Unlocking Human Dignity:

A Plan to Transform the U.S. Immigrant Detention System



A Joint Report of Migration and Refugee Services/United States Conference of Catholic Bishops and The Center for Migration Studies

UNITED STATES CONFERENCE OF CATHOLIC BISHOPS

CMS CENTER FOR MIGRATION STUDIES

Grounded by our belief in Jesus Christ and Catholic teaching, Migration and Refugee Services/United States Conference of Catholic Bishops fulfills the commitment of the U.S. Catholic bishops to protect the life and dignity of the human person. We serve and advocate for refugees, asylees, migrants, unaccompanied children, and victims of human trafficking.

The Center for Migration Studies of New York (CMS) is an educational institute/think tank devoted to the study of international migration, to the promotion of understanding between immigrants and receiving communities, and to public policies that safeguard the dignity and rights of migrants, refugees and newcomers. CMS is a member of the Scalabrini International Migration Network (SIMN), a global network of more than 270 entities that provide services to migrants, including shelters along migrant corridors and welcoming (integration) centers in receiving communities.

Cover Photo: Fleeing the civil war in Sri Lanka, PK escaped without proper documentation and found his way onto a flight that landed at Dulles Airport. Even though he only intended to transfer airplanes at Dulles and immediately continue his journey to Canada where he planned to apply for asylum, the INS stopped him at Dulles and placed him in detention. His initial asylum application in the US was denied. He appealed the decision and remained in Immigration & Naturalization Service (INS) detention in various local and country jails in Virginia for five years while awaiting the outcome of the appeal. Finally, the INS released him in 2001 on the condition the he leave immediately for Canada to apply for asylum, something he intended to do five years previously. Photo Credit: © Steven Rubin; Picture of a detention center. Photo Credit: IStockPhoto

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Dear Brothers and Sisters,

On behalf of the U.S. Conference of Catholic Bishops' Committee on Migration, I am pleased to transmit the following report by Migration and Refugee Services and Center for Migration Studies, entitled "Unlocking Human Dignity: A Plan to Transform the U.S. Immigrant Detention System."

As Catholic bishops in the United States, we approach immigrant detention not so much as a public policy issue, but as pastors concerned with the well-being of those we love and serve. Each day, we witness the baleful effects of immigrant detention in our ministries, including our pastoral and legal work in prisons and detention centers. We experience the pain of severed families that struggle to maintain a semblance of normal family life. We see traumatized children in our schools and churches. We see divided families that are struggling to support themselves in our parishes, food pantries, soup kitchens and charitable agencies. We host support groups for the spouses of detained and deported immigrants. We lament the growth of "family" detention centers which undermine families and harm children. We see case after case of persons who represent no threat or danger, but who are nonetheless treated as criminals.

We also view immigrant detention from the perspective of our biblical tradition, which calls us to love, act justly toward, and identify with persons on the margins of society, including newcomers and imprisoned persons. Our long experience as a pilgrim people in a pilgrim church has made us intimately familiar with uprooting, persecution, living outside the law's protections, and imprisonment. We recall that in the Old Testament, the Jewish people were deported, exiled, enslaved, scattered and dispersed. From this experience, they learned to love and identify with migrants, not to oppress them (Dt 10:12-18).

Old Testament narratives speak very directly to the reality of migrants and newcomers today. Like many migrants, Joseph, Jacob's son, is sold into involuntary servitude and trafficked to a foreign land (Gen 37: 18-36), where he becomes a devoted and trusted servant (Gen 39: 1-6). After being falsely accused by his master's wife, he is imprisoned (Gen 39: 11-20). Pharaoh ultimately finds him "endowed with the spirit of God" and puts in charge of the land of Egypt (Gen 41: 37-41). Given a chance to succeed, Joseph more than fulfills his responsibilities, saving people "the whole world" over from the effects of a devastating famine (Gen 41: 55-57). Like immigrants today, Joseph sends provisions to his family and ultimately arranges for his father and family to join him in Egypt (Gen 46: 7; Cornell 2014, 17). Jacob aptly describes himself and his ancestors to Pharaoh as "wayfarers" or sojourners on earth (Gen 47: 9).

Migration also characterizes the life of Christ. Jesus journeys from heaven to earth in order that human beings

might follow him to the Kingdom (Jn 1: 1-18). After learning of Jesus's coming birth, Mary travels to Judah to visit Elizabeth and Zechariah (Lk 1:39-45). In the Gospels, Jesus enters the world during his family's journey to be enrolled in their ancestral homeland (Lk 2:1-7), where they are denied lodging. The Holy Family flees to Egypt to avoid persecution by King Herod and, even after Herod's death, cannot return to Israel, but must settle in Nazareth for fear of Herod's son, Archelaus (Mt 2: 13-15, 19-23). In his itinerant public ministry, Jesus has nowhere to lay his head (Lk 9:58), his own people refuse to accept Him (Jn 1: 11), and He tends to those who move "like sheep without a Shepherd" (Mk 6:34). The Nazarenes rise up against Him and drive Him away (Lk 4: 28-30). The Scribes and Pharisees plot against Him and repeatedly accuse Him of breaking the law, while they themselves fail to live according to its spirit (Mt 22: 15-22; 23: 23-27) and fail to grasp that love of neighbor fulfills the law (Rom 13:10; Gal 5:14). Jesus teaches that nations will ultimately by judged by how they treat the dispossessed and needy, including the stranger (Mt 25: 31-46). Migrants fall within every marginal group set forth in the Judgment Day parable, the hungry, thirsty, stranger, naked, ill, and imprisoned. Like many migrants, Jesus is imprisoned and falsely accused. He is tortured and crucified as a criminal.

The Apostles and members of the early Church follow the "Way" (Acts 18: 25-26; 22: 4; 24:14), and suffer persecution, arrest, imprisonment without trial, and forced migration. In Philippi, Paul and Silas are stripped, beaten with rods, and imprisoned, their feet tethered to a stake, for "disturbing" the city and advocating unlawful customs (Acts 16: 16-24). When the magistrates order their release, Paul evokes his Roman citizenship and refuses to leave secretly. Ultimately, the magistrates "placated them and led them out and asked that they leave the city" (Acts 16: 35-40).

This biblical tradition reminds us that discipleship requires solidarity with the "least of these," including the imprisoned stranger. It challenges us to "live the experience of the disciples on the road to Emmaus (Lk 24: 13- 25), as they are converted to be witnesses of the Risen Lord after they welcome him as a stranger." (USCCB and CEM 2003, 40). It recognizes the right to migrate in response to war, natural disaster, human rights abuses, extreme poverty, and whenever human beings cannot realize their God-given dignity at home (Sacred Congregation of Bishops 1969, 7). It calls us to be neighbors, like the Good Samaritan, to our near and far neighbors in need (Benedict XVI 2005, 15). It teaches us that we make up one body in Christ (Rom 12: 5). It demands of us a "firm and persevering determination to commit … to the common good; that is to say, to the good of all and each individual because we are all really responsible for all." (John Paul II 1987, 38). It calls us to be "permanently in a state of mission" and for all of our "customs, ways of doing things, times and schedules, languages and structures" to be "suitably channeled for the evangelization of today's world," so that we become "environments of living communion and participation." (Francis 2013, 25-27). It calls us to evangelize in deeds, sometimes using words.

We have repeatedly spoken of the Gospel imperative to protect the rights of refugees, to promote the reunification of families, and to honor the dignity of all persons, whatever their status. Yet the US immigrant detention system represents a far cry from solidarity or communion. It divides us from our brothers and sisters. It contributes to the misconception that immigrants are criminals and a threat to our unity, security and well-being. It engenders despair, divides families, causes asylum-seekers to relive trauma, leads many to forfeit their legal claims, and fails to treat immigrants with dignity and respect. Human flourishing occurs in loving relation to others. Yet detention incapacitates and segregates people, denying them freedom and preventing their participation in society.

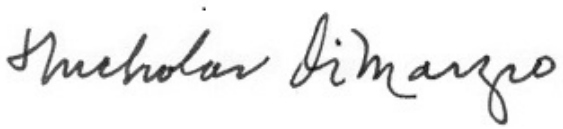
We write in solidarity with detained immigrants and their families who we see, accompany, serve and learn from

each day. We ask Catholics and others of good will to help meet the material, social and spiritual needs of families separated from loved ones by detention and removal, to ensure that their communities do no profit from the misery caused by the criminalization and confinement of immigrants, and to work steadfastly to reform the laws that undergird the US immigrant detention system. We urge Catholic institutions to increase their commitment to immigrant detainees and their families. We urge the Administration and Congress to build an immigration system that affords due process protections, honors human dignity and minimizes the use of detention.

The following report is a result of our visits to detention centers across the nation—in Texas, California, Illinois, Arizona, and New Jersey. It examines the flaws in the current U.S. immigrant detention system and their impact on the human rights and dignity of our fellow human beings, and offers recommendations for reform of the system. We endorse the findings and recommendations of this report.

Sincerely,





Most Reverend Eusebio L. Elizondo, M.Sp.S.
Auxiliary Bishop of Seattle
Chair, USCCB Committee on Migration

Most Reverend Nicholas DiMarzio
Bishop of Brooklyn
Chair, Center for Migration Studies
Member, USCCB Committee on Migration

I. A Vision for Reform

The US immigrant detention system grew more than five-fold between 1994 and 2013. During these years, the average daily detained population rose from 6,785 to 34,260 (Figure 1). The number of persons detained annually increased from roughly 85,000 persons in 1995 to 440,557 in 2013 (Kerwin 1996, 1; Simansky 2014, 6). Since the beginning of the Obama administration's detention reform initiative in 2009, annual detention numbers have reached record levels (Figure 2). More persons pass through the U.S. immigrant detention system each year than through federal Bureau of Prisons (BOP) facilities (Meissner et al. 2013, 131).

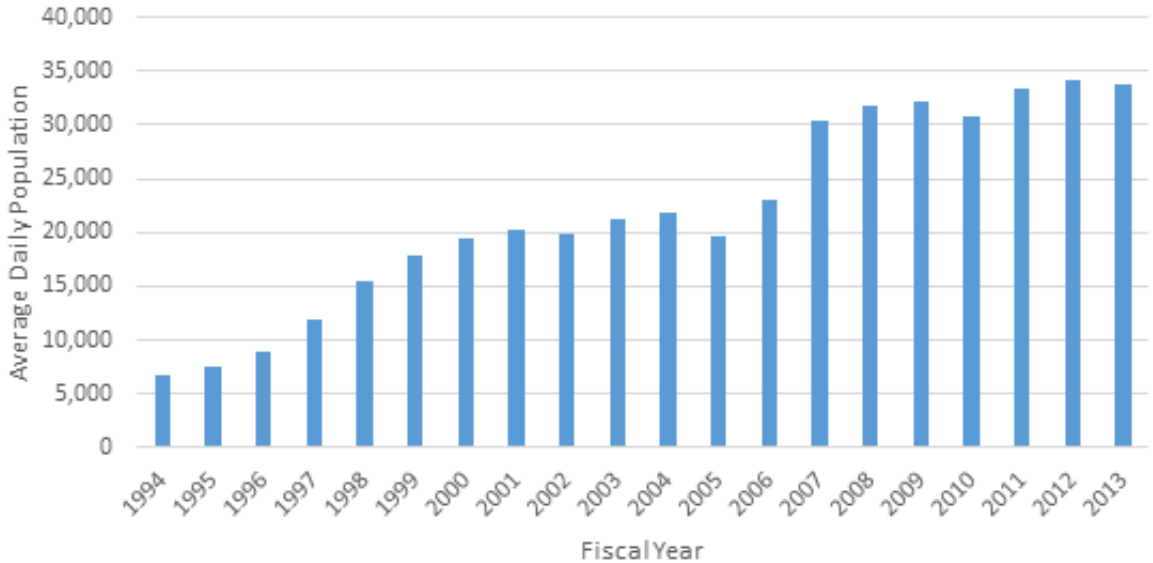
This growth has occurred in what may be the most troubled institution in the vast U.S. immigration enforcement system. The numbers only hint at the toll that this system exacts in despair, fractured families, human rights violations, abandoned legal claims, and diminished national prestige.

The U.S. Department of Homeland Security (DHS) lacks the authority to imprison criminals and does not hold anybody awaiting trial or serving a criminal sentence. Congress and DHS use the anodyne language of "processing" and "detention" to describe this system. Yet each year DHS's Immigration and Customs Enforcement agency (ICE) holds hundreds of thousands of non-citizens and the occasional U.S. citizen (Carcamo 2014), many for extended periods, in prisons, jails, and other secure facilities where their lives are governed by standards designed for criminal defendants. Detention brands immigrants as criminals in the public's eye and contributes to the sense that they deserve to be treated as such.

In many respects, immigrant detainees are treated less favorably than criminal defendants. U.S. mandatory detention laws cover broad categories of non-citizens, including lawful permanent residents (LPRs), asylum-seekers, petty offenders, and persons with U.S. families and other strong and longstanding ties to the United States. Sixty percent of the unauthorized have resided in the United States for 10 years or more and 17 percent for at least 20 years (Warren and Kerwin 2015, 86-87, 99). Moreover, DHS has interpreted the laws to preclude the release of mandatory detainees, even release coupled with the most intensive restrictions and monitoring. By way of contrast, most criminal defendants receive custody hearings by judicial officers shortly after their apprehension and they can be released subject to conditions that will reasonably ensure their court appearance and protect the public.

Detention is treated as a pillar of the U.S. immigration enforcement system akin to border control or removal, but in fact it is a means to an end that would be far better

Figure 1: Average Daily Population of Detainees, FY 1994 - 2013



Source: Siskin 2004; Siskin 2012; DHS-OIG 2014; Email correspondence with Alison Siskin from the Congressional Research Service.



Immigrant detainees inside the mealroom at El Centro Service Processing Center, a Federal Detention Facility in El Centro, California. The Statue of Liberty mural on the wall was painted by detainees. Photo Credit: © Steven Rubin

served by a more humane, less costly system. Its purpose is to ensure that non-citizens in removal proceedings appear for their hearings and, if they are removable and lack legal relief, that their removal can be effected. Detention is also justified as a tool to protect others, although this consideration is more relevant to the criminal justice system. In fact, there are tested, effective, and humane ways to accomplish these goals short of detention. Supervised or conditional release programs have long been a mainstay of the criminal justice system, but have only recently begun to gain traction in the immigration context. Moreover, detention makes it far less likely that indigent and low-income immigrants will be able to secure legal counsel and, thus, to present their claims for relief and protection.

In 2009, DHS-ICE discontinued the detention of immigrant families at the T. Don Hutto Residential Facility, a privately owned, 512-bed, former medium security prison in Taylor, Texas, that had been the subject of law suits and scathing human rights reports (Bernstein 2009). It also suspended plans for three new family detention centers, leaving only 38 families with children in ICE facilities (Schriro 2009, 11). However, in response to the dramatic increase in the migration of parents and minor children from Honduras, Guatemala and El Salvador in Fiscal Year (FY) 2014, the Obama administration has opened new family detention facilities which will have a combined capacity of roughly 3,700 beds (Cowan and Edwards 2014; Wilder 2014; DHS-ICE 2014d). Conditions at detention facilities are particularly ill-suited and harmful to children.[1] Many argue that they violate the minimum standards for the detention and treatment of children set forth in the settlement of the *Flores v. Meese* litigation in 1997. Detention can cause children anxiety, depression, sleep difficulties, regression in academic achievement and language development, social withdrawal, and post-traumatic stress (Fazel, Karunakara and Newnham 2014). It also violates the internationally-recognized "best interests of the child standard." For these reasons, immigrant families should not be detained.

Immigrant detention may be necessary for short periods in limited circumstances, including during screening and processing of non-citizens by immigration officials and, in rare cases, to hold persons who are not likely to appear for their removal hearings or who will pose a danger even if they are subject to the most restrictive forms of supervised release.[2] Some past studies have shown that persons released and advised to appear for court hearings—often in the distant future and at distant locales—fail to appear at acceptable rates. This is not surprising since they may not understand the instructions they have been given or the requirement to appear. That said, our proposed system would ensure high court appearance rates by providing a continuum of supervised release/community support programs based on risk of flight and danger. Similar programs have been shown to be highly successful at ensuring high appearance rates.

Detention should not be used as a central immigration "management" tool. Instead, the status quo should be replaced by a system characterized by timely, individual-

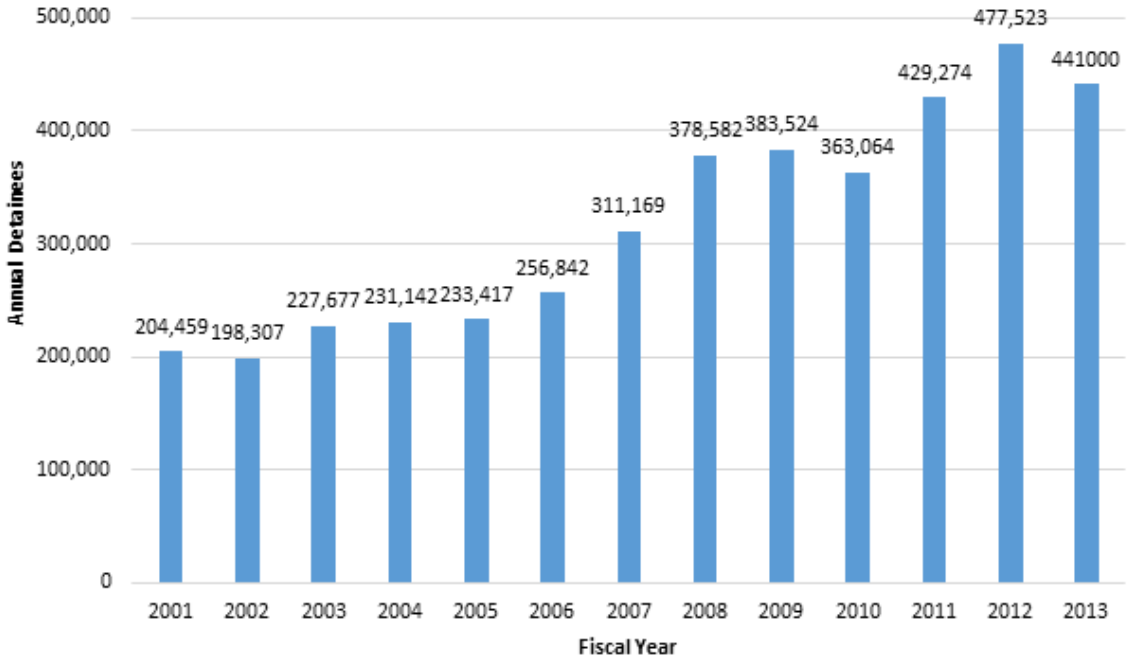
ized custody hearings by immigration judges or judicial officers of all persons in DHS custody, resulting in supervised release with case management and community-based support services in a high percentage of cases. Any restrictions or conditions placed on released noncitizens should be the least restrictive, non-punitive means necessary to promote court appearances. In fact, no other U.S. legal system permits a deprivation of liberty without review and oversight by an independent judiciary.

Since 2009, the Obama administration has worked to reform the U.S. detention system, achieving several incremental successes. However, in the interim, the number of detainees annually has increased (Figure 2). Moreover, the overwhelming majority of detainees will still be held in prisons, jails and prison-like facilities at the end of the reform initiative.[3] In short, deeper reforms are needed. Persons who, with sufficient supervision and community support, would appear for their immigration proceedings, should not be detained. The current system, which is based on a correctional, criminal, and national security paradigm, should be replaced by one that reflects DHS-ICE's legal authorities and the nature of those in its custody.

The number of immigrant detention facilities should be substantially contracted, the role of for-profit prisons in administering this system should be reduced, and detention should be used only as a last resort when less harmful strategies and programs – viewed on a continuum, beginning with the least restrictive (release on recognizance) and moving to release programs with rising levels of supervision, monitoring and support – are exhausted. The current legal and physical detention infrastructure should be largely dismantled.

Detention should not be used to deter illegal immigration or refugee-like flows, or as a means to evade U.S. sovereign responsibilities to protect those who have fled persecution. Its use should turn exclusively on an individualized determination of flight risk and danger. Mandatory detention should be eliminated in virtually all cases, with the exception of a category of cases involving potential

Figure 2: Annual Detention Population, FYI 2001 - 2013



Sources: Immigration and Naturalization Service (INS). Various years. *Yearbook of Immigration Statistics*. Washington DC: INS. http://www.dhs.gov/archives; DHS. Various years. *Yearbook of Immigration Statistics.* Washington DC: DHS, Office of Immigration Statistics. http://www.dhs.gov/yearbook-immigration-statistics; Simansky 2014.

danger to the public and threats to national security. As it stands, mandatory detention has served as a poor proxy for dangerousness and flight risk and, thus, has impeded effective management of the detention system (DHS OIG 2006, 5-6). The release of persons awaiting criminal trial has long been a necessary and effective feature of federal, state, and local criminal justice systems. While not fully apposite, the success of supervised release programs in the criminal justice system provides strong evidence that this approach could ensure high appearance rates in removal proceedings.

Pregnant and nursing women, asylum-seekers (particularly those determined to have a credible fear of persecution), the very ill, the disabled, the elderly, immigrant families, and other vulnerable persons should not be detained. Detainees should be held in non-penal settings which approximate the conditions of normal life. Among other minimum standards, detainees should be afforded the opportunity to practice their faith, including generous access to religious services, activities and personnel. In addition, decisions to detain should be regularly revisited and independently reviewed by an immigration judge or judicial officer.

To transform the U.S. immigrant detention system will require the large-scale expansion of alternative to detention (ATD) programs. ATD programs represent a form of custody and should be available to those subject to mandatory detention. Highly restrictive ATD programs with electronic monitoring devices and regular reporting and visitation, while preferable to confinement in a prison-like setting, can stigmatize and humiliate immigrants and should be used sparingly. Community-based, case-management services for persons in removal proceedings can ensure court appearances at high rates and at lower financial and human cost.

Funding for the U.S. immigration court system should increase by an order of magnitude.This would diminish case backlogs which now average more than 18 months (TRAC 2015), allow for the timely adjudication of cases, and obviate the need for costly and prolonged detention. Prolonged detention should be statutorily prohibited, whether for persons whose removal proceeding are pending or for those who have received an order of removal. As it stands, the immigration court system receives only one-sixtieth of the combined funding of DHS's two immigration enforcement agencies, Customs and Border Protection (CBP) and ICE (DOJ 2014; DHS 2014a).

Immigration judges or judicial officers should be vested with the authority to make custody decisions soon after detention for every person facing removal, including those subject to expedited, summary, administrative, and non-court removals. In addition, all persons facing removal should be afforded a hearing before an immigration judge.

Finally, detention makes it far more difficult for indigent and low-income immigrants to secure counsel and, as a result, to present their legal claims for relief and protection, including asylum. Given its responsibility to afford due process and its strong interest in fully informed and efficient decision-making, the U.S. government should fund legal counsel for indigent persons in removal proceedings, particularly detainees.

Don't Take My Sweater

The family detention facility in Artesia, New Mexico, now closed, held children who averaged six and one-half years old. Artesia is a desert-like arid climate and landscape, with temperatures reaching 100 Fahrenheit or more during the summer. At one point, the facility contained dozens of families—young mothers with little children. One little girl, around two years old, always wore a bright pink and black sweater, which was, as her mother told it, her favorite possession. The little girl feared that if she took off the sweater, it would be taken away. The image of this little girl, overheated because she wore her favorite possession and feared its loss, shows the vulnerability of little children in a restrictive setting and how unsuited children are to live in prison-like facilities.

II. Analogous UNHCR and ABA Standards on Detention

Standards and guidelines released by the American Bar Association (ABA) and the United Nations High Commissioner for Refugees (UNHCR) over the last three years offer substantial support for a transformed immigrant detention system. The ABA *Civil Immigration Detention Standards* were intended to serve as a "blueprint" and guide to the DHS-ICE detention reform initiative, while the UNHCR standards primarily cover asylum-seekers and were intended for a global audience.

U.S. immigration law allows for the release of non-mandatory detainees if they would not "pose a danger to property or persons" and are "likely to appear" for proceedings.[4] The ABA immigrant detention standards posit a more limited purpose for detention: "to ensure court appearances and effect removal." (ABA 2012, Introduction).[5] Moreover, the ABA standards adopt a guiding principle at odds with broad U.S. mandatory detention rules; that is, that "[a]ny restrictions or conditions placed on noncitizens – residents or others – to ensure their appearance in immigrant court or their actual removal should be the least restrictive, non-punitive means necessary to further these goals, and decisions to continue to detain should be regularly revisited." (ibid.). This principle assumes particular importance when applied to children. The UNHCR has appropriately made an end to child detention the first goal of its "global strategy … to end the detention of asylum seekers and refugees." (UHNCR 2014, 17).[6]

The ABA envisions a continuum of ATD programs. (ibid., note 1). If after considering all the alternatives, detention is deemed necessary to ensure court appearances in an individual case, then the ABA would place the detainee in a facility that "might be closely analogized to 'secure' nursing homes, residential treatment facilities, domestic violence shelters, or in in-patient psychiatric treatment facilities" that seek to "normalize living conditions … to the greatest extent possible." (Ibid., 3).

The ABA sets forth detailed standards to guide many aspects of custodial life. For example, the ABA provides a series of standards on access to religious services.[7] Overall, the ABA standards argue for the need to replace the status quo system of (mostly) prisons and jails governed by standards designed for criminal pre-trial defendants, with a more humane, cost-effective system that is appropriate for non-citizens in civil removal proceedings.

The *UNHCR Detention Guidelines* place detention in the context of international law, particularly the 1967 United



Unaccompanied Migrant Child involved in the screening process by the Customs and Border Patrol, June 5, 2014. Photo Credit: Customs and Border Patrol/US Government

A Visit to Karnes, Texas

The delegation, led by the archbishop of San Antonio, entered the new facility, a model for the Department of Homeland Security (DHS). Nothing seemed amiss and the facilities were clean and spacious. As the Archbishop said Mass under a tent in the compound, the fear and trepidation on the faces of the mothers were clear. One by one, they prayed aloud for deliverance from the facility and for reunification with their families. Many had been traumatized from their journey north from Central America. One confessed that her husband had been murdered by gang members and that they had threatened her and her children as well. After the Mass, many asked for assistance with their asylum claims, as they had no lawyers to assist them and little information from enforcement officials about the process. Please help us, please pray for us, they asked. The delegation walked out deflated and frustrated, awake to the damage caused by the facility, despite its outward appearance.

Nations Protocol relating to the Status of Refugees and the 1951 United Nations Convention relating to the Status of Refugees which provide that states should not "expel or return" a refugee to territories "where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." The Catholic Church has consistently supported and urged all states to ratify and abide by the Refugee Convention. The U.S. has signed onto the 1967 Protocol and the *International Covenant on Civil and Political Rights*. Yet U.S. interdiction, interception and detention policies prevent migrants from reaching U.S. territorial boundaries and securing protection (Flynn 2014). These policies have also inspired several states to "externalize" their immigration enforcement policies and, thus, to evade their responsibilities to protect refugees and others in need (ibid.).

The UNHCR guidelines affirm that "the right to seek asylum must be respected" and asylum seekers must not be penalized for illegal entry or stay. Yet the U.S. detention system leads asylum seekers to abandon their claims, which would be reason enough to reform the system. Because asylum-seekers enjoy the rights to liberty, human security, and free movement, the UNHCR standards provide that detention "should be a measure of last resort, with liberty being the default position" (UNHCR 2012, 14).

Like the ABA standards, the UNHCR guidelines provide that detention must be based on an individualized assessment, and must be necessary, reasonable, and proportionate to a "legitimate purpose." (Ibid., ¶ 2). The UNHCR believes that detention "may be permissible" for short periods to "carry out initial identity and security checks," and "can be exceptionally resorted to" for three legitimate purposes: "to protect the public order" (which allows the detention of those "likely to abscond" or who otherwise "refuse to cooperate with the authorities"); to protect public health; and to protect national security (ibid., ¶ 24, 28-30). Moreover, the guidelines state that decisions to detain or extend detention must be subject to procedural safeguards; detention conditions must be humane and dignified; the special needs and circumstances of asylum-seekers should be taken into account; and detention should be subject to independent monitoring and inspection by international and regional bodies and non-governmental organizations (NGOs).

Because detention decisions require an individualized assessment, the UNHCR guidelines consider "mandatory or automatic detention" to be "arbitrary" and impermissible (ibid., ¶ 18-20). Moreover, they provide that detention must be "in accordance with and authorized by law" and the law must offer sufficient protections against arbitrary detention, which includes indefinite detention. The guidelines prohibit detention "to deter future asylum-seekers, or to dissuade those who have commenced their claims from pursuing them," or for punitive purposes (ibid., ¶ 32).

UNHCR would require that ATD programs – from "reporting requirements to structured community supervision and/or case management programmes" – be considered "part of an overall assessment of the necessity, reasonableness and proportionality" of detention (ibid., ¶ 35). Its

guidelines provide that detention should be used only as a "last resort" and when a "less invasive or coercive means" cannot accomplish the "same ends." (ibid.).[8] In addition, ATDs that restrict liberty should be subject to "human rights standards" and "periodic review in individual cases by an independent body." (ibid., ¶ 37). Finally, UNHCR provides that ATDs should not be used as "alternative *forms of* detention" or be applied to persons who would otherwise be released (ibid., ¶ 38).

III. *Characteristics of the Immigrant Detention System and the Need for Reform*

DHS-ICE does not have the authority to incarcerate immigrants. Instead, its authority is limited to holding non-citizens during the adjudication and removal process. Yet the U.S. detention system has long operated like a prison system, but without the benefit of civil rights case law or "the same levels of proficiency and professionalism" as most correctional systems (Schriro 2010, 1442-1443, 1449). The system's physical infrastructure consists of a sprawling hodgepodge of state and local jails, for-profit prisons, BOP prisons, Border Patrol holding cells, and prison-like "service processing centers" administered by ICE. It holds noncitizens – more than three-quarters of whom are subject to mandatory detention (GAO 2014, 28) -- in a diverse mix of roughly 250 facilities which includes:

- 103 facilities owned by states, localities and private entities which held roughly one-third of ICE detainees between 2010 and 2012 (via intergovernmental service agreements (IGSAs)), and which also held criminal inmates.
- Nine state, local and private (contract) facilities, holding 22 percent of detainees, which housed only immigrant detainees.
- Seven contract facilities, holding 19 percent of immigrant detainees, which are owned and operated by for-profit prison agencies.
- 125 state, local and private facilities, holding 14 percent of ICE detainees pursuant to IGSAs with the U.S. Marshals Service.[9]

There are Solutions: Alternatives To Detention

In January, 2014, the U.S. Conference of Catholic Bishops (USCCB), along with its Catholic Charities partners, launched a small pilot program with DHS to accept detainees and help them in the community. Though small, the pilot worked to provide legal and community-based case management to released detainees and integration into the community for those provided immigration relief. USCCB will now take families into the program in the hope of demonstrating the effectiveness of the model and expanding it.

- Six "service processing centers," containing 12 percent of ICE detainees that are owned by ICE and operated by ICE employees and contractors.
- Residential family detention centers which will ultimately house more than 3,700 persons (including children) in Dilley, Texas; Karnes, Texas; and Berks County, Pennsylvania (Cowan and Edwards 2014; Wilder 2014; DHS-ICE 2014d).[10]

Since 2009, the Obama Administration has worked to reform the U.S. immigrant detention system with the goal of creating a system that reflects its legal authority, which is to ensure appearances during the civil removal process. Its administrative reforms evidence a meaningful and good-faith response to longstanding problems in the immigrant detention system (Schriro 2010, 1442; DHS-ICE 2014c). Among other reforms, ICE changed its policy on detention for asylum seekers to "generally release" arriving non-citizens who demonstrate a credible fear of return to their home countries and who seek political asylum in the United States (DHS-ICE 2009). Under the prior policy, arriving asylum seekers who demonstrated a credible fear of return had to apply in writing for "parole" and would only be granted parole if they could demonstrate significant community ties.[11] ICE has also eliminated roughly 100 contracts with states and localities, and has reduced its detention bed space in contract facilities accordingly.



Children and Families being screened by the Border Patrol following their apprehension at the border, March 28, 2014. Photo Credit: Customs and Border Patrol/US Government

ICE has also developed ambitious new standards related to conditions of confinement, its Performance Based National Detention Standards (PBNDS), that address historical and recurrent problems in the U.S. detention system (DHS-ICE 2013b). The standards have undergone several iterations based on consultation with diverse stakeholders, including the USCCB and numerous Catholic entities. They cover medical and mental health services; access to legal information, support and counsel; transfers away from family and support services; access to religious services; reporting and responding to grievances and complaints; and visitation practices. ICE has likewise built a "civil detention" facility designed to showcase and reflect these standards (Semple and Eaton 2012), and it has exercised greater oversight of detention facilities. It has also issued directives on reporting and notification of detainee deaths, prevention of and intervention in cases of sexual abuse and assault, facilitation of "parental rights" for those in custody, and central review and oversight of detainee segregation decisions (DHS-ICE 2014c).

A linchpin of its administrative reform has been the development of a "risk classification assessment" (RCA) instrument designed to guide custody and detainee placement decisions. In FY 2013, only nine percent of the 168,087 persons processed through the RCA program were released from custody outright or placed in an ATD program (GAO 2014, 28). While the RCA generally seeks to assess dangerousness, flight risk and vulnerability (GAO 2014, 8), ICE has not publicized the actual (evolving) criteria used to make "automated" custody and placement decisions. Thus, it remains difficult to assess whether this new enforcement tool will meaningfully alter custody rates and placement patterns, or will instead automatize continued overreliance on detention.

At the outset of the DHS-ICE detention reform initiatives, the founding director of ICE's Office of Detention Policy and Planning wrote that while immigrant detention "is unlike federal detention as a matter of law," both criminal convicts and civil detainees were:

> … held in secure facilities with hardened perimeters in remote locations, generally at considerable distances from counsel and/or their communities. With but a few exceptions, the facilities that ICE uses to detain aliens were originally built as jails and prisons to confine pre-trial and sentenced felons (citations omitted). They continue to operate true to their original design. Their layout, construction, staffing plans, and population management strategies are largely based upon traditional

> correctional principles of command and control (Schriro 2010, 1442).

The same holds true today. Six years into ICE's reform initiative, the great majority of ICE detainees continue to be held in jails, prisons and prison-like facilities, subject to standards based on American Correctional Association (ACA) standards for criminal defendants awaiting the disposition of their cases. Moreover, this will remain the case for the great majority of detainees even after ICE's reform initiative has been fully implemented (HRF 2011, 18). Several problems have long plagued this system, and require far deeper reforms than are currently being contemplated.

IV. The Misuse of Detention, Abusive Conditions and the Persistent Mistreatment of Vulnerable Populations

The ABA has called for better treatment not just of immigrant detainees, but of criminal defendants awaiting trial as well. Because the "[d]eprivation of liberty pending trial is harsh and oppressive, subjects defendants to economic and psychological hardship, interferes with their ability to defend themselves, and, in many instances, deprives their families of support," the ABA supports a presumption of release of criminal defendants "pending adjudication of charges." (ABA 2007, 1). For the same reasons, immigrant detention should be used sparingly and as a last option. The U.S. detention system deprives persons of liberty, divides families, inhibits integration, and prevents participation in the broader society. According to the founding director of ICE's Office of Detention Policy and Planning, detained immigrants often receive worse treatment and fewer protections than criminals serving prison sentences (Schriro 2010, 1445).

In a 2000 report titled *The Needless Detention of Immigrants in the United States: Why Are We Locking Up Asylum-Seekers, Children, Stateless Persons, Long-Term Permanent Residents, and Petty Offenders?*, the Catholic Legal Immigration Network, Inc. (CLINIC) outlined the extensive literature on the U.S. detention system (CLINIC 2000b).[12] By that point, a steady stream of reports by government oversight agencies, NGOs, and assorted experts had detailed severe problems in the treatment of asylum-seekers, torture survivors, the mentally ill, women, children, families, indefinitely detained persons, mandatory detainees, illegally detained U.S. citizens, and particular ethnic and national groups. Other reports had documented problems in different types of detention facilities. Still others described systemic problems related to conditions of confinement, including lack of access to counsel, restrictions on visitation, limited pastoral care, poor health services, the misuse of segregation, physical and emotional abuse, and deaths in custody (ibid.).

A later exposé on the U.S. immigrant detention system described a phenomenon familiar to pastoral workers, legal counsel, and other visitors to detention centers: i.e., the depression and lethargy of many detainees who simply try to sleep through the day (Dow 2004, 95). As the Leadership Conference for Civil Rights (LCCR) and ABA described in a 2004 report, detention leads to pervasive despair:

> The combination of physical isolation, substandard conditions at facilities, limited access to lawyers, and the lack of legal information demoralizes many detainees – some, even to the point that they give up their cases and agree to be deported rather than continue to be imprisoned. (LCCR and ABA 2004, 68-69).

Attorneys and pastoral workers from Catholic agencies have learned first-hand of the sexual abuse of women detainees, women forced to deliver babies in restraints, frequent hunger strikes, suicides, government officials pressuring detainees to abandon their legal claims, and the treatment of severe medical conditions with Tylenol, Advil, and Motrin. In the past, visitors faced arbitrary and often cruel visitation policies, and detention centers provided scant access to outside groups and even barred groups that reported on deplorable conditions or abuse. One facility placed mentally ill detainees in a cell with one-way mirrors that prevented medical personnel or guards from seeing them. Another enforced a no-smoking policy which applied to the prison grounds outside, but not to its living areas. In addition, a burgeoning set of studies has documented shortages in legal counsel, particularly for detainees, and the importance of representation to case outcomes (Kuck 2005 Ramji-Nogales, Schoenholtz and

Schrag 2007; Markowitz et al. 2011; ABA Commission on Immigration 2010; Kuck 2005).

According to ICE's 2009 assessment of the U.S. detention system, the agency's lack of expertise and experience in this area made it "difficult" to develop guidance and evaluate the performance of contractors (Schriro 2009, 16). The study also reported on ICE's failure to "formally publish policy and procedure or technical manuals specific to detention." (ibid.). An analysis of ICE information systems that same year concluded that the agency failed to collect sufficient information that would allow it to identify persons eligible for possible release or to track compliance with its own standards (Kerwin and Lin 2009). This finding explained, in part, years of futility by government oversight and human rights agencies that criticized the detention system for its failures to abide by established legal standards and to safeguard rights. In 2014, the GAO reported that data collection and maintenance limitations prevented ICE headquarters from evaluating whether field offices had complied with its guidance related to the transition to less restrictive "technology-only" ATD program following a period of compliance with the "full-service" program (GAO 2014, 20-26). In addition, the GAO faulted ICE for not collecting data on appearance rates for participants in "technology-only" ATD programs (ibid., 31).

Unfortunately, severe problems have persisted since the inception of DHS-ICE's detention reform initiative. In March 2015, USCCB's Migration and Refugee Services (MRS) called for an end to family detention, arguing that the government's use of detention in order to deter migration violated international law, led to the return of young mothers and children to perilous situations, and undermined the "best interests" of the child standard (MRS 2015, 2-4). Other recent reports have documented:

- The removal in 2013 of 72,000 persons who claimed to have U.S.-born children (DHS-ICE 2014a; DHS-ICE 2014b);[13]
- conditions in the makeshift "family detention" facility in Artesia, New Mexico, which the American Immigration Lawyers' Association characterized as a "due process failure and humanitarian disaster" and which the Obama administration subsequently decided to close (AILA 2014; DHS-ICE 2014d);
- the extensive lobbying by for-profit prison corporations and the rising share of immigrants detained in private facilities (Carson and Diaz 2015, 6, 11-14);
- the legal severance of parent-child relationships as a result of U.S. detention and deportation practices (ARC 2011);
- prolonged detention in a system intended for short-term custody (Heeren 2010);
- federal officials that pressure detainees without legal counsel to "stipulate" to removal, often based on inaccurate information and a promise of diminished time in custody (Koh et al. 2011);
- confining children and others arrested by the Border Patrol in extremely cold holding cells for extended periods (AIJ 2013);
- hunger strikes in response to poor conditions in the Northwest Detention Center in Tacoma, Washington and the Stewart Detention Center in Lumpkin, Georgia (Altman 2014; Redmon 2014);
- the use of long-term, unchecked solitary confinement in ICE contract facilities (NIJC and PHR 2012);[14]
- sexual abuse, harassment, and deficiencies in reporting on and recording incidents of sexual misconduct (HRW 2010; GAO 2013, 18-24);
- violence, verbal abuse and discrimination against lesbian, gay, bisexual and transgender persons (Gruberg 2013.);
- the immigration system's failure to provide case-by-case custody determinations or to rely sufficiently on ATDs (LIRS 2011);
- deficiencies in for-profit, contract facilities (Human Rights Advocates 2010; Mason 2012);

- problems related to due process, legal access, transfers, segregation, overcrowding and religious expression in detention facilities in Georgia (ACLUGA 2012); and
- lower legal representation rates among detained immigrants in the San Francisco Immigration Court and the difference counsel makes in case outcomes (NCCIJ 2014).

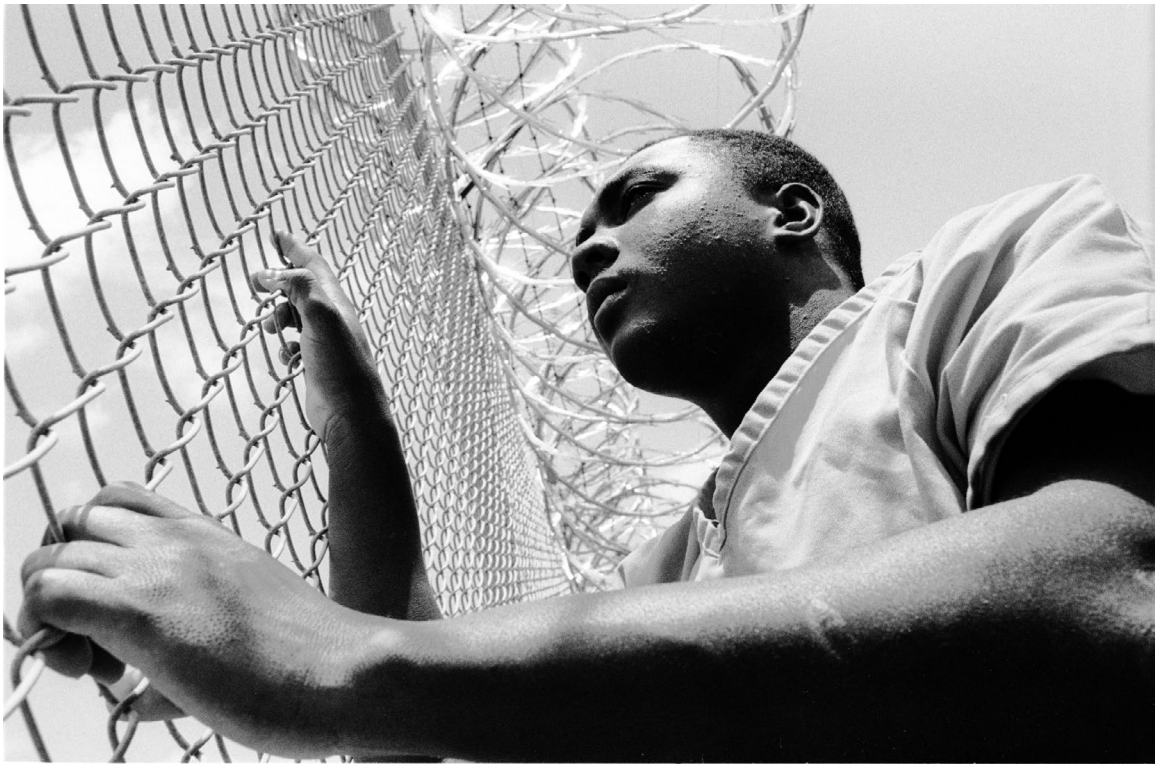
As these reports suggest, the high costs, hardships, and abuses created by the large-scale use of detention will persist without fundamental change. Although laudable, the current reform initiative has not gone deep enough and will not, by itself, create a truly "civil" system, designed to minimize the use of detention, ensure appearances during the adjudication and removal process, and promote due process and informed decision-making in individual cases.

V. A National Security and Criminal Paradigm

At the heart of the federal immigrant detention system is an anomaly. On the one hand, persons subject to detention are in a civil (not criminal) process, albeit one which could result in their removal, separation from family, loss of livelihood, and return to a place where they may have few ties or face extreme danger.

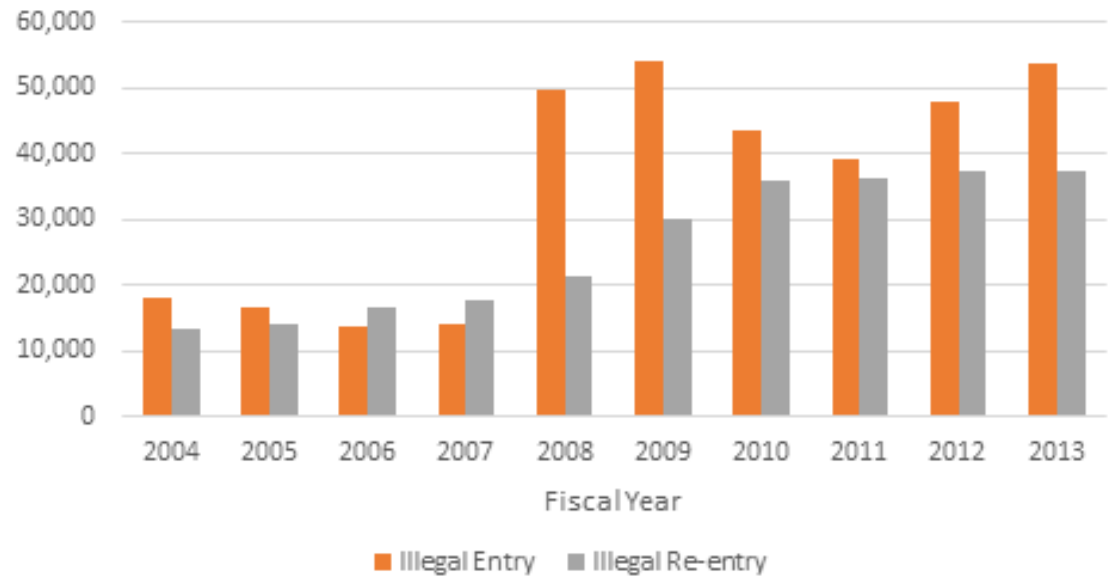
On the other hand, a criminal justice/national security paradigm has shaped, guided and spurred the growth of the U.S. immigration enforcement and detention system. It is not surprising that immigrants have been treated as criminals and security threats, given that they are subject to a legal regime and to custody by an agency devoted to protecting the homeland against terrorism and transnational crime (DHS 2014c, 14).[15] The fact that DHS-ICE regularly reports on its detention and removal of "criminal aliens" contributes to this misconception.

For those without criminal histories, detention can be a dispiriting, even crushing response from a nation which they will soon join, rejoin, or be forced to leave, and from which they had hoped far better and more. From a pastoral perspective, detention can put self-sacrificing immigrants at risk of internalizing an inaccurate and even sacrilegious view of themselves. For asylum-seekers, it can evoke the conditions they have fled (ABA Commission 2010, 1-53; Haney 2005, 197).



Juan Belalcazar, a 23 year old asylum seeker from Colombia, stands beside the razor wire lined fence at Krome Service Processing Center, an Immigration & Naturalization Service (INS) detention facility in Miami, Florida where he was held for 7 months. Photo Credit: © Steven Rubin

Figure 3: Immigration Criminal Prosecutions by Lead Charge, FY 2004 - 2013



Source: TRAC 2014

Most detainees have never been convicted of a crime or have been convicted of a minor, non-violent crime. In FY 2013, DHS removed a record 438,421 persons, including 198,394 (roughly 45 percent) "criminal aliens" (Simansky 2014, 6-7).[16] Nearly one-third of deported "criminal aliens" in FY 2013 had been convicted of an immigration-related offense and an additional 15 percent had been convicted of traffic offenses (ibid., 7).[17] Based on an assessment of "threat risk" and "special vulnerability," ICE classifies only 20 percent of detainees as requiring a "high custody level." (GAO 2013, 9). However, even "high custody" detainees have served their sentences (if any) and, with proper supervision and support, would overwhelmingly appear for court proceedings. Moreover, 44 percent of ICE detainees with criminal histories in 2013 were solely misdemeanants and others fell within an enforcement category that includes non-citizens who committed multiple misdemeanors (DHS-ICE 2013a, 3-5).

Illegal entry has long been a crime. However, ordinary immigration offenses were historically treated as violations of "civil" law, leading to deportation proceedings. Between 1986 and 1996, the Immigration and Naturalization Service (INS) referred on average fewer than 10,000 immigration cases per year for criminal prosecution, and fewer than 8,500 persons per year (on average) were actually prosecuted (TRAC 2002), typically for egregious immigration violations. Yet over the last two decades, immigration-related prosecutions have risen sharply. This trend has accelerated in recent years, spurred by Operation Streamline which arrests and prosecutes U.S.-Mexico border crossers in particular sectors and corridors. Operation Streamline prosecutions have taken the form of summary, en masse guilty pleas, largely devoid of due process protections (Kerwin and McCabe 2010). The USCCB has strongly opposed the criminalization of U.S. immigration law and called for the termination of Operation Streamline. Prosecutions for illegal entry fell in the first six months of FY 2014 (Associated Press 2014; TRAC 2014c), while prosecutions for illegal re-entry increased. However, the president has not terminated Operation Streamline.

Immigration enforcement has become so intertwined with the federal criminal justice system that the U.S. Supreme Court has held that the failure of attorneys to advise clients on the immigration consequences of criminal plea agreements constitutes ineffective assistance of counsel in violation of the Sixth Amendment of the U.S. Constitution.[18]

CBP and ICE refer more cases for criminal prosecution and account for more matters "concluded" by U.S. Attorneys than all other federal law enforcement agencies combined (Meissner, et al. 2013, 99-100; Motivans 2013, 14). In 2010, more than one-half of the suspects arrested and

booked by the U.S. Marshals Service were arrested by DHS agencies (Motivans 2013, 7).

In 2013, immigration-related cases represented 63 percent of all cases before federal magistrates (which mostly handle misdemeanors) and 26 percent of the cases in federal district courts (which handle felonies) (Rosenblum and Meissner 2014, 27-28). Immigration-related prosecutions reached nearly 100,000 in FY 2013 (TRAC 2014a).[19] The overwhelming majority of immigration prosecutions in recent years have been for illegal entries and illegal re-entries following removal (Figure 3), including 95 percent in 2013 (TRAC 2014b). The rise in immigration-related prosecutions has diverted federal law enforcement resources to minor offenders at the expense of the government's ability to investigate and prosecute transnational criminal enterprises that traffic narcotics, arms, and human beings (Lydgate 2010, 7-9).

While immigration violations have commanded a growing proportion of federal prosecutorial and judicial resources, the criminal justice system has also substantially impacted U.S. immigration enforcement strategies and workload. Between 2011 and 2013, for example, DHS removed more "criminal aliens" for immigration-related crimes than for any other category of crime (Simansky 2014, 7).[20]

DHS-ICE's use of detention for broader immigration enforcement, investigative, and deterrent purposes runs afoul of UNHCR detention guidelines and U.S. domestic law. A potential deprivation of liberty should be based on an individualized assessment by an impartial adjudicator of the need to detain in furtherance of a legitimate purpose and should be regularly reviewed. Yet families fleeing violence in Central America are now being detained in order to deter or "stem" illegal migration and de facto refugee flows.

It is hotly disputed whether detention to deter succeeds on its own terms. Like other nations, the United States assumes this to be the case (Preston 2014). While noting the "very limited available evidence on what enforcement programs are most cost-effective at deterring illegal migration," one researcher has attributed the abatement in illegal entries by Central American adults in 2006 and 2007



A Border Patrol Agency conducts a pat down of a female Mexican being placed in a holding facility. Photo Credit: Customs and Border Patrol/US Government

to the end of "catch and release" (Roberts 2014).[21] Under this practice, immigration officials released non-Mexican nationals on their own recognizance to appear for their removal hearings.

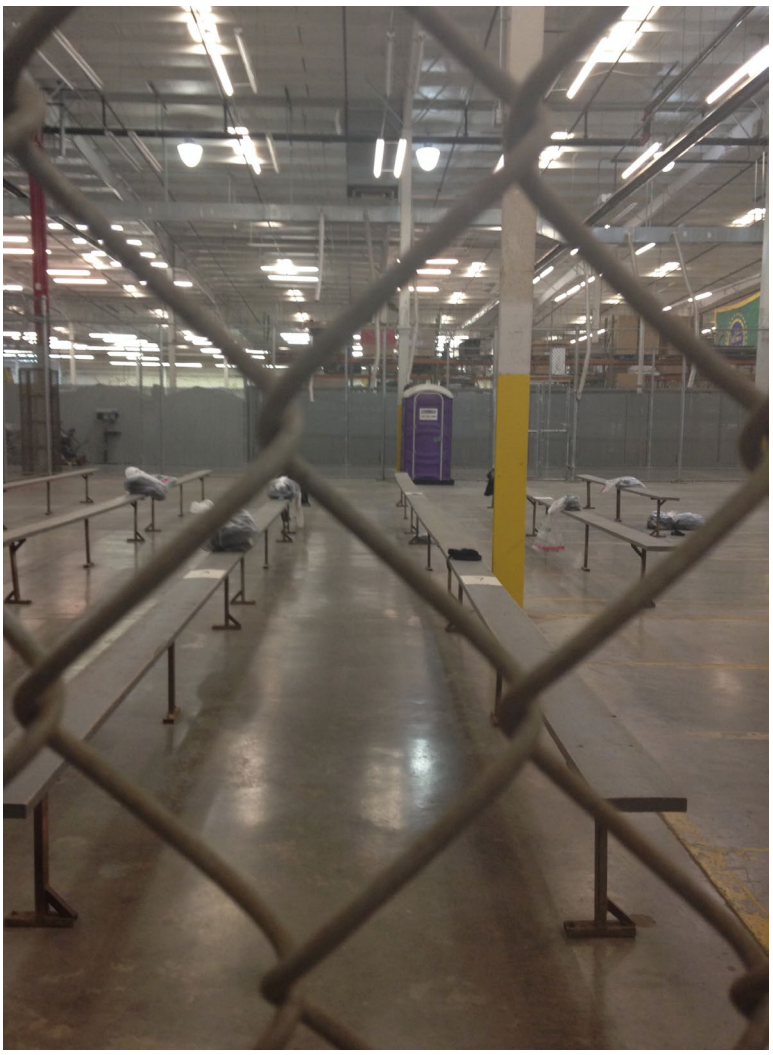
On the other hand, the UN Special Rapporteur on the rights of migrants avers that "there is no empirical evidence that detention deters irregular migration or discourages persons from seeking asylum" and points out that harsh detention policies over a 20-year period have not resulted in a decrease in irregular migration (UN General Assembly 2012, 8). In the United States, there has been no rigorous examination of whether detention deters illegal immigration, much less deters persons fleeing for their lives or the lives of their children. However, even if such persons could be deterred, it would be ethically problematic to do so and misguided, at best, to use vulnerable persons as a means to this end.

Following the 9/11 terrorist attacks, INS detained thousands of Middle-Eastern and South Asian men who the De-

partment of Justice (DOJ) required to register with the government, arriving asylum-seekers from countries with an Al Qaeda presence, and migrants from Haiti (Kerwin 2005, 759-761, Kerwin 2002, 23-24). Not only have "preventive" and "pre-textual" detention been criticized from a civil liberties and international law perspective, but according to national security experts these tactics make it difficult to uproot terrorist conspiracies because they alienate members of communities that might otherwise be a source of intelligence (Kerwin 2005, 761).

VI. The Problem of Mandatory Detention

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) mandated the detention of broad categories of inadmissible or removable non-citizens,[22] including persons subject to "expedited removal," who are arrested without documents or with improper documents at ports-of-entry or within 100 miles of land or coastal borders.[23] Persons in "expedited removal" can be released if they are found to have a "credible fear" of persecution. In 2003, the USCCB and the Conferencia del Episcopado Mexicano (CEM) argued that IIRIRA eviscerated due process rights, led to the detention and deportation of minor offenders, and separated families (USCCB and CEM 2003, 92). In recent years, more than three-quarters of non-citizens in ICE custody have been deemed mandatory detainees (DHS-OIG 2014). Although mandatory detention need not preclude a custody hearing,[24] broad mandatory detention rules make it virtually impossible to create a system that ensures appearances during the adjudication and removal process through the least restrictive means possible.



In 2003, the Supreme Court upheld mandatory detention for non-citizens with pending removal cases for the "brief period necessary" to complete removal proceedings, which the court found to be "a month and a half in the vast majority of cases … and about five months in the minority of cases in which the alien chooses to appeal."[25] Yet as of January 25, 2009, 2,362 persons in removal proceedings had been detained for more than six months, and 570 had been detained for one year or more (Kerwin and Lin 2009, 16), hardly a "brief period." The number of long-term detainees in removal proceedings has almost certainly increased in the interim, given growing court delays and backlogs.

By way of contrast, the U.S. Supreme Court has prohibited the indefinite detention of persons ordered removed; i.e., those whose removal proceedings have been completed. The Immigration and Nationality Act (INA) requires DHS to remove non-citizens within 90 days following receipt of a removal order, provides that DHS "shall" detain non-citizens during the removal period, and "shall not" release those who are inadmissible or deportable on criminal or national security grounds.[26] In order to avoid finding this provision unconstitutional, the Supreme Court held that six months after a removal order becomes final the burden must shift to the government to show there is a "significant likelihood of removal in the reasonably foreseeable future."[27] If the government cannot meet this burden, the detainee must be released. In 2003, the court extended

this decision to "inadmissible" persons or those stopped at a port-of-entry or border, who are deemed not to have entered the nation.[28]

These latter two decisions have led to a decrease in the number of non-citizens with orders of removal who are in prolonged or indefinite detention, but long-term detention persists for large numbers of persons with pending removal proceedings (Kerwin and Lin 2009, 16-18). Despite the Supreme Court's apparently disparate holdings, prolonged detention cannot be reasonably justified based on the stage of the removal adjudication process.

Federal law treats non-citizens in civil removal proceedings more harshly than it does criminal defendants awaiting disposition of their cases or even convicts awaiting sentencing or the execution of a sentence. Judicial officers must consider federal defendants for release pending judicial proceedings, the imposition or execution of a sentence, or appeal.[29] At an initial pre-trial hearing, criminal defendants may be: (1) released on personal recognizance or on an unsecured bond; (2) released subject to conditions; (3) temporarily detained in order to permit revocation of conditional release, deportation, or exclusion, or (4) detained.[30]

Federal law provides that judicial officers should release criminal defendants on personal recognizance or unsecured bond unless they determine that "such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community."[31] If criminal defendants cannot be released on personal recognizance or unsecured bond, judicial officers must consider the "least restrictive … condition, or combination of conditions" that will reasonably ensure the defendant's appearance and the safety of others and the public.[32] Federal law presumes that criminal defendants charged with certain offenses represent a flight risk or danger, but this presumption can be rebutted.[33] In contrast, non-citizens subject to mandatory detention cannot avoid detention by demonstrating that they are not a flight risk or danger. They are categorically viewed as flight risks, although many are not, particularly those with family and strong community ties.

Persons charged with immigration-related crimes experience the highest rate of pre-trial incarceration of all federal criminal defendants, higher even than persons accused of violent crimes and weapons charges (Cohen 2013, 3). Between 2008 and 2013, the percentage of defendants released prior to the disposition of their cases ranged from 28 to 38 percent (Table 1), but would have been far higher if immigration offenders were not included (AO 2014, Table H-3 and H-3A).

Table 1: Federal Criminal Defendants Released Pretrial, FY 2008-2013

Fiscal Year	Total	Number Released	Percent Released
2013	99,300	27,887	28.1
2012	99,426	27,767	27.9
2011	111,797	37,790	33.8
2010	111,271	38,434	34.5
2009	100,838	34,268	34
2008	90,183	33,834	37.5

Source: Administrative Office of the United States Courts (AO). *Annual Report of the Director: Judicial Business if the United States Courts*. Washington DC: AO Statistics Division, Office of Judges Programs, various years. http://www.uscourts.gov/Statistics/JudicialBusiness/archive.aspx; http://www.uscourts.gov/Statistics/JudicialBusiness/2013/statistical-tables-us-district-courts-

Between 1995 and 2010, the percentage of released criminal defendants who engaged in pre-trial misconduct ranged from 16 to 22 percent (Cohen 2013, 8, Table 4).[34] Yet the percentage of released criminal defendants who failed to appear for court hearings – i.e., the primary criterion in the immigrant detention context -- *did not exceed three percent* in any year during this period (ibid.). Moreover, only one percent of the 101,622 defendants released pretrial for cases disposed in federal district court between 2008 and 2010 failed to appear (Cohen 2012, 13).

States also offer the opportunity for pre-trial release to most criminal defendants (NCSL 2013). In 2009, 62 percent of felony defendants in the nation's 75 largest counties were released pretrial (Reaves 2013, 17). Among the defendants released, 29 percent committed some form of misconduct (ibid., 20). An estimated 16 percent were re-arrested for a new offense, eight percent for a felony and seven percent for a misdemeanor (ibid., 21). An estimated 17 percent failed to appear in court, but only three percent failed to appear or were not returned to court during the one year study period (ibid.).

VII. Reasons for the Growth of Immigrant Detention

Several factors have driven the growth of the immigrant detention system. First, the law mandates detention in broad categories of cases, guaranteeing the excessive use of detention and precluding the release of many persons who would present little risk of flight if supervised appropriately. Beginning with the Anti-Drug Abuse Act of 1988 and culminating in the IIRIRA, the number of crimes leading to removal has expanded, the discretion of Immigration Judges to allow non-citizens to remain based on their equitable ties in the United States has diminished, and the categories of non-citizens subject to mandatory detention have increased.

The expansion of crimes labeled "aggravated felonies" - a term of art unique to immigration law that encompasses both serious and minor crimes (even misdemeanors) – has led to automatic removal and mandatory detention for thousands of noncitizens, notwithstanding their length of residence, family or other equitable ties in the United States (LCCR and ABA 2004; CLINIC 2000a). In addition, non-LPRs that DHS believes to be removable as "aggravated felons" are subject to a streamlined, administrative removal procedure without ever appearing before an immigration judge (ABA Commission 2010, 1-34 to 1-37).

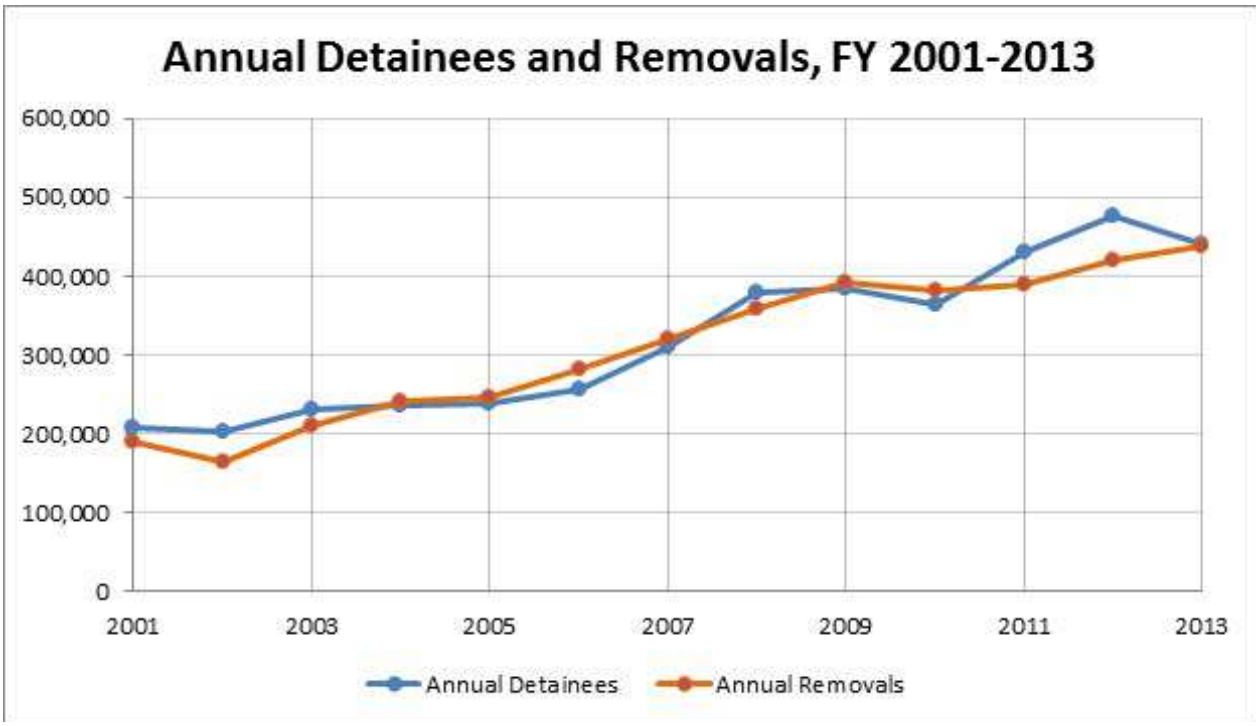
Second, as stated, DHS has reinstituted the large-scale detention of families in response to the increased migration of parents and minor children from the Northern Triangle nations of Central America. In 2014, U.S. family detention capacity began to mushroom from roughly 100 beds to several thousand.[35] The projected 3,700 family detention beds translates into more than one million detention bed nights per year, and may not signal the end of the expansion of this system.

Third, immigration enforcement funding has expanded dramatically over the last quarter of a century. In 1990, the INS's budget was $1.2 billion. By 2014, combined funding for CBP and ICE equaled $18 billion (DHS 2014a, 49-50, 64). However, this figure understates U.S. spending on immigration enforcement because it does not count the substantial annual expenditures on enforcement by other DHS agencies and divisions, by non-DHS federal agencies, and by states and localities. Because Congress and successive administrations have treated detention as a centerpiece of the U.S. immigration enforcement system, detention spending and capacity have grown accordingly.

In addition, Congress has attempted to mandate that ICE fill all 34,000 beds at its disposal, whether or not this is necessary based on the agency's enforcement priorities or operational needs. Correctional officials often seek to decrease the use of prison beds and save government resources. Yet Congress has stipulated that ICE "shall maintain a level of not less than 34,000 detention beds,"[36] which many Members interpret to mean that ICE must fill 34,000 beds each night. However, DHS Secretary Jeh Johnson has testified that he interprets this language to require that DHS maintain 34,000 beds, not detain 34,000 persons every night (Johnson 2014a).

Fourth, states and localities have assumed a far greater role over the last several years in enforcing federal immigration law, both independent of and in partnership with

Figure 4: Annual Detainees and Removals, FY 2001 - 2013



Sources: Simansky 2014, 5-6; DHS 2013, 103; INS/DHS. Various years. *Yearbook of Immigration Statistics*. Washington DC: DHS, Office of Immigration Statistics. http://www.dhs.gov/yearbook-immigration-statistics.

the federal government. Several major ICE enforcement partnerships have targeted non-citizens who have been arrested or who are serving time for crimes, including Secure Communities, the Criminal Alien Program (CAP), and the 287(g) program. These programs have fed substantial numbers of persons into the detention system. Secure Communities, for example, screened persons arrested in prisons, jails and detention centers against immigration databases in all 3,181 U.S. law enforcement jurisdictions. Between 2011 and 2013, Secure Communities accounted, for an average of 81,000 removals and returns per year (Rosenblum and Meissner 2014, 38).

On November 20, 2014, the Obama administration announced the discontinuance of the Secure Communities program as one of its executive action measures (Johnson 2014c). However, the centerpiece of the Secure Communities program – ICE screening for immigration violations through use of the fingerprints taken by state and local law enforcement agencies following an arrest – will remain a feature of its successor program. Henceforth, ICE will only seek the transfer into its custody of non-citizens to who come within its new Priority 1 and 2 removal categories (ibid.). Moreover, ICE will not ask local law enforcement to hold or detain non-citizens beyond the time they would normally be held, but simply to notify ICE prior to the release of a non-citizen in state or local custody (ibid.).

Fifth, the detention system is an adjunct to the removal system. Detention has been used to ensure appearances throughout the adjudication and removal process. Thus, it is not surprising that annual immigrant detention increases have paralleled increases in removals (Figure 4). In recent years, greater use of administrative, summary, expedited, and non-court removals have resulted in annual detention increases, particularly for short-term detainees (Noferi 2014).

Non-citizens may be ordered removed by an immigration judge acting within the Executive Office for Immigration Review (EOIR), a division of the DOJ, or through more summary processes. During a formal removal hearing before an immigration judge, a non-citizen has the right to present evidence, call witnesses, and contest the government's assertion that he or she is removable. He or she may also apply for certain forms of discretionary relief from removal, including asylum, withholding of removal, adjustment of status, and cancellation of removal. If an immigration

judge determines that a non-citizen is inadmissible or deportable, and does not qualify for relief from removal, the judge may issue a formal removal order.

However, there are also several truncated and accelerated removal procedures which entail minimal process and operate either entirely outside the immigration court system or receive only cursory judicial review and oversight. The USCCB Committee on Migration has urged that the use of these proceedings be minimized. Similarly, the ABA Commission on Immigration has cautioned that these processes provide "unprecedented authority" to "low-level immigration officers" and preclude the "oversight of an impartial adjudicator," are "radically accelerated" and "largely insulated from public scrutiny and judicial review." (ABA Commission 2006, 107C, 9). In 2010, the Commission decried the "shift toward a removal system" in which immigration courts play no or only a perfunctory role and DHS is "responsible for all steps in the process, from apprehension and detention to issuing the order and deporting the individual." (ABA Commission 2010, 1-35 and 1-36). A December 2014 study found that 83 percent of removals now take place "without a hearing or a chance to present" legal claims to an Immigration Judge, including 95 percent of the cases of Mexican unaccompanied children (ACLU 2014, 6 and 11). Accelerated, non-court procedures include:

- Expedited removal, which accounted for 193,032 removals in 2013 (Simansky 2014, 5), applies to non-citizens who attempt to enter the United States without entry documents or by using improper documents, who are arrested within 100 miles of U.S. land and coastal borders, who have been present in the United States for less than two years, and who fail to demonstrate a "credible fear" of persecution in their home countries. Persons ordered removed pursuant to expedited removal do not receive a hearing before an immigration judge.

- Reinstatement of removal, which accounted for 170,247 removals in 2013 (ibid.), applies to persons who have been previously ordered removed or have departed voluntarily while under a removal order, and who illegally re-enter the United States. Persons in this situation often have family and long tenure in the United States, but are summarily removed with only minimal process.[37]

- Administrative removal in which DHS issues an order of removal to a non-citizen who is not an LPR and who DHS believes to be removable as an "aggravated felon." There were 127,376 administrative removals from FY 2003 to FY 2013 (Rosenblum and McCabe 2014, 23).

- Stipulated orders of removal, in which a non-citizen waives his or her right to a formal removal proceeding – often due to pressure from government officials and a desire to escape detention (Koh, Srikantiah, and Tumlin 2011, 3-7) – and agrees to be removed.[38] While ICE does not publish statistics on stipulated removals, a 2011 study estimated that 160,000 stipulated removals had taken place in the previous decade, including one-third of all removals in 2008 (ibid., 1, 14). The study found that virtually all stipulated removal cases involved detainees, and that 96 percent of persons removed under this process lacked legal representation (ibid., 1, 7-8).[39]

Sixth, the massive U.S. enforcement system funnels non-citizens into a grossly underfunded Immigration Court system that receives roughly $300 million per year or one-sixtieth the level of CBP and ICE funding (DOJ 2014; DHS 2014a). By the end of March 2015, a record 441,939 cases were pending before immigration judges, with the average case pending 599 days and delays in some courts reaching more than two years (TRAC 2015). Immigration judges expedite removal cases involving detainees. However, because detention is a function of the removal process, delays in the adjudication of removal cases necessarily lead to increased, long-term detention. A one-night snapshot of ICE detainees in January 2009 found that 4,154 had been detained for more than six months (Kerwin and Lin 2009, 22). These delays waste valuable government resources, needlessly disrupt the lives of immigrants who will ultimately be found eligible for immigration relief, and prolong the removal process for non-citizens who have no possibility of remaining.[40]



Mexican migrants in the US illegally are placed in holding cells before being returned to their country. Photo Credit: Customs and Border Patrol/US Government

VIII. Overreliance on Private Prisons

Private prison agencies administer large swaths of the immigrant detention system. INS began to contract with for-profit entities in the late 1970s (McDonald 1994). In 1983, the Correctional Corporation of America (CCA) was incorporated and in 1984 it contracted with INS for a 350 bed immigrant detention facility (Green and Mazón 2012). By 2014, CCA was the world's largest for-profit prison corporation with 37 percent of the U.S. market in private correctional facilities (prisons and immigrant detention centers), and $1.7 billion in total revenue in 2013 (IBIS World 2014). The Wackenhut Corporation, a predecessor to the GEO Group, received its first immigrant detention contract in 1987 (Mason 2012, 4). In 2014, the GEO Group's market share of the U.S. private correctional industry was 22 percent, and its revenue exceeded $1 billion in 2013 (IBIS-World 2014).[41] In 2014, GEO and CCA detained a combined 45 percent of the U.S. immigrant detention population each night (Carson and Diaz 2015, 8).

In late 1988, private detention facilities held roughly 800 immigrants (McDonald 1994). At present, 19 percent of detainees are held in privately owned and operated facilities (GAO 2013, 10). However, this figure excludes the state and local contract facilities that are administered by private entities, and does not speak to the extensive private contracts for services within detention facilities. Thus, a 2009 report found that for-profit prison agencies administered 12 of the 17 largest detention facilities, which collectively held more than one-half of all detainees (Kerwin and Lin 2009, 14-16). In 2012, 62 percent of the 50 facilities with the largest immigrant detainee populations were privately operated (Mason 2012, 8). By 2015, for-profit prison corporations administered nine of the nation's ten largest immigrant detention centers (Carson and Diaz 2015, 6-7).

Private prisons also contract with the U.S. Marshalls Service (USMS) to hold persons in federal custody prior to the disposition of their criminal cases. In 2011, 30 percent of USMS detainees were held in privately-operated facilities, up from seven percent in 2000 (Mason 2012, 7). Forty percent of USMS detainees in 2011 had been arrested for immigration-related crimes, primarily illegal entry and re-entry (ibid., 3). Private prison agencies also manage BOP facilities, which hold substantial numbers of prisoners

serving sentences for immigration-related crimes (Green and Mazón 2012, 20).

For-profit prisons did not enter the immigrant detention business based on a track record of successfully providing detention services (Nathan 2007). The rise of this industry has been attributed to a combination of factors , including the trend toward privatization of government services, the ability of private contractors to create detention capacity more rapidly than government (by avoiding government procurement procedures and bond issuances that fund prison construction), rising demand for detention and prison beds, poor government performance in administering prisons, promises of lower costs, DHS-ICE's lack of expertise in managing a detention system, and the lack of accountability to DHS-ICE by state and local contractors (Schriro 2010, 1442; Nathan 2007; McDonald 1994).

Private prison agencies argue that they provide higher-quality, more accountable services at less cost than the government.[42] Some claim to have a vested financial interest in performing well under government contracts (Flynn and Cannon 2009, 16), and to be acutely responsive to whatever policy direction or reforms that the government initiates. Many studies and reports vigorously dispute these claims and highlight scandalous levels of abuse in privately-administered facilities.[43] In addition, the for-profit prison industry lobbies in its financial self-interest, including for funding for services that government agencies do not need or want (Dow 2004, 97) and for draconian immigration enforcement laws (like Arizona's S.B. 1070) that have been opposed by the Obama administration.

The U.S. immigrant detention system should substantially contract. Yet private prison agencies seek to maximize profits for their shareholders and to expand the market for their services. The Associated Press reported in 2012 that CCA, GEO, and the Management and Training Corporation had spent $45 million in federal and state lobbying and in campaign donations over the previous decade (Associated Press 2012). In 2011, CCA reportedly spent $2 million on federal lobbying and employed 37 federal lobbyists in four firms, as well as its own in-house lobbyists (Mason 2012, 13). Generally, CCA has sought appropriations for ICE, Bureau of Prisons and USMS which can be used to fund its detention work (ibid., 14). For-profit prison agencies also helped to champion "model" state enforcement legislation that gave rise to Arizona's SB 1070 and other draconian state bills (Sullivan 2010), which the U.S. bishops strongly opposed. Many provisions in these bills were found to be unconstitutional.

One of the guiding principles of the current detention reform initiative is the need to "provide federal oversight



An Ankle Bracelet (Electronic Monitoring Device) and the Violation of Human Dignity

Esmerelda, a mother of three U.S.-citizen children, was placed in an ankle bracelet by ICE. The bracelet humiliated her and impeded her life, as it went off in public as she was shopping for groceries and caused a rash on her leg and increased her angst and sleeplessness. The ankle bracelet also reminded her that she could be separated from her children and family. In addition, she experienced harassment from an ICE officer, who asked her when she would go home and told her that staying in the U.S. would only hurt, not help, her family. Esmerelda asked for help from her local priest, who advocated on her behalf with lawmakers. Finally, one lawmaker from Congress showed concern and intervened to have her ankle bracelet removed. Esmerelda was given a new ICE officer. Since the ankle bracelet's removal , Esmerelda has been much more active in her community and she cooks at her parish for special events. She is an active member of her parish and assists the priest with projects in the community.

of key detention operations and track performance and outcomes." (Schriro 2009). Yet according to the founding director of its Office of Detention Policy and Planning, ICE's lack of expertise in administering the immigrant detention system has undermined "its ability to identify services for which it should contract, to oversee its contracts with states, localities, and for-profit prisons, to assess performance under these contracts, and to address deficiencies." (Schriro 2010, 1442). Given the substantial privatization of the U.S. immigrant detention system, there is a particular need for robust government oversight to promote compliance with standards and to correct breaches of them (Flynn and Cannon 2009, 7).

As one global study has concluded, the incentive for for-profit corporations to perform well can be undermined by "extremely close ties between facility operators and government decision-makers," "the consolidation of large parts of a market under one or a few companies," the success of the private prison industry in advocating to expand their business and to fight robust regulation, and the absence of substantial oversight by independent entities (Flynn and Cannon 2009, 16-17). In fact, these conditions can be found in varying degrees in the United States. Indeed, if accountability can be diminished by "the consolidation of large parts of a market under one or a few companies" (ibid., 16), it is instructive to note that nearly 60 percent of the private correctional market is consolidated under thew world's two largest correctional corporations, CCA and GEO. In addition, the privatization of the detention system incentivizes detention growth, makes effective oversight and accountability difficult and, in the United States, has created a network of politically active agencies with a financial self-interest in a large immigration enforcement and detention infrastructure.

An important element of oversight is access to information about the detention system by the press, service providers, faith-based organizations, human rights agencies, and other NGOs. Yet one international study has decried the "shroud of commercial confidentiality that prevents proper public scrutiny and accountability of government-private sector contractual relationships and operations." (Nathan 2007). In addition, private prison agencies have claimed immunity from and actively resisted coverage under freedom of information laws, compounding the challenge of accountability and oversight (Nathan 2007; Human Rights Advocates 2010). According to a lengthy exposé on immigrant detention, the marriage of INS (now DHS) and private corporations led to increased resistance to public scrutiny of the detention system (Dow 2004, 90-91).

Many argue that imprisonment and detention should be the province of the government, not private entities. In 2009, the Supreme Court of Israel banned for-profit prisons, holding that the transfer of state authority to imprison and to enforce the law would infringe on the fundamental rights to personal freedom and human dignity (Paulsworth 2009). Certainly, it would be unconstitutional and a derogation of its sovereign responsibilities if the U.S.

government were to cede authority for custody decisions and detention to non-state actors. It would be equally dangerous if the detention system were to reach the tipping point at which the federal government no longer exercised sufficient control or oversight of it.

Finally, detention and the broader criminalization of immigration has shaped the public's view of unauthorized immigrants as criminals (Ackerman and Furman 2013), creating an environment conducive to seeing even the most vulnerable as a business opportunity (Flatow 2014). For all of these reasons, private corporations should have a more limited and modest role in a shrinking detention system.

IX. Need to Expand the Use of Alternatives to Detention

ICE's FY 2010-2014 strategic plan identified the need to "develop a cost effective Alternatives to Detention program that results in high rates of compliance" as a centerpiece of its detention reform initiative (DHS-ICE 2010, 7). Well-managed ATD programs have proven effective in ensuring high appearance rates at far less cost (financial and human) than detention. Between 1987 and 1999, for example, MRS administered a successful reintegration program for indefinitely detained "Mariel Cubans."[44] In 1999 and 2000, Catholic Charities of New Orleans administered an effective, self-funded ATD program for indefinite detainees with criminal records and asylum-seekers (CLINIC 2000b, 26-28). Both of these programs achieved high rates of compliance. Similarly, the Vera Institute for Justice's pilot "Appearance Assistance Program" from February 1997 to March 2000 achieved an overall court appearance rate of 90 percent (Vera Institute 2000).

There are two general types of ATD programs. The first type relies heavily on technology, extensive reporting, monitoring and visitation. The second relies on community-based support and case management services. At present, ICE funds two large ATD programs of this kind, "full service" and "technology assisted" ATDs (DHS 2014b, 62-63).[45] In the full service program, contractors use a combination of case management and monitoring, including the use of tracking devices and home and office visits. By 2014, full service programs were available in 45 cities (GAO 2014, 9). Technology assisted programs use only monitoring technology and do not include case management services (DHS 2014b, 62-63). Technology-only programs are available in 96 locations (GAO 2014, 11). As a general matter, electronic monitoring devices violate human dignity and should be used only in rare cases, when case management or monitoring is not available.

Between FY 2011 and 2013, the full service ATD program yielded an appearance rate of 99 percent at court hearings and 95 percent at scheduled final removal hearings (ibid., 30).[46] ICE does not collect or report on similar performance results for the technology-only program (ibid., 31).

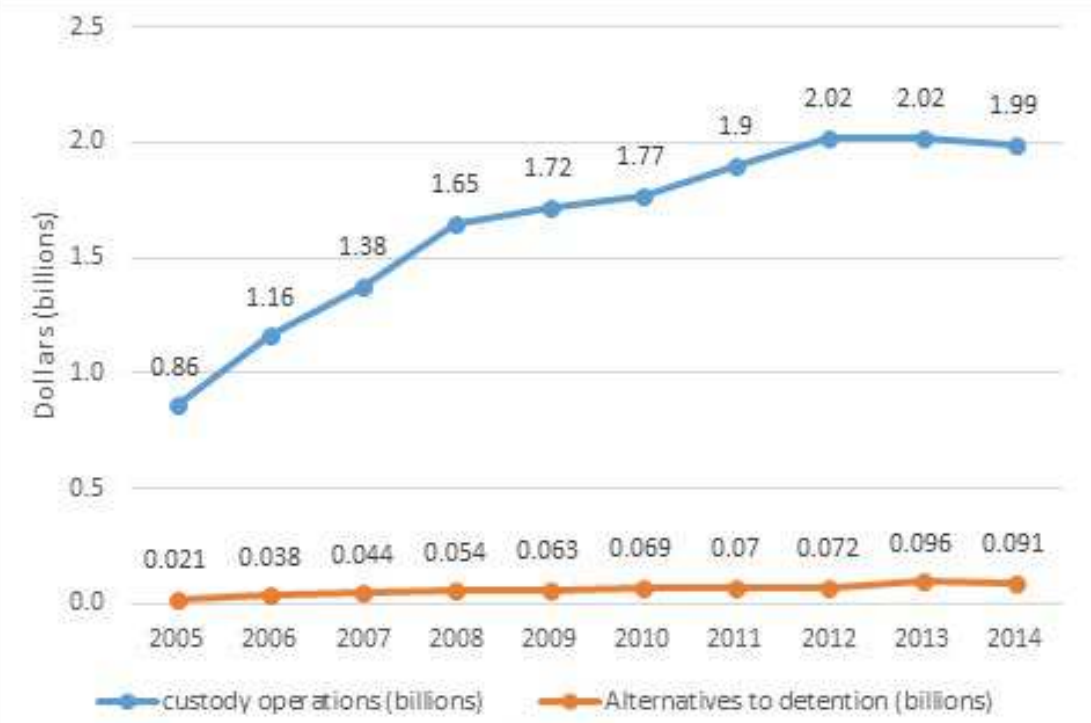
In 2013, there were roughly 22,090 persons in ATD programs on an average night, with the great majority in full-service programs (Table 2), compared to roughly

Table 2: The Average Daily Number of Individuals in ATD Programs, FY 2009-FY2013

2009	17,586
2010	16,532
2011	17,957
2012	23,034
2013	22,090

Source: DHS. 2014. *US Immigration and Customs Enforcement Salaries and Expenses: Congressional Justification Fiscal Year 2015*. Washington DC: DHS. http://www.dhs.gov/sites/default/files/publications/DHS-Congressional-Budget-Justification-FY2015.pdf.

Figure 5: Appropriations for Custody Operations and Alternatives to Detention, FY 2005 - 2014



Sources: DHS. Various years; DHS *DHS Budget in Brief*. Washington DC: DHS. http://www.dhs.gov/dhs-budget; Congressional Research Service (CRS). Various years. *Department of Homeland Security Appropriations.* Washington DC: CRS. http://fas.org/sgp/crs/homesec/.

34,000 in detention facilities. In addition a total of 40,864 unique or individual non-citizens participated in these two programs in FY 2013 (GAO 2014, 13-14). Because immigration courts fast-track the cases of detainees, persons in ATD programs remain in those program on average for longer periods than detainees remain in custody. Yet even accounting for slower turnover among ATD participants than detainees, ATD programs cost substantially less than detention. The average immigration detention bed cost $158 per night in FY 2013, compared to $10.55 for the average daily cost of ATD programs (GAO 2014, 18-20). Yet ICE devotes only a fraction of its detention budget to ATD programs (Figure 5). As these figures demonstrate, it would be cost-effective if DHS-ICE more widely utilized ATDs and if Congress appropriated more funding for them. Congress should also appropriate far greater amounts to the Immigration Court system in order to expedite hearings, to reduce court backlogs and, by extension, to reduce detention and ATD costs.

The second type of ATD program relies on community-based support, case management services, and individual service plans to mitigate flight risk. These programs have traditionally received only modest, if any, government funding. They avoid the stigmatization caused by electronic ankle monitors and other restrictive forms of supervision, while relying on community-based services and resources to accomplish the same purpose. Case managers educate and assist participants to comply with ICE and Immigration Court reporting requirements, and help them to secure legal assistance. These programs also work to integrate persons who may be eligible to remain in the United States, with an emphasis on job readiness and placement services. They also assist persons who are ordered removed to establish contact with family and other support systems in their countries of origin.

X. Recommendations for Reform

Catholic social teaching recognizes the authority and responsibility of sovereign states to regulate migration in furtherance of the common good. On this basis, the U.S. bishops have strongly advocated for broad immigration reform legislation, including humane and effective enforcement policies. Properly crafted legislation could substantially reduce the pressure of the U.S. immigration



Archbishop Garcia-Siller celebrating Mass for detained migrants at a detention facility in Texas. Photo Credit: MRS/ USCCB

enforcement and immigration court system, and facilitate reform of the U.S. detention system. However, detention reform does not require and should not wait for passage of comprehensive reform legislation.

The U.S. immigrant detention system is neither humane nor, in its current form, necessary. The underlying purpose of detention – to ensure appearances during the adjudication and removal process, and, in rare cases, to protect the public – can be served more efficiently and humanely through a large-scale investment in supervised release, case management and community support programs, than through detention.[47] As an overarching recommendation, the U.S. immigrant detention system should be replaced with a flexible, humane and less costly continuum of release programs that honor due process, uphold the rights of non-citizens and ensure court appearances and removal. As a preliminary step toward that goal, Congress should commission a comprehensive study on the benefits, challenges, cost, and time frame for creating a truly civil immigrant detention system. This study should include a review of the pre-trial release infrastructure of federal and state criminal justice systems, and an analysis of how these systems could serve as a template for a court-based immigration "compliance" system to replace the current detention system.

Some commentators support a large-scale detention system on the grounds that immigrants have a greater motive to abscond than criminal defendants, as evidenced by their low court appearance rates in past studies. Yet many persons in removal proceedings enjoy strong family, employment, and community ties in the United States, making them unlikely to abscond with proper supervision and support. Sixty percent (6.6 million in total) of the unauthorized have lived in the United States for 10 years or more and 17 percent (1.9 million) for at least 20 years (Warren and Kerwin 2015, 86-87, 99). In addition, civil detainees present less of a public safety risk than criminal defendants.

Moreover, the choice is not between – as past studies would indicate – outright release or detention. Rather, Congress should fund and DHS should create a full menu of ATD programs, with varying degrees of support and supervision, reporting, oversight and monitoring. The expansion of community-based, case management programs should be a particular priority. Supervised release programs have yielded extremely high approval rates. In addition, such programs have long been an indispensable feature of the criminal justice system, ensuring high appearance rates at modest cost. Several additional recommendations for reform of the U.S. immigrant detention system follow.

First, immigrant detention has too often been used as a

"deterrent" to illegal migration and even de facto refugee flows, as well as a broad brush strategy to uncover and disrupt possible terrorist conspiracies.[48] It has also been employed as part of a broader enforcement strategy to prevent refugees and other migrants who are fleeing violence from reaching territorial protection (Flynn 2014). The use of detention for these purposes has pushed the boundaries of legality and, at times, has been counter-productive. Rather than putting immigration and protection policies in service to the human person (Benedict XVI 2007), these strategies have treated human beings as a means to an end. The well-being of individuals should not be sacrificed to broad, often misguided law enforcement and national security strategies. Our nation can achieve security only by respecting human rights, not by undermining them.

In 2003, U.S. and Mexican bishops argued that unauthorized immigrants "should be detained for the least amount of time possible, and should have access to the necessary medical, legal, and spiritual services." (USCCB and CEM 2003, 94). They also called for the release of migrants found to have a "credible fear of persecution." (ibid.). Detention should only be used sparingly, for brief periods (when necessary), and as a last resort when less restrictive strategies cannot reasonably ensure appearances during the adjudication and removal process and cannot protect the public.[49] Prolonged detention -- for persons in removal proceedings and for those who have been ordered removed -- should be eliminated.

Second, an expanded supervised released, case-management and community-support ATD infrastructure should not be located within a homeland security, law enforcement, and paramilitary organization with little competency or experience in providing these services. Instead, Congress should transfer the responsibility to manage ATDs from DHS-ICE to an arm of the federal government better suited to the care and custody of non-citizens. The successful transfer of responsibility for unaccompanied minors to the Office of Refugee Resettlement (ORR) under the Homeland Security Act of 2002 represents a promising model in this regard.[50]

Third, Congress should eliminate mandatory detention in all but the most egregious criminal and national security cases. In the overwhelming majority of cases, immigration judges or judicial officers should be permitted to consider the full range of equities and release options for persons in removal proceedings, whether formal court proceedings or non-court, administrative and summary processes. Mandatory detention does not permit individualized release determinations and, thus, prevents consideration of family ties, employment, housing, criminal history, and other factors that may be relevant to release determinations and conditions (ABA Commission 2010, I-52).

ICE's 2009 assessment of the U.S. detention system, which led to the current administrative reform initiative, recommended the establishment of "a system of Immigration Detention with the requisite management tools and informational systems to detain and supervise aliens in a setting consistent with assessed risk." (Schriro 2009, 3). Yet mandatory detention precludes release even by persons who can demonstrate that they present no risk of flight and danger. Just as pre-trial custody hearings do not require the release of dangerous criminal defendants, hearings on immigrant detention would not require the release of persons who are likely to abscond or pose a danger to others. Rather, they would allow immigration judges or judicial officers to weigh individual equities against a continuum of release options, with the goal of ensuring appearances in the least intrusive, most efficient way possible. The status quo system unconscionably denies an impartial review of a potential deprivation of liberty with all of the attendant negative consequences for immigrants and their families.[51]

Fourth, the role of for-profit prison agencies in the immigrant detention system should be curtailed and rigorously monitored. Some argue that private prisons are particularly responsive to whatever reforms the government initiates. Yet these agencies have supported draconian enforcement laws, which they presumably think will lead to greater business opportunities. In addition, they have reportedly lobbied for services that government agencies do not want or need (Dow 2004, 97).

Custody determinations and imprisonment implicate liberty, human flourishing, the integrity of families, and contributory justice. States exist to promote these shared "goods." Yet the government has increasingly ceded

responsibility for this function to private, for-profit entities whose primary loyalties run to their shareholders, not to the common good. Investors and private prison agencies have viewed even the tragic increase in unaccompanied child minors as a business and investment opportunity (Flatow 2014). While U.S. immigration agencies do not have a stellar track record in administering the detention system, the solution is not greater reliance on for-profit prisons. Rather it is to decrease the use of detention, to develop greater government expertise, and to strengthen oversight of any private contractors that may be necessary.

In 2003, the U.S. and Mexican bishops pointed out that "the presence of the Church within detention facilities and jails" is an expression of hospitality and communion with migrants, as well as "an essential way of addressing the human rights violations that migrants may face when they are apprehended." (USCCB and CEM 2003, 42). For these reasons, the U.S. government should provide generous access to international organizations, faith-based groups, NGOs and the press, to all of its immigrant detention facilities.[52] For-profit prisons are more likely to maintain or improve the quality of their services with "high degrees of surveillance and oversight, particularly by international organizations or other supra-national bodies." (Flynn and Cannon 2009, 16). Moreover, by their nature, human beings must be free to practice their faith. Religious practice provides particular consolation to persons in trying circumstances, like detention. Thus, all detention facilities should be required to provide generous access to religious services, activities and personnel.

Fifth, detention reform requires the wholesale expansion of ATD programs. In 2014, nearly $2 billion of ICE's $5.61 billion budget was devoted to detention, but only $91 million to ATD programs and virtually nothing to community-based, case-management ATD programs. This means that ICE devotes less than five percent of its detention budget to supervise nearly 40 percent of those in its custody on a given night, counting persons in detention and in ATD programs. It could save additional monies if it leveraged community-based networks and organizations to provide case management and support services.

DHS should rely far more heavily on the "least restrictive" ATD programs needed to ensure appearances and protect the public. ATD programs should not be used to expand detention capacity, as has occurred in the criminal justice system.[53] Like detention, intensive reporting and monitoring programs can stigmatize and incapacitate persons, and should not be used if effective, less restrictive alternatives are available. Unfortunately, ATD programs have been used to expand detention capacity in the form of highly restrictive programs, not to decrease its use. In addition, ATD programs – particularly highly restrictive programs -- should be viewed as a form of custody, which would allow mandatory detainees to participate in them.

The INA provides that DHS "shall take into custody" broad categories of non-citizens who have committed criminal offenses and such persons may be released only in limited circumstances.[54] A non-citizen subject to conditions set and controlled by the government – whether via supervised release, electronic monitoring, or placement in an alternative facility – effectively remains in government's custody. Remarkably, certain federal prisoners can serve parts of their sentences through supervised release programs that entail home detention or confinement in other community settings, but ATDs have not been made available to "mandatory" detainees in civil removal proceedings (USSC 2013, §5C1.1).

Sixth, ICE's 2009 assessment of the U.S. detention system highlighted several problems related to its information systems, including the sufficiency of data collected, the data's reliability, its availability, its storage, and its strategic use (Schriro 2009, 3, 15-18). A separate report concluded that ICE did not collect sufficient information to allow it to identify persons who should be considered for release or to ensure adherence with its own standards of confinement (Kerwin and Lin 2009, 5). Problems with data collection and use continue to undermine the integrity of the detention system. This is evidenced by ICE's failure to track court appearance rates by participants in one of its signature ATD programs and its inability to measure compliance with its guidance to place non-citizens in less restrictive ATD programs after they have successfully met full-service program requirements for 90 days (GAO 2014, 20-22, 31).

ICE should undertake and communicate the results of a

comprehensive analysis of its "information systems." This review should identify the information ICE tracks on those subject to its custody; how, when, and which officials collect, enter, and can access this information; its quality control procedures; and the accessibility of this information to congressional oversight committees, government watchdog agencies, and relevant ICE officials.

Seventh, the detention of families with children, particularly detention for the purpose of attempting to deter others from seeking protection in the United States, should be terminated. The vast majority of families would appear for their removal proceedings with appropriate orientation, case management services, supervision and community support. Parents with children should receive individual custody determinations and should be released into ATD programs that reflect child welfare principles. DHS-ICE touted the discontinuance of family detention at the T. Don Hutto facility in 2009 as one of its signature detention reform achievements. Unfortunately, it reversed course in 2014 and has rapidly built an immense family detention infrastructure in an effort to expedite the removal of recently-arrived parents and children (Johnson 2014b). This strategy will not deter imperiled persons from seeking refuge in the United States. However, it will invariably lead to the return of de facto refugees to their persecutors in violation of international law. Family detention facilities should be closed and community-based supervision and support programs should be provided to immigrant families, as necessary to ensure court appearances.

Eighth, DHS may need to hold immigrants during processing, intake, initial custody determinations, and as a last resort for non-citizens who, even with the most restrictive supervision or monitoring, would present a flight risk or a danger. At the same time, the effective imprisonment of immigrants during the adjudication and removal process cannot be justified. The ABA's civil detention standards propose that DHS-ICE's physical infrastructure should consist of facilities akin to "'secure' nursing homes, residential treatment facilities, domestic violence shelters, or in-patient psychiatric treatment facilities." (ABA 2012, 4). The ABA standards further provide that civil facilities should have "ample common space, freedom to move within the facility, extended access to indoor and outdoor recreation, and abundant opportunities to relate to other residents and to persons outside the facility" (ibid.), and should approximate normal living conditions to the extent feasible (ibid. 69). Detention -- in the rare cases when it is necessary – should occur in facilities that are appropriate for persons in civil custody.

Ninth, immigration judges should adjudicate cases now handled through administrative, informal and non-court processes, and should make release and custody determinations in all removal cases. These responsibilities – added to an immense yearly workload and a daunting backlog of nearly 450,000 cases -- will require increases by an order of magnitude in EOIR funding and staffing. Thus, Congress should substantially increase funding for the U.S. immigration court system in order to diminish case backlogs, permit the timely adjudication of removal cases, obviate the need for detention and allow immigration judges to adjudicate and review all removal cases.

As stated, the immigration court system receives only one-sixtieth of the funding of CBP and ICE. In addition, the cost of "right-sizing" the immigration court system may well be offset by reductions in DHS detention funding and diminished federal court expenses related to reviewing habeas corpus petitions.

Apart from funding considerations, there is strong moral need to create an adjudication system that upholds due process and the rule of law. To that end, all unrepresented, indigent persons in removal proceedings should be provided with legal representation at the government's expense. Legal counsel is one of the most important determinants, even more important than the strength of the underlying legal claim, in asylum and other case outcomes (Ramji-Nogales, Schoenholtz and Schrag 2007, 340). For present purposes, it substantially increases court appearance rates (Vera 2000, 41-42), and may also lead to decreased overall costs to the government due to reduced use of detention, more efficient court proceedings and less frequent placement of the children of detainees in foster care (Montgomery 2014). More importantly, legal representation is a fundamental attribute of due process and contributes to the right decisions being made under the law.[55]

It will take time to transition from a system characterized by prisons, jails, and jail-like facilities, to one characterized by supervised release, case-management and community-based support programs. Therefore, the federal government should proceed with these reforms with all deliberate haste.

XI Endnotes

1 When a US Conference of Catholic Bishops (USCCB) delegation toured the Artesia facility on July 23, 2014, for example, it learned that detained mothers had to keep their children with them at all times, including during interviews to determine if they could pursue political asylum claims. In addition, it found that the dining hall area was the only indoor area suitable for meals, legal meeting and religious activities.

2 Detention should only be used as a last resort in the rare cases when alternative programs cannot realistically ensure appearances or protect the public.

3 Moreover, for-profit prison corporations apply substantial political pressure to create what they view as business opportunities in the form of draconian enforcement policies and greater use of detention.

4 8 CFR §236.19 (c)(8); 8 CFR §3.19(h)(3).

5 The ABA standards on *criminal* pre-trial release add community, victim and witness protection to the criteria governing release determinations. Like its civil detention standards, the ABA's pretrial release standards provide that release conditions be the "least restrictive" necessary to "reasonably ensure a defendant's attendance at court proceedings and protect the community, victims, witnesses or any other person." (ABA 2007, 1).

6 UNHCR's five sub-goals or objectives for ending child detention are to develop legal frameworks to "ensure children are not detained, except in exceptional circumstances, as a measure of last resort, for a legitimate purpose and for the shortest possible period"; that the "best interests of the child" standard governs all decisions related to children; that "alternative reception/care arrangements (including for families)" be "available and appropriate"; that "child sensitive screening and referral procedures" lead to timely referral to "relevant child protection institutions or organisations" and to the receipt of "necessary services and assistance"; and, that the "immediate release of children from detention and their placement in other forms of appropriate accommodation is coordinated amongst national agencies and, as appropriate, with UNHCR." (ibid.).

7 Unfortunately, the ABA's detention standards on access to health care incorporate by reference ABA Standards on the Treatment of Prisoners that provide for access to abortion services.

8 Similarly, Amnesty International has argued that immigrant detention "should only be used as a measure of last resort; it must be justified in each individual case and be subject to judicial review." (AI 2009, 11).

9 The US Marshals Service holds federal prisoners prior to their conviction or acquittal.

10 The Artesia Family Residential Center opened at the Federal Law Enforcement Training Center in New Mexico in June 2014. In November 2014, ICE suspended intake to this facility. ICE has contracted with the Correctional Corporation of America (CCA) to operate a new 2,400 bed facility for families in Dilley, Texas. It has converted its existing facility in Karnes, Texas into a "family detention" facility and plans to increase its size. It also plans to increase the size of its family detention center in Berks County, Pennsylvania .

11 The term "parole" does not carry criminal connotations under US immigration law. It refers to release into the United States for a temporary period and does not, in itself, lead to permanent status.

12 This report does not cover the custody of unaccompanied minors. The Homeland Security of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (November 25, 2002), transferred responsibilities for the care and placement of unaccompanied children from INS to the

Department of Health and Human Services' Office of Refugee Resettlement (ORR), which oversees refugee resettlement and integration. The Migration and Refugee Services (MRS) department of the US Conference of Catholic Bishops (USCCB) has produced a number of superb reports on unaccompanied child migration, including a 2012 report on the legal outcomes of children placed in long-term foster care and a recent report on the factors driving child migration to the United States (MRS 2012; MRS 2013).

13 Given that 4.5 million US citizen children have an unauthorized parent and another million children are themselves unauthorized (Pew Hispanic Center 2013), removal and detention policies invariably separate parents from their children.

14 Solitary confinement has been used for persons that present disciplinary concerns, but also "to protect" persons who are at risk of abuse and violence from other detainees (Gruberg 2013, 6-7).

15 Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (November 25, 2002).

16 ICE accounted for 75 percent of DHS removals in FY 2013 (Simansky 2014, 6).

17 As one of several Executive action measures, the Obama administration announced on November 20, 2014 that it had altered its enforcement priorities, which govern apprehension, detention, and removal (Johnson 2014d). It is unclear how or whether this step will lead to a shift in enforcement patterns.

18 *Padilla v. Kentucky*, 559 US 356 (2010).

19 Between 1995 and 2010, the number of immigration offenders with cases "disposed" in federal district courts rose from 5,103 to 39,001 (Cohen 2013,3).

20 Many immigration-related crimes carry harsh criminal sentences, including up to 20 years for illegal re-entry following removal. 8 USC 1326(b)(2).

21 For a variety of reasons, persons released at the US-Mexico border – without orientation, basic information, support or supervision of any kind – should not be expected to appear at high rates for later court hearings in different locations. Many will not understand this requirement or even know about scheduled hearings.

22 INA §§ 236 (c)(1); 236A, 212(a)(3)(b); 237(a)(4)(B)).

23 INA §235.

24 One circuit court of appeals has held that an independent bond hearing – covering flight risk and dangerousness – is required in cases of prolonged detention (after six-months) for mandatory detainees in removal proceedings. *Rodriguez v. Robbins*, No. 12-56734 (9th Cir. 2013).

25 *Demore v. Kim*, 538 US 510 (2003).

26 INA §241(a).

27 *Zadvydas v. Davis*, 533 US 678 (2001).

28 *Clark v. Martinez*, 543 US 371, 378 (2005).

29 18 USC §3141.

30 18 USC §3142 (a).

31 18 USC §3142 (b).

32 18 USC §3142 (c)(B).

33 18 USC §3142 (e).

34 Pretrial misconduct includes technical violations of bail conditions, failure to appear at scheduled court appearances, and arrests for a new offense (Cohen 2013, 10).

35 From September 2009 until June 2014, ICE used only one family detention facility, the Berks Family Residential Facility, a modestly-sized, residential facility (housing 90 to 100 persons per night) located near Reading Pennsylvania.

36 Consolidated and Further Continuing Appropriation Act, 2013, Division D, Title II, (P.L. 113-6).

37 Non-citizens may challenge a determination that they are subject to reinstatement of removal in a written or oral statement to an immigration officer. 8 CFR § 241.8.

38 Under the law, Immigration Judges are required to determine if the waivers are "voluntary, knowing, and intelligent." 8 CFR § 1003.25(b).

39 One study also counts voluntary return or departure as an additional summary, non-court form of removal. Under it, non-citizens agree to leave the country, but without receiving a formal removal order with all its negative legal consequences. However, this process can ill-serve persons with a legal claim to remain. An estimated 23,455 voluntary returns took place in FY 2013 (ACLU 2014, 23).

40 While court backlogs can partly be explained by the growth in the US enforcement system, they are also due in part to ICE's insufficient use of alternative to detention programs.

41 The US immigrant detention system served as the gateway for the industry's entry into the correctional field (Green and Mazón 2012, 9; McDonald 1994; Flynn 2014).

42 While this section primarily addresses for-profit prisons, humanitarian organizations provide detention services in Portugal, France and elsewhere (Flynn and Cannon 2009, 16).

43 One report found that the emphasis by private prisons on cost-cutting can lead to substandard conditions, understaffed facilities, poorly compensated guards, less training, higher turnover, and greater levels of abuse (Mason 2012, 12). The CCA-operated T. Don Hutto Residential Center in Williamson County, Texas for detained immigrant families was, for example, the object of numerous scathing reports (see, LIRS and Women's Commission 2007).

44 MRS is now administering an integrated, community-based ATD pilot program for persons who would otherwise be detained, including asylum-seekers, torture survivors, pregnant women, primary caregivers, the elderly and victims of crime.

45 The technology assisted program uses monitoring technology only and does not include case management services (DHS 2014b, 62-63).

46 In FY 2012, ATD's performance measures were adjusted: final hearing appearance rates and average cost per participant are no longer the primary focus. Instead, the ATD program focuses on the number of removals (ibid. 65).

47 The UNHCR detention guidelines describe a range of ATDs for asylum-seekers, including release with reporting to immigration authorities or case managers, release on the condition that the asylum-seeker will reside in a particular residence, release on bond or on the condition that a guarantor or surety assumes responsibility for ensuring court appearances, and release with community support and supervision programs (UNHCR 2012, 41-45). Similarly, the ABA civil detention standards identify a "continuum of strategies and programs" short of detention, from "release on recognizance or parole, to release on bond, to community-based supervised release programs, to 'alternative to detention' programs with various levels of supervision, to home detention (with strict conditions) that represent an alternative 'form' of detention, to detention in civil detention facilities." (ABA 2012, 4, note 1).

48 The DHS Office of Immigration Statistics defines detention more narrowly as the "physical custody of an alien in order to hold him/her, pending a determination on whether the alien is to be removed from the United States or awaiting return transportation to his/her country of citizenship, after a final order of removal has been entered." (Simansky and Sapp 2013, 2).

49 The ABA civil detention standards provide that detention should only be used based upon "an objective determination that he or she presents a threat to national security or public safety or a substantial flight risk that cannot be mitigated through parole, bond, or a less restrictive form of custody or supervision." (ABA 2012, 4).

50 To point out this precedent is not to propose that ORR be vested with responsibility for the majority of adults in removal proceedings or who are awaiting removal.

51 As the Supreme Court stated in *Zadvydas v. Davis*, 533 US 678, 690, freedom "from government custody, detention, or other forms of physical restraint–lies at the heart of the liberty" interest protected by the Fifth Amendment's due process clause.

52 The ABA civil detention standards likewise provide that "independent observers should be permitted to monitor conditions in facilities, to assess compliance with these standards, and to issue public reports with findings and recommendations." (ABA 2012, 5).

53 Between 1982 and 2007, the number of persons imprisoned and jailed in the United States grew from 612,496 to 2,293,157, while the number of persons under community supervision grew from 1,581,868 to 5,117,528 (Pew Center on the States 2009, 40).

54 INA §236(c).

55 To this end, the decision by the US Department of Health and Human Services to fund legal representation for unaccompanied children deserves substantial praise.

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