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# Making Civil Immigration Detention "Civil," and Examining the Emerging U.S. Civil Detention Paradigm

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# MAKING CIVIL IMMIGRATION DETENTION "CIVIL," AND EXAMINING THE EMERGING U.S. CIVIL DETENTION PARADIGM

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Abstract

In 2009, the Obama Administration began to reform its sprawling immigration detention system by asking the question, "How do we make civil detention civil?" Five years later, after opening an explicitly-named "civil detention center" in Texas to public criticism from both sides, the Administration's efforts have stalled. But its reforms, even if fully implemented, would still resemble lower-security criminal jails.

This symposium article is the first to comprehensively examine the Administration's efforts to implement "truly civil" immigration detention, through new standards, improved conditions, and greater oversight. It does so by undertaking the first descriptive comparison of the U.S.'s two largest civil detention systems—immigration detention and sex offender civil commitment—to ascertain the value of the "civil" label of detention reform. It finds the emerging civil detention paradigm to be an incarcerative model presuming round-the-clock confinement but with lower security, as well as increasing, near-criminal procedural protections. Thus, the "civil" label of reform has little meaning, either to the individual's deprivation of liberty or the expressive message communicated. More meaningful and more "civil" reform would be to implement a system that detains less, not

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just better. Looking forward, I offer a prescriptive framework for a civil detention system—one that detains far less frequently, for shorter periods, and in non-secure facilities not constituting "detention" as traditionally conceived.

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## Introduction

In 2009, in the Obama Administration's infancy, new Department of Homeland Security ("DHS") Secretary Janet Napolitano hired Dr. Dora Schriro, then head of Arizona's corrections system, to perform a "comprehensive and candid" review of DHS' enormous immigration detention system.[1] The Administration envisioned this review to be its first step towards reforming immigration detention into a "truly civil detention system," as Immigration and Customs Enforcement ("ICE") director John Morton stated.[2] Thus, Dr. Schriro saw her central question, as she later put it, to be "How do we make civil detention civil?"[3]

Dr. Schriro issued her report in October 2009 after touring immigration detention facilities around the country. She described the "largest detention system in the country," then detaining over 378,000 individuals a year and over 31,000 per day, mainly in jails and prisons.[4] She recommended the creation of a detention model tailored to the immigrant population, governed by different standards than criminal incarceration, with robust oversight and transparency. [5] Subsequently, in the next three years, ICE developed new (albeit still legally non-binding) detention standards to govern this new civil detention model,[6] and hired detention monitors to enforce it.[7]

In March 2012, ICE then opened what it called "the most tangible evi-

1 University of Florida Center for Latin American Studies, *Loyola University Conference: Imprisoned, Forgotten, and Deported: Immigration Detention, Advocacy, and the Faith Community* at 1:59-2:48 (Jan. 18, 2012), http://www.youtube.com/watch?v=37InDqyjrSo&feature=youtu.be (focusing on speech by Dr. Dora Schriro, then-Commissioner of the NYC Department of Corrections).

2 Nina Bernstein, *U.S. to Reform Policy on Detention for Immigrants*, N.Y. TIMES, Aug. 6, 2009, *available at* http://www.nytimes.com/2009/08/06/us/politics/06detain.html.

3 University of Florida Center for Latin American Studies, *supra* note 1, at 3:11-3:15.

4 DR. DORA SCHRIRO, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS at 4, 6 (2009), *available at* http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf [hereinafter Schriro Report]. This is greater than the number of persons handled by the Federal Bureau of Prisons or

3 University of Florida Center for Latin American Studies, *supra* note 1, at 3:11-3:15.

4 DR. DORA SCHRIRO, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS at 4, 6 (2009), *available at* http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf [hereinafter Schriro Report]. This is greater than the number of persons handled by the Federal Bureau of Prisons or any state's prison system in a year. *See* Dora Schriro, *Improving Conditions of Confinement for Criminal Inmates and Immigrant Detainees*, 47 AM. CRIM. L. REV. 1441, 1446 (2010) [hereinafter *Improving Conditions*]; César Cuauhtémoc García Hernández, *The Perverse Logic Of Immigration Detention: Unraveling The Rationality Of Imprisoning Immigrants Based On Markers Of Race And Class Otherness*, 1 COL. J. RACE & L. 353, 357 & n. 16 (2012).

5 Schriro report at 5.

6 *See generally* U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, PERFORMANCE BASED NATIONAL DETENTION STANDARDS 2011 (2011), *available at* http://www.ice.gov/doclib/detention-standards/2011/pbnds2011.pdf [hereinafter PBNDS].

7 U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, DETENTION REFORM ACCOMPLISHMENTS, *available at* http://www.ice.gov/detention-reform/detention-reform.htm (last visited Feb. 20, 2012).

dence" of reform – the first explicitly named "civil detention" facility.[8] The Karnes County Civil Detention Center in Texas provides detainees with freedom of movement within its 29 acres, semi-private bathrooms, initial medical screening upon arrival at a centralized medical center, family visits with meaningful contact, and programs and resources such as a library, computers with Internet, a gym, a soccer pitch, and basketball and volleyball courts. Guards are called "resident advisers" and wear blue polo shirts and khaki trousers.[9] ICE planned its future to look like Karnes. It concurrently planned four other civil facilities like it, to house in total 4,622 detainees (14% of U.S. detainees) in these conditions it called "non-penal."[10] The bipartisan U.S. Commission on International Religious Freedom subsequently recommended that all immigration facilities "replicate the physical structure of Karnes," in its "Best Practices" for detention of asylum seekers.[11]

Human rights groups also called the Karnes facility a "step forward," with good reason.[12] U.S. immigration detention facilities have been widely criticized for violating international human rights standards for their treatment of civil detainees with criminal incarceration methods, such as prison uniforms, shackles, strip-searches and solitary confinement, as well as unsanitary conditions, inadequate medical screenings and treatment, and widespread physical, verbal, and sexual abuse, often in response to detainees' assertion of rights.[13] All these violations have occurred without pro-

[8] Kirk Semple & Tim Eaton, *Detention for Immigrants That Looks Less Like Prison*, N.Y. TIMES, Mar. 13, 2012, *available at* http://www.nytimes.com/2012/03/14/us/model-immigration-detention-center-unveiled-in-texas.html (quoting Gary Mead, ICE director for Enforcement and Removal Operations).

[9] Indeed, a N.Y. Times photo – albeit taken through a chain link fence – showed a gym that looked much like a hotel's. *See* Ben Sklar, *Slideshow: A Model Immigration Detention Center*, N.Y. TIMES, Mar. 14, 2012, *available at* http://www.nytimes.com/imagepages/2012/03/14/us/IMMIG-2.html.

[10] RUTHIE EPSTEIN & ELEANOR ACER, HUMAN RIGHTS FIRST, JAILS AND JUMPSUITS: TRANSFORMING THE U.S. IMMIGRATION DETENTION SYSTEM—A TWO-YEAR REVIEW 18-20 (2011), http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Jails-and-Jumpsuits-report.pdf; CODY MASON, DOLLARS AND DETAINEES: THE GROWTH OF FOR-PROFIT DETENTION 6 (2012), http://sentencingproject.org/doc/publications/inc_Dollars_and_Detainees.pdf.

[11] U.S. COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM, ASSESSING THE U.S. GOVERNMENT'S DETENTION OF ASYLUM SEEKERS: FURTHER ACTION NEEDED TO FULLY IMPLEMENT REFORMS 4 (2013) [hereinafter USCIRF 2013], *available at* http://www.uscirf.gov/sites/default/files/resources/ERS-detention%20reforms%20report%20April%202013.pdf.

[12] *See, e.g.*, *Silky Shah, Karnes County Civil Detention Center: A Step in the Right Direction, But Better Options Exist @ LIRSorg*, *DET.WATCH NETWORK* (Mar. 14, 2012), http://detentionwatchnetwork.wordpress.com/2012/03/15/karnes-detention-center-a-step-in-the-right-direction-but-better-options-exist-lirsorg/ (Lutheran Immigration and Refugee Service press release).

[13] *See, e.g.*, FRANÇOIS CRÉPEAU, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, REPORT OF THE SPECIAL RAPPORTEUR ON THE HUMAN RIGHTS OF MIGRANTS 7-8 (2012), *available at* http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-24_en.pdf; NATIONAL IMMIGRANT JUSTICE CENTER, INVISIBLE IN ISOLATION: THE USE OF SEGREGATION AND SOLITARY CONFINEMENT IN IMMIGRATION DETENTION (2012), *available at*

cedural protections that criminal defendants receive, such as appointed counsel, making immigration detention in many ways the worst of both the civil and criminal worlds.[14] Meanwhile, DHS' use of detention has grown even further, to a record 477,523 detainees in fiscal year 2012 and 34,000 or more on any one day[15]—the "invisible civil rights issue of our time," as Juliet Stumpf called it.[16] DHS' civil detention reform initiatives have been the U.S. government's primary response.

In 2014, though, five years after Dr. Schriro's report, her question "How do we make civil detention civil?" remains largely unanswered. In this symposium Article, I offer the first comprehensive assessment of the Administration's reforms towards a "truly civil" detention system. Scholars have examined the conflation between civil and criminal legal frameworks,[17] particularly as to immigration law,[18] and specifically as to its enforcement.[19] Scholars have also begun to examine immigration detention, noting the structural similarities between immigration detention and criminal pretrial detention,[20] criticizing the "unmistakable penal reality" of current detention conditions[21] and quantitative over-detention,[22] and arguing

https://www.immigrantjustice.org/publications/report-invisible-isolation-use-segregation-and-solitary-confinement-immigration-detenti; INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON IMMIGRATION IN THE UNITED STATES: DETENTION AND DUE PROCESS 97-98 (2010) [hereinafter "IACHR"], *available at* http://www.oas.org/en/iachr/migrants/docs/pdf/migrants2011.pdf; AMNESTY INTERNATIONAL USA, JAILED WITHOUT JUSTICE – IMMIGRATION DETENTION IN THE USA 29 (2009), *available at* http://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf.

14 *See Improving Conditions*, *supra* note 4, at 1445 ("...in general, criminal inmates fare better than civil detainees.").

15 DHS OFFICE OF IMMIGRATION STATISTICS, IMMIGRATION ENFORCEMENT ACTIONS: 2012, 1 (2012), *available at* http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2012_1.pdf; DHS OFFICE OF INSPECTOR GENERAL, ICE'S RELEASE OF IMMIGRATION DETAINEES, 2 (2014), *available at* http://www.oig.dhs.gov/assets/Mgmt/2014/OIG_14-116_Aug14.pdf. *See generally* Mark Noferi, Center for Migration Studies, IMMIGRATION DETENTION: BEHIND THE RECORD NUMBERS (Feb. 13, 2014), http://cmsny.org/immigration-detention-behind-the-record-numbers/.

16 Juliet Stumpf, *Civilizing Civil Detention*, JOTWELL (May 9, 2014), *available at* http://lex.jotwell.com/civilizing-civil-detention/.

17 *See e.g.* John C. Coffee, *Paradigms Lost, The Blurring of the Criminal and Civil Law Models And What Can Be Done About It*, 101 YALE L.J. 1875 (1992).

18 *See e.g.* Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, And Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006) ("Immigration law today is clothed with so many attributes of criminal law that the line between them has grown indistinct"); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1921 (2000).

19 *See e.g.* Ingrid Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1288 (2010) (describing "collaborative relationship" between criminal and immigration enforcement authorities that "undermines the criminal-civil divide"); Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and its Possible Undoing*, 49 AM. CRIM. L. REV. 105 (2012) [hereinafter McLeod].

20 *See* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 391 (2006); Steven H. Legomsky, *The Detention of Aliens: Theories, Rules, And Discretion*, 30 U. MIAMI INTER-AM. L. REV. 531, 537-39 (1999).

21 César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV.

that detention constitutes punishment under current legal frameworks.[23]

This article, however, is the first to consider recent civil immigration detention reforms. I examine the substantive meaning of the civil label of detention conditions reform (if any), either from the detainee's perspective, as to the deprivation of liberty involved, or an expressive perspective, as to the message conveyed.[24] Notably too, I critique the future of immigration detention more than its present, by focusing on DHS' new 2011 civil detention standards, and subsequent 2012 American Bar Association (ABA) Model Civil Immigration Detention Standards,[25] so as to imagine and examine a world of fully-implemented civil immigration detention, as currently conceptualized.

Additionally, I undertake this inquiry by examining immigration detention within the broader context of U.S. civil detention. I do so through the first descriptive comparison of DHS detention practices, and the procedures attending them, to those employed in sexually violent predator ("SVP") civil commitment, America's second-largest civil detention system. Although immigration is the "behemoth" of U.S. noncriminal detention,[26] over 5,000 sex offenders are currently adjudged dangerous and detained after completing their criminal sentence.[27] SVP commitment is well-examined, with most scholars having criticized its legal foundations,[28] but without ex-

1346, 1382 (2014) [hereinafter Hernández]; Maunica Sthanki, *Deconstructing Detention: Structural Impunity and the Need for an Intervention*, 65 RUTGERS L. REV. 447, 451 (2013) (arguing that immigration detention operates with entrenched structural impunity, and recommending external oversight).

22 Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 U. CHI. L. REV. 137 (2012) (providing institutional design recommendations regarding over-detention); Hernández at 1406-09 (arguing to reassess the method used to detain, and move towards regime focused on supervised custody); Kalhan, *infra* note 24, at 58 (arguing for "a more fundamental reconsideration of immigration control policies," less connected to criminal enforcement); *see also* Sarah Gryll, Comment, *Immigration Detention Reform: No Band-Aid Desired*, 60 EMORY L.J. 1211, 1235 (2011).

23 Hernández at 1382 (2014) (arguing that immigration detention constitutes punishment, under regulation versus punishment tests, given its legislative intent).

24 To date, Anil Kalhan's 2010 Essay has performed the most comprehensive analysis of detention reform following Schriro's report. Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42 (2010). As Kalhan noted, ICE's reform proposals "target excessive conditions of confinement but leave other excessive practices intact," such as over-detention. *Id.* at 44. Here, I build upon Kalhan's observations, more specifically examine ICE's 2011 detention standards which followed Kalhan's Essay, draw conclusions in the context of other civil detention schemes, and delineate a framework for civil detention.

25 American Bar Association, *ABA Civil Immigration Detention Standards*, 1-85 (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/immigration/abaimmdetstds.authcheckdam.pdf [hereinafter "ABA Standards"].

26 Adam Klein and Benjamin Wittes, *Preventive Detention in American Theory and Practice*, 2 HARV. NAT'L SEC. J. 85, 145-52 (2011) [hereinafter *Klein & Wittes*].

27 *See infra* Section III.A.

28 *See, e.g.*, Klein & Wittes, at 164-169; David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CAL. L. REV. 693, 701 (2009) [hereinafter Cole, *Shadows*]; Stephen Morse, *Preventive Detention, Mental Disorder And Criminal Law*, 101 J. CRIM. L. & CRIMINOLOGY 885 (2011); Fredrick E. Vars, *Rethinking the Indefinite Detention of Sex Offenders*, 44 CONN. L. REV.

amining its conditions. Nor have scholars who have surveyed the legal frameworks for immigration detention and SVP commitment focused on their conditions.[29] This descriptive comparison facilitates examination of the value and impact of terming detention reforms "civil." After all, although criminal pretrial detention is also legally civil,[30] criminal pretrial detention reforms are not billed as "civil detention reform."[31]

In examining this emerging civil detention paradigm, two major descriptive trends emerge: (1) constant confinement, but with improved, lower-security conditions and greater programmatic offerings, and (2) stronger procedural protections than in ordinary civil proceedings, approaching those in criminal proceedings.[32] But the emerging civil paradigm still most resembles criminal incarceration.

First, the new civil detention paradigm is still incarcerative—employing round-the-clock confinement of detainees in closed facilities[33]—albeit marked by separate, improved, and less restrictive conditions of confinement for civil detainees, with greater programmatic offerings and resources. That said, the goal of incapacitation dominates where in tension with the unique needs of a civil population (e.g. family ties, litigating pending proceedings, or treatment). Given this, I argue that less restrictive conditions inside the walls do not meaningfully distinguish civil detention from lower-security criminal incarceration, in terms of the deprivation of liberty imposed upon detainees,[34] with its impacts on work, family, mental

161 (2011); Tamara Rice Lave, *Controlling Sexually Violent Predators- Continued Incarceration at What Cost*, 14 NEW CRIM. L. REV. 213 (2011); Corey Rayburn Yung, *The Emerging Criminal War on Sex Offenders*, 45 HARV. C.R.-C.L. L. REV. 435 (2010); Michael Louis Corrado, *Sex Offenders Unlawful Combatants And Preventive Detention*, 84 N.C. L. REV. 77 (2005); Eric S. Janus, *Closing Pandora's Box- Sexual Predators and the Politics of Sexual Violence*, 34 SETON HALL L. REV. 1233 (2004); *Peter C. Pfaffenroth, The Need for Coherence: States' Civil Commitment of Sex Offenders in the Wake of Kansas v. Crane, 55 STAN. L. REV. 2229* (2003); David J. Gottlieb, Essay, *Preventive Detention of Sex Offenders*, 50 KAN. L. REV. 1031 (2002); Eric S. Janus, *Hendricks and the Future of Sex Offender Commitment Laws*, 24 WM. MITCHELL L. REV. 515 (1998).

29 *See* Klein & Wittes, *supra* note 17 at 99-100; Cole, *Shadows* at 703.

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

31 *See* Henry Joel Simmons, Right on Crime, *Saving Money by Reforming Pretrial Detention* (June 3, 2011), http://www.rightoncrime.com/2011/06/saving-money-by-reforming-pretrial-detention/; Pretrial Justice Institute, http://www.pretrial.org/.

32 Judith Resnik, *Detention, The War On Terror, And The Federal Courts*, 110 COLUM. L. REV. 579, 659 (2010) (regarding immigration detention, "the administrative proposals for improvement [have] continued to rely on the model of detention, albeit with better facilities, and the judicial responses have insisted, despite legislative obstacles, on some procedural protections for detained aliens.").

33 Although the word "detention" is commonly used in connection with civil laws and "incarceration" in connection with criminal laws, I treat the two terms as functionally equivalent here. I define them both as Michael Flynn does: the physical restraint of a person against their will in a confined space for some amount of time. *See* MICHAEL FLYNN, GLOBAL DETENTION PROJECT, WORKING PAPER NO. 4 IMMIGRATION DETENTION AND PROPORTIONALITY 7-9 (2011), *available at* http://www.globaldetentionproject.org/fileadmin/publications/GDP_detention_and_proportionality_workingpaper.pdf.

34 Rinai Kitai-Sangero, *The Limits of Preventive Detention*, 40 MCGEORGE L. REV. 903, 917

health, and the ability to attend to proceedings.[35] Indeed, research shows that indefinite detention may cause greater psychological harm than criminal incarceration, even with less restrictive conditions.[36] Nor do less restrictive conditions inside the walls change the expressive message of detention as connoting criminality.[37] Put more simply, Adam Gopnik wrote, "[T]he thing about jail is that there are bars on the windows and they won't let you out. This simple truth governs all the others."[38] Removing the bars and barbed wire does not make detention "civil."

Secondly, the new civil detention paradigm is marked by stronger procedural protections, approaching those given to criminal defendants.[39] SVP committees possess procedural safeguards such as a higher burden to detain, a requirement to appoint counsel, oversight from individualized and appellate review, and even jury trials.[40] Concomitantly, procedural protections such as appointed counsel and bond hearing oversight are advancing for immigration detainees through the courts, legislation, and local initiatives, such that one can envision a future where immigration detainees are granted at least some of the procedural protections granted to SVP committees.[41] But again, additional criminal-like procedural safeguards implicitly but expressively confirm that the deprivation of liberty at stake resembles criminal incarceration.[42] And without concomitant substantive reforms to laws causing the high incidence of detention, it is plausible that immigra-

(2009) ("Detainees and convicted prisoners are harmed to the same extent by a denial of their freedom.").

35 Albert W. Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510, 517 (1986) (summarizing collateral impacts of detention besides time and liberty). *See infra* Section II.A.2.

36 *See infra* notes 112-14 and accompanying text.

37 *See infra* Section IV.A.

38 Adam Gopnik, *The Caging of America*, THE NEW YORKER, Jan. 30, 2012, *available at* http://www.newyorker.com/arts/critics/atlarge/2012/01/30/120130crat_atlarge_gopnik#ixzz2A5DhOeOz.

39 Klein & Wittes, *supra* note 26, at 186-89 (summarizing growing trend that preventive detention authorities provide adequate procedural due process).

40 *See infra* Section III.

41 *See infra* Section II.C.

42 I and others have argued for increased procedural protections to immigrant detainees. *See, e.g.*, Mark Noferi, *Deportation Without Representation*, SLATE, May 15, 2013, *available at* http://www.slate.com/articles/news_and_politics/jurisprudence/2013/05/the_immigration_bill_should_include_the_right_to_a_lawyer.html; Mark Noferi, *Cascading Constitutional Deprivation: The Right To Appointed Counsel For Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63, 63 (2012); Shalini Bhargava, *Detaining Due Process: The Need for Procedural Reform in "Joseph" Hearings After Demore v. Kim*, 31 N.Y.U. REV. L. & SOC. 51 (2006); Harvey Gee, *Placing Limitations on the Government's Indefinite Detention of Immigration Detainees After Rodriguez*, 17 GONZ. J. INT'L L. 1 (2014). In this article, though, I largely assume those procedural arguments will advance over time as happened in the U.S. criminal system, *see* Noferi, 18 Mich. J. Race & L. at 108-09, and critique a future of immigration detention that includes greater process.

tion detention may become fair but not just,[43] as critics of the U.S. criminal system have alleged[44]—a system with many lawyers and much incarceration.

If the civil label of detention reform is to mean anything, I argue, it must mean not only "better," less restrictive detention with criminal-like process, but less detention.[45] As the U.S. Supreme Court has said, "[i]n our society, liberty is the norm, and detention prior to [criminal] trial or without [criminal] trial is the carefully limited exception."[46] This necessitates a principles-based, not rules- or specifications-based approach. More meaningful long-term reform would be to enact a system of civil custody and supervision employing a spectrum of restrictions, more narrowly tailored to the affected population, with relatively few individuals in secure detention.

Accordingly, I propose here a three-pronged framework for a civil detention system, with specific recommendations—that it involve (1) less *incidence* of detention, with (2) shorter *duration*, and (3) a different *nature* of liberty restrictions, outside the traditional 24-7 secure facility model, and perhaps warranting reevaluation of procedural due process tests.[47] On the latter point, DHS could use non-secure or semi-secure facilities—residences that allow individuals to come and go, or facilities allowing extended furloughs. Scholars such as Michael Flynn have called non-secure facilities "not detention."[48] Yet that is precisely the point. To be "truly civil," a system of civil detention should detain less.

Lastly, I evaluate the political viability of current "civil" detention reforms. To be clear, DHS has not completed its goals as Schriro defined them. Of ICE's four other planned civil facilities besides Karnes, two have stalled due to local political opposition, and two others have still received

43 *Cf.* Gopnik, *supra* note 38; *see also* Hernandez at 1346 (noting that incorporating criminal procedural protections into immigration law would "alter the immigration detention decision making and adjudication process... less radically than first appears," in part due to substantively strict immigration laws regarding the consequences of criminal convictions).

44 William Stuntz, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011); Michelle Alexander, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012). *See also* McLeod, *supra* note 19, at 168-73.

45 Mark Noferi, *New ABA Civil Immigration Detention Standards: Does "Civil" Mean Better Detention Or Less Detention?*, CRIMMIGRATION BLOG (Aug. 28, 2012, 4:00 am), http://crimmigration.com/2012/08/28/new-aba-civil-immigration-detention-standards-does-civil-mean-better-detention-or-less-detention.aspx.

46 United States v. Salerno, 481 U.S. 739, 755 (1987).

47 *See* Noferi, *supra* note 42. *See also* Robert Koulish, *Entering the Risk Society: A Contested Terrain for Immigration Enforcement*, JUSTICE AND SOCIAL CONTROL 61, 77 (Oct. 2012) (noting US courts' differing treatment of immigration custody); Erin Murphy, *Paradigms Of Restraint*, 57 DUKE L.J. 1321, 1352 (in criminal justice, as a matter of procedural due process "liberty interests tend to begin only at the jailhouse door").

48 FLYNN, *supra* note 33 at 23. *See also* Michael Flynn, *Who Must Be Detained? Proportionality as a Tool For Critiquing Immigration Detention Policy*, REFUGEE SURV. Q. 1, 8-9 (2012).

serious human rights criticism.[49] Criticisms remain widespread of ICE facility conditions across the country.[50] Detention standards have "not yet been fully implemented."[51] Oversight remains self-governing, with its results unclear,[52] and potentially exacerbated by the growing use of privately operated facilities.[53] Recently, as large numbers of Central American families and children have arrived, the Administration has temporarily prioritized its existing civil detention bed space for them,[54] and requested $879 million in emergency funding for additional detention.[55]

Yet so far, both pro-immigrant advocates and restrictionists seem to reject the fundamental premise of reform—agreeing that immigration detention is jail, and only disagreeing on whether immigrants belong there.[56] Civil detention reform has largely been a policymakers' movement, and the lack of a natural political constituency for reform may endanger its long term viability.

This Article contains five parts. Part I addresses the utility of comparing immigration detention and SVP commitment to define the new civil detention paradigm. Part II provides an overview of the U.S. immigration detention system—the underlying rationales, detained population, conditions, and procedures. In this section, I comprehensively examine for the first time in scholarship ICE's recent detention standards, as well as the ABA's new model immigration detention standards. Part III provides a compara-

49 *See infra* Section V.B.

50 *See, e.g.*, USCIRF 2013, *supra* note 11, at 3 (detainees generally "remain in jails and jail-like detention centers"); Molly Hennessy-Fiske & Cindy Carcamo, *Overcrowded, unsanitary conditions seen at immigrant detention centers*, L.A. Times (June 18, 2014), http://www.latimes.com/nation/nationnow/la-na-nn-texas-immigrant-children-20140618-story.html#page=1.

51 USCIRF 2013 at 7.

52 Sthanki, *supra* note 21, at 497-500.

53 *See infra* Section IV.A,

54 Karnes is now hosting Central American women and children. Susan Carroll, *Feds will house immigrant families at detention center near San Antonio*, Houston Chronicle (July 18, 2014), http://www.chron.com/news/article/Feds-will-house-immigrant-families-at-detention-5630925.php.

55 Barack Obama, *Letter to Speaker John Boehner*, (July 8, 2014), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/budget_amendments/emergency-supplemental-request-to-congress-07082014.pdf. This article addresses ICE adult detention facility standards, and not separate family detention standards; *see* U.S. ICE, *Family Residential Standards*, https://www.ice.gov/detention-standards/family-residential/, or detention of children in Health and Human Services facilities. *See* U.S. Department of Health and Human Services, Administration for Children & Families, *Unaccompanied Children Frequently Asked Questions*, http://www.acf.hhs.gov/unaccompanied-children-frequently-asked-questions. This article also addresses standards for ICE long-term detention, rather than Border Patrol short-term detention, which has also received serious criticism for poor conditions. *See, e.g.*, AMERICAN IMMIGRATION COUNCIL, *No Action Taken: Lack of CBP Accountability in Responding to Complaints of Abuse*, (May 4, 2014), *available at* http://www.immigrationpolicy.org/special-reports/no-action-taken-lack-cbp-accountability-responding-complaints-abuse.

56 *See infra* Section V.B.

ble overview of U.S. sex offender post-conviction civil commitment. Part IV draws descriptive conclusions as to the emerging civil detention paradigm. Part V identifies a preliminary framework for a civil detention regime, and assesses the political viability of current civil detention reforms.

## I. Comparing Immigration Detention and Sexually Violent Predator ("SVP") Civil Commitment

As background, this section summarizes the practices, population and costs, and of both immigration detention and SVP civil commitment, and then explores the utility of comparing the two civil schemes.

### A. Immigration Detention: Legal Framework, Population and Costs

Immigrant detainees are detained to prevent flight or public safety risk (similar to criminal pretrial detainees).[57] Most immigrant detainees are detained pursuant to one of several statutory authorities.[58] An immigrant may be detained pending his formal deportation proceedings in immigration court (pre-hearing detention), either with an individualized bond determination,[59] or without bond, if he has committed certain crimes.[60] Additionally, "arriving aliens" at the border are detained pending proceedings if deemed inadmissible.[61] For those ordered removed, DHS is mandated by law to initially detain such immigrants pending physical removal (post-removal order detention).[62]

57 Legomsky, *supra* note 20, at 537-39.

58 *See* Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. C.R.-C.L. L. REV. 601, 609-13 (2010) (reviewing detention authorities); Mark Noferi, CENTER FOR MIGRATION STUDIES, IMMIGRATION DETENTION: BEHIND THE RECORD NUMBERS (Feb. 13, 2014) (analyzing detention trends), http://cmsny.org/immigration-detention-behind-the-record-numbers/.

59 8 U.S.C. § 1226(a) (2006 & Supp. 2011). DHS may also release the immigrant on parole.

60 8 U.S.C. § 1226(c) (2006 & Supp. 2011). The criteria for mandatory detention, such as the determination of an "aggravated felony" or "crime involving moral turpitude," are extremely complicated, and can encompass minor conduct such as simple drug possession or subway turnstile jumping. *See* Noferi, *Cascading Constitutional Deprivation*, *supra* note 42, at 89-94. Also, as 91 percent of immigration detainees were male as of 2009, I will default to using "he" in this Article. *See* Schriro Report, *supra* note 4, at 6.

61 These may include returning lawful permanent residents and asylum seekers. 8 U.S.C. §1225(b)(1)(B)(iii) (IV), (b)(2)(A). They may be paroled into the United States for humanitarian reasons. 8 U.S.C. § 1182(d)(5).

62 8 U.S.C. § 1231(a)(2) (2006 & Supp. 2011) (such an immigrant is mandatorily detained for 90 days after the order of removal, and if not removed by then, may be released under supervision, after receiving a custody review); 8 U.S.C. § 1231(a)(3) (2006 & Supp. 2011); 8 C.F.R. § 241.13-241.14 (2009) (certain inadmissible or criminal aliens, or immigrants whom DHS determines to pose flight risk or danger, may be detained beyond the 90-day removal period); 8 U.S.C. § 1231(a)(6) (detention may not constitutionally extend beyond a period "reasonably necessary to secure removal."). *See* Kalhan,

Further, an increasing number of immigrants are detained pursuant to summary, out-of-court processes. DHS uses "expedited removal" to summarily remove, without a court hearing, noncitizens who encounter immigration authorities at or within 100 miles of a US border with insufficient or fraudulent documents.[63] Detention is mandatory pending removal, except for those found to have a "credible fear" of persecution,[64] who can then either be paroled by DHS or have a bond hearing in immigration court while they pursue an asylum claim.[65] DHS also uses "reinstatement of removal" to summarily remove those with a prior removal order.[66] Similarly, detention is mandatory pending removal, under post-removal order authorities, except for those found to have a "reasonable fear" of persecution.[67] In fiscal year 2012, DHS effectuated a record 75 percent of its removals via these summary processes that involve mandatory detention, and the number of individuals detained has risen accordingly.[68]

Current laws and DHS practices thus result in over-detention relative to DHS' purported aims, in several ways.[69] In in-court removal proceedings, DHS interprets the statute mandating "custody" of those with prior crimes to require incarcerative detention, rather than supervision or monitoring.[70] DHS also aggressively interpreted this statute to require detention of immigrants not taken into ICE custody immediately after release from criminal custody.[71] Moreover, DHS officers and immigration judges' discretionary bond decisions, for those eligible for individualized determinations, over-

*supra* note 24, at 46 & n.29 (citing Zadvydas v. Davis, 533 U.S. 678, 699-701 (2001) (defining six months as presumptively reasonable); Clark v. Martinez, 543 U.S. 371, 386 (2005) (extending *Zadvydas* to inadmissible noncitizens)).

63 8 U.S.C. §§ 1225(b)(1)(A)(i), 1182(a)(6)(C), (7)(A)(i)(I)); 69 Fed. Reg. 48,877 (2004) (expanding definition of "border" to within 100 miles).

64 8 U.S.C. §§ 1225(b)(1)(A)(i)), (B)(iii)(IV).

65 8 U.S.C. § 1182(d)(5)(A); 8 C.F.R. §§ 212.5(b), 235.3(c).

66 8 U.S.C. § 1231(a)(5); 8 C.F.R. § 1241.8.

67 8 C.F.R. § 1241.8(f); 8 U.S.C. § 1231(a)(2). *See generally* Denise Gilman, *Realizing Liberty: The Use Of International Human Rights Law To Realign Immigration Detention In The United States*, 36 Fordham Int'l L. J. 243, 308-12 (2013).

68 Noferi, BEHIND THE RECORD NUMBERS, *supra* note 15. That said, DHS has not released numbers of detainees by removal authority. Kalhan, *supra* note 24, at 46; Donald Kerwin & Serena Yi-Ling Lin, *Immigration Detention: Can ICE Meet Its Legal Imperatives and Case Management Responsibilities?* 23-25 (Sept. 2009), *available at* http://www.migrationpolicy.org/pubs/detentionreportSept1009.pdf.

69 Kalhan, *supra* note 24, at 53-56.

70 *See* RUTGERS SCHOOL OF LAW-NEWARK IMMIGRANT RIGHTS CLINIC, *FREED BUT NOT FREE: A REPORT EXAMINING THE CURRENT USE OF ALTERNATIVES TO IMMIGRATION DETENTION*, 24-25 (July 2012) [hereinafter FREED BUT NOT FREE], *available at* http://www.law.newark.rutgers.edu/files/FreedbutnotFree.pdf (citing Memorandum from the American Immigration Lawyers Association to David Martin 9 (Aug. 6, 2010), available at www.nilc.org/document.html?id=94.).

71 Kalhan, *supra* note 24, at 54 n.83 (citing Quezada-Bucio v. Ridge, 317 F. Supp. 2d 1221, 1224 (W.D. Wash. 2004)).

whelmingly result in either denial or prohibitively high bond settings.[72] Most detainees do not have criminal convictions.[73] But given the "close connection" of the immigration detention system to the criminal system,[74] immigrants with criminal convictions are particularly more likely to be over-detained relative to their danger in the immigration system than the criminal system[75] (and criminal defendants are likely over-detained as it is).[76] DHS also likely underutilizes its parole authority for those in summary processes with a fear of persecution.[77]

In fiscal year 2014, ICE spent nearly $2 billion to detain immigrants.[78] The average cost of detaining an immigrant, accounting for personnel costs, is $159/day (or over $58,000/year).[79] (It is unclear whether costs are higher in a new "civil" facility like Karnes.) Comparatively, less restrictive forms of custody ("alternatives to detention"), such as electronic monitoring or supervised release, generally range in cost from 30 cents to $8/day.[80] DHS spent $92 million on alternatives to detention in fiscal year 2014, and

72 Joshua Occhiogrosso-Schwartz, *Insecure Communities, Devastated Families: New Data on Immigrant Detention and Deportation Practices in New York City* 8-11 (July 23, 2012), http://immigrantdefenseproject.org/wp-content/uploads/2012/07/NYC-FOIA-Report-2012-FINAL.pdf. *See infra* Section V.A.

73 Kerwin and Li, *supra* note 68, at 1 (58 percent of detainees on January 25, 2009 did not have a criminal record).

74 Padilla v. Kentucky, 559 U.S. 365, 366 (2011) (stating there is "close connection" of deportation to criminal process); *cf.* McLeod, *supra* note 19, at 154 ("when immigration regulation happens through or in reference to criminal law administration--when suspected immigration law violators are conflated with criminal law violators, a set of deeply rooted assumptions and practices are set in motion").

75 *See* Noferi, *Cascading Constitutional Deprivation*, *supra* note 42, at 83 & n.105; *In re* Juan of Guerra, 24 I&N Dec. 37, 40 (BIA 2006) (setting out factors for immigration judge to consider when determining bond, including criminal charges or convictions).

76 *See* Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 554 (2012) (analyzing criminal pretrial detention data and concluding that the U.S. currently over-detains older defendants, defendants with clean records prior to their instant charge, and defendants charged with fraud and public-order offenses). All of these types of defendants might well be mandatorily detained without bail in the immigration system, even long after their criminal charges. *See also* Mark Noferi, *Mandatory Immigration Detention for U.S. Crimes: The Noncitizen Presumption of Dangerousness*, IMMIGRATION DETENTION, RISK AND HUMAN RIGHTS (forthcoming 2014), *available at* http://works.bepress.com/cgi/viewcontent.cgi?article=1005&context=mnoferi; Noferi, *Cascading Constitutional Deprivation*, *supra* note 42, at 83 & n.105.

77 Kalhan, *supra* note 24, at 54 n.86.

78 DEP'T OF HOMELAND SECURITY, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT SALARIES AND EXPENSES, 62 (2014).

79 NAT'L IMMIGRATION FORUM, THE MATH OF IMMIGRATION DETENTION, 2 (2013), *available at* http://www.immigrationforum.org/images/uploads/mathofimmigrationdetention.pdf; Leslie E. Vélez & Megan Bremer, Unlocking Liberty: A Way Forward for U.S. Immigration Detention Policy 11 (2011), *available at* http://www.lirs.org/wp-content/uploads/2012/05/RPTUNLOCKINGLIBERTY.pdf;

80 DEP'T OF HOMELAND SECURITY, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT SALARIES AND EXPENSES, 62 (2014), *available at* http://www.dhs.gov/sites/default/files/publications/DHS-Congressional-Budget-Justification-FY2015.pdf; *see also* Samuel Wiseman, *Pretrial Detention and the Right to be Monitored*, 123 YALE L. J. 1344, 1372-74 (2014) (similar costs of criminal justice monitoring).

their scale remains limited.[81] In 2013, 22,090 were participating in these alternative programs (compared to the over 477,000 who passed through detention).[82] An independent study found the programs essentially function as "alternatives to release," not "alternatives to detention," as most in supervision were nonviolent immigrants who would have otherwise been released.[83]

## B. SVP Civil Commitment: Legal Framework, Population and Costs

SVP committees are detained to prevent public safety risk (although under a corollary presumption of treatment to potentially improve their dangerous mental abnormality, else detention would be permanent).[84] SVP commitment, for most involved, has an even closer connection to the criminal process than immigration detention.[85] Typically, SVP commitment is triggered by prior criminal activity, as it requires prior instances of sexual misconduct as evidence of future dangerousness.[86] Indeed, the SVP-committed population is composed almost entirely of past criminals, as compared to immigration detention, in which a majority of detainees have no criminal record.

Like immigration detention, SVP commitment likely results in over-detention relative to the actual dangerousness of the detainees. There is no evidence that sex offenders recidivate at greater numbers than other categories of criminals; if anything, the opposite is true.[87]

81 DEP'T OF HOMELAND SECURITY, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT SALARIES AND EXPENSES, 60 (2014). *See also* FREED BUT NOT FREE, at 5; SCHRIRO REPORT, *supra* note 4, at 20-21.

82 DEP'T OF HOMELAND SECURITY, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT SALARIES AND EXPENSES, 82 (2014).

83 *See also* FREED BUT NOT FREE, at 9 (describing Intensive Supervision Appearance Program ("ISAP")).

84 Kansas v. Hendricks, 521 U.S. 346, 360-361, 364 (1997) (ruling that aim of sex offender civil commitment is to prevent the commission of future crimes, but noting that commitment is "only *potentially* indefinite," subject to periodic review) (emphasis Court's).

85 Ryan K. Melcher, Note, *There Ain't No End for the "Wicked": Implications of and Recommendations for § 4248 of the Adam Walsh Act After United States v. Comstock*, 97 IOWA L. REV. 629, 652 (2012).

86 *See* Klein & Wittes, *supra* note 26, at 164 (citing, e.g., D.C. Code § 22-3803 (2010) (requiring "repeated misconduct in sexual matters")). Prior criminal conduct is used "solely for evidentiary purposes" to establish requisite future dangerousness. *Hendricks*, 521 U.S. at 362 (citing Allen v. Illinois, 478 U.S. 364, 371 (1986)). Federal law does not require an actual charge or conviction, while fifteen states do. *Compare* 18 U.S.C. § 4248(a) (may be civilly committed if serving a federal sentence – not necessarily for sexual misconduct – and, among other factors, has "engaged or attempted to engage in sexually violent conduct or child molestation") *with Comstock*, 507 F. Supp. 2d at 557 n. 25 (collecting state statutes requiring antecedent charge or conviction for sexual misconduct).

87 Corey Rayburn Yung, *Sex Offender Exceptionalism and Preventive Detention*, 101 J. CRIM. L.

As of 2010, approximately 5,264 sexually violent predators ("SVPs") were detained after their criminal sentences, by twenty states, the District of Columbia, and the federal government.[88] Costs of SVP civil commitment have been high. As of 2010, twenty states spent approximately $500 million on civil commitment of sex offenders– an average cost of approximately $100,000 per year per offender, about four times the cost of prison.[89] Higher costs appear primarily due to treatment, programs, supervised freedoms,[90] and especially, the need for psychiatric experts at trial.[91]

### C. The Utility of Comparing Immigration Detention and SVP Civil Commitment

The immigration detention and SVP commitment frameworks share key commonalities that make these two regimes an apt starting point to describe the civil paradigm. Both systems share preventive purposes, with the primary goal incapacitation of the detainee to prevent future crimes, since detainees are perceived to pose danger.[92]

Perhaps most significantly for purposes of this Article, both systems share both the legal *and* expressive commonality of the "civil" designation,

& CRIMINOLOGY 969, 973-74 (2011) (summarizing empirical evidence).

88 Katherine Godin, *Comments in Opposition to H 5874 – Relating to Civil Commitment of Sexually Violent Predators,* R.I. ACLU 1 (2011), http://riaclu.org/images/uploads/2011_Civil_Commitment_Written_Testimony.pdf (stating 5,200 sex offenders were detained by twenty states as of 2010); Nina Totenberg, *Federal Prisoners Kept Beyond Their Sentence*, NPR, January 12, 2010, http://www.npr.org/templates/story/story.php?storyId=122452485 (discussing how 84 federal sex offenders were detained by the federal government as of 2010). In 2012, USA TODAY reported that the federal government detained 64 SVPs. *See* Brad Heath, *Sexual Predators Rarely Committed Under Justice Program*, USA TODAY, March 19, 2012, *available at* http://www.usatoday.com/news/nation/story/2012-03-13/dangerous-sexual-predators-detained/53621210/1.

89 Rhode Island ACLU, *Comments in Opposition to H 5874 – Relating to Civil Commitment of Sexually Violent Predators* (2011), *available at* http://riaclu.org/images/uploads/2011_Civil_Commitment_Written_Testimony.pdf. Kansas spends as much as $185,000 per year per offender. *Id.* at 1.

90 Gary Craig, *Civil Commitment of sex offenders costs state $175,000 apiece*, Rochester Democrat and Chronicle (Dec. 24, 2010), *available at* http://www.democratandchronicle.com/article/20101226/NEWS01/12260311/Civil-confinement-sex-offenders-costs-state-175-000-apiece.

91 New York spent nearly $3 million on experts to evaluate sex offenders and testify at civil commitment trials. Id. Massachusetts spent over $1.3 million between 2006 and 2008. Rhode Island ACLU, *supra* note 89, at 2.

92 David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1007 (2002); Steven H. Legomsky, *The Detention of Aliens: Theories, Rules, And Discretion*, 30 U. MIAMI INTER-AM. L. REV. 531, 537-39 (1999); Nora V. Demleitner, *Abusing State Power Or Controlling Risk?: Sex Offender Commitment And Sicherungverwahrung*, 30 FORDHAM URB. L.J. 1621, 1627 (2003) ("the only guaranteed method to prevent the further commission of sexual offenses by former sex offenders is to incapacitate them"); *Hendricks*, 521 U.S. at 360-361.

distinct from criminal detention or incarceration.[93] Indeed, this expressive quality of the "civil" label may be the primary distinction between pre-hearing immigration detention and pretrial criminal detention. Several scholars have noted the similarities between the two, in legal classification (both civil),[94] goals (both designed to prevent flight from proceedings and preserve public safety),[95] mechanisms (detention in jails, bond, and supervision),[96] and detention standards (both initially based on jail standards).[97]

That said, legally, neither immigration detention, nor SVP commitment, nor criminal pretrial detention can be punishment.[98] U.S. case law has recognized that civil detainees should not be incarcerated with, or exactly like, convicted criminals, even if case law has not delineated how civil detainees' conditions should be different.[99] Following this, courts have mainly examined challenges to immigration detention conditions,[100] and SVP commitment conditions,[101] under the same admittedly deferential standard as pretrial criminal detention.

93 The "civil" designation also distinguishes these systems from other forms of noncriminal preventive detention. That said, I exclude military or national security detention from this analysis because its legal framework and expressive qualities connote a more imminent state of emergency than "civil" detention. *See* Klein & Wittes, *supra* note 26, at 90-123 (summarizing military and emergency detention powers). Additionally, regarding quarantine – health-related emergency detention – although it is legally and expressively civil, I use SVP commitment as more emblematic of the emerging civil detention paradigm because quarantine laws do "not see much use today." *Id.* at 170.

94 Kalhan, *supra* note 24, at 51 & n. 66.

95 Legomsky, *The Detention of Aliens*, 30 U. MIAMI INTER-AM. L. REV. at 537-39.

96 Stumpf, *The Crimmigration Crisis*, 56 AM. U. L. REV. at 391.

97 *See* Kalhan, *supra* note 24, at 50.

98 Bell v. Wolfish, 441 U.S. 520 (1979) (evaluating criminal pretrial detention under the Due Process Clause, and holding "the proper inquiry is whether those conditions amount to punishment of the detainee"). Kansas v. Hendricks, 521 U.S. at 362-63; Demore v. Kim, 538 U.S. 510, 548-52 (2003) (Souter, J., dissenting);

99 Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 742 (2011) (stating "Clearly, detainees should not be treated like convicts..."). *See also generally* Hernandez, *supra* note 21, at 1389-91. This conflation has also spilled over into legal analyses of pretrial detention and post-conviction incarceration. *See* Catherine T. Struve, *The Conditions of Pretrial Detention*, 161 U. PA. L. REV. 1009, 1012 (2013) (noting "chaotic" state of case law governing conditions claims by pretrial detainees, and frequent conflation of Fifth Amendment standards for pretrial detainees with Eighth Amendment standards for convicted prisoners).

100 The Fifth Circuit has considered challenges to immigration detention conditions under the same standard, and most U.S. courts have followed. *Edwards v. Johnson*, 209 F.3d 772, 778 (5th Cir. 2000) ("We consider a person detained for deportation to be the equivalent of a pretrial detainee"); *see also, e.g., Adekoya v. Herron*, 2013 WL 6092507, 2013 U.S. Dist. LEXIS 164575, *25 (W.D.N.Y. 2013); *Baptiste v. Essex Cnty*, 2013 U.S. Dist. LEXIS 175154, *6 (D.N.J. Dec. 10, 2013); *Belbachir v. County of McHenry*, 2012 U.S. Dist. LEXIS 141230, *7 (N.D. Ill. Sept. 28, 2012). That said, the Fifth and Eleventh Circuit have considered claims by *excludable* noncitizens under the less stringent standard that detention must not involve "gross physical abuse." *Lynch v. Cannatella*, 810 F.2d 1363 (5th Cir. 1987); *Adras v. Nelson*, 917 F.2d 1552, 1559 (11th Cir. 1990).

101 Jones v. Blanas, 393 F.3d 918, 932 (9th Cir. 2004) (if SVP committee "is confined in conditions identical to [or] similar to . . . those in which his criminal counterparts are held, we presume that the detainee is being subjected to 'punishment.'"); Youngberg v. Romeo, 457 U.S. 307, 322 (1982) (involuntary committee to state institution for mentally retarded).

Yet criminal pretrial detention is different because it is expressively criminal. It occurs in jails that are built and held out to the public as part of the criminal justice system,[102] leading easily to perceived conflation between pretrial detention and post-conviction incarceration, despite their different legal statuses. For example, as Adam Kolber points out, courts meting out punishment at sentencing routinely grant credit for time served in pretrial detention, even though pretrial detention is legally not punishment.[103]

Thus, reforms to immigration detention and SVP commitment are not only undertaken,[104] but expressively billed as "civil" in a way absent in the criminal justice field.[105] Comparing these two civil systems allows for common assessment of this expressive value (for example, its impact on the political acceptance of detention reforms).

Key differences do exist between immigration detention and SVP civil commitment. Both immigration detention and SVP commitment have other goals in addition to incapacitation—with immigration, to prevent flight from proceedings,[106] and with SVP commitment, to treat the committee until he is no longer dangerous.[107] That said, as described below, in both systems those goals are subsumed in practice to the goal of incapacitation to prevent public danger.[108]

102 Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996).

103 Adam J. Kolber, *Against Proportional Punishment*, 66 VAND. L. REV. 1141, 1142 (2013) ("Even though pretrial detention is technically not punishment, it is harsh treatment, and most people are inclined to give offenders credit for it.").

104 *See* MARGARET TAYLOR, *SYMBOLIC DETENTION*, IN DEFENSE OF THE ALIEN 153, 156 (1997) (the conditions of detention are a "component of its symbolic message").

105 *See* Bernstein, *supra* note 2. Pretrial criminal justice reforms, conversely, are billed as criminal justice reforms, not "civil" reforms. *See* Pretrial Justice Institute, *Implementing the Recommendations of the National Symposium on Pretrial Justice: The 2013 Progress Report* (2014) (not once mentioning that pretrial detention is legally civil), *available at* http://www.pretrial.org/download/infostop/Implementing%20the%20Recommendations%20of%20the%20National%20Symposium%20on%20Pretrial%20Justice-%20The%202013%20Progress%20Report.pdf

106 In the case of noncitizens arriving in the United States ("arriving aliens"), detention is also used to prevent their entering the U.S. Legomsky, *supra* note 20, at 537-39.

107 Otherwise, detention would be unconstitutionally punitive rather than regulatory. *Hendricks*, 521 U.S. at 367-68 (1997). At a constitutional minimum, the person must be dangerous to others and suffer from a mental illness or "mental abnormality." *Id.* at 360. A subsidiary requirement is that the offender have "serious difficulty" controlling his behavior. Kansas v. Crane, 534 U.S. 407, 413 (2002). *See generally* Klein & Wittes, *supra* note 26, at 164.

108 All SVP facilities by law must provide treatment, although the system is oft-criticized because of the tension between disclosing information in therapy regarding past misdeeds and the effect of disclosure upon release (similar to parole hearings). Corey Rayburn Yung, *Sex Offender Exceptionalism and Preventive Detention*, 101 J. CRIM. L. & CRIMINOLOGY 969, 983-84 (2011); New York State Office of Mental Health, *Annual Report on the Implementation of Mental Hygiene Law Article* 11 (July 2011), *available at* http://www.omh.ny.gov/omhweb/statistics/SOMTA_Report_2010.pdf; Demleitner, *supra* note 92, at 1634 (discussing how SVP commitment is criticized in practice as "incapacitative rather than therapeutic"), citing Steven I. Friedland, *On Treatment, Punishment, and the Civil Commitment of Sex Offenders*, 70 U. COLO. L. REV. 73, 82 (1999)).

Another difference is that immigration detention is short-term (in theory), with the final endpoint being the deportation hearing or deportation itself,[109] while SVP commitment is long-term in theory and practice, with the only endpoint being successful treatment, if ever achieved.[110] That said, this distinction does not bear on whether conditions of confinement are "civil."[111] Moreover, both systems detain without a fixed endpoint, raising the possibility of psychological harm from indefinite detention, as researchers have documented regarding detained immigrants.[112] Notably, this research has found that the traumas from indefinite detention "appear to be *independent* of the conditions of detention."[113] Thus, even in improved, "civil" facility conditions, indefinite detention still poses a "huge threat" to "health and wellbeing," as Swedish researchers found.[114]

109 In practice, immigrants may be and are detained for years. *See, e.g.*, Diop v. ICE, 656 F.3d 221 (3d Cir. 2011) (holding mandatory detention without individualized hearing for nearly three years unreasonable); Kalhan *supra* note 24, at 49. Given current court backlogs, the average case now takes over a year and a half to make its way through the immigration courts. Hector Becerra, *Immigration court backlog adds to border crisis*, L.A. Times (July 9, 2014), *available at* http://www.latimes.com/nation/la-na-immigration-court-20140710-story.html#page=1.
Another potential distinction is that an immigration detainee arguably possesses the "keys to his own cell" because he may escape detention by accepting deportation, while SVP detainees have no such option. That said, U.S. courts have generally rejected this argument because it infringes upon the immigration detainee's due process right to litigate his deportation hearing (so long as the detainee possesses a valid claim and deportation is not final). *See* Hall v. I.N.S., 253 F. Supp. 2d 244, 254 n. 17 (D. R.I. 2003); Chanthanounsy v. Cumberland County Sheriff, 2002 WL 1477170 (D. Me. July 9, 2002), *aff'd*, 2002 WL 31112190 (D. Me. Sept. 23, 2002).

110 SVP commitment is typically subject to periodic review, *see* 18 U.S.C. § 4247(e) (2006). Additionally, SVP detainees are presumed to one-day return into the U.S., unlike detained immigrants.

111 *See* FLYNN, *supra* note 33, at 8 ("there is no minimum amount of time during which custody should not be considered deprivation of liberty").

112 The indefinite nature of immigration detention causes psychological and physical trauma (and exacerbates past traumas for immigrant asylum seekers). Indefinite detainees have little information or control over their confinement, and experience circumstances similar to "sensory deprivation." PHYSICIANS FOR HUMAN RIGHTS, *PUNISHMENT BEFORE JUSTICE: INDEFINITE DETENTION IN THE U.S* 7-11 (2013), https://s3.amazonaws.com/PHR_Reports/indefinite-detention-june2011.Pdf; thus, as Swedish immigrant detainees reported, "detention is worse than prison because in prison at least the outcome and the time period are known." Soorej Jose Puthoopparambil, Beth Maina-Ahlberg & Magdalena Bjerneld, *Do Higher Standards of Detention Promote Well-Being?* 44 FORCED MIGRATION REV. 39 (2013), *available at* http://www.fmreview.org/detention/puthoopparambil-et-al#sthash.qtDveW84.dpuf; Immigration detainees thus develop feelings of "helplessness and hopelessness that lead to debilitating depressive symptoms, chronic anxiety, despair, dread," and "PTSD and suicidal ideation." PHYSICIANS FOR HUMAN RIGHTS at 11; CENTER FOR VICTIMS OF TORTURE (CVT), TORTURE ABOLITION AND SURVIVOR SUPPORT COALITION, INTERNATIONAL (TASSC), AND UNITARIAN UNIVERSALIST SERVICE COMMITTEE (UUSC), TORTURED & DETAINED: SURVIVOR STORIES OF U.S. IMMIGRATION DETENTION 11 (Nov. 2013), http://www.uusc.org/files/Report_TorturedAndDetained_Nov2013.pdf; Janet Cleveland, *Psychological Harm and the Case for Alternatives*, 44 FORCED MIGRATION REV. 7-8 (2013) (providing Canadian research), *available at* http://www.fmreview.org/detention/cleveland%20#sthash.kZt8o3pC.dpuf; *see also* Brief of 26 Professors and Researchers of Sociology, Criminology, Anthropology and Law as *Amici Curiae* in Support of Petitioner-Appellees and Urging Affirmance, *Robbins v. Rodriguez*, No. 12-56734, 715 F.3d 1127 (9th Cir. 2013), *available at* https://www.aclu.org/files/assets/rodriguez_social_science_amicus.pdf.

113 PHYSICIANS FOR HUMAN RIGHTS at 7 (emphasis added).

114 Puthoopparambil et al. at 39. The U.S. Supreme Court took a different view than psychological research regarding the indefinite nature of immigration detention. It essentially held that in pre-removal

Additionally, SVP commitment is designed to detain citizens, while immigration detention is designed to detain noncitizens. Thus, SVP commitment has historically operated on the legal assumption that additional process is required (such as appointed counsel), while immigration detention has historically operated on the opposite assumption that little process is required, if any.[115] That said, U.S. courts and legislatures are moving towards imposing additional procedural safeguards immigration detention, as described below.[116]

Moreover, notwithstanding the difference in citizenship, I argue the two detained populations are more similar than dissimilar in that both are historically politically powerless, and commonly stereotyped as especially dangerous and "criminal" despite contrary empirical evidence.[117] SVP and immigration laws thus both represent detention "exceptionalism."[118]

hearing detention, the existence of an endpoint, even if not fixed, constituted a "definite termination point," as opposed to post-removal order detention; Demore v. Kim, 538 U.S. 510, 529 (2003), *citing* Zadvydas v. Davis, 533 U.S. 678, 697 (2001) ("post-removal-period detention, unlike detention pending a determination of removability, has no obvious termination point." ).

115 Mark Noferi, *Framing the Right to Counsel in Immigration Proceedings: Law and Society 2014 Recap*, IMMIGRATIONPROF BLOG (June 11, 2014) ("acknowledging the historical perception of immigration law as a largely rights-free realm"), *available at* http://lawprofessors.typepad.com/immigration/2014/06/-framing-the-right-to-counsel-in-immigration-proceedings-law-and-society-2014-recap-by-mark-noferi.html; *see also Demore*, 538 U.S. at 521 ("Congress regularly makes rules that would be unacceptable if applied to citizens") (citing Mathews v. Diaz, 426 U.S. 67, 79-80 (1976)). This is so even though the Due Process Clause has been interpreted to apply to noncitizens for over a century. Yamataya v. Fisher, 189 U.S. 86 (1903); *see generally* Hiroshi Motomura, *The Curious Evolution Of Immigration Law: Procedural Surrogates For Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992).

116 Resnik, *supra* note 32. *See also* Section II.B.

117 Yung, *supra* note 28, at 988 ("It is difficult, if not impossible, to name a group in the United States that is more reviled than sex offenders...."); Joseph Margulies, *Preventive Detention, Deviance, Risk, And Law*, 101 J. CRIM. L. & CRIMINOLOGY 729, 753-54 (2011) (discussing the public's view of sex offenders as "super-predators"); Jennifer Chacon, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827 (describing conflation of immigrants with criminal threats); MARIA JOAO GUIA, *Crimmigration, Securitisation and the Criminal Law of the Crimmigrant*, JUSTICE AND SOCIAL CONTROL 18, 27-29 (2012); Mark Noferi, *Mandatory Immigration Detention for U.S. Crimes: The Noncitizen Presumption of Dangerousness*, IMMIGRATION DETENTION, RISK AND HUMAN RIGHTS (forthcoming 2014), *available at* http://works.bepress.com/cgi/viewcontent.cgi?article=1005&context=mnoferi.

118 *See* Yung, *supra* note 28, at 997-998; César Cuauhtémoc Garcia Hernández, *Invisible Spaces and Invisible Lives In Immigration Detention*, 57 HOW. L.J. 869, 873-880 (2014).

## II. U.S. Immigration Detention: A Survey

In this section, I briefly survey the conditions and attendant processes of the immigration detention and SVP civil commitment systems.

### A. The Civil Immigration Detention Model

Here, I describe the new civil immigration detention model. I organize this analysis by the areas of reform Dr. Schriro targeted to tailor immigration detention to its non-criminal aims: (1) overarching strategy and standards, (2) conditions of confinement, (3) programs and recreational opportunities, and (4) oversight, accountability, and transparency.[119]

I focus on ICE's recent 2011 standards governing its civil model. In nearly all respects, ICE's new standards are still modeled after and explicitly cite the American Correctional Association's (ACA) model Core Jail Standards, designed for jails that house both pre-trial and post-conviction criminal defendants.[120] I also analyze parallel model standards for immigration detention recently promulgated by the American Bar Association.[121]

#### *Overarching Strategy and Standards*

Dr. Schriro made recommendations as to the broad strategies, policies, and practices by which detainees are managed, and recommended specifically that ICE develop separate standards for immigration detainees.[122] In early 2012, ICE released new Performance-Based Detention National Standards ("PBNDS") for detention facilities under its control.[123] The new PBNDS, following Schriro's recommendations, provide for housing immigrant detainees separately from criminal detainees, and provides a system to more meaningfully classify immigration detainees by security risk.[124]

119 *See* SCHRIRO REPORT, *supra* note 4, at 5.

120 The Core Jail Standards are a subset of the American Correctional Association Performance-based Standards for Adult Local Detention Facilities, designed to house "persons awaiting trial, serving sentences, or otherwise are locally confined." American Jail Association, *Resolutions of the American Jail Association* 9 (compiled April 2012), http://www.aja.org/assets/cms/files/Membership/Resolutions%2004_2012.pdfThe ICE Performance-Based Detention National Standards cite the ACA Core Jail Standards in nearly every relevant section.

121 *See* ABA Standards, *supra* note 25.

122 SCHRIRO REPORT, *supra* note 4, at 5, 16; *Improving Conditions*, *supra* note 4, at 1146-47 (ICE's 2000 and revised 2008 standards both based upon American Correctional Association standards for pre-trial defendants). Dr. Schriro also identified special concerns regarding special populations - families with minor children, women, the ill and infirm, asylum seekers, and vulnerable populations. *Id.*

123 PBNDS, *supra* note 6, at 66-78.

124 *Id.*

Both of these standards, if implemented, would constitute an improvement for detainees. Generally, immigration detention has been criticized for its similarity to criminal incarceration,[125] and in many cases even worse conditions.[126] Detainees have commonly been housed in actual prisons and jails with individuals serving criminal sentences and have been forced to wear prison uniforms.[127] In 2009, 50 percent of detainees were housed in county jails contracted to ICE.[128] Conditions of confinement at new facilities like Karnes thus represent an improvement.

Still, the default for the new ICE model is round-the-clock confinement—similar to confinement of criminal defendants, if not with them.[129] Indeed, the PBNDS formal detainee classification system of low-, medium-, or high- custody is essentially analogous to low, medium, or high security prisons in the criminal system.[130]

The ABA standards, by comparison, advocate more broadly for ICE to use a "continuum of strategies and programs" to achieve its main goal of preventing flight from deportation. These strategies range from "release on recognizance or parole, to release on bond, to community-based supervised release programs, to 'alternative to detention' programs with various levels of supervision, to home detention (with strict conditions) that represent an alternative "form" of detention, to detention in civil detention facilities."[131] In doing so, the ABA model standards (if implicitly) go beyond recommendations to reform detention conditions *per se*, to offer recommendations to reform a system that over-detains.[132]

*Conditions of Confinement*

Dr. Schriro also made recommendations for less restrictive conditions of detention: adopting the "fewest number of custody classifications neces-

125 *See* SCHRIRO REPORT, *supra* note 4, at 23.

126 *See, e.g.*, Detention Watch Network, *Detention Watch Network Expose And Close Reports On 10 Of The Worst Immigrant Prisons In The US*, http://www.detentionwatchnetwork.org/ExposeAndClose; Margaret H. Taylor, *Detained Aliens Challenging Conditions Of Confinement And The Porous Border Of The Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087, 1113 (1995) ("[t]he overall picture... is one of harsh detention conditions similar to -- and sometimes worse than -- the prevailing conditions for criminal incarceration.").

127 Detention Watch Network, *Expose And Close*, at 2; IACHR, *supra* note 13, at ¶246-47 ("in every circumstance described here, the immigration detainees are treated as criminals").

128 SCHRIRO REPORT, *supra* note 4, at 10.

129 *See* PBNDS at 85 ("The facility's front entrance shall be a controlled access point. Entrance into the secure perimeter shall be controlled with electronic interlocking doors or grilles to prevent unauthorized entry or exit."), *citing* American Correctional Association, *Performance-based Standards for Adult Local Detention Facilities*, 4th Edition, 4-ALDF-2A-07.

130 FLYNN, *supra* note 33, at 21-22; Flynn, *Who Must*, *supra* note 48, at 10.

131 ABA Standards, *supra* note 25, at § II.C n. 1., p. 4.

132 Noferi, *supra* note 45, *New ABA Civil Immigration Detention Standards*.

sary," providing greater access throughout the facility, and "normalizing the living environment for low-custody aliens."[133] The new 2011 PBNDS followed these recommendations, although its standards do not materially differ from jail standards. The PBDNS provide that detainees shall be assigned to the "least restrictive housing unit consistent with facility safety and security."[134] That said, the PBNDS still provide for "continuous supervision by staff."[135] Most significantly, the ICE PBNDS, like jail standards, envision a facility with a "secure perimeter."[136]

Conversely, the ABA standards perhaps subtly point the way to qualitatively different facilities that do not require round-the-clock confinement. Under "Physical Plant and Environment," the ABA standard provides that a facility should be "secured by controlled access and perimeter walls if necessary."[137] It is unclear whether the ABA is recommending a facility that should be secured "if necessary"—i.e., an "open" check-in or registration facility, to which immigrants can come and go.[138] Or, the ABA might be recommending a facility like Karnes that should be secured by controlled access, but with the most prison-like controls present "if necessary"–i.e., perimeter walls, prison-like towers, fences, or barbed wire.[139] While the latter might be an improvement, the former would be a dramatic change from US practices to date.

ICE's furlough policy is extremely limited, to "emergency requests" and only with high-level signoff.[140] Impacts on detainees have been document-

133 SCHRIRO REPORT, *supra* note 4, at 5, 21-23 (discussing how freedom of movement was "largely restricted," and many detainees were largely confined to cells).

134 PBNDS, *supra* note 6, at 71, *citing* American Correctional Association, *Performance-based Standards for Adult Local Detention Facilities*, 4th Edition, 4-ALDF 2A-30, 2A-31, 2A-32, 2A-33, 2A-34 [hereinafter ACA 4-ALDF].

135 PBNDS, *supra* note 6, at 345. Jail standards provide for "all inmate movement . . . controlled by staff." American Correctional Association, Core Jail Standard, 1-CORE-2A-07 [hereinafter ACA Core Jail Standard]. The ABA standard provides some increased freedom of movement, in that "residents should be able to move freely and without escort during daylight hours." ABA Standards, *supra* note 25; *see also* JAILS AND JUMPSUITS, *supra* note 10, at 35.

136 PBNDS, *supra* note 6, at 5; ACA 4-ALDF, at 2A-04.

137 ABA Standards, *supra* note 25, at 12, § IV.B.8.

138 By comparison, some European immigration registration facilities use such an open system. Ireland uses a "semi-secure" system in which detainees may apply for furloughs of a week or more. FLYNN, *supra* note 33, at 23.

139 *See* ABA Standards, *supra* note 25 at 12 (providing for facilities secured by controlled access and perimeter walls only "if necessary," but "not by traditional prison-like towers, fences, or barbed or concertina wire"). The answer is unclear from the ABA standards' language and context. The ABA cites as analogous some examples more resembling the former (i.e., domestic violence shelters, see ABA Standards § II.C.D), some more resembling the latter (i.e., secure nursing homes or in-patient psychiatric facilities, see id.).

140 The new ICE standards do provide for "emergency requests" to attend, *inter alia*, a "a family-related state court proceeding." PBNDS, *supra* note 6, at 335 (Sec 5.2.V.A,). The section appears more targeted, though, at visiting "critically ill members of the immediate family or to attend their funerals." *Id.* (Sec. 5.2.II.1). This is all on a "case-by-case basis, and with approval of the respective Field Office

ed. For example, thousands of detained immigrants lose their children in parallel family court proceedings because ICE does not let them attend scheduled family court conferences.[141] The furlough policy is limited even for the unique needs of civil immigration detainees—i.e. the need to litigate a deportation case in immigration court. ICE currently makes no allowance to release or furlough detainees to help them secure counsel and challenge their deportation, even though studies show that detention is the largest obstacle to securing representation, which in turn frustrates the ability to litigate proceedings effectively.[142] Even criminal laws allow for exceptions for temporary pretrial release to the extent "necessary for preparation of the person's defense."[143] ICE also does not typically make allowances for its detainees to gain post-conviction relief in criminal court and thus avoid deportation—for example, to bring claims of ineffective assistance of counsel due to lack of immigration advice, following the Supreme Court's 2010 Padilla v. Kentucky decision.[144]

ABA guidelines more broadly provide for supervised furloughs for those with families or family court proceedings. ABA guidelines also provide for supervised furloughs for those detained longer than 90 days, and specifically home visits for those with citizen families, which represents another step beyond the presumption of round-the-clock incarceration.[145] ABA guidelines also more explicitly provide for furloughs for "compelling humanitarian reasons" including, but not limited to, "family court proceedings."[146]

The ICE PBNDS also provide for basic human rights, following Dr.

Director" (although he may "delegate this authority to the Assistant Field Office Director-level for any detainee who does not require a high degree of control and supervision.") *Id.* at 336. Notably, "[n]o less than two escorts are required for each trip." *Id.*

141 Sarah Rogerson, *Lack of Detained Parents' Access to the Family Justice System and the Unjust Severance of the Parent-Child Relationship*, 47 FAMILY L.Q. 141, 154-55 (2013); Seth Freed Wessler, *Thousands of Kids Lost From Parents In U.S. Deportation System*, COLORLINES, Nov. 2, 2011, http://colorlines.com/archives/2011/11/thousands_of_kids_lost_in_foster_homes_after_parents_deportation.html.

142 New York Immigrant Representation Study, *Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings*, 33 CARDOZO L. REV. 357, 363-65, 367-68 (2011); Noferi, *supra* note 42, at 66 ("The impact of detention and consequent lack of representation is stark.").

143 18 U.S.C. §3142(i) (2006 & Supp. 2011).

144 559 U.S. 365 (2011); NYU SCHOOL OF LAW IMMIGRANT RIGHTS CLINIC AND FAMILIES FOR FREEDOM, JUSTICE DETAINED, JUSTICE DENIED: IMMIGRATION AND CUSTOMS ENFORCEMENT PREVENTS IMMIGRANTS FROM FIGHTING UNLAWFUL CRIMINAL CONVICTIONS 19-23 (July 2014), *available at* http://familiesforfreedom.org/news/releases/%E2%80%9Cjustice-detained-justice-denied%E2%80%9D-report-families-freedom-and-nyu-school-law-immigrant.

145 ABA Standards, *supra* note 25, at 39, § X.B.3. "Residents who are detained for more than 90 days, particularly those with US citizen family members and minor children, should be eligible to leave a facility for home visits. DHS/ICE may impose reasonable conditions, including electronic monitoring and/or an escort, to ensure a resident's continued custody and return." *Id.*

146 *Id.* at 39, § X.B.4.

Schriro's recommendations: a credible detainee grievance system,[147] medical screening,[148] and infectious disease containment practices.[149] The ABA standards go further and provide for medical, dental, and mental health screenings within 12 hours, a crucial component since 121 ICE detainees have died since October 2003.[150] The ABA standards also provide for special training and accommodations for vulnerable populations, such as women, children, the mentally ill, and asylum seekers (and indeed, counsels that minors and pregnant women should not be detained at all).[151] For families, ABA guidelines provide that ICE should house detainees "within a reasonable distance of their family, social, and cultural support systems," and allow visitation every day, with physical contact, for "at least two hours ordinarily."[152]

All these human rights improvements are advances over past detention practices; all would positively impact detainees' lives, and none should be discounted. These improvements, however, simply raise the level of civil detention to that of criminal incarceration that meets basic human rights.

*Programs and Recreational Opportunities*

Dr. Schriro also made recommendations as to programs for detainees such as a law library, contact with family and counsel, indoor and outdoor recreation, and religious activities.[153] The 2011 ICE PBNDS address these concerns, in some cases providing specificity beyond that of criminal jail

147 PBNDS, *supra* note 6, at 392; SCHRIRO REPORT, *supra* note 4, at 22. Reports of physical, verbal, and sexual abuse by corrections officers have been increasingly common, and complaints by detainees have been met with outright hostility and threats of disciplinary action or transfer to other facilities. *See, e.g.*, JAILED WITHOUT JUSTICE, *supra* note 10, at 42; HUMAN RIGHTS WATCH, DETAINED AND AT RISK: SEXUAL ABUSE AND HARASSMENT IN UNITED STATES IMMIGRATION DETENTION 18 (Aug. 2010) ("detainees at times have to seek out grievance forms from guards overseeing their care, who may be the ones responsible for abuse or may be perceived as posing a threat of retaliation"), *available at* http://www.hrw.org/sites/default/files/reports/us0810webwcover.pdf; NEW ORLEANS WORKERS' FOR RACIAL JUSTICE, DETENTION CONDITIONS AND HUMAN RIGHTS UNDER THE OBAMA ADMINISTRATION: IMMIGRANT DETAINEES REPORT FROM BASILE, LOUISIANA (July 2009) [hereinafter DETENTION CONDITIONS AND HUMAN RIGHTS], *available at* http://www.nowcrj.org/wp-content/uploads/2009/07/detention-conditions-report.pdf.

148 PBNDS, *supra* note 6, at 233-59; SCHRIRO REPORT, *supra* note 4, at 25-26. 131 ICE detainees have died since October 2003. US Immigration and Customs Enforcement, *List of Deaths in ICE Custody October 2003-June 18, 2012* (Aug. 12, 2012, 6:17 AM), http://www.ice.gov/doclib/foia/reports/detaineedeaths2003-present.pdf.

149 SCHRIRO REPORT, *supra* note 4, at 22 (recommending a "well maintained physical space and comprehensive infectious disease containment practices"); PBNDS, *supra* note 6; at 237-40; IACHR, *supra* note 13, at ¶¶ 297-307 (describing insufficient food and water supplies, insufficient heat, and 50 detainees housed in the size of less than a basketball court).

150 ABA Standards, *supra* note 25, at § III.C; *compare* PBNDS, *supra* note 6, at 55.

151 ABA Standards at § II.G, XII.

152 *Id.* at § X.A.

153 SCHRIRO REPORT, *supra* note 4, at 23-25. She termed this "programs management".

standards. For example, PBNDS provide for a law library with additional specificity, such as that it be "large enough to provide reasonable access to all detainees who request its use," with sufficient tables, chairs, and computers, and LexisNexis and paper publications."[154] PBNDS also provide for enhanced detainee visitation by legal counsel, including confidential visits, seven days a week, without auditory supervision, in private consultation rooms, where detainees may retain legal materials (albeit after inspection), and with "appropriate special assistance" to the limited-English proficient.[155] The ICE PBNDS provide detainees access to outdoor recreation four hours a day, seven days a week (weather and scheduling permitted),[156] which goes beyond the one hour per day provided by criminal jail standards.[157] The standards also provide for specific practices to ensure detainees have regular opportunities to participate in religious practice, whatever their faith.[158]

The proposed ABA standards go further again than ICE standards in some respects. For example, they provide additional, specific requirements for a law library,[159] specifically prohibit Plexiglas between lawyers and clients,[160] recommend that detainees be housed near family to facilitate visita-

154 PBNDS, *supra* note 6, at 342-45; *compare* ACA Core Jail Standard, *supra* note 135, at 1-CORE-5C-04 ("library services are available to inmates."). Law libraries have been described as entirely absent in some detention facilities; where they exist, the materials are commonly outdated, not relating to immigration law, and only in English. KAREN TUMLIN, ET AL., A BROKEN SYSTEM: CONFIDENTIAL REPORTS REVEAL FAILURES IN U.S. IMMIGRANT DETENTION CENTERS 33 (2009) [hereinafter BROKEN SYSTEM], *available at* www.nilc.org/document.html?id=9; JAILED WITHOUT JUSTICE, *supra* note 10, at 32. In any event, access to law libraries is commonly limited as well. *Id.* at 32 (requests for access often depended on the "mood of the guards.").

155 PBNDS, *supra* note 6, at 317-18, 341; *compare* ACA Core Jail Standard, *supra* note 135, at 1-CORE-6A-02 ("Inmate access to counsel is ensured. Such contact includes, but is not limited to, telephone communications, uncensored correspondence, and visits."). Explicit barriers to communications with lawyers have been common in immigrant detention. A 2010 survey found 78% of detainees in facilities that prohibited lawyers from scheduling private telephone calls with clients. NATIONAL IMMIGRANT JUSTICE CENTER, ISOLATED IN DETENTION: LIMITED ACCESS TO LEGAL COUNSEL IN IMMIGRATION DETENTION FACILITIES JEOPARDIZES A FAIR DAY IN COURT 4 (Sept. 2010) (surveying 25,489 detainees in 67 detention facilities), *available at http://www.immigrantjustice.org/sites/immigrantjustice.org/files/Detention%20Isolation%20Report%20FULL%20REPORT%202010%2009%2023_0.pdf.* Several facilities commonly prohibit contact visits between detainees and lawyers, where legal documents may be exchanged. BROKEN SYSTEM, *supra* note 154, at 14-15; IACHR, *supra* note 13, at ¶ 326.

156 PBNDS, *supra* note 6, at 290.

157 ACA Core Jail Standard, *supra* note 135, at 1-CORE-5C-01. Exercise opportunities in immigrant detention been described as extremely limited or absent. JAILED WITHOUT JUSTICE, *supra* note 10, at 41; BROKEN SYSTEM, *supra* note 154, at 20-25.

158 PBNDS, *supra* note 6, at 294-303; *compare* SCHRIRO REPORT, *supra* note 4, at 24 (criticizing lack of religious access).

159 ABA Standards, *supra* note 25, at 15 ("access to updated legal materials including current relevant codes, regulations, court rules, self-help materials, and legal forms"). They also require that all facilities permit "know-your-rights" presentations. *Id.* at § VII.D.

160 *Id.* at 14. For counsel, ABA guidelines provide for access to detainees 12 hours a day, without advance notice, in private, confidential rooms without Plexiglas where detainees and counsel can trade documents. ABA Standards § VII.B-C.

tion,[161] and recommend that communal areas be available for "most of each day."[162] Still, as with conditions of confinement, improved access to programs and recreational opportunities inside the secure perimeter are only allowed to the extent they do not interfere with the presumption of round-the-clock incarceration.

*Oversight, Accountability and Transparency*

Lastly, the new ICE PBNDS standards, and accompanying practices, reflect some progress towards Dr. Schriro's recommendations as to oversight, accountability, and transparency, as well as some resistance.

Historically, insufficient federal oversight has been a primary contributor to substandard conditions,[163] exacerbated by ICE's tendency to contract with state, local, and especially private detention facilities outside its direct control.[164] Public oversight has been difficult as well, since ICE has been resistant to FOIA requests,[165] and private facilities are typically exempt.[166]

Since 2009, oversight has improved. ICE, as Dr. Schriro recommended, has hired 42 on-site detention monitors, to answer criticisms of lax and inconsistent enforcement of its own standards.[167]

Still, the revised 2011 ICE standards remain non-binding as a matter of law.[168] Moreover, the standards do not give rise to any legal redress for detainees,[169] unlike Board of Prisons standards, incorporated into federal reg-

161 *Id.* at 37. For families, ABA guidelines provide that ICE should house detainees "within a reasonable distance of their family, social and cultural support systems," and allow visitation every day, with physical contact, for "at least two hours ordinarily." *Id.* at 37-38.

162 *Id.* at 14, 17 ("Residents should be permitted the maximum amount of freedom of movement within the facility, both indoors and outdoors, consistent with the safety and security of residents and staff.").

163 Cesar Cuauhtemoc Garcia Hernandez, *Invisible Spaces and Invisible Lives In Immigration Detention*, 57 HOW. L.J. 869, 889 (2014).

164 Matthew Martin, *Improving The Carceral Conditions Of Federal Immigrant Detainees*, 125 HARV. L. REV. 1476, 1481 (2012); Sthanki, *supra* note 21, at 456-60.

165 Hernandez, *Invisible Spaces*, 57 HOW. L.J. at 890-92.

166 Lily Ostrer, *Immigrant Detention*, HARVARD POLITICAL REVIEW, July 8, 2012, *available at* http://hpronline.org/united-states/immigrant-detention/ (quoting Mark Dow: "the culture of... the immigration agency, just makes the system of detention even more opaque").

167 JAILS AND JUMPSUITS, *supra* note 10, at V.

168 *See* Martin, *supra* note 70, at 1481 & n.37. Recent legislation that passed the Senate would have required ICE to incorporate the standards into all contracts, required annual inspections, imposed financial penalties for noncompliance, and made all detention facility contracts, memoranda, and reviews subject to FOIA. The Border Security, Economic Opportunity, and Immigration Modernization Act of 2013, 113th Cong. S. 744, § 3716 (2013) [hereinafter S. 744].

169 *See* Martin, at 1481 n.37 (citing Syncor Int'l Corp. v. Shalala, 127 F.3d 90, 93-94 (D.C. Cir. 1997); Mada-Luna v. Fitzpatrick, 813 F.2d 1006, 1013 (9th Cir. 1987)). Most likely, they are statements of policy without binding effect. *Id.*; *but see* Steven Neeley, *Immigration Detention: The Inaction of the Bureau of Immigration and Customs Enforcement*, 60 ADMIN. L. REV. 729 (2008) (argument that that ICE's failure to follow its own standards, even if not formally promulgated, gives rise to a

ulation.[170] As Dr. Schriro argued, "The ultimate form of enforcement [of standards] is regulation that also affords opportunity for relief."[171] The resulting lack of redress for detainee maltreatment, as well as detainees' inability to sue nonfederal facilities under the Federal Tort Claims Act, has contributed to substandard conditions.[172] If ICE incorporated its standards into regulation, which might allow immigrant detainees to sue, conditions might at least reach the minimum standards of care that many (if not all) criminal facilities possess.[173]

That said, accountability has also lagged. In an important step, ICE's revised standards apply to at least some contracted facilities, if ICE's contract specifies as such, which between state, local, and federal facilities, housed eighty-four percent of detainees in 2011.[174] But, privately owned facilities have historically been even more removed from ICE's oversight and control,[175] and have experienced some of the worst abuses.[176] Riots occurred in Reeves County, TX in 2010 and 2011,[177] hunger strikes occurred in Basile County, LA in 2009,[178] food is substandard, and detainees are routinely discouraged from making complaints or grievances.[179] ICE has also reduced its reliance on private facilities slightly—43 percent in January 2012, down slightly from 48 percent in 2009, but still significantly up from 25 percent in 2002.[180]

claim under the U.S. Administrative Procedure Act).

170 *Improving Conditions*, *supra* note 4, at 1446.

171 *Id.* at 1451.

172 *Id.* at 1451, 1487-91; Sthanki, *supra* note 21, at 472-73.

173 Kalhan, *supra* note 24, at 51-52 (arguing that binding standards might "help clarify what 'truly civil' detention requires"). Immigrant detainees are generally precluded from challenging conditions under the Eighth Amendment, as immigration detention is not "punishment," although Fifth Amendment protections apply. *See generally* Taylor, *supra* note 126, at 1090.

174 *See, e.g.*, PBNDS, *supra* note 6, at 22 ("This detention standard applies to the following types of facilities housing ERO detainees: Service Processing Centers (SPCs); Contract Detention Facilities (CDFs); and State or local government facilities used by ERO through Intergovernmental Service Agreements (IGSAs) to hold detainees for more than 72 hours."); Sthanki, *supra* note 21, at 466; Martin, *supra* note 70, at 1478. ICE has terminated contracts for noncompliance with its standards at only three facilities, though, and as of 2010, continued to use facilities that had been non-compliant for two or more years. *Improving Conditions*, *supra* note 4, at 1447.

175 Martin, *supra* note 70, at 1478.

176 Hernandez, *Invisible Spaces*, 57 HOW. L.J. 869, 886-88.

177 Nina Bernstein, *Companies Use Immigration Crackdown to Turn a Profit*, N.Y. TIMES, Sept. 28, 2011, at A1.

178 DETENTION CONDITIONS AND HUMAN RIGHTS, *supra* note 104, at 6-7.

179 *Id.*

180 Mason, *supra* note 10, at 5. The average number of ICE detainees housed daily in private facilities grew 188% from 2002 to 2012 (from 4,841 to 13,927), compared to a 26% growth in publicly operated facilities. *Id.*

## B. Procedures Attending Immigration Detention

Historically, few procedural protections have been afforded to immigration detainees—although this is changing, through litigation and legislation.

Detention precedes any process provided to the detainee. For example, in formal in-court removal proceedings, the detainee must affirmatively request a bond hearing after DHS makes the initial decision (unlike criminal proceedings, in which judges typically set bail at the outset).[181] The presumptions on review favor detention, with the burden on the detainee to rebut his detention, if an individual opportunity is provided to do so.[182] As noted, detention is categorically mandated for those in formal removal proceedings with certain prior crimes, those in summary processes (expedited removal or reinstatement of removal), and those post-removal order.[183]

This state of affairs is changing, however. In the courts, the Ninth Circuit recently provided bond hearings to those mandatorily detained in formal removal proceedings for six months or longer,[184] as did the Third Circuit on a case-by-case basis.[185] Separate litigation is pending to challenge the burden that mandatory detainees with criminal convictions must overcome to receive an individualized hearing.[186] Additionally, immigration reform legislation that passed the Senate in 2013 would have required bond hearings in formal removal proceedings within 6 days (except for those

181 8 C.F.R. § 1003.19 (2012); *compare* 18 U.S.C. § 3142(a) (in federal criminal proceedings, the magistrate determines bail at the defendant's first appearance).

182 Those discretionarily detained pre-hearing, for whom DHS has set bond or denied it, bear the burden to show at a bond hearing before an immigration judge that they are *neither* a flight risk nor danger. 8 C.F.R. § 1236.1(c)(8) (2012) (respondent must demonstrate that his "release would not pose a danger to property or persons"). Those mandatorily detained pre-hearing in formal removal proceedings bear the even higher burden to first show that the Government is "substantially unlikely" to ultimately establish the mandatory detention charge(s) at the removal hearing—i.e., that the Government has no colorable argument for mandatory detention. Matter of Joseph, 22 I. & N. Dec. 799, 800 (B.I.A. 1999). Those detained post-removal order are mandatorily detained for 90 days, and receive administrative custody review, at which they must show "good reason to believe there is no significant likelihood of removal to the country to which he or she was ordered removed," as well as lack of flight risk and danger. 8 C.F.R. § 241.13 (2012); *see also id.* § 241.4(d)(1). Those detained in expedited removal are mandatorily detained and receive no detention review. 8 U.S.C. § 1182(d)(5) (2006 & Supp. 2011). Only those whom are found to have a credible fear of persecution may be paroled at DHS' discretion, if they arrived at a port of entry. US IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE) NO. 11002.1, PAROLE OF ARRIVING ALIENS FOUND TO HAVE A CREDIBLE FEAR OF PERSECUTION OR TORTURE (2010), *available at* http://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_aliens_found_credible_fear.pdf.
Outside these procedures, detainees may challenge their detention through a *habeas* petition in federal court, although many do not because of the time and effort involved. Heeren, *supra* note 55, at 622-26.

183 *Supra* Section I.A.

184 Rodriguez v. Robbins, 715 F.3d 1127 (9th Cir. 2013).

185 Diop v. ICE, 656 F.3d 221 (3d Cir. 2011).

186 *Gayle v. Napolitano*, ACLU, No. 12-cv-2806 (D.N.J. Jan. 8, 2008), *available at* https://www.aclu.org/immigrants-rights/gayle-v-napolitano.

mandatorily detained for prior crimes), shifted the burden to DHS to establish detention, and required *de novo* custody redeterminations every 90 days.[187]

Appointed counsel has historically not been provided to immigrant detainees to challenge detention, nor to defend their underlying removal proceedings.[188] That said, DHS recently agreed to provide appointed counsel to mentally ill detainees, pursuant to a federal court settlement.[189] Litigation is also pending to provide appointed counsel to children in removal proceedings.[190] In the political process, the Senate's 2013 legislation would have provided appointed counsel in formal removal proceedings to children, the mentally ill, and the "particularly vulnerable."[191] Moreover, New York City now provides counsel to any resident detained in formal removal proceedings, with other municipalities exploring similar programs.[192]

Appellate review of the detention decision is provided to those detained pre-removal order, although with a presumption of detention during appellate review.[193] Appellate review of detention decisions is not provided to arriving aliens nor those detained post-removal order (except via *habeas* in federal court).

## III.U.S. Sexually Violent Predator ("SVP") Civil Commitment: A Survey

In this section, I briefly survey the conditions and attendant processes of

187 S. 744, § 3717. § 3717(a) (requiring the DHS to demonstrate at a bond hearing that "no conditions, including the use of alternatives to detention that maintain custody over the alien, will reasonably assure the appearance of the alien as required and the safety of any other person and the community".).

188 Those in formal removal proceedings have a statutory right to have counsel present, but at no cost to the government. 8 U.S.C. § 1362 (2006 & Supp. 2011). Arriving aliens have no right to have counsel present. 8 C.F.R. § 1003.19(h)(2)(i) (2009).

189 *Department of Justice and the Department of Homeland Security Announce Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions*, DEP'T OF JUSTICE (Apr. 22, 2013), http://www.justice.gov/eoir/press/2013/SafeguardsUnrepresentedImmigrationDetainees.html; ACLU, *Federal Court Orders Legal Representation for Immigrant Detainees With Mental Disabilities*, Apr. 23, 2013, *available at* http://www.aclu.org/immigrants-rights/federal-court-orders-legal-representation-immigrant-detainees-mental-disabilities.

190 *Groups Sue Federal Government over Failure to Provide Legal Representation for Children*, AMERICAN IMMIGRATION COUNCIL (Jul. 9, 2014), https://www.aclu.org/immigrants-rights/groups-sue-federal-government-over-failure-provide-legal-representation-children.

191 S. 744, § 3502.

192 Mark Noferi, *Municipalities Help Advance Access to Counsel for Immigrants*, Immigration Impact (Aug. 13, 2014), *available at* http://immigrationimpact.com/2014/08/13/municipalities-help-advance-access-to-counsel-for-immigrants/.

193 8 C.F.R. §§ 1003.6(c), 1003.19(i) (2012); Raha Jorjani, *Ignoring The Court's Order: The Automatic Stay In Immigration Detention Cases*, 5 INTERCULTURAL HUM. RTS. L. REV. 89, 119 (2010).

the SVP civil commitment system today, with a similar focus on recent reforms and their similarity to the immigration detention reforms described earlier.

## A. The Civil SVP Commitment Model

Conditions of confinement at SVP facilities, like those at immigration detention facilities, currently appear quite mixed, but they are trending towards improvement. On the ground, conditions in SVP facilities on average may be already closer to the Karnes civil model, although the development of standards may lag behind ICE's recent efforts. Here, I survey SVP confinement conditions, from available data and media reports, again by using Dr. Schriro's categories of civil reform set out above.

### *Overarching Strategy and Standards*

In SVP commitment, as with immigration detention, the more recent trend is towards separate facilities from criminal jails or prisons (in New York, Washington state, Virginia, Arizona, and California, for example).[194] Still, some civilly committed sex offenders are still held in actual prisons. Indeed, federal sex offenders are solely held at the Federal Correctional Institute in Butner, North Carolina, managed by Board of Prisons ("BOP") officers and subject to BOP rules and regulations.[195] Placements in correctional facilities are particularly common in jurisdictions with recently enacted SVP commitment statutes.[196]

Even in separate facilities, the default model is still round-the-clock confinement.[197] Indeed, each SVP committee has been adjudged dangerous as

194 Hannah Rappleye, *America's Expensive Sex Offenders*, SALON, Apr. 17, 2012, *available at* http://www.salon.com/2012/04/17/americas_expensive_sex_offenders/. California, which civilly commits the most SVPs, has built a new $388 million civil commitment facility with 1,500 beds. *Id. See also* N.Y. Mental Hyg. Law § 10.10(e) (Consol. 2014) (requiring separation from correctional facility inmates, even if housed on same grounds).

195 *See* Timms v. Johns, 700 F. Supp. 2d 764, 769-70 (E.D.N.C. 2010) (finding that SVP committee was subject to criminal punishment). Some states similarly incarcerate civil committees in actual prisons. For example, New Jersey SVP committees live in barred cells originally built as the "administrative segregation" facility of the East Jersey State Prison in Avenel, NJ. Alves v. Main, 2012 U.S. Dist. LEXIS 84761, 2012 WL 2339809 (D.N.J. June 19, 2012) (class action complaint challenging conditions at New Jersey's Special Treatment Unit ("STU")).

196 Brian K. Holmgren, *Sexually Violent Predator Statutes: Implications for Prosecutors and their Communities*, 32-JUN PROSECUTOR 20, 28 (1998).

197 Monica Davey & Abby Goodnough, *Doubts Rise as States Hold Sex Offenders After Prison*, N.Y. TIMES, Mar. 4, 2007, *available at* http://www.nytimes.com/2007/03/04/us/04civil.html [hereinafter Davey & Goodnough]; Minnesota Office Of The Legislative Auditor, *Civil Commitment of Sex Offenders* 42 (March 2011), *available at* http://www.auditor.leg.state.mn.us/ped/pedrep/ccso.pdf (stating that Minnesota committees receive an "all-or-nothing outcome," either an "expensive, high security facility" or release to the community).

a predicate for his commitment. Notwithstanding this perceived dangerousness, a minority of states have incorporated supervision outside the secure facility, to varying degrees. Arizona and Washington have incorporated limited furlough programs depending on the success of treatment, with varying degrees of personal supervision or GPS tracking bracelets.[198] Texas operates an exclusively outpatient model, incorporating treatment and case management with GPS monitoring and surveillance.[199] Its costs are one-fifth that of inpatient treatment.[200] North Dakota provides outpatient treatment for some, depending on the outcome of a risk assessment.[201] New York has a two-track system, with either commitment to a secure facility or intensive community supervision, also depending on the outcome of a risk assessment.[202]

*Conditions of Confinement*

Like the new Karnes model, some SVP commitment facilities have already incorporated less restrictive conditions of confinement, albeit with a secure perimeter. Even dedicated civil commitment facilities have razor-wire fences and guard stations.[203] That said, in newer facilities, residents typically do not wear uniforms and possess freedom of movement inside the fence.[204] Facility staff are not "guards."[205]

*Programs and Recreational Opportunities*

SVP facilities have made even greater strides than immigration facilities towards providing programs, resources, and recreational opportunities to committees. This may be because SVP programs incorporate a treatment paradigm into their incapacitative practices. In this vein, newer dedicated

198 Rappleye, *supra* note 194 (comparing the Minnesota model with Arizona's, which provides for "Less Restrictive Alternative" program with supervised furloughs, GPS monitoring, and work release).

199 Jeslyn A. Miller, *Sex Offender Civil Commitment: The Treatment Paradox*, 98 CAL. L. REV. 2093, 2124-2125 (2010).

200 *Id.* at 2125. *See also* New York City Bar Association, *Statement on Civil Commitment of Sex Offenders: Senate Bill S6325 and Assembly Bill A09282* (2006), *available at* www.nycbar.org/pdf/report/Sex_Offender_Stmt.pdf (discussing how community-based treatment and effective monitoring could serve same purpose at far lower cost in dollars and civil liberties).

201 North Dakota Legislative Counsel Staff, *Alternatives to Inpatient Civil Commitment of Sex offenders* (October 2006), www.legis.nd.gov/assembly/59-2005/docs/pdf/79318.pdf.

202 *See* New York State Office of Mental Health, *Annual Report on the Implementation of Mental Hygiene Law Article 3, 10* (July 2011), http://www.omh.ny.gov/omhweb/statistics/SOMTA_Report_2010.pdf. 36.7% of SVPs have been shunted to the lesser restrictive track. *Id.* at 3.

203 Davey & Goodnough, *supra* note 197.

204 *Id.*; Rappleye, *supra* note 194 (residents may "roam the inside of the facility relatively freely").

205 Davey & Goodnough, *supra* note 197.

sex offender facilities provide recreational opportunities such as movie nights and classes; a 20,000-book library, badminton courts, room for music and art therapy facilities,[206] weight rooms, a snack bar,[207] and health and social habit classes.[208] Visitation standards are unclear, though. Additionally, as noted, SVP facilities go beyond immigration facilities in providing furloughs to encourage reintegration.

*Oversight, Accountability and Transparency*

SVP detention similarly evidences a trend towards particularized standards and greater oversight (although again, with mixed results on the ground), and already incorporates a transparency that ICE historically has lacked. There are neither nationalized standards for SVP civil commitment nor model standards such as the ABA's recent immigration detention standards, likely due to the novelty of SVP civil commitment.[209] That said, at least seven states that civilly commit SVPs have instituted standards such as professional certification for individual treatment providers, best practice guidelines for professionals, program certification, risk assessment, notification, or registration.[210] Some of these state standards are binding,[211] unlike immigration standards.

SVP oversight is improving as well.[212] For example, New York has a specialized oversight office that monitors supervision and treatment plans and detainee progress.[213] Greater transparency is also provided through various state reports that track the progress of committees.[214]

The level of privatization of SVP commitment facilities is, to date, far

206 *Id.* (discussing California's facilities).

207 Office of Mental Health, *St. Lawrence Psychiatric Center,* http://omh.ny.gov/omhweb/facilities/slpc/facility.htm (describing New York's St. Lawrence Psychiatric Center).

208 Davey & Goodnough, *supra* note 197 (describing Pennsylvania classes such as "Athlete's Foot," and "Proper Table Manners.").

209 *Id.* ("As sex offender commitment centers are neither prisons nor traditional mental health programs, no national oversight body or standards exist").

210 Minnesota Department of Corrections, *Sex Offender Policy and Management Board Study,* www.doc.state.mn.us/publications/.../pdf/sexoffenderboard.pdf (December 2000) (discussing how Colorado, Illinois, Iowa, Pennsylvania, Tennessee, Washington, and Wisconsin all have standards for sex offender commitment).

211 *Id.*

212 Mary Prescott, *Invasion of the Body Snatchers: Civil Commitment After Adam Walsh,* 71 U. PITT. L. REV. 839, 859 (2010) ("adequate oversight mechanisms remain critical").

213 Naomi J. Freeman & Noel C. Thomas, Presentation at the Sex Offender Civil Commitment in Minnesota: Challenges and Opportunities Symposium (January 19, 2012) (presentation *available at* http://www.omh.ny.gov/omhweb/forensic/bsoet/).

214 *See, e.g.*, New York State *Annual Report, supra* note 108; Minnesota Office of the Legislative Auditor, *supra* note 197.

less than that of immigration detention. Florida is the only state with a fully privatized SVP commitment facility.[215] GEO Group's "Geo Care" division manages the Florida facility, with lower staffing levels and reduced costs, after the previous private contract was discontinued for mismanagement.[216] Virginia considered privatizing its state-owned facility, but ultimately rejected proposals because it found the state could provide better services at less cost.[217]

B. Procedures Attending SVP Civil Commitment

The procedural safeguards for SVP civil commitment generally approach, although do not uniformly equal, the level of due process provided to criminal defendants, and go far beyond that provided to immigration detainees.[218] Fifteen states statutorily provide for a jury trial at the commitment hearing,[219] with eleven of those states requiring a unanimous decision.[220] Eleven states require proof beyond a reasonable doubt to commit,[221] while nine states and the federal government require clear and

215 Chris Kirkham, *Private Prison Company May Take Over Virginia Sex Offender Center*, HUFFINGTON POST, July 16, 2012, *available at* http://www.huffingtonpost.com/2012/07/16/private-prisons-virginia-sex-offenders_n_1672526.html.

216 *Id.*

217 Associated Press, *Va. won't privatize sex offender treatment program*, Richmond Times-Dispatch (July 22, 2014), http://www.timesdispatch.com/va-won-t-privatize-sex-offender-treatment-program/article_ab95a5fa-372e-5f98-b906-001f8813b853.html.

218 *See generally*, W. David Ball, *The Civil Case at the Heart of Criminal Procedure: In re Winship, Stigma, and the Civil-Criminal Distinction*, 38 AM J. CRIM. L. 117 (2011).

219 ARIZ. REV. STAT. ANN. 36-3707 (2014); CAL. WELF. & INST. CODE § 6601 *et. seq.* (Deering 2014); FLA. STAT. ANN. § 394.916, 394.917 (West 2013); 725 ILL. COMP. STAT. 207/35 (2006); IOWA CODE § 229A.7 (1) (2009); KAN. STAT. ANN. § 59-29a07(a) (2011); MASS. GEN. LAWS ch. 123A (2014), *In re Johnstone*, 453 Mass. 544, 547 (2009); MO. REV. STAT. § 632.492, 632.495 (2013); N.H. REV. STAT. ANN. § 135-E:11 (2014); N.Y. MENTAL HYG. LAW §10.07(d), (f) (Consol. 2013); S.C. CODE ANN. § 44-48-90, 44-48-100(A) (2010); TEX. HEALTH & SAFETY CODE ANN. § 841.061(b) (2014); VA. CODE ANN. § 37.2-908(B) (2009); WASH. REV. CODE § 71.09.060(1) (2009); WIS. STAT. § 980.05(2) (2013). *See generally* Jefferson C. Knighton, Daniel C. Murrie, Marcus T. Boccaccini & Darrel B. Turner, *How Likely Is "Likely to Reoffend" in Sex Offender Civil Commitment Trials?*, 38 LAW & HUM. BEHAV, 293, 302 (2014).

220 CAL. WELF. & INST. CODE § 6601 *et. seq.* (Deering 2014); FLA. STAT. ANN. § 394.917 (West 2013); IOWA CODE § 229A.7 (1) (2009); KAN. STAT. ANN. § 59-29a07(a) (2011); MASS. GEN. LAWS ch. 123A (2014); MO. REV. STAT. § 632.495 (2013); N.Y. MENTAL HYG. LAW § 10.07(d) (Consol. 2013); S.C. CODE ANN. § 44-48-100(A) (2010); TEX. HEALTH & SAFETY CODE ANN. § 841.062(b) (2014); VA. CODE ANN. § 37.2-908(B) (2009); WASH. REV. CODE § 71.09.060(1) (2009). Five states, and the federal government, do not require a jury trial. 18 U.S.C. §§ 4247(d), 4248(a) (2014); CONN. GEN. STAT. §17a-498 (2013) (general commitment statute); MINN. STAT. § 253B.08, 09 (2013); N.J. STAT. ANN. 30:4-27.28, 27.29 (2012); N.D. CENT. CODE § 25-03.3-13 (2014); 42 PA. CONS. STAT. § 6403 (2014). The First, Eighth, Ninth, and Tenth federal Circuits have held no constitutional right to a jury trial exists in civil commitment proceedings. *See e.g. United States v. Sahhar*, 917 F.2d 1197, 1206-07 (9th Cir. 1990); *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1256 (10th Cir. 2008); *Poole v. Goodno*, 335 F.3d 705, 710-11 (8th Cir. 2003); *United States v. Carta*, 592 F.3d 34, 43 (1st Cir. 2010).

221 ARIZ. REV. STAT. ANN. 36-3701 (2014); CAL. WELF. & INST. CODE § 6604 (Deering 2014);

convincing evidence.[222] The SVP commitment hearing is commonly preceded by a probable cause determination of dangerousness.[223]

Appointed counsel is statutorily provided to indigent potential committees in every state and at the federal level.[224] Most states provide counsel at all stages of the proceeding, including the probable cause hearing,[225] and some states provide counsel upon the filing of a petition[226] or at the psychiatric evaluation.[227] Some states provide counsel on appeal.[228] The appointed counsel in most states is a specialized mental health defender,[229] although Florida provides a criminal public defender,[230] and New York provides representation by the criminal *pro bono* panel if specialized counsel is unavailable.[231]

All jurisdictions that provide trial-type hearings also provide a right to present evidence and concomitant evidentiary rights.[232] Judicial appeals are provided under similar standards as to criminal appeals.[233] Once a final commitment order is entered, commitment is typically indefinite, subject to

Iowa Code Ann. § 229A.7 (West 2013); 725 ILL. COMP. STAT. § 207/35 (2006); KAN. STAT. ANN. § 59-29a10 (2011); MASS. GEN. LAWS ch. 123 (2014) (*see, e.g.*, *Mendonza v. Commonwealth*, 423 Mass. 771, 783 (1996)); S.C. CODE ANN. § 44-48-100 (2010); TEX. HEALTH & SAFETY CODE ANN. § 841.062 (2014); WASH. REV. CODE. § 71.09.060 (2009); WIS. STAT. § 980.05 (2013).

222 18 U.S.C.A. § 4247, §4248(d) (2014); CONN. GEN. STAT. § 17a-498 (2014); FLA. STAT. ANN. § 394.917 (West 2013); MO. REV. STAT. § 632.495 (2013); MINN. STAT. ANN. § 253B.09 (2013); NEB. REV. STAT. § 71-1209 (2006); N.H. REV. STAT. ANN. § 135-E:11 (2007); N.J. STAT. ANN. § 30:4-27.24 (2012); N.Y. MENTAL HYG. LAW § 10.07 (Consol. 2013); N.D. CENT. CODE § 25-03.3-09 (2014); 42 PA. CONS. STAT. § 6404 (2014); VA. CODE ANN. § 37.2-908 (2009).

223 CAL. WELF. & INST. CODE § 6602, 6603 (Deering 2014) (providing for pre-hearing probable cause determination). In the federal system, an *ex parte* certification suffices. *Timms,* 700 F. Supp. 2d 764 (requiring judicial determination of probable cause to justify continued detention), *vacated on procedural grounds*, 627 F.3d 525 (4th Cir. 2010). States commonly provide a time limit on pre-hearing detention. *E.g.,* Minn. Stat. § 253B.08 (2005) (requiring a trial within 90 days of filing of the commitment petition). Federal law does not. *United States v. Timms*, 799 F. Supp. 2d 582, 596 (E.D.N.C. 2011).

224 *See* 18 U.S.C. § 4247(d) (2006) (citing 18 U.S.C. § 3006A (2006)'s procedures for appointed representation of federal criminal defendants); *see also* 725. Ill. Comp. Stat. 207/25(c)(1) (2006) ("If the person is indigent, the court shall appoint counsel").

225 S.C. Code Ann. § 44-48-80(C)(1) (2010).

226 N.H. Rev. Stat. Ann. § 135-E:23 (2007).

227 N.Y. Mental Hyg. Law § 10.03(d) (Consol. 2011) (appointed counsel at the psychiatric evaluation if first).

228 N.Y. Mental Hyg. Law § 10.13(c) (Consol. 2007).

229 *See, e.g.*, N.Y. Mental Hyg. Law § 10.06(c) (Consol. 2012).

230 Fla. Stat. § 394.916(3); *see, e.g.*, In re May, 975 So. 2d 579, 581 (Fla. Dist. Ct. App. 2008) (explaining that under § 394.916(3) a person facing commitment is entitled to counsel during commitment hearings at state expense)).

231 N.Y. Mental Hyg. Law § 10.06(c) (Consol. 2012).

232 *See, e.g.*, 18 U.S.C. § 4247(d) (2006) (potential committee "shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing."); U.S. v. Edwards, 777 F. Supp. 2d 985, 995-96 (E.D.N.C. 2011) (stating *Brady* evidentiary disclosures must be made in Walsh Act civil commitment proceedings).

233 *See* United States v. Hall, 664 F.3d 456, 462 (4th Cir. 2012).

periodic review.[234]

## IV. The Emerging Civil Detention Paradigm: A Criminally Incarcerative, Lower Security Model With Increasing Process

From a comparison of immigration detention and SVP civil commitment, two major trends emerge: (1) improved conditions, comparable to lower-security criminal incarceration (and less restrictive in some aspects); and (2) stronger procedural protections than in ordinary civil proceedings, albeit still less than criminal protections. SVP commitment has further advanced towards fulfilling both trends. But in both systems, to the extent tension exists between incarceration and the particular needs of detainees owing to their noncriminal status, incarceration generally trumps. Inevitably, in both systems, complaints have resulted that civil detention is merely jail under a different name.[235] Indeed, as the SVP civil commitment system has already incorporated reforms that immigrant advocates are currently advocating for,[236] this comparison may cause reevaluation of advocates' long-term goals.

### A. Round-the-Clock Confinement With Lower Security, Improved Conditions, and Greater Programmatic and Recreational Opportunities

The emerging civil detention paradigm still presumptively relies on round-the-clock confinement within a secure perimeter—yet inside the perimeter, with lower security, improved conditions and greater programmatic opportunities, at least for those detainees classified as lower-security. Still, incapacitation remains the primary goal in both regimes. Thus, in terms of the deprivation of liberty imposed, the civil detention paradigm still most closely resembles criminal incarceration. So long as those confined cannot leave, they and their families suffer the same collateral ef-

234 *See, e.g.*, 18 U.S.C. § 4247(e) (2006).

235 *See* Rappleye, *supra* note 194 (lawyer litigating conditions said, "As a person off the street you walk in and think, my goodness, this is certainly a prison"); *see also* Laura Sullivan & Amy Walters, *Trying to Make Immigrant Detention Less Like Prison*, NPR.ORG (Mar. 14, 2012) http://m.npr.org/news/front/148538183?singlePage=true (quoting ACLU-Texas director describing Karnes "It's a prison. It's a clean, nice-looking prison . . . If it walks like a duck . . ."); Puthoopparambil, Maina-Ahlberg & Bjerneld Soorej, *supra* note 112, (Swedish detainees, in specialized facility operated by civil servants, without uniforms and with cellphone and Internet access, called it a "prison with extra flavours").

236 *See e.g.* Epstein & Acer, HUMAN RIGHTS FIRST, JAILS AND JUMPSUITS, *supra* note 10 (arguing for conditions reforms); Ahilan Arulanantham, American Civil Liberties Union, Hearing, Senate Judiciary Committee, *Building an Immigration System Worthy of American Values*, (Mar. 20, 2013) (arguing for procedural reforms such as appointed counsel and bond hearings), *available at* https://www.aclu.org/files/assets/testimony_of_ahilan_arulanantham_for_3_20_13_senate_judiciary_committee_hearing_final_3_22_13.pdf.

fects—loss of work and resultant economic impacts, loss of personal contact,[237] psychological harm on the individual detained,[238] and less ability to meaningfully participate in legal proceedings, whether instant or parallel proceedings.[239] (Even if counsel is provided, detention would still impact detainees' ability to participate in proceedings, likely producing a higher chance of a negative outcome).[240]

In immigration detention, along these lines, ICE's recent standards do not depart from the round-the-clock incarceration model embodied in comparable criminal standards.[241] The reforms envisioned in the latter categories Dr. Schriro identified—conditions of confinement, programs and recreational opportunities, and oversight and accountability—have not carried over to the first category, overarching strategy and standards, in which the model remains four walls and a locked door.[242] This is certainly true given current practices, but would be true even if ICE PBNDS detention standards were fully implemented. And this is despite indications that immigration detainees pose comparatively less public safety risk than criminal detainees,[243] and no more flight risk, at least.[244]

Thus, the civil detention model still resembles jail. The similarity is particularly evidenced by the fact that both systems subjugate their uniquely

237 Alschuler, *supra* note 35, at 517.

238 Section I.C, *supra*.

239 *See* Rogerson, *supra* note 141; *Accessing Justice*, *supra* note 142, at 374.

240 Baradaran & McIntyre, *supra* note 76, at 555 (summarizing criminal studies that detail negative impacts of detention on case outcomes).

241 *See* Brittney Nystrom, *Promise of Better Detention Conditions Must be Followed by Action*, National Immigration Forum Blog (March 1, 2012), http://immigrationforum.org/blog/display/blog-promise-of-better-detention-conditions-must-be-followed-by-action ("the new changes won't address the fundamental contradiction of immigration detention centers operating like correctional institutions.").

242 Kalhan, *supra* note 17, at 24 (stating that the government's reform proposals "target excessive conditions of confinement but leave other excessive practices intact.").

243 Schriro noted that the "demeanor" of immigration detainees is different from criminal detainees, with most immigration detainees seeking "repatriation or relief," exercising "exceptional restraint," and having a "low propensity for violence." Schriro Report at 4, 21. In 2009, her survey found that only 11 percent of immigration detainees had committed violent crimes. *Id.* at 2. Separately, Schriro has noted that the immigration detainee population has "appreciably well-developed" life skills, being more likely to have come from "intact families," with "jobs," "families with minors," and a "stake in the community"—as she put it, "more diversity than you would see in the criminal justice system." Human Rights First, *Dialogues on Detention: What is "Civil" Detention?* at 0:49-4:57 (Sept. 12, 2012), https://www.youtube.com/watch?v=QM7zZe7I1OM (comments by Dora Schriro).

244 Recent studies of U.S. immigrants in alternatives to detention have showed extremely high compliance rates. *See* Doris Meissner, Donald M. Kerwin, Muzaffar Chishti, and Claire Bergeron, THE RISE OF A FORMIDABLE MACHINERY, MIGRATION POLICY INSTITUTE 130 (Jan. 2013) (in fiscal year 2010, about 94 percent of U.S. alternatives to detention participants appeared at their immigration hearings), *available at* http://www.migrationpolicy.org/research/immigration-enforcement-united-states-rise-formidable-machinery; VERA INSTITUTE OF JUSTICE, TESTING COMMUNITY SUPERVISION FOR THE INS: AN EVALUATION OF THE APPEARANCE ASSISTANCE PROGRAM ii (2000) (90 percent of supervised participants appeared in immigration court), *available at* http://www.vera.org/sites/default/files/resources/downloads/INS_finalreport.pdf.

civil aims to the incapacitative rationale—the one goal that civil detention shares with criminal incarceration.[245] Immigration detention has the dual goal of preventing flight before deportation, which can be adequately addressed through less restrictive measures than incarceration.[246] SVP commitment regimes have the dual goal of treatment and eventual rehabilitation, which would be better furthered by wider use of supervised release, furloughs and outpatient programs. Yet both systems, for the most part, eschew those alternatives in favor of incapacitation behind a locked door.[247] And programs designed to meet the uniquely civil needs of the population, whether access to pending proceedings, or access to treatment, are typically provided only to the extent they do not frustrate incapacitation.[248] When the shared criminal goal takes precedence over civil goals, it is hard to identify a meaningful role that the "civil" label plays.

This is not to say that detention reforms to date have been valueless to detainees. Indeed, Schriro has stated that immigrant detainees' "conditions of detention should be at least the same and never worse than individuals who are being held on criminal charges," and effectuating that "would immediately raise the bar in so many different ways."[249] Implementation of the ICE PBNDS would further this goal, as would implementation of the ABA standards, even further. But, it raises the question of whether the civil label of reform has value.

The expressive value of detention conditions reform termed "civil" appears to be no different than the expressive value of criminal incarceration. Law has expressive value, as many have set out,[250] as does its enforcement.[251] On the one hand, both the Administration's recent immigration detention reforms and state SVP commitment practices appear largely to be

245 Hendricks, 521 U.S. at 373 (Kennedy, J., concurring). Indeed, Nora Demleitner noted the "ease with which civil instruments can be used to achieve incapacitative goals." Demleitner, supra note 92, at 1633.

246 *See* FREED BUT NOT FREE, *supra* note 70, at 10.

247 For example, the U.S. interprets INA § 236(c), which mandates that the government "take into custody" certain criminal aliens, to equate "custody" with incarcerative detention, rather than less restrictive forms of custody such as electronic monitoring or supervised release, which U.S. criminal systems routinely employ. *Id.* at 24-25. *See also* Legomsky, *supra* note 18, at 541 (arguing that public safety concern primarily animates mandatory detention).

248 *Cf.* Demleitner, *supra* note 92, at 1634-35.

249 University of Florida Center for Latin American Studies, *Loyola University Conference: Imprisoned, Forgotten, and Deported: Immigration Detention, Advocacy, and the Faith Community* at 1:05 (Jan. 18, 2012), http://www.youtube.com/watch?v=37InDqyjrSo&feature=youtu.be.

250 *See e.g.*, Elizabeth S. Anderson and Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L.REV. 943 (1995); Murray Edelman, THE SYMBOLIC USES OF POLITICS (1964).

251 *See e.g.*, Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. REV. 858 (2014); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 533 (2001).

well-intentioned efforts to put into practice the legal distinction between jail, which is used pursuant to a criminal process, and civil detention, which is not. But in their implementation, these efforts have functioned more as an expressive pun (i.e. "more civil" detention) rather than a meaningful legal norm.[252]

Moreover, because the physical structure of civil detention still resembles jail, the expressed message still remains one connoting criminality of the detainees, subsuming government efforts to express reform.[253] Physical structures express messages as well, as both criminal[254] and immigration[255] scholars have articulated. And since American society most strongly associates incarceration with criminal punishment, as Dan Kahan has set out,[256] I posit here that so long as civil detention in locked, secure facilities like jails remains widespread, its use will expressively connote criminality, even with conditions reform.[257] As Schriro noted, "Immigration Detention and Criminal Incarceration detainees tend to be seen by the public as comparable."[258] This is all the more troubling because theoretically, civil detention should not reflect expressive messages, as its aim should be prevention, not to communicate the moral condemnation that accompanies criminal punishment.[259] But, the expressive message connoted by incarceration may help explain why civil detention has nearly always been applied to perceived "dangerous others."[260]

ABA model immigration standards do point the way beyond the locked door, in two ways. The first is the ABA standards' comparative embrace of

252 *Cf.* Demleitner, *supra* note 92, at 1631 (calling civil framing of SVP commitment laws "forced").

253 *See also* Section V. B.

254 *See e.g.*, Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 384 (1997); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996); Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157, 2191 (2001).

255 Several scholars have explored the expressive message of the U.S. southern border fence, for example. Pratheepan Gulasekaram, *Why a Wall?*, 2 U.C. IRVINE L. REV. 147, 161-62, 169-70 (2012); Mary Fan, *When Deterrence and Death Mitigation Fall Short: Fantasy and Fetishes as Gap-Fillers in Border Regulation*, 42 LAW & SOC. REV. 701, 711 (2008); Linda Bosniak, *Between the Domestic and the Foreign: Centering the Nation's Edges*, 24 CONSTITUTIONAL COMMENTARY 271, 276 (2007).

256 Kahan, *What Do Alternative Sanctions Mean*, 63 U. CHI. L. REV. at 591 ("Imprisonment is the punishment of choice in American jurisdictions.... for those who commit serious criminal offenses, the law strongly prefers one form of suffering--the deprivation of liberty--to the near exclusion of all others."). *See also* Kalhan, *supra* note 24, at 42 (explaining that civil immigration detention is more aptly termed "immcarceration").

257 *See also* Mark Noferi, *Mandatory Immigration Detention for U.S. Crimes: The Noncitizen Presumption of Dangerousness*, IMMIGRATION DETENTION, RISK AND HUMAN RIGHTS (forthcoming 2014), *available at* http://works.bepress.com/cgi/viewcontent.cgi?article=1005&context=mnoferi. *Cf.* Mcleod, *supra* note 19, at

258 *See* SCHRIRO REPORT, *supra* note 4, at 4.

259 *Cf.* Kahan, 63 U. CHI. L. REV. at 598-600.

260 Resnik, *supra* note 32, at 663.

furloughs for "humanitarian reasons," including home visits for those detained at length and for parallel proceedings, with supervision or electronic tracking if necessary.[261] Some states with SVP commitment already incorporate furloughs with supervision to a greater degree, providing a model for immigration detention practices. Increased use of immigration detention furloughs would better recognize the more stable nature of immigrant detainees' lives outside the facility—at least in facilitating family contact, if not stable work. Yet ICE currently lags even behind criminal justice practices in providing furloughs.[262]

Second, and further, the ABA standards implicitly may recommend qualitatively different facilities without 24/7 "controlled access" (only "if necessary"), as part of a "continuum of strategies."[263] Here again, SVP commitment is further ahead, with Texas, New York, and North Dakota all employing an outpatient model to varying degrees.

These two strategies differ in their default presumption. With furloughs, the presumption is jail, but temporary release with supervision for good behavior; in nonsecure facilities, the presumption is release with supervision, but redetention for violations. For example, European countries more widely use "nonsecure" or "semi-secure" immigration facilities.[264] Nonsecure facilities or release would also likely lead to a lesser expressive connotation of criminality.

### B. More Robust Criminal-Like Due Process Protections

Secondly, the emerging civil detention paradigm is marked (perhaps ironically) by robust due process protections approaching that of a criminal trial. Again, SVP civil commitment is further towards the model than immigration detention, here because its population is largely comprised of citizens, regarding whom there has been little question that rights apply.[265]

261 ABA Standards, *supra* note 25, § X.B.3, 4.

262 Furloughs have long been a part of criminal incarceration practices, under the theory that furloughs foster rehabilitation and eventual integration into society. *See* Dusty Collier, Note, *The "Ideal" Pendulum Swing: From Rhetoric to Reality*, 13 BERKELEY J. CRIM. L. 175, 185 (2008) (describing support for furloughs as part of the criminal movement towards "indeterminate sentencing"); Michael M. O'Hear, *Beyond Rehabilitation: A New Theory Of Indeterminate Sentencing*, 48 AM. CRIM. L. REV. 1247 (2011). The comparative absence of furloughs in immigration detention may be because immigration detention presumes eventual deportation, and thus immigration authorities are historically unconcerned with rehabilitation. *Cf.* Hernandez, *supra* note 21, at 1401 (arguing that rehabilitation is inapposite to immigration detention because rehabilitation requires remorse).

263 ABA Standards, *supra* note 25, at 4, § II.C & n. 1 and 12, § IV.B.8.

264 Alice Edwards, *Measures of First Resort: Alternatives to Immigration Detention in Comparative Perspective*, 7 THE EQUAL RIGHTS REVIEW 117, 118 (2011).

265 *Cf.* Geoffrey Heeren, *Persons Who Are Not The People: The Changing Rights Of Immigrants In The United States*, 44 COLUM. HUMAN RIGHTS L. REV. 367 (2013).

Still, as courts impose procedural due process protections on immigration proceedings, that state of affairs is likely to change.[266] Indeed, although some see legislation for appointed counsel in immigration proceedings as politically unlikely,[267] in part due to immigrants' historically disfavored status, Congress provided appointed counsel to SVP committees with little debate and no evident backlash.[268]

That said, the provision of procedural safeguards, I posit, affirms that the proceedings involve criminal-like stakes,[269] if not that the litigant is criminal-like himself, in our U.S. society that has come to associate appointed counsel with the criminal process.[270] Process has an expressive value,[271] as well as a political component and political impact, as William Stuntz and others have noted.[272] Expressively, there is nothing inherently "civil" about appointed counsel—perhaps more the opposite.[273] Providing appointed

266 *See* Hiroshi Motomura, *The Curious Evolution Of Immigration Law: Procedural Surrogates For Substantive Constitutional Rights*, 92 COLUM. L. REV.1625, 1631-32 (1992).

267 Carla Reyes, *Access to Counsel in Removal Proceedings: A Case Study for Exploring the Legal and Societal Imperative to Expand the Civil Right to Counsel*, 17 D.C. L. REV. 131, 154 (2014) (calling federal legislation for appointed counsel "not politically feasible"); Erin B. Corcoran, *Bypassing Civil Gideon: A Legislative Proposal to Address the Rising Costs and Unmet Legal Needs of Unrepresented Immigrants*, 115 W. VA. L. REV. 643 (2012) (arguing for legislative proposal for qualified non-lawyer representatives, on cost-efficiency grounds).

268 The Congressional Record is silent as to any debate on appointed counsel. *See* 18 U.S.C. §4247(d) (2006). In this vein, Congress also provided Al Qaeda military detainees appointed counsel with little evident backlash. *E.g.*, National Defense Authorization Act for Fiscal Year 2012, 125 STAT. 1298 §1024(b)(2) (2011). *See generally* Mark Noferi, *Deportation Without Representation*, SLATE.COM (May 15, 2013), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/05/the_immigration_bill_should_include_the_right_to_a_lawyer.html#.

269 Indeed, under the Supreme Court's Constitutional rulings to date, counsel has generally only been provided in civil proceedings when liberty is denied, and not in other civil proceedings with high stakes. *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 26-27 (1981) (not requiring counsel in parental termination proceedings, citing "the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty"). Others have argued, though, that as states blur the line between civil and criminal proceedings, with civil proceedings increasingly taking on the characteristics of criminal matters (serious consequences in an adversarial process against the government), the formalistic line between appointed counsel in criminal proceedings and not in civil proceedings is becoming anachronistic. Chad Flanders and Alexander Muntges, *The Trumpet Player's Lament: Rethinking The Civil Gideon Movement*, 17 U.D.C. L. REV. 28 (2014).

270 *See* Dickerson v. United States, 530 U.S. 428, 430 (2000) ("[*Miranda*] warnings have become part of our national culture"). For similar reasons, a public relations firm recently hired to advocate for Central American immigrant children advised against making arguments for counsel that referenced the criminal right to appointed counsel. The firm advised, "Child refugees should not be described like criminals on trial. Due process is a powerful concept but language about trials, judges and lawyers can invoke associations with crime, and suggest that refugees have a burden of guilt. Consider softer language ('these children deserve a chance to tell their story, with full due process')." Hattaway Communications, *Message Landscape: Child Refugees* (Aug. 2014) (on file with author).

271 *See* Judith Resnik, *Due Process: A Public Dimension*, 39 FLA. L. REV. 405, 419-420 (1987).

272 *See generally* William J. Stuntz, *The Political Constitution Of Criminal Justice*, 119 HARV. L. REV. 780, 790-807 (2006).

273 Notably, as civil right to counsel becomes more entrenched in American society, this may change, and Americans may not necessarily associate appointed counsel with the criminal process. *Cf.* John Pollock, *The Case Against Case-By-Case: Courts Identifying Categorical Rights to Counsel in*

counsel to immigration detainees, for example, would essentially put civil detainees on par with most criminal pretrial detainees, at least in one respect. Indeed, providing appointed counsel to immigrants may be more politically viable than "civil" detention conditions improvements,[274] if counsel might expressively affirm a perception of immigrant criminality in the public eye.

All this is not to say that appointed counsel would not be enormously valuable to those who receive it. Appointed counsel would almost certainly reduce the incidence of pretrial detention, at least in formal removal proceedings where a detainee, now represented, could challenge bond at a hearing.[275] As to final deportation outcomes, immigration studies show a marked disparity between represented and unrepresented detainees,[276] and counsel would likely save thousands each year from deportation.[277]

But, appointed counsel without parallel substantive reforms to the harshness of immigration law—i.e. deportations with detention and without discretion—may result in a system that is fair but not just. As critics have alleged of our modern criminal system,[278] the immigration system might become a system with many lawyers and much incarceration. William Stuntz argued that in the criminal realm, court-ordered procedural protections led to a decades-long legislative backlash of substantive overcriminalization.[279] It is unclear if a similar dynamic would occur in immigration,

*Basic Human Needs Civil Cases*, 61 DRAKE L. REV. 763, 781-84 (2013) (for example, 44 states and the District of Columbia appoint counsel in parental termination proceedings, as of spring 2013).

274 *See* Section V.B. Further, the growing trend to provide procedural safeguards to preventive detention raises the question of the limits of procedural due process to render preventive detention substantively or morally fair. To provide an extreme example, no one has credibly argued that providing appointed counsel in the *Korematsu* detention process, to more accurately determine whether one was of "Japanese ancestry," would have saved those proceedings from criticism. Korematsu v. United States, 323 U.S. 214, 217 (1944). I will explore this topic in future research.

275 Dr. John Montgomery, NERA Economic Consulting, *Cost of Counsel in Immigration: Economic Analysis of Proposal Providing Public Counsel to Indigent Persons Subject to Immigration Removal Proceedings* ¶ 17 (May 28, 2014), available at http://www.nera.com/67_8564.htm, *citing* Douglas L. Colbert, Ray Paternoster, & Shawn Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 101 (2002) (empirical study showed that representation at criminal bail hearings improved results for defendants and reduced pretrial detention).

276 NYIRS, *Accessing Justice*, *supra* note 142, at 363-64 (18 percent of detainees with representation succeeded, compared to 3 percent without representation).

277 Montgomery, *Cost of Counsel in Immigration*, *supra* note 275, at 21, 24 (estimating that providing appointed counsel in formal removal proceedings nationwide would reduce deportations by 15 percent among those detained throughout their case, and 6.5 percent among those detained but released, thus avoiding nearly 15,000 deportations each year).

278 McLeod, *supra* note 19, at 168-73, *citing* William Stuntz, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011). *See also* McLeod at 168 (arguing that immigration enforcement structurally reinforces racial hierarchies), *citing* Michelle Alexander, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 96-97 (2012).

279 Stuntz, COLLAPSE at 792-93; William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 519-20 (2001). Adam Cox and Cristina Rodriguez raise the possibility of

and the potential interplays require greater examination than space permits here. But, it suffices to say that procedural protections such as appointed counsel, while benefiting detainees in the current system, without more may also have the unintended consequence of legitimizing as "fair" a substantively unfair system.[280]

Allegra McLeod argues more fundamentally for "a shift in the governing crime-centered conceptual and enforcement framework"—specifically, one that "legislatively narrowed the scope, reduced the harshness, and revised the crime-centered enforcement model in the immigration domain."[281] Correspondingly, I argue here that in the long-term, dramatically reducing the number of immigration detainees, and reducing mandatory deportation grounds, may be preferable to providing lawyers to several hundred thousand detainees a year to litigate impossible cases. And if the solution is to take immigration law out of its currently "crime-centered framework" in politics and discourse,[282] the ultimate answer may be to drastically reduce detention, with its expressive message of criminality, rather than only to provide appointed counsel, potentially with its own implicit message of criminality.

### C. Use of Private Detention Facilities

I also make an additional policy point regarding the privatization of civil detention facilities. The new "civil detention paradigm" suffers from deficient institutional knowledge, standards, and oversight due to the novelty and unclear nature of civil detention. Both the immigration detention and SVP commitment systems have made strides towards specialized standards and oversight. But particularly in the immigration context, the lack of institutional knowledge has contributed to a reliance on private prison and detention companies that may potentially countermand any advances in conditions from specific standards and increased oversight.[283]

a similar dynamic in the immigration system. Adam Cox & Cristina Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458, 529 (2009).

280 McLeod, *supra* note 19, at 173 ("a rights revolution in immigration procedure may fall short in reorienting substantive immigration law"); *id.* at 170 ("As it has in the criminal law context, an immigration procedural rights revolution may have the unintended consequence of legitimizing the increasingly harsh substantive immigration law by offering, in principle, a panoply of robust procedural protections seldom enjoyed by defendants in practice and against which harsh substantive laws can be defended.");

281 McLeod, *supra* note *19*, at 172-73.

282 *Id.*

283 *See Improving Conditions*, *supra* note 4, at 1442 (explaining that the ICE "has considerable expertise and infrastructure in the area of immigration enforcement but not in immigrant detention"). SVP commitment has relied less on private facilities, although similar incentives to do so are present.

Private prison companies possess incentives to maximize profits by providing substandard, less expensive care to inmates, and keeping facilities chronically understaffed and undertrained.[284] For example, one study found that private prison employees receive 58 hours less training and receive about $5,327 less in annual salary than their public counterparts.[285] Another Department of Justice study found that privately operated facilities have significantly lower staffing levels compared to publicly operated prisons, leading to a higher rate of assaults on staff and inmates.[286] The same study found "squalid and inhumane living conditions" and "exploitation of the inmates" in private facilities, caused in part by a lack of contract supervision.[287]

Oversight over private facilities appears more challenging, in part because ICE's only remedy is to terminate a contract (which it does rarely),[288] and in part because private companies are not subject to Freedom of Information Act requests.[289] Oversight of private companies is not theoretically impossible, as Alexander Volokh has pointed out.[290] But practically speaking, ICE has yet to exercise effective oversight over private facilities in the immigration context.[291]

Given this, it is incongruous at best and counterproductive at worst that ICE seeks to implement its new civil detention reforms entirely through private companies.[292] If the trend continues, without meaningful oversight on contracts, the profit incentive on the ground may countermand any structural advances that might encourage better conditions of confinement.

284 *See, e.g.*, Kalhan, *supra* note 24, at 52. *See also* Martin, *supra* note 164, at 1481; *The Influence of the Private Prison Industry in Immigration Detention*, DET. WATCH NETWORK http://www.detentionwatchnetwork.org/privateprisons (last visited March 12, 2012).

285 *See* Curtis R. Blakely & Vic W. Bumphus, *Private and Public Sector Prisons—A Comparison of Select Characteristics*, 68(1) FED. PROB. 27, 29 (2004), *available at* http://www.uscourts.gov/uscourts/FederalCourts/PPS/Fedprob/2004-06/prisons.html.

286 *See* James Austin & Garry Coventry, *Emerging Issues on Privatized Prisons*, MONOGRAPH 1, xi., *available at* https://www.ncjrs.gov/pdffiles1/bja/181249.pdf.

287 *See* Mason, *supra* note 10, at 12 ("[T]he emphasis on cutting costs to ensure profits can lead to understaffing and employees with less training, lower pay and benefits, and higher turnover rates. This has made cases of violence, abuse, negligence and substandard healthcare more common").

288 Sthanki, *supra* note 21, at 465.

289 *See, e.g.*, *id.* at 16 (demonstrating how private companies exacerbate the lack of transparency in the already-opaque immigration detention system, such as when ICE never provided report authors a complete and accurate list of private facilities after months of requests); *see also id.* at 8-9 (explaining how this would change if pending Senate legislation passed); *see also* Mark Noferi, *Appointed Counsel*, *supra* note 42.

290 Alexander Volokh, *A Tale of Two Systems: Cost, Quality, and Accountability in Private Prisons*, 115 HARV. L. REV. 1868, 1871, 1886-1890 (2002) (arguing that performance of private prisons could rise with more robust standards, increased transparency and oversight, and legitimate competition).

291 Sthanki, *supra* note 21, at 456, 465.

292 Mason, *supra* note 10, at 5 (ICE seems "prepared to primarily rely on private companies to address concerns" regarding conditions).

## V. Looking Forward: Assessing the Civil Detention Model

In sum, it appears that the "civil" label given U.S. immigration detention reforms to date has little substantive meaning, either regarding the deprivation of liberty, or the expressed message of civil detention. If anything, the analysis here illustrates the continuing asymmetric incorporation of criminal norms—and now reforms—into immigration law.[293] Viewed this way, conditions and process improvements in immigration law are simply decades behind their incorporation into criminal law.[294]

That said, this analysis begs the question of what truly "civil" detention would entail. Looking forward, I preliminarily offer the first a definitional framework for a system of civil custody and supervision—a more accurate term than "civil detention"—and provide recommendations to enact it into U.S. immigration law. As a postscript, I also explore the political viability of civil detention reform as conceptualized and implemented to date.

### A. A Civil Immigration Detention Framework: Less, Shorter, and a Different Nature of Detention

Ultimately, rather than "civil detention," the more pertinent inquiry would be the overall framework of "civil custody and supervision," with detention as one part. The guiding maxim would be, as the Supreme Court stated, "[i]n our society, liberty is the norm, and detention prior to [criminal] trial or without [criminal] trial is the carefully limited exception."[295] The aim would be prevention, rather than total incapacitation as an assumed default. The legal test would be the proportionality of the ends used, and attendant deprivation of liberty, to the particular aims of the particular laws.[296] Such a proportionality inquiry might first, identify and

293 Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, And Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006) ("Immigration law today is clothed with so many attributes of criminal law that the line between them has grown indistinct"); Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. at 1288(describing "collaborative relationship" between criminal and immigration enforcement authorities that "undermines the criminal-civil divide").

294 *See* Malcolm M. Feeley & Van Swearingen, *The Prison Conditions Cases and the Bureaucratization of American Corrections: Influences, Impacts and Implications*, 24 PACE L. REV. 433 (2004) (describing advancement of prison conditions through litigation and other means); Ingrid Eagly, *Gideon's Migration*, 122 YALE L.J. 2282, 2305 (2013) (summarizing development of criminal right to counsel before *Gideon v. Wainwright*, 372 U.S. 335 (1963)).

295 United States v. Salerno, 481 U.S. 739, 755 (1987).

296 *See* FLYNN, *supra* note 33, at 4 (assessing whether detention practices are proportionate to the aims of immigration enforcement by examining the type of detention centre). *See also* Resnik, *supra* note 32, at 584 ("legally diverse" preventive detention systems "must distinguish among and classify detainees to justify why a particular subset is to be confined in more restrictive conditions than others");

place along a spectrum the relevant deprivation of liberty; second, ascertain whether that deprivation of liberty is sufficiently tailored to the relevant civil or criminal ends; and third, whether the deprivation is grossly disproportionate.[297]

To give more concrete detail to the kind of regime that would meet such a proportionality inquiry, converting immigration detention into civil custody and supervision would likely entail three reforms: (1) less *incidence* of detention, with (2) shorter *duration*, and (3) a different *nature* of liberty restrictions, outside the traditional 24-7 secure facility model.

***Incidence***: If immigration detention were truly tailored to its goals of preventing flight risk and danger, there would almost surely be far less of it.[298] There is no comprehensive study assessing the actual risk that immigrant detainees pose. But the current immigration system detains individuals dramatically more frequently than the criminal pretrial system, its closest structural analog, even though it stretches credulity that immigration arrestees could be that much more inclined than criminal arrestees to abscond or commit crimes.[299]

For example, a New York study found that from 2005 to 2010, ICE discretionarily denied bail to 71 percent of arrestees, mandatorily denied bail to 9 percent, and set extremely high bonds for the rest, such that over half of them could not afford release. Contrastingly, in New York criminal courts, 1% of criminal defendants are held without bail; 31% receive bond, with 80% of those bond settings $1,000 or below; and 68% are released on recognizance.[300] The proportions of detention incidence are nearly reversed. Meanwhile, the available data indicates that immigration arrestees are no more likely to abscond immigration proceedings than criminal ar-

Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 U.C. IRVINE L. REV. 415, 416-18 (2012) (discussing proportionality and immigration law generally); Kalhan, *supra* note 24, at 49 (calling immigration detention a "quasi-punitive regime far out of alignment with immigration custody's permissible purposes").

297 Wishnie at 420. This might resemble what William Stuntz recommended in the criminal realm—"some sort of constitutional proportionality principle with bite." William Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEM. LEGAL ISSUES 1, 30 (1996). *See also* Sherry F. Colb, *Freedom From Incarceration: Why Is This Right Different From All Other Rights*, 69 N.Y.U. L. REV. 781, 799 (1994) (taking issue with other theories governing proportionality review of substantive criminal law).

298 *See* Kalhan, *supra* note 24, at 48 ("existing policies and practices almost certainly have caused over detention); Das, 80 U. CHI. L. REV. at 145 (arguing for less ("optimal") detention from an institutional design perspective); Hernandez, *supra* note 21, at 1412 (reforms would be "likely to lead to less detention than we experience today").

299 ICE's data seems to recognize this as well. As Hernandez noted, an early risk assessment that ICE performed on its detention population showed that on a single day in May 2011, ICE classified only 19 percent of its detainees as high-risk. Hernandez, *supra* note 21, at 1412-13, citing HUMAN RIGHTS FIRST, JAILS AND JUMPSUITS at 2.

300 Occhiogrosso-Schwartz, *Insecure Communities, at* 8-11.

restees in criminal proceedings,[301] and are less likely to commit crimes.[302]

To better tailor detention to its goals, Congress (and DHS, where administratively possible) could first eliminate mandatory detention provisions.[303] Yet discretionary detention still comprises the bulk of detention decisions. Shifting the burden on these decisions to DHS, rather than the noncitizen, would likely reduce incidences of discretionary detention. S. 744 provided an example, but DHS could also implement solutions administratively.[304]

Additionally, ICE nationally deployed a risk assessment tool in 2013, which assesses flight and public safety risk and recommends detention and release.[305] Theoretically, the tool has potential to reduce incidence of detention, as it has in some criminal justice jurisdictions.[306] That said, ICE has not made public data on the risk assessment tool, and it is unclear if the

301 In the 1990s, before the advent of electronic tracking devices and supervision techniques, studies found that nearly 80 percent of deportable "criminal aliens" appeared for hearings. U.S. Senate Committee on Governmental Affairs, *Criminal Aliens in the United States*, S.Rep. No. 104-48 (1995). In 2009, in the 75 largest U.S. counties, 83 percent of adult felony defendants who were released pretrial attended all court hearings (virtually all with lawyers, as well). U.S. Department of Justice, Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties, 2009 - Statistical Tables*, p. 21 Table 18, (December 2013), http://www.bjs.gov/content/pub/pdf/fdluc09.pdf. Moreover, in criminal proceedings, studies show a defendant's likelihood of failing to appear is "statistically unaffected by... immigration status." Allyson Theophile, *Pretrial Risk Assessment and Immigration Status: A Precarious Intersection*, FEDERAL PROBATION 73:2 (2009).

302 In criminal proceedings, for example, released unauthorized immigrants were re-arrested pretrial at lower rates than US citizens—0.0 to 3.2 percent, compared to 1.9 to 4.5 percent. Theophile at 73:2

303 Congress could amend 8 U.S.C. § 1225(b)(1)(b)(iii)(IV) so that detention in expedited removal "may," not "shall," be used pending a credible fear determination. In addition, DHS could allow parole for asylum seekers in expedited removal arriving between ports of entry, to mitigate detention after credible fear is found. *See* Section I.A., *supra*. DHS could administratively reinterpret 8 U.S.C. § 1226(c), which mandates "custody," to allow for electronic supervision. Memorandum from the American Immigration Lawyers Association to David Martin (Aug. 6, 2010), *available at* www.nilc.org/document.html?id=94. DHS could also administratively reinterpret reinstatement of removal provisions to allow for release for those pursuing asylum. Gilman, *Realizing Liberty*, 36 FORDHAM INT'L L. J. at 312. Moreover, Congress could repeal the "bed quota" which requires 34,000 detention spaces, and exacerbates detention as a default. A recent DHS report found that individual field offices vary detention practices based on the quota. DHS OFFICE OF INSPECTOR GENERAL, ICE'S RELEASE OF IMMIGRATION DETAINEES (2014), *available at* http://www.oig.dhs.gov/assets/Mgmt/2014/OIG_14-116_Aug14.pdf.

304 *See* 8 C.F.R. § 1236.1(c)(8) (2012).

305 Robert Koulish & Mark Noferi, *Unlocking immigrant detention reform*, BALTIMORE SUN (Feb. 20, 2013), *available at* http://www.baltimoresun.com/news/opinion/oped/bs-ed-immigrant-detention-20130220,0,5653483.story; Mark Noferi & Robert Koulish, *Boost protections for detained immigrants*, NEWARK STAR-LEDGER (May 1, 2013), *available at* http://blog.nj.com/njv_guest_blog/2013/05/boost_protections_for_detained.html. The 2011 ICE PBNDS standards also incorporated a risk assessment, but only to determine the level of custody, not the detention decision itself. ICE PBNDS, *supra* note 6, at 62-78.

306 *See, e.g.*, PRETRIAL JUSTICE INSTITUTE, USING TECHNOLOGY TO ENHANCE PRETRIAL SERVICES: CURRENT APPLICATIONS AND FUTURE POSSIBILITIES (2012), *available at* http://www.pretrial.org/Featured%20Resources%20Documents/PJI%20USING%20TECHNOLOGY%20TO%20ENHANCE%20PRETRIAL%20SERVICES%20%282012%29.pdf. *See also* SCHRIRO REPORT, *supra* note 4, at 17, 20-21 (recommending adoption of risk assessment).

tool has reduced incidence of detention in practice.[307]

***Duration***: Moreover, when detention is imposed, it is often imposed for prolonged periods, sometimes years.[308] At some point, prolonged detention ceases to be proportional to its aims.[309] Even shorter periods of detention of days, weeks or months can be extremely impactful on a detainee's life.[310] For example, those seeking asylum through reinstatement of removal proceedings are detained on average for 111 days until receiving a "reasonable fear" interview,[311] which can cause serious trauma to one whom has been persecuted.

The U.S. could impose time limits as European countries have.[312] France, for example, which receives the third-most asylum seekers after the US and Canada, limits short-term detention to 48 hours and longer-term detention to 32 days.[313] Time limits could be achieved through legislation or administrative action. S. 744, for example, required a detention decision within 72 hours,[314] and similar legislation could amend expedited removal and reinstatement provisions. That said, DHS could also self-impose limits through regulation.

***Nature of Detention***: More broadly, ICE could change the nature of its detention facilities, to not require constant incapacitation. Notably, nonsecure (a.k.a. "open") and semi-secure facilities, as used in Europe,[315] would change the physical nature of U.S. detention, to more narrowly tailor a liberty deprivation to the government's goals and the individual's circumstances. This would be part of a genuine spectrum of restrictions, ranging from detention on the most restrictive end to nonsecure or semi-secure facilities, home arrest, electronic tracking, supervision, and at the other end

307 Mark Noferi & Robert Koulish, *ICE Risk Assessments: From Mass Detention to Mass Supervision?* CRIMMIGRATION.COM (May 16, 2013), http://crimmigration.com/2013/05/16/ice-risk-assessments-from-mass-detention-to-mass-supervision.aspx. Human rights advocates criticized an early version of the risk assessment tool for being over-weighted towards detention. LIRS, UNLOCKING LIBERTY, *supra* note 79, at 21. Robert Koulish and I are analyzing samples of risk assessments received through the Freedom of Information Act, and plan to release results.

308 Kalhan, *supra* note 24, at 49.

309 *Cf.* Zadvydas, 533 U.S. at 690-93.

310 Alschuler, *supra* note 35, at 517.

311 Kate Linthicum, *Immigrants seeking U.S. protection spend months in detention, suit says*, L. A. TIMES, (April 17, 2014), *available at* http://www.latimes.com/local/la-me-asylum-delays-20140418-story.html.

312 Robyn Sampson & Grant Mitchell, *Global Trends in Immigration Detention and Alternatives to Detention: Practical, Political and Symbolic Rationales*, 1 JOURNAL OF MIGRATION & HUMAN SECURITY 97, 100 (2013), *available at* http://jmhs.cmsny.org/index.php/jmhs/article/view/14.

313 GLOBAL DETENTION PROJECT, *France Detention Profile* (2009), http://www.globaldetentionproject.org/countries/europe/france/introduction.html.

314 S. 744 § 3717(a).

315 Alice Edwards, *Measures of First Resort: Alternatives to Immigration Detention in Comparative Perspective*, 7 THE EQUAL RIGHTS REVIEW 117, 118 (2011).

release on recognizance.[316]

Michael Flynn's helpful typology of immigration custody environments defines a "nonsecure" facility as one that does not physically restrain a person from leaving at will, but imposes redetention for violations.[317] Indeed, Flynn calls a "nonsecure" facility "by definition not a detention facility."[318] That is precisely the point, regarding the arguments here. A truly civil detention system, more tailored to its goals, should detain less.

Flynn thus distinguishes "secure" facilities which deprive liberty – even where detainees are allowed to move about the facility once inside—from "non-secure" facilities, such as immigration reception centers, which do not physically restrain a person from leaving by guards, barbed-wire fences, or locked doors.[319] *Id.* Italy, for example, uses nonsecure facilities for asylum seekers,[320] and Belgium uses nonsecure residences for families.[321]

A "semi-secure" facility is one with physical attributes that prevent leaving (i.e. locked doors, guards, or barbed wire), but only partially restricts freedom (for example, allowing individuals to leave during the day but imposing a curfew at night).[322] "Semi-secure" facilities are not much different than U.S. facilities that allow furloughs, depending on the level of restriction. For example, Ireland has a semi-secure facility that encourages application for furloughs of a week or more[323]—not substantially different than the ABA's recommendation for US facilities housing detainees with families. That said, the difference between a "nonsecure" and "semi-secure" facility is whether the default presumption is detention or not, depending on the individual's behavior.

It is not clear why nonsecure and semi-secure facilities have not been used in the US, except perhaps tradition.[324] Nor did the ABA or USCIRF recommend non-secure or semi-secure facilities, perhaps for the same reason. [325] Nonsecure and semi-secure facilities would be a marked departure

316 ABA Standards, *supra* note 25, at § II.C n. 1., p. 4.

317 FLYNN, *supra* note 33, at 23; *see also* Hernandez, *supra* note 21, at 1407-08 (discussing Flynn).

318 FLYNN, *supra* note 33, at 23.

319 FLYNN at 21-23.

320 *Id.* at 18.

321 Liesbeth Schockaert, *Alternatives to detention: open family units in Belgium*, 44 FORCED MIGRATION REVIEW 52 (2013), *available at* http://www.fmreview.org/detention/schockaert.

322 *Id.* at 22.

323 *Id.* at 23.

324 *Cf.* McLeod, *supra* note 19, at 152 (blaming the "entrenched crime-centered institutional culture of criminal-immigration enforcement" for making civil detention reform unattainable).

325 *See* USCIRF, *supra* note 11, at 1 (recommending asylum seekers be housed only in "civil facilities"); ABA Standards, *supra* note 25, at § II.C n. 1., p. 4. Notably, the ABA's recommended continuum of supervision omitted nonsecure and semi-secure facilities, skipping directly from home arrest to detention. *Id.*

from current practices. Currently, ICE operates a fairly binary incarceration-or-not system, with nearly half a million detained each year, all in secure facilities,[326] and only about 22,000 supervised in alternatives to detention. Under current law, ICE could build nonsecure and semi-secure facilities and employ them to house most of its current detainees, with the potential exception of detainees in expedited removal, which might require regulatory reinterpretation.[327] Doing so would dramatically change the nature of the US detention system, and likely tailor liberty restrictions better to actual risks.

Were such a system of civil custody and supervision implemented—with less, shorter, and a different nature of detention, when used—it might engender differing procedural due process analyses for differing deprivations of liberty. To date, procedural due process doctrine has essentially defined incarceration as a brightline, equivalent to "confinement," with incarceration triggering greater protection than lesser deprivations of liberty.[328] The US does not particularly use nonsecure or semi-secure facilities. And courts have little considered whether lesser restrictive forms of custody than confinement, such as electronic monitoring or supervised release, might trigger lesser procedural protections.[329] In this sense, procedural due process analysis of civil detention might come to reflect Fourth Amend-

326 Gilman, *Realizing Liberty*, at 250 & n. 26.

327 Expedited removal provides for "detention," not "custody." *Compare* 8 U.S.C. §§ 1225(b)(1)(A)(i)), (B)(iii)(IV) to 8 U.S.C. § 1226(c). Moreover, 8 C.F.R. § 235.3(e) provides specific requirements for noncitizens in expedited removal "taken into Service custody and detained at a facility other than at a Service Processing Center" (i.e. a Contract Detention Facility or facility operated pursuant to an intergovernmental agreement, many of which are not operated by ICE). The four requirements for their detention are "24-Hour supervision, conformance with safety and emergency codes, food service, and availability of emergency medical care." 8 C.F.R. § 235.3(e)(1-4). The requirement of "24-hour supervision" might preclude a nonsecure or semi-secure facility, although electronic tracking might meet it.

328 Erin Murphy, *Paradigms Of Restraint*, 57 DUKE L.J. 1321 (2008) (analyzing criminal procedural protections). *See also, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 530 (2004) ("[C]ommitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.") (citing Jones v. United States, 463 U.S. 354, 361 (1983)); In re Gault, 387 U.S. 1, 27 (1967) (The Court, in describing juvenile detention, stated, "It is of no constitutional consequence—and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time."); *see also* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 25-26 (1981) (focusing on "defendant's interest in personal freedom") (citing Scott v. Illinois, 440 U.S. 367, 373 (1979) ("actual imprisonment is a penalty different in kind")).

329 *See* Ortega v. United States Immigration & Customs Enforcement, 737 F.3d 435 (6th Cir. 2013) (considering whether individual, subject to home confinement with electronic monitoring, had liberty interest against being transferred to jail pursuant to an ICE detainer. "A prison cot is not the same as a bed, a cell not the same as a home, from every vantage point: privacy, companionship, comfort.... What process is due will vary from setting to setting..."); *See* generally Robert Koulish, Entering the Risk Society: A Contested Terrain for Immigration Enforcement, in JUSTICE AND SOCIAL CONTROL 77 (Oct. 2012) (analyzing spectrum of restrictions on liberty imposed by ATD).

ment case law, which has judicially developed so as to apply a spectrum of differing standards to differing deprivations of liberty.[330] More broadly, it may be necessary to more precisely define terms such as "incarceration," "detention," "custody," and "supervision" to more accurately reflect the spectrum of deprivations of liberty that are increasingly employed.[331]

## B. The Civil Immigration Detention Reform Movement to Date: Assessing its Political Impact

Lastly, as a postscript, I summarize the state of the government's implementation of civil immigration detention reform, and offer thoughts as to the political viability and impact of the government's efforts.

To date, the government's civil detention reform efforts have stalled. In 2011, ICE planned five civil facilities.[332] One (Karnes) opened, two others have been blocked by local opposition, and the remaining two still receive human rights criticism:

- ***Karnes, TX***: Karnes opened in 2012, and has recently been shifted to house Central American families.[333]
- ***Crete, IL***: Although ICE selected Crete, IL as a detention center in 2011, political opposition the following year resulted in Crete's city council withdrawing Crete from consideration.[334] ICE is now exploring a replacement facility in Hobart, IN, but the city's mayor has publically "announced his administration will not support" the immigration center.[335]
- ***Southwest Ranches, FL***: in June 2012 ICE decided to cancel the planned facility amid opposition by a neighboring city, Pembroke Pines. Litigation from the private prison company en-

330 *See, e.g.*, Terry v. Ohio, 392 U.S. 1 (1968).

331 The debate whether electronic monitoring is an alternative form of detention, or an alternative to detention, is emblematic. *See* Kalhan, *supra* note 24, at 55-56 (arguing that DHS' alternatives to detention are alternative forms of custody). Lower courts have begun to address these questions. *Compare* Xiaoyuan Ma v. Holder, 860 F. Supp. 2d 1048, 1052-55 (N.D. Ca. May 16, 2012) (electronic monitoring constitutes "in custody" for purposes of habeas) *with* Nguyen v. B.I., Inc., 435 F. Supp. 2d 1109, 1114 (D. Or. 2006) ("placement in [electronic monitoring] is not detention").

332 HUMAN RIGHTS FIRST, *supra* note 10, at 18-19.

333 James Munoz, *First illegal immigrants arrive at Karnes County detention center,* KENS5 (Aug.1 2014), http://www.kens5.com/story/news/local/2014/08/01/illegal-immigrants-arrive/13476487/.

334 Naomi Nix, *Crete withdraws from detention center consideration,* CHICAGO TRIBUNE (Jun. 12, 2012), *available at* http://www.chicagotribune.com/news/local/breaking/chi-crete-withdraws-from-detention-center-consideration-20120611-story.html.

335 Elvia Malagon, *Hobart Mayor won't back potential immigration detention center, NWI.COM* (Apr. 13, 2014), *available at* http://www.nwitimes.com/news/local/lake/hobart/hobart-mayor-won-t-back-possible-immigration-detention-center/article_aa7b1068-167f-520d-b3e7-3805ad86503b.html.

sued.[336]

- ***Essex County, NJ***: In Essex County, NJ, despite civil reforms at the private Delaney Hall facility, the facility has been the subject of major human rights criticism, as to noncompliance with ICE standards, nonresponse to grievances, verbal abuse and mistreatment, and poor medical service, food service, and visitation.[337]
- ***Orange County, CA***: Similarly, in Orange County, CA, the NGO Detention Network Watch in November 2012 released a report, "Expose and Close," which designated the Theo Lacy facility as one of the ten worst immigration detention centers in the country.[338]

Moreover, a sixth facility, Broward in Florida, was also noted by the U.S. Commission on International Religious Freedom as feeling "less penal," and "more appropriate" for asylum seekers. That said, a 2013 Americans for Immigrant Justice report detailed issues such as "sexual assault, substandard medical care, improper isolation, excessive use of force, abysmal conditions, and the lack of due process."[339]

Given this, serious questions remain as to the political viability of the government's efforts. On one hand, scholars such as David Cole have worried that the institutionalization in law of civil or preventive detention might "normalize" its use as the norm, not the exception.[340] Institutionalization in formal standards and physical facilities may further that trend. Additionally, detention reforms may particularly normalize civil detention

336 Heather Carney, *Judge Tosses Lawsuit Against Pembroke Pines Over Southwest Ranches Immigration Detention Center,* SUN SENTINEL (Mar. 22, 2013), *available at* http://www.huffingtonpost.com/2013/03/22/cca-lawsuit-pembroke-pines-southwest-ranches_n_2929423.html.

337 Semuteh Freeman and Lauren Major, *Immigration Incarceration: The Expansion and Failed Reform of Immigration Detention in Essex County, NJ*, NEW YORK UNIVERSITY SCHOOL OF LAW IMMIGRANT RIGHTS CLINIC 5 (Mar. 2012), https://afsc.org/sites/afsc.civicactions.net/files/documents/ImmigrationIncarceration2012.pdf; *but see* UNITED STATES COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM, STATEMENT OF THE U.S. COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM ON ASYLUM: CREDIBLE FEAR AND PAROLE PROCESSES 4 (2013) (calling Delaney Hall "noticeably less penal"), *available at* http://www.uscirf.gov/sites/default/files/resources/USCIRF-statement-asylum-credible-fear-rev4.pdf.

338 *OC's Theo Lacy detention facility among 10 worst in U.S.*, ACLU (Nov. 15, 2012), http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/ExposeClose/Expose-TheoLacy11-13.pdf.

339 Susan Barciela and Cheryl Little, *Broward Transitional Center: A 'Model' for Civil Detention* AMERICANS FOR IMMIGRANT JUSTICE (March 2013), http://aijustice.org/wp-content/uploads/2013/04/BTC-A-Model-for-Civil-Detention.pdf.

340 Cole, *Shadows*, *supra* note 28, at 749; *see also* Rappleye, *supra* note 194 (quoting Dr. Fred Berlin, director of Johns Hopkins Sexual Behavior Consultation Unit: existing SVP legislation "is based on the exception, rather than the rule.");

by putting a "comfortable face" on it, as Michael Flynn argued;[341] and improved procedural checks such as appointed counsel may amplify that normalization by reassuring the public that lawyers are present to advocate for their clients' interests.[342] Essentially, extrapolating the current civil detention model forward, the concern is that the public may perceive detention as "not really jail," but in any event "fair."[343] Reforms may concurrently obscure in the public debate larger policy questions regarding the cost and morality of large-scale civil preventive detention.

That said, civil detention reform has yet to implement the "comfortable face" on detention that Flynn worries about. Even if reforms were fully implemented, "civil" detention appears to be a distinction without a difference to the public. Both sides of the immigration debate essentially reject the premise of civil detention reform—i.e. any distinction between civil facilities such as Karnes and criminal prisons.

Pro-immigrant advocates have objected to immigration detention on civil grounds *writ large*.[344] For example, subsequent to Karnes' opening, local activists and immigrant advocates in Illinois and Florida called the new civil facilities "prisons" and forced ICE to change its plans.[345]

On the other hand, restrictionists have objected to the supposedly preferential conditions given to noncitizens over criminal defendants. In 2012, the House Judiciary Committee Chair held a hearing called "Holiday on ICE," at which he and others criticized ICE's new standards as providing

341 MICHAEL FLYNN, ON THE UNINTENDED CONSEQUENCES OF HUMAN RIGHTS PROMOTION ON IMMIGRATION DETENTION 2 (Mar. 12, 2012), *available at* http://www.globaldetentionproject.org/fileadmin/publications/Flynn_Discussion_Paper_v4.pdf; Michael Flynn & Michelle Brane, *Does making immigration detention more humane make it more widespread?* NEW INTERNATIONALIST MAGAZINE (Jan. 1, 2014), http://newint.org/features/web-exclusive/2014/01/01/detention-humane-widespread/. Even alternatives to detention may help normalize methods of social control based on risk management tools. Koulish, *supra* note 47, at 4.

342 *See* Section IV.B.

343 Notably, this concern may be a long time away from fruition. Indeed, the recent facility that the U.S. built in Artesia, NM to house Central American families has already been criticized and sued for poor conditions and poor access to counsel. Julia Preston, *U.S. Faces Suit Over Tactics at Immigrant Detention Center*, N.Y. TIMES (Aug. 22, 2014), *available at* http://www.nytimes.com/2014/08/23/us/us-faces-suit-over-tactics-at-immigrant-detention-center.html?_r=0.

344 Rep. Gallegly: "Numerous statements issued by the [immigrant] advocates make clear they are opposed to the immigration detention in and of itself." *Holiday on ICE: The U.S. Department of Homeland Security's New Immigration Standards: Hearing before the Subcommittee on Immigration Policy and Enforcement of the Committee on the Judiciary, House of Representatives*, 112 Cong. 2 (2012), *available at* http://judiciary.house.gov/hearings/printers/112th/112-104_73543.PDF;

345 Amy Sherman, *Opponents of SW Ranches prison protest Wasserman Schultz*, MIAMI HERALD, May 30, 2012, http://miamiherald.typepad.com/nakedpolitics/2012/05/opponents-of-sw-ranches-prison-protest-wasserman-schultz-in-aventura.html (quoting Florida Immigrant Coalition Executive Director Maria Rodriguez: "Latino and immigrant families... will be hurt by this prison..."); Press Release, Rep. Jesse Jackson, Jr., Jackson Applauds Crete Board For Deep-Sixing Prison (June 12, 2012), *available at* http://jackson.house.gov/index.php?option=com content&task=view&id=552&Itemid=86 ("Crete is a wonderful small town.... A prison would have changed that image forever").

preferential jail treatment to illegal immigrants.[346] The conflation of detained immigrants with criminals has been clear. For example, Jessica Vaughn, of the Center for Immigration Studies, stated that "ICE detention centers were already softer than those at other federal and local [criminal] facilities," and described the immigration detention population as comprised of "criminals," "who have been convicted of a crime," and those whom "ICE euphemistically refers to as 'non-criminals'."[347]

Thus, these sides agree that immigration detention is jail, and merely disagree on whether immigrants belong there. So far, civil detention reform has been a policymakers' movement, not a public movement. This lack of a political constituency may affect the long-term viability of reform, and moot Flynn's concerns.[348]

## Conclusion

To date, U.S. civil immigration detention reform has been marked by little that is uniquely civil—either regarding impacts on the individual liberty of detainees, or the expressive message connoted by reformed facilities. This is true even were reform fully implemented. Ultimately, "truly civil" detention would likely entail less detention, of shorter duration, and when used, more often "not detention"—a system of civil custody and supervision, rather than a system of civil detention. It is possible reforms in that vein might lead to a transformation of immigration enforcement from mass detention to mass supervision.[349]

Most likely, the solution to the increasing numbers of U.S. detainees will be to change the discourse on immigration enforcement, and take it out of its crime-centered framework. That, most likely, requires less detention, not better and better-checked detention.

346 *Holiday on ICE: The U.S. Department of Homeland Security's New Immigration Standards: Hearing before the Subcommittee on Immigration Policy and Enforcement of the Committee on the Judiciary, House of Representatives*, 112 Cong. 2 (2012) (statement of Sen. Lamar Smith, Chairman, H. Comm. On Immigration) (stating, "Under this Administration, detention looks more like recess."), *available at* http://judiciary.house.gov/hearings/printers/112th/112-104_73543.PDF;

347 *Holiday on ICE: The U.S. Department of Homeland Security's New Immigration Standards: Hearing before the Subcommittee on Immigration Policy and Enforcement of the Committee on the Judiciary, House of Representatives*, 112 Cong. 2 (2012) (statement of Jessica Vaughn), http://judiciary.house.gov/_files/hearings/Hearings%202012/Vaughan%2003282012.pdf.

348 These arguments may be reconciled by noting that the actual conditions being reformed appear to have public impact, while their "civil" label does not. This disconnect between the legal grounds of civil detention and its public reception suggests a *sub rosa* expressive quality to preventive incarceration which I will explore in future research. Because of this expressive quality of preventive incarceration, it may be politically difficult for ICE to use alternatives to detention, as it is politically difficult for legislatures to use alternative sanctions to criminal incarceration. *See* Kahan, *supra* note 102, at 605-608.

349 Mark Noferi & Robert Koulish, *ICE Risk Assessments: From Mass Detention to Mass Supervision?* CRIMMIGRATION.COM (May 16, 2013), http://crimmigration.com/2013/05/16/ice-risk-assessments-from-mass-detention-to-mass-supervision.aspx.

Professor Katherine Vaughns was a member of the University of Maryland Francis King Carey School of Law faculty, serving as our colleague, friend, and mentor for almost thirty years. She will always be remembered for her dedication to colleagues and students, for her commitment and service to this institution along with others about which she cared deeply, and for her constant friendship and support for all who had the privilege to know and work with her. As a member of the faculty, Kathy, as she is fondly remembered, regularly taught in the areas of immigration law and policy, complex litigation and remedies. Her scholarly writings were primarily in the area of immigration law and policy. Kathy not only was a dedicated member of our law faculty, but she was also active in several national professional organizations, including the American Bar Association, the Law School Admission Council and the Association of American Law Schools. She was particularly dedicated to improving the bar performance of law graduates. In recent years, Professor Vaughns became a tireless advocate for the arts, and she was a particularly strong devotee of Center Stage in Baltimore. Kathy died May 4, 2013 of pancreatic cancer. We miss her greatly.

— University of Maryland Francis King Carey Law Faculty