Civil Immigration Detention: When Civil Detention Turns Carceral

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ABSTRACT

Since the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), there has been an extreme rise in the number of immigrants taken into U.S. Immigration and Customs Enforcement (ICE) custody. In Fiscal Year (FY) 2016, ICE took over 352,000 immigrants into custody pending removal proceedings or removal after a final order. The growing number of immigrant detainees led ICE to begin contracting with private, for-profit companies to house and care for ICE detainees. As of the end of 2016, 65 percent of all ICE detainees were housed in privately operated facilities.

The treatment immigrant detainees face in privately operated detention facilities shows a clear lack of administrative oversight and guidance. While ICE-operated detention facilities are bound to follow all ICE procedures concerning the treatment of detainees, many privately operated detention facilities are not contractually required to follow all ICE medical and oversight standards. Privately operated detention centers consistently fail to provide detainees' physical and mental health examinations within a reasonable time following their detention. Even when examinations are conducted in a reasonable time, medical personnel frequently misdiagnose or fail to diagnose acute and chronic health conditions.

This Comment discusses the development of the current immigration law regime and how the regime has led to the use of privately operated immigrant detention centers. Additionally, this Comment explores the inadequate medical treatment received by many ICE detainees and how this improper care has led to a substantial number of immigrant deaths. Finally, this Comment recommends that three steps be taken to reform the current immigration laws: first, legislative action

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should be taken to reduce the types of individuals subject to mandatory detention; second, ICE should discontinue its use of privately operated detention facilities; and third, ICE should properly allocate its resources to adequately care for those remaining in ICE custody.

Table of Contents

I. INTRODUCTION

On June 10, 2011, Pablo Gracida-Conte was transferred to the Immigration and Customs Enforcement (ICE)[1] Eloy Detention Center in Eloy, Arizona after being arrested for a misdemeanor[2] and found in violation of Section 212(a)(6)(A)(i) of the Immigration and Nationality Act[3] (INA).[4] Only July 19th, Mr. Gracida-Conte visited the detention

1. "U.S. Immigration and Customs Enforcement (ICE) enforces federal laws governing border control, customs, trade and immigration to promote homeland security and public safety." *Who We Are*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, https://www.ice.gov/about (last visited Mar. 15, 2018).

2. Mr. Gracida-Conte was arrested for selling alcohol to a minor, a misdemeanor in violation of California Penal Code Section 25658. *See* DEP'T OF HOMELAND SEC., DEATH INVESTIGATION FOR PABLO GRACIDA-CONTE 2 (2012), https://www.documentcloud.org/documents/ %202695513-Gracida-Conte-Pablo.html.

3. *See* Immigration and Nationality Act § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i) (2012) (requiring an "alien present in the United States without being

center's medical clinic for vomiting and profuse sweating and was treated for dehydration.[5] Nearly three months later, Mr. Gracida-Conte was again examined for complaints of nausea, vomiting, upper abdominal pain, and bloating.[6] Within a few days, Mr. Gracida-Conte reported a ten out of ten pain level, burning abdominal pain, and daily vomiting.[7] The medical staff scheduled a laboratory test and recommended a bland diet.[8]

On October 22nd, Mr. Gracida-Conte returned to the medical clinic complaining of shortness of breath, increased pain levels, nausea when eating, pain while lying down, and difficulty sleeping.[9] Later that day, he refused to receive his medication.[10] Two days later, on October 24th, a nurse examined Mr. Gracida-Conte after complaints of abdominal pain after taking his medications, insomnia, poor appetite, and persistent weakness and dizziness.[11] Mr. Gracida-Conte reported that he had not eaten for the preceding two months and could not recall his last meal.[12] He also disclosed that he had a heart attack in 2000.[13] Despite the fact that Mr. Gracida-Conte's condition should have been considered urgent, a nurse practitioner scheduled Mr. Gracida-Conte for a follow-up visit the next day and stated that he would be referred to cardiology if he remained in ICE custody.[14]

On October 25th, the following day, Mr. Gracida-Conte was unable to complete a sentence without stopping to breathe.[15] He had a second abnormal EKG and the detention center medical staff referred him to a regional hospital emergency room.[16] Emergency room personnel diagnosed Mr. Gracida-Conte with severe cardiomyopathy[17] and possible pneumonia.[18] Mr. Gracida-Conte was transferred to a second hospital after a doctor noted that he was ailing from complex cardiac issues and

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admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, [be] inadmissible").

4. *See* DEP'T OF HOMELAND SEC., *supra* note 2, at 2–3.
5. *See id.* at 4–5.
6. *See id.* at 6.
7. *See id.* at 6–7.
8. *See id.* at 6.
9. *See id.* at 8.
10. *See id.*
11. *See id.* at 8–9.
12. *See id.* at 8.
13. *See id.* at 9.
14. *See* DEP'T OF HOMELAND SEC., *supra* note 2, at 9.
15. *See id.*
16. *See id.*
17. "[C]ardiomyopathy is a chronic disease of the heart muscle . . . that causes it to become abnormally enlarged, thickened, and/or stiffened." *Id.*
18. *See id.*

would benefit from a higher level of care.[19] Within five days of entering hospital care, Mr. Gracida-Conte died of cardiomyopathy.[20] He became the tenth person since October 2003 to die while incarcerated at the Eloy Detention Center, operated by CoreCivic.[21]

The ICE Office of Detention Oversight (ODO)[22] conducted an investigation into Mr. Gracida-Conte's death and concluded that Mr. Gracida-Conte was not provided medical care in accordance with ICE standards after repeated attempts to receive medical attention.[23] In an interview with Creative Corrections' ("CC")[24] Chief Medical Officer during the investigation, the Chief Medical Officer concluded that Mr. Gracida-Conte's death might have been prevented had the providers administered appropriate medical treatment in a timely manner.[25] During the investigation, an interviewed doctor stated that Mr. Gracida-Conte's condition on October 24th should have been considered urgent and he should have been referred to a cardiologist at that time.[26]

The United States immigration system is in a severe crisis concerning the detention of immigrants facing the possibility of deportation.[27] In Fiscal Year (FY) 2016, ICE detained an average of

19. *See id.* at 9–10.

20. *See id.* at 10.

21. AM. CIVIL LIBERTIES UNION, FATAL NEGLECT: HOW ICE IGNORES DEATHS IN DETENTION 10 (2016), https://www.aclu.org/sites/default/files/field_document/fatal_neglect_acludwnnijc.pdf. CoreCivic, formerly the Corrections Corporation of America, is a private company describing itself as "[a] national leader in high-quality corrections and detention management" that is "guided by a philosophy that upholds correctional best practices and national accreditation standards." *CoreCivic Safety*, CORECIVIC, http://www.corecivic.com (last visited Apr. 2, 2018); *see also* Devlin Barrett, *Private-Prison Firm CCA to Rename Itself CoreCivic*, WALL ST. J. (Oct. 28, 2016), https://www.wsj.com/articles/private-prison-firm-cca-to-rename-itself-corecivic-1477666800.

22. The ODO, a component of the ICE Office of Professional Responsibility (OPR), "oversees ICE detention functions, ensuring that facilities adhere to the agency's detention standards." *Office of Professional Responsibility (OPR)*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, https://www.ice.gov/leadership/opr (last visited Mar. 15, 2018).

23. *See* DEP'T OF HOMELAND SEC., *supra* note 2, at 12 (finding that Mr. Gracida-Conte "did not receive appropriate or medically acceptable medical care while confined at [Eloy Detention Center]"). The death review further found that Mr. Gracida-Conte complained about his health to Eloy medical staff, however, medical staff "failed to provide him with timely and efficient health care." *Id.* at 13.

24. CC is a "national management and consulting firm contracted by ICE to provide subject matter expertise in detention management with an emphasis on health care." *Id.* at 11.

25. *See id.* at 12.

26. *See id.* at 9. All names included in the death report have been redacted and the identity of this doctor is unclear.

27. *See, e.g.*, Garrett Epps, *How the Supreme Court is Expanding the Immigrant Detention System*, ATLANTIC (Mar. 9, 2018), https://www.theatlantic.com/politics/archive/2018/03/jennings-v-rodriguez/555224/; Christina Fialho, *Immigration Detention in the United States Denies Basic Human Freedoms*, L.A. TIMES (Mar. 28, 2018),

34,376 immigrants each day,[28] and for FY 2018 ICE's target average daily population significantly increased to 51,379 immigrants.[29] The conditions faced by immigrant detainees show a lack of administrative oversight and guidance, necessitating a legislative and administrative overhaul of the civil immigration detention system.[30]

As evidenced by Mr. Gracida-Conte and many other immigrant detainees' accounts,[31] civil immigration detainees are treated similarly to criminals serving time.[32] Mr. Gracida-Conte's story demonstrates how medical treatment within immigration detention facilities routinely fails to meet adequate physical and mental health treatment standards.[33]

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http://www.latimes.com/socal/daily-pilot/opinion/tn-dpt-me-commentary-immigration-20180328-story.html; Sylvester Owino, *I Spent a Decade in Immigration Detention*, HILL (Mar. 7, 2018), http://thehill.com/opinion/immigration/377162-i-spent-a-decade-in-immigration-detention.

28. DEP'T OF HOMELAND SEC., FISCAL YEAR 2018 ICE BUDGET OVERVIEW AND CONGRESSIONAL JUSTIFICATION 14 (2017), https://www.dhs.gov/sites/default/files/publications/ICE%20FY18%20Budget.pdf [hereinafter DEP'T OF HOMELAND SEC., 2018 ICE CONGRESSIONAL BUDGET JUSTIFICATION]. As of March 15, 2018, the Department of Homeland Security (DHS) had not published the 2017 average daily population of immigrants in detention facilities. However, at the end of FY 2017, 58,766 immigrants were currently in custody of the Department of Justice (DOJ). *See* DEP'T OF HOMELAND SEC., ALIEN INCARCERATION REPORT FISCAL YEAR 2017, QUARTER 4, at 2 (2017), https://www.dhs.gov/sites/default/files/publications/Alien_Incarceration_Report_OIS_FY17_Q4_2.pdf.

29. DEP'T OF HOMELAND SEC., 2018 ICE CONGRESSIONAL BUDGET JUSTIFICATION, *supra* note 28, at 14.

30. *See infra* Section II.C for a discussion of the poor conditions faced by detained immigrants. *See generally* PENN STATE LAW CTR. FOR IMMIGRANTS' RIGHTS CLINIC, IMPRISONED JUSTICE: INSIDE TWO GEORGIA IMMIGRANT DETENTION CENTERS (May 2017), https://pennstatelaw.psu.edu/sites/default/files/pictures/Clinics/Immigrants-Rights/Imprisoned_Justice_Report.pdf (recounting the conditions of two detention centers housing immigrants in Georgia and making recommendations to cure the problems faced by detainees).

31. *See, e.g.*, AM. CIVIL LIBERTIES UNION, *supra* note 21, at 7–21. "This report examines egregious violations of U.S. Immigration and Customs Enforcement's (ICE) own medical care standards that played a significant role in eight in-custody deaths from 2010 to 2012." *Id.* at 3.

32. *See* Rodriguez v. Robbins, 804 F.3d 1060, 1072–73 (9th Cir. 2015), *rev'd*, 138 S. Ct. 830 (2018) ("Prolonged detention imposes severe hardship on class members and their families. Civil immigration detainees are treated much like criminals serving time . . . .").

33. *See generally* AM. CIVIL LIBERTIES UNION, *supra* note 21. Although this Comment focuses only on the discussion of inadequate medical care in immigration detention, an additional concern with immigration detention is that detainees are typically housed in shared jail cells with no privacy and limited access to larger spaces or the outdoors. *See Rodriguez*, 804 F.3d at 1073. This confinement limits the ability to meet with legal counsel, further frustrating the challenges of navigating complex immigration law and proceedings. *See id.* For a discussion of immigrant detainees' access to legal counsel and advice, see PENN STATE LAW CTR. FOR IMMIGRANTS' RIGHTS CLINIC, *supra* note 30, at 28–30, 41–42; Mark Noferi, *Cascading Constitutional Deprivation: The Right*

Many immigrants detained during removal proceedings have criminal records and are considered dangerous to the community, thereby justifying Congress's clear intent to detain and deport such individuals.[34] However, the group of individuals who are detained and awaiting deportation proceedings also includes non-citizens who are not dangerous, have strong family and community ties, are not flight risks, and may also have other strong defenses to deportation.[35] The detention of individuals who are not dangerous and do not constitute flight risks occurs despite the fact that there are alternatives to detention already used by ICE that are ideal for such immigrants.[36] The detention of such individuals has resulted in ICE detaining so many individuals that it is unable to properly care for each detainee.[37]

Part II of this Comment discusses the development of the current immigration law regime and how it has led to the use of privately operated immigrant detention centers.[38] Part III explores the inadequate medical treatment received by many ICE detainees and how this improper care has led to a substantial number of immigrant deaths.[39] Part IV then reviews recent immigration enforcement and detention law before recommending that three steps be taken to reform current immigration law: first, legislative action should be taken to reduce the types of individuals subject to mandatory detention; second, ICE should discontinue its use of privately operated detention facilities; and third, ICE should properly allocate its resources to adequately care for those remaining in ICE custody.[40]

II. BACKGROUND

For FY 2018, the Department of Homeland Security (DHS) projected that its target average daily population of detainees would be 51,379, a significant increase from the total average daily population of 34,376 in FY 2016.[41] To meet this target, Congress appropriated

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to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings, 18 MICH. J. RACE & L. 63, 76–80 (2012).

34. *See* Lora v. Shanahan, 804 F.3d 601, 605 (2d Cir. 2015), *vacated*, 84 U.S.L.W. 3562 (2018) (explaining that "Congress was quite clear that it wanted" dangerous individuals or those with no ties to the community to be detained pending deportation).

35. *See id.*

36. *See* OFFICE OF INSPECTOR GEN., DEP'T OF HOMELAND SEC., U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT ALTERNATIVES TO DETENTION (REVISED) 2 (2015), https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-22_Feb15.pdf.

37. *See infra* Sections II.B–.C.

38. *See infra* Part II.

39. *See infra* Part III.

40. *See infra* Part IV.

41. *See* DEP'T OF HOMELAND SEC., 2018 ICE CONGRESSIONAL BUDGET JUSTIFICATION, *supra* note 28, at 14.

$3,471,806,000 for enforcement, detention, and removal operations.[42] Due to the consistently high average daily population target, DHS has turned to privately operated detention centers to house immigrants and is looking for even more detention facilities following the increase in detention in 2017.[43] This massive quota of daily ICE detainees has impacted the quality of life for each detainee in ICE custody.[44] To fully understand the problems associated with current immigration detention policy, it is important to briefly review the background of immigration law in the United States.

A. The Expansive Reach of United States Immigration Law

Civil immigrant detention can be divided into three broad categories: (1) immigrants deemed inadmissible at arrival, (2) immigrants awaiting removal proceedings, and (3) immigrants for whom a deportation order has been issued but who have yet to be deported.[45] There are several immigration statutes governing the detention of such immigrants. First, INA Section 235(b) subjects immigrants seeking admission at the border to mandatory detention pending removal proceedings unless they are "clearly and beyond a doubt entitled to be admitted."[46] Second, INA Section 236(a) authorizes discretionary[47] detention of an alien pending a decision on whether he or she is to be removed,[48] while INA Section 236(c) requires mandatory pre-removal-order detention without bond of immigrants convicted of certain crimes.[49] Finally, INA Section 241(a)(1) authorizes mandatory detention during a 90-day period after an immigrant is ordered removed, and those not removed within this timeframe must be released on supervision.[50]

42. *See* Consolidated Appropriations Act, Pub. L. No. 115-31, 131 Stat. 135, 407 (2017).

43. *See infra* Section II.B; *see also* Laurel Wamsley, *As It Makes More Arrests, ICE Looks for More Detention Centers*, NAT'L PUB. RADIO, Oct. 26, 2017, https://www.npr.org/sections/thetwo-way/2017/10/26/560257834/as-it-makes-more-arrests-ice-looks-for-more-detention-centers.

44. *See infra* Section II.C.

45. *See* Adam Klein & Benjamin Whittes, *Preventative Detention in American Theory and Practice*, 2 HARV. NAT'L SEC. J. 85, 141–44 (2011).

46. 8 U.S.C. § 1225(b) (2012). This mandatory detention provision applies to all immigrants entering the United States without proper documentation and includes asylum seekers. *See* ALISON SISKIN, CONG. RESEARCH SERV., RL32369, IMMIGRATION-RELATED DETENTION: CURRENT LEGISLATIVE ISSUES 5–9 (2012).

47. The statute officially gives discretion to the Attorney General; however, the Secretary of the DHS typically uses this discretion. *See* SISKIN, *supra* note 46, at 6.

48. *See* 8 U.S.C. § 1226(a).

49. *See id.* § 1226(c). This list of crimes includes crimes of moral turpitude, aggravated felonies, high-speed flight, controlled substance violations, certain firearm offenses, and crimes of domestic violence. *See* SISKIN, *supra* note 46, at 5 & n.33.

50. *See* 8 U.S.C. § 1231(a)(1).

However, Section 241(a)(1) also authorizes the government to continuously detain certain immigrants beyond the 90-day removal period.[51]

These provisions were passed in 1996 as part of a group of harsh and inflexible deportation laws that substantially transformed civil immigration detention.[52] Prior to this legislative reform in the 1990s, individuals taken into custody and charged with being deportable could petition an immigration judge for release on bond.[53] Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) in an attempt to strengthen and streamline the process of removing deportable criminal immigrants after the "wholesale failure by the INS[54] to deal with increasing rates of criminal activity of aliens."[55] Congress believed that a major cause of the increase in immigrant criminal activity was the INS's failure to detain deportable criminal immigrants during their removal proceedings.[56]

IIRIRA also expanded the definition of criminal alien under INA Section 236(c) to include a wide range of offenses.[57] Prior to the enactment of IIRIRA, administrative precedent had established a presumption of release that was rebuttable if the INS demonstrated at a bond hearing that the individual posed a flight risk or a danger to the community.[58] However, IIRIRA eliminated bond hearings for non-citizen offenders facing deportation under INA Section 236(c), regardless of the

51. *See id.* § 1231(a)(6). This provision was originally interpreted as permitting indefinite detention when removal was not reasonably foreseeable, but the Supreme Court in *Zadvydas v. Davis* found that it only permits detention for up to six months when removal is not reasonably foreseeable. *See* Zadvydas v. Davis, 533 U.S. 768, 701 (2001); SISKIN, *supra* note 46, at 4–5.

52. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended at 8 U.S.C. §§ 1226, 1231); *see also* Margaret H. Taylor, Demore v. Kim*: Judicial Deference to Congressional Folly*, *in* IMMIGRATION STORIES 343, 348–49 (David A. Martin & Peter H. Shuck eds., 2005); Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 44–45 (2010).

53. Taylor, *supra* note 52, at 346.

54. The Immigration and Naturalization Service (INS) was an agency of the U.S. DOJ from 1933 to 2003 charged with administering the Immigration and Nationality Act. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., OVERVIEW OF INS HISTORY 7–11 (2012), https://www.uscis.gov/sites/default/files/USCIS/History%20and%20Genealogy/Our%20History/INS%20History/INSHistory.pdf. In 2003, the INS was abolished and its functions were placed under the authority of three agencies: the U.S. Citizenship and Immigration Services (USCIS), ICE, and Customs and Border Patrol (CPB). *See id.* at 11.

55. Demore v. Kim, 538 U.S. 510, 518–19 (2003).

56. *See id.*

57. *See* 8 U.S.C. § 1226(c) (2012). INA Section 236(c) authorizes the detention of immigrants who have committed certain crimes, including any aggravated felony and any two "crimes involving moral turpitude." *See Demore*, 538 U.S. at 513 n.1.

58. *See* Taylor, *supra* note 52, at 346.

seriousness of the underlying crime, the risk of flight, or the potential danger to the community.[59]

The passage of IIRIRA combined with a rise in immigration in the United States resulted in an extreme rise in the number of immigrants taken into custody pending removal proceedings.[60] By 2009, ICE was imprisoning over 370,000 immigrants each year, and of the immigrants in detention on September 1, 2009, an estimated 66 percent were held pursuant to mandatory detention.[61] Of the immigrants subject to mandatory detention, only 11 percent had committed violent crimes and the majority of the population was characterized as "low custody, or having a low propensity for violence."[62] As discussed below, IIRIRA's expansive reach transformed immigration detention and the conditions faced by detainees.[63]

B. Privatization of ICE-Owned Detention Facilities

Due to the current 51,379 average daily population target set by DHS for FY 2018, DHS has turned to the use of detention centers operated by private, for-profit corporations that are estimated to be responsible for 65 percent of all ICE immigration detention beds.[64] CoreCivic contracted with ICE to operate over 10,000 beds in 2016,[65] while GEO Group, Inc. ("GEO"), another private company, contracted to operate over 7,180 beds in 2013.[66] ICE, which pays these private companies to house detainees, accounted for 28 percent of CoreCivic's

59. *See* 8 U.S.C. § 1226(c).

60. *See* Lora v. Shanahan, 804 F.3d 601, 604 (2d. Cir. 2015), *vacated*, 84 U.S.L.W. 3562 (2018) (explaining that the expanded definition of criminal aliens and the simultaneous rise in immigration resulted in "an enormous increase" in the number of immigrants taken into custody pending removal) (vacated and remanded for further proceedings in light of the Supreme Court's decision in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018)).

61. *See* DORA SCHRIRO, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION & CUSTOMS ENF'T, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 2 (2009), https://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf.

62. *Id.*

63. *See infra* Sections II.B–.C.

64. *See* HOMELAND SEC. ADVISORY COUNCIL, REPORT OF THE SUBCOMMITTEE ON PRIVATIZED IMMIGRATION DETENTION FACILITIES 6 (2016), https://www.dhs.gov/sites/default/files/publications/DHS%20HSAC%20PIDF%20Final%20Report.pdf.

65. *See* CoreCivic, Inc., Annual Report (Form 10-K) 16–20 (Feb. 23, 2017). This number was determined by adding up the facility capacity for each CoreCivic-owned-and-managed facility utilized by ICE, found on pages 16 through 20 of CoreCivic's Annual 10-K filed with the SEC for the year 2016.

66. *See* NAT'L IMMIGRATION FORUM, THE MATH OF IMMIGRATION DETENTION: RUNAWAY COSTS FOR IMMIGRATION DETENTION DO NOT ADD UP TO SENSIBLE POLICIES 7 (2013), http://immigrationforum.org/wp-content/uploads/2014/10/Math-of-Immigation-Detention-August-2013-FINAL.pdf.

total revenue, equal to $511.8 million, for FY 2016.[67] In the same year, GEO reported total annual revenues of $2.179 billion, of which 18 percent was attributed to its partnership with ICE.[68]

The use of private facilities to house ICE detainees continues to increase monthly.[69] Private, for-profit companies operating detention facilities have an incentive, as publicly traded companies, to keep costs low, which negatively impacts the medical care provided to detainees.[70]

On August 26, 2016, in response to a Department of Justice announcement that directed the Bureau of Prisons (BOP) to reduce and eventually end its use of privately operated prisons, former Secretary of Homeland Security Jeh Johnson tasked the Homeland Security Advisory Council (HSAC) with reviewing ICE's use of privately operated detention facilities and evaluating whether the practice should continue.[71] After a two month review of ICE policies, the Subcommittee on Privatized Immigration Detention Facilities ("Subcommittee") concluded in December 2016 that the use of private, for-profit detention facilities was likely to continue "with improved and expanded ICE oversight," due to "[f]iscal considerations, combined with the need for realistic capacity to handle sudden increases in detention."[72]

The Subcommittee reasoned that BOP, an entirely separate entity of the federal government, had the ability to end its use of privately operated detention centers because only 15 percent of BOP detainees were housed in privately operated facilities, while 90 percent of ICE detainees were housed in privately or locally operated detention facilities.[73] The declining BOP prison population provided a "clear opportunity" for the BOP to end the use of privately operated facilities.[74]

The situation before ICE was in sharp contrast to that of the BOP: from September to October 2016, ICE's detention capacity, which

67. *See* CoreCivic, Inc., *supra* note 65, at 36.

68. *See* GEO GROUP, INC., 2016 ANNUAL REPORT 1 (2016), http://www.snl.com/Interactive/newlookandfeel/4144107/2016-GEO-Annual-Report.pdf.

69. *See, e.g.*, John Burnett, *Big Money as Private Immigrant Jails Boom*, NAT'L PUB. RADIO (Nov. 21, 2017), https://www.npr.org/2017/11/21/565318778/big-money-as-private-immigrant-jails-boom; Jessica Kwong, *ICE Seeks 5 More Detention Centers as Immigration Arrests Rise*, NEWSWEEK (Oct. 26, 2017), http://www.newsweek.com/ice-seeks-5-more-detention-centers-immigration-arrests-rise-694296; Wamsley, *supra* note 43.

70. *See* Kate Linthicum, *Citing Neglect, Law Makers Urge Halt to Migrant Detention Center Expansion*, L.A. TIMES (July 14, 2015), http://www.latimes.com/local/lanow/la-me-ln-adelanto-immigrant-detention-20150713-story.html.

71. *See* HOMELAND SEC. ADVISORY COUNCIL, *supra* note 64, at 1.

72. *Id.* at 2; *see also* Chico Harlan, *In Policy Review, Homeland Security Panel Sends Mixed Message About Future of Private Immigrant Detention*, WASH. POST (Dec. 1, 2016), http://wapo.st/2lJZiXp.

73. *See* HOMELAND SEC. ADVISORY COUNCIL, *supra* note 64, at 7.

74. *See id.*

typically ranges from 31,000 to 34,000 detainees, rose to 41,000 detainees.[75] In the end, the Subcommittee believed that ICE's capacity to handle surges in detainee populations, which result from the decisions of policymakers to prioritize the removal of certain classes of immigrants over others, could not "reasonably be maintained solely through the use of facilities staffed and operated by federal officers."[76]

C. The Fatal Conditions in Immigration Detention

The conditions in civil detention facilities closely relate to carceral conditions in penal detention facilities, contradicting the well-established principle that immigration detention is civil in nature.[77] ICE's website states that its Enforcement and Removal Operations (ERO) component "manages and oversees the nation's civil immigration detention system."[78] Further, the United States Supreme Court has stated that a "deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry."[79] Despite the classification of immigration removal proceedings and detention as being civil, immigration detention facilities are notorious for their carceral conditions.[80]

1. General Health Requirements for ICE Detention

The ICE Health Service Corps (IHSC) provides direct care to approximately 13,500 ICE detainees, including medical, dental, and mental health care.[81] IHSC provides medical case management and oversight for an additional 15,000 detainees housed at non-IHSC staffed detention facilities.[82] According to the medical standards required in all ICE-operated detention facilities, commonly referred to as Performance-

75. *See id.*

76. *See id.*

77. *See* Zadvydas v. Davis, 533 U.S. 678, 690 (2001) ("The proceedings at issue here are civil, not criminal, and we assume that they are nonpunitive in purpose and effect. There is no sufficiently strong special justification here for indefinite civil detention—at least as administered under this statute.").

78. *Immigration Enforcement, Detention Management*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, https://www.ice.gov/detention-management (last updated Jan. 3, 2018).

79. Immigration & Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984).

80. *See generally* AM. CIVIL LIBERTIES UNION, *supra* note 21; SCHRIRO, *supra* note 61; *US: Deaths in Immigration Detention*, HUM. RTS. WATCH (July 7, 2016, 12:00 AM), https://www.hrw.org/news/2016/07/07/us-deaths-immigration-detention.

81. *See ICE Health Service Corps*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, https://www.ice.gov/ice-health-service-corps (last updated Jan. 3, 2018).

82. *See id.*

Based National Detention Standards 2011 (PBNDS 2011),[83] each detainee must receive timely and efficient medical care.[84] Specifically, every detention facility must provide each detainee with an initial medical, dental, and mental health screening within the first 12 hours of the detainee's detention.[85] Each detainee must then receive a comprehensive health assessment by a qualified, licensed health care professional no later than 14 days after entering into ICE custody.[86]

Despite the mandated medical care requirements established by PBNDS 2011, immigration detention centers consistently fail to provide detainees with physical and mental health examinations within a reasonable time following their detention.[87] Even when examinations *are* conducted in a reasonable time, medical personnel frequently misdiagnose or fail to diagnose acute and chronic health conditions.[88] Mr. Gracida-Conte's story[89] is just one of many examples of immigrant detention medical staff failing to properly examine and treat serious and

83. ICE established a National Detention Standard in 2000, when ICE was formed, which provided "conditions of confinement, program operations and expectations within the agency's detention system." *See 2000 Detention Operations Manual*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, https://www.ice.gov/detention-standards/2000 (last updated July 12, 2017). These standards have since been revised and updated and are now known as PBNDS 2011. *See generally* U.S. IMMIGRATION & CUSTOMS ENF'T, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 2011 (2016), https://www.ice.gov/doclib/detention-standards/2011/pbnds2011r2016.pdf [hereinafter U.S. IMMIGRATION & CUSTOMS ENF'T, 2011 OPERATIONS MANUAL].

84. *See* U.S. IMMIGRATION & CUSTOMS ENF'T, 2011 OPERATIONS MANUAL, *supra* note 83, at 257–58.

85. *See id.* at 258.

86. *See id.*

87. *See* Stacey A. Tovino, *The Grapes of Wrath: On the Health of Immigration Detainees*, 57 B.C. L. REV. 167, 174 (2016). A report filed by DHS Office of Inspector General (OIG) on December 11, 2017 stated that after inspections of five detention facilities, OIG "identified problems that undermine the protection of detainees' rights, their humane treatment, and the provision of a safe and healthy environment." OFFICE OF INSPECTOR GEN., DEP'T OF HOMELAND SEC., CONCERNS ABOUT ICE DETAINEE TREATMENT AND CARE AT DETENTION FACILITIES (2017), https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-32-Dec17.pdf.

88. *See* AM. CIVIL LIBERTIES UNION, *supra* note 21, at 6. *Fatal Neglect* reflects the study of 24 ICE ODO detainee death review documents. *See id.* at 3. The study was conducted by the ACLU, Detention Watch Network (DWN), and National Immigrant Justice Center (NIJC) after receiving the ODO death reviews through a Freedom of Information Act (FOIA) request. *Id. Fatal Neglect* discusses eight cases identified by ICE investigators as non-compliant with ICE detention standards for medical care. *Id.*

89. *See supra* notes 1–26 and accompanying text.

sometimes fatal illnesses.[90] This problem is especially evident in privately operated detention centers.[91]

2. Failure to Provide Adequate Medical Care

Even when medical conditions are properly diagnosed, a detainee's transfer to a different facility can lead to a diagnosed medical condition being left untreated due to administrative oversight in forwarding medical records.[92] Raul Ernesto Morales-Ramos is one such detainee affected by inadequate medical care while in ICE custody.[93] Medical staff at the Theo Lacy Detention Facility saw Mr. Morales-Ramos for gastrointestinal (GI) symptoms on April 10, 2013.[94] At this visit, the medical staff recommended that Mr. Morales-Ramos see a GI specialist for a follow-up visit.[95] Over a year later, the recommended consultation still had not occurred.[96]

Mr. Morales-Ramos was subsequently transferred to the privately operated Adelanto Detention Facility in May 2014 with no documentation of his GI symptoms.[97] After ten months of repeated sick calls for body aches, weight loss, joint pain, and diarrhea, a doctor examined Mr. Morales-Ramos in March 2015 and discovered the "largest [abdominal mass] she ha[d] ever seen in her practice."[98] During a colonoscopy on April 3, 2015, Mr. Morales-Ramos began to experience abdominal bleeding after the doctor attempted to remove a

90. *See, e.g.*, AM. CIVIL LIBERTIES UNION, *supra* note 21, at 7–8 (recounting the story of Evalin-Ali Mandza, a 46-year-old ICE detainee who died of a heart attack after an officer waited 26 minutes to notify a doctor that Mr. Mandza was suffering from a heart attack and a nurse waited 30 additional minutes to place a 911 call).

91. *See infra* Sections II.C.2–.3.

92. *See generally* U.S. IMMIGRATION & CUSTOMS ENF'T, DETAINEE DEATH REVIEW—RAUL ERNESTO MORALES-RAMOS, https://www.ice.gov/doclib/foia/reports/ddr-morales.pdf (last visited Apr. 7, 2018) [hereinafter U.S. IMMIGRATION & CUSTOMS ENF'T, MORALES-RAMOS DEATH REPORT]. Between October 1, 2003 and June 5, 2017, 172 immigrant detainees died while in ICE custody. *See generally* U.S. IMMIGRATION & CUSTOMS ENF'T, LIST OF DEATHS IN ICE CUSTODY, https://www.ice.gov/doclib/foia/reports/detaineedeaths-2003-2017.pdf (last visited Mar. 16, 2018). In FY 2017, 12 immigrants died in ICE custody, and as of February 1, 2018, two immigrants had died in ICE custody in FY 2018. *See* Daniella Silva, *Cuban Detainee, 33, Dies in Custody of U.S. Immigration Authorities*, NBC NEWS (Feb. 1, 2018), https://www.nbcnews.com/news/us-news/cuban-detainee-33-dies-ice-custody-n843531.

93. *See generally* U.S. IMMIGRATION & CUSTOMS ENF'T, MORALES-RAMOS DEATH REPORT, *supra* note 92.

94. *See id.* at 8–9.

95. *Id.* at 9.

96. *See id.* at 16.

97. *See id.* at 17.

98. *Id.* at 17–26.

rectal mass.[99] Mr. Morales-Ramos died three days later after a surgical attempt to stop his bleeding.[100]

In a study of 18 death reviews conducted by the Human Rights Watch,[101] two independent experts noted that it appeared Mr. Morales-Ramos began suffering from symptoms of cancer in 2013, at least two years before his death, but that his symptoms went undiagnosed and untreated until one month before he died.[102] Earlier action on the part of the Theo Lacy and Adelanto Detention Facilities' medical staff could have saved Mr. Morales-Ramos's life.[103] However, administrative oversight and poor documentation led to Mr. Morales-Ramos's condition being ignored.[104]

Mr. Morales-Ramos is not the only detainee impacted by inadequate medical care at the Adelanto Detention Center. In recent years, Adelanto has been at the center of protests against the use of private detention facilities at the immigration detention level and the federal penal level.[105] In one well-known case, Gerardo Corrales, an immigrant detainee at Adelanto and 19-year old paraplegic using a wheelchair, was arrested for the possession of Xanax before being placed in ICE custody in February 2015.[106] Mr. Corrales was denied sufficient catheter bags by the Adelanto facility, which forced him to wash his catheter bags in the sink and reuse them.[107] This led to a serious urinary tract infection that ultimately

99. *Id.* at 29–30.

100. *Id.* at 32.

101. The Human Rights Watch and two medical reviewers analyzed the findings of 18 ICE death reviews for deaths occurring between May 2012 and June 2015. *See US: Deaths in Immigration Detention*, *supra* note 80. The study's analysis relies upon the facts and conclusions included in the ODO's report of each investigation. *See id.* This study is just one of many examinations into available ICE death reports, which reveal ICE's continued failure to provide adequate medical care, causing many unnecessary detainee deaths. *See, e.g.*, AM. CIVIL LIBERTIES UNION, *supra* note 21, at 3–4.

102. *See US: Deaths in Immigration Detention*, *supra* note 80.

103. *See id.* ("'Had Mr. Morales' gastrointestinal symptoms been evaluated much sooner as was clinically indicated, it is possible that the malignancy from which Mr. Morales died, might have been caught at a time when it was still treatable,' Dr. Keller said.").

104. *See* U.S. IMMIGRATION & CUSTOMS ENF'T, MORALES-RAMOS DEATH REPORT, *supra* note 92, at 16 ("Additionally, nursing staff stated that prior to implementation of the [Electronic Medical Record system in 2014], they often assessed detainees without reviewing their medical record prior to or during those assessments. As a result, [Mr. Morales-Ramos], and ostensibly others', complaints and symptoms were not identified or documented as recurrent.").

105. *See* Linthicum, *supra* note 70 ("The letter [written by two dozen members of Congress to the DOJ] calls on the Justice Department to launch an investigation into [Adelanto] and for ICE to stop its expansion there . . . .").

106. *See* CHRISTINA M. FIALHO, AFFIDAVIT REGARDING GERARDO CORRALES 1 (2015), http://chu.house.gov/sites/chu.house.gov/files/documents/Gerardo_Corrales_Affidavit_Fialho.pdf.

107. *See id.*

required hospitalization on March 12, 2015.[108] Doctors at the hospital noted that Mr. Corrales was suffering from kidney failure that could have potentially led to his death.[109] Adelanto's complete failure to provide sanitary medical treatment to Mr. Corrales is additional evidence of privately operated detention facilities' failures to provide adequate medical care, resulting in the endangerment of detainees' lives.

3. Failure to Provide Adequate Mental Health Care

In addition to inadequate physical health treatment, ICE detention facilities also fail to provide adequate mental health treatment for detainees.[110] In fact, suicide is the most common cause of death for an immigrant detainee due to substandard mental health and medical care.[111] For example, staff at the Eloy Detention Center failed to conduct an initial physical and mental examination of Jose Lopez-Gregorio until he had been detained for 21 days.[112] After being placed on suicide watch on September 24, 2006, the facility ignored Mr. Lopez's sick call request on September 27th.[113] On September 29, Mr. Lopez hanged himself with a bed sheet.[114] There have been at least five suicides at the Eloy Detention Center alone since 2003;[115] however, Eloy is not the only ICE detention facility plagued by suicide.[116] The cases discussed throughout this Section, reflecting the need for accountability and higher standards of medical and mental health care, will be discussed further below.[117]

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108. *See id.*

109. *See id.*; *see also* Christina Fialho, *Words Beyond Walls: Free the Adelanto 4*, HUFFINGTON POST (June 30, 2015), http://www.huffingtonpost.com/christinafialho/words-beyond-walls-free-t_b_7607236.html.

110. *See* Tovino, *supra* note 87, at 181.

111. *See, eg.*, *id.*

112. Memorandum from Det. & Deportation Officer, Det. Standards Compliance Unit, U.S. Immigration & Customs Enf't, to John P. Torres, Dir., Office of Det. & Removal Operations 1–2 (Oct. 11, 2006), https://bsl.app.box.com/s/7n451fvcsmas6jjy3jhu8ubuonhpyrwz.

113. *See id.*

114. *See* Dana Priest and Amy Goldstein, *Suicides Point to Gaps in Treatment*, WASH. POST, May 13, 2008, at A1; Perla Trevizo, *Report: Inspections of Immigrant Detention Centers Flawed*, TUCSON.COM (Oct. 21, 2015), http://tucson.com/news/report-inspections-of-immigrant-detention-centers-flawed/article_2b93b5b0-784e-11e5-8408-ef17773098a9.html (noting Mr. Lopez's death on September 29, 2006 due to asphyxia).

115. As of July 28, 2015, five individuals had committed suicide at the Eloy Detention Center. *See* Megan Jula and Daniel Gonzalez, *Eloy Detention Center: Why So Many Suicides?*, AZCENTRAL (July 28, 2015), https://www.azcentral.com/story/news/arizona/investigations/2015/07/28/eloy-detention-center-immigrant-suicides/30760545/.

116. *See* Paloma Esquivel, *'We Don't Feel OK Here': Detainee Deaths, Suicide Attempts and Hunger Strikes Plague California Immigration Facility*, L.A. TIMES (Aug. 8, 2017), http://www.latimes.com/local/lanow/la-me-ln-adelanto-detention-20170808-story.html (describing detainees' carceral experiences at the Adelanto Detention Facility).

117. *See infra* Part III.

III. ANALYSIS

The extensive reach of current immigration legislation has led to the abuse and unnecessary confinement of many immigrants facing deportation.[118] While civil detention is necessary for those deportable immigrants who pose a threat to the safety of society or who could flee prior to deportation proceedings, current legislation overreaches because it mandates the detention of a substantial percentage of deportable immigrants who are not dangerous and have extensive familial ties to the United States, indicating that they will not attempt to flee while awaiting deportation proceedings.[119] The monstrous civil immigration detention institution, detaining 352,882 individuals in FY 2016,[120] is in desperate need of legislative reform followed by the administrative implementation of improved living standards in *all* immigration detention facilities, regardless of their designation as ICE-operated or privately operated.

Before living conditions for immigrant detainees can improve, Congress must take action to reduce the number of immigrants taken into ICE custody and placed in civil detention until their deportation hearings and determinations. Once Congress tailors immigration legislation to reduce the number of immigrant detainees, DHS and ICE can then allocate their resources to properly and humanely care for each immigrant in custody. A reduction in the total number of immigrant detainees will allow ICE to stop the creation and renewal of new contracts with private, for-profit corporations in the housing and supervision of immigrant detainees.[121] The phase-out of privately operated detention facilities will then lead to the improvement of detention conditions for immigrant detainees because ICE will be able to use its funds to provide direct medical care, through IHSC, for all ICE detainees.

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118. *See supra* Section II.A.

119. *See supra* notes 52–63 and accompanying text.

120. *See DHS Releases End of Fiscal Year 2016 Statistics*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Dec. 30, 2016), https://www.ice.gov/news/releases/dhs-releases-end-fiscal-year-2016-statistics.

121. While 65 percent of the ICE detainee population is housed in facilities operated by private, for-profit contractors, 25 percent of the population is housed in facilities operated by county jails or other local or state government entities. *See* HOMELAND SEC. ADVISORY COUNCIL, *supra* note 64, at 6. The Subcommittee recommended that the phase-out of privately operated detention facilities should not cause an increased use of county jail detention because of the difficulty in getting county facilities to ensure acceptable detention standards. *See id.* at 7–8. This Comment agrees with the position of the Subcommittee because the use of county jail facilities is just as, if not more, "problematic" for ICE detainees as the use of privately operated facilities. *See id.* at 7.

A. Attempted Reforms and their Successes and Failures

A variety of immigration detention reforms has been implemented since President Obama's commitment in 2009 to reform the current immigration system.[122] However, these reforms have failed to fully address the problems related to the enforcement of immigration law and the standard of medical care for detainees.

1. Enforcement Priority Reforms

Most recently, in November 2014, former Secretary Johnson announced measures to strengthen and unify DHS's immigration enforcement priorities by establishing three tiers of enforcement categories.[123] The categories concentrated resources on the arrest, detention, and removal of individuals identified as posing a threat to national security, public safety, or border security.[124] Johnson's prioritized enforcement method has since been superseded by President Trump's January 25, 2017 executive orders regarding border security, immigration enforcement, and enhancing public safety in the United States.[125]

President Trump's executive orders, announced only five days into his new administration, vastly expanded the enforcement priorities to include "detain[ing] individuals apprehended on suspicion of violating Federal or State law, including Federal immigration law, pending further proceedings regarding those violations."[126] With these executive orders, President Trump put into action his promise to apprehend, detain, and deport any eligible immigrant.[127] President Trump's policy for DHS to

122. *See* Maria Mendoza, Comment, *A System in Need of Repair: The Inhumane Treatment of Detainees in the U.S. Immigration Detention System*, 41 N.C. J. INT'L L. 405, 444–47 (2016); *Detention Reform*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, https://www.ice.gov/detention-reform#tab1 (last updated Jan. 3, 2018).

123. Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf't, R. Gil Kerlikowske, Comm'r, U.S. Customs & Border Prot., Leon Rodriguez, Dir., U.S. Citizenship & Immigration Servs., & Alan D. Bersin, Acting Assistant Sec'y for Policy 3 (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

124. OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., ANNUAL FLOW REPORT 1 (2016), https://www.dhs.gov/sites/default/files/publications/DHS%20Immigration%20Enforcement%202016.pdf.

125. *See* Exec. Order No. 13,767, 82 Fed. Reg. 8,793 (Jan. 25, 2017); Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 25, 2017).

126. Exec. Order No. 13,767, 82 Fed. Reg. at 8,793.

127. *See generally id.*; Exec. Order No. 13,768, 82 Fed. Reg. 8,799. At the end of February 2017, Secretary John Kelly issued a memorandum implementing President Trump's new policies concerning immigration. *See generally* Memorandum from John Kelly, Sec'y, U.S. Dep't of Homeland Sec., to Kevin McAleenan, Acting Comm'r, U.S.

take all appropriate action and to "establish contracts to construct, operate, or control facilities to detain aliens at or near the land border with Mexico"[128] has required ICE to turn more to private contracts due to the significant price differences between ICE-operated and privately operated facilities.[129] However, ICE should be focusing its efforts on only detaining those who pose a danger to society or are deemed a flight risk in order to use all available resources to properly care for its detainees.

2. Health Care Reforms

In August 2009, the ICE Office of Detention Policy and Planning (ODPP) and the ODO were created "to focus on greater federal oversight, to provide specific attention to detainee care, and to design a civil detention system."[130] The ODPP is charged with designing a detention system that meets the needs of ICE's detainees, including their medical needs.[131] When a detainee dies while in ICE custody, the agency conducts investigations into each death.[132] The investigations are run by "a centralized team of ICE personnel and subject-matter experts who interview local personnel and review medical and custody records to evaluate the medical care related to the death."[133]

Additionally, the implementation of centralized healthcare under the IHSC has brought improvements to health care in ICE detention facilities.[134] However, challenges in detainee health care still exist and it

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Customs & Border Prot., Thomas D. Homan, Acting Dir., U.S. Immigration & Customs Enf't, Lori Scialabba, Acting Dir., U.S. Citizenship & Immigration Servs., Joseph B. Maher, Acting Gen. Counsel, Dimple Shah, Acting Assistant Sec'y for Int'l Affairs, and Chip Fulghum, Acting Undersec'y for Mgmt. (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf.

128. *See* Exec. Order No. 13,767, 82 Fed. Reg at 8,794.

129. *See* Burnett, *supra* note 69.

130. *Detention Reform*, *supra* note 122.

131. *Overview, Office of Detention Policy and Planning (ODPP)*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, https://www.ice.gov/leadership/odpp (last updated Jan. 3, 2018). ICE's website describes ODPP's duties as follows:

> The Office of Detention Policy and Planning (ODPP) leads U.S. Immigration and Customs Enforcement's (ICE) efforts to overhaul the current immigration detention system, an effort which requires extensive collaboration and consultation with both internal and external stakeholders.
>
> ODPP is charged with designing a detention system that meets the unique needs of ICE's detained population.

Id.

132. AM. CIVIL LIBERTIES UNION, *supra* note 21, at 3.

133. *Id.*

134. *See* HOMELAND SEC. ADVISORY COUNCIL, *supra* note 64, at 11.

is important that ICE take the necessary steps to improve conditions.[135] Under the ICE-run detention model, ICE leadership "can respond more quickly and effectively to developing problems or sudden incidents."[136] Because IHSC health care falls directly under the accountability of ICE officials, medical staff at ICE-operated facilities is more responsive to issues.[137] While privately operated facilities face yearly inspections by the ERO, failure on the part of ICE officials to follow up on the inspection results leads privately operated facilities to continue substandard medical care practices.[138]

B. A Solution to the Current Immigration Crisis

Three steps should be taken to reform the current immigration laws to ultimately improve the care provided to immigrant detainees. First, legislative action should be taken to reduce the types of individuals subject to mandatory detention.[139] Second, ICE should discontinue its use of privately operated detention facilities.[140] Finally, ICE should properly allocate its resources to adequately care for those remaining in ICE custody.[141]

1. Step One: Reduce the Categories of Individuals Subject to Mandatory Detention Through Legislative Reform

Essential to the first step in reforming the current immigration system is (1) changing the type of crimes covered by the mandatory detention statute to include only dangerous crimes or crimes of moral turpitude, and (2) allowing immigrants to have individualized bond hearings to determine if they actually pose a security threat or a flight risk. The current policy for mandatory detention should be refined to require the detention of only those immigrants convicted of violent offenses and crimes of moral turpitude,[142] who therefore pose a threat to

135. *See id.* at 10 (noting that "[a]lthough there are definitely still problems and challenges in health care at IHSC-staffed facilities, most persons with whom [the Subcommittee] talked indicated that the quality of care in such facilities is better than under a contractor-supplied system").

136. *Id.* at 9.

137. *See id.* at 10.

138. *See id.* at 15.

139. *See infra* Section III.B.1.

140. *See infra* Section III.B.2.

141. *See infra* Section III.B.3.

142. For example, this category of offenders could include those convicted of what the Uniform Crime Reporting (UCR) classifies as Part I offenses: murder and nonnegligent homicide, rape, robbery, aggravated assault, burglary, motor vehicle theft, larceny-theft, and arson. *See UCR Offense Definitions*, UNIFORM CRIME REPORTING

society, and those who are deemed to be a flight risk. A report by Dr. Schriro, the former Director of the ODPP, found that only an estimated 11 percent of the criminal immigrants[143] subjected to mandatory detention in 2009 had been convicted of violent crimes.[144] An immigrant subject to mandatory detention is held in detention facilities without the opportunity to have an individualized determination made of the necessity of detaining him or her.[145] Detention is mandatory for these immigrants regardless of the severity of their crime or their potential threat to society.[146] Mandatory detention standards should be amended so that only violent offenders and those that pose a flight risk are subject to mandatory detention.

Furthermore, when an immigrant is brought into ICE custody through mandatory detention, the individual should automatically receive a bond hearing and an individualized determination should be made concerning his or her threat to society and potential for flight. The introduction of mandatory bond hearings and individual determinations is a change that must be made by Congress following the Supreme Court's recent decision in *Jennings v. Rodriquez*.[147] In *Jennings*, a plurality of Justices held that detained immigrants do not have the statutory right to periodic bond hearings during the detention because nothing in the mandatory detention statutes suggested a six-month time limitation on the length of detention.[148] The Court also held that the canon of constitutional avoidance is inapplicable to help find that detainees have a right to periodic bond hearings during the course of their detention.[149] As evidenced by the Supreme Court's decision in *Jennings*, without further guidance from Congress that immigrant detainees subject to mandatory detention should be granted bond hearings, this critical step cannot be completed. Therefore, Congress needs to take action to permit these individuals to receive automatic bond

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STAT., https://www.ucrdatatool.gov/offenses.cfm (last updated Jan. 26, 2017). This is not an exhaustive list, but is an example of offenses constituting violent crimes.

143. Criminal immigrants refers to those convicted of felonies. SCHRIRO, *supra* note 61, at 2.

144. *Id.* While the FY 2017 ICE ERO Report states that 73.7 percent of the immigrants arrested were individuals with criminal convictions, a vast majority of these criminal convictions included traffic offenses (including DUIs), drug offenses, and immigration offenses. *See* IMMIGRATION & CUSTOMS ENF'T, FISCAL YEAR 2017 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 4 (2017), https://www.ice.gov/sites/default/files/documents/Report/2017/iceEndOfYearFY2017.pdf.

145. *See supra* notes 52–59 and accompanying text.

146. *See supra* notes 45–59 and accompanying text.

147. Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

148. *Id.* at 834.

149. *Id.* at 842–47.

hearings and individual determinations concerning their potential threat to society.

2. Step Two: Phase Out the Use of Privately Operated Detention Facilities

The second step in reforming the current sprawling immigration detention system is to phase out the use of privately operated detention facilities. The ICE-operated detention facility model (also known as the ICE SPC model) is generally more expensive than privately operated facilities or county jails.[150] ICE estimates that it costs an average of $184.35 per day per person in an ICE SPC, while the average cost is $144.23 in a privately contracted detention facility.[151] ICE claims that the cost difference between the two methods pressured Congress, through appropriations, to reduce the use of ICE-operated facilities, causing the closure of many of these facilities over the past eight years.[152] Despite the increased cost in ICE-operated facilities, however, a reduction in the ICE detainee population, which would be feasible following step one of my proposed solution,[153] would allow ICE to allocate more appropriated funds to the care of each individual detainee.

Of significant importance to this proposed immigration reform is the fact that discontinuing contracting with private, for-profit companies will automatically result in safer and more humane immigration detention. Under the current congressional appropriations and target bed quota of over 51,000 beds per day, ICE does not have the resources to provide direct medical, dental, and mental health care to even a majority of those in ICE custody.[154] A reduction in the number of detainees and the number of private facilities, whose contracts routinely fail to include mandatory application of PBNDS 2011, would allow IHSC to directly administer medical attention to most, if not all, ICE detainees.

3. Immediate Change for the Interim

ICE should implement certain policies immediately to alleviate poor conditions while legislative reform is underway. Since the process to implement this Comment's proposed reform could take many years to complete, it is important that ICE take action to begin changing the

150. *See* HOMELAND SEC. ADVISORY COUNCIL, *supra* note 64, at 9.
151. *See id.*
152. *See id.*
153. *See supra* Section III.B.1.
154. *See* HOMELAND SEC. ADVISORY COUNCIL, *supra* note 64, at 10 (noting that IHSC provides direct care to only 13,500 detainees and could not increase that number without expanded appropriations from Congress).

current oversight rules of privately operated facilities because the immigration crisis is likely to continue to worsen throughout President Trump's administration.

The Subcommittee noted that the current inspection system used with privately operated facilities leaves too much reliance on the private facility operators to implement any standard of care changes or address any deficiencies found during the annual ERO inspection.[155] ICE must ensure (1) that its contracts with private corporations include procedures to correct identified problems and (2) that there is strict follow-up review by ERO after the conclusion of an inspection.[156]

Additionally, ICE should implement the use of "ICE wardens" in any remaining privately operated facilities.[157] These individuals would be relatively high-ranking ERO officers and would be accountable for early response to problems and fixing any deficient conditions in privately operated facilities.[158] The use of ICE wardens would eliminate current accountability issues in privately operated facilities because accountability currently resides with the contractor, not ICE.[159] While it is unlikely that the immigration detention system will automatically move away from privately operated facility use, these are just a few changes that would lead to improvements in the standard of care received by detainees in privately operated facilities.

IV. CONCLUSION

The first key step in moving toward a detention system that truly is just and humane is legislative reform of the relevant immigration law to reduce the number of immigrants mandatorily detained. Following a reduction in the number of individuals detained by ICE, the phase-out of the use of privately operated detention centers can begin. Both steps will lead to the availability of funds that can be used to provide IHSC staff to most, if not all, detention facilities. The accountability that comes with IHSC staff will not only improve living conditions for current ICE detainees, but will also save the lives of detainees with conditions like Mr. Gracida-Conte and Mr. Morales-Ramos.[160]

Civil immigrant detention "is a weighty exercise of governmental power and must be done with care, vigilance, and protections for the rights and health of the detainees."[161] The process to reform the

155. *See id.* at 13–16.
156. *See id.* at 15.
157. *See id.* at 16.
158. *See id.*
159. *See id.*
160. *See supra* notes 1–26, 93–104 and accompanying text.
161. *See* HOMELAND SEC. ADVISORY COUNCIL, *supra* note 64, at 5.

immigration detention system is one that will be very difficult, costly, and time consuming. However, it must be done to properly protect the lives of the detained immigrant population in the United States.

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