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## Immigration Detention Reform: No Band-Aid Desired

Sarah Gryll

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## **IMMIGRATION DETENTION REFORM: NO BAND-AID DESIRED**

### ABSTRACT

*The United States is a land of immigrants. Yet the United States has adopted laws and policies to prevent mass migrations to this country. Despite these efforts, millions of illegal immigrants currently reside in the United States and more enter every year. An intense public debate about how to treat such immigrants has been at the forefront of the political forum for decades. In recent years, a new vigor for reform has fueled the debate. The Obama Administration vowed to enact comprehensive immigration reform and, in its first year, unveiled a number of reforms meant to address the deteriorating conditions of the immigration detention system.*

*In a political climate ripe for immigration reform, this Comment proposes a more comprehensive approach to immigration detention reform. Current government efforts focus solely on the conditions of detention. The reforms aim to improve medical care, increase direct federal oversight of the detention centers, and transition the system from one built and currently operating as a criminal system to a civil system that fits the needs of the detainee population. While these are all important and necessary steps, they are mere band-aids that fail to address the source of the problem—why the United States is detaining a greater percentage of immigrants every year. This Comment proposes a combined statutory and regulatory scheme that will address the root causes of the percentage increase in detainees and simultaneously ease the pressures on the detention system in two ways: (1) reducing the categories of individuals subject to mandatory detention and (2) requiring more individualized determinations for aliens that are neither flight risks nor dangers to the community. These measures will ultimately decrease the number of detainees in the detention system.*

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## INTRODUCTION

*[M]eaningful 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—often for prolonged periods of time—when other forms of supervised release would be sufficient to address the government’s concerns, as well as the need for basic due process.<sup>1</sup>*

Errol Barrington Scarlett has lived in the United States for over thirty years<sup>2</sup> and is a long-time, lawful permanent resident.<sup>3</sup> Originally from Jamaica, he has four children and numerous siblings, all of whom are U.S. citizens.<sup>4</sup> But, for over five and a half years, Mr. Scarlett was locked behind bars in multiple federal detention centers, pending removal proceedings.<sup>5</sup> The United States subjected him to mandatory detention because of a nonviolent, decade-old drug possession offense for which Mr. Scarlett had already served his sentence.<sup>6</sup> Mr. Scarlett’s familial ties, combined with his long-time, lawful permanent resident status, weigh strongly in favor of cancellation of removal, a form of relief for aliens in removal proceedings.<sup>7</sup> Yet, as of July 2009,<sup>8</sup> Mr. Scarlett had not even been afforded an individualized bond hearing.<sup>9</sup>

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<sup>1</sup> Press Release, Am. Civil Liberties Union, DHS Plan to Improve Immigration Detention an Encouraging Step (Oct. 6, 2009) [hereinafter ACLU DHS Plan Press Release], available at [http://www.aclu.org/immigrants-rights\\_prisoners-rights/dhs-plan-improve-immigration-detention-encouraging-step](http://www.aclu.org/immigrants-rights_prisoners-rights/dhs-plan-improve-immigration-detention-encouraging-step).

<sup>2</sup> *Scarlett v. U.S. Dep’t of Homeland Sec. Bureau of Immigration & Customs Enforcement*, 632 F. Supp. 2d 214, 216 (W.D.N.Y. 2009).

<sup>3</sup> Press Release, Am. Civil Liberties Union, After Being Detained Five Years Without Bond Hearing, Immigrant to Get Day in Court (July 13, 2009) [hereinafter ACLU Day in Court Press Release], available at <http://www.aclu.org/immigrants-rights/after-being-detained-five-years-without-bond-hearing-immigrant-get-day-court>.

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

<sup>5</sup> *Scarlett*, 632 F. Supp. 2d at 217. Mr. Scarlett was detained for over two and a half years in the Federal Detention Center in Oakdale, Louisiana. *Id.* At the time of the district court opinion, Mr. Scarlett was being detained at the Buffalo Federal Detention Facility. *Id.*

<sup>6</sup> ACLU Day in Court Press Release, *supra* note 3. Mr. Scarlett pleaded guilty to criminal possession of a controlled substance, second degree, on January 29, 1999. *Scarlett*, 632 F. Supp. 2d at 216. The court sentenced him to a term of five years to life, and he was released from prison on May 28, 2002. *Id.* It was not until January 22, 2003, almost eight months after he had been released from custody, that the government commenced removal proceedings against Mr. Scarlett. *Id.* The Department of Homeland Security (DHS) and U.S. Immigration and Customs Enforcement (ICE) have held Mr. Scarlett in custody since November 25, 2003. *Id.* at 217. ICE was formed in 2003 as part of the U.S. Department of Homeland Security. *ICE Overview*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, <http://www.ice.gov/about/index.htm> (last visited May 24, 2011). ICE is responsible for enforcing the United States’ immigration and customs laws. *Id.*

<sup>7</sup> 8 U.S.C. § 1229b (2006) (amended 2008). Cancellation of removal falls into two categories: (1) cancellation of removal for permanent residents and (2) cancellation of removal and adjustment of status for nonpermanent residents. *Id.* For certain permanent residents, the Attorney General has the power to cancel removal of an alien who is inadmissible or deportable if the alien: “(1) has been an alien lawfully admitted for

That same month, a district court in New York ordered the government finally to provide Mr. Scarlett with such a hearing.<sup>10</sup> The court held that the government's authorization to detain Mr. Scarlett was not permitted by 8 U.S.C. §1226(c)<sup>11</sup> because Mr. Scarlett was released from incarceration nearly eighteen months prior to his immigration detention.<sup>12</sup> Rather, the government's detention of Mr. Scarlett was authorized by §1226(a),<sup>13</sup> which affords Mr. Scarlett the opportunity to an individualized bond hearing before an immigration judge.<sup>14</sup> The court concluded that Mr. Scarlett's "detention has far exceeded the parameters of the 'brief' or 'limited' period of time which the United States Supreme Court deemed constitutional."<sup>15</sup> At an individualized bond hearing, the government would need to demonstrate that Mr. Scarlett either poses sufficient danger to the community or is a flight risk to warrant his continued detention.<sup>16</sup>

Mr. Scarlett's story is just one of thousands highlighting the strong need for immigration detention reform. Despite the government's failure to provide evidence that Mr. Scarlett would be a danger to the community or a flight risk if released on bond, current federal law mandates Mr. Scarlett's detention

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permanent residence for not less than 5 years, (2) has resided in the United States continuously for 7 years after having been admitted in any status, and (3) has not been convicted of any aggravated felony." *Id.* § 1229b(a). Mr. Scarlett qualifies for cancellation of removal under the first two prongs, but the court questioned whether his controlled substance conviction constituted an aggravated felony offense. *See Scarlett*, 632 F. Supp. 2d at 223 (stating that if "it is determined that a conviction for criminal possession of a controlled substance, second degree, does not constitute an aggravated felony," then Mr. Scarlett's case "will be remanded to the immigration court to determine whether he should be afforded cancellation of removal").

<sup>8</sup> There are no known new developments as of May 2011 in Mr. Scarlett's case.

<sup>9</sup> *Scarlett*, 632 F. Supp. 2d at 216, 219–20; *see also* ACLU Day in Court Press Release, *supra* note 3 ("During his lengthy detention, the government never gave him a hearing but only a string of 'rubberstamp' custody reviews denying his release.").

<sup>10</sup> *Scarlett*, 632 F. Supp. 2d at 219–20, 223.

<sup>11</sup> *Id.* at 219. This section requires the Attorney General to take into custody any alien who is deportable on the basis of committing certain offenses or has been sentenced to a term of imprisonment for at least one year. 8 U.S.C. § 1226(c)(1). The language states that "[t]he Attorney General shall take into custody any alien . . . when the alien is released." *Id.* (emphasis added). A number of district courts have held that, in light of this language, the mandatory detention statute does not apply to aliens "when the alien was not taken into immigration custody at the time of his release from incarceration on the underlying criminal charges." *Scarlett*, 632 F. Supp. 2d at 219; *see also* Bromfield v. Clark, No. C06-757RSM, 2007 WL 527511, at \*3 (W.D. Wash. Feb. 14, 2007) (collecting cases).

<sup>12</sup> *Scarlett*, 632 F. Supp. 2d at 219.

<sup>13</sup> This provision authorizes the arrest and detention of an alien pending a decision on whether the alien is to be removed from the United States. 8 U.S.C. § 1226(a).

<sup>14</sup> *Scarlett*, 632 F. Supp. 2d at 219–20.

<sup>15</sup> *Id.* at 223.

<sup>16</sup> ACLU Day in Court Press Release, *supra* note 3. For an explanation of when flight risk and danger to the community are pertinent to a detention determination, *see infra* note 250.

solely because of his prior conviction—almost ten years earlier for a nonviolent crime.<sup>17</sup> At the time he was detained, Mr. Scarlett was not charged with any other crime and had been free in the community since his release from prison on May 28, 2002.<sup>18</sup> No evidence suggested that he posed a danger to the community or was a flight risk during the almost eighteen months he was free between his incarceration by the state and his detention by Immigration and Customs Enforcement (ICE).<sup>19</sup> Thus, Mr. Scarlett's continued detention seems unnecessary, as it does not serve the purposes of the statute.

This Comment argues that the detention of individuals in Mr. Scarlett's position, who are neither dangers to the community nor flight risks, contributes to the central problem faced by today's immigration detention system: the detention of an increased percentage of the immigrant population, and the concurrent burdens imposed on the system. Instead, these individuals should have the opportunity for bond, parole, or a similar alternative to detention while their removal proceedings progress.<sup>20</sup> Not only would this make a huge difference in immigrants' quality of life, it would also significantly decrease the pressure on the detention system by alleviating many of the problems inherent in increased numbers of detainees.

Immigration reform has been at the forefront of political discussion for a number of years. Its status as one of the more divisive issues in American politics partly derives from the massive influx of immigrants and refugees into the United States in the 1980s.<sup>21</sup> The powerful animosity felt by both Congress and the public toward these new immigrants led to a series of laws

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<sup>17</sup> *Scarlett*, 632 F. Supp. 2d at 216–17. Classes of deportable aliens are listed in 8 U.S.C. § 1227 (amended 2008). Included in this list are those who have committed certain classes of crimes. *Id.* § 1227(a)(2). Mr. Scarlett's conviction falls within these categories. *See id.* § 1227(a)(2)(B)(i).

<sup>18</sup> *Scarlett*, 632 F. Supp. 2d at 216–17.

<sup>19</sup> *Id.* at 219; ACLU Day in Court Press Release, *supra* note 3.

<sup>20</sup> Removal is an administrative process “during which the government determines whether immigrants are eligible to stay in the United States and, if they are subject to a final order of removal, makes arrangements for their deportation.” Nina Rabin, *Immigration Detention in Arizona: A Quietly Growing System Crying Out for Reform*, ARIZ. ATT'Y, July–Aug. 2009, at 31, 31. For a discussion of alternatives to detention, see *infra* notes 200–01 and accompanying text.

<sup>21</sup> *The History of Immigration Detention in the U.S.*, DET. WATCH NETWORK, <http://www.detectionwatchnetwork.org/node/2381> (last visited May 24, 2011). While the more recent debates about immigration reform stem from this massive influx beginning in the 1980s, the United States has had a storied and tense history with immigration for over one hundred years. *See, e.g., Chinese Exclusion Act (1882)*, HARVARD UNIV. LIBRARY OPEN COLLECTIONS PROGRAM, <http://ocp.hul.harvard.edu/immigration/themes-exclusion.html> (last visited May 24, 2011) (stating that the Chinese Exclusion Act was the first major law restricting immigration into the country and halted Chinese immigration into the United States for ten years).

that decisively shifted U.S. policy toward detention as a primary response to immigration in the late twentieth century.<sup>22</sup> Other events, such as the September 11th terrorist attacks, further pushed U.S. policy toward the use of detention as the primary immigration enforcement mechanism.<sup>23</sup>

In his presidential campaign, then-Senator Obama advocated for comprehensive immigration reform.<sup>24</sup> In an effort to follow through on these promises, the Department of Homeland Security (DHS) announced three waves of reforms in the fall and winter of 2009. These reforms propose to improve oversight and address human rights concerns in the immigration detention system.<sup>25</sup>

While these reforms are promising and long overdue, they do not address the fundamental problem: the growing number of detainees and the failure of the immigration detention system to handle them.<sup>26</sup> To alleviate the growing inadequacy of these detention centers, ICE should detain fewer aliens. Thus, this Comment proposes that Congress should act to limit both the categories of aliens who must be detained by ICE<sup>27</sup> and those immigrants whom ICE officers may detain at their discretion.<sup>28</sup>

Part I of this Comment provides possible explanations for the increase in detainees since the early 1990s, focusing on congressional and agency actions that have contributed to this increase. It then analyzes the DHS reform efforts and argues that they are inadequate because they fail to address why ICE is detaining an increasing percentage of aliens. Part II explains why the problems inherent in the current immigration detention system warrant a more comprehensive solution than the Obama Administration's reforms propose—they require reforms that result in fewer detainees. It details the unfairness of

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<sup>22</sup> See *The History of Immigration Detention in the U.S.*, *supra* note 21.

<sup>23</sup> See *infra* notes 36–38 and accompanying text.

<sup>24</sup> See, e.g., *Immigration*, BARACKOBAMA.COM, [http://www.barackobama.com/issues/immigration/index\\_campaign.php](http://www.barackobama.com/issues/immigration/index_campaign.php) (last visited Feb. 15, 2011) (on file with author) (providing President Obama's 2008 campaign immigration platform, which focused on (1) securing the border, (2) improving the immigration system, and (3) “bring[ing] people out of the shadows”).

<sup>25</sup> See *infra* Part I.B.

<sup>26</sup> See *infra* Part I.B.

<sup>27</sup> This Comment distinguishes between mandatory detentions and discretionary detentions. Federal law requires the mandatory detention of certain categories of aliens. See discussion *infra* Part I.A.2.b (outlining the categories of mandatory detention).

<sup>28</sup> All other illegal immigrants are subject to discretionary detention, which allows ICE officers to determine, based on certain factors such as humanitarian concerns and available bed space, whether an alien will be detained. See discussion *infra* Part I.A.2.c (explaining how ICE discretion works in practice).

detention determinations—including problems associated with agency discretion in detention determinations, the high costs of detention, and the inadequacy of the current infrastructure to accommodate the rising number of detainees—and advocates a return to more individualized determinations of detention. Part III proposes a new federal law (or a modification of current immigration detention laws) that would lessen the categories of individuals subject to mandatory detention. Legislation that focuses on reducing the number of detainees in the detention system is essential to any comprehensive immigration overhaul. Such a statute should limit the individuals subject to mandatory detention to those who are a danger to the community or a flight risk,<sup>29</sup> which would be consistent with previous judicial interpretations of immigration policy.<sup>30</sup> Furthermore, this statute should specify that all other aliens are subject to alternative forms of detention. Part III also proposes the creation of comprehensive and clear-cut agency regulations advising ICE officers when to detain individuals not subject to mandatory detention as well as when alternatives to detention are available. ICE policy guidelines should outline specific factors for ICE officers to consider, thereby lowering any risk of arbitrariness in ICE officers' determinations of detention.<sup>31</sup> It will take the combined efforts of Congress and DHS to lessen the number of detainees in the immigration detention system.

## I. THE CURRENT STATE OF AFFAIRS

The fundamental problem faced by the immigration detention system today is that ICE is detaining an increasingly greater number of immigrants. Section A will examine why these numbers are rising. In particular, section A will establish that the increasing number of detainees is not the result of a rising number of immigrants in the United States; rather, ICE is apprehending fewer immigrants each year, but it is detaining a higher percentage of those whom it apprehends than ever before. Section B will then explore the reforms proposed by the Obama Administration in his first year in office and demonstrate that they fail to address this problem.

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<sup>29</sup> As discussed in Part III below, this Comment suggests that aliens guilty of violent offenses should fall into this category while all others should be subject to the discretion of ICE agents, who should focus on alternatives to detention whenever possible.

<sup>30</sup> See *infra* notes 70–72 and accompanying text.

<sup>31</sup> See *infra* Part III.B (discussing how agency action could alleviate arbitrariness in detention determinations).

A. *Why Are There More Detainees? Explanations for the Rise in Detainees as a Percentage of Those Apprehended*

Between 2000 and 2010, the unauthorized immigrant population in the United States increased by 27%, or 2.3 million people.<sup>32</sup> This breaks down to an annual average net increase of 230,000 unauthorized immigrants a year.<sup>33</sup> Although immigration statistics are uncertain due to reporting problems, these are the best figures we have,<sup>34</sup> and they underscore that immigration reform is a concern for policymakers because of its massive public policy implications.<sup>35</sup>

Fears of public safety have fueled the enactment of many of the statutes and regulations requiring the detention of more categories of aliens.<sup>36</sup> For example, the Oklahoma City bombing in 1995 directly led to more support for the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which increased the categories of aliens subject to mandatory detention by, for example, adding to the types of crimes which constitute an aggravated felony.<sup>37</sup> Another example is the USA Patriot Act of 2001, a response to the September 11th terrorist attacks that mandates the detention of certain aliens with ties to terrorism.<sup>38</sup>

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<sup>32</sup> MICHAEL HOEFER ET AL., U.S. DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2010, at 1–2 (2011) [hereinafter 2010 ESTIMATES], available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2010.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2010.pdf) (stating that the number of unauthorized immigrants living in the United States fell from January 2007 to January 2010).

<sup>33</sup> *Id.*

<sup>34</sup> ICE and DHS are in the best position to provide accurate data due to their resources and access to information. Thus, this Comment relies on data provided by these government agencies, which it considers the best available.

<sup>35</sup> Stephen H. Legomsky, *The Detention of Aliens: Theories, Rules, and Discretion*, 30 U. MIAMI INTER-AM. L. REV. 531, 532 (1999). Legomsky explains that there is a tension between two competing concerns: "Detention proponents focus on deterring illegal immigration and removing noncitizens who commit crimes. They consider detention vital to these enforcement goals. Opponents emphasize the liberty interests at stake, the cruelty of long-term detention, and the huge and often wasteful expense." *Id.* at 532–33 (footnote omitted).

<sup>36</sup> See, e.g., Kristen M. Jarvis Johnson, *Fearing the United States: Rethinking Mandatory Detention of Asylum Seekers*, 59 ADMIN. L. REV. 589, 600 (2007) (stating that the September 11th attacks precipitated "[i]ncreased homeland security and anti-terrorism efforts," which in turn led to "tightened detention policies").

<sup>37</sup> See generally 142 CONG. REC. 7960 (1996) (debating whether the proposed statute would prevent types of terrorism such as the Oklahoma City bombings). For a discussion of how AEDPA increased the categories of aliens subject to mandatory detention, see *infra* Part I.A.2.b.

<sup>38</sup> See 148 CONG. REC. 17590 (2002) ("[I]ntelligence agencies and criminal investigators were unable to analyze and disseminate information needed to detect and prevent the September 11th attacks partly because of restrictions on their ability to share information and coordinate tactical strategies in order to disrupt foreign terrorist activities. . . . Accordingly, Congress enacted the USA Patriot Act . . .").

These statutes are just two examples illustrating a recent shift in immigration enforcement policy toward detention. Combined with the discretion ICE officers employ in individual detention determinations and a conscious shift by the Executive and Legislative Branches toward detention as the primary means of enforcing immigration policy, these statutes have led to a massive explosion of detainees held by ICE. As suggested in Part I.A.1, this massive rise in the number of detainees is not simply the result of an increased number of undocumented aliens in the United States during this same period. To stop this sharp increase, any effective immigration reform must restrict the categories of individuals subject to mandatory detention and lessen ICE officer discretion.

Part I.A.1 uses statistics on the number of detainees, apprehensions, and the unauthorized immigrant population to conclude that the increase in detainees is not merely a function of more aliens entering the United States or ICE apprehending more aliens; rather, it is a function of an increase in the *percentage* of illegal immigrants detained as a function of those apprehended. Part I.A.2 then explores why ICE is detaining more aliens. Specifically, it looks at policy choices, congressional action, and agency action that together led to a greater focus on detention as the primary means of immigration policy enforcement in the United States.

### *1. A Look at the Numbers*

Immigration statistics measure both apprehension and detention. *Apprehension* is the seizure of “foreign nationals who are. . .in the United States illegally.”<sup>39</sup> *Detention*, by contrast, is “[t]he seizure and incarceration of an alien in order to hold him/her while awaiting judicial or legal proceedings or return transportation to his/her country of citizenship.”<sup>40</sup>

Statistics show a sharp increase in detentions. In 2009,<sup>41</sup> ICE detained a record total of 383,524 aliens.<sup>42</sup> This number was almost 5,000 more than the

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<sup>39</sup> NANCY RYTINA & JOHN SIMANSKI, U.S. DEP’T OF HOMELAND SEC., APPREHENSIONS BY THE U.S. BORDER PATROL: 2005–2008, at 1 (2009), available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_apprehensions\\_fs\\_2005-2008.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_apprehensions_fs_2005-2008.pdf). Undocumented immigrants who are “apprehended are subject to removal from the United States for violating the Immigration and Nationality Act.” *Id.*

<sup>40</sup> OFFICE OF IMMIGRATION STATISTICS, U.S. DEP’T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2008, at 2 (2009) [hereinafter IMMIGRATION ENFORCEMENT ACTIONS: 2008], available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement\\_ar\\_08.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_08.pdf).

<sup>41</sup> All yearly statistics are in reference to the fiscal year (October 1 to September 30).

previous year when ICE detained the prior record total of 378,582 aliens.<sup>43</sup> The 2008 number represented a 22% increase in detainees from 2007.<sup>44</sup>

As these statistics reveal, the number of detainees in immigration centers is growing exponentially. From 1994 to 2008, the daily detention population multiplied by almost five times.<sup>45</sup> In 1994, the daily detention population was only 6,785; that number rose to 31,244 by 2008.<sup>46</sup> During this time period, this population grew steadily from year to year, with only two slight dips from 2001 to 2002 and then again from 2004 to 2006.<sup>47</sup> The most significant increases followed the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act in 1996 (the IIRIRA, which applied retroactively),<sup>48</sup> and Congress's allocation of increased funding for more bed spaces in detention centers between 2006 and 2007.<sup>49</sup> The statistics demonstrate that the greater number of detainees cannot be accounted for solely by an increase in illegal immigrants in the United States during the same period; rather, the increase in detentions is based on the greater percentage of detainees as a function of the total number of apprehensions of illegal immigrants.

Figure 1 compares the numbers of apprehensions to the numbers of detainees for the years 2001 through 2009. While the daily detention population and the total number of aliens detained in a given year have increased from the early 1990s to the present, the number of apprehensions has

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<sup>42</sup> OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2009, at 3 (2010) [hereinafter IMMIGRATION ENFORCEMENT ACTIONS: 2009], available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement\\_ar\\_2009.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_2009.pdf).

<sup>43</sup> IMMIGRATION ENFORCEMENT ACTIONS: 2008, *supra* note 40, at 3. All data on apprehensions and detentions relate to events, so if an individual has been apprehended twice in one year, that individual will appear twice in the data. *Id.* at 2.

<sup>44</sup> *Id.* at 3.

<sup>45</sup> ALISON SISKIN, CONG. RESEARCH SERV., RL 32369, IMMIGRATION-RELATED DETENTION: CURRENT LEGISLATIVE ISSUES 13–14 (2008).

<sup>46</sup> *Id.* at 14.

<sup>47</sup> *Id.* at 13–14.

<sup>48</sup> DET. & DEPORTATION WORKING GRP., BRIEFING MATERIALS SUBMITTED TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON THE HUMAN RIGHTS OF MIGRANTS 5 (2007), available at [http://www.aclu.org/pdfs/humanrights/detention\\_deportation\\_briefing.pdf](http://www.aclu.org/pdfs/humanrights/detention_deportation_briefing.pdf). For example, the 1996 statutes expanded the definition of *aggravated felony* and specified that the new definition applied retroactively. Therefore, aliens who had committed newly defined "aggravated felonies" well before the passage of the laws were now subject to mandatory detention. See discussion *infra* Part I.A.2.b.

<sup>49</sup> DET. & DEPORTATION WORKING GRP., *supra* note 48, at 5; SISKIN, *supra* note 45, at 13. For a discussion of why the most significant increases in number of detainees followed these events, see Part I.A.2.

not followed the same upward trajectory.<sup>50</sup> Rather, the number of apprehensions has experienced many more peaks and valleys.<sup>51</sup> In its 2007 Annual Report, DHS's Office of Immigration Statistics reported that DHS made 960,756 apprehensions in 2007.<sup>52</sup> That same year, ICE detained 311,169 aliens, which exceeded detentions during the previous year by 21%.<sup>53</sup> This was a marked increase, especially considering that the number of apprehensions dropped appreciably (by 19%) between 2006 and 2007.<sup>54</sup> A similar phenomenon occurred from 2007 to 2008 when the number of apprehensions dropped again to 791,568, while the number of detainees rose to 378,582.<sup>55</sup> In the last year for which data is available, the number of detainees rose by almost 5,000, whereas the number of apprehensions dropped by almost 200,000.<sup>56</sup>

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<sup>50</sup> IMMIGRATION ENFORCEMENT ACTIONS: 2008, *supra* note 40, at 3. The figure entitled "Apprehensions: Fiscal Years 1968 to 2008" illustrates that the number of apprehensions from the early 1990s through the present has increased and decreased with great frequency, *id.*, whereas Alison Siskin's report includes a chart that illustrates an upward trend in the number of detentions during that same time period, SISKIN, *supra* note 45, at 13.

<sup>51</sup> IMMIGRATION ENFORCEMENT ACTIONS: 2008, *supra* note 40, at 3. Apprehension data is collected on INS Form I-213, Record of Deportable/Inadmissible Alien, using the Enforcement Case Tracking System (ENFORCE). *Id.* at 2; IMMIGRATION & NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, 2001 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 237 (2003), *available at* <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2001/yearbook2001.pdf>. Data on detained aliens is collected through the INS's automated Deportable Alien Controls System (DACs). *Id.* at 237-38.

<sup>52</sup> OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2007, at 3 (2008), *available at* [http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement\\_ar\\_07.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_07.pdf).

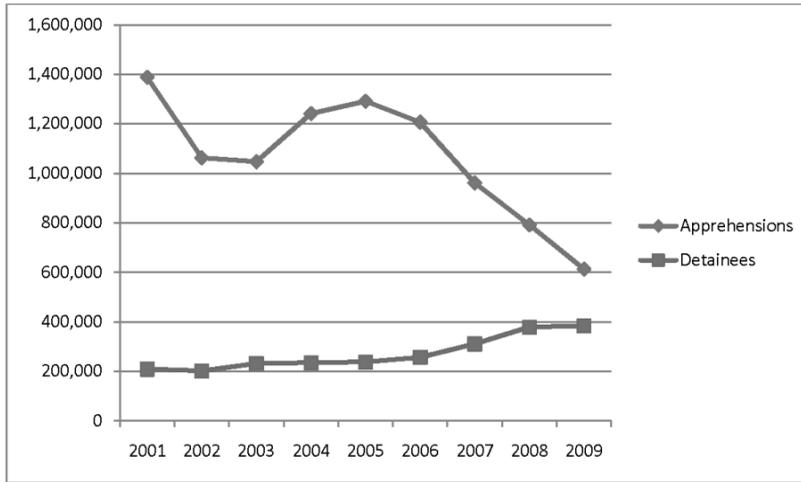
<sup>53</sup> *Id.* The number detained represented 32% of those apprehended. *See id.*

<sup>54</sup> *Id.* at 1. The report does acknowledge that part of the decrease in total apprehensions is due to a change in reporting practices, but it confirms that this does not account for the entire decrease. *Id.* at 3.

<sup>55</sup> IMMIGRATION ENFORCEMENT ACTIONS: 2008, *supra* note 40, at 1, 3.

<sup>56</sup> IMMIGRATION ENFORCEMENT ACTIONS: 2009, *supra* note 42, at 1, 3.

Figure 1: Apprehensions v. Detainees (2001–2009)



Sources: Office of Immigration Statistics, U.S. Dep't of Homeland Sec.; U.S. Immigration and Naturalization Service, Dep't of Justice.

These statistics demonstrate that no correlation exists between the number of apprehensions and the number of detainees. As the number of detainees continues to rise, the number of apprehensions has failed to keep pace. This finding is significant because it illustrates that the greater number of detainees is not merely a function of more illegal immigrants being apprehended; rather, a greater percentage of apprehended illegal immigrants are being detained. This may suggest that ICE is detaining apprehended individuals who, in past years, it would have let go.

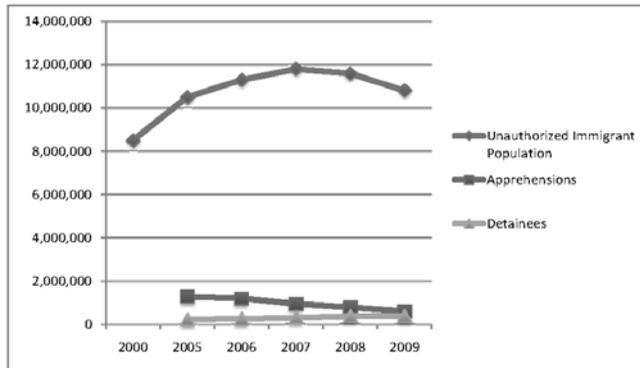
The second set of incongruent data shows that, as the unauthorized immigrant population has leveled off,<sup>57</sup> detentions have continued to rise.<sup>58</sup> As Figure 2 depicts, the unauthorized immigrant population has been leveling off, and even dropping, in the last few years. In January 2000, an estimated 8.5

<sup>57</sup> It is important to emphasize again that these numbers are estimates due to the inherent difficulty in calculating the unauthorized immigrant population. MICHAEL HOEFER ET AL., U.S. DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2009, at 2 (2010) [hereinafter 2009 ESTIMATES], available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2009.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2009.pdf). They are the best figures currently available. *Id.* For a discussion of the methodology behind them, see *id.* at 1–2.

<sup>58</sup> Compare *id.* at 2 (explaining that the number of unauthorized immigrants declined between 2007 and 2009), with IMMIGRATION ENFORCEMENT ACTIONS: 2008, *supra* note 40, at 3 (showing that the number of detainees rose again from 2007 to 2008).

million unauthorized immigrants were residing in the United States.<sup>59</sup> That number rose to 10.5 million in January 2005,<sup>60</sup> to 11.6 million in January 2006,<sup>61</sup> and then, in January 2007, only by 200,000 to 11.8 million.<sup>62</sup> Over the last few years though, the number of unauthorized immigrants in the United States has been declining.<sup>63</sup> The number decreased by almost one million from January 2008 to January 2009,<sup>64</sup> when the unauthorized immigrant population dropped to 10.8 million.<sup>65</sup> One year later, that number remained the same.<sup>66</sup>

Figure 2: Unauthorized Immigrant Population v. Apprehensions v. Detainees (2000, 2005–2009)<sup>67</sup>



Source: Office of Immigration Statistics, U.S. Dep't of Homeland Sec.

<sup>59</sup> MICHAEL HOEFER ET AL., U.S. DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2005, at 1 (2006), available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/ILL\\_PE\\_2005.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ILL_PE_2005.pdf).

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

<sup>61</sup> MICHAEL HOEFER ET AL., U.S. DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2006, at 1 (2007), available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/ill\\_pe\\_2006.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ill_pe_2006.pdf).

<sup>62</sup> MICHAEL HOEFER ET AL., U.S. DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2007, at 1 (2008), available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2007.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2007.pdf).

<sup>63</sup> 2010 ESTIMATES, *supra* note 32, at 1 (stating that the number of unauthorized immigrants living in the United States fell from January 2007 to January 2010).

<sup>64</sup> Compare MICHAEL HOEFER ET AL., U.S. DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2008, at 1 (2009), available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2008.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2008.pdf), with 2009 ESTIMATES, *supra* note 57, at 1.

<sup>65</sup> 2009 ESTIMATES, *supra* note 57, at 1.

<sup>66</sup> 2010 ESTIMATES, *supra* note 32, at 1.

<sup>67</sup> No statistics are available for the number of detainees or apprehensions in 2000.

Thus, as Figure 2 illustrates, the unauthorized immigrant population has remained relatively steady in recent years, even dropping in the last few, whereas the number of detainees has continued to rise. The greater number of detainees, then, cannot solely be a factor of more illegal immigrants in the United States. Rather, it is due to ICE detaining a greater percentage of those who are apprehended.

## 2. *Why Is ICE Detaining More Aliens? And Why Now?*

The increase in the number of detainees is a result of three factors: (1) a shift in policy toward detention as the primary means of immigration enforcement, (2) newly enacted statutes that have expanded the categories of individuals subject to mandatory detention, and (3) the wide latitude bestowed on ICE officers in discretionary detentions. This Comment argues that these three factors all reflect an incorrect shift away from individual determinations of detention, and that detention should be the exception rather than the norm in immigration policy.

### a. *Policy Choices: The Shift Toward Detention as the Primary Means of Enforcement*

A significant factor precipitating the rise in the number of aliens detained by ICE is a policy shift toward using detention as a primary means of immigration enforcement.<sup>68</sup> Previously under the Immigration and Nationality Act (INA), the United States Immigration and Naturalization Service (INS)<sup>69</sup> effectively eliminated the use of detention except when an individual was a security threat or a flight risk.<sup>70</sup> Prior to its amendment in 1996, §1252(a) gave discretion to the Attorney General to deny bail to aliens in deportation

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<sup>68</sup> See Kevin R. Johnson, *Immigration and Civil Rights After September 11: The Impact on California—An Introduction*, 38 U.C. DAVIS L. REV. 599, 604 (2005) (“In recent years, the federal government has increasingly relied on detention of noncitizens in enforcing the immigration laws, particularly immigrants convicted of crimes and awaiting deportation.”).

<sup>69</sup> INS oversaw the immigration service functions of the federal government prior to its dissolution on March 1, 2003. See *Our History*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/portal/site/uscis/> (follow “About Us” hyperlink; then follow “Our History” hyperlink) (last visited May 24, 2011). The Homeland Security Act of 2002, enacted in response to the September 11th attacks, dissolved INS. *Id.* The Homeland Security Act separated the functions of INS into three bodies within DHS: (1) U.S. Citizenship and Immigration Services, (2) ICE, and (3) Customs and Border Protection. *Id.*

<sup>70</sup> DET. & DEPORTATION WORKING GRP., *supra* note 48, at 10.

proceedings,<sup>71</sup> but “the Board of Immigration Appeals (BIA) had long interpreted that statutory grant of discretion to conform to due process requirements, holding that aliens should not be detained unless they posed either a risk of flight or a danger to the national security.”<sup>72</sup>

Beginning in the 1980s, however, a large influx of Cuban, Haitian, and Central American refugees—and public and congressional animosity toward this influx—greatly influenced the adoption of U.S. policy favoring the detainment of more aliens in both the mandatory and discretionary detainment categories.<sup>73</sup> This policy shift took force, then, in the 1990s when the United States began using detention as its primary means of enforcement, regardless of whether the individual was a security threat or a flight risk.<sup>74</sup> The United States’ decision to act in the 1990s seems to derive, at least in part, from fears of public safety in the wake of the World Trade Center bombing in 1993<sup>75</sup> and the Oklahoma City bombing in 1995, reinforcing the government’s desire to keep dangerous individuals out of the United States.<sup>76</sup> Thus, detention shifted from the exception to the norm in U.S. immigration enforcement policy: the use of detention as an immigration enforcement mechanism tripled during the 1990s.<sup>77</sup>

Evidence of this change in enforcement strategy can be seen in the exponential rise of bed space capacity. In 1995, INS had a daily detention

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<sup>71</sup> The statute provided that an alien

[p]ending a determination of deportability . . . may, upon warrant of the Attorney General, be arrested and taken into custody. . . . [A]ny such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (A) be continued in custody; or (B) be released under bond . . . ; or (C) be released on conditional parole.

8 U.S.C. § 1252(a)(1) (1994).

<sup>72</sup> David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1021 (2002).

<sup>73</sup> See *The History of Immigration Detention in the U.S.*, *supra* note 21.

<sup>74</sup> *Id.*

<sup>75</sup> See generally 142 CONG. REC. 7963 (1996) (memorializing Congressman Buyer’s argument that the proposed statute would prevent international terrorists, such as the mastermind behind the 1993 World Trade Center bombing, from entering the United States).

<sup>76</sup> See *supra* note 37 and accompanying text (explaining that the 1995 bombing helped provoke passage of AEDPA in 1996); see also INTER-AM. COMM’N ON HUMAN RIGHTS, REPORT ON IMMIGRATION IN THE UNITED STATES: DETENTION AND DUE PROCESS 3 (2010), available at <http://cidh.org/pdf/files/ReportOnImmigrationInTheUnitedStates-DetentionAndDueProcess.pdf> (“In an effort to control the influx of new immigrants, since the mid-1990s the United States stepped up efforts to detect, detain and deport undocumented immigrants and criminally-convicted legal immigrants . . .”).

<sup>77</sup> DET. & DEPORTATION WORKING GRP., *supra* note 48, at 5.

capacity of fewer than 7,500 beds.<sup>78</sup> As of October 2009, it had over 30,000.<sup>79</sup> This increase was the direct result of policy objectives and greater congressional funding to expand ICE's capacity to detain aliens.<sup>80</sup> Legislation that would require the addition of further bed space capacity, which has been introduced in both houses of Congress, underscores the push to detain more aliens.<sup>81</sup>

*b. Congressional Action: The Rise in Mandatory Detentions*

Through the enactment of various statutes, Congress has drastically expanded the categories of individuals subject to mandatory detention,<sup>82</sup> thereby contributing to the rise in the number of detainees.<sup>83</sup> The two core statutes expanding mandatory detention are the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and Antiterrorism and Effective Death Penalty Act (AEDPA), which Congress enacted in 1996 to achieve three goals: deter illegal immigration, prevent terrorism, and streamline enforcement of the death penalty.<sup>84</sup>

The first two goals are reflected in provisions requiring mandatory detention of criminal aliens. Current immigration law requires the mandatory

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<sup>78</sup> DORA SCHRIRO, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 2 (2009), available at <http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf>.

<sup>79</sup> *Id.*

<sup>80</sup> *See, e.g.*, SISKIN, *supra* note 45, at 13, 17 (noting that, as of 2007, ICE could detain 27,500 aliens per day and legislation pending before the Senate sought to increase that number to 31,500). Congress increased bed space funding from 20,800 beds in 2006 to 27,500 beds in 2007. *Id.*; *see also* Johnson, *supra* note 36, at 601 ("The 2004 Intelligence Reform and Terrorist Prevention Act authorized construction of up to 40,000 additional detention bed spaces, nearly twice the current average daily detainee bed space.")

<sup>81</sup> *See, e.g.*, SISKIN, *supra* note 45, at 17 ("S. 1639 would specify that for many of the guest worker and legalization provisions in the bills to go into effect, that DHS' Immigration and Customs Enforcement (ICE) must have enough bed space to detain 31,500 aliens per day."); *id.* at 20 ("H.R. 750 . . . would mandate that DHS make available 100,000 additional beds . . . for aliens in custody."). The Senate proposal states that for the guest-worker and legalization provisions to go into effect, more space would be needed to house those who would be detained under the new provisions. Thus, the inference is that Congress is trying to increase bed space to detain more aliens.

<sup>82</sup> Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified in scattered sections of 8 and 18 U.S.C.); Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 8, 15, 18, 22, 28, 40, 42, and 50 U.S.C.).

<sup>83</sup> *See* DET. & DEPORTATION WORKING GRP., *supra* note 48, at 5 ("[The IIRIRA] significantly increased the number of immigrants subject to mandatory detention and ha[s] drastically increased the average number of immigrants held in detention on a daily basis.")

<sup>84</sup> Shoba Sivaprasad Wadhia, *The Policy and Politics of Immigrant Rights*, 16 TEMP. POL. & CIV. RTS. L. REV. 387, 387 (2007).

detention of criminal aliens<sup>85</sup> as well as individuals who pose a national security risk.<sup>86</sup> “Criminal aliens include those who are inadmissible on criminal-related grounds as well as those who are deportable due to the commission of certain criminal offences while in the United States.”<sup>87</sup> The 1996 statutes redefined certain crimes so as to subject more aliens to mandatory detention as “criminals.”

For example, the IIRIRA and AEDPA expanded the definition of *aggravated felony* for immigration purposes.<sup>88</sup> “Specifically, AEDPA expanded the term by increasing the types of crimes which can constitute an ‘aggravated felony,’ while [IIRIRA] modified the sentencing and/or monetary terms related to many pre-existing offenses listed in the aggravated felony definition.”<sup>89</sup> Prior to the 1996 statutes, §1101(a)(43)(A) listed only murder as an aggravated felony.<sup>90</sup> The 1996 statutes expanded aggravated felony in §1101(a)(43)(A) to include “murder, rape, or sexual abuse of a minor.”<sup>91</sup> As another example, prior to the 1996 statutes, a crime of violence or a theft or burglary offense qualified as an aggravated felony if the felon’s term of imprisonment was at least five years.<sup>92</sup> Under the 1996 statutes, the required term was reduced to one year.<sup>93</sup> Expanding these categories to encompass

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<sup>85</sup> 8 U.S.C. § 1182(a)(2) (amended 2008); *id.* 1226(c)(1)(A) (2006).

<sup>86</sup> *Id.* § 1226(c)(1)(D). Any alien inadmissible or deportable for terrorist activity is subject to mandatory detention. *Id.* §§ 1226a(a)(1)–(3), 1182(a)(3)(B).

<sup>87</sup> SISKIN, *supra* note 45, at 7 n.33. An alien is inadmissible for (1) crimes of moral turpitude or an attempt or conspiracy to commit such a crime, (2) controlled substance violations, (3) two or more criminal convictions with aggregate sentences of five years or more, (4) controlled substance trafficking, (5) prostitution and commercialized vice, and (6) receipt of immunity from prosecution for serious criminal activity. 8 U.S.C. § 1182(a)(2).

Any alien who is found in the United States who is inadmissible is deportable. Only the following groups of criminal aliens who are inadmissible or deportable are not subject to mandatory detention: (1) aliens convicted of a single crime of moral turpitude who were sentenced to less than one year; (2) aliens convicted of high speed flight; and (3) aliens convicted of crimes of domestic violence, stalking, and child abuse or neglect.

SISKIN, *supra* note 45, at 7 n.33.

<sup>88</sup> AEDPA, Pub. L. No. 104-132, sec. 440, § 1101(a)(43), 110 Stat. 1214, 1277–78; IIRIRA, Pub. L. No. 104-208, sec. 321, § 1101(a)(43), 110 Stat. 3009, 3009-627 to -628.

<sup>89</sup> Wadhia, *supra* note 84, at 394. The term has even been interpreted to reach misdemeanor offenses such as shoplifting. *Id.*

<sup>90</sup> 8 U.S.C. § 1101(a)(43)(A) (1994). This version of the statute was effective until April 23, 1996. *Id.* AEDPA was effective as of April 24, 1996, and IIRIRA was effective as of September 30, 1996. AEDPA § 1; IIRIRA § 1.

<sup>91</sup> 8 U.S.C. § 1101(a)(43)(A) (2006).

<sup>92</sup> *Id.* § 1101(a)(43)(F)–(G) (1994).

<sup>93</sup> *Id.* § 1101(a)(43)(F)–(G) (2006).

more crimes automatically subjected a greater number of immigrants to mandatory detention.

In a further effort to deter illegal immigration and prevent terrorism, these 1996 statutes further stipulated that the newly expanded definitions be applied retroactively.<sup>94</sup> Thus, the statutes “required the mandatory detention of non-U.S. citizens newly defined as ‘aggravated felons’” based on even nonviolent offenses committed before the passage of the statutes.<sup>95</sup> Furthermore, the statutes also compelled the mandatory detention of persons under final orders of removal who had committed aggravated felonies, were terrorist aliens, or had been illegally present in the United States.<sup>96</sup> As a result, entire categories of aliens who would not have been subject to mandatory detention before 1996 must now be detained if caught.

The IIRIRA also instituted an expedited removal process.<sup>97</sup> Under this process, aliens who arrive in the United States without valid documentation or with false documents are ordered removed from the country.<sup>98</sup> A removal decision is not subject to any further hearing, review, or appeal, unless the alien indicates an intention to apply for asylum or expresses a fear of persecution<sup>99</sup>:

If the arriving alien expresses a fear of persecution or an intent to apply for asylum, the alien is placed in detention until a “credible fear” interview can be held. If the alien is found to have a credible fear, he may be paroled into the United States. If the credible fear is unsubstantiated, the alien is detained until the alien is removed from the United States.<sup>100</sup>

At the same time, AEDPA instituted expedited procedures for the removal of suspected foreign terrorists from the United States. Further, it allowed for the detention and deportation of non-U.S. citizens based on “secret evidence”

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<sup>94</sup> *Id.* § 1101(a)(43) (“Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after [the effective date of the Act].”).

<sup>95</sup> WALTER A. EWING, IMMIGRATION POLICY CTR., OPPORTUNITY AND EXCLUSION: A BRIEF HISTORY OF U.S. IMMIGRATION POLICY 6 (2008), available at <http://www.immigrationpolicy.org/sites/default/files/docs/OpportunityExclusion11-25-08.pdf>.

<sup>96</sup> See 8 U.S.C. §§ 1226(c), 1226a(1)–(3), 1227(a)(2)(A)(iii), 1227(a)(4)(B), 1182(a)(3)(A)–(B); see also SISKIN, *supra* note 45, at 7 n.36 (“Prior to IIRIRA, aliens convicted of aggregated [sic] felonies who could not be removed could be released.”).

<sup>97</sup> 8 U.S.C. § 1225(b)(1)(A)(i).

<sup>98</sup> *Id.* § 1182(a)(6)(C), (a)(7).

<sup>99</sup> *Id.* § 1225(b)(1)(A)(i).

<sup>100</sup> SISKIN, *supra* note 45, at 10.

that neither they nor their attorneys could see.<sup>101</sup> The scope of expedited removal has subsequently been expanded a number of times since its first enactment.<sup>102</sup>

Together, the IIRIRA and AEDPA also raised both bars to entry and bars to reentry. The AEDPA instituted more stringent procedures for granting asylum,<sup>103</sup> as immigration law now requires the mandatory detention of asylum seekers without proper documentation until they can demonstrate a “credible fear of persecution.”<sup>104</sup> “If the officer determines at the time of the interview that an alien has a credible fear of persecution [as defined by the statute], the alien shall be detained for further consideration of the application for asylum.”<sup>105</sup> But, if the officer determines at the time of the interview that the alien does not have a credible fear of persecution, “the officer shall order the alien removed from the United States without further hearing or review.”<sup>106</sup> The statute requires that “[a]ny alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed.”<sup>107</sup> These harsher procedures simultaneously make it more difficult for aliens to seek asylum and require their detention as their cases proceed.

At the same time, IIRIRA “established three- and ten-year bars to re-entry for immigrants unlawfully present in the United States.”<sup>108</sup> Under the new bars

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<sup>101</sup> EWING, *supra* note 95, at 7 (internal quotation marks omitted).

<sup>102</sup> In 2004 and 2006, DHS implemented regulations expanding expedited removal along the borders of the United States. See, e.g., Press Release, U.S. Dep’t of Homeland Sec., Department of Homeland Security Streamlines Removal Process Along Entire U.S. Border (Jan. 30, 2006), *available at* [http://www.dhs.gov/xnews/releases/press\\_release\\_0845.shtm](http://www.dhs.gov/xnews/releases/press_release_0845.shtm) (announcing the expansion of expedited removal along the United States–Canadian border and all United States coastal areas); Press Release, U.S. Dep’t of Homeland Sec., DHS Announces Expanded Border Control Plans (Aug. 10, 2004), *available at* [http://www.dhs.gov/xnews/releases/press\\_release\\_0479.shtm](http://www.dhs.gov/xnews/releases/press_release_0479.shtm) (explaining that the expansion of expedited removal “will only apply to those caught within 100 miles of the Mexican or Canadian borders, and only if they are apprehended within their first 14 days in the U.S.”).

<sup>103</sup> See 8 U.S.C. § 1225(b) (regarding applicants for admission to the United States); EWING, *supra* note 95, at 6–7.

<sup>104</sup> 8 U.S.C. § 1225(b)(1)(A)–(B). The most recent DHS reforms address asylum seekers. See *infra* text accompanying notes 158–61.

<sup>105</sup> 8 U.S.C. § 1225(b)(1)(B)(ii). The statute defines “credible fear of persecution” in clause (v). *Id.* § 1225(b)(1)(B)(v). While the definition gives ICE officers some degree of guidance, its meaning is still vague.

<sup>106</sup> *Id.* § 1225(b)(1)(B)(iii)(I).

<sup>107</sup> *Id.* § 1225(b)(1)(B)(iii)(IV).

<sup>108</sup> EWING, *supra* note 95, at 6. Immigrants “unlawfully present” refers to those aliens who remain in the United States after the expiration of lawful status or without being admitted or paroled. 8 U.S.C. § 1182(a)(9)(B)(ii).

to reentry, any alien who is unlawfully present in the United States for a period of more than 180 days but less than one year, who voluntarily departs the United States, and who again seeks admission into the country within three years of her previous departure will be inadmissible.<sup>109</sup> Similarly, any alien unlawfully present in the United States for one year or more who seeks admission again within ten years of her previous departure will also be inadmissible.<sup>110</sup> These more stringent bars to reentry demonstrate a concerted U.S. policy shift toward deterring aliens from trying to enter the United States,<sup>111</sup> and detaining them if they do.

Additionally, the USA Patriot Act of 2001 (Patriot Act), enacted in response to the September 11th attacks, “radically revise[d] the rules governing detention of immigrants.”<sup>112</sup> It permits the detention of an alien “if the Attorney General has reasonable grounds to believe that the alien” is engaged in terrorist activity or “any other activity that endangers the national security of the United States.”<sup>113</sup> Accordingly, under this new provision, if the alien is certified as one engaged in terrorist activity and taken into custody, the Attorney General must place the alien in removal proceedings or charge the alien with a criminal offense within seven days of detaining the alien.<sup>114</sup> Otherwise, the alien must be released.<sup>115</sup> David Cole indicates the expansive reach of the new provisions, partly due to the broad definition of “engage in terrorist activity”:

Because the INA defines “engage in terrorist activity” so broadly as to include the use of, or threat to use, a weapon with intent to endanger person or property, it would encompass a permanent resident alien who brandished a kitchen knife in a domestic dispute with her abusive husband, or an alien who found himself in a barroom brawl, picked up a bottle, and threatened another person with it.<sup>116</sup>

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<sup>109</sup> 8 U.S.C. § 1182(a)(9)(B)(i)(I).

<sup>110</sup> *Id.* § 1182(a)(9)(B)(i)(II).

<sup>111</sup> As discussed below in notes 244–45, deterrence is one of the rationales for detention.

<sup>112</sup> David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 970 (2002).

<sup>113</sup> USA Patriot Act of 2001, Pub. L. No. 107-56, § 236A, 115 Stat. 272, 351 (2001) (codified as amended at 8 U.S.C. § 1226(a)).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> Cole, *supra* note 112, at 971 (footnote omitted).

Prior to the Patriot Act, §1226a, which deals with mandatory detention of suspected terrorists, did not even exist.<sup>117</sup> The Patriot Act is thus another example of Congress expanding the definitions of the categories of aliens subject to mandatory detention. Overall then, Congress's decision to redefine existing categories has vastly expanded the pool of aliens subject to detention.<sup>118</sup> Thus, in part, the enactment of the expansive standards in the IIRIRA, the AEDPA, and the Patriot Act has caused the exponential increase in the number of alien detainees.<sup>119</sup>

*c. Agency Action: The Rise in Discretionary Detentions*

However, new immigration laws are not solely to blame for the rise in detainees. A third factor contributing to the increase in detainees is the rise in discretionary action by ICE officers. This rise stems from both the wide discretion given to such officers when making “discretionary detention determinations,” as well as an increase in the number of enforcement operations and officers out in the field.

ICE officers encounter two types of aliens: those who are subject to mandatory detention and those who are not. In its review of when and how ICE officers exercise discretion, the United States Government Accountability Office (GAO) found that “when [officers] encounter aliens who are fugitives, criminals, or other investigation targets, their ability to exercise discretion is limited by clearly prescribed policies and procedures governing the handling of targeted aliens.”<sup>120</sup> Because these categories of individuals are subject to mandatory detention or are the subjects of investigations, ICE officers must detain them upon an encounter.<sup>121</sup> This shows the effects of mandatory detention on the ground.<sup>122</sup>

However, when ICE officers encounter an alien who is not subject to mandatory detention—a discretionary detainee—officers have wide latitude to

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<sup>117</sup> USA Patriot Act § 236A (enacting 8 U.S.C. § 1226a).

<sup>118</sup> DET. & DEPORTATION WORKING GRP., *supra* note 48, at 10–11 (“One of the prime causes of the expansion in immigration detention is new legislation, enacted in 1996, that requires mandatory detention of many noncitizens in removal proceedings, without any individualized determination that they pose a danger or a flight risk that would actually justify such detention.”).

<sup>119</sup> See *supra* Figure 1 (showing the rise in detainees following the enactment of these statutes).

<sup>120</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-67, IMMIGRATION ENFORCEMENT: ICE COULD IMPROVE CONTROLS TO HELP GUIDE ALIEN REMOVAL DECISION MAKING 6 (2007) (footnote omitted).

<sup>121</sup> See *id.* (noting that aliens subject to mandatory detention pose an exception to an officer's ability to exercise discretion); *supra* Part I.A.2.b (discussing mandatory detention).

<sup>122</sup> See *supra* Part I.A.2.b.

determine whether to detain or release the alien pending the alien's immigration court hearing.<sup>123</sup> "When making this determination, ICE guidance instructs officers to consider a number of factors, such as humanitarian issues, flight risk, availability of detention space, and whether the alien is a threat to the community."<sup>124</sup> Although these factors provide some guidance to ICE officers in determining which aliens to detain, a perceived arbitrariness in this determination still remains, largely because "ICE has yet to formally publish policy and procedure or technical manuals specific to detention."<sup>125</sup> This lack of formal guidance likely makes ICE officers hesitant to release discretionary detainees; due to the uncertainty in the law and agency regulations, officers are unsure when release is appropriate. Of course, it is not possible to establish causation definitively because of the discretionary nature of these detentions. However, this Comment argues that this uncertainty is leading ICE officers to err on the side of caution and detain more of the aliens they encounter.

An example might help illustrate the arbitrariness inherent in many discretionary decisions made by ICE officers. As GAO reported, at one field office it visited, officers revealed that they had released two women and two children on an operation due to a lack of appropriate detention space to house women and children.<sup>126</sup> This suggests that the ICE officers likely would have detained those women and children if, when encountered, adequate detention space had been available for them.<sup>127</sup> But, a lack of appropriate detention space to house women and children should not be the primary factor in deciding whom to detain. This story further implies that, even if the ICE

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<sup>123</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 120, at 6.

<sup>124</sup> *Id.* at 15. Although these factors provide some guidance to ICE officers in their determinations of alien detention, GAO found that:

With respect to DRO's field operational manual, some guidance is available to help officers decide whether to detain aliens pending their immigration hearings, but it does not clarify how officers should exercise discretion to determine detention for nonmandatory detention cases, especially for aliens with humanitarian issues or aliens who are not targets of ICE investigations.

*Id.* at 20.

<sup>125</sup> SCHRIRO, *supra* note 78, at 16. Dr. Schriro recommends that "[t]he field should have access to timely, clear and complete written guidance about its critical functions—such as determining an alien's bond amount, eligibility for parole, or suitability for placement in an ATD program—so as to ensure effective staff performance and case processing." *Id.*; see also U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 120, at 22 ("[A 2004 DHS memo] provides officers and supervisors with flexibility on detaining aliens (who are not subject to mandatory detention) depending on the circumstances of the case, such as available bed space. However, this memo does not offer specific guidance on determining detention for aliens with humanitarian circumstances or aliens who are not primary targets of ICE investigations.").

<sup>126</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 120, at 16.

<sup>127</sup> See *id.*

officers had reason to believe the women and children were dangerous, they would have had to release them because there was no appropriate place to detain them. If the law and agency regulations only required the detention of dangerous aliens, appropriate detention space would be available to take in more aliens when necessary.

Another likely cause for the increase in ICE's discretionary detainments is the expansion of ICE worksite enforcement<sup>128</sup> and fugitive operations,<sup>129</sup> two procedures to locate and apprehend illegal aliens.<sup>130</sup> In 2006, ICE arrested 716 criminal aliens and 3,667 other illegal aliens as part of its worksite enforcement operations.<sup>131</sup> These numbers represent a marked increase from 2005 when ICE made far fewer than 500 criminal arrests and just over 1,000 administrative arrests.<sup>132</sup> Through July 2007 alone, ICE made more criminal arrests and administrative arrests in its worksite operations than the combined arrests for worksite enforcement operations from 2002 through 2005.<sup>133</sup> These numbers indicate a correlation between expanded worksite enforcement and fugitive operations, and the number of discretionary detainments.

As the number of officers in the field increases, the probability that they will encounter aliens with humanitarian issues or aliens who are not targets of other investigations increases.<sup>134</sup> Thus, the opportunities to exercise discretion in detention determinations also increase.<sup>135</sup> As these opportunities grow, so too does the potential for arbitrariness in their determinations. Due to the lack of standardized guidance for these discretionary decisions, there is a great risk

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<sup>128</sup> Worksite enforcement operations “are conducted to apprehend and remove aliens who are unlawfully employed and impose sanctions on employers who knowingly employ these aliens.” *Id.* at 2.

<sup>129</sup> Fugitive operations “are enforcement operations designed to locate, apprehend, and remove aliens from the country who have not complied with orders of removal issued by an immigration judge—known as fugitive aliens.” *Id.*

<sup>130</sup> *Id.* at 23.

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

<sup>132</sup> *Id.* at 23–24.

<sup>133</sup> *Id.* at 23. ICE made 742 criminal arrests and 3,651 administrative arrests through July 2007. *Id.*

<sup>134</sup> *Id.* The report explains that increases in worksite enforcement and fugitive operations “may increase the number of encounters that officers have with removable aliens who are not the primary targets or priorities of ICE investigations.” *Id.* at 24. These aliens are those that are not subject to mandatory detention under federal law. *Id.* at 6.

<sup>135</sup> *Id.* at 23. The report explains that “ICE has experienced a more than six-fold increase (between fiscal year 2003 and the third quarter of fiscal year 2007) in the number of new officers participating in worksite enforcement operations,” which means that “more officers are making decisions and exercising discretion in these complex environments.” *Id.* at 31. The report recommends that ICE have a mechanism to provide information regarding enforcement operations across all field offices because it “would help identify areas needing corrective action regarding officer decision making.” *Id.*

of improper decision making, which becomes greater as the number of encounters with aliens increases.<sup>136</sup> As the GAO report notes, “With these expanded operations, the need for up to date and comprehensive guidance to reduce the risk of improper decision making becomes increasingly important.”<sup>137</sup> In addition, the lack of specific criteria to follow in detention determinations can lead to due process violations. In a recent report on immigration in the United States, the Inter-American Commission on Human Rights (IACHR) argues, “[D]etention of immigrants also has a significant impact on detainees’ chances of putting on an adequate defense and filing claims for relief. As a result, the quality of due process in immigration proceedings is affected.”<sup>138</sup>

While the new federal immigration laws, increased ICE discretion, and policy shifts have drastically increased the number of detainees, ICE officers still maintain discretion not to detain an alien. Yet the policy shift toward detainment as the primary means of immigration enforcement has likely led to more of these discretionary decisions resulting in detainments. While the recent reforms address many of the problems with the current immigration detention system, they will not lessen the number of immigrants ICE detains.

### *B. Recent Reforms*

Immigration reform, which has consistently been a controversial issue in American politics, has grown even more divisive in recent years.<sup>139</sup> In President Obama’s first year in office, his team at DHS announced three waves of reform meant to address growing concerns about oversight of the immigration detention system and human rights violations therein.<sup>140</sup> While these reforms do address the penal nature of the current system, inadequate medical care, and oversight issues, they fail to effectively target the root of the immigration problem: increased detention and the system’s inability to handle the rising number of detainees. This section will first address the Obama Administration’s proposed reforms before concluding that they fail to address the crux of the problem: increased detention. While U.S. officials acknowledge the rising number of detainees, they fail to acknowledge that it is

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<sup>136</sup> See *supra* notes 124–25 and accompanying text.

<sup>137</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 120, at 23.

<sup>138</sup> INTER-AM. COMM’N ON HUMAN RIGHTS, *supra* note 76, at 130–43 (discussing the impact of detentions on immigrants’ due process).

<sup>139</sup> See *supra* notes 21–22 and accompanying text.

<sup>140</sup> See *infra* Part I.B.1.

a problem, and rather than try to reduce the numbers, they promise to keep detaining large numbers of aliens.<sup>141</sup>

### 1. Proposed Reforms

DHS announced its first round of immigration detention reforms on August 6, 2009.<sup>142</sup> The stated purpose of these reforms is to address the human rights concerns regarding detainees in the immigration detention system, improve oversight of the system, and integrate expanded use of alternatives to detention to lower the number of detainees held in detention centers.<sup>143</sup> The reforms are not meant to reverse the overall increase in aliens subject to detention or lessen the number of detainees in the system.<sup>144</sup>

Instead, DHS's reform efforts focus on improvements to the detention centers and the lives of detainees in those centers.<sup>145</sup> Such improvements call for greater access to health care and greater direct federal oversight of the centers and their operations.<sup>146</sup> This overhaul recognizes that the current system relies heavily on a "decentralized, jail-oriented approach,"<sup>147</sup> which does not adequately address the needs of the detention population's civil makeup.<sup>148</sup>

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<sup>141</sup> See *infra* note 168 and accompanying text.

<sup>142</sup> *Fact Sheet: 2009 Immigration Detention Reforms*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT (Aug. 6, 2009), <http://www.ice.gov/news/library/factsheets/reform-2009reform.htm>. In response to a question about the timing of the announcement, ICE Assistant Secretary John Morton answered that it was a factor of how long he had been on the job. John Morton, Assistant Sec'y, U.S. Immigration & Customs Enforcement, Transcript of Conference Call to Announce Major Reforms Planned for Immigration and Customs Enforcement's Immigration Detention System (Aug. 6, 2009).

<sup>143</sup> Mary Meg McCarthy, Exec. Dir., Heartland Alliance's Nat'l Immigrant Justice Ctr., Department of Homeland Security Detention Reform: A Step in the Right Direction, but Does Not Go Far Enough to Address Human Rights Concerns (Aug. 6, 2009) (transcript available at <http://www.immigrantjustice.org/news/detention/2009dhsdetentionreform.html>); *Fact Sheet: 2009 Immigration Detention Reforms*, *supra* note 142.

<sup>144</sup> See *infra* notes 168–72 and accompanying text (acknowledging that the reforms are not meant to reduce the number of detainees, but rather that ICE intends to continue detaining large numbers of aliens).

<sup>145</sup> *Fact Sheet: 2009 Immigration Detention Reforms*, *supra* note 142.

<sup>146</sup> *Id.*

<sup>147</sup> SCHRIRO, *supra* note 78, at 2–3 (“With only a few exceptions, the facilities that ICE uses to detain aliens were built, and operate, as jails and prisons to confine pre-trial and sentenced felons. ICE relies primarily on correctional incarceration standards designed for pre-trial felons and on correctional principles of care, custody, and control. These standards impose more restrictions and carry more costs than are necessary to effectively manage the majority of the detained population.”); *Fact Sheet: 2009 Immigration Detention Reforms*, *supra* note 142.

<sup>148</sup> McCarthy, *supra* note 143; *Fact Sheet: 2009 Immigration Detention Reforms*, *supra* note 142.

Specifically, the reforms outline seven steps for ICE Director John Morton<sup>149</sup> to implement immediately.<sup>150</sup> These steps are intended to design a civil detention system tailored to ICE's needs, and to improve medical care, custodial conditions, fiscal prudence, and ICE oversight.<sup>151</sup> Certain steps also propose more specific goals, such as discontinuing use of family detention at the T. Don Hutto Family Residential Facility in Texas, operating the Hutto facility solely as a female detention center, and relocating detained families to the Berks Family Residential Center in Pennsylvania.<sup>152</sup>

Further, on October 6, 2009, DHS Secretary Janet Napolitano and Morton announced a second round of immigration detention reform initiatives.<sup>153</sup> This round of reform efforts focuses on the seven areas that the newly created Office of Detention Policy and Planning (ODPP) is evaluating in its overhaul of the detention system.<sup>154</sup> Along with identifying specific steps to be taken in each of these seven areas, DHS also introduced five core principles to guide long-term efforts:

- ICE will prioritize efficiency throughout the removal process to reduce detention costs, minimize the length of stays and ensure fair proceedings;
- ICE will detain aliens in settings commensurate with the risk of flight and danger they present;
- ICE will be fiscally prudent when carrying out detention reform;
- ICE will provide sound medical care; and

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<sup>149</sup> Director Morton is the head of ICE, the principal investigative component of DHS. *Director, John Morton*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, <http://www.ice.gov/about/leadership/director-bio/john-morton.htm> (last visited May 24, 2011).

<sup>150</sup> *Fact Sheet: 2009 Immigration Detention Reforms*, *supra* note 142.

<sup>151</sup> *Id.*

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

<sup>153</sup> *ICE Detention Reform: Principles and Next Steps*, U.S. DEP'T OF HOMELAND SEC. (Oct. 6, 2009), [http://www.dhs.gov/xlibrary/assets/press\\_ice\\_detention\\_reform\\_fact\\_sheet.pdf](http://www.dhs.gov/xlibrary/assets/press_ice_detention_reform_fact_sheet.pdf).

<sup>154</sup> *Id.* These seven areas are those that Dr. Schriro identified in her overview and evaluation of the immigration detention system as the "seven components that ICE must address in order to design a successful system of Immigration Detention." SCHRIRO, *supra* note 78, at 4. The seven areas are population management, detention management, programs management, health care management, alternatives to detention management, special populations management, and accountability. *ICE Detention Reform: Principles and Next Steps*, *supra* note 153.

- ICE will ensure Alternatives to Detention (ATD) are cost effective and promote a high rate of compliance with orders to appear and removal orders.<sup>155</sup>

These core principles address the need for greater federal oversight, more specific attention to detainee care, and greater uniformity at detention facilities throughout the United States.<sup>156</sup> Morton also announced that ICE had successfully completed a number of the steps announced in its August reforms, such as forming the ODDP and Office of Detention Oversight (ODO), and transitioning the Hutto Facility into a “dedicated detention facility for women.”<sup>157</sup>

Finally, DHS announced a third round of reforms in December 2009, when ICE issued new procedures for asylum seekers<sup>158</sup>:

U.S. immigration laws generally require aliens who arrive in the United States without valid entry documents to be immediately removed without further hearing; however, arriving aliens can pursue protection in the United States if they are first found by a U.S. Citizenship and Immigration Services (USCIS) asylum officer or an immigration judge to have a credible fear of persecution or torture in their home country.<sup>159</sup>

The new policy, effective January 4, 2010, states that ICE will automatically consider for parole those aliens who arrive in the United States and are found to have a credible fear of persecution or torture,<sup>160</sup> as compared to the former policy, which required aliens to affirmatively request parole in writing.<sup>161</sup> Thus, while the reforms do provide ICE officers with *some* additional guidance for when they encounter aliens entering the country, this policy addresses only a narrow set of circumstances, and ICE officers are otherwise left with insufficient guidance.

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<sup>155</sup> ICE Detention Reform: Principles and Next Steps, *supra* note 153.

<sup>156</sup> *Id.*

<sup>157</sup> Janet Napolitano, U.S. Sec’y of Homeland Sec. & John Morton, Assistant Sec’y, U.S. Immigration & Customs Enforcement, New Immigration Detention Reform Initiatives Press Conference (Oct. 6, 2009).

<sup>158</sup> *Fact Sheet: Revised Parole Policy for Arriving Aliens with Credible Fear Claims*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT (Dec. 16, 2009), <http://www.ice.gov/news/library/factsheets/credible-fear.htm>.

<sup>159</sup> Press Release, U.S. Immigration & Customs Enforcement, ICE Issues New Procedures for Asylum Seekers as Part of Ongoing Detention Reform Initiatives (Dec. 16, 2009), *available at* <http://www.ice.gov/news/releases/0912/091216washington.htm>.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

## 2. *Inadequacy of Proposed Reforms*

DHS's reforms are necessary to address a number of problems inherent in the immigration detention system.<sup>162</sup> Yet, they fail to address the most fundamental problem: ICE is detaining too many aliens. To lessen the detainee population, any comprehensive immigration reform must not only address the inadequacies of the current system, but must also address why ICE is detaining more aliens.

As discussed, one of the largest issues impeding immigration detention reform is the rising number of detainees in the system in recent years<sup>163</sup>:

The size of the detained alien population is a function of the number of admissions and removals or releases and the total number of days in detention. Over time, policies have changed, priorities have been refined and new strategies have been adopted, resulting in a greater number of unlawfully present aliens apprehended and detained. While the detained population has increased appreciably over time, the proportion of the arrested population who are criminal aliens has remained fairly constant.<sup>164</sup>

As the IACHR report explains, “[I]mmigration detention in the United States is the rule rather than the exception, and . . . the chances of obtaining one’s release are few.”<sup>165</sup> One reason this is a problem is that “vulnerable groups figure prominently among those being held in immigration detention. . . . The generalized use of detention in the case of asylum-seekers does not comport with the right to personal liberty.”<sup>166</sup> The DHS reforms ignore these realities. While they do acknowledge the inadequacy of the current system, they fail to comprehensively address the expansion of mandatory detentions or the arbitrary nature of discretionary detentions. However, as detention centers remain unable to handle the large influx of detainees they continue to receive, focusing solely on improving these centers, and the system more generally, will not effectively solve the human rights and due process violations that have become routine in them.<sup>167</sup> Thus, even if DHS’s reforms are wholly

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<sup>162</sup> See *supra* Part I.B.1 (including human rights concerns, the lack of direct federal oversight, and inadequate medical care).

<sup>163</sup> SCHRIRO, *supra* note 78, at 12.

<sup>164</sup> *Id.*

<sup>165</sup> INTER-AM. COMM’N ON HUMAN RIGHTS, *supra* note 76, at 35.

<sup>166</sup> *Id.*

<sup>167</sup> McCarthy, *supra* note 143. See generally INTER-AM. COMM’N ON HUMAN RIGHTS, *supra* note 76 (noting that the Inter-American Commission on Human Rights released a report in December 2010 detailing how the Obama Administration’s reforms are not sufficient to improve the immigration detention system);

successful, its efforts are still inadequate because they will not lower the number of aliens in the detention system.

## II. ISSUES INHERENT IN THE IMMIGRATION DETENTION SYSTEM AND THE NEED FOR A MORE COMPREHENSIVE SOLUTION RESULTING IN FEWER DETAINEES

Ultimately, the immigration detention system will only improve if ICE detains fewer aliens. As discussed, mandatory detention provisions are too broad; similarly, the lack of guidance provided to ICE officers leads to their overuse of discretionary detentions. While the reforms proposed by the Obama Administration address numerous other failings in the system, they neglect to address the increased immigrant population. In fact, Morton conceded that the reforms will not decrease the number of aliens detained: the reforms are not “about whether or not we’re going to detain people. We are going to continue to detain people, and we’re going to continue to detain people on a large scale.”<sup>168</sup> This acknowledgement implies that ICE does not recognize that the increasing number of detainees is one of the key issues impeding successful immigration reform.

In fact, this is the most central problem faced by the current detention system, and the root of all other problems. Therefore, ICE should detain fewer aliens for three reasons: (1) mandatory and discretionary detention determinations currently result in detention of individuals who should not be detained, (2) detention is not a cost-effective solution, and (3) the current system is not capable of handling the rising number of detainees.

### A. *Unfairness in Detention Decisions*

Both the mandatory detention statutes and ICE’s implementation of nonmandatory detentions result in the detention of individuals who should never have been detained in the first place.<sup>169</sup> Subsection 1 will first establish

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Mary Meg McCarthy, Exec. Dir., Heartland Alliance’s Nat’l Immigrant Justice Ctr., International Human Rights Commission: Immigration Detention System Violates U.S. Human Rights Obligations (Mar. 18, 2011) (transcript available at <http://www.immigrantjustice.org/press/detention/iachrreport.html>) (endorsing the IACHR’s report, which “condemns the increasing dependence of the U.S. government on detention as an immigration enforcement tool and urges it to expand alternatives to detention programs”).

<sup>168</sup> Morton, *supra* note 142.

<sup>169</sup> See, e.g., INTER-AM. COMM’N ON HUMAN RIGHTS, *supra* note 76, at 6 (“[T]he Inter-American Commission is convinced that in many if not the majority of cases, detention is a disproportionate measure and

why the mandatory detention provisions need to be narrowed, and subsection 2 will establish why individual determinations are needed for discretionary detention decisions, also leading to the detention of fewer aliens.

### *1. The Mandatory Detention Provisions Should Be Narrowed*

The categories of aliens subject to mandatory detention should be narrowed to their pre-1996 definitions. Aliens subject to mandatory detention are thrown into detention centers without an individualized determination of whether it is necessary to detain them.<sup>170</sup> In certain cases, like that of Mr. Scarlett, the sole basis for detention is a single, nonviolent offense for which the individual has already served his sentence in the criminal justice system.<sup>171</sup> DHS's reforms, while designed to improve the immigration detention system, still fail to address why lawful permanent residents such as Mr. Scarlett continue to be detained, even though they pose no threat to the community nor present a flight risk.<sup>172</sup> There is no evidence that detaining these individuals has protected the public or prevented any aliens from absconding.

### *2. Discretionary Detention Determinations Are Arbitrary and Neglect Individualized Consideration*

The current regulations governing discretionary detentions are arbitrary and do not require an individualized determination of an alien's need for detention; this lack of specific criteria for ICE officers to use in their detention determinations leads them to err on the side of caution and detain more of the aliens they encounter. But many of those whom ICE detains could just as effectively be placed in alternatives to detention (ATD)<sup>173</sup> or released without risking flight or danger to the community. These two alternatives would come at a much lower cost to the government and would provide a much better existence for the aliens who would not be subject to the problems of the detention system. As discussed previously, ICE officers have wide latitude in

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the alternatives to detention programs would be a more balanced means of serving the State's legitimate interest in ensuring compliance with immigration laws.").

<sup>170</sup> See *supra* notes 82–119 and accompanying text (discussing mandatory detention).

<sup>171</sup> See *supra* note 6 and accompanying text.

<sup>172</sup> Morton, *supra* note 142.

<sup>173</sup> ATD "are the community-based supervision strategies that make up a significant portion of less restrictive conditions of control." SCHRIRO, *supra* note 78, at 5. ICE currently operates three ATD programs: the Intensive Supervision Appearance Program, Enhanced Supervision Reporting, and Electronic Monitoring. *Id.* at 20. The three programs had a total of 19,160 aliens in them as of September 1, 2009. *Id.* at 6.

determining whether discretionary detentions are appropriate.<sup>174</sup> The perception is that discretionary detention determinations are arbitrary.<sup>175</sup> One reason for this arbitrariness is that no formal regulations guide ICE officers in their determinations of discretionary detentions.<sup>176</sup> This is illustrated through ICE's failure to provide comprehensive and up-to-date guidance on how to exercise discretion.<sup>177</sup> To address this issue of arbitrariness in discretionary detention determinations, ICE must focus on making more individualized determinations of detention and concurrently create more and better training opportunities for ICE officers and lawyers, in an effort to ensure greater uniformity in the exercise of discretion across all ICE units.<sup>178</sup>

The GAO review lists a number of concerns that arise from ICE's failure to provide up-to-date and comprehensive guidance.<sup>179</sup> First, the Office of Investigations' (OI) and Office of Detention and Removal Operations' (DRO) manuals have not been updated to reflect the sharp increase in ICE's worksite enforcement and fugitive operations in recent years.<sup>180</sup> Thus, ICE officers have no guidance on how to handle the increased number of aliens they encounter or how to make discretionary detention determinations when factors such as sole-caregiver responsibilities, medical reasons, or lack of bed space limit their ability to detain all the aliens they encounter.

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<sup>174</sup> See *supra* Part I.A.2.c.

<sup>175</sup> See *supra* text accompanying note 126 (providing one example of a seemingly arbitrary detention determination).

<sup>176</sup> See *supra* Part I.A.2.c.

<sup>177</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 120, at 7.

<sup>178</sup> In its review, GAO made three similar recommendations to enhance ICE's ability to inform and monitor its officers' use of discretion:

- (1) develop time frames for updating existing policies, guidelines, and procedures for alien apprehension and removals and include factors that should be considered when officers make apprehension, charging, and detention determinations for aliens with humanitarian issues;
- (2) develop a mechanism to help ensure that officers are consistently provided with updates regarding legal developments; and
- (3) evaluate the costs and alternatives for developing a reporting mechanism by which ICE senior managers can analyze trends in the use of discretion across ICE's field offices to help identify areas that may require management actions—such as changes to guidance, procedures, and training—to address problems or support development of best practices.

*Id.* at 10.

<sup>179</sup> *Id.* at 7.

<sup>180</sup> *Id.*

Second, there is a dearth of uniformity across ICE offices and units.<sup>181</sup> ICE lacks a mechanism allowing it to analyze information specific to the exercise of discretion across all units.<sup>182</sup> This means that ICE cannot monitor whether all of its offices are employing similar standards when making discretionary detention determinations. While many of the ICE organizational units responsible for removal operations have issued guidance memoranda regarding discretion due to humanitarian issues, these memoranda fail to comprehensively address the myriad circumstances ICE officers and attorneys may encounter.<sup>183</sup> Additionally, these memoranda generally only apply to the unit that issued them rather than uniformly throughout ICE units,<sup>184</sup> again illustrating the absence of formal standards leading to arbitrariness. This means that one ICE unit could stipulate that all aliens with sole-caregiver status should be subject to alternatives to detention, while another ICE unit could suggest that they be detained absent extenuating circumstances.

Third, in its review, the GAO found that “the guidance does not serve to fully support officer decision making in cases involving humanitarian issues and aliens who are not primary targets of ICE investigations.”<sup>185</sup> This lack of guidance illustrates one of the largest risks of ICE’s current method of discretionary detention determinations: it “puts ICE officers at risk of taking actions that do not support the agency’s operational objectives.”<sup>186</sup> This risk is further complicated by GAO’s finding that no consistent mechanism ensures that ICE officers are aware of legal developments that affect their detention decisions.<sup>187</sup> Rather, each Chief Counsel Office independently decides whether to communicate these legal developments to ICE officers, thereby putting ICE officers at risk of making incorrect *and* illegal removal and detention decisions.<sup>188</sup>

Further, President Obama’s reforms only take one small step to provide greater guidance to ICE officers in making discretionary detention

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<sup>181</sup> *Id.* at 7–8. ICE has seventy-five Offices of Investigations, Offices of Detention and Removal Operations, and Chief Counsel field offices involved in the alien apprehension and removal program. *Id.* at 9.

<sup>182</sup> *Id.* at 8.

<sup>183</sup> *Id.* at 7.

<sup>184</sup> *Id.* at 7–8.

<sup>185</sup> *Id.* at 7.

<sup>186</sup> *Id.* at 8.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

determinations<sup>189</sup>—in the context of asylum seekers.<sup>190</sup> The revised guidelines, issued by ICE in December 2009,

will permit parole from detention—which temporarily authorizes aliens to enter the United States without being formally admitted or granted immigration status—of aliens arriving at U.S. ports of entry who establish their identities, pose neither a flight risk nor a danger to the community, have a credible fear of persecution or torture, and have no additional factors that weigh against their release.<sup>191</sup>

Admittedly, these guidelines give ICE officers making detention determinations clearer standards,<sup>192</sup> which account for individual factors and thus provide for more individualized determinations of asylum seekers.<sup>193</sup> While this is a promising step, it addresses only asylum seekers—a small percentage of the illegal immigrants entering the country—and lacks more comprehensive guidelines to help ICE officers in their general discretionary detention determinations.<sup>194</sup> ICE officers need specific, standardized criteria across all units to guide them in these determinations. Only then will the due process rights of aliens be upheld.

### *B. The Higher Costs of Detention*

Each time the government detains an alien, it spends more money; the increasing number of detainees thus strains the detention system because it compels the government to spend larger sums of money on detaining aliens. The proposed reforms do not address reducing the number of detainees. Therefore, as the number of detainees continues to rise, the costs of detention will rise as well.

Detention is a multibillion-dollar industry.<sup>195</sup> With a few exceptions, most of the over 300 facilities used to detain immigrants are contracted out to local

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<sup>189</sup> See *supra* text accompanying notes 158–61 (discussing the revised parole policy for asylum seekers with credible fear claims).

<sup>190</sup> Press Release, U.S. Immigration & Customs Enforcement, *supra* note 159.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> DANIEL C. MARTIN & MICHAEL HOEFER, U.S. DEP'T OF HOMELAND SEC., REFUGEES AND ASYLEES: 2008, at 3 (2009), available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_rfa\\_fr\\_2008.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_rfa_fr_2008.pdf).

<sup>195</sup> *The Money Trail*, DET. WATCH NETWORK, <http://detentionwatchnetwork.org/node/2393> (last visited May 24, 2011); see also Leslie Berestein, *Detention Dollars: Tougher Immigration Laws Turn the Ailing Private Prison Sector into a Revenue Maker*, SAN DIEGO UNION-TRIB., May 4, 2008, at C1 (“As increasingly tough immigration laws have called for the detention and deportation of ever more immigrants, the demand for

or county facilities through intergovernmental agreements, private prison corporations, or the Federal Bureau of Prisons.<sup>196</sup> The average cost of detaining an alien for one day at one of these facilities is ninety-five dollars.<sup>197</sup> ICE pays for every bed at some locations, regardless of whether it is occupied, whereas at others the daily rate is reduced if a certain occupancy level is achieved.<sup>198</sup> Furthermore, the average cost per day does not include other expenses ICE incurs, such as on-site and off-site medical care for detainees, transportation between detention facilities, education provided to detained minors, facility rent, and other services.<sup>199</sup>

By comparison, the ATD program costs range from twelve dollars to twenty-two dollars per day.<sup>200</sup> Even though this figure does not include other costs incurred by ICE, including compensation of ICE personnel assigned to the ATD unit and fugitive operations activities,<sup>201</sup> it is still much lower than the cost of detaining an alien in a detention center.

One of the core issues with prison privatization is that competition for profits can lead to a push for greater incarceration. “By exacerbating the pressure on [ICE] to find adequate bed space, mandatory detention forces [ICE] to rely increasingly heavily on contracts with privately run facilities where some of the least humane conditions prevail.”<sup>202</sup> Many of these private companies even lobby Congress for more detention, to increase the number of detainees housed and, correspondingly, their profits.<sup>203</sup> Thus, rather than focus on humanitarian and medical concerns, these private companies are principally concerned with profit maximization:

Detention-for-dollars puts perverse financial incentives in play. Public jailers are increasingly heard to boast about cutting expenditures for custody and care of detainees well below the *per diem* price they’ve negotiated with federal authorities. This insidious incentive cuts directly across concerns about compliance with

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bed space by immigration authorities has helped turn what was once a dying business into a multibillion-dollar industry with record revenue and stock prices several times higher than they were eight years ago.”)

<sup>196</sup> *The Money Trail*, *supra* note 195.

<sup>197</sup> DET. & DEPORTATION WORKING GRP., *supra* note 48, at 5; OFFICE OF INSPECTOR GEN., U.S. DEP’T OF HOMELAND SEC., ANNUAL PERFORMANCE PLAN FOR FISCAL YEAR 2010, at 64 (2009), available at [http://www.dhs.gov/xoig/assets/OIG\\_APP\\_FY10.pdf](http://www.dhs.gov/xoig/assets/OIG_APP_FY10.pdf).

<sup>198</sup> SCHIRO, *supra* note 78, at 11.

<sup>199</sup> *Id.*

<sup>200</sup> OFFICE OF INSPECTOR GEN., *supra* note 197, at 64.

<sup>201</sup> SCHIRO, *supra* note 78, at 11.

<sup>202</sup> Legomsky, *supra* note 35, at 547.

<sup>203</sup> *The Money Trail*, *supra* note 195.

detention standards that were created to foster a decent, humane custodial environment for the rapidly-growing number of people who are subjected to detention.<sup>204</sup>

Significantly reducing the number of detainees will hurt these private companies because it will largely obviate the need for new prisons and detention centers.

While the DHS reforms do acknowledge the high costs of detention,<sup>205</sup> they fail to adequately respond to this problem. They promise that “[e]ach of these reforms are expected to be budget neutral or result in cost savings through reduced reliance on contractors to perform key federal duties and additional oversight of all contracts.”<sup>206</sup> A few of the reforms do have a likelihood of reducing costs.<sup>207</sup> For example, ICE hopes to cut medical care costs of transportation by minimizing transfers.<sup>208</sup>

But, as discussed previously, one of the largest problems with the current immigration detention system is the perverse incentive given to private contractors to push for greater incarceration: their profits increase as the number of detainees rises.<sup>209</sup> As discussed, ICE has no present plans to reduce the number of aliens it detains.<sup>210</sup> Although the reforms promise to reduce ICE reliance on contractors to perform key federal duties and to centralize all contracts under ICE headquarters’ supervision, they do not address whether ICE will continue to contract with these local or county facilities, private prison corporations, and the Federal Bureau of Prisons.<sup>211</sup> ICE does not own the facilities required to detain the number of illegal immigrants it retains in its custody, and thus relies on these facilities and contracts to do so. If it were to detain these aliens on its own, it would need to build facilities to hold them, which would come at a high cost. If ICE chooses to continue to contract with local and county facilities owned and run by companies principally concerned with high profits, the costs of detention will not decrease considerably. Thus, the current reforms do not minimize the high costs of detention because they fail to address the significant problem of competition for profits among private

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<sup>204</sup> DET. & DEPORTATION WORKING GRP., *supra* note 48, at 51.

<sup>205</sup> *ICE Detention Reform: Principles and Next Steps*, *supra* note 153.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> See *supra* notes 202–04 and accompanying text.

<sup>210</sup> See *supra* text accompanying note 168.

<sup>211</sup> *ICE Detention Reform: Principles and Next Steps*, *supra* note 153.

contractors.<sup>212</sup> Because ICE pays per detainee, as the number of detainees rises, so too do ICE's costs. Therefore, because the reforms neglect to acknowledge the need to reduce the number of detainees, the costs of detention will remain astronomical.

*C. The Inadequacy of the Current System: The Pressures of a Larger Detention Population on an Ill-Equipped Immigration Detention System*

ICE should also detain fewer aliens because the current system is not designed to handle the rising number of detainees. Most ICE facilities were originally built—and currently operate—as prisons.<sup>213</sup> In some cases, ICE detainees are housed at facilities with pretrial and sentenced inmates.<sup>214</sup> Movement within the facilities is largely restricted.<sup>215</sup> Additionally, “ICE adopted standards that are based upon corrections law and promulgated by correctional organizations to guide the operation of jails and prisons.”<sup>216</sup> Thus, ICE treats a civil population of detainees like criminal inmates.

This lack of proper infrastructure and personnel has led to numerous humanitarian and due process violations.<sup>217</sup> In general, detainees are entitled to medical care, yet some facilities fail to provide adequate care, which is a violation of the detainees' rights. Further, when detainees die in some of these facilities, officials cover up their deaths because they do not want bad publicity.<sup>218</sup> This further violates the detainees' humanitarian and due process rights.

Recently, the *New York Times* and the American Civil Liberties Union (ACLU) obtained documents under the Freedom of Information Act detailing numerous deaths in immigration detention centers due to substandard or unavailable medical care.<sup>219</sup> For example, the documents indicate that an investigation into the suicide of a twenty-two-year-old detainee named Nery Romero at the Bergen County Jail in New Jersey concluded that unbearable,

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<sup>212</sup> See *supra* notes 202–04 and accompanying text.

<sup>213</sup> SCHIRO, *supra* note 78, at 4.

<sup>214</sup> *Id.* at 21.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 4.

<sup>217</sup> McCarthy, *supra* note 143.

<sup>218</sup> *Id.*

<sup>219</sup> Nina Bernstein, *Officials Obscured Truth of Migrant Deaths in Jail*, N.Y. TIMES, Jan. 10, 2010, at A1. The documents discuss many of the 107 deaths in detention recorded by ICE since October 2003. *Id.*

untreatable pain had been a significant factor in his suicide.<sup>220</sup> The investigation also revealed that jail medical personnel had falsified a medication log to show that Mr. Romero had been given Motrin, yet, “[w]hen the drug was supposedly administered, Mr. Romero was already dead.”<sup>221</sup>

The documents also uncovered the death of Emmanuel Owusu in October 2008 at the Eloy Detention Center in Arizona.<sup>222</sup> Mr. Owusu’s story contains many similarities to Mr. Scarlett’s.<sup>223</sup> The Phoenix field-office director wrote to her subordinates that she was confused as to how Mr. Owusu came into the detention center’s custody.<sup>224</sup> In response to the field-office director’s surprise and confusion, a report on Mr. Owusu’s death was revised to refer to his “lengthy criminal history ranging from 1977 to 1998” but failed to note that—except for the 1979 battery conviction—that history consisted mostly of shoplifting offenses.<sup>225</sup> This story is another illustration of the violations of due process rights occurring at immigration detention facilities. ICE held Mr. Owusu for two years in a detention center on the basis of a battery conviction twenty-five years earlier. That ICE revised the report in light of the field-office director’s surprise at the basis for Mr. Owusu’s detention suggests that it was trying to cover up why he was detained. If so, this was a violation of Mr. Owusu’s due process rights.

Again, the DHS reforms do address serious problems with the immigration detention system.<sup>226</sup> The reforms acknowledge that immigration detention is designed to serve a population that is “civil in nature and is not one exercised of the [penal] power or incarceration power,”<sup>227</sup> and that the current system is ill equipped to handle this population. In admitting that detainees are a civil, not criminal, population, the reforms recognize that they should be housed in a system designed for such, rather than in centers tailored for hardened

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<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> See *supra* notes 2–19 and accompanying text (discussing Mr. Scarlett’s story). Originally from Ghana, Mr. Owusu arrived in the United States on a student visa in 1972 and was a long-time, lawful permanent resident. Bernstein, *supra* note 219. Immigration authorities detained him in 2006 on the basis of a 1979 conviction for misdemeanor battery and retail theft. *Id.* Mr. Owusu was a diabetic with high blood pressure who died of a heart ailment weeks after dismissal of his last appeal opposing deportation. *Id.*

<sup>224</sup> Bernstein, *supra* note 219. The field-office director wrote, “Convicted in 1979? That’s a long time ago.” *Id.* (internal quotation marks omitted).

<sup>225</sup> *Id.* (internal quotation marks omitted).

<sup>226</sup> See, e.g., *Fact Sheet: 2009 Immigration Detention Reforms*, *supra* note 142 (explaining that the reforms are designed to “address the vast majority of complaints about our immigration detention”).

<sup>227</sup> Morton, *supra* note 142.

criminals.<sup>228</sup> The reforms also take great steps to address human rights violations and related concerns, most notably through greater access to medical care.<sup>229</sup>

So, this Comment does not suggest that the Administration's reform efforts are worthless or unnecessary—quite the opposite. The reforms recognize many inadequacies of the current system and outline a number of necessary steps to address those issues.<sup>230</sup> However, while these reforms will hopefully improve the conditions of detention for those already detained, they do little, if anything, to address *why* so many aliens are being detained. Thus, even complete success in implementing the current reforms only addresses two symptoms of the immigration detention problem—the condition and the oversight of the detention centers. The reforms fail to target the fundamental issue: why ICE is detaining such large numbers of aliens. To do so will require that Congress and ICE work together to address the root source of the problem.

### III. A PROPOSED STATUTORY AND REGULATORY SCHEME TO LOWER THE NUMBER OF DETAINEES

The current immigration detention reforms fail to address the heart of the immigration detention problem; they merely act as temporary band-aids. They only change the condition of the system as it currently stands.<sup>231</sup> Instead, meaningful immigration detention reform must focus on the root of the problem: why ICE is detaining more immigrants in the first place.<sup>232</sup>

On the other hand, many advocate groups go too far in the other direction and argue that mandatory detention should be completely eliminated.<sup>233</sup> These groups include the ACLU and the National Immigrant Justice Center

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<sup>228</sup> See *supra* notes 147–48 and accompanying text.

<sup>229</sup> See, e.g., *Fact Sheet: 2009 Immigration Detention Reforms*, *supra* note 142 (explaining that one step provided by the reforms is to hire a medical expert who will independently review medical complaints and denials of requests for medical services).

<sup>230</sup> *Id.* (outlining “substantial steps . . . to overhaul the immigration detention system”).

<sup>231</sup> See *supra* Part I.B.

<sup>232</sup> ACLU DHS Plan Press Release, *supra* note 1.

<sup>233</sup> See Press Release, Heartland Alliance's Nat'l Immigrant Justice Ctr., U.N. Special Rapporteur Denounces U.S. Immigrant Detention System (Mar. 7, 2008), available at <http://www.immigrantjustice.org/news/detention/nijcstmtunsrfinalreport.html> (stating that both the ACLU and the National Immigrant Justice Center endorse the U.N. Special Rapporteur's report).

(NIJC).<sup>234</sup> They argue for individualized decisions in every case based on the individual's risk for flight and danger to the community.<sup>235</sup>

While an individualized determination of each alien's risk for flight and danger to the community in every instance initially seems ideal, it is also impractical. There would be massive public outcry if certain categories of aliens, such as those who have committed violent offenses, were released into the community.<sup>236</sup> Furthermore, this approach would be difficult to administer, largely due to limited resources.<sup>237</sup> Another problem with this approach is that it would give too much power to government bureaucrats. If ICE were to give each alien an individualized determination, it would largely erode any legislative power over detention determinations because the agency would be making all the decisions on the ground. The Supreme Court has long held that the federal government, and Congress in particular, has the power to control immigration.<sup>238</sup> Therefore, allowing ICE this type of power would severely restrict Congress's ability to enact and enforce immigration legislation.

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<sup>234</sup> See ACLU DHS Plan Press Release, *supra* note 1 (“The new DHS detention initiatives fail to examine the pipeline that channels hundreds of thousands of people into ICE detention in the first place. A large segment of people detained by [ICE] have not been convicted of any crime. . . . In order to truly reform and improve its immigration detention system, DHS must reform the ICE enforcement programs that are herding masses of people into ICE detention every day.” (quoting Joanne Lin, ACLU Legislative Counsel) (internal quotation marks omitted)); Mary Meg McCarthy, Exec. Director, Heartland Alliance’s Nat’l Immigrant Justice Ctr., DHS Announces New Immigration Detention Reforms: Government Plan Includes Positive Steps, but Must Reexamine Immigration Enforcement Approach to Achieve “Truly Civil” Reform (Oct. 6, 2009) (transcript available at <http://www.immigrantjustice.org/press/detention/government-plan-includes-positive-steps-but-must-reexamine-immigration-enforcement-approach-to-achieve-truly-civil-reform.html>) (“DHS must improve the conditions under which immigrants are detained. However, the continuing rapid increase in immigration-related arrests across the United States will undermine even the best-laid plans to improve detention conditions. DHS reform initiatives are already being outpaced by federal and local programs that sweep up individuals who violate civil immigration laws but are neither criminals nor threats to our communities.”).

<sup>235</sup> DET. & DEPORTATION WORKING GRP., *supra* note 48, at 123 (“Mandatory Detention should be eliminated; DHS should be required to make individualized determinations of whether or not a noncitizen presents a danger to society or a flight risk sufficient to justify their detention.”).

<sup>236</sup> See, e.g., Sarah Cross, *U.S. Immigration Detention Policy: Seeking an Alternative to the Current System*, in FORCED MIGRATION AND THE CONTEMPORARY WORLD 255, 276 (Andrzej Bolesta ed., 2003) (explaining that an individual, rather than categorical, approach to detention determinations is ideal, but due in part to “the current anti-immigrant climate that characterizes the U.S., . . . the proposed system would clearly encounter an array of obstacles”).

<sup>237</sup> See, e.g., Legomsky, *supra* note 35, at 544 (“The most obvious advantage of mandatory detention is that it avoids the expense of individual hearings.”).

<sup>238</sup> See Anne B. Chandler, *Why Is the Policeman Asking for My Visa? The Future of Federalism and Immigration Enforcement* 3 (Univ. of Hous. Pub. Law & Legal Theory Series, No. 2008-A-15, 2008), available at [http://papers.ssm.com/sol3/papers.cfm?abstract\\_id=1126924](http://papers.ssm.com/sol3/papers.cfm?abstract_id=1126924) (explaining that while there is no clear-cut textual support for broad and exclusive federal control over immigration policy, Congress has relied

Other commentators argue that detention is necessary for three reasons.<sup>239</sup> First, detention is necessary to prevent people from absconding.<sup>240</sup> As one commentator points out, approximately one-third of those not detained fail to appear for their removal hearings.<sup>241</sup> Second, in certain situations, aliens must be detained to protect the public safety.<sup>242</sup> But as Stephen Legomsky argues, certain classes of aliens are not necessarily any more of a danger to the community than others:

Arriving passengers found inadmissible, asylum seekers in expedited removal proceedings, and those people whose removal orders have been finalized do not pose any systematically greater threat to the public safety than does anyone else who is suspected of failing to meet our immigration criteria.<sup>243</sup>

The third rationale for detaining illegal immigrants is to deter future immigration violations.<sup>244</sup> Legomsky argues that this rationale might be somewhat applicable to aliens that fall into mandatory detention categories, such as asylum claimants in expedited removal proceedings, but has no practical application to aliens removable on either criminal or terrorist grounds.<sup>245</sup>

This Comment adopts a middle ground wherein certain categories of illegal immigrants should still be mandatorily detained, while the rest of the undocumented immigrant population should be subject to individualized determinations. Those who are not a flight risk and pose no danger to the community should be released pending their proceedings.<sup>246</sup> To accomplish this requires a combination of congressional and agency action.<sup>247</sup> Congress

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on, and the Supreme Court has been receptive to, the argument that Congress's power over immigration policy is implicit in the Constitution).

<sup>239</sup> See Legomsky, *supra* note 35, at 536–41 (explaining the three theories of detention).

<sup>240</sup> *Id.* at 537–39.

<sup>241</sup> *Id.* at 537. Legomsky continues by explaining possible reasons for this figure, such as an illegal immigrant's misunderstanding of the removal process and failure to receive notice of her court dates. *Id.*

<sup>242</sup> *Id.* at 539–40.

<sup>243</sup> *Id.* at 539.

<sup>244</sup> *Id.* at 540.

<sup>245</sup> *Id.*

<sup>246</sup> See *id.* at 547 (“Every time [ICE] is required to use a detention bed for a person who in fact poses no threat at all, it has one fewer bed available for a person who poses a threat and whom [ICE] would have had the discretion to detain.”).

<sup>247</sup> See, e.g., Carrie Acus Love, *Balancing Discretion: Securing the Rights of Accompanied Children in Immigration Detention 1* (Feb. 13, 2009) (unpublished manuscript), available at <http://ssrn.com/abstract=1375645> (arguing that Congress needs to cabin agency discretion “through comprehensive legislation and

should act to limit the categories of aliens mandatorily detained by ICE, while ICE should work to standardize its officers' use of discretion so that all ICE units make discretionary detention determinations more uniformly.

#### A. Congressional Action

To lessen the number of detainees in the system, Congress must act to reduce the categories of mandatory detention to pre-1996 levels. The categories added by statute since 1996 drastically increased the number of aliens subject to mandatory detention, many of whom pose no risk of flight nor danger to the community and have committed only minor, nonviolent offenses that now constitute aggravated felonies under the new statutes.<sup>248</sup> Little evidence suggests that detaining these aliens is keeping the community safer or preventing them from fleeing:

When Congress imposed mandatory detention through [8 U.S.C. § 1226(c)], it was effectively saying that the risk that some aliens within section [1226(c)'s] enumerated categories will either not show up for future proceedings or prove dangerous to the community justifies detaining all aliens in that category, even those who do not actually pose either risk. In other words, Congress found that it is necessary to briefly detain even those aliens who pose absolutely no risk at all in order to avoid the risks posed by other aliens.<sup>249</sup>

Rather, Congress should draw the line at those who commit violent offenses. Aliens who commit violent crimes, such as murder and rape, should be mandatorily detained, while those who commit minor, nonviolent offenses, such as shoplifting, should not be detained unless proven to be a flight risk or danger to the community. These new classifications will require that ICE give each alien not subject to mandatory detention an individualized determination of her risk to the community and her risk of flight.<sup>250</sup>

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congressionally mandated regulations"). Love's focus is on accompanied children who are already detained. *See id.* at 32–36.

<sup>248</sup> *See supra* Part I.A.2.b; *see also* Legomsky, *supra* note 35, at 539 ("There is no reason to believe that a noncitizen who has completed his or her criminal sentence poses a greater danger to the community than does a United States citizen who has committed the same offense.").

<sup>249</sup> *Scarlett v. U.S. Dep't of Homeland Sec.*, 632 F. Supp. 2d 214, 223 (W.D.N.Y. 2009) (alterations in original).

<sup>250</sup> David Cole argues for a similar position in his work on preventive detention. Cole, *supra* note 72, at 1007. He states:

If the alien poses a flight risk, his detention may be necessary to ensure that he will be around if and when a final removal order is effective. If the alien poses a danger to the community, his detention may be necessary to protect the community while his legal status in the United States is

Narrowing the categories of aliens subject to mandatory detention will address all three harms identified in Part II. The legislation will subject fewer illegal immigrants to mandatory detention, and will thus allow ICE to make individual determinations for the remainder.<sup>251</sup> This Comment proposes that when ICE issues more defined guidelines for discretionary detention determinations, these specific criteria will help ICE officers in their detention determinations. As a result, officers will less likely default to detention when they are unsure about whether to detain an alien and thus will detain fewer aliens.

Narrowing the categories of aliens subject to mandatory detention has other benefits as well. In particular, it will reduce the number of aliens in detention centers and thus reduce costs for the federal government.<sup>252</sup> Further, lowering the number of detainees will decrease the pressures on the immigration detention system and give ICE the ability to handle the detention populations more effectively.<sup>253</sup> When taken in conjunction with each other, these steps will have the overall effect of reducing the number of detainees. Fewer illegal immigrants will be subject to mandatory detention, and ICE officers, relying on more defined criteria to make their discretionary detention decisions, will be less likely to lean toward detention as the default.

Additionally, Congress should create a task force to oversee ICE that is separate from the agency itself. One of the barriers to immigration detention reform is the culture of secrecy that is pervasive throughout the agency<sup>254</sup>: “‘Because ICE investigates itself there is no transparency and there is no reform or improvement,’ Chris Crane, a vice president in the union that represents employees of the agency’s detention and removal operations, told a Congressional subcommittee. . . .”<sup>255</sup> Thus, one of the central flaws in the proposed reform efforts is the continued reliance on ICE to oversee itself.<sup>256</sup> Any true reform effort needs to include an independent task force to ensure

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resolved. But where an alien poses neither a danger nor a flight risk, his removal may be effectuated without detention . . . .

*Id.*

<sup>251</sup> For a discussion of ICE’s use of individualized determinations, see *supra* Part I.A.2.c.

<sup>252</sup> See *supra* notes 200–01 and accompanying text (discussing the lower cost of ATD as compared to detention in a detention center).

<sup>253</sup> For a discussion of the effects of the rising detainee population on the immigration detention system, see *supra* Part II.C.

<sup>254</sup> Bernstein, *supra* note 219.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

that ICE is following through on its reform efforts and is transparent in its actions.

### *B. Agency Action*

Congressional action alone will not address the rising number of detainees. Congress must work with ICE to reduce the number of aliens the agency detains every year. ICE currently has the ability to exercise discretion when its officers encounter aliens who are not subject to mandatory detention or the subject of an investigation.<sup>257</sup> ICE officers are given very little guidance in how to exercise this discretion, which leads to a lack of uniformity across ICE units and a perceived arbitrariness in who is detained.<sup>258</sup>

ICE should take two interconnected steps to reduce discretionary detainee determinations. First, it should focus on making more individualized determinations of detention.<sup>259</sup> This requires that ICE issue clear standards to all units regarding the factors to consider when ICE officers encounter aliens. These factors should include humanitarian issues such as the need for medical care and sole-caregiver status, as well as the alien's risk of flight and danger to the community. Currently ICE agents are prone to err on the side of detention because of uncertainties in the law, which is resulting in inconsistencies in its application by ICE across all its units.<sup>260</sup> If ICE officers could make discretionary detention determinations based on clearer standards, they would feel more comfortable making individualized determinations.

While standardized regulations will alleviate a great deal of the arbitrariness inherent in the current exercise of discretion, discretion in and of itself connotes some degree of personal judgment. Thus, different ICE officers will still vary in the ways they make discretionary detention determinations. But, giving them a set of factors to consider in their determinations will dramatically reduce this arbitrariness. This Comment does not propose bright-line rules; ICE officers are supposed to have discretion in those cases where

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<sup>257</sup> See *supra* Part I.A.2.c.

<sup>258</sup> See *supra* Part I.A.2.c.

<sup>259</sup> Dr. Schriro made this suggestion in her evaluation of ICE's system of immigration detention. See SCHRIRO, *supra* note 78; see also INTER-AM. COMM'N ON HUMAN RIGHTS, *supra* note 76, at 147 ("Whatever the case, the determination of whether a person should be incarcerated ought to be done on a case-by-case basis, taking into account the person's circumstances and sufficiently substantiating the reasons why the decision was not based on a presumption of liberty.").

<sup>260</sup> See *supra* notes 181–88 and accompanying text (discussing the lack of uniformity across ICE units).

the alien does not fall into a mandatory detention category.<sup>261</sup> Rather, this Comment suggests providing a list of standards on which ICE officers can depend in these situations. These standards will ensure each alien individual consideration because ICE officers will look at the specifics of an alien's circumstances by taking account of such factors as medical needs and danger to the community. This in turn will allow for more uniformity across ICE units; ICE officers everywhere will be employing the same criteria in their detention determinations. Thus, ICE officers would make an individualized assessment of the alien and her circumstances, and then based on the ICE standards, the officers would make a detention determination.

Second, ICE should create more and continuing training opportunities for its officers and require that they be informed of all legal developments that could potentially affect their detention decisions.<sup>262</sup> This will ensure that the officers are making decisions in line with current law and ICE regulations.<sup>263</sup> In conjunction with training, ICE should effectively communicate the objective criteria ICE officers must use in detention determinations and all legal developments to ICE officers by memorializing them in manuals. Better training, in combination with comprehensive manuals, will help ensure uniformity in ICE officers' exercises of discretion by clarifying what criteria ICE officers should consider when making detention decisions.<sup>264</sup> In particular, training based on these new standards will impose greater uniformity throughout the agency by guaranteeing that ICE officers across the country are following the same guidelines and rules when exercising discretionary detention determinations.

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<sup>261</sup> See *supra* Part I.A.2.c.

<sup>262</sup> See *supra* notes 185–88 and accompanying text; *infra* note 264 and accompanying text (explaining the lack of guidance given to ICE officers, especially in regards to new legal developments, and that more officer training is needed to ensure uniformity in standards across ICE offices).

<sup>263</sup> See *supra* notes 185–88 and accompanying text; *infra* note 264 and accompanying text.

<sup>264</sup> ICE does rely on both formal and on-the-job training. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 120, at 18. The Office of Investigations (OI) instituted a two-week worksite enforcement training course in 2007, which provided information on the exercise of discretion regarding aliens who present humanitarian issues. *Id.* This is a great first step, but further training is needed, especially if ICE does implement new guidelines regarding discretionary detention determinations. Further, in its review, the GAO learned that most OI officers had not participated in major worksite enforcement operations since 1998. *Id.* This almost ten-year gap between the last time many of these officers participated in these operations and the recent expansion in the number of operations illustrates the need for greater training.

These steps will help guarantee the end goal, which is to ensure greater uniformity in the exercise of discretion across all ICE units.<sup>265</sup> Uniform regulations throughout the agency combined with training to educate officers on how to exercise their discretion, as well as consistent updates on new legal developments, will guarantee that ICE officers are employing discretion uniformly across the country. Properly implemented, these measures will reduce arbitrariness by creating and communicating consistent, clear standards regarding discretionary detention determinations. And, ultimately, they will reduce costs and relieve pressures on the immigration detention system by lowering the number of detained immigrants.

### CONCLUSION

The current political climate presents an opportunity for significant immigration detention reform. Public debate on the issue has been at the forefront of political discussion for a number of years. President Obama already took significant steps during his first year in office to address the immigration detention problem and propose and implement solutions through a series of reforms led by DHS. Yet these reforms fail to address the crux of the problem with immigration detention. They focus solely on the conditions of detention, including medical care and greater direct federal oversight of the system, while failing to address why ICE is detaining more immigrants than in previous years.

To comprehensively address immigration detention, we must reduce the number of detainees in the system. This requires the combined efforts of both Congress and ICE. Congress must work to undo its previous actions of expanding categories of mandatory detention and restrict mandatory detention to only violent, criminal immigrants. And ICE must work to apply uniform guidelines throughout its units so that ICE officers exercise their discretion in a way that comports with ICE standards and current legal developments. Illegal immigrants should be given individualized determinations, and if they are not a flight risk or a danger to the community, they should not be detained. This would allow someone like Mr. Scarlett to remain free pending removal proceedings. The combined efforts of these two Branches of the government to lower the number of detainees in the system will go a long way toward

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<sup>265</sup> Ensuring greater uniformity is especially important should Congress reduce the categories of aliens subject to mandatory detention because this will increase the opportunities for ICE officers to make discretionary determinations.

providing relief for the illegal immigrant population and relieving the pressures on the immigration detention system.

SARAH GRYLL\*

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