



NAVAL POSTGRADUATE SCHOOL

MONTEREY, CALIFORNIA

THESIS

**TO DETAIN OR NOT TO DETAIN: THE LEGAL, FINANCIAL,
AND HUMANITARIAN RAMIFICATIONS OF DETAINING
ALL MIGRANTS WITHOUT A LAWFUL STATUS**

by

Valerie A. Davis

December 2021

Co-Advisors:

Erik J. Dahl

Lynda A. Peters (contractor)

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WITHOUT A LAWFUL STATUS**

Valerie A. Davis
Supervisory Immigration Officer, U.S. Citizenship and Immigration Services,
Department of Homeland Security
BS, University of Houston, 2004
JD, Widener University, 2011

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requirements for the degree of

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**NAVAL POSTGRADUATE SCHOOL
December 2021**

Approved by: Erik J. Dahl
Co-Advisor

Lynda A. Peters
Co-Advisor

Erik J. Dahl
Associate Professor, Department of National Security Affairs

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ABSTRACT

This thesis analyzes the implications—legal, financial, and humanitarian—arising from immigrant detention in the United States. The methods used are as follows: legal analysis, both international and domestic; cost analysis of Immigration and Customs Enforcement (ICE) facilities and private prisons; and comparative analysis of actual immigrant detention conditions to international norms and ICE’s self-imposed standards. This thesis finds the following: immigrant detention is legal in the United States with limited constitutional protections; the financial costs for immigrant detention are difficult to estimate accurately; U.S. immigrant detention practices appear to violate international norms; and ICE’s self-imposed standards are hard to meet. This thesis concludes policies that more clearly define the requirements for immigrant detention in the United States should be limited in use and scope. Furthermore, the U.S. government should either implement new laws and regulations or modify existing ones to establish a more consistent standard regarding which migrants without a lawful status should be detained pending criminal or administrative proceedings.

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LIST OF ACRONYMS AND ABBREVIATIONS

ACLU	American Civil Liberties Union
AILA	American Immigration Lawyers Association
BOP	Bureau of Prisons
CAT	Convention against Torture
CBP	Customs and Border Protection
CC	CoreCivic
DHS	Department of Homeland Security
DOJ	Department of Justice
EO	Executive Order
FOIA	Freedom of Information Act
FRC	family residential center
FY	fiscal year
GAO	Government Accountability Office
GEO	GEO Group, Inc.
IACHR	Inter-American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICE	Immigration and Customs Enforcement
INA	Immigration and Nationality Act
NDS	National Detention Standards
OIG	Office of Inspector General
OPR	Office of Professional Responsibility
PBNDS	Performance-Based National Detention Standards
SMU	Special Management Unit
UAC	unaccompanied alien child
UDHR	Universal Declaration on Human Rights
UN	United Nations
USMS	U.S. Marshals Service

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EXECUTIVE SUMMARY

Over the past several decades, the U.S. government has issued various policies outlining how the Department of Justice would prosecute and detain migrants who have illegally crossed the border or attempted to do so. Researchers have separately analyzed the legality, costs, and humanitarian challenges of immigrant detention. However, no one has conducted a composite analysis of the legal, financial, and humanitarian effects on the U.S. government of its immigrant detention policies.¹ This thesis analyzes these implications and recommends possible areas of improvement for the United States in the realm of immigrant detention policies. In particular, it asks the following question: Considering the legal, financial, and humanitarian implications of immigrant detention, under what conditions should the United States implement policies to detain migrants who have either entered or attempted to enter the United States unlawfully?

The legal concerns surrounding immigrant detention stem from the U.S. government's use of a mechanism akin to criminal punishment, in the form of restricting migrants' liberty, to correct a violation of federal administrative law. This mechanism also circumvents U.S. legal obligations under international law—created and championed by the United States and codified in U.S. law—by continuing to detain victims of violence, trafficking, and crime.² Over the years, U.S. immigration law has evolved to incorporate aspects of criminal law, such as mandatory detention for specified crimes as implemented through the Immigration Reform and Control Act of 1986.³ Restricting a migrant's liberty for an administrative function like border control blurs the line between criminal and administrative law.

¹ Juan Rocha, "Operation Streamline and the Criminal Justice System," *Arizona Attorney* 40, (November 2011).

² Inter-American Commission on Human Rights, *Report on Immigration in the United States: Detention and Due Process* (Washington, DC: Inter-American Commission on Human Rights, 2010), 16-19, <https://www.oas.org/en/iachr/migrants/docs/pdf/migrants2011.pdf>.

³ Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986).

In addition to the legal implications, the financial implications of immigrant detention are critical to understanding its overall effect on the U.S. government. Based on numbers of migrants detained over time, it is apparent that the United States struggles to control the flow of migrants into the country.⁴ The Department of Homeland Security (DHS) currently has record apprehension numbers, which calls into question the accuracy of the immigrant detention estimates made for budgetary purposes.⁵ Not only do the numbers of detainees fluctuate, but the cost of immigrant detention constantly fluctuates as well.⁶ Finally, the mission of “securing our borders” constitutes nearly 23 percent of DHS’s overall budget of approximately \$92 billion for fiscal year 2020.⁷ Since all of these costs also fluctuate from year to year, the financial implications of immigrant detention are inconsistent, reported in fragments, and difficult to anticipate.

Finally, there are humanitarian implications stemming from immigrant detention. Although U.S. immigrant detention centers have detention standards in place to ensure humane treatment of detainees, some scholars question the ability of these facilities to provide non-jail-like conditions for individuals detained because of an administrative process.⁸ In addition, the U.S. government’s continued detention of migrants who are victims of violence, trafficking, and crime is frowned upon by the international

⁴ Customs and Border Protection, “United States Border Patrol Southwest Border Sectors: Total Illegal Alien Apprehensions by Fiscal Year 1960-2019” (Washington, DC: Customs and Border Protection, 2019), https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Fiscal%20Year%20Southwest%20Border%20Sector%20Apprehensions%20%28FY%201960%20-%20FY%202019%29_0.pdf. This table does not depict numbers for FY20 and FY21 due to the additional Title 42 authority during the COVID-19 global pandemic.

⁵ “Southwest Land Border Encounters (by Component),” Customs and Border Protection, accessed July 20, 2021, <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters-by-component>.

⁶ Department of Homeland Security, *U.S. Immigration and Customs Enforcement Budget Overview: Fiscal Year 2020 Congressional Justification* (Washington, DC: Department of Homeland Security, 2019), 114, https://www.dhs.gov/sites/default/files/publications/19_0318_MGMT_CBJ-Immigration-Customs-Enforcement_0.pdf.

⁷ Department of Homeland Security, *FY 2020 Budget in Brief* (Washington, DC: Department of Homeland Security, 2019), 7, https://www.dhs.gov/sites/default/files/publications/fy_2020_dhs_bib.pdf.

⁸ “ICE Detention Standards,” Immigration and Customs Enforcement, November 9, 2021, <https://www.ice.gov/factsheets/facilities-pbnds>.

community.⁹ Therefore, the U.S. government's immigrant detention policies give rise to significant humanitarian concerns.

The research design for this thesis is a compilation of various methods of analysis to assess each pillar—legal, financial, and humanitarian—of immigrant detention. That is, each chapter uses a different analytical method based on the pillar analyzed therein:

- Legal: legal analysis of the basis for administrative detention and applicable constitutional protections;
- Financial: cost analysis of immigrant detention and profitability of private prisons;
- Humanitarian: comparative analysis of the U.S. detention standards against international human right standards and internal immigrant detention standards.

Based on the conclusions of each analysis, the thesis then consolidates these determinations to assess under what circumstances the United States should continue to implement policies that determine which migrants to detain.

The legal analysis determined that immigrant detention—criminal-*like* but civil in nature and thus purportedly more humane than criminal detention—is legal, which was to be expected given the U.S. government's continued use of immigrant detention as a deterrent to illegal immigration. However, migrants without lawful status have some lesser constitutional protections under the Fourth, Fifth, and Sixth Amendments depending on the prosecution path taken by the U.S. government. Given the lesser constitutional protections provided to migrants in immigrant detention—and given that the U.S. government's recognition of these protections depends on the immigrant status of the migrants—the government makes it unclear which legal path a migrant will traverse. Thus, the United States should consider the legal effects of the policy when deciding which policies to enact.

⁹ Inter-American Commission on Human Rights, *Immigration in the United States*, 16, 21, 96, 122, 129.

The complexity of using immigrant detention policies is compounded in light of its costs. Migrant flows are uncontrollable, and this thesis determined that the estimates Immigration and Customs Enforcement (ICE) uses to project the money needed for immigrant detention, which it predicts two years in advance, are inaccurate. The inaccuracy of the cost estimates leads to a congressional budget that fluctuates or a need for the U.S. government to pull money from other agencies mid-fiscal year, which in turn leaves those agencies to determine how to fully operate under a reduced budget. Thus, from a financial perspective, the U.S. government can and should control the costs of immigrant detention by expanding the use of enforcement discretion or more clearly defining the circumstances under which a migrant *must be* detained by immigration officials.

Adding to the legal and financial complications of immigrant detention is the U.S. government's treatment of those from other countries who do not violate criminal laws in the United States. The humanitarian analysis shows that human rights experts view the United States as violating international human rights laws when it detains migrants. This perspective is further supported by the possibility that the U.S. government is directly violating multiple sections of the Universal Declaration on Human Rights. However, the more pointed finding of this analysis is that ICE has set standards for immigrant detention but repeatedly failed to meet them in various ways, including those related to the security of migrants and detention facilities, the health and medical care of migrants, and even basic sanitary and nutritional standards. These lapses in the humanitarian treatment of migrants in immigrant detention show why the United States should be trying to reduce its immigrant detainee population.

Although there is no standard for weighting these three pillars in an analysis, the U.S. government should at a minimum consider how each of them influences the perception and cost of using immigrant detention in deciding when to enact an executive policy and what the policy should require. While it is difficult to pinpoint specific circumstances under which an immigration enforcement policy that calls for additional mandatory detention should be used, government should limit its use of immigration enforcement policies to situations of dire need rather than political motivation or a desire

to give Congress a “chance to fix the system.”¹⁰ Research shows that the number of migrants detained fluctuates noticeably when the political party in the White House changes, and the influxes of migrants stem from fluctuating immigration enforcement policies that align with the political views of the sitting president.¹¹ The legal, financial, and humanitarian costs are thus exacerbated by the ebb and flow of policies of various administrations.

Overall, immigration enforcement policies should be limited to circumstances under which government officials can more accurately predict the costs or provide more flexibility for ICE to use discretion and allow for more limited detention when there is an unexpected surge in migrants crossing the U.S. border without lawful status. The following recommendations should be explored by the Legislative and Executive Branches of the U.S. government to determine how to minimize the negative implications that arise from detaining migrants, sometimes for extended periods.

First, in the short term, the United States should return to its historical use of immigrant detention as the exception, not the standard. Furthermore, the U.S. government—all branches—should limit the use of immigration enforcement policies solely to circumstances under which there is a dire need to mitigate the free flow of migrants against the appearance of forgoing human rights and the other legal implications arising from immigrant detention. Although limiting the use of immigrant detention to just those who fall within the mandatory detention guidelines of 8 U.S.C. § 1226(c) would result in more people being released on bond, committing to these actions would provide additional protections to migrants and ensure that the United States is affording them protections relevant to their individual situations.

Second, the U.S. Congress should pass laws that more clearly define who is subject to mandatory detention while also providing clearer parameters on when ICE and other U.S. government entities can exercise discretion to release migrants pending further

¹⁰ Barack Obama, “Remarks by the President on Immigration,” Obama White House Archives, June 15, 2012, <https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration>.

¹¹ Customs and Border Protection, “Total Illegal Alien Apprehensions by Fiscal Year.”

judicial actions. Using the legislative process to create and define immigrant detention laws allows for uniform protection of due process rights for all migrants entering and in the United States. This would also minimize the politicizing of immigration through multiple executive policies. Moreover, several sections of Title 8 of the *U.S. Code* could be modified: § 1225(b)(1)(B)(iii)(IV), § 1226(a), and § 1226(a)(2).¹² Given that statutory language regarding immigrant detention already exists, modification or further definition of the parameters would not necessitate complete immigration law overhaul, which has been part of ongoing debates for several presidential election cycles.¹³

Third, if it is accomplished more easily than modifying existing laws, the U.S. government could create a new section of law—either part of Title 8 or another more appropriate title of the *U.S. Code*. This new section of law would clearly define how the U.S. government will respond to humanitarian crises at the borders of the United States. This section of law could define the parameters of a humanitarian crisis, the classifications of migrants involved in humanitarian crises, when a migrant would be discretionarily released, and when a migrant would be detained. This section of law could also specify how the United States will accommodate detained migrants and how to finance the increased costs. Finally, this section of law could define which agency or department within the U.S. government leads the housing or detainment efforts of these migrants.

Fourth, although executive policies are lawful and U.S. presidents for decades have used them to mold their individual administrations, presidents should stop using executive policies as they relate to the restriction of liberty of people, including migrants, within U.S. borders. This change would minimize the appearance that they are trying to legislate from the Oval Office and give the legislative power back to the legislature. One way that the United States could limit the use of executive policies is to enact legislation that limits the executive branch’s authority as defined in the U.S. Constitution, Article II. By creating a defined limitation—for example, *the president shall not issue executive policies that relate to any action covered by constitutional protections in the Bill of Rights*—the executive

¹² 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (2018); 8 U.S.C. § 1226(a) (2018); 8 U.S.C. § 1226(a)(2) (2018).

¹³ Claire Felter, Danielle Renwick, and Amelia Cheatham, “The U.S. Immigration Debate,” Council on Foreign Relations, August 31, 2021, <https://www.cfr.org/backgrounder/us-immigration-debate-0>.

branch's executive power would be limited to actions that truly involve the administration of the U.S. government. This limiting clause in turn would prevent actions that teeter on the line of breaching constitutional protections, such as restricting liberty without full due process.

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I. INTRODUCTION

In 2017, Attorney General Jeff Sessions instituted an immigration detention policy that he referred to as “zero tolerance.”¹ This policy instructed immigration law enforcement to detain, sometimes indefinitely, any migrants without legal status caught inside the United States, whether first-time or repeat offenders, until deportation or until a judge granted some form of immigration relief.² This policy applied to, among others, trafficked migrants, women, children, and migrants fearful of the violence in their home country.³ While some executive policies related to immigration are controversial as this one was, each administration has the express right, as outlined in the Constitution, to set executive policies that determine how finite resources, such as money and man hours, are spent.⁴ Accordingly, through the Department of Justice (DOJ), the Biden administration issued policy to reverse Sessions’s 2017 memo.⁵

Over the past several decades, the U.S. government has issued various policies outlining how the DOJ would prosecute migrants who have illegally crossed the border or attempted to do so. Researchers have separately analyzed the legality, costs, and humanitarian challenges of immigrant detention. However, no one has conducted a composite analysis of the legal, financial, and humanitarian effects on the U.S. government of such immigrant detention policies.⁶ This thesis analyzes these implications and recommends possible areas of improvement for the United States in the realm of immigrant detention policies.

¹ Jeff Sessions, “Zero-Tolerance for Offenses under 8 U.S.C. § 1325(a)” (official memorandum, Washington, DC: Office of the Attorney General, 2018), <https://www.justice.gov/opa/press-release/file/1049751/download>.

² Sessions.

³ Sessions.

⁴ U.S. Const. art. II, § 2.

⁵ Monty Wilkinson, “Interim Guidance on Prosecutorial Discretion, Charging, and Sentencing” (official memorandum, Washington, DC: Office of the Attorney General, 2021), <https://www.justice.gov/ag/page/file/1362411/download>.

⁶ Juan Rocha, “Operation Streamline and the Criminal Justice System,” *Arizona Attorney* 40, (November 2011).

A. RESEARCH QUESTION

Considering the legal, financial, and humanitarian implications of immigrant detention, under what conditions should the United States implement policies to detain migrants who have either entered or attempted to enter the United States unlawfully?

B. SIGNIFICANCE

The legal concerns surrounding the U.S. government's use of immigrant detention stem from the government's use of a mechanism akin to criminal punishment, in the form of restricting migrants' liberty. This mechanism intends to correct a violation of federal administrative law while also circumventing U.S. legal obligations under international law—created, championed by the United States, and codified in U.S. law—by continuing to detain victims of violence, trafficking, and crime.⁷ The Immigration and Nationality Act (INA) of 1952, codified under Title 8 of the *U.S. Code* and amended in 1965, contains what is generally known as immigration law.⁸ U.S. immigration law defines lawful migration, the ability to move across U.S. borders, and permissible methods to control borders.⁹ Historically, it has been administrative in nature, meaning that it regulates government actions and procedures, and the harshest consequence for violating the law is deportation.¹⁰ Over the years, however, U.S. immigration law has evolved to incorporate aspects of criminal law, such as mandatory detention for specified crimes as implemented through the Immigration Reform and Control Act of 1986.¹¹ Restricting a migrant's liberty for an administrative function like border control blurs the line between criminal and administrative law.

⁷ Inter-American Commission on Human Rights, *Report on Immigration in the United States: Detention and Due Process* (Washington, DC: Inter-American Commission on Human Rights, 2010), 16-19, <https://www.oas.org/en/iachr/migrants/docs/pdf/migrants2011.pdf>.

⁸ "Immigration," Legal Information Institute, accessed March 11, 2020, <https://www.law.cornell.edu/wex/immigration>.

⁹ Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911.

¹⁰ Juliet P. Stumpf, "Crimmigration: Encountering the Leviathan," in *The Routledge Handbook on Crime and International Migration*, ed. Sharon Pickering and Julie Ham (London: Routledge, 2014), 238-40, <https://doi.org/10.4324/9780203385562>.

¹¹ Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359.

This blurred distinction seems to have begun in case law, e.g., *Wong Wing v. United States* and *Bugajewitz v. Adams*.¹² *Wong Wing* solidified that deportation is not punishment as stated in the Fifth and Sixth Amendments to the Constitution and applied to exclusion or deportation matters through application of the 14th Amendment.¹³ Applying federal constitutional law, the U.S. Supreme Court in both *Wong Wing* and *Bugajewitz* reinforced the U.S. government's ability to exclude or deport whomever the government decides based on any characteristic and indicated that deportation proceedings are administrative, not criminal, in nature.¹⁴ However, the Court in *Wong Wing* further stated that any consequence of an immigration detention resulting in "hard labor" would trigger the application of the Fourth, Fifth, and Fourteenth Amendments because the Court considered it "infamous punishment" depriving a person of liberty, akin to criminal punishment.¹⁵ Overlap continues between multiple spheres of law that traditionally do not intersect, creating an unusual area of legal concern.

In addition to the legal implications, the financial implications of immigrant detention are critical to understanding its overall effect on the U.S. government. Based on the numbers of migrants detained over time, it appears that the United States struggles to control the flow of migrants into the country, as illustrated in Figure 1.

¹² Stumpf, "Crimmigration," 238-40; *Wong Wing v. United States*, 163 U.S. 228 (1896); *Bugajewitz v. Adams*, 228 U.S. 585 (1913).

¹³ *Wong*, 163 U.S. at 235-36.

¹⁴ *Wong*, 163 U.S. at 237-38; *Bugajewitz*, 228 U.S. at 591.

¹⁵ *Wong*, 163 U.S. at 237-38.

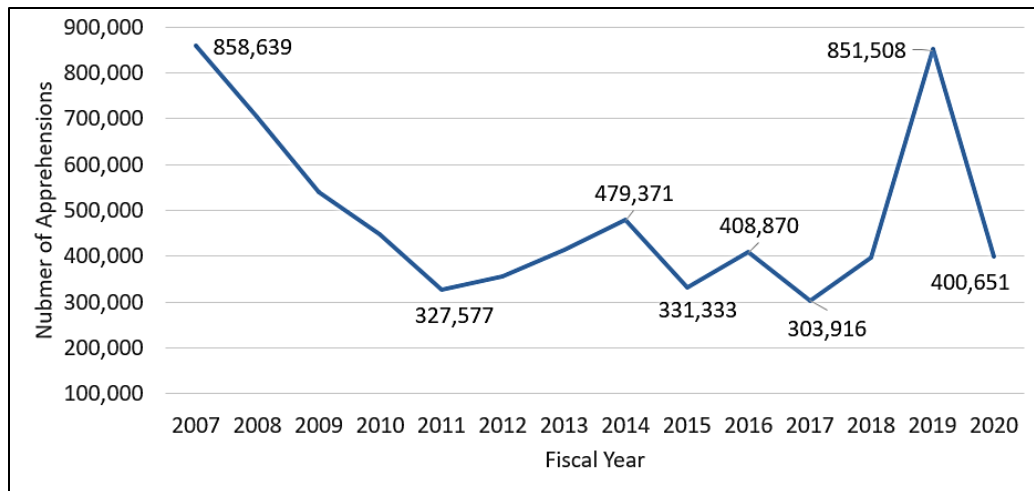


Figure 1. Number of Migrants Apprehended along the Southwest Border.¹⁶

The flow of migrants highlights three main issues related to the costs of immigrant detention. First, as Figure 1 illustrates, the number of migrants detained fluctuates over time, sometimes more than doubling, as was the case from fiscal year (FY) 2018 to 2019, and other times halving, as in the following year.¹⁷ Moreover, the Department of Homeland Security (DHS) currently has record apprehension numbers, which further calls into question the accuracy of the overall immigrant detention estimates made for budget purposes.¹⁸ As shown in Figure 2, the average daily bed population increases annually.

¹⁶ Adapted from Customs and Border Protection, “United States Border Patrol Southwest Border Sectors: Total Illegal Alien Apprehensions by Fiscal Year 1960-2019” (Washington, DC: Customs and Border Protection, 2019), https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Fiscal%20Year%20Southwest%20Border%20Sector%20Apprehensions%20%28FY%201960%20-%20FY%202019%29_0.pdf. This table does not depict numbers for FY20 and FY21 due to the additional Title 42 authority during the COVID-19 global pandemic.

¹⁷ Customs and Border Protection.

¹⁸ Joel Rose, “Border Patrol Apprehensions Hit a Record High. But That’s Only Part of the Story,” NPR, October 23, 2021, <https://www.npr.org/2021/10/23/1048522086/border-patrol-apprehensions-hit-a-record-high-but-thats-only-part-of-the-story>; “Southwest Land Border Encounters,” Customs and Border Protection, November 15, 2021, <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>.

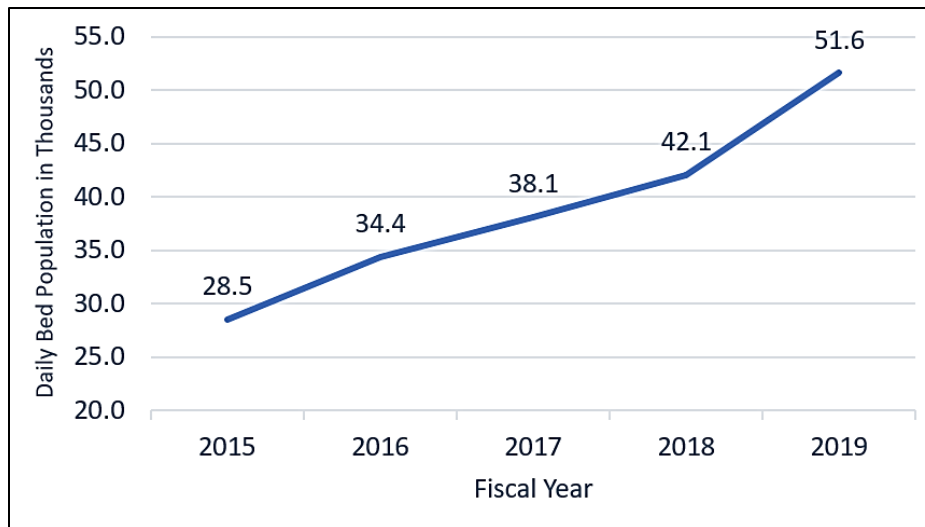


Figure 2. Actual Numbers of Migrants Detained for FY 2015–2019.¹⁹

Second, not only do the numbers of detainees increase, but the cost of immigrant detention constantly fluctuates as well. As demonstrated in Figure 3, during FY 2016–2018, the cost per immigrant detention bed steadily increased, followed by a decrease in 2019.²⁰ In addition, the 2017 and 2018 per-bed costs were higher than U.S. Immigration and Customs Enforcement (ICE) had anticipated.²¹ Thus, fluctuations in the daily bed rate could have an impact on the overall yearly bed costs, which have a negative effect on ICE’s annual budget, to be made up by pulling money from other DHS budgets.²²

¹⁹ Adapted from Department of Homeland Security, *U.S. Immigration and Customs Enforcement Budget Overview: Fiscal Year 2020 Congressional Justification* (Washington, DC: Department of Homeland Security, 2019), 6, https://www.dhs.gov/sites/default/files/publications/19_0318_MGMT_CBJ-Immigration-Customs-Enforcement_0.pdf.

²⁰ Department of Homeland Security, 114.

²¹ Department of Homeland Security, 114.

²² Department of Homeland Security, 114.

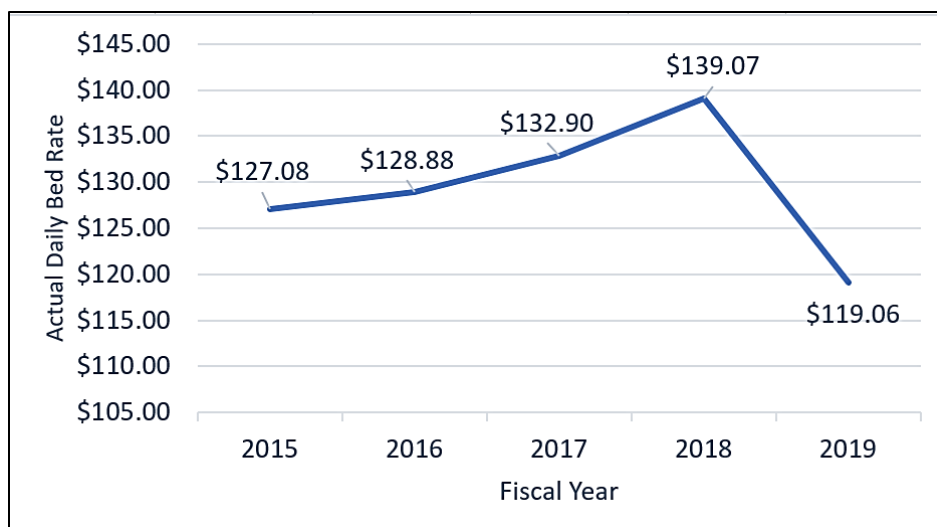


Figure 3. Actual Costs per Bed for FY 2015–2019.²³

Third, the costs depicted in ICE’s estimates include only certain costs that a detention facility incurs overall. For example, the cost per migrant per day to detain does not include any of ICE’s personnel costs, the costs to procure additional detention space, or the initial processing costs to U.S. Customs and Border Protection (CBP).²⁴ CBP’s budget is calculated separately from ICE’s budget, as DHS’s budget is broken down by agency.²⁵ Furthermore, the costs for apprehensions at the border, which are not calculated as a part of immigrant detention costs, are grouped under the mission of “securing our borders,” which constitutes nearly 23 percent of DHS’s overall budget of approximately \$92 billion for FY 2020.²⁶ All of these additional costs fluctuate from year to year because the resources needed change with the flow of migrants. For example, the number of ICE

²³ Adapted from Department of Homeland Security, *U.S. Immigration and Customs Enforcement Budget Overview: Fiscal Year 2019 Congressional Justification* (Washington, DC: Department of Homeland Security, 2018), 6, <https://www.dhs.gov/sites/default/files/publications/U.S.%20Immigration%20and%20Customs%20Enforcement.pdf>; Department of Homeland Security, *Immigration and Customs Enforcement Budget Overview: Fiscal Year 2020*, 114.

²⁴ Department of Homeland Security, *Immigration and Customs Enforcement Budget Overview: Fiscal Year 2020*.

²⁵ Department of Homeland Security, *FY 2020 Budget in Brief* (Washington, DC: Department of Homeland Security, 2019), https://www.dhs.gov/sites/default/files/publications/fy_2020_dhs_bib.pdf.

²⁶ Department of Homeland Security, 7.

employees increased by approximately 1,000 from FY 2019 to FY 2020.²⁷ Thus, the financial implications of immigrant detention are inconsistent, reported in fragments, and difficult to anticipate.

Finally, there are humanitarian implications stemming from immigrant detention. For example, the United States detains minors, with or without parents, and those lacking the mental capacity to understand the nature of the immigration violation they have committed.²⁸ According to federal district courts, federal settlement agreements, and human rights experts, the United States should generally discontinue detaining minors in part because immigrant detention can have a severe negative mental impact on minors.²⁹ Nevertheless, the U.S. government's immigration enforcement branches—CBP and ICE—continue to detain minors based on the actions of their parents.³⁰ Finally, an additional circumvention of its legal obligations under international law is the U.S. government's continued detention of victims of violence, trafficking, and crime.³¹ Therefore, the U.S. government's immigrant detention policies give rise to significant humanitarian concerns.

Given the questions surrounding the legal, financial, and humanitarian implications of immigration detention, it is imperative for the United States to consider whether it is implementing policy in the most responsible manner.

²⁷ Department of Homeland Security, *FY 2019 Budget in Brief* (Washington, DC: Department of Homeland Security, 2018), 32, www.dhs.gov/publication/fy-2019-budget-brief; Department of Homeland Security, *FY 2020 Budget in Brief*, 24.

²⁸ Inter-American Commission on Human Rights, *Immigration in the United States*, 18-19.

²⁹ *Flores v. Sessions*, No. 17-55208 (9th Cir. filed July 5, 2017); Giselle Malina, "How Should Unaccompanied Minors in Immigration Detention Be Protected from Coercive Medical Practices?," *AMA Journal of Ethics* 21, no. 7 (July 2019): 603, <https://doi.org/10.1001/amajethics.2019.603>; Kim I. Mills, "APA Decries Proposal Allowing Indefinite Detention of Immigrant Children," American Psychological Association, November 6, 2018, <https://www.apa.org/news/press/releases/2018/11/detention-immigrant-children>.

³⁰ Customs and Border Protection, "Southwest Land Border Encounters"; "Detention Management," Immigration and Customs Enforcement, November 12, 2021, <https://www.ice.gov/detention-management>.

³¹ Inter-American Commission on Human Rights, *Immigration in the United States*, 16, 21, 96, 122, 129.

C. DEFINITION OF TERMS AND SCOPE OF THESIS

To analyze the various implications of U.S. immigrant detention, it is necessary to define what type of migrant and immigrant detention facility falls within the scope of this analysis. A migrant's characteristics determine which type of immigration detention facility holds the migrant, and the legal, financial, and humanitarian implications of immigrant detention are defined by the kind of immigrant detention facility, whether a family residential center or an adult immigrant detention facility.

1. Child and Adult Migrant Defined

As the INA and *U.S. Code* both define “child” but do not define “adult,” an adult is anyone not falling under the definition of a child.³² According to the *U.S. Code*, a child is a person not having achieved the age of 18 years.³³ Thus, any migrant who is 18 years of age or older is considered an adult for immigration purposes.³⁴ This thesis focuses solely on adult migrants.

2. Immigrant Detention Facilities Defined

Although the terms or concepts are often interchanged, an immigrant detention facility is different from a temporary holding facility. Luke Darby's article in *GQ* about private companies and immigrant detention captions a DHS Office of Inspector General photo that illustrates the volume and manner of detention at the McAllen Border Patrol Station.³⁵ While this June 2019 photo purportedly illustrates the overcrowded conditions of “immigration detention,” it actually illuminates confusion surrounding the technical

³² 6 U.S.C. § 279(g)(2) (2018).

³³ 6 U.S.C. § 279(g)(2).

³⁴ Notably, children are defined differently for family-based immigration classifications and benefits filed with U.S. Citizenship and Immigration Services from children under immigration enforcement. See 8 U.S.C. § 1101 (2018), <https://www.law.cornell.edu/uscode/text/8/1101>.

³⁵ Luke Darby, “Private Companies Are Cashing in on ICE's Detention Centers,” *GQ*, July 19, 2019, <https://www.gq.com/story/private-profit-detention-centers>; Department of Homeland Security, Office of Inspector General, *Management Alert—DHS Needs to Address Dangerous Overcrowding and Prolonged Detention of Children and Adults in the Rio Grande Valley*, OIG-19-51 (Washington, DC: Department of Homeland Security, 2019).

meaning of immigrant detention and detaining a migrant.³⁶ Thus, it is important to establish the parameters of the type of facility analyzed in this thesis.

When migrants present themselves at a port of entry for admission to the United States, a U.S. government official reviews their travel documents to determine whether they have a lawful right to enter the country.³⁷ If the documentation presented at a port of entry is insufficient to establish a right to entry, CBP refers the migrant to a deferred inspection site, a temporary holding facility, for continued identification and processing.³⁸ At the deferred inspection site, CBP completes identification and determines the migrant's immigration status.³⁹ If the migrant does not have a U.S. immigration status or right to enter the United States, the migrant can request permission to remain in the United States.⁴⁰ Once this right is exercised, CBP, sometimes at a deferred inspection site, determines whether the migrant falls under mandatory detention policies or is eligible for release pending appearance in immigration court.⁴¹ If CBP determines that detention is necessary, the migrant will be transferred to an immigration detention facility.⁴²

When a migrant is apprehended in the interior of the country by ICE, ICE identifies and processes the migrant at a temporary holding facility. As with CBP, migrants apprehended by ICE without legal status must request permission to remain in the United

³⁶ Darby, "Cashing in on ICE's Detention Centers."

³⁷ "Immigration Inspection Program," Customs and Border Protection, September 1, 2020, <https://www.cbp.gov/border-security/ports-entry/overview>.

³⁸ "Deferred Inspection Sites," Customs and Border Protection, accessed November 15, 2021, <https://www.cbp.gov/contact/ports/deferred-inspection-sites>.

³⁹ Customs and Border Protection.

⁴⁰ Customs and Border Protection.

⁴¹ "Glossary," Citizenship and Immigration Services, accessed November 15, 2021, https://www.uscis.gov/tools/glossary?topic_id=v#alpha-listing; Jeh Johnson, "Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants" (official memorandum, Washington, DC: Department of Homeland Security, 2014), 3-6, [https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf?utm_source=google&utm_medium=google&utm_term=\(not%20provided\)&utm_content=undefined&utm_campaign=\(not%20set\)&gclid=undefined&dclid=undefined&GAID=1961627328.1566071939](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf?utm_source=google&utm_medium=google&utm_term=(not%20provided)&utm_content=undefined&utm_campaign=(not%20set)&gclid=undefined&dclid=undefined&GAID=1961627328.1566071939).

⁴² Immigration and Customs Enforcement, "Detention Management."

States by challenging their removal through immigration proceedings or be deported.⁴³ Once a migrant requests permission to stay in the United States through some form of immigration relief, ICE determines whether the migrant must be detained or can be released pending appearance in immigration court. If the decision is to detain a migrant, the migrant is transferred to an immigrant detention facility until the migrant is granted admission to the country or removed. Thus, ICE's initial holding facility, like CBP's, is temporary and intended to provide time to identify and determine legal status along with any other initial processing needed. Neither of these temporary facilities are considered immigrant detention facilities for the purposes of this thesis because the focus of the analysis is about long-term detention facilities.

3. Adult Migrant Facility versus Family Residential Center

ICE breaks down its immigrant detention costs based on whether minors are present in its facilities; thus, understanding the distinctions between facility types is necessary to assess financial implications. There are multiple types of immigrant detention facilities: single-male, single-female, mixed male/female, and family residential centers.⁴⁴ In its budget proposals, ICE simplifies these categories into merely adult beds or family residential center beds.⁴⁵ Although there is a third type of migrant housing facility, which provides accommodations for an unaccompanied alien child (UAC), the detention facilities for UACs are not included in ICE budget proposals because the care for a UAC is paid for and controlled by the Department of Health and Human Services' Office of Refugee Resettlement.⁴⁶ DHS distinguishes UAC housing from adult or family housing because a

⁴³ See Immigration and Customs Enforcement, "Application for a Stay of Deportation or Removal," ICE Form I-246 (Washington, DC: Department of Homeland Security, 2020), <https://www.ice.gov/doclib/forms/i246.pdf>; "Noncitizens in Deportation or Removal Proceedings," Nolo, accessed October 17, 2021, <https://www.nolo.com/legal-encyclopedia/deportation-removal-proceedings-immigration-court>.

⁴⁴ Immigration and Customs Enforcement, "Detention Management."

⁴⁵ Department of Homeland Security, *FY 2020 Budget in Brief*.

⁴⁶ "ORR Fact Sheet on Unaccompanied Children's Services," Department of Health and Human Services, Office of Refugee Resettlement, accessed November 18, 2021, <https://www.acf.hhs.gov/archive/orr/fact-sheet/orr-fact-sheet-unaccompanied-childrens-services>; "Unaccompanied Children Frequently Asked Questions," Department of Health and Human Services, Office of Refugee Resettlement, March 26, 2021, <https://www.acf.hhs.gov/orr/unaccompanied-children-frequently-asked-questions>.

UAC is a migrant child under the age of 18 arriving without a parent.⁴⁷ Thus, UACs are not detained in a typical immigrant detention facility like adults or family units, and these facilities are not included in the cost analysis. Of the detention facilities within ICE's budget, the largest immigrant detention facility classification is adult immigrant detention.⁴⁸ Once an age determination is made, ICE uses the adult migrant's gender to determine which facility will house the adult migrant.⁴⁹ Although men and women have different needs, ICE's calculations per bed are the same, regardless of gender.⁵⁰ The analysis in this thesis centers on adult beds, regardless of gender.

The second type of immigrant detention facility in ICE's budget is designed to house family units pending immigration hearings or determinations. To be housed in a family residential center (FRC), migrants must be a "family unit."⁵¹ A family unit includes a non-U.S. citizen parent and a non-U.S. citizen minor.⁵² Furthermore, none of the migrants in the family unit can have a criminal history.⁵³ In FRCs, ICE provides additional services to family units that are not provided at adult immigration facilities.⁵⁴ For example, FRCs provide school-aged children access to educational resources, including classrooms led by certified teachers.⁵⁵ ICE provides all of these additional services in the FRC, so it

⁴⁷ Department of Health and Human Services, Office of Refugee Resettlement, "ORR Fact Sheet"; Department of Health and Human Services, Office of Refugee Resettlement, "Frequently Asked Questions"; 6 U.S.C. § 279(g)(2).

⁴⁸ This observation is based on 54,000 total detention beds, which include 2,500 beds for families but do not include facilities to house unaccompanied alien children. Department of Homeland Security, *FY2020 Budget in Brief*, 3.

⁴⁹ "Our Locations," GEO Group, March 7, 2021, <https://www.geogroup.com/Locations>; "Find a Facility," CoreCivic, accessed November 15, 2021, <http://www.corecivic.com/facilities>.

⁵⁰ Laurence Benenson, "The Math of Immigration Detention, 2018 Update: Costs Continue to Multiply," National Immigration Forum, May 9, 2018, <https://immigrationforum.org/article/math-immigration-detention-2018-update-costs-continue-multiply/>.

⁵¹ Immigration and Customs Enforcement, "Family Residential Standards (FRS): Program Philosophy, Goals, and Expected Outcomes" (Washington, DC: Department of Homeland Security, 2020), 1, https://www.ice.gov/doclib/frs/2020/1.0_Overview.pdf.

⁵² Immigration and Customs Enforcement, "Detention Management."

⁵³ Immigration and Customs Enforcement, "Family Residential Standards."

⁵⁴ Immigration and Customs Enforcement, "Detention Management."

⁵⁵ Immigration and Customs Enforcement.

is reasonable to infer there are additional overhead costs.⁵⁶ Given the unique characteristics of FRCs, this thesis does not analyze the legal, financial, or humanitarian implications of family processing.

D. LITERATURE REVIEW

The scholarly literature about immigration detention exhibits the following main focuses: support of or opposition to immigrant detention and preventive detention.

1. Support of or Opposition to Immigrant Detention Generally

Scholars have criticized the U.S. immigrant detention policy—as it applies to asylum seekers, family units, migrants of a tender age, and any migrant who is in the United States for economic reasons—on the grounds of human rights and international obligations. Scholars like Steel et al. focus on the psychological effects of immigrant detention on migrants.⁵⁷ Steel et al. have determined that immigrant detention contributes to or exacerbates post-traumatic stress and other mental health disorders.⁵⁸ Such criticism comes not only from the private sector but also from federal government agencies responsible for oversight—such as the DHS’s Office of Inspector General (OIG) and ICE’s internal division, the Office of Detention Policy and Planning—that say ICE needs to create better immigrant detention standards for its facilities.⁵⁹ Schriro found that the immigration detention facilities used by ICE were actually jails or prisons and intended to function as such.⁶⁰ In addition, Schriro concluded that ICE personnel lacked the training and skills necessary to “design” or run an immigrant detention facility.⁶¹

⁵⁶ Immigration and Customs Enforcement.

⁵⁷ Zachary Steel et al., “Impact of Immigration Detention and Temporary Protection on the Mental Health of Refugees,” *British Journal of Psychiatry* 188, no. 1 (January 2006): 58-64, <https://doi.org/10.1192/bjp.bp.104.007864>.

⁵⁸ Steel et al.

⁵⁹ Dora Schriro, *Immigration Detention Overview and Recommendations* (Washington, DC: Immigration and Customs Enforcement, 2009), 3, <https://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf>.

⁶⁰ Schriro, 2.

⁶¹ Schriro, 3.

Following Schriro's 2009 report, ICE developed the Performance-Based National Detention Standards (PBNDS) to increase the health, welfare, and safety of all detained migrants.⁶² Some of the newly created standards include the following: how a migrant's personal property is handled; how a migrant is inspected before entering the facilities; and how a migrant's medical treatment is provided, including separate standards for women.⁶³ ICE supports its immigrant detention practices through regularly reporting to Congress that the percentage of immigration facilities meeting all detention standards is 100 percent.⁶⁴ However, ICE provides its reports only on ICE-run facilities.⁶⁵ There appears to be no official federal oversight of the private contract facilities vis-à-vis the PBNDS. However, the private sector has criticized the medical care provided in private facilities as well as the facilities' ability to meet other detention standards such as security.⁶⁶ A direct response from the U.S. government about the negative effects of immigrant detention has not emerged; instead, the U.S. government focuses on what it is doing, according to the law.⁶⁷

Those who support stricter immigrant detention policies focus on its legal basis and the notion that allowing migrants to go free pending immigration determinations will encourage crises at the border and relax border security.⁶⁸ The U.S. government indicates

⁶² Schriro, *Immigration Detention*; Department of Homeland Security, Office of Inspector General, *Treatment of Immigration Detainees Housed at Immigration and Customs Enforcement Facilities*, OIG-07-01 (Washington, DC: Department of Homeland Security, 2006), https://www.oig.dhs.gov/assets/Mgmt/OIG_07-01_Dec06.pdf; Immigration and Customs Enforcement, *Performance-Based National Detention Standards 2011* (Washington, DC: Department of Homeland Security, 2011), <https://www.ice.gov/detention-standards/2011>.

⁶³ Immigration and Customs Enforcement, *National Detention Standards 2011*, pts. 2, 4.

⁶⁴ Department of Homeland Security, *Immigration and Customs Enforcement Budget Overview: Fiscal Year 2020*, 5.

⁶⁵ Department of Homeland Security, 5.

⁶⁶ Judith Greene and Alexis Mazón, *Privately Operated Federal Prisons for Immigrants: Expensive. Unsafe. Unnecessary* (Brooklyn: Justice Strategies, 2012), 12-13, <https://www.justicestrategies.org/publications/2012/privately-operated-federal-prisons-immigrants-expensive-unsafe-unnecessary>.

⁶⁷ "The Trump Administrations' Immigration Agenda Protects American Workers, Taxpayers, and Sovereignty," Trump White House Archives, February 4, 2020, <https://trumpwhitehouse.archives.gov/briefings-statements/trump-administrations-immigration-agenda-protects-american-workers-taxpayers-sovereignty/>.

⁶⁸ "Cheney: These Bills Would Exacerbate the Crisis at the Border," Official website of Congresswoman Liz Cheney, March 18, 2021, <https://cheney.house.gov/2021/03/18/cheney-these-bills-would-exacerbate-the-crisis-at-the-border/>.

that it detains asylum seekers because some in this category exploit loopholes in the asylum process.⁶⁹ Furthermore, some supporters indicate that detaining all migrants until they are cleared is the only way to protect the United States from more crimes, an approach known as “preventive detention.”⁷⁰

2. Preventive Detention

As previously stated, there has been a blurring of the lines between two historically distinct spheres of law—criminal law and administrative law—such that scholars like Garcia Hernandez believe immigration law is akin to criminal law.⁷¹ Surrounding the intersection of immigration law and criminal law, the theme of preventive detention has emerged.⁷² Preventive detention is the presumption that all migrants will commit a crime unless they are required to establish that they will not commit a crime.⁷³ Thus, the argument is that detaining a migrant before a crime is committed protects society.

One opponent of this practice, Blum, explores the post-9/11 theory that terrorist suspects should be considered enemy combatants and detained until the suspects can prove they are not a danger to society, known as the “enemy combatant” policy.⁷⁴ Blum states that the enemy combatant program is devoid of procedural protections granted by the U.S. Constitution.⁷⁵ Blum concludes that most proposed solutions or alternatives are merely different versions of the same concept—preventive detention.⁷⁶ Blum disagrees with the

⁶⁹ “Court Closes Asylum Loophole,” *Wall Street Journal*, June 25, 2020, <https://www.wsj.com/articles/court-closes-asylum-loophole-11593127194>.

⁷⁰ Michael T. Light, Jingying He, and Jason P. Robey, “Comparing Crime Rates between Undocumented Immigrants, Legal Immigrants, and Native-Born U.S. Citizens in Texas,” *Proceedings of the National Academy of Sciences* 117, no. 51 (2020): 32340-2347, <https://doi.org/10.1073/pnas.2014704117>; *United States v. California*, No. 19-532 (U.S. filed Oct. 22, 2019).

⁷¹ Cesar Garcia Hernandez, “Immigration Detention as Punishment,” *UCLA Law Review* 61 (June 2014): 49-50.

⁷² Stephanie Blum, “Preventive Detention in the War on Terror: A Plan for a More Moderate and Sustainable Solution” (master’s thesis, Naval Postgraduate School, 2008), <http://hdl.handle.net/10945/3792>.

⁷³ Blum, 31.

⁷⁴ Blum.

⁷⁵ Blum, 207.

⁷⁶ Blum, 207.

practice of preventive detention because, in short, it cuts against the grain of the ideals of the United States.⁷⁷ Most literature explores this theory in a terrorism context, and it remains contentious whether preventive detention might be applicable in the immigrant detention context.

Nevertheless, this preventive detention theme appears in several trends in immigrant detention. One trend is the federal government's expansion of federal immigration enforcement to local and state law enforcement, which occurs in two distinct ways. The first way is through the use of the federal administrative process of removal from the United States instead of criminal proceedings against migrants believed to be committing crimes.⁷⁸ The burden of proof—the evidence needed to establish the immigration violation—is lower in an administrative deportation hearing than a criminal legal proceeding because the government need only establish by “clear and convincing evidence” that the violation occurred.⁷⁹ This burden of proof is lower than “beyond a reasonable doubt,” which is the criminal standard.⁸⁰ Thus, the administrative avenue utilizes a lower burden of proof and a less-restrictive procedural process to mitigate possible threats, and the program is called ICE's criminal alien program.⁸¹ Olszewski supports expanding the criminal alien program to assist local law enforcement and create a “mega-community” to protect all U.S. citizens by all levels of law enforcement.⁸²

However, this is not the only method in which immigration enforcement is expanding to the local and state enforcement level. Another way is the enhancement of possible punishments or arrest by local and state law enforcement based on federal

⁷⁷ Blum, 209.

⁷⁸ Laura Michalec Olszewski, “Expansion of U.S. Immigration and Customs Enforcement's Criminal Alien Program in the War on Terror” (master's thesis, Naval Postgraduate School, 2008), <https://calhoun.nps.edu/handle/10945/3788>.

⁷⁹ Burdens of Proof in Removal Proceedings, 8 C.F.R. 1240.8 (2021), <https://www.law.cornell.edu/cfr/text/8/1240.8>.

⁸⁰ Bryan A. Garner, Tiger Jackson, and Jeff Newman, eds., *Black's Law Dictionary*, 8th ed. (Eagan, MN: West, 2004), 1293-94.

⁸¹ “Criminal Alien Program,” Immigration and Customs Enforcement, September 16, 2021, <https://www.ice.gov/identify-and-arrest/criminal-alien-program>.

⁸² Olszewski, “Immigration and Customs Enforcement's Criminal Alien Program,” 67-74.

immigration violations. For example, local and state agencies have begun to exercise federal immigration authority through a program ICE launched in its 287(g) program.⁸³ This expansion of the uses of immigration authority is explored by Bloom. Although Bloom argues that ICE's 287(g) program is highly beneficial, Bloom identifies a lack of specific guidance about how local authorities should use their expanded federal authority.⁸⁴ To further illustrate Bloom's concerns, Rosenblum and Kandel identify additional concerns, such as how the 287(g) program could deteriorate federal relations with local communities.⁸⁵ Thus, this expansion has both supporters and objectors.

The second trend of expanding immigration law into the area of criminal law is called "crimmigration," coined after the *Padilla v. Kentucky* court determined in 2010 that criminal defense attorneys are required to provide advice regarding the immigration implications of criminal plea agreements.⁸⁶ Juliet Stumpf devised this term while analyzing the commingling of the immigration and criminal spheres of law.⁸⁷ Stumpf analyzes these two areas of law under a group membership theory analysis, i.e., an in-group and out-group analysis along political party ideologies.⁸⁸ She concludes that like criminal law's exclusionary effect on U.S. citizens, the U.S. expansion of immigration law intends to restrict and exclude undesirable migrants from U.S. society.⁸⁹

The body of work surrounding crimmigration seeks to define its meaning and how it has developed over the years. However, none of the literature regarding immigrant

⁸³ "Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act," Immigration and Customs Enforcement, October 21, 2021, <https://www.ice.gov/287g>; James S. Bloom, "The Use of State and Local Law Enforcement for Immigration Enforcement under Federal Authority 287(g): A Case Study Analysis" (master's thesis, Naval Postgraduate School, 2009), <http://hdl.handle.net/10945/4843>.

⁸⁴ Bloom, "Immigration Enforcement under Federal Authority 287(g)."

⁸⁵ Marc R. Rosenblum and William A. Kandel, *Interior Immigration Enforcement: Programs Targeting Criminal Aliens*, CRS Report No. R42057 (Washington, DC: Congressional Research Service, 2011), 26-36, <https://crsreports.congress.gov/product/pdf/R/R42057>.

⁸⁶ *Padilla v. Kentucky*, 559 U.S. 356 (2010); Juliet P. Stumpf, "The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power," *American University Law Review* 56, no. 2 (December 2006): 367-419.

⁸⁷ Stumpf, "The Crimmigration Crisis."

⁸⁸ Stumpf, 396-418.

⁸⁹ Stumpf, 396-402.

detention analyzes the intersection of criminal and administrative law to establish whether the United States should continue using executive policies to determine immigrant detention, which is the focus of this thesis. Instead, the heart of the discussion is how the United States arrived at a blended system of criminal and immigration law; its effects along with the financial and humanitarian implications of immigrant detention and policies have not been explored.

E. RESEARCH DESIGN

The research design for this thesis is a compilation of various methods of analysis to assess each pillar—legal, financial, and humanitarian—of immigrant detention. That is, each chapter uses a different analytical method based on the pillar analyzed in that chapter.

In Chapter II, the legal analysis centers on identifying and defining the various legal paths a migrant could traverse. This is followed by an examination of statutory and court-determined immigrant detention limits currently in place or in litigation in the U.S. court system.

In Chapter III, the financial analysis determines the amount of money the government spends to detain migrants and analyzes the impact of migrant flows on those amounts. The chapter compares the estimated data and methodologies used by ICE against the final costs contained in the Government Accountability Office’s best practices criteria for analyzing federal budgets.⁹⁰ It then analyzes the financial impacts of migrant flows on the private prison sector by examining how much profit various private prisons earn to house migrants as opposed to detaining individuals convicted of federal crimes.

Chapter IV analyzes how migrants are treated in U.S. immigrant detention facilities against international humanitarian standards and domestic immigrant detention standards. First, the chapter analyzes how U.S. immigration detention policies compare with the international human rights laws that the United States has signed and/or codified. Next, the

⁹⁰ Timothy M. Persons, *GAO Cost Estimating and Assessment Guide: Best Practices for Developing and Managing Capital Program Costs*, GAO-09-3SP (Washington, DC: Government Accountability Office, 2009), <https://www.gao.gov/products/GAO-09-3SP>.

chapter evaluates ICE’s written immigrant detention standards, considering its own and independent reviews of those same standards.

Based on the analytical conclusions of each pillar—legal, financial, and humanitarian—the thesis then consolidates these determinations to assess under which circumstances the United States should continue to implement policies when determining which migrants to detain.

II. LEGAL IMPLICATIONS OF ADDRESSING MIGRANTS WITHOUT A LAWFUL STATUS

One day, a migrant swims across the Rio Grande in South Texas without an admission document to enter the United States. CBP apprehends and processes the migrant as a first-offense illegal-entry migrant, as the migrant has no additional criminal record. What happens next? Depending on the immigration official or DOJ attorney's decision under current executive policies, immigration officials could restrict a migrant's liberty until the U.S. government removes the migrant from the United States. Apprehension in a different year or under a different administration could find that same migrant falling under the United States' humanitarian mechanisms, which would result in immigration officials releasing the migrant into the United States pending an immigration judge's determination regarding the migrant's immigration status. Thus, the same entry scenario has at least two different outcomes based on the pre-removal immigrant detention policies in place at the time of apprehension.

To analyze the legal protection implications surrounding pre-removal immigrant detention, this chapter first examines the various paths that can unfold once CBP or ICE encounters and apprehends a migrant, including the decision to pursue criminal and/or administrative removal proceedings. This is followed by a general explanation of the difference between civil, criminal, and administrative proceedings and an examination of the legal scholarship that questions the U.S. Supreme Court's categorization of immigrant detention. Next, the chapter examines the applicability of the U.S. Constitution in removal proceedings that result in immigrant detention. Finally, the chapter examines whether time constraints apply in the immigrant detention context, then analyzes the situations in which a time limit applies. This final section concludes by identifying the current legal uncertainty surrounding time limits for immigrant detention.

Overall, this chapter shows that the U.S. Supreme Court has determined immigration removal proceedings are civil in nature, which results in partial constitutional protections for migrants without a legal status during the administrative removal process. Furthermore, this chapter finds that the U.S. government's use of immigrant detention

without time limits is legal under most circumstances, although it remains contentious due to lower court cases challenging the U.S. Supreme Court’s position.

A. REMOVAL PROCEEDINGS OR CRIMINAL PROSECUTION?

Once immigration officials—CBP or ICE—apprehend a migrant, they have two possible paths to process the migrant for his or her unlawful entry into the United States: refer the migrant for criminal prosecution by the DOJ or proceed through the administrative removal process.⁹¹

- If CBP or ICE decides to pursue administrative removal, the migrant is transferred to ICE custody at a detention facility for continued processing.⁹²
- If CBP or ICE refers the migrant for criminal prosecution by the DOJ, the latter decides whether to prosecute the case in federal district court.⁹³
- If the DOJ declines to prosecute, the migrant’s case continues through the administrative removal process.⁹⁴
- If the DOJ elects to prosecute, it formally charges the migrant under 8 U.S.C. § 1325 or 8 U.S.C. § 1326, depending on whether the migrant has been apprehended and removed previously.⁹⁵ If the government succeeds in obtaining a conviction against the migrant, the migrant serves his or her sentence in federal custody, either with the U.S. Marshals Service (USMS) or Bureau of Prisons (BOP).⁹⁶ Once the migrant finishes serving his or her

⁹¹ Greta L. Goodwin, *Immigration Enforcement: Immigration-Related Prosecutions Increased from 2017 to 2018 in Response to U.S. Attorney General’s Direction*, GAO-20-172 (Washington, DC: Government Accountability Office, 2019), 12, <https://www.gao.gov/assets/gao-20-172.pdf>.

⁹² Goodwin, 12.

⁹³ Goodwin, 12.

⁹⁴ Goodwin, 12.

⁹⁵ Goodwin, 12.

⁹⁶ Goodwin, *Immigration Enforcement*, 12; Jesse Franzblau, *A Legacy of Injustice: The U.S. Criminalization of Migration* (Chicago: National Immigrant Justice Center, 2020), 4, <https://immigrantjustice.org/research-items/report-legacy-injustice-us-criminalization-migration>.

criminal sentence or if the government fails to obtain a conviction, the migrant is returned to DHS for administrative removal.⁹⁷

In short, as shown in Figure 4, a migrant could go straight to administrative removal or be criminally prosecuted for his or her unlawful border crossing before being administratively removed from the United States. During either of these processes, migrants can be held in immigrant detention, which means anytime during the removal proceedings or after a removal order is issued.

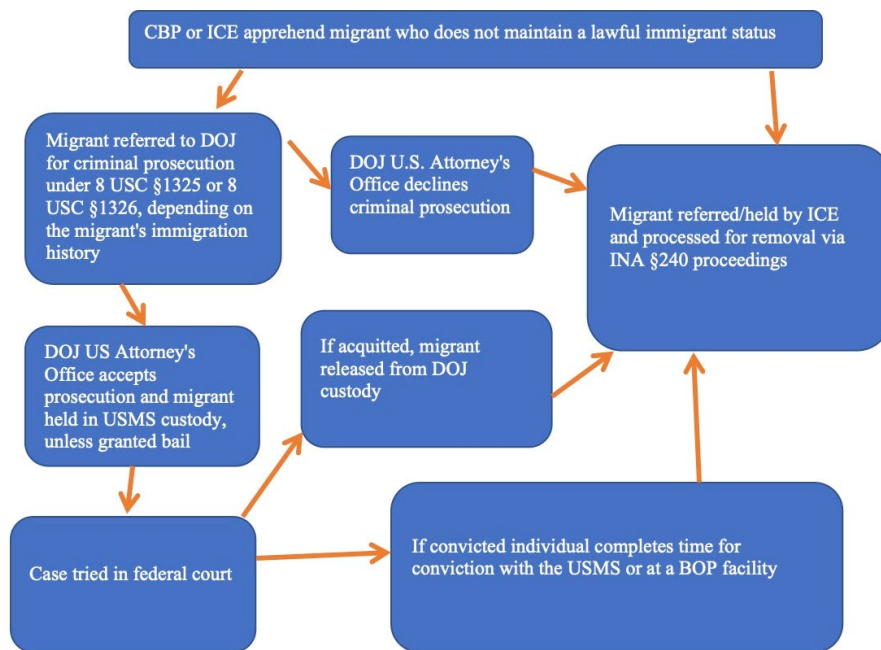


Figure 4. Migrant Flow after CBP or ICE Apprehension.⁹⁸

B. IMMIGRANT DETENTION DURING REMOVAL PROCEEDINGS: CIVIL OR CRIMINAL?

When analyzing the legal implications arising from immigrant detention, it is imperative first to examine generally the differences between a criminal proceeding and a

⁹⁷ Goodwin, *Immigration Enforcement*, 12.

⁹⁸ Adapted from Goodwin, *Immigration Enforcement*, 12; Franzblau, *A Legacy of Injustice*, 4.

civil proceeding because these nuances determine the legal protections provided to the person who is the subject of the proceeding. The U.S. Constitution distinguishes between criminal and civil proceedings and whether constitutional protections apply, but since the legislature does not always clearly label a given statute as criminal or civil, how the courts have categorized immigration law and removal proceedings matters.⁹⁹

There are three types of legal proceedings: criminal, civil, and administrative.¹⁰⁰ When an individual commits a crime against society, the state initiates a criminal proceeding against the individual for a court to adjudge guilt, which can result in a sentence of jail time or a fine.¹⁰¹ Various levels of courts handle criminal proceedings, such as local, state, and federal courts, depending on the law that was violated. Although a civil suit also occurs in a court setting, it differs from a criminal proceeding in several ways.¹⁰² A civil proceeding arises from a dispute between two or more persons, such as a breach of contract or divorce.¹⁰³ A civil suit may result in an agreement between the parties to resolve the issue—known as a settlement—or the court ordering a payment of money to compensate the injured party—known as damages.¹⁰⁴ Finally, an administrative proceeding centers on a violation of administrative law, which is used to facilitate the laws and regulations established by a government entity in accordance with the authority to govern various government functions, such as tax liabilities or federal immigration laws.¹⁰⁵ Violations of

⁹⁹ Mary M. Cheh, “Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction,” *Hastings Law Journal* 42, no. 5 (July 1991): 1329-30.

¹⁰⁰ Cristobal Ramón and Theresa Cardinal Brown, “Decriminalizing Illegal Border Crossing: What Does It Mean? An Explainer of Civil vs. Criminal Immigration Enforcement,” Bipartisan Policy Center, January 15, 2020, <https://bipartisanpolicy.org/blog/decriminalizing-illegal-border-crossing-what-does-it-mean-an-explainer-of-civil-vs-criminal-immigration-enforcement/>.

¹⁰¹ Ramón and Brown.

¹⁰² “Civil Cases vs. Criminal Cases: Key Differences,” FindLaw, April 1, 2019, <https://www.findlaw.com/litigation/filing-a-lawsuit/civil-cases-vs-criminal-cases-key-differences.html>.

¹⁰³ FindLaw.

¹⁰⁴ Ramón and Brown, “Decriminalizing Illegal Border Crossing.”

¹⁰⁵ Ramón and Brown.

administrative laws typically result in fines or an order that certain actions be taken or restrictions on future benefits occur.¹⁰⁶

Although the three types of proceedings appear to be clearly distinct and with different outcomes, there are some similarities. When a person is arrested for violating a criminal law, the individual is placed in custody (arrested) and cannot be compelled to testify or answer questions surrounding his or her arrest because of the Fifth Amendment.¹⁰⁷ In addition, the individual can be held in pre-trial detention until his or her case is resolved. In a civil case, a person is not arrested or detained unless the individual is found in contempt of court by a judge, for example when an individual does not comply with a judge's order to respond to a question or fulfill a payment (civil contempt) or makes an outburst in court (criminal contempt).¹⁰⁸ During a civil contempt arrest and detention, a court requires that an individual be detained in a jail and not released until he or she complies with the court's order.¹⁰⁹ With criminal contempt, the matter is handled like a criminal case as described above. In an administrative proceeding, a person *may* be placed in custody and detained when the individual violates an administrative law, as when a migrant crosses the U.S. border illegally and is caught.¹¹⁰

Immigration law is governed by the INA, which contains the laws written and enacted by the U.S. Congress to govern immigration to the United States. Although it has some criminal-law-like sections with penalties, immigration law is considered primarily administrative.¹¹¹ When crossing the border without permission, a migrant has violated an administrative law that has a criminal-like consequence: apprehension and detention. Once apprehended, the migrant is detained until a judge orders the individual removed from the United States or grants bond while the removal case proceeds, a consequence that resembles that of a criminal law violation because of the restraint of liberty. However, the

¹⁰⁶ Ramón and Brown.

¹⁰⁷ U.S. Const. amend. V.

¹⁰⁸ Cheh, "Constitutional Limits on Using Civil Remedies," 1350-51.

¹⁰⁹ *United States v. United Mine Workers of America*, 330 U.S. 258, 302-04 (1947).

¹¹⁰ Cheh, "Constitutional Limits on Using Civil Remedies," 1343.

¹¹¹ Ramón and Brown, "Decriminalizing Illegal Border Crossing."

U.S. Supreme Court has routinely held that removal proceedings are a “purely civil action” intended to end “continued violation of the immigration laws.”¹¹² According to the U.S. Supreme Court, immigrant detention during removal proceedings is a permissible loss of liberty when done in accord with immigration rules and regulations.¹¹³ Finally, an immigration judge’s purpose in removal proceedings is to determine whether the migrant has the right to remain in the United States, not to adjudge guilt or punish the migrant.¹¹⁴ Thus, it is firmly settled in case precedent that removal proceedings are civil and not criminal in nature.

While the U.S. Supreme Court is the highest court of the land and final arbiter of the law, this determination has been challenged by legal scholars and the international community and might continue to be challenged in court as the immigration legal landscape develops. First, not all scholars agree with the Court’s view of immigrant detention. Drawing on the work of H. L. A. Hart, legal scholar Cesar Garcia Hernandez concludes that immigrant detention, including pre-removal, is punitive and therefore not civil in nature.¹¹⁵ Hart’s theoretical approach to defining *legal punishment* is a five-part test that, when applied to immigrant detention, produces a result that differs from the U.S. Supreme Court’s characterization.¹¹⁶ Hart’s five considerations are as follows: punishment has “unpleasant consequences”; punishment is caused by a legal violation; punishment must be for the actual offense done by the offender; punishment is imposed by others, not self-imposed by the offender; and punishment is administered by officials from the legal system that the offender violated.¹¹⁷ As analyzed by Garcia Hernandez, immigrant detention

¹¹² The U.S. Supreme Court in *INS v. Lopez-Mendoza* used the term “deportation” proceedings while the U.S. government, as of this writing, uses the term “removal” proceedings. Thus, for consistency, this thesis uses the latter. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984).

¹¹³ *United States v. Salerno*, 481 U.S. 739, 748-49 (1987); *Carlson v. Landon*, 342 U.S. 524, 537-42 (1952); *Wong*, 163 U.S. at 236-37.

¹¹⁴ *Lopez-Mendoza*, 468 U.S. at 1032, 1038.

¹¹⁵ Garcia Hernandez, “Immigration Detention as Punishment,” 1359.

¹¹⁶ Garcia Hernandez, 1359.

¹¹⁷ Garcia Hernandez, “Immigration Detention as Punishment,” 1359; H. L. A. Hart, “The Presidential Address: Prolegomenon to the Principles of Punishment,” *Proceedings of the Aristotelian Society* 60 (1959): 4.

should be considered criminal or punitive in nature because it clearly meets all five of Hart’s characteristics. For one, Garcia Hernandez finds, immigrant detention “is plainly unpleasant.”¹¹⁸ Furthermore, Garcia Hernandez, channeling Hart, finds that immigrant detention is

“intentionally administered” by people acting pursuant to “an authority constituted by a legal system” “for an offense against legal rules”. . . . It is, after all, a *deliberate deprivation of liberty* carried out *by immigration officials operating under the authority of federal statutes* that allow or require confinement *upon violation* of any of a number of immigration law provisions.¹¹⁹

Garcia Hernandez asserts that Hart’s final characteristic is met because migrants are detained when they have violated the INA, as charged under the INA or the *U.S. Code*.¹²⁰ Thus, immigrant detention is a punishment for violating immigration laws that appears to be more closely aligned with criminal punishment than a civil remedy.

Garcia Hernandez is not alone in his assessment that pre-removal immigrant detention is like criminal detention. As outlined in Chapter I, Juliet P. Strumpf asserts that the application of immigration law, including immigrant detention, has more criminal than administrative or civil implications.¹²¹ Strumpf does not assess the issue of immigrant detention using Hart’s five-factor analysis. Instead, she argues against the U.S. Supreme Court’s interpretation that removal proceedings and their consequences are civil rather than criminal in nature on the basis that, “as criminal sanctions for immigration-related conduct and criminal grounds for removal from the United States continue to expand, aliens become synonymous with criminals.”¹²² Strumpf argues that the United States continues to increase its criminalization of immigration violations, which results in an irreversible intertwining of criminal law and immigration law in three ways: 1) substantive overlap of criminal and immigration laws, 2) enforcement of immigration law via criminal-law

¹¹⁸ Garcia Hernandez, “Immigration Detention as Punishment,” 1380.

¹¹⁹ Garcia Hernandez, 1380 (emphasis added).

¹²⁰ 8 U.S.C. § 1226(a) (2018); 8 U.S.C. § 1226(c) (2018).

¹²¹ Strumpf, “Crimmigration.”

¹²² Strumpf, “The Crimmigration Crisis,” 419.

processes, and 3) procedural similarities between criminal and immigration law.¹²³ Thus, Stumpf claims that immigration law and its consequences are becoming more like criminal law and punishment.

In addition to legal scholars, members of the Inter-American Commission on Human Rights (IACHR) view immigrant detention in the United States as more criminal than civil. In 2010, the IACHR reviewed the policies and procedures of U.S. immigrant detention as they relate to human rights laws because “the United States hosts the largest number of international [migrants] in the world.”¹²⁴ Multiple times in its report, the IACHR references the United States’ *civil* immigration laws and detention while at times also noting how immigrant detention itself looks criminal.¹²⁵ The IACHR references Dora Schriro’s 2009 article, stating, “ICE relies primarily on correctional incarceration standards . . . with more restrictions and . . . more costs than are necessary.”¹²⁶ The IACHR uses Schriro’s categorization of ICE’s official policies to support its finding that U.S. immigrant detention is more like a criminal detention system than a civil one.¹²⁷ In addition, the IACHR finds that the United States’ immigrant detention program often violates detention standards and provides less-than-humane conditions to detainees, which contradicts conditions expected in a civil detention scenario.¹²⁸ Thus, the concerns noted by the IACHR are that the United States claims it uses civil detention while maintaining detention conditions with criminal characteristics.

Although scholars like Garcia Hernandez, Strumpf, and Schriro and the international community use this analysis to argue that the U.S. immigrant removal process is either a criminal or a hybrid criminal/civil system, the U.S. Supreme Court maintains its determination that pre-removal immigrant detention is non-punitive, and removal proceedings are civil in nature.

¹²³ Stumpf, 387, 381.

¹²⁴ Inter-American Commission on Human Rights, *Immigration in the United States*, 8.

¹²⁵ Inter-American Commission on Human Rights, 6, 17, 19, 85, 243.

¹²⁶ Schriro, *Immigration Detention*, 2-3.

¹²⁷ Inter-American Commission on Human Rights, *Immigration in the United States*, 85-86.

¹²⁸ Inter-American Commission on Human Rights.

C. CONSTITUTIONAL PROTECTIONS AND MIGRANTS WITHOUT A LEGAL STATUS

The U.S. Supreme Court’s determination that immigrant removal proceedings are civil in nature creates a potential disconnect between the theoretical and actual execution of pre-removal immigrant detention. Several constitutional protections, such as the right to legal counsel, that apply in criminal proceedings do *not* apply to civil proceedings, which confer fewer constitutional protections.¹²⁹ People criminally prosecuted by the U.S. government rely on the constitutional protections provided by the Bill of Rights and other amendments, such as the due process clause, to ensure they are treated fairly, resulting in many resources being available to those accused of crimes.¹³⁰ The U.S. Supreme Court has noted in more than one case that migrants are afforded less constitutional protection due merely to having been born in a country other than the United States, regardless of the civil or criminal nature of the proceedings.¹³¹ The Bill of Rights, however, was intended to delineate *human* rights that apply to all persons in the United States, not only U.S. citizens.¹³² Although the Fourth, Fifth, and Sixth Amendments are not expressly limited to citizens, decisions by the courts create the appearance that the Bill of Rights does not apply to non-U.S. citizens.

¹²⁹ U.S. Const. amend. VI.

¹³⁰ Jeanne F. Cooney, Michelle Tran, and Kristina Sjostrom, *Know Your Rights: A Guide to the United States Constitution* (Minneapolis: United States Attorney’s Office, District of Minnesota, 2012), <https://www.justice.gov/sites/default/files/usao-ne/legacy/2012/04/27/Civil%20Rights%20Book-NE-2.pdf>; “Criminal Law,” Justia, accessed November 15, 2021, <https://www.justia.com/criminal/>.

¹³¹ *Shaughnessy v. Mezei*, 345 U.S. 206 (1953) (court permitting indefinite detention based on undisclosed evidence); *Galvan v. Press*, 347 U.S. 522 (1954) (court permitting exclusion based on lawful political associations); *Porterfield v. Webb*, 263 U.S. 225 (1923) (court permitting state discrimination regarding land ownership based on foreign national status).

¹³² *Kwong Hai Chew v. Colding*, 344 U.S. 590, 598 n.5 (1953); *Reno v. Flores*, 507 U.S. 292, 306 (1993); *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *Demore v. Kim*, 538 U.S. 510, 543 (2003); Frances M. Kriemer, “Dangerousness on the Loose: Constitutional Limits to Immigration Detention as Domestic Crime Control,” *NYU Law Review* 87, no. 5 (November 2012): 1516-17. All sources mention that migrants in removal proceedings receive fewer constitutional protections than American citizens.

1. Fourth Amendment

The Fourth Amendment protects “the people” from unlawful government search and seizure without probable cause.¹³³ However, there is nuance in how various protections apply under the Fourth Amendment in removal proceedings. In *INS v. Lopez-Mendoza*, two migrants were ordered deported for illegal entry via administrative removal procedures.¹³⁴ While they were in pre-trial custody, both admitted to immigration officials that they had unlawfully entered the United States.¹³⁵ Both later asserted that their arrests at work by immigration officials without a search or arrest warrant were unlawful, with one alleging further that the evidence obtained during the arrest should be excluded under the Fourth Amendment.¹³⁶ The U.S. Supreme Court determined that the Fourth Amendment protection against unlawful arrest has no bearing on a removal proceeding, even though probable cause to arrest is generally necessary.¹³⁷ To address whether the exclusionary rule applied in removal proceedings, the Court engaged in a cost-benefit analysis, which weighed the social costs to the government of applying the exclusionary rule against the benefits to the migrant of allowing the evidence obtained via an unlawful arrest to be excluded from a removal proceeding.¹³⁸ Given the removal proceedings’ civil nature and its ability to deter unlawful acts by government officials, the Court found that the social costs of applying the exclusionary rule of the Fourth Amendment in removal proceedings would greatly outweigh the benefits of correcting or guiding law enforcement actions.¹³⁹ Therefore, the Court did not extend application of the exclusionary rule to

¹³³ U.S. Const. amend IV.

¹³⁴ *Lopez-Mendoza*, 468 U.S. at 1032.

¹³⁵ *Lopez-Mendoza*, 468 U.S. at 1035-37.

¹³⁶ *Lopez-Mendoza*, 468 U.S. at 1035-37. In *Lopez-Mendoza*, the Court used the term “arrest” in referencing the immigrants’ apprehension by ICE that led to the removal proceedings. Given the Court’s use of the term arrest in its decision, the discussion surrounding this case uses the same terminology. However, the remainder of the thesis distinguishes between administrative apprehension and criminal arrest by using the term “apprehension” instead of arrest.

¹³⁷ *Lopez-Mendoza*, 468 U.S. at 1039-40.

¹³⁸ *Lopez-Mendoza*, 468 U.S. at 1040-50

¹³⁹ *Lopez-Mendoza*, 468 U.S. at 1050-51.

removal hearings.¹⁴⁰ Thus, although the Fourth Amendment prohibits the warrantless arrest of an individual unless based on probable cause—and case law requires the exclusion from a criminal proceeding of any evidence obtained following an unlawful search and seizure—the Court found that the exclusionary rule does not apply in a civil removal proceeding.

Moreover, in *INS v. Lopez-Mendoza*, the Court was resolute in its determination that an unlawful arrest has no bearing on removal proceedings.¹⁴¹ This finding implies that probable cause to arrest a migrant for immigration proceedings may not be necessary. However, it appears that this determination may be challenged soon. The Ninth Circuit Court of Appeals recently ruled that ICE’s detainer process, which is a precursor to deportation proceedings and detention, violated a migrant’s Fourth Amendment rights because it did not meet the probable cause standard to hold a migrant.¹⁴² In short, the Ninth Circuit held that probable cause to arrest applies in the “civil immigration context.”¹⁴³ Since pre-removal immigrant detention is a byproduct of the removal process, the court’s determination would allow someone to challenge probable cause to detain in removal proceedings in the region of the country covered by the Ninth Circuit Court of Appeals. However, the Ninth Circuit Court remanded the case to the trial court for application of its holding. Therefore, it is unclear whether the U.S. Supreme Court will review and rule on the ability of migrants to challenge the lawfulness of their arrest. Even with this potential and limited change, the U.S. Supreme Court’s decision that migrants in immigrant detention do not have blanket Fourth Amendment protections continues to stand for the time being.

¹⁴⁰ *Lopez-Mendoza*, 468 U.S. at 1050-51.

¹⁴¹ *Lopez-Mendoza*, 468 U.S. at 1040.

¹⁴² *Gonzalez v. U.S. Immigration and Customs Enforcement*, Nos. 20-55175 and 20-55252 (9th Cir. filed Sept. 11, 2020), <https://cdn.ca9.uscourts.gov/datastore/opinions/2020/09/11/20-55175.pdf>.

¹⁴³ *Gonzalez*, at 63.

2. Fifth Amendment

As with the Fourth Amendment, removal processes for migrants provide partial constitutional protection under the Fifth Amendment. According to the Fifth Amendment, “no person shall be held . . . without indictment . . . or shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.”¹⁴⁴ In *Miranda v. Arizona*, the U.S. Supreme Court established a set of warnings related to the Fifth Amendment right not to be compelled to testify against oneself, which law enforcement officers are required to provide to anyone in custody and subject to questioning.¹⁴⁵ In *Chavez v. Martinez*, the U.S. Supreme Court held that the constitutional protection against self-incrimination could be applicable in an administrative proceeding; however, it applies only to persons who are forced to testify against themselves in a *criminal* case or whose pre-trial statements are admitted as testimony against them.¹⁴⁶ Furthermore, the U.S. Supreme Court in *Hiibel v. Sixth Judicial District Court of Nevada* stated that any requirement to make statements about one’s identity to law enforcement is not a violation of the Fifth Amendment, though, because identity information is non-incriminating.¹⁴⁷ As a result of these decisions, the Fifth Amendment appears to apply in removal proceedings even though the proceedings are civil, not criminal. Moreover, migrants are required to identify themselves when asked by the government because identity questions do not equate to self-incrimination. However, a migrant could assert his or her Fifth Amendment right to refuse to answer any other questions, but the government is not obligated to advise the migrant of that right. Thus, the legal precedent leads to confusion about whether a migrant must answer all questions posed by a government official.

While the Fifth Amendment appears to apply in removal proceedings, migrants without lawful status are provided some lesser version of Fifth Amendment protection in

¹⁴⁴ U.S. Const. amend. V.

¹⁴⁵ *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹⁴⁶ *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972); *Chavez v. Martinez*, 538 U.S. 760, 766-67 (2003).

¹⁴⁷ *Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty.*, 542 U.S. 177, 190-91 (2004).

accordance with 8 C.F.R. § 287.3(c), which states that the migrant “will be advised of the reasons for his or her arrest and the right to be represented at no expense to the Government.”¹⁴⁸ Furthermore, migrants are told that the statements they make “may be” used against them but are not told they can remain silent.¹⁴⁹ During a migrant’s initial immigration processing by either CBP or ICE, U.S. immigration officials ask them questions beyond determining their identity, including questions about their fear of return and crimes committed, which migrants are expected to answer.¹⁵⁰ Legal advocates for migrants view these interviews as custodial interrogations because they believe the migrant is in law enforcement custody and being interrogated to provide self-incriminating statements, as shown by advocate groups teaching migrants to remain silent.¹⁵¹ As a result, a migrant’s statements regarding anything beyond identity can result in one’s detention or a penalty of incarceration, which would otherwise trigger Fifth Amendment protections if made following an arrest for a criminal violation. Therefore, migrants subject to removal processes are placed in a situation where the information they provide to immigration officials can be used against them in both current and subsequent removal proceedings. This occurs because the migrant’s statements will be used during the administrative removal proceeding following his or her arrest, and after the migrant is administratively removed for the first unlawful border crossing, the resulting removal is used against the migrant in future reentry removal proceedings.

Not only can a migrant’s initial interview with ICE or CBP be used against him or her in administrative removal proceedings; the same statements could be used against a migrant who is criminally prosecuted under Title 8 of the *U.S. Code*, relating to

¹⁴⁸ *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984); Jennifer M. Chacón, “A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights,” *Duke Law Journal* 59, no. 8 (May 2010): 1605, <https://scholarship.law.duke.edu/dlj/vol59/iss8/2/>; Disposition of Cases of Aliens Arrested without Warrant, 8 C.F.R. § 287.3(c) (2021), <https://www.law.cornell.edu/cfr/text/8/287.3>.

¹⁴⁹ Disposition of Cases of Aliens Arrested without Warrant.

¹⁵⁰ “Claims of Fear: CBP Southwest Border and Claims of Credible Fear Total Apprehensions/Inadmissibles (FY2017-FY2019),” Customs and Border Protection, July 17, 2020, <https://www.cbp.gov/newsroom/stats/sw-border-migration/claims-fear>.

¹⁵¹ “Know Your Rights,” National Immigration Law Center, accessed December 11, 2020, <https://www.nilc.org/get-involved/community-education-resources/know-your-rights/>.

immigration law violations. When a migrant illegally enters the United States for the first time and is apprehended, the migrant could be referred to the DOJ for criminal prosecution under 8 U.S.C. § 1325.¹⁵² If the DOJ takes the case, the migrant's initial statements made under oath at apprehension could be used against him or her under evidentiary rules if those statements differ from what the migrant says in the criminal court proceedings because prior inconsistent statements are allowed in criminal proceedings under a hearsay exception.¹⁵³ If convicted under 8 U.S.C. § 1325 for illegal entry, the migrant could be incarcerated for up to six months.¹⁵⁴

Furthermore, this conviction becomes part of the migrant's immigration record.¹⁵⁵ If the migrant illegally crosses the U.S. border again, the conviction is used to determine whether to criminally prosecute the migrant under 8 U.S.C. § 1326 for illegal reentry.¹⁵⁶ If the migrant is convicted of violating 8 U.S.C. § 1326, the migrant receives an enhanced sentence because of the prior removal; the migrant can be incarcerated for more than a year, even if the previous offense was handled via an administrative removal.¹⁵⁷ Thus, in the case of prosecution under 8 U.S.C. § 1326, the outcome of the initial administrative removal process is effectively criminal, as the removal decision is treated the same as a criminal conviction for illegal entry, and a basis to impose an enhanced punishment following a reentry conviction. Therefore, the removal system is categorized as administrative but has criminal consequences in later proceedings, without having

¹⁵² Unlawful Entry, Failure to Depart, Fleeing Immigration Checkpoints, Marriage Fraud, Commercial Enterprise Fraud, 8 U.S.C. § 1325 (2018), <https://www.justice.gov/archives/jm/criminal-resource-manual-1911-8-usc-1325-unlawful-entry-failure-depart-fleeing-immigration>.

¹⁵³ Fed. R. Evid. 801(d)(1).

¹⁵⁴ *U.S. Sentencing Guidelines Manual* § 2L1.2(b) (2018).

¹⁵⁵ Citizenship and Immigration Services, "Purpose and Background," in *USCIS Policy Manual*, vol. 1 (Washington, DC: Citizenship and Immigration Services, 2021), <https://www.uscis.gov/policy-manual/volume-1-part-c-chapter-1>.

¹⁵⁶ Reentry of Removed Aliens, 8 U.S.C. § 1326 (2018), <https://www.law.cornell.edu/uscode/text/8/1326>.

¹⁵⁷ Neither the sentencing guidelines nor Title 8 specify that the removal be for a criminal conviction under 8 U.S.C. § 1325. Thus, a prior administrative removal may be sufficient to meet the prior removal requirements for conviction under 8 U.S.C. § 1326. See 8 U.S.C. § 1326(a); *U.S. Sentencing Guidelines Manual* § 2L1.2(b).

provided the same level of constitutional protections applicable in a criminal proceeding during the administrative removal process.

3. Sixth Amendment

Finally, there is a lack of definiteness surrounding the application of the Sixth Amendment to the U.S. Constitution and whether it restricts access to legal counsel for migrants during removal proceedings. The Sixth Amendment reads as follows:

In all *criminal* prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.¹⁵⁸

Although the Sixth Amendment explicitly applies to all criminal proceedings, the U.S. Supreme Court has held that it only applies to those crimes that can result in a jail or prison sentence—all felonies and some misdemeanors—because no one should be imprisoned for any level of crime “unless having been represented by counsel.”¹⁵⁹ According to 8 U.S.C. § 1325(a), any migrant apprehended for a first-time offense of illegal entry is subject to fine and imprisonment up to six months.¹⁶⁰ Because the maximum sentence for a conviction under 8 U.S.C. § 1325(a) is six months in prison, a conviction under this section is a misdemeanor under federal law.¹⁶¹ When prosecuted under 8 U.S.C. § 1326 for illegal reentry, the migrant’s conviction is a felony because it can result in incarceration up to 18 months.

As a result of the non-felony nature of administrative removal proceedings, the government is not required to provide counsel. By contrast, migrants criminally prosecuted for illegal entry and reentry do, like anyone else facing criminal charges that carry a jail or prison penalty, have the right to federally funded legal counsel when they meet the income

¹⁵⁸ U.S. Const. amend. VI (emphasis added).

¹⁵⁹ *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972); U.S. Const. amend. VI.

¹⁶⁰ 8 U.S.C. § 1325.

¹⁶¹ “Misdemeanors,” FindLaw, November 22, 2019, <https://criminal.findlaw.com/criminal-law-basics/misdemeanors.html>.

restrictions because these proceedings are held in federal court, not immigration court. Thus, the Sixth Amendment is inconsistently applied in the illegal reentry context since the right is not fully recognized in administrative removal cases but is in criminal prosecution cases, even though both proceedings result from the same act of crossing the U.S. border unlawfully.

When a migrant is apprehended, ICE delivers the INA warnings, as required by statute.¹⁶² Although the warnings indicate that migrants have the right to an attorney, the migrant is expected to bear the cost of the attorney or go without representation during the administrative removal process.¹⁶³ In addition, there is no express right for migrants to be told whether removal will be postponed until they can obtain an attorney.¹⁶⁴ Thus, if immigration officials choose to process the migrant administratively, the migrant is permitted legal counsel, but legal counsel is not provided at the government's expense, nor is it guaranteed that the migrant will be given time to obtain an attorney before the immigration proceeding occurs. Unless the migrant has the financial means to hire an attorney or can obtain free representation from a pro bono attorney, the migrant is expected to manage one's own immigration case throughout the process and defend against any detention or removal findings. By contrast, if the U.S. Attorney's Office decides to criminally prosecute rather than administratively process the migrant, the migrant is afforded the right to legal counsel at the government's expense; however, the migrant may not have sufficient time to meet with counsel because of the pace of these proceedings.¹⁶⁵ Therefore, the path to legal representation in immigrant proceedings, civil or criminal, is complex and unclear.

¹⁶² Bloom, "Immigration Enforcement under Federal Authority 287(g)."

¹⁶³ Ingrid Eagly and Steven Shafer, *Access to Counsel in Immigration Court* (Washington, DC: American Immigration Council, 2016), <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>; 8 U.S.C. § 1229a(b)(4) (2018), <https://uscode.house.gov/view.xhtml?hl=false&edition=prelim&req=granuleid%3AUSC-prelim-title8-section1229a&num=0&saved=%7CZ3JhbnVsZWlkOlVTQy1wcmVsaW0tdGl0bGU4LXNIY3Rpb24xMjI5%7C%7C%7C0%7Cfalse%7Cprelim>.

¹⁶⁴ 8 U.S.C. § 1229a(b)(4).

¹⁶⁵ Joanna Lydgate, *Assembly-Line Justice: A Review of Operation Streamline* (Berkeley: University of California, 2010), 13, https://www.law.berkeley.edu/files/Operation_Streamline_Policy_Brief.pdf.

Currently, the only situation in which the Sixth Amendment applies to all migrants regardless of their immigration status is the attorney's duty to explain the possible immigration effects from a conviction in a criminal proceeding unrelated to illegal entry, for example, when a migrant is prosecuted for violation of a state law such as illegal possession of narcotics. In 2010, the U.S. Supreme Court in *Padilla v. Kentucky* held that criminal defense lawyers have a duty to inform their migrant clients of the possible immigration effect of a conviction or plea of guilty.¹⁶⁶ Thus, if a migrant is charged with a crime for which a conviction could result in the migrant's removal from the United States, the migrant's lawyer is obligated to advise of that immigration consequence.

In summary, the various administrative and criminal paths whereby a migrant can be processed for unlawful entry, either initial entry or subsequent reentries, lead to varying applications of Fourth, Fifth, and Sixth Amendment constitutional protections.

D. TEMPORAL LIMITS OF REMOVAL PROCEEDINGS

A final area of legal implication arising from immigrant detention is the indeterminate time of confinement migrants are subjected to when in administrative removal proceedings. Currently, ICE detains men and women in immigrant detention facilities across the country, sometimes for indefinite periods.¹⁶⁷ When it was determined that mandatory immigrant detention was necessary in some situations, the justification centered on criminal aliens and the need to protect the U.S. population, as demonstrated by two laws passed in 1996 specifying the crimes sufficient to warrant a migrant be held in detention.¹⁶⁸ Currently, however, a majority of detained migrants are adults without children who have crossed the border for the first time and have no criminal or other administrative immigration violations in their backgrounds.¹⁶⁹ Although minors have a

¹⁶⁶ *Padilla*, 559 U.S. at 356.

¹⁶⁷ ICE indicates that family units are housed together in "family staging centers" for no longer than 20 days. Immigration and Customs Enforcement, "Detention Management."

¹⁶⁸ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, <https://www.govinfo.gov/content/pkg/PLAW-104publ132/html/PLAW-104publ132.htm>; Illegal Immigration and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996), <https://www.govinfo.gov/content/pkg/STATUTE-110/pdf/STATUTE-110-Pg3009.pdf>.

¹⁶⁹ Immigration and Customs Enforcement, "Detention Management."

time limit of 20 days for detention, the U.S. government can detain adult migrants without children as long as the government deems necessary during removal procedures.¹⁷⁰

The laws, legislative intent of Congress, and decisions of the U.S. Supreme Court indicate that Congress did not intend indefinite immigrant detention; however, in practice, the U.S. government is holding adult migrants for unlimited time during the removal process. Although two federal criminal laws relate to detention timeframes for immigration border violations, the courts have yet to state or define a blanket time limit on civil immigrant detention, regardless of which statute or regulation applies. More recently, the courts are starting to carve out specific situations for time limits to migrant detention although, as of this writing, it is unclear what the courts' final determination will be.

1. Federal Criminal Laws

As it currently stands, neither of the immigration entry violation laws prescribes indefinite detention in its sentencing guidelines. As noted earlier, although 8 U.S.C. § 1325 criminalizes illegal entry, it is similar to a misdemeanor, which does not register on the federal sentencing guidelines, as a conviction carries a sentence of up to six months in jail.¹⁷¹ Furthermore, 8 U.S.C. § 1326 criminalizes illegal *reentry* after removal, which is a felony charge and penalized by up to two years in prison.¹⁷² Hence, once a migrant has been removed and returns to the country illegally, the reentry violation charge falls within federal sentencing guidelines and is elevated to a higher degree of crime, carrying a stiffer penalty.¹⁷³

¹⁷⁰ Immigration and Customs Enforcement, “Detention Management”; *Flores v. Lynch*, 212 F. Supp. 3d 902, 914 (2015).

¹⁷¹ 8 U.S.C. § 1325; American Immigration Council, “Prosecuting People for Coming to the United States” (Washington, DC: American Immigration Council, 2020), 2, <https://www.americanimmigrationcouncil.org/research/immigration-prosecutions>.

¹⁷² 8 U.S.C. § 1326; American Immigration Council, “Prosecuting People for Coming to the United States,” 2.

¹⁷³ 8 U.S.C. § 1326; U.S. Sentencing Commission, *Primer: Immigration Guidelines* (Washington, DC: U.S. Sentencing Commission, 2020), 22, https://www.ussc.gov/sites/default/files/pdf/training/primers/2020_Primer_Immigration.pdf.

Both federal incarcerations are in addition to any time spent in administrative immigrant detention related to removal.¹⁷⁴ Immigration authorities do not have a prescribed time limit when restricting migrants' liberty to facilitate an administrative removal. By detaining a migrant following criminal prosecution and for any additional time needed to remove the migrant from the country, the federal government is detaining a migrant with a longer restriction of liberty than is federally mandated. That is, migrants held in immigrant detention following a federal conviction are held for a period beyond the prescribed time of restriction of liberty in the criminal statutes, which appears inconsistent with congressional intent as federal courts have interpreted it.

2. Court-Established Temporal Limits

In response to the practice of de facto indefinite detention, the U.S. Supreme Court has held that its interpretation of immigration law does not support indefinite detention for specific classes of noncitizens while facilitating an administrative process like removal. In reviewing statutes granting the civil detention of a migrant, such as 8 U.S.C. § 1226(a) and (c), 8 U.S.C. § 1225(b), and 8 U.S.C. § 1231(a), Congress at times mentions a period, but it makes no clear mention of a limit to the length of detention for a migrant.¹⁷⁵ According to the Court, U.S. immigration officials have the authority to detain a migrant to ensure completion of the removal process, unless it exercises its discretionary authority to grant parole.¹⁷⁶ Even without the explicit time constraints, the Court's specific classes of migrants have limited the U.S. government's unfettered, indefinite detention of migrants.

Other than the statutory detention time limits for criminal immigration violations, as it stands today, the Court has defined situations whereby immigration officials cannot detain a migrant without considering parole: 1) migrants who have not obtained the age of majority and 2) migrants who have been ordered removed but are awaiting removal. Regarding the first class of migrant, minor immigrants, according to the Court in the well-

¹⁷⁴ Goodwin, *Immigration Enforcement*, 12; Franzblau, *A Legacy of Injustice*, 4.

¹⁷⁵ 8 U.S.C. § 1226(a) (2018); 8 U.S.C. § 1226(c) (2018); 8 U.S.C. § 1225(b) (2018); 8 U.S.C. § 1231(a) (2018).

¹⁷⁶ *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018).

known *Flores* settlement, which was later codified into law, underage migrants are to be held using the “least restrictive means” possible.¹⁷⁷ Furthermore, Judge Gee of the Central District of California defined “less restrictive means” as encompassing a timeframe of fewer than 20 days.¹⁷⁸ Thus, it is clear that migrants under the age of 18 who are in pre-removal immigrant detention must not be detained longer than 20 days.

As analyzed in the following, the second situation for which the courts have established temporal limits surrounds migrants who were admitted to the country but have been ordered removed and whom the government cannot physically remove within six months of issuing the removal order. The U.S. Supreme Court in *Zadvydas* indicated that any migrant in this category who has not been removed within 180 days must be granted a parole hearing, according to 8 U.S.C. § 1231(a)(6).¹⁷⁹ The Court held to do otherwise would imply that the statute provides for indefinite detention, which is not permissible under a constitutional interpretation of the statute or by understanding the congressional intent of the statute.¹⁸⁰ The parole hearing is an opportunity for the migrant to establish there is “no significant likelihood of removal in the foreseeable future.”¹⁸¹ Moreover, the Court’s decision in *Zadvydas* established that Congress did not intend for indefinite detention of a migrant ordered removed under 8 U.S.C. § 1231(a)(6); further, if the government wants to detain a migrant beyond the 180 days specified, the government must establish a significant likelihood that removal can be completed in a reasonable time to continue detaining the migrant pending removal.¹⁸² This determination impresses that the Court’s interpretation of the law intends there to be a time limit on the restriction of liberty in a civil detention setting, such as immigrant removal processes.

The U.S. Supreme Court’s interpretation was expanded further by its decision in *Clark*. Unlike *Zadvydas*, in *Clark*, the migrants had not been admitted to the United States

¹⁷⁷ *Flores*, 507 U.S. at 292; *Flores v. Lynch*, No. CV 85-04544 DMG (C.D. Cal. filed Aug. 21, 2015).

¹⁷⁸ *Flores*, No. CV 85-04544 DMG.

¹⁷⁹ *Zadvydas*, 533 U.S. at 682, 690, 699-70.

¹⁸⁰ *Zadvydas*, 533 U.S. at 689-90, 699.

¹⁸¹ *Zadvydas*, 533 U.S. at 683-84.

¹⁸² *Zadvydas*, 533 U.S. at 697, 701.

but rather paroled into the United States following the Mariel boatlift.¹⁸³ The migrants' paroles were revoked by the attorney general because of criminal convictions on the part of both migrants.¹⁸⁴ At the time of revocation, immigration officials detained the migrants pending conclusion of removal proceedings, and both migrants were ordered removed.¹⁸⁵ After being ordered removed and the passage of the initial 90-day period to complete removal, both migrants filed a writ of habeas corpus challenging their continued detention.¹⁸⁶ The Court in *Clark* determined that Congress's intent, as defined in *Zadvydas*, applies to all three categories of immigrants affected in 8 U.S.C. § 1231, regardless of the method of admission into the United States, because the Court cannot give different meaning to the same text.¹⁸⁷ Thus, the Court affirmed the Ninth Circuit ruling that migrants ordered removed have the ability to question their prolonged detention when removal is not in the foreseeable future. Although the Court expanded application of the hearing requirement to a broader scope of migrants ordered removed, the Court has not made a determination about time limitations for other immigrant detention situations.

3. Legal Challenges

In response to these decisions and cases currently being litigated in various federal courts is the question whether the courts should impose a time limit on immigrant detention in all possible scenarios. Following *Clark* and *Zadvydas*, U.S. Attorney General Barr issued a decision in *Matter of M-S-*.¹⁸⁸ This matter involved a class of migrants who claimed fear of return, were "found by an asylum officer to have a credible fear," and then were given the opportunity to request asylum before an immigration judge during full removal proceedings.¹⁸⁹ The question in *Matter of M-S-* was whether a migrant can be released on

¹⁸³ *Clark v. Martinez*, 543 U.S. 371 (2005).

¹⁸⁴ *Clark*, 543 U.S. at 375.

¹⁸⁵ *Clark*, 543 U.S. at 375-76.

¹⁸⁶ *Clark*, 543 U.S. at 376.

¹⁸⁷ *Clark*, 543 U.S. at 371.

¹⁸⁸ *Clark*, 543 U.S. at 378, 386.

¹⁸⁹ *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019); 8 U.S.C. § 1225(b)(1).

bond according to 8 U.S.C. § 1225.¹⁹⁰ In Barr’s decision, he held that all migrants falling into this succinct category should be detained during the removal process, unless discretionarily granted parole under 8 U.S.C. § 1182(d)(5)(A) because there is no implicit exception for bond.¹⁹¹ In short, migrants pending removal hearings after being found to have a credible fear are “ineligible for bond” until the proceedings conclude.¹⁹² After Barr’s decision in *Matter of M-S-*, government officials appealed a Western District of Washington’s 2019 decision in *Padilla v. U.S. Immigration and Customs Enforcement*.¹⁹³ This litigation involves an appeal of a lower court’s preliminary injunction preventing ICE from detaining without a bond hearing migrants who had been found to have a credible fear and are pending full removal hearings, like those identified in *Matter of M-S-*. The Ninth Circuit held that migrants in these circumstances could be held in detention for period longer than those in *Zadvydas* and *Demore*.¹⁹⁴ Although the Ninth Circuit decision cites the U.S. Supreme Court’s repeated holdings that “non-punitive detention violates the Constitution unless it is strictly limited” and asserts that there must be a prompt hearing to determine whether the government’s purpose is furthered by the continued detention, the U.S. Supreme Court vacated the decision and remanded the case to the Ninth Circuit to reconsider in light of its recent decision in *Department of Homeland Security v. Thuraissigiam*.¹⁹⁵ Thus, it is unsettled whether it is permissible to detain without limit those awaiting full removal hearings based on positive credible fear determinations.

In all regards, it is unclear whether Congress intended a time limit on immigrant detention because neither Congress, nor the executive branch, nor the courts have stated,

¹⁹⁰ *Matter of M-S-*, 27 I&N Dec. at 509.

¹⁹¹ *Matter of M-S-*, 27 I&N Dec. at 509, 516-17. The decision references Section 235 of the Immigration and Nationality Act, which directly corresponds to the U.S.C. as referenced in this thesis. For consistency, the reference has been changed to the corresponding U.S.C. section.

¹⁹² *Matter of M-S-*, 27 I&N Dec. at 518-19.

¹⁹³ *Padilla v. U.S. Immigration and Customs Enforcement*, 379 F. Supp. 3d 1170 (W.D. Wash. 2019).

¹⁹⁴ *Padilla* 387 F. Supp. 3d 1219 (W.D. Wash. 2019), *appeal docketed*, No. 19-35565 (9th Cir. July 5, 2019).

¹⁹⁵ The U.S. Supreme Court has not yet heard *Thuraissigiam*, so it is not discussed in more detail. *Department of Homeland Security v. Thuraissigiam*, 591 U.S. __ (2020).

implemented, or interpreted a temporal limit. However, it seems plausible that the courts could expand time limits to apply in all situations of immigrant detention in the future.

E. CONCLUSION

This chapter demonstrated that according to the U.S. Supreme Court, removal proceedings are civil in nature, despite legal scholars and the international community arguing that the U.S. migrant pre-determination detention system mimics criminal detention. Furthermore, migrants without a lawful status in removal proceedings do not have Fourth Amendment protections, but they have specific and limited Fifth Amendment protections depending on where they are in the removal process and how they entered it. Furthermore, the Sixth Amendment does not apply to migrants without a lawful status in administrative removal proceedings but could when migrants are charged with criminal immigration violations. In short, the application of the Fourth, Fifth, and Sixth Amendments is sometimes affected by the prosecution/removal path determined by the government. Finally, this chapter found that Congress did not intend for migrants to be detained indefinitely because the Court has imposed some time limits on detention for certain migrants, though the time limits have not been universally applied. The temporal question relating to immigrant detention, however, may change in the future.

In conclusion, based on the legal analysis, the circumstances under which the United States should use immigration policies to determine when immigrants without a lawful status are detained depend on the situation. Thus, the U.S. government should consider how its policies affect the legal rights of migrants who enter or attempt to enter the United States without a lawful status when determining which policies to enforce or enact.

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III. THE FINANCIAL IMPLICATIONS OF LONG-TERM IMMIGRANT DETENTION

In addition to the legal implications surrounding immigrant detention, financial implications are inherent in the system. Overall, immigration enforcement involves costs arising from the following: apprehending migrants along U.S. borders, arresting migrants in the interior of the country who have no lawful status to remain in the United States, arresting migrants in the interior of the country who have violated state and local criminal laws, detaining migrants who wish not to return to their home countries, and returning migrants to their home countries.¹⁹⁶ According to the Migration Policy Institute, the U.S. government spends more on immigration enforcement than on any other federal law enforcement entity, including the Federal Bureau of Investigation and USMS.¹⁹⁷ In addition, the extent of the financial implications of immigrant detention are affected by evolving immigration enforcement policies that change who should be held pending immigration determinations.

The U.S. government analyzes and debates the cost of detention in its annual budgets, and each department focuses on providing an estimate for its budget year at least two years ahead. These estimates appear in the overall proposed *Presidential Budget for Congress* to debate and enact.¹⁹⁸ However, such a process does not consider the fluctuating *overall* costs to detain a changing number of migrants every day, which sometimes necessitate ICE entering into contracts with private prisons. Fully assessing all the financial implications of immigrant detention thus requires considering all ways

¹⁹⁶ Department of Homeland Security, *FY 2020 Budget in Brief*; Department of Justice, *FY 2019 Budget Request at a Glance* (Washington, DC: Department of Justice, 2020), <https://www.justice.gov/jmd/page/file/1033086/download#:~:text=The%20Department's%20FY%202019%20Discretionary,the%20Attorney%20General's%20highest%20priorities.>

¹⁹⁷ Doris Meissner et al., *Immigration Enforcement in the United States: The Rise of a Formidable Machinery* (Washington, DC: Migration Policy Institute, 2013), <https://www.migrationpolicy.org/research/immigration-enforcement-united-states-rise-formidable-machinery>.

¹⁹⁸ Shaun Donovan, "Overview of the Budget Process," in *Preparation, Submission, and Execution of the Budget*, OMB Circular No. A-11 (2016) (Washington, DC: Executive Office of the President, 2016), 3-4, https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/a11_current_year/a11_2016.pdf.

in which money flows surrounding it—including who profits from an enhanced immigrant detention policy—when determining under what circumstances to implement enhanced immigrant detention policies.

To that end, Section A defines the scope and data limitations for this chapter, followed by the criteria for assessing the financial implications of immigrant detention. Then, Section B analyzes the overall costs of immigrant detention, then analyzes the individual components of the overall cost calculation. Section C breaks down the profitability of private immigrant detention prisons as compared to other federal criminal detention profits. To conclude, this chapter considers the factors to assess the circumstances under which executive policies should be used to detain migrants who have entered or attempted to enter the United States unlawfully.

Immigrant detention costs have ebbed and flowed through the years, sometimes by many millions of dollars in a year.¹⁹⁹ These varying numbers have numerous causes, such as underestimating bed costs in detention facilities or the beds needed in a year.²⁰⁰ Furthermore, ICE immigration officials have stated that changes in administrations routinely lead to policy changes regarding enforcement priorities, which effect the estimates.²⁰¹ Due to the uncontrollable nature of migrant flows to the United States, inaccurate estimations of the costs involved with immigrant detention, and the expansion of using private for-profit companies to detain migrants, from a financial perspective, the United States should consider controlling the fluctuation in costs by limiting its use of executive immigration enforcement policies to detain migrants.

A. SCOPE, DATA LIMITATIONS, AND ANALYTICAL CRITERIA

There are many interrelated costs associated with immigrant detention, not all of which are easily identified in federal budget documents or clearly connected to long-

¹⁹⁹ Benenson, “The Math of Immigration Detention.”

²⁰⁰ Rebecca S. Gambler, *Immigration Detention: Opportunities Exist to Improve Cost Estimates*, GAO-8-343 (Washington, DC: Government Accountability Office, 2018), 4, 11, <https://www.gao.gov/products/GAO-18-343>.

²⁰¹ Gambler, 15.

term immigrant detention. Thus, Part 1 of this section summarizes the characteristics of detention relevant to determining immigrant detention costs and discusses the data limitations. Part 2 details the fiscal criteria used to analyze the budgetary information.

1. Scope and Data Limits

First, it is necessary to examine the costs associated with long-term detention pending removal proceedings, as these costs are the ones most likely to reflect the financial implications of changing immigrant detention policies. The immigration enforcement costs not included in the present analysis are those ancillary to the detention of migrants beyond 72 hours, as determined by DHS classifications of facilities, such as the costs associated with apprehension and initial processing by CBP; non-detention monitoring of migrants by ICE; or ancillary DHS programs, including the Migrant Protection Protocols, which had required asylum seekers to remain in Mexico pending an asylum determination.²⁰² All of these excluded costs relate to comprehensive immigration enforcement; in other words, these costs are incurred regardless of whether the migrant is detained long-term while pending removal hearings. Instead, the financial analysis undertaken in this thesis is limited to the costs associated with long-term immigrant detention facilities, not temporary holding facilities or transport.

Within the scope of long-term detention, it is relevant to compare the estimated versus actual daily population, daily bed rates, annual costs for immigrant detention, and revenues earned by the for-profit private companies, which are often used to meet ICE's immigrant detention needs. According to the Government Accountability Office (GAO), ICE's budgets and congressional justifications determine the costs of immigrant detention in terms of overall detention beds, broken down into the average daily

²⁰² Kirstjen Nielsen, "Policy Guidance for Implementation of the Migrant Protection Protocols" (official memorandum, Washington, DC: Department of Homeland Security, 2019), https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf; Exec. Order No. 14010, 86 Fed. Reg. 8267 (Feb. 5, 2021), Sec. 4(ii)(B), <https://www.govinfo.gov/content/pkg/FR-2021-02-05/pdf/2021-02561.pdf>. In February 2021, President Joe Biden ordered DHS to examine its migrant protection protocols and pause any additions to the list while the program was under review; however, as of this writing, this reversal of policy is being litigated in the federal court system. See *Texas v. Biden*, No. 2:21-CV-067-Z (N.D. Tex. filed Aug. 13, 2021); *Texas v. Biden*, No. 21-10806 (5th Cir. filed Aug. 19, 2021); "Featured Issue: Migrant Protection Protocols (MPP)," American Immigration Lawyers Association, November 18, 2021, <https://www.aila.org/advo-media/issues/all/port-courts>.

population and daily bed rates.²⁰³ These categories are sometimes further broken down by the type of immigrant detention facility, adult or family.²⁰⁴ ICE estimates its population and daily bed rate for each bed type two years into the future based on the past four years of average daily populations and daily bed rates.²⁰⁵ Therefore, this analysis focuses on each of these to identify the financial implications of immigrant detention.

Nevertheless, in ICE's past budgets, three identifiable hinderances complicate the analysis and cause further restrictions in comparing data. First, since 2003, the line-item descriptions in ICE's budgets relating to immigrant detention costs have varied from "detention and deportation" to "detention and removal operations" to "enforcement and removal operations."²⁰⁶ Furthermore, budgets following the 2008 terminology change indicate "custody" or "detention" as merely one aspect of a larger budget line item, "custody operations," which is one part of the bigger line item of detention and removal operations or enforcement and removal operations.²⁰⁷ Since custody operations include things other than long-term immigrant detention costs, as demonstrated in the calculations that follow, it is difficult to determine for these years what exact percentage of the overall line item relates directly to long-term immigrant detention.

Second, although the budget documents for FY 2008 through FY 2011 use the term "custody operations," these budget documents do not use the same breakdown of the costs in a clearly defined manner to determine the calculation used to request funds for immigrant detention beds. Thus, in both the budget request and budget justification documents for FY 2008 and FY 2009, DHS and ICE describe the immigrant detention

²⁰³ Gambler, *Opportunities Exist*, 3-4.

²⁰⁴ Gambler, 18.

²⁰⁵ Gambler, 3.

²⁰⁶ George W. Bush, *Securing the Homeland, Strengthening the Nation* (Washington, DC: White House, 2002), https://georgewbush-whitehouse.archives.gov/homeland/homeland_security_book.html; Department of Homeland Security, *Performance Budget Overview FY 2005* (Washington, DC: Department of Homeland Security, 2005), https://www.dhs.gov/sites/default/files/publications/2004PBO_FINAL_29_JAN_04_0.pdf; Department of Homeland Security, *Annual Financial Report 2011-2013* (Washington, DC: Department of Homeland Security, 2011).

²⁰⁷ Gambler, *Opportunities Exist*, 10.

bed numbers in terms of how many additional immigrant detention beds are needed or how many are needed for various programs rather than a clear overall number of beds.²⁰⁸ Moreover, budget documents for the same fiscal years do not provide details on a cost per bed.²⁰⁹ For FYs 2010 and 2011, ICE breaks down its budget funding requests into categories that do not clearly relate to a cost per bed or number of beds needed.²¹⁰ For example, ICE breaks down its budget requests in terms of rent, travel, healthcare, and other various parts, but some of these categories could be subsumed under the daily bed rate of recent budget requests.²¹¹ Furthermore, the *Budget in Brief* documents for FY 2010 and FY 2011 indicate expenses for various categories related to detention bed costs and address the costs in terms of additional overall funds needed for immigrant detention beds.²¹² Finally, these budget documents show overall costs for custody operations in terms of employees needed and general costs without a single breakdown of the individual types of costs.²¹³

Third, a delay in the availability of “just in time” actual costs for FY 2020 and FY 2021 makes it difficult to determine how ICE’s costs, including immigrant detention costs, might have changed since ICE estimated the specific costs for FY 2019. In the

²⁰⁸ Department of Homeland Security, *FY 2008 Budget in Brief* (Washington, DC: Department of Homeland Security, 2007); “Budget - Fiscal Year 2008,” Immigration and Customs Enforcement, December 28, 2007, <https://www.ice.gov/factsheets/budget2008>; Department of Homeland Security, *FY 2009 Budget in Brief* (Washington, DC: Department of Homeland Security, 2008), https://www.dhs.gov/xlibrary/assets/budget_bib-fy2009.pdf.

²⁰⁹ Department of Homeland Security, *FY 2008 Budget in Brief*; Immigration and Customs Enforcement, “Budget - Fiscal Year 2008”; Department of Homeland Security, *FY 2009 Budget in Brief*.

²¹⁰ Department of Homeland Security, *FY 2010 Budget in Brief* (Washington, DC: Department of Homeland Security, 2009), https://www.dhs.gov/sites/default/files/publications/budget_bib_fy2010.pdf; Department of Homeland Security, *Budget Overview Fiscal Year 2010* (Washington, DC: Department of Homeland Security, 2009), https://www.dhs.gov/sites/default/files/publications/dhs_congressional_budget_justification_fy2010.pdf; Department of Homeland Security, *FY 2011 Budget in Brief* (Washington, DC: Department of Homeland Security, 2010), https://www.dhs.gov/sites/default/files/publications/budget_bib_fy2011.pdf; Department of Homeland Security, *Congressional Budget Justification FY 2011* (Washington, DC: Department of Homeland Security, 2010), https://www.dhs.gov/sites/default/files/publications/dhs_congressional_budget_justification_fy2011.pdf; Department of Homeland Security, *Annual Financial Report 2011-2013*.

²¹¹ Department of Homeland Security, *Budget Overview Fiscal Year 2010*.

²¹² Department of Homeland Security, *FY 2010 Budget in Brief*.

²¹³ Department of Homeland Security, *Congressional Budget Justification FY 2011*, 1056 of 3985.

various congressional justification documents for ICE’s budgets, ICE details its anticipated costs per bed and the after-the-fact actual costs per bed.²¹⁴ However, the 2020 *Congressional Justification* still shows a “to be determined” designation for the FY 2019 actual costs.²¹⁵ This delay in publishing expenditures makes it difficult to determine how accurately ICE projects its costs.

Thus, given the inconsistencies in terminology since DHS’s inception, ICE’s cost explanations, and available data, this analysis covers the years 2012 through 2019 because these years contain the same line-item terminology for detention-related budget items, allowing for one-to-one comparison of cost data, and have actual numbers available to complete the comparison. Parsing the details of the budget to determine the specific costs of detention and provide a 100 percent accurate cost analysis is difficult. Nevertheless, the available data provide a current picture of how immigrant detention costs have changed over the years.

2. Financial Implications Criteria

This financial implication analysis uses a modified version of the GAO’s best practices for estimating costs to determine which components of the detention budget to analyze. When reviewing budget estimates, the GAO follows the best practices outlined in the *GAO’s Cost Estimating and Assessment Guide*, which assesses the reliability of a budget estimate according to four general characteristics: well-documented,

²¹⁴ Department of Homeland Security, *U.S. Immigration and Customs Enforcement Budget Overview: Fiscal Year 2017 Congressional Justification*, vol. 2 (Washington, DC: Department of Homeland Security, 2016), https://www.dhs.gov/sites/default/files/publications/FY%202017%20Congressional%20Budget%20Justification%20-%20Volume%202_1.pdf; Department of Homeland Security, *U.S. Immigration and Customs Enforcement Budget Overview: Fiscal Year 2018 Congressional Justification* (Washington, DC: Department of Homeland Security, 2017), <https://www.dhs.gov/sites/default/files/publications/ICE%20FY18%20Budget.pdf>; Department of Homeland Security, *Immigration and Customs Enforcement Budget Overview: Fiscal Year 2019*; Department of Homeland Security, *Immigration and Customs Enforcement Budget Overview: Fiscal Year 2020*; Department of Homeland Security, *U.S. Immigration and Customs Enforcement Budget Overview: Fiscal Year 2021 Congressional Justification* (Washington, DC: Department of Homeland Security, 2020), https://www.dhs.gov/sites/default/files/publications/u.s._immigration_and_customs_enforcement.pdf.

²¹⁵ Department of Homeland Security, *Immigration and Customs Enforcement Budget Overview: Fiscal Year 2020*, ICE-6.

comprehensive, accurate, and credible.²¹⁶ Based on these criteria, this chapter analyzes whether ICE's estimates are accurate and credible for the years analyzed, FY 2012 through FY 2019.

Although there are four characteristics, this analysis focuses on two—accuracy and credibility—because of the available data in ICE's public-facing documents. In 2018, the GAO found that ICE did not maintain sufficient documentation of its budget review process.²¹⁷ Currently, the only documents available that assess the comprehensiveness of ICE's budget review process are from the GAO; it is, therefore, infeasible to further analyze whether ICE has rectified its deficiencies in documentation. Nonetheless, the GAO identified that ICE is comprehensive in its budget estimates, meaning that it includes estimates for all anticipated costs and justifications for the estimates provided.²¹⁸ Since the GAO has determined that ICE's budget estimates are comprehensive, it is unnecessary to analyze this criterion because neither ICE nor the GAO has made any further data available that challenge this determination.

This leaves accuracy and credibility as possible characteristics to examine the accuracy of ICE's immigrant detention cost estimates. To assess whether an estimate is accurate, it should be "unbiased, based on an assessment of most likely costs, adjusted properly for inflation, and [contain] few, if any, minor mistakes. . . . Variances between planned and actual costs should be documented, explained, and reviewed."²¹⁹ Furthermore, the budget should assess how sensitive the estimates are to any change in any factor involved in the estimates.²²⁰ Considering factors that could require a change in the budget provides for reliability in the data, which establishes the credibility of the

²¹⁶ Gambler, *Opportunities Exist*, 4.

²¹⁷ Gambler, 11-12. According to the GAO, ICE claims to have a review process, but ICE does not have documentation to show that it exists.

²¹⁸ Gambler, 23-24.

²¹⁹ Gambler, 23.

²²⁰ Gambler, 23.

estimate.²²¹ Given the limits in analyzing all four criteria, this analysis reviews multiple fiscal years' budgets through the lenses of accuracy and credibility.

Finally, although government budgets are used to show government spending, it is important to consider where the money is going because the output is part of the fiscal process. When determining where to detain someone, ICE considers minimum bed quotas at nearby facilities, as it must pay contracted prison companies regardless of whether the beds are filled.²²² Given that ICE considers its private prison contracts before detaining a migrant, it is relevant to identify the financial implications of using private prisons for immigrant detention in determining the circumstances under which the United States should use immigration enforcement policies to detain migrants entering or attempting to enter the United States unlawfully.

B. FINANCIAL IMPLICATIONS OF IMMIGRANT DETENTION

A holistic assessment of ICE's annual budget justifications and publicly available documents reveals that, first, during FYs 2012 through 2019, ICE's average daily bed population estimates were inaccurate. Second, during those same years, ICE's daily bed rate estimates were inaccurate. Third, ICE's overall annual immigrant detention estimates have been inaccurate. As such, this section analyzes whether there are controllable or uncontrollable reasons underlying or causing the inaccuracy of ICE's immigrant detention cost estimates.

According to ICE, it uses the following calculation to project its spending on immigrant detention:

$$\text{Cost of detention} = \text{number of beds} \times \text{daily bed rate.}^{223}$$

²²¹ Gambler, 27.

²²² Rebecca Gambler, *Immigration Detention: Additional Actions Needed to Strengthen Management and Oversight of Facility Costs and Standards*, GAO-15-153 (Washington, DC: Government Accountability Office, 2014), 18-19, <https://www.gao.gov/products/GAO-15-153>.

²²³ Gambler, *Opportunities Exist*, 10-11.

ICE’s anticipated budget costs, however, do not include the payroll expense of the ICE employees needed to run the facilities or facilitate administrative processes.²²⁴ Therefore, the estimated costs include all other provisions needed or required for the migrant while in immigrant detention.²²⁵ Based on ICE’s calculation, there are three components in assessing the accuracy of its detention cost estimates: the average number of detention beds needed daily, daily bed rates, and the overall cost of immigrant detention estimates. The following sections detail each one in turn.

1. Average Daily Number of Beds

In FYs 2012–2019, ICE’s average daily bed numbers were incorrect such that estimates of this factor lacked accuracy, according to GAO standards. Consequently, ICE’s estimates resulted in funding shifts to cover unexpected immigrant detention costs, which indicate the average daily number of bed estimates lacked credibility.

The number of beds needed daily by immigration detention facilities is determined by the number of people migrating to the United States and the number of migrants apprehended and detained under immigrant enforcement policies. As shown in Figure 5, ICE’s annual immigrant detention budget has underestimated the average daily bed count in its detention facilities in eight out of nine years, even though one overestimate was favorable to ICE’s budget.

²²⁴ Benenson, “The Math of Immigration Detention.”

²²⁵ Department of Homeland Security, *Immigration and Customs Enforcement Budget Overview: Fiscal Year 2020*, 6.

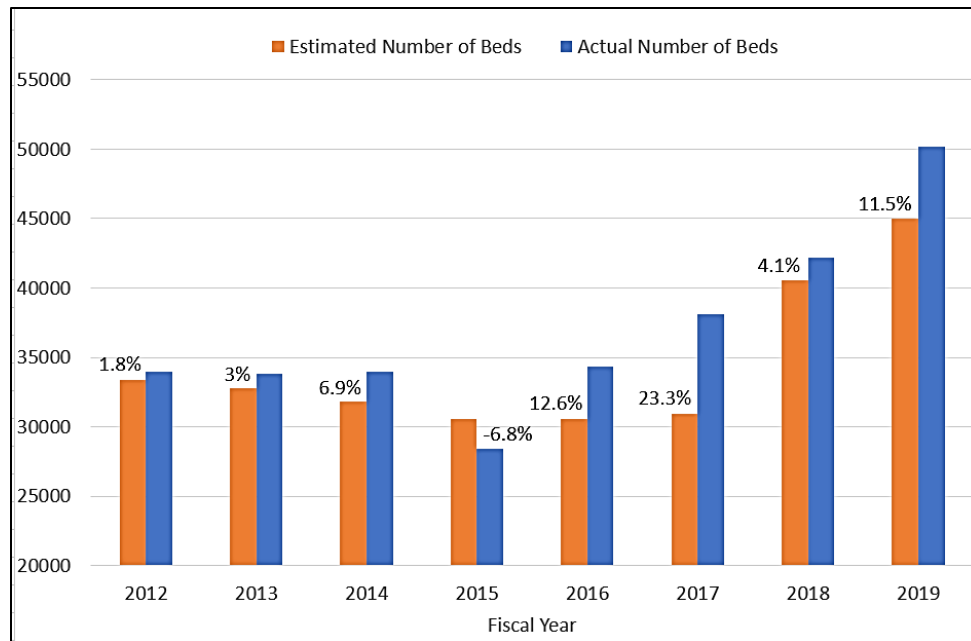


Figure 5. ICE’s Estimated vs. Actual Daily Bed Populations, FY 2012–2019.²²⁶

For FY 2012, FY 2013, FY 2014, FY 2016, FY 2017, FY 2018, and FY 2019, ICE underestimated the number of beds it needed for immigrant detention by 1.8 percent, 3 percent, 6.9 percent, 12.6 percent, 23.3 percent, 4.1 percent, and 11.5 percent, respectively.²²⁷ Conversely, ICE overestimated its need for FY 2015 by 6.8 percent.

²²⁶ Adapted from Department of Homeland Security, *Congressional Budget Justification FY 2012* (Washington, DC: Department of Homeland Security, 2011), OSEM-4, OSEM-58, <https://www.dhs.gov/sites/default/files/publications/dhs-congressional-budget-justification-fy2012.pdf>; Department of Homeland Security, *Annual Financial Report 2011-2013*, 1035, 1066 of 3134; Department of Homeland Security, *FY 2014 Budget in Brief* (Washington, DC: Department of Homeland Security, 2013), 130, <https://www.dhs.gov/sites/default/files/publications/FY%202014%20BIB%20-%20FINAL%20-508%20Formatted%20%284%29.pdf>; Department of Homeland Security, *Congressional Budget Justification FY 2015* (Washington, DC: Department of Homeland Security, 2014), 1290 of 3499; <https://www.dhs.gov/sites/default/files/publications/DHS-Congressional-Budget-Justification-FY2015.pdf>; Department of Homeland Security, *Immigration and Customs Enforcement Budget Overview: Fiscal Year 2017*, 2:5; Department of Homeland Security, *Immigration and Customs Enforcement Budget Overview: Fiscal Year 2018*, ICE-14; Department of Homeland Security, *Immigration and Customs Enforcement Budget Overview: Fiscal Year 2019*, ICE-5; Department of Homeland Security, *Immigration and Customs Enforcement Budget Overview: Fiscal Year 2020*, 6; Department of Homeland Security, *Immigration and Customs Enforcement Budget Overview: Fiscal Year 2021*, 18.

²²⁷ The author’s calculation is based on the estimated and reported average daily bed populations.

Overall, ICE's misestimations averages out to 7.4 percent each year.²²⁸ For FY 2020, ICE estimated it would need 54,000 beds to detain migrants pending removal hearings, which was a 20 percent increase from its estimate for FY 2019.²²⁹ In ICE's FY 2020 and FY 2021 budget requests, it indicated its large estimated increases were a result of various operational factors, such as increased CBP apprehensions and interior enforcement after Executive Order (EO) 13768 was issued in January 2017.²³⁰

According to the GAO's 2018 report on the accuracy of ICE's estimates, it is acceptable that ICE uses historical data to estimate the number of beds it will need, and under- or over-estimations are to be expected.²³¹ However, there is no guideline defining an acceptable level of misestimation. Using historical data without evaluation of the assumptions underlying the estimate calls into question the accuracy of the estimate, according to the GAO standard.²³² Although ICE has always used historical data as the basis for its estimates, it was not until FY 2020 that ICE addressed or analyzed the reason for the difference between its estimated and actual costs.²³³ As ICE recently started its analysis of these fluctuations, problems may persist with the accuracy of the estimates, which in turn can affect the credibility of ICE's estimates before FY 2019. In other words, ICE's estimates for FY 2012 through FY 2019 do not appear to account for changes in any of the factors involved with the calculation.²³⁴

²²⁸ The author's calculation is based on the average difference of all years, including the overestimated years.

²²⁹ Department of Homeland Security, *Immigration and Customs Enforcement Budget Overview: Fiscal Year 2020*, 6.

²³⁰ Department of Homeland Security, *Immigration and Customs Enforcement Budget Overview: Fiscal Year 2020*, O&S-16; Department of Homeland Security, *Immigration and Customs Enforcement Budget Overview: Fiscal Year 2021*, O&S-18.

²³¹ See Gambler, *Opportunities Exist*; Timothy M. Persons, *Cost Estimating and Assessment Guide: Best Practices for Developing and Managing Program Costs*, GAO-20-195G (Washington, DC: Government Accountability Office, 2020), <https://www.gao.gov/products/GAO-20-195G>.

²³² Gambler, *Opportunities Exist*, 13-14.

²³³ Gambler, *Opportunities Exist*, 26; Department of Homeland Security, *Immigration and Customs Enforcement Budget Overview: Fiscal Year 2020*, O&S-16.

²³⁴ Gambler, *Opportunities Exist*, 14-15, 26.

Furthermore, basing bed estimates on historical data does not account for any changes in administration and corresponding changes in mandatory detention policies, which calls into question the credibility of these estimates.²³⁵ In short, ICE's estimates regarding the average daily population, i.e., the number of immigrant detention beds needed daily, lack accuracy and credibility because they appear to be based on unreliable assumptions. In addition, its assumptions did not account for any outside factors, such as changes in migrant flow or enforcement policies, that when combined affect the budget estimates' accuracy and credibility.

2. Daily Bed Rates

Second, during the same period, FY 2012 to FY 2019, ICE's daily bed rate estimates were inaccurate for adult detention facilities, which further contributes to the inaccuracy of ICE's budgets. As illustrated in Figure 6, ICE misestimated the daily bed rate for FY 2012, FY 2013, and FY 2014 by 3.2 percent, 2.6 percent, and .7 percent, respectively. Thus, for FY 2012 through FY 2014, ICE overestimated the daily bed cost for immigrant detention by an average of 2.2 percent. In contrast, the misestimate for FYs 2015–2019 shows that ICE underestimated the cost of adult beds for FY 2015, FY 2016, FY 2017, FY 2018, and FY 2019 by 14.5 percent, 15.5 percent, 11.5 percent, 12 percent, and 12 percent, respectively.²³⁶ Based on ICE's method of using this historical data as the basis for calculating future daily bed costs, ICE's budget estimates have an average misestimation of 13.1 percent. Thus, ICE's budgets are inaccurate for all years between FY 2012 and FY 2019, with the misestimate having a higher budget shortage than a budget surplus effect.

²³⁵ Gambler, 15.

²³⁶ According to its FY2020 congressional justification, ICE changed how it was estimating its daily bed rate following the FY2019 servicewide cost realignment. Department of Homeland Security, *Immigration and Customs Enforcement Budget Overview: Fiscal Year 2020*, O&S-113.

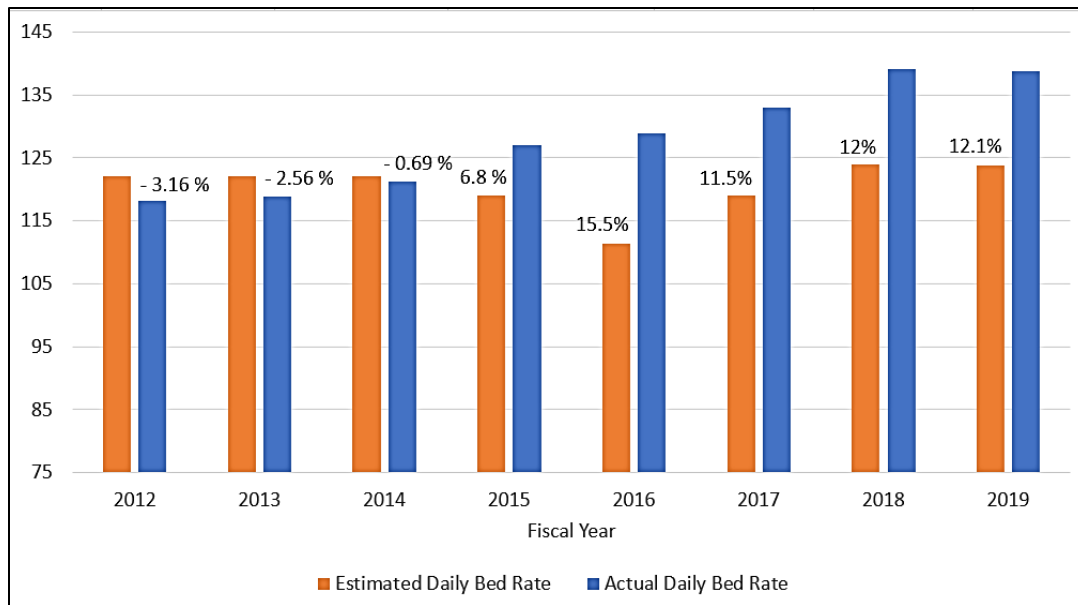


Figure 6. ICE’s Estimated vs. Actual Daily Bed Rates, FY 2012–2019.²³⁷

Furthermore, as stated previously, ICE’s estimates, based solely on historical numbers without apparent consideration of other factors, give the appearance that ICE’s daily bed rate estimates lack accuracy, which in turn affects the credibility of the estimates.

3. Annual Cost Estimates

Since ICE’s estimates for each element of its equation lack accuracy and, in turn, credibility, its overall budget estimates regarding the annual immigrant detention costs for the same fiscal years—2012 through 2019—are likewise inaccurate and not credible.

According to ICE’s budget documents, a proportion of the overall custody operations budget is not attributed directly to immigrant detention costs. This is

²³⁷ Adapted from Department of Homeland Security, *Congressional Budget Justification FY 2012*, OSEM-58; Department of Homeland Security, *Annual Performance Report FY2012-FY2014* (Washington, DC: Department of Homeland Security, 2013), 4, 48, <https://www.dhs.gov/sites/default/files/publications/DHS-%20Annual%20Performance%20Report%20and%20Congressional-Budget-Justification-FY2014.pdf>; Department of Homeland Security, *Congressional Budget Justification FY 2015*, 1252 of 3499; Department of Homeland Security, *Immigration and Customs Enforcement Budget Overview: Fiscal Year 2018*, ICE-O&S-131; Department of Homeland Security, *Immigration and Customs Enforcement Budget Overview: Fiscal Year 2019*, 5; Department of Homeland Security, *Immigration and Customs Enforcement Budget Overview: Fiscal Year 2020*, 113; Department of Homeland Security, *Immigration and Customs Enforcement Budget Overview: Fiscal Year 2021*, 132; Gambler, *Opportunities Exist*, 33.

evidenced in the FY 2019 *Budget in Brief* wherein ICE indicates that the custody operations budget request is for \$2.7 billion; however, the estimated bed rate multiplied by the estimated average daily population multiplied by 365 days equals approximately \$2.4 billion, which results in a difference of approximately \$300 million.²³⁸ Based on this discrepancy and ICE’s estimates for both factors in the calculation for annual immigrant detention costs, this section of the analysis focuses on the overall annual estimate and actual immigrant detention costs.

Table 1 details calculations for both the estimated and actual annual bed costs based on publicly available data provided by ICE and DHS. This table demonstrates the estimated versus actual differences in each fiscal year’s annual immigrant detention costs. Although FY 2013 and FY 2015 are the most accurate, all the other years show a significant difference, by tens of millions of dollars.

Table 1. ICE’s Calculated Annual Immigrant Bed Costs, FY 2012–2019.²³⁹

Fiscal Year	2012	2013	2014	2015	2016	2017	2018	2019
Estimated Annual Adult Detention Bed Cost	\$1.48 B	\$1.46 B	\$1.42 B	\$1.33 B	\$1.24 B	\$1.34 B	\$1.83 B	\$2.03 B
Actual Annual Adult Detention Bed Cost	\$1.47 B	\$1.46 B	\$1.50 B	\$1.32 B	\$1.62 B	\$1.85 B	\$2.14 B	\$2.54 B

As shown in Figure 7, during each of these same years, ICE’s estimated budget for immigrant detention, based on the estimated average daily population, fluctuated between \$1.2 billion and \$2 billion. Although all fiscal years analyzed show a discrepancy between estimated and actual overall costs, FY 2016 and FY 2017 had the largest difference between estimated and actual: over 30 percent each year. More

²³⁸ Department of Homeland Security, *FY 2019 Budget in Brief*, 114.

²³⁹ Adapted from Department of Homeland Security, Department of Homeland Security *Congressional Budget Justification FY 2012*; Department of Homeland Security, *Annual Financial Report 2011-2013*; Department of Homeland Security, *Annual Performance Report FY2012-FY2014*; Department of Homeland Security, *Congressional Budget Justification FY 2015*; Department of Homeland Security, *Immigration and Customs Enforcement Budget Overview: Fiscal Year 2017*; Department of Homeland Security, *Immigration and Customs Enforcement Budget Overview: Fiscal Year 2018*; Department of Homeland Security, *Immigration and Customs Enforcement Budget Overview: Fiscal Year 2019*; Department of Homeland Security, *Immigration and Customs Enforcement Budget Overview: Fiscal Year 2020*; Department of Homeland Security, *Immigration and Customs Enforcement Budget Overview: Fiscal Year 2021*.

specifically, for 2016, ICE estimated the costs would be less than for FY 2015, but in FY 2016, the actual costs were approximately 30 percent higher than its estimate. Furthermore, the FY 2017 estimated budget was roughly \$10 million more than FY 2015, but the actual costs were almost 37 percent higher than its estimates. In dissecting and then aggregating the available cost data, there is a discrepancy between 7 and 37 percent in the estimates versus actual costs. Just to reiterate, there is no given number for an acceptable level of misestimation, only that the accuracy of the estimates relies on the underlying assumptions.

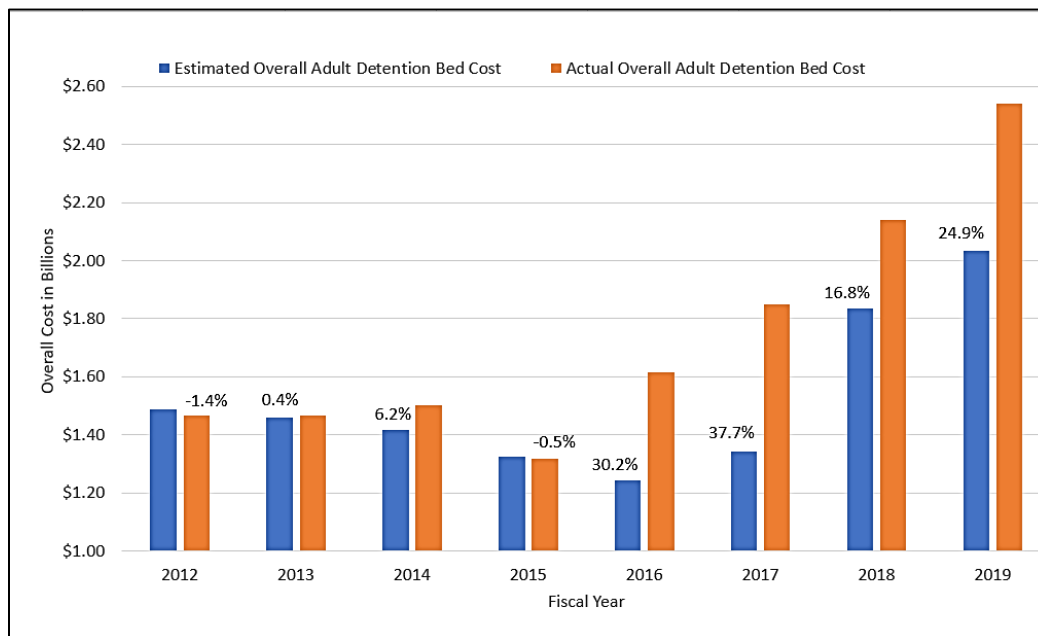


Figure 7. ICE's Estimated vs. Actual Overall Adult Immigrant Detention Costs.²⁴⁰

²⁴⁰ Adapted from Department of Homeland Security, *Congressional Budget Justification FY 2012*; Department of Homeland Security, *Annual Financial Report 2011-2013*; Department of Homeland Security, *Annual Performance Report FY2012-FY2014*; Department of Homeland Security, *FY 2014 Budget in Brief*; Department of Homeland Security, *Congressional Budget Justification FY 2015*; Department of Homeland Security, *Immigration and Customs Enforcement Budget Overview: Fiscal Year 2017*; Department of Homeland Security, *Immigration and Customs Enforcement Budget Overview: Fiscal Year 2018*; Department of Homeland Security, *Immigration and Customs Enforcement Budget Overview: Fiscal Year 2019*; Department of Homeland Security, *Immigration and Customs Enforcement Budget Overview: Fiscal Year 2020*; Department of Homeland Security, *Immigration and Customs Enforcement Budget Overview: Fiscal Year 2021*.

In comparing annual cost estimates to the actual costs, ICE apparently does not consider how the actual annual costs fluctuate over the years because it continues to use previous estimates for its budget request calculations. It is reasonable to assert that, because of its misestimates related to the number of beds and daily bed rates, ICE's overall budgets lack accuracy. Furthermore, ICE's reliance on one method of calculation, which has repeatedly led to inaccurate results, negatively impacts the credibility of the overall adult detention bed costs calculus.

4. Possible Explanations for Variations

One reason for ICE's misestimates is that the U.S. government appears to inaccurately predict the impact that the movement of people into the country and executive immigrant detention policy mandates have on ICE's immigrant detention budgets. In recent years, as in the summer of 2019 and FY 2021 to date, the United States has seen a significant increase in the number of migrants arriving at the border for assorted reasons, including humanitarian and economic.²⁴¹ Sometimes, migrants come in caravans of several thousand at one time.²⁴² These unpredictable influxes of migrants occur regardless of immigrant detention policies.²⁴³ When an unexpected influx of migrants arrives in the United States, the U.S. government must find places and funds to detain any arrivals that exceed ICE's current immigrant detention capacity. This leads to emergency funding measures like the one in July 2019 when ICE deemed it needed additional funds to detain migrants in accordance with H.R. 6776.²⁴⁴ The language of DHS's request indicated that ICE lacked sufficient funds to detain the

²⁴¹ Customs and Border Protection, "Southwest Land Border Encounters."

²⁴² "Key Facts about the Migrant and Refugee Caravans Making Their Way to the USA," Amnesty International, November 16, 2018, <https://www.amnesty.org/en/latest/news/2018/11/key-facts-about-the-migrant-and-refugee-caravans-making-their-way-to-the-usa/>. Each year referenced reflects a different administration with a different immigration enforcement policy.

²⁴³ "DHS to Reprogram and Transfer \$271 Million to Support Humanitarian and Security Emergency Response," Department of Homeland Security, August 27, 2019, <https://www.dhs.gov/news/2019/08/27/dhs-reprogram-and-transfer-271-million-support-humanitarian-and-security-emergency>.

²⁴⁴ Department of Homeland Security, *Department of Homeland Security FY 2019 Southwest Border Emergency Transfer Reprogramming Notification* (Washington, DC: Department of Homeland Security, 2019), 4-7; Department of Homeland Security Appropriations Act, H.R. 6776, 115th Cong. (2019), Title II, Sec. 208, <https://www.congress.gov/bill/115th-congress/house-bill/6776/text>.

increased number of migrants, as required by the immigrant detention policy at the time.²⁴⁵ According to ICE’s 2018 *Congressional Justification*, ICE also requested additional funds in FY 2018 to implement EO 137680, “Enhancing Public Safety in the Interior of the United States.”²⁴⁶ These events show that the combination of unpredictable migrant flows and frequently changing mandatory immigrant detention policies, which limit ICE’s authority to detain, make it hard for ICE to predict its budgetary needs accurately.

C. FINANCIAL IMPLICATIONS OF THE PRIVATE PRISON INDUSTRY

In addition to the costs detailed by ICE, another important financial implication arising from immigrant detention is ICE’s contracts for immigrant detention. A relevant comparison involves analyzing the profits earned by for-profit private prisons for immigrant detention against their profits for criminal detainees from other federal law enforcement partners. First, it is necessary to specify the scope of the for-profit private prison industry as it relates to immigrant detention—including identifying which companies operate immigrant detention facilities and what percent of immigrant detention facilities are managed by each—and then compare the profits earned by private prison companies from immigrant detention versus federal criminal detention. In comparing the profits earned for housing migrants by two dominate for-profit private prison companies—CoreCivic (CC) and GEO Group, Inc. (GEO)—it appears these companies profit more from engaging in administrative immigrant detention than from detaining federal criminal violators.

1. Scope of the Private Prison Industry

ICE reports who manages an immigrant detention facility by the type of contract or entity contracted with to house migrants.²⁴⁷ There are three types of immigrant

²⁴⁵ Department of Homeland Security, “DHS to Reprogram and Transfer \$271 Million.”

²⁴⁶ Department of Homeland Security, *Immigration and Customs Enforcement Budget Overview: Fiscal Year 2018*, O&S-18.

²⁴⁷ “Detention Facilities,” Immigration and Customs Enforcement, July 13, 2019, <https://www.ice.gov/detention-facilities>.

detention managers: federally run, state or local government run, and for-profit privately run.²⁴⁸ Federally run immigrant detention facilities are run by federal law enforcement agencies, including ICE, USMS, and BOP.²⁴⁹ According to its FY 2019 detention statistics, ICE reported that it utilized approximately 130 immigrant detention facilities.²⁵⁰ Of the 130 immigrant detention facilities, the federal government manages approximately 10 percent, or 13 facilities.²⁵¹ Of the 130 immigrant detention facilities, state and local governments manage approximately 58 percent, or 76 facilities, which include sheriff's office, county, city, and state detention facilities.²⁵² Finally, of the 130 immigrant detention facilities, for-profit, privately owned companies—including CC, GEO, Management and Training Corporation, and Immigration Centers of America—manage approximately 32 percent, or 41 facilities.²⁵³ Of the four for-profit private companies, two manage approximately 83 percent, or 34 of the 41 facilities—CC manages 13, and GEO manages 21.²⁵⁴ Figure 8 demonstrates the correlating market shares for each of the leading privately owned, for-profit companies.

²⁴⁸ Immigration and Customs Enforcement, “Detention Management.”

²⁴⁹ Immigration and Customs Enforcement, “Detention Facilities.”

²⁵⁰ Immigration and Customs Enforcement, “Detention Facilities.” According to its detention management reporting, as of July 2019, ICE utilizes approximately 146 immigrant detention facilities. Given the fluctuating number of immigrant detention facilities reported by ICE, the author chose to use older data because the number of facilities did not materially alter the analysis.

²⁵¹ Immigration and Customs Enforcement, “Detention Facilities.”

²⁵² Immigration and Customs Enforcement.

²⁵³ Immigration and Customs Enforcement, “Detention Facilities”; CoreCivic, “Find a Facility”; GEO Group, “Our Locations.”

²⁵⁴ Immigration and Customs Enforcement, “Detention Facilities”; CoreCivic, “Find a Facility”; GEO Group, “Our Locations.”

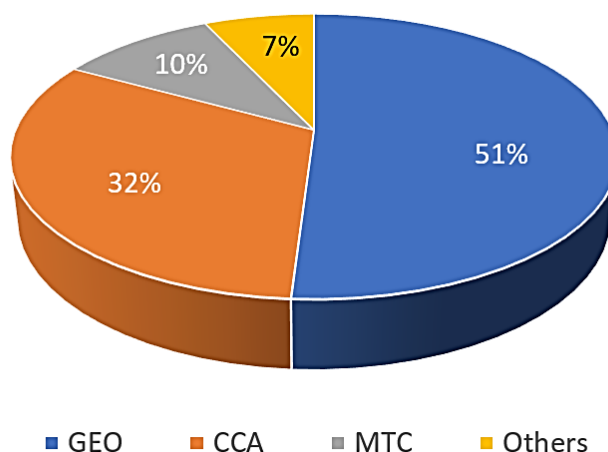


Figure 8. Market Share Percentages of For-Profit Prison Companies.²⁵⁵

ICE reports the costs per bed in each of these facilities based on the contract involved. The cost per bed to detain a migrant in a for-profit facility (\$148.43) is lower than the cost per bed in a federally run ICE facility (\$203.87).²⁵⁶ Even less costly is the cost per bed at a state or locally run facility (\$111.81 on average).²⁵⁷ Thus, the per-bed cost indicates it is most cost effective to maintain beds at a state or local facility. However, in aggregate, for-profit companies have a greater capacity (47,000) to detain migrants.²⁵⁸ Given the greater detention capacity of for-profit facilities and a larger aggregate dollar amount going to for-profit private prisons, it is relevant to analyze how much profit the private sector earns for immigrant detention compared to federal criminal detention

²⁵⁵ Adapted from Immigration and Customs Enforcement, “Detention Facilities”; CoreCivic, “Find a Facility”; GEO Group, “Our Locations.”

²⁵⁶ Department of Homeland Security, *Immigration and Customs Enforcement Budget Overview: Fiscal Year 2019*, ICE-O&S-109. Since the number of facilities is based on FY 2019 reporting, it is best to use cost data from FY 2019 to ensure consistency.

²⁵⁷ Department of Homeland Security, *Immigration and Customs Enforcement Budget Overview: Fiscal Year 2019*, ICE O&S-109. See also Dougals MacDonald and Carl Patten Jr., *Governments’ Management of Private Prisons* (Cambridge, MA: Abt Associates, 2004), <https://www.ojp.gov/pdffiles1/nij/grants/203968.pdf>.

²⁵⁸ CoreCivic, “Find a Facility”; GEO Group, “Our Locations.” The author made an aggregate determination based on the for-profit facilities’ descriptive websites.

because it helps demonstrate how much federal funding is going to private companies to perform administrative federal government functions.

Neither CC nor GEO nor ICE has released the specific number of for-profit beds utilized by ICE at any given time, and the number of detained migrants changes daily; thus, it is unclear exactly how many beds are currently filled by migrant detainees. Regardless, the number of available beds demonstrates the potential cap of how much money ICE pays to for-profit facilities. When using 47,000 possible beds at a cost of \$148.43 per bed at a for-profit prison, the total possible amount spent annually equals \$2.54 billion. Possibly, 100 percent of the overall estimated immigrant detention budget—\$2.54 billion—will go to for-profit facilities even though it is unlikely the United States will rely solely on private prisons for immigrant detention. Comparing private company profits from immigrant detention to those from federal criminal detention is another factor in examining ICE’s costs for immigration detention.

2. Immigrant Detention versus Criminal Detention

Although profit is good for a private company and its shareholders, executive government agencies should understand how its immigrant detention profits compare to criminal detention profits in determining the circumstances under which a migrant must be detained pending removal from the United States. It is clear from CC’s and GEO’s annual reports that both companies provide detention services for other federal law enforcement entities. According to the BOP’s website, a considerable although undefined number of detention space contracts are intended to house migrants who have been convicted of crimes.²⁵⁹ Additionally, the USMS indicates it contracts with private prisons but does not provide data regarding the details.²⁶⁰ Therefore, publicly available information regarding both agencies does not detail how much per bed is spent with CC and GEO under these other federal contracts. As there is no way to compare the specific costs that the BOP or USMS incurs due to private prison contracts, the following analysis focuses on the profits

²⁵⁹ “Contract Prisons,” Federal Bureau of Prisons, accessed March 7, 2021, https://www.bop.gov/about/facilities/contract_facilities.jsp.

²⁶⁰ U.S. Marshals Service, “Facts and Figures 2021” (Washington, DC: U.S. Marshals Service, 2021), <https://www.usmarshals.gov/duties/factsheets/facts.pdf>.

earned based on the federal agency contracting with the private prison company. What appears is that CC and GEO profit more from immigrant detention, which is meant to be administrative, than they do from criminal detention, which is meant to be punitive. Given these financial implications, the U.S. government should consider such factors when establishing immigration enforcement policies because there may be circumstances under which it would be unreasonable to apply the policies.

In CC's and GEO's annual reports, each company uses different language, so for consistency, this thesis analyzes net revenues. The most recent annual report for each company is for FY 2019. Thus, a detailed discussion of each company's 2019 net revenues follows.

a. CoreCivic

According to its 2019 annual report, CC's operating income, which is revenue minus costs, totaled approximately \$282 million.²⁶¹ CC indicates that 85 percent of the company's operational income—\$239.7 million—derives from correctional and detention facilities.²⁶² CC further breaks down the percentage of operating income attributable to its primary federal customers, which include the USMS, BOP, and ICE.²⁶³ Thus, to determine how much of CC's operational income derives from federal entities, it is necessary to multiply the total operational income from correctional and detention facilities (\$239.7 million) by the percentage earned from federal contracts (51 percent), which comes to \$122.3 million.²⁶⁴ Thus, in 2019, facilities housing federal detainees accounted for approximately 43 percent of all of CC's profits.

There is one final calculation necessary to determine how much of CC's 2019 income came from contracts with ICE. CC estimates that ICE contractually pays 29 percent

²⁶¹ CoreCivic, *2019 Annual Report*, Form 10-K (Nashville, TN: CoreCivic, 2020), 54, <http://ir.corecivic.com/static-files/78f48d3d-5df1-44e2-ba20-fce435193496>.

²⁶² CoreCivic, 6.

²⁶³ CoreCivic, 6, 11.

²⁶⁴ CoreCivic, 12.

of the total income it derives from federal detention.²⁶⁵ Thus, CC's overall federal income (\$122.3 million) multiplied by ICE's percentage (29 percent) equals CC's annual income from ICE contracts—roughly \$35.5 million in 2019. Therefore, approximately 13 percent of CC's overall profits were generated from ICE contracts to detain migrants without a lawful status.

To determine whether CC's approximately \$35.5 million in 2019 profits for ICE contracts is reasonable, a determination must be made regarding how much income CC generated from the USMS and BOP because showing how administrative detention compares to criminal detention can reveal financial implications for the government in setting immigrant enforcement policies. According to CC's 2019 annual reporting, the company earned 17 percent of its overall income from federal detention contracts with the USMS, worth \$122.3 million.²⁶⁶ Using the same calculations described above, in 2019, CC earned approximately \$20.1 million from USMS contracts for federal criminal detention in 2019. Although CC profits from USMS contracts increased in 2019, CC's profits from ICE contracts still amounted to approximately \$15 million more than profits earned for criminal detention.

Likewise, according to CC's 2019 annual reporting, the company earned approximately 6 percent of its overall income from federal detention contracts with the BOP, worth \$122.3 million. Using the same calculation, CC profited approximately \$6.1 million from BOP contracts for federal criminal detention in 2019. Although CC's profits from BOP contracts decreased in 2019, its profits from ICE contracts still amounted to approximately \$30 million more than profits earned for criminal detention. Moreover, CC's profits from ICE detention contracts surpassed the total profits earned from contracts with the USMS and BOP combined by almost \$10 million.

Thus, it appears as though CoreCivic is more profitable when detaining migrants in the United States, which is non-punitive, than criminal detainees, which is penal detention. However, this is just one analysis of the two major private prison companies. In the next

²⁶⁵ CoreCivic, 11.

²⁶⁶ CoreCivic, 12.

subsection, a comparative analysis shows how ICE, the USMS, and the BOP stack up as contributors to GEO's profits.

b. GEO Group

According to GEO's annual report, its 2019 net operating income, which is revenue minus operating costs, was approximately \$655 million.²⁶⁷ The summary graphs regarding financials included in GEO's 2019 annual report clearly detail ICE's role in its financial success, which reduces the number of necessary calculations.²⁶⁸ GEO earns 64 percent of its total revenue from U.S. detention and corrections facilities, a total of \$419.2 million.²⁶⁹ According to GEO's reporting, ICE accounts for 22 percent of its overall federal facility income through its immigrant detention contracts, or \$92.2 million.²⁷⁰ The net operating income generated from ICE in 2019 was approximately 14 percent of GEO's company-wide net operating income of \$655 million.²⁷¹

As in the previous section, to determine whether GEO's approximately \$92.2 million in 2019 net operating income based on ICE contracts is reasonable, a determination must be made regarding how much income GEO generates from the USMS. According to GEO's annual reporting, income earned from the USMS was 11 percent of GEO's federal facility operating income of \$419.2 million.²⁷² Thus, the total operating income GEO earned through USMS contracts in 2019 was approximately \$46.1 million. Therefore, GEO's profits from ICE immigrant detention contracts amounted to approximately \$46 million more than profits earned from criminal detention contracts with the USMS.

²⁶⁷ GEO Group, *2019 Annual Report* (Boca Raton, FL: GEO Group, 2020), 18, <http://investors.geogroup.com/Doc/Index?did=51297083>.

²⁶⁸ GEO Group, 1.

²⁶⁹ GEO Group, 1.

²⁷⁰ GEO Group, 1.

²⁷¹ GEO Group, 1, 18.

²⁷² GEO Group, 1.

Likewise, according to GEO's 2019 annual report, 12 percent of its net operating income is generated from BOP contracts to detain federal criminal detainees.²⁷³ Using the same calculations as above, GEO earned approximately \$50.3 million from BOP contracts for federal criminal detention in 2019.²⁷⁴ Although GEO's profits from BOP contracts increased in 2019, its profits from ICE contracts still amounted to approximately \$42 million more than profits earned from criminal detention in total.

In sum, when comparing CC's and GEO's income earned from ICE contracts for immigrant detention, these for-profit private prison companies clearly earn more in profits to detain migrants for administrative purposes than from either of their other two federal law enforcement customers for penal purposes.

D. CONCLUSION

To help determine the circumstances under which immigration enforcement policies should be used to detain migrants entering or attempting to enter the United States unlawfully, this chapter has found that ICE's daily population estimates, daily bed rate estimates, and annual immigrant detention costs are inaccurate and not credible because the estimates are based on historical data without assessing or accounting for the reasons its past estimates were off. The ICE cost analysis was followed by an analysis of the profits earned by the two main for-profit private prison companies used by ICE, as well as the BOP and USMS. Notably, the private companies profit more from immigrant detention of those violating administrative law than from criminal detention of those violating federal criminal law.

This analysis also revealed that it is important to address an overarching factor that leads to cost fluctuation with immigrant detention: migrant flows. Any implementation of immigration enforcement policy negatively affects cost forecasting of bed needs, which is required two years in advance. Thus, there is no way to accurately estimate how many migrants will fall under immigrant detention policies from year to year. The data

²⁷³ GEO Group, 1.

²⁷⁴ GEO Group, 1.

demonstrate that the uncontrollability of the migrant flow typically leads to an increase in costs due to an increased need for beds. Moreover, this one factor that no one can anticipate triggers changes in detention bed needs and costs, which are compounded by changing immigration enforcement priorities.

Although it is difficult to pinpoint specific circumstances under which an immigration enforcement policy that implicates additional mandatory detention circumstances should be used, government officials should limit its use of immigration enforcement policies that change the number of those subjected to immigrant detention. Policies should be limited to circumstances under which government officials can more accurately predict the costs or provide more flexibility with discretion to cap detention during unexpected surges in migrants crossing the U.S. border without lawful status.

Finally, since immigration enforcement policies dictate that migrants be detained, these policies directly affect the level of profitability of for-profit private companies because the more migrants the United States detains, the more ICE uses for-profit private prisons to house them.²⁷⁵ When outsiders look at ICE's financial detention practices, the most common criticism is that ICE uses private prisons to detain migrants who are not violent criminals.

Although each of the financial implications examined in this chapter has highlighted a different facet of the problem, the U.S. government should consider all of them when determining under which circumstances to use immigration enforcement to detain migrants who enter or attempt to enter the United States without lawful status.

²⁷⁵ Sunny Kim, "Private Prison Firm Quietly Ramps Up GOP Lobbying Efforts as Trump Expands Immigrant Detention Centers," CNBC, October 4, 2019, <https://www.cnbc.com/2019/10/04/private-prison-firm-ramps-up-lobbying-amid-trump-immigration-crackdown.html>.

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IV. HUMANITARIAN IMPLICATIONS OF DETAINING MIGRANTS WHO ENTER OR ATTEMPT TO ENTER WITHOUT A LAWFUL STATUS

The previous chapters of this thesis analyzed objective information and data with the aim of determining the conditions under which the United States should consider using immigration detention policies. What is missing from both of those analyses, legal and financial, is the humanitarian perspective as it relates to U.S. immigrant detention. Given the administrative and civil nature of immigration proceedings, as established in Chapter II, it is reasonable to expect immigrant detention to be less restrictive and more humane than prison or jail, primarily because the U.S. immigration system does not provide detained migrants with full constitutional protections. Indeed, the U.S. Supreme Court has well established that individuals apprehended for administrative purposes, such as immigration status, should have a *higher* standard of care than those held for criminal violations.²⁷⁶ Therefore, it is reasonable to examine the extent to which the United States has implemented that higher standard of care through its detention standards. Even with this expected higher standard, many migrant advocates, such as the American Civil Liberties Union (ACLU) and the American Immigration Lawyers Association (AILA), assert that ICE cannot maintain minimum humanitarian standards in its immigration facilities.²⁷⁷ Likewise, other scholars contend that these facilities pose risks to the migrants housed in them, instead of being less restrictive and more “detainee friendly.”²⁷⁸

This chapter assesses these claims’ validity by examining the conditions found in U.S. immigrant detention facilities vis-à-vis international humanitarian norms and ICE’s self-imposed detention standards. Considering the humanitarian impacts of immigrant detention is imperative. Eugene Bardach and Eric M. Patashnik, authors of *A Practical*

²⁷⁶ Youngberg v. Romeo, 457 U.S. 307 (1982).

²⁷⁷ *Holiday on ICE: The U.S. Department of Homeland Security’s New Immigration Detention Standards: Hearing before the Subcommittee on Immigration Policy and Enforcement of the Committee on the Judiciary, House of Representatives*, 112th Cong., 1 (2012), 3-8, 89-125, 139-47, 148-52.

²⁷⁸ Altaf Saadi et al., “Understanding U.S. Immigration Detention: Reaffirming Rights and Addressing Social-Structural Determinants of Health,” *Health and Human Rights Journal* 22, no. 1 (June 2020): 187-98; Steel et al., “Impact of Immigration Detention.”

Guide for Policy Analysis, developed an eightfold process detailing how to analyze and develop solutions through government policy.²⁷⁹ Bardach and Patashnik’s process includes a step called “selecting criteria,” which describes analyzing the pros and cons of various criteria when evaluating a policy.²⁸⁰ One such criterion is “equality, equity, fairness, and justice,” which evokes the same ideals as those that form the basis of the humanitarian perspective.²⁸¹ The eightfold process acknowledges the analytical approach to assessing governance; however, it also suggests a philosophical approach through incorporating values analysis to determine “good” or “bad” policy.²⁸² The process asserts that any policy analysis should also look to the legal basis of an individual’s right when evaluating the policy against the values of society.²⁸³ This is a different type of legal analysis, however, than the one conducted in Chapter II. Therefore, this chapter examines the humanitarian perspective of immigrant detention against the legally established international human rights standards and the United States’ domestic detention standards.

Section A of this chapter describes the limited available data. Section B then analyzes the extent to which U.S. immigration detention standards fulfill international humanitarian norms and ideals, including Article 9 of the Universal Declaration of Human Rights (UDHR), which relates to the right not to be unreasonably arrested, and Article 5 of the UDHR, which relates to being free from “cruel and inhumane treatment.”²⁸⁴ Section C analyzes whether ICE meets its own immigrant detention standards for security practices, housing and nutrition requirements, and healthcare. From a humanitarian perspective, this chapter demonstrates that until the U.S. government can ensure all immigrant detention facilities comply with international and domestic immigrant detention standards, the

²⁷⁹ Eugene Bardach and Eric M. Patashnik, *A Practical Guide for Policy Analysis: The Eightfold Path to More Effective Problem Solving*, 5th ed. (Los Angeles: CQ Press, 2016), xvi-xviii.

²⁸⁰ Bardach and Patashnik, 27.

²⁸¹ Bardach and Patashnik, 32.

²⁸² Bardach and Patashnik, 27-28.

²⁸³ Bardach and Patashnik, 38.

²⁸⁴ G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948), <https://www.un.org/en/universal-declaration-human-rights/>.

United States has limited circumstances under which it should use immigration enforcement policies for *all* who enter or try to enter the United States unlawfully.

A. DATA LIMITATIONS

Three principal sources report the conditions within ICE’s detention facilities: ICE’s internal inspections, the DHS-OIG, and ICE’s Office of Professional Responsibility–Office of Detention and Oversight (OPR-ODO). ICE’s internal immigrant detention inspections are conducted by the Nakamoto Group, Inc. In May 2018, ICE began providing summaries of its internal inspections with redacted reports available on its website.²⁸⁵ DHS-OIG conducts oversight inspections and openly publishes its reports.²⁸⁶ In terms of ICE’s OPR-ODO, the search for a public-facing repository of these reports uncovered no results.²⁸⁷ However, some of ICE’s OPR-ODO reports have been published by others in response to Freedom of Information Act (FOIA) requests.²⁸⁸

Of the available reports, most have notable deficiencies in comprehensiveness and transparency. First, ICE does not compile or analyze statistical data on internal reports concerning repeated violations or deficiencies across facilities or years, and the violations themselves are difficult to analyze because the reports are heavily redacted.²⁸⁹ Furthermore, ICE’s internal inspection reports do not provide its reasoning for why a facility with multiple deficiencies can still be found “acceptable,” especially when the

²⁸⁵ “Facility Inspections,” Immigration and Customs Enforcement, accessed November 28, 2020, <https://www.ice.gov/facility-inspections>.

²⁸⁶ “About Us,” Department of Homeland Security, Office of Inspector General, accessed October 8, 2020, <https://www.oig.dhs.gov/about>.

²⁸⁷ “Office of Professional Responsibility,” Immigration and Customs Enforcement, April 2, 2021, <https://www.ice.gov/leadership/opr>.

²⁸⁸ “Office of Detention Oversight - Detention Facility Compliance Inspections,” Immigration and Customs Enforcement, accessed November 29, 2020, <https://www.ice.gov/foia-category/office-detention-oversight-detention-facility-compliance-inspections>. As of this writing, the website provides 10 possible pages of investigating reports. However, when advancing forward to the next page, the same reports appear.

²⁸⁹ Department of Homeland Security, Office of Inspector General, *ICE’s Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements*, OIG-18-67 (Washington, DC: Department of Homeland Security, 2018), <https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf>.

previous inspection has found the facility “deficient.”²⁹⁰ In addition, no reasoning or analysis explains how an immigrant detention facility found to have 57 serious concerns and violations could be given an “acceptable” rating despite its unfavorable comparison to the detention standards.²⁹¹ Second, DHS-OIG identifies ICE’s inability to inspect its non-federal immigrant detention centers, which indicates that even though ICE publishes its internal inspection reports, these reports are not comprehensive.²⁹² Third, DHS-OIG neither inspects nor reports on all immigrant detention facilities every year, as evidenced by the limited number of published reports.²⁹³ For example, FY 21 has one report so far, FY 20 had one, FY 19 had two, and FY 18 had one.²⁹⁴ And fourth, the OPR-ODO has published only 10 FOIA-requested inspection reports: two from 2016, three from 2018, and five from 2020.²⁹⁵

Overall, it is unclear whether ICE is inspecting every facility every year. Based on the available inspection reports, it is difficult to gauge the extent of any issues identified in the reports. Nevertheless, the available reports provide critical insight into the functioning of at least some of the facilities because DHS-OIG provides an unbiased review of the conditions in immigrant detention facilities, based on ICE’s self-imposed detention standards and further substantiated by ICE’s internal reports and OPR-ODO reports.

²⁹⁰ Nakamoto Group, “Annual Detention Inspection of the Bossier Parish Corrections Center” (official memorandum, Rockville, MD: Nakamoto Group, 2019), https://www.ice.gov/doclib/facilityInspections/BOSSRLA19_CL_01-31-19.pdf.

²⁹¹ Nakamoto Group, “Annual Detention Inspection of the Northern Oregon Correctional Facility” (official memorandum, Rockville, MD: Nakamoto Group, 2018), https://www.ice.gov/doclib/facilityInspections/norco_CL_12-13-2018.pdf.

²⁹² Department of Homeland Security, Office of Inspector General, *ICE’s Inspections and Monitoring*.

²⁹³ “Audits, Inspections, and Evaluations,” Department of Homeland Security, Office of Inspector General, accessed November 19, 2020, <https://www.oig.dhs.gov/reports/audits-inspections-and-evaluations>.

²⁹⁴ Department of Homeland Security, Office of Inspector General.

²⁹⁵ The website attempts to publish more than 10 reports, as evidenced by the buttons at the bottom to advance to additional pages. However, these buttons do not advance the information forward to another page of reports. Immigration and Customs Enforcement, “Office of Detention Oversight.”

B. INTERNATIONAL HUMANITARIAN NORMS

The first set of standards used to analyze whether the United States should engage in immigrant detention is the international human rights standards. Although the United States is not a signatory to and has not ratified the UDHR, it is reasonable to apply these international human rights standards to U.S. immigration detention for three reasons. In short, the United States helped draft the UDHR while agreeing to other humanitarian doctrines that build upon it, the United States holds other countries accountable to these same international standards, and U.S. partners and allies hold the United States accountable to these standards. Each reason is examined more fully in turn.

First, it is reasonable to apply international human rights standards to U.S. immigration detention laws because the United States championed the UDHR, is a signatory to the International Covenant on Civil and Political Rights (ICCPR) and the 1951 Refugee Convention and its 1967 Protocol, and implements laws that mirror their humanitarian language. For example, the United States enacted refugee and asylum laws that the U.S. government must apply to those fleeing violence in their home countries using language and standards similar to those in the 1951 Refugee Convention and its 1967 Protocol to determine whether a person is a “refugee.”²⁹⁶ Moreover, the United States is a signatory to the ICCPR, which establishes rights similar to those in the UDHR.²⁹⁷ Furthermore, ICE has implemented its detention standards, which comply with National Detention Standards (NDS) governing criminal prisons and jails across the country, to “ensure that detainees in ICE custody reside in *safe, secure and humane environments* and under appropriate conditions of confinement” (emphasis added), whose language invokes the humane treatment described in the UDHR: “No one shall be subjected to . . . inhumane . . . treatment.”²⁹⁸ Thus, the United States has enacted legislation intended to protect those fleeing harm in their own countries and

²⁹⁶ 8 U.S.C. § 1158 (2018), <https://www.law.cornell.edu/uscode/text/8/1158>; 8 U.S.C. § 1101(a)(42); United Nations High Commissioner for Refugees, *Convention and Protocol Relating to the Status of Refugees* (The Hague: United Nations High Commissioner for Refugees, 1966), art. 1, <https://www.unhcr.org/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html>.

²⁹⁷ G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966), <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

²⁹⁸ Immigration and Customs Enforcement, “Detention Management”; Universal Declaration of Human Rights, art. 5.

established standards for its civil immigrant detention facilities that comport with the ideals of the UDHR. All of these reasons make the international standards an appropriate measure of the conditions in U.S. immigrant detention facilities.

Second, the United States holds other states accountable based on the international norms enshrined in human rights doctrines like the UDHR. The United States aims to uphold human rights through its criticism of countries that violate human rights.²⁹⁹ Beyond being a signatory to or ratifying various international conventions, the United States has gone further to pass the Global Magnitsky Human Rights Accountability Act in 2016, which gives the president of the United States the authority to impose sanctions against those found to engage in human rights violations.³⁰⁰ Under this law, the United States has imposed financial sanctions against leaders, former leaders, and individual citizens of several countries, including Burma, The Gambia, and Pakistan, stating that these individuals have violated international human rights.³⁰¹ Therefore, as evidence shows that the United States has held others accountable for violating the standards established in the UDHR, the United States endorses these norms and should likewise be held accountable to them.

Finally, it is relevant to apply UDHR standards to U.S. immigrant detention because the United Nations (UN) and other states evaluate the United States against the UDHR standards. The United States continues to be criticized by other nations for its human rights violations.³⁰² Some countries, such as Canada, have begun to undo previous immigration agreements with the United States on the basis that those states view U.S. immigration

²⁹⁹ Human Rights Watch, *World Report 2020: Rights Trends in United States* (New York: Seven Stories Press, 2019), https://www.hrw.org/sites/default/files/world_report_download/hrw_world_report_2020_0.pdf.

³⁰⁰ Global Magnitsky Human Rights Accountability Act, S. 284, 114th Cong., 2 (2016), <https://www.congress.gov/bill/114th-congress/senate-bill/284>.

³⁰¹ “United States Sanctions Human Rights Abusers and Corrupt Actors across the Globe,” Department of the Treasury, December 21, 2017, <https://home.treasury.gov/news/press-releases/sm0243>; Matt Spetalnick and David Brunnstrom, “U.S. Imposes Sanctions on Myanmar Military over Rohingya Crackdown,” Reuters, August 17, 2018, <https://www.reuters.com/article/us-myanmar-rohingya-usa-idUSKBN1L21KL>.

³⁰² Human Rights Watch, *World Report 2018: Rights Trends in United States* (New York: Seven Stories Press, 2018), https://www.hrw.org/sites/default/files/world_report_download/201801world_report_web.pdf; Human Rights Watch, *World Report 2019: Rights Trends in United States* (New York: Seven Stories Press, 2018), https://www.hrw.org/sites/default/files/world_report_download/hrw_world_report_2019.pdf; Human Rights Watch, *World Report 2020*.

detention as violating human rights.³⁰³ For example, in 2004, Canadian courts found Canada's Safe Third Country Agreement, which provides for asylum seekers' return to the United States when they cross the U.S. border into Canada, unconstitutional.³⁰⁴ The court reasoned that U.S. immigration detention constituted "punishment" of asylum seekers and, therefore, a human rights violation under the UDHR.³⁰⁵ In addition, the UN criticizes U.S. immigrant detention, asserting that U.S. immigration detention laws that impose mandatory detention violate human rights.³⁰⁶ Thus, U.S. partners and allies base their international policies and agreements in part on how the United States aligns with the international human rights standards, which could affect broader U.S. immigration policy. Since the United States endorses and holds other states accountable to these international standards, and U.S. partners and allies hold the United States accountable to these same standards, it is reasonable to examine the standards in place in U.S. immigrant detention facilities against the international norms.

The UDHR calls for human rights and universal treatment of all who flee persecution based on immutable characteristics.³⁰⁷ In addition, the UDHR calls for humane treatment for all who are lawfully detained.³⁰⁸ These rights include the right to life and liberty, the right to be free from inhumane treatment or torture, and the right to live safely and securely.³⁰⁹ The following sub-sections analyze whether U.S. immigration detention comports with Article 9

³⁰³ Derrick Silove, Zachary Steel, and Richard F Mollica, "Detention of Asylum Seekers: Assault on Health, Human Rights, and Social Development," *Lancet* 357, no. 9266 (May 2001): 1436-37, [https://doi.org/10.1016/S0140-6736\(00\)04575-X](https://doi.org/10.1016/S0140-6736(00)04575-X); "Immigration," Trump White House Archives, accessed May 17, 2021, <https://trumpwhitehouse.archives.gov/issues/immigration/>; "Asylum Seekers & Refugees," National Immigrant Justice Center, accessed November 16, 2021, <https://immigrantjustice.org/issues/asylum-seekers-refugees>; Laura C. N. Wood, "Impact of Punitive Immigration Policies, Parent-Child Separation and Child Detention on the Mental Health and Development of Children," *BMJ Pediatrics Open* 2, no. 1 (September 2018): 1-2, <https://doi.org/10.1136/bmjpo-2018-000338>.

³⁰⁴ National Immigrant Justice Center, "Asylum Seekers & Refugees."

³⁰⁵ National Immigrant Justice Center.

³⁰⁶ "Treatment of Asylum Seekers at the Southern Border," Amnesty International, accessed November 16, 2021, <https://www.amnesty.org/en/latest/research/2018/10/usa-treatment-of-asylum-seekers-southern-border/>.

³⁰⁷ Universal Declaration of Human Rights.

³⁰⁸ Universal Declaration of Human Rights.

³⁰⁹ Universal Declaration of Human Rights.

of the UDHR and ICCPR, in terms of reasonable detention, and Article 5 of the UDHR, as it relates to the cruel and inhumane treatment of those detained.

1. Arbitrary Detention

As Chapter II finds, the U.S. laws do not impose temporal limits on ICE's use of immigration detention. Detention of asylum seekers is allowed under international human rights standards if it is "in accordance with and authorized by law," with some caveats.³¹⁰ Although immigrant detention does not itself violate international human rights, the UN Working Group on Arbitrary Detention (hereafter, Working Group), the legal body that assesses whether states' actions violate human rights norms, has declared that any migrant's detention "must not be arbitrary" or "indefinite."³¹¹ According to Amnesty International's summary of the UDHR, Article 9, "Nobody should be arrested, [and] put in prison . . . *unless there is good reason to do so*" (emphasis added).³¹² Article 9 of the ICCPR reads, "No one shall be subjected to arbitrary arrest or detention."³¹³ Furthermore, according to the UN Working Group, there are five categories of arbitrary detention: no legal basis for the deprivation of liberty, "the deprivation of liberty results from the exercise of rights" contained in the UDHR or ICCPR, detention procedures violate the right to a fair trial, the immigrant's detention is prolonged without "administrative or judicial review or remedy," or the deprivation of liberty "constitutes a violation of international law on the grounds of discrimination."³¹⁴ On this basis, the UN Working Group found "serious issues" with

³¹⁰ United Nations High Commissioner for Refugees, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention* (The Hague: United Nations, 2012), 11, <http://www.unhcr.org/refworld/docid/50348953b8.html>.

³¹¹ United Nations High Commissioner for Refugees, *Detention Guidelines*, 11; "Working Group on Arbitrary Detention," United Nations Human Rights Office of the High Commissioner, accessed November 16, 2021, <https://www.ohchr.org/en/issues/detention/pages/wgadindex.aspx>.

³¹² "What Is the Universal Declaration of Human Rights?," Amnesty International UK, October 21, 2017, <https://www.amnesty.org.uk/universal-declaration-human-rights-UDHR>.

³¹³ International Covenant on Civil and Political Rights, art. 9.

³¹⁴ United Nations High Commissioner for Refugees, *Detention Guidelines*, 11; Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention on Its Visit to the United States of America* (The Hague: United Nations, 2017), 5, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/193/37/pdf/G1719337.pdf>.

immigrant detention during the UN's 2016 visit to the United States. The Working Group concluded that it viewed the United States' mandatory detention practices as a violation of international human rights.³¹⁵ Therefore, while international norms allow for the detention of asylum seekers when "there is good reason to do so," U.S. immigrant detention without administrative or judicial review violates a migrant's human right not to be arbitrarily detained, according to Article 9 of the UDHR.

2. Cruel, Inhumane Treatment

In addition to engaging in arbitrary detention, U.S. immigrant detention violates human rights under the UDHR by not eliminating cruel and inhumane conditions in its detention facilities. Advocates like AILA and the ACLU consistently criticize ICE's inability to protect its migrants, citing migrants' complaints about rampant sexual abuse and inappropriate strip searches in immigrant detention.³¹⁶ ICE's investigations support these allegations. In recent years, as required by its standards, ICE began to publish its Prison Rape Elimination Act of 2003 (PREA) inspection results to show how it handles rape and sexual assault within its facilities.³¹⁷ According to ICE's own data, on average, 13 percent of all sexual assault claims by migrants in ICE detention have been substantiated from FY 2014 to FY 2018.³¹⁸ Of those substantiated allegations, ICE reports that, on average, 26 percent were perpetrated by an ICE contractor or an ICE staff member.³¹⁹ In addition, according to U.S. government oversight bodies, ICE inspections, and auditing entities like the OIG and GAO, fellow inmates and detention facility staff members have sexually assaulted immigration detainees.³²⁰ Thus, ICE clearly cannot provide a detention environment free from sexual assaults committed by government employees, contractors, or detainees.

³¹⁵ Working Group on Arbitrary Detention, *Report of the Working Group*, 6.

³¹⁶ Saadi et al., "Understanding U.S. Immigration Detention"; H.R., *Holiday on ICE*, 97.

³¹⁷ "PREA Statistics," Immigration and Customs Enforcement, July 22, 2021, <https://www.ice.gov/prea>.

³¹⁸ Immigration and Customs Enforcement.

³¹⁹ Immigration and Customs Enforcement.

³²⁰ H.R., *Holiday on ICE*; Immigration and Customs Enforcement, "PREA Statistics."

Sexual assaults within ICE detention facilities violate Article 5 of the UDHR. According to its language, “No one shall be subjected to torture or cruel, inhuman, or degrading treatment.”³²¹ Although the United States is not a signatory to the UDHR, it is a signatory to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which defines torture as

any act by which severe pain or suffering . . . is intentionally inflicted on a person for such purposes as obtaining . . . third person information or a confession, . . . or intimidating or coercing him, or for any reason . . . with the consent or acquiescence of a public official or other person acting in an official capacity.³²²

According to the *Handbook on Procedures and Criteria for Determining Refugee Status* under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, rape and sexual assault are sufficiently severe to constitute harm rising to the level of persecution or torture.³²³ Since sexual assault could constitute torture, and inspection reports show it occurs in federal immigrant detention facilities, the United States could be perceived as violating Article 5 of the UDHR if it is found to allow torture or any actions that amount to torture according to the CAT.

Furthermore, the immigrant detention facilities in question are run by either a government official or a government contractor. Given the applicability of the UDHR and the CAT, the correlation between sexual assault and torture, and the U.S. government’s acknowledgment that rape and sexual assault are severe enough to mandate specialized legislation and treatment, any violation involving sexual assault or physical harm committed by a government employee or contractor could amount to a violation of the UDHR, Article 5. Therefore, any act of sexual assault of a migrant by a detention official or government

³²¹ Universal Declaration of Human Rights, art. 5.

³²² G.A. Res. 39/46, Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Dec. 10, 1984), art. 1, <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>.

³²³ United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva: United Nations High Commissioner for Refugees, 2019), 21, <https://www.unhcr.org/publications/legal/5ddfedc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html>; Citizenship and Immigration Services, RAO Directorate, “Definition of Persecution and Eligibility Based on Past Persecution” (Washington, DC: Citizenship and Immigration Services, 2019), 25, https://www.uscis.gov/sites/default/files/document/foia/Persecution_LP_RAIO.pdf.

contractor while the migrant is held in U.S. custody could be viewed as a violation of the UDHR and the CAT by international partners and allies.

C. DOMESTIC DETENTION STANDARDS

While U.S. immigration detention facilities can be reasonably held to international human rights standards, ICE also holds its facilities to a set of self-imposed detention standards. Currently, ICE maintains various sets of detention standards for its facilities: 1) the 2011 Performance-Based National Detention Standards (PBNDS), which ICE revised in 2016; 2) the 2000 NDS, which are only partially superseded by 3) the most recent issuance of ICE's 2019 PBNDS; and 4) the 2008 NDS.³²⁴ Each of the four sets of standards prescribes the level of care to be provided in immigrant detention facilities around the country, but ICE does not specify which version of the detention standards apply to which facility.³²⁵ These standards are minimum expectations relating to all facilities housing migrants.³²⁶ However, contractual obligations establish which set of detention standards applies at facilities not owned or operated by ICE or federal officials. Less frequently, ICE inspects state and local jails that house immigrant detainees to ensure compliance with NDS.³²⁷ Furthermore, federal oversight agencies note in their reporting that ICE has not provided sufficient explanation as to why there are so many applicable immigrant detention standards in use.³²⁸ Nevertheless, all four sets establish similar standards, ranging from healthcare to safety, to food standards, to sleeping quarters.³²⁹

³²⁴ Immigration and Customs Enforcement, *2000 Detention Operations Manual* (Washington, DC: Department of Homeland Security, 2020), <https://www.ice.gov/detain/detention-management/2000>; Immigration and Customs Enforcement, *2008 Operations Manual* (Washington, DC: Department of Homeland Security, 2020), <https://www.ice.gov/detention-standards/2008>.

³²⁵ Immigration and Customs Enforcement, "Detention Management."

³²⁶ Immigration and Customs Enforcement, *National Detention Standards 2011*.

³²⁷ "ICE Detention Standards," Immigration and Customs Enforcement, November 9, 2021, <https://www.ice.gov/factsheets/facilities-pbnds>.

³²⁸ Gambler, *Additional Actions Needed*, 33.

³²⁹ Department of Homeland Security, Office of Inspector General, *Concerns about ICE Detainee Treatment and Care at Four Detention Facilities*, OIG-19-47 (Washington, DC: Department of Homeland Security, 2019), 1, <https://www.oig.dhs.gov/sites/default/files/assets/2019-06/OIG-19-47-Jun19.pdf>.

Since ICE developed these standards for its detention facilities, unbiased regulatory oversight is necessary to evaluate ICE's assertion that it follows these standards. DHS-OIG provides unbiased regulatory oversight via annual inspections and reporting.³³⁰ Furthermore, ICE has two additional inspection mechanisms to ensure detention facilities comply with its self-imposed detention standards: the Nakamoto Group's inspections paid for by ICE and ICE's OPR-ODO inspections.³³¹ Humanitarian non-government organizations like the Detention Watch Network also document U.S. immigrant detention facilities' conditions.³³² This section draws upon these sources to analyze whether ICE complies with its own detention standards regarding security classification, segregation, hygiene and food standards, and healthcare initiatives.

1. Security Classification

When a migrant enters an immigration detention facility, ICE conducts a physical search and background and criminal systems research, then categorizes the migrant into one of three security risk categories: low, medium, or high.³³³ Once the classification is complete, ICE detention standards mandate that detention facilities house migrants "in the least restrictive housing consistent with their security classification."³³⁴ Three of the ICE standards detail how detention facilities should house medium-risk migrants based on whether the

³³⁰ Department of Homeland Security, Office of Inspector General, "About Us." Most U.S. government entities have an Office of Inspector General. For example, the Department of Health and Human Services' OIG oversees its mission and corresponding facilities. See <https://oig.hhs.gov/>.

³³¹ Immigration and Customs Enforcement, "Facility Inspections."

³³² "Detention Oversight," Detention Watch Network, accessed November 16, 2021, <https://www.detentionwatchnetwork.org/issues/detention-oversight>.

³³³ Immigration and Customs Enforcement, *2000 Detention Operations Manual*, 4-6; Immigration and Customs Enforcement, *2008 Operations Manual*, 5-6; Immigration and Customs Enforcement, *National Detention Standards 2011*, 64-65; Immigration and Customs Enforcement, "Custody Classification System," in *2019 National Detention Standards for Non-Dedicated Facilities* (Washington, DC: Department of Homeland Security, 2019), <https://www.ice.gov/detention-standards/2019>.

³³⁴ Immigration and Customs Enforcement, "Detainee Classification System," in *2000 Detention Operations Manual*, 5; Immigration and Customs Enforcement, "Classification System," in *2008 Operations Manual*, 6; Immigration and Customs Enforcement, *National Detention Standards 2011*, 65; Immigration and Customs Enforcement, "Custody Classification System," in *2019 National Detention Standards*, 22.

migrants have committed violent offenses.³³⁵ These guidelines state migrants with medium-risk classification who have not committed a violent offense can be housed with low-risk migrants, and those with violent offenses can be housed with high-risk migrants.³³⁶ These security categories help facilities ensure the safety of migrants by not allowing hardened gang- or cartel-affiliated detainees access to those who are not engaged in similar criminal behavior.³³⁷ Furthermore, the security classification identifies the guidelines applicable to the migrant's assigned housing unit regarding the migrant's time spent outside of living quarters, including whether any restrictions are placed on the migrant.³³⁸ In light of the 2019 PBNDS, ICE incorporates additional considerations when determining a migrant's security classification, including gender identity, mental health, and disabilities, to ensure the migrant's safety.³³⁹ Finally, ICE is permitted to place a migrant in administrative segregation when it deems the migrant is susceptible to harm by the general detention population or has a characteristic that makes the migrant different from the rest of the immigrant population.³⁴⁰

However, in its 2018 and 2019 reporting, DHS-OIG found that ICE has at times violated its security classification standards. In its 2020 report on its 2019 investigation of four facilities, DHS-OIG noted that ICE did not apply and update migrant classifications

³³⁵ Immigration and Customs Enforcement, "Detainee Classification System," *2000 Detention Operations Manual*, 5; Immigration and Customs Enforcement, "Classification System," in *2008 Operations Manual*, 6; Immigration and Customs Enforcement, *National Detention Standards 2011*, 65.

³³⁶ Immigration and Customs Enforcement, "Detainee Classification System," in *2000 Detention Operations Manual*, 5; Immigration and Customs Enforcement, "Classification System," in *2008 Operations Manual*, 6; Immigration and Customs Enforcement, *National Detention Standards 2011*, 65.

³³⁷ Immigration and Customs Enforcement, *ICE/DRO Detention Standard: Classification System* (Washington, DC: Department of Homeland Security, 2008), 1, <https://www.ice.gov/detain/detention-management/2008>.

³³⁸ Immigration and Customs Enforcement, *2000 Detention Operations Manual*, 4-6; Immigration and Customs Enforcement, *2008 Operations Manual*, 5-6; Immigration and Customs Enforcement, *National Detention Standards 2011*, 64-65; Immigration and Customs Enforcement, "Custody Classification System," in *2019 National Detention Standards*, 22.

³³⁹ Immigration and Customs Enforcement, "Custody Classification System," in *2019 National Detention Standards*, 22-23.

³⁴⁰ Immigration and Customs Enforcement, *2008 Operations Manual*, sec. 2.5, 13-15; Immigration and Customs Enforcement, *National Detention Standards 2011*, 174; Immigration and Customs Enforcement, "Special Management Units," in *2019 National Detention Standards*, 53.

according to its standards in some facilities.³⁴¹ ICE's internal investigations and OPR-ODO investigation reports found similar violations.³⁴² The standards outline that throughout the migrant's detention period, ICE should periodically reassess the security risk of the migrant by accounting for criminal checks and detention violations.³⁴³ By ICE's own account, in 2017, its officers conducted an initial assessment per the standard; however, if a re-assessment differed from the initial assessment, ICE officials in some facilities altered the determination to indicate there was no change in the involved migrant's security classification.³⁴⁴

Regarding housing classification irregularities, ICE's internal facility inspections identified that several facilities violated ICE detention standards by placing low-risk migrants in high-risk housing units and vice versa.³⁴⁵ These actions directly contravene ICE's detention standards regarding security risk assessments and re-assessments. An improper housing assignment could result in less-restrictive, more-favorable detention conditions for a high-security-risk migrant.³⁴⁶ It could also, however, harm migrants through unjustifiable

³⁴¹ Department of Homeland Security, Office of Inspector General, *Capping Report: Observations of Unannounced Inspections of ICE Facilities in 2019*, OIG-20-45 (Washington, DC: Department of Homeland Security, 2020), 8-9, <https://www.oig.dhs.gov/sites/default/files/assets/2020-07/OIG-20-45-Jul20.pdf>.

³⁴² Immigration and Customs Enforcement, "Facility Inspections"; Immigration and Customs Enforcement, "Office of Detention Oversight."

³⁴³ Immigration and Customs Enforcement, "Detainee Classification System," in *2000 Detention Operations Manual*, 6; Immigration and Customs Enforcement, "Classification," in *2008 Operations Manual*, 3; U.S. Immigration and Customs Enforcement, *National Detention Standards 2011*, 63; Immigration and Customs Enforcement, "Custody Classification System," in *2019 National Detention Standards*, 22.

³⁴⁴ Department of Homeland Security, Office of Inspector General, *Capping Report*, 9-11.

³⁴⁵ Nakamoto Group, "Annual Detention Inspection of the Marshall County Jail" (official memorandum, Rockville, MD: Nakamoto Group, 2018), 4, https://www.ice.gov/doclib/facilityInspections/marshallCoIL_CL_10_25_2018.pdf; Nakamoto Group, "Annual Detention Inspection of the Tulsa County Jail" (official memorandum, Rockville, MD: Nakamoto Group, 2018), 4, https://www.ice.gov/doclib/facilityInspections/tulsaCoOK_CL_06_01_2018.pdf; Nakamoto Group, "Annual Detention Inspection of the Geauga County Jail" (official memorandum, Rockville, MD: Nakamoto Group, 2018), 4, https://www.ice.gov/doclib/facilityInspections/geaugaCoOH_CL_11-29-2018.pdf; Nakamoto Group, "Annual Detention Inspection of the Robert A. Deyton Detention Center" (official memorandum, Rockville, MD: Nakamoto Group, 2019), 4, https://www.ice.gov/doclib/facilityInspections/deytonDetCtrGA_CL_12-05-2019.pdf.

³⁴⁶ Immigration and Customs Enforcement, Office of Professional Responsibility, *Enforcement and Removal Operations, ERO Miami Field Office, Monroe County Detention Center, Key West, Florida, May 22-24, 2018* (Washington, DC: Department of Homeland Security, 2018), <https://www.ice.gov/foia/2018-monroe-county-detention-center-key-west-fl-may-22-24-2018>.

restrictions or endangerment by not keeping them separated from a high-risk migrant.³⁴⁷ Thus, harm is caused when some ICE facilities violate its detention standards through improper documentation of classification assessments, not following its internal processes and procedures related to the security classification of migrants housed in its facilities, and improper housing assignments of migrants.

2. Immigrant Segregation

Next, some of ICE's facilities do not follow its internal standards for the use of administrative segregation, which is a violation of its Special Management Unit (SMU) immigration detention standards. Beyond the initial categorical separation by security risk, ICE can also segregate migrants because of violations they have committed during their time in detention facilities (disciplinary segregation) or because of particular safety concerns, e.g., the need for protective custody or separating migrants who fear the general population (administrative segregation).³⁴⁸ ICE standards distinguish between administrative and disciplinary segregation, dictating that migrants in administrative segregation are subject to the same standards as those in general populations, so long as their movement does not interfere with the immigrant detention facility's security.³⁴⁹ In contrast, ICE standards provide that more restrictive measures be used for those housed in disciplinary segregation.³⁵⁰ Migrants in disciplinary segregation, for example, have less

³⁴⁷ Immigration and Customs Enforcement, Office of Professional Responsibility.

³⁴⁸ Immigration and Customs Enforcement, "Administrative Segregation," in *2000 Detention Operations Manual*, 2-3; Immigration and Customs Enforcement, *2008 Operations Manual*, 10-11; Immigration and Customs Enforcement, *National Detention Standards 2011*, 174-75; Immigration and Customs Enforcement, "Special Management Units," in *2019 National Detention Standards*, 53-54.

³⁴⁹ Immigration and Customs Enforcement, "Recreation," in *2000 Detention Operations Manual*, 6; Immigration and Customs Enforcement, "Recreation," *2008 Operations Manual*, 4-5; Immigration and Customs Enforcement, *National Detention Standards 2011*, 373; Immigration and Customs Enforcement, "Recreation," in *2019 National Detention Standards*, 153.

³⁵⁰ Immigration and Customs Enforcement, "Special Management Unit-Disciplinary Segregation," in *2000 Detention Operations Manual*, 3-7; Immigration and Customs Enforcement, "Special Management Units," in *2008 Operations Manual*, 5; Immigration and Customs Enforcement, *National Detention Standards 2011*, 217-18, 222; Immigration and Customs Enforcement, "Special Management Units," in *2019 National Detention Standards*, 61.

recreational time and are confined to their quarters for longer periods than those in administrative segregation or the general detention population.³⁵¹

DHS-OIG's 2019 report on inspections conducted in 2018 reveals that some ICE facilities limited migrants' rights by invoking administrative segregation beyond what its standards allow. As explained in *Concerns about ICE Detainee Treatment and Care at Four Detention Facilities*, DHS-OIG found that some ICE facilities segregated migrants even though the migrants' situation did not warrant it.³⁵² Compounding this problem was the fact that sometimes ICE facilities further restricted migrants through inconsistent application of the minimum segregation standards. For example, some ICE detention facilities violated the standards by restricting a migrant's rights to recreational time by reducing it from seven days a week to five.³⁵³ Furthermore, ICE's internal inspection reports found that ICE facilities sometimes violated the SMU standards, too, by not providing healthcare screenings or recreation time daily while the migrant was in segregation.³⁵⁴ One ICE detention facility even deducted any time spent showering from the migrant's daily allotment of recreation time, which contravenes ICE detention standards.³⁵⁵

³⁵¹ Immigration and Customs Enforcement, "Recreation," in *2000 Detention Operations Manual*, 6; Immigration and Customs Enforcement, "Recreation," in *2008 Operations Manual*, 4-5; Immigration and Customs Enforcement, *National Detention Standards 2011*, 373; Immigration and Customs Enforcement, "Recreation," in *2019 National Detention Standards*, 153.

³⁵² Department of Homeland Security, Office of Inspector General, *Concerns about ICE Detainee Treatment*, 5-6.

³⁵³ Department of Homeland Security, Office of Inspector General, 5.

³⁵⁴ Nakamoto Group, "Annual Inspection of the Aurora ICE Processing Center" (official memorandum, Rockville, MD: Nakamoto Group, 2018), 3, https://www.ice.gov/doclib/facilityInspections/denverCdfCo_CL_10_04_2018.pdf; Nakamoto Group, "Annual Detention Inspection of the Irwin County Detention Center" (official memorandum, Rockville, MD: Nakamoto Group, 2018), 3, https://www.ice.gov/doclib/facilityInspections/irwinCoGA_CL_06_14_2018.pdf; Nakamoto Group, "Annual Detention Inspection of the Howard County Detention Center" (official memorandum, Rockville, MD: Nakamoto Group, 2018), 3, https://www.ice.gov/doclib/facilityInspections/howardCoMD_CL_11-29-2018.pdf; Nakamoto Group, "Annual Detention Inspection of the Tulsa County Jail," 5; Nakamoto Group, "Annual Detention Inspection of the Theo Lacy Facility" (official memorandum, Rockville, MD: Nakamoto Group, 2018), 3, https://www.ice.gov/doclib/facilityInspections/theoLacyFacility_CL_11-08-2018.pdf.

³⁵⁵ Nakamoto Group, "Annual Detention Inspection of the Howard County Detention Center," 4.

Some administrative segregation practice violations were even more severe, including violating migrants' right to be subjected to the least invasive search measures, even while in segregation.³⁵⁶ A person's right to privacy and autonomy are inherent in the U.S. Constitution.³⁵⁷ Within ICE immigrant detention standards, it is permissible only to conduct strip searches more often when a migrant is in segregation so long as ICE has a reason to believe the migrant may possess contraband.³⁵⁸ Furthermore, ICE's detention standards allow for the use of restraints in special situations.³⁵⁹ ICE officials can use arm and leg restraints on migrants deemed high risk or in administrative segregation.³⁶⁰ However, in 2018, DHS-OIG discovered that some ICE facilities were using strip searches and body restraints beyond the allowable situations established in its security standards and procedures.³⁶¹ OPR-ODO's inspections, likewise, found that some ICE facilities violated internal standards regarding searches and use of restraints.³⁶² Moreover, ICE's internal detention inspections found violations because migrants were required to consent to all strip search requests and were subjected to them without reasonable suspicion of carrying contraband.³⁶³ In fact, three ICE facilities were found to be searching migrants whenever

³⁵⁶ Immigration and Customs Enforcement, "Searches of Detainees," *2008 Operations Manual*, 3-6; Immigration and Customs Enforcement, *National Detention Standards 2011*, 120-23; Immigration and Customs Enforcement, "Searches of Detainees," in *2019 National Detention Standards*, 37-39.

³⁵⁷ *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Planned Parenthood of Southern Pa. v. Casey*, 505 U.S. 833 (1992).

³⁵⁸ Immigration and Customs Enforcement, "Searches of Detainees," in *2008 Operations Manual*, 3-6; Immigration and Customs Enforcement, *National Detention Standards 2011*, 120-23; Immigration and Customs Enforcement, "Searches of Detainees," in *2019 National Detention Standards*, 37-39.

³⁵⁹ Immigration and Customs Enforcement, "Use of Force and Restraints," in *National Detention Standards 2011*; Immigration and Customs Enforcement, "Use of Force and Restraints," in *2019 National Detention Standards*.

³⁶⁰ Immigration and Customs Enforcement, *2019 National Detention Standards*.

³⁶¹ Department of Homeland Security, Office of Inspector General, *Concerns about ICE Detainee Treatment*, 5.

³⁶² Immigration and Customs Enforcement, "Office of Detention Oversight."

³⁶³ Nakamoto Group, "Annual Detention Inspection of the Pike County Correctional Facility" (official memorandum, Rockville, MD: Nakamoto Group, 2019), 3, https://www.ice.gov/doclib/facilityInspections/pikeCountyPenn_CL_04_25_2019.pdf; Nakamoto Group, "Annual Detention Inspection of the Linn County Correctional Center" (official memorandum, Rockville, MD: Nakamoto Group, 2019), 3, https://www.ice.gov/doclib/facilityInspections/linnCoIA_CL_06-20-2019.pdf.

they were coming and going from recreational time despite a lack of documented reasonable suspicion.³⁶⁴

In sum, although more severe restrictions on movement and freedom apply to high-risk migrants, some ICE facilities were found to go beyond the established justifications for placing a migrant in administrative segregation and using restraints. Thus, some facilities violated ICE's self-imposed immigration detention standards.

3. Hygiene and Food Standards

Although ICE's internal standards are designed to ensure the adequate hygiene of detained migrants, ICE's facilities at times do not meet its own internal standards for hygiene, including facilities and products. Among ICE's detention standards are those intended to ensure the health and well-being of migrants housed in immigration facilities.³⁶⁵ According to Sections 1.2 and 4.5 of the PBNDS, all migrants in detention shall have properly working sanitary systems available to ensure their hygiene and safety.³⁶⁶ Of the facilities inspected in 2018 and 2019, DHS-OIG found that two facilities had broken, non-working, or moldy restroom facilities. The Nakamoto Group inspections also found three facilities with moldy and/or dirty restroom and shower facilities.³⁶⁷ OIG reports note five facilities lacked other sanitization facilities, including access to laundry facilities and running water.³⁶⁸ Meanwhile, the Nakamoto Group found that one facility

³⁶⁴ Department of Homeland Security, Office of Inspector General, *Concerns about ICE Detainee Treatment*, 5; Immigration and Customs Enforcement, "Facility Inspections."

³⁶⁵ Immigration and Customs Enforcement, *National Detention Standards 2011*.

³⁶⁶ Immigration and Customs Enforcement, "Environmental Health and Safety," in *National Detention Standards 2011*; Immigration and Customs Enforcement, "Personal Hygiene," in *National Detention Standards 2011*.

³⁶⁷ Nakamoto Group, "Annual Detention Inspection of the El Paso Service Processing Center" (official memorandum, Rockville, MD: Nakamoto Group, 2018), 3, https://www.ice.gov/doclib/facilityInspections/elPasoSPC_CL_12-13-2018.pdf; Nakamoto Group, "Annual Detention Inspection of the Tulsa County Jail," 3; Nakamoto Group, "Annual Detention Inspection of the DeKalb County Detention Facility" (official memorandum, Rockville, MD: Nakamoto Group, 2020), 4, https://www.ice.gov/doclib/facilityInspections/deKalbCoDetFac_CL_01-30-2020.pdf.

³⁶⁸ Department of Homeland Security, Office of Inspector General, *Concerns about ICE Detainee Treatment*, 8-10; Department of Homeland Security, Office of Inspector General, *Capping Report*, 11-15.

did not provide adequate water or air temperature.³⁶⁹ Furthermore, the OIG found that some ICE facilities failed to provide laundry products and access to facilities to maintain clean clothes.³⁷⁰ Moreover, at least two facilities were found to have repeat offenses in multiple inspections.³⁷¹ Finally, in comparison to the number of detention facilities maintained annually for the available reports, the few inspections completed by DHS-OIG make it unclear how pervasive these issues are among ICE facilities. Since DHS-OIG, the Nakamoto Group, and ICE's OPR-ODO found similar violations in approximately 18 of 189 available facilities, as detailed in the inspection reports reviewed for 2016, 2018, 2019, and 2020, it is unclear whether ICE has researched and corrected these concerns as necessary at any of its immigrant detention facilities.³⁷²

In addition to the inadequate hygiene capabilities at facilities, some ICE facilities were found not to provide sufficient hygiene products for migrants, especially for women, for the duration of the time they spent in the detention facilities.³⁷³ According to all four sets of ICE detention standards, ICE is to provide upon admission basic hygiene products to ensure migrants can maintain personal hygiene.³⁷⁴ If a migrant runs out of a toiletry item, the housing officer must replenish it upon request.³⁷⁵ Toiletry items should include

³⁶⁹ Nakamoto Group, "Annual Detention Inspection of the DeKalb County Detention Facility," 4.

³⁷⁰ Department of Homeland Security, Office of Inspector General, *Concerns about ICE Detainee Treatment*.

³⁷¹ Nakamoto Group, "Annual Detention Inspection of the Tulsa County Jail"; Nakamoto Group, "Annual/180-Day Re-Inspection of Bossier Parish Corrections Center" (official memorandum, Rockville, MD: Nakamoto Group, 2019), https://www.ice.gov/doclib/facilityInspections/bossierParish_CL_12-05-2019.pdf.

³⁷² Department of Homeland Security, Office of Inspector General, *Concerns about ICE Detainee Treatment*; Department of Homeland Security, Office of Inspector General, *Capping Report*.

³⁷³ Department of Homeland Security, Office of Inspector General, *Concerns about ICE Detainee Treatment*, 10; Samantha Chavarria, "Menstruating Girls Being Detained at the Border Are Being Denied Sanitary Napkins," Mitú, August 29, 2019, <https://wearemitu.com/things-that-matter/in-another-story-of-border-crisis-inhumanity-detained-girls-are-actually-being-denied-feminine-hygiene-products/>.

³⁷⁴ Immigration and Customs Enforcement, "Detainee Handbook: Personal Hygiene," in *2000 Detention Operations Manual*; Immigration and Customs Enforcement, "Personal Hygiene," in *2008 Operations Manual*; Immigration and Customs Enforcement, *National Detention Standards 2011*, 328-29; Immigration and Customs Enforcement, "Personal Hygiene," in *2019 National Detention Standards*, 128.

³⁷⁵ Immigration and Customs Enforcement, "Detainee Handbook: Personal Hygiene," in *2000 Detention Operations Manual*; Immigration and Customs Enforcement, "Personal Hygiene," in *2008 Operations Manual*; Immigration and Customs Enforcement, *National Detention Standards 2011*, 328-29; Immigration and Customs Enforcement, "Personal Hygiene," in *2019 National Detention Standards*, 128.

feminine hygiene products for female detainees, but often ICE does not provide sufficient feminine products.³⁷⁶ According to a DHS-OIG inspection report in 2019, one facility also failed to provide shampoo and conditioner; instead, ICE required migrants to purchase these vital necessities.³⁷⁷ In December 2019, one Nakamoto Group inspection found and documented that at least one facility did not provide sufficient hygiene products, clothes, and bedding.³⁷⁸ Furthermore, an OPR-ODO inspection report in 2020 found that one facility out of the 10 inspected was not providing toiletries as required.³⁷⁹ In short, some ICE immigrant detention hygiene facilities are in disrepair or unmaintained, and some ICE facilities do not provide the items needed to maintain personal hygiene throughout the duration of detention.

In addition to facilities not providing adequate hygiene accommodations, some ICE detention facilities violate its standards related to food prep, storage, and serving. ICE detention standards state that facilities will provide migrants three meals a day, which should be nutritionally balanced and address the religious or cultural needs of the migrants.³⁸⁰ ICE standards dictate that the facility management review nutritional plans every three months to ensure they are correctly updated.³⁸¹ For her 2013 report, *Border Meals: Detention Center Feeding Practices, Migrant Subjectivity, and Questions on Trauma*, Megan A. Carney interviewed former migrant detainees and others who have relations with detained migrants about the meals and accommodations for meals provided

³⁷⁶ Chavarria, “Menstruating Girls Being Detained at the Border.”

³⁷⁷ Department of Homeland Security, Office of Inspector General, *Concerns about ICE Detainee Treatment*, 10.

³⁷⁸ Nakamoto Group, “Annual/180-Day Re-Inspection of Bossier Parish Corrections Center,” 4.

³⁷⁹ Immigration and Customs Enforcement, Office of Professional Responsibility, *Enforcement and Removal Operations ERO Detroit Field Office, Chippewa County Correctional Facility, Sault Sainte Marie, Michigan, September 21-24, 2020* (Washington, DC: Department of Homeland Security, 2020), <https://www.ice.gov/foia/2020-chippewa-county-correctional-facility-sault-sainte-marie-mi-september-21-24-2020>.

³⁸⁰ Immigration and Customs Enforcement, “Food Service,” in *National Detention Standards 2011*; G.A. Res. 663 C (XXIV/LXII), Standard Minimum Rules for the Treatment of Prisoners (May 13, 1977), https://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf.

³⁸¹ Immigration and Customs Enforcement, “ICE Detention Standards.”

in immigration detention facilities across the country.³⁸² Those interviewed told stories of how detention center staff and officials use food to punish migrants or get them to follow the staff's expectations.³⁸³ In addition, reports from DHS-OIG and the Nakamoto Group on 2019 inspections found that six immigrant detention facilities served spoiled or rotten food to migrants and failed to package food or store it properly.³⁸⁴ Finally, ICE's internal inspection reports and OPR-ODO inspection reports from 2016 and 2018–2020 found that approximately 21 detention facilities violated detention standards because they provided spoiled food or maintained inappropriate food temperatures when storing or serving meals.³⁸⁵ This finding is supported by the Nakamoto Group's inspections detailing how some facilities did not properly maintain food temperatures or properly document their internal food temperature checks.³⁸⁶ The Nakamoto Group also noted one facility with observable cockroaches in two different annual reports, 2019 and 2020, and a different facility had mice in 2019.³⁸⁷ Thus, evidence from DHS-OIG, the Nakamoto Group, OPR-ODO, and testimonials indicates that ICE violates its self-imposed standards because some

³⁸² Megan A. Carney, "Border Meals: Detention Center Feeding Practices, Migrant Subjectivity, and Questions on Trauma," *Gastronomica* 13, no. 4 (Winter 2013): 32-46, <https://doi.org/10.1525/gfc.2013.13.4.32>.

³⁸³ Carney.

³⁸⁴ Department of Homeland Security, Office of Inspector General, *ICE Needs to Address Concerns about Detainee Care and Treatment at the Howard County Detention Center*, OIG-21-03 (Washington, DC: Department of Homeland Security, 2020), 3, <https://www.oig.dhs.gov/sites/default/files/assets/2020-10/OIG-21-03-Oct20.pdf>; Nakamoto Group, "Annual Detention Inspection of the Marshall County Jail," 4; Nakamoto Group, "Annual Detention Inspection of the El Valle Detention Facility" (official memorandum, Rockville, MD: Nakamoto Group, 2018), 3, https://www.ice.gov/doclib/facilityInspections/elValleDFTX_CL_12-06-2018.pdf.

³⁸⁵ Immigration and Customs Enforcement, "Facility Inspections"; Immigration and Customs Enforcement, "Office of Detention Oversight."

³⁸⁶ Nakamoto Group, "Annual Detention Inspection of the Irwin County Detention Center," 3; Nakamoto Group, "Annual Detention Inspection of the Okmulgee County Jail-Moore Detention Facility" (official memorandum, Rockville, MD: Nakamoto Group, 2018), 4, https://www.ice.gov/doclib/facilityInspections/okmulgeeCoOk_CL_10_04_2018.pdf; Nakamoto Group, "Annual Detention Inspection of the Tulsa County Jail," 4-5; Nakamoto Group, "Annual Detention Inspection of the El Paso Service Processing Center," 4; Nakamoto Group, "Annual Detention Inspection of the Prairieland Detention Center" (official memorandum, Rockville, MD: Nakamoto Group, 2019), 4, https://www.ice.gov/doclib/facilityInspections/prairielandDetCtr_CL_02-14-2019.pdf.

³⁸⁷ Nakamoto Group, "Annual Detention Inspection of the Tulsa County Jail," 3; Nakamoto Group, "Annual Detention Inspection of the Suffolk County House of Corrections" (official memorandum, Rockville, MD: Nakamoto Group, 2019), 3, https://www.ice.gov/doclib/facilityInspections/suffolkCoMA_CL_05_16_2019.pdf.

ICE facilities do not provide appropriately stored or prepared nutritious meals three times a day to all migrants in their care.

Therefore, and in addition to ICE's security and segregation violations, DHS-OIG, the Nakamoto Group, and OPR-ODO found that some ICE facilities do not uniformly keep safe, clean, and working detention facilities in keeping with their immigrant detention facility standards. Of those ICE facilities inspected for health requirements per the ICE detention standards, some of the facilities were found to force migrants to live in unsanitary and unhealthy situations because of non-working restroom or bathing facilities, fail to provide access to hygiene products, and maintain substandard food facilities and storage for the migrants.

4. Healthcare in Facilities

In addition, ICE sometimes falls short of its immigrant detention standards by providing less-than-adequate healthcare for migrants and having insufficient medical resources to address migrants' health needs appropriately. According to ICE's PBNDS, Section 4.3, all migrants must have access to medical treatment, including mental health care, based on the standards of the National Commission on Correctional Healthcare.³⁸⁸ ICE's benchmarks further state that migrants must have access to medical and mental health screenings as soon after arrival as possible, and care should be available 24 hours a day, seven days a week.³⁸⁹ Medical and mental health resources should be available to detainees in a migrant's native language or given the migrant's communication needs.³⁹⁰ Section 4.3 also details various scenarios in which ICE is required to engage in specific tasks related to healthcare, such as transferring a migrant to a more competent medical facility, or refrain from certain actions, such as not imposing restraints on pregnant women.³⁹¹

³⁸⁸ Immigration and Customs Enforcement, "Medical Care," in *National Detention Standards 2011*; United Nations High Commissioner for Refugees, *Detention Guidelines*, 30.

³⁸⁹ Immigration and Customs Enforcement, "Medical Care," in *National Detention Standards 2011*; United Nations High Commissioner for Refugees, *Detention Guidelines*, 30.

³⁹⁰ United Nations High Commissioner for Refugees, *Detention Guidelines*, 30.

³⁹¹ Immigration and Customs Enforcement, "Medical Care," in *National Detention Standards 2011*.

Nonetheless, ICE does not have enough doctors to provide the required medical health screenings and care based on the number of migrants detained daily. According to Saadi et al. in “Understanding U.S. Immigration Detention: Reaffirming Rights and Addressing Social-Structural Determinants of Health,” some ICE facilities do not maintain sufficient medical staff to address all the needs of migrants in a timely way.³⁹² This claim is supported by Nakamoto Group inspections, which found two facilities did not provide sufficient medical staff to meet the detention standards.³⁹³ Furthermore, in the course of an investigation by the Women’s Refugee Commission, migrants reported that some facilities lacked medical care or provided delayed health care.³⁹⁴ Although the Women’s Refugee Commission identified these deficiencies in 2011 and 2012, detained migrants continue to complain of a lack of medical staff to address their concerns adequately.³⁹⁵ As found by Saadi et al., detained migrants continue to assert that ICE facilities have routinely neglected or provided substandard services for women’s health care needs.³⁹⁶ Although not specific to women’s facilities, ICE’s internal investigation reports indicate that three inspections demonstrated medical care violations regarding documentation and timely access to healthcare within the prescribed standards.³⁹⁷ Furthermore, ICE’s OPR-ODO found that four of the 10 inspection reports noted that ICE facilities did not provide proper access to health screenings.³⁹⁸

³⁹² Saadi et al., “Understanding U.S. Immigration Detention.”

³⁹³ Richard M. Stana, *Alien Detention Standards: Observations on the Adherence to ICE’s Medical Standards in Detention Facilities*, GAO-08-869T (Washington, DC: Government Accountability Office, 2008), 3, <https://www.gao.gov/products/GAO-08-869T>; Nakamoto Group, “Annual/180-Day Re-Inspection of Bossier Parish Corrections Center,” 4.

³⁹⁴ H.R., *Holiday on ICE*, 55; Julie M. Linton et al., “Detention of Immigrant Children,” *Pediatrics* 139, no. 5 (May 2017): 5, <https://doi.org/10.1542/peds.2017-0483>.

³⁹⁵ Saadi et al., “Understanding U.S. Immigration Detention.”

³⁹⁶ H.R., *Holiday on ICE*; Saadi et al., “Understanding U.S. Immigration Detention.”

³⁹⁷ Nakamoto Group, “Annual Detention Inspection of the St. Clair County Jail” (official memorandum, Rockville, MD: Nakamoto Group, 2018), 5, https://www.ice.gov/doclib/facilityInspections/stClairCoMI_CL_08_09_2018.pdf; Nakamoto Group, “Annual Detention Inspection of the Krome Service Processing Center” (official memorandum, Rockville, MD: Nakamoto Group, 2019), 3, https://www.ice.gov/doclib/facilityInspections/kromeSPC_CL_02-14-2019.pdf; Nakamoto Group, “Annual Detention Inspection of the El Valle Detention Facility,” 5.

³⁹⁸ Immigration and Customs Enforcement, “Office of Detention Oversight.”

Since there is a scarcity of medical professionals in detention facilities, ICE's detention standards "allow for 'detention officers' to perform initial medical, dental, and mental health screenings of detainees."³⁹⁹ OPR-ODO found that one facility had its deportation officers conducting medical screenings of detainees.⁴⁰⁰ Having an immigration official instead of a medical professional assess a migrant's health needs could lead to a misdiagnosis or failure to identify a significant health concern. In the worst outcome, when an immigrant detention facility lacks sufficient resources to screen and maintain the health of those detained, it could result in migrant deaths while in government custody.⁴⁰¹

Finally, in addition to the unaddressed general medical concerns of migrants, some ICE facilities have failed to address migrant mental health concerns, whether acute or chronic, which further contravenes ICE's healthcare standards. According to mental health studies, migrants in detention are 75 percent more likely to suffer from mental conditions like post-traumatic stress disorder than those not held in custody because there is a link between immigrant detention and adverse mental health outcomes.⁴⁰² Multiple studies have shown that U.S. immigration detention resulting in a significant amount of time spent in custody potentially harms migrants' mental health.⁴⁰³ Moreover, the limited resources of medical staff in detention facilities further exacerbate the problem as migrants are unable to maintain treatment plans for common mental health issues while in custody.⁴⁰⁴ This evidence demonstrates that some of ICE's immigrant detention facilities fail to meet its healthcare standards.

³⁹⁹ H.R., *Holiday on ICE*, 47.

⁴⁰⁰ Immigration and Customs Enforcement, Office of Professional Responsibility, *Enforcement and Removal Operations ERO Saint Paul Field Office, Freeborn County Adult Detention Center Albert Lea, Minnesota, September 21-25, 2020* (Washington, DC: Department of Homeland Security, 2020), <https://www.ice.gov/foia/2020-freeborn-county-adult-detention-center-albert-lea-mn-september-21-25-2020>.

⁴⁰¹ H.R., *Holiday on ICE*, 10.

⁴⁰² M. von Werthern et al., "The Impact of Immigration Detention on Mental Health: A Systematic Review," *BMC Psychiatry* 18, no. 1 (2018): 10, 14-16, <https://doi.org/10.1186/s12888-018-1945-y>.

⁴⁰³ Saadi et al., "Understanding U.S. Immigration Detention"; Steel et al., "Impact of Immigration Detention."

⁴⁰⁴ Saadi et al., "Understanding U.S. Immigration Detention."

D. CONCLUSION

This chapter compared the United States' immigration detention standards to the international humanitarian standards contained in Article 9 of the UDHR on arbitrary detention and Article 5 of the UDHR on cruel and unusual punishment, as well as ICE's internal self-imposed immigrant detention center standards. The United States' practices are found to contravene the UDHR, Article 5, related to arbitrary detention primarily because a migrant's detention period appears indefinite, and there are few administrative reviews or remedies available to challenge it. It is possible that the international community could view the United States as allowing torturous acts to occur to detained migrants because U.S. immigrant detention facilities do not prevent sexual assaults and physical abuse from happening. And these acts are sometimes committed by government officials and contractors, which could be a violation of the UDHR, Article 9, prohibiting cruel and unusual punishment. Overall, the second section of this chapter has found that the United States could be viewed as violating international human rights conventions in its immigrant detention centers.

With respect to ICE's internal immigration detention standards, the third section of this chapter found that ICE facilities sometimes violate ICE security standards by not modifying a migrant's original security classification as required. When ICE uses administrative segregation beyond its intended use, ICE is harming migrants in violation of its internal standards. In the realm of hygiene and food standards, DHS-OIG, ICE's OPR-ODO, and ICE's internal inspections reveal that some facilities in 2016, 2018, 2019, and 2020 were not providing working restroom and bathing facilities. In addition, ICE was not providing sufficient hygiene products to migrants, even going so far as to require migrants to pay for the products, which directly contravenes ICE's standards. Regarding food preparation, storage, and serving standards, DHS-OIG found that ICE facilities, at times, were not safely storing or serving food. Furthermore, it found that some ICE facilities did not meet the nutritional standards as outlined in their internal standards, including accommodating religious and cultural requests.

Finally, this chapter has identified that some facilities are unable to meet ICE's self-imposed standards to provide sufficient healthcare to all migrants under their watch. This

is because ICE facilities may have insufficient medical staff to complete health assessments at intake, and some even go so far as allowing non-medical immigration officials to conduct health checks. Also, some ICE facilities focus on the emergent care of migrants while overlooking chronic care issues, including not properly addressing mental health needs. All these deficiencies constitute violations of ICE's established healthcare guidelines for the migrants held in its care.

Given the limitations on the frequency of inspections and physical admission of inspectors to the facilities, the issues identified in this chapter may be more widespread than the raw numbers show. Conversely, it is also possible that the publicly reported numbers are relatively accurate and that these problems are limited in their prevalence across immigrant detention centers. Unfortunately, there is no way to know definitively. Nevertheless, based on this review and analysis, this chapter finds that the U.S. government appears to violate international humanitarian norms through its immigration detention standards by engaging in arbitrary detention while providing detention facilities that lack sufficient protection against sexual assaults and other physical harm. Furthermore, this chapter finds that ICE does not meet its self-imposed standards regarding security, administrative segregation, hygienic facilities, nutritious meals, and healthcare. Nonetheless, given the reported violations of international and domestic humanitarian detention standards, limited circumstances exist under which the United States should use immigration detention policies to detain migrants without a lawful status.

V. CONCLUSION

This research shows that although it is legal to detain *any* and *all* migrants present in the United States without a lawful status, the costs associated with this detention depend on various factors, such as migrant flows (uncontrollable) and the U.S. government's discretion (controllable), that make the costs vary drastically between FYs and administrations. Moreover, the humanitarian implications of immigrant detention reveal the reputational, human, and moral *costs* to the U.S. government when enforcing strict immigrant detention policies.

Overall, based on the legal, financial, and humanitarian implications of immigrant detention, this research shows that the circumstances under which it is sustainable to use executive policies to define when a migrant without a lawful status should be detained greatly fluctuate. Although executive policies are flexible, they are often used politically instead of pragmatically. Therefore, instead of changing the policy with every changing administration, the U.S. government should clearly define the parameters under which it exercises its executive authority by defining when it is most important to use policy. Even though limited use of executive policy could result in less flexibility for the Executive Branch, it is beneficial because it gives time for the U.S. legislature to further tailor the policy to the crisis at hand. By clearly defining when a policy is to be implemented, such as during a humanitarian crisis at the southern border, *rather than* for any migrant at any time in any location, the U.S. government can justify the policy based on urgent need rather than try to circumvent legislative processes. In addition, when the U.S. government limits policy via the stroke of a pen, it limits the migrants directly affected by that policy, which in turn demonstrates that the policy is not boundless.

A. SUMMARY OF FINDINGS

The legal analysis determined that immigrant detention, criminal-*like* but civil in nature and thus purportedly more humane than criminal detention, is legal—its legality was to be expected given the U.S. government's continued use of immigrant detention as a deterrent to illegal immigration. However, migrants without lawful status have some lesser

constitutional protections under the Fourth, Fifth, and Sixth Amendments depending on the prosecution path taken by the U.S. government. These lesser protections appear inadequate because the time a migrant can be detained is open-ended, and only under rare circumstances can the migrant challenge the indefiniteness of detention. Given the lesser constitutional protections provided to migrants in immigrant detention, using executive policies to determine which prosecution path a migrant traverses—one either too lenient or strict in using discretion to detain—negates the legal idea of notice, whereby someone who breaks a law is presumed aware of the consequences arising from that violation. In other words, when the government makes it unclear which legal path a migrant will traverse, the U.S. government is making things uncertain for the migrant. It could also be argued that government employees entrusted to carry out the policies and procedures would not know how they should process migrants. Thus, on this basis, the United States should look to the effects of the policy when deciding which policies to enact and when.

The complexity of using immigrant detention policies is compounded when viewing immigrant detention in light of its costs. Migrant flows are uncontrollable, and this thesis does not attempt to address the causes of migrant flows or why migrants predominantly flow to the United States. Regardless, the financial analysis determined that the estimates ICE uses to project the money needed for immigrant detention, which it predicts two years in advance, are inaccurate. This is because there is no way to accurately predict how many migrants coming to the United States will fall under the executive policy in place at the time. Furthermore, ICE's estimates are often based on historical data that were inaccurate without accounting for the cause of the miscalculation. These methods lead to a congressional budget that fluctuates, as seen during summer 2019, or a need for the U.S. government to pull money from other agencies, which in turn leaves those agencies to determine how to operate fully under a reduced budget. This situation is akin to a house of cards tumbling because just one of the cards—ICE—does not have the funds it needs to carry out the mission with which it has been entrusted.

Thus, from a financial perspective, the U.S. government can and should control the costs of immigrant detention by expanding the use of enforcement discretion or more clearly defining the circumstances under which a migrant *must be* detained by immigration

officials. The U.S. government should explore this flexible approach because it routinely spends more money to civilly detain than it does to criminally detain a person, as shown by the level of profits earned by private prisons for immigrant detention. Since immigration enforcement policies are the primary determinant of which migrants are detained, these policies directly affect the level of profitability of for-profit private prison companies. Furthermore, the companies ICE uses for for-profit private prisons consistently lobby Congress to have a stricter immigration enforcement policy.⁴⁰⁵ Under these circumstances, budgetary needs are less predictable than they would be if ICE were to use more state and local government facilities. Furthermore, reducing the U.S. government's reliance on for-profit companies would align with the philosophy that government functions should be carried out by public entities rather than for-profit ones.⁴⁰⁶

Adding to the legal and financial complications of immigrant detention is how the United States treats those from other countries who do not violate criminal laws in the United States. The humanitarian analysis showed that the United States is viewed internationally by human rights experts as violating international human rights laws by detaining migrants. This perspective is further supported by the U.S. government's possible direct violations of sections of the UDHR. Such violations could have a negative impact on the image of the United States, potentially resulting in international litigation in human rights courts for violating these agreements.

However, the more pointed finding of this thesis is that ICE has set standards for immigrant detention but repeatedly failed to meet them in various ways. ICE does not adhere to its standards relating to the security of migrants and detention facilities, the health and medical care of migrants, or even basic sanitary and nutritional standards that ensure migrants can take care of themselves while detained. These lapses in the humanitarian

⁴⁰⁵ Kim, "Private Prison Firm Quietly Ramps Up GOP Lobbying Efforts."

⁴⁰⁶ Ralph O. White and Kenneth E. Patton, *Matter of CoreCivic, Inc.*, GAO Decision B-418620, B-418620.2 (Washington, DC: Government Accountability Office, 2020), <https://www.gao.gov/products/D22002>; Yvonne D. Jones, *2019 Lobbying Disclosure: Observations on Lobbyists' Compliance with Disclosure Requirements*, GAO-20-449 (Washington, DC: Government Accountability Office, 2020), <https://www.gao.gov/products/GAO-20-449>; "Political & Lobbying Activity," CoreCivic, accessed November 16, 2021, <http://ir.corecivic.com/corporate-governance/political-lobbying-activity>.

treatment of migrants in immigrant detention show why the United States should try to reduce its immigrant detainee population.

Overall, this research highlights how the financial aspect does not align with the humanitarian, all while other scholars question the legality of how the United States handles migrants present without a lawful status. Although there is no standard for weighing or assessing how these three pillars work together or against each other in an analysis, the U.S. government should at a minimum consider how each of them influences the perception and cost of using immigrant detention in deciding when to enact an executive policy and what the policy should require.

Ultimately, while it is difficult to pinpoint specific circumstances under which an immigration enforcement policy that implies additional mandatory detention circumstances should be used, it appears that the government should limit its use of immigration enforcement policies to situations of dire need rather than political motivation or a desire to give Congress a “chance to fix the system.”⁴⁰⁷ These policies are often canceled, revoked, or removed via subsequent executive orders to undo what was implemented by a former president.⁴⁰⁸ As shown in Chapter I, the number of migrants detained fluctuates noticeably when the political party in the White House changes, and the influxes of migrants stem from fluctuating immigration enforcement policies that align with the political views of the sitting president. The legal, financial, and humanitarian costs are thus exacerbated by the ebb and flow of policies of various administrations. Instead, immigration enforcement policies should be limited to circumstances under which government officials can more accurately predict the costs or provide more flexibility using discretion to cap detention when there is an unexpected surge in migrants crossing the U.S. border without lawful status.

⁴⁰⁷ Obama, “Remarks by the President on Immigration.”

⁴⁰⁸ “Statement from President Donald J. Trump,” Trump White House Archives, September 5, 2017, <https://trumpwhitehouse.archives.gov/briefings-statements/statement-president-donald-j-trump-7/>.

B. RECOMMENDATIONS

The following four recommendations should be explored by the Legislative and Executive Branches of the U.S. government to determine how to minimize the negative implications that arise from detaining migrants, sometimes for extended periods.

First, in the short term, the United States should return to its historical use of immigrant detention as the exception, not the standard. Furthermore, the U.S. government—all branches—should take the initiative to weigh its use of immigration enforcement policies only in circumstances under which there is a dire need to mitigate the free flow of migrants against the appearance of forgoing human rights and the other legal implications arising from immigrant detention. Although limiting the use of immigrant detention solely to those who fall within the specific mandatory detention guidelines of 8 U.S.C. § 1226 would result in more people being released on bond, committing to these actions would provide additional protections to migrants and ensure that the United States is affording them protections relevant to their individual situations. Alternative mechanisms to detention, such as ankle monitoring, are already in place to help track these individuals.⁴⁰⁹ In sum, there is no need to implement the additional measure of detention, only a possible need to shift resources to track these individuals.

Second, the U.S. Congress should pass laws that more clearly define who is subject to mandatory detention while also providing clearer parameters on when ICE and other U.S. government entities can exercise discretion to release migrants pending further judicial actions. Using the legislative process to create and define immigrant detention laws ensures uniform protection of due process rights for all migrants entering and in the United States. Enacting legislation would also minimize the politicizing of immigration through successive executive policies. Three sections of Title 8 of the U.S.C. could be modified:

1. Section 1225(b)(1)(B)(iii)(IV) could include additional language related to the migrant who is “pending a final credible fear determination” *up to 20*

⁴⁰⁹ Immigration and Customs Enforcement, “Detention Management.”

*days from the date of claiming fear; unless a final order of removal has been issued, the detention shall be no longer than 180 days.*⁴¹⁰

2. Section 1226(a)(2) could be modified to cover migrants “pending removal” and/or “pending full asylum determination by the immigration judge” by modifying the statutory language to the following: *the attorney general may release the alien even if previously removed and while pending a full-merits hearing of outstanding asylum or Convention against Torture claims before an immigration judge.*⁴¹¹
3. Section 1226(a) could be amended to include a fourth subsection that reads as follows: *a migrant should be released on bond when there are no prior immigration removals.*⁴¹²

Given that statutory language regarding immigrant detention already exists, modification or further definition of the parameters would not necessitate a complete immigration law overhaul, which has been part of ongoing debates for multiple presidential election cycles.⁴¹³

Third, if it is accomplished more easily than modifying existing laws, the U.S. government could create a new section of law—either part of Title 8 or another more appropriate title of the *U.S. Code*. This new section of law would clearly define how the U.S. government will respond to humanitarian crises at the borders of the United States. This section of law could define the parameters of a humanitarian crisis, the classifications of migrants involved in humanitarian crises, when a migrant would be discretionarily released, and when a migrant would be detained. This section of law could also specify how the United States will accommodate those migrants detained and where the financial resources can be found to cover the increased costs. Finally, this section of law could define

⁴¹⁰ 8 U.S.C. § 1225(b)(1)(B)(iii)(IV).

⁴¹¹ 8 U.S.C. § 1226(a)(2) (2018).

⁴¹² 8 U.S.C. § 1226(a).

⁴¹³ Claire Felter, Danielle Renwick, and Amelia Cheatham, “The U.S. Immigration Debate,” Council on Foreign Relations, August 31, 2021, <https://www.cfr.org/backgrounders/us-immigration-debate-0>.

which agency or department within the U.S. government leads the housing or detainment efforts of these migrants.

Fourth, although executive policies are lawful and U.S. presidents for decades have used them to mold their individual administrations, presidents should stop using executive policies as they relate to the restriction of liberty of people, including migrants, within U.S. borders. This approach would minimize the appearance that they are trying to legislate from the Oval Office and gives the legislative power back to the legislature. One way that the United States could limit the use of executive policies is to enact additional legislation that limits the Executive Branch's authority as defined in the U.S. Constitution, Article II. By creating a defined limitation—for example, *the president shall not issue executive policies that relate to any action covered by constitutional protections in the Bill of Rights*—the Executive Branch's executive power would be limited to those actions involving the administration of the U.S. government. This limiting clause in turn would prevent actions that teeter on the line of breaching constitutional protections, such as restricting liberty without due process.

Given the various courses of actions proposed in this thesis, there will be some unintended results post-implementation and challenges to overcome in making such legal changes. First, it is inevitable that the number of migrants released into the U.S. interior will increase. Although local and municipal governments may not initially be prepared for the demands that the resulting influx will have on their resources, the federal government could plan for these increases by adding funding provisions in the modified or added statutory sections for any necessary increases in the humanitarian aid. These funding provisions could detail where the money will come from and the parameters for its use. While the legal and regulatory accommodations are being made, local and municipal governments could rely on local and state charitable organizations to assist with humanitarian crises. Second, an increase in the release of migrants into communities across the country will require more federal employees to monitor these individuals pending determination of their cases. There is the possibility of an increase in use of alternatives to detention, like ankle monitoring devices, which conversely could have a positive effect of reducing overall costs to manage migrants in the United States without a lawful status.

Third, if the U.S. government implements the recommendations and the number of migrants released into communities across the United States increases, it is reasonable to expect immigration laws and enforcement to become more politicized and increase heated political debates across local, state, and federal jurisdictions. This, in turn, could dramatically slow, if not block, the legislative process needed to bring about changes in immigrant detention. Even with all of these hurdles to fixing the immigrant detention system, laws, and regulations, the long-term return on investment from pursuing the changes outlined in this thesis could be more thoroughly explored in future research, including the potential for improving the global image of the United States.

C. RECOMMENDATIONS FOR FURTHER RESEARCH

Even if these recommendations were followed today, several areas of the legislative process would benefit from further research to mitigate the implications of migrant detention. This thesis did not analyze the implications arising from detaining migrant families based on executive policies. It would be reasonable to assume that the negative effects of detaining children would be greater than the negative effects of detaining adults because of their tender age. A three-pillar approach to analyzing the detention of migrant families, including minors, is needed.

Moreover, an in-depth analysis of how much money the government spends to process migrants during a crisis, for example, when migrants create residence under a bridge during an international humanitarian crisis, is not explored in this thesis and has not been located through the course of the research. Urgent humanitarian migrant crises happen, as seen in the 2021 arrival of thousands of Haitians at the Texas–Mexico border or the evacuation of Afghanistan nationals who worked with the U.S. government because of the imminent threat of death by the Taliban.⁴¹⁴ Such crises lead potentially to more migrants being detained or housed at the expense of the U.S. government and, in turn, to

⁴¹⁴ James Dobbins et al., “How Hope, Fear and Misinformation Led Thousands of Haitians to the U.S. Border,” *New York Times*, September 17, 2021, <https://www.nytimes.com/2021/09/17/us/haitians-border-patrol.html>; Jessica Donati, “U.S. Aims to Resume Regular Evacuation Flights from Afghanistan,” *Wall Street Journal*, October 14, 2021, <https://www.wsj.com/articles/u-s-to-resume-evacuation-flights-from-afghanistan-11634212800>.

more legal, financial, and humanitarian implications. Thus, the more the United States can control when it detains a migrant, the more it can control the implications.

One additional area of research paramount to the nation's security is whether or how immigrant detention facilities could become a catalyst for radicalization. Terrorism experts have warned there is always a triggering event or catalyst in the radicalization process.⁴¹⁵ As identified by the National Institute of Justice, a triggering event could be something a person sees a government do with which he or she disagrees.⁴¹⁶ It would be reasonable to think that immigrant detention for any length of time could constitute a triggering event in the radicalization process. Thus, the U.S. government's immigrant detention policies could be facilitating radicalization, yet this aspect of immigrant detention has not been analyzed by scholars.

D. CONCLUSION

The debate surrounding immigration generally and immigrant detention specifically continues and remains highly politicized. For example, if the recent publicity surrounding Representative Alexandria Ocasio-Cortez's and Representative Liz Cheney's discussion about what to call immigrant detention centers is an indicator of the contentiousness, the United States will continue to vacillate on how to handle the migrant crisis all over the country.⁴¹⁷ Whether to detain migrants, how to fund immigrant detention, and under what conditions should any forced immigrant detention be permitted persist at the forefront of political debates in the United States. Moreover, the international debate over how to manage migrant flows and influxes remains.⁴¹⁸ Therefore, until the

⁴¹⁵ Allison G. Smith, *How Radicalization to Terrorism Occurs in the United States: What Research Sponsored by the National Institute of Justice Tells Us* (Washington, DC: National Institute of Justice, 2018), 7-8, <https://www.ojp.gov/pdffiles1/nij/250171.pdf>.

⁴¹⁶ Smith, 8.

⁴¹⁷ Elizabeth Thomas, "Reps. Alexandria Ocasio-Cortez, Liz Cheney Spar over 'Concentration Camp' Comment," ABC News, June 18, 2019, <https://abcnews.go.com/Politics/rep-alexandria-ocasio-cortez-liz-cheney-spar-concentration/story?id=63791170>.

⁴¹⁸ Platform for International Cooperation on Undocumented Migrants, *More Detention, Fewer Safeguards: How the New EU Pact on Migration and Asylum Creates New Loopholes to Ignore Human Rights Obligations* (Brussels: Platform for International Cooperation on Undocumented Migrants, 2020), <https://picum.org/more-detention-fewer-safeguards-how-the-new-eu-pact-on-migration-and-asylum-creates-new-loopholes-to-ignore-human-rights-obligations/>.

U.S. government can come to a *meet-in-the-middle* approach on immigration to the United States and modify the laws such that executive policy becomes less influential, the need for academic research into the implications of immigrant detention will continue into the foreseeable future.

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