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# Realizing Liberty- The Use of International Human Rights Law to Realign Immigration Deterntion in the United States

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ARTICLES

# REALIZING LIBERTY: THE USE OF INTERNATIONAL HUMAN RIGHTS LAW TO REALIGN IMMIGRATION DETENTION IN THE UNITED STATES

*By Denise Gilman*[*]

INTRODUCTION ..... 244
I. THE CURRENT STATE OF IMMIGRATION DETENTION ..... 252
II. INTERNATIONAL HUMAN RIGHTS STANDARDS ..... 261
A. Development of the International Human Rights Standards ..... 261
B. Content of the International Human Rights Standards ..... 265
1. Rights that Form the Basis of the International Human Rights Standards ..... 266
2. General Principles of the International Human Rights Standards Relating to Immigration Detention ..... 267
3. Specific Requirements of International Human Rights Law Regarding Immigration Detention ... 272
III. THE RELEVANCE OF THE INTERNATIONAL HUMAN RIGHTS STANDARDS TO US IMMIGRATION DETENTION ..... 279
A. US Obligations Under International Human Rights Law ..... 280

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B. Similarities Between the International Human Rights Standards and US Constitutional Standards on Civil Detention ..... 284
C. The Use of the International Human Rights Standards to Interpret US Law ..... 287
IV. INCOMPATIBILITIES BETWEEN THE IMMIGRATION DETENTION REGIME IN THE UNITED STATES AND THE INTERNATIONAL HUMAN RIGHTS STANDARDS ..... 294
A. The Overall Detention Regime ..... 295
B. Detention of Individuals in Expedited Removal and Reinstatement of Removal ..... 304
1. Expedited Removal ..... 304
2. Reinstatement of Removal ..... 308
C. Detention of Arriving Aliens ..... 313
D. Mandatory Detention on Criminal and Terrorism Grounds ..... 319
E. Non-Mandatory Detention ..... 326
CONCLUSION ..... 333

## *INTRODUCTION*

BM came to the United States from Nicaragua as a young child and became a lawful permanent resident in 1987.[1] In August 2007, Immigration and Customs Enforcement ("ICE") detained BM and held him for more than a year during deportation proceedings.[2] Prior to his detention, BM had lived

1. Brief for Petitioner at 3, BM v. Mukasey, 382 F. App'x. 417 (5th Cir. 2010) (No. 08-60586) [hereinafter BM Brief]. The cases of BM and FH presented here were both handled by the Immigration Clinic at the University of Texas School of Law. Our clients have given their permission to summarize their stories for this Article but have preferred to preserve the confidentiality of their names.

2. *Id.* at 5. In the United States, proceedings initiated by Immigration and Customs Enforcement ("ICE") to deport or exclude an individual are technically referred to as "removal proceedings." *See* 8 U.S.C. § 1229a (2006) (providing for removal proceedings). This Article will use the laymen's term "deportation" interchangeably with the technical term "removal." These proceedings take place before an immigration court and include consideration of an individual's removability as well as any applications for "relief from removal" that would grant the individual permission to remain in the United States without regard to removability. *See id.*; *see also, e.g.*, 8 U.S.C. § 1158 (2006) (providing for asylum); 8 U.S.C. § 1229b (2006)

in Austin, Texas and had worked for the state government.[3] His entire immediate family lived in the United States, and his mother suffered from terminal cancer.[4] Yet, ICE detained BM under immigration law's mandatory detention provisions while pursuing deportation based on two drug possession convictions.[5] ICE succeeded in deporting BM, but in 2010, the US Supreme Court overturned the line of cases that had prevented BM from applying to remain in the United States.[6] BM returned to the United States for additional immigration court hearings to decide his immigration status, and he eventually won the right to resume his life in this country. ICE detained BM for an additional three months during the renewed proceedings and for a period after BM received approval from the immigration court to remain in the United States as a lawful permanent resident.[7]

FH has lived a very different experience from BM but also faced immigration detention in the United States. FH fled his country of Eritrea by foot after the Eritrean military tortured him, including by tying his legs and arms together behind his back and hanging him from a tree in the infamous helicopter position.[8] FH presented himself at the US border on August 26, 2010 seeking asylum and was immediately detained.[9] ICE held FH in immigration detention for more than a month, although he has a US citizen brother and other close family members who

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(providing for cancellation of removal); 8 U.S.C. § 1255 (2006) (providing for adjustment of status). Because the language of international human rights law does not track this US law terminology, I will often refer to immigration court proceedings more generally as "proceedings to determine status" or "proceedings to determine whether an individual will be allowed to remain in the United States."

3. BM Brief, *supra* note 1, at 5.

4. *Id.* at 4.

5. *Id.* at 3–4; 8 U.S.C. § 1226(c) (2006) (providing for mandatory immigration detention in certain cases).

6. Carachuri-Rosendo v. Holder, 130 S. Ct. 2577 (2010); Letter Request for Bond Hearing from Barbara Hines, Attorney for Respondent, Univ. of Tex. Immigration Clinic, to the Honorable Judge Glenn McPhaul, Exec. Office for Immigration Rev. (Nov. 21, 2011) [hereinafter Letter from Barbara Hines] (on file with author).

7. *See* Letter from Barbara Hines, *supra* note 6.

8. *See* Brief for Respondent, Matter of FH (2011) [hereinafter FH Brief] (on file with the author). Identifying information has been redacted to preserve the confidentiality of this asylum proceeding.

9. *See* 8 U.S.C. § 1225(b)(1)(B)(ii) (2006); Documents from File of FH (2010) (on file with the author).

wished to host him during immigration court proceedings to decide his asylum claim.[10] In detaining him, ICE did not consider the fact that US immigration courts grant eighty-five percent of Eritrean asylum claims, which is not surprising since the US State Department reports that human rights abuses in Eritrea are rampant and Eritrean asylum seekers returned home are often "disappeared."[11] After release from detention, FH lived with his family in Austin, Texas, attended all immigration court proceedings, and received asylum in the immigration court in November 2011.[12]

The United States detained 429,000 migrants like BM and FH during 2011, the last year for which definitive numbers are available.[13] These 429,000 detainees were held during proceedings to determine whether they would be deported or allowed to remain in the United States and, in some cases, until physical deportation could take place.[14] They were held in the custody of ICE, the federal entity within the Department of Homeland Security ("DHS") charged with enforcing the immigration laws.[15] Detention of migrants has followed a significant and steady upward course over the last two decades as detention has expanded and become the presumptive norm in immigration cases.[16] This trend has proceeded largely unchecked despite efforts at reform by advocates concerned with the humanitarian and financial impact of such a large-scale

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10. FH Brief, *supra* note 8, at 32.

11. *See* OFFICE OF PLANNING, ANALYSIS, & TECH., U.S. DEP'T OF JUSTICE, IMMIGRATION COURTS: FY 2011 ASYLUM STATISTICS, *available at* http://www.justice.gov/eoir/efoia/foiafreq.htm; *see also* BUREAU OF DEMOCRACY, U.S. DEP'T. OF STATE, 2010 HUMAN RIGHTS REPORT: ERITREA 4 (2011), *available at* http://www.state.gov/documents/organization/160120.pdf.

12. Order of the Immigration Judge (Nov. 14, 2011) (on file with the author).

13. *See* OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., ANNUAL REPORT: IMMIGRATION ENFORCEMENT ACTIONS: 2011 (2012) [hereinafter DHS IMMIGRATION ENFORCEMENT ACTIONS 2011].

14. *See generally* 8 U.S.C. §§ 1225, 1226, 1229a, 1231 (2006).

15. *About ICE: Overview*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, http://www.ice.gov/about/overview (last visited Feb. 13, 2013); *see also Detention Management*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, http://www.ice.gov/detention-management (last visited Feb. 13, 2013).

16. *See infra* notes 36–41 and accompanying text (providing statistics on growth of detention); *see also infra* notes 226–29, 236 and accompanying text (establishing extent of US reliance on detention).

detention program that lacks cogent contours.[17] The trend currently shows no sign of reversal.[18]

In the meantime, human rights bodies have overcome their traditional reluctance to adjudicate claims touching on central aspects of statehood and sovereignty and have developed meaningful international human rights law standards for assessing immigration detention practices. The newly-developed standards call into question many aspects of the current immigration detention system that leads to the widespread detention of asylum seekers and other migrants in the United States.[19] The international standards provide a helpful legal framework for considering immigration detention in the United States, particularly as they derive from binding international legal norms and have much in common with US law regarding civil detention in contexts not as contentious as immigration.[20]

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17. *See, e.g.*, AM. BAR ASSOC., RESOLUTION AND REPORT ON ABA CIVIL IMMIGRATION DETENTION STANDARDS AUGUST 2012 (2012); HUMAN RIGHTS FIRST, JAILS AND JUMPSUITS: TRANSFORMING THE U.S. IMMIGRATION DETENTION SYSTEM—A TWO-YEAR REVIEW (2011) [hereinafter JAILS AND JUMPSUITS]; LUTHERAN IMMIGRATION & REFUGEE SERV., UNLOCKING LIBERTY: A WAY FORWARD FOR U.S. IMMIGRATION DETENTION POLICY (2011) [hereinafter UNLOCKING LIBERTY]; HUMAN RIGHTS FIRST, U.S. DETENTION OF ASYLUM SEEKERS: SEEKING PROTECTION, FINDING PRISON (2009) [hereinafter U.S. DETENTION OF ASYLUM SEEKERS]; AMNESTY INT'L, JAILED WITHOUT JUSTICE: IMMIGRATION DETENTION IN THE USA (2009) [hereinafter JAILED WITHOUT JUSTICE].

18. *See infra* Part I (describing continued expansion of immigration detention); *see also* Keep Our Communities Safe Act of 2011, H.R. 1932, 112th Cong. (2011) (proposing significant expansion of immigration detention); Conference Call by John Morton, Assistant Secretary, U.S. Immigration and Customs Enforcement (Aug. 6, 2009) [hereinafter Morton Press Conference on Detention Reform] (transcript on file with the author) (announcing that ICE planned major reforms to the immigration detention system and clarifying that the reforms would not "reduce the number of people presently detained"); John T. Morton, Assistant. Sec'y of Homeland Sec. for ICE, Speech at the Migration Policy Institute: Immigration & Customs Bureau Agenda (Jan. 25, 2010), *available at* http://www.c-spanvideo.org/program/CustomsP [hereinafter Morton MPI Speech] (stating that detention will continue "on a grand scale").

19. *See infra* Part IV (analyzing in detail general and specific incompatibilities between the immigration detention regime in the United States and international human rights standards on immigration detention).

20. Civil detention is confinement not imposed as punishment after a full criminal proceeding. It is also called administrative, preventive, or non-punitive detention. *See* Zadvydas v. Davis, 533 U.S. 678, 690–91 (2001); David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1006 (2002) [hereinafter Cole, *In Aid of Removal*]; *see also* ALICE EDWARDS, U.N. HIGH COMM'R FOR REFUGEES, BACK TO BASICS: THE RIGHT TO LIBERTY AND SECURITY OF PERSON AND

Human rights law analysis should therefore spur positive changes to immigration detention in the United States that will bring rationality back to our system and protect liberty.

While immigration detention has ballooned in the United States, the available scholarship includes few efforts to analyze the various components that interact to create such a massive detention system. There is even less scholarship available analyzing the new international human rights standards as applied to US immigration detention. In the late 1990s and early 2000s, some scholars analyzed the detention framework that evolved after Congress adopted restrictive immigration measures in 1996 that increased detention.[21] However, that literature involved only a guess at what was to come and could not address the current reality of detention expanded beyond any expectation. Nor could that scholarship incorporate a human rights analysis, since the human rights standards developed with specificity only in recent years. Much more recently, scholars in the United States have begun to use human rights law to consider immigration detention, but they have done so mainly by analyzing discrete aspects of immigration detention in the United States.[22] Meanwhile, international scholars have begun to evaluate immigration detention laws and policies from a human

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'ALTERNATIVES TO DETENTION' OF REFUGEES, ASYLUM-SEEKERS, STATELESS PERSONS AND OTHER MIGRANTS 8 (2011) [hereinafter BACK TO BASICS] (distinguishing civil immigration detention from criminal detention).

21. *See* Cole, *In Aid of Removal*, *supra* note 20, at 1022–26; Michele R. Pistone, *Justice Delayed is Justice Denied: A Proposal for Ending the Unnecessary Detention of Asylum-seekers*, 12 HARV. HUM. RTS. J. 197, 232–47 (1999). *See generally* Stephen H. Legomsky, *The Detention of Aliens: Theories, Rules, and Discretion*, 30 U. MIAMI INTER-AM. L. REV. 531 (1999).

22. *See* Barbara A. Frey & X. Kevin Zhao, *The Criminalization of Immigration and the International Norm of Non-Discrimination: Deportation and Detention in U.S. Immigration Law*, 29 LAW & INEQ. 279, 301–11 (2011) (considering mandatory detention provisions); Bridget Kessler, *In Jail, No Notice, No Hearing . . . No Problem? A Closer Look at Immigration Detention and the Due Process Standards of the International Covenant on Civil and Political Rights*, 24 AM. U. INT'L L. REV. 571, 583–603 (2009) (focusing on procedures for detention prior to initiation of deportation proceedings); *see also* Michelle Brané & Christiana Lundholm, *Human Rights Behind Bars: Advancing the Rights of Immigration Detainees in the United States Through Human Rights Frameworks*, 22 GEO. IMMIGR. L.J. 147, 156–58 (2008) (presenting potential strategies for using human rights law to address detention without analyzing which components of detention may violate human rights provisions).

rights perspective.[23] However, that work has not focused on the particularities of the US immigration detention system.

This Article represents a first effort, then, to synthesize and present the recently-developed international human rights standards and apply those rules to the US immigration detention system in a systematic manner. In so doing, the Article demonstrates how the application of international human rights law standards can bring rationality and humanity to US immigration detention by revitalizing the right to liberty, which constitutes a core conception in both international human rights law and US law. The Article does not suggest that immigration detention in the United States should be abolished. It does urge realignment of US law in a way that would scale back immigration detention in order to bring the detention system and its components into line with international human rights norms and with the US tradition of liberty that treats civil detention as an exceptional situation.

While many concerns exist regarding immigration detention conditions, including the harsh prison-like environment at many facilities, inadequate health care and the remote placement of facilities that impedes access to counsel and family visitation,[24] I do not consider those issues in this Article.[25] Instead, the Article focuses on the fact and extent of

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23. *See generally* GALINA CORNELISSE, IMMIGRATION DETENTION AND HUMAN RIGHTS: RETHINKING TERRITORIAL SOVEREIGNTY (2010) (considering the impact on sovereignty of immigration detention rules in Europe); DANIEL WILSHER, IMMIGRATION DETENTION: LAW, HISTORY, POLITICS (2012) (describing evolution of detention and international law, particularly in Europe); Eleanor Acer & Jake Goodman, *Reaffirming Rights: Human Rights Protections of Migrants, Asylum Seekers, and Refugees in Immigration Detention*, 24 GEO. IMMIGR. L.J. 507 (2010) (urging changes to a proposed international instrument to improve implementation of human rights standards on immigration detention); Cathryn Costello, *Human Rights and the Elusive Universal Subject: Immigration Detention Under International Human Rights and EU Law*, 19 IND. J. GLOBAL LEGAL STUD. 257 (2012) (analyzing tensions between human rights and immigration detention in Europe).

24. *See, e.g.*, Brané & Lundholm, *supra* note 22, at 158–63; U.S. DETENTION OF ASYLUM SEEKERS, *supra* note 17, at 17–30, 51–67; JAILED WITHOUT JUSTICE, *supra* note 17, at 29–43.

25. One author has suggested that well-intentioned efforts to improve conditions in immigration detention may lead to continued detention of large numbers of migrants by making immigration detention more acceptable. *See* MICHAEL FLYNN, GLOBAL DETENTION PROJECT, ON THE UNINTENDED CONSEQUENCES OF HUMAN RIGHTS PROMOTION ON IMMIGRATION DETENTION (2012); *see also* Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 58 (2010) (explaining that "it

migrant detention, regardless of the conditions of the specific detention placement. The analysis does treat all US immigration detention as "hard" detention, implicating the full panoply of liberty concerns involved in civil detention. In other words, no adult immigration detention facilities in the United States allow free movement out of the facility or otherwise have conditions that call into question their classification as detention facilities.[26] Nor does the Article explore the very real negative consequences of detention for migrants, because the deprivation of liberty itself must be understood as having a severe impact that demands justification, without a showing of further harm. If there were any doubt, however, the harm caused by detention has been well-documented. Among other impacts, studies show that detention leads to deterioration of the mental and physical health of detained migrants as well as their families.[27] Additional studies show that migrants in detention are much less likely to obtain counsel and are much more likely to lose their immigration cases.[28]

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may not be sufficient to focus exclusively on improving conditions of confinement" to address foundational problems with immigration detention).

26. *See* Michael Barajas, *ICE's 'Soft' Detention Strategy at New Immigration Facility Begs the Question: Why do Lowest-Risk Detainees Need to be Detained at All?*, SAN ANTONIO CURRENT, Mar. 21, 2012 (quoting Gary Mead, Executive Associate Director of ICE Enforcement & Removal Operations, as recognizing that individuals at the newest "civil" detention facility are still "detained"). The facilities where unaccompanied minors are held, which are under the jurisdiction of the U.S. Department of Health and Human Services, rather than ICE, present a softer form of custody. *See* 6 U.S.C. § 279(a) (2006); WOMEN'S REFUGEE COMM'N, HALFWAY HOME: UNACCOMPANIED CHILDREN IN IMMIGRATION CUSTODY 5–19 (2009) [hereinafter WRC, HALFWAY HOME]. In addition, for children, release and reunification with family members is emphasized over detention. *See* WRC, HALFWAY HOME, *supra*, at 8. For these reasons, this Article does not address the detention of children.

27. *See* Kalina Brabeck & Qingwen Xu, *The Impact of Detention and Deportation on Latino Immigrant Children and Families: A Quantitative Exploration*, 32 HISP. J. BEHAV. SCI. 341, 345–46, 354–55 (2010) (documenting increased mental health difficulties of US citizens and other family members of migrants subject to detention and deportation); Allen S. Keller et al., *Mental Health of Detained Asylum Seekers*, 362 LANCET 1721, 1722 (2003) (explaining that "detaining asylum seekers exacerbates symptoms of depression, anxiety, and post-traumatic stress disorder"); Nina Bernstein, *Documents Reveal Earlier Immigration Deaths*, N.Y. TIMES (Jan. 9, 2010), www.nytimes.com/2010/01/10/nyregion/10detainside.html.

28. *See* Symposium, *Innovative Approaches to Immigrant Representation: Exploring New Partnerships*, 33 CARDOZO L. REV. 357, 363–64 (2011) (explaining that detained migrants in removal proceedings in New York City went unrepresented at a rate of sixty percent, which is much higher than the rate for non-detained individuals, and

Finally, this Article focuses on those individuals who are detained pending a decision as to whether they will be deported or will gain the ability to remain in the United States. Most detained migrants with a final decision ordering deportation, either through an abbreviated process or after full proceedings to adjudicate immigration status, are removed quite quickly. They therefore remain in detention for a short period of time pending execution of the deportation.[29] US law already imposes time limits and procedural requirements on the detention of such migrants with a final removal order, although problems remain with the implementation of these rules.[30] The justification for detention of migrants after issuance of a removal order is also more obvious, including under international human rights standards.[31] The US government has already decided that these migrants must leave the United States, and only physical removal remains. This group of detainees does not present the same considerations regarding the appropriateness of detention as those detainees with a pending decision in their cases.

With these premises in mind, the Article first describes the current state of immigration detention in the United States in Part I. Part II then traces the recent unfolding of well-developed international human rights standards regarding immigration detention and sets out the human rights law framework for evaluating immigration detention. Part III proceeds to consider the relevance of the international standards in analyzing US immigration detention. It first explores the binding nature of the international human rights standards, at least as a question of international law. Next, it compares the international human

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additionally, unrepresented detained individuals have only a three percent success rate in achieving permission to remain in the United States); *see also* Andrew I. Schoenholtz & Hamutal Bernstein, *Improving Immigration Adjudications Through Competent Counsel*, 21 GEO. J. LEGAL ETHICS 55, 55–56 (2008) (pointing out that detainees are more limited than non-detained migrants in obtaining counsel and representation is the "single most important non-merit factor" determining outcomes in immigration proceedings).

29. *See* DORA SCHRIRO, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 6 (2009) [hereinafter SCHRIRO STUDY] (noting that average detention times are longer for individuals seeking relief as compared to those pursuing only voluntary removal); *see also infra* notes 42, 52 and accompanying text.

30. 8 U.S.C. § 1231 (2006); 8 C.F.R. §§ 241.4–5 (2012); Zadvydas v. Davis, 533 U.S. 678, 701 (2001); Clark v. Martinez, 543 U.S. 371, 373 (2005).

31. *See infra* notes 130–32 and accompanying text.

rights framework to US law on civil detention in non-immigration contexts, concluding that the standards are almost fully in line with one another. Given these similarities, as well as the importance of complying with international obligations, I conclude in this Part that the United States should realign the US immigration detention system so that it meets the international standards. Specifically, I propose that courts should intervene, where necessary, to protect liberty and due process by giving substance to the international standards through the interpretation of US statutory and constitutional provisions. Part IV engages in a detailed analysis of the US immigration detention system and its various components as measured against international human rights standards. Significant incompatibilities with international human rights law are identified, and this Part urges delimitation of US law to resolve these incompatibilities and curb the excesses of immigration detention in the United States.

## I. *THE CURRENT STATE OF IMMIGRATION DETENTION*

The current immigration detention system sweeps hundreds of thousands of migrants into ICE custody each year.[32] All are detained pending either adjudication of immigration status or deportation and are thus held in civil or administrative detention.[33] These migrants include lawful permanent residents like BM who face deportation as a result of criminal convictions, asylum seekers like FH, undocumented migrants with long periods of residence in the United States, recent unlawful border-crossers seeking work, and individuals with final deportation orders waiting to be physically removed to their

32. *See* DHS IMMIGRATION ENFORCEMENT ACTIONS 2011, *supra* note 13, at 1 (reporting the detention of 429,000 migrants in 2011); DONALD KERWIN & SERENA YI-YING LIN, MIGRATION POLICY INST., IMMIGRANT DETENTION: CAN ICE MEET ITS LEGAL IMPERATIVES AND CASE MANAGEMENT RESPONSIBILITIES? 7 (2009) [hereinafter MPI STUDY] (illustrating this trend over the last decade).

33. *See* 8 U.S.C. § 1226 (2006) (providing for detention "pending a decision on whether the alien is to be removed from the United States"); 8 U.S.C. § 1231 (2006) (providing for detention after entry of a removal order); Morton Press Conference on Detention Reform, *supra* note 18 (acknowledging that ICE detention is "civil in nature"); SCHRIRO STUDY, *supra* note 29, at 2, 4 (emphasizing that ICE detention is administrative and must be distinguished from criminal incarceration).

countries.[34] Migrants detained pending a decision constitute roughly sixty percent of all immigration detainees at any given moment.[35]

Rapid expansion has characterized the US immigration detention system for some time now. In the last decade, immigration detention has more than doubled from 209,000 immigration detainees in 2001[36] to 429,000 immigration detainees in 2011.[37] The steady growth of detention becomes

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34. *See* 8 U.S.C. § 1226 (providing for detention during immigration proceedings); 8 U.S.C. §§ 1182(a), 1227(a) (2006) (providing grounds of deportation that can lead to deportation proceedings, including grounds that affect undocumented individuals and grounds that affect lawful permanent residents and other individuals who legally entered the United States); 8 U.S.C. § 1225(a)(1) (2006) (providing for detention of asylum seekers and others placed in expedited removal proceedings upon apprehension at or near the border); *see generally* JAILED WITHOUT JUSTICE, *supra* note 17; UNLOCKING LIBERTY, *supra* note 17, at 5–6.

35. *See* MPI STUDY, *supra* note 32, at 16–17 (providing data supporting the conclusion that sixty-three percent of immigration detainees had pending cases, where pending cases are calculated as a percentage of the total number of cases for which information was available regarding pending or post-final order status).

36. *Id.* at 7.

37. DHS IMMIGRATION ENFORCEMENT ACTIONS 2011, *supra* note 13, at 1. The numbers have varied somewhat over the last few years while remaining at very high levels approaching the more than 400,000 detentions taking place in 2011. *See id.* (reporting that 429,000 migrants were detained in 2011); *see also* OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., ANNUAL REPORT—IMMIGRATION ENFORCEMENT ACTIONS: 2009, at 1 (Aug. 2010) [hereinafter DHS IMMIGRATION ENFORCEMENT ACTIONS 2009] (reporting that 383,000 migrants were detained in 2009; OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., ANNUAL REPORT—IMMIGRATION ENFORCEMENT ACTIONS: 2010, at 1 (June 2011) [hereinafter DHS IMMIGRATION ENFORCEMENT ACTIONS 2010] (reporting that 363,000 migrants were detained in 2010). The fluctuations and the overall high rate of detention have little relation to unauthorized border crossing trends, since unlawful crossings have been in steady decline in recent years. *See* OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., APPREHENSIONS BY THE U.S. BORDER PATROL: 2005–2010, at 1 (2011) (noting that apprehension statistics serve as a proxy for illegal entry into the United States and reporting that border apprehensions declined sixty-one percent between 2005 and 2010); U.S. BORDER PATROL NATIONWIDE ILLEGAL ALIEN APPREHENSIONS FISCAL YEARS 1925–2011, at 1 ( 2011) (showing downward trend in border apprehensions between 2009 and 2011); DHS IMMIGRATION ENFORCEMENT ACTIONS 2011, *supra* note 13, at 3 (noting that apprehensions along the Southwest border decreased twenty-seven percent from 2010 to 2011); DHS IMMIGRATION ENFORCEMENT ACTIONS 2009, *supra*, at 1 (showing that apprehensions at the border were trending downwards); *see also* Lourdes Medrano, *Behind Decline in US–Mexico Border Crossings: Higher Risks, Lower Rewards*, CHRISTIAN SCI. MONITOR (Dec. 14, 2011), http://www.csmonitor.com/USA/2011/1214/Behind-decline-in-US-Mexico-border-crossings-higher-risks-lower-rewards (reporting recent low number of apprehensions along the US–Mexico border as a reflection of the lower number of illegal crossings).

even more apparent if average daily population over the last two decades is considered. In 1994, immigration authorities held an average of 6,785 detainees a day.[38] By 2011, the average daily population had reached 33,330, an almost five-fold increase over a fifteen-year period.[39]

The expansion of immigration detention has been particularly dramatic in recent years. In 2005, there were 238,000 immigration detainees each year,[40] but that number increased by almost 200,000 in just five years to the 2011 figure of 429,000.[41]

A significant number of those detained are summarily removed and thus remain in detention only for a very brief period of time. However, many others undergo lengthy immigration court proceedings to determine whether they may remain in the United States and may be detained for all or a significant portion of those proceedings. For example, during 2011, the US government deported more than 250,000 individuals through reinstatement of removal and expedited removal, which are expedited programs requiring only the most perfunctory adjudication by ICE in most cases.[42] However, during that same time, ICE detained more than 125,000 migrants through full-fledged proceedings in immigration court.[43] For 2011, the immigration courts reported that they completed proceedings in 128,745 cases involving detained

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38. *See* ALISON SISKIN, CONG. RESEARCH SERV., RL32369, IMMIGRATION-RELATED DETENTION: CURRENT LEGISLATIVE ISSUES 12 (2004), *available at* http://digital.library.unt.edu/ark:/67531/metacrs5951/m1/1/high_res_d/RL32369_2004Apr28.pdf.

39. *Fact Sheet: Detention Management*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT (Nov. 10, 2011), http://www.ice.gov/news/library/factsheets/detention-mgmt.htm [hereinafter ICE, *Detention Fact Sheet*]; *see also* U.S. IMMIGRATION & CUSTOMS ENFORCEMENT SALARIES AND EXPENSES, FISCAL YEAR 2013 CONGRESSIONAL BUDGET JUSTIFICATION 37 (2013), http://www.dhs.gov/xlibrary/assets/mgmt/dhs-congressional-budget-justification-fy2013.pdf [hereinafter DHS CONGRESSIONAL BUDGET JUSTIFICATION].

40. OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., ANNUAL REPORT—IMMIGRATION ENFORCEMENT ACTIONS: 2005, at 1 (2006).

41. DHS IMMIGRATION ENFORCEMENT ACTIONS 2011, *supra* note 13, at 1.

42. *Id.*; *see infra* Part IV.B., for an explanation of the expedited removal and reinstatement of removal processes.

43. *See* OFFICE OF PLANNING, ANALYSIS & TECH., U.S. DEP'T OF JUSTICE, FY 2011: STATISTICAL YEAR BOOK O1 (2012) [hereinafter EOIR STATISTICAL YEARBOOK 2011].

immigrants.[44] This number of more than 125,000 detainees pending a determination of status in immigration court proceedings is consistent with ICE statistics.[45] Overall, forty-two percent of deportation cases completed in the immigration courts in 2011 involved detained immigrants, demonstrating the prevalence of detention during proceedings that will result in a determination regarding removability and immigration status.[46]

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44. *Id.* The actual number of immigration court proceedings involving detained migrants in 2011 would be greater than that number, because the statistic relates only to cases in which the migrant was detained at completion of the immigration court case. Some cases last longer than one year, meaning that some migrants detained during 2011 would not appear in the statistics for that year, because their cases would not have been completed until a subsequent year. *See Latest Immigration Court Numbers, as of January 2013*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Feb. 6, 2013), http://trac.syr.edu/immigration/reports/latest_immcourt (reporting that, on average, pending cases have been awaiting conclusion for almost a year and a half); MPI STUDY, *supra* note 32, at 16, 19 (reporting on individuals who remained in detention for longer than a year pending a result in their deportation proceedings). Other migrants held in detention during immigration court proceedings in 2011 would not appear in this statistic, because they would have been detained during some period of the proceedings but released before completion of the case. EOIR STATISTICAL YEARBOOK 2011, *supra* note 43, at B2, H3 (providing information regarding individuals released on bond during immigration court proceedings); *Detainees Leaving ICE Detention from the Port Isabel Service Processing Center*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (2010), http://trac.syr.edu/immigration/detention/200803/PIC/exit [hereinafter *Detainees Leaving ICE Detention*] (reporting on immigration detainees released on bond during pending deportation proceedings).

45. ICE reports that it removed 392,000 immigrants in 2011. DHS IMMIGRATION ENFORCEMENT ACTIONS 2011, *supra* note 13, at 1. If the approximately 250,000 individuals who faced only summary removal proceedings are subtracted from those figures, 142,000 individuals remain. *Id.* Many of those 142,000 individuals would have faced detention and deportation in proceedings before the immigration courts. Some individuals removed were likely not detained at all or for the full pendency of the immigration court proceedings. On the other hand, the actual number of individuals in detention during proceedings before the immigration courts would also include those who were not removed at the end of proceedings. A number of those detained would have won the right to remain in the United States. Of the approximately 220,000 cases completed in immigration court in 2011, more than 55,000 (greater than twenty-five percent) resulted in relief or dismissal of the deportation proceedings. EOIR STATISTICAL YEARBOOK 2011, *supra* note 43, at D2. The estimate of more than 125,000 in detention pending a decision on deportability and status is therefore reliable and errs on the side of a more conservative estimate.

46. *See* EOIR STATISTICAL YEARBOOK 2011, *supra* note 43, at O1. In a submission to the Inter-American Commission on Human Rights, the US government asserted that the "vast majority of aliens in immigration proceedings are not detained." Submission of the Government of the United States to the Inter-American Commission on Human Rights with Respect to the Draft Report on Immigration in the United States: Detention and Due Process, at 9, OEA/Ser.L/V/III, doc. 47 (Aug. 2, 2010), *available at* http://cidh.org/pdf%20files/ReportOnImmigration.USG.Response10.15.2010.pdf

Individuals who seek to remain in the United States generally remain in detention for three months or more, and it is not uncommon for individuals to stay in detention even longer, sometimes for more than a year.[47] DHS's published statistics generally do not include information regarding the typical length of stay.[48] When DHS does provide a figure, the agency usually asserts that the average length of time in detention is approximately thirty to thirty-five days.[49] However, this figure does not disaggregate the detention data for those undergoing contested immigration proceedings to determine their ability to remain in the United States.[50] It thus includes those individuals awaiting the outcome of immigration court proceedings in the same figure with the large numbers of migrants who are deported by ICE under summary deportation orders or who leave voluntarily within a day or week of arrest.[51]

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[hereinafter US Submission to the IACHR]. The immigration court statistics belie this assertion.

47. *See infra* notes 52–56 and accompanying text.

48. *See, e.g.*, DHS IMMIGRATION ENFORCEMENT ACTIONS 2011, *supra* note 13, at 1; ICE, *Detention Fact Sheet*, *supra* note 39.

49. *See* SCHRIRO STUDY, *supra* note 29, at 6 ("on average, an alien is detained 30 days"); DHS CONGRESSIONAL BUDGET JUSTIFICATION, *supra* note 39, at 36 (noting that the average length of stay is thirty-five days); Gary Mead, Human Rights Situation of Migrant Workers, Refugee Children and Other Vulnerable Groups in the United States: Statement Before the Inter-American Commission on Human Rights (Oct. 12, 2007), *available at* http://www.oas.org/es/cidh/audiencias/Hearings.aspx?Lang=Eng&Session=13&page=1 (stating that the "average length of stay . . . [in] custody last year . . . was approximately thirty-five days").

50. The Inter-American Commission on Human Rights has attempted to obtain disaggregated data regarding length of detention for the various categories of immigrants subject to deprivation of liberty, making several requests to the United States in conjunction with a series of hearings and working group meetings held with non-governmental organizations. *See* Letter from Sarah Paoletti, Practice Assoc. Professor & Dir., Transnational Legal Clinic, Univ. of Pa. Law Sch. et al., to the Inter-American Commission on Human Rights (Oct. 17, 2011) (on file with author); Telephone Interview with Alvaro Botero at the Inter-American Comm'n on Human Rights (Jan. 2012) [hereinafter Botero Telephone Interview] (notes on file with the author). The Inter-American Commission has not received a response. *See id.*

51. SCHRIRO STUDY, *supra* note 29, at 6. DHS has noted that as many as twenty-five percent of individuals in detention are held for a day or less and that thirty-eight percent are released within a week. *Id.* The government's presentation of these numbers clarifies that the majority of the individuals held only for short periods of time are not released pending immigration court proceedings. Rather, they depart the country voluntarily or are removed pursuant to summary removal proceedings. *Id.* In 2011, the government deported more than 250,000 individuals (sixty-four percent of total removals) through reinstatement of removal and expedited removal. DHS

Consequently, DHS statistics represent a serious understatement of the length of detention experienced by most migrants, particularly those who challenge the grounds for their deportation or seek asylum or other relief from deportation and thus are entitled to proceedings to determine whether they will be allowed to stay in the United States.

A closer look at the government's own figures reveals the reality that migrants who remain in detention during contested proceedings experience a much longer average length of detention. DHS has recognized that the length of time in detention varies significantly depending on whether the detainee fights deportation.[52] For example, in a 2009 report to Congress, DHS acknowledged that the average length of detention for asylum seekers ranges from 48 days to 130 days, depending on the procedural stance of the asylum claim.[53] At least fifteen percent and up to forty-eight percent of asylum seekers remained in detention for longer than 90 days.[54] Similarly, an independent study looking at data regarding detention for a single snapshot day—January 25, 2009—found that ICE detained migrants for an average of at least eighty-one days.[55] The study further found that ICE held ten percent of

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IMMIGRATION ENFORCEMENT ACTIONS 2011, *supra* note 13, at 1. Another 324,000 individuals returned home voluntarily or otherwise without a formal removal order. *Id.* Some migrants involved in these summary proceedings would never have been officially detained but instead would have left the United States shortly after an initial encounter and apprehension by immigration authorities. *See* DHS IMMIGRATION ENFORCEMENT ACTIONS 2011, *supra* note 13, at 1 (noting that DHS apprehended 642,000 individuals in 2011 while ICE detained 429,000). However, many others would have been detained, although only for very short periods of time, and their inclusion in the data significantly affects the statistic for average detention length. *See* SCHRIRO STUDY, *supra* note 29, at 6. In contrast to the ICE statistics, the Department of Justice provides statistics that separate out pre-trial criminal detention for those held for fewer than four days. *See U.S. Marshals Service Summary Case Processing Statistics: Fiscal Year 1994–2011*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/ofdt/summary.htm (last visited Feb. 13, 2013).

52. *See* SCHRIRO STUDY, *supra* note 29, at 6.

53. *See* DHS & ICE, DETENTION AND REMOVAL OPERATIONS REPORT: REQUIRED BY SECTION 903 OF THE HAITIAN REFUGEE IMMIGRATION FAIRNESS ACT 5 (2009).

54. *See id.*; *see also* DHS & IC, DETAINED ASYLUM SEEKERS: FISCAL YEAR 2009 REPORT TO CONGRESS 8, 44 (2012) (reporting that up to twenty-five percent of asylum seekers remained in detention for longer than ninety days in 2010 and further noting that, during 2010, more than 100 asylum seekers remained in custody after a year of detention).

55. *See* MPI STUDY, *supra* note 32, at 16, 19.

detainees in custody pending removal proceedings for longer than six months but less than a year, and held more than 500 individuals in detention for longer than a year awaiting final adjudication of their cases.[56] Perversely, individuals with the opportunity to remain in the United States and with the greatest interest in doing so will remain in the custody of the US government for the longest period of time.

A combination of legal, political, and financial considerations explains the current emphasis on detention in immigration cases. Much of the early upward tick in immigration detention resulted from the passage of legislation in 1996 that broadened the categories of individuals subject to detention, removal, and mandatory detention.[57] But, that legislation does not explain the particularly rapid growth of detention after 2005.

Instead, recent growth in detention levels corresponds to political trends that have advanced "get-tough" stances towards crime, border control, and immigration.[58] Thus, in the wake of Congress' adoption of the REAL ID Act,[59] connecting immigration with national security and criminal concerns, and the introduction of additional legislation[60] proposing a harsh immigration crackdown, then-Secretary of Homeland Security Michael Chertoff announced new detention policies in the fall

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56. *See id.*; *see also* ACLU, ISSUE BRIEF UPDATE: PROLONGED IMMIGRATION DETENTION OF INDIVIDUALS WHO ARE CHALLENGING REMOVAL 9 (2011) (noting that on November 1, 2010, 2,743 individuals who were still challenging deportation had been detained for six months or more).

57. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (codified as amended as amended in scattered sections of 8 and 18 U.S.C.); *see also* Legomsky, *supra* note 21, at 533–34.

58. *See, e.g.*, Graeme Wood, *A Boom Behind Bars*, BLOOMBERG BUSINESSWEEK (Mar. 17, 2011), http://www.businessweek.com/magazine/content/11_13/b4221076266454.htm (tracing increased detention due to a "get-tough approach on immigration" and noting parallels between growth in criminal and immigration detention); *see also* Adam Liptak, *U.S. Prison Population Dwarfs that of Other Nations*, N.Y. TIMES (Apr. 23, 2008), http://www.nytimes.com/2008/04/23/world/americas/23iht-23prison.12253738.html (noting upward trend in criminal incarceration rates in the United States and noting its connection to the "movement to get tough on crime").

59. Real ID Act of 2005, Pub. L. No. 109–13, 119 Stat. 302 (2005).

60. Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005).

of 2005.[61] He publicly stated that President George W. Bush's administration had received pressure to deal with illegal immigration through "tough enforcement" measures.[62] In response, Secretary Chertoff announced intentions to greatly expand immigration detention capacity with the goal of detaining all migrants undergoing proceedings to determine their status, regardless of individual circumstances.[63] President Barack Obama's administration has similarly responded to the political environment by focusing heavily on immigration enforcement, including high levels of immigration detention.[64] Since 2005, Congress has also emphasized immigration enforcement and has consistently appropriated funding to ensure expansive detention.[65]

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61. *Comprehensive Immigration Reform II: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 4 (2005) [hereinafter Chertoff Hearing] (statement of Sec'y Michael Chertoff, U.S. Dep't of Homeland Sec.). This announcement also followed a shift toward detention effectuated through expansion of the expedited removal program, which mandates detention of certain recently arriving migrants for rapid deportation. *See* 8 U.S.C. § 1225 (2006). In 2004, DHS extended the program's reach to include not only migrants arriving at the border or at sea but also those apprehended within 100 miles of the border during the first fourteen days after their entry. *See* Designating Aliens For Expedited Removal, 69 Fed. Reg. 48877 (Aug. 11, 2004).

62. Chertoff Hearing, *supra* note 61, at 45 (testifying that meetings with members of Congress established the need for "aggressive and innovative steps" for dealing with immigration and announcing "tough enforcement" measures).

63. *Id.; see also* Chris Strohm, *DHS to End 'Catch and Release' of Illegal Aliens in October*, GOV'T EXEC. (Feb. 3, 2006), http://www.govexec.com/defense/2006/02/dhs-to-end-catch-and-release-of-illegal-aliens-in-october/21082 [hereinafter *DHS to End Catch and Release*]. This announcement is known as the end of "catch and release" in commonly-used but weighted parlance. It signified a shift in detention policy toward detention and ended the prior situation in which many individuals were released pending removal proceedings in immigration court. *Id.*; *see* SISKIN, *supra* note 38, at 2–4; Memorandum from Asa Hutchinson, Under Sec'y for Border & Transp. Sec., Dep't of Homeland Sec. on Detention Prioritization and Notice to Appear Documentary Requirements 1 (Oct. 18, 2004) (establishing priority categories for deciding "whether to detain an alien"); Legomsky, *supra* note 21, at 543 (noting older case-by-case release policies).

64. Janet Napolitano, Sec'y, Dep't of Homeland Sec., Prepared Remarks at the Center for American Progress (Nov. 13, 2009) (referencing repeatedly the importance of "enforcement" of immigration laws, protecting national security and detaining "dangerous criminal aliens"); Morton MPI Speech, *supra* note 18 (reflecting ICE head's insistence on detention on a "grand scale").

65. *See* S. REP. NO. 112-169, at 52 (2012) [hereinafter 2013 SENATE REPORT ON APPROPRIATIONS] (approving funding of detention at the 2010 and 2011 level to ensure that there will be no return to the "ill-advised 'catch and release' policy"); H.R. REP. NO. 112-492, at 13 (2012) [hereinafter HOUSE 2013 APPROPRIATIONS BILL FOR DHS] (mandating that "funding made available under this heading shall maintain a

Immigration detention is also big business, which is another factor leading to its steady growth in recent years. For-profit prison companies often carry out immigration detention.[66] These corporations increase their revenues substantially when immigration detention expands as has occurred in the last decade, resulting in lucrative contracts.[67] Because detention serves as such an important profit source, private correctional companies lobby Congress and make campaign contributions to protect those profits by increasing or maintaining high detention levels. Reportedly, the Corrections Corporation of America has spent "more than [US]$23 million in lobbying over the course of the decade."[68] In 2005, the year that began the most dramatic upward swing in detention, the corporation spent

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level of not less than 34,000 detention beds"); *Detention of Criminal Aliens: What Has Congress Bought?*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Feb. 11, 2010), http://trac.syr.edu/immigration/reports/224 (tracking substantial increases in Congressional funding of detention and deportation with the goal of protecting "public safety and national security, particularly by detaining and removing criminal aliens").

66. *See* MPI STUDY, *supra* note 32, at 15 (showing that twelve of seventeen immigration detention facilities were managed by for-profit correctional companies).

67. *See* Garance Burke & Laura Wides-Munoz, *Immigrants Prove Big Business for Prison Companies*, YAHOO! NEWS (Aug. 2, 2012), http://news.yahoo.com/immigrants-prove-big-business-prison-companies-084353195.html (explaining that the GEO Group, which cites ICE as its largest client, increased its net income from US$16.9 million to US$78.6 million since 2000 and further noting that Corrections Corporation of America ("CCA") earned more than US$162 million in net income in 2011); Chris Kirkham, *Private Prisons Profit from Immigration Crackdown, Federal and Local Law Enforcement Partnerships*, HUFFINGTON POST (June 7, 2012), http://www.huffingtonpost.com/2012/06/07/private-prisons-immigration-federal-law-enforcement_n_1569219.html (reporting that "according to securities filings" the two largest private prison corporations, CCA and GEO Group, Inc., "have more than doubled their revenues" from immigration detention since 2005); *see also* NAT'L IMMIGRATION FORUM, THE MATH OF IMMIGRATION DETENTION: RUNAWAY COSTS FOR IMMIGRATION DETENTION DO NOT ADD UP TO SENSIBLE POLICIES 5 (2012) (noting that CCA and GEO reported respective annual revenues of US$1.73 billion and US$1.6 billion in 2011); Corrections Corp. of Am., Annual Report (Form 10-K) 13, 35 (Feb. 25, 2011) (stating that ICE detention has accounted for approximately twelve percent of revenue in recent years and "filling these available beds would provide substantial growth"); The GEO Grp., Inc., Annual Report (Form 10-K) 33–34 (Mar. 2, 2011) (stating that ICE detention accounts for thirteen percent of profits and "loosening" of immigration laws or immigration enforcement could adversely impact profits).

68. *See* Kirkham, *supra* note 67; *see also* Burke & Wides-Munoz, *supra* note 67 (reporting that private corrections companies spent US$32 million on federal lobbying and on campaign contributions since 2000); Wood, *supra* note 58 (stating that the CCA spends an average of US$1–2 million lobbying dollars each year).

US$4 million lobbying the federal government.[69] Some of the expansion in detention must be attributed to these financial interests.[70]

## II. *INTERNATIONAL HUMAN RIGHTS STANDARDS*

On a parallel track, as detention has grown rapidly in the United States, human rights bodies have developed increasingly sophisticated, consistent, and cogent standards for addressing detention of migrants.[71] The standards are sufficiently specific that the laws and practices of states, including the United States, may be measured against them.

### A. *Development of the International Human Rights Standards*

The trend toward standards development in the immigration detention context is recent, however. For more than forty years after the signing of the Universal Declaration of Human Rights in 1948 and the birth of modern human rights law, international bodies made little effort to analyze the application of human rights norms to immigration detention. The adoption of multiple international and regional human rights treaties in the years after the promulgation of the Universal Declaration of Human Rights[72] failed to secure serious attention to the issue, even though basic provisions of these treaties relating to liberty of the person had obvious implications

69. *See* Kirkham, *supra* note 67; *see also* Burke & Wides-Munoz, *supra* note 67 (stating that private prison companies spent US$5 million on lobbying in 2005).

70. *See* Kirkham, *supra* note 67 (making a connection between increased lobbying in 2005 and increased detention beginning that year).

71. *See* CORNELISSE, *supra* note 23, at 337 (noting a "growing body of human rights law . . . concerned with the practice of immigration detention"); WILSHER, *supra* note 23, at 169 (showing how international fora began to look at immigration detention practices after the 1980s).

72. *See* International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Organization of American States, American Convention on Human Rights art. 1, *opened for signature* Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978) [hereinafter American Convention]; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221; International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Dec. 18. 1990, 2220 U.N.T.S. 3 [hereinafter UN Convention on the Rights of Migrants].

for immigration detention.[73] During this time, international human rights law slowly eroded traditions of absolute sovereignty within state territory, at least when confronted with assertions of individual rights.[74] Yet, sovereignty conceptions continued to reign supreme in connection with a state's power to control its borders and all related areas, including detention of immigrants. International bodies remained reluctant to intervene in this perceived core area of sovereignty.[75]

However, this adherence to the extreme version of sovereignty finally gave way beginning in the 1990s.[76] Initially, international human rights bodies focused on the situation of refugees and asylum seekers in applying human rights norms to immigration detention. The UN High Commissioner for Refugees ("UNHCR") first formulated specific guidelines to

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73. *See* WILSHER, *supra* note 23, at 121 (stating that even when international human rights instruments were drafted after World War II, "initially their impact [was] . . . rather limited" on immigration issues).

74. *See* LOUIS HENKIN, THE AGE OF RIGHTS 13–15 (1990); Peter J. Spiro, Note, *The States and International Human Rights*, 66 FORDHAM L. REV. 567, 569 (1997) (noting that "the basic premise" of human rights is "that nations cannot treat their subjects as they please" and documenting the expansion of subject matter areas touched by human rights law).

75. *See* WILSHER, *supra* note 23, at 169 (noting acceptance of sovereignty as justification for immigration detention in early human rights instruments); Stephen Legomsky, *The Last Bastions of State Sovereignty: Immigration and Nationality Go Global*, *in* CHALLENGES OF GLOBALIZATION: MIGRATION, LABOR AND GLOBAL GOVERNANCE 43, 44 (Andrew Sobel ed., 2009) (citing immigration as one of the last "bastions of national sovereignty" in relation to the international community); Linda S. Bosniak, *Human Rights, State Sovereignty and the Protection of Undocumented Migrants Under the International Migrant Workers Convention*, 25 INT'L MIGRATION REV. 737, 742–43, 749, 757–58 (1991) (stating that state sovereignty concerns led to delays and ambiguities in the drafting of the UN Convention on the Rights of Migrants in the 1980s); Costello, *supra* note 23, at 261–63 (noting that deep-rooted sovereignty considerations impact international human rights law interpretations in the immigration detention context); Office of the U.N. High Comm'r for Human Rights, Fact Sheet No. 24 (Rev. 1) 1–2, The International Convention on Migrant Workers and its Committee (2005), *available at* http://www.ohchr.org/Documents/Publications/FactSheet24rev.1en.pdf (stating that the UN Convention on the Rights of Migrants was adopted by the General Assembly in 1990 after ten years in development but only received enough State ratifications to come into force in 2003).

76. *See* Costello, *supra* note 23, at 259 (dating international human rights focus on immigration detention to 1997); INT'L DETENTION COAL., THE ISSUE OF IMMIGRATION DETENTION AT THE UN LEVEL: RECENT DEVELOPMENTS RELEVANT TO THE WORK OF THE INTERNATIONAL DETENTION COALITION (IDC) 4, 7 (2011) (highlighting increased attention to immigration detention issues in recent years by human rights bodies at the United Nations).

circumscribe the detention of refugees and asylum seekers in 1995 and then revised those guidelines shortly thereafter in 1999.[77] These standards adopted in the 1990s represented UNHCR's framework analyzing detention for several decades and were only recently superseded through the adoption of new UNHCR "Detention Guidelines" in 2012.[78] Once UNHCR began to consider detention issues, other human rights bodies at the United Nations ("UN") also addressed the detention of refugees and asylum seekers in the 1990s as well.[79]

Then, the UN human rights system widened the circle of immigration detention under consideration and created bodies to interpret and monitor human rights norms applicable to the detention of migrants generally.[80] In the last fifteen years, UN human rights bodies have produced numerous decisions and resolutions that lay out permissible contours of detention for asylum seekers and other migrants as well, in accordance with international human rights law.[81]

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77. *See* U.N. High Comm'r for Refugees, UNHCR's Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers (1999), *available at* http://www.unhcr.org/refworld/docid/3c2b3f844.html (providing the first detailed guidance on detention of refugees and asylum seekers); *see also* U.N. High Comm'r for Refugees, Detention of Refugees and Asylum-Seekers (1986), *available at* http://www.unhcr.org/refworld/docid/3ac68c43c0.html (giving the initial statement regarding the protections due to detainees).

78. U.N. High Comm'r for Refugees, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention (2012) [hereinafter UNHCR Detention Guidelines], *available at* http://www.unhcr.org/refworld/docid/503489533b8.html.

79. *See* Human Rights Comm., *A v. Australia, Communication No. 560/1993*, U.N. Doc. CCPR/C/59/D/560/1993 (Apr. 3, 1997) [hereinafter Human Rights Comm., *A. v. Australia*] (addressing detention of asylum seekers).

80. *See* Comm'n on Human Rights, Rep. on its 53rd Sess., Mar. 10–Apr. 18, 1997, at 166, U.N. Doc. E/1997/23 (1997) (mandating that the United Nations Working Group on Arbitrary Detention consider all forms of immigration detention); Report of the Working Group on Arbitrary Detention, U.N. Comm'n on Human Rights, 56th Sess., Annex 2, Deliberation No. 5, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment regarding the Situation of Immigrants and Asylum Seekers, U.N. Doc. E/CN.4/2000/4 (1999), [hereinafter Deliberation No. 5] (setting out initial principles, largely procedural in nature, for evaluating when immigration detention violates the right to liberty); Comm'n on Human Rights, Rep. on its 55th Sess., Mar. 22–Apr. 30, 1999, U.N. Doc. E/CN.4/1999/167 (1999) (creating the Special Rapporteurship on the Rights of Migrants).

81. *See* Human Rights Comm., *Communication No. 1255,1256,1259, 1260,1266,1268,1270&1288/2004*, U.N. Doc. CCPR/C/90/D/1255,1256, 1259,1260,1266,1268,1270&1288/2004 (Jul. 20, 2007) [hereinafter Human Rights Comm., *Shams v. Australia*] (addressing detention of asylum seekers); Human Rights

Similarly, the regional human rights bodies for the Americas, charged with promoting and enforcing human rights law in the member states of the Organization of American States ("OAS"), began to consider immigration detention issues a little more than a decade ago, initially in the refugee context and then in connection with all migrants.[82] Most recently, in 2010, the Inter-American Commission of Human Rights (the "IACHR" or the "Inter-American Commission") and the Inter-American Court of Human Rights (the "Inter-American Court") issued interpretations regarding the application of human rights law to immigration detention that laid out the most

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Comm., *Communication No. 900/1999*, U.N. Doc. CCPR/C/76/D/900/1999 (Oct. 28, 2002) (same). *See also* Working Grp. on Arbitrary Detention, U.N. Comm'n on Human Rights, Rep. on its Sixtieth Sess., U.N. Doc. E/CN.4/2004/3 (2003) [hereinafter 2003 Report of the Working Group on Arbitrary Detention] (setting out concrete guidelines for the application of human rights norms to immigration detention); Working Grp. on Arbitrary Detention, U.N. Comm'n on Human Rights, Rep. on its Sixty-second Sess., U.N. Doc. E/CN.4/2006/7 (2005) [hereinafter 2005 Report of the Working Group on Arbitrary Detention] (same); Working Grp. on Arbitrary Detention, U.N. Comm'n on Human Rights, Rep. on its Seventh Sess., U.N. Doc. A/HRC/7/4 (2008) [hereinafter 2008 Report of the Working Group on Arbitrary Detention] (same); Working Grp. on Arbitrary Detention, U.N. Comm'n on Human Rights, Rep. on its Tenth Sess., U.N. Doc. A/HRC/10/21 (2009) [hereinafter 2009 Report of the Working Group on Arbitrary Detention] (same); Working Grp. on Arbitrary Detention, U.N. Comm'n on Human Rights, Rep. on its Thirteenth Sess., U.N. Doc. A/HRC/13/30 (2010) [hereinafter 2010 Report of the Working Group on Arbitrary Detention] (same); Special Rapporteur on the Human Rights of Migrants, *Specific Groups and Individuals: Migrant Workers*, U.N. Doc. E/CN.4/2003/85/Add.1 (Jan. 30, 2003) (by Gabriela Pizarro) [hereinafter Special Rapporteur 2002 Report] (applying human rights norms to immigration detention); Special Rapporteur on the Human Rights of Migrants, U.N. Doc. A/HRC/20/24 (Apr. 2, 2012) (by Francois Crepeau) (same) [hereinafter Special Rapporteur 2012 Report]; Special Rapporteur on the Human Rights of Migrants, *Addendum: Mission to the United States of America*, U.N. Doc. A/HRC/7/12/Add.2 (Mar. 5, 2008) (by Jorge Bustamante) [hereinafter Special Rapporteur Report on Mission to the US] (expounding human rights standards while making findings on immigration detention in the United States); *see also* U.N. Office of the High Comm'r for Human Rights, CCPR General Comment No. 15: The Position of Aliens Under the Covenant, ¶ 5 (Apr. 11, 1986) [hereinafter General Comment 15] (offering an early general statement of principles regarding detention of migrants by the U.N. Human Rights Committee).

82. *See* INTER-AMERICAN COMM'N ON HUMAN RIGHTS, ORG. OF AMERICAN STATES, REPORT ON THE SITUATION OF HUMAN RIGHTS OF ASYLUM SEEKERS WITHIN THE CANADIAN REFUGEE DETERMINATION SYSTEM (2000) (establishing detention standards in the context of the asylum process in Canada); Ferrer-Mazorra v. United States, Case 9903, Inter-Am. C.H.R., Report No. 51/01, OEA/L/V/II.111, doc. 20 rev. (2001) (addressing the detention of Cuban migrants); INTER-AMERICAN COMM'N ON HUMAN RIGHTS, ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS: 2000 ch. VI (2001) (addressing the detention of migrant workers).

comprehensive and detailed standards by international human rights bodies yet.[83]

Thus, while it was late in developing, there is now a corpus of international human rights law on immigration detention. The international human rights standards include both general principles and specific guidelines regarding immigration detention and provide a clear and rational framework for determining when immigration detention complies with international human rights law and when it does not.

### B. *Content of the International Human Rights Standards*

The international human rights standards of the United Nations and the inter-American system are the best developed and also are those that apply to the United States.[84] This Part will thus focus on the universal and the regional inter-American standards.[85] Given their recent development, the standards offered by the various international human rights bodies have

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83. *See* Velez Loor v. Panama, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 218 ( Nov. 23, 2010) (holding that lengthy detention of irregular immigrant violated international human rights law); *see also* INTER-AMERICAN COMM'N ON HUMAN RIGHTS, REPORT ON IMMIGRATION IN THE UNITED STATES: DETENTION AND DUE PROCESS 11–33 (2010) [hereinafter IACHR REPORT ON DETENTION] (analyzing international human rights law norms applicable to immigration detention in the United States).

84. *See infra* Section III.A. (discussing the binding nature of the relevant human rights instruments).

85. This Part does not consider the standards developed by European human rights bodies since they have no direct relevance in the United States. Nor will this Part reference the statements and resolutions of the political bodies of the United Nations and the Organization of American States ("OAS"), although there are a number that urge limitations on detention. *See* G.A. Res. 64/166, ¶ 4, U.N. Doc. A/RES/64/166 (Mar. 19, 2010) (calling on states to reduce the detention of migrants); OAS General Assembly, Inter-American Program for the Promotion and Protection of the Human Rights of Migrants, Including Migrant Workers and Their Families, AG/RES. 2141 (XXXV-O/05) 11, 15 (June 7, 2005) (urging programs to prevent "arbitrary arrest" of migrants in immigration proceedings). These pronouncements are policy statements rather than legal standards, and are not entitled to the same weight given to specific international human rights instruments and to the statements of experts and bodies appointed to interpret those instruments. *See infra* notes 168–69 and accompanying text (describing the persuasive authority of the standards issued by the bodies appointed to interpret human rights instruments). Finally, the section does not cite to the UN Convention on the Rights of Migrants, although that instrument includes provisions relating to immigration detention, because the United States has not ratified the treaty and is not bound by it. *See generally* UN Convention on the Rights of Migrants, *supra* note 72.

not been systematized. This Part presents the standards in a schema that captures the general principles and individual requirements set out under international human rights law.

### 1. Rights that Form the Basis of the International Human Rights Standards

The international human rights standards relating to immigration detention rely on bedrock rights guaranteed in international human rights instruments. The human right to liberty is a principal source of law. The right to liberty and freedom from "arbitrary" detention is set forth in the International Covenant on Civil and Political Rights (the "ICCPR")[86] as well as in the American Convention on Human Rights (the "American Convention"),[87] which further develops the right as originally set out in the American Declaration on the Rights and Duties of Man ("the American Declaration").[88]

The right to due process protected in the ICCPR, the American Convention and the American Declaration, also serves as a vital source of law for international standards on immigration detention. Each treaty establishes that no individual shall be deprived of physical liberty except as established by law; additionally each of the treaties includes a separate provision guaranteeing due process in legal proceedings.[89]

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86. *See* ICCPR, *supra* note 72, art. 9(1) ("Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.").

87. American Convention, *supra* note 72, arts. 7(1), 7(3) ("Every person has the right to personal liberty and security. . . . No one shall be subject to arbitrary arrest or imprisonment.").

88. *See* Organization of American States, American Declaration of the Rights and Duties of Man, OAS Res. XXX, art. I, OEA/Ser.L.V./II.23 (May 12, 1948) [hereinafter American Declaration] ("Every human being has the right to . . . liberty."); *Id.* art. XXV (entitling section "Right of protection from arbitrary arrest").

89. *See* ICCPR, *supra* note 72, art. 9(1) ("No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law."); *Id.* art. 14(1) ("[E]veryone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal . . . ."); American Convention, *supra* note 72, art. 7(2) ("No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto."); *Id.* art. 8 (1) ("Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law."); American Declaration, *supra* note 88, art. XXV ("No person may be deprived of his

As to refugees and asylum seekers, the limitations on immigration detention derive from the same human right to liberty guaranteed to all migrants but also from specific provisions in the refugee treaties.[90] These treaty provisions prohibit punishment of or undue restrictions on the rights of those seeking protection.[91] The United Nations Convention relating to the Status of Refugees (the "Refugee Convention")[92] provides that states "shall not impose penalties, on account of their illegal entry or presence, on refugees who enter or are present in their territory without authorization."[93] The treaty further provides that states may not apply "restrictions other than those which are necessary" to irregular migrants claiming refugee status.[94]

### 2. General Principles of the International Human Rights Standards Relating to Immigration Detention

Based on these core rights, international human rights law establishes general principles on immigration detention. These principles impose human rights limitations on government authority to control immigration, require that immigration detention be used as a last resort, and mandate the non-punitive nature of immigration detention. In turn, these general principles lead to a framework requiring that immigration detention be reasonable, necessary, and proportional in order to comply with international human rights obligations.

Thus, international human rights law standards on immigration detention start from the premise that governments may control immigration and may expel or exclude non-

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liberty except in the cases and according to the procedures established by pre-existing law."); *Id.* art. XXVI (entitling section "Right to due process of law") .

90. *See* UNHCR Detention Guidelines, *supra* note 78, ¶¶ 12–14.

91. *See id.*

92. U.N. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter Refugee Convention]. This convention was extended by the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Refugee Protocol]. The Refugee Convention entered into force for the United States on Nov. 1, 1968, through accession to the Refugee Protocol. Subsequent mentions of the provisions of the treaty will reference only the Refugee Convention, although the Refugee Protocol is what binds the United States.

93. *Id.* art. 31(1).

94. *Id.* art. 31(2); *see also id.* art. 26 (providing for freedom of movement and choice of residence for refugees).

citizens.[95] However, this ability to control migration is limited by the requirement that, even in carrying out immigration control, states must abide by international human rights norms and refugee law protections.[96] The Inter-American Court of Human Rights has held succinctly that "States may establish mechanisms to control the entry into and departure from their territory of individuals who are not nationals, as long as they are compatible with the norms of human rights protection."[97] Further developing this rule of law, the court has noted that, "international law has placed certain limits on the application of migratory policies that must always be applied . . . whatever the legal situation of the migrant may be."[98]

Similarly, the UN Human Rights Committee (the "HRC") has stated that human rights law "does not recognize the right of aliens to enter or reside in the territory of a State party" and that it is "a matter for the State to decide who it will admit to its territory."[99] However, human rights norms, including the right to liberty, nonetheless apply to protect migrants as the state makes its determinations.[100] Other bodies of the United Nations have reached similar conclusions.[101]

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95. Velez Loor v. Panama, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 218, ¶ 97 (Nov. 23, 2010); General Comment 15, *supra* note 81, ¶¶ 5, 9; 2010 Report of the Working Group on Arbitrary Detention, *supra* note 81, ¶¶ 58, 59; Special Rapporteur Report on Mission to US, *supra* note 81, at 7.

96. *Velez Loor*, Inter-Am. Ct. H.R. (ser. C) No. 218, ¶ 97; General Comment 15, *supra* note 81, ¶¶ 5, 9; 2010 Report of the Working Group on Arbitrary Detention, *supra* note 81, ¶¶ 58, 59; Special Rapporteur Report on Mission to US, *supra* note 81, ¶ 7; Special Rapporteur 2012 Report, *supra* note 81, ¶ 6 ("The fact that a person is irregularly in the territory of a State does not imply that he or she is not protected by international human rights standards.").

97. *Velez Loor*, Inter-Am. Ct. H.R. (ser. C) No. 218, ¶ 97.

98. *Id.* ¶ 100.

99. General Comment 15, *supra* note 81, ¶ 5.

100. *See id.* ¶¶ 5, 9.

101. 2010 Report of the Working Group on Arbitrary Detention, *supra* note 81, ¶¶ 58, 59 (acknowledging "the sovereign right of States to regulate migration" while requiring observance of "[s]trict legal limitations" and "judicial safeguards" where immigration detention is concerned); Special Rapporteur Report on Mission to US, *supra* note 81, ¶ 9 (noting that international law "recognizes every State's right to set immigration criteria and procedures" but "does not allow unfettered discretion to set policies for detention . . . of non-citizens without regard to human rights standards"); *see also* Special Rapporteur 2012 Report, *supra* note 81, ¶ 6 (confirming that international human rights standards protect migrants in irregular status).

Human rights law further establishes the overarching principle that immigration detention must be a last resort. The bodies of the universal and inter-American human rights systems have established a presumption against detention for all migrants in application of the right to liberty guaranteed in the respective human rights treaties. In connection with its review of detention in the United States, the Inter-American Commission on Human Rights looked to the right to liberty and explicitly established "the paramount principle" that detention during proceedings is an "exceptional measure."[102] The Inter-American Commission expounded on this principle establishing that: "member States must enact immigration laws and establish immigration policies that are premised on a presumption of liberty—the right of the immigrant to remain at liberty while his or her immigration proceedings are pending—and not on a presumption of detention."[103] Similarly, in analyzing the application of the right to liberty to migrants, the UN Working Group on Arbitrary Detention and the UN Special Rapporteurship on the Human Rights of Migrants have concluded that detention of migrants must be a "last resort."[104]

In interpreting states' treaty obligations to asylum seekers and refugees, UNHCR has established this same "presumption against detention."[105] The UNHCR Detention Guidelines establish that "detention of asylum-seekers should normally be avoided" and should be a "measure of last resort, with liberty being the default position."[106]

International human rights law establishes the principle of detention as a last resort as both a global rule for assessing the overall structure of a state's detention system[107] and a decision-making rule for states to apply in individual determinations.[108]

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102. IACHR REPORT ON DETENTION, *supra* note 83, ¶ 34.

103. *Id.* ¶ 39.

104. 2009 Report of the Working Group on Arbitrary Detention, *supra* note 81, ¶ 67; *see* 2010 Report of the Working Group on Arbitrary Detention, *supra* note 81, ¶ 59; Special Rapporteur 2012 Report, *supra* note 81, ¶ 68.

105. UNHCR Detention Guidelines, *supra* note 78, ¶ 2.

106. *Id.* ¶¶ 2, 14.

107. *See* IACHR REPORT ON DETENTION, *supra* note 83, ¶¶ 39, 102 (insisting on laws and policies establishing a presumption of detention).

108. *See* UNHCR Detention Guidelines, *supra* note 78, ¶ 21 (establishing that detention can only be "exceptionally resorted to" where it is "necessary in an individual case"); 2009 Report of the Working Group on Arbitrary Detention, *supra* note 81, ¶ 67

So, a state may not rely systemically on detention as a primary means of immigration control. At the same time, the presumption against detention must be a touchstone for individual immigration detention determinations.[109] It follows that a detention system will violate the principle that treats detention as a last resort if it consistently fails to employ the presumption against detention in individual proceedings.[110]

A final general rule of international human rights law holds that detention of migrants in connection with immigration status determinations "should never involve punitive purposes."[111] The human rights bodies have made clear that detention is allowed solely as an administrative measure, during the process of determining immigration status or incident to removal following a decision to deport.[112] Applying this principle, the Inter-American Commission on Human Rights has equated immigration detention with "pre-trial" or "preventive" detention permitted only in non-punitive circumstances.[113] Where a state deploys detention without adequate connection to these limited administrative purposes, detention is punitive and impermissible under international law.[114]

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(providing that "detention shall be the last resort" and shall be unlawful in cases where removal is not possible); *see also* 2010 Report of the Working Group on Arbitrary Detention, *supra* note 81, ¶ 59.

109. *See* UNHCR Detention Guidelines, *supra* note 78, at 1 (noting that the guidelines, including the principle of last resort, are intended to guide governments in the elaboration and implementation of detention policies and to guide decision-makers making assessments about the necessity of detention in individual cases).

110. *See* Velez Loor v. Panama, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 218, ¶ 171 (Nov. 23, 2010) (finding a human rights violation in immigration policies that fail to determine on an individual basis whether other less restrictive means than physical custody may be utilized to meet government objectives).

111. *Id.*; *see* Special Rapporteur 2012 Report, *supra* note 81, ¶¶ 31, 70 (noting that detention "should under no circumstance be of a punitive nature"); Special Rapporteur 2002 Report, *supra* note 81, ¶¶ 73 (same).

112. *See, e.g.*, Special Rapporteur 2012 Report, *supra* note 81, ¶¶ 24, 69, 70.

113. *See* IACHR REPORT ON DETENTION, *supra* note 83, ¶¶ 34–38 (insisting also that "immigration violations ought not to be construed as criminal offenses").

114. *See Velez Loor*, Inter-Am. Ct. H.R. (ser. C) No. 218, ¶ 171 (holding that detention is punitive and violates international human rights law if it is not necessary for immigration-related purposes in an individual case); IACHR REPORT ON DETENTION, *supra* note 83, ¶ 232 (noting that detention leads to a violation of the right to liberty absent exceptional circumstances where detention is warranted in connection

As to asylum seekers, the Refugee Convention also precludes punitive detention.[115] The Refugee Convention explicitly sets forth that States "shall not impose penalties, on account of their illegal entry or presence, on refugees."[116] If there were any doubt about the reach of this treaty provision,[117] UNHCR has made clear that its prohibition on punitive measures includes detention and applies broadly to most asylum seekers.[118]

The general principles just outlined underlie the concrete framework for considering immigration detention, which requires that detention be reasonable, necessary and proportional in order to comply with international human rights obligations. Numerous decisions, resolutions and interpretations by international human rights bodies have confirmed this trilogy of necessity, reasonableness and proportionality.

The UN Special Rapporteurship on the Human Rights of Migrants has established that detention of migrants must be "necessary, reasonable and proportional to the objectives to be achieved."[119] In the seminal immigration detention case of *A v. Australia*, the UN Human Rights Committee also required a "proportionality" analysis for immigration detention and held

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with immigration proceedings); *see also* 2010 Report of the Working Group on Arbitrary Detention, *supra* note 81, ¶ 58 (establishing that "administrative detention" is permissible but "criminalization of irregular migration exceeds the legitimate interests of States"); WILSHER, *supra* note 23, at 168 (noting that detention assumes a "punitive nature" if it is unnecessary for legitimate purposes). In addition to becoming punitive if it no longer adheres to the bounds of and reasons for civil proceedings, detention may also violate international human rights norms if the conditions or place of detention are punitive rather than civil in nature. *See, e.g.*, Special Rapporteur 2012 Report, *supra* note 81, ¶ 31 (noting that "prison-like conditions" of detention may result in a determination that detention is "punitive in nature"); IACHR REPORT ON DETENTION, *supra* note 83, ¶¶ 19, 64 (noting that a "genuinely civil detention system" must have special conditions reflecting the non-punitive nature of the detention).

115. UNHCR Detention Guidelines, *supra* note 78, ¶ 32.

116. Refugee Convention, *supra* note 92, art. 31(1).

117. The treaty specifically provides that penalties are inappropriate where refugees are "coming directly from a territory where their life or freedom was threatened . . . provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence." *Id.*

118. *See* UNHCR Detention Guidelines, *supra* note 78, ¶¶ 11–14, 32 (establishing that illegal entry or stay does not give the State the power to detain, and detention may not serve as a punitive measure for illegal entry or presence).

119. Special Rapporteur 2012 Report, *supra* note 81, ¶ 9.

that immigration detention is arbitrary and thus violative of the right to liberty protected in the ICCPR "if it is not necessary."[120] The Inter-American Court reached an almost identical holding in *Velez Loor v. Panama*, providing that a custodial measure would be arbitrary unless applied only when "necessary and proportionate."[121] The Inter-American Commission has also concluded that "standards of necessity and proportionality should be applied" to detention of migrants.[122]

In the refugee context, the UNHCR Detention Guidelines establish that states may resort to detention of asylum seekers only if detention is "necessary," "reasonable in all the circumstances," and "proportionate to a legitimate purpose."[123] A recent analysis of the current state of international law on immigration detention commissioned by UNHCR notes the importance of each of the requirements of reasonableness, necessity and proportionality: "In assessing whether detention is necessary and reasonable in all the circumstances, the standard of proportionality is applied."[124]

### 3. Specific Requirements of International Human Rights Law Regarding Immigration Detention

International human rights law has identified even more specific requirements in application of the reasonableness, necessity and proportionality framework to analyze the permissibility of immigration detention. Human rights bodies do not always clarify whether a specific requirement is necessary to satisfy a particular prong of the trilogy or reflects an application of all three elements. The decisions and interpretations of human rights bodies nonetheless coalesce around the following requirements to ensure compliance with the reasonableness, necessity, and proportionality framework.[125]

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120. Human Rights Comm., *A v. Australia*, *supra* note 79, ¶ 9.2.

121. Velez Loor v. Panama, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 218, ¶ 171 (Nov. 23, 2010).

122. IACHR REPORT ON DETENTION, *supra* note 83, ¶¶ 39, 102.

123. UNHCR Detention Guidelines, *supra* note 78, ¶¶ 2, 18.

124. BACK TO BASICS, *supra* note 20, at 21.

125. In addition to the specific standards below, the international human rights bodies sometimes raise a requirement that immigration detainees be provided free legal representation. *See Velez Loor*, Inter-Am. Ct. H.R. (ser. C) No. 218, ¶¶ 132, 146 (finding due process violations in the failure to appoint free legal representation to a

First, to be reasonable and free from arbitrariness, detention must take place only in compliance with pre-existing domestic law.[126] In connection with this standard, detainees must also be informed as to the legal reasons for their detention.[127]

Second, for detention to be reasonable and proportional, the government must justify the deprivation of liberty based on a

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detained migrant); Special Rapporteur Report on Mission to US, *supra* note 81, ¶ 114 (recommending appointed counsel for detained migrants); Special Rapporteur 2012 Report, *supra* note 81, ¶ 72(a) (recommending that migrants in detention should receive free legal representation); Special Rapporteur 2002 Report, *supra* note 81, ¶ 75(c) (same). The human rights standards do not make clear whether they require free legal representation in connection with the decision regarding custody or in connection with the underlying proceedings to determine immigration status. *See Velez Loor*, Inter-Am. Ct. H.R. (ser. C) No. 218, ¶¶ 132, 146 (emphasizing that the migrant faced punitive custody in requiring appointment of counsel); *compare* Special Rapporteur Report on Mission to US, *supra* note 81, ¶ 114 (recommending that appointed counsel should be available to immigration detainees "placed in removal proceedings"); *and* Special Rapporteur 2012 Report, *supra* note 81, ¶ 72(a) (recommending that appointed counsel should be assisted by free legal counsel "during administrative proceedings"); *and* Special Rapporteur 2002 Report, *supra* note 81, ¶ 75(c) (same) *with* IACHR REPORT ON DETENTION, *supra* note 83, ¶ 441 (requiring that the government provide access to legal counsel for migrants in detention). Given the lack of clarity regarding appointment of counsel and the overlap between issues relating to the role of counsel in immigration status proceedings and in detention decisions, I do not address the issue of legal counsel in this Article. However, other scholars have argued persuasively that a right to counsel *should* exist for detained migrants seeking to challenge their detention. *See* Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63 (2012); *see also* Michael J. Churgin, *An Essay on Legal Representation of Non-Citizens in Detention*, 5 INTERCULTURAL HUM. RTS. L. REV. 167, 172 (2010) (suggesting possibility of appointment of counsel for detained children or migrants with mental disabilities).

126. Special Rapporteur 2012 Report, *supra* note 81, ¶¶ 9, 72(a) (explaining that "detention of migrants must be prescribed by law," and that a "decision to detain should only be taken under clear legal authority"); Special Rapporteur 2002 Report, *supra* note 81, ¶ 75(c) (stating that detention is allowed "only on the basis of criteria established by law"); *see also* Deliberation No. 5, *supra* note 80, Principle 6; *Velez Loor*, Inter-Am. Ct. H.R. (ser. C) No. 218, ¶ 116 (holding detention unreasonable where the decision authorizing detention failed to set forth specifically which legal dispositions applied).

127. 2010 Report of the Working Group on Arbitrary Detention, *supra* note 81, ¶ 61; Special Rapporteur 2012 Report, *supra* note 81, ¶ 72(a) (stating that migrants should be informed in a language they understand of the reasons for detention); Special Rapporteur 2002 Report, *supra* note 81, ¶ 75(d) (stating that detained migrants must be informed of the reasons for the deprivation of liberty); Deliberation No. 5, *supra* note 80, Principles 1, 8.

valid governmental purpose.[128] Detention is permissible only where it is "essential" to "serve a legitimate interest of the State."[129]

In recognition of the non-penal nature of immigration detention, the principal permissible purpose for detention is to allow a government to execute removal of a deportable migrant from the country.[130] Removal is not always automatic or immediate, however, and proceedings must sometimes be undertaken to determine immigration status and to decide whether deportation will even be required.[131] Detention may then be permitted for other circumscribed purposes relating to the immigration process.[132] Specifically, detention may be

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128. *See* Human Rights Comm., *A v. Australia*, *supra* note 79, ¶ 9.4 (holding that without legitimate governmental objectives justifying detention, detention may be considered arbitrary); Special Rapporteur 2012 Report, *supra* note 81, ¶¶ 9, 24 (requiring "legitimate objectives" for detention and establishing that the "principle of proportionality requires that detention has a legitimate aim"); 2010 Report of the Working Group on Arbitrary Detention, *supra* note 81, ¶ 64 (establishing that the "principle of proportionality requires that detention always has a legitimate aim").

129. *See* IACHR REPORT ON DETENTION, *supra* note 83, ¶ 39; *see also* Human Rights Comm., *A v. Australia*, *supra* note 79, ¶ 9.2 (establishing that detention is arbitrary if not "necessary" to meet government goals); Human Rights Comm., *Shams v. Australia*, *supra* note 81, ¶ 7.2 (holding that the state must provide adequate justification for detention).

130. Special Rapporteur 2012 Report, *supra* note 81, ¶ 24 (finding detention permissible only where there is a legitimate aim, which is a "real and tangible prospect of removal"); 2010 Report of the Working Group on Arbitrary Detention, *supra* note 81, ¶¶ 59, 64 (finding that "facilitating the expulsion of an irregular migrant" with a removal order is a permissible justification for detention and noting that detention will usually only be justified if there is a "real and tangible prospect of removal"); Special Rapporteur 2002 Report, *supra* note 81, ¶ 35 ("Administrative deprivation of liberty should last only for the time necessary for the deportation/expulsion to become effective.").

131. *See* UNHCR Detention Guidelines, *supra* note 78, ¶ 33 (establishing that detention on the grounds of expulsion can only occur after a claim to remain has been finally determined and rejected and noting that those in ongoing proceedings are not "available for removal" and so cannot be detained to effectuate removal).

132. The human rights bodies have made clear, on the one hand, that immigration detention is mainly permissible to facilitate expulsion where the prospect of removal is "real and tangible." *See* Special Rapporteur 2012 Report, *supra* note 81, ¶ 24; 2010 Report of the Working Group on Arbitrary Detention, *supra* note 81, ¶¶ 59, 64; Special Rapporteur 2002 Report, *supra* note 81, ¶ 35. On the other hand, they have also established that detention may be justified for specified reasons connected with the immigration process that go beyond facilitating immediate deportation of individuals required to depart. *See* Special Rapporteur 2012 Report, *supra* note 81, ¶ 9 (listing the "risk of absconding" and danger to public security as legitimate objectives for detention); 2010 Report of the Working Group on Arbitrary Detention, *supra* note

justified during the pendency of proceedings to determine immigration status in order to address the possibility that a migrant might evade or obstruct the proceedings or constitute a danger to the community.[133] Verification of identity may also be an acceptable governmental objective for brief periods of detention pending a decision regarding immigration status.[134]

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81, ¶ 59 (listing as reasons for detention the "risk of absconding" or the identification of an irregular migrant, as well as expulsion of a migrant with removal order); *see also Velez Loor*, Inter-Am. Ct. H.R. (ser. C) No. 218, ¶ 169 (accepting detention to execute a deportation order or to ensure that a migrant will appear for immigration proceedings). The two types of justifications for detention fit together by assuming that justifications relating to flight risk or public security apply when ongoing proceedings have yet to determine removability or where there is some reason preventing or delaying deportation even after deportation has been ordered. *See* UNHCR Detention Guidelines, *supra* note 78, ¶ 33 (clarifying that the need to physically deport a migrant may constitute one basis for detention but that another basis must be invoked during ongoing proceedings where removal is not imminent or definite); *see also* David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693, 697 (2009) (asserting that civil immigration detention of persons who "pose a danger to the community or a risk of flight" is permissible "because the adjudication of . . . immigration status cannot be performed instantaneously") [hereinafter Cole, *Out of the Shadows*].

133. IACHR REPORT ON DETENTION, *supra* note 83, ¶¶ 39, 102 (accepting the need to ensure that an individual reports for immigration proceedings and protection of public safety as justifications for detention); 2010 Report of the Working Group on Arbitrary Detention, *supra* note 81, ¶ 59 (listing "the risk of absconding" as a permissible justification for detention); Special Rapporteur Report on Mission to US, *supra* note 81, ¶ 110 (identifying "danger to society" and "flight risk" as justifications for immigration detention); Special Rapporteur 2012 Report, *supra* note 81, ¶ 9 (identifying "risk of absconding" and danger to self or "public security" as legitimate objectives for detention); Special Rapporteur 2002 Report, *supra* note 81, ¶¶ 35, 75(c) (identifying the risk of absconding or non-cooperation with proceedings and the need to protect "public security" as justifications for detention); *see also Velez Loor*, Inter-Am. Ct. H.R. (ser. C) No. 218, ¶¶ 114–116, 169 (holding that reasons of security and public order, as well as the need to ensure appearance at immigration proceedings, might justify detention).

134. 2010 Report of the Working Group on Arbitrary Detention, *supra* note 81, ¶ 59 (listing "the necessity of identification of [a] migrant in an irregular situation" as an additional justification for detention); *see also* Human Rights Comm., *A v. Australia*, *supra* note 79, ¶ 9.4 (short detention for the purpose of investigating an illegal entry might be permissible). Some have suggested that international human rights law standards may be open-ended in allowing for additional justifications for detention. *See* Special Rapporteur 2012 Report, *supra* note 81, ¶ 11 (asserting that, under the ICCPR, an assessment of the accepted grounds for detention is made "on a case-by-case basis"). This reading is not reflected in the weight of the guidance provided by international human rights bodies, which list specific acceptable governmental purposes for detention. *See, e.g.*, *id.* ¶ 9 (listing specific legitimate objectives for detention as only including the need to prevent a flight risk or a security risk); Special Rapporteur

For asylum seekers, the permissible state objectives mirror the acceptable goals under general human rights law but are even more specifically delineated. UNHCR has concluded that detention of asylum seekers may be necessary, and therefore permissible, only in connection with three purposes: public order, public health or national security.[135] The UNHCR guidelines further clarify that detention to "protect public order" is only appropriate where: 1. the asylum-seeker is likely to abscond or refuse to cooperate; 2. detention is associated with accelerated procedures in narrow circumstances; 3. brief detention is necessary to carry out initial identity and security checks; or 4. an initial brief period of detention is necessary to allow for a "preliminary interview" on the asylum claim.[136]

Third, detention must be both necessary to meet the identified legitimate goals of the state and proportional to those goals.[137] To verify the necessity and proportionality of detention, the state must consider all alternative means of achieving its legitimate goals.[138] If there is a means for meeting the identified goal of detention without resorting to deprivation of liberty, then detention is not necessary and proportionate.[139] Specifically, the government must consider alternatives to detention, such as release on bond, enrollment in a community

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Report on Mission to US, *supra* note 81, ¶ 110; IACHR REPORT ON DETENTION, *supra* note 83, ¶ 39.

135. UNHCR Detention Guidelines, *supra* note 78, ¶ 21.

136. *Id.* ¶¶ 21–30.

137. *See Velez Loor*, Inter-Am. Ct. H.R. (ser. C) No. 218, ¶ 171; IACHR REPORT ON DETENTION, *supra* note 83, ¶¶ 39, 102.; Special Rapporteur 2012 Report, *supra* note 81, ¶ 9; UNHCR Detention Guidelines, *supra* note 78, ¶¶ 2, 18.

138. Human Rights Comm., *Shams v. Australia*, *supra* note 81, ¶ 7.2 (holding that a government must show that "there were no less invasive means of achieving the same ends" to justify detention); 2009 Report of the Working Group on Arbitrary Detention, *supra* note 81, ¶ 67 ("[A]lternatives to detention should be sought whenever possible . . . ."); Special Rapporteur 2012 Report, *supra* note 81, ¶ 51 (finding that States must always "consider in the first instance less intrusive alternatives to detention of migrants"); Special Rapporteur 2002 Report, *supra* note 81, ¶ 75(f) (providing that "non-custodial measures and alternatives to detention" should be made available to migrants).

139. *See* UNHCR Detention Guidelines, *supra* note 78, ¶ 34 ("[N]ecessity and proportionality tests . . . require an assessment of . . . alternatives to detention"); Human Rights Comm., *Shams v. Australia*, *supra* note 81, ¶ 7.2.

supervision program or electronic supervision, before deciding to detain a migrant.[140]

Fourth, the government must establish the necessity of detention on an individualized basis.[141] The need for detention and the viability of less restrictive alternatives must be assessed on a "case-by-case basis" with a view to the specific circumstances presented.[142] The government bears the burden of proof in establishing the need for detention.[143] In addition, detention should not be automatic or mandatory for all irregular migrants or for certain classes of migrants.[144]

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140. *See* UNHCR Detention Guidelines, *supra* note 78, ¶ 34; Human Rights Comm., *Shams v. Australia*, *supra* note 81, ¶ 7.2; *Velez Loor*, Inter-Am. Ct. H.R. (ser. C) No. 218, ¶ 171; IACHR REPORT ON DETENTION, *supra* note 83, ¶ 41; Special Rapporteur 2012 Report, *supra* note 81, ¶¶ 50–67 (emphasizing the requirement that governments consider non-custodial alternatives to detention and laying out standards regarding alternatives to detention); *see generally* BACK TO BASICS, *supra* note 20. Alternatives to detention include any measures that allow release from physical custody, including release on bond, release through a formal alternative-to-detention supervision program, reporting requirements and other mechanisms. Special Rapporteur 2012 Report, *supra* note 81, ¶ 51.

141. *See* UNHCR Detention Guidelines, *supra* note 78, ¶¶ 18–19 (providing that decisions to detain are to be based on a "detailed and individualized assessment"); Human Rights Comm., *A v. Australia*, *supra* note 79, ¶¶ 9.2, 9.4 (holding that detention must be necessary "in all the circumstances of the case" and the grounds for detention must be "particular to . . . individuals"); IACHR REPORT ON DETENTION, *supra* note 83, ¶¶ 35, 37; Special Rapporteur Report on Mission to US, *supra* note 81, ¶ 23.

142. IACHR REPORT ON DETENTION, *supra* note 83, ¶¶ 35, 37; *see also* Special Rapporteur Report on Mission to US, *supra* note 81, ¶ 23 (noting that detention decisions "should be made on a case-by-case basis after an assessment of the functional need to detain a particular individual"). *Cf.* Special Rapporteur 2012 Report, *supra* note 81, ¶ 10 (emphasizing that detention on public safety grounds must be based on an "individual assessment in each case").

143. IACHR REPORT ON DETENTION, *supra* note 83, ¶¶ 39, 134 ("The burden of proof must be on the authority ordering detention or denying parole, not on the immigrant"); UNHCR Detention Guidelines, *supra* note 78, ¶ 47(v) ("[The] burden of proof to establish the lawfulness of the detention rests on the authorities in question"); *see* Human Rights Comm., *Shams v. Australia*, *supra* note 81, ¶ 7.2 . (holding that a government must advance grounds "particular to [individual] cases which would justify their continued detention"); Human Rights Comm., *A v. Australia*, *supra* note 79, ¶ 9.4 (holding that a government must provide appropriate justification for detention not to be designated as arbitrary).

144. UNHCR Detention Guidelines, *supra* note 78, ¶ 20 (establishing that mandatory or automatic detention is prohibited as arbitrary); *Velez Loor*, Inter-Am. Ct. H.R. (ser. C) No. 218, ¶ 118 (finding a violation of the right to liberty where detention of irregular migrants was automatic without consideration of individualized circumstances); IACHR REPORT ON DETENTION, *supra* note 83, ¶ 428 (disapproving "mandatory detention for broad classes of immigrants"); Special Rapporteur 2012

Fifth, to ensure proportionality, detention still must be for the shortest time period possible even where necessary and reasonable.[145] In addition, a maximum period of detention should be established by law.[146]

Sixth, an individual detained for immigration purposes must have the possibility to seek review of his detention before an independent tribunal shortly after detention begins.[147] Specifically, the international human rights standards require that detention "must be ordered or approved by a judge."[148] In other words, if the initial decision to detain is not made by a court, then the detainee must have the ability to access prompt court review of the decision to detain. In addition, after the initial determination or review of detention by a court, there

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Report, *supra* note 81, ¶ 68 ("Detention for immigration purposes should never be mandatory or automatic.").

145. Special Rapporteur 2012 Report, *supra* note 81, ¶¶ 21, 68 (noting that immigration detention is "only permissible for the shortest period of time"); 2009 Report of the Working Group on Arbitrary Detention, *supra* note 81, ¶ 67 (same); *Velez Loor*, Inter-Am. Ct. H.R. (ser. C) No. 218, ¶ 171 (same); UNHCR Detention Guidelines, *supra* note 78, ¶ 45 (noting that asylum-seekers should not be held in detention "for any longer than necessary").

146. 2010 Report of the Working Group on Arbitrary Detention, *supra* note 81, ¶ 61; Special Rapporteur 2002 Report, *supra* note 81, ¶ 75(g); Deliberation No. 5, *supra* note 80, Principle 7; UNHCR Detention Guidelines, *supra* note 78, ¶ 46 ("[M]aximum periods of detention should be set in national legislation"); *see also Velez Loor*, Inter-Am. Ct. H.R. (ser. C) No. 218, ¶ 117 (noting that Panamanian law did not include time limits for the period of detention in finding a violation of the right to liberty).

147. *Velez Loor*, Inter-Am. Ct. H.R. (ser. C) No. 218, ¶¶ 107, 127 (requiring review of immigration detention by a judge or tribunal); Special Rapporteur 2012 Report, *supra* note 81, ¶¶ 18, 19 (establishing right to proceedings before a court on the lawfulness of detention without lengthy delay); 2008 Report of the Working Group on Arbitrary Detention, *supra* note 81, ¶ 52 (noting that a judicial authority shall decide promptly on the lawfulness of detention); Special Rapporteur Report on Mission to US, *supra* note 81, ¶ 122 (finding that detention of a non-citizen must be "promptly assessed by an independent court"); 2003 Report of the Working Group on Arbitrary Detention, *supra* note 75, ¶ 86 (requiring review "by a court or a competent, independent and impartial body" to avoid a finding of arbitrary detention); Deliberation No. 5, *supra* note 80, Principles 3, 8; IACHR REPORT ON DETENTION, *supra* note 83, ¶ 429; UNHCR Detention Guidelines, *supra* note 78, ¶ 47(iii) (requiring review of detention decision by "judicial or other independent authority" within 24–48 hours of the decision to detain).

148. 2010 Report of the Working Group on Arbitrary Detention, *supra* note 81, ¶ 61; *see also* Special Rapporteur 2012 Report, *supra* note 81, ¶ 23 (observing that review of detention should be judicial); *Velez Loor*, Inter-Am. Ct. H.R. (ser. C) No. 218, ¶¶ 107, 126 (requiring review of immigration detention by a judge or tribunal).

must be "automatic, regular and judicial . . . review of detention."[149]

Review of detention by a court must encompass not only compliance with domestic law but also with human rights standards.[150] Even where domestic provisions allow for detention, the court must order release if the government fails to establish, on an individualized basis, that detention was necessary to meet legitimate government goals.[151]

## III. *THE RELEVANCE OF THE INTERNATIONAL HUMAN RIGHTS STANDARDS TO US IMMIGRATION DETENTION*

In Part IV, I will identify a number of points of incompatibility between the international human rights standards and current law and practice on immigration detention in the United States. However, this Part will first offer a foundation for how and why these international human rights standards should apply to immigration detention in the United States. International human rights standards are appropriately applied to US immigration detention for two principal reasons. First, the standards constitute international obligations for the United States. Second, the international human rights standards governing immigration detention largely mirror the US constitutional standards applicable to civil detention in contexts other than immigration.

Given these two points, it is appropriate to urge the United States to use the international human rights standards to delimit immigration detention and to provide migrants with the same liberty and due process protections offered to others facing civil detention in the United States. It would be ideal if the executive

149. 2010 Report of the Working Group on Arbitrary Detention, *supra* note 81, ¶ 61; *see* Human Rights Comm., *A. v. Australia*, ¶ 9.4 (requiring periodic review of justification for detention); 2009 Report of the Working Group on Arbitrary Detention, *supra* note 81, ¶ 67; Special Rapporteur 2012 Report, *supra* note 81, ¶ 23 ("[P]eriodic review of detention should be automatic"); UNHCR Detention Guidelines, *supra* note 78, ¶ 47(iv) (requiring "regular periodic reviews of the necessity for the continuation of detention").

150. *See* Human Rights Comm., *A v. Australia*, *supra* note 79, ¶ 9.5; *see also* 2010 Report of the Working Group on Arbitrary Detention, *supra* note 81, ¶ 61 (stating that review must extend to lawfulness of detention not just reasonableness); Special Rapporteur 2012 Report, *supra* note 81, ¶ 23 (same).

151. *See* Human Rights Comm., *Shams v. Australia*, *supra* note 81, ¶ 7.3.

and legislative branches took action to bring immigration detention in the United States into line with international human rights norms. However, the trends suggest that such action is not forthcoming. For example, in announcing detention conditions reforms in 2009, the lead governmental official on immigration detention made clear that the announced changes would not extend to the process for imposing detention or the scale of detention.[152] The US Congress has also refused to allow any reconsideration of the parameters and extent of immigration detention it mandates and funds each year.[153] In fact, Congress has recently considered legislation that would expand detention and further weaken existing limits.[154] Barring action by the political branches, US courts should utilize international human rights standards as they engage in statutory and constitutional interpretation in cases regarding immigration detention in order to achieve compliance with international norms.

### A. *US Obligations Under International Human Rights Law*

It is appropriate for the US courts to apply international human rights law standards in interpreting statutes and constitutional guarantees to ensure that the United States does not fail to uphold international obligations that it has assumed.[155] Regardless of their direct domestic effect, the

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152. Morton Press Conference on Detention Reform, *supra* note 18 ("This is not about whether or not we're going to detain people. . . . This is about how we detain them"). In another example of executive resistance to reform of the detention scheme, DHS and the Department of Justice have both denied petitions for rulemaking that would expand access to individualized review of detention of asylum seekers by the immigration courts. *See* Letter from U.S. Dep't of Justice, Exec. Office for Immigration Rev., Office of the Gen. Counsel to Mary Meg McCarthy (Mar. 19, 2012) [hereinafter Denial of Petition for Rulemaking] (on file with the author).

153. 2013 SENATE REPORT ON APPROPRIATIONS, *supra* note 65, at 52 (explaining that the full mark-up of appropriations legislation for fiscal year 2013 provides greater funding than requested by DHS to ensure that the number of detention beds remains at 2010 and 2011 levels); HOUSE 2013 APPROPRIATIONS BILL FOR DHS, *supra* note 65, at 13 (insisting that ICE maintain 34,000 detention beds to keep detention at the same level funded in 2012).

154. H. COMM. ON THE JUDICIARY, KEEP OUR COMMUNITIES SAFE ACT OF 2011, H.R. REP. NO. 112-255 (2011) (voting out of full committee legislation that would expand mandatory detention and further limit judicial review of detention decisions).

155. *See* Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804) (holding that statutes must be construed so as not to conflict with international law).

United States is bound by the treaties that underlie the international human rights standards relating to immigration detention and thus has an international obligation to comply with those standards.[156]

The United States became bound by the Refugee Convention through accession in 1968 to the Refugee Protocol.[157] The United States has recognized its legal obligations under the Refugee Convention and has adopted legislation to codify the Convention in US law in order to ensure compliance with its terms.[158]

The ICCPR also creates legal obligations for the United States, as a treaty duly ratified by the United States in 1992.[159] The United States did not limit its legal obligations under the ICCPR in the context of immigration detention by entering any relevant reservations, understandings or declarations to the relevant provisions, in articles 9 and 14 of the ICCPR, relating to the right to liberty and due process.[160] While the United States Senate declared the ICCPR non-self-executing at the time of ratification,[161] that fact does not dilute the international obligations imposed.[162] While direct domestic judicial enforcement of the ICCPR may not be possible without domestic implementing legislation, the international legal

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156. *See* LOUIS HENKIN ET AL., HUMAN RIGHTS 211, 937 (2d ed. 2009) (noting that human rights treaties create legal obligations for states).

157. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267; *see also* I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 436–37 (1987).

158. *See Cardoza-Fonseca*, 480 U.S. at 436–37.

159. ICCPR, *supra* note 72; *see* HENKIN ET AL., HUMAN RIGHTS, *supra* note 156, at 211, 937.

160. See 138 CONG. REC. S4781-01 (daily ed. Apr. 2, 1992) (ICCPR).

161. *Id.* § III.

162. LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION (2d ed. 1996) (noting that, "[w]hether a treaty is self-executing or not, it is legally binding on the United States" and must be a rule for the courts as necessary to carry out treaty obligations); Sarah Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 118 (2006) ("[T]he fact that a treaty is not self-executing does not qualify the United States' international obligations under the treaty."); Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 A.J.I.L. 695, 706, 719 (1995) (noting that a "treaty would be violated" where the United States fails to implement it, regardless of a determination that it is not self-executing and further commenting that treaties "impose primary obligations on . . . government officials"). *Cf.* Medellin v. Texas, 552 U.S. 491, 504 (2008) (holding that treaties are binding as an international issue but "not all international law obligations automatically constitute binding federal law enforceable in United States courts").

obligation to comply with the treaty remains binding on the United States.[163]

Through its membership in the OAS and ratification of the legally binding OAS Charter, the United States accepted binding obligations to protect the human rights set forth in the American Declaration.[164] While the United States questions the exact nature of its obligations, which are well-established as a matter of international law, the government acknowledges that the American Declaration does serve as a source of obligation.[165] The US government has accepted the applicability of the American Declaration as a source for reviewing its actions in matters brought before the bodies of the inter-American human rights system.[166] The United States has also explicitly undertaken

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163. *See supra* notes 156, 162 and accompanying text. Some scholars argue that a treaty continues to have domestic legal effect, and possibly judicial enforceability, even if it is declared to be non-self-executing. *See* William M. Carter, Jr., *Treaties as Law and the Rule of Law: The Judicial Power to Compel Domestic Treaty Implementation*, 69 MD. L. REV. 344, 383–84 (2010) (asserting that a non-self-executing declaration should not be read to deprive a treaty of domestic legal effect); Vazquez, *supra* note 162, at 706–07 (arguing that validity of non-self-executing declarations as an automatic bar to court enforcement of treaties is problematic under US and international law).

164. The United States ratified the OAS Charter on June 15, 1951, and the agreement entered into force on December 13, 1951. *See* OAS Charter (as amended through 1993), Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3. The OAS Charter identifies the protection of "fundamental rights of the individual" as a central principle agreed upon by the "American States." *Id.* art. 3(l). The nature of the human rights obligation accepted by the member states of the OAS is further developed in the Statute of the Inter-American Commission on Human Rights approved by the General Assembly of the OAS. *See* O.A.S. Res. 447, 9th Sess., Vol. 1 at 88 O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80 (Oct. 1979) [hereinafter IACHR Statute]. The Statute defines human rights as including the rights set forth in the American Declaration. *See id.* art. 1(2). Thus, for purposes of the obligations of the United States under the Charter, human rights are those protected in the American Declaration. *See, e.g.*, IACHR REPORT ON DETENTION, *supra* note 83, ¶ 30; IACHR, *Workman v. United States*, Case 12.261, Report No. 33/06, at 70 (2006); IACHR, *Roach & Pinkerton v. United States*, Case 9647, Report No. 3/87, OEA/Serv.L./V/II.71, at 48–49 (1987); *see also* I/A Ct. H.R., Advisory Opinion OC-10/89, Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, at 42–47 (July 14, 1989) (establishing that the member states of the OAS are bound by the Declaration as a legal matter); Douglas Cassel, *Inter-American Human Rights Law, Soft and Hard*, *in* COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 393, 396–97 (Dinah Shelton ed., 2000) (noting that the American Declaration became "hard" law, which is legally binding, by incorporation through the OAS Charter).

165. U.S. Submission to the IACHR, *supra* note 46, at 3.

166. *See, e.g.*, IACHR, *Workman*, Case 12.261, *supra* note 164, at 63 (setting forth the United States' argument that the petition should be rejected "on the basis that it

a "political commitment to uphold the American Convention" and has agreed that violations of the American Declaration constitute a failure to fulfill that obligation.[167]

The rights to due process and liberty set forth in these binding instruments form the basis for the human rights standards governing immigration detention described above, while further interpretation by human rights bodies converted the general terms of those rights into more specific principles and requirements for states to follow. The expert bodies issuing these interpretations were created for just the purpose of interpreting and enforcing those human rights instruments.[168] Their interpretations thus constitute persuasive authority

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fails to state a violation of the American Declaration"); IACHR, *Roach & Pinkerton*, Case 9647, *supra* note 164, at 38 (setting forth the United States' argument that the Inter-American Commission should look to the American Declaration for the "relevant standards" in analyzing the claim against the United States); *see also* HENKIN ET AL., *supra* note 156, at 620 (noting the United States has somewhat "contradictory positions" regarding the binding nature of the American Declaration).

167. US Submission to the IACHR, *supra* note 46, at 3.

168. *See* Refugee Convention, *supra* note 92, art. 35 (giving the UNHCR the "duty of supervising the application" of the Refugee Convention); *see also* I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 439 n.22 (1987) (noting that the UNHCR guidelines provide "significant guidance" in "giving content" to U.S. obligations under the Refugee Convention); ICCPR, *supra* note 72, arts. 28, 40, 41 (charging the UN Human Rights Committee with treaty interpretation and case adjudication tasks); Lawrence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 338–44 (1997) (noting the role of the Human Rights Committee in "supervising states parties' compliance with the ICCPR"); OAS Charter, *supra* note 164, arts. 53(c), 106, 145 (charging the Inter-American Commission with promoting and monitoring "the observance and protection of human rights"); IACHR Statute, *supra* note 164, art. 1(2) (identifying the Inter-American Commission as the organ of the OAS responsible for human rights issues); American Convention, *supra* note 72, arts. 52–60, 62, 64 (establishing the Inter-American Court and charging it with interpretation of the human rights norms applicable to members of the OAS); I/A Ct. H.R., Advisory Opinion OC-10/89, *supra* note 164, ¶¶ 44, 47 (affirming authority of the Inter-American Court to interpret the American Declaration, together with the American Convention as part of the same evolving body of inter-American human rights law applicable to member states of the OAS); U.N. Commission on Human Rights Resolution 1999/44, ¶¶ 2–3, 7 (requiring the appointment of a Special Rapporteur on the Human Rights of Migrants with recognized international standing and experience and charging the rapporteur to monitor and interpret the human rights obligations of States under the ICCPR); U.N. Commission on Human Rights Resolution 1991/42, ch. 1, sec. A, ¶ 11 (charging that the members of the Working Group on Arbitrary Detention serve as independent experts and apply the ICCPR and other binding international instruments).

regarding the international obligations assumed by the United States in connection with the underlying instruments.[169]

### B. *Similarities Between the International Human Rights Standards and US Constitutional Standards on Civil Detention*

Furthermore, upon consideration, the international human rights law standards for evaluating immigration detention do not differ greatly from standards applied by the Supreme Court of the United States to civil detention in contexts other than immigration, such as criminal pre-trial detention or commitment of those deemed mentally ill. The Supreme Court has interpreted the liberty and due process rights enshrined in the US Constitution[170] to impose requirements on civil detention that are very similar to the international human rights standards described above.[171]

The caselaw of the US Supreme Court, particularly the *Demore v. Kim* decision, suggests that the same limitations on civil detention do not always apply in the immigration context.[172] As will be discussed below, the *Demore* decision is a problematic outlier in light of other case law and theoretical understandings of the current state of immigration law.[173] As such, international human rights law standards can play an important role in reinterpreting *Demore* and US law to ensure that immigration detention is delimited in line with international human rights law and generally applicable US civil detention standards. The point of the discussion here, however, is to show that limitations on civil detention outside of the immigration detention context

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169. *See* Dinah Shelton, *Commentary and Conclusions*, *in* COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 451–52, 461–62 (Dinah Shelton ed., 2000) (noting that non-binding human rights statements by jurisdictional bodies and specially appointed rapporteurs and working groups apply legally binding obligations to specific human rights situations and express broad international consensus).

170. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law."); U.S. CONST. amend. XIV ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law.").

171. *See* Cole, *In Aid of Removal*, *supra* note 20 (noting similarities between human rights law and US constitutional law and urging application of constitutional limits on civil detention to immigration detention).

172. 538 U.S. 510, 521–24 (2003); *see also* Carlson v. Landon, 324 U.S. 524 (1952).

173. *See infra* notes 207–22, 348–56 and accompanying text.

are carefully delineated in a manner that closely parallels international human rights law standards.

Thus, in the leading case on civil detention, *United States v. Salerno*, the US Supreme Court held that detention without trial or before trial is permissible but only in limited circumstances.[174] *Salerno* arose in the criminal justice context and involved a federal statute that permitted courts to refuse bond to individuals charged with certain crimes.[175] The Supreme Court held that pre-trial detention in criminal cases is sometimes constitutionally acceptable and noted that preventive or civil detention is appropriate in certain other contexts, such as the commitment of mentally unstable individuals.[176] However, in line with the general principles of the international human rights standards on immigration detention that impose a presumption against detention, the Supreme Court further held that "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[177]

Also in line with the general international principles, the Supreme Court held that a civil restriction on liberty must be non-punitive.[178] Additional Supreme Court decisions have reached similar conclusions regarding the general principles that civil detention must be non-punitive and exceptional.[179]

The Supreme Court's jurisprudence on civil detention also parallels international law in requiring a legitimate governmental goal for detention as well as a showing of necessity and proportionality in the use of detention to meet that goal.[180] As with the international standards on immigration detention, legitimate governmental goals are circumscribed. The permissible goals generally involve preventing danger to the

174. 481 U.S. 739, 748–49 (1987).

175. *Id.* at 739.

176. *Id.* at 748–49.

177. *Id.* at 755.

178. *Id.* at 746–47.

179. *See* Kansas v. Hendricks, 521 U.S. 346, 356–57, 363–64 (1997) (finding civil commitment constitutionally permissible in "narrow circumstances" if no "punitive" objective or intent shown); *see also* Addington v. Texas, 441 U.S. 418, 428 (1979) (finding that state power in civil commitment cases is not exercised in a "punitive sense").

180. *Salerno*, 481 U.S. at 748–50 (1987) (describing "particularized," "legitimate and compelling" governmental interest justifying pre-trial detention and noting that there must be no alternatives to detention available).

community or avoiding the risk of flight to ensure proper administration of justice.[181] The Supreme Court requires that these goals underlie the statutory scheme allowing for civil detention in a particular context (e.g. pre-trial detention in criminal cases, mental health commitment), but also that these goals justify particular detention decisions.[182] In *Salerno*, for example, the Supreme Court found the pre-trial detention statute constitutional because it required the government to establish that detention was actually necessary in each case to ensure the safety of the community.[183] Furthermore, the statute required a showing that no other mechanism, such as conditions of release, could ensure community safety.[184]

US law also matches the requirement imposed in the human rights law standards that the government must bear the burden of proving the necessity of detention on an individualized basis. In upholding the pre-trial detention statute in *Salerno*, the Supreme Court emphasized that pretrial detention decisions must be made on an individualized basis and that the government bears the burden of proving the need for detention "by clear and convincing evidence."[185] Similarly, the Supreme Court recently emphasized the government's burden of demonstrating individualized reasons for detention in approving use of a federal material witness statute to detain.[186] The Supreme Court has similarly required that the government justify civil commitment of persons with mental illness on an individualized basis.[187]

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181. *Id.*, at 748–49; *see also* Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2079, 2085 (2011) (allowing for detention of material witnesses); *Addington*, 441 U.S. at 425–26 (noting the "legitimate interest" in protecting citizens unable to care for themselves and in protecting "the community from the 'dangerous tendencies' of some who are mentally ill"); Cole, *In Aid of Removal*, *supra* note 20, at 1006–10 (highlighting these two principle justifications for civil detention derived from US case law—flight risk or danger to the community). Of course, the central governmental objective in the immigration context—securing deportation—is not named in other contexts.

182. *Salerno*, 481 U.S. at 747; *Addington*, 441 U.S. at 426–27.

183. *Salerno*, 481 U.S. at 750.

184. *Id.*; *see also al-Kidd*, 131 S. Ct. at 2079 (noting approvingly that the material witness statute requires release if other alternatives exist for securing testimony).

185. *Salerno*, 481 U.S. at 750–51.

186. *al-Kidd*, 131 S. Ct. at 2082.

187. *Addington*, 441 U.S. at 427 (holding that the government must meet its burden with "proof more substantial than a mere preponderance of the evidence"); *see also* 18 U.S.C. § 4248(d) (allowing for civil commitment of a "sexually dangerous"

The limitations on the length of detention imposed by US law mirror the international standards as well. In *Salerno*, the Supreme Court relied on the strict time limits imposed in the statute to find pre-trial detention constitutional.[188]

Finally, consonant with international human rights law, US law requires a judicial imprimatur on civil detention decisions. The Supreme Court found the statute at issue in *Salerno* constitutional in significant part because it offered a meaningful judicial hearing with procedural safeguards on the detention decision.[189]

Because international human rights standards relating to immigration detention do not differ greatly from US law on civil detention in other areas, invocation of international law would not alter US law principles relating to liberty and due process. Rather, use of the international standards would allow for the application of liberty and due process rights to immigration detention in a way that would reinforce the important content given to these rights both in the United States and internationally.

### C. *The Use of the International Human Rights Standards to Interpret US Law*

International human rights law standards should therefore be used in the United States to ensure adequate protection of the right to liberty and due process in the immigration detention context. This Article urges a moderate route by which the courts would use the international standards to inform their interpretations of the US Constitution and the relevant US statutes regulating immigration detention. This proposal acknowledges that not all of the international human rights standards are fully binding and judicially enforceable as a matter

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person where dangerousness is established by "clear and convincing" evidence at an individualized hearing).

188. *Salerno*, 481 U.S. at 747; *see also Addington*, 441 U.S. at 428, n.4 (noting approvingly that involuntary commitment is imposed only for the time necessary until there is no longer a danger); *al-Kidd*, 131 S. Ct. at 2079 (noting approvingly that the material witness statute requires pretrial release if continued detention is not necessary).

189. *Salerno*, 481 U.S. at 742–43 (also noting the possibility for expedited appellate review).

of US law, even where they do constitute international obligations.[190] However, as noted above, the potential problems with direct applicability, under US law, do not affect the international obligations of the United States in connection with the human rights standards set out in Part II.[191] As such, the proposal maintains that it is feasible and desirable for courts to interpret US law in a manner that allows compliance with those obligations.[192] This approach responds to the suggestion by scholars that US courts are most likely to use international law, and are on the most stable ground in doing so, when international law informs their interpretations of statutes and the Constitution rather than serving as a direct source of US law.[193]

The proposal finds specific support in the work of international law scholars who have suggested that US courts should reference international law in circumstances such as those presented in the immigration detention context, where

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190. As noted above, for example, some treaty provisions have been explicitly deemed non-self-executing, which may preclude a direct judicial cause of action. *See supra* notes 161–63 and accompanying text; *see also* Sosa v. Alvarez-Machain, 542 U.S. 692, 735 (2004) (holding that the ICCPR is "not self-executing and [does] not itself create obligations enforceable in the federal courts"). The United States has questioned the enforceable effect of other international instruments. *See, e.g.*, Flores-Nova v. Att'y Gen. of United States, 652 F.3d 488, 495 (3d Cir. 2011) ("[N]either the unratified American Convention nor the American Declaration is itself enforceable domestically."); Denial of Petition for Rulemaking, *supra* note 152, at 8 (asserting that relevant international human rights authorities "do not create any legally enforceable rights"). In addition, the direct applicability within US law of some obligations may be called into question where particular detention statutes have been adopted after the US became bound to the relevant international norms. *See* Edye v. Robertson, 112 U.S. 580, 597–98 (1884) (noting a later-in-time statute prevails over earlier treaty provisions); Vazquez, *supra* note 162, at 696–97.

191. *See supra* notes 156, 161–63 and accompanying text; Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (requiring that states perform their international obligations under the treaty in good faith regardless of domestic law).

192. *See* Murray v. The Schooner Charming Betsy , 6 U.S. (2 Cranch) 64 (1804).

193. David Cole, *The Idea of Humanity: Human Rights and Immigrants' Rights*, 37 COLUM. HUM. RTS. L. REV. 627, 645–49 (2006) [hereinafter Cole, *The Idea of Humanity*]; Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 700–05 (2007); *see also* Harold Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 56 (2004); Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT'L L. 82, 88 (2004) (noting that international human rights norms and decisions "cannot control constitutional interpretation, but they may inform it" and may prove helpful in requiring reexamination of long-standing doctrinal structures).

international human rights standards bind the United States and do not run counter to basic principles of US law.[194] The use of international human rights standards relating to immigration detention fits particularly well with the framework proposed by Sarah Cleveland, which outlines principles for the application of international law in constitutional interpretation.[195] Two central criteria identified by Cleveland for the use of international law in US courts inquire about: 1. the level of US acceptance of the international law norms; and 2. the degree of receptivity in the US Constitution to the norms.[196]

The principle giving weight to the degree of US acceptance of the international rule argues in favor of the applicability of the international standards here.[197] As discussed above, the human rights standards constitute "'US international law obligations'" which are '"binding on the United States.'"[198]

The constitutional receptiveness principle is met as well, because the international standards do not "depart from the established constitutional rule."[199] Rather they match the "historical interpretation" given to the rights of liberty and due process found in the US constitution.[200] US courts have even

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194. *See* Cleveland, *supra* note 162, at 107–08 (suggesting four criteria for evaluating the appropriateness of reference to international law in constitutional interpretation); Waters, *supra* note 193, at 701 (urging consideration of the domestic "value" of a treaty, including a review of the ratification history and any reservations to treaty provisions); Neuman, *supra* note 193, at 87 (favoring use of international human rights law in constitutional interpretation where the "normative foundations [of human rights law] are compatible with the basic assumptions of the U.S. constitutional system").

195. *See* Cleveland, *supra* note 162, at 107–08.

196. I emphasize these two criteria as they are the most relevant in analyzing the suitability of using international human rights standards on immigration detention to interpret US law. Use of the international standards would be appropriate under the other two criteria offered by Cleveland as well, however. The criteria of "norm universality" argues in favor of application of international law, because the international instruments in question are widely ratified and the norms of liberty and due process are universally recognized. There is also a great degree of consistency between the universal interpretation of these rights and the interpretation of the regional system for the Americas. *See id.* at 119–22. The consideration of "international law limits" on international law powers also supports use of international human rights standards, because those standards include recognition of government power over immigration as well as limits on that power. *See id.* at 122–23.

197. *Id.* at 115.

198. *Id.* at 115–16.

199. *Id.* at 109.

200. *Id.*

acknowledged the benefits of interpreting US law in light of the applicable international norms on immigration.[201]

Of course, the US standards on civil detention that match the international rules are not currently applied with full force to immigration detention.[202] It is for this reason that international human rights law standards fill a lacuna by placing limitations on the detention of migrants in accordance with the rights of liberty and due process.[203] Even more, the immigration exceptionalism that leads to the inapplicability of constitutional constraints on civil detention in the immigration context is highly problematic as a matter of both US and international law. This exceptionalism should not serve as an impediment to constitutional receptiveness of international human rights law standards that apply liberty and due process rights to immigration detention.

The US Supreme Court's decision in *Demore v. Kim*, issued in 2003, countenanced a distinction between immigration detention and other civil detention.[204] The Supreme Court upheld a statute that allowed for mandatory detention of entire categories of migrants with criminal histories without reference to the constitutional limits applied in other contexts.[205] The Court explicitly stated as justification that, "Congress may make rules as to aliens that would be unacceptable if applied to citizens."[206]

It is difficult to see the basis for the *Demore* decision in specific constitutional precedent.[207] In fact, the decision diverges

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201. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 436–37 (1987); *see also* Zadvydas v. Davis, 533 U.S. 678, 721 (2001) (Kennedy J., dissenting).

202. *See* Cole, *In Aid of Removal*, *supra* note 20, at 1014; T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE AND AMERICAN CITIZENSHIP 153 (2002); *see also* Demore v. Kim, 538 U.S. 510 (2003) (approving detention of broad categories of immigrants without reference to the constitutional limitations on civil detention applicable in other contexts).

203. *See* Neuman, *supra* note 193, at 87 (favoring consideration of international human rights law where gaps in US constitutional law protection exist based on outdated doctrinal structures).

204. *Demore*, 538 U.S. at 531.

205. *Id.*

206. *Id.* at 522.

207. *See* Cole, *Out of the Shadows*, *supra* note 132, at 717 (indicating that the reasoning in *Demore* was "flawed" because it distinguishes between citizens and non-citizens for detention purposes); M. Isabel Medina, Demore v. Kim—*A Dance of Power and Human Rights*, 18 GEO. IMMIGR. L.J. 697, 722 (2004) (asserting that "[n]one of the

significantly from the Supreme Court's decision just two years earlier in *Zadvydas*.[208] In *Zadvydas*, the Supreme Court applied contemporary constitutional liberty understandings to the detention of migrants in prohibiting indefinite and categorical detention of individuals pending physical deportation after entry of a removal order.[209] While putting *Zadvydas* aside, the *Demore* decision relied heavily on the 1950s case of *Carlson v. Landon*[210] in justifying mandatory detention.[211] However, even the older *Carlson* decision found immigration detention without bail constitutional only where justified by individualized decisions regarding involvement in Communist activities that suggested a danger to the community.[212]

Given the lack of support in the Court's own case law, the *Demore* decision may best be understood as relying on a general principle of exceptionalism in the immigration context based on the aged doctrine of governmental "plenary power" over immigration.[213] However, the plenary power doctrine has fallen into disrepute in the US legal system.[214] Perhaps for this reason the *Demore* decision does not directly mention the doctrine.

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cases relied on by the Court" directly support the idea that migrants have a lesser liberty interest).

208. Zadvydas v. Davis, 533 U.S. 678 (2001).

209. *Id.* at 690–92 (citing extensively to *United States v. Salerno*, 481 U.S. 739 (1987)).

210. Carlson v. Landon, 342 U.S. 524 (1952).

211. *Demore*, 538 U.S. at 523–25. *Demore* also relied on the Court's decision in Mathews v. Diaz, 426 U.S. 67 (1976), and its progeny for the general proposition that Congress may treat immigrants differently than citizens. *Demore*, 538 U.S. at 521–22. However, neither *Mathews* nor the other cases cited related to detention and the core right to liberty from physical custody. *See Mathews*, 426 U.S. 67, 85–87; *Demore*, 538 U.S. at 521–22.

212. *Carlson*, 342 U.S. at 541–44; *see Demore*, 538 U.S. at 574 (Souter, Stevens, and Ginsburg, JJ., concurring in part and dissenting in part) (noting that the Supreme Court has recognized "that the detention scheme in *Carlson* required 'some level of individualized determination' as a precondition to detention" and unanimously held as such in [subsequent caselaw]").

213. *See* Medina, *supra* note 207, at 722 (noting "oblique reference to the plenary power doctrine" in the *Demore* decision). The *Demore* decision relies on cases that recognize and apply the plenary power doctrine. *See Demore*, 538 U.S. at 522–25; *Carlson*, 342 U.S. at 534; *see generally* Harisiades v. Shaughnessy, 342 U.S. 580 (1952).

214. *See Zadvydas*, 533 U.S. at 695 (applying constitutional limitations to the plenary power in the context of immigration detention); Medina, *supra* note 207, at 704; Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339, 339–40 (2002) (describing doctrinal "abandonment of plenary power"); ALEINIKOFF, *supra* note 202, at 184 (arguing that the plenary power doctrine is "wholly out of step with

Even more importantly, the very concept of the plenary power doctrine relies on conceptions of maximum sovereignty over immigration that derived from earlier versions of international law.[215] With the development of human rights treaties and standards, international law no longer condones an understanding of sovereignty that grants states unlimited powers over migrants.[216] Several scholars have noted that newer international law constraints on absolute state authority over immigration require reconsideration of the treatment of migrants under US law.[217] As Cleveland notes, "if the government's constitutional authority over aliens is based on powers allowed under international law, then the government's constitutional authority logically also should be limited by the constraints that international law imposes."[218] Some US courts have similarly accepted the premise that evolving international law may impose new limits on US immigration law, given its international law underpinnings.[219]

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modern constitutional law"); Louis Henkin, *The Constitution and United States Sovereignty*, 100 HARV. L. REV. 853, 862 (1987) ("The doctrine . . . emerged in the oppressive shadow of a racist, nativist mood a hundred years ago.").

215. *See, e.g.*, Gabriel J. Chin, 46 UCLA L. REV. 1, 58–59 (1998) (observing that the Supreme Court "derived the plenary power doctrine from its understanding of international law rather than any specific provision of the Constitution"); Neuman, *supra* note 193, at 83 (noting that Supreme Court invocation of sovereignty to justify broad powers over immigration "addressed the international regime of [the] period"); Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893) (relying on "the principles of international law" to establish sovereign power over immigration not subject to judicial review); *see also Carlson*, 342 U.S. at 534, n.18 (relying on III HACKWORTH'S DIGEST OF INTERNATIONAL LAW 725 (1942) in applying the plenary power doctrine).

216. *See supra* Part II.A.; *see also* Bosniak, *supra* note 75, at 751–53.

217. Cleveland, *supra* note 162, at 122; *see also* Cole, *The Idea of Humanity*, *supra* note 193, at 636 (noting that "the source of the 'plenary power' of immigration has long been identified as international law itself" and "the evolution of international human rights has placed significant restrictions on sovereignty"); Michael Scaparlanda, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965, 1015 ("[W]here the international law of sovereignty provides the background norm for constitutional decision making as it does in [immigration] cases, the Court ought to look at the current norm with its recent limitations.").

218. Cleveland, *supra* note 162, at 122.

219. *See* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1388 (10th Cir. 1982) ("[W]e note that in upholding the plenary power of Congress over exclusion and deportation of aliens, the Supreme Court has sought support in international law principles. . . . It seems proper then to consider international law principles for notions of fairness as to propriety of holding aliens in detention."); Beharry v. Reno, 183 F. Supp. 2d 584 (2002), *rev'd on other grounds*, 329 F.3d 51, 2003 (2d Cir. 2003) ("It is

This analysis requiring consideration of international human rights norms in the immigration context, even in the face of traditional assertions of plenary power, applies with particular force to detention. As detailed above, the evolution since the 1990s of international human rights law standards regarding immigration detention has been significant.[220] The international human rights standards addressing immigration detention recognize state sovereignty over immigration but nonetheless establish concrete protections for migrants facing deprivation of liberty in connection with their immigration status.[221] Thus, international law has not only developed limitations on state authority over immigration in a general sense but now imposes specific restrictions on a state's invocation of sovereignty to detain migrants.[222] In doing so, human rights law requires full liberty and due process protections for migrants facing detention, foreclosing any possibility of invoking international law to afford lesser versions of these rights to migrants. The current version of international law must hold sway in determining the contours of US sovereignty over immigration detention.

It would be circular to accept that the United States might avoid the application of international human rights standards in the immigration detention context on the grounds that US law withholds rights from migrants in reliance on an outdated notion of international law. In the end, the United States interprets the rights to liberty and due process in line with international human rights law regardless of the questionable distinctions that currently prevent full application of those rights to immigration detention. US courts should thus reference international human rights law to guarantee to migrants facing

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inappropriate to sustain . . . plenary power based on a 1920 understanding of international law, when the [current] conception is radically different.").

220. *See supra* Part II.A.

221. *See supra* Part II.B.

222. *Cf.* Jean v. Nelson, 727 F.2d 957, 964, n.4 (11th Cir. 1984) (considering almost thirty years ago the possibility that human rights law limited US sovereignty in connection with immigration detention but finding no evidence at that time that "international practice" had changed the "background" of international law sufficiently to require reconsideration of expansive sovereignty over detention of migrants).

detention the same liberty and due process rights that it applies to others facing civil detention.

## IV. *INCOMPATIBILITIES BETWEEN THE IMMIGRATION DETENTION REGIME IN THE UNITED STATES AND THE INTERNATIONAL HUMAN RIGHTS STANDARDS*

Having established the relevance and role of the international human rights standards, it is now necessary to measure the US immigration detention system against those standards. Detention in the United States takes place pursuant to pre-established law and so meets that basic requirement of international human rights law. Unfortunately, the overall detention system in the United States, as well as specific components of that system, conflict with multiple other international standards. The system thus fails to adequately protect liberty and due process. This Part will first address systemic violations created by the approach of the US detention system as a whole. It will then consider the main categories of detention[223] that deprive migrants of liberty pending a decision in their immigration cases by the US immigration courts: 1. detention of individuals in limited or abbreviated proceedings known as expedited removal and reinstatement of removal; 2. detention of "arriving aliens" who are placed into immigration proceedings upon arrival at a port of entry into the United States; 3. mandatory detention of individuals suspected of

223. I attempt to provide a general sense of the scope of detention in each of these categories. However, ICE does not provide a breakdown showing the numbers of individuals held in different detention categories. *See* DHS Immigration Enforcement Actions 2011, *supra* note 13. This lack of transparency is difficult to understand, because the disaggregated numbers would be relatively easy for ICE to provide. For example, ICE records information identifying individuals subject to mandatory detention and those deemed "arriving aliens" on the custody determination and charging document forms issued in almost all cases. *See generally* Memorandum from Asa Hutchinson, Under Sec'y for U.S. Border and Transportation, on Detention Prioritization and Notice to Appear Documentary Requirements to Michael J. Garcia, Assistant Sec'y for U.S. Immigration & Customs Enforcement, and Robert Bonner, Comm'r of U.S. Customs & Border Prot. (Oct. 18, 2004). Complicating the analysis further, the figures for each category overlap with other categories. Thus, an individual may move from detention under expedited removal to detention as an arriving alien or discretionary detention. Similarly, individuals may be subject to mandatory detention both as arriving aliens and under criminal mandatory detention provisions. The numbers and percentages offered in this Article represent estimates based on the limited data that is available.

criminal activity or involvement in terrorism; and 4. discretionary detention of all other individuals undergoing immigration proceedings.[224]

### A. *The Overall Detention Regime*

The detention regime of the United States does not comply with the general human rights principles treating detention as a last resort.[225] The statistics regarding the sheer number of individuals subjected to immigration detention and the lengthy duration of detention demonstrate a systemic emphasis on detention in the immigration context without meaningful constraint.[226] In its careful investigation into immigration detention in the United States, the Inter-American Commission specifically concluded that the United States utilizes "detention based on a presumption of its necessity."[227] As outlined below,

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224. I examine only the most prevalent components of the complicated and intertwined detention system. For example, I do not examine the specific rules for the detention of stowaways. *See* 8 C.F.R. § 241.11 (2012). I do not analyze detention resulting from the placement by DHS of immigration "detainers" on individuals physically detained by other federal, state and local law enforcement agencies. Detainers form an increasingly important role in the immigration detention process, particularly with the expansion of the Secure Communities program, which automatically alerts ICE to individuals in law enforcement custody elsewhere, leading to the issuance of many more detainers. *See* KATE M. MANUEL, CONG. RESEARCH SERV. R42690, IMMIGRATION DETAINERS: LEGAL ISSUES 3 (2012), *available at* http://www.fas.org/sgp/crs/homesec/R42690.pdf. ICE frequently retrieves and detains individuals placed on such detainers, and many individuals in immigration detention arrived there as a result of the detainer process. However, the detainers do not themselves necessarily constitute a category of immigration detention. It is not even clear whether ICE has custody of individuals who are still held by other law enforcement authorities through imposition of a detainer. *Id.* at 14–17. Nonetheless, questions do arise about the impact of detainers on liberty and due process, which are being addressed elsewhere. *Id.* at 17–25; *see generally* Christopher N. Lasch, *Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164 (2008).

225. *See* Special Rapporteur Report on Mission to US, *supra* note 81, at 112 (finding that "overuse of immigration detention in the United States" violates international law); IACHR REPORT ON DETENTION, *supra* note 83, ¶¶ 17, 102, 354, 416 (concluding that US immigration detention is the rule rather than the exception, in violation of human rights requirements).

226. *See supra* Part I; *see also* Kalhan, *supra* note 25, at 48 ("[E]xisting policies and practices almost certainly have caused *overdetention*: detention of individuals who pose no actual flight risk or danger to public safety or are held under overly restrictive circumstances.").

227. IACHR REPORT ON DETENTION, *supra* note 83, ¶17.

the various components of the immigration detention system operate to create an overall structure that assumes migrants apprehended by ICE will be detained for all or lengthy portions of proceedings to determine their status, without serious consideration of the need for such detention or adequate access to judicial review.[228] The result is a system in which the government spends approximately US$2 billion a year on detention,[229] without clarity as to who is detained on what basis, while impacted migrants pay the human cost of this severe deprivation of liberty.

Given the extent to which the US immigration detention system as a whole is out of line with international human rights standards, significant realignment is necessary to guarantee the presumption against detention and adequate protection of liberty. Limits must be imposed on the various components of immigration detention, as described in the following sections,

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228. *See infra* Part IV.B–E. Habeas corpus is potentially available to challenge detention in the various categories described below. However, availability of habeas does not satisfy the requirement for judicial authorization and review, as it is an exceptional remedy available only at the instigation of the detainee. Additionally, the case law strictly limits the availability of habeas relief as a means of protecting liberty. *See generally, e.g.*, Diop v. ICE, 656 F.3d 221 (3d Cir. 2011) (granting habeas relief and requiring individualized hearing before the immigration court, but only after nineteen month period of detention,); Nadarajah v. Gonzales, 443 F.3d 1069, 1082 (3d Cir. 2006) (limiting habeas review of detention on the grounds that government "discretion in making a [custody] decision is quite broad"); Noh v. INS, 248 F.3d 938, 942 (9th Cir. 2001) (holding that certain custody determinations are "unreviewable" in habeas); *see generally* Crespo v. Baker, 2012 U.S. Dist. LEXIS 47909 (S.D. Cal. Apr. 3, 2012) (requiring individualized hearing where there was a prolonged detention of 15 months but denying habeas relief for other challenges to automatic detention). This Article assumes, on the other hand, that immigration court review would meet the requirement of authorization and review of custody by a tribunal. However, as described in Parts IV.C and IV.D, immigration court review often is not available. *See infra* Parts IV.C–D Also, as set out in Part IV.E, a number of limitations currently make the immigration court custody review process inadequate to meet international human rights law obligations even where it does apply. *See infra* Part IV.E. These limitations must be resolved for immigration court review to satisfy the international human rights law requirement of judicial review of detention.

229. The current average cost of detention per day is US$122, requiring an annual budget of approximately US$2 billion. *See* DHS CONGRESSIONAL BUDGET JUSTIFICATION, *supra* note 39; *see also* NAT'L IMMIGRATION FORUM, *supra* note 67, at 2 (noting that ICE has confirmed an actual daily cost of US$164 per bed, including overhead, and summarizing legislative action to authorize approximately US$2 billion for immigration detention for 2013).

using the international human rights standards to interpret US statutory and constitutional law.

However, scaling back immigration detention to bring the system in line with international standards does not mean that the United States cannot exercise control over immigration.[230] The United States might most effectively assert control over immigration by recreating the entire system to legalize logical immigration flows, thus making harsh enforcement of outdated laws, including through detention, much less necessary.[231] In any case, the United States may continue to engage in immigration enforcement, so long as it does so with respect for human rights and without resorting to detention automatically.

For example, nothing in the international human rights standards prevents the initial apprehension of migrants believed to be removable from the United States.[232] Currently, many removals each year take place shortly after such an arrest through abbreviated proceedings or decisions to return voluntarily without a formal deportation order.[233] The United States could continue to remove individuals in this way as a function of immigration control, and the arrests would be justified as necessary to facilitate immediate deportation so long

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230. *See supra* notes 95–101 and accompanying text.

231. *See* AM. IMMIGRATION LAWYERS ASS'N, SOLUTIONS THAT WORK: A POLICY MANUAL FOR IMMIGRATION REFORM (Jenny B. Levy ed., 2010); *Comprehensive Immigration Reform in 2009; Can We Do It and How?: Hearing Before the Subcomm. on Immigration, Refugees and Border Sec. of the S. Comm. on the Judiciary*, 111th Cong. 9–10 (2009) (statement of Doris Meissner, Migration Policy Institute); Stuart Anderson, *Answering the Critics of Comprehensive Immigration Reform*, Cato Institute Trade Briefing Paper, no. 32, May 9, 2011.

232. The distinction between apprehension and detention is recognized in immigration law and in other detention schemes. *See* 8 C.F.R. § 287.3 (2012) (noting that arrest must be followed in forty eight hours by decision whether to continue in custody); DHS Immigration Enforcement Actions 2011, *supra* note 13, at 1 (distinguishing between apprehension and detention); Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991) (requiring a hearing regarding detention within forty eight hours after arrest in the criminal context); Hamdi v. Rumsfeld, 542 U.S. 507, 534 (2004) (requiring additional procedures after initial seizure when the decision is made to continue to hold).

233. *See supra* notes 42, 52 and accompanying text; *see also ICE Bypassing Immigration Courts? Deportations Rise as Deportation Orders Fall*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, (Aug. 13, 2012), http://trac.syr.edu/immigration/reports/291.

as due process and other human rights were protected.[234] As an alternative means of enforcement, the United States could also focus its resources on accomplishing the removal of non-detained individuals who have already received a final order of deportation rather than on detaining them pending a final decision on deportability and immigration status. The government has largely ignored such a strategy, but it could be effective.[235]

The United States has instead become reliant on detention as its principal means of immigration enforcement, and the conflation of detention and immigration control has led to the current presumption of detention that violates international human rights standards.[236] US immigration law and practice must disentangle detention and enforcement and restore the use of detention to its proper limited role.

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234. For example, due process protections must apply to ensure that individuals with claims to asylum or other relief were not removed summarily without the opportunity to present those claims.

235. *See* U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, THE IMMIGRATION AND NATURALIZATION SERVICE'S REMOVAL OF ALIENS ISSUED FINAL ORDERS (2003) (recommending measures to improve rate of removal for non-detained individuals with final orders of removal, including improvements in controlling database information on addresses, negotiating with governments who do not readily accept returned deportees, and more promptly and effectively serving surrender notices to individuals scheduled for deportation); *Fact Sheet: ICE Fugitive Operations Program*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT (Nov. 7, 2011), http://www.ice.gov/news/library/factsheets/fugops.htm (reporting that dedication of increased resources allowed for a substantial reduction of the number of individuals in the United States with outstanding deportation orders); EILEEN SULLIVAN ET AL., VERA INSTITUTE, TESTING COMMUNITY SUPERVISION FOR THE INS: AN EVALUATION OF THE APPEARANCE ASSISTANCE PROGRAM (Aug. 1, 2000) (recommending that individuals with final deportation orders be subjected to the "most intensive levels" of non-custodial alternatives to detention to ensure departure); *see also* BACK TO BASICS, *supra* note 20, at 70 (describing supervision programs for individuals ordered deported in Belgium and Australia, which led to high rates of returns).

236. *See, e.g.*, 2013 SENATE REPORT ON APPROPRIATIONS, *supra* note 65, at 52 (stating that detention is "critical to ensuring the integrity of our entire immigration enforcement system"); Special Rapporteur Report on the Mission to the U.S., *supra* note 81, ¶ 33 ("Detention has not always been the primary enforcement strategy relied upon by the United States immigration authorities, as it appears to be today."); NATIONAL NETWORK FOR IMMIGRANT AND REFUGEE RIGHTS, REPORT TO THE U.N. SPECIAL RAPPORTEUR ON THE HUMAN RIGHTS OF MIGRANTS: DETENTION OF MIGRANTS IN THE UNITED STATES, ¶ 31 (2012), *available at* http://www.nnirr.org/~nnirrorg/drupal/sites/default/files/unsr_migrants_january_2012_us_detention_overview.pdf (noting that the US immigration detention system has become the "cornerstone of immigration enforcement").

As noted, the government need not rely on expansive detention to enforce immigration laws.[237] Conversely, presumptive use of detention does not necessarily further enforcement goals. The US immigration system foresees the possibility that, after an initial arrest, some migrants will undergo contested immigration proceedings where they may assert challenges to the government's allegations of deportability or otherwise seek authorization to remain in the United States.[238] The opportunities to raise claims to avoid deportation reflect the rights due to migrants and policy decisions about which migrants should hold lawful immigration status in the United States.[239] The detention regime must reflect this reality that not all migrants placed in removal proceedings will merit expulsion from this country. There can be no presumption, then, that detention during immigration proceedings is justified as a means of achieving deportation in enforcement of the immigration laws.[240]

To comply with international human rights standards, the detention system must instead require that the government justify ongoing detention after arrest in connection with immigration proceedings.[241] The government must do so based

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237. *See supra* notes 231–35 and accompanying text.

238. As noted above, such cases currently involve somewhere above 125,000 detained migrants a year. *See supra* notes 43–45 and accompanying text.

239. *See, e.g.*, 8 U.S.C. § 1229a (2006) (granting migrants due process rights to defend against the government's allegations of deportability); 8 U.S.C. § 1158 (2006) (providing for asylum as a means of avoiding deportation, in codification of US obligations under the Refugee Convention); 8 U.S.C. § 1255 (2006) (providing adjustment of status as a route for some migrants to avoid deportation by obtaining lawful permanent resident status through close family members); 8 U.S.C. § 1229b (2006) (allowing for cancellation of removal and a grant of permanent status to some migrants where close family members, who are US citizens or lawful permanent residents, would suffer exceptional and extremely unusual hardship as a result of deportation).

240. Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. C.R.-C.L. L. REV. 601, 602 n.9 (2010) (citing data obtained by the ACLU indicating that, between 2001 and 2009, almost 6,000 persons obtained permission to remain in the United States after spending more than six months in detention).

241. An initial decision regarding custody after arrest must be made within forty eight hours of arrest under the regulations. *See* 8 C.F.R. § 287.3 (2012). The requirement of an individualized determination regarding the necessity of detention with judicial review under international human rights law might attach at this point or at some point soon thereafter when it becomes clear whether an individual will be deported summarily or leave voluntarily or will instead undergo proceedings to

on individualized determinations, with adequate review, regarding the existence of a flight risk or danger to the community. The government must also consider all possible alternatives to detention that might address such risks.[242]

This is not to say that factors currently triggering detention would have no relevance.[243] Factors such as criminal history, manner of arrival into the United States, strength of the claim to remain in the United States, prior immigration violations and family ties could be considered in evaluating the need for detention to avoid flight risk or danger to the community.[244] ICE has announced that it will seek to apply these factors with greater accuracy and consistency through deployment of a risk classification assessment tool, which would be fully appropriate.[245] However, reference to these relevant factors

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determine status. I will not propose a specific timeframe for the determination, but the requirement of a prompt determination and review suggests no longer than a week or two after detention. In the United States, the statistics on length of stay in detention suggest that migrants are either removed rapidly in such a timeframe or will instead undergo proceedings to determine status, making this timeframe appropriate for a meaningful analysis of the need to detain. *See supra* notes 42, 52 and accompanying text.

242. *See* IMMIGRANT RIGHTS CLINIC, RUTGERS SCHOOL OF LAW-NEWARK, FREED BUT NOT FREE: A REPORT EXAMINING THE CURRENT USE OF ALTERNATIVES TO DETENTION 10 (2012) [hereinafter FREED BUT NOT FREE] (reporting that the appearance rate in removal proceedings for individuals enrolled in official alternatives to detention programs was 93.8%); DHS CONGRESSIONAL BUDGET JUSTIFICATION, *supra* note 39, at 54 (positing how alternatives such as "electronic monitoring and supervision can be just as effective . . . as traditional detention"); IMMIGRATION AND CUSTOMS ENFORCEMENT, ALTERNATIVES TO DETENTION FOR ICE DETAINEES (Oct. 23, 2009) (describing how alternatives to detention programs provide "an appropriate level of supervision during removal proceedings" for individuals with low flight risk); *see also* BACK TO BASICS, *supra* note 20, §§ iv–v (laying out "best practices" that make alternatives to detention an effective and less invasive means of addressing governmental goals).

243. *See* 8 U.S.C. § 1226(a)–(c) (2006); Guerra, 24 I. & N. Dec. 37, 39 (B.I.A., 2006).

244. *Guerra*, 24 I. & N. Dec., at 40.

245. *See Detention Reform Accomplishments*, ICE, http://www.ice.gov/detention-reform/detention-reform.htm (last visited Feb. 13, 2013). To the extent that the tool requires ICE to make individualized determinations regarding flight risk or danger to the community based on objective and relevant criteria, it could present a positive development leading to release of individuals on bond or into formal alternatives-to-detention programs where they would have been detained in the past. *See* JAILS AND JUMPSUITS, *supra* note 17, at 41, 43. However, the tool, as currently designed, may still be weighted problematically in favor of detention. *See* BACK TO BASICS, *supra* note 20, at 81.

might only be made on the basis of the specific nature of the factors in a given case. It would not be permissible to place migrants into categories presumptively requiring detention, such as conviction of a particular crime, rather than analyzing individual circumstances.

Under a human rights-compliant system, some individuals would still be detained. There can be little doubt that some migrants in the United States represent a flight risk or a danger to the community that cannot be mitigated effectively, other than through detention, while their proceedings are ongoing.

To be clear, though, significantly fewer migrants should be detained under a system that reverses the presumption of detention and requires individualized showings of need to detain with adequate judicial review of detention decisions.[246] Even government officials have recognized that the current structure imposes restrictions on liberty in situations where it is unnecessary, and commentators have noted the "excessiveness" of detention in the United States.[247] Migrants, such as BM and FH, would be candidates for release if the risk of flight or danger were to be meaningfully analyzed, since they posed no threat, had strong ties to the United States, and presented a reasonable likelihood of winning their immigration cases, which gave them every reason to appear for hearings. Other migrants might present some risk of flight or danger in this system, but should nonetheless be released, under a system that treats detention as a last resort, upon payment of a bond or placement in the least restrictive supervision program that would mitigate the risks.[248]

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246. It is impossible to estimate the exact decrease in detention numbers that should occur, because disaggregated information regarding the characteristics of individuals in detention is not available. However, it is almost certain that the decrease would be substantially greater than the 1,200 fewer beds that the Obama administration proposed for the 2013 fiscal year. *See* DHS CONGRESSIONAL BUDGET JUSTIFICATION, *supra* note 39.

247. Kalhan, *supra* note 25, at 49 (referencing a "pattern of excessiveness" spanning the detention process); SCHRIRO STUDY, *supra* note 29, at 2–3.

248. Government officials sometimes assert that the US system currently focuses detention on only those migrants who require that measure. ICE officials have claimed that ninety percent of detainees fit within certain set priorities for detention based on criminal history, repeat immigration violations or recent border crossing. *See* Statement of Gary Mead, Inter-American Commission on Human Rights Working Group Meeting on Immigration Detention and Due Process in the United States (Oct. 2011) (notes on

Overall, a system revised in accord with international human rights standards would preserve liberty while allowing the government to target its enforcement more effectively by detaining only those who require such custody, and freeing up resources to process others who do not. Unfortunately, such a system has never been tested in the United States.[249]

The US immigration detention system has not been driven by individual determinations regarding the need to detain but rather by external factors not relevant either to migrants' liberty interests or the government's goal of administering effective immigration proceedings. Thus, the Supreme Court in *Demore* indicated that procedures for individualized bail determinations in place before 1996 had not been tested "under optimal conditions," because release was often necessitated by "funding and detention space considerations."[250] DHS officials have also stated that migrants were generally released due to lack of bed space before 2005, without individual consideration of the need for detention.[251] Rather than responding to these difficulties by establishing a more effective system based on individualized need for detention, the United States adopted a similarly arbitrary but more liberty-restrictive detention regime. Congress now insists on the detention of large numbers of migrants

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file with the author); *see also* DHS CONGRESSIONAL BUDGET JUSTIFICATION, *supra* note 39, at 54 (noting that ICE focuses detention "on those high priority individuals who have criminal convictions or fall under other priority categories"). These statements conceal important distinctions between individuals in each priority category. For example, ICE does not indicate how many recent border crossers are asylum seekers with a facially viable claim to remain in the United States. Nor does ICE indicate what type of criminal history is involved for individuals detained in that category. The criminal histories of many currently detained are very minor and do not suggest any serious flight risk or danger to the community. *See Graphical Highlights: Most Serious Charge Recorded for ICE Detainees Ordered by Frequency*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (2012), http://trac.syr.edu/immigration/reports/274/include/table4.html (noting that traffic offenses and public order crimes were included in numbers of criminal detainees); SCHRIRO STUDY, *supra* note 29, at 6 (indicating that the most common crimes include drug and traffic offenses). At best, by its own admission, the government continues to detain individuals based on their status or connection to extremely broad categories. Individualized analysis does not determine who the government detains.

249. *See* Demore v. Kim, 538 U.S. 510, 528 (2003) (acknowledging that individualized detention hearings have "not been tested under optimal conditions or . . . in all their possible permutations").

250. *Id.* at 519, 528.

251. *DHS to End Catch and Release*, *supra* note 63, at 1.

(specifically 34,000 a day) without regard for the need to detain.[252] Mandatory detention without review also applies to entire categories of migrants.[253] Financial considerations and political currents have imposed a presumption that almost all other individuals arrested by ICE should be detained as well for a portion, if not all, of their proceedings.[254]

The *Demore* Court did not find it problematic that the US government had failed to attempt the "least burdensome means" of immigration enforcement by engaging in individualized detention decisions with review.[255] However, international law standards set out a different expectation: that immigration systems will only restrict liberty as a last resort. The United States should modify its detention processes to meet that standard. The result will be a regime that detains those migrants who truly require detention, leading to much greater rationality at less cost to the government,[256] while significantly improving respect for liberty.

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252. HOUSE 2013 APPROPRIATIONS BILL FOR DHS, *supra* note 65, (insisting that DHS "shall maintain a level of not less than 34,000 detention beds").

253. See *infra* Part IV.C.

254. *See supra* notes 61–70 and accompanying text; *Detainees Leaving ICE Detention*, *supra* note 44, at 3 (noting that ten percent of migrants were released on bond during proceedings nationally, while the remaining migrants in detention were released only upon deportation, voluntary departure, or a win in their case allowing them to remain in the United States); News Release, ICE, ICE Opens its First-Ever Designed-and-Built Civil Detention Center (Mar. 13, 2012), *available at* http://www.ice.gov/news/releases/1203/120313karnescity.htm [hereinafter Designed-and-Built Civil Detention Center] (describing new 600-bed detention facility that detains migrants who have been "carefully screened to ensure that they do not pose a threat to themselves or others, and are not a flight risk"); UNLOCKING LIBERTY, *supra* note 17, at 32 (reporting that resource constraints on institutional alternatives to detention programs, such as the fact that certain programs exist only within a certain radius from a limited number of designated ICE offices, make the programs ineffective substitutes for detention).

255. *Demore*, 538 U.S. at 528.

256. There would undoubtedly be costs associated with a system that detains fewer migrants, such as the cost of making individualized detention determinations or the cost of imposing alternatives to detention, such as ankle bracelets, or even the cost of locating individuals who do abscond. *See* Denial of Petition for Rulemaking, *supra* note 152, at 10. However, those costs would almost certainly not be greater than the cost of detaining across the board. *See* NAT'L IMMIGRATION FORUM, *supra* note 67, at 8 (predicting a savings of US$1.6 billion annually—an eighty-two percent reduction in costs—by releasing individuals without serious criminal histories and placing them in already existing alternatives-to-detention programs).

### B. *Detention of Individuals in Expedited Removal and Reinstatement of Removal*

The US immigration detention system provides for detention of individuals in streamlined removal proceedings. These proceedings are known as expedited removal and reinstatement of removal.

#### 1. Expedited Removal

Under expedited removal, migrants who are apprehended at or near the border without proper documents may be removed immediately without recourse to any hearing or other procedure.[257] The statute and regulations require their detention until removal, which takes place promptly in most cases.[258]

The statute includes an exception to the expedited removal process for asylum seekers.[259] Asylum seekers may avoid expedited removal if they declare their intention to seek asylum and then pass a screening interview known as a credible fear interview.[260] The statute and regulations mandate detention of individuals awaiting a credible fear interview and credible fear decision except in very narrow circumstances.[261] Only ICE, which is the detaining authority, can make a decision to release.[262] There is no opportunity to seek independent review

257. 8 U.S.C. § 1225(b)(1)(A)(2006). Currently, expedited removal applies to individuals apprehended upon arrival at sea or at a US port of entry, as well as to those who are apprehended within 100 miles of the border after entering the United States no more than fourteen days prior to their apprehension. *See id.*; *see also* Designating Aliens For Expedited Removal, 69 Fed. Reg. 48877 (Aug. 11, 2004).

258. 8 U.S.C. § 1225(b)(1)(B)(iii)(IV); 8 C.F.R. § 235.3(b)(2)(iii) (2012); *see* BLAS NUÑEZ-NETO ET AL., CONG. RESEARCH SERV., RL 33097, BORDER SECURITY: APPREHENSIONS OF "OTHER THAN MEXICAN" ALIENS 8 (2005), *available at* http://trac.syr.edu/immigration/library/P1.pdf. (indicating that deportation under expedited removal takes place as soon as the day of apprehension); U.S. DETENTION OF ASYLUM SEEKERS, *supra* note 17, at 14 (describing "immediate" deportation under expedited removal).

259. 8 U.S.C. § 1225b(1)(A)(ii). Migrants placed in expedited removal also have a limited ability to challenge expedited removal on the grounds that they are US citizens or lawful permanent residents or already have refugee status. *See* 8 C.F.R. § 235.3(b)(5).

260. 8 U.S.C. § 1225(b)(1)(B); 8 C.F.R. 235.6(a)(1); 8 C.F.R. 208.30(f).

261. *See* 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (providing for mandatory detention); 8 C.F.R. § 235.3(b)(4)(ii) (2012) (allowing for parole only in cases of "medical emergency" or "legitimate law enforcement objective").

262. 8 C.F.R. § 235.3(b)(4)(ii).

by an immigration court or any other tribunal.[263] In 2011, approximately 11,000 asylum seekers were detained as part of the expedited removal process.[264]

Normally, the period of detention pending the credible fear interview is short. Most of the interviews are held within two weeks after the asylum seeker is taken into custody.[265] Individuals who pass the credible fear interview are placed into removal proceedings in immigration court where they have the opportunity to pursue their asylum claim.[266] They are no longer in expedited removal and are not subject to the expedited removal mandatory detention rules.[267] Their eligibility for release from detention, and the procedures that will apply, depends on other factors discussed below.[268]

The summary nature of the expedited removal process raises profound concerns regarding the compatibility of expedited removal with international human rights norms, particularly for asylum seekers.[269] However, the human rights problems inherent in expedited removal do not relate directly to detention but to other aspects of the process.

Detention under expedited removal for a brief period of time is likely not itself incompatible with international human

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263. *See id.*

264. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., ASYLUM DIV. QUARTERLY STAKEHOLDER MEETING: CREDIBLE FEAR AND REASONABLE FEAR WORKLOAD REPORT (Nov. 30, 2011) [hereinafter NOVEMBER 2011 ASYLUM STAKEHOLDER MEETING].

265. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., ASYLUM DIV. QUARTERLY STAKEHOLDER MEETING MINUTES 2 (June 8, 2010) (stating that the agency goal is to complete most credible fear interviews within fourteen days and showing statistics that support success in meeting that goal).

266. *See* 8 U.S.C. § 1225(b)(1)(B)(ii); 8 C.F.R. 235.6(a)(1); 8 C.F.R. 208.30(f).

267. *See* X-K-, 23 I. & N. Dec. 731, 731 (B.I.A., 2005).

268. *See id.*; *see infra* Parts IV.C, IV.E.

269. *See* U.S. COMM'N ON INT'L RELIGOUS FREEDOM, ASYLUM SEEKERS IN EXPEDITED REMOVAL 3 (2005); IACHR REPORT ON DETENTION, *supra* note 83, ¶¶ 116–18; U.N. High Comm'r for Refugees, Submission for the Office of the High Commissioner for Human Rights Compilation Report Universal Periodic Review: United States of America, at 3 (2010), *available at*, http://www.unhcr.org/refworld/pdfid/4bcd741c2.pdf; *see also Is This America? The Denial of Due Process to Asylum Seekers in the United States*, HUMAN RIGHTS FIRST (2000), http://www.humanrightsfirst.org/our-work/refugee-protection/due-process-is-this-america (last visited on March 13, 2013). It could be argued that the entire expedited removal process is so clearly contrary to international human rights law that detention in connection with expedited removal must also be unlawful. I will not take up that argument here, as my focus is exclusively on detention.

rights standards relating to immigration detention. Detention of individuals who will be imminently removed presents the situation in which the government's legitimate goal of securing removal is most salient. For individuals who do not seek asylum, a final removal decision is in effect, and the government is justified in maintaining custody over them for the short period until it executes their removal.

For individuals who do seek asylum, detention during the brief period before the credible fear interview is also likely justified by the possibility that removal will soon become necessary for at least some individuals who will fail the screening, such that detention directly relates to ensuring the possibility of prompt removal. In addition, even the UNHCR standards permit detention of asylum seekers for the brief period necessary to confirm identity and initially screen the claim,[270] which is essentially what the credible fear interview does.[271] So, brief detention of those who will pass the credible fear interview does not present a serious difficulty under international standards either.[272]

The expedited removal procedures do not permit an individualized determination regarding the necessity of detention or any possibility for judicial review. However, it would be difficult if not impossible to guarantee a hearing on the need for detention more quickly than the removal itself or the credible fear interview and decision. The individualized determination and review of detention required under international law must take place promptly, but almost all

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270. *See* UNHCR Detention Guidelines, *supra* note 78, ¶¶ 24–28.

271. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., ASYLUM DIV. QUARTERLY STAKEHOLDER MEETING: CREDIBLE FEAR AND REASONABLE FEAR WORKLOAD REPORT SUMMARY FY 2012 (Jan. 26, 2012) (reporting credible fear interview passage rate of approximately eighty percent); U.S. CITIZENSHIP & IMMIGRATION SERVS., ASYLUM DIV. QUARTERLY STAKEHOLDER MEETING: CREDIBLE FEAR AND REASONABLE FEAR WORKLOAD REPORT SUMMARY FY 2010 (Oct. 19, 2010) (reporting credible fear interview passage rate of approximately seventy two percent).

272. This analysis assumes that asylum seekers will be released once they pass the credible fear interview or will be detained only based on an individualized determination with judicial review. However, under current law and practice, ICE detains some asylum seekers after a favorable credible fear interview, without adequate justification, and judicial review is not always available and is problematic where it does apply. *See infra* Parts IV.C., IV.E. Additional interpretations of the statutes and regulations are required in light of the international human rights standards to resolve these incompatibilities with international norms. *See id.*

systems allow for some short period of detention before those determinations are made.[273]

However, should the wait period for a credible fear interview extend beyond a brief period, probably no more than two weeks, detention under expedited removal would no longer comply with the international standards.[274] In that case, the courts could interpret the statute to impose a strict time limit on the credible fear interview process to ensure compliance with international standards.[275] Otherwise, it would become necessary to interpret the expedited removal statute to provide the protections required under international law including individualized determinations, a showing of necessity of detention, and judicial review.[276]

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273. *See* 8 § C.F.R. 287.3 (2012) (arrest must be followed in forty eight hours by initial decision whether to continue in custody); *see also* 18 U.S.C. § 3142 (2012) (containing specific guidelines regarding the timing of pre-trial detention hearings in federal criminal proceedings and requiring that the hearing take place upon appearance before a judicial offer or within three to five days after that appearance).

274. I do not suggest the exact time limit that would be required, but international human rights law would likely not condone a period of longer than the current two weeks. *See* Saadi v. United Kingdom, App. No. 13229/03, Eur. Ct. H.R. 7 (2008) (finding detention at border for expedited proceedings was permissible where the length of detention was limited and lasted only seven days).

275. Current law contains no such limitation. *See* 8 U.S.C. § 1225(b)(1)(B) (2006); 8 C.F.R. § 208.30 (2012); 8 C.F.R. § 235.3(b)(4) (2012).

276. The courts have previously been unwilling to entertain litigation to curtail the expedited removal statute. *See* AILA v. Reno, 18 F. Supp. 2d 38 (D.D.C. 1998), *affirmed by* 199 F.3d 1352 (D.C. Cir. 2000). The resistance was based partly on procedural limitations in the statute and partly on long-standing conceptions regarding the lack of constitutional protection due to migrants at the border. Procedural limitations should not be read in a way that would prevent review of the scheme that would bring it into compliance with international law. As for the rights granted to individuals at the border, the distinction between individuals outside of the boundaries of the United States and those within the United States is eroding. *See infra* notes 318–22 and accompanying text. In any case, expedited removal now applies to individuals who have made their way into the United States and who should claim protection of the right to liberty even under a restrictive interpretation of the territorial reach of US constitutional law. *See* Designating Aliens For Expedited Removal, 69 Fed. Reg. 48877, (Aug. 11, 2004) (applying expedited removal to individuals apprehended within 100 miles of the border). An interpretation guaranteeing international human rights law protections to those placed in expedited removal is thus possible without significantly altering US law.

### 2. Reinstatement of Removal

Reinstatement of removal is a similarly abbreviated process for removing immigrants from the United States without proceedings in immigration court. Reinstatement of removal applies to individuals who previously received an order of removal and left or were deported from the United States but then returned illegally.[277] In these cases, the statute provides that the prior order will simply be reinstated and the individual will be deported without any opportunity to appear before an immigration judge or to challenge deportation in any other way.[278] During the reinstatement of removal process, the migrant is detained, under the provisions requiring detention of persons with final orders of removal.[279]

There is an exception to reinstatement of removal, similar to the exception to expedited removal, for individuals who fear persecution in the country to which they would be returned.[280] A migrant claiming a fear of persecution or torture if deported is referred for an interview to determine whether the fear is "reasonable."[281] If the result of this screening interview is favorable, the migrant will be allowed only to seek withholding of removal (the US precept for *non-refoulement* of refugees to a country where they would face persecution) in strictly limited proceedings before the immigration court.[282] Persons who pass a reasonable fear interview generally remain detained without review during the proceedings in immigration court.[283] More

277. 8 U.S.C. § 1231(a)(5) (2006).

278. *See id.;* 8 C.F.R. § 1241.8(a) (2012).

279. 8 U.S.C. § 1231(a)(2); 8 C.F.R. § 241.3 (2012) (regulating detention after entry of removal order); 8 C.F.R. § 1241.8(f) (2012) (regulating reinstatement of removal and providing that detention will be in accord with the general provisions on detention after entry of a removal order); Memorandum from the Office of the Chief Immigration Judge, Operating Policies and Procedures Memorandum No. 99-5 on Implementation of Article 3 of the UN Convention Against Torture 9 (May 14, 1999) (noting that it is "likely" that individuals in reinstatement of removal who request a reasonable fear interview will be detained).

280. 8 C.F.R. § 1241.8(c) (2012).

281. *Id.;* 8 C.F.R. § 1208.31; 8 C.F.R. § 208.31 (2012).

282. 8 C.F.R. § 208.31(c) (2012).

283. OFFICE OF THE CHIEF IMMIGRATION JUDGE, DEP'T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL 108, 110 (2008) (noting individuals in "limited removal proceedings," including withholding-only proceedings, may be detained and there is no possibility of review of detention by the immigration court); 8 C.F.R. § 1241.8(f) (2012).

than 3000 individuals with refugee claims were detained in connection with the reinstatement of removal process in 2011.[284]

As with expedited removal, there are serious concerns that reinstatement of removal violates rights, such as due process.[285] However, brief detention of migrants in reinstatement of removal usually will not independently violate international human rights standards. Detention in these instances is designed to facilitate the execution of a pre-existing final decision on removal.

However, for individuals who claim persecution while awaiting deportation under reinstatement of removal, detention pending the reasonable fear interview violates international human rights standards, at least as the process is currently carried out. Individuals seeking withholding of removal proceedings remain in detention for lengthy periods of time, waiting for a reasonable fear interview and then a decision on whether they may pursue refugee protection in the United States. The regulations require that the reasonable fear interview be conducted within ten days of referral for the interview, in the absence of "exceptional circumstances."[286] Notwithstanding the shorter time limits set out in the regulations, government officials charged with conducting the reasonable fear interview process have set an expectation that most interviews will be conducted within ninety days after referral.[287] Officials further acknowledge that some migrants in detention are held for "about six months" pending the reasonable fear interview.[288]

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284. *See* NOVEMBER 2011 ASYLUM STAKEHOLDER MEETING, *supra* note 264.

285. *See* Lee J. Teran, *Mexican Children of U.S. Citizens: "Viges Prin" and Other Tales of Challenges to Asserting Acquired U.S. Citizenship*, 14 SCHOLAR 583, 658–68 (2012); Daniel Kanstroom, *The Right to Deportation Counsel in* Padilla v. Kentucky*: The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461, 1465 (2011).

286. 8 C.F.R. § 208.31(b) (2012).

287. Memorandum from Ted Kim, Acting Chief of Asylum Div., U.S. Citizenship & Immigration Servs., to All Asylum Office Staff on Implementation of Reasonable Fear Processing Timelines and APSS Guidance, Attachment 1 (Apr. 17, 2012) [hereinafter Reasonable Fear Memorandum].

288. AM. IMMIGRATION LAWYERS ASSOC., HOUSTON OFFICE MEETING MINUTES (May 10, 2012) (on file with the author); *see also* Reasonable Fear Memorandum, *supra* note 287 (requiring special notifications when reasonable fear interviews will be delayed more than 150 days).

In these circumstances, detention is not incident to immediate deportation based on a final order and so may only be justified for the purposes of avoiding a flight risk or danger to the community during the pending proceedings to determine status. While persons subject to reinstatement of removal have a final removal order, they have invoked a procedural mechanism that requires a determination of their immigration status. This mechanism is provided by statute in order to comply with international obligations to prevent expulsion of refugees to a country where they will be persecuted or tortured.[289] Given the length of time they must spend in detention pending a screening interview, individuals who have requested a reasonable fear interview are in a situation that most closely compares to the situation of individuals detained pending a determination of their status prior to entry of a removal order. As such, the decision regarding the necessity of detention must be made on an individualized basis with the possibility for judicial review. International human rights law does not permit an exception to these standards based only on the existence of a prior removal order, as contemplated by the reinstatement of removal process in the United States.[290]

Current practice regarding detention after a favorable reasonable fear interview also violates international human rights standards. Individuals who do not pass the reasonable fear interview might be detained, if execution of the confirmed removal order were rapid, without violating international law. However, individuals who have passed the reasonable fear interview fall clearly within the category of persons pending a determination of their immigration status and so may only be detained in limited circumstances. Their removal is far from imminent, because an initial threshold determination has already been made that they may be eligible for withholding of

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289. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., ASYLUM OFFICER BASIC TRAINING COURSE, REASONABLE FEAR OF PERSECUTION AND TORTURE DETERMINATIONS 5 (2008).

290. *See* Velez Loor v. Panama, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 218, ¶¶ 169, 172 (Nov. 23, 2010) (specifically finding impermissibly punitive the imposition of detention as a result of a prior deportation order).

removal and thus may not ever be deported.[291] Yet, under the current system, detention is automatic rather than a measure of last resort. There is no possibility for an individualized determination regarding detention with the possibility for judicial review. Nor does the system provide guarantees to ensure that detention is for the shortest period of time possible, with a maximum limit, or allow for periodic review.

The courts should thus reinterpret the current statute and regulations in order to ensure compliance with international human rights standards in the reinstatement of removal context. In connection with migrants awaiting a reasonable fear interview, the courts might interpret the statute and regulations as imposing a strict deadline for conducting and ruling on the reasonable fear interview after taking the migrant into custody. The ten day time limitation already found in the regulations could provide the deadline, and exceptions could be read as very limited. If the reasonable fear interview were conducted in this timeframe,[292] the existing removal order would likely serve as adequate basis for detention during this brief period when immediate removal would not yet be subject to serious question.

Absent the imposition of such a time limit, for individuals awaiting an interview and decision on reasonable fear, the courts should interpret the statute and regulations to allow for release based on an individualized determination of the need for detention with the possibility for judicial review. In any case, the requirement of an individualized determination with review should be imposed for individuals who have passed the

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291. Under the unique US *non-refoulement* system, the individual would still have an order of removal even if an immigration court granted withholding of removal after full proceedings; the decision would only preclude removal to the country of persecution or torture. *See* 8 C.F.R. § 1208.16(f) (2012); I-S- & C-S-, 24 I. & N. Dec. 432 (B.I.A., 2008). However, removal to a different country would generally be impossible, and the individual would be permitted to remain and work in the United States. *See* Heeren, *supra* note 240, at 926 ("[T]here are very few cases where DHS has ever succeeded in deporting an immigrant to a country where she does not have citizenship.").

292. As with the credible fear interviews, I do not suggest a specific deadline for conducting the reasonable fear interview. However, there is no justification for making the deadline for reasonable fear interviews more lenient than the timeframe for credible fear interviews, and international law would presumably limit that period to no more than a week or two. *See supra* notes 273–74 and accompanying text.

reasonable fear interview and must wait for a final determination of their claim in immigration court proceedings.

Such an interpretation in compliance with international human rights standards is fully plausible given the structure of the statute and regulations. The post-removal order detention statute allows for release of individuals subject to its provisions.[293]

The relevant implementing regulations do not provide a procedure for release of individuals in the context of reinstatement of removal and withholding-only proceedings in immigration court, but they also do not prohibit release.[294] The regulations also fail to provide for review of custody decisions affecting persons subject to reinstatement of removal, by immigration court or other means.[295] However, they need not be interpreted as impeding immigration court review of detention in the reinstatement of removal context. The regulations already provide for immigration court review of custody decisions in other post-removal order cases where removal is unlikely and detention is thus problematic.[296] The regulations could be interpreted to provide the same review of decisions regarding custody of individuals in reinstatement of removal proceedings where a migrant is awaiting, or has already passed, a reasonable fear interview.[297] If the regulations are instead read to preclude

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293. Specifically, the statute establishes the authority for post-order detention and then prohibits post-order release of individuals subject to the criminal grounds for mandatory detention (discussed below), suggesting that others may be released. 8 U.S.C. § 1231(a)(2) (2006).

294. *See* 8 C.F.R. § 1241.8 (2012) (regulating the reinstatement of removal process). The general regulation on post-order detention provides that an individual subject to an order of removal will be taken into custody, but remains silent on the possibility of release during the removal period. 8 C.F.R. § 241.3 (2012) *Cf.* 8 C.F.R. § 1241.14(a)(2) (2012) (allowing for review of decisions not to release after expiry of the removal period, without removal, based on special circumstances).

295. *See* 8 C.F.R. § 1241.8 (2012) (omitting any provision on release or review of detention); 8 C.F.R. § 1236.1(d) (2012) (allowing immigration court review of custody determinations, but only "[p]rior to [a] final order," without any mention of the status of individuals subject to reinstatement of removal).

296. *See* 8 C.F.R. § 1241.14(a)(2) (2012) (allowing for continued detention after removal period only in exceptional cases and with immigration court review).

297. In fact, for proceedings taking longer than six months, release should presumptively occur. *See* Zadvydas v. Davis, 533 U.S. 678, 701 (2001) (holding that migrants may not be held indefinitely based on a final removal order, if removal does not occur, and establishing a presumptive six-month time limit on post-order detention); 8 U.S.C. § 1231(a)(1)(B) (beginning removal period when removal order

release on the grounds that proceedings are ongoing and removal still may become possible, detention should be subject to individualized immigration court review under the general provisions relating to individuals in pending proceedings.[298]

### C. *Detention of Arriving Aliens*

US immigration law also provides for the detention without review of entire classes of individuals who are categorized by law as "arriving aliens."[299] An arriving alien is any individual who applies for admission to the United States at a port-of-entry, for example at an airport or border bridge.[300] ICE does not provide statistics regarding the number of individuals subject to "arriving alien" detention rules.[301] The arriving aliens provisions primarily affect certain categories of asylum seekers and returning lawful permanent residents who have allegedly abandoned their status or have criminal histories.

Many asylum seekers originally placed in expedited removal are categorized as arriving aliens, because they were placed into expedited removal after having presented themselves at a port-of-entry.[302] Even once they pass a credible fear interview and

becomes final); 8 U.S.C. § 1231(a)(3) (providing for supervised release after the removal period if removal not accomplished).

298. *See* 8 U.S.C. § 1226(a) (2006) (allowing for release from detention during removal proceedings); C.F.R. § 1208.2(c)(3) (2012) (outlining that withholding only proceedings are to follow same procedure as removal proceedings); 8 C.F.R. § 1236.1(d) (2012) (allowing for appeal to the immigration court of custody decisions before final order of removal); 8 C.F.R. § 1003.19(h)(2)(i) (2012) (precluding immigration court review of immigration detention decisions in other contexts, but not in reinstatement of removal or withholding-only contexts). It may be most appropriate for the courts to interpret detention in reinstatement of removal as detention during the pendency of proceedings, allowing for release and immigration court review. *See* Castillo v. ICE Field Office Dir., 2012 U.S. Dist. Lexis 162862 (W.D. Wash. Nov. 14, 2012) (holding that an applicant for withholding of removal who has passed a reasonable fear interview should have the opportunity to seek review of detention under 8 U.S.C. § 1226(a)). To do so, the courts would only need to invalidate the current regulatory requirement that review of detention take place before entry of a final order. *See* 8 C.F.R. § 1236.1(d) (2012).

299. 8 C.F.R. § 1003.19(h)(2)(i)(B) (2012).

300. 8 C.F.R. § 1.2 (2012).

301. DHS Immigration Enforcement Actions 2011, *supra* note 13.

302. Those asylum seekers who entered the United States and were placed in expedited removal because they were apprehended near the border shortly after crossing, but who were not apprehended at the border, are not arriving aliens. *See* X-K-, 23 I. & N. Dec. 731, 735 (B.I.A., 2005).

leave the expedited removal process for normal immigration court proceedings, they remain arriving aliens because of the manner of their original arrival.[303] FH presents just such a case.

Lawful permanent residents returning to the United States are generally not deemed to be seeking admission, and therefore are not treated as arriving aliens. However, the statute delineates circumstances involving criminal history or abandonment of status in which lawful permanent residents will be deemed to be arriving aliens, seeking admission to the United States. These lawful permanent residents will be detained upon return to this country and placed in proceedings in immigration court to determine their status.[304]

For arriving aliens, the law grants ICE officials exclusive authority to make determinations regarding their custody situation.[305] ICE may continue to detain a migrant or may release the individual on parole, with or without the payment of a bond. ICE's custody determination may not be reviewed by an immigration judge or other tribunal.[306] Furthermore, the regulations place the burden on the detained immigrant to show an absence of flight risk or danger to the community before ICE will even consider release.[307]

The provisions that tightly circumscribe the rights of arriving aliens and sanction their detention are incompatible with international human rights standards.[308] The rules on arriving aliens create a presumption of detention, rather than release, for whole classes of migrants. They preclude meaningful individualized determinations requiring the government to bear the burden of showing a legitimate goal justifying detention and the unavailability of alternatives other than detention to meet that goal. The rules further fail to provide for authorization or

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303. *See id.;* EXEC. OFFICE FOR IMMIGRATION REV., IMMIGRATION JUDGE BENCHBOOK, (IX)(C) (2007), *available at* http://www.justice.gov/eoir/vll/benchbook/resources/sfoutline/jurisdiction.html.

304. 8 U.S.C. § 1101a(13)(C).

305. 8 C.F.R. § 236.1(c)(8)–(11) (2012); 8 C.F.R. § 1003.19(h)(2)(i)(B); 8 C.F.R. § 235.3(c) (2012).

306. 8 C.F.R. § 1003.19(h)(2)(i)(B) (2012).

307. 8 C.F.R. § 236.1(c)(8) (2012); 8 C.F.R. § 235.3(c) (2012); 8 C.F.R. § 212.5(b) (2012).

308. Special Rapporteur Report on Mission to the US, *supra* note 81, ¶¶ 122–23; IACHR REPORT ON DETENTION, *supra* note 83, ¶¶ 139, 418, 431.

review of detention by a tribunal and periodic review. They certainly do nothing to ensure that detention is for the shortest period necessary or to impose a limit on the length of detention.

The restrictions on the liberty and due process rights of arriving aliens are particularly problematic, because they have the greatest impact on asylum seekers and on returning lawful permanent residents. Asylum seekers enjoy special protections against detention under international law even when they arrive to a country with no documented status.[309] In addition, both asylum seekers and returning lawful permanent residents who have been placed in removal proceedings have strong reasons and legal opportunity to challenge their removal. They will both likely be detained for an extended period during ongoing proceedings, and their detention cannot be justified by a certain and imminent removal. Nor can detention be justified by the risk of flight, because such individuals will have every incentive to appear for their proceedings. In this context, the international human rights standards should be closely followed.

The US courts should, therefore, reference international law to invalidate the special rules limiting the rights of arriving aliens in connection with detention. To achieve this result, the courts need only invalidate the regulations that currently prevent arriving aliens from accessing an individualized review by an immigration court regarding detention.[310] There is no statute that requires the government to treat arriving aliens distinctly from other migrants. The courts could simply determine that proper interpretation of the immigration statute, in light of international standards consistent with constitutional protections, does not require or permit implementing a regulation that restricts the rights of this particular group of migrants to such an extent.[311]

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309. *See* UNHCR Detention Guidelines, *supra* note 78, ¶ 32.

310. Specifically, it would be necessary to invalidate 8 C.F.R. § 1003.19(h)(2)(i)(B) (2012) (precluding immigration court review of detention decisions regarding arriving aliens) and possibly 8 C.F.R. § 235.3(c) (2012) (suggesting that arriving aliens in removal proceedings be detained unless paroled by ICE). See discussion *infra* Part IV.E for problems with the immigration court review process, as pertains to human rights compliance, which also must be resolved.

311. At least one court has reached the conclusion that arriving aliens are constitutionally entitled to an individualized bond hearing before the immigration court, where the government has the burden of proving flight risk or danger to the

Such a reinterpretation might meet with resistance. The regulations presumably limit the rights of arriving aliens under the theory that individuals presenting themselves at the US border seeking admission have few, if any, rights.[312] Based on the Supreme Court's decision in *Mezei* in the early 1950s, and other cases from this same period, conventional wisdom held for years that migrants at the nation's periphery enjoyed almost no legal protection.[313]

However, that notion was based on the plenary power doctrine.[314] As described above, that doctrine has eroded significantly.[315]

Even more, the treatment of migrants seeking entry to the US was based on a manifestation of the plenary power doctrine that has recently become particularly suspect: the assertion that constitutional protections do not apply at the border as a question of territorial sovereignty.[316] The extraterritoriality exception to rights affected even those individuals physically detained within the United States under the fiction that they had not been allowed to enter, as a legal matter, and so they remained outside US boundaries and without protection.[317] In 2008, the Supreme Court called that fiction into question.[318]

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community once detention becomes prolonged, despite the regulations precluding such a hearing. *See* Crespo v. Baker, 2012 U.S. Dist. LEXIS 47909 (S.D. Cal. Apr. 3, 2012); Centeno-Ortiz v. Culley, 2012 U.S. Dist. WL 170123, at *9 (S.D. Cal. Jan. 19, 2012).

312. In fact, DHS and the immigration courts have recently refused to adopt new regulations that would allow immigration courts to review the detention of arriving aliens on this basis. *See* Denial of Petition for Rulemaking, *supra* note 152, at 5.

313. *See* Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212–13 (1953); *see also* United States ex rel Knauff v. Shaughnessy, 338 U.S. 537, 542–43 (1950).

314. *See Mezei*, 345 U.S. 212–13; *Knauff*, 338 U.S. 542–43; *see also* ALEINIKOFF, *supra* note 202, at 174 (noting that *Mezei* and *Knauff* would be overturned if the plenary power doctrine were cast aside).

315. *See supra* notes 214–19 and accompanying text.

316. *See* Cole, *The Idea of Humanity*, *supra* note 193, at 650–51; Zadvyas v. Davis, 533 U.S. 678, 693 (2001).

317. *See* Jean v. Nelson, 727 F.2d 958, 969 (11th Cir. 1984) (holding that the entry distinction applies to individuals even though they were held in detention centers in the United States); Gisbert v. Attorney General, 988 F.2d 1437, 1440 (5th Cir. 1993) (same).

318. I thank Jordan Pollock, a recent University of Texas Law School graduate, for helping me to develop the idea that both international human rights law and US constitutional law have moved in the same direction in eliminating the distinctions in rights granted to migrants at the border.

In the 2008 case, *Boumediene v. Bush*, involving the detention of suspected terrorists at Guantanamo, the Supreme Court employed a pragmatic approach to analyzing sovereignty and territorial jurisdiction for the purpose of determining the applicability of constitutional liberty protections.[319] The Court held that the proper analysis should consider the "nature of the sites where apprehension and then detention took place," including the degree of US control.[320] Under this practical reading, detention within the physical territory and control of the United States requires protection of the central liberty rights of detainees, regardless of their status as migrants stopped at the border.

This newer approach is also reflected, albeit more tentatively, in the Supreme Court's decision in *Clark v. Martinez*.[321] In *Clark*, which predates *Boumediene* by several years, the Supreme Court held that migrants with final orders of removal may not be detained indefinitely within the United States, even if they were never legally admitted to this country.[322] While the decision was based on statutory interpretation, it supports a rethinking of the territoriality limitations as applied to migrants, particularly in light of both *Boumediene* and the evolution of international standards applying to immigration detention. Given these developments, the questionable distinction made between migrants deemed to be at the border (even when they are physically held in custody inside the United States) and those who have entered the United States, should not require continued allegiance to the arriving alien regulation. The courts should invalidate the regulation in light of international human rights standards.

The United States has implicitly acknowledged the tenuousness of the current rules regarding arriving aliens, at least as to asylum seekers, further supporting invalidation of the regulations. In December 2009, ICE issued a memorandum

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319. Boumediene v. Bush, 553 U.S. 723, 763–71 (2008); *see also* Rasul v. Bush, 542 U.S. 466, 482 (2004) (noting that the right to assert liberty through habeas corpus has depended "not on formal notions of territorial sovereignty" but rather on practical questions regarding the entity that has jurisdiction over the place of detention).

320. *Boumediene*, 553 U.S. at 763–71.

321. Clark v. Martinez, 543 U.S. 371, 380 (2005).

322. *Id.* at 377–81.

providing for the presumptive release from detention on parole of arriving asylum seekers who have passed credible fear interviews.[323] Under the new policy, ICE releases a far greater number of asylum seekers, categorized as arriving aliens, than was previously the case.[324] ICE has thus acknowledged that detention is not necessary for many asylum seekers arriving at the border and that across-the-board detention is problematic in this context.

This policy memorandum, however, does not go far enough to conform US law to international standards. The policy still does not allow for review of detention decisions by a tribunal, and thus leaves full discretion to detain or release in the hands of the same administrative officials who have taken custody over the asylum seeker. Individualized custody review by the immigration courts would likely result in release, on a finding of no flight risk or danger to the community, for at least some "arriving" asylum seekers who remain in detention under the current policy.[325] The absence of a mechanism for challenging ICE's decisions regarding detention of arriving asylum seekers also still contrasts with the availability of individualized court review of detention for those who make their way into the United States before apprehension.[326] Thus, asylum seekers such as FH who arrive at the border and declare their need for protection, continue to be systematically disadvantaged in challenging detention, in conflict with international human rights law standards that require individualized assessment and review for all detention decisions.[327]

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323. ICE, Dir. No. 11002.1, Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture, ¶ 1 (Dec. 8, 2009).

324. Denial of Petition for Rulemaking, *supra* note 152 (noting that, under current guidelines, ICE releases approximately seventy six percent of arriving aliens who have passed a credible fear interview).

325. *See* Notes of Nikiya Natale, Summer 2012 Intern with the South Texas Pro Bono Asylum Representation Project (July 19, 2012) (on file with the author) (providing information regarding "arriving" asylum seekers from Eritrea and Rwanda detained in south Texas as of July 19, 2012 who had been held from seventy-four to ninety-two days after passing their credible fear interviews).

326. *See infra* Part IV.E; *see also* Denial of Petition for Rulemaking, *supra* note 152, at 1.

327. *See* UNHCR Detention Guidelines, *supra* note 78, ¶¶ 13 (prohibiting the application of punitive measures to asylum seekers who present themselves promptly to the authorities).

In addition, the new release policy takes the form of a memorandum, rather than a regulation, and so may be changed at any time.[328] As such, US immigration detention law still does not adequately ensure the rights to liberty and due process of individuals presenting at the border. Further transformation of US law, by reference to international standards, is necessary to secure those rights.

### D. *Mandatory Detention on Criminal and Terrorism Grounds*

US immigration law also mandates the detention of entire categories of individuals, regardless of their arriving alien status, who have been convicted or suspected of particular crimes or of involvement in terrorism.[329] Lawful immigration status, length of residence in the United States and family ties here are irrelevant in these mandatory detention cases. Consequently, lawful permanent residents like BM are regularly detained under these statutory provisions. ICE does not provide information regarding the number of individuals mandatorily detained in this category. However, the available numbers suggest that, on a given day, near half of the migrants in ongoing immigration court proceedings to determine deportability and status are subject to mandatory detention.[330]

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328. Policies on parole of arriving aliens have, in fact, changed multiple times through memoranda such as this one. *See* ICE Policy Directive No. 7-1.0, Parole of Arriving Aliens Found to Have a 'Credible Fear' of Persecution or Torture (Nov. 6, 2007) (imposing stringent standards for release of individuals who have passed the credible fear interview and explicitly superseding prior policy that favored release, contained in Memorandum from Michael Pearson, Detention Guidelines Effective October 9, 1998 (Oct. 7, 1998)).

329. *See* 8 U.S.C. § 1226(c) (2006). Numerous commentators have noted that the criminal and terrorism grounds requiring mandatory detention are extremely broad and do not encompass only serious and dangerous crimes or acts. *See, e.g.*, HUMAN RIGHTS FIRST, DENIAL AND DELAY: THE IMPACT OF THE IMMIGRATION LAW'S "TERRORISM BARS" ON ASYLUM SEEKERS AND REFUGEES IN THE UNITED STATES 10–11 (2009); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH & LEE L. REV. 469, 483–86 (2007); Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 619, 632 (2003).

330. The US government, in 2009, stated that sixty-six percent of individuals detained on a given day were subject to mandatory detention. *See* SCHRIRO STUDY, *supra* note 29, at 6. However, this mandatory detention figure must encompass those individuals held under the separate provisions requiring detention of migrants subject to a final removal order, which I do not address. *See* 8 U.S.C. § 1231(a)(2) (2006). Otherwise, all individuals not subject to a final removal order would be subject to

The detainee may challenge the determination that he falls within the broad categories of persons subject to mandatory detention, but detention is otherwise automatic.[331] Individuals subject to mandatory detention may not be released during the pendency of their proceedings except in extremely limited circumstances, and only at ICE's discretion.[332] Even then, the detainee bears the burden of proving that there is no risk of flight or danger to the community.[333] There is no review by the immigration court or any other tribunal regarding the necessity or proportionality of detention.[334]

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mandatory detention, since approximately thirty-four percent of individuals in detention on a given day have a final order. *See* MPI Study, *supra* note 32, at 16–18. If the thirty-four percent of individuals with a final order are excluded from the sixty-six percent in mandatory detention, then approximately thirty-two percent of the total number of individuals in detention are subject to mandatory detention on criminal or terrorism grounds while they await the conclusion of the proceedings in their immigration cases. If the number of individuals held pursuant to a final order of removal is actually higher than thirty-four percent, then the percentage of individuals held in mandatory detention based on criminal or terrorism grounds would be slightly smaller. *See id.* (calculating thirty-four percent figure for individuals with final orders as a percentage of all detainees rather than as a percentage of cases for which information was available regarding pending or post-final order status). Further complicating the calculations, the thirty-two percent subjected to mandatory detention pending a final removal order likely includes individuals detained pursuant to expedited removal in addition to those mandatorily detained on criminal or terrorism grounds. So, the number of individuals mandatorily detained on criminal and terrorism grounds is probably fewer than thirty-two percent of the total number of individuals detained pending a final decision. In comparison, migrants who are discretionarily detained during ongoing immigration proceedings—in other words, migrants who are not included in the sixty-six percent of migrants who are mandatorily detained during immigration proceedings or based on a final order—represent about thirty-four percent of the total number detained on a given day. *See* SCHRIRO STUDY, *supra* note 29, at 6. A comparison of the discretionarily detained percentage (thirty-four percent) with the percentage of individuals mandatorily detained pending proceedings (below thirty-two percent) demonstrates that mandatory detention applies to a little less than half of the total number of individuals detained pending a decision on their case. *See also* JAILED WITHOUT JUSTICE, *supra* note 17, at 6 (describing difficulties in obtaining information from ICE regarding numbers of individuals mandatorily detained).

331. 8 C.F.R. § 1003.19(h)(2)(ii) (2012); Joseph, 22 I. & N. Dec. 799 (B.I.A., 1999).

332. 8 U.S.C. § 1226(c)(2) (2006) (allowing release only where necessary to provide protection to witnesses or other individuals cooperating with a major criminal investigation); 8 C.F.R. § 1003.19(h)(2)(i)(D) (2012) (prohibiting immigration court review of detention for individuals held under 8 U.S.C. § 1226(c)(2)).

333. 8 U.S.C. § 1226(c)(2).

334. 8 U.S.C. § 1226 (e); 8 C.F.R. § 1003.19(h)(2)(i)(D) (2012).

The mandatory detention statute conflicts with the international human rights standards regarding immigration detention in multiple ways.[335] At the level of principles, it establishes a system that presumptively and irrevocably detains large classes of individuals rather than treating detention as a measure of last resort.

In relation to the more specific requirements of international human rights law, the mandatory detention statute prevents any analysis of the existence or legitimacy of governmental goals justifying detention and certainly does not hold the government to its burden of proof to establish the need for detention in individual cases. Nor does the mandatory detention statute allow for adoption of less restrictive means for meeting governmental objectives, such as through imposition of alternatives to detention, other than physical custody.[336] The statute does not ensure that detention is for the minimum period necessary, and there is no time limit on the period of detention under the statute. While detention should end with the completion of removal proceedings, no timeframe is imposed on those proceedings. Detention may also continue even after there is no longer any justification that detention is necessary to effectuate removal or to prevent flight risk or danger to the community. For example, detention sometimes continues even when the detainee has won the right to remain in the United States but awaits a decision on an appeal filed by ICE.[337]

Finally, the mandatory detention statute and the implementing regulations preclude the type of determination or review of detention by a tribunal required by international law. The possibility for a hearing to determine whether a detainee

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335. *See* Special Rapporteur Report on Mission to US, *supra* note 81, ¶¶ 15, 23, 72–74, 110; IACHR REPORT ON DETENTION, *supra* note 83, ¶¶ 17, 49, 428.

336. Advocates have argued that the mandatory detention statute could be read to allow use of alternatives to detention, such as ankle bracelets or reporting requirements, as a means of complying with the statutory command to take all individuals subject to the statute into custody. *See* UNLOCKING LIBERTY, *supra* note 17, at 38–39; Heeren, *supra* note 240, at 632. However, the statute is not currently interpreted in that manner. *Id.*

337. *See* Heeren, *supra* note 240, at 629 (describing the history of an individual client detainee who remained in detention for eleven months after an immigration court granted him the right to remain in the United States); *see also* Letter from Barbara Hines, *supra* note 6.

properly falls within the category of individuals subject to mandatory detention is not adequate under the international human rights standards. The international standards require that the reviewing tribunal have the authority to review not just compliance with domestic law but also with the international requirements of an individualized showing of the need for detention.[338]

The mandatory detention statute is not readily susceptible to an interpretation that would bring it into line with international human rights standards.[339] It will likely be necessary, then, to instead interpret the US Constitution's rights to liberty and due process in accord with international human rights standards in order to overcome the mandatory detention provisions. Specifically, the courts should invalidate the mandatory detention statute as exceeding the limits on detention imposed by the liberty and due process provisions of the Constitution. By striking down the mandatory detention statute, the courts would devolve to immigration officials the authority to detain and release all individuals in removal proceedings after an individualized determination without regard to their inclusion in the categories currently subject to mandatory detention. The decision to detain or release would be subject to review by the immigration courts in the same way

338. *See* Human Rights Comm., *A v. Australia*, *supra* note 79, ¶ 9.5 (finding that the detention review process violated human rights where it allowed only inquiry into the applicability of the mandatory detention category to the detainee); Human Rights Comm., *Shams v. Australia*, *supra* note 81, ¶7.3 (noting similarly that the detention review process as applied violated human rights).

339. Some scholars have argued that ICE could interpret the mandatory detention statute more narrowly than it currently does. *See* Kalhan, *supra* note 25, at 53–54. Such narrowed interpretations would bring the statute closer to compliance with international human rights law and might even lead to de facto individualized hearings in many cases to determine whether mandatory detention should apply in particular circumstances. Such reinterpretations would be desirable and would be consistent with the approach urged in this Article. However, even if more narrowly interpreted, the statute would presumably still apply to require detention of at least some categories of migrants without any individualized determination or opportunity for review. As such, it would still violate liberty and due process as understood under international human rights law.

that non-mandatory detention decisions are currently subject to review.[340]

It will be necessary to wrestle with the Supreme Court's decision in *Demore* to reach such a conclusion regarding the unconstitutionality of the mandatory detention statute. In *Demore,* the Supreme Court approved the current broad interpretation of the mandatory detention statute as constitutionally sound.[341] However, the Supreme Court's decision should not stand in the way of a determination of unconstitutionality in light of international human rights standards that aid in construing the Constitution's liberty and due process provisions in a manner that provides adequate protection of these central rights. Constitutional interpretations can and should change in light of persistent and coherent international standards that call those interpretations into question, as is the case here.[342]

The use of international human rights standards would do important work in bringing constitutional interpretation back into line with Supreme Court jurisprudence in cases other than *Demore.* An interpretation that rendered the mandatory detention statute invalid would be fully in line with the civil detention cases in contexts other than immigration, as described above.[343] It would also be consistent with the Supreme Court's decision in *Zadvydas,* establishing the applicability of constitutional protections regarding civil detention to immigration detention.[344] *Zadvydas*' reference to constitutional limits on detention after a finding of removability strongly suggests that the Constitution is properly interpreted to impose limits on immigration detention before a decision regarding removal has even been made.[345]

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340. *See infra* Part IV.E for discussion on human rights compliance problems with the immigration court review process, which also must be resolved for immigration court review to comply with international human rights standards.

341. 538 U.S. 510 (2003).

342. Cleveland, *supra* note 162, at 111 (noting that "judicial construction of constitutional provisions does evolve" and the "persistent presence" of an international rule that diverges from a particular constitutional interpretation should lead to reconsideration of the constitutional rule).

343. *See supra* Part III.B.

344. Zadvydas v. Davis, 533 U.S. 678, 690 (2001).

345. *Id.*; *see* Cole, *In Aid of Removal, supra* note 20, at 1022 ("If aliens finally ordered deported have a liberty interest in being free of physical custody, *a fortiori*

It would also be possible to reverse course after *Demore* by recognizing some of the limitations of the decision on its own terms, particularly when the international human rights standards help to explain the relevance of those limitations. In *Demore*, the Court upheld the mandatory detention statute on the grounds that it allowed for detention for the brief period necessary to facilitate immediate removal.[346] Putting the Court's analysis in the terms of the international human rights standards, detention would be purely for the purpose of imminent removal and so would be non-punitive.[347] However, the Court misinterpreted the mandatory detention scheme in ways that conceal its incompatibility with international human rights law. The mandatory detention scheme in fact imposes detention during proceedings to determine status, which may be lengthy and without a definite outcome. Once this reality becomes apparent, the grounding of the decision in *Demore* falters.

Thus, the *Demore* court expressly based its analysis and decision on an understanding that detention times under the statute were very brief.[348] However, the information now available demonstrates that detention times are much longer than understood by the Court, at least for individuals challenging removal.[349] A number of courts have already concluded that the realities of lengthy detention times require the imposition of constitutional limitations on the mandatory detention statute despite the decision in *Demore*.[350] These

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aliens who have only been *charged* as deportable have at least as strong a liberty interest.").

346. Demore v. Kim, 538 U.S. 510, 513–14, 529 (finding detention for a "brief period" constitutional where the migrant conceded that he was deportable).

347. Even if detention under the scheme was intended to facilitate immediate removal, international human rights law standards would still require a determination that detention was actually necessary to secure removal in the individual circumstances if detention for this purpose exceeded a very limited period.

348. *Demore*, 538 U.S. at 529.

349. *See supra* notes 52–56 and accompanying text.

350. *See* Diop v. ICE, 656 F.3d 221 (3d Cir. 2011) (deciding that the Constitution only authorizes mandatory detention for a reasonable time, after which an individualized custody determination hearing is constitutionally required); Casas-Castrillon v. Dep't of Homeland Sec., 535 F.3d 942 (9th Cir. 2008) (determining that the mandatory detention statute cannot constitutionally authorize prolonged detention, so individual review is required under general detention statute rather than mandatory detention provision); Monestime v. Reilly, 704 F. Supp. 2d 453 (S.D.N.Y.

decisions do not go far enough to impose constitutional limits on detention in compliance with the international standards, though. Rendered in the shadow of *Demore*, they require individualized review only after detention has become prolonged. International standards instead require an individualized determination with judicial review *promptly after detention takes place* and require periodic reviews thereafter if detention continues.[351] The decisions nonetheless demonstrate very real possibilities for reinterpreting constitutional norms to invalidate mandatory detention even after *Demore*.

The *Demore* decision also relied heavily on the understanding that the statute covered individuals who would be deported. Thus, the Court repeatedly referenced mandatory detention of "*deportable* criminal aliens"[352] and placed emphasis on the fact that the named detainee had acknowledged deportability.[353] In concurrence, Justice Kennedy explicitly noted that the "purpose behind the detention is premised upon the alien's deportability."[354]

However, many individuals subject to mandatory detention, such as BM, face complex immigration proceedings in which the final result is far from clear. US law makes available procedures for challenging removability or for seeking permission to remain in the United States even to individuals subject to mandatory detention.[355] Some non-trivial number will not be deported at the end of those proceedings but instead will receive

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2010) (holding that an individualized hearing is constitutionally required despite mandatory detention statute).

351. The decision and review may not be feasible immediately upon apprehension. But they must take place promptly and as a means of determining whether detention is necessary, not whether it has become unduly prolonged.

352. *Demore*, 538 U.S. at 513, 528 (emphasis added).

353. *Id.* at 514, 523; *cf. id.* at 523 n.6 (noting that the individual detainee had applied for relief from deportation and might not be deported without analyzing the impact that this reality had on its characterization of detention as incidental to deportation).

354. *Demore*, 538 U.S. at 531.

355. *See, e.g.*, 8 U.S.C. § 1229a(a)–(c) (2006) (setting out proceedings and burden of proof where deportability is challenged); 8 U.S.C. § 1101(a)(15)(U) (2006 & Supp. V 2011) (providing for visas for individuals who have been victimized and have assisted law enforcement authorities); 8 U.S.C. § 1182(d)(13) (providing a waiver for criminal and other bars to lawful immigration status); 8 C.F.R. § 208.17 (2012) (precluding deportation of individuals who would be subjected to torture even if they have serious criminal convictions).

authorization to remain in the United States.[356] In these circumstances, automatic detention does not directly serve the purpose of removing deportable migrants. Detention must then be deemed punitive unless the government engages in individualized determinations of the need for detention to meet specific goals relating to the pending removal proceedings, such as preventing flight or danger to the community.

Because mandatory detention is instead automatic for entire categories of persons, it fails to meet the international human rights standards. The limitations of the *Demore* decision require reconsideration of its holding regarding the constitutionality of mandatory detention in light of international human rights standards.

### E. *Non-Mandatory Detention*

In a final category, the immigration laws allow for the detention of all other migrants in immigration court proceedings who are not subject to automatic detention under one of the schemes described above. Asylum seekers who are not arriving aliens and who have been placed into proceedings after a successful credible fear interview fall into this category. All other individuals apprehended within the United States and placed into proceedings also fall into this category if not otherwise subject to mandatory detention under the criminal and terrorism grounds.

After apprehension, for individuals not subject to mandatory detention, ICE makes an initial decision to detain or to release with or without payment of bond.[357] The detainee may

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356. *See* EOIR Statistical Yearbook 2011, *supra* note 43, at D2, P2 (noting that favorable results were achieved in twenty-five percent of deportation cases in immigration court in 2011 and even individuals who underwent removal proceedings during incarceration on serious criminal charges obtained relief or termination of proceedings in almost 150 cases during 2011); *Historic Drop in Deportation Orders Continues as Immigration Court Backlog Increases*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Apr. 24, 2012), http://trac.syr.edu/immigration/reports/279 (showing that relief was granted in approximately fifteen percent of all removal proceedings and another approximately fifteen percent of all removal cases resulted in termination of removal proceedings for failure to sustain deportability or other similar reasons).

357. *See* 8 U.S.C. § 1226(a) (2006); 8 C.F.R. § 236.1(c)(8) (2012). ICE has full authority not to detain an individual after apprehension under these provisions. The statute and regulations allowing detention pending removal proceedings are explicitly

seek review by the immigration court of a decision to detain, and the court may order release and may lower any bond set by ICE.[358] An appeal to the Board of Immigration Appeals, the appellate administrative body on immigration issues, is also possible.[359] The available data suggests that a little more than half of all detainees awaiting a decision in their immigration cases are detained discretionarily rather than pursuant to mandatory detention.[360] A rough estimate would put the number of individuals held by ICE in discretionary detention at approximately 75,000 per year.[361]

The non-mandatory detention scheme has received less attention than the mandatory detention provisions, perhaps because individualized determinations and release from

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permissive rather than mandatory. 8 U.S.C. § 1226(a); 8 C.F.R. § 236.1(b) (2012). However, as a general rule, ICE officials detain arrested individuals and place them into removal proceedings. *See* AARTI KOHLI ET AL., THE CHIEF JUSTICE EARL WARREN INST. ON LAW & SOC. POLICY, SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS 7–10 ( 2011) (noting that ICE proceeded to detain sixty two to eighty three percent of apprehended individuals, releasing few on bond, and detention rates were similar for aggravated felony cases and discretionary detention cases); *Detainees Leaving ICE Detention*, *supra* note 44 (finding that, nationally, only ten percent of migrants were released on bond during proceedings).

358. 8 C.F.R. § 1236.1(d) (2012).

359. *Id.* § 1236.1(d)(3).

360. *See supra* note 330 (calculating the approximate portion of individuals subject to mandatory and discretionary detention pending a decision on deportability and status, in reliance on data made available by the government); SCHRIRO STUDY, *supra* note 29, at 6.

361. The immigration courts report that 75,000 individuals sought bond hearings in 2011. *See* EOIR Statistical Yearbook 2011, *supra* note 43, at B7. This number serves as a proxy for those who are detained discretionarily and thus have the ability to seek release at a hearing in immigration court. Some small percentage of those who pursue a bond hearing in immigration court are actually subject to mandatory detention. *See* Julie Dona, *Making Sense of 'Substantially Unlikely': An Empirical Analysis of the* Joseph *Standard in Mandatory Detention Custody Hearings*, IMMIGR., REFUGEE & CITIZENSHIP L. E-J., *available at* http://ssrn.com/abstract=1856758 (finding fewer than 200 cases involving hearings that challenged mandatory detention over a four-year period). On the other hand, some individuals who were detained on a discretionary basis will have obtained release from ICE through payment of a bond without requesting a bond hearing in immigration court and will thus not be reflected in the figures from the immigration court even though ICE detained them at agency discretion for some period. This 75,000 number also represents slightly more than half of the total number of individuals detained pending immigration court proceedings, which is consistent with other government figures. *See supra* notes 43–45, 330 and accompanying text (calculating that discretionary detention accounts for more than half of detention pending proceedings and estimating that more than 125,000 individuals are detained pending proceedings in total).

detention are broadly available under these provisions in theory.[362] However, most migrants eligible for release nonetheless remain in detention for some or all of the length of their removal proceedings.[363] The statutory regime does not comply with the general principle of international human rights law imposing a presumption against detention.[364]

The continued emphasis on detention in this segment of the US detention system follows from a number of incompatibilities between the discretionary detention scheme and the more specific international human rights requirements. As an initial matter, ICE and the immigration courts do not make a determination regarding the least restrictive means for meeting governmental objectives relating to the immigration process before resorting to detention. After initial apprehension, ICE and the immigration courts generally only evaluate the possibility of continued detention or release on bond. They do not systematically consider the possibility of deploying alternatives to detention, other than payment of a bond, to address the potential for flight risk or danger to the community.[365]

ICE could employ formal alternative-to-detention programs, such as community supervision programs, reporting requirements and ankle bracelet technology. However, the agency generally initiates enrollment in these programs for individuals who have already been released from detention.[366] As a result, the programs do not serve as means of allowing release from detention. Instead, when ICE requires participation in such a program, it increases the level of supervision imposed rather than minimizing the restrictions, as required by

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362. *But cf.* Kalhan, *supra* note 25, at 48 (attributing "overdetention" in some part to "bonds that are routinely set too high for detainees to pay").

363. *See Detainees Leaving ICE Detention*, *supra* note 44 (noting that only ten percent of migrants are released on bond); Designed-and-Built Civil Detention Center, *supra* note 254 (describing detention center exclusively for detainees who "do not pose a threat to themselves or others, and are not a flight risk").

364. *See* IACHR REPORT ON DETENTION, *supra* note 83, ¶ 232 ("[D]etention for a protracted period owing to the inability to post bond—which is what happens in most cases—becomes arbitrary").

365. *See* UNLOCKING LIBERTY, *supra* note 17.

366. *Id.* at 32; FREED BUT NOT FREE, *supra* note 242, at 1.

international human rights law.[367] Even then, ICE's decision regarding use of these alternatives usually does not depend on any evaluation of the level of supervision necessary in an individual case, but rather on the financial and physical availability of programs at the time and place when ICE considers their use.[368]

The immigration courts do not consider the possibility of imposing alternatives to detention, other than bond, at all in their review of custody decisions.[369] The immigration courts cannot order release while requiring participation in an alternatives-to-detention program.[370] Only ICE may enroll a migrant in such a program.[371] The immigration courts cannot then conduct a review of ICE detention decisions that includes a meaningful analysis of the possibility for controlling any potential flight risk or danger through mechanisms less restrictive than detention.

Given the insistence in the international human rights standards that the full range of alternatives to detention be considered to ensure the least restrictive means of meeting governmental objectives, the courts should interpret the immigration regulations to require ICE to consider all alternatives to detention before reaching a decision to detain. Similarly, they should interpret the custody review authority of the immigration court to include the ability to order release from detention and imposition of the least restrictive alternative to detention that would address any flight risk or danger to the

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367. *See* Kalhan, *supra* note 25, at 55 (asserting that, if a migrant placed in a formal alternative-to-detention program would otherwise have been released on recognizance or bond, the "alternative" involves a restraint more restrictive than necessary to accomplish governmental goals).

368. UNLOCKING LIBERTY, *supra* note 17, at 31; FREED BUT NOT FREE, *supra* note 242, at 8; DHS CONGRESSIONAL BUDGET JUSTIFICATION, *supra* note 39, at 44; SCHRIRO STUDY, *supra* note 29, at 20.

369. The exclusive focus on bond leads to the problematic rule that individuals who pose a danger to the community may not be released at all. *See* Urena, 25 I. & N. Dec. 140 (B.IA., 2009). If payment of a monetary bond is the only available alternative to detention, it is understandable that the courts would see it as a means of meeting the governmental goal of avoiding flight risk but not of preventing dangerousness. If other alternatives were considered, such as electronic supervision, the result would likely be different.

370. *See* 8 C.F.R. § 1236.1(d) (2012) (allowing immigration court review only to decide detention, release or release on bond).

371. *See* UNLOCKING LIBERTY, *supra* note 17.

community. The regulations must also be read to preclude imposition of an alternative to detention that is more restrictive than release alone once ICE or the court has determined that no flight risk or danger to the community exists. Nothing in the statute or regulations prevents such an interpretation in light of international human rights law.[372]

Apart from the failure to consider true alternatives to detention, the custody determination process in discretionary detention cases suffers from several other problems under international human rights law. The process fails to require the government to justify detention in reference to a legitimate goal as required under the international human rights standards. The case law and regulations require consideration of the appropriate governmental goals of avoiding flight risk or danger to the community during the pendency of removal proceedings.[373] However, the process and consideration of factors relating to flight risk or danger focus exclusively on the determination as to the amount of bond required for release.[374] Thus, bond is not treated as an alternative to detention that may be utilized to address some level of established flight risk. Instead, the process assumes that detention may be ended only through payment of a bond, without requiring the government to establish danger or flight risk in the first place.[375]

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372. *See* 8 U.S.C. § 1226(a) (2006) (allowing for release on bond or parole and mentioning the possibility of conditions); 8 C.F.R. § 236.1(c)(8) (2012) (referencing the statute to describe detention decisions allowed by ICE); 8 C.F.R. § 1236.1(d) (providing for immigration court review of ICE custody decisions). As a practical matter, procedural and contractual arrangements would need to be worked out between ICE and the immigration courts to allow the immigration courts to enroll migrants in formal alternatives to detention programs, because ICE currently dictates when and where such programs are available.

373. *See* Guerra, 24 I. & N. Dec. 37, 40 (B.IA., 2006) (requiring analysis of flight risk or danger to the community and delineating factors to be considered including the migrant's criminal record, record of appearance at hearings, family ties, and fixed address, and manner of entry into the United States); 8 C.F.R. § 1236.1(c)(8).

374. 8 U.S.C. § 1226(a) (2006) (allowing for release on bond or parole); 8 C.F.R. § 236.1(c)(8) (2012) (giving ICE the authority to release migrants on bond); § 1236.1(d) (providing for immigration court review of bond decisions).

375. *See* 8 U.S.C. § 1226(a) (2006); 8 C.F.R. § 1236.1(c)(8),(d) (2012). ICE or a reviewing immigration court may order release without payment of a bond, on recognizance. However, such release is relatively uncommon and its availability does not dilute the focus on bond as the primary means of obtaining release. *See supra* notes 357, 363. The UNHCR Detention Guidelines specifically address the situation where a bond is "systematically required," with any failure to pay bond resulting in continued

Furthermore, release from detention is deemed to be discretionary at all times.[376] In other words, the process does not result in mandatory release where the government fails to make a showing of the necessity of detention in an individual case. In line with the discretionary nature of the process, "the burden is on the alien" to show that he or she "merits" release on bond.[377] The detainee must establish that "he or she does not present a danger to persons or property, is not a threat to the national security, and does not pose a risk of flight."[378] The process inverts the burden of proof required under the international human rights standards. Rather than requiring the government to establish the necessity of detention, the detainee must show an absence of reasons for detention in order to seek release.

The imposition of the burden of proof on the detainee and the broad discretion enjoyed by ICE and the immigration courts in reaching detention decisions often lead to prohibitively high bond amounts, which in effect constitute a decision to detain rather than release. The average bond amount set nationwide is US$6,000, and bonds are often much higher.[379] It is simply impossible for many detained migrants to pay this amount and obtain release, so they remain in detention throughout their removal proceedings.[380] The setting of a bond becomes a means of continued detention, without established necessity, rather than a means of securing appearance at removal hearings after release. Where bond is set at a prohibitively high level, a determination has been made that detention is not necessary to meet governmental objectives; yet the migrant is not released.

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detention. UNHCR finds that such a system provides for detention that is "arbitrary" as insufficiently tailored to individual circumstances. UNHCR Detention Guidelines, *supra* note 78, at Annex A (vi).

376. *See Guerra*, 24 I. & N. Dec. at 39; D-J, 23 I. & N. Dec. 572, 575 (B.I.A., 2003); 8 C.F.R. § 1236.1(c)(8) (2012).

377. *Guerra*, 24 I. & N. Dec. at 40; *see* 8 C.F.R. § 1236.1(c)(8) (2012).

378. *Guerra*, 24 I. & N. Dec. at 38; *see* 8 C.F.R. § 1236.1(c)(8) (2012).

379. IACHR REPORT ON DETENTION, *supra* note 83, ¶ 81 (citing to the US government response to the IACHR Report); NYU SCH. OF L. IMMIGRANT RIGHTS CLINIC, ET AL., INSECURE COMMUNITIES, DEVASTATED FAMILIES: NEW DATA ON IMMIGRATION DETENTION AND DEPORTATION PRACTICES IN NEW YORK CITY 8 (2012) [hereinafter NYU IMMIGRANT RIGHTS CLINIC DATA] (noting that high bonds often require individuals to remain in detention throughout proceedings and providing a recent example of a high bond amount of US$100,000).

380. *See* IACHR REPORT ON DETENTION, *supra* note 83, ¶ 81; NYU IMMIGRANT RIGHTS CLINIC DATA, *supra* note 379 at 8.

The bond procedures thus also fail to ensure that detention is for the shortest period possible.

The detention determination process should be modified, in light of the international human standards. The government must bear the burden of proof of showing the necessity of detention in the proceedings. Where necessity is not shown, the immigration court must order a migrant's release if ICE has chosen not to do so. Discretion to detain or to set bond levels must be correspondingly limited to ensure adequate protection of the right to liberty.

The courts could interpret the current statute in accordance with the international human rights standards to achieve these changes. The statute does not designate who carries the burden of proof for detention decisions,[381] although it does suggest that release from detention is permissive rather than mandatory and that detention decisions fall within the government's discretion.[382] The statute could nonetheless be read to recalibrate the burden of proof and cabin discretion to detain or release where the government has failed to make a showing of the need for detention. Changes in the regulations and case law would necessarily follow changes in the interpretation of the statute.[383]

A final difficulty remains with the current process for detention determinations. There is no provision for automatic periodic review of detention as required under international law. After ICE makes an initial detention decision, ICE may change custody conditions or order release, but faces no requirement to periodically consider such possibilities or to consider the continued need for detention on its own initiative.[384] Furthermore, the regulations generally limit a detainee's ability to challenge detention to a single request for immigration court review of the detention decision.[385] After an

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381. 8 U.S.C. § 1226(a) (2006).

382. *Id.* (providing that a migrant "may be released on such conditions as the [government] deems appropriate").

383. The regulations and caselaw imposing the burden of proof on the migrant to justify release would necessarily be found to be incompatible with a proper interpretation of the statute. *See* 8 C.F.R. § 236.1(d) (2012); 8 C.F.R. 1236.1(d) (2012); *Guerra*, 24 I. & N. Dec. at 40.

384. *See* 8 C.F.R. § 236.1(d) (2012).

385. 8 C.F.R. § 1003.19(e) (2012).

initial challenge, a detainee may only invoke renewed review by the immigration court through a written request "showing that [the detainee's] circumstances have changed materially."[386] The law thus includes no procedure for evaluating the continued necessity of detention, based on the length of detention or the circumstances of the case, and imposes no maximum time limit for detention. The detention decision review procedure should be strengthened by imposing requirements based on the international human rights standards. Specifically, the regulation imposing restrictions on renewed challenges to detention decisions should be deemed inapplicable, and automatic review of detention by ICE with recourse to the immigration court should be required.[387]

Changes in the non-mandatory detention process in line with the international human rights standards are made relatively easily under new interpretations of the current statutory and regulatory structure. Yet, they would lead to significant improvements in protections of the rights to liberty and due process in the immigration detention context.

## *CONCLUSION*

The time to align the US immigration detention regime with international human rights standards has come. Reform of the immigration detention system in light of international human rights law will not do violence to basic US constitutional principles. To the contrary, invocation of international human rights law will strengthen the strict constitutional limitations on civil detention already applied in the United States and hasten the application of those restraints in the immigration detention context. The international human rights standards are desperately needed to bring reason in this contentious area and to ensure protection of the fundamental rights to liberty and due process.

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386. *Id.*

387. As part of a settlement agreement in litigation regarding the Hutto detention facility in Taylor, Texas, ICE was required to engage in periodic automatic reviews of detention and to provide reasons where it continued detention. *See* Settlement Agreement § 5, In re Hutto Family Detention Center, No. A-07-CA-164-SS, (W.D. Tx. Aug. 26, 2007). While the system did not work perfectly, it demonstrated the feasibility of periodic review of detention and provided a model.