detention is to de-couple illegal aliens from the criminal sphere, by discontinuing mass immigration detention.

2.1. The 1980s: Crime and Drugs Rhetoric

The process of criminalization described in the introduction began affecting immigration policies in the 1980s. This section argues that criminalization is one of the roots of the current crisis in immigration detention because it profoundly reshaped immigration policies with far reaching consequences for illegal aliens. On the one hand, criminalization made an imprint on the text of immigration laws, thus erecting the legal structure that in the 1990s and 2000s would demand and legitimate the practice of mass immigration detention. On the other hand, criminalization had a significant impact on the body of undocumented aliens. Because the process of criminalization and its consequences are as recent as they are deep, regulating the practice of detention is not a viable strategy to prevent the mistreatment of detainees. The only effective strategy to protect the rights of undocumented aliens is to dismantle the practice of immigration detention, thus attacking the core of the problem. The following paragraphs describe the changes and effects the criminalization paradigm wrought in the pre-1996 years. The year 1996 is a milestone because it saw the emergence of a different paradigm and the enactment of two significantly harsh immigration laws.

The discursive process of criminalization, which frames illegal aliens as unethical anti-citizens, criminals and drug traders, had a deep influence on immigration law. In the pre-1996 years, criminalization informed and shaped two distinct sets of policies: those regulating the admission of foreigners and interior enforcement policies. First,

criminalization reshaped policies regulating the admission of foreigners to the United States. In this respect, Mark Dow, author of *American Gulag*, argues that the increase in the use of immigration detention was propelled by the arrival of refugees.[107] In the 1980s, the United States became the destination of two groups of refugees: Cubans in 1980 and Haitians in 1981. Because the government was initially more sympathetic to Cubans,[108] it utilized mass detention to stem the inflow of Haitians, who the government considered economic refugees.[109] In the words of Attorney General William French Smith, "detention of aliens seeking asylum was necessary to discourage people like Haitians from setting sail in the first place."[110] The use of detention to sift aliens led to overcrowding and poor conditions in immigration detention facilities. The practice mass detention also became progressively embedded in laws that were intended to control drug trade and crime.

Second, criminalization altered interior enforcement policies. Ira Kurzban argues that between 1986 and 1996 Congress acted under the premise of combating illegal immigration and crime. The framing of illegal aliens as criminals led to tough-on-immigration interior enforcement law, which resulted in "the elimination of the basic features of a procedurally fair immigration system."[111] The relevant laws enacted in this period were:

---

[107] Dow, *American Gulag*, 7.
[108] Cuban refugees were initially welcomed to the United States, according to President Carter, with "open arms." This policy changed when Fidel Castro used the Mariel boatlift – a mass exodus of more than 125,000 Cubans – as an opportunity to exile individuals released from prison and mental institutions or who were considered "misfits." See Hing, *Defining American*, 256.
[109] Dow, *American Gulag*, 7.
[110] United States Attorney General William French Smith qtd. in Dow, *American Gulag*, 7.
[111] Ira J. Kurzban, "Democracy and Immigration," in *Keeping Out the Other*, ed. David C. Brotherton and Philip Kretsedemas (New York: Columbia University Press, 2008), 64.

- The Immigration Control and Reform Act[112] of 1986 established expedited deportation for persons in prison.
- The Anti-Drug Abuse Act[113] of 1986 made drug offenses a basis for inadmissibility retroactively. This meant that non-citizens, who had been found in possession of controlled substances in the past, were now at risk of being deported from the United States.
- The Omnibus Anti-Drug Abuse Act[114] of 1988 initiated the use of "aggravated felonies" as a ground for deportation. Aggravated felonies are crimes that automatically make an alien deportable. The Act defined aggravated felons as "drug traffickers and murderers" and stated that these individuals were not eligible for most of the forms of relief from deportation. This included lawful permanent residents. The Omnibus Anti-Drug Abuse Act also established the mandatory detention of non-citizens and legal permanent residents convicted of aggravated felonies.
- The Immigration Act[115] of 1990 expanded the definition of aggravated felonies and eliminated judicial recommendations against deportation.
- The Violent Crime Control and Law Enforcement Act[116] of 1994 expanded the definition of "aggravated felony" and "permitted, for the first time, a summary

---

[112] *Immigration Reform and Control Act of 1986*, Public Law 99-603, U.S. Statutes at Large 100 (November 6, 1986), 3359.
[113] *Anti Drug Abuse Act of 1986*, Public Law 99-570, U.S. Statutes at Large 100 (October 27, 1986), 3207.
[114] *Omnibus Anti-Drug Abuse Act of 1988*, Public Law 100-690, U.S. Statutes at Large 102 (November 18, 1988), 4181.
[115] *Immigration Act of 1990*, Public Law 101-649, U.S. Statutes at Large 104 (November 29, 1990), 4978.
[116] *Violent Crime Control and Law Enforcement Act of 1994*, Public Law 103-322, U.S. Statutes at Large 108 (September 13, 1994), 1796; U.S. Government Accountability Office, *INS Management: Follow-up on Selected Problems*, July 22, 1997, http://www.gao.gov/archive/1997/gg97132.pdf (accessed January 20, 2010), 3.

form of removal for certain nonresident aggravated felons."[117] This meant that aliens who committed a crime classified as an aggravated felony could be deprived of their right to see an immigration judge to challenge their deportation. As Kurzban points out, an amendment was later introduced that expanded the crimes that, under immigration law, qualified as "aggravated felonies."[118]

A product of a paradigm that equates illegality with criminality, the pre-1996 laws described above, introduced substantial changes in immigration policy. First, they created the category of aggravated felonies.[119] This type of felonies is of concern only to aliens and causes much confusion because its definition remains vague. Second, the pre-1996 laws applied the changes retroactively. The retroactive nature of the changes meant that a significant number of aliens who had committed offenses in the past became deportable overnight. Third, the pre-1996 laws created mandatory detention. Mandatory detention is the incarceration without right to bail of aliens in removal proceedings and occurs only after, and thus is different from, criminal detention.[120] Notably, mandatory detention had a small impact on aliens prior to the 1996 laws because most courts held that it was unconstitutional.[121] The creation of mandatory detention and of aggravated felonies in the context of anti-drug and anti-crime legislation demonstrates the significant extent to which the government and Congress conflated undocumented immigration with drug trade and crime.

---

[117] Kurzban, "Democracy and Immigration," 65.
[118] *Immigration and Nationality Technical Corrections Act of 1994* Public Law 103-416, U.S. Statutes at Large 108 (October 25, 1994), 4305. See Ira J. Kurzban, "Democracy and Immigration," in *Keeping Out the Other*, ed. David C. Brotherton and Philip Kretsedemas (New York: Columbia University Press, 2008), 64.
[119] "Aggravated felony" is an immigration word of art, defined under 8 U.S.C. 1101 (a) (43).
[120] Austin T. Fragomen Jr, "The Illegal Immigration Reform and Immigrant Responsibility Act of 1996: An Overview," *International Migration Review* 31, no 2 (1997), 454.
[121] Stephen H. Legomsky, "The Detention of Aliens: Theories, Rules, and Discretion," *The University of Miami Inter-American Law Review* 30, no 3 (1999): 531-549.

The laws that emerged as a consequence of criminalization had direct effects on the body of illegal aliens. Recall that Sassen, Dauvergne and others argue that developed states respond to their anxieties about globalization by reaffirming their authority to regulate the admission and expulsion of foreigners. This demeanor leads to a crackdown on illegal aliens, whom states consider a direct challenge to their sovereignty. Recall further that developed states understand undocumented immigration as a product of individual decisions rather than geopolitical and socioeconomic phenomena; therefore, they demand individual accountability from illegal aliens. Thus the crackdown on illegal immigration occurs precisely on the body of undocumented aliens through their detention and deportation.

The impact of the criminalization paradigm on illegal aliens is evident in the growth of the immigration detention population nationwide. As a result of the tough-on-immigration laws enacted before 1996, the average daily detention population more than tripled from 2,370 in 1980 to 8,592 in 1996. The fast rate of increase in detention population overwhelmed the detention network. By December 1995 overcrowding compelled INS authorities in Miami, FL to relax immigration law enforcement.[122]

Besides overcrowding facilities, criminalization led to poor detention conditions and to the mistreatment of alien detainees. The harmful consequences of criminalization were the clearest in two detention centers: Krome Processing Center in Miami, FL, and Elizabeth Contract Detention Facility in Elizabeth, NJ. Although they were geographically distant and were managed by different entities – the INS operated Krome, and a private firm operated Elizabeth – the series of events that occurred between 1993 and 1998 in these locales demonstrates that criminalization is one of the causes of the

[122] Andres Viglucci, "US Softens its Stance on Detention of Refugees," *Miami Herald*, December 12, 1995.

current crisis in immigration detention. In particular, these events suggest that, through the tough immigration laws it bolstered, criminalization led to appalling conditions of detention and to the mistreatment of detained undocumented aliens. In fact, the scandals at Krome and Elizabeth resulted in the creation of the first set of detention standards in 1998.

The government built Krome in 1979 to house Cubans during the Mariel Boatlift and used it to house Haitians asylum seekers in 1982, after which Krome became a long-term detention facility.[123] The first significant event at Krome occurred in September 1993, when an officer, Edward Calejo punched and kicked several times David Bernard, a non-criminal detainee who posed no threat to his safety.[124] Calejo changed the story and declared that the detainee had attacked him.[125] The Department of Justice's investigation that followed Bernard's complaint revealed that Calejo had other guards hit him and the he tried to claim worker's compensation.[126] Calejo pleaded guilty and Judge Federico Moreno sentenced him to a year and a day in prison for a civil rights violation.[127] Calejo's testimony revealed a more complex reality. After completing the sentence, Calejo met with Mark Dow and expressed sorrow and surprise about the outcome of his case because he "had never seen anything result from investigations of officer

---

[123] Because of the lack of limitations on length of detention, aliens whose governments were unwilling to take back or who lacked travel documents paced long periods of incarceration. See U.S. Office of the Inspector General – Michael R. Bromwich, *Alleged Deception of Congress: The Congressional Task Force on Immigration Reform's Fact-Finding Visit to Miami District of INS in June, 1995*, September 1996, http://www.justice.gov/oig/special/9606/index.htm (accessed January 15, 2010); Larry Rother, "'Processing' for Haitians Means Time in a Rural Prison," *New York Times*, June 21, 1992, http://www.nytimes.com/1992/06/21/weekinreview/the-nation-processing-for-haitians-is-time-in-a-rural-prison.html?scp=1&sq=Processing%20for%20Haitians%20is%20time%20in%20a%20rural%20prison&st=cse (accessed January 15, 2010).
[124] U.S. Attorney – Southern District of Miami (FL), "News Release: Former Krome Guard Beating Detainee," January 4, 1996 qtd. in Mark Dow, *American Gulag*, (Berkeley, University of California Press, 2004), 48.
[125] John Lantigua, "INS Guard Charged in Beating of Haitian," *Miami Herald*, June 2, 1995, Sec B.
[126] Associated Press, "Guard Indicted in Beating at Krome," *Boca Raton News*, June 2, 1995.
[127] Dow, *American Gulag*, 52.

misconduct."[128] Calejo argued that although it was common for guards to lock detainees who avoided counts in the bathrooms overnight and to have non-consensual sex with female detainees, investigations were often fruitless. According to Dow, this happened due to the lack of witnesses or because detainees were deported before they could testify.[129] The punitive and abusive conditions of detention that detainees endured at Krome made the detention center, in the words of a local INS officer, very much like "a jail."[130]

The second event, which occurred in June 1995, made Krome nationally infamous. Upon the inauguration of the 104th Congress, Speaker of the House Newt Gingrich created a congressional task force to provide recommendations to curb illegal immigration and effectively remove undocumented aliens.[131] Besides New York and San Diego, the task force visited Krome and the Miami Airport on June 10, 1995. The task force presented a report on June 29, 1995, which made almost no mention of Krome.[132] However, on June 27, 1995, the President and three officers from the INS local employees' union in Miami sent Speaker Gingrich and members of the task force a note signed by forty-seven INS employees, which complained that the INS management had "purposefully and actively deceived the delegation" about the caliber of the problems with immigration detention in Miami.[133] According to Michael Wixted, President of the Union of INS workers, "what the congresspeople saw wasn't an accurate example […] If they had seen what chaos actually exists down here, I think they would have had a

---

[128] Edward Calejo, qtd. in Dow, *American Gulag*, 52.
[129] U.S Department of Justice, Civil Rights Division, "Notice to Close File," File No. DJ 144-18-2967, May 18, 1993, qtd. in Mark Dow, *American Gulag*, (Berkeley, University of California Press, 2004), 52.
[130] U.S. Office of the Inspector General – Michael R. Bromwich, *Alleged Deception of Congress*.
[131] U.S. Office of the Inspector General – Michael R. Bromwich, *Alleged Deception of Congress.*
[132] U.S. Office of the Inspector General – Michael R. Bromwich, *Alleged Deception of Congress*.
[133] U.S. Office of the Inspector General – Michael R. Bromwich, *Alleged Deception of Congress*

different impression of what we do."[134] On July 12, Task Force Chairman Gallegly requested a formal investigation.[135] The Office of the Inspector General's (OIG) inquiry revealed that out of a population of 407 aliens, local officers moved 137 detainees out of Krome in the 24 hours previous to the visit. Of the total number of transfers, 101 were directly motivated by the congressional inquiry. According to Inspector General Michael Bromwich's testimony, senior district INS officials were concerned that Krome was overcrowded. For this reason, they moved forty-five detainees to another jail, some of them only during the visit, and they released fifty-six aliens into the community. This strategy prevented the task force from seeing that female detainees had been sleeping in cots in the lobby area. It was also problematic because 35 detainees were not medically cleared before release. In addition, the OIG found that INS employees had been instructed to lie to members of the task force if asked whether anyone except criminal aliens were housed in a particular section of the detention center. Bromwich called this finding the "worst of all" because it was not "merely a license to lie but an order to lie."[136] The façade the Miami Field Office erected to deceive Congress inspired the *Miami Herald* to refer to Krome as a Potemkin Village, after the Russian army officer Grigory Potemkin, who allegedly built artificial villages to deceive Russian Empress Catherine II during her visit to the Ukraine.[137] Even though Miami INS officers knew that aliens were in substandard conditions of detention, they deliberately lied to Congress.

---

[134] Catherine Wilson, "INS Employees: Congressional Taskforce Deceived During Visit," *The Associated Press*, July 12, 1995.
[135] U.S. Office of the Inspector General – Michael R. Bromwich, *Alleged Deception of Congress*.
[136] U.S. Office of the Inspector General – Michael R. Bromwich, *Alleged Deception of Congress*.
[137] *Miami Herald*, "An INS Potemkin Village?" July 14, 1995, Sec A, 20. See *Encyclopedia Britannica Online*, s.v. "Potemkin, Grigory Aleksandrovich," http://search.eb.com/eb/article-9061055 (accessed March 11, 2010).

The detention center in Elizabeth, NJ reflects the pernicious nature of the criminalization discourse and the reasons why in-custody abuses became a significant problem that led INS to enact non-binding standards in 1998. In June 1995, after complaining of being beaten and drugged by prison guards, 300 detainees rioted and trashed the detention center.[138] After the riot, INS revoked its contract with ESMOR Inc., the firm operating the facility. INS decided to temporarily shut down the facility and transferred detainees to a dozen other jails. However, that did not solve the problem of in-custody abuses. In March 1998, three guards from Union County Jail, one of the jails in Elizabeth where INS had transferred detainees, were found guilty of assault, misconduct, and conspiracy to obstruct the investigation.[139] These guards had assaulted and abused more than a dozen detainees. The problem continued. After keeping the facility closed for eighteen months, INS signed a contract with the Corrections Corporation of America (CCA) and by May 1996 INS had devised a plan to make Elizabeth a "national model."[140] The changes the CCA introduced in the facility exemplify the effects of the criminalization discourse. Rather than focusing on detention conditions, the CCA invested a million dollars in "security gates, motion detectors, shatter-resistant windows, surveillance cameras, and electronic doors."[141] Elizabeth reopened in 1997. In May 1998, Steve Townsend, a former assistant warden sued the CCA alleging that he was fired for informing INS that detainees were forcibly sedated.[142] However, INS was quick to

---

[138] Mark Mooney and Rob Speyer, "Rioters Trash Jail for Aliens," *Daily News*, June 19, 1995.
[139] Ronald Smoothers, "3 Prison Guards Guilty of Abuse of Immigrants," *New York Times*, March 7, 1998, Sec. A.
[140] Elizabeth Llorente, "INS Likely to Reopen Detention Center, Florida Firm Named Manager," *The Record*, June 14, 1996.
[141] *The Record,* "Lost Message of Esmor: An Emphasis on Security over Basic Rights," November 29, 1996.
[142] Elizabeth Llorente, "New Concerns about INS Detention Center," *The Record*, May 25, 1998; MaryAnn Spoto, "Whistle-blower Sues Corrections Company," *The Star-Ledger*, May 3, 1998.

dismiss the allegations. According to INS District Director in Newark, flawless oversight was impossible because "we can't be everywhere and know everything."

The events at Krome and Elizabeth demonstrate that the criminalization paradigm is one of the main contributors to the current crisis in immigration detention. The framing of undocumented aliens as criminals gave rise to tough laws. These laws increased the number of aliens in detention, which led to poor detention conditions, overcrowding, and the mistreatment of alien detainees. Criminalization became a legitimizing rhetorical instrument for the government's crackdown on illegal immigration. Criminalization demanded and justified the mass incarceration of illegal aliens, thus having a direct and harmful impact on the body of illegal aliens. Criminalization also dehumanized alien detainees because authorities began concealing information of abuses and considered natural the fact that detainees were falling through the cracks of an unregulated and unsupervised detention system. The complex, far reaching and dire processes that criminalization set off in the years prior to 1996 render attempts at regulating the practice of detention such as detention standards ineffective to prevent in-custody mistreatment.

2.2. The 1990s: The Transition from Criminalization to Securitization

Although criminalization remained the dominant logic, the mid-1990s witnessed the emergence of the securitization paradigm, which framed undocumented aliens as potential terrorists and thus as an existential threat to the nation. While securitization did not replace the criminalization paradigm, the laws enacted between 1996 and 2001

primarily connected aliens to terrorism. For this reason, those years represent a transition period. This section considers immigration policy until 2001 and the next section considers immigration policy post-9/11.

Like the process of criminalization described above, securitization is also a product of states' reassertion of their authority over the admission and expulsion of foreigners through individual accountability. The securitization paradigm sees illegal aliens as existential threats and promotes and justifies policies that would otherwise be uncommonly tough. This means that the policies enacted to deal with undocumented aliens would not be as harsh as they are if aliens were not defined as an existential threat to the American nation.

This section argues that, in light of the significant extent to which securitization penetrated immigration laws, palliatives such as detention guidelines or legally binding detention standards are insufficient and ineffective to adequately protect the rights of aliens in custody. For this reason, policy-makers ought to end the practice of mass immigration detention and to extend the use of alternatives to detention. To advance this argument, the following paragraphs look at two landmark laws enacted in 1996. These laws introduced substantial changes to immigration policy and had negative far-reaching consequences in terms of immigration detention. Chronologically, the first one is the Antiterrorism and Effective Death Penalty Act (AEDPA), which President Bill Clinton signed into law on April 24, 1996.[143] The second law is the Illegal Immigration Reform

[143] *Antiterrorism and Effective Death Penalty Act of 1996,* Public Law 104-132, U.S. Statutes at Large 110 (April 24, 1996), 1214.

and Immigrant Responsibility Act, which President Bill Clinton signed into law on September 30, 1996.[144]

The Antiterrorism and Effective Death Penalty Act (AEDPA) came into being at the crossroads of criminalization and securitization. In congruence with the criminalization discourse, Congress passed AEDPA as part of an omnibus crime package.[145] Yet, the first word of the Act's title was "Antiterrorism." Moreover, President Clinton signed the Act into law on the first anniversary of the Oklahoma City bombing. Although the Act had a significant impact on aliens, it must be kept in mind that the author of the attack was a United States citizen. This contradiction notwithstanding, AEDPA marks the beginning of securitization's primacy in guiding immigration policies. Its aim was to facilitate the prosecution of individuals associated with terrorist activities. However, the law had several relevant ramifications and consequences for aliens. At that time, President Clinton expressed concerns that the Act "makes a number of major ill-advised changes in our immigration laws that have nothing to do with fighting terrorism."[146] AEDPA made two significant changes that concern this thesis: it expanded the grounds for deportability and it restricted judges' ability to grant discretionary waivers from deportation. Both changes legitimized and called for the detention of larger numbers of illegal aliens.

First, AEDPA expanded the grounds for deportability to cover crimes of moral turpitude and all drug offenses. Crimes of moral turpitude are those that shock public

---

[144] *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Public Law 104-208, U.S. Statutes at Large 110 (1996): 3009-546.
[145] Lena Williams, "A Law Aimed at Terrorists Hits Legal Immigrants," *New York Times*, July 17, 1996, http://www.nytimes.com/1996/07/17/nyregion/a-law-aimed-at-terrorists-hits-legal-immigrants.html?scp=1&sq=A%20law%20aimed%20at%20terrorists%20hits%20legal%20aliens&st=cse (accessed January 15, 2010).
[146] Lena Williams, "A Law Aimed at Terrorists."

conscience[147] and are inherently evil or *malum in se*.[148] This concept resembles that of aggravated felony insofar as both are amorphous, and both have undergone expansion since 1996. In terms of drug offenses, Julie Rannik indicates that prior to AEDPA, possession of marijuana up to thirty grams was no ground for deportability.[149] Second, the Act took away judges' power to grant deportation waivers, which were called Section 212(c) waivers, after the section of the INA describing them. Judges were able to grant this relief from deportation if aliens were able to show that their ties to the United States outweighed their convictions.[150] The elimination of Section 212(c) waivers responded to concerns by Congress that aliens were abusing this option and that too many criminals were being released.[151] From her research, Rannik asserts that aliens did abuse judges' discretion to grant waivers.[152] Nevertheless, Jacqueline Bhabha explains that the elimination of this form of relief separated families and jeopardized aliens' United States-born children's access to parental care.[153] The expansion of the grounds for deportability and the retroactive application of this change made deportable aliens who had committed crimes even before the act came into being.

Five months after AEDPA came into being, President Bill Clinton signed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). The Act compounded the criminalizing and securitizing effects of previous legislations and led to an increase in detention population, poorer conditions of detention, and the mistreatment

---

[147] Julie K. Rannik, "The Anti-Terrorism and Effective Death Penalty Act of 1996: A Death Sentence for the 212(c) Waiver," *The University of Miami Inter-American Law Review 28,* no. 1 (1996), 123.
[148] Ira J. Kurzban, *Immigration Law Sourcebook*, 10th ed. (Washington, DC: American Immigration Law Foundation, 2006), 54.
[149] Rannik, "Anti-Terrorism and Effective Death Penalty Act," 123.
[150] Jacqueline Bhabha, "The 'Mere Fortuity' of Birth? Are Children Citizens?" *Differences: A Journal of Feminist Cultural Studies*, 15 no 2 (2004), 103.
[151] Rannik, "Anti-Terrorism and Effective Death Penalty Act," 138.
[152] Rannik, "Anti-Terrorism and Effective Death Penalty Act," 138.
[153] Bhabha, "'Mere Fortuity' of Birth?," 104.

of alien detainees. IIRIRA introduced five substantial changes in the United States' immigration laws. First, the Act expanded the category of aggravated felonies to include crimes of violence which term of imprisonment exceeds one year, and applied this change retroactively.[154] As with laws discussed above, this change made many aliens deportable overnight.

Second, IIRIRA expanded the definitions of "conviction" and "term of imprisonment" in a way detrimental to aliens. The meaning of these terms is important to determine whether crimes constitute aggravated felonies. The Act established that a conviction exists when there is a formal judgment of guilt, when a judge or jury finds the defendant guilty and orders some form of punishment, or when the alien enters a plea of guilt or *nolo contendere*.[155] IIRIRA also redefined "term of imprisonment" to mean any period of incarceration ordered by a judge even if its execution is then suspended.[156] The fact that procedures other than formal adjudication of guilt came to mean "conviction" and that even non-executed sentences began counting as "term of imprisonment" made deportable an increasing number of aliens.

To understand the impact of those changes on aliens, consider the following example. An illegal alien (she could also be a legal permanent resident) commits burglary. Under the INA, burglary offenses for which the term of imprisonment is at least a year constitute aggravate felonies. Suppose that her attorney suggests that she pleads guilty in exchange for a light sentence. Suppose further that in this case the sentence is of

---

[154] Fragomen Jr, "Illegal Immigration Reform," 452.
[155] *Nolo contendere* is "a plea in a criminal prosecution that without admitting guilt subjects the defendant to conviction but does not preclude denying the truth of the charges in a collateral proceeding." *Merriam Webster Online Dictionary*, s.v. "nolo contendere," http://search.eb.com/dictionary?va=nolo%20contendere&query=nolo%20contendere (accessed March 15, 2010); Fragomen Jr, "Illegal Immigration Reform," 453.
[156] Fragomen Jr, "Illegal Immigration Reform," 454.

one year and one day in prison, but it is suspended. According to the criminal system, the suspension allows the alien to walk. However under post-IIRIRA immigration laws, the term of imprisonment of more than a year makes her an aggravated felon and therefore deportable. This is exacerbated by the fact that that the Act mandates her detention without the right to bail.

Third, IIRIRA further developed mandatory detention. It is true that the Act shortened the period of pre-removal detention to ninety days and stipulated that individuals who the government cannot remove within ninety days may be released. However, IIRIRA established that aliens who are inadmissible on certain grounds[157] such as health issues, who are ordered removed for a broad range of crimes such as aggravated felonies and controlled substances offenses,[158] or who are considered a risk to the community must be detained beyond the ninety-day period.[159]

Fourth, IIRIRA further disempowered aliens by introducing drastic changes to judicial review. Although not all of the changes to judicial review are strictly related to immigration detention, they show the government's predisposition to limit aliens' due process rights. IIRIRA striped courts of their power to review expedited removal decisions. The elimination of judicial review meant that decisions of immigration officers at the borders to expeditiously deport aliens are final. IIRIRA also barred courts from reviewing decisions regarding the removal of aliens who commit certain offenses.[160]

---

[157] Covered in Section 212(a) of the INA.
[158] Covered by Sections 237(a)(1)(C) and 237(a)(2)
[159] Fragomen Jr, "Illegal Immigration Reform," 457.
[160] Offenses covered in Sections 212(a)(2), 237(a)(2)(A)(iii), 237(a)(2)(B), 237(a)(2)(C), 237(a)(2)(D), or 237(a)(2)(A)(ii) of the Immigration and Nationality Act. See Fragomen Jr, "Illegal Immigration Reform," 456.

Fifth, in consonance with AEDPA, IIRIRA further limited the conditions of eligibility for deportation waivers. The Act amended Section 212(h) so that lawful permanent residents are eligible for waivers only if they have resided in the United States for the previous seven years and have not committed aggravated felonies.[161] The broader definition of aggravated felony made many permanent residents ineligible for deportation waivers and subject to mandatory detention.

While immigrant rights advocates and legal scholars argued that the 1996 laws had introduced some of the "toughest measures ever taken against illegal immigration," the government expressed optimism.[162] In 1998, INS Commissioner Doris Meissner extolled the "increased detention capacity and improved removal efforts" of the INS.[163] She argued that the 1996 laws had increased the government capacity to catch undocumented aliens, which were minimal under previous legislation.[164] In fact, Meissner's comment missed the point: the 1996 laws made an increasing number of aliens detainable, but did not significantly enhance the government's ability to house them. Between 1997 and 2000, the detained population tripled from 8,200 to 20,000.[165] Such monumental increase was the result of the expansion of the grounds for mandatory detention, the increase in the number of crimes that count as aggravated felonies, the redefinition of the meaning of conviction and term of imprisonment, the limitation of judicial review, and the restrictions applied to eligibility criteria for deportation waivers. The retroactive application of these changes made many aliens deportable for crimes they

---

[161] Fragomen Jr, "Illegal Immigration Reform," 458.
[162] Fragomen Jr, "Illegal Immigration Reform," 438
[163] Doris Meissner, Senate Committee on Immigration, *Concerning INS Reform: Detention Issues*, 105th Cong. 2nd sess., September 16, 1998. http://fas.org/irp/congress/1998_hr/98091631_llt.html (accessed January 17, 2010).
[164] Meissner, *Concerning INS Reform*.
[165] Elizabeth Llorente, "INS Acts to Curtail Abuse of Detainees," *The Record*, January 28, 2001; Hedges, "Policy to Protect."

had committed in the past, and that at the time they were committed did not lead to deportation.

The considerable increase in the number of aliens detained had two fundamental consequences. First, it overwhelmed the government's detention capacity. As she praised the 1996 laws, Commissioner Meissner had to acknowledge thus, "even with the significant increases in resources, INS will be unable to meet the custody requirements of IIRIRA."[166] This is a parallel situation to the one that INS authorities in Miami, FL experienced in December of 1995, when lack of detention space compelled them to relax immigration enforcement. Due to the lack of space, Meissner explained that INS had "no alternative but to increasingly rely on local facilities" for the detention of aliens.[167] Contributing to the nascent crisis, the use of private and local jails sent detainees far from the public eye and from INS's scrutiny.

The second consequence of the increase in the number of aliens detained was overcrowding, violence, and instances of mistreatment. Across the country, detention conditions became progressively gruesome. A February 1998 article in *The San Diego Union Tribune* describes one of INS's operations near the border with Mexico.[168] In response to criticism from immigrant rights advocates about unsanitary conditions of detention and about the fact that INS was detaining 150 people in cells that could hold half as many, INS rented a motel. This did not solve the problem because female detainees had to sleep three-to-a-bed. To appease critics, a San Diego INS official clarified that "we don't want to punish these people. All we want to do is warn them

---

[166] Meissner, *Concerning INS Reform.*
[167] Meissner, *Concerning INS Reform.*
[168] Leonel Sanchez, "Motel Hold 'Economic Offenders:' Rights Advocates Decry INS Policy for Noncriminals," *San Diego Union-Tribune*, March 13, 1998.

about using fraudulent documents."[169] Nevertheless, 1996 laws and the way in which INS applied them showed otherwise.

The 1996 laws further embedded criminalization and securitization into immigration policies. AEDPA and IIRIRA made fundamental changes in immigration laws. The 1996 laws AEDPA and IIRIRA converted the INS Detention Program into the fastest growing detention program within the Department of Justice, and made aliens the fastest growing prison population. The 1996 laws portrayed undocumented aliens as criminals and terrorists, which suggests that they are a direct threat to the existence of the American nation. Thus, the laws created extreme policies to deal with this threat such as mandatory detention or the limitation of judicial review. In this way, securitization had a deep and far-reaching impact on immigration policies and, according to Sassen, on the body of illegal aliens. In light of securitization's deep imprint, policies that merely finesse the crackdown on illegal immigration such as detention standards would not be effective to prevent instances of in-custody abuses. Thus, only a critical reconsideration of the practice of mass immigration detention will effectively protect the rights of undocumented aliens. The next section turns to the securitizing policies enacted after the events of September 11, 2001.

2.3. The 2000s: Security and Terrorism Rhetoric Post-9/11

Immigration detention experienced another turn after 9/11. The policies enacted in the wake of the attacks mark the apogee of the securitization process. As DHS argued in a November 2005 press release, "since the events of 9/11, President Bush has placed

[169] Sanchez, "Motel Hold 'Economic Offenders.'"

ever-increasing importance on immigration control … and has devoted significant resources to the stark challenge of illegal migration."[170] This section focuses on the USA PATRIOT Act of 2001, the REAL ID Act of 2005, and the end of catch-and-release policy in 2006. These measures expanded the grounds for the detention of undocumented aliens and made it difficult for them to seek relief from detention; thus bringing an increasing number of aliens under the shadow of immigration detention. As a result, detention conditions worsened, in-custody abuses became more grotesque, and the government faced increasing pressure from human rights advocates to enact binding detention standards. The effects of these policies suggests the high degree to which securitization became embedded in immigration policies. In light of such deep impact, neither the enactment of guidelines nor the creation of binding detention standards will effectively solve the crisis in immigration detention. Thus, the most effective way of protecting illegal aliens' rights is that policy-makers reconsider the practice of mass immigration detention.

The first example of the securitization's tight grip over immigration policy is the USA PATRIOT Act. President George W. Bush signed the USA PATRIOT Act into law on October 26, 2001.[171] From behind a veil of secrecy, the Act expanded the mass detention of non-citizens and the use of mandatory detention. According to Shirin Sinnar, the Act made two substantial changes.[172] First, it expanded the conditions under which an organization could be classified as terrorist and made aliens, even marginally related to it,

---

[170] U.S. Department of Homeland Security, "DHS Announces Long-Term Border and Immigration Strategy," November 2, 2005, http://www.dhs.gov/xnews/releases/press_release_0795.shtm (accessed April 1, 2010).
[171] *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, Public Law 107-56, U.S. Statutes at Large 115 (October 26, 2002), 272.
[172] Shirin Sinnar, "Patriotic or Uncostitutional? The Mandatory Detention of Aliens under the USA Patriot Act," *Stanford Law Review* 55, no 4 (2003), 1422.

deportable.[173] Before the USA PATRIOT Act, the label "terrorist" was reserved for organizations that directly threatened the security of the United States or its nationals. Under the Act, any organization designated by the Secretary of State in consultation with the Attorney General, or any organization engaged in committing, inciting or planning terrorist activities could be categorized as terrorist.[174] Nothing depicts better the broad scope of the definition of terrorist than the Act's treatment of the concept of "organization." Under the USA PATRIOT Act, a terrorist organization can be "a group of two or more individuals, whether organized *or not*."[175] The lax definition of terrorism led to the following paradox: had the USA PATRIOT Act been enacted before 1980, it would have resulted in the deportation of supporters of the African National Congress party against apartheid.[176] Second, the Act conferred a substantial degree of discretion to the government regarding alien certification. Certification is the process to establish that an alien is related to a terrorist organization. Aliens could be certified under the USA PATRIOT Act if the Attorney General had "reasonable grounds to believe" that the alien may pose a threat to national security.[177] Certified aliens were to be placed under mandatory detention without bond.[178]

The government's attitude worsened the effects of the USA PATRIOT Act. According to Karen Tumlin, the government's secretiveness made it difficult to

---

[173] Sinnar, "Patriotic or Uncostitutional?," 1422.
[174] Sinnar, "Patriotic or Uncostitutional?," 1423.
[175] [Emphasis mine]. *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, Public Law 107-56, U.S. Statutes at Large 115 (October 26, 2002), 272, § 411 (a)(1)(G).
[176] Riddhi Mukhopadhyay, "Death in Detention: Medical and Mental Health Consequences of Indefinite Detention of Immigrants in the United States," *Seattle Journal of Social Justice* 7, (2009), 700.
[177] *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, Public Law 107-56, U.S. Statutes at Large 115 (October 26, 2002), 272, § 412(a)(3).
[178] Sinnar, "Patriotic or Uncostitutional?," 1424.

accurately evaluate the real consequences of the Act.[179] Even so, it is known that there were more than 1,100 individuals in mandatory detention without the right to bond by October 2001.[180] Once in detention, aliens were victims of different types of abuses. In its third semiannual report to Congress, the Office of the Inspector General identified over a thousand complaints alleging civil rights abuses related to the USA PATRIOT Act.[181] Out of the 1,043 complaints the OIG identified thirty-four that fell under its jurisdiction, were related to the USA PATRIOT Act, and entailed civil rights violations. According to the report, the complaints "ranged in seriousness from alleged beatings of immigration detainees to BOP correctional officers verbally abusing inmates."[182] Nevertheless, the government was unmoved. At a hearing before the House Judiciary Committee, Attorney General John Ashcroft responded to allegations of abuses documented by the OIG. He stated that "we made no apologies" for holding people in detention for as long as the government needed to determine whether they were related to terrorism.[183]

The second example of the high degree to which securitization influenced immigration policy is the REAL ID Act, which became law on May 11, 2005, formally as Division B of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief.[184] Although its title says nothing about immigration, the REAL ID Act had different far-reaching implications for aliens and asylum seekers.

---

[179] Karen C. Tumlin, "Suspect First: How Terrorism Policy is Reshaping Immigration Policy," *California Law Review* 92, no. 4 (2004).
[180] American Society of International Law, "US Detention of Aliens in the Aftermath of September 11 Attacks," *The American Journal of International Law* 96, no 2 (2002), 471.
[181] U.S. Office of the Inspector General, *Report to Congress on the Implementation of Section 1001 of the USA PATRIOT Act*, July 17, 2003, http://www.justice.gov/oig/special/0307/final.pdf (accessed February 16, 2010), 6.
[182] U.S. Office of the Inspector General, *Implementation of Section 1001*, 7.
[183] Eric Lichtblau, "Threats and Responses: The Justice Department; Ashcroft Seeks More Power to Pursue Terror Suspects," *New York Times*, June 6, 2003, Sec 1.
[184] *Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief of 2005*, Public Law 109-13, U.S. Statutes at Large 119 (2005), 231.

The Act is a product of the securitization paradigm because it frames aliens as potential terrorists and thus existential threats to the United States, and also because it led to more aliens in detention. The REAL ID Act made two sets of changes strictly related to the securitization of aliens. The first set of changes has to do with the asylum application process. Section 101 of the Act, titled "Preventing Terrorist from Obtaining Relief From Removal," required asylum applicants to present evidence to corroborate that their race, religion, nationality, membership in a particular social group, or political opinion will be a central cause for persecution in their countries. In addition, the Act allowed for credibility of the applicant's claim to be established based on the applicant's demeanor, candor, or responsiveness. These placed female asylum seekers who find themselves unable to talk about rape in front of male asylum officers or immigration judges at great disadvantage. Furthermore, the Act limited the judicial review of decisions regarding the availability of corroborating evidence.[185] Revealingly, the REAL ID Act introduced these changes, which placed more obstacles on the road of asylum seekers, under the premise of preventing *terrorists* from obtaining relief from removal. In reality, Section 101 of the Act prevents asylum seekers from finding refuge.

The second set of changes the REAL ID Act wrought is related to the definition of terrorism. First, the Act broadened the definition of what counts as being engaged in terrorist activities. For example the REAL ID Act made inadmissible those aliens who received military training from or on behalf of organizations that at any point in time were considered terrorist organizations. In addition, the Act made inadmissible aliens who a consular officer, the Attorney General, or the Secretary of the DHS "knows, or has

[185] The Library of Congress, "H.R. 1268," *Summary As Of 5/11/2005*, http://thomas.loc.gov/cgi-bin/bdquery/D?d109:3:./temp/~bdTG2k:@@@D&summ2=m&l/bss/d109query.html| (accessed March 28, 2010).

reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity…"[186] Thus, under the REAL ID Act aliens do not have to engage in terrorist activities in order to be considered terrorists. Second, the REAL ID expanded the definition of "terrorist organization." It affirmed the definition of a terrorist organization, *inter alia*, as a "group of two or more individuals, whether organized or not …"[187] Moreover, the Act made relatives of individuals remotely connected to organizations that are deemed to be terrorist inadmissible and deportable. In short, the changes in immigration policy the REAL ID Act introduced lead to an increase in the size of the immigration detention population. Although the Act did not explicitly mandate the incarceration of aliens, by making them deportable or inadmissible the Act made them subject to mandatory detention. In short, the REAL ID Act further securitized illegal aliens: it portrayed them as terrorists and as an existential threat to the country, and fostered detention as the appropriate practice to deal with such threat.

The termination of the catch and release policy is the third measure that this section considers to argue that securitization deeply affected immigration policies and became one of the roots of the current crisis in immigration detention. This measure expanded the practice of mass immigration detention, making an increasing number of aliens subject to poor detention conditions and mistreatment. Catch and release was informally introduced as a result of insufficient detention space. It consisted in serving aliens who were apprehended but could not be immediately deported with a charging document and releasing them until the date of the court hearing. As a result of the

---

[186] *Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief of 2005*, Public Law 109-13, U.S. Statutes at Large 119 (2005), 306.
[187] *Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief of 2005*, Public Law 109-13, U.S. Statutes at Large 119 (2005), 308.

security panic that followed the events of September 11, 2001, the government practically discontinued this practice. The termination of catch and release was part of the first phase of the Secure Border Initiative (SBI). The SBI was a long term plan: the first phase, announced in November 2005, aimed to secure the border and the second phase, announced in April 2006, focused on strengthening interior enforcement.[188] According to Kelsey Papst, although DHS announced the discontinuation of catch and release in November 2005, the policy effectively ended in August 2006.[189] The ways in which the government announced the SBI and referred to catch and release are examples of securitization.

The President's depiction of the policy is an example of the securitization process. In a speech in May 2006 President George W. Bush argued that catch and release was an ineffective policy because the "vast majority" of aliens would not show up to court.[190] The statement was hyperbolic since figures for the year 2005 indicate that sixty percent of the aliens did appear in front of the immigration judge.[191] Later, President George W. Bush reframed catch and release as a problem that undermined the effort of the Border Patrol to catch undocumented aliens.[192] In a May 2007 speech he said, "one of the problems we had prior to the administration addressing the problem was we had what

---

[188] The first phase was announced on November 2, 2005 and the press release and fact sheet are available from DHS's website. See U.S Department of Homeland Security, "Border and Immigration Strategy;" U.S. Department of Homeland Security, "Fact Sheet: Secure Border Initiative," November 2, 2005, http://www.dhs.gov/xnews/releases/press_release_0794.shtm (accessed March 30, 2010). The DHS announced the second phase of the SBI on April 20, 2006. See U.S. Department of Homeland Security, "Department of Homeland Security Unveils Comprehensive Immigration Enforcement Strategy for the Nation's Interior," April 20, 2006, http://www.dhs.gov/xnews/releases/press_release_0890.shtm (accessed March 30, 2010).
[189] Papst, "Protecting the Voiceless," 272.
[190] George W. Bush, "Immigration & American Society: Primetime Address to the Nation," May 15, 2006.
[191] Spencer S. Hsu, "Backlog at the Borders, Cracks in the System," *The Washington Post*, May 14, 2005.
[192] George W. Bush, "More in Immigration: Address to the Arizona Border Patrol," April 9, 2007.

was called – what happened was called catch and release."[193] Presenting catch and release as a problem rather than as a more or less effective policy is a way of securitizing undocumented aliens. This is so because whereas ineffective policies can be amended, problems ought to be eliminated. President George W. Bush's description of catch and release as a problem foreclosed the possibility of finding a middle ground; the only tenable solution was to dismantle catch and release.

The way in which immigration officials referred to catch and release is another example of securitization. In the press release announcing the first phase of the SBI, DHS Secretary Chertoff argued that illegal aliens posed a substantial problem: "the ability of individuals to enter our country outside legal channels is a threat to our homeland security."[194] Chertoff's statement brought to the fore two fundamental components of the securitization paradigm: the concept of nation and the concept of an existential threat. First, Secretary Chertoff's statement crystallized the differences between *us*, represented by the nation and the homeland, and *them*, illegal aliens. This underscored the idea that aliens are different from members of the nation, it contributed to creating an image of aliens as the *other*. Second, consistent with the securitization logic, Secretary Chertoff defined illegal aliens as a threat to "our homeland security." This concept was expanded in the press release announcing the second part of the SBI in April 2006. In that occasion, Secretary Chertoff asserted, "illegal immigration poses an increasing threat to our nation."[195] At this point in time, the presence of illegal aliens was not only a threat, but also an increasing threat. Such an increasing challenge justified uncommonly harsh policies and increasing utilization of resources. Thus, a DHS September 2006 fact sheet

[193] George W. Bush, "Immigration Reform: Address in Georgia," May 29, 2007.
[194] U.S. Department of Homeland Security, "Border and Immigration Strategy."
[195] U.S. Department of Homeland Security, "Comprehensive Immigration Enforcement."

titled "Protecting the Homeland Post September 11" announced the expansion of detention beds to 27,500.[196]

The discontinuation of catch and release was problematic. It affected primarily aliens other than Mexicans, since those coming from the neighbor country can be returned expeditiously. The fast removal of Mexican citizens is possible because they do not need a valid passport to return to Mexico, while aliens from other countries do. For those of other nationalities, the end of catch and release meant longer periods of detention. According to Ajmel Quereshi, the year before the termination of this policy the DHS only detained 34 percent of non-Mexicans for immigration violations. In contrast over 99 percent of non-Mexican illegal aliens were detained in 2006.[197] The increase in the number of detainees and the shortage of detention space worsened the conditions of detention.[198] In May 2008, an editorial in *The Washington Post* critiqued the impact of the abandonment of catch and release on the size of alien detention population and the quality of health care in detention centers.[199] The editorial identified 83 deaths in detention between 2003 and 2008. Granted, a certain number of deaths in detention were explained by the large number of people going through immigration detention. However, *The Washington Post* states that even employees from the Division of Immigrant Health Services were concerned about the agency's ability to provide adequate health care in light of the growing detention population.

---

[196] U.S. Department of Homeland Security, "Fact Sheet: Protecting Our Borders Post September 11," http://www.dhs.gov/xnews/releases/pr_1158339830666.shtm (accessed April 1, 2010).
[197] Ajmel Quereshi, "Hope for Change in Immigration Policy: Recommendations for the Obama Administration," *Human Rights Brief* 16 (2009), 19.
[198] Papst, "Protecting the Voiceless," 273.
[199] *Washington Post*, "Detention Deficit," May 17, 2008.

This section argued that through its imprint on immigration laws, securitization led to a surge in immigration detention resulting in the mistreatment of immigration detainees. The years following the events of 9/11 witnessed the apogee of the securitization paradigm. The products of the securitization logic – the USA PATRIOT Act, the REAL ID Act and the end of catch and release policy – framed undocumented aliens as existential threats to the nation and caused a significant increase in their detention. As a consequence, detention conditions became precarious and instances of mistreatment became frequent. This section also contended that the securitization paradigm has been an established paradigm in immigration policy-making for the last fourteen years. In light of the deep, harmful effects of the process of securitization, the most effective way to solve the crisis besetting immigration detention is to dismantle the idea that illegal aliens are a threat to the nation. Therefore, the best avenue to protect immigrant rights is to reconsider the practice of mass immigration detention.

2.4. The Current Legacies of the Criminalization and Securitization Paradigms

This chapter made two arguments; first, it contended that criminalization and securitization had a deep impact on immigration laws and on the public perception of illegal aliens. Criminalization and securitization have acted as rhetorical instruments in the government's crackdown on illegal immigration: justifying and calling for more restrictive, harsher measures against illegal aliens. Second, this chapter demonstrated that the impacts of criminalization and securitization are recent, deep, and detrimental to illegal aliens. Their recency suggests that the crisis of mass immigration detention is occurring at a specific point in time and that there is room for a solution. Their depth and

injurious nature indicate that the crisis is a grave and pressing problem that requires a swift and effective solution. The overcrowding of detention centers and the othering of illegal aliens as criminals and existential threats to the nation have led to human rights abuses and mistreatment of alien detainees. The next chapter considers the significant extent to which the government failed to address the crisis in immigration detention through non legally binding detention guidelines.

3. Past and Current Proposals to Address the Crisis in Alien Detention

The effect of criminalization and securitization on immigration policy created a crisis in alien detention. As the government began using detention as an immigration control tool and framing aliens as criminals and security threats, detention conditions worsened and the number of instances of in-custody abuse increased. Progressively, the media and human rights groups began publicizing in-custody abuses. As a response, the Immigration and Naturalization Service (INS) enacted a set of detention guidelines in 1998. Because the standards did not carry the force of law, detainees were unable to utilize them to make legal claims; therefore, abuses continued undeterred. The increasing publicity of in-custody mistreatment of aliens intensified immigrant rights advocates' pressure on the government to give the detention guidelines the weight of law. In light of the government's indifference, in 2007 advocates formally petitioned the Department of Homeland Security (DHS) to codify the standards. Two years later, DHS denied the petition. Upon taking office, the Obama administration recognized the gruesome conditions of detention and acknowledged that the immigration detention system is "broken."[200] In its first year in power, Obama administration promised structural reforms and enacted some promising changes. Yet, these have been insufficient to resolve the crisis in immigration detention. Therefore, advocates' proposal of binding detention standards remains on the table.

---

[200] Karen Tumlin, Linton Joaquin and Ranjana Natarana, *A Broken Immigration System*, National Immigration Law Center, ACLU of Southern California, Holland & Knight, 2009, http://www.nilc.org/immlawpolicy/arrestdet/A-Broken-System-2009-07.pdf (accessed February 11, 2010).

3.1. The First Set of Standards

In January 1998, INS created twelve non-binding standards to regulate immigration detention. According to immigrant rights advocates, public exposure of in-custody abuses motivated the creation of the standards. The deception of Congress at Krome and the riot at Elizabeth revealed severe problems with immigration detention.[201] According to INS Commissioner Doris Meissner, implementing detention standards was part of INS's "policy to treat all aliens in custody with dignity and respect" and as part of a commitment to "provide a safe and humane environment for all individuals held in its custody."[202] Furthermore, the standards were an attempt to homogenize conditions of detention across dissimilar facilities, a pressing issue in the light of an ever-increasing detention population: by 1998 INS detained a daily average of 16,400 aliens.[203] With these standards, INS intended to address the concerning dearth of regulations. Before 1998, the only norms governing immigration detention were twenty-four hour supervision, conformance with safety and emergency codes, food service, and availability of emergency care.[204] The 1998 standards covered issues of access to legal materials, population counts, marriage requests, telephone access, visitation, detainee voluntary work program, group legal rights presentations, clothing, access to medical care, religious practices, suicide prevention and intervention, and hunger strikes. The standards applied to Service Processing Centers, such as Krome, and contract facilities, such as Elizabeth, but not to local jails.

---

[201] National Immigration Project of the National Lawyers Guild et al., *Petition to Initiate Rulemaking,* January 24, 2007, www.nationalimmigrationproject.org/detention%20petition%20for%20rulemaking%20-%207-09.pdf (accessed January 17, 2010), 5.
[202] Meissner, Senate Committee on Immigration, *Concerning INS Reform.*
[203] Meissner, Senate Committee on Immigration, *Concerning INS Reform;* National Immigration Project of the National Lawyers Guild et al., *Petition to Initiate Rulemaking*, 5.
[204] 8 C.F.R § 235(3)(e).

Immigrant rights advocates had a marginal participation in the creation of the standards. The INS requested informal feedback from immigrant rights advocates and from the American Bar Association. INS Commissioner Meissner, who expressed satisfaction with the standards, explained that they were based on policies from INS, the Bureau of Prisons (BOP) and the American Correctional Association (ACA). Nevertheless, she did not explain why criminal detention standards were used to devise detention standards for administrative detainees. Recall that, compared to criminal incarceration, immigration detention is administrative in nature and ought not to be punitive. Notwithstanding the inadequacy of criminal standards as a model for immigration detention guidelines, Meissner praised ACA standards and because they would "ensure detainee rights are not violated."[205] History proved her wrong.

The 1998 standards failed to solve the crisis in immigration detention in three distinct ways. First, they did not apply to local jails.[206] Although INS knew that it held contracts with hundreds of local jails, which housed a significant percentage of the immigration detention population, the agency decided to omit local facilities from the purview of the 1998 standards. According to official statistics, as of February 1998 the INS had agreements with over a thousand state, county and local jails.[207] Moreover, the law stated that existent jails were to be used before constructing new facilities, which meant that the use of local jails would become more widespread.[208] For this reason, the

---

[205] Meissner, Senate Committee on Immigration, *Concerning INS Reform*.
[206] Human Rights Watch, *Locked Away: Immigration Detainees in Jails in the United States* (September 1998), http://www.hrw.org/reports98/us-immig/Ins989-02.htm#TopOfPage (accessed November 16, 2008).
[207] INS Detention and Deportation Statistics, February 25,1998, qtd. in Human Rights Watch, *Locked Away*.
[208] According to the Immigration and Nationality Act, "prior to initiating any project for the construction of any new facility for the Service, the Commissioner shall consider the availability for purchase or lease of any existing prison, jail, detention center or other comparable facility suitable for such use." Immigration

exemption of local facilities from the requirements of the 1998 detention standard reflects INS's willful neglect of the large percentage of aliens who were housed in these facilities. According to INS officials, the reason was the lack of space. In the words of Kristine Marcy, Senior Counsel at INS Office of Field Operations, "it is not in INS's interest to force the jails to meet certain standards because we need the space … contractually, you cannot force the jails to do certain things. It's a dilemma."[209] Revealingly, the dilemma is whether aliens are detained in humane conditions rather than whether mass immigration detention is desirable. Senior Counsel Marcy's statement suggests that despite the fact that INS was aware that detention compromised human rights, the agency chose to introduce only cosmetic reforms.

Second, the 1998 standards failed to create humane conditions of detention because they were implemented in a decentralized manner. Oversight of the standards' implementation was left in the hands of the officers in charge of detention facilities. These local officers were to report back to INS district director, who reported to INS regional director. This meant that individual officers were requested to apply uniform standards in highly diverse contexts. As Meissner indicated in her Congressional testimony, "INS' detention operations are complex because of the diverse populations within the two categories of detainees – criminal aliens and non-criminals. We detain adult males and females, juveniles and even families. Each of these groups presents complex security, administrative, and even social issues to our detention program managers."[210] Third, the 1998 standards failed to address mistreatment of detainees

---

and Nationality Act (INA), Section 241(g)(2); Federal Detention Plan 1997 – 2001, qtd. in Human Rights Watch, *Locked Away*, 19.

[209] Qtd. in Human Rights Watch, *Locked Away*.

[210] Meissner, Senate Committee on Immigration, *Concerning INS Reform*.

because they were legally unenforceable, merely an INS's internal policy, which detainees could not use to make legal claims.

In its report *Locked Away*, Human Rights Watch heavily criticized the 1998 standards. The report indicated that in 1998 INS held sixty percent of its detainees in local facilities.[211] After interviewing over 200 alien detainees at different facilities, Human Rights Watch concluded that they were often treated in the same way as regular prisoners, that medical and dental care were substandard, and that detainees had limited access to attorneys and families. The report expressed concerns about the lack of binding detention regulations: "There are no laws, federal regulations or INS policy governing how local jails holding INS detainees should be inspected or monitored."[212] For this reason, Human Rights Watch called on the INS to devise comprehensive national standards that applied to all types of facilities and to promulgate these standards as federal regulations.[213]

Although the 1998 standards were ineffective to improve detention conditions, they succeed in raising public awareness about the gruesome conditions in detention facilities. Although detainees faced significant obstacles to access counsel, awareness led to civil litigation and formal complaints. In 1999, Salvador G. Longoria and Michele Gaudin sued the Orleans Parish Prison in New Orleans on behalf of thirteen Asian detainees who had been beaten by guards. The suit was settled in September 1999 and the detainees were ordered released.[214] Suits were also filed by detainees at the Passaic

---

[211] Human Rights Watch, *Locked Away*, 5.
[212] Human Rights Watch, *Locked Away*, 6.
[213] Human Rights Watch, *Locked Away*, 11.
[214] Chris Hedges, "Suit Details the Beatings of Detainees in Louisiana," *New York Times*, January 2, 2001.

County Jail in New Jersey and the San Pedro Jail in Los Angeles.[215] Two-dozen detainees from the Hudson County Correctional Center (Kearny, NJ) sent a letter to INS complaining of unsanitary conditions in detention, lack of legal representation and of frequent transfers that were causing them to miss court deadlines resulting in deportation.[216]

In tandem with litigation, human rights organizations did significant research and fact-finding in detention facilities. In 1999 and 2000, Human Rights Watch conducted several visits to the San Pedro Processing Center and to INS's staging area. Allyson Collins, a researcher for the organization, summarized the results of the visits in a letter to INS Commissioner Doris Meissner.[217] For each facility it identified which standards were unmet and which situations fell beyond the scope of the 1998 guidelines but need to be addressed. Besides overcrowding, Collins raised concerns about lack of medical treatment, the lack of hygiene, and the humiliating nature of body searches among other issues. The report that came out of the visitations was the first to use the 1998 guidelines as units of measurement.

In summary, the design and oversight of the 1998 standards prevented them from accomplishing INS's goal to make immigration detention humane and protect immigrant's rights. Although the standards' limited scope and non-binding nature left many detainees unprotected, they generated an avalanche of complaints. These led to the

---

[215] Hedges, "Policy to Protect."
[216] Hedges, "Policy to Protect."
[217] Allyson Collins – Human Rights Watch, letter to INS Commissioner Doris Meissner, October 29, 2000, http://www.hrw.org/en/news/2000/10/29/letter-ins-commissioner-doris-meissner (accessed February 2, 2010).

formulation of National Detention Standards (NDS) in 2000, by then, the number of detainees annually held by INS was 20,000.[218]

3.2. The National Detention Standards

INS released the NDS on November 13, 2000.[219] The original set contained thirty-six standards and was later expanded to thirty-eight. The NDS entered into force on January 1, 2001 and came into full effect in 2003. Though not legally binding, the NDS were more comprehensive than the 1998 guidelines and applied to all Service Processing Centers, Contract Detention Facilities, and to those Intergovernmental Service Agreements (local jails) that held detainees for more than seventy-two hours. As with the 1998 standards, the negotiation leading to the NDS incorporated feedback from several parties: the Department of Justice, the American Bar Association and other immigrant rights advocacy organizations.[220] The government, advocates, and media reactions bring to the fore the different attitudes towards illegal aliens in detention and crystallize some of the processes at play in the crisis of alien detention.

Government officials underscored the positive changes that the NDS aimed to make in immigration detention. Notably, the arguments replicated those offered in 1998. First, officials argued that the NDS were to improve safety, security and fairness. According to Meissner, who resigned shortly after the standards were released, "our continued goal is to provide safe, secure and humane conditions of detention for all aliens

---

[218] Hedges, "Policy to Protect Jailed;" Llorente, "INS Acts;" Associated Press, "New INS Guidelines Take Effect," January 1, 2001.
[219] Associated Press, "New INS Guidelines;" Cindy Gonzalez, "Rules May have Little Midlands Effect," *Omaha World Herald*, January 2, 2001; Llorente, "INS Acts."
[220] Tumlin, Joaquin and Natarana, *Broken Immigration System*, 4; National Immigration Project of the National Lawyers Guild et al., *Petition to Initiate Rulemaking*, 6. Note: The government website often cited for the press release of the NDS which expands on the creation process is no longer available.

in INS custody."[221] A White House press release argued that the implementation of the standards would ensure that "those detained, particularly those who have pending asylum cases, are treated fairly."[222] Second, officials stated that the standards would create uniformity. In fact, their concerns about the heterogeneity in the immigration detention system were correct because the 1998 standards had done nothing to smooth the differences. Moreover, the constant increase in the detention population sharpened the contrasts between detention facilities across the country. The roots of the entropy were INS's decentralized structure and the outsourcing of immigration detention and law enforcement to local authorities. INS spokeswoman Kareen Kraushaar explained the prevailing disharmony in geographical terms, saying that the United States "is a big country, and there are many different types of facilities."[223] Because discrepancies in detention practices across the country had become problematic, the government argued that the standards would assure "a basic level of care" to everybody.[224] Third, government officials asserted that the NDS would enhance implementation and monitoring. According to INS spokeswoman Kraushaar, "in 1998, the standards were basically just put out there with very little training … Now the training will be significant to ensure that the standards are integrated, accepted, and adopted throughout the detention system."[225]

---

[221] Doris Meissner qtd. in Hedges, "Policy to Protect." Karen Kraushaar, a spokeswoman for INS and Aaron Cabrera, who ran Port Isabel Service Processing Center, echoed the concept of a safer and more secure environment. See Dane Schiller, "INS Posts Detention Standards; Goal Is to Treat Detainees Fairly," *San Antonio Express News*, January 3, 2001; Cindy Gonzalez, "New INS Guidelines Could Affect County Jails," *Omaha World Herald*, January 3, 2001; Llorente, "INS Acts."
[222] U.S. Newswire, "White House Blueprint for Beginnings," July 10, 2001.
[223] Schiller, "Detention Standards."
[224] Schiller, "Detention Standards."
[225] Llorente, "INS Acts."

Notably, government officials openly denied that the NDS were a response to a crisis in immigration detention. According to INS Director of Media Relations Russell Bergeron Jr., the standards were not conceived to address "major systemic issues in our own facilities."[226] In fact, they were devised, Bergeron said, to "provide standards and specific guidelines in all facilities."[227] The reluctance to admit that the standards answered to appalling conditions of detention is a manifestation of the effects of the criminalization and securitization paradigms. The framing of undocumented aliens as criminals and security threats had led to their dehumanization, and therefore, to the notion that they did not possess rights and that whatever rights they obtained were a privilege. Furthermore, while INS officials extolled the standards for all the benefits they were meant to bring, they were well aware that the NDS were mere guidelines. In fact, history would prove that, like the 1998 standards, the NDS achieved little in terms of preventing human rights abuses in detention centers.

The government's celebration of the 2000 detention guidelines served to further criminalize illegal aliens. In the same press release announcing the creation of the NDS, the White House equated illegal immigration with crime. The release stated that the Bush administration was committed to "removing those who have entered the country illegally and to detaining criminal aliens."[228] Though apparently a minor detail, the mention of illegal aliens and criminal aliens in the same sentence is significant. Recall that the criminalization and securitization of illegal aliens occur primarily through acts of speech. In the same paragraph, the White House used "deportable aliens" and "criminals" as synonyms: "INS will continue to target its efforts primarily on removing *deportable*

[226] Hedges, "Policy to Protect."
[227] Hedges, "Policy to Protect."
[228] U.S. Newswire, "White House Blueprint for Beginnings."

aliens held in Federal, State and local facilities to ensure that these *criminal aliens* are not allowed back on the street."[229] The equation of deportable and criminal aliens bears witness to the underlying assumption that immigration violations are criminal violations. While it is true that criminal aliens are deportable, the percentage of aliens in detention with criminal records has been historically low. A recent study by the Transactional Records Access Clearinghouse of the University of Syracuse shows that between 2005 and 2008 the number of non-criminal detainees doubled, while the number of criminal detainees remained practically constant.[230] According to Dr. Schriro's[231] October 2009 report, only 11 percent of detained aliens have committed serious crimes, such as aggravated assault, rape, murder, robbery, arson, burglary, larceny-theft, and motor vehicle theft.[232] The relative number of criminal aliens to the number of non-criminal detainees suggests that the equation of "criminal" and "deportable" lacks foundations.

Immigrant rights advocates were ambivalent towards the creation of the NDS. They emphasized that the standards were long overdue and welcomed the uniformity that they were supposed to create.[233] According to Chris Nugent, director of the immigration pro-bono project at the American Bar Association, immigration detention was excessively arbitrary. Nugent argued that the system was fragmented and that the

---

[229] U.S. Newswire, "White House Blueprint for Beginnings."
[230] Transactional Records Access Clearinghouse, *Detention of Criminal Aliens: What has Congress Bought?*, February 2010, http://trac.syr.edu/immigration/reports/224/ (accessed February 14, 2010).
[231] DHS Secretary Janet Napolitano appointed Dora Schriro as her Special Advisor on Immigration and Customs Enforcement to head the newly created office of Office of Detention Policy and Planning. She was to survey the state of immigration detention and to overhaul the immigration detention system. Schriro released her report on October 9, 2009 and testified before Congress on December 10, 2009. She stepped down from her position in September 2009. Nina Bernstein, "Immigration Official to Run New York's Jails," *New York Times*, September 8, 2009, http://www.nytimes.com/2009/09/09/nyregion/09detain.html (accessed April 26, 2010).
[232] Schriro, *Immigration Detention Overview*, 6.
[233] Llorente, "INS Acts."

disproportionate amount of power local actors enjoyed resulted in disobedience.[234] In fact, neither set of standards was able to solve the problems of arbitrariness and decentralization. Chapter four argues that these issues make binding detention standards an impractical solution to in-custody abuses of detainees.

Immigrant rights advocates expressed two different concerns regarding the NDS. The first concern was that the standards lacked the weight of law. According to Judy Rabinovitz, senior staff attorney for the American Civil Liberties Union, detention facilities were not used to comply with detention regulations such as the standards set by the American Correctional Association.[235] Therefore "the non-enforceable nature of the standards could prevent conditions in detention centers from improving."[236] Jail officers and county sheriffs echoed the idea that the unenforceable nature of the standards would become an obstacle. Bart Chavez, an immigration attorney in Omaha, argued that due to INS's dullness in performing basic tasks and its lack of manpower, the creation of detention guidelines would "convolute things much more."[237] In fact, advocates' concern about the limited effect of the NDS proved to be correct. The second concern that advocates voiced was that the standards were incomplete. According to Hussein Shadruddin, an attorney for the Lawyer's Committee for Civil Rights Under Texas Law, the standards were "a good start" but came up short.[238] Indeed, immigrant rights advocates asserted that the standards did not address issues such as frequent transfers of detainees without the notification of the lawyers.[239]

---

[234] Llorente, "INS Acts."
[235] Hedges, "Policy to Protect."
[236] Hedges, "Policy to Protect."
[237] Gonzalez, "Little Midlands Effect."
[238] Schiller, "Detention Standards."
[239] Hedges, "Policy to Protect."

Unlike the government, the media made it clear that the standards sought to address in-custody violation of immigrant rights. The *New York Times* introduced the NDS as follows: "After scores of complaints and lawsuits concerning physical and mental abuse of aliens detained in county jails and other detention centers, the Immigration and Naturalization Service has issued national standards for the treatment of its detainees."[240] Similarly, an article in *The Record* begins: "Confronted with riots, hunger strikes, and scores of allegations of abuse and inhumane conditions, the federal immigration agency has established standards for the treatment of foreign nationals detained in its custody."[241]

Some journalists introduced the NDS as an overreaction on the part of INS. Dane Schiller for the *San Antonio Express-News* explained that the standards called "for special treatment regarding everything from telephoning lawyers to changing underwear."[242] In his article for the *New York Times*, Chris Hedges indicated: "The new standards, cover everything from visiting policies to grievance procedures."[243]These arguments were based, first, on the unfounded assumption that immigration detention was comparable to criminal detention. According to Chris Hedges, "for all the horror stories, no one is suggesting that the immigrant prisoners are treated any worse than the native-born prisoners in the county jails."[244] The *New York Times* journalist's argument is similar to that of Sarpy County, NE, Sheriff Patrick Thomas, who claimed that there were no reasons for concern about immigration detention because all detainees, criminal and

---

[240] Hedges, "Policy to Protect."
[241] Llorente, "INS Acts."
[242] Schiller, "Detention Standards;" World News Digest, "Immigration: INS Issues National Detention Standards," January 2, 2001.
[243] Hedges, "Policy to Protect."
[244] Hedges, "Policy to Protect."

immigration alike, received equal treatment.[245] Second these arguments were based on journalists' ambiguous descriptions of the NDS. For instance, an *Associated Press* article indicated that the standards covered "some three dozen areas," when in fact they only covered three main areas: detainee services, security and control, and health services.[246]

While the NDS were not an overreaction, they added to the extensive volume of information that detention facilities, particularly those housing immigration and criminal detainees, had to process. The large volume of information that detention facilities administrators must peruse and digest indeed creates space for the argument that the NDS were staggering. The 2000 standards can be found on ICE's website in individual files, each containing several pages. Each file states the policy, defines the range of applicability of the standards, then outlines the way in which the policy is to be applied and finally contains several pages of tables and related forms. The total number of pages describing policies and their range of applicability is two hundred. While this may seem overwhelming, consider the standards that the Federal Bureau of Prisons (BOP) and the American Correctional Association (ACA) set for criminal detention. The BOP operates federal detention facilities, and its regulations take 161 pages of the Code of Federal Regulations.[247] In addition, the agency periodically publishes Policy Statements, which are divided into eight different series.[248] The ACA certifies detention facilities that comply with its national standards. Notably, ACA's standards are compiled into twenty-one manuals, each corresponding to a specific type of detention facility or correctional

---

[245] Gonzalez, "Little Midlands Effect."
[246] Associated Press Online, "New INS Guidelines."
[247] 28 C.F.R §§ 500.1 to 572.40.
[248] Federal Bureau of Prisons, *Policy Documents*, http://www.bop.gov/DataSource/execute/dsPolicyLoc?start=reset (accessed March 17, 2010).

program. Thus, the NDS were not significantly more complex than BOP or ACA's regulations.

Other journalists argued that the standards were incomplete and pointed to their unenforceable nature. An editorial in the St. Petersburg Times identified two main flaws.[249] The first issue was that jails lacked incentives to enforce the standards because the NDS were only suggestions. The second problem was the omission of important aspects, such as the transfer of detainees, which have a significant impact on detainees' ability to seek counsel. Thus, the editor recommended INS to "give these suggestions teeth" and to include the relevant issues that were left out.

The different reactions to the NDS on the part of the government, advocates, and the media brought to the fore three important issues. First, they revealed that the standards were useless to detainees because they were not legally binding. In this regard, the progressive wording of the policy statements contrasted with their ineffectiveness as a tool to seek redress. For instance, the standards requested detention facilities to "provide detainees with nutritious, attractively presented meals, prepared in a sanitary manner," but failed to prevent that detainees were fed uncooked food or food that was still frozen.[250] Second, the NDS added to an already extensive volume of information that detention facilities, especially those housing also criminal detainees, had to process. This was more so in local jails housing aliens and citizens. Third, the NDS left important issues unaddressed. One of them was that they did not regulate the transfer of detainees. According to a 2009 report by Human Rights Watch, INS/ICE conducted 1.4 million transfers between 1999 and 2008. Although transfers are sometimes necessary to provide

---

[249] St. Petersburg Times, "INS Standards Need Teeth," January 8, 2001.
[250] James Pinkertion, "Detention, then Deportation: Illegal Immigrants' Last Stop; Rare Tour Gives a Glimpse of the Ever-Increasing Activity at Facility," *Houston Chronicle*, July 6, 2008.

detainees with medical care, they often jeopardize detainees' access to legal counsel and contact with family members.[251] Another limitation was that the NDS did not apply to local facilities holding alien detainees for less than three days. In effect, the NDS promised too much but accomplished too little.

3.3. The Performance-Based Standards and a Denied Petition

In tandem with the increase in immigration enforcement after 9/11 described in chapter two, the impracticality of the guidelines standards to solve the crisis in immigration detention paved the way for more in-custody abuses of aliens' rights. The mistreatment of alien detainees resulted in bad publicity for DHS, which had taken over INS's functions in 2003. In December 2006, the Office of the Inspector General (OIG) found instances of noncompliance with the NDS at five immigration detention facilities.[252] Perhaps not surprisingly, Krome was one of them. The OIG found that several facilities failed to provide adequate medical care and food, and that conditions of detention in many of them were improper.[253] Motivated by the report, over a dozen human rights organizations wrote a letter to the DHS petitioning the agency to codify the standards.[254] Among the signatories there were American Friends Service Committee Immigrant Rights Programme, the American Civil Liberties Union of New Jersey, the

---

[251] Human Rights Watch, *Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States*, December, 2009, http://www.hrw.org/sites/default/files/reports/us1209web.pdf (accessed February 16, 2010).

[252] The report evaluated compliance with standards related to health care, environmental health and safety, general conditions of confinement, and reporting of abuse. The facilities studied were: Berks County Prison (BCP, Leesport, Pennsylvania), Corrections Corporation of America Facility (San Diego, California), Hudson County Correction Center (Kearny, New Jersey), Krome Service Processing Center (SPC, Miami, Florida), Passaic County Jail (PCJ, Paterson, New Jersey). See U.S. Office of the Inspector General, *Treatment of Immigration Detainees Housed at Immigration and Customs Enforcement Facilities*, OIG-07-01, December 2006, www.dhs.gov/xoig/assets/mgmtrpts/OIG_07-01_Dec06.pdf (accessed February 16, 2010).

[253] U.S. Office of the Inspector General, *Treatment of Immigration* Detainees, 1.

[254] William Fisher, "Many Abuses Found in Jails for Immigrants," *Inter Press Service*, February 9, 2007.

Centre for Constitutional Rights, and the Seton Hall University Law Centre for Social Justice.

Advocates presented a more formal request shortly afterwards. On January 25, 2007, a group of immigrant rights organizations and individual immigration detainees filed a petition, pursuant the Administrative Procedures Act, for the DHS to initiate rulemaking.[255] This time, it was not individual parties, but a coalition of some of the most important legal and immigrant's rights organizations in the country. The signatories were the National Immigration Project of the National Lawyers Guild, the American Immigration Lawyers Association, the American Immigration Law Foundation Legal Action Center, Casa de Proyecto Libertad, the Catholic Legal Immigration Network Inc., Families for Freedom, and the National Immigrant Justice Center. In addition, eighty-four individual alien detainees endorsed the petition. All of them were represented by Attorney Michael Wishnie, a Professor of Law at the Yale Law School. The participation of different organizations reveals the high degree of relevance that the issue of in-custody abuses had attained by early 2007.

The Petition for Rulemaking (henceforth, the Petition) is an exceptional document for the study of the controversy surrounding immigration detention standards. The Petition traced the history of the detention standards, identified the problems that beset immigration detention and explained the reasons why the DHS should promulgate regulations governing the detention of non-citizens. The text underscored the importance of the 1998 and 2000 standards in "creating uniformity among facilities and acknowledging the necessity for safe and humane treatment of immigrant detainees."[256]

---

[255] 5 U.S.C § 533

[256] National Immigration Project et al., *Petition to Initiate Rulemaking,* 7, 8.

Nonetheless, because abuses in detention persisted, "without meaningful enforcement, the DOM [Detention Operations Manual] alone is insufficient to assure uniform and human treatment of detainees."[257] The petition thus proposed four different ways in which the standards could be codified and emphasized the importance of including all detention facilities, especially local jails and facilities holding detainees for less than seventy-two hours, under the scope of the standards.

The Petition provided six justifications for the codification of detention standards. On the one hand, these reasons echoed the arguments put forward thus far. On the other hand, as the next paragraphs note, the arguments contained certain logical and practical gaps, which reveal the extent to which detention standards are an impractical solution to the current crisis in immigration detention.

A. Regulations are needed to insure uniformity and consistency in detention condition, an announced agency priority.

In the light of staggering differences among detention centers, binding regulations would force all detention facilities to operate in the same way and to reach the same results. In other words, binding standards would force uniformity. Although solving the disharmony besetting immigration detention was a paramount endeavor, the Petition did not address why uniformity would be a consequence of, rather than a necessary factor for, legally enforceable standards. Consider that ACA has different manuals with regulations for different types of facilities. Given the significant discrepancies between government-managed immigration detention centers and small local jails, it is doubtful that binding standards will bring all facilities into line and it is also questionable whether subjecting all facilities to the exact same standards is desirable.

[257] National Immigration Project et al., *Petition to Initiate Rulemaking,* 7.

B. The expanding detainee population, housed in the absence of uniform standards, risks exposing DHS to legal liability and adverse publicity.

The petitioners argued that binding standards would shield the DHS from litigation and the bad publicity originated by the results of a growing detainee population. However, unless the binding standards were internalized, they would continue to be an ex post facto solution to in-custody abuses. Rather than preventing abuses from happening, the standards would create consequences for violations.

C. DHS can better monitor and assure quality control in all of its facilities through the promulgation of standards.

The petition stated that binding standards placed DHS at a better position in bargaining with private contractors and local detention facilities. Once the standards have the force of law, the argument holds, ICE will be better able to threaten non-complying parties with termination of the contract. This idea suggested a process of "survival of the fittest" among contractors in as much as the standards placed them in a position in which they must either comply or exit the market. Although incentives in the form of regulations are an attractive strategy, the fact that local facilities and private contractors agreed to comply with the regulations did not imply that they would actually do so. In this sense, binding standards were, again, an ex post facto solution. Moreover, the petitioners did not address the fact that, even with incentives in place, ICE would have to effectively oversee compliance.

D. Regulations are needed so DHS can preserve the health and welfare of detainees, prevent cruel and improper treatment, and reduce liability for violating the constitutional rights of detainees.

The idea that binding detention standards are essential to insure adequate treatment of alien detainees is the most compelling argument the petitioners put forward. In fact, as this thesis shows, the increasing use of immigration detention has led to poor conditions of confinement and abuses. In light of the human and constitutional rights that aliens enjoy, enacting legally enforceable detention standard would provide them with a tool to defend their rights in a court of law.

E. DHS should emulate the bureau of prisons' promulgation of binding regulations.

The suggestion that the DHS should follow the Bureau of Prisons' approach to detention is suggestive and compelling. The Petition explained that the BOP was created in the thirties due to overcrowding to preserve inmates' wellbeing. The BOP published binding regulations governing detention practices between 1976 and 1979. Notably, these regulations, now included in the Code of Federal Regulations, were passed due to public outcry about conditions of detention.

F. Codification of humane detention standards will complement U.S. foreign policy goals and strengthen compliance with international norms.

The Petition argued that inadequate detention conditions are detrimental to the United States because, once removed, aliens would take this negative impression to their home countries. In addition, the petitioners argue that binding standards would facilitate United States compliance with international agreements on the subject of detention. As this thesis has shown, immigration detention policies in the United States criminalize and securitize aliens to a significant extent. It is also true that a significant number of binding and non-binding international agreements enshrine the rights of detained aliens and aliens

in general. However, as discussed in chapter one, the United States has on several occasions shown reluctance to apply and subject itself to international law. Therefore, the United States skepticism towards international law weakens the relevance of this argument.

Although DHS did not respond to the petition initially, the exchange between the President of the American Bar Association Karen Mathis and DHS Secretary Michael Chertoff foretold the outcome of the Petition. Shortly after the Petition was filed, Mathis wrote to Chertoff. After explaining the ABA's concerns with immigration detention, she asserted that legally binding standards were necessary because the solutions that the government had offer until then had been ineffective. Mathis said, "still, the Inspector General found, and we continue to hear, that immigrants do not have consistent, meaningful access to telephones or mail or adequate legal materials."[258] In addition, she pointed out that since 2003 ABA had received over a hundred letters of complaint from detainees at different facilities. In his response, Chertoff recognized the importance of ensuring "full NDS compliance by ICE officers" and of "providing safe, secure, and humane conditions of detention" to all immigration detainees.[259] However, he indicated that codifying the standards could be "a lengthy and resource-intensive process" and that updating them would be "laborious," "protracted," and would "undermine" DHS's flexibility to respond to "changing circumstances."

The stark contrast between advocates' and DHS's arguments suggests the existence of two parallel perceptions of the immigration detention systems. One of them

---

[258] Karen J. Mathis, letter to Department of Homeland Security Secretary Michael Chertoff, January 31, 2007, www.abanet.org/poladv/letters/immigration/2007jan31_detenstandards_l.pdf-2007-01-31 (accessed February 17, 2010).
[259] Michael Chertoff, letter to American Bar Association President Karen J. Mathis, March 19, 2007, www.abanet.org/publicserv/immigration/ltr_from_dhs31907.pdf (accessed February 17, 2010).

is plagued with instances of abuses of detainees' rights exacerbated by improper oversight, excessive decentralization and lack of binding rules. The other runs smoothly, is concerned about the wellbeing of detainees and is effectively supervised. In May 2007, ICE spokeswoman Jamie Zuieback, stated that the immigration detention system was indeed performing well. When she was confronted with evidence of inadequate conditions of detention, Zuieback retorted, "I think you'll see that our facilities are quite safe and humane."[260]

Notwithstanding DHS's claims that the practice of immigration detention was humane, and that internal oversight was effective, investigations kept showing a different reality. In July 2007, the Government Accountability Office (GAO) reported that in spite of ICE's annual reviews of detention facilities, the agency was unaware of pervasive problems with detainees' access to telephones in twenty-three detention centers.[261] The GAO identified monitoring shortcomings as "insufficient internal controls and weaknesses in ICE's compliance review process."[262] The report echoed Mathis's argument that "a new solution" was necessary because of flawed oversight.[263] Advocates and the media's increasing focus on in-custody deaths brought to light ICE's lack of information about deaths in detention centers.[264] After the release of GAO's report, an

---

[260] Samantha Henry, "Shedding Light on Detainees' Plight," *Herald News*, May 27, 2007.
[261] U.S. Government Accountability Office, *Alien Detention Standards: Telephone Access Problems Were Pervasive at Detention Facilities; Other Deficiencies die not Show a Pattern of Noncompliance*, GAO-07-875, July 2007, http://www.gao.gov/new.items/d07875.pdf (accessed February 16, 2010).
[262] U.S. Government Accountability Office, *Alien Detention Standards*.
[263] Mathis, letter to Michael Chertoff.
[264] In June 2007, *New York Times* journalist Nina Bernstein reported that sixty-two immigrants had died in ICE's custody since 2004. However, as advocates uncovered deaths that ICE had ignored, the number kept increasing.

editorial in the *Washington Post* reflected public concern with immigration detention, calling on ICE to "treat detained migrants fairly."[265]

After a year of waiting for a response to the Petition, and in light of well-documented inadequate conditions of detention, advocates filed a lawsuit against DHS. The attorney for the plaintiff, Michael Wishnie, filed the Complaint on April 30, 2008 to the United States Court of the Southern District of New York. The Complaint argued that Secretary Chertoff was in violation of the Administrative Procedures Act for failing to respond to advocates' Petition within reasonable time. The Complaint reiterated the arguments outlined in the Petition: the fast increase in the immigration detention population, the high number of immigration detention facilities, the fact that most abuses occurred in state and local facilities, the inconsistent conditions of detention that motivated INS to enact the first set of standards, and the fact that the NDS did not apply to the 150 facilities that housed detainees for less than seventy-two hours.[266] It also provided five justifications for binding standards: the nonbinding nature of the NDS, the lack of incentives for detention centers to comply with the NDS, the lack of an effective enforcement mechanism, the inadequate or nonexistent training jail employees receive, and the lack of a mechanism for detainees to report abuses. The Complaint requested the Court to direct Secretary Chertoff to design binding standards to regulate the detention of aliens.

Secretary Chertoff responded more than two months after advocates filed the Complaint. In a latter dated July 15, 2008, the agency said that ICE would "continue to

---

[265] Washington Post, "Treat Migrant Detainees Fairly," July 19, 2007.
[266] *Families for Freedom et. al v. Michael Chertoff*, Complaint, April 30, 2008, www.nationalimmigrationproject.org/Detention_Standards_%20Complaint_final.pdf (accessed February 17, 2010).

study the possibility of commencing a rulemaking action" and outlined the DHS's efforts to enhance the conditions of immigration detention.[267] However, as District Judge Denny Chin later stated, this response was not a "response" as a matter of law. In fact, Chertoff's letter left the question of whether the DHS would initiate a rulemaking procedure unanswered.

While DHS placed the Petition on the back burner, it released new detention standards. On September 12, 2008 the agency published a set of 41 standards, known as Performance Based National Detention Standards (PBNDS). These were the product of an eighteen-month revision of the NDS, which a new set of ACA standards, released in June 2004, had prompted.[268] DHS revised the PBNDS shortly after their release, on December 5, 2008, and added an additional standard on February 20, 2009.[269] The new standards focused on expected outcomes rather than procedures. They incorporated guidelines on news media interviews and tours, searches and detainees, sexual abuse and assault prevention and intervention, and staff training. According to ICE's website, the PBNDS were a "natural progression and build upon the NDS."[270] The PBNDS entered into effect in January 2010.

Although ICE praised the PBNDS as a step forward, the standards remained non-binding. This raised concerns among advocates. According to the Detention Watch Network's website, "the standards remain mere guidelines for which ICE cannot be held

---

[267] *Families for Freedom et. al v. Michael Chertoff*, Memorandum Decision, June 25, 2009, www.nationalimmigrationproject.org/Judge%20Chin's%20decision%20-%207-09.pdf (accessed February 17, 2010), 6.
[268] Jane Holl Lute, letter to Michael J. Wishnie and Paromita Shah, July 24, 2009, www.nationalimmigrationproject.org/DHS%20denial%20-%207-09.pdf (accessed February 17, 2010), 2.
[269] Jane Holl Lute, letter to Michael J. Wishnie and Paromita Shah, 3.
[270] U.S. Immigration and Customs Enforcement, "Detention and Removal," http://www.ice.gov/partners/dro/dmp.htm (accessed February 16, 2010).

accountable through recourse to the courts."[271] The PBNDS's non-binding nature was problematic; first, because it made it difficult for detainees to seek redress for in-custody abuses, and second, because it made it hard for them to argue their cases against deportation. Thus, the devise of performance based standards as a solution to in-custody abuses and poor conditions of detention proved ineffective.

Upon the release of the PBNDS it became clear that the media, advocates, and even Congress did not hope that the standards would make a significant positive change in immigration detention. First, unlike the 2000 standards, the media barely noticed the creation of the PBNDS's. In fact, newspapers paid greater attention to reports of in-custody abuses and deaths. Second, Representative Lucille Roybal-Allard, who called the detention conditions "shameful," introduced the Immigration Oversight and Fairness Act of 2008 to create rules governing the protection of minor and women and detention conditions such as access to telephones, medical care, sexual abuse complaints, and transfer of detainees.[272] According to Representative Roybal-Allard, "although federal immigration authorities adopted detention standards in 1998 and 2000, you wouldn't know it today."[273] As a response to appalling conditions of detention and DHS's inaction, the bill, which did not pass and was reintroduced in February 2009, drew support from immigrant rights organizations.[274]

The DHS's disregard for aliens in detention became clearer in during the last months of the Bush administration. On October 15, 2008, the agency requested the court

---

[271] Detention Watch Network, "Conditions in Immigration Detention," http://www.detentionwatchnetwork.org/node/2383 (accessed February 16, 2010).
[272] *Immigration Oversight and Fairness Act of 2008*, HR 7255, 110th Cong., 2nd sess., *Congressional Record* (October 3, 2008), E2225.
[273] *Immigration Oversight and Fairness Act of 2008*, HR 7255, 110th Cong., 2nd sess., *Congressional Record* (October 3, 2008), E2225.
[274] See the statements of the American Civil Liberties Union Legislative Counsel Joanne Lin in States News Service, "Bill Ushers in Humane Standards for Immigration Detention Facilities," October 3, 2008.

to dismiss the Petition.[275] District Court Judge Denny Chin reserved his decision and tried to have the parties – advocates for binding standards and the DHS – negotiate an agreement. The DHS promised that it would reach a decision by January 16, 2009. On that day, it asked for a four day extension. By then, the Obama administration had taken office. On January 21, 2009, the Department declared that previous letters only represented the DHS's perspective "at the time" they were issued, that it would miss the January 21, 2009 deadline, and that "it could not commit to a specific date" to reach a decision about plaintiffs' petition.[276]

The DHS did not reach a decision until they were ordered to do so. On June 6, 2009, Judge Chin denied the DHS's motion to dismiss the petition for rulemaking and declared the two and a half years delay "unreasonable as a matter of law."[277] Simultaneously, Judge Chin gave DHS thirty days to respond to the Petition. The response came twenty-nine days later and was not surprising. In a letter dated July 24, 2009, DHS Deputy Secretary Jane Holl Lute denied the petition for rulemaking. The overarching justification for the denial was that the recently released PBNDS were sufficient and that creating binding standards would be "laborious, time consuming, and less flexible." Revealingly, these were the same reasons Secretary Chertoff put forward in his letter to ABA President Karen Mathis on March 19, 2007. The fact that the DHS used the same arguments that it had expressed two years before raises the question whether the Department actually gave the Petition any serious consideration.

Yet more striking were the particular grounds on which the DHS denied the Petition. First, Deputy Secretary Lute argued that, because immigration detainees were

---

[275] *Families for Freedom et. al v. Michael Chertoff*, Memorandum Decision, 6.
[276] *Families for Freedom et. al v. Michael Chertoff*, Memorandum Decision, 7.
[277] *Families for Freedom et. al v. Michael Chertoff*, Memorandum Decision, 12.

not comparable to criminal detainees, the argument that ICE should follow the Bureau of Prisons was invalid. Inasmuch as alien detainees are civil, not criminal detainees this is true. Notably, both plaintiffs and the defendant use the same assumption: immigration detention is not criminal detention. However, they reach opposite conclusions. For immigrant rights advocates, the differential nature of immigration detention was the reason why binding standards had to be enacted. For DHS, the differential nature of immigration detention was the reason why binding standards were unnecessary. Because immigration detainees are not criminals, they spend shorter periods of time in detention and therefore have different medical needs. In this way, DHS distinguished "health care" from "health maintenance." The former applied to alien detainees, the second to remand (criminal) prisoners. While the DHS based its argument on a valid premise – immigration detention is radically different from criminal detention – it reached an erroneous conclusion. The first reason is that DHS's argument took the comparison between administrative and criminal detention out of its usual context. The second reason is that available reports show that administrative and criminal detainees often suffer from similar ailments. After all, both aliens and criminals belong to the human species.

The second argument DHS used to justify the denial of the Petition was that the new PBNDS already addressed the petitioners' concerns. To make his point, Deputy Secretary Lute referred to some of the issues that the PBNDS covered, namely media interviews and tours, searches and detainees' sexual abuse and assault prevention and intervention, and staff training. While these issues had been left out of the 2000 NDS, these aspects were only peripheral to detention and the petitioners' concerns were broader

than those four issues. For this reason, the argument that the PBNDS addressed the concerns raised in the petition is untenable.

The third explanation for the denial of the Petition was that the DHS had implemented other oversight mechanisms besides the PBNDS. In particular, Deputy Secretary Lute mentioned the creation of the Detention Facilities Inspection Group. This organ, operating within the Office of Professional Responsibility was in charge of reviewing inspection of detention facilities in terms of compliance with the PBNDS.[278] Fourth, DHS argued that the creation of binding standards was not a substitute for effective management of detention facilities. Because, according to Deputy Secretary Lute, DHS was committed to effective management, it was not necessary to create legally enforceable standards. This fourth argument presented a false dichotomy. Although it is true that, as DHS argues, "judicially enforceable regulations are no substitute for management of facilities," this does not imply that enforceable rules and effective management are mutually exclusive. In fact, they logically seem two sides of the same coin because binding rules have the potential to make detention management efficient by establishing standard procedures and responsibilities. To summarize, DHS's reasons to repeal the Petition were haphazard and suggested that the agency did not seriously consider the argument that immigrant rights advocates put forward.

3.4. Policies under the Obama Administration

While the Obama administration slammed the door to binding standards, it strived to champion a slightly different approach to the practice of immigration detention. The Obama administration took office with the aim of enacting comprehensive immigration

[278] Jane Holl Lute, letter to Michael J. Wishnie and Paromita Shah, 4.

reform, a project several times unsuccessfully attempted by the Bush administration. However, the administration found significant challenges. In the area of alien detention these were the increasing number of deaths in detention and mounting allegations of poor conditions of confinement. Given the urgency of these issues and the magnitude of the project of comprehensive immigration reform, the administration took a pragmatic approach. At a press conference on April 29, 2009, President Obama stated his goal of earning public confidence before attempting comprehensive reform.[279] To do so, the administration put forward a two-pronged approach: switching from factory raids to employer verification and working with the existent legal framework. Although the approach aimed to gain public confidence primarily by securing the border, the administration acknowledged the pressing nature of the problems with alien detention and their significance to the immigrant community.

Although DHS's officials argued that humanizing immigration detention was a priority, its actions conveyed a significant degree of ambivalence.[280] On the one hand, the administration took some significant steps. For instance, DHS hired Dr. Schriro to head the Office of Detention Policy and Planning, act as Special Advisor to Secretary Janet Napolitano on immigration detention, and to conduct a review of immigration detention. While the government's acknowledgement of the crisis was a fundamental first step, the administration deferred meaningful changes to a later point in time. On the other hand, DHS announced the expansion of local enforcement programs, which chapter four argues

---

[279] Barack Obama, "News Conference by the President 4/29/09," *White House Documents and Publications*, April 30, 2009.
[280] John Morton, House Homeland Security Subcommittee on Border, Maritime and Global Counterterrorism, *The FY 2010 Budget for Immigration and Customs Enforcement, Customs and Border Protection and the U.S. Coast Guard*, 111th Cong., 1st sess., June 11, 2009.

has starkly increased the number of detained aliens and has led to racial profiling.[281] Furthermore, in February 2009, ICE conducted a raid at shop in Bellingham, WA without the knowledge of DHS's headquarters, in which twenty-eight illegal aliens were arrested.[282] The raid caused public outcry not only because it was done behind the back of DHS but also because it contradicted the administration promise of switching from factory raids to employer verification. As reports of in-custody abuses kept piling up and meaningful changes were slow to happen, some newspapers began comparing President Barack Obama's approach to alien detention with that of his predecessor. [283] The lack of a prompt solution to the crisis in immigration detention conveyed the idea that the new administration was "finessing" the crackdown on illegal aliens that previous administrations had begun[284] and that a "firm stance on immigrants"[285] remained the policy.

Yet, in spite of the Obama administration's initial inaction, the assessment of immigration detention practices bore fruit. On August 6, 2009, ICE announced a series of measures to overhaul immigration detention. The document released by the agency is a valuable object of study.[286] It summarized ICE's perspective on the state of affairs in immigration detention and outlined the agency's aims for the future. ICE's diagnosis stated that the primary problem besetting the immigration detention system was the lack

---

[281] Janet Napolitano, Senate Committee on the Judiciary, *Oversight of Department of Homeland Security*, 111th Cong., 1st sess., May 6, 2009.
[282] Manuel Valdes, "Napolitano Orders Review of WA Raid," *Associated Press & Local Wire*, February 25, 2009; Associated Press, "Some Cases Where Obama's Policies Are Like Bush's," February 28, 2009.
[283] Associated Press, "Obama's Policies Are Like Bush's."
[284] Tom Barry, "Napolitano Finessing Immigrant Crackdown," *La Prensa San Diego*, February 6, 2009.
[285] Julia Preston, "Firm Stance on Immigrants Remains Policy under Obama," *New York Times*, August 4, 2009, Sec A.
[286] U.S. Immigration and Customs Enforcement, "2009 Immigration Detention Reforms," August 6, 2009, http://www.ice.gov/pi/news/factsheets/2009_immigration_detention_reforms.htm (access February 19, 2010).

of federal oversight and management. This argument should come at no surprise. In fact, aliens are detained in 350 facilities around the country, the facilities vary in nature and most of them are not operated by ICE employees. In addition, ICE tangentially mentioned that alien detainees were housed in facilities designed for "penal, not civil detention."[287] That suggests the significant degree to which illegal aliens are criminalized. Not only they are framed as lawbreakers (even when some of them have no criminal record), but they are also housed in jails. With respect to ICE's future goals, the agency indicated that in the next three to five years it would reduce reliance on jails and "design facilities located and operated for immigration detention purposes."[288] In order to centralize immigration detention and move it back into the civil sphere, ICE took seven concrete steps. The most significant actions were: the creation of an Office of Detention Policy and Planning (ODPP) led by Dr. Schriro to devise a "new civil detention system to meet the needs of ICE,"[289] the recruitment and hiring of twenty-three ICE detention managers to replace the privately contracted inspectors at twenty-three facilities, the establishment of the Office of Detention Oversight to investigate detainee grievances, and the discontinuation of the use of the T. don Hutto Family Residential Center in Texas. The reforms announced in early August show that in spite of the initial lethargy, ICE was taking some initial steps in addressing human rights abuses in detention centers. For this reason, congressmen, advocates, and the media welcomed the announcement, but stressed that more substantial reforms were necessary.[290]

---

[287] U.S. Immigration and Customs Enforcement, "2009 Detention Reforms."
[288] U.S. Immigration and Customs Enforcement, "2009 Detention Reforms."
[289] U.S. Immigration and Customs Enforcement, "2009 Detention Reforms."
[290] Senator Kristen E. Gillibrand, "Menendez, Gillibrand React to Administration's Detention System Announcement," *States News Service*, August 6, 2009; Lucille Roybal-Allard, "Detention Center Reforms Announced by ICE Welcomed," *States News Service*, August 6, 2009; Senator Patrick Leahy, "Leahy Comment on ICE Reforms to Detention System," *Congressional Documents and Publications*, August 6,

Further action took place two months later. On October 6, 2009, Dr. Schriro, released her report on immigration detention in the United States.[291] After touring twenty-five facilities, interviewing employees, detainees and over a hundred non-governmental organizations, federal, state, and local agents, Dr. Schriro reached significant conclusions. Her report found that ICE operated the "largest detention and supervised released program in the country."[292] Dr. Schriro's investigation revealed that fifty-one percent of alien detainees were felons but that only eleven percent of them committed serious crimes under the Uniform Crime Report (UCR) Program of the Federal Bureau of Investigation,[293] that the majority of detention centers were operated as jails and prisons, that ICE personnel lacked expertise on designing community-based alternatives, and that the strategies used to detain, supervise and provide medical care to detainees were disparate across the country and among detention facilities.[294] These findings are similar in nature to the findings of previous reports. Nevertheless, the novelty is that this time, it was ICE rather than an external agency like the OIG or GAO that documented the problems.

As the report was released, DHS Secretary Napolitano and Assistant Secretary John Morton announced a series of changes to address Dr. Schriro's recommendations to improve oversight, increase efficiency, and cut costs. According to the press release, the changes aimed to "enhance the security and efficiency of ICE's nationwide detention

---

2009; American Civil Liberties Union, "DHS Plan to Improve Immigration Detention and Close Hutto Facility a Good First Step," *States News Service*, August 6, 2009.

[291] Schriro, *Immigration Detention Overview*.

[292] Schriro, *Immigration Detention* Overview, 2 and 3.

[293] The eleven percent of aliens to which Dr. Schriro's report refers are aliens who committed crimes that fall under Part I of the UCR. See U.S. Federal Bureau of Investigations, *Uniform Crime Reporting Handbook*, 2004, http://www.fbi.gov/filelink.html?file=ucr/handbook/ucrhandbook04.pdf (accessed April 14, 2010), 8.

[294] Schriro, *Immigration Detention* Overview, 2 and 3.

system while prioritizing the health and safety of detainees."[295] DHS established five core principles to guide its policies in the long term. These guidelines expressed the agency's concerns not only with implementing fair and humane detention practices, but also with reducing the cost of immigration detention. DHS also enumerated seven reforms that had taken place immediately. Some of these changes highlight the depth of the crisis of immigration detention in terms of improper federal oversight of detention centers, for instance the creation of a library of contracts for detention facilities with which ICE had agreements. In fact, the press release indicated that the Office of Acquisitions at ICE headquarters managed only eighty of the over three hundred contracts with detention facilities. Other changes revealed the intensity of the crisis in terms of the government's lack of tools to provide adequate treatment to alien detainees. For example, the development of a risk assessment and custody classification system and the implementation of a medical classification system suggests that prior to October 2009, ICE lacked the tools to adequately evaluate risks and medical needs of detained aliens. In addition, DHS outlined three one-year benchmarks. In terms of the latter, the agency committed to revising the standards reviewing all its contracts with detention facilities, aligning detention standards with the different conditions of detention appropriate for diverse detainee populations, and to issuing bids for the construction of detention facilities embodying the agency's five core principles.[296] By the end of 2009, on December 16, ICE issued new parole guidelines for asylum seekers in detention in order to facilitate their release if they had solid basis for asylum and posed no threat to the community or flight risk.

---

[295] U.S. Department of Homeland Security, "Fact Sheet," October 6, 2009, http://www.ice.gov/doclib/10-06-09-fact_sheet_ice_detention_reform.pdf (accessed February 19, 2010), 1.
[296] U.S. Department of Homeland Security, "Fact Sheet," 1.

As in early August, the changes enjoyed a warm reception. Representatives David Price and Lucille Roybal-Allard, who had introduced the Immigration Oversight and Fairness Act in February, commended the "administration's determination to reform America's broken detention system."[297] Human Rights Watch and Amnesty International welcomed the announcements but underscored that the plans should be quickly converted into action and that the law must reflect the changes.[298] Most of the comments drawn by the announcement referred not to the changes per se, but to the DHS's attitude. In fact, what advocates and newspapers found positive was the change in the government's mindset. An editorial in the *New York Times* asserted that immigration detention had "strayed far" its mission of sorting out those aliens who were deportable and removing them.[299] For the *New York Times* editor, the plan unveiled in early October suggested, "the government has finally come to understand that detainees are not violent criminals."[300] In short, the government's attitudes in 2009 were piecemeal but reflected an incipient change in mindset and a desire for correcting past policy mistakes and improving the conditions of detention.

For all the initial gloss, the changes introduced in August and October were not enough to solve the crisis in alien detention. In addition, some of the policies have not been implemented; for instance, the submission to Congress of a nationwide plan to expand Alternatives to Detention (ATD).[301] The language used in policies suggests that DHS is seeking to reduce its exposure to complaints rather than to prevent the

---

[297] Representative Lucille Roybal-Allard, "Price, Royball-Allard Applaud Reforms Proposed for Immigration Detention System," *States News Service*, October 6, 2009.
[298] Human Rights Watch, "Plans to Improve Management and Oversight Offer Hope but Need Action," *States News Service*, October 6, 2009; Amnesty International, "Amnesty International Encouraged by Secretary Napolitano's Decision to Identify New Detention Practices," October 6, 2009.
[299] New York Times, "Salvaging Immigration Detention," October 6, 2009, Sec A.
[300] New York Times, "Salvaging Immigration Detention."
[301] U.S. Department of Homeland Security, "Fact Sheet," 2.

mistreatment of alien detainees. In testimonies, press releases and statements, DHS officials mentioned oversight, cost, and efficiency as the axes of the immigration detention reform. In its press releases, DHS made no mention of the rights of illegal aliens but framed the reforms in terms of making immigration detention civil and humane. While a significant step this approach indicates that the question of whether detention is the appropriate practice to deal with undocumented immigration is left out of the debate. In fact, the new policies that DHS announced contemplate the construction of detention centers designed for aliens rather than for criminals. According to New York Senator Charles Schumer, who serves as the Chairman of the Senate Immigration Committee, instead of detention, the government should use electronic monitoring technology.[302] In the words of ACLU Immigrant Rights Project's Deputy Director Judy Rabinovitz, "meaningful reform of the system must focus not only on the conditions under which immigrants are being detained, but on why they are being detained in the first place."[303]

The reactions to the changes that the Obama administration enacted suggest that policies thus far have been exclusively focused on the method of alien detention. In other words, the government is focused on *how* to detain undocumented aliens rather than on *why* it is necessary to incarcerate them. Therefore, DHS's recent policies emphasize aspects such as detention capacity, management, and oversight. Nonetheless, as long as detention continues to be the primary tool to control illegal immigration, the criminalization and securitization discourses will continue influencing the public

---

[302] Charles E. Schumer, "Schumer Reacts to Obama Administration New Immigrant Detention Policy," *Congressional Documents and Publications*, October 6, 2009.
[303] American Civil Liberties Union, "DHS Plan to Improve Immigration Detention an Encouraging Step," *States News Service*, October 6, 2009.

perception of illegal aliens, making them more vulnerable to in-custody mistreatment. Because the changes introduced by the Obama administration were cosmetic, the crisis in immigration detention continues. At a Congressional hearing in December 2009, Dr. Schriro underscored the significant extent to which detention practices continue to criminalize illegal aliens;

> As a matter of law, civil detention is unlike criminal incapacitation and yet, civil and criminal detainees tend to be seen by the public as comparable and typically, both confined populations are managed in similar ways by government. Each group is ordinarily detained in secure facilities with hardened perimeters often in remote locations at considerable distances from counsel and their communities. With only a few exceptions, the facilities that U.S. Immigrations and Customs Enforcement (ICE) used to detain aliens were built, and operate, as jails and prisons to confine pretrial and sentenced felons. Their design, construction, staffing plans, and population management strategies were based largely upon the principles of command and control. Additionally, ICE adopted detention standards that were based upon corrections law and promulgated by correctional organizations to guide the operation of jails. Establishing standards and expressing expectations for civil detention are our challenge and our opportunity.[304]

Dr. Schriro's statement brings to the fore the inadequacy of alien detention practices and the ineffectiveness of the guidelines that INS and DHS created to regulate alien detention. Dr. Schriro argues that solving the crisis in immigration detention – "establishing standards and expressing expectations for civil detention" – remains a challenge and an opportunity. The next chapter demonstrates that the solution that immigrant rights

[304] Schriro, *Moving Toward Effective Immigration Detention Management*.

advocates propose of legally binding detention standards would be ineffective to address the current crisis in immigration detention and to protect the rights of aliens in detention.

4. Obstacles to Implementing Legally Binding Detention Standards

Given that promoting binding detention standards is the dominant idea among immigrant rights advocates, it deserves close scrutiny. This chapter evaluates the effectiveness of the policy of creating binding detention standards to solving the problem of abuses of detained aliens' rights. Based on this analysis, this chapter argues that legally binding detention standards are an impractical solution to the current crisis in immigration detention for two reasons. First, binding detention standards would be ineffective because of ICE's decentralized structure. Second, binding standards are impractical because ICE outsources two key services to local agents and private firms: detention and immigration enforcement. Because ICE is decentralized and outsources some of its most important functions to third parties, immigration detention has become an heterogeneous practice across the country. Thus, the first section of this chapter discusses ICE's structural organization and demonstrates the high extent to which the agency is decentralized. The second section considers ICE's outsourcing of detention to private firms and of immigration law enforcement to local police departments through the so-called 287(g) program. This chapter argues that binding immigration detention standards are an impractical solution to the current crisis of in-custody abuses of alien detainees because the immigration detention system is arbitrary, geographically fragmented, and ICE lacks presence in the field.

4.1. ICE's Decentralized Structure

To begin with, binding standards are a futile solution to prevent the mistreatment of alien detainees because the decentralized structure of ICE complicates the uniform

enforcement of a given set of rules across the country. The story behind the evolution of ICE's structures brings to the fore the significant extent to which the agency is decentralized and the problems that such decentralized organization would create for the uniform application of binding immigration detention standards.

ICE bequeathed its organizational structure from INS. In 1991, INS underwent a process of centralization, which reduced the power of regional offices vis-à-vis Washington headquarters. This was not as successful as anticipated. According to a 1997 GAO report, the changes in 1991 had unintended consequences which caused uncoordinated performance.[305] The dire results of the 1991 reform created demand for decentralization. In November 1993, Doris Meissner was appointed as INS Commissioner. Consistent with the prevailing criminalization rhetoric, which saw illegal immigration as out of control, Commissioner Meissner stated that immigration had been "a backburner issue," and aimed to make immigration enforcement a priority.[306] In addition, Congress and interest groups put significant pressure on the federal government to eradicate illegal immigration. As a result, INS budget was drastically increased and Commissioner Meissner began a decentralization campaign.[307] The campaign took place between July and October 1994 and aimed at reducing headquarters' "span of control over field units" and to improve supervision on the field.[308] This second set of changes did not produce the expected results. The 1997 GAO report found that the reforms created uncertainties about roles and responsibilities, which were deepened by

---

[305] U.S. Government Accountability Office, *INS Management: Follow-up on Selected Problems*, July 22, 1997, http://www.gao.gov/archive/1997/gg97132.pdf (accessed January 20, 2010), 21-2
[306] Doris Meissner, qtd. in U.S. Government Accountability Office, *INS Management*, 21-2
[307] The budget was increased from $2.6 billion in 1996 to $3.2 billion in 1997. U.S. Government Accountability Office, *INS Management*, 18.
[308] U.S. Government Accountability Office, *INS Management*, 23.

imbalances among INS staff.[309] The greater degree of maneuver not only hindered functionality but also led to perverse consequences. One such was the deception of Congress discussed in chapter two, which INS Managers in the Miami and Eastern Regional Office orchestrated in 1995.[310]

By the year 2000, the decentralized organization of the agency was still under fire. At that time, the agency was divided into thirty-four districts. In addition, INS stored its data at eighty different sites.[311] An article in *The Oregonian* indicates that, paradoxically, both pro- and anti-immigration groups were frustrated with INS.[312] Both parties' discontent was fuelled by the consequences of INS's decentralized structure. On one hand, anti-immigration groups argued that INS was ineffective at enforcing immigration laws. On the other, immigrant rights advocates were concerned that INS's policies and the excessive authority local officers wielded led to mistreatment of detainees. In short, INS's decentralized structure led to what Don Krewin, Director of Catholic Legal Immigration Network, called a system of "little fiefdoms" in which each locality operated under its own rules.[313]

INS's decentralized structure preoccupied the Bush Administration. Although the 2000 detention standards promised uniformity, detention centers and field offices still enjoyed a high degree of discretion over the detention of illegal aliens. For this reason, the government began centralizing the immigration detention system. Besides strengthening national security, the centralization campaign had aimed for the "delivery

---

[309] U.S. Government Accountability Office, *INS Management*, 7.
[310] U.S. Government Accountability Office, *INS Management*, 27.
[311] Kim Christensen, Richard Read, Julie Sullivan and Brent Walth, "Immigration Agency is Rife with Abuses," *Newhouse News Service*, December 8, 2000.
[312] Christensen et al, "Immigration Agency is Rife with Abuses."
[313] Christensen et al, "Immigration Agency is Rife with Abuses."

of better services to visitors and immigrants to the United States."[314] Revealingly, this argument in favor of centralization was the same as the one used to support the decentralization campaign in 1994.

The events of September 11, 2001 provided the federal government with an opportunity to increase its authority over the detention of illegal aliens. On September 17, 2001, Attorney General John Ashcroft requested INS Commissioner James Ziglar to increase the 24-hour period in which the government can decide whether to charge an alien detain for a violation to 48 hours or, according to the Attorney General, to "an additional reasonable time, if necessary, under emergency or in other extraordinary circumstances".[315] As Gamboa reports, Ashcroft chose not to specify what accounted as "extraordinary" but indicated that the change primarily applied to seventy-five individuals detained in the context of the September 11 investigation. Immigrant rights advocates expressed an ambivalent reaction. According to Jeanne Butterfield, executive director of the American Immigration Lawyers Association, "under the circumstance [of the September 11 events] 48 hours is not unreasonable."[316] Nonetheless, she recommended caution in determining what was reasonable beyond that.

The government introduced more changes in April 2002, which also had very limited effect in terms of fostering centralization. Among other measures, the federal government consolidated the management of detention and removal operations. This meant the transfer of functions form federally-run detention facilities to INS headquarters in Washington. Once the changes were made, INS Commissioner James Ziglar indicated

---

[314] U.S. State Department, "Attorney General Announces More Reforms to Immigration Service," April 18, 2002.
[315] Suzanne Gamboa, "INS Changes Rules."
[316] Suzanne Gamboa, "INS Changes Rules."

that the head of detention and removals in Washington would directly supervise the detention centers operated by the government. In other words, the head of detention and removals would "have ultimate responsibility and accountability for the care of detainees and the implementation of detention standards."[317] Attorney General Ashcroft touted these changes as "unprecedented," and Commissioner Ziglar underscored the beneficial impact they would have on aliens.[318] According to Commissioner Ziglar, "the consolidation of management will help ensure that our detention policies and procedures are aimed at creating safe, secure and humane environment for all detainees and that they are executed uniformly and consistently throughout the United States." Nevertheless, the consolidation of detention and removal operations management left aside all the local jails and private facilities that housed immigration detainees.

The third change was the creation of the Department of Homeland Security. DHS was created under the Homeland Security Act of 2002, signed into law on November 25, 2002.[319] The newly created department absorbed INS on March 1, 2003.[320] The creation of DHS was the largest reorganization in the Federal Government since the creation of the Department of Defense in 1947. The reorganization of federal agencies was problematic because DHS integrated twenty-two extant federal agencies, each of which had disparate scopes and missions. For this reason, the creation of DHS led to a high degree of cohesion but sacrificed coherence.

---

[317] U.S. State Department, "Attorney General Announces More Reforms."
[318] U.S. State Department, "Attorney General Announces More Reforms."
[319] *Homeland Security Act of 2002*, Public Law 107–296, U.S. Statutes at Large 116 (2002), 2135.
[320] U.S. Citizenship and Immigration Services, "Our History," http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=e00c0b89284a3210VgnVCM100000b92ca60aRCRD&vgnextchannel=e00c0b89284a3210VgnVCM100000b92ca60aRCRD (accessed February 21, 2010).

In terms of immigration and immigration detention, the creation of DHS separated service from security functions and placed aliens under the security microscope.[321] As Karen Tumlin indicates, the defunct INS conflated law enforcement and service provision functions. It was in charge of citizenship, asylum, detention, and removal among other things.[322] Under DHS, separate agencies were created. On the one hand the United States Citizenship and Immigration Service (USCIS), is responsible for the administration of immigration and naturalization. On the other hand, the government gave Customs and Border Protection (CBP) and the Immigration and Customs Enforcement (ICE) security and law enforcement tasks. In addition, whereas the old agency was called Immigration and Naturalization *Service*, the new organization's name is Department of Homeland *Security*. In this way, the reorganization placed immigration affairs in the sphere of an agency which mission is to "lead the unified national effort to secure America," further securitizing illegal aliens.[323]

In spite of the agency restructuring, ICE and CBP inherited a decentralized structure. Whereas CBP is responsible for preventing "terrorists and terrorist weapons from entering the United States," the government tasked ICE enforcing immigration and customs laws; therefore, this thesis is primarily interested in the latter agency.[324] Congruent with the securitization logic, ICE has become the "largest investigative arm of

---

[321] CNN.com, "Bush Signs Homeland Security Bill," November 26, 2001, http://archives.cnn.com/2002/ALLPOLITICS/11/25/homeland.security/ (accessed January 10, 2010); Julia Malone, "Homeland Security Bill Will Dismantle INS," *The Atlanta Journal-Constitution*, November 14, 2002.
[322] Tumlin, "Suspect First," 1178.
[323] U.S. Department of Homeland Security, "Strategic Plan Fiscal Years 2008 – 2013," www.dhs.gov/xlibrary/assets/DHS_StratPlan_FINAL_spread.pdf (accessed February 21, 2010), 3.
[324] U.S. Department of Homeland Security, "Department Subcommittees and Agencies."

the Department of Homeland Security."[325] Accordingly, it operates the largest detention system in the United States.[326] Within ICE, the government created the Office of Detention and Removal Operations (DRO) to supervise the apprehension, detention and removal of illegal aliens.[327] Both ICE and DRO have a decentralized structure, with 24 field offices and 186 subfield offices.

Thus, the decentralized structure of ICE and DRO remained a concerning issue. In May 2004, DHS Deputy Secretary James Loy acknowledged that the structure of the immigration system continued to be decentralized.[328] More than five years later, in her October 2009 report, Dr. Schriro pointed out that the decentralized structure of immigration detention impaired communications along the chain of command. She indicated that policy direction comes in the form of memoranda, which are amended with superseding memoranda or verbally modified when policies change.[329] For this reason, Dr. Schriro suggested, "the field should have access to timely, clear and complete written guidance about its critical functions."[330] Dr. Schriro reiterated the negative effects of decentralization in her testimony of December 2009. She argued that the decentralized management of bed and detainee transfers leads to mismanagement, longer periods of detention, a higher number of transfers and "aggravated disparities between arrest activity and bed capacity."[331] The lack of coordination between field offices and between field offices and headquarters makes it unviable to enforce a binding set of standards

---

[325] U.S. Department of Homeland Security, "Department Subcommittees and Agencies," http://www.dhs.gov/xabout/structure/#1 (accessed January 11, 2010); U.S. Immigration and Customs Enforcement, "About," http://www.ice.gov/about/index.htm (accessed January 11, 2010).
[326] Schriro, *Immigration Detention Overview*, 6.
[327] U.S. Immigration and Customs Enforcement, "Detention & Removal," http://www.ice.gov/pi/dro/ (accessed February 21, 2010); Schriro, *Immigration Detention Overview*, 5.
[328] James Loy, House Select Committee on Homeland Security, 108th Cong., 2nd sess., May 6, 2004.
[329] Schriro, *Immigration Detention Overview*, 16.
[330] Schriro, *Immigration Detention Overview*, 16.
[331] Schriro, *Moving Toward Effective Immigration Detention Management*.

uniformly across the country. To understand the extent to which ICE's decentralized structure is complicates the enforcement of binding detention standards, it is illuminating to consider some of the consequences of decentralization.

A problematic outcome of decentralization is inconsistency in the treatment of detainees across detention facilities. A case in point is the provision of medical care. As a response to concerns voiced by Congress, the media, and advocacy groups, GAO investigated ICE's organizational structure and resources to provide for detainees' medical needs. The report was released in February 2009 and concluded that ICE's organizational structure differed across detention facilities.[332] The report shows that some detainees were treated by staff from the Division of Immigration Health Services (DIHS), while others were treated by staff provided by local jails. GAO found that in fiscal year 2007, DIHS staff treated detainees at 21 facilities holding 53 percent of the average daily detention population. The other 47 percent was treated at one of the remaining 508 local jails (IGSAs). The consequences of the decentralized approach to medical treatment are several. First, DIHS providers differed from IGSAs providers. Second, while DIHS compiles monthly reports with data from all the facilities it serves and reports to DHS, ICE does not collect data from IGSAs, because these local facilities are not required to report back to DHS. Third, although facilities are responsible for transferring medical information together with the detainee, ICE does not have a method to monitor whether local facilities comply with this rule. Therefore, in the area of medical services, ICE's decentralized structure led to divergences among facilities with negative consequences for the quality of health care.

---

[332] U.S. Government Accountability Office, *Organizational Structure and Resources for Providing Health Care to Immigration Detainees*, February 23, 2009, http://www.gao.gov/new.items/d09308r.pdf (accessed February 20, 2010), 3.

Decentralization also affected the reporting of detainees' deaths. Notably, ICE did not previously have any centralized method to account for in-custody deaths. In practice, the headquarters had no information regarding the exact number and causes of death or the location of the deceased. According to *New York Times* journalist Nina Bernstein, the first list of in-custody deaths was complied by advocacy groups and aliens families in 2007, which accounted for 20 fatalities.[333] In fact, Bernstein argues that ICE established reporting procedures for in-custody deaths in 2006, according to which detention facilities were to report all deaths to ICE's headquarters in detail.[334] By mid-July 2007, ICE had compiled a list, which accounted for 62 deaths since 2004.[335] However, the agency was reluctant to provide details regarding the identity of the deceased, location and cause of death. The agency's accounting system contained serious flaws. On April 3, 2009, ICE released an updated list, which included previously omitted deaths. This second death roster accounted for 90 fatalities. However, Bernstein argues that this second list also contained significant errors.[336] First, it omitted the death of Ana Romero Rivera on August 28, 2008, which the press had reported at the time.[337] Second, it changed the cause of deaths of some detainees without explanation. Third, the new list did not mention the facility at which the detainees were held. Of the 92 deaths that *The New York Times* accounted for, 32 occurred at privately contracted facilities, 37 at local

---

[333] Nina Bernstein, "Officials Say Fatalities Of Detainees Were Missed," *New York Times*, August 18, 2009.
[334] Nina Bernstein, "Officials Hid Truth of Immigrant Deaths in Jail," *New York Times*, January 9, 2010, http://www.nytimes.com/2010/01/10/us/10detain.html?pagewanted=2 (accessed April 6, 2010).
[335] Esmeralda Bermudez, "Detainee Centers Fail Immigrants, Report Alleges," *The Oregonian*, July 13, 2007.
[336] Nina Bernstein, "Immigration Agency's Revised List of Deaths in Custody," *New York Times*, April 3, 2009.
[337] Associated Press, "Funeral for Inmate Who Died Awaiting Deportation," December 10, 2008.

jails, 20 at federal detention facilities and the remaining three in other places.[338] Revealingly, the newspaper's math yielded radically different results than the accounting done by ICE. In March 2009, a month earlier, ICE officials had testified before Congress that only six people had died in privately-run facilities. As ICE released the second version of the death roster, an ICE spokeswoman acknowledged omitting one death, but asserted thus, "we believe we have accounted for every single detainee death."[339] She was wrong. In August 2009, another *New York Times* article indicated that one out of ten deaths since 2006 had been overlooked and left out of the list of deaths that ICE had given Congress in March 2009.[340] The omissions were because ICE's mechanism to keep track of the number of immigration detention deaths across the country was inadequate. After correcting the omissions, the number of in-custody deaths since October 2003 totaled 107.[341]

In addition to gaps in the medical treatment provided to detainees and lack of information about the number of in-custody deaths, ICE's decentralized structure creates conditions for local officials to withhold information about in-custody abuses. In early 2010, the *New York Times* and the American Civil Liberties Union investigated this issue.[342] The investigation revealed that staff at local facilities withheld information about in-custody abuses from overseers and that ICE officials used their overseeing authority to conceal this information from the public. The case of Bergen County Jail in New Jersey exemplifies this two-tiered mechanism of deceit. In 2007 an investigation conducted by ICE's Office of Professional Responsibility found that untreated pain had been a main

---

[338] Bernstein, "Revised List of Deaths in Custody."
[339] Bernstein, "Fatalities Of Detainees Were Missed."
[340] Bernstein, "Fatalities Of Detainees Were Missed."
[341] Bernstein, "Officials Hid Truth."
[342] Bernstein, "Officials Hid Truth."

factor in a 22-year-old detainee's suicide. The internal investigation found also that staff at the facility had falsified the detainee's medication log to make it look as if the detainee had received adequate treatment. However, ICE did not release this information to the public or the detainee's family. The events at Bergen County Jail are similar in nature to those that occurred at Krome SPC in 1995. Back then, regional INS officials ordered subordinates to lie. At Bergen County Jail, ICE officials concealed and supported jail operators' lies.

This section argued that decentralization has an established pedigree and continues to be an obstacle to the uniform enforcement of binding detention standards across the United States. Already in 1991 GAO warned: "Strong leadership and management reforms needed to address serious problems."[343] Eighteen years later, in August 2009, ICE promised reforms to "move away from our present decentralized, jail-oriented approach."[344] Yet, substantial change is wanting. The current organizational structure leads on the one hand to the mistreatment of detainees and on the other to these abuses being concealed. At first, binding detention standards seem the best move to prevent these abuses. However, under the current conditions, enforcing a set of standards in immigration detention facilities across the country becomes a chimera. Detention centers differ too much in scope, structure and management. Moreover, field offices across the country also differ significantly in size, they deal with different alien cohorts, and have different priorities. These obstacles make the implementation of binding standards for the sake of preventing abuses of aliens' rights a good idea, but hardly a practical one.

---

[343] U.S. Government Accountability Office, *Immigration Management: Strong Leadership and Management Reforms Needed to Address Serious Problems*, January 23, 1991.
[344] U.S. Immigration and Customs Enforcement, "2009 Detention Reforms."

4.2. ICE's Outsourcing of Services

The insurmountable problem posed by ICE's decentralized structure is not the only obstacle to the implementation of binding detention standards. The second factor that makes legally enforceable immigration detention standards an ineffective solution to the crisis in immigration detention is the ICE's outsourcing of two of its key functions: detention and immigration law enforcement. This section argues that the use of third parties places detainees further away from the public eye, hinders oversight, and ultimately increases disharmony and fragmentation in the detention system. The first part of this section demonstrates that the outsourcing of detention services limits ICE's capacity to perform effective oversight of detention practices. The second part of this section argues that the outsourcing of immigration law enforcement services through the 287(g) program bestows excessive power on local police departments. Because these lack perspective and have specific interest, they use such power as they see fit. The misuse of immigration law enforcement authority leads to the detention and deportation of aliens for minor issues such as traffic violations. Examining the consequences of the 287(g) program is significant because the Obama administration vowed to expand it in spite of the harsh criticism and evidence that the program led to racial profiling and civil rights abuses.

Prior to the analysis, a few notes on terminology are in order. Rather than granting local agents a healthy degree of discretion over immigration law enforcement, the immigration detention system permits a concerning amount of arbitrariness on their part. There is a fundamental difference between these two qualities. One of the meanings of

"discretion" is the "ability to make responsible decisions."[345] In theory, by granting local authorities operational discretion and using local facilities, immigration laws intend to allow for sensible and expedient decisions to be made. However, as this section demonstrates, the detention system turns out to be quite arbitrary in practice. Arbitrariness means that decision-making is "based on or determined by individual preference or convenience rather than by necessity or the intrinsic nature of something."[346] In short, operational discretion leads to arbitrary practices and these in turn compromise immigrant rights and lead to significant discrepancies across regions. Arbitrariness thus creates a hostile environment for the uniform application and enforcement of binding detention standards.

4.2.1. Contract Detention Facilities and Local Jails

ICE uses a vast array of disparate detention facilities across the country, which increases entropy and disharmony in the immigration detention system. Revealingly, neither INS nor ICE knows the exact number of local facilities with which it has contracts. A Human Rights Watch 1998 report indicates that because each district decided the number of detention facilities to be used, Washington headquarters did not have a complete list of the jails INS used. In fact, when the organization asked the INS for this information, it obtained several different lists. After eliminating duplicate entries, Human Rights Watch counted 687 facilities. This number was far from INS's statistics, which claimed the agency had contracts with 1,041 jails. Ten years later, the situation continues. In late 2009, ICE Director of Detention Policy and Planning Dr. Schriro

[345] *Merriam-Webster Dictionary*, s.v. "discretion."
[346] *Merriam-Webster Dictionary*, s.v. "arbitrary."

indicated that the agency was using "approximately" 247 local prisons, seven SPCs, and seven CDFs.[347] However, Dr. Schriro's figures differ significantly from those on ICE's website. According to the latter source, detainees are housed at 350 local facilities (IGSAs), eight facilities managed by the government (SPCs), eight facilities owned by private companies (CDFs), and five facilities owned and operated by the Bureau of Prisons (BOP).[348] According to ICE's website, the detention population was assigned as follow: 67 percent to local facilities, 17 percent to contract facilities, 13 percent to ICE-owned facilities, and 3 percent to Bureau of Prison's facilities. Having the right figures is not a matter of just counting numbers. Knowing how many facilities ICE uses and where aliens are housed is fundamental to devising sound policies. Yet, ICE's ignorance of the real number of local jails that are in use reflects the high degree to which detention management is decentralized.

4.2.2. Immigration Law Enforcement by Local Police under 287(g) Program

The real consequences of ICE's overtly lax outsourcing of immigration law enforcement services can be gauged by a case in point. This section examines a specific program, known as 287(g) agreements, that grants state and local officers authority to enforce immigration laws.[349] Subcontracting the enforcement of federal immigration laws to local police officers is problematic. Local officers' view of the immigration landscape is limited to their immediate context. For this reason there is a significant risk that the program will lead to an arbitrary enforcement of immigration laws, which makes the

---

[347] Schriro, *Immigration Detention Overview*, 10, 11.
[348] U.S. Immigration and Customs Enforcement, "Detention and Removal," http://www.ice.gov/partners/dro/dmp.htm (accessed February 22, 2010).
[349] For the sake of avoiding repetitions, the terms "287(g) agreements" and "287(g) program" will be used interchangeably.

uniform enforcement of immigration detention standards impractical. The 287(g) program is a case in point, because the ways in which it has been organized and misused by local agencies has led in some locales to racial profiling, an extreme case of arbitrary enforcement of immigration laws.

Before analyzing the extent to which 287(g) agreements exacerbate arbitrariness and disharmony in the immigration detention system, it is important to consider the legal framework regulating states' ability to enforce federal immigration laws. States and local authorities have limited powers to enforce immigration laws. As stated by the Supreme Court in *Takashashi v. Fish and Game Commission* "the Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States [and] the period they may remain … Under the Constitution, states are granted no such powers."[350] This means that state or local agencies cannot establish who may remain in the United States, contradict federal laws or override legislation enacted by Congress.[351] In 1996 the Office of Legal Counsel (OLC) of the Department of Justice issued a memorandum underscoring the limited powers states have to regulate immigration. The document established that local agencies had the authority to arrest individuals suspected of violating criminal provisions of the Immigration and Nationality Act, but indicated that they lacked the power to stop and detain aliens for civil violations. This meant that states could not detain aliens for residing in the country illegally.[352]

The advent of the securitization discourse changed this. The events of September 11, 2001 caused a reversal of such understanding. A 2002 memorandum by the OLC

---

[350] *Takashashi v. Fish and Game Commission* 334 U.S. 410 (1948), 419
[351] Quereshi, "Hope for Change," 21
[352] Teresa Wynn Roseborough – Office of Legal Counsel, *Assistance by State and Local Police in Apprehending Illegal Aliens*, February 5, 1996, http://www.justice.gov/olc/immstopo1a.htm (accessed January 21, 2010).

rejected the conclusion of the 1996 document and encouraged states to enforce immigration laws. Thus, with certain limitations, states were bestowed the power to detain aliens solely based on immigration status.[353] Some conservative scholars such as Kris Kobach interpreted this as a positive change.[354] The events of September 11, 2001 also increased the demand for stricter enforcement of immigration laws. As Kobach put it, "the terrorist attacks of September 11, 2001 underscored for all Americans the need to restore the rule of law in the immigration arena."[355] In a context of security hysteria, conservatives such as Jessica Vaughan and James Edwards Jr. from the Center for Immigration Studies praised local immigration law enforcement programs as the solution to terrorism.[356] For this reason, the 287(g) program suddenly became popular.[357]

The creation of the authority of state and local officers to perform arrests for civil violations of immigration laws gave rise to a number of local anti-immigration initiatives.[358] For instance, the number of bills containing anti-immigration provisions in all fifty states increased from thirty in 2005 to over 1,500 in 2007.[359] Especially after the events of September 11, 2001 and with the encouragement of Attorney General John Ashcroft, many cities entered into 287(g) agreements with the federal government. The next paragraphs examine the nature of 287(g) agreements and argue that these lead to a high degree of arbitrariness in the immigration detention system. Coupled with the

---

[353] Kris W. Kobach, "State and Local Authority to Enforce Immigration Law: A Unified Approach for Stopping Terrorists," *Backgrounder*, June 2004, http://www.cis.org/articles/2004/back604.pdf (accessed February 6, 2010), 1.
[354] Kobach, "State and Local Authority," 2.
[355] Kobach, "State and Local Authority," 1.
[356] Jessica Vaughan and James R. Edwards Jr., "The 287(g) Program: Protecting Home Towns and Homeland," *Backgrounder*, October 2009, http://www.cis.org/articles/2009/287g.pdf (accessed February 7, 2010), 1.
[357] Randal C. Archibold, "U.S. Alters Disputed Program Letting Local Officers Enforce Immigration Law," *New York Times*, October 17, 2009, Sec A.
[358] Quereshi, "Hope for Change," 21.
[359] Quereshi, "Hope for Change," 21.

decentralized structure of immigration agencies, arbitrariness leads to heterogeneity in the enforcement of immigration laws and in detention practices. In such an inharmonious environment, implementing and enforcing immigration detention rules would at best produce uncertain results.

Further evidence for the effects of the decentralized structure of immigration detention can be gathered from the effects of 287(g) agreements, which name derives from the corresponding section of the Immigration and Nationality Act.[360] The agreements were created in 1996 to enhance states' ability to fully enforce immigration laws: to investigate, prepare cases, and hand them over to ICE to begin removal proceedings.[361] To become involved, an agency must sign a memorandum of agreement with ICE and its officers must undergo training.[362] The intention behind the creation of 287(g) agreements is still the subject of debate. Immigrant rights advocates and GAO argue that the program is meant to facilitate the removal of serious criminals; however, conservative groups and some Congressmen led by Representative Lamar Smith argue that the program was devised to authorize local law enforcement agencies to enforce immigration laws as they see fit.[363] Notably, while the 287(g) agreements were hardly

---

[360] Under section 287(g) of the INA,

> "… the Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law."

Omnibus Consolidated Appropriations Act of 1997, Public Law 104-208, Div C, S133, U.S Statutes at Large 3009-546 (1996), 563-4.

[361] Vaughan and Edwards Jr., "The 287(g) Program," 3.

[362] U.S. Immigration and Customs Enforcement, "The ICE 287(g) Program: A Law Enforcement Partnership," http://www.ice.gov/pi/news/factsheets/section287_g.htm (accessed February 7, 2010).

[363] According to Rep. Smith, who was directly involved in the drafting of the IIRIRA, "the goal was to really enable those local law enforcement authorities who wanted to enforce the immigration laws in whatever way they thought best, and that might or might not include those who have committed serious

noticed at the time of their creation, they became very popular after September 11, 2001.[364] In 2009, the program produced the second highest number of detentions relative to other programs run by ICE.[365]

The 287(g) agreements render binding immigration detention standards impractical to address the crisis in immigration detention because they foster arbitrariness. Local police departments can choose whether or not to enter into a 287(g) agreement and can also choose the degree to which to use the authority the agreement confers. In this way, 287(g) agreements lead to different degrees of immigration law enforcement in different localities. Precisely because of this, 287(g) agreements have been unable to achieve their goal of deterring illegal immigration. For instance, while Gwinnett County Sheriff Butch Conway praised the program for reducing the number of foreign inmates in jails through their removal, other officials suggested that the reduction was rather due to the fact that illegal aliens were moving elsewhere.[366] Because of their capacity to lead to arbitrary enforcement of immigration laws resulting in racial profiling

---

crimes." Lamar Smith, House Subcommittee on Immigration, Citizenship and Refugees, Border Security, and International Law and Subcommittee on the Constitution, Civil Rights, and Civil Liberties, *Public Safety and Civil Rights Implications of State and Local Enforcement of Federal Immigration Laws*, 111th Cong., 1st sess., April 2, 2009, http://judiciary.house.gov/hearings/printers/111th/111-19_48439.pdf (accessed February 8, 2009), 6.

[364] A report by the Center for Immigration Studies indicates that lobbyists on both sides of the 1996 immigration reform targeted other provisions and the agreements were to a significant extent non-controversial. Indeed, a search in the Lexis Nexis database for articles in United States newspapers and wires yields only 2 articles between 1996 and 2004. While the first agreement was signed in 2002, there were seven agencies participating in July 2007, sixty-seven in February 2009, and seventy-three in October 2009. See Michael Chertoff, House Appropriations Subcommittee on Homeland Security, 109th Cong., 2nd sess., July 27, 2006; Vaughan and Edwards Jr., "The 287(g) Program," 1.

[365] Schriro, *Immigration Detention Overview*, 12.

[366] Andria Simmons, "Gwinnett Jail Reports Drop in Foreign-Born Inmates; Sheriff's Office Says Push to Identify Offenders in U.S. Illegally is Working," *Atlanta Journal-Constitution*, December 31, 2009.

and arbitrary detention, the "explosion in interest in 287(g) agreements" in the last two years is a matter of concern as expressed by Representative Zoe Lofgren.[367]

The next paragraphs consider Maricopa County, AZ to argue that such fears are well founded and that 287(g) agreements fracture the immigration detention system and create disharmony. The recent events in Maricopa County indicate the ease with which local authorities can use 287(g) agreements to arbitrarily detain and deport illegal aliens based on their physical appearance or on minor issues such as a broken headlight. The inability of ICE to effectively monitor the use of such powerful tool as 287(g) agreements are, demonstrates that the agency's outsourcing of immigration law enforcement services is a major obstacle for binding immigration detention standards to prevent abuses of aliens detainees' rights.

In November 2004, Andrew Thomas, a conservative attorney ran for Maricopa General Attorney on an anti-immigration platform. He won and together with Maricopa County Sheriff Joe Arpaio, they became nationally known for their raids on undocumented and legal aliens. At that time, Sheriff Arpaio was already nationally known for making inmates wear pink underwear among other mean practices. He was sued by U.S. Attorney General Janet Reno in 1997 over the conditions in the jail he administered.[368] In late 2007 Sheriff Arpaio decided to participate in the 287(g) program

---

[367] Representative Zoe Lofgren, Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, and he Subcommittee on the Constitution, Civil Rights, and Civil Liberties, *Public Safety and Civil Rights Implication of State and Local Enforcement of Federal Immigration Laws*, April 2, 2009, 111th Cong., 1st sess., http://judiciary.house.gov/hearings/printers/111th/111-19_48439.pdf (accessed February 7, 2010), 2.

[368] Randal C. Archibold, "Challenges to a Sheriff Both Popular and Reviled," *New York Times*, September 28, 2008, Sec A; Michael Lacey, "Janet Napolitano's Sorry Service in Arizona Makes Her a Terrible Choice for Homeland Security Secretary," *Phoenix New Times*, November 27, 2008.

and deputize 160 of his officers.[369] Under Arpaio's command, his deputies began pulling over cars that had broken lights, asking for identifications and arresting individuals unable to produce one, gave false names or had forged documents. As a consequence, aliens and United States citizens would be arrested for crimes that merited no time in jail.[370] Those who were determined to reside in the country illegally were handed over to ICE.

Next, Arpaio began conducting sweeps in Latino neighborhoods and stopping and questioning street vendors. At that point, his deputies operated in teams, wearing ski masks.[371] In addition to targeting Latino neighborhoods Sheriff Arpaio also arrested United States citizens. The American Civil Liberties Union points to the case of Julio Mora. Mr. Mora, a United States citizen was detained for several hours while his immigration status was being determined, during which time the deputies humiliated him.[372] Sheriff Arpaio's tactics exemplify the negative consequences of the arbitrary enforcement of immigration laws. Indeed, his crackdown on aliens targeted mostly those who were in the country illegally rather than those who had committed serious crimes. By intimidating day laborers, street vendors, and people committing minor traffic violations, Arpaio's 287(g) authority and resources was not directed towards detaining aliens that posed a real serious threat. Instead, they instilled fear and distrust among the population.

---

[369] Megan Irwin, "Flushing Them Out: Joe Arpaio and Andrew Thomas Are Teaching the Rest of the Nation How to Terrorize Illegal Immigrants," *Phoenix New Times*, December 27, 2007.
[370] Ray Stern, "Police State: How the U.S. Immigration and Customs Enforcement Agency Turned All Local Authorities into La Migra," *Phoenix New Times*, October 2, 2008.
[371] Michael Lacey, "Are Your Papers in Order?," *Phoenix New Times*, March 19, 2009.
[372] States News Service, "House Hearing Will Examine Illegal Profiling and Police Misconduct by Local Law Enforcement Acting as Federal Immigration Agents," April 1, 2009.

As the raids became cruel and discriminatory, complaints from advocacy organizations and politicians increased. Notwithstanding the mounting evidence of racial profiling and civil rights violations, neither ICE field office nor the agency's headquarters pay heed. Arpaio's roundups exerted such a terrorizing effect that the mayor of Guadalupe, Rebecca Jiménez, asked him to terminate a raid in her city.[373] Upon asking Arpaio not to return on the next day, the Sheriff replied "Well, we will be back here tomorrow. Full force! … If you don't like the way I operate, you go get your own police department."[374] In the course of 2008, the mayor of Phoenix, the Arizona Anti-Defamation League, the Arizona Latino Legislative Caucus among others, asked United States Attorney General to investigate the Sheriff for racial profiling and for violating the terms of the Maricopa County Sheriff Office memorandum of agreement with ICE.[375] In April 2008, the Mayor of Phoenix requested the Federal Bureau of Investigation to scrutinize Arpaio's sweeps, accusing the Sheriff of "a pattern of practice and conduct that includes discriminatory harassment, improper stops, searches, and arrests."[376] In July 2008, the Mexican American Legal Defense and Education Fund and the American Civil Liberties Union of Arizona filed a class-action lawsuit against Joe Arpaio, the Maricopa County Sheriff Office, and Maricopa County.[377]

However, ICE officials were unmoved and claimed that the allegations were unfounded. The agent in charge of the ICE Office of Investigations in Arizona asserted thus, "so far, we have not been able to identify any allegations against Maricopa

---

[373] Stephen Lemons, "Guadalupe Made it Clear that Joe Arpaio's Attacking Anyone with Brown Skin," *Phoenix New Times*, May 29, 2008.
[374] Lacey, "Are Your Papers in Order?"
[375] Stephen Lemons, "ICE's Matthew Allen and David DeConcini Get Ripped Apart by the Talon Terror," *Phoenix New Times*, November 6, 2008.
[376] Michael Lacey, "Janet Napolitano = Homeland Futility," *The Village Voice*, November 26, 2008.
[377] Lemons, "Ripped Apart by the Talon Terror."

County."[378] After a visit to Guadalupe to observe Sheriff Arpaio's procedures, Jim Pendergraph, an ICE official from Washington, declared: "I saw nothing that gave me a heartburn."[379] Because neither Arpaio nor ICE cared about the terms of the memorandum of agreement, an editorial in the *New York Times* argued that "if this doesn't look to you like a carefully regulated, federally supervised effort to catch dangerous criminals, that's because it isn't."[380] Sheriff Arpaio's use of his 287(g) authority to persecute and terrorize illegal aliens generated distrust of the police and discontent among the population. Above all, Arpaio's racial profiling demonstrates how discretion can lead to abuses and arbitrary enforcement of laws, especially when oversight is lacking.

The events of February 4, 2009 brought government inaction to an end.[381] On that day, Sheriff Arpaio conducted a televised parade of two hundred detainees who marched, escorted by heavily armed guards, into a tent detention camp outside of Phoenix in shackles and wearing prison jumpsuits. National media referred to the camp as "Tent City" called the parade "a degrading spectacle."[382] A February 6 editorial in the *New York Times* called Arpaio as a "publicity-obsessed star of a Fox reality show and the self-appointed scourge of illegal immigrants."[383] Amidst media condemnation, Maricopa County Attorney Andrew Thomas withdrew his support, stating: "Racial and ethnic segregation is unconstitutional."[384] On February 13, House Judiciary Committee Chairman John Conyers, Immigration Subcommittee Chairwoman Zoe Lofgren, Constitution Subcommittee Jerrold Nadler, and Crime Subcommittee Chairman Bobby

---

[378] Lemons, "Ripped Apart by the Talon Terror."
[379] New York Times, "Immigration, Outsourced," April 9, 2008.
[380] New York Times, "Immigration, Outsourced"
[381] Associated Press Online, "House to Look at Locals Enforcing Immigration Law," March 4, 2009.
[382] New York Times, "Arpaio's America," February 6, 2009.
[383] New York Times, "Arpaio's America."
[384] Ruben Navarrette, "Sheriff's Circus Act Is No Laughing Matter for Napolitano," *Contra Costa Times*, February 12, 2009.

Scott requested United States Attorney General Eric Holder and Department of Homeland Security Secretary Janet Napolitano to investigate the allegations of racial profiling and civil rights abuses by Sheriff Arpaio.

The increasing allegations of Arpaio's misuse of his 287(g) authority to terrorize undocumented aliens in Maricopa County brought 287(g) agreements under the limelight. The effectiveness of the program and its potential to lead to ethnic profiling and discrimination were put under the microscope. As public outrage about Arpaio's treatment of aliens spiked, DHS Secretary Janet Napolitano acknowledged being wary of the Sheriff's tactics. As a result of Arpaio's opportunistic behavior in using the power bestowed by the 287(g) agreement to run an anti-immigration campaign, the repeated allegations of human rights abuses in detention centers, and the change in administration, DHS Secretary Napolitano ordered a review of several of ICE's programs, including 287(g) agreements.[385] According to Napolitano, the scrutiny was motivated by "questions about how 287(g) agreements are administered, and if uniform standards are applied."[386] In addition, the GAO was requested to review the program's effectiveness and report the results before the House Homeland Security Committee.

The report GAO released on February 20, 2009, found that the structure of the 287(g) program had granted local officers a high degree of discretion. Not a surprise. As local agencies implemented the agreements under lax supervision, the enforcement of immigration laws became arbitrary. Arbitrariness not only led to differences in the way in which immigration laws were enforced across communities, but it also sparked concerns of discrimination among the locals. In short, GAO's report found significant problems in

[385] Associated Press Online, "House to Look at Locals."
[386] Randal C. Archibold, "Lawmakers Want to Look At Sheriff In Arizona," *New York Times*, February 14, 2004.

the structure of the program.[387] The agency demonstrated that although memorandums of agreement and background checks were required, other fundamental controls were lacking. One of the main shortcomings of the program was that memorandum of agreements did not convey the idea that the 287(g) partnerships were meant to facilitate the detention of serious criminals. As a result, local officers would arrest individuals for petty crimes such as speeding or carrying an open container of alcohol.[388] GAO also found that ICE did not consistently explain the way in which participating agencies were to use their 287(g) authority.[389] In addition, the report suggests that ICE did not specify the "nature and extent" of its overview of participating agencies.[390]GAO also indicated that in twenty of the 29 memorandums of agreement reviewed, ICE did not specify what date participating agencies were mandated to report.[391] In conclusion, the report argues that the 287(g) program led to concerns in more than half of the 29 communities scrutinized about racial profiling.[392] Coupled with bigotry, the lax regulations of the 287(g) program and the considerable degree of discretion it bestowed on local agents led to ethnic profiling, discrimination, arbitrary detentions and generated distrust among the population.

After the release of GAO's report, a House Homeland Security Committee hearing was scheduled to discuss the results reported by the investigative agency. The name of the hearing, "Examining 287(g): The Role of the State in Local Law

---

[387] U.S. Government Accountability Office, *Immigration Enforcement: Controls Over Program Authorizing State and Local Enforcement of Federal Immigration Laws Should be Strengthened*, January 30, 2009, http://www.gao.gov/new.items/d09381t.pdf (accessed February 8, 2009).
[388] U.S. Government Accountability Office, *Immigration Enforcement*, 4; Peter Barnes, "Team of 8 Deputies Quickly Rounds Up Illegals," *Washington Times*, November 12, 2009, Sec A
[389] U.S. Government Accountability Office, *Immigration Enforcement*, 4.
[390] U.S. Government Accountability Office, *Immigration Enforcement,* 4.
[391] U.S. Government Accountability Office, *Immigration Enforcement*, 4.
[392] U.S. Government Accountability Office, *Immigration Enforcement*, 6.

Enforcement in Immigration Law" suggests that neither the scope nor the effectiveness of the 287(g) program were clear. However, concerns about racial profiling were second to those about funding. In his opening remarks, Chairman Bennie G. Thompson "applauded the growth of successful programs" such as 287(g). Chairman Thompson then stated that in order to know whether the taxpayers' money ($40 million in FY 2008) had been appropriately spent, it would have been necessary to know if the aliens removed through the program (29,000 in FY 2008) were actually dangerous. Concerns with arbitrary detentions and racial profiling only came second. Towards the end of his remarks, Chairman Thompson said that "while I do not know whether 287(g) is an effective program, I do know that it is a program that has been accused of racial profiling."[393]

The March hearing on 287(g) agreements led to a few modifications, which were introduced to placate GAO's concerns.[394] As it would soon be seen, the reforms did little to address alien, human, and civil rights advocates. The reforms also had a negligible impact on Maricopa County Sheriff Arpaio, who argued that he would continue arresting illegal aliens under state laws.[395] On August 25, 2009, the American Civil Liberties Union together with other 520 organizations sent a letter to President Barack Obama urging him to terminate 287(g) partnerships. The letter argues that the program exacerbates the disproportionate detention of African Americans and Latinos. It asserts that the granting of authority to local officers to enforce immigration laws "has resulted in the widespread use of pretextual traffic stops, racially motivated questioning and

---

[393] Bennie G. Thompson, House Homeland Security Committee, *Examining 287(g): The Role of State and Local Law Enforcement in Immigration Law*, 111th Cong., 1st sess, March 4, 2009, http://homeland.house.gov/SiteDocuments/20090304140810-08669.pdf (accessed February 7, 2010).
[394] William F. Riley, House Homeland Security Committee, *Examining 287(g): The Role of State and Local Law Enforcement in Immigration Law*, 111th Cong., 1st sess, March 4, 2009, http://homeland.house.gov/SiteDocuments/20090304140905-47205.pdf (accessed February 8, 2010), 9.
[395] Lacey, "Napolitano's Sorry Service."

unconstitutional searches and seizures primarily in communities of color."[396] The letter also criticizes the program as a "failed Bush experiment." Although the 287(g) agreements were devised in 1996, the first agreement was signed in 2002.[397] The concerns of racial profiling also reached the United Nations. In a letter dated September 28, 2009, the United Nations Committee on the Elimination of Racial Discrimination recommended the Obama administration to reconsider programs such as the 287(g) that lead to racial profiling.[398]

Mounting pressure on the government brought some changes to the 287(g) program. On July 9, 2009, DHS announced two main modifications to the Memorandum of Agreement.[399] First, DHS required partner agencies to pursue all the criminal charges for which offenders are arrested. This policy was intended to prevent arrests for minor violations. Second, the reformed MOAs would specify partners' enforcement powers, incorporate guidelines for oversight and complaints procedures among other things. Months later, in early October, the Department of Homeland Security revoked its agreement with Maricopa County Sheriff Office.[400] However, Sheriff Arpaio was not moved. He vowed to use anti-human smuggling law to stop and question people.[401] If

---

[396] Marielena Hincapie et al, letter to U.S. President Barack Obama, August 25, 2009, https://salsa.democracyinaction.org/o/371/images/LETTER_TO_PRESIDENT_20090825133229.pdf (accessed February 7, 2010), 1.
[397] Marielena Hincapie et al, letter to President Barack Obama, 1.
[398] Fatimata-Binta Victoire Dah, United Nations High Commissioner for Human Rights, letter to U.S. President Barack Obama, September 28, 2009, http://www.aclu.org/files/pdfs/humanrights/uncerdresponse_racialdiscrimination.pdf (accessed February 6, 2010).
[399] States News Service, "Secretary Napolitano Announces New Agreement For State and Local Immigration Enforcement Partnerships and Adds 11 New Agreements," July 10, 2009.
[400] Joe Arpaio qtd. in Randal C. Archibold, "Immigration Hard-Liner Has His Wings Clipped," *New York Times*, October 7, 2009.
[401] Joe Arpaio qtd. in Archibold, "Immigration Hard-Liner."

ICE did not want to take them he would "take a little trip to the border and turn them over at the border."[402]

Local officers' abuse of 287(g) authority aggravated and exemplified the criminalization of illegal aliens. Recall that criminalization is a discursive process that sees the presence of illegal aliens as conducive to crime. Because Sheriff Arpaio saw undocumented aliens as criminals, he arrested both criminal and non-criminal aliens alike. Arpaio's use of his 287(g) authority to target non-criminal aliens is a consequence of criminalization. Anti-immigrant advocates may object that 287(g) agreements are for localities to use as they see fit. Or perhaps they may argue that if detention is the only way to remove undocumented aliens, then arresting criminal and non-criminal aliens is the right thing to do. However, the aim of the 287(g) program is to arrest dangerous aliens. In addition, according to GAO, ICE would not have enough detention space if local agencies detained aliens for minor offenses.[403] For this reason, it would be logical for participants in the 287(g) program to use the limited number of beds available to detain aliens who pose a significant threat to the public.[404] In short, local officials' deviation from the original and logical scope of the 287(g) program, the terrorizing of aliens communities and the arrest of aliens for minor misdemeanors or traffic violations are palpable instances of criminalization.

While some local officers used their 287(g) authority to zealously eradicate illegal immigration, other localities questioned the effectiveness of the program and refrained from participating. This reflects how a single program, which is improperly overseen, can be or not be used for different purposes. One example is Houston, TX. In mid 2009,

---

[402] Archibold, "Immigration Hard-Liner."
[403] U.S. Government Accountability Office, *Immigration Enforcement*, 4.
[404] U.S. Government Accountability Office, *Immigration Enforcement*, 4.

Houston Mayor Bill White backed off from his previous decision of joining the 287(g) program. The Mayor had sought to participate in order to be consistent with his previous policies.[405] However, the events in Maricopa County and the investigations that followed raised concerns among the Latino community.[406] In an intermediate step, Mayor White tried to modify the terms of the agreement to ensure that the 287(g) program would only target serious criminals.[407] Indeed, the Mayor and the press were aware that in its generic form the 287(g) would cast a wide net over criminal and non-criminal aliens. Nevertheless, negotiations with the federal government failed. For this reason, and because he believed that the program was too costly in terms of budget and manpower, Mayor White chose not to participate in the contentious program.

Another instance of local officers expressing concerns about the 287(g) program is that of Los Angeles Police Department Chief William Bratton. As he explained the reason why the Los Angeles Police Department chose not to participate, Chief Bratton raised important issues. First, he said that the 287(g) program does not make communities safer because it instills fear of the police among immigrant communities.[408] The Police Department Chief referred to a case in which an illegal alien who contacted the police about a crime he witnessed was later arrested and deported.[409] Second, Bratton argued that participation could lead to an increase in crime. "Breeding fear and distrust of authority among some of our children could increase the rate of crime," Bratton said.[410] In short, Chief Bratton suggested that community trust in the police is a key element of

---

[405] Bradley Olson and Susan Carroll, "Backlash Grows over Screening for ICE at Jail," *Houston Chronicle*, May 2, 2009.
[406] Olson and Carroll, "Backlash Grows."
[407] Lisa Falkenberg, "Mayor Wants to Rewrite the Rules on Immigrants," *Houston Chronicle*, August 6, 2009.
[408] Associated Press, "LAPD Chief: Cops Shouldn't Tag Immigrants," October 27, 2009.
[409] William Bratton, "Cops, Not ICE," *Los Angeles Times*, October 27, 2009.
[410] Associated Press, "Cops Shouldn't Tag Immigrants."

security. Because programs like 287(g) that give immigration law enforcement powers to local police erode trust, they backfire.

The divergent reactions to the 287(g) program in Maricopa County on the one hand and in Houston and Los Angeles on the other reflect the significant degree of maneuver that local authorities enjoy. While some police departments used their authority to terrorize aliens, others expressed concerns about the effects of the program on alien communities. The disparate actions and opinions reflect the disharmony prevailing in the immigration detention system. Not only can local agencies decide whether or not to participate, but also they can decide how to use their 287(g) authority. Because 287(g) agreements allowed partner agencies to use their power according to their needs, the discretionary use of 287(g) authority inexorably led to significant differences between regions.

Connecting the facts with the literature, the effects of ICE's outsourcing of services confirms Riddhi Mukhopadhyay's argument and disproves Miriam Wells's thesis. The analysis of ICE's use of private and local detention facilities and the 287(g) program echo Mukhopadhyay's assertion that federal immigration policies grant excessive discretion. According to Mukhopadhyay, current policies "provide untrained immigration officials with high levels of discretion in determining whether an immigrant should be detained and deported, adding to an already xenophobic detainee system."[411] Although local officials receive training, they remain untrained in that their perspective is narrow. Local officials see immigration as a local phenomenon, affecting their city or county. Acting under the premise that illegal aliens are criminals, which Mukhopadhyay identifies as xenophobia, local officers such as Joe Arpaio conduct sweeps and arrest

[411] Mukhopadhyay, "Death in Detention," 711.

whoever is suspect of being in the country illegally. Yet, this not only leads to mistreatment of detainees, but also it does not solve the problem of undocumented immigration. If aliens are chased out of one city, they move to another.

The argument put forward in this chapter challenges Miriam Wells's idea about the ways in which localities reshape immigration policy.[412] According to Wells, while federal policies are migrant-exclusive, implementation at the local level is migrant-inclusive.[413] Localities are able to dilute the restrictive terms of federal immigration policies because the many administrative layers that compose the state do not function harmoniously. These disjoints create space for local organization to reshape federal policies on the ground. Wells explains that identification and arrest depend on local police and that the immigration authorities only come into play at a later stage. She argues that although the law instructs police departments to cooperate, the terms remain ambiguous.[414] However, the case of 287(g) agreements shows that this is not so. In fact, some of the localities such as Maricopa County used their authority to carry out anti-immigration initiatives. Thus, the consequences of the 287(g) program contrast with Well's argument that local enforcement agencies are more lenient on aliens than federal laws request.

4.3. Conclusion

To conclude, this chapter explored the nature and consequences of ICE's decentralized structure and the outsourcing of two of ICE's main functions: immigration

---

[412] Miriam J. Wells, "The Grassroots Reconfiguration of U.S. Immigration Policy," *International Migration Review* 38, no 4 (2004): 1308-1347.
[413] Wells, "The Grassroots Reconfiguration," 1308.
[414] Wells, "The Grassroots Reconfiguration ," 1316.

detention and law enforcement. The analysis showed that decentralization and the haphazard outsourcing of ICE's functions have perverse consequences for immigrant rights and make binding immigration standards as proposed by immigrant's rights advocates an ineffective solution to the crisis in immigration detention. Decentralization reduces ICE's presence on the field and hinders oversight. Unchecked local discretion is problematic because local officers have limited horizons inasmuch as they only see the effects of immigration on their localities. For this reason, local use of 287(g) authority is myopic and leads to the mistreatment of aliens when informed by the criminalization or securitization paradigms. Besides identifying the negative consequence, the discussion showed that immigration detention is indeed remarkably decentralized. Decentralization results in stark differences between detention facilities across the country. These differences are an insurmountable obstacle in the road of uniform and effective implementation of binding detention standards. For this reason, legally enforceable detention standards are an impractical solution to in-custody human rights abuses.

5. Going Forward: Reconsidering the Policy of Mass Detention of Undocumented Aliens

This closing chapter carries the debate about immigration detention a step forward. Before moving on to its argument, a recapitulation of the preceding chapters is in order. This thesis investigates what can be done about the problem of alien detention in the United States. The introduction suggested that immigration detention is a significant problem – in terms of the number of aliens in detention centers – and is deeply rooted in the contemporary dynamics of states' responses to globalization. Chapter two considered the results of the processes of criminalization and securitization, and argued that these have led to recurrent violations of immigrant detainees' rights. That chapter suggested that the increase in the size of immigration detention population, the punitive conditions of detention, and the mistreatment of immigration detainees are recent and grave phenomena. Chapter three argued that the responses to the crisis of immigration detention that the government has engineered so far have been at best insufficient. As a response to the failure of nonbinding guidelines to prevent in-custody abuses, immigrant rights advocates proposed the creation of legally binding detention standards. Chapter four demonstrated that binding detention standards are also impractical because the agency dealing with immigration detention is decentralized and it outsources some of its primary functions to local actors, which make the immigration detention system arbitrary. The obvious and thus far unpreventable abuses of detained illegal aliens raise the following question: What can be done to solve the problem of abuses in immigration detention in the United States?

Chapter five approaches the problem of recurrent in-custody abuses with a long-term perspective. This chapter answers that the best way to prevent in-custody abuses of

aliens in deportation detention is to abolish the practice of mass immigration detention. The aim of this strategy is that human rights violations are not the outcome of immigration policy. The following paragraphs introduce four arguments in favor of ending mass immigration detention. First, ending mass immigration detention will remove non-criminal aliens from the criminal sphere, thus countering the harmful effects of criminalization and securitization. This strategy will also prevent, rather than seek redress for, human rights abuses in detention. Second, abolishing mass immigration detention will prevent the incarceration of asylum seekers, refugees and United States citizens. Third, terminating such practice will subdue the lasting injurious psychological impacts of detention. Fourth, ending the practice of mass immigration detention will save taxpayers' money.

Prior to delving into those four rationales for reconsidering the practice of mass immigration detention, it is important to underscore the reasons why such strategy is a valid endeavor. First, this project has a long-term scope and focuses on the problems that lie at the core of immigration detention. Advocates who propose binding detention standards are offering a patch to some symptoms of the immigration detention crisis such as access to attorneys and medical treatment. In contrast, this thesis goes deeper into the problem and seeks to eliminate the root of these flaws, namely, the practice of mass immigration detention, which is a result of the paradigms of criminalization and securitization.

Second, the argument that policy-makers should discontinue the practice of mass immigration detention is not at all radical because, as chapter two shows, mass immigration detention is a recent practice and the discourses that enable it are recent as

well. On the one hand, this policy analysis is not in favor of the total abolition of immigration detention. It recognizes that illegal immigration is a breach of the law and that the government has a right to remove aliens who are in the country without permission. Yet, this thesis is also attentive to the fact that illegal aliens are human beings and deserve not to have their rights violated, and to the fact that almost half of the aliens in detention are not criminals.[415] On the other hand, alternative to detention programs already exist, yet they are still underdeveloped. If policy-makers reserve detention only for aliens who commit serious crimes such as those categorized as Part 1 under the Uniform Crime Reports, they could utilize the remaining funding to enhance and expand alternative to detention programs.[416]

5.1. Reconsidering Mass Immigration Detention Will Address the Root of the Problem

This section argues that while the strategy of binding standards advocates acquiesces with and institutionalizes the practice of mass detention, this thesis' proposal of abolishing such practice directly targets the root of the crisis of immigration detention. The issue at stake is in-custody abuses of aliens' rights, which roots are the negative effects of the criminalization and securitization paradigms. Because the most effective approach to any malady is to target its causes, ending mass immigration detention is an effective strategy to protect aliens' rights. To understand why the strategy of abolishing mass immigration detention addresses the root of the crisis of immigration detention it is

---

[415] Schriro, *Immigration Detention Overview*, 6.

[416] The Universal Crime Reports (UCR) is a system used by the Federal Bureau of Investigations to categorize crimes. Part 1 crimes are the most serious ones (e.g. aggravated assault, forcible rape, murder, arson, burglary). The Part 1 category of UCR is narrower than the ambiguous definition of aggravated felonies under immigration law, which puts aliens in jail for marijuana offenses.

important to consider the shortcomings of the strategy proposed by binding standards advocates.

What makes binding standards advocates' policy ineffective to solve the current crisis in immigration detention is that advocates are excessively focused on finessing immigration detention and avoid asking a fundamental question: why is mass immigration detention necessary? In other words, they are strictly focused with the cosmetic aspects of the problem, the conditions of detention, rather than with the problem itself: immigration policy that sees illegal aliens as criminals and terrorists, and a mushrooming immigration detention system that incarcerates criminal and non-criminal aliens alike, under lax supervision, in facilities that for the most part are not prepared to house them.

Because advocates are too busy seeking to improve the conditions of detention today, the lose sight of the dominant trend in immigration detention: the breathtaking increase in the number of detained aliens since the 1980s. In other words, advocates for binding standards place too much emphasis in the short-term. Their shortsightedness is notable in their reports on immigration detention. The evidence to support this claim comes from the analysis of reports by non-governmental organizations on the subject of immigration detention published between 2007 and 2009. The authors of these reports are immigrant rights organizations such as ACLU of Massachusetts, the Women's Refugee Commission, the Florida Immigrant Advocacy Center, Amnesty International and Human Rights First, among others.[417] The purpose of analyzing those reports is that the

[417] Women's Commission for Refugee Women and Children and Lutheran Immigration and Refugee Service, *Locking Up Family Values: The Detention of Immigrant Families*, February 2007, www.womensrefugeecommission.org/docs/famdeten.pdf (accessed October 24, 2009); Seattle School of Law International Human Rights Clinic and OneAmerica, *Voices from Detention: A Report of Human*

suggestions that advocates put forward indicate their understanding of the issue at stake as well as their strategy to approach it. Revealingly, only few of the many suggestions that advocates make advise the government to discontinue the use of mass detention part of immigration policy. The majority of the reports are concerned with *how* rather than *why* undocumented aliens must be detained. Thus, they champion cosmetic solutions such as determining mandatory detention on a case-by-case basis, restricting aliens' freedom according to their flight risk, humanizing the conditions under which undocumented aliens are detained, and incorporating human rights frameworks into immigration detention. From those recommendations it becomes clear that rather than asking whether detention itself is compatible with human rights, the organizations

---

Rights Violations at the Northwestern Detention Center, June 2008, www.hatefreezone.org/downloads/Detention%20Center%20Study.pdf (accessed October 24, 2009); No More Deaths, *Crossing the Line*, http://www.nomoredeaths.org/index.php/Download-document/9-Crossing-The-Line-Human-Rights-Abuses-of-Migrants-in-Short-term-Custody.html (accessed January 17, 2010); Georgia Detention Watch, *Report on the December 2008 Humanitarian Visit to the Stewart Detention Center*, www.acluga.org/Georgia_Detention_Watch_Report_on_Stewart.pdf (accessed January 17, 2010); American Civil Liberties Union (ACLU) of Massachusetts, *Detention and Deportation in the Age of ICE*, December 2008, http://www.aclum.org/ice/documents/aclu_ice_detention_report.pdf (accessed October 24, 2009); University of Arizona Southwest Institute for Research on Women and Bacon Immigration Law and Policy Program, *Unseen Prisoners*, sirow.arizona.edu/files/UnseenPrisoners.pdf (accessed October 24, 2009); Women's Refugee Commission and Orrick, Herrington & Sutcliffe LLP, *Halfway Home: Unaccompanied Children in Immigration Custody*, February 2009, www.womensrefugeecommission.org/docs/halfway_home.pdf (accessed October 24, 2009); Florida Immigrant Advocacy Center, *Dying for Decent Care: Bad Medicine in Immigration Custody*, February 2009, www.fiacfla.org/reports/DyingForDecentCare.pdf (accessed January 17, 2010); Human Rights Watch, *Detained and Dismissed: Women's Struggles to Obtain Health Care in United States Immigration Detention*, March 16, 2009, http://www.hrw.org/sites/default/files/reports/wrd0309web_1.pdf (accessed January 17, 2010); Amnesty International, *Jailed without Justice: Immigration Detention in the USA*, March 2009, www.amnestyusa.org/uploads/JailedWithoutJustice.pdf (accessed October 24, 2009); Human Rights First, *U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison*, http://www.humanrightsfirst.org/pdf/090429-RP-hrf-asylum-detention-report.pdf (accessed October 24, 2009); U.S. Office of Inspector General, *Immigration and Custom Enforcement Detention Bedspace Management*, OIG-09-52, April 2009, http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_09-52_Apr09.pdf (accessed January 17, 2010); National Immigration Law Center, American Civil Liberties Union (ACLU) of Southern California, and Holland & Knight, *A Broken System: Confidential Reports Reveal Failures in U.S. Immigrant Detention Centers*, July 2009, www.aclu-sc.org/downloads/55/306323.pdf (accessed January 18, 2010); Human Rights Watch, *Locked Up Far Away*, December 2, 2009, http://www.hrw.org/sites/default/files/reports/us1209web.pdf (accessed January 18, 2010); Human Rights Watch, *Jailing Refugees: Arbitrary Detention of Refugees in the US Who Fail to Adjust to Permanent Resident Status*, December 29, 2009, http://www.hrw.org/sites/default/files/reports/refugees1209webwcover.pdf (accessed January 26, 2010).

suggest ways of finessing the practice of mass immigration detention. The Director of the Immigrant Rights Project at the American Civil Liberties Union of Maryland, Ajmel Quereshi, makes a similar argument as many of the reports.[418] He suggests the Obama administration the termination of Operation Streamline, the suspension of ICE detention quotas, and the reinstitution of the catch and release policy. While these recommendations may decrease the number of aliens in custody, Quereshi does not question why mass immigration detention is necessary or desirable

Some reports come close to questioning the practice of mass immigration detention, but they utilize superficial arguments. Consider *A Broken System*, published in July 2009 by the National Immigration Law Center, the American Civil Liberties Union of Southern California, and the law firm Holland & Knight. The report shows that ICE compliance with its own standards is dismal and makes twenty-five detailed recommendations. *A Broken System* is the most forward among the fourteen reports analyzed in its challenge of mass immigration detention because it calls for a moratorium on the expansion of the immigration detention system. However, it argues that the moratorium should only last until "conditions in immigration detention are dramatically improved."[419] The report *Unseen Prisoners*, published in January 2009 by the University of Arizona also recommends reduction or termination of mandatory detention. However, its authors remain silent about the reasons for this change and this recommendation is buried among more than thirty suggestions. In short, non-governmental organizations'

[418] Quereshi, "Hope for Change," 19.
[419] National Immigration Law Center, American Civil Liberties Union of Southern California, and Holland & Knight, *A Broken System: Confidential Reports Reveal Failures in U.S. Immigrant Detention Centers*, July 2009, www.aclu-sc.org/downloads/55/306323.pdf (accessed January 18, 2010): 74-81.

reports avoid suggesting a reconsideration of the legal and discursive process through which immigrations have been othered as criminals and security threats.

Other reports make a point in suggesting the implementation of ATD schemes. As the proposal of a moratorium on immigration detention, the call for the expansion of ATD programs comes closer to but still falls short of questioning the practice of mass immigration detention. While ATD initiatives such as electronic monitoring and reporting programs take aliens physically outside of the criminal sphere (i.e. detention centers), they will remain ineffective unless they are accompanied by the abolition of mass detention. Only the abolition of mass immigration detention will defuse the criminalizing and securitizing rhetoric. If alternatives to detention are expanded but the practice of mass immigration detention continues, in-custody abuses will continue to occur. The only difference will be that in addition of 32,000 illegal alien detainees, there will be a growing number of illegal aliens under state supervision. But the crisis, which is a product of the massive incarceration of non-criminal aliens and therefore of the criminalization and securitization discourses, will ensue. For this reason, policymakers must implement ATD programs together with the abolition of mass immigration detention.

The websites of immigrant rights advocacy groups or organizations that run campaigns on immigrant rights present a similar picture. Human Rights Watch website states that United States' immigration policies and enforcement procedures violate provisions of international human rights treaties by, *inter alia*, depriving immigration detainees of their freedom from arbitrary detention.[420] Likewise, the American Civil

[420] Human Rights Watch, "Unfair Immigration Policies," http://www.hrw.org/en/united-states/us-program/unfair-immigration-policies (accessed March 2, 2010).

Liberties Union recognizes the government's power to set immigration policy but underscores the importance of defending the rights granted to aliens by the Constitution.[421] A similar case is that of Detention Watch Network, a coalition of organizations that focuses specifically on immigration detention. According to its website, Detention Watch Network runs campaigns to improve detention conditions, to educate communities about detention and deportation issues, and to foster timely response to ICE raids.[422] On February 25, 2010 the Detention Watch Network launched the "Dignity Not Detention: Preserving Human Rights and Restoring Justice" campaign.[423] The initiative focuses in the states of Arizona, Georgia, and Texas, which have seen a drastic expansion in the use of immigration detention in the last years.[424] The objective of the campaign is to defend the values of dignity, human rights and the due process of law. For this reason, it advocates for a reduction in detention spending and a greater availability of ATD programs. As such, the campaign does not question the practice of detention but seeks to make amendments so that immigration detention does not undermine immigrants' dignity, human rights and their right to due process. This strategy is a contradiction in terms because detention is intrinsically punitive and, when fuelled by the paradigms of criminalization and securitization, it greatly undermines all the values that the "Dignity Not Detention" campaign is set to protect. In conclusion, non-governmental organizations advocating detention standards and better conditions of

---

[421] American Civil Liberties Union, "About the ACLU's Immigrants Rights Project," http://www.aclu.org/immigrants-rights/about-aclus-immigrants-rights-project (accessed March 2, 2010).
[422] Detention Watch Network, "Who We Are," http://www.detentionwatchnetwork.org/whoweare (accessed March 2, 2010).
[423] Detention Watch Network, "About the Campaign," *Dignity Not Detention* http://detentionwatchnetwork.org/DND_about (accessed March 26, 2010).
[424] Consider the case of Maricopa County Sheriff Joe Arpaio surveyed in chapter four.

detention are advancing a strategy that is incapable of protecting aliens' rights in the long run.

Having demonstrated that advocates for binding detention standards and immigrant rights advocates do not question the practice of mass immigration detention substantially, it is important to explain the problematic aspects of such stance. First, because they seek to finesse mass immigration detention, binding standards advocates tacitly acquiesce with the massive incarceration of all illegal aliens irrespective of their criminal records. The debate about detention standards forecloses any discussion about the practice of detention itself. Once standards are passed and detention becomes "humane" there is no reason anymore to discuss whether detaining illegal aliens *en masse* is in fact desirable from a human rights perspective. For this reason, advocates acquiescence results in the legitimization of mass immigration detention. Second, the institutionalization of mass immigration detention is problematic because detention is a punitive practice in itself. Although alien detention shall not be punitive in nature, the confinement of aliens' bodies to a limited space and the imposition of prison jumpsuits and shackles are quite punitive practices.

While immigrant rights advocates' support for binding standards has the effect of legitimizing the practice that leads to abuses of aliens' human and constitutional rights, it is important to recognize the positive aspect of advocates' work. Advocates bring relief to those aliens who are currently in custody. Undoubtedly, fair, humane and civil conditions of detention should characterize any detention system. In their endeavor to protect human rights and ameliorate the contractual conditions of detention, advocates must work with the policies that be.

In light of advocates' myopia and the government's paranoia about illegal aliens, this policy analysis seeks an effective way out of the current crisis that respects and protects aliens' rights. That way is to suggest that policy-makers abolish mass immigration detention. As stated above, the problem of alien detention is in-custody rights violations, themselves a product of the effects of the criminalization and securitization discourses. For this reason, to address the root of the problem, policy-makers should terminate mass immigration detention. Ending this practice means discontinuing the incarceration of aliens who pose no serious threat to society. Currently, the majority of illegal aliens must go through the detention system; those who have no criminal records and have economic resources are able to post bond and may be released. Yet, illegal aliens rarely have access to between $5,000 and $10,000, and therefore they must sit in detention.

Terminating mass immigration detention will decouple illegal aliens from the criminal sphere. As chapter four explains, in the case of the 287(g) program, immigration law enforcement generates distrust of the authorities not only among illegal aliens, but also among the immigrant community in general. In a similar way, practices such as mass immigration detention other immigrants and aliens and create fear and distrust. This has two far-reaching results. First, as Engbersen and van der Leun argue, mass immigration detention drives aliens further into the underground.[425] For this reason, ending mass immigration detention becomes an effective strategy to reduce the size of the underground economy and enhance the security of the nation. The second result of mass immigration detention is to fracture the polity by neglecting and othering immigrants and aliens. Needless to say, aliens are not part of the polity, but the immigrant community is.

[425] Engbersen and van der Leun, "Social Construction," 62-64.

In light of this negative effect, ending mass immigration detention becomes, once again, a practical strategy to promote unity, discourage resentment, and defuse social and ethnic tensions.

5.2. Reconsidering Mass Immigration Detention Will Prevent Abuses of Asylum Seekers, Refugees and Citizens

The second reason why it is imperative that policy-makers reconsider the practice of detention is that asylum seekers, refugees, and United States citizens are often trapped in the detention net. The detention, and in some cases deportation, of these groups of people is not only regrettable and concerning, but also paradoxical. It is the state turning against its own citizens and vulnerable displaced individuals.

In the last years, asylum seekers have become a significant population group and the United States detains a significant number of them every year. According to the statistics published by DHS, the number of individuals granted asylum increased from 8,472 in 1990 to 22,930 in 2008. Asylum seekers are individuals who have suffered or fear suffering persecution in their home countries due to race, religion, nationality, political opinion, or membership in a particular social group, and are physically present in the United States when asking for protection.[426] This indicates that those asylum

[426] U.S. Citizenship and Immigration Services, "Asylum," http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=f39d3e4d77d73210VgnVCM100000082ca60aRCRD&vgnextchannel=f39d3e4d77d73210VgnVCM100000082ca60aRCRD (accessed March 4, 2010). See also the Convention relating to the Status of Refugees of 1951. According to the Convention, a refugee is a person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality, and is unable to, or owing to such fear, is unwilling to avail himself of the protection of that country." United Nations General Assembly, *Convention relating to the Status of Refugees*, (July 28, 1951) United Nations Treaty Series 189, 137, Article 1.

seekers who arrive without valid documents, without a visa, or who miss the one-year deadline to file a petition for asylum, are at great risk of being detained.

In a context of expanding alien detention, asylum seekers have also become victims of the criminalization and securitization paradigms. The government detains asylum seekers in different ways. One of these ways is at ports of entry. Between 2007 and 2008, DHS detained 6,310 asylum seekers attempting to enter the United States.[427] This elevated number is due to expedited removal. Recall from chapter two that the government created this summary deportation proceeding in 1996 and broadened its reach in the aftermath of the September 11, 2001 events.[428] Under expedited removal, aliens arriving to the United States without proper documents must be summarily deported. However, the principle of *non refoulment* prohibits the United States from returning asylum seekers to their home countries if they fear persecution.[429] For this reason, asylum seekers are placed in mandatory detention until an Asylum Officer or Immigration Judge determines that they have a "credible fear of persecution" and allows them to apply for parole. Another way in which asylum seekers are detained is in the interior of the country. In many cases asylum seekers overstay their visas or do not meet the one-year deadline to file the asylum application. Unfortunately, the data on the

---

[427] The figures are provided by the Asylum Office Headquarters. In 2004, 7,421 asylum seekers were placed in mandatory detention (See United States Commission on International Religious Freedom, *Report on Asylum Seekers in Expedited Removal*, February 8, 2005, http://www.uscirf.gov/index.php?option=com_content&task=view&id=1892 (accessed March 3, 2010). 8,469 asylum seekers were detained in 2005, 1,311 were detained in 2006, 3,182 were detained in 2007, and 3,128 were detained in 2008 (See Human Rights First, *U.S. Detention of Asylum Seekers*, April 29, 2009, www.humanrightsfirst.org/pdf/090429-RP-hrf-asylum-detention-report.pdf (accessed April 8, 2010), note 52.)

[428] On November 13, 2002 the INS expanded expedited removal to apply to undocumented non-Cubans who had entered the United States by sea in the previous two years. On August 11, 2004 the DHS announced that it had expanded expedited removal to cover undocumented aliens apprehended within 100 miles of the border who had entered in the previous fourteen days. See *Federal Register* 69, no 154, (2004): 48, 877.

[429] United Nations General Assembly, *Convention relating to the Status of Refugees*, (July 28, 1951) United Nations Treaty Series 189, 137, Article 33.

detention of asylum seekers is incomplete. Under the Haitian Refugee Immigration Fairness Act of 1999, Congress requested ICE to release statistics about the detention of asylum seekers.[430] However, the agency has not provided all the information required. The data available are only about the detention of a category of asylum seekers, called affirmative asylum seekers.[431] According to these, the government detained 487 affirmative asylum seekers in 2006 and 254 in 2007.[432]

Besides asylum seekers, the immigration detention system also places a significant number of refugees in custody. The difference between asylum seekers and refugees has to do with the location of the individual at the time he or she seeks protection. Contrary to asylum seekers, refugees apply for protection outside of the United States. If the government considers that they face or fear persecution and if they are admissible under immigration law, refugees are allowed to travel to and reside in the United States.[433] Although it seems that refugees' situation is more secure than that of asylum seekers, a December 2009 report by Human Rights Watch shows that the government detains a significant number of them.[434]

A variety of reasons make refugees victims of unnecessary detention. First, there is a legal inconsistency. On the one hand, the law mandates the detention of refugees who

---

[430] *Haitian Refugee Immigration Fairness Act of 1999*, Public Law 105-277, U.S. Statutes at Large 112 (1999): 2681-541.

[431] Affirmative asylum is one of two ways of obtaining asylum in the United States. The other path is defensive asylum. Defensive asylum occurs when an asylum seeker files his or her application during removal proceedings.

[432] Human Rights First, *U.S. Detention of Asylum Seekers*, April 29, 2009, www.humanrightsfirst.org/pdf/090429-RP-hrf-asylum-detention-report.pdf (accessed April 8, 2010), note 53 and 54.

[433] United States Citizenship and Immigration Service, "Refugee," http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=385d3e4d77d73210VgnVCM100000082ca60aRCRD&vgnextchannel=385d3e4d77d73210VgnVCM100000082ca60aRCRD (accessed March 4, 2010).

[434] Human Rights Watch, *Jailing Refugees: Arbitrary Detention of Refugees in the US Who Fail to Adjust to Permanent Resident Status*, December 29, 2009, http://www.hrw.org/sites/default/files/reports/refugees1209webwcover.pdf (accessed January 26, 2010)

do not adjust their status to permanent residents one year after arriving to the United States in order to reassess their immigration status.[435] On the other hand, the law prohibits refugees from applying for permanent residence before being physically present in the country for a year.[436] This legal inconsistency is paradoxical, as is the fact that those who flee persecution and unrest are placed in detention. Second, recent government policies related to refugees' adjustment of status have increased the grounds for detention. Notwithstanding recent reforms, the government stated that section 209(a) of the Immigration and Nationality Act (INA) "not only allows…detention, it mandates it."[437] This indicates the intention to mandate the detention of refugees who fail to adjust their status to legal permanent residents within the one-year deadline. In addition, a memorandum issued on November 10, 2009 by the Phoenix (AZ) ICE Field Office indicates the tightening of immigration law enforcement. According to Field Office Director Katrina Kane, refugees may be placed in removal proceedings before they have a chance of applying for a green card.[438] Third, refugees have the disadvantage of not knowing the particulars of immigration laws. In fact, the interviews Human Rights Watch conducted at detention facilities in Arizona and Pennsylvania revealed unawareness among refugees of need to adjust their immigration status to legal permanent residence within a year of residing in the United States. Coupled with refugees' unawareness of the intricacies of the United States immigration laws, recent policies and perverse legal

---

[435] Immigration and Nationality Act, § 209; 8 U.S.C. 1159(a)(1).
[436] 8 C.F.R. § 209.1
[437] Brief for Respondents at 4, ¶ 13-14, *Dong v. Holder*, No. 09-01594 (D. Ariz., August 29, 2009) qtd. in Human Rights Watch, *Jailing Refugees*, 8.
[438] Katrina S. Kane, Field Office Director, Immigration and Customs Enforcement, Department of Homeland Security, qtd. in Human Rights Watch, *Jailing Refugees*, 3.

inconsistencies lead to their arbitrary detention. Such detention places refugees at risk of mistreatment and human rights abuses.

On January 4, 2010, ICE enacted new parole guidelines meant to benefit asylum seekers.[439] While the changes were positive, they reflect the sorry nature of existent policies. Under the new rules, aliens who arrive in the United States and are found to have a credible fear of persecution will be automatically considered for parole. In addition, the new policy specifies the meaning of "public interest," an essential term in the determination of whether aliens can be paroled. Although these changes may reduce the number of asylum seekers who are detained for not having proper documents, many asylum seekers and refugees continue to be detained in prison-like facilities. As a consequence they face overcrowding, lack of medical treatment, inability to obtain outside help and uncertainty.

Besides asylum seekers and refugees, another case in point is that of United States citizens in deportation detention. This paradoxical fact proves that the widespread use of detention leads to the unfortunate reality of the state turning against its own citizens. The fact that citizens are being detained and deported proves that mass detention is a faulty strategy to deal with illegal immigration. In fact, taxpayers' dollars are put to use not to ensure that serious criminal aliens leave the country but to incarcerate and remove citizens, victims of persecution and non-criminal aliens. An unpublished study by the Vera Institute of Justice shows that in 2006 there were 125 individuals in immigration

---

[439] U.S. Immigration and Customs Enforcement, "ICE Issues New Procedures for Asylum Seekers as Part of Ongoing Detention Reform Initiatives," December 16, 2009, http://www.ice.gov/pi/nr/0912/091216washington.htm (accessed March 3, 2010); U.S. Immigration and Customs Enforcement, "Revised Parole Policy for Arriving Aliens with Credible Fear Claims," December 16, 2009, http://www.ice.gov/pi/news/factsheets/credible-fear.htm (accessed March 3, 2010).

custody whose attorneys believed had valid claims to United States citizenship.[440] In February 2008 the American Civil Liberties Union released a statement calling on ICE to terminate the deportation of United States citizens.[441] The same month, Gary E. Mead, Deputy Director of the Office of Detention and Removal Operations of ICE acknowledged in a statement before the House Committee on the Judiciary that in some cases individuals who have claims to citizenship have been detained.[442] Deputy Director Mead referred to the study by the Vera Institute of Justice and claimed that detention of citizens could only occur when ICE was unable to validate their claims.[443] The scandal of United States nationals being deported reached such proportion that on September 25, 2009, Senator Robert Menendez (D-NJ), introduced a bill to end the removal of citizens. The bill, titled "Protect Citizens and Residents from Unlawful Raids and Detention Act" (S.3594) died and was reintroduced on July 30, 2009 (S. 1549).

A significant problem affecting immigration detainees is that, because detention is administrative, they have fewer rights and due process protections than criminal detainees. For instance, they must procure themselves legal advice at no cost to the government. Because they are often subjected to limited visiting hours and are held in facilities far from their homes, it is hard for detainees to find, hire and in many cases pay for attorneys. It is also hard for citizens to procure the documents they need to prove their claims to citizenship. In fact, while the burden of proof falls with ICE for arrests in the

---

[440] Marissa Taylor, "Immigration Officials Detaining, Deporting American Citizens," *McClatchy Newspapers*, January 24, 2008, http://www.mcclatchydc.com/227/story/25392.html (accessed January 18, 2010).
[441] States News Service, "ACLU Demands ICE Ends Illegal Deportation of U.S. Citizens," February 13, 2008.
[442] Gary E. Mead, Committee on Immigration, Citizenship, Refugees, Border Security and International Law, *Problems with ICE Interrogation, Detention and Removal Procedures*, February 13, 2008, http://judiciary.house.gov/hearings/pdf/Mead080213.pdf (accessed January 18, 2010).
[443] Mead, *Problems with ICE Interrogation*.

interior of the country, the agency's effort to prove citizenship is limited. As Deputy Director Mead explained, ICE only searches the detainee's file and relevant databases. Yet, in many cases this search produces no results, even when the person in question is a citizen.

It becomes evident that a reconsideration of the use of immigration detention as an immigration control policy is necessary. Asylum seekers and refugees arrive to the United States escaping persecution, torture, prolonged incarceration, and war. They often lack command of the English language, economic resources, and knowledge of the immigration laws. The government's policies mandating detention further and deepen aliens' vulnerability. Regrettably, the use of detention leads to the paradoxes of the incarceration of those who are fleeing persecution and the incarceration of citizens themselves.

5.3. Reconsidering Mass Immigration Detention Will Subdue Its Lasting Psychological Consequences

In addition to the unnecessary incarceration of asylum seekers, refugees, and citizens, the practice of immigration detention has lasting consequences on detainees' psyche. Most of the research about this issue focuses on refugees and asylum seekers, who are a significantly vulnerable populations. Consider that they are driven out of their home countries because of their political ideas, nationality, religious beliefs, or membership in particular social groups. Many of them are victims of torture, abuses, arbitrary arrests and detentions. It is concerning that the government to which they turn seeking protection incarcerates them, sometimes for unclear legal reasons for an

undisclosed duration in remote facilities. Because of their vulnerability, and the nature of confinement, immigration detention has been proven to have lasting psychological impacts.

The majority of the research about the effects of immigration detention on detainees has taken place in Australia and the United Kingdom. It is true that immigration detention systems are not comparable across countries. Although Australia enacted a policy of mandatory detention of asylum seekers, detention lasts between two and seven years and occurs in specific detention centers, some of which are offshore.[444] In fact, researchers argue that the severity of Australia's immigration detention system is unparalleled when compared to that of other developed countries.[445] Nevertheless, because of the lack of data on the United States, this section considers research in the United Kingdom and Australia.

Research in Australia shows that immigration detention has a harmful impact on asylum seekers' psyche and that it undermines their precarious mental health.[446] As victims of persecution who fled their countries, asylum seekers are a traumatized population.[447] Immigration detention exacerbates their trauma. Detention has harmful

---

[444] Pauline McLoughlin and Megan Warin, "Corrosive Places, Inhuman Spaces: Mental Health in Australian Immigration Detention," *Health & Place*, 14 (2008), 254, 255.
[445] McLoughlin and Warin, "Corrosive Places," 255; Derrick Silove, "Mental Health of Asylum Seekers: Australia in a Global Context," in *The Health of Refugees: Public Health Perspectives from Crisis to Settlement*, ed. Pascale Allotey, 68-82. (South Melbourne, Vic: Oxford University Press, 2003).
[446] Derrick Silove and Zachary Steel, "The Mental Health and Well Being of On-Shore Asylum Seekers in Australia," *Psychiatry Research and Teaching Unit*, 1998, www.safecom.org.au/pdfs/zachary-steel-report.pdf (accessed March 7, 2010); Zachary Steel, Derrick Silove, Robert Brooks, Shaheh Momartin, Bushra Alzuhairi and Ina Susljik, "Impact of Immigration Detention and Temporary Protection on the Mental Health of Refugees," *British Journal of Psychiatry* 188 (2006): 58-64; Derrick Silove, Patricia Austin, and Zachary Steel, "No Refuge From Terror: The Impact of Detention on the Mental Health of Trauma-affected Refugees Seeking Asylum in Australia," *Transcultural Psychiatry* 44, no. 3 (2007): 359-393; Leslie F. Koopowitz and Sotoodeh Abhary, "Psychiatric Aspects of Detention: Illustrative Case Studies," *Australian and New Zealand Journal of Psychiatry* 38 (2004): 495-500; McLoughlin and Warin, "Corrosive Places," 255; Silove, "Mental Health of Asylum Seekers," 68-82.
[447] Silove and Steel, "Mental Health and Well Being of On-Shore Asylum Seekers," 4.

effects on adults, families and children. It leads to post-traumatic stress disorder, depression, mental health-related disability, and self-harm and suicidal behavior. Detention also disrupts family unity and causes illness of parents, and the reversal of family roles, whereby children have to look after their parents. Detention also results in emotional disturbances in children such as incontinence and food refusal. In addition, these effects have proven to be prolonged and to last for several years after the person is released into the community. In fact, Leslie Koopowitz and Sotoodeh Abhary argue that the effects of immigration detention are comparable to the psychological consequences of detention during the last apartheid government in South Africa.[448]

Research in the United Kingdom shows similar results as that in Australia. A recent article by Katy Robjant, Ian Robbins, and Victoria Senior suggests that immigration detention further increases the psychological stress of asylum seekers.[449] The researchers compared levels of depression, anxiety and post-traumatic stress disorder between a group of detained asylum seekers, a group of asylum seekers who had been previously detained for criminal offenses, and a group of asylum seekers who were not in detention. The study revealed that detained asylum seekers had higher levels of depression, anxiety and post-traumatic stress disorder than the other groups.

In the United States, Physicians for Human Rights and the Bellevue/NYU Program for Survivors of Torture studied the health of asylum seekers in detention. The report, titled *From Persecution to Prison* was released in June 2003. It evaluates the health status of 70 asylum seekers detained at two immigration detention centers and

---

[448] Koopowitz and Abhary, "Psychiatric Aspects of Detention," 495-500.
[449] Katy Robjant, Ian Robbins, and Victoria Senior, "Psychological Distress amongst Immigration Detainees: A Cross-sectional Questionnaire Study," *British Journal of Clinical Psychology*, 48 (2009): 275-286.

county jails in the states of New York, New Jersey, and Pennsylvania. Considering that the United States detained more than three thousand asylum seekers in 2008, a study of only 70 individuals is not statistically significant. Nevertheless, it echoes the findings of researchers in Australia and the United Kingdom. The Physicians for Human Rights' report found "extremely high symptom levels of anxiety, depression and post-traumatic stress disorder among detained asylum seekers."[450] The researchers also surveyed the availability of health care and the conditions of detention. They conclude "in order to promote the health and well-being of asylum seekers, they should not be imprisoned."[451] This coincides with the overall argument of this thesis: the most effective way to prevent violations of illegal aliens' rights is to reconsider detention.

Immigration detention is detrimental to detainees' mental health. It exacerbates their fears of being deported and makes it difficult for them to resettle and leave their traumatic experiences behind. It may be said that the case of illegal aliens is different because they are not escaping torture or persecution. In reality, undocumented aliens face significant insecurities that make them vulnerable. Some left everything behind when they moved to the United States. Others entered the United States several years ago and do not have any support network in their home countries. Others have spouses or children in the United States and fear being separated. Detention exacerbates these anxieties and drives illegal aliens deeper into the shadow of illegality. Recall that detention fuels the criminalization discourse. Due to its reflexive nature, criminalization has a long-lasting impact on alien detainees' identities. Because the perverse psychological impact is a

---

[450] Physicians for Human Rights and Bellevue/NYU Program for Survivors of Torture, *From Persecution to Prison*, June 2003, http://physiciansforhumanrights.org/library/documents/reports/report-perstoprison-2003.pdf (accessed March 7, 2010), 1.
[451] Physicians for Human Rights and Bellevue/NYU Program for Survivors of Torture, *From Persecution to Prison*, 17.

result of detention, neither non-binding nor binding detention standards will mitigate it. As long as asylum seekers, refugees, and illegal aliens are indiscriminately detained, they will continue to be vulnerable to the perverse long-term effects of detention. For this reason, it is imperative that policy-makers reconsider the practice of immigration detention.

5.4. Reconsidering Mass Immigration Detention Will Reduce Cost to Taxpayers

Thus far, this chapter has argued that the government must reconsider the use of detention as an immigration control policy for three reasons. First, it is necessary to move beyond the short-term strategies that advocates for binding detention standards promote. In other words, binding standards are not a long-lasting remedy to ongoing human rights abuses of alien detainees but only a temporary fix. Second, the practice of detaining undocumented aliens casts its net over asylum seekers, refugees and citizens. Third, immigration detention has an adverse impact on detainees' mental health. This section presents a fourth argument in favor of discontinuing the use of immigration detention and returning to pre-1996 immigration policies. The following paragraphs demonstrate that policy makers should reconsider detention because the practice is costly to taxpayers. Immigration detention is an unnecessary expenditure in the case of non-criminal detainees, asylum seekers and refugees, and it is more expensive than ATD. Before the analysis, it is important to underscore that the economics of immigration and immigration detention are extensive fields of research. Because advocates and experts often use diverse sets of data from different years, this section relies solely on official data when possible. Third-party reports are used only when they are based on ICE's figures or when

there is consensus and there are no official figures available. The argument that, because of its high cost, the government should reconsider the practice of detention has two parts.

In first place there is the cost of detention proper. According to a National Immigration Forum study, the daily cost per alien detainee is $141 dollars.[452] This includes the renting of bed space and ICE operational expenses. However, according to Dr. Schriro's October 2009 report, the per diem rate of $141 does not account for certain costs of detention.[453] For instance, one of these costs is the medical care that the Division of Immigration Health Services (DIHS) provides. The annual cost of immigration detention is even more alarming than the per diem rates. Multiplying $141 times the daily number of detainees, which on September 1, 2009 was 31,075, the annual cost to taxpayers of immigration detention is $1.5 billion dollars. In fact, ICE's budget for custody operations in 2010 is $1.77 billion dollars. The historical evolution of ICE's detention budget is also dismal.[454] ICE's budget for custody operations has doubled between 2003 and 2010.[455]

The dollars that taxpayers spend in detaining asylum seekers, refugees, and criminal and non-criminal aliens were a salvation for private prison operators. According to Michele Deitch, an expert on prison privatization, the federal government rescued the

---

[452] National Immigration Forum, "The Math of Immigration Detention," *Backgrounder*, July 7, 2009, http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf (accessed March 9, 2010).
[453] Schriro, *Immigration Detention Overview*, 11.
[454] Unlike other aspects of immigration detention, detailed information about ICE's budget is available for the past five years. See U.S. Immigration and Customs Enforcement, "Fact Sheets," http://www.ice.gov/pi/news/factsheets/index.htm (accessed March 8, 2010).
[455] The dollar figures are expressed in 2010 dollars. The figures ICE provides for detention operations since 2005 are the following in billions of dollars [current dollars (2010 dollars)]: Fiscal year 2010: $1.77; fiscal year 2009: $1.72 ($1.74); fiscal year 2008: $1.65 ($1.66); fiscal year 2007: $1.38 ($1.45); fiscal year 2006: $1.16 ($1.25); and fiscal year 2005: $0.86 ($0.96). See U.S. Immigration and Customs Enforcement, "Fact Sheets;" National Immigration Forum, "Math of Immigration Detention," 1.

industry from bankruptcy in the late 1990s.[456] For the government, economic incentives are the reasons why private facilities are attractive.[457] The two main firms in this field are the Corrections Corporation of America (CCA) and the Wackenhut Corporation, now called the GEO Group. ICE, the United States Marshals Service, and the Bureau of Prisons have contracts with them. Each firm earns over ten percent of its revenue from contracts with ICE.[458] In 2009, motivated by the lower cost of detaining aliens in private facilities, the government moved to completely privatize immigration detention. Its argument was based on economic incentives and the fact that ICE only owns and operates eight facilities. The Senate allowed ICE to complete privatization.[459] However, the House of Representatives rejected the project on the grounds that ICE needs to demonstrate an ability to adequately provide for medical care and effectively supervise its facilities.[460] The final Department of Homeland Security Appropriations Act of 2010 establishes that ICE shall not continue contracts with private facilities if in the last two evaluations these receive a score of less than "adequate."[461] The Act also stipulates that there will be no less than 33,400 detention beds until September 2010.[462] While Congress did not allow ICE to fully privatize immigration detention, ICE's attempt to sell its Service Processing Centers suggests that economics trumps concern about conditions of detention and monitoring of immigration detention facilities. In short, immigration detention is

---

[456] Michele Deitch, qtd. in Leslie Bernstein, "Tougher Immigration Laws Turn the Ailing Private Prison Sector into a Revenue Maker," *San Diego Union-Tribune*, May 4, 2008.
[457] Michele Deitch reported that while ICE spends $119.28 dollars per day per detainee, private prisons charged $87.99 dollars. Michele Deitch, qtd. in Bernstein, "Tougher Immigration Laws."
[458] National Immigration Forum, "Math of Immigration Detention," 1.
[459] H.R. 2892 [Engrossed Amendment as Agreed to by Senate], July 9, 2009, 73.
[460] H.R. 2892 [Report No. 111-157], June 16, 2009, 20.
[461] *Department of Homeland Security Appropriations Act 2010*, Public Law 111-83, U.S. Statutes at Large 123 (2009), 2149.
[462] *Department of Homeland Security Appropriations Act 2010*, Public Law 111-83, U.S. Statutes at Large 123 (2009), 2142, 2149.

undeniably an expensive practice. In 2010, taxpayers are footing a bill of $1.77 billion dollars to incarcerate non-criminal illegal aliens. Are there any alternatives?

5.5. Beyond Mass Immigration Detention

The analysis above established that in light of the high humanitarian and economic cost of mass immigration detention, and because this practice creates distrust of the government among the immigrant community, fractures the nation, and exacerbates ethnic tensions, policy-makers should dismantle mass immigration detention. Yet, this policy-analysis would not be complete if it remained silent about the way forward after mass immigration detention. For this reason, this last section argues that, together with the abolition of mass immigration detention, policy-makers should enhance and expand alternative to detention programs. Recall from section 5.1. that the use of ATD must be a substitute and not a complement of mass immigration detention.

While criminalization and securitization have lent support to the idea that illegal aliens are criminals and pose a threat to the nation, immigration detention statistics offer a different picture. Consider the figures that Dr. Schriro provides in her report about immigration detention: of the total number of detainees, 31,075 in September 1, 2009, 49 percent were not criminals, and of the remaining 51 percent, only 11 percent were serious criminals, namely aliens who committed UCR Part 1 crimes such as murder.[463] For this reason, once mass immigration detention is abolished, ICE could monitor practically half of its detainees through ATD schemes.

[463] Schriro, *Immigration Detention Overview*, 6.

Currently, there are three ATD programs.[464] Intense Supervision Appearance Program (ISAP) is privately run and consists of an arrangement of telephonic reporting, radio frequency and global positioning tracking, unannounced home visits, curfew checks, and employment verification. Enhanced Supervision Reporting (ESR), also privately run, is less restrictive and less costly. Electronic Monitoring (EM) is operated by ICE and relies on telephonic reporting, radio frequency and global positioning tracking. The use of ATD is more humane than incarceration and economically more attractive. Although official figures for the per capita costs of each program are not available, experts argue that the daily per capita cost is between $12 and $22 dollars.[465] This means that ATD programs cost approximately one tenth of immigration detention.

Consider the advantage in using ATD for asylum seekers vis-à-vis detention. The last available comprehensive statistics related to the detention of asylum seekers are for fiscal year 2006. That year, ICE detained 487 asylum seekers who asked for protection after entering the United States (affirmative asylum), 257 asylum seekers who had met the credible fear interview, and 5,017 persons who asked for asylum after being detained for immigration violations (defensive asylum). Recall that defensive asylum means that the person asks for asylum after he or she has been placed in removal proceedings. The average stay for affirmative asylum applicants was 46.9 days, for those who had had the

---

[464] Schriro, *Immigration Detention* Overview, 20.

[465] The Detention Watch Network argues that alternatives to detention programs cost $12 dollars per night. In her testimony before Congress, Michelle Barné from the Women's Commission for Refugee Women and Children, asserted that these programs cost $22 dollars per person per day. Dr. Schriro indicated in her October 2009 report that, as with the cost of detention, the figures for ATD programs do not include the cost of ICE personnel monitoring ATDs or the costs of fugitive operations activities. See Detention Watch Network, "About the U.S. Detention and Deportation System," http://www.detentionwatchnetwork.org/aboutdetention (accessed March 9, 2010); Michelle Barné, Subcommittee on Border, Maritime, and Global Counterterrorism, *Crossing the Border: Immigrants in Detention and Victims of Trafficking*, 110th Cong., 1st sess., March 15, 2007, www.womensrefugeecommission.org/docs/detention%20test%20dhs.pdf (accessed March 9, 2010), 8; Schriro, *Immigration Detention Overview*, 11.

credible fear interview it was 48.1, and for those who had defensive asylum cases it was 109.1 days. Multiplying the number of applicants that were eventually granted asylum by the daily cost of detention, it is possible to calculate the total cost of detaining asylum seekers in a particular year. In fiscal year 2006, the taxpayers paid $18 million dollars to detain asylum seekers. One important caveat about this calculation is that the data for asylum seeker detention are from 2006 and that the figure for the cost of detention ($141 per capita, per day) are for 2009. Notwithstanding this mismatch, it is clear that taxpayers spent a significant amount of their money to incarcerate asylum seekers. Using the highest imputed daily cost of ATD of $22 per person, had the government allowed these asylum seekers to participate in one of these programs, taxpayers would have only spent $2.9 million dollars. The use of detention rather than ATD programs cost the taxpayers an extra $15 million dollars. While these calculations may be deemed inaccurate due to the lack of up to date information, what matters is the message they convey. In brief, the use of immigration detention instead of alternatives to detention is costly and, in the case of asylum seekers and non-criminal aliens, it is a misuse of tax dollars.

While current ATD programs have humanitarian and economic advantages, they face three significant limitations: lack of funding, technical limitations, and the unwillingness on the part of DHS to expand these schemes. In terms of funding, the distribution of resources between detention operations and ATDs schemes is staggering.[466] For fiscal year 2010, while DRO allocated 69.4 percent of its budget to detention operations, the agency allotted only 2.5 percent to ATD programs. It may be said that because ATD schemes and alien detention have different per capita costs, the allocation of resources will per force be uneven. Yet, it is clear that ATD programs are

[466] U.S. Immigration and Customs Enforcement, "Fact Sheets."

not a priority for ICE in terms of funds allocation. In fact, such eschewed allocation of economic resources has repeated itself ever year since 2005. For fiscal year 2005, DRO allocated only 1 percent of its budget to ATD.

Because of funding limitations, ATD programs suffer from technological limitations. In fact, two of the three ATD programs are only available within a limited distance from ICE's twenty-four field offices. As Dr. Schriro indicates in her October 2009 report, ISAP and ESR are available only within a fifty to eighty-five mile radius from field offices.[467] For this reason, EM is the only scheme available to aliens who live beyond such radii. Yet, EM can accommodate only 5,000 aliens per day. For this reason, if policy-makers are to end mass immigration detention and turn instead to ATD programs, they will have to allocate more funding to enhance the existent programs and increase the number of aliens who can participate.

In addition to economic and technological limitations, DHS attitude constrains the use of ATD programs. Although DHS and ICE have vowed to expand ATD, their deeds indicate that the agencies are reluctant to do so. DHS failed to meet the deadline of January 5, 2009 for submitting a plan to implement ATD nationwide, as the DHS Appropriations Act for 2009 required.[468]For this reason, in its June 2009 report on DHS appropriations for fiscal year 2010, the House of Representatives expressed concern that the agency had failed to implement ATD schemes nationwide.[469] Thus, ICE included the development of a strategy to implement ATD nationwide in the reforms announced in

---

[467] Schriro, *Immigration Detention Overview*, 20.
[468] *Consolidated Security, Disaster Assistance, and Continuing Appropriations Act*, Public Law 29, 110th Cong., 2nd sess., (Sept. 30, 2008), 54.
[469] H.R. 2892 [Report No. 111-157], June 16, 2009, 54.

August 2009.[470] Yet, the agency has not taken any concrete steps. In light of DHS and ICE's failure act, Congress required that the agencies make ATD nationally available to illegal aliens in the 2010 Appropriations Act for DHS, yet this time Congress did not set a deadline.[471] Although the politics of ATD are beyond the scope of this thesis, DHS's reluctance to expand these programs is clear. The criminalization and securitization discourses help understand such reluctance, which is puzzling at first because ATD are convenient from economic and humanitarian perspectives. It is for this reason that the development of ATD must be accompanied by the termination of mass immigration detention.

Because on September 1, 2009 there were 19,160 aliens participating in ATD programs, it may be argued that three aforementioned obstacles are not significant. Nonetheless, if policy-makers were to make ATD available to all non-criminal detainees, they would have to roughly double the current capacity of the programs. Consider the following: According to Dr. Schriro, forty-nine percent of the 31,075 aliens who were in ICE custody on September 1, 2009 were not criminals. That translates as approximately 15,226 aliens who could have been enrolled in an ATD program. This calculation does not include aliens who have minor crimes or minor misdemeanors. Again, recall that only eleven percent of the aliens who were in detention on September 1, 2009 had been found guilty of serious crimes. For this reason, if policy-makers abolish mass immigration detention, DHS must at least double the capacity of ATD schemes. Currently, the number of aliens who can participate in those programs remains limited: ISAP has a capacity for

[470] U.S. Immigration and Customs Enforcement, "2009 Detention Reform."
[471] *Department of Homeland Security Appropriations Act 2010*, Public Law 111-83, U.S. Statutes at Large 123 (2009), 2142, 2149.

6,000 aliens per day, ESR for 7,000, and EM for 5,000.[472] Notably, while the daily capacity is 18,000 aliens, Dr. Schriro stated in her report that on September 1, 2009 there were 19,160 aliens on ATD programs. This discrepancy suggests that the lack of accurate information, a negative outcome of ICE's decentralized structure, or the fact that the system is overwhelmed and needs expansion.

This concluding section has argued that, once policy-makers abolish mass immigration detention, the use of ATD is the way forward. It has also suggested that the termination of mass immigration detention is inseparable of ATD. Unless non-criminal illegal aliens and aliens with minor misdemeanors, for which they have already paid, are taken out of the criminal sphere, American taxpayers will continue funding a practice that leads to human rights violations and to the incarceration of vulnerable populations and citizens. This will be the case because detention reinforces the criminalization and securitization paradigm: the higher the number of illegal aliens in detention, the more dangerous they seem. For this reason, the termination of mass immigration detention is fundamental to dismantle the criminalization and securitization logics.

While policy-makers must spearhead the change in immigration detention policies, human right advocates and civil society in general will play a fundamental role. In the path towards the abolition of mass immigration detention immigrant advocates and civil society are fundamental in changing the public perception of illegal aliens. In this respect, campaigns that emphasize the positive impact of immigration on the United States are fundamental. A concrete example of this sort of action is The Advocates for Human Rights' campaign *Energy of a Nation*, which emphasizes the contributions of

[472] Schriro, *Immigration Detention Overview*, 20.

immigrants to the United States.[473] Utilizing this type of argument, advocates will facilitate the work of policy-makers by emphasizing the benefits of abolishing mass immigration detention. For instance, the facts that criminalization and securitization drive illegal aliens deeper into the underground and the informal sector and that mass immigration detention other illegal aliens and ostracizes the immigrant community, thus fracturing the nation. Although illegal aliens are different from legal immigrants, a change in public opinion favorable to immigrants will help de-criminalize illegal aliens.

Yet, because, as Mertus indicates non-governmental organizations remain outside of the real of policy-making and implementation, policy-makers must take the crucial step of ending mass immigration detention, which is the most effective strategy to protect illegal aliens' human and constitutional rights. Recall that chapter one utilized Mertus's analysis to explain the limited impact of international human rights norms on immigration detention policies and practices in the United States. Although Mertus is concerned principally with United States foreign policy, her analysis is compelling and relevant to this thesis. In her book *Bait and Switch*, she argues that human rights norms matter, and that although American exceptionalism has limited their impact on foreign policy, due to the work of civil society human rights remains a rhetorically available framework in the United States.[474] While Mertus recognizes the importance of human rights advocates and civil society in protecting human rights ideas, she acknowledges that those groups face a "Sisyphean struggle" and will triumph only when human rights

---

[473] The Advocates for Human Rights, *Talking Immigration*, 2008, http://www.energyofanation.org/sites/25e1f498-741c-478a-8a08-aa486d8533a5/uploads/Talking_Immigration_2010.pdf (accessed April 24, 2010).
[474] Mertus, *Bait and Switch*, 17.

become embedded in United States' interests, ideas and expectations.[475] Thus, civil society has an important role in supporting policies that terminate mass immigration detention. Nonetheless, unless policy-makers introduce changes, immigrant rights advocates will continue to roll their boulder up the cliff day in and day out.

As the conclusion to this thesis, this chapter identified four reasons why policy makers ought to reconsider the practice of immigration detention. First, the strategy of seeking binding standards is not likely to solve the problems that immigration detention creates in terms of the mistreatment of detainees. Second, the practice of immigration detention is undesirable because it is harmful to asylum seekers, refugees, and even United States citizens. Third, immigration detention has negative lasting consequences on detainees' mental health and nurtures the criminalization complex. Fourth, because approximately half of the detention population is not criminal, detention is economically unwise and costly compared to its alternatives. Since the Obama administration took office, a breeze of change has begun to blow. The immigration agencies have acknowledged some of the issues besetting the immigration detention system and have promised change. Policy makers now have the challenge and the opportunity to solve the problems that cloud immigration detention. After twelve years of false starts, a good way to begin would be with the question: Why mass immigration detention?

[475] Mertus, *Bait and Switch*, 208.

Bibliography

Advocates for Human Rights, The. *Talking Immigration*. 2008. http://www.energyofanation.org/sites/25e1f498-741c-478a-8a08-aa486d8533a5/uploads/Talking_Immigration_2010.pdf (accessed April 24, 2010).

Albrecht, Hans-Jörg. "Fortress Europe? Controlling Illegal Immigration." *European Journal of Crime, Criminal Law and Criminal Justice*, 10 no 1 (2001): 1-22.

American Civil Liberties Union. "About the ACLU's Immigrants Rights Project." http://www.aclu.org/immigrants-rights/about-aclus-immigrants-rights-project (accessed March 2, 2010).

——. "DHS Plan to Improve Immigration Detention and Close Hutto Facility a Good First Step." *States News Service*, August 6, 2009.

——. "DHS Plan to Improve Immigration Detention an Encouraging Step." *States News Service*, October 6, 2009.

American Civil Liberties Union of Massachusetts. *Detention and Deportation in the Age of ICE*. December 2008. http://www.aclum.org/ice/documents/aclu_ice_detention_report.pdf (accessed October 24, 2009).

American Society of International Law "US Detention of Aliens in the Aftermath of September 11 Attacks." *The American Journal of International Law* 96, no 2 (2002): 470-475.

Amnesty International. "Amnesty International Encouraged by Secretary Napolitano's Decision to Identify New Detention Practices." October 6, 2009.

——. *Jailed Without Justice: Immigration Detention in the USA*. http://www.amnestyusa.org/uploads/JailedWithoutJustice.pdf (accessed May 19, 2009).

——. *Migration-Related Detention: A Research Guide on Human Rights Standards Relevant to the Detention of Migrants, Asylum-Seekers and Refugees*. November 1, 2007. http://www.amnesty.org/en/library/asset/POL33/005/2007/en/f07d6dce-ad6b-11dc-a4b5-ef6c4a573348/pol330052007eng.pdf (accessed March 11, 2009).

Anti Drug Abuse Act of 1986. Public Law 99-570. U.S. Statutes at Large 100 (October 27, 1986): 3207.

Antiterrorism and Effective Death Penalty Act of 1996, Public Law 104-132, U.S. Statutes at Large 110 (April 24, 1996): 1214.

Archibold, Randal C. "Challenges to a Sheriff Both Popular and Reviled." *New York Times*, September 28, 2008, Sec A.

——. "Immigration Hard-Liner Has His Wings Clipped." *New York Times*, October 7, 2009.

——. "Lawmakers Want to Look At Sheriff In Arizona." *New York Times*, February 14, 2004.

——. "U.S. Alters Disputed Program Letting Local Officers Enforce Immigration Law." *New York Times*, October 17, 2009, Sec A.

Associated Press. "Funeral for Inmate Who Died Awaiting Deportation." December 10, 2008.

——. "Guard Indicted in Beating at Krome." *Boca Raton News*, June 2, 1995.

——. "House to Look at Locals Enforcing Immigration Law." March 4, 2009.

——. “LAPD Chief: Cops Shouldn’t Tag Immigrants.” October 27, 2009.

——. “New INS Guidelines Take Effect.” January 1, 2001.

——. “Some Cases Where Obama’s Policies Are Like Bush’s.” February 28, 2009.

Bacon, David. “For an Immigration Policy Based on Human Rights.” In *Immigration: A Civil Rights Issue*, edited by Susanne Jonas and Suzie Dod Thomas, 157-173, Wilmington, DE: Scholarly Resources Inc, 1999.

Barack Obama. “News Conference by the President 4/29/09.” *White House Documents and Publications*. April 30, 2009

Barmaki, Reza. “Criminals/Refugees in the Age of Welfareless States: Zygmut Bauman on Ethnicity, Asylum and the new ‘Criminal.’” *International Journal of Criminology and Sociological Theory* 2, no. 1 (2009): 251-266.

Barnes, Peter. “Team of 8 Deputies Quickly Rounds Up Illegals.” *Washington Times*, November 12, 2009, Sec A

Barry, Tom. “Napolitano Finessing Immigrant Crackdown.” *La Prensa San Diego*, February 6, 2009.

Bauman, Zygmunt. *Work, Consumerism and the New Poor*. 2nd ed. New York: Open University Press, 2005.

Benhabib, Seyla. “Political Theory and Political Membership in a Changing World.” In *Political Science: The State of the Discipline* edited by Ira Katznelson and Helen V. Milner, 404-434. Washington DC: American Political Science Association, 2002

Bermudez, Esmeralda. “Detainee Centers Fail Immigrants, Report Alleges.” *The Oregonian*, July 13, 2007.

Bernstein, Leslie. "Tougher Immigration Laws Turn the Ailing Private Prison Sector into a Revenue Maker." *San Diego Union-Tribune*, May 4, 2008.

Bernstein, Nina. "Immigration Agency's Revised List of Deaths in Custody." *New York Times*, April 3, 2009.

——. "Immigration Official to Run New York's Jails." *New York Times*, September 8, 2009. http://www.nytimes.com/2009/09/09/nyregion/09detain.html (accessed April 26, 2010).

——. "Officials Hid Truth of Immigrant Deaths in Jail." *New York Times*, January 9, 2010. http://www.nytimes.com/2010/01/10/us/10detain.html?pagewanted=2 (accessed April 6, 2010).

——. "Officials Say Fatalities Of Detainees Were Missed." *New York Times*, August 18, 2009.

Bhabha, Jacqueline. "The 'Mere Fortuity' of Birth? Are Children Citizens?" *Differences: A Journal of Feminist Cultural Studies*, 15 no 2 (2004): 91-117.

Bosniak, Linda S. "Human Rights, State Sovereignty and the Protection of Undocumented Migrants Under the International Migrants' Workers Convention." In *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, edited by Barbara Bogusz, Ryszard Cholewinski, Adam Cygan and Erika Szyszczak, 311-371. Leiden: Martinus Nijhoff Publishers, 2004.

Brane, Michele and Christiana Lundholm. "Human Rights behind Bars: Advancing the Rights of Immigration Detainees in the United States Through Human Rights Frameworks." *Georgetown Immigration Law Journal*, 22 (2008): 147-75.

Bratton, William. "Cops, Not ICE." *Los Angeles Times*, October 27, 2009.

Brewer, Garry D. and Peter DeLeon. *The Foundations of Policy Analysis*. Homewood, IL: The Dorsey Press, 1983.

Bush, George W. "Immigration & American Society: Primetime Address to the Nation." May 15, 2006.

——. "Immigration Reform: Address in Georgia." May 29, 2007.

——. "More in Immigration: Address to the Arizona Border Patrol." April 9, 2007.

Buzan, Barry, Ole Weaver and Jaap de Wilde. *Security: A New Framework for Analysis*. Boulder, CO: Lyenne Rienner Publishers, 1998.

Chertoff, Michael. Letter to American Bar Association President Karen J. Mathis. March 19, 2007. www.abanet.org/publicserv/immigration/ltr_from_dhs31907.pdf (accessed February 17, 2010).

Chimmi, B.S. "Globalization, Humanitarianism and the Erosion of Refugee Protection." *Journal of Refugee Protection* 13, no 3 (2000).

Christensen, Kim, Richard Read, Julie Sullivan and Brent Walth. "Immigration Agency is Rife with Abuses." *Newhouse News Service*, December 8, 2000.

CNN.com. "Bush Signs Homeland Security Bill." November 26, 2001. http://archives.cnn.com/2002/ALLPOLITICS/11/25/homeland.security/ (accessed January 10, 2010).

Collins, Allyson – Human Rights Watch. "Letter to INS Commissioner Doris Meissner." October 29, 2000. http://www.hrw.org/en/news/2000/10/29/letter-ins-commissioner-doris-meissner (accessed February 2, 2010).

Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, Public Law 329, 110th Cong., 2nd sess., (Sept. 30, 2008).

Dauvergne, Catherine. "Sovereignty, Migration and the Rule of Law in Global Times." *The Modern Law Review* 67 no. 4 (2004): 588-615.

——. *Making People Illegal.* New York: Cambridge University Press, 2008.

Department of Homeland Security Appropriations Act 2010. Public Law 111-83. U.S. Statutes at Large 123 (2009): 2142.

Detention Watch Network. "About the Campaign." *Dignity Not Detention.* http://detentionwatchnetwork.org/DND_about (accessed March 26, 2010).

——. "About the U.S. Detention and Deportation System." http://www.detentionwatchnetwork.org/aboutdetention (accessed March 9, 2010).

——. "Conditions in Immigration Detention." http://www.detentionwatchnetwork.org/node/2383 (accessed February 16, 2010).

——. "Who We Are." http://www.detentionwatchnetwork.org/whoweare (accessed March 2, 2010).

Donnelly, Jack. "International Human Rights: A Regime Analysis." *International Organization* 40, no. 3 (1986): 599–642.

Dow, Mark. *American Gulag*. Berkeley, University of California Press, 2004.

Engbersen, Godfried and Joanne van der Leun. "The Social Construction of Illegality and Criminality." *European Journal of Criminal Policy and Research* 9 (2001): 51-70.

Falkenberg, Lisa. "Mayor Wants to Rewrite the Rules on Immigrants." *Houston Chronicle*, August 6, 2009.

Families for Freedom et. al v. Michael Chertoff. Complaint. April 30, 2008. www.nationalimmigrationproject.org/Detention_Standards_%20Complaint_final.pdf (accessed February 17, 2010).

Fischer, Frank and John Foster, eds. *The Argumentative Turn in Policy Analysis and Planning*. Durham: Duke University Press, 1993.

Fischer, Frank. *Evaluating Public Policy*. Chicago, IL: Nelson-Hall Publishers, 1995.

Fisher, William. "Many Abuses Found in Jails for Immigrants." *Inter Press Service*, February 9, 2007.

Florida Immigrant Advocacy Center. *Dying for Decent Care: Bad Medicine in Immigration Custody*. February 2009. www.fiacfla.org/reports/DyingForDecentCare.pdf (accessed January 17, 2010).

Fragomen Jr., Austin T. "The Illegal Immigration Reform and Immigrant Responsibility Act of 1996: An Overview." *International Migration Review* 31, no 2 (1997): 438-460.

Gamboa, Suzanne. "INS Changes Rules on Immigration." *Associated Press Online*, September 18, 2001.

Garland, David. *The Culture of Control*. Chicago, IL: University of Chicago Press, 2001.

Georgia Detention Watch *Report on the December 2008 Humanitarian Visit to the Stewart Detention Center*. www.acluga.org/Georgia_Detention_Watch_Report_on_Stewart.pdf (accessed January 17, 2010).

Gillibrand, Kristen E. "Menendez, Gillibrand React to Administration's Detention System Announcement." *States News Service*, August, 6, 2009.

Goldsborough, James. "Out-of-Control Immigration." *Foreign Affairs* 79, no. 5 (2000): 89–101.

Gonzalez, Cindy. "New INS Guidelines Could Affect County Jails." *Omaha World Herald*, January 3, 2001.

——. "Rules May have Little Midlands Effect." *Omaha World Herald*, January 2, 2001.

Griffiths, Douglas M. Minister Counselor Permanent Mission of the United States of America to the United Nations, United Nations High Commissioner for Human Rights, September 28, 2009, http://www.aclu.org/files/pdfs/humanrights/uncerdresponse_racialdiscrimination.pdf (accessed February 6, 2010).

Haitian Refugee Immigration Fairness Act of 1999. Public Law 105-277. U.S. Statutes at Large 112 (1999): 2681-541.

Hayter, Teresa. *Open Borders: The Case against Immigration Controls*. London: Pluto Press, 2000.

Hedges, Chris. "Policy to Protect Jailed Immigrants Is Adopted by U.S." *New York Times*, January 2, 2001.

——. "Suit Details the Beatings of Detainees in Louisiana." *New York Times*, January 2, 2001.

Held, David, Anthony McGrew, David Goldblatt and Jonathan Perraton. *Global Transformations: Politics, Economics and Culture*. Stanford, CA: Stanford University Press, 1999.

Henkin, Louis. "U.S. Ratification of Human Rights Convention: The Ghost of Senator Bricker." *The American Journal of International Law* 89, no. 2 (1995): 341-350.

Henry, Samantha. "Shedding Light on Detainees' Plight," *Herald News*, May 27, 2007.

Hincapie, Marielena on behalf of the National Immigration Law Center et. al. Letter to President Barack Obama. August 25, 2009, https://salsa.democracyinaction.org/o/371/images/LETTER_TO_PRESIDENT_20090825133229.pdf (accessed February 7, 2010).

Hing, Bill Ong. *Defining America Through Immigration Policy*. Philadelphia: Temple University Press: 2004.

Hoeffer, Michael, Nancy Rytina and Brian C. Baker. "Estimates of the Unauthorized Immigrant Population in Residing in the United States: January 2009." Department of Homeland Security. http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2009.pdf (accessed February 11, 2010)

Hoffer, Michael, Nancy Rytina and Christopher Campbell. "Estimates of the Unauthorized Immigrant Population in Residing in the United States: January 2006." Department of Homeland Security. http://www.dhs.gov/xlibrary/assets/statistics/publications/ill_pe_2006.pdf (accessed February 11, 2010).

Homeland Security Act of 2002. Public Law 296. 107th Cong., 2nd sess. U.S. November 25, 2002.

Hsu, Spencer S. "Backlog at the Borders, Cracks in the System." *Washington Post*, May 14, 2005.

Human Rights First. *U.S. Detention of Asylum Seekers*. April 29, 2009. www.humanrightsfirst.org/pdf/090429-RP-hrf-asylum-detention-report.pdf (accessed April 8, 2010).

Human Rights Watch. *Detained and Dismissed: Women's Struggles to Obtain Health Care in United States Immigration Detention*. March 16, 2009. http://www.hrw.org/sites/default/files/reports/wrd0309web_1.pdf (accessed January 17, 2010).

——. "Plans to Improve Management and Oversight Offer Hope but Need Action." *States News Service*, October 6, 2009.

——. "Unfair Immigration Policies." http://www.hrw.org/en/united-states/us-program/unfair-immigration-policies (accessed March 2, 2010).

——. *A Violent Education*. August 2008. http://www.hrw.org/reports/2008/us0808/ (accessed November 16, 2008).

——. *Jailing Refugees: Arbitrary Detention of Refugees in the US Who Fail to Adjust to Permanent Resident Status*. December 29, 2009. http://www.hrw.org/sites/default/files/reports/refugees1209webwcover.pdf (accessed January 26, 2010).

——. *Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States*. December, 2009. http://www.hrw.org/sites/default/files/reports/us1209web.pdf (accessed February 16, 2010).

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Public Law 104-208, U.S. Statutes at Large 110 (1996): 3009-546.

Immigration Act of 1990. Public Law 101-649. U.S. Statutes at Large 104 (November 29, 1990): 4978.

Immigration and Nationality Technical Corrections Act of 1994 Public Law 103-416, U.S Statutes at Large 108 (October 25, 1994): 4305.

Immigration Reform and Control Act of 1986. Public Law 99-603. U.S. Statutes at Large 100 (November 6, 1986): 3359.

Inda, Jonathan Xavier. *Targeting Immigrants,* Malden, MA: Blackwell Publishing, 2006.

Irwin, Megan. "Flushing Them Out: Joe Arpaio and Andrew Thomas Are Teaching the Rest of the Nation How to Terrorize Illegal Immigrants." *Phoenix New Times*, December 27, 2007.

Jordan, Bill, and Frank Düvell. *Irregular Migration: The Dilemmas of Transnational Mobility*. Northampton, Mass.: Edward Elgar Publishing Inc., 2002.

Juss, Satvinder Singh. *International Migration and Global Justice*. Burlington, VT.: Ashgate Publishing Company, 2006.

Kobach, Kris W. "State and Local Authority to Enforce Immigration Law: A Unified Approach for Stopping Terrorists." *Backgrounder*, June 2004. http://www.cis.org/articles/2004/back604.pdf (accessed February 6, 2010).

Koopowitz, Leslie F. and Sotoodeh Abhary. "Psychiatric Aspects of Detention: Illustrative Case Studies." *Australian and New Zealand Journal of Psychiatry* 38 (2004): 495-500.

Krasner, Stephen D. "Structural Causes and Regime Consequences: Regimes as Intervening Variables." *International Organization* 36, no 2 (1982): 185-205.

Kurzban, Ira J. "Democracy and Immigration." In *Keeping Out the Other*, edited by David C. Brotherton and Philip Kretsedemas. New York: Columbia University Press, 2008.

——. *Immigration Law Sourcebook*. 10th ed. Washington, DC: American Immigration Law Foundation, 2006.

Lacey, Michael. "Janet Napolitano = Homeland Futility." *The Village Voice*, November 26, 2008.

——. "Janet Napolitano's Sorry Service in Arizona Makes Her a Terrible Choice for Homeland Security Secretary." *Phoenix New Times*, November 27, 2008.

Lahav, Gallya, and Virginie Guiraudon. "Actors and Venues in Immigration Control: Closing the Gap between Political Demands and Policy Outcomes." *West European Politics* 29, no. 2 (2006): 201–233.

Lantigua, John. "INS Guard Charged in Beating of Haitian." *Miami Herald*, June 2, 1995. Sec B.

League of Nations. *Convention on Certain Questions Relating to the Conflict of Nationality Law*. April 13, 1930. Treaty Series 179, p. 89, No. 4137. http://www.unhcr.org/refworld/docid/3ae6b3b00.html (accessed March 19, 2010).

Leahy, Patrick. "Leahy Comment on ICE Reforms to Detention System." *Congressional Documents and Publications*, August 6, 2009.

Legomsky, Stephen H. "The Detention of Aliens: Theories, Rules, and Discretion." *The University of Miami Inter-American Law Review* 30, no 3 (1999): 531-549.

Lemons, Stephen. "Guadalupe Made it Clear that Joe Arpaio's Attacking Anyone with Brown Skin." *Phoenix New Times*, May 29, 2008.

——. "ICE's Matthew Allen and David DeConcini Get Ripped Apart by the Talon Terror." *Phoenix New Times*, November 6, 2008.

Lichtblau, Eric. "Threats and Responses: The Justice Department; Ashcroft Seeks More Power to Pursue Terror Suspects." *New York Times*, June 6, 2003, Sec 1.

Little, Cheryl. "INS Detention in Florida." *The University of Miami Inter-American Law Review* 30, no 3 (1999): 551-575.

Llorente, Elizabeth. "New Concerns about INS Detention Center." *The Record*, May 25, 1998.

——. "INS Acts to Curtail Abuse of Detainees." *The Record*, January 28, 2001.

——. "INS Likely to Reopen Detention Center, Florida Firm Named Manager." *The Record*, June 14, 1996.

Lute, Jane Holl. Letter to Michael J. Wishnie and Paromita Shah. July 24, 2009. www.nationalimmigrationproject.org/DHS%20denial%20-%207-09.pdf (accessed February 17, 2010).

Lynn Jr., Lawrence E. "A Place at the Table: Policy Analysis, Its Postpositivist Critics, and the Future of the Practice." *Journal of Policy Analysis and Management* 18, no. 3 (1999): 411-425.

Malone, Julia. "Homeland Security Bill Will Dismantle INS." *The Atlanta Journal-Constitution*, November 14, 2002.

Matas, David. "Freedom of Movement: The International Legal Framework." In *Still Moving: Recent Jewish Migration in Comparative Perspective*, edited by Daniel J. Elazar and Marton Weinfield. New Brunswick, NJ: Transaction Publishers, 2000.

Mathis, Karen J. Letter to Department of Homeland Security Secretary Michael Chertoff. January 31, 2007. www.abanet.org/poladv/letters/immigration/2007jan31_detenstandards_l.pdf-2007-01-31 (accessed February 17, 2010).

McLoughlin, Pauline and Megan Warin. "Corrosive Places, Inhuman Spaces: Mental Health in Australian Immigration Detention." *Health & Place*, 14 (2008): 254-264.

Mertus, Julie. *Bait and Switch*. 2nd ed. New York: Routledge, 2008.

Miami Herald. "An INS Potemkin Village?" July 14, 1995. Sec A, 20.

Migration Policy Institute. "Immigration to the United States by Decade." *MPI Data Hub*. http://www.migrationinformation.org/DataHub/charts/final.immig.shtml (accessed November 18, 2008).

Minderhoud, Paul. "Coping with Irregular Migration: The Dutch Experience." In *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, edited by Barbara Bogusz, Ryszard Cholewinski, Adam Cygan and Erika Szyszczak. 387–406. Leiden: Martinus Nijhoff Publishers, 2004.

Mooney, Mark and Rob Speyer. "Rioters Trash Jail for Aliens." *Daily News*, June 19, 1995.

Moravcsik, Andrew. "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe." *International Organization* 54, no. 2 (2000): 217–252.

Mukhopadhyay, Riddhi. "Death in Detention: Medical and Mental Health Consequences of Indefinite Detention of Immigrants in the United States." *Seattle Journal of Social Justice* 7, (2009): 693-727.

Nafziger, James. "The General Admission of Aliens Under International Law." *The American Journal of International Law* 77 no. 4 (1983): 804-847.

National Immigration Forum. "Detention & Enforcement." http://www.immigrationforum.org/images/uploads/DetentionReportsSummaries2007-2009.pdf (accessed February 28, 2010).

——. "The Math of Immigration Detention." *Backgrounder*. July 7, 2009. http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf (accessed March 9, 2010).

National Immigration Law Center, ACLU of Southern California, and Holland & Knight – Karen Tumlin, Linton Joaquin and Ranjana Natarana. *A Broken Immigration System*. 2009. http://www.nilc.org/immlawpolicy/arrestdet/A-Broken-System-2009-07.pdf (accessed February 11, 2010).

National Immigration Law Center, American Civil Liberties Union of Southern California, and Holland & Knight. *A Broken System: Confidential Reports Reveal Failures in U.S. Immigrant Detention Centers*. July 2009. www.aclu-sc.org/downloads/55/306323.pdf (accessed January 18, 2010).

National Immigration Project of the National Lawyers Guild et al. *Petition to Initiate Rulemaking*. January 24, 2007. www.nationalimmigrationproject.org/detention_petition_final.pdf (accessed January 17, 2010).

Navarrette, Ruben. "Sheriff's Circus Act Is No Laughing Matter for Napolitano." *Contra Costa Times*, February 12, 2009.

Neumayer, Eric. "Do International Human Rights Treaties Improve Respect for Human Rights?" *The Journal of Conflict Resolution* 49, no. 6 (2005): 925–953.

New York Times. "Arpaio's America." February 6, 2009.

——. "Immigration, Outsourced." April 9, 2008.

——. "Salvaging Immigration Detention." October 6, 2009, Sec A.

No More Deaths. *Crossing the Line*. http://www.nomoredeaths.org/index.php/Download-document/9-Crossing-The-Line-Human-Rights-Abuses-of-Migrants-in-Short-term-Custody.html (accessed January 17, 2010).

Olson, Bradley and Susan Carroll. "Backlash Grows over Screening for ICE at Jail." *Houston Chronicle*, May 2, 2009.

Omnibus Anti-Drug Abuse Act of 1988. Public Law 100-690. U.S. Statutes at Large 102 (November 18, 1988): 4181.

Omnibus Consolidated Appropriations Act of 1997. Public Law 208, Div C, S133. 104th Cong., 2nd sess. September 30, 1996.

Papst, Kelsey. "Protecting the Voiceless: Ensuring ICE's Compliance with Standards that Protect Immigration Detainees." *McGeorge Law Review* 40 (2009): 261-89.

Parsons, Wayne. *Public Policy*. Brookfield, VT: Edward Elgar Publishing Ltd., 1995.

Physicians for Human Rights and Bellevue/NYU Program for Survivors of Torture. *From Persecution to Prison*. June 2003. http://physiciansforhumanrights.org/library/documents/reports/report-perstoprison-2003.pdf (accessed March 7, 2010).

Pickus, Noah and Peter Skerry. "Good Neighbors and Good Citizens." In *Debating Immigration,* edited by Caron M. Swain. New York: Cambridge University Press, 2007.

Pinkertion, James. "Detention, then Deportation: Illegal Immigrants' Last Stop; Rare Tour Gives a Glimpse of the Ever-Increasing Activity at Facility." *Houston Chronicle*, July 6, 2008.

Plender, Richard. "Recent Trends in National Immigration Control." *The International and Comparative Law Quarterly* 35, no 3 (1986): 531-66.

Preston, Julia. "Firm Stance on Immigrants Remains Policy under Obama." *New York Times*, August 4, 2009, Sec A.

Quereshi, Ajmel. "Hope for Change in Immigration Policy: Recommendations for the Obama Administration." *Human Rights Brief* 16 (2009): 19-23.

Rannik, Julie K. "The Anti-Terrorism and Effective Death Penalty Act of 1996: A Death Sentence for the 212(c) Waiver." *The University of Miami Inter-American Law Review* 28*,* no. 1 (1996): 123-150.

Robjant, Katy, Ian Robbins, and Victoria Senior. "Psychological Distress amongst Immigration Detainees: A Cross-sectional Questionnaire Study." *British Journal of Clinical Psychology*, 48 (2009): 275-286.

Roseborough, Teresa Wynn – Office of Legal Counsel. *Assistance by State and Local Police in Apprehending Illegal Aliens*. February 5, 1996. http://www.justice.gov/olc/immstopo1a.htm (accessed January 21, 2010).

Rother, Larry. "'Processing' for Haitians Means Time in a Rural Prison." *New York Times*, June 21, 1992. http://www.nytimes.com/1992/06/21/weekinreview/the-

nation-processing-for-haitians-is-time-in-a-rural-prison.html?scp=1&sq=Processing%20for%20Haitians%20is%20time%20in%20a%20rural%20prison&st=cse (accessed January 15, 2010).

Roybal-Allard, Lucille. "Detention Center Reforms Announced by ICE Welcomed." *States News Service*, August 6, 2009.

——. "Price, Royball-Allard Applaud Reforms Proposed for Immigration Detention System." *States News Service*, October 6, 2009.

Ruggie, John Gerard. "Human Rights and the Future International Community." *Daedalus* 112, no. 4 (1983): 93–110.

Sanchez, Leonel. "Motel Hold 'Economic Offenders:' Rights Advocates Decry INS Policy for Noncriminals." *San Diego Union-Tribune*, March 13, 1998.

Sassen, Saskia. "Beyond Sovereignty: Immigration Policy Making Today." In *Immigration: A Civil Rights Issue*, edited by Susanne Jonas and Suzie Dod Thomas, 15-26. Wilmington, DE: Scholarly Resources, Inc., 1999. Schindlmayr, Thomas. "Sovereignty, Legal Regimes, and International Migration." *International Migration*, 41 no. 2 (2003): 109-123.

Sassen, Saskia. *Losing Control? Sovereignty in the Age of Globalization*. New York: Columbia University Press, 1996.

Schiller, Schiller. "INS Posts Detention Standards; Goal Is to Treat Detainees Fairly." *San Antonio Express News*, January 3, 2001.

Scholte, Jan Aart. *Globalization, a Critical Introduction*. 2nd ed. New York: Palgrave Macmillan, 2005.

Schriro, Dora. *Immigration Detention Overview and Recommendations*. October 6, 2009. www.ice.gov/doclib/091005_ice_detention_report-final.pdf (accessed March 24, 2010).

Schumer, Charles E. "Schumer Reacts to Obama Administration New Immigrant Detention Policy." *Congressional Documents and Publications*. October 6, 2009.

Seattle School of Law International Human Rights Clinic and OneAmerica. *Voices from Detention: A Report of Human Rights Violations at the Northwestern Detention Center*. June 2008. www.hatefreezone.org/downloads/Detention%20Center%20Study.pdf (accessed October 24, 2009).

Secure Fence Act of 2006. Public Law 637. 109th Cong., 2nd sess. October 26, 2006.

Sharkansky, Ira, ed. *Policy Analysis in Political Science*. Chicago: Markham Publishing Company, 1970.

Siegel Dina and Frank Bovenkerk. "Crime and Manipulation of Identity among Russian-Speaking Immigrants in the Netherlands." *Journal of Contemporary Criminal Justice* 16, no 4 (2000): 424-44.

Silove, Derrick "Mental Health of Asylum Seekers: Australia in a Global Context." In *The Health of Refugees: Public Health Perspectives from Crisis to Settlement*, edited by Pascale Allotey, 68-82. South Melbourne, Vic: Oxford University Press, 2003.

Silove, Derrick and Zachary Steel. "The Mental Health and Well Being of On-Shore Asylum Seekers in Australia." *Psychiatry Research and Teaching Unit*. 1998. www.safecom.org.au/pdfs/zachary-steel-report.pdf (accessed March 7, 2010).

Silove, Derrick, Patricia Austin, and Zachary Steel. "No Refuge From Terror: The Impact of Detention on the Mental Health of Trauma-affected Refugees Seeking Asylum in Australia." *Transcultural Psychiatry* 44, no. 3 (2007): 359-393.

Simmons, Andria. "Gwinnett Jail Reports Drop in Foreign-Born Inmates; Sheriff's Office Says Push to Identify Offenders in U.S. Illegally is Working." *Atlanta Journal-Constitution*, December 31, 2009.

Sinnar, Shirin. "Patriotic or Uncostitutional? The Mandatory Detention of Aliens under the USA Patriot Act." *Stanford Law Review* 55, no. 4 (2003): 1419-56.

Smoothers, Ronald. "3 Prison Guards Guilty of Abuse of Immigrants." *New York Times*, March 7, 1998. Sec. A.

Spiro, Peter J. "The New Sovereigntists: American Exceptionalism and Its False Prophets." *Foreign Affairs* November/December 2000.

Spoto, MaryAnn. "Whistle-blower Sues Corrections Company." *The Star-Ledger*, May 3, 1998.

St. Petersburg Times. "INS Standards Need Teeth." January 8, 2001.

States News Service. "ACLU Demands ICE Ends Illegal Deportation of U.S. Citizens." February 13, 2008.

——. "Bill Ushers in Humane Standards for Immigration Detention Facilities." October 3, 2008.

——. "House Hearing Will Examine Illegal Profiling and Police Misconduct by Local Law Enforcement Acting as Federal Immigration Agents." April 1, 2009.

——. "Secretary Napolitano Announces New Agreement For State and Local Immigration Enforcement Partnerships and Adds 11 New Agreements." July 10, 2009.

Steel, Zachary, Derrick Silove, Robert Brooks, Shaheh Momartin, Bushra Alzuhairi and Ina Susljik. "Impact of Immigration Detention and Temporary Protection on the Mental Health of Refugees." *British Journal of Psychiatry* 188 (2006): 58-64.

Steiner, Henry J., Philip Alston, Ryan Goodman. *International Human Rights in Context: Law, Politics and Morals*. 3rd ed. New York: Oxford University Press, 2007.

Stern, Ray. "Police State: How the U.S. Immigration and Customs Enforcement Agency Turned All Local Authorities into La Migra." *Phoenix New Times*, October 2, 2008.

Taylor, Marissa. "Immigration Officials Detaining, Deporting American Citizens." *McClatchy Newspapers*, January 24, 2008. http://www.mcclatchydc.com/227/story/25392.html (accessed January 18, 2010).

The Record. "Lost Message of Esmor: An Emphasis on Security over Basic Rights." November 29, 1996.

Torpey, John. *The Invention of the Passport, Surveillance, Citizenship and the State*. Cambridge: Cambridge University Press, 2000.

Transactional Records Access Clearinghouse. *Detention of Criminal Aliens: What has Congress Bought?* February 2010. http://trac.syr.edu/immigration/reports/224/ (accessed February 14, 2010).

Tumlin, Karen C. "Suspect First: How Terrorism Policy is Reshaping Immigration Policy." *California Law Review* 92, no. 4 (2004): 1173-1239.

University of Arizona Southwest Institute for Research on Women and Bacon Immigration Law and Policy Program. *Unseen Prisoners*. sirow.arizona.edu/files/UnseenPrisoners.pdf (accessed October 24, 2009).

U.S. Citizenship and Immigration Service. "Refugee." http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=385d3e4d77d73210VgnVCM100000082ca60aRCRD&vgnextchannel=385d3e4d77d73210VgnVCM100000082ca60aRCRD (accessed March 4, 2010).

——. "Asylum." http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=f39d3e4d77d73210VgnVCM100000082ca60aRCRD&vgnextchannel=f39d3e4d77d73210VgnVCM100000082ca60aRCRD (accessed March 4, 2010).

——. "Our History." http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=e00c0b89284a3210VgnVCM100000b92ca60aRCRD&vgnextchannel=e00c0b89284a3210VgnVCM100000b92ca60aRCRD (accessed February 21, 2010).

U.S. Congress. *Congressional Record*. 110th Cong., 2nd sess., 2008.

——. Appropriations Subcommittee on Homeland Security. 109th Cong., 2nd sess., July 27, 2006.

——. Committee on Immigration, Citizenship, Refugees, Border Security and International Law. *Problems with ICE Interrogation, Detention and Removal Procedures*. February 13, 2008. http://judiciary.house.gov/hearings/pdf/Mead080213.pdf (accessed January 18, 2010).

——. Homeland Security Committee. *Examining the 287(g): The Role of State and Local Law Enforcement in Immigration Law*. 111th Cong., 1st sess. March 4, 2009. http://homeland.house.gov/SiteDocuments/20090304140905-47205.pdf (accessed February 8, 2010).

——. Homeland Security Subcommittee on Border, Maritime, and Global Counterterrorism. *Moving Toward More Effective Immigration Detention Management*. 111th Cong., 1st sess., December 10, 2009.

——. Homeland Security Subcommittee on Border, Maritime, and Global Counterterrorism. *The FY 2010 Budget for Immigration and Customs Enforcement and Border Protection and U.S. Coast Guard*. 111th Cong., 1st sess., June 11, 2009.

——. Select Committee on Homeland Security. 108th Cong., 2nd sess. May 6, 2004.

——. Subcommittee on Border, Maritime, and Global Counterterrorism. *Crossing the Border: Immigrants in Detention and Victims of Trafficking*. 110th Cong., 1st sess. March 15, 2007. www.womensrefugeecommission.org/docs/detention%20test%20dhs.pdf (accessed March 9, 2010).

——. House. Subcommittee on Immigration, Citizenship and Refugees, Border Security, and International Law and Subcommittee on the Constitution, Civil Rights, and Civil Liberties, *Public Safety and Civil Rights Implications of State and Local Enforcement of Federal Immigration Laws*. 111th Cong., 1st sess., April 2, 2009.

U.S. Congress. Senate. Committee on the Judiciary. *Oversight of Department of Homeland Security*. 111th Cong., 1st sess., May 6, 2009.

——. Subcommittee on Immigration. *Concerning INS Reform: Detention Issues*. 105th Cong. 2nd sess., September 16, 1998. http://fas.org/irp/congress/1998_hr/98091631_llt.html (accessed January 17, 2010).

U.S. Department of Homeland Security. "Department of Homeland Security Unveils Comprehensive Immigration Enforcement Strategy for the Nation's Interior." April 20, 2006. http://www.dhs.gov/xnews/releases/press_release_0890.shtm (accessed March 30, 2010).

——. "Department Subcommittees and Agencies." http://www.dhs.gov/xabout/structure/#1 (accessed January 11, 2010).

——. "DHS Announces Long-Term Border and Immigration Strategy." November 2, 2005. http://www.dhs.gov/xnews/releases/press_release_0795.shtm (accessed April 1, 2010).

——. "Fact Sheet." October 6, 2009. http://www.ice.gov/doclib/10-06-09-fact_sheet_ice_detention_reform.pdf (accessed February 19, 2010).

——. "Fact Sheet: Secure Border Initiative." November 2, 2005. http://www.dhs.gov/xnews/releases/press_release_0794.shtm (accessed March 30, 2010).

——. "Illegal Alien Resident Population." http://www.dhs.gov/xlibrary/assets/statistics/illegal.pdf (accessed February 11, 2010).

——. "Strategic Plan Fiscal Years 2008 – 2013." www.dhs.gov/xlibrary/assets/DHS_StratPlan_FINAL_spread.pdf (accessed February 21, 2010).

U.S. Federal Bureau of Investigations. *Uniform Crime Reporting Handbook*. 2004. http://www.fbi.gov/filelink.html?file=ucr/handbook/ucrhandbook04.pdf (accessed April 14, 2010).

U.S. Federal Bureau of Prisons "Policy Documents." http://www.bop.gov/DataSource/execute/dsPolicyLoc?start=reset (accessed March 17, 2010).

U.S. Government Accountability Office. *Alien Detention Standards: Telephone Access Problems Were Pervasive at Detention Facilities; Other Deficiencies die not Show a Pattern of Noncompliance*. GAO-07-875. July 2007. http://www.gao.gov/new.items/d07875.pdf (accessed February 16, 2010).

——. *Illegal Aliens: National Net Cost Estimates Vary Widely*. July 25, 1995. http://www.gao.gov/archive/1995/he95133.pdf (accessed March 15, 2010).

——. *Immigration Enforcement: Controls Over Program Authorizing State and Local Enforcement of Federal Immigration Laws Should be Strengthened*. January 30, 2009. http://www.gao.gov/new.items/d09381t.pdf (accessed February 8, 2009).

——. *Immigration Management: Strong Leadership and Management Reforms Needed to Address Serious Problems*. January 23, 1991.

——. *INS Management: Follow-up on Selected Problems*. July 22, 1997. http://www.gao.gov/archive/1997/gg97132.pdf (accessed January 20, 2010).

——. *Organizational Structure and Resources for Providing Health Care to Immigration Detainees*. February 23, 2009. http://www.gao.gov/new.items/d09308r.pdf (accessed February 20, 2010).

——. *Undocumented Aliens: Questions Persist about Their Impact on Hospitals' Uncompensated Care Costs*. http://www.gao.gov/new.items/d04472.pdf (accessed January 14, 2010).

U.S. Immigration and Customs Enforcement. "2009 Immigration Detention Reforms." August 6, 2009. http://www.ice.gov/pi/news/factsheets/2009_immigration_detention_reforms.htm (access February 19, 2010).

——. "About." http://www.ice.gov/about/index.htm (accessed January 11, 2010).

——. "Detention and Removal." http://www.ice.gov/partners/dro/dmp.htm (accessed February 16, 2010).

——. "Fact Sheets." http://www.ice.gov/pi/news/factsheets/index.htm (accessed March 8, 2010).

——. "ICE Issues New Procedures for Asylum Seekers as Part of Ongoing Detention Reform Initiatives." December 16, 2009. http://www.ice.gov/pi/nr/0912/091216washington.htm (accessed March 3, 2010).

——. "Revised Parole Policy for Arriving Aliens with Credible Fear Claims." December 16, 2009. http://www.ice.gov/pi/news/factsheets/credible-fear.htm (accessed March 3, 2010).

——. "The ICE 287(g) Program: A Law Enforcement Partnership." http://www.ice.gov/pi/news/factsheets/section287_g.htm (accessed February 7, 2010).

U.S. Newswire. "White House Blueprint for Beginnings." July 10, 2001.

U.S. Office of the Inspector General – Michael R. Bromwich. *Alleged Deception of Congress: The Congressional Task Force on Immigration Reform's Fact-Finding Visit to Miami District of INS in June, 1995*. September 1996. http://www.justice.gov/oig/special/9606/index.htm (accessed January 15, 2010).

U.S. Office of Inspector General. *Immigration and Custom Enforcement Detention Bedspace Management*. OIG-09-52. April 2009. http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_09-52_Apr09.pdf (accessed January 17, 2010).

——. *Report to Congress on the Implementation of Section 1001 of the USA PATRIOT Act*. July 17, 2003. http://www.justice.gov/oig/special/0307/final.pdf (accessed February 16, 2010).

——. *Treatment of Immigration Detainees Housed at Immigration and Customs Enforcement Facilities*. OIG-07-01. December 2006. www.dhs.gov/xoig/assets/mgmtrpts/OIG_07-01_Dec06.pdf (accessed February 16, 2010).

U.S. State Department. "Attorney General Announces More Reforms to Immigration Service." April 18, 2002.

United Nations - Treaty Collection Databases. http://treaties.un.org/Pages/DB.aspx?path=DB/MTDSG/page1_en.xml (accessed March 30, 2009).

United Nations General Assembly, *Universal Declaration of Human Rights*, www.un.org/en/documents/udhr/ (accessed March 19, 2010).

——. *Convention relating to the Status of Refugees*, (July 28, 1951) United Nations Treaty Series 189, 137.

United Nations High Commissioner for Human Rights. "Monitoring Civil and Political Rights." http://www2.ohchr.org/english/bodies/hrc/index.htm (accessed November 16, 2008).

——. "Special Rapporteur of the Commission on Human Rights on the human rights of migrants." http://www2.ohchr.org/english/issues/migration/rapporteur/ (accessed November 16, 2008).

——. Fatimata-Binta Victoire Dah. Letter to President Barack Obama. September 28, 2009. http://www.aclu.org/files/pdfs/humanrights/uncerdresponse_racialdiscrimination.pdf (accessed February 6, 2010).

United States Commission on International Religious Freedom. *Report on Asylum Seekers in Expedited Removal*. February 8, 2005. http://www.uscirf.gov/index.php?option=com_content&task=view&id=1892 (accessed March 3, 2010).

Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Public Law 107-56, U.S. Statutes at Large 115 (October 26, 2002): 272.

Valdes, Manuel. "Napolitano Orders Review of WA Raid." *Associated Press & Local Wire*, February 25, 2009.

Vattel, Emerich de. *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law on Luxury*. Edited by Béla Kapossy and Richard Withmore. Indianapolis, IN: Liberty Fund. http://oll.libertyfund.org/title/2246 (accessed March 18, 2010).

Vaughan, Jessica and James R. Edwards Jr., "The 287(g) Program: Protecting Home Towns and Homeland." *Backgrounder*, October 2009. http://www.cis.org/articles/2009/287g.pdf (accessed February 7, 2010).

Viglucci, Andres. "US Softens its Stance on Detention of Refugees." *Miami Herald*, December 12, 1995.

Violent Crime Control and Law Enforcement Act of 1994. Public Law 103-322. U.S. Statutes at Large 108 (September 13, 1994): 1796.

Washington Post. "Detention Deficit." May 17, 2008.

——. "Treat Migrant Detainees Fairly." July 19, 2007.

Weiner, Myron. "Ethics, National Sovereignty and the Control of Immigration." *International Migration Review* 30, no. 1 (1996): 171-197.

Welch, Michael and Liza Schuster. "Detention of Asylum Seekers in the US, UK, France, Germany and Italy: A Critical View of the Globalizing Culture of Control." *Criminal Justice* 5 (2005): 331-355.

Wells, Miriam J. "The Grassroots Reconfiguration of U.S. Immigration Policy." *International Migration Review* 38, no 4 (2004): 1308-1347.

Willem van Genugten, "The United States reservations to the ICCPR: International law versus God's own constitution." *Kluwer Law International*, (1998). http://papers.ssrn.com/sol3/papers.cfm?abstract_id=969438 (accessed November 16, 2008).

Williams, Lena. "A Law Aimed at Terrorists Hits Legal Immigrants." *New York Times*, July 17, 1996. http://www.nytimes.com/1996/07/17/nyregion/a-law-aimed-at-terrorists-hits-legal-immigrants.html?scp=1&sq=A%20law%20aimed%20at%20terrorists%20hits%20legal%20aliens&st=cse (accessed January 15, 2010).

Wilson, Catherine. "INS Employees: Congressional Taskforce Deceived During Visit." *The Associated Press*, July 12, 1995.

Women's Commission for Refugee Women and Children and Lutheran Immigration and Refugee Service. *Locking Up Family Values: The Detention of Immigrant Families*. February 2007. www.womensrefugeecommission.org/docs/famdeten.pdf (accessed October 24, 2009).

Women's Refugee Commission and Orrick, Herrington & Sutcliffe LLP. *Halfway Home: Unaccompanied Children in Immigration Custody*. February 2009.

www.womensrefugeecommission.org/docs/halfway_home.pdf (accessed October 24, 2009).

World News Digest. "Immigration: INS Issues National Detention Standards." January 2, 2001.

Zimmermann, Klaus F. "Tackling the European Migration Problem." *The Journal of Economic Perspectives* 9, no. 2 (1995): 45–62.