Cross, Sarah

Working Paper

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TIGER Working Paper Series, No. 77

Provided in Cooperation with:
TIGER - Transformation, Integration and Globalization Economic Research, Warsaw

Suggested Citation: Cross, Sarah (2005) : U.S. immigration detention policy: Seeking an alternative to the current system, TIGER Working Paper Series, No. 77, Transformation, Integration and Globalization Economic Research (TIGER), Warsaw

This Version is available at:
https://hdl.handle.net/10419/140729

TRANSFORMATION, INTEGRATION and GLOBALIZATION ECONOMIC RESEARCH
CENTRUM BADAWCZE TRANSFORMACJI, INTEGRACJI I GLOBALIZACJI

TIGER Working Paper Series

No. 77

U.S. Immigration Detention Policy: Seeking an Alternative to the Current System

Sarah Cross

Warsaw, June 2005

Sarah Cross worked with Lutheran Immigration and Refugee Service where, as Assistant Director for Grassroots Advocacy and Public Education. E-mail: scross@lirs.org

Sarah Cross

U.S. Immigration Detention Policy: Seeking an Alternative to the Current System

Summary

Since the passage of new legislation in 1996, which considerably extended the boundaries of mandatory detention for non-citizens, immigration detention has become the fastest growing prison program in the United States. As a result, detention centres have swelled to over 200,000 detainees annually, as the asylum system strains to manage increasing demand on its resources. With a current daily population of detainees almost tripling since 1992 to an average of 20,000 and an average annual expenditure of over $600 million on detention, the U.S. immigration service presently faces an urgent need to reform its system in order to cope with ever-increasing pressure.

This paper analyses the current US asylum adjudication system presenting the alleged rationale for and the costs of detention. Upon citing the widely accepted relevant international standards it proposes an alternative model, based on a individual rather than categorical approach in the decision to detain, which also shows viable option for release into the community.

1. Introduction

Since the passage of new legislation in 1996, which considerably extended the boundaries of mandatory detention for non-citizens, immigration detention has become the fastest growing prison program in the United States (Detention Watch Network, hereafter DWN 2001). As a result, detention centres have swelled to over 200,000 detainees annually (Pritchard 2001), as the asylum system strains to manage increasing demand on its resources. With a current daily population of detainees almost tripling since 1992 to an average of 20,000 (INS 2002) and an average annual expenditure of over $600 million on detention, the U.S. immigration service presently faces an urgent need to reform its system in order to cope with ever-increasing pressure.

The government agency - the Immigration and Naturalization Service (INS) - once charged with the dual tasks of enforcing immigration laws and providing services to immigrants, including asylum seekers, long struggled to achieve this mandate and fell drastically short on both fronts, as recognized by the U.S. Congress (Washington Post 2002, New York Times 2002).

The failure of the INS to manage its conflicting mandate ultimately resulted in its dismantling. The Homeland Security Act of 2002 (HSA) - which moved 185,000 federal employees and 22 federal agencies into a new Department of Homeland Security (DHS) - formally abolished the INS and divided its functions into three bureaux: Citizenship and Immigration Services (CIS); Immigration and Customs Enforcement (ICE); and the Customs and Border Protection (CBP).

Although this restructuring was initially thought to be a potential solution to the mixed mandate of both service and enforcement that plagued the INS, the months since the transfer of these functions to DHS have yielded little positive change in the system that greets asylum seekers. In fact, in the wake of September 11th, 2001, the U.S. government has significantly expanded its power to detain non-citizens, including asylum seekers (Lawyers Committee for Human Rights 2003). Of the changes that have occurred, most have marked a significant step back, as the events of September 11th instilled a pervasive fear of foreigners in the national psyche, and parole rates across the country have likely decreased (Physicians for Human Rights 2003). To date, there is insufficient research on the post-September 11 trends to include in this essay, though it is widely acknowledged that the new climate is significantly less hospitable to immigrants[*]. While it is still early to determine what the lasting impact of the new structure will be, it seems clear that the much hoped-for improvement to the system is still greatly needed.

This paper seeks to examine the enforcement of immigration within U.S. borders, in particular its directive to detain aliens 'who enter the United States illegally or otherwise violate immigration laws' (ICE Home Page 2003), in light of international standards. By measuring the reality of the U.S. detention system against ideals outlined by the international community we will be able to identify shortcomings and explore ways in which U.S. policy can better conform to such standards. These standards, which govern both the circumstances under which a non-citizen is detained, and the conditions of the detention environment itself remain, as we shall see, unmet by the U.S. system. Given both the legitimate interest the

[*] A number of reports attempt to outline the effects of September 11 on the U.S. immigration system to date, and together they document a chilling effect on the nation's hospitality to newcomers. For further reference on this issue, see The Lawyers Committee for Human Rights 2003 report; the Physicians for Human Rights 2003 report; the Migration Information Source, August 2002; The Migration Policy Institute 2003 report, and the American-Arab Anti-Discrimination Committee Research Institute 2003 report, among others.

government holds in the detention of certain aliens and the severity of its application to those arriving at U.S. shores, it is imperative to investigate possible ways in which detention can be used responsibly in order to ensure a just system.

In the following pages, we will investigate the current system, considering both the benefits and costs of detention in light of its professed aims of ensuring public safety and appearance in court hearings, as well as deterring illegal immigration. After examining these rationales for detention and identifying situations in which they reasonably allow for the deprivation of an alien's liberty, we will seek to determine when the benefit of this kind of justified detention outweighs the costs involved. In considering the significant costs, we will take account of both the human cost of such a draconian measure as well as the economic toll on the government and detainee alike. As I hope to demonstrate, all too often these costs outweigh ostensible benefits, revealing a crucial need to reconsider the asylum adjudication process, with particular emphasis on providing fair access to fair procedures and implementing alternatives to detention. With the life or death of an asylum seeker potentially at stake, and with the eyes of the international community fixed on the actions of the U.S. government, one of the principle architects of the refugee protection system, the United States simply can not afford to flout international standards and deny asylum seekers their due protection.

2. The Current Asylum Adjudication System

Although before 1980, the U.S. maintained a policy of detaining only those entrants who posed either a flight risk or threat to public safety, since then the government has increasingly turned to detention to manage new arrivals (Lawyers Committee for Human Rights, hereafter LCHR 1999). The trend toward incarceration culminated in the 1996 passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), a comprehensive statue that made detention mandatory for five broad groups of non-citizens, including asylum seekers arriving without proper travel documents. Two separate procedural screenings are in place to filter in only those entitled to formal immigration court hearings, the first of which occurs at the port of entry. While some asylum seekers without such documents, or whom the immigration inspector suspects of fraud are summarily turned away without a hearing, those entrants who are not deemed inadmissible are apprehended upon entry and are subject to new 'expedited removal' procedures. Throughout this process, the asylum seeker remains in detention, ineligible for release until she/he is determined by an ICE asylum officer or an immigration judge in a second interview to have a 'credible fear' of persecution (Cochrane 2000). Credible fear, defined as 'a significant possibility, taking into account the credibility of the statements made by the alien, that the alien could establish eligibility for asylum' (Immigration and Nationality Act, cited by LCHR 1999) must be demonstrated in order for the detainee to become eligible for parole under U.S law and ICE's own parole guidelines for asylum seekers. Once credible fear is established, the asylum seeker is no longer subject to expedited removal.

Release from detention, or parole, is granted at the discretion of INS District Director, with no regular review of the asylum seeker's detention and no formal mechanism for reviewing a denial of parole (Amnesty International, hereafter AI 1999: 24). It is the stated policy of the immigration service to favour parole, as explicitly articulated in 1998 INS guidelines: 'although parole is discretionary in all cases where it is available, it is INS policy to favour release of aliens found to have credible fear of persecution, provided that they do not pose a risk of flight or danger to the community' (INS Memorandum 1998). Despite these guidelines, the parole option is employed unevenly by the individual directors throughout the

33 INS districts, and often asylum seekers remain in detention well after demonstrating credible fear (Schultz 2000; Vera Institute of Justice 2000).

A variety of reasons accounts for why efforts to facilitate parole throughout the years have fallen short of expectations and have failed to satisfy even ICE's own goals. Beyond the initial problem of placing discretion to parole in the hands of individual ICE officers, resulting in release practices described by Helton as 'inconsistent to the point of whimsy,' (Helton 1998) other aspects of the system militate against release of credible asylum seekers. Within the decentralized, enforcement-minded ICE culture, there is little incentive for officers to be proactive about parole, especially when they are ultimately accountable when decisions to release go awry[†]. Release is antithetical to enforcement and not incorporated firmly in ICE mission; in fact, districts are evaluated upon the number of individuals it removes from districts, rather than those it paroles (Pistone 1999). Bureaucratic convenience further favours detention, since officers prefer the simple task of finding out about available bed space to the greater efforts of considering individual facts of a particular case. Finally, because there exists no central or independent oversight over the administrative structure and no legally binding regulations that apply to all facilities in which ICE detainees are held, practices vary significantly across districts.

Human rights groups petitioned to have the then-INS parole practices, introduced in its 1992 Asylum Pre-Screening Officer Program (APSO), codified into law, but INS declined (LCHR 1999). Although it professed a desire to ensure that 'genuine asylum seekers are not needlessly detained while they pursue their claims and to help the agency make well-reasoned use of its limited and expensive detention space' (INS Memorandum 1993), the government never fully realized the potential of its release options (Helton 1998). Non-compliance, ill funding and lack of accountability got in its way, as noted in an internal evaluation finding that it operated 'inefficiently, inconsistently from district to district' (Pistone 1999). Its failure to formalize a uniform administrative process for parole has resulted in a 'disturbingly low' (LCHR 1999) national parole rate of perhaps as low as 10 to 40 per cent.

3. The Rationales for Detention

In many cases, detention serves legitimate public interests. As recognized by the 1951 Convention, states have the competence to detain non-citizens pending their status determination; limits on the freedom of movement of refugees are seen to be justified by, for example, exceptional circumstances, national security interests, public safety concerns, and to verify the entrant's identity (Goodwin-Gill 1996: 247). Detention offers the assurance, as well, that those awaiting final status determination or removal from the country will be accessible to the authorities at all times. Moreover, a viable asylum system, which demands that those without credible claims not gain entry, is predicated upon effective detention and removal procedures. Therefore, sometimes detention is an appropriate measure against fraudulent claimants, pending their removal. So states rely on detention for many reasons and there are unmistakable benefits to this practice.

Three rationales are most commonly advanced for the detention of aliens pending removal proceedings. They rest on the public concerns that detainees not abscond pending status determination or removal, that the public safety not be jeopardized by the detainee's

[†] Particularly in the wake of September 11, 2001, when it was uncovered that two of the hijackers involved in the attacks on the World Trade Centre towers were issued student visas by INS *after* the attack, heightened concern about making mistakes or potentially calamitous decisions has gripped immigration officials.

release, and that future illegal entry in to the country be deterred by the grim prospect of detention.

3.1 Concern that a Detainee Might Abscond

The concern that once released into the community, an asylum seeker might go underground and fail to show up for hearings is well-founded. That approximately one-third of those not detained fail to appear for removal hearings testifies, as Legomsky (1999) points out, to a real problem. He further notes that before mandatory detention was in place, almost ninety percent of those non-detained aliens ordered removed failed to surrender themselves for removal. Consequently, the government assumes a substantial burden to locate those who abscond in order to remove them.

For arriving asylum seekers without already established community ties, there is less at stake than for those non-citizens who have settled, should they decide to abscond. Moreover, if they have a genuine fear of persecution in their home country, concern over a denial of their claim and subsequent return home might intensify one's incentive to abscond. Particularly for those whose claims have already been refused, there is little to lose by absconding, for if found, their subsequent removal would only be an execution of the orders already pending against them. So perhaps mandatory detention is most justified for that category of aliens awaiting removal, whose incentive to abscond appears the greatest (Legomsky 1999).

However, despite these warranted fears that aliens released into the community will disappear for good, there remain, as Legomsky describes, a number of reasons to question the use of this rationale to detain non-citizens, especially asylum seekers. As a category, arriving undocumented aliens - some of whom are seeking asylum - are subject to mandatory detention, but this categorical basis of the detention sentence overlooks the individual variance in likelihood to abscond; though mandatory detention is imposed upon all of them, asylum seekers as a group are not necessarily more likely to abscond than any other group of detainees (since all aliens presumably have a desire to remain in the US and fear removal, including categories not designated by IIRIRA). Those genuine asylum seekers mentioned above with increased incentive to abscond for fear of return to persecution at home should not therefore be singled out for detention based on this incentive. So doing would undercut the humanitarian objective of the asylum regime.

Moreover, while asylum seekers with credible claims undeniably harbour these incentives to abscond, so too are there powerful incentives for them not to. Because under IIRIRA, the vast majority of asylum seekers screened into detention have already been deemed genuine through 'credible fear' interviews (while all others are turned away at the border), they have reason to believe in the ultimate grant of asylum. Given the numerous and desirable benefits that asylum protection affords, like work authorization (and consequently, a potential income), travel documents, and the possibility of gaining permanent residency for oneself and one's family, it is clearly to their advantage to pursue their claims, already deemed credible, in the courts. This incentive should powerfully prevail over the counter-incentive to abscond (Schuck 1997). Such a tendency was confirmed by the 1997 Report to Congress of the Commission on Immigration Reform, in which it found that the risk of flight among those with credible claims was not sufficient to warrant detention (Report to Congress 1997).

Ultimately, the rationale that detention is warranted by an individual's flight risk, while not irrational, loses much of its force when examined through the lens of IIRIRA's

changes (Pistone 1999). IIRIRA's extension of mandatory detention to broad categories of people belies the individual differences in flight risk that each asylum seeker will pose, and the statute's pre-screening of only credible asylum seekers into the detention system removes incentive to abscond. In light of these changes that the 1996 laws effected, post-IIRIRA invocation of the 'absconding rationale' loses much of its earlier strength.

3.2 Concern for Public Safety

The rationale that an asylum seeker should be detained in order to protect the public from a potential threat he might pose is ostensibly sound, but upon examination, also fails to offer compelling justification for detention. Again the creation of mandatory categories of those eligible for detention - in this case those seen as violating immigration law by virtue of arriving without proper travel documents - seems to work against the purported rationale for detaining them.

Since IIRIRA demands detention for entire groups, it raises obvious concern over the logic that an entire group, as opposed to an individual, can pose a threat to public safety. As Legomsky points out, certain designated categories (such as arriving passengers found inadmissible, asylum seekers in expedited removal proceedings and those awaiting final removal) 'do not pose any systematically greater threat to the public safety than does anyone else who is suspected of failing to meet our immigration criteria' (Legomsky 1999). Even those detained in relation to criminal charges do not necessarily warrant detention on the basis of this rationale, since non-citizens who have completed their criminal sentences presumably pose the same threat, though remain undetained. Furthermore, regular criminals are released on bond while asylum seekers with no record of criminality are detained, in apparent disregard of the safety rationale. The only category to which this rationale seems to reasonably apply is the terrorist category, but the legitimacy of detention for this single category does not therefore justify its application to all categories, particularly credible asylum seekers.

In light of the inapplicability of most of the mandatory detention categories to this rationale and the 'paucity of evidence that quantifies the risk of criminal activity by asylum applicants in general' (Pistone 1999), great caution should be exercised in pointing solely to this rationale to justify detention of non-citizens.

3.3 The Desire to Deter Illegal Immigration

The deterrence rationale rests on the assumption that the prospect of being incarcerated upon arrival without proper documentation will discourage potential economic migrants or others who might abuse the asylum system from seeking to enter the country unlawfully. Deterrence theory presupposes that it would target only illegitimate entrants, while not simultaneously discouraging the arrival of genuine asylum seekers, who presumably can anticipate different treatment in accordance with the protection to which they are lawfully entitled. This questionable assumption aside, deterrence as a rationale for detention, particularly of asylum seekers, is problematic on a number of levels.

On a fundamental level, it appears contradictory to the ethos of asylum. As Helton commented, 'Detention for purposes of deterrence is a form of punishment, in that it deprives [asylum seekers] of their liberty for no other reason than their having been forced into exile. […] To officials who enacted these policies, however, it was of no moment that this form of deterrence was at odds with international law' (Helton 1986).

Since deterrence is directed at those with unfounded claims to entry, we should expect corresponding detention policy to apply only to those illegitimate migrants but not to asylum seekers with credible claims (Martin and Schoenholtz 2000: 12), which as IIRIRA practices make clear, is not the case. In addition, as Pistone points out, deterrence is a an entirely different kind of rationale from the first two, insofar as the others can be applied directly to individual cases and result in varying detention decisions, whereas deterrence relies entirely upon its collective nature. Indeed, according to Pistone, 'the idea of detaining any single individual on the ground of deterrence, while simultaneously paroling others, is irrational' (Pistone 1999).

Drawing on widespread acknowledgement (Human Rights Watch, hereafter HRW, 1998) that the de facto determinant of whether an immigrant will be detained appears to be available detention space, Pistone goes on to argue that the U.S. in fact boasts a deterrence-based system. Such a system attempts to detain as many aliens as it has the capacity to, with the only limiting factor being available beds, and with the aim to increase capacity. Indeed, a mere visit to the former INS web site confirmed this view; its first line read, 'Strengthening the nation's capacity to detain and remove criminal and other deportable aliens is a key component of INS's comprehensive strategy to deter illegal immigration' (U.S. Citizenship and Immigration Services 2003).

Finally, like the other two rationales offered for detaining asylum seekers, the deterrence theory is undermined in two forceful ways by the enactment of IIRIRA. Firstly, because the statute effectively creates a detention population with reasonable claims to asylum, those pre-screened into detention through the expedited removal proceedings represent 'a narrowly selected subset of the undifferentiated and substantially larger group that detention was originally designed to deter' (Pistone 1999). Meanwhile, those without valid claims have already been screened out and sent home without ever reaching a detention centre. Essentially, 'INS detains credible asylum seekers pursuant to a system designed to deter an entirely different group of people' (Pistone 1999). Those currently subject to detention, having been found credible in two separate screening processes, do not represent the population that the U.S. should seek to deter, thus challenging the justification for detention on deterrence grounds.

A second concern recognizes that IIRIRA's implementation removed significant incentives to abuse the asylum system (for example, by revoking eligibility for a work permit pending final status determination and sanctioning frivolous claims). Without those former inducements to exploit the system, those with invalid claims are already less likely to view asylum as a means to gain illegitimate entry into the country, which is, in effect, deterrence without detention. For these reasons, the use of detention to deter has become an 'outdated remedy for a problem that no longer exists' (Pistone 1999).

In sum, the public concern over illegal immigration and immigrants who pose safety threats is real and legitimate, and recourse to detention of aliens can be a valuable government option for enforcement in certain cases (Legomsky 1999). As we have seen, the three major rationales advanced in favour of detention of asylum seekers each possess a certain force, albeit a considerably weakened one in light of the changes wrought by the 1996 passage of IIRIRA. Furthermore, no single rationale applies to all of the current categories of mandatory detention, begging the question of how justified is the use of mandatory detention for particular categories of entrants (Legomsky 1999). Given that the theories of detention outlined above can offer potential benefits to the host community (such as the ability to locate and remove an illegitimate immigrant, protection from potential danger and diminished numbers of unlawful entrants), it is imperative that we explore the potential costs of administrative detention as well, in order to determine whether these benefits, weighed

against such costs, provide adequate justification for such a severe measure as the deprivation of liberty.

4. Costs of Detention

The costs of detention, to both the individuals detained and the public in general are numerous and grave, both in human and fiscal terms, and are therefore to be considered carefully in determining the need for detention. In this section, we will look first at the human costs to detained individuals, and then move on to consider other costs involved to the public. The human costs of detention are varied, ranging from the unpleasant conditions a detainee must endure, the psychological and physical impact of incarceration, and impeded ability to present claims.

4.1 Human Costs

When an individual is detained, the most obvious price she/he pays is her/his freedom of movement. This deprivation of liberty also involves several other ancillary costs, as Legomsky noted, such as the inability to work, attend school, travel, and socialize with friends, and often involves family separation as well. From a financial perspective, the loss of employment opportunities and potential income to support dependents (some of whom may even be citizens or lawful permanent residents) intensifies a detained asylum seeker's difficulties. Foremost on the human toll of detention is the physical surroundings of the facilities in which asylum seekers are detained, and the conditions that characterize those facilities.

4.1.1 Conditions of Detention

Human rights observers, legal commentators and government agencies alike have acknowledged in recent years the many inadequacies of detention facilities. ICE's Service Processing Centers (SPC), privately operated contract facilities and state, local, and county jails in which ICE rents space constitute the three types of facilities used to detain immigrants, and they are all emphatically prisons, despite the euphemisms used in the system. Such facilities are high in security, often with barbed wire fences, head counts, 'lock-downs', surveillance systems and locked doors (AI 1999: 11, McCoy 1999, HRW 1998). Inmates of these facilities are stripped of their personal possessions and forced to wear prison attire.

Inside these facilities, inhumane and abusive conditions prevail (Cochrane 2000), which have been well documented over the years[‡]. One of the most shocking accounts of the harsh treatment of non-citizens in U.S. immigration detention came from the government itself, in the form of a report issued by the Office of the Inspector General (an independent entity that reports to the Attorney General and to Congress) on June 2, 2003 (The September 11 Detainees 2003). A litany of similar abuses are painstakingly detailed by the Lawyer's Committee for Human Rights in their 1999 report. In it, conditions in Elizabeth, New Jersey

[‡] There is a long list of such reports. Abuses at the Krome detention facility in Miami were described in 1991 by The Minnesota Lawyers for International Human Rights and Physicians for Human rights, and again in 2000 by the Women's Commission for Refugee Women and Children. See also The American Civil Liberties Union 1994 Report, the Lawyer's Committee for Human Rights 1999 report, 'Refugees Behind Bars: The imprisonment of Asylum seekers in the wake of the 1996 immigration act'; the Human Rights Watch 1998 report, among others.

are described that caused a federal judge to declare (if proven) many aspects as violations of human rights law, including unsanitary conditions, racial insults, the shackling of detainees while meeting with their lawyers, inadequate medical care and sexual abuse. In some instances, use of tear gas, physical discipline, strip searches, and inappropriate sedation have also occurred (LCHR 1999).

Such conditions are not unique to this facility, however. In a 2000 report, the Women's Commission for Refugee Women and Children (hereafter WCRWC) chronicles the abuses women are subject to at the Krome SPC in Miami, Florida. Its investigations revealed rampant sexual, physical, and verbal misconduct of guards toward female detainees, including false promises of release from detention in exchange for sex (WCRWC 2000: 1), which have been confirmed in other reports (Elsner 2002).

In addition to sexual abuse specifically targeting women, a range of other problems that plague this facility fester at most others as well. A chronic concern in many facilities is major overcrowding, which results in a virtual break-down of the system and impedes the provision of services to the overwhelming numbers of detainees (WCRWC 2000). Inmates are often deprived of the outdoors, recreation or any other meaningful activity, and rights to visitation with friends, family or legal counsel (HRW 1998). As Amnesty International reported, 'Asylum seekers […] are not only deprived of their liberty, they are sometimes held in conditions that amount to cruel, inhuman or degrading treatment. In some facilities detainees rarely see natural daylight and the food provided is substandard, or violates deeply held religious beliefs. Asylum seekers are frequently detained in shoddy temporary shelters […] and do not know how long they will be held' (AI 1999: 9). Common complaints also address poor translation services in the facilities, lack of English classes or any form of spiritual support, and the internationally condemned commingling of asylum seekers with criminal inmates held in most jails.

Such conditions have sparked widespread protests among inmates throughout the country, in the form of hunger strikes, rioting and class action suits (LCHR 1999). The overall grievances over the length of detention and lack of parole combine with daily dilemmas, such as lack of access to counsel, telephones, and legal materials to make the reality of detention quite a bleak one. Indefinite detention in such an environment indisputably comes at a high cost to the asylum seeker.

4.1.2 The Physical and Mental Health Costs of Detention

Among the other objectionable conditions in detention facilities, one of the most problematic is the inadequate health care available to asylum seekers. According to The Lancet, the 'physical toll of detention cannot be overemphasized' (Young 1998). A recent case in the Wackenhut facility in Queens, in which confinement with a West African asylum seeker resulted in 90 other detainees testing positively for exposure to tuberculosis, highlighted problems with the medical screening process in place in most facilities (LCHR 1999). In the Krome facility, as the Women's Commission reports, no women doctors are on staff, in-person translation services are not offered, and conditions have been described as unsanitary and unsafe (WCRWC 2000: 21). Incidents involving negligent medical care - inaccurate diagnosis, failure to explain the illness or proper use of a medication, and prohibitively long waits and high fees for appointments - are widely documented at Krome as well as in a number of other facilities (HRW 1998).

Particularly in jails, where approximately 60 per cent (HRW 1999) of the immigrant detainee population is housed, medical conditions are woefully deficient. As Human Rights

Watch found, in their study of asylum seekers housed in jails, innumerable obstacles to mental and physical health face immigration detainees in local jails, where the sole ICE requirement regarding medical care is provision of 24 hour emergency service. Not required, however, are on-staff doctors or nurses, initial screenings for infectious disease, or any provision for mental health services. Due to long waits and high fees (resulting in second-class treatment of indigent detainees), as well as inaccurate diagnosis, even the most basic problems often go untreated. The only dental care provided is tooth extractions, in contravention of both international standards and explicit American Correctional Association guidelines (HRW 1999).

If the physical health of detainees is obstructed through such restricted access to services, the mental health of detainees suffers significantly more, due to the non-existence or inadequacy of mental health services. Moreover, the need for these services is made even more critical by the fact that pre-existing mental distress is often exacerbated in detention, and where none may have formerly existed, the detention environment can even produce emotional instability (Sultan and O'Sullivan 2001: 593). In terms of pre-existing problems, countless asylum seekers arrive having experienced traumatic events at home and in flight, including exposure to gross human rights violations and violent atrocities (such as murder, torture and rape), family separation, imprisonment, and unplanned departures. These prior experiences increase risk of mental distress among detained asylum seekers (Steel and Silove 2001: 597), up to 30% of whom are estimated to be survivors of torture (Piwowarczyk 2001).

In an inquiry carried out in Australian detention centres, psychological distress was seen as a common manifestation in asylum seekers, enhanced by pre-existing emotional states, the stresses created by the length and conditions of detention and a sense of hopelessness for the future (cited in Sultan and O'Sullivan 2001). This finding highlights the role that not only pre-existing conditions (such as possible Post Traumatic Stress Disorder), but also the detention environment plays in contributing to social and mental difficulties. Steel and Silove (2001) raise concerns about the past experiences of detained asylum seekers and the 'retraumatizing' environment of detention.

Among the conditions that might lead to further mental distress, they and others believe, are the intimidating atmosphere and uncompassionate treatment within the facilities (Sultan and O'Sullivan 2001: 595), separation of families and social isolation of inmates (Silove, Steel and Mollica 2001), and the favouring of security over care (Silove, Steel and Mollica 2001: 1436). Making detention even more difficult to endure is its indeterminate nature and its perception by detainees as unjust (Silove, Steel and Mollica 2001: 1437). In addition, the detention environment, with its dearth of activities, resources and educational materials, frustrates detainees' efforts to structure their time meaningfully, resulting in profound boredom, aimlessness and apathy (Sultan and O'Sullivan 2001: 593). The abnormal social circumstances in which detained asylum seekers find themselves result in fear, despondency, frustration and chronic stress, while the lack of social support networks and translation services often lead to feelings of isolation and despair (Sultan and O'Sullivan 2001: 594). Underpinning all of this is the general loss of dignity. As Zimbardo's famous prison study demonstrated, the very setting of detention precludes rehabilitation, highlighting the extent to which the detention environment itself is pathological, contributing directly to mental distress (Zimbardo 1971). As Silove, Steel and Mollica forcefully declare, 'instead of providing rehabilitation and a supportive environment for individuals fleeing oppression, governments have gone to elaborate and costly lengths to reproduce the environment of threat and fear from which these people have fled' (Silove, Steel and Mollica 2001: 1437).

Most recently, the harmful impact of imprisonment on the mental health of asylum seekers was documented by Physicians for Human Rights (PHR) and The Bellevue/NYU

Program for Survivors of Torture (2003). In this first systematic and comprehensive study examining the health status of detained asylum seekers, the findings confirmed the extremely poor mental health of the detainees, and demonstrated its further deterioration with longer detention stays. The report concludes that 'Case after case in this study illustrated that the US government's practice of imprisoning asylum seekers inflicts further harm on an already traumatized population' (PHR and The Bellevue/NYU Program for Survivors of Torture 2003: 2).

The mental anguish imposed by detention not only challenges asylum seekers' ability to rebuild their lives, but it impedes their ability to present their claims for asylum convincingly. As Piwowarczyk (2001) describes, the disabling effects of emotional distress predispose asylum seekers to a number of problems in preparing for hearings and presenting their case. The situation that these individuals find themselves in often impairs their abilities to concentrate, solve problems and evaluate options, which are necessary in applying for asylum. The fact that they are living in chaos, continuing to struggle through their predicaments, makes normal social functioning difficult; this difficulty further hinders their efforts to prepare their cases, as the ability to relate socially is critical in working with an attorney or relating a story to a judge (Piwowarczyk 2001). Anxious thoughts, low self-esteem, pervasive self-doubt and fragmented memories frustrate asylum seekers' accounts and make them appear [non]-credible (Kalin 1998: 232). Importantly, the enforcement environment in detention intensifies asylum seekers' fear and distrust of authorities; this adversely affects their ability to talk openly about the details of their plight and consequently jeopardizes their asylum claims.

In considering the human costs of detention, critical attention should be paid to the severe, numbing effects that prolonged confinement has on asylum seekers, who are struggling to rebuild their lives in a new and isolated environment. As we have seen, the detention environment precludes rehabilitation of pre-existing mental distress, and meanwhile is replete with stressors that trigger new and acute mental anguish. The loss of dignity, impaired work capacity, financial stress and breakdown in social support that asylum seekers in detention experience speak tellingly to the deleterious effects of the detention environment. Furthermore, the experience of detention inhibits asylum seekers' efforts to effectively present their cases, putting them at an unfair disadvantage to asylum seekers released into the community (Silove, Steel and Mollica). The intense anxiety created by living essentially in a vacuum impedes asylum seekers ability to meaningfully rebuild their lives and contributes to human suffering that, in many cases, is both unnecessary and unjust (Salinsky 1997) and as such, this cost should be weighed heavily against the benefits of detention.

4.1.3 Inability to Present Valid Claims

In addition to the problems discussed in the previous section, other features of the detention situation further hinder successful claims, constituting yet another cost of this policy. From the moment they are detained, asylum seekers are at a distinct disadvantage, due to the difficulty of securing counsel. Unlike criminals, asylum seekers are denied the right to government-appointed counsel, and as a result, approximately 90 per cent of detainees go unrepresented in their claims for asylum (DWN 2001). This fact is all the more troubling in light of the finding that applicants who retain legal representation are granted asylum more than six times as often as those who do not, meaning unrepresented asylum seekers' claims are frequently denied wrongfully (Pritchard 2001). Securing counsel poses a significant obstacle to asylum seekers due to their lack of information on available services, their lack of

English language skills and financial resources, and their location in remote areas to which legal representatives must travel great distances (AI 1999; LCHR 1999).

With or without counsel, asylum seekers face the further obstacle of impeded ability to thoroughly prepare their cases from detention centres. While incarcerated, they are less able to locate witnesses, gather evidence that might support their claims, or access legal materials and current reports on relevant human rights conditions in home countries. Only a few facilities offer legal libraries and resources to detainees, or even current newspapers (DWN 2001), and even where such resources exist, language barriers often render them useless. For those fortunate enough to retain counsel, detention facilities offer little privacy for collaboration and only limited hours and cramped spaces in which to work, making communication difficult (Pistone 1999).

Not only is preparing a case more problematic in detention, but articulating the asylum claim is as well. Often, removal hearings are conducted via video conference for detained asylum seekers, and in such a setting, they are unable to consult privately with counsel and to establish their credibility as easily (Pistone 1999). In addition, immigration judges sometimes deny adequate time to prepare cases, citing costs to the government of prolonging detention (LCHR 1999). Finally, fear of not being able to present claims successfully, and consequently having to remain indefinitely in detention, discourages asylum seekers from pursuing their claims, however valid they may be.

All these factors conspire to undermine asylum seekers' ability to put forward a valid claim while in detention, and severely disadvantage them relative to those released from detention. The substantial obstacles they face constitute a great cost not only to each asylum seeker individually, but also, as we shall see, to the asylum system as a whole, as they obstruct the process of fair and efficient adjudication of valid claims.

4.2 Public Costs

Taken together, the obstacles addressed above:

do more than simply temporarily inconvenience a few thousand individuals each year. These costs impede the ascertainment of truth in the asylum adjudication process, with both permanent and severe consequences. The cumulative effect is to undermine the ability to achieve the ultimate goal of the process - to distinguish between deserving and undeserving asylum applicants, and to grant protection to deserving applicants (Pistone 1999).

This result is particularly regrettable given that the stakes for both individuals and the general public are so high. Not only is it in the public's interest to have an efficient, fair, and consistent asylum system, but it also behoves the government, as a world leader in the refugee protection regime, to set a high standard to which other states can look.

Particularly when it turns out that detention was unnecessary (either because the asylum seeker ultimately gained status or would not have absconded or posed a safety threat), the costs of detention seem far greater (Legomsky 1999: 7). While only hindsight affords us this knowledge, it is nonetheless lamentable that liberty and economic losses proved unnecessary and unjust, tainting the validity of the system. Only in capital cases are the stakes so often as high, and importantly, in the criminal justice system there are effective safeguards in place (such as the provision of independent adjudicators and judicial review) to assure against inaccurate negative decisions (AI 1999: 5). In fact, as Legomsky illustrates in an analysis of false negatives and positives, the benefit of 'false negatives' - in which predictions that an individual will not abscond prove false - come at a high cost: that of 'false positives,'

in which the individual is detained based on the erroneous assumption that she/he will abscond or pose a threat (Legomsky 1999: 8-9). As one study revealed, over one-half of the asylum seekers it followed were ultimately allowed to remain, making detention unnecessary and unjust for a significant number of people (Vera 2000). False negatives, tolerated in the criminal but not the removal context, result in substantial costs to asylum seekers and prove to be a considerable waste of government resources.

Government resources, in terms of time, personnel, and materials needed to adjudicate claims and detain asylum seekers pending status determination, are dissipated needlessly when the asylum seeker possesses a legitimate claim to entry; but the cost to the government is also considerably high even before such an outcome is revealed. With the U.S. government spending an average of $66 per person per day, the current system costs American taxpayers over a million dollars a day, the figure constantly increasing (DWN 2001). By detaining asylum seekers and prohibiting them from working, the government further loses any revenue from income taxes levied on their potential salaries (Legomsky 2000: 631). Together, these public costs are significant, pointing to an urgent need for the government to make better choices - ones that satisfy the public's legitimate concerns about immigration - with the limited resources at its disposal.

In order to be fully able to determine when the benefits of detention outweigh the costs, one final category of costs needs to be explored - that of the U.S. failure to comply with international standards relating to the detention of asylum seekers.

5. Relevant International Standards

International human rights and refugee law provide a solid framework for instructing states on issues of detention, and numerous documents, encompassing both binding treaties and common law declarations, relate specifically to this theme. An obvious starting point is the 1951 Geneva Convention, to which the U.S. is legally bound, which limits the freedom of movement of refugees in only exceptional circumstances 'when necessary and such restrictions shall only be applied until their status in the country is regularized' (Article 31). Further, Article 31 explicitly proscribes imposing penalties 'on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened […] enter or are present in their territory'. As Goodwin-Gill concludes: 'In short, a number of limitations on the detention of refugees can be inferred from the provisions of the 1951 Convention, and references to "necessary" measures of detention imply an objective standard, subject to independent review' (Goodwin-Gill 1996: 248). As we have seen, however, in the U.S. system, immigrants are frequently incarcerated unnecessarily (if they pose no risk of flight or danger to the public, or if they have already been found credible), and detention decisions are made at the discretion of District Directors, without independent review.

Where the 1951 Convention and the 1967 Protocol fail to specifically address limits on detention, human rights law extends protection against detention. Human rights instruments, such as the Universal Declaration of Human Rights (Article 9) and the International Covenant on Civil and Political Rights (which the U.S. ratified in 1992) affirm that no one shall be subjected to arbitrary arrest or detention. Article 9.4 of ICCPR specifies that one who is detained 'shall be entitled to take proceedings before a court,' though this is routinely defied by U.S. practice. These documents stipulate that detention should be reviewed 'as to its legality and necessity, according to the standard of what is reasonable and necessary in a democratic society. Arbitrary embraces not only what is illegal, but what is unjust' (Goodwin-Gill 1996: 248). Critics of U.S. policy note that often, decisions to detain

are indeed arbitrary, as they rest on such factors as availability of bed space and the attitude of District Directors, rather than on an independent, objective assessment of each individual case, and are not subject to review (AI 1999: 8).

Not only does human rights law address the circumstances that lead to detention, but conditions of it as well. It expressly prohibits cruel, inhuman or degrading treatment, calls for special protection for families and children and requires basic procedural rights and guarantees. Clearly, U.S. practices detailed above are often inconsistent with these human rights doctrines. More specifically, a number of international standards directly address the issue of detention in great detail. In February 1999, the United Nations High Commissioner for Refugees (UNHCR) issued a revised version of its Guidelines on the Detention of Asylum seekers, stating that as 'a general rule, asylum seekers should not be detained' (Guidelines 1999). Asserting that 'the use of detention is, in many instances, contrary to the norms and principles of international law,' it urged that 'viable alternatives to detention should be applied first' (Guidelines 1999). This tenet has been incorporated into U.S. law and, in theory, specifically into ICE practices; a 1998 memorandum from INS Office of Field Operations establishes that it 'is INS policy to favour release of aliens found to have a credible fear of persecution, provided that they do not pose a risk of flight or danger to the community' (INS 1998). Although this statement affirms earlier instructions in December 1997 that parole should be considered, their reiteration has unfortunately not translated into regular practice, as we have seen (AI 1999: 33).

The Executive Committee of the UNHCR, of which the U.S. is a member, has also spoken clearly on detention issues. It has advised that domestic legislation and administrative practice distinguish between asylum seekers and other aliens. Particularly for the 60 per cent majority of asylum seekers, who are housed in jails together with criminal inmates (DWN 2001), the government has failed stunningly to facilitate this distinction (HRW 1998). Due to insufficient tracking and record-keeping, often ICE itself does not know who among the detained population is seeking asylum (AI 1999: 6), and rarely do they convey that information to the respective jail authorities. In fact, ICE standards in place in local jails do not even attempt to identify the special needs of asylum seekers, who are forced to commingle with convicted criminals despite contrary international prescriptions (HRW 1998). Indeed, it seems almost as if the Executive Committee, in its 1998 session, was speaking directly to the U.S. when it stated unambiguously that it: deplores that many countries continue routinely to detain asylum seekers on an arbitrary basis, for unduly prolonged periods, and without giving them adequate access to UNHCR and to fair procedures for timely review of their detention status; notes that such detention practices are inconsistent with established human rights standards and urges the States to explore more actively all feasible alternatives to detention. (Executive Committee 1998)

This unequivocal pronouncement is echoed in numerous other non-treaty standards adopted by consensus by UN member states, such as the UN Standard Minimum Rules for the Treatment of Prisoners and the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. Furthermore, the U.S. currently does not protect asylum seekers against indefinite detention, despite the call for establishing a maximum time limit for detention in the 1998 report of the Working Group on Arbitrary Detention of the UNHCR (Cochrane 2000).

Measured against these accepted international standards, U.S. detention law and practice demonstrates that it 'does not respect the spirit of agreed international norms for detention of refugees and, in particular instances, violates the letter of these standards' (AI 1999: 8). Collectively, these breaches of human rights standards, for which asylum seekers

individually and the integrity of the asylum system in general pay the price, further highlight the extreme costs involved in the current detention practices in the U.S.

6. An Alternative Model

Administrative detention, then, clearly has both benefits and costs, with each sometimes outweighing the other. The questions become: how do we identify those cases in which the benefits outweigh the costs? How can we reasonably reduce those costs, taking practical account of economic and administrative realities, but recognizing that certain principles of justice are too essential to be compromised? This section will attempt to answer these questions and envision a better system, first by considering procedures for the decision to detain, and then by examining viable options for parole.

6.1 An Individual Rather than Categorical Approach in the Decision to Detain

Because IIRIRA stipulates that five broad categories of non-citizens are subject to mandatory detention, the procedure that leads to detention is less the result of a decision than a mandate, and therein lies the problem. By designating certain groups of people as requiring detention, the U.S. Congress assumes that certain cases have enough in common to warrant broad generalizations, rather than relying on individual assessments (Legomsky 1999: 7). As we have seen in our discussion of the rationales of detention, no single rationale justifies application to a broad group, and their collective nature is particularly problematic when the group to which it applies encompasses arriving asylum seekers, who in their haste to flee could not collect the requisite documents and are forced to enter the country 'illegally.' Therefore, as a starting point in addressing ways in which to improve the U.S. asylum adjudication system, it makes sense to start at the very beginning, with the flawed concept of mandatory detention.

While mandatory detention does have its benefits, again they must be weighed against the more customized benefits of individual adjudication. Mandatory detention avoids false negative decisions and expenses of individual hearings, while more forcefully deterring future illegal entrants (Legomsky 1999: 8). However, as many human rights advocates have noted, these benefits are overshadowed by more compelling benefits of customized adjudication.

Regarding the concern over false negative decisions, as we saw earlier, the consequence is a false positive, in which the costs associated with detention prove needless because the asylum seeker has been granted asylum or would not have posed risk of flight or public danger (Legomsky 1999: 9). So the corresponding benefit of individual adjudication is the avoidance of false positives, which do not deprive an asylum seeker of liberty unnecessarily. The strength of the deterrence logic fades somewhat when we consider that, by being obliged to deter such vast numbers of asylum seekers, ICE is less able to enforce other, more serious immigration violations due to the increased post-IIRIRA scarcity of bed space (Legomsky 1999: 10). The point that individual hearings strain resources is well taken, but must also be considered against the considerable fiscal costs of mandatory detention.

Finally, an important benefit of individual adjudication is that it avoids the increased pressure that mandatory detention places on ICE to find bed space, thus alleviating its increased reliance on contracting with local jails, where a majority of ICE detainees are housed, but where the least humane conditions prevail (HRW 1998). Given the inviolable importance of the human rights at stake, such as freedom of movement and freedom from inhumane and degrading treatment, this benefit must weigh heavily against those of

mandatory detention. Justice dictates that those who exercise their right to seek asylum (Article 14, UDHR) be afforded fair access to individual hearings upon arrival, rather than be subject to categorical detention by virtue of group designation.

6.2 Viable Options for Release into the Community

The benefits of individual adjudication underpin a model, favoured by many[§], for an alternative approach to detention. Legislation favouring administrative discretion over fixed rules would promote a fairer process for asylum seekers, whose detention decisions would be made more accurately on the merits of their individual claims. This fairness would be incorporated at the outset, in pre-trial detention hearings for asylum seekers who have established credible fear. Such a parole hearing, before an immigration judge, would determine whether an applicant could be released into the community while awaiting adjudication of the asylum claim.

Not unlike the criminal justice system, this proposed asylum system would rely on release before trial as a norm, implement procedural safeguards for the potential detainee, and consider varying forms of supervision before detention. In the criminal justice system, an array of safeguards protects the defendant in pre-trial detention hearings. These include the right to counsel, to pre-trial access to the evidence, to be present at the hearing, to testify on their own behalf, to present witnesses and to introduce evidence, among others (AI 1999). As reasonable protections, these rights should be extended to all credible asylum seekers, as well as other rights, such as that to adequate interpretation. Furthermore, suitable adjudicators - who are independent, free from undue bias and culturally aware - should preside over such hearings (Kalin 1998: 239).

In such an open process before judicial officers, held immediately upon the asylum seeker's arrival, the decision to parole can be made independently and consistently, and be subject to review. Decisions to release credible asylum seekers into the community could be founded on a number of considerations, including the strength of the asylum claim, the applicant's ties to and support from the community, as well as his character and history of appearances in court (Vera 2000). If a flight risk or danger threat exists, he can be released into the community under various forms of supervision, to be discussed below. If, however, a judge determines that such a threat does exist based on evidence in the hearing, and no form of conditional release into the community could neutralize this threat, detention would be warranted. In this case, detention orders would have to be clearly written, stating the reasons for detentions and conditions for release, and be explained to the asylum applicant in a language she/he understands.

This criminal justice model allows for conditional release when legitimate public concerns weigh against release on one's own recognizance. In this instance, judges would be advised to release asylum seekers on the least restrictive combination of measures that would alleviate those concerns, based on the features of each individual case. As the Vera Institute of Justice found, when commissioned by INS in 1996 to study options for supervised release, many release conditions can successfully lead to asylum seekers' appearance in court. Supervised release into the community can be maintained at two levels, intensive and regular, both of which had overwhelming success in the study populations, depending upon individual features. Such conditional release could involve requiring the asylum seeker to: remain in the custody of a designated person or group home, report regularly to ICE, comply with a set

[§] Among the advocates for individual adjudication and increased reliance on parole are Helton, Pistone, Legomsky, Lutheran Immigration and Refugee Services, and the Lawyers Committee for Human Rights.

curfew, attend English classes, or any other condition that would ensure an individual's compliance with the law.

After completing its three-year study supervising more than 500 non-citizens, the Vera Institute concluded that the most effective way for the government to assure compliance with the law and at the same time, treat non-citizens in a just and humane manner is to 'release to alternatives as many people as it can, as quickly as it can, while they complete their immigration court hearings' (Vera 2000: 70). This conclusion, echoed by a similar pilot study in New Orleans (Ebrahimian 2001: 2), is based upon their striking finding that all groups of non-citizens released into community supervision appeared for hearings at impressive rates - above 90% (p. 71). The Institute concluded that, with appropriate screening, the government can effectively release asylum seekers who are 'good risks,' the majority of whom are willing to appear for hearings and not needing to be detained (or in some cases even supervised). Furthermore, since more than half of those released eventually were allowed to remain in the country, detaining these asylum seekers unnecessarily would have been both a waste and an injustice (p. 70).

The benefits of such a system are manifold. The most obvious are that it ensures appearance in court without jeopardizing public safety, straining government resources, or depriving individuals of their liberty needlessly. Thus, it would 'assure a just system in which every non-citizen in removal proceedings is given the degree of freedom that is commensurate with the maintenance of public safety and the rule of law' (p. 73). Additionally, there are practical benefits, such as the ability to release an asylum seeker into any part of the country, regardless of where he was screened, in order to ensure the asylum seeker's proper access to family, friends and counsel who could assist him throughout the adjudication process. The increased release of credible asylum seekers would free up space for those whom the court determines in need of detention, and the reduced pressure on ICE to find more space would enable the agency to rely less on contracts with jails, where human rights abuses are most common. This type of system would bring the U.S. closer to satisfying international standards, and would be more consistent with American traditions of justice.

This model is preferable to the existing scheme from a financial perspective as well, as concluded by pilot projects (Ebrahimian 2001: 2). Using the Queens, New York facility as an example, Pistone calculates the yearly average ($7,708,800) of detaining asylum seekers there and weighs it against the estimated costs of a pre-trial hearing for those with credible claims, arguing that the cost savings of not detaining those eligible for release 'would finance the proposed system with a significant surplus' (Pistone 1999). The government could free itself of its burden to support claimants pending adjudication, while opening up space for higher risk detainees; with less pressure on its system, the government would rely less on expensive contracts with non-ICE facilities.

With these practical, ethical and financial considerations all supporting an alternative to the current detention system, there appears compelling reason to implement such changes. The proposed system recognizes that occasionally detention of asylum seekers is appropriate, but obliges the government to 'demonstrate reasons for doing so in accordance with international standards and by means of a prompt, fair individual hearing before a judicial authority whose status affords the strongest possible guarantees of competence, impartiality and independence' (AI 1999). Only by infusing the detention system with such fundamental safeguards and reasonable prospects of parole can the government maintain a credible, viable system that comes closer to international standards and minimizes needless human suffering.

7. Conclusion

The proposed system would go a long way toward resolving a number of the problems that plague the current U.S. detention system. As we have seen, those who arrive in the country seeking asylum face a system beleaguered by both legislative limitations and administrative incompetence. From the outset, detention policy is constrained by its reliance on fixed categories for mandatory detention, incarcerating countless asylum seekers unnecessarily. Further legislative shortcomings include lack of legislation to govern the parole of detainees and failure to establish binding law to dictate their treatment within detention facilities. Beyond these legislative problems, a host of administrative failures mar the current system. Failure to implement the parole policy in a proactive and consistent manner, lack of accountability in the administrative structure and oversight over the decentralized agency, poor tracking of asylum seekers in its facilities (especially of those held with criminals), and failure to ensure humane conditions for immigration detainees in all its facilities, are just a few of the breakdowns in the current detention system. These legislative and administrative problems are made all the more objectionable in light of their defiance of international standards, rendering the U.S. detention system acceptable neither in theory nor in practice.

The proposed system indeed offers an attractive alternative model to the current system, replacing the ad hoc determinations of district directors with a legislative framework that ensures fairness. Instead of being at the mercy of ICE officers' discretion, asylum seekers would be assured impartial decision makers, guided by clear substantive standards that provide procedural protection, with the objective of conditional release for the majority with credible claims (Pistone 1999). Conditional release is desirable for, as pilots studies have shown, with the right combination of supervision, information, and community support, asylum seekers will choose to comply with ICE requirements (HRW 1999), making the high costs of detention, in both human and fiscal terms, unnecessary. This ideal takes into account legitimate government concerns, while seeking to preserve the dignity of those who arrive in the country in need of protection.

It remains, however, an ideal. In the current anti-immigrant climate that characterizes the U.S., intensified by the events of September 11, the proposed system would clearly encounter an array of obstacles. Its successful implementation would require first the dismantling of the pervasive enforcement culture that dominates immigration practices, which trumps service considerations and obstructs decisions to release. Initially, it was hoped that the legislation that separated the enforcement and service mandates of the agency (Eilperin and Thompson 2002: 27) would, among other things, bolster protection to asylum seekers and facilitate the implementation of release options for eligible detainees. But, unfortunately, the continuing trend toward over-incarceration of asylum seekers has only intensified in the wake of the events of September 11 and through the formation of the Department of Homeland Security[**]. Now falling under the jurisdiction of a governmental department whose primary concern is national security, immigrants are increasingly recast as potential terrorists, further 'justifying' their detention.

[**] Some examples of this trend include: tighter release standards for asylum seekers in detention who have been found to have a credible fear of persecution, based on concerns about verification of identity, and open-ended security clearance procedures leading to indefinite detention; new regulations limiting the authority and reducing the size of the appellate court reviewing asylum adjudications and other forms of immigration relief; and new restrictions to the appeals process. Furthermore, in June 2003, DHS released their ten-year enforcement plan titled 'The End Game.' It reflects an institutionalization of the view that immigrants are a threat and calls for continued expansion of immigration detention and enforcement resources and powers.

In addition to the improvement of immigration services, public education is needed to militate against the damage done to public perception of immigrants and asylum seekers. Well hidden from the public gaze, detention centres offer an inhospitable welcome that reflects the unfortunate public perception of asylum seekers. As long as these unfriendly conditions persist, compounded by the U.S. government's consistent lack of regard for international standards, little progress can be made toward granting asylum seekers the type of protection they deserve, and that international law dictates they receive.

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