



Unlocking Liberty

A Way Forward for
U.S. Immigration
Detention Policy



Lutheran Immigration
and Refugee Service

A proposal for the federal government to responsibly enforce immigration laws, significantly reduce the financial costs of enforcement, and compassionately fulfill humanitarian obligations



Table of Contents

Executive Summary	3
Introduction: Overview and Key Concepts.....	5
Section One: Benefits of Alternatives to Detention.....	9
Section Two: Impact of 9/11 on Alternatives to Detention.....	25
Section Three: Impediments to Alternatives to Detention	35
Conclusion	49
Appendices	51
Appendix A: LIRS Recommendations to Congress and ICE Appendix B: Principles for Risk Assessment	
Appendix C: Model Custody Decision Tree Appendix D: Factors for Decision Tree	
Appendix E: Initiatives in Other Countries Appendix F: Initiatives in the United States	
Acknowledgements	67



The uncertainty of indefinitely prolonged detention, the conditions of facilities, and the fear of deportation often create a sense of despair among immigration detainees.

Executive Summary

In a country that honors due process, and during a time when most are calling for reduced federal spending, locking people up should be the exception to the rule. Yet immigrant detention is the fastest growing, least scrutinized form of incarceration in the United States. On any given day, the U.S. government imprisons more than 33,000 immigrants—many of whom are refugees or survivors of torture or human trafficking—in a vast national network of about 250 federal, private, state, and local jails. The cost to U.S. taxpayers is \$122 per detainee per day. These figures, however, fail to account for the human costs. It is well documented that detention has negative long-term consequences for immigrants' mental and physical health and negatively impacts their ability to integrate into society upon release. All of these costs must necessarily be borne by the public for those granted relief in their removal cases and permitted to stay in the United States. In contrast, alternatives to detention (ATDs) are cheaper—they cost only \$22 or less per person per day—and are more humane.

An effective use of a broad continuum of alternatives to detention would allow the federal government to meet its responsibility to enforce compliance with U.S. immigration laws, meet its humanitarian obligations, and significantly reduce the financial burden to U.S. taxpayers. Alternatives that utilize case management for those released from custody have a number of benefits:



- respect for and fulfillment of human rights,
- higher rates of compliance and appearance,
- reduced costs,
- improved integration outcomes for individuals granted relief from removal, and
- improved client health and welfare.

The record is clear. Since the 1980s, projects operated by nonprofit organizations in the United States and abroad that have provided tailored supervision, case management, and social services have consistently produced high appearance rates for much less money than detention. Recognizing the successes of these models, Congress provided U.S. Immigration and Customs Enforcement (ICE), an arm of the Department of Homeland Security, with funding to initiate a holistic alternative for noncitizens who did not need to be detained. Unfortunately, the U.S. government's approach has focused on security at the expense of other goals, casting shadows on the program's operations.

Unlocking Liberty: A Way Forward for U.S. Immigration Detention Policy, reviews the U.S. government's attempts to implement ATD programs and reveals five overarching structural challenges that must be overcome:

- an overreliance on detention as an approach to immigration enforcement,
- the lack of individualized risk assessments to determine who needs to be detained or otherwise supervised to ensure appearance and removal,
- absence of necessary data indicators and the mechanisms to collect and report those indicators to evaluate the use of detention and alternatives,
- absence of a robust case management system with referrals to appropriate social services, and
- insufficient access to legal and social services.

To better control the immigrant removal process, reduce costs, and meet human rights obligations under domestic and international law, three critical reforms are needed to U.S. immigration enforcement policies: an individualized assessment and process to challenge all custody decisions, robust case management tailored to individual needs, and access to legal and support services. In order to implement these reforms, Congress and ICE must take the following actions.

Recommended Actions for Congress

- Repeal mandatory detention laws.
- Require individualized assessments with judicial review.
- Codify the maximum length of and reasons for detention consistent with international human rights principles of due process, prohibition of arbitrary detention, and freedom of movement.
- Expressly define the levels of restriction that amount to constructive custody.
- Increase resources for immigration court adjudications.

Recommended Actions for ICE

- Create and implement policies and regulations to avoid detention unless necessary.
- Develop, implement, and evaluate a standardized method that is subject to judicial review and that will assess the need to detain as well as the risks of detention for vulnerable populations in need of special protections or support.
- Ensure that detention is only used in cases when the U.S. government has proven that none of the less restrictive alternatives to detention is appropriate.
- Develop, support, and engage community-based programs and resources that increase access to case management, legal services, and other support.



Introduction

Overview

Immigrant detention is the fastest-growing, least scrutinized form of incarceration in the United States.¹ On any given day, the U.S. government incarcerates more than 33,000 immigrants in a vast national network of approximately 250 federal, private, state, and local jails.²

Among the detained population as a whole, the United States detains asylum seekers, refugees, torture survivors, undocumented immigrants, victims of human trafficking, long-term lawful permanent residents, families, and parents of children who are U.S. citizens. Although the government sometimes argues that detention is necessary to keep communities safe from immigrants with criminal

1. Nina Bernstein, "City of Immigrants Fills Jail Cells With Its Own," *New York Times*, Dec. 27, 2008.

2. Speech by John Morton, assistant secretary of the U.S. Department of Homeland Security, to American Immigration Lawyers Association, San Diego, June 16, 2011 (hereinafter Morton speech, June 16, 2011); and Dora Schiro, Immigration Detention Overview and Recommendations (Washington, DC: U.S. Immigration and Customs Enforcement, Oct. 6, 2009), <http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf>. Note that "as of October 18, 2011, the number of ICE authorized facilities is down from 340 to 249. Of those 249 authorized facilities, 115 over-72 hour facilities, with an average daily population of greater than 10, account for 98.6% of the detained population." Correspondence from Andrew Lorenzen-Strait, senior policy advisor for ICE's Detention Management Division, to LIRS, on file with author.



histories, more than half of the immigrants detained in 2009 and 2010 had no criminal histories, and among those who did, almost 20 percent had committed only traffic-related offenses.³ Only 11 percent of the detainees with felony convictions had committed violent crimes.⁴ Many of the individuals who are detained will remain in detention while their immigration applications are pending before the immigration courts. Some are detained while awaiting removal. For this latter group, detention may be indefinite if the detainee is stateless (e.g., for those from the West Bank and the Gaza Strip) or if their country of origin will not issue travel documents for repatriation.

Though international law recognizes that control over immigration is an essential power of government, it does not give nations unfettered discretion to use arbitrary, prolonged detentions. The United Nations (UN) Working Group on Arbitrary Detention acknowledges “the sovereign right of states to regulate migration,” yet cautions that “immigration detention should gradually be abolished. . . . If there has to be administrative detention, the principle of proportionality requires it to be a last resort.”⁵

With an expertise born of decades of coordinating services for newcomers, Lutheran Immigration and Refugee Service (LIRS) works with at-risk immigrants, offering critical legal and social support to asylum seekers, torture survivors, and other vulnerable individuals in detention. LIRS’s expertise, experience, and compassion inform the organization’s advocacy for just, humane treatment of people who seek protection, freedom, or opportunity in the United States, and inspire the call to end the use of unnecessary detention and other overly restrictive enforcement measures.

LIRS recognizes and appreciates the collaborative working relationship with a number of government stakeholders, particularly the various offices within U.S. Immigration and Customs Enforcement (ICE), an arm of the Department of Homeland Security (DHS). This report is written two years after a DHS immigration detention reform announcement. Many improvements to the system are underway as of the date of the publication of this report, and they include tools and policies to make better-informed decisions regarding whom to detain, what levels of supervision are necessary for each individual, and improvements to the current alternatives to detention program. The data in this report draw exclusively from publicly available sources, and we acknowledge that more information, especially data that reflects potential progress toward many of our recommendations, can and should be updated in the future.

This report contributes to the extensive literature on the faults of the U.S. immigration detention system. Recognizing that detention is a lawful and legitimate enforcement measure, this report focuses on system improvements the government should undertake to expand alternatives for people who do not need to be detained. It isolates policy and structural recommendations for reforms that will build the infrastructure needed to ensure that detention is used only when necessary. Section One explores the benefits of ATD programming and provides a legal context. Section Two reviews Alternatives to Detention (ATD) initiatives in the United States from the mid-1990s to the present as well as the range of monitoring and supervision tools they employ. Section Three discusses the structural impediments to ATD programming. Finally, the

3. U.S. Immigration and Customs Enforcement, *Immigration Enforcement Actions: 2010* (Washington, DC: U.S. Department of Homeland Security, June 2011, <http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf>); American Civil Liberties Union of Georgia and Georgia Detention Watch, “Securely Insecure: The Real Costs, Consequences & Human Face of Immigration Detention” (fact sheet), January 2011, <http://www.georgiadetentionwatch.com/documents>; According to Human Rights First’s report, *Jails and Jump Suits*, released October 2011, asylum seekers and other immigration detainees today are still overwhelmingly held in jails and jail-like facilities. They found that approximately 50 percent of the ICE’s population was held in actual correctional facilities that also held criminal detainees. They found that since DHS and ICE announced intentions to reform the detention system, there has been no decrease in that proportion citing ICE data from FY 2011. This data indicates that approximately 47 percent of the average daily detained population (14,934 out of 31,653) was being held in nondedicated or shared-use facilities—i.e., correctional facilities that either have an ICE section within the larger facility, or that actually co-mingle ICE detainees with regular criminal pre-trial detainees and/or sentenced criminals, depending on the facility.

4. Dora Schiro, *Immigration Detention Overview and Recommendations*, 2. ICE maintains that the population is shifting because of the recent enforcement priority memo and offered that as of October 18, 2011, “90 per cent of the average daily population at ICE detention facilities during FY’11 were detained either because their detention was mandatory by law or because their cases fell into one of the agency’s three immigration enforcement priorities.” Correspondence from ICE to LIRS is on file with author. Whether there is a shift in the percentage of detainees with serious felony convictions remains unknown.

5. UN Human Rights Council, *Report of the Working Group on Arbitrary Detention*, A/HRC/13/30, Jan. 18, 2010, http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.30_en.pdf.

report offers conclusions and recommendations to better control the immigrant removal process while saving costs and meeting human rights obligations under domestic and international law.

Key Concepts

Control, supervision, monitoring, and enforcement mechanisms are interchangeable terms in the sense that all are used by various countries to describe or justify restrictions of liberty for purposes of regulating immigration. In the United States, enforcement is the mechanism most frequently utilized by the government, and detention is the primary enforcement tool.

The concept of alternatives to detention refers to options for monitoring immigrants other than placing them in closed detention facilities. The options include surety bonds, a guarantor or sponsor, community-based support, constructive custody measures, and open reception centers.

It is necessary first to eliminate a common misnomer from the outset. What is referred to as “alternatives to detention” at the international level has a different connotation in the U.S. context. ICE used the term “community release” in its “Alternatives to Detention Nationwide Implementation Program Plan” to Congress, dated March 31, 2010, to broadly refer to “any alien released from detention, whether supervised pursuant to the ATD program or released on bond, parole, with an Order of Supervision pursuant to Form I-220B, or with an Order of Recognizance pursuant to Form I-220A.” However, all of these mechanisms fall within the definition of ATD used in this paper. This report informs the debate on the utilization of all “community release” mechanisms as alternatives to detention. The term is not limited to how ICE has historically utilized its congressional funding for its programming.

Community-based support is a holistic social service approach to meeting the immediate and long-term needs of individuals upon release from ICE custody and throughout immigration proceedings. This utilizes a case management model for intensive coordination of social services—including housing—to encourage immigrants to fully integrate into their new surroundings and to comply with ongoing immigration proceedings and mandates.

Case management in the ATD context refers to “a comprehensive, coordinated service delivery approach widely used in the human services sector to ensure a coordinated response to, and support of, the health and well-being of vulnerable people with complex needs.”⁶ This is distinct from the manner in which an office or agency manages individual case files or caseloads, which is referred to as file management.

Fundamentally, when an individual’s liberty is restricted by the government, the well-established principle in both international and U.S. law requires the government to apply the least restrictive means necessary to achieve its legitimate interests. In the immigration context, the concept of the least restrictive alternative prohibits the government from restricting a person’s liberty beyond the degree necessary to mitigate the risks of flight or of posing danger to the community. For example, detention is a more restrictive form of supervision than periodic reporting to an ICE office. Thus, if periodic reporting is sufficient to mitigate the risk of flight, then it must be used instead of detention.

Open reception centers have fewer restrictions on movement than those that are closed (such as detention facilities). However, the level of restrictions and services in open centers varies from country to country.⁷ The open centers have security measures that control access into the center and monitor the movement of residents in and out.

6. International Detention Coalition, *There Are Alternatives* (Melbourne, Aus.: International Detention Coalition, 2011), 30, <http://idcoalition.org/handbook> (hereafter IDC Handbook); Case Management Society of Australia, “What is Case Management?” <http://www.cmsa.org.au/definition.html>; Arthur J. Frankel and Sheldon Gelman, *Case Management: An Introduction to Concepts and Skills* (Chicago: Lyceum Books, 2004).

7. STEPS Consulting Social, *The Conditions in Centres for Third Country National (Detention Camps, Open Centres as well as Transit Centres and Transit Zones) With a Particular Focus on Provisions and Facilities for Persons with Special Needs in the 25 EU Member States*, December 2007, 192-200, http://www.libertysecurity.org/IMG/pdf_eu-ep-detention-centres-report.pdf.





ATD programs provide services such as basic living needs, cultural orientation, job readiness, and emotional support that foster hope for individuals awaiting decisions on their immigration status.

Section One: Benefits of Alternatives to Detention

The diverse benefits of alternatives to detention outweigh the singular benefit of detention.

The United States has an interest in controlling the flow of immigration in a manner that saves the most money, complies with legal principles, does no unnecessary harm to immigrants, and promotes integration for those who are authorized to remain in the country. Initiatives that focus solely on controlling immigrants without regard to these four goals can do more harm than good. Given the current economic climate, it is especially critical that all enforcement initiatives are tailored to derive the optimal benefit from each dollar spent. Since that benefit can be achieved only by carefully balancing all of the goals, any debate between detention and alternatives to detention must consider the aggregate goals rather than any single goal in isolation.

For most people held in closed facilities, the congressionally mandated detention of categories of immigrants means that vast numbers of people are unjustifiably deprived of liberty without an individual assessment as to the need for it. As the primary enforcement tool, detention not only costs more than the broad spectrum of alternative measures, but also undermines the integrity of the United States' international and domestic commitments to protect liberty. Because the practice of detaining people who do not need to be detained increases the use of detention, resources are allocated to custody operations, i.e., detention facility management, instead of to developing community-based alternatives with case management models of service. Implementing individualized custody determinations, coupled with case management by people who have experience working with immigrants, could substantially reduce detention to necessary levels and divert resources to more appropriately ensure that immigrants report for immigration proceedings. This diversion would increase resources for and deliver improved care to anyone the government must detain.

The International Detention Coalition and the La Trobe Refugee Research Centre at La Trobe University, Victoria, Australia, undertook global research over a two-year period to address the gap between the clear legal framework mandating detention as a last resort and the lack of clarity as to how governments may achieve it. Their research found that “asylum seekers and irregular migrants rarely abscond while awaiting the outcome of a . . . lawful process.” It also found that these individuals are better able to comply with liberty or release conditions or a negative final decision if the following conditions have been met:

- Their basic needs are met in the community.
- They have been through a fair and efficient determination process.
- They have been informed throughout the process and have been provided advice on all options for remaining in the country legally.
- They have, if needed, been supported to consider sustainable avenues for departure.

The research identified multiple benefits when governments prioritized community-based enforcement options over detention, including

- fewer costs than detention,
- higher rates of compliance,
- increased voluntary return and independent departure rates,
- reduction in wrongful detention and litigation,
- reduction in overcrowding and lengthy periods in detention,
- respect for and fulfillment of human rights,
- improved integration outcomes for approved cases, and
- improved client health and welfare.⁸

While all of these benefits would be valuable in the U.S. context, this section discusses five: lower costs, higher rates of compliance, respect for human rights, improved health and welfare for immigrants, and improved integration outcomes.

8. IDC Handbook, 5 and 51.

A. ATD programming is less expensive and more cost-effective than detention.

“The cost argument is a simple one: detention costs considerably more than most alternatives to detention.”⁹ There are numerous factors that make ATD programs less costly: they reduce unnecessary litigation, prevent facilities from being overcrowded, and curtail lengthy periods of detention. This report tracks the dollars spent per day per person using detention versus ATD programs to achieve the desired outcomes.

The average cost of immigration detention, as cited by the Department of Homeland Security (DHS), is \$122 per person per day.¹⁰ However, this does not take into account the salaries and other personnel costs needed to run a detention facility. When those are included, the total cost is about \$166 per day.¹¹ Even this figure does not represent the total operational costs per diem because on-site medical care provided by the ICE Health Service Corps (IHSC), formerly known as the Division of Immigration Health Services, and offsite medical care approved by IHSC are not taken into account.¹² The administration’s fiscal year (FY) 2012 budget request to Congress included \$5.5 million per day for immigration detention.¹³ The House proposal would increase that amount, but, as of October 2011, the Senate had not yet acted on the budget.¹⁴ This cost will keep rising with the continued expansion of the immigration detention system.

By contrast, a range of per diem ATD costs estimated by ICE demonstrates significant savings. By one official estimate, the Intensive Supervision Appearance Program (ISAP, discussed in Section Two) had an average cost of \$22 per person per day, offering a fiscally responsible alternative to detention.¹⁵ It is unclear if this dollar amount represents only the contract cost or also includes ICE personnel assigned to the ATD unit and other expenditures, but many ATD estimates do not take personnel-related costs into account.¹⁶ The inclusion of costs for Fugitive Operations, a separate ICE initiative, may inaccurately inflate some ATD per diem costs. ICE has also provided estimated direct costs, i.e., without including cost of ICE staff time, for its leading ATD programs: \$14.42 for ISAP, \$8.52 for Enhanced Supervision Reporting (ESR), and between 30 cents and \$5 for Electronic Monitoring Program (EMP).¹⁷ These costs are comparable to the direct costs of ICE’s Appearance Assistance Program (AAP) which operated at a daily rate of only \$12 per person.¹⁸

Table 1 illustrates the increase in detention and removal spending from FY 2005 through 2011. It also shows the small percentage of funds that go to detention alternatives compared with the amount allocated to custody operations, i.e., the management of designated detention facilities and jails. In the

9. Alice Edwards, *Back to Basics: The Right to Liberty and Security of Person and ‘Alternatives to Detention’ of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants* (Geneva: UN High Commissioner for Refugees, 2011) (hereinafter UNHCR, *Back to Basics*). Also see Ophelia Field and Alice Edwards, *Alternatives to Detention of Asylum Seekers and Refugees* (Geneva: UNHCR Division of International Protection Services, April 2006).

10. Statement of John Morton, assistant secretary of the U.S. Department of Homeland Security, transcript of House Appropriations Subcommittee on Homeland Security Hearing on the Proposed Fiscal 2012 Appropriations for Immigration and Customs Enforcement, March 11, 2011.

11. National Immigration Forum, *The Math of Immigration Detention*, August 2011, 2, <http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf>; U.S. Immigration and Customs Enforcement Salaries and Expenses, Fiscal Year 2012 Congressional Budget Justification, 57, <http://www.dhs.gov/xlibrary/assets/dhs-congressional-budget-justification-fy2012.pdf>.

12. Dora Schriro, *Immigration Detention Overview and Recommendations*.

13. National Immigration Forum, *The Math of Immigration Detention*.

14. *Ibid.*

15. U.S. House of Representatives, *House Report 109-476* (Washington, DC: Government Printing Office, May 22, 2006), 38, www.gpo.gov/fdsys/pkg/CRPT-109hrpt476/content-detail.html.

16. Dora Schriro, *Immigration Detention Overview and Recommendations*.

17. Donald Kerwin and Serena Yi-Ying Lin, *Immigrant Detention: Can ICE Meet its Legal Imperatives and Case Management Responsibilities?* (Washington, DC: Migration Policy Institute, September 2009), 32, http://www.migrationpolicy.org/news/2009_9_10.php.

18. Vera Institute for Justice, *Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program*, 1 (New York: Vera Institute for Justice, August 2000), 65, <http://www.vera.org/download?file=615/finalreport.pdf> (hereinafter Vera, *Testing Community Supervision*).



current fiscal year, funding for alternatives to detention is less than 3 percent of the total budget, while funding for custody operations is more than 73 percent.

TABLE 1: ICE Spending FY 2005–2011

Fiscal Year	Custody Operations		Alternatives to Detention (ATD)		Total for Detention and Removal Operations (DRO)	ATD Spending as Percentage of Total DRO
	Overall Spending	Enhancements/ Initiatives	Overall Spending	Enhancements/ Initiatives		
2005	\$864,126,000	n/a	\$20,712,000	n/a	\$1,218,391,000	1.69%
2006	\$1,161,627,000	\$104 million	\$38,212,000	\$15.4 million	\$1,645,370,000	3.25%
2007	\$1,381,767,000	\$241 million	\$43.6 million	\$0	\$1,984,345,000	2.2%
2008	\$1,647,212,000	\$250.4 million	\$53,889,000	\$10 million	\$2,381,401,000	2.68%
2009	\$1,721,268,000	\$71.7 million	\$63 million	\$7.2 million	\$2,481,213,000	2.82%
2010	\$1.77 billion	n/a	\$69.9 million	\$6 million	\$2.55 billion	2.98%
2011	\$1.9 billion	n/a	\$72 million	n/a	\$2.6 billion	2.77%

The data for 2005-10 is from ICE Fact Sheets for the fiscal years indicated, and 2011 data is from U.S. Public Law 112-10 (H.R. 1473), approved April 15, 2011.

A cost savings of \$4.4 million per night could be achieved if the U.S. government only detained individuals who have committed violent crimes.¹⁹ “This would result in an annual savings of over \$1.6 billion—an 80% reduction in costs.”²⁰

The cost of detention is exacerbated by the prolonged, indefinite detention of immigrants who exercise their right to apply for relief from removal or who cannot be removed to their countries of origin. While ICE reports that the average length of detention is approximately 30 days, the Migration Policy Institute (MPI) reported that ICE continues to detain large numbers of people for more than six months.²¹ People who wish to apply for permission to stay in the United States or for protection from removal to their country of origin stay in detention longer. It can take months or even years for immigrants to go through proceedings that determine whether they are eligible to stay in the United States or, after being issued a final order of removal, for the government to arrange for their deportation.

MPI’s analysis of detainees on January 25, 2009, revealed that 4,154 people had been in ICE custody for more than six months, which will be exacerbated by immigration court delays that are longer than ever before in history.²² Asylum seekers spend between 47 and 109 days in detention, depending on the procedural status of their immigration cases.²³ Separate research by Human Rights First has shown that some asylum seekers spend months or even years in detention before their claims are decided.²⁴ And a report by the American Civil Liberties Union identified at least two detainees with severe mental illnesses who spent as long as five years in detention.²⁵

19. National Immigration Forum, *The Math of Immigration Detention*.

20. Ibid.

21. Donald Kerwin and Serena Yi-Ying Lin, *Can ICE Meet Its Legal Imperatives and Case Management Responsibilities?*

22. Ibid.

23. Statement of Physicians for Human Rights before the U.S. Senate Committee on the Judiciary, May 19, 2010, <http://www.rcusa.org/uploads/pdfs/PHR%20Testimony,%205-19-10.pdf>.

24. Human Rights First, *U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison* (New York: Human Rights First, 2009), <https://www.humanrightsfirst.org/wp-content/uploads/pdf/090429-RP-hrf-asylum-detention-sum-doc.pdf>.

25. American Civil Liberties Union, “Immigrants with Mental Disabilities Lost in Detention for Years” (press release), March 25, 2010, <http://www.aclu.org/immigrants-rights-prisoners-rights/immigrants-mental-disabilities-lost-detention-years>.

In addition to the vast majority of noncitizens who apply for relief while in detention, there are several categories of people who commonly face prolonged or indefinite detention. Individuals who have been ordered removed but who are either not recognized as a citizen of any state or will not be received by their countries of origin face indefinite detention and prolonged separation from their families. ICE continues to detain many people even after they have obtained favorable court rulings when the government is appealing. Noncitizens whose removal is withheld or deferred by court order in order to protect them from persecution or torture are often detained for three months after the court order is finalized. This practice runs counter to a government memo permitting ICE officers to release noncitizens who obtain these particular court orders.²⁶ Some who are granted bonds by an immigration judge or DHS stay in detention because they cannot pay the bonds. Refugees who do not complete the proper paperwork after they've lived here for one year can be detained while they file and await a decision on their adjustment application.²⁷

Critics of ATDs dispute claims of their lower costs by arguing that the immigration cases of people in ATD programs take longer in court because those cases are placed on a slower court docket for nondetainees, thereby diminishing any savings. Immigration courts schedule hearings for people in detention at a faster pace in order to minimize the time spent in detention while cases are pending, given the significant liberty interest at stake. Thus, those dockets are cleared at a faster rate. Once an individual is released from detention, the case is automatically transferred to the immigration court closest to their new place of residence and placed on a nondetained docket. This means that the case will take longer to adjudicate.

To illustrate the point, we compared the time it took to complete cases on detained dockets with nondetained dockets for immigrants who fought their cases and were granted relief in FY 2010. First, we examined the average number of days to complete contested cases in which the immigrant was the prevailing party on the detained dockets in York, Pennsylvania; Miami; and New York City. The averages were 159, 61, and 224 respectively.²⁸ Then we examined the average number of days to complete contested cases in which the immigrant was the prevailing party on the nondetained dockets in Philadelphia, Miami, and New York City. The averages, which are markedly longer than the averages for detained dockets, are 886, 399, and 646 respectively.²⁹ Thus, services are provided for a longer period of time for those enrolled in ATD programs because their cases will be heard on a slower docket.

The government has taken steps to reduce the disparity between detained and nondetained case adjudication times in order to save more money for ATDs. Control over the immigration court docket is the responsibility of the Executive Office for Immigration Review (EOIR), an office of the U.S. Department of Justice. Together with ICE, this office has taken a number of steps to expedite the cases of individuals enrolled in the current ATD program (i.e., the Intensive Supervision Appearance Program II or ISAP II that is described more fully later in this report) to maximize the cost benefits of supervised release programs.³⁰

As demonstrated in a joint report from the Detention Watch Network and the Stanford Law School's Immigrant Rights Clinic, participating in an ATD program dramatically improves a detainee's ability to work with lawyers, which can reduce court delays.³¹ However, any efforts by the government

26. ICE may release a noncitizen before the 90-day removal period has expired when the noncitizen has a final order of removal and an order withholding or deferring removal. See memo from Bo Cooper, INS general counsel, HQCOU 50/1.1 (April 21, 2000), reprinted in 77 No. 39 Interpreter Releases 1445, 1460 (Oct. 9, 2000).

27. Each year, U.S. authorities resettle refugees from overseas. After a year in the United States, they must apply for lawful permanent resident status. The consequence for not doing so is detention. However, the government does not formally notify refugees of this. For some, their limited English, limited resources, and lack of understanding of the U.S. legal process and of the deadline's existence keep them from applying in a timely manner. See Human Rights Watch, *Jailing Refugees* (New York: Human Rights Watch, December 2009), <http://www.hrw.org/node/87370>. In 2010, DHS issued a policy memo modifying its process.

28. See http://trac.syr.edu/phptools/immigration/court_backlog/outcomes.php.

29. Ibid.

30. U.S. Immigration and Customs Enforcement Salaries and Expenses, Fiscal Year 2012 Congressional Budget Justification, 44.

31. Detention Watch Network and Stanford Law School Immigrants' Rights Clinic, *Community-based Alternatives to Immigration Detention* (August 2010), 12, <http://www.detentionwatchnetwork.org/ATDReport>.



to resolve immigration cases at a faster rate must ensure that access to justice and legal representation is not compromised.³² The stated costs of detention fail to account for the well-documented longer-term consequences of detention on mental and physical health and related services, and eventually the immigrant's prospects of integrating into society well.³³ All of these costs must necessarily be borne by the public for those granted relief in their removal cases.

Finally, data analysis of either cost or compliance must account for the selection bias since the types of cases litigated by individuals selected for ATD programs differs from the cases of people who are not selected. This phenomenon is tied to the government's intuitive determinations of flight risk. Individuals whose claims for relief are invalid or tenuous will likely be viewed as greater flight risks and considered less likely to comply. Since the government typically selects people who pose minimal flight risks to enroll in ATDs, it is probable that those enrolled have stronger claims for relief. Stronger claims are generally pursued through multiple contested hearings in contrast to weaker claims that are dismissed more quickly. The lengthier litigation increases the costs of both ATDs and detention, especially ATDs that are on the slower nondetained dockets. Nonetheless, ATDs save more money than detention, especially for individuals who are pursuing legal relief.

B. ATD programming can result in high compliance rates.

ATDs offer a means for the U.S. government to weigh all relevant goals, including compliance. For the ATD programs that yield high compliance rates, such as Vera Institute of Justice's (Vera) Appearance Assistance Program (AAP), ATDs offer a more effective solution to the costs of detention without sacrificing compliance.³⁴ In FY 2010 the government's ATD programs yielded a 93.8 percent appearance rate for immigration hearings, which exceeded the target rate by 35.8 percent.³⁵ In 2009 ICE reported appearance rates of 87 percent for ISAP participants, 96 percent for ESR participants, and 93 percent for EMP participants.³⁶

While detention is an effective way of making sure that immigrants appear for court hearings and deportation, it is costly—and not just in the financial sense. Detention damages the well-being of immigrants, undermines integration for those who have permission to stay in the United States, and significantly undermines the integrity of the U.S. immigration system by promoting arbitrary detention.

According to Vera's final report to the government on AAP, several factors increase the likelihood that an individual will comply with hearing appearance requirements.³⁷ The most consistent factors are having community ties or family in the United States and being represented by counsel. Participation in the program also had a positive effect—independent of other factors—on hearing attendance for AAP participants with criminal histories who had intensive, regular supervision and for undocumented workers with intensive supervision.³⁸ According to Vera, the reasons that participation in the program was an independent driver of compliance are twofold. First, the supervision provided by participation can counteract other factors that motivate people to abscond.³⁹ Second, participating in the program increases a detainee's likelihood of getting a lawyer, which makes compliance much easier.⁴⁰

32. An evaluation of efforts the British government undertook to address a significant backlog in processing immigration cases illustrates this point. In its implementation of the New Asylum Model, the government has been effective in reducing its backlog but widely criticized for infringing upon the due process rights of asylum seekers and other immigrants because the system does not give them sufficient time to get lawyers or to gather evidence to support their claims. See UNHCR, *Back to Basics*.

33. UNHCR, *Back to Basics*.

34. Vera's AAP was a different program than ICE's AAP, which was mentioned on page 11.

35. U.S. Immigration and Customs Enforcement Salaries and Expenses, Fiscal Year 2012 Congressional Budget Justification, 43.

36. Donald Kerwin and Serena Yi-Ying Lin, *Immigrant Detention: Can ICE Meet its Legal Imperatives and Case Management Responsibilities?*

37. Vera, *Testing Community Supervision*.

38. *Ibid.*, 7 and 46.

39. *Ibid.*, 7.

40. *Ibid.*

A survey of participants highlighted several other components of AAP that positively influenced compliance.⁴¹ Participants found the mere provision of information to be extremely helpful regarding the court process, the search for a lawyer, learning about the available legal options, and understanding the consequences for failing to appear.⁴² Participants also revealed a desire to comply so they would not disappoint the program staff, who had treated them with respect.⁴³

While the programs can yield positive compliance rates to compete with those derived from detention, selecting appropriate participants, as well as ensuring that they get the right level of support and supervision, is also critical.

C. ATDs are more likely to comport with due process requirements under international law and the U.S. Constitution than the current detention framework.

The use and conditions of immigration detention in the United States are equivalent to incarceration in the criminal justice system, but without the same constitutional safeguards.⁴⁴ Every year mandatory detention laws affect thousands of immigrants, many of whom are pursuing valid applications to remain in the United States so they can stay with their families or avoid persecution or torture. Detention, especially the framework prevalent in the United States, raises the potential for many egregious violations of an individual's rights, including, but not limited to, the right to liberty. The less restrictive nature of ATD programs makes it possible for the government to meet its goals of controlling immigration without unjustly depriving immigrants of their basic rights.

i. ICE's custody decisions must comply with the due process requirements under international and U.S. law.

International law recognizes the authority the United States has to detain as a measure of immigration control. However, this authority is restricted by requiring due process before the government can deny an individual's right to liberty. Because DHS does not have general police power to detain immigrants, the agency's administration of laws "cannot reach beyond the limits of the statute that created it. . . ."⁴⁵ In other words, its power to detain must come from a statutory grant of authority. Any expressed authority to detain will still be subject to the principles of due process.

International human rights law requires that detention decisions be made on a case-by-case basis after an individualized assessment of the functional and legitimate need of detaining a particular individual, the understanding that anyone deprived of liberty is entitled to judicial review of this decision, and that any restriction of liberty should be the least restrictive means necessary.⁴⁶ Custody is considered arbitrary when "it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context. . . ."⁴⁷ Arbitrary detention of immigrants is against the basic tenets of human rights norms as enshrined under the preamble of the UN Charter, provisions of the International Covenant on Civil

41. *Ibid.*, 7.

42. *Ibid.*

43. *Ibid.*

44. *Endgame: Office of Detention and Removal Strategic Plan, 2003-2012* (Washington, DC: U.S. Department of Homeland Security, Aug. 15, 2003), <http://cryptogon.com/docs/endgame.pdf> (noting the use of the American Correctional Association detention standards as a baseline for immigration detention standards).

45. *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 953 (1983).

46. UN General Assembly, *International Covenant on Civil and Political Rights*, art. 9(1), <http://www.unhcr.org/refworld/docid/3ae6b3aa0.html> (hereinafter ICCPR).

47. *A. v. Australia*, Human Rights Committee, Communication No. 560/1993, CCPR/C/59/D/560/1993, para. 9.2 (April 30, 1997), <http://www1.umn.edu/humanrts/undocs/html/vws560.html>.



and Political Rights (ICCPR), provisions of the UN Convention Relating to the Status of Refugees (Refugee Convention), and interpretations of both of these instruments by the UNHCR Executive Committee (ExCom) and the UN Human Rights Committee (HRC), which oversees the ICCPR's implementation. It also contravenes articles 3, 9, and 14 of the Universal Declaration on Human Rights.

Article 12 of the ICCPR applies to restrictions on movement short of full physical detention and has been interpreted to mean that severe restrictions on movement may be considered a deprivation of liberty.⁴⁸ In accordance with that, when a government restricts a person's liberty, it should only be for the extent necessary to meet the legal objectives for which the restriction is intended.⁴⁹

This corresponds with the principle of proportionality, in which any restrictive measure must be the least intrusive option to achieve the desired outcomes. In the immigration context, those outcomes include the following: verifying identity, protecting national security or public safety, and mitigating the risk that a person will not appear at immigration court proceedings. Any restrictions placed with the purpose of achieving these outcomes must be limited to only that period of time in which there is no less restrictive means to achieve the outcome. The restriction on freedom must not continue beyond that period.⁵⁰ For example, if posting a bond can mitigate a risk that a person who does not have a permanent address will not appear in court, then detention would not be justified as a means of mitigating flight risk.

Furthermore, any decision to deprive individuals of liberty or to restrict their movement must be subject to review. In order to be implemented effectively, the system must be subject to oversight and allow an impartial adjudicator to make any decisions about releasing immigrants.

The Fifth Amendment of the U.S. Constitution prohibits the government from depriving an individual of life, liberty, or property without due process of law. In assessing whether the procedures guiding government action contain sufficient safeguards to meet the due process requirement, the Supreme Court established a three-part balancing test in *Mathews v. Eldridge*:

- weighing the private interest affected by the official action,
- weighing the risk of an erroneous deprivation if additional due process is not afforded, and
- weighing the government's interest in maintaining the current level of procedural protections.⁵¹

The court has consistently recognized that "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."⁵² Accordingly, "Due process calls for an individualized determination before someone is locked away."⁵³

ICE's stated purposes for detaining immigrants are to ensure that they appear at immigration proceedings and, when necessary, to ensure that they can be deported.⁵⁴ Counter to international human rights principles as well as U.S. constitutional protections regarding deprivation of liberty in the criminal justice system, in the immigration system the burden rests on the individual to articulate his or her eligibility for release rather than on the government to demonstrate a need to detain or otherwise restrict an individual's liberty. In practice, noncitizens will be detained unless the noncitizen establishes eligibility for release and proves that he or she is not a security threat or flight risk. People who satisfy this burden may be released with no conditions on bond or parole, or placed into the ISAP II (described in detail in Section Two). Pursuant to the Immigration and Nationality Act (INA), there are

48. Ophelia Field and Alice Edwards, *Alternatives to Detention of Asylum Seekers and Refugees*, 7 (citing *Celepli v. Sweden*, HRC Case No. 456/1991; *Karker v. France*, HRC Case No. 833/1998).

49. *Ibid.*

50. See HRC General Comment No. 27 on freedom of movement, Nov. 2, 1999 (adopted at 1,783rd meeting on Oct. 18, 1999), CCPR/C/21/Rev.1/Add.9, paras. 2-5).

51. *Mathews v. Eldridge*, 424 U.S. 319, 334-335 (1976).

52. See *Demore v. Kim*, 538 U.S. 510, 548 (2003) and Justice David Souter's dissent, citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992).

53. *Demore*, 552.

54. U.S. Immigration and Customs Enforcement, *Strategic Plan for Fiscal Years 2010-2014* (Washington, DC: Department of Homeland Security, June 2010), <http://www.ice.gov/doclib/news/library/reports/strategic-plan/strategic-plan-2010.pdf>.

large categories of noncitizens who cannot show eligibility for release; the INA mandates detention for certain categories of noncitizens, including people who come to the United States and express a fear of return to their home country, without any review of individual circumstances. For individuals that fall within these categories, the law permits detention without a bond hearing or any other judicial review of the decision to detain.⁵⁵

The Supreme Court has upheld the constitutionality of the use of mandatory detention in limited circumstances.⁵⁶ In 2003 the court heard *Demore v. Kim*, which challenged the constitutionality of the INA provision that permits the mandatory detention of certain ex-offenders.⁵⁷ The majority of the justices ignored jurisprudence related to freedom from bodily restraint and instead focused on prior immigration-related precedent that said, “In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”⁵⁸ Relying on this rationale, the court held that the mandatory detention of a certain class of immigrants—namely, in this instance, ex-offenders—is a constitutionally permissible part of the removal process.⁵⁹

However, this decision did not allow for long-term detention and should be read in conjunction with decisions related to indefinite detention. Also, the court did not address the severe deprivation of liberty caused by prolonged mandatory detention. Indeed, throughout the opinion the court referred to mandatory detention for the “brief period” necessary for removal proceedings, a period it understood to average 45 days for immigration cases in the first instance and five months for cases on appeal.⁶⁰

This decision is inconsistent with international law and the prohibition against arbitrary detention and deprivations of liberty, as well as a significant departure from Supreme Court jurisprudence, because it allows a discriminate application of due process clause of the Constitution.⁶¹ The dissenting opinion in *Demore v. Kim*, written by Justice David Souter and joined by Justices John Paul Stevens and Ruth Bader Ginsberg, focused on the fundamental liberty interest at risk in physically restraining any individual. Souter concluded, “The [majority’s] holding that the Due Process Clause allows [detention] under a blanket rule is devoid of even ostensible justification in fact and at odds with the settled standard of liberty.” He expressed his disapproval with permitting any detention that is not “necessary to counter a risk of flight or danger,” stating that “it is arbitrary or capricious and violates the substantive component of the Due Process Clause.”⁶²

Souter further emphasized, “Procedural due process requires, at a minimum, that a detainee have the benefit of an impartial decision-maker able to consider particular circumstances on the issue of necessity.”⁶³ Due process for physical detention requires a “special justification” that “outweighs the individual’s constitutionally protected interest in avoiding physical restraint as well as adequate procedural protections. There must be a sufficiently compelling government interest to justify such [an] action, usually a punitive interest in imprisoning the convicted criminal or a regulatory interest in forestalling danger to the community.”⁶⁴

55. INA, sections 212(a) and 237(a)(2).

56. *Ibid.*

57. INA, sec. 236(c).

58. *Demore*, 521.

59. *Demore*, 531.

60. *Demore*, 513.

61. Justice Souter’s dissent reiterates this point by highlighting that Supreme Court jurisprudence has never “suggested that the government could avoid the Due Process Clause by selecting a class of people for confinement on a categorical basis and denying members of that class any chance to dispute the necessity of putting them away” (*Demore*, 551-52). He concluded by acknowledging that prior cases have held that in the enforcement of immigration laws, the government may use “reasonable presumptions and generic rules” in carrying out its statutory discretion; nevertheless, he emphasized that this holding “gave no *carte blanche* to general legislation depriving an entire class of aliens of liberty during removal proceedings.” Even allowing for reasonable presumptions and generic rules does not “disturb established standards that detention of an alien must be justified in each individual instance” (*Demore*, 575-76).

62. *Demore*, 557, citing *Reno v. Flores*, 507 U.S. 292 (1993).

63. *Demore*, 557, citing *Foucha v. Louisiana*, 504 U.S. 71, 90, (1992).

64. *Demore*, 557, citing *Zadvydas v. Davis*, 533 U.S. 678 (2001) (Kennedy J. dissenting).



While it is well established that the U.S. government has the authority to detain people for purposes of immigration control, this authority is not without restrictions and limitations under its legal obligations. The majority in *Demore* patently discriminates against immigrants and undermines fundamental prohibitions on discrimination and well-founded due process principles under the Constitution and the U.S. international legal obligations.

Under this flawed legal framework, the main legal authority from Congress for the detention of immigrants is found in sections 235 and 236 of the INA, which govern the detention of immigrants subject to removal proceedings, and section 241, which governs detention in cases in which a final order of removal has been issued.⁶⁵ The scope of authority that the act gives ICE to arrest and detain immigrants is exceptionally broad.

The statutes authorizing detention do so in two ways, granting authority to use both discretion and categorical mandatory detention as described above. In the former, the law provides ICE with the authority to arrest and detain a noncitizen pending a decision on whether he or she is to be removed from the United States.⁶⁶ Even without a warrant, ICE is authorized by statute to arrest any noncitizen if the officer “has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest.”⁶⁷ Congress failed to impose minimum due process protections that put the burden on the government to justify the need to detain individuals on a case-by-case basis. Rather, the INA mandates detention for some categories of individuals charged on grounds of “inadmissibility or “deportability” without any review of their particular circumstances. It permits detention without a bond hearing or any other judicial review of the decision to detain.⁶⁸ (Mandatory detention is discussed further as a structural impediment for ATDs in Section Three.)

For example, expedited removal is a fast-track deportation process that significantly reduces access to lawyers, hearings, and judges.⁶⁹ Originally only applied to individuals who arrived at a port of entry, expedited removal was later extended to other groups of irregular immigrants—those who came here outside of any formal channels—already present in the United States. People in the latter group are entitled to a bond hearing by an immigration judge, while those in the former group are not. Anyone who enters the country without valid documents or with documents that an immigration officer believes are fraudulent—whether that individual is seeking asylum or not—is subject to expedited removal proceedings and thus mandatory detention. Asylum seekers who arrive on valid visas but indicate a fear of returning home or an intent to seek asylum are also subject to expedited removal and mandatory detention because their intention to seek asylum is deemed to invalidate their visas, leaving them in the same category as those who lack appropriate documents.⁷⁰ Detention is mandatory for asylum seekers who are not summarily repatriated and awaiting an initial interview (“credible fear interview”) to determine whether or not their fear is credible to pursue an asylum claim before an immigration judge. The waiting period for this interview generally lasts from two to 14 days. Asylum seekers who pass the credible fear interview and are allowed to pursue asylum are no longer subject to expedited removal and are placed into immigration proceedings adjudicated by an immigration judge.⁷¹

Mandatory detention laws affect long-term lawful permanent residents who have family, property, and businesses in the United States as well as people who are undocumented or who arrive at ports of entry without prior authorization to enter the United States. Using detention as a default, which is the de facto result of mandatory detention laws, presumes a need for it that violates due process principles.

65. See also 8 U.S. Code (USC), sections 1225-26 and 1231.

66. INA, sec. 236(a); 8 Code of Federal Regulations (CFR), sec. 236.1(b)(1).

67. INA, sec. 287(a)(2).

68. See INA, sec. 212(a) and INA, sec. 237(a)(2).

69. INA, sec. 235.

70. INA, sec. 222(g).

71. INA, sec. 208(d)(1); 8 CFR, sec. 208.20(f).

ii. Presuming a need for detention without individualized and periodic risk assessments or judicial review leads to arbitrary detention.

Overly relying on detention as an enforcement tool for monitoring immigrants in various stages of the adjudication or removal processes often violates the spirit of international laws and conventions and, in many cases, also violates the actual letter of the instruments. To comply with international law, the government must implement a review system to guarantee that individuals will not be detained any longer than necessary to achieve legitimate government goals.⁷²

In stark contrast to international human rights norms, the increasing reliance of U.S. authorities on detention to manage immigration has resulted in countless individuals being unnecessarily detained for prolonged periods without any individualized determinations that they are either a danger to society or a flight risk. Jorge Bustamante, the UN Special Rapporteur (UNSR) on the Human Rights of Migrants, reported in 2008 that the U.S. immigration detention system lacked the procedural safeguards necessary to keep detention of immigrants from being arbitrary within the meaning of the ICCPR.⁷³ He found that many immigrants were detained for months or even years while awaiting a final determination on whether they were eligible to stay in the country or after being issued a final order of removal as the government arranged their deportation. He stressed, “International conventions require that the decision to detain someone should be made on a case-by-case basis after an assessment of the functional need to detain a particular individual,” noting that in the United States “the individual assessment of cases does not appear to be sufficient and that detention policies . . . constitute serious violations of international due process standards.”⁷⁴

Similarly, the Inter-American Commission on Human Rights (IACHR) stated in its 2010 *Report on Immigration Detention in the United States*, “One of the IACHR’s main concerns is the increasing use of detention [in the United States] based on a presumption of its necessity, when in fact detention should be the exception.”⁷⁵ The commission noted its concern that in “many, if not the majority of cases, detention is a disproportionate measure, and the alternatives to detention programs would be a more balanced means of serving the State’s legitimate interest in ensuring compliance with immigration laws.”⁷⁶

Despite Congress’s persistent inability to legislate basic procedural safeguards in the context of restricting liberty of immigrants following the *Demore* decision, the Obama administration has recently taken two steps toward reconciling the unfair procedural gap: establishing a more accessible parole process for arriving asylum seekers and developing a risk and classification tool.

Noncitizens who are classified as “arriving aliens” under immigration law may not seek release on bond or any other review of their detention before an immigration judge.⁷⁷ They are only eligible to apply for parole at the sole discretion of ICE.⁷⁸ However, in January 2010 ICE implemented its new parole policy for arriving asylum seekers whose fear of return is deemed credible by asylum officers.⁷⁹ The new policy mandates, for the first time, an automatic process to review certain immigrants’ eligibility

72. Article 9 of the ICCPR prohibits arbitrary detention, requiring that any detention be lawful. “Lawful” does not necessarily mean “legal”; just because detention may be in accordance with national laws does not mean it is not arbitrary. The HRC found “arbitrariness is not to be equated with “against the law,” but must be interpreted more broadly to include elements of inappropriateness, injustice, and lack of predictability.”

73. See Jorge Bustamante, *Report of the Special Rapporteur on the human rights of migrants* (New York: UN Human Rights Council, March 5, 2008), 10.

74. *Ibid.*

75. Inter-American Commission on Human Rights, *Report on Immigration Detention in the United States*, OEA/Ser.L/V/II. , Doc. 78/10 (2010), <http://cidh.org/countryrep/USImmigration/TOC.htm>.

76. *Ibid.* The IACHR concluded that “immigration detention in the U.S. is the rule rather than the exception and that the chances of obtaining one’s release are few.”

77. INA, sec. 235(b)(2); 8 CFR, sec. 1.1(q); sec. 1225(b)(2); sec. 235.3(b)(5) and (c); sec. 1003.19(h).

78. 8 CFR, sec. 208.30(f); sec. 235.3(b)(5) and (c).

79. Immigrants arriving at those ports are legally defined as “arriving aliens” pursuant to INA, sec. 235.



for release. The process directs agents to parole asylum seekers who have established that they have a credible fear of returning to their home country, can verify their identity, and do not pose a security or flight risk. Asylum seekers remain in custody while they await a parole evaluation, which typically occurs within three weeks of apprehension. As a result of the reform and the new policy that delivers individualized assessments, release of arriving asylum seekers has increased dramatically. According to ICE figures released on October 6, 2011, on file with the author, of the 3,457 individuals reviewed under this policy, ICE released 2,461 asylum seekers, or 71 percent. Although a denial of parole cannot be judicially reviewed, those who are denied may request a redetermination.⁸⁰ Those who fail the credible fear interview remain in expedited removal proceedings and are detained until they are removed.⁸¹ Notably, since this policy is not codified by regulation, it can be superseded or rescinded at any time.

For individuals other than arriving asylum seekers, parole is granted in extremely limited instances. While the parole policy could benefit the asylum seekers who meet the definition of “arriving alien” and pass credible fear interviews, it excludes the majority who do not meet this definition. In other words, it does not apply to asylum seekers who have passed a credible fear interview and who entered between ports of entry, even though under federal regulations they are eligible for it. Others eligible for parole include immigrants with serious medical conditions; pregnant women; juveniles; witnesses in judicial, administrative, or legislative proceedings; and immigrants whose continued detention is not in the public interest.⁸²

While Title 8 of the Code of Federal Regulations authorizes judicial review of the conditions of release, it is subject to strict time limitations. In *Matter of Toscano-Rivas*, the U.S. attorney general affirmed the Board of Immigration Appeal’s decision that immigration judges are authorized to modify nonmonetary terms of release. An immigrant who seeks judicial review of terms of release must apply to the immigration judge to ameliorate them within seven days of being released.⁸³ There is no apparent justification for this singular, narrow time frame.

To accomplish the second step toward reconciling the procedural gap, ICE has allocated resources to develop a risk assessment tool. In FY 2010, the agency committed itself to develop and implement “a more refined risk assessment classification tool to ensure all eligible candidates are placed in ATDs and the appropriate level of supervision is administered.”⁸⁴ This tool, which will make decisions related to population management, release of immigrants, and decisions regarding when to use alternatives to detention, responds to 2009 recommendations emphasizing that a risk assessment tool is critical to the successful implementation of ATDs nationally.⁸⁵ Following tested and effective models in the U.S. criminal justice system, this tool was adapted to recognize the civil (versus criminal) authority of ICE to detain.

ICE has devised and is now beginning to implement a new detainee intake process to improve the consistency and transparency of its custody and release decisions. The risk assessment tool contains objective criteria to guide decision-making regarding whether or not an alien should be detained or released; the alien’s custody classification level, if detained; and the alien’s level of community supervision (to include an ICE ATD program), if released. It includes mathematically weighted factors that should signal the likelihood of threat to the community based on past behavior as well as of absconding for each and every individual ICE apprehends.

80. 8 CFR, sec. 235.3(b)(5) and (c) and sec. 212.5; INA, sec. 212(d)(5)(A); and 8 U.S.C., sec. 1182(d)(5)(A).

81. INA, sec. 235(b)(1)(A)(iii); 8 U.S.C., sec. 1225(b)(1)(B)(iii)(IV).

82. 8 CFR, sec. 212.5(b).

83. Any time afterward, an immigrant must make the request to the district director. Thereafter, any appeals of a district director’s decision should be made to the BIA within 10 days.

84. See ICE, “Alternatives to Detention for ICE Detainees” (fact sheet), Oct. 23, 2009, <http://www.aila.org/content/default.aspx?bc=1016%7C6715%7C12053%7C26286%7C31038%7C30487> (hereinafter ICE, ATD fact sheet).

85. Dora Schriro, *Immigration Detention Overview and Recommendations*, 17 (recommending that ICE needs a risk assessment tool to implement ATD nationwide).

In a recent report on ATD programs, the UNHCR issued a caution after reviewing the intake worksheet (Pilot Version 5/28/2010), which is one component of the risk assessment in development by the U.S. government: “While the risk assessment tool is an improvement on what has generally been a ‘detain first, ask later’ policy, the US risk assessment tool, based on a mathematical calculation, risks becoming a bureaucratic, tick-box exercise and may lead only to artificial individual assessments rather than real ones. It also appears heavily weighted in favour of detention.”⁸⁶

Given that approximately 66 percent of immigrants in detention are held under mandatory custody provisions, the majority will neither benefit from this individualized process nor have any access to judicial review.⁸⁷ This gap in the implementation of the tool will severely limit its capacity to advance the efficiency of custody and removal operations as a whole.

Despite concerns, developing this tool represents a significant step forward because the U.S. government will, for the first time, implement an individualized assessment of eligibility for release. It will modify ICE’s failure to employ a standardized means of assessing custody determinations for each person it encounters to date.⁸⁸

Using the tool, immigration officers should be more likely to identify any special vulnerabilities that may affect custody determinations. In early 2010, LIRS led a coalition of NGOs to offer guiding fundamental principles for the tool’s creation, as well as for a model decision tree that included extensive factors to consider in its development and a comprehensive list of tiered vulnerability triggers. Please refer to Appendixes B, C, and D for these recommendations. ICE sought and was receptive to remarkable input from experts in the field and NGOs.

DHS Assistant Secretary John Morton said that an automated version of the tool is expected to be available in January 2012. ICE has also advised LIRS that in developing its tool, as of the date of publication, it includes the following special vulnerabilities: “disability, advanced age, pregnancy, nursing mothers, sole caretaking responsibilities, mental health issues, and victimization, including aliens who may be eligible for relief related under the Violence Against Women Act (VAWA), victims of crime (U visa), or victims of human trafficking (T visa).” While the list falls short of the recommendation from experts advising ICE, the creation of a tool can be followed by improvement of it.

A validated, effective risk assessment and classification tool would provide a standard process that the government can follow to ensure that its immigration decisions adhere to the legal principles.⁸⁹ The tool should enable ICE officers to assess the risks of flight and danger to the community if an individual were released from custody. Any need to mitigate those risks would be evaluated for the least restrictive means to effectively mitigate them. The tool would also measure the need for support if the immigrant either remains in detention or is released and has a pending case or other conditions placed upon release. An in-depth interview by a qualified individual who has the experience and training to understand the issues that immigrants, refugees, and asylum seekers face can dramatically improve DHS’s ability to adequately screen participants while creating further efficiencies in processing.

It would be used when an immigrant is initially apprehended and then on a periodic basis if he or she remains in custody. Informed by a dynamic risk assessment and classification tool, ICE could make decisions as to the appropriateness of a diverse range of alternative options, including, but not limited to, release, bond, telephone reporting, in-person reporting, case manager meetings, unannounced home

86. UNHCR, *Back to Basics*, 81.

87. Dora Schriro, *Immigration Detention Overview and Recommendations*.

88. Inter-American Commission on Human Rights, *Report on Immigration in the United States: Detention and Due Process*, 123, para. 355.

89. When this report was going to press, the government had allocated resources for the tool’s development, its pilot, and most recently its automation. The validation part of the process includes an assessment performed after the tool is used to ensure that certain factors were taken into account when deciding if someone is a flight risk. Typically, these factors should include the following considerations: whether the immigrant has a valid immigration application, an attorney, is the sole breadwinner for a family, has children left without care, and is a homeowner. Please refer to Appendixes B, C, and D for extensive NGO recommendations to ICE.



visits, global positioning system (GPS) monitoring, house detention, residential group living, constructive custody measures, and detention in a secured facility. Risk assessment is necessary when developing any effective ATD program because it measures the level of restriction necessary to meet the program's goals. Thus, while the tool itself is not an ATD, it is a vital component of implementing alternatives.

iii. Detention impedes full, fair adjudication of valid claims.

The psychological impact of detention, as well as the practical obstacles it imposes, undermine a noncitizen's ability to prepare immigration applications. The consequences of this systematic impediment threaten the integrity of the immigration court system and make it more difficult for the U.S. government to meet its legal obligations.

Since the United States is bound to its own Constitution and is a signatory to international conventions triggering additional due process and nondiscrimination commitments, all parts of the government have an obligation to ensure access to full, fair hearings to asylum seekers. For immigrants who will more likely face persecution or torture as defined in U.S. immigration laws if they return to their home countries, the failure to fairly and fully adjudicate their claims violates international law. The 1951 Refugee Convention prohibits signatory states from forcibly returning people who would likely be persecuted on account of race, religion, nationality, political opinion, or membership in a particular social group. Similarly, the Convention against Torture prohibits signatory states from returning people to countries where they face torture.

The devastating impact of detention can deter immigrants who have plausible claims to legal status in the United States from fighting their cases. When this impacts people who would more likely than not suffer persecution or torture in their native country, the lack of a full, fair hearing of the claim violates U.S. obligations under international law and substantive due process protections under the Constitution. Women, who account for about 10 percent of the detainees here, are more likely to give up valid claims and succumb to deportation if they are detained and separated from their children.⁹⁰ According to a Human Rights Watch report, "Many non-citizens with strong claims that they should be allowed to remain in the country—including lengthy residence or relationships with US citizen spouses and children—are discouraged from pursuing their claims because of the prospect of additional months or years of detention."⁹¹

In some situations, the hardship that detention imposes may lead a bona fide refugee to return to a country where he or she fears persecution or torture.⁹² While studies have found that asylum seekers may be four to six times more likely to win their cases when counsel represents them, more than a third of those in detention do not have legal representation in immigration court.⁹³

The likelihood that someone who is eligible for protection from deportation would give up his or her case is particularly acute when the individual cannot get an attorney. Detention severely hinders communication with the outside world, which undermines the ability to prepare the immigration application for court. Immigrants are less likely to obtain legal representation if they are in detention.⁹⁴ A

90. Human Rights Watch, "US: Immigration Detention Neglects Health" (press release) March 17, 2009, <http://www.hrw.org/en/news/2009/03/17/us-immigration-detention-neglects-health>; and Human Rights First, *Refugee Women at Risk: Unfair U.S. Laws Hurt Asylum Seekers* (New York: Lawyers Committee for Human Rights, 2002), http://www.humanrightsfirst.org/wp-content/uploads/pdf/refugee_women.pdf.

91. Human Rights Watch, *Costly and Unfair Flaws in Immigration Detention Policy*, (Human Rights Watch, May 2010), 2, <http://www.hrw.org/sites/default/files/reports/usimmigration0510webwcover.pdf>.

92. See Leslie Véléz, Annie Sovcik, and Eleanor Acer, "Obtaining Parole for Asylum Seekers: Jumping the Hurdles of Expedited Removal, Detention, and the New Parole Directive," *Immigration Law*, May/June 2008, 26.

93. A. Schoenholtz and J. Jacobs, "The State of Asylum Representation: Ideas for Change," *Georgetown Immigration Law Journal*, 16, no. 4, summer 2002, 739-40; Human Rights First, *U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison*, note 310, <http://www.humanrightsfirst.org/wp-content/uploads/pdf/090429-RP-hrf-asylum-detention-report.pdf>. While 37 percent of detained asylum seekers did not have representation in 2008, only 17 percent of nondetained and released asylum seekers did not have representation.

94. National Immigrant Justice Center, *Isolated in Detention: Limited Access to Legal Counsel in Immigration Detention Facilities Jeopardizes a Fair*

study of 91,747 completed cases nationwide revealed that 86 percent of immigrants whose cases began and ended while they were detained did not have lawyers.⁹⁵ Often detainees do not have the documents they need for identification or evidence at their disposal. Legal resources in detention facility libraries are limited at best and may not be available in the detainees' languages. Access to these libraries can be tightly controlled and too limited. Placing phone calls to obtain documents or making visits to psychologists or medical professionals for evaluation—assuming the detainee is able to locate them—is almost impossible.

D. ATD programming is more supportive of—and less likely to harm—the well-being of immigrants.

Detention creates significant humanitarian costs, particularly for people who exercise their right to a hearing. The negative impact of detention is measured by both harm to mental health and diminished access to full, fair hearings, especially for women, children, asylum seekers, and other vulnerable groups.⁹⁶ Detention is a traumatic event and causes psychological harm, especially to individuals seeking protection from persecution and torture who remain detained for months or years.⁹⁷ A report on open and closed reception centers commissioned by the European Parliament found that “the deprivation of freedom and the conditions in detention centres create or aggravate psychological or psychiatric disorders.”⁹⁸ Research shows that detention is particularly harmful to survivors of torture and others who have suffered abuse from totalitarian governments in their countries of origin.⁹⁹ The harmful consequences of detention can be avoided by utilizing ATD mechanisms.

The benefits of a robust case management approach utilized in an ATD program have great potential to improve immigrants' mental and physical well-being. Case management facilitates referrals to health care providers. It also provides more effective methods to communicate critical information about the court process, the deportation process, and legal options that can build the participant's confidence and trust in the system. This may reduce their anxiety. The caseworkers would also be in the best position to respond to the early signs of noncompliance, which may prevent negative outcomes.

E. ATD programming improves integration outcomes for those who remain in the United States.

The International Detention Coalition found that community-based support through ATD programs improved integration outcomes for people whose cases were eventually approved.¹⁰⁰ While

Day in Court (Chicago: Heartland Alliance, September 2010), <http://www.immigrantjustice.org/isolatedindetention>.

95. Nina Siulc, Zhifen Cheng, Arnold Son, and Olga Byrne, *Legal Orientation Program: Evaluation and Performance and Outcome Measurement Report, Phase II*, (New York: Vera Institute of Justice, May 2008), 40-41, http://www.vera.org/download?file=1778/LOP%2Bevaluation_updated%2B5-20-08.pdf.

96. Human Rights First, *In Liberty's Shadow: U.S. Detention of Asylum Seekers in the Era of Homeland Security* (New York: Human Rights First, 2004), 33-39, http://www.humanrightsfirst.org/wp-content/uploads/pdf/Liberty's_Shadow.pdf.

97. G. J. Coffey, I. Kaplan, R.C. Sampson, and M.M. Tucci, “The meaning and mental health consequences of long-term immigration detention for people seeking asylum,” *Social Science & Medicine*, 70 (2010): 2070-79; M. Ichikawa, S. Nakahara, and S. Wakai, “Effect of post-migration detention on mental health among Afghan asylum seekers in Japan,” *Australian and New Zealand Journal of Psychiatry*, 40 (2006): 341-46; Zachary Steel and others, “Impact of immigration detention and temporary protection on the mental health of refugees,” *British Journal of Psychiatry*, 188 (2006): 58-64.

98. STEPS Consulting Social, *The Conditions in Centres for Third Country National (Detention Camps, Open Centres as well as Transit Centres and Transit Zones) With a Particular Focus on Provisions and Facilities for Persons with Special Needs in the 25 EU Member States*.

99. Physicians for Human Rights and the Bellevue/NYU Program for Survivors of Torture, *From Persecution to Prison* (Boston: Physicians for Human Rights/Bellevue/NYU Program for Survivors of Torture, 2003), <http://www.survivorsoftorture.org/files/pdf/perstoprison2003.pdf>; A. Burnett and M. Peel, “Asylum seekers and refugees in Britain: The health of survivors of torture and organised violence,” *British Medical Journal*, 322 (2001): 606. According to Burnett and Peel, in immigration detention, “Survivors of torture often describe feelings of fear and powerlessness caused by the clanging of cell doors, footsteps in the corridor and uniforms, which restimulates their distress.”

100. IDC Handbook, 5, 9, 30, and 51.



some immigrants may be removed or voluntarily depart, many others will stay in the United States permanently. Local communities and newcomers both benefit from successful integration.

Integration—which is different from assimilation—is a long-term, two-way process that places demands on both the receiving society and the newcomer. “The host society should be prepared to accept refugees as equals and take action to facilitate access to resources and decision-making processes in parity with the national population. On the part of the refugees, there should be a willingness to adapt to the lifestyle of the host society without requiring a loss of their own cultural identity.”¹⁰¹ The process starts at the time of arrival and extends for however long it takes the newcomer to become an active member of society from a legal, economic, social, and cultural perspective.¹⁰² Ultimately, a person who successfully integrates with the community should feel a sense of belonging and membership there.

Several factors impede integration. Newcomers may not be able to access health care services. Even those who can afford the services or are eligible for public assistance may be unable to access the services due to language barriers or lack of knowledge.¹⁰³ Inability to secure stable housing can affect several areas of the individual’s life, including employment and educational opportunities.¹⁰⁴ “Barriers to employment include language, non-recognition of overseas qualifications, lack of familiarity with the . . . job-search culture, employer attitudes and racism.”¹⁰⁵ Access to education is limited for newcomers who are not proficient in English or who are unfamiliar with the public system. Case management delivered through ATD programming can help overcome these barriers and lead to improved outcomes for those who remain in the United States.

In the context of asylum seekers whose status is uncertain while their applications are pending, integration measures should not be deferred until asylum has been granted. “To do so could reinforce exclusion, for example by leaving refugee professionals de-skilled and demoralized by the time they have permission to work. . . . The fact that some will not succeed does not mean that all should be treated as if they will not succeed.”¹⁰⁶ This same logic applies to any individual who will be granted some form of relief from removal and will remain in the United States.

101. Refugee Council, *Agenda for Integration* (London: Refugee Council, November 2004), 4, http://www.refugeecouncil.org.uk/Resources/Refugee%20Council/downloads/policy_responses/agenda_integ_nov04.pdf.

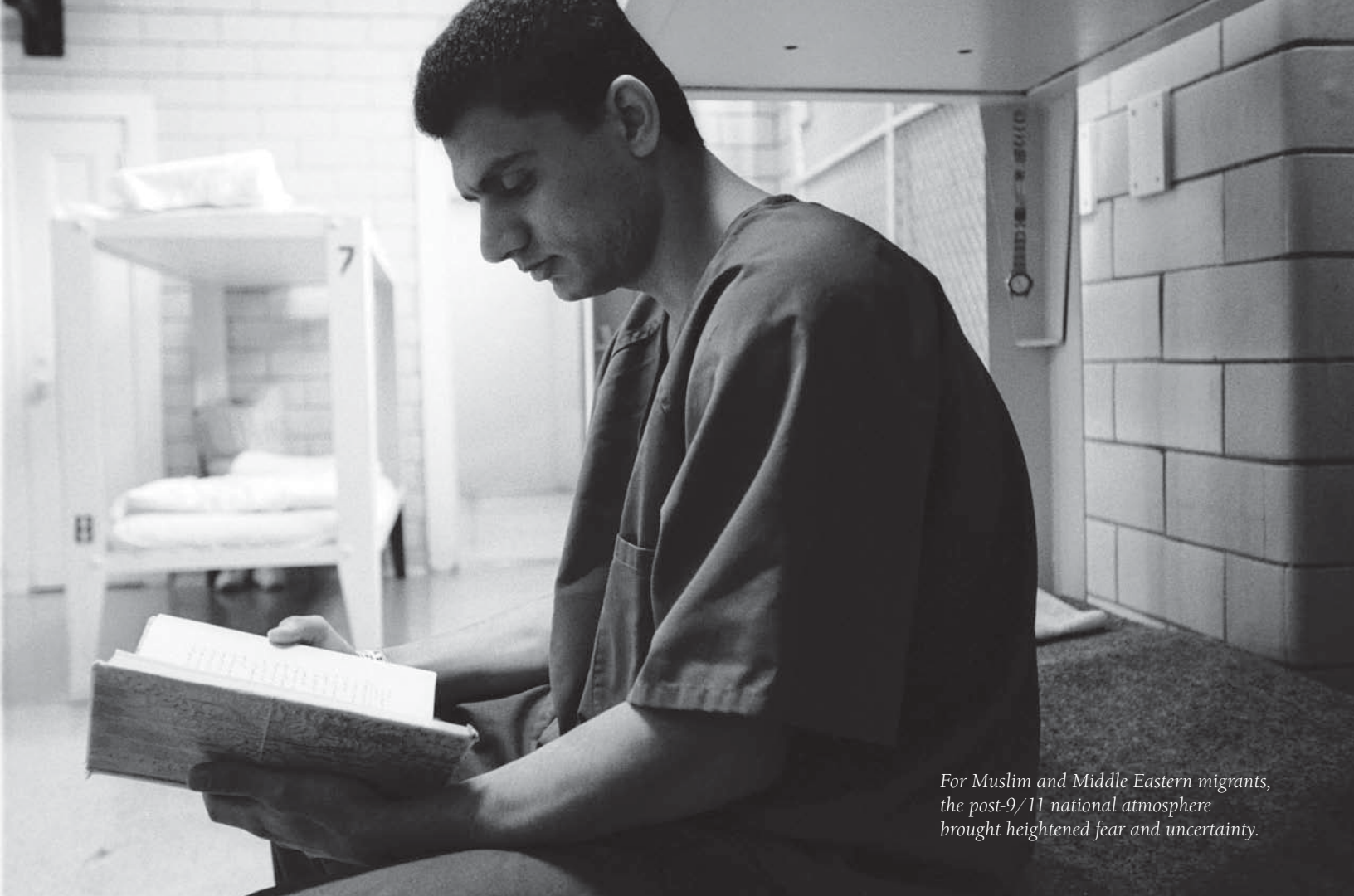
102. *Ibid.*

103. *Ibid.*, 14.

104. *Ibid.*, 12.

105. *Ibid.*, 8.

106. *Ibid.*, 4.



For Muslim and Middle Eastern migrants, the post-9/11 national atmosphere brought heightened fear and uncertainty.

Section Two: Impact of 9/11 on ATD

ATD programming in the United States has been affected by the political responses to the attacks on September 11, 2001.

Through the initiative of some community-based organizations—acting independently or through public-private partnerships—there have been a handful of examples of successful community-based ATD programming in the United States. They succeeded in saving the government money, ensuring compliance with court appearances, and promoting the participants' well-being. Despite these achievements, the usage of such programs declined after September 11, 2001, when tighter security trumped all other government goals. This section discusses some of the programs that were popular in the late 1990s and some the government has used since 9/11.

A. ATD programming delivered by nongovernmental organizations

For decades, nongovernmental organizations (NGOs) have welcomed newcomers seeking protection in the United States and provided them with safe havens. Community and faith-based institutions have tailored programs to receive and serve particularly vulnerable populations—refugees, asylum seekers, victims of human trafficking, torture survivors, and unaccompanied children. Numerous agencies have spent years or decades providing critical social services and speaking for immigrant communities, which are often suppressed and silenced.¹⁰⁷ In order to promote self-sufficiency and security, service providers offer support with access to housing, medical and mental health care, educational opportunities, transportation, employment, family reunification, legal representation, and basic community integration. They have used this expertise to offer alternatives to detention for many people.

In 1999 the U.S. Immigration and Naturalization Service (INS), which was dismantled and reorganized under the DHS in 2003, asked LIRS to help 89 Chinese asylum seekers detained in Ullin, Illinois. They were part of a group of about 500 who arrived by boat to the U.S. territory of the Northern Mariana Islands. Since they met the 1967 Protocol Standard of the U.N. Refugee Convention requiring that a refugee not be returned to a country where his or her life or freedom would be threatened, the 89 people were flown by INS to the mainland to apply for asylum; once there, they were detained them at Tri-County Detention Center in Ullin, approximately a 10-hour drive from Chicago and far from nonprofit legal service providers. INS offered to pay the travel and lodging costs for a small group of pro bono attorneys to go to Ullin to assist the asylum seekers.

LIRS organized the effort by contacting nonprofit service providers and recruiting a team of pro bono attorneys with the right expertise from around the country. With limited funding, six attorneys spent a total of three weeks in Ullin informing the asylum seekers about their rights in immigration proceedings and interviewing and preparing parole requests for 33 of them who did not have legal counsel or family ties in the country.

At the government's request, LIRS placed 25 members of the group in open shelters around the country, mainly in Chicago, and ensured that they were referred to attorneys. The locations were not publicly disclosed due to trafficking concerns.

LIRS secured sponsorship from refugee shelters for those 25 asylum seekers. The shelters agreed to provide housing, food, medical care, and continuous case management to ensure that they attended court proceedings and complied with other requirements. LIRS coordinated with local legal services providers to provide ongoing pro bono legal representation. For several months after they were released, LIRS coordinated conference calls every two weeks with legal representatives and shelter managers to monitor the cases and address any problems.

Two of the 25 eventually moved in with family members, and one disappeared. The remaining 22 appeared consistently for INS check-ins and court dates. This small initiative, therefore, had a 96 percent appearance rate.¹⁰⁸ And the costs were found to be just 3 percent of the cost of detaining the group for a year.¹⁰⁹

Similarly, Catholic Charities Archdiocese of New Orleans (CCANO) successfully worked with the INS to receive and support 39 asylum seekers released from detention. CCANO's expertise in refugee

107. See Ophelia Field and Alice Edwards, *Alternatives to Detention of Asylum Seekers and Refugees*.

108. Esther Ebrahimian, "The Ullin 22: Shelters and Legal Service Providers Offer Viable Alternatives to Detention," *Detention Watch Network News*, August/September 2000, 8.

109. Using 1999 figures, the INS and LIRS estimated that keeping 22 people in detention while their legal cases wound through the system (at an average cost of \$63 per person per day) cost \$500,000. Hospitality through local nonprofits—at \$2 per person per day—cost only \$16,000. The dramatic difference in cost is due to the efficient management of the community-based services, which received donated goods and services worth thousands of dollars.

resettlement and immigration legal services and its strong relationships with locally based social service providers and immigration attorneys were essential to the program's success.¹¹⁰

CCANO provided the asylum seekers—who had no family members in the United States—with intensive case management to help them integrate into the community and pursue their asylum claims. Case management services included helping them obtain housing, food, clothing, household furnishings, and other necessities; intensive English language programs; and, most importantly, the services of pro bono attorneys. Each individual was assigned a counselor who accompanied him or her to meetings at INS, served as an interpreter for meetings with lawyers and social service agencies, provided transportation to critical appointments, and familiarized them with New Orleans. INS agreed to issue work authorizations to the paroled asylum seekers pursuant to INA 212(d)(5), and the counselor helped them get basic identity documents such as Social Security and state identification cards. Additionally CCANO helped the asylum seekers find jobs.

The program was expanded to provide similar services to 64 “indefinite detainees” who had been languishing in detention because they could not be removed from the United States.¹¹¹ Because none of indefinite detainees was able to locate family members willing to sponsor them, government officials first tried to place them in halfway houses.¹¹² Those who could not access halfway houses were released to the care of CCANO.

The indefinite detainees received services similar to those provided to the asylum seekers. Since most of them spoke English and had lived in the United States for several years before their detention, they needed much less assistance. For example, the indefinite detainees did not need legal representation because their immigration cases were closed and most were quite familiar with how to find a job or lease an apartment. The encouragement and emotional support provided by program staff was most important in helping the former detainees reintegrate after a long absence from society.

The cost to run CCANO's program was about \$1,430 per client annually, or \$3.90 per day.¹¹³ The court appearance rate for participants from May 1999 through January 2002 was 97.5 percent.¹¹⁴ The outcomes for indefinite detainees served by the program were also very positive; 62 of 64 long-term detainees served by the program from August 1999 to December 2003 complied with the conditions of their release.¹¹⁵

B. ATD pilot program: Vera Institute's Appearance Assistance Program (AAP)

The preeminent model of a U.S.-based program was Vera's AAP, a three-year program was the government's first ATD initiative for noncitizens. The program screened detained immigrants in New York and New Jersey for eligibility in a supervised release and assistance program, which applied different methods and levels of supervision to determine how to increase the chances they would appear in court and comply with removal orders.¹¹⁶ Vera's AAP was based on the institute's 30 years of experience in pre-trial services programs in the criminal justice system, which demonstrated that people with strong community ties consistently appeared for their court dates. Five hundred people participated in the program at both general and intensive levels of supervision in three groups: asylum seekers, people convicted of crimes and facing removal, and undocumented workers.

110. Sue Weishar, “A More Humane System: Community-Based Alternatives to Immigration Detention (Part 2),” *Just South Quarterly*, Spring 2011 (hereinafter Weishar, “A More Humane System”). Also see Catholic Legal Immigration Network Inc., *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?*, 2000 (hereinafter CLINIC, *The Needless Detention of Immigrants*) for more information and an additional example.

111. Ibid. “Indefinite detainees” here means immigrants who are inadmissible or deportable based on criminal charges but whom the government was unable to remove because no country would accept them.

112. Ibid.

113. Ibid., 9.

114. Ibid.

115. Ibid.

116. David Mizner, *The Appearance Assistance Program, Attaining Compliance with Immigration Laws Through Community Supervision* (New York: Vera Institute of Justice, 1998), 4, <http://www.vera.org/download?file=211/aap.pdf>.



Vera's AAP assessed risk through the use of a point scale that determined eligibility based on the following criteria: community ties, compliance in previous proceedings, and public safety. In the cases of people who lacked strong community ties, the program recruited representatives from community-based organizations to serve as guarantors. Program staff conducted screenings and made release recommendations to immigration authorities. Generally, the participants in the program reported in person to AAP staff on a biweekly basis and checked in by phone each week.¹¹⁷ In addition, staff regularly visited participants' homes. This monitoring system was effective at ensuring compliance and disseminating information about the immigration system and upcoming court dates.

The three-year pilot program saved the federal government almost \$4,000 per participant and boasted an overall 91 percent appearance rate of noncitizens generally at all required hearings and a 93 percent appearance rate for asylum seekers.¹¹⁸ The rates of undocumented immigrants who received intensive supervision improved the greatest, underscoring the success of the program because these people had the least chance of winning their cases and thus were less likely to appear without case management services.

The robust risk assessment instrument used in Vera's AAP and the program's meaningful case management contributed to its success. Case managers informed the participants of the positive reasons to appear and the consequences of not appearing. They referred participants to pro bono lawyers, obtained interpreters when needed, and assisted with transportation to immigration proceedings. They also connected the participants with housing, medical care, job information, and other critical social services.¹¹⁹

C. Direction of ATD programming post-9/11

After September 11, 2001, politics dictated that the government should focus on security almost to the exclusion of all other interests. INS was reorganized under DHS, and ICE was created in 2003. ICE continued the discussions that INS had begun about alternatives to detention, but from a completely different perspective than Vera's successful AAP pilot. Without political will for programming that focused on community support and case management models, nonprofits stopped incubating formal initiatives. Thus, the foundations laid for ATD programming in the 1990s were largely discarded.

Despite the shifting political winds after 9/11, the success of the AAP pilot prompted Congress to appropriate \$3 million for alternatives to detention in 2002. Doing so acknowledged that an ATD program is a more humane, cost-effective way of ensuring that people in immigration proceedings appear in court. Moreover, Congress underscored the need for community-based programs that provide necessary social services.

Congress has steadily increased funding for the development and expansion of programs that facilitate the release of detained adults into alternative programs. In FY 2005, it appropriated \$5 million. The following year, the appropriation increased to \$28.5 million, and in 2007, that amount increased by more than 50 percent to \$43.6 million.¹²⁰ By FY 2011, Congress had appropriated \$72 million for ATD.

Unfortunately, the boom in funds that AAP generated did not build upon lessons learned from AAP and other models. The post 9/11 concept of an ATD was based on retrofitted correctional facilities with fewer limitations on the detainees' movements. A well-known example of this was Florida's Broward Transitional Center. Subsequent government programs—which policy makers referred to as ATD—focused on the most restrictive forms of supervision, ranging from the remodeled detention facilities to electronic monitoring devices.

117. *Ibid.*, 10.

118. *Ibid.*

119. *Ibid.*

120. S. Rept. 107-42 (2001), 40; Conf. Rept. 107-278 (2001), 79; Conf. Rept. 108-10 (2003), 626; Conf. Rept. 108-280 (2003), 32; Conf. Rept. 108-774 (2004), 44; H. Rept. 108-541 (2004), 31; S. Rept. 108-280 (2004), 25; Conf. Rept. 109-241 (2005), 47; S. Rept. (2005), 36; H. Rept. 109-79 (2005), 35; H. Rept. 109-476 (2006), 38; H. Rept. 110-181 (2007), 42; S. Rept. 110-84 (2007), 137.

i. Broward Transitional Center

When Congress appropriated the \$3 million on ATDs in 2002, it mandated the use of “community based organizations to screen asylum-seekers and other INS detainees for community ties, provide them with necessary services and help to assure their appearance at court hearings.”¹²¹

The response was a closed detention facility in southern Florida’s Broward County. Here the agency would house women who were either asylum seekers or immigrants without criminal histories in a dormitory-style setting that provided a less restrictive, more humane atmosphere. GEO Group Inc. got the contract and turned an existing building into an immigration detention facility.¹²²

ii. ICE’s Intensive Supervision Appearance Program

In 2004 ICE developed two distinct programs using its ATD appropriations line item that deal directly with controlling immigrants “outside of the physical detention arena.”¹²³ The Electronic Monitoring Device Program (EMP) and the Intensive Supervision Appearance Program (ISAP) were operated as alternatives to detention under contract with nongovernmental operators. Each program had different levels of reporting requirements. Individuals reported directly to the contractor, and the contractors reported any violations of the conditions of release to ICE. Detention and Removal Operations (DRO) would detain, refer for prosecution, or otherwise sanction violators.¹²⁴ ICE officers directly referred contractor cases that they thought were suitable for the ISAP, which included structured reporting requirements and unscheduled home visits.

The ISAP was designed to improve the rates appearance for immigration interviews and hearings, as well as the rates of compliance with final orders of removal.¹²⁵ It was open only to immigrants who did not fall into one of the mandatory detention categories. Driven by limited detention capacity, a growing number of detainees, and the need to decrease the numbers of immigrants absconding, the purpose of ISAP was to provide a highly structured supervision mechanism that emphasized appearance at immigration court proceedings for people at least 18 years old who were not in detention.¹²⁶ The program was restricted to people within certain geographic areas.¹²⁷

ICE put the management of the program up for bid in 2004. The Vera Institute proposed to replicate its AAP. Volunteers of America in Minneapolis also bid, with a proposal to offer a low staff-to-caseload ratio, special assistance for torture counseling, and pro bono lawyers. ICE gave the contract to Behavioral Interventions Inc., a private company whose model was based on the use of electronic monitoring.¹²⁸ Behavioral Interventions, which was bought by GEO Group Inc. in 2010, continues to manage the ISAP II operations under contract with ICE.

Behavioral Interventions’ case specialists monitored the activities of immigrants who came from ICE custody into ISAP. Those who were selected to participate had to comply with a variety of activities and

121. Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Bill, 2002, 40.

122. GEO Group Inc. is a private corporation that specializes in managing correctional facilities. It is the second largest ICE contractor and operates seven facilities with a total of 7,183 beds for annual revenue of \$1.17 billion in 2010. See National Immigration Forum, *The Math of Immigration Detention*, 4.

123. Memo from ICE Acting Director Victor X. Cerda to field office directors, Dec. 10, 2004.

124. Ibid.

125. ISAP II, Statement of Work, Contract No. HSCECR-09-D-00002, SOW- 30, Sept. 3, 2010, 31-32 (information obtained by a after filing a request under the Freedom of Information Act.)

126. Memo from Wesley Lee to field office directors, *Eligibility Criteria for Enrollment into the Intensive Supervision Appearance Program (ISAP) and the Electronic Monitoring Device (EMD) Program*, May 11, 2005, <http://www.scribd.com/doc/21347523/Alternatives-to-Detention-FOIA>.

127. ICE, “Alternatives to Detention,” 15, <http://www.scribd.com/doc/21347523/Alternatives-to-Detention-FOIA>. The eight ISAP pilot sites were Portland, Ore., St. Paul, Denver, Baltimore, San Francisco, Kansas City, Mo., Philadelphia, and Miami; the program’s first expansion included Delray Beach, Fla., Orlando, New York/New Jersey, and Los Angeles.

128. ISAP II, Statement of Work, Contract No. HSCECR-09-D-00002, SOW- 30.



reporting requirements, such as home and local office visits, employment verification, and curfews.¹²⁹ To ensure successful completion, ISAP relied on electronic GPS monitoring devices for anyone released to this supervision program and also included telephonic reporting, unannounced home visits, and curfews (i.e., home arrest). Participants reported to their assigned ISAP office regularly for interviews.

The participant's incentive to abide by the rules was to eventually have the GPS monitor removed. The program primarily relied on this single factor to ensure successful participation rather than case management or any individualized assessment of the need for supervision. Although ISAP was intended to ensure compliance rates with deportation, many of the people selected to participate could not have been deported.¹³⁰

iii. Electronic monitoring device implementation

The EMP effort functioned as a supplement to ISAP, especially in locations where Behavioral Interventions was not operational.¹³¹ It consisted of two monitoring systems.¹³² The first, telephonic reporting, was a call-in system utilizing voice recognition. This could be used as an added condition of release from detention or for supplementing in-person reporting requirements. It was available nationwide for the purposes of increasing the levels of reporting, which ranged from daily, weekly, or monthly. The second EMD system was radio frequency monitoring, a home curfew system that uses electronic tagging.¹³³

Through these programs, ICE used devices to manipulate individuals to obtain travel documents that would assist the U.S. government with the individual's removal, a purpose inconsistent with any legitimate reason to restrict liberty.¹³⁴

DHS initiated an additional program in 2008: Enhanced Supervision Reporting (ESR). According to the department, this was less intensive and required less intermediary supervision levels.¹³⁵ The ESR contract was awarded to a private company, Group 4 Securicor (G4S). The program used the same monitoring methods as ISAP. ESR was offered at all 24 ICE/DRO field offices and three additional sub-offices. DHS described ESR as a "more effective monitoring program . . . [that provided] structured and closely supervised electronic monitoring, residence verification, home visits, in-person reporting and document requirements for program participants."¹³⁶ ESR was distinct from ISAP in that it required fewer home visits and explicitly did not incorporate any case management for referrals to services by community providers.¹³⁷ The contract required G4S to enroll participants during large-scale ICE operations such as work site enforcement or fugitive operations.¹³⁸ Records showed that this program in particular "suffered from poor data tracking of immigrants who have absconded from the program."¹³⁹

129. DHS/ICE salaries and expenses/program performance justification to Congress for FY 2009, 39.

130. Memo from Cerda to field office directors, Nov. 12, 2004, and recirculated on Sept. 29, 2006, by Gary Mead, ICE's assistant director for management. In this memo, Cerda instructed the staff to maximize the effectiveness of ATD, and to closely manage and monitor individuals released because ICE cannot remove them. Officers were encouraged to use liberty-restricting GPS monitoring devices to obtain information from the individual, including information about next of kin, employment verification, and utility bills, to mitigate the likelihood that they would flee.

131. Memo from Lee to field office directors, June 28, 2005. "For those sites not participating in ISAP, consideration of the use of electronic for monitoring technology (EMP) should be a priority."

132. Memo from Lee to field office directors, May 11, 2005.

133. Ibid.

134. Ibid., 3.

135. Enhanced Supervision Reporting (ESR) Statement of Work, Sept. 3, 2010. FOIA Request Item 2 (A)&(C)a1 167.

136. DHS/ICE salaries and expenses/program performance justification to Congress for FY 2009, 39.

137. ICE, "Alternatives to Detention."

138. Ibid.

139. Susan Carol, "Flaws found in options for immigrant detention," *Houston Chronicle*, Oct. 20, 2009, <http://www.chron.com/dispatch/story.mpl/special/immigration/6675443.html#ixzz1PGLTkOdT>.

D. ATD programming from 2009 through 2011

In FY 2008 Congress directed ICE to take steps to ensure that it only used alternatives to detention in lieu of using detention facilities; this was in response to claims that the agency was misusing ATDs to increase restrictions on and supervision of individuals suitable for release.¹⁴⁰ Congress's mandate to DHS consistently and repeatedly directed funding toward the development of Vera-like community-based ATD programming that provides necessary services to ensure compliance as an alternative to the expensive, one-size-fits-all detention model.

On July 20, 2009, ICE consolidated all ATD programs into ISAP II by awarding a single contract to Behavioral Interventions.¹⁴¹ According to DHS, the shift to a single contractor would allow better performance and evaluation.¹⁴² With the launch of a new request for proposals, ICE required a needs-based case management component for the first time as a term in the contract. The program, named ISAP II, continues to rely on the use of electronic ankle monitors, installation of biometric voice recognition software, unannounced home visits, employer verification, and in-person reporting to supervise participants.¹⁴³ At the beginning of 2011, 17,454 people were enrolled in ISAP II, and 13,583 of them were receiving full services. ISAP II is poised to expand; according to Behavioral's contract with ICE, more offices were scheduled to open from July 2009 through July 2014.¹⁴⁴

In describing its ATD programs to Congress, ICE classified them into two types: full-service and technology-assisted.¹⁴⁵ People are assigned to them "based on public safety and security, flight risks, along with an [immigrant]'s status within immigration proceedings. . . . Determination of the form of monitoring to which an [immigrant] is assigned depends largely on whether the [full-service ATD] is available where the [immigrant] resides and whether a slot is available."¹⁴⁶

The full-service option under ISAP II is implemented by contractors who provide the equipment and monitoring services in addition to what ICE describes as case management service provisions. The case management described by ICE, however, does not rise to the level of intensive, ongoing coordination of referrals to community-based services that defines traditional case management service delivery models. Instead the monitoring may include both home and office visits as well as technological options, which include both active and passive GPS monitoring and less restrictive telephonic reporting-only options.¹⁴⁷

When ICE refers an immigrant into a full-service version of ISAP II, the contractor provides the person with an orientation to the program and assigns a case specialist. The specialist conducts an assessment to determine the needs of the individual and is supposed to develop an individual service plan for referrals to services.¹⁴⁸ However, in practice this is problematic. For example, if an individual does not have an attorney, the contractor provides the list of nonprofit accredited service providers maintained by the EOIR and instructs the individual to call all of them to seek representation. Notably, ICE has already provided this list to the individual when they are first charged with an immigration infraction. Rather than reach out to the legal community, including local bar associations, the

140. Ibid.

141. "The GEO Group Announces \$415 Million Acquisition of B.I. Incorporated," *Business Wire*, Dec. 21, 2010, <http://www.businesswire.com/news/home/20101221005564/en/GEO-Group-Announces-415-Million-Acquisition-B.I.> See BI Inc., *Intensive Supervision and Reporting Program (ISAP) II Monthly Progress Report For Period Covering: November 8, 2009 through November 30, 2009*, (Sept. 3, 2010, FOIA Request Item 1d 4).

142. ICE, "Detention Reform Accomplishments" (fact sheet), <http://www.ice.gov/detention-reform/detention-reform.htm> (accessed April 23, 2011).

143. Detention Watch Network and Stanford Law School Immigrants' Rights Clinic, *Community-based Alternatives to Immigration Detention*.

144. The contract's appendices have a listing of the cities and can be accessed at <http://www.ice.gov/doclib/foia/contracts/biincorporatedhscecr09d00002.pdf>.

145. U.S. Immigration and Customs Enforcement Salaries and Expenses, Fiscal Year 2012 Congressional Budget Justification, 44.

146. Ibid.

147. Ibid.

148. Ibid.



responsibility to make the referral “to ensure basic needs have been met,” is deemed satisfied under the contract regardless of whether or not the individual has been able to obtain a legal consultation.¹⁴⁹ Full-service programs, which exist in 30 locations across the country, are only available for immigrants residing within a 50- to 85-mile radius of an ICE office.

Technology-assisted options under this contract use the contractor’s equipment while ICE continues to supervise the alien participants directly. There is no case management service provision, and intake is limited to an overview of the program and any individual reporting requirements. These electronic monitoring options (tagging and telephonic reporting) are available at all ICE locations.

ISAP II symbolizes a positive step toward reducing reliance on detention and a tentative first step toward using case management models in conjunction with alternatives to detention. Additionally, unlike previous generations of ICE’s official ATD programming, this contract allows for a continuum of restrictions that use electronic monitoring. For example, as of the date of this publication, ICE advised LIRS that more the program requires only telephonic reporting as an electronic monitoring tool for more than 60 percent of participants and GPS monitoring on less than 40 percent. ICE also reports that appearance rates at final hearings remain more than 95 percent.

However, improvements are still necessary to bring the program into compliance with due process requirements. The current process of enrollment places restrictions on individual liberty interests and freedom of movement without a formal risk assessment process because risk assessment is still not live nationwide; the program does not require the government to demonstrate a need for restrictions and it provides little, if any, opportunity for judicial review of the conditions of release from detention. As discussed in the context of the immigration detention system as a whole, these flaws are systemic and thus are not specific to ISAP II.

While ISAP II, as the single contract under the ATD Unit, represents significant progress to expand the concept of ATD in the United States, the program has several shortcomings:

- **Enrollment of noncitizens residing in the community instead of drawing from noncitizens who are in detention:** One criticism that has been levied specifically at ISAP II is that it enrolls people who were never detained while their immigration cases are pending. Rather than looking to the current detention populations and utilizing various supervision methods as a step down from unnecessary detention, it is seeking individuals already released into the community to increase restrictions of liberty on more people. The program would be more cost-effective and more compliant with due process if this changed based on an objective assessment of a need for restricting liberty instead of prioritizing the de-escalation of restriction of people detained who do not need to go through a similar assessment.
- **Inappropriate levels of supervision:** Supervision is only appropriate and cost effective, when applied exclusively to people who’ve been assessed and deemed to need supervision. The most intensive forms of supervision (i.e., electronic tagging and home arrest) have been applied to categories of immigrants who do not merit such intensive monitoring. Not only does this drive up costs by spending resources on people who do not need supervision, but it also risks undermining the country’s international human rights obligations.

Example: Individuals who have been issued orders of protection by the immigration court in the form of withholding of removal or protection under the Convention against Torture cannot be removed to their country of origin, which

149. Ibid.

prevents their removal from the United States unless a third country is willing to receive them. Some have been placed in ankle bracelets for extended periods and have been placed on exceedingly strict check-in schedules.

- **Overly emphasizes enforcement at the expense of case management:** Under the current contract, the ISAP II program offers participants minimal assistance to ensure they are adequately equipped to participate in their immigration proceedings. It does not provide adequate information about the immigration process or meaningful assistance in finding lawyers and other nonprofit social services as needed.¹⁵⁰ Rather than focusing on addressing participants' basic needs that present obstacles to court appearance, ICE's program allocates its resources exclusively to enforcement techniques. Without building capacity to support people who do not need to be detained, high financial costs are ultimately borne by expensive enforcement techniques and high humanitarian costs are borne by the individual.

ICE's program lacks robust case management, and participants do not have the necessary resources to meaningfully engage in the immigration process. Vera's AAP and international models demonstrated that case management is necessary for ensuring appearance. That case management includes explaining to participants the benefits they could gain by appearing in court and the consequences of failing to appear; providing assistance in getting interpreters, lawyers, transportation to hearings, housing, medical and social care services, and employment; and general guidance in navigating the complexities of the immigration legal system.

ICE has publicly stated its intention to include case management in ISAP II; however, the lack of it continues to be a persistent shortcoming. Providing ISAP II participants with a list of available resources neither effectively engages nor makes the best use of available community services. The contractor has a wealth of knowledge and expertise in alternative methods, particularly in the criminal justice context; however, as a newer entity in dealing with the needs specific to immigrants, successful case management requires social service coordination and intimate knowledge of local resources and cultural expertise specific to this population. Without reliable, holistic case management services, participants will not understand their responsibilities, may not be able to comply with program requirements, and are at risk of failing. Any alternatives to detention that do not adequately support the participants are destined to fall short on compliance rates and will tarnish the reputation of ATDs as a concept. Waiting for a contractor to acquire this knowledge in isolation reinvents the wheel while driving up costs. In researching this report, not a single local agency with a history and mission of delivering services to immigrants indicated that they had been invited, at least by the contractor, to assist in mapping local resources and establishing mutual understanding of services and programs at the local level.

- **Lack of confidentiality undermines communication:** This issue is not specific to ISAP II, but certainly affects the implementation of the program. The private contractors that ICE relies upon are unable to establish trust with participants because they lack experience working with immigrant communities and are perceived as representatives of immigration authorities.¹⁵¹ Selecting contractors with historically closer ties to the communities may minimize the potential lack of trust. However, local ICE officials have

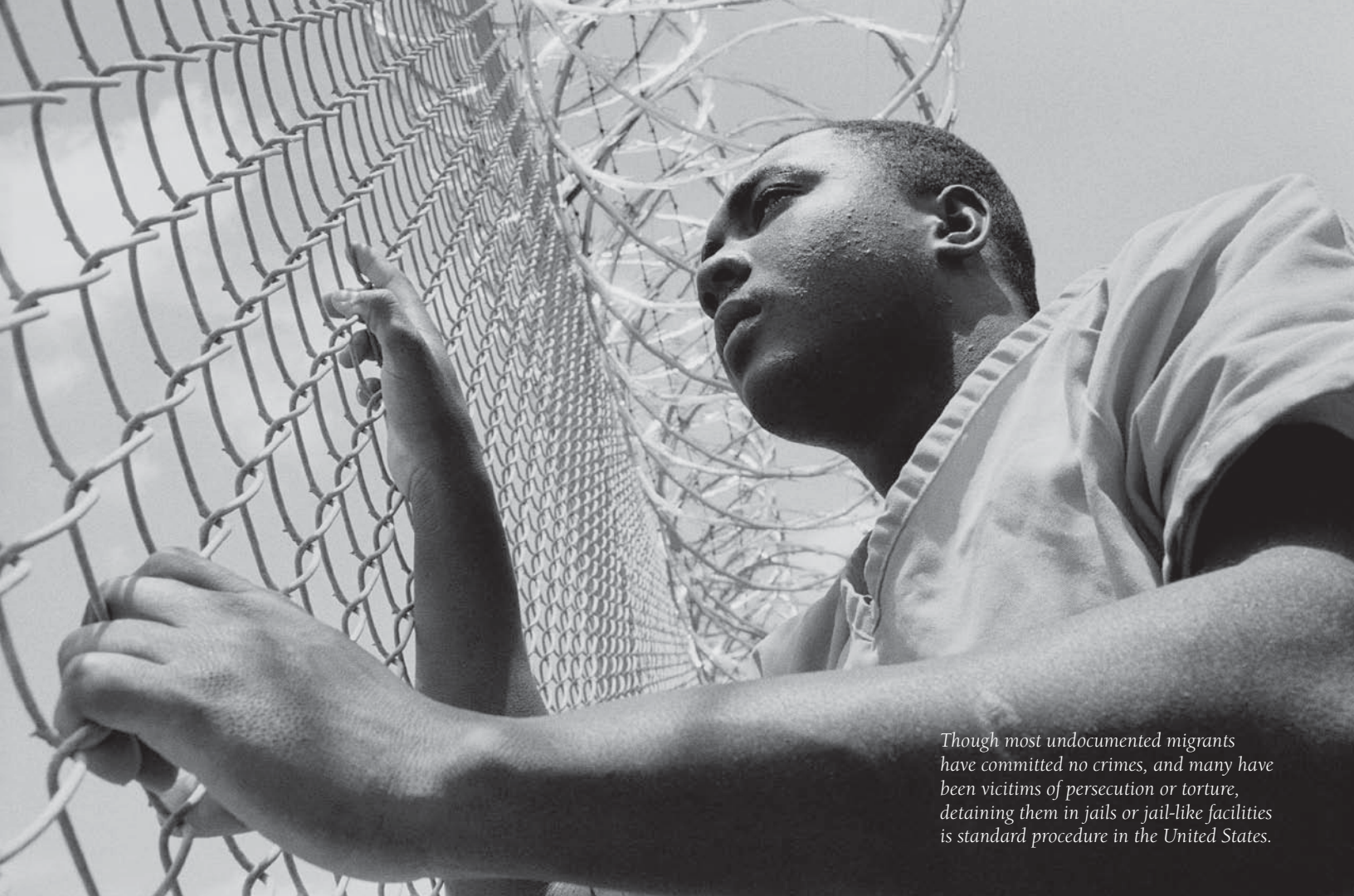
150. Detention Watch Network and Stanford Law School Immigrants' Rights Clinic, *Community-based Alternatives to Immigration Detention*.

151. Ibid.

even acknowledged that information participants provided to program staff may be used as evidence against them in removal proceedings.¹⁵² Lack of confidentiality is a significant obstacle to open communication. It is likely to affect future ATD programming, which should be considered during the design and implementation of future programs and contracts, including alternate funding options to protect information and avoid inherent conflicts of interest. This is a challenge particularly unique to the civil immigration system, in which information necessary to make informed decisions for release or appropriate levels of restrictions may elicit information that can be used against an individual in legal proceedings for relief or immigration benefit.

- **There is no mechanism to control potential bias toward restrictive measures:** While for-profit contractors can be successful partners with the government, ICE has placed restrictions on individuals since 2003 without any internal mechanisms to control profit-driven incentives for more restrictive measures than necessary. Behavioral Interventions is a for-profit company whose inception was the development of an electronic tagging device, which is one of the more restrictive means of supervision. Without a risk assessment tool or other transparent, standard process for determining the level of restriction, the use of electronic monitoring devices raises the question whether such devices are necessary in individual cases or merely profitable. In the future, critical controls such as a validated standard risk assessment tool and independent review of all custody decisions can prevent such biases. Additionally, more nonprofit organizations with the capacity and expertise to operate variations or components of the program must be engaged. Please refer to Section Three for a further discussion on this point.

152. Ibid.



Though most undocumented migrants have committed no crimes, and many have been victims of persecution or torture, detaining them in jails or jail-like facilities is standard procedure in the United States.

Section Three: Impediments to ATD

The current immigration enforcement and removal system contains several structural impediments to the effective implementation of ATD programming.

DHS's ATD programming has not reduced reliance on detention, nor has it resulted in reserving limited bed space for individuals who are a high flight risk or a danger to others. In some instances, such as the Broward facility and other highly restrictive programs that amount to constructive custody, programs have been used to increase restrictions of liberty. Immigrant rights advocates regularly report that DHS's alternatives to detention programs—especially those that entail significant supervision and monitoring efforts—are being used for people, including as asylum seekers, stateless individuals, and longtime lawful permanent residents with extensive community ties, whose only prior criminal convictions are for often minor or extremely old offenses. The government is expending resources supervising people who probably do not need it.

Example: “Raymond” is a Cuban citizen who has been in detention for more than six months.¹⁵³ Because the United States and Cuba do not have a repatriation agreement, Raymond cannot be deported to Cuba, and he faces prolonged detention. He came to the United States seeking political asylum. Since he arrived, he has cooperated fully with immigration authorities, was granted work authorization, held a job, and paid taxes. However, after Raymond pled guilty to an offense for which he received a sentence of probation, he was placed into deportation proceedings. His criminal defense lawyer never advised him of the immigration consequences that would result from the guilty plea. Raymond does not pose a flight risk. He has a stable residence, a job to return to, and the unconditional support of his wife and family. Yet he faces mandatory and indefinite detention. His wife, who is in bad health, is suffering extreme financial and emotional hardship as a result of her husband’s detention. Rather than remain in custody indefinitely as a “mandatory detainee,” Raymond should be considered for enrollment in a formal supervision program such as ISAP II.

Many of these problems are systemic. Over time, the U.S. government’s attempts to implement ATD initiatives have shed light on several overarching challenges:

- an overreliance on detention based on a presumption of the need to detain;
- the lack of individualized risk assessments to determine who needs to be detained or otherwise supervised to ensure appearance and removal;
- absence of necessary data indicators and the mechanisms to collect and report those indicators in order to evaluate the use of detention and ATD;
- the absence of a robust case management system with referrals to appropriate social services; and
- insufficient access to legal and social services.

A. The United States relies too much on detention by presuming the need to detain.

Following his mission to the United States, UNSR Bustamante said that the current system makes detention “the primary enforcement strategy relied upon by the United States immigration authorities.”¹⁵⁴ In FY 1996, the country had a daily immigration detention capacity of 8,279 beds and held 108,000 individuals in detention over the course of the year.¹⁵⁵ The daily capacity has increased to 33,400 beds with an annual detention population of 392,000 in FY 2010.¹⁵⁶ Between 1996 and 2011, the use of detention as an immigration management tool had tripled.

At this point, the severity and institutional nature of the problems in the ICE detention system cannot be refuted. In effect, immigrants in “civil” custody face all the privations, inhumanity, and violence of prison.¹⁵⁷

i. U.S. legislation authorizing custody promotes categorical approaches.

Overwhelming critiques of mandatory detention laws are not new. In 2000 a CLINIC report titled “The Needless Detention of Immigrants” offered the following analysis:

153. Detention Watch Network, “Indefinitely Detained: Raymond’s Story,” July 13, 2010, <http://www.detentionwatchnetwork.org/raymond>.

154. See Jorge Bustamante, *Report of the Special Rapporteur on the human rights of migrants*, 12.

155. Government Accountability Office, *DHS: Organizational Structure and Resources for Providing Health Care to Immigration Detainees* (Washington, DC: Government Accountability Office, Feb. 23, 2009), 8, <http://www.gao.gov/new.items/d09308r.pdf>.

156. National Immigration Forum, *The Math of Immigration Detention*.

157. See IACHR, *Report on Immigration in the United States: Detention and Due Process* (Washington, DC: Inter-American Commission on Human Rights, Dec. 30, 2010); Detention Watch Network, National Immigrant Justice Center, and Midwest Coalition for Human Rights, *Year One Report Card: Human Rights & the Obama Administration’s Immigration Detention Reforms* (Washington, DC: Detention Watch Network, Oct. 6, 2010); Amnesty International, *Jailed Without Justice* (New York: Amnesty International, March 25, 2009); Human Rights First, *U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison*; Sarah Mehta, *Deportation by Default: Mental Disability, Unfair Hearings, and Indefinite Detention in the US Immigration System* (New York: Human Rights Watch and American Civil Liberties Union, July 26, 2010).

Despite its lamentable track record and failure to make even marginal progress on many of these issues over the span of many years, Congress passed legislation in 1996, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“the 1996 Immigration Act”), that has nearly tripled the number of noncitizens in INS custody. The act requires the ICE to detain: virtually all immigrants inadmissible or deportable on criminal and national security grounds; virtually all asylum seekers who present themselves at the border but lack proper documents, until they can demonstrate a “credible fear” of persecution; those seeking admission to the United States who appear inadmissible for other than document problems; and those ordered removed for 90 days or if the person “conspires or acts to prevent his removal” for more than the 90-day “removal period.”¹⁵⁸

This legislation resulted in significantly expanded categorical approaches to mandatory detention.

Rather than impose a burden upon the government to justify the need to detain individuals on a case-by-case basis, the law mandates detention of certain categories of immigrants without a bond hearing or any other judicial review. An individualized approach would require the government to demonstrate the need to restrict an immigrant’s freedom based on a risk of either flight or danger to the community. The government would then need to show that its intended means of mitigating any flight risk or danger to the community are the least restrictive ones.

By 2009 about 66 percent of immigrants in detention were held under mandatory custody provisions.¹⁵⁹ Two of the most common triggers of mandatory detention are criminal convictions—even minor or first-time offenses for which no jail time is required—and expedited removal (as described in detail in Section One). Long-term legal permanent residents and other immigrants are held in mandatory detention if they have been convicted of certain criminal offenses for which the person spent no time in jail. More than half of the immigrants detained in 2009 and 2010 had no criminal histories, and among those who did, almost 20 percent were for traffic-related offenses.¹⁶⁰ Only 11 percent of the detainees with felony convictions have committed violent crimes.¹⁶¹

Mandatory detention laws are responsible for detaining thousands of immigrants, such as asylum seekers, refugees who have adjusted to lawful permanent residency, and undocumented immigrants, without review of an individual’s circumstances. These laws have expanded a system of arbitrary detention at a great expense to the U.S. government, because ICE is required to detain individuals categorically, even when expensive detention may not be necessary. Thus, the mandatory detention structure strips the ICE bureaucracy of discretion and undermines the efficiency and stewardship of its funding. Indeed, during the congressional debate leading to the 1996 mandatory detention statutes and afterwards, INS publically argued against such a structure.¹⁶²

Additionally, mandatory detention contradicts international law and stands in contrast to other systems of justice in the United States. While recent parole policy changes have created a narrow exception for arriving asylum seekers, the laws continue to limit government discretion to release them, even when detention is deemed unnecessary.

158. CLINIC, *The Needless Detention of Immigrants*, p.2, citing the following:

- Public Law 104-208, 110 Stat. 3009 (Sept. 30, 1996)
- INA sec. 236(c)(1); 8 CFR sec. 236.1(c)
- INA sec. 235(b)(1)(B)(ii)-(iii)(IV); 8 CFR sec. 235.3(b)(2)(iii) and (4)(ii)
- INA sec. 235(b)(2)(A); 8 CFR sec. 235.3 (c)
- INA sec. 241(a)(1)(C)(2); 8 CFR sec. 241.3

159. ICE, “ICE Fiscal Year 2010 Enacted Budget,” November 5, 2009, <http://www.ice.gov/doclib/news/library/factsheets/doc/2009budgetfactsheet.doc>; Dora Schriro, *Immigration Detention Overview and Recommendations*.

160. American Civil Liberties Union of Georgia and Georgia Detention Watch, “Securely Insecure: The Real Costs, Consequences & Human Face of Immigration Detention.”; U.S. Immigration and Customs Enforcement, *Immigration Enforcement Actions: 2010* (Washington, DC: U.S. Department of Homeland Security, June 2011), <http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf>.

161. Dora Schriro, *Immigration Detention Overview and Recommendations*, 2.

162. Testimony of Doris Meissner, INS commissioner, before the Senate Subcommittee on Immigration, Sept. 16, 1998: “Most of the people for whom custody is mandatory are people we want removed from the United States. However, in some cases, no purpose is served by maintaining the person in custody during the entire process. Accordingly, while we agree that we have discretion to determine whether to pursue removal, we firmly believe that determination should not be dictated by whether the person’s custody will be mandated by the statute.”



Even under current laws, however, unnecessary detention need not be the case. The law's mandatory detention provisions could be satisfied through home detention and other alternative forms of custody. In addition, thousands of immigrants in ICE custody could be released under supervision.

ii. Interpretation of custody impedes effective usage of ATD.

The U.S. criminal justice system commonly uses an array of custody options, such as electronic GPS tagging and house arrest, based on an individualized risk assessment of a defendant, to meet pre-trial and post-sentencing needs.¹⁶³ Developed and studied over several decades, these programs have proven more effective and cost far less than incarceration. Yet the immigration system has only recently begun employing these methods of supervision on a limited basis.

The continuum of monitoring strategies provides tools with varying degrees of restrictions upon freedom of movement, including electronic monitoring via radio frequency and GPS, unannounced home visits, and telephonic reporting requirements.¹⁶⁴ Although ICE does not recognize any ATDs as custodial measures, it employs those with high levels of restriction that equate to custody.

Very intensive home detention restricts movement at a level that amounts to custody. In a 1996 report on the home detention of immigrants, Vera Institute warned, "Expansion of a home detention program to include persons who would otherwise be released increases a program's cost, diverts resources from persons appropriate for electronic monitoring, and curtails individuals' liberty unnecessarily."¹⁶⁵ Focusing on both the financial and human cost of imposing unnecessary restrictions, Vera's report emphasized that ATD programs that otherwise restrict liberty should be limited to detainees who would not otherwise be released on bond or other conditions.¹⁶⁶

Supervision and monitoring associated with GPS ankle monitors also restricts movement enough to constitute custody. This is a practice commonly accepted for offenders who do not require the level of supervision provided by a detention facility. Similarly, ICE's use of electronic tagging imposes a level of restriction that amounts to constructive custody.¹⁶⁷ Thus, the government should consider enrolling those who are mandatorily detained under INA sections 235 and 236.

Previously, the government relied heavily on technologies, such as electronic ankle devices with 24-hour GPS monitoring. This is happening to a lesser extent under ISAP II. The devices are approximately five inches wide—too large to conceal under clothing. The batteries must be charged daily and can require the wearer to remain attached to an electrical outlet for as long as three hours. In addition, people who have worn them have experienced stigma and indignity as a result. The devices make it extremely difficult for the individual to participate in daily life activities.

ICE does employ some noncustodial tools that are less restrictive. The majority of individuals released on bond, on their own recognizance, or on parole are currently monitored through regular mandatory appearances either in immigration court or with U.S. Citizenship and Immigration Services (CIS). In addition, there are three different processes used for periodic supervision. Some immigrants are required to call a designated phone number from another designated number at set intervals, some must present themselves to an immigration official at a designated office, and some are required to open

163. The federal sentencing guidelines expressly permit substitution of all or part of a prison sentence with alternatives to incarceration that include intermittent confinement (spending nights and weekends in physical custody or community confinement) in a community treatment center, halfway house, or similar residential facility, or home detention. Whether these options are available to a particular defendant depends not only on the seriousness of the offense committed but also an assessment of the individual's criminal history, if any.

164. ICE, "Alternatives to Detention for ICE Detainees."

165. Vera Institute of Justice, *Home Detention for Immigration Detainees, Would it be Useful, Legal, and Effective?* (New York: Vera Institute of Justice, September 1996), 9-10, <http://www.vera.org/download?file=640/353.4vi.pdf>.

166. Ibid.

167. Constructive custody implies a certain level of restraints that prevent an individual from moving freely, but is distinguishable from actual custody.

their homes for official visits as part of their supervision. These processes are especially common during the first few months following release from ICE custody and have been employed through the local ICE offices as well as the various ATD programs.

As UNHCR concluded, in certain situations the level of restrictions imposed upon individuals by alternatives to detention may amount to a restriction of liberty that more accurately constitutes an alternative form of detention.¹⁶⁸ According to the American Immigration Lawyers Association, “All of DHS’s alternatives to detention programs rely heavily on electronic [tagging] devices which seriously restrict an individual’s freedom of movement—thereby converting the program into an alternative form of custody rather than an alternative to detention.”¹⁶⁹

Clearly, the efficacy of tools for monitoring and supervising migrants must be evaluated according to the doctrine of the least restrictive alternative. The use of overly restrictive tools may yield high compliance rates, but will yield poor results vis-à-vis the other critical goals of ATD programming.

The U.S. government may increase the restrictions of movement as a consequence for noncompliance. The other most common consequence is the financial costs of defaulting on a bond. Some immigrants are released upon payment of a bond, which is refunded when the removal proceedings or process are complete and the individual has complied with all conditions. If they do not comply, they may lose the entire amount.

During her confirmation hearing in October 2007, ICE’s former assistant secretary Julie Myers said that Detention and Removal Operations “is expanding the [electronic tagging] program to encompass a larger portion of the non-detained docket, as current funding levels allow.” Thus, an increasing number of people who were deemed to be low risks and residing in the community appeared at regularly scheduled check-in appointments with ICE and left with electronic tagging monitors that radically and unjustifiably curbed their freedom. Similarly, in its FY 2009 salary justification to Congress, DHS described this practice as modifying a “condition of release.” This vision is limited to the components of some ATDs that impose supervision and other conditions, but fails to recognize the more holistic components of ATD (e.g., case management or referrals to services) and thereby arbitrarily circumvents reliance on bond, regular in-person appointments, or other sureties. Using ATDs this way is inappropriate in the absence of a demonstrated need for coercive measures that restrict movement to mitigate the risk of flight or danger to the community in an individual case. ICE statements signal an institutional preference toward coercive enforcement tactics that restrict the liberty of those who were already released from detention. This undermines the cost benefit of ATD as well as the validity of dedicating resources to the least restrictive means necessary.

At the time of this report, the ICE resists acknowledging that methods such as home arrest, or 24-hour GPS monitoring amount to constructive custody and thus satisfy mandatory custody or detention. This confining legal interpretation requires physical incarceration at a heavy price to taxpayers as opposed to custody that is constructed by less restrictive means. Constructive custody options are legally recognized alternatives in the criminal justice system, but not in the immigration system. The government’s position creates a prohibition on utilizing anything other than detention for people held in mandatory custody. Hence, mandatory custody provisions have become mandatory detention provisions.

There are two problems with this. First, categorical mandates without judicial review are arbitrary restrictions on liberty. Second, detention is not the only form of custody. At a certain level, intensive supervision and restrictions on liberty imposed by means other than detention constitute custodial control. Consequently, alternatives—like ISAP II—can be utilized to satisfy decisions to hold an individual

168. UNHCR, *Back to Basics*, 42 (citing *Celepli v. Sweden*, HRC Case No. 456/1991, and *Karker v. France*, HRC Case No 833/1998).

169. American Immigration Lawyers Association, “Position Paper: Alternatives to Detention,” July 3, 2008, <http://www.aila.org/content/default.aspx?docid=25874>.



in custody. ICE must employ the full range of mechanisms for custody and control to create a stronger infrastructure for effectively controlling immigration and meeting the related objectives of spending money wisely, avoiding unnecessary harm to immigrants, comporting with legal principles, and helping integrate immigrants who have legal relief so they will eventually become part of the community.

iii. The system lacks mechanisms to prevent prolonged, indefinite detention.

As discussed earlier, the length of time spent in detention may be prolonged or indefinite for people applying for relief from removal or who cannot be returned to their homelands. The presumption to detain drives prolonged and indefinite detention. As discussed above, the Supreme Court reads limits into this plenary detention power, particularly to avoid constitutional questions. However, the statutes and regulations generally require little in the way of periodic custody reviews or time limitations.

While the statutes authorizing custody do not limit the length of time DHS may hold an individual in custody, the federal courts have interpreted implicit limitations in order to avoid prolonged, indefinite detention. In *Zadvydas v. Davis*, the Supreme Court held that the Immigration and Nationality Act's Section 241(a)(6) "does not permit indefinite detention" and only authorizes detention for the "period reasonably necessary to bring about that [noncitizen's] removal from the United States."¹⁷⁰ The court said the purpose of detention in this statute is to ensure that the government can readily deport noncitizens with a final order of removal, but "if removal is not reasonably foreseeable, [then] the court should hold continued detention unreasonable and no longer authorized by statute."¹⁷¹ In other words, the purpose of detention loses meaning when someone cannot actually be deported. The court determined that six months is a reasonable period of time for the government to get someone deported from the United States. If six months pass and the noncitizen claims that there is "no significant likelihood of removal in the reasonably foreseeable future," the government must prove the contrary, i.e., there is a significant likelihood of removal that necessitates detention, in order to justify continued detention.¹⁷²

The holding of *Zadvydas* was then codified in Section 241.13 of the Code of Federal Regulation establishing "special review procedures" for noncitizens ordered removed, detained beyond the removal period, and already subject to the custody review procedures under 8 CFR, Section 241.4. These regulations are the only example of a codified limitation on the length of detention.

Since the *Demore* decision, circuit courts have called upon DHS to demonstrate the need to detain someone when their detention is prolonged (i.e., exceeds the average length of time to deport).¹⁷³ By the logic of these cases, the custody of persons who have been detained for prolonged periods of time should be reviewed, with a presumption for release. If the government fails to do so, it must release the individual from detention.

iv. Recent shifts as a matter of discretionary policy signal a move away from the detention presumption for certain individuals.

DHS revised its policy memoranda on enforcement priorities and prosecutorial discretion in June 2011.¹⁷⁴ The use of the department's prosecutorial discretion, which refers to its authority to decline

170. *Zadvydas v. Davis*, 533 U.S. 678, 698 (2001).

171. *Ibid.*, 699-700.

172. *Ibid.*, 701.

173. See *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003); *Tijani v. Willis*, 430 F.3d 1241 (9th Cir. 2005); and *Casas-Castrillon v. Dep't of Homeland Sec.*, 535 F.3d 942 (9th Cir. 2008).

174. Memo from Morton, "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens," June 17, 2011 (hereinafter Morton, *Exercising Prosecutorial Discretion*), <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

to enforce immigration laws against certain individuals and groups, is based on two premises that are outlined in two memos from DHS Assistant Secretary Morton. “The first is the necessity of using limited resources wisely. . . . The second theory of prosecutorial discretion concerns compassionate and humanitarian use of law enforcement tools.”¹⁷⁵ These memos appropriately describe a non-binding framework for making smart and principled decisions on how to enforce the law that should be codified in statute or regulation to endure.

The memos streamline the sundry related memos that have been issued over the years, and they move forward by calling upon ICE employees—including trial attorneys—to take affirmative steps to implement prosecutorial discretion. Specifically, Morton’s memo lists 19 factors that should be considered when deciding whether to exercise prosecutorial discretion for humanitarian reasons. It also identifies categories of individuals who warrant “particular care” when making discretionary prosecutorial decisions. The guidance demands that ICE allocate expensive detention resources in accordance with the enforcement priorities.

However, these policies do not explicitly empower ICE employees to exercise prosecutorial discretion when an individual falls into one of the categories of people whose detention is mandatory. So they do not directly address the presumption to detain the more than 60 percent of people currently held in detention under the categorical mandatory detention laws. Furthermore, these policies are neither in agency regulations nor enacted by Congress and, thus, may be rescinded by the agency at any time.

B. The system lacks individualized risk assessments to determine who needs to be detained or otherwise supervised to ensure appearance and removal.

In allocating resources to measures that deprive liberty properly, the problem with a lack of standard risk assessment is twofold. First, the government is detaining categories of people without demonstrating a legitimate need for detention. Unnecessary detention drives up the cost of detention and undermines due process and other fundamental human rights obligations. Second, the government’s ATD enrollment process selects from a limited number of people in detention, and fails to measure the appropriate level of supervision and support needed through ATD programming.

The largest gap in risk assessment is the total absence of individualized assessment of risk for people subject to mandatory detention. There is also no standard assessment of risk with judicial review for people eligible for parole, such as arriving asylum seekers who are found to have a credible fear of return. Even those who are eligible for bond but cannot pay it do not receive periodic risk assessments. Finally, there is no standardized, transparent, individualized assessment of risk for people with final orders of removal who cannot be removed, including people with orders granting temporary protection from removal as a protective measure against persecution or torture.

Using individualized custody determinations could improve efficiency by maintaining the detention levels necessary and diverting those resources to more appropriate means of ensuring that immigrants report for immigration proceedings. Detention is only appropriate when the U.S. government objectively demonstrates, with clear facts, that it is the only means possible to meet a legitimate government interest. Without a standardized risk assessment tool, the government is not in a position to be able to articulate these factors for each and every individual it encounters. On the contrary, U.S. law mandates categorical approaches toward certain groups of people, such as those seeking asylum or those who have a criminal conviction, however minor. Doing so runs afoul of the government’s international and domestic legal protections owed to people in the country.

175. Shoba Sivaprasad Wadhia, *The Morton Memo and Prosecutorial Discretion: An Overview* (Washington, DC: Immigration Policy Center, July 2001), 4, http://immigrationpolicy.org/sites/default/files/docs/Shoba_-_Prosecutorial_Discretion_072011_0.pdf.



ICE is currently developing the scientific risk assessment tool discussed in detail above. However, given the constraints of the immigration laws that mandate detention for categories of immigrants, the assessment of risk factors will not benefit the system because ICE will use that data for the majority of people the agency detains. Therefore, it will neither significantly reduce the prevalence of arbitrary detention for most detainees nor will it help the government save money, increase compliance, and observe legal obligations unless ICE changes its legal position on the use of constructive custody measures or Congress changes the mandatory detention laws.

The parole policy for arriving asylum seekers who pass credible fear interviews is one exception to the general absence of individualized assessments. While this change in policy is positive, the lack of support for those who are released is a growing concern. It is imperative that those who are released have access to community support programs, e.g., legal services, and other resources. The absence of these undermines the individual's ability to comply with the legal proceedings as well as the purpose of such a policy in the first place.

***Example:** To protect his family and save his own life, Ahmad fled his home country of Afghanistan after being targeted by the Taliban as a “U.S. loyalist” for providing translation assistance to the U.S. Army in 2002. When he came to the United States seeking protection and attempted to enter with a false passport, he was detained. He claimed asylum and was found to be eligible; he met the refugee definition, he was credible, and he established a well-founded fear of persecution if he returned to Afghanistan. Nevertheless, an immigration judge denied his initial asylum application because he did not attempt to relocate within Afghanistan before escaping to the United States. Ahmad appealed his case. Because he was considered an “arriving alien,” he was not eligible for a custody determination before a judge. As an asylum seeker who had established a credible fear of persecution, he was eligible for parole, but ICE determined that he was a flight risk because he lacked community ties. Ahmad remained in detention for more than a year before he was granted asylum and released from detention. Ahmad was a perfect candidate for a community-based ATD program that could have provided him the support he needed while fighting his case without imposing severe restrictions on his liberty and wasting valuable taxpayer money.*

C. Without a system to develop the necessary data indicators as well as mechanisms to collect and report indicators, ICE cannot adequately set goals or evaluate its use of either detention or ATD.

Another historic challenge for DHS's use of alternatives is acquiring adequate data. Data is unavailable, not collected, or evaluated incorrectly. For example, although ICE regularly releases individuals on bond and other means of less restrictive measures such as parole, sureties, or release on one's own recognizance, these measures are neither monitored as ATD programs nor tracked. For the rest of the program, compliance and cost efficiency cannot be measured based on the current analyses and data collected.

At a minimum, ICE must collect information necessary to allow the agency to comply with the law, including detaining only for authorized reasons and periods of time. The 2009 MPI report found that ICE's systems missed information that would allow it to make informed and timely decisions. In it ICE officials have acknowledged that the agency does not get “complete and accurate information” and “its previously released reports are sometimes incorrect.”¹⁷⁶ Although ICE signaled significant

176. Donald Kerwin and Serena Yi-Ying Lin, *Immigrant Detention: Can ICE Meet its Legal Imperatives and Case Management Responsibilities?*

progress toward setting its own data measures, the measures do not provide for collecting and publicly disseminating the following data:

- Daily costs of the variations of different monitoring mechanisms within ISAP II
- Number of individuals denied release from ICE custody
- Number of individuals released and disaggregated according to release on recognizance, bond, ISAP II, or other alternatives while their immigration proceedings are pending
- Number of individuals pursuing legal relief in their court proceedings enrolled in ISAP II
- Number of individuals on telephonic reporting only, passive GPS tagging, active GPS tagging, and the related rates of appearance
- Daily cost of monitoring individuals released to the community of alternatives to detention beyond the ISAP II program
- Number of grants of protection of legal relief for detained cases versus nondetained cases
- Percentage of individuals who were released from detention, received case management services, and failed to appear for court hearings
- Number or percentage of individuals who appeared at final hearings
- Number or percentage of individuals removed after successfully participating in the program
- Number of individuals who abscond or leave the country on their own
- Cost variations between individuals in the current program who are pursuing relief versus those not pursuing it

ICE's program lacks clear indicators of success that would permit participants to graduate to less intensive phases of the program or escalate based on obvious factors. Historically, DHS has based the success of its programs on removal rates, but success should also be measured in terms of cost savings when used in lieu of alternatives. There is limited institutional buy-in for investment in alternatives in lieu of detention, with detention being the norm and default *modus operandi*. The lack of meaningful screening and standards for assessing compliance has resulted in unnecessary supervision and monitoring of many of the program's participants.

Additionally, ICE lacks robust data to articulate its own measures of success and how it meets them in the public forum. ICE cannot be a strong public proponent of its own program until it tracks the data necessary to indicate the cost savings and the humanitarian and health crises averted because of the program. LIRS and NGOs must rely on a body of research and data and logic that shows that alternatives work and save other governments significant costs, even in countries that offer health care and other social services, instead of relying on more pertinent U.S. government data. Little is known about appearance and removal rates of individuals released on bond and other alternative measures beyond the mandate of the current ATD unit within ICE.

D. Absence of a robust case management system impedes critical and appropriate referrals to social services.

The United States lacks government-funded ATDs that are tailored to the broad spectrum of individual needs. With ISAP II, DHS has made some progress in developing the various components necessary to support a more robust system of supervised release. Yet real case management is lacking, and the agency has not made progress in developing a full continuum of alternatives.

Case management requires identifying the needs of the individual, addressing those needs with available resources, and building resilience in the individual to face the range of potential outcomes



in their cases.¹⁷⁷ Case management and supervision are generally administered by experienced social workers or other social service professionals. They form an essential link among participants, immigration officials, and the community. Caseworkers make sure people understand their immigration status as well as the legal and administrative immigration processes, duties, and responsibilities.

When implemented properly, case management can help resolve immigration more fairly, which in turn should build the confidence of both adjudicators and applicants in the determination process and may reduce invalid appeals.¹⁷⁸ The key to this is to provide the right information about immigration proceedings, options for relief, and strategies for obtaining counsel. Knowledge of the process and available options may reduce participants' suspicions about being cheated by the system and may empower them to make more timely decisions about their cases. And access to counsel significantly improves their chances of getting a full, fair hearing.

Lack of case management inhibits the opportunity to promote individual responsibility. In the United States, many requirements are placed on immigrants who typically do not have the support system they need to be responsible for their own success. For example, immigrants are required to respond to requests for evidence in order to advance their cases in removal proceedings. Those who have received deportation orders or permission for voluntary departure must also take steps toward returning to their countries of origin.¹⁷⁹ While beyond the scope of this report, recent surveys of international policies and practices provide more detail about the things immigrants must do to assist in their cases.¹⁸⁰

Case management can also effectively address increased levels of risk or noncompliance. For example, if someone fails to report to the immigration official as scheduled, proper case management would allow the government to more fairly step up supervision as necessary. Vera's AAP pilot utilized the case management model in this manner. Supervision staff responded to program violations, including failure to meet reporting requirements, by implementing sanctions.¹⁸¹ Sanctions varied based on the seriousness of the violation as well as the participant's history in the program from verbal warnings to more meetings or telephone check-ins to returning to detention.¹⁸² The sanctions were implemented early in order to avoid escalation of noncompliance to the point that a participant does not come to a hearing.¹⁸³

E. Access to legal and social services is insufficient.

Individuals held in custody by ICE have severely limited access to legal services. Because ICE's authority to detain is limited to removal proceedings, which involve administrative civil violations, these individuals are not in criminal proceedings and do not have access to public defenders. Access to many social services is equally limited, setting apart the United States (and any ATD mechanism) from other countries in terms of social welfare practices. Robust services do exist here—but through charity and civil society organizations. Access to these services may require strong partnerships with these organizations to support the safe and successful appearance of individuals without resorting to costly detention. A holistic social service approach rooted in local relationships has the greatest potential to meet the immediate and long-term needs of people after they are released from ICE custody and throughout their immigration proceedings. In appropriating

177. IDC Handbook.

178. *Ibid.*

179. *Ibid.*, 36-37

180. IDC Handbook and UNHCR, *Back to Basics*.

181. Vera, *Testing Community Supervision*, 16.

182. *Ibid.*

183. *Ibid.*

funds for the programs, Congress has repeatedly recommended that ICE collaborate with community-based organizations for ATD, but to date, it has not done so.

The support and information that immigration attorneys (or legal service providers accredited by the U.S. Board of Immigration Appeals) give immigrants about the legal process and the consequences of not showing up at DHS check-ins and court hearings is crucial. In addition to overall case management, access to legal services advances the government's interest in ensuring that everyone released from detention with pending applications or orders of supervision complies with the terms of release and appears at subsequent court hearings.

Adequate legal assistance also creates a more expeditious and fair system. It can help reduce delays in proceedings. Immigrants who lack information about the legal process or the law may request multiple continuances of their hearings because they do not know how to proceed. Improving access to legal counsel means that immigration judges will not have to spend as much time instructing unrepresented immigrants. In addition, with access to information about their cases and the likelihood of obtaining legal relief, people are better equipped to make informed decisions about whether to voluntarily deport, resulting in fewer immigration applications for relief and fewer cases in immigration courts. Reducing these delays in proceedings will reduce the length of time an individual spends in ATD.

The administration must identify and partner with nonprofits to ensure greater access to legal and social service for individuals released from detention in order to realize the cost savings of decreased use of detention. Nonprofits in the civil society sector, versus for-profit models, are especially vital to success in the United States because outcomes necessitate quality output, not just quantity. Output quality is difficult to write into a contract and even more challenging to monitor. Access to social and legal services to meet the goal of reducing unnecessary detention requires quality.

In this regard, potential civil society sector outcomes key to the success of ATDs in the United States include greater access to goods and services than the government or business sectors can provide for lower income individuals, improved basic medical care and education, and stronger local cultural and social cohesion.¹⁸⁴ Nonprofits are the ideal partners for this work because they are mission-driven rather than profit-driven. Other significant attributes of nonprofits include a primary interest in social rather than economic outcomes, control by communities rather than private owners, empowerment by tradition and values rather than money, and a primary goal expressed in values rather than in wealth creation.¹⁸⁵

In the end, nonprofits tend to generate more resources for the investment because of their ability to attract volunteers and donations of goods and services. A closer look at current public-private initiatives for legal screenings and services as well as current nonprofit service responses to individuals released from detention reveal a wealth of additional resources to leverage and build upon.

i. Public-private partnerships for provision of social service coordination for refugees and other immigrant populations

Access to social services—particularly for housing and mental health—will increase compliance rates by improving the stability of immigrants enrolled in ATD programs. Because a case management model facilitates access to both legal and social services, the lack of robust case management is an impediment to access. For decades, nonprofit agencies have delivered case management to resettled refugees under the Department of State Refugee Admissions Program. These programs specialize in case management for refugee, asylee, and immigrant populations, especially for vulnerable individuals, and program staff have expertise in leveraging local resources to access needed services.

184. Waddal, Steve. "Societal Learning: Creating Big-Systems Change" *The Systems Thinker*, Volume 12, 2001.

185. *Ibid.*



While systemic case management makes it easier for immigrants to get access to existing legal and social services, current capacity is not sufficient to support the needs of all. Efforts to build that capacity have been extremely limited. Primarily, the focus has been on public-private partnerships for legal services in targeted detention facilities. The startlingly high number of immigrants who proceed unrepresented demonstrates the limitation of these initiatives.¹⁸⁶

ii. Public-private legal service screening initiatives

In 2003 Congress first provided funding for EOIR to establish the Legal Orientation Program (LOP). This was based on a model of presenting information on individuals' legal rights to groups of people in detention that was developed by the Florence Immigrant and Refugee Rights Project, a nonprofit legal services project in Arizona. LIRS supported the initiative and replicated it through other local partners to build the capacity for access for legal services in detention to prove the benefits and government efficiency to the government. The now federally funded LOPs typically include three components:

- an interactive “know your rights” group presentation conducted by a nonprofit agency;
- individual orientation, when detainees who are not represented by counsel can briefly discuss their cases with nonprofit personnel; and
- a referral or self-help component, in which individuals with potential claims for relief or who have made an informed decision to voluntarily depart after learning their rights under the immigration law are referred to pro bono lawyers or get self-help legal materials and training through group workshops.

Today, LOP has expanded to 25 detention centers across the country coordinated by the Vera Institute.

In partnership with the U.S. Office of Refugee Resettlement, LIRS created the Detained Torture Survivors Legal Support Network, a system of local legal service organizations that conduct orientation programs in ICE detention centers as well as screening for and identifying torture survivors among detainees.¹⁸⁷ Attorneys assist the survivors to make sure they receive a full legal assessment and orientation to the removal proceedings or removal process. In 2010 alone, the network's partners identified 262 torture survivors in immigration detention in geographic areas where the program is operational—Miami; New York City; Newark, New Jersey; Florence, Arizona; York, Pennsylvania; and Northern Virginia. They then connected the survivors with legal assistance to obtain protection from future torture in order to pursue full rehabilitation.

Without a systemic process for some form of legal intervention, efficient processing and appropriate resource allocation is nearly impossible. Initiatives that provide access to counsel through public-private partnerships are proven models that should be expanded and replicated, especially because they are the most cost-efficient way to ensure that individuals move through the system efficiently. Expanding these initiatives would greatly reduce the levels of unnecessary detention because immigrants eligible for release or legal relief would have the appropriate information to enable them to assume personal responsibility in pursuing their options.¹⁸⁸

While systemic case management makes it easier for immigrants to get access to existing legal and social services, there is not sufficient capacity to support the needs of all. Efforts to build that have been extremely limited. Primarily, the focus has been on public-private partnerships for legal services

186. National Immigrant Justice Center, *Isolated in Detention* (Chicago: National Immigrant Justice Center, September 2009), <http://www.immigrantjustice.org/sites/immigrantjustice.org/files/Detention%20Isolation%20Report%20FULL%20REPORT%202010%2009%2023.pdf>.

187. Founded by LIRS, the Network continues to operate under the leadership of LIRS partially supported by a grant from the Office of Refugee Resettlement's services to survivors of torture.

188. National Immigrant Justice Center, *Isolated in Detention* (Chicago: National Immigrant Justice Center, September 2009).

in targeted detention facilities. The startlingly high number of immigrants who proceed unrepresented demonstrates the limitation of these initiatives.

ii. Recent growth in informal hospitality initiatives


While delivering services to newcomers such as refugees has traditionally been a focal point of community-based programs for immigrant communities, a growing number of social service organizations have expanded the scope of their work to specifically include people negatively affected by immigration detention. These people have become more vulnerable in the United States as the topic of immigration remains politically charged and controversial, and the use of detention remains widespread. The need for nongovernmental assistance is increasingly more apparent as political, social, and economic environments change substantially. Local communities have seen increased anti-immigrant sentiment, harsher laws, less judicial discretion, increased use of detention for noncriminals in immigration proceedings, increased raids, and aggressive enforcement tactics. All of these factors have intensified the fear and anxiety immigrants feel, have separated families, and have overburdened the social service network for immigrants.

Today, a number of nonprofit groups are increasingly responding to requests for assistance for people recently released from ICE detention facilities. Community-based organizations have seen men and women released from detention with nowhere to go, no family or friends nearby with whom they can live, and minimal familiarity with their local surroundings. Recognizing the increased risk for exploitation and abuse, nonprofits have created hospitality programs to welcome individuals as they embark on a new life in the United States.

Aiming to provide safe shelter and basic social services, nongovernmental programs have found that previously detained individuals are comfortable approaching them for assistance during their legal proceedings. They are more inclined to appear for ongoing immigration appointments and ultimately are better able to integrate into their new community. See Appendix F for examples of hospitality and ATDs through the provision of post-release services.

The LOP and the Detained Torture Survivors Legal Support Network are examples of public-private partnerships that build capacity to screen individuals according to U.S. immigration law and to identify people eligible for release. Local hospitality initiatives responding to the call for habilitation of immigrants offer an opportunity for increased public-private partnerships for community support programs within the alternatives to detention continuum. These initiatives can help ICE control immigration in less costly ways that respect the U.S. commitments to human rights. Beyond these examples, there is a gap in capacity building for legal services nationally and no formal efforts to build social service supports.





Protecting the basic human rights of migrants and considering vulnerability factors when making custody decision should be hallmarks of U.S. immigration policy.

Conclusion

An effective use of a broad continuum of alternatives to detention can provide the U.S. government with the means to meet its responsibility to enforce compliance with immigration laws, meet its humanitarian and human rights obligations, and significantly reduce the financial burden of current enforcement policies.

The shortfalls of relying on a detention-first policy undermine all three of these goals. In the discussion of detained versus nondetained approaches to immigration control, the government needs to be able to decide if and when to use detention. This paper highlighted three critical elements to all successful enforcement measures that control immigration: an individualized assessment and process to challenge all custody decisions, robust case management tailored to individual needs, and access to legal and support services.

A review of the U.S. government's historical attempts to implement ATD revealed five overarching challenges that can and must be overcome:

- An overreliance on detention based on a presumption of the need to detain
- A lack of individualized risk assessments to determine who needs to be detained or otherwise supervised to ensure appearance and removal

- An absence of necessary data indicators and the mechanisms to collect and report those indicators in order to evaluate the use of detention and ATD
- An absence of a robust case management system with referrals to appropriate social services
- Insufficient access to legal and social services.

A process for individualized custody and classification assessments is one of three critical elements of success for any alternative control measure. Resources spent on supervision are fiscally prudent only if they are used on people who need it. Indeed, the restriction of liberty is not inherently inappropriate, but the restriction must be justified by an appropriate determination of individual risk.

As a first step, standardizing all decisions to restrict an individual's liberty and requiring independent review of all custody decisions opens the door for the United States to assume its burden to articulate why a person's liberty must be restricted. It also lets the government assume a leading role in protecting human rights for migrants, refugees, and asylum seekers, and invest resources in an infrastructure that supports release with the appropriate conditions as a preference to detention.

The U.S. government must make use of community support services and the case management model in order to develop ATD programs that are best for the individual, the community, and the federal government. Since the 1980s, projects operated by nonprofits here and abroad have provided tailored supervision, case management, and social services, and have consistently produced high appearance rates in immigration court at a far lower cost to the government than detention.

Immigration detention is the most expensive and least humane option the government has for assuring compliance with the immigration process. Release should be the first and preferred option whenever possible, alternatives to detention a second preference, and detention a last resort. Any use of detention should be in the least restrictive, nonpenal setting possible, and the decision to detain must be subject to judicial review at periodic intervals. Access to legal counsel is a minimal procedural safeguard against arbitrary and due process violations.



Compared to detention, ATD programs significantly reduce the financial costs of immigration enforcement. ATDs also reduce the human costs of enduring prolonged confinement.

Appendices

Appendix A: LIRS Recommendations to Congress and ICE..... 52

Appendix B: Principles for Risk Assessment..... 54

Appendix C: Model Custody Decision Tree 56

Appendix D: Factors for Decision Tree 57

Appendix E: Initiatives in Other Countries..... 62

Appendix F: Initiatives in the United States 64

Appendix A: LIRS Recommendations to Congress and ICE

Recommendations to Congress

1. Affirm the U.S. government's commitment to only use detention as a last resort by
 - A. enacting legislation mandating individualized assessments with judicial review that requires the government to prove that any restriction of liberty is lawful, necessary, and proportionate;
 - B. repealing all mandatory detention requirements, which will be replaced by the mandate for individualized assessments; and
 - C. codifying the lawful, legitimate reasons for and maximum length of detention consistent with international human rights principles.
2. Empower ICE to leverage resources according to demonstrated levels of risk and need by expressly defining the levels of restriction that amount to constructive custody, and by permitting ICE to satisfy custodial requirements by utilizing ATDs that rise to the level of constructive custody.
3. Increase resources for immigration court adjudications.

Recommendations to ICE

1. Create and implement policies and regulations to avoid detention unless necessary instead of waiting for Congress to mandate a legal presumption against detention.
2. Develop, implement, and evaluate a standardized method, i.e., a risk assessment tool, that is subject to judicial review and that will assess the need to detain as well as the risks of detention for vulnerable populations in need of special protections or support.
3. Maintain its authority over all ATD measures to determine eligibility of participants, set reasonable reporting and supervision requirements that are based on a validated, individualized risk assessment, and enforce compliance.
4. Consider using medical professionals, social workers, or other similarly trained staff to elicit the relevant information for periodic risk assessment.
5. Ensure that detention is only used in cases when the government has proved that none of the less restrictive alternatives to detention within the continuum of options will work for an individual.
6. Redefine and expand the dialogue on ATD to include all infrastructures that limit the use of detention as a measure of last resort when necessary. All open detention arrangements, constructive custody arrangements, community support programs, telephonic reporting, case management, bond, and sureties support a use of detention as a measure of last resort.
7. Recognize home detention and electronic monitoring devices as ATDs that amount to constructive custody and therefore would be appropriate options for people who are subject to mandatory detention.

8. Work with local, state, and other federal agencies to create or support access to individualized case management, legal services, basic needs (e.g., housing, food, health care), and documentation (e.g., proof of identity and status) in various communities.
9. Develop, support, and engage community-based programs that increase access to case management, legal services, basic needs, and documentation in community settings.
 - A. Identify local community support providers.
 - B. Develop a directory of social and legal services providers in apprehension and destination communities.
10. Develop a transparent, dynamic mechanism for applying various conditions in community-based settings when monitoring beyond court appearances is necessary.
 - A. Develop indicators and mechanisms to manage and analyze data in order to measure the efficacy of various strategies to achieve both removal and integration. An initial step should include developing a database to collect data on daily costs of ISAP II compared with detention.
 - B. Collect and disseminate data that tracks the number of individuals ICE decides to detain or release, and whether a person was released on recognizance, bond, an order of supervision, ISAP, or other ATD programs to be developed.
 - C. Work with EOIR to collect and disseminate data on the average length of different categories of immigration cases (e.g., asylum cases of detained and nondetained individuals), program completion rates, and statistics concerning the number of favorable immigration rulings, voluntary departures, removals, and absconders in ISAP.
11. Encourage government employees to use detention as a last resort through annual performance plans.
12. Evaluate the implementation of its policies to ensure that detention is used only as a last resort.



Appendix B: Principles for Risk Assessment

Detailed NGO Recommendations to ICE on Framework Principles for a Risk-Assessment Instrument

In order to make progress toward ICE’s public commitment to enhancing the security and efficiency of the detention system and ensuring the health, safety, and well-being of those in its custody, ICE needs meaningful processes in place to enable it to conduct an individualized custody assessment for every individual. This individualized assessment is necessary to ensure the proper use of ICE’s civil detention authority in appropriate cases and so the agency can determine appropriate conditions of facilities. A comprehensive, robust classification and assessment tool should allow ICE to make better decisions about who is detained and for how long, and will also make better use of limited government resources.

The following are principles of fundamental importance that we hope will serve to guide the process to inform the development of the assessment tool and next steps:

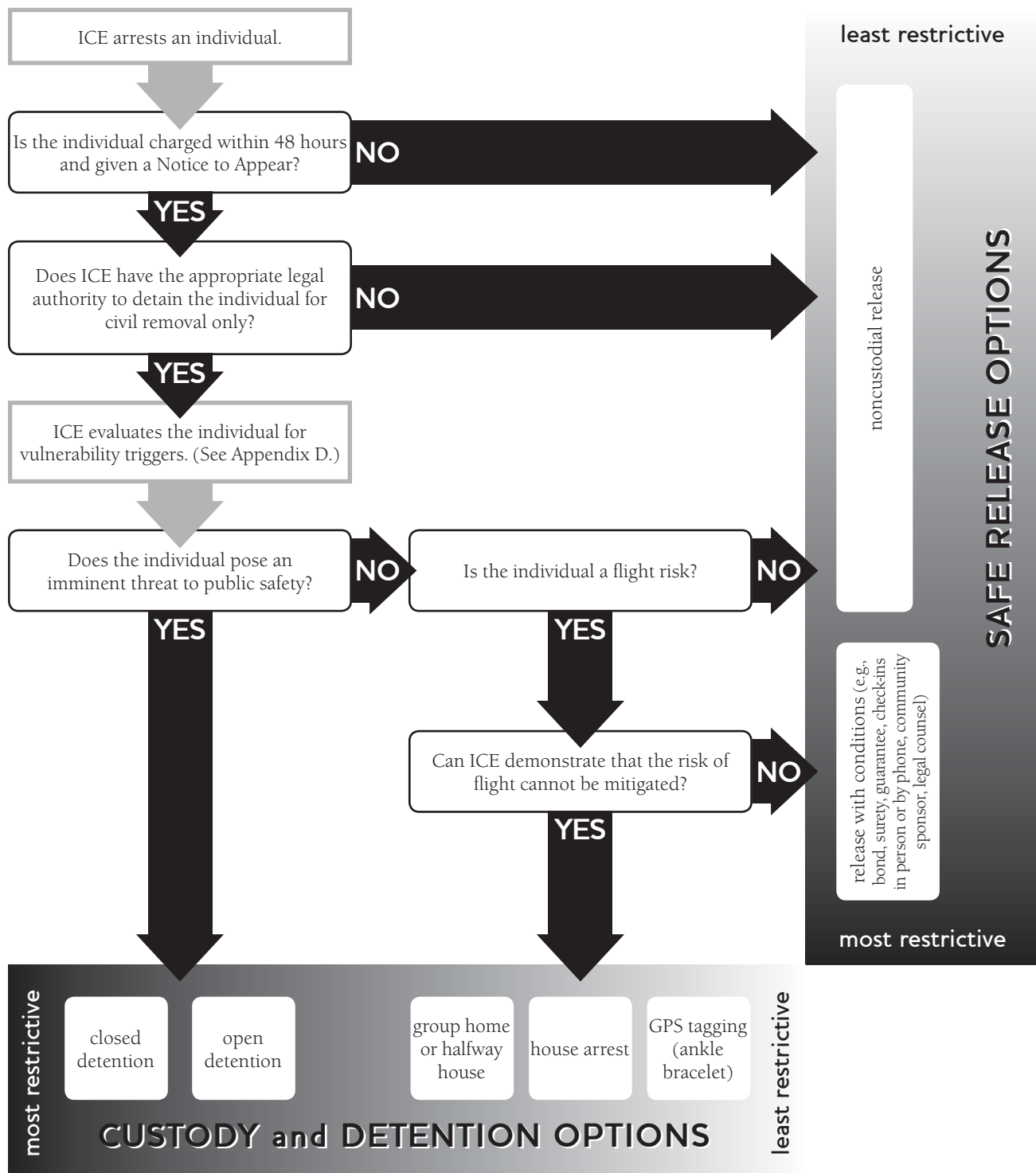
1. The tool must enable ICE to articulate why it is necessary to deprive anyone of his or her liberty. The tool is used at any time ICE or its contractors or delegates use the agency’s authority to deprive anyone of their liberty. The tool must be designed with an understanding that all custody decisions are subject to prosecutorial discretion and that ICE officers are required to exercise discretion in a judicious manner.¹⁸⁹ This means that in compelling cases ICE can and should utilize its authority to exercise discretion favorably (i.e., determining that a particular individual or class of individuals are not suitable for custody) to not detain someone.
2. After ICE has determined that deprivation of liberty is necessary and has articulated the need to detain that is consistent with its authority, the tool must trigger an individual determination as to the person’s eligibility for release on parole or affordable bond.
3. The tool should elicit individualized information, so that after ICE has determined that deprivation of liberty is necessary and articulated why a person is not eligible for release, the tool mandates the least restrictive setting appropriate for that individual’s safety and necessary to assure appearance, protect the community, or effect removal, including an articulated determination of whether an alternative to detention can mitigate or exacerbate the identified risk.
4. The tool must be dynamic, not static. It must ensure that eligibility for release is reconsidered at any point during custody when there is a change of flight risk circumstances (such as eligibility for relief, attainment of legal counsel, ability to post a bond, sponsorship by a community-based organization to provide shelter or other services that may cure this risk), or a change in risk of harm to the individual because of the custodial setting.
5. The classification and risk assessment tool must not be written in a way that expands the use of mandatory detention by precluding anyone with past criminal conduct (actual or alleged) from being considered for release.
6. Given the custodial impact of placement of ICE detainers on individuals in state or federal custody, ICE must develop national guidance regarding the issuance of ICE detainers to reflect the principles used to develop the tool.

189. Memorandum from Doris Meissner, INS commissioner, on exercising prosecutorial discretion, Nov. 17, 2000.

7. The information obtained through the tool cannot be used against the individual in immigration or court proceedings. ICE must collect confidential information in order to make informed decisions regarding appropriateness of custody or custody classification. It will not be able to do this without protecting information obtained for these decisions from potentially being used perniciously in determining eligibility for relief for removal or in a future criminal prosecution.

Appendix C: Model Custody Decision Tree

NGO Recommendations to ICE for Considering the Necessity of Custody and Detention or the Preferability of Safe Release



Appendix D: Factors for Decision Tree

NGO Recommendations Regarding Factors to Consider When Using the Custody Decision Tree in Appendix C

LIRS, together with a broad coalition of nongovernmental organizations working on detention reform, compiled the following charts to organize various factors for consideration when making determinations regarding the following:

- Is custody or detention necessary?
- If so, what is the appropriate level of custody or detention?
- When should other restrictions be placed on individuals' liberty to mitigate flight risk or threat to public safety?
- Which individuals present humanitarian considerations or “vulnerability triggers” that should inform all three of the decision points above?

We recommend that the federal government create an evaluation instrument that meets the goals and takes into account the factors outlined in the following table:

Instrument Goals	Factors and Triggers with Comments <i>(These factors are explained more fully on page 58.)</i>
Establish individual's identity.	<ul style="list-style-type: none"> • Individual has government-issued identification. • Individual does not have government-issued ID but can get it. • Individual has a third-party sworn affidavit as to his or her identity, and the affiant has government-issued ID. • Individual has neither a government-issued ID nor an affidavit, but he or she has made credible statements that do not raise doubts his or her identity.
Identify individuals that ICE has the authority to detain, according to the INA, who cannot be released because they pose an imminent threat to public safety.	<ul style="list-style-type: none"> • Significant history of violent felony convictions • Frequency of violent offenses • Degree of offense and whether violence was involved • When conviction occurred, over ten year old conviction should not be considered. • Length of sentence served • Age when offense was committed • Gang affiliation <i>This raises concerns given that gang experts have concluded that accurately determining gang membership is very difficult. Information in gang databases is often obsolete. The information documented in filed interview cards, which is later entered into the gang database, can be inaccurate and is the result of field interviews with patrol officers who have little or no experience with gangs. The unreliability of the information is exacerbated by inadequate departmental oversight and quality control measures. Additionally, it is easy to misinterpret symbols as gang-related when they are not. Experts have stressed that modern gangs make less use of symbols, including gang names, clothing, and traditional initiation rites, than gangs of the past. Such misinterpretation can lead to identifying individuals of specific ethnicities as gang members and mistakenly including them in gang databases.</i> • NGO recommendations: <ul style="list-style-type: none"> ◦ ICE must offer clear guidance to those who enforce ICE regulations on defining “gang affiliation” and determining whether a person is properly classified as a gang member. ◦ Any gang identification must require at least three independent sources of documentation that indicate actual membership. ◦ Individuals must have the opportunity to provide mitigating evidence before gang identification can be made. ◦ ICE must specify what information was relied upon to allege gang affiliation, e.g., body tattoos or clothing; names of police officers who gave information; gang database information, including dates and information when data was acquired.



Predict likelihood that a person will appear at and comply with immigration court proceedings.	<ul style="list-style-type: none"> • Individual is from a country to which removal is unlikely • He or she is represented by counsel • Prior supervision history. If the individual successfully completed probation or parole, then a favorable score should result. • Individual understands and articulates willingness to comply with conditions and responsibilities of release. <i>The subjective nature of this factor raises concerns: evaluation of this attitude could be easily abused, officers involved in making evaluation may have insufficient guidance, and cross-cultural challenges may become evident during the interview process. Could this be revised to include specific questions, including the following:</i> <ul style="list-style-type: none"> ◦ Did the individual provide answers to questions asked during the interview process? ◦ Were the questions asked in a language the individual could understand? ◦ Did the government provide an explanation of individual's responsibility to appear at court proceedings? ◦ After an explanation of the conditions of release, if any, does the individual communicate his or her understanding and willingness to comply? • Ties to the community <ul style="list-style-type: none"> ◦ Has the individual lived at his or her current address for more than six months? ◦ Does the individual have any family members in this country? ◦ Are any family members local? ◦ Is there a non-U.S. citizen spouse, partner, or children in the country? ◦ Does the individual live with family members? ◦ Does the individual have financial stability and economic ties to the community? ◦ Does the individual own property? ◦ Is the individual employed, in school, or in a training program? ◦ Does the individual have known sponsors, U.S. citizen or other? ◦ Is the individual the caretaker for a minor child? ◦ Is the individual being detained with one or more of children? ◦ Does the individual provide financial, physical, or other direct support for others? ◦ Is the individual a member of a local place of worship? ◦ Does the individual have access to social services or shelter? • Ties to home country <ul style="list-style-type: none"> ◦ Did the individual live in his or her home country for more than two years after the age of 18? ◦ Has he or she traveled there within the last five years? ◦ Does the individual have family in the home country? ◦ Does he or she speak the language of the home country? • Eligibility for legal relief <ul style="list-style-type: none"> ◦ Substantive eligibility for relief? Is person eligible for relief under a provision of the Immigration and Nationality Act? ◦ Any pending petitions, including Department of Labor petitions? ◦ Any pending U.S. Citizenship and Immigration Services applications? ◦ Does individual have a valid claim to U.S. citizenship? • What stage of the removal process is the individual? <ul style="list-style-type: none"> ◦ Pre-trial? Post-order of removal? On appeal? ◦ Is the persons removal imminently foreseeable?
Ensure that detainees do not commit serious misconduct and will not victimize other detainees.	<p>Can the government reasonably predict that this individual may harm others while in custody?</p> <ul style="list-style-type: none"> • See imminent public safety threat factors listed above. • Analysis of most recent pending violent criminal charge or conviction with the following criteria: the degree of the offense, whether violence was involved, and the age of the individual at the time offense was allegedly committed. (convictions more than 10 years old with no intervening contact with criminal justice system must not be considered). • Escape from incarceration history • Number of disciplinary convictions while in incarceration • History and patterns of assaultive behavior [<i>Disciplinary findings arising from an underlying mental health problem of a detained individual should not qualify</i>] • Mitigating Circumstances <p>Will a detainee be at risk of victimization or harm? <i>See vulnerability triggers and factors below.</i></p>
Identify individuals that require special population management needs.	<p>See detailed chart below for tiered factors that will trigger a vulnerability that will require special attention.</p> <p>Types of harms in detention to be prevented:</p> <ul style="list-style-type: none"> • Lack of sufficient medical care • Psychological trauma • Physical abuse • Sexual abuse • Family separation and other severe hardship to dependent family members

We recommend that the government consider each of the following vulnerability factors to at the decision stage indicated:

	Decision Stage		
	Stage 1: Should the Individual Be Placed in Detention?	Stage 2: What Level of Supervision Is Warranted?	Stage 3: What Custody Classification Should Be Used?
Primary Vulnerability Factors	<ul style="list-style-type: none"> • Serious medical needs • Serious mental health needs • Cognitive or intellectual disability • Physical disability • Older than 65 • Younger than 20 or in Office of Refugee Resettlement (ORR) custody • Pregnant or nursing • Detained with children • Supporting dependents • Risk of family disruption • Victim of torture or persecution • Victim of abuse, violence, crime, or trafficking • Risk based on actual, or perceived sexual orientation, gender identity, or gender nonconformance • Perceived risk of abuse for other reasons 	<ul style="list-style-type: none"> • Serious medical needs • Serious mental health needs • Cognitive or intellectual disability • Physical disability • Older than 65 • Younger than 20 years old or in ORR custody • Pregnant or nursing • Detained with children • Supporting dependents • Risk of family disruption • Victim of torture or persecution • Victim of violence, crime, or trafficking • Risk based on actual or perceived sexual orientation, gender identity, or gender nonconformance • Perceived risk of abuse for other reasons 	<ul style="list-style-type: none"> • Serious medical needs • Serious mental health needs • Substance abuse concerns that are at risk of serious medically consequential withdrawal or that carry a dual diagnosis of mental health and substance abuse problems • Cognitive or intellectual disability • Physical disability • Older than 65 • Younger than 20 or in ORR custody • Pregnant or nursing • Detained with children • Risk of family disruption • Victim of torture or persecution • Victim of abuse, violence, crime, or trafficking • Risk based on actual or perceived sexual orientation, gender identity, or gender nonconformance • Risk of severe social isolation • Perceived risk of abuse for other reasons • Individuals identified as affiliated with gang membership who have only low-level affiliation • Risk based on sex offense history
Primary Vulnerability Factors	<ul style="list-style-type: none"> • Ongoing substance abuse treatment • Recent psychological trauma • Risk of severe social isolation • Court-ordered mental health treatment and/or ongoing mental health treatment 	<ul style="list-style-type: none"> • Ongoing substance abuse treatment • Recent psychological trauma • Risk of severe social isolation • No violent history • No prior history of incarceration or detention • Small or frail • Risk based on sex offense history • Court-ordered mental health treatment or ongoing mental health treatment 	<ul style="list-style-type: none"> • No violent history • No prior history of incarceration or detention • Recent psychological trauma • Small or frail • Males with slight builds • Limited English proficiency • Individuals with dietary restrictions • Individuals with religious accommodation needs • Salvadorans eligible to apply for asylum in ICE custody pursuant to 8 USC 1357 • Court-ordered mental health treatment or ongoing mental health treatment

Explanation of vulnerability factors

1. Individuals with serious special medical needs as determined by medical personnel
 - a. Individuals whose medical condition requires infirmary-level care, daily nursing, intravenous medication, more than weekly medical or laboratory contact, or pain management (or any other medical care) in excess of what is provided in detention.
 - b. Individuals who have medical interventions that could significantly increase mortality or morbidity
 - c. Individuals who have serious medical needs including post-surgical care, severe asthma or allergies, sleep-related problems, strict dietary needs, and conditions that require doctor visits more than twice a month.
2. Individuals with serious special mental health needs as determined by medical personnel
 - a. Patients who may not be sufficiently stable to place in general population, such as patients with both Axis I and Axis II disorders who are symptomatic at the time of intake or who have tried to harm themselves or commit suicide within the past 12 months.
 - b. Individuals who are already getting care or treatment in the community or who have access to care in the community.
 - c. Serious mental health needs include conditions that require being treated with psychotropic medication and regular supervision by mental health professional, suicidal tendencies, etc.
3. Individuals with cognitive/intellectual disabilities
4. Individuals with physical disabilities
5. Individuals older than 65
6. Individuals younger than 20, or children coming from ORR custody
7. Pregnant or nursing women
8. Individuals who are being detained with one or more of their children
9. Individuals who provide financial, care, or other direct support to their children, parents, spouse, long-term partner, or other dependents (focus should be on loss of the support role and possibility of hardship or harm)
10. Individuals at risk of serious family disruption from detention (e.g., individuals in the midst of civil litigation to determine important family rights, parents at risk of losing custody of children or whose children could be placed in custody of the state if they are detained)
11. Victims of torture or persecution
 - a. Based on pending or approved petition under VAWA, T Nonimmigrant Status petition, or U Nonimmigrant Status petition (conclusive) **or**
 - b. Based on answers in screening **or**
 - c. Based on credible third-party information, e.g., attorney, medical provider, prior custodian, law enforcement officials, NGO representatives
12. Victims of abuse, violence, crime or trafficking
 - a. Based on pending or approved petition under VAWA, T Nonimmigrant Status petition, or U Nonimmigrant Status petition (conclusive) **or**
 - b. Based on answers in screening **or**
 - c. Based on credible third-party information, e.g., attorney, medical provider, prior custodian, law enforcement officials, NGO representatives
13. Individuals at risk of abuse due to actual or perceived sexual orientation, sexual or gender identity, or gender nonconformance
 - a. Based on self-identification **or**
 - b. Based on reliable third-party information **or**

- c. Based on gender non-conforming appearance, behavior, mannerisms **or**
 - d. Based on history of medical treatment or diagnosis related to gender transition
 - e. Focus should not be only on whether a person actually is of a particular sexual orientation or gender identity but also on whether they are at risk of abuse because of how they identify themselves or how others perceive them.
 - f. Staff may respectfully inquire regarding transgender status based on indicators such as name and gender discrepancies in personal records or identification.
14. Individuals with substance abuse concerns who are engaged in treatment programs that cannot be continued in detention (e.g., methadone, buprenorphine, CBT), who are at risk of serious medically consequential withdrawal (e.g., ETOH, benzodiazepine), or who carry a dual diagnosis of mental health and substance abuse problems and are engaged in treatment for either problem in the community
 15. Individuals who have experienced serious recent psychological trauma (e.g., recent miscarriage; recent death of spouse, partner, or child; witness to torture or other violence)
 16. Individuals at risk of severe social isolation due to language abilities (e.g., being the only speaker of his or her language in facility), scarring, disfigurement, or other reasons
 17. Court-ordered mental health treatment or ongoing mental health treatment
 - a. This pertains to cases in which individuals were found incompetent to stand trial by a criminal court and then taken into ICE custody either before they get the ordered treatment or while in treatment.
 - b. This allows individuals to complete court-ordered mental health treatment (or continue with ongoing community-based mental health treatment) as part of the custody determination process.
 18. Individuals who perceive themselves to be at risk of physical or sexual abuse for other reasons
 19. Individuals with no violent history
 20. Individuals with no prior history of incarceration or detention
 21. Individuals who are notably small or frail
 22. Individuals whose English is limited
 23. Individuals who may be at risk of abuse due to a history of sex offenses against an adult or child



Appendix E: Initiatives in Other Countries

Examples of ATD Initiatives in Other Countries

Research conducted outside the United States has shown that a number of countries have taken steps to ensure that detention is used as a last resort.¹⁹⁰ Indeed, some countries do not detain immigrants at all, while others have developed community-based models and other mechanisms designed to ensure the limited use of detention.

While reception centers are not utilized in the United States, many countries use them as one alternative to detention during periods when applications are pending or when removal is under way. A study commissioned by the European Parliament examined various reception center models, including open reception centers, with varying degrees of services and functions in European Union nations. In many open reception models, the residents can enter and exit the center for work, but must return at specified times. Depending on the purpose of the center and whether it offers accommodation, individuals may reside there for a few weeks or a few years. Some open centers are only used during the initial reception in order to verify identification and conduct an initial examination of an asylum claim.¹⁹¹ Other models include both reception and accommodation while immigration cases are pending.¹⁹²

Finally, some open centers provide a mechanism to prepare people whose applications have been rejected to return to their countries of origin.¹⁹³ When the level of services and restrictions are high, the location is remote and the length of residence is long; these open centers are plagued by the same problems identified in detention centers.

The German government utilizes “community” centers for the period when applications are pending and “open expulsion” centers to encourage foreign nationals to accept “voluntary return.”¹⁹⁴ In the Netherlands, there are application centers, “orientation and integration” centers for candidates waiting for an initial response to their asylum applications, and “return” centers for candidates who have received an initial refusal and are appealing.¹⁹⁵ Asylum seekers in Denmark are first sent to reception centers and then to accommodation centers; if their applications are rejected, they are sent to return centers.¹⁹⁶ In France, Poland, Finland, Greece, and the Czech Republic, asylum seekers are placed in the same centers throughout all the stages of proceedings.¹⁹⁷

Lawmakers and courts throughout the world are increasingly encouraging the use of detention as a last resort. New Zealand recently amended its immigration laws to include the establishment of ATD and provide legal aid for asylum seekers to challenge their detention in court. Even when a presumption against detention is not established in law, several countries like Spain, Sweden, Indonesia, and Argentina have developed policies to ensure that unaccompanied children are not kept in detention.¹⁹⁸ A growing body of case law shows that foreign courts are requiring governments to demonstrate the reasons for detention and to account for not using less restrictive measures available. Courts in Austria, Germany, Denmark, the Netherlands, Slovenia, and Hong Kong have all placed such burdens on the government.¹⁹⁹

190. IDC Handbook.

191. Ibid.

192. Ibid.

193. Ibid.

194. STEPS Consulting Social, *The Conditions in Centres for Third Country National (Detention Camps, Open Centres as well as Transit Centres and Transit Zones) With a Particular Focus on Provisions and Facilities for Persons with Special Needs in the 25 EU Member States*, 193.

195. Ibid.

196. Ibid.

197. Ibid.

198. IDC Handbook; Australian Department of Immigration and Citizenship, “Fact Sheet 82: Immigration Detention,” <http://www.immi.gov.au/media/fact-sheets/82detention.htm#b>.

199. Ibid.

An in-depth evaluation of government-sponsored alternatives to detention efforts in Canada, Sweden, and Australia demonstrates that an understanding of one's immigration status, the legal process, and the potential outcomes of a pending case are essential components to achieving high compliance rates. Each of these countries uses case management, access to services, and early intervention in ATD programs, and each of them have extremely high compliance rates—at least 90 percent or higher for pre-judgment immigrants and 60 to 97 percent for those with deportation orders.

The Japanese Ministry of Justice launched a pilot program in September 2010 to facilitate the provisional release of detainees held in custody for prolonged periods. The program includes free legal advice from the Japan Federation of Bar Associations.

Authorities in Hong Kong have begun conducting individualized custody determinations before detaining immigrants, resulting in the release of the most vulnerable populations. The government there also funds a project run by an NGO that arranges housing in the community as well as direct provision of food, clothing, and medicine to participants. Using a case management approach, workers assess each case on intake and develop an appropriate program of response in line with available resources. Vulnerable populations, like unaccompanied children, get priority and extra support when possible. The program costs HK\$109 (about the equivalent of \$8.51) per person per day and has a compliance rate of around 97 percent.²⁰⁰

These examples exemplify elements of successful models and initiatives that can be used in the United States. However, they must be adapted to fit the situation here; the country has a large number of people subject to detention and limited access of social supports. Released individuals are not eligible for most public benefits and are usually unable to work, leaving them with extremely limited assistance or resources in their community. In the United States, civil society plays a significant role in the economic system, and tapping into the social services that this segment offers is fundamental to moving away from dependency on a flawed detention-first approach.

200. Ibid., 28.



Appendix F: Initiatives in the United States

Examples of U.S. Community-Based Hospitality Initiatives

As discussed in Section Three, there has been renewed interest in the delivery of hospitality services, mostly with a housing component, for individuals released from detention. While there are several exciting examples nationwide, the following descriptions highlight three different types of programs doing similar work.

Freedom House

Freedom House, located near Detroit, is an example of a community-based alternative to immigration detention. In 1983, a group of concerned citizens began offering safe haven to people who were fleeing from mass murder and political persecution in El Salvador. Many were making their way to Canada, where asylum was more readily available at the time, and they passed through Detroit on their journey and needed support before crossing the border.

St. Peter's Episcopal Church was the first temporary housing location. Members of the church and other volunteers and activists from Detroit and Windsor, Ontario, across the border, joined together to form the Detroit/Windsor Refugee Coalition and Freedom House. Eventually, the church's limited capacity was inadequate, and the residence moved to a larger space in southwest Detroit.

Since its inception, Freedom House has provided housing, legal, and social services to refugees coming from various parts of the world. It offers a variety of services to its residents, including emergency housing, food, legal representation, social service coordination, educational support, employment skills training, transportation, and transitional housing after immigration relief is granted. The staff also coordinates with local medical and mental health professionals to provide culturally appropriate care for residents. In addition, they help immigrants who want to reunite with family members in Canada.

Immigrants receive support for the duration of their immigration proceedings and/or until they are able to live independently. The house comfortably hosts 35 people; however, the organization does not deny services to anyone eligible for asylum in the United States.

Casa Marianella

Casa Marianella was started in 1986 by the Austin (Texas) Interfaith Task Force for Central America as a safe haven for people fleeing civil war and political persecution throughout Central America. Located in the Texas capital, the home has welcomed hundreds of men and women.

In addition to bed space, food, and clothing, Casa Marianella offers English classes, basic social service coordination, and emotional support for adults seeking to stay in the United States. Typically 21 to 30 people stay each night, and the approximate length of stay is 30 days, although residents are allowed to remain until stable housing arrangements are secured. There are case managers on-site, as well as former residents who now volunteer to support current residents.

In 2003, Casa Marianella opened a new facility, Posada Esperanza, specifically designed to meet the unique needs of women and children fleeing violence. It houses up to seven families at a time that generally reside in the home for three to six months. Each child's individual needs are addressed, and support is offered to mothers as they work toward being self-sufficient, finding employment,

and learning strong parenting skills. Residents have access to counseling, legal assistance, health care, public school enrollment, and additional educational training in the areas of nutrition, English language skills, health, safety, and budgeting. Each resident also receives a monthly bus pass, and the staff is available for transportation to necessary appointments. Tutors are available to help children with homework and provide further academic support whenever necessary. Volunteers help link mothers to community-based services available to them after leaving the home. Posada Esperanza staff also plan activities to reinforce positive behavior and support family unity.

Christ House

Christ House is one example of a community-based alternative for individuals released from detention. It is a residence for men released from immigration detention in or around New York City who are seeking protection in this country. With no place to call home or loved ones to rely on, individuals are welcomed into this home in the Bronx for up to six months at a time. They live freely and are supported throughout the duration of their immigration proceedings and/or until they are able to live independently. Upon release from ICE detention, each man is greeted by a “house father” who aids with job skill training, employment opportunities, recertification courses, language skills, basic financial assistance, and general community assimilation. The small nonprofit also helps each new resident connect with family members or friends, whether they are living in the United States or elsewhere. Since 1981, Christ House has successfully empowered hundreds of men as they make their way in the United States.



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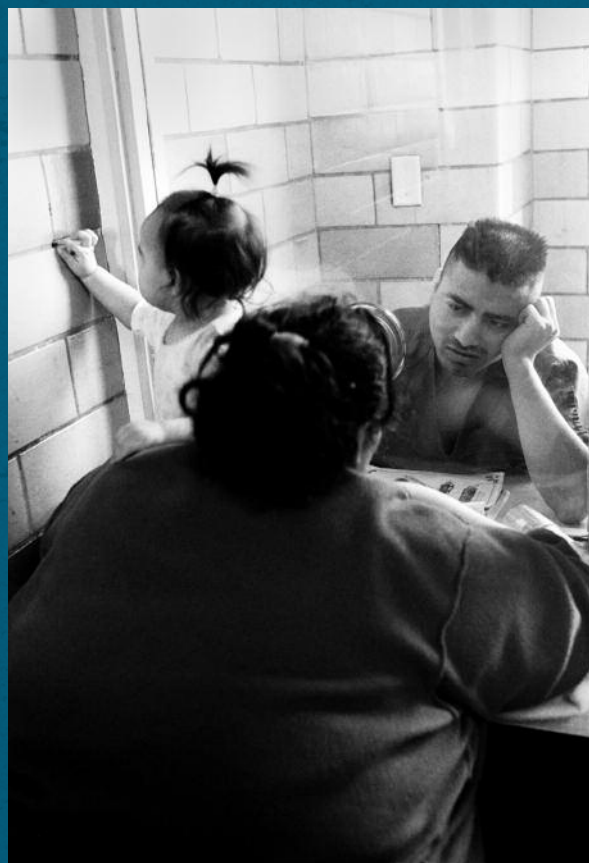
Lutheran Immigration and Refugee Service has been a champion for vulnerable refugees and migrants since 1939. The organization provides resettlement and community integration services for refugees, specialized care for migrant children, and support for at-risk migrants and their families. In addition, Lutheran Immigration and Refugee Service advocates for welcome, working with government officials to craft laws and policies that preserve human dignity and guiding churches and communities as they help newcomers transition into U.S. society.

With an expertise born of decades of service experience, Lutheran Immigration and Refugee Service works with at-risk migrants, offering critical legal and social support to asylum seekers, torture survivors, and other vulnerable individuals. This expertise, experience, and compassion inform the organization's advocacy for just and humane treatment of those who seek protection, freedom, or opportunity in the United States and inspire the call to curtail the widespread use of unnecessary detention and other overly restrictive enforcement measures.



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ABOVE: A man detained in a Seattle facility receives a visit from his wife and daughter. Families separated by immigration detention endure emotional strain as well as financial hardship due to loss of income and the costs of travel for visiting.

FRONT COVER: A painting of the Statue of Liberty overlooks a group of men in an El Centro, California, detention center. In a nation with a centuries-long tradition of offering newcomers protection, prosperity, and the promise of a better life, hundreds of thousands of migrants are detained each year.

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