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Alternatives to Immigration Detention

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ALTERNATIVES TO IMMIGRATION DETENTION

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The United States places over 440,000 people each year in immigration detention, far more than any other country in the world. This Article argues that there are compelling humanitarian and financial reasons to utilize more alternatives to detention. It examines the strengths and limitations of existing alternatives, including the need to develop more community-based case management programs and to rely less on electronic monitoring. The Article then sets forth several legal arguments under the Constitution, Rehabilitation Act, and international human rights law for requiring greater consideration of alternatives to detention.

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INTRODUCTION

Immigration detention has become one of the most egregious forms of mass incarceration in the United States. Over 440,000 immigrants are detained in this country each year, far more than anywhere else in the world.[1] The number of immigration detainees is now over twice the total number of federal inmates serving sentences for all federal crimes combined.[2] On any given day, 37,000 noncitizens are held in immigration detention centers across the country, of whom 25,000 do not yet have a final order of removal.[3] Nearly three-quarters of these detainees are held in facilities run by private prison

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1 JOHN F. SIMANSKI, DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, IMMIGRATION ENFORCEMENT ACTIONS: 2013, at 5 tbl.5 (2014), http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf. The number of detainees has nearly doubled since 2005; *cf.* MARY DOUGHERTY, DENISE WILSON & AMY WU, DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, IMMIGRATION ENFORCEMENT ACTIONS: 2005, at 4 (2006), http://www.dhs.gov/sites/default/files/publications/Enforcement_AR_05.pdf. Other destination countries for migrants detain just a small fraction of this number, including Greece (77,000), the United Kingdom (30,000), France (25,000), Canada (10,000), Germany (4800), and Australia (2000). *See* AUSTL. GOV'T, DEP'T OF IMMIGRATION & BORDER PROT., IMMIGRATION DETENTION AND COMMUNITY STATISTICS SUMMARY 4 (2015), https://www.border.gov.au/ReportsandPublications/Documents/statistics/immigration-detention-statistics-30-nov-2015.pdf; GLOB. DET. PROJECT, THE UNCOUNTED: DETENTION OF MIGRANTS AND ASYLUM SEEKERS IN EUROPE 24 (2015), https://www.globaldetentionproject.org/the-uncounted-the-detention-of-migrants-and-asylum-seekers-in-europe; *Germany Immigration Detention Profile*, GLOBAL DETENTION PROJECT, http://www.globaldetentionproject.org/countries/europe/germany/introduction.html (last updated Oct. 2014).

2 *Population Statistics*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/statistics/population_statistics.jsp (last updated May 25, 2017) (showing 188,513 federal inmates).

3 CARL TAKEI, MICHAEL TAN & JOANNE LIN, ACLU, SHUTTING DOWN THE PROFITEERS: WHY AND HOW THE DEPARTMENT OF HOMELAND SECURITY SHOULD STOP USING PRIVATE PRISONS 6 (2016) [hereinafter SHUTTING DOWN THE PROFITEERS], https://www.aclu.org/sites/default/files/field_document/white_paper_09-30-16_released_for_web-v1-opt.pdf; *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-153, IMMIGRATION DETENTION: ADDITIONAL ACTIONS NEEDED TO STRENGTHEN MANAGEMENT AND OVERSIGHT OF FACILITY COSTS AND STANDARDS 9 (2014), http://www.gao.gov/assets/670/666467.pdf.

corporations; fifteen percent are in local jails, some of which intermingle civil immigration detainees with prisoners held on criminal charges; and just twelve percent are in federally-owned facilities.[4] In recent years, immigration detention has even drawn thousands of children into its web, with the addition of two huge "Family Residential Centers" in Texas, both run by private prison corporations.[5]

This Article argues that the United States' approach to immigration detention must change. A range of alternatives to detention already exists, yet detention remains the default, rather than being used as a last resort. Furthermore, the most coercive alternative-to-detention program, which involves electronic monitoring, is used far more often than less restrictive alternatives. Meanwhile, community-based alternatives involving case management, which have proven highly successful in other countries, are just getting off the ground in the United States.

In addition to making utilitarian and humanitarian arguments for shifting the focus (and funding) from detention to alternative programs, this Article explores innovative legal arguments for challenging the current approach to immigration detention. Part I provides an overview of immigration detention and its impact, describing how custody determinations are currently made and the various types of harm that detention inflicts on taxpayers, detainees, and their U.S. citizen family members. Part II sets forth the existing range of alternatives to detention, evaluating the strengths and limitations of each option based on cost, capacity, compliance rates, accessibility, and the degree of infringement on an individual's liberty, privacy, and dignity.

In Part III, the Article proposes several legal approaches for challenging the U.S. Immigration and Customs Enforcement's (ICE) failure to consider and use alternatives to detention on a larger scale. First, the Article sets forth constitutional arguments based on the Excessive Bail Clause, Due Process Clause, and Equal Protection Clause. Second, the Article examines disability-rights arguments based on the Rehabilitation Act and Americans with Disabilities Act. Third, the Article demonstrates how international human rights law bolsters the domestic legal arguments by underscoring relevant principles of reasonableness and proportionality. This Part examines the challenges associated with each of these arguments as well as their potential for propelling greater consideration of alternatives to detention.

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4 SHUTTING DOWN THE PROFITEERS, *supra* note 3, at 1, 9–10, 12.

5 *See id.* at 10; *see also* Molly Hennessy-Fiske, *Immigrant Family Detention Centers Are Prison-like, Critics Say, Despite Order to Improve*, L.A. TIMES (Oct. 23, 2015, 6:30 PM), http://www.latimes.com/nation/nationnow/la-na-immigration-family-detention-20151020-story.html.

I. IMPACT OF IMMIGRATION DETENTION

A. *Overview of Custody Determinations*

When a noncitizen is apprehended for an immigration violation, an officer with the Department of Homeland Security (DHS) makes the initial determination about whether to detain the individual.[6] If a decision is made to detain, the officer must then determine the appropriate custody classification level. If a decision is made to release, the officer must decide what conditions, if any, should be required.[7] Options include releasing the person on her own recognizance, under an order of supervision, upon payment of a bond, or into an electronic monitoring program.

Since March 2013, ICE has been using a national Risk Classification Assessment (RCA) to help with these custody determinations. The RCA is a computerized algorithm that helps assess flight risk and danger to the community based on a number of factors.[8] The factors considered in assessing danger are gathered largely from other databases, including criminal history, open warrants, supervision history, disciplinary infractions, and gang affiliations.[9] The factors used to assess flight risk are obtained during an intake interview and include community ties, family history, residence history, employment history, substance abuse history, immigration history, and legal representation.[10]

The creation of the RCA represented an important step forward in terms of the decision-making process around detention. But the RCA and its implementation raises several important concerns. First, the RCA does not distinguish between recent convictions and old ones nor consider whether someone who committed a crime has been "rehabilitated," which are factors that risk assessment tools used in the criminal context take into account.[11]

Second, the RCA's recommendations are not binding, allowing officers to exercise their discretion to override them.[12] A study by the DHS Office of the Inspector General found that ICE overrode the RCA's

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6 8 U.S.C. § 1226(a) (2012); 8 C.F.R. § 1236.1(d)(1) (2016).

7 8 C.F.R. § 1236.1(d).

8 Robert Koulish, *Using Risk to Assess the Legal Violence of Mandatory Detention*, LAWS, Sept. 2016, at 7, http://www.mdpi.com/2075-471X/5/3/30/pdf.

9 *Id.*

10 *Id.* at 8.

11 SHUTTING DOWN THE PROFITEERS, *supra* note 3, at 16.

12 *See* Koulish, *supra* note 8, at 7.

recommendations in 7.6% of cases for the general population in 2014.[13] For certain subpopulations, however, this figure is much higher. For example, the Center for American Progress found that ICE overrode the RCA's recommendations in nineteen percent of cases involving LGBT individuals.[14]

Third, the RCA sometimes leaves the decision up to ICE without making any recommendation.[15] For the general population, this occurred in 15.7% of cases, but for LGBT individuals, the decision was left up to ICE in sixty-four percent of cases.[16] When the RCA does not make an explicit recommendation to release, the default for ICE appears to be to detain the individual.[17]

One of the reasons that ICE officers are choosing to detain individuals who could be released is political pressure to fill the beds in immigration detention facilities.[18] Since 2007, Congress has provided in the Department of Homeland Security Appropriations Act that DHS "shall maintain a level of not less than 34,000 detention beds."[19] While ICE is technically not required to *fill* all these beds, this mandate appears to be driving detention practices.[20] The mere notion that a certain number of people should be detained at any given time reduces the incentive to explore alternatives and contributes to the arbitrary and excessive use of detention.[21]

If a noncitizen wants to challenge ICE's decision to detain or the amount of the bond set by ICE, she may request a bond redetermination hearing before an immigration judge (IJ).[22] The minimum amount of

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13 U.S. DEP'T HOMELAND SEC., OFFICE OF INSPECTOR GEN., OIG-15-22, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT'S ALTERNATIVES TO DETENTION (REVISED) 14 (2015) [hereinafter OIG REPORT ON ALTERNATIVES TO DETENTION], https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-22_Feb15.pdf.

14 Sharita Gruberg, *No Way out: Congress' Bed Quota Traps LGBT Immigrants in Detention*, CTR. FOR AM. PROGRESS (May 14, 2015, 11:00 AM), https://www.americanprogress.org/issues/lgbt/news/2015/05/14/111832/no-way-out-congress-bed-quota-traps-lgbt-immigrants-in-detention.

15 *See id.*

16 *Id.*

17 The RCA gave the option of release seventy percent of the time for LGBT immigrants, but ICE chose to detain them without bond sixty-four percent of the time. *Id.*; *see also* SHARITA GRUBERG & RACHEL WEST, CTR. FOR AM. PROGRESS, HUMANITARIAN DIPLOMACY: THE U.S. ASYLUM SYSTEM'S ROLE IN PROTECTING GLOBAL LGBT RIGHTS 25 (2015), https://cdn.americanprogress.org/wp-content/uploads/2015/06/LGBTAsylum-final.pdf.

18 *See infra* note 281.

19 Department of Homeland Security Appropriations Act, Pub. L. No. 114-4, § 562, 129 Stat. 39, 43 (2015).

20 Gruberg, *supra* note 14.

21 *See* SHUTTING DOWN THE PROFITEERS, *supra* note 3, at 17 ("No corrections system in America operates under a similar quota.").

22 8 C.F.R. § 1236.1(d)(1) (2016); *id.* § 1003.19(d).

bond that the IJ may set is $1500.[23] At the hearing, the noncitizen bears the burden of demonstrating that she is not a flight risk or a danger to the community.[24] Someone who is found to present a danger to persons or property is ineligible for bond.[25] IJs consider a number of factors in determining whether to release a noncitizen on bond and the amount of the bond.[26] Over the past two decades, IJs have granted roughly half of the motions requesting bond redetermination.[27] Once an IJ makes a bond redetermination, the IJ cannot reconsider that decision unless the noncitizen demonstrates a material change in circumstances.[28] However, a noncitizen may appeal the IJ's bond redetermination decision to the Board of Immigration Appeals (BIA).[29]

In a large number of cases, the Immigration and Nationality Act (INA) restricts the discretion of DHS and IJs to set a bond by providing that certain categories of people "*shall be taken into custody*."[30] This provision is often referred to as "mandatory detention," because DHS interprets "custody" to mean detention.[31] However, many advocates and commentators have made persuasive legal arguments, supported by federal court precedents, that "custody" should be more broadly interpreted to include other forms of restrictions on liberty, such as

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23 8 U.S.C. § 1226(a) (2012).

24 8 C.F.R. § 1236.1(c)(8); *see also* Adeniji, 22 I. & N. Dec. 1102, 1102 (B.I.A. 1999).

25 Guerra, 24 I. & N. Dec. 37, 38 (B.I.A. 2006).

26 *Id.* at 40. These factors are:

> (1) whether the alien has a fixed address in the United States; (2) the alien's length of residence in the United States; (3) the alien's family ties in the United States, and whether they may entitle the alien to reside permanently in the United States in the future; (4) the alien's employment history; (5) the alien's record of appearance in court; (6) the alien's criminal record, including the extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses; (7) the alien's history of immigration violations; (8) any attempts by the alien to flee prosecution or otherwise escape from authorities; and (9) the alien's manner of entry to the United States.

Id.

27 *What Happens When Individuals Are Released on Bond in Immigration Court Proceedings?*, TRAC IMMIGR. (Sept. 14, 2016), http://trac.syr.edu/immigration/reports/438 (stating that IJs granted bond in forty-six percent of cases over the past twenty years).

28 8 C.F.R. § 1003.19(e).

29 *Id.* §§ 1003.1(b)(7), 1003.19(f), 1003.38, 1236.1(d)(3)(i).

30 Immigration and Nationality Act § 235, 8 U.S.C. § 1225 (2012); *id.* § 236(c)(1), 8 U.S.C. § 1226(c)(1).

31 *See* Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. C.R.-C.L. L. REV. 601, 632 (2010); Philip L. Torrey, *Rethinking Immigration's Mandatory Detention Regime: Politics, Profit, and the Meaning of "Custody"*, 48 U. MICH. J.L. REFORM 879, 906–11 (2015) (challenging DHS's interpretation of custody to mean detention); *see also* Aguilar-Aquino, 24 I. & N. Dec. 747, 752 (B.I.A. 2009) (finding that the words "custody" and "detention" have the same meaning).

house arrest and electronic monitoring.[32] In addition, based on the language of the INA, commentators have argued that "mandatory detention" should only be applied to individuals taken into custody by ICE immediately after being released from serving their criminal sentences, and that it should not be applied to individuals with substantial challenges to removal.[33] Yet DHS continues to interpret the statute broadly.

One group subject to "mandatory detention" is "arriving aliens," which includes all noncitizens who arrive at an official U.S. port of entry or are interdicted at sea.[34] Many asylum seekers with no criminal record, including thousands of mothers and children fleeing violence in Central America, fall into this category.[35] In addition, there are "mandatory detention" categories based on a wide range of offenses, such as "crimes involving moral turpitude" (a term that includes, but is not limited to, crimes involving theft or fraud, as well as domestic violence), aggravated felonies (a term of art in immigration law that has over two dozen definitions and includes certain misdemeanors), controlled substance

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32 *See, e.g.*, Reno v. Koray, 515 U.S. 50, 63–64 (1995) (holding, in sentencing context, that whether an individual is "released" depends on if he remains "subject to [the custodian's] control," and not whether he is still subject to "jail-type confinement"); Jones v. Cunningham, 371 U.S. 236, 240 (1963) (explaining that federal habeas law defines custody as restraints on a person's liberty that are "not shared by the public generally"); United States v. Sack, 379 F.3d 1177 (10th Cir. 2004) (holding that a defendant who had been ordered to reside in a halfway house and failed to return after a day of work could be convicted of escape from custody), *cert. denied*, 544 U.S. 963 (2005); Torrey, *supra* note 31, at 906–11; *see also* SHUTTING DOWN THE PROFITEERS, *supra* note 3, at 26.

33 *See* Immigration and Nationality Act § 236(c), 8 U.S.C. § 1226(c)(1) (instructing the government to take custody "when the alien is released" from serving his criminal sentence, and referring only to aliens who are "deportable" and "inadmissible"); SHUTTING DOWN THE PROFITEERS, *supra* note 3, at 27 (discussing legal arguments for interpreting the INA's custody requirement narrowly). *But see* Rojas, 23 I. & N. Dec. 117, 127 (B.I.A. 2001) (rejecting the argument that mandatory detention is limited to aliens who have just been released from serving their criminal sentences); Joseph, 22 I. & N. Dec. 799, 806 (B.I.A. 1999) (interpreting § 236(c) to apply to any noncitizen who is *charged* with deportability or inadmissibility under one of the designated grounds, unless the individual can show that the government is "substantially unlikely" to establish the charges). Although the Ninth Circuit recently rejected *Rojas*, four other circuits have agreed with the government's position. *See* Preap v. Johnson, 831 F.3d 1193, 1204–07 (9th Cir. 2016) (affirming district court orders requiring bond hearings for detainees in California and Washington State who were not immediately detained upon their release from relevant criminal custody), *petition for cert. filed*, No. 16-1363 (U.S. May 11, 2017). *But see* Lora v. Shanahan, 804 F.3d 601, 616 (2d Cir. 2015); Olmos v. Holder, 780 F.3d 1313 (10th Cir. 2015); Sylvain v. U.S. Attorney Gen., 714 F.3d 150, 155–57 (3d Cir. 2013); Hosh v. Lucero, 680 F.3d 375, 381 (4th Cir. 2012).

34 Immigration and Nationality Act § 235, 8 U.S.C. § 1225; 8 C.F.R. 1003.19(h)(1)(i)(B) (providing that IJ has no authority to redetermine or set bond for an arriving alien); Oseiwusu, 22 I. & N. Dec. 19, 19–20 (B.I.A. 1998) (holding IJ has no authority over the detention of arriving aliens and therefore lacks authority to consider bond request of an alien returning pursuant to a grant of advance parole).

35 SHUTTING DOWN THE PROFITEERS, *supra* note 3, at 22.

convictions, certain firearms offenses, and various other crimes.[36] Offenses as minor as misdemeanor shoplifting with a one-year sentence and possessing more than an ounce of marijuana trigger mandatory detention.[37]

In many circuits, a person who is subject to mandatory detention can be indefinitely detained until a final decision is made in the case, which can take months or even years, due to lengthy court backlogs.[38] To date, only the Ninth and Second Circuits have held that constitutional concerns require granting individuals subject to mandatory detention a bond hearing after 180 days in detention.[39] Four other circuits have recognized that prolonged detention without a bond hearing raises serious due process concerns but have adopted a case-by-case approach for determining when mandatory detention becomes unreasonably prolonged.[40] In 2016, the Supreme Court granted certiorari on this issue of prolonged immigration detention without a bond hearing.[41] By comparison, in the criminal context, "judicial decisions regarding bond and release conditions are typically made within hours or days of arrest."[42]

Two-thirds of the people in immigration detention (25,000 out of 37,000) do not have a final order of removal, which means that they may ultimately be allowed to remain in the United States. Of these 25,000 individuals, approximately 15,000 have no criminal record whatsoever. Furthermore, in FY 2015, IJs ultimately ruled in favor of nearly twenty

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36 Immigration and Nationality Act § 236(c), 8 U.S.C. § 1226.

37 *Id.* § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G) (listing as an aggravated felony "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at least one year" (footnote omitted)); *id.* § 236(c)(1)(B), 8 U.S.C. § 1226(c)(1)(B) (providing that anyone who is deportable based on an aggravated felony must be taken into custody); *id.* § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i) (making any conviction for a violation of a law relating to a controlled substance, other than a single offense involving possession for one's own use of thirty grams or less of marijuana, a deportable offense); *id.* § 236(c)(1)(B), 8 U.S.C. § 1226(c)(1)(B) (providing that anyone who is deportable under § 237(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) shall be taken into custody).

38 *Legal Noncitizens Receive Longest ICE Detention*, TRAC IMMIGR. (June 3, 2013), http://trac.syr.edu/immigration/reports/321.

39 Rodriguez v. Robbins, 804 F.3d 1060, 1085, 1089 (9th Cir. 2015), *cert. granted sub nom.* Jennings v. Rodriguez, 136 S. Ct. 2489 (2016); Lora v. Shanahan, 804 F.3d 601 (2d Cir. 2015), *cert. denied*, 135 S. Ct. 2494 (2016).

40 *See* Sopo v. U.S. Attorney Gen., 825 F.3d 1199 (11th Cir. 2016); Reid v. Donelan, 819 F.3d 486 (1st Cir. 2016); Diop v. ICE/Homeland Sec., 656 F.3d 221 (3d Cir. 2011); Ly v. Hansen, 351 F.3d 263 (6th Cir. 2003).

41 *Rodriguez*, 136 S. Ct. 2489.

42 SHUTTING DOWN THE PROFITEERS, *supra* note 3, at 24; *cf.* 18 U.S.C. § 3142(f) (2012) (directing that decisions regarding conditions of release or detention be made at the initial appearance unless a continuation is granted, and limiting the duration of such continuances); FED. R. CRIM. P. 5(a) (requiring person arrested to be taken for initial appearance "without unnecessary delay"); Corley v. United States, 556 U.S. 303, 320 (2009) (noting that the Rule 5 presentment requirement "stretches back to the common law").

percent of individuals subject to mandatory detention.[43] These facts stress that thousands of people are being unnecessarily detained at taxpayer expense.

B. *Cost to Taxpayers*

The United States spends more money on immigration enforcement than on the FBI, Drug Enforcement Agency, Secret Service, U.S. Marshalls Service, and Bureau of Alcohol, Firearms and Explosives combined.[44] In fact, the nearly $18 billion per year that the federal government spends on immigration enforcement is twenty-four percent higher than the total amount spent on these other federal law enforcement agencies.[45] Of that $18 billion, $2 billion goes to immigration detention, nearly double the amount that was spent on detention in 2005.[46]

The average daily cost of immigration detention is now $187 per person, for a total of over $5 million *per day* for the federal government.[47] Much of that money goes to private prison companies that operate seventy-three percent of the immigration detention beds in the country.[48] The total revenue that the two largest private prison contractors—Corrections Corporation of America (CCA) and GEO Group (GEO)—received from ICE more than doubled from $307 million in 2008 to over $765 million in 2015.[49] Some facilities, such as the one in Karnes, Texas that is operated by GEO, cost $32 million to

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43 EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, CERTAIN CRIMINAL CHARGE COMPLETION STATISTICS 2 (2016), https://www.justice.gov/sites/default/files/pages/attachments/2016/08/25/criminal-charge-completion-statistics-201608.pdf.

44 Press Release, Migration Policy Inst., U.S. Spends More on Immigration Enforcement than on FBI, DEA, Secret Service & All Other Federal Criminal Law Enforcement Agencies Combined (Jan. 7, 2013), http://www.migrationpolicy.org/news/us-spends-more-immigration-enforcement-fbi-dea-secret-service-all-other-federal-criminal-law.

45 *Id.*

46 *See* DORIS MEISSNER ET AL., MIGRATION POLICY INST., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 131 (2013), http://www.migrationpolicy.org/research/immigration-enforcement-united-states-rise-formidable-machinery.

47 *See* SHUTTING DOWN THE PROFITEERS, *supra* note 3, at 24 n.75 (explaining that this figure "was calculated by dividing ICE's FY 2016 custody operations cost ($2,316,744,000) by 365 days to obtain a daily custody operations cost ($6,347,243.84) and dividing that by the number of FY 2016 authorized detention beds (34,000)"); *see also* U.S. IMMIGRATION AND CUSTOMS ENF'T, TRANSP. SEC. ADMIN., U.S. COAST GUARD, DEP'T OF HOMELAND SEC., CONGRESSIONAL BUDGET JUSTIFICATION FY 2017—VOL. II, at 3, 5, 6 (2017), https://www.dhs.gov/sites/default/files/publications/FY%202017%20Congressional%20Budget%20Justification%20-%20Volume%202_1.pdf (funding 30,913 detention beds for FY 2017).

48 *See* SHUTTING DOWN THE PROFITEERS, *supra* note 3, at 9–10.

49 *Id.* at 10.

build just to detain "low-risk, adult males" and now is used to hold women and children.[50] This trend of expanding immigration detention is at odds with policy changes that the Department of Justice has made to phase out the use of private prisons, provide more proportional sentences for low-level and nonviolent drug offenses, and use a range of calibrated, community-based alternatives to detention. It also inflicts enormous suffering on detainees and their families.

C. *Harm Inflicted on Detainees*

Noncitizens in immigration detention suffer many of the same harms as convicted criminals.[51] They are torn from their communities, separated from their families and friends, locked in cells, forced to wear restraints and orange jumpsuits, subjected to strip searches, and constantly monitored. In addition, detention has severe financial consequences for detainees and their families, since the detainees are no longer able to earn an income.

Another major harm related to detention is that it impedes access to counsel and makes it much more difficult to mount a legal defense to deportation.[52] Detention centers tend to be located in remote parts of the country, far from the metropolitan areas where immigration attorneys are clustered.[53] In removal proceedings overall, forty-five percent of immigrants are unrepresented;[54] but a 2007 study found that eighty-four percent of detainees did not have attorneys.[55] More recent

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50 NAT'L IMMIGRATION FORUM, THE MATH OF IMMIGRATION DETENTION: RUNAWAY COSTS FOR IMMIGRATION DETENTION DO NOT ADD UP TO SENSIBLE POLICIES 8–9 (2013), https://immigrationforum.org/wp-content/uploads/2014/10/Math-of-Immigation-Detention-August-2013-FINAL.pdf; HUMAN RIGHTS FIRST, FACT SHEET: IMMIGRATION DETENTION: HOW CAN THE GOVERNMENT CUT COSTS? (2013), http://www.humanrightsfirst.org/uploads/pdfs/immigration-detention-fact-sheet-jan-2013.pdf.

51 *See* Samuel R. Wiseman, *Pretrial Detention and the Right to be Monitored*, 123 YALE L.J. 1344, 1353 (2014).

52 *See, e.g.*, Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, a Case Study*, 78 FORDHAM L. REV. 541 (2009).

53 According to Human Rights First, nearly forty percent of ICE's total bed space is more than sixty miles from an urban center, and some are much farther. For example, the Port Isabel facility is 155 miles from Corpus Christi, and the LaSalle facility is 220 miles from New Orleans and 138 miles from Baton Rouge. HUMAN RIGHTS FIRST, JAILS AND JUMPSUITS: TRANSFORMING THE U.S. IMMIGRATION DETENTION SYSTEM—A TWO-YEAR REVIEW 31 (2011), http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Jails-and-Jumpsuits-report.pdf.

54 *See* EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2014 STATISTICS YEARBOOK F1 (2015), https://www.justice.gov/eoir/pages/attachments/2015/03/16/fy14syb.pdf.

55 NINA SIULC ET AL., VERA INST. OF JUSTICE, IMPROVING EFFICIENCY AND PROMOTING JUSTICE IN THE IMMIGRATION SYSTEM: LESSONS FROM THE LEGAL ORIENTATION PROGRAM 1 (2008), http://archive.vera.org/sites/default/files/resources/downloads/LOP_Evaluation_May2008_final.pdf.

data suggest that this figure has not changed much, with eighty-three percent to ninety percent of detainees being unrepresented in Texas, where a quarter of the nation's immigration detainees are located.[56] Detention also impairs the ability to mount a defense by making it difficult to obtain evidence from the outside world. Given the number of obstacles that must be overcome, many detainees simply give up and never file or abandon applications for relief.[57]

For people fleeing human rights violations in their own countries, the experience of being detained can inflict particularly severe emotional harm, re-traumatizing them and exacerbating existing mental illnesses, such as posttraumatic stress disorder, anxiety, and major depression.[58] The psychological harm of detention can even amount to torture when measures such as solitary confinement are used.[59]

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56 TEX. APPLESEED, JUSTICE FOR IMMIGRATION'S HIDDEN POPULATION: PROTECTING THE RIGHTS OF PERSONS WITH MENTAL DISABILITIES IN THE IMMIGRATION COURT AND DETENTION SYSTEM 10, 13 (2010), https://www.texasappleseed.org/sites/default/files/10-Immigration DetentionReportMentalDisabilities.PDF.

57 One study found that in New York City, only eighteen percent of represented detainees and three percent of unrepresented ones had favorable outcomes in their removal proceedings, compared to seventy-four percent of represented non-detainees and thirteen percent of unrepresented non-detainees. *See* Steering Comm. of the N.Y. Immigrant Representation Study Report, N.Y. Immigrant Representation Study Report: Part 1, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 CARDOZO L. REV. 357, 363–64 (2011); *see also EOIR Table 5-1. Asylum Withdrawals by Custody Status by Fiscal Year Completed*, U.S. COMMISSION INT'L RELIGIOUS FREEDOM 670, http://tinyurl.com/hadxcah (last visited June 7, 2017) (finding that, over a five-year period, detained credible fear claimants withdrew their asylum claims in immigration court at more than double the rate of non-detained or released claimants: thirteen percent versus five percent).

58 *See, e.g.*, Kenneth Carswell et al., *The Relationship Between Trauma, Post-Migration Problems and the Psychological Well-Being of Refugees and Asylum Seekers*, 57 INT'L J. SOC. PSYCHIATRY 107 (2011) (finding PTSD and distress in refugees and asylum seekers in the United Kingdom due to post-migration problems); Cornelis J. Laban et al., *Impact of a Long Asylum Procedure on the Prevalence of Psychiatric Disorders in Iraqi Asylum Seekers in the Netherlands*, 192 J. NERVOUS & MENTAL DISEASE 843 (2004); Gillian Morantz et al., *The Divergent Experiences of Children and Adults in the Relocation Process: Perspectives of Child and Parent Refugee Claimants in Montreal*, 25 J. REFUGEE STUD. 71 (2011) (finding trends of depression in children and parent asylum seekers in Canada); Shana Tabak & Rachel Levitan, *LGBTI Migrants in Immigration Detention: A Global Perspective*, 37 HARV. J.L. & GENDER 1, 38–42 (2014).

59 The psychological effects of solitary confinement may become irreversible after fifteen days. *See* Juan E. Méndez (Special Rapporteur of Human Rights Council), *Promotion and Protection of Human Rights: Human Rights Questions, Including Alternative Approaches for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms*, at 9, U.N. Doc. A/66/268 (Aug. 5, 2011); Manfred Nowak (Special Rapporteur of Human Rights Council), *Promotion and Protection of Human Rights: Implementation of Human Rights Instruments*, at 23–24, U.N. Doc. A/63/175 (July 28, 2008); *see also* MIKE CORRADINI, KRISTINE HUSKEY & CHRISTY FUJIO, PHYSICIANS FOR HUMAN RIGHTS, BURIED ALIVE: SOLITARY CONFINEMENT IN THE US DETENTION SYSTEM (2013), https://s3.amazonaws.com/PHR_Reports/Solitary-Confinement-April-2013-full.pdf; HEARTLAND ALL. NAT'L IMMIGRANT JUSTICE CTR. & PHYSICIANS FOR HUMAN RIGHTS, INVISIBLE IN ISOLATION: THE USE OF SEGREGATION AND SOLITARY CONFINEMENT IN IMMIGRATION DETENTION (2012) [hereinafter INVISIBLE IN

Detention can also inflict grave physical harm, due to delayed or denied medical care, physical and sexual violence, and the risk of suicide. Even ICE's most recent detention standards, the 2011 Performance Based National Detention Standards, fall short of the National Commission on Correctional Health Care's standards for medical care in prisons and jails.[60] Furthermore, nearly half of the detained population are held in facilities that operate under older, weaker standards.[61] In numerous cases where people have died in immigration detention centers, ICE's internal reviews identified violations of medical standards as contributing factors to their deaths.[62] These violations included failure to meet health care needs in a timely manner, failure to refer people to higher-level medical care, inadequate staffing of medical personnel, and inadequate screening for illnesses.[63] Detention centers also fail to take adequate precautions to prevent suicide. Nearly ten percent of the deaths in ICE custody during the Obama administration were suicides.[64] Since 2003, fourteen detainees have died in the Eloy Detention Center in Arizona alone, five of them suicides, making it the deadliest facility in the country.[65]

Certain populations face unique challenges to obtaining medical care in detention. For example, women are often denied screenings that can detect early stages of deadly diseases like cervical or breast cancer.[66]

ISOLATION], http://www.immigrantjustice.org/sites/immigrantjustice.org/files/Invisible%20in%20Isolation-The%20Use%20of%20Segregation%20and%20Solitary%20Confinement%20in%20Immigration%20Detention.September%202012_7.pdf.

60 *See, e.g.*, ACLU, WRITTEN STATEMENT OF THE ACLU FOR A HEARING ON "HOLIDAY ON ICE: THE U.S. DEPARTMENT OF HOMELAND SECURITY'S NEW IMMIGRATION DETENTION STANDARDS" (2012), https://www.aclu.org/other/aclu-statement-hearing-titled-holiday-ice-us-department-homeland-securitys-new-immigration; ACLU, DET. WATCH NETWORK & NAT'L IMMIGRANT JUSTICE CTR., FATAL NEGLECT: HOW ICE IGNORES DEATHS IN DETENTION (2016) [hereinafter FATAL NEGLECT], https://www.aclu.org/sites/default/files/field_document/fatal_neglect_acludwnnijc.pdf; FLA. IMMIGRANT ADVOCACY CTR., DYING FOR DECENT CARE: BAD MEDICINE IN IMMIGRATION CUSTODY (2009), http://d3n8a8pro7vhmx.cloudfront.net/aijustice/pages/273/attachments/original/1390427524/DyingForDecentCare.pdf?1390427524; U.S. COMM'N ON CIVIL RIGHTS, WITH LIBERTY AND JUSTICE FOR ALL: THE STATE OF CIVIL RIGHTS AT IMMIGRATION DETENTION FACILITIES 32–36 (2015) [hereinafter WITH LIBERTY AND JUSTICE FOR ALL], http://www.usccr.gov/pubs/Statutory_Enforcement_Report2015.pdf.

61 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-153, IMMIGRATION DETENTION: ADDITIONAL ACTIONS NEEDED TO STRENGTHEN MANAGEMENT AND OVERSIGHT OF FACILITY COSTS AND STANDARDS 30–32 (2014), http://www.gao.gov/assets/670/666467.pdf.

62 FATAL NEGLECT, *supra* note 60; *see also US: Deaths in Immigration Detention*, HUM. RTS. WATCH (July 7, 2016, 12:00 AM), https://www.hrw.org/news/2016/07/07/us-deaths-immigration-detention.

63 FATAL NEGLECT, *supra* note 60, at 6.

64 *Id.* at 5.

65 SHUTTING DOWN THE PROFITEERS, *supra* note 3, at 1.

66 HUMAN RIGHTS WATCH, DETAINED AND DISMISSED: WOMEN'S STRUGGLES TO OBTAIN HEALTH CARE IN UNITED STATES IMMIGRATION DETENTION 43–63 (2009), https://www.hrw.org/sites/default/files/reports/wrd0309web_0.pdf.

Pregnant women, in particular, face special challenges, as they do not receive proper prenatal, delivery, or post-partum care.[67] Furthermore, survivors of sexual assault and gender-based violence fail to receive timely treatment and counseling.[68] Persons living with HIV often encounter gaps in receiving their medications or changes in their medication, especially when they are transferred from one detention center to another.[69] In addition, transgender individuals are often denied hormone therapy, even though ICE's detention guidelines provide that individuals receiving such therapy before being detained should continue receiving it in detention.[70]

Detainees are also vulnerable to physical and sexual assaults.[71] According to a report by the U.S. Government Accountability Office (GAO), ICE's data system described 215 incidents of sexual assault in immigration detention from October 2009 through March 2013.[72] The actual number may be much higher, since forty percent of the allegations were never even reported to ICE headquarters.[73] In addition, fourteen percent of the calls placed to a hotline for reporting abuse did not go through.[74] Women and LGBT detainees are especially vulnerable to abuse in detention.[75] The Center for American Progress documented

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67 *Id.* at 52–57.

68 *Id.* at 57–61; *see also* HUMAN RIGHTS WATCH, DETAINED AND AT RISK: SEXUAL ABUSE AND HARASSMENT IN UNITED STATES IMMIGRATION DETENTION (2010) [hereinafter DETAINED AND AT RISK], https://www.hrw.org/sites/default/files/reports/us0810webwcover.pdf.

69 HUMAN RIGHTS WATCH, CHRONIC INDIFFERENCE: HIV/AIDS SERVICES FOR IMMIGRANTS DETAINED BY THE UNITED STATES (2007), https://www.hrw.org/sites/default/files/reports/us1207web.pdf; *see also* Homer D. Venters, Jennifer McNeely & Allen S. Keller, *HIV Screening and Care for Immigration Detainees*, HEALTH & HUM. RTS. J., Dec. 2009, at 89, 92 ("ICE detainees known to have HIV/AIDS are afforded a level of care at odds with accepted standards of practice, even for correctional settings.").

70 Adam Frankel & Christina Fialho, *Trapped in Detention, Transgender Immigrants Face New Traumas*, MSNBC (Aug. 29, 2015, 2:04 PM), http://www.msnbc.com/msnbc/trapped-detention-transgender-immigrants-face-new-traumas ("[T]ransgender women are frequently denied access to health care, including hormone replacement therapy, and in certain rare instances, HIV medication.").

71 DETAINED AND AT RISK, *supra* note 68; NAT'L PRISON RAPE ELIMINATION COMM'N, NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT (2009), https://www.ncjrs.gov/pdffiles1/226680.pdf.

72 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-38, IMMIGRATION DETENTION: ADDITIONAL ACTIONS COULD STRENGTHEN DHS EFFORTS TO ADDRESS SEXUAL ABUSE 14 (2013) [hereinafter GAO REPORT ON SEXUAL ABUSE], http://www.gao.gov/assets/660/659145.pdf; *see also Documents Obtained by ACLU Show Sexual Abuse of Immigration Detainees Is Widespread National Problem*, ACLU (Oct. 19, 2011), https://www.aclu.org/news/documents-obtained-aclu-show-sexual-abuse-immigration-detainees-widespread-national-problem (documenting nearly 200 sexual assaults in immigration detention from 2007–2011).

73 GAO REPORT ON SEXUAL ABUSE, *supra* note 72, at 19.

74 *Id.* at 23.

75 SHARITA GRUBERG, CTR. FOR AM. PROGRESS, DIGNITY DENIED: LGBT IMMIGRANTS IN U.S. IMMIGRATION DETENTION 1 (2013) [hereinafter DIGNITY DENIED], https://www.americanprogress.org/wp-content/uploads/2013/11/ImmigrationEnforcement.pdf;

nearly 200 incidents of abuse against LGBT immigration detainees between 2008 and 2013,[76] and the GAO found that one in five "substantiated" cases of sexual assault in immigration detention involved a transgender detainee.[77] Although DHS has promulgated a regulation to comply with the Prison Rape Elimination Act (PREA), it falls short of PREA's standards and does not immediately apply to privately operated detention facilities, which hold the vast majority of immigration detainees in the country.[78]

D. *Harm Inflicted on U.S. Citizen Children*

Approximately 4.5 million U.S. citizen children have a parent who is in the country without legal immigration status.[79] These children live in a state of constant uncertainty about their lives.[80] When a parent is apprehended and detained by ICE, the stress increases exponentially. Children often experience great difficulty in communicating with detained parents, due to distance, strict visiting rules, and the expense of telephone calls to detention centers.[81] These barriers to communication cause emotional harm and leave some children feeling like their parents have simply "disappeared."[82] The financial stress that detention inflicts on a family can also lead to instability in housing and in caregiving arrangements, which further exacerbates emotional harm.[83] In addition, many spouses of detained individuals struggle with depression, which impacts the cognitive and behavioral development of their U.S. citizen

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SHUTTING DOWN THE PROFITEERS, *supra* note 3, at 1–2 (describing a guard responsible for transporting detainees from the Hutto detention facility to the airport for deportation sexually assaulted multiple women on the side of the road between 2009 and 2010).

76 DIGNITY DENIED, *supra* note 75, at 5.

77 GAO REPORT ON SEXUAL ABUSE, *supra* note 72, at 60–61.

78 42 U.S.C. §§ 15601–15609 (2012); 6 C.F.R. § 115.42 (2017); *see also* U.S. IMMIGRATION AND CUSTOMS ENF'T, ICE POLICY NO. 11062.2, SEXUAL ABUSE AND ASSAULT PREVENTION AND INTERVENTION (2014), https://www.ice.gov/doclib/detention-reform/pdf/saapi2.pdf. The U.S. Commission on Civil Rights, a bipartisan, independent congressional commission, concluded that DHS's regulation falls short of PREA's standards. *See* WITH LIBERTY AND JUSTICE FOR ALL, *supra* note 60, at 70–91.

79 Luis H. Zayas & Laurie Cook Heffron, *Disrupting Young Lives: How Detention and Deportation Affect US-born Children of Immigrants*, AM. PSYCHOL. ASS'N (Nov. 2016), http://www.apa.org/pi/families/resources/newsletter/2016/11/detention-deportation.aspx.

80 *Id.*

81 HEATHER KOBALL ET AL., URBAN INST. & MIGRATION POLICY INST., HEALTH AND SOCIAL SERVICE NEEDS OF US-CITIZEN CHILDREN WITH DETAINED OR DEPORTED IMMIGRANT PARENTS, at vi–vii (2015), http://www.urban.org/sites/default/files/alfresco/publication-pdfs/2000405-Health-and-Social-Service-Needs-of-US-Citizen-Children-with-Detained-or-Deported-Immigrant-Parents.pdf.

82 *Id.* at vii.

83 *Id.* at 7.

children.[84] At the same time, child welfare services face significant challenges in providing services to families with detained parents.[85] All of these factors affect children's cognitive and emotional development, as well as performance in school. The detention of a parent is strongly associated with depression, anxiety, self-stigma, aggression, and withdrawal among children.[86] Increasing the use of alternatives to detention would help reduce these humanitarian costs.

II. ALTERNATIVES TO DETENTION

ICE has a range of options that it can use in lieu of detention. As discussed below, however, many of these options are underutilized. These include releasing an individual on her own recognizance, through a grant of parole, under an order of supervision, upon payment of a bond, into an electronic monitoring program, or into a community-based case management program.[87] While electronic monitoring is the most restrictive and invasive of these options, it is the only option that ICE considers an official Alternative-to-Detention (ATD) Program.[88] Furthermore, community-based case management programs, which have proven highly successful in other countries, are just getting off the ground in the United States.

Despite the range of alternatives to detention that are currently available, ICE still chooses to detain far more people than it releases. In FY 2013, ICE released 113,690 people under one of above-mentioned options, while it detained 440,557—nearly four times as many.[89] These figures indicate that ICE is not always considering less restrictive alternatives before resorting to detention. This Part discusses the strengths and limitations of various alternatives.

A. *Release on Own Recognizance*

A large percentage of the immigrants who are currently detained by ICE present no threat to public safety. An analysis performed by the

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84 *Id.* at 5.

85 *Id.* at 27.

86 Zayas & Heffron, *supra* note 79.

87 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-26, ALTERNATIVES TO DETENTION: IMPROVED DATA COLLECTION AND ANALYSES NEEDED TO BETTER ASSESS PROGRAM EFFECTIVENESS 7 (2014) [hereinafter GAO REPORT ON ALTERNATIVES TO DETENTION], http://www.gao.gov/assets/670/666911.pdf.

88 *Id.* at 8–9 (referring to the Intensive Supervision Appearance Program (ISAP) as "the ATD program").

89 *Id.* at 6, 8.

Associated Press found that 18,690 out of the 32,000 individuals in immigration detention on January 25, 2009 (fifty-eight percent) had no criminal conviction.[90] A similar analysis conducted by the *Huffington Post* in 2011 found that 13,185 out of the 32,300 individuals in immigration detention (forty-one percent) had no criminal history.[91]

Since ICE does not report the percent of *detainees* with criminal convictions, it is difficult to obtain current and reliable data on this issue. ICE does, however, report the percentage of people removed from the country who had a criminal conviction. Between 2011 and 2015, ICE has increased its focus on apprehending and removing immigrants who have been convicted of crimes.[92] In FY 2014, ICE reported that eighty-five percent of removals from the country's interior (as opposed to at the border) involved individuals with a criminal conviction.[93] However, a quarter of those people had only been convicted of a misdemeanor carrying a maximum sentence of one year.[94] Furthermore, approximately 1700 women and children are detained in "Family Residential Centers," where only individuals without criminal records can be held.[95]

Those who are not a threat to public safety and present no flight risk may be released on their own recognizance, which does not require posting a bond or complying with supervision requirements.[96] This option avoids restricting liberty and is the least expensive option. ICE's Advisory Committee on Family Residential Centers has advised that "[f]or many families, release on recognizance with information about rights and responsibilities and referrals to legal services and psycho-

90 *See* DONALD KERWIN & SERENA YI-YING LIN, MIGRATION POLICY INST., IMMIGRANT DETENTION: CAN ICE MEET ITS LEGAL IMPERATIVES AND CASE MANAGEMENT RESPONSIBILITIES? 20–22 (2009), http://www.migrationpolicy.org/pubs/detentionreportSept1009.pdf.

91 Elise Foley, *No Conviction, No Freedom: Immigration Authorities Locked 13,000 in Limbo*, HUFFINGTON POST (Mar. 28, 2012), http://www.huffingtonpost.com/2012/01/27/immigration-detention_n_1231618.html.

92 U.S. IMMIGRATION AND CUSTOMS ENF'T, DEP'T OF HOMELAND SEC., ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT, FISCAL YEAR 2014, at 5 (2014), https://www.ice.gov/doclib/about/offices/ero/pdf/2014-ice-immigration-removals.pdf.

93 *Id.*

94 *Id.* at 10.

95 U.S. IMMIGRATION AND CUSTOMS ENF'T, REPORT OF THE DHS ADVISORY COMMITTEE ON FAMILY RESIDENTIAL CENTERS 109 (2016) [hereinafter DHS ADVISORY REPORT], https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf; *see also Immigration Detention Map & Statistics*, CIVIC, http://www.endisolation.org/resources/immigration-detention (showing a daily population of 1111 at the South Texas Residential Facility in Dilley, Texas and 616 at the Karnes County Correctional Center in Karnes City, Texas) (last visited Apr. 18, 2017).

96 GAO REPORT ON ALTERNATIVES TO DETENTION, *supra* note 87, at 7.

social supports is sufficient to ensure compliance with immigration proceedings."[97]

A pilot study conducted by the Vera Institute of Justice in 2000 found that seventy-eight percent of asylum seekers who are released without any supervision comply with court proceedings.[98] Yet in FY 2013, only around 30,000 people were released on their own recognizance––less than seven percent of the people detained that year, suggesting that this option is greatly underutilized.[99]

B. *Parole*

Parole is another option that is rarely used at the present time. Even if someone is subject to mandatory detention as an "arriving alien"—as many asylum seekers are—ICE has discretion to release that person on parole in certain situations. Specifically, parole may be granted for urgent humanitarian reasons, a medical emergency, when there is a significant public benefit, or for a legitimate law enforcement objective.[100] In 2009, ICE issued a memorandum requiring that arriving aliens found to have a credible fear of persecution or torture be automatically reviewed for parole eligibility.[101] The memorandum provided that parole should be granted after a positive credible fear determination, as long as the person is not a flight risk and poses no danger to the community.[102] But ICE is not implementing this guidance. In fact, ICE trial attorneys "vigorously contest" the release of mothers and children on parole.[103] In FY 2013, ICE granted parole to only around 6000 people, just one percent of all the individuals detained that year.[104]

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97 *See* DHS ADVISORY REPORT *supra* note 95, at 15.

98 1 VERA INST. OF JUSTICE, TESTING COMMUNITY SUPERVISION FOR THE INS: AN EVALUATION OF THE APPEARANCE ASSISTANCE PROGRAM: FINAL REPORT TO THE IMMIGRATION AND NATURALIZATION SERVICE 8 (2000) [hereinafter VERA INST. REPORT], https://storage.googleapis.com/vera-web-assets/downloads/Publications/testing-community-supervision-for-the-ins-an-evaluation-of-the-appearance-assistance-program/legacy_downloads/INS_finalreport.pdf.

99 GAO REPORT ON ALTERNATIVES TO DETENTION, *supra* note 87, at 8.

100 *See* 8 U.S.C. § 1182(d)(5)(A) (2012); 8 C.F.R. §§ 212.5, 235.3(b)(2)(iii) (2016).

101 U.S. IMMIGRATION AND CUSTOMS ENF'T, DIRECTIVE NO. 11002.1, PAROLE OF ARRIVING ALIENS FOUND TO HAVE A CREDIBLE FEAR OF PERSECUTION OR TORTURE para. 8.2 (2009), https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_aliens_found_credible_fear.pdf.

102 *Id.* para. 6.2.

103 *A One-Week Snapshot: Human Rights First at Dilley Family Detention Facility Post-*Flores *Ruling*, HUM. RTS. FIRST (Aug. 6, 2015), http://www.humanrightsfirst.org/resource/one-week-snapshot-human-rights-first-dilley-family-detention-facility-post-flores-ruling.

104 GAO REPORT ON ALTERNATIVES TO DETENTION, *supra* note 87, at 8.

C. *Bond*

Bond is a highly effective means of ensuring appearance at court hearings, and it is available only to individuals who have been found not to pose a danger. During FY 2015, eighty-six percent of those released on bond by an immigration judge appeared at their court hearings.[105] Yet judges have historically granted only ten percent of bond redetermination motions. In FY 2016, this figure was significantly higher at thirty percent.[106] Although this is an improvement, it is still far lower than the percent of criminal defendants detained without bail. A 2012 study found that in New York, for example, eighty percent of the noncitizens apprehended by ICE are detained without bond, but only one percent of criminal defendants are held without bail.[107] ICE has been even harsher than immigration judges in setting bonds. In ninety-four percent of cases where a detainee requested a bond redetermination hearing before an immigration judge, ICE refused to set any bond at all.[108]

Although bond is effective in satisfying the government's interests, it often does not help immigrants actually get released from detention because they cannot afford to pay the bond.[109] Immigration bonds do

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105 *What Happens When Individuals Are Released on Bond in Immigration Court Proceedings?*, *supra* note 27.

106 *Id.*; *see also* GAO REPORT ON ALTERNATIVES TO DETENTION, *supra* note 87, at 8 (stating that around 41,000 people total were released on bond in FY 2013, which represents only ten percent of the number detained that year).

107 NYU SCH. OF LAW IMMIGRANT RIGHTS CLINIC, IMMIGRANT DEF. PROJECT, FAMILIES FOR FREEDOM, INSECURE COMMUNITIES, DEVASTATED FAMILIES: NEW DATA ON IMMIGRATION DETENTION AND DEPORTATION PRACTICES IN NEW YORK CITY 9 (2012), http://immigrantdefenseproject.org/wp-content/uploads/2012/07/NYC-FOIA-Report-2012-FINAL.pdf.

108 *What Happens When Individuals Are Released on Bond in Immigration Court Proceedings?*, *supra* note 27.

109 OLGA BYRNE, ELEANOR ACER & ROBYN BARNARD, HUMAN RIGHTS FIRST, LIFELINE ON LOCKDOWN: INCREASED U.S. DETENTION OF ASYLUM SEEKERS 25 (2016) [hereinafter LIFELINE ON LOCKDOWN], http://www.humanrightsfirst.org/sites/default/files/Lifeline-on-Lockdown_0.pdf (stating that seventy percent of the attorneys surveyed nationwide reported that ICE sets bonds too high); ELIZABETH CASSIDY & TIFFANY LYNCH, U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, BARRIERS TO PROTECTION: THE TREATMENT OF ASYLUM SEEKERS IN EXPEDITED REMOVAL 47–48 (2016), http://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf (reporting that the DHS often imposes bonds that are too high for families to afford and then defends those amounts at bond redetermination hearings in immigration court); INTER-AM. COMM'N ON HUMAN RIGHTS, HUMAN RIGHTS SITUATION OF REFUGEE AND MIGRANT FAMILIES AND UNACCOMPANIED CHILDREN IN THE UNITED STATES OF AMERICA 71 (2015) [hereinafter IACHR 2015 REPORT], http://www.oas.org/en/iachr/reports/pdfs/Refugees-Migrants-US.pdf ("[A]t the culmination of bond hearings, immigration judges have been setting extremely high bond amounts, up to $15,000 or more, such that those who may qualify to be released are unable to meet the required amount.").

not take into consideration an individual's financial circumstances.[110] Furthermore, there is a statutorily mandated minimum bond amount of $1500.[111] Although this may not seem very high, it still results in detention based solely on indigence. By comparison, in 2008, only thirteen percent of defendants in New York City who were arrested on non-felony charges and given a bond of $1000 or less were able to post bail at arraignment.[112]

In FY 2016, the median bond amount in immigration cases was $8000, with sixty percent of all bonds set between $5000 and $12,600.[113] Since immigration bonds must be paid in full cash value, they are even harder to post than bail in criminal cases, where defendants can typically put down a deposit or provide some type of collateral.[114] The people most vulnerable to harm in immigration detention are often the ones least likely to be able to post a bond.[115] And when people are able to post a bond, the financial consequences for the family can be disastrous, resulting in the loss of housing or other necessities.[116]

While the criminal justice system has been moving away from its historical focus on monetary bonds as the principle method of release from detention, the immigration system has not yet absorbed the lessons learned in the criminal context.[117] As a substantial body of research has shown that monetary bonds fail to deter criminal activity, are poor predictors of flight risk, result in detention based on economic status, and disproportionately affect minorities, it is critical to consider

110 LIFELINE ON LOCKDOWN, *supra* note 109, at 25 ("[I]t is not clear whether ICE has issued any formal guidance to field offices instructing ICE officers how to assess an individual's ability to pay—with respect to families in detention or individuals generally. Reports from attorneys serving asylum seekers and other immigrants do not indicate that any such policy has been implemented.").

111 8 U.S.C. § 1226(a) (2012).

112 *New York City: Bail Penalizes the Poor*, HUM. RTS. WATCH (Dec. 2, 2010, 11:45 PM), https://www.hrw.org/news/2010/12/02/new-york-city-bail-penalizes-poor.

113 *See What Happens When Individuals Are Released on Bond in Immigration Court Proceedings?*, *supra* note 27.

114 SHUTTING DOWN THE PROFITEERS, *supra* note 3, at 30.

115 For example, transgender individuals have higher rates of poverty, unemployment, family rejection, and social isolation, making it particularly difficult for them to post a bond. *See* JAIME M. GRANT ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL. & NAT'L GAY & LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 2–7 (2011), http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf; *see also* María Inés Taracena, *Free Nicoll: Bond Fundraiser Begins for Transgender Woman in All-Male Immigration Detention Center*, TUCSON WKLY. (Apr. 15, 2015, 11:30 AM), http://www.tucsonweekly.com/TheRange/archives/2015/04/15/free-nicoll-bond-fundraiser-begins-for-transgender-woman-in-all-male-immigration-detention-center.

116 Wiseman, *supra* note 51, at 1357, 1360–61.

117 *See, e.g.*, Denise Gilman, *To Loose the Bonds: The Deceptive Promise of Freedom from Pretrial Immigration Detention*, 92 IND. L.J. 157, 197–202 (2016) (discussing the move away from financial bonds in the criminal context based on substantial research demonstrating the inefficiency and unfairness of that system).

non-monetary alternatives to immigration detention.[118] The arbitrary nature of bond-setting in removal proceedings, where there are no meaningful standards for setting bond amounts, makes it even more urgent to consider non-monetary alternatives.[119]

D. *Supervised Release*

An alternative that does not discriminate against indigent individuals is supervised release, which involves being released under an order that requires compliance with certain conditions. These conditions often include being required to check-in regularly with ICE, obtaining permission from ICE before leaving the city or state, keeping ICE informed of any address change, having a curfew, receiving random home visits by ICE, and obtaining travel documents to facilitate removal.[120]

Currently, only ICE makes decisions about supervised release. Unlike criminal judges, immigration judges only make bond redeterminations; they do not release individuals on their own recognizance or under orders of supervision. In FY 2013, only 13,000 people were released under an order of supervision, making it the least utilized alternative after parole.[121]

Studies show that supervised release programs can be very effective in both the immigration and criminal contexts.[122] The Vera Institute of Justice reported an eighty-four percent compliance rate among asylum seekers who received minimal supervision, which is nearly identical to the compliance rate among individuals released on bond.[123] Supervised release may be even more effective if immigrants are given clearer instructions—in a language they can understand—regarding their release conditions.[124] A pilot supervised release program for defendants

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118 *Id.*

119 *Id.* at 209–12.

120 *See* 8 C.F.R. §§ 241.5(a), 241.13(h) (2016).

121 GAO REPORT ON ALTERNATIVES TO DETENTION, *supra* note 87, at 8.

122 *See* THOMAS H. COHEN & BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, NCJ 214994, STATE COURT PROCESSING STATISTICS, 1990–2004: PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 5 (2007), http://bjs.ojp.usdoj.gov/content/pub/pdf/prfdsc.pdf; *Criminal Justice Section, State Policy Implementation Project*, A.B.A., http://www.americanbar.org/content/dam/aba/administrative/criminal_justice/spip_handouts.authcheckdam.pdf (last visited May 17, 2017); *see also* Wiseman, *supra* note 51, at 1363.

123 VERA INST. REPORT, *supra* note 98, at 6.

124 *See* DHS ADVISORY REPORT, *supra* note 95, at 105 ("Many NGOs have complained that detainees who are released do not receive effective communication of their release conditions or options, including, for non-Spanish speakers, instructions in a language they understand about when and where to appear in court."); Letter from CARA Family Detention Pro Bono Project, to Sarah Saldaña, Director, Immigration and Customs Enf't Dep't of Homeland Sec.

in New York, operated by the Criminal Justice Agency, reported a compliance rate of eighty-seven percent.[125]

One of the main objections to supervised release programs pertains to the costs involved and limited capacity.[126] While supervised release is more expensive than bond release due to the human supervision involved, it is still far less expensive than detention. According to data provided by the U.S. Courts, pretrial detention is ten times more expensive than the cost of supervision by a pretrial services officer in the federal system.[127] The daily cost of pretrial detention per federal defendant is $73 (an annual cost of $26,655), while the daily cost of supervision by pretrial service officers is just $7.24 (an annual cost of $2644).[128] The District of Columbia now relies almost exclusively on supervision, rather than bail, for pretrial defendants, and this approach has proven highly successful, resulting in very low rates of absconding and violent crimes by those released.[129]

E. *Electronic Monitoring*

The most restrictive and invasive alternative to being detained is the Intensive Supervision Appearance Program (ISAP), which involves electronic monitoring.[130] ISAP was initiated in 2004 as a five-year pilot program that operated in ten cities.[131] In 2009, the program became national, receiving $62 million in funding from Congress. DHS hired a private, for-profit company, Behavioral Interventions Incorporated (BI), to administer, track, monitor, and provide reports on ISAP

(July 27, 2015) [hereinafter CARA Letter], http://www.aila.org/File/DownloadEmbeddedFile/65278.

125 *Mayor de Blasio Announces $17.8 Million to Reduce Unnecessary Jail Time for People Waiting for Trial*, NYC.GOV (July 8, 2015), http://www1.nyc.gov/office-of-the-mayor/news/471-15/mayor-de-blasio-17-8-million-reduce-unnecessary-jail-time-people-waiting-trial.

126 *See, e.g.*, FLA. LEGISLATURE OFFICE OF PROGRAM POLICY ANALYSIS & GOV'T ACCOUNTABILITY, NO. 10-08, PRETRIAL RELEASE PROGRAMS' COMPLIANCE WITH NEW REPORTING REQUIREMENTS IS MIXED 2 (2010), http://www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/1008rpt.pdf ("[T]he amount of funds provided by local governments to . . . [pretrial release] programs ranged from $65,000 in Bay County to $5.2 million in Broward County.").

127 *Supervision Costs Significantly Less than Incarceration in Federal System*, U.S. COURTS (July 18, 2013), http://www.uscourts.gov/news/2013/07/18/supervision-costs-significantly-less-incarceration-federal-system.

128 *Id.*

129 TIMOTHY R. SCHNACKE, NAT'L INST. OF CORR., U.S. DEP'T OF JUSTICE, MONEY AS A CRIMINAL JUSTICE STAKEHOLDER: THE JUDGE'S DECISION TO RELEASE OR DETAIN A DEFENDANT PRETRIAL 57, 60 (2014), https://s3.amazonaws.com/static.nicic.gov/Library/029517.pdf.

130 OIG REPORT ON ALTERNATIVES TO DETENTION, *supra* note 13, at 3.

131 *Id.*

participants.[132] In 2010, GEO Group acquired BI and took over the program.[133] Congress appropriated $90 million to fund the most recent version of ISAP in 2014.[134] As of February 2014, 22,201 individuals were participating in ISAP.[135]

There are two versions of ISAP, both of which involve electronic monitoring: the "Technology-Only" version and a "Full-Service" version that includes "case management" services. In February 2014, there were 11,368 people in the Full-Service program and 10,833 in the Technology-Only program.[136] The electronic monitoring is done either through a GPS monitoring device attached to the participant's ankle ("ankle bracelet") or through telephonic reporting with voice recognition software.

Electronic monitoring through ISAP is highly effective. In Contract Year 2013, the Full-Service program had a 99.9% compliance rate for all court hearings, including the final removal hearing, and a 79.4% compliance rate with orders of removal among those who lost their cases and were ordered removed.[137] Unfortunately, ICE has not been collecting similar data for the Technology-Only program, although it is now improving data collection efforts.[138]

In addition to being highly effective, electronic monitoring is also much cheaper than detention. Under the Technology-Only program, telephonic monitoring costs just $0.17 per participant per day, and GPS monitoring costs $4.41 per participant per day.[139] The "Full-Service" option that includes case management costs $8.37 per participant per day.[140] ICE estimated that the average cost per ISAP participant would be $5.16 in FY 2016, compared to $123.54 per day for detention.[141] Yet

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132 Contract with BI Incorporated for providing professional support services for ISAPII for the ICE/DRO/Alternatives to Detention Unit, Period of Performance 7/20/2009–7/19/2014, https://www.ice.gov/sites/default/files/documents/FOIA/2016/biIncorporatedHSCECR09D00002.pdf.

133 *The GEO Group Announces $415 Million Acquisition of B.I. Incorporated*, BUS. WIRE (Dec. 21, 2010, 8:41 AM), http://www.businesswire.com/news/home/20101221005564/en/GEO-Group-Announces-415-Million-Acquisition-B.I; *see also Alternatives to Immigration Detention: Less Costly and More Humane than Federal Lock-Up*, ACLU, https://www.aclu.org/sites/default/files/assets/aclu_atd_fact_sheet_final_v.2.pdf (last visited Apr. 28, 2017) [hereinafter *Alternatives to Immigration Detention*].

134 OIG REPORT ON ALTERNATIVES TO DETENTION, *supra* note 13, at 3.

135 *See id.* at 4.

136 *Id.*

137 *See Alternatives to Immigration Detention*, *supra* note 133, at 2 (citing *Intensive Supervision Appearance Program II: Contract Year 2013 Annual Report* (BI Incorp. 2013)); *see also* GAO REPORT ON ALTERNATIVES TO DETENTION, *supra* note 87.

138 GAO REPORT ON ALTERNATIVES TO DETENTION, *supra* note 87, at 31.

139 OIG REPORT ON ALTERNATIVES TO DETENTION, *supra* note 13, at 4.

140 *Id.*

141 *Backgrounder: Alternatives to Detention (ATD): History and Recommendations*, LUTHERAN IMMIGR. & REFUGEE SERV., http://lirs.org/wp-content/uploads/2015/07/LIRS-

Congress allocated only $122 million to ISAP in FY2016, which is less than four percent of the $3.3 billion total spent on detention and removal.[142]

Although electronic monitoring is a cost-effective alternative, it is also more restrictive, more invasive of privacy, and a greater affront to dignity than any of the other alternatives discussed above.[143] The GPS device must be charged for several hours a day, which means that participants in the program have to plug themselves into the wall, constraining their movement for hours at a time. This can be a degrading and dehumanizing experience.[144] For participants who are pregnant or have young children, having to stay in one place for hours is especially difficult.[145] Another drawback of the GPS device is that it is heavy and can become painful.[146] Wearing an ankle bracelet is also stigmatizing, since society often assumes that individuals wearing ankle bracelets are criminals, which can lead to discrimination and create problems at work or in school.[147]

Backgrounder-on-Alternatives-to-Detention-7.6.15.pdf (last visited June 26, 2017); *see also* U.S. DEP'T OF HOMELAND SEC., CONGRESSIONAL BUDGET JUSTIFICATION FY 2016, at 46 (2015), http://www.dhs.gov/sites/default/files/publications/DHS_FY2016_Congressional_Budget_Justification.pdf.

142 U.S. DEP'T OF HOMELAND SEC., BUDGET-IN-BRIEF FISCAL YEAR 2016, at 5 (2015), https://www.dhs.gov/sites/default/files/publications/FY_2016_DHS_Budget_in_Brief.pdf.

143 *See, e.g.*, Eric Maes & Benjamin Mine, *Some Reflections on the Possible Introduction of Electronic Monitoring as an Alternative to Pre-Trial Detention in Belgium*, 52 HOW. J. CRIM. JUST. 144, 157 (2013) (arguing, inter alia, that electronic monitoring raises numerous privacy concerns).

144 Letter from Eleni Wolfe-Roubatis, Centro Legal de la Raza, to Megan H. Mack, Officer of Civil Rights & Civil Liberties, Dep't of Homeland Sec. and John Roth, Inspector Gen., Dep't of Homeland Sec. 6–14 (Apr. 20, 2016), http://centrolegal.org/wp-content/uploads/2016/05/Complaint-to-OCRCL-Cover-Letter.pdf (alleging violations of due process and liberty rights of asylum seekers by U.S. Immigration and Customs Enforcement through the use of ISAP); John Burnett, *As Asylum Seekers Swap Prison Beds for Ankle Bracelets, Same Firm Profits*, NPR (Nov. 13, 2015, 4:56 AM), http://www.npr.org/2015/11/13/455790454/as-asylum-seekers-swap-prison-beds-for-ankle-bracelets-same-firm-profits; Maya Schenwar, *The Quiet Horrors of House Arrest, Electronic Monitoring, and Other Alternative Forms of Incarceration*, MOTHER JONES (Jan. 22, 2015, 7:00 AM), http://www.motherjones.com/politics/2015/01/house-arrest-surveillance-state-prisons.

145 Schenwar, *supra* note 144; E. C. Gogolak, *Ankle Monitors Weigh on Immigrant Mothers Released from Detention*, N.Y. TIMES (Nov. 15, 2015), https://www.nytimes.com/2015/11/16/nyregion/ankle-monitors-weigh-on-immigrant-mothers-released-from-detention.html.

146 Kyle Barron & Cinthya Santos Briones, *No Alternative: Ankle Monitors Expand the Reach of Immigration Detention*, NACLA (Jan. 6, 2015), http://nacla.org/news/2015/01/06/no-alternative-ankle-monitors-expand-reach-immigration-detention ("The use of the ankle monitors requires a period of physical adjustment, causing swelling of the foot and leg, as well as severe cramps. The person must be tethered to an outlet as the device is charged for hours, twice every day. . . . The greatest challenge that people under ISAP face with the use of the monitor is the psychological effects."); M.M., *Living with an Ankle Bracelet*, MARSHALL PROJECT (July 16, 2015, 12:31 PM), https://www.themarshallproject.org/2015/07/16/living-with-an-ankle-bracelet#.1UaJaftgJ.

147 *See* sources cited *supra* note 146.

Given the deprivations of liberty, privacy, and dignity imposed by ISAP, commentators and advocates have persuasively argued that this program is actually a form of "custody."[148] At least one federal district court has implicitly recognized that electronic monitoring and twelve-hour curfews under ICE's ISAP constitute "custody."[149] If this interpretation were widely adopted, half of the detainees subject to "mandatory detention" would be eligible for release into the ISAP program.[150]

As the most restrictive alternative to detention, electronic monitoring should be reserved for high-risk individuals. When ISAP became a national program in 2009, ICE limited it to high-priority categories that included people who already had final orders of removal and individuals in removal proceedings at risk of absconding. But ISAP has since become the default alternative-to-detention program and is often used for very low-risk individuals, including mothers released from family detention.[151] Currently, there is a lack of clarity around the criteria for enrolling individuals in ISAP, as well as for having electronic monitors removed.[152] If ICE relied more on other alternatives to detention, ISAP's position as the most restrictive option on the spectrum would become clear.

F. *Community-Based Alternatives*

Early explorations of community-based alternatives in the 1980s and 1990s involved partnerships between immigration authorities and

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148 *See, e.g.*, RUTGERS SCH. OF LAW-NEWARK, IMMIGRANT RIGHTS CLINIC & AM. FRIENDS SERV. COMM., FREED BUT NOT FREE: A REPORT EXAMINING THE CURRENT USE OF ALTERNATIVES TO IMMIGRATION DETENTION 24–25 (2012), https://www.afsc.org/sites/afsc.civicactions.net/files/documents/Freed-but-not-Free.pdf; *Featured Issue: Adult Detention*, AM. IMMIGR. LAW. ASS'N (Aug. 19, 2016), http://www.aila.org/advo-media/issues/enforcement/adult-detention (citing various AILA documents discussing the definition of "custody"); *see also* sources cited *supra* note 32.

149 *See* Nguyen v. B.I. Inc., 435 F. Supp. 2d 1109 (D. Or. 2006).

150 *See* Koulish, *supra* note 8, at 9. The study found that only twenty-five percent of mandatory detainees in Baltimore were considered "high risk" under the RCA, fifty-eight percent were medium risk, and seventeen percent were actually low risk. *Id.*

151 *See* DHS ADVISORY REPORT, *supra* note 95, at 17 ("[I]t appears that ICE is routinely requiring ISAP, including ankle monitors, as a general condition of release from family detention."); CASSIDY & LYNCH, *supra* note 109, at 48 ("[I]t appears that electronic monitoring is being used extensively without full individualized assessments of whether an asylum seeker is a non-appearance risk.").

152 *See, e.g.*, CARA Letter, *supra* note 124. The CARA Family Detention Pro Bono Project consists of the American Immigration Lawyers Association, the American Immigration Council, the Catholic Legal Immigration Network, and the Refugee and Immigrant Center for Education and Legal Services.

faith-based organizations.[153] These programs proved very successful. Catholic Charities of New Orleans's program achieved a compliance rate of ninety-seven percent at a cost of just $1430 per year per person and Lutheran Immigration and Refugee Service's (LIRS) program achieved a ninety-six percent appearance rate at just three percent of the cost of detention.[154] From 1997 to 2000, the Immigration and Nationality Service funded the Vera Institute for Justice to conduct an "Appearance Assistance Program" that focused on case management.[155] This program involved 500 participants and achieved an overall court appearance rate of ninety-one percent.[156]

In recent years, ICE renewed its interest in exploring community-based supervision programs. In June 2013, ICE entered into an unfunded contract with LIRS to release immigrants from detention into a community-based model.[157] Under this contract, ICE referred immigrants with specific vulnerabilities to LIRS's partners in several pilot sites.[158] LIRS has established coalitions of community partners in these locations that provide case management services, legal services, and housing. In addition, LIRS tracks referral practices, cost, and compliance to assess the model's effectiveness.

Similarly, in January 2014, ICE launched a small pilot program with the U.S. Conference of Catholic Bishops (USCCB) and its Catholic Charities partners to release vulnerable detainees into a community-based model that provides case management, legal services, and holistic support.[159] The participants include families, asylum-seekers, torture-survivors, primary caregivers, the elderly, and victims of crime.[160] These

153 *See* CATHOLIC LEGAL IMMIGRATION NETWORK, INC., THE NEEDLESS DETENTION OF IMMIGRANTS IN THE UNITED STATES 26–28 (2000), https://cliniclegal.org/sites/default/files/atrisk4.pdf; MIGRATION & REFUGEE SERVS., U.S. CONFERENCE OF CATHOLIC BISHOPS & CTR. FOR MIGRATION STUDIES, UNLOCKING HUMAN DIGNITY: A PLAN TO TRANSFORM THE U.S. IMMIGRANT DETENTION SYSTEM 28 (2015) [hereinafter UNLOCKING HUMAN DIGNITY], http://www.usccb.org/about/migration-and-refugee-services/upload/unlocking-human-dignity-report.pdf; *Backgrounder: Alternatives to Detention (ATD): History and Recommendations*, *supra* note 141.

154 *Backgrounder: Alternatives to Detention (ATD): History and Recommendations*, *supra* note 141.

155 *Id.*

156 *Id.*; *see also* VERA INST. REPORT, 98 note.

157 *Issue Brief: The Community Support Initiative: A Model National Project to Prove the Effectiveness of Alternatives to Immigration Detention*, LUTHERAN IMMIGR. & REFUGEE SERV., http://lirs.org/wp-content/uploads/2014/08/ISSUE-BRIEF-LIRS-Alternatives-to-Detention-Project-Overview-final.pdf (last visited June 6, 2017).

158 *Id.*; *see also Access to Justice: LIRS's Alternatives to Immigration Detention Project*, LUTHERAN IMMIGR. & REFUGEE SERV., http://lirs.org/wp-content/uploads/2015/05/LIRS_ATJ_overview.pdf (last visited June 6, 2017). These sites included: Tucson/Phoenix, Austin/San Antonio, Boston, Chicago, New York/Newark, Seattle/Tacoma, and Minneapolis/St. Paul.

159 UNLOCKING HUMAN DIGNITY, *supra* note 153, at 13.

160 *Id.* at 28 n.46.

pilot programs laid the groundwork for ICE's first large-scale community-based supervision program.

In 2015, legal challenges to detention conditions for children created a more urgent need for a larger, community-based alternative-to-detention program. In August 2015, U.S. District Court Judge Dolly M. Gee in the Central District of California found that the two "Family Residential Centers" in Karnes and Dilley, Texas, were not in compliance with a 1997 settlement in a case called *Flores v. Meese*, which required that children who enter the United States without their parents be granted a "general policy favoring release" to relatives or foster care.[161] The settlement further provided that "all minors who are detained" must be held in "licensed" facilities, under the least restrictive conditions, away from unrelated adults, and given access to medical care, exercise, and education.[162]

Judge Gee ordered DHS to promptly release the children unless it could demonstrate that they posed a significant flight risk or a danger to themselves or others.[163] She gave DHS until October 23, 2015 to comply with the order. DHS appealed the order and also tried a new tactic of trying to make the family detention centers compliant with the *Flores* settlement by getting them licensed as child care facilities by the Texas Department of Family Protective Services. This tactic was also challenged in court and ultimately proved unsuccessful.[164]

In December 2015, ICE launched its first large-scale community-based alternative-to-detention program, called the Family Case Management Program. The word "families" generally refers to female-headed households: women who entered the country with their children. The key component of this program is case management. According to ICE's description of the program, each case manager will oversee twenty families.[165] The case managers will provide a required set of core services, including orientation, initial intakes, education about

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161 Wil S. Hylton, *The Shame of America's Family Detention Camps*, N.Y. TIMES MAG. (Feb. 4, 2015), http://www.nytimes.com/2015/02/08/magazine/the-shame-of-americas-family-detention-camps.html; Roque Planas, *Family Detention Centers Seek Child Care Licenses as Deadline Looms*, HUFFINGTON POST (Jan. 16, 2017), http://www.huffingtonpost.com/entry/immigrant-family-detention-texas_us_56295a93e4b0aac0b8fc58a8.

162 Hylton, *supra* note 161.

163 *See* Planas, *supra* note 161.

164 *Id.*; *see also* Nigel Duara, *Hundreds of Women and Children Are Released from Texas Immigration Detention Facilities*, L.A. TIMES (Dec. 6, 2016, 2:30 AM), http://www.latimes.com/nation/la-na-texas-immigration-detention-release-20161204-story.html; Press Release, Human Rights First, Texas Judge Denies Licenses to Family Detention Facilities (Dec. 5, 2016), http://www.humanrightsfirst.org/press-release/texas-judge-denies-licenses-family-detention-facilities.

165 MARY F. LOISELLE, GEO WORLD, GEO CARE'S NEW FAMILY CASE MANAGEMENT PROGRAM 3 (2016), https://www.geogroup.com/userfiles/1de79aa6-2ff2-4615-a997-7869142237bd.pdf ("[A]n estimated 20:1 family unit to case manger ratio.").

ICE check-ins, developing and updating family service plans, and connecting the participants with low-cost or pro bono service providers.[166] They will also assess needs such as housing, transportation, medical and mental health services, religious services, ESL classes, and translation services in order to make appropriate referrals.[167]

The Family Case Management Program is supposed to include a total of 1500 families across five metropolitan areas: Baltimore/Washington, New York, Miami, Chicago, and Los Angeles.[168] However, it has been slow to get off the ground. ICE's Advisory Committee on Family Residential Centers reported in September 2016 that the most recent data it had from ICE showed that only forty-eight families had been enrolled in the program.[169] The Advisory Committee further reported that "there is so far little data on the program's efficacy."[170]

The most controversial aspect of the Family Case Management Program has been the decision to award the $11 million contract to GEO Care, L.L.C., a subsidiary of GEO Group, the private, for-profit corporation that operates the family detention center in Karnes, Texas.[171] Although ICE had been working with Lutheran Immigration and Refugee Services and the USCCB on smaller, pilot case management programs, it ultimately gave the contract for the Family Case Management Program to GEO.[172] ICE expects GEO to manage the overall program but to subcontract with community-based organizations to handle the case management services.[173]

The numerous human rights abuses that have occurred at Karnes, as well as other detention centers operated by GEO, have created a high level of distrust between community-based organizations and the private corporation, which will likely make it difficult to establish a good working relationship. Even if the case managers work well with GEO, the program may have a hard time developing trusting relationships with the community partners that need to be involved to provide a

166 *Id.*

167 *Id.*

168 Michael Barajas, *ICE Awards Contract to Private Prison Company that Was Just Slammed in Federal Report*, HOUS. PRESS (Sept. 22, 2015, 12:30 PM), http://www.houstonpress.com/news/ice-awards-contract-to-private-prison-company-that-was-just-slammed-in-federal-report-7785696.

169 DHS ADVISORY REPORT, *supra* note 95, at 18–19.

170 *Id.* at 19.

171 Barajas, *supra* note 168.

172 Jason Buch, *ICE Announces Caseworker Program for Immigrant Families*, SAN ANTONIO EXPRESS-NEWS (Sept. 17, 2015, 6:40 PM), http://www.expressnews.com/news/local/article/ICE-announces-caseworker-program-for-immigrant-6512150.php; Burnett, *supra* note 144.

173 Buch, *supra* note 172.

holistic range of services, including housing, medical and mental health care, legal aid, transportation, education, and job skills.

A second, related concern involves the independence of the case managers. Presumably the case managers will have a background in social work, which prepares them to identify and address the needs of the participants, not to be responsible for immigration enforcement. Conflating case management and enforcement responsibilities would be a recipe for disaster. Case managers cannot possibly gain the trust of participants, which is necessary for them to perform their jobs, if they are also required to report noncompliance to ICE and play a role in enforcing removal orders. Case managers should work towards empowering their clients, which is antithetical to policing them.

A third concern is that GEO has a conflict of interest because it is the same private corporation that operates the ISAP program and multiple detention centers.[174] GEO profits whether or not the community-supervision program is successful. Participants who fail to follow through with the program's requirements will likely be placed in either ISAP or sent back to a family detention facility, both of which benefit GEO financially.[175] In other words, any incentive that GEO has to see participants in the program succeed is undercut by its incentives to have them fail, especially since detention is more lucrative for GEO than community-based supervision.[176]

In addition to this conflict of interest, GEO has no experience providing case management services to families.[177] The role that "case managers" play in the ISAP program is perfunctory and focuses on enforcement rather than prioritizing and addressing participants' basic needs. GEO has never had to work closely with case managers in a community-based setting in the way that the Family Case Management Program requires. Nor has GEO previously formed close working relationships with community groups that provide a wide range of

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174 *See GEO Care*, GEO, https://www.geogroup.com/GEO-Care (last visited Apr. 28, 2017); *Our Locations*, GEO, https://www.geogroup.com/Locations (last visited Apr. 28, 2017).

175 *See* THE GEO GROUP, INC., 2016 ANNUAL REPORT: PART II 5, 10, 16–17, 20–21 (2016), http://www.snl.com/Interactive/newlookandfeel/4144107/2016-GEO-Annual-Report.pdf.

176 *Id.* at 15–16 (showing that in 2016, Geo's total revenue from U.S. Corrections and Detention activities was $1.37 billion, while its revenue from GEO Care, which handles ISAP, was $394 million); *see also supra* notes 138–41 and accompanying text (comparing the costs of ISAP and detention).

177 *See, e.g.*, Press Release, Am. Immigration Lawyers Ass'n, Obama Administration Again Hands Families over to Private Prison Company (Sept. 18, 2015) [hereinafter Press Release], http://aila.org/advo-media/press-releases/2015/administration-hands-families-over-private-prision (quoting Jeanne Atkinson, Executive Director of Catholic Legal Immigration Network, as saying "GEO does not have the legal or social case management expertise, nor trust of the immigrant community to successfully implement this program").

services.[178] By contrast, the two faith-based organizations that applied for the contract, USCCB and LIRS, have expertise developed through decades of experience providing legal and social case management services to vulnerable populations.[179]

ICE could take several steps to strengthen this community-based case management program. First, it should adopt a model that protects case managers' independence. Second, it should provide formal and informal mechanisms for participants, staff, and community partners to give feedback that is regularly reviewed and used to make improvements to the program's design and operations. Third, the program should have a publicly available code of conduct that helps set clear expectations and provides ethical guidelines, including, among other things, the importance of confidentiality, conflicts of interest, and abuse of power. Fourth, ICE should ensure that any supervision conditions are reviewed regularly to ensure that they are not excessive. Developments in a client's legal case, employment situation, housing, and family situation can all influence decisions about what level of supervision is required. Fifth, ICE should ensure that systems are in place for collecting, analyzing, and reporting data, which should be publicly reported. This data should include information about compliance rates, cost, demographics of participants, types of services provided, number of cases per case manager, and number and nature of any grievances filed. Finally, the program should have an independent, external review mechanism. This review body should have access to facilities, records, and staff; monitor the data collected and the grievances that are filed; and have expertise in investigating these types of grievances.

In other countries, community-based case management programs have proven to be effective alternatives to immigration detention.[180] Australia, Sweden, the Netherlands, Belgium, Hong Kong, Thailand,

178 *Id.* (quoting Victor Nieblas Pradis, President of the American Immigration Lawyers Association, as saying "this contract should have gone to an entity with actual experience connecting vulnerable populations with wrap-around services in the community like housing, medical care, and legal services"); *see also* Katharina Obser, Opinion, *Missing the Point: Alternatives to Detention to Be Run by Private Prison Contractors*, NEW AM. MEDIA (Sept. 25, 2015), http://newamericamedia.org/2015/09/missing-the-point-alternatives-to-detention-to-be-run-by-private-prison-contractors.php ("ICE has acknowledged that it understands the unique experience community-based organizations bring to providing case management. But rather than awarding the contract to these organizations, ICE's choice of Geo Care continues to allow profiting from vulnerable women and children seeking protection.").

179 *See* Press Release, *supra* note 177.

180 *See* UNHCR, OPTIONS PAPER 2: OPTIONS FOR GOVERNMENTS ON OPEN RECEPTION AND ALTERNATIVES TO DETENTION 5–7 (2015), http://www.unhcr.org/en-us/protection/detention/5538e53d9/unhcr-options-paper-2-options-governments-open-reception-alternatives-detention.html.

and Indonesia have all successfully implemented such programs.[181] Compliance rates are ninety-four percent in Australia, ninety-seven percent in Hong Kong, ninety-seven percent in Thailand, which has a program that focuses specifically on unaccompanied children seeking refugee status, and ninety-four percent for a similar program in Indonesia.[182] These examples show that case management is an effective tool to help people navigate complex immigration proceedings. By using detention only as a measure of last resort, the United States can help uphold the rights and values that attract so many millions of people to this country.

III. LEGAL ARGUMENTS FOR ALTERNATIVES

While the financial and humanitarian policy reasons for expanding the use of alternatives to detention are compelling, they have thus far not resulted in significant changes to ICE's detention practices, despite the existing range of alternatives. There is therefore a need to explore potential legal challenges to ICE's current detention practices. This Part proposes three different approaches for challenging ICE's failure to adequately consider alternatives, including constitutional arguments, disability rights-based arguments, and international human rights arguments.

A. *Constitutional Arguments*

1. Excessive Bail

The Eighth Amendment states that "[e]xcessive bail shall not be required."[183] Under the Excessive Bail Clause, bail should be set no higher than the sum required to protect the government's interests in preventing flight and danger.[184] The Supreme Court has indicated that the Excessive Bail Clause is not limited to criminal proceedings but also applies in the immigration context.[185] Indeed, the Excessive Bail Clause

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181 INT'L DET. COAL., THERE ARE ALTERNATIVES 10–11 (2015), http://idcoalition.org/wp-content/uploads/2016/01/There-Are-Alternatives-2015.pdf.

182 *Id.* at 10, 45, 52.

183 U.S. CONST. amend. VIII.

184 Stack v. Boyle, 342 U.S. 1, 5 (1951) ("Bail set at a figure higher than an amount reasonably calculated [to ensure the defendant's presence at trial] is 'excessive' under the Eighth Amendment.").

185 Browning–Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 263 n.3 (1989) (explaining that there is potential for abuse of the Bail Clause "when there is a direct

may be particularly relevant to immigration, since the government requires immigration detainees to pay the full cash value of the bond to be released, not just provide a deposit, property, or other type of collateral, as in the criminal context, where even unsecured bonds are common.[186] Since payment of a full cash bond is not required by statute, this is a practice that would not require congressional action to change.[187]

While traditional challenges under the Excessive Bail Clause involve whether the amount of bail fixed was too high, courts have also applied it to the conditions of pretrial release.[188] In some of these cases, the government conceded that the Excessive Bail Clause applies to non-pecuniary conditions of release, such as imposition of a curfew and electronic monitoring.[189] *United States v. Salerno*, one of the leading Supreme Court cases on the Excessive Bail Clause, explains that the "substantive limitation of the Bail Clause is that the Government's proposed *conditions of release or detention* not be 'excessive' in light of the perceived evil."[190] As a court in the Southern District of New York explained, the analysis in *Salerno*, which examined whether pretrial

government restraint on personal liberty, be it in a criminal case or in a civil deportation proceeding"); Carlson v. Landon, 342 U.S. 524, 531–48 (1952) (holding that denial of bail did not violate the Excessive Bail Clause and that, on rearrest of an alien who had been released on bail, a new warrant should be obtained).

186 SHUTTING DOWN THE PROFITEERS, *supra* note 3, at 30; *see also* MICHAEL R. JONES, PRETRIAL JUSTICE INST., UNSECURED BONDS: THE AS EFFECTIVE AND MOST EFFICIENT PRETRIAL RELEASE OPTION 3 (2013), http://www.pretrial.org/download/research/Unsecured+Bonds,+The+As+Effective+and+Most+Efficient+Pretrial+Release+Option+-+Jones+2013.pdf (explaining that studies have found unsecured bonds to be just as effective in achieving compliance with court appearances and safety).

187 *See* 8 U.S.C. § 1226(a) (2012) (referring generally to "security approved by . . . the Attorney General").

188 *See, e.g.*, United States v. Peeples, 630 F.3d 1136 (9th Cir. 2010) (per curiam) (holding that Adam Walsh Amendments did not violate Excessive Bail Clause as applied to the defendant); United States v. Scott, 450 F.3d 863, 866 n.5 (9th Cir. 2006) ("There may thus be cases where the risk of flight is so slight that any amount of bail is excessive; release on one's own recognizance would then be constitutionally required, which could further limit the government's discretion to fashion conditions of release."); United States v. Cossey, 637 F. Supp. 2d 881 (D. Mont. 2009) (holding that Adam Walsh Amendments did not violate Excessive Bail Clause as applied to the defendant); United States v. Torres, 566 F. Supp. 2d 591 (W.D. Tex. 2008) (holding that the automatic imposition of curfew and electronic monitoring as conditions of release pursuant to the Adam Walsh Amendments violated the Excessive Bail Clause as applied to the defendant); United States v. Arzberger, 592 F. Supp. 2d 590, 604–06 (S.D.N.Y. 2008) (holding that an individualized determination was required regarding whether bail conditions, as applied to the defendant, violated his rights under the Excessive Bail Clause); United States v. Gardner, 523 F. Supp. 2d 1025, 1026, 1029–31 (N.D. Cal. 2007) (holding that imposing electronic monitoring as a condition of pretrial release did not violate the Excessive Bail Clause in a case involving conspiracy to engage in sex trafficking of a minor).

189 *Arzberger*, 592 F. Supp. 2d at 604.

190 United States v. Salerno, 481 U.S. 739, 754 (1987) (emphasis added) (determining whether pretrial detention of defendants was warranted).

detention violated the Eighth Amendment, "would have been entirely unnecessary if the Excessive Bail Clause only applied to economic conditions of bail."[191]

However, courts have not yet addressed the specific question of whether a bail requirement resulting in detention is "excessive" when alternatives that do not require any payment would be just as effective and efficient in achieving the government's interests. Samuel R. Wiseman has argued that there is a need for courts to develop a jurisprudence of excessiveness to test the fit between the government's pretrial goals (e.g., preventing flight) and the means to accomplish them.[192] Drawing on the text, purpose, and history of the Excessive Bail Clause, he argues that at least an intermediate level of scrutiny should be applied, requiring the chosen means to be "not substantially more burdensome than necessary" to achieve the government's goals.[193] Under this standard, if defendants released under electronic monitoring have an appearance rate at least as low as those released on bail, and the cost of monitoring is no greater, then concern over flight risk cannot justify imprisonment.[194] Wiseman notes that "[t]he key to this constitutional argument . . . is establishing monitoring's superior effectiveness."[195] Applying the same reasoning, a bond requirement resulting in immigration detention would be excessive if alternatives exist that could serve the government's goals as well as bond at no greater cost.

The concept of excessiveness in the Bail Clause reflects the principle of proportionality found in multiple parts of the Eighth Amendment, including the Excessive Fines Clause and Cruel and Unusual Punishment Clause.[196] A nonretributive measure may be disproportionate because its "costs and burdens outweigh [its] likely benefits," or because it is "unnecessarily costly or burdensome when compared to alternative means of achieving the same benefits."[197] Failure to consider alternatives to immigration detention risks both types of disproportionality.

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191 *Arzberger*, 592 F. Supp. 2d at 604.

192 Wiseman, *supra* note 51, at 1384.

193 *Id.* at 1344, 1389–95.

194 *Id.* at 1384–85.

195 *Id.* at 1384.

196 *See* United States v. Salerno, 481 U.S. 739, 754 (1987); Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 599–606 (2005).

197 Frase, *supra* note 196, at 576 (describing the former as "ends disproportionality" and the latter as "means disproportionality").

2. Procedural Due Process

Failure to consider alternatives to detention also implicates due process. Freedom from detention, including immigration detention, "lies at the heart of the liberty that [the Fifth Amendment Due Process] Clause protects."[198] The Supreme Court has therefore found that immigration detention must "bear[][a] reasonable relation to the purpose for which the individual [was] committed."[199] The purpose of immigration detention is to prevent flight and danger to the community.[200] Failure to consider alternatives to detention can result in the detention of noncitizens for reasons totally unrelated to flight or danger, such as inability to pay a bond. Detention without consideration of alternatives therefore may not always be reasonably related to the government's legitimate purposes in preventing flight and danger.[201] This is particularly true in civil proceedings, including removal proceedings, where the individual interests at stake are more substantial than mere loss of money and "due process places a heightened burden of proof on the State."[202]

At the heart of the traditional three-part test in *Mathews v. Eldridge* for procedural due process is the concept of proportionality.[203] This test requires "comparing the marginal benefits gained by added procedural safeguards with the added cost and administrative burdens of those

198 Zadvydas v. Davis, 533 U.S. 678, 690 (2001); *see also Salerno*, 481 U.S. at 750 (recognizing the fundamental nature of pretrial liberty).

199 *Zadvydas*, 533 U.S. at 690 (second and third alteration in original) (quoting Jackson v. Indiana, 406 U.S. 715, 738 (1972)); *see also* Rodriguez v. Robbins, 804 F.3d 1060, 1077 (9th Cir. 2015) (requiring the government to establish that it has "a legitimate interest reasonably related to continued [immigration] detention"); Singh v. Holder, 638 F.3d 1196, 1203 (9th Cir. 2011) (establishing procedural safeguards for immigration bond determination hearings "to ensure that the government's asserted justification for physical confinement 'outweighs the individual's constitutionally protected interest in avoiding physical restraint'" (quoting Casas-Castrillon v. Dep't of Homeland Sec., 535 F.3d 942, 950 (9th Cir. 2008))).

200 *Zadvydas*, 533 U.S. at 690–91; *see also* 8 C.F.R. § 1236.1(c)(8), (d)(1) (2016); Guerra, 24 I. & N. Dec. 37, 38 (B.I.A. 2006); Adeniji, 22 I. & N. Dec. 1102, 1102 (B.I.A. 1999).

201 *See* Bearden v. Georgia, 461 U.S. 660, 672 (1983) ("Only if the sentencing court determines that alternatives to imprisonment are not adequate in a particular situation to meet the State's interest in punishment and deterrence may the State imprison a probationer who has made sufficient bona fide efforts to pay."); Pugh v. Rainwater, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc) ("The incarceration of those who cannot [pay bond], without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements."); Williams v. Farrior, 626 F. Supp. 983, 985 (S.D. Miss. 1986) ("[I]t is clear that a bail system which allows only monetary bail and does not provide for any meaningful consideration of other possible alternatives for indigent pretrial detainees infringes on both equal protection and due process requirements.").

202 Cooper v. Oklahoma, 517 U.S. 348, 363 (1996); *see also Singh*, 638 F.3d at 1204 (quoting *Cooper*, 517 U.S. at 363).

203 Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

safeguards."[204] Under the first prong of the *Mathews* test, a court considers the private interest at stake, which, here, is freedom from physical detention. The Court has long held 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."[205] Indeed, even in the context of the war on terror and individuals accused of being "enemy combatants," the Court has stressed that the deprivation of liberty associated with physical detention must be given great weight on the *Mathews* scale.[206]

Under the second prong of the test, courts consider the government's interest, which is to prevent flight and protect the community's safety. Third, courts consider the risk of an erroneous deprivation of the private interest at stake. Failing to consider alternatives to detention creates a substantial risk of erroneous deprivation of liberty. The range of alternatives to detention discussed above is often sufficient to protect the government's legitimate interests in preventing flight and protecting safety.[207] While the government is not required to use the least burdensome means of securing noncitizens, using detention as the default, rather than as a last resort, creates an enormous risk of erroneous deprivation of liberty.[208]

3. Equal Protection

The Equal Protection Clause of the Fifth Amendment prohibits the federal government from "invidiously den[ying] one class of defendants a substantial benefit available to another class of defendants."[209] Failure to consider alternatives to detention other than posting a bond, as well as failure to take an individual's ability to pay into account when setting a bond, disproportionately results in the detention of indigent persons. Although indigent individuals are not normally a suspect class entitled to heightened scrutiny, the Supreme Court has applied heightened scrutiny in situations where indigent individuals are "completely unable to pay for some desired benefit, and as a consequence, they sustained an

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204 Frase, *supra* note 196, at 611.

205 Foucha v. Louisiana, 504 U.S. 71, 80 (1992).

206 Hamdi v. Rumsfeld, 542 U.S. 507, 529–31 (2004).

207 *See* Pugh v. Rainwater, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc).

208 *See* Rodriguez v. Robbins, 804 F.3d 1060, 1087–88 (9th Cir. 2015) (explaining that the court's injunction "merely directs [Immigration Judges] to 'consider' restrictions short of detention" and "does not require that IJs apply the least restrictive means of supervision").

209 Bearden v. Georgia, 461 U.S. 660, 665 (1983).

absolute deprivation of a meaningful opportunity to enjoy that benefit."[210]

Applying this rationale, the Court has invalided state laws that prevent an indigent criminal defendant from acquiring a transcript or an adequate substitute for a transcript to use during trial.[211] The Court found that the payment requirements amounted to de facto discrimination against those who were totally unable to pay for the transcripts, for "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[212] Similarly, in holding that an indigent defendant has a right to counsel on appeal, the Court found that "an unconstitutional line ha[d] been drawn between rich and the poor," since an indigent individual without counsel only received a "meaningless ritual, while the rich man ha[d] a meaningful appeal."[213] Likewise, a bond redetermination hearing is only a meaningless ritual if indigent individuals who are totally unable to pay for a bond remain detained even if a bond is granted, while wealthier individuals obtain their freedom.

Furthermore, in cases where fundamental rights are involved, the Court has been more willing to look closely at distinctions on the basis of wealth. For example, the Court has struck down state statutes requiring payment of filing fees in divorce cases because of the fundamental nature of the marital relationship.[214] The Court has also struck down state laws that required payment of filing fees to submit a writ of habeas corpus, finding that failure to extend the "the highest safeguard of liberty" to indigent prisoners violated equal protection.[215] Physical liberty is, of course, also what is at stake in the context of immigration detention, and the Court has "always been careful not to 'minimize the importance and fundamental nature' of the individual's right to liberty."[216]

Of direct relevance to the present argument is the Fifth Circuit's decision in *Pugh v. Rainwater*, which applied heightened scrutiny to an equal protection claim challenging a State's refusal to consider a defendant's inability to pay in setting bail.[217] There, the court reasoned

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210 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 19–20 (1973). *But see* Harris v. McRae, 448 U.S. 297, 323 (1980) ("[T]his Court has held repeatedly that poverty, standing alone is not a suspect classification.").

211 *See* Griffin v. Illinois, 351 U.S. 12, 19–20 (1956).

212 *Id.* at 19.

213 Douglas v. California, 372 U.S. 353, 357–58 (1963).

214 Boddie v. Connecticut, 401 U.S. 371, 374 (1971).

215 Smith v. Bennett, 365 U.S. 708, 712 (1961).

216 Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (quoting United States v. Salerno, 481 U.S. 739, 750 (1987)).

217 Pugh v. Rainwater, 572 F.2d 1053, 1055–56 (5th Cir. 1978) (citing Williams v. Illinois, 399 U.S. 235 (1970)); *see also* Tate v. Short, 401 U.S. 395 (1971).

that "imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible."[218] A number of federal district courts and state courts have likewise held that failure to consider alternatives to bail for pretrial detainees violates equal protection by impermissibly discriminating against indigent individuals.[219]

Even if only rational basis applies, rather than heightened scrutiny, one could argue that the failure to consider alternatives to detention is not rationally related to the government's legitimate interests in preventing flight and protecting the public.[220] This argument would require showing that alternatives to detention are highly effective at achieving the government's interests and do not impose a greater financial or administrative burden. The evidence, discussed in Part II above, suggests that this is, in fact, the case for at least some of the alternatives to detention. Additional data regarding the short- and long-term costs involved in establishing and administering various types of alternative-to-detention programs would be extremely useful in supporting this type of equal protection challenge.[221]

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218 *Pugh*, 572 F.2d at 1056.

219 *See, e.g.*, Williams v. Farrior, 626 F. Supp. 983, 985 (S.D. Miss. 1986) ("For purposes of the Fourteenth Amendment's Equal Protection Clause, it is clear that a bail system which allows only monetary bail and does not provide for any meaningful consideration of other possible alternatives for indigent pretrial detainees infringes on both equal protection and due process requirements."); Alabama v. Blake, 642 So. 2d 959, 968 (Ala. 1994) ("Under the scheme established by the Act, a defendant with financial means . . . can obtain immediate release simply by posting bail. However, an indigent defendant charged with a relatively minor misdemeanor who cannot obtain release by cash bail, a bail bond, or property bail, must remain incarcerated for a minimum of three days, and perhaps longer, before being able to obtain judicial public bail. We conclude that, as written, article VII of the Act violates an indigent defendant's equal protection rights guaranteed by the United States Constitution . . . ."); Lee v. Lawson, 375 So. 2d 1019, 1023 (Miss. 1979) ("A consideration of the equal protection and due process rights of indigent pretrial detainees leads us to the inescapable conclusion that a bail system based on monetary bail alone would be unconstitutional.").

220 *But see* McGinnis v. Royster, 410 U.S. 263, 268–70 (1973) (rejecting an equal protection challenge to a New York statute that denied certain state prisoners good-time credit for parole eligibility for the period of their presentence county jail incarceration, but granted the full allowance of good-time credit for the entire period of their prison confinement to those released on bail prior to their sentence).

221 *See, e.g.*, Armour v. City of Indianapolis, 566 U.S. 673, 682–87 (2012) (holding that administrative convenience provided a rational basis for the city's unequal treatment of sewer customers); FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993) (holding that plausible policy reason for the classification exists if "there is any reasonably conceivable state of facts that could provide a rational basis for the classification"). *Armour*, however, involved a tax statute, where especially broad latitude in creating distinctions is allowed. Regan v. Taxation with Representation of Wash., 461 U.S. 540, 547 (1983).

4. Substantive Due Process

Failure to consider alternatives to detention may also give rise to a substantive due process challenge to the conditions of immigration detention. In the criminal context, claims regarding the conditions of detention are governed by either the Fourth Amendment or the Eighth Amendment. The Fourth Amendment's requirement that seizures must be "reasonable" begins at the time of arrest, but it is not clear when this requirement ends.[222] When arrests occur without a warrant, circuit courts are split regarding whether the Fourth Amendment's reasonableness standard extends until there is a judicial determination of probable cause.[223]

In the immigration context, which involves nonpunitive civil detention, the conditions of detention are governed by substantive due process under the Fifth Amendment after the Fourth Amendment's protections end. The line demarking when the Fourth Amendment's protections end and substantive due process protections begin, however, is even murkier than in the criminal context, since arrests are typically made without warrants and there is no judicial review of probable cause.[224] One could argue that without any judicial determination of probable cause, the Fourth Amendment reasonableness standard should govern the entire period of immigration detention. Courts, however, have not applied the Fourth Amendment in this manner; instead, they have applied substantive due process protections to the conditions of immigration detention.

The substantive due process standard for conditions of nonpunitive pretrial detention derives from the Supreme Court's decision in *Bell v. Wolfish*, which requires a court to determine whether the conditions are imposed for the purpose of punishment. *Wolfish* explained that "if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua*

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222 *See* Catherine T. Struve, *The Conditions of Pretrial Detention*, 161 U. PA. L. REV. 1009, 1019 (2013).

223 The Sixth and Ninth Circuits have found that the reasonableness standard applies until there is a judicial determination of probable cause, while the Fourth and Eleventh Circuits have rejected this view. Meanwhile, the Seventh and Tenth Circuits have applied the reasonableness standard to certain types of claims arising before a judicial determination of probable cause but an Eighth Amendment "subjective deliberate indifference" standard to other types of claims arising during the same period. *Id.* at 1019–22.

224 *See* Michael Kagan, *Immigration Law's Looming Fourth Amendment Problem*, 104 GEO. L.J. 125, 161–63 (2015) (discussing constitutional concerns arising from the absence of a neutral review for probable cause in immigration enforcement).

detainees."[225] In other words, a court must decide whether a restriction or condition "appears excessive in relation to the alternative [nonpunitive] purpose assigned [to it]."[226]

Based on *Wolfish*, some courts have held that pretrial detainees are entitled to "reasonable" care,[227] while other courts apply the "deliberate indifference" standard derived from Eighth Amendment cases regarding cruel and unusual punishment.[228] The Supreme Court has never clarified whether nonpunitive, pretrial detainees receive greater protections under substantive due process than convicted prisoners receive under the Eighth Amendment. However, the emphasis on reasonableness in *Wolfish* is consistent with Supreme Court cases holding that the conditions of nonpunitive civil commitment must "bear some reasonable relation to the purpose for which the individual is committed."[229] Since immigration detainees are both civil detainees and pre-adjudication detainees, they should be entitled to protections at least as great as afforded to civilly committed individuals and pretrial defendants.[230]

Building on the implied principle of proportionality, the Court in *Wolfish* addressed consideration of less harsh alternatives in a footnote, explaining:

> [L]oading a detainee with chains and shackles and throwing him in a dungeon may ensure his presence at trial and preserve the security of the institution. But it would be difficult to conceive of a situation where conditions so harsh, employed to achieve objectives that could be accomplished *in so many alternative and less harsh methods*,

225 Bell v. Wolfish, 441 U.S. 520, 539 (1979).

226 *Id.* at 538 (second alteration in original) (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 169 (1963)).

227 *See, e.g.*, Rhyne v. Henderson County, 973 F.2d 386, 388 (5th Cir. 1992); Cupit v. Jones, 835 F.2d 82, 85 (5th Cir. 1987) ("[P]retrial detainees are entitled to reasonable medical care unless the failure to supply that care is reasonably related to a legitimate governmental objective."); Haitian Ctrs. Council, Inc. v. Sale, 823 F. Supp. 1028, 1043–44 (E.D.N.Y. 1993).

228 As Catherine T. Struve has explained, "[t]he trend is toward applying the Eighth Amendment subjective deliberate indifference standard" to claims of denial of medical care, failure to prevent suicide, and failure to protect from attack, whereas courts are "relatively evenly divided" between the deliberate indifference standard and the test in *Wolfish* for claims relating to general conditions of confinement; and there is "at least a three-way split in the case law" with respect to excessive force claims. Struve, *supra* note 222, at 1024. Struve proposes "an intermediate ground between objective reasonableness and subjective deliberate indifference," which is "in essence, the objective deliberate indifference test." *Id.* at 1067–68.

229 Jackson v. Indiana, 406 U.S. 715, 738 (1972); *see also* Youngberg v. Romeo, 457 U.S. 307, 324 (1982) (holding that a civilly committed individual has a substantive due process right to "conditions of reasonable care and safety" and "reasonably nonrestrictive confinement conditions").

230 *See* Jones v. Blanas, 393 F.3d 918, 932 (9th Cir. 2004).

> would not support a conclusion that the purpose for which they were imposed was to punish.[231]

In a subsequent case quoting this language, the Court confirmed that "a failure to consider, or to use, 'alternative and less harsh methods' to achieve a nonpunitive objective can help to show that legislature's 'purpose . . . was to punish.'"[232]

The Ninth Circuit has interpreted the language in *Wolfish* regarding consideration of less harsh alternatives as another way to understand the rule that restrictions should not be excessive in relation to their purpose.[233] The court found that incarcerating someone for six days because she refused to submit to booking procedures was excessive under the standard in *Wolfish*, given the alternatives available, which included booking over the defendant's objections, requesting a booking order, and partial booking.[234] Thus, similar to the analysis under the Excessive Bail Clause, failure to consider less harsh alternatives to immigration detention may result in the imposition of restrictions or conditions that are excessive and disproportionate in relation to the government's purpose of preventing flight and danger.[235] In the criminal context, courts have ordered anti-incarcerative planning and programs as remedies in litigation involving constitutional challenges to detention conditions.[236] Along the same lines, courts could order DHS to develop and use alternatives to detention in litigation challenging immigration detention conditions.

B. *Disability Rights Arguments*

Disability rights statutes provide another avenue for challenging ICE's failure to consider and use alternatives to immigration detention. The Americans with Disabilities Act (ADA) prohibits discrimination based on a disability by "public entities," including an "instrumentality of a State."[237] Its precursor, the Rehabilitation Act (RA), prohibits disability-based discrimination in programs and activities that receive

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231 *Wolfish*, 441 U.S. at 539 n.20 (emphasis added).

232 Kansas v. Hendricks, 521 U.S. 346, 388 (1997) (alteration in original) (quoting *Wolfish*, 441 U.S. at 539 n.20).

233 Hallstrom v. City of Garden City, 991 F.2d 1473, 1484–85 (9th Cir. 1993).

234 *Id.*

235 U.S. CONST. amend. VIII ("Excessive bail shall not be required . . . .").

236 *See generally* Margo Schlanger, *Anti-Incarcerative Remedies for Illegal Conditions of Confinement*, 6 U. MIAMI RACE & SOC. JUST. L. REV. 1 (2016).

237 42 U.S.C. § 12132 (2012) (prohibiting discrimination by a "public entity"); *id.* § 12131(1) (defining "public entity" as including an "instrumentality of a State or States or local government").

"Federal financial assistance" or are "conducted by any Executive Agency."[238] The trickiness in applying these two statutes in the context of immigration is the use of three different types of facilities: those operated by ICE, state and local jails, and private prison companies.

The ADA applies to state and local governments, but not to the federal government, because it has not waived its immunity. However, as an executive agency, DHS can be sued under the Rehabilitation Act for violations that occur in all three types of immigration detention facilities. In fact, DHS has issued regulations implementing the Rehabilitation Act.[239] These regulations specifically provide that DHS cannot avoid responsibility under the Rehabilitation Act by "contractual, licensing, or other arrangements."[240] Therefore, despite DHS's contracts with state and local jails, as well as private prison companies, it remains liable for violations of the Rehabilitation Act that occur in those facilities. Federal appellate court decisions confirm that the federal government is liable to ensure that their contractors comply with the Rehabilitation Act.[241]

State and local jails that contract with DHS, on the other hand, can be sued under Title II of the ADA, because they "fall squarely within the statutory definition of 'public entity.'"[242] Furthermore, the Supreme Court has found that state prisons satisfy the ADA's requirement to provide the "benefits" of "programs, services, or activities." The Court has explained that "[m]odern prisons provide inmates with many recreational 'activities,' medical 'services,' and educational and vocational 'programs,' all of which at least theoretically 'benefit' the

238 Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (2012). Although this Section focuses on the ADA and RA, challenges to immigration detention practices may also be brought under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400–1482 (2012), based on failure to provide appropriate special education services to children held in "Family Residential Centers." *See* DHS ADVISORY REPORT, *supra* note 95, at 65–67.

239 6 C.F.R. §§ 15.1–15.70 (2017).

240 *Id.* § 15.30(b)(1); *see also id.* § 15.50 (stating that DHS generally "shall operate each program or activity so that the program or activity, *when viewed in its entirety*, is readily accessible to and usable by individuals with a disability" (emphasis added)); *id.* § 15.49 ("Except as otherwise provided in § 15.50, no qualified individual with a disability shall, because *the Department's facilities* are inaccessible to or unusable by individuals with a disability, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the Department." (emphasis added)).

241 *See, e.g.*, Castle v. Eurofresh, Inc., 731 F.3d 901, 910 (9th Cir. 2013) ("Defendants are obligated to ensure that Eurofresh—like all other State contractors—complies with federal laws prohibiting discrimination on the basis of disability."); Henrietta D. v. Bloomberg, 331 F.3d 261, 286 (2d Cir. 2003) ("The common law of contracts strongly suggests that the state defendant is liable to ensure that localities comply with the Rehabilitation Act in their delivery of federally-funded social services.").

242 Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 210–12 (1998) (holding that Title II of the ADA, prohibiting "public entity" from discriminating against "qualified individual with a disability" on account of that individual's disability, applied to inmates in state prisons).

prisoners (and any of which disabled prisoners could be 'excluded from participation in')."[243]

The more difficult question is whether the private prison companies that operate immigration detention facilities can be held liable for violations of either the RA or the ADA. The issue under the RA is whether a private prison company receives "federal financial assistance."[244] Several circuit courts have held that purely compensatory payments to private companies at fair market value do not constitute "federal financial assistance"; but if the federal government intends to give a subsidy to the company, rather than just compensate them, that could constitute "federal financial assistance."[245] The challenge, therefore, would be in establishing that the government subsidizes—and intends to subsidize—the private prison companies that hold immigration detainees. At a minimum, courts should permit discovery to obtain evidence that would help show the government's intent to subsidize the company.[246]

Alternatively, one could try to hold private prison companies liable under the ADA by arguing that: (1) the private prison company is a "public entity" as an "instrumentality of a State" under Title II of the ADA;[247] or (2) the detention facility operated by the private prison company is a "place of public accommodation" under Title III of the ADA.[248] At the time of this writing, no courts have held that a private prison company can be a "public entity" under Title II. However, in a dissenting opinion, Judge Rosemary Barkett on the Eleventh Circuit backed the "instrumentality of the State" theory, explaining that "when a company *takes the place of the state* in performing a function within the exclusive province of the state, that company cannot be permitted to avoid the requirements of the law governing that state function."[249] The majority, on the other hand, found that the private prison company,

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243 *Id.* at 210.

244 34 C.F.R. § 104.4(a) (2016) ("No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance."); *id.* § 104.3(h) (defining "federal financial assistance").

245 *See* Shotz v. Am. Airlines, Inc., 420 F.3d 1332, 1335 (11th Cir. 2005); DeVargas v. Mason & Hanger-Silas Mason Co., 911 F.2d 1377, 1382 (10th Cir. 1990); Jacobson v. Delta Airlines, Inc., 742 F.2d 1202, 1210 (9th Cir. 1984); *cf.* Venkatraman v. REI Systems, Inc., 417 F.3d 418, 421 (4th Cir. 2005) (reaching the same conclusion in discussing contractor liability under Title VI of the Civil Rights Act of 1964).

246 Shepherd v. U.S. Olympic Comm., 94 F. Supp. 2d 1136, 1147 (D. Colo. 2000) ("Shepherd should be allowed the benefit of discovery, particularly with reference to the issue of whether Congress or any federal agency, by providing direct or indirect financial assistance to USOC, has or had the requisite intent to subsidize it.").

247 42 U.S.C. § 12131(1)(B) (2012).

248 *Id.* § 12182(a).

249 Edison v. Douberly, 604 F.3d 1307, 1312 (11th Cir. 2010) (Barkett, J., dissenting).

GEO Care Group, Inc., could not be held liable under Title II, reasoning that "a private corporation is not a public entity merely because it contracts with a public entity to provide some service."[250] Other courts have reached the same conclusion.[251]

With respect to the argument that a detention facility operated by a private company qualifies as a "place of public accommodation" under Title III of the ADA, this would also likely be an uphill battle due to lack of precedent. The ADA lists twelve types of facilities that qualify as "public accommodations" and does not include prisons.[252] However, the list includes a "place of lodging," as well as services that are provided by private prisons, such as service of "food or drink," as well as health care services.[253] A private prison company that directly provides these services could potentially be held liable under Title III. At least one district court has found that "it is reasonable to consider a jail a public place in the context of inmates' rights to be free from discrimination on the basis of their disabilities."[254] There, the court analogized jails to schools and hospitals, which restrict public access but are nevertheless considered "public accommodations."[255] Other courts have also found that highly restricted areas can be public accommodations, even though they are not open to the general public.[256]

Thus, while legal theories exist for holding a private prison company liable under the RA and ADA, there is currently little support for these theories by way of precedent. However, DHS can be sued under the RA for violations committed by its private contractors, and

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250 *Id.* at 1310 (majority opinion).

251 *See, e.g.*, Green v. City of New York, 465 F.3d 65, 79 (2d Cir. 2006) (concluding that a private hospital performing services pursuant to a contract with a municipality was not an instrumentality of the government, and thus not a public entity under the ADA); Lee v. Corr. Corp. of Am./Corr. Treatment Facility, 61 F. Supp. 3d 139, 143 (D.D.C. 2014) ("As a private prison company, defendant is not covered by Title II of the ADA."); Cox v. Jackson, 579 F. Supp. 2d 831, 852 (E.D. Mich. 2008) (holding that a private company providing medical services to a prison is not a public entity).

252 42 U.S.C. § 12181(7).

253 *Id.* § 12181(7)(A), (B), (F); *see also* Hernandez v. County of Monterey, 70 F. Supp. 3d 963 (N.D. Cal. 2014) (holding that a private provider of jail medical services operated a place of public accommodation for purposes of Title III of the ADA).

254 Wilkins-Jones v. County of Alameda, 859 F. Supp. 2d 1039, 1054 (N.D. Cal. 2012).

255 *Id.*

256 *See, e.g.*, Martin v. PGA Tour, Inc., 204 F.3d 994, 998 (9th Cir. 2000) ("[T]he fact that users of a facility are highly selected does not mean that the facility cannot be a public accommodation."); Menkowitz v. Pottstown Mem'l Med. Ctr., 154 F.3d 113 (3d Cir. 1998) (holding that the denial of hospital staff privileges to a physician can be challenged under Title III of the ADA, even though the case involved parts of the hospital that are not open to the general public); Indep. Living Res. v. Or. Arena Corp., 982 F. Supp. 698, 759 (D. Or. 1997) (holding that an arena's executive suites contracted by businesses are public accommodations); Anderson v. Little League Baseball, Inc., 794 F. Supp. 342, 344 (D. Ariz. 1992) (undisputed that Title III applies to access to coaches' box on baseball field).

state and local jails can be sued under the ADA as public entities. The RA and ADA claims discussed below therefore are directed primarily at DHS and state and local jails.

Under both the RA and the ADA, the plaintiff bears the initial burden of establishing the elements of the prima facie case, which requires showing that: (1) the plaintiff is an individual with a disability; (2) the plaintiff was either excluded from participation in or denied the benefits of a public entity's services, programs or activities, or was otherwise discriminated against by the public entity; and (3) such exclusion, denial of benefits, or discrimination was by reason of the plaintiff's disability.[257] The burden then shifts to the public entity to show that the requested accommodation or modification would require a fundamental alteration or produce an undue financial and administrative burden.[258]

A qualified disability is broadly defined as "a physical or mental impairment that substantially limits one or more major life activities."[259] The second element is usually easy to satisfy in the context of correctional facilities, since the Supreme Court has recognized that almost any activity in which inmates participate is controlled by jail staff, making it a public service, activity, or program.[260] The third element, which requires showing discrimination on the basis of a disability, can be shown in various ways. The denial of equal access to services, as well as using administrative methods that have the effect of discrimination, constitute discrimination.[261] The RA does not explicitly recognize "institutionalization" and "segregation" as forms of discrimination like the ADA.[262] However, the regulations implementing

257 *See, e.g.*, Cohen v. City of Culver City, 754 F.3d 690, 695 (9th Cir. 2014).

258 28 C.F.R. § 35.150(a)(3) (2016).

259 42 U.S.C. § 12102(1)(A) (2012). The determination of whether an impairment "substantially limits a major life activity" is made "without regard to the ameliorative effects of mitigating measures such as medication . . . or . . . learned behavioral or adaptive neurological modifications." *Id.* § 12102(4)(E)(i)(I)–(IV).

260 *Yeskey*, 524 U.S. at 210–11; *see also* Hernandez v. County of Monterey, 110 F. Supp. 3d 929, 935–36 (N.D. Cal. 2015) ("[M]ost everything provided to inmates is a public service, program or activity, including sleeping, eating, showering, toileting, communicating with those outside the jail by mail and telephone, exercising, entertainment, safety and security, the jail's administrative, disciplinary, and classification proceedings, medical, mental health and dental services, the library, educational, vocational, substance abuse and anger management classes and discharge services.").

261 28 C.F.R. § 35.130(b)(1)(i)–(ii), b(3)(i); *see also* McGary v. City of Portland, 386 F.3d 1259, 1265 (9th Cir. 2004) (explaining that when a public entity's uniformly enforced policy or program places a greater burden on a disabled person than non-disabled persons, and the entity fails to reasonably accommodate the disability, the entity discriminates against the disabled person "by reason of" his disability).

262 *See* 42 U.S.C. § 12101(a)(2), (3), (5) (ADA); Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 600 (1999).

the RA do require programs, services, and activities to be administered in "*the most integrated setting appropriate*" to the needs of individuals with disabilities, just like the ADA.[263] In addition, both statutes require public entities to make reasonable modifications when necessary to avoid discrimination.[264]

Applying this framework, courts have found valid RA and ADA claims based on a variety of deficiencies in correctional centers. These include denial of medical and psychiatric care to pretrial detainees and inmates;[265] failure to reasonably accommodate mobility-impaired and dexterity-impaired pretrial detainees within the detention center;[266] failure to provide appropriate transportation to wheelchair-bound arrestee;[267] failure to provide immediate access to prescribed HIV medications;[268] failure to offer exercise, religious services, classes, and meetings in a location accessible to inmates who cannot climb stairs;[269] and failure to furnish sign language interpreters to inmates.[270]

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263 *Compare* 28 C.F.R. § 41.51(d) (RA), *with id.* § 35.130(d) (ADA).

264 *Id.* § 35.130(b)(1)(7)(i).

265 *See, e.g.*, Winters v. Ark. Dep't of Health and Human Servs., 491 F.3d 933, 936 (8th Cir. 2007) (finding that the failure to provide "reasonable medical care" to a pretrial detainee on the basis of disability can constitute discrimination under the ADA and RA); Kiman v. N.H. Dep't of Corr., 451 F.3d 274, 284 (1st Cir. 2006) (acknowledging that "[m]edical care is one of the 'services, programs, or activities' covered by the ADA" but noting that courts have "differentiated ADA claims based on negligent medical care from those based on discriminatory medical care"); Cleveland v. Gautreaux, 198 F. Supp. 3d 717 (M.D. La. 2016) (holding that plaintiff stated a valid ADA claim based on failure to provide treatment for mental disabilities, as well as denial of a wheelchair), *appeal dismissed*, No. 16-30926 (5th Cir. Oct. 26, 2016); Anderson v. County of Siskiyou, No. C 10–01428 SBA, 2010 WL 3619821 (N.D. Cal. Sept. 13, 2010) (holding that failure to provide access to psychiatric care and treatment to a pretrial detainee who had been found incompetent to stand trial and committed suicide in county jail violated the ADA); Hughes v. Colo. Dep't of Corr., 594 F. Supp. 2d 1226, 1241–42 (D. Colo. 2009) (holding that the plaintiff's allegations regarding outright denial of medical treatment for his mental disability was sufficient to state a claim under the ADA); *see also* United States v. Georgia, 546 U.S. 151, 157 (2006) (stating, in dictum, that "it is quite plausible that the alleged *deliberate refusal* of prison officials to accommodate . . . disability-related needs in such fundamentals as . . . medical care" constitutes exclusion from or denial of the benefits of the prison's services, programs, or activities under the ADA (emphasis added)); *Yeskey*, 524 U.S. at 210 (expressly noting that the phrase "services, programs, or activities of a public entity" in 42 U.S.C. § 12132 encompasses medical services offered in prisons); *cf.* Simmons v. Navajo County, 609 F.3d 1011, 1021–22 (9th Cir. 2010) (holding that the mere provision of inadequate medical care does not state a claim under the ADA); Bryant v. Madigan, 84 F.3d 246, 249 (7th Cir. 1996) (same).

266 *See, e.g.*, Pierce v. County of Orange, 526 F.3d 1190 (9th Cir. 2008).

267 *See, e.g.*, Gorman v. Bartch, 152 F.3d 907, 913 (8th Cir. 1998) ("Gorman's allegations that the defendants denied him the benefit of post-arrest transportation appropriate in light of his disability fall within the framework of both Title II of the ADA and § 504 of the Rehabilitation Act.").

268 *See, e.g.*, McNally v. Prison Health Servs., 46 F. Supp. 2d 49, 58–59 (D. Me. 1999).

269 *See, e.g.*, Hernandez v. County of Monterey, 110 F. Supp. 3d 929 (N.D. Cal. 2015) (finding significant evidence of ADA violations based on failure to provide exercise, religious services, classes, and Narcotics and Alcoholic Anonymous meetings to inmates who could not

Many of the same types of deficiencies have been documented in immigration detention centers. For example, human rights organizations have documented numerous cases of denial of life-saving HIV/AIDS medications in immigration detention facilities.[271] In addition, ICE's Advisory Committee on Family Residential Centers has reported that ICE lacks policies, standard operating procedures, and strategies for complying with the RA with respect to communications-related disabilities, such as sight-impairments, hearing-impairments, and speech-impairments.[272] Furthermore, reports indicate that ICE often places individuals with mental disabilities in administrative segregation and solitary confinement simply because jail staff are unwilling to deal with their unique circumstances.[273]

Placing detainees with physical and mental disabilities in alternative-to-detention programs would help avoid liability under the RA. If a detention facility is inaccessible to individuals with disabilities, or cannot provide cells that are safe and appropriate for individuals with disabilities, placement in an alternative program could constitute the simplest and most cost-effective form of a reasonable accommodation or modification.

In *Olmstead v. L.C. ex rel. Zimring*, the seminal Supreme Court case prohibiting the unnecessary isolation of persons with mental disabilities, the Court required community-based services, as long as the person's treatment professionals determine that community services are appropriate, the person does not object to living in the community, and the provision of services in the community would be a reasonable accommodation.[274] Citing *Olmstead*, the Seventh Circuit has remarked

climb stairs, as well as failure to provide inmates with sign language interpreters).

270 *See, e.g.*, *id.*

271 *See, e.g.*, HUMAN RIGHTS WATCH, CHRONIC INDIFFERENCE: HIV/AIDS SERVICES FOR IMMIGRANTS DETAINED BY THE UNITED STATES (2007), https://www.hrw.org/sites/default/files/reports/us1207web.pdf; BRIAN STAUFFER, HUMAN RIGHTS WATCH, "DO YOU SEE HOW MUCH I'M SUFFERING HERE?": ABUSE AGAINST TRANSGENDER WOMEN IN US IMMIGRATION DETENTION (2016), https://www.hrw.org/sites/default/files/report_pdf/us0316_web.pdf (documenting cases of transgender detainees who were not given access to HIV medications for two to three months after entering detention); *HIV/AIDS Services for Immigrants Detained by the United States: Human Rights Watch submission to the House Judiciary Committee Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law*, HUM. RTS. WATCH (June 1, 2008, 8:00 PM), https://www.hrw.org/news/2008/06/01/hiv/aids-services-immigrants-detained-united-states.

272 *See* DHS ADVISORY REPORT, *supra* note 95, at 80–81.

273 INVISIBLE IN ISOLATION, *supra* note 59, at 9; INTER-AM. COMM'N ON HUMAN RIGHTS, REPORT ON IMMIGRATION IN THE UNITED STATES: DETENTION AND DUE PROCESS 118 (2010), http://www.oas.org/en/iachr/migrants/docs/pdf/migrants2011.pdf ("[T]he Inter-American Commission is deeply troubled by the use of confinement ('administrative segregation' or 'disciplinary segregation') in the case of vulnerable immigration detainees, including . . . mentally challenged detainees." (footnote omitted)).

274 Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 597–601 (1999).

that "[t]o be 'institutionalized,' whether in a prison, a madhouse, or a 'state-operated developmental center,' is to be frozen out of society."[275]

In order to avoid liability under *Olmstead*, public entities must demonstrate that integrated community services would be too costly. An effective plan for achieving community integration of people with disabilities demonstrates compliance with the ADA. Although the integration mandate of the ADA does not apply federal immigration detention centers, the identical mandate of the RA does. By analogy, then, *Olmstead*'s reasoning should apply in this context. Under *Olmstead* and its progeny, keeping individuals with disabilities institutionalized in a detention center when equally effective and less expensive options are available may be difficult to justify. While the government may try to argue that alternative placements require a "fundamental alteration," courts have found that "transfer of services to *existing community settings* is not, by itself, a 'fundamental alteration.'"[276] Since ICE already has existing alternatives to detention, no fundamental alteration should be necessary.

The government would also likely argue that placing immigration detainees with disabilities in community-based alternatives imposes undue hardship. Although the government's own data indicate that the per person cost of alternative-to-detention programs are far cheaper than detention, that comparison may not be enough to defeat the hardship argument.[277] *Olmstead* noted that courts may not simply compare the cost of institutionalization against the cost of community-based health services because that comparison does not take into account the State's financial obligation to continue operating partially full institutions with fixed overhead costs.[278] The Court in *Olmstead* was concerned about taking resources from other institutionalized mental health patients in order to provide immediate relief to the plaintiffs. In the immigration detention context, shifting funding from detention to

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275 Ill. League of Advocates for the Developmentally Disabled v. Ill. Dep't of Human Servs., 803 F.3d 872, 875 (7th Cir. 2015).

276 Disability Advocates, Inc. v. Paterson, 598 F. Supp. 2d 289, 336 (E.D.N.Y. 2009) (emphasis added); *see also* Townsend v. Quasim, 328 F.3d 511, 519 (9th Cir. 2003) ("*Olmstead* did not regard the transfer of services to a community setting, without more, as a fundamental alteration.").

277 *Olmstead* lists several factors that are relevant to the fundamental-alteration defense, including the State's ability to continue meeting the needs of other institutionalized mental health patients for whom community placement is not appropriate, whether the State has a waiting list for community placements, and whether the State has developed a comprehensive plan to move eligible patients into community care settings. *Olmstead*, 527 U.S. at 605–06.

278 *Id.* at 604 n.15; *see also id.* at 612–15 (Kennedy, J., concurring) (noting that states have considerable latitude in analyzing the "comparative costs of treatment" and cautioning courts against intervening in "political" decisions about the allocation of funds).

alternatives may also have a negative impact on individuals with disabilities who remain detained.

There are at least two responses to this argument. First, some courts have held that, under *Olmstead*, a public entity should, at a minimum, have a working plan for placing persons with mental disabilities in less restrictive settings, as well as a waiting list that moves at a reasonable pace and is not controlled by endeavors to keep institutions fully populated.[279] ICE and its contractual partners have presented no such plan, or any kind of waiting list for alternative-to-detention programs. This is, therefore, not a situation where a court would have to "order displacement of persons at the top of the community-based treatment waiting list by individuals lower down who commenced civil actions."[280] Second, there is evidence that ICE's custody determinations are, in fact, driven by the availability of bed space in detention centers.[281]

In situations where immigration detainees are kept in solitary confinement or administrative isolation due to a mental disability, *Olmstead* is particularly relevant. Litigation in Colorado, for example, has challenged the administrative segregation of prisoners with mental disabilities under the ADA.[282] In 2014, the Department of Justice issued

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279 *See id.* at 605–06 (majority opinion); *see also* Pa. Prot. & Advocacy, Inc. v. Pa. Dep't of Pub. Welfare, 402 F.3d 374, 382 (3d Cir. 2005) (describing "the minimal burden of demonstrating 'that there will be ongoing progress toward community placement' under the general plan" and stating that "[w]ithout such a preliminary showing, an agency cannot establish a fundamental alteration defense" (quoting Frederick L. v. Dep't of Pub. Welfare, 364 F.3d 487, 500 (3d Cir. 2004))); *see also* Jefferson D.E. Smith & Steve P. Calandrillo, *Forward to Fundamental Alteration: Addressing ADA Title II Integration Lawsuits After* Olmstead v. L.C., 24 HARV. J.L. & PUB. POL'Y 695, 724 (2001) ("[I]f . . . plaintiffs satisfy eligibility criteria for an existing community treatment plan, but have not been transferred due to error, administrative convenience, or a lack of available slots, then a court is less likely to deem a required transfer to be a fundamental alteration based on administrative discretion as an essential feature.").

280 *Olmstead*, 527 U.S. at 606.

281 *See, e.g.*, CASSIDY & LYNCH, *supra* note 109, at 62 (finding that the McAllen Border Patrol station tracks family detention bed space and releases families with bus tickets and Notices to Appear if there are no beds available); DHS ADVISORY REPORT, *supra* note 95, at 4 (stating that decisions appear to be "largely dependent on whether there is available bed space in [Family Residential Centers]"); IACHR 2015 REPORT, *supra* note 109, at 70 (concluding that, but for capacity limitations, all families would be detained under current policy); LUTHERAN IMMIGRATION & REFUGEE SERV. (LIRS) & THE WOMEN'S REFUGEE COMM'N (WRC), LOCKING UP FAMILY VALUES, AGAIN 6 (2014), http://lirs.org/wp-content/uploads/2014/11/LIRSWRC_LockingUpFamilyValuesAgain_Report_141114.pdf ("DHS officials have stated that there is no set standard or policy to determine which families are detained and which families are released except for the availability of bed space.").

282 *See generally* Brittany Glidden & Laura Rovner, *Requiring the State to Justify Supermax Confinement for Mentally Ill Prisoners: A Disability Discrimination Approach*, 90 DENV. U. L. REV. 55 (2012); Thomas L. Hafemeister & Jeff George, *The Ninth Circle of Hell: An Eighth Amendment Analysis of Imposing Prolonged Supermax Solitary Confinement on Inmates with a Mental Illness*, 90 DENV. U. L. REV. 1, 30 (2012).

a Findings Letter charging the Pennsylvania Department of Corrections with violating the ADA through its policies and practices of unnecessarily segregating prisoners with disabilities.[283] Commentators have noted that this action by the Department of Justice has opened the door to further litigation challenging the use of solitary confinement under the ADA.[284] In fact, New York and Texas have already started scaling back the use of solitary confinement under the pressure of lawsuits and concerns about isolation's impact on individuals with mental disabilities.[285]

In considering disability rights-based challenges to immigration detention practices, it is crucial to remember that immigration detention is supposed to be nonpunitive and, therefore, should be based on civil, rather than criminal, principles.[286] This is why deterrence is not a legitimate reason for immigration detention.[287] As ICE's Advisory Committee on Family Residential Centers has explained, integration into the community would allow immigrant families, many of whom have experienced enormous psychological trauma, to "remain intact" and "maximize [their] opportunity to function as pro-social and productive members of the community."[288]

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283 *See* Letter from Thomas E. Perez, Assistant Attorney Gen., U.S. Dep't of Justice, & David J. Hickton, U.S. Attorney, to Tom Corbett, Governor of Pa., Investigation of the State Correctional Institution at Cresson and Notice of Expanded Investigation (May 31, 2013), https://www.justice.gov/sites/default/files/crt/legacy/2013/06/03/cresson_findings_5-31-13.pdf; Letter from Jocelyn Samuels, Acting Assistant Attorney Gen., U.S. Dep't of Justice, & David J. Hickton, U.S. Attorney, to Tom Corbett, Governor of Pa., Investigation of the Pennsylvania Department of Corrections' Use of Solitary Confinement on Prisoners with Serious Mental Illness and/or Intellectual Disability (Feb. 24, 2014), https://www.justice.gov/sites/default/files/crt/legacy/2014/02/25/pdoc_finding_2-24-14.pdf.

284 *See, e.g.*, Elizabeth Alexander, "*This Experiment, So Fatal*": *Some Initial Thoughts on Strategic Choices in the Campaign Against Solitary Confinement*, 5 U.C. IRVINE L. REV. 1, 37–39 (2015); Ian M. Kysel, *Banishing Solitary: Litigating an End to the Solitary Confinement of Children in Jails and Prisons*, 40 N.Y.U. REV. L. & SOC. CHANGE 675, 703–04 (2016); Ariel A. Simms, *Solitary Confinement in America: Time for Change and a Proposed Model of Reform*, 19 U. PA. J.L. & SOC. CHANGE 239, 254–55 (2016); Jessica Knowles, Note and Comment, "*The Shameful Wall of Exclusion*": *How Solitary Confinement for Inmates with Mental Illness Violates the Americans with Disabilities Act*, 90 WASH. L. REV. 893, 928–30 (2015).

285 Anita Kumar, *Critics of Va. Supermax Prison Doubt Isolation Is the Solution*, WASH. POST, Jan. 8, 2012, at A1.

286 *See* Demore v. Kim, 538 U.S. 510, 532–33 (2003) (Kennedy, J., concurring) (stating that immigration detention is permissible only "to facilitate deportation, or to protect against risk of flight or dangerousness"); Zadvydas v. Davis, 533 U.S. 678 (2001).

287 *See* R.I.L.-R v. Johnson, 80 F. Supp. 3d 164 (D.D.C. 2015) (enjoining DHS from using deterrence as a factor in initial custody determinations and in arguments against release of families on bond); Press Release, Jeh C. Johnson, Sec'y of Homeland Sec., Statement on Family Residential Centers (June 24, 2015), https://www.dhs.gov/news/2015/06/24/statement-secretary-jeh-c-johnson-family-residential-centers (announcing that DHS had "discontinued invoking general deterrence as a factor in custody determinations in all cases involving families").

288 DHS ADVISORY REPORT, *supra* note 95, at 23.

Just as the Court in *Olmstead* reasoned that "institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life," so, too, does institutional placement of civil immigration detainees cause unnecessary stigma and suffering.[289] The explosion of interest in providing trauma-informed services to immigrants reflects the increasing awareness of past experiences of violence and trauma among this population, as well as an expanding body of research demonstrating the physical and behavioral impact of such trauma.[290] Detention compounds this trauma, and its cumulative effect can be psychologically and physically devastating.[291] Confinement of immigration detainees also "severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment," as the Court stated in *Olmstead*.[292]

C. *International Human Rights Arguments*

Failure to consider alternatives to immigration detention not only raises serious constitutional concerns, but also violates fundamental principles of international human rights law.[293] Immigration detention under human rights law "must be justified as reasonable, necessary and

289 Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 600–01 (1999).

290 DHS ADVISORY REPORT, *supra* note 95, at 136; Kimberly A. Ehntholt & William Yule, *Practitioner Review: Assessment and Treatment of Refugee Children and Adolescents Who Have Experienced War-Related Trauma*, 47 J. CHILD PSYCHOL. & PSYCHIATRY 1197 (2006).

291 DHS ADVISORY REPORT, *supra* note 95, at 31; *see also* Guy J. Coffey et al., *The Meaning and Mental Health Consequences of Long-Term Immigration Detention for People Seeking Asylum*, 70 SOC. SCI. & MED. 2070 (2010). Children are uniquely vulnerable to health and developmental issues even if detained only for a brief time. *See* INT'L DET. COAL., CAPTURED CHILDHOOD 50 (2012), http://idcoalition.org/wp-content/uploads/2012/03/Captured-Childhood-FINAL-June-2012.pdf.

292 *Olmstead*, 527 U.S. at 600–01.

293 The principles governing detention stem primarily from the rights to liberty and security. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms art. 5, Nov. 4, 1950, C.E.T.S. No. 005; G.A. Res. 2200A (XXI) art. 9, International Covenant on Civil and Political Rights (Dec. 16, 1966); G.A. Res. 217 (III) A arts. 3 & 9, Universal Declaration of Human Rights (Dec. 10, 1948); Human Rights Comm., *General Comment No. 35, Article 9 (Liberty and Security of Person)*, ¶ 3, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014) [hereinafter *General Comment No. 35*]; Charter of Fundamental Freedoms of the European Union, art. 6, 2000 O.J. (C 364) 1, 10; Inter.-Am. Comm'n H.R., *American Convention on Human Rights* art. 7 (Nov. 22, 1969); Inter.-Am. Comm'n H.R., *American Declaration of the Rights and Duties of Man* arts. I & XXV (1948); Org. of African Unity [OAU], *African Charter on Human and Peoples' Rights* art. 6, OAU Doc. CAB/LEG/67/3 (June 27, 1981); *Principle 7: The Right to Freedom from Arbitrary Deprivation of Liberty*, YOGYAKARTA PRINCIPLES, http://www.yogyakartaprinciples. org/principle-7 (last visited June 7, 2017).

proportionate in the light of the circumstances and reassessed as it extends in time."[294]

Reasonableness requires assessing "any special needs or considerations in the individual's case," while "proportionality requires that a balance be struck between the importance of respecting the rights to liberty and security of person and freedom of movement, and the public policy objectives of limiting or denying these rights."[295] The individualized analysis of proportionality should take into account all relevant factors, including the likelihood of absconding, whether the person poses a danger to the community, the risk of harm in detention, and the availability of appropriate medical and mental health care.[296] Detention rules that apply to broad categories of noncitizens, such as mandatory detention policies in the United States, are inconsistent with this type of individualized analysis.[297]

Referencing the same notion of excessiveness that appears in the constitutional provisions discussed above, United Nations High Commissioner for Refugees' (UNHCR) Detention Guidelines provide that "authorities must not take any action exceeding that which is strictly necessary to achieve the pursued purpose in the individual case."[298] Critically, consideration of *alternatives to detention* is part of the overall assessment of necessity, reasonableness, and proportionality.[299] Examining whether *less restrictive or coercive* measures could achieve the same ends in each individual case helps ensure that detention is used only as a measure of last resort.[300]

The principle of proportionality plays a role not only in deciding whether to detain someone, but also in choosing among various alternatives to detention.[301] "[T]he level and appropriateness of placement in the community need to balance the circumstances of the individual with any risks to the community."[302] An international human rights analysis also recognizes that individual factors may change over

294 *See General Comment No. 35*, *supra* note 293, ¶ 18.

295 UNHCR, DETENTION GUIDELINES: GUIDELINES ON THE APPLICABLE CRITERIA AND STANDARDS RELATING TO THE DETENTION OF ASYLUM-SEEKERS AND ALTERNATIVES TO DETENTION 21 (2012) [hereinafter UNHCR DETENTION GUIDELINES], http://www.un.am/up/library/Gudelines%20Related%20to%20Detention_eng.pdf.

296 *General Comment No. 35*, *supra* note 293, ¶ 18.

297 UNHCR DETENTION GUIDELINES, *supra* note 295, at 16 ("Mandatory or automatic detention is arbitrary as it is not based on an examination of the necessity of the detention in the individual case."); *see also General Comment No. 35*, *supra* note 293, ¶ 18.

298 UNHCR DETENTION GUIDELINES, *supra* note 295, at 21.

299 *Id.* at 21–22.

300 *Id.*

301 *Id.* at 15–16, 22.

302 *Id.* at 15.

time, requiring decisions about detention and alternatives to be reviewed periodically by an independent body.[303]

Although international human rights law is not enforceable in U.S. courts, it is particularly relevant to the detention of asylum seekers, since it informs the international interpretation of the U.N. Convention and Protocol Relating to the Status of Refugees, which serve as the basis for U.S. asylum law. Furthermore, the international human rights principles of necessity, reasonableness, and proportionality echo the constitutional prohibitions against excessiveness, as well as the notion of reasonable modifications in disability rights law. These human rights principles therefore help provide additional insights into how to construe and construct the constitutional and disability rights arguments discussed above.

CONCLUSION

Whether one views immigration detention through the criminal lens of pretrial detention or a civil lens similar to institutional commitment, the current approach of detention as default is difficult to justify. Noncitizens in removal proceedings have a much harder time being released from detention than pretrial defendants due to excessive bonds, inadequately developed community-based supervision programs, and a general failure to calibrate the deprivation of liberty to the risk posed by a particular individual. In this respect, immigration detention has much to learn from the criminal justice system. At the same time, despite the highly vulnerable populations that end up in immigration detention, a disability rights framework requiring the most integrated setting appropriate has not been applied to the immigration system. Rethinking the use of immigration detention through the lenses of due process, equal protection, excessive bail, disability rights, and basic human rights principles would save both money and lives.

Congress can also take several steps to support alternatives to immigration detention. First and foremost, Congress should appropriate more money to these alternatives, especially community-based alternatives, and less money to detention. This recommendation does not require Congress to appropriate any more money for immigration enforcement; rather, money currently being spent on detention should be diverted to alternative programs. By amending the INA's "mandatory detention" provisions, giving immigration judges authority to review all detention decisions, eliminating a minimum

303 *General Comment No. 35*, *supra* note 293, ¶ 18

bond requirement, and eliminating the "bed quota" that results in arbitrary detention, Congress could further support the development of alternatives.

Finally, community-based organizations also have a critical role to play in supporting alternatives to detention. There is a deficit of organizations that provide the types of services people need upon being released from detention. Many former detainees struggle to find permanent housing, transportation, access to health care, legal counsel, and employment. By collaborating with each other and with national and international organizations, community-based organizations can create strategic alliances, draw attention to the need for more funding for this type of work, and share valuable knowledge about working with immigrants who have been released from detention. These organizations can also play a critical role by sharing this knowledge with ICE to inform the design of future alternative-to-detention programs that utilize a case management approach.