NO CHANCE FOR YOU: NEEDED MODIFICATIONS TO THE IMMIGRATION AND NATIONALITY ACT'S MANDATORY DETENTION SCHEME

By: Andrew J. Rankin

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Constitutions **Page**

Statutes **Page**

Regulations **Page**

Legislation and Related Materials **Page**

Secondary and Other Materials **Page**

INTRODUCTION

Veronica, a Guatemalan national living in Arkansas who has overstayed a visitor's visa, is out for a walk near her home. Veronica is in a severely abusive relationship; her abuser spends almost all the household income on alcohol and drugs and refuses to let her work. Despite Veronica's best efforts to make her limited funds stretch, she is without sufficient food at least one day each week. As she is walking, she sees a neighbor unloading groceries from the trunk of his car. With full knowledge that theft is wrong, she steals two bags out of the neighbor's trunk so that she would have food for the day. The neighbor phones police; Veronica is ultimately arrested and convicted for misdemeanor theft.[1]

A block away from Veronica's house, Miguel, also a visa overstay of Guatemalan nationality, is raping his nine-year-old niece. One of Miguel's neighbors notifies authorities after hearing screams coming from Miguel's house; Miguel is arrested and convicted of rape.[2] Regardless of the great chasm in the severity of their crimes, Veronica and Miguel will receive the *same* pre-trial treatment under our immigration laws.[3] This all-too-common result illuminates one of several deep flaws with certain provisions of the Immigration & Nationality Act ("INA"), the omnibus federal legislation that regulates U.S. immigration.[4]

Generally, the INA contains three statutory provisions, sections 235(b), 236(c), and 236(a), that authorize Immigration & Customs Enforcement ("ICE") and Customs & Border Protection ("CBP")[5] to mandatorily detain certain non-citizens[6] during their immigration proceedings, no

1. ARK. CODE ANN. § 5-36-103(b)(4)(A).
2. *Id.* § 5-14-103(a)(3)(A).
3. *See infra* note 32.
4. Immigration and Nationality Act, Pub. L. 82-414, 66 Stat. 163, *as amended*.
5. Both ICE and CBP are sub-agencies within the Department of Homeland Security ("DHS"). U.S. IMMIGR. AND CUSTOMS ENF'T, WHAT WE DO; U.S. CUSTOMS AND BORDER PROTECTION, ABOUT CBP. Together, these three agencies enforce the country's immigration laws. 6 U.S.C. §§ 111–15, 211–23, 251–57.
6. Throughout this paper, the less-derogatory term "non-citizen" is employed in lieu of the statutory term "alien," except where using the term "alien" is unavoidable. *See, e.g.*, Title 8 of the United States Code ("Aliens

matter how long they may last. However, these provisions, as currently written and enforced, are punitive, both to the detained non-citizen and the public fisc. Additionally, they are unnecessary, as reasonable modifications can be made to each of the sections that better account for the legitimate individual interests at stake and, at the same time, avoid doing violence to the equally legitimate reasons why the INA contains a mandatory detention scheme in the first place.

Part I of this paper will detail the three mandatory detention provisions, each unique in operation and coverage, from apprehension to detention. Part II will elucidate three major shortcomings with the statutes in their current form. Specifically, these statutes unduly encroach on the INA's right to counsel, place a crushing financial burden on the American taxpayer, and create, intended or otherwise, a punishment disparity between civil immigration law and state and federal criminal law. Finally, the paper concludes with Part III, which advances three proposals for amending these statutes. They focus on expanding the government's use of detention alternatives and limiting the respective scope of each statute so that only those non-citizens whose detention properly furthers congressional intent remain in immigration custody.

I. THE STATUTORY SCHEME ON MANDATORY DETENTION UNDER THE INA

Before one of the mandatory detention provisions may be invoked, a non-citizen must first be apprehended and detained by ICE or CBP. This can happen by one of three principal methods. First, she might be arrested by law enforcement authorities, such as the local Sheriff, the state police, or the FBI, and charged with committing a crime under local, state, or federal law. Once initial booking is complete, many detention facilities provide access to or data on detainees to ICE agents under an information-sharing agreement, the most prominent of which is the Criminal Alien

and Nationality") and *infra* note 7; *see also* D. Carolina Nunez, *War of the Words: Aliens, Immigrants, Citizens, and the Language of Exclusion*, 2013 BYU L. REV. 1517, 1555 (discussing the de-humanizing characteristics of the term "alien").

Program ("CAP").[7] Under CAP, agents receive biographical data on arrestees, such as fingerprints, name, date of birth, country of birth, and, if known, immigration status.[8] Agents then compare the information received to ICE's own databases.[9] If the agent determines he has probable cause[10] to believe the detainee is removable from the United States, he can issue a temporary detainer asking the local, state, or federal facility to provide certain notices to ICE regarding release and transfer of the non-citizen so that ICE may assume custody over her.[11]

The second way a non-citizen may result in immigration custody is detention by CBP officials at a port of entry or apprehension following an uninspected entry, often referred to as an illegal entry in common parlance. Generally, a non-citizen who presents herself at a port of entry or enters the country without permission is deemed to be seeking admission to the United States and must be inspected by an immigration official.[12] Special rules exist for lawful permanent

7. Immigrant Legal Resource Center, *ICE's Criminal Alien Program (CAP): Dismantling the Biggest Jail to Deportation Pipeline* (2016), https://www.ilrc.org/sites/default/files/resources/cap_guide_final.pdf. Recently, the U.S. Supreme Court impliedly recognized the constitutionality of information-sharing programs. *See* Arizona v. United States, 567 U.S. 387, 411–12 (2012) ("Consultation between federal and state officials is an important feature of the immigration system . . . . [Congress] has encouraged the sharing of information about possible immigration violations."). Ultimately, the constitutionality of CAP's administration is beyond the scope of this paper.

8. *ICE's Criminal Alien Program*, *supra* note 7.

9. *Id.*

10. U.S. IMMIGR. AND CUSTOMS ENF'T, POLICY NUMBER 10074.2, ISSUANCE OF IMMIGR. DETAINERS BY ICE OFFICERS, § 2.4; *see also* Moreno v. Napolitano, 213 F. Supp. 3d 999, 1007 (N.D. Ill. 2016) (holding that the immigration detainer is a form of warrantless arrest and, to avoid a Fourth Amendment violation, INA § 287(a)(2), which governs warrantless arrests, requires the officer to have "reason to believe," which is the functional equivalent of probable cause, the non-citizen is removable from the United States).

11. Though beyond the scope of this paper, it is noteworthy that the constitutionality of immigration detainers has fallen under significant attack in recent years. *See, e.g.*, Mercado v. Dallas Cty., 229 F. Supp. 3d 501 (N.D. Tex. 2017) (holding that probable cause of removability is not probable cause of a crime, as immigration violations are civil, as opposed to criminal, in nature); U.S. DEP'T OF HOMELAND SECURITY, MEMORANDUM (Nov. 20, 2014) https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf (collecting cases in fn. 1); American Civil Liberties Union, *ICE Detainers and the Fourth Amendment: What Do Recent Federal Court Decisions Mean?* (Nov. 13, 2014), https://www.aclu.org/sites/default/files/field_document/2014_11_13_-_ice_detainers_4th_am_limits.pdf. There is also a non-constitutional argument that immigration detainers may only be issued for non-citizens who are alleged to have violated controlled substances laws. INA § 287(d); *see also* Kate M. Manuel, *Immigr. Detainers: Legal Issues*, CONG. RES. SERV., 10–12 (May 7, 2015), https://fas.org/sgp/crs/homesec/R42690.pdf; *but see* Comm. for Immigrant Rights of Sonoma Cty. v. Cty. of Sonoma, 644 F. Supp. 2d 1177, 1197-99 (N.D. Cal. 2009) (applying *Chevron* deference and holding ICE reasonably construed its ambiguous statute).

12. INA § 235(a)(1), (3); 8 C.F.R. § 235.1(a), (f).

residents (i.e. green card holders) returning from a trip abroad.[13] Regardless of the immigration status of the non-citizen, she will not be admitted unless she is, creatively enough, "admissible"[14] to the United States. If she is deemed to be inadmissible, she can be detained by immigration officials.[15] Being present in the country without authorization is an explicit ground of inadmissibility that often leads to detention.[16]

Finally, a non-citizen may be placed in immigration custody pursuant to a raid or some other concerted enforcement action. Traditionally, these operations are conducted in neighborhoods with a high concentration of immigrants. At times, ICE agents are searching for a particular individual; at other times, ICE will simply proceed in a door-to-door fashion, expecting unsophisticated persons to consent to agents' requests for entry into and a search of their home.[17]

Now that the non-citizen is in immigration custody, the situation is ripe for ICE to invoke one of the three mandatory detention statutes – INA §§ 235(b), 236(c), or 236(a) – depending on the non-citizen's circumstances. Accordingly, we turn to the mechanics of each statutory scheme, before focusing on the infirmities from which these statutes suffer.

A. Section 235(b) of the Immigration and Nationality Act: The non-citizen applying for admission into the U.S.

Section 235(b) of the INA, by far the most involved of the mandatory detention statutes, can be invoked to detain a non-citizen in one of two scenarios: (1) when the non-citizen is an "arriving alien" or a "minimally present alien" who is inadmissible under certain provisions of

13. INA § 101(a)(13)(C).
14. INA § 212(a).
15. INA § 235(b)(1), (2).
16. INA § 212(a)(6)(A)(i).
17. For a brief overview of ICE raids and the issues they raise, see Albert Sabat, *An ICE Home Raid Explainer*, ABC NEWS (Apr. 10, 2013), http://abcnews.go.com/ABC_Univision/News/ice-home-raid/story?id=18896252; National Immigration Law Center, *Know Your Rights: Everyone Has Certain Basic Rights, No Matter Who is President* (Nov. 10, 2016), https://www.nilc.org/wp-content/uploads/2016/11/Rights-No-Matter-Who-Is-Pres-2016-11-10.pdf.

INA § 212(a); or (2) when the non-citizen is not described in (1), but is otherwise not clearly and beyond a doubt entitled to be admitted.

Tackling the first scenario, an "arriving alien" is defined by agency regulation, in pertinent part, as "an applicant for admission coming or attempting to come into the United States at a port-of-entry. . . ."[18] Less abstractly, think of a traveler who is walking across a pedestrian foot bridge in south Texas, arriving at an inspection station staffed with CBP officers. This traveler must be inspected to gain entry.[19] During the inspection process, the CBP officer decides if the traveler satisfies INA § 212(a), which provides ten different provisions under which the officer may exclude her from entry. If the traveler is inadmissible to the United States for two of these enumerated reasons, either immigration fraud[20] or failure to provide appropriate entry documents,[21] the officer may take her into custody and summarily remove her from the United States without further hearing or review, save for a limited exception in a situation where the non-citizen claims to have permanent status.[22]

If our hypothetical traveler is not an "arriving alien," but she is nevertheless inadmissible under INA § 212(a)(6)(C) or INA § 212(a)(7), the officer may still summarily remove her under the same process provided for arriving aliens, as long as she has not been physically present in the United States for two years.[23] In the second scenario, our traveler is someone who is inadmissible under one of the ten provisions of INA § 212(a) but has been physically present in the United States for more than two years. Here, immigration authorities may detain her, although they can

18. 8 C.F.R. § 1001.1(q).
19. INA § 235(a)(1), (3); 8 C.F.R. § 235.1(a), (f).
20. INA § 212(a)(6)(C).
21. INA § 212(a)(7).
22. INA § 235(b)(1)(A)(i), (C).
23. INA § 235(b)(1)(A)(iii)(II).

no longer summarily remove her from the United States.[24] Instead, she must be given a removal hearing before an Immigration Judge.[25]

Mandatory detention creeps into the picture differently, depending on whether our traveler is in the first or second scenario. Under the former, our traveler can avoid summary removal from the United States by making a bona fide claim for asylum.[26] Her case is then sent to an asylum officer for a "credible fear interview."[27] Should an asylum officer find the traveler to have a credible fear of persecution,[28] she will be given a hearing before an Immigration Judge[29] and mandatorily detained throughout the asylum adjudication process.[30] Under the latter, the road to mandatory detention is much more straightforward; a single statutory provision requires mandatory detention.[31]

B. Section 236(c) of the Immigration and Nationality Act: The non-citizen involved in criminal activity

Section 236(c) of the INA concerns solely criminal non-citizens.[32] It is also the most difficult of the mandatory detention schemes to apply, as immigration jurisprudence has constantly fluctuated at the agency and federal levels on the analysis to be employed for determining when

24. INA § 235(b)(2)(A).
25. *Id.* There are two minor exceptions at INA § 235(b)(2)(B)(i), (iii), (C).
26. INA § 235(b)(1)(A)(ii).
27. INA § 235(b)(1)(B)(i).
28. INA § 235(b)(1)(B)(v).
29. 8 C.F.R. § 235.6(a)(1)(ii).
30. INA § 235(b)(1)(B)(ii).
31. INA § 235(b)(2)(A).
32. INA § 236(c) Detention of criminal aliens –

(1) Custody – The Attorney General shall take into custody any alien who –

(A): is inadmissible by reason of having committed any offense covered in section 212(a)(2),
(B): is deportable by reasons of having committed any offense covered in section 237(a)(2)(A)(ii), (A)(iii), (B), (C), or (D),
(C): is deportable under section 237(a)(2)(A)(i) on the basis of an offense for which the alien has been sentence [sic] to a term of imprisonment of at least 1 year, or
(D): is inadmissible under section 212(a)(3)(B) or deportable under section 237(a)(4)(B),

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

criminal activity triggers an immigration consequence and, thus, mandatory detention.[33] However, once it is determined that a non-citizen falls within one of the four categories of § 236(c)(1), she cannot be released from ICE custody,[34] save for very narrow exceptions for certain witnesses in a criminal case and pardons.[35]

Section 236(c)(1)(A) refers to inadmissible[36] non-citizens who either have committed or been convicted of, as the case may be, one or another of a litany of criminal acts.[37] Barring the applicability of any enumerated exception in § 212(a)(2),[38] one act, be it as petty as stealing groceries or as heinous as rape, is sufficient to invoke the application of § 236(c)(1)(A).

The second provision, INA § 236(c)(1)(B), covers those individuals who are criminally deportable for certain acts.[39] Some of the listed activity mirrors, at least to some extent, that as applied to inadmissible non-citizens,[40] while other of the activity is unique to deportable non-citizens.[41] The third section, 236(c)(1)(C), fully incorporates the language from §

33. *Compare, e.g.*, Matter of Silva-Trevino, 24 I&N Dec. 687 (A.G. 2008) (*"Silva-Trevino I") with* Matter of Silva-Trevino, 26 I&N Dec. 826 (BIA 2016) (*"Silva-Trevino III")*.

34. 8 C.F.R. § 236.1(c)(1)(i).

35. INA §§ 236(c)(2), 237(a)(2)(A)(vi).

36. The terminology in § 236(c) requires a brief explanatory word. A non-citizen is "inadmissible" when she has either never been previously admitted to the United States or is returning from abroad with legal documents and is forbidden from entering. Imagine the non-citizen is knocking on the door of the country and waiting for someone to open. A non-citizen is "deportable" when she has already been admitted and is facing expulsion. Imagine the door was opened previously, but now the United States will open it again to expel her. Cath. Legal Immigr. Network, Inc., *Inadmissibility vs. Deportability: Who's Inadmissible? Who's Deportable? Why Should You Care?* (Mar. 26, 2014), https://cliniclegal.org/sites/default/files/inadmissibility_and_deportability_workshop.pdf.

37. *See* INA § 212(a)(2)(A)-(I).

38. INA § 212(a)(2)(A)(ii)(I) ("youthful offender exception"); INA § 212(a)(2)(A)(ii)(II) ("petty offense exception").

39. INA § 237(a)(2)(A)(ii) (multiple criminal convictions); (A)(iii) (aggravated felonies, the definitions of which may be found at INA § 101(a)(43)(A)–(U)); (2)(B) (controlled substance offenses); (2)(C) (firearms offenses); (2)(D) (listing various miscellaneous crimes).

40. *Compare* INA § 212(a)(2)(A)(i)(I) *with* INA § 237(a)(2)(A)(i).

41. INA § 237(a)(2)(A)(iii), *supra* note 39. Aggravated felonies are unique to deportable non-citizens, that is they are not found in INA § 212.

237(a)(2)(A)(i).[42] Finally, § 236(c)(1)(D) rounds out the section and requires mandatory detention for those non-citizens either inadmissible or deportable on terrorist-related grounds.[43]

As mentioned above, should § 236(c)(1) encapsulate a non-citizen's criminal conduct, she is mandatorily detained, assuming §§ 236(c)(2) or 237(a)(2)(A)(vi) do not apply, pending the outcome of her removal proceedings before an Immigration Judge. However, there is a minor procedural protection afforded a non-citizen who wishes to challenge the immigration officer's contention that § 236(c)(1) applies.[44]

C. Section 236(a) of the Immigration and Nationality Act: The catchall detention provision

The last of the mandatory detention provisions only applies when § 235(b) and § 236(c) are not in play. Upon warrant, an immigration officer may take any non-citizen into custody pending a decision on her removability.[45] Following the non-citizen's apprehension, the immigration officer has three choices on how to proceed. First, he may continue to detain the non-citizen.[46] If the officer chooses this option, it is the functional equivalent of mandatory detention.

The officer also has two alternatives. Specifically, he may release the non-citizen on a bond no lower than $1500,[47] or he may release her on her own recognizance, that is without a bond.[48] Given that § 236(a) is the least restrictive of the detention statutes, an Immigration Judge may conduct a full review of the immigration officer's custody decision, upon request by the non-

42. *See* INA § 236(c).
43. *Id.*
44. 8 C.F.R. § 1003.19(h)(2)(ii); *see also* Matter of Joseph, 22 I&N Dec. 799 (BIA 1999) (en banc). As will be explained *infra* in the introduction to Part III, this protection is primarily hollow due to the extremely high burden it places on the non-citizen to overcome § 236(c)(1) inclusion.
45. INA § 236(a); 8 C.F.R. § 287.5(e)(3).
46. INA § 236(a)(1).
47. INA § 236(a)(2)(A).
48. INA § 236(a)(2)(B).

citizen.[49] Further appeal may be taken to the BIA.[50] During review, it is unquestioned that the Immigration Judge, and the BIA on appeal, may detain the non-citizen or release her on a bond of no less than $1500.[51] However, it is still unsettled as to whether either an Immigration Judge or the BIA may grant release on recognizance, although the law is trending toward the view that both entities indeed have this authority.[52] In order to be released from custody, whether on a bond or on her own recognizance, the non-citizen must satisfy, pursuant to regulation, two threshold conditions: (1) that she is not a flight risk and (2) that she is not a danger to her community.[53]

II. THE PROBLEMS WITH THE INA'S MANDATORY DETENTION STATUTES

Beyond potential constitutional concerns,[54] the focus of this Part is on three glaring defects in these detention statutes. First, subjecting non-citizens to mandatory detention substantially

49. 8 C.F.R. § 1236.1(d)(1).

50. The Board of Immigration Appeals is the administrative agency sitting between an immigration trial court and a federal court of appeals. It is similar to an intermediate appellate court. U.S. DEP'T OF JUST., BOARD OF IMMIGR. APPEALS, https://www.justice.gov/eoir/board-of-immigration-appeals (last updated Oct. 2, 2017).

51. 8 C.F.R. § 1236.1(d)(1).

52. Rivera v. Holder, 307 F.R.D. 539 (W.D. Wash. 2015); *but see* In re Luis Navarro-Solajo, 2011 Immig. Rptr. LEXIS 946, at *3 fn. 2 (BIA Apr. 13, 2011). At present, the BIA is adjudicating a case that will set national precedent on the issue. The government, in its brief, agrees that the Immigration and the BIA both have full authority to grant a non-citizen release on recognizance, which is also known as conditional parole. American Civil Liberties Union, *Dep't of Homeland Security Files Brief to the Board of Immigr. Appeals Acknowledging that Immigr. Judges May Grant Conditional Parole Under INA § 236(a) as an Alternative to Release on a Monetary Bond*, https://www.aclu.org/sites/default/files/assets/rivera_practice_advisory_1-27-14_final.pdf (last visited Nov. 11, 2017).

53. Matter of D-J-, 23 I&N Dec. 572, 574 (A.G. 2003); Matter of Adeniji, 22 I&N Dec. 1102, 1111-13 (BIA 2001) (en banc); Matter of Drysdale, 20 I&N Dec. 815, 817-18 (BIA 1994); 8 C.F.R. § 236.1(c)(8).

54. The U.S. Constitution's Fifth Amendment provides "[n]o person shall be . . . deprived of . . . liberty . . . without due process of law . . . ." U.S. CONST. amend. V; s*ee also* Zadvydas v. Davis, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment – from government custody, detention, or other forms of physical restraint – *lies at the heart* of the liberty that the [c]lause protects.") (emphasis added). The ultimate question of constitutionality is beyond the scope of this paper, but it is relevant to note the Due-Process-Clause-issues courts have found with the INA's mandatory detention statutes. At bottom, there seems to be a disagreement as to whether the Due Process Clause applies to all non-citizens. *Compare* Clark v. Martinez, 543 U.S. 371, 380 (2005) *with* Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953). Several federal courts of appeals and the Supreme Court have resorted to the canon of constitutional avoidance, a doctrine whose genesis is found in Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 341–56 (1936) (Brandeis, J., concurring) (explaining that a court will avoid ruling under the Constitution so long as there are narrower grounds upon which the matter can be resolved), in finding implicit in the INA's detention statutes a maximum period of custody. *Zadvydas*, 553 U.S. at 690 (applying the canon to a provision of the INA concerning detention awaiting removal as opposed to awaiting trial); Rodriguez v. Robbins, 715 F.3d 1127, 1144 (9th Cir. 2013) ("*Rodriguez II*") (applying the canon to INA § 235(b)); Diop v. ICE/Homeland Sec., 656 F.3d 221, 231 (3d Cir. 2011) (applying the canon to INA § 236(c)); Casas-Castrillon v. Dep't of Homeland Sec., 535 F.3d 942, 950–52 (9th Cir. 2008) (applying the canon to INA § 236(a)). After years of percolation and federal circuit court

burdens the INA's right to counsel provisions.[55] Without implying that one can easily navigate other areas of law without the assistance of counsel, the web of immigration law is especially tangled and dense. A large percentage of the clients of most immigration lawyers are grossly uneducated, unsophisticated in legal matters, and terrified of being removed to their country of origin, often times because of the extraordinarily compelling circumstances which brought them to our shores in the first place. The guiding hand of an experienced immigration lawyer makes a tremendous difference in the outcome of a client's case.[56]

Second, the cost of detaining immigrants pursuant to the INA's detention statutes is extreme. Taxpayers paid $3.471 billion for detention operations during fiscal year 2017.[57] Under the current administration, that number is likely to increase.[58] From fiscal years 2010 to 2016, the

---

precedent, the Supreme Court will rule on these matters finally during its October 2017 Term. Rodriguez v. Robbins, 804 F.3d 1060 (9th Cir. 2015) ("*Rodriguez III*"), *cert. granted sub nom.* Jennings v. Rodriguez, 136 S. Ct. 2489 (2016). The eventual opinion of the Supreme Court in *Jennings* does not change the analysis of this paper, as there are other reasons, which are explained *infra* in this Part II, for modifying the INA's mandatory detention statutes that lie outside the Constitution.

55. INA §§ 240(b)(4)(A), 292; 8 C.F.R. § 292.

56. *See, e.g.*, UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, U.S. ASYLUM SYSTEM: SIGNIFICANT VARIATION EXISTED IN ASYLUM OUTCOMES ACROSS IMMIGRATION COURTS AND JUDGES, pp. 22, 30 (2008) ("ASYLUM SYSTEM") (explaining how asylum applicants are *twice* as likely to be granted said relief from removal with the assistance of counsel) (emphasis added).

57. Consolidated Appropriations Act, 2017, H.R. 244, Pub. L. 115-31, 131 Stat. 135, 407 (2017). It should be distinctly noted that this figure does *not* include the cost to taxpayers when the government must defend itself against the myriad and almost always severely protracted detention-based lawsuits filed by either detainees or advocacy groups challenging detention practices or alleging constitutional and civil rights violations. A very recent example is Lyon v. U.S. Immigration & Customs Enf't, 171 F. Supp. 3d 961 (N.D. Cal. 2016). Plaintiff sued the government on violations of the U.S. Constitution and the INA. Complaint, No. 3:13-cv-5878-EMC, ECF No. 1. This litigation commenced in December of 2013 and ultimately settled in November 2016, almost three years later. The district court's final order approving the settlement agreement was the 286th entry on the docket. Final Approval of Class Action Settlement Agreement, ECF No. 286. Other examples abound. *See, e.g.*, Flores v. Sessions, 862 F.3d 863 (9th Cir. 2015) (discussing the continuing validity of a class action settlement *from 1997* – the Ninth Circuit upheld the settlement); In re Hutto Family Detention Center, No. 1:07-cv-00164-SS (W.D. Tex.) (litigating spanning 2.5 years and over 100 ECF docket entries, resulting in the government shutting down family detention at the Hutto facility); Orantes-Hernandez v. Meese, No. 2:82-cv-01107-MMM-VBK (C.D. Cal.) (litigation spanning over 20 years, with close to 1000 ECF entries, the product of which was a permanent injunction protecting a class of El Salvadoran nationals from coercive detention practices). Although no reliable data exists, it can be fairly assumed that, given the duration of the various cases listed above, the government's defense in each of these cases ran several million dollars in salaries, document preparation and assembly, office supplies, and the like.

58 Exec. Order 13767, 82 Fed. Reg. 8793, 8794-95 (Jan. 30, 2017) (directing the Secretary of DHS to expend all appropriate resources to construct or otherwise provide for detention facilities to detain all non-citizens at or near the U.S.-Mexico border and terminate an Obama-era immigration enforcement program known as "catch and release"); *see also* U.S. DEP'T OF HOMELAND SECURITY, MEMORANDUM (Feb. 20, 2017).

appropriations awarded by Congress to DHS has included funding for the required apprehension and detention of a minimum number of immigrants, with the most recent number set at 34,000.[59] In addition to the heavy monetary burden imposed on the general population, one must not lose sight of the human toll exacted by long-term detention.[60]

Finally, the INA's mandatory detention statutes, as currently written, have created an unfortunate punishment disparity vis-à-vis federal and state criminal bail laws. Although explained in greater detail *infra* at Part II.C, essentially the issue is that the INA's mandatory detention statutes and the bail laws at the state and federal levels are in place for the same two reasons, namely to guard against flight risk and ensure safety in the community.[61] Yet, a non-citizen faces harsher pre-trial punishment under the INA's mandatory detention statutes, which are *civil* in nature, than pursuant to federal or state *criminal* law.

A. The mandatory detention statutes severely burden a non-citizen's right to counsel under the INA

59. Consolidated Appropriations Act, 2016, Pub. L. 114-113, 129 Stat. 2242, 2497–98 (2015) ("[F]unding made available . . . shall maintain a level of not less than 34,000 detention beds through September 30, 2016.").

60. *See, e.g.*, *Rodriguez*, 804 F.3d 1060, 1073 (9th Cir. 2015) ("[V]isitation [of detainees] is restricted and often no-contact, drastically disrupting family relationships [. . . They] have missed their children's births and their parents' funerals. After losing a vital source of income, [their] spouses have sought government assistance, and their children have dropped out of college."). Ultimately, an examination of this important cost is beyond the scope of this paper. Nevertheless, it is significant to note that, in addition to the *Rodriguez* court's statement about the impact of mandatory detention on a non-citizen's family, a major contemporaneous issue is the effect on mothers fleeing violence and persecution with their children in tow. Esther Yu His Lee, *How Immigration Detention Centers Retraumatize Women and Children Fleeing from Violence*, THINK PROCESS (Oct. 22, 2015) https://thinkprogress.org/how-immigration-detention-centers-retraumatize-women-and-children-fleeing-from-violence-5624ac39e0ec/; Amber D. Moulton, *No Safe Haven Here: Children and Families Face Trauma in the hands of U.S. Immigration*, UNITARIAN UNIVERSALIST SERVICE COMMITTEE http://www.uusc.org/sites/default/files/no_safe_haven_here_-_children_and_families_face_trauma_in_the_hands_of_u.s._immigration.pdf (last visited Nov. 13, 2017). For a recent, comprehensive, analysis of the short- and long-term psychological impacts of immigration detention, see Kalian M. Brabeck, M. Brinton Lykes & Cristina Hunter, *The Psychosocial Impact of Detention and Deportation on U.S. Migrant Children and Families*, 84 AM. J. ORTHOPSYCHIATRY 496 (2014).

61. *See infra* note 98 and accompanying text. *See also* 8 C.F.R. § 236.1(c)(8); 18 U.S.C. § 3142(e)(1) (bail purposes at the federal level, which mirror those in the INA); Lauren Kelleher, *Out on Bail: What New York Can Learn from D.C. About Solving a Money Bail Problem*, 53 AM. CRIM. L. REV. 799, 801, 805-06 (2016) (same, but at the state level).

As immigration proceedings are civil in nature, there is no right to counsel under the U.S. Constitution.[62] Nonetheless, the INA unambiguously states that non-citizens facing removal from this country may retain counsel to represent them, provided there is no cost to the government.[63] The implementing regulations of § 292 permit both licensed attorneys and, in certain, narrow, circumstances, non-attorneys to provide representation.[64] As mentioned previously, the immigration attorney plays a vital role in assisting her client, who is almost without exception uneducated and unsophisticated in legal matters, navigate the incessantly turbulent waters of immigration law.[65] When her client is detained under one of the INA's mandatory detention schemes, the immigration attorney, whose job is already highly complex by the nature of the law she is practicing, has an even more challenging task ahead of her.[66]

The immigration attorney must actively work with her client to build a winning case.[67] Our immigration laws provide numerous pathways to legal status for non-citizens, each with its own substantive requirements. The commonality among them all is that the client must explain and prove her unique story to the factfinder.[68] However, immigration detention centers are often located in extremely remote areas such as a desert or a very small town with little to no

62. U.S. CONST. amend. VI ("In all *criminal* prosecutions, the accused shall enjoy . . . the assistance of counsel for his [defense].") (emphasis added); *see also* Matter of Compean, Bangaly & J-E-C-, 24 I&N Dec. 710, 716–26 (A.G. 2009) (discussing the inapplicability of the Constitution's Fifth and Sixth Amendments to civil removal proceedings), *vacated on other grounds by* Matter of Compean, Bangaly & J-E-C-, 25 I&N Dec. 1 (A.G. 2009).

63. INA § 292.

64. 8 C.F.R. § 292.1(a)-(e).

65. ASYLUM SYSTEM, *supra* note 56.

66. One challenge that must be assumed overcome for purposes of this paper is the ability of the detained client's family or friends to raise enough funds to hire an immigration lawyer, provided the client is unable to acquire *pro bono* representation.

67. *See* Olivia Quinto, *In a Desert Selling Water: Expanding the U-Visa to Victims of Notario Fraud and Other Unauthorized Practices of Law*, 14 RUTGERS RACE & L. REV. 203, 222 (2013) ("[Sixty-seven] percent of immigrants who had counsel prevailed in pursuing their cases, while only eight percent of those without attorneys succeeded.") (internal citation omitted).

68. INA § 240(c)(4)(A)-(C).

infrastructure.[69] Accordingly, the immigration attorney faces a logistical dilemma of balancing her workload of local cases, hearings, and other matters with spending the quality, in-person, time with her detained client that she knows is necessary, not only to assemble a competent case to satisfy the burden of proof,[70] but also to gain the client's trust, respect, and confidence. To the extent detainees are "provided" with access to a telephone inside the facility as an alternative to contact visits,[71] both practical and legal hardships substantially minimize the workability of this option.[72] Moreover, many immigration courts place detained cases on "rocket dockets," which drastically reduces the time given to the immigration attorney to work with her client to prepare the case for trial.[73]

---

69. *New Data on 637 Detention Facilities Used by ICE in FY 2015*, TRAC IMMIGRATION (Apr. 12, 2016), http://trac.syr.edu/immigration/reports/422/ (listing the locations of and providing other detailed information on the 637 facilities used by ICE to detain immigrants in fiscal year 2015). For example, ICE maintains a facility in Jena, a remote town in central Louisiana with a population of just over 3,400 inhabitants. U.S. CENSUS BUREAU, https://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml?src=bkmk (last visited Nov. 13, 2017). Similar results are found in a substantial majority of the remaining 636 facilities located around the country. *See also* Quinto, *supra* note 67, at 222 ("More than 80% of [immigrant] detainees were in facilities that were isolated and beyond the reach of legal aid organizations . . . .") (internal citation omitted); *Isolated in Detention: Limited Access to Legal Counsel in Immigration Detention Facilities Jeopardizes a Fair Day in Court*, NAT'L IMMIGRANT JUST. CTR app. 6 (Sept. 2010) ("*Isolated in Detention*"), https://www.immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2017-04/Isolated-in-Detention-Report-FINAL_September2010.pdf

70. INA § 240(c)(4)(A)-(C).

71. ICE has adopted detention guidelines known as the Performance-Based National Detention Standards ("PBNDS"), with the most recent iteration set down in 2011. Section 5.6 deals with telephone access for detainees. TELEPHONE ACCESS, U.S. IMMIGR. & CUSTOMS ENF'T (Dec. 2016), https://www.ice.gov/doclib/detention-standards/2011/5-6.pdf.

72. As an initial matter, the PBNDS was not promulgated using notice-and-comment rulemaking, *see* 5 U.S.C. § 553(b), thus the Standards are not binding on ICE. *See generally* Families for Freedom v. Chertoff, No. 1:08-cv-04056-DC (S.D.N.Y. June 25, 2009) (order discussing Plaintiff's ultimately unsuccessful petition under 5 U.S.C. § 553(e) to DHS for the promulgation of official detention regulations). To date, ICE has only adopted detention regulations implementing the Prison Rape Elimination Act of 2003, Pub. L. 108-79, 117 Stat. 972 (2003). Standards to Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities, 79 Fed. Reg. 13100 (Mar. 7, 2014). A comprehensive bill providing for statutory immigration detention standards and mandating DHS set down binding regulations was introduced in the U.S. House of Representatives by Adam Smith of Washington State in May 2015. Accountability in Immigration Detention Act, H.R. 2314, 114th Cong. (2015). The bill has been buried in the House's Subcommittee on Immigration and Border Security since late June 2015. Further, immigration advocacy groups have reported inconsistent application of the PBNDS, such as poor phone quality, high cost for calls, and arbitrary time limits placed on conversations with counsel. *Isolated in Detention*, *supra* note 69, at pp. 8–9 & app. 4. In 2016, the first ever class action lawsuit regarding detainee phone access was settled, but the class is limited to four California detention centers. *Lyon*, 171 F. Supp. 3d, at ECF No. 262.

73. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 35–36 (2015) (presenting detailed findings that continuances requested by detained non-citizens were on average five time shorter than their non-detained counterparts). Recently, the Executive Office for

The lawyer representing a detained non-citizen faces severe, case-compromising, obstacles that simply do not exist if her client is free from detention. Further, normal case preparation tasks are grossly complicated, which stifles forward progress. Consider an all-too-common hypothetical.[74] Mr. Doe entered the United States for the only time in May 2010 on a visitor's visa.[75] An immigration official authorized a six-month stay; Mr. Doe did not timely depart. He married a United States citizen, Mrs. Doe, in December 2012. In 2014, Mr. Doe was convicted of turnstile jumping and sentenced to serve one year in the local jail. Following completion of his state conviction, ICE immediately apprehended Mr. Doe and refused to release him, citing INA § 236(c)(1)(C).[76] Mr. Doe was transported to a facility in Jena, Louisiana, six hours from the family home in Jonesboro, Arkansas. Mrs. Doe retained an immigration attorney, who determined Mr. Doe was eligible to become a permanent resident, provided he could prove a bona fide marriage to his wife and convince the Immigration Judge to grant him a hardship waiver for his crime.[77]

Under the foregoing hypothetical, Mr. Doe's counsel has the following principal tasks: (1) work to prepare Mrs. Doe's petition, which requires substantial participation and evidence from

---

Immigration Review, which is the agency within the Department of Justice that administers the U.S. immigration court system, issued a memorandum explicitly stating that its highest docketing priority is detained individuals. Letter from Mary Beth Keller, Chief Immigration Judge, to All Immigration Judges, All Court Administrators, and All Immigration Court Staff (Jan. 31, 2017) https://www.justice.gov/sites/default/files/pages/attachments/2017/01/31/caseprocessingpriorities.pdf. Nevertheless, when the setting of an expedited trial does not impinge on a non-citizen's right to counsel or due process of law, the "rocket docket" phenomenon can work in the non-citizen's favor, as documentary evidence and witness' memory may become stale or be less persuasive as time passes. *See, e.g.*, Priscilla Alvarez, *Trump's Immigration Crackdown is Overwhelming a Strained System*, THE ATLANTIC (Apr. 21, 2017), https://www.theatlantic.com/politics/archive/2017/04/trump-immigration-court-ice/523557/ ("Over time . . . memories begin to fade. If a person can't testify until years after entering the United States, 'that can obviously cause problems.'").

74. This fact pattern has been oversimplified for brevity. However, in practice this hypothetical raises numerous sub-issues, each with its own complications. Were these sub-issues to be discussed, they would further drive home the complexity of immigration law, especially for those advocating for clients in detention.

75. INA § 101(a)(15)(B).

76. INA § 236(c). ICE's rationale was that Mr. Doe's conviction was for a crime involving moral turpitude pursuant to Mojica v. Reno, 970 F. Supp. 130, 137 (E.D.N.Y. 1997).

77. INA § 204(a)(1)(A)(ii) (allowing for a U.S. citizen spouse to petition for the non-citizen spouse's permanent residence); INA § 245 (detailing the basic requirements for permanent residence); INA § 212(h)(1)(B), (2) (providing a waiver for certain crimes if the non-citizen can show extreme hardship to a U.S. citizen spouse).

both spouses; (2) in light of the "rocket docket" phenomenon, craft legal arguments to convince the Immigration Judge to temporarily postpone Mr. Doe's case to allow for agency adjudication of said petition;[78] (3) prepare the permanent residency and hardship filings, which again require much input from *both* spouses; and (4) attempt to competently and meaningfully prepare Mr. Doe, among others, for a stressful, several-hour, trial on the merits. If those matters aren't cumbersome enough, imbedded are the aforementioned difficulties of visiting Mr. Doe to afford him some level of personal treatment and battling the detention facility's arbitrary communication policies regarding telephone access.[79] Also lingering is the very real possibility that counsel, during the proceedings, will be unable to meet an internal deadline[80]set by the Immigration Judge due to the inherent difficulties of working with a detained client, which could lead to debilitating sanctions for Mr. Doe, including forfeiture of the right to file his application or evidence in support thereof.[81] As this section demonstrates, the INA's mandatory detention provisions certainly and substantially water down the benefit that hiring counsel is supposed to bring to scared and unsophisticated immigrant detainees.

B. The INA's mandatory detention statutes impose extreme financial obligations on U.S. taxpayers

Detaining individuals under the INA brings with it a financial burden for the American taxpayer. In all areas of law where confinement is employed, such as in a state's criminal justice

78. *E.g.*, Matter of Hashmi, 24 I&N Dec. 785 (BIA 2009).

79. *See supra* note 72 and accompanying text.

80. During a non-citizen's removal proceedings, the Immigration Judge has considerable discretion to set deadlines for the submission of evidence, including, but not limited to, briefs, pre-hearing statements, supporting documents, and applications. *See generally Immigration Court Practice Manual*, § 3 (June 26, 2017). Although the Federal Rules of Evidence do not strictly apply in immigration proceedings, *see, e.g.*, Matter of De Vera, 16 I&N Dec. 266, 268-69 (BIA 1977), the authority of Immigration Judges in this regard is analogous to that of an Article III judge in controlling how evidence is presented and witness are examined. *See* FED. R. EVID. 611(a).

81. Matter of Interiano-Rosa, 25 I&N Dec. 264 (BIA 2010) (approving the propriety of an Immigration Judge's refusing to accept documents or applications for failing to follow strict deadlines); 8 C.F.R. § 1003.31(c); *Immigration Court Practice Manual*, § 3.1(d)(ii) (June 26, 2017).

system or pursuant to a state's civil commitment statute for the mentally ill, undoubtedly there will be a cost for the public to bear. However, this fact is especially true in U.S. immigration law, which has the largest immigrant detention system in the world.[82] As mentioned *supra*, DHS detention appropriations cost the taxpayers $3.471 billion for fiscal year 2017.[83] In no way is this figure an aberration, as Congress has consistently provided the agency over $2.5 billion in annual funding for these same operations since 2010.[84]

Overall, the cost to implement the INA's mandatory detention statutes have more than doubled since the mid-2000s, placing an increasingly heavier burden on taxpayers.[85] A closer inspection of the congressional appropriations to DHS since 2010 elucidates the primary reason: the insertion of the controversial "immigration bed quota."[86] The quota's creator is the late Senator

---

82. *See U.S. Immigr. Detention Profile*, GLOBAL DETENTION PROJECT, https://www.globaldetentionproject.org/countries/americas/united-states (last updated May 2016). Note that this Part II.B focuses exclusively on persons detained due to *civil* immigration violations, such as those that trigger the mandatory detention statutes. The U.S. detains tens of thousands more non-citizens on *criminal* immigration violations, such as entering the country without authorization, 8 U.S.C. § 1325, or unlawfully returning to the United States after a prior removal, 8 U.S.C. § 1326. Peter Wagner & Bernadette Rabuy, *Mass Incarceration: The Whole Pie 2017*, PRISON POLICY INITIATIVE (Mar. 14, 2017), https://www.prisonpolicy.org/reports/pie2017.html (estimating the federal government detains approximately 41,000 individuals on criminal immigration violations).

83. *See supra* note 57 and accompanying text.

84. 129 Stat. at 2498 (authorizing $3.217 billion for fiscal year 2016); Department of Homeland Security Appropriations Act, 2015, Pub. L. 114-4, 129 Stat. 39, 43 (2015) (providing $3.431 billion); Consolidated Appropriations Act, 2014, Pub. L. 113-76, 128 Stat. 5, 251 (2014) (providing $2.785 billion); Consolidated and Further Continuing Appropriations Act, 2013, Pub. L. 113-6, 127 Stat. 198, 347 (2013) (for the period March 27, 2013, to September 30, 2013, providing $2.753 billion); Continuing Appropriations Resolution, 2013, Pub. L. 112-175, 126 Stat. 1313 (2012) (Congress failed to pass a specific appropriations bill for fiscal year 2013. Instead, it passed a six-month continuing resolution, covering October 1, 2012, to March 27, 2013, and authorized funding at the level for fiscal year 2012. *See infra*.); Consolidated Appropriations Act, 2012, Pub. L. 112-74, 125 Stat. 786, 950 (2011) (providing for $2.75 billion); Continuing Appropriations Act, 2011, Pub. L. 111-242, 124 Stat. 2607, 2607-08 (2010) (carrying over the authorized amount from fiscal year 2010, *infra*); Department of Homeland Security Appropriations Act, 2010, Pub. L. 111-83, 123 Stat. 2142, 2149 (2009) (authorizing $2.545 billion). Earlier this year, the U.S. House introduced the Department of Homeland Security Appropriations Act, 2018, H.R. 3355, which provides for what would be a record $4.413 billion for custody and detention operations. *Id*. at 9–10. The Act is currently pending in the House Committee on Appropriations. Department of Homeland Security Appropriation Act, H.R. 3355, 115th Cong., https://www.congress.gov/bill/115th-congress/house-bill/3355/text (last visited Nov. 29, 2017).

85. *The Math of Immigration Detention: Runaway Costs for Immigration Detention Do Not Add Up to Sensible Policies*, NAT'L IMMIGR. F., 4 fig.2 (Aug. 2013), http://immigrationforum.org/wp-content/uploads/2014/10/Math-of-Immigation-Detention-August-2013-FINAL.pdf (showing that detention costs have more than doubled since 2005, increasing from just under $1 billion in 2005 to $3.471 billion in 2017).

86. An example of the language comprising the bed quota is provided *supra* at note 59. Although not the focus of this paper, a brief word about this term of art is warranted. There may be a disagreement as to the proper

Robert Byrd (D-WV), who inserted the language into the DHS appropriations bill for fiscal year 2010. The quota for that year was "no[] less than 33,400 detention beds . . . ."[87] Following its initial use, the immigration bed quota appeared in every DHS appropriations bill from 2011 until 2016.[88] For fiscal year 2017, Congress did not insert any bed quota language into its DHS appropriations bill. However, what Congress did do was award DHS $3.471 billion for its detention operations, which was the largest appropriation in its history.[89] Had bed quota language been provided along with this record award, the number of immigrants DHS would be required to hold in custody would have skyrocketed by over 5,000 beds to 39,324.[90] Finally, in May of 2017, then-DHS Secretary John Kelly submitted the agency's annual Budget in Brief for fiscal year 2018, which provides, *inter alia*, the total appropriations the agency is requesting from Congress and a

---

interpretation of the legislative language. Former DHS Secretary Jeh Johnson testified before Congress in 2014 that he interprets the language as an instruction from Congress that DHS is to intelligently spend its money so that it is, at any one time, capable of detaining, at a minimum, the number of immigrants provided in the legislation, not that the agency must keep those beds full at all times. However, during this same testimony, Representative John Culberson was unmistakably explicit in his repudiation of Secretary Johnson's position, stating, "[t]he law is mandatory [. . .] You shall fill [the required number] of beds." Esther Yu His Lee, *Homeland Security Head Insists 'Bed Mandate' is Not a Quota to Fill Detention Centers*, THINK PROGRESS (Mar. 12, 2014, 8:42 PM) https://thinkprogress.org/homeland-security-head-insists-bed-mandate-is-not-a-quota-to-fill-detention-centers-f93fa05bc896/. Irrespective of what the correct interpretation might be, DHS has been operating practically under the belief that the language is mandatory, in line with the statement of Rep. Culberson. *See also* Anita Sinha, *Arbitrary Detention? The Immigration Detention Bed Quota*, 12 DUKE J. CONST. L & PUB. POL'Y 77, 84-88 (2017) (discussing the bed quota in mandatory terms); Robert M. Morgenthau, Editorial, *The US Keeps 34,000 Immigrants in Detention Each Day Simply to Meet a Quota*, THE NATION (Aug. 13, 2014), https://www.thenation.com/article/us-keeps-34000-immigrants-detention-each-day-simply-meet-quota/.

87. Department of Homeland Security Appropriations Act, 2010, Pub. L. 111-83, 123 Stat. at 2149.

88. 124 Stat. at 2607-08 (maintaining the quota at 33,400 beds for fiscal year 2011); 125 Stat. at 950 (*increasing* the detention bed quota from 33,400 to 34,000 for fiscal year 2012); 126 Stat. at 1313 (maintaining the quota at 34,000 beds for the first half of fiscal year 2013); 127 Stat. at 347 (maintaining the quota at 34,000 beds for the second half of fiscal year 2013); 128 Stat. at 251 (maintaining the quota at 34,000 beds for fiscal year 2014); 129 Stat. at 43 (maintaining the quota at 34,000 beds for fiscal year 2015); 129 Stat. at 2498 (maintaining the quota at 34,000 beds for fiscal year 2016).

89. *Supra* note 57. The award surpassed the previous record-high funding of $3.431 billion, which Congress authorized for fiscal year 2015, by approximately $40 million, and surpassed fiscal year 2016's funding by $254 million.

90. 163 CONG. REC. H7084 (daily ed. Sept. 6, 2017) (statement of Rep. Jayapal); Lazaro Zamora & Jeff Mason, *Immigration in the Omnibus: No Wall Funding, But Gains for Trump*, BIPARTISAN POL'Y CENT. (May 10, 2017), https://bipartisanpolicy.org/blog/no-wall-funding-but-gains-for-trump/; *Federal Budget Limits Trump's Anti-Immigrant Agenda, Continues to Expand Detention and Border Militarization*, DETENTION WATCH NETWORK (May 2, 2017), https://www.detentionwatchnetwork.org/pressroom/releases/2017/federal-budget-limits-trump-s-anti-immigrant-agenda-continues-expand.

breakdown of that total into constituent categories.[91] In its Budget, DHS requested $2.7 billion for its detention operations, which will provide it with a bed allowance of 51,379, a massive increase from the 34,000 beds provided in 2016 and the 39,324 beds in 2017.[92] When one considers that these extreme implementation costs for the INA's mandatory detention statues are situated within the larger DHS budget, which is bigger than the *combined* budgets of all other federal law enforcement agencies,[93] it is irrefutable the American populace shoulders an exceedingly heavy cost to detain non-citizens under the INA.

C. The INA's mandatory detention statutes have created a deep and unnecessary punishment disparity between immigration and criminal law

When DHS invokes one of its mandatory detention statutes to hold a non-citizen in custody pending resolution of her case, she faces stiffer punishment under the *civil* INA than if she had been arrested for a high-grade Tennessee felony. To understand how that can be the result, one must closely examine the rights afforded the individual in each situation. On the immigration side of the equation, the non-citizen has at most a limited right to ask DHS to release her pending the ultimate adjudication on whether she qualifies for some lawful status to remain in this country.[94] Yet, on the criminal side of the scale, she most assuredly does have a full and unconditional right to a bail hearing.[95] It is vital to note here that the issue is not whether she will be successful in her bail hearing, but that she is entitled to one in the first place. In deciding the question of pre-trial

---

91. U.S. DEP'T OF HOMELAND SECURITY, BUDGET-IN-BRIEF: FISCAL YEAR 2018.

92. *Id.* at 4; *see also* Kate Voight, *The Trump Administration Fiscal Year 2018 Budget: Funding for a Massive Deportation Machine*, AILA Doc. No. 17060906 at *2 (posted June 9, 2017). As the appropriations bill pending in Congress, which also does not contain bed quota language, authorizes $4.413 billion, it is likely that 51,379 beds are conservative. *See supra* note 84 and accompanying text.

93. Doris Meissner et al., *Immigration Enforcement in the United States: The Rise of a Formidable Machinery*, MIGRATION POL'Y INST. (2013), http://www.migrationpolicy.org/research/immigration-enforcement-united-states-rise-formidable-machinery.

94. 8 C.F.R. § 1003.19(h)(2)(ii); Matter of Joseph, 22 I&N Dec. 799 (BIA 1999) (en banc).

95. TENN. CODE ANN. § 40-11-102 provides in relevant part, "[b]efore trial, *all* defendants shall be bailable . . . except for capital offenses where the proof is evident or the presumption [is] great." (emphasis added).

detention, a Tennessee judicial officer is to consider a multitude of factors, all of which bear on the same policies, flight risk and danger to the community, that underlie the INA's mandatory detention schemes.[96] As can be seen from the Tennessee bail statute, only a very narrow class of persons are ineligible to make application for release.[97] A similar setup is found in every other U.S. state.[98]

Evidence of a punishment disparity is even stronger when one considers the respective purposes of our immigration and criminal laws. An individual who violates one of our immigration laws, for instance the provision that subjects visa overstays to removal[99] or the statute that renders inadmissible a non-citizen who commits certain drug offenses,[100] has committed a civil infraction and nothing more.[101] Juxtapose that with an individual who burglarizes a residence in violation of the peace and dignity of a state. This individual has not just done something "wrong," like the non-citizen who overstayed her visa, but she has transgressed social norms to such an extent that

96. TENN. CODE ANN. § 40-11-115(b) (factors 1-3, 7, and 8 bearing on flight risk, factor 5 bearing on danger to the community, and factors 4 and 6 bearing on both).

97. TENN. CODE ANN. § 40-11-102.

98. ALA. CONST. of 1901, art. 1, § 16 ("[A]ll persons shall, before conviction, be bailable . . . except for capital offenses [] when the proof is evident or the presumption [is] great . . . ."); ALA. CODE §§ 15-13-2 and -3; ALA. R. CRIM. P. 7.2 (listing factors for consideration, all of which bear upon either flight risk, danger to the community, or both); FLA. R. CRIM. P. 3.131(a) ("Unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great, every person charged with a crime or violation of municipal or county ordinance shall be entitled to pretrial release on reasonable conditions."); FLA. STAT. § 903.046(1) (explicitly stating the dual policies of bail are to guard against flight risk and danger to the community); *Id.* at § 903.046(2) (listing factors that weigh on the policies in subsection (1)); MASS. GEN. LAWS ch. 276 §§ 57 (superior court proceedings), 58 (district court proceedings), 58A (release of "dangerous" persons); MASS. R. CRIM. P. 7.3(b)(1)(D) (instructing judges to determine conditions of release pursuant to statute); VA. CODE ANN. § 19.2-120 (like the Florida statute, explicitly prescribing the policy for bail and providing exceptions for a litany of serious offenses); *Id.* at § 19.2-121 (listing factors that track those of the other states described *supra*); Matthew J. Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 ARIZ. L. REV. 909, 920-31 (2013) (surveying the right to bail, either provided constitutionally or statutorily, in every U.S. state).

99. INA § 237(a)(1)(B).

100. INA § 212(a)(2)(C).

101. Arizona v. United States, 567 U.S. 387, 396 (2012) ("Removal is a civil, not criminal, matter."); Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) (explaining that the sole product of immigration proceedings is a determination that a non-citizen must return to her homeland because she is contained within a congressionally-created class of persons, pursuant to U.S. CONST. art. 1, § 8, cl. 4, that do not deserve to reside lawfully within our borders. As the Court plainly put it, "deportation is not punishment for a crime.").

she is subject to the mighty arm of the state and can be *punished*, not *banished*, for her actions so that the policies behind the criminal law may be ably discharged.[102]

Criminal law and immigration law are mutually exclusive in terms of the goals each is supposed to accomplish. With an aim as punitive as retribution,[103]for example, placed alongside an objective as administrative as exclusion, one would expect the former to be more onerous than the latter in terms of how it treats offenders pre-trial. Yet, the right-stripping effect of the INA's mandatory detention statutes yields a reality that is exactly backward.[104] By implementing targeted modifications to these statutes, law and policymakers can easily reverse this punishment disparity, make the immigrant detention system more fiscally responsible, and restore the INA's right to counsel to its proper place of paramount importance. Simultaneously, these modifications would continue to fully advance the dual policies of ensuring that non-citizens appear for their hearings and other appointments with immigration officials and that dangerous individuals do not visit harm upon the American people. This paper now turns its attention to three proposed solutions.

III. PROPOSED ADJUSTMENTS TO THE MANDATORY DETENTION STATUTES

Initially, some might argue whether changes to the schemes are actually necessary. After all, the arguments go, detained non-citizens have a right, both under federal regulation[105] and

102. *See, e.g.*, Marc O. DeGirolami, *Against Theories of Punishment: The Thought of Sir James Fitzjames Stephen*, 9 OHIO ST. J. CRIM. L. 699, 703-07 (2012) (explaining the five theories of punishment as deterrence, both specific and general, retribution, rehabilitation, restitution, and incapacitation).

103. *Id*. at 703–04.

104. In practice, ICE routinely uses the mandatory detention statutes to hold non-citizens with little to no criminal history or risk of flight, further entrenching this disparity. When a non-citizen is processed into ICE custody, she is formally classified, based on a number of factors, into one of three categories: low custody, medium custody, or high custody. IMMIGR. & CUSTOMS ENF'T, CUSTODY CLASSIFICATION SYSTEM (Dec. 2016). A comprehensive government study from 2014 reveals that approximately 44% of all ICE detainees were officially classified "low custody" and another 41% were classified "medium custody." UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, IMMIGRATION DETENTION: ADDITIONAL ACTIONS NEEDED TO STRENGTHEN MANAGEMENT AND OVERSIGHT OF FACILITY COSTS AND STANDARDS, 8 (Oct. 2014); Dora Schriro, *Immigration Detention Overview and Recommendations*, IMMIGR. & CUSTOMS ENF'T, 2 (Oct. 6, 2009) (a comprehensive study of ICE's detention practices, finding "[t]he majority of the population is characterized as low custody, or having a low propensity for violence.").

105. 8 C.F.R. § 1003.19(h)(2)(ii).

agency case law,[106] to challenge the applicability of INA § 236(c), and other detained non-citizens may ask for a custody review due to "changed circumstances."[107] In rebuttal, it is crucial to note that for a non-citizen to challenge § 236(c) under either case law or regulation, she must satisfy a very high standard: she must show that DHS is "substantially unlikely to prevail on a charge of removability specified in section 236(c)(1) of the Act."[108] With respect to those non-citizens desiring to argue "changed circumstances," this avenue is limited to those individuals held pursuant to INA § 236(a),[109] and the change in the non-citizen's circumstances must be "material" for her to request a custody review.[110] Apart from these two largely hollow detention review procedures, conspicuous by its absence is any relief for those non-citizens mandatorily detained under INA § 235(b).

As the current remedies are either inadequate or non-existent, this paper proposes three amendments to modernize the INA's mandatory detention statutes: (1) limit INA § 236(c)'s scope to violent offenders; (2) allow non-citizens held under either INA §§ 235(b) or 236(a) to present evidence to DHS supporting their release from custody; and (3) expand the use of Alternatives to Detention.

A. Limiting INA § 236(c)'s scope to violent offenders better harmonizes the competing individual and government interests at stake

Congress should amend INA § 236(c)[111] to require mandatory detention of only those non-citizens classified by DHS as "violent offenders." In turn, a "violent offender" would be defined as "a non-citizen who has committed an offense which resulted in *actual* bodily injury, however

106. Matter of Joseph, 22 I&N Dec. 799 (BIA 1999) (en banc).
107. 8 C.F.R. § 1003.19(e).
108. *Joseph*, 22 I&N at 806; *see also id.* at 809–10 (Schmidt, Chairman, dissenting in part) (finding the standard of "substantially unlikely" set by the majority to be overly demanding).
109. *See, e.g.*, Singh v. Green, 2017 U.S. Dist. LEXIS 134019 at *4-5 (D.N.J. Aug. 22, 2017).
110. *Id.*; *see also* 8 C.F.R. § 1003.19(e).
111. *See supra* note 32 and accompanying text.

slight, to the person of another, according to the facts and circumstances of the situation as may be adduced by testimony, documentary evidence, or otherwise."[112] Should DHS find the non-citizen a violent offender, she may seek review of the determination before an Immigration Judge and, finally, the BIA. All other non-citizens who have committed crimes, but are not violent offenders, will have a statutory right to ask for release from custody. During such review, they will have to bring forth evidence, be it testimonial, documentary, or otherwise, demonstrating that their circumstances neither implicate flight risk nor danger to the community.

This limitation on INA § 236(c) strikes an appropriate balance between the competing interests of non-citizens and the public at large. Congress enacted the current version of § 236(c)[113] as part of a concerted effort to control the growing number of non-citizens committing crimes within our borders and to strengthen the former Immigration & Naturalization Service's[114] efficacy in locating, prosecuting, and removing these individuals for their actions.[115] The Supreme Court, in *Demore v. Kim*, a 2003 landmark case challenging the constitutionality of § 236(c), further explained the nature of the problem that prompted congressional investigation.[116] The most serious problems Congress faced were, according to the Court, the high recidivism rates among

112. On the surface, a ready constitutional counterargument can be made against this proposal, specifically that it violates Supreme Court precedent on when criminal activity triggers immigration consequences. However, in those cases, the Supreme Court *strictly* limited its holdings to providing the proper analysis for determining when criminal activity gives rise to inadmissibility and deportability, *see* note 36, *supra*, which are terms quite separate and apart from the issue of pretrial immigration detention. *See* Mathis v. United States, 136 S. Ct. 2243 (2016); Descamps v. United States, 133 S. Ct. 2276 (2013); Moncrieffe v. Holder, 569 U.S. 184 (2013); Taylor v. United States, 495 U.S. 575 (1990).

113. Current section 236(c) was adopted by Congress in 1996; the statutory language comes from two pieces of 1996 legislation. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. 104-208, 110 Stat. 3009, 3594–95 (1996); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214, 1259–68 (1996).

114. This federal agency ceased operations on March 1, 2003, when its functions were collapsed into the newly-created Department of Homeland Security as part of the Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135 (2002).

115. Criminal Aliens in the United States: Hearings before the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs, 103d Congr., 1st Sess. (1993) ("Criminal Aliens Hearings").

116. 538 U.S. 510, 518–21.

non-citizens,[117] the growing percentage of non-citizens housed in federal and state criminal custody,[118] and the government's rank inability to remove these individuals after their criminal proceedings concluded.[119] In consequence, the public interest was strong in passing a robust statute that allowed the government, once it located these individuals, to detain them until an Immigration Judge could decide their fate. The strength of this interest continues to the present day, as it is most illogical to contend that any reasonable person desires unsafe streets.

Likewise, the interests of the detained non-citizen are also enduring. Fundamentally, Congress, independent of its proper motives, has made a choice for certain groups of people, essentially denying them the opportunity to prove that their circumstances make mandatory detention inappropriate. This categorical treatment of large swaths of the immigrant population makes the facial, unsubstantiated, assumption that each and every non-citizen who commits a crime poses the same amount of danger as any other.[120] Moreover, as explained *supra* in Part II.A, a mandatorily detained non-citizen faces significant access-to-counsel problems, which may, in addition to minimizing the vital importance of the INA's right-to-counsel provisions, uncomfortably encroach on the Due Process Clause's guarantee of fundamental fairness, the "touchstone of the [Clause]."[121]

---

117. *Id.* at 518–19 (explaining Congress' reliance on a 1986 study, seven years prior to the 1993 Criminal Aliens Hearings, which concluded that 77% of non-citizens identified as deportable for criminal activity re-offended at least once more before their immigration proceedings began, and 45% re-offended multiple times).

118. *Id.* at 518.

119. *Id.* at 519.

120. Andrew David Kennedy, *Expedited Justice: The Problems Regarding the Current Law of Expedited Removal of Aggravated Felons*, 60 VAND. L. REV. 1847, 1857 (2007) (discussing the inherent danger to the public of violent offenders); Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L. J. 1131, 1142 (2002) (referring to a 2001 congressional subcommittee hearing during which Congress admits that detaining a non-violent individual under the INA's mandatory detention statutes, pending a decision from an Immigration Judge on whether she will ultimately be allowed to lawfully reside in the United States, is more problematic).

121. Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973).

The proposal suggested herein reasonably and fairly balances the equities on both sides by accentuating and giving effect to each party's most powerful point while simultaneously minimizing the harshness of full deference to either argument. As will be explained *infra* in this Part III.A, it can even be argued that the government "comes out ahead." The government's strongest interest is maintaining public safety.[122] Violent offenders, if released, are the non-citizens most likely to compromise that legitimate interest.[123] Therefore, the government may detain these individuals until an Immigration Judge either grants them relief, in which case they are released into the U.S. with lawful status, or orders them removed from our shores, in which case they are released to their home countries as deportees.

However, it is overly harsh for the government to indiscriminately round up and mandatorily incarcerate non-citizens solely because their actions fall within the bounds of a statute that does not take individualized facts into account. This weakness is the non-citizens' strength. To that end, the non-violent detainee is afforded an opportunity to bring forth her unique circumstances. Note what is missing: the non-citizen does *not* get a presumption of release. Non-violent or otherwise, she has still committed some type of offense in violation of either local, state, or federal criminal law. Accordingly, a failsafe is built into the proposal, namely the burden[124] of demonstrating she is not a flight risk or a danger to the community. If she is successful, she is released on bond, recognizance, or under such conditions as the government may prescribe[125]. If she is not, the government's interest in public safety prevails, and she remains detained.

B. Affording § 235(b) and § 236(a) detainees a hearing before DHS increases efficiency and provides a check against arbitrary detention decisions

122. *See* Criminal Aliens Hearings, *supra* note 115.

123. Kennedy, *supra* note 120.

124. Unless otherwise specified, the burden of proof in immigration matters is preponderance of the evidence. Matter of Chawathe, 25 I&N Dec. 369, 375 (AAO 2010); Matter of E-M-, 20 I&N Dec. 77, 79-80 (Comm'r 1989).

125. *See, e.g.*, INA § 236(a)(2)(A), (B).

Congress should amend INA §§ 235(b) and 236(a) to provide each non-citizen with a hearing as of right before a DHS officer. During this hearing, the non-citizen will be required to show, by a preponderance of the evidence,[126] that she is neither a flight risk nor a danger to the community.[127] If the non-citizen carries her burden, DHS must release her on bond, her own recognizance, or other conditions.[128] Should the DHS officer decline to release the non-citizen, she must be given a written decision containing a substantive analysis[129] of the evidence brought forward and the reasoning for its deficiencies. The non-citizen would then have a statutory right, upon request, to seek review of the DHS decision before an Immigration Judge and, if necessary, before the BIA. If the Immigration Judge concludes the DHS officer did not provide a sufficient analytical framework, the case shall be remanded back to DHS with instructions to provide a proper analysis.[130]

Enacting this proposal will greatly increase government efficiency. To begin, DHS would not be working with a blank canvas. On the contrary, the BIA has developed myriad precedential decisions discussing factors that bear upon whether a non-citizen, who is not otherwise subject to § 236(c), should be released from custody.[131] These factors are: (1) whether the non-citizen has a fixed U.S. address; (2) the length of residence in the U.S.; (3) family ties in the U.S., particularly those who can confer immigration benefits; (4) employment history in the U.S., including length and stability of same; (5) prior immigration record; (6) attempts to escape from authorities or other flight to avoid prosecution; (7) prior failures to appear for scheduled court proceedings; (8)

126. *See supra* note 124.
127. *See supra* notes 53 and 61.
128. *See supra* note 125.
129. *Cf.* Matter of Saelee, 22 I&N Dec. 1258, 1262 (BIA 2000) (en banc) (rejecting superficial custody analyses made by DHS).
130. *Id.*
131. Matter of Guerra, 24 I&N Dec. 37, 40 (BIA 2006) (collecting factors and cases).

criminal record, including extensiveness and recency, indicating consistent disrespect for the law; and (9) the method of the non-citizen's entry into the U.S.[132] The DHS officer will have every incentive to come to a reasoned decision based on the evidenced adduced during the initial review, lest an Immigration Judge will remand the matter.

Full compliance with these procedures will relieve stress on the immigration court system, which is at present struggling to handle more than 632,000 cases spread among just 334 judges, for an average docket of just under 1900 cases,[133] in two ways. First, it is exceedingly likely that by conducting deliberate custody reviews, DHS will release a large number of non-citizens without court intervention.[134] Second, for those cases on which DHS does deny release, the Immigration Judge will have a complete record of the proceedings below, which will enable her to proceed more swiftly on review and conserve already-overstretched government resources. At most, she might have to grant a brief recess for the non-citizen to submit any other evidence and witnesses in advance of the hearing.

Separate from judicial efficiency and economy, this proposal, by providing the non-citizen with a written decision on why DHS will not release her, wholly eliminates the prospect of arbitrary and capricious agency action. A detainee held under INA § 235(b) or § 236(a) does not

132. *Id.*

133. *Immigration Court Backlog Tool*, TRAC IMMIGR., http://trac.syr.edu/phptools/immigration/court_backlog/ (last visited Nov. 29, 2017) (showing backlog of 632,261 cases as of August 2017); U.S. DEP'T OF JUST., OFFICE OF THE CHIEF IMMIGRATION JUDGE, https://www.justice.gov/eoir/office-of-the-chief-immigration-judge (last updated Aug. 24, 2017) (stating approximately 330 immigration judges are adjudicating cases as of August 24, 2017); *How a 'Dire' Immigration Court Backlog Affects Lives*, PBS: NEWS HOUR (Sept. 18, 2017, 10:52 PM), https://www.pbs.org/newshour/show/dire-immigration-court-backlog-affects-lives (stating 334 judges as of September 18, 2017). In contrast, the average federal district court judge has a docket of 633 cases (a third of what the average Immigration Judge handles) as of June 2017. U.S. COURTS, U.S. DIST. COURTS–NAT'L JUDICIAL CASELOAD PROFILE, http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0630.2017.pdf (last visited Nov. 29, 2017).

134. *See, e.g.*, *supra* note 104 and accompanying text.

have any avenue whatever to argue that one or the other statutory scheme is inapplicable to her.[135] Relatedly, the current statutory language is couched in such terms that DHS need not provide any justification for the non-citizen's detention.[136] At the required hearing, should DHS desire to continue detention, it will be obligated to explain itself in writing not just so an Immigration Judge will have a baseline understanding for review,[137] but also so she can scrutinize the substance of the agency's action and remand otherwise baseless decisions.

Finally, this modification to INA §§ 235(b) and 236(a) provides for proper vetting to ensure that only those non-citizens who cannot carry their burden of proof, and no others, remain in custody. A non-citizen has at her disposal a litany of factors to substantiate her petition for release.[138] Carried out to its endpoint, this proposal allows for three different levels of review (a DHS officer, an Immigration Judge, and the BIA). If after adjudication at the BIA the non-citizen is still detained, that result is strong evidence of either a flight risk or a danger to the community, which aligns perfectly with the intent of Congress.[139]

C. Expanding the use of Alternatives to Detention would save taxpayers hundreds of millions of dollars

Congress should amend each mandatory detention statute to provide a rebuttable presumption that release of a non-citizen on an Alternative to Detention ("ATD") would fully serve the dual policies of ensuring that non-citizen's appearance at future immigration proceedings and community safety. DHS may rebut this presumption by putting on proof or testimony, sufficient

135. *Cf. supra* note 44, albeit these protections are hollow in nature, as explained in the introduction to Part III, *supra*.

136. INA § 235(b)(1)(A)(i), (iii)(II); INA § 235(b)(2)(A); INA § 236(a)(1).

137. This proposition is analogous to one of the most fundamental principles of U.S. administrative law: Paraphrased, when a federal court is reviewing an agency adjudication, the agency must explain the basis for its decision. SEC v. Chenery Corp., 318 U.S. 80, 87 (1943) ("*Chenery I*").

138. *Guerra*, 24 I&N at 40.

139. *See* Criminal Alien Hearings, *supra* note 115.

to satisfy a preponderance of the evidence,[140] of the non-citizen's circumstances that show she is either a flight risk or a danger to the community. Should the DHS successfully rebut the presumption, the non-citizen may be mandatorily detained under the statutes as currently written, but the non-citizen may appeal the negative decision to an Immigration Judge and, if necessary, to the BIA. Under this proposal, the ATDs available for use would be electronic monitoring, for example an ankle bracelet or GPS cell phone tracking, or community supervision by the non-citizen's local ICE office. Should the non-citizen later engage in criminal activity or fail to appear for appointments with immigration officials, the non-citizen may be returned to custody.

The benefits of this proposal are threefold.[141] First, ATDs are cheaper than traditional brick-and-mortar detention. There is no stronger evidence of this than the government's own comments and findings. In its budget overview for fiscal year 2018, DHS calculated the average daily cost to taxpayers for the detention of one adult non-citizen to be $133.99[142] and one family to be $319.37.[143] In this same document, DHS stated that the average daily cost for an ATD enrollee was between $4.13 and $4.50.[144] By the author's calculation, the savings that the use of ATDs gives the taxpayer under these figures are approximately 96.6% for each individual and 101.4% for each family.[145] In addition, DHS freely acknowledges that the use of ATDs are more

140. *See supra* note 124.

141. An important additional benefit of the government releasing a non-citizen on an ATD is that the non-citizen's family remains united and intact while proceedings are ongoing. *Cf. supra* note 60.

142. U.S. DEP'T OF HOMELAND SECURITY, U.S. IMMIGRATION AND CUSTOMS ENF'T: BUDGET OVERVIEW, 128 (2018). The graph on this page shows this cost has increased annually without exception over the last four years.

143. *Id.* at 131.

144. *Id.* at 179–80. It should be noted that the government, on the pages referenced, describes these figures as costs that it is paying to contractors to enroll select non-citizens in an ATD and not as costs that are passed onto the enrollee herself. The author is not aware of any official government source which indicates that non-citizens are obligated to pay anything for an ATD enrollment.

145. In his calculation, the author used $4.50 as the ATD cost, both for simplicity and to use the highest ATD cost provided by DHS.

cost-effective than institutional lockup.[146] To illustrate, consider 51,379, which is the number of detention beds DHS said it will be able to maintain during fiscal year 2018.[147] If we assume all are individuals and not part of a family and multiply this number by $133.99, the daily and annual taxpayer bills are $6.884 million and $2.512 billion, respectively. However, if DHS were to enroll just 60%[148] of those 51,379 non-citizens in ATDs, those costs plummet to $2.892 million daily and $1.055 billion annually.

Second, a rebuttable presumption of release under an ATD is appropriate because the various programs' success rate is exceedingly high. DHS has recently made this unmistakably clear.[149] Available statistics reveal that during fiscal years 2011-2013, non-citizens enrolled in the "Full-Service" ATD programs[150] complied at a rate no lower than 90%,[151] and those enrolled in the "Technology-Only" programs[152] complied at a rate no lower than 79.8%.[153] Even in the absence of statistics, non-citizens released under an ATD have every incentive to comply with

146. *See, e.g.*, U.S. DEP'T OF HOMELAND SECURITY, BUDGET-IN-BRIEF: FISCAL YEAR 2016, 5. Notwithstanding such acknowledgment, the percentage of overall funding dedicated to ATDs is still woefully abysmal, although progress is being made. In the pending 2018 DHS appropriations bill, *supra* note 84, only 4.03% (or $177.7 million) of the total budget is appropriated to ATDs. H.R. REP. NO. 115–239, at 29 (2017). However, in fiscal year 2014, when $2.785 billion was awarded to DHS, *supra* note 84, just 3.28% (or $91.44 million) of the total was devoted to ATDs. U.S. DEP'T OF HOMELAND SECURITY, CONGRESSIONAL BUDGET JUSTIFICATION: FISCAL YEAR 2016, 5.

147. BUDGET-IN-BRIEF: FISCAL YEAR 2018, *supra* note 91.

148. This percentage is used for illustrative purposes only. The number would likely be much higher, as only 15% of ICE detainees are "high" custody. IMMIGRATION DETENTION, *supra* note 104.

149. BUDGET OVERVIEW, *supra* note 142, at 179 ("Historically, [DHS] has seen strong [non-citizen] cooperation with ATD requirements during the adjudication of immigration proceedings.").

150. "Full-Service" programs combine the use of technology with case management support. U.S. DEP'T OF HOMELAND SECURITY, IMMIGRATION SERVICES, https://bi.com/immigration-services/.

151. UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, ALTERNATIVES TO DETENTION: IMPROVED DATA COLLECTION AND ANALYSES NEEDED TO BETTER ASSESS PROGRAM EFFECTIVENESS, 35 (Nov. 2014), http://www.gao.gov/assets/670/666911.pdf.

152. IMMIGRATION SERVICES, *supra* note 150. "Technology-Only" programs provide just electronic monitoring.

153. ALTERNATIVES TO DETENTION, *supra* note 151.

release conditions. These individuals are attempting to secure lawful status in the United States, a near impossible task to complete by absconding or engaging in nefarious behavior.[154]

Finally, this proposal properly vets a non-citizen's individual facts and circumstances before she is mandatorily detained throughout her immigration proceedings. If DHS believes a non-citizen's release under an ADT will nevertheless offend one of the dual policies of mandatory detention, it must offer evidence sufficient to preponderate against release. Further review by an Immigration Judge and the BIA will ensure that DHS has a valid basis for its contention before affirming the original decision. The totality of these procedures will leave subject to mandatory detention only those truly nomadic, cunning, and dangerous non-citizens, thereby fully promoting congressional intent.[155]

IV. CONCLUSION

It is time for U.S. immigration law respecting pre-trial detention to turn a corner, not on its rationale but on its approach. The maladies from which these mandatory detention statutes suffer are no longer reasonably arguable. The proposed solutions, however, modernize, economize, and, perhaps most importantly, humanize how we process immigrants navigating our complex laws. Adopting these changes does not help immigrants "get off." Instead, each proposal holds non-citizens accountable relative to their actions. If we continue down the path we are on, however, the inscription on the Statute of Liberty must be amended so it accurately reflects our treatment of immigrants looking for a better life: "Give me your tired, your poor, your huddled masses yearning to be free . . . so we can lock you all up."

---

154. Denise Gilman, *To Loose the Bonds: The Deceptive Promise of Freedom from Pretrial Immigration Detention*, 92 IND. L. J. 157, 190–91 (2016) ("Many migrants have no history that would raise any suggestion of danger and have strong incentives to appear for their hearings in order to pursue opportunities to remain in the United States with stable legal status.").

155. For example, these individuals would be the 15% of ICE's detainee population labeled as "high" custody. *See supra* note 104.